

**IN THE IOWA DISTRICT COURT FOR SAC COUNTY**

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<b>STATE OF IOWA,</b>	)	
<b>Plaintiff,</b>	)	<b>CASE NO. FECR 011900</b>
	)	
<b>v.</b>	)	<b>DEFENDANT’S MOTION</b>
	)	<b>FOR DISCOVERY SANCTIONS,</b>
<b>TRACEY ANN RICHTER,</b>	)	<b>MOTION TO EXCLUDE</b>
<b>Defendant.</b>	)	<b>PROSECUTOR AND MOTION</b>
	)	<b>FOR ATTORNEY FEES</b>
	)	
	)	

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COMES NOW attorneys, Scott Bandstra and Karmen Anderson, for and on behalf of the Defendant, Tracey Richter, and hereby files her Motion for Discovery Sanctions, Motion to Exclude Sac County Attorney, Benjamin Smith (hereinafter “SCA”), and Motion for Attorney Fees states as follows:

**FACTS**

On December 13, 2001, Dustin Wehde and an unknown intruder entered Defendant’s, Tracey Richter’s, Early, Iowa residence and assaulted Defendant. Richter was able to break free while being assaulted and obtained a gun from a gun safe thereby enabling her to shoot Dustin Wehde to protect herself and her minor children. After shooting Dustin Wehde, Richter retrieved her children from the oldest son’s bedroom and while they were walking down the hall, Richter observed Dustin Wehde rocking back and forth attempting to get up. Richter returned her children back to the bedroom, went back to the master bedroom and told Dustin Wehde repeatedly to stay down. Dustin Wehde continued to attempt to get up and Richter shot him two more times, killing him.

Ten (10) years elapsed prior to the SCA filing the first degree murder charges against Richter. Through discovery, DCI Special Agent, Trent Vileta, indicated that the

case never closed. See Exhibit A, DCI Agent Vileta's deposition page 8, attached hereto and incorporated by reference. This should have been a sufficient time for the government to obtain all evidence to support its filing of the first degree murder charges against Richter. Unfortunately, since the criminal charges were filed, the government has continued to thwart the production of evidence to defend Richter against these charges – see below.

The government's "new evidence" for criminally charging Richter with first degree murder is that allegedly Richter told government witness, Mary Higgins (hereinafter "Higgins"), about a pink journal found in Dustin Wehde's car immediately after the December 13, 2001 shooting. Law enforcement did not disclose the existence of Dustin's pink journal to any of the witnesses or the press. The government's theory is that Richter' supposed disclosure to Higgins about Dustin's journal evidences that Richter had knowledge of the journal. The government opines that Richter forced Dustin Wehde to write in this journal which implicates her ex-husband, John Pitman, III, in the December 13, 2001 shooting. Contrary to the government's assertions, in Higgins' first two interviews, she made no reference to Dustin's journal. In her March 2011 interview, she refers to Dustin's journal, but indicates that Richter told her that the journal contained pornography and the color of this journal was not mentioned.

In a transcribed July 14, 2011 Higgins interview, on page 1, SCA stated to Mary Higgins, "Here, before you start, this is what I pulled . . . this is what TRACY had given to . . . **this is your testimony.**" See Exhibit B attached hereto and incorporated by reference. On page 95, of the transcribed Higgins' interview, SCA stated, "I am going to pull these e-mail . . . I just wanna make sure . . . here . . . here's an exact quote, I believe, from TRACEY in an e-mail to . . . uh . . . the sheriff. Uh . . . March 3, 2005, she send an e-mail to KENNY;

and I just wanna clarify one thing; when . . . **when you and I had discussed this just recently like a week ago; and we set this up, you had already known about the journal from a previous conversation we had. . . “**

After “preparing” Mary Higgins with this testimony, on July 26, 2011, SCA criminally charged Richter with First Degree Murder in Sac County, Iowa.

On August 3, 2011, SCA stated to Attorney Bandstra that he would voluntarily produce his entire investigative file because his office had an “open policy” for producing discovery. SCA indicated that there was no exculpatory evidence in the government’s file on multiple occasions. SCA requested that Richter file a formal discovery request and he would produce this discovery. On August 4, 2011, per SCA’s request, the undersigned filed his Request for Production of Documents. On August 5, 2011, the undersigned provided to SCA two (2) flash drives for SCA to provide Richter the previously agreed upon discovery file. However, contrary to his previous assertion, SCA refused to provide the undersigned with the government’s discovery file. SCA indicated that he would send the documents on the following Monday.

On August 9, 2011, following the bond review hearing, the discovery was again requested and SCA indicated that it would be overnighted in the next couple of days.

On August 17, 2011, the undersigned again requested the State’s discovery file. See Exhibit C attached hereto and incorporated by reference. However, State failed to respond to Defendant’s discovery request.

On August 24, 2011, the undersigned for the fourth time requested the State’s discovery file. See Exhibit D, attached hereto and incorporated by reference. Despite a fourth request, SCA still did not respond to Richter’s discovery request forcing Richter to

file a Motion to Compel to obtain the government's discovery file.

On August 26, 2011, SCA provided a partial disclosure of the government's evidence, which included primarily civil documents the State had in its possession. SCA assured Defense Counsel that the State's file did not contain exculpatory evidence.

On or about August 29, 2011, the State provided the majority of their file. Contrary to SCA's assertions, the government's file did contain exculpatory evidence, including forensic recreationist's, Rodney Englert's, report confirming Richter's statement of how the December 13, 2001 home invasion occurred. SCA's file also included former Sac County Detective's, Dennis Cessford's, investigative report including information regarding the second intruder that was never followed up by law enforcement until 2009.

On September 1, 2011, Richter requested the following, including, Mona Wehde's cellular and land-line telephone records documenting incoming calls for December of 2001; Michael Robert's telephone records (incoming and outgoing) for December of 2001; An inventory and production of all documentation obtained from the December 18, 2001 search of the Wehde residence including, but not limited to the black address book and all other items found; and all photographs taken during Englert's investigation/report. See Exhibit E attached hereto and incorporated by reference.

At the September 2, 2011 Motion to Compel hearing, the issue of deposing former Sac County Attorney, Earl Hardisty (hereinafter "Hardisty"), on September 12, 2011 was discussed in chambers. The Court indicated that the undersigned could informally interview Hardisty in lieu of taking his deposition because Hardisty was not listed as a government witness. SCA was present during this conversation and did not

object.

On September 7, 2011, Richter provided to the government, a list of sixteen (16) witnesses it wanted to depose based upon the Minutes of Testimony. In this correspondence, Defendant also provided, pursuant to Iowa Rule of Criminal Procedure 2.13(3), a list of Richter's witnesses including, but not limited to Hardisty. See Exhibit F attached hereto and incorporated by reference.

