STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF BECKER | SEVENTH JUDICIAL DISTRICT

Case Type: Felony

State of Minnesota,

Respondent,

vs.

Kenneth Eugene Andersen,

Petitioner.

Court File No. 03-CR-07-171

RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF ANSWER TO PETITION FOR POST-CONVICTION RELIEF

INTRODUCTION

On September 27, 2016, Petitioner filed a postconviction petition. Respondent State of Minnesota submits this memorandum of law in support of its answer to that petition.

STATEMENT OF FACTS

I. ANDERSEN'S MURDER OF CHAD SWEDBERG.

A. Background

Before his death, thirty-four-year-old Chad Swedberg lived with his wife, Leslie Fain in rural Becker county. T. 915, 921-22.[1] A number of Leslie Fain's relatives also lived with them, including Leslie's sister, Morningstar Bellcourt. T. 927-29. Kenneth Swedberg, Chad's older brother, lived across the street with his wife and children. T. 922-93, 927, 1465; Exh. 186.[2]

Chad had worked as a construction laborer and supplemented the family income by hunting beavers, catching leeches, and doing miscellaneous handyman jobs. T. 231-32, 937-38. He also made maple syrup. T. 939-46.

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[1] "T." refers to trial transcript.

[2] "Exh." references are to the exhibits received at trial.

In April 2007, Chad's maple-syruping operation was located in a clearing in the woods approximately one-half mile behind his house and accessible by a dead-end private road and trail. T. 940, 1116, 1271; Exhs. 7, 209. Chad collected sap from a number of maple trees, evaporated the sap in a large pan heated by a wood fire, and filtered and collected the resulting syrup. T. 1720-24. Chad's friend Al Baker, a 72-year-old retiree, helped Chad with this operation. T. 1720-21.

B. The Morning Of The Murder

Chad planned to process maple syrup on April 13, 2007, with the help of Al Baker and his step-son Jesse Fain. T. 1064-65.

Chad was to be at the site early to cut wood to fuel the evaporator and have it ready by the time Baker and Jesse arrived later in the morning. *Id.* On that particular morning, however, Chad delayed his departure to wait for a television show about a man living with wolves. T. 951.

Baker telephoned Chad's cell phone at 7:30 a.m. T. 1735. After Chad told him he was waiting to watch the television show before he went out to start the day's syruping operation, Baker decided to drive to Waubun, Minnesota, to buy groceries to fix their lunches for that day. T. 1730.

A half an hour later, Chad told his wife that he could not wait any longer for the television show. T. 951. Chad left for his maple syruping site a minute or two before the show he had been waiting for began at 8:05 a.m. T. 951-52, 2714.

After Chad left, Leslie heard two "very loud" gunshots. T. 955-56. She could not think of any reason for gunshots back there. *Id.*

Leslie telephoned Chad's cell phone at 8:13, 8:15, 8:27, and 8:45, but he did not answer any of her calls. T. 955-56, 970-71, 2631; Exhs. 187-89. Leslie became very worried because of the two gunshots and Chad's failure to answer her repeated phone calls. T. 955-56. She got

ready for work and tried to reach Chad by telephone one more time at 9:46 a.m. T. 956; Exh. 187-89.

Leslie then walked down the trail to the syruping site and found Chad laying motionless on the ground. T. 959-60. Although Chad appeared dead, Leslie noticed no blood and thought that he had suffered a heart attack. T. 960. Leslie called Chad's brother Kenneth at 9:55 a.m. and called 911 at 9:57 am. T. 971, 1260; Exh. 187-89, 194. She called Kenneth first because she feared that the 911 operator would not be able to find the location of Chad's body. T. 960.

White Earth police officers Scott Brehm and Nicholas Stromme arrived one or two minutes after 10:00 a.m. T. 1074, 1116. Kenneth Swedberg met them there and told them that his brother was dead and that his body was about 1000 yards down the trail. *Id*. The officers proceeded down the trail and found Leslie crying and screaming. T. 1077-79, 1117. She pointed Chad's body out to them next to the cooker that Chad used to process his maple syrup. *Id.* Officer Stromme did not initially notice any blood in checking the body for signs of life. T. 1082.

Leslie told the officers that she had come to look for her husband after hearing two shotgun blasts and repeatedly failing to reach him on his cell phone. T. 1083, 1121. The officers decided to turn the body over to look for signs of wounds. T. 1083. When they did, they saw blood pooling near the armpit area and beginning to soak through his shirt. T. 1085.

Two EMTs arrived at 10:15 a.m. T. 1086, 1147, 2783, 2786. One of them cut and peeled back some layers of Chad's clothing and discovered an apparent bullet hole. T. 1080-89, 2787. Officer Stromme took custody of a cell phone found in Chad's inner left jacket pocket. T. 1089. The cell phone was turned on and had service. T. 1090.

C. The Crime Scene

The woods surrounding the clearing where Chad had been shot to death provided clear fields of fire from 20 to 30 or more yards away at various points. T. 1105, 2109. Four trails led from the clearing: one to the east, one to the south, one to the northwest, and one to the north. T. 1170-71. A Becker County Sheriff's investigator walked on the northbound trail until it came to "T" and turned to the west. T. 1172. Before the trail turned to the west, he saw what he believed to be two tracks of footprints in the frost that had accumulated on the leafy trail, one track going north and the other going south toward the murder scene. T. 1173, 1176. The trail of footprints extended for about 20 feet. T. 1121, 1173. The trail going to the north turned to the west, and went to the southeastern corner of Fish Hook Lake. T. 1250-51, 1301; Exh. 132.

Andersen and his brother, Frank Andersen, lived in separate residences on the far side of Fish Hook Lake and were the only residents on the lake. T. 1409, 2120. The trail leading north from the murder scene to the southeastern shore of the lake was approximately 0.5 miles in length, and the straight-line distance from that point to Andersen's residence on the far side of the lake was approximately 0.8 miles, or a total distance of approximately 1.3 miles. T. 1385, 1390-94; Exh. 132.

Police officers found no other significant evidence of human foot tracks other than what appeared to be the area where Chad had been gathering firewood. T. 1339-65. Police officers also examined the shore of Fish Hook Lake where the north trail met the lake. T. 1341-54. Deputy John McArthur, who weighed 270 pounds, was able to walk across the lake to its south shore. Although the condition of the lake surface was mushy at the point he left the lake and he could see water near the shore, he was able to get onto the shore without getting his shoes wet. T. 1355, 1402.

D. Initial Forensic Findings

Ramsey County Assistant Medical Examiner Victor Froloff performed the autopsy. T. 1798, 1808. Chad had been shot twice—once in the back of the right shoulder and once in the left buttock. T. 1820. Dr. Froloff determined that the injuries caused by the two gunshots caused Chad to bleed to death within a matter of minutes. T. 1825-26. The absence of any stippling or gun powder around the bullet wounds led Dr. Froloff to conclude that Chad had not been shot at close range. T. 1838. Based upon the type of tissue damage that Chad sustained, Dr. Froloff believed that the bullets had been fired from a rifle. T. 1821.

Nathaniel Pearlson, a BCA firearms examiner, examined the bullets from Chad's body and determined that they had been fired from a .30 caliber weapon. T. 2415-21. Although Pearlson was "reasonably certain" that they were Winchester silver tips, he could not positively identify them as such and was unable to determine their weight or grain because they were damaged. T. 2421, 2453-54.

E. The History Of Andersen's Relationship With Chad Swedberg

Although Chad and Andersen had a life-long relationship, it had deteriorated in the year and month preceding Chad's murder.

Chad and Andersen began doing business as KC Construction in 2006 erecting pole barns for various clients. T. 932, 1959. Andersen's nephew, Joshua Bogatz, also occasionally worked for the business. T. 2031.

On August 17, 2006, a Yamaha Grizzly ATV and some aluminum ramps were stolen from a Roseau County residence where Chad and Andersen were constructing a pole building. T. 1957-59. On the same day, Andersen asked his brother Frank to obtain a tribal registration for him for a particular Yamaha Grizzly ATV. T. 2180.

At some point, Andersen confessed to Chad and Bogatz that he had stolen the four-wheeler. T. 2032-33. Andersen seemed scared and upset and actually shook a little bit as he confessed. T. 2034.

On the evening of November 11, 2006, the stolen ATV was discovered behind Chad Swedberg's residence. T. 1945. By that time it was registered to Andersen's mother, Geraldine Belanger, and had a White Earth registration sticker. T. 1980-81.

An investigator spoke with Chad about the stolen ATV on November 22, 2006. T. 1963. When questioned, Chad's demeanor was forthcoming and cooperative. T. 1964. When told where the stolen ATV had been found, Chad looked surprised. *Id*. Chad agreed to call Andersen and let the investigator record the conversation. T. 1665-66, 1699; Exh. 166, 166A. Chad telephoned Andersen and told him that the police had come to question him about the missing ATV and that the police had found it near Chad's house. T. 1966-67. Chad handed the phone to the police officer.

The police executed a warrant to search Andersen's house and property in Becker County on December 12, 2006. T. 1981-82. After finishing the search, they went to Frank Andersen's nearby residence and found the stolen ATV ramps next to Frank's garage. T. 1982-83.

On January 4, 2007, Andersen was charged with felony theft. T. 1985-86; Exh. 164. An omnibus hearing in the matter was scheduled for April 16, 2007 — three days after Chad Swedberg was shot to death. T. 1987; Exh. 165.

Another incident in March 2007 finally ended the pole-building partnership between Chad and Andersen. Chad came home upset and told Leslie that the pole building that he and Andersen had erected had burned down with most of Chad's tools inside. T. 1941-42. Chad said

he did not want to work with Andersen anymore. He and Leslie decided it would be better for Chad to find a different construction job. T. 943.

During the first week of April 2007, Chad told Jesse that he intended to stop working with Andersen. T. 1043. About a week before his death, Chad also changed his mind about participating with Andersen in a leeching business. T. 943-44.

F. Andersen's Activities On The Morning Of Chad Swedberg's Death And The Days Thereafter

Andersen used his cell phone to telephone Chad at 7:46 a.m. on April 13, 2007. T. 2630, 2722; Exhs. 187, 260. He later told the police that during that telephone conversation he asked Chad for a ride to Fargo to apply for a loan. T. 2637-40. According to Andersen, Chad declined because Chad and Baker intended to make maple syrup that morning. T. 2637-40.

After speaking with Chad, Andersen used his cell phone to call Baker at 7:52 a.m. T. 1734, 1736, 1742, 2722; Exhs. 203, 260. Andersen asked Baker to stop by on his way to Chad's syruping site and look at a tank that Andersen intended to use to store leeches. T. 1736, 1742. Baker agreed but wanted to buy groceries in Waubun before proceeding to Andersen's house. T. 1736-37. Baker testified that Andersen knew that Baker would be driving to Waubun — a 15-minute drive each way — to purchase groceries for lunch before going to Andersen's residence. T. 1732. Baker also testified that Andersen did not tell him that Andersen was about to leave town or that Baker needed to get to Andersen's house by any particular time. T. 1744.

Before his telephone call to Baker at 7:52 a.m. Andersen had never asked Baker to come look at his leech tank. T. 1744. After his telephone call to Baker, Andersen never again asked Baker to come look at his leech tank. T. 1744-45.

