STATE OF MINNESOTA DISTRICT COURT

COUNTY OF BECKER SEVENTH JUDICIAL DISTRICT

Kenneth Eugene Andersen,

Petitioner,

Case No. 03-CR-07-171

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR POST-CONVICTION RELIEF

vs.

State of Minnesota,

Respondent.

INTRODUCTION

At an evidentiary hearing which took place on October 23, 2018, Defendant Kenneth Andersen obtained testimony, through witness Jesse Fain, in which Mr. Fain stated he found cigarette butts at the scene of the crime just days after the crime, and claims he informed law enforcement of said cigarette butts. (EH. 136-141). In addition, Defendant Kenneth Andersen presented evidence that Albert Baker stated he saw shell casings near the scene of the crime just days after the crime, and claims he informed law enforcement of said shell casings, though Baker denied having made such statements when impeached with them. (EH. 60-61). After review of Defendant Kenneth Andersen's file, Mr. Andersen has discovered that no disclosures of any such contacts with law enforcement by Mr. Fain or Mr. Baker had been made, though any and all relevant evidence has requested by trial counsel.

Following that hearing, with the permission of landowner, an investigator hired by Defendant Kenneth Andersen conducted a grid-based search of the crime scene using metal detectors and discovered the existence of two empty (2) shell casings, that appear to be of the

.308 caliber manufactured by Winchester. (See Exhibit 1 – Schienbein Affidavit with photos). This new evidence calls into question Mr. Andersen's purported guilt for this crime, and the manner in which the crime scene was investigated and evidence disclosed to Mr. Andersen in this matter.

STATEMENT OF FACTS

The factual background and testimony from Andersen's trial were set forth multiple times. This memorandum is focused on the newly discovered evidence presented in support of his petition for postconviction relief and the testimony from the evidentiary hearing.

2016 Petition for Postconviction Relief.

In a 2016 postconviction petition, Mr. Andersen presented 51 exhibits comprising 258 pages in support of his petition for postconviction relief. Relevant to this petition is evidence showing that Al Baker was at the scene of the crime as early as 8:00 a.m. on April 13, 2007 and found bullets and cigarette butts left by the shooter. (Doc. 157–Exhibit 10).

This information was obtained when Mr. Andersen's family hired an investigator to speak with Mr. Baker. During that interview, Mr. Baker claimed that the .308 rifle he discarded prior to officers coming out to check his weapons was actually in Illinois with his brother. (2017 Postconviction Exhibit 10 – Egelhof Report of Interview with Al Baker; Exhibit 2). Mr. Baker also claimed to have seen the spot where Mr. Andersen waited to shoot Chad Swedberg, finding cigarette butts and two (2) shell casings on the ground. (Id.). After making these statements, Mr. Baker ended the interview and has refused any further contact with Mr. Andersen's investigator.

When law enforcement followed up with Mr. Baker, he stated that he did recall finding cigarette butts and shell casings. (See Bauman Report of Interview with Baker – Exhibit 3; Recording of Baker Interview – Exhibit 4). However, after Mr. Baker stated he had seen those

items and reported them to law enforcement, rather than conducing a search or determining if this was the case, the interviewing officers told Mr. Baker that the evidence would have been incredibly important before trying to convince him that he had not actually seen any shell casings or cigarette butts. (Id.).

Through review of his file, Mr. Andersen has been unable to locate any documentation provided to him related to Mr. Baker reporting this find to law enforcement prior to 2016.

In investigating other elements of Mr. Andersen's petition for postconviction relief, officers also contacted Jesse Fain. (See Bauman Report of Interview with Jesse Fain – Exhibit 5; Recording of Jesse Fain Interview – Exhibit 6). During their interview of Mr. Fain, he recalled that he and Mr. Baker had in fact gone to the scene of the crime to look for evidence. Mr. Fain stated that he and Mr. Baker had observed cigarette butts there that they believed indicated the location the shooter and lain in wait for Chad Swedberg on April 13, 2007. Mr. Fain indicated he believed he told law enforcement about this.

Through review of his file, Mr. Andersen has been unable to locate any documentation provided to him related to Mr. Fain reporting this find to law enforcement prior to 2016.

Relevant portions of the October 23, 2017 evidentiary hearing.

During the October 23, 2017 evidentiary hearing, Mr. Andersen obtained testimony from several witnesses that resulted in Mr. Andersen seeking permission from landowner RA to conduct a grid search of the crime scene using metal detectors that resulted in the discovery of the .308 shell casings. The testimony of the relevant witnesses is set forth below.

Albert Baker. Baker was questioned about a statement he made to both Andersen's investigator and to Agent Bauman that he had found shell casings near where Chad was shot. Baker denied that he found any shell casings. (EH.60). He also denied telling Andersen's

investigator that he found shell casings. (EH.60). He also denied that he told Agent Bauman he found shell casings. (EH.60-61).

