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II. STATEMENT OF THE CASE

This is an appeal from the denial of a Motion for New Trial determined after affirmance by the Supreme Court of the Appellant's conviction for first degree murder [Neb.Rev.Stat. 28-303(1) (Reissue 1989)] and use of firearm in the commission of a felony [(T:1); Neb.Rev.Stat. 28-1205(1) (Reissue, 1989)], on direct appeal. Nebraska v. Frances Thompson, 244 Neb 375, 507 N.W.2d 253 (Neb. 1993).

For purposes of this Opening Brief, the Appellant will reference the record as follows: the original Transcript as (T:page); the Supplemental Transcript as (ST:page); the original Bill of Exceptions as (page:line); and the Supplemental Bill of Exceptions as (S page:line).

On May 28, 1992, the Defendant filed a Motion for Discovery and Return of Property requesting disclosure of documents prepared by the County Coroner and other evidence which might lead to potentially exculpatory or impeachment evidence. (T:105). This Motion was denied (106:23 -107:1) after the County Attorney denied the existence thereof (106:6-15).

On April 27, 1992, the Defendant filed a Motion for Recusal of County Prosecutor, contending that the County Attorney was needed as a potential witness for the defense (T:35). This Motion was denied (86:15-16; S1:15-18).

After the Defendant's conviction, a copy of the deceased's

Death Certificate was obtained, signed by the County Coroner (S5:22 - S6:2). A Motions for New Trial, based upon the contents of the document, was filed on May 24, 1993 (ST:1). The District Court continued the Hearing on the Motion, due to the pendency of the direct appeal to the Supreme Court (S9:5-9).

On November 23, 1993 a Supplement to Motion for New Trial was filed. (ST:2). The District Court denied the two Motions for New Trial (ST:12; S27:4-11).

The Defendant hereby appeals from the denial of the Motions for New Trial, entered herein, pursuant to Neb.Rev.Stat. 25-1912 (Reissue 1989).

The Defendant urges this Court to reverse the denial of a new trial, and reverse her convictions for first degree murder and use of a firearm during a felony, and remand this case to the District Court for a new trial.

III. STATEMENTS OF ERROR

The Appellant raises the following errors by the Trial Court on Appeal:

1. The Trial Court erred in denying the Defendant's Motions for New Trial for the suppression of potentially exculpatory and impeaching evidence and information which leads to such evidence, in violation of the Defendant's Rights to Due Process of Law, including her Rights to Confrontation and a Fair Trial.

IV. PROPOSITIONS OF LAW

1. Discovery in a criminal case is controlled by either statute or court rule, "in the absence of a constitutional requirement." State v. Phelps, 241 Neb. 707, 731, 490 N.W.2d 676, 692 (1992).

2. Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct 1194, 1196 (1963); United States v. Bagley, 473 U.S. 667, 670, 105 S.Ct. 3375, 3377 (1985); State v. Phelps, supra, 241 Neb. at 731, 490 N.W.2d at 692.

3. The suppressed evidence is "material", requiring reversal of any conviction, where there is a "`reasonable probability that, had the evidence been disclosed...the result of the proceeding would have been different'." State v. Jackson, 231 Neb. 207, 435 N.W.2d 893, 897 (1989); United States v. Bagley, supra, 473 U.S. at 682, 105 S.Ct. at 3383.

4. suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." United States v. Bagley, supra, 373 U.S. at 87, 83 S.Ct at 1197; Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766 (1972).

5. The distinction between exculpatory and impeachment evidence protected under the holdings in Brady v. Maryland has been eliminated. United State v. Bagley, supra, 473 U.S. at

677, 105 S.Ct. at 3380; State v. Jackson, supra, 435 N.W.2d at 897.

6. The more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and make pretrial and trial decisions on the basis of this assumption. United States v. Bagley, supra, 473 U.S. at 683-684, 105 S.Ct. at 3384.

7. When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within the general rule of Brady v. Maryland. Giglio v. United States, supra, 405 U.S. at 155, 92 S.C.t at 766; Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177 (1959).

8. A County Attorney may be called as a witness by a defendant where the prosecutor's testimony is material to the defense. Gajewski v. United States, 321 F.2d 261, 268 (8th Cir. 1963); United States v. Maloney, 241 F.Supp. 49, 50 (D.Pa. 1965); State v. Tabor, 63 Kan. 542, 66 P. 237 (1901).

V. STATEMENT OF FACTS

On August 18, 1991, Dean Frank (decedent) was shot to death by the Defendant, Frances Thompson.

The State argued at trial that the Defendant shot the deceased in a pre-meditated manner, luring him to her home to do so. The Defendant contended that she had acted in self-defense, shooting a larger, stronger man who attacked her in her rural home after arriving uninvited, unwanted, and unannounced, and after repeatedly threatening to do serious bodily harm or kill her and destroy her animals and property.

The State's case was entirely circumstantial. In State v. Frances Thompson, 244 Neb. 375, 507 N.W.2d 253 (1993), this Court held that the State had met the minimum sufficiency of evidence showing required to sustain the verdict and that the Trial Court's failure to admit evidence of the Defendant's experiences of the consequences of threatening and violent behavior in her previous relationship with another man, did not deprive her of her right to present a defense. In the instant matter, however, a detailed discussion of the record is necessarily presented for the Court to properly understand how the State's circumstantial case was far from conclusive or overwhelming, and how the exculpatory and impeachment evidence, or information which could have led to impeachment evidence suppressed by the State, was material, and probably would have affected the verdict. As the record in this case reveals:

On August 18, 1991 Frances Thompson was a forty-one (41) year

old widow (1116:17-22) and mother, with a twenty-two (22) year old son, Steven Thompson (1118:25 - 1119:1), who had recently left home and graduated basic training in the U.S. Navy (1134:4-6).

The death of Dean Frank occurred during the summer break between the Defendant's third and fourth year of studies at the University of Nebraska, at Lincoln (1122:2-7). The Defendant was an "A" student (1259:7-10). Under the circumstances, the Defendant was positively looking forward to attending law school, becoming a lawyer, and returning to Knox County to provide legal representation for local farmers and ranchers (1121:18-24).

At the time of this incident, Frances Thompson had everything going well in her life, with a promising future (1134:9-15).

Evidence at trial showed the Defendant and Frank had known each other for about six years prior to the incident (1141:22) and had been friends (991:21; 1146:9-18). In the Spring of 1991, the Decedent told a girlfriend that he planned to marry the Defendant (573:25 - 574:3).

However, although she considered the proposal, at the end of July, 1991, the Defendant told Frank she would not marry him. Frank's response was to threaten her (1192:10-20).

