

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF BECKER

SEVENTH JUDICIAL DISTRICT

Case Type: Criminal

Kenneth Eugene Andersen,

Court File No. 03-CR-07-171

Petitioner,

vs.

State of Minnesota,

Respondent.

**STATE'S MEMORANDUM OF LAW  
FOLLOWING EVIDENTIARY  
HEARING AND IN OPPOSITION  
TO MOTION TO EXPAND  
RECORD**

TO: The above-named defendant and defendant's attorney, Zachary A. Longsdorf, Longsdorf Law Firm, P.L.C., 5854 Blackshire Path, Suite 3, Inver Grove Heights, MN 55076.

**INTRODUCTION**

The State of Minnesota submits this memorandum of law to address the evidence presented at the evidentiary hearing on October 23, 2018, and in opposition to the motion to expand the record. This memorandum is complementary to the State's Answer to the postconviction petition, the State's Memorandum of Law in support of the Answer, the State's Memorandum of Law in Opposition to Motion to Amend Petition, and the State's Memorandum of Law in Opposition to Motion to Clarify and Amend. The arguments in those documents are incorporated herein by reference.

**STATEMENT OF THE FACTS**

In September 2016, Petitioner filed a petition seeking postconviction relief in which he alleged 16 pieces of newly discovered evidence. Docs. 155, 156. In its Answer, the State asserted that the petition was untimely, Andersen had not established any exception to the two-year time limits in the postconviction statute, and the claims were procedurally barred.

Doc. 176. The State also asserted that even if considered, the claims in the petition lacked merit and did not provide a basis for postconviction relief.

In an order filed on March 1, 2017, this Court summarily denied the petition. Doc. 195. This Court found that the petition was untimely and each piece of alleged evidence failed in establishing the exception for newly-discovered evidence. Doc. 195, p. 7, 19.

On appeal, the Minnesota Supreme Court affirmed in part, reversed in part, and remanded for further proceedings. *Andersen v. State*, 913 N.W.2d. 417, 419 (Minn. 2018).

This petition was based on 16 pieces of alleged newly-discovered evidence. *Id.* at 421. The supreme court held that this Court erred when it decided the credibility of two affidavits (the Weaver and Bellanger affidavits) without holding a hearing. *Id.* at 423. Accordingly, the supreme court held a “prophylactic reversal” was required as to those affidavits and directed this Court: “On remand, the postconviction court must assume that the facts alleged in the Bellanger and Weaver affidavits are true, construe them in the light most favorable to Andersen, and then assess whether, under Minn. Stat. § 590.04, subd. 1, an evidentiary hearing is required.” *Id.* at 424 (footnote omitted). Because the court was reversing “prophylactically,” it specifically did not decide whether the facts alleged in the Weaver and Bellanger affidavits were sufficient to satisfy any exception to the two-year time limit on postconviction petitions. *Id.* at 424 n.6.<sup>1</sup> Apparently the supreme court failed to recall that this Court had already done just that when it found that “even if the Petitioner was able to prove the truth of the above evidence, it would not

---

<sup>1</sup> The supreme court stated that one of the facts alleged in the Bellanger affidavit was that Al Baker had received two calls on the day of Swedberg’s funeral from somebody claiming to have killed Swedberg. *Andersen*, 913 N.W.2d. at 423. The supreme court also found this same fact did not satisfy an exception to the two-year time limitation because Andersen knew about it before his second postconviction petition. *Id.* at 425.

show clear and convincing proof of his innocence as required by Minn. Stat. § 590.04, subd. 4(a)(b).” Doc. 195, p. 19.<sup>2</sup>

Nonetheless, this Court held a hearing to determine the credibility of the assertions in the Weaver affidavit and the remaining assertions in the Bellanger affidavit.

### ARGUMENT

Initially, Andersen argues the wrong standard in his memorandum of law. He argues he is entitled to relief under the test for obtaining a new trial based on newly-discovered evidence from *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997) and the *Larrison* test for recanted testimony. But he hasn’t gotten to that stage yet. This Court held his petition was untimely and the supreme court affirmed that holding. *Andersen*, 913 N.W.2d at 424. His petition can only proceed if he first satisfies one of the exceptions to the time limit. *Id.*; *Roby v. State*, 808 N.W.2d 20, 26 n.5 (Minn. 2011). The question here then is whether he has satisfied the newly-discovered evidence exception in Minn. Stat. § 590.01, subd. 4(b)(2).<sup>3</sup>

#### I. THE REMAINING STATEMENTS IN THE BELLANGER AFFIDAVIT ARE NOT CREDIBLE.

This Court “is in the best position to judge the credibility of the witnesses and make determinations in the face of conflicting testimony.” *Braith v. Fischer*, 632 N.W.2d 716, 720 (Minn. Ct. App. 2001). The district court is able to observe the witnesses as they testify in the context of the entire proceeding. *In re A.D.*, 535 N.W.2d 643, 648 (Minn. 1995).

