STATE OF MINNESOTA DISTRICT COURT

COUNTY OF BECKER SEVENTH JUDICIAL DISTRICT

Kenneth Eugene Andersen,

Petitioner,

Case No. 03-CR-07-171

PETITIONER'S POST HEARING MEMORANDUM

vs.

State of Minnesota,

Respondent.

INTRODUCTION

The case against Mr. Andersen was entirely circumstantial, with the trial judge admitting he "struggled" with Mr. Andersen's motion for a directed verdict. (T. 2770). On direct appeal Justice Page, writing in concurrence, stated "Although, on the record before us the answer to that question is a close one, I believe that the totality of the remaining evidence is sufficient to establish Andersen's guilt beyond a reasonable doubt." (T. 2770; *State v. Andersen*, 784 N.W.2d 320, 325, 330 (Minn. 2010). In the end, the jury apparently believed the testimony and evidence presented was sufficient to show Mr. Andersen's guilt, because it found him guilty of the first-degree murder of Chad Swedberg.

However, sometime in late 2014, Mr. Andersen learned of the existence of a witness who claimed to have seen Leslie Fain, Jesse Fain, and a third individual he believed to be Leslie Fain's brother traveling in a white car on the morning of Chad's death. This resulted in Mr. Andersen retaining a private investigator to obtain a statement from that witness and to investigate other information Mr. Andersen had learned only after being provided access to his

file and discovery from his case. The results of this investigation were presented in Mr. Andersen's petition for postconviction relief and resulted in an evidentiary hearing related to the witness who saw Leslie and Jesse Fain on the morning of Chad's death and statements made by Al Baker. Testimony related to this newly discovered evidence from witnesses with potentially relevant information was presented to the Court on October 23, 2018.

The testimony from that hearing, if true, puts Leslie and Jesse Fain in a location they could not have been if their trial testimony was true, and calls into question the very timeline of events which were alleged to support Mr. Andersen's guilt. The hearing also resulted in testimony indicating the existence of previously undisclosed evidence of witnesses finding shell casings and cigarette butts near the scene of the shooting, and raised serious questions about the veracity of testimony given at trial by certain witnesses and the completeness of the investigation.

Given the circumstances under which Mr. Andersen was tried, the specific knowledge Mr. Weaver possesses, along with the supporting evidence corroborating Mr. Weaver's testimony, and, because of revelatory testimony related to previously undisclosed evidence, Mr. Andersen respectfully requests that this Court issue an Order granting him a new trial where he is tried before a jury informed of all the relevant circumstances.

Mr. Andersen also requests that he be allowed to supplement the record with additional evidence obtained as a result of the evidentiary hearing. This evidence is necessary and proper in this matter due to testimony given by witnesses Mr. Andersen did not have access to outside of subpoenaing them to the evidentiary hearing, and goes directly to the credibility of Stacy Weaver and Mr. Andersen's claims based on his testimony. A separate motion has been filed.

FACTS

The testimony of Stacy Weaver.

The first witness at the evidentiary hearing was Stacy Weaver. (10-23 T. 7). Mr. Weaver testified that he knew Mr. Andersen and Chad Swedberg only incidentally. (10-23 T. 9-10). Mr. Weaver also knew Leslie Fain because his mother used to date her uncle. (10-23 T. 10). Mr. Weaver also knew Jesse Fain and had seen him off and on. (10-23 T. 11). He did not consider any of the above people to be friends, but did know who they were when he saw them. (10-23 T. 11).

Mr. Weaver testified he interacted with Chad Swedberg the day before Chad was killed. Mr. Weaver recalled that he purchased a yellow Ford F-150 van from Chad Swedberg the day before his death. (10-23 T. 12). Mr. Weaver recalled clearly that this transaction took place the day before Chad's death, because he had plans to return the next morning, the same day Chad was killed, to look at another vehicle Chad was interested in selling. (10-23 T. 12)

Mr. Weaver's interactions with Chad Swedberg occurred because he was looking for a van to use in his leeching business. (10-23 T. 9, 12). Mr. Weaver's friend and distant cousin, Joe Heisler, knew that Chad had a van for sale and told Mr. Weaver about it. (10-23 T. 12). Mr. Heisler set up the meeting for Mr. Weaver to look at the van. (10-23 T. 13).

It was toward evening when Mr. Weaver and Mr. Heisler went to look at the van. (10-23 T. 13). Mr. Weaver paid $150.00 in cash to Chad Swedberg and Chad gave him the title. (10-23 T. 14). However, Mr. Weaver never filed the title to the vehicle because after he learned of Chad's death, he did not want anything more to do with the van. (10-23 T. 15). Mr. Weaver later sold the van to his brother, Brad Weaver, who got it running and sold it. (10-23 T. 15).

Mr. Weaver and Mr. Heisler pulled the van home with Joe Heisler's truck the night Mr. Weaver bought it. (10-23 T. 15). However, before towing the van to Mr. Weaver's house, Mr. Weaver and Mr. Heisler had to run to Mr. Weaver's house to get an air compressor to fill a flat tire on the van. (10-23 T. 16). Chad told Mr. Weaver he needed money from the van sale for mapling, since it was mapling season. (10-23 T. 17).

Mr. Weaver believed the other vehicle he planned to return to look at was an Isuzu or Ford Tracker, but is not sure now exactly what it was. (10-23 T. 17, 38-39). He did not look at it the night he bought the van because it was getting dark, but he did talk to Chad and Joe about coming back the next morning to take a look at it. (10-23 T. 17). Mr. Weaver understood that vehicle needed some work as well. (10-23 T. 17). Mr. Weaver, using Hearing Exhibit 5, was able to show where the van was located on the Swedberg property before he and Mr. Heisler towed it away. (10-23 T. 21). The photograph offered as Exhibit 5 was taken within days of Chad's death, and the van was not present in the photograph.

On the morning of Chad's death, Mr. Weaver got up early, probably a little after 6 a.m. (10-23 T. 22). It was his intention to go look at Chad's other car that morning before Chad went out mapling. (10-23 T. 22-23). Joe Heisler called to ask if he was ready to go not long after he got up. (10-23 T. 22). Not long after that, Mr. Weaver's mother called him and asked for a ride to Moorhead. (10-23 T. 23). She offered him $100.00 and he agreed to give her a ride. (10-23 T. 23). Mr. Weaver then went to get his mother. (10-23 T. 23).

Not long after leaving his home, Mr. Weaver saw a white car passing on Highway 21. (10-23 T. 24, 40). Jesse Fain was driving the car, Leslie Fain was in the passenger seat, and a man Mr. Weaver believed was Leslie Fain's brother was in the middle of the back seat. (10-23 T. 24, 40). Mr. Weaver described the man in the middle of the backseat as a short biker guy.

(10-23 T. 24). Mr. Weaver described the timing of this incident as being around the breaking of daylight. (10-23 T. 28).

Mr. Weaver is not sure of the exact make and model of the vehicle, but knows it was a white Metro-like vehicle. (10-23 T. 25, 38). It was light when Mr. Weaver saw the white car. (10-23 T. 28). It was the only car that went by. (10-23 T. 28). The white car went from his left to his right. (10-23 T. 28). Mr. Weaver believes that Leslie Fain was ducking down and trying to cover her face as the car went by. (10-23 T. 29). He recalls seeing Leslie Fain's glasses. (10-23 T. 29).

After the white car went by, Mr. Weaver turned and followed it toward Ogema. (10-23 T. 30). Mr. Weaver followed the car for a couple blocks and then stopped at his mother's. (10-23 T. 30). After getting his mother, she and Mr. Weaver went to the bank in Moorhead, then went to Mahnomen to cash her check, and then back home. (10-23 T. 30-31).

When Mr. Weaver returned home, he intended to find Joe Heisler and go to Chad's to look at the other car, but he learned Chad had been killed. (10-23 T. 31). According to Mr. Weaver, Mr. Heisler called Chad a few times, but Chad did not answer. (10-23 T. 31). Joe said he tried to call Chad a couple times but Chad didn't answer. (10-23 T. 31).

Mr. Weaver stated that he told a few people about what he saw that morning shortly after Chad's death, but not many. (10-23 T. 38). He didn't think people believed what he said back then. (10-23 T. 38). Mr. Weaver did not talk with law enforcement about this because they did not come to him and he did not know who to see or talk to about it, though had he been approached, his story would have been the same as it was today. (10-23 T. 40-41). He also stated that he did not know who killed Chad Swedberg, that he did not know if it was important

that he saw Leslie or Jesse Fain that morning, and that he was not going to lie for anyone. (10-23 T. 40-41).

