

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF OSWEGO: CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

-vs-

GARY J. THIBODEAU,

Defendant.

AFFIRMATION IN
SUPPORT OF MOTION
Indictment No. 94-161

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

RANDI JUDA BIANCO, attorney for the defendant herein, being admitted to practice before the courts of this State, with offices located at 4 Clinton Square, 3rd Floor, Syracuse, New York, affirms the following under the penalties of perjury:

1. Pursuant to Article 440.10(1)(b), (g), and (h) of the Criminal Procedure Law of the State of New York, your deponent moves this Court for an Order vacating the judgment of conviction of defendant, Gary Thibodeau, entered on the 7th day of August, 1995, convicting him of Kidnapping in the First Degree, in violation of New York State Penal Law § 135.25 after a jury trial.

2. The defendant contends that the judgment should be vacated pursuant to N.Y. Criminal Procedure Law 440.10(1)(b), (g) and (h), in that (1) new evidence has been recently discovered since the entry of judgment based upon a verdict of guilty after trial that could not have been produced by the defendant at trial even with due diligence on his part and is of such a character as to create a probability that had such evidence been received at trial, the verdict would have been more favorable to the defendant; and (2) the prosecution and/or their agents

obtained Thibodeau's conviction through fraud and misrepresentations and intentionally withheld exculpatory and impeachment material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), in violation of Art. I, § 6 of the New York State Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

3. The averments herein are made upon information and belief, based on a thorough examination of the court records in this case, an independent investigation, interviews with the witnesses, the attached exhibits, and a memorandum of law, which is annexed hereto and made a part hereof.

Introduction

4. On April 3, 1994, Heidi Allen was working the morning shift as a clerk at the D&W convenience store ("D&W") when she was abducted and never heard from again. Within minutes of her disappearance, deputies from the Oswego County Sheriff's Office responded to the store and immediately began interviewing customers and potential witnesses. No physical evidence was ever discovered and Allen's whereabouts remain a mystery.

5. Almost immediately, investigators began focusing on Richard Thibodeau, because he contacted the command center to tell them that he had been at the D&W that morning to purchase cigarettes. Within 12 days of Allen's disappearance, Richard Thibodeau's brother, Gary Thibodeau ("Thibodeau" or "defendant"), also became a suspect. In August of 1994, an Oswego County grand jury returned a two-count indictment charging both Richard and Gary Thibodeau with Kidnaping in the First and Second Degrees, in violation of N.Y. Penal Law §§ 135.25, 135.20. Following a jury trial, Gary Thibodeau was convicted of kidnaping in the first degree and sentenced to 25 years' to life imprisonment. Richard Thibodeau was tried second and acquitted. The brothers have always maintained their innocence.

The Jury Trial

6. A jury trial was conducted from May 22 to June 19, 1995.

7. Gary Thibodeau was represented at trial by Joseph Fahey, who is now a County Court Judge in Onondaga County, New York.

8. The State's case was predicated mostly (if not entirely) on circumstantial evidence. At the heart of the prosecution was the fact that Richard Thibodeau drove his white van with dark blue doors to the D&W store the morning of Allen's abduction and purchased two packs of cigarettes at approximately 7:42 a.m. This was the last purchase recorded by Allen on the cash register.

9. **John Swenszkowski** recalled seeing Richard get out of his van and walk toward the entrance of the store as Swenszkowski was returning from the store to his car after purchasing a pack of cigarettes and two Sunday newspapers at 7:41 a.m. (T 1234-35, 1239, 1246-47).¹ As Swenszkowski walked passed Richard's van he did not notice anybody inside the vehicle (T 1237). After settling into his vehicle and pulling forward to drive from the parking lot, Swenszkowski noticed Richard's van had moved forward about three or four feet, before resting next to the double doors in front of the store with its passenger side closest to the store's entrance (T 1239, 1245). Swenszkowski then drove home.

10. Several minutes later, customer **David Stinson** entered the store to purchase a morning newspaper and noticed the clerk was absent (T 1239, 1245).² Stinson waited by the counter perusing the paper, as more customers walked in the store. Two people bought newspapers, left money on the counter and left the store (T 1403-04). After waiting in the store

¹ References to the trial transcript ("T") are to the pages numbers included therein.

² Stinson testified that he arrived at the store at approximately 7:41 a.m. (T. 1400).

for a “few minutes,” Stinson and two other individuals who had entered the store began looking through the store for Allen (T. 1405). As the other individuals continued searching inside the store, Stinson exited the store to check whether Allen was in her car parked in the lot. Before Stinson got to Allen’s car, he noticed a Sheriff’s car at a nearby intersection and flagged him into the store.

11. **Deputy Richard Curtis** testified that Stinson flagged him down at approximately 7:45 a.m. (T. 1416-1422).³ Upon arriving at the store, Curtis radioed dispatch to inform them of the suspicious absence of Allen, interviewed customers, cordoned off the store, and conducted a search of the area (T. 1417-22).