Baker also denied that he was ever in the woods by Chad's house after Chad was shot. (EH.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. (EH.61). Despite acknowledging that he had been in the woods, Baker continued to deny seeing shell casing or telling anyone about them. (EH.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. (EH.61-62). Baker did give a recorded statement in which he told Agent Bauman he found shell casings. (See Exhibits 3, 4).

Baker went on to state that Geraldine Bellanger 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. (EH.63). Baker initially denied knowing Geraldine Bellanger. (EH.62). However, he eventually agreed that he knew who she was, but said he was not real familiar with her. (EH. 63). He also denied ever telling Bellanger that he was at the scene earlier or that he saw Andersen coming out of Chad's house. (EH.63).

On cross, Baker claimed he could not recall talking with either police or Andersen's investigator. (EH.64). He also could not remember testifying at trial. (EH. 64). However, he does recall that the day Chad got shot he stopped and got lunch in Waubun in the morning. (EH. 65-66). By the time he got there, Leslie was already frantic and screaming. (EH. 66). Baker also stated he would have turned shell casings over to law enforcement if he found them. (EH. 66).

On re-direct, Baker denied driving his Camaro to the grocery store on the day of Chad's murder. (EH.67). However, he did agree that he went to the store go get lunch. (EH.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. (EH.68).

Jesse Fain. Fain testified that after Chad's death the family decided to finish the syrup. (EH.136). It was everyone at first, then just Jesse sitting there alone. (EH.136-37). Despite this, Fain repeatedly denied that he was ever in the area of the syrup camp with Al Baker after Chad's death. (EH.136-37).

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

On cross, 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. (EH.140). Fain also agreed that this incident occurred within just a few days of Chad's death because it was still syrup season. (EH.141). Fain went on to testify that he thinks he mentioned the cigarette butts to law enforcement before his 2016 interview. (EH.141).

August 2019 Crime Scene Search.

Following the evidentiary hearing, with the permission of landowner Rebecca Aarestad, an investigator hired by Defendant Kenneth Andersen conducted a grid-based search of the crime scene using metal detectors and discovered the existence of two empty (2) shell casings, that appear to be of the .308 caliber manufactured by Winchester. (See Exhibit 1).

Additional undisclosed information.

It is known, from a recording of an interview with Kenneth Swedberg, marked Bates 1055, that during the initial perimeter search conducted by Kenneth Swedberg and Joe McArthur, that they identified a red jacket in the woods. (See Exhibit 7 – 4-17-07 Interview with Kenneth Swedberg). This was not included the police report related to the interview. (See Exhibit 8 – April 13 and 17 Police Report). After review of Defendant Kenneth Andersen's file, Mr. Andersen has discovered that no disclosures of any kind related to the red jacket were made, though any and all relevant evidence has requested by trial counsel. (See Exhibit 9 - Demands for Disclosure Dated July 1, 2007).

It also is known based on a police report related to a conversation with Leslie Fain, which took place on April 15, 2007, that law enforcement was planning to grid off and search the area and that members of Fain's family had already been back around the scene of the crime to make syrup. (See Exhibit 10 – April 15, 2007 Leslie Fain Interview). Trial testimony from Captain Joe McArthur and White Earth Investigator John McArthur establish that searches of the crime scene area were, in fact, conducted between April 13th and 17th, 2007.

It is also known based on trial testimony that Kenneth Swedberg drove a bobcat the scene of the crime on April 13, 2007 and, based on evidence in the record submitted by Geraldine Bellanger, that Jesse Fain tipped the bobcat over on April 15, 2007.

At trial, many witnesses were called to make it seem as though thorough searches were conducted, and the prosecutor argued that the lack of shell casings, or any other evidence, at the scene, was evidence of premeditation because the shooter had cleaned up after himself in order to avoid detection. The existence of a red jacket, along with cigarette butts and shell casings would have disproved this argument.

Defendant Andersen also discovered that no disclosures that purport to identify all agents of the state who were at or around the scene of the crime, and the majority of those agents at or around the scene either did not prepare reports, or those reports were never disclosed to Mr. Andersen. Finally, it is also known that the prosecution did not make full disclosures to Mr. Andersen prior to his trial, and that the prosecution file was missing documents. (See Exhibit 11 – July 8, 2013 Letter).

Defendant Andersen has a due process right to information and documentation of the search(es) conducted at the crime scene and accurate reports thereof to determine whether the new evidence he has obtained is relevant to his case and now brings this motion seeking disclosure of that information, or any information related to such.

Additional new evidence obtained since the October 2017 Evidentiary Hearing.

Following the evidentiary hearing, Mr. Andersen was able to obtain additional corroborating evidence related to Stacy Weaver's purchase of a van from Chad Swedberg that showed this occurred on the dates that Mr. Weaver testified. Mr. Andersen requested that he be allowed to supplement the record with additional evidence obtained as a result of the evidentiary hearing. This motion was denied and the district court refused to consider this evidence which showed that Weaver's testimony was true and that he was correct about the timing of the events.

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 also 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 12 - 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 13 – 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 14 - 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 basic 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 15 - Affidavit of Paul Beaupre.

