STATE OF MINNESOTA DISTRICT COURT

COUNTY OF BECKER SEVENTH JUDICIAL DISTRICT

Kenneth Eugene Andersen,

Petitioner,

Case No. 03-CR-07-171

PETITIONER'S REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR POST-CONVICTION RELIEF

vs.

State of Minnesota,

Respondent.

I. INTRODUCTION

The case against Mr. Andersen was based entirely on circumstantial evidence. During Mr. Andersen's trial and on direct appeal the trial court and the Minnesota Supreme Court recognized that the question of whether the circumstantial evidence against Mr. Andersen was enough to convict him was a close one. (T. 2770); *State v. Andersen*, 784 N.W.2d 320, 336 (Minn. 2010) (Justice Page concurring). On review of Mr. Andersen's prior postconviction action, the Minnesota Supreme Court, in determining whether Mr. Andersen's claims were *Knaffla* barred, stated "The record suggests that at the time of his direct appeal, Andersen knew trial counsel had not provided him discovery. Indeed, Andersen argues that he did not actually receive discovery until July 7, 2010, which was after his direct appeal but before he filed his petition for postconviction relief. We need not and do not decide whether, *in light of the unique facts of this case*, Andersen's claims of ineffective assistance of trial counsel is *Knaffla*-barred

because we conclude that the claim is meritless on its face." *Andersen v. State*, 830 N.W.2d 1, 13 n. 6 (Minn. 2013)(emphasis added).

In response to Mr. Andersen's petition for postconviction relief, Respondent has asserted that his claims are time and procedurally barred, that the evidence Mr. Andersen has now presented attacking nearly every aspect of the case against him is immaterial, and that each piece of evidence he presents, if considered at all, should be considered on its own discretely from the other new evidence presented. Mr. Andersen contends that the evidence he presented, and the claims supported by the evidence, are timely, procedurally proper, and cast sufficient doubt about the accuracy of his conviction in this unique case to warrant review of his claims on their merits and to warrant granting a new trial.

II. FACTS IN DISPUTE

Mr. Andersen stands by the statement of facts and evidence he presented with his petition. However, he wishes to draw attention to and contests the following facts from Respondent's recitation of facts:

- Respondent asserts that Chad Swedberg left home at 8:02 a.m. (Responsive Memorandum P. 2). This, however, does not address the evidence presented as Exhibit 6 to Mr. Andersen's petition showing Ann Fain's statement that Chad left the home that morning before she did.
- Respondent asserts that Chad Swedberg told Jesse Fain that he intended to stop working with Mr. Andersen. (Responsive Memorandum P. 7). This disregards Mr. Fain's sworn grand jury testimony on this issue where, when asked if Chad told him he wasn't going to work with Mr. Andersen anymore, he stated "He – He – he didn't say that directly. What he said was – I asked him if he was gonna do either leaching or work with Fud, and he

indirectly said that he didn't have to do anything with him because he'd be able to do it on his own." (GJ. 344).

- Respondent continues to rely upon the testimony of John McArthur who asserts that Mr. Andersen was served with a search warrant by both Mr. Baumman and Mr. Sieling and became angry when they went to search the outbuildings (Responsive Memorandum P. 18), when the evidence presented as Exhibits 40 and 41 to Mr. Andersen's petition shows that Officer Sieling was not present and that Mr. Andersen was not personally given the warrant, but rather it was later left on his table. This is important because the Minnesota Supreme Court specifically relied upon the testimony regarding Mr. Andersen's purported reaction in affirming Mr. Andersen's conviction. *State v. Andersen*, 784 N.W.2d 320, 330 (Minn. 2010).
- Respondent discusses Mr. Andersen's first postconviction action on pages 21-22, but does not note that in bringing that petition, Mr. Andersen specifically stated on page 2 of his petition, that the petition was based only on the very limited amount of discovery he had received to that point. (2010 Postconviction Petition P. 2). Further, even though that petition was denied and the Minnesota Supreme Court affirmed, in a footnote, Judge G. Barry Anderson, dissenting, noted that claims based upon documents not provided to Mr. Andersen until after his direct appeal should not be *Knaffla* barred. *Andersen v. State*, 830 N.W.2d 1, 16, n. 1 (Minn. 2013) (Justice Anderson dissenting).