12. **Christopher Bivens** testified that he observed two unidentified white males and one white female in front of the store as he was traveling east along Route 104 from Oswego (T. 1287-1291). Prior to trial, Bivens provided several accounts of his observations on the day of Allen’s disappearance.

- a. On April 8, 1994, Bivens first contacted the police by phone and reported driving past the store sometime between 8:00 and 8:30 a.m. and observing two men and a woman arguing on the porch area of the store (T. 3120). He was unable to describe the people with any specificity (T. 3120). Bivens was also unable to identify any vehicles at the store, but stated that there was one vehicle near the gas pump (T. 3121, 1317).⁴
- b. On April 14, 1994, a \$20,000 reward was announced in the case.
- c. On April 17, 1994, Deputy Cromie contacted Bivens to conduct a follow-up conversation (T. 3145). Cromie testified that Bivens claimed during the phone call,

³ Curtis testified that he “punched” the incident card at 7:55 a.m. (T. 1440).

⁴ Investigator Yager testified that Bivens was unable to identify any vehicles during his conversation with Bivens on April 8, 1994. (T. 3121). Bivens testified that he told Yager that he saw either a pickup truck or a van (T. 1318).

- “I know that was Heidi” (T. 3146). At trial, however, Bivens was not as confident. Instead, Bivens testified that he informed Deputy Cromie that it might have been Allen at the store (T. 1324).
- d. On April 18, 2014, Bivens provided a statement to police at his home. He stated that he was driving approximately 45 miles per hour as he passed the D&W (T. 1338). He was uncertain whether the van was a Dodge or a Chevy (T. 1332-1333). Bivens also described the two men involved as strong, husky, and between thirty and forty years old (T. 1328). He claimed that one man had the female in a bear hug (T. 1352).
 - e. On April 20, 2014, Investigators Hall and Yerdon drove Bivens past Richard Thibodeau’s van. Bivens told the officers that the van was the right style, but the wrong color (T. 1342).
 - f. On April 21, 1994, Investigator Hall showed Bivens photographs of Richard Thibodeau’s van. After engaging in a conversation about the back of the van, Bivens told the officer that he was 80 percent sure the van he saw on the morning of Allen’s disappearance belonged to Richard Thibodeau (T. 1344). Investigator Hall then told Bivens to sleep on it overnight (T. 1344).
 - g. On April 22, 1994, officers met with Bivens at approximately 7:00 a.m. and showed him additional photographs of the van. For the first time, Bivens claimed with certainty that the van belonged to Richard Thibodeau because of the condition of the rear bumper and the presence of rust spots over the rear wheel (T. 1344-1345).
 - h. At trial, Bivens testified that he left his residence in Oswego at approximately 7:30 a.m., instead of between 8:00 and 8:30 a.m. (T. 1287-1288). Because he was running low on fuel, he slowed down to 30 miles per hour, instead of 45, as he neared the

D&W to see whether it was open (T. 1290). He claimed to have seen one of the males holding the female in a bear hug (T. 1293). At trial, Bivens testified that he saw a Chevy C-10 light blue van, with dark blue doors and a six inch stripe down its side in the center (T. 1299). He further testified that the back part of the bumper was hanging down and had a trailer. He identified the van as belonging to Richard Thibodeau based on the condition of the bumper and rust spots over the rear wheel (T. 1303-1304). He testified that he did not pull into the gas station because he did not have enough time to get gas and did not want to get involved in a dispute (T. 1311).

13. **Nancy Fabian** told the jury that she observed a van at approximately 7:45 a.m. driving close behind her as she was traveling east of the convenience store along Route 104 (T 1731). She testified that the van was driving erratically and that the driver, who she described as having dark hair,⁵ appeared to be struggling with something inside the van. (T 1728-29).

14. **Donald Neville, Sr.**, one of Gary Thibodeau's neighbors on Kenyon Road, testified about making two observations as he drove by the defendant's house at approximately 7:30 a.m. First, he noticed that there were no cars parked in front of his home (T 1778-81, 1785-86). Second, he noticed the presence of tracks in the snow on Thibodeau's driveway, which struck Neville as unusual because there was "usually not any action around" Gary's home that early in the morning (T 1787). When Donald Neville, Sr., passed Thibodeau's house again that morning, between 8:00 a.m. and 8:30 a.m., he noticed Richard's van parked in the driveway (T 1797-98).

⁵ As Richard Thibodeau had grey hair, the State argued that Gary Thibodeau must have been driving after the brothers allegedly abducted Allen.

15. **Donald Neville, Jr.**, testified that he heard “a lot of yelling and screaming” coming from Thibodeau’s house as he stood outside his father’s house at approximately 10:30 that morning (T 1962). He thought there was a “violent argument” between a man and a woman (T 1962-63). Neville testified that he did not see a van at Thibodeau’s residence (T. 1968).