When Baker arrived at Andersen's house after purchasing groceries in Waubun, no one was home. T. 1743. Baker looked for Andersen's leech tank but could not find one.

Earlier in the morning, at approximately 7:30 a.m., Andersen had telephoned his brother Frank. T. 2177. Andersen told Frank he was on his way to Fargo and asked Frank if he needed anything from Fargo. *Id*.

At 8:34 a.m., Andersen called his sister, Elizabeth Andersen, to see if her oldest daughter, Amy Mertens, could drive him to his tax preparer. T. 2226-28. Elizabeth told him that Amy could not because Amy was already at work. Sometime shortly after 9:00 a.m., Andersen attempted to contact his cousin Douglas Haverkamp. T. 1556, 1568-70.

Bradley Riggle, one of Haverkamp's roommates, testified that he called Andersen's cell phone at 9:17 a.m., after noticing from his caller ID that Andersen had called Riggle's land line between 5 and 10 minutes earlier. T. 1556, 1568-70; Exh. 196. Andersen asked to speak to Haverkamp and asked Haverkamp for a ride to Fargo. *Id*. Haverkamp agreed and asked Riggle to give him a ride to Andersen's house. T. 1558.

Andersen called Riggle's cell phone at 9:34 a.m. while Riggle and Haverkamp were en route. T. 1558-59, 1570-71; Exh. 196. Andersen asked Riggle to bring Haverkamp to meet Andersen at his sister Elizabeth's house, which was on their way and between a half-mile and a mile away from Andersen's house. T. 2071. Haverkamp drove Andersen to Mahnomen in Andersen's pickup. T. 1560-61, 1563, 1591-93, 2777.

Wanda Nelson, an employee of the Jackson Hewitt Tax Service in Mahnomen, testified that Andersen had a 2:00 p.m. appointment that day. T. 1652, 1655-56; Exh. 179. He showed up unexpectedly between 9:45 and 10:00 a.m. without calling in advance and asking if he could come earlier. T. 1657, 1659, 1663, 1674. Because her 10:00 a.m. appointment had not yet

arrived, she agreed to meet with Andersen, even though he had shown up more than four hours early. T. 1657. While he was at her office that morning, Andersen seemed more nervous than usual. T. 1670-71.

Andersen had spoken with Nicole Knudson at Citi Financial Finance on April 9 to apply for a loan over the telephone. T. 1679. He said that the loan was for some home repairs. T. 1680. Knudson let Andersen know that he qualified for a $7,500 unsecured loan, provided he brought in the necessary documentation. T. 1679-80. Andersen was to come to Moorhead on April 12. T. 1680-81. Andersen did not come on April 12, as scheduled, but showed up unexpectedly on April 13. T. 1682. Knudson was not able to process the loan for him that day because he did not bring his 2005 tax return. T. 1682. Knudson testified that Andersen was "a little agitated and nervous" while she was with him. T. 1684.

While Andersen was with Knudson, his cell phone rang and he answered it. T. 1683. At the end of the conversation, he told her that his business partner had been shot and that he had to leave. According to Haverkamp, Andersen was in the financial company office in Moorhead not very long, perhaps five minutes or so. T. 1602. Andersen came out "practically running," and said they had to go home. T. 1596. Andersen told Haverkamp that "Kenny" Swedberg had been shot. *Id*. After they had been on the road awhile, Andersen received a call on his cell phone informing him that "Chad" had been shot. T. 1597.

Amy Mertens testified that she called Andersen at 11:49 a.m. on April 13 and told him Chad had been killed. T. 1926-29. Her first telephone call at 11:46 went to Andersen's voice mail. T. 1927-29; Exh. 204. When she called him back at 11:49, she told him that Chad had been killed.

On Thursday, April 19, the date of Chad's funeral, Andersen opened a savings account at Midwest Bank in Detroit Lakes and deposited a check from CitiFinancial of Breckenridge, Minnesota. T. 2594-99; Exhs. 170, 172. Shelley Marohl, the bank's manager, commented that Andersen was dressed particularly well. T. 2601. Andersen explained that he had just come from Chad Swedberg's funeral where he had served as a pallbearer. *Id*. Andersen said it was a hard funeral because it was for one of his best friends. When Marohl said it must have been hard, Andersen responded "especially since I was probably the last person to probably see him alive." *Id*.

When Marohl asked Andersen how that had happened, Andersen said that he had stopped by that morning to see if Chad would go with him to South Dakota to buy leech traps. *Id*. Andersen remarked that Chad should have come with him. *Id*.

G. Andersen's Statements To The Police And Other Evidence

On September 18, 2006, Chad bought Andersen a Tikka model T3-300 Winchester certified magnum rifle and a Nikon Buckmaster rifle scope at Reed's Sporting Goods store in Walker, Minnesota. T. 1040-42, 2268-69, 2271, 2280, 2683; Exhs. 69, 101A.

In October 2006, Andersen, Chad, Ken Heisler, and Daniel Clark went elk hunting in Colorado. T. 2261. Clark testified that Andersen "had a 300 like the gun I use." T. 2263. The Tikka 300 rifle that Chad had purchased for Andersen the previous month had a silver barrel and a black stock. Exhs. 69, 101A. Photographs of the elk-hunting trip show Andersen carrying a rifle with a silver barrel and black stock. T. 2265-67; Exhs. 70, 71.

Becker County Sheriff's Deputy Joseph McArthur participated in executing a search warrant at Andersen's house on December 12, 2006, in connection with the investigation of the ATV stolen from the Kenworthys in Roseau County. T. 1329-30. During the search, Deputy McArthur noticed a number of firearms in a gun cabinet in one of the bedrooms. T. 1331. He

called in the serial numbers and models of those firearms to dispatch to determine if any of those firearms had been stolen; none had. T. 1331. One of the firearms at Andersen's house on that date was the Tikka 300 rifle that Chad had bought for Andersen on September 18, 2006. T. 1331-32, 2149, 2153-55, 2271, 2280; Exhs. 67, 69, 101A.

Around the second week of December, 2006, Andersen asked his sister, Elizabeth Andersen, to bring his guns to her house because he feared they would be stolen if they remained at Andersen's house. T. 2230-32. Elizabeth testified that one of Andersen's rifles had a silver barrel and a black stock. T. 2233-34. Elizabeth further testified that in March 2007 — the month immediately preceding Chad Swedberg's murder — Andersen retrieved that particular rifle from her house and never returned it. T. 2234-35.

Becker County Investigator John Sieling and BCA Special Agent Daniel Baumann interviewed Andersen on April 15, 2007. T. 1220, 2610, 2635-36. Andersen was not yet a suspect; the police were merely talking to as many of the local residents as they could. T. 2636-37. Although Andersen appeared cooperative, T. 2636, a number of his statements were directly contradicted by other evidence.

1. Andersen told the officers that when he called Al Baker on the morning of April 13 and asked him to stop by on his way to Chad's maple-syrup site to check on Andersen's leech tank, Baker agreed to be there at 8:30 a.m. T. 2641. As noted above, however, Baker testified that Andersen knew that he was first driving to Waubun to purchase groceries for lunch and Andersen did not tell him that Andersen was about to leave town or that Baker needed to get to Andersen's house by any particular time. T. 1732, 1736, 1744.

2. Andersen also told the officers that he and Douglas Haverkamp met at Andersen's house and that the two of them left for Andersen's appointments in Mahnomen and Fargo

between 8:30 and 9:00 a.m. T. 2641-42. Telephone records and the testimony of Bradley Riggle and Douglas Haverkamp established that Andersen and Haverkamp did not leave for Mahnomen until sometime after 9:34 a.m.

3. Andersen told Baumann and Sieling that he had an appointment with a tax preparer in Mahnomen between 9:00 and 9:30 a.m. on April 13, and an appointment with a banker in the Fargo area around 11:00 a.m. on the same day. T. 2641-42. This claim was directly contradicted by the tax preparer and the loan officer. The tax preparer testified that Andersen's appointment was not until 2:00 p.m. that afternoon, and the loan officer testified that he was scheduled to meet with her on April 12 and did not have an appointment on April 13 at 11:00 a.m. or at any other time.

After the April 15 interview, Agent Baumann learned that the bullets removed from the body during the autopsy indicated that Chad had been killed with larger caliber bullets and that a Tikka 300 magnum rifle had previously been seen at Andersen's house on December 12, 2006. T. 2653-56; Exh. 208.[3]

Investigator Sieling and Special Agent Baumann reinterviewed Andersen on May 29, 2007. T. 2657. Although Andersen again appeared cooperative, T. 2658, he furnished incomplete information and once again made statements contradicted by other evidence.

1. When asked what firearms he had, Andersen identified two shotguns, a muzzleloader, and a .222. T. 2659. He told the officers that he had taken those firearms to his sister's residence because he had feared someone was going to burglarize his home. T. 2659-60.

[3] Initial public reports were that Chad Swedberg had been killed with a smaller caliber weapon. T. 2661-62.

Two other firearms remained at his residence: a .22 rifle and another shotgun. T. 2660. Andersen said nothing about a Tikka rifle or a .30 caliber rifle. T. 2661.[4]

2. Andersen said he had been elk hunting in Colorado and used a 7-millimeter magnum firearm for the hunt. *Id*. Baumann and Sieling asked to look at Andersen's firearms, and Andersen agreed. T. 2663. They went directly to Elizabeth's house and found two shotguns, a 22 rifle, a .222 rifle, and a muzzleloader. T. 1221-22, 2663-2666, Exh. 47. There was no Tikka rifle or any other .30 caliber firearm. T. 1222, 2666.

When shown a photograph of the Tikka rifle that the police had seen in Andersen's house on December 12, 2006, Elizabeth testified that it "looked like" the rifle that Andersen had taken back from her house in March 2007. T. 2333-34. Elizabeth noted that the gun in the photograph and the gun Andersen had retrieved from her house had "the same silver barrel and black stock." T. 2236.

Agent Baumann obtained three search warrants: one for Elizabeth Andersen's residence and its outbuildings, one for an area south of Frank Andersen's residence where the Tikka rifle had been fired, and one for Andersen's residence and its outbuildings. T. 2673. The warrant to search Andersen's residence and the outbuildings sought to look for a .30 caliber firearm, .30 caliber bullets, bullet fragments, cartridges and casings, and documents or writings indicating Andersen's ownership of such items. T. 2676-77.

On June 7, 2007, Agent Baumann assembled a large group of officers to execute the warrants. T. 2677-78. Before any were executed, Agent Baumann, Investigator Sieling, and

[4] As of the date of this second interview of Andersen, the public had been led to believe that Chad Swedberg had been shot to death with a small caliber gun. T. 2662. When questioned by the police, Ken Swedberg, Frank Andersen, Al Baker, and Jesse Fain all acknowledged that they had one or more .30 caliber firearms. T. 1222, 2662-63.

Officer John McArthur proceeded ahead to Andersen's residence, intending to give him an opportunity to provide more information and voluntarily turn over any firearms he possessed. T. 2678.

When they arrived at Andersen's residence, Baumann and Sieling went inside, while McArthur stayed outside. T. 2679. Although Andersen immediately informed them that he had just woken up and was hung over, he did not appear to have any difficulty understanding what they were saying or what was going on. T. 2679. They began interviewing him without telling him they had a search warrant. T. 2680.

