APPENDIX

Appendix A

Opinion below
Tracey Zornes v. William Bolin, 20-3013 (8th Cir.)
(slip op.) (dated June 27, 2022)

United States Court of Appeals
For the Eighth Circuit

No. 20-3013

Tracy Alan Zornes,

Petitioner - Appellant,

v.

William Bolin,

Respondent - Appellee.

Appeal from United States District Court
for the District of Minnesota

Submitted: February 17, 2022
Filed: June 27, 2022

Before LOKEN, COLLOTON, and SHEPHERD, Circuit Judges.

COLLOTON, Circuit Judge.

Tracy Zornes is serving a life sentence for murder in Minnesota. He brought a petition for writ of habeas corpus in the district court, alleging that the state trial court violated his right to a public trial, and that the decision of the state supreme

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court upholding his conviction was contrary to, or an unreasonable application of, clearly established federal law. The district court[1] denied the petition, and we affirm.

I.

In November 2011, Zornes was convicted of two counts of first-degree murder, first-degree arson of a dwelling, and theft of a motor vehicle in Minnesota state court. *See* Minn. Stat. §§ 609.185(a)(1), 609.561, subdiv. 1, 609.52 subdiv. 2(17). The Minnesota trial court sentenced him to two consecutive life sentences without the possibility of parole.

On direct appeal, Zornes challenged the trial court's decision to exclude two people from the courtroom during jury *voir dire*. Zornes's girlfriend was present in the courtroom for two days of jury selection. She was included on a joint witness list prepared by the parties. When counsel alerted the trial court to the girlfriend's presence on her second day of attendance, the court ordered her to leave the courtroom to comply with an order sequestering witnesses. Zornes did not object.

The next day, Zornes informed the court that Robert Stivers, a brother of one of the murder victims, was present in the courtroom. Stivers was on the State's witness list. Zornes explained to the court, however, that the State "may be willing to remove him from that list and in return we would not be objecting if he wants to watch from the observation room so we don't have the jurors in eye contact with him." The State then confirmed its desire to remove Stivers from the witness list. Consistent with Zornes's proposal, the court declared that Stivers would be allowed to sit in the observation room during *voir dire*, but would not be a witness at trial.

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[1]The Honorable Eric C. Tostrud, United States District Judge for the District of Minnesota.

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Zornes argued on appeal in state court that the trial court's decision to sequester the girlfriend and to direct Stivers to watch from an observation room violated his right to a public trial under the Sixth and Fourteenth Amendments. The Supreme Court of Minnesota rejected the contentions. *State v. Zornes*, 831 N.W.2d 609, 618 (Minn. 2013). With respect to the girlfriend, the court concluded that a potential witness is distinct from the "public" generally, and that the trial court had broad discretion to exclude a witness from the courtroom. After observing that the girlfriend played a key role in Zornes's planned alibi defense, the court explained that questioning of prospective jurors can be wide ranging and cover details of trial strategy, so it is conceivable that a witness could tailor her testimony in response to what she hears during voir dire. *Id.* at 619-20. The court ultimately held that the sequestration of the defendant's girlfriend did not violate Zornes's constitutional right to a public trial. The court also ruled that the exclusion of Stivers from the courtroom during *voir dire* was "too trivial to implicate Zorne[s]'s Sixth Amendment right to a public trial," and found it unnecessary to address whether Zornes invited the alleged error. *Id.* at 620-21.

After failing to obtain post-conviction relief in state court, Zornes filed a petition for writ of habeas corpus in the district court. As relevant here, Zornes challenged the state court's disposition of his claim alleging a violation of the right to a public trial. The district court denied relief. The court reasoned that the state supreme court's decision was not contrary to clearly established federal law, because the Supreme Court has not addressed the constitutionality of partial closures of trial proceedings. The court also concluded that the state court's decision was not an unreasonable application of clearly established federal law, because any alleged error in the ruling was subject to fairminded disagreement. The district court granted a certificate of appealability, and we review the district court's conclusion *de novo*.

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II.

A federal court's authority to grant a writ of habeas corpus on behalf of a state prisoner is governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996. A federal court cannot grant a habeas petition with respect to any claim that was adjudicated on the merits in state court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

A state court decision is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court confronts facts that are materially indistinguishable from relevant Supreme Court precedent yet reaches the opposite result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A decision involves an "unreasonable application of" federal law if the state court "correctly identifies the governing legal standard but either unreasonably applies it to the facts of the particular case or unreasonably extends or refuses to extend the legal standard to a new context." *Munt v. Grandlienard*, 829 F.3d 610, 614 (8th Cir. 2016); *see Williams*, 529 U.S. at 407. To demonstrate an unreasonable application, a prisoner must show "that a state court's adjudication was not only wrong, but also objectively unreasonable, such that 'fairminded jurists' could not disagree about the proper resolution." *Smith v. Titus*, 958 F.3d 687, 691 (8th Cir. 2020) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)), *cert. denied*, 141 S. Ct. 982 (2021); *see Williams*, 529 U.S. at 409-12. We evaluate the reasonableness of the state court's ultimate conclusion, not necessarily the reasoning used to justify the decision. *Dansby v. Hobbs*, 766 F.3d 809, 830 (8th Cir. 2014).

Zornes argues that the state court's decision is contrary to and involved an unreasonable application of two Supreme Court decisions: *Waller v. Georgia*, 467

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U.S. 39 (1984), and *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam). *Waller* considered a trial court's decision to close a pretrial suppression hearing to the public. The Court ruled that it was constitutional error to close the hearing, and that to justify such a closure, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." 467 U.S. at 48. *Presley* held that the right to a public trial extends to the *voir dire* of prospective jurors, and clarified that the trial court must consider reasonable alternatives to closure even when they are not proposed by the parties. 558 U.S. at 213-14.

The state supreme court's decision in this case is not contrary to *Waller* and *Presley*. When evaluating Sixth Amendment claims involving the right to a public trial, this court and others have distinguished between total closures and partial closures of criminal proceedings. *See Garcia v. Bertsch*, 470 F.3d 748, 752-53 (8th Cir. 2006); *United States v. Osborne*, 68 F.3d 94, 98-99 & n.12 (5th Cir. 1995) (collecting cases). Whether a closure is total or partial depends on who is excluded during the time in question. *United States v. Thompson*, 713 F.3d 388, 395 (8th Cir. 2013). This court applies the stringent standard announced in *Waller* to total closures, but conducts a different analysis for partial closures. *Id.*

The exclusions of Zornes's girlfriend and Stivers were both partial closures of the jury selection proceedings under this rubric; at no point did the trial court bar all members of the public from the courtroom. *Waller* and *Presley* both involved total closures. *Waller*, 467 U.S. at 42; *Presley*, 558 U.S. at 210, 214; *see Presley v. State*, 674 S.E.2d 909, 910-911 (Ga. 2009). The Supreme Court has never addressed a "partial closure" of jury selection (or any phase of a trial) in which a potential witness is sequestered or a relative of a victim is excluded at the suggestion of the defendant. Where no Supreme Court decision has confronted the specific question presented to

the state court, the court's decision cannot be contrary to clearly established federal law for the purposes of § 2254(d)(1). *Woods v. Donald*, 575 U.S. 312, 317 (2015) (per curiam). Accordingly, we conclude that the Minnesota court's decision is not contrary to clearly established federal law.

The next issue is whether the state court decision involved an unreasonable application of clearly established federal law. As noted, *Waller* and *Presley* involved complete closures of a courtroom to the public, and did not address how a court should analyze an order excluding a prospective witness or victim's relative from attending jury *voir dire*. Zornes argues that a "partial closure" must satisfy the same stringent standard for a complete closure discussed in *Waller*. But this court and other courts of appeals have concluded that partial closures may be justified by a "substantial reason" without the "overriding interest" that *Waller* requires to justify a complete closure. *Thompson*, 713 F.3d at 395; *United States v. Simmons*, 797 F.3d 409, 414 (6th Cir. 2015). The distinction in standards is based on the view that a partial closure does not implicate the same secrecy and fairness concerns that are raised by a total closure. *Garcia*, 470 F.3d at 752-53. A state court reasonably could take the same analytical approach that has been followed by several federal courts of appeals.

The first "partial closure" at issue was the exclusion of Zornes's girlfriend as a potential witness under the trial court's sequestration order. This court has held that the right to a public trial does not prohibit the sequestration of witnesses from the evidentiary portion of a trial. We relied on the fact that sequestration lessens the danger that a witness will tailor her testimony to that of earlier witnesses, and aids in detecting testimony that is less than candid. *United States v. Ricker*, 983 F.3d 987, 994-95 (8th Cir. 2020); *see United States v. Blanche*, 149 F.3d 763, 769-70 (8th Cir. 1998). The Minnesota court concluded that the same rationale justified sequestration of a witness during *voir dire*, because it is possible that a witness could tailor her testimony in response to what she hears from attorneys and prospective jurors during

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jury selection. Zornes complains that the state court's rationale would have allowed the exclusion of 184 potential witnesses, but no other potential witness sought to attend *voir dire*, so the state court had no occasion to address whether the witness list should have been narrowed or the sequestration order relaxed as to others.

This court has not considered sequestration during jury selection on a direct appeal, and the parties have not identified any other appellate decision on point. While appellate decisions regarding jury *voir dire* often say that counsel should not use the process to discern a prospective juror's opinion of the evidence, it is apparent that attorneys sometimes do provide a preview of evidence during that phase of trial. *E.g.*, *Osgood v. State*, No. CR-13-1416, 2020 WL 2820637, at *13 (Ala. Crim. App. May 29, 2020); *State v. Nichols*, No. CA-CR 16-0070, 2017 WL 3431476, at *2 (Ariz. Ct. App. Aug. 10, 2017); *In re Commitment of Perez*, No. 09-12-00132-CV, 2013 WL 772842, at *7 (Tex. App. Jan. 29, 2013); *People v. Ochoa*, 28 P.3d 78, 93-94 (Cal. 2001). A discussion by counsel of what the evidence is likely to show raises the potential for tailoring of testimony by a prospective witness. As the Minnesota court observed, counsel's line of questioning during *voir dire* also may reveal trial strategy that could be accommodated later by a willing witness.

In the absence of any decision of the Supreme Court on the subject, we agree with the district court that fairminded jurists could take the view that the substantial reasons justifying witness sequestration during the evidentiary phase of a trial extend to jury *voir dire*. And just as our decisions have not required a trial court to fine-tune sequestration during the evidentiary phase according to the risk of tailoring posed by the testimony of each particular witness, we cannot say it was unreasonable for the state court to treat jury *voir dire* as an undifferentiated whole for purposes of sequestration of a key alibi witness. Therefore, the state court's denial of the claim based on sequestration of Zornes's girlfriend did not involve an unreasonable application of clearly established federal law.

The second "partial closure" was the trial court's direction that Stivers, the victim's brother, watch jury *voir dire* from an observation room. The court recognized that Stivers would not be a witness, so he was not subject to the sequestration order. Zornes argues that the state supreme court's decision to allow the exclusion of Stivers from the courtroom was an unreasonable application of *Waller* and *Presley*.

The Minnesota court concluded that excluding Stivers from *voir dire* was "too trivial" to implicate the Sixth Amendment. In reaching that conclusion, the court considered that the courtroom was never cleared of all spectators, the trial remained open to the general public and the press, there was no period of the trial in which members of the public were absent during the trial, and at no time was the defendant, his family, his friends, or any witness improperly excluded. *Zornes*, 831 N.W.2d at 620-21 (citing *State v. Lindsey*, 632 N.W.2d 652, 660-61 (Minn. 2001)).

Zornes contends that the state court's "triviality" rule is an unreasonable application of *Waller* and *Presley*. He maintains that a conclusion of triviality cannot be reconciled with *Waller*'s demand that the court must identify an overriding interest for closure and consider reasonable alternatives. *Waller*, 467 U.S. at 48.

The Minnesota court's decision to apply a "triviality" standard, however, is not the outlier that Zornes suggests. The Second Circuit in *Peterson v. Williams*, 85 F.3d 39 (2d Cir. 1996), ruled that an unjustified temporary closure in that case was "too trivial to amount to a violation" of the right to a public trial. *Id.* at 42. Judge Calabresi's opinion for the court explained that a triviality standard looks to "whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant . . . of the protections conferred by the Sixth Amendment." *Id.* Where "the values furthered by the public trial guarantee" were not jeopardized when the trial court briefly neglected to reopen the courtroom after an undercover officer finished testifying, the court held that the defendant's rights were not

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infringed. *Id.* at 43-44. Several courts have adopted the *Peterson* approach, *e.g.*, *United States v. Perry*, 479 F.3d 885, 890 (D.C. Cir. 2007); *Braun v. Powell*, 227 F.3d 908, 918-20 (7th Cir. 2000), and have continued to apply it after *Presley*. *See United States v. Lewis*, No. 19-6148, 2022 WL 216571, at *7-8 (6th Cir. Jan. 25, 2022) (deputy marshal for twenty minutes excluded two spectators who were speaking loudly); *United States v. Anderson*, 881 F.3d 568, 573 (7th Cir. 2018) (trial continued after courthouse was locked for the night at 5:00 p.m.); *United States v. Patton*, 502 F. App'x 139, 141-42 (3d Cir. 2012) (members of defendants' families allegedly denied entry during jury selection because courtroom was filled to capacity); *United States v. Greene*, 431 F. App'x 191, 195-97 (3d Cir. 2011) (court security officer excluded defendant's brother from *voir dire* for want of seating space); *Kelly v. State*, 6 A.3d 396, 408-11 (Md. 2010) (exclusion of defendant's family for two to three hours during *voir dire* due to insufficient space in courtroom).

Whether or not the Supreme Court ultimately would endorse this line of authority tracing back to the Second Circuit's decision in *Peterson*, we believe that fairminded jurists could conclude that it is not inconsistent with *Waller* and *Presley*. Those cases involved total closures of the courtroom for entire phases of a criminal trial. But as *Peterson* discussed, even absolute words derive their meaning from context, 85 F.3d at 40, and the Supreme Court has not addressed whether a closure temporarily impacting but one potential spectator infringes on a defendant's right to a "public trial." Accepting, therefore, that a "triviality standard" is not an unreasonable application of clearly established federal law, we cannot say that the state court's employment of that standard created an unreasonable application here. The victim's relative, Stivers, was able to observe jury selection from an observation area, and Zornes does not explain how that remote viewing by one spectator undermined the values furthered by the constitutional guarantee of a public trial. *See id.* at 43.

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Finally, even if the state supreme court's approval of the exclusion of Stivers during *voir dire* did amount to an unreasonable application of *Waller* and *Presley*, we would nonetheless affirm the dismissal of Zornes's petition on an alternative ground. A defendant may waive his right to a public trial by consenting to the closure of a proceeding. *Addai v. Schmalenberger*, 776 F.3d 528, 533-34 (8th Cir. 2015). Zornes not only consented to excluding the victim's brother from the courtroom during *voir dire*, but affirmatively requested that procedure so that prospective jurors would not have "eye contact with him." Under any standard of review, Zornes waived his present claim that the exclusion of Stivers from the courtroom during jury selection violated the right to a public trial.

* * *

The judgment of the district court is affirmed.

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Appendix B

Report and Recommendation
Tracy Zornes v. Michelle Smith, 16-cv-1730 - KMM
(dated September 16, 2019)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Tracy Alan Zornes,

Petitioner,

v.

Michelle Smith,

Respondent.

Case No. 16-cv-1730-ECT-KMM

REPORT AND RECOMMENDATION

Robert H. Meyers, Office of the Federal Defender, for petitioner Tracy Alan Zornes.[1]

Cecilia A. Knapp, Clay County Attorney's Office, for respondent Michelle Smith.

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Petitioner "Tracy Alan Zornes was convicted of the first-degree premeditated murders of Megan Londo and John Cadotte, arson for setting a fire that destroyed the apartment building where Londo and Cadotte were murdered, and theft of Cadotte's car." *State v. Zornes* ("*Zornes I*"), 831 N.W.2d 609, 612 (Minn. 2013). The trial court sentenced Mr. Zornes to consecutive life sentences without possibility of parole on the murder convictions. *Id.* at 617. Mr. Zornes appealed those convictions directly to

[1] This Court appointed Mr. Meyers to represent Mr. Zornes with respect to the claim raised in Ground One of the petition for a writ of habeas corpus. *See* ECF No. 45. The remaining claims were litigated by Mr. Zornes pro se.