16. **Michael Neville** also testified that he heard a male and female shouting from within Gary’s residence at around the same time as Donald Neville, Jr. (T 1984). The brothers both testified that the screaming continued for about 30 minutes (T 1965, 1984).

17. Two other neighbors, **Edward Bartlett** and **Trisha Ann Bartlett** heard no voices and never observed a van at Gary’s residence Easter morning.

18. Other neighbors, **William Cowen** and **Susan Cowen** testified that they saw a dark colored van on the side of the road just south of Gary’s driveway at 8:55 a.m., but neither could identify the van as belonging to Richard Thibodeau (T. 1867-1881). Susan Cowen testified she had never seen the van before (T. 1894).

19. Two more neighbors, **Christine Wilson-Frasier** and **Steven Dennis Frasier**, testified that they saw Richard Thibodeau’s van in his own driveway sometime between 8:00 a.m. and 8:45 a.m. (T. 2733-2739, 2988).

20. At trial, **Brittany Ann Link** claimed to have seen Richard Thibodeau’s van at the defendant’s residence on Easter morning. She later recanted her testimony. At trial, however, she testified that she lived across the street from Thibodeau. When she woke up on Easter morning, she looked out the window to check the weather and saw Richard Thibodeau’s van in the defendant’s driveway (T. 1838-40). The time was 7:48 a.m. (T. 1842). Link testified that she had seen this van at the defendant’s house about 25 to 30 times in the past (T. 1843). She had not told anyone about the van until 13 months after Allen had disappeared (T. 1853, 1857).

After the trial, Link provided new information casting doubt on her trial testimony. She said that she had felt pressure to testify that she had seen Richard Thibodeau's van because she believed that is was what law enforcement authorities wanted her to say.

21. The People also presented testimony through two jailhouse informants, **Robert Baldasaro** and **James McDonald**, who were housed in a Worcester, Massachusetts jail with Gary Thibodeau. In summary, both men testified that Thibodeau told them he occasionally used drugs with Allen, that she was upset because she felt "Gary was going to try to screw her about something" and "get [Allen] in some kind of trouble," that Allen had been bludgeoned to death with Thibodeau's shovel, and that investigators would never find her body (T 1544, 1637, 1666, 1669). However, neither informant testified that Thibodeau outright confessed to abducting and killing Allen.

22. Following the trial, the jury rendered a verdict of guilty on the count of Kidnaping in the First Degree. On August 7, 1995, he was sentenced to 25 years to life.

Post-Conviction Proceedings

23. In a published decision, the Fourth Department rejected Thibodeau's consolidated appeals challenging both his conviction and sentence on direct appeal and the denial of his post-conviction motion to vacate the judgment pursuant to N.Y. CPL 440.10(1)(b), (c), (f), (g), and (h). *People v. Thibodeau*, 700 N.Y.S.2d 621 (4th Dept. 1999). Specifically, Thibodeau contended that (1) the trial court erred in admitting certain hearsay testimony, (2) the court erred in refusing to vacate the judgment of conviction on the ground that the then-13-year-old witness's testimony was incredible as a matter of law, (3) that Thibodeau was denied his right to be present during a portion of voir dire, (4) that the presumption of death established in the kidnaping statute, N.Y. Penal Law § 135.25(3) is unconstitutional, (5) that the evidence was

legally insufficient; (6) that the State committed prosecutorial misconduct, (7) that the prosecution deliberately withheld Brady material, (8) that the trial court's interested witness instruction was unbalanced and improper, (9) that there was a grave risk that an innocent man was convicted,⁶ (10) that Thibodeau's conviction was repugnant in light of his brother's acquittal, and (11) Thibodeau was denied a fair trial as a result of cumulative error. As relevant here, Thibodeau's *Brady* challenge concerned the prosecutor's failure to disclose Allen's diaries and the prosecution's cooperation agreement with the jailhouse informant. The New York Court of Appeals denied leave to appeal. *People v. Thibodeau*, 711 N.Y.S.2d 173(2000) (table).

24. In 2001, Thibodeau filed a petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 raising the same issues he previously asserted on direct appeal and in his 440.10 motion. On January 3, 2005, the district court (McAvoy, J.) issued a Decision & Order adopting the Report and Recommendation and denying Thibodeau's petition for a writ of habeas corpus. The district court granted Thibodeau a certificate of appealability to challenge only the constitutionality of the New York State kidnapping statute on vagueness grounds and denying his request to appeal the denial of his habeas petition on other grounds.

25. On May 11, 2007, the Second Circuit issued a published decision affirming the district court's denial of his federal habeas petition after finding that the New York kidnapping statute's presumption of death was not impermissibly vague. *Thibodeau v. Portuondo*, 486 F.3d 61 (2d Cir. 2007).