Prior to this occurring, in July, 1991, the Defendant, a long-time gun owner, purchased .357 magnum ammunition for the revolver she had inherited from her husband, who was killed in a construction accident more than a decade earlier (1138:2-71).

Unknowingly, while she was in the store, Ms. Thompson was mistakenly given .357 rifle rounds by the clerk (475:19-20). On

August 6, 1991, she returned the ammunition and replaced it with a type that would fit into her revolver (475:20-21; 1214:3-10). Clerk, Dave Rudloff testified that it was not unusual for a person who received the wrong ammunition from the store to return it and obtain the correct size (477:25 - 478:3).

Several letters from the Defendant to Frank in July, 1991 were introduced by the State revealing the Defendant sought honesty and openness from Frank regarding his other relationships with women (1184:3-7). Being unsuccessful, she then suggested they end the relationship with a "minimum of hard feelings" (1184:14 - 1186:1). Four letters from the Defendant to her son were introduced by the State, written from late July through August 17, 1991 (E:31 - 34). The first letter (E:31), written after Frank's initial threat to the Defendant, included a reference to her former relationship with "Ron [Thompson]", who had repeatedly committed "acts of violence and threats" and that the Defendant "expect[ed] real problems from Dean now too" due to similarities in their behavior (1195:23 - 1196:2; E:31). Other letters included statements reflecting anger at having to be afraid again and suggested that her son should punch and kick Frank when home on leave from the Navy, should Frank come to the house (E:32-34). August, 1991 Letters to Frank's ex-wife (E:29) and a girlfriend (E:26) were also introduced by the State. In them, the Defendant wrote she was no longer interested in a relationship with Frank and asked for advice as to her safety following the first threat by Frank (E:29).

No statement, written or oral, was introduced from any source,

that expressed or implied that the Defendant wanted to or planned to kill Dean Frank, or even wanted him dead.

Betty Frank, in a responsive letter, wrote that the Defendant was "lucky" to be done with Frank and that she divorced him upon the advice of local ministers, even though it was against her religious beliefs (525:3-9; E:117). Evidence was introduced which showed a pattern and history of violent and threatening behavior by Frank against women, including his ex-wife (421:22-25, 513:17 - 514:4; 612:15-25, 613:24 - 614:3). The violent and threatening behavior from Frank, according to Mrs. Frank, would occur when he was sober, as well as drunk (509:15-18; 968:24 - 969:5).

Apparently learning the Defendant was finding out about him, Dean Frank wrote her on August 7, 1991, expressing his love for her and that she should not believe what she is hearing from others about him (E:40).

Frank's landlady, Elaine Clemmens (796:1-19), his Mother (791:5-8), and his close friend Delores Fisher (563:20-24), all testified that Frank was depressed over his failing relationship with the Defendant at the time of his death. Ms. Fisher testified that five (5) days before the shooting, she contacted Frances Thompson on behalf of Frank, and pleaded with the Defendant to take Frank back (563:20-24).

Toll records further showed unilateral phone calling by Frank to Frances Thompson in the week preceding the incident (E:121, 37) and none from her to him.

The day before the incident, the Defendant target practiced

with her handguns on her farm (1230:12-18). Local rural witnesses testified it would not be unusual for the Defendant or others in the rural areas of Knox County to target practice with firearms (294:5-11; 474:3-7).

The State argued that the Defendant's purchase of the wrong sized .357 magnum ammunition "in July", 1991 (475:19-21), which she returned for the correct size about a week later (476:1-2), her purchase of .25 caliber ammunition before Frank's death (476:17-21), and target practicing on August 17, 1991, shows that she planned the killing of Dean Frank on August 18, 1991. Sheriff's Deputy Janecek testified that his wife did such target practicing (296:25 - 297:1-12).

Although Ms. Thompson's son testified the Defendant regularly target practiced several times a year (703:3-11), the practice on this occasion followed the Defendant's learning that Dean Frank had a history of violence against women (574:14-20; 994:10-12; 1212:11-14). A law enforcement officer testified that a .357 magnum revolver was a good weapon to use for self-defense (298:5-7; 299:13-17).

Frank's toll records showed calls to the Defendant's residence at 7 and 10 p.m. on August 17, 1991 and 1 a.m. and 7 a.m. on August 18, 1991 (732:24 - 733:3; E:37). The Defendant testified the first call involved Frank's invitation to take her out for dinner, which Ms. Thompson declined (1230:25 - 1231:4). The latter three calls included graphic threats against her life and property by Frank (1232:2-11; 1234:6-12; 1234:20-24).

After 7 a.m, Dean Frank continued his day by falsely telling his boss he was going over to Fran Thompson's residence later in the day to help her move back to Lincoln (720:1-18). He soon contacted and lied to his Mother, who testified her son told her he was going to spend the afternoon arrow hunting (785:11-20). Frank then went to Delores Fisher's residence and did some drinking (566:19 - 567:24). He left, Ms. Fisher testified, telling her he was tired and going home (568:5-7).

Toll records showed a half hour phone call from Frank to the Defendant's residence in mid-afternoon on August 18, 1991 (E:37). The State claimed this was proof the Defendant knew Frank was going to come to her residence (1368:15-17). The only evidence of the substance of this call was to the contrary (1243:8-14). The State further claimed this was supported by the evidence that a bag of food Frank had then purchased (E:38; 279:2-6; 279:24 - 280:8), was then brought to the house. However, the food included sandwich meat (1244:2-13), and the unrefuted evidence showed the Defendant was a total vegetarian and had been for years (324:20-22; 1243:23; 1244:1). Thus, the evidence showed that whatever food he bought and brought to her house, he did not bring it for her. Frank was neither asked nor invited to come to the Defendant's residence (1243:8-14).

On August 18, 1991, the Defendant shot Dean Frank in the "computer" room of her home (212:6-16). The Defendant, upon questioning by investigating officers at the scene, admitted shooting the deceased, but that it had been in self-defense when

he attacked her inside her house (416:20-22). Unrefuted evidence showed that the shooting occurred shortly after Frank arrived at Frances Thompson's house at approximately 5:30 p.m. (461:19 - 462:18; 619:13 - 621:5). At 5:35 p.m., the Defendant called the Sheriff's Department, and informed them that she had shot Dean Frank (353:3-8; 401:16-19). As a result of this call, paramedics and law enforcement officials were immediately dispatched to the residence. According to Sheriff Eisenbeis, it was the only reason they came at all (415:8-10).

