

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF LYON

FIFTH JUDICIAL DISTRICT

Case Type: Criminal  
Case File No. 42-CR-08-220

HON. DAVID W. PETERSON

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STATE OF MINNESOTA,

Plaintiff,

v.

OLGA MARINA FRANCO del CID,

Defendant.

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**MOTIONS FOR JUDGMENT OF ACQUITTAL OR A NEW TRIAL**

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TO: The Honorable David W. Peterson, presiding Judge, and the Lyon County District Court Administrator, Richard R. Maes, Esq., Lyon County Attorney, 607 W. Main St., Marshall, MN 56285.

**PLEASE TAKE NOTICE** that Defendant Olga Marina Franco del Cid hereby moves this Court for Judgment of Acquittal or in the alternative for a New Trial.

Defendant's motions are based on Minn. R. Crim. P. 26.03, subd. 17(3) (2008), Minn. R. Crim. P. 26.04, subd. 3 (2008), affidavits, and on the record and files of the court. Minn. R. Crim. P. 26.04, subd. 1(2) (2008).

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Dated: August 29, 2008

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**FILED IN THIS OFFICE**

*8-29-08*

Karen J. Bierman  
COURT ADMINISTRATOR  
Marshall Lyon County, Minnesota

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR A NEW TRIAL**

*PREFACE*

**HONOR, RESPECT, FAIRNESS, AND JUSTICE**

It does not honor the children who lost their lives, the injured, or their families to convict the wrong person on evidence shrouded in doubt and evidence as supportive of Ms. Franco's claim of innocence as it is of the State's allegations of guilt. Respect does not consist in convicting this young woman through speculation and conjecture, no matter the motivation. An unjust verdict brings no closure, for such unfairness infects things insidiously, the wound remains open and the remedy cannot but disturb it again.

The evidence presented by the State was inconclusive. The evidence Olga Franco presented as to what happened in that accident was substantively rebutted. And being forced to revisit this tragedy, it bears considering what this process could have, yet failed to accomplish. Society has a keen interest in attaining justice, but no more than do the grief-stricken families.

The prosecution promised answers to these families, to the community, then disregarded the very process by which the answers could have been, but now likely never will be obtained. The prosecution ignored important evidence and rather than advocating for justice, advocated only defeat of its chosen candidate.

The heartbroken community did not simply demand a warm young body to be summarily dispatched. They displayed no vindictiveness. They displayed no desire to add more tragedy to one already far too unbearable.

It is easy to comprehend these grieving families' compelling need to accept and believe that the verdict was true to the evidence. They wanted, they needed some explanation by which they could strive to understand how this diabolical accident could have happened and thereby begin in some small and desperate way the interminable healing process. But, they expressed no desire to obtain answers regardless of the method, regardless of the uncertainty.

Some, maybe all, knew already that an event so terrible as this one will never truly see closure. Though no scale exists on which the weight of one parent's pain at losing a child can be compared to another parent's having lost two, each knows that there is no closure possible for such a horrible experience, as Marty Javens observed when asked whether it mattered what verdict the jury delivered: "It's not going to make much difference to me either way. I want justice. (But) a reporter asked me if there'd be closure after this. I said no."

Hopefully, though likely as slowly as their pain is deep, time will disclose to these families that so horrific a tragedy, by its very nature, is incomprehensible. Though

things will never be the same, and scars will remain, one day, with God's help, they will, for their own mental and emotional survival, come to know that this terrible event can only be accepted and that the pain, though it will forever be felt, will one day become more bearable.

No reasonable person can fault the families for believing the jury's decision was right and just. Yet to believe they desired that this young woman's life be unjustly destroyed merely to lessen their own pain is to ignore who these people are. They are good, decent, and intelligent people in the throes of the worst situation they could never have imagined thrust upon them. They will not fault a Court for rectifying this verdict's injustice.

A verdict founded on evidence that could support no conclusion other than that Ms. Franco was not, could not have been, the driver of the minivan that spun their world in reverse is not justice. It will not supplant their loss to allow a verdict to stand when that verdict delivered a profound injustice.

The State promised answers, but for every "answer" the prosecution offered, it ignored another, inconsistent with the first. The families will not fault the Court for rectifying the resulting injustice because the correct and fair answer will resound in the ensuing rebuke that, in the future, the prosecution and the State *must* fulfill their duty to truly seek all the answers rather than simply adopt the first convenient hypothesis and thereafter defy all contrary evidence.

To allow the verdict to stand will leave an insidious doubt that will grow as the emotional intensity fades to dispassionate reflection and that doubt will fester and it will never allow the families or the community the healing they so desperately need and deserve. They wanted justice, not blind revenge, not to destroy yet another life. That is not who they are.

## I INTRODUCTION

The evidence presented in the trial leads to no reasonable conclusion other than that the State<sup>1</sup> did not prove its hypothesis of Ms. Franco's guilt beyond any reasonable doubt of those crimes conditioned on her in fact having been the driver of that minivan when it crashed into the bus. The evidence presented was more consistent with the hypothesis that Defendant was not driving the van at the time it caused the accident.

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<sup>1</sup> (hereinafter "the State" and/or "the prosecution/prosecutor")

The State's evidence was therefore insufficient and Defendant is entitled to a Judgment of Acquittal.

Justice is not attained in simply delivering up someone upon whom to pin these terrible felonies, the responsibility for this ghastly event, someone to go to prison to offer an illusion of justice. Justice is obtained by guaranteeing that the responsibility is correctly placed.

Mendoza's mere presence in his van would undermine the State's hypothesis and bolster Ms. Franco's so the State allowed Mendoza to slip through their fingers. He will likely never pay for what he, more likely than any other person, did. The State sought to collect Mendoza's entire debt from Ms. Franco, though she did not incur it.

With the dearth of evidence supporting its hypothesis, yet against any sense of fairness, the State immediately coined a conclusory mantra it would hammer into the conscious and subconscious of every person who could hear: "she was pinned in the driver's seat, that's all we need to know." Before, during, and after the trial.

Throughout the trial the State repeatedly elicited improper testimony from its witnesses on the ultimate issue despite multiple admonitions by the Court that the prosecutor must adequately instruct the State's witnesses not to do so. The State also did so by withholding information about several witnesses' critical knowledge, resulting in an eyewitness becoming unavailable. And it did so by withholding all information concerning (of highly suspect veracity) a surprise, end-of-trial "rebuttal" witness. Consequently, despite the Court's own efforts to insure Defendant a fair trial, the State prevented her from receiving one. A new trial is warranted.

The heartrending circumstances of this case make Defendant's Motions for Judgment of Acquittal or a New Trial as difficult to bring as it is to imagine the courage necessary to grant them. But to deny Defendant's motions would not only deny justice, it would disregard it entirely.

## II PROCEDURAL HISTORY

- **February 19, 2008:** Date of charged offenses.
- **February 21, 2008:** Complaint filed by Lyon County Attorney's Office, charging Defendant with four felony counts of "Criminal Vehicular Homicide"; one misdemeanor count of "Stop Sign Violation"; and one misdemeanor count of "No Minnesota Driver's License." Bail was set at \$400,000 without conditions and \$200,000 with conditions.
- **April 22, 2008:** Amended Complaint filed by Lyon County Attorney's Office, charging Defendant with four felony counts of "Criminal Vehicular Homicide"; ten felony counts of "Criminal Vehicular Injury"; seven gross misdemeanor counts of "Criminal Vehicular Injury"; one gross misdemeanor count of "False Name and Date of Birth to a Peace Officer"; one misdemeanor count of "Stop Sign Violation"; and one misdemeanor count of "No Minnesota Driver's License"; Bail continued as previously set.
- **March 12, 2008:** Case reassigned to The Honorable David W. Peterson.
- **May 21, 2008:** Demand for Speedy Trial filed.
- **June 11, 2008:** Defendant's Motion for Change of Venue Granted. Venue changed from Marshall, Minnesota in Lyon County to Willmar, Minnesota in Kandiyohi County. Trial date set for July 28, 2008.
- **July 19, 2008:** Order on completion of Omnibus Hearing finding probable cause.
- **July 28, 2008:** Jury selection commenced in Kandiyohi County, the Honorable David W. Peterson presiding.
- **July 30, 2008:** Jury selection completed.
- **August 6, 2008:** Jury convicted Defendant of all 24 Counts in the Amended Complaint. Sentencing to be within 30-45 days.

### III. LEGAL ISSUES

#### A. Judgment of Acquittal Must be Entered for Insufficiency of Evidence

Due process requires the State to prove every element of each charged offense beyond any reasonable doubt. The ultimate issue in this case, whether or not Defendant was driving the van at the time it caused the accident, was based on circumstantial evidence. In a circumstantial evidence case, all the circumstances proved must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt.

*ISSUE:* Where the State's proof is entirely circumstantial and the circumstances the State proved may be consistent with the hypothesis that Defendant is guilty, but are *not* inconsistent with any rational hypothesis other than Defendant's guilt, has the State provided sufficient evidence proving Defendant guilty of each element of each crime charged beyond any reasonable doubt? **ANSWER: No.**

Relevant Authority:

- Minn. R. Crim. P. 26.03, subd. 17(1) (2008)
- *State v. Hughes*, 749 N.W.2d 307 (Minn. 2008)
- *State v. Leake*, 699 N.W.2d 312, 326 n. 10 (Minn. 2005)
- *Bernhardt v. State*, 684 N.W.2d 465 (Minn.2004)
- *State v. Swain*, 269 N.W.2d 707 (Minn.1978).

#### B. New Trial Should be Granted Here in the Interests of Justice, for Surprise, The Verdict is not Justified by the Evidence, and for Prosecutor Misconduct

A new trial should be granted where the substantial rights of the accused have been so violated as to make it reasonably clear that a fair trial was not had. A conviction will be reversed for prosecutorial misconduct where (1) the prosecutor's remarks or conduct were improper; and (2) the remarks or conduct prejudicially affected the defendant's substantial rights so as to deprive her of a fair trial.

**ISSUE:** Where 1) the ultimate fact to be decided by the jury was whether Defendant was driving the minivan at the time it caused the crash; 2) Defendant denied driving the minivan at the time it caused the crash; 3) no eyewitness observed Defendant driving the minivan when it caused the crash and the State's proof of that alleged fact was thus circumstantial; 4) Defendant's denial made her credibility a critical issue in the trial; 5) three separate State witnesses referred to Defendant as the driver, resulting in the Court warning the prosecutor on three separate occasions that he must adequately instruct his witnesses not to refer to Defendant as the driver; 6) only after the third warning by the Court did the prosecutor's witnesses refrain from referring to Defendant as the driver; 7) the prosecutor implied admissions by Defendant solely by asking a question for which he provided no foundation or supporting evidence; 8) the prosecutor asked questions and attempted to introduce exhibits disparaging Defendant's credibility, but failed to and could not prove the facts improperly implied; 9) the prosecutor withheld witness information allowing a possible eyewitness to leave the State making that witness unavailable; and 10) the prosecutor withheld the identity of and knowledge of a witness, knowledge directly pertinent to an issue already in evidence, calling that witness at the end of the trial to rebut Defendant's testimony and disparage her credibility; did such conduct by the prosecutor constitute prosecutorial misconduct so affecting Defendant's substantial rights as to deny her a fair trial?  
**ANSWER: Yes.**

Relevant Authority:

- Minn. R. Crim. P. 26.04 (2008)
- *State v. Yurkiewicz*, 212 Minn. 208, 3 N.W.2d 775 (1942)
- *U.S. v. Samples*, 456 F.3d 875 (8th Cir. Ct. App. 2006), rehearing and rehearing en banc denied, certiorari denied 127 S.Ct. 1162, 166 L.Ed.2d 1005
- *State v. Fields*, 730 N.W.2d 777 (2007)
- *Opsahl v. State*, 677 N.W.2d 414 (2004)
- *State v. Turnbull*, 267 Minn. 428, 127 N.W.2d 157 (1964)
- *State v. Jones*, 266 Minn. 523, 124 N.W.2d 727 (1963)
- *State v. Van Wagner*, 504 N.W.2d 746 (Minn. 1993)

**IV.  
FACTS**

**REVIEW OF EVIDENCE AT TRIAL**

**A. The Charges**

Defendant was charged by Amended Complaint with four felony counts of "Criminal Vehicular Homicide"; ten felony counts of "Criminal Vehicular Injury"; seven

gross misdemeanor counts of "Criminal Vehicular Injury"; one gross misdemeanor count of "False Name and Date of Birth to a Peace Officer"; one misdemeanor count of "Stop Sign Violation"; and one misdemeanor count of "No Minnesota Driver's License."

The charges were based on a February 19, 2008 collision near Cottonwood, Minnesota between a 1998 Plymouth Voyager van ("the van" or the "mini-van"), a school bus, and a pickup ("the accident"). The accident caused the deaths of four children, injured sixteen others, and injured Defendant and another adult. The prosecutor alleged Defendant was driving the van at the time of the accident, failed to stop for a stop sign, and thereby caused the crash. Defendant denies she was driving or ever drove the van and that the van's owner, her abusive boyfriend, was driving and fled the scene within minutes after the accident.

A jury trial was held before this Honorable Court and on August 6, 2008, the jury returned its verdicts finding Defendant guilty on all 24 Counts. All but the charge of false information to a peace officer were wholly dependent on whether or not Defendant was properly found, beyond any reasonable doubt, to have been the driver of Mendoza's van at the time it caused the accident with the school bus. The critical facts as introduced and admitted into evidence through testimonial and documentary evidence were as follows.

**B. Defendant's Background  
From Guatemala to *Guatepeor***

Olga Marina Franco del Cid is from Guatemala.<sup>2</sup> Her education ceased at the sixth grade level. She grew up with her parents and two sisters in rural Guatemala.

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<sup>2</sup> Except as otherwise indicated, this and the facts following in this section are taken from the Trial Transcript ("TT"), Franco, at 444-510, Exhibit A.

She paid a "coyote"<sup>3</sup> several thousand dollars to get her to the United States.<sup>4</sup> She does not speak, read, or comprehend the English language.

Defendant worked at jobs in Montevideo, Cottonwood, and Willmar. She met Francisco Sangabriel Mendoza (a.k.a. Samuel Rivera Melendez) while working in Willmar. They developed a relationship and Mendoza asked her to live with him and she agreed.

Shortly after they began living together, Mendoza became physically and verbally abusive of her. He often left her at home and later came home after drinking and would yell at and hit her. He made her quit a job and kept her at home during that time. He controlled who she called or spoke to, what she wore, and when and where she was allowed to go. She testified that Mendoza did not allow her to have a key to their rented home and that he kept those keys on his keychain also containing the keys to his minivan.

Defense witness Salvador Cruz, an in-home family counselor and adjunct professor at St. Cloud State University who was appointed by the Court to counsel Defendant to address her mental depression and physical and mental abuse, visited in person with Defendant eleven times over twenty-five hours. Mr. Cruz testified as to what he had learned during those twenty-five hours of counseling Defendant:

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<sup>3</sup> [A] "coyote" is a person paid to smuggle illegal immigrants across the border between Mexico and the United States. Wikipedia, at [http://en.wikipedia.org/wiki/People\\_smuggling](http://en.wikipedia.org/wiki/People_smuggling) (last viewed August 18, 2008).

<sup>4</sup> See, e.g., Yvette De La Garza, Greg Magnus, and Lisa Castro, SIGNONSANDIEGO, "Crossing 'La Linea'" (February 26, 2003) <http://www.signonsandiego.com/news/features/migrant/20030621-9999-border.html> (last viewed August 18, 2008) ("Drawn by the promise of jobs and a better life, migrants provide a steady source of cheap labor for U.S. farms and industry. Likewise, U.S. dollars are often the main financial support for many tiny pueblitos in South America.")

A: She had been very much abused physically, mentally, emotionally by her partner, a boyfriend, I believe. The name was used; Francisco. And he would dictate what she should wear, what she would dress. She would put makeup on her, she would paint her fingernails, very jealous man, and I believe she also mentioned she -- he had been married one time, but divorced due to abuse from that relationship.

Q: Is there anything else she told you about the abuse?

A: Afraid.

Exhibit A, TT, Cruz, at 386.

Defendant testified that the day before the accident, Mendoza stayed home from work because he was sick and, because she did not have a ride, Defendant also stayed home from work. On the day of the accident, Defendant had found in Mendoza's things pictures of Mendoza's ex-wife. When she confronted Mendoza about the photographs, he pushed and hit her. Mendoza was also angry with Defendant because she had dressed in clothes he did not like. She ended up wearing blue jeans<sup>5</sup> and a black coat.

Defendant testified that Mendoza had the only keys to the trailer they lived in and to the van and that he kept all the keys on his keychain with the keys to the van. He did not allow Ms. Franco to have her own key to the trailer.

Mendoza continued arguing with her on their way to work that afternoon. Defendant did not recall any other vehicles on County 24 before the accident and did not recall Mendoza passing another vehicle. As the van approached the intersection where the crash occurred, Mendoza was looking at and yelling at her. Defendant saw the school bus approaching, exclaimed "watch out, there's a bus," and as Mendoza

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<sup>5</sup> While Defendant testified only that she wore pants that were blue, State witness Juan Esparza Campos testified that she was wearing "jeans," i.e., she was wearing blue jeans. Exhibit A, TT, Esparza, at 177 ("A. -- she was wearing jeans . . .").

turned his head, and not wanting anything to happen to her, Defendant took off her seatbelt so she could get out of the van.<sup>6</sup> She did not make it.

