STATE OF MINNESOTA DISTRICT COURT

COUNTY OF BECKER SEVENTH JUDICIAL DISTRICT

Kenneth Eugene Andersen,

Petitioner,

Case No. 03-CR-07-171

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR POST-CONVICTION RELIEF

vs.

State of Minnesota,

Respondent.

INTRODUCTION

Mr. Andersen was indicted for first degree murder related to the killing of Chad Swedberg. Mr. Andersen maintained his innocence and demanded a jury trial. At trial, the state speculated that Mr. Andersen had walked from his property, which abutted Fish Hook Lake, across the frozen lake, and to maple syrup site where Chad was working and killed him. This walk, which was over a mile long, took one trial witness at least 32 minutes, one way, during an experiment that was done after Chad's death.

The state's theory of the case was that Mr. Andersen killed Chad Swedberg because their friendship was deteriorating because Chad no longer wanted to be in business with Mr. Andersen and because Mr. Andersen believed that Chad was cooperating with police in a case involving a stolen four-wheeler. In order to convict Mr. Andersen, and to rule out other potential suspects, the state relied heavily on a timeline set forth by Leslie Fain and claims that Mr. Andersen had fabricated an alibi since his version of events did not match up with that of others.

Numerous witnesses testified that Mr. Andersen and Chad were very close friends, and had been for most of their lives. The state advanced two (2) theories to explain why Mr. Andersen would have killed his best friend. First, it speculated that the relationship between the two (2) men was deteriorating, because there was some evidence that Chad did not want to participate in Mr. Andersen's business ventures any longer. Second, the state speculated that Mr. Andersen feared Chad would testify against him in a theft case involving a stolen ATV. If convicted of theft, Mr. Andersen's presumptive sentence was probation.

The jury found Mr. Andersen guilty. He was sentenced to life in prison. Since his trial and previous postconviction, Mr. Andersen has uncovered significant new evidence which calls into question his alleged motive for the shooting and, more importantly, calls into question nearly every aspect of the alleged timeline of events and which show his alibi was not fabricated. He has also obtained additional evidence showing he did not commit this crime and that important exculpatory evidence was not disclosed prior to trial.

To the extent that postconviction relief proceedings are civil in nature and subject to General Rule of District Court Practice 115.05, limiting memoranda of law submitted in connection with a motion to 35 pages absent permission of the Court, petitioner respectfully requests the Court's permission to exceed that page limitation in this memorandum. The record in this case is extensive, the petition raises numerous claims, the crimes for which petitioner was convicted are extremely serious, and the sentence he received is the maximum sentence authorized by law.

STATEMENT OF FACTS

The Events on April 13, 2007, from 9:55 On.

At 9:55 a.m. on April 13, 2007, Leslie Fain called 911 from a remote spot in the woods behind her Becker County home. (T. 978, 1074, 1076). She was crying and hysterical – having trouble describing the purpose of her call. (T. 977-79). Leslie told the dispatcher that her husband had gone out into the woods to make maple syrup. (T. 977). She had a bad feeling after hearing two (2) shotgun blasts in the morning and decided to check on him after he did not answer his phone. (T. 979). Leslie told dispatch that she found her husband lying in the woods and that he was "not breathing." (T. 979).

As the dispatcher tried to get more information, Leslie said that her husband's brother was "there." (T. 980). The brother, Kenneth Swedberg, told Leslie "He's dead." (T. 980). Then, Kenneth took the phone from Leslie and said to the dispatcher, "There's no pulse. He's cold already." (T. 980). Kenneth identified his brother as Chad Swedberg and said that Chad was 35 years old. (T. 980). He said he did not know what happened to Chad, and only knew that Chad had gone into the woods to make maple syrup. Kenneth provided the dispatcher with an address on Little White Earth Lake Road, and offered to meet the emergency workers at that address with his four-wheeler. (T. 980-81).

White Earth police officers Scott Brehm and Nick Stromme, who were cross-deputized to work within Becker County, were the first to arrive in the area. (T. 1073-76, 1113-16). When they arrived at Little White Earth Lake Road, they initially saw nothing. (T. 1076, 1116). Then, Kenneth came out of the woods on a four-wheeler. (T. 1076). Neither officer knew Kenneth, but Kenneth announced, "Chad is fucking dead." (T. 1077). Stromme thought Kenneth seemed relatively calm. (T. 1117). Kenneth told the officers that Chad was in the woods about a

thousand yards down the trial and agreed to let the officers use his four-wheeler to get to the scene. (T. 1116-17).

The officers rode Kenneth's four-wheeler and followed his direction to get the scene, where they saw Leslie. (T. 1076-80). Leslie was on the phone yelling and screaming. (T. 1119). Leslie gestured toward Chad, who was lying on the ground near a wood-burning stove, surrounded by dogs. (T. 1079-81, 1119)[1]. Leslie pulled the dogs back, and Stromme approached Chad to check for a pulse. (T. 1119). Finding no pulse, Stromme decided to check for injuries. (T. 1120). He did this by rolling Chad over, and in doing so, observed some blood. (T. 1121-22). At that point, officers decided to contact a supervisor. (T. 1122). Stromme moved Chad's body back to its original position, and blood began trickling from his nose. (T. 1123). Stromme put Chad's baseball cap over his face to avoid further upsetting Leslie, who was standing nearby. (T. 1123).

Emergency medical technicians Ryan Sherbrooke and Devon Green soon arrived at the Little White Earth Lake Road address. (T. 1140-41). Kenneth met them there and said that "his fucking brother was dead" and that "he thought he OD'd." (T. 2786). He directed them to Chad's body but remained at the residence. (T. 1141).

Sherbrooke and Green had some difficulty navigating the trail because it was muddy and slippery. (T. 1135, 1139, 1141). When they finally arrived at the scene, Sherbrooke confirmed that Chad had died, and then attempted to determine the cause of death. (T. 1142-43). He exposed Chad's chest and observed what appeared to be a bullet hole in the back of Chad's shoulder. (T. 1143). Sherbrooke prepared a report, noting the cause of death as "firearm injury, accidental." (T. 1150).

[1] At trial, Leslie testified that Chad's body had not been moved. (T. 962-63).

Green, however, recalled hearing a 911 call from the Little White Earth Lake address earlier in the morning reporting a "domestic." (T. 2784). The call had been cancelled shortly afterwards.[2] Green also observed that Chad appeared to have died some time before they arrived. (T. 2787). His lips were blue and his face was ashen. (T. 2887).

While Brehm stayed with the body and the EMTs, Stromme went to the residence on Little White Earth Lake Road to await the arrival of a supervisor. (T. 1125). As Stromme walked, he encountered Al Baker, an area resident who was sitting on a four-wheeler at an intersection on the trail. (T. 1125, 1716-17). He directed Al to stay away from the scene and continued to walk toward the house. (T. 1125).

Officer John Sieling, an investigator with the Becker County sheriff's department drove to the Little White Earth Lake Road address from 20 to 25 miles away. (T. 1163-64). When he arrived, he met with Stromme, who briefed him. (T. 1165). As the officers spoke, Leslie, Kenneth, Leslie's sister – Morningstar Bellcourt, and some dogs emerged from the woods in a pickup truck driven by Al Baker. (T. 1167). They told Sieling that the trail was muddy and suggested he take a four-wheeler back to the scene. (T. 1167).

Sieling drove a four-wheeler to the clearing in the woods and ordered Brehm and others who had arrived to seal there area off with police tape. (T. 1169). He also ordered a search of the immediate area. (T. 1170). Several trails led from the clear into the woods – one to east, one to the south, one to the northwest, and one to the north. (T. 1170-71). Sieling began walking on the northbound trail alone. (T. 1172). He walked on that trail until it came to a "T", and then he went to the west and to the east. (T. 1172). The trail was softy and muddy. (T. 1172). But, as the trail turned to the west, Sieling noted the ground was hard, as if still frozen. (T. 1172-73).

[2] No record of the "domestic" call was ever located. See (T. 2833-88).

About 60 to 70 yards from Chad's body, Sieling observed what he believed to be two (2) tracks of footprints going north and south in the frost that had accumulated on the leafy trail. (T. 1173, 1176)[3]. These footprints extended for about 20 feet. Further up the trail, where the frost was present again, there were no tracks found[4]. (T. 1178). Sieling did not take pictures of these footprints, however, because his camera did not have batteries. (T. 1176). He did not ask anyone else to photograph the footprints, even though other officers had cameras. (T. 1177, 1296). As the sun rose, the footprints Sieling saw disappeared. (T. 1178). No one else observed the footprints and they were never documented. (T. 1178-79, 1296-96).

Officer Joseph McArthur, a Captain with the Becker County sheriff's department, also participated in the search of the area. (T. 1338-1368). Kenneth offered to drive McArthur around the perimeter of the woods. (T. 1338). They drove for fifteen minutes to half an hour, stopping on occasion to look for tracks in the trailheads. (T. 1341-1352). Eventually, they got out of Kenneth's vehicle and walked eastbound on foot. (T. 1341-1352). The road, which deteriorated in quality as they walked, turned north, and they continued to follow it until they reached Fish Hook Lake. (T. 1348-53). The ice extended to the shore where they entered the lake. (T. 1353-54).

Kenneth Swedberg knew of two (2) trails that went from Fishhook Lake to the location of the crime scene; one in the northeast corner and one in the southeast corner. (T. 1354-55). Kenneth Swedberg and Officer McArthur followed to the east shore of Fishhook Lake toward the north trail, but turned around because the banks were snow covered so that if someone had tried getting on the lake from the woods it would have been easy to see. (T. 1354). While

[3] Petitioner lived at least 1.3 miles from the tracks Sieling found. This calculation includes .5 miles through the woods from Chad's body to Fish Hook Lake and .8 miles across the lake.
[4] The fact that there were no footprints in the frost here was not in police reports and only came out at trial.

walking back to the southeast corner of the lake, Kenneth noticed that he was leaving footprints on the surface of the lake. (T. 1506). Reaching an area of the lake where a trail lead back toward the crime scene, McArthur and Kenneth noticed that the lake surface was mushy and they could see open water near the shoreline so that they had to jump on cattail clumps to avoid getting wet. (T. 1355). While walking the trail from the lake back to the crime scene, they found an old partial heal print left where Chad had been trapping beaver. (T. 1509).[5] No report of frost was made by McArthur[6]. (**Exhibit 1 - McArthur Report dated April 14, 2007**). Officer Sieling's report that he had seen frost was made on April 30, 2007, Officer McArthur made his report on April 14, 2007. (**Exhibit 2 and 1 - Sieling Report, McArthur Report**).

Witness Interviews and Testimony

Leslie Fain

Fifty-two year old Leslie Fain stated she and Chad had married after they had been living together for some time. (T. 915, 921-24). They did not announce their marriage because Chad's family opposed the relationship. (T. 924). In particular, Kenneth and his wife, Lisa, did not approve of her. (T. 924, 985-86). Nonetheless, Chad and Leslie built their house on land that was jointly owned by Chad and Kenneth. (T. 921-23, 1466-67). The house was just 300 yards from the home where Kenneth and his family lived. (T. 1468).

Kenneth and Chad had a bee keeping business together. (T. 986). According to Leslie, Kenneth "ripped off" Chad in the business. (T. 986). There were other problems in the brothers' relationship as well. (T. 986). Leslie claimed that Kenneth had cheated Chad out of some land by having Chad sign a quit-claim deed, and that Kenneth was always taking advantage of Chad.

[5] The trail that McArthur and Kenneth walked form the southeast corner of Fishhook Lake to the crime scene is the same trail Sieling called the Northbound trail.
[6] McArthur's report contains no mention of any other searchers finding footprints.

(T. 986). She also said that Kenneth's wife, Lisa, did not like her and had tried to turn the family against her. (T. 924).

In addition to tensions with Kenneth and his family, there was occasional conflict within Chad and Leslie's own home. Several of Leslie's family members, her sister Morningstar, her nephew Thomas Covington, her son – Jesse Fain, her daughter-in-law – Ann Fain, and three (3) grandchildren were all living in the home. (T. 927-29). For the most part, Chad was good natured about this living arrangement, but on occasion he was irritated by it. (T. 938-39).

According to Leslie, Chad's passion was spending time outdoors. (T. 930). About four (4) years prior to his death, Chad began a maple syrup operation in the woods behind their house. (T. 939-41). He would collect sap from the trees and then process it using a contraption built by his friend Al Baker. (T. 1720-26). Leslie was concerned about the maple syrup operation because it was on land that Chad did not own. (T. 998).

Leslie told investigators that on the morning of Chad's death, he was planning to go into the woods to make syrup. (T. 946, 951). Although he wanted to get to the maple syrup site early, he was also interested in watching a segment on the news about a man who lived with wolves. (T. 951). He hung around the house waiting for the segment. (T. 951). Leslie recalled that her sister, Morningstar, was sleeping. Her son, Jesse, left the house for work at about 7:40 a.m. (T. 949-50). Morningstar's son, seventeen-year-old Thomas, got on the school bus about 7:37 a.m., the regular pickup time. (T. 950). Her daughter-in-law, Ann, drove one of her children to school, leaving some time before 8:00 a.m. (T. 949-51). Leslie intended to go to work after Chad left. (T. 946).

Chad became frustrated when the promised television segment did not come on. (T. 951). Noting that he wanted to get the fire going at the maple syrup site before Al Baker arrived,

he left the home. (T. 951). Leslie recalled that the segment came on as soon as Chad left, and she yelled for him. (T. 951). Chad had already hiked too far to hear her, however. (T. 952). She watched the segment herself and then worked on her computer. (T. 955). The segment aired from 8:05 to 8:12 a.m. (T. 2714).

At some point, Leslie heard two loud shots fired. (T. 955). She did not think it was hunting season, and she was concerned. (T. 955). At 8:13 a.m., and 8:15 a.m., she called Chad's phone. He did not answer. (T. 955, 970). Ann came back before the shots happened. (T. 955). She said that she too heard the shots. (T. 956).

Leslie then took a shower and got ready for work. (T. 956). Afterwards, she called Chad once again. (T. 955-56). When he did not answer, she put on her mud boots and hiked down the trail that lead to the clearing in the woods where Chad would be working. (T. 956). As Leslie walked, she heard a noise – like the sound of a four-wheeler – coming from the woods. (T. 956, 1000-01). She wondered who was in the woods with Chad. (T. 1001). At trial, Leslie claimed that the noise was Chad's brother Kenneth using a drill with a special attachment to stir his bee food. (T. 957). On cross-examination, she admitted that the noise she heard was not coming from the area of Kenneth's home. (T. 1002). It took Leslie about fifteen minutes to reach the clearing. (T. 1008). She told investigators that when she got there, she immediately saw Chad's body. (T. 959). After finding Chad, Leslie called Kenneth, and instructed him to come to the clearing. (T. 960). Then she called 911. (T. 960).

Leslie told investigators that she suspected Kenneth had something to do with Chad's death, as there had been a lot of animosity between the two (2). (T. 1218, 1019). Other than Kenneth, Leslie did not know of another person who would harm Chad. (T. 994-95, 1021, 1218). She suggested that investigators speak with Kenneth Andersen, who might know more

about that than she would. (T. 995, 1219). Leslie told investigators that Mr. Andersen was Chad's "best friend" and business partner. (T. 989-90).

Chad and Mr. Andersen worked together constructing pole barns. (T. 935). Their business had recently suffered a blow when a building containing many of their tools had burned down. (T. 942-43). Before Chad's death, Mr. Andresen was planning to start a leeching business. (T. 943). He asked Chad to participate. (T. 943). According to Leslie, Chad was initially interested in the leeching business and had begun to work on the project. (T. 944). In the days before his death, Chad's interest in the business had begun to wane. (T. 944). Leslie testified that Chad intended to stop working with Mr. Andersen and was going to buy a greenhouse. (T. 934-44). Leslie specifically testified that Chad would purchase the greenhouse from Steven Lhotka who had agreed to teach her and Chad to do all the greenhouse stuff. (T. 934-44).

At trial, Ms. Fain testified that her and Chad's finances were doing well, even though she was not being paid for her work. (T. 936, 933-37, 948). Ms. Fain testified that Chad made money from other stuff, like leeching and hunting beavers. (T. 938). Ms. Fain was not impeached on this statement even though in an interview with investigators on May 1, 2008, she reported she and Chad were borrowing money to make their mortgage payments. (**Exhibit 3 – Leslie Fain May 1, 2008 Interview**). It is believed that the report and transcript of this interview had not been disclosed at the time of Leslie's testimony. During a hearing in the wrongful death case, Kenneth Swedberg testified that he was loaning Chad money around the time of his death.