Mr. Weaver also testified about talking to an investigator for Mr. Andersen. The investigator found him. (10-23 T. 32). Mr. Weaver also recalls talking with Mr. Andersen on the phone about this one time. (10-23 T. 42). It was right about the same time the investigator came out to see him. (10-23 T. 41). Mr. Weaver stated he was not threatened or offered anything, he was just there to say what he had seen. (10-23 T. 33).

Mr. Weaver also talked to a law enforcement investigator and John McArthur. (10-23 T. 32). Mr. Weaver never said anything to the police before they came out after he signed the affidavit. (10-23 T. 33). After he provided the affidavit and met with law enforcement, Mr. Weaver got several phone calls he believed were related to the affidavit, which said "You fat fucker, keep your mouth shut." (10-23 T. 34).

The testimony of Joe Heisler.

Joe Heisler is friends with, and a cousin to, Stacy Weaver. (10-23 T. 44). Mr. Heisler knew both Mr. Andersen and Chad Swedberg and considered both to be his friends. (10-23 T. 45). He also knew Leslie and Jesse Fain. (10-23 T. 46).

Mr. Heisler vaguely recalls going with Mr. Weaver to purchase a van from Chad Swedberg. (10-23 T. 46). His memory was not clear, but he recalled the van being a large conversion type van. (10-23 T. 46). Mr. Heisler does not recall the specific details of looking at the van with Mr. Weaver, but does recall a Suzuki Sidekick Chad owned. (10-23 T. 47). Mr. Heisler later came to own that Sidekick, which was given to him after Chad's death. (10-23 T. 47).

Finally, Mr. Heisler's phone number was 218-204-0234. (10-23 T. 47). He agreed that if Chad Swedberg's phone records showed a call from that number back in 2007, the call would have been from him. (10-23 T. 47).

The testimony of Leslie Fain.

Ms. Fain acknowledged she knew Stacy Weaver, stating his mother used to date her uncle. (10-23 T. 49). Ms. Fain also knows Joe Heisler. (10-23 T. 49).

Ms. Fain went on to deny knowing anything about Chad selling a van to Mr. Weaver. (10-23 T. 49). She claimed to not even recall Chad having a van, let alone a yellow van. (10-23 T. 49). She stated she never saw a yellow van parked on their property. (10-23 T. 50). Ms. Fain also has no recollection of someone coming out with an air compressor and taking the van. (10-23 T. 50). Ms. Fain also claimed that she was not aware of Chad being paid for the van, and stated "Chad did a lot of jobs he got money for. I wasn't always aware of where he got his money." (10-23 T. 50).

Ms. Fain went on to state that she didn't really pay attention to all the cars on the property, because there were lots of them, and they were not her cars. (10-23 T. 50-51). She stated Chad and Kenny had lots of cars in the back lot. (10-23 T. 51). Ms. Fain was also unable to recall what vehicle Chad was driving at the time of his death. (10-23 T. 51). She does recall a Suzuki Sidekick, however. (10-23 T. 51). Ms. Fain also denied having any kind of gathering at her house on the night before Chad's death. (10-23 T. 54-56).

Ms. Fain's testimony regarding her lack of knowledge of how and where Chad earned his money was in contradiction to her trial testimony on this subject. For example, during her trial testimony, Ms. Fain stated that she handled the finances and money for the couple (T. 1021-22),

and stated that it was not possible for Chad to have spent $125 or $250 purchasing a gun from Mr. Andersen without her knowledge. (T. 974).

Ms. Fain denied that anyone living at her home at the time of Chad's death owned a white vehicle of any kind. (10-23 T. 51-52). Ms. Fain also denied being in a vehicle near Bear Clan road on the morning of Chad's death, stating she was home getting ready for work. (10-23 T. 52). Ms. Fain admitted wearing glasses all the time in 2007. (10-23 T. 52).

On cross, Ms. Fain stated her trial testimony was truthful. (10-23 T. 53). She also stated she had three (3) brothers, two blood related and one by adoption. (10-23 T. 53). Steven Creed was living in Hawley. (10-23 T. 53). One other brother was in South Carolina "or something" and the other in the State of Washington. (10-23 T. 53-54). Steven weighed about 500 pounds back in 2007. (10-23 T. 54).

The testimony of Albert Baker.

Mr. Baker was called in relation to certain statements he was alleged to have made to Geraldine Bellanger, Lisa Swedberg, and Mr. Andersen's investigator. The substance of his testimony is as follows:

Mr. Baker admitted he knew Lisa Swedberg and that he knew she was Chad Swedberg's sister in law. He agreed that the last time he spoke with Kenneth and Lisa Swedberg was at Chad's funeral. (10-23 T. 57). However, he denied telling Lisa Swedberg that the voices in his head told him to kill Chad and denied that he heard any voices in his head. (10-23 T. 58, 64-65).

Mr. Baker was also questioned about a statement he made to both Mr. Andersen's investigator and to Agent Bauman that he had found shell casings near where Chad was shot. Mr. Baker denied that he found any shell casings. (10-23 T. 60). He also denied telling Mr.

Andersen's investigator that he found shell casings. (10-23 T. 60). He also denied that he told Agent Bauman he found shell casings. (10-23 T. 60-61).

Mr. Baker also denied that he was ever in the woods by Chad's house after Chad was shot. (10-23 T. 61). However, on further questioning, he admitted that he had gone back into the woods to see what "they" were doing, but said he did not stay long. (10-23 T. 61). Despite acknowledging that he had been in the woods, Mr. Baker continued to deny seeing shell casing or telling anyone about them. (10-23 T. 61).

Despite his inability to recall nearly anything he had ever said or done, Mr., Baker did agree that if there was a recording of him stating that he found shell casings, he must have said that to Agent Bauman. (10-23 T. 61-62). Mr. Baker did give a recorded statement in which he told Agent Bauman he found shell casings. (See Exhibit 8 – Baker Police Report). A recording of this exists.

Mr. Baker was also questioned about the information provided in the Affidavit of Geraldine Bellanger, related to his statement to Ms. Bellanger that he had been at the scene earlier than he told police and had seen Mr. Andersen coming out of Chad Swedberg's house. Mr. Baker initially denied knowing Geraldine Bellanger. (10-23 T. 62). However, he eventually agreed that he knew who she was, but said he was not real familiar with her. (10-23 T. 63).

Mr. Baker went on to state that Geraldine was probably not telling the truth if she said she had talked to him about Chad's death because he couldn't remember talking to her. (10-23 T. 63). He also denied ever telling Ms. Bellanger that he was at the scene earlier or that he saw Mr. Andersen coming out of Chad's house. (10-23 T. 63).

On cross, Mr. Baker claimed he could not recall talking with either police or Mr. Andersen's investigator. (10-23 T. 64). He also could not remember testifying at trial. (10-23 T.

64). However, he does recall that the day Chad got shot he stopped and got lunch in Waubun in the morning. (10-23 T. 65-66). By the time he got there, Leslie was already frantic and screaming. (10-23 T. 66). Mr. Baker also stated he would have turned shell casings over to law enforcement if he found them. (10-23 T. 66).

On re-direct, Mr. Baker denied driving his Camaro to the grocery store on the day of Chad's murder. (10-23 T. 67). However, he did agree that he went to the store go get lunch. (10-23 T. 67-68). He also agreed that he got sunburned waiting at Chad's house, that he told investigators he was hungry when they got to him, and that he forgot to bring his insulin with him that day. (10-23 T. 68).

The testimony of Lisa Swedberg.

Ms. Swedberg was questioned about a conversation she had with Al Baker. Ms. Swedberg stated the last time she talked to Mr. Baker was at Chad's funeral. (10-23 T. 72). She denied that Al Baker ever told her the voices in his head told him to kill Chad. (10-23 T. 73). She also denied ever telling Geraldine Bellanger that Al told her about voices in his head. (10-23 T. 73). However, she did state it was likely that she told Ms. Bellanger that Al Baker freaked her out, because he did freak her out the way he looked at her. (10-23 T. 73). Finally, Ms. Swedberg stated that if Al Baker had said anything like that, she would have told the police or someone. (10-23 T. 74).