Though the prosecution diligently sought to create inconsistencies in Defendant's testimony by asking the same questions in subtly different ways, the prosecution did not succeed in impeaching any of Defendant's substantive testimony. Despite the cultural and language barriers, despite that she was facing a gallery of the victim's families; despite that she was being observed with rapt attention by the jury who held her fate in their hands, despite her sixth grade education, Defendant's testimony was substantively unimpeached.

That Defendant was unable to recall exact distances, speeds, or precisely where the minivan was in the frightening seconds before the impending crash is far more understandable than questionable. Not one other witness had better recall and all suffered from the inability inherent in violent motor vehicle collisions to recall such things with precision. That she could not explain what happened to cause her foot to be trapped in the ensuing collision is understandable, particularly considering *no witness*

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<sup>6</sup> Though the prosecutor impliedly ridiculed Defendant's reaction to the impending collision by trying to get out of the van, it is human nature to seek to avoid great danger (the natural reaction to danger is even codified through common usage in the phrase "flight or fight."). Choosing to attempt in an emergency to leave a minivan seconds before an impending collision with a substantially larger bus cannot be said to have been an unreasonable choice. For example, in a comment to an article about a multiple car accident, where the cause was attributed to traffic speeding along, one participant stated "I had a close escape from this horrible accident, as I was in a car **and I just managed to jump out of it** and then all I could hear was bang, bang, bang. I have seen it all with my eyes, and would never want to see such a thing again in my whole life. It was a sorry sight." Joel, Abu Dhabi, UAE, Posted: March 12, 2008, comment to Rayeesa Absal and Kevin Scott, *Horror accident on Abu Dhabi-Dubai highway near Ghantoot*, Last updated: March 12, 2008 (last viewed August 18, 2008) (emphasis added) at [http://www.gulfnews.com/nation/traffic\\_and\\_transport/10196597.html](http://www.gulfnews.com/nation/traffic_and_transport/10196597.html) (last viewed August 18, 2008). In fact, it has long been settled law that a decision made when confronted with an emergency, even if the choice from hindsight does not appear to have been the best or safest choice, is not *de facto* negligence. See *Johnson v. Townsend*, 195 Minn. 107, 110, 261 N.W. 859, 861 (1935) ("[O]ne, suddenly confronted by a peril, through no fault of his own, who, in the attempt to escape, does not choose the best or safest way, should not be held negligent because of such choice, unless it was so hazardous that the ordinarily prudent person would not have made it under similar conditions.").

could do so. No one knows exactly what happened to cause Defendant's right foot to become trapped as it was. No witness testified that it could happen only if, or even if, she had been the driver. No one, including the jury, could have done anything other than speculate as to how that happened and, more importantly, whether or not it had any bearing on Defendant's alleged status as the driver.

**C. Evidence Demonstrated that Defendant  
was not Driving Mendoza's Van at Time of Crash**

Evidence was introduced that in 2006, Defendant attempted to drive her sister's car, but was stopped for erratic driving and issued a citation for having no driver's license. Defendant testified the experience frightened her so much that she swore to herself never to touch a car again. There was no conclusive evidence introduced that she ever did. Defendant also testified she did not drive Mendoza's van on the day of the accident and never had before.

No witness testified as to having seen Defendant driving the van on the day of the accident or at the time of the crash. See Exhibit A, TT, Testimony of Dobrenski, at 91; Moat, at 101; Devereaux, at 84; and Hancock, at 74-75. Nor could the witnesses agree on the color jacket or coat or shirt Ms. Franco was wearing at the time of the crash, though one of the State's witnesses in the best position to observe, Joseph Kimpe, who was right in the van helping Defendant, corroborated Defendant's testimony that the coat she was wearing that day was *black*. See:

BY MR. GUERRERO:

Q. What color was the coat?

A. Black.

Q. Ms. Franco, you've been photographed in a coat that was colored blue, and I've seen that in the newspapers. Whose coat was that blue coat?

A. On my first court date that I had there they put it on me there in Marshall at the jail.

Q. But it was not your coat, was it?

A. No.

Q. And what color was your coat?

A. Black.

Exhibit A, TT, Franco, at 470-71,

and

Q. Mr. Kimpe, I know you were helping a lot of people and the -- the adrenalin must have been pumping in your body, but do you recall what color coat Ms. Franco was wearing?

A. It was a black jacket.

Exhibit A, TT, J. Kimpe, at 160.

Larry Moat testified he thought Ms. Franco was wearing a light-colored coat or shirt. See Exhibit A, TT, Moat, at 105-06 ("It was a light -- I don't know if it was a coat or a shirt or what, it was light-colored.") Moat only saw Ms. Franco from a distance for a short time.

All the testimony, with the exception of the single event where Defendant tried unsuccessfully to actually drive a car almost two years prior to the accident and the State's suspicious surprise "rebuttal" witness whose testimony bore no indicia of credibility, was that Defendant did not drive any vehicles, much less Mendoza's van.

The State called Ben Stendahl at the end of the trial to impeach Defendant's testimony that she had never driven Mendoza's minivan. The circumstances under which Stendahl was called and the characteristics of his testimony tend disturbingly towards fabrication. First, Defense counsel had at the beginning of the trial raised the issue of Defendant's ability to drive by eliciting through Trooper Dana Larsen testimony

that, as the chief investigator of this accident, the State had done nothing to determine whether Defendant even knew how to drive a vehicle. See:

BY MR. GUERRERO:

Q. Have -- after the accident, after February 19th, have you ever made any attempt, you as the chief investigating officer, made any attempt or try to find out whether Ms. Franco can in fact drive an automobile?

A. Whether she can?

Q. Yes.

A. No.

Exhibit A, TT, Dana Larsen, at 63.

The prosecution improperly secreted this "witness" to spring him on Ms. Franco at the last possible moment to impart the greatest prejudicial effect on Ms. Franco's chance for a fair trial. Second, Stendahl's testimony was sufficiently vague to lend a defense against perjury, yet suitably detailed to get the testimony admitted and cause Ms. Franco maximum harm.

However, the State withheld not only the direct information in its possession regarding this alleged observation of Defendant's purported ability to drive a vehicle (the witness testifying he saw someone he *now thinks* was Defendant driving Mendoza's van on *approximately* six occasions, See Exhibit A, TT, Ben Stendahl, at 602), it withheld even the knowledge of the existence of this witness, effectively -- albeit wrongfully -- preventing Defendant's ability to perform any adequate investigation of Stendahl's vague and suspicious "knowledge."<sup>7</sup> More damaging, this equivocal surprise testimony,

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<sup>7</sup> The prosecutor's surprise notice of this witness at the end of the trial also substantially, if not fatally, and certainly unfairly, compromised the Court's ability to adequately assess the propriety of allowing this surprise witness, as no adequate defense investigation of the information could be performed by which to better inform the Court's decision. Unnecessarily forcing the Court to make a decision on such minimal information lest the Court substantially delay the trial near its completion was inexcusable, particularly when the issue had been raised at the beginning. The prosecution acted improperly in placing the Court

particularly coming at the end of the trial, improperly suggested to the jury that Defendant was not only lying about never having driven that van, but directly implied she was driving Mendoza's van at the time it caused the crash.

Stendahl also testified his observations occurred between 2:30 and 3:00 pm. However, Defendant's un rebutted testimony was that, as she and Mendoza worked the 4:00 pm shift in another town miles away, they would be finishing lunch and preparing to leave for work at this time. See Exhibit A, TT, Franco, rebuttal, at \_\_\_\_.

Stendahl also testified he was *unsure* it was Defendant he allegedly saw driving Mendoza's minivan. Nor did he testify he ever took down or ran the license plate numbers to verify it even was Mendoza's minivan he allegedly saw. The only reason he gave for noticing the vehicle was the incomprehensible assertion that the van he allegedly saw being driven by someone he now thinks was Ms. Franco on an estimated number of occasions caught his eye because the van's windows were *not* tinted. See Exhibit A, Stendahl, at 602.

Stendahl's credibility is further belied by his testimony that he was present at the trailer Ms. Franco shared with Mendoza when immigration and customs enforcement officials ("ICE") executed a search warrant on that property within a couple of days of the accident. The detailed ICE report of the execution of the search warrant meticulously lists the individuals present during the search. See Exhibit B. Stendahl's name is conspicuously *absent* from that list.<sup>8</sup> Stendahl testified to this alleged

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in that position, requiring the Court to recess and quickly assess this critical issue on limited information and call it as the Court based thereon saw it.

<sup>8</sup> Stendahl also testified only five people were present during the search, though in fact there were eight people present. See Exhibit B.

participation to demonstrate why he claimed the van he allegedly saw with a female driver was Mendoza's van as he also testified his Chief of Police had some rental property in that trailer court and that he had previously seen a van parked in front of Mendoza's trailer *resembling* the one involved in the accident and the one he said he had observed in the past.

Though this information was unquestionably highly relevant to the investigation of this horrific fatal accident, none of this information is contained in either the ICE reports or any State investigation reports, nor was it ever conveyed to defense counsel. It just happened to suddenly materialize, by inappropriate ambush, when it was needed to cast aspersions on Defendant's testimony and to plug the holes in the State's leaking hypothesis.

**D. Mendoza was not the only  
Eye-Witness the Prosecution Allowed to Leave Town**

Prosecution witness Gail Maus testified that the van *passed her vehicle just moments before the crash*. See Exhibit A, TT, Gail Maus, at 124. The State had never disclosed to Defendant that this woman had alleged she saw the minivan moments before the crash and instead disclosed only that Ms. Maus would testify about "observations of the scene of the accident." See:

MR. GUERRERO: What is she going to testify to?

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THE COURT: Can you just outline briefly?

MR. MAES: Sure, she came -- she came upon the intersection. She believed it was within that period of time just prior to the accident. She came up to the stop sign and she saw Ms. Franco in the minivan. She did not see anyone else.

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MR. MAES: I said that she's going to testify about her observations --

MR. EISENBRAUN: At the scene.

**MR. MAES:** The exchange of information was just that she was a witness and she was going to testify about her observations at the scene.

**THE COURT:** Well, I'm going to allow some leeway in terms of setting the scene from different perspectives, but your discovery said your witness would testify as to her observations of the scene? I mean, that was the summary of it or whatever?

**MR. MAES:** Yes.

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**MR. MAES:** I had her on the list and where she lives and, you know, and talked about what she said.

Exhibit A, TT, Gail Maus, at 116-23 (emphases added).

Then, disregarding his express representations to the Court, the prosecutor *immediately* elicited testimony regarding observations *substantively different from and prior to* Ms. Maus' "observations of the scene of the accident," i.e., the highly relevant and important information the prosecution said *it did not disclose to Defendant because she was only* "going to testify about her observations at the scene." *Id.* See:

THE COURT: Very well, Mr. Maes, you may proceed.

BY MR. MAES:

Q. Thank you, Your Honor. I believe where we left off is you were traveling towards 23 on Highway 24, is that correct?

A. Yes, yes.

Q. All right, and you had traveled on 24 from Minneota?

A. Yes.

Q. Now, I believe there's a Highway 59 that you end up crossing some distance back, is that correct?

A. Yes.

Q. Do you know about how far back from this intersection Highway 59 is?

A. You know, I drive it twice a month, three miles maybe, I don't -- I couldn't tell you. It's kind of a rough road.

Q. Now, after you crossed 59, did you see any other traffic on the road?

A. I did not see traffic coming at us, but a vehicle did pass us.

Q. And --

A. It was a van.

Q. Okay, was it a minivan?

A. It was a van.

Q. All right, did you see any other traffic aside from that van?

A. No, I did not.

Exhibit A, TT, Maus, at 129-30.

Ms. Maus testified that she did not notice and could not identify the occupants of the van or its driver when it passed her vehicle. But, she did testify that her brother was a passenger in her vehicle and was in a better position to see who was driving. See:

BY MR. GUERRERO:

Q. No, what -- I'm -- what I'm -- my question is -- goes to what you told me, not to what your brother -- but didn't you just tell me that your brother was in a better position to tell who was driving the car than you?

A. **My brother saw it more clearly than me, yes.**

Exhibit A, TT, Maus, at 134-35 (emphases added).

Not only did the State fail to notify Defendant's counsel of the brother until less than a week before the start of Defendant's trial, the State also withheld from Defendant's counsel knowledge that *this witness had seen the van moments before the crash*, disclosing *only* that he might testify as to "observations of the scene of the accident." More egregious, though this witness was the only other potential witness besides Mendoza, Ms. Franco, and Ms. Maus to who was driving that van moments before the crash, the prosecution, while subpoenaing Ms. Maus to testify, did not subpoena her brother. Having no subpoena, this witness left town the evening after the first full day of testimony, before Ms. Maus agreed that her brother would have been in a better position *to tell us who was driving that minivan*. See:

BY MR. GUERRERO:

Q. Where is your brother?

A. My brother is either in Denver, Colorado, right now or on his way.

Q. And when did he leave?

A. He left last night, I believe, I'm not sure, but I think last night.

Q. Did you receive a subpoena to appear here today?

A. Yes, I did.

Q. Did he?

A. No, he did not.

Exhibit A, TT, Maus, at 134-35.

The prosecutor spoke with Ms. Maus and her brother the week before the trial. Having listed this person as a trial witness, the prosecution surely explored with the witness his availability during the upcoming trial and was undoubtedly told that this witness would be leaving town. The State withheld the knowledge that this witness (and his sister) had observed the van moments before the accident and let him leave the State.

**E. Mechanics of The Crash – Simple Physics, Common Sense**

*"[I]f we could free the foot from the wreckage,  
we could remove her from the vehicle"*

1. *The State's false and prejudicial refrain and other misconduct.* The very night of the accident the prosecutor and law enforcement coined a false refrain, that Ms. Franco was found "pinned in the driver's seat." They repeated variations of that refrain up to and throughout the trial. The phrase was an erroneous, improper, and unfair conclusion. It was never proven by any credible or reliable evidence.

The prosecutor and law enforcement used that refrain over and over to pound it in so hard that any contrary proof would be, as it turned out to be, wholly ineffective in disputing the conclusion and thereby prejudice any chance Defendant might have had for a fair trial. The prosecutor repeated this improper conclusion in the State's Opening Statement and elicited it from the State's witnesses thereafter. See:

BY MR. MAES:

You're going to hear from a First Responder from Cottonwood who was the first on the scene, and I believe that she'll tell you that she only observed Ms. Franco in the van behind the seat -- in the driver's seat behind the wheel, and that she couldn't get out, that she was pinned in that seat, and she'll explain what she observed and what she did.

Exhibit A, TT, State's Opening, at 10-11 (emphasis added),

*2. More misconduct – the prosecutor's repeated failure to comply with the Court's restrictions intended to afford Ms. Franco a fair trial.*

BY MR. MAES:

A. So, I walked up -- up to this van, and looked, see if anybody is in there.

Q. Was there?

A. Yes, there was a driver still pinned behind the wheel.

Exhibit A, TT, Dana Larsen, at 25-27 (emphasis added).

Not only did the witness repeat the State's improper conclusion stating that Ms. Franco was "pinned behind the wheel," this was the first of multiple instances where, despite repeated warnings by the Court and the prosecutor's reluctant acknowledgment as to his understanding of the applicability of that basic rule of evidence, the State's witness testified to the ultimate conclusion. The prosecutor's failure to adequately instruct its witnesses not to so testify was an appalling injustice to Ms. Franco and cumulatively denied her any chance at a fair trial, despite the Court's efforts to insure she received just that. See Exhibit A, TT, Larsen, at 25-26 (emphases added):

MR. EISENBRAUN: Objection, Your Honor, ask that that statement be stricken. It's a conclusion which is for the jury to decide.

THE COURT: Counsel, please?

(WHEREUPON, the following conference was conducted at the Bench between the Court and counsel and out of the hearing of those present in the courtroom:)

MR. EISENBRAUN: Did you not rule on our objection where there's -- he was supposed to instruct his witnesses not to say that sort of stuff. I -- I move for a mis-trial.

THE COURT: I thought the -- the understanding was that -- that the witnesses wouldn't go into the conclusion as to who was the driver, that that be in the province of the jury. They certainly can describe whatever they saw. They can say, "I saw a person in a location in this condition," they may say all these sorts of factual things, but not otherwise, and I think that was the understanding, right?

**MR. MAES: Well, I probably understood it.** I thought that's what was explained. Is it possible to just have a brief recess so I can remind the witness.

Then, the prosecutor allowed it to happen *again*. See Exhibit A, TT, Steven Knutson, at 187-91 (emphases added):

A. Well, as the driver of the rescue van my primary responsibility was to stay with the truck and assist with off loading of rescue equipment, but the scene was so large that **I was instructed by one of my chiefs to leave the truck and help extricate a trapped female driver of a minivan.**

MR. EISENBRAUN: Your Honor, may we approach?

THE COURT: Counsel.

(WHEREUPON, the following conference was conducted at the Bench between the Court and counsel and out of the hearing of those present in the courtroom:)

MR. EISENBRAUN: I asked him to try to keep these -- not just to say that she was the driver. He just said that she was the driver. I'm requesting a mistrial. That's the second time that we've instructed the jury. Not only that, this is incredibly cumulative to keep hearing the same story over and over and over and we're going to hear it over and over and over again.