Mr. Andersen obtained the Affidavit of Darrin Anthony Fineday. Mr. Fineday states that in early July 2007, he purchased a yellow Ford van from his relative Bradley Weaver for $200.00. Mr. Fineday states that Bradley Weaver told him that he had bought the van from his brother Stacy Weaver, who had sold him the van because its previous owner was killed and Stacy no longer wanted the van. Mr. Fineday goes on to state that Stacy Weaver told him he had bought the van from Chad Swedberg the night before Chad was killed and that he gave Chad some money and some marijuana as payment for the van. Marijuana was found in Chad Swedberg's pocket on the date of his death. (T. 807-09). Mr. Fineday went on to state that he drove van until approximately the second or third week in August 2007, when he went into the ditch with it and damaged it. He then sold the van to the local junk yard owner, Butchy Bellanger, for $60.00. (See Fineday Affidavit – Exhibit 16).

Mr. Andersen also obtained an Affidavit from Tanya Gunderson. Ms. Gunderson states that she was involved in a sexual relationship with Chad Swedberg approximately two (2) years prior to his death. She was aware that Chad was living with Leslie Fain at the time but did not believe that they were married. A few months before Chad's death, Tonya ran into him at a bar in Waubun. Chad asked her if she was single and she said she was, but he wasn't. Chad winked at her and said he would catch her later. Two to three weeks before Chad's death, Tanya saw Chad at her bar in Twin Valley when Chad, along with Mr. Andersen and another individual made a trip out there to see her. While others played pool, Chad and Tanya went into a back

room and engaged in their "usual horseplay" and "heavy petting." Chad told Tanya that he wanted to reignite his relationship with her and told her that he was sick of Leslie Fain and her family using him. Tanya also wanted to be with Chad, but told him she wanted a relationship and would not be with him unless he left Leslie. Chad told her he had broken off his relationship with Leslie and that Leslie needed to find a place to live but would be gone soon and he would get back to her when Leslie was gone. Between then and Chad's death, Chad had called Tanya one time to ask if she was still thinking about him. She said she was and for Chad to call her when Leslie was gone. (Exhibit 17 – Gunderson Affidavit).

VI. ARGUMENT

A. Postconviction Standards

Minnesota Statute §590.01, allows a person convicted of a crime to bring a postconviction relief petition seeking a new trial based upon a claim that the conviction was obtained in violation of Petitioner's constitutional rights. §590.01 subd. 1.

I. MR. ANDERSEN'S NEWLY DISCOVERED EVIDENCE SHOWS MULTIPLE BRADY VIOLATIONS

A. The standard of review for discovery disclosure violations.

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 of 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.

B. The state failed to make the disclosures required by *Brady* and Rule 9.01.

Mr. Andersen has identified the following documents and evidence which were not disclosed to him or his trial counsel prior to trial:

1. Notes, reports, testing results, or other documents, created at any time, related to Jesse Fain reporting he found cigarette butts at or near the scene of the crime in April 2007.
2. Notes, reports, testing results, or other documents, created at any time, related to Albert Baker reporting he found shell casings at or near the scene of the crime in April 2007.
3. Notes, reports, or other documents, created at any time, which evidence or show any changes to the scene of the crime between the date of the offense, April 13, 2007 and the April 17,

2007 searches, including, but not limited to: any evidence that people had been at or around the scene of the crime, whether any vehicles and/or equipment at the scene were moved, and whether there was any evidence of firewood being cut and burned since the date of the offense.

4. Notes, reports, testing results, or other documents, created at any time, related to red jacket observed by Joe McArthur and Kenneth Swedberg on at or near the scene of the crime on April 13, 2007.

Mr. Andersen is now aware, because of investigation that his agents conducted, that there are .308 caliber Winchester shell casings near the scene of the crime. We also know that these are from a class of gun and shell casing that are consistent with the bullet fragments removed from Chad Swedberg. The failure of the prosecution to turn over evidence related to these shell casings, or conduct its own investigation, has caused Mr. Andersen to lose valuable evidence and significantly reduced its significance now that Mr. Andersen has obtained it.

C. Mr. Andersen was prejudiced by the state's failure to disclose.

Prejudice sufficient to warrant reversal of a conviction exists where the non-disclosed evidence is "material exculpatory evidence in the sense that there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the trial would have been different. *State v. Clobes*, 422 N.W.2d 252, 255 (Minn. 1988). The best way to understand the damage done by a Brady nondisclosure is to look at the words of the prosecutor during closing argument. *Kyles v. Whitley*, 514 U.S. 419, 444 (1995).

That is the nature of the evidence that was not disclosed in this matter. The prosecution's case rested in large part on the idea that Mr. Andersen was concealing a gun capable of firing the bullets that killed Chad Swedberg. However, as the trial testimony showed, the Tika rifle and

Winchester bullets allegedly connected to Mr. Andersen were far from the only combination of gun and bullets that were consistent with the bullet fragments at issue in this matter. Trial testimony showed that there were many guns in the 30-caliber class that had the same class characteristics as the fragments at issue.

