

STATE OF MINNESOTA
IN SUPREME COURT

A18-0846
A20-1588

Washington County McKeig, J.

State of Minnesota,

Respondent,

vs.

Filed: August 18, 2021
Office of Appellate Courts

Stephen Carl Allwine,

Appellant.

Christa J. Groshek, Anna E. Tobia, Groshek Law, P.A., Minneapolis, Minnesota, for appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota, for respondent.

S Y L L A B U S

1. Sufficient evidence supports the jury's verdict that appellant is guilty of first-degree premeditated murder.
2. The district court did not abuse its discretion by denying appellant's claim of prosecutorial misconduct without an evidentiary hearing because, even if the alleged facts

were proven by a preponderance of the evidence, appellant is conclusively entitled to no relief on that claim.

3. Based on the information before the district court when it denied appellant's claim of ineffective assistance of trial counsel without an evidentiary hearing, the district court did not abuse its discretion because, even if the then-alleged facts were proven by a preponderance of the evidence, appellant is conclusively entitled to no relief on that claim.

4. A motion for reconsideration of a postconviction order that denies relief cannot introduce new evidence.

Affirmed.

O P I N I O N

MCKEIG, Justice.

After being convicted of first-degree premeditated murder for killing his wife, appellant Stephen Allwine¹ appeals from his conviction and from the district court's denial of his petition for postconviction relief. Allwine presents four issues on appeal. First, he argues his conviction must be reversed because the evidence presented at trial was insufficient to support the jury's verdict that he is guilty. Second, he claims his conviction must be reversed, or alternatively, a postconviction evidentiary hearing must be held, because the State committed prosecutorial misconduct. Third, he argues he is entitled to a new trial because his trial counsel provided ineffective assistance of counsel. Last, he contends an evidentiary hearing must be held to review the opinions of two experts to

¹ Because we reference multiple members of the Allwine family in this opinion, we will refer to appellant as "Stephen" or "Allwine" to eliminate confusion.

determine if a new trial is warranted. Because we conclude that these claims have no merit, we affirm the judgment of conviction and the decision of the district court that denied postconviction relief.

FACTS

Stephen and Amy Allwine married in 1998. Stephen worked in information technology. Amy ran a dog training business from the Allwine family residence. Stephen and Amy had a son, J.A. Stephen and Amy were very involved in their church, which does not condone infidelity or divorce. Stephen was a church elder who gave sermons and counseled others in the congregation. If a church elder is found to have committed adultery, that person could no longer serve as an elder and may be asked to leave the congregation. Beginning in 2014, Stephen engaged in multiple extramarital affairs.

In February 2016, a person using the online screen name “dogdayGod” sent a message to Besa Mafia² on the dark web,³ seeking to hire a person to kill Amy. Soon after, dogdayGod sent a second message to Besa Mafia requesting that Amy be killed while she was on a business trip in Moline, Illinois. DogdayGod provided Besa Mafia with the address of the hotel where Amy would be staying, a physical description of Amy, a

² The record shows that “Besa Mafia” is a store on the dark web that advertises itself as a forum for individuals to hire a hitman.

³ The record shows the “dark web” is a part of the internet that masks a user’s identity, making the user virtually anonymous. The dark web can only be accessed using a specialized web browser called “TOR.”

description of Amy's vehicle, and a photograph of Amy. DogdayGod paid Besa Mafia in Bitcoin⁴ to kill Amy.

In May 2016, the Federal Bureau of Investigation (FBI) learned through an anonymous source that dogdayGod was trying to hire a hitman to kill Amy. An FBI agent and a Cottage Grove police detective notified Amy of the threat against her life. Law enforcement advised Amy to take security precautions and to report any suspicious activity to police. The next month, Amy notified the FBI that she had received two anonymous emails threatening to harm her and her family unless she committed suicide. In response to the threats, the FBI began an investigation. Investigators interviewed Stephen and Amy's work colleagues, and searched Stephen and Amy's two HP Notebook laptop computers.⁵ The investigation did not result in any leads.

November 13, 2016: The Day Amy Allwine Was Killed

Stephen awoke shortly before 6:00 a.m. and went to his basement office to work. Around 12:00 p.m., Stephen went upstairs to have lunch with Amy and J.A. Soon after, Amy told Stephen that she was feeling dizzy, lightheaded, and that she was going to bed to rest. Around 1:00 p.m., C.Z., Amy's father, arrived at the Allwine residence to finish a home project that he had started a few days earlier. Stephen told C.Z. that Amy was in bed and not feeling well. C.Z. did not see his daughter while he was at the Allwine residence.

⁴ The record shows "Bitcoin" is an online digital currency.

⁵ For clarity, these HP laptop computers are not the same as the MacBook Pro laptop computer discussed below.

Around 2:00 p.m., C.Z. left. Minutes later, Stephen called C.Z. and asked him to return and pick up J.A., so that he could take Amy to the clinic for medical attention. C.Z. returned to the Allwine residence, picked up J.A., and the two left.

Around 5:30 p.m., Stephen arrived at C.Z.'s residence to pick up J.A. C.Z. asked Stephen what he learned about Amy's illness at the clinic. Stephen told C.Z. that Amy decided not to go to the clinic. Following a brief conversation, Stephen and J.A. left. Stephen and J.A. returned to the Allwine residence at approximately 6:52 p.m. Upon entering their home, J.A. saw his mother lying on the floor with a pool of blood around her head. At approximately 7:00 p.m., Stephen called 911. On the 911 call, Stephen told the emergency dispatcher: "I think my wife shot herself. There's blood all over." Minutes later, Cottage Grove police arrived at the Allwine residence. Officers went into the master bedroom and saw Amy lying face up on the floor with her pants unbuttoned and unzipped, her hands at her sides, blood on the floor, and a handgun laying on Amy's left forearm. Officers discovered Amy suffered a gunshot wound to the right side of her head.

Stephen Allwine's Trial

Following an investigation, a grand jury indicted Stephen Allwine on the charge of first-degree premeditated murder. Minn. Stat. § 609.185(a)(1) (2020). Allwine retained private defense counsel. On January 23, 2018, the case proceeded to trial. The State presented several witnesses and experts, including law enforcement officials, the medical examiner who conducted the autopsy on Amy's body, and a computer forensic expert who analyzed over 60 electronic devices that were seized from the Allwine residence—

including a MacBook Pro laptop computer with the username “S Allwine” and an iPhone 6S named “S Allwine’s iPhone.”

A retired officer testified that Allwine reported to police that he had been scammed out of \$6,000 while trying to purchase Bitcoin in March 2016. Another officer testified that the crime scene was “strange” and not consistent with a suicide. The medical examiner testified that she discovered a nontherapeutic amount of scopolamine⁶ in Amy’s system. Based on the level of scopolamine, the medical examiner agreed with law enforcement’s assessment that Amy died at 3:15 p.m. or earlier on November 13, 2016. The medical examiner also agreed with law enforcement’s assessment that the evidence was not consistent with a suicide.

The computer forensic expert testified that the user S Allwine downloaded TOR—a web browser needed to access the dark web—on the MacBook Pro laptop computer.⁷ The expert testified that he found a “note” on the MacBook Pro laptop computer with an email address “sharklasers.com,” which allows users to send anonymous emails. The expert testified that the user S Allwine composed an anonymous email on the MacBook Pro laptop computer. The expert testified that minutes before dogdayGod sent a message

⁶ The record shows that “scopolamine” is a prescription drug that is commonly used to prevent motion sickness. Scopolamine can cause a person to experience blurred vision, a dry mouth and throat, confusion, hallucinations, dilated pupils, flushing of the skin, drowsiness, or insomnia. Further, the record shows Amy never had a prescription for scopolamine.

⁷ The record shows that Allwine told FBI investigators in August 2016 that he had never used the dark web.

to Besa Mafia, requesting that Amy be killed while traveling to Moline, Illinois, the user S Allwine ran a Google search of Moline, Illinois on the MacBook Pro laptop computer. The expert testified that the user S Allwine used the MacBook Pro laptop computer to view Amy's Facebook account and browsed her photographs the day before dogdayGod sent a photo of Amy to Besa Mafia. The expert testified that dogdayGod sought to buy the drug scopolamine online. Last, the expert testified that the same unique 34-digit alphanumeric code that dogdayGod used to pay Besa Mafia in Bitcoin was found on the MacBook Pro laptop computer with the username S Allwine.

The defense argued that Stephen could not have murdered Amy because he was not home at the time Amy was murdered. The defense presented several witnesses⁸ who all testified to either seeing Amy sometime in the afternoon in her driveway or to hearing an anonymous vehicle speed off quickly around the Allwine residence. On January 31, 2018, the jury found Stephen Allwine guilty of first-degree premeditated murder. The district court sentenced him to life without the possibility of release.

Postconviction History

In May 2018, Allwine filed a direct appeal with our court. On September 28, 2018, while his direct appeal was pending, CBS News aired an episode of *48 Hours*—titled “Click for a Killer: Part I.” The episode featured the Allwine case, and included interviews

⁸ The record shows that Allwine's trial counsel hired multiple experts, but none testified at trial because trial counsel believed that their testimony would have been consistent with the State's experts, or because they were not relevant to the defense's theory of the case—that Allwine was not at home at the time Amy was murdered.

with lawyers and law enforcement officials involved in the case. In the episode, an unidentifiable man named “Yura” claimed that a Besa Mafia hitman killed Amy. Subsequently, we granted Allwine’s motion to stay his direct appeal to allow him to pursue postconviction relief in district court. *State v. Allwine*, A18-0846, Order at 1–2 (Minn. filed Apr. 2, 2019).

On August 1, 2019, Allwine filed a petition for postconviction relief.⁹ Three weeks later, on August 20, 2019, Allwine made a request for funds under Minn. Stat. § 611.21(a) (2020)¹⁰ to hire a digital forensic expert in support of his petition. The district court denied Allwine’s request for funds on September 5, 2019, because he did not establish he was “indigent” as is statutorily required.¹¹ On May 4, 2020, the State filed a response to Allwine’s petition for postconviction relief. In support of its response, the State submitted an affidavit of Allwine’s trial counsel, explaining the decisions he made during trial. On

⁹ Seven months later, on March 2, 2020, clarifying language was added to the petition under Minn. Stat. § 590.03 (2020), which allows a district court to “permit amendments” to the petition. *See Rossberg v. State*, 874 N.W.2d 786, 791 (Minn. 2016). Although Allwine captioned the amended document as a “second petition for postconviction relief,” we refer to the two documents as Allwine’s “petition for postconviction relief,” for ease of reference.

¹⁰ Minnesota Statutes § 611.21(a) allows a district court, after making the appropriate inquiry and findings, to authorize counsel for an indigent defendant or a defendant whose annual income at the outset of the prosecution is below a certain level, to obtain “investigative, expert, or other services necessary to an adequate defense in the case.”

¹¹ This was not Allwine’s first request for funds. On July 8, 2019, Allwine filed a motion for funds to hire an expert, which the district court granted on July 16, 2019.

June 3, 2020, the district court issued an order amending the briefing schedule and closing the record as of June 12, 2020.

On July 8, 2020, Allwine filed another motion for funds under Minn. Stat. § 611.21(a). Before ruling on this additional motion for funds, the district court directed Allwine to provide an affidavit listing his income “at the outset of the prosecution” to determine his eligibility.¹² On August 12, 2020, Allwine’s postconviction counsel informed the district court that she was “working with [Allwine’s] family to determine his assets at the outset of the case,” and anticipated receiving that information “in the next two weeks.” The record contains no indication that Allwine or his counsel ever provided the district court with his income at the outset of the prosecution.

On September 21, 2020, the district court issued Findings of Fact, Conclusions of Law, and an Order denying Allwine’s petition for postconviction relief.¹³ Four days later, on September 25, 2020, Allwine filed a motion to set aside the district court’s findings of fact and filed a third motion for funds under Minn. Stat. § 611.21(a), with the district court.

On October 16, 2020, the district court denied Allwine’s motion, which it construed as a motion to reconsider its order denying postconviction relief. It also denied Allwine’s July 8, 2020 and September 25, 2020 motions for funds. The court concluded that Allwine

¹² The record shows Allwine’s counsel claimed that the “relevant timeframe” when interpreting the statutory phrase “at the outset of the prosecution” contained in Minn. Stat. § 611.21(a), was “when [Allwine] began prosecuting his post-conviction action” in 2019.

¹³ Since the court had not received Allwine’s proof of income affidavit, it had not ruled on his July 8, 2020 motion for funds when it issued its postconviction order denying relief.

had not established that he was indigent “at the outset of the prosecution” and, therefore, he did not qualify for funds under Minn. Stat. § 611.21(a).

On November 9, 2020, Allwine filed a second motion to reconsider the district court’s findings of fact in the September 2020 order denying postconviction relief. In support of this motion, Allwine submitted an affidavit from a medical expert, challenging parts of the testimony the State’s medical examiner provided during Allwine’s trial. On November 23, 2020, the district court denied Allwine’s second motion to reconsider its order denying his petition for postconviction relief. On December 3, 2020, Allwine filed a third motion to reconsider the postconviction order denying relief. In support of this third motion, Allwine submitted an affidavit from a digital forensic expert, challenging some of the statements made in the affidavit submitted by Allwine’s trial counsel.¹⁴ On December 17, 2020, before the district court ruled on his third reconsideration motion, Allwine filed an appeal with our court from the district court’s September 2020 order denying postconviction relief. The next day, the district court denied Allwine’s third motion to reconsider, reasoning that the case was before our court and, consequently, its “authority is suspended due to an appeal.”