Mr. Andersen makes the following reply to Respondent's discussion and dismissal of the evidence he presents to support his petition. Mr. Andersen believes the following facts to be in his favor or at least in dispute based on the evidence he presented. The existence of these questions of fact based on the evidence Mr. Andersen presented underscores the need for an

evidentiary hearing to resolve these questions of fact prior to reaching a conclusion on the claims raised.

1. Purported proof of disclosure of evidence prior to or during trial.

Respondent has provided several Disclosure sheets which it contends proves that the documents Mr. Andersen has alleged he did not receive in discovery were actually disclosed to him. Despite the existence of these documents, Mr. Andersen stands by his assertion these were documents he never received and further alleges that the existence of the Disclosure sheets does not actually show that the documents were actually disclosed to him or counsel.

By a letter dated July 8, 2013, the State responded to the Order Mr. Andersen obtained for disclosure of "missing documents." (Petition Exhibit 44). In that letter, Mr. Andersen was informed that some of the Bates numbers he requested, 3277, 3289, 3340, 3341, and 3346 were not actually used and had no documents associated with them. Despite this statement in 2013, Mr. Andersen is in possession of a Supplemental Prosecution disclosure, dated June 10, 2008 and a sworn Affidavit of Personal Service, stating that documents 3289-3463 were personally served on his attorney. (Reply Memorandum Exhibit 1 – June 10, 2008 Supplemental Prosecution Disclosure). What this shows, and what was shown by Mr. Andersen in his successful motion to compel disclosure, is that despite Respondent's apparent confidence it disclosed the material documents Mr. Andersen claims not to have received, no one, including the State itself, can be sure what it did and did not disclose in this matter.

This conclusion is further supported by the events at Mr. Andersen's sentencing hearing. There, trial counsel put on the record that he was still receiving discovery even after the trial had ended and stated that, despite protestations to the contrary from the state, that he had never received those documents before. (June 12, 2008 Sentencing Hearing P. 2, 8). This, along with

Mr. Durkin's Affidavit (Petition Exhibit 8) raise questions regarding the accuracy of the disclosures purportedly made by the State. It also shows that the current claim documents were disclosed should not be accepted without close re-examination of what the record in this case shows.

2. Baker statements to investigator and Geraldine Bellanger

Respondent asserts that the evidence related to Al Baker does not show that he was at the scene of the crime earlier than his testimony said he was and that other evidence shows Mr. Baker could not have been there earlier because he was seen driving in the direction of his home at around 7:30 or 7:45. (Responsive Memorandum P. 23-24).

First, a combination of the Affidavit of Geraldine Bellanger (Petition Exhibit 11) and the Egelhof Investigative Report (Petition Exhibit 10) combine to show what Mr. Baker stated about being at the scene earlier and being in a position to see cigarette butts and shell casings where the shooter waited to shoot Chad Swedberg. Additionally, Mr. Baker returning home from the store between 7:30 and 7:45, as Respondent now asserts took place (Responsive Memorandum P. 23) is consistent with the allegations Mr. Andersen makes (See Petition Exhibit 7). Finally, the 7:30 to 7:45 timeframe does not fit the State's narrative at trial that Mr. Baker still had to go to the store **after** he talked with Mr. Andersen at 7:52.

The timing of Mr. Baker being at the store is important because (1) Mr. Baker's guns were never inspected because his purported timing matched up (Baumann trial testimony T. 2755-56) and (2) because the Minnesota Supreme Court specifically relied upon Mr. Baker going to the store after the 7:52 call as circumstantial proof of Mr. Andersen's guilt because he then knew Mr. Baker would not be at the scene. *State v. Andersen*, 784 N.W.2d 320, 330 (Minn. 2010). Further, the assertion that this evidence is immaterial and not exculpatory is meritless.

Given the large scale search and the lock down of the scene, if the statements Mr. Baker has now made to two (2) separate people are true, the only time he would have been able to find the cigarette butt and shell casing has to be before all that occurred, placing him at the scene before police closed it off.

3. April 19, 2007 Al Baker call to police and April 20, 2007 interview

Respondent asserts that the April 20, 2007 recording of the questioning of Al Baker was turned over prior to trial, disputes Mr. Andersen's characterization of the contents of the calls Mr. Baker received, and dismisses the relevance of the information about the setup of Mr. Baker's phones. (Responsive Memorandum P. 24-25).