Baumann and Sieling first went through the timeline for April 13, and Andersen reiterated what he had told them earlier. T. 2681. He said he left that morning between 8:30 and 9:00 a.m. to go to his tax preparer. When they confronted him with information that his appointment with the tax preparer was not until 2:00 p.m., he continued to insist that the appointment was between 9:00 and 9:30 a.m. *Id.*

Concerning the telephone calls he received in Fargo from his niece, Amy Mertens, Andersen again said that he had received at least two calls from her. T. 2680-82. He said that in the first call, he was still at the bank, and Amy Mertens told him that "Ken" had been shot. He again claimed that Amy Mertens called him back a second time and told him that "Chad" had been the victim and was dead. *Id.*

Concerning whether he had owned a Tikka rifle, Andersen said that he had owned two over the years. T. 2682. He said that Chad had purchased a Tikka rifle and an expensive scope for him at Reed's Sporting Goods store. T. 2683.

Andersen said that he no longer owned that Tikka rifle. He said he gave it to Chad to trade for two muzzleloaders on November 23, 2006, two days before the start of the 2006

muzzleloader deer season. *Id*. According to Andersen, Chad kept one of the muzzleloaders and Andersen had the other. T. 2686. Andersen said that he removed the scope from the Tikka to use it on a different rifle. T. 2684.

At first, Andersen said that he was unsure where the transaction had taken place. *Id*. After some thought, he said that it may have occurred in Bagley. *Id*. Officer McArthur then contacted a Clearwater County investigator and gave him the make, model, and serial number of the particular Tikka 300 Winchester short mag and the names of Chad Swedberg and Andersen. T. 2118. The investigator called McArthur back and said no such gun was in their automated pawn system under either name. T. 2118. McArthur relayed that information to Baumann and Sieling. *Id*.

Baumann then told Andersen that there was no record in Bagley of any transaction involving the Tikka rifle. T. 2684. In response, Andersen indicated that the transaction might possibly have occurred in Fosston, Minnesota. *Id*. Officer McArthur called the Polk County Sheriff's Department and provided the same information he had previously given to Clearwater County. T. 2119. Polk County reported back that there had not been any transaction involving a Tikka rifle at the Fosston gun shop. T. 2119, 2685.

After being informed there was no record of any transaction involving a Tikka rifle in Fosston, Andersen said that the transaction might have occurred at Reed's Sporting Goods store. T. 2685.

Andersen denied any involvement in Chad's death and noted that he would get lost if he tried to find his way back to where Chad had been killed. T. 2687. This statement was contradicted by a number of witnesses. Jesse Fain testified that Andersen had been to Chad's maple-syruping site in previous years. T. 1062. Joshua Bogatz testified that sometime during

2007, Andersen told him that Chad either showed or told Andersen where Chad was syruping. T. 2009-10. Bogatz also testified that Andersen knows that area "pretty good" and has never seen Andersen get lost there. T. 2010-11. Andersen's brother testified that he and Andersen hunted near and around Fish Hook Lake and that he and Andersen are both familiar with that area. *Id*. Andersen himself had told the police on April 15 that he had hunted with Chad in the woods between his house and Chad's house the previous winter. T. 2650-51.

When asked what he had done with the ammunition for the Tikka rifle, Andersen said that he had either shot it all or traded it in with the weapon itself. T. 2685-86. When asked what type of ammunition he used in the Tikka, he described it as "150 grain with some special tip on it." T. 2686.

The investigators began searching the house with Andersen's consent. T. 2690-91. Andersen asked for permission to go to attend to his leeching business at a nearby barn. T. 2691. He volunteered to have an officer accompany him and asked that John McArthur be that officer. *Id*.

Andersen had said that the Tikka had been traded in for two muzzleloaders on November 23, 2006, but the same Tikka had been seen at Andersen's residence during a search about an unrelated matter on December 12, 2006. T. 2702. When Agent Baumann confronted Andersen about that discrepancy, Andersen did not want to speak with him anymore. T. 2702-03.

During the search of Andersen's house, the police found a Nikon Buckmaster scope, a manual for a Tikka T-3 Bolt Action firearm, and a number of cartridges, including two Winchester Supreme silver-tipped cartridges and another .300 caliber round. T. 2695-2700; Exhs. 51, 52, 54, 137 and 137A.

After the police began their search of his house, Andersen, accompanied by Officer McArthur, went to a nearby dairy barn containing a number of leech tanks. T. 2121. Andersen and Douglas Haverkamp each began bringing leeches from the barn and sorting, and cleaning them. T. 2121-22.

After some of Andersen's potential leech customers had come and gone, 6 to 10 additional police officers came walking down Andersen's driveway. T. 2126. When Andersen asked McArthur what they were doing, McArthur told him that they were coming to search and that there was a lot of searching to be done. T. 2127. Andersen said he did not care if the police searched his home but did not like that they were coming "down there." *Id*.

Andersen said he was calling a lawyer and then left and made a call on his cell phone. *Id*. When he returned, he reiterated that he did not like what was going on. *Id*. Andersen then left and made a second phone call. T. 228. When he came back after the second phone call, he told Officer McArthur that he had just talked to his brother Frank Andersen, that the search "was over," and that "the police could not search." *Id*. Andersen began swearing. *Id*. He said he did not care if the police searched his house but that the other buildings were not his. He reiterated that he had spoken to his brother Frank a couple of times and that Frank said, "It is done. It is over. You guys are done. You can't search out here." T. 2129.

Frank Andersen directly contradicted Andersen's account of what Frank had said on that occasion. Frank testified that he merely told Andersen that no one was to be allowed in Frank's house until Frank saw the search warrant. T. 2179-80. As far as Frank was concerned, the police could search anything else except his house. *Id*. Frank specifically testified that he never told Andersen that Frank did not want the police in any of the outbuildings. *Id*.

When Andersen became upset and insisted that the police could not search any outbuildings, Officer McArthur brought him back to the house to speak with Baumann and Sieling. T. 2129-30. At that point, Andersen was served with the search warrant. T. 2130. Andersen became even more angry. *Id.* He began swearing and saying he had to leave. *Id.* He and Haverkamp loaded leeches into a van and left. T. 2130-31.

McArthur then joined other officers searching Andersen's outbuildings, including the dairy barn in which Andersen had been processing leeches. T. 2132-34. A lean-to shed had been added to the original portion of the barn. T. 2134. McArthur inspected the area above the ceiling of the lean-to addition. T. 2135-36. The top of the ceiling was insulated by pink fiberglass batts laid in the cavities between each of the roof joists. T. 2136, 2140; Exh. 61.

Officer McArthur noticed two areas where the insulation appeared to be a brighter pink, suggesting that those particular areas had been disturbed. T. 2141. He pulled up the insulation in those areas but found nothing out of the ordinary. *Id.* McArthur crawled further back and saw another area of insulation that appeared to have been previously disturbed. T. 2143. He lifted that insulation and found the Tikka rifle that Chad had bought for Andersen on September 18, 2006, that had been in Andersen's gun cabinet on December 12, 2006, and that Andersen had picked up from his sister the month before Chad was murdered. T. 2143, 2145-55; Exhs. 63, 65-67, 69, 201, and 201A. Andersen's right palm print was subsequently identified on the underside of the rifle grip. T. 2342.

The two .30 caliber Winchester Silvertip Supreme Bullets found in Andersen's house were furnished to Nathanial Pearlson, the BCA tool mark and firearms examiner. T. 2430. Pearlson determined that they were consistent with the bullets recovered from Chad's body. T. 2443-44.

Pearlson also examined the Tikka Model T3-300 Winchester Magnum rifle found hidden in the insulation. T. 2429. Pearlson test-fired the Tikka and compared the test-fired bullets with the bullets recovered from Chad's body. T. 2443.

The bullets shared a number of class characteristics. First, the bullets were both .30 caliber. T. 2566. Second, the barrel of the rifle that fired the bullets recovered from Chad's body and the barrel of Andersen's Tikka each had four lands and grooves. *Id*. Third, the widths of the lands and grooves on the bullets recovered from the body were the same as the widths of the lands and grooves of the bullets test-fired from the Tikka. *Id*. Finally, the right-hand twist of the bullets was the same. T. 2566-67. Based on the shared class characteristics, Pearlson concluded that the Tikka was consistent with the rifle used to murder Chad Swedberg. T. 2443.

Pearlson could not conclusively identify Andersen's Tikka rifle as the murder weapon because its barrel did not have enough tool marks or other imperfections to transfer a sufficient quantity of unique marks to the bullets recovered from Chad's body. T. 2411. As Pearlson explained, some manufacturers use polishing steps to rid barrels of machining marks. T. 2403. Accordingly, not all firearms transfer enough unique marks onto the bullets fired from them in order to permit a conclusive identification. T. 2404. Pearlson testified that the lack of machine marks on the bullets make it impossible to identify the gun that fired them.

On June 20, 2007, Andersen told Chad's former employer, Mike Ladue, that he had received a $250 check from Chad and Leslie's joint checking account in connection with Andersen's sale of the Tikka. T. 2713. Leslie testified that she and Chad never gave Andersen money for any gun. T. 974. Records of their only joint checking account show no $250 check payable to Andersen. T. 974-75; Exh. 190.

H. Andersen's Defense

Devon Green, one of the two EMTs who responded to Leslie Fain's 911 call at 9:57 a.m. on April 13, had been monitoring radio traffic from Becker County, Mahnomen County, and White Earth dispatch beginning shortly before 7:00 a.m. T. 2785, 2801. She testified that sometime during that period she heard a radio message about a 911 domestic call for the Swedberg residence and a radio call about a cancellation of that domestic call a short while later. T. 2784-86.

I. The State's Rebuttal Evidence

The dispatchers and secretaries from Becker County, Mahnomen County, and White Earth law enforcement who were working on the morning of April 13 testified as rebuttal witnesses. They testified that they received no calls reporting a domestic dispute at the Swedberg residence on the morning of April 13. T. 2835, 2836-37, 2839, 2845, 2849, 2850-53, 2864-67, 2874, 2876, 2879-81, 2888; Exhs. 263-65. Becker County dispatch records show that the only domestic call that morning was a 7:16 a.m. call about a domestic at a particular residence in Detroit Lakes. T. 2866.

J. Deliberations And Verdict

After deliberating for approximately 10 and one-half hours over the course of two days, the jury found Andersen guilty of first-degree murder. T. 3031-3036, 3040-44.

II. DIRECT APPEAL

Andersen filed a direct appeal of his conviction. In that appeal, he raised four issues: 1) the search warrant application contained material misrepresentations and did not establish probable cause; 2) the evidence was insufficient to convict him of first-degree murder; 3) the state should be required to show that the monitoring of his phone calls in jail did not lead to any evidence admitted at trial, and; 4) in a pro se supplemental brief, the trial court committed error

when it questioned jurors about incidents outside the courtroom. *State v. Andersen*, 784 N.W.2d 320, 323 (Minn. 2010) (*Andersen I*). The Minnesota Supreme Court rejected each of his arguments and affirmed the conviction. *Id.* at 329, 332-33, 334, 336.