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the Minnesota Supreme Court, which affirmed. *Id.* at 628. Twice Mr. Zornes sought post-conviction relief in the state courts; the state courts denied both requests. *See Zornes v. State* ("*Zornes II*"), 880 N.W.2d 363 (Minn. 2016); *Zornes v. State* ("*Zornes III*"), 903 N.W.2d 411 (Minn. 2017).

Now before the Court is Mr. Zornes's petition for a writ of habeas corpus. *See* Petition [ECF No. 1]; 28 U.S.C. § 2254. Mr. Zornes challenges the validity of his convictions on thirteen grounds. After review, this Court concludes that several of the claims raised by Mr. Zornes in this habeas corpus proceeding are procedurally barred, because those claims were not "fairly presented" to the state courts. The remaining claims fail on the merits. Accordingly, it is recommended that Mr. Zornes's habeas petition be denied.

I. BACKGROUND

"Following an early-morning apartment fire in Moorhead in February 2010, the bodies of Megan Londo and John Cadotte were discovered by emergency personnel. Londo and Cadotte had both been beaten and stabbed, and had died before the apartment was set ablaze." *Zornes II*, 880 N.W.2d at 367. A smoke detector had been removed from the incinerated room. *See Zornes I*, 831 N.W.2d at 614. A couple of days later, "a passerby found the burnt remains of Cadotte's Honda Civic. The police were called, and during the subsequent processing of the car, investigators recovered the remains of a smoke detector." *Id.* at 615.

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Police quickly narrowed in on Mr. Zornes as a person of interest in the crimes. Among other factors, Mr. Zornes's nephew, "S.W.," told police that he had watched Mr. Zornes torch a red Honda Civic matching the description of Mr. Cadotte's vehicle. *Id.* Mr. Zornes had gone on the lam by this point, hiding out at a makeshift campsite in the woods. *Id.* at 616. Police located Mr. Zornes after they convinced "one of Zornes's friends, who had been helping Zornes while he was hiding from the police, to reveal Zornes's location to them." *Id.* During a pat down search of Zornes, the police recovered a folding knife. They also seized a hammer, screwdriver, utility knife, and scissors from Zornes's campsite.

Mr. Zornes was indicted on two counts of first-degree premeditated murder, two counts of second-degree intentional murder, first-degree arson of a dwelling, and theft of a motor vehicle. *See Zornes I*, 831 N.W.2d at 616. The jury voted to convict on all counts except the charges of second-degree murder, and the court sentenced Mr. Zornes "to two consecutive life sentences without the possibility of parole for the two first-degree premeditated murder convictions, a consecutive 48-month sentence for the arson conviction, and a 30-month sentence for the motor-vehicle theft conviction to run consecutive with the other sentences." *Id.* at 617 (footnote omitted).

Three times the matter has appeared before the Minnesota Supreme Court on appellate review: the direct appeal from the conviction, the appeal from the denial of

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his first petition for post-conviction review, and the appeal from the denial of his second petition for post-conviction review.[2]

On direct review, Mr. Zornes raised four claims before the Minnesota Supreme Court. First, Mr. Zornes contended that his right to a public trial, as guaranteed by the Sixth Amendment of the federal constitution, was violated when two persons—his girlfriend, who is identified by the Minnesota Supreme Court as "E.M."; and the brother of victim John Cadotte—were removed from the courtroom during voir dire. *See Zornes I*, 831 N.W.2d at 618-21. Second, Mr. Zornes argued that the trial court improperly admitted an ambiguous statement—either "this wasn't anything sexual" or "it wasn't sexual related"—that he made to police immediately before or during what was later found by the trial court to be an unlawful warrantless search following his arrest. *Id.* at 621-24. Third, Mr. Zornes argued that the trial court abused its discretion by admitting into evidence the folding knife, utility knife, scissors, screwdriver, and hammer found either on his person or at his campsite at the time of his arrest; Mr. Zornes had contended that nothing directly tied those items to the crime scene, they were irrelevant to the case, and were therefore inadmissible under state law. *Id.* at 624-26. Fourth, Mr. Zornes argued that the trial court abused its discretion in deciding that, if Mr. Zornes elected to testify, evidence about his three

[2] Under Minnesota law, "[a] defendant may appeal as of right from the district court to the Supreme Court from a final judgment of conviction of first-degree murder." Minn. R. Crim. P. 29.02, subd. 1(a). This right of immediate appeal to the Minnesota Supreme Court persists through post-conviction review.

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prior felony convictions could be used to impeach his testimony. *Id.* at 626-28. The Minnesota Supreme Court rejected each of the four claims on the merits.

Mr. Zornes next filed a petition for post-conviction review in state court. *See* Minn. Stat. § 590.01. The Minnesota Supreme Court, on review of the denial of the petition by the trial court, characterized the petition as raising three categories of claims. First, according to the Minnesota Supreme Court, Mr. Zornes raised several new claims of "trial errors," including

> that the prosecution: (1) improperly argued that he had the "means" to commit the murders although his pocketknife was incapable of inflicting some of the victims' wounds; (2) submitted a "false and misleading" witness list to the court; (3) entered photos and testimony into evidence without foundation; and (4) committed misconduct in its questioning of a witness. Zornes also argue[d] that the prosecutor committed misconduct during closing argument by (5) improperly referring to his choice not to testify; (6) making other prejudicial statements; and (7) using an "inflammatory" computer-based slide presentation.

Zornes II, 880 N.W.2d at 368. The trial court found, and the Minnesota Supreme Court agreed, that each of these claims of "trial error" were or should have been known to Mr. Zornes at the time of the direct appeal and therefore could not be raised in a post-conviction proceeding, invoking what is known in Minnesota as the *Knaffla* rule. *Id.* at 368-69 (citing *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976)); Minn. Stat. § 590.01, subd. 1.

Second, Mr. Zornes raised several claims of ineffective assistance of trial counsel in his initial petition for post-conviction review. Most of these claims

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correlated to the seven arguments of "trial error" listed above; for example, Mr. Zornes claimed that the prosecutor committed misconduct by using inflammatory tactics during her closing arguments, and then claimed that his trial counsel was ineffective for failing to object to the use of those tactics and seek a mistrial. Both the district court reviewing Mr. Zornes's habeas petition and the Minnesota Supreme Court concluded that, just as Mr. Zornes could have raised the claims of trial error on direct appeal, so too could he have raised the claims of in-court ineffective-assistance-of-trial-counsel claims on direct appeal, and thus these claims were also barred by *Knaffla*. *Zornes II*, 880 N.W.2d at 369.

But Mr. Zornes also raised a claim of ineffective assistance of trial counsel *not* based on the trial errors listed above: in light of evidence, not presented at trial, showing that the tools procured from the search of his campsite could not have inflicted many of the victims' wounds, his trial counsel was ineffective in failing to prevent the tools from being admitted into evidence. *Id.* at 369-70. The district court found that this claim was also barred by *Knaffla*, but the Minnesota Supreme Court hedged its bets, concluding that "even if this issue is not *Knaffla*-barred," the claim failed on the merits. *Id.* at 370.

Third, Mr. Zornes argued that his *appellate* counsel provided ineffective assistance in three respects: (1) by failing to raise on direct appeal the ineffective-assistance-of-trial-counsel claim, regarding his trial counsel's failure to prevent the tools from being introduced into evidence; (2) by failing to raise any claim regarding

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the prosecution's use of a PowerPoint slide during closing arguments that, he contended, "contain[ed] information not admitted into evidence," and (3) by failing to raise any claim that the prosecutor had committed misconduct during her closing argument when she referred to Mr. Zornes's decision not to testify at trial. *Zornes II*, 880 N.W.2d at 371, 373. All three ineffective-assistance-of-appellate-counsel claims were rejected on the merits by the Minnesota Supreme Court.

Mr. Zornes filed the instant federal habeas corpus petition while the appeal of his first petition for post-conviction review remained pending before the Minnesota Supreme Court. Mr. Zornes expressly conceded in the habeas petition that three of the grounds raised in his petition— Grounds Eleven, Twelve, and Thirteen—had not yet been raised either on direct appeal or in his first petition for post-conviction review. *See* Petition at 12, 22-24. The government, therefore sought dismissal of the habeas petition on the grounds that Mr. Zornes had raised both exhausted and unexhausted claims, *see Rose v. Lundy*, 455 U.S. 509, 522 (1982), or, alternatively, asked for denial of Grounds Eleven through Thirteen as procedurally barred, *see* 28 U.S.C. § 2254(b). In response, Mr. Zornes requested that this matter be held in abeyance while he returned to state court and presented the issues in a second petition for post-conviction review. This Court concluded that Ground Thirteen, which depended in part upon a recent forensic analysis not available to Mr. Zornes at the time he filed his first petition for post-conviction review, might plausibly be considered on the merits in the state courts. *See* ECF No. 27 at 6. Accordingly, this Court recommended that

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this matter be stayed pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), while Mr. Zornes returned to state court and litigated his second petition for post-conviction review. *Id.* at 26-27. The recommendation of a stay was adopted without objection from the parties. *See* ECF No. 28.

Mr. Zornes filed his second petition for post-conviction review in state court raising not only the three claims he had identified in his federal habeas petition as not previously having been raised (Grounds Eleven through Thirteen), but others as well, including:

> 1. The prosecution failed to provide him with a number of documents that he only recently has discovered, which he believes is a *Brady*[3] violation;
>
> 2. The forensic pathologist's report provided newly discovered evidence of actual innocence;
>
> 3. His investigator discovered new evidence of recantations of trial witnesses;
>
> 4. Trial counsel provided ineffective assistance by failing to strike jurors who were biased;
>
> 5. Trial counsel provided ineffective assistance by failing to conduct an investigation; and
>
> 6. Law enforcement officials did not sufficiently investigate his case.

Zornes III, 903 N.W.2d at 416. The Minnesota Supreme Court concluded that the first three of the claims lacked merit—the evidence cited by Mr. Zornes in support of his

[3] *See Brady v. Maryland*, 373 U.S. 83 (1963).

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Brady claim was not material; the forensic pathologist's report would have been unlikely to produce an acquittal or more favorable result if introduced at trial; and the witness-recantation claim was unsupported by evidence—while the remaining three claims were or could have been known at the time of the direct appeal and were therefore barred under *Knaffla*. *Id.* at 416-21.

The parties submitted additional briefing following the conclusion of Mr. Zornes's second state post-conviction proceeding. After that briefing was submitted, this Court appointed counsel to prepare a memorandum of law on the following question:

> The Minnesota Supreme Court concluded that Mr. Zornes's right to a public trial had not been violated during his criminal proceedings. Was this conclusion contrary to or did it involve an unreasonable application of clearly established federal law, as claimed in Ground One of Mr. Zornes's habeas petition?

ECF No. 45 at 1. Supplemental briefing on that issue has now been submitted by both parties, and Mr. Zornes's habeas corpus petition is ripe for review.

II. ANALYSIS

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") sets forth the standards that govern this Court's substantive review of Mr. Zornes's habeas corpus claims. The relevant portion of AEDPA, 28 U.S.C. § 2254(d), provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court

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> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In *Williams v. Taylor*, 529 U.S. 362 (2000), the United States Supreme Court discussed § 2254(d)(1) and how it should be applied by federal district courts. The Supreme Court recognized that

> a state-court decision can be "contrary to" this Court's clearly established precedent in two ways. First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

Id. at 405.

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The Supreme Court also explained that

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> [a] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. . . . [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 409, 411.

A writ of habeas corpus is also available where the state court's resolution of a prisoner's criminal case is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). In other words, habeas relief can be granted if the conviction is based on findings of fact that could not reasonably be derived from the state court evidentiary record. When reviewing a state court decision, however, "a federal court . . . presumes that the state court's factual determinations are correct; this presumption may be rebutted only by clear and convincing evidence." *Lee v. Gammon*, 222 F.3d 441, 442 (8th Cir .2000). In addition, 28 U.S.C. § 2254(e)(1) provides that

> [i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

"AEDPA . . . imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Renico v.*

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Lett, 559 U.S. 766, 773 (2010) (citations and quotations omitted). Habeas relief cannot be granted unless the petitioner has identified and substantiated a specific error committed by the state courts. Moreover, the petitioner must show that the state courts committed the type of error that is actionable under § 2254(d), as that statute has been interpreted by the Supreme Court. Finally, the petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

B. Procedural Default

Generally, "[b]efore seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal quotations omitted). Each claim for relief raised in a federal habeas petition must independently be exhausted in the state courts. Presentation of a mixed petition—that is, a habeas petition raising both exhausted and unexhausted claims—is grounds for dismissal of the *entire* habeas petition without prejudice. *See Lundy*, 455 U.S. at 522.

Section 2254(b), however, requires that the habeas applicant exhaust only those state-court remedies that are "available." 28 U.S.C. § 2254(b)(1)(A). Where state procedural rules prevent examination of the merits of a claim, the petitioner

technically has satisfied the exhaustion requirement of § 2254(b), because no state-court remedies remain "available" for that claim. *See McCall v. Benson*, 114 F.3d 754, 757 (8th Cir. 1997). Still, though, because the applicant can no longer fairly present the claim to the state courts in a manner that entitles the applicant to a ruling on the merits, the applicant is usually barred from seeking federal habeas corpus relief on that claim. *See Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). This kind of claim—one that has not been fairly presented to the state courts and is now barred from consideration by state-law procedural rules—is said to have been procedurally defaulted. *See McCall*, 114 F.3d at 757. A procedurally defaulted claim must be denied—assuming that the respondent has interjected the affirmative defense of procedural default—unless the petitioner "can demonstrate either cause and actual prejudice, or that a miscarriage of justice will occur if we do not review the merits of the petition." *Id.*

C. Overview of Mr. Zornes's Claims

Mr. Zornes, as a formal matter, raises thirteen grounds for relief in his habeas corpus petition. This list somewhat oversimplifies things, though. Many of the grounds for relief in the habeas petition are presented as "direct" claims of error—mostly, claims that Mr. Zornes's convictions must be overturned as a result of prosecutorial misconduct. But Mr. Zornes also requested partway through this habeas corpus proceeding that his petition be interpreted as raising ancillary claims of ineffective assistance of trial counsel (for failure to object at trial or raise certain

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arguments regarding the alleged prosecutorial misconduct) and ineffective assistance of appellate counsel (for failure to raise the claims of prosecutorial misconduct on direct appeal). *See* ECF No. 35 at 4. Thus, for example, Ground Seven of the habeas petition expressly raises a claim that the prosecution suborned perjury from a witness, *see* Petition at 18, but Mr. Zornes also asks, that Ground Seven be interpreted as raising a claim of ineffective assistance of trial counsel (because no objection was made to the allegedly suborned perjury) and ineffective assistance of appellate counsel (because no claim regarding suborned perjury was raised on appeal). *Id.*

As explained above, however, only if a specific claim has been fairly presented to the state courts may that claim be considered on the merits in this habeas corpus proceeding; it is not enough for a related claim based on the same facts to have been raised. *See, e.g.*, *Wyldes v. Hundley*, 69 F.3d 247, 253 (8th Cir. 1995) (citing *Tippitt v. Lockhart*, 903 F.2d 552, 554 (8th Cir. 1990)). For example, to the extent that Mr. Zornes seeks habeas relief on claims of prosecutorial misconduct, he must establish that he has fairly presented those specific claims to the Minnesota Supreme Court. Similarly, to the extent that Mr. Zornes seeks relief for ineffective-assistance related to an instance of alleged prosecutorial misconduct, he must establish that he has fairly presented *that* ineffective-assistance claim to the Minnesota Supreme Court. Thus, any given ground for relief raised by Mr. Zornes may contain multiple disparate claims, and those claims have been fairly presented to the Minnesota Supreme Court in whole, in part, or not at all.

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With that in mind, the grounds for relief raised in Mr. Zornes's habeas petition can be grouped into three categories. First, some of the grounds—specifically, Grounds Three, Four, Five, Six, Seven, and Twelve—have not been fairly presented to the Minnesota Supreme Court at all, whether interpreted as direct claims of error, claims of ineffective assistance of trial counsel, or claims of ineffective assistance of appellate counsel. Those grounds are procedurally barred and, as this Court will explain below, should be denied on that basis. Second, some of the grounds—specifically, Grounds Eight, Nine, Ten, and Eleven—are procedurally barred in part, but certain of the claims either raised or implied by those grounds were fairly presented to the Minnesota Supreme Court. With respect to those grounds for relief, this Court will examine the extent to which the grounds have been procedurally defaulted and then continue to the merits of any claims that have been fairly presented. Third, the remaining grounds raised by Mr. Zornes—specifically, Grounds One, Two, and Thirteen—were fairly presented to the Minnesota Supreme Court in a manner that plainly entitled Mr. Zornes to review before that court. Those grounds for relief are not procedurally defaulted, and this Court will proceed to the merits of the claims raised within those grounds.