The impact of this cannot be understated. This was described by the trial judge as a close case that he struggled with in deciding whether to grant a motion for judgment of acquittal. It is also a case where an individual that was at and around the scene of the crime, and associated with everyone involved in this matter, is known to have sent a .308 rifle either to someone in Alaska, or to someone in Indiana, depending on when he was asked about it. (See Exhibit 18 – Report of 5-20-2008 Examination of Baker firearms; Exhibit 2 – Egelhof Report of Interview with Baker). This is also an individual who was not investigated because his alibi allegedly cleared him, but that has been called into question, even by the prosecution, as part of recent proceedings.

D. Even without a showing of prejudice Mr. Andersen is entitled to a new trial.

Where the state has withheld evidence in violation of the Rules set forth by the Minnesota Supreme Court, cases have been overturned even where prejudice cannot be shown. *See State v. Kaiser*, 486 N.W.2d 384 (Minn. 1992); *State v. Schwantes*, 314 N.W.2d 243 (Minn. 1982); *State v. Zeimet*, 310 N.W.2d 552 (Minn. 1981); *State v. Hall*, 315 N.W.2d 223 (Minn. 1982). In *State v. Schwantes*, the Minnesota Supreme Court explained that the interests of justice require granting a new trial where the state withheld evidence that had been requested by the defendant "to insure that the reciprocal discovery rules adopted by this court are observed by both the prosecution and the defense." *Schwantes*, at 245. The *Schwantes* Court further held that this was the case even where evidence of the defendant's guilt was strong. *Id.*

If *Schwantes* applies to cases where requested information is withheld where there is strong evidence of guilt, there can be little doubt that it should also apply in cases such as there were there was nothing more than circumstantial evidence and where the withheld evidence relates directly toward showing that another individual, whose whereabouts we now know are in question, who was at the scene, who was alone in Mr. Andersen's barn, and who never brought the lunch he allegedly bought supplies for, sent away a .308 rifle before law enforcement even bothered to look at his guns. Now, two (2) .308 shell casings have been found at the scene. If, as both Fain and Baker testified, they told law enforcement about the evidence they observed, the failure to obtain and disclose this evidence is inexcusable and should result in Mr. Andersen receiving a new trial in the interests of justice.

II. MR. ANDERSEN WAS DENIED HIS DUE PROCESS RIGHTS TO PRESENT A DEFENSE

A. Mr. Andersen has a clearly established constitutional right to a meaningful chance to present a defense.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006), quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). It has been said that "The right of the accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). "[A] person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend." *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). This 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. *Herrera v. Collins*, 506 U.S. 390, 397 (1993).

B. The failure of the prosecution to conduct a reasonable search that resulted in the discovery of available exculpatory evidence was unreasonable.

Mr. Andersen had a due process right to present evidence to show that the investigation that lead to his arrest was incomplete and incompetently conducted from the very beginning. *See Alvarez v. Ercole*, 763 F.3d 223, 230-31 (2nd Cir. 2014); 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)).

The *Alvarez* case is particularly instructive in showing how Mr. Andersen was precluded from presenting admissible evidence, or questioning witnesses about, as a result of the incompetently conducted investigation in this matter, where Mr. Andersen has now discovered empty .308 shell casings at the scene of the crime.

In that case, Alvarez sought to question the lead detective in the case regarding a report the detective had received that an individual named Vazquez had told officers that a longtime acquaintance named "Julio" told Vazquez that he (Julio) had taken care of a problem with a man who had argued with Julio's wife. *Alvarez v. Ercole*, 763 F.3d 223, 226-27 (2nd Cir. 2014). Vazquez also told the investigator that Julio drove a car similar to one witnesses saw at the scene and generally matched the description witnesses had given of the shooter. *Id*. Despite receiving this information, and a phone number and address for Julio from Vazquez, police officers did nothing to track down Julio. *Id*. When defense counsel received this information, he called the phone number, identified the individual as Julio Guerrero, and was able to learn that Julio drove a vehicle consistent with that witnesses reported being at the scene. *Id.*

At trial, Alvarez attempted to cross-examine the lead detective on the case about the report, asking the detective to explain why the Julio lead was never investigated. *Id.* at 228. Alvarez argued that he should be able to question the detective regarding the report because it was evidence of shoddy police work because officers did not attempt to track down Julio. *Id.* The state trial court excluded the evidence, preventing Alvarez from questioning detectives about it, holding that it was hearsay and also excluding it because the evidence did not establish a clear link between the potentially culpable third party and the charged crime. *Id.* The reasoning of the state trial court was upheld by the appellate division. *Id.*

Alvarez then sought federal habeas relief. The district court judge granted his petition, holding that denying Alvarez's request to examine the detective regarding the Julio report was an unreasonable application of Supreme Court precedent interpreting the confrontation clause, and finding that the error prevented Alvarez from receiving a fair trial. *Id.* at 230. On appeal, the Second Circuit Court of Appeals affirmed the habeas grant.