More specifically, the supreme court found there was sufficient evidence to support the conviction. *Id.* at 332. In arguing to the contrary, Andersen "attempt[ed] to break the evidence into discrete pieces in an effort to establish that, when viewed in isolation, these evidentiary fragments support a reasonable hypothesis other than guilt." *Id.* But instead, and appropriately, the supreme court considered all the circumstances proved and concluded that "the reasonable inferences that can be drawn from the circumstances proved are consistent with Andersen being the killer and inconsistent with any other rational hypothesis." *Id.*

III. FIRST POSTCONVICTION PETITION

In December 2012, Andersen filed a postconviction petition in which he raised seven claims: 1) newly-discovered evidence; 2) recordings of his jail calls were admitted at trial in violation of his constitutional right to counsel; 3) expert testimony at trial regarding firearms and palm prints violated his right to confrontation; 4) prosecutorial misconduct during closing argument; 5) the state withheld evidence until after trial; 6) ineffective assistance of trial counsel, and; 6) ineffective assistance of appellate counsel. *Andersen v. State*, 830 N.W.2d 1, 6 (Minn. 2013) (*Andersen II*).

For his newly-discovered evidence claim, Andersen submitted a handwritten statement from his mother, Geraldine Bellanger, in which she claimed that Ken Swedberg told her he had seen a blue pickup leaving Chad's house at 8:45 a.m. on the morning of the murder. *See* Exhibit B to Postconviction Petition, filed on December 10, 2012. For his ineffective assistance claims, Andersen asserted his attorneys failed to give him a copy of the discovery and his trial counsel

failed to cross-examine some witnesses about other pieces of evidence and failed to subpoena other witnesses, such as Glen Fladmark. *Id.* at 19-48.

The district court denied the petition without a hearing, finding that the claims were either barred by *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976), or were meritless on their face. *Andersen II*, 830 N.W.2d at 5. The supreme court affirmed for the same reasons. *Id.*

IV. RESTITUTION APPEAL

Andersen later raised a challenge to the trial court's restitution order. *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015) (*Andersen III*). At sentencing, the court had ordered Andersen to pay restitution, but reserved the determination of the amount for 30 days. *Id.* at 912. The state submitted a timely request for the restitution amount, but the court inadvertently did not issue a specific order at that time. *Id.* After it was brought to the court's attention, the court issued an order for the requested restitution. *Id.* at 912-13. The supreme court affirmed the district court's order for restitution. *Id.* at 916.[5]

V. CURRENT POSTCONVICTION PETITION

On September 27, 2016, Andersen filed the current postconviction petition (Petition), with a supporting memorandum of law (Defendant's Memorandum). He raises four claims: 1) ineffective assistance of counsel for failing to conduct an adequate investigation; 2) newly-discovered evidence of a *Brady* violation; 3) newly-discovered evidence that would have resulted in an acquittal, and; 4) he should be granted a new trial in the interests of justice. Petition, at 2-3.

[5] Andersen had filed a motion to order the Department of Corrections to return money taken from his wages before the restitution order. The district court denied the motion on the merits. *Andersen III*, 871 N.W.2d at 913. The supreme court held the motion was properly denied, but on the alternative ground that such a motion was not the proper mechanism for challenging an administrative action of the Department of Corrections. *Id.* at 915. Thus, the supreme court ultimately affirmed, as modified, the district court's order. *Id.* at 915-16.

As all four claims are premised on the same 16 pieces of information, a discussion of each piece of information is set forth here:

1. "Evidence that Al Baker was at the scene of the crime as early as 8:00 a.m. on April 13, 2007, and found a bullet and cigarette butts left by the shooter." Defendant's Memorandum, at 55. For this proposition Andersen cites Exhibit 10.[6] *Id.*

But Exhibit 10, which is a narrative report by a defense investigator, only recounts a statement by Baker that he "saw the spot where Andersen waited to shoot Swedberg; there were cigarette butts and two expended casings." This report does not establish that Baker was there on the morning of the murder.

Exhibit 11, which is a narrative report from a defense investigator, recounts a discussion with Geraldine Bellanger, Andersen's mother. In that report, the investigator claims that Bellanger told him that Al Baker told Bellanger that during Andersen's trial, Baker asked the judge if he could say something to Andersen, the judge told Baker to go ahead, and Baker then thanked Andersen for not shooting Baker. Exhibit 11, p. 1. According to the defense investigator, Baker told him a story about thanking Andersen during the trial for not shooting Baker. Exhibit 10, p. 2. The trial transcript does not reveal any such exchange. T. 1716, 1769-71, 1792.

Bellanger told the investigator that Baker also said Baker had arrived at Swedberg's house earlier in the day of the murder than he had told the police and had seen Andersen leaving Swedberg's house "earlier," and that is why Baker thanked Andersen at trial. Exhibit 11, p. 2. It is not clear why Andersen would want presented at a new trial evidence that a witness placed

[6] "Exhibit" references are to the exhibits appended to Defendant's Memorandum.

him at the scene of the murder near the time of the murder. Andersen does not explain how that exculpates him.

Moreover, other evidence establishes that Baker could not have been at Swedberg's home earlier that morning. The owners of the convenience store in Waubun recall Baker coming into the store shortly after the store opened at approximately 7:30 a.m. Exhibit 7, p. 2. Doug Darco testified at trial that he saw Baker driving east on Highway 113, heading away from Waubun and in the direction of his home, at "7:30, quarter to eight, somewheres [sic] in there" on the morning of the murder. T. 1940, 1942.

2. Evidence of 9 minutes and 20 seconds of an interview with Al Baker that was not disclosed prior to trial, and in which Baker reports receiving two calls from somebody claiming to have killed Swedberg and that his phone system was set up so he could receive and make calls through his home phone and his cell phone. Defendant's Memorandum, at 55. For these propositions Andersen cites Exhibit 9.

a. Disclosure

The entire recording, including the portion in Exhibit 9, was disclosed prior to trial. Bates number 537 is a compact disc containing the entire interview of Al Baker that occurred on April 20, 2007. It includes the portion of the interview Andersen claims is missing, and which is set forth in Exhibit 9. That recording was disclosed to Andersen on July 11, 2007. *See* Exhibit A, attached to the Affidavit of Matthew Frank (hereafter "Frank Aff., Ex. __"). (This is also Document #49 on the Register of Actions.) His claim of a disclosure violation is simply without merit.

b. The calls

The transcribed portion in Exhibit 9 does not contain any discussion of two callers who confessed to killing Swedberg. Baker references calls, but the only content of the calls was a question about whether Baker was happy now or satisfied with something. Exhibit 9, p. 2-4. Not only does this Exhibit not support his claim, he does not explain how this would be exculpatory.

Furthermore, it is not clear what relevance there is to how Baker's phone was set up at the time. Andersen does not explain how this establishes his innocence.

3. "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." Defendant's Memorandum, at 55. For this proposition he cites Exhibit 10.

But Exhibit 10 does not support such a claim. Exhibit 10, which is a narrative report from the defense investigator's conversation with Baker, states that Baker was asked about the .30 caliber hunting rifle he owned, which he had told police he gave to a female relative living in Alaska, and Baker stated that the rifle was a .308 caliber Winchester he had sold to his granddaughter when she moved to Alaska. According to the narrative report, Baker added that the "rifle is *now* in the possession of her father . . . who lives" in Illinois. Exhibit 10, p. 2 (emphasis supplied). Exhibit 10 does not contain any information that impeaches Baker's testimony or statements about guns because Exhibit 10 only recounts where that gun was at the time of the interview, which occurred on November 20, 2014.

Al Baker admitted to investigators after the murder that he owned a .30 caliber rifle. T. 2662-63. The jury heard that evidence.

4. "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." Defendant's Memorandum, at 55. For this proposition he cites Exhibit 13.

Exhibit 13 does not support this claim. Wanda Nelson testified at trial that the "tax return" is different from the reference copy, and a client has to specifically request a copy of the tax return. T. 1666-67. Her statement set forth in Exhibit 13 does not impeach this testimony, as it only states that the copy he received that morning should have been a reference copy. Wanda Nelson testified that Andersen called later that afternoon and requested a copy of his tax return. T. 1669.[7] Again, Andersen fails to explain how this would exculpate him.

Exhibit 13 is Bates number 3204, and was served on defense counsel on May 6, 2008. Frank Aff., Ex. B.

5. "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." Defendant's Memorandum, at 55. For this he cites Exhibit 17.

But Exhibit 17 does not support this assertion. Exhibit 17 is a narrative report from a defense investigator about his conversation with Wanda Nelson. In it, the investigator reports that Wanda Nelson said she had little memory of the details of her interaction with Andersen and stands by her trial testimony. Exhibit 17, p. 1-2.

[7] In a November 2014 interview with a defense investigator, Wanda Nelson reaffirmed her testimony. Exhibit 17, p. 2.

And again, Andersen does not explain how the question of whether he called and requested a copy of his tax return be faxed to a bank or physically picked it up himself some eight hours after the murder is material to his guilt or innocence.

6. "Evidence contradicting the trial testimony of Douglas Haverkamp and Bradley Riggle that [sic] 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." Defendant's Memorandum, at 55. For this he cites Exhibit 18.

Exhibit 18 is Bates number 847, and was served on Andersen on July 19, 2007. *See* Frank Aff., Ex. C. (This is also Document #50 in the Register of Actions.)

Riggle testified at trial that he and Haverkamp had plans to go to Detroit Lakes to eat lunch, kill time; nothing specific. T. 1556-57. He did not testify that they planned to go to Ulen for Haverkamp's taxes. Haverkamp testified they had plans to go to Detroit Lakes for lunch, and denied that they planned to go to Ulen to get his taxes done. T. 1587.

In Riggle's statement dated August 15, 2007, Riggle stated "we were talking about going to Detroit Lakes to go out to eat, then he had to go do, pay for his taxes." Exhibit 18, p. 2. Riggle could not have been impeached at trial with his August 2007 statement because he did not testify they had a plan to go do Haverkamp's taxes. Haverkamp could not have been impeached at trial with Riggle's statement because it was Riggle's statement, not Haverkamp's. According to the defense investigator, in December 2014, Haverkamp said that he did not have a plan involving his taxes that day and did not know why Riggle would have said that. Exhibit 19, p. 1. But even if Riggle could be cross-examined about that, Andersen has not established how that

would be material to the evidence of his guilt. What their plan was when they went to Detroit Lakes is immaterial to the evidence of Andersen's murder.

Moreover, it is not clear why Andersen would want to create any issue about the credibility of Riggle and Haverkamp – they are the closest things he has to an alibi. They are two witnesses that can place him somewhere that is not the scene of the murder near the time of the murder. There would be no good reason in trying to impeach either of them.

7. "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." Defendant's Memorandum, at 56. For this he cites Exhibit 19.

This is not exactly what Exhibit 19 recounts. Exhibit 19 is a narrative report from the defense investigator regarding an interview with Haverkamp in December 2014. Haverkamp reported that he was driving Andersen around selling leeches when Andersen was arrested. Haverkamp gave the money they made selling leeches to Andersen's father, but "kept a couple hundred dollars as compensation for the work he had been doing for Andersen." Exhibit 19, p. 2. The report says nothing about the van.

Setting aside that it seems ridiculous to conclude that Haverkamp would be "afraid" of Andersen because he kept "a couple hundred dollars" for work he had done for Andersen, it is again difficult to ascertain how this evidence would have changed the trial or would demonstrate Andersen's innocence. Haverkamp was one of the few witnesses who could place Andersen somewhere that was not the crime scene near the time of the murder. There would be no benefit in impeaching Haverkamp.