The Defendant invited arriving officers into her home (212:2-4), showed them where Frank lay, and gave them the revolver used in the shooting (213:7). Dean Frank was still alive when he was found by paramedics on the floor near the table used by Fran Thompson to work on her computer (361:8-21). Paramedic Captain Mitch Mastalir testified that when he asked Frank: "Can you hear me?", Frank replied: "Just leave me alone, let me die". Lucinda Mastalir testified that when she went to put an oxygen mask on Frank's face, he turned away and said: "Leave me alone, let me die" (383:14-16). The State speciously argued that this evidence showed Frank thought the male and female paramedics were really Fran Thompson and he was telling her to get away (1373:24 - 1374:4).

Dean Frank had been shot three times, once in the front and twice from the back (897:23 - 899:18). Three bullet holes were also found below the floor near where his body was found (237:23 - 238:4). The law enforcement testimony revealed that the latter three bullets had not been fired through the body of Frank before

lodging in the sub-floor structure of the house (326:1 - 327:2).

The Defendant testified that upon returning to Frank from her call for help to the Sheriff, Frank asked her for a pen and paper (1255:10), saying he knew he was dying (1256:16 - 1257:16). Before the Defendant could get them, he reached over and wrote "self-defense" on the floor, using his own blood and left hand. (1255:16 - 1256:6). When Frank received the pen and paper, he again wrote "self-defense" and additionally that he "love[d] Fran". While they waited for help to arrive, Frank asked for a drink of water, which the Defendant obtained for him (1254:3-7). The Defendant testified she also placed a pillow under his head to make him more comfortable while they waited for help (1255:3-5).

Evidence at the scene corroborated the Defendant's version of events. Most significantly, they found a handwritten note identified by a State expert as having been written by Frank (538:8-14), in which he made a substantial effort to make clear to anyone who came upon the scene, that he loved the Defendant and that she had defended herself against him (235:14; E:58). The State's handwriting expert also testified that there was no evidence Frank's writing was "guided" (539:19-23). Investigators also found the words "self-defense" written in Frank's blood on the floor where he lay (225:24-25; E:53).

Additionally, deputies found the pillow placed under Frank's head (225:21-22; E:53) and the glass of water provided him by the Defendant (225:23-24; E:53).

The State argued, without any evidentiary support, that the

Defendant somehow coerced Frank into writing "self-defense" three times and "love" two times after shooting him only once. There was no evidence of coercion or that the Defendant shot Frank only one time before he made the writings. Indeed, according to the State's handwriting expert Pam Zilly, Frank's writing on the note was "consistent with a person seriously wounded or in fact dying of the wounds." (543:2-8).

Also without any support, the State claimed the Defendant, knowing that an ambulance was on its way, then had to kill Frank before they arrived, so he could not tell arriving officials what had happened (1370:16-23). However, the Defendant knew that law enforcement could arrive as quickly as 20 minutes after her call (1236:4-13). Yet, according to the State, moments before the arrival of law enforcement the Defendant again shot the Decedent (1372:2) two more times. Evidence showed it took nearly 45 minutes for Knox County deputies to arrive at the house (401:16; 923:13).

According to its theory, the State claimed this "A" student shot Frank in the back, because it would look too suspicious to shoot him in the head and then claim he wrote the notes (1336:10-12). The State further argued that because of the way he was curled up, she could not shoot him again in the front and make it look like self-defense, so she shot him in the back two times (1336:6-18). And, the State argued, this honor student figured she could shoot the decedent in the back and get away with it, somehow thinking law enforcement in the area would not know "comin' from goin'" (1336:14-16). The problem was, it lacked evidence to

support this extraordinary tale.

In an effort to support its case, the State called Dr. Brad Randall, a forensic pathologist for hire from the Sioux Falls, South Dakota Laboratory of Clinical Medical Science. He was the State's key witness and the verdict against the Defendant rested on his testimony. (1373:19-21). Dr. Randall told the jury that in his opinion, someone would "probably only survive for several minutes, 10 to 15 minutes maybe would be an average figure" after the fatal back shot to the liver (908:14-21). The State's pathologist witness admitted that he had never treated a live person for gunshot wounds (912:8-10) and that it was "possible" for Frank to have survived for as long a period as the Defendant described (910:21-911:2; 916:24-917:2; 924:10-22). From this testimony, the State argued Frances Thompson fired one shot into Frank, then two shots later on, right before the arrival of law enforcement. The State never explained how two teenagers a half-mile from the scene heard more than one shot shortly after Frank arrived.

Steven Haverkamp and Josh Vesely were approximately one-quarter to one-half mile away from the Defendant's residence, practicing golf on the Vesely farm in the late afternoon of August 18, 1991. (1461:1-16). Haverkamp testified that within minutes of seeing Frank's car pass down the road toward the Thompson residence, he heard 2 to 3 shots (461:19-24). The State argued that upon Frank's arrival, the Defendant fired only one shot, striking him in the chest (1370:8-10). The State made no effort

to explain the uncontradicted evidence clearly inconsistent with this theory.

Haverkamp acknowledged that with the high wind blowing that day and the terrain, that he may not have heard all the shots (463:14-24). Sheriff Eisenbeiss testified that it would not be unusual for persons a distance away to fail to hear all shots fired. Wind, distance, terrain, attention, were all factors that would affect what number of shots a person heard. But while a person may not hear all shots fired, they would not hear more shots than were actually fired (414:3-19). The boys remained in the area for about another half hour or more and heard no additional shots (462:6-13).

Also in conflict with Dr. Randall's and the State's scenario, Dr. Gary Peterson, Chief Medical Examiner for Hennipin County [Minneapolis, Minnesota] (1088:12 - 1089:23), testifying as a court-appointed expert for the Defendant, told the jury that in his experience, while a person with these wounds "might" die within 10 to 15 minutes, an outer range would be difficult to set. "It could be any length of time. It could go on a very long period of time. It could be longer than an hour. It depends on the individual." (1094:1-10).

Dr. Peterson further testified that in his opinion, a person who sustained these wounds would still be capable of writing the note Frank produced on paper and the words found on the floor (1098:2-20).

Randall further testified that due to "shoring" found on the

upper right arm related to one of the wounds, the decedent had to have been lying on his right side on his arm when shot in the back (916:3-8). The State, however, argued that Frank was shot in the back while he lay on his "left" side, and "never moved" (1370:13-15).