That Court first held that the Julio evidence was relevant and admissible for the purposes of allowing Alvarez to demonstrate that the NYPD had failed to take obvious preliminary steps to investigate leads that pointed to suspects other than Alvarez. *Id*. at 830. It went on to hold that precluding Alvarez from examining the detective regarding the evidence because of a lack of a "clear link" was erroneous because Alvarez was not presenting the evidence as third-party culpability evidence, but rather to show that obvious investigative steps were not conducted, which resulted in an incomplete investigation that prematurely concluded Alvarez was the guilty party. *Id.* It went on to note that the Julio evidence showing that viable suspect was never investigated could have led the jury to seriously doubt the adequacy of the investigation. *Id*. at 231.

All of the same considerations are present in this case. The prosecution sought to convict Mr. Andersen because he had a gun that could have fired the bullets at issue, but the evidence Mr. Andersen has now obtained, and which he did not have during his trial, shows that the investigation against him was incomplete, that law enforcement failed to check on obvious potential suspects, and, ultimately, even when witnesses relied on heavily by the prosecution provided information about cigarette butts and shell casings near the scene of the crime, absolutely nothing was done to follow up on that, either when it was initially reported or when officers followed up on that evidence after Mr. Andersen filed his petition for postconviction relief in 2016. Evidence of the shell casings related to the shooting was then only recovered because of action taken by Mr. Andersen when the it was clear the state would do nothing, aside from try to convince Al Baker that he must have imagined seeing the very shell casings that were then recovered at the scene of the crime, in the very area Baker said he had seen them.

In failing to even bother to try to locate this evidence, and thereby precluding Mr. Andersen from presenting a complete defense, the prosecution actively violated Mr. Andersen's rights. *See Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (stating it is improper to preclude a defendant from exposing facts to the jury from which the jurors could appropriately draw inferences relating to the reliability" of the police investigation).

C. The prosecution lack of action and incompetent investigation had a substantial and injurious effect on the outcome of his trial.

In *Alvarez*, after finding that state court decision precluding Alvarez from examining the lead detective regarding the Julio evidence was contrary to clearly established federal law, that Court went on to analyze whether that constitutional error was harmless, concluding that it was not. It held that the error was not harmless because questioning the detective about the unpursued leads was an integral part of Alvarez's defense, which was focused on planting

reasonable doubt through showing a lack of thoroughness of the investigation into the case. *Id*. at 233. The Court noted that since Alvarez was precluded from questioning the detective about the Julio evidence, the jury "might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness." *Id*. at 233. Finally, the Court noted that the two (2) identifications were suspect and that there was no physical evidence tying Alvarez to the crime. *Id*. at 234.

In the present case, the error cannot be harmless for the same reasons. Because the prosecution failed to follow through when it was presented with evidence that had the potential to implicate someone other than Mr. Andersen and never disclosed this information to Mr. Andersen before his trial, Mr. Anderson was unable to expose this during his case. It was a theme of Mr. Andersen's defense that there was reasonable doubt about his identity as the shooter because the investigation was flawed and incomplete and failed to consider that others also had access to guns and bullets that had the same class characteristics as those at issue.

It was not until Mr. Andersen's investigator caught Al Baker unaware and interviewed him that this evidence first came to Mr. Andersen's attention, though Baker stated that he had informed law enforcement at an earlier time. Then, when law enforcement followed up with Baker and with Jesse Fain, they found they told similar stories about finding items at the crime scene. Despite this, nothing was done. And despite both Baker and Fain saying they told law enforcement at an earlier time, there is no record of this information ever provided to Mr. Andersen. Now, when Mr. Andersen, with his own investigator, obtained the very evidence that Baker said would be at the scene of the crime, the one person we know that had .308 rifles, is dead, and has long ago sent those rifles away – in one case just before law enforcement bothered to ask to look at his gun, over a year after the shooting.

Even if Mr. Andersen was not able to present this new evidence evidence as alternate perpetrator evidence, the fact that the prosecution's investigation was conducted so haphazardly, and with an obvious intent to ignore any evidence that might implicate anyone but Mr. Andersen, he had a clear right to present such evidence in his defense to show the incomplete and conclusory nature of the investigation. Particularly in a case where both the trial judge and the Minnesota Supreme Court noted the sufficiency of the evidence was a close call, the prosection's failure to act when apprised of evidence that was favor to Mr. Andersen cannot be harmless error under these circumstances.

III. MR. ANDERSEN'S REQUEST TO COMPEL DISCLOSURE

Defendant Andersen has a due process right to information and documentation of the search(es) conducted at the crime scene and accurate reports thereof to determine whether the new evidence he has obtained is relevant to his case and now brings this motion seeking disclosure of that information, or any information related to such. Mr. Andersen therefore requests that the Court issue an Order requiring disclosure of the following materials:

1. Provide and allow inspections of any and all notes, reports, testing results, or other documents, created at any time, related to Jesse Fain reporting he found cigarette butts at or near the scene of the crime in April 2007.
2. Provide and allow inspections of any and all notes, reports, testing results, or other documents, created at any time, related to Albert Baker reporting he found shell casings at or near the scene of the crime in April 2007.
3. Provide and allow inspections of any and all notes, reports, or other documents, created at any time, which evidence or show any changes to the scene of the crime between the date of the offense, April 13, 2007 and the April 17, 2007 searches, including, but not limited to: any

evidence that people had been at or around the scene of the crime, whether any vehicles and/or equipment at the scene were moved, and whether there was any evidence of firewood being cut and burned since the date of the offense.