During her testimony, Leslie specifically denied that Chad had ever received money from Mr. Andersen related to the sale and trade of guns. (T. 974). This testimony was presented

because Mr. Andersen had informed police officers that he had sold the Tikka rifle, which may have been used to shoot Chad, to Chad the prior fall. (T. 886-88). Despite Ms. Fain's claims, Mr. Andersen, after trial, obtained information proving this was not the case.

Specifically, Mr. Andersen learned that his trial investigator, Glenn Fladmark, had actually gone to the local Wal-Mart and procured a tape showing that Liz Andersen had given an envelope of cash to Chad and Leslie. According to Liz Andersen, this took place in December of 2006. Liz saw Chad take the cash from the envelope and hand it to Leslie. Supporting this version of events is the Affidavit of Josh Bogatz. Mr. Bogatz, only after trial, reported that in the fall of 2006, he was aware that Mr. Andersen and Chad had worked out some sort of swap involving the Tikka rifle. (**Exhibit 4 - Bogatz Affidavit and Interview Report**). While Mr. Bogatz was not aware of the details of the swap, he did recall Mr. Andersen bringing the Tikka rifle to a job site one day and leaving it with Chad. Id. Chad later rode with Mr. Bogatz and left the cased rifle in Mr. Bogatz's vehicle. Id. Mr. Bogatz took the Tikka rifle, along with a muzzleloader that had also been left in his vehicle, to Chad the following morning. Id. Mr. Bogatz personally saw Chad place both guns in a gun safe at his home. Id.

Ann Fain

Ann Fain spent much of the morning home with Leslie. (T. 1439-49). After Jesse left for work, Ann drove one of their children to school in Ogema, while two (2) other children remained behind with Leslie. (T. 1440-46). Ann made the ten-minute ride to Ogema, arriving at the school a few minutes after 8:00 a.m., and then returned home. (T. 1444-46, 1698, 1702). When she got home, Chad had already left. (T. 1445-48). Morningstar was still sleeping. (T. 1446). Morningstar's son, Thomas, had gone to school. (T. 1446).

Ann, who was pursuing a nursing degree, began to do some homework at the kitchen table. (T. 1441, 1446). She recalled hearing a noise, which Leslie said was a shotgun. (T. 1447). Ann was accustomed to hearing guns on the woods behind the home so she did not pay much attention to the shooting. (T. 1447, 1454). Chad often hunted in the woods in the morning. (T. 1454). Nonetheless, Leslie, who tended to be paranoid, began trying to reach Chad on his cell phone. (T. 1447-48). Eventually, Leslie told Ann that she was going to walk into the woods to check on Chad. (T. 1449). Ann returned to her homework. (T. 1450). At some point, Morningstar woke up and told Ann that an ambulance was outside. (T. 1451). She immediately called Jesse and told him that Chad had been shot. (T. 1451-52).

After trial, when Mr. Andersen was finally provided with discovery, he observed that he was missing hundreds of pages of discovery based on the Bates numbers on documents he was provided by counsel. After trial, Mr. Andersen obtained, for the first time, a report (Bates Stamp 3235), in which Ann Fain told police officers that Chad had left the home before she left to take her child to school. (**Exhibit 6 – Ann Fain Witness Contact Sheet**). This contradicts both Ann's trial testimony and the various statements and trial testimony of Leslie Fain, who indicated that Ann left before Chad did. The timing of the events is incredibly important because the timeline set forth by Leslie Fain suggested the shooter acted with premeditation because the shots happened at such a time that it was reasonable to believe the shooter had lied in wait and then shot Chad as soon he made to the maple syrup site. If, as the school cameras showed, Ann dropped her child off at 8:01 a.m., she had to leave home approximately 10 to 15 minutes before 8:00, and if Chad was already gone, he would have been at the maple syrup site for quite some time before the shots were heard. Regardless of who did the shooting, this takes away the lying in wait aspect that was used to support the element of premeditation.

Jesse Fain

Jesse said that Ann called him at work about 10:00 a.m. to tell him that Chad had been shot. (T. 1045). After he received the call, he rushed home to discover Chad had been shot. (T. 1045-46). Although Chad was technically Jesse's stepfather, the men were close in age and were good friends. (T. 925, 1040). In fact, on the day of Chad's death, Jesse was planning on leaving work early to help Chad with maple syrup production. (T. 1064-65). Chad was going to get to the site early to chop some wood. (T. 1064-65). Then, Jesse and Al Baker would meet him there around 10:00 a.m. (T. 1065). According to Jesse, he had been at the maple syrup site the prior night with Chad and Al. (T. 1050). Around dark that night, they walked to a pond to the north to get water to extinguish the syrup making fire that day. (T. 1056).

Afterwards, they had gone to Kenneth's house for a short visit. (T. 1063-64). Jesse had not observed any tension between Chad and Kenneth during that visit. (T. 1064). But, Jesse did note that while they were in the woods the night before, Mr. Andresen had called to discuss leeching with Chad. (T. 1058-59). Chad did not want to talk to Mr. Andresen. (T. 1059). Instead, Al spoke with Mr. Andresen. (T. 1058-59). Jesse recalled having a conversation with Chad, a week or so before his death, about the construction business with Mr. Andersen. (T. 1042).

According to Jesse, Chad planned to stop working with Mr. Andersen. (T. 1042-43). In affirming Mr. Andersen's conviction in direct appeal, the Minnesota Supreme Court pointed to this testimony as circumstantial proof of the deteriorating relationship between Mr. Andersen and Chad Swedberg, which supported the jury's decision. *State v. Andersen*, 784 N.W.2d 320, 325, 330 (Minn. 2010). At trial, Jesse Fain was not impeached using his grand jury testimony, where, when asked if Chad told him he wasn't going to work with Mr. Andersen anymore, he

stated "He – He – he didn't say that directly. What he said was – I asked him if he was gonna do either leaching or work with Fud, and he indirectly said that he didn't have to do anything with him because he'd be able to do it on his own." (GJ. 344).

Morningstar Bellcourt

Morningstar and her son, Thomas Covington, had been living with Chad and Leslie for about a year when Chad died. (T. 1705-06). On the day of Chad's death, Morningstar slept until about 10:00 a.m. (T. 1707). When she awoke, she felt as though something was wrong. (T. 1708). Ann was there, and she told Morningstar that Chad had suffered a heart attack. (T. 1710). Morningstar quickly dressed and went outside. (T. 1709). She encountered Kenneth, who was driving a fork lift. (T. 1709). Morningstar got a pallet and threw it onto the fork lift, and hopped on herself. (T. 1709-10). Then Kenneth drove the fork-lift up to the maple syrup site. (T. 1709-10).

Leslie was there, screaming and crying on the ground, clutching Chad's dogs. (T. 1711). Morningstar helped Leslie stand up, and together, they began walking toward the house. (T. 1711). It was so muddy that Morningstar fell down as she walked. (T. 1711). They soon came across Al Baker, who had his truck. (T. 1711). Al gave Morningstar, Leslie, and the dogs a ride back to the house. (T. 1712).

Morningstar recalled that just before noon, Mr. Andersen called the house and asked for Chad. (T. 1712-15). She told Mr. Andersen that Chad was dead. (T. 1713). Mr. Andersen said he was in Fargo and that he was on his way back. (T. 1713). Morningstar asked Mr. Andersen if someone had called him and he responded that he would be back as soon as he could. (T. 1713).

Kenneth Swedberg

Chad's brother, Kenneth, told investigators that he last saw Chad the night before. (T. 1473). Chad and Jesse had come over to look at a batch of someone else's maple syrup at Kenneth's request. (T. 1474). According to Kenneth, they had no disagreements during this meeting. (T. 1474-75). Kenneth acknowledged that he had occasional conflicts with his younger brother. (T. 1475-76). But, according to Kenneth, the relationship was mostly good at the time of Chad's death. (T. 1475-76). This was in direct contradiction to the statement Leslie Fain gave police on May 1, 2008. (**Exhibit 3 – Leslie Fain May 1, 2008 Interview**).

On the day Chad died, Kenneth awoke about 7:15 a.m. and went outside to make food for the bees he kept. (T. 1482). This involved mixing corn syrup in a tank using his drill with a special attachment. (T. 1482-84). As he stirred the syrup, Kenneth saw Thomas Covington and his own daughter get on the school bus at 7:40 a.m. (T. 1484-86). Kenneth thought it was odd that Thomas boarded the school bus on time because Thomas was usually running late. (T. 1521). Kenneth also noticed Thomas was wearing a tank top, even though it was only 30 to 32 degrees outside. (T. 1521).

Eventually, Kenneth went inside his house and began rolling pollen patties for his bees. (T. 1487). As he worked, he listened to "Swap and Shop", a ten to fifteen minute radio program. (T. 1487-88). At 8:45 a.m., Lisa left to take their daughter to an appointment. (T. 1488). Kenneth said he then went to do some work in his shop. (T. 1488). At some point while Kenneth was in his house, Leslie called him, frantic, and told him to come to the maple syrup site because something had happened to Chad. (T. 1489). Kenneth quickly drove to the site on his four-wheeler. (T. 1490).

At the scene, Kenneth went to Chad and checked his pulse on his neck. (T. 1490). He found Chad was cold and assumed he was dead. (Id.) Kenneth then took Leslie's phone from her and talked to the 911 dispatcher. (T. 1491). Then he went to meet police on his four-wheeler. (T. 1492). After directing police to the maple syrup site, Kenneth got a forklift and a pallet. (T. 1492). Morningstar came out and hopped on the forklift and they rode to the site together. (T. 1492-93). When they arrived, an EMT told them Chad had been shot. (T. 1493). Kenneth was "shocked" to hear this. (T. 1493). Kenneth, Morningstar, Leslie, and the dogs then started to walk back to the house. (T. 1493-94). As they walked, they ran into Al Baker, who gave them a ride in his pickup truck. (T. 1494).

When Kenneth got to Chad's house, he saw Officer Joe McArthur standing in the yard and said "What the hell are you guys standing for? The killer might be running in the woods." (T. 1496). McArthur agreed to drive around with Kenneth to look for tracks. (T. 1496). Kenneth decided to drive toward Mr. Andersen's house, which was located at the far side of Fish Hook Lake. (T. 1497). He later characterized this decision as a "premonition." (T. 1497). Eventually, Kenneth and McArthur hiked to Fish Hook Lake and crossed the lake on the ice. (T. 1499-1502). Then, they went to the maple syrup site. (T. 1508). Along the way, Kenneth observed a footprint pressed into the mud. He believed this was Chad's footprint. (T. 1509).

Lisa Swedberg

Kenneth's wife, Lisa, told investigators that Kenneth went outside to prepare his bee food about 7:30 a.m. (T. 1544). Sometime after their daughter and Thomas got the school bus, they sat together in the kitchen and rolled pollen patties for the bees. (T. 1546). As they did this, they listened to Swap and Shop on the radio, which was quite loud. (T. 1546). Lisa left about 8:45 a.m. to take their other daughter to an appointment. (T. 1546). After the appointment, which

lasted about an hour, Lisa returned to her car and discovered a message from Kenneth. (T. 1546-47). When Lisa called Kenneth back, he told her that something had happened to Chad. (T. 1547).

Al Baker

Seventy-two year old Al Baker told investigators he had known Chad for quite some time. (T. 1716-19). Al was a jack of all trades and like to help Chad with various projects, including the maple syrup operation. (T. 1716-22, 1759). He was not as quick as he used to be, however, because he had heart problems. (T. 1728).

On the day of Chad's death, Al was planning to meet Chad at the maple syrup site. (T. 1729). He called Chad at 7:30 a.m. (T. 1729, 1736). Mr. Baker said this call was to inform Chad that he had to run to the grocery store in Waubun to get for the day's activities. Waubun is located about 15 minutes west of Mr. Baker's home. (T. 1716, 1730, 1732). Mr. Baker drove his Camaro convertible to the store because it was fast. The car was very rare, with only 44 ever made. (T. 1732-33).

At 7:52 a.m., Mr. Andersen called Al. (T. 1731, 1736). Mr. Andersen asked Al to stop by his place to look at a bulk tank that Mr. Andersen wanted to turn into a storage tank for leeches. (T. 1731-32). It was not unusual for Mr. Andersen to ask Al to come over, and Al had been to Mr. Andersen's home many times over the years. (T. 1742). Al had converted a bulk tank into a leech tank in the past. (T. 1765). Al believed that Mr. Andersen was going to start a leeching business. (T. 1742). Though Mr. Andersen's home was slightly out of his way, he agreed to stop by on his way to the maple syrup site. (T. 1730-32).

After speaking with Mr. Andersen, Al went to get food to make lunch for the day. (T. 1730, 1733-37). According to Al, he decided to drive to the grocery store, which was about 15

minutes away in Waubun. (T. 1730-31). After stopping at the store, he returned home and made lunch. (T. 1731-32). Al claimed he may have called Mr. Andersen to tell him he was running late, but was not certain. (T. 1733). Al was unable to recall any other phone contact with Mr. Andersen that morning. Eventually, Al drove to Mr. Andersen's house. (T. 1735, 1743). When he arrived, there was no one there. (T. 1743). Mr. Andersen's truck was also gone. (T. 1743). Al testified that while at Mr. Andersen's place on his own, he went into the barns to look around. (T. 1743 – 1744). At 9:57 a.m., Al called Mr. Andersen's cell phone and when he got no answer, decided to head to the maple syrup site. (T. 1734, 1743).

Al parked his truck near the maple syrup site and unloaded his four-wheeler. (T. 1746). Suddenly, a police officer emerged from the wood and told Al not to go any farther. (T. 1746). The officer told him that the maple syrup site was a crime scene. (T. 1748). Al heard "screaming and hollering" and soon he saw Leslie and a few others. (T. 1748). He gave them a ride to Leslie and Chad's house. (T. 1749). Later that day, he was allowed to retrieve his four-wheeler from the woods. (T. 1750).

During this testimony, Mr. Baker indicated that, despite having gone to the grocery store with the purpose of getting lunch to take to the syrup camp, he forgot his insulin, and perhaps the lunch, at home. (T. 1750-51). Mr. Baker went onto testify that he needed to have four (4) insulin shots a day, including a long lasting shot and also short acting shots before meals. (T. 1751). Later, Mr. Baker stated that it was Mr. Andersen, and not Chad, who knew Mr. Baker was going to the store that morning. (T. 1762). When challenged about this discrepancy, Mr. Baker said he did not remember who knew because he has short term memory loss. (T. 1790).

In addition to forgetting to bring his lunch, Mr. Baker's testimony about when he went to the store were inconsistent with other evidence. Doug Darco testified that he saw Mr. Baker

driving **away** from the grocery store at 7:45 a.m. that morning. (1939-47). He knew it was Mr. Baker because Mr. Baker drove a distinctive vehicle. (Id.) The time at which Mr. Darco saw Mr. Baker going away from the store is inconsistent with Mr. Baker's claims he went to the store only after speaking with Mr. Andersen at 7:52 a.m. Additionally, only after this trial when he was allowed to see discovery documents, Mr. Andersen learned that the store owner had provided a statement indicating that Mr. Baker had arrived shortly after they had opened. (**Exhibit 7 – Karen Spencer Contact Sheets**). This was consistent with Doug Darco's testimony that Mr. Baker was going away from the store by 7:45 a.m.

According to investigators, the reason Mr. Baker's four (4) guns capable of firing a 30 caliber round were not inspected was that Mr. Baker's timeline had checked out. (T. 2755-56). This ended up being of vital importance because, as Mr. Andersen learned through a police report disclosed on the date of his sentencing, Mr. Baker reported having sent a .308 Winchester rifle to his niece in Alaska after Chad's murder. (**Exhibit 8 - Durkin Affidavit with Police Report**).

Since trial, Mr. Andersen has learned additional information regarding Mr. Baker. This information, in the form of 9 minutes and 20 seconds of an interview with Mr. Baker which took place on April 20, 2007, was only disclosed to Mr. Andersen through his civil case. (**Exhibit 45 – Kenneth Andersen Affidavit ¶ 80**). The recording Mr. Andersen received in discovery in his civil case contained an additional 9 minutes and 20 seconds of an interview with Mr. Baker that was not turned over or transcribed prior to trial. In that part of the interview, it came out that that Mr. Baker had reported, on April 19, 2007, receiving a phone call in the nature of a confession to Chad's murder and that on April 20, 2007 investigators went and took a recorded statement from Mr. Baker in which Mr. Baker stated that someone had called him claiming responsibility for the

murder of Chad Swedberg and in which Mr. Baker stated that he had his phone system set up so that he could take call made to his home phone on his cell phone. (**Exhibit 9 – Baker Recording Transcript**[7]). In that recording, Mr. Baker also stated that he did not want to find out who killed Chad.