Mr. Andersen contends that the first 9:20 of the interview with Baker was not turned over prior to trial and has explained in his Affidavit, attached as Reply Memorandum Exhibit 2 – December 7, 2016 Affidavit of Kenneth Andersen, how he came to learn of this evidence only after trial. The sole transcriptions in any of Mr. Andersen's discovery files from the April 20, 2007 conversation with Mr. Baker (starting at Bates 1598) start 9 minutes and 20 seconds into that interview, entirely omitting any mention of the phone calls or the setup of Mr. Baker's phone system was discussed. Further, Respondent has not even alleged that any report was ever made related to Mr. Baker's April 19, 2007 call to report the calls he received, let alone that such a report was ever disclosed.

Mr. Andersen also contends that the contents of the first 9:20 of the recording and the statements that Mr. Baker made to his mother and investigator support the conclusion that Mr. Baker received a phone call from an individual claiming responsibility for Chad's death and the conclusion that Mr. Baker sent a rifle that could have fired the fatal shot to a place different than he told police officers. (See Petition Exhibits 9, 10, and 11). For these reasons, the contents of

that first 9:20 of the Baker interview and his statements since trial are incredibly important both in that they establish that Mr. Baker apparently received a call from someone claiming responsibility for Chad's death, because it establishes that Mr. Baker did not need to be home to make and receive the calls that purportedly established his inability to be at the scene earlier than his testimony said he was, and because it contains a statement he sent a gun that was capable of firing the fatal shot to somewhere other than where he told investigators. In a case where both the trial court and Minnesota Supreme Court acknowledged it was a close call whether there was enough evidence to convict Mr. Andersen and where Mr. Baker was ruled out as a suspect such that his guns were never checked because he was supposedly taking calls at home, this is unbelievably material evidence.

4. Riggle and Haverkamp evidence.

Respondent argues that the evidence Mr. Andersen presents regarding Haverkamp and Riggle regarding the trip to the tax preparer and Haverkamp keeping money that belonged to Mr. Andersen is immaterial, and not proven. (Responsive Memorandum P. 27-28). To support his claim that Mr. Haverkamp kept money and a van that belonged to Mr. Andersen and was avoiding Mr. Andersen and his family because of it, Mr. Andersen has presented the Affidavit of Frank Andersen, who was dealing with Mr. Haverkamp on this issue. (See Exhibit 3 - Affidavit of Frank Andersen).

This evidence Mr. Andersen now presents is material to his case because the Minnesota Supreme Court pointed to Mr. Andersen's actions in ensuring he had a ride out of town and false statements to police in an attempt to create an alibi as circumstantial proof supporting his conviction in his case. *State v. Andersen*, 784 N.W.2d 320, 332 (Minn. 2010). Mr. Andersen has now shown, by conducting investigation and document review that was not previously done, that

his morning unfolded exactly as he said it did, taking away the purported circumstantial proof of his guilt from lying to create an alibi.

5. Jeffrey Nelson

Mr. Andersen disputes Respondent's characterization of the 12/4/07 interview between Jeffrey Nelson and Leslie and Jesse Fain as providing more proof of Mr. Andersen's guilt. The contention at trial and the substance of Mr. Nelson's testimony was that Mr. Andersen stole the four-wheeler and put Chad at risk and that Chad was cooperating with the investigation. However, the contents of that interview show this was not so clearly the case.

For example, on page 4, Mr. Nelson asks Leslie Fain about Chad's alibi of being at a funeral on the date the four-wheeler was stolen and Ms. Fain is unable to identify any funeral Chad might have attended around that time and later says Chad went up there that night, referencing the job the four-wheeler was stolen from. (Petition Exhibit 28). Mr. Nelson also references Mr. Andersen appearing at a court appearance in Roseau County on the day the four-wheeler was taken. That same report also shows that Chad Swedberg and Leslie and Jesse Fain were aware of the presence of the four-wheeler and its potential origins long before they were purportedly surprised to learn of it.

Rather than strengthen the case against Mr. Andersen, the contents of this report show it is more likely that Mr. Andersen was in-fact covering for Chad Swedberg than the other way around. This evidence calls into question the evidence the Supreme Court used to reach the conclusion that Mr. Andersen and Chad Swedberg were fighting such that this was a potential motive for Mr. Andersen to commit the murder. *State v. Andersen*, 784 N.W.2d 320, 325 (Minn. 2010).