On December 22, 2020, we consolidated Allwine’s stayed direct appeal with his postconviction appeal. *State v. Allwine*, Nos. A18-0846, A20-1588, Order at 2–3 (Minn. filed Dec. 22, 2020).

¹⁴ As explained below, the affidavits Allwine submitted on November 9, 2020 and December 3, 2020 with his motions to reconsider were submitted to the district court *after* the scheduling order closed the record, and after the district court issued its order denying Allwine’s petition for postconviction relief.

ANALYSIS

On appeal, Allwine presents four arguments. He argues (1) the evidence is insufficient to sustain the jury's verdict that he is guilty of first-degree premeditated murder; (2) the State committed prosecutorial misconduct; (3) his trial counsel provided ineffective assistance of counsel; and (4) an evidentiary hearing must be held to review the opinions of the two experts whose affidavits were submitted with the motions to reconsider to determine whether a new trial is warranted. We consider each in turn.

I.

The first issue we address is whether sufficient evidence supports the jury's verdict that Allwine is guilty of first-degree premeditated murder. In assessing the sufficiency of the evidence, we determine "whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992).

"A conviction based on circumstantial evidence, however, warrants heightened scrutiny." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). This heightened scrutiny requires us to consider whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt. *See State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002). "Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *Id.*

When “reviewing the sufficiency of circumstantial evidence, our first task is to identify the circumstances proved.” *Al-Nasser*, 788 N.W.2d at 473 (quoting *State v. Anderson*, 784 N.W.2d 320, 329 (Minn. 2010)) (internal quotation marks omitted). In identifying the circumstances proved, we defer “to the jury’s acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.” *Id.* (citation omitted) (internal quotation marks omitted). In simpler terms, we “winnow down the evidence presented at trial” to a “subset of facts” that are consistent with the jury’s verdict and “disregard evidence that is inconsistent with the jury’s verdict.” *State v. Harris*, 895 N.W.2d 592, 600–01 (Minn. 2017). Second, we independently examine the reasonableness of any inferences that can be drawn from the circumstances proved, as a whole, including an inference consistent with rational hypotheses other than guilt. *Al-Nasser*, 788 N.W.2d at 473-74. In considering the reasonable inferences drawn from the circumstances proved, we “give no deference to the fact finder’s choice between reasonable inferences.” *State v. Stein*, 776 N.W.2d 709, 716 (Minn. 2010) (plurality opinion).

To sustain a conviction based on circumstantial evidence, “the reasonable inferences that can be drawn from the circumstances proved *as a whole* must be consistent with the hypothesis that the accused is guilty” and must also be “inconsistent with any rational hypothesis except that of guilt.” *State v. Fox*, 868 N.W.2d 206, 223 (Minn. 2015) (emphasis added). The State was required to prove at trial that Stephen acted with premeditation and intent when he caused Amy’s death. Minn. Stat. § 609.185(a)(1); *see*

also State v. Leake, 699 N.W.2d 312, 326 n.10 (Minn. 2005) (explaining the elements of first-degree premeditated murder).

Allwine claims only four facts are consistent with the hypothesis of his guilt: (1) He was married to Amy, (2) Amy was found dead at the home she shared with him, (3) he could not be excluded as a contributor to the DNA found on the gun at the scene, and (4) he was home with Amy for much of the day on which she was killed. Allwine also argues there are many circumstances proved that are inconsistent with the hypothesis of his guilt. The State counters that Allwine's characterization of the circumstances proved is "woefully inadequate" and ignores many facts in record that are consistent with the jury's verdict. We agree with the State here. Both of Allwine's claims are incorrect.

First, the circumstances proved in this case are as follows. On November 13, 2016, the day Amy was killed, Stephen awoke at the Allwine residence at approximately 6 a.m. and did not leave the residence until approximately 5 p.m. Stephen began working from his basement office that morning. At approximately 12:15–12:30 p.m., Amy told Stephen that she was experiencing dizziness, lightheadedness, and dry mouth. Amy then told Stephen she was going to bed to rest. Stephen's last employment activity was at approximately 12:51 p.m. Amy's father picked J.A. up from the Allwine residence at 2 p.m., leaving Stephen and Amy in the home. Based on the level of scopolamine found in Amy's system, the medical examiner agreed with the assessment that Amy died at 3:15 p.m. or earlier that day. Police also discovered a particle of gunshot residue on Stephen's right hand.

Computer forensic analysis of the MacBook Pro laptop computer with the username S Allwine established the following facts. The analysis found that the TOR browser—needed to access the dark web—was installed on the MacBook Pro laptop computer. Stephen previously told law enforcement that he had never used the dark web before. Forensic analysis also discovered that the same computer searched for a service that allows users to send anonymous emails, and that the user clicked the “compose” button to create an anonymous email. Seven minutes before dogdayGod sent an email to Besa Mafia seeking to hire a person to kill Amy while she was on a business trip to Moline, Illinois, a user of the same MacBook Pro laptop computer ran a Google search for Moline, Illinois. The MacBook Pro laptop computer was used to search for the drug “scopolamine,” the same drug found in Amy’s system. Amy never had a prescription for scopolamine. Lastly, the analysis found that the MacBook Pro laptop computer contained the same unique 34-digit alphanumeric Bitcoin code as the code that dogdayGod used to communicate with Besa Mafia. The computer forensic expert also opined that the person using “S Allwine’s iPhone” on March 22, 2016 was the person who paid Besa Mafia in Bitcoin to kill Amy.

Second, Allwine’s claim that there are many circumstances inconsistent with the hypothesis of his guilt misunderstands our circumstantial evidence analysis on review. As noted above, rather than consider circumstances inconsistent with guilt, as he asks us to do, we are bound to *disregard* evidence that is inconsistent with the jury’s verdict when identifying the circumstances proved. *See Harris*, 895 N.W.2d at 601.

Next, we independently examine the reasonableness of all inferences that can be drawn from the circumstances proved. The circumstances proved support three reasonable

inferences in favor of the jury's verdict. First, the circumstances proved support the reasonable inference that the person plotting to kill Amy and using the online screen name dogdayGod was Stephen Allwine. The computer forensic expert provided extensive testimony establishing a chronological and digital nexus between dogdayGod's messages to Besa Mafia and actions taken by the user of the MacBook Pro laptop with the username S Allwine. Particularly, the fact that the same 34-digit alphanumeric Bitcoin code that dogdayGod sent to Besa Mafia was found on the S Allwine MacBook Pro laptop provides a strong inference that Allwine was the person using the online screen name dogdayGod.

Second, the circumstances proved support the reasonable inference that Stephen drugged Amy with scopolamine. Because Amy did not have a prescription for scopolamine, because Stephen—as dogdayGod—was searching the dark web for scopolamine on the MacBook Pro laptop computer, and because a nontherapeutic amount of scopolamine was found in Amy's system after death, a reasonable inference arises that Stephen drugged Amy with scopolamine the day she died.

Last, the circumstances proved support the reasonable inference that Stephen was the person who used the handgun to shoot and kill Amy. The medical examiner testified that Amy died at 3:15 p.m. or earlier. Stephen told investigators he was the only person with Amy at that time, and even claimed he talked to her over an hour after her time of death. Law enforcement testified that the crime scene was inconsistent with a suicide, and Stephen's right hand tested positive for gunshot residue. These inferences are reasonable based on the circumstances proved.

The reasonable inferences are also *inconsistent* with a rational hypothesis other than guilt. When viewed *as a whole*, the circumstances proved do not support a reasonable inference that someone else killed Amy, especially when Allwine's right hand tested positive for gunshot residue, Allwine—as dogdayGod—searched for scopolamine to purchase on the dark web, a nontherapeutic amount of scopolamine was found in Amy's system after death, and Amy did not have a prescription for scopolamine. Accordingly, there is no rational hypothesis other than guilt. Therefore, we conclude that the circumstantial evidence is sufficient to support the jury's verdict that Stephen Allwine is guilty of first-degree premeditated murder.

II.

Second, we consider whether the facts alleged in the petition for postconviction relief, if proven by a preponderance of the evidence, support a claim that the State committed prosecutorial misconduct. The district court concluded that the State did not and therefore denied Allwine's claim without an evidentiary hearing. We review the district court's denial of postconviction relief, including a denial of relief without an evidentiary hearing, for an abuse of discretion. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record. *Id.*

Allwine argues the prosecution committed misconduct by failing to disclose the third-party Yura confession, in violation of Minnesota's "very broad discovery rules" and Rule 3.8(g)–(h) of the American Bar Association's (ABA) Rules of Professional

Conduct.¹⁵ Because the Minnesota Rules of Criminal Procedure only require prosecutors to disclose exculpatory evidence before or during a trial, and because Allwine's trial was complete before the prosecution was aware of or had possession of the Yura confession, the State argues it did not commit prosecutorial misconduct. We agree with the State here as well.

Rule 9 of the Minnesota Rules of Criminal Procedure governs evidentiary disclosure requirements. The rule requires the State to disclose exculpatory evidence at the defense's request and before the Rule 11 omnibus hearing. Minn. R. Crim. P. 9.01, subd. 1(6). Further, the rule imposes a continuing duty on the State to disclose exculpatory evidence "before and during trial." Minn. R. Crim. P. 9.03, subd. 2(c). By the plain language of these Rule 9 provisions, the State had a duty to disclose exculpatory evidence—such as a third-party confession—to the defense from the filing of charges until the trial has ended.

Here, the record shows prosecutors exchanged several email communications with CBS News staff from January 2018 to September 2018, but none of the communications included exculpatory evidence.¹⁶ Allwine's claim that the State violated "broad discovery

¹⁵ Without providing a substantive argument, Allwine also asserts in connection with this claim that he "was not charged with Aiding and Abetting so his conviction must be reversed." Because Stephen does not go beyond this conclusory statement in his briefs, we deem the argument waived. *State v. Morrow*, 834 N.W.2d 715, 724 n.4 (Minn. 2013). Even if we reached this argument, however, we would reject it because "aiding and abetting is *not* a separate substantive offense, but rather is a theory of criminal liability." *State v. Ezeka*, 946 N.W.2d 393, 400 n.1 (Minn. 2020) (citation omitted) (internal quotation marks omitted).

¹⁶ An email exchange on May 7, 2018, mentions Yura, but in no way suggests that he had confessed to the murder of Amy.

rules" and the ABA Rules of Professional Conduct is without merit. As mentioned, our discovery rules expressly place a duty on the State to disclose exculpatory evidence to the defense before or during trial—not *after* trial. Nothing establishes that the State had undisclosed exculpatory evidence regarding an alternative perpetrator before or during the trial. Accordingly, there is no disclosure violation. Further, Allwine's reliance on the ABA's Rules of Professional Conduct is misplaced because those rules concern *attorney discipline*, not the criminal evidentiary matters at issue here.

Accordingly, even if the facts Allwine alleges in his petition for postconviction relief were proven at an evidentiary hearing, Allwine's prosecutorial misconduct claim fails as a matter of law. Consequently, the district court did not abuse its discretion when it denied Allwine's prosecutorial misconduct claim without an evidentiary hearing.

III.

Third, we determine whether the facts Allwine alleged in his petition for postconviction relief, if proven by a preponderance of the evidence, support a claim that his trial counsel provided ineffective assistance of counsel. "Because claims of ineffective assistance of counsel involve mixed questions of law and fact, our review of decisions by the postconviction court is *de novo*." *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). Ineffective assistance of counsel claims are governed by "the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668 (1984)." *Nicks*, 831 N.W.2d at 504 (applying *Strickland* in the context of a postconviction petition seeking a new trial based on an ineffective assistance of counsel claim). *Strickland* requires a petitioner to show that (1)

trial counsel's representation fell below an objective standard of reasonableness¹⁷ and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020).

Allwine provides three reasons why his counsel was ineffective.¹⁸ First, he argues his trial counsel was ineffective because he failed "to use an expert to develop alternative perpetrator theory and to present alternative perpetrator evidence" against two persons. He also argues his trial counsel was ineffective because his trial counsel "did not consult with a medical examiner nor did he present the testimony of a medical examiner." Last, he contends his trial counsel was ineffective because his trial counsel failed "to use [a] computer forensic expert." In arguing that the district court erred when it failed to order a

¹⁷ The objective standard of reasonableness means "representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *White v. State*, 248 N.W.2d 281, 285 (Minn. 1976).