The testimony of Geraldine Bellanger.

Geraldine Bellanger was called to testify about her conversations with Al Baker and Lisa Swedberg. Mr. Bellanger is the mother of Kenneth Andersen. (10-23 T. 78). She also knows Al Baker and Lisa Swedberg. (10-23 T. 78).

Ms. Bellanger recalls that the conversation with Lisa Swedberg took place on the patio at the Swedberg house. (10-23 T. 78-79). During that conversation, Lisa Swedberg told her that she was creeped out by Al because Al said the voices in his head told him to kill Chad. (10-23 T. 79-80).

Ms. Bellanger also stated that Al Baker told her he was at the Swedberg home earlier than he told police and saw Mr. Andersen coming out of the house. (10-23 T. 82). That is why he thanked Mr. Andersen for not shooting him. (10-23 T. 82).

Ms. Bellanger believes her son is innocent and his conviction is a travesty of justice. (10-23 T. 84). She has been working hard to find evidence to help clear her son. (10-23 T. 84). She hired the investigator for Mr. Andersen. (10-23 T. 85).

On cross, Ms. Bellanger stated she does not believe her conversation with Kenneth Swedberg took place in 2009. (10-23 T. 86). Instead, she thinks the conversation with Kenneth and Lisa took place about four (4) years before she signed the affidavit. (10-23 T. 87). She recalled the specific date for the call with Albert Baker because she had her notes when she told the investigator about that. (10-23 T. 87-88).

It was talking to Al that made her think she wanted an investigator to look into her son's case. (10-23 T. 88). She did not tell the police about what Al said because she has no faith in the police. (10-23 T. 88). Ms. Bellanger is not sure when she told Mr. Andersen about what Al Baker told her, but it wouldn't have been right away and would not have been over the phone. (10-23 T. 89-90). She does not trust the phones after his calls were being recorded before trial. (10-23 T. 90).

The testimony of Kenneth Andersen.

Mr. Andersen first learned Stacy Weaver might have evidence relevant to his case though his mother. (10-23 T. 92). This either happened when Ms. Bellanger visited him in person at Rush City or on the phone. (10-23 T. 92). Mr. Andersen recalled that this conversation took place within about two (2) weeks of when his family retained an investigator to look into his case. (10-23 T. 92-93). While Mr. Andersen is uncertain of the exact date, he was mindful of the two (2) year postconviction filing deadline and made sure that his claims were filed within two (2) years of when he learned of Mr. Weaver's statements. (10-23 T. 93). Mr. Andersen was not specifically aware of what Mr. Weaver would say before the investigator got to him. (10-23 T. 94). Mr. Andersen learned of Al Baker's statements that were at issue in the evidentiary around the same time. (10-23 T. -93-94).

What started this for Mr. Andersen was that he had not initial been allowed to have the discovery in his case when it was going on. (10-23 T. 94). Then, in 2010, when that rule changed, he finally started gaining access to those materials and when he saw the materials were not all there, he started filing motions. (10-23 T. 94-95). Mr. Andersen also started trying to find out if his attorneys had material he had not yet seen. (10-23 T. 96).

Through this, he was able to get ahold of two CDs that contained what was alleged to be his entire file. (10-23 T. 96). Over time in the prison, he was allowed to go through those materials. (10-23 T. 97). He received the first CD just before his first postconviction action and the second CD before his second postconviction. (10-23 T. 97). The second CD is what lead to Mr. Andersen filing a motion to compel. (10-23 T. 98). It was from those materials that Mr. Andersen decided he needed to have an investigator working on his case and that caused him to ask his mother to contact Al Baker. (10-23 T. 97-98).

The investigation that was conducted and the exhibits that were submitted as a result stemmed largely from these documents that Mr. Andersen had never seen before his motion to compel. (10-23 T. 100).

The testimony of Steven Creed.

Mr. Creed lived in Hawley back in April 2007. (10-23 T. 107-08). He worked construction, which would require him to get there at 5:30 a.m., start work at 6:00 a.m. and then work all day through lunch and until about 10 at night. (10-23 T. 108). He learned about Chad's death from his mother after his shift was done. (10-23 T. 108). He weighed 678 pounds in 2007. (10-23 T. 108). Now he only weighs 448 pounds. (10-23 T. 109).

He was not in a white car with Leslie and Jesse Fain on April 13, 2007. (10-23 T. 109). He would not even fit in a small car. (10-23 T. 110).

During cross-examination, Mr. Creed first denied ever bringing up Jesse's white car to police, but then did state that a couple years after, he did weld something on a white car. (10-23 T. 110).

The testimony of Kenneth Swedberg.

Kenneth is Chad's brother. (10-23 T. 112). Everything he testified to at Chad's trial was true. (10-23 T. 112).

He recalls the last time he talked to Geraldine Bellanger because he wrote the date down. (10-23 T. 112-13). That conversation took place on 1/24/09. (10-23 T. 113-14). He cannot recall all they talked about, it was primarily Chad's murder. She wanted to prove Mr. Andersen was innocent. (10-23 T. 114). Al Baker never confessed to killing Chad. (10-23 T. 115).

He does agree that he did have at least one other conversation with Geraldine that took place in the summer. (10-23 T. 115). He never told Geraldine that Al confessed. (10-23 T. 116). He did not ever hear Lisa tell Geraldine that Al confessed either. (10-23 T. 116).

For the very first time, Mr. Swedberg testified that he saw Jesse Fain leaving for work on the morning of April 13, 2007 at around 7:30. (10-23 T. 117).

The testimony of Joan LaVoy.

Ms. LaVoy worked with Jesse Fain on April 13, 2007. (10-23 T. 119). She recalls arriving at work between 7:30 and 7:40 on the day she later learned Chad Swedberg had been killed. (10-23 T. 120). She walked into the building with Jesse Fain. (10-23 T. 120).

Ms. LaVoy thinks she saw Jesse pull in, but then is not sure. (10-23 T. 121). She could not recall the color of his car and does not know what direction he came from. (10-23 T. 120). She did not see Jesse park. (10-23 T. 120). She also does not know anything about what Jesse did before he got to work. (10-23 T. 120).

The testimony of Karl Biederman.

Mr. Biederman worked with worked with Jesse Fain on April 13, 2007. (10-23 T. 123). He got to work sometime between 7:30 and 8:00 that day. (10-23 T. 123). Jesse was already at work. (10-23 T. 123). They shared an office, so he knows Jesse was there. (10-23 T. 124).

Mr. Beiderman knows he got there between 7:30 and 8:00, but is not sure if it was closer to 7:30 or 8:00. (10-23 T. 125). He did not see Jesse driving at all that day and doesn't know anything about what Jesse did before he got to work that day. (10-23 T. 125).

The testimony of Leslie Nessman.

Ms. Nessman worked with Jesse Fain on April 13, 2007. (10-23 T. 126). She recalls getting to work late the day she learned Chad died. (10-23 T. 127). Jesse drove a white "jeepy"

looking thing back then. (10-23 T. 127). She thinks it was a "Geo Tracker." (10-23 T. 127). She parked right next to Jesse's vehicle that day. (10-23 T. 127). She has no idea what time Jesse got to work that day and does not know what he did or did not do before he got to work. (10-23 T. 128).

The testimony of Jesse Fain.

Leslie Fain is Jesse's mother. (10-23 T. 129). At the time of Chad's death, Jesse was living with Chad and Leslie. (10-23 T. 129). His testimony at trial was all true. (10-23 T. 129-30).

Mr. Fain testified he was not driving a car with his mother and Steven Creed on the day of Chad's death. (10-23 T. 130-31). He did not own a white Geo Metro until after that. (10-23 T. 131). At that time, he owned a Kia Sportage and a Chevy Venture van. (10-23 T. 131). The Kia is a white four-door midsized SUV. (10-23 T. 131). He bought the Geo Metro on August 26, 2009. (10-23 T. 133). He bought the Kia Sportage in 2005. (10-23 T. 133). He did not have access to a white Geo Metro on the day of Chad's death. (10-23 T. 134). Mr. Fain stated he left home in his Kia Sportage about 7:30 on the day of Chad's death. (10-23 T. 134-35). He was at work until he got a call from his wife about Chad. (10-23 T.135-36).

Mr. Fain knows Stacy Weaver. (10-23 T. 134). He believes Stacy Weaver saw him in the white Geo Metro "pretty regularly" because he drove it all over White Earth. (10-23 T. 134).

