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July 29, 2009

Ms. Karen Bierman
Lyon County District Court Administrator
607 West Main Street
Marshall, Minnesota 56258

RE: State of Minnesota v. Olga Marina Franco del Cid
District Court Case No. 42-CR-08-220

Dear Ms. Bierman:

I am faxing herewith Defendant's Petition for Postconviction Relief, Affidavit, and Exhibits. Two of the Exhibits cannot be faxed, 1) the DVD; and 2) the BCA material filed under seal for data privacy reasons. Recognizing the materials comprise over 80 pages, I will send the three copies (and original if you prefer) by U.S. mail. If you desire that I do so, please send me an email on receipt of this and I will put them in the mail so your staff doesn't have to make the copies. In the meantime, I will also email a copy to Rick Maes and deliver a hardcopy to the Attorney General, with confirmation when the latter has been done.

Respectfully,



Neal A. Eisenbraun
NAE/maci
Attachment

C: Richard R. Maes, Esq. (by Fax: 507-537-6495; Email: RickMaes@co.lyon.mn.us)
Maria Caram Ibarra (by Email: macaram@usa.net)

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF LYON

FIFTH JUDICIAL DISTRICT

Case Type: Criminal

Case File No. 42-CR-08-220

OLGA MARINA FRANCO del CID,
(a.k.a. Alianiss Nunez Morales)

Petitioner.

and

STATE OF MINNESOTA,

Respondent,

**DEFENDANT'S
PETITION FOR POSTCONVICTION RELIEF**

TO: Chief Judge, Lyon County District Court, 607 W. Main St., Marshall, MN 56258.

Pursuant to Minn. Stat. § 590.01 (Supp. 2009), Defendant Olga Marina Franco del Cid respectfully submits the following petition for postconviction relief.

**I.
STATEMENT OF THE FACTS,
GROUNDS UPON WHICH THE PETITION IS BASED,
AND RELIEF DESIRED**

(For ease of reference, the Exhibits are sequentially Bates' numbered OF000001-OF000064 at the lower right corner. When citing to an Exhibit, the Bates' page number is also cited to enable the reader to refer directly to that page.)

**A.
CHARGES AND CONVICTIONS**

Olga Marina Franco del Cid ("Franco") 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.” Exhibit A (OF000001-003) (Complaint).

The charges were based on a February 19, 2008 collision near Cottonwood, Minnesota between a 1998 Plymouth Voyager Mini-van (“Mini-van”), a school bus, and a pickup (“Accident”). *Id.* The Accident caused the deaths of four children, injured sixteen others, and injured Franco and another adult. *Id.* The prosecutor alleged Franco was driving the Mini-van at the time of the Accident, failed to stop for a stop sign, and thereby caused the crash. *Id.* Franco denies she was driving the Mini-van at the time of the Accident or that she ever drove the Mini-van at all and that the Mini-van’s owner, Franco’s abusive boyfriend, Francisco Sangabriel Mendoza (a.k.a. Samuel Rivera Melendez) (hereafter “Mendoza”) was driving and fled the scene within minutes after the Accident.

A jury trial was held before the Honorable David W. Peterson and on August 6, 2008, the jury returned its verdicts finding Franco guilty on all 24 Counts. See Exhibit B; Trial Transcript; pp. 1353-1361 (OF000005-013) (hereafter “T”). All but the charge of false information to a peace officer were wholly dependent on whether or not 1) Franco was properly found, beyond any reasonable doubt, to have been the driver of Mendoza’s Mini-van at the time it caused the Accident with the school bus; and 2) the driving conduct in causing the Accident was grossly negligent.

B.
MINNESOTA STATE PATROL’S
ANIMATED ACCIDENT RECONSTRUCTION REVEALED POST-TRIAL

An imperative of Franco's defense was her assertion that the collision caused two, distinct, physical movements of Mendoza's Mini-van calling into play two, distinct, analyses of the physics of the Mini-van's movement and the corresponding movement of the Mini-van's occupants. Affidavit of Neal A. Eisenbraun (Franco's co-defense trial counsel and sole appellate counsel). At impact, the school bus was traveling south at approximately 55-60 mph and perpendicular to Mendoza's Mini-van, which was traveling east at approximately 30-50 mph (range depending on which expert and which formula was most accurate). See Exhibit B; T at pp. 920:5-7 (OF000014), Testimony of Trooper Skoglund (State's accident reconstruction expert) (School bus traveling at 55-60 mph) ("Skoglund Testimony"); 920:11-15 (Skoglund – Mini-van traveling at 46-50); and 1156:9-16 (OF000015), Testimony of Donn Peterson (Franco's forensic engineer/accident reconstruction expert) (Peterson – Mini-van traveling at high 20s to 39/40 mph) ("Peterson Testimony").