6. Gunderson, Weaver, Lhokta, Underdahl and other new evidence

Mr. Andersen has provided an Affidavit in which he explains how it came about that he obtained statements from various community members after his trial. These individuals reached out to Mr. Andersen, his family, and his investigator after they learned Mr. Andersen's family had hired an investigator. Why they did not speak out before is a question of fact that cannot be resolved against the credibility of their evidence without first conducting an evidentiary hearing to assess testimony on the issue. *Martin v. State*, 825 N.W.2d 734, 742 (Minn. 2013)(When a district court concludes that newly discovered testimony is unreliable without first evaluating the credibility of the witness at an evidentiary hearing, the postconviction court misapplies Minn. Stat. § 590.04 and abuses its discretion).

The evidence related to Weaver and his seeing Leslie Fain in a vehicle outside of her home is clearly new evidence which cannot be simply discarded. The fact is, if this is true, it calls into question everything Ms. Fain testified about regarding the morning of Chad's death. And, given the circumstantial case against Mr. Andersen and how it is enough to convict him, the evidence he has now presented that both Al Baker and Leslie Fain where not where they testified they were is incredibly relevant and material.

Respondent also asserts that the Weaver evidence does not comport with the timeline, supplied largely by Leslie Fain, and ignores the rest of the evidence, including the statement that Mr. Weaver had purchased a vehicle from Chad and Leslie the night before, which Chad had said would make Leslie mad. (Petition Exhibit 34). This evidence, if true, would completely disrupt the delicate timeline needed to show that Mr. Andersen could have committed the crime, and because it was evidence that Mr. Weaver held himself and obtained outside Mr. Andersen's

presence, there is no reason Mr. Andersen would have been able to discover until Mr. Weaver decided to come forward.

In regards to the Gunderson evidence, Respondent asserts that this evidence would not support alternate perpetrator evidence. Reply Memorandum P. 33. Even if this is true, in a case where a stolen four-wheeler is used to show motive for a murder, evidence of the decedent's extra-marital affair and desire to end his strained relationship with his wife and have her and her entire family move out of his home just before he was murdered is absolutely relevant and material evidence. It is yet another piece of evidence that shows that the entirety of the testimony given by Ms. Fain, which was used to establish the timeline for Chad's death, was filled with holes and untruths, much like her claim that Chad had discussed purchasing a greenhouse from Frank Lhokta. (Petition Exhibit 35).

Further, if Ms. Gunderson was conducting a somewhat secret relationship with Chad, there is no reason Mr. Andersen would know of this unless or until Ms. Gunderson came forward, making this new evidence.

7. Kenneth Swedberg

Respondent asserts it is immaterial that Kenneth Swedberg knew Chad had been shot with a larger bullet. (Responsive Memorandum P. 36-37). Respondent also asserts that Exhibit 35, which Petitioner cited to support this claim, is not related. That is accurate. Petitioner intended to cite to Exhibit 46, the Investigative Report related to David James Lhotka to support this claim. Additionally, Mr. Andersen has proof Kenneth Swedberg made that statement. (Reply Memorandum Exhibit 4 – Kenneth Swedberg Statement, Bates 874).

This evidence is material because it was a huge theme of the State's case to claim that when no one knew about the size of the gun that killed Chad Swedberg, Mr. Andresen was

allegedly hiding a gun of that caliber. In closing the State said that "everyone else" is showing their 30 caliber guns. (T. 2970). The Minnesota Supreme Court pointed to the fact that Mr. Andersen allegedly hid his 30 caliber gun when the public did not know of the size of the gun as proof of his guilt that helped sustain his conviction. *State v. Andersen*, 784 N.W.2d 320, 332 (Minn. 2010).

The evidence Mr. Andersen presents shows that Kenneth Swedberg, from his statement, knew that it was a large gun and gives a potential basis for the knowledge, from the Underdhal and Lhotka evidence. The fact that Mr. Swedberg was aware of this so soon after the murder, along with evidence that Al Baker had shipped away a 30 caliber gun that was never inspected are material facts that should not simply be ignored in resolving Mr. Andersen's claims.

III. ARGUMENT

Respondent argues that Mr. Andersen's claims are time barred, procedurally barred, and that they lack merit such that the claims should be denied without conducting an evidentiary hearing to assess the credibility of the new evidence. This memorandum is submitted primarily to address these arguments. Mr. Andersen stands by the arguments made in his initial memorandum regarding the merits of his claims.

1. Mr. Andersen has presented sufficient evidence to satisfy the newly discovered evidence and interests of justice exceptions to the two (2) year time limit.