Mr. Fain also testified that after Chad's death the family decided to finish the syrup. (10-23 T. 136). It was everyone at first, then just Jesse sitting there alone. (10-23 T. 136-37). Despite this, Mr. Fain repeatedly denied that he was ever in the area of the syrup camp with Al Baker after Chad's death. (10-23 T. 136-37).

However, after having his recollection refreshed, Mr. Fain did recall that he went back there with Al Baker and looked for evidence. (10-23 T. 139). It was during maple syrup season because there were tools and thermometers out. (10-23 T. 139). They found some cigarette butts that Al Baker found. (10-23 T. 139). However, Mr. Fain said they never found any shell casings. (10-23 T. 140). He would have reported those if he did. (10-23 T. 140).

On cross, Mr. Fain acknowledged that he when he talked to Agent Baumann, he said he and Al Baker thought the cigarette butts showed the location where the shooter had hidden. (10-23 T. 140). Mr. Fain also agreed that this incident occurred within just a few days of Chad's death because it was syrup season still. (10-23 T. 141). Mr. Fain went on to testify that he thinks he mentioned the cigarette butts to law enforcement before his 2016 interview. (10-23 T. 141).

Mr. Fain was also questioned about Chad Swedberg selling a van to Stacy Weaver. Mr. Fain denied knowing anything about Chad or his mother ever owning a Ford van. (10-23 T. 141). He also denied knowing anything about Chad selling a van the day before his death, but did agree that during the night before Chad's death, he and Al were at the sugar bush while Chad went and did something else for a while. (10-23 T. 142).

Additional corroborative evidence related to the Van

Mr. Andersen requests that he be allowed to supplement the record with additional evidence obtained as a result of the evidentiary hearing. This evidence is necessary and proper in this matter due to testimony given by witnesses Mr. Andersen did not have access to and goes directly to the credibility of those witnesses and the accuracy of Mr. Andersen's claims. Specifically, both Leslie Fain and Jesse Fain completely disavowed any knowledge of Chad Swedberg ever owning or selling a Ford Van, which constitutes false testimony that is easily disproven.

This evidence should be considered because it corroborates testimony at the evidentiary hearing and because Mr. Andersen didn't have access to witnesses like Leslie Fain and Jesse Fain and had no way to know they would deny ever having seen a van that Chad drove for months and which sat in their yard. *See Hooper v. State*, 838 N.W.2d 775, 778 (Minn. 2013) (stating that it was not a frivolous argument for the petitioner to argue that evidenced from *Knaffla* barred claims could still be used as corroborating evidence in claims the court did consider).

This evidence includes the Affidavits of Elizabeth Andersen, Paul Beaupre, and Jerry Libby.

In her Affidavit, Ms. Andersen, who is Mr. Andersen's sister, states during the spring that Chad was shot, he parked a yellow and tan Ford Van in her driveway when it broke down. The van, which had a broken rear window, was parked such that it was partially blocking the road past Ms. Andersen's house, so she asked Chad to get the van out of there. Chad and Kenneth then came to her house and Chad worked on the van, trying to get the van running. Ms. Andersen recalls personally speaking with Chad while he worked the van. One day, not long before Chad was shot, the van was there when Ms. Andersen left for work and it was gone when she got home. Exhibit 1- Affidavit of Elizabeth Andresen. Ms. Andersen's affidavit is corroborated by a statement she gave to police just a few months after Chad's death, in which she says he was at her house just a week or two before his death. Exhibit 2 – Elizabeth Andersen Interview Transcript (Bates 2365-66).

In his Affidavit, Jerry Libby states that he recalls seeing a yellow Ford Van in Chad Swedberg's yard. Mr. Libby recalls that while taking meat to Kenneth Swedberg's for

processing, he saw the van in the yard of Chad Swedberg and Leslie Fain. Mr. Libby recalls the van had a broken out back window. Exhibit 3 - Affidavit of Jerry Libby.

In his Affidavit Paul Beaupre provides details of his recollections of seeing both Chad Swedberg and Jesse Fain in a yellow Ford Van. Mr. Beaupre first states that sometime in or around November of 2006, he was putting his icehouse on Norcross Lake near 474th Street, in White Earth. Mr. Beaupre was pushing the icehouse out by hand because his truck was rear-wheel drive only and he did not want to take it on the ice. While he was pushing the icehouse out, Chad Swedberg drove by in a yellow Ford Van. Chad saw Mr. Beaupre and turned around in a driveway and came back to where Mr. Beaupre was. Chad then came out and helped Mr. Beaupre push the icehouse out. Chad then stayed while Mr. Beaupre cut holes in the ice because Chad wanted to see how thick the ice was getting.

In order to cut the holes for spearfishing he was going to do, Mr. Beaupre had to run back to his truck to get the saw. While he was retrieving the saw, Mr. Beaupre saw Jesse Fain sitting in the passenger side of the van, presumably waiting for Chad to return. When Mr. Beaupre came back out with the saw, he cut his holes and Chad helped him get the icehouse centered over the holes and banked up. Chand then wished Mr. Beaupre good luck with his fishing and drove away in the van.

Mr. Beaupre also recalled seeing Chad in the van a few weeks prior to when Chad helped him with the icehouse. During that interaction, Mr. Beaupre and several others were setting up to do a deer drive near Spirit Lake, off from 374th Street. Chad drove up to the group and stopped to talk to them briefly. Chad was also driving the yellow Ford Van at that time.

Mr. Beaupre is fairly certain these interactions took place in the fall of 2006 because of the truck he was driving when Chad helped him push his icehouse out. Mr. Beaupre graduated

from high school in 2005. A year later, a friend of his joined the navy and was on his way to basis training. Mr. Beaupre bought the friend's 2-wheel drive Ford F150 in the fall of 2006. Because the truck was 2-wheel drive, he did not want to take it onto the ice. Exhibit 4 - Affidavit of Paul Beaupre.

ARGUMENT

1. The Newly Discovered Evidence Presented Entitles Mr. Andersen to a New Trial.

Under Minnesota law, in order for a defendant to be entitled to a new trial on the ground that new evidence has been discovered, four criteria must be met. *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997). First, the evidence must not have been known to the defendant at the time of trial. *Id*. Second, the failure to learn of the evidence cannot be due to a lack of due diligence. *Id*. Third the evidence must be material, not cumulative, impeaching or doubtful. *Id*. Finally, the evidence must be such that it would probably produce a more favorable result. *Id*. The Petitioner must prove the four (4) prongs by a fair preponderance of the evidence. *Miles v. State*, 840 N.W.2d 195, 202 (Minn. 2013). The *Rainer* test applies where there is newly discovered evidence without a recantation or proof of false trial testimony. *Sutherlin v. State*, 574 N.W.2d 428, 433 (Minn. 1998).

The three prong *Larrison* test applies where there are allegations of newly discovered evidence of false testimony at trial. *Id*. at 434. *Larrison* applies both to recantations and when it has been discovered that false testimony was given at trial. *Williams v. State*, 692 N.W.2d 893, 896 (Minn. 2005). In order to receive a new trial based upon newly discovered evidence of false testimony, the petitioner must establish the following three factors by a *fair preponderance* of the evidence: (1) the court must be reasonably well-satisfied that the testimony in question was false, (2) without that testimony the jury *might* have reached a different conclusion, and (3) the

petitioner must have been taken by surprise at trial or did not know of the falsity until after the trial. *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004). Failure to meet the third prong has never been relied upon to deny a new trial. *Ferguson v. State*, 645 N.W.2d 437, 445 (Minn. 2002). New trials generally have been denied based upon failure to satisfy the first and second prongs. *Id.*

The evidence in this matter implicates both the *Rainer* test, in that the evidentiary hearing resulted in the production of new evidence that was not available at trial, and the *Larrison* test, in that the evidence produced at the evidentiary hearing shows that certain testimony given at trial was false. The evidence also raises questions regarding whether evidence was improperly concealed from Mr. Andresen prior to, during, and even after his trial.

However, regardless of whether the newly discovered evidence in his matter is analyzed under *Rainer* or *Larrison*, or even under a *Brady* standard, Mr. Andersen is entitled to relief.