On September 8, 2011, Richter made a limited waiver of her right to speedy trial and trial was continued until October 25, 2011 in Fort Dodge, Iowa.

On September 20, 2011, private investigator, Scott Gratias, contacted government witness, Mary Higgins, who indicated to Mr. Gratias that she would not speak with him until she talked with her lawyer, SCA. Higgins indicated that she wanted SCA's permission prior to prior to doing an interview. See Exhibit G attached hereto and incorporated by reference.

On September 22, 2011, Defendant was to depose government witnesses, Mary Higgins, Robyn Padgett, Robert Harvey. However, immediately prior to the *Watson* hearing, SCA filed a Motion to Quash Depositions set for September 22, 2011. The Court granted SCA's Motion in part and ordered the State to fully cooperate in securing the depositions of **all State's witnesses requested by the Defendant in the next two weeks** [emphasis added]. The Court indicated that the parties should not leave the courthouse until a deposition schedule was determined. The parties' deposition schedule included depositions for the following week on September 26, 27 and possibly 30, 2011.

On September 23, 2011, immediately after the depositions of government witnesses, Robyn Padgett, Dennis Drey and Trent Vileta, SCA assured Richter's counsel

that if depositions were not taken on the September 26, 2011 that on September 27, 2011 SCA would present Mary Higgins, Dr. Leszek Marczewski, Dr. Carroll and Colin McCoullough for their depositions. However, contrary to SCA's statement and the Court's ruling, SCA never produced any witnesses for deposition on September 27, 2011. See SCA's e-mail Exhibit H attached hereto and incorporated by reference. In this e-mail, SCA remarks upon having to secure government's witnesses. SCA has not provided addresses of many of the State's witnesses, therefore Richter cannot secure them. SCA agreed to make the witnesses available and not disclose the addresses because he has alleged that Richter is a threat and will attempt to tamper with witnesses.

On September 28, 2011, SCA had a telephone call with Hardisty (Richter's listed witness), whereby SCA told Hardisty to "knock it off and quit talking to Attorney Bandstra about the [Richter] case." SCA referred to Attorney Bandstra as a "snake" who would "burn" Hardisty. When Hardisty refused SCA's request not to speak with Attorney Bandstra, SCA then told Hardisty that if he was going to talk to Bandstra that Hardisty should call SCA prior to talking with Bandstra and tell SCA what he was going to talk to Bandstra about. Hardisty indicates in his affidavit that SCA was trying to threaten or intimidate him to prevent him from revealing exculpatory evidence. See Hardisty's Affidavit Exhibit I, attached hereto and incorporated by reference.

Despite only producing for deposition, five (5) of the sixteen (16) requested government witnesses in Richter's September 1, 2011 correspondence, on September 30, 2011 (just three weeks prior to trial), SCA filed a Notice of Added Minutes of Testimony and Witness List whereby SCA alleges that Richter's substantial rights will not be prejudiced. In its Added Minutes of Testimony, SCA lists an additional twenty (20)

witnesses and many of these witnesses are simply identified as “employment unknown.” SCA did not include the Supplemental Minutes of Evidence in his electronic mail, but indicates that the Supplemental Minutes will be sent via United States mail. Richter’s counsel received the government’s additional discovery on October 1, 2011. Contrary to SCA’s assertions, the government’s actions clearly do prejudice Richter’s substantive constitutional rights to a fair trial.

### **RENEWED MOTION TO COMPEL**

#### **A. GOVERNMENT HAS NOT PRODUCED ALL EXCULPATORY EVIDENCE**

In *DeSimone v. State*, the Iowa Supreme Court recently stated, “In this appeal, we must decide if the State's failure to turn over a witness's timecard showing that the witness could not possibly have seen the events to which she testified constitutes a *Brady* violation . . . On further review, we find a *Brady* violation occurred. Therefore, we reverse the judgment of the district court and remand the case for the district court to enter an order vacating the defendant's conviction for sexual abuse and ordering a new trial on the sexual abuse charge.” See *DeSimone v. State*, WL 3962862 (Iowa 2011).

The *DeSimone* Court stated, “To establish a *Brady* violation has occurred, DeSimone must prove by a preponderance of the evidence “(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issue of guilt.” *Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003) (quoting *State v. Veal*, 564 N.W.2d 797, 810 (Iowa 1997) (internal quotation marks omitted); accord *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 1948,

144 L.Ed.2d 286, 302 (1999).” The *DeSimone Court* stated, “*Suppression of evidence*. The prosecution “has a duty to learn of any favorable evidence known to ... others acting on the government's behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490, 508 (1995). Nondisclosure of evidence is the touchstone for suppression; the good or bad faith of the prosecutor is not relevant. *State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1986).” *Id.*

The prosecution has a duty to disclose regardless of whether the accused requests *Brady* material. *Harrington*, 659 N.W.2d at 522. “Nonetheless, ‘if the defendant either knew or should have known of the essential facts permitting him to take advantage of the evidence,’ the evidence is not considered ‘suppressed.’ ” *Id.* (quoting *Cornell v. State*, 430 N.W.2d 384, 385 (Iowa 1988)); accord *United States v. Ladoucer*, 573 F.3d 628, 636 (8<sup>th</sup> Cir. 2009); *United States v. O’Hara*, 301 F.3d 563, 569 (7<sup>th</sup> Cir. 2002). However, before holding a lack of diligence on the part of defense counsel, defense counsel must be aware of the potentially exculpatory nature of the evidence and its existence. See *United States v. Griggs*, 713 F.2d 672, 674 (11<sup>th</sup> Cir. 1983) (stating a *Brady* violation does not exist where the defendant or his attorney knew of the alleged exculpatory information); *Harrington*, 659 N.W.2d at 522 (holding although the defendant had knowledge of the existence of the police reports, the defendant “did not have the ‘essential facts’ of the police reports so as to allow the defense to wholly take advantage of this evidence [and] ‘only access to the documents themselves would have provided the range and detail of information necessary to fully understand the implications of the police investigation’” (quoting *Mazzan v. Warden*, 116 Nev. 48, 993 P.2d 25, 37 (2000)).” *DeSimone v. State*, WL 3962862 (Iowa 2011).



Per the *DeSimone* ruling, a *Brady* violation has occurred, if Richter can prove by a preponderance of the evidence “(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and, (3) the evidence was material to the issue of guilt.”