Minn. Stat. § 590.01, Subd. 4 requires that a claim be brought within two years of the petitioner's conviction becoming final. If a petitioner is outside the two (2) year window in that provision, he must meet one (1) of the five (5) exceptions to the two (2) year time limit set out in §590.01, Subd. 4(b) before his claims will be addressed on their merits. There are two (2) applicable exceptions in this case.

A. NEWLY DISCOVERED EVIDENCE

One of the exceptions is for newly discovered evidence where five (5) conditions are met. Minn. Stat. § 590.01, Subd. 4(b)(2). The requirements in 590.01, Subd. 4(b), are that the evidence: "could not have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the two-year time 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."

In its brief, Respondent essentially argues that Mr. Andersen could have discovered all the evidence he presented prior to trial had he exercised due diligence. Mr. Andersen disputes that claim and stands behind the explanation and evidence he presented along with his Petition to support his claims that the evidence he has presented is newly discovered evidence. However, it should be beyond dispute that the following evidence presented constitutes newly discovered evidence in that it could not have been discovered through the exercise of due diligence. Mr. Andersen stands by his arguments regarding the change in the outcome made in his opening brief.

There should be no question that the evidence related to Al Baker and his statements regarding being at the scene early and shipping his guns to Illinois, the evidence from Stacy Weaver, the evidence from Tonya Gunderson, and the evidence from David James Lhotka constitute newly discovered evidence which requires review of the merits of those claims. The evidence Mr. Andersen obtained from Weaver, Gunderson and Lhotka was obtained only after word got out that he had hired an investigator and they came forward to him. (Reply Memorandum Exhibit 2 – December 7, 2016 Kenneth Andersen Affidavit). Without them

coming forward to talk to the investigator of their own free will, Mr. Andersen would never have obtained this information. The statements Mr. Baker made to Ms. Bellanger and Mr. Andersen's investigator are also new statements that are completely different from his trial testimony such that there was no way to obtain this evidence until Mr. Baker said it. To conclude this evidence could have been obtained at an earlier time would effectively require Mr. Andersen to go around asking all trial witnesses if they had changed their testimony yet.

Mr. Andresen also contends that the evidence relating to the undisclosed and un-transcribed first 9:20 of the April 20, 2007 Al Baker interview, along with the lack of any documentation or disclosure of his call to police on April 19, 2007 to report the calls he received – which is what lead to the April 20th interview in the first place – constitutes newly discovered evidence because he obtained this evidence and learned of it only though his own persistent efforts in protecting his rights, fighting for discovery and access to case materials in question as described in his initial Affidavit (Petition Exhibit 45) and his December 7, 2016 Affidavit attached hereto as Reply Memorandum Exhibit 2). That this evidence was not available before trial is evident in the fact that it never came up at trial at all.

For the evidence related to the investigation into Wanda Nelson, Douglas Haverkamp and Bradley Riggle, Josh Bogatz, and Frank Lhokta, Mr. Andersen contends this is newly discovered evidence because he has only learned in bits and pieces and over time how little investigation and follow up was actually done on his case. The results of his investigation yielded new evidence he only learned he needed after he was able to obtain and review discovery. The difficulties he had obtaining this discovery show why claims based on evidence that resulted from it are timely made.

The requirement of 590.01, Subd. 4(b) at this point is to ***allege*** the existence of newly discovered evidence that would prove innocence by clear and convincing evidence in order to be "entitled to consideration of the petitions under the newly discovered evidence exception to Minn. Stat. § 590.01, subd. 4(b)(2)." *Miles v. State*, 800 N.W.2d 778, 783 (Minn. 2011) (citing *Gassler v. State*, 787 N.W.2d 575, 583 (Minn. 2010); *Scott v. State*, 788 N.W.2d 497, 502 (Minn. 2010)). Here Mr. Andersen has identified newly discovered evidence which raises very serious questions about whether his conviction was obtained in violation of his rights, and the allegations, if proven true, would entitle him to reversal of his conviction, requiring that his claims be reviewed on their merits.