4. Provide documentation and proof of any and all state agents that accessed the crime scene at any time on or after April 13, 2007.
5. Requiring the prosecution to obtain and disclose reports from known agents who were at or around the crime scene, including, but not limited to: White Earth Officers Bill Brunell, Mike Larouge, Jack Lamb Blade, and Brent Larson; Detroit Lakes Officer Robert Strand; Becker Count Sheriff's Deputies David Bjerka and Charles Jaskins; Detroit Lakes EMT Craig Fontaine; White Earth Conservation Officer Al Fox; any and all BCA agents; and any and all additional agents of the state who were at the scene in any capacity.
6. Provide and allow inspections of any and all notes, reports, testing results, or other documents, created at any time, related to red jacket observed by Joe McArthur and Kenneth Swedberg on at or near the scene of the crime on April 13, 2007.

Disclosure of this information should be required for the purpose of affording Defendant Kenneth Andersen his due process right to seek redress and all legal remedies.

IV. MR. ANDERSEN HAS OBTAINED NEWLY DISCOVERED EVIDNECCE WHICH ENTITLES HIM TO A NEW TRIAL

Under Minnesota law, in order for a defendant to be entitled to a new trial on the grounds that new evidence has been discovered, four criteria must be met. *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997). The *Rainer* test applies where there is newly discovered evidence without a recantation of trial testimony. *Sutherlin v. State*, 574 N.W.2d 428, 433 (Minn. 1998). 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 showing required for a petitioner to receive an evidentiary hearing is lower than that required to receive a new trial." *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004) (quoting *Ferguson v. State*, 645 N.W.2d 437, 442 (Minn. 2002)). In order to receive an evidentiary hearing in which to prove his allegations, the petitioner must only allege facts, supported by "more than argumentative assertions without factual support," that, if proven by a preponderance, would entitle Petitioner to relief. *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002). The trial court must grant an evidentiary hearing "wherever material facts are in dispute that must be resolved in order to determine the issue raised on the merits." Minn. Stat. § 590.04, subd. 1. If there is any doubt as to whether material facts are in dispute, an evidentiary hearing should be issued to resolve those issues. *Opsahl*, 677 N.W.2d at 423 (citing *King v. State*, 649 N.W.2d 74, 88 (Minn. 2001). When the district court concludes that newly discovered

testimony is unreliable without first evaluating the credibility of the witness at an evidentiary hearing, the postconviction court misapplied Minn. Stat. § 590.04 and therefore abused its discretion. *Martin v. State*, 825 N.W.2d 734, 742 (Minn. 2013).

A. Evidence now in Mr. Andersen's possession was not known or available at the time of trial and/or he was taken by surprise.

Mr. Andersen was not in possession of the newly discovered described above at the time of trial or his previous petition. See *Andersen v. State*, 830 N.W.2d 1, 16 n. 1 (Minn. 2013) (Justice Anderson dissenting). Were he, he would have presented it at trial or in conjunction with a claim asserting his innocence long ago. With the shell casings, these were not discovered until August 2019. With the remaining evidence, the need for evidence related to Chad Swedberg' van ownership and sale did not become evident until after the evidentiary hearing when certain witnesses gave testimony that was demonstrably false, which triggered the need for Mr. Andersen to seek out additional information to counter that false testimony.

In short, there is no reason to believe that Mr. Andersen would not present this information at an earlier time if he had knowledge of such information.

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. Either the shell casings that were discovered where reported by Al Baker and Jesse Fain and not disclosed to Mr. Andersen prior to his trial, or there was no reason for Mr. Andersen to even become aware of this unless and until Al Baker mentioned them. Either way, Mr. Andersen's lack of knowledge of the existence of the shell casings was not due to lack of due diligence. As to the remaining evidence, evidence related to the ownership of the van did not come into dispute until false testimony was given at hearing. When the need for the evidence did not exist until the evidentiary hearing, not having it cannot be due to lack of due diligence.

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).

The evidence here is material and exculpatory because it not only attacks every aspect of the state's circumstantial case against Mr. Andersen, but directly relates to the gun that was used in the shooting, and shows that it was a caliber not in Mr. Andersen's possession, and, there is nothing in this case to suggest that Mr. Andersen ever even had access to a .308 rifle. These shell casings that do not match the gun found on Mr. Andersen's property are exculpatory for Mr. Andersen.

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

The manner in which Mr. Andersen's trial would have changed had he been in possession of the evidence he now presents has been discussed in detail above in great detail. Whether viewed through the lenses of the Fifth and Sixth Amendment violations stemming from non-disclosure, lack of investigation and, or as newly discovered evidence under those standards, it is clear the outcome of the case would change. This is particularly true in light of the skeptical eye cast upon the case by the trial court and the Supreme Court on direct review[1].