¹⁸ Allwine also argues that the district court's decision to issue its findings of fact, conclusions of law, and order denying his postconviction petition before he submitted the two affidavits "violated [his] right of due process" by "not allowing [him] to submit expert information as to his claim of ineffective assistance of counsel[.]" Accordingly, he claims that "this Court must reverse and remand for an evidentiary hearing." We disagree. On June 3, 2020, the district court issued an order amending the briefing schedule. In it, the district court stated that the "record will close on June 12, 2020 and the Court will take the matter under advisement on that date." Such an order rests within the district court's discretion. *See Matakis v. State*, 862 N.W.2d 33, 40–41 (2015); *cf.* Minn. R. Crim. P. 9.03, subd. 3 (allowing the district court to impose "reasonable terms and conditions" on discovery); Minn. R. Civ. P. 16.02(c) (similar authority for civil cases). Consequently, the district court did not abuse its discretion in ordering that the record close on June 12, 2020. *See Matakis*, 862 N.W.2d at 41.

new trial on his claims of ineffective assistance of counsel, Allwine primarily relies on the two expert affidavits submitted with his motions to reconsider.¹⁹

In reviewing whether the district court abused its discretion here, we consider the information available to the district court *at the time* the court issued its order denying postconviction relief. *Cf. State v. Jenkins*, 782 N.W.2d 211, 231 (Minn. 2010) (rejecting a police misconduct argument that “was not made to the district court at the time it was considering admission of the motive evidence.”). When the district court issued its September 2020 order denying Allwine’s petition for postconviction relief, the two affidavits had not yet been presented to it. Allwine’s reliance on the affidavits is misplaced and, therefore, his ineffective assistance of counsel argument on appeal cannot prevail. Therefore, the district court did not err when it denied Allwine’s petition for postconviction relief.

In addition, the district court did not abuse its discretion when it denied Allwine’s three reconsideration motions because such motions *cannot* introduce new evidence into the record. *See Sullivan v. Spot Weld, Inc.*, 560 N.W.2d 712, 715–16 (Minn. App. 1997) (rejecting attempt to supplement record with affidavit submitted in support of motion to reconsider), *rev. denied* (Minn. Apr. 27, 1997). Although we have never squarely considered whether a motion for reconsideration can introduce new evidence into the

¹⁹ Allwine’s argument regarding alternative perpetrators does not rest on the two expert affidavits. Assuming, without deciding, that Allwine’s trial counsel did not pursue an alternative perpetrator theory, such an omission fails to state a claim of ineffective assistance of trial counsel as a matter of law. Under well-established law, the decision to pursue alternative perpetrators is a matter of trial strategy that we do not scrutinize. *Opsahl*, 677 N.W.2d at 421.

record, the court of appeals' analysis in *Sullivan* is sound and consistent with the advisory committee's comment to the rule that authorizes motions for reconsideration. *See* Minn. Gen. R. Prac. 115.11 advisory comm. cmt.—1997 amendment (“Motions for reconsideration are not opportunities for presentation of facts or arguments available when the prior motion was considered.”). We therefore hold that a motion for reconsideration cannot introduce new evidence. Because Allwine’s motions for reconsideration introduced two affidavits as new evidence, the district court did not err when it denied the motions.²⁰ For the foregoing reasons, the district court did not err when it denied the petition for postconviction relief and the motions for reconsideration.

²⁰ In effect, the State argues that we should not consider the affidavits in determining any of the issues on appeal because an order denying a motion for reconsideration is not an appealable order. *See Hohenwald v. State*, 875 N.W.2d 843, 846 (Minn. 2016). The State’s argument is unsound because it conflates two distinct questions. The first question is whether an appeal may be taken from a particular order. The State is correct that a defendant cannot appeal *from* an order denying a motion for reconsideration. The second question is which orders may an appellate court review when a defendant files an appeal *from* a judgment. As Minn. R. Crim. P. 28.02, subd. 11, makes clear, in an appeal from a judgment, “the court may review any order . . . as the interests of justice may require.” Here, Allwine filed a timely appeal from his judgment of conviction. *See* Minn. R. Crim. P. 29.02, subd. 1(a) (authorizing an appeal in a first-degree murder case from the judgment). Consequently, we may review the district court’s October, November, and December 2020 orders denying Allwine’s motions for reconsideration based on the supporting affidavits presented to the district court at the time it decided each order. But as previously stated, we cannot consider the affidavits in determining whether the court abused its discretion when it made the decision in September 2020 to deny Allwine’s claim of ineffective assistance of counsel without an evidentiary hearing because those affidavits were filed *after* that decision was made.

IV.

Finally, we determine whether an evidentiary hearing must be held to review the opinions of two experts²¹ to determine if a new trial is warranted.²² As previously mentioned, Allwine improperly submitted the affidavits from the two experts with his motions for reconsideration. Accordingly, Allwine is not entitled to an evidentiary hearing to consider the opinions of the two experts.

CONCLUSION

For the foregoing reasons, we affirm the judgment of conviction and the decision of the district court that denied Allwine's petition for postconviction relief.

Affirmed.

²¹ One of these experts is the digital forensic expert previously mentioned that Allwine's trial counsel chose not to have testify during his trial.

²² Allwine also argues the district court erred when it denied his motion for funding, as authorized under Minn. Stat. § 611.21(a), for him to hire an expert. This assertion is incorrect, however. Section 611.21(a) distinguishes between two categories of defendants: (1) those with "counsel appointed by the court for an indigent defendant" and (2) those with private counsel who have an annual income not greater than 125 percent of the poverty line "at the outset of the prosecution." Because Allwine has a private attorney, he is not entitled to funds for experts unless he established that his annual income was not greater than 125 percent of the poverty line at the outset of the prosecution. Allwine did not do that before the district court. Accordingly, the district court did not err in denying him additional funding. The fact that Allwine has private counsel also dooms his claim that, under Minn. Stat. § 590.05, he is entitled to funding to hire an expert without a showing that his income was not greater than 125 percent of poverty line at the outset of the prosecution.

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF WASHINGTON

TENTH JUDICIAL DISTRICT

Stephen Carl Allwine,

Petitioner,

vs.

State of Minnesota,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER DENYING SECOND
PETITION FOR POSTCONVICTION
RELIEF**

Court File No: 82-CR-17-242

This matter came on Petitioner's Second Petition for Postconviction Relief before Douglas B. Meslow, on June 22, 2020. Petitioner is represented by Christa J. Groshek, Esq. Respondent is represented by Nicholas A. Hydukovich, Assistant Washington County Attorney.

NOW THEREFORE, having considered all the facts and circumstances surrounding this matter and the pleadings filed in connection with this Petition, this Court makes the following:

FINDINGS OF FACT

1. On November 13, 2016, Amy Allwine ("Amy") died of a gunshot wound to the head. On January 18, 2017, Petitioner Stephen Carl Allwine ("Allwine") was charged with Second Degree Murder-Intentional. On March 24, 2017, Allwine was indicted on First Degree Murder-Premeditated. The jury convicted Allwine of First Degree Murder – Premeditated following a trial that lasted from January 12, 2018, through January 31, 2018.

The following evidence was introduced at trial:

2. Allwine and Amy were married in 1998. (12T. p. 32).¹ Allwine was a member of the United Church of Christ and an elder in the church. (12T. pp. 42-44).

¹ The transcripts are filed in 16 volumes for hearing dates from March 24, 2017 through January 31, 2018, which is the date of the first appearance following the indictment through the last day of trial. The transcripts are labeled by Roman numerals. Transcript Volume #16 from January 31, 2018, the last date of trial, is incorrectly labeled Volume VII. For ease of reading and because two of the filed transcripts from two different trial days are labeled as Volume VII, this Order will refer to the transcripts by numbers rather than Roman numerals.

3. Allwine had three extramarital affairs. (12T. pp. 182-84, 196, 198-99; 13T. 43-44, 118-33).

4. In May 2016, the FBI learned that a person was attempting to hire a hitman to kill Amy through the Besa Mafia website on the Dark Web.² (15T. p. 34, Ex. 124). A person with the screen name dogdayGod sent the following message to Besa Mafia:

I am looking to hire you for a hit, but what is the recommended way to convert cash to bitcoin anonymously. If I pull \$5000 out for a hit, after the hit I assume that the police would see that draw and wonder where it went, so even if the bitcoins are not traceable, that missing money would raise suspicion? Is there a way to make it look like I am buying something and end up with bitcoins so that the money looks like it is going to something tangible and not cash to pay for a hit?

5. On May 31, 2016, FBI Special Agent Asher Silkey and a Cottage Grove police detective met with Amy to notify her of the hit attempt. (2T. p. 73). DogdayGod sent messages to the Besa Mafia regarding a March 19, 2016, business trip that Amy was taking to Moline, Illinois.³ DogdayGod provided the address of the hotel where Amy was staying, a physical description of her, a description of her vehicle, and a picture of Amy. (Ex. 125, 127).

6. On July 31, 2016, Amy called Special Agent Silkey to report that on July 24, 2016, and July 31, 2016, she received anonymous emails telling her to commit suicide and threatening to harm her family members if she did not commit suicide. (2T. pp. 76-77, 79; Ex. 83, 84). The July 24, 2016, email contained details such as her parents' address and the color of shirt that her son was wearing the Friday before the email was sent. (Ex. 84).

7. Police recovered email messages on one of Allwine's email accounts that were exchanged with a person named Ryan Seidel regarding purchasing Bitcoin. (14T. pp. 143-44). On March 4, 2016, Ryan Seidel met a man who he could not identify at a Wendy's restaurant in Minneapolis. (14T. pp. 144-45, 147-48). The man paid \$6,000.00 for Bitcoin. (14T. pp. 143, 145, 156). Allwine had a dinner date that night with Michelle Woodard, a woman with whom he was having an affair. (T14. pp. 120, 129). Allwine texted Ms.

² Besa Mafia is a "store" on the Dark Web that advertises itself as a forum to hire a hitman.

³ The FBI was provided this information in May 2016 from a confidential source who obtained it through a hack of the Besa Mafia website. Thus, the emails were sent prior to May 2016.

Woodard and told her that he would be late because he had met a man at a fast-food restaurant to “exchange” Bitcoin and he locked his keys in his truck. (T.14, pp. 129). Allwine’s cell phone records indicate that he called his insurance company for lockout assistance at a Wendy’s in Minneapolis on March 4, 2016. (T.14. p. 81).

8. On March 7, 2016, Allwine reported to the Cottage Grove Police Department that he was scammed of \$6,000.00 in Bitcoin from a man named Mark while trying to purchase computer, lab gear, and study material. (12T. 187-88). Police found no emails on any of Allwine’s accounts with a man named Mark to purchase training supplies. (12T. pp. 206-07).

9. On the day that Amy was killed, Allwine reported to police that Amy told him around 12:15-12:30 p.m. that she was feeling dizzy and lightheaded and went to lie down in her bed. (Ex. B at p. 4 – transcript of Allwine’s November 15, 2016, interview with police).

10. Amy’s father was at the Allwine residence the day that Amy died from approximately 1:00 – 2:00 p.m. to finish installing a dog door in the home. (12T. pp. 38-39). Allwine called Amy’s father shortly after 2:00 p.m., just after he left the home, and asked him to pick up the Allwines’ son, Joseph, so he could take Amy to the clinic. (12T. p. 39). Allwine told Amy’s father that he would pick up Joseph at 5:30 p.m. (*Id.*)

11. Amy never went to the clinic. (Ex. B pp. 5-6). Allwine told police that he checked on Amy later in the afternoon and then went back downstairs and finished work. (Ex. B pp. 5-6). The records from Allwine’s employer show his last actions on November 13, 2016, were at 12:51 p.m. (12T. p. 165).

12. Amy was shot in the head at 3:15 p.m. or earlier on November 13, 2016. (16T. pp. 58-59).

13. Allwine called Amy’s father around 5:00 p.m. and told him that he may be late picking up Joseph because he had to get gas. (12T. p. 40). Allwine arrived at the home of Amy’s father to pick up Joseph at 5:30 p.m. (*Id.*). Allwine and Joseph went to Culver’s for dinner and arrived home at 6:52 p.m. and found Amy dead. (12T. pp. 128-29, Ex. B at p. 6).

14. Officers found Amy in a bedroom, face up on the floor with a handgun in her left forearm. (11T. pp. 62, 75, 76). The Sergeant at the scene confirmed that Amy was right handed and testified that he had never known someone to commit suicide with a gun using their non-dominant hand. (11T. pp. 136-37).

15. Crime scene investigators opined that Amy had been moved because she was found face up, but the blood from her nose and mouth flowed left and the blood stain patterns near her head showed blood that had dripped from an elevated position above the floor. (11T. pp. 198-200). Amy's blood was found on the wood floor outside the bedroom. (11T. pp. 207-08).

16. The BCA analyzed swabs taken from the trigger, slide, and pistol grip of the gun found next to Amy which contained mixtures of DNA from which Allwine and Amy could not be excluded, but which excluded over 99% of the world population. (14T. pp. 46-47). Allwine's hands were swabbed the night of the killing and gunshot residue was found on his right hand. (13T. pp. 14, 16-17).

17. Amy had an elevated level of Scopolamine in her system that she ingested orally. (13T. p. 37; 16T. p. 31). Scopolamine is a prescription drug used to treat motion sickness and Amy did not have a prescription for Scopolamine. (13T. pp. 28-29; 16T. pp. 30-31). Scopolamine can cause impaired thought, blurred vision, and slow movement. (13T. p. 38). DogdayGod made two posts on a website asking whether there was a seller of Scopolamine located in the Minneapolis area. (12T. pp. 204-06).