Applying the *DeSimone Brady* factors to the instant case: (1) SCA has withheld the above-mentioned items. SCA originally promised to voluntarily produce his entire investigative file. However, contrary to his initial statements, SCA refused to produce any discovery for an entire month until Richter filed a Motion to Compel this discovery. Richter was prejudiced by SCA’s intentional withholding of its evidence because it delayed her ability to pursue her investigation and defense of the first degree murder charges against her.

As evidenced by Exhibit E, since September, 1, 2011, SCA has refused to provide evidence in its possession, including, but not limited to, Mona Wehde’s cellular and land-line telephone records documenting incoming calls for December of 2001; Michael Robert’s telephone records (incoming and outgoing) for December of 2001; an inventory and production of all documentation obtained from the December 18, 2001 search of the Wehde residence including, but not limited to, the black address book and all other items found; and all photographs taken or referenced in Englert’s investigation/report.

Regarding *DeSimone* element (2), Richter’s requested items are exculpatory. Mona Wehde’s telephone records are relevant to establish when she had communications with the person whom she believed was the second intruder, Jeremy Collins, immediately after the December 13, 2001 shooting. Richter’s ex-husband’s, Michael Roberts’, telephone records are relevant because he had taken Dustin Wehde paintballing to perform “home invasions” prior to the December 13, 2001 shooting and he spoke with Mona Wehde at

3:00 a.m. the morning after the shooting. The address book was in Dustin Wehde's possession prior to his death and Rodney Englert's photographs are relevant because the photographs establish evidence that substantiates Richter's statement on how the shooting occurred.

Regarding *DeSimone* element (3), as noted above, the above-mentioned evidence is material to Richter's guilt.

If the Iowa Supreme Court determined that the government failing to provide a time card in *DeSimone* was a *Brady* violation warranting a new trial, clearly SCA's actions of withholding the above-mentioned exculpatory evidence in its possession is a *Brady* violation warranting suppression of evidence in the instant action.

## **B. SPOILIATION**

The intentional destruction of evidence, sometimes discussed as a form of obstruction of justice, is usually referred to as spoliation. When it is established, the fact finder may draw the inference that the evidence destroyed was unfavorable to the party responsible for its spoliation. *Prudential Insurance Co. v. Lawnsdail*, 235 Iowa 125, 130, 15 N.W.2d 880, 883 (1944); McCormick on Evidence s 273, at 660-61 (2d ed. 1972); 22A C.J.S. Criminal Law s 596, at 377 (1961). Cf. *United States v. Remington*, 191 F.2d 246, 251 (2d Cir. 1951) (suppression of evidence); *State v. Parker*, 261 Iowa 88, 100-01, 151 N.W.2d 505, 512-13 (1967) (dictum; failure to call witness). *State v. Langlet*, 283 N.W.2d 330, 333 (Iowa 1979)

A spoliation instruction is "a direction to the jury that it [may] infer from the State's failure to preserve [evidence] that the evidence would have been adverse to the State." *State v. Vincik*, 398 N.W.2d 788, 795 (Iowa 1987). The definitive Iowa case on a

defendant's entitlement to a spoliation instruction based on the government's destruction of evidence is *State v. Langlet*, 283 N.W.2d 330 (Iowa 1979). In that case this court noted the general principle that when evidence is intentionally destroyed, “the fact finder may draw the inference that the evidence destroyed was unfavorable to the party responsible for its spoliation.” 283 N.W.2d at 333. This inference is based on the rationale that a party's destruction of evidence is “an admission by conduct of the weakness of [that party's] case.” *Id.* Cited in *State v. Hartsfield*, 681 N.W.2d 626, 630 (Iowa 2004)

The government has a duty to produce evidence. If there is evidence in the government's possession, and it later indicates that the item has not been preserved, a spoliation instruction is appropriate, which states that the evidence can be inferred to be favorable to the defendant.

In the present case, during their investigation, law enforcement obtained two Post-It notes with Dustin Wehde's handwriting on them. One referenced “money in November” and the other contained a telephone number to a hotel in Des Moines, Iowa. The existence of the Post-It notes was confirmed in both Mona Wehde’s and Robin Padgett's depositions. Law enforcement has indicated that they cannot find the Post-It notes.

Jeremy Collins’ bank statements were obtained by the prosecutor, but now Collins’ bank statements cannot be found.

The government hired forensic recreationist Rod Englert to do a forensic recreation of the Early, Iowa residence where the December 13, 2011 home invasion took place. The state has repeatedly indicated that it does not have Mr. Englert's photographs from the re-creation.

Per the *Vincik*, Court rationale, Richter has proven that the items were in the State's possession, Richter has repeatedly requested this exculpatory evidence, the State has continually claimed that they cannot be located, thus they failed to preserve the evidence or intentionally destroyed it.

If the Court does not grant Richter's Motion to Dismiss, at trial, the government should be precluded from presenting any evidence regarding the above-mentioned matters and Richter should be allowed the inference that these items evidence were intentionally destroyed and can be inferred as favorable to the Defendant.

**C. GOVERNMENT OBSTRUCTED DEFENDANT FROM DEPOSING WITNESSES**

Iowa Rule of Criminal Procedure 2.14(6)(c), Failure to Comply, states, "if at any time during the course of the proceedings it is brought to the attention of the Court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the Court may upon timely application order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing any evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

At the September 22, 2011 *Watson* hearing concerning the undersigned's alleged conflict of interest regarding State's witness, Michael Roberts, SCA filed a Motion to Quash each and every one of the fourteen depositions that Defendant had set for that week and the following week. SCA's filing of the Motion to Quash Depositions thirty minutes before the *Watson* hearing and presenting it to defense counsel at said hearing failed to provide Richter with adequate time to respond to or address this issue. Further, by the time SCA filed his Motion to Quash, Defense counsel had already expended substantial time and resources in preparing for Mary Higgins' and DCI Forensic

Pathologist Robert Harvey's depositions, which were to take place the afternoon following the *Watson* hearing.

Immediately after the September 23, 2011 depositions, SCA assured Richter's counsel that if depositions were not taken on the September 26, 2011; on September 27, 2011 SCA could present Mary Higgins, Dr. Leszek Marczewski, Dr. Carroll and Colin McCoullough for their depositions. However, contrary to SCA's statement and the Court's ruling, SCA never produced any witnesses for deposition on September 27, 2011 or any of the government's witnesses during the week of September 26, 2011.

On September 30, 2011, SCA filed Notice of Additional Witnesses listing twenty (20) new witnesses. SCA failed to provide any information regarding these witnesses and some of the government's witnesses have never been mentioned or identified in the evidence the government has provided to Richter. Filing the additional twenty (20) witnesses when SCA has only allowed five (5) of the sixteen (16) requested government's witnesses to be deposed appears to be disingenuous and an attempt delay the discovery process.