Mr. Andersen only learned of the additional portions of the April 20, 2007 interview with Al Baker because that information was turned over in his civil case. When he received this, he brought a motion seeking full disclosure of that information. (**Exhibit 12 - Motion to Compel Discovery**). Mr. Andersen's motion was granted, but the recording he received did not contain the entire interview. Mr. Andersen brought a second motion, which was denied, even though he had not received what had been ordered.

After learning this important information, Mr. Andersen's mother spoke with Mr. Baker about the call. In that call, Mr. Baker claimed he was at Chad's place around 8:00 and saw Mr. Andersen coming out of the Swedberg house. Mr. Baker also claimed that he never sent a gun to Alaska, and did not know anyone there, but had actually sold his guns at auction. Mr. Baker also stated that on the date of Chad's funeral, he received a call from someone claiming to have killed Chad and that he reported those calls to law enforcement. (**Exhibit 11 - Geraldine Bellanger Affidavit**).

As a result of this, Mr. Andersen's family hired an investigator to speak with Mr. Baker. During that interview, Mr. Baker claimed that the .308 rifle he discarded prior officers coming out to check his weapons was actually in Illinois with his brother. (**Exhibit 10 – Egelhof Report of Interview with Al Baker**). Mr. Baker also claimed to have seen the spot where Mr. Andersen waited to shoot Chad Swedberg, finding cigarette butts and two (2) shell casings on the ground.

[7] Petitioner is in possession of the actual recording, which can be provided.

(Id.). After making these statements, Mr. Baker ended the interview and has refused any further contact with Mr. Andersen's investigator.

Vernon Wander

Vernon Wander, who lived near the woods where Chad died, recalled hearing two (2) shots between 8:30 and 9:00 a.m. in the vicinity of the site. (T. 1546-40). Based on the sound of the shots, he thought they came from a 30-06, a .30-caliber gun, or a 270 or 280. (T. 1539.40).

Wanda Nelson

Wanda Nelson was preparing Mr. Andersen's 2006 income tax returns. At trial, Ms. Nelson's testimony seemed to contradict nearly everything Mr. Andersen told investigators in the days following Chad's death about his schedule on April 13, 2007. She testified that on April 13, 2007, Mr. Andersen did not have an appointment at 9:30 a.m., but rather had an appointment at 2:00 p.m. (T. 1652, 1655-56). Ms. Nelson went on to tell the jury that while Mr. Andersen reviewed his 2006 returns with her on his computer, he did not ask for, or receive, a copy of his returns that day. (T. 1669). She also told the jury that later that same day, around 4:00 p.m., Mr. Andersen called her to request a copy of his 2006 returns and then shortly after that arrived to pick up his returns. (T. 1670).

At trial, the state used this testimony from Ms. Nelson to argue to the jury in closing that Mr. Andersen had showed up early for his appointment to create an alibi. (T. 2942). It also used this testimony argue that Mr. Andersen went back to Mahnomen later in the afternoon of April 13, 2007 to get his tax returns to further his alibi in which he claimed to have left the tax preparer's office with a copy of his returns. (T. 2940, 2943-45, 2950). In affirming Mr. Andersen's conviction, the Minnesota Supreme Court pointed out that Mr. Andersen arrived at

the tax preparer's office before his scheduled appointment as circumstantial evidence supporting his conviction. *State v. Andersen,* 784 N.W.2d 320, 325, 330 (Minn. 2010).

Only after his trial, Mr. Andersen learned for the first time that in an interview on May 1, 2008, Ms. Nelson informed investigators that, contrary to her trial testimony, Mr. Andersen had in fact left her office with a "reference copy" of his income tax returns. (**Exhibit 13 – Nelson Witness Contact Form**). This was in direct contradiction to Ms. Nelson's trial testimony that Mr. Andersen did not ask for or receive a copy of his returns. In addition, only after his trial, Mr. Andersen received a Report of Investigation related to an interview of Jeffery Thompson. (**Exhibit 14 – Thompson Interview**). In that report, Mr. Thompson told investigators that he was with Mr. Andersen until 4:30 p.m. that afternoon, when he dropped Mr. Andersen off at his home. Id. This is consistent with Affidavits provided by Zurn and Beaupre. (**Exhibit 15- Zurn Affidavit; Exhibit 16 - Beaupre Affidavit**). This shows that contrary to how it was presented to the jury, Mr. Andersen in fact left his tax preparer's office with a copy of his returns and spent his entire afternoon either at the home of Kenneth Swedberg or his own home and could not have returned to Mahnomen to pick up a copy of his tax returns.

On November 11, 2014, Mr. Andersen's investigator interviewed Ms. Nelson regarding the events of April 13, 2007. During that interview, Ms. Nelson indicated that while she had little recollection of the meeting with Mr. Andersen, it was her practice that a customer left with a "reference copy" of their returns whether they needed it or not. (**Exhibit 17 - Egelhof Report of Interview with Wanda Nelson**). Ms. Nelson went on to state that it was in fact possible that Mr. Andersen had told her that he would arrive between 9:00 and 10:00 a.m. on April 13, 2007 if he could get a ride. Id. She also stated that it was possible that Mr. Andersen had not returned to

pick up his returns on April 13, 2007, but instead he may have called her to request that she fax them to the bank so he could get a loan. Id.

During that interview, Ms. Nelson expressed a very negative attitude regarding the Native American community, indicating on several occasions that "those people" were always late for appointments and didn't care about hard work, instead focusing on getting as much money as possible. Id. Ms. Nelson also stated that when it came to Native American's she would often schedule 10 appointments for people to come in for their returns and only three (3) would show up, or she would schedule two (2) appointments and 10 people would show up. Ms. Nelson also stated that when at the Mahnomen office, it was her practice to only hand out the reference copy to customers because "those people out there" would lose the copy and only cared about what size check they would get. (Id). In the context of the interview, "those people" was clearly a reference to Native Americans. Ms. Nelson also volunteered that she did not believe in welfare and was sick of Native Americans being handed money through the Earned Income Credit. (Id.) She also stated that even though she lived near the border of the Red Lake Reservation, she had only been on the Reservation twice because of her fears about it. (Id).

This interview raises serious questions about Ms. Nelson's testimony in general and about whether her purported recollections of her interactions with Mr. Andersen actually happened the way she said they did, or if she just thought they did because that is how she believes Native Americans act.

Mr. Andersen's Statements to Investigators.

Mr. Andersen was interviewed two (2) days after Chad's death. (T. 2635-36). He was not a suspect and was cooperative. (T. 2636). According to Mr. Andersen, he called Chad at about 7:46 to "shoot the bull," something they often did. (T. 2637). During this conversation, he

asked Chad for a ride to Fargo. (T. 2637). Mr. Andersen wanted to go to Fargo to get a loan for his leeching business that he was starting with Chad. (T. 2637, 2640). Chad declined, telling Mr. Andresen he was going to make syrup that day. (T. 2637). After this call, Mr. Andersen called Al Baker, to see if Al could stop to look at the leech tank on his way to the syrup site. (T. 2638-40). Al informed Mr. Andresen he would come by at 8:30 a.m. (T. 2641).

Mr. Andersen then called his cousin, Doug Haverkamp, to see if he could get a ride to Fargo. (T. 2641). Mr. Andersen also told Doug that he needed to stop to see his tax preparer in Mahnomen between 9:30 and 10:00 a.m. (T. 2641). Doug agreed to drive Mr. Andersen and arrived at his house between 8:30 and 9:00 a.m. (T. 2642). When Al did not arrive at Mr. Andersen's home, Mr. Andersen attempted to call him at 8:38 a.m., and then left. (T. 2734, 2642).

While Mr. Andersen was trying to get a loan, he received a message from his niece, Amy Mertens. (T. 2644). She told him that Kenneth Swedberg had been shot. (T. 2645). Amy then called back and actually spoke with Mr. Andersen when she said that "he" was dead. (T. 2645). After receiving these phone calls, Mr. Andersen called Chad's house and spoke with Morningstar, who told him that Chad was dead. After Mr. Andersen learned of this, he called Kenneth Swedberg and said he would come over as soon as he could. Mr. Andersen did that and met Kenneth at his house. (T. 2646).

Over a month after Chad's death, investigators spoke with Mr. Andersen again. (T. 2657). This time, they requested information about Mr. Andersen's guns. (T. 2657). Investigators found Mr. Andersen in his barn, tending leeches along with Doug Haverkamp. (T. 2658). Mr. Andersen was cooperative and allowed investigators into his home to look around. (T. 2658). Mr. Andersen was an avid hunter and his home contained many mounts. (T. 2659).

Mr. Andersen told officers he owned the following guns: a 410 shotgun, a 12 gauge shot gun, a 222 rifle, a .22, a pump action shotgun, and a muzzle loader. (T. 2659-60). About three or four months earlier, Mr. Andersen had heard that someone intended to steal his guns when he was not home, which was often. (T. 2660). To prevent this, he took most of his guns to his sister's house for storage. (T. 2660). The only gun he kept at his home was the pump action shotgun. (T. 2660).

Investigators attempted to confirm the details that Mr. Andersen had provided. Phone records corroborated that Mr. Andersen had called Chad and Al in the morning on April 13, 2007. Phone records also confirmed that Mr. Andersen had called Al a second time around 8:38 a.m. (T. 2721). Phone records also showed that Mr. Andersen received two (2) calls from Amy Mertens, just as he had said. (T. 2723).

Mr. Andersen also went to Mahnomen to meet with his tax preparer and then went to Fargo / Moorhead to meet with a banker. (T. 2722). Just as Mr. Andersen stated, Doug Haverkamp gave him a ride. (T. 1592-97). Doug testified he did not notice anything unusual about Mr. Andersen's demeanor before he learned of Chad's death. (T. 1592-97, 1603-04). Mr. Andersen's sister, Liz, had the guns that Mr. Andersen had given her for safekeeping. (T. 2230-31, 2664-66).

Investigators were troubled by some alleged inconsistencies in Mr. Andersen's statements. See (T. 2643, 2661). Phone records indicated that Mr. Andersen did not call Doug until 9:17 a.m. (T. 1569). Based on these phone records, investigator determined that Mr. Andersen did not leave for Mahnomen until after 9:30 a.m. (T. 1570-71). Investigators also learned that Mr. Andersen's appointment with his tax preparer was allegedly scheduled for 2:00 p.m., hours after he actually arrived. (T. 1655). Mr. Andersen actually met with her around

10:00 a.m., when her 10:00 a.m. failed to show. (T. 1657). The tax preparer noted that Mr. Andersen was never on time for his appointments and was regularly very early or very late. (T. 1672). However, as discussed above, Ms. Nelson later admitted that Mr. Andersen said he would be by in the morning if he could get a ride.

Similarly, Mr. Andersen was alleged not to have a scheduled appointment at the bank that morning. (T. 1680-81). He had missed an appointment that had been scheduled for the day before. (T. 1680-81). However, Mr. Andersen did have contact with a loan officer the day of Chad's death to discuss when he could come in, informing the loan officer he would be in around 11 am since he could get his taxes that morning. (**Exhibit 45 – Andersen Affidavit ¶ 66**). Despite his alleged lack of an appointment, Mr. Andersen was able to meet with a banker when he did arrive. (T. 1681-83). Mr. Andersen, who claimed to need the loan for home repairs, was turned down because he did not have his paperwork. (T. 1680, 1681-83)

The reason Mr. Andersen was seeking a loan for home repairs was during a prior call to the bank, he was informed they did not do business loans. (**Exhibit 45 – Andersen Affidavit ¶ 58**). However, the banker did tell him that they did home improvement loans and if the project involved work on his house, he might be able to qualify. (Id.) Mr. Andersen indicated that he would need to make some changes to the water softener and water lines in his home to accommodate the leach tanks. (Id.) The banker told him that might work for getting a loan. However, Mr. Andersen only had a draft copy of his tax returns with him, and was not able to get a loan with those. (Id. ¶ 68) He did attempt to call his tax preparer to see if she had a finished return she could fax over. (Id.)

The banker also recalled that Mr. Andersen, who turned his phone on during the meeting to call his tax preparer, received an incoming phone call. (T. 1683). After the call, appellant said

that his "business partner had been shot," and that he had to go. (T. 1683). However, the banker admitted that she could have misunderstood Mr. Andersen. (T. 1689-90). Mr. Andersen told investigators that his niece had initially reported that Kenneth, and not Chad, had been shot. (T. 2645). Amy, on the other hand, thought that she told Mr. Andersen that Chad was the person who had been shot when they spoke at 11:49 a.m. (T. 1929, 1932). However, Amy testified that she was in shock after learning of Chad's death. (T. 1930-32). At 11:52, Mr. Andersen called Chad's house and asked for him. (T. 1715).

Officers were also puzzled when Mr. Andersen seemed to be missing a .30 caliber Tikka rifle that had been observed during the execution of a search warrant at his home several months earlier. (T. 1329-32). Mr. Andersen did not mention the rifle during his statements, and the rifle was not among the guns he stored at his sister's house or in his own home. (T. 2661, 2664-66). Mr. Andersen did not mention the Tikka rifle because he had not owned it for months and months, having traded it to Chad as part of the muzzleloader transaction as discussed above. The last time Mr. Andersen saw the rifle was when he handed it to Chad in the presence of Josh Bogatz.

Doug Haverkamp

During his statements to officers, Mr. Andersen stated that on the morning of April 13, 2007, when he spoke with Doug Haverkamp, Doug told him that he intended to go to Ulen that day to get his taxes. During its opening statement, and again in closing, the state attacked Mr. Andersen's credibility by telling the jury that Mr. Andersen was lying about what Doug told him in order to create an alibi. (T. 876-77, 2950). To support this, the state presented the testimony of Brad Riggle, who lived with Doug Haverkamp, who stated that he and Doug intended to go to Detroit Lakes on April 13, 2007 for lunch and did not have other plans. (T. 1577-78). It also

presented the testimony of Haverkamp, who stated he did not have plans to go to Ulen to have his taxes done. (T. 1587). In affirming Mr. Andersen's conviction, the Minnesota Supreme Court pointed to Mr. Andersen making these alleged false statements to police to create an alibi as circumstantial evidence that he committed the crime. *State v. Andersen*, 784 N.W.2d 320, 332 (Minn. 2010).

After he finally received his discovery, Mr. Andersen discovered a transcription of an interview with Brad Riggle, dated April 15, 2007. In that transcription, Riggle stated that he and Doug planned to go to Detroit Lakes to eat and that after eating, he was taking Haverkamp to get his taxes done. (**Exhibit 18 – Riggle Interview**). Learning of this, and observing that his trial attorney had not used this police report to impeach Riggle, Mr. Andersen had his investigator make contact with Riggle and Haverkamp to determine why they had testified they had no intentions related to Haverkamp's taxes when they told officers just days after Chad's death that they had.

During the interview, Haverkamp indicated he had no recollection of planning to do his taxes at the time. Riggle confirmed that his memory when he spoke with investigators on April 15, 2007 was good. (**Exhibit 18 – Riggle / Haverkamp Interview**). The police and investigative report show that the claims that Mr. Andersen lied about Haverkamp having plans to do his taxes, which were made by the state and relied upon by the Supreme Court as part of affirming the conviction, were simply false.

Mr. Haverkamp later spoke with Mr. Andersen's investigator. During that meeting, Mr. Haverkamp admitted that after Mr. Andersen's arrest, he had kept Mr. Andersen's van as well as all of the proceeds from the leaching, which was essentially theft. Because of this, he was afraid of Mr. Andersen and unwilling to provide a statement at an earlier time. Id.

The autopsy

An autopsy showed that Chad had been shot twice, once in the back of the right shoulder and once in the left buttock. (T. 1820). The medical examiner determined that the injuries caused Chad to bleed to death. (T. 1825-26). There was no stippling of the wounds, so it was theorized the shots came from some distance away. (T. 1838). Based on the type of tissue damage observed, the medical examiner believed the bullets were fired from a rifle. (T. 1821). Two (2) bullets were removed from Chad's body. (T. 1821).

A firearms examiner with the BCA examined the two (2) bullets. (T. 2415-21). The examiner believed that the bullets were fired from a .30 caliber weapon. (T. 2420). Although he believed the bullets to be Winchester brand Supreme Silver Tips, he was unable to determine the weight or grain of the bullet because they were damaged. (T. 2421). The examiner also inspected the impressions from the bullets in an effort to determine what type of .30 caliber gun had fired them. (T. 2425). The bullets had been fired by a gun with a right twist and 4 lands and grooves. (T. 2425). According to the examiner, this was a common pattern among .30 caliber guns. (T. 2425). The examiner speculated that the gun may have been a Winchester, a Remington, a Harrington and Richardson, a Bush Master, or an H & K. (T. 2426).