⁶ This ground was supported by Gary Thibodeau's passing a polygraph test administered by Michael Carbery on March 28, 1996. The results were unequivocal that Mr. Thibodeau was telling the truth that he had no involvement in or knowledge of the disappearance of Heidi Allen. The polygraph results were submitted to County Court and are located in the original appellate record at pages 468-469. During the polygraph, Mr. Thibodeau was asked the following questions and gave the following answers: 1) Do you know who is responsible for Heidi Allen's disappearance? Answer: "No"; 2) Did you take any part in Heidi Allen's disappearance? Answer: "No"; 3) Did you personally see Heidi Allen on April 3, 1994? Answer: "No"; 4) Do you personally know where Heidi Allen is? Answer "No"; and 5) Did you ever brag to any inmate that you were responsible for Heidi Allen's disappearance? Answer: "No" (See Exhibit W).

26. The undersigned defense counsel represented Thibodeau *pro bono* during his post-conviction proceedings.

Newly Discovered Evidence

27. On February 22, 2013, undersigned counsel was notified by an attorney, Lisa Cuomo, that counsel's former law office telephone number received a call from a woman who claimed to have information regarding the disappearance of Heidi Allen. The woman specifically requested to speak with defense counsel, but attorney Mary Felasco received the call, listened to the woman's information, and then referred her to the District Attorney's Office. Attorney Felasco worked as an Assistant District Attorney in Oswego County at the time of Heidi Allen's disappearance. Attorney Lisa Cuomo alerted defense counsel about the call. Upon learning about this phone call, defense counsel asked Attorney Cuomo for the telephone number of the witness and was told that they did not have it anymore. Defense counsel immediately contacted the District Attorney and inquired about the unidentified woman who was reaching out to defense counsel about the Heidi Allen case. The District Attorney refused to identify the woman or provide defense counsel with her contact information. Defense counsel insisted that she be permitted to speak with the woman who attempted to contact her at her former office telephone number, but her demands were rebuffed. The District Attorney stated that upon speaking with the woman she did not feel comfortable talking with defense counsel and he refused to provide her name or contact information notwithstanding the fact that the woman reached out to defense counsel first. Defense counsel persisted in her demand to learn what this woman knew about the Heidi Allen case and eventually the District Attorney explained that he would keep counsel apprised regarding the investigation. Several phone calls followed between the District Attorney and defense counsel regarding the progress of the follow-up investigation.

28. On June 6, 2013, defense counsel received a letter from the District Attorney's Office, which set forth the efforts made by the Oswego County Sheriff's Office to follow up on the information provided by the woman, who defense counsel later learned was Tonya Priest. The letter annexed several exhibits, including recorded phone conversations, videotaped police interview and witness statements. This material was provided to defense counsel with a request to keep the information confidential in order to maintain the integrity of the investigation. More than one year has lapsed and there has been no further investigation into this matter. In fact, upon examination of the recorded phone conversations and police interview of a potential witness, it became apparent that the Oswego County Sheriff's Office was content to allow those involved to deny knowledge despite compelling evidence to the contrary.

29. The evidence provided by Tonya Priest is compelling and exculpatory and demonstrates that Gary Thibodeau is actually innocent.

30. Tonya Priest, the woman who called defense counsel but was referred to the District Attorney's Office, was flown to New York by Law Enforcement for an in-person interview after they spoke to her by telephone. During the interview Ms. Priest disclosed that back in 2006 an individual named James Steen, a/k/a Thumper, told her and Thumper's girlfriend, Victoria West, that he along with two other individuals, Roger Breckenridge and Michael Bohrer, abducted Heidi Allen from the D&W convenience store, beat her to death and later disposed of her body in the woods near Rice Road in Oswego, New York. Priest disclosed the information because she could no longer live with the knowledge that an innocent person was in prison. On February 28, 2013 and March 1, 2013, Tonya Priest provided a detailed sworn affidavits to the Oswego County Sheriff's Office regarding the information she learned through Steen (Exhibits A & B) and agreed to contact the girlfriend of Roger Breckenridge, Jennifer

Westcott, who she believed was a witness to the kidnapping of Heidi Allen and later assisted in disposing of the van used in the abduction. That same day, after providing an affidavit and while still in New York for the investigation, Tonya Priest reached out to Jennifer Westcott on Facebook and Jennifer Westcott accepted her friend request. Their initial communication centered on their respective children and was followed up by Tonya claiming her ex-husband was about to appear for a parole hearing and her concern that he would disclose that she knew what happened with Heidi Allen. Tonya Priest was baiting Jennifer Westcott into acknowledging what she knew about the disappearance of Heidi Allen.

31. On March 2, 2013, Tonya Priest called Jennifer Westcott. The phone call was monitored and recorded by Oswego County Sheriff's Deputy Rojek, but that fact was not made known to Westcott. During the phone conversation, Westcott confirmed that she knows about Heidi Allen's abduction during the following exchange:

Tonya Priest: "But he [James Steen] just told me that him, Michael Bohrer and Roger had taken Mike's van to the store and that they brought her to your house and he said that you did flip out when they got there and I stuck up for you and I don't blame you for flipping out . . . it's not your fault you know so I knew a long time ago-I just didn't want you to think I thought less of you."