Defendant is attaching an Attorney Fee Affidavit, evidencing time expended in attempting to obtain discovery from SCA, preparing for Ms. Higgins and Forensic Pathologist, Robert Harvey's depositions and Ms. Anderson's time in driving to Fort Dodge, Iowa in anticipation of continuing on to Sac City, Iowa to conduct the depositions. Defendant requests the Court grant the Motion for Discovery Sanctions and order the government be responsible for paying Richter's attorney fees.

## **PROSECUTORIAL MISCONDUCT**

In *State v. Graves*, the Iowa Supreme Court described a due process violation based upon prosecutorial misconduct by stating, "To assess whether the county attorney's action in this case constitutes misconduct, it is necessary first to understand the nature of the role played by the prosecutor in a criminal trial. A prosecutor "is not an advocate in the ordinary meaning of the term." 63C Am. Jur. 2d *Prosecuting Attorneys* § 1, at 114 (1997). That is because a prosecutor owes a duty to the defendant as well as to the public. See *State v. Iowa Dist. Ct.*, 568 N.W.2d 505, 508 (Iowa 1997) (stating "a county attorney owes a duty to do justice, not only for the accusers, but also for the accused"); *Webb*, 244 N.W.2d at 333 (stating "prosecutors have a dual function"); *State v. Tolson*, 248 Iowa 733, 734-35, 82 N.W.2d 105, 106 (1957) (noting prosecutor owes a duty to the public and to the accused)." *State v. Graves*, 668 N.W.2d 860, 870 (Iowa 2003).

The *Graves* Court stated, "the prosecutor's duty to the accused is to "assure the defendant a fair trial" by complying with "the requirements of due process throughout the trial." *DeVoss*, 648 N.W.2d at 64; accord *Tolson*, 248 Iowa at 734, 82 N.W.2d at 106. Thus, while a prosecutor is properly an advocate for the State within the bounds of the law, the prosecutor's primary interest should be to see that justice is done, not to obtain a conviction. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 653, 79 L. Ed. 1314, 1321 (1935); *State v. Levy* 160 N.W.2d 460, 467 (Iowa 1968); 63C Am. Jur. 2d *Prosecuting Attorneys* § 23, at 135-36 ("It is as much the prosecutor's duty to see that a person on trial is not deprived of any of his or her statutory or constitutional rights as it is to prosecute the defendant."); *ABA Standards for Criminal Justice* 3-1.2(b), (c) (3d ed. 1993) (stating the prosecutor is an advocate, but "the duty of the prosecutor is to seek

justice, not merely to convict"). An observation we made many years ago is unfortunately still true today: even though prosecutors should keep in mind their obligation to the accused at every stage of the proceeding, too often, they do not." *Id.*

The *Graves* Court continued by stating, "to show a denial of due process, the defendant must establish the prosecutor's misconduct deprived the defendant of a fair trial. There are many components of a fair trial. *See generally* 21A Am. Jur. 2d *Criminal Law* § 998, at 259-60 (1998). The aspect of a fair trial implicated in the present case is the accused's right "to have his or her guilt or innocence determined solely on the basis of the evidence introduced at trial." *Id.* at 260. This right is threatened "by any incident likely to prejudice the jury." *Id.* at 876-877.

In the present case, pursuant to the *Graves* Court rationale, SCA owed a duty to be fair to Richter and to the public. In Exhibit B, Higgins' July of 2011 interview page one, SCA stated, "this is what TRACY had given to . . . this is **your testimony.**" (emphasis added). On page 95, regarding Dustin Wehde's pink journal, SCA states, "I am going to pull these e-mail . . . I just wanna make sure . . . here . . . here's an exact quote, I believe, from TRACEY in an e-mail to . . . uh . . . the sheriff. Uh . . . March 3, 2005, she sent an e-mail to KENNY; and I just wanna clarify one thing; when . . . when you and I had discussed this just recently like a week ago; **and we set this up, you had already known about the journal from a previous conversation we had.** . . ." (emphasis added).

Richter has a constitutional right to have her guilt or innocence determined solely on the basis of the evidence introduced at trial. As the prosecutor, SCA has a duty to investigate and interview witnesses. However, SCA cannot ethically provide Higgins with government evidence and then attempt to make it appear that Higgins learned about this

information from Richter rather than SCA. SCA's statement to Higgins as to what she is going to testify to and what she **knew** about Dustin's pink journal based upon what SCA has previously told her substantially prejudices Richter's fundamental right to a fair trial. At best, it could appear SCA is more interested in Richter's conviction than seeking justice. At worst it is a fair inference that SCA is manufacturing evidence which is a substantial and material breach of the judicial process as an officer of the court.

### **WITNESS TAMPERING**

Iowa Rule of Criminal Procedure 2.11(f), Interference with Witnesses states, "the defendant, attorneys representing the defendant or the state, and their representatives and agents shall not instruct or advise persons, except the defendant, having relevant information that he or she should refrain from discussing the case with opposing counsel or an unrepresented defendant, or from showing opposing counsel or an unrepresented defendant any relevant evidence. The defendant, attorney representing the defendant for the state, and their representatives and agents shall not otherwise impede investigation of the case by opposing counsel or an unrepresented defendant."

Iowa Code Section 719.3, Preventing Apprehension, Obstructing Prosecution, or Obstructing Defense, states, "A person who, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, knowingly does any of the following acts, commits an aggravated misdemeanor:

1. Destroys, alters, conceals or disguises physical evidence which would be admissible in the trial of another for a public offense, or makes available false evidence or furnishes false information with the intent that it be used in the trial of that case.



2. Induces a witness having knowledge material to the subject at issue to leave the state or hide, or to fail to appear when subpoenaed. Iowa Code Ann. § 719.3.

Iowa Code Section 720.4, Tampering with Witnesses or Jurors, states, A person who offers any bribe to any person who the officer believes has been or may be summoned as a witness or juror in any judicial or arbitration proceeding, or any legislative hearing, or who makes any threats toward such person or who forcibly or fraudulently detains or restrains such person, with the intent to improperly influence such witness or juror with respect to the witness' or juror's testimony or decision in such case, or to prevent such person from testifying or serving in such case, or who, in retaliation for anything lawfully done by any witness or juror in any case, harasses such witness or juror, commits an aggravated misdemeanor.” Iowa Code Ann. § 720.4.