D. Procedurally Defaulted Grounds

1. Grounds Three and Six

Two spectators were removed from the courtroom during voir dire at Mr. Zornes's trial, and many other persons were potentially excluded from the courtroom

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for the entirety of the trial proceedings because the prosecution indicated that it might call those persons as witnesses. Three of the grounds for relief raised in Mr. Zornes's habeas corpus petition—Grounds One, Three, and Six—relate to this removal and exclusion. In Ground One, Mr. Zornes contends that the removal and exclusion of individuals from the courtroom violated his Sixth Amendment right to a public trial. That claim was fairly presented to the Minnesota Supreme Court on direct appeal and is discussed in greater depth below. In Ground Six, Mr. Zornes contends that the prosecution submitted a witness list containing the names of persons that the State had no actual intention of calling as witnesses, thereby getting those individuals excluded from the courtroom, and thus committed prosecutorial misconduct. And in Ground Three, Mr. Zornes contends that his attorney's failure to object to what he believes to have been a "false" witness list amounted to ineffective assistance of counsel.

The claims presented in Grounds Three and Six were raised by Mr. Zornes in his first petition for post-conviction relief in state court. With respect to each claim, however, the Minnesota Supreme Court concluded that Mr. Zornes could have raised the issue on direct appeal and therefore that the claims were barred from further consideration by *Knaffla*. *See Zornes II*, 880 N.W.2d at 368-69 (citing *Knaffla*, 243 N.W.2d at 741). Because of the effect of *Knaffla*, neither Ground Three nor Ground Six has been presented to the Minnesota Supreme Court in a manner that entitled Mr. Zornes to a ruling on the merits. Moreover, *Knaffla* will continue to bar consideration

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of those claims if raised in a future state-court proceeding. Accordingly, both claims are now procedurally defaulted.[4]

This procedural default can be overcome only through a showing either of cause and actual prejudice, or that a miscarriage of justice will occur if the claims are not reviewed. *See McCall*, 114 F.3d at 757. Mr. Zornes has not established any cause for the failure to raise the claims presented in Grounds Three and Six to the state courts at the appropriate time, much less cause justifying avoidance of the application of the usual rules of procedural default. Moreover, the claims in Grounds Three and Six are largely duplicative of the claim raised in Ground One of the habeas petition, which *has* been fairly presented to the Minnesota Supreme Court and is therefore amenable to federal habeas review. No miscarriage of justice will result from the denial of the largely duplicative Grounds Three and Six.

2. Grounds Four and Five

Grounds Four and Five of the habeas petition are also interrelated. Evidence regarding a blood-spattered chair found at the crime scene was admitted at trial. Mr. Zornes's trial counsel did not object to admission of the evidence. In Ground Five of the habeas petition, Mr. Zornes contends that the admission of the blood-spattered chair without adequate evidentiary foundation violated his constitutional rights. In

[4] Mr. Zornes did not argue before the state courts that his appellate counsel was ineffective for failing to raise the claims now presented in Grounds Three and Six of the habeas petition, and thus any such claim of ineffective assistance of appellate counsel would also be procedurally defaulted.

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Ground Four of the habeas petition, Mr. Zornes contends that the failure to object to the admission of the evidence amounted to ineffective assistance of counsel.

The Minnesota Supreme Court squarely rejected each of these claims as barred by *Knaffla*. *See Zornes II*, 880 N.W.2d at 368-69. Mr. Zornes knew, or should have known, of these claims at the time he presented his direct appeal, yet he failed to raise these issues. *Knaffla* thus precluded those issues from being raised in Mr. Zornes's first petition for post-conviction review, and *Knaffla* continues to preclude those issues from being raised in the state courts now.[5] Accordingly, the claims raised in Grounds Four and Five have become procedurally defaulted.

Only through a showing of cause and prejudice, or manifest injustice, can Mr. Zornes overcome that procedural default. Again, Mr. Zornes has not demonstrated adequate cause for the failure to raise these claims related to the blood-spattered chair at the appropriate time before the state courts. Moreover, Mr. Zornes cannot show that manifest injustice would result from the refusal to consider Grounds Four and Five on the merits; indeed, the evidence at issue appears to have been marginal to the prosecution's case, and Mr. Zornes does not make clear how he believes that further "foundation" for the evidence presented would have helped his defense. It is also

[5] *Knaffla* would not necessarily have barred a claim of ineffective assistance of appellate counsel related to the blood spatter—e.g., that Mr. Zornes's appellate counsel was ineffective in failing to raise the issue on direct appeal—but Mr. Zornes did not present such a claim to the Minnesota courts, and it is now too late to do so.

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unclear how Mr. Zornes alleges he was prejudiced by the introduction of the chair. Grounds Four and Five should therefore be dismissed as procedurally defaulted.

3. Ground Seven

Police took DNA samples from Mr. Zornes's cheek and penis shortly after his arrest. A warrant for the search was not obtained for another three and a half hours. *Zornes I*, 831 N.W.2d at 616. Mr. Zornes successfully had the results of that DNA testing suppressed.[6] *Id.* But the issue of DNA testing nevertheless arose at trial, with an expert testifying on behalf of the prosecution that she had obtained known samples from the two victims and two other persons, E.M. and B.K.; that the items found at Mr. Zornes's campsite contained male DNA; and that the DNA did not match the profiles of the victims, E.M., or B.K. Mr. Zornes contends that the line of questioning was a roundabout method of eliciting testimony regarding evidence that had been suppressed; the jurors would have intuited from the testimony, Mr. Zornes argues, that his DNA had been found on the items recovered from the campsite. In addition, Mr. Zornes contends that the DNA expert was untruthful when she testified that she had samples from only the victims, E.M., and B.K., as she also had the samples unlawfully taken from Mr. Zornes.

[6] Not suppressed was an ambiguous but incriminating statement made by Mr. Zornes around the time of the DNA collection that tended to implicate him in the offenses. The propriety of the admission of that statement was a focus of Mr. Zornes on direct appeal, *see Zornes I*, 831 N.W.2d at 621-24, but the claim was not renewed in his habeas petition.

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These claims were among the alleged "trial errors" identified by the Minnesota Supreme Court that should have been raised on direct review. *See Zornes II*, 880 N.W.2d at 368. "Because Zornes's claims of trial error are all based on events that occurred during his trial, they were all known or should have been known at the time of the direct appeal," and thus the *Knaffla* bar applied to those claims. *Id.* Similarly, ineffective-assistance-of-trial-counsel claims related to the putatively improper testimony could have been raised on direct appeal; because the ineffective-assistance claims were not raised at that time, those claims were likewise barred by *Knaffla*.[7] *Id.* at 369. Mr. Zornes has not and cannot fairly present the claims raised in Ground Seven to the Minnesota Supreme Court. No adequate cause exists for the failure to raise the claims at the appropriate time, and no manifest injustice results from the refusal to consider it in the first instance. Ground Seven should be denied.

4. Ground Twelve

Mr. Zornes contends that one of the jurors demonstrated bias against Native Americans during voir dire—Mr. Zornes himself is Native American—while another juror expressed admiration of the county sheriff and admitted to having previously interacted with other persons involved in the trial, including the judge and defense

[7] Mr. Zornes did not raise a correlative ineffective-assistance-of-appellate-counsel claim before the Minnesota Supreme Court.

counsel.[8] In Ground Twelve, Mr. Zornes argues that his counsel provided ineffective assistance by declining to strike those jurors from the panel. By his own admission, Mr. Zornes had presented neither the claim of juror bias nor a claim of ineffective assistance of counsel for failure to strike the jurors in the state courts at the time that he filed his habeas petition. *See* Petition at 23. Ground Twelve was among the claims that Mr. Zornes sought to exhaust in his second petition for post-conviction review following the imposition of the *Rhines* stay in this matter.

The Minnesota Supreme Court made short work of the claim. "Zornes's claims of ineffective assistance of counsel for failure to strike biased jurors can be determined on the basis of the trial record. . . . Because these claims were known at the time of trial and were not raised during the direct appeal, the *Knaffla* rule bars the claims, unless the facts alleged in the petition establish one of the exceptions to the *Knaffla* rule." *Zornes III*, 903 N.W.2d at 421. No exception to *Knaffla* was found to apply by the Minnesota Supreme Court, and the claim was therefore rejected without consideration of the merits. Mr. Zornes has failed to fairly present his claims to the Minnesota courts, and, once more, Mr. Zornes has demonstrated neither adequate cause for the failure nor that a manifest injustice would result from a refusal to

[8] Mr. Zornes mentions only the juror alleged to have demonstrated racial bias in the habeas petition itself, *see* Petition at 23; he includes the allegations regarding the second juror in his initial memorandum in support of his habeas petition, *see* ECF No. 19 at 28-30.

consider the claims. Ground Twelve should therefore also be denied on the grounds of procedural default.

E. "Mixed" Grounds

Each of the six grounds for relief discussed above has not been not fairly presented to the Minnesota Supreme Court, and none of those grounds may now be raised in a new state-court proceeding. Accordingly, those claims have become procedurally defaulted in full, and denial of those grounds was recommended above on that basis.

By contrast, Grounds Eight, Nine, Ten, and Eleven of the habeas petition include both claims that have been fairly presented and claims that have not been fairly presented in the state courts. Each of Grounds Eight, Nine, and Ten concern alleged prosecutorial misconduct committed during closing arguments. The claims presented there were initially raised in Mr. Zornes's first petition for post-conviction review. In affirming the denial of that petition, the Minnesota Supreme Court concluded that Mr. Zornes could have raised the claims of prosecutorial misconduct on direct appeal and thus that those claims were barred by *Knaffla*. *See Zornes II*, 880 N.W.2d at 368-69. By the same token, the Minnesota Supreme Court concluded that Mr. Zornes could have raised any claims of ineffective assistance of *trial* counsel regarding the alleged prosecutorial misconduct on direct appeal. *Id.* at 369. But Mr. Zornes could not argue on direct appeal that his appellate counsel was ineffective for failing to raise issues related to the alleged prosecutorial misconduct; accordingly,

Knaffla did not bar consideration of his ineffective-assistance-of-appellate-counsel claims. Those claims were instead considered and denied on the merits by the Minnesota Supreme Court. *Id.* at 370-73.

Similarly, Ground Eleven consists of multiple claims. In part, Mr. Zornes contends that the prosecution and law enforcement failed to investigate matters that he insists would have exonerated him if pursued. In other claims, Mr. Zornes contends that the prosecution failed to turn over evidence favorable to him. On review of the denial of Mr. Zornes's second petition for post-conviction review, the Minnesota Supreme Court concluded that the investigatory claims could have been raised earlier and therefore were barred by *Knaffla*, but the court proceeded to the merits of the remaining claims now raised in Ground Eleven. *See Zornes III*, 903 N.W.2d at 417-19, 421.

Thus, in each of Grounds Eight, Nine, Ten, and Eleven, Mr. Zornes has raised claims that have been fairly presented to the state courts alongside claims that have become procedurally defaulted. Those claims that have become procedurally defaulted—the claims of prosecutorial misconduct and ineffective assistance of trial counsel in Grounds Eight, Nine, and Ten; and the investigatory claims in Ground Eleven—should be denied because of that procedural default. But this Court now considers the merits of the remaining claims.

1. Ground Eight

Mr. Zornes contends in Ground Eight of his petition that the prosecutor alluded to his invocation of his Fifth Amendment right against self-incrimination on several occasions during closing arguments; that his appellate counsel failed to raise the issue on direct appeal; and that the failure to do so amounted to ineffective assistance of appellate counsel. *See United States v. Triplett*, 195 F.3d 990, 995 (8th Cir. 1999) ("It is . . . well established that prosecutorial misconduct occurs when the prosecutor comments at trial, directly or *indirectly*, on the defendant's failure to testify."). Mr. Zornes is correct in part: the prosecutor did improperly allude to Mr. Zornes's decision not to testify, though only once; and his appellate attorney did not raise the issue on direct appeal. Because the decision not to litigate the claim before the Minnesota Supreme Court was reasonable, however, Mr. Zornes's appellate attorney did not provide ineffective assistance of counsel.

Claims of ineffective assistance of appellate counsel, like all ineffective-assistance claims, are governed by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).[9] To prevail, Mr. Zornes must show that his counsel's performance fell below an objective standard of reasonableness, and that there is a

[9] "The right to counsel at trial is guaranteed by the Sixth Amendment, but the Fifth Amendment due process clause governs the right to counsel for appellate proceedings." *Steele v. United States*, 518 F.3d 986, 988 (8th Cir. 2008). The *Strickland* test is applied to both sets of claims. *See Williams v. Ludwick*, 761 F.3d 841, 845 (8th Cir. 2014).

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reasonable probability that, but for his counsel's errors, the result of his proceeding would have been different. *Id.* at 687-88 & 94; *accord Pfau v. Ault*, 409 F.3d 933, 939 (8th Cir. 2005). "[A]bsent contrary evidence," the Court must "'assume that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." *United States v. Brown*, 528 F.3d 1030, 1033 (8th Cir. 2008) (quoting *Roe v. Delo*, 160 F.3d 416, 418 (8th Cir. 1998)). "Because one of appellate counsel's important duties is to focus on those arguments that are most likely to succeed, counsel will not be held to be ineffective for failure to raise every conceivable issue." *Link v. Luebbers*, 469 F.3d 1197, 1205 (8th Cir. 2006). In general, only if an omitted claim is clearly stronger than the issues that were raised can a petitioner demonstrate ineffectiveness on the part of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (quotation omitted). And on habeas review, claims of ineffective assistance of counsel are "doubly deferential"; counsel is presumed to have provided adequate assistance, while the decision of the state court denying the claim of ineffective assistance is afforded deference under § 2254(d). *See Cullen v. Pinholster*, 563 U.S. 170, 190 (2011).

Mr. Zornes alleges that his Fifth Amendment rights were violated when the prosecutor referred in her closing argument to his decision not to testify at trial. *See* Petition at 19; ECF No. 19 at 22-23. Mr. Zornes is not terribly precise in his habeas petition or accompanying documents in identifying the instances in which he believes the prosecutor stepped over the line. But in his briefing before the Minnesota Supreme Court on appeal from the denial of his first petition for post-conviction

relief, Mr. Zornes cited fifteen instances in which the prosecutor allegedly referred to his decision not to testify. *See* ECF No. 40-4 at 22-23. But as the Minnesota Supreme Court correctly pointed out, "the large majority of these references are not to Zornes' decision not to testify, but rather to statements made by Zornes following the crime, which were entered into evidence through witness testimony." *Zornes II*, 880 N.W.2d at 372. For example, where the prosecutor stated (in reference to Mr. Zornes) that "he's got some explaining to do," Tr. 1387, it was in the context of describing Mr. Zornes's actions and motivations in the days after the murder, consistent with testimony provided by witnesses at trial, *see id.* ("It's also on February 20th that the explanations start coming from this defendant because the people in this community know he was supposed to pick up [Ms. Londo], they were supposed to ride together, and [Ms. Londo] is dead and he is not and he's got some explaining to do.").

Two of the comments made by the prosecutor do not fit this description. The first comment was similarly innocuous. Mr. Zornes accurately quotes the prosecutor as stating in her closing statement that "it would be nice to know [a] motive," Tr. 1391, but the broader context of the quote makes clear that the prosecutor was not alluding to Mr. Zornes's decision to remain silent, but was explaining away a shortcoming in the State's case, *see id.* ("And it's also important to know that — it would be nice to know [a] motive for these brutal homicides, but motive is not an element of any offense with which this defendant is charged. And motive does not

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need to be proven."). This reference cannot reasonably be interpreted as a reference to Mr. Zornes's decision not to testify.