Dr. Randall admitted he initially determined the related wound was a "graze" wound (902:12-15). Months later, he changed his findings after he received a phone call from Knox County Deputy Don Henery in the Spring of 1992 (902:10-22; 973:18 - 976:16). Dr. Peterson testified this wound was unquestionably shoring and that his examination thereof and experience led to the conclusion that Frank need not have been lying down on his arm to sustain such injuries. (1097:4-8). In fact, the pathology evidence was very much consistent with his having been standing with his right upper arm near his body when he received this back shot (1097:7-19).

The State's pathologist, apparently to counter the Defendant's contention that Frank had written "self-defense" in his blood on the floor, denied observing any blood on the decedent's hands when he examined the body (907:2-7). However, Deputy Sheriff Henery, also present during the external physical examination of the body by Dr. Randall, belied the so-called expert's findings and told the jury he observed blood on Frank's left and right hands (969:6-25; 970:1-25; 971:1-4).

The State's pathologist, Dr. Brad Randall, told the jury that many months after the autopsy of Frank, he received a phone call from Knox County's chief investigator, and then changed his

findings as to how Frank died (902:10-22; 973:18 - 976:16).

Therefore, in addition to the substance of Dr. Peterson's professional opinion that the pathology evidence was significantly less conclusive with the State's version of events as claimed by Dr. Randall, physical evidence from the scene and eyewitness testimony was also in conflict.

The State's case was therefore far from substantial proof that the Defendant intentionally and with premeditation, murdered Frank. While the State in a strictly circumstantial case, such as this one, is no longer required to disprove every "hypothesis" consistent with the defendant's innocence, State v. Fleck, 238 Neb. 446, 471 N.W.2d 132, 135 (1991), in this case, rather than being a "hypothesis", there was substantial, virtually unrefuted evidence that the Defendant had acted in self-defense, and never intended to kill Dean Frank.

In addition to evidence supporting the lack of motive or intent to kill Dean Frank, substantial evidence [in addition to the above], was presented that Frances Thompson shot the deceased in self-defense.

The Defendant contended at trial that she shot Frank, after being repeatedly threatened by him, and after he then come to her remote home unannounced, uninvited, and unwelcome, and attacked her, leaving her no choice but to defend herself as best she could.

As referenced above, prosecution witness Delores Fisher testified that in early Spring, 1991, Dean Frank told her that he planned to marry the Defendant (573:25 - 574:3).

Towards the end of July, Frances Thompson said "no" to the idea. According to the Defendant, Frank responded by telling her in words she understood to mean: if he could not have her, then no one would (1192:10-20).

The Defendant testified she did not know whether to take this as a serious threat, since the Decedent had not said anything like that to her before (1192:21 - 1193:5). However, the comment re-kindled terrifying memories of a threatening and violent relationship with Ronald Thompson, the last serious relationship she had had. (1196:11-14).

The Defendant also testified that because of what had happened to her at the hands of Mr. Thompson, she decided to try to find out more about Frank and how dangerous he might actually be (1210:14-17). Since Ms. Thompson and Frank did not have any mutual friends, in early August, some three weeks before the shooting incident, and upon returning from visiting her son in Illinois (1207:16 - 1208:6), the Defendant unsuccessfully attempted to meet with Frank's ex-wife, Betty Frank (1208:23 - 1210:16).

The next day she contacted Frank's girlfriend, Delores Fisher, and learned that within the previous year, Dean Frank had threatened to slit her throat (1212:11-14). The Defendant began to see a different side of Frank's personality that was threatening to women, and so began for her a growing inference and fear that he might in fact be dangerous (1212:22-24).

The Defendant then wrote a letter to Betty Frank, informing her that she is not going to marry her ex-husband, but was scared

of him due to the threat he made. She inquired: "how violent is he?" (E:29; 486:11 - 488:22).

As described above, the day of the shooting, August 18, 1991, and unknown to the Defendant at the time, Betty Frank responded by letter how "lucky" Thompson was to be done with him, and how she had been compelled to divorce Dean Frank at the urging of local ministers, even though contrary to her religious beliefs (E:117).

Also as mentioned above, five days before the shooting incident, Delores Fisher begged the Defendant to take Dean Frank back (563:20-24). The same day, Frances Thompson went to the nearby Boham farm and spoke with Sharon Boham. The Boham family leased land on the family farm on which the Defendant lived. As corroborated by Sharon Boham, the Defendant told her of plans to change the lock on the main gate, since Frank had a key (1221:5-6) and she did not want him there anymore (994:609; 1223:8-10). She also imparted to Sharon Boham that she was scared of Frank (994:20-25). The Defendant asked Mrs. Boham, a long-time community resident, what she knew of Dean Frank and was told about one of Frank's violent incidents handled by law enforcement (994:10-12).

As described above, Frances Thompson testified that four (4) days later, August 17, 1991 at about 7 p.m., Frank called and invited her to dinner (1230:25 - 1231:2). She told him "no" (1231:4-7). Toll records corroborated Frank's call to her residence (E:37).

Toll records show that Frank called again after 10 p.m. (E:37). The Defendant testified that Frank became nasty with her,

threatening violence and to send the "Gatz boys" after her (1231:15-25). The Defendant did not know them or their reputation (1232:2-11).

The Defendant called the Knox County Sheriff's Department to report the threatening call (593:16 - 594:10). She told Deputy Don Henery the substance thereof, together with the fact of the previous threat by Dean Frank when she rejected his proposal for marriage (1223:23-24). As Deputy Henery acknowledged, the Defendant inquired about what law enforcement knew of the Gatz boys (594:13-14), but was not provided any information (594:14-16). He told her to get a tape recorder and try to record any future calls (594:16-20). Although he was aware of Frank's violent and threatening past (613:24 - 614:3), he made no effort to contact Frank or talk with him about leaving the Defendant alone (607:22 - 608:4).

From this exchange with the Sheriff's Department, the Defendant was made acutely aware, that unless Dean Frank was actually at her residence, at least twenty (20) to twenty-five (25) minutes from the nearest law enforcement office, she could not count on assistance (607:9-17; 1236:11-13).

According to toll records (E:37), Frank called again after 1 a.m. (732:19-23), August 18, 1991. The Defendant testified she was again threatened by Frank. He told her he would burn her house, slit her throat, shoot her truck full of holes with her in it, and butcher her pet pig (1234:6-12). He called again at 7 a.m. (732:24 - 733:3) and made more threats on her life and property (1234:20-

24). When he did not come over and being unable to get any information from law enforcement, the Defendant called Delores Fisher to ask how real the threats by Frank were, including the threat of the Gatz boys (1240:7 - 1241:8).