STACY WEAVER TESTIMONY

A. Evidence now in Mr. Andersen's possession was not known or available at the time of trial.

It is beyond dispute that Mr. Andersen was not in possession of the newly discovered evidence presented at the postconviction proceedings at the time of trial. There is no reason to believe that Mr. Andersen would sit on such information while on trial for his life and then for another 10 years after he was convicted if he had knowledge of an independent witness whose testimony would make it nearly impossible for the crime to have occurred in the way the evidence presented at trial claimed it did.

B. The failure to learn of the evidence was not due to a lack of due diligence.

Mr. Andersen's newly discovered evidence also satisfies the second prong of the *Rainer* test. Based on the information Mr. Weaver provided, in which he did not tell what he knew, Mr.

Andersen had no reason to even begin to suspect that Mr. Weaver held information that would be useful in his case. The Supreme Court, in *State v. Caldwell*, 322 N.W.2d 574, 588 (Minn. 1982), stated "we do not believe that due diligence necessarily requires defense counsel in a case of this magnitude to reinterview persons who were not listed as prospective witnesses and whose prior statements indicate that they possess no information helpful or relevant to the case."

Here, Mr. Weaver was not identified as a potential witness and, as he testified, even though he thought the police should have talked to him at the time, they did not and he did not make what he knew known. Then, as Mr. Weaver's testimony shows, the time between him coming out with what he knew and when he was approached by an investigator was short. This is evidence of due diligence on Mr. Andersen's part. If law enforcement was unable to identify Mr. Weaver as a witness, with all of its resources, there is no reason Mr. Andersen should be required to have done so prior to Mr. Weaver coming forward and making his story known.

In addition to the *Caldwell* case from Minnesota, Mr. Andersen has identified cases from numerous other courts which show that, under the factual circumstances presented, he did exercise due diligence to obtain the newly discovered evidence. In *Starns v. Andrews*, 524 F.3d 612 (5th. Cir., 2008), that court held that due diligence did not require that the defendant learn of exculpatory grand jury testimony where the state downplayed the exculpatory nature of the grand jury testimony and where defendant's counsel in a wrongful death suit learned of the exculpatory evidence in a deposition years after the conviction became final, even though criminal defense counsel had been given the witness' address prior to trial.

In *Moore v. Knight*, 368 F.3d 936 (7th Cir. 2004), that Court held that the habeas petition was timely as filed within one year of when petitioner obtained investigative report and affidavits showing improper judicial contact with the jury. *Id.*at 938-40. This was the case even though the

judge had reported the contact with the jury, off the record, prior to sentencing, because the judge presented the contact as benign when it was not. *Id*. at 439. Moore's conviction became final on March 28, 1997. *Id*. at 938. In early 1997 Moore first learned through a friend, who had overheard conversations, that the judge's contact with the jury was more than the judge had reported. *Id*. At that same time, Moore asked his friend to investigate this further. *Id*. On May 18, 1998, the friend provided an investigative report and two (2) affidavits from jurors which indicated that they felt the judge's communications contained commentary on the credibility of witnesses. *Id*. Petitioner filed for postconviction relief in state court on January 5, 1998 and then "after following proper procedural routes appeared before United States District Court for Northern District of Indiana" seeking habeas relief. *Id*. at 939. That Court held that lag of time between initially learning of possible improper conduct in early 1997 and receiving affidavits in May 1998 did not show lack of due diligence because petitioner was in prison. *Id*. at 940. It also held that May 18, 1998 was the proper date for the factual predicate since that was the date that petitioner obtained actionable information to make his claim. *Id*. at 940.

Mr. Andersen has also identified the following cases which support his claims. *See Wilson v. Beard*, 426 F.3d 653 (3rd Cir. 2005) (The defendant's conviction became final in 1985. *Id.* at 655. On March 31, 1997, after the prosecutor from Wilson's trial decided to run for district attorney, a video tape of the prosecutor explaining that it was his preference to strike black jurors, and explaining how he did it in a way to get past *Batson* analysis, was released. *Id*. at 657. Wilson learned of the existence of the tape on or around April 6, 1997 from his prior attorney. *Id*. at 660. Wilson then filed a petition for relief in state court based upon the video on June 2, 1997. *Id*. at 659. That petition was pending until March 22, 2001. *Id*. Wilson then filed for habeas relief on January 23, 2002. *Id*. If Wilson knew or should have known of the video between April 1 and

April 5, 1997, his habeas petition would be untimely. The Third Circuit Court of Appeals held that Wilson did not fail to exercise due diligence in failing to learn of the tape until April 6, 1997, when he was told about it by counsel, because due diligence did not require him to continuously monitor the news on the remote possibility of learning facts helpful to his case. *Id.* at 661-62).

These cases, along with *Caldwell*, show that in a case where a defendant discovers evidence that was not previously known to him and then takes prompt steps to develop it after he learns of it, he has exercised due diligence. They also show that when the reason the defendant was unaware of the evidence at trial was because a witness decided not to tell what he or she knew, or because the evidence was otherwise hidden in some way, due diligence does not require that the evidence be discovered.

Here, nothing at the time of trial indicated to Mr. Andersen that the Weaver evidence might exist, and therefore, it cannot have been through lack of due diligence that the evidence was not presented. Then, the evidence and testimony shows that when Mr. Andersen did learn that Mr. Weaver had evidence that was potentially relevant to his case, he reacted by hiring an investigator, obtaining a sworn statement, and making a timely claim based on this evidence.

C. The exculpatory evidence is material.

Black's defines material as "[i]mportant; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished with form." Black's Law Dictionary, 5th ed. A material fact is one that "tends to establish any of [the] issues raised." *Id.* In the context of newly-discovered evidence, courts have generally held that the exculpatory evidence must not only be material, but must not be doubtful, cumulative, or impeaching. *Wayne v. State*, 498 N.W.2d 446, 228 (Minn. 1993). Newly discovered evidence must be credible in order to warrant relief. *Race v. State*, 504 N.W.2d 214, 218 (Minn. 1993).

The Weaver evidence is material, because if it is true, it puts Leslie Fain and Jesse Fain far outside of where they claimed to have been during that morning. The evidence about the cigarette butts and shell casings is important because it shows that evidence was not disclosed when it was found. This was not months or even weeks later, but just a few days after the murder. And it wasn't just some cigarette butts like Jesse Fain wanted to testify, it was cigarette butts that he and Al Baker felt were left by the shooter. It was also cigarette butts and shell casings that we know were not discovered by investigators during the multi-day search of the area.

D. The newly discovered evidence presented is such that it is likely to produce a different result at trial.

Whether it is under *Rainer* with its "probably" change the outcome standard, or *Larrison*, with its "might" change the outcome standard, the requirement is that Mr. Andersen prove his claim by a fair preponderance of the evidence. *Miles v. State*, 840 N.W.2d 195, 202 (Minn. 2013). A "preponderance of the evidence" is defined by Black's Law Dictionary as "The greater weight of the evidence, not necessarily by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight, that though not sufficient to free the mind wholly from all reasonable doubt, it still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." Black's Law Dictionary, 5th ed

It is also important to keep in mind that the case against Mr. Andersen was entirely circumstantial, with the trial judge admitting he "struggled" with Mr. Andersen's motion for a directed verdict and Justice Page, on Mr. Andersen's direct appeal, writing in concurrence, stating "Although, on the record before us the answer to that question is a close one, I believe that the totality of the remaining evidence is sufficient to establish Andersen's guilt beyond a reasonable doubt." (T. 2770; *State v. Andersen*, 784 N.W.2d 320, 325, 330 (Minn. 2010).

The question from Mr. Weaver's testimony is really whether he has his timing right about when he purchased the van and saw the car with Leslie Fain, Jesse Fain, and a third person, such that these events occurred on April 12th and 13th of 2007. There are several important reasons to believe that Mr. Weaver was correct in his assertion that these events happened the day Chad was shot and the evening before.

The first and most important reason to believe Mr. Weaver's account of what happened is because phone records from around April 13, 2007 back up Mr. Weaver's testimony. These are records that Mr. Weaver has no control over and of which he had no reason to know exist.

At trial, the prosecution offered Trial Exhibits 187, 188, and 189, which were phone records for Chad Swedberg's cell phone, his home phone, and Leslie Fain's cell phone. (T. 969-970). At the time, Chad's cell phone number was 218-850-9122, the home phone number was 218-983-4034, and Leslie Fain's cell phone number was 218-849-5304. (T. 968). Also important is that during the evidentiary hearing, Joe Heisler testified that he vaguely recalled helping Stacy Weaver buy a yellow van and that his phone number was 218-204-0234. (10-23 T. 47).