18. Police seized electronic devices from Allwine and his home and delivered (66) devices to Mark Lanterman, Chief Technology Officer of Computer Forensic Services, to analyze.⁴ (11T. p. 137; 14T p. 74; 15T pp. 4, 10).

19. A TOR browser is needed to access the Dark Web and Lanterman found a TOR browser installed on a MacBook obtained from Allwine's home with the user name "S Allwine." (15T. pp. 52-53).

20. Lanterman found that a virtual private network was installed on the MacBook, which can be used to encrypt internet communications. (15T. pp. 52-53). On July 16, 2016, the MacBook user searched the term "Guerilla mail," which is a service that allows users to send anonymous emails. (15T. p. 54).

21. Lanterman found a note with the email address exqplqv@sharklasers.com on an iPhone 6S named "S Allwine's iPhone," which Allwine gave to police the night of the murder. (11T. p. 64, 12T p. 122, 15T. p. 56). Sharklasers.com is a service that allows users to send anonymous emails. (15T. p. 56).

⁴ Allwine does I.T. work for two companies, which may explain the large number of devices located at the home.

22. On February 16, 2016, dogdayGod sent an email to Besa Mafia stating that Amy would be traveling to Moline, Illinois in March 2016, which is a three hour drive from Chicago, and asked for the price in Bitcoin for doing the hit and making it look like an accident. (15T. 38-39). Five minutes before dogdayGod sent the message to Besa Mafia, the user of the MacBook did a Google search for "Moline, IL" and clicked on a map showing the driving distance between Moline and Chicago. (15T. p. 39).

23. On March 5, 2016, dogdayGod sent a link of a photo of Amy to the Besa Mafia. (15T. p. 41). The photo link of Amy came from the website sallwine.net, but was not posted on that website until 45 minutes before dogdayGod sent the email to Besa Mafia. (15T. p. 44). The MacBook was used to browse photos on Amy's Facebook account the day before the link to Amy's photo was sent to Besa Mafia. (15T. p. 44).

24. The first threatening email was sent to Amy on July 24, 2016. (15T. pp. 57-58). The email stated that the sender knew where her parents, brother, and sister lived and obtained this information from a website called radaris.com. (15T. pp. 58-59). The MacBook accessed the radaris.com website and searched for Amy's relatives on July 8, 2016, and July 23, 2016. (15T. pp. 60-61).

25. On February 14, 2016, dogdayGod sent a message to Besa Mafia requesting to hire a hit and pay for it in Bitcoin. (15T. pp. 36-37). The MacBook was used to search for Bitcoin mining software later that day and an app called Bitcoin Wallet was installed on Allwine's Samsung Galaxy G5 cell phone. (15T. p. 37; 12T. pp. 149 -50).

26. On March 22, 2016, dogdayGod sent a message to Besa Mafia indicating that Bitcoin was sent to the wrong Bitcoin "address." (15T. p. 47). The message provided a 34-character code where the Bitcoin was sent and asked if Besa Mafia could "match up" the address. (15T. pp. 46-47).

27. Lanterman found that Allwine's iPhone had been backed up to the MacBook. (15 T. pp. 47-48). A deleted note from the Notes app on Allwine's iPhone was recovered on the MacBook. (15T. pp. 48-49). The note contained the same 34-character Bitcoin Wallet address referenced in dogdayGod's message to Besa Mafia was found on the MacBook.⁵ (15T. pp. 48-49). The note with the Bitcoin Wallet address was created on Allwine's iPhone on March 22, 2016, at 9:54:04 a.m. (15T. p. 50). DogdayGod sent the message to Besa

⁵ Bitcoin transactions come out of a Bitcoin Wallet and each wallet has a unique 34-character code. (15T. pp. 16-17).

Mafia that contained the 34-character Bitcoin Wallet address 23 seconds after the note was created and 40 seconds later the note was deleted. (15T. p. 50).

28. Following a seven day trial, the jury convicted Allwine of First Degree Murder – Premeditated.

Allwine's Appeal and Postconviction Motions:

29. On February 2, 2018, Allwine was sentenced to life imprisonment for the crime of Murder in the First Degree - Premeditated in violation of Minn. Stat. §609.185(a)(1) for the murder of Amy.

30. On May 31, 2018, Allwine filed an appeal with the Minnesota Supreme Court. On December 7, 2018, the Minnesota Supreme Court granted Allwine an extension to April 1, 2019 to file his appellate brief.

31. On March 29, 2019, Allwine filed a motion to stay his appeal to seek postconviction relief in district court. On April 2, 2019, the Minnesota Supreme Court granted Allwine's motion to stay his appeal and ordered Allwine to file a Petition for Postconviction Relief by August 1, 2019. On July 8, 2019, Allwine filed a motion to extend the filing date of the Petition, which was denied by Order of the Supreme Court. The Supreme Court's Order noted that the State opposed Allwine's motion to further extend the time to file a Petition on the grounds that good cause was not shown since he can amend his Petition if necessary.

32. On August 1, 2019, Allwine filed a First Petition for Postconviction Relief. Allwine did not file a memorandum of law with the First Petition and requested that the Court and the attorneys determine a briefing schedule for filing the memoranda of law.

33. On August 19, 2019, this Court and the attorneys held a phone conference to discuss the briefing schedule. On September 9, 2019, the Court issued an Order requiring Allwine to file and serve his memorandum of law by December 19, 2019, and the State to file its response by January 15, 2020.

34. On January 3, 2020, counsel for Allwine filed a letter in the court file informing the Court that their office was never served with the Court's September 9, 2019 Order that determined the dates for filing memoranda of law. Allwine's counsel requested an additional (60) days to file a memorandum of law.⁶ On January 7, 2020, the Court issued an

⁶ Counsel for Allwine was correct. Court administration did not serve the September 9, 2019 Order, on Allwine's attorney.

Order extending the deadline dates. The Order required Allwine to file his memorandum of law by March 3, 2020, and required the State to file its response by April 3, 2020.

35. On March 2, 2020, Allwine filed a Second Petition for Postconviction Relief and a memorandum of law. On April 1, 2020, the State requested a (30) day extension of time to respond to the Petition, which was granted by Order dated April 2, 2020. On May 4, 2020, the State filed its response to the Second Petition.

36. On June 1, 2020, Allwine's attorney filed a letter in the court file requesting an additional (30) days to respond to the State's brief. On June 3, 2020, the Court issued an Order that required Allwine to file a response to the State's brief by June 12, 2020.

37. On June 12, 2020, Allwine filed his response to the State's brief. Allwine also filed a letter requesting to keep the record open to obtain documentation from Allwine's trial counsel and information from Allwine's hired experts. On June 16, 2020, the State filed a letter opposing Allwine's request to keep the record open. The Court kept the record open until June 22, 2020, when a phone conference was held with the attorneys to discuss Allwine's request to keep the record open. The Court denied the request to continue keep the record open during the phone conference. Thus, the record closed on June 22, 2020.

38. Allwine requests that his conviction be vacated; that the Court grant a new trial; or that an evidentiary hearing be held on the basis of (1) ineffective assistance of trial counsel, (2) newly obtained evidence, and (3) prosecutorial misconduct.

39. Allwine contends that his trial counsel was ineffective for the following reasons:

- Failure to challenge the indictment;
- Failure to contest omnibus issues;
- Failure to properly cross examine the State's computer forensics expert;
- Failure to move for a mistrial or accept the trial court's one week continuance to respond to late discovered evidence during trial;
- Failure to hire experts to rebut and testify against the State's evidence regarding (1) ballistics, (2) blood spatter, (3) DNA, (4) gunshot residue, (5) footprint pattern, (6) digital evidence, and (7) medical examiner and/or forensic pathologist;
- Failure to investigate Alvin Andrew and Kristin Elmquist as alternative perpetrators; and

- Failure to object to the State's mischaracterization of Allwine's church's stance on divorce during closing arguments.

40. Allwine contends that he is entitled to postconviction relief based on prosecutorial misconduct related to a *48 Hours* television episode titled "Click for a Killer" that was created and produced by CBS News. The episode aired on September 29, 2018. The episode features a video sent to CBS News by a person named "Yura," who claims to be a member of the Besa Mafia. Yura is wearing a black mask and sunglasses to hide his identity and his voice is disguised. Yura states in his video that the Besa Mafia killed Amy. Allwine alleges that Prosecutor Kreuser committed misconduct by communicating with *48 Hours* staff before and after the trial and failing to disclose Yura's statement to defense counsel.

41. Allwine also alleges that Prosecutor Fink committed misconduct in his closing argument when he mischaracterized the position of Allwine's church on divorce.

42. Allwine contends that he is also entitled to postconviction relief on the basis of Yura's statement in the *48 Hours* television program, which he alleges is newly discovered evidence.

From the foregoing Findings of Facts, this Court makes the following:

CONCLUSIONS OF LAW

1. Minn. Stat. § 590.01, subd. 1, provides, in pertinent part, as follows:

[A] person convicted of a crime, who claims that: the conviction obtained or the sentence or other disposition made violated the person's rights under the Constitution or laws of the United States or of the state ... may commence a proceeding to secure relief by filing a petition in the district court in the county in which the conviction was had to vacate and set aside the judgment and to ... grant a new trial ... or make other disposition as may be appropriate.

2. Minn. Stat. § 590.04, subd. 1 provides that:

Unless the petition and the files and records conclusively show that the petitioner is entitled to no relief, the court shall promptly set an early hearing on the petition and response thereto, and promptly determine the issues, make findings of fact and conclusions of law with respect thereto, and either deny the petition or enter an order granting appropriate relief.

3. To obtain an evidentiary hearing on a petition for postconviction relief, the petitioner must allege facts that would, if proved by a fair preponderance of the evidence, entitle him to relief. *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002)(citation omitted). “The reviewing court considers the totality of the evidence before the judge or jury in making this determination.” *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003)(citation omitted).

4. “The petition must allege “more than argumentative assertions without factual support.”” *Nissalke v. State*, 861 N.W.2d 88, 91 (Minn. 2015)(*rehearing denied* May 20, 2015)(citation omitted).

5. On appeal, a post-conviction court’s determinations will not be overturned absent an abuse of discretion. *Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995).

Ineffective Assistance of Counsel:

6. The state and federal constitutional right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686; 104 S.Ct. 2052, 2063 (1984).

7. Generally, an ineffective assistance of counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal.” *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000)(citations omitted).

8. The two-part test for ineffective assistance of counsel requires a defendant to prove that “counsel’s representation ‘fell below an objective standard of reasonableness’ and ‘that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987)(*citing Strickland* at 2068).

9. “[T]he standard for attorney competence is ‘representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.’” *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993)(citation omitted).

10. Review of counsel’s performance under the first prong of the *Strickland* test is highly deferential. *Griffin v. State*, 941 N.W.2d 404, 408 (Minn. 2020)(citation omitted).

11. “There is a strong presumption ‘that counsel’s performance fell within a wide range of reasonable assistance.’” *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003)(citation omitted).

12. “Counsel’s decisions regarding trial strategy are granted particular deference.” *Miller* at 716.

Failure to Challenge the Indictment

13. Allwine contends that his trial counsel, Mr. Kevin DeVore (“DeVore”), was ineffective because he did not challenge the indictment. The Petition alleges that it is “common sense” for a criminal defense attorney to challenge an indictment, but it fails to cite any legal authority that failure to challenge an indictment is ineffective nor does it allege any facts regarding why DeVore was ineffective in failing to challenge the indictment.

14. “A presumption of regularity attaches to the indictment and it is a rare case where an indictment will be invalidated ... [A] criminal defendant bears a heavy burden when seeking to overturn an indictment.” *Dobbins v. State*, 788 N.W.2d 719, 731 (Minn. 2010).

15. The State submitted an affidavit from DeVore in response to the Petition. DeVore ordered and reviewed the grand jury transcripts. DeVore alleges that he “did not find any areas of the grand jury process that appeared to violate Mr. Allwine’s constitutional rights, nor did I find that the charging document was lacking pursuant to Rule 17.06, subd. 2 of the Minnesota Rules of Criminal Procedure.”

16. DeVore concluded that there was no basis to challenge the indictment. It is not ineffective assistance of trial counsel to fail to raise a claim that has no merit. *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007).

17. The Petition fails to meet the first prong of the *Strickland* test for ineffective assistance of counsel because it does not establish, by a preponderance of the evidence, how DeVore’s representation fell below an objective standard of reasonableness. Even if the first prong of *Strickland* was met, the Petition fails to meet the second prong of the *Strickland* test because it does not allege any facts related to how the result would have been different if DeVore had challenged the indictment.