Bellanger is the defendant’s mother and she loves him. T. 78, 83-84. Bellanger believes wholeheartedly that Andersen’s conviction is a travesty of justice and she has been working very hard to get the conviction overturned. T. 84. When asked who she thought killed Chad Swedberg, she responded that Tommy Covington and Al Baker came to mind. T. 84. She

---

<sup>2</sup> It appears the Court meant to cite to Minn. Stat. § 590.01, subd. 4(b)(2).

<sup>3</sup> The supreme court rejected his claim under the interests-of-justice exception. *Andersen*, 913 N.W.2d at 428-29.

admitted she initiated the investigation that led to the affidavits at issue. T. 85-86. Bellanger admitted that she did not report the statements to law enforcement because she does not trust them. T. 88-89.

There are three statement from the Bellanger affidavit that remain at issue. Doc. 324, p. 6.

1. Baker told her that on the day of the murder, Baker actually arrived at Swedberg's house earlier than he told the police and that he had seen Kenneth Andersen come out of Swedberg's house earlier. Bellanger affidavit, p. 1, lines 13-17.

Baker was 83 years old at the time of the hearing. T. 56. He acknowledged that he was having some problems with his memory over the last couple of years. T. 63-64. Baker testified he could not recall telling Bellanger that he had seen Andersen coming out of the house that morning. T. 63. In light of Bellanger's obvious bias in favor of her son, her interest in overturning her son's murder conviction, her state of mind that Al Baker is a potential suspect, and Baker's memory problems, Bellanger's claim that this was exactly what Baker said to her is not credible.

Moreover, this is inconsistent with Andersen's own testimony. At the hearing, Andersen testified that he was at his home until he went to his sister's home. T. 101-02. Andersen agreed that he called Riggle and Haverkamp at 9:34 a.m., they met him at his sister's home, and they all left from there. T. 101, 103-04. At that time, Baker had not yet arrived at Andersen's home - Baker was just driving up as they left. T. 104-05.

It is far more likely that if Baker said anything like this at all to Bellanger, it was about seeing Andersen at his sister's home at that point in time; but filtered through Bellanger's bias in favor of her son, she reports it in the manner she did. Bellanger's statement about what Al Baker said is simply not credible.

2. Lisa Swedberg told her that Baker creeps her out ever since Baker told her he heard voices telling him to kill Chad. Bellanger affidavit, p. 2, lines 1-3.

Bellanger really could not recall when the conversation took place. T. 78-79. She admitted that she went to Lisa and Ken Swedberg's house to talk about Chad's murder. T. 79.

Baker denied telling Lisa Swedberg that voices in his head told him to shoot Chad Swedberg. T. 58, 64-65.

Lisa Swedberg denied that Al Baker told her voices in his head told him to shoot Chad Swedberg, or that she told that to Bellanger. T. 73-74. Lisa Swedberg testified that if Baker had said something about that, she would have reported it to the attorneys or the police, and probably her husband too. T. 74-75. Kenneth Swedberg testified that Lisa did not tell him that Al Baker had said to her that voices in his head told him to kill Chad Swedberg. T. 116. Lisa Swedberg candidly admitted that Baker did make her uneasy, but because he was "just one of those guys that seemed like he looked right through you." T. 73, 75.

Being Chad Swedberg's sister-in-law, and having an uneasiness about Al Baker, Lisa Swedberg had every incentive to report to law enforcement and at least her husband that Baker confessed to the murder. Bellanger's claim that Lisa Swedberg said this to her is simply not credible.

3. Kenneth Swedberg and Lisa Swedberg mentioned something about Baker confessing to the crime. Bellanger affidavit, p. 2, lines 3-4.

Baker denied that anybody ever confessed to murdering Chad Swedberg to him. T. 65. Lisa Swedberg said she could not recall Baker telling her that somebody confessed to Chad's murder. T. 76. She also denied telling Bellanger that Baker had said that. T. 76.