Andersen's further claim that because of this, Haverkamp was "unwilling to speak with his investigator at an earlier time" is simply not supported by Exhibit 19. The only reference to an earlier interview is Haverkamp's statement that he had declined a previous interview because he "was intoxicated." Exhibit 19, p. 1.

8. Evidence of an interview with 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." Andersen adds that this statement was not turned over prior to trial and "shows that Nelson was aware Mr. Andersen could not have stolen the four-wheeler." Defendant's Memorandum, at 56. For this he cites Exhibit 38.

Exhibit 38 does not establish this. There is nothing in Exhibit 38 regarding whether Jeff Nelson knew Andersen could not have stolen the four-wheeler.

Jeff Nelson testified at trial that when he interviewed Chad about the stolen ATV, Chad said he had nothing definite or any knowledge of the ATV being stolen or where it was found. T. 1963-64. Nelson added that Chad appeared surprised when Nelson informed him that ATV had been found behind Chad's home. T. 1964.

The transcript of Nelson's interview with Leslie and Jesse Fain is Exhibit 28. In that interview, Jesse Fain said that Chad thought the ATV "in the back" was Andersen's. Exhibit 28, p. 12.[8] After Jesse Fain talked with Liz Andersen about Andersen's thefts, Jesse suggested to Chad that the ATV might be stolen and Chad agreed. *Id.* Chad tried to figure out when Andersen would have stolen it. Exhibit 28, p. 12-13. Jesse continued to talk with Chad about how Andersen's thefts were putting Chad in jeopardy, and Chad agreed. Exhibit 28, p. 13.

[8] Jesse Fain refers to "Fudd," which was Andersen's nickname at the time. T. 927.

There is nothing in this interview that impeaches Jeff Nelson's trial testimony. Nor is there anything in this interview that establishes Nelson was aware Andersen could not have stolen the four-wheeler. In fact, this interview would have given Nelson more reason to believe that Andersen stole the ATV.

Moreover, this interview establishes more reason for Chad to cooperate with the prosecution of Andersen for the theft of the ATV. This was one of the motives the state asserted for Andersen's murder of Chad. It is likely that if this evidence was admissible in a new trial, it would strengthen the state's case, not establish Andersen's innocence.

Andersen discussed this interview in his first postconviction petition, which he filed in December 2012. *See* Memorandum Supporting Petition for Post-Conviction Relief, at 35.

9. Evidence of a video 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." Defendant's Memorandum, at 56. For this he cites Exhibit 11.

Exhibit 11 is the defense investigator's narrative report about his conversation with Anderson's mother, Geraldine Bellanger. It includes Bellanger's account of her conversation with Glen Fladmark, Andersen's investigator at the time of trial, in which Fladmark claimed to have obtained video of the encounter between Liz Andersen and the Swedbergs at Wal-Mart. Exhibit 11, p. 2.

But Exhibit 37, the statement of Liz Andersen, completely undermines this claim. Liz Andersen states that Andersen asked her to "meet Chad Swedberg down in Detroit Lakes to give him money that was owed to Chad *from working with Kenneth*, my brother[.]" Exhibit 37

(emphasis supplied). Liz Andersen explains this occurred at the Wal-Mart. *Id.* This, of course, would make sense as Andersen and Chad had worked together for some time. *See supra*, at 5-7.

The evidence establishes that Andersen maintained possession of the Tikka rifle found hidden in Andersen's barn. Chad bought the Tikka rifle for Andersen at Reed's Sporting Goods Store. On December 12, 2006, officers investigating the ATV theft searched Andersen's home and found that Tikka rifle. Shortly thereafter, Andersen took all his guns, including the Tikka rifle, to his sister's home. In March 2007, however, Andersen retrieved the Tikka rifle from his sister's home. The Tikka rifle found in Andersen's barn was the same rifle found in his home in December. It contained Andersen's palm print. *See supra*, at 10-11, 18-19.

Nor would the statement of Josh Bogatz produce a different result, for the same reasons. *See* Exhibit 4. In that statement, Bogatz discusses a Tikka rifle, but says he "thought this rife [sic] was one I had sold to Kenny Anderson [sic], my step-uncle." Exhibit 4, p. 1. The Tikka rifle found hidden in Andersen's barn had been purchased at Reed's Sporting Goods.

Evidence about this exchange of money would not have altered the evidence about Andersen's possession of the Tikka rifle found in his barn after the murder. Nor would it establish Andersen's innocence.

10. Evidence that 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." Defendant's Memorandum, at 56. For these propositions he cites Exhibits 4, 19, and 30.

Exhibit 4 contains no information about Andersen's phone.

Exhibit 19, p. 1-2 (narrative report of conversation with Douglas Haverkamp) and Exhibit 30 (handwritten statement of Jeff Thomson) contain statements like this about the condition of

Andersen's phone. But Andersen does not explain how this would be material to the evidence at trial.

Jeff Thompson testified at trial about a conversation he had with Andersen later in the day of Chad's murder. T. 1639-40. In that conversation, Andersen said he had talked with Chad on Andersen's cell phone that morning. T. 1640. Andersen showed Thompson Andersen's cell phone and Thompson saw the numbers and letters on the phone, but "didn't really pay attention." T. 1640-41. So, obviously, Andersen was able to use his phone to call Chad at Chad's house that morning.

These exhibits do not establish that Andersen was unable to use his phone that morning to make the calls. Others were able to get a signal in the area of the syrup camp: Leslie was able to use her phone to call Kenneth Swedberg and 911 at the location where Chad died, and Chad's phone had service. *See supra* at 3.

The evidence also establishes that Andersen was able to use his phone without it being plugged in. Haverkamp testified that Andersen's phone was plugged in during the drive to Moorhead and back. T. 1597-98. But, Andersen took his phone into the loan office and received a call on his phone. T. 1596-97. Nichole Knudson testified that Andersen brought his phone with him into the loan office, used it to make a call to his tax preparer, and received a call about his business partner being shot. T. 1683-84, 1690. This information does not establish that Andersen could not have used his phone to make calls that morning.

11. Evidence that Chad was "having an extra-marital affair and had broken off his relationship with Leslie." For this he cites Exhibit 33.

Exhibit 33 is a narrative report of the defense investigator's telephone interview of Tonya Buschette-Gunderson on February 9, 2015. At the time of the interview, Buschette-Gunderson

was an inmate at the Minnesota Correctional Facility at Shakopee. Exhibit 33, p. 1. The investigator claims that Buschette-Gunderson told him that about two or three weeks before the murder, she and Chad engaged in some "heavy petting" and Chad said that he wanted to reignite their relationship. Buschette-Gunderson supposedly said that Chad had to "get rid of that woman, she's nuts," meaning violent, and Chad said that Fain would be gone soon and he was just giving her time to get her stuff out. Exhibit 33, p. 1.

Gunderson-Buschette does not explain, or the defense investigator did not ask her why she did not report this information to the police when she learned of his murder that same day. Her failure to report such information seems strange, given that she was supposedly waiting to start a relationship with Chad as soon as the woman she considered "nuts" and violent had moved out. Exhibit 33, p. 1.

But, even assuming her statements are true and admissible at trial, they do not establish Andersen's innocence. In his petition or memorandum, Andersen does not explain the importance or relevance of this testimony even though it is his burden to establish a right to relief. So he leaves it to Respondent and this Court to assume that he is trying to suggest Leslie Fain as an alternative perpetrator. But this meek evidence, even if it were admissible, would not be sufficient to introduce evidence of an alternative perpetrator at a trial. *See State v. Troxel*, 875 N.W.2d 302, 309-10 (Minn. 2016) (alleged alternative perpetrator's presence near the party, the sexually explicit text messages with the victim, the purported motive as a spurned lover, and the purported opportunity to commit the crime based on the absence of a confirmed alibi were insufficient to admit evidence of an alternative perpetrator); *State v. Larson*, 787 N.W.2d 592, 598 (Minn. 2010) ("Evidence of motive alone does not have the inherent tendency to connect a third party to the commission of the crime.").

12. "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." Defendant's Memorandum, at 56. For this he cites to Exhibit 34.

This does not comport with evidence of the timeline of events. Andersen talked with Chad at 7:46 a.m. T. 2630, 2722; Exhs. 187, 260. Ann Fain's son had to be to school by 8:00 a.m., and it takes her about 10 minutes to drive there. T. 951, 1444. The Court received in evidence as Trial Exhibit 198 a photograph of Ann Fain's van pulling away from the school after dropping off her son a couple minutes after 8:00 a.m. T. 1455, 1698.

When Ann Fain arrived back at the house, Leslie Fain was there. T. 1446. Ann Fain and Leslie Fain both heard the gun shots. T. 1007, 1453. So, Chad was alive at 7:46 a.m. and Ann Fain saw Leslie Fain in the home at about 8:10 to 8:15 a.m. That only gives her roughly a half-hour to get a .30 caliber rifle, go out into the woods and shoot Chad, and then also get in a car with Jesse Fain and another individual and drive southwest on Highway 34.

More importantly, evidence establishes that Jesse Fain was at work that morning. Jesse Fain testified that he left for work at about 7:30 a.m. and was at work at the RTC in White Earth until he got the call about Chad's death at about 10:00 a.m. T. 1044.[9] Indeed, at trial Andersen stipulated that "Jesse Fain did arrive at the White Earth Regional Tribal Council Building in White Earth at approximately 7:40 a.m. and he stayed at the building until sometime after 10 a.m." T. 1694.[10]

[9] Ann Fain testified that Jesse had already left for work when she left to take her son to school. T. 1445.

[10] No doubt that stipulation was based on the fact that investigators had spoken with Jesse Fain's coworkers, who confirmed his presence at work during those times. *See* Frank Aff., Ex. D. The report that is Exhibit D, Bates numbers 590-91, was disclosed to Andersen on July 19, 2016. *See* Frank Aff., Ex. B.

13. "Evidence that, contrary to her trial testimony that she and Chad had been in talks to buy a greenhouse, the greenhouse owner, Frank Steven Lhotka, has never spoken with either Chad or Leslie about selling them his greenhouse." Defendant's Memorandum, at 57. For this he cites Exhibit 35.

But Exhibit 35 does not really say that. Exhibit 35 is a very brief narrative report from the defense investigator regarding his conversation with Lhotka. It was apparently a brief conversation, as the report is only five sentences long. In it, the investigator states that he asked Lhotka "if, prior to the murder of Chad Swedberg, he had been contemplating a sale of a greenhouse to Mr. Swedberg. Mr. Lhotka, in response to the above question, answered 'No.'" Exhibit 35. The report does not establish that he had never spoken with them about selling his greenhouse, only that he was not "contemplating" a sale of a greenhouse to them prior to the murder.

