APPELLATE COURT FILE A17-0658
STATE OF MINNESOTA
SUPREME COURT

Kenneth Eugene Andersen,

Appellant,

vs.

State of Minnesota,

Respondent.

APPELLANT'S REPLY BRIEF

Zachary A. Longsdorf
Longsdorf Law Firm, PLC
Attorney for Appellant
5854 Blackshire Path, Suite 3
Inver Grove Heights, MN 55076
Telephone: (651) 788-0876
Attorney I.D. No.: 390021

Matthew Frank
Assistant Attorney General
445 Minnesota Street, Suite 1800
St. Paul, MN 55101-2134
Telephone: (651) 757-1448

Tammy L. Merkins
Becker County Attorney
913 Lake Avenue
Detroit Lakes, MN 56501
Telephone: (218) 847-6590

Attorneys for Respondent

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Appellant Kenneth Andersen files his Reply Brief to address, rebut, and clarify certain factual assertions and arguments contained in the Respondent's Brief. Mr. Andersen stands behind the factual assertions and other arguments made in his Appellant's Brief, but will address several of the factual discrepancies in Respondent's Brief below.

This Reply Brief is primarily prepared to address the Respondent's assertions that Mr. Andersen's claims should not be reviewed on their merits as they are time barred and that the claims are unsupported by fact. Respondent's assertions regarding the impact of Mr. Andersen's newly discovered evidence depend primarily on construing that evidence and the impact it would have on his case as narrowly as possible, and depends heavily on simply ignoring Mr. Andersen's postconviction reply filings of December 14, 2016. (Doc. Id. # 186, 187, 188).

Mr. Andersen contends that entirely disregarding evidence he presented and giving other evidence the narrowest possible construction is an abuse of discretion at this point. *See Miles v. State*, 800 N.W.2d at 783 (Minn. 2011). This is particularly true in cases built on circumstantial evidence. *Wilson v. State*, 726 N.W.2d 103, 107 (Minn. 2007). When the evidence Mr. Andersen presented is analyzed at face value, it satisfies the newly discovered evidence and interests of justice exceptions, such that his claims cannot be denied without first conducting an evidentiary hearing to address the credibility of the evidence presented.

I. Response to Respondent's Factual Assertions.

In its Statement of the Case, Respondent states that Mr. Andersen filed his petition on September 27, 2016 and then states the district court denied that petition on March 1, 2017. (Respondent's Brief P. 2). Here, and throughout its brief, Respondent does not acknowledge that Mr. Andersen filed responsive pleadings, even going so far as to assert Mr. Andersen never addressed the issue of the timelines of his petition. (Respondent's Brief P 32). Mr. Andersen did file responsive pleadings in which he specifically addressed the timeliness of his petition, including an affidavit in which he set forth in great detail information relating to what he had available to him and when regarding the newly discovered evidence he presented to support his claims. (Doc. Id. # 186, 187, 188).

This Court has recognized that when it comes to claims based on newly discovered evidence, the time limit in Minn. Stat. § 590.01, Subd. 4(c) is a waivable defense. *Carlton v. State*, 816 N.W.2d 590, 600-07 (Minn. 2012). Here, Mr. Andersen brought his petition on the basis of evidence he specifically alleged was newly discovered. (Doc. Id. # 155 – Petition for Postconviction Relief P. 3; Doc. Id. # 156 – Memorandum of Law in Support of Petition P. 48-53, 54-57). When Respondent raised a timeliness defense, Mr. Andersen responded with proof regarding the timeliness of his claims, including his own affidavit in which he provides detail about his efforts to obtain discovery and conduct an investigation into his case. (Doc. Id. 188 – Exhibit 2).

Because it ignores Mr. Andersen's responsive filings, Respondent also asserts there was no evidence related to Haverkamp and Mr. Andersen's van (Respondent's

Brief. P. 13-14). Mr. Andersen presented a sworn affidavit from Frank Andersen regarding his interactions with Mr. Haverkamp regarding the van. (Doc. Id. # 188, Ex. 3).