The initial 14 or more degree angular impact of Mendoza's Mini-van with the perpendicularly-moving school bus arrested the forward movement of the Mini-van while the occupants, not having then encountered an obstruction, continued to move forward, with that movement being arrested and shifted slightly left by the deployment of the airbags. See Exhibit B; T at pp. 1142:16-25 (OF000016); 1143:1-5 (OF000017); 1145:2-4 (OF000018); 1168:16-25 (OF000019); 1169 (OF000020); 1170 (OF000021); 1171:1-20 (OF000022); Peterson Testimony. Having hit the perpendicularly-moving school bus at an angle, the Mini-van was within milliseconds (i.e., instantly), spun fast to the right 270 degrees. See Exhibit B; T at pp. 926:10-11; 23-25 (OF000024), Skoglund Testimony (Mini-van spun 270 degrees); 1151:16-25 (OF000025), Peterson Testimony (fast spin). As the Mini-van spun to the right, the occupants were caused to move to the left, (Exhibit B; T at pp. 1142:16-25 (OF000016); 1143:1-5

(OF000017); 1145:2-4 (OF000018); 1168:16-25 (OF000019); 1169 (OF000020); 1170 (OF000021); 1171:1-20 (OF000022); (Peterson Testimony) a force anyone who has taken a corner fast has certainly experienced, i.e., as the car corners to the right, one feels one's body going to the left.

One of the State's first witnesses testified that on the initial impact of Mendoza's Mini-van with the school bus the driver's door of the Mini-van came open. See Exhibit B; T at pp.726:24-25 (OF000026); 727:1-2(OF000027), Testimony of Larry Moat (State's eyewitness to crash). While the State offered no direct or rebuttal evidence on the subject, Franco's crash-reconstruction expert testified that his inspection of the driver's and passenger's seat belts demonstrated a lack of any "witness marks" which in a crash of this severity are certain to have appeared had either Mendoza or Franco been wearing his and her seat belt at the time of the crash. Exhibit B; T at pp. 1149:13-25 (OF000028); 1150:1-23 (OF000029), (Peterson Testimony). Thus, Franco's expert testified, the unrestrained driver would have been ejected from the Mini-van and the passenger would have moved left until being stopped by the driver's seat. Id. at 1161:21-25 (OF000030); 1162:1-16 (OF000031).

Franco's expert also testified that because the occupants were unrestrained and the Mini-van struck the school bus at an angle, the occupants' bodies would, within milliseconds, have begun the leftward movement and while the airbags would have stopped the upper body from continuing forward, the airbags would not have stopped the lower body and the passenger's legs and feet would have continued moving under the airbag both forward and to the left. Exhibit B; T at pp. 1142:16-25 (OF000016); 1143:1-5 (OF000017); 1145:2-4 (OF000018); 1168:16-25 (OF000019); 1169 (OF000020); 1170 (OF000021); 1171:1-20 (OF000022); Peterson Testimony. Both the State and Franco agree that the overwhelming majority of the structural damage to the

Mini-van resulted from the Mini-van's initial impact with the school bus and that this was also when Franco's right foot became trapped in that damage under the center of the dash.

The State not only produced no evidence concerning the movement of the Mini-van's occupants during the Mini-van's fast, 270 degree rightward spin milliseconds after the initial impact, the State disputed that there would have been any movement. See Exhibit B; T at p. 932-933 (OF000032-033) (Testimony of State's accident reconstruction expert). An animated recreation of the crash sequence was crucial to Franco's ability to adequately demonstrate and explain the force and immediacy of the spin and the ensuing leftward-positioning effect on the occupants' bodies. See Exhibit C (OF000046) (Fox 9 News Feature on State Patrol Animated Recreation of Accident).