Regardless, this statement would not have impeached any testimony at trial. At trial, Leslie Fain testified that when Chad decided not to go into the leeching business with Andersen, Chad told her they would start a greenhouse business. T. 944. She testified: "He had been talking to [Lhotka] and we were going to buy the greenhouse from [Lhotka] and [Lhotka] said he would help us with contacts and stuff and we would raise plants and sell plants. That is what we talked about." *Id.* When she was asked who Lhotka is, Leslie Fain testified: "Steve [Lhotka], I think. I don't know. He is a guy who lives over in Waubun. He has a greenhouse out there he was selling." *Id.*

Leslie Fain's testimony is based on her conversation with Chad about their plans, and there is no evidence she talked to Lhotka about it. She could not be impeached by Lhotka's conversation with Chad. Even if she could, all it would establish is that Chad told Leslie Fain a

different story than Chad's actual conversations with Lhotka. This would not provide a material difference to the trial.

14. Evidence that, contrary to his testimony at trial, Kenneth Swedberg went through Chad's pockets and removed drug evidence, "which provided an opportunity to know the bullet hole size." Defendant's Memorandum, at 57. For this he cites Exhibits 35 and 36.

Exhibit 35 has nothing to do with this assertion.

Exhibit 36 is a statement of Gary Underdahl relating his conversation with Kenneth Swedberg sometime after December 1, 2013. In that statement, Underdahl represents that Kenneth Swedberg told him and Dave Lhotka that upon arriving at the scene, he went through Chad's pockets and removed some drug paraphernalia, possibly a "one-hit" pipe, as he knew his brother always carried such a pipe. Exhibit 36, p. 1. Underdahl asserts that Kenneth Swedberg also said, although Underdahl "can no longer recall for sure," he had also removed a small quantity of marijuana. *Id.*

Underdahl's statement does not establish that Kenneth Swedberg saw the bullet hole or had the opportunity even assuming the truth of Underdahl's report about Kenneth Swedberg's statements.

Moreover, this theory is contradicted by the evidence. Kenneth Swedberg told the first police officer to arrive on the scene that he thought Chad possibly had suffered a heart attack. T. 1077. Kenneth Swedberg told the paramedics that Chad might have suffered an overdose. T. 2786. Obviously, Kenneth Swedberg had every incentive to tell the police officers and paramedics that his brother had been shot if he had seen the bullet hole.

In addition, the paramedics had to cut away some of Chad's clothing to determine he had been shot. T. 1087-89, 1110, 1143. Exhibit 36 does not establish that Kenneth Swedberg cut away or removed any of Chad's clothing to see the bullet hole.

Finally, this information does not exculpate Andersen. Like many of the individuals questioned about Chad's murder, Kenneth Swedberg admitted that he had a .30 caliber rifle. T. 1222, 1512-13, 2662-63. If he had an opportunity even to see the bullet hole, and then assumedly knew it was a large caliber bullet, he would not have made this admission. And, of course, if Kenneth Swedberg had been the shooter, he would not have needed to see the size of the bullet hole to know what size gun was used.

15. Evidence of a statement from Josh Bogatz that he "dropped off 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." Defendant's Memorandum, at 57. For this he cites Exhibit 4.

The lack of materiality of this information is discussed, *supra* at 30-31.

16. Evidence in the form of an affidavit from Liz Andersen that she took an envelope of cash to Chad in a Wal-Mart store. Defendant's Memorandum, at 57. For this he cites Exhibit 37.

The lack of materiality of this information is discussed, *supra* at 30-31.

ARGUMENT

"A petition for postconviction relief is a collateral attack on a conviction that enjoys a presumption of regularity." *King v. State*, 649 N.W.2d 149, 156 (Minn. 2002) (citing *Hummel v. State*, 617 N.W.2d 561, 563 (Minn. 2000)). The petitioner bears the burden of proving by a preponderance of the evidence facts sufficient to warrant reopening the case. *Henderson v.*

State, 675 N.W.2d 318, 322 (Minn. 2004). A hearing on the petition is not required if the petition, files, and record "conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1. A hearing is only required when there are material facts in dispute that were not resolved at trial and that must be resolved to rule on the merits of the issues raised. *Rhodes v. State*, 875 N.W.2d 779, 786 (Minn. 2016). To obtain a hearing, claims in a postconviction must be more than argumentative assertions without factual support. *Davis v. State*, 784 N.W.2d 387, 392 (Minn. 2010).

I. THE PETITION IS UNTIMELY.

Andersen filed this petition long after the limitations period. The postconviction statute is the exclusive means for challenging a conviction after a direct appeal. Minn. Stat. § 590.01, subd. 2. Under that statute, a postconviction petition must be filed within two years of an appellate court's disposition of the direct appeal when a defendant has taken a direct appeal. Minn. Stat. § 590.01, subd. 4(a)(2); *Hannon v. State*, 781 N.W.2d 887, 891 (Minn. 2010). "[A] postconviction court may summarily deny an untimely claim." *Rhodes*, 875 N.W.2d at 787 (citing Minn. Stat. § 5901.01, subd. 4 (2014); *Colbert v. State*, 870 N.W.2d 616, 622 (Minn. 2015)).

The Minnesota Supreme Court resolved Andersen's direct appeal when it affirmed his convictions on June 30, 2010. Andersen filed this petition on September 27, 2016, well beyond the two-year limitations period of the postconviction statute.

II. PETITIONER HAS NOT SATISFIED ANY OF THE EXCEPTIONS TO THE TWO-YEAR TIME LIMIT.

In his petition and supporting memorandum, Andersen completely fails to address the fact that his petition is untimely.[11] So, while there are exceptions to the two-year time limit, he also fails to specifically invoke or provide argument concerning those exceptions. This is reason enough to deny the petition. *See Miles v. State*, 800 N.W.2d 778, 782 (Minn. 2011); *Hannon*, 781 N.W.2d at 891.

But, in light of the Minnesota Supreme Court's statements that a petition does not need to include a specific citation to one of the exceptions and a court should look to the statement of facts and grounds supporting the petition to determine whether to consider any of the exceptions, *Roby v. State*, 787 N.W.2d 186, 190-91 (Minn. 2010), Respondent will address the newly-discovered-evidence and not-frivolous-and-in-the-interests-of-justice exceptions as those terms are mentioned in his petition and memorandum. Although he mentions them, he does not provide the pertinent legal analysis or facts necessary to obtain relief under them.

Before he can get consideration of the merits of his claims in this untimely petition, Andersen must establish that the petition meets one of the exceptions to the time limit. As each of his claims appears to be based on the information he asserts is newly-discovered evidence of his innocence, it would be most efficient to address the newly-discovered evidence of innocence claim first.

[11] Andersen's failure to address the timeliness issue is puzzling given that his counsel represented the postconviction petitioner in *Greer v. State*, in which the Minnesota Supreme Court held that the petition was untimely. 836 N.W.2d 520, 523 (Minn. 2013). *See also, Bolstad v. State*, 878 N.W.2d 493, 496-97 (Minn. 2016) (same).

A. Newly-Discovered Evidence Of Innocence

Andersen asserts 16 pieces of alleged newly-discovered evidence. Defendant's Memorandum, at 55-57. The postconviction statute provides an exception to the two-year time limitation for claims when:

> the petitioner alleges the existence of newly discovered evidence, including scientific evidence, that could not have been ascertained by the exercise of due diligence by the petition or the petitioner's attorney within the two-year period for filing a postconviction petition, and the evidence is not cumulative to evidence presented at trial, is not for impeachment purposes, and establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted

Minn. Stat. § 590.01, subd. 4(b)(2).

However, the statute contains a two-year limit on claims brought under the exceptions in paragraph (b): "Any petition invoking an exception provided in paragraph (b) must be filed within two years of the date the claim arose." Minn. Stat. § 590.01, subd. 4(c). Before addressing the merits of the paragraph (b) exception, the court first must address under paragraph (c) whether the claim was filed within two years of when it arose. *Carlton v. State*, 816 N.W.2d 590, 600 (Minn. 2012).

1. When the claim arose

For purposes of paragraph (c), "claim" refers to "an event that supports a right to relief under the asserted exception." *Yang v. State*, 805 N.W.2d 921, 925 (Minn. Ct. App. 2011). This is an objective test: the two year period begins to run when the petitioner knew or should have known of the claim. *Greer v. State*, 836 N.W.2d 520, 523 (Minn. 2013).

At least nine of the pieces of information relied on for Andersen's claims predate the petition by more than two years:

> 2: The entire recording of the Al Baker interview on April 20, 2007, was disclosed to Andersen in July 2007. Frank Aff., Ex. A.

4: The narrative report regarding Wanda Nelson (Exhibit 13) was disclosed on May 6, 2008. Frank Aff., Ex. B.

5: The information in the interview with Wanda Nelson (Exhibit 17) was known to Andersen at the time of trial.

6: The interview of Bradley Riggle (Exhibit 18) was disclosed to Andersen prior to trial. Frank Aff., Ex. C. The Haverkamp statement (Exhibit 19) is consistent with his trial testimony.

7: Andersen should have known that Haverkamp kept some of his money and his van (as alleged in Exhibit 19) long before trial.

9: Andersen should have known that Liz Andersen took money to Chad at Wal-Mart in December 2006 (Exhibits 11 and 37) long before trial. Liz Andersen states that Kenneth Andersen asked her to take the money to Chad. Exhibit 37.

10: Andersen should have known that his cell phone was in poor working condition and he was using a nail as an antennae, and that Doug Haverkamp and Jeff Thompson knew that from being around him (Exhibits 19 and 30) long before trial. It was, after all, Andersen's own cell phone. Both Haverkamp and Thompson testified at trial, and both discussed phone calls from Andersen.

15: Andersen should have known that Bogatz took his Tikka rifle to Chad's house (Exhibit 4) long before trial. Bogatz states that he was present when Andersen and Chad discussed the trade, Andersen brought the rifle in the car they were all riding in, and then Bogatz took the rifle to Chad's. Exhibit 4.

16: Just as in item 9, Andersen would have known that he told Liz Andersen to take money to Chad (Exhibit 37) long before trial.

Andersen has not clearly established that he learned of the remaining pieces of information within two years of filing the petition:

1: While the report regarding the interview with Al Baker (Exhibit 10) is dated November 20, 2014, Andersen does not at all address when he first became aware of this information.

3: Again, while the report regarding the interview with Al Baker (Exhibit 10) is dated November 20, 2014, Andersen does not at all address when he first became aware of this information.

8: The Jeff Nelson interview with the Fains (Exhibit 28) is dated December 4, 2007. Andersen claims he obtained this during discovery in his civil

case, but he does not indicate when he received it. Defendant's Memorandum, at 42. The defense investigator's interview of Jeff Nelson (Exhibit 38) adds no additional information.

11: While the narrative report of the interview with Tonya Buschette-Gunderson is dated February 9, 2015 (Exhibit 33), Andersen does not address when he first became aware of this information. Buschette-Gunderson discusses encounters she had with Chad over the years when Andersen was present, so he should have known of those encounters long before trial.

12: While the statement of Stacy Weaver is dated December 8, 2014 (Exhibit 34), Andersen does not address when he learned of this information.

13: While the narrative report of the contact with Frank Lhotka is dated December 16, 2014 (Exhibit 35), Andersen does not address when he first became aware of this information.

14: While the statement of Gary Underdahl regarding his conversation with Kenneth Swedberg is dated December 5, 2014 (Exhibit 36), Andersen does not establish when he first became aware of this information.