Respondent also asserts that Mr. Andersen did not make argument to the district court about Jesse Fain's trial testimony that Chad said he would not work with Mr. Andersen any longer being inconsistent with Mr. Fain's grand jury testimony. (Respondent's Brief P. 26). This was specifically argued to the postconviction court, both in Mr. Andersen's initial filings (Doc. Id. # 156 - P. 13-14) and in his responsive pleadings. (Doc. Id. # 187 P. 2-3).

Throughout its brief, Respondent asserts that the entire recording of the April 20, 2007 recording of the interview with Al Baker was disclosed prior to trial. (Respondent's Brief P. 7, 27). What Respondent never does, however, is allege that evidence of Baker's April 19, 2007 call to authorities, which resulted in the April 20, 2007 interview, was disclosed. (See Doc. Id. # 156 Appellant's Memorandum of Law in Support of Petition P. 69; Doc. Id. # 188, Reply Memorandum P. 6). Respondent also never alleges that the first 9 minutes and 20 seconds of the recording was transcribed prior to disclosure to Mr. Andersen. While Mr. Andersen stands by his assertions that the entire recording was not disclosed, as set forth in his December 7, 2016 Affidavit (Doc. Id. 188 – Exhibit 2), it is quite a coincidence that the April 19th call was not disclosed and that the first 9 minutes and 20 seconds of interview was not transcribed. Further, that nothing from the first part of that call came up at trial supports Mr. Andersen's contention he did not have the entire recording.

Respondent also continues to assert there is no evidence to support Mr. Andersen's claims about Baker being at the scene of the crime around 8:00 a.m., finding shell casings, and reporting someone confessed to killing Chad. (Respondent's Brief P. 5-6, 35-37). As part of this, Respondent asserts that statement of Geraldine Bellanger lacks "trustworthiness" and asserts that because Baker himself did not sign an affidavit, there is no need for a hearing. (Respondent's Brief P. 37). Respondent also asserts that what Baker said is hearsay and would not be admissible at trial. (Id.).

Minnesota law does not require that Baker sign an affidavit in order for Mr. Andersen to present sufficient evidence to obtain an evidentiary hearing. *See Ferguson v. State*, 645 N.W.2d 437 (Minn. 2002) (reversing and remanding for evidentiary hearing based on an affidavit from a third party who observed the trial witness recant his testimony in person). What a petitioner in a postconviction action needs to do is not necessarily present an affidavit from the person making the statement, but to allege facts, supported by more than mere argumentative assertion, to be granted a hearing. *Martin v. State*, 825 N.W.2d 734, 742 (Minn. 2013). In this case, by presenting the Affidavit of Geraldine Bellanger containing her recitation of her interaction with Baker, along with the Investigative Report of JP Eglehof, which corroborates portions of what Ms. Bellanger stated and included the information about the shell casings and cigarette butts, which investigators for the state later confirmed with Baker, Mr. Andersen has done this.

In addition to it being premature to simply dismiss the allegations contained in the Affidavit of Geraldine Bellanger and the investigator's corroborating report, it is too early to say if Baker's statement is inadmissible hearsay, or not. (Respondent's Brief P.

37). This Court addressed exactly this scenario in *Ferguson v. State*, 645 N.W.2d 437 (Minn. 2002). There a witness (Edwards) recanted in the presence of his father (Turnipseed), who provided Ferguson with an affidavit detailing the recantation. *Id*. at 441-42. This Court, in remanding for a hearing, noted that while the affidavit of Turnipseed was inadmissible hearsay at the present time, that might change after a hearing. First, it might be admissible if Edwards asserted his Fifth Amendment right to remain silent, thereby becoming available such that his statement became admissible as a statement against penal interest. *Id*. at 443. It might also become admissible if Edwards admitted he lied during his trial testimony. *Id*. at 443. That fact that there were scenarios in which the third-party affidavit detailing the recantation might be inadmissible did not do away with the need to conduct an evidentiary hearing in *Ferguson*, and it should not in this case.