The second comment, however, is a different matter. Near the end of her closing statement, the prosecutor remarked, in reference to the remnants of the smoke detector found in Mr. Cadotte's charred vehicle, that "some things can't be explained. [Mr. Zornes] can't explain that smoke detector." Tr. 399. The comment drew an immediate objection from defense counsel. *Id.* The trial court declined to declare a mistrial, but Mr. Zornes later requested and received an instruction that the jury was not to draw an adverse inference from his decision not to testify. *See Zornes II*, 880 N.W.2d at 373. Unlike the other comments referenced by Mr. Zornes, the prosecutor's statement that "some things can't be explained. [Mr. Zornes] can't explain that smoke detector" can reasonably be interpreted as a reference to the decision not to testify and thus arguably amounts to prosecutorial misconduct. Nevertheless, the Minnesota Supreme Court concluded that the comment of the prosecutor was "at most harmless error, and thus his appellate attorney was not ineffective by failing to raise the issue on appeal." *Id.*

"A claim of appellate ineffectiveness can be based on counsel's failure to raise a particular issue on appeal, although it is difficult to show deficient performance under those circumstances because counsel 'need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.'" *Cargle v. Mullen*, 317 F.3d 1196, 1202 (10th Cir.

2003) (quoting *Smith*, 528 U.S. at 288). The standard is helpfully summarized in this context by *Cargle*:

> If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance.

Cargle, 317 F.3d at 1202. "[I]t is . . . possible to bring a *Strickland* claim based on [appellate] counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent." *Smith*, 528 U.S. at 765.

Although Mr. Zornes's direct claim of prosecutorial misconduct is not properly before the Court on habeas review—again, that claim has been procedurally defaulted—the relative merit of that challenge, as compared to the issues that *were* raised on appeal, is relevant to determining whether Mr. Zornes's appellate counsel acted reasonably in omitting the claim on direct appeal. Mr. Zornes raised four issues on direct appeal. All had some merit, and at least one—the claim that Mr. Zornes was denied his Sixth Amendment right to a public trial—was very strong, as explored below. Conversely, in denying Mr. Zornes's claim of ineffective assistance of appellate counsel, the Minnesota Supreme Court signaled after conducting a harmless-error review that it would not have found the prosecutorial-misconduct claim

compelling had it been appropriately raised. Similarly, it is doubtful that, had the issue been preserved, the direct claim of prosecutorial misconduct would have been successful on federal habeas review. *See Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (requiring a showing on habeas review that the petitioner demonstrate that the trial error had a substantial and injurious effect on the jury's verdict). The comment of the prosecutor that Mr. Zornes "can't explain that smoke detector," though impermissible, was an indirect reference to the decision not to testify. This mistake was made only once by the prosecutor. Mr. Zornes sought and received a no-adverse-inference jury instruction. And the evidence of Mr. Zornes's guilt—even after discounting evidence regarding possession of the possible murder weapons, see discussion of Ground Two below—was substantial. *See Zornes I*, 831 N.W.2d at 623.

The Minnesota Supreme Court reasonably concluded that Mr. Zornes would not have succeeded on his prosecutorial-misconduct claim had the claim been raised before it on direct review. Accordingly, the decision of Mr. Zornes's appellate attorney not to raise the issue on direct appeal could not have been objectively unreasonable. *See Dyer v. United States*, 23 F.3d 1424, 1426 (8th Cir. 1994). The claim of ineffective assistance of appellate counsel raised in Ground Eight should be denied.

2. Ground Nine

The prosecution is alleged to have committed two other acts of misconduct during closing arguments, and Mr. Zornes's appellate attorney is said to have provided ineffective assistance in failing to raise those instances of misconduct on direct appeal.

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In Ground Nine, Mr. Zornes contends that the prosecutor conducted her closing argument in an overly inflammatory manner, thus depriving him of due process. This Court considers the argument within the context of an ineffective-assistance-of-appellate-counsel claim: Was Mr. Zornes's appellate counsel constitutionally deficient in failing to raise this instance of alleged prosecutorial misconduct on direct appeal?

The claim was not well developed before the Minnesota Supreme Court,[10] and it is not well developed here. It is true that comments intended solely to inflame juror emotions are inappropriate and that, where such comments deprive a defendant of a fair trial, reversal is warranted. *See, e.g.*, *United States v. Tulk*, 171 F.3d 596, 599 (8th Cir. 1999). But the comments of the prosecutor cited by Mr. Zornes—counting from one to twenty-one to represent the number of blows landed on one victim—are not too incendiary, all things considered. Further, the comments were directed towards a legitimate purpose: establishing that Mr. Zornes acted with the requisite premeditation to be convicted of first-degree murder rather than second-degree murder. *See* Tr. 1392.

[10] The Minnesota Supreme Court understandably elided this aspect of Mr. Zornes's claim with its discussion of the related claim, brought in Ground Ten, that the prosecutor improperly presented evidence through a PowerPoint presentation used during closing arguments. *See Zornes II*, 880 N.W.2d at 371. But Mr. Zornes did present the argument regarding inflammatory conduct before the Minnesota Supreme Court as a separate and discrete claim for relief. *See* ECF No. 40-4 at 25-26.

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The claim of prosecutorial misconduct raised in Ground Nine had little hope of securing a favorable result for Mr. Zornes on direct appeal. His attorney acted reasonably in declining to pursue a marginal claim, thereby detracting from the four substantially more viable claims for relief that were in fact raised. Mr. Zornes has not established that his appellate attorney's performance fell below an objective standard of reasonableness in this regard. *See Strickland*, 466 U.S. at 687-88. Ground Nine therefore should be denied.

3. Ground Ten

A final instance of alleged prosecutorial misconduct during closing arguments was presented by Mr. Zornes in his first petition for post-conviction review:

Mr. Zornes claimed that the prosecutor used a PowerPoint slide that included information not admitted into evidence and that had not been shown to either the court or his defense attorney in advance. As with the two claims just discussed, the Minnesota Supreme Court concluded that this claim was barred by *Knaffla* if presented directly as a claim of prosecutorial misconduct or if presented as a claim of ineffective assistance of trial counsel. *See Zornes II*, 880 N.W.2d at 368-70. The Minnesota Supreme Court went on to consider the claim in the context of ineffective assistance of appellate counsel but concluded, in essence, that the claim had been insufficiently pleaded. "Zornes does not explain further which facts were included [in the presentation] that allegedly lacked evidentiary support. Accordingly, he has not alleged facts that, if proven, would entitle him to relief." *Id.* at 371.

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The Minnesota Supreme Court is correct that Mr. Zornes did not give it much to work with regarding this claim. The exact nature of the evidence alleged to have been introduced through the PowerPoint presentation remains even now somewhat unclear. The crux of the claim appears to concern photographs of the crime scene which, according to Mr. Zornes, were altered to include red indications in various spots.[11] *See* ECF No. 19 at 21; ECF No. 40-4 at 27. On the face of the transcript, the prosecution appears to have used these altered photographs to demonstrate where the smoke detector and carbon-dioxide detector had been removed from the room. *See* Tr. 1397. According to Mr. Zornes, however, the effect of the additional red coloration on the photograph was to make the crime scene appear more violent than it actually was.

One difficulty in evaluating this claim is that the PowerPoint presentation at issue is not in the record available to this Court. The Minnesota Supreme Court concluded that an evidentiary hearing on the claim was unnecessary given the dearth of factual allegations in the petition for post-conviction review and subsequent briefing on appeal. Only in rare circumstances, not present in this case, may a court sitting in federal habeas corpus review of a state-court judgment hold an evidentiary

[11] Mr. Zornes also claims in his briefing before this Court that the prosecutor made a statement during closing arguments concerning the failure to test the fingernail clippings of Mr. Cadotte that was not supported by the evidence in the record, *see* ECF No. 19 at 21, but this claim was not presented to the Minnesota Supreme Court, *see* ECF No. 40-4 at 27.

hearing "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). By failing to adequately allege what, exactly, the prosecution had disclosed through the presentation that was not admitted into evidence (other than the red highlighted pictures), Mr. Zornes forfeited his chance for further evidentiary development in the state courts. Therefore, under § 2254(e)(2), cannot be afforded an evidentiary hearing on the issue in federal court, either.

The question, then, is whether the allegations regarding the PowerPoint presentation offered by Mr. Zornes, if assumed to be true, would entitle him to relief based on his appellate counsel's supposed ineffectiveness in failing to raise the issue on direct appeal. This Court concludes that the answer is no. Even assuming that the prosecutor during her closing argument used photographs of the crime scene that had been altered to indicate in red various items or places within those photographs, and even assuming that these alterations had a prejudicial tendency because they were evocative of blood, Mr. Zornes must still establish that his appellate counsel's failure to raise the issue on direct review fell short of the *Strickland* standard for professional conduct. As explained above, Mr. Zornes's appellate counsel raised four colorable claims for relief on direct review. "Where, as here, 'appellate counsel competently asserts some claims on a defendant's behalf, it is difficult to sustain an ineffective assistance claim based on allegations that counsel was deficient for failing to assert some other claims.' This is because one of appellate counsel's functions is to winnow

the available arguments and exercise judgment about which are most likely to succeed on appeal." *Gray v. Norman*, 739 F.3d 1113, 1117-18 (8th Cir. 2014) (quoting *Link*, 469 F.3d at 1205). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Smith*, 528 U.S. at 288. The claim that Mr. Zornes contends his appellate counsel should have raised on direct review either would have required, if raised as a direct prosecutorial-misconduct claim, surviving plain-error review, as no objection was lodged by trial counsel to the use of the exhibit at trial, *see State v. Ramey*, 721 N.W.2d 294, 298-300 (Minn. 2006); or, if raised as an ineffective-assistance claim, would have required a showing that, but for his counsel's errors, the result of his proceeding would have been different, *Strickland*, 466 U.S. at 694. Neither task would have been easy in light of the evidence arrayed against Mr. Zornes and the relatively fleeting and ephemeral nature of the alleged misconduct — items and locations on a photograph highlighted in red rather than a less sanguinary hue. Appellate counsel would have used reasonable professional judgment in concluding that other claims were more worth pursuing on direct appeal. Ground Ten should be denied.

4. Ground Eleven

In the section of his habeas corpus petition setting out Ground Eleven, Mr. Zornes asserts that forensic lab personnel were instructed by law enforcement not to perform DNA testing on fingernail clippings of the victims because, Mr. Zornes asserts, this DNA testing would have revealed that someone other than him

committed the crimes for which he was convicted. *See* Petition at 22. Mr. Zornes repeats this claim in the briefing supporting his habeas petition, but in that briefing he also provides six other instances in which he alleges that law enforcement and the prosecution either failed to investigate possible leads that would have established his evidence or, failed to turn over evidence favorable to the defense.

Although grouped into a single category of claims in his second petition for post-conviction review, the Minnesota Supreme Court separated the arguments presented in Ground Eleven of the habeas petition into claims arising under *Brady* and claims "that law enforcement officials did not sufficiently investigate the case." *Zornes III*, 903 N.W.2d at 420. Mr. Zornes's *Brady* claims concerned potentially exculpatory evidence that was *actually* possessed by law enforcement and the prosecution, but not turned over to the defense; Mr. Zornes's investigation claims concerned leads that he believed *would* have supplied exculpatory evidence had law enforcement followed up on those aspects of the investigation.

The Minnesota Supreme Court rejected the investigation claims as barred by *Knaffla*, as each of the supposed investigatory failures would have been known to Mr, Zornes and his attorneys on direct appeal. *Id.* at 420-21. Thus, for instance, it was too late for Mr. Zornes to pursue a claim in his second petition for post-conviction review on the theory that law enforcement should have conducted DNA testing of the victims' fingernail clippings, as Mr. Zornes knew at least by the time of trial that

such testing had not been conducted. Due to the effect of *Knaffla*, these investigatory claims are now procedurally barred in federal court as well.[12]

By contrast, the Minnesota Supreme Court considered the merits of Mr. Zornes's *Brady* claims, presumably because, unlike the matters at issue in the investigatory claims, Mr. Zornes would not necessarily have known about specific pieces of exculpatory evidence that were not turned over to the defense and therefore could not have earlier raised claims under *Brady* concerning that evidence. Mr. Zornes identified three such pieces of evidence: "The first document is the transcript of a police interview with M.K.M., a friend of Zornes. The transcript shows that she informed the police that, after the murder, Zornes told her that [the female victim's] boyfriend, Mexican boyfriend had started their house on fire. The second document is a transcript of a police interview with Zornes's sister. The third is a narrative of a police interview with Zornes's friend M.P." *Zornes III*, 903 N.W.2d at 417 (cleaned up).

To establish a *Brady* violation, Mr. Zornes is required to establish three elements: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by

[12] Indeed, it is difficult to understand what constitutional hook would hold claims that the police should have pursued other leads. Such arguments are certainly raised by able defense attorneys at trial, but they do not clearly implicate claims such as ineffective assistance or prosecutional misconduct generally raised on either direct appeal or in habeas proceedings.

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the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The Minnesota Supreme Court concluded that none of the three documents cited by Mr. Zornes gave rise to relief under *Brady*. This Court finds that each of those conclusions was reasonable.

First, as to the police interview of M.K.M., although the transcript at issue had not been turned over to the defense, a report and recording of another police interview with M.K.M. had been disclosed. The two interviews differed only in that M.K.M. informed police in the non-disclosed interview that the boyfriend of the victim (Ms. Londo), who was posited by Mr. Zornes to have started the fire, was Mexican. *Zornes III*, 903 N.W.2d at 419-20. The finding regarding the differences in the transcripts is a factual one presumed to be correct on federal habeas corpus review, *see* 28 U.S.C. § 2254(e)(1), and Mr. Zornes has not shown by clear and convincing evidence that the characterization of the factual record by the Minnesota Supreme Court was incorrect. What then remains of Mr. Zornes's claim regarding the police interview with M.K.M. is whether her description of Ms. Londo's boyfriend as "Mexican" was material such that prejudice would have ensued from the failure to disclose it. Mr. Zornes has not explained how or why that information was relevant to his defense, and the Court cannot discern an exculpatory use of that piece of information. Accordingly, the Minnesota Supreme Court's rejection of Mr. Zornes's *Brady* claim was reasonable.

Second, with respect to the transcript of the police interview with Mr. Zornes's sister, the Minnesota Supreme Court concluded that "the allegedly suppressed evidence was not material because it was readily available in other documents; accordingly, no reasonable probability exists that, had the evidence been disclosed to the defense, the result of the trial would have been different." *Zornes III*, 903 N.W.2d at 418. That the evidence in the transcript was duplicative of materials given to Mr. Zornes is a factual finding presumed to be correct on federal habeas review. *See* 28 U.S.C. § 2254(e)(1). Mr. Zornes has not rebutted, or even attempted to rebut, that finding. Without such a rebuttal, Mr. Zornes cannot show that the transcript at issue was material, and his *Brady* claim thus falls short.

Third, with respect to the police interview with M.P., the trial court determined that the narrative of that interview *had*, in fact, been turned over to Mr. Zornes's counsel before trial. *See Zornes III*, 903 N.W.2d at 418. The Minnesota Supreme Court found that the record before it supported that conclusion. *Id.* Again, Mr. Zornes has not rebutted the presumption that this factual finding is correct. *See* 28 U.S.C. § 2254(e)(1). And, of course, if Mr. Zornes or his attorney actually received the interview at issue, he cannot prosecute a *Brady* claim premised on his failure to receive that interview.

In conclusion, the aspects of Mr. Zornes's claims in Ground Eleven regarding insufficient investigation are procedurally barred and his *Brady* claims fail on the merits. It is recommended that Ground Eleven be denied for those reasons.

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F. Fully Exhausted Grounds

1. Ground One

Two persons were removed from the courtroom during the voir dire stage of Mr. Zornes's trial. The Minnesota Supreme Court explained the circumstances of the removals as follows:

> E.M. was Zornes's girlfriend and was potentially a significant witness at trial. In fact, E.M. played a key role in Zornes's planned alibi defense. E.M. attended voir dire on October 18 and then again on October 19. E.M. was on the joint witness list prepared by both sides. On October 19, counsel brought to the district court's attention the fact that a potential witness was in the courtroom. The court stated that witnesses were to be excluded during the trial process and that because the court "determined that voir dire selection is part of the trial process [the court] cannot allow any potential witnesses to be present." The court went on to note that excluding witnesses from voir dire "is an intricate and complex legal issue that, frankly, we haven't researched before, but, it's [the court's] judgment that the safest thing to do is to order all witnesses sequestered throughout the voir dire process and the trial." E.M. was then excluded from the courtroom for the remainder of the voir dire proceedings. . . .
>
> The circumstances leading to the removal of Cadotte's brother from the courtroom and his placement in an observation room are more complicated than the sequestration of E.M. The day after the district court sequestered E.M., Zornes's trial counsel alerted the court to the fact that Cadotte's brother was in the courtroom during voir dire. At the time, the brother was on the witness list. Zornes's trial counsel stated that it was his "understanding that the state may be willing to remove [the brother] from [the witness] list and in return we would not be objecting if [the brother] wants to watch from the observation room so we don't have the jurors in eye contact with him." The

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> State agreed to this proposal, removed the brother from the witness list, and allowed him to watch the trial proceedings from an observation room.