[1] (T. 2770) "I am not uncomfortable telling you folks I have struggled with this, but I can't in good conscience take the position that no reasonable jury, taking into account the state's evidence and was favorable to the state under the circumstances, that no reasonable jury could convict Mr. Andersen." (T. 2770). *State v. Andersen*, 784 N.W.2d 320, 336 (Minn. 2010) (Justice Page concurring) – calling case a "close one".

If Mr. Andersen was aware of the existence of the .308 shell casings at trial, this is a matter that would not have even made it to a jury, because the district court would have granted a motion for judgment of acquittal on all counts. The nature of the having shell casings that do not match any firearm Mr. Andersen is alleged to have ever had access to, along with evidence that another individual closely associated with Chad Swedberg had disposed of a gun of that caliber prior to law enforcement examining his firearms raises the level of doubt to such heights that no reasonable jury would have been able to convict Mr. Andersen. That, in conjunction with the other evidence Mr. Andersen has presented in this matter challenging nearly every aspect of his conviction should leave little doubt that the outcome would have changed. *See Hooper v. State*, 838 N.W.2d 775, 778 (Minn. 2013) (noting that evidence which was ruled to be *Knaffla* barred can be considered as corroborating evidence for procedurally proper claims).

V. MR. ANDERSEN SHOULD BE GRATED A NEW TRIAL IN THE INTERESTS OF JUSTICE

Mr. Andersen should be granted a new trial in the interests of justice based upon a showing of actual innocence, or in the alternative, to ensure the fair administration of justice. The Supreme Court will use its supervisory power to award a new trial in the interests of justice to ensure the fair administration of justice. *See State v. Beecroft*, 813 N.W.2d 814, 846-47 (Minn. 2012); *State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994); *State v. Salitros*, 499 N.W.2d 815 (820) (Minn. 1993); *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992). While a new trial will not be granted in the absence of exceptional circumstances, it will be done when necessary to protect a defendant from fundamental unfairness and to protect the integrity of judicial proceedings. *Gassler v. State*, 787 N.W2d 575, 586 (Minn. 2010). It will also be done regardless of whether the defendant was prejudiced by the illegal act. *State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005); *State v.*

Salitros, 499 N.W.2d 815 (820) (Minn. 1993); *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992).

In *State v. Beecroft*, 813 N.W.2d 814, 846-47 (Minn. 2012), this Court reversed despite a lack of prejudice where multiple state actors interfered with the statutorily mandated independence of medical examiners. *Id.* at 852. In *State v. Salitros*, 499 N.W.2d 815, 820 (Minn. 1993), this Court reversed in the interests of justice where the prosecutor made clearly improper arguments at trial that were known to be improper at the time they were made. *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992), is particularly instructive, as the state failed to disclose exculpatory evidence and told a witness to keep her mouth shut about the exculpatory evidence. *Id.* The Supreme Court reversed without concern for prejudice because it was clear that the Rules of Criminal Procedure required the information be disclosed. *Id.* In *State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005), this Court ordered a new trial regardless of prejudice where the state injected race into closing arguments despite case law clearly prohibiting this.

In the present case, it has been clear that anything would be done to ensure Mr. Andersen was found guilty. Before trial, his phone calls with his attorneys and investigator were recorded and reviewed under highly suspicious circumstances. Even though the state alleges these calls were not eavesdropped on, when Mr. Andersen and his attorney set a trap to determine if the calls were being listened to, the trap was sprung when his attorney was searched in a manner making it clear the calls had been listened too. In addition, as detailed previously, when Mr. Andersen went to contact potential witnesses for a defense, they had been told not to cooperate with Mr. Andersen.

When officers went for a search warrant, they left out material information and made everything seem so much more favorable than was realistic. During trial, disclosures kept coming throughout trial, including and up to the date of Mr. Andersen's sentencing, and on occasion included incredibly important information such as that Al Baker, at a time when officers had leaked that the murder weapon was a .222, had disposed of a .308 rifle just prior to officers finally checking his weapons over a year after the shooting. That was evidence that was incredibly important at the time of the disclosure – after the trial was over – and it is incalculably more important now that Mr. Andersen has discovered the very shell casings Baker said would be there, which are from a .308.

This is a case where both the district court, during trial, and the Supreme Court, on direct appeal, struggled with the facts and whether they pointed to Mr. Andersen's guilt. court (T. 2770); *State v. Andersen*, 784 N.W.2d 320, 336 (Minn. 2010)(Justice Page concurring). Since then, Mr. Andersen has presented evidence that attacks nearly every aspect of the case against him.

In a previous postconviction, Mr. Andersen presented evidence, broken, generally, into 16 categories. Through that evidence, Mr. Andersen showed the following facts that called into question the outcome of his trial:

1. That Al Baker was at the scene of the crime as early as 8:00 a.m. on April 13, 2007 and found bullets and cigarette butts left by the shooter. (Doc. 157–Exhibit 10).