Respondent asserts that the shooting occurred between 8:00 and 8:13 a.m. (Respondent's Brief P. 6). While this has been generally stated, and even written by this Court, that is not what the specific evidence presented at trial shows. Leslie Fain testified Chad left moments before a news segment about a man living with wolves started to air. (T. 951-52). That segment did not air until 8:05 a.m. (T. 2714). Given Leslie's testimony it took her 15 minutes to reach the hearing, the shooting could not have occurred at 8:00 a.m., or even 8:05 a.m. and had to be later. However, even this is far from certain, because Vernon Wander, who lived nearby, recalled hearing two shots later, between 8:30 and 9:00 a.m. (T. 1546-40).

II. The district court erred in denying Mr. Andersen's newly claims without an evidentiary hearing.

Respondent generally asserts that Mr. Andersen's claims are untimely or procedurally barred and therefore no hearing on the evidence is necessary. As part of this assertion, Respondent claims the evidence is (1) not new evidence (Respondent's Brief P. 32-33), (2) that Mr. Andersen did not act with due diligence to discover the evidence (Id. P. 33), (3) that the evidence is cumulative (Id. P. 33), (4) that the evidence is impeaching (Id. P. 33), and that it does not show innocence (Id. 33-34). As part of this, Respondent incorrectly asserts Mr. Andersen did not address these issues at the district court. (Id. P. 32).

In determining if the district court abused its discretion, it is important to keep in mind that Mr. Andersen's claims were denied without the benefit of an evidentiary hearing to allow the district court to make credibility determinations. Under those circumstances the district court must accept the presented evidence at face value. *Miles*, 800 N.W.2d at 783. In support of his petition, Mr. Andersen presented what he classified as 16 categories of newly discovered evidence supported both by new evidence obtained through his investigator that was in many cases corroborated by previously disclosed evidence.

This included, but is not limited to, evidence from a third-party that Leslie and Jesse Fain were not where they testified that were at trial, that the decedent was involved in an extra-marital affair and had told his partner in the affair he asked Leslie Fain to leave his house, that Al Baker, who was at the scene and admitted to being alone in Mr.

Andersen's barn on the morning of the shooting, claimed to have found cigarette butts and shell casing where the shooter laid in wait, and newly obtained evidence showing that the gun in question had been transferred out of Mr. Andersen's possession in the fall of 2005. (Appellant's Brief P. 31-34).

In order to reach the conclusion that all of this new evidence discussed in Mr. Andersen's opening brief and his filings with the district court would have no impact on the outcome of Mr. Andersen's case if presented to the jury, the district court, as Respondent urged, viewed all the evidence independently of the other evidence and gave it as little credibility as possible, including, in some cases, outright declaring it did not find the evidence credible. This included, for example, describing Stacy Weaver as "she", and stating "… the Court finds this statement inherently unreliable." (Add. 17). It also included completely disregarding the affidavit of Geraldine Bellanger as "inherently dubious." (Add. 10). With nearly every piece of evidence, as described in Mr. Andersen's opening brief, the first step the district court took was to give the evidence presented the least amount of credit possible. (Appellant's Brief P. 34-39). This Court has been extremely clear that concluding newly discovered evidence is unreliable without first evaluating the credibility of the witness at an evidentiary hearing is misapplication of Minn. Stat. § 590.04 and an abuse of discretion. *Martin v. State*, 825 N.W.2d 734, 742 (Minn. 2013). This Court regularly reverses and remands newly discovered evidence cases for evidentiary hearings where district court made improper credibility determinations or where the resolution of the claim depends on undecided facts. *See Caldwell v. State*, 853 N.W.2d 766 (Minn. 2014); *Martin v. State*, 825 N.W.2d 734

(Minn. 2013); *State v. Bobo*, 820 N.W.2d 511 (Minn. 2012); *Dobbins v. State*, 788 N.W.2d 719 (Minn. 2010); *Wilson v. State*, 726 N.W.2d 103 (Minn. 2007); *Stutelberg v. State*, 741 N.W.2d 867 (Minn. 2007); *Ferguson v. State*, 45 N.W.2d 437 (Minn. 2002). It should do so here.