Knowing that law enforcement would not respond unless Frank was actually there and not having a tape recorder to record the most recent threats, Thompson felt no need to hurry to report the early morning threatening calls (1235:8-13). However, since they had been made and she wanted law enforcement to be apprised of the calls, the Defendant called the Knox County Sheriff's Department at approximately 12:30 p.m. and spoke with Deputy Lee Waterman (1235:6-17). Waterman confirmed the existence and substance of the call (815:17 - 816:2)).

Waterman's advice to the Defendant was for her to come to the Sheriff's Department on Monday, make a statement, and then get a Restraining Order against Frank from the Clerk of Court's Office the next day [Monday] (816:19-23). The Defendant related how this idea sounded good to her and made plans and a note (E:142) to do so (1236:16-25; 1237:21 - 1238:8).

On August 18, 1991, the Defendant called her sister Leslie Hackley in California for input as to how real she should consider Frank's threats (1013:13 - 1018:13).

Thus, in the weeks after an apparent death threat from a man who said he loved her, made upon her turning down his proposal of marriage, the Defendant took various reasonable steps to ascertain whether the man was capable of making good on any such threat,

found out he was, and in fact had a history of doing so. Up to a couple of hours before the shooting, she continued to try to find out and discuss with others how dangerous this man might really be to her. To no one was there even the suggestion she wanted Frank dead or planned to kill him.

Frank then called the Defendant's residence, telling her, as though forgetting their relationship was over, that he was going to do laundry and buy food (1243:1-4). He neither asked nor was invited to come to the Defendant's residence (1243:8-14).

At approximately 5:30 p.m., the Defendant testified that she was home alone, typing the details of the preceding day with Frank on her computer ["I just keep records of everything"] (1244:16-23; E:35). As she had since the threatening calls began the night before (1247:1-4), the Defendant kept her .357 magnum revolver near her at all times.

Suddenly, unannounced, uninvited, and unwanted, Frank came to and entered Frances Thompson's home (1243:8-14). The Defendant described him as acting as though nothing was wrong between himself and the Defendant. Battered women's expert Anne Hoschler testified as to the typical pattern of violent men to be threatening, then nice, then threatening (1074:25 - 1075:21). The Defendant was well aware of this pattern of behavior from her own experience (E:146).

Frank suddenly changed his mood and turned on the Defendant, yelling about killing her (1249:8-16). He then started for the Defendant (1249:22). According to the Defendant, Frank's threat was in the same tone of voice as the threats made on the phone

earlier that morning and the previous night (1249:19-20). When he reached the entry-way from the kitchen to the "computer" room, the Defendant pointed the .357 magnum at Frank in an attempt to stop him (1249:25 - 1250:9).

The State's pathologist, Dr. Brad Randall testified that an unarmed man was capable of strangling a women, breaking her bones, or otherwise causing serious bodily injury or death (919:23 - 921:5). From her prior experiences with Ron Thompson, which the Defendant was not able to describe for the jury, the Defendant knew this only too well (See, e.g., Offer of Proof, E:146).

Frank lunged. Fran Thompson, believing that she was in imminent danger of serious bodily injury or death, began to shoot the revolver as fast as she could (1250:11-20). By the third shot, she realized Frank's forward motion had stopped. Not wanting to shoot him anymore, but unable to stop herself from pulling the trigger, she pointed the pistol towards the floor (1250:21 - 1251:7). All six rounds were fired. Nebraska State Patrol Sgt. Mark Boharty testified that all six shots could be rapid fired from such a revolver in five (5) seconds (776:6-11).

Upon questioning from arriving law enforcement officers, Frances Thompson explained she shot Frank in self-defense when he attacked her in her home (416:20-22).

Dr. Peterson told the jury that after examining all the pathology evidence available in this case, he concluded that the wounds were consistent with rapid firing of the revolver with the first shot striking the decedent in the front as he came towards

her, causing an instinctive, instantaneous 180 degree turn, with the 2nd and third rapidly fired shot striking Frank in the back (1102:15-25; 1103:1-11). In short, Dr. Peterson's professional opinion was that the pathology evidence was consistent with the Defendant's version of events, including how and when Frank's wounds occurred, how he would be capable of writing the notes he left, still be alive 45 minutes later when help arrived, and still be capable of making comments to paramedics.

There was also no evidence of any motive the Defendant might have had to plan to kill Frank. There was no evidence the Defendant hated or wanted to see Frank dead, and substantial evidence to the contrary. There was no evidence as to any reason why the Defendant would risk everything she had attained through years of hard work, risk a bright future, and risk life imprisonment or death, to shoot and kill a man she considered a friend, but increasing felt afraid of. There was no evidence why a woman with a reputation for truthfulness and peacefulness, would engage in an elaborate plan to violently murder this man. There was substantial uncontradicted evidence that the Defendant was scared of Frank by August 18, 1991, that his past violent and threatening behavior toward women showed she had a reason to fear him, that Frank threatened to kill her, that she had rejected his interest in a relationship, and that law enforcement would not help her unless he was at her house and able to reach the phone in time to call for assistance.

The State's circumstantial case was therefore minimal. In

fact, what with the exception of the testimony of Dr. Randall, the State's case rested entirely on speculation or circumstances clearly consistent with innocent conduct and often on acts other evidence showed was for reasons unconnected with any malicious intent to kill. With the sparsity of evidence supporting the State's case, the critical questions at trial therefore involved when each of the three shots which struck Frank were fired and how long he lived after the firing of these shots.

Thus, evidence which would impeach Dr. Randall, or his conclusion as to the circumstances under which the shots were fired, or information which would lead to such evidence, would clearly be critical to the jury's determination of whether to believe the State's story, beyond a reasonable doubt. Suppression of any such evidence or information would therefore be material to the question of guilt or innocence and would probably result in a different verdict.

Nine months after the prosecution of the Defendant began, it was first learned during a hearing on her Motion to Recuse the County Attorney since he was a potential defense witnesses (T:35), that the County Attorney also served as the County Coroner in connection with the death of Dean Frank. (75:21 - 76: 1; S2:11-13). It was also learned that the Coroner's job included the issuance of a death certificate and an investigation of deaths in the County. (80:4-7). Upon this revelation, the Defendant then by letter specifically sought disclosure by the County Attorney of all documents made by him in his dual capacity as County Coroner,

regarding the death of Dean Frank (E:150; S2:3-10; S4; S11:10-13). The State refused to voluntarily disclose documents required by statute or practice (S2:13-18). A Motion for Discovery was then filed and in Paragraph 10-12, specifically sought reports or other documents regarding the death of Frank which were prepared by the County Coroner (T:105; S5:1-10).