In sum, the record establishes that more than half of the pieces of information he relies on for the claims in his petition predate the petition by more than two years. Therefore, claims based on those pieces of information are barred by Minn. Stat. § 590.01, subd. 4(c). *See Roby v. State*, 808 N.W.2d 20, 25 (Minn. 2011) (holding that two affidavits were more than two years old and so the claims asserted therein were barred by section 590.01, subd. 4(c)). Andersen has not satisfied his burden of establishing that he did not know of, or could not have known of the remaining pieces of information until two years before filing the petition. He has not established that he filed the petition within two years of when a claim of newly-discovered evidence arose.

2. The statutory requirements

Even if this Court accepts that a claim of newly discovered evidence of innocence arose within two years of filing the petition, Andersen has still failed to establish the requirements of the newly-discovered evidence exception to the two-year time bar.

To satisfy the newly-discovered evidence exception to the limitations period on postconviction petitions, the petitioner must demonstrate 1) the existence of newly-discovered evidence; 2) which could not have been ascertained by the exercise of due diligence by the petitioner within the two-year limitations period; 3) the evidence is not cumulative to evidence presented at trial; 4) the evidence is not for impeachment purposes, and; 5) the evidence must establish by the clear and convincing standard that the petitioner is innocent of the offense for which he was convicted. Minn. Stat. § 590.01, subd. 4(b)(2). *See also, Gassler v. State*, 787 N.W.2d 575, 582 (Minn. 2010).[12]

a. Newly discovered evidence

As indicated above, more than half the pieces of information Andersen relies on are not newly discovered. *See supra*, at 41.

b. Due diligence

Andersen could have discovered all of the remaining information long ago with due diligence. Andersen makes no attempt to explain why he waited so many years to interview Al Baker, Buschette-Gunderson, Stacy Weaver, Frank Lhotka, or Gary Underdahl. *See e.g., Erickson v. State*, 842 N.W.2d 314, 318 (Minn. 2014) (holding that "nothing in the record

[12] Andersen only addresses the test for obtaining a new trial based on newly-discovered evidence from *Rainer v. State*, 566 N.W.2d 692 (Minn. 1997). Defendant's Memorandum, at 72-77. However, because his petition is untimely, he must first address the statutory factors for the newly-discovered-evidence exception to the two-year time limitation, not the *Rainer* factors. *Miles v. State*, 840 N.W.2d 195, 200-01 (Minn. 2013).

supports a conclusion that through the exercise of due diligence Erickson could not have obtained" the evidence within the two years for filing a postconviction petition).

c. Cumulative

Clearly the information from the interview of Wanda Nelson (Exhibit 17) is cumulative to her trial testimony. The information about Haverkamp not going to Ulen to get his taxes done is cumulative because Haverkamp testified to that. T. 1587.

d. Impeachment

The information about Al Baker (Exhibits 10 and 11), Wanda Nelson (Exhibits 13 and 17), Brad Riggle (Exhibit 18), Doug Haverkamp (Exhibit 19), Jeff Nelson (Exhibit 28), Buschette-Gunderson (Exhibit 33), Frank Lhotka (Exhibit 35), and Kenneth Swedberg (Exhibit 36) is all impeachment evidence. It is not clear what purpose the first nine minutes of the Al Baker interview on April 20, 2007, would serve.

e. Actual innocence

The information does not establish his actual innocence by the clear and convincing standard. "Actual innocence is more than an uncertainty about guilt. Instead, establishing actual innocence requires evidence that renders it more likely than not that no reasonable jury would convict." *Riley v. State*, 819 N.W.2d 162, 170 (Minn. 2012). To meet the requirements of the newly-discovered-evidence exception to the time requirement, the petitioner must demonstrate that the new evidence "would on its face prove the petitioner's innocence by a clear and convincing standard." *Miles v. State*, 800 N.W.2d 778, 783 (Minn. 2011). The clear and convincing standard is met when the "truth of the fact to be proven is 'highly probable.'" *Id.* (quoting *Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999)). "In order to prove a claim by clear and convincing evidence, a party's evidence should be unequivocal, intrinsically probable and credible, and free from frailties." *Gassler v. State*, 787 N.W.2d 575, 583 (Minn. 2010).

For example, in *Gassler*, the postconviction proceedings established that portions of an FBI firearms examiner's testimony about the analysis of lead in bullets for comparison purposes had been discredited. *Id.* The supreme court held that the elimination of the bullet lead analysis testimony did not establish his innocence by the clear and convincing standard because there was other testimony about Gassler's actions around the time of the murder, evidence of motive, an admission, and other ballistics tests. *Id.* Nonetheless, Gassler argued that the remaining evidence was of dubious credibility and the case lacked physical evidence. *Id.* The supreme court rejected that argument because witness credibility is for the trier of fact, not the appellate court. *Id.* The court added that the burden to establish innocence is on the petitioner, and that "merely showing that improperly admitted evidence may have influenced the jury does not by itself prove innocence." *Id.*

Here, the assertion that Al Baker saw Andersen at Chad's home that morning, even assuming its truth, does not establish Andersen's innocence; it actually suggests the opposite. Other evidence establishes that Baker was not at Chad's home when Chad was murdered. The phone calls Al Baker received do not contain any information about an alternative perpetrator. Baker admitted to investigators after the murder that he owned a .30 caliber rifle. T. 2662-63. Whether Andersen left the tax preparer's office with a reference copy of his taxes does not bear at all on his innocence. The same holds true for whether he returned later in the day to get a copy of his refund.

Whether Riggle was wrong about Haverkamp intending to go to Ulen to get his taxes done does not bear on Andersen's innocence. The mere assertion that Haverkamp kept some money from the sale of leeches after Andersen's arrest does not bear on Andersen's innocence.

Nothing in the Jeff Nelson interview with Jesse and Leslie Fain establishes that Chad or Nelson knew Andersen could not have stolen the four-wheeler. The report actually suggests that Chad came to realize Andersen had stolen it, providing further proof of Andersen's motive.

That Liz Andersen delivered money to Chad for work he had done for Andersen does not bear on Andersen's innocence. The poor condition of Andersen's cell phone does not on its face prove Andersen's innocence. – it simply does not establish he could not have made the calls he made.

Even if it was true that Chad was having an affair and wanted to end his relationship with Leslie, that does not on its face establish Andersen's innocence because it fails to connect by clear and convincing evidence Leslie to the murder. There is no other evidence connecting Leslie to the murder. Even if it is true that Leslie Fain was driving on Highway 34 between 7:30 and 8:00 a.m., that does not establish that Andersen could not have killed Chad, nor does it connect Leslie Fain or Jesse Fain to Chad's murder. That Chad may not have told Leslie what Frank Lhotka was actually contemplating about the greenhouse does not bear on Andersen's guilt.

Even if Kenneth Swedberg had an opportunity to view the size of the bullet hole, this would not establish Andersen's innocence. Kenneth Swedberg admitted that he owned a .30 caliber gun. And if Kenneth Swedberg had shot his brother, he would not have needed an opportunity to see the bullet hole. This assertion simply has no bearing on Andersen's innocence. The assertion by Josh Bogatz that he delivered a Tikka rifle to Chad's home does not change the fact that the Tikka rifle found hidden in Andersen's barn was the same Tikka rifle found in Andersen's home during the search warrant in November, and was the same rifle Andersen retrieved from his sister's house shortly before the murder.

B. Interests Of Justice

Another exception to the two-year requirement is when "the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice." Minn. Stat. § 590.01, subd. 4(b)(5).

1. When the claim arose

Again, Andersen must first establish that his petition was filed within two years of when a claim under an exception to the two-year time limit arose. Minn. Stat. § 590.01, subd. 4(c). With regard to the interests-of-justice exception, that means he must establish that he filed the petition within two years of an event that establishes a right to relief in the interests of justice. *Yang v. State*, 805 N.W.2d 921, 925 (Minn. Ct. App. 2011). *See also Bolstad v. State*, 878 N.W.2d 493, 496 (Minn. 2016) (holding that even if the claim qualified for the interests-of-justice exception, it was not brought within two years of when the claim arose because he should have known of the interests-of-justice claim at the time of trial). He has not done so here.

2. Statutory requirements

a. Frivolous

A petition is frivolous if the factual contentions are clearly baseless. *Wallace v. State*, 820 N.W.2d 843, 850 (Minn. 2012). As discussed above, *supra* at 23-37 and below, *infra* at 53-57, Andersen's factual contentions are clearly baseless.

In addition, a petition is frivolous if it is procedurally barred. *Wallace*, 820 N.W.2d at 850. As previously discussed, Andersen's claim is time-barred. As discussed below, it is also procedurally barred.

b. Interests of justice

The claimed interests of justice must relate to the reason the petition was filed after the two-year time limit. *Sanchez v. State*, 816 N.W.2d 550, 557 (Minn. 2012). Generally, the supreme court has reserved the application of "interests-of-justice" exceptions for "exceptional situations." *Gassler*, 787 N.W.2d at 586. In *Gassler*, the supreme court identified a non-exclusive list of factors for a court to consider in deciding whether the interests of justice warrant consideration of a time-barred petition. 787 N.W.2d at 586-87. Andersen has not addressed these factors at all. He suggests that part of the delay was the failure of his hired counsel to provide him with discovery. This cannot be deemed exceptional. If accepted, this mere assertion would essentially eliminate the time-bar in the statute. Andersen brought a previous postconviction petition in which he discussed the discovery, so clearly he had access to it in his previous petition. He mentions that he obtained discovery during his civil case, but does not explain still the time between that case and this petition. He certainly knew that Glen Fladmark had done some work for his case in 2007 and 2008.

III. THE PETITION IS PROCEDURALLY BARRED BY *STATE V. KNAFFLA* AND THE POSTCONVICTION STATUTE.

The procedural bar in *State v. Knaffla* and the similar procedural bar in the postconviction statute both justify the summary denial of this petition.

A. Knaffla Bar

In *State v. Knaffla* the supreme court held that once a defendant has had a direct appeal, he may not raise claims in a postconviction petition that were raised, or which could have been raised in the direct appeal. 243 N.W.2d 737, 741 (Minn. 1976) ("It must be emphasized,

however, that where direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief."). This rule also applies to claims that could have been raised in a previous postconviction petition. *See Williams v. State*, 869 N.W.2d 316, 318 (Minn. 2015) ("We have long held that the *Knaffla* rule bars any claims that were, or could have been, raised in a prior postconviction petition."); *Townsend v. State*, 723 N.W.2d 14, 19 (Minn. 2006) (holding that ineffective assistance of counsel claim was barred by *Knaffla* because the claim was "available at the time of the first post-conviction proceeding").

The supreme court has recognized two exceptions to the *Knaffla* bar: "(1) if a novel legal issue is presented, or (2) if the interests of justice require review." *Powers v. State*, 731 N.W.2d 499, 502 (Minn. 2007). Even though a court must liberally construe a petition, a postconviction court may decline to consider either exception when the petitioner fails to raise or argue the exceptions. *Ashby v. State*, 752 N.W.2d 76, 79 (Minn. 2008); *Brown v. State*, 746 N.W.2d 640, 642 (Minn. 2008); *Erickson v. State*, 725 N.W.2d 532, 535 (Minn. 2007). He has not addressed the exceptions.