III. Mr. Andersen's claims satisfy both the newly discovered evidence and interests of justice exceptions to Minn. Stat. § 590.01 and *Knaffla*.

Respondent asserts that this Court should deny Mr. Andersen the relief he seeks on appeal because his claims for postconviction relief were time barred under the provisions of Minn. Stat. § 590.01 and procedurally barred under *Knaffla*. The time bar argument is based, in part, on unrealistic claims that Mr. Andersen was, or should have been, aware of the newly discovered evidence at the time of his trial and that even if he was not aware of it, the evidence presented does not establish his innocence by clear and convincing evidence, even if true. The *Knaffla* argument is based upon a claim that Mr. Andersen knew or should have known of the claims he now makes during trial, on direct appeal, or during a prior petition for postconviction relief. These arguments made by Respondent ignore the realities of the situation, which will be addressed below.

First, contrary to Respondent's claim, Mr. Andersen did address these issues with the district court and set forth in great detail his arguments regarding the timeliness and proper procedural posture of his claims. (Appellant's Brief P. 39-46). Far from failing to offer an explanation for why certain actions were not taken at an earlier time, Mr. Andersen very specifically addressed the evidence he obtained and how he obtained in it in his affidavit dated December 7, 2016. (Doc. Id. # 188 Exhibit 2).

In doing this, Mr. Andersen demonstrated he acted with due diligence to obtain the information he presented to support this claim, by showing that he was denied access to his case file at trial and on direct appeal, by showing the circumstances which precluded these claims from being raised at an earlier time, including being denied access by trial and appellate counsel and the need to obtain an order from the district court requiring that certain information be disclosed. (Doc. Id. 188 – Exhibit 2). This is also a case where the prosecution was caught recording Mr. Andersen's jail calls with counsel and admitted its agent had told important witnesses, like Josh Bogatz, not to cooperate with Mr. Andersen's defense. (Doc. Id. No. # 156 Memorandum of Law P. 34-42). Minnesota law requires only that defendant exercise "due diligence" in obtaining newly discovered evidence, nothing more. *See Pierson v. State*, 637 N.W.2d 571, 577 (Minn. 2002); *State v. Caldwell*, 322 N.W.2d 574, 588 (Minn. 1982). Under the circumstances in this case where Mr. Andersen's ability to defend himself was actively infringed upon by the state, he has shown the necessary level of diligence required to have the merits of his claims addressed.

Respondent also asserts the evidence presented is only impeaching, is cumulative and that it is not exculpatory even if it is new. For example, with Baker, it says the fact he got rid of a .30 caliber gun just impeaches him. (Respondent's Brief P. 33). It reaches this conclusion by ignoring everything else about Baker. Including that Mr. Andersen has now shown through new evidence that Baker could answer his house phone from his cell phone, that he claims to know where the shooter laid in wait, that he claimed to have seen cigarette butts and shell casings at the scene, and that he admitted being at the scene

much earlier than his testimony showed. (Doc. 157-Exhibit 9 Baker Recording Transcript, Exhibit 10; Doc. 158–Exhibit 11 Bellanger Affidavit). This in conjunction with the fact that Baker was going away from Waubun before he spoke with Mr. Andersen, the fact that he sent away a .30 caliber gun, and the fact that he admitted to being in Mr. Andersen's barn the morning of the shooting, does far more than impeach Baker and is not cumulative.