Test firing the rifle

A firearms expert from the BCA test fired the Tikka using 150 grain Winchester Silver Tip bullets and compared the fired rounds to the bullets that were removed from Chad's body. (T. 2432-2441). The examiner was unable to connect either the Tikka Rifle or the type of bullets found in Mr. Andersen's home to the bullets removed from Chad's body. When asked by the state to describe the results of the testing, the examiner described them as inconclusive. (T.

2443). However, on cross examination, during the following exchange, the examiner directly stated that the bullets he test fired and the bullets removed from Chad's body did not match:

Q. But you did as you stated, you did test fire some rounds of ammunition that you had in your office; correct?

A. Yes.

Q. And that – that bullet couldn't be – or could not be considered to be a positive match with the bullet that was found in the body of Chad Swedberg; is that correct?

A. Yes.

(T. 2455). The examiner later admitted that none of the individual characteristics of the fired bullets matched the bullets removed from Chad's body. (T. 2466). Additionally, while the examiner testified that he was "reasonably certain" the bullets removed from Chad's body were Winchester Silver Tips, he acknowledged that he had never made such a statement in his reports and that the most he could actually say was that the bullets were consistent with Winchester Silver Tips. (T. 2453). When pressed, the expert had to admit that the characteristics that caused him to believe it was the Winchester bullet were also the most common configuration or a .30 caliber rifle. (T. 2556). In fact, the firearms examiner conceded that a number of .30 caliber guns could have fired the bullets that were found in Chad's body. (T. 2456-2494).

Several other potential suspects, including Kenneth Swedberg and Al Baker, had .30 caliber rifles. (T. 1512-13, 1758-59, 2663). Investigators never seized these guns, and they were never test fired. (T. 2731). Mr. Baker's guns were never tested because his purported alibi of being at home to take phone calls, then traveling to the grocery store after talking with Mr. Andersen at approximately 7:52 a.m. checked out. (T. 2755). This testimony was not challenged, because despite Agent Baumann's knowledge that Mr. Baker could take his home

phone calls from his cell phone, the portion of the interview in which Mr. Baker made those statements was not disclosed until it was turned over on a CD containing recordings of Mr. Andersen's jail calls. Additionally, Mr. Andersen was considered a suspect because he had purportedly attempted to hide ownership of the 30 caliber Tikka rifle after police leaked information Chad had been shot with a .222 rifle. Yet, when Mr. Baker reported to police that he had shipped one of his 30 caliber guns to Alaska, after they were aware he could answer his home phone from his cell phone, nothing was done to check his guns. As Mr. Andersen's investigator later learned, Mr. Baker's claims about sending the gun to Alaska had changed to a claim the gun was shipped to his brother in Illinois. (**Exhibit 10 – Egelhof Report of Interview with Al Baker**).

Search Warrant Execution

Investigators appeared at Mr. Andersen's home with a search warrant on June 6, 2007. Before investigators commenced their search – and without telling Mr. Andersen they had a search warrant, they interviewed him again. (T. 2679). Mr. Andersen said he was quite hung over, and his appearance was consistent with a hangover. (T. 2680). Investigators confronted the hungover man with what they believed were inconsistencies in this prior statements. (T. 2681). Mr. Andersen insisted he had an appointment with his tax preparer at 9:00 or 9:30 a.m., even when investigators said they knew the appointment was for the afternoon. (T. 2681).

When the investigators questioned Mr. Andersen about the call from his niece, he said that he had received multiple calls that day. (T. 2682). He clarified that he had received a call from Amy indicating that Kenneth Swedberg had been shot. (T. 2682). Then, he said Amy called him a second time to say it was Chad who was shot and that he was dead. (T. 2682). Mr.

Andersen did not mention his phone call to Morningstar, but urged officers to check his phone records because he was not trying to hide anything. (T. 2682, 2747).

Investigators asked Mr. Andersen whether he owned a Tikka rifle. (T. 2682). He acknowledged owning several Tikka rifles over the years. (T. 2682). He told investigators that he had traded his Tikka rifle to Chad for two (2) muzzleloaders. (T. 2682-84). Since Chad did not want the scope on the Tikka, Mr. Andersen removed it and planned to use it on a different gun. (T. 2683-84). Although Mr. Andersen did not remember where the Tikka was traded in, investigators were able to verify that Chad had purchased two (2) muzzleloaders and that Mr. Andersen had one (1) of them.

Mr. Andersen was later able to obtain an Affidavit from Mike LaDue. Mr. LaDue stated that shortly after Mr. Andersen and Chad had returned from a hunting trip to Colorado, he was with both men when he heard Chad talking about how much he liked the Tikka rifle and stating that he intention to buy the rifle from Mr. Andersen later that fall when he had the money to buy it. (**Exhibit 20 - Mike LaDue Affidavit**). Mike LaDue had been subpoenaed as a witness at Mr. Andersen's trial, but as he waited outside the courtroom, he was informed by Mr. Andersen's trial counsel that his testimony was not needed. (Id.)

Mr. Andersen told investigators that when he had the Tikka rifle, he used 150 grain ammunition with a special tip. (T. 2686). He also led investigators to an area where he had test fired the Tikka so that they could collect any remaining bullets or fragments. (T. 2690). Mr. Andersen denied any involvement in his friend's death. (T. 2686).

Still unaware of the search warrant, Mr. Andersen allowed officers to search his house and provided assistance in pointing out several items. (T. 2691, 2694). Mr. Andersen only asked that officers not bring a bunch of marked squad cars onto his property that morning while

he was conducting his leaching business. (T. 2691). In that search, investigators seized a scope, a manual for a Tikka rifle, and two Winchester Supreme Ballistics Silver Tip bullets. (T. 2692-2700). When investigators began searching the outbuildings, Mr. Andersen objected, stating that his brother, Frank, who owned the property, would not approve of the search if it involved his home. (T. 2701). At that point, investigators told Mr. Andersen they had a search warrant for the entire property, including Frank's home. (T. 2702).

According to John McArthur, at that point, Mr. Andersen became nervous and agitated and attempted to stop the search. (T. 2127-2131). However, this is not what actually occurred. Mr. Andersen was incredibly hung over, and likely still highly intoxicated from the night prior, when officers arrived. During their conversation in the living room, he kept falling asleep and was on the verge of vomiting. As the interview continued and then when he was asked to move, he began to feel even more ill. When officers initially asked to search the property, Mr. Andersen agreed on the above condition. Then, when he spoke with his brother Frank, Frank said he didn't want anyone on searching his property and would not give permission. Mr. Andersen did get agitated, but as he explained on the recorded interview, it was because he saw all the police cars coming toward his house after he requested they do not as part of allowing a search. (**Exhibit 40 – Andersen Interview Dated June 7, 2007, Page 6**). McArthur also testified at trial that after Mr. Andersen objected to the search, he was served with a search warrant by Officer Sieling and then left. (T. 2130). However, as the police report created by Officer Sieling shows, he was not at the Andersen residence when Mr. Andersen left. (**Exhibit 41 – Sieling Police Report of June 7, 2007**). These distinctions and clarifications are important because the Minnesota Supreme Court relied upon the testimony of McArthur regarding Mr.

Andersen's reaction to the search and being served with a search warrant as evidence supporting the conviction. *State v. Andersen*, 784 N.W.2d 320, 330 (Minn. 2010).

During a search of the barn, where appellant had his leeching operation, investigators discovered a Tikka rifle. (T. 2704). The rifle was underneath some insulation in the roof area of the barn. (T. 2141-2151). It did not have a scope. (T. 2160). During later examination, investigators claimed to discover two (2) sets of prints on the gun, a finger print on the magazine and a partial palm print on the stock. After taking 26 separate major case finger print samples from Mr. Andersen, investigators claimed to match Mr. Andersen's palm prints to a partial palm print on the underside the rifle. (T. 2160, 2342). There was no testimony about how "good" the match was or what changed that allowed for an allegedly conclusive determination to take place. They claimed to be able to eliminate Mr. Baker as being the person who put the finger print on the magazine. (T. 2343). The sole proof provided showing that this verification took place was an email from another scientist stating "Done" in response to a request for review of the fingerprint results. (**Exhibit 21 – Finger Print Email**). Mr. Andersen was arrested shortly after the gun was found.

RECORDING JAIL CALLS

After Mr. Andersen was arrested, and while he was awaiting trial in the Becker County jail, his phone calls with his attorneys and with his defense investigator were being monitored and recorded. Mr. Andersen and his attorneys were initially unaware of this. (See OH 134). Mr. Andersen became aware this was happening when a member of the jail staff warned him it was occurring.

When Mr. Andersen first learned of this practice, one of his attorneys, William Bullmer, contacted the state via letter. (**Exhibit 22 - Bullmer Affidavit**). In response, the state assured

Mr. Bullmer that the attorney client calls were protected and claimed no knowledge of any such recording. (**Exhibit 22**). This was the case even though, as Agent Dan Baumann later testified, he started receiving recordings of jail calls between Mr. Andersen and counsel shortly after his arrest in June 2007 and reported it. (**Exhibit 24 - Baumann Dep. P. 75-76**). Baumann also testified that after receiving the recordings, he edited them, removing the attorney calls, before creating a new CD that was what was passed along to defense counsel. Id. - Baumann Dep. 45.

Unsure whether they were being told the truth regarding the recording of Mr. Andersen's legal phone calls, defense counsel set up a ruse to flush out the truth. In that ruse, Mr. Andersen's investigator passed him a note during an in person visit asking Mr. Andersen to call William Bulmer and ask Mr. Bulmer to bring drugs to him in the jail during his next visit. Mr. Andersen made the call to Mr. Bulmer at his cell phone number, which Mr. Bulmer had been assured was on the blocked list. During that call, Mr. Andersen asked Mr. Bullmer to bring drugs into the jail for him. Mr. Bullmer agreed and said he would bring in the drugs during his next visit. When Mr. Bullmer arrived for his next visit, two (2) officers pulled him aside, searched his briefcase and conducted what was nearly a strip search of Mr. Bullmer in Mr. Andersen's view. The manner in which Mr. Bullmer was searched clearly indicates that the call between Mr. Andersen and his attorney was illegally monitored despite assertions made to the Court that no such calls had been monitored and no action had been taken as the result of information obtained from those calls. (**Exhibit 45 – Andersen Affidavit ¶ 76**).

Based on these occurrences, Mr. Andersen requested a hearing to take testimony regarding the recording and monitoring of his jail phone calls. At that hearing, the following testimony was obtained from Captain Joe McArthur regarding the jail phone system.

Upon an inmate's arrival, he is provided with a copy of the Becker County Jail Handbook, which tells the inmate that "non-attorney / client privilege phone calls" will be "monitored or recorded." (OH 115-17). Captain McArthur went on to state that, initially, in order to have a phone number blocked as a legal number, the inmate had to contact the outside company that ran the phone system, Reliance, and request the number be placed on the blocked list. (OH 130). The outside company then investigated the number, and if it checked out as a legal number, put it on the list. (OH. 130). Later, according to McArthur, the policy changed so that the inmate gave the number to the outside company, which did the same thing, but then in the end, the jail was to make the final determination of whether the number was blocked. (OH 131).

In Mr. Andersen's case, Captain McArthur swore under oath Mr. Andersen made the request to have the three numbers, which were cell phone numbers, blocked on December 3, 2007. (OH 132). The numbers were provided to the outside company, which did its investigation and then left whether to block the number up to the jail. (OH 133). The jail decided the numbers would not be blocked because they were cell phone numbers and it was jail policy not to block cell phone numbers. (OH 133). While this policy was not written the Handbook, it was nevertheless jail policy. (OH 135). For approximately six (6) months, every phone call Mr. Andersen made to the numbers which had been removed from the blocked list was recorded. (OH 136-37). Captain McArthur and Agent Dan Baumann both testified that no investigation ever took place as a result of listening to these recordings. (OH 138, 142). McArthur also testified that Mr. Andersen's calls with his private investigator were monitored because they were not considered privileged communication by the Becker County Jail. (OH 137).

Agent Baumann testified he received disks from the jail that contained all of appellant's phone calls. (OH 143). Then, he would download them to his computer. (OH 143-45). Agent Baumann claimed he did not listen to Mr. Andersen's attorney phone calls or use information from those calls to initiate investigation. (OH 140-42). However, Baumann testified he would investigate leads based on phone calls that Mr. Andersen had with other people. (OH 142).

At the Omnibus hearing, the Court informed the state that no matter what else happened, it was to immediately cease recording any call Mr. Andersen made to his attorneys, whether it was to a cell phone or a land line. (OH 149). In its order denying Mr. Andersen's motion to dismiss the charges against him, the trial court, however, denied Mr. Andersen's motion to dismiss, finding "no evidence of prejudice" given that the investigators claimed not to listen to the phone calls and because of a finding that Mr. Andersen did not request that the cell phone numbers be blocked. (**Exhibit 25 - Omnibus Hearing Order**).

In the state's written submission following this hearing, it assured the Court that, in addition to his attorney phone calls, Mr. Andersen's call to his investigator were also being blocked. (**Exhibit 23 – State's Omnibus Response**). During his civil suit, Mr. Andersen learned that his calls with his private investigator continued to be monitored, as his investigator's cell phone was not included on the private list. (**Exhibit 44 – Affidavit of Randy Hodgson, dated June 25, 2009**). Mr. Andersen, however, was not aware of this during his criminal case because those recording were never turned over to defense counsel.

In Mr. Andersen's subsequent civil case, during discovery, inquiry was made into whether all cell phone calls were actually monitored. Randy Hodgson, the jail supervisor testified, that even under the new jail handbook, which did state that cellphone calls to lawyers would be recorded, they did allow two (2) tribal defenders who were allowed non-recorded

cellphone calls. (**Exhibit 26 - Randy Hodgson Dep. 83-84**). He indicated the agreement that allowed this was in place before he took over as jail supervisor. Id. Mr. Hodgson was also asked about whether, during Mr. Andersen's time in jail, calls with private investigators were considered private calls. He testified that even though there was no mention of private investigators in the jail handbook, the jail considered those calls to be private and did not record or monitor them. (Id - Randy Hodgson Dep. 80-81). This testimony was in direct contradiction to Captain McArthur's testimony that the jail recorded all cell phone calls and had a policy of not considering calls with investigators protected legal calls.

Mr. Hodgson also provided testimony about how numbers were marked as private that was in direct contradiction to the testimony of Captain McArthur, stating that it was the jail's decision of whether a number was marked as private and that the number was made private before it was even faxed to Reliance. (Id. - Randy Hodgson Dep. 57-58). Mr. Hodgson went on to state that there had been no changes in how numbers were put in the private list since 2004. (Id. - Randy Hodgson Dep. 60-61). He also described that once he received a request to have a number made private, he put that number into the system directly and "automatically" after he confirmed it was an attorney and, if it was requested, would send the number to Reliance to have it made toll free, if the inmate requested. (Id. - Randy Hodgson Dep. 57-58). Mr. Hodgson also stated that the only reason he sent the numbers to Reliance was to have them made toll free, which was something he had no control over. Id. Mr. Hodgson also described that Reliance's role was simply to verify that the number belonged to an attorney and that the attorney wanted to make the call toll free before it would add the call to the toll free list. (Id. - Randy Hodgson Dep. 58). Mr. Hodgson stated the numbers were only sent to Reliance if there was a request they be

made toll free. (Id). He also testified that in 2007, if a number was found to be a cell phone number, it would be removed from the list. (Id. - Randy Hodgson Dep. P. 132).

During his deposition, Agent Baumann testified that initially he was making CDs and doing summaries of all non-private calls Mr. Andersen made. (**Exhibit 24 - Baumann Dep. 113**). After Mr. Andersen's grand jury proceedings, he stopped making CDs and summaries containing all the calls, instead just putting on the calls he felt had evidentiary value. (Id. - Baumann Dep. 45, 113-14). He also testified that the CDs that were turned over to defense counsel were CDs that he had made, and on which he excluded any calls between counsel and / or investigators. (Id. - Baumann Dep. 48 -50). Agent Baumann also testified that he had destroyed all the CDs from the jail with an ice auger blade and had recently deleted all the Andersen calls that remained on his computer, so there was no way to know what was, or was not on there. (Id. - Baumann Dep. 36, 99, 125).

During her deposition testimony, jailer Jennifer Soyring testified that she passed along Mr. Andersen's request to have his attorney's phone number added to the private list when he handed her his business card. (**Exhibit 42 – Soyring Dep. 45-46**). She recalled this because Mr. Andersen gave her the card so she could get the number and then Mr. Andersen was persistent in requesting the card back so he too could have the phone number. (T. 45-46).