Failure to Contest Omnibus Issues

18. With respect to omnibus issues, DeVore’s affidavit states as follows:

In response to the allegation that trial counsel did not contest any omnibus issues, there were none. The police were summoned by the defendant himself; and they entered and searched the house at his request. Mr. Allwine then met with investigators on his own. The defendant voluntarily gave a statement that night. He was not in custody and he was allowed to leave afterward. His position was that he had nothing to do with this and he was more than willing to assist the investigators in order to figure out what happened to his wife. The seizure of the computers and electronic devices was accomplished with valid search warrants. As part of his

ongoing trial strategy and defense of the case, Mr. Allwine gave a second statement with counsel present. Again, this was a voluntary statement. In trial counsel's opinion, there were no legitimate omnibus issues.

19. DeVore concluded that there was no omnibus issues. Again, it is not ineffective assistance of trial counsel to fail to raise a claim that has no merit. *Gail* at 248.

20. The Petition alleges that the only thing linking him to the Bitcoin Wallet is Lanterman's testimony there are "issues with the Bitcoin wallet address," which are primarily challenges to Lanterman's credibility.⁷ The Petition also alleges that DeVore should have requested "an evidentiary hearing regarding Mr. Lanterman's credibility before trial." "[I]t is the province of the jury to determine the credibility of witnesses." *State v. Pilot*, 595 N.W.2d 511, 516 (Minn. 1999).

21. DeVore was not ineffective for failing to request a "pretrial evidentiary hearing" on the issue of witness credibility since this is a jury issue. DeVore questioned Lanterman's credibility at trial and he attempted to submit the Hennepin County Order into evidence. (T. 15. pp. 84- 96). Judge Ekstrum denied DeVore's request to enter the Hennepin County Order into evidence, but he allowed DeVore to inquire whether Lanterman's credibility was ever questioned by a judge. (*Id.*).

22. The Petition fails to meet the first prong of the *Strickland* test for ineffective assistance of counsel because it does not establish, by a preponderance of the evidence, that DeVore's representation fell below an objective standard of reasonableness.

Cross Examination of Lanterman

23. As set forth above, the State offered evidence that an iPhone note containing a unique 34-character Bitcoin Wallet address was created on March 22, 2016, on the iPhone that the State alleged belonged to Allwine; the same 34-character code was sent by dogdayGod to the Besa Mafia approximately 20 seconds later; and the note was deleted from the iPhone approximately 40 seconds after the message was sent by dogdayGod. (T. 15. pp 48-50). Lanterman testified that he is unaware of a way to remotely "enter a note" in an iPhone. (T. 15. pp. 50-51). The Petition challenges DeVore's cross examination of Lanterman arguing that it is "common knowledge" that a person can edit a note in another

⁷ The Petition alleges that Lanterman's credibility was questioned by a Hennepin County district court judge in an Order filed July 17, 2014 in *Mark Lanterman and Computer Forensic Services v. Michael Roman Afermoth* – Case file No. 27-CV-12-22089 (T. 15. pp. 87-88 --- trial transcript incorrectly cites the case # as 17-CV-12-22089).

person's iPhone. DeVore hired two computer experts to help him prepare for trial. One of the experts helped DeVore prepare Lanterman's cross examination and was present during the trial. A claim of failure to ask "effective" cross examination questions focuses on trial tactics of counsel which "should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight." *Miller* at 717.

24. "[I]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," *Strickland* admonishes reviewing courts to 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.' In *Strickland*'s words, "[j]udicial scrutiny of counsel's performance must be highly deferential." *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003)(citation omitted).

25. DeVore's cross examination of Lanterman is protected trial strategy and was not ineffective.

Failure to Request a Continuance or Move for a Mistrial for Late Discovered Evidence

26. The trial began on January 18, 2018. On January 25, 2018, BCA Special Agent Michelle Frascone ("Frascone") testified outside of the presence of the jury that she noticed a possible footprint in a photo as she was preparing for her trial testimony on January 24, 2018. (T. 13. p. 57). She asked BCA staff to prepare an overlay photo to better view the possible print, which was submitted to the Court as Exhibit C. (T. 13. P. 57). Outside the presence of the jury, Frascone estimated the footprint to be a men's shoe size 11.5 - 12. (T. 13. P. 66). DeVore asked that the photo not be admitted into evidence. (T. 13. p. 81). Judge Ekstrum allowed Exhibit C to be admitted into evidence as a demonstrative exhibit only and offered DeVore a one week continuance to retain an expert. (T. 13. P. 84). DeVore stated in his affidavit that he discussed the continuance with Allwine and it was decided that a one-week delay would not have made a difference since the photo was not difficult to understand and Frascone was not going to testify that the footprint was Allwine's. This is trial strategy and is not ineffective assistance of counsel.

27. This issue is also moot because Exhibit C was never submitted to the jury. Even if the Petition established that DeVore's performance was deficient, it fails to meet the second prong of the *Strickland* test for ineffective assistance of counsel fails because the jury

never received the photo. Consequently, Allwine cannot demonstrate that the result of the proceeding would have been different.

Failure to hire experts to rebut and testify against the State's evidence

28. The State called witnesses to testify regarding the time and cause of death (Dr. Kelly Mills – Ramsey County Medical Examiner), DNA evidence, digital forensic evidence (Lanterman), and crime scene evidence (BCA agents Garfield and Frascone). The Petition alleges that DeVore was ineffective for failing to retain experts to rebut the State's evidence regarding (1) ballistics, (2) blood spatter, (3) DNA, (4) gunshot residue, (5) footprint pattern, (6) digital evidence, and (7) medical examiner and/or forensic pathologist.

29. DeVore did hire experts. He retained James Fleming ("Fleming") to analyze the gunshot residue and ballistics evidence. Fleming provided his findings and opinions to DeVore. DeVore states in his affidavit that he did not call Fleming because his testimony would not have contradicted the State's expert witness testimony. DeVore hired two digital forensic experts, John Carney ("Carney") and Jeff Wold, to analyze the electronic forensic evidence. Carney attended the trial to provide DeVore with ongoing advice and he helped DeVore prepare Lanterman's cross examination. DeVore's affidavit states that did not call Carney as a witness at trial because on "cross examination Mr. Carney would have to admit that he could not dispute Mr. Lanterman's findings." DeVore did not hire blood spatter, DNA, foot-print pattern, or a medical examiner and/or forensic pathologist because of the type of defense presented to the jury, which was that Allwine was not present when Amy died. DeVore stated in his affidavit that it "was too much of a risk at trial for the defendant to argue over blood spatter and cause of death because he was a grieving widower who had an alibi for his whereabouts." DeVore also states in his affidavit that the State did not present DNA, blood spatter or cause of death evidence as **direct evidence** against Allwine, but it was presented to show that someone other than Amy killed her. Lanterman's testimony was used by the State to help connect Allwine to the crime and DeVore hired two experts to assist him with this evidence. "What evidence to present to the jury, including which witnesses to call, represents an attorney's decision regarding trial tactics and lies within the proper discretion of trial counsel." *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). DeVore's decisions regarding which experts to hire is protected trial strategy and is not ineffective assistance of counsel.

Failure to Investigate Alternative Perpetrators

30. The Petition alleges that DeVore failed to investigate Alvin Andrew (“Andrew”), who lived with the Allwines, and Kristin Elmquist (“Elmquist”), who owned a dog training business that competed with Amy’s business.

31. The Petition alleges that Andrew lived in the basement of the Allwine home before the murder and had “access to the technology in question.” The Petition alleges that Elmquist was aware of Amy’s location in Illinois in March 2016; that she would not provide a statement without an attorney; and that she has expanded her business by taking over some of Amy’s former clients.

32. The allegation in the Petition that DeVore failed to investigate Andrew and Elmquist is incorrect. DeVore investigated both Andrew and Elmquist and concluded that neither person was responsible for Amy’s death.

33. The allegations in the Petition and the evidence received at trial do not put Andrew or Elmquist near the home on the day that Amy died. The allegations in the Petition regarding both Andrew and Elmquist are mere argumentative assertions without factual support, which do not rise to the level necessary to grant an evidentiary hearing. *Nissalke* at 91.

34. The extent of trial counsel’s investigation represents trial strategy. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004).

35. A defendant who alleges ineffective assistance of counsel for failure to investigate must show actual prejudice. *Gates* at 562.

36. DeVore’s investigation into Andrew and Elmquist is protected trial strategy and not ineffective assistance of counsel.

37. The reviewing court is to consider the totality of the evidence in determining whether the postconviction petition alleges sufficient facts to warrant an evidentiary hearing. *Rhodes* at 842. The State submitted substantial evidence, as set forth above, that Allwine communicated with Besa Mafia to attempt to have Amy killed and that Allwine was the only person at the home when Amy was killed. Thus, even if the first prong of *Strickland* was met, the Petition fails to meet the second prong of the *Strickland* test because it does not contain sufficient facts to how the result would have been different with the alternative perpetrator evidence.

Failure to object to the State’s mischaracterization of Allwine’s church’s stance on divorce during closing arguments

38. "The prosecutor's argument need not be 'colorless,' and it may include conclusions and inferences that are reasonably drawn from the facts in evidence." *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010)(citations omitted).

39. The prosecutor stated in closing arguments that Allwine "intended to kill Amy Allwine because a divorce would hurt him in the eyes of the church" and his church did not sanction divorce. (T. 17. pp. 12, 16). The Petition alleges that there was "no evidence of this being the church's divorce philosophy" and that Amy's parents' stated in their interview with police that the church (of which they were also members) does not condemn divorce, but helps people work through their issues.⁸ The Petition alleges that DeVore was ineffective because he failed to object to these statements during the prosecutor's closing argument. However, there was evidence both in the record and at trial that the church condemned divorce. Allwine told investigators that the church does not allow divorce unless the marriage was premised on one spouse lying to the other. (Ex. B. at 18). Additionally, Frascone testified that when she interviewed Allwine he told her the following:

[T]he church does not condone divorce. They see it as a marriage between a man a woman and God. And if on a case by case basis there was a divorce, that typically the person would not remarry. (T. 14. p. 197)

40. The Court concludes that the allegations in the Petition are incorrect. There was evidence regarding the church's position on divorce obtained by Agent Frascone from Allwine himself. The statements made by the prosecutor in his closing arguments are reasonably drawn from this evidence. It is not ineffective assistance of counsel to fail to object to statements in a closing argument that are based on reasonable inferences that can be drawn from the evidence. *Fields v. State*, 733 N.W.2d 465, 470 (Minn. 2007)(citation omitted).

Prosecutorial Misconduct

Mischaracterization of Church's Position on Divorce in Closing Arguments

41. "Because the prosecutor's arguments were based on reasonable inferences that could be drawn from that evidence, we conclude that the prosecutor's closing argument did not amount to misconduct." *Fields* at 470. Since the Court has concluded that the

⁸ This information came from a police interview with Amy's father and was not presented to the jury.

prosecutor's closing arguments were based on reasonable inferences drawn from the evidence, there can be no prosecutorial misconduct.

Failure to Disclose Evidence- Brady Violation

42. Prosecutor Kreuser exchanged several emails with CBS News staff from January 8, 2018 – September 2018 related to the *48 Hours* episode titled “Click for a Killer” that discussed Stephen Allwine’s case and included a statement by “Yura” that Besa Mafia killed Amy. (Ex. 1 to Petitioner’s March 2, 2020 First Memorandum of Law in Support of Postconviction Relief). The Petition alleges that Prosecutor Kreuser committed misconduct by failing to disclose Yura’s statement and that this failure to disclose constitutes a *Brady* violation which entitles him to a new trial.

43. “[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005)(citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963)).

44. “The duty to disclose such evidence exists even where there has been no request by the accused, and the remedy for a *Brady* violation is a new trial.” *State v. Hunt*, 615 N.W.2d 294, 299 (Minn. 2000)(citations omitted).

45. “Three elements must be met to succeed on the claim of a *Brady* violation: (1) the evidence must be favorable to the defendant as either exculpatory or impeaching; (2) the evidence must have been suppressed by the prosecution, intentionally or otherwise; and (3) the evidence must be material. In other words, the absence of the evidence must have caused prejudice to the defendant.” *Campbell v. State*, 916 N.W.2d 502, 510 (Minn. 2018)(citations omitted).

46. The only exculpatory information is Yura’s statement that the Besa Mafia killed Amy. The email communications between the prosecutor and CBS News do not contain any exculpatory information. There is no evidence that Prosecutor Kreuser knew about Yura’s statement before or during the trial. Allwine cites no legal authority, and this Court has not found none, that *Brady* requires the prosecutor to disclose this information after trial.

47. Even if Prosecutor Kreuser knew about Yura’s statement before or during the trial or if *Brady* mandates disclosure of exculpatory information after trial, there is no *Brady* violation unless the evidence is material. “Evidence is material under *Brady* if “there is a

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id* at 511. "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *Id*.

48. "We make a materiality determination by considering the effect the undisclosed evidence would have had in the context of the whole trial record." *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010)(citation omitted). "[A] new trial is not required simply because a defendant uncovers previously undisclosed evidence that would have been possibly useful to the defendant but unlikely to have changed the verdict." *Id*.