Respondent makes similar claims regarding the new evidence about Leslie Fain, which includes, but is not limited to, evidence that Leslie was in a car on the road around 7:30 a.m. even though she testified she was home that entire time and evidence of Chad having told his partner in an extramarital affair that he was breaking off his relationship with Leslie and had asked her to move out. (Respondent's Brief P. 37-38). If this evidence is true, it does impeach Leslie Fain, but evidence that she was somewhere else that morning and with people she did not disclose is relevant and admissible at trial outside of its impeaching value because Fain was at the scene with the victim and the affair and relationship ending evidence provides motive. *See State v. Vance*, 714 N.W.2d 428, 437-39 (Minn. 2006) (stating that evidence having an inherent tendency to connect an alternate perpetrator to the crime is admissible); see also *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of the accused in a criminal trial is, in essence, the fair opportunity to defend against the State's accusations.).

The case against Mr. Andersen was based entirely on circumstantial evidence. When Mr. Andersen made a motion for judgment of acquittal, the trial judge stated: "I am not uncomfortable telling you folks I have struggled with this, but I can't in good

conscience take the position that no reasonable jury, taking into account the state's evidence and was favorable to the state under the circumstances, that no reasonable jury could convict Mr. Andersen." (T. 2770). In reviewing the case, Justice Page, in his concurrence, also pointed out that case was a "close one" on the evidence actually presented at trial. *State v. Andersen*, 784 N.W.2d 320, 336 (Minn. 2010) (Justice Page concurring).

Given this, evidence of the same caliber, showing the opposite, if true, has to be able to establish Mr. Andersen's innocence by clear and convincing evidence. The only way to avoid what should otherwise be a logical conclusion is to construe the offered evidence as narrowly as possible to reach the conclusion that, even if believed, it could not change the outcome of the case. However, discrediting the evidence to give it such a narrow construction is improper before an evidentiary hearing. *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004).

If circumstantial evidence and second-hand testimony offered against Mr. Andersen is sufficient to put him in prison for life when presented to a jury, the affidavits reports, and other evidence he presented should be, at the very least, sufficient to warrant an evidentiary hearing, if not a new trial, before Mr. Andersen dies in prison without ever having an opportunity to present the evidence of innocence he has obtained. *See State v. Jacobson*, 326 N.W.2d 663, 667 (Minn. 1982) (stating that while the newly discovered evidence might be questioned, the credibility and materiality of the new evidence required a new trial because the new evidence was "not so doubtful as to make a different

result improbable and, in a matter of this importance, we think the jury should be the final arbiter.").

In asserting Mr. Andersen's claims should not be reviewed under the interests of justice exception, Respondent claims Mr. Andersen has not established when his claims arose. (Respondent's Brief P. 39). This claim, again, ignores that Mr. Andersen provided a detailed affidavit regarding what he knew and when, and in which he described the external impediments that prevented these specific claims from being raised at an earlier time. (Doc. Id. # 186, 187, 188).

Included in Mr. Andersen's proof regarding his efforts to obtain discover and information about his case were documentation of his motion to compel discovery in May 2013 which was granted on June 10, 2013, (Doc. 158–Exhibit 12 Motion to Compel Discovery). He also provided details regarding counsel refusing to allow him to review discovery, his communication with the district court about a purported order preventing him from doing so, details of when he first received what was purported to be the complete discovery file in his case on CD in September 2014, which he was able to temporarily review, before computer issues and the loss of the CDs in the prison law library, and how all of this resulted in hiring an investigator, which in turn lead to some people, like Stacy Weaver and Tonya Gunderson coming forward with information they knew about Chad's death. (Doc. Id. # 188 – Exhibit 2 ¶ 1, 2, 3, 4, 7, 8, 18, 19(1), 19(2)).

Mr. Andersen contends that this shows when his claims arose and demonstrates the appropriate level of diligence on his part to warrant review of these claims on their merits.