Zornes I, 831 N.W.2d at 618-19, 620 (citations and footnote omitted). In his petition for a writ of habeas corpus, Mr. Zornes argues that the enforced exclusion of the E.M. and Mr. Cadotte's brother, and the implicit exclusion of everyone on the prosecution's witness list, violated his Sixth Amendment right to a public trial.[13] *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

"The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet." *In re Oliver*, 333 U.S. 257, 268-69 (1948). Whatever the source of the suspicion of closed proceedings, at least two states extended the right of public trial to the accused at the time of the founding, and soon thereafter the right was

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[13] The bulk of respondent's briefing on the public-trial claim frames the issue as one of ineffective assistance of counsel. As explained above, Mr. Zornes does contend in Ground Three that his trial attorney provided ineffective assistance by failing to object to the exclusion of witnesses. But Mr. Zornes did not present such an ineffective-assistance claim to the Minnesota Supreme Court, and the claim raised Ground Three has thus been procedurally defaulted. By contrast, Mr. Zornes fairly presented his direct public-trial claim on direct appeal, *see Zornes I*, 831 N.W.2d at 618-21, and it is this direct claim that is renewed in Ground One of the habeas petition, *see* Petition at 4. Much of respondent's briefing on this issue is therefore unhelpful.

embedded within the federal constitution by way of the Sixth Amendment.[14] *Id.* at 267 & n.15. Yet for nearly two centuries the right as contained within the Sixth Amendment went largely unexplored by the Supreme Court of the United States.[15]

The Supreme Court filled this jurisprudential gap in *Waller v. Georgia*, 467 U.S. 39 (1984). In *Waller*, a trial court of the State of Georgia closed itself to the public during the course of a seven-day suppression hearing. *Id.* at 41-43. The *Waller* court concluded that the Sixth Amendment public-trial rights of the accused had been infringed by the closure. *Id.* at 48-49. In so concluding, the Supreme Court set out what is now the controlling test: "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48.

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[14] The general principle of openness in criminal proceedings extends still further back in American jurisprudence; William Penn's Code of Laws of 1682 included a guarantee "[t]hat all courts shall be open . . . ." *Commonwealth ex rel. Paylor v. Cavell*, 138 A.2d 246, 249 (Pa. 1958) (quotation omitted). Indeed, a kernel of the right can be traced back to the Norman Conquest. *See Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501, 505 (1984).

[15] In *Oliver*, the Supreme Court expressly founded such a right as applied to the states through the due process clause of the Fourteenth Amendment, largely without reference to the Sixth Amendment *In re Oliver*, 333 U.S. at 258, 275-76. The First Amendment likewise guarantees the right of public trial, but to those who would attend as bystanders rather than those who stand accused of criminal offenses. *See Press-Enterprise Co.*, 464 U.S. at 508-10.

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As relevant here, two questions remained open in the wake of *Waller*. First, to what proceedings does the Sixth Amendment right to a public trial extend? No doubt difficult cases remain to be decided on that question, *see State v. Smith*, 876 N.W.2d 310, 341-43 (J. Stras, concurring), but this is not one of them. In 2010, the Supreme Court held in *Presley v. Georgia* that the Sixth Amendment public-trial right extends to voir dire proceedings. 558 U.S. 209, 213 (2010) (per curiam). In addition, *Presley* applied the four-part test set forth in *Waller* to the voir dire closure there before the court. *Id.* at 214. Any suggestion to the contrary—that is, any suggestion that applying a different or lesser standard to voir dire closures than that set forth in *Waller*—would be a decision contrary to clearly established federal law as determined by the Supreme Court of the United States. *See* 28 U.S.C. § 2254(d)(1).

The second question remaining open following *Waller* is trickier for present purposes. Both *Waller* and *Presley* involved instances of *total* closure—i.e., instances in which all members of the public had been excluded from the courtroom.[16] What, though, of instances of *partial* closure—i.e., instances in which some, but not all, members of the public are excluded from the courtroom? The Supreme Court has remained mute on the question, but the several circuit courts to take up the issue on direct appellate review, including the Eighth Circuit, "have required only a 'substantial

[16] *Presley* concerned the exclusion of a "lone courtroom observer"—the defendant's uncle—from the courtroom during voir dire. *See Presley*, 558 U.S. at 210. The trial court's conclusion in that matter, however, demonstrated that *any* observer would have been excluded had they tried to attend. *Id.* at 210.

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reason' for the partial closure, instead of the stringent 'overriding interest' required by *Waller*." *Garcia v. Bertsch*, 470 F.3d 748, 752-53 (8th Cir. 2006) (citing *United States v. Osborne*, 68 F.3d 94, 98-99 (5th Cir. 1995) and *United States v. Farmer*, 32 F.3d 369, 371 (8th Cir. 1994)); *accord United States v. Simmons*, 797 F.3d 409, 414 (6th Cir. 2015) ("All federal courts of appeals that have distinguished between partial closures and total closures modify the *Waller* test so that the 'overriding interest' requirement is replaced by requiring a showing of a 'substantial reason' for a partial closure, but the other three factors remain the same."). In all respects other than the lesser requirement of a "substantial reason," though, the *Waller* test has been applied unaltered by federal appellate courts to instances of partial closure.

The Minnesota Supreme Court, by contrast, applied neither the *Waller* test nor the modified *Waller* test. Rather, the Minnesota Supreme Court took a third approach towards the exclusion of E.M. and a fourth approach towards the exclusion of Mr. Cadotte's brother. With respect to E.M., the Minnesota Supreme Court concluded, reasoning from *Geders v. United States*, 425 U.S. 80, 87 (1976) and *Perry v. Leeke*, 488 U.S. 272 (1989), that the trial court has near-total discretion to sequester potential witnesses during trial. *See Zornes I*, 831 N.W.2d at 618-20 (citing, inter alia, *State v. Posten*, 302 N.W.2d 638, 640 (Minn. 1981) (stating that, "while discretionary, in practice sequestration [of witnesses] is rarely denied in criminal cases and rarely should be denied.")).

That same reasoning, however, could not be applied to the exclusion of Mr. Cadotte's brother, who had been removed from the prosecution's witness list by the time he had been excluded from the courtroom. Instead the Minnesota Supreme Court concluded, relying on its previous decision in *State v. Lindsey*, 632 N.W.2d 652, 660-61 (Minn. 2001), "that not all courtroom restrictions implicate a defendant's Sixth Amendment right to a public trial" and that the removal of Mr. Cadotte's brother "was too trivial to implicate Zorne's [sic] Sixth Amendment right to a public trial." *Zornes I*, 831 N.W.2d at 620.

The undersigned is not the first to have "great difficulty squaring the Minnesota Supreme Court's rule—and the triviality exception on which it relies—with the clearly established federal law of the Supreme Court of the United States." *Smith v. Smith*, No. 17-CV-0763 (JRT/TNL), 2018 WL 3696601, at *7 (D. Minn. Aug. 3, 2018). Nothing in *Waller* or *Presley* implies such a triviality exception. Quite the opposite, in fact: *Waller* stresses the attachment of Sixth Amendment rights to "*any* closure." *Waller*, 467 U.S. at 47 (emphasis added); *see also Smith*, 2018 WL 3696601, at *8.

Moreover, the Minnesota Supreme Court's triviality analysis in this matter is vulnerable to attack on its own terms. Only Mr. Cadotte was actually removed from the courtroom after entering, but by all indications, every person listed on the prosecution's witness list—one hundred and eighty-four total—would have been removed had the need arisen. Regardless of the freedom invested in trial courts to

sequester witnesses, *see Leeke*, 488 U.S. at 600-01, by the time of voir dire, the government had become aware that the testimony of quite a few of the listed individuals would no longer be relevant to the prosecution, *see* ECF No. 59-1. Yet those persons, too, would not have been permitted to enter the courtroom due to their continuing presence on the witness list. Like straws atop a camel, the exclusion of non-witnesses no doubt must add up at some point, turning what might have been a "trivial" closure (if such a thing exists) into a non-trivial closure. Yet the Minnesota Supreme Court did not confront this issue.

The trouble for Mr. Zornes, however, is that what is being challenged in this habeas corpus proceeding is not the *reasoning* of the Minnesota Supreme Court or its triviality analysis, but the *decision* of the Minnesota Supreme Court and its conclusion that Mr. Zornes's Sixth Amendment right to a public trial was not violated. *See* 28 U.S.C. § 2254(d)(1); *Dansby v. Hobbs*, 766 F.3d 809, 830 (8th Cir. 2014) (*citing Williams v. Roper*, 695 F.3d 825, 833-37 (8th Cir. 2012)); *accord Gill v. Mecusker*, 633 F.3d 1272, 1292 (11th Cir. 2011). Moreover, Mr. Zornes must show not only that the Minnesota Supreme Court was wrong, but that the decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Most critically, the error must be one resulting in a decision that is contrary to or that unreasonably applies federal law *as determined by the Supreme Court of the United States itself*. *See* 28 U.S.C. § 2254(d)(1). This standard is "difficult to meet" under any

circumstances. *Harrington*, 562 U.S. at 102. Given the paucity of Supreme Court case law on the issue of partial closures, the standard might accurately be described as impossible to meet on the specific partial-close claim raised by Mr. Zornes.

First, assuming (as this Court does) that, pursuant to *Waller* and *Presley*—and contrary to the reasoning of the Minnesota Supreme Court—Mr. Zornes's Sixth Amendment rights were implicated by the partial closure, neither *Waller* nor *Presley* expressly sets forth any standard for when the public-trial right is actually violated by a partial closure. To be sure, the test in *Waller* can be read as applying to *any* closure, partial or complete. In fact, the four-part test set forth in *Waller* appears to contemplate that less-than-complete closures fall within its ambit. *See Waller*, 467 U.S. at 48 ("[T]he closure must be no broader than necessary to protect that [overriding] interest . . . ."); *cf. Oliver*, 333 U.S. at 271-72 ("[W]ithout exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged."). Although this Court finds that the reading of *Waller* as applying to partial closures is the better one, the federal courts of appeals that have considered the issue have unanimously rejected such a reading. *See, e.g.*, *Drummond v. Houk*, 797 F.3d 400, 402-04 (6th Cir. 2005);[17] *Garcia*, 470 F.3d at 754. Perhaps those courts have all been

[17] The Sixth Circuit originally concluded in *Drummond*, on habeas review, that the Sixth Amendment rights of the defendant had been violated by a partial closure. *See Drummond v. Houk*, 728 F.3d 520, 526-30 (6th Cir. 2013). The Supreme Court tersely vacated the judgment and remanded in light of *White v. Woodall*, 572 U.S. 415 (2014),

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wrong, but their unanimity cannot be chalked up to each of court having unreasonably applied federal law in a way that is beyond the scope of fair-minded disagreement among jurists.

Second, what those appellate courts have adopted for consideration of partial closures is the modified test that substitutes the "overriding interest" requirement of *Waller* with the lesser showing of a "substantial reason," while leaving the other prongs of the *Waller* test intact. *See, e.g.*, *Simmons*, 797 F.3d at 413-14. The decision of the Minnesota Supreme Court is vulnerable to attack under this modified *Waller* test as well: the trial court offered *no* findings on the record to support the exclusion of non-witnesses such as Mr. Cadotte's brother, much less reasons adequate to support the substantial interest in the closure.[18] But the modified *Waller* test applied by the federal courts of appeals is not "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). This Court is constrained by the standard of review set forth in § 2254(d)(1). Until the Supreme Court weighs in on the question of what standard applies under the Sixth Amendment

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in which the inferior courts were again reminded at length of the standard established by § 2254(d)(1). *See Robinson v. Drummond*, No. 13-496, 134 S. Ct. 1934 (Apr. 28, 2014).

[18] Respondent contends that Mr. Cadotte's brother was removed because "[h]e was visibly expressive and openly emotional throughout the court process; it was apparent to everyone present in the courtroom." ECF No. 59 at 10. No citation to the record is provided for this observation, and the relevant portion of the voir dire transcript reflects no such concern.

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to partial closures of criminal proceedings, habeas petitioners proceeding under § 2254 cannot establish that a partial closure amounts to a clear violation of their constitutional rights under clearly established federal law within the meaning of § 2254(d)(1).

Mr. Zornes's partial-closure claim therefore falls within a frustrating jurisprudential gap. In rejecting Mr. Zornes's public-trial claim, the Minnesota Supreme Court applied a triviality analysis untethered to the decisions of the Supreme Court of the United States on the issue. But those Supreme Court decisions do not expressly apply to partial closures of the kind at issue in this matter. The federal appellate courts have filled this gap by applying their own modified *Waller* test to partial closures, and the decision of the Minnesota Supreme Court does not satisfy this test, either. But the modified *Waller* test is not " clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added). Thus, as far as habeas corpus review goes, *no* finding of the state courts regarding a partial closure, no matter how apparently erroneous as a matter of federal law, can be found to satisfy § 2254(d)(1).

Nevertheless, because the decision cannot be said to contradict or amount to an unreasonable application of clearly established federal law as determined by the Supreme Court, Mr. Zornes is not entitled to habeas corpus relief. Ground One must be denied.

2. Ground Two

At trial, defense counsel sought to have the pocketknife, utility knife, scissors, screwdriver, and hammer found on or near Mr. Zornes at the time of his arrest excluded as lacking relevance—nothing directly tied the items to the crime scene—and therefore inadmissible under the Minnesota Rules of Evidence. The trial court rejected the argument and admitted the items,[19] finding that the tools were arguably consistent with the types of things that had been used to kill Ms. Londo and Mr. Cadotte. *See Zornes I*, 831 N.W.2d at 625-26. The Minnesota Supreme Court found on direct appeal that the admission of the items as evidence did not amount to an abuse of discretion by the trial court. *Id.*

In his first petition for post-conviction review in state court, Mr. Zornes renewed his argument regarding the admissibility of the pocketknife, this time in the form of an argument regarding ineffective assistance of counsel. Autopsy reports from the time of the trial revealed that some of the wounds found on the victims likely could not have been caused by the pocketknife entered into evidence. Defense counsel, however, did not press this wound-incompatibility argument in seeking to have the pocketknife excluded. Mr. Zornes argued that his failure to press this argument amounted to ineffective assistance.

[19] Only the folding knife and hammer were mentioned by the prosecution at trial. *See Zornes I*, 831 N.W.2d at 626.

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The trial court rejected the ineffective-assistance claim as barred by *Knaffla*, but the Minnesota Supreme Court proceeded to the merits of the claim. "It is true that counsel did not make the argument that the knife was incapable of inflicting the specific wounds Zornes points to in the autopsy reports," explained the Minnesota Supreme Court. "However, counsel could reasonably have concluded that this argument should not be pursued because, according to the same autopsy reports, the victims *did* have wounds (such as those on their ears) that could have been produced by the knife in question." *Zornes II*, 880 N.W.2d at 370. The pocketknife therefore remained relevant as a matter of Minnesota law, *see id.* at 370 n.4 (citing *State v. Daniels*, 361 N.W.2d 819, 827 (Minn. 1985)), and trial counsel did not provide ineffective assistance in pursuing what likely would have been a losing argument under the Minnesota Rules of Evidence. Moreover, notwithstanding the admission of the items as evidence, Mr. Zornes's trial counsel emphasized to the jury the tenuous connection between the recovered items and the crime scene throughout the trial. "On these facts," the Minnesota Supreme Court concluded, "Zornes cannot overcome the strong presumption that his trial counsel's performance was reasonable." *Zornes II*, 880 N.W.2d at 370. In Ground Two of his habeas petition, Mr. Zornes argues that the Minnesota Supreme Court's decision on his ineffective-assistance claim involved an unreasonable application of clearly established federal law.