MR. MAES: This is the last of the witnesses.

MR. EISENBRAUN: It's ridiculous. Oh, yeah.

THE COURT: Okay, so this is the last witness on the cumulative piece of it?

MR. EISENBRAUN: Is there no way that you can stop that?

**THE COURT: Do you want to take a recess to talk to this witness to make sure that --**

**MR. EISENBRAUN: It isn't going to help.**

**THE COURT: -- that he understands the -- the evidentiary ruling on that issue?**

**MR. MAES: I certainly can.**

MR. EISENBRAUN: He should have done that before, but -- Your Honor, I mean --

MR. MAES: I think I told everyone multiple times.

MR. EISENBRAUN: Let me ask him if he follows --

THE COURT: Well --

MR. EISENBRAUN: And that's what the danger of cumulative is, is we're going to get some person in here who wants to get her.

THE COURT: Okay, okay.

MR. EISENBRAUN: Now that we've heard that it was just the right foot that was trapped, finally an honest person -- she's been sitting in jail for almost six months, almost a half year, from an accident. I have been there myself, Your Honor. This is not right. This is inhuman, indecent.

THE COURT: Well, apparently this is the last witness, so there is no -- there will be no further particular testimony about --

**MR. EISENBRAUN: He should be excused right now for having said that. We -- we can't take a chance. Obviously, he can't follow rules.**

THE COURT: Well, I'll grant a short recess so that you can speak with the witness, and -- and the witness can -- can refashion his testimony consistent with the Court's earlier ruling. In the meantime, are you requesting that I ask the jury to disregard the last answer?

MR. EISENBRAUN: Absolutely, and is this on the record?

THE COURT: This is all on the record, yeah, so I'll request that -- or, I'll give that instruction.

**MR. EISENBRAUN: And I think there should be sanctions if they do it again, because he needs to prepare his witnesses. We're required to do that, right.**

THE COURT: **Well, the State is on notice that it needs to make sure, doubly sure, triply sure, that its witnesses know the rulings in that regard.** But I'll give the curative now so that --

MR. EISENBRAUN: Thank you, Your Honor.

(WHEREUPON, the following occurred in the hearing of all:)

THE COURT: Very well, ladies and gentlemen of the jury, you are to disregard the last answer by the witness. With that, we'll take a brief recess, about a five, ten minute recess, and then we'll resume.

(WHEREUPON, a recess is taken from 4:18 p.m., until 4:30 p.m., at which time the following occurs:)

THE COURT: If counsel could approach please for just one moment?

(WHEREUPON, the following conference was conducted at the Bench between the Court and counsel and out of the hearing of those present in the courtroom:)

THE COURT: I believe there was at least a motion for a mistrial, is that still on the table as far as the Defense is concerned?

MR. EISENBRAUN: Well, you've stopped the cumulative --

THE COURT: I can't hear you?

MR. EISENBRAUN: You've stopped the cumulative and done the curative, right?

THE COURT: Well, I -- I've -- I gave the curative, and my understanding is the State has one final witness on the scene. In light of that, is the mistrial motion still on the table as far as the Defense is concerned or not?

MR. EISENBRAUN: I -- what do you think?

MR. GUERRERO: We've got a -- we've got a client in jail. We can't start over.

MR. EISENBRAUN: Okay. No, it's -- it's withdrawn. It's withdrawn because we want to get this done.

*Incredibly*, though consistent with the prosecutor's conduct throughout the trial, the prosecutor *did not* do as the Court "triply" warned him he must, "make sure, doubly sure, triply sure, that its witnesses know the rulings in that regard." Just as defense counsel had predicted -- "**We -- we can't take a chance. Obviously, he can't follow rules**" -- this very witness, within a few questions, *again*, and clearly intentionally, referred to Ms. Franco as "the driver." See Exhibit A, TT, Steven Knutson, at (emphasis added):

BY MR. MAES:

Q. Now, did you notice any cuts on the individual's hands or face?

A. I guess I really wasn't -- I **looked at her -- the driver a couple times.** I was more -- we were more concerned with right now getting her leg out. There was -- somebody had already put a neck brace on --

The prosecutor's repeated disregard of the Court's restrictions severely prejudiced Ms. Franco's ability to receive a fair trial. Consequently, she did not. And, the State's own evidence demonstrated the failed veracity of its "pinned driver" refrains.

3. *The dash was "below her knee" or the dash was "above her knee" depending on which State witness one believed -- but regardless, the dash was not on her knee.*

On cross-examination, Knutson clarified that the van's dash was *not* actually pushing on Ms. Franco's knee, it was *below her knee*. See Exhibit A, TT, Knutson, at 195

(emphases added):

BY MR. GUERRERO:

Q. Officer Knutson, or Fireman -- Firefighter Knutson, when you say that the dashboard was pushing on her leg, was that above the knee or below the knee?

**A. Below the knee.**

As had the State's witness, Joseph Kimpe. See Exhibit A, TT, Joseph Kimpe, at 163 (emphases added):

BY MR. GUERRERO:

**Q. So, it was her right ankle that was trapped or held down by the dashboard?**

**A. Yes.**

And, as had the State's witness, Juan Esparza Campos. See Exhibit A, TT, Juan Esparza Campos, at 181 (emphases added):

BY MR. MAES:

**Q. Now, you said the dash was, what, holding her knee?**

**A. I'm not say her knee, above her knee.**

The repeated failure of the prosecutor to prevent the State's witnesses from testifying to the conclusion on the ultimate issue, whether Ms. Franco was the driver of the van at the time it caused the crash, and repetition of the improper conclusion that Ms. Franco was "pinned in the driver's seat" or "pinned behind the wheel" was inappropriate, unfair, prejudicial to Ms. Franco's right to a fair trial, and cannot reasonably be said to have done anything other than improperly influence the jury's verdict.

The prosecution also sought to improperly imply where the evidence did not exist to support it that the van's dash was intruding so much into the passenger compartment that it was very difficult to even get the extrication equipment in there. However, State witness Kirk Lovsness' testimony demonstrated that *only Defendant's right foot* was trapped and that the difficulty in getting the extrication equipment in there was that it

was a "big piece of equipment." See Exhibit A, TT, Kirk Lovsness, at 171 (emphasis added):

A: I entered the vehicle from the driver's side, got down on my knees and looked right in there, and I had the extrication tools and tried to find an area to get leverage with the spreader to spread somewhere, somehow, so we could free the right foot.

Q: Did you find a spot to do that?

A: I was not able to after I -- I -- we tried hard, from different angles, from different -- we went around to the passenger seat, we -- we thought -- we tried hard thinking of different methods to get at that right foot. We -- we pried the brake pedal out of the way with a log chain to try to free up more space. It was visible but **it was just impossible to get that big piece of equipment** in there to get leverage.

See also, Exhibit A, TT, J. Kimpe, at 157-58 (emphasis added):

BY MR. MAES:

Q. Now, when you say it was so tight, what was so tight?

A. There was just no room, **I mean, the cutter is, you know, about that long**, but it's only so wide, or, you know, around. There was just no room to possibly maneuver that tool in there to get at that, to cut that pedal off.

*4. No physical evidence of trauma to Ms. Franco's knees means no trauma to Ms. Franco's knees – in fact, she had no injury at all beyond the broken ankle. That the persistent repetition of the improper conclusion of the "pinned in the driver's seat" phrase was highly prejudicial is further demonstrated by the complete absence of any evidence that Defendant ever expressed any complaints of pain to her knees, or any evidence of any abrasions, scratches, or even bruises to her knees. In fact, there was no evidence that she sustained any injury other than the fracture of her right ankle. See Exhibit A, TT, Larsen, at 67:*

BY MR. GUERRERO:

Q. When you saw Ms. Franco in the hospital on the date of the accident did you observe any chest injuries?

A. No.

And Exhibit A, TT, Kelly Martin Kimpe, at 150:

BY MR. GUERRERO:

Q. So, what was her -- I'm sorry, was there any damage done to her right knee that you could see?

A. Not that I could see.

And Exhibit A, TT, J. Kimpe, at 166:

BY MR. GUERRERO:

Q. Okay, how about, did Ms. Franco complain through somebody else of any abdominal pain?

A. I didn't hear anything, but --

And Exhibit A, TT, J. Kimpe, at 166:

BY MR. GUERRERO:

Q. Mr. Kimpe, you didn't see any chest injuries on Ms. Franco, did you?

A. She had a jacket on, I couldn't tell.

And Exhibit A, TT, Lovsness, at 172:

BY MR. MAES:

Q. Now, did you notice any blood on her hands or face?

A. I didn't notice any, no.

And Exhibit A, TT, Esparza, at 182:

BY MR. MAES:

Q. All right, now did you notice any blood on her hands or face?

A. No, I don't recall that, no.

Q. Okay, did you notice any cuts on her hands or face?

A. No.

Q. Did you see any injuries or possible injuries?

A. Not -- after we started moving her out on a little backboard, then I noticed beside -- beside she was complaining about the right leg, I notice something not right kind of below her knee, and that, she was --

Q. All right.

And Exhibit A, TT, Knutson, at 194:

BY MR. MAES:

Q. -- "yes -- yes" or "no". Did you see any cuts on the individual in the driver's seat, either their hands or face?

A. No.

And Exhibit A, TT, Franco, at 505:

BY MR. GUERRERO:

Q. Ms. Franco, besides breaking your right ankle did you suffer any other injuries as a result of this collision?

A. No.

And Exhibit A, TT, Franco, at 505:

BY MR. MAES:

Q. You didn't have any injuries to your left arm?

A. No.

Q. The hospital took chest ex-rays because you were complaining.<sup>9</sup>

A. I don't know.

And Exhibit A, TT, Angel Correa, at 566:

BY MR. GUERRERO:

Q. Did you at any time go and look in the Plymouth minivan?

A. Yes.

Q. And did you recognize the -- Ms. Franco, who was seated in the minivan?

A. Yes.

Q. And did you say anything to her?

A. Yes, I asked her if she was okay.

Q. And what did she -- did she respond?

A. Yes, that her foot was hurting.

5. "[I]f we could free the foot from the wreckage, we could remove her from the vehicle." Lovsness and Esparza spent substantial time working in close proximity with Defendant to free *her right foot* from where it was trapped between the accelerator and

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<sup>9</sup> This question, without any exhibit to support it before or after it was asked, was yet another improper conclusion.

the center of the van and no person had better opportunity to observe Defendant's position. The evidence demonstrated that Defendant was *not* "pinned" in the driver's seat, easy extrication was prevented *only* because *her right foot* was trapped. See Exhibit A, TT, Lovsness, at 170-71 (emphases added):

BY MR. MAES:

Q. So, did you just grab her and pull her out?

A. That wasn't possible.

Q. Why not?

A. It was very close quarters. The steering wheel was there -- there didn't appear to be any problem from the waist up. I think we could have freed the person, but from the waist down **the foot, the right foot of the person was pinned in the wreckage --**

Q. So, --

A. -- **the leg was twisted,**<sup>10</sup> and the right leg -- **the right foot was trapped** between the -- in the floor wreckage near the console, near the accelerator area.

Q. Now, when you say it was trapped, or what do you mean by that?

A. From the arch forward wasn't visible, it was inside the wreckage.

Q. How were you able to see this?

A. I entered the vehicle from the driver's side, got down on my knees and looked right in there, and I had the extrication tools and tried to find an area to get leverage with the spreader to spread somewhere, somehow, **so we could free the right foot.**

And *Id.* at 175 (emphases added):

BY MR. GUERRERO:

Q. And was it you that just told us that the -- that she was okay from the waist up from your observation?

A. From my observation my thought were **if we could free the foot from the wreckage, we could remove her from the vehicle. We couldn't do anything until that foot was free,** and she was able to speak and I guess what led me to believe that was, she could scream, and being able to scream led --

Q. Was a good sign?

A. I -- I think it would be.

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<sup>10</sup> The importance of the fact that Ms. Franco's right leg was "twisted" is discussed infra.

See also Exhibit A, TT, K. Kimpe, at 139 (emphasis added):

BY MR. MAES:

Q. Could you describe to the jury how she was seated?

A. She was sitting behind the driver's wheel with her right leg pinned underneath the dash,<sup>11</sup> and her foot was pinned down in the gas pedal.

And Exhibit A, TT, Franco, at 495 (emphasis added):

BY MR. MAES:

Q. And then he came over to you and tried to help you out?

A. Yes.

Q. And he couldn't get you out?

A. He wasn't able to take me out.

Q. Why not?

A. He would pull on my foot. I would yell at him to take me out, that my foot was crushed.

And Exhibit A, TT, Franco, at 505 (emphases added):

BY MR. GUERRERO:

**Q. Ms. Franco, besides breaking your right ankle did you suffer any other injuries as a result of this collision?**

**A. No.**

Had Ms. Franco been the driver of the van when it crashed, she could not have remained in the driver's seat *and* avoided substantially greater injury *and* left no DNA. She was *not* the driver, as the balance of the evidence showed.

6. To "*spin*" is to move, just not to the State; but Defendant's expert wrote the "*spin*" formula. The State's crash reconstruction witness,<sup>12</sup> Sgt. Skoglund, testified as to

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<sup>11</sup> As the testimony quoted previously demonstrated, the only portion of "the right leg" that was "pinned" was Ms. Franco's right foot. See also Exhibit A, TT, K. Kimpe, at 149 (emphasis added): A. I had her squeeze my hands, and I seen her leg was badly broken because it was -- her jeans were all bloody and it -- her leg was very twisted.

<sup>12</sup> It bears noting that Sgt. Skoglund (who the State failed to offer as, and therefore the Court did not find that he was, an expert) is not an engineer. He has a degree in law enforcement with a minor in sociology. He attended the Peace Officers Training and Skills program and the Minnesota State Patrol Academy,

his opinion regarding the initial impact, the damage caused thereupon, and the movement of the occupants on that initial impact based on the "principal direction of force." Sgt. Skoglund testified that *on the initial impact* into the perpendicular bus, which was traveling at 50-60 mph, the forward motion of the minivan would have been stopped, but the occupants would have continued moving forward *during the initial impact sequence*. See Exhibit A, TT, Paul Skoglund, at 308-09 (emphases added):

BY MR. MAES:

Q. All right. Now, I heard the term "principal direction of force", are you familiar with that?

A. Yes.

Q. And what does that mean?

A. It's a calculation when we do the -- the conservation of linear momentum, it's just another calculation, and it -- it calculates the angle of the direction of force on -- on the vehicle that's involved in the crash, and in this case the Plymouth, you know, **the direction of force was coming from the front**

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including its crash reconstruction program. He passed an Accreditation Commission For Traffic Accident Reconstructionists test and takes continuing education classes.

Donn Peterson (who was offered and accepted by the State and the Court as an expert witness) has a Master of Science and Mechanical Engineering Degree. He is a registered professional engineer in Minnesota, Wisconsin, and Ohio specializing in forensic engineering. He has practiced for 30-35 years. His areas of expertise are crash analysis, accident reconstruction, and mathematical and computer simulations involving the application of physics, engineering, and mathematics principles to understanding motion and kinematics. Qualified as an expert in mechanical engineering in both State and Federal Courts, he has testified as an expert in mechanical engineering over a hundred times. Ten years ago, he developed a program called "3-D Math Model for Vehicle Dynamic Simulations, Including Effects of Tires, Suspensions and Terrain," which was peer reviewed and published in the National Academy of Forensic Engineering Journal. He developed that program when faced with analyzing an unusual accident akin to the one at issue in this case, where not only was it a straight on collision, but there was also a significant spin factor after the initial impact and some offset, where one side gets hit first or harder than the other side in the initial part of the impact, and where they had to determine the trajectories of an occupant of a car after impact. See also Exhibit C, ACCIDENT RECONSTRUCTION, National Academy of Forensic Engineers (NAFE 2000) (Regarding substantive differences between degrees of qualification which public officials and the courts should consider with respect to acceptability of testimony and noting that just as an EMT is not to be put in the same category as a licensed physician with respect to medical knowledge, nor is the certified accident reconstructionist to be put in the same category as the licensed professional engineer).

towards the rear of the vehicle, and -- and I calculated a PDOF angle for that.

Q. And what's the significance of the PDOF angle?

A. Well, it -- it -- it helps us determine what direction anything inside the vehicle, people and, you know, objects, anything else, wireless phones or, you know, sleeping bags, or whatever, it helps us determine what direction that they're going to travel during the collision.

**Q. Now, in this particular case, what direction would objects have traveled upon impact?**

A. Well, the PDOF angle I calculated was about fourteen degrees, you know, that's -- that's pretty close to just going straight forward. It's a little bit -- in this crash it was a little bit off to the left.

Q. Was that because of the angle of the intersection?

A. It's because of the angle that they both interacted with each other during the collision.

Q. Okay, now, so if it's just about straight, what would have been the principal of direction?

A. Bodies and other objects in a vehicle move exactly opposite the principal direction of force. So, you know, if the principal direction of force is coming from 14 degrees, then you're going to move 180 degree different than that. But if you think of a -- if I'm sitting in a car and the zero angle is like right through the middle of the car and out the windshield and out the rear door -- or out the rear window, and then if you think 90 degrees is that far off, this is zero, this is 90, that's 45, well, 14 is pretty darn near straight ahead, and that would -- and so -- so whatever people were in the vehicle or whatever objects that weren't secured will be going toward the direction -- the principal direction of force, so basically forward.