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

Finally, Respondent asserts that Mr. Andersen's request for a new trial in the interests of justice must be denied because there is nothing extraordinary about his case. (Respondent's Brief P. 44-45). In doing this, Respondent asserts that claims related to the state's admitted interference with witnesses, illegal recording of jail phone calls, misstatements in obtaining a search warrant, and ineffective assistance of trial counsel are procedurally barred and should not be considered in determining what the interests of justice require. (Id. 45).

The fact that these issues were previously litigated does not mean that they did not happen. It is a matter of record in this case that all of the things Mr. Andersen described in seeking relief at the district court did happen. (Doc. Id. 156 – Memorandum of Law in Support of Petition P. 34-46). It is also a fact that Mr. Andersen has only recently been able to conduct and complete the sort of investigation into his case he believe was being conducted prior to this trial. The jail call recording, interfering with witnesses, and the lack of preparation by trial counsel are directly related to the fact that Mr. Andersen has only very recently completed the investigation into his case.

This stuff cannot and should be looked at in a vacuum. What happened before trial, including the prosecution and its agents telling witnesses not to cooperate, has a direct relationship to the fact that Mr. Andersen has only recently been able to get Josh Bogatz to cooperate and tell what he knew about the gun swap that put the Tika rifle in possession of Chad Swedberg. Mr. Andersen being aware this swap took place and being able to obtain the cooperation of the sole witness to the swap are two (2) different things,

and through the actions of its agent, the state actively interfered with Mr. Andersen's ability to do the later. This both explains why Mr. Andersen was not able to present this evidence at an earlier time and shows the sort of state interference with a defendant's ability to defend himself that has justified reversal in the interests of justice in the past. *See State v. Beecroft*, 813 N.W.2d 814, 852 (Minn. 2012).

Further, the fact that Mr. Andersen and his attorneys knew their calls were being monitored impacted their ability to work together on his defense and contributed to the lack of investigation prior to trial. The fact that trial counsel also repeatedly admitted to not being prepared was born out when Mr. Andersen was able to complete his investigation and obtain so much information that, if presented at trial, likely would have resulted in a judgment of acquittal from a district court judge who was close to doing it even without Mr. Andersen putting on a defense.

The call recordings and witness interference happened and it is part of the reason Mr. Andersen is where he is today. This Court has already recognized that the circumstances of this case, particularly as they relate to how and when Mr. Andersen was able to obtain discovery, are unique. *Andersen v. State*, 830 N.W.2d 1, 13 n. 6 (Minn. 2013. This case is also unique in the fact that Mr. Andersen has been able to trace back his lack of knowledge regarding discovery and the evidence against him to the above actions of the state and the fact his trial kept the information from him and has shown diligence in seeking to vindicate his rights by seeking court intervention in obtaining discovery and then acted quickly by hiring an investigator when he learned there might be evidence to support his innocence.

The newly discovered evidence in this case raises uncomfortable questions about the fairness of the criminal justice system and what, if anything, will be done to check the state when its agents abandon their roles as ministers of justice and employ a win at all costs approach that knowingly and willingly tramples over the few and precious rights that a person accused of a crime has to protect himself and when the defendant is hampered in his defense by counsel's lack of responsiveness and preparation. If the concepts of due process, fundamental fairness at trial, and a defendant's unalienable right to defend himself against the allegations made against him are to mean anything, a case like this cannot be swept under the rug and ignored.

CONCLUSION

Mr. Andersen respectfully requests that this Court grant his petition for a new trial or, in the alternative, remand this matter to the district court for an evidentiary hearing where he will be able to exercise his right to prove the allegations he made in his Petition for Postconviction Relief.

Longsdorf Law Firm, PLC

s/ Zachary A. Longsdorf

Zachary A. Longsdorf, I.D. No.: 390021
Attorney for Appellant
5854 Blackshire Path, Suite 3
Inver Grove Heights, MN 55076
Telephone: (651) 788-0876
Facsimile: (651) 223-5790
zach@longsdorflaw.com