It is worth noting at the outset what Mr. Zornes's claim is *not*. Mr. Zornes is not claiming, and indeed he cannot claim in this federal habeas corpus proceeding,

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that the decision of the trial court to admit the items found at the time of his arrest was erroneous or an abuse of discretion as a matter of Minnesota law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *Sweet v. Delo*, 125 F.3d 1144, 1154 (8th Cir. 1997). Nor is Mr. Zornes claiming that the admission of the items into evidence itself amounted to a violation of his federal constitutional (e.g., due process) rights. *See Wallace v. Lockhart*, 701 F.2d 719, 724 (8th Cir. 2013) ("[Q]uestions concerning the admissibility of evidence are matters of state law and are not reviewable in a federal habeas corpus proceeding unless the asserted error infringed a specific constitutional protection or was so prejudicial as to deny due process."). Moreover, even if he were raising such a due-process claim in his habeas petition, Mr. Zornes did not raise that claim before the Minnesota Supreme Court, rendering any such federal due-process claim now procedurally defaulted.

What is raised by Mr. Zornes in Ground Two of his federal habeas corpus petition is an ineffective-assistance claim, which does implicate a federal constitutional right. Moreover, unlike a due-process claim derived from the admission of the items into evidence, Mr. Zornes fairly presented the ineffective-assistance claim to the Minnesota Supreme Court on appeal from the denial of his first petition for post-conviction relief. *See Zornes II*, 880 N.W.2d at 369-70.

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But at bottom, Mr. Zornes's ineffective-assistance claim depends upon the viability of his underlying state-law claim about the inadmissibility of the evidence. If his trial counsel would not have succeeded in getting the items excluded from evidence had he made the wound-incompatibility argument later raised, then the attorney's performance could not have fallen below an objective standard of reasonableness in failing to make that argument. *See Strickland*, 466 U.S. at 687-88. In affirming the denial of Mr. Zornes's ineffective-assistance claim, the Minnesota Supreme Court intimated that the items would have been admissible even if shown to be incapable of producing some of the wounds found on the victims, because "the victims *did* have wounds (such as those on their ears) that could have been produced by the knife in question." *Zornes II*, 880 N.W.2d at 370 (citing *Daniels*, 361 N.W.2d at 827 (approving admission into evidence of gun that, "[w]hile definitely not the gun which fired the fatal shot . . . could well have been one of the guns used in the crime . . . .")).

The state courts' conclusions regarding the admissibility of the items as a matter of state law are controlling and ultimately determinative of the ineffective-assistance claim. Because Mr. Zornes's attorney could not have succeeded in getting the evidence excluded, he could not have rendered ineffective assistance by failing to make a particular argument as to why that evidence should have been excluded. Ground Two must therefore be rejected.

3. Ground Thirteen

Ground Thirteen of the habeas petition, the final claim raised by Mr. Zornes, is in large part a continuation of the claim raised in Ground Two. Following his conviction, Mr. Zornes commissioned a forensic report from Dr. Marcella Fierro. Dr. Fierro concluded, consistent with the autopsy reports created prior to trial, that the items recovered from Mr. Zornes at the time of his arrest could not have caused some of the wounds found on the victims. *See* ECF No. 32-8 at 1-5. In his second petition for post-conviction review in state court, Mr. Zornes sought a new trial on the basis of newly discovered evidence, namely Dr. Fierro's report. The Minnesota Supreme Court, reviewing the claim as a matter of state law, concluded that Dr. Fierro's report did not entitle Mr. Zornes to a new trial "because it was already established at trial that it was not possible to conclusively prove 'that the victims' wounds were caused by the specific tools found at the campsite.'" *Zornes III*, 903 N.W.2d at 420 (quoting *Zornes II*, 880 N.W.2d at 370).

Mr. Zornes is correct that the Minnesota Supreme Court's summarization of his claim, and Dr. Fierro's report, leaves something to be desired. The crux of Mr. Zornes's argument is not, as the Minnesota Supreme Court put it, that the prosecution failed to conclusively show that the items seized from him upon arrest caused the death of the victims, though this is true. *See Zornes III*, 903 N.W.2d at 420. Rather, Mr. Zornes's argument is that the forensic analysis affirmatively established

that those items *could not* have caused some of the wounds found on Ms. Londo and Mr. Cadotte.

That said, Mr. Zornes's claim nevertheless falls short. To begin, it is not entirely clear what claim Mr. Zornes is raising, or could raise, in this federal habeas corpus proceeding based on Dr. Fierro's forensic report. In his petition for post-conviction review, Mr. Zornes presented his claim as one of entitlement to a new trial under state law based on the newly discovered evidence. *See Zornes III*, 903 N.W.2d at 419 (citing *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997)). But "it is not the province of a federal habeas court to reexamine state-court determinations of state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle*, 502 U.S. at 67-68.

Mr. Zornes appears to conceive of the claim raised in Ground Thirteen as one of actual innocence based on the putatively newly discovered evidence of Dr. Fierro's report. But there is a critical problem with such a claim: Dr. Fierro's report simply does not establish Mr. Zornes's actual innocence of the offenses for which he was convicted. Read at its broadest, the report establishes that the items recovered from Mr. Zornes at the time of his arrest could not have caused some of the wounds found on the victims. But those items were hardly the cornerstone in the State's case against Mr. Zornes. As summarized by the Minnesota Supreme Court on direct appeal,

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> Zornes was seen entering the apartment with Londo and Cadotte and no other individuals were seen with the victims or in the apartment around the time of the murders. There was extensive telephone and text message contact between E.M.'s cellphone and Cadotte's cellphone on the night of the murders, despite the fact that the two did not know each other. There is testimony that Zornes was using Cadotte's cellphone, thus placing him with the victims. A neighbor who lived in the apartment building heard "two males and a female" in the apartment beneath him. The apartment door was locked and Londo, who was last seen alive with Zornes, had the only key. Zornes made repeated, inconsistent statements to acquaintances that placed him in the vicinity of the apartment at the time of the murders and arson. Zornes stole Cadotte's car and set fire to it in a remote area. An investigation of the apartment revealed a location where it appeared a smoke detector had been removed and a smoke detector was subsequently found in Cadotte's car. It is highly likely that Zornes removed the smoke detector from the apartment and placed it in Cadotte's car. . . . The recovery of C.C.'s possessions from S.W.'s home, possessions that C.C. had stored in her apartment, also demonstrates Zornes was likely to have been at the scene of the murders and arson.

Zornes I, 831 N.W.2d at 623. Even after excluding entirely any inference regarding the items seized at the time of Mr. Zornes's arrest, a great deal of evidence connected Mr. Zornes to the crime scene. Exclusion of the seized items, or even an affirmative finding that the seized items did not cause the deaths of Ms. Londo or Mr. Cadotte—a finding that goes beyond the conclusion of Dr. Fierro's report—would still not be sufficient to establish Mr. Zornes's innocence of the offenses for which he was convicted.

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Beyond actual innocence, at least two additional constitutional claims are arguably implied by Ground Thirteen. Although Mr. Zornes has not fairly presented those federal claims to the Minnesota Supreme Court, this Court will consider the merits of those claims in the interest of justice. *See* 28 U.S.C. § 2254(b)(2).

First, the claim raised in Ground Thirteen can be interpreted as sufficiency-of-the-evidence claim. The difference is subtle but important. "Unlike a review of the sufficiency of the evidence which focuses on whether a rational juror *could* have convicted, a habeas court considering actual innocence . . . determin[es] whether rational jurors *would* have convicted." *See Hayes v. Battaglia*, 403 F.3d 935, 940 (7th Cir. 2005) (Flaum, J., concurring). Moreover, it is well-established that insufficient evidence is a basis upon which to seek federal habeas corpus relief. *See Jackson v. Virginia*, 443 U.S. 307, 324 (1979) ("[I]n a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 . . . the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt."). But any sufficiency-of-the-evidence claim presented by Mr. Zornes would ultimately fail for the same reason that his actual-innocence claim fails: a rational factfinder, hearing the evidence presented at trial, as summarized by the Minnesota Supreme Court above, could reasonably have concluded that Mr. Zornes was guilty of the offenses for which he was convicted. And this remains true even if the items seized upon arrest are ignored entirely.

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Second, Ground Thirteen could be interpreted as encompassing an ineffective-assistance claim: had Mr. Zornes's trial counsel pursued the forensic evidence proffered by Dr. Fierro, then the items seized at the time of arrest would have been excluded from trial. This claim, however, would be largely duplicative of the claim raised in Ground Two of the habeas petition. The forensic report of Dr. Fierro did not differ substantially from the forensic analysis available to, but not used by, Mr. Zornes's attorney at trial—the items seized could not have caused some of the wounds found on the victims but could have caused others. As explained with respect to Ground Two, the incompatibility of the items with some but not all of the victims' wounds would not necessarily have required the exclusion of those items from evidence under Minnesota law. Any ineffective-assistance claim predicated on the failure to procure a report like that prepared by Dr. Fierro therefore would ultimately fail for the same reason that the ineffective-assistance claim raised in Ground Two failed.

For all these reasons, Ground Thirteen must also be denied.

G. Conclusion

Many of the claims raised by Mr. Zornes in his federal habeas corpus petition have not been, and cannot now be, fairly presented to the Minnesota Supreme Court. Those claims have become procedurally defaulted and must be dismissed on that basis. The remaining claims fail on the merits. Accordingly, it is recommended that Mr. Zornes's habeas petition be denied.

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Only one matter merits further comment: A § 2254 habeas corpus petitioner cannot appeal an adverse ruling on his petition unless he is granted a certificate of appealability ("COA"). *See* 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1). A COA cannot be granted unless the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This Court is satisfied that the relevant standard of review precludes relief on Ground One of the habeas corpus petition, but Mr. Zornes has nevertheless made a substantial showing that his public-trial right has been violated. Accordingly, this Court recommends that a COA be issued on the following question (the same question upon which counsel was appointed to represent Mr. Zornes before this Court): The Minnesota Supreme Court concluded that Mr. Zornes's right to a public trial had not been violated during his criminal proceedings. Was this conclusion contrary to or did it involve an unreasonable application of clearly established federal law, as claimed in Ground One of Mr. Zornes's habeas petition? This Court recommends denial of a COA on all other claims.

RECOMMENDATION

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY RECOMMENDED THAT:

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1. The petition for a writ of habeas corpus of petitioner Tracy Alan Zornes [ECF No. 1] be DENIED.

2. That a certificate of appealability be issued on the following question: The Minnesota Supreme Court concluded that Mr. Zornes's right to a public trial had not been violated during his criminal proceedings. Was this conclusion contrary to or did it involve an unreasonable application of clearly established federal law, as claimed in Ground One of Mr. Zornes's habeas petition?

3. That a certificate of appealability be denied on all other claims.

Date: September 16, 2019

s/Katherine Menendez
Katherine Menendez
United States Magistrate Judge

NOTICE

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals.

Under Local Rule 72.2(b)(1), "a party may file and serve specific written objections to a magistrate judge's proposed finding and recommendations within 14 days after being served a copy" of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. *See* Local Rule 72.2(b)(2). All objections and responses must comply with the word or line limits set forth in Local Rule 72.2(c).

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Appendix C

Memorandum Opinion and Order
Tracy Zornes v. Michelle Smith 16-cv-1730 – KMM
(dated July 27, 2020)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Tracy Alan Zornes,

Petitioner,

v.

Michelle Smith,

Respondent.

File No. 16-cv-1730 (ECT/KMM)

OPINION AND ORDER

Tracy Alan Zornes, *pro se*.

Robert H. Meyers, Office of the Federal Defender, Minneapolis, MN, for Petitioner Tracy Alan Zornes.[1]

Cecilia A. Knapp, Clay County Attorney's Office, Moorhead, MN, for Respondent Michelle Smith.

Petitioner Tracy Alan Zornes commenced this action by filing a petition for a writ of habeas corpus. ECF No. 1. The case is before the Court on a Report and Recommendation ("R&R") [ECF No. 62] issued by Magistrate Judge Katherine Menendez. Magistrate Judge Menendez recommends denying the petition with respect to each of the thirteen grounds raised by Zornes. R&R at 59. Magistrate Judge Menendez also recommends that a certificate of appealability be issued on the question of whether the Minnesota Supreme Court's conclusion that Zornes's right to a public trial was not violated

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[1] Pursuant to 18 U.S.C. § 3006A, the Court appointed counsel to represent Zornes solely on the claim raised in ground one of his habeas petition. *See* ECF No. 45; R&R at 1 n.1 [ECF No. 62]. Zornes litigated all other claims raised in his habeas petition *pro se*.

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during his criminal proceedings was contrary to or involved an unreasonable application of clearly established federal law. *Id.* Both Zornes and Respondent Michelle Smith filed objections to the Report and Recommendation. ECF Nos. 65, 69, 73. Because the Parties have objected, the Report and Recommendation must be reviewed de novo pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.2(b)(3) to the extent of those objections. Based on that review, the Report and Recommendation will be accepted.

I[2]

Zornes raises several *pro se* objections to the Report and Recommendation. ECF No. 65. Two of those objections concern matters Zornes believes were not addressed in the Report and Recommendation—authority cited in his briefing regarding the issue of procedural default and a request he made previously to amend his habeas petition. The remaining objections concern Magistrate Judge Menendez's analysis and conclusions with respect to specific grounds for relief raised in Zornes's habeas petition.

A

Zornes raises a general objection that the Report and Recommendation does not address arguments against procedural default that he raised in his briefing. ECF No. 65 at 12. His first argument is that the procedural bar established in *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976), should not preclude habeas relief. A federal court generally may only consider "those claims which the petitioner has presented to the state court in accordance with state procedural rules." *Abdullah v. Groose*, 75 F.3d 408, 411 (8th Cir. 1996) (quoting

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2 The relevant facts and procedural history are set forth in great detail in the Report and Recommendation and will not be repeated here. *See* R&R at 2–9.

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Satter v. Leapley, 977 F.2d 1259, 1261 (8th Cir. 1992)). If a petitioner has not fairly presented his claims to the state court and state procedural rules prevent a petitioner from obtaining a hearing on the merits of his or her claims, "then the petitioner is also procedurally barred from obtaining habeas relief in a federal court unless he can demonstrate either cause and actual prejudice, or that a miscarriage of justice will occur if we do not review the merits of the petition." *McCall v. Benson*, 114 F.3d 754, 757 (8th Cir. 1997) (citations omitted). Minnesota law establishes clear procedural rules that prevented, and continue to prevent, the consideration of many of Zornes's claims on the merits in state court. *See Knaffla*, 243 N.W.2d at 741 ("[W]here direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief."); *Colbert v. State*, 870 N.W.2d 616, 626 (Minn. 2015) (stating known claims include those that "should have been known" and *Knaffla* also applies to a petitioner's second or subsequent postconviction petition to "bar[] consideration of claims that were raised, or could have been raised, in a previous postconviction petition"). Under Minnesota law, a claim is excepted from the *Knaffla* rule only if "the defendant presents a novel legal issue or if the interests of justice require the court to review the claim." *Wright v. State*, 765 N.W.2d 85, 90 (Minn. 2009). The Minnesota Supreme Court did not find such an exception to any of Zornes's claims that it determined were barred by *Knaffla*. Though Zornes may theoretically overcome procedural default of a particular habeas claim by showing cause for his default and actual prejudice, or that failure to consider the claim on its merits would result in a miscarriage

of justice, *see McCall*, 114 F.3d at 757, it would be improper to categorically disregard the *Knaffla* rule in evaluating whether Zornes is entitled to habeas relief.