INTERFERENCE WITH WITNESSES

In addition to the above, this is also a case where investigators actively attempted to prejudice Mr. Andersen's ability to put together a defense by threatening witnesses to prevent them from cooperating with Mr. Andersen's attorneys and investigators. This information came to light when Mr. Andersen's counsel and investigator heard from two (2) witnesses that the

witnesses had been instructed not to talk with defense counsel or their investigators. (**Exhibit 27 - Affidavit of William Bullmer, dated 12-5-07**).

During the March 8, 2008 Omnibus hearing, Mr. Andersen presented the testimony of investigator Glen Fladmark regarding interactions he had regarding Kenneth Swedberg. (OH. 89-90). Mr. Fladmark testified that he had arranged, through Mike LaDue, to meet with Kenneth Swedberg, but when they went to do it, Mike LaDue said that Kenneth Swedberg was having second thoughts about the meeting because police officers had told him not to talk to Mr. Andersen's investigator. (OH. 89). Kenneth Swedberg did ultimately meet with them after they expressed an interest in learning the truth regarding Chad's murder. (OH. 90).

Mr. Andersen also presented the testimony of Josh Bogatz. Mr. Bogatz testified that in early 2008, he was approached by agent Baumann who told him not to talk to anyone about the Chad Swedberg case. (OH. 97). Specifically, he stated that at some point after Chad Swedberg's death, he was instructed not to talk to anyone about the case. (OH. 100). Mr. Bogatz felt this was an instruction not to talk to defense counsel about the case. (OH. 100). Agent Baumann later contacted Mr. Bogatz to tell him that he could talk with Mr. Andersen's attorneys. (OH. 100).

After Mr. Andersen's trial, Mr. Bogatz was contacted by Mr. Andersen's new investigator, JP Egelhof. Mr. Bogatz indicated that during his first meeting with investigators, he was told, before he was being recorded, that Chad Swedberg had been shot with a .222 rifle and that investigators knew it was Mr. Andersen who did it. It was only after he was told this that he was interviewed, and the information he had been given changed his feelings about his uncle a great deal. After the investigators stopped recording, they told him not to talk to anyone about because he could mess up the case. Four or five months later, Agent Baumann contacted Mr.

Bogatz and told him that he could talk with Mr. Andersen's attorneys, but not with potential witnesses. (**Exhibit 4 - Bogatz Affidavit; Egelhof report**). Mr. Bogatz's uncertainty about who he was allowed to speak with resulted in Mr. Andersen being deprived of powerful exculpatory evidence related to ownership of the Tikka rifle alleged to have been used to shoot Chad Swedberg.

And, in addition to illegally invading Mr. Andersen's right to have the assistance of counsel and impeding his right to present a defense, disclosure of exculpatory evidence was woefully incomplete. During trial, Mr. Andersen's counsel was continually fighting for complete disclosure of evidence. As was noted several times during hearings and at trial, Mr. Durkin was regularly receiving disclosures up to and during trial. These late disclosures prevented lack of meaningful follow up and investigation on Mr. Andersen's defense. (**Exhibit 8 - Durkin Affidavit**).

In addition he was told by his trial counsel that the trial judge had issued an order preventing Mr. Andersen from being able to see the discovery in his case at all. As a result of this, at trial when he was tasked with helping counsel pull documents for use was the first time Mr. Andersen saw any of those documents. During this, he did not get to read the document, but, rather, would search by Bates number and hand it to counsel.

In addition, during his appeal, Mr. Andersen remained in touch with William Bulmer, who was no longer with Mr. Durkin's firm. Mr. Bullmer also attempted to help Mr. Andersen obtain access to the discovery materials from his case. (**Exhibit 27 - Bullmer Affidavit**). Mr. Bulmer spoke with Mr. Durkin regarding Mr. Andersen obtaining his discovery materials and was also informed that there was a Court Order preventing Mr. Andersen from accessing those materials. (Id).

As a result of the purported order preventing him from accessing the discovery in his case, Mr. Andersen did not come into possession of the discovery in his case until after his conviction and even then only in pieces as time went by. After he was allowed access to the evidence disclosed against him, Mr. Andersen learned of numerous documents and evidence that had not been disclosed and of other evidence, which had been disclosed, but which had not been used by defense counsel despite being exculpatory. Since gaining access to his discovery, Mr. Andersen has been diligently seeking to obtain the portions of discovery he believed were missing from his file. (**See Exhibit 5**).

In addition to seeking discovery disclosures on his own, Mr. Andersen obtained various information through the discovery process in his civil lawsuit. Among the items that were disclosed were recordings of an interview with Al Baker, which took place on 20th, 2007, which were not previously disclosed in their entirety. In those interviews, Mr. Baker claimed to have received calls from someone claiming responsibility for Chad Swedberg's death in the days prior to the interviews and in which the caller mentioned it was his fourth kill.

Through an additional document requests, Mr. Andersen also obtained a recording of an interview, from December 4, 2007, between Jeffrey Nelson and Leslie Fain and Jesse Fain. The document showed it had not been printed until 7/5/11 and contradicted the trial testimony and argument that Chad didn't know about four-wheeler, when it was clear he did. It also contained a statement that police knew that Mr. Andersen was in court, and not at work, on the day the four-wheeler went missing. (**Exhibit 28 - December 4, 2007 Report**). Mr. Andersen had his investigator contact Mr. Nelson regarding this report. Mr. Nelson indicated that the report was part of his file and that both the BCA and the Becker County Sheriff's Office would have had

access to the file and would obtain documents pertinent to the murder investigation themselves. (**Exhibit 38 – Egelhof Report of Interview with Jeffrey Nelson**).

MISSTATEMENTS OF FACT IN OBTAINING A SEARCH WARRANT

In addition to the above, in seeking to obtain a search warrant for Mr. Andersen's property, the state made the following misrepresentations in its search warrant application.

That Investigator Sieling observed a "set of human footprints" in the morning frost. Testimony at the Omnibus hearing showed that Investigator Sieling had, in fact, reporting seeing a "track" and that the words "human" and "footprint" were not in Investigator Sieling's report. (OH. 15-16). Additionally, in a report dated April 14, 2007, Joe McArthur stated that Investigator Sieling told him that he had not seen any footprints. (**Exhibit 1 - McArthur Report**).

Agent Baumann next represented to the Court that the fire arms examiner had identified the bullets used to kill Chad Swedberg as a "thirty caliber round marketed under the Winchester Brand as Supreme Ballistic Silvertip bullets." During his Omnibus hearing testimony, Baumann testified that the firearm report said only that the bullets were "consistent" with the identified bullets. (OH. 24-25). This misstatement was important to obtaining the search warrant because Mr. Andersen was linked to the Supreme Ballistic Silvertip bullets.

Next it was sworn that Mr. Andersen had reported using a .300 Tikka rifle to shoot a fisher. However, upon examination, it was shown both that the reporting officer has clearly stated that Mr. Andersen reported using a .222 rifle to shoot the fisher and that Agent Baumann had personally spoke with the taxidermist, Dan Clark and that Mr. Clark told him that Mr. Andersen said he used a .222 rifle. (T. 25-27). That was a clear misstatement of fact and it was

important because investigators were trying to link Mr. Andersen to a .30 caliber rifle he was allegedly hiding, not a .222 which had already been inspected by officers.

In addition to the misrepresentations in the warrant, it also contained many omissions of important fact. The first fact omitted was that Leslie Fain reported hearing a four-wheeler go by when she got to Chad's body. (OH 39). This, omission, in conjunction with the "human footprint" statement was clearly designed to create probable cause to search for Mr. Andersen and remove focus from others, including Al Baker who was known to have a four-wheeler near the scene.

Next Agent Baumann swore to the Court that Josh Bogatz had reported selling a .300 Tikka rifle to Mr. Andersen in 2005. However, Agent Baumann failed to include the pertinent fact that he had learned that Mr. Andersen had pawned that gun, which was later sold. (OH. 36-37). In fact, Agent Baumann had obtained the pawn receipt showing the gun had been sold by the pawn shop but did not include that fact when seeking a search warrant. (Id.)

The next omission had to do with an interview with Sue Swedberg. Agent Baumann felt it important enough to inform the Court that Ms. Swedberg had reported that Mr. Andersen felt Leslie Fain had killed Chad and had made a statement that he would kill Leslie Fain for having done it. However, Agent Baumann omitted Ms. Swedberg's statement that Chad had personally told her that if he was found dead, Thomas Covington would have done it and the fact that Thomas Covington lived with Chad at the time of his death. (OH. 31). Agent Baumann also failed to mention that Sue Swedberg and her husband had recently filed a wrongful death lawsuit against Chad Swedberg because of the shooting death of their son in Chad's home. (OH. 32-33).

Finally, Agent Baumann swore to the Court that there was probable cause to search Mr. Andersen because Officer McArthur had found a footprint near a beaver pond to the north of the

footprints allegedly observed by Investigator Sieling. What was omitted, however, was the Kenneth Swedberg had immediately identified those footprints as belonging to Chad Swedberg. (OH. 36-37).

After the Omnibus hearing, the search warrant was upheld on the Court's determination there were no material misstatements or omissions which should invalidate the warrant. (**Exhibit 25 - Omnibus Order**).

Trial Counsel's Lack of Preparation for Trial.

In addition to the state conduct above, Mr. Andersen also learned after this trial that his own attorney had not been diligent in investigating his case, which resulted in loss of important evidence. This happened because of lack of diligence and because trial counsel did not pay the investigator. As a result, much useful information went by the wayside. This is evidenced by the following documents: Affidavit of Geraldine Bellanger regarding her conversation with Fladmark in which Mr. Fladmark indicated he still held evidence related to Mr. Andersen's case that trial counsel had not requested, including evidence showing Liz Andersen handing money to Chad Swedberg inside the Detroit Lakes Wal-Mart. (**Exhibit 11 - Geraldine Bellanger Affidavit**). Affidavit of Glen Fladmark detailing lack of communication and direction from Rory Durkin prior to trial. (**Exhibit 29 - Glen Fladmark Affidavit**). Affidavit of William Bullmer showing lack of communication and work on Mr. Andersen's case. (**Exhibit 27 - William Bullmer Affidavit**).

In addition to the above, Mr. Andersen's counsel made several statements on the record reflecting the lack of preparedness for trial. This was evident in events which took place prior to trial. During the pretrial hearing, Mr. Durkin expressed surprise that trial had been set for May 12, 2008 and informed that Court that he would have to scramble to be ready "for the most part".

(Pretrial T. 6). Then, three (3) days into jury selection, Mr. Durkin requested a mistrial because he had not asked jurors about a potential witness. He said this had occurred because trial come up "somewhat suddenly." (T. 728). In response, the Court admonished counsel, indicating that the defense had made the speedy trial and demand and that counsel needed to be prepared. (T. 728-29). This put counsel in a difficult position to object to late and ongoing disclosures by the state or to express any concerns about his preparation for trial.

Prior to his Omnibus hearing, after Mr. Bulmer left trial counsel's firm, Mr. Andersen desired to retain different counsel. As a result of this, Mr. Durkin filed a motion to withdraw on April 1, 2008, citing to conflict with Mr. Andersen. Ultimately, counsel informed Mr. Andersen that he had to remain on the case. The conflict arose because trial counsel refused to allow Mr. Andersen access to any of the discovery in his file and would not make him aware of what, if anything, had been done to investigate his case. (**Exhibit 45 – Andersen Affidavit ¶ 78-80**). This, coupled with the state's interference, left Mr. Andersen entirely unable to do anything to effectively defend himself.

MR. ANDERSEN'S ACTIONS ON APRIL 13, 2007

Mr. Andersen has provided an Affidavit in which he details his exact movements on the date of April 13, 2007. This Affidavit is attached as **Exhibit 45**.

That morning, Mr. Andersen called Chad, looking for a ride to Mahnomen to get his taxes done and then to Moorhead to apply for a loan to get their leeching business started. Chad could not give him a ride because Chad was going to make syrup. Mr. Andersen then made a few more calls trying to find a ride. Unable to find a ride right away, Mr. Andersen called Al Baker to see if Mr. Baker could come over to look at his bulk tanks to let him know what he needed to purchase to make the conversion. Mr. Backer said he could be over around 8:30,

because he was already planning to go to Chad's house to make syrup. Mr. Baker said he just needed to strap his four-wheeler into his truck and he would head over.

After that, Mr. Andersen called Doug Haverkamp and Brad Riggle to see if either of them could give him a ride. Doug said he could drive Mr. Andersen, so Mr. Andersen called his mother to see if he could borrow some money to pay for having his taxes done. These calls were all made from Mr. Andersen's cell phone, but were made from inside his house because his cell phone battery would only last a few seconds if it was not plugged in. At the time, Mr. Andersen was using a nail as an antenna. The poor condition of Mr. Andersen's cell phone was known to many people, including Jeffery Thompson, Josh Bogatz, and Doug Haverkamp. (**See Exhibits 30, 4, 19**). Kenneth Swedberg was also aware of the poor condition of Mr. Andersen's phone, as evidenced in his interview with police recorded on April 17, 2007. (**See Exhibit 31 – Kenneth Swedberg Interview Transcript**). This information was not included in the police report made regarding that interview. (**See Exhibit 32 – Report of Kenneth Swedberg Interview**).

After Mr. Andersen waited as long as he could for Mr. Baker, he unsuccessfully called Mr. Baker to see where he was. Receiving no answer, he left his home to meet his mother and Doug Haverkamp. Near the end of Liz Andersen's driveway, Mr. Andersen encountered both his mother and Doug Haverkamp. After getting some money from his mother, Mr. Andersen and Doug Haverkamp left in Mr. Andersen's vehicle. As they drove, Mr. Andersen and Doug Haverkamp encountered Mr. Baker near the home of George Fortier. Mr. Andersen pulled out his phone to call Mr. Baker, but the phone was dead and needed charging before it could be used.

From there, Mr. Andersen met with his tax preparer in Mahnomen and left with what he believed to be a copy of the final returns. He then went to CitiFinancial to meet with a loan officer. Once there, he presented the tax paperwork to the loan officer and learned that he only

had a reference copy and not a full copy. He was informed he needed a full copy to be considered for the loan. He then went out to his truck to get his phone off the charger to call his tax preparer to see if he could get a full copy of the returns faxed to the bank.

When he turned on his phone, Mr. Andersen saw he had a message from his niece, Amy Mertens. In the message, Ms. Mertens said what Mr. Andersen initially believed was "Uncle, Ken Swed's been shot." Ms. Mertens typically referred to Mr. Andersen as Uncle Kenny, so he was a little confused by the message. Mr. Andersen then received a second call from Ms. Mertens in which she said "Did you hear Swed's been killed?" Right after this, Mr. Andersen's phone died. He then left the bank, plugged his phone in, in his truck, and called Chad's house to find out what was going on.

When Mr. Andersen arrived at his home, Jeffery Thompson came by and picked him up. Eventually they were allowed to go as far as Kenneth Swedberg's home, where they stayed for several hours. Jeffery Thompson eventually dropped Mr. Andersen off at his home and Mr. Andersen called his tax preparer to ask her to fax a full copy of his returns to the bank. Numerous people were present when Mr. Andersen made the call.

NEWLY DISCOVERED EVIDENCE

After learning from Glenn Fladmark that most of the investigation that Mr. Andersen had requested be done, was in fact not done, because Mr. Fladmark was either not paid to do the work or instructed not to by Mr. Andersen's trial counsel, Mr. Andersen hired a new investigator to follow up on that investigation. This resulted in a great deal of exculpatory evidence in addition to much evidence tending to impeach the main witnesses upon which his conviction rested. Mr. Andersen also directed his investigator to follow up on other information of which he had only recently become aware. The more important of that information is set forth below.

Tanya Gunderson

On February 9, 2015, Investigator Egelhof made contact with an individual named Tonya Gunderson. Ms. Gunderson stated during that interview that she was involved in a sexual relationship with Chad Swedberg approximately two (2) years prior to his death. She was aware that Chad was living with Leslie Fain at the time but did not believe that they were married. A few months before Chad's death, Tonya ran into him at a bar in Waubun. Chad asked her if she was single and she said she was, but he wasn't. Chad winked at her and said he would catch her later. Two to three weeks before Chad's death, Tanya saw Chad at her bar in Twin Valley when Chad, along with Mr. Andersen and another individual made a trip out there to see her. While others played pool, Chad and Tanya went into a back room and engaged in their "usual horseplay" and "heavy petting." Chad told Tanya that he wanted to reignite his relationship with her and told her that he was sick of Leslie Fain and her family using him. Tanya also wanted to be with Chad, but told him she wanted a relationship and would not be with him unless he left Leslie. Chad told her he had broken off his relationship with Leslie and that Leslie needed to find a place to live but would be gone soon and he would get back to her when Leslie was gone. Between then and Chad's death, Chad had called Tanya one time to ask if she was still thinking about him. She said she was and for Chad to call her when Leslie was gone. (**Exhibit 33 - Gunderson Investigative Report**).