The phone records show several things that corroborate Mr. Weaver's testimony and, most importantly, the timeline for the events he testified about. First, both Chad Swedberg's cell phone and home phone show calls from 218-204-0234 on April 13, 2007. See Exhibit 5 - BAF Standard Report for number 218-983-4034 showing call from 218-204-0234 at 10:52:13 on April 13, 2007 (Bates 434); see also Exhibit 6 - Chad Swedberg Phone review (218)850-9122 showing missed call from 218-204-0234 at 12:49 p.m.). Subpoenaed records for 218-850-9122 also show calls from 218-204-0234 at 6:30 and 7:40 on April 11, 2007. (See Exhibit 7 (Bates 461)).

Even though Mr. Weaver had no way to know that these phone records existed, they are entirely consistent with his testimony about when and how he purchased the van. We know from Mr. Weaver's testimony, that Joe Heisler set up the initial meeting with Chad. The calls between Chad and Heisler on April 11, 2007, are indicative of this occurring and setting up the April 12, 2007 meeting that did take place. We also know that Joe Heisler was going to set up the meeting for Mr. Weaver to come back to look at the Suzuki after Mr. Weaver returned from taking his mother to the bank. The phone records are consistent with this because they show calls from Heisler to both Chad's cell phone and home phone at times that are consistent with Mr. Weaver's testimony that Mr. Heisler called Chad several times after Mr. Weaver got back because Mr. Weaver was still interested in looking at the vehicle.

The inference to make from this connection is that if Mr. Weaver was correct on that date of the transactions, which is linked directly to seeing the white car with Leslie and Jesse Fain in it, then several of the main witnesses against Mr. Andersen were not where they said they were during their trial testimony. Mr. Weaver was entirely credible about the transaction taking place, Joe Heisler vaguely remembered it, and the phone records are consistent with Mr. Weaver's recollection of how the events unfolded. Further, the dates of the transactions stick out in Mr. Weaver's mind because he was supposed to be go to Chad's house the same day Chad was shot.

With both Chad's death as the anchor in Mr. Weaver's mind for recalling when this happened and the phone records, it is reasonable to conclude that he is telling the truth about the van purchase and that he is right about the timing of when this occurred.

What is also consistent with Chad having sold that van to Stacy on April 12th is that, according to Jesse Fain, while Jesse and Al Baker are back at the syrup camp, Chad left for a while on the 12th. (T. 1058; 10-23 T. 141-42). Jesse Fain said that it was so Chad could get the

hydrometer to test the syrup (T. 1058), but that doesn't add up. We know from Al's testimony that Chad had been back collecting sap and cooking for two (2) days prior to this death, so they would have needed the hydrometer before then. (T. 1726). Another thing we also know from Jesse Fain's testimony was that Chad had been there cooking all day and was wrapping up for the day around that time. (T. 1055-57). Jesse Fain testified they left around the time it got dark. (T. 1055).

Whatever Mr. Fain might speculate about why Chad left, the timing of when he left is consistent with Mr. Weaver's testimony that he bought the van in the evening and that he did not look at the second vehicle because it was starting to get dark by that time. (10-23 T. 17). That Chad left the syrup camp to sell the van is also consistent with Stacy Weaver's testimony that Chad said he wanted the money for mapling and that Chad said he was going to be out making syrup early the next day, which we know Chad did do. With the clear testimony there were only two (2) days before Chad's death during which he was making syrup, and only one time we know of that Chad left the camp around the time it was getting dark, the inference is that sale took place exactly when and where Mr. Weaver said it did.

Chad having sold that van on the night of the 12th is also consistent with crime scene photographs offered at trial. Using Hearing Exhibit 5, Mr. Weaver showed where the van was when he pulled it out. The van was not present in that photograph. Additional aerial photographs offered at trial, both from the helicopter on April 13th and the airplane from the next week, do not show that van anywhere on the property.

Stacy Weaver has no idea how his testimony fits in this case and was simply telling the Court what he knew to be true. The fact that Mr. Weaver does not know how his testimony fits

into the case, in conjunction with the fact that it fits perfectly with everything he said, is a strong indication his testimony about both what he saw and when he saw it are credible.

It is further worth noting that Mr. Weaver's timeframe for these events does not necessarily conflict with testimony presented about when Jesse Fain arrived at work. Mr. Weaver described the encounter on the 13th as happening at around the time sun was coming up. (10-23 T. 28). In the timeframe of April 13, 2007, that occurred around 6:40 a.m.[1] So, it is possible for Mr. Weaver to have seen what he saw and for Jesse Fain to be at work by the time his co-workers started arriving sometime after 7:30 a.m. Further, none of the witnesses offered to say they saw Mr. Fain at work have any idea what he did before he got to work and their testimony is not certain about the exact time they or Mr. Fain arrived at work that day.

The same is true of Kenneth Swedberg stating he saw Jesse Fain leave for work at 7:30. (10-23 T. 117). While this is the first time this claim has ever been documented, we know Kenneth Swedberg got up at 7:15 that day, then went to the bathroom like always, and then went out to feed his bees. (T. 1482). Kenneth Swedberg seeing Jesse Fain leaving at 7:30 does not mean that Jesse Fain did not go somewhere before Kenneth got up and made it outside.

One area of Mr. Weaver's testimony that was less certain than his statements about when and where the sale took place was the exact make and model of the white car he saw on the morning of April 13, 2007. While Mr. Weaver was clear he saw a white four door car, he could not specifically identify what it was. However, the inability to specifically identify the make and model of the car, as testimony at the evidentiary hearing showed, was not uncommon. For example, Leslie Nessman, Jesse Fain's co-worker, parked right next to him that morning and called his vehicle a "jeepy" looking thing and though it was a "Geo Tracker." (10-23 T. 127).

[1] https://www.timeanddate.com/sun/@5024239?month=4&year=2007

And, while Mr. Weaver was not exactly certain on the make and model of the vehicle he saw, he was certain of the identity of the front seat passengers, going so far as to describe Leslie Fain's reaction to passing him and noting that she was wearing glasses. The reasonable inference is that what caught Mr. Weaver's attention was not the car itself, but the people he saw in the car.

Another factual issue that arose during the evidentiary hearing was both Leslie Fain and Jesse Fain denied any knowledge of Chad Swedberg ever owning a Ford Van or a van of any kind.

Testimony from the evidentiary hearing that Leslie. Fain didn't know what Chad did for money and did not pay attention to things like cars is totally inconsistent with her trial testimony that Chad could not have purchased a gun for $125 or $250 without her knowledge and her testimony that she handled all the finances. (T. 974, 1021-22). If the Evidentiary hearing testimony is accepted as true, then it shows her trial testimony to the opposite is false. Applying the *Larrison* test, removing such testimony from the trial might change the outcome. That is the case because the issue of who had the Tikka rifle and when was, probably, the main issue at trial, even though no one could say for sure it was the murder weapon. Ms. Fain testified there is no way Chad could have purchased or possessed the rifle without her knowledge. Now, at the evidentiary hearing, she said she didn't even know what cars Chad owned because she didn't pay attention to what he did for money and with his possessions.

Part of Mr. Andresen's defense was trying to show that he did not own the Tikka rifle and had not for some time prior to Chad's death. Testimony from Ms. Fain that she didn't know what Chad did for money and with his possessions could have made for a different outcome in a very close case. How could she simultaneously claim to not know about Chad's finances and

possessions, but be so precisely sure that Chad could not have purchased a gun without her knowing?"

There is similar evidence of false testimony from Jesse Fain at trial. During trial, Jesse Fain said he and Chad did everything together. (T. 1040). However, at the Evidentiary Hearing, Mr. Fain could not recall Chad ever having anything to do with the van. Despite Leslie Fain and Jesse Fain both denying Chad ever owned or sold a van, there is evidence Chad absolutely owned such a van.

This matters because of a statement we have from Paul Beaupre. Mr. Beaupre says he was pushing his icehouse onto a lake when Chad drove by in the van. Chad stopped to help Mr. Beaupre push the icehouse out. When Mr. Beaupre went to his truck, he saw Jesse Fain sitting in the van. This evidence that Jesse Fain was in that very van the fall prior to Chad's death and Stacy Weaver purchasing the van is relevant and important evidence that only became so after Mr. Fain falsely claimed not to know anything about the van. There is also evidence from Jerry Libby that he recalls the van being parked in the Swedberg yard when he was in the area before Chad's death.