It is difficult if not impossible to adequately describe the two, distinct, movements of the Mini-van and the ensuing and distinctly different directional forces on the occupants. Likewise, it is difficult and near impossible to mentally conceptualize the distinctiveness of the two movements and correlative forces on the occupants, particularly the immediate, secondary, 270 degree rightward rotational spin of the Mini-van without visualization of the actual motion that transpired. Franco's crash-reconstruction expert opined to defense counsel that only an animated recreation of the crash sequence and vehicle movement would enable him to adequately explain the forward and then leftward positional changes of the Mini-van's occupants' during the crash sequence so that an average lay-person could grasp the imperative foundational sequence sufficiently. See Eisenbraun Affidavit.

Seeking a facility that could produce such an animation, defense counsel were quoted prices ranging from a low of approximately \$10,000 for a very basic, not-to-scale animation without showing occupant movements, to a high of \$20,000-\$30,000 if Franco required a

precise-to-scale re-creation animation including occupant positioning effects. See Eisenbraun Affidavit. Because Franco's poverty prevented her from being able to fund even the simplest animated recreation and Minnesota law does not provide impoverished defendants with sufficient funds to pay the costs of an animated recreation, Franco was therefore unable to do so.

Subsequent to the trial and Franco's post-trial motions, Franco learned that the State Patrol itself had prepared or had caused to be prepared an animated recreation of the mechanisms of the entire crash sequence, demonstrating the State itself deemed this secondary recreation necessary for purposes of explaining the accident sequence in a comprehensible manner. That the State Patrol had produced this animated recreation was discovered on or about January 15, 2009, when Fox 9 news televised a segment showing the State Patrol's animation. See Exhibit C (OF000046).

Franco was and never has been notified by the State that the State Patrol had, was in the process of, or intended to prepare or cause to be prepared an animation of the Accident sequence. See Eisenbraun Affidavit. Thus, this important State accident reconstruction evidence through which Franco's expert could have adequately demonstrated the crash sequence, particularly the most important aspect to Franco's defense, the spin sequence, was unavailable to her at trial. Having no knowledge or notice of the State Patrol's intent to produce the animated re-creation, Franco was also deprived of information material to her decision to demand a speedy trial.

Relief Desired. Franco asks the Court to order the State Patrol to disclose when it decided to fund and create the animated depiction of the crash sequence and when it did so, in order that the Court can determine whether the State's failure to reveal that information prevented Franco from receiving a fair trial, as the animation would have been the best demonstrative evidence by which Franco could have demonstrated the physics of the Accident

sequence and the effect on the Mini-van's occupants during all portions of that sequence. Franco also asks the Court to grant her a new trial so that this critical new evidence can rightfully be considered by a jury as necessary to vindicate Franco's fundamental right to a fair trial.

C.
NEW, CONCLUSIVE EVIDENCE OF
BOYFRIEND'S PRESENCE IN HIS MINI-VAN

As introduced above, another crucial element of Franco's defense was the presence in the Mini-van of the Mini-van's owner, Franco's physically abusive boyfriend, Mendoza. From its opening statement, the State dismissed Franco's defense that Mendoza was in the Mini-van at the time of the crash by characterizing what it knew as a near certain fact as mere "rumors or conversations, reports" of someone else being present in the Mini-van. See Exhibit B; T at p. 636 (OF000037).

The State had collected the Mini-van's airbags after the Accident and requested that Franco provide a sample of her body fluids, which she voluntarily did, in order to discern whether her DNA matched the DNA on either airbag. Though Franco also informed the State that the defense possessed personal belongings of Mendoza, including his toothbrush, from which his DNA could also be obtained and compared, the State never tested those objects for Mendoza's DNA to compare with the DNA of the "unknown male" found on both airbags, the result of which would have produced exculpatory evidence, conclusively demonstrating that Mendoza was present in his Mini-van at the time of the Accident. See Eisenbraun Affidavit. Additionally, the State had participated in the execution of a search warrant on Franco's and Mendoza's trailer home during which more than 30-some items of personal property belonging to both Franco and Mendoza were seized by ICE agents. See Exhibit B; T at p. 878 (OF000045-1)