Jennifer Westcott: "Right . . .no, um in my own head dropped that shit . . . I don't know probably about ten years ago. . . but it took me a while to get it gone."

Tonya Priest: "How the hell, why did they even involve you, or even do this?"

Jennifer Westcott: "I don't know."

Tonya Priest: "I mean you were young."

Jennifer Westcott: "yeah that and the cocaine."

Tonya Priest: "It was for cocaine. Yeah, sounds like the area. I don't know kiddo. I love you and I'm sorry this happened to you."

Jennifer Westcott: “Yeah.”

Tonya Priest: “Roger put you through a lot and there is no reason for it Jennifer. You are a good girl.”

Jennifer Westcott: “Well, maybe that is why he is sitting in Elmira where he needs to be right now.”

* * *

Tonya Priest: “Did you even know that . . . this was Heidi that they brought there and that this is what they were going to do?”

Jennifer Westcott: “Nah, uh uh”

Tonya Priest: “Had no clue, they just showed up with her? . . . What a bad position for you probably scared the shit out of you?”

Jennifer Westcott: “Well it’s not even - they didn’t even bring her in the house, they made her sit in the van.”

* * *

Tonya Priest: “That’s what he had told me and I mean as long as that’s all you know and everything then the only thing they said you did was junk the van with Roger then I really wouldn’t worry about anything. I mean you really had no part of it-it’s kind of sad that it even happened. Is that why you guys went to Florida?”

Jennifer Westcott: “Uh huh Yup, We went to Florida before Jacob, right after”

* * *

Tonya Priest: “What did they do just leave her in the van when they got to your house?”

Jennifer Westcott: “Yeah.”

* * *

Jennifer Westcott: “It bothers me to talk about it. I won’t lie to you but”

Tonya Priest: Oh I know Hon, but that's why it bothers me –it's been bothering me since Thumper told me and I was like no way Jennifer doesn't know –she would have talked to me and Vicki about because we were all very close.

Jennifer Westcott: I couldn't say anything about that-never to anybody-no nothing.

Tonya Priest: Why was it you didn't say anything because they scared you Hon?

Jennifer Westcott: Uh Yeah.

* * *

Tonya Priest: Who scared you Roger-probably Roger living with you?

Jennifer Westcott: Yeah, yeah. It was all crazy, yeah all of them people Dan Barney, Fucking Bob Schicala, all them big guys.

Tonya: Who?

Jennifer Westcott: Dave Maynes, uh yeah

* * *

Tonya Priest: Yeah, who the heck are they?

Jennifer Westcott: The guy they used to call Rambo

Tonya Priest: I don't know who that is. I don't think I ever met him.

Jennifer Westcott: I never seen him after that either. . . . I only seen him a couple of times

Tonya Priest: Rambo, what is his real name?

Jennifer Westcott: Bob something . . .Shicota

* * *

(Exhibits C & C1).

32. Based upon the statements of Tonya Priest and the admissions made by Westcott during her phone conversation with Tonya Priest, investigators conducted an in-person

videotaped interview of her on March 7, 2013 at the Sheriff's Office. During her conversation with Investigator Pietroski, Westcott denied any knowledge surrounding the disappearance of Heidi Allen. She did admit that she had previously been interviewed by law enforcement at the time of Heidi Allen's disappearance, but claimed she never spoke about it again until she had recently been contacted by Priest. Westcott stated that law enforcement officers "swarmed grandma Breckenridge's house" when she lived in the blue house in Parish shortly after Heidi Allen came up missing (Exhibits D & E). This information was never disclosed to defense counsel and no report was ever produced to defense counsel detailing their investigation into Roger Breckenridge or Jennifer Westcott.

33. Westcott told Pietroski that when Tonya Priest called her and tried to tell her she knew that Steen, Breckenridge and Bohrer had kidnapped Allen, Westcott responded, "Tonya, what the hell are you talking about? . . . I'm like you're fucking crazy." At that point during the interview, Westcott had not been told that her phone conversation with Priest was recorded. Significantly, after Westcott was contacted by Sheriff's Deputies asking her to come in for an interview, Westcott sent a text message to Priest asking her if she was a "cop." The following exchange took place between Westcott and Priest: "And if you knew something maybe you should have come forward a long time ago because . . . you damn well know who DB is. DB don't be afraid of DB, put that asshole where he belongs. He threatened me as well, I just moved. I want no part of that area Jen." Westcott told Investigator Pietroski that she had no clue who in the hell DB is and that Tonya had stopped texting her. Again, Westcott had not yet been told about the recording during which she told Tonya why she refused to say anything to the police because she was scared of "Dan Barney [DB], Fucking Bob Schicala, all them big guys . . . Dave Maynes. . . . the guy they use to call Rambo." Indeed, Tonya never mentioned the name

Dan Barney during their recorded phone conversation. Dan Barney's name was first mentioned by Westcott. Nevertheless, Westcott denied knowing who Tonya was referring to during her interview with Investigator Pietroski and he never confronted her about her denial concerning "DB." In addition to texting Priest, Westcott also sent a text message to Richard Murtaugh prior to her interview with Pietroski asking whether he knew about Roger junking a van used in the Heidi Allen abduction. Murtaugh responded by questioning Jen's identity and nothing more was apparently exchanged. Interestingly, Murtaugh owned a junkyard and for whatever reason Westcott felt compelled to contact him prior to her interview with Pietroski. Westcott never mentioned exchanging text messages with Murtaugh until Pietroski asked her to examine her phone (Exhibits C & D). Additionally, Priest never mentioned where Westcott and Breckenridge junked the van during her phone conversation with Westcott.