During a Hearing on the Motion, the County Attorney stated to the Court and Defendant:

> For the record, I would like to state with regard to paragraph 10 that the Knox County Coroner or I made no report in connection with Dean Frank and that I will go on, if I might, with regards to paragraphs 11 and 12 that also deal with the coroner's inquest or coroner's actions, that <u>none of the items sought exist</u> other than with regard to the records, reports, et cetera, of the Knox County Sheriff's office, all of which have been furnished to the defendant. <u>There is simply nothing for us to provide</u> with regard to 10, 11, and 12 (106:6-15). [Emphasis added].

(See, S19:17-25). The Defendant's Counsel accepted the County Attorney's representation (106:21-22). So did the District Court which then denied the request for disclosure requested in Paragraphs 10-12 of the Motion as "moot by reason of such documents not having been prepared by the Court." (106:23-107:1). Significantly, after Defendant's conviction and imprisonment, the County Attorney agreed the Trial Court refused to sustain the Defendant's request for pre-trial disclosure of documents prepared by the County Coroner in this case, as a result of the State's (mis-)representations (S20:6-15). The Court also denied the Defendant's recusal motion, "there being no basis whatsoever to

disqualify the County Attorney." (86:15-16; S1:15-18).

On the instant Motion for New Trial, the District Court ruled that relief was not warranted since the death certificate was not discoverable under 29-1912(1)(f) since it was "unusable" by the prosecutor; that the Coroner's "opinion" as to the "cause" of death would not be competent, that the defense was not "blindsided" in this matter and not prejudiced by the State's failure to provide the document; that the Certificate was not "newly discovered" since it was available in Lincoln, Nebraska from the Bureau of Vital Statistics; that the certificate is not competent evidence and inadmissible for the purpose of "proving cause of death"; and it was not impeachment evidence since it "does not wholly reflect the County Attorney's conversations with Dr. Brad Randall and does not constitute evidence in any respect." (ST:12).

Subsequent to the filing of the Notice of Appeal in the direct appeal of this case, it was learned that the County Attorney, as County Prosecutor, did indeed create at least one document regarding the death of Dean Frank. A copy of a Certificate of Death (E:149 and 151; S2:19-25; S3; S11:10-13; S13:3-6) issued and signed by the County Coroner was provided to one of Defendant's Counsel (S5:18-20). The document was signed by the County Attorney on August 26, 1991, a week after the shooting of Frank and six (6) days after his autopsy by Dr. Randall (S5:22 - S6:2).

The clear language of the form-document and the added responses of the County Coroner thereto supported the Defendant's version of events surrounding the shooting of Frank and were in

direct conflict with the testimony of Dr. Randall.

Specifically, the document states that the deceased survived for "1 Hour, 25 mins." after receiving "Multiple Trauma", which was designated as the "Immediate Cause" of death. "1 Hour, 25 mins." was also designated on the Certificate of Death as the period of time between Frank's death and when he received the "Gunshot Wounds to the Abdomen". The documents lists the time of Frank's death as 7 p.m. (S6:3 -S7:14). [Emphasis added].

The document not only directly conflicts with Dr. Randall's key "findings" and therefore would have been useful during his cross-examination, but would also have made the County Attorney/County Coroner an importance witness since he completed the document from conversations with the State's pathologist.

Subsequent to the affirmance of the Defendant's conviction, the Defendant filed Motions for New Trial, based in part upon the suppression of the Death Certificate and the potentially material exculpatory and impeaching contents therein (ST:1 and 2; S1:23 - S2:8; S5:3-4).

At the recent Hearing held on the Motions, the County Attorney/Coroner told the Court said he "wish[ed] he could point to a document" that showed he had provided the Defendant with a copy of any one of the numerous Notice of Serving Discovery Documents he filed in this case which contained an entry of such disclosure, "but I can't". (S8:7-10).

At the Hearing, the County Attorney testified was called by the Defendant to testify. The Coroner revealed the information he

put on the Certificate of Death for Frank:

> [C]ame from the Knox County Sheriff's Office and its various officers. I had information from Brad Randall, the pathologist who performed the autopsy of Dean Frank, and I believe I had a preliminary autopsy report from him. (S14:3-13) [Emphasis added].

No where in Randall's report [disclosed to the Defendant] (E:127), was there any reference to Frank's death probably occurring in 10-15 minutes or that Frank had to be lying on the floor when fatally shot. (976:7-15). The County Attorney/Coroner then acknowledged that he listed on the Certificate that the immediate cause of death was "multiple trauma" as a result of "gunshot wounds to the abdomen". (S14:19-22). He also acknowledged that he recorded on the Certificate that the "interval between onset and time of death" was "one hour and 25 minutes" (S15:2-6), and that he left blank the portion of the Certificate designated for any "other significant conditions" which were "contributing to the death, but were not related" (S15:7-13).

The Defendant contends that at the Hearing on the Motion for New Trial, the County Coroner further revealed that the State's pathology witness had told him findings and opinions shortly after Frank's autopsy, which were in conflict with his trial testimony.

For example, at trial, Dr. Randall testified that in his opinion, the liver shot, which would have been fatal by itself, would probably have caused death within 10-15 minutes, making the Defendant's version of events virtually impossible. However, according to the recent testimony of the Coroner, Randall made no

mention of this finding in a conversation shortly after the autopsy (S16:11-13; S17:3-5). According to the Coroner, Randall further told him that at the onset of the shooting, the fatal "liver shot, in his opinion **had** occurred" (S16:24-25) and that Frank would still be alive upon the arrival of help, but "didn't think" the deceased would have "lived for that period of time and be talking and conscious (S16:25 - S17:2)." As described above, when found by the paramedics, Frank was only semi-conscious and stated only that he wanted to be left alone to die.

Further new exculpatory and impeaching evidence was obtained from the Coroner in his testimony, as to his August 1991 conversations with Randall before completing the Certificate of Death. In addition to the change in the above opinion as to when Frank was fatally shot and how long thereafter he would have lived, the Coroner shed further light on the suspicious timing of Randall's changed opinions, as well as his competence when he changed his opinion that another wound was not a graze but shoring.

As with all of the sudden and dramatically different opinions of Randall right before trial, the State never disclosed them prior to trial.

Contrary to the trial testimony of State's pathologist Randall and Deputy Henery that their suspicious phone conversation, which resulted in Randall's significantly changed opinions, occurred months before trial, the County Attorney's recent testimony described how this was actually "shortly before trial" and was initially "weeks" before and "not months" before (S18:4-9). The

Coroner's testimony then changed to: "whatever he [Randall] testified it what it was (S18:10); then to: "Weeks or a couple of months" (S18:11-13). The Coroner said he was not competent to answer the question of whether the difference in findings from grazing to shoring was a conflict in Randall's findings (S19:1-4). He testified he never sought to amend the Certificate of Death as a result of the different findings Randall testified to at trial (S20:21).