After the Bureau of Criminal Apprehension's ("BCA") laboratory reported that none of the DNA obtained from either airbag matched Franco's DNA, but instead came from an "unknown male," Franco reiterated that the defense possessed some of Mendoza's personal belongings that could be tested and compared with that of the "unknown male," but the State still did not do so. See Eisenbraun Affidavit. Franco did not have the funds with which to obtain her own test of these belongings. See Eisenbraun Affidavit. Nor had the prosecutor prior to trial provided Franco with copies of the BCA's entire file, or even all of the materials the prosecutor had himself obtained; it produced only a letter disclosing that the initial testing would potentially render some of the evidence incapable of subsequent testing, and later, the report containing the BCA examiner's conclusions. See Exhibits E (OF000048) (Spoliation notice) and F (OF000049-050) (Examiner's Report of Conclusions).

After this appeal was filed and the January Fox 9 news report aired, a donor loaned Franco the funds with which to test Mendoza's toothbrush for his DNA for comparison with the DNA of the "unknown male" found on both the driver's and passenger's airbags. See Eisenbraun Affidavit. Franco had the tests conducted and the DNA found on Mendoza's toothbrush matched the DNA found on both the driver's and passenger's airbags. See Exhibit G (OF000051).

Had the State analyzed not only Franco's DNA, but also Mendoza's, this evidence would have been, as it should have been, available to Franco in support of her entire defense, i.e., the presence of the boyfriend and that he was the one who was in fact driving the Mini-van at the time of the Accident. In fact, though the State could easily have determined the blood on the airbags was Mendoza's at the same time it undertook to determine it was *not* Franco's, the State elected not to, thus permitting the prosecutor to unfairly and improperly confuse the jury on this

critical fact by claiming it did not know to whom the blood DNA belonged and to falsely imply that it could have been any one of the multiple first responders on the scene. See, e.g., Exhibit B; T at p. 636 (OF000037).

Relief Desired. Franco requests that the Court consider the conclusive new exculpatory evidence that Mendoza, the Mini-van's owner, was in fact present in his Mini-van at the time of the Accident and whether the State's failure to test Mendoza's DNA for comparison at the same time it tested Franco's improperly denied Franco her fundamental right to a fair trial. See section E, below, at p. 13 (Prosecutors considered ministers of justice who safeguard defendants' rights as well as enforce the public's rights and are charged with the ethical responsibility of determining that justice is done, not just winning the case). The State had available to it the DNA evidence containing the exculpatory information, had the means by which to determine the evidence was in fact exculpatory, and the additional effort would have been minimal, but in failing to conduct that additional test, rendered that exculpatory evidence unavailable to Franco. Franco asserts that the State's unjustifiable failure entitles her to a new trial where this exculpatory evidence can be introduced in her defense and requests that the Court so order.

D.

PROSECUTOR WITHHELD A POTENTIALLY EXCULPATORY DOCUMENT AND ARGUED FACTS CONTRADICTED BY THAT DOCUMENT

When, after filing her appeal and then receiving the funds to enable Franco to conduct her own DNA test to compare Mendoza's DNA to that found on the airbags, Franco's counsel obtained the BCA's complete file. See Eisenbraun Affidavit. In the BCA's file materials, Franco discovered a July 18, 2008 fax from Lyon County Attorney Richard R. Maes to BCA forensic scientist Amy A. Liberty, entitled "Disclosure Request." The prosecutor's Disclosure Request asked Ms. Liberty to "Please FAX a copy of your notes indicating where on the airbags

the samples that were analyzed were located.” See Exhibit H (OF000052). A handwritten notation on this fax states “faxed case notes pgs 1-3 on 7/21/08.” *Id.* Franco is unaware whether the prosecution also obtained and withheld from her other portions of the file as nothing other than the pre-test-spoliation notice and reported conclusions were ever disclosed by the prosecutor.

In the State’s opening statement, the prosecutor stated to the jury as follows:

10 *** You'll hear from the BCA agent
11 who will tell you, Well, I -- I did find a little bit of
12 blood on the air bags. I found some not only on the driver's
13 air bag, but a little bit -- *a little bit* on the *driver's* air
14 bag, and *quite a bit* on the *passenger* air bag.

See Exhibit B; T at p. 636 (OF000037) (State’s Opening Statement) (emphases added).