Defendant did not dispute what happened *on the initial impact*. In fact,

Defendant's crash reconstruction expert, Donn Peterson, testified to the same. See

Exhibit A, TT, Donn Peterson, at 524-25 (emphases added):

BY MR. EISENBRAUN:

Q. And what happens to the occupants or items in a -- in a vehicle, what type of movement do they undergo when you get that kind of spin movement? Let me back up a second; when you -- **when it first strikes on initial impact, what kind of movement would the bodies have?**

A. First initial impact, those bodies are going to tend to go in the same direction, the same speed that they were before the impact started, and they will do that until they literally strike something that starts to interfere with that motion, like the dash, for example, like a steering wheel.

Q. Or an air bag?

A. The air bags only have an effect -- that's a complex effect. It's not going to stop them in its tracks because the air bag strikes you in the face and probably about the shoulder level. It is designed to keep you, your head, out of the windshield. If you're not belted in, it isn't going to do anything with your lower body. It's going to want to go in the same direction it was going. So, it's going to literally stretch you out kind of on an angle, and a sideways deal, and -- and perhaps guide you a little bit more towards the opposite side at a slightly reduced rate.

**Q. And, so, the first -- when it hits into an object, they're going to keep going forward, is what you're saying?**

**A. That's definitely right.**

Defendant has never argued that she ended up in the van's driver's seat as a result of *the initial impact*. Although both the prosecution and Sgt. Skoglund were fully cognizant of the spin. Yet, both ignored the direct evidence concerning the effect on the van's occupants during the second phase of the crash-sequence movement, the spinning or rotational movement of the van, *within milliseconds after the initial impact*.

Sgt. Skoglund's testimony regarding the spin related *only* to whether the spin caused damage *to the van*, ignoring the effects of the van's "270 degree" spin on the van's occupants. See Exhibit A, TT, Skoglund, at 305-07 (emphases added):

BY MR. MAES:

WITNESS: \*\*\* So, **the damage** that we see on the left front here is **obviously from the impact** with the axle.

Q. After that damage occurred were there any other forces that would cause additional damage?

A. You know, no other contact -- as -- as that was occurring, then the bus was -- it was -- the minivan was acting like a wedge going underneath the side of the bus, so the bus was already beginning its role, and then after the impact with the axle, then the bus continued rolling off, and then the -- the minivan was spun around clockwise about 270 degrees. **So, there wasn't any other contact damage with anything that would have caused really any contact damage at that point, and induced damage**, you know, there might -- might have been some sheet metal flexing or something from the -- **from the rotation**, but minor.

Q. Well, I believe from looking at that photograph **everything seems to be quite crushed from this impact?**

A. Yes.

**Q. Would there have been any additional after that impact and as it gets into the spin?**

**A. No.**

**Q. Now, you said it -- the van did spin 270 degrees, how did you determine that?**

**A. It was on the scale diagram and it was, you know, I mean, it was at its final rest facing north in the southbound lane, and we know where it came from on -- off the County -- County Road 24, and so it -- it was about 270 degrees, give or take a few degree either way, but about three-quarters of a turn, and the distance from the impact area, if I can point out on this drawing here, the distance between the area of impact and where the van actually ended up was -- was short -- a short enough distance that three-quarters of a rotation would be a logical conclusion. Anything more than that, then we would likely we would see the van further south along the Highway 23 there.<sup>13</sup>**

**Q. So, essentially after impact it's spinning or it begins its rotation?**

**A. Yeah, it -- it -- yeah, it did a clockwise three-quarter turn rotation to its final rest.**

Sgt. Skoglund ignored the force of that spin or the effect on the unrestrained occupants, but common sense informs us without the need of such testimony: a three-quarter rotation of the van *after* total destruction of the van's front, including completely disabling the front tires, with the entire two-phase sequence taking less than two seconds to complete, involved substantial force. The State focused *only* on the initial

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<sup>13</sup> The prosecutor misunderstood the unimportance of "principal direction of force" in analyzing where the van's occupants would have ended up after the spin. See Exhibit A, TT, Donn Peterson, at 544; 547-48 (emphasis added):

BY MR. MAES:

**Q. All right. Now, you indicated that -- how do you -- what is the principal direction of force in your model? (footnote continued next page)**

**A. That model holds for any one of these numbers because it relies on the speed and the spin post-collision. It does not rely on the principal direction of force. The biggest thing principal direction of force enters up in is taking to the next step from here in order to get what the speed was before the impact occurred.**

**Q. And would it be important to have the pre-impact speed in order to I guess verify the results you're coming up with?**

**A. I don't know that it's necessary to -- to have it for what I've done here. In fact, I -- it's not necessary for what I've done here.**

Skoglund's testimony itself demonstrated he had determined that the van spun 270 degrees *not* based on the "principal direction of force" in the initial impact, but merely by where it ended up.

impact. The State offered no evidence *nor did it rebut* Defendant's evidence that the spin also involved substantial force factors.

For whatever reason, and the failure, not the reason, is important here, the prosecution chose to skip over the secondary movement of the minivan in the crash sequence by addressing the leftward movement of the occupants in relation *only* to the *initial* motion, despite the unequivocal and common sense evidence of that secondary movement.

6. *When a thing stop going forward, unrestrained objects on top keep going forward; when a thing spins suddenly to the right, unrestrained objects on top go to the left.* Defendant's engineer, Donn Peterson, did address the force-effects on the occupants of *both* the initial impact *and* the ensuing violent spin of the van to the right, including the extremely short time the entire process took. See Exhibit A, TT, Peterson, at 518-19 (emphases added):

BY MR. EISENBRAUN:

**Q. And did you also review the analyses performed by Sargent Skoglund of the State Patrol?**

**A. Yes.**

**Q. And in review of that did you come across an analysis of the spin factor of the minivan as it would relate to the movement of the occupants within the minivan?**

**A. No, I did not.**

**Q. And did you go ahead and perform that analysis?**

**A. Yes.**

**Q. And could you explain that, what you did?**

**A. I exercised my mathematical model<sup>14</sup> in order to determine what the speed of the van was post-collision, as soon as it separated from the bus before it came to rest, and it had two components. One, was it had a linear speed, the center of gravity or center of mass moved in a certain direction towards where it came to rest, but in addition to that there was a big amount of spin that was involved in it, and I used that model in order to tell me the best estimate of**

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<sup>14</sup> "3-D Math Model for Vehicle Dynamic Simulations, Including Effects of Tires, Suspensions and Terrain"

what the speed was and what the spin rate was, and by spin I mean it's kind of like looking down from the top on it, going clockwise. I don't mean rolling or pitching, I mean, what we call yawl.

Q. And can you describe the spin that affected the minivan -- or, actually, from the point of impact to the point of rest of the van, what -- what occurred based on your analysis?

A. In that time from -- well, the impact has really got two phases of it. **One of it is the time of contact**, which is on the order of perhaps 120 milliseconds, just slightly over about a tenth of a second, and **then the rest of it is after the vehicles separate, what happens when they're moving from the point of separation to the point where they stop moving.** And during that last part of it, **that turned out to be about a 1.9 second transient of motion and spin**, the van turned approximately three-fourths of a revolution, 270 degrees, and the center of mass moved approximately twenty-one feet, and literally it followed pretty close to the trajectory of U.S. 23, or State 23, I'm not sure which it was, but the highway that the bus was on, and that roadway is skewed at an angle. It's not at an north-south orientation, it's skewed southwest-northeast.

Q. So, you're saying that from the point of impact, time of impact, to the time that the minivan stopped spinning was 1.9 seconds?

A. Yes.

As Peterson testified, and common sense tells us, the sideways linear momentum of the school bus would have been imparted to the minivan upon impact. *It would have been physically impossible for that not to occur.* Because the mass of the school bus is substantially greater than the mass of the minivan, and because the minivan struck towards the middle of the bus (and was alleged by Sgt. Skoglund to have been hit by the school bus' rear wheels so hard as to shear the entire wheel and axle assembly from the school bus), the imparted momentum would have appeared as rotational momentum in the minivan.

Peterson testified that the rotational momentum of the van as the van was moving violently to the right, would have had the same effect on the occupants of the van as the forward impact had, i.e., the occupants would have moved in the opposite

direction of the rotational momentum.<sup>15</sup> Peterson explained that though the occupants are described as “moving,” this is more an illusion because what actually happens is that while the vehicle moves, the occupants essentially stay where they were while the vehicle moves out from under them.<sup>16</sup> Regardless, the result is the same. The occupants are forced out of the position each was in at the time the spin begins, and in the direction opposite to the direction of the spin.<sup>17</sup>

*7. The seatbelts – the evidence – they were not in use at the time of the crash.* Neither Skoglund nor any other State witness testified as to whether or not the driver’s and passenger’s seatbelts were buckled at the time of the crash. But, Ms. Franco testified that neither she nor Mendoza were wearing their seatbelts at the time of the crash. Peterson told us why the seatbelts *could not* have been in use by the occupants when the crash occurred. He testified that he inspected the seatbelts after the crash and found no evidence that the seatbelts were buckled at the time of the crash. Peterson testified that in an essentially head-on collision for a vehicle in the minivan’s position, particularly one as violent as this accident was, any seatbelts being worn at the time by the occupants would have left “witness marks” from the stress placed on the

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<sup>15</sup> See also Exhibit D, Lesson 1: Motion Characteristics for Circular Motion, <http://www.glenbrook.k12.il.us/gbssci/phys/Class/circles/u6i1d.html> (last viewed August 18, 2008).

<sup>16</sup> *Id.*

<sup>17</sup> Anyone who has sped too fast around a corner knows quite well that if the curve was to the right, the body gets scrunched to the left against the door, or, if a passenger, cuddled up next to the driver. Or, in swerving to the right to avoid something suddenly appearing in the way, that cell phone left on the dash is going to slide right down the dash, to the left.

seatbelts by the bodies pressing against them. The State offered no evidence to rebut this testimony.<sup>18</sup> See Exhibit A, TT, Peterson, at 530-31 (emphases added):

BY MR. EISENBRAUN:

Q. Now, you mentioned something about witness marks on a seatbelt. I didn't quite understand that. Could you explain what that would be?

A. When the --

Q. You mentioned it to me earlier, I'm sorry, not -- not earlier here.

A. When a seatbelt is in position and there's been the -- a collision, which makes the body inside move against it, cinch it up real tight, put real high forces in it, the effect is to stretch that webbing, it's a nylon blend of some kind usually, stretch it on up. And the seatbelt has got two anchor points upon which the belt is bent. One is what we call the D-ring, it's the shoulder belt part, and then the B-pillar right behind the seat. Another part is typically down in the -- near the clasp. The horrendous forces that go along with stretching that out create friction, which literally melts that fabric and leaves a mark that we can see.

Q. Did you inspect the seatbelts in the minivan?

A. Yes, I did.

Q. Did you find any witness marks?

A. No, not on either one.

Q. And those are on the strap.

A. They'd be on the strap.

Q. And in a head-on -- almost head-on collision like this, when the body goes, excuse me, goes forward, did the seatbelt just stay taught, I mean, the fabric - - does the fabric stretch.

A. The fabric stretches, it stretches a fair amount.

Q. And why is that?

A. Well, it has to stretch if it's going to let you slow down relatively gently. If it were of such a nature that it didn't stretch at all, it would be just like you banged into a -- that railing in front of you, hard wood. So, you've got to have the stretch in order to do what we call a ride-down. In order for the seatbelt to do the job that it's intended to do, it's got to it's got to kind of gently lay you into the new position, and to do that it stretches.

8. *The driver's door popped open on impact and the driver went out the open door.* Peterson further testified that on commencement of the minivan's right rotational

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<sup>18</sup> The only evidence of any kind regarding seatbelt use was the prosecution's referral to a comment by Susy Campos the night of the accident. However, this statement was not made by Defendant, was made by Ms. Campos without any foundation for the making, and could not properly be attributed to Defendant. See Exhibit E.

movement, the unbelted occupants would have moved opposite, i.e., to the left. The driver would have been crushed against the driver's door -- were it to remain closed -- and the passenger would have been thrown to the left, towards the driver's side. Prosecution witness Larry Moat, who witnessed the accident as it occurred, testified that on impact by the minivan with the school bus, the driver's door of the minivan "popped" open. See Exhibit A, TT, Moat, at 106:

BY MR. MAES:

A. -- and once the van was stopped through the door -- the driver's door came open on impact.

Q. So, you saw the driver's door pop open on impact?

See also Exhibit A, TT, Franco, at 491:

BY MR. MAES:

Q. Francisco opened the door?

A. It opened itself -- by itself.

Q. When did that happen?

A. At the time of the collision.

Peterson testified that under such circumstances the unbelted driver would have gone out that open door while the passenger's leftward movement would have been stopped by the driver's seat and/or the steering column. See Exhibit A, TT, Peterson, at 528-530; 556-58 (emphases added):

BY MR. EISENBRAUN:

Q. Now, we had a witness testify who saw the collision happening by the name of Larry Moat, and he testified -- the question was: "So, you saw the driver's door pop open on impact?" And he said, "Yeah." **If the driver is unbelted, are they going to be able to -- and the door pops open, are they going to be able to stay in that minivan?**

A. **No.**

Q. Why not?

A. **Because their body is going to be pushed up against the -- the door area, and that's the only thing that can hold it in place and the door is not in position, the forces are such in that initial impact that it's going to just keep on going and go out.**

Q. So, the air bag --

A. The door may deflect it, change its direction, but you can't -- it won't stay in.

Q. So, the air bag wouldn't hold them in the vehicle?

A. Not under the circumstances you described, no.

Q. Because the seventy-five milliseconds isn't enough?

A. No.

Q. And if there's an unbelted passenger, where is the passenger going to go?

A. Well, in this way the passenger continues to go straight ahead, just like the driver, but it's when the vehicle whips around and away from beneath it, it's the equivalent of though it looks like it's moved over to the left hand side, or towards the driver's seat.

Q. So, if -- if Ms. Franco was sitting in the driver's seat unbelted, and actually driving that minivan, and the door popped open on impact, as Larry Moat testified, could she have stayed in the minivan?

A. I don't see how.

Q. And was there anything to her left after the door popped open that you're aware of that would -- could have stopped her movement outside the van?

A. No.

Q. If -- if her boyfriend was sitting in the passenger seat, where would he have ended up?

A. He would have ended up generally in the position where we've got the passenger.

Q. And they're either on -- on the seat or they hit the seat and fall to the floor?

A. Something like it.

Q: Now, we had a witness testify who saw the collision happening by the name of Larry Moat, and he testified -- the question was: "So, you saw the driver's door pop open on impact?" And he said, "Yeah." **If the driver is unbelted, are they going to be able to -- and the door pops open, are they going to be able to stay in that minivan?**

A: **No.**

Q: Why not?

A: **Because their body is going to be pushed up against the -- the door area, and that's the only thing that can hold it in place and the door is not in position, the forces are such in that initial impact that it's going to just keep on going and go out.**

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Q. Sargent Skoglund did not tell us about the effect of the spin after impact, and I'm wondering if -- **did you use your calculations of the spin to arrive at your leftward movement of the bodies in the van?**

A. Yes.

Q. And Mr. Skoglund also did not tell us about the effect of the deployment of the air bags. I'm wondering if -- did you use the -- this -- did this come into play in your leftward movement of bodies in the van?

A. To some extent it does. The first fifty milliseconds or thereabouts it will not come into play because it takes that long to deploy it. From that point on it will affect the upper body.

MR. EISENBRAUN: May I approach?

THE COURT: You may.

THE WITNESS: Are we done here?

BY MR. EISENBRAUN:

Q. I don't understand a lot of -- a lot of those mathematical calculations and stuff, but referring to Exhibit #1, this is the minivan which was coming from County 24 going this direction the testimony shows, and hit -- hit the bus approximately here, and now it's down here and pointing this way instead of this way. **That's a pretty significant change in direction, isn't it?**

A. Yes -- yes it is.

Q. **And the reason it's over here is the -- the bus pulled it?**

A. Yes.

Q. **And the reason it's facing that way now instead of that way is because the bus caused it to spin?**

A. Yes.

Q. **And the witness testified that the door popped open on impact, and so if there was a person sitting in the driver's seat, that final spin is going to send them right out the door, correct?**

A. Correct.

9. *The physics corroborate Defendant's testimony that she could not have been the driver at the time the van crashed. This is exactly the actions Defendant testified as having occurred in this crash, the evidence supports her testimony, and there was no rebuttal evidence to refute either this testimony or Peterson's description of the physics involved during the crash, likewise supporting Defendant's testimony. The prosecution's cross-examination focused on efforts to vaguely suggest less effects of*

the obvious spin on occupant movement, but did nothing to dispute that those effects occurred.