Stacy Weaver

On October 27, 2014, Investigator Egelhof interviewed an individual named Stacie Weaver. Mr. Weaver stated that he knew Mr. Andersen only incidentally. However, the day before Chad's death, Mr. Weaver had purchased an old Ford Econoline van from Chad Swedberg for $150.00. Mr. Weaver had learned the van was for sale through a friend, Joe

Heisler. During the transaction where he bought the van, Weaver also learned that Chad had a Suzuki Tracker for sale, but that it needed a fuel pump. Weaver asked Chad why he didn't ask his brother Kenneth for help and Chad said that Kenneth would sooner kill him than help him.

Mr. Weaver asked Chad if he could come over the following morning to look at the Tracker. Chad said that would be fine, but he might be back making syrup. The next morning, Weaver got up early, between 5:30 and 6:00 so he could go over to see the Tracker. However, while he was waiting for Joe Heisler to pick him up, Weaver's mother called him and asked if he could give her a ride to get a loan. She offered him $100 for doing this and he accepted. Weaver then called Heisler on his cell phone and told him of the change in plans. Heisler said he would let Chad know they were not coming that morning.

Weaver's mother arrived between 7:30 and 8:00. Weaver got into her car and drove east on Bear Clan Road until they arrived at the "T" intersection with Highway 34. There as Weaver waited for traffic to pass, he saw a white Geo Metro pass by. In that Geo Metro, Weaver saw Leslie Fain in the front passenger seat. He also saw that Jesse Fain was driving and saw an individual he believed to be Leslie's brother in the back seat. The passenger side of the Geo Metro passed only feet away from Weaver and he has no doubt he saw Leslie Fain in the vehicle. (**Exhibit 34 - Weaver Affidavit**).

No one in the Swedberg household made any mention of the sale of the van or the fact that Mr. Weaver was expected to come over to view the Tracker on the morning of Chad's death.

Steven Frank Lhotka

During trial, Leslie Fain testified that she and Chad intended to purchase a greenhouse from Steven Lhotka and that Mr. Lhotka had agreed to teach them what they needed to know to run the greenhouse properly. (T. 944). After trial, Mr. Andersen learned for the first time that

no one had ever contacted Mr. Lhotka to verify this information. He had Investigator Egelhof do so. During that contact, Mr. Lhotka stated that prior to Chad's death, he had not been contemplating selling the greenhouse to Chad and Leslie and that he had never spoken with either of them regarding such a sale. (**Exhibit 35 – Lhotka Investigative Report**).

Gary Underdahl and Dave Lhotka

On December 5, 2014, Gary Underdahl was interviewed by Investigator Egelhof. In that interview, and in his subsequent statement, Underdahl stated that in the winter of 2013, he became interested in the 2007 murder of Chad Swedberg. Coincidentally, he had been selling firewood to Leslie Fain around the time he became interested. Through a mutual acquaintance, Dave Lhotka, Mr. Underdahl met Kenneth Swedberg. During a meeting, Underdahl asked Swedberg about finding his brother. Kenneth laid down and showed how Chad was positioned when he found him. He went on to explain that he grabbed Chad's collar or sleeves and pulled him up. He then saw blood. After this, Kenneth went through Chad's pockets and removed some marijuana and a one hitter pipe. He then rolled Chad back into the position he had found him. During that conversation, Kenneth Swedberg also asked Underdahl to find out the identity of an individual named Brian who had been staying at Chad's house around the time Chad was killed. (**Exhibit 36 – Underdahl Investigative Report**). This is inconsistent with Kenneth's trial testimony that he just checked Chad's pulse.

Dave Lhotka confirmed that the meeting between Kenneth and Underdahl had taken place, but did not recall Kenneth's statement about removing marijuana from Chad's pockets, even though Lhotka knew Chad to be a regular marijuana user. (**Exhibit 46**).

John Bogatz and the Tikka Rifle

The rifle found in Mr. Andersen's barn had been his. This was the most persuasive piece of evidence against Mr. Andersen. Despite this, he had a reasonable explanation, not for how the rifle got into his barn, but for what he had done with it when he stopped owning it the year prior. He was, however, unable to present this during the trial because of the pressure put on Josh Bogatz not to talk with Mr. Andersen's attorney or investigator as described above.

However, after trial, Mr. Andersen's investigator was able to get a statement from Mr. Bogatz. During the interview, Bogatz stated that in 2006 he sold a Tikka .300 short magnum rifle to Mr. Andersen. He believes that was the rifle Mr. Andersen used when he went elk hunting in Colorado in 2006. At some point in 2006, while Bogatz was working with Mr. Andersen and Chad, he heard them discussing a trade of the Tikka rifle from Mr. Andersen to Chad. Bogatz was unaware of the exact details of the trade, but believed that Mr. Andersen owed money to Chad and that Chad had a muzzleloader Mr. Andersen wanted, so that might have been part of it. Then, one day shortly after, Mr. Andersen brought the cased rifle to a job in Calloway, Minnesota and it was put in the car Chad was driving. Later that day, Bogatz and Chad rode around road hunting and after a while, Bogatz dropped Chad off at Berry's bar where Chad intended to meet Mr. Andersen for some drinks. The gun remained in the car with Bogatz. The next day, Bogatz stopped at Chad's house and dropped off both the Tikka rifle and the muzzleloader that were in the car. Bogatz talked with Chad for a while and saw him put the guns in his gun safe. It was the last time Bogatz saw either gun. (**Exhibit 4 - Bogatz Affidavit**).

In his affidavit, Mr. Andersen provides further detail regarding the exchange. During the trip to Colorado, Chad expressed a desire to buy the Tikka rifle from Mr. Andersen because he had been using a rifle he borrowed from his uncle in Wisconsin. However, when he shot the

rifle, Chad did not like the scope, which had a series of dots showing the height of a shot a certain distance instead of the regular cross-hairs. Mr. Andersen and Chad had been discussing a way to get permits to hunt in an area of Colorado known to have larger elk and determined that if they were to use muzzleloaders, they could use their preference points, which might allow them to get into such an area. As a result of this, the two (2) men began looking for muzzleloaders to buy. When they did find a pair they wanted to buy, they worked out a deal involving the muzzleloaders, the Tikka rifle, and some money Mr. Andersen owed Chad from a job they had just finished. Chad would purchase both of the muzzleloaders and give one to Mr. Andersen. Mr. Andersen would in turn give the Tikka rifle to Chad and then, depending on whether Chad wanted to pay separately for the difference between the value of the muzzleloader and the Tikka rifle, or have it deducted from the amount he was owed from the most recent job, the money from the job would be paid to Chad. After the muzzleloaders were purchased and the Tikka rifle in Chad's possession, as told by Bogatz, Mr. Andersen obtain payment from the customer for a pole building he and Chad had built. Mr. Andersen was busy for some reason, but made arrangements to have his sister Liz Andersen take Chad's share of the payment to him in cash. Mr. Andersen directed Liz to meet Chad at the Wal-Mart in Detroit Lakes and to either give Chad all the cash if he paid separately for the gun, or to give Chad a designated amount of cash if he did not have payment for the Tikka rifle.

Liz Andersen and The Tikka Rifle

On February 9, 2015, Liz Andersen, Mr. Andersen's sister provided an affidavit. In that affidavit, she recalls that in December of 2006, during a snow storm, Mr. Andersen asked her to give some cash to Chad. Liz met Chad and Leslie in the Walmart in Detroit Lakes by the men's clothing department and gave Chad the money, which was $2,500.00. She recalls that Chad was

wearing jeans, a camo hat, and a camo jacket. Leslie was wearing black pants and a black jacket. It looked like they had hunting items in their cart. Liz talked with Chad and Leslie for a little bit, then they thanked her for bringing the money since Mr. Andersen was out of town. (**Exhibit 37 - Liz Andersen Affidavit**).

VI. ARGUMENT

A. Postconviction Standards

Minnesota Statute §590.01, allows a person convicted of a crime to bring a postconviction relief petition seeking a new trial based upon a claim that the conviction was obtained in violation of Petitioner's constitutional rights. §590.01 subd. 1.

B. Evidence Forming the Basis for This Petition

Mr. Andersen has obtained a voluminous amount of newly discovered evidenced relating to his case. This evidence, by in large, was not available to him at trial or at the time of his previous petition because:

- Trial counsel failed to pay the investigator for work they wanted done,
- Even when the investigator did the work, trial counsel never asked about it or followed up,
- Trial counsel refused to allow Mr. Andersen access to discovery in his case, including evidence the investigator obtained, and
- The state withheld and/or failed to disclose material and exculpatory evidence, including turning over documents as late as the date of Mr. Andersen's sentencing, or not at all.

Mr. Andersen has obtained the following newly discovered evidence that was not available to him at trial or his prior postconviction which forms the basis for this petition:

- Evidence that Al Baker was at the scene of the crime as early as 8:00 a.m. on April 13, 2007 and his claims that he found a bullet and cigarette butts left by the shooter. (**Exhibit 10**).
- Evidence of 9 minutes and 20 seconds of an interview with Al Baker which was not transcribed or disclosed prior to trial in which Mr. Baker reports having received two (2) phone calls from someone claiming to have killed Chad Swedberg and in which Mr. Baker states that his phone system is set up so that he can make and receive phone calls through his home phone from his cell phone. (**Exhibit 9**).
- Evidence that Al Baker sent a .308 rifle to his brother in Illinois, rather than to his niece in Alaska as Mr. Baker told police before trial. (**Exhibit 10**).
- Evidence in the form of a witness contact sheet created after an interview with Wanda Nelson that, contrary to her trial testimony that Mr. Andersen did not leave her office with a copy of his taxes, Mr. Andersen had in fact left with a reference copy. (**Exhibit 13**).
- Evidence that contrary to her trial testimony that Mr. Andersen returned to her office to obtain a copy of his taxes in the afternoon of April 13, 2007, Mr. Andersen had actually called her office to request that she fax a copy of his tax returns to the bank. (**Exhibit 17**).
- Evidence contradicting the trial testimony of Douglas Haverkamp and Bradley Riggle that did not intend to go to Ulen to do Mr. Haverkamp's taxes in the form of a transcribed statement from April 15, 2007 in which Mr. Riggle stated he intended to go to Ulen with Mr. Haverkamp to have Mr. Haverkamp's taxes done. (**Exhibit 18**).

- Evidence that Douglas Haverkamp had taken Mr. Andersen's van and the proceeds from his leaching operation and was therefore afraid of Mr. Andersen and unwilling to speak with his investigator at an earlier time. (**Exhibit 19**).
- Evidence from an interview between Jeffrey Nelson and Leslie and Jesse Fain, that contrary to the trial testimony of Jeffery Nelson (T. 1964, 2935), Chad knew the stolen four-wheeler was on his property. This was evidence that was not turned over to Mr. Andersen prior to trial and shows that Nelson was aware Mr. Andersen could not have stolen the four-wheeler. (**Exhibit 38**).
- That Mr. Andersen's trial investigator had obtained a recording of Liz Andersen handing an envelope of cash to Chad and Leslie Swedberg inside a Wal-Mart, corroborating Mr. Andersen's statement he had sold the Tikka rifle to Chad, but that Mr. Andersen's trial counsel had never paid for the work, so did not receive the recording prior to trial. (**Exhibit 11**).
- Evidence that Mr. Andersen's cell phone was in very poor condition, such that he could not use it for more than a few moments at a time unless it was plugged in and that he was using a nail as an antennae. (**Exhibit 30; Exhibit 4; Exhibit 19**)
- Evidence that, contrary to the picture the state and Leslie Fain tried to paint at trial about a happy and stable relationship between Leslie and Chad, that Chad was having an extra-marital affair and had broken off his relationship with Leslie. (**Exhibit 33**).
- Evidence that Leslie Fain, along with Jesse Fain and an individual believed to be Leslie's brother, were seen driving on Highway 34 between 7:30 and 8:00 a.m. on April 13, 2007 by Stacy Weaver. (**Exhibit 34**).

- Evidence that, contrary to her trial testimony that she and Chad had been in talks to buy a greenhouse, the greenhouse owner, Steven Frank Lhotka, has never spoken with either Chad or Leslie about selling them his greenhouse. (**Exhibit 35**).
- Evidence that, contrary to Kenneth Swedberg's testimony he did nothing more than move Chad's body slightly to check for a pulse, that he had rolled Chad over and then went through his pockets to remove evidence of drug use which provided an opportunity to know of the bullet hole size. (**Exhibit 35; Exhibit 36**).
- Evidence in the form of an Affidavit from Josh Bogatz in which Josh Bogatz explains that he dropped of a Tikka rifle at the home of Chad Swedberg on behalf of Mr. Andersen after Swedberg and Andersen made some kind of trade involving ownership of the rifle. (**Exhibit 4**).
- Evidence in the form of an Affidavit from Liz Andersen in which Ms. Andersen explained that, at Mr. Andersen's request, she took an envelope of cash to Chad Swedberg and that she gave Chad the money inside a Wal-Mart during a heavy snow storm. (**Exhibit 37**).

CLAIM ONE – MR. ANDERSEN RECEIVED THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

1. The standard of review for ineffective assistance of counsel claims.

The U.S. Constitution guarantees every defendant the right to "to have the Assistance of Counsel" in criminal prosecutions. U.S. CONST. amend. VI. Defendants have the burden of showing that their counsel's performance was deficient. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficiency must be serious enough so "that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment." *Id.* In order for counsel to be

effective, if counsel has been appraised of a possible defense, he or she has an obligation to follow through on the information received. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)

Rompilla v. Beard, 545 U.S. 374, 387 (2005). An attorney's strategic decisions receive deference if they are reasonable under the circumstances, however, strategic decisions made after a less than complete investigation are reasonable only to the extent the limitations of the investigation were reasonable. *Wiggins*, 539 U.S. at 533. An attorney's preparatory activities are more closely scrutinized. *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993).

A defendant must establish that the deficient performance actually prejudiced the defense. *Wiggins*, 539 U.S. at 521. To establish prejudice, petitioner must show that there is a reasonable probability that, but for his attorney's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. In a case where the allegation is based on a claim of failure to investigate, to show prejudice sufficient to warrant reversal the petitioner can make a showing of what investigation would have yielded to show that the outcome would have been different. *S*ee *Rompilla v. Beard*, 545 U.S. 374, 390 (2005)(prejudice evident in contents of file that was discovered by postconviction counsel that trial counsel should have discovered but did not because of lack of investigation); *Wiggins v. Smith*, 539 U.S. 510 (2003)(holding that evidence discovered by postconviction counsel, and which was not discovered by trial counsel due to lack of investigation, showed prejudice because of its mitigating qualities); *Williams v. Taylor*, 529 U.S. 362, 396-98 (2000)(finding prejudice

where cumulative effect of mitigation evidence that trial counsel would have discovered through proper investigation may have made a difference to the jury if it had been presented).

A. Trial Counsel Conducted an Inadequate Investigation.

Up to and during his trial, Mr. Andersen was lead to believe that The Court had issued an order which prohibited him from being able to see both the evidence against him and the results of any investigation. As a result of this, while he was kept vaguely aware of the evidence against him, he did not have access to the documents and evidence provided in discovery or the specific results of investigation done on his behalf. This meant that while Mr. Andersen had knowledge of people and evidence that he felt was vital to his case, he had no way of knowing what was done and what was not done when he passed information along to his counsel.

It was not until after trial that Mr. Andersen actually learned how little of the investigation he requested had actually been done. The sheer volume of evidence favorable to his defense that Mr. Andersen has been able to obtain with an investigator who was paid and actually followed through on investigation evidences the fact that his trial counsel failed to conduct an adequate investigation.

B. Trial Counsel's Lack of Investigation Was Unreasonable.

The decision not to conduct the necessary investigation in Mr. Andersen's case was unreasonable because it was a decision made without having conducted a full investigation. *Wiggins*, 539 U.S. at 533; *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993). Proof that this lack of investigation was not a strategic decision is evident in the fact that the defense theory of the case was trying to show to the jury that Mr. Andersen was where he claimed to be on the morning of April 13, 2007 and that there were other individuals with a motive and the opportunity to commit the crime. In case where Mr. Andersen's liberty for the remainder of his

life was on the line, there was a strong need to meet all of the state's allegations head on and show that they were false or misleading. By failing to conduct the requisite investigation, Mr. Andersen's trial counsel failed to do this.