The BCA notes which the prosecutor had requested on July 18, 2008 and which were faxed to him on July 21, 2008 show the opposite. Not only were there more blood stains identified on the driver’s airbag than were identified on the passenger’s airbag, the undisclosed documents reveal that there were also blood stains found on the back of the driver’s airbag whereas none were found on the back of the passenger’s airbag. See Exhibit I (OF000053), (BCA notes, pp. 1-3) (submitted in a sealed envelope as the State asserts that the BCA file materials obtained by Franco are non-public data considered discovery in a criminal case and restricted from further disclosure by Minn. R. Crim. P. 9.03, Subd. 4, Minn. Stat. § 13.82, and Minn. Stat. § 299C.155.); see also Exhibit F (Report on the Examination of Physical Evidence, Report No. 3 June 20, 2008) (3 blood stains from driver’s airbag analyzed; 2 blood stains from passenger airbag analyzed).

Because the prosecutor withheld the information he had specifically requested from, and which was provided to him by, the BCA, Franco was unable to challenge the false and misleading impression that the passenger airbag contained “quite a bit” of blood, but there was only “ a little bit on the driver’s airbag,” suggesting that, on the chance that Franco was to be believed in stating Mendoza was in fact in the Mini-van at the time of the Accident (though the prosecutor disputed this throughout the trial) the existence of more blood on the passenger airbag thus implied that is where he had been seated.

Had the prosecutor properly produced this discovery material he had in his possession, Franco would have rightfully been able to demonstrate the State’s lack of veracity on an important issue and this information would have corroborated the veracity of Franco’s testimony that Mendoza, while outside the Mini-van, reached in the passenger window to try to free her right foot, and that he also tried from the driver’s side to free her right foot, hence the blood on the back of the driver’s side airbag. Finally, because Franco testified and therefore rendered her credibility imperative, and she is the only witness who testified to observing blood on Mendoza immediately after the Accident, this evidence was undeniably critical to Franco’s credibility and thus to her defense.

Relief Desired. Franco requests a hearing to determine whether the State’s failure to produce evidence in its possession (and whether additional evidence may have been withheld) unfairly impaired Franco’s credibility, prevented her from fully defending herself, and thus deprived her of her fundamental right to a fair trial. Furthermore, Franco asks the Court to determine whether the State’s inexplicable decision to test only Franco’s DNA for comparison when it could have simultaneously tested Mendoza’s DNA for comparison, which would have corroborated Franco’s testimony that 1) Mendoza was in the Mini-van at the time of the

accident; 2) was injured and *bleeding*; and 3) that he had fiddled around by both the passenger's airbag and the driver's airbag in trying to free Franco's right foot, unfairly deprived her of her fundamental right to a fair trial. (Other than the DNA evidence, there was no evidence outside Franco's testimony that Mendoza was bleeding. In fact, the testimony suggested he was not, which could have had no effect other than to cast fatal doubt on Franco's credibility.)

E.
POST-TRIAL APPELLATE DECISION
WARRANTS RECONSIDERATION OF FRANCO'S
MOTION FOR JUDGMENT OF ACQUITTAL FOR INSUFFICIENCY
OF THE EVIDENCE ON ELEMENT OF GROSS NEGLIGENCE

On June 16, 2009, the Minnesota Court of Appeals issued an unpublished decision wherein the Court held that merely speeding under icy winter road conditions and failing to stop for a stop sign does not amount to gross negligence. *State v. Van Tassel*, 2009 WL 1684072 (Minn. App.) (copy attached as Exhibit J; OF000054-64). Van Tassel was the driver of a car involved in a single-vehicle accident resulting in the death of her passenger. The evidence established that Van Tassel was driving too fast – an estimated fifteen miles above the speed limit – for the icy road condition at the intersection, that due to her speed her application of her brakes caused her vehicle to begin to slide, that believing she would not be able to stop, she intentionally elected not to stop for the stop sign at the intersection, and resulting in a crash that caused the death of Van Tassel's passenger. The dissent noted that the evidence established that Van Tassel was traveling “about 70” miles per hour in a 55 mile-per-hour zone, drove partially on a snow-covered shoulder, put the car in neutral, ran a stop sign, was ‘jamming out to music,’ and was driving in this manner during blowing snow that made driving conditions hazardous.”