The prosecution also endeavored to suggest Peterson ignored aspects of the accident such as the bus' impact with the pickup, which occurred *after* the van and bus had separated and was therefore irrelevant to the motion of the van after separation. Regardless, as the States own evidence showed, it is undisputed that the van experienced a sudden 270 degree spin to the right within milliseconds of the initial impact with the bus. The State offered no evidence supporting its implied hypothesis that the driver and passenger in the van could somehow have avoided displacement to the left as the van spun violently to the right. The jury could not reasonably have ignored Defendant's evidence or the State's failure to produce *any* of its own on this issue.

*10. A bent steering wheel – the body that caused the bend in the van's steering wheel could not have avoided injury – but Ms. Franco had no injury the steering wheel could have caused – Mendoza displayed actions indicating he did.* Finally, Peterson also testified as to the import of the obvious bend in the van's steering wheel, obvious from the State's photograph exhibit of the van's interior. See Exhibit A, TT, Peterson, at 534-35 (emphases added):

BY MR. EISENBRAUN:

Q. I'm showing you what's been marked as Exhibit #5. Can you take a look at that, and particularly the steering wheel. There's something about that that bothered me.

A. Well, **the steering wheel appears to have a – a bend in it**, and the column is shifted over to the left. You can't tell that in this drawing -- or this photograph, but that's what I remember from being out there.

Q. And, based on your experience, thirty some years of accident reconstruction, have you ever seen bent steering wheels before?

A. Oh, yes.

**Q. And what is a likely cause of a bent steering wheel?**

**A. A likely cause of a bent steering wheel is the occupant or the driver moving forward and getting slammed into it.**

**Q. And based on that same experience, do you have any opinion as to whether or not a body making that kind of bend in the steering wheel would suffer injury?**

**A. They usually complain viciously of injuries if they'd hit that hard.**

Not only did the State offer no evidence to rebut this hypothesis, there was no evidence whatsoever that *Defendant* sustained any injury to her abdomen or chest, and no evidence that she even complained of any. However, Keryn Vigil, who picked Mendoza up as he was fleeing down County 24 from the accident scene, testified Mendoza made movements and sounds leading Vigil to conclude Mendoza was injured. See Exhibit A, TT, Keryn Vigil, at 362-63; 370 (emphases added):

BY MR. GUERRERO:

**Q. Did you -- did he seem to be injured on the ride from Highway 24 -- or, excuse me, County Road 24 to Minneota the previous day?**

**A. Yes, not only on that ride, but on the full ride.**

**Q. And what -- why did you believe that he had been injured?**

**A. I did not say injured.**

**Q. What did you say?**

**A. I just said when I said that he said that he wanted to be more relaxed it was just for him to ride more relaxed, more comfortably.**

**Q. Did you hear any noises or see any movements that might indicate to you that he was injured?**

**A. That's a ver -- that question is better. I guess he felt I could hear him, that he was in pain.**

\*\*\*

BY MR. MAES:

**Q. All right. Now, you -- you testified earlier you could hear he was in pain?**

**A. When I brought him to Willmar.**

Additionally, blood DNA from an "unidentified male" was found on the driver's airbag. But, though the State had or had access to personal items belonging to

Mendoza from which a DNA sample likely could have been obtained, the State made no effort to ascertain whether it belonged to Mendoza or, as the prosecutor endeavored to imply, from any of the emergency responders.<sup>19</sup>

Oddly, after seeking to establish that all the van's interior damage occurred on impact with the school bus, and now being confronted with the steering wheel damage,

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<sup>19</sup> See Exhibit A, TT, Jeremy Christenson, at 255; 257:

BY MR. GUERRERO:

Q. When you made the search on the trailer of Ms. Franco and her boyfriend in Minneota, do you remember seeing any of their personal items?

A. Yes, I do.

Q. Did you take any personal items?

A. Yes, we did, we took approximately thirty-six or thirty-seven items from the house.

BY MR. MAES:

Q. All of these documents, including the money that was seized in this matter, are being held for the Federal case that you talked about?

A. Yes, the evidence is being held for evidence in the pre-mentioned identity theft case.

and Exhibit A, TT, Amy Liberty, at 260; 268; 270 (emphasis added);

Q. What type of biological fluids do you analyze?

A. DNA can come from biological fluids, such as blood, semen, saliva. We can also get DNA from hairs, from sweat, from just an individual touching another object, things like that, anyway in which, you know, a biological source would be transferred to another source.

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Q. So, you tested both the bags for blood, and when you went through your testing were you able to identify where that blood came from, or the source, I guess?

A. I was able to determine that DNA profile that I obtained from the blood on both of the air bags was a male DNA profile and did not match Olga Franco.

Q. Now, was the blood from the same person?

A. Yes.

Q. On both air bags?

A. Yes.

\*\*\*

BY MR. GUERRERO:

Q. You've told us that you received a — a DNA sample from Ms. Franco. Did you receive any other samples?

A. No other known samples, no.

\*\*\*

Q. The State did not provide any samples to you that were designated as a male individual, right?

A. Correct.

the prosecutor suggested another hypothesis: well, wait just a second said the State, it just occurred to us, maybe that damage was attributable to the emergency responders' extrication efforts. See Exhibit A, TT, Peterson, at 354-355 (emphasis added):

BY MR. MAES:

Q. Now, you mentioned that the steering column had -- had been moved, bent is what I think you said?

A. As I recall it, it had been.

Q. And a steering wheel hooked in with part of the dash and the entire interior area?

A. The column is --

Q. Goes through --

A. -- and it's -- it's got -- you've got an anchor, well, two points of anchor at least, one of them down near the floorboards, another one up in the -- the dash area.

Q. Now, you understand that the firemen in this case used a ram to do what they called a dash roll?

A. I understood that they had used some tools in order to extricate Olga.

Q. And the person doing that testified that they had to move that eight inches, the dash, during that role.

A. Immaterial to me, but, okay, let them go.

Q. All right. Well, could that explain some of the damage you -- you were talking about?

A. Displacement of the steering column? Possible, not that bend in the steering wheel. They'd have to actually put a tool on the steering wheel itself to bend it, if -- if that would have done it.<sup>20</sup>

Q. Now --

A. But the displacement of the column is possible.

Q. Okay, when you reviewed the vehicle you saw that the brake was bent, is that --

A. The what?

Q. The brake pedal was bent towards the outside?

A. I think it was.

Q. All right. You understand the firemen put a chain on that and pulled it out, or didn't you realize that?

A. I think I was told that.

See also Exhibit A, TT, J. Kimpe, at 158 (emphasis added):

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<sup>20</sup> There was no evidence that any tool was used on the steering wheel.

A. No, there was no way to get in there, you know, not without hurting her worse, you know, 'cause you could see that her leg was broke bad. She was bleeding, and she was in a lot of pain. And so at that time then, you know, it just wouldn't work to cut -- just cut the seat out, 'cause you can't get at all the bars and braces under there, and that's a lot of stuff. **So, then we took the dash, the center dash out and underneath the dash there's two support columns in there, and that's what we cut. We cut those columns, bent them over, and at that time Marshall Fire was also there, and they used a hydraulic ram in the doorway and cut a brace. So, between the Jaws -- I had the Jaws inside and we rolled the dash back, you know, so the whole steering wheel and everything came up off of her legs<sup>21</sup> then, you know, between the Jaws and the hydraulic ram.**

Thus the prosecution established that some of the interior damage to the van occurred during the initial impact with the bus and that some, particularly the damage to the *dash*, was due to the responders' extrication efforts. The prosecutor did not establish which caused which. Rather than clarify the evidence, this demonstrated that the State's photograph exhibits of the van's interior damage could not reliably be used by the jury to conclude that the condition of the interior of the van immediately after the accident, and *before* the pictures were taken, was the same as the condition appearing in the pictures taken *after* all the extrication efforts were completed. They jury could only *speculate* as to which elements of the damage were caused on impact, which were caused due to the extrication efforts, *and* what difference it made. Defendant's hypothesis that Mendoza's body caused the bend in the steering wheel is more likely than the State's speculative hypothesis that the responders' caused that damage.

**F. Defendant's Trapped *Right Foot*  
Evidence Showed She was *not* "Pinned in the Driver's Seat"  
"If we could free the foot from the wreckage,  
we could remove her from the vehicle."**

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<sup>21</sup> See Exhibit A, TT, Joseph Kimpe, at 163 (emphases added):

- Q. So, it was her right ankle that was trapped or held down by the dashboard?**  
**A. Yes.**

1. The State provided no evidence to support its implied hypothesis that defendant's right foot could have been trapped *only* if she had been the driver – defendant's testimony as to what happened during the crash is a more likely hypothesis as it is the only one supported by evidence. The State offered no evidence as to how Defendant's right foot became trapped, or how the entrapment of Defendant's right foot proved the State's hypothesis that she was the driver of Mendoza's van at the time of the crash.

All the State offered on this subject was 1) that *Defendant* did not prove how her right foot became trapped where it became trapped; and 2) the *conclusion* based on speculation and conjecture that the fact her foot was trapped where it was somehow proved the State's hypothesis that she was in fact the driver of Mendoza's van at the time of the crash. The State failed to even offer evidence that the entrapment of Defendant's foot could *not* have resulted had she *not* been the driver of Mendoza's van at the time of the crash.

Though Defendant was not required to prove anything, she offered *unrebutted* expert testimony, by orthopedic surgeon Dr. Paul Diekmann, that the nature and mechanism of the fracture of Defendant's right ankle resulting from the crash and entrapment could not have resulted from Defendant's foot having been on either the brake or accelerator pedals. Dr. Diekmann testified that Defendant's foot was most likely not on any flat surface at the time of the crash.

The State's witnesses, Kirk Lovsness and Kelly Martin Kimpe, also testified that Defendant's right leg was "twisted." See Exhibit A, TT, Lovsness, at 170-71 (emphasis added):

A. -- **the leg was twisted**, and the right leg -- the right foot was trapped between the -- in the floor wreckage near the console, near the accelerator area.

and Exhibit A, TT, K. Kimpe, at 149 (emphasis added):

A. I had her squeeze my hands, and I seen her leg was badly broken because it was -- her jeans were all bloody and it -- **her leg was very twisted**.

The prosecution offered no evidence as to how Ms. Franco's leg came to be "twisted." Defendant, on the other hand, testified that immediately prior to the crash she took off her seatbelt so she could get out of the van before it crashed. The evidence showed that the school bus was traveling perpendicular to the minivan and at a speed of approximately 50 to 60 mph. Seeing the school bus coming at the minivan from the left as the minivan approached the school bus, the natural reaction of the passenger would be to move in the opposite direction away from the impending impact with the school bus. In doing so, the passenger's body would be angled with the head and shoulders away from the impending impact and towards the passenger door,<sup>22</sup> with the passenger's feet angled towards the center of the van to brace. The only logical conclusion from the evidence is that Defendant's right foot was thus trapped where it was trapped, on impact with the school bus, when nearly all the interior damage occurred, except that caused by the firemen in the extrication process.

Defendant also testified that the van's ensuing spin caused her to end up to the left, towards the driver's seat. She testified that she ended up between the driver's and passenger's seats after the crash and pulled herself up onto the driver's seat with the steering wheel. If Defendant had been in the driver's seat at the time of the collision,

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<sup>22</sup> Which also explains why Ms. Franco's DNA was not found on the passenger airbag.

and remained there throughout the collision, there is no logical explanation for how her right leg became twisted. On the other hand, coming from the passenger seat, having her right foot trapped on impact, and then being thrown to the left with all but her right foot capable of movement, it is entirely logical that her right leg would have become twisted in the process. It does not matter *when* Defendant's right foot was trapped or her right leg was twisted, it only matters *how* and how that had any bearing on whether Defendant was the driver of the van at the time of the crash.

2. *The jury did not require the State to prove how or that Ms. Franco's trapped right foot proved its hypothesis that she was the driver of the van – the jury improperly required Ms. Franco to prove how or that it did not.* Indeed, according to one juror, interviewed by Star Tribune reporter Pam Louwagie about the verdict, where Defendant's right foot was trapped was *key* to the jury's finding Defendant guilty: "We did a poll right away and it was pretty much split." \*\*\* "***The biggest factor was where her foot was***" near the gas pedal, [juror Denee] Elwood said." Louwagie, Pam, *Verdict in bus crash won't fade deep scars*, (Star Tribune, August 8, 2008) (emphases added).

However, the State offered *no* evidence as to how Defendant's right foot became trapped or how the fact that it did or the manner in which it did proved the State's hypothesis that this fact demonstrated Defendant was the driver of the van at the time of the crash and that no other hypothesis was possible. Failing this, the jury was left only with speculation and conjecture as to how Defendant's right foot became trapped and how that could possibly have proved the State's hypothesis beyond any reasonable doubt that this could only lead to one conclusion: that Defendant was the driver of

Mendoza's van at the time of the crash. The jury could but speculate. Speculation is it doubt and the jury was required to resolve that doubt in favor of Defendant.

Furthermore, the State did not rebut Defendant's testimony as to how she got into the driver's seat. It merely ridiculed Defendant's testimony by stating "she was pinned behind the wheel" and that's all we need to know. Speculation and conjecture in a criminal jury trial *are not* all we need to know if the State wishes to convict a person of terrible crimes because speculation and conjecture are reasonable doubt and with that doubt, the law does not permit the conviction to stand.

Speculation and conjecture were unnecessary. As demonstrated above and next, the only hypothesis that makes sense and is supported by the evidence is that Mendoza *was* in his van at the time of the crash and he *was* driving his van at the time of the crash.

3. *If Mendoza was not the driver, he would still have been where Ms. Franco was found.* As a review of the evidence below that Mendoza was in fact in his van at the time it caused the crash shows, under the State's hypothesis that Defendant was the driver of the van at the time of the crash, one must believe that Mendoza was the passenger and that he was somehow thrown up, over, and across the driver, while the unrestrained driver miraculously stayed put in the driver's seat. As the unrebutted evidence demonstrates that neither the driver's nor the passenger's seatbelts were in use at the time of the crash, one must believe that this petite Defendant managed to stay in the driver's seat while the much larger passenger was thrown out the driver's door. Or, completely implausibly, up and over the passenger seat and out the rear, passenger-side sliding door.

4. *If Ms. Franco had been the driver, her right foot may have remained in trapped in the van under the dash, but she would have been out of the van. As Peterson testified, had Defendant been the driver, her trapped foot would not have held her in the van; she would still have been ejected from the minivan and that trapped foot, well, it would have either been pulled free or pulled off. See Exhibit A, TT, Peterson, at 543 (emphasis added):*

BY MR. EISENBRAUN:

Q. Now, if Ms. Franco had been in the driver's seat at the time of impact, and it -- and she was unbelted, which she testified to and there was no evidence that this -- there is no evidence that the seatbelt was being worn, so if she was in the driver's seat unbelted and her foot was caught on -- with some metal or something in the center underneath the dash, would that have anchored her in the van with the force of the spin?

A. By and large the metal structure of your pedals down there would bend such that it would tend to free up.

Q. **So, foot -- her foot would pull free?**

A. **Either free or off.**

The State did not rebut this testimony.

**G. The Evidence Demonstrated Conclusively  
that Francisco Sangabriel Mendoza Was in His Van**

1. *The State's disregard of the evidence that Mendoza was in his van did not make the evidence go away. That evidence was unequivocal. The State's investigation and the State's building of its case against Defendant not only failed to pursue the clear evidence that Mendoza was in his van and a suspect as the driver, the prosecution denied it up to the very moment of the trial, and then endeavored to cast doubt on its own witnesses. See, e.g., Exhibit A, TT, State's Opening Statement, at 11 (emphasis added):*

BY MR. MAES:

You will learn that the air bags were sent in to the BCA to see if they could find any DNA, and I think you'll probably hear in part because **after the initial investigation there was some rumors or conversations, reports, about another person being in that van, that other person being Ms. Franco's boyfriend.**

2. *The State did not want Mendoza in that van for the fact belied its hypothesis.*

*Yet more misconduct.* The State demonstrated not only that it did nothing to discern whether the ample DNA evidence found on the airbags and belonging to an

"unidentified male" belonged to Mendoza, the State sought to confuse the issue.

Although the State had access to multiple personal items belonging to Mendoza seized in the execution of a search warrant on his home a couple days after the accident, neither law enforcement officials nor the prosecution sought to obtain DNA samples from those items for a comparison with the DNA of the "unidentified male" found on the minivan's airbags. The State, instead of seeking to rule other suspects out, ignored that very process. Rather than seeking to resolve the uncertainty in this evidence in an effort to support its hypothesis, the prosecution instead proffered the speculative possibility that the DNA of the "unidentified male" could belong to any one of the male emergency responders, and left the issue to pure speculation and conjecture.

The prosecution suggested that it was the jury's responsibility to resolve the speculation as to who that DNA belonged to. See Exhibit A, TT, State's Opening Statement, at 12 (emphases added):

I believe she'll also tell you that, "I also found some on the passenger air bag, right in the middle of there that -- and there was a sufficient amount to identify that individual, and it was not Ms. Franco, but an uni -- unidentified male, and that that DNA also matched the little bit of blood that was found in the vehicle."

Now, **through the course of this trial people aren't going to agree as far as what that shows or what they believe it shows, and that's the case in**

any trial, otherwise we wouldn't be here. **That ends up being your responsibility.**

The prosecution misstated the law. The jury's responsibility when confronted with speculation as to what the evidence means, i.e., doubt, is to resolve that doubt in favor of Defendant. Though Defendant had no lab or the financial means to conduct her own DNA tests, she *voluntarily* gave her own blood so the State could test *hers* against what was found on the airbags because she knew her DNA could not be on the driver's airbag and she was correct. It was the *State's* obligation to take the necessary steps to endeavor to identify the "unknown male." But, it did not want it to be Mendoza's as that would further weaken its shallow hypothesis pointed like a poisoned arrow at Ms. Franco.