34. Investigator Pietroski eventually confronted Westcott with some of the statements she made during the recorded conversation. After he told her their conversation had been recorded, Westcott stated, "Well then I tell you what, she chopped something because I never said anything about a white van." Investigator Pietroski then told her, "well she says you get pissed off because they brought her there and you're like yeah and she's like yeah and you're like well she stayed out in the van. She never came in your house and she says you got pissed off and she says 'I don't blame you.'" Westcott responded, "I don't know, I don't know, I have nothing else to say, I have nothing else to say" (Exhibits C & D). However, Investigator Pietroski proceeded to assure Westcott that even if she bore some responsibility, she would not be in any trouble, but she needed to explain why she said this to Tonya Priest. Westcott simply stated, "probably just to shut the crazy bitch up, to tell you the truth, I mean, she was rambling on and on." Investigator Pietroski found Westcott's denials acceptable and allowed her to

execute a statement denying any knowledge regarding the kidnapping of Heidi Allen despite her admissions on the monitored recording with Tonya Priest (Exhibit F). Westcott was reluctant to execute a statement because she recognized she had already confessed to having knowledge of Allen's abduction during the recorded phone conversation, but she agreed to sign a statement after she was reassured by Investigator Pietroski that he was not looking to arrest her for anything, but simply looking to corroborate what people were saying or to "squash the investigation" (Exhibits C & D).

35. On March 21, 2013, Bohrer was interviewed and although he denied involvement in Heidi Allen's abduction, he revealed that he was originally interviewed in 1994 early on in the investigation at the Sheriff's Office by Deputy Wheeler (Exhibit G – audio interview). However, defense counsel was never provided with a report memorializing Deputy Wheeler's interview with Bohrer nor was it ever disclosed that he was even a suspect during the investigation. During his most recent interview, when asked about his knowledge surrounding the abduction of Heidi Allen he stated "it is different from what everybody else believes." He admitted to living at Spinners, a hotel right down the road from the D & W, at the time she disappeared and he admitted to being obsessed with the Heidi Allen case and hoarding a box of memorabilia about the case. Bohrer also stated that he was scrapping metal and made multiple trips to the junkyard owned by Richard Murtaugh. Significantly, Bohrer also stated that he had been waiting for this call by law enforcement because he knew "he was going to pop up in the picture someday." Bohrer claimed to know that Gary Thibodeau was not involved in Allen's abduction and that Christopher Bivens first statement to the police was closest to the truth, although he denied any personal responsibility in her disappearance (Exhibit G).

36. On March 19, 2013, members of the Oswego County Sherriff's Department interviewed Roger Breckenridge at Elmira Correctional Facility where he is incarcerated. During Breckenridge's interview he also denied involvement in Allen's abduction but stated that he was interviewed by Deputies early on in the investigation and he told them he had junked a van that he supposedly took from Gary Thibodeau's property (Exhibit G) Again this information was never disclosed to defense counsel and the significance of this revelation cannot be overstated since Gary Thibodeau did not own a van, and the State's case was based on the theory that Allen was abducted in Richard Thibodeau's van.

37. On March 15, 2013, James Steen was interviewed by members of the Oswego County Sherriff's Department at Auburn Correctional Facility. Steen is currently serving a life sentence for a double homicide. He signed a statement denying any involvement in Allen's disappearance and denied telling "anyone that I had anything to do with it" (Exhibit H).

38. On May 2, 2013, based upon the information provided to them by Tonya Priest, the Oswego County Sheriff's Office interviewed Megan Shaw presumably to corroborate the information she provided them about James Steen's admissions. Once again, Priest's information was corroborated and Shaw provided the Sherriff's department with a sworn affidavit relaying Steen's admissions of Kidnapping Heidi Allen (See Exhibit I).

39. Thereafter, on June 6, 2013, defense counsel received the letter from the District Attorney's Office requesting that the information remain confidential in order for the Sheriff's Office to continue their investigation (Exhibit J). Tonya Priest has not been contacted by law enforcement in more than one year (Exhibit V).