Under the circumstances, the relevant question is not whether the choices made by counsel were strategic, but whether the decisions were reasonable. Prevailing norms of practice as reflected in the American Bar Associates Standards and the like are guides to determining what is reasonable. *Strickland*, 446 U.S. at 688-89)(citing ABA Standards for Criminal Justice); see also *Williams v. Taylor*, at 396 (relying on ABA Standards for Criminal Justice in finding counsel ineffective). See also *Roe v. Flores-Ortega*, 528 U.S. 479, 481 (2000). These cases impose a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary, and requires that a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances. *Strickland*, 466 U.S. at 691; *see also Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993). Here there was very limited investigation conducted, and even when the investigation was conducted, trial counsel either failed to follow through and obtain the results of the investigation, or when receiving the results, failed to use them at trial. These actions fall below a reasonable standard of care.

C. Reasonable Investigation by Trial Counsel Would Have Rebutted Nearly Every Aspect of the State' Case.

There is no need to speculate regarding what investigation and proper review of the evidence disclosed by trial counsel would have yielded in this case. Investigation Mr. Andersen had conducted after he learned his trial counsel had not done shows us exactly what was obtained. What was obtained was evidence which attacked nearly every aspect of the state's case and which called into question the credibility of nearly all the witnesses presented.

Specifically, evidence obtained by Mr. Andersen during his own investigation addresses the following evidence at trial:

- Testimony of Leslie Fain
    - Leslie testified that Mr. Andersen's relationship with Chad was deteriorating because Chad no longer wanted to work with Mr. Andersen. (T. 933-34). As evidence of this intention on Chad's part, Leslie Fain told the jury that she and Chad had talked to Steven Lhotka about purchasing his greenhouse and that Mr. Lhotka had agreed to teach her and Chad how to run the greenhouse. (Id.) When Mr. Andersen learned for the first time, after trial, that no one had talked to Mr. Lhotka about Leslie's claim, he had his investigator do so. As Mr. Lhotka stated in his interview, he was not contemplating selling his greenhouse to Chad and Leslie and had, in fact, never spoken with either of them about doing so. (**Exhibit 35**).
    - At trial, Leslie Fain testified that Chad had never received money from Mr. Andersen related to the sale and trade of guns. (T. 974). However Mr. Andersen learned, through his mother who spoke with Glen Fladmark, that Mr. Fladmark had actually obtained a video recording from the Detroit Lake Wal-Mart showing Chad and Leslie receiving an envelope of cash from Liz Andersen. That this occurred and was related to the trade of the Tikka rifle was further corroborated by statements obtained by Mr. Andersen's investigators from Josh Bogatz and Liz Andersen.
    - At trial, Leslie testified that she and Chad had a strong relationship and that he liked having her family living with them. (T. 938-39). On February 9, 2015, Mr. Andersen's investigator obtained a statement from Tonya Gunderson. Ms. Gunderson stated that she had been involved in a sexual relationship with Chad about

two (2) years prior to his death. Two weeks before Chad's death, he came to her bar Chad told Tonya he wanted to re-ignite their relationship while they engaged in heavy petting. Chad told Tonya he was tired of Leslie and her family using him and that he had broken it off with Leslie and was waiting for her to find a place to live. (**Exhibit 33**).

- At trial, Leslie testified she was at home the entire morning of Chad's death. (T. 946-951). In October 2014, after Mr. Andersen learned that he had information, he had his investigator obtain a statement from Stacy Weaver. Mr. Weaver provided a sworn statement in which he reported that he had seen Leslie Fain, Jesse Fain, and another individual he believed to be Leslie Fain's brother driving on Highway 34 at between 7:30 and 8:00 a.m. on the day of Chad's murder. Mr. Weaver was aware it was that same day because he had purchased a van from Chad the night before and initially had plans to go back to Chad's place to look at another vehicle Chad had for sale. Mr. Weaver changed his plans when his mother asked him for a ride. (**Exhibit 34**).

- Wanda Nelson – At trial, Ms. Nelson's testimony was presented because it purportedly showed that Mr. Andersen lied to police officers about his plans and whereabouts on the day of Chad's shooting. Among the important points from her testimony were that Mr. Andersen allegedly did not have an appointment at 9:30 a.m., that he did not receive a copy of his tax returns when he left her office, and that Mr. Andersen returned to get a copy of the returns at around 4:00 p.m. that day.
    - On May 1, 2008, investigators for the state spoke with Ms. Nelson. During that interview, Ms. Nelson stated that Mr. Andersen had in fact left her office with what

was called a reference copy of his returns. (**Exhibit 13**). Trial counsel did not use this information to impeach Ms. Nelson.

- After learning of this, Mr. Andersen had his investigator contact Ms. Nelson. During that interview, Ms. Nelson stated it was possible that Mr. Andersen had scheduled an appointment but then said he would show up earlier, between 9 and 10 a.m., if he could get a ride. She also stated that it was possible that Mr. Andersen had called her and asked her to fax his tax returns to the bank, rather than returning to get them himself around 4:00[8]. (**Exhibit 17**).
- Additionally, counsel failed to follow through with investigation into Mr. Andersen's whereabouts on the afternoon of Chad's passing. Had counsel done so, Mr. Andersen would have been able to present the testimony of Jeffrey Thompson, who told investigators that he was with Mr. Andersen until 4:30 p.m. on the day of Chad's death. (**Exhibit 14; Exhibit 30**)

- Doug Haverkamp and Bradley Riggle. The testimony of these men was presented at trial to show that Mr. Andersen's statement to the police that he had called Haverkamp seeking a ride to do his taxes and his subsequent statement that Haverkamp was also going to do his taxes that day was a lie to create an alibi. In affirming Mr. Andersen's conviction on direct review, the Minnesota Supreme Court pointed to this testimony as proof he made false statements to the police to create an alibi as circumstantial evidence of his guilt. *State v. Andersen*, 784 N.W.2d 320, 332 (Minn. 2010).
  - At trial, Mr. Riggle's testimony was not impeached using the transcription on an interview he did on April 15, 2007, in which he told police officers that he and Mr.

[8] Ms. Nelson also stated that she had made and kept copies of Mr. Andersen's files despite company policy to destroy documents after a certain amount of time.

Haverkamp intended to go to Detroit Lakes for breakfast and then to get Haverkamp's taxes done. (**Exhibit 18**).

- In addition, through contact with Mr. Haverkamp, it was learned he worried about Mr. Andersen being set free because he had taken Mr. Andersen's van and all the proceeds from the last leech sale.

Evidence Mr. Andersen has obtained also tends to show that Al Baker admitted having been at the scene of the crime much earlier and in a much more intimate way than he ever previously admitted, including knowing where the shooter lied in wait and having found two (2) shell casings and some cigarette butts at the scene. This, in conjunction with evidence Mr. Baker disposed of a .30 caliber gun prior to Mr. Andersen's trial and the fact that Mr. Baker reported having received calls in the nature of a confession along with the fact he could use his cell phone to take calls on his home phone, casts a very different light on Mr. Baker as a potential suspect.

This evidence that Mr. Andersen has obtained since trial attacks nearly every aspect of what both the district court and the Supreme Court have acknowledged was a very close case and contradicts the state's entire theme of the case, which was that Mr. Andersen lied and lied in an attempt to create an alibi. Were this evidence available at trial, it would have been a very different outcome.

D. Mr. Andersen Suffered Prejudice as a Result of Counsel's Lack of Investigation and Preparation for Trial.

During trial and on direct appellate review, the relevant courts expressed skepticism about the strength of the evidence against Mr. Andersen. The trial judge stated: "I am not uncomfortable telling you folks I have struggled with this, but I can't in good conscience take the position that no reasonable jury, taking into account the state's evidence and was favorable to the

state under the circumstances, that no reasonable jury could convict Mr. Andersen." (T. 2770). In reviewing the case, Justice Page, in his concurrence, also pointed out that case was a "close one" on the evidence actually presented at trial. *State v. Andersen*, 784 N.W.2d 320, 336 (Minn. 2010) (Justice Page concurring). This shows how little would need to have changed in order for the outcome of this case to be different, which is all the prejudice Mr. Andersen needs to show in order to obtain a new trial.

A defendant has suffered prejudice where there is a reasonable probability that the defendant would not have been found guilty if counsel's performance had not been ineffective. *Antwine v. Delo*, 54 F.3d 1357, 1365 (8th Cir. 1999); *Jones v. Wood*, 207 F.3d 557, 562-63 (9th Cir. 2000) (stating that counsel's failure to conduct pretrial investigation of the possibility that another had committed the murder was ineffective assistance because there was evidence that another had committed the crime). Trial counsel's failure to discover and present evidence to the jury as described above undoubtedly prejudiced Mr. Andersen.

Much of the state's case against Mr. Andersen was circumstantial and was built upon the allegations that when Mr. Andersen was not even really a suspect, he gave false statements about where he was and what he was doing in an attempt to create an alibi and that he had the motive to kill Chad because their relationship was deteriorating because Chad might someday testify against Mr. Andersen at trial related to the four-wheeler theft. The above evidence attacks all of this.

Leslie Fain testified she was at home the entire morning of Chad's death, that she had Chad were getting along well, that their finances were going well, and that Chad was going to buy a greenhouse because he was not going to work with Mr. Andersen anymore. Stacy Weaver's testimony, if believed by a jury, would show Leslie was not where she said she was.

The idea that Mr. Andersen was not where he said he was made him the prime suspect in Chad's murder. Evidence in the form of the police report from May 1, 2007, which showed Chad and Leslie were having significant financial problems was not used to impeach her. And, as the Affidavit of Steven Frank Lhotka shows, there were no discussions with Mr. Lhotka to purchase his greenhouse. This shows that nearly everything Leslie Fain said at trial was a lie, and a reasonable review of the provided disclosures and a reasonable investigation by counsel would have allowed the jury to hear all this evidence.

The other evidence, including the testimony of Wanda Nelson, Al Baker, Bradley Riggle, and Douglas Haverkamp was presented to show Mr. Andersen was making things up to make it appear like he had an alibi and was cited as circumstantial evidence of his guilt. However, reasonable review of the provided discovery and some investigation showed this was not the case at all. Mr. Andersen did have an appointment at 2:00 p.m. with Wanda Nelson, but also told her he might be there between 9:00 and 10:00 if he could get a ride. Mr. Andersen actually called Haverkamp and Riggle for a ride and was informed they were going to Ulen to get Haverkamp's taxes done. Mr. Andersen had actually left Ms. Nelson's office with a copy of his tax returns and could have called her to have them faxed to the bank, like Mr. Andersen said, rather than returning to her office around 4:00 to get them. Finally, some investigation into Ms. Nelson would have revealed her distrust and bias toward the Native American community. Reasonable investigation also revealed that Al Baker admitted being at the scene and knowing where the shooter rested and that he claimed to have received calls from the killer.

All of this evidence was vital to Mr. Andersen's defense in this circumstantial case. At trial, he was presented as a liar, trying to hide his whereabouts with lies that came unraveled when investigators looked at them with any level of scrutiny. Not taking steps to meet the

allegations against Mr. Andersen head on allowed the state to convince the jury Mr. Andersen was lying from the start, when he really was not at all. Trial counsel's failure to conduct an adequate investigation put at risk both petitioner's right to an opportunity to present a defense and meet the state's case and the reliability of the adversarial testing process and the result was substantial and injurious to Petitioner. *Strickland*; see also *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1996). Unless the accused receives the effective assistance of counsel, a serious risk of injustice infects the trial itself. *United States v. Chronic*, 466 U.S. 648, 655-56 (1984). For all of these reasons, Mr. Andersen suffered significant prejudice by trial counsel's failure to prepare and to conduct a reasonable investigation prior to trial. If that investigation had occurred, he would not have been convicted of a crime he did not commit.

CLAIM TWO – MR. ANDERSEN'S NEWLY DISCOVERED EVIDENCE SHOWS A BRADY VIOLATION

1. The standard of review for discovery disclosure violations.

In *Brady v. Maryland* the United States Supreme Court held that it was a violation of the Due Process Clause of the Fourteenth Amendment for the state to withhold evidence favorable to the accused upon request of the accused for said information. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Included in this obligation to turn over evidence is the obligation of the prosecutor to learn of any favorable evidence known to others acting on the government's behalf, including police officers. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Also included is the obligation to turn over evidence which weighs on a witnesses' credibility of the witness may be determinative of guilt or innocence. *Giglio v. United States*, 405 U.S. 150, 154 (1972). One of the reasons *Brady* has been held to extend to witness credibility evidence is because exposure of a witness's

motivation is a proper and important function of the constitutionally protected right to cross-examination. *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974).

Minnesota rules and cases "require much more of the prosecution than the federal cases require." *State v. Kaiser*, 486 N.W.2d 384, 386 (Minn. 1992). Rules put in place by the Minnesota Supreme Court require not only that prosecutors completely open their files to defense counsel but also imposes an ongoing obligation on prosecutors to make continuing disclosure when new items are added to files after defense counsel has looked at it. *Id*. at 387. These rules governing disclosure are codified at Minnesota Rules of Criminal Procedure 7 and 9 and are put in place to "provide a comprehensive method of discovery of the prosecution (Rule 9.01) and defense (Rule 9.02) cases. The rules are intended to give the parties complete discovery subject to constitutional limitations. Comment to Minn. R. Crim. P. 9. "A prosecutor cannot circumvent the requirement of open-file discovery by not taking notes or by not putting things in the file that belong in the file." *Kaiser*, at 387.

i. The state failed to make the disclosures required by *Brady* and Rule 9.01.

Mr. Andersen has identified the following documents and evidence which were not disclosed to him or his trial counsel prior to trial:

- The first 9 minutes and 20 seconds of the April 20, 2007 Interview conducted with Al Baker. During that first 9 minutes and 20 seconds, Mr. Baker informed investigators for the state that he had received two (2) phone calls from someone claiming to have killed Chad Swedberg and that he had his home phone system set up so that he could answer calls to his house using his cell phone. This evidence was only disclosed to Mr. Andersen during his civil lawsuit when he discovered the full recording in disclosures made in that case. The transcription and recording that were turned over did not contain

the first portion of that interview, where Mr. Baker made the statements about the calls he received or how the calls were set up.

- The 9 minutes and 20 seconds of the Baker recording also show that Al Baker called police on April 19, 2007 after receiving the call. No record of this call was provided prior to trial. Interestingly, when Al Baker's phone records were later subpoenaed, records were only requested up until April 15, 2007, not up to April 19, 2007. (**Exhibit 39 – Baker Phone Records**).
- Over 300 pages of missing Bates stamped documents as evidenced by the letter of Matthew Frank. (**Exhibit 44 – Matthew Frank letter regarding missing documents**).

ii. Mr. Andersen was prejudiced by the state's failure to disclose.

Prejudice sufficient to warrant reversal of a conviction exists where the non-disclosed evidence is "material exculpatory evidence in the sense that there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the trial would have been different. *State v. Clobes*, 422 N.W.2d 252, 255 (Minn. 1988). Failure to notify Mr. Andersen of the most important parts of the April 20, 2007 interview with Al Baker was undoubtedly prejudicial, and given the circumstances, had to be intentional. To be clear, portions of that recording and transcription were turned over, just not the portions where Mr. Baker stated he received a call from someone who claimed to have killed Chad and in which Mr. Baker destroyed his own alibi of being at home when he took and made certain phone calls by admitting that he could use his home phone from his cell home.

Whether nondisclosure was intentional or unintentional, it cannot realistically be disputed that Mr. Andersen was prejudiced when this information was not disclosed or that the prejudice started well before trial. During the course of the investigation, Mr. Baker was not considered a

suspect and his guns, including a gun capable of firing the shot that killed Chad Swedberg – which Mr. Baker initially claimed he shipped to Alaska and then later claimed was with his brother in Illinois – were not inspected because the timeline he gave of his morning checked out. (T. 2755-56).

The recording had a multitude of exculpatory evidence for Mr. Andersen. Mr. Baker was not a suspect because he allegedly took phone calls at his home on the morning of the murder. However, in that recording, Mr. Baker stated that he had call forwarding set up so that he could answer his home phone from his cell phone. When Mr. Andersen's alibi purportedly didn't stand up, the fact that he was purportedly missing a 30 caliber gun made him the prime suspect and lead to his conviction. A jury being presented with evidence that Mr. Baker's alibi was full of holes and that he too was missing a 30 caliber gun would create reasonable doubt as to Mr. Andersen's guilt.