On appeal from convictions of criminal vehicular homicide and reckless driving, Van Tassel argued, *inter alia*, that the evidence was insufficient to prove criminal vehicular homicide.

The Court of Appeals agreed, observing that “[g]ross negligence requires evidence of negligence coupled with ‘*the presence of some egregious driving conduct.*’” Citing *State v. Miller*, 471 N.W.2d 380, 384 (Minn. App. 1991) (Emphasis added). The Court further observed that in determining “the distinction between ordinary negligence and gross negligence, the defendant's conduct as a whole must be examined.” Citing *State v. Al-Naseer*, 690 N.W.2d 744, 752 (Minn. 2005). Accordingly, the Court concluded that Van Tassel's actions in traveling an estimated 15 miles an hour over the speed limit on icy roads did not show egregious conduct above and beyond ordinary negligence or that the evidence demonstrates very great negligence without even scant care.” The Court further observed that:

Driving above the speed limit and too fast for weather conditions violates traffic laws and is evidence of civil negligence. See Minn. Stat. § 169.14, subd. 1 (2004) (requiring driver to maintain speed that is “reasonable and prudent under the conditions”); Minn. Stat. § 169.96(b) (2004) (stating that violation of traffic law is evidence of negligence in civil actions). But *without more*, exceeding the speed limit by driving about seventy miles an hour in a fifty-five-mile-an-hour speed zone while approaching an intersection that proved to be slippery, is driving too fast for conditions but it is not gross negligence. See *Grover*, 437 N.W.2d at 63 (stating that mere violation of statute generally does not satisfy standard for criminal negligence, much less criminal gross negligence).

(Emphasis added).

Finally, in considering the sufficiency of the evidence to sustain the conviction for gross negligence, the Court took issue with the prosecutor’s “inflammatory insinuations” that likely influenced the outcome by preventing an objective view of the evidence. In doing so, the Court observed that:

“Prosecutors are considered ministers of justice who safeguard the defendant's rights as well as enforce the public's rights. *State v. Cabrera*, 700 N.W.2d 469, 475 (Minn.2005). Prosecutors are charged with the ethical responsibility of determining that justice is done, not just with winning a case. *Berger v. United States*, 295 U.S. 78, 88 55 S.Ct. 629, 633 (1935). Although prosecutors have a duty to “use every legitimate means to bring about a just [conviction],” they also have a duty to “refrain from improper methods calculated to produce a wrongful [one].” *Id.*

Relief Desired. Based on the fact that in the present case the only evidence regarding driving conduct is that the Mini-van was, though less than the speed limit, traveling too fast to stop for, and did not stop for, the stop sign, Franco requests that the Court reconsider its prior denial of her motion for judgment of acquittal on the issue of gross negligence and based on this new appellate authority, now grant her motion.

F.
ERROR OF LAW – NO RIGHT OF WAY VIOLATION
COUNT VIII OF THE COMPLAINT

Regardless of who was driving the Mini-van at the time of the Accident, Franco’s conviction under Count VIII of the Complaint is contrary to the applicable law. That Count related to James Mark Hancock and contained the operative traffic violation charge on which all other criminal vehicular injury charges were based, i.e., the charge that the driver of the Mini-van ran a stop sign and thus failed to yield the right-of-way to the school bus and Mr. Hancock. See Exhibit A, Complaint at p. 9 (OF000003), Count VIII.

The charge was based on Minn. Stat. § 169.20, Subd. 3(a) (2008). This statute, entitled “Right of way,” and but for a statutory exception contained therein, would have *ordinarily* granted Mr. Hancock the right-of-way over the driver of the Mini-van. However, the State’s crash reconstruction expert determined from the “black box” in Mr. Hancock’s vehicle that when the crash was occurring, Mr. Hancock’s vehicle was traveling at 63 miles per hour. See Exhibit B; T at p. 921 (OF000043) (Skoglund Testimony).

The speed limit on the road on which Mr. Hancock was traveling is 60 miles per hour. See Exhibit B; T at p. 704:20-22 (OF000044); Testimony of James Hancock (“Q: Do you know what the speeding limit is on Highway 23 at that point? A: Sixty.”) Thus, at the time of the

crash, Mr. Hancock was traveling at an unlawful speed. “The driver of any vehicle traveling at an unlawful speed [forfeits] any right-of-way which the driver might otherwise have [under § 169.20].” Minn. Stat. § 169.20, Subd. 1(d) (2008) (emphasis added).