3. *Because the State was slow, they let Mendoza go – its investigation blown, the State chose Ms. Franco to atone.* State witness Trooper Dana Larsen, the Chief Investigator on this case. See Exhibit A, TT, Larsen, at 60:

BY MR. GUERRERO:

Q. Trooper Larsen, you've told the jury that you are the chief investigating officer of this accident, is that correct?

A. That would be correct.

Although the evidence reviewed below can leave no doubt that Mendoza was in fact in his van at the time it caused the crash with the school bus, Trooper Larsen testified he still has insufficient evidence to justify doing anything to track down Mendoza except determine his "identity." See Exhibit A, TT, Larsen, at 69 (emphasis added):

BY MR. GUERRERO:

Q. Thank you. On the night you interviewed Ms. Franco, did you ask her whether or not anybody else was in the van?

A. No.

Q. You just assumed that no one else was in the van, didn't you?

A. Yes.

Q. Wouldn't that be a common question for an accident investigation?

A. If we had information that maybe somebody else was in there, then we would have asked that, but we -- with witness statements at the scene, they didn't indicate anybody was in there with her.

Q. You mean they didn't indicate anything to you?

A. Right, and the information that I received was from -- was second hand, which was from another trooper.<sup>23</sup>

**Q. And -- and today, in front of this jury, you know that's wrong now, don't you?**

**A. We have not confirmed whether there was anybody else in that van.**

**Q. You mean you haven't?**

**A. We're -- that is correct. We haven't been able to find out exactly if there was somebody else in there or not.**

and *id.* at 72 (emphasis added):

BY MR. GUERRERO:

Q. So, as the State -- State Patrol, the agency that has the chief responsibility in this accident, have you done anything to locate this Mendoza person?

A. Yes, we have -- I mean, Melendez, or whatever name we're going to go by with him?

Q. His name is Mendoza.

A. Okay. Yes, we have contacted with the assistance of INS. They've used their resources to try and locate him for us, and they have not been able to.

Q. But the State Patrol has not?

A. No.

and *id.* at 73 (emphasis added):

BY MR. GUERRERO:

**Q. And why did you contact INS?**

**A. Why did we?**

**Q. Yes.**

**A. To try to confirm identification.**

---

<sup>23</sup> It seems implausible, if not incredible, that Trooper Larsen would honestly ignore information because it came from a fellow State Trooper.

4. *Wait a minute! The State did suspect Mendoza was "involved in" the accident – but they did not want to get him, they only wanted to get his name right. Other than the effort to "confirm identification," the "INS" told a story diametrically opposed to Trooper Larsen's. According to the witness from the "INS," the State Patrol did indeed believe Mendoza was "involved in" the accident and *that* is why the State Patrol contacted them. See Exhibit A, TT, Jeremy Christenson, at 242-43 (emphases added):*

BY MR. MAES:

Q. Now, at some point were you contacted by the Minnesota State Patrol to assist in an investigation involving an incident on February 19th?

A. Yes, I was.

Q. And can you tell the jury who contacted you?

A. Our office received a request from the State Patrol. I don't know who exactly placed the call from the State Patrol. The call ultimately made it to my supervisor, and it was assigned to me to assist the State Patrol in **establishing the identity of a person involved in an accident** is what I was originally told.)

5. *"Our office received a request from the State Patrol." The State cannot credibly deny Mendoza was in his van – the evidence was consistent only with the hypothesis that he was – in fact, he told his sister "he had been in an accident and some people were seriously hurt, and he thought some people were killed, and he needed money to get to Brownsville, Texas." Despite the State's implausible (and unfortunately false<sup>24</sup>) explanation, the evidence that Mendoza was in his van when it crashed into the school bus was conclusive. The evidence showed that he was the registered owner of that minivan and the person who insured it. See Exhibit A, TT, Larsen, at 70; 71:*

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<sup>24</sup> The prosecution understandably did not attempt to impeach its own witness and thus Christenson's testimony on this issue was unrebutted.

BY MR. GUERRERO:

Q. Are you aware of -- well, did you look in to see who owned the van?

A. Yes.

Q. Who owned the van?

A. The registered owner is Francisco Sangabriel Mendoza.

\*\*\*

Q. And you also in the van on the date of the accident found some registration papers, didn't you? That is, isn't -- aren't the registration papers go along with the lic -- the issuance of a license plate?

A. They normally do, yes.

Q. Did you find those that day, on the date of the accident, which is February 19th?

A. Not that I recall.

Q. When did you find them?

A. Well, I just ran the registration from the license plate.

Q. I see. When -- when did you do that?

A. The day of the crash.

The evidence showed that he was due at work the afternoon of the crash, where he worked the same shift as Defendant. See Exhibit A, TT, Franco, at 468-69:

Q. And did you -- did you have a job then when you moved to Minneota?

A. Yes.

Q. And where was that?

A. At the wood place.

Q. Is it Norcraft Industries, the same cabinet factory that you'd worked for before in Cottonwood, Minnesota?

A. Yes.

Q. Did Mr. Mendoza start working there with you, as well?

A. Yes.

Q. As a matter of fact, you suggested that place of employment to Mr. Mendoza, didn't you?

A. Yes.

Q. And did you and Mr. Mendoza apply for a job and start working at that place?

A. Yes.

Q. And did you work at the same shift?

A. Yes.

The evidence showed that since they started that job Mendoza and Defendant traveled to work together every day in Mendoza's van with Mendoza always driving.

But, Mendoza did not show up for work the afternoon of the accident day and he never has since. See Exhibit A, TT, Vigil, at 354-55; 358; 359:

BY MR. GUERRERO:

Q. Mr. Vigil, I'm going to hand you what's been marked as Defendant's Exhibit #27, and ask you if you recognize that photo?<sup>25</sup>

A. Yes.

Q. Tell the jury who that is.

A. Oh, I know him as Samuel.

Q. Would that be Samuel Melendez?

A. The last name I did not know as that precisely.

Q. Now, sir, before February 19 of this year had you ever seen that person you described as Samuel?

A. Yes.

Q. And tell the jury where you saw him?

A. He used to work with me.

Q. And would that be the cabinet factory in Cottonwood, Minnesota?

A. Correct.

Q. Do you also work the second shift at the cabinet factory?

A. Correct.

\*\*\*

Q. Did Mr. Mendoza go to work that day?

A. Yes, you mean him, Samuel?

Q. Yes.

A. No, he did not.

\*\*\*

Q. Mr. Vigil, before we recessed I believe I asked you whether or not Samuel ever returned to work at the cabinet factory?

A. No, he did not return.

Multiple witnesses testified to seeing an unidentified male at the van immediately after the accident concluded, one saying the male acted anxious and disturbed. See Exhibit A, TT, Dobrenski, at 97-98; 99:

BY MR. MAES:

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<sup>25</sup> This photo Exhibit #27 was previously identified as Francisco Sangabriel Mendoza, a.k.a. Samuel Melendez, Ms. Franco's abusive boyfriend and the owner of the van.

Q. Now, do you ever remember people going to the van?  
A. Shortly after the van hit the side of the bus there was a man there, and I don't know where he came from, but he was there in a very short time, and --  
Q. All right, was that before or after you called 9-1-1?  
A. After or during; it was either after or right during, I'm not sure.  
Q. And you didn't see where this man came from?  
A. No.  
Q. So, would it have been possible for it to be someone who was traveling from the other direction?  
A. Possibly, but I don't know if anybody could have walked that fast.  
Q. Okay.  
A. So, yeah.  
Q. Now, you said that you saw a man there. Where was he in relationship to the van?  
A. He was on the pass-- passenger side of the van.  
Q. Okay, and what was he doing, if you know?  
A. He was trying to open the door, and he was kind of peering like this in there, and he was kind of -- then he kind of went like this and paced around like this.  
Q. Okay, and how long was he there.  
A. And I don't know how long he was there. I saw him for probably a -- I'm guessing a half a minute or a minute there, and then I don't know where he -- what happened to him.  
Q. Have you ever seen him again?  
A. No.  
Q. Were there a lot of people around the van in a very short time?  
A. No.

\*\*\*

BY MR. GUERRERO:

Q. It's interesting to see what you look like now that I see you in person. Basically, what you've told the jury here today is what you've told me on the telephone, right?  
A. Um-hum, yes.  
Q. That you did see a man immediately --  
A. Yes.  
Q. -- after the -- you saw a man immediately after the accident and he appeared on the passenger side of the minivan, and then all of a sudden he disappeared?  
A. Yes.  
Q. And you never saw that man again?  
A. No.  
Q. And I believe you told me on the telephone that he -- he looked worried or anxieties at the time?  
A. Yes.

and Exhibit A, TT, Moat, at 105-06; 108; 113:

BY MR. MAES:

A. And there was one person on the -- standing on the passenger side of the van. I didn't know if he came from the van or if he came from a vehicle behind, or --

Q. All right, so you said you did see a male on the passenger side, or --

A. I really couldn't tell if it was a male or a female.

Q. And do you know where that person came from?

A. No, I don't.

Q. But they were there rather quickly?

A. Yes, I mean, within a couple minutes from the time it happened. I got the truck stopped and grabbed my phone and dialed 9-1-1, and then I looked up and they -- this person was standing at -- on the passenger side of the van.

A: And there was one person on the -- standing on the passenger side of the van. I didn't know if he came from the van or if he came from a vehicle behind, or --

Q: All right, so you said you did see a male on the passenger side, or --

A: I really couldn't tell if it was a male or a female.

Q: And do you know where that person came from?

A: No, I don't.

Q: But they were there rather quickly?

A: Yes, I mean, within a couple of minutes from the time it happened. I got the truck stopped and grabbed my phone and dialed 9-1-1, and then I looked up and they -- this person was standing at -- on the passenger side of the van.<sup>26</sup>

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<sup>26</sup> Mr. Moat also testified that he saw the van as it went over the railroad tracks just before striking the bus and that he thought he saw only one person in it -- the driver. He then testified that though "I didn't get that close," he thought the person he saw in the driver's seat after the accident was the same person he was before. However, he could not tell whether either person was a male or female and though Ms. Franco and Joseph Kimpe testified she was wearing a black coat, Mr. Moat thought the person he saw was wearing a light-colored top. See Exhibit A, TT, Moat, at 105-06; 110. As Ms. Franco is barely over five feet tall and Mendoza (from the identification documents ICE and the State recovered) is 5'7". It is just as likely that Mr. Moat was unable to see Ms. Franco in the van seconds before the violent collision as it is that he simply did not have the time to make so many observations clearly. Additionally, as would be expected, Mr. Moat was alternating looking at the van and the school bus as the accident occurred. See *Id.* at 112 (emphasis added) (Q. Now, did you look at the school bus after you saw the minivan coming too fast into the intersection? A. I watched the collision. I was looking kind of at both the school bus and the minivan.)

\*\*\*

Q. How long was this person by the passenger side of the van?

A. Just when I saw the person at the passenger side just maybe minute or two, and then they headed west on foot. I thought they were going back to one of the vehicles that stopped past the tracks.

\*\*\*

BY MR. GUERRERO:

Q. Mr. Moat, do you remember saying that you heard from someone at the Cottonwood Fire Department they saw somebody running away?

A. I heard hearsay that they saw somebody running, yes.

Q. Okay, that's all I want. I -- I'm not offering it for the truth of the matter, as to -- that's what you told me right after the accident, didn't you?

A. Yeah, I didn't see anybody running, I seen him walking, you know, to the west on -- on the edge of the highway -- the edge of the County Road.

and Exhibit A, TT, Jeremy Christenson,<sup>27</sup> at 252; 253 (emphases added):

BY MR. MAES:

Q. Now, have you made any attempts to locate Sangabriel Mendoza?

A. Yes, I have.

Q. And can you just give the jury an idea of what attempts were made?

\*\*\*

A. \*\*\* I had also had ICE agents from all those offices attempt to locate him at the known addresses in those areas, as well. Through these efforts we had discovered that following this accident Sangabriel had -- had traveled here to Willmar, or, excus -- yes, here to Willmar, and talked to his sister, Naomi, I believe her name was. Naomi advised me that she had contact with Sangabriel on the 22nd or after the accident, and that he advised her he had been in an accident and some people were seriously hurt, and he thought some people were killed, and he needed money to get to Brownsville, Texas.

and Exhibit A, TT, Fabian Marcial, at 339; 341:

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<sup>27</sup> Jeremy Christenson is a immigration and customs enforcement agent who was contacted by Trooper Dana Larsen to assist in identifying Francisco Sangabriel Mendoza, the sole investigatory effort the State made concerning Mendoza. See Exhibit A, TT, Larsen, at 72; 73.

BY MR. GUERRERO:

- Q. Did you see a man running away from the scene of the accident?  
A. Yes.  
Q. Did you know who that man was?  
A. No.  
Q. Had you ever seen him before?  
A. He was working there with me.  
Q. At the cabinet factory in Cottonwood?  
A. Um-hum, um-hum, yes.

\*\*\*

BY MR. MAES:

- Q. Now, did law enforcement talk to you after this crash?  
A. After what time are you referring to?  
Q. About five or six days later did an officer talk to you?  
A. Oh, yes, yes, yes.  
Q. And did you tell this officer that you saw this man running down -- or running on Highway 24?  
A. Yes.

\*\*\*

and Exhibit A, TT, Luciana Franco, at 349:

BY MR. GUERRERO

- Q. Did you ask her where her boyfriend was?  
A. Yes.  
Q. And what did Ms. Franco, Ms. Olga Franco, reply to that question?  
A. She told me, "He left, he left running."

and Exhibit A, TT, Vigil, at 354-55; 356-57; 367-68:

BY MR. GUERRERO:

- Q. Mr. Vigil, I'm going to hand you what's been marked as Defendant's Exhibit #27, and ask you if you recognize that photo?  
A. Yes.  
Q. Tell the jury who that is.  
A. Oh, I know him as Samuel.  
Q. Would that be Samuel Melendez?  
A. The last name I did not know as that precisely.  
Q. Now, sir, before February 19 of this year had you ever seen that person you described as Samuel?  
A. Yes.

Q. And tell the jury where you saw him?  
A. He used to work with me.  
Q. And would that be the cabinet factory in Cottonwood, Minnesota?  
A. Correct.

\*\*\*

Q. Did you see his minivan in front of the trailer?  
A. I saw -- I saw a minivan like that maroon color.  
Q. Now, on the date of the accident, February 19 of this year, did you see that person that you described as Samuel?  
A. Yes, I saw him.  
Q. Would you tell the jury where you saw him on February 19?  
A. I was on my way to work and I saw a person jogging, and by the time that he was almost in front of me I recognize him as -- it was him, the one that I was working with. Therefore, since it was very cold I stopped almost immediately. I stop a little bit ahead, but I -- I went back. Because of the cold, the window of my car could not roll down. Then I unlocked my car so I could ask him why -- why is it that he was walking or jogging. As soon as I unlocked my car he immediately went inside the car from the rear door and he asked me if I could take him to Minneota. He wanted to make a call with his cell phone, however, he did not have it with him. At that time I thought, well, I was almost at -- at work, I saw that as an opportunity to here -- well, God put him on -- on my way, so I decided to help him, and we went -- we headed towards Minneota. As we were getting closer he told me, "You are going to go -- you are going to miss work regardless, why don't you take me to Willmar." I told him -- I replied to him, "No, I am not going to miss work, I am going to be late for work," because I was on probation. He then told me, "Well, I don't have the key of my trailer and I want to go and get it." I told him, "You know what, don't worry about it," since it was -- since it was very cold, I told him, "You can stay in my place." I have -- have trusted him because, you know, I have already been given him on -- on our way there.

\*\*\*

Q. Earlier you said that you saw a man jogging or you saw Samuel jogging before you picked him up, is that correct?  
A. You are correct.  
Q. Would you tell the jury why you picked Samuel up on that day?  
A. It was a co-worker and I had already been talking to him about Christ. And I said, well this is the opportunity to offer him help if he is walking by himself in the cold. That happens instantly, I thought about that instantly, as soon as I recognized him.

and Exhibit A, TT, Olga Franco, at 483; 484; 485-86; 490-93:

BY MR. GUERRERO:

Q. And what happened to Mr. Melendez?

A. Well, when the accident happened he was by the side. He was driving and he was pushed out onto the street.

\*\*\*

Q. Do you recollect whether or not Mr. Mendoza said anything to you after the collision?

A. Yes.

Q. What did he say?

A. That if I were to say that I was driving, my life --

THE INTERPRETER: May the interpreter correct herself?

A. -- that if I were to say that he was driving, my life would be at risk.

Q. Did you say anything to him?

A. No.

Q. And then what happened?

A. After he told me that, he said that he was not going to allow for him to be deported to Mexico again, and that he was not going to allow for the police to pick him up.