40. More than one year has passed and nothing more has been done to vindicate this miscarriage of justice. In fact, the District Attorney told defense counsel that the wooded area in

which Tonya Priest believed Heidi Allen's body was disposed of is too vast an area to search.⁷ They also recently stated that they did not find the information provided by Priest credible. The defense recently began a follow-up investigation and in addition to the newly discovered evidence of admissions made by James Steen, defense has uncovered additional evidence in support of a motion to vacate Gary Thibodeau's conviction.

41. On July 10, 2014, an individual named Carl Robinson questioned Westcott through Facebook about a comment she posted. Westcott claimed a Post Standard reporter was harassing her and her family and Carl Robinson engaged in the following private exchange through instant messaging:

Robinson: Remember the bday party and rods and everyone was talking about Heidi for some reason? u mentioned that the real killers were never caught. Maybe someone said something about that, and its why its all coming back up now.

Westcott: yes but I am not going to tell anyone about it. Im not going to be the next one dead for running my mouth off!! I will not go to court for anything that I said over 10 years ago that's retarded.

Robinson: I am just saying if u do know something u should tell someone. Its only right!!

Westcott: Im done talking about her! I don't have to say anything carl, idc what ppl are saying im not saying nothing about it. I will not be the next one dead in a box in the woods.

(Exhibit K and K1)

On July 27, 2014, after the story broke on the local news, Westcott reached out to Robinson through Facebook and this communication is very telling in that Westcott was attempting to conceal information from the authorities:

Jenn: If anyone ask you I never went to florida when Heidi went missing and I never lived on rice road – don't tell them anything!

⁷ In contrast to the District Attorney's statement, in a videotaped interview with the Post Standard on July 22, 2014, Oswego County Sheriff Todd stated the area had been searched and there was no cabin and there never was a cabin.

(Exhibit L)

The most recent exchanges between Westcott and Carl Robinson clearly confirm the information Westcott conveyed about Heidi Allen's abduction during the monitored phone conversation between her and Priest and further undermine her feigned denials during her interview with Pietroski.

42. The newly discovered evidence provides both the identity of the actual abductors and murderers of Allen and a motive for the crime. In June 2014, defense counsel discovered several reports which clearly indicate that Heidi Allen was a confidential informant and this information was never disclosed to Gary Thibodeau's trial counsel, similar to Allen's diary, which defense counsel learned about following Thibodeau's conviction after trial.

43. According to Sergeant Lortie in a report dated April 27, 1994, nearly four weeks after Allen's disappearance, Allen began working as a confidential informant with the ACT TEAM in 1991 or 1992. When Allen was signed up as an informant, officers placed her pedigree information, a codename, and Deputy Van Patten's name on an index card, which was kept together with a photograph of Allen (Exhibit M).

44. In a report dated December 8, 1994, Deputy Van Patten recalled dropping the index card and accompanying photograph in the parking lot while using a payphone outside the D & W store in 1991 or 1992 (Exhibit N). As explained by Deputy Montgomery in a report dated December 8, 1994, he retrieved the index card and photograph from an employee of D & W after the items were found in the parking lot of the store (Exhibit O).

45. In addition, the defense recently discovered a report prepared by Investigator Kleist of the Oswego County Sheriff's Office on May 16, 1995, which stated that while deputies were conducting inventory of the items found during the Allen search they discovered paperwork

that referred to Allen as a confidential informant. The report makes specific reference to her as a confidential informant, a photograph of her, names and numbers, Sheriff Department card, paperwork with drug information, notes from the day of her abduction, and a 1993 personal planner (Exhibit P).

46. This information concerning Allen's status as a confidential informant was never turned over to Gary Thibodeau's trial counsel and counsel did not learn of this information until June and July of 2014.

47. Additionally, it appears that the Sherriff's department had Allen's 1993 personal planner as part of her confidential informant file which was never disclosed. Interestingly, the reports prepared by Deputy Van Patten indicate that Allen was signed up as an informant sometime in 1991 or 1992 (when she would have only been 15). However, it appears her personal planner is dated 1993.

48. The significance of Allen's status as a confidential informant is heightened by the fact that one of suspects, Michael Bohrer, recently volunteered that he heard about Heidi Allen's confidential informant card being found in the parking lot (Exhibit G). This is significant to motive because the fact that Allen's confidential informant card was discovered in the D&W parking lot was *never* made public by the authorities. Gary Thibodeau had no knowledge of this and it was never brought out at the trial or during the media coverage.

49. Defense counsel recently contacted trial counsel for Gary Thibodeau, Judge Joseph Fahey, to inquire whether he ever knew about Heidi Allen being a confidential informant and to determine if he had ever been provided with a copy of the reports surrounding Allen's history of being a confidential informant for the Oswego County Sheriff's Office. Judge Fahey had never heard about this information prior to our conversation, nor had he ever seen any report

filed by the Oswego County Sheriff's Office documenting Allen's activity as an informant. Had these documents been turned over to trial counsel, he would have demanded disclosure of those individuals named by Allen in her capacity as an informant (Exhibit Q). Notwithstanding the fact that Heidi Allen's CI file contained critical information in support of a motive for her disappearance, particularly since this information was dropped in the very parking lot where she worked and was abducted, it was never turned over to the defense.

