

STATE OF MINNESOTA

IN SUPREME COURT

A17-0658

Kenneth Eugene Andersen,

Appellant,

State of Minnesota

Respondent

Appellant's Supplemental Pro Se Reply Brief

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## ARGUMENT

- I. THE DISTRICT COURT DID ABUSE ITS DISCRETION WHEN, IT SUMMARY DENIED APPELLANT'S PETITION FOR POSTCONVICTION RELIEF, WHERE NONE OF THE ISSUES RAISED IN THE PETITION ARE EITHER KNAFFLA OR PROCEDURALLY BARRED OR ARE SUSCEPTIBLE ABSENT AN EVIDENTIARY HEARING

### A. The Discovery Documents Used By Appellant Was Not Available To Appellant At Trial Or Direct Appeal

The State continues to argue that the District Court did not error when it concluded that Appellant knew about issues pertaining to discovery that was raised in Appellant's last postconviction petition. As proof, the State wants this Court to look at when these bate-stamped documents were served upon Appellant's trial counsel. As seen below, a look at the facts in the record shows the State is mistaken.

**State's Disclosure Sheets Have No Merit:** Had the District Court and State actually looked at the rules governing discovery disclosures when Appellant's trial and direct appeal was in place, (Minn. R. Crim. P. 9.03 subd. 4) (2008-09), they would have seen that Appellant's attorney was forbidden per that rule, to share information or give Appellant access to discovery documents pertaining to this case. Also see, Andersen v. State, 830 N.W. 2d 1, 12, (Minn. 2013). As such, Appellant did not have discovery used in this appeal prior.<sup>1</sup>

### B. Discovery Issues Were Timely:

The State alleges that issues raised with discovery documents were not timely. As seen below, the facts in the record shows the State is mistaken.

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<sup>1</sup> The State's position that Appellant should have known what was in discovery at the time of trial and direct appeal is very troubling since they have previously argued that Appellant's attorneys could not share/disclosed discovery information to Appellant per the exact rule stated above.

**Appellant's quest to get access to discovery documents:** The record shows that Appellant was hindered at every level in trying to obtain discovery. This burden started before trial and well after Appellant's direct appeal.<sup>2</sup>

To make sure there was no confusion on when Appellant found out about issues, and to show that Appellant acted with due diligence, Appellant supplied a very detailed (sworn affidavit) explaining how and when Appellant found out about issues brought in this appeal. See, Appellant's Reply Memorandum (exhibit 2). A review of this document will show issues related to discovery on this appeal were timely filed.

(The State's assertion that Appellant has not supplied when/how Appellant became aware of issues raised in this appeal, (i.e., pages 25, 30, 32) is unfounded since the District Court and the State were both supplied a copy of Appellant's Reply Memorandum (exhibit 2).

Also, a person's timeline should not start when a document is created, etc...; it should start when a person actually has possession of the document. Under this standard, a person can meet the requirement of "alleging a fact and having factual support."<sup>3</sup>

### **C. Discovery Issues Were Clearly Argued To The Postconviction Court**

The State asserts that Appellant's discovery issues "were not specifically argued to the postconviction court as newly discovered evidence." As seen below, a look at the facts in the record shows the State is mistaken.

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<sup>2</sup> This Court has already acknowledged Appellant's struggles in obtaining discovery and called Appellant's case "unique" because of the struggles. See, Andersen v. State, 830 N.W. 2d 1, 12, (Minn. 2013).

<sup>3</sup> It must also be noted that discovery documents not entered as evidence cannot be brought up on direct appeal. See, Rule 11 of the Minn. R. Civil. App. P (2208-09).

**Appellant's Postconviction Petition and Memorandums:** Throughout Appellant's petition and memorandums, Appellant has clearly stated that Appellant has obtained newly discovered evidence, (i.e. page 3 Appellant's petition, page 2 Appellant's memorandum, etc...) that attack the state's case. To support this allegation, Appellant submitted numerous discovery exhibits, which have been highlighted in the memorandum. As such, the issues related to discovery were clearly argued to the postconviction court.

**D. Appellant's Discovery Issues Have Merit**

Amazingly, the State also asserts that all of Appellant's issues pertaining to discovery have no merit because; they don't fundamentally alter the timeline of events from the morning of the homicide, are for impeaching purposes only, and don't prove Appellant's innocence by clear and convincing standards, etc... As seen below, if one looks at the quality of the State's case against Appellant, the State is mistaken.

**State's Evidence Against Appellant:** No evidence of any value was found that linked Appellant to the crime scene. As such, the State's case against Appellant was purely circumstantial. . See, State v. Andersen, 784 N.W. 2d 320, 324 (Minn. 2010).

To gain the conviction, the State called numerous witnesses to the stand to impeach statements that Appellant had made to the investigators. Nearly all the witness's testimony used to impeach Appellant's statements were about conversations they had with Appellant hours or days after Chad had been shot.

Appellant's Postconviction Petition Discovery Documents Appellant's Pro Se Brief, pages 6-22, outlined numerous documents. When these documents are "viewed in the light most favorable to Appellant", they attack nearly every aspect of the State's case. They show, at a bare minimum that: the timeline of events from the morning of the murder were fundamentally altered, false testimony was used to gain a conviction, and Appellant was denied a right to a full and fair trial, Appellant had ineffective assistance of counsel, and that Appellant was denied a meaning full review of this case by this court. As such, Appellant's discovery issues have merit.<sup>4</sup>

#### E. District Court's Order And Memorandum

A careful review for the District Court's order and memorandum only enhances that the District Court abused its discretion as seen below.