\*\*\*

Q. And then what did Mr. Melendez do?

A. He took off running.

Q. Did he take off running down -- or west on County Road 24, which is the county road you were riding on?

A. Yes.

Q. And are you telling this jury then that you could clearly see him running down County Road 24?

A. Yes.

Q. And at that point were you -- were you seated in the driver's seat?

A. Yes, I had already moved myself to a comfortable position there.

Q. Do you see -- did you see what happened to Mr. Melendez?

A. Yes.

Q. Tell us what happened to Mr. Melendez?

A. Well, he was injured all over. He was bleeding a lot on his face.

Q. When was the last time you -- the last time you saw Mr. Melendez?

A. When he took off running.

\*\*\*

BY MR. MAES:

Q. Did you try to swerve or turn?

A. No.

Q. Did you try to brake?

A. I wasn't the one driving.

Q. Did Francisco try to brake?

A. Yes.

Q. But it was too late?

A. Yes.

\*\*\*

Q. Now, I can't remember, did Francisco have his seatbelt on?

A. No.

Q. When you hit the bus what happened -- what do you remember happening next?

A. He got out, and then he was laying down on the side where he had been driving, on the side of -- on the road.

Q. All right, do you remember the van spinning at all?

A. No.

Q. When he got out did he open the door?

A. Yes, the door was open.

Q. Francisco opened the door?

A. It opened itself -- by itself.

Q. When did that happen?

A. At the time of the collision.

Q. You were -- you weren't moving when Francisco got out of the van?

A. Yes.

Q. You were moving?

A. Yes.

Q. When did you move into the driver's seat?

A. Since he wasn't there anymore, since I saw him that he was down and all that, since I didn't see him there, that's when I started moving myself.

Q. When you started moving were you in the passenger seat?

A. No.

Q. Where were you?

A. I was close to that place. I couldn't reach to settle myself back in the place where I was before, that's why I settled myself on that one.

Q. Were you in between the seats in the van?

A. I was like in the middle.

Q. And were you in the middle when the van stopped moving?

A. Yes.

Q. After it stopped moving you then got in the driver's seat?

A. Yes, I settled myself in there.

Q. Was it at that time that you saw Francisco outside?

A. Yes.

Q. Where was he laying?

A. By the side where he had been driven -- driving, right by the van.

Q. If you look at that exhibit behind you, could you point to where he was laying?

A. This part.

Q. Okay.

THE INTERPRETER: May the interpreter correct -- correct herself?

THE WITNESS: On this area.

BY MR. MAES:

Q. All right. How long was he laying there?

A. I don't know.

MR. GUERRERO: Your Honor, for the record, may -- may the Court Reporter report that she pointed on the driver's side of the van after it came to rest?

THE COURT: Do you concur, Mr. Maes?

MR. MAES: Yes.

THE COURT: The record may so show.

BY MR. MAES:

Q. Was it a minute?

A. I don't know, I don't remember.

Q. When he got up what did he do?

A. When I asked him for help, I told him to help me to get out, and then he tried to get me out but he was not able to.

Q. Did he try to get you out from the driver's side?

A. No, he went in through where I was, on the side where I was.

Q. So, he was laying on the roadway and got up, and where did he go?

A. He took off running.

and Exhibit A, TT, Angel Correa, at 566-69:

BY MR. GUERRERO:

Q. Did you say anything else to Ms. Franco?

A. Yes, I asked her where her partner was.

Q. And what do you mean by partner?

A. Or her husband, I didn't know as to whether or not they were married.

Q. And what did she say?

A. That he had fled, that he'd fled.

Q. Did you see -- did you see this you called him partner, I want to call him boyfriend, did you see the boyfriend --

A. Yes.

Q. -- on the scene?

A. When we got there with Fabian we got there and I saw someone running on -- toward Minnesota.

Q. Did you -- did you know his name?

A. No, no.

Q. Did you recognize him from work?

A. Yes.

Q. And was he the same person that was -- that you knew as the boyfriend of Ms. Franco?

A. Yes.

Q. So, as I understand it, you went first to the bus, and then you -- you -- then you saw the boyfriend --

A. No, no. Before I -- before I got out of the car that I was riding.

Q. You saw the boyfriend?

A. Yes, I saw him running and I told Fabian, "Look, it's the guy that I work with us," or I told him it looks like him. I was doubting though.

Q. And you saw him running away from the scene?

A. Yes.

MR. GUERRERO: May I approach, Your Honor?

THE COURT: You may.

BY MR. GUERRERO:

Q. If I were to show you a photograph, could you tell us, and it's marked Exhibit #27, would -- would you tell us whether or not that's the person you thought you saw?

A. Could I see it?

Q. Yes.

A. Yes.

Q. That's the person you thought you saw running away from the scene, right?

A. Yes.

Q. Did you ever see him again at work after that day?

A. No.

Q. Did you ever see him anywhere?

A. No.

MR. GUERRERO: No further questions, Judge.

THE COURT: Any cross by the State?

CROSS EXAMINATION

BY MR. MAES:

Q. Earlier you said you weren't sure if you could -- if you knew who it was.

A. Yeah, how can I say it, how can I explain that? I mean, I told this guy and he said, "No, that's not him, it's got to be some one -- somebody else that is running." But, yes, I am sure that it was him. It was not that far away.

Q. Okay, no other questions.

6. *Mendoza could not get in his trailer because he left his key in his van back at the accident scene.* Keryn Vigil also testified that they drove to Mendoza's trailer, but Mendoza discovered he did not have his keys and could thus not gain entry. See Exhibit A, TT, Vigil, at 363; 368-69

BY MR. GUERRERO:

Q. Did he give you a reason why he -- you were taking him to Willmar?  
A. Yes, he wanted the keys.  
Q. And the key to what?  
A. Of the trailer so he could open it.  
Q. So, you thought that you were taking him to Willmar so that he could get a key to return to Minnesota and open the trailer with that key?  
A. Yes.

\*\*\*

Q. Mr. Vigil, do you know why Samuel did not go into his trailer instead of going to your house?  
A. I offered him to go to my house because he said that he did not have the keys to go into his house.  
Q. So, he told you that he did not have the keys to get into his trailer, right?  
A. True, true.

Mendoza did not have his keys because, as Defendant testified, the keys to the trailer were on his keychain with the keys to his minivan. See Exhibit A, TT, Olga Franco, at 478; 479:

BY MR. GUERRERO:

Q. So, there was only one key ring that included the car and the house, is that correct?  
A. Yes.

\*\*\*

A. I didn't have the key for the trailer. He was the only one who had it.

The keys to Mendoza's van and to the trailer were right where he abandoned them, in the van back at the scene of the accident from which Mendoza had just fled, as was, according to Trooper Larsen, his driver's permit. See Exhibit A, TT, Larsen, at 71-72:

BY MR. GUERRERO:

Q. And you also in the van on the date of the accident found some registration papers, didn't you? That is, isn't -- aren't the registration papers go along with the lic -- the issuance of a license plate?

A. They normally do, yes.

Q. Did you find those that day, on the date of the accident, which is February 19th?

A. Not that I recall.

Q. When did you find them?

A. Well, I just ran the registration from the license plate.

Q. I see. When -- when did you do that?

A. The day of the crash.

Q. Okay. Did you also find a driver's license, that is, the driver's license you carry in your wallet?

A. Yes.

Q. And who was that issued to?

A. That was issued to Samuel Rivera Melendez, and this was an instruction permit.

Q. Did it have a photograph?

A. It did.

#### **H. The Hospital Bed Statement – Deficient, Unreliable, and Inconclusive**

Though Defendant testified as to why she might have said that she was driving<sup>28</sup> and that the interpreter might have said that Defendant had at some unknown time stated Mendoza had stayed home sick the day of the accident, she did not recall making those statements. Within a couple of hours of the accident, after Defendant had

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<sup>28</sup> See Exhibit A, TT, Olga Franco, at 484; 488:

BY MR. GUERRERO:

Q. Do you recollect whether or not Mr. Mendoza said anything to you after the collision?

A. Yes.

Q. What did he say?

A. That if I were to say that I was driving, my life --

THE INTERPRETER: May the interpreter correct herself?

A. -- that if I were to say that he was driving, my life would be at risk.

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Q. Ms. Franco, right after the accident when Mr. Melendez said that your life may be at risk if you told anybody, did you actually believe that?

A. Yes.

Q. Why?

A. Because the way in which he would hit me, I did believe it.

been receiving morphine (commencing during the ambulance ride to the hospital) and other sedative medications for several hours, and after having undergone an attempted conscious sedation reduction, and while awaiting surgery to repair her compound fracture, waiting with continuous delivery of intravenous morphine, two State Troopers came to her hospital bed and interrogated her. They interrogated her through an interpreter who was already there and who testified she is not certified as an interpreter, did not graduate high school, and has no English language certification. Many of the questions asked and answers given were not interpreted for Defendant and were instead volunteered by the interpreter without establishing any reliable foundation as to how the interpreter came to that knowledge.<sup>29</sup>

In that interrogation, Defendant was alleged to have stated "I was driving to cabinetry . . . ." It is a common colloquialism for one to say, in, for instance, telling another that she and her friend were in Duluth or some such place over the weekend, that "we drove to Duluth." Additionally, the differences inherent in languages and how something is described were discussed, particularly in pointing out that one cannot say in Spanish that "I missed the bus," but, rather, would say "the bus missed me." Thus, that single isolated statement cannot be said to unequivocally conflict with a subsequent specific statement by Defendant, free of the influence of immediate tragedy, trauma,

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<sup>29</sup> Further indication of the profound deficiencies in Ms. Campos' allegations as to what was actually said and by whom and when is the fact that though the transcript of that interrogation reveals Ms. Campos' told the Troopers that "We've been trying to call [Ms. Franco's boyfriend and Ms. Franco] gave me two numbers and I put them in my cell, and I've been trying to contact him and there is no answer[] on neither one of them." However, a review of both cell phones shows that Ms. Campos made but one call, to *Defendant's* cell phone, and none to Mendoza's. See Affidavit of Maria Alexandra Caram (emphasis added).

pain, and sedating narcotic drugs, or the substantial evidence indicating that she was not *the driver* of the van at the time it caused the crash.

In addition to the evidence already reviewed, the conditions under which the statement was made, the differences demonstrated in terminology usage from language-to-language, and the inherent ambiguity in the statement demonstrated by the interpreter's wrongly assuming the position of answering for Defendant cast doubt on the meaning of that statement. And that doubt the jury was required to resolve in Defendant's favor.

**I. The Prosecutor Improperly Attempted to Imply  
an Admission by Defendant, but Offered no  
Foundation and No Supporting Evidence**

The State implied that Defendant did drive by asking Defendant whether she recalled telling her aunt that she was driving the minivan at the time of the crash. However, Defendant testified that she had no recollection of the evening of and day following the accident and recalled making no such statement. See Exhibit A, TT, Olga Franco, at 508 (emphasis added):

BY MR. MAES:

**Q. Now, Ms. Franco, the following day after the accident you talked with your aunt, Petrona, and you told her that you were driving, correct?**

A. I don't remember anything still.

**Q. You don't remember anything the next day?**

A. No, still I don't.

The State subsequently produced no evidence that Defendant did make, or to rebut her testimony that she did not recall making, such a highly prejudicial statement and the jury was left with the inappropriate suggestion, based solely on the prosecution's unsupported question, that Defendant did in fact make such a statement.

It was improper for the prosecution to even ask this question without offering any foundational support that could be addressed by Defendant on cross-examination or to try to force Defendant to call a witness the prosecution implied would be adverse to Defendant. That bell having been rung so loudly by the prosecution, no objection or curative instruction could reasonably have been expected to silence the ringing.

In another effort to improperly disparage Defendant's credibility, which as noted earlier, was a critical issue in the trial, the prosecution improperly sought to impeach Defendant's prior testimony that she had not been employed for several months in late 2007, including October. Without no other evidence to support its intended but improper inference that Defendant was lying about the subject, the prosecution attempted to introduce a document that demonstrated only that Defendant had *applied* for employment, though the prosecution also succeeded in spinning the subject to suggest Defendant had been employed when all she had done is sign *an application for* employment. See Exhibit A, TT, Olga Franco, at 502 (emphasis added):

BY MR. MAES:

Q. Let me ask again, Ms. Moral -- Ms. Franco, did you take a pen and sign Alianiss Morales on this form?

A. Yes.

Q. And the date on this form was October 15th, 2007?

A. I don't remember.

**Q. And it was employment at Jennie-O?**

A. Yes.

Q. Thank you.

Though Defendant had previously testified that she did and could not read this application form as it was in English and she did not fill out the application, the Court permitted the prosecution to inquire as to whether she had actually signed it. The prosecution took the liberty of asking more, in the ambiguously-phrased question "And it

was employment at Jennie-O?", leaving out the "for" between the words "was" and "employment" in the question, which is what the document in fact demonstrated it was, an *application for* employment, with no evidence that employment was ever offered or undertaken. Because, as Defendant had previously testified, it was not. On being challenged, the prosecution, having gotten its ambiguously-phrased question answered as it intended, and rather than making an offer of proof that did not exist, waived off further effort. 502-05 (emphases added):

MR. MAES: I would offer Exhibit #33 for the limited purpose we were discussing.

MR. GUERRERO: Your Honor, I -- I assume that the exhibit is being offered for the purpose of impeachment. It hasn't been established -- this is an application, it hasn't been established whether or not she worked at Jennie-O after that date, and until he can establish --

THE COURT: Counsel approach, please?

(WHEREUPON, the following conference was conducted at the Bench between the Court and counsel and out of the hearing of those present in the courtroom:)

**THE COURT: The question on cross as it pertains to this issue was whether or not the defendant worked in October, November, December of '07 and January of '08.**

MR. GUERRERO: Right.

THE COURT: She answered, "No." I haven't seen this document, but everybody says it's a job application, is that what it is?

MR. MAES: I was -- I think I questioned about the verification form --

MR. EISENBRAUN: And she had been -- and there's a big note -- rehire condition, or they are waiting for something.

THE COURT: Well, let me ask the State this, I mean, are you contending that this is anything other than a job app?

MR. MAES: Well, its employment verification is the page I was referring to.

THE COURT: Which page is that?

MR. MAES: Page Three.

THE COURT: Okay. Are -- are you contending that this is proof of the fact that she was employed?

MR. MAES: Yes.

THE COURT: Okay, and what's the --

MR. MAES: They verified the employment as required and on that date.

THE COURT: And what's the Defense position on that.

MR. EISENBRAUN: May I see it?

THE COURT: Oh.

**MR. EISENBRAUN: That's an employment eligibility verification.**

THE COURT: What's that?

**MR. EISENBRAUN: An employment eligibility -- I'm sorry, an employment eligibility verification, not employment.**

THE COURT: I mean, I'll -- I'll be honest, I don't know enough about the form to know whether it means she's employed or not employed, so --

THE COURT: Because she's filled out the necessary identification, is that --

**MR. EISENBRAUN: See here, date of re-hire, there's nothing there. It actually shows that she wasn't. . . .**

THE COURT: I'll ask the question -- what's that?

**MR. MAES: We don't have to continue with this.**

THE COURT: You're going in a different direction?

MR. MAES: Huh?

**THE COURT: Are you going in a different direction?**

**MR. MAES: Yeah.**

THE COURT: Okay.

However, once again, the prosecution improperly rang the bell without any evidence to support the resounding and harmful sound any reasonable evaluation would determine it had already made and with no intent to introduce any other evidence because there was none. These multiple improper attacks on Defendant's credibility without providing proper foundation or allowing the Defendant to rebut the same without assuming the unwarranted and substantial risk of *emphasizing* the prosecution's attacks clearly prejudiced Defendant's right to a fair trial.

## V. POINTS AND AUTHORITIES

### A. Motion for Judgment of Acquittal Distinguished from Motion for New Trial.

A motion for judgment of acquittal and a motion for a new trial are governed by different standards. A judgment of acquittal is appropriate where the evidence produced at trial is insufficient to sustain the conviction. Minn. R. Crim. P. 26.03, subd. 17(1) (2008); *State v. Hughes*, 749 N.W.2d 307 (Minn. 2008). A new trial is appropriate

where the substantial rights of the accused have been so violated as to make it reasonably clear that a fair trial was not had. Minn. R. Crim. P. 26.04, subd. 1(1) (2008); *State v. Yurkiewicz*, 212 Minn. 208, 3 N.W.2d 775 (1942).

#### **B. Joinder of Motions**

A motion for judgment of acquittal must be joined with a motion for a new trial. Minn. R. Crim. P. 26.04, Subd. 3 (2008) (Any motions for judgment of acquittal or to vacate judgment shall be joined with a motion for a new trial.).

#### **C. Judgment of Acquittal Must be Entered When, as Here, the Evidence is Insufficient to Sustain the Conviction**

The court must order entry of a judgment of acquittal when the evidence is, as it is here, insufficient to sustain a conviction. Minn. R. Crim. P. 26.03, subd. 17(1) (2008). Upon granting the defendant's motion, the court shall set aside the verdict and enter judgment of acquittal for defendant. Minn. R. Crim. P. 26.03, subd. (3) (2008).

When reviewing the sufficiency of the evidence, the Court views the evidence in the light most favorable to the State and assumes that the jury believed the State's witnesses and disbelieved contrary evidence. *State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008) (citation omitted). The issue herein is whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that appellant was guilty beyond any reasonable doubt of driving the minivan at the time it caused the accident.