So, despite evidence showing that the van was at the Swedberg home, and that Jesse Fain rode in the van, Leslie and Jesse Fain deny any knowledge of the van. The inference that can be drawn is that they want to avoid any association between the van and with Stacy Weaver. They want to avoid being tied with the van, because it was sold to Stacy Weaver the day before Chad's death, and making that known would have resulted in law enforcement contacting Mr. Weaver, who then would have reported what he saw the morning after he bought the van.

Also, none of the people Stacy Weaver said he saw in the car can admit they were in the car. For Leslie and Jesse Fain, it would be in direct contradiction to their trial testimony and

constitute perjury, and it would call into question the entire timeline given for the events of April 13, 2007. For Steven Creed, he wouldn't be committing perjury if he said he was in the car, but it would create problems for his family members. And, it is not certain it was Steven Creed in the car anyway. Mr. Weaver did not give a positive ID, though he did think the person in the rear of the car looked like Leslie Fain's brother.

If Mr. Weaver is telling the truth, then no one in that car can mention the van sale because it would lead the police to Mr. Weaver since he saw Chad the day before his death. Based on the way Leslie Fain tried to duck down, we can also infer that the passengers in the car where aware that Mr. Weaver saw them and at least one of passengers did not want to be seen. Bringing up the van sale to law enforcement would get Mr. Weaver involved, and getting him involved leads to answering questions about what Mr. Weaver said he saw. Jesse and Leslie Fain needed to avoid this at all costs, since what Mr. Weaver said he saw was Jesse and Leslie fain at a time and place that is inconsistent with what the told law enforcement and testified to at trial

The fact that Stacy Weaver was threatened at a time when his involvement in the case was minimally known is also an indication his testimony is true and potentially harmful to someone who is still at large. It is clear the testimony was from someone who knew Mr. Weaver because he is a larger man, and the caller referred to him as a "fat fucker." (10-23 T. 34). The fact that Mr. Weaver was threatened is relevant because the filing was not something that was widely known, and there are very few people who would have any reason to threaten Mr. Weaver to stop him from telling his story. If Mr. Andersen is the killer and there was no one else involved, who has any motivation to threaten Mr. Weaver?

Under *Rainer*, the test to determine if the newly discovered evidence would probably change the outcome of the case requires examination of how the case would have looked if the newly discovered evidence was presented at trial. *Dukes v. State*, 621 N.W.2d 246, 257-58 (Minn. 2001). Under *Larrison*, the test is if the outcome of the case might change if the false testimony was removed.

In this circumstantial case, anything that calls into question the timeline or the testimony of anyone from inside Chad Swedberg's home would have the ability to change the outcome of the case. In particular, this is a case where there is no direct evidence of Mr. Andersen's involvement, and even with the gun found in his barn, the most that can be said about the gun is that it could have fired the bullets removed from Chad Swedberg's body, not that it ***was*** the gun.

The case against Mr. Andersen was built on the idea that gun could have been the one and had always belonged to Mr. Andersen. It was also built on alleged inconsistencies in Mr. Andersen's explanation of what he was doing on the morning of April 13, 2007. The theory advanced was that the inconsistencies in Mr. Andersen's timing of events that morning created enough time for him to have committed the murder. If this is enough evidence to convict a man of first-degree murder and imprison him for life with no possibility of release, then evidence showing similar discrepancies and lies about timelines of others who would have been suspects if their timelines were similarly suspect, has to lead the conclusion that Mr. Andersen would have been acquitted at trial if that evidence were presented.

CIGARETTE BUTTS AND SHELL CASINGS

1. Applicable standards of law.

The *Rainer* standard was discussed in detail above.

In *Brady v. Maryland* the United States Supreme Court held that it was a violation of the Due Process Clause of the Fourteenth Amendment for the state to withhold evidence favorable to the accused upon request of the accused for said information. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Included in this obligation to turn over evidence is the obligation of the prosecutor to learn of any favorable evidence known to others acting on the government's behalf, including police officers. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Also included is the obligation to turn over evidence which weighs on a witnesses' credibility if the witness may be determinative of guilt or innocence. *Giglio v. United States*, 405 U.S. 150, 154 (1972). One of the reasons *Brady* has been held to extend to witness credibility evidence is because exposure of a witness's motivation is a proper and important function of the constitutionally protected right to cross-examination. *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974).

Minnesota rules and cases "require much more of the prosecution than the federal cases require." *State v. Kaiser*, 486 N.W.2d 384, 386 (Minn. 1992). Rules put in place by the Minnesota Supreme Court require not only that prosecutors completely open their files to defense counsel but also imposes an ongoing obligation on prosecutors to make continuing disclosure when new items are added to files after defense counsel has looked at it. *Id*. at 387. These rules governing disclosure are codified at Minnesota Rules of Criminal Procedure 7 and 9 and are put in place to "provide a comprehensive method of discovery of the prosecution (Rule 9.01) and defense (Rule 9.02) cases. The rules are intended to give the parties complete discovery subject to constitutional limitations. Comment to Minn. R. Crim. P. 9. "A prosecutor cannot circumvent the requirement of open-file discovery by not taking notes or by not putting things in the file that belong in the file." *Kaiser*, at 387.

2. Whether analyzed as a Brady violation or as newly discovered evidence, this evidence requires that Mr. Andersen be given a new trial.

Testimony at the October 23, 2018 evidentiary hearing also showed that two (2) trial witnesses, Jesse Fain and Al Baker, while at the scene of Chad's death, within days of it occurring, found cigarette butts they believed belonged to the shooter, and in the case of Baker, potentially found shell casings.

Depending on what we make of Jesse Fain's testimony, this evidence was either not reported to law enforcement until after this postconviction action was commenced, or was potentially reported to law enforcement at some earlier time, but never disclosed to Mr. Andersen or his counsel. (10-23 T. 141). Whether this evidence is viewed as newly discovered evidence or as the failure to disclose absolutely relevant and potentially exculpatory evidence, these bombastic disclosures are sufficient to call into question the outcome of Mr. Andersen's case in such a manner that a new trial must be held.

After the evidentiary hearing, we know for sure that Jesse Fain and Al Baker found cigarette butts that they believed showed where the shooter had lain in wait. (10-23 T. 140). We know this because even though Jesse Fain initially denied this had taken place, or even going back into the woods, he eventually did admit it. (10-23 T. 139). We also know that this occurred within just a few days of Chad's death. (10-23 T. 140-41).

What we also now know is that Al Baker admits that he admitted to both Mr. Andersen's investigator and Agent Bauman that he found shell casings at the scene of the crime. The affidavit of Investigator Egelhoff and the report and recording made by Agent Bauman regarding Mr. Baker's statement are not hearsay and should be admissible in this matter in a statement against penal interest. *See Ferguson v. State*, 645 N.W.2d 437, 443 (Minn. 2002); Minn. R. Evid. 804(a)(1), 804(b)3).

In this case, Mr. Baker claimed to have no knowledge of this subject matter whatsoever, including claiming not to recall having spoken with Mr. Egelhoff or Agent Baumann about the shell casings, or ever having seen any shell casings. (10-23 T. 60-61). We also know that, while Mr. Baker denied even knowing who Geraldine Bellanger was, he admitted to her that he was at the Swedberg property earlier than he told investigators. Mr. Baker was also questioned about a statement he made to both Mr. Andersen's investigator and to Agent Bauman that he had found shell casings near where Chad was shot. Mr. Baker denied that he found any shell casings. (10-23 T. 60). He also denied telling Mr. Andersen's investigator that he found shell casings. (10-23 T. 60). He also denied that he told Agent Bauman he found shell casings. (10-23 T. 60-61).

Mr. Baker lacks memory of the subject matter. He found but did not disclose shell cases, and he sent away a gun that was of the type that had the potential to have fired the bullets that killed Chad Swedberg. Because all of this could subject Mr. Baker to criminal liability, the sworn statement of Investigator Egelhoff and the report and recording made by Agent Bauman regarding Mr. Baker's admission are admissible evidence and should be considered.