In *State v. Welborn*, the Iowa Supreme Court stated, “. . . In *State v. Bartilson*, 382 N.W.2d 479, 481 (Iowa App.1985), this court dealt specifically with the threat component of section 720.4, and adopted the definition of “threat” used in *State v. Jackson*, 305 N.W.2d 420, 423 (Iowa 1981): “Threaten” is defined as “to utter threats against”; “threat” is defined as “an expression of an intention to inflict evil, injury or damage on another.” (Citation omitted). “This usage suggests the focus in determining whether a threat has been made is upon the actions of the person expressing or uttering his or her intention to inflict evil, injury or damage.” *Bartilson*, 382 N.W.2d at 481 (emphasis in original). *State v. Welborn*, 443 N.W.2d 72, 74 (Iowa Ct. App. 1989).

As noted above by the *Graves* Court, SCA had a duty to be fair to Richter, including, but not limited to providing access to government witnesses. Per I.R.Cr.P. 2.11(f), SCA was not to instruct or advise persons having relevant information from

discussing the case with opposing counsel. As evidenced by Exhibit I, on September 20, 2011 private investigator, Scott Gratias, attempted to interview government witness, Mary Higgins, but she said that she would not speak with Gratias until she talked with her lawyer, SCA and had his permission. Subsequent to this attempted interview, SCA has never provided Higgins to speak with Gratias.

As evidenced by Exhibit F, on September 7, 2011, defense counsel notified SCA that Hardisty was Richter's witness. SCA has never added Hardisty to his witness list. However, despite this knowledge and statements by the Court that Richter's counsel could speak with Hardisty, on September 28, 2011, SCA spoke with Hardisty whereby SCA told Hardisty to "knock it off and quit talking to Attorney Bandstra about the [Richter] case." SCA called Attorney Bandstra a "snake" and told Hardisty that if he was going to talk to Bandstra that Hardisty should call SCA prior to talking with Bandstra and tell SCA what he was going to talk to Bandstra about. Hardisty indicated that he thought SCA was attempting to threaten him.

SCA's command for Hardisty to quit talking to Attorney Bandstra satisfies the *Welborn* Court's definition of a "threat" -- an intention to inflict evil, injury or damage. SCA has violated his duty to provide Richter with a fair trial at every step of the judicial process. It would appear that SCA's actions establish that he is only interested in Richter's criminal conviction rather than seeking justice. He has clearly violated Iowa Rule of Criminal Procedure 2.11(f) and Iowa Court Rule 32:3.4(a) and (f) by tampering with the witnesses Higgins and Hardisty. SCA's actions are unconscionable and warrant additional review by the Court.

Based upon SCA's actions, Richter's criminal charges should be dismissed with prejudice because Richter's procedural due process rights have been violated by SCA or in the alternative, SCA should be removed from the case for his witness tampering and failing to provide and/or disclose evidence and Mary Higgins should be prohibited from testifying. Richter should be awarded attorney fees for SCA's actions

### **CONCLUSION**

For the above-mentioned reasons, Defendant Tracey Richter requests that based upon the government's actions of violating her procedural due process rights, including but not limited to, fabricating testimony, withholding evidence, failing to comply with a court order regarding scheduling depositions and witness tampering, the Court dismiss the First Degree Murder Criminal charges against Richter with prejudice or in the alternative, exclude Attorney Benjamin Smith as a prosecutor in this matter and exclude Mary Higgins and the twenty witnesses identified in the government's witnesses identified in the Additional Minutes of Testimony and assess Richter's attorney fees to the government for its discovery violations. Defendant Richter requests that the Court hold a hearing on the matter contemporaneously with Richter's Motion to Dismiss.

Respectfully submitted,

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Robert Powers, Esq.

#### PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the parties to this litigation to the attorney of record at their respective addresses by sending these documents via electronic mail on the 4th day of October, 2011.

Watie J. O'Connor

1 investigation on this matter?

2 A. The case was never closed, so ...

3 Q. Okay.

4 A. -- it wasn't so much -- I think that's a  
5 bit like a miscommon use of or misunderstanding  
6 right now is that people are saying that we  
7 reopened the case. We actually just re-examined  
8 it. It was never -- it never went to a closure, I  
9 guess.

10 Q. Okay. And so who asked you and/or  
11 directed you to begin doing an investigation in  
12 this matter?

13 A. My supervisor and it's Special Agent in  
14 Charge Terry Klooster, and it's K-L-O-O-S-T-E-R.

15 Q. And, Special Agent Vileta, did you work  
16 at all with the Sac County Attorney at that time?

17 A. Some, yes.

18 Q. And who was that?

19 A. Earl Hardisty.

20 Q. And what were your directives from  
21 Mr. Klooster?

22 A. With a cold case it kind of falls by the  
23 wayside if we have something else go on, so kind  
24 of look at it when I had time, see if there's  
25 anything that we could do with it, that sort of

# IOWA DIVISION OF CRIMINAL INVESTIGATION

CASE: 0113423

TYPED BY/DATE: JESSICA 07/14/11

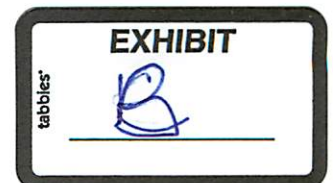
231537

KM: SHERIFF KEN MCCLURE  
MH: MARY HIGGINS  
TV: S/A TRENT VILETA  
BS: SAC COUNTY ATTORNEY BEN SMITH

## RECORDED INTERVIEW

CASE AGENT: S/A TRENT VILETA

1 TV: You may not (UNINTELLIGIBLE) be right back.  
2  
3 (pause – approximately 1 minute 10 seconds)  
4  
5 KM: No (UNINTELLIGIBLE)  
6  
7 MH: (UNINTELLIGIBLE)  
8  
9 KM: Why in the hell (UNINTELLIGIBLE) Des Moines?  
10  
11 MH: 'Cause you already told me.  
12  
13 KM: Well it's not gonna be in (UNINTELLIGIBLE) it's not gonna be here.  
14  
15 MH: (UNINTELLIGIBLE) here?  
16  
17 KM: No. They'll change (UNINTELLIGIBLE)  
18  
19 BS: Here, before you start, this is what I pulled...this is what TRACY  
20 had given to...this is your testimony.  
21  
22 MH: My testimony?  
23  
24 BS: At the...at her trial.