Zornes also argues that Magistrate Judge Menendez did not address his argument that the limitation on procedural default established in *Trevino v. Thaler*, 569 U.S. 413 (2013), applies. ECF No. 65 at 12. Zornes previously cited *Trevino* in his memorandum in opposition to Smith's August 2016 motion to dismiss his habeas petition, essentially for the premise that he had failed to raise ineffective-assistance-of-counsel claims on direct appeal because the trial court record did not contain the evidence necessary to substantiate those claims. *See* ECF No. 24 at 2. Smith's motion was denied, and the case was stayed while Zornes litigated his second petition for post-conviction relief. ECF No. 28. Notwithstanding that Magistrate Judge Menendez understandably did not address this authority in the Report and Recommendation because Zornes does not appear to have relied on *Trevino* in his briefing in support of his habeas petition, *Trevino* is of limited relevance here. Prior to *Trevino*, the United States Supreme Court held in *Martinez v. Ryan* that a defendant may establish cause for procedural default under the following circumstances: "Where, under state law, claims of ineffective assistance of trial counsel *must* be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. 1, 17 (2012) (emphasis added). This was a "narrow exception," *see id.* at 9, to the general rule that "ineffective assistance of counsel during state post-conviction proceedings cannot serve as cause to excuse factual or procedural default,"

Wooten v. Norris, 578 F.3d 767, 778 (8th Cir. 2009) (citing *Coleman v. Thompson*, 501 U.S. 722, 752–55 (1991)). In *Trevino*, the Court extended its holding in *Martinez* to cases in which a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal[.]" *Trevino*, 569 U.S. at 429. In contrast, "Minnesota state law does not require that an ineffective-assistance-of-trial-counsel claim be raised only in a collateral—meaning post-conviction—proceeding[.]" *Delk v. Smith*, No. 13-cv-89 (JRT/SER), 2014 WL 538586, at *14 (D. Minn. Feb. 11, 2014); *see also McClendon v. Minnesota*, No. 13-cv-2368 (PJS/HB), 2014 WL 4722490, at *7 (D. Minn. Sept. 22, 2014). Rather, under Minnesota law, "[i]f a claim of ineffective assistance of trial counsel can be determined on the basis of the trial record, the claim must be brought on direct appeal or it is *Knaffla*-barred." *Nissalke v. State*, 861 N.W.2d 88, 93 (Minn. 2015). But if "such a claim requires examination of evidence outside the trial record or additional fact-finding by the postconviction court, such a claim is not *Knaffla*-barred[.]" *Id.* In short, Minnesota's procedural framework provides a meaningful opportunity, and in some circumstances even compels a defendant, to raise ineffective-assistance-of-trial-counsel claims on direct appeal. Accordingly, Zornes's case does not fall within the intended scope of application of the rules established in *Martinez* and *Trevino*.

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B

Zornes also objects to the absence of a ruling on his January 2018 request to amend his habeas petition.[3] ECF No. 65 at 2; *see* Pet. Supp. Mem. at 4 [ECF No. 35]. In a supplemental memorandum in support of his habeas petition, Zornes requested permission to amend his petition "so as to consolidate the issues and better explain them." Pet. Supp. Mem. at 4. Zornes elaborated that he intended that "[t]he entirety of the issues in ZORNES II (Grounds 2-10) contain an Appellate Counsel claim as well as a Trial counsel claim[.]" *Id.* In a separate objection to the Report and Recommendation, Zornes states that "it was error not to . . . allow [him] to amend his petition and add claims of Ineffective Assistance of Appellate Counsel." ECF No. 65 at 11. Though Magistrate Judge Menendez did not issue a formal order in response to his request, the Report and Recommendation states that Zornes "requested partway through this habeas corpus proceeding that his petition be interpreted as raising ancillary claims of ineffective assistance of trial counsel . . . and ineffective assistance of appellate counsel," R&R at 13–14, and considers the viability of those claims throughout, *see generally id.* Because Magistrate Judge Menendez considered the claims that Zornes asserts he would have raised in an amended petition and Zornes does not describe any other substantive amendments he would make that might lead the Court to reach a different conclusion as to one or more of his claims, formally granting Zornes's request at this juncture would be futile. *See IBEW Local 98 Pension Fund v. Best Buy Co.*,

[3] Zornes states that his request was made in February 2017, but there were no filings in this case made during that time and the record reflects that he requested to amend his petition in January 2018.

326 F.R.D. 513, 521 (D. Minn. 2018) ("A district court may refuse to grant leave to amend pleadings for 'undue delay, bad faith on the part of the moving party, futility of the amendment or unfair prejudice to the opposing party.'" (quoting *Sanders v. Clemco Indus.*, 823 F.2d 214, 216 (8th Cir. 1987))).

C

Zornes raises a more specific objection to Magistrate Judge Menendez's analysis and disposition of grounds three and six of his habeas petition as being procedurally defaulted. ECF No. 65 at 10–11 In those claims, Zornes alleges that the prosecution committed misconduct by submitting an expansive witness list containing the names of individuals it never intended to call as witnesses resulting in their exclusion from the courtroom and that his trial counsel provided constitutionally ineffective assistance by not objecting to the witness list. ECF No. 1 at 8–10, 17. Zornes raised those claims in his first petition for post-conviction relief in state court, and the Minnesota Supreme Court ultimately concluded that the claims were procedurally barred because review of the claims did not require the consideration of factual issues outside the trial record and Zornes knew or should have known of the issues at the time of his direct appeal. *Zornes v. State*, 880 N.W.2d 363, 368–69 (Minn. 2016) (*Zornes II*) (citing *Knaffla*, 243 N.W.2d at 741). Accordingly, those issues were not and cannot be fairly presented to the state court in a manner that entitles him to a ruling on the merits.

Zornes argues nonetheless that Magistrate Judge Menendez should have considered his claims on the merits because the *Knaffla* rule is "'inadequate' based upon the circumstances to warrant withdrawal of a federal remedy." ECF No. 65 at 10. Zornes

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offers some explanation for his failure to raise the claims on direct appeal. He asserts that the claims required additional evidence that could only be submitted in post-conviction proceedings and that he was told by his appellate counsel that he could not raise the "'witness' issue" on direct appeal and relied on that advice. *Id.* at 11. Zornes concedes that he did not subsequently raise the issue of ineffective assistance of appellate counsel in his state-court post-conviction proceedings but asserts that he "could not 'reasonably have known'" to do so. *Id.*

Zornes's assertions are insufficient to show cause that would allow him to overcome procedural default. *See Cagle v. Norris*, 474 F.3d 1090, 1099 (8th Cir. 2007) ("If a prisoner fails to demonstrate cause, the court need not address prejudice."). "Cause typically turns on whether some objective circumstance external to the defense impeded counsel from raising the claim." *Kennell v. Dormire*, 873 F.3d 637, 640 (8th Cir. 2017). Zornes does not give any indication as to what additional evidence would have been necessary for the consideration of his claims, nor does he provide any other reason to question the Minnesota Supreme Court's conclusion with respect to the adequacy of the trial record. To the extent that he seeks to show cause by claiming ineffective assistance of appellate counsel, such a claim is itself procedurally defaulted and he has not demonstrated cause with respect to that claim. *See Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). Zornes's statement that he could not have reasonably known to raise an ineffective-assistance-of-appellate-counsel claim in post-conviction proceedings based on his appellate counsel's alleged failure to raise the witness list issues on direct appeal is particularly dubious given that he raised

several other ineffective-assistance-of-appellate-counsel claims in his first post-conviction petition. *See Zornes II*, 880 N.W.2d at 370–73.

D

Zornes also objects to Magistrate Judge Menendez's analysis of ground two of his habeas petition as "a state law claim" concerning the admissibility of evidence rather than "the Ineffective Assistance Claim he attempted to present." ECF No. 65 at 1, 2–7. In ground two, Zornes challenges the Minnesota Supreme Court's determination in his first post-conviction case that his trial counsel did not render constitutionally ineffective assistance by not arguing that a knife recovered at the time of Zornes's arrest could not have inflicted specific wounds and not presenting expert testimony regarding wound incompatibility. ECF No. 1 at 7–8. As Magistrate Judge Menendez indicated, whether his trial counsel's assistance was constitutionally ineffective depends on the objective reasonableness of his trial counsel's actions, and the reasonableness of his trial counsel's actions is necessarily judged by whether the argument and expert testimony desired by Zornes was likely to result in the exclusion of the knife from evidence or otherwise refute the state's evidence. *See* R&R at 52; *see also Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (quotation omitted)). To the extent that Zornes now argues that the Minnesota Supreme Court inaccurately limited its consideration of his ineffective-assistance claim to his trial counsel's lack of success in getting the knife excluded and did

not consider a broader argument that his trial counsel failed to properly rebut the state's evidence, *see* ECF No. 65 at 5, it is notable that the Minnesota Supreme Court expressly stated that Zornes's trial counsel "did not stop at seeking exclusion of the evidence," *Zornes II*, 880 N.W.2d at 370. Indeed, on cross-examination of the medical examiner, Zornes's trial counsel "established that the examiner could not say that the victims' wounds were caused by the specific tools found at the campsite," and during closing argument, his trial counsel "emphasized . . . that none of the items found at the campsite, including the pocketknife, 'yielded anything that would connect those items to the crimes.'" *Id.* Additionally, the Minnesota Supreme Court's reasoning that Zornes's trial counsel could reasonably have concluded not to pursue a wound-incompatibility argument as a basis for exclusion in light of the full scope of the autopsy reports, also applies to any decision made by Zornes's trial counsel not to hire a wound-incompatibility expert to rebut the state's evidence. *See id.* Zornes has not shown, on the record before the Minnesota Supreme Court at the time of his first petition for post-conviction relief, that his trial counsel's actions, or lack thereof, were anything other than "the exercise of reasonable professional judgment." *See Strickland*, 466 U.S. at 690. Accordingly, Zornes is not entitled to habeas relief on the ineffective-assistance claim raised in ground two of his petition.[4]

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[4] Zornes alternatively argues that the Minnesota Supreme Court only made a determination as to the admissibility of the items recovered at the time of his arrest and that it never made a determination on the merits of the ineffective-assistance-of-trial-counsel claim raised in ground two of his habeas petition. This argument is plainly refuted by the text of the court's opinion in *Zornes II*, 880 N.W.2d at 369–70 ("We conclude that, even if th[e] issue [of whether his trial counsel was ineffective] is not *Knaffla*-barred, the postconviction court did not abuse its discretion in denying the claim without a hearing,

E

Zornes similarly argues that the Report and Recommendation "misconstrues" the claim in ground thirteen of his habeas petition as a state-law claim rather than an ineffective-assistance-of-counsel claim based on his trial counsel's failure to investigate. ECF No. 65 at 7–10. But Zornes's claim in ground thirteen, which is related to his claim in ground two, principally arises from a state-law claim for relief in his second post-conviction petition based on newly-discovered evidence. ECF No. 1 at 24; *see Zornes v. State*, 903 N.W.2d 411, 419–20 (Minn. 2017) (*Zornes III*). The Minnesota Supreme Court considered the claim on its merits and determined that Zornes was not entitled to a new trial under state law based on an expert forensic report he commissioned, as the report's conclusion that the items recovered from Zornes at the time of his arrest could not have caused some of the victims' wounds was consistent with the facts established at trial and not newly-discovered evidence. *Zornes III*, 903 N.W.2d at 419–20. This state-court determination on a state-law question will not be reexamined here. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). However, Zornes also raised an argument in his second post-conviction petition that "his lawyer's investigation was unreasonable because it failed to uncover the evidence underlying his claims of newly discovered evidence." *Zornes III*, 903 N.W.2d at 420. The Minnesota Supreme Court determined that this ineffective-assistance claim was *Knaffla*-barred because Zornes should have known of the claim at

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because the postconviction files and the trial court record conclusively show that Zornes is not entitled to relief on this basis.").

trial and did not raise it on direct appeal. *Id.* at 421. Zornes did not challenge this conclusion in his habeas petition, *see* ECF No. 1 at 24, but raised the issue in his supporting memorandum, ECF No. 19 at 43–44. Contrary to Zornes's objection, in the "interests of justice," Magistrate Judge Menendez considered an ineffective-assistance claim "implied by" ground thirteen of Zornes's habeas petition premised on his trial counsel's failure to pursue additional forensic evidence regarding wound incompatibility. *See* R&R at 56–57. Such a claim overlaps substantially with ground two of Zornes's habeas petition, and, as discussed above, Zornes is not entitled to habeas relief on this basis.

Zornes's briefing and objections indicate that he perhaps intended to raise a broader claim of ineffective assistance to encompass his trial counsel's failure to investigate other aspects of his case. For example, Zornes points to evidence of an alternative perpetrator as an example of "avenues of investigation that went unexplored." ECF No. 65 at 9–10; ECF No. 19 at 32–42. Zornes seeks to overcome procedural default of such a claim, and seemingly his other procedurally-defaulted constitutional claims as well, *see* ECF No. 65 at 12, through a showing of actual innocence, in order to bring himself "within the narrow class of cases . . . implicating a fundamental miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 314–15 (1995) (quotation omitted) (stating a procedural claim of innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits" (quotation omitted)); *see McCall*, 114 F.3d at 757. This so-called "gateway standard" for reviving procedurally-defaulted claims requires a habeas petitioner to show that "a constitutional violation has probably resulted in the conviction of one who is actually

innocent." *Schlup*, 513 U.S. at 327 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). A habeas petitioner must establish with "new reliable evidence," that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 536–37 (2006) (quoting *Schlup*, 513 U.S. at 327). New evidence is evidence that "was not available at trial through the exercise of due diligence." *Kidd v. Norman*, 651 F.3d 947, 953–54 (8th Cir. 2011) (recognizing a circuit split regarding the "meaning of 'new' evidence in cases where one or more of the procedurally defaulted claims are claims involving trial counsel's alleged ineffectiveness in failing to discover or present evidence of the petitioner's innocence"). In evaluating the adequacy of a petitioner's showing, a district court "is not bound by the rules of admissibility that would govern at trial." *Schlup*, 513 U.S. at 327. "[H]abeas corpus petitions that advance a substantial claim of actual innocence are extremely rare." *Id.* at 321; *see House*, 547 U.S. at 538 (stating the gateway standard is "demanding and permits review only in the extraordinary case" (quotation omitted)).

The "new evidence" offered by Zornes is not sufficient to meet this stringent standard. *See* ECF No. 65 at 9–10, 13–15. Critically, much, if not all, of the evidence Zornes offers was available at the time of trial through due diligence. Even if this were not the case, the evidence is not inherently exculpatory and does not call into question the significant circumstantial evidence supporting his conviction. *See State v. Zornes*, 831 N.W.2d 609, 623 (Minn. 2013) (*Zornes I*); R&R at 55. Moreover, some of his "new evidence" is not evidence at all, but rather his own interpretation of the evidence offered by the prosecution at trial that was considered by the jury in reaching their verdict. *See*

ECF No. 65 at 13–15. In all, Zornes has not shown that it is "more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *See House*, 547 U.S. at 536–37.[5]

II

Zornes, through counsel, also objects to Magistrate Judge Menendez's conclusion that he is not entitled to habeas relief on his claim in ground one of his petition that his Sixth Amendment right to a public trial was violated by the exclusion of particular individuals from the courtroom during voir dire. ECF No. 69; *see* R&R at 39–48. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that an application for a writ of habeas corpus "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings" unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). "A state court decision is 'contrary to' clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court reaches the opposite result in a case involving facts that are materially indistinguishable from relevant Supreme Court precedent." *Smith*

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5 Zornes alternatively requests a certificate of appealability as to the claims raised in grounds two and thirteen of his habeas petition. The issuance of a certificate of appealability requires a petitioner to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox v. Norris,* 133 F.3d 565, 569 (8th Cir. 1997). Zornes has not made such a showing as to those claims.

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v. Titus, 958 F.3d 687, 691 (8th Cir. 2020) (citing *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). "An 'unreasonable application' of clearly established federal law 'occurs when a state court correctly identifies the governing legal standard but either unreasonably applies it to the facts of the particular case or unreasonably extends or refuses to extend the legal standard to a new context.'" *Id.* (quoting *Munt v. Grandlienard*, 829 F.3d 610, 614 (8th Cir. 2016)); *see also Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) ("Relief is available under § 2254(d)(1) only if the state court's decision is objectively unreasonable."). The requirements of § 2254(d)(1) are "meant to be difficult, because AEDPA 'reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems.'" *Smith*, 958 F.3d at 691 (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (internal quotation omitted)).

The United States Constitution confers on criminal defendants the right to a public trial. U.S. Const. Amend. VI. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia,* 467 U.S. 39, 46 (1984) (quotation omitted). In *Waller*, the United States Supreme Court held that closure of a courtroom during a pretrial suppression hearing implicates a defendant's Sixth Amendment right to a public trial and that "any closure of a suppression hearing over the objections of the accused" must meet four requirements to be justified. *Id.* at 46–48. "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the

trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48 (citing *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 511–12 (1984), in which the Court concluded that the press and public have a qualified First Amendment right to attend voir dire proceedings). In *Presley v. Georgia*, the United States Supreme Court extended the Sixth Amendment right to a public trial to voir dire proceedings and applied the *Waller* test before concluding that the trial court had failed to consider reasonable alternatives to closure and remanding the case for further proceedings. 558 U.S. 209, 212–16 (2010).