49. Substantial evidence was submitted at trial for which the jury could have used to find Allwine guilty. This evidence, which supports that Allwine and not someone else killed Amy, is set forth in greater detail in the Findings and is summarized as follows:

- Amy had Scopolamine in her system prior to her death and Allwine told police and Amy's father that she told him that she was not feeling well at lunchtime and went to bed to lie down between 12:15 – 12:30 p.m. (Ex. B. at p. 4; 12T. p. 39; 13T p. 37; 16T. p. 31);
- Amy was shot at 3:15 p.m. or earlier. (16T. pp. 58-59). Amy's father was at the Allwine residence to install a dog door between 1:00 – 2:00 p.m. (12 T. pp. 38-39). Allwine called Amy's father shortly after 2:00 p.m., just after he left the residence, and asked him to come back and pick up their son, Joseph, so he could take Amy to the clinic. (12T. p. 39). Allwine called Amy's father at 5:00 p.m. to tell him that he may be late picking up Joseph because he had to get gas. (*Id.*) Allwine picked up Joseph from Amy's parents' home around 5:30 p.m. (*Id.*) Allwine told police that he checked on Amy later in the afternoon and then went back downstairs and finished work. (Ex. B pp. 5-6). The records from Allwine's employer show his last actions on November 13, 2016, were at 12:51 p.m. (12T. p. 165);
- DNA that matched Allwine, but excluded 99% of the world's population was found on the gun. (14T. pp. 46-47); and
- The swab taken from Allwine's hand the night that Amy died contained gunshot residue. (13T. pp. 14, 16-17).

50. Yura's video statement that he submitted to CBS News contained no details

regarding Amy's murder. There is no evidence that anyone was in the Allwine home after 2:00 p.m. except for Amy and Allwine. No crime scene or DNA evidence linked any person to the crime except for Allwine. When considering the effect that this newly discovered

evidence would have had in context of the entire trial record, there is a reasonable probability that if this new evidence been disclosed to the defense, the result of the proceeding would not have been different. Thus, this evidence is not material and there is no *Brady* violation.

Misconduct - Failure to Disclose Information – Discovery Violation

51. The prosecution has a duty to disclose exculpatory information at the defense's request and before the Rule 11 hearing. Minn. R. Crim. P. 9.01, subd. 1(6). The prosecution also has a continuing duty to disclose exculpatory evidence under Minn. R. Crim. P. 9.03 subd. 2, which states, in relevant part, as follows:

- (b) If, after compliance with any discovery rules or orders, a party discovers additional material, information, or witnesses subject to disclosure, that party must promptly notify the other party of what it has discovered and disclose it.
- (c) Each party has a continuing duty of disclosure before and during trial.

52. The Petition alleges that the prosecution had a duty to disclose her communications with CBS News before and after the trial. The only communications that Prosecutor Kreuser had with CBS News before the trial were a couple of emails related to the dates of jury selection, the potential day that the trial will begin, and whether the Judge Ekstrum had issued an Order regarding CBS News' motion for cameras in the courtroom. Lawyers are not prohibited from speaking to the press prior to trial; they are prohibited from making statements that will have a substantial likelihood of materially prejudicing a jury trial in a pending criminal matter. Minn. R. Prof. Conduct 3.6(a). These email communications exchanged prior to trial are not prohibited and, therefore, cannot be prosecutorial misconduct.

53. The email communications between Prosecutor Kreuser and CBS News staff after trial are relatively ordinary. They involve answering questions about some of the evidence submitted at trial, providing clearer copies of photos received in evidence that CBS News had already obtained in a data request, and talking about the weather. The email communications do not contain or reference exculpatory evidence. Accordingly, they cannot form the basis of a prosecutorial misconduct claim.

54. As set forth above, there is no evidence that the prosecutor knew of Yura's statement until after trial. Minn. R. Crim. P. 9.01 and 9.03 do not impose an ongoing duty on

Judge cites
prof. conduct
and not law

the prosecutor to disclose evidence after trial. Thus, Prosecutor Kreuser did not violate the discovery rules and did not commit misconduct.

Newly Discovered Evidence

55. "New evidence warrants a new trial where a defendant establishes (1) that the evidence was not known to him or his counsel at the time of trial, (2) that his failure to learn of it before trial was not due to lack of diligence, (3) that the evidence is material, and (4) that the evidence will probably produce either an acquittal at a retrial or a result more favorable to the petitioner." *State v. Hurd*, 763 N.W.2d 17, 34 (Minn. 2009)(citations omitted).

56. In *Ranier v. State*, 566 N.W.2d 692, 693 (Minn. 1997), a defendant convicted of first degree murder for the shooting death of his girlfriend filed a petition for postconviction relief. His defense at trial was that he picked up a loaded shotgun in the breezeway of his home while walking the victim to her car, tucked it under his arm and it went off accidentally hitting the victim in the back. *Id* at 694. The victim's son told police that the gun was in the living room by the gun case. *Id*. The State's expert testified that the gun had to be cocked before firing, but that it could be cocked by catching it on clothing. *Id*. After trial, the defendant received an anonymous letter that stated, in part, as follows:

Mr. Rainer, I heard you were going back to court on something that you are in prison for. I am not going to have this on my mind forever. You don't belong there. The girl's son was 8 or 9 years old. They told him to say the gun was in the house. ... I heard they shaved some hammer off the gun so you can't say it caught on all the clothes you had on. Can't you tell someone about this wrongdoing. I can't tell you who I am. I will be in hot water, but you don't belong there.

Id at 695.

57. The postconviction court denied the motion without a hearing and was affirmed on appeal. *Id* at 696. The Supreme Court held that the anonymous letter did not meet the test for a new trial based on newly discovered evidence because it was uncorroborated, unreliable and not likely to produce a more favorable result. *Id* at 695-96. Like the anonymous letter in *Ranier*, Yura's video that he sent to CBS News claiming that an unnamed person from the Besa Mafia killed Amy is uncorroborated, unreliable, and not likely to produce a more favorable result.

58. Assuming that Yura's statement satisfies the first two prongs of test for a new trial due to newly discovered evidence, "[t]he materiality standard under a *Brady* analysis is

more favorable to a defendant than the fourth prong of the newly-discovered-evidence test.” *Walen* at 217-18 (citations omitted). Because the Court concluded that the new evidence is not material under *Brady*, then it is not material under the newly-discovered-evidence analysis.

From the foregoing Conclusions of Law, this Court makes the following:

ORDER

1. The Second Petition for Postconviction Relief is **DENIED**.
2. The Court Administrator shall serve a copy of this Order on Petitioner’s counsel, the Washington County Attorney’s Office, the Minnesota Clerk of the Appellate Courts, and Minnesota Attorney General Keith Ellison, which constitutes due and proper service of its provisions for all purposes.

Date: _____

BY THE COURT:

 Meslow, Douglas (Judge)
2020.09.21 15:47:43 -05'00'

Douglas B. Meslow
Judge of District Court

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF WASHINGTON

TENTH JUDICIAL DISTRICT

STEPHEN CARL ALLWINE,

Court File No. 82-CR-17-242

Plaintiff,

v.

**FIRST PETITION FOR
POSTCONVICTION RELIEF**

STATE OF MINNESOTA,

Respondent.

TO THE DISTRICT COURT ABOVE-NAMED; Mr. Nicholas Hydukovich, Assistant Washington County Attorney, Washington County Attorney's Office, 15015 62nd Street North, Stillwater, Minnesota 55082; the Minnesota Clerk of the Appellate Courts; and the Minnesota Attorney's General Office.

Petitioner, Stephen Carl Allwine, respectfully requests, through the undersigned counsel, that the Court grant his petition for postconviction relief pursuant to Minnesota Statutes sections 590.01 to 590.06; and alleges as follows:

I.

That Petitioner is restrained of his liberty by virtue of the following conviction: Washington County District Court dated February 2, 2018, sentencing Petitioner to life imprisonment for the crime of Murder in the First Degree – Premeditated, in violation of Minnesota Statutes section 609.185(a)(1).

II.

Previous proceedings brought by the Petitioner are as follows:

Appeal to Minnesota Supreme Court. Petitioner filed his appeal on May 31, 2018.

On December 7, 2018, the Supreme Court granted Mr. Allwine's motion for an extension to file and serve his brief. In an Order dated April 2, 2019, the Supreme Court stayed Petitioner's appeal pursuant to such motion by Petitioner in order to seek postconviction relief. The Supreme Court required Mr. Allwine to file his Petition for Postconviction relief by August 1, 2019, and contemporaneously file with the Clerk of the Appellate Courts and serve on Respondent a notice confirming the filing of the petition.

Citing financial difficulty to hire necessary experts and to give experts ample time to review the evidence, on July 8, 2019, Petitioner motioned the Supreme Court for an extension to file his Petition for Postconviction Relief. On July 9, 2019, Respondent objected to this request, but Respondent conceded that Petitioner may file his supporting memorandum of law at a later time, and that Petitioner may amend his Petition for Postconviction Relief while proceedings are pending. Minn. Stat. § 590.03 (2018). The Supreme Court, citing Respondent's objection, denied Petitioner's request and ordered the Petition for Postconviction Relief be filed in the district court on or before August 1, 2019.

III.

That Petitioner requests relief as follows:

That the judgment of conviction and sentence of the Washington County District Court, dated February 2, 2018, be vacated, the judgment set aside, and Petitioner discharged, or that the Court grant a new trial pursuant to Minnesota Statutes section 590.01, subdivision 1.

IV.

That the facts and grounds upon which this Petition is based are as follows:

1. Ineffective assistance of counsel:
 - A. On the basis of trial counsel failing to challenge the grand jury indictment pursuant to Minnesota Rules of Criminal Procedure 17.07, subdivision 3.
 - B. On the basis of trial counsel not contesting any omnibus issues to include challenging whether there was probable cause to link the Bitcoin account to Petitioner and challenging the admissibility of evidence such as the emails from "dogdaygod" to Besa Mafia.
 - C. On the basis of trial counsel not moving for a mistrial, or alternatively, accepting the one-week continuance allowed by the Court after the Court admitted the State's late discovered and late noticed photograph of a foot print at the alleged murder scene produced in the middle of trial.¹
 - D. On the basis of trial counsel not hiring experts to rebut and testify against the State's evidence, specifically: experts in ballistics, blood splatter, DNA, gunshot residue, foot-print pattern, digital forensics evidence, and/or a medical examiner or forensic pathologist.
 - E. On the basis of trial counsel not investigating alternative perpetrator Mr. Alvin Andrew.

¹ Assistant Washington County Attorney Fred Fink has previously been reprimanded for

2. New Evidence:

A. On the basis that CBS News Inc. *48 Hours* conducted an investigation of this matter and in its episode “Click for a Killer” that aired on September 29, 2018, the hitmen group Besa Mafia admitted to killing Ms. Amy Allwine, which exonerates Mr. Allwine of guilt in this matter, as Mr. Allwine was convicted under Minnesota Statutes section 609.185(a)(1) and not Aiding and Abetting Murder pursuant to Minnesota Statutes section 609.05, subdivision 1.

3. Failure to Disclose:

A. On the basis that the Washington County Attorney’s Office of the State of Minnesota engaged in the production of the *48 Hours* episode and failed to disclose this to Petitioner and his counsel, even though Petitioner had already filed notice of his appeal and his postconviction timeline had not run. Minn. R. Crim. P. 9.01, 9.03. In this episode, an alternative perpetrator was disclosed. Days within the airing of the episode, Ms. Jamie Kreuser Balvin, Assistant Washington County Attorney who tried the matter, responded to posts on Facebook with links to the *48 Hours* episode and yet never disclosed this episode to Petitioner. Luckily, Petitioner happened upon the episode by mere chance.

B. However, that does not diminish the seriousness of this violation.

Prosecutors are held to a high standard when it comes to disclosing newly

07/12/2015 4:01

discovered evidence involving convicted defendants. The American Bar Association Rules of Professional Conduct 3.8(g) states:

When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority, and (2) if the conviction was obtained in the prosecutor's jurisdiction, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

4. Facts

- A. On or about January 18, 2017, Stephen Carl Allwine was charged with a single count of Murder – Second Degree - Intentional. The charge arose out of law enforcement's suspicion that Mr. Allwine murdered his wife, Ms. Amy Allwine.²
- B. Pursuant a 911 telephone call by Mr. Allwine at approximately 7:00 p.m. on November 13, 2016,³ Ms. Allwine presented as deceased with a gunshot wound to the head.
- C. Law enforcement eventually secured the scene and investigated the incident.

² (Compl., Jan. 18, 2017.)

³ (Trial Vol. 11 Tr., 45:10-20.)

D. Prior to November 13, 2016, Ms. Allwine received death threats via email.⁴

The e-mails included statements such as:

Here is how you can save your family. Commit suicide. If you do not, then you will slowly see things taken away from you, and each time you will know that you could have stopped it, which will eat you apart from the inside. By the time I am done you will want to end it anyway, so why not do it now and save them.⁵

Law enforcement was involved and investigated these death threats.⁶ The perpetrator of the e-mails was unknown. The Allwines purchased a gun for protection at this time.⁷

E. During the investigation, the following was noted:

- i. The gun was positioned in Ms. Allwine's left arm⁸ and she was right-handed.
- ii. Upon arrival at the scene, law enforcement noted Ms. Allwine's body was warm to the touch.⁹
- iii. Blood was pooled around Ms. Allwine's head in the master bedroom where her body was discovered.¹⁰
- iv. Wood flooring outside of the master bedroom appeared very clean and hazy with a residue.¹¹

⁴ (Ex. 83, 84, 129.)