**RECORDED INTERVIEW – MARY HIGGINS (CON'T)**

25  
26 MH: Oh yeah.  
27  
28 BS: That you gave the state cops.  
29  
30 MH: Okay, that's fine.  
31  
32 BS: And I just highlighted some things.  
33  
34 MH: I didn't bring my glasses; what's it say? I know...  
35  
36 TV: Let's go out here (UNINTELLIGIBLE)  
37  
38 MH: (UNINTELLIGIBLE)  
39  
40 BS: No, I mean it's...it's pretty consistent. It's consistent with what you  
41 said.  
42  
43 MH: (UNINTELLIGIBLE)  
44  
45 KM: Well...  
46  
47 (door closes)  
48  
49 (pause – approximately 7 minutes 15 seconds)  
50  
51 MH: (UNINTELLIGIBLE)  
52  
53 KM: (UNINTELLIGIBLE) that stays in here (UNINTELLIGIBLE)  
54  
55 TV: I'm sorry?  
56  
57 KM: I'm not elected official (UNINTELLIGIBLE) understand the whole  
58 (UNINTELLIGIBLE)  
59  
60 BS: (UNINTELLIGIBLE)  
61  
62 KM: You're a good campaigner, you know all about politics, don't you?  
63  
64 MH: I did phone calling, which I'm not doing again.  
65  
66 BS: Let's hope it doesn't come down to that.  
67  
68 MH: (laughs)  
69

**RECORDED INTERVIEW – MARY HIGGINS (CON'T)**

4196 MH: Years and years and years later; what did we talk about?  
4197 Oh...uh...TRACEY put up some kind of a...something on the  
4198 Internet about...uh...MIKE changing his name and...  
4199  
4200 KM: MICHAEL ROBERTS deadbeat dad.  
4201  
4202 MH: Something...that's it. And sh...actually ROBYN said to me  
4203 did...have you heard about that Internet site, and I said well  
4204 y...who told me? I don't know. (UNINTELLIGIBLE) told me about  
4205 it. And TRA...and...and she said she had...ROBYN said she'd  
4206 already looked it up.  
4207  
4208 TV: We can discuss...  
4209  
4210 MH: Hell no.  
4211  
4212 TV: ...the dentist in Chicago.  
4213  
4214 MH: I would have no reason to.  
4215  
4216 BS: I'm gonna pull these e-mail...I just wanna make sure  
4217 that...here...here's an exact quote, I believe, from TRACEY in an  
4218 e-mail to...uh...the sheriff. Uh...March 3, 2005, she sends an e-  
4219 mail to KENNY; and I just wanna clarify one thing; when...when  
4220 you...when you and I had discussed this just recently like a week  
4221 ago, and we set this up, you had already known about the journal  
4222 from a previous conversation that we had...  
4223  
4224 MH: Correct.  
4225  
4226 BS: (UNINTELLIGIBLE) before that...  
4227  
4228 MH: I didn't think...  
4229  
4230 BS: No law enforcement...  
4231  
4232 MH: ...anything of it.  
4233  
4234 BS: ...had ever told you anything...  
4235  
4236 MH: No.  
4237  
4238 BS: ...about that? Okay.  
4239  
4240 MH: No, I didn't think anything of it.



# THE BANDSTRA LAW FIRM, P.C.

INSURANCE EXCHANGE BUILDING  
505 FIFTH AVENUE, SUITE 810  
DES MOINES, IOWA 50309

SCOTT L. BANDSTRA  
KARMEN R. ANDERSON

Telephone: (515) 283-2050  
Facsimile: (515) 283-2052  
E-mail: scott@bandstralaw.com

August 17, 2011

Ben Smith, Esq.  
100 NW State Street  
Sac City, IA 50583

Doug Hammerand  
Hoover State Office Building, 2<sup>nd</sup> Floor  
Des Moines, IA 50319

RE: State v. Richter-Roberts

Dear Ben and Doug:

I am in receipt of your Resistance to Defendant's Discovery and I am responding thereto.

On August 3, 2011, you indicated to my associate and me that you would provide us with the discovery at the hearing on August 5, 2011. Based upon your statements, we provided two flash drives. However, when we arrived on August 5, 2011, you became angry and indignant and refused to provide us the discovery. Now you are filing a formal resistance to us obtaining discovery. I am disappointed in your failure to honor your previous promise.

Clearly, pursuant to Iowa Rules of Criminal Procedure, we are entitled to any and all documentation. As an officer of the court, I would ask that you withdraw your resistance and provide your entire file. If you are not willing to do so, we will proceed accordingly based upon your previous representations.

After reviewing the minutes of testimony, I would specifically request the following:

1. Dennis Cesford's original notes and the diagram drawn;
2. The notes of the interview of Bert Pitman on or about December 13<sup>th</sup> and/or 14<sup>th</sup>, 2001;
3. Defendant's December 17, 2001 recorded statement;
4. The February 12, 2002 child protective interview of Bert Pitman;



5. Bert Pitman's entire juvenile file;
6. Photographs taken by DCI employee Robert Harvey;
7. The fingerprint analysis based upon Robert Harvey's work;
8. The July 12, 2011 Robitaille interview of Tracey Roberts;
9. Any and all police reports regarding this investigation;
10. Any and all polygraph test and results administered to Bert Pitman and Michael Roberts;
11. Taped recordings of the 911 call on December 13, 2001;
12. Any blood spatter notes, reports, photographs;
13. Dustin Wehde's death certificate;
14. Investigative records, reports and notes regarding Chief of Police, Roger Ray;
15. Any letters or emails sent by Defendant that are referenced in the Trial Information;
16. Access to Dustin Wehde's computer that Mona Wehde restricted in December 2001.

Please respond on or before August 19, 2011. I look forward to hearing from you.

Sincerely yours,

/s/

Scott L. Bandstra

SLB:kjo

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E-mail: [scott@bandstralaw.com](mailto:scott@bandstralaw.com)

August 24, 2011

Via United States mail and electronic mail

Ben Smith, Esq.  
100 NW State Street  
Sac City, IA 50583

RE: State v. Richter-Roberts

Dear Ben:

This is a good faith attempt to resolve a discovery dispute.

On or about August 4, 2011, you indicated that the Sac County Attorney's office had an "open discovery" policy, whereby if I provided you a flash drive, you would provide me with all relevant discovery. Based upon your statements, I, along with my associate, Karmen Anderson, presented to your office to obtain the discovery with two flash drives, one for you and one for us. You refused to provide us the discovery but have indicated to the Court in your Resistance to our Motion for Discovery that you will produce the relevant discovery.

As you know, the Court has set the first degree murder trial for Tracy Richter for September 28, 2011. With five weeks to trial, I am specifically requesting that you provide all documentation in your possession to this office, including exculpatory evidence, witness statements including Tracey Richter and Bert Pitman's, all investigative reports and so this law firm can defend Tracy Richter against the above-mentioned charges.

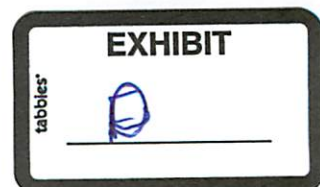
If you do not provide the requested documentation within the next week, or on or before August 29, 2011, this law firm will proceed accordingly.