Kenneth Swedberg, Chad Swedberg's brother, testified that he took notes of the conversation with Bellanger. T. 112-13. Those notes reveal that there was an initial

conversation with Bellanger on January 24, 2009. T. 113-14. Kenneth Swedberg said that in the conversation, Bellanger seemed like she wanted to prove her son innocent. T. 114-15. Kenneth Swedberg denied that Baker confessed to the murder to him, or that Baker told him somebody had confessed to him. T. 115. He also denied that he told Bellanger that Baker had confessed to the murder or that Baker had obtained a confession to the murder. T. 115-16. Kenneth Swedberg added that if Baker had confessed or obtained a confession, Kenneth would have reported it to the police right away. T. 116. Kenneth Swedberg explained that Bellanger tried to have another conversation about Chad's murder later, in the summer, but he refused to discuss it more. T. 115.

Again, Kenneth Swedberg had every incentive to report such information to law enforcement at the time. Moreover, Kenneth Swedberg took notes of the conversation, which helped refresh his recollection about the conversation. Bellanger has no such assistance. Rather, she is reporting these alleged statements many years later, without being able to recall when the conversation was. Kenneth Swedberg's recall of the conversation is much more reliable.

Andersen asserts in his memorandum of law, p. 9, that Baker told Agent Bauman he found shell casings. He cites to Exhibit 8. This is not entirely accurate. According to that report, Baker said he believed he found shell casings, but also indicated he may not have observed shell casings.<sup>4</sup>

At the hearing, Baker denied finding shell casings out in the woods. T. 60. Baker admitted that he had gone back out into the woods after Chad Swedberg's murder, but he never found any shell casings. T. 61. When asked if they had a recording of him saying that he did, Baker said he would not dispute it. T. 62. Andersen did not produce such a recording at the

---

<sup>4</sup> Andersen repeats this mischaracterization later in his memorandum, p. 34, when he claims Baker admitted that he "found shell casings at the scene of the crime." More unsubstantiated is his claim on page 35 that Baker "found but did not disclose" shell casings.

hearing or play it for Baker. Baker testified that if he would have found shells in the woods, he would have turned them over to law enforcement. T. 66.

Jesse Fain testified that he and Baker had gone out in the woods at some time after Chad's murder and, looking around, they found some cigarette butts. T. 139. Jesse Fain denied that they ever found any shotgun shells. T. 139-40. Upon a leading question from defense counsel, Jesse Fain said they probably talked with investigators about finding the cigarette butts. T. 140. Jesse Fain clarified that he could not recall how long after Chad's murder they found these cigarette butts. T. 140.

## **II. THE STACY WEAVER AFFIDAVIT PROVIDES NO BASIS FOR RELIEF.**

### **A. The Claims In The Stacy Weaver Affidavit Are Not Credible.**

Despite saying he was not there to "lie for nobody," Weaver admitted that he was "pretty shaken up," "just shook up," and "pretty shook up." T. 41, 10, 15, 33. His demeanor on the witness stand was of somebody who was not comfortable with reporting this under oath.

Weaver claimed that the same day he found out about Chad's murder, he saw Jesse Fain driving a white vehicle, with his mother in the passenger seat, and a bigger, husky guy in the back seat at the intersection of highway 21 and Bear Clan Drive. T. 24-25, 29, 31. Weaver thought the vehicle was white, but added he did not know if it was a Geo Metro. T. 25. When asked on direct if it was a car or SUV, he admitted he really could not say that part – he could only say it was white. T. 25. When asked if it was light out, Weaver said it was "breaking daylight." T. 28. When asked if the sun was up, Weaver said: "When you're up early in the morning and you see daylight, that's the way it was: but you could see people in the car." T. 28. The car was coming from the east. T. 28. That would mean, of course, that any sunlight there would have been illuminating the back of the car and shining into Weaver's eyes.

During cross-examination, Weaver was asked about his affidavit in which he said the vehicle was a Geo Metro. Weaver said it could have been a white Tracker, but he thinks it was a Geo Metro. T. 39.

Strikingly, Weaver surmised from Leslie Fain's posture that it was possible she was trying to avoid being seen. T. 30, 40. This take on the evidence shows his mindset about the matter. He explained, "I don't know if they knew when I was going out there – me and Joel Heisler were going out there that morning." T. 30. This is apparently a reference to plans Weaver and Heisler supposedly had to go back to Chad Swedberg's to look at another vehicle. T. 13. Heisler, however, had no recollection of a plan to go back the next day to look at a Suzuki Sidekick. T. 47. Heisler added that he did recall the Sidekick though because "Chad" used it to drive to work every day. T. 47.