Further, even beyond Mr. Baker telling a police officer and a private investigator that he found the shell casings, there are reasons to believe that Mr. Baker did find the shell casings he told both investigators about. First, we know, because Jesse Fain confirmed it, that Mr. Baker was at the scene within days after Chad's death. We also know from Mr. Fain's testimony that Mr. Baker found the cigarette butts and pointed them out before Mr. Fain saw them. According to Mr. Fain, there were no shell casings there when Mr. Baker showed him the cigarette butts.

The inferences we can make from the testimony and evidence include that shortly after the accident there was physical evidence found and (1) either not reported to law enforcement or (2) was reported to law enforcement and never disclosed to Mr. Andresen. The more likely

occurrence under these circumstances is that, despite the protestations to the otherwise, Jesse Fain and Al Baker did not tell law enforcement what they had found. If they had, it surely would have been documented in some report somewhere. That this evidence was not disclosed in any way until December 1, 2016 is a strong indication it was never turned over to law enforcement.

We also know now that, Mr. Baker sent a gun out of state before it was checked, even though Mr. Andresen was not aware of that at trial. (Postconviction Exhibit 8 – Durkin Affidavit with Baker Police Report[2]). The inference is that Mr. Baker had a reason not to make those shell casings known and did not make them known, even though he did the cigarette butts.

We also know that even though there have been claims that multiple witnesses put Mr. Baker at the store at a certain time, not a single witness testified about this, and aside from Douglas Darco seeing Mr. Baker driving away from the store at about 7:45. (T. 1939-47), and Mr. Andersen seeing him sometime after 9:42 a.m. that morning (10-23 T. 105), no one knows for sure where Mr. Baker was for this two (2) hour period, especially since he could answer his home from his cell phone. (Postconviction Exhibit 9). These facts, along with statements about finding shell casings and being at the scene earlier than he testified, are the type of statements and evidence that would result in a different outcome at Mr. Andersen's trial had the jury been aware of this.

Regardless of why the evidence was not made known, the issue with the lack of disclosure, and with the lack of any attempt to locate this evidence by law enforcement after Baker and Fain reported it, especially when Baker and Fain first found the cigarette butts and potentially the shell casings, is that this evidence was the type of physical evidence that had the potential to provide a definitive resolution to this matter. The shell casings could have answered

[2] While this evidence was ruled to be *Knaffla* barred, it can still be considered as corroborating evidence for this procedurally proper claim. *See Hooper v. State*, 838 N.W.2d 775, 778 (Minn. 2013).

once and for all whether the Tikka rifle even fired the bullets that killed Chad Swedberg. That was evidence that had the potential to completely exonerate Mr. Andersen, the Tikka rifle in his barn notwithstanding, if the shell casings showed the Tikka rifle was not the gun. Yet, nothing has been done to locate them because, apparently, law enforcement did not believe Mr. Baker enough to look for this evidence.[3] This is troubling because, even today, the discovery of the shell casings could provide a definitive answer of whether the Tikka rifle was the murder weapon.

A similar chance at resolution of the case was available from the cigarette butts when they were discovered. It is very possible those cigarette butts contained DNA material that could have been used to find who had been in that location that Jesse Fain and Al Baker felt was the location the shooter had lain in wait. And with this, there is no doubt it happened because Jesse Fain confirmed it did occur, even though Al Baker had no memory of it.

The existence of evidence of this nature, found not by law enforcement, but by family members and friends, calls into question the completeness and credibility of the investigation and is evidence that is relevant, material, and, when a Defendant knows of such evidence, he has a constitutional right under the Fifth and Sixth Amendments to present such evidence is his defense at trial. Here, evidence of cigarette butts and, potentially, shell casings, that were discovered and either not reported to law enforcement or reported to law enforcement but not disclosed to Mr. Andersen are the kind of evidence that has the potential to change the outcome in a case we already know is razor thin.

It is not difficult to imagine Mr. Andersen's primary theme of the case knowing of this evidence. There was a person from Chad's household and a person known to be in the woods

[3] This lack of belief in Mr. Baker when he said he found shell casings is the exact opposite of how Mr. Baker was treated when he said he sent away a .30 caliber gun to his niece and that was accepted as true without any follow up.

where he was right after Chad's death, who hindered police investigation into the crime by not disclosing the discovery of the type of evidence that had the potential to provide definitive proof in what was otherwise a very circumstantial of cases. Such evidence is relevant to allowing the jury to make an informed decision and Mr. Andersen would have had a constitutional right to present that evidence were he aware of it at trial. *See Alvarez v. Ercole*, 763 F.3d 223, 230-31 (2nd Cir. 2014) (holding that the defendant had a constitutional right to present evidence showing that obvious investigative steps were not conducted, which resulted in an incomplete investigation that prematurely concluded Alvarez was the guilty party); see also *Cudjo v. Ayers*, 698 F.3d 752 (9th Cir. 2012), *cert. denied sub nom. Chappell v. Cudjo*, 133 S.Ct. 2735 (2013) (A majority of the Ninth Circuit panel granted guilt-or-innocence phase relief in California capital case, finding that the California Supreme Court's decision upholding the exclusion of critical defense evidence pointing to a different perpetrator was "contrary to" *Chambers v. Mississippi*, 410 U.S. 284 (1973), and that the error was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)). And, imagine how powerful this evidence would have been for Mr. Andersen's defense had he learned before the day of his sentencing that Al Baker told police that he had sent a 30-caliber gun out of state before it could be tested and was able to present that the jury. *See Hooper v. State*, 838 N.W.2d 775, 778 (Minn. 2013) (stating that it was not a frivolous argument for the petitioner to argue that evidenced from *Knaffla* barred claims could still be used as corroborating evidence in claims the court did consider).

In this case, the cigarette butts and shell casings are not necessarily evidence of an alternate perpetrator, though they certainly could have been that had it been investigated, but even if not traditional alternate perpetrator evidence, it is relevant and material evidence that goes directly to a defense that obvious investigative steps were not conducted, which resulted in

an incomplete investigation that prematurely and inaccurately concluded that Mr. Andersen was the guilty party.

Whether this occurred because Baker and Jesse Fain did not disclose what they found, or because law enforcement did not follow up when they received this information, the discovery of cigarette butts and potentially the shell cases with nothing done about it is powerful evidence in Mr. Andersen's defense that was not available at trial, but is now, and the refusal to allow Mr. Andersen to present this evidence to a jury at a new trial will result in a violation of his right to present a complete defense. *Herrera v. Collins,* 506 U.S. 390, 397 (1993)(stating the right to defend includes the right to compulsory process, the right to be informed of any and all evidence, including exculpatory evidence, the right to cross examine witnesses, the right to the assistance of counsel, and firmly established trial rights.).

CONCLUSION

Mr. Andersen's burden in this case, depending on whether the claims are viewed through *Rainer, Brady, or Larrison*, is to prove either the existence of new evidence that "probably" changes the outcome of the case or the existence of false testimony, the absence of which "might" change the outcome, if the jury did not hear the testimony. What he does not need to do is prove the identity of an alternative perpetrator.

The starting point in this analysis should be what was acknowledged by the both the trial court and the Minnesota Supreme Court, that this was an incredibly close circumstantial case. Starting from this point, the inescapable conclusion following the evidentiary hearing is that Mr. Andersen must be granted a new trial where a jury of his peers is able to determine his fate after being made aware of all the relevant evidence both for and against him.

Stacy Weaver was a credible witness who doesn't even know how his testimony fits in this case. What he said about the van is corroborated by Affidavits from three (3) separate witnesses and, most importantly, by phone records that show Joe Heisler placing a call to Chad Swedberg on the date and time Stacy Weaver indicated he and Heisler were thinking about going back to look at the Suzuki.

This shows the date on which the van transaction took place, and calls into question the truthfulness of the testimony of prosecution witnesses, and very much calls into question the very timeline that was the foundation of the case against Mr. Anderson. Because Mr. Weaver presented as a credible witness and there is outside evidence corroborating the date and timing of what he saw, it would be an abuse of discretion to deny Mr. Andersen a new trial on these grounds.

The same is true of the evidence related to the cigarette butts and shell casings. While this evidence does not identify an alternative perpetrator, it is of such importance and so severely calls into question the completeness and objectivity of the investigation as to tip the scale in favor of Mr. Andersen's acquittal had a jury learned that this evidence was found and, for whatever the reason was, nothing was ever done with it.

This case was entirely circumstantial and was as close as could be. Given the new evidence obtained by Mr. Andersen and proven at the evidentiary hearing, he must be granted a new trial.

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