B. INTERESTS OF JUSTICE

The second exception is where the Petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice. §590.01 subd. 4(b)(5). To be timely, a claim in the interests of justice must simply be filed within two (2) years of when the claim arises. Minn. Stat. § 590.01, subd. 4(c). The Minnesota Supreme Court set forth five (5) factors that it considers non-exclusive that go toward whether it is in the interests of justice to review a petition. Those factors are: (1) whether the claim has substantive merit; (2) whether the defendant deliberately and inexcusably failed to raise the issue on direct appeal; (3) whether the party alleging error is at fault for that error and the degree of fault assigned to the party defending the alleged error; (4) whether some fundamental unfairness to the defendant needs to be addressed; and (5) whether application of the interests-of-justice analysis is necessary to protect the fairness, integrity, or public reputation of judicial proceedings. *Gassler v. State*, 787 N.W.2d 575, 586-87 (Minn. 2010).

This is a case where it is truly in the interests of justice to review the merits of Mr. Andersen's claims. The first part is whether the claims have merit. Mr. Andersen spent a great deal of time in opening memorandum addressing the merits of his claims. It is worth noting that he has, now, presented evidence, through investigation that was not done prior to trial, which calls into question nearly every aspect of the case against him in what was already deemed to be a close call both by the trial court and the Minnesota Supreme Court on direct appeal.

The second prong is whether Mr. Andersen deliberately or inexcusably failed to raise the issues on direct appeal. This is clearly not the case. As Mr. Andersen has explained in his Affidavits and what his prior actions seeking completion of discovery show (Petition Exhibit 12) - Motion to Compel Discovery) is that he has been fighting to get information related to his case since he never saw it beforehand due to the way in which disclosures were made and how trial and appellate counsel acted. The circumstances that caused this are extraordinary.

Mr. Andersen was denied access to his materials because of a purported order that never existed. (Petition Exhibit 5). He then attempted to gain access to these materials through both trial and appellate counsel and was unable to do so. After retaining different counsel, he did receive his documents, but had issues related to computer access and space limitations in prison. Then, when he began to get through the documents, he took action to try to gain access to what he believed was missing. Even though he showed documents were missing, his request was opposed by the State. The evidence Mr. Andersen has presented here and the claims he has made are, in a sense, the culmination of efforts he expended over the past decade to obtain records and discovery in his case and the investigation he conducted as a result.

The third prong is the level of fault Mr. Andersen faces. Here it is very little. He has been fighting to get discovery and working to see everything about his case for a long time.

When things did come up, he would act on them quickly and raise the claims he could in the time he was allotted.

The issue of fundamental unfairness is triggered here. Mr. Andersen did not get to see the discovery because of how it was sent out. Then, his witnesses were tampered with to prevent them from being helpful to his case. Then, his calls were recorded and investigators were at places he wanted to go before he got there. Then trial counsel, who said he was not ready for trial, refused to turn over discovery and trial evidence and appellate counsel wouldn't get it. When Mr. Andersen did get his files, the prison was not equipped for him to keep them or see them on a computer, so he had to send them away time and again. These unusual circumstances that raises questions related to fundamental fairness and of whether a defendant should be held to serve a life sentence where he has no possibility of release without having the evidence he now presents and the claims he now makes being addressed on their merits.

Finally, this is necessary to protect the justice system. The Supreme Court has already noted the unique characteristics of the case and this Court should too. Disclosure was haphazard at best, witnesses were instructed not to talk with Mr. Andersen's representatives, jail calls were recorded and listened too, and Mr. Andersen had to fight with counsel and the state to get the information that resulted in him hiring an investigator and building this case.

What sets Mr. Andersen's interest of justice claim apart from many others is the struggle he had to obtain and view the evidence against him. He has provided details about this, and even in his 2010 petition, noted that he had received and reviewed very little discovery and was basing his claim only on that. Here, the claims Mr. Andersen is making were trigged by his fighting to obtain and then reviewing discovery in his case, meaning that the trigger for his claims should not be viewed as the time of trial, but rather when he obtained and was able to review the

discovery and then obtain meaningful evidence to support his claims. Under this view, with the unusual circumstances of this case, Mr. Andersen's claims should be considered timely as raised within two (2) years of when the claims arose under the interests of justice.

2. Mr. Andersen's claims are not procedurally barred.

A newly discovered evidence claim cannot be procedurally barred, because those bars apply to claims that were either previously raised or known but not raised. Here, as discussed above, much of the evidence Mr. Andersen has presented is true newly discovered evidence. That he was not aware of this evidence at trial is supported by the fact it was never raised as part of his defense in a hotly contested circumstantial evidence case. These claims related to this evidence, then, were not able to be raised on direct appeal and logically cannot be barred. Similarly, given that his ineffective assistance of counsel claim requires proof from outside the trial record, it is properly raised in postconviction. *Dukes v. State*, 621 N.W.2d 246, 255 (Minn. 2006).