⁵ (Ex. 84.)

⁶ (Trial Vol. 12 Tr., 69:2-25—86:1-22.)

⁷ (See Ex. 112.)

⁸ (Trial Vol. 11 Tr., 62:7.)

⁹ (Trial Vol. 11 Tr., 62:21.)

¹⁰ (Ex. 80, at 3.)

¹¹ Trial Vol. 14 Tr., 65:15-22—66:1-4.)

F. On November 13, 2016, Mr. Allwine provided a sample for a gunshot residue kit, a DNA sample via buccal swab, and agreed to speak with Detective Raymond.¹²

G. Search warrants were executed on the Allwine residence, several cellular phones, the Allwine's residence video doorbell system, and Comcast/Xfinity home security system.¹³ Mr. Allwine's computer was examined.¹⁴

H. Many items were tested for DNA including: a blue washcloth from the Allwine's laundry room, the pistol trigger of the gun located by Ms. Allwine, and pistol grips of the gun located by Ms. Allwine.¹⁵ The DNA on the blue washcloth could not exclude Mr. and Ms. Allwine as contributors; the DNA on the pistol trigger resulted that the mixture of Mr. and Ms. Allwine could not be excluded as contributors; the DNA on the pistol grip found Ms. Allwine as the major DNA contributor but could not exclude Mr. Allwine as a contributor, and that a swab from an earbud/headset was a mixture of three or more individuals with a major male DNA profile that did not match Mr. or Ms. Allwine.¹⁶

I. Communications between "dogdaygod" and Besa Mafia on the Dark Web discuss "dogdaygod" hiring Besa Mafia to kill Ms. Allwine; "dogdaygod"

¹² (Trial Vol. 12 Tr., 116:19-25—118:1-22, 121:18-23, 122:15-25—126:1-14.)

¹³ (Compl.)

¹⁴ (Ex. 139.)

¹⁵ (Ex. 109.)

¹⁶ (Ex. 109, at 5.)

was to pay Besa Mafia in Bitcoin currency for the hit on Ms. Allwine.¹⁷ It was the State's theory during the trial that Besa Mafia never followed through.

J. A formal Omnibus Hearing was never held. Trial counsel, Mr. Kevin DeVore, did not contest *any* omnibus issues, including whether there was probable cause to link the Bitcoin account to Petitioner or the admissibility of the e-mail communications between Besa Mafia and "dogdaygod" due to lack of foundation, despite the severity of the offense and the matter's complicated technological evidence.

K. A jury trial was held over the course of multiple days beginning January 16, 2018, through January 31, 2018.

L. At trial, the State offered a bevy of experts and professionals to build its case, which included: a digital forensics expert, Mr. Mark Lanterman, who opined that the electronic devices seized from the Allwine residence were used to communicate with Besa Mafia using the "dogdaygod" profile;¹⁸ Ms. Lindsay Garfield of the Minnesota Bureau of Criminal Apprehension

¹⁷ (Ex. 85, 124, 125, 127, 128.)

¹⁸ (Ex. 139.) In the grand jury testimony on page 247, Mr. Lanterman says he is doing the evaluation for free; contrastingly, in Trial Volume 15 Transcript on page 9, Mr. Lanterman explains that he overcharged the Washington County Attorney's Office in another matter, and so he did not need more money to work on this case. Additionally, Mr. Lanterman's credibility was questioned by Judge Philip Bush from the Hennepin County District court in the case of Mark Lanterman and Computer Forensic Services versus Michael Roman Afermoth. (Trial Vol. 15 Tr., 84:10-25—85:1-12.)

opined that the scene was not consistent with that of a suicide;¹⁹ Dr. Kelly Mills opined that Ms. Allwine was moved after she was shot indicating she did not commit suicide;²⁰ Ms. Michelle Frascone of Metro Homicide of the Minnesota Bureau of Criminal Apprehension opined that a late-discovered footprint at the scene was an adult size foot print;²¹ and Mr. Ross Thomas of the Minnesota Bureau of Criminal Apprehension in the Forensic Science Laboratory in the Biology or DNA section opined on the source of DNA on multiple items: that blood received from the floor in between the floorboards outside the master bedroom was a single source DNA profile that matched Ms. Allwine, that the blood on the slide near the muzzle of the handgun, Springfield XDS 9mm, and the slide above the serial number, both resulted in single source DNA profile that matched Ms. Allwine, that the blue washcloth had a mixture of four individuals and Mr. and Ms. Allwine could not be excluded as contributors, that a swab from the trigger release and slide of the firearm had a mixture of two or more individuals and the DNA mixture could not exclude Mr. and Ms. Allwine, that the pistol grip was a mixture of three or more individuals and the major DNA profile matched Ms. Allwine, and Mr. Allwine could not be excluded as a contributor, and that a swab from an earbud/headset was a mixture of three or more individuals with a major male DNA profile that did not match Mr.

¹⁹ (Trial Vol. 11 Tr., 201:15-17.)

²⁰ (Trial Vol. 16 Tr., 33:1-11.)

²¹ (Trial Vol. 14 Tr., 172:20-25—173:1-13.)

or Ms. Allwine.²² Based on the testimony and exhibits, it appears that the unidentified major male DNA profile was the only profile that was entered into the Minnesota DNA databases and the National DNA Index System to be periodically searched, despite the presence of DNA from other individuals on the washcloth and pistol grip.²³

M. In turn, defense counsel did not offer any experts; he did not offer any to counter the State's supposition that Mr. Allwine was "dogdaygod" and that he wanted his wife dead. The State presented almost thirty witnesses; the defense called four witnesses.

N. The jury convicted Mr. Allwine on January 31, 2018.

O. On February 2, 2018, the district court sentenced Mr. Allwine to life imprisonment.

5. That Mr. DeVore did not provide rebutting evidence in any of these areas, to include the testimony of experts, calls into question the effectiveness of Mr. DeVore's representation of Mr. Allwine.

V.

Pursuant to Minn. Stat. § 590.04, subdiv. 1 (2016), Petitioner requests that an evidentiary hearing be held on his Petition.

²² (Trial Vol. 14 Tr., 43:12-25—47:1-11.)

²³ (Trial Vol. 14 Tr., 29:18-25—61:1-8); (Ex. 109.)

VI.

That all grounds for relief presently known to the Petitioner are included in the Petition.

VII.

That Petitioner may amend the Petition pursuant to Minnesota Statutes section 590.03.

VIII.

That the Court and the parties determine a briefing schedule as to the memorandum of law associated with the Petition after this matter is assigned to a judge in the Tenth Judicial District.

IX.

That Petitioner also alleges such other grounds related to the Constitution and laws of the United States or the State of Minnesota which appear from the records and proceedings therein, and such grounds that the Court may decide to have litigated even though not specifically raised by the Petitioner, such as his right not to have evidence illegally seized, his right not to have statements obtained from him in violation of his right to counsel or his right not to incriminate himself or other legal right, his right to be charged by proper complaint, information, or indictment, his right to be confronted by his accusers, his right not to be required to give evidence incriminating himself, his right not to be placed twice in jeopardy, his right to due process of law including discovery, his right to disclosure of favorable evidence, his right to counsel and to the effective aid and

representation of counsel, and his right to be sentenced by a Court of competent jurisdiction and to a fair legal sentence.

Dated this 1 day of August, 2019.

GROSHEK LAW, P.A.



Christa J. Groshek (#303331)
Lucas J.M. Dawson (#392146)
Kindra M.S. Szymanski (#398537)
302 North 10th Avenue
Minneapolis, MN 55401
(612) 827-3833
(612) 294-2565 fax
christa@grosheklaw.com
luca@grosheklaw.com
kindra@grosheklaw.com
ATTORNEYS FOR PETITIONER

STATE OF MINNESOTA
COUNTY OF WASHINGTON

DISTRICT COURT
TENTH JUDICIAL DISTRICT
CRIMINAL DIVISON

State of Minnesota,
Plaintiff,

Case No: 82-CR-17-242

v.

Stephen Carl Allwine,
Defendant.

**Ex Parte Affidavit of
Christa J. Groshek, Esq.**

STATE OF MINNESOTA)

)ss.

COUNTY OF HENNEPIN)

I, Christa J. Groshek, licensed attorney in the state of Minnesota and officer of the court, state the following:

1. We have been diligently preparing Mr. Allwine's case for post-conviction relief and appeal. At all times, we have had three attorneys working on his file.
2. This affidavit serves as an offer of proof as to why it is critical that the Court must grant IFP funding requests for the retention of experts in the following areas: medical examiner, DNA, ballistics, blood spatter, computer forensics, and shoe print experts. At a minimum, even if the Court does not grant IFP funding, the Court should allow an evidentiary hearing with the expert testimony that we have been able to secure through Dr. Arden.
3. On August 11, 2020, Mr. Allwine's power of attorney paid \$3,953.21 into Mr. Allwine's trust account.
4. Mr. Allwine also received a \$1,200.00 stimulus check from the government and that was deposited into the Groshek Law trust account.
5. The 2020 federal poverty guidelines for a household of 1 is \$12,760.00 in earnings

for the year.

No one has my
bitcoin number

6. Mr. Allwine meets the poverty guideline as he did not earn over \$12,760.00 for 2020.
7. The State secured a conviction against Mr. Allwine in a highly circumstantial case. Specifically, the State relied upon experts to:
 - a. Connect Mr. Allwine's bitcoin number to an email that "dogdaygod" paid "Besa Mafia" for a "hit" on A.A. by providing that same bitcoin account number;
 - b. Connect Mr. Allwine to the "dogdaygod" email exchange wherein "dogdaygod" provides a "Hawaii picture" from the allwine.net.webpage for identification of A.A. for the hit;
 - c. Solidify A.A.'s time of death at 3:15 p.m. (when Mr. Allwine was home);
 - d. Connect Mr. Allwine's DNA to the murder weapon;
 - e. Create a theory that A.A. was moved from the hallway to the bedroom by Mr. Allwine citing bloodspatter and drip and a size 12 shoe print; and
 - f. Rule out the theory that A.A. committed suicide.
8. Trial counsel for Mr. Allwine did not present *one expert witness* to challenge the State's expert witness testimony.
9. Upon reviewing the "expert file" that trial counsel provided to the firm on June 18, 2020, (despite our previous requests), I have ascertained that trial counsel did consult with two experts in the areas of ballistics and computer forensics. Trial counsel did not consult with a medical examiner, a DNA scientist/lawyer trained in DNA, or a shoe print expert.
10. Trial counsel opted to not call the experts he consulted in ballistics and computer forensics.
11. Trial counsel did consult with the computer forensics expert who drafted questions for trial counsel to ask the State's expert.
12. However, trial counsel did not ask the questions that the expert prepared. He

explained in an email to the computer forensic expert that he “did not understand” the questions that the expert drafted and that it “wasn’t in his nature” to ask those types of questions and further that he “would not be able to do it.” (Exhibit A – Email to John Carney). As to the scientific evidence, trial counsel even argued in his closing argument that “a lot of this stuff, at least, was over my head.” (Exhibit B - Transcript of Closing Argument).

13. Trial counsel boiled his theory of the case down for the expert that he chose not to call as a witness and not to rely upon for cross examination. Trial counsel stated, “I am selling a down to earth honest eyewitness supported defense.” This suggests that his strategy was to argue that Mr. Allwine had an alibi and was not present at the time of A.A.’s death, so he could not have “done it.” Trial counsel’s affidavit also states that his trial strategy was to show that Mr. Allwine had an alibi.
14. This strategy failed during trial counsel’s cross examination of the State’s medical examiner, Dr. Kelly Mills. Trial counsel was attempting to establish that A.A.’s time of death could only be determined in vague terms such as “some time that afternoon.” However, counsel’s question did not produce the answer he sought. Instead, his questions elicited the time of the death as 3:15 p.m. (Exhibit C - Testimony of Kelly Mills). This was very problematic for the defense because Mr. Allwine was home at 3:15 p.m. with A.A.
15. Because counsel did not consult with a medical examiner, he was unable to pivot from a “down to earth eyewitness defense” to an aggressive cross examination of the state’s medical examiner to establish that all of the literature in this area establishes that without an eye witness or a video recording of the death there is NO WAY that any medical examiner could pinpoint the time of death to a specific hour and minute.
16. If trial counsel had consulted with Dr. Jonathan Arden, medical examiner, as we have, trial counsel would have had the benefit of our examiner who would have been able to testify to the following:
 - a. No one can determine the time of death with accuracy without credible eyewitness testimony which we don’t have here;

- b. There are too many variables to exactly ascertain the time of death;
- c. The evidence obtained at the scene when officers first arrived at 7:00 p.m., supports the theory that A.A. had recently died because she was "warm to the touch" and her neck was not stiff. This indicates that rigor mortis had not yet set in;
- d. Rigor mortis typically sets in approximately 3-4 hours. If A.A. was killed at 3:15 p.m. as the State's expert testified, by the time the officer arrived at 7:00 p.m., rigor mortis would have set in and her neck and appendages would have been "cold." Instead, what the officer reported does not support the State's expert's conclusion because the officer found A.A.'s skin "warm to the touch" and her neck not stiff and easy to move. In fact, the officer noticed that rigor mortis had not yet set in; and
- e. The information from the scene does not support that A.A. was dragged from the hallway to the bedroom. This is true because the bedroom was carpeted. There was no blood "path" on the carpet and given A.A.'s injuries, she would have been bleeding profusely.