50. The jury was never presented with evidence that there were three possible suspects interviewed by Sheriff's Deputies, because those reports were never disclosed to the defense. Defense counsel also recently discovered notes by Sheriff's investigators that indicate Dan Barney was a "probable" suspect and interviewed on April 14, 1994 (Exhibit R1). That same day, Barney was discarded as a possible suspect (Exhibit R). However, the Oswego County Sheriff's Office never produced a report detailing how or why Barney became a suspect. The defense was never provided with any report generated by the Oswego County Sheriff's Office following their interviews of Westcott, Breckenridge, Barney, Bohrer, or Richard Murtaugh. Ironically, four of five individuals who have now been implicated in Allen's disappearance through the admissions of Steen to three persons: Tonya Priest, Jennifer Westcott, and Megan Shaw.

51. The State's failure to provide this critical *Brady* information, together with its fraudulent misrepresentations, are made painfully clear in a letter by then-Assistant District Attorney Donald Todd to trial counsel for Thibodeau, dated December 21, 1994. In the letter, Todd explained that he provided Thibodeau the reports concerning the identities and follow-up investigation relative to each suspect in Allen's disappearance. After listing the types and forms of information, Todd provided an exhaustive list of individuals from whom law enforcement

authorities collected information. This list included approximately 200 individuals, companies, associations, institutions, and agencies. Conspicuously absent from this list is any mention of Dan Barney, James Steen, Roger Breckenridge, Michael Bohrer, Jennifer Westcott, or Richard Murtaugh (Exhibit X).

52. The *Brady* violations on the part of the prosecution mandate a reversal of Gary Thibodeau's conviction or, at minimum, that the Court hold an evidentiary hearing on these issues. There is no question Gary Thibodeau was denied his right to a fair trial and the newly discovered evidence clearly establishes his actual innocence.

53. Most recently, on July 25, 2014 Danielle Babcock contacted defense counsel and revealed that she worked for Bohrer in the past and he threatened to harm her in the same way he did Heidi Allen (Exhibit S). Also newly discovered is information concerning admissions made by Bohrer to Tyler Hayes. Bohrer told Tyler Hayes in 2000 that he knew where Heidi Allen's body was and he knew who was involved in the abduction. Most troubling is the fact that Mr. Hayes immediately contacted 911 who put him in touch with a member of the Oswego County Sheriff's Office. Mr. Hayes spoke to the Sheriff's Investigator and after providing him the information, but was never contacted again (Exhibit Z).

54. On July 25, 2014, defense counsel also received information from Joseph Mannino who stated that in 2011 he was housed with James Steen at the Oswego County Jail when Steen was awaiting his murder trial. Steen told him that he was involved with "squashing" the van used in the abduction of Heidi Allen (Exhibit T).

55. On July 26, 2014 Deborah Vecchio reached out to newspaper reporter John O'Brien via email to let him know there is a cabin in the woods off of Rice Road down the street from where she lives. John O'Brien reached out to Richard Haumann, investigator for the

Federal Public Defender Office and they went to the site on July 27, 2014 (Exhibit Y). This cabin was located across the street from 68 Rice Road where Jennifer Westcott lived in April, 1994. They met with the owner of the property's son and walked to the location of the cabin. When they arrived it was readily apparent that someone had recently been digging in the area. There was debris which had been placed on the green foliage and fresh footprints in the dirt. Defense Counsel Lisa Peebles contacted District Attorney Gregg Oakes and he met her at the site. Richard Haumann and John O'Brien called the Oswego County Sheriff's Department and the New York State Police (Exhibit Y).

56. The District Attorney eventually contacted Oswego County Sheriff's investigators who arrived at the scene 2 ½ hours later and indicated they would secure the site. On July 28, 2014 defense counsel was notified that cadaver dogs alerted to an area at the site and were very active in one particular spot. Based upon the reactions of the dogs, the District Attorney contacted the Onondaga County Medical Examiner to conduct a forensic investigation and archeological dig of the area.

57. Deborah Vecchio stated that her son built this elaborate cabin in 1991 when he was 15 years old and further stated when she saw Michael Bohrer at his computer shop he would frequently joke with her about her son's cabin (Exhibit U). In addition, she stated that her father, Walter Rice, rented the trailer to the Westcott family in 1994 which was on the property he owned at 68 Rice Road. Vecchio specifically recalled Jennifer Westcott living at the trailer because she repeatedly added members to her family, including her boyfriend. Vecchio stated that she recalled her father being upset with Westcott and had the family move out when he returned from Florida (Exhibit U).

WHEREFORE, for these reasons stated herein and in the annexed affidavits, exhibits, and the legal basis outlined in the accompanying Memorandum of Law, this Court is urged to reverse Gary Thibodeau's conviction.

Dated: Syracuse, New York
July 25, 2014

Randi Juda Bianco, Esq.