Thank you in advance for your cooperation.

Very truly yours,

Scott L. Bandstra

SLB:kjo



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E-mail: [scott@bandstralaw.com](mailto:scott@bandstralaw.com)

September 1, 2011

Via hand delivery and electronic mail

Ben Smith, Esq.  
100 NW State Street  
Sac City, IA 50583



Doug Hammerand, Esq.  
Hoover State Office Building, 2<sup>nd</sup> Floor  
Des Moines, IA 50319

RE: State v. Richter-Roberts

Gentlemen:

The e-mail sent earlier was a draft and was inadvertently sent out. I wanted to review additional governmental discovery prior it out.

This firm has not yet been able to view every document, but on the initial inventory there does not appear to be included certain documents:

1. In Dennis Cessford's report (included in DCI Agent Vileta's Supplemental Report A page 107), it indicates that that he interviewed Elwin J. Hopkins, M.D. and Early Bank Manager, Vicki Mathaidess, and that these interviews are included, but the interviews were not provided in the file; 
2. Dennis Cessford's hand-written notes of his December 30, 2001 interview of Mona Wehde;
3. The affidavit of Marie Friedman; 
4. Mona Wehde's land-line telephone records documenting incoming calls for December of 2001;
5. Michael Robert's telephone records (incoming and outgoing) for December of 2001;
6. An inventory and production of all documentation obtained from the December 18, 2001 search of the Wehde residence including, but not limited to the black address book and all other items found;
7. All photographs taken or referenced in the Englehart investigation/report;



8. All photographs of Bert Pitman's door immediately after the December 13, 2001 home invasion; and
9. DCI Agent Vileta's Supplemental Report E page 186 of his April 22, 2009 interview of Jeremy Collins.

The audio files that are in AIFF format cannot be accessed on a PC, thus defense counsel is unable to open them.

At the hearing tomorrow, I will provide additional flash drives that the converted audio files can be saved to, as well as the above requested documents (1-9) and any supplemental discovery in the state's possession. As we continue to review the discovery, we will update our requests as necessary.

If you have any questions regarding this matter, do not hesitate to contact me.

Very truly yours,

/s/

Scott L. Bandstra

cc: Tracey Richter



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September 7, 2011

VIA ELECTRONIC MAIL AND UNITED STATES MAIL

Ben Smith, Esq.  
100 NW State Street  
Sac City, IA 50583

Doug Hammerand, Esq.  
Hoover State Office Building, 2<sup>nd</sup> Floor  
Des Moines, IA 50319

RE: State v. Richter

Gentlemen:

Pursuant to our September 2, 2011 hearing before the Honorable Kurt Wilke, trial has been continued until mid October of 2011 in order for discovery to occur.

I wish to depose the following of the state's witnesses, including:

1. Daniel Bruscher;
2. Bill McClure;
3. Dennis Drey;
4. L.J. Marczewski, M.D.;
5. Daniel Mosier;
6. Robert Harvey;
7. John Pitman III;
8. Colin McCullough;
9. Steven Komie;
10. Marie Friedman;
11. Diane McInerny;
12. Robyn Padgett;
13. Ken McClure;
14. Trent Vileta;
15. Mary Higgins; and
16. Jonathan Robitaille.



I would prefer to take these depositions in Des Moines, Iowa, as all of the parties, other than Mr. Smith, are located here. Please advise of your dates of availability within the next three weeks and if you are willing to have the depositions in Des Moines, Iowa. I presume that you will make all of the witnesses available for their deposition to be taken. If this is not the case, please advise so that I can issue subpoenas.

Pursuant to Iowa Rule of Criminal Procedure 2.13(3), Defendant, Tracey Richter, may call the following people at time of trial, including, but not limited to:

1. Ramona Wehde;
2. Rodney Englert;
3. James Gallagher;
4. Bert Pitman;
5. Elvin Hopkins, M.D.;
6. Vicki Mathaidess;
7. Melissa Schmit;
8. Molly Vadnais;
9. Jeremy Collins;
10. John Cayton;
11. Earl Hardisty; and
12. Noah Roberts.

I look forward to hearing from both of you regarding deposition dates.

Very truly yours,

Scott L. Bandstra

cc: Tracey Richter

# AFFIDAVIT

\*  
\*  
\*

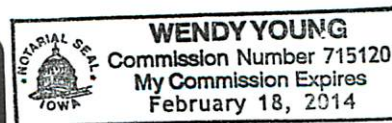
STATE OF IOWA )  
 )  
COUNTY OF POLK )

I, Scott Gratias being first duly sworn depose and say that on 09/20/11 I called the phone number of 712-273-5585 and spoke with Mary Higgins who is listed as a potential witness on the case of SOI v. Tracey Ann Richter-Roberts. I informed Mrs. Higgins that my name was Scott Gratias and I am a private investigator working with attorney Scott Bandstra, who is representing Tracey Richter- Roberts. Mrs. Higgins informed me that she did not want to speak with me without first contacting her attorney. I asked who her attorney is and she informed me that her attorney is Mr. Ben Smith. I asked if that was the same Ben Smith who is the prosecutor and she stated that it is. She further stated that she wants Mr. Smith's approval and permission prior to doing any interviews. She also stated that she would like for him to be present during the interview. At that point, no further questions were asked of Mrs. Higgins and our conversation was concluded.

  
Scott Gratias

Subscribed and sworn to me by Scott Gratias; this 29 day of Sept, 2011.

  
Notary Public for the State of Iowa





**Karmen Anderson**

**From:** Ben Smith [benjsmith41@gmail.com]  
**Sent:** Wednesday, September 28, 2011 1:15 AM  
**To:** dhammer@ag.state.ia.us; Doug Hammerand; Scott Bandstra; Karmen Anderson  
**Subject:** response to deposition query  
**Signed By:** benjsmith41@gmail.com  
 Scott –

The State cannot agree to your proposed deposition schedule. First, I am not available this Friday (September 30, 2011) and neither is AAG Doug Hammerand. Second, it is unreasonable to expect me to guarantee and otherwise secure the voluntary appearances of six (6) out-of-state witnesses, most of whom are busy professionals living thousands of miles from Iowa, all in less than three (3) days.