The Defendant contends that had the State not denied the existence of any reports or documents prepared by the Coroner and disclosed the nature of the contents of the Certificate of Death, together with disclosure of the document itself, it would have provided a substantial basis for cross-examination of the State's key witness, Dr. Randall, on the critical question at trial: how long it would have taken Frank to die after being fatally shot, as well as the credibility of Randall's opinion that Frank was on the floor when the fatal shot was fired. In addition, the Defendant contends that had the Certificate of Death been provided or had the determinations therein been disclosed, the Defendant would have been provided with substantial evidence and information that the County Attorney/Coroner was a material defense witness as to impeachment of Dr. Randall on the key issues in this case.

Under such circumstances, the Defendant contends that the State suppressed material exculpatory and impeaching evidence or information, regarding the State's key witness and issues in the case, which probably would have affected the verdict, requiring a

reversal of the Defendant's convictions and a remanding of this matter for a new trial.

VI. ARGUMENT.

A. The Misleading of the Court And Counsel As To The Existence Of And Failure To Disclose The Certificate Of Death, Under Facts Of This Case, Was A Suppression Of Material Exculpatory And Impeaching Evidence, Requiring A New Trial Be Ordered For The Defendant.

The Defendant requested pre-trial disclosure of specific information and evidence which might have been created by the County Coroner as to his work in connection with the death of Dean Frank. The Court denied the motion orally because the prosecutor said none existed. The Defendant's Counsel also accepted the State's misrepresentation that no such documents existed.

After the direct appeal, the District Court denied a Motion for New Trial, in part, determining for the first time that the death certificate was not discoverable under 29-1912(1)(f).

However, as this Court noted in State v. Phelps, 241 Neb. 707, 731, 490 N.W.2d 676, 692 (1992), "[d]iscovery in a criminal case is controlled by either statute or court rule, "**in the absence of a constitutional requirement.**" Therefore, as the Defendant contends in this case, if disclosure was required to protect her rights to confrontation and to present a defense, whether or not 29-1912(1(f) required disclosure under other circumstances was not an issue and the statute would not have been a proper bar to the disclosure sought here. This Court has held that the Sixth Amendment right to confrontation is violated where the State fails

to produce impeaching "information" even where privileged. State v. Hankins, 232 Neb. 608, 441 N.W.2d 854, 871 (1989) [citing, State v. Trammell, 231 Neb. 137, 435 N.W.2d 197 (1989)].

In Brady v. Maryland, 373 U.S. 83, 83 S.Ct 1194 (1963), the United States Supreme Court espoused:

> [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.

Ibid, 373 U.S. at 87, 83 S.Ct. at 1196; United States v. Bagley, 473 U.S. 667, 670, 105 S.Ct. 3375, 3377 (1985); State v. Phelps, supra, 241 Neb. at 731, 490 N.W.2d at 692.

The suppressed evidence is "material", requiring reversal of any conviction, where there is a "`reasonable probability that, had the evidence been disclosed...the result of the proceeding would have been different'." State v. Jackson, 231 Neb. 207, 435 N.W.2d 893, 897 (1989) [quoting, United States v. Bagley, supra, 473 U.S. at 682, 105 S.Ct. at 3383]. The Jackson Court noted that suppressed evidence is material, where if disclosed, "may make the difference between conviction and acquittal." Ibid, 435 N.W.2d at 897.

The Brady Court further expressed the general rule:

> [T]hat suppression of material evidence justifies a new trial `irrespective of the good faith or bad faith of the prosecution.'

Ibid, 373 U.S. at 87, 83 S.Ct at 1197; Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766 (1972). Therefore, it matters not "whether the nondisclosure was a result of negligence or

design, it is the responsibility of the prosecutor." Ibid, 405 U.S. at 155, 92 S.Ct. at 766.

The Brady rule is based upon "the requirement of due process". United States v. Bagley, supra, 473 U.S. at 676, 105 S.Ct. at 3379. Its purpose, as applicable here, is "not to displace the adversary system" as the "primary means" to uncover the "truth", "but to ensure that a miscarriage of justice does not occur." Ibid, 473 U.S. at 676, 105 S.Ct. at 3380. And a miscarriage of justice exists in this case as a result of the suppression herein.

The Supreme Court in United States v. Bagley, supra, eliminated any distinction between exculpatory and impeachment evidence protected under the holdings in Brady. Ibid, 473 U.S. at 677, 105 S.Ct. at 3380; State v. Jackson, supra, 435 N.W.2d at 897.

In this case, the prosecutor first told the Court and Defendant that the Coroner authored no documents in connection with Frank's death. This caused the District Court to deny the motion for pre-trial disclosure. Relying on this representation, the Defendant made no effort to pursue other potential avenues of securing any such documents. After conviction, when it became obvious that such a document existed, the prosecutor admitted he failed to provide such a document. Due to the potentially exculpatory and impeaching value of the document, the prejudice to the Defendant from the failure to provide it, it having significant bearing on the State's key witness and evidence, is the same.

In Bagley, the Court noted the government's acknowledgement

that less than candid or incomplete response to a specific request for discovery "not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist." As in the instant case, "[i]n reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." Ibid, 473 U.S. at 683, 105 S.Ct. at 3384.

The Court in Bagley, using language particularly important under the facts of the instant case concluded:

> [T]he more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and make pretrial and trial decisions on the basis of this assumption.

Ibid, 473 U.S. at 683-684, 105 S.Ct. at 3384.

As the Court in Giglio v. United States noted:

> When the `reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule.

Ibid, 405 U.S. at 155, 92 S.C.t at 766 [citing and quoting Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177 (1959)]. Such is the case at bar.

The United States Supreme Court has recognized, as in this case, that the "jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." Napue v. Illinois, supra, 360 U.S. at 269, 79 S.Ct.

at 1177; United States v. Bagley, supra, 473 U.S. at 677, 105 S.Ct. at 3380. The Court recognized that it may be upon even "subtle factors" affecting a witness' credibility , that "a defendant's life or liberty may depend." Ibid.

In Giglio v. United States, supra, the United States Supreme Court reversed the defendant's conviction for passing forged money orders where the State, as here, misrepresented the existence of impeaching information and evidence as to the prosecution's key witness. In that case, the suppressed matter pertained to a promise not to prosecute him for the same crime. Ibid, 405 U.S. at 155-156, 92 S.Ct. at 766.