Relief Desired. Franco requests that the Court enter a judgment of acquittal on the conviction related to James Mark Hancock.

II.
IDENTIFICATION OF PROCEEDINGS
IN WHICH PETITIONER WAS CONVICTED,
AND DATE OF ENTRY OF JUDGMENT AND SENTENCE

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.

September 23, 2008: District Court denied Petitioner's Motions for Judgment of Acquittal or a New Trial.

October 8, 2008: Petitioner was sentenced to twelve years incarceration and sentence was immediately executed. Petitioner was transferred to the Minnesota Correctional Facility – Shakopee (MCF-SHK) where she is currently incarcerated under OID Number 227521. (Petitioner was and remains registered at MCF-SHK under the name Alianiss Nunez Morales, the name under which she was initially charged.)

III.
IDENTIFICATION OF PREVIOUS PROCEEDING
AND GROUNDS THEREIN ASSERTED ON BEHALF OF THE PETITIONER
TO SECURE RELIEF FROM THE CONVICTION AND SENTENCE

December 29, 2008: Petitioner filed a Notice of Appeal with the Minnesota Court of Appeals.

June 9, 2009: Petitioner filed with the Court of Appeals a Motion to Stay Appeal to Allow Franco to Renew her Motion for a New Trial based on Newly Discovered Evidence.

June 30, 2009 (filed July 1, 2009): The Court of Appeals granted Petitioner's motion to stay her appeal pending further proceedings in the District Court and ordering that Petitioner file a postconviction petition or a motion to reinstate her appeal within thirty days of the Court of Appeal's Order.

July 13, 2009: On Petitioner's request for guidance from the District Court concerning the Court's preferred method, timing, and procedure, if any, the District Court issued a Scheduling Order requiring that her Petition and required copies be filed with the Lyon County District Court Administrator on or before July 29, 2009.

**IV.
NAME AND ADDRESS OF ATTORNEY REPRESENTING PETITIONER**

Neal A. Eisenbraun, Atty. Reg. # 014860X
731 58th Avenue Northeast
Fridley, Minnesota 55432-5622

Respectfully submitted this 29th day of July, 2009.

NEAL A. EISENBRAUN, CHARTERED



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STATE OF MINNESOTA
COUNTY OF LYON

DISTRICT COURT
FIFTH JUDICIAL DISTRICT

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

OLGA MARINA FRANCO del CID,
(a.k.a. Alianiss Nunez Morales)

Petitioner.

and

STATE OF MINNESOTA,

Respondent,

**AFFIDAVIT OF NEAL A. EISENBRAUN IN SUPPORT OF
DEFENDANT'S PETITION FOR POSTCONVICTION RELIEF**

State of Minnesota)
) ss.
County of Hennepin)

Neal A. Eisenbraun, being first duly sworn on oath, attests as follows:

1. I was one of Defendant's trial attorneys and I am the attorney for Defendant in this appeal and base this affidavit on my own personal knowledge to which I am willing to testify under oath in Court if requested to do so.

2. I am and have been since 1983 licensed to practice law before the Supreme Court of Minnesota and the Minnesota District Courts and I am also admitted to practice before the United States District Court for the District of Minnesota, the Eighth Circuit Court of Appeals, and the United States Supreme Court.

3. Exhibits A through J are true and correct copies of the documents attached hereto and referenced in Defendant's Petition for Postconviction Relief.

4. An imperative of Defendant's defense was her assertion that the collision caused two distinct physical movements of Mendoza's mini-van calling into play two distinct analyses

of the physics of the mini-van's movement and the corresponding movement of the mini-van's occupants.

5. Defendant's crash-reconstruction expert opined that in order to adequately explain the mini-van's occupants' movement during the crash sequence so that an average lay-person could grasp that foundational sequence sufficiently, an animated recreation of the sequence was needed.

6. In seeking a facility that could produce such an animation, Defendant was quoted prices ranging from a low of approximately \$10,000 for a very basic not-to-scale animation without showing occupant movement, to a high of \$20,000-\$30,000 for a precise-to-scale recreation animation including occupant movement.