17. The "Time of Death Defense" and Mr. Allwine's alibi receives new life with the addition of an expert like Dr. Arden. Likewise, if the jury finds Arden persuasive, then the argument that a third party- such as "Yura" from Besa Mafia, killed A.A. also makes sense and casts reasonable doubt upon the State's case. Mr. Allwine was not charged with aiding and abetting the murder of A.A. He was charged with actually killing her himself. This juxtaposition of medical opinion and facts squarely positions Mr. Allwine for post conviction relief.

18. In July 2020, we asked Dr. Arden to prepare a report on these findings for the Court's review. We are waiting for his report to submit to the Court.

19. Once the time of death was established as 3:15 p.m. and that time went unchallenged by counsel, it was imperative that trial counsel counter the State's computer forensic evidence.

20. Trial counsel hired John Carney, a computer forensic expert, to consult on Mr.

Allwine's case. Mr. Carney recommended many areas of attack to trial counsel and provided trial counsel with cross examination questions for the State's computer forensic expert. Trial counsel did not use any of the Mr. Carney's suggestions:

- a. The Besa Mafia evidence was allowed into evidence as law enforcement testified to the "third party tip" on the murder for hire of A.A. by "dogdaygod." The expert pointed trial counsel to *Lorraine v. Markel*,- a case wherein the defense successfully challenged the introduction of "electronically stored information" as such hearsay evidence without proper foundation. Trial counsel made no motion in limine nor did he object that the Besa Mafia tip was hearsay;
- b. The expert recommended that trial counsel cross examine the State's forensic expert about the possibility that Mr. Allwine's phone (where the bitcoin address matching the one given to Besa Mafia "matched") had been hacked. Specifically, the expert suggested that trial counsel cross examine the State's computer expert about whether any testing was done to determine if the phone had been "jailbroken." If a phone is "jailbroken," then none of the phone's security features work and a "hack attack" would be easily accomplished;
- c. The expert recommended demanding the forensic analysis reports of Mr. Allwine's phone- which would detail where the bitcoin code was found. Trial counsel did not request this report and did not object to the State's expert testimony about the findings of these analysis reports. Trial counsel did not have these reports to present to the expert that he hired so as to further cross examine the State's witnesses;
- d. The expert recommended requesting authentication for the iTunes backup allegedly containing the Bitcoin wallet address. The expert stressed that without this information there was no "proof" that this phone was Mr. Allwine's. Likewise, the expert recommended that trial counsel demand the "metadata" for Mr. Allwine's phone to determine if the iTunes backup could be authenticated. Trial counsel also failed to cross examine the State's expert as to these issues;

- e. A.A.'s computer was accessed remotely at 10:34 p.m. on the day of her death on November 13, 2016. Mr. Allwine was with family at that time and had an alibi. Trial counsel did not effectively cross examine the State's computer forensic expert about what he called the "officer's mistake" regarding the remote access.
- f. Trial counsel also failed to call Officer Torguson as a witness, who never conceded that he made a mistake, but instead noted that he found several mistakes in Lanterman's report.
- g. A.A.'s computer was forensically examined by the State. Trial counsel did not obtain this discovery nor did he cross examine any state witness regarding this;
- h. The State linked Mr. Allwine to "dogdaygod" because "dogdaygod" provided a "Hawaii" picture of A.A. to Besa Mafia. The State claimed that Mr. Allwine was "dogdaygod" because of the close proximity in time when the photo was uploaded to the "allwine .net.webpage" and then thereafter shared with Besa Mafia. The expert told trial counsel that the State failed to present evidence that the pictures "matched" or in other words that the photo Besa Mafia was given was the same one as the one uploaded to "allwine.net.webpage." Specifically, the expert advised trial counsel to ask questions about the seven ways that the pictures needed to match to be considered identical. This included matching: hashcodes, EXIF data, date and time stamp, time of creation, GPS locations of photo creation. Trial counsel did not cross examine effectively on this issue; and
- i. The expert also noted that two potential alternative perpetrators, Kristin Elmquist and Gayle Hunter who were questioned and had their electronics analyzed. Both of these women held jobs in computer technology and one admitted to knowing how to send anonymous gmail messages and used email spoofing technology to make it look like someone else was sending the email that she authored. Mr. Carney recommended that trial counsel request to see the computer forensic analysis of the electronics of these two alternative

perpetrators. Trial counsel did not do this.

21. Trial counsel's expert file further referenced the information about the two potential alternative perpetrators. Trial counsel did not attempt to introduce information about either despite the following. As indicated above, trial counsel did not follow the advice of expert John Carney to request the computer forensic analysis of these ladies' electronics.

a. Gayle Hunter

- Gayle Hunter was a computer programmer at NSP and Wells Fargo.
- She told investigators that she knows how to send anonymous gmail messages and has used a spoofing technology to make it look like someone else was sending the email that she in fact authored.
- Ms. Hunter had a key to A.A.'s residence.
- She is suicidal and detailed to investigators how she would carry out a plan to kill herself.
- She also suffers from Bipolar, Borderline personality disorder, Depression and PTSD.
- She has been treated for her mental health issue in a hospital and has not lived with her husband since 1998.

b. Kristin Elmquist

- Kristin Elmquist was also in the dog training business like A.A. This is how the two were acquainted. Ms. Elmquist had a business called, "For the love of dogs."
- Ms. Elmquist was also in the computer business. She worked as a computer scientist for Fairview Health.
- A.A. told investigating agents on September 13, 2016 (just two months before her death) that the person making the death threats has information only Kristin Elmquist would have.

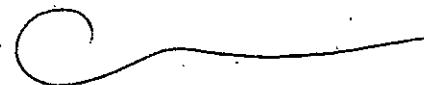
- When Ms. Elmquist was contacted by law enforcement regarding the threats, she refused to meet with them without her attorneys.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

I declare under penalty of perjury that everything I have stated in this document is true and correct. Minn. Stat. §358.116.

Date:

9/25/20


Christa J. Groshek, Esq.

STATE OF MINNESOTA
COUNTY OF WASHINGTON

DISTRICT COURT
TENTH JUDICIAL DISTRICT
CRIMINAL DIVISION

State of Minnesota,
Plaintiff,

Case No: 82-CR-17-242

v.

Stephen Carl Allwine,
Defendant.

Affidavit of John J. Carney

STATE OF MINNESOTA)

)ss.

COUNTY OF HENNEPIN)

John J. Carney, after being duly sworn upon oath, deposes and states:

1. I am Chief Technology Officer, lead digital forensic examiner, and expert witness at Carney Forensics, which is an assumed name of Carney Consulting LLC, a Minnesota limited liability company located in Washington County in Minnesota. Carney Forensics has been in business since 2008. My attached CV sets forth my education, training, professional career, court room testimony, and publications.
2. Your Affiant was retained by trial counsel Devore as a consulting expert in the Allwine matter. I reviewed reports and State's evidence for him. I advised him during trial preparation and wrote cross examination scripts. I observed the State's expert's direct examination and cross examination testimony one morning during trial.
3. I submit the following material to rebut trial counsel Devore's affidavit in which he imagines my hypothetical testimony at trial. He states in paragraph 12 of his affidavit to the court dated May 4, 2020,

"Trial counsel did not call Mr. Carney to testify because his testimony would not have contradicted the state's experts and would only serve to bolster and enforce the opinion of Mark Lanterman. On cross examination, Mr. Carney would have to admit that he could not dispute Mr. Lanterman's findings. Therefore, as a trial strategy it did not seem fruitful to put a defense witness on that would agree with the analysis of the state's witness."

4. In rebuttal I state my careful review of the digital forensics and police reports coupled with independent research I performed on the matter would have positioned me to deliver effective expert testimony that differed, disputed, contradicted, and questioned many of the

State's expert's opinions and findings. My testimony would have helped trial counsel Devore introduce reasonable doubt in the minds of the jury. Examples of my findings may have included:

- Besa Mafia "dark web" evidence was not properly authenticated for admissibility into the record.
- A chain of three digital photographs depicting the victim in Hawaii was not proven to be exactly identical as it moved from disc to web site to Besa Mafia as testified by both of the State's experts.
- State's expert did not identify conclusively the encrypted iPhone backup found on defendant's MacBook laptop and did not properly authenticate it for admissibility into the record.
- State's expert did not examine the defendant's iPhone to confirm the source of the evidence from the encrypted backup found on the defendant's MacBook laptop.
- Impossibility of remote access to the defendant's iPhone was not proven conclusively because its jailbreak status and lock password settings were not disclosed and possibly not known by the State.
- A forensic examination by the State of the victim's computer showed it was accessed on the night of her death and "folders were accessed". The State's expert also says in his report that remote access began a year earlier in November 2015 and he collected a timeline of the access events in an Excel spreadsheet. Scores of them were remote access. The identity of the remote user and the method of access were not disclosed by the State, nor was I afforded the opportunity to examine it independently to investigate.
- Trial counsel Devore did not give me the opportunity to independently examine the defendant's MacBook laptop, including the encrypted iPhone backup, for exculpatory evidence.
- Trial counsel Devore did not give me the opportunity to independently examine the defendant's iPhone for exculpatory evidence.
- Trial counsel Devore did not give me the opportunity to testify in behalf of the defendant at trial.

5. The lack of foundation and authentication to support admissibility of the Besa Mafia "dark web" evidence is a good example of a central evidentiary issue about which I would have provided effective, digital forensic testimony material to the trial. I interpret the defendant's concerns about "chain of custody" in his post-conviction relief request as his expression of problems with foundation and authentication of evidence that may not be what it purports to be.

6. I provided trial counsel Devore with my finding on Besa Mafia evidence in an email on January 16, 2018 during trial preparation. I based my finding on *Lorraine v. Markel American Insurance Company*, 241 F.R.D. 534 (D. Md. 2007), a case in which a landmark decision about the admissibility and authentication of digital evidence was set down in a 100-page opinion by District of Maryland Magistrate Judge Paul W. Grimm. He stated that neither party provided admissible evidence to support the facts in their respective motions and dismissed them for the following reasons:

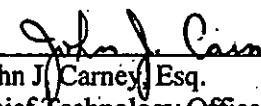
- None of the exhibits were authenticated.
- No attempt was made to resolve hearsay issues.
- The original writing rule was not complied with.
- The absence of unfair prejudice was not demonstrated.

7. To my knowledge admissibility of the Besa Mafia digital evidence was not subjected to these and other rules of evidence before or during trial.
8. In my opinion trial counsel Devore did not grasp the significance of the digital evidence in this case and did not master it, which led to an ineffective cross examination of the State's expert. I developed a cross examination script for trial counsel Devore of the important chain of Hawaii photograph evidence depicting the victim sent to Besa Mafia to identify her. The script was three pages in length and asked 123 questions in five fact areas. The questions were fact-based, crisp, and fast moving. They were designed for yes/no answers for the most part. I put in follow-up questions and correct answers to questions to help trial counsel Devore on cross to move along smoothly, quickly, and provide the answer to the expert, if needed. They were questions to which experts should know the answers, or could easily refresh from the report.
9. I wrote a brief introduction to my cross examination script for trial counsel Devore in which I laid out my strategy to dominate Mark Lanterman on the cross. I began by saying, "In computer forensic proofs the devil's in the details." Mastery, and therefore confidence, of the details is critical to success with this form of evidence.
10. But trial counsel Devore emailed me asking me to pare down my cross examination script because, "It is not my style and I simply do not know the subject matter well enough to ask those types of questions."
11. So sensing lack of will to learn more and master this critical subject, I streamlined my cross examination. I pared the script by editing it down from three pages to just ¾ of one page. When streamlined, it asked 30 questions in just three fact areas. They were simpler questions, but also more vague and arguable, especially for an experienced expert witness like the State's expert. Ultimately, the line of questioning on cross examination I heard in the court room during trial did not succeed on this issue. Trial counsel Devore didn't expose the lack of rigor in analysis behind the declared match of photographs in the chain due to their looking the same with the same file name.
12. My review of reports in the Allwine matter raised questions about several candidates for alternate perpetrator and investigations of their digital devices which were not disclosed. Both Gayle Hunter and Kristin Elmquist stood out in my review because of their occupations in the computer science and software engineering fields. Both were technologically sophisticated. I read in a police report about the victim suspecting Elmquist as a potential source of anonymous death threats she received. But neither of these candidates' digital evidence was disclosed to me for examination to identify inculpatory evidence for the victim's death. I was not given the opportunity to independently recover and examine digital evidence from digital devices belonging to either of them for the same purpose.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

I declare under penalty of perjury that everything I have stated in this document is true and correct. Minn. Stat. §358.116.

Date: December 3, 2020


John J. Carney, Esq.
Chief Technology Officer
Carney Forensics