*1. When the evidence is circumstantial, circumstances proven must be consistent with hypothesis of guilt and inconsistent with any rational hypothesis other than guilt.* Circumstantial evidence receives "the same weight as any other evidence so long as the circumstances proved are consistent with the hypothesis that the accused is

guilty and inconsistent with any rational hypothesis other than guilt." *Id.* citing *State v. Leake*, 699 N.W.2d 312, 319 (Minn. 2005). Where circumstantial evidence is consistent with the State's theory that the defendant committed the act on which the charges are based, but is also consistent with the rational hypothesis that another person committed the act, and the State's evidence did not exclude the other rational hypothesis, the evidence was insufficient to sustain the guilty verdict.) See *Hughes*, at 313; *Bernhardt v. State*, 684 N.W.2d 465, 478-479 (Minn.2004); *State v. Swain*, 269 N.W.2d 707, 712 (Minn.1978) (In a circumstantial evidence case, "all the circumstances proved must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt").

**D. A New Trial Should be Granted Here  
in the Interests of Justice, for Surprise, the  
Verdict is not Justified by the Evidence,  
and for Prosecutor Misconduct**

On the defendant's written motion, a new trial may be granted by the Court on any of the following grounds:

- (1) If required in the interests of justice;
- (3) Misconduct of the jury or prosecution;
- (4) Accident or surprise which could not have been prevented by ordinary prudence;
- \*\*\*
- (7) The verdict or finding of guilty is not justified by the evidence, or is contrary to law.

Minn. R. Crim. P. 26.04 (2008).

Whether a new trial should be granted rests largely within the discretion of the trial court. See *State v. Collins*, 276 Minn. 459, 150 N.W.2d 850 (1967), cert. denied, 390 U.S. 960, 88 S.Ct. 1058, 19 L.Ed.2d 1156; *State v. Huber*, 275 Minn. 475, 148

N.W.2d 137 (1967). A new trial should be granted where the substantial rights of the accused have been so violated as to make it reasonably clear that a fair trial was not had. *State v. Yurkiewicz*, 212 Minn. 208, 3 N.W.2d 775 (1942); *State v. Kruse*, 137 Minn. 468, 163 N.W. 125 (1917); *State v. Crawford*, 96 Minn. 95, 104 N.W. 822, 1 L.R.A.,N.S., 839 (1905); *State v. Nelson*, 91 Minn. 143, 97 N.W. 652 (1903).

A guilty verdict based upon speculation and conjecture provides grounds for granting a new trial motion. See *State v. Johnson*, 277 Minn. 230, 152 N.W.2d 768 (1967), cert. denied, 390 U.S. 990, 88 S.Ct. 1190, 20 L.Ed.2d 1297; *State v. Anderson*, 272 Minn. 384, 137 N.W.2d 781 (1965). Denials of motions for a new trial are often based on facts demonstrating evidence in support of defendant's guilt was overwhelming. See *State v. Dobbins*, 725 N.W.2d 492 (2006), certiorari denied 127 S.Ct. 3021, 168 L.Ed.2d 741; *State v. Clobes*, 422 N.W.2d 252 (Minn. 1988); *State v. Wiley*, 295 Minn. 411, 205 N.W.2d 667 (1973); *State v. Bergland*, 1971, 290 Minn. 249, 187 N.W.2d 622 (1971); *State v. West*, 285 Minn. 188, 173 N.W.2d 468 (1969); *State v. Townley*, 149 Minn. 5, 182 N.W. 773 (1929), certiorari denied 42 S.Ct. 54, 257 U.S. 643, 66 L.Ed. 413.

Inaccurate transcription of an audio recording of defendant's response to police officer's question may be grounds for granting a new trial where defendant has not initiated the introduction of the information. See *State v. Green*, 747 N.W.2d 912 (Minn. 2008). A new trial may also be granted on a showing that pretrial publicity appearing in news media so contaminated the criminal proceeding that it was impossible to ensure a trial consistent with fundamental fairness as required by the due process clause of

Fourteenth Amendment or that publicity was of such nature that it was impossible to secure an impartial jury. *State v. Azzone*, 271 Minn. 166, 135 N.W.2d 488 (1965).

A conviction will be reversed for prosecutorial misconduct where (1) the prosecutor's remarks or conduct were improper; and (2) the remarks or conduct prejudicially affected the defendant's substantial rights so as to deprive her of a fair trial. *U.S. v. Samples*, 456 F.3d 875 (8th Cir. Ct. App. 2006), rehearing and rehearing en banc denied, certiorari denied 127 S.Ct. 1162, 166 L.Ed.2d 1005. Whether a new trial should be granted because of misconduct of the prosecuting attorney is also ordinarily a matter within discretion of trial court since the trial court is in best position to evaluate the prejudicial nature of the conduct complained of. *State v. Russell*, 1969, 282 Minn. 223, 164 N.W.2d 65 (1969), certiorari denied 90 S.Ct. 109, 396 U.S. 850, 24 L.Ed.2d 100.

In cases involving serious prosecutorial misconduct, a motion for a new trial will be granted unless the state can demonstrate certainty beyond a reasonable doubt that the misconduct was harmless. See *State v. Caldwell*, 322 N.W.2d 574 (Minn. 1982). See also *State v. Van Wagner*, 504 N.W.2d 746 (Minn. 1993) (new trial granted for prophylactic reasons where prosecutor improperly persisted in attempts to get prejudicial hearsay evidence before the jury). Prosecutorial misconduct results from violations of clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in state's case law and affects substantial rights where there is a reasonable likelihood that it would have had a significant effect on the jury's verdict. See *State v. Fields*, 730 N.W.2d 777 (2007); *State v. Washington*, 725 N.W.2d 125 (Minn. Ct. App. 2006), review denied.

Prosecutorial misconduct is deemed "harmful" if it played significant or substantial role in persuading the jury to convict; the more serious the misconduct, the more likely it was harmful. See *State v. Van Wagner*, 504 N.W.2d 746 (1993). However, even if the prosecutor's misconduct may have been harmless, a new trial may nevertheless be granted for prophylactic reasons. *Id.* Prosecutorial misconduct and its impact are to be examined, for purposes of determining whether misconduct was "harmful," within context of record as whole, considering strength of state's evidence and weaknesses of any defense evidence. *Id.* Even where a precautionary instruction is given, a new trial will be ordered if it appears that defendant has been deprived of fair trial. *State v. Jones*, 266 Minn. 523, 124 N.W.2d 727 (1963).

It is improper for a prosecutor to ask questions that are calculated to elicit or insinuate an inadmissible and highly prejudicial answer. *State v. Brown*, 739 N.W.2d 716 (2007). See also *State v. Goldenstein*, 505 N.W.2d 332 (Minn. Ct. App. 1993), review denied (New trial may be required for prosecutorial misconduct where state asks questions which by innuendo may lead to prejudicial supposition as to existence of facts not proved); *State v. Currie*, 267 Minn. 294, 126 N.W.2d 389 (1964) (Asking questions which by innuendo leave a prejudicial supposition as to the existence of facts not proved may require a new trial even where objection to the questions is sustained). Likewise, eliciting improper testimony going to defendant's or witnesses' credibility where that credibility is an ultimate issue can be the basis for granting a new trial. See *State v. Turnbull*, 267 Minn. 428, 127 N.W.2d 157 (1964)

Defendant is entitled to a new trial based on false trial testimony where defendant establishes, by a fair preponderance of the evidence, that: (1) the court must

be reasonably well satisfied that the testimony in question was false; (2) without that testimony the jury might have reached a different conclusion; and (3) the petitioner was taken by surprise at trial or did not know of the falsity until after trial. *Opsahl v. State*, 677 N.W.2d 414 (2004). Where it has not been established that the government knowingly sponsored false testimony, a defendant seeking a new trial must show the jury would have probably or likely reached a different verdict had the perjury not occurred. *Evenstad v. Carlson*, 470 F.3d 777 (8<sup>th</sup> Cir. Ct. App. 2006).

## VI.

### ARGUMENT

**Olga Marina Franco del Cid**

**The Only Person Who Knows Directly**

**Who was in the Van as the Crash Occurred**

**Who was Driving the Van as the Crash Occurred**

**What Happened Inside that Van as the Crash Occurred**

The State's hypothesized that Defendant was driving the van at the time it caused the crash with the school bus. The defense has a different, inconsistent, and, based on the evidence introduced at trial, a more likely hypothesis. Defendant asserts that her physically abusive boyfriend, Francisco Mendoza, the owner of the van, was driving his van at the time it caused the crash with the school bus.

At the conclusion of the crash, Defendant was sitting in the driver's seat of the van with her right foot caught under the dash by the floor near the center. The State hypothesized that because Defendant was sitting in the driver's seat at the conclusion of the crash with her foot trapped, she was by inference the driver of the van at the time of the collision. Defendant asserts that she was sitting there because it is close to where she ended up when the van stopped spinning and this was the only place she

could pull herself up to, the driver's seat, and the steering wheel the only thing she could use to do so.

The State introduced evidence that on initial impact by the van with the school bus the van's occupants would have been propelled forward or maybe at a slight 14 degree angle. The Defendant agreed with this evidence. But, the State offered no direct or rebuttal evidence concerning the movement of the van after the initial impact: *the van's undisputed 270-degree-about-face-less-than-two-second spin.*

Defendant introduced expert testimony by an engineer who developed a program for exactly that spin factor and the effect on vehicle occupants, a program that was peer-reviewed and published in his engineering profession's journal and has been used many times by the him in other cases. Through this expert, Defendant established that on initial impact, the occupants would indeed move forward as the van stops, but they keep going in the direction they were going before the van stopped, or until something like an airbag or the dash slowed or stopped the occupants. The expert then discussed what the State disregarded, though it was aware of it – what happens next.

Within milliseconds of the initial impact with the school bus traveling perpendicular to the van at 50-60 mph and as the much larger school bus continued on, that perpendicular motion was transferred to the van, yanking the van in the direction the school bus was going and causing it to spin those 270 degrees to the right. Just as the occupants on initial impact kept going in the same direction as before the initial impact, the same occupants will react the same way. As the van suddenly changes direction and begins its spin to the right, the occupants who having been stopped by the

airbags and continue not moving. The moving van leaves them like a waiter leaves a glass on a table when he yanks the table cloth out from under it.

The occupants' bodies remain essentially where they were when the van started its fast spin until encountering some object, in which case the occupants will be pressed against that object and begin moving with the van. If an occupant does not encounter any such object, such as were a driver's door to pop open on the initial impact, the occupant will find himself out of the van. It would be physically impossible for him to not go out of the spinning van. The passenger, however, will encounter the driver's seat and/or the steering wheel and end up pressed there or fall to the floor or a combination of both and be pressed there and, pressed there will move with the van until it stops spinning.

But, no one actually saw all this happen, except Defendant, whose credibility was consequentially critical. They saw only the after-effects, the conclusion of the process, from which everyone worked backwards trying to figure out the beginning. Except Defendant.

No witness testified to having actually seen Defendant driving the van at the time of the crash and no direct evidence was introduced to show that she was. Mendoza, her physically abusive boyfriend and the van's owner was seen outside the van briefly, then fled the scene and was picked up a short distance from the accident by an acquaintance and a couple of days later called his sister and told her he had been in an accident with his girlfriend and got hurt and needed money. But he did not say Defendant was driving and he did not deny he was driving. No one saw Mendoza actually get out of the van. It is all circumstantial. Except Defendant's testimony.

The State was unwilling to admit that Mendoza was in the van with Defendant at the time of the crash, but argued that whether he was or not matters not. Defendant asserts that it matters very much whether or not the controlling and jealous and physically abusive and verbally threatening Mendoza was in his own van as opposed to the hypothesis that an assertive and controlling and physically abusive boyfriend would even permit the woman he misused and abused, disrespected and neglected, to drive his van. This man who would not allow Defendant either to carry her own cell phone or possess a key to her own home. But most importantly, it matters because he was driving his van when it crashed into the school bus, not her. Defendant asserts that it matters very much.

As no one actually saw or identified Defendant driving or as the driver of the van at the time of the crash, or even that they saw her in the van before the crash, there was no direct evidence that Defendant was actually driving the van at the time it collided with the school bus, only circumstantial. As no one saw Mendoza in or driving the van at the time of the crash, or get out of the van during or after the crash, other than Defendant's direct testimony to those facts, the evidence as to Mendoza's presence and participation was also circumstantial. The Minnesota Supreme Court tells us that where the evidence is circumstantial, the State cannot convict a person unless that evidence is consistent only with the State's hypothesis. But, it was not. The evidence was not only consistent with Defendant's assertions, it was *more* consistent with Defendant's assertions. The evidence was therefore insufficient to the conviction.

Only one person has direct knowledge of who was in the van and who was driving the van as the crash occurred. Only one person has direct knowledge of what

happened inside that van as the crash occurred. Only one person, -Olga Marina Franco del Cid.

A young woman whose physical abuse at the hands of her domineering boyfriend ended when he abandoned her broken and bleeding in the bitter Minnesota cold in the vehicle he had moments before crashed into a school bus full of kids and then fled from an act for which the entire world would blame and condemn her and only her. Physical abuse that left her with such terror in her heart that she may indeed have heeded his threat that he would kill her if she so much as said he had been there. Such terror that she cries at the mention of his name.

A young woman who left her poor, rural Guatemala home to risk her life that she might improve it. A young woman with but a sixth grade education who has endured six months of anyone's worst nightmare and the only consolation being that at least in jail she is safe from her boyfriend.<sup>30</sup>

A young woman who sees few kind faces if she dares to look at all. This young woman got up on that stand to tell her story, knowing that the prosecutor who became in her perception her persecutor, an experienced trial lawyer, would ask her nearly whatever he wanted and would try to trick her into saying what she did not mean, his nineteen years of education with more required every year he wishes to keep his license against her six.

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<sup>30</sup> Ah, things *are* not always as they seem. Reflection has proven an initial perception by counsel was in fact a misperception: there was much prudence in the Court's well-considered and intended security measures, including the clear presence of sufficient uniformed and armed police officers to guarantee *everyone's* safety, including, if not particularly, Defendant's.

This young lady got up there though she had to answer all those questions looking right at the families who believe she killed their children. Or looking over at the jury, a group of people from a world far away from hers and she from a world far away from theirs, neither having any real understanding of the other.

She got up there to defend herself, to tell her story just as everyone had demanded of her. And she did. She told us what happened that afternoon when she entered her own "Ground Hog Day," waking every day after every day to the same small cell, the same meals, the same everything. And what she said, others had often already corroborated. She spent some three hours answering questions, through tears when talking about her abusive boyfriend and what he did to her, but always polite and sincere.

She told us all those things we went over throughout this Memorandum. She was not substantively impeached. Her story held, her facts checked. She described what is now self-evident as having had to happen, the State's hypothesis never exceeding but another possibility. Nothing else makes sense. Not the State's hypothesis. Besides, the State so let many opportunities to learn more accurately what happened slip away, or refused to look, that its hypothesis was no more than an advertising slogan – she was pinned behind the wheel, that's all we need to know, concrete walls, now off you go.

What she told us *makes sense*. Defendant's hypothesis is consistent with all the circumstantial evidence. The State's hypothesis is not. And in such a case as this, that consistency requires entry of a Judgment of Acquittal.

## VII. CONCLUSION

*Every truth passes through three stages before it is recognized. In the first it is ridiculed, in the second it is opposed, and in the third it is regarded as self-evident. Arthur Schopenhauer, 1788-1860*

In the beginning, Ms. Franco told us Mendoza was in his van with her as the crash occurred, Mendoza was driving his van as the crash occurred, and what happened to her and Mendoza in his van as the crash occurred. But she was ridiculed by all because the State not only would not listen, but disparaged all she said, all she was. She next tried through a trial to tell us Mendoza was in his van with her as the crash occurred, Mendoza was driving his van as the crash occurred, and what happened to her and Mendoza in his van as the crash occurred. But she was opposed by the State and all who watched because the truth was unacceptably painful and said far too much about the State's blind drive to convict her while disregarding and too often failing even to seek *all* the facts. So, now, all she has left is her confidence in this Court. There has not been and there will not be a more thorough, more objective review of this case and the evidence from beginning to end than there has been by this Court. So, Ms. Franco begs this Court to correct this injustice, an injustice that is as clear as the truth has become self-evident.

From the evidence adduced at trial it is self-evident that Ms. Franco's abusive boyfriend was in his van with her as the crash occurred. It is self-evident that Mendoza was driving his van as the crash occurred. And it is self-evident *what* happened to Ms. Franco and to Mendoza in his van as the crash occurred. Regrettably, the Court has no power to do anything to erase this tragedy or the inconceivable pain it inflicted. But, the

Court does have the power to say enough is enough and see to it that yet another tragedy is averted.

Defendant therefore respectfully asks this Court, based on the insufficiency of the evidence, to enter Judgment of Acquittal, or in response to the improprieties of the State, at least to order a New Trial. The facts and the law support it and the facts and the law thus require it.

Someone must believe that Ms. Franco too has under any humane sense of fairness and justice a right to an opportunity to heal. But, the belief without action is insufficient, for *no person's healing can begin when the price paid for it is injustice.*

Respectfully submitted on behalf of Olga Marina Franco del Cid this 29th day of August, 2008.

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