Andersen had a direct appeal and a previous postconviction proceeding. All of his claims are barred by the *Knaffla* rule. As set forth above, *supra* at 41-42, Andersen either was aware of these factual claims or should have been aware of them before his direct appeal or previous postconviction proceeding. He discussed the discovery during his previous postconviction proceeding. In that proceeding, he raised claims of ineffective assistance of counsel and newly-discovered evidence, just as he does here.

1. Ineffective assistance of counsel

Andersen could have raised his ineffective assistance of counsel claim in the direct appeal. *See Williams v. State*, 869 N.W.2d 316, 318 (Minn. 2015) (holding that claim of ineffective assistance of counsel for failure to investigate alternative perpetrator was barred by the *Knaffla* rule because he knew about the claim and could have raised it in his first postconviction petition). He also could have raised it in his first postconviction petition, and in fact he did. *Andersen II*, 830 N.W.2d at 10-13. *See also Quick v. State*, 757 N.W.2d 278, 280-81 (Minn. 2008) (holding that claim of ineffective assistance of counsel for failure to provide the case file after trial was "either known or should have been known at the time of Quick's first petition for postconviction relief" and was barred by *Knaffla*). The *Knaffla* rule bars this claim.[13]

Andersen has not claimed or argued that either exception to the *Knaffla* rule applies and so this Court need not consider them. But even if the Court does, neither one applies. Certainly a claim of ineffective assistance of counsel is not novel. *See McKenzie v. State*, 754 N.W.2d 366, 369 (Minn. 2008) (holding that ineffective assistance of counsel claim was not novel because the Supreme Court released *Strickland v. Washington* eight years before the trial). For the same reasons that the petition does not satisfy the interests-of-justice exception to the two-year time limit, it does not satisfy this exception to the *Knaffla* rule.

[13] This claim is also barred by the prohibition on second or successive petitions. Minn. Stat. § 590.04, subd. 3 ("The court may summarily deny a second or successive petition for similar relief on behalf of the same petitioner and may summarily deny a petition when the issues raised in it have previously been decided by the Court of Appeals or the Supreme Court in the same case."). *See also Erickson v. State*, 842 N.W.2d 314, 320 (Minn. 2014) ("Having rejected a similar ineffective-assistance-of-counsel claim when reviewing Erickson's first postconviction petition, we decline to revisit the issue here.").

2. *Brady* claim

Andersen has not established precisely when he learned of this claim. He had access to the discovery before his first postconviction petition. Even so, the claim is without merit because the entire recording of the April 20, 2007, interview with Al Baker was disclosed to him before trial. Frank Aff., Ex. A.

3. Newly-discovered evidence

A claim of newly-discovered evidence is not barred by the *Knaffla* rule if the evidence was not available at the time of the direct appeal. *Gustafson v. State*, 754 N.W.2d 343, 348 (Minn. 2008). Presumably the same rule applies to evidence that was not available at the time of a previous postconviction petition, as the *Knaffla* bar also applies to previous postconviction proceedings.

Andersen has not established that he could not have discovered the factual predicates for this claim before his direct appeal or his first postconviction proceeding. *See supra*, at 41-42.

4. Interests of justice

Andersen could have made his free-standing interests-of-justice claim in his direct appeal and first postconviction petition. It is therefore procedurally barred.

B. Statutory Procedural Bar

The postconviction statute contains a similar procedural bar: "A petition for postconviction relief after a direct appeal has been completed may not be based on grounds that could have been raised on direct appeal of the conviction or sentence." Minn. Stat. § 590.01,

subd. 1. This procedural bar is the codification of the *Knaffla* rule. *See Andersen II*, 830 N.W.2d at 8 n.3.[14]

For all the same reasons that his claims are barred by the *Knaffla* rule, they are barred by Minn. Stat. § 590.01, subd. 1.

Moreover, there are no exceptions to the procedural bar in the postconviction statute. In 2005, the Minnesota legislature added this procedural bar to the post-conviction statute. *See Townsend v. State*, 767 N.W.2d 11, 13 (Minn. 2009). In drafting the statute, the legislature used language nearly identical to the procedural bar in *Knaffla*. In amending the statute to add the *Knaffla* procedural bar, however, the legislature chose not to permit any exceptions.

The Minnesota Supreme Court adopted exceptions to the *Knaffla* procedural bar well before the legislature amended the statute. *See Taylor v. State*, 691 N.W.2d 78, 79 (Minn. 2005) (citing *Ives v. State*, 655 N.W.2d 633, 636 (Minn. 2003) and *Fox v. State*, 474 N.W.2d 821, 825 (Minn. 1991) for the two main exceptions). "Courts presume that the legislature acts with full knowledge of previous statutes and existing caselaw." *Pecinovsky v. AMCO Ins. Co.*, 613 N.W.2d 804, 809 (Minn. Ct. App. 2000) (holding that in construing a statutory amendment, the court presumed the legislature was aware of the manner in which the supreme court had interpreted the prior statute, and the legislature's "decision to use a different phrase implies that

[14] One difference between the *Knaffla* bar and the statutory bar is that the statutory bar, because of its specific language, does not apply to claims that were raised, or could have been raised *only* in a previous postconviction petition. *Hooper v. State*, 838 N.W.2d 775, 787 n.2 (Minn. 2013). None of Andersen's claims are the kind of claims that could only be raised in a postconviction petition. *See e.g., Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (claim of ineffective assistance of appellate counsel was not *Knaffla*-barred because it could have been raised only in a postconviction proceeding, not in the direct appeal).

it intended the new phrase to have a different meaning.") Accordingly, this Court must presume that when the legislature amended the post-conviction statute to add the procedural bar, it did so with full knowledge of the supreme court's case law allowing exceptions. The legislature's decision to adopt the *Knaffla* bar language, but not the exceptions, indicates the legislature did not intend to allow any exceptions to the statute's procedural bar.[15]

IV. EACH OF THE CLAIMS IN THE PETITION IS WITHOUT MERIT.

A. Ineffective Assistance Of Counsel

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984). To prevail on a claim of ineffective assistance of counsel, appellant must establish two factors: (1) counsel's performance was deficient to the degree "that counsel [was] not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" (the performance prong) and (2) the deficient performance prejudiced the defense so seriously as to deprive the defendant of "a trial whose result is reliable" (the prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *accord*, *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003); *Gates v. State*, 398 N.W.2d 598, 561 (Minn. 1987). A court need not address both prongs if the defendant fails to establish one of them. *Rhodes*, 657 N.W.2d at 842.

The burden of proof is on Andersen to show that his counsel was not competent. *State v. Heinkel*, 322 N.W.2d 322, 326 (Minn. 1982). Courts presume that counsel's performance fell

[15] The Minnesota Supreme Court has questioned, but not decided whether the *Knaffla* exceptions remain applicable to postconviction petitions. *See Andersen II*, 830 N.W.2d at 8 n.3; *Sontoya v. State*, 829 N.W.2d 602, 604 n.3 (Minn. 2013).

within a wide range of reasonable professional assistance. *State v. Vick*, 632 N.W.2d 676, 688 (Minn. 2001). Andersen must establish that counsel's actions "were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. There is a strong presumption that trial counsel's performance was reasonable. *Carney v. State*, 692 N.W.2d 888, 892 (Minn. 2005). Counsel is ineffective only if, objectively, the representation fell below that of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009). The reasonableness of counsel's performance is evaluated on the facts existing at the time of counsel's conduct. *Rhodes*, 657 N.W.2d at 844.

Andersen claims his counsel was ineffective because of an inadequate investigation. "Generally, [a court] will not review ineffective assistance of counsel based on trial strategy." *Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008). "Trial strategy includes the extent of counsel's investigation." *Id. See also Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). Just as the supreme court held in Andersen's first postconviction proceeding, the extent of his trial counsel's investigation is a matter of trial strategy that is not reviewed in an ineffective assistance of counsel claim. *Andersen II*, 830 N.W.2d at 13 (citing *State v. Davis*, 820 N.W.2d 525, 539 n.10 (Minn. 2012); *Francis v. State*, 781 N.W.2d 892, 898 (Minn. 2010); *State v. Bobo*, 770 N.W.2d 129, 138-39 (Minn. 2009); *Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009); *Hodgson v. State*, 540 N.W.2d 515, 518 (Minn. 1995)).

As to the prejudice prong, Andersen must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Gates*, 398 N.W.2d 558, 562 (Minn. 1987) (citing *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068). A reasonable probability means a probability sufficient to undermine confidence in the

outcome. *Sanchez-Diaz,* 758 N.W.2d at 848. In claiming prejudice, Andersen faces a heavy burden. *Strickland,* 466 U.S. at 697, 104 S. Ct. at 2069. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. at 693, 104 S. Ct. at 2067. Instead:

> With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merits of an effectiveness claim only in the rarest case.

Id. at 697, 104 S. Ct. at 2069.

Andersen's claim also fails on the prejudice prong. Even if his trial counsel had gathered the information he now posits, the evidence would not have changed the outcome of the trial. *See Gates*, 398 N.W.2d at 561-62. None of the evidence impacts directly Andersen's innocence. Most of it is minor impeachment, with little evidentiary value.

B. Alleged *Brady* Violation

This claim is without merit because the entire recording of the April 20, 2007, interview with Al Baker was disclosed to him before trial. Frank Aff., Ex. A.

C. Newly-Discovered Evidence

To be entitled to a new trial on the basis of newly discovered evidence, the petitioner must establish the four factors of the *Rainer* test. *Andersen II,* 830 N.W.2d at 1. Those factors are:

> (1) that the evidence was not known to the defendant or his/her counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result.

Id. (quoting *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997)). A hearing is not necessary if the affidavits offering the alleged newly discovered evidence fail, on their face, to establish the petitioner is entitled to relief. *Andersen II*, 830 N.W.2d at 7.

Much of the information Andersen submits to support this claim is contained in reports from his investigator and is of insufficient weight to even merit a hearing. *See Andersen II*, 830 N.W.2d at 7; *State v. Ferguson*, 742 N.W.2d 651, 660 (Minn. 2007). Andersen could have discovered all of it through due diligence before trial. Most of it is not material, in that it is impeaching or doubtful. *See Torres v. State*, 837 N.W.2d 487, 491-92 (Minn. 2013); *State v. Tscheu*, 829 N.W.2d 400, 403 (Minn. 2013).

Andersen also fails to satisfy that the evidence would probably produce an acquittal at a new trial. *See Miles v. State*, 840 N.W.2d 195, 202-03 (Minn. 2013); *Andersen II*, 830 N.W.2d at 7. The proffered information does not bear directly on Andersen's guilt. It is mostly minor impeachment evidence. It is all of such doubtful character that it could not possibly produce a different result at trial.

D. Interest Of Justice

Andersen's free-standing claim for a new trial in the interests of justice is plainly without merit. "Postconviction courts do not possess the supervisory powers" to which he refers. *Bolstad*, 878 N.W.2d at 498. Andersen cannot ask this Court "to use the supervisory powers doctrine to reverse his conviction" and this Court should summarily deny this claim. *Id.*

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that the Court summarily deny the petition for postconviction relief.

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Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota

/s/ **Matthew Frank**
Matthew Frank
Assistant Attorney General
Atty. Reg. No. 021940X

445 Minnesota Street, Suite 1800
St. Paul, MN 55101-2134
Telephone: (651) 757-1448
Fax: (651) 297-4348
matthew.frank@ag.state.mn.us

ATTORNEYS FOR RESPONDENT