Weaver's claim that he saw these three individuals on the same morning as Chad Swedberg's murder is not credible. Leslie Fain denied being in a vehicle that morning as Weaver described. T. 52. She reaffirmed the truth of her trial testimony. T. 53.

Leslie Fain's brother could not have been with her that morning. Leslie Weaver explained that she has three brothers, and on the day of Chad's murder, one brother was in basic training in South Carolina, one brother was in the State of Washington, and her adopted brother, Steven Creed, was working in Hawley, Minnesota. T. 53-54. She said that at the time of Chad's murder, her brother Steven weighed about 500 pounds, but her other brothers were not that big. T. 54. Her brother, Steven Creed, fits Weaver's description of the person in the back seat.

Steven Creed testified that at the time of Chad Swedberg's murder, Creed was living in Hawley, Minnesota, about 45 minutes away. T. 108. He testified that he had to be to work at 5:30 a.m. and remained there all day. T. 108. Creed recalls the day of Chad's murder because his mother called him that day and informed him. T. 108. On that day, Creed weighed

678 pounds. T. 108. Creed denied that he was in a white Geo Metro with his mother and Jesse Fain on the morning of Chad's murder at the intersection Weaver described. T. 109. Creed testified he could not fit in a car that small – he “can't even fit in my mom's Escort.” T. 109.

Jesse Fain denied that on the morning of Chad Swedberg's murder he was in a white Geo Metro with his mother and one of her brother's. T. 130-31. On that day, he did not own a white Geo Metro. T. 131. Jesse Fain testified that on the day of Chad Swedberg's murder, he owned a white Kia Sportage, which was a mid-sized SUV. T. 131.

Jesse Fain explained that about two years later he bought a white Geo Metro. T. 131-33. The Court received into evidence as Exhibit 9 a packet of paperwork establishing that Jesse Fain bought the white Geo Metro on August 26, 2009. T. 133. The paperwork also shows that Jesse Fain purchased the Kia in 2005. T. 133. Jesse Fain further explained that after he bought the white Geo Metro, there were times when Stacy Weaver would have seen him driving around in the Geo Metro: this would have happened “[p]retty regularly.” T. 134. Indeed, Weaver admitted that he has seen Jesse Fain riding through town off and on with his mother. T. 11.

Andersen failed to establish that Jesse Fain could have been at two places that morning. Kenneth Swedberg saw Jesse Fain leave for work at 7:30 a.m. T. 117. Jesse Fain testified that he left for work at “around 7:30 [in the morning] or thereafter.” T. 135. He said he arrived at work at “[m]aybe twenty to, quarter to. I'm not too sure. It doesn't take too long.” T. 135.

Three witnesses who worked with Jesse Fain on the day of Chad Swedberg's murder all testified that Jesse Fain was at work that morning. Joan LaVoy testified that she walked into the building with Jesse Fain at about 7:35 or 7:40 a.m. T. 120. Karl Biederman testified that when he arrived at work between 7:30 and 8:00 a.m., Jesse Fain was already at work. T. 123-24. Leslie Nessman testified that when she arrived at work at 8:05 a.m., Jesse Fain was already there.

T. 127. She recalled that at the time, Jesse Fain drove a white Geo Tracker to work. T. 127. Jesse Fain testified that he saw each of these people at work that morning. T. 135. Jesse Fain testified that he left work that day, after receiving a frantic call from his wife, at about 10:00 a.m. T. 135-36.

Andersen appears to contend that Jesse Fain could have been in the car as Weaver claims and also left for work at 7:30 a.m. It is Andersen's burden to prove that he is entitled to relief. He failed to do that. Weaver claimed when he saw the Fains in the vehicle, it was "breaking daylight," with enough sunlight to see people in the car. In his memorandum, Andersen asserts that sunrise on that day was at 6:40 a.m. The State objects to the Court considering this evidence, as it was not offered at the hearing. Even so, Andersen did not establish at the hearing that Jesse Fain could have been where Weaver claims sometime after 6:40 and leaving his house at 7:30. That was his burden.

Weaver's claim that he saw the Fains in this vehicle on that particular day more than 11 years ago is simply not credible. It is far more likely that Weaver is creating this scene out of an interest in helping Bellanger and Andersen. It is possible he saw Jesse Fain, Leslie Fain, and some other individual in the white Geo Metro Jesse Fain bought two years after Chad Swedberg's murder on some other date, and he is transposing that scene upon the day of the murder. But he did not see that on the morning of Chad Swedberg's murder.