2. Evidence of 9:20 of an interview with Al Baker which wasn't transcribed or disclosed prior to trial in which Baker reports having received two phone calls from someone claiming to have killed Chad and in which Baker states his phone system is set up so he can make and

receive phone calls through his home phone from his cell phone. (Doc. 157 – Exhibit 9, Doc. 158 – Exhibit 11).

3. That Al Baker sent a .308 rifle to his brother in Illinois, rather than to his niece in Alaska as Baker told police before trial. (Doc. 157 – Exhibit 10).

4. Evidence of a witness contact sheet created after an interview with Wanda Nelson that Appellant didn't leave her office with a copy of his taxes, Appellant had in fact left with a reference copy. (Doc. 158: Exhibit 13).

5. That contrary to Nelson's trial testimony Appellant returned to her office to obtain a copy of his taxes in the afternoon of April 13, 2007, Appellant had called her office to request she fax a copy of his tax returns to the bank and that she had racial bias toward Native Americans. (Doc. 158: Exhibit 17).

6. Evidence contradicting the trial testimony of Douglas Haverkamp and Bradley Riggle that they didn't intend to go to Ulen to do Haverkamp's taxes in the form of a transcribed statement from April 15, 2007 in which Riggle stated he intended to go to Ulen with Haverkamp to have Haverkamp's taxes done. (Doc. 158-Exhibit 18).

7. That Haverkamp had taken Appellant's van and the proceeds from his leeching operation and was afraid of Appellant and unwilling to speak with his investigator at an earlier time. (Doc. 157-Exhibit 19; Doc. 188–Exhibit 3)

8. Evidence from an interview between Jeffrey Nelson and Leslie and Jesse Fain, that contrary to the trial testimony of Jeffery Nelson (T. 1964, 2935), Chad knew the stolen four-wheeler was on his property. This evidence wasn't turned over to Appellant prior to trial and shows that Nelson was aware Appellant couldn't have stolen the four-wheeler. (Doc. 160-Exhibit 38)

9. That Appellant's trial investigator obtained a recording of Liz Andersen handing an envelope of cash to Chad and Leslie Swedberg inside a Wal-Mart, corroborating Appellant's statement he sold the Tikka rifle to Chad, but that Appellant's trial counsel never paid for the work, so didn't receive the recording prior to trial. (Doc. 158-Exhibit 11).

10. That other people knew Appellant's cell phone was in very poor condition, such that he couldn't use it for more than a few moments at a time unless it was plugged in and that he was using a nail as an antenna. (Doc. 160-Exhibit 30; Doc. 157-Exhibit 4; Doc. 158-Exhibit 19)

11. That, contrary to the picture the state and Leslie Fain tried to paint at trial about a happy, stable relationship between Leslie and Chad, Chad was having an affair and broke off his relationship with Leslie. (Doc. 160-Exhibit 33).

12. That Leslie Fain, along with Jesse Fain and an individual believed to be Leslie's brother, were seen driving on Highway 34 between 7:30 and 8:00 a.m. on April 13, 2007 by Stacy Weaver. (Doc. 16-Exhibit 34).

13. That, contrary to her trial testimony she and Chad had been in talks to buy a greenhouse, the greenhouse owner, Steven Frank Lhotka, has never spoken with either Chad or Leslie about selling them his greenhouse. (Doc. 160-Exhibit 35).

14. That, contrary to Kenneth Swedberg's testimony he did nothing more than move Chad's body slightly to check for a pulse, he rolled Chad over and then went through his pockets to remove evidence of drug use which provided an opportunity to know of the bullet hole size. (Doc. 160-Exhibit 35; Exhibit 36).

15. An Affidavit from Josh Bogatz in which he explains he dropped off a Tikka rifle at the home of Chad Swedberg on behalf of Appellant after Swedberg and Andersen made a trade involving the rifle. (Doc. 157-Exhibit 4).

16. An Affidavit from Liz Andersen in which she explained she took an envelope of cash to Chad Swedberg and that she gave Chad the money inside a Wal-Mart during a heavy snow storm. (Doc. 160-Exhibit 37).

Now, Mr. Andersen has presented evidence that the very shell casings Al Baker said he saw at the scene just days after the shooting were located, and they appear to be .308 shell casings, which just happen to be the very same kind of gun Baker had sent away before law enforcement got around to checking him guns more than a year after the shooting. Through this, Mr. Andersen has attacked and exposed nearly every aspect of the case against him.

While there is a need for time and procedural bars, these bars should not result in an individual who is able to present this kind of voluminous evidence calling into question his conviction from having that addressed.

Here, the confluence of all of these events deprived Mr. Andersen of his right to due process and a fair trial and this Court should order him retried in the interests of justice. See *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

CONCLUSION

For the reasons stated above, Mr. Andresen requests that this Court schedule this matter for an evidentiary hearing where he is allowed to present evidence in support of his claims.

Dated: 5/26/2020

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s/ Zachary A. Longsdorf

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