7. Subsequent to the trial and post-trial motions, Defendant learned after the airing of a Fox 9 news report on or about January 15, 2009 showing it that the State Patrol itself had prepared or had caused to be prepared an animated recreation of the mechanisms of the entire crash sequence which was revealed.

8. Though the State Patrol disclosed this animated recreation of the crash sequence to Fox 9 news, it has to this day never mentioned it to Defendant.

9. Defendant was never notified that the State Patrol had, was in the process of, or intended to prepare or cause to be prepared an animation of the accident sequence.

10. Additionally, during its investigation of the crash, the State had collected the mini-van's airbags after the accident and requested that Defendant provide a sample of her body fluids, which she voluntarily did provide, in order to discern her DNA to see if it matched the DNA on either airbag.

11. Though defense counsel also informed the State that the defense possessed personal belongings of Mendoza, including his toothbrush, from which his DNA could also be obtained and compared, the State never tested those objects for Mendoza's DNA to compare with the DNA of the "unknown male" found on both airbags, the result of which would have conclusively demonstrated Mendoza was present in his mini-van at the time of the accident and would have thus provided Defendant with important exculpatory evidence.

12. After the Bureau of Criminal Apprehension's laboratory reported that none of the DNA obtained from either airbag matched Defendant's DNA, but instead came from an "unknown male," defense counsel reiterated that the defense possessed some of Mendoza's personal belongings that could be tested and compared with that of the "unknown male," but the State still did not test Mendoza's DNA.

13. Defendant also learned through disclosures by the prosecution that the prosecution had obtained reports from the Federal Immigration and Custom's Enforcement agency ("ICE") disclosing that ICE had executed a search warrant on the trailer home of Defendant and Francisco Sangabriel Mendoza (a.k.a. Samuel Revira Melendez) whereupon ICE

had seized in excess of thirty items of personal property belonging to both Defendant and Mendoza.

14. Defendant did not have the funds with which to obtain her own DNA tests on those belongings.

15. After this appeal was filed and the January Fox 9 report aired, a donor loaned Defendant the funds with which to test Mendoza's toothbrush for his DNA for comparison with the DNA of the "unknown male" found on both the driver's and passenger's airbags, which testing revealed that the DNA from Mendoza's toothbrush did match the DNA of the "unknown male" found on the driver's and passenger's airbags.

16. The presence of Mendoza's blood DNA on both airbags would have reinforced Defendant's credibility which, because she testified, was an imperative in her defense, and a factor the State consistently sought to disparage and rebut.

17. When Defendant's counsel obtained the BCA's data for the purpose of comparing the DNA found on Mendoza's toothbrush with the "unknown male's" DNA found on the mini-van's airbags, Defendant found within the file a July 18, 2008 fax from Lyon County Attorney Richard R. Maes to BCA forensic scientist Amy A. Liberty.

18. The Maes' fax sought a copy of Ms. Liberty's "notes indicating where on the airbags the samples that were analyzed were located" and a handwritten note on that fax indicates the notes, pages 1-3, were faxed to the prosecutor on July 21, 2008.

19. However, the prosecution never revealed that he had obtained those notes, nor did the prosecutor provide Defendant with a copy of those notes, despite Defendant's requests for all discoverable materials and information.

20. The prosecutor subsequently misrepresented the distribution of the blood stains on the airbags in his opening statement, but because he had not provided those notes to Defendant, she was unable to rebut the prosecutor's misrepresentations.

21. The only materials produced by the prosecutor from the BCA were a spoliation notice and the examiner's report of her conclusions of her examination of the DNA of Defendant in comparison with the DNA found on both the driver's and passenger's airbags, which did not match.

22. The State's failure to disclose that it was preparing or intended to prepare an animated recreation of the crash sequence, failure to analyze and compare the DNA of Mendoza, the involved mini-van's owner, and the prosecution's failure to disclose all the materials he had obtained from the BCA, and seeking to diminish or destroy Defendant's credibility while

withholding information or failing to pursue potentially exculpatory information unfairly interfered with and prevented Defendant from presenting a full and complete defense.

Further your affiant says not.



Neal A. Eisenbraun

Subscribed and sworn to before me this 29th day of July, 2009



Notary Public