#### Facts And Issues Missed By The District Court:

- Failed to acknowledge that the State's witnesses at Appellant's omnibus hearing completely falsified their testimony about the phone issues.
- Failed to acknowledge that multiple pieces of evidence show that Al Baker did not have to go to the Waubun Store after Appellant called.
- Failed to acknowledge that Baker has no alibi from 7:45-10:00 a.m. on the morning Chad was killed.
- Failed to acknowledge that the State has never transcribed the first 9 plus minutes of Al Baker's April 20, 2007, interview.

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<sup>4</sup> When impeaching evidence is used to secure a conviction, impeaching evidence must be able to be used to show actual innocence as well. What's just and fair for one party, must be just and fair for the opposite party in an appeal.

- Failed to acknowledge that the State has admitted that their disclosure sheets are not accurate.
- Failed to acknowledge that Wanda Nelson has recently come forward and admitted she has a racial bias against Native Americans. (Appellant is Native American).
- Failed to acknowledge that Ken Swedberg was only person to know that Chad Swedberg had been shot with a “big bullet” hours after Chad’s body was found.
- Failed to acknowledge that Officer Jeff Nelson admitted that the interview he conducted with Leslie and Jesse Fain in December of 2007 should have been turned over to Appellant’s counsel because the State had full access to his file.
- Failed to acknowledge that Officer Jeff Nelson recently admitted that at the time of Appellant’s trial, he knew Chad had lied to him about his involvement in the theft of the 4-wheeler used as motive in Appellant’s case.
- Failed to acknowledge that Appellant’s counsel, submitted a Reply Memorandum with exhibits that cured alleged defects in Appellant’s Postconviction petition that was outlined in the State’s Reply Memorandum and current brief.

These overlooked facts, combined with all the issues found in Appellant’s Brief, and Appellant’s Pro Se Brief, clearly shows that the District Court abused its discretion when it denied Appellant’s petition.

**F. Appellant Has Established Exceptional Circumstances That Warrants A New trial, Or at A Bare Minimum An Evidentiary Hearing In The Interest Of Justice**

The State asserts that Appellant has not offered any factual background to support Appellant’s interest of justice claims. Out of all assertions, none could be more far-fetched.

**Appellant's Postconviction Petition, Memorandum And Brief:** A review of Appellant's case shows that there are exceptional circumstances why Appellant's case warrants a new trial, or an evidentiary hearing.

- Search warrant had known misrepresentations.
- Witnesses were told, and later retold in a secret way, not to talk to Appellant's defense investigator.
- It took a hearing to make the State comply with discovery rules.
- Appellant's attorney-client calls were monitored and recorded by the State.
- Appellant's counsel stated on record that he wasn't prepared for trial.
- During trial, the State was disclosing evidence that they had well before Appellant's trial, but not disclosed.
- State disclosed evidence just before Appellant was sentenced, and after.
- Appellant's trial and Appellate counsel refused to give Appellant access to discovery which denied Appellant a meaningful review of case.
- During civil depositions, sworn testimony was given which proves the State's witnesses lied about the recording and monitoring of Appellant's calls.
- When file was obtained, hundreds of documents were missing.
- State admits their disclosure sheets are not accurate.

The above issues, combined with all issues found in Appellant's Postconviction petition memorandums and briefs more than adequately shows there are exceptional circumstances in Appellant's case.

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These circumstances started from the beginning of Appellant's case and are still continuing because the State refuses to turn over Al Baker's April 19, 2007, interview he had with Investigator John Sieling. As such, under the interest of justice, Appellant should get a new trial, or at a minimum, an evidentiary hearing.

### Conclusion

Throughout this case, Appellant has, and always will, maintained his innocence in the shooting death of Chad Swedberg on April 13, 2007. To guide Appellant through the judicial process, Appellant hired legal counsel. Immediately thereafter, Appellant's case has spun out of control with discovery documents being withheld; Appellant's calls being recorded and monitored; witnesses were told not to talk to Appellant's defense, etc...

Hoping the above issues were not going to continue, Appellant's case moved forward. However, as trial started, Appellant's counsel told the court he was not prepared. To make matters worse, the State was disclosing evidence on the defense as the trial was going on, though they had the evidence well before trial. This also rendered Appellant's counsel ineffective as well. Amazingly, after Appellant's trial and sentencing, the State disclosed more evidence, which Appellant's counsel refused to turn over.

Acting with due diligence and facing many hurdles, Appellant was finally able to see discovery, hundreds of pages were missing. As such, Appellant filed motions, which were opposed by the State, to get the missing evidence. In doing so, the State finally admitted their disclosure sheets were not accurate. After review of the documents, evidence was gathered from numerous people and Appellant filed a timely Postconviction petition.



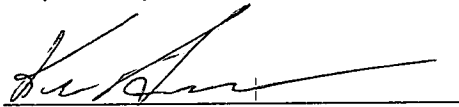
In the postconviction petition, Appellant proved that: witnesses were still being coerced by the State not to talk to Appellant's defense, after being warned of such action, false testimony had been given at Appellant's omnibus hearing and trial by state witnesses, an interview tape had been edited, a State's witness had a racial bias against Appellant, and that Appellant had ineffective assistance of counsel, etc...

In response, the State urged the District Court to disregard Appellant's evidence, also that their disclosure sheets are not accurate, and that Appellant's issues have no merit. In giving hardly any weight, or any at all, to Appellant's evidence, Appellant's postconviction petition was denied.

As such, Appellant respectfully requests this Court to; review Appellant's facts outlined in Appellant's postconviction petition, memorandums and briefs, grant Appellant a new trial, or an evidentiary hearing under fundamental fairness.

Dated: 9/19, 2017

Respectfully submitted



Kenneth E. Andersen (Pro Se)