Following last Thursday's hearing, within twelve (12) hours, I secured promises for three of the State's witnesses to appear the following day. All three appeared and all three were deposed. At the conclusion of these depositions, I assured you my office would do everything within its power to coordinate the scheduling/taking of depositions of the State's witnesses according to your availability the following two weeks. In a little over twenty-four hours (24), I was able to secure promises from the below-listed witnesses to appear for depositions the week of October 3, 2011:

- <!--[if !supportLists]-->1. <!--[endif]-->Sheriff Ken McClure next Monday (October 3, 2011) at 10:30 a.m.
- <!--[if !supportLists]-->2. <!--[endif]-->Deputy Dan Bruscher next Monday (October 3, 2011) at 1:30 p.m.
- <!--[if !supportLists]-->3. <!--[endif]-->Dan Moser next Thursday (October 6, 2011) at 10:30 a.m.
- <!--[if !supportLists]-->4. <!--[endif]-->Dr. Thomas Carroll next Thursday (October 6, 2011) at 1:30 p.m.
- <!--[if !supportLists]-->5. <!--[endif]-->Dr. Leszek Marczewski (available after 1:00 p.m. on Mondays, Tuesdays, and Fridays, beginning the week of October 10, 2011)
- <!--[if !supportLists]-->6. <!--[endif]-->Colin McCullough (available anytime in the afternoon the week of October 3, 2011, except for Tuesday October 4, 2011).

Given the above, it is reasonable to assume that the State will soon secure the promises of the remaining in-state-witnesses to appear for depositions the week of October 3, 2011, or soon thereafter.

Also, your client does have the right to depose all the State's witnesses. However, as AAG Doug Hammerand pointed out to me, despite your assertions to the contrary, there is no authority that



requires out-of-state witnesses to appear for in-person depositions in Iowa, nor is there any authority that requires out-of-state witness or Sac County to advance the costs associated with such travel.

The State has already made one (1) out-of-state witness available for depositions (Mona Wehde), and we can continue to try to secure the voluntary appearances of the remaining out-of-state witnesses; however, with the exception of Robert Harvey, the remaining out-of-state witnesses live significant distances from Iowa. Therefore, your client's options with regards to deposing the out-of-state witnesses are as follows: 1) You can continue to allow my office to use its best efforts to arrange in-person depositions of the out-of-state witnesses for a date that is available to the witness and both parties, but only after your client advances all travel related costs (e.g., airfare, overnight lodging, etc); 2) You can obtain a subpoena for an in-person deposition from the appropriate authority of the jurisdiction in which each out-of-state witness resides and then travel to said jurisdictions to depose the out-of-state witnesses; or 3) You can allow my office to arrange for the out-of-state witnesses to be deposed via phone or videophone (e.g., Skype, ICN).

At last Thursday's hearing, Judge Wilke asked us to work together to schedule depositions. Beginning Monday, I have worked diligently to coordinate the scheduling of depositions for the remaining witnesses. There is not much I can do if the witnesses do not immediately return my calls or have conflicts with your available dates and times. I guess what I am trying to say is I am doing the best I can. If this is not sufficient, then let Doug and I know, so we can provide you our available dates and the addresses not listed in the minutes of testimony so that you can subpoena the remaining witnesses.

You need to provide me with the dates you are available to go to the DCI lab to inspect the items you noted earlier (Dustin Wehde's clothing and the black composition book) so that I can make the appropriate arrangements. Also, I am not sure whether the set of pictures I brought with me to the last series of depositions were the pictures to which Mr. Hardisty was referring as I found them much the same way they appeared on the table in the jury room; not labeled and in no discernible order. I have tried to contact Mr. Englert regarding this issue, but as I stated earlier today, I have not yet heard back from him. Regardless, when I get the chance, I will scan them and e-mail them to you.

Respectfully,

Ben Smith

Sac County Attorney

## IN THE IOWA DISTRICT COURT FOR SAC COUNTY

STATE OF IOWA,

Plain tiff,

V.

TRACEY ANN RICHTER,

Defendant.

CASE NO. FECR011900

AFFIDAVIT OF

EARL HARDISTY

COMES NOW, the Affiant, Earl Hardisty, and states to the Court as follows:

1. I am an attorney licensed to practice in the State of Iowa.
2. I previously was the County Attorney for Sac County, Iowa.
3. During my time as Sac County Attorney, I participated in a criminal investigation regarding a December 13, 2001 shooting which occurred in Early, Iowa involving Tracey "Roberts" Richter.
4. Iowa attorney, Benjamin Smith, has subsequently been elected as Sac County Attorney.
5. After Ben Smith became County Attorney, Tracey "Roberts" Richter was criminally charged with First Degree Murder concerning the December 13, 2001 shooting at her former residence.
6. It is my understanding that Tracey Richter has listed me as a witness in the defense of her First Degree Murder case, and that the State has not listed me as a witness in this matter.
7. On September 27, 2011 Benjamin Smith left a voice message on my home phone, asking me to call him. Shortly after 12:30 P.M. on September 28, 2011, I returned his call.
8. I had an approximately 15 minute telephone conversation with Mr. Smith. During this conversation Mr. Smith told me "Scott Bandstra is a snake; he is going to burn you." "Knock it off, quit talking to Scott, and quit telling him things about this case."
9. I asked him what was the problem; I had only provided factually correct and information which was exculpatory to the Defendant. I asked him whether he believed that I had told Scott something which was incorrect. He did not respond to that question.
10. Mr. Smith told me that I was violating ethical rules because I was revealing "privileged information".
11. I responded, that the information obtained in a criminal investigation was no longer privileged information, regarding the defendant, after the criminal charge has been

EXHIBIT


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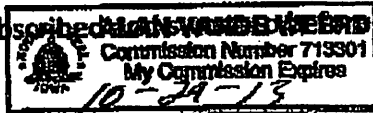
filed; because the prosecutor has a duty to provide all exculpatory evidence to the defendant.


12. Mr. Smith disagreed; saying that, the duty to disclose information to the defendant does not apply to a former county attorney, and thus I was providing privileged information to Scott Bandstra. I told him that I disagreed with him; that I believe that I still have a duty to provide exculpatory evidence that could be used in Tracey Richter's defense so that she could have a fair trial.
13. Mr. Smith got rather belligerent with me because I would not agree to stop talking to Scott Bandstra concerning the evidence of the case.
14. Mr. Smith ended the conversation by saying come to me and tell me what you are going to tell Scott before you tell him any thing.
15. During the conversation; Mr. Smith was trying to intimidate me and threaten me, to prevent me from revealing exculpatory evidence in the case to Defense Counsel, Scott Bandstra.
16. I also believe that it is unethical for a State's Prosecutor to threaten another attorney with an ethical violation, when the intention of that prosecutor is merely to try to prevent the discovery of evidence which is exculpatory for the Defendant, relating to the crime charged.

FURTHERMORE the Affiant sayeth not.

  
Earl E. Hardisty, affiant

Subscribed and sworn to before me on this 3<sup>rd</sup> day of October, 2011.



  
Notary Public in and for the State of Iowa