In an attempt to bolster Weaver's claim that it was the day of Chad Swedberg's murder, Andersen offered Weaver's testimony about buying a van from Chad Swedberg the night before. There are two problems with this.

First, the proof of this actual purchase is slight, at best. Weaver claimed that the evening before Chad Swedberg's murder, he bought a van from Chad Swedberg. T. 12, 14. Weaver admitted that he only dealt with Chad – he did not see or speak to Leslie Fain and Leslie Fain

never came out of the house. T. 16-17. He also admitted that the van was parked in the weeds over on one side of the property. T. 18, 20.

Leslie Fain could not recall Weaver and Heisler coming to the house and buying a van from Chad Swedberg. T. 49-50. Leslie Fain added that she never saw a “yellow van parked in my parking lot.” T. 50. Leslie Fain testified that Chad “did what he did” and she was not “always aware of where he got his money.” T. 50. Fain added that they had lots of cars in the back that she never paid attention to because the cars were not hers. T. 51. Leslie Fain denied they owned a white vehicle on the day of Chad’s murder. T. 51-52.

Jesse Fain testified he could not recall there being a yellow van on Chad and Leslie’s property around the time of Chad’s murder. T. 141

Second, even if Weaver bought a van from Chad Swedberg the night before the murder, this does not establish that it was the next morning Weaver saw Jesse Fain, Leslie Fain, and her brother in a car Jesse Fain did not own for another two years. Weaver still would have to have perfect recall 11 years later that it was the morning after this purchase that Chad Swedberg was murdered.

Andersen’s counsel’s statement in the memorandum of law, p. 16, that Leslie and Jesse Fain “completely disavowed any knowledge of Chad Swedberg ever owning or selling a Ford van,” which is false testimony that can be “easily disproven.” This is not accurate either. First, Leslie Fain testified she did not see a yellow van parked in her parking lot – Weaver claimed it was off to the side, in the weeds - but admitted that they had lots of vehicles and she did not keep track of them all. Jesse Fain said he could not recall such a van. Second, Andersen fails to explain how he could easily disprove Leslie Fain’s and Jesse Fain’s knowledge about whether Chad Swedberg “ever owning or selling a Ford van.” That is not what they were asked about, and Andersen offers nothing that could prove their knowledge false.

**B. Even If True, Weaver's Statement Is Only For Impeachment.**

Because Andersen's petition was untimely, he has to establish the newly-discovered evidence exception to the two-year time limit. Minn. Stat. § 590.01, subd. 4(b)(2). That exception cannot be met with evidence that is for "impeachment purposes." *Id.* Weaver's claim about seeing Jesse and Leslie Fain in a vehicle that morning – before Chad Swedberg's murder – could only be used to impeach Leslie's testimony that she was home that morning. There is no other possible purpose for this testimony; it does not place them near the scene of the murder or otherwise implicate them in the murder. Nor does it independently exculpate Andersen. Thus, even if Weaver's claim was true, it could not satisfy the newly-discovered evidence exception.

**III. The Motion To Expand The Record Should Be Denied.**

First, the State objects to Andersen simply submitting a unilateral affidavit and statements with his memorandum of law. The hearing was an evidentiary one; that was when evidence was to be submitted and cross-examined. The State asks the Court to disregard the additional submissions and statements.

On August 15, 2018, this Court scheduled the hearing for October 23, 2018. Andersen had more than two months to prepare for the hearing. He should have had any evidence he believed he needed at the hearing. This Court should not have to schedule serial hearings until Andersen is able to offer all the evidence he thinks of as the case goes along.

More importantly, the evidence he intends to offer, apparently, regarding the van is not going to change anything. That evidence would not establish that the van purchase occurred the night before Weaver supposedly saw the Fains in a vehicle Jesse Fain had not purchased for another two years. It would not support the accuracy of Weaver's claim of seeing them in that vehicle at all. And the evidence would not change the fact that Weaver's claim is for impeachment only and cannot establish the newly-discovered evidence exception.

**CONCLUSION**

For all the foregoing reasons and the arguments in the State's Memorandum of Law in support of the Answer, this Court should deny the postconviction petition.

Dated: December 21, 2018

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, Minnesota 55101-2134  
(651) 757-1448 (Voice)  
(651) 282-2525 (TTY)  
matthew.frank@ag.state.mn.us

ATTORNEYS FOR RESPONDENT