Further, even if there are issues with procedural bars as Respondent asserts, this is a case where it is in the interest of justice to review the merits of Mr. Andersen's claims. Generally, "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." *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). There are two (2) exceptions to the *Knaffla* rule: "(1) if a novel legal issue is presented, or (2) if the interests of justice require review." *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006). "For the second exception to apply, the petitioner must not have "deliberately and inexcusably" failed to raise the issue on direct appeal." *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). Review in the interest of justice

should be granted where the claim has merit and was asserted without deliberate or inexcusable delay. *Wright v. State*, 765 N.W.2d 85, 90 (Minn. 2009).

The issues Mr. Andersen raises related to the evidence presented are in the interests of justice in just that way. As Mr. Andersen set forth in his opening brief, his claims have merit. Second, he had impediments to raising these claims at an earlier time as described above and in his Affidavits. This, along with the prior Supreme Court recognition that the facts and circumstances of this case are unique weigh in favor of reviewing all of Mr. Andersen's claims on their merits and in light of all of the evidence presented because there has been nothing intentional or inexcusable related to Mr. Andersen not raising these claims earlier.

4. Mr. Andersen should be granted a new trial in the interests of justice.

As Justice Dietzen noted in denying Mr. Andersen's postconviction appeal in 2013, this case presents unique facts. *Andersen v. State*, 830 N.W.2d 1, 13 n. 6 (Minn. 2013). Mr. Andersen contends that these unique facts should result in the granting of a new trial to protect the interests of justice.

The things we know about this case that make this case unique and worthy of review in interests of justice are as follows:

- Mr. Andersen's jail call were illegally monitored;
- Potential witnesses were given instructions in such a way that it resulted in their refusal to meet with and/or cooperate with defense counsel and investigators;
- Important details were left out of the search warrant applications;
- That on April 19, 2007, Al Baker called police to report receiving suspicious phone calls and that no report of this call was ever made or disclosed to Mr. Andersen;

- That, at the very least, the first 9:20 of the April 20, 2007 interview resulting from the April 19, 2007 call to the police was never transcribed, and as Mr. Andersen contends in this Affidavits, was never actually turned over until a civil lawsuit relating to the recording of his calls;
- That, despite protestations that all discovery was disclosed, there are sworn disclosure statements for Bates numbers the state later claimed were unused;
- That trial counsel failed to pay its investigator and did not pick up evidence related to the investigation that did actually take place; and
- That Mr. Andersen, after a long and hard fight to gain access to his case materials, was able to conduct a reasonable investigation which has now produced evidence challenging nearly every important aspect of the case against him in what has been acknowledged to be a very close case by both the trial judge and the Minnesota Supreme Court.

In a case where Mr. Andresen was convicted based entirely on circumstantial evidence, and the State on direct appeal argued this evidence needed to be viewed as a whole, it should not be that when Mr. Andersen actually is able to conduct the investigation that needed to be done prior to trial, and comes up with evidence which attacks nearly every part of that circumstantial case, each piece of evidence he presented is immaterial and should be viewed discretely to avoid it having an appreciable impact.

The prosecution admitted there is no direct evidence of Mr. Andersen having committed the crime (T. 2971). How can Mr. Andersen be required to provide such absolute proof of his innocence when there was no such proof of his guilt? What he has done is collect evidence which attacks and discredits nearly all of the evidence that purportedly showed his guilt. This shows, among other things, that another individual admitted being at the scene of the crime and

shipped away a gun capable of firing the lethal shot, that the decedent's spouse may have been outside the home much earlier than she testified, that Mr. Andersen's purportedly manufactured alibi was actually true, and that a person who was actually at the scene within an hour or so of the decedent's death received a phone call in the manner of a confession to the murder but this information was not disclosed to him before trial.

This case has the sort of unique facts and unusual circumstances that raise the most fundamental of all questions in the criminal justice system. Mr. Andresen isn't entitled to a perfect trial, but he is entitled to a fair one. By showing all that occurred before, during, and after his trial, with the conduct of the state, the conduct of counsel, and the evidence that has been obtained since, Mr. Andersen has shown his trial was not fair and that he should be granted a new trial in the interests of justice.

IV. CONCLUSION

For the reasons stated above, Mr. Andersen requests that this court issue an order granting his immediate release, or in the alternative, a new trial.

Dated: 12/14/16

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