In United States v. Bagley, supra, the defendant, as here, made a specific request for certain items, particularly deals or promises and considerations afforded the prosecution's witnesses. Ibid, 473 U.S. at 671, 105 S.Ct. at 3377. The government response failed to disclose the existence of a promise to pay each of its two key witnesses a mere $300 in return for their cooperation. Ibid, 473 U.S. at 673, 105 S.Ct. at 3378. The District Court made findings that the money was not payment for their testimony and that disclosure prior to trial would have no effect on the verdict. Ibid, 473 U.S. at 674, 105 S.Ct. at 3378-3379.

The Court noted that if any Constitutional error existed, it stemmed from the "Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination." Ibid, 473 U.S. at 679, 105 S.Ct. at 3381. Such is the case here.

In the instant case, the Defendant contends that due to the pre-trial misrepresentation by the County Attorney as to the non-existence of any documents prepared by the Coroner in connection with the death of Frank, efforts to seek other possible sources of such documents were reasonably not explored, and she was denied the use of the Certificate of Death to impeach the State's key witness, their hired pathologist, and was denied information in the Certificate which would have made the County Attorney/Coroner a witness for the Defense and an impeachment witness against Dr. Randall. As in Bagley, there is a "significant likelihood" that the prosecutor's response to the specific request for documents created by the Coroner "misleadingly induced" defense counsel to believe that Randall could not be impeached through any documents created by the Coroner or by the Coroner himself. Ibid, 473 U.S. at 684, 105 S.Ct. at 3384.

The District Court's denial of the Motion for New Trial, in part contending that the Defendant was not "blindsided" by the post-trial securing of the Certificate of Death and that it was not "newly discovered" since it was otherwise available through the Bureau of Vital Statistics, were in error since such positions ignored the reasonable reliance made upon the misrepresentations of the County Attorney that no such documents existed.

The State's case was entirely circumstantial. All of the limited, circumstantial evidence of intent pertained to innocent conduct, consistent with evidence of the pattern of Fran Thompson's life long before there were any problems with Dean Frank. The

State claimed it was part of a carefully prepared plot. With the exception of the new opinions of the State's pathology witness, Dr. Brad Randall, the prosecution's case was mere conjecture. Since Ms. Thompson's evidence of self-defense was substantial, the issue of Dr. Randall's credibility and the credibility of his evidence became of critical importance for the jury's determination of whether a reasonable doubt existed.

The suppressed evidence and information in the Certificate of Death which would have also indicated that the County Attorney/Coroner was indeed a significant impeachment witness went to the heart of the State's case, particularly, the evidence of how Frank died and how long he lived after being shot by the Defendant. The Defendant contends her right to a fair trial also includes disclosure of exculpatory and impeaching information in the hands of the County Attorney, especially when such information and evidence stems from his work in connection with the facts of this case, as here, in a non-privileged capacity such as coroner. Her rights to due process would, in this situation have to include the availability of the County Attorney to be a defense witness. Indeed, it has been recognized that a prosecutor may be called as a defense witness. See, Gajewski v. United States, 321 F.2d 261, 268 (8th Cir. 1963); United States v. Maloney, 241 F.Supp. 49, 50 (D.Pa. 1965); State v. Tabor, 63 Kan. 542, 66 P. 237 (1901)(conviction for arson reversed where trial court refused to allow defendant to call the county attorney as a witness to impeach the testimony of one of the state's witnesses).

Randall's trial testimony as to the timing of and life expectancy after the fatal shot, unimpeached by the prior findings of Randall himself, as told to and recorded by the Coroner, allowed for the State's argument that the Defendant murdered Frank. The suppressed evidence and information which would have led to the County Attorney/Coroner as a witness, showed Randall, after he finished the autopsy on Frank, actually concluded death was in the manner consistent with that described by the Defendant. The Trial Court was in error when it concluded that the suppressed information was not impeachment evidence.

On the Certificate of Death, the County Attorney/Coroner described the information he received in writing and orally from Dr. Randall immediately after the autopsy. According to the Coroner, the State's pathology witness, at a time when his observations and tests on Frank's body would be fresh on his mind, told the Coroner findings and opinions which were consistent with the information listed on the Certificate of Death, but contrary to Dr. Randall's trial testimony that Frank would likely have died within 10-15 minutes after being shot in the liver. At trial the State argued, he must have been fatally shot right before law enforcement arrived, not 45 minutes earlier in self-defense as the Defendant described. However, shortly after the autopsy, Randall told the Coroner that at the onset of the shooting, "the liver shot, in his opinion **had** occurred" and that Frank would be alive, though probably not conscious by the time help arrived. This information is critical and goes to the heart of the State's

limited circumstantial case against Frances Thompson and therefore would probably have made a difference in the verdict if the information had been properly disclosed.

Additionally, even if, as the Trial Court ruled, the County Coroner was not competent to give an opinion as to the cause of death, or the Certificate of Death competent evidence (standing alone) as to the cause of Frank's death, the Coroner's testimony regarding conversations with Randall and the specific information revealed on the Certificate of Death he created therefrom (and suppressed), would have materially aided in the impeachment of Randall and the providing of evidence supportive of the defense of Frances Thompson. As the Supreme Court noted in Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974), even where a state statute would otherwise bar the use of certain evidence at trial, such evidence or information may be used to impeach a key prosecution witness. See, United States v. Bagley, 473 U.S. at 678, 105 S.Ct. at 3381. Thus the Trial Court's finding that the death certificate is not competent evidence and not admissible to prove the cause of Frank's death misconstrues the purpose for which the Certificate and resulting materiality of the Coroner's testimony would have been used by the defense, and the Constitutional necessity and propriety of their use in this case.

VII. CONCLUSION.

The facts of this case reflecting substantial evidence of self-defense compared with the minimal circumstantial (only)

evidence supporting the convictions herein, and the suppression of evidence and information which could have helped support the Defendant's defense and impeach the State's key witness, encourage and mandate the remedying of the injustice in this case.

For all the above argument and authority, the Defendant's convictions should be reversed and the matter remanded back to the District Court for a new trial.

Dated this 25th day of April, 1994.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that two true and correct copies of the Appellant's Opening Brief were mailed, U.S. postage paid to Don Stenberg, Office of Attorney General, Department of Justice, 2115 State Capitol, Lincoln, Nebraska 68509 and John Thomas, Knox County Attorney, Knox County Courthouse, Center, Nebraska 68724.

Dated this ___ day of April, 1994.

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