Mr. Andersen was also prejudiced in the loss of evidence which may have shown his innocence. Had the information about Mr. Baker's phone been disclosed, Mr. Andersen could have pushed for having Mr. Baker's guns inspected before the .308 gun was sent away. Additionally, had Mr. Andersen been aware of the phone calls, he could have taken steps to preserve evidence related to the calls in hopes of learning where they came from. These were calls wherein, if Mr. Baker's statement to officers was to be believed, someone called him and took responsibility for Chad Swedberg's death. However, even if the caller was not able to be identified, simply being able to prevent evidence to the jury that someone else had called Mr. Baker and claimed responsibility for killing Chad would have been powerful evidence in Mr. Andersen's favor in a case where the trial judge strongly considered granting a motion for a judgment of acquittal when the state rested.

iii. Even without a showing of prejudice Mr. Andersen is entitled to a new trial.

Where the state has withheld evidence in violation of the Rules set forth by the Minnesota Supreme Court, cases have been overturned even where prejudice cannot be shown. *See State v. Kaiser*, 486 N.W.2d 384 (Minn. 1992); *State v. Schwantes*, 314 N.W.2d 243 (Minn. 1982); *State v. Zeimet*, 310 N.W.2d 552 (Minn. 1981); *State v. Hall*, 315 N.W.2d 223 (Minn. 1982). In *State v. Schwantes*, the Minnesota Supreme Court explained that the interests of justice require granting a new trial where the state withheld evidence that had been requested by the defendant "to insure that the reciprocal discovery rules adopted by this court are observed by both the prosecution and the defense." *Schwantes*, at 245. The *Schwantes* Court further held that this was the case even where evidence of the defendant's guilt was strong. *Id*.

If *Schwantes* applies to cases where requested information is withheld where there is strong evidence of guilt, there can be little doubt that it should also apply in cases such as there were there was nothing more than circumstantial evidence. Mr. Andersen was not able to point to another person as the perpetrator, but always maintained that it was not him and that he had been telling the truth about where he was and when he was there. Alleged inconsistencies in Mr. Andersen's statements were exploited to make it look as though he was covering something up, and therefore guilty of the crime.

When powerful evidence that someone else admitted responsibility for the crime and additional evidence that worked to weaken, if not destroy, Mr. Baker's alibi arose, that evidence was not turned over in suspect manner. Mr. Andersen received it not in his criminal case, but, rather, as part of discovery in a civil suit regarding illegal recording of his jail call. Further, even though Mr. Baker clearly told officers that he had received a call from someone claiming responsibility for Chad Swedberg's death on April 19, 2007, his phone records only obtained

until April 15th. Any chance Mr. Andersen had to learn of this exculpatory evidence was prevented by the manner in which this occurred.

There was also additional information not turned over, but none as important as the information in the first 9 minutes and 20 seconds of the April 20, 2007 meeting with Al Baker. Given the utter importance of that evidence and the troubling implications the failure to disclose this evidence raises, Mr. Andersen should be granted a new trial, even if it this Court believes he is unable to show sufficient prejudice. Justice demands that Mr. Andersen be awarded a new trial where he is allowed to have a jury decide his fate after hearing this explosive evidence.

CLAIM THREE – MR. ANDERSEN HAS OBTAINED NEWLY DISCOVERED EVIDENCE WHICH ENTITLES HIM TO A NEW TRIAL.

Under Minnesota law, in order for a defendant to be entitled to a new trial on the grounds that new evidence has been discovered, four criteria must be met. *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997). The *Rainer* test applies where there is newly discovered evidence without a recantation of trial testimony. *Sutherlin v. State*, 574 N.W.2d 428, 433 (Minn. 1998). First, the evidence must not have been known to the defendant at the time of trial. *Id*. Second, the failure to learn of the evidence cannot be due to a lack of due diligence. *Id*. Third the evidence must be material, not cumulative, impeaching or doubtful. *Id*. Finally, the evidence must be such that it would probably produce a more favorable result. *Id*. The Petitioner must prove the four (4) prongs by a fair preponderance of the evidence. *Miles v. State*, 840 N.W.2d 195, 202 (Minn. 2013).

Where there are allegations of newly discovered evidence of false testimony at trial, three prong *Larrison* test applies. *Sutherlin v. State*, 574 N.W.2d 428, 433 (Minn. 1998). In order to receive a new trial based upon newly discovered evidence of false testimony, the petitioner must

establish the following three factors by a *fair preponderance* of the evidence: (1) the court must be reasonably well-satisfied that the testimony in question was false, (2) without that testimony the jury *might* have reached a different conclusion, and (3) the petitioner must have been taken by surprise at trial or did not know of the falsity until after the trial. *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004). Failure to meet the third prong has never been relied upon to deny a new trial. *Ferguson v. State*, 645 N.W.2d 437, 445 (Minn. 2002). New trials generally have been denied based upon failure to satisfy the first and second prongs. *Id.*

"The showing required for a petitioner to receive an evidentiary hearing is lower than that required to receive a new trial." *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004) (quoting *Ferguson v. State*, 645 N.W.2d 437, 442 (Minn. 2002)). In order to receive an evidentiary hearing in which to prove his allegations, the petitioner must only allege facts, supported by "more than argumentative assertions without factual support," that, if proven by a preponderance, would entitle Petitioner to relief. *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002). The trial court must grant an evidentiary hearing "wherever material facts are in dispute that must be resolved in order to determine the issue raised on the merits." Minn. Stat. § 590.04, subd. 1. If there is any doubt as to whether material facts are in dispute, an evidentiary hearing should be issued to resolve those issues. *Opsahl*, 677 N.W.2d at 423 (citing *King v. State*, 649 N.W.2d 74, 88 (Minn. 2001). When the district court concludes that newly discovered testimony is unreliable without first evaluating the credibility of the witness at an evidentiary hearing, the postconviction court misapplied Minn. Stat. § 590.04 and therefore abused its discretion. *Martin v. State*, 825 N.W.2d 734, 742 (Minn. 2013).

Whether Mr. Andersen's newly discovered evidence is analyzed under *Rainer* where it is newly discovered evidence or whether it is analyzed under *Larrison* where it shows false testimony was given at trial, Mr. Andersen is entitled to a new trial.

A. Evidence now in Mr. Andersen's possession was not known or available at the time of trial and/or he was taken by surprise.

Mr. Andersen was not in possession of the newly discovered described in Section B at the time of trial or his previous petition. See *Andersen v. State*, 830 N.W.2d 1, 16 n. 1 (Minn. 2013) (Justice Anderson dissenting). Were he, he would have presented it at trial or in conjunction with a claim asserting his innocence long ago. There is no reason to believe that Mr. Andersen would not present this information at an earlier time if he had knowledge of such information.

B. The failure to learn of the evidence was not due to a lack of due diligence.

Mr. Andersen's newly discovered evidence also satisfies the second prong of the *Rainer* test. Without going through all the evidence again, the reasons Mr. Andersen did not have this information at the time of trial stem either from the failures of his trial counsel to conduct a reasonable investigation and the make Mr. Andersen aware of the evidence against him or the evidence not being disclosed in a timely manner, if at all.

The Supreme Court, in *State v. Caldwell*, 322 N.W.2d 574, 588 (Minn. 1982), stated "we do not believe that due diligence necessarily requires defense counsel in a case of this magnitude to reinterview persons who were not listed as prospective witnesses and whose prior statements indicate that they possess no information helpful or relevant to the case." Mr. Andersen has identified cases from numerous other courts which show that, under the factual circumstances presented, he did exercise due diligence to obtain the newly discovered evidence. In *Starns v. Andrews*, 524 F.3d 612 (5th. Cir., 2008), that court held that due diligence did not require that the defendant learn of exculpatory grand jury testimony where the state downplayed the

exculpatory nature of the grand jury testimony and where defendant's counsel in a wrongful death suit learned of the exculpatory evidence in a deposition years after the conviction became final, even though criminal defense counsel had been given the witness' address prior to trial.

In *Moore v. Knight*, 368 F.3d 936 (7th Cir. 2004), that Court held that the habeas petition was timely as filed within one year of when petitioner obtained investigative report and affidavits showing improper judicial contact with the jury. *Id.*at 938-40. This was the case, even though the judge had reported the contact with the jury, off the record, prior to sentencing, because the judge presented the contact as benign. *Id*. at 439. Moore's conviction became final on March 28, 1997. *Id*. at 938. In early 1997 Moore first learned through a friend, who had overheard conversations, that the judge's contact with the jury was more than the judge had reported. *Id*. At that same time, Moore asked his friend to investigate this further. *Id*. On May 18, 1998, the friend provided an investigative report and two (2) affidavits from jurors which indicated that they felt the judge's communications contained commentary on the credibility of witnesses. *Id*. Petitioner filed for postconviction relief in state court on January 5, 1998 and then "after following proper procedural routes appeared before United States District Court for Northern District of Indiana" seeking habeas relief. *Id*. at 939. That Court held that lag of time between initially learning of possible improper conduct in early 1997 and receiving affidavits in May 1998 did not show lack of due diligence because petitioner was in prison. *Id*. at 940. It also held that May 18, 1998 was the proper date for the factual predicate since that was the date that petitioner obtained actionable information to make his claim. *Id*. at 940.

Mr. Andersen has also identified the following cases which support his claims. *See Wilson v. Beard*, 426 F.3d 653 (3rd Cir. 2005) (The defendant's conviction became final in 1985. *Id.* at 655. On March 31, 1997, after the prosecutor from Wilson's trial decided to run for district

attorney, a video tape of the prosecutor explaining that it was his preference to strike black jurors, and explaining how he did it in a way to get past *Batson* analysis, was released. *Id*. at 657. Wilson learned of the existence of the tape on or around April 6, 1997 from his prior attorney. *Id*. at 660. Wilson then filed a petition for relief in state court based upon the video on June 2, 1997. *Id*. at 659. That petition was pending until March 22, 2001. *Id*. Wilson then filed for habeas relief on January 23, 2002. *Id*. If Wilson knew or should have known of the video between April 1 and April 5, 1997, his habeas petition would be untimely. The Third Circuit Court of Appeals held that Wilson did not fail to exercise due diligence in failing to learn of the tape until April 6, 1997, when he was told about it by counsel, because due diligence did not require him to continuously monitor the news on the remote possibility of learning facts helpful to his case. *Id*. at 661-62).

These cases are proof that a defendant cannot be expected to be omnipotent or to overcome the failings of counsel. Here, Mr. Andersen was unaware that the investigation he was requesting was not being done because he believed his counsel when he was told he could not see the evidence against him. This, in conjunction with the lack of disclosures by the state should be sufficient to satisfy this prong.

C. The exculpatory evidence is material.

Black's defines material as "[i]mportant; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished with form." Black's Law Dictionary, 5th ed. A material fact is one that "tends to establish any of [the] issues raised." *Id.* In the context of newly-discovered evidence, courts have generally held that the exculpatory evidence must not only be material, but must not be doubtful, cumulative, or impeaching. *Wayne v. State*, 498 N.W.2d 446, 228 (Minn. 1993).

The evidence here is material and exculpatory because it not only attacks every aspect of the state's circumstantial case against Mr. Andersen, but directly raises the possibility that Al Baker received a call from someone claiming to be responsible for the murder but nothing was done to investigate this. Someone else claiming responsibility for the crime is completely exculpatory for Mr. Andersen.

D. The newly discovered evidence presented is such that it is likely to produce a different result at trial.

The manner in which Mr. Andersen's trial would have changed had he been in possession of the evidence he now presents has been discussed in detail above in great detail. Whether viewed through the lenses of the Fifth and Sixth Amendment violations stemming from non-disclosure, lack of investigation and trial preparation by counsel, or as newly discovered evidence under those standards, it is clear the outcome of the case would change. This is particularly true in light of the skeptical eye cast upon the case by the trial court and the Supreme Court on direct review[9].

CLAIM FOUR – MR. ANDERSEN SHOULD BE GRATED A NEW TRIAL IN THE INTERESTS OF JUSTICE

Mr. Andersen should be granted a new trial in the interests of justice based upon a showing of actual innocence, or in the alternative, to ensure the fair administration of justice.

The Supreme Court will use its supervisory power to award a new trial in the interests of justice to ensure the fair administration of justice. *See State v. Beecroft*, 813 N.W.2d 814, 846-47 (Minn. 2012); *State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005); *State v. Scales*, 518

[9] (T. 2770) "I am not uncomfortable telling you folks I have struggled with this, but I can't in good conscience take the position that no reasonable jury, taking into account the state's evidence and was favorable to the state under the circumstances, that no reasonable jury could convict Mr. Andersen." (T. 2770). . *State v. Andersen*, 784 N.W.2d 320, 336 (Minn. 2010) (Justice Page concurring) – calling case a "close one".

N.W.2d 587, 592 (Minn. 1994); *State v. Salitros*, 499 N.W.2d 815 (820) (Minn. 1993); *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992). While a new trial will not be granted in the absence of exceptional circumstances, it will be done when necessary to protect a defendant from fundamental unfairness and to protect the integrity of judicial proceedings. *Gassler v. State*, 787 N.W2d 575, 586 (Minn. 2010). It will also be done regardless of whether the defendant was prejudiced by the illegal act. *State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005); *State v. Salitros*, 499 N.W.2d 815 (820) (Minn. 1993); *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992).

In *State v. Beecroft*, 813 N.W.2d 814, 846-47 (Minn. 2012), this Court reversed despite a lack of prejudice where multiple state actors interfered with the statutorily mandated independence of medical examiners. *Id*. at 852. In *State v. Salitros*, 499 N.W.2d 815, 820 (Minn. 1993), this Court reversed in the interests of justice where the prosecutor made clearly improper arguments at trial that were known to be improper at the time they were made. *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992), is particularly instructive, as the state failed to disclose exculpatory evidence and told a witness to keep her mouth shut about the exculpatory evidence. *Id*. The Supreme Court reversed without concern for prejudice because it was clear that the Rules of Criminal Procedure required the information be disclosed. *Id*. In *State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005), this Court ordered a new trial regardless of prejudice where the state injected race into closing arguments despite case law clearly prohibiting this.

In the present case, it has been clear that anything would be done to ensure Mr. Andersen was found guilty. Before trial, his phone calls with his attorneys and investigator were recorded and reviewed under highly suspicious circumstances. Even though the state alleges these calls

were not eavesdropped on, when Mr. Andersen and his attorney set a trap to determine if the calls were being listened to, the trap was sprung when his attorney was searched in a manner making it clear the calls had been listened too. In addition, as detailed above, when Mr. Andersen went to contact potential witnesses for a defense, they had been told not to cooperate with Mr. Andersen. When officers went for a search warrant, they left out material information and made everything seem so much more favorable than was realistic. During trial, disclosures kept coming throughout trial, including and up to the date of Mr. Andersen's sentencing, and on occasion included incredibly important information such as that Al Baker, at a time when officers had leaked that the murder weapon was a .222, had disposed of a 30 caliber weapon.

Then, it was only when Mr. Andersen filed a federal lawsuit to seek compensation for this willful and flagrant violation of his rights that he learned that key evidence of another person taking responsibility for Chad Swedberg's murder had been withheld from him during trial, even though the second half of the interview with Al Baker, which did not contain this information, was transcribed and turned over.

In addition to these acts undertaken by the state and its agent, which can have no purpose other than to illegally deprive Mr. Andersen of his rights, Mr. Andersen went to trial with counsel who admitted not being prepared, who failed to pay and communicate with his investigator, and who actively sought to prevent Mr. Andersen from having access to any of the documents and evidence related to his case. These circumstances, working together create a situation where the only just outcome is for Mr. Andersen to be given a fair trial where he is able to meet the allegations against him fully.

"The right of the accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S.

284, 294 (1973). "[A] person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend." *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). This right to defend includes the right to compulsory process, the right to be informed of any and all evidence, including exculpatory evidence, the right to cross examine witnesses, the right to the assistance of counsel, and firmly established trial rights. *Herrera v. Collins*, 506 U.S. 390, 397 (1993). These are rights that have been recognized as the most important of trial rights and have been zealously guarded.

This case presents exceptional circumstances that require ordering a new trial. As set forth in above, and in the factual background, the circumstances resulting in Mr. Andersen's conviction raise serious questions about whether he received a fair trial. The trial was hindered by the systematic failure on all levels. For whatever the reason, seriously exculpatory evidence was withheld by the state. There is an accumulation of undisclosed exculpatory evidence and investigation left undone that shows that Mr. Andersen did not receive a fair trial. In the end, this served to deprive Mr. Andersen of his right to due process and to have a fair trial wherein evidence was fairly submitted to adversarial testing.

CONCLUSION

For the reasons stated above, Mr. Andresen requests that this Court schedule this matter for an evidentiary hearing where he is allowed to present evidence in support of his claims.

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