In Zornes's case, the Minnesota Supreme Court concluded that exclusion of Zornes's girlfriend, who was on the witness list, was within the district court's discretion to sequester potential witnesses during trial and that removal of a victim's brother from the courtroom, who was no longer on the witness list, was "too trivial" to implicate Zornes's constitutional right to a public trial. *Zornes I*, 831 N.W.2d at 618–21. In his habeas petition, Zornes alleges that the actual exclusion of these two individuals, as well as the implicit exclusion of everyone on the prosecution's lengthy witness list, violated his Sixth Amendment right to a public trial. ECF No. 1 at 5. In her analysis, Magistrate Judge Menendez distinguished Zornes's case from *Waller* and *Presley* on the basis that Zornes's case involved partial closure of the courtroom to particular individuals rather than total closure to all members of the public. R&R at 42–43. Magistrate Judge Menendez reasoned that, because the United States Supreme Court has not directly addressed the applicability of the *Waller* test to partial closures, the Minnesota Supreme Court did not reach a conclusion that was contrary to, or that involved an unreasonable application of, clearly

established federal law. *Id.* at 42–48. Magistrate Judge Menendez noted that, although the triviality exception applied by the Minnesota Supreme Court does not seem to comport with clearly established federal law, *id.* at 44, the court's ultimate decision that Zornes's constitutional right to a public trial was not violated is not erroneous in light of the standard of review imposed by AEDPA, *id.* at 45–48.

Zornes argues that the Minnesota Supreme Court's decision was contrary to the United States Supreme Court's decisions in *Waller* and *Presley* for two reasons. First, Zornes asserts that clearly established federal law holds that the *Waller* test applies to "any closure." ECF No. 69 at 3–10; *see Waller*, 467 U.S. at 47 ("[W]e hold that under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press-Enterprise* and its predecessors."); *see also Presley*, 558 U.S. at 213 ("*Waller* provided standards for courts to apply before excluding the public from any stage of a criminal trial[.]"). Second, Zornes contends that the facts underlying his claim are indistinguishable from the circumstances in *Presley*, in which the Court recognized that the right to a public trial extends to voir dire proceedings. ECF No. 69 at 11–15.

The courtroom closures addressed by the Court in *Waller* and *Presley* were total closures of the courtroom, *i.e.*, "an exclusion of members of the public and the press." *See United States v. Thunder*, 438 F.3d 866, 868 (8th Cir. 2006). In *Waller*, the state court "ordered the suppression hearing closed to all persons other than witnesses, court personnel, the parties, and the lawyers." 467 U.S. at 42. In *Presley*, though only one observer, the defendant's uncle, actually was excluded from the courtroom, both the

Supreme Court of Georgia and the United States Supreme Court's analyses indicate they understood the courtroom to have been closed to all potential spectators. *See* 558 U.S. at 210–11; *Presley v. State*, 674 S.E.2d 909, 910–11 (Ga. 2009). Unlike *Waller* and *Presley*, Zornes's case did not involve a total closure of the courtroom to members of the public and press but primarily concerned the exclusion of anticipated witnesses. In Zornes's case, only two individuals were excluded from the courtroom, one of whom was a witness, and the state court's reasoning indicates that any further exclusions would seemingly have been limited to individuals on the prosecution's witness list. *See Zornes I*, 831 N.W.2d at 618–21. The witness list was, unquestionably, lengthy, but the exclusion of numerous witnesses is not "equal" to the exclusion of the public as Zornes suggests. *See* ECF No. 69 at 14; *Geders v. United States*, 425 U.S. 80, 87 (1976) ("The judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony.") Zornes's case is therefore factually distinguishable from relevant Supreme Court precedent.

When no case from the United States Supreme Court "confront[s] 'the specific question presented . . .' the state court's decision could not be 'contrary to' any [of its] holding[s]." *Woods v. Donald*, 575 U.S. 312, 317 (2015) (quoting *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam)). "Clearly established Federal law" means "the holdings, as opposed to the dicta, of [the United States Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. The United States Supreme Court "has never addressed the lawfulness of partial closures." *Irby v. Smith*, No. 15-cv-1997 (PJS/TNL), 2016 WL 3255019, at *2 (D. Minn. June 13, 2016) (citing *Garcia v.*

Bertsch, 470 F.3d 748, 754 (8th Cir. 2006) and collecting cases); *see also, e.g.*, *Alarcia v. Remington*, No. SA CV 10-447-PSG (SH), 2010 WL 3766337, at *8 (C.D. Cal. Sept. 10, 2010) ("Petitioner has failed to cite, and the Court has been unable to locate, a single United States Supreme Court case which addresses the Sixth Amendment right to a public trial in the context of a partial closure, such as where the trial court excluded certain witnesses from proceedings that were open to the general public."). Indeed, the Eighth Circuit, and several other circuit courts of appeals, have denied habeas claims involving partial closures, recognizing the Court's silence on this issue and distinguishing *Waller*. *See, e.g.*, *Enriquez v. Sec'y*, 662 F. App'x 650, 654–56 (11th Cir. 2016) (per curiam); *Drummond v. Houk*, 797 F.3d 400, 402–04 (6th Cir. 2015); *Angiano v. Scribner*, 366 F. App'x 726, 726–27 (9th Cir. 2010) (mem.); *Garcia*, 470 F.3d at 754. Though the expansive reading of *Waller* that Zornes encourages may well be a reasonable interpretation, absent caselaw from the United States Supreme Court directly confronting the issue of partial closure, it is impossible to conclude that the Minnesota Supreme Court's decision conflicts with any holding of the United States Supreme Court.

Zornes further argues that the Minnesota Supreme Court failed to identify the governing legal standard and apply it to his claims and asserts that it was objectively unreasonable for the Minnesota Supreme Court to apply precedent concerning witness sequestration and its own triviality test instead of the test established in *Waller*. ECF No. 69 at 16–26. To obtain relief, a habeas petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for

fairminded disagreement." *Harrington*, 562 U.S. at 103. "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the United States Supreme] Court." *Id.* at 101 (quoting *Knowles v. Mirzayance,* 556 U.S. 111, 122 (2009) (internal quotation marks omitted)). As noted in a prior decision from this District, there is "great difficulty" in "squaring" the Minnesota Supreme Court's triviality exception "with the clearly established federal law of the Supreme Court of the United States." *Smith v. Smith*, No. 17-cv-673 (JRT/TNL), 2018 WL 3696601, at *7 (D. Minn. Aug. 3, 2018), *aff'd sub nom.*, *Smith v. Titus*, 958 F.3d 687 (8th Cir. 2020). However, the limited precedent of the United States Supreme Court regarding a defendant's constitutional right to a public trial, and absence of a case squarely establishing a legal rule with respect to partial closures, let alone partial closures that involve the exclusion of witnesses, compels the conclusion that the Minnesota Supreme Court was not objectively unreasonable in not applying the *Waller* standard in Zornes's case. Moreover, recognizing that the Minnesota Supreme Court also did not apply the modified-*Waller* test adopted by many circuit courts of appeals to evaluate partial courtroom closures, *see Garcia*, 470 F.3d at 752–53, and that the United States Supreme Court also has not addressed the propriety of that test, the mere fact that courts have taken differing approaches in partial closure cases lends support to the conclusion that any alleged error in the state court's ruling here is subject to "fairminded disagreement." Because Zornes has not shown that the Minnesota Supreme Court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, he is not entitled to habeas relief on this claim.

III

Smith objects to Magistrate Judge Menendez's recommendation that a certificate of appealability be issued on the question of whether the Minnesota Supreme Court's conclusion that Zornes's right to a public trial was not violated during his criminal proceedings was contrary to or involved an unreasonable application of clearly established federal law. ECF No. 73; *see* R&R at 58. Smith argues that a certificate of appealability should not be issued because denial of Zornes's petition with respect to this issue is warranted and the issue is not debatable among reasonable jurists.

A petitioner seeking a writ of habeas corpus pursuant to 28 U.S.C.§ 2254 may not appeal an adverse ruling unless the district court issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox v. Norris,* 133 F.3d 565, 569 (8th Cir. 1997).

Smith contends that a certificate of appealability should not be issued, not only because there is no clearly established federal law requiring the application of *Waller* to partial closures, but, alternatively, because either there was no courtroom closure in Zornes's case or Zornes waived his claim by inviting closure. ECF No. 73 at 5–11. For these reasons, Smith argues that no "reasonable jurists would resolve this issue any differently than the Minnesota Supreme Court[.]" *Id.* at 12. Smith also asserts that the Report and Recommendation mistakenly relies on facts concerning the sequestration of

potential witnesses in concluding that Zornes made a substantial showing that his constitutional right to a public trial was violated and that only the removal of the single non-witness should be considered. *Id.* at 2–3 (citing R&R at 58).

Even limiting the scope of the closure issue to removal of the non-witness, Zornes has made an adequate showing to warrant a certificate of appealability. The triviality exception applied by the Minnesota Supreme Court, though perhaps supported by decisions from the circuit courts of appeals, *see id.* at 11–12, has no foundation in United States Supreme Court caselaw. Although the existence of those decisions may lend credence to the view that *Waller* does not apply to "any closure," it does not render Zornes's position on the issue unreasonable. Smith's assertions that there was no closure because the victim's brother was placed in an observation room and, alternatively, that "the law of the circuit" is clear that Zornes waived his claim by inviting closure, only raise additional unresolved questions as to the applicability of *Waller*. The Minnesota Supreme Court expressly declined to decide "whether the alleged error was invited by the defendant; to what extent, if any, removal of the brother amounted to a partial courtroom closure; or the significance of his placement in an observation room." *Zornes I*, 831 N.W.2d at 620–21. And "*Waller* and *Presley* do not address the standard for whether an actual closure occurred in the first instance, but rather, the court's justification for the closure." *Taylor v. Dayton*, No. 16-cv-3893 (DSD/LIB), 2019 WL 1643555, at *2 (D. Minn. Apr. 16, 2019). As in other cases from this District in which certificates of appealability have been issued, Zornes's claim implicates issues left open to debate by reasonable jurists in the absence of United States Supreme Court precedent. *See, e.g.*, *Taylor*, 2019 WL 1643555, at *3; *Smith*,

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2018 WL 3696601, at *12. Accordingly, although dismissal of Zornes's habeas petition is proper at this juncture, he has shown that these "issues deserve further proceedings." A certificate of appealability will therefore be granted as to the claim raised in ground one of Zornes's petition.

IV

Neither party has otherwise objected to Magistrate Judge Menendez's recommendations with respect to the issues raised in grounds four, five, seven, eight, nine, ten, eleven, and twelve of Zornes's petition for a writ of habeas corpus. Those recommendations are therefore reviewed for clear error. *See* Fed. R. Civ. P. 72(b); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (per curiam). Finding no clear error, they will be adopted.

ORDER

Therefore, based upon all the files, records, and proceedings in this matter, **IT IS ORDERED THAT**:

1. Petitioner's Objections to the Report and Recommendation [ECF Nos. 65, 69] are **OVERRULED**;

2. Respondent's Objections to the Report and Recommendation [ECF No. 73] are **OVERRULED**;

3. The Report and Recommendation [ECF No. 62] is **ACCEPTED**;

4. The petition for a writ of habeas corpus filed by Petitioner Tracy Alan Zornes [ECF No. 1] is **DENIED**.

5. A certificate of appealability shall be issued on the following question: The Minnesota Supreme Court concluded that Mr. Zornes's right to a public trial had not been violated during his criminal proceedings. Was this conclusion contrary to, or did it involve an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, as claimed in ground one of Mr. Zornes's habeas petition?

6. A certificate of appealability is denied on all other claims.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 27, 2020

s/ Eric C. Tostrud
Eric C. Tostrud
United States District Court

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Appendix D

Minnesota Supreme Court's Opinion
State of Minnesota v. Tracy Zornes
(dated May 31, 2013)

STATE OF MINNESOTA

IN SUPREME COURT

A12-0463

Clay County

Anderson, Paul H., J.

State of Minnesota,

Respondent,

vs.

Filed: May 31, 2013
Office of Appellate Courts

Tracy Alan Zornes,

Appellant.

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, Saint Paul, Minnesota; and

Brian Melton, Clay County Attorney, Moorhead, Minnesota, for respondent.

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

The district court did not abuse its discretion when it sequestered a witness during voir dire because the district court has substantial discretion to sequester witnesses during the trial process, and voir dire is part of the trial process, *Presley v. Georgia*, 558 U.S. 209 (2010).

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The removal of a person from the courtroom was too trivial under the factors outlined in *State v. Lindsey*, 632 N.W.2d 652 (Minn. 2001), to implicate the defendant's Sixth Amendment rights.

Absent an exception, the police must have a warrant before conducting searches under the Fourth Amendment of the United States Constitution; therefore, when the district court correctly concluded that no exception applied in this case, the court did not err when it concluded that the police's warrantless search for DNA evidence on the defendant was unlawful.

Any error in the district court's admission of the defendant's disputed statement was harmless beyond a reasonable doubt.

The admission of physical evidence that is both sufficiently connected to a defendant and to the scene of the alleged crime generally falls within a district court's discretion; therefore, the court did not abuse its discretion when it admitted several items found with the defendant that were sufficiently connected to both the defendant and the crime scene.

A district court must weigh the five factors that we outlined in *State v. Jones*, 271 N.W.2d 534 (Minn. 1978), to determine whether a defendant's prior conviction is more probative than prejudicial and when the court properly weighed the *Jones* factors it did not abuse its discretion by concluding that the defendant's three prior felony convictions could be admitted for impeachment purposes.

Affirmed.

OPINION

ANDERSON, Paul H., Justice.

Tracy Alan Zornes was convicted of the first-degree premeditated murders of Megan Londo and John Cadotte, arson for setting a fire that destroyed the apartment building where Londo and Cadotte were murdered, and theft of Cadotte's car. On direct appeal, Zornes argues that the district court committed four reversible errors. First, Zornes argues that the court's removal of two persons from the courtroom during voir dire violated his right to a public trial under the United States and Minnesota Constitutions. Second, he argues that the court violated his Fourth Amendment rights when it admitted a statement Zornes made to the police that he claims was made during an unlawful search. Third, Zornes argues that the court abused its discretion when it admitted into evidence several items that were found when Zornes was arrested. Finally, Zornes argues that the court abused its discretion when it ruled that, if he chose to testify at trial, the State could attempt to impeach him using three prior felony convictions. Because we conclude that none of the alleged errors requires reversal, we affirm.

In February 2010, 25-year-old Megan Londo was trying to stay clean and to regain custody of her children. She was also contemplating a move from Naytahwaush to Moorhead so that she could be closer to her children. After Londo had a physical altercation with one of her family members, Londo's fiancé arranged for her to stay with his sister, C.C, in Moorhead. The apartment building where C.C. and her boyfriend, S.G., lived consisted of three apartment units: C.C. lived in a unit that occupied the entire lower-level of the building; "C." and his girlfriend, S.P., lived in one of the two

upstairs apartments; and J.M. and his 2-year old daughter lived in the other upstairs apartment. Londo moved in with C.C. by the middle of February 2010.

On Thursday, February 18, 2010, S.G. learned that the police were seeking to arrest him for a probation violation stemming from a felony DWI conviction. Thus, S.G. decided to flee to Wahpeton, North Dakota, where his parents lived, but he did not have a car, so he asked John Cadotte to give him a ride in Cadotte's red Honda Civic. Cadotte was willing to provide rides for people, usually in return for some gas money. Sometime that evening, Cadotte drove S.G., C.C., and Londo to Wahpeton. Because Cadotte was planning to hang out with a friend near C.C. and S.G.'s apartment later that night, he asked for permission to stay at their apartment if he decided to drink. When S.G. and C.C. were dropped off in Wahpeton, Londo was entrusted with possession of the only key to C.C.'s apartment. While traveling back to Moorhead, Londo used Cadotte's cellphone to contact a friend in an attempt to acquire some prescription pain pills.

That same evening, Londo was looking for transportation to Naytahwaush. A mutual acquaintance connected Londo with Zornes, who was staying in Moorhead with E.M., his on-again, off-again girlfriend. Apparently things were not going well between Zornes and E.M., so Zornes used E.M.'s cellphone to contact a female friend, S.B., in an attempt to arrange a ride back to his home in Naytahwaush. S.B. also happened to be a friend of Londo's. S.B. attempted to find a ride for Zornes but she was unable to do so. During these conversations, Londo also said that she was looking for a ride home to Naytahwaush.

In a subsequent conversation, Zornes told S.B. that his sister had agreed to give him a ride to Naytahwaush. Knowing that Londo was also looking for a ride there, S.B. asked Zornes if Londo could ride with him and Zornes said that was fine. S.B. then gave Londo E.M.'s cellphone number so that Londo could contact Zornes. At 9:08 p.m., a call was placed from Cadotte's cellphone to E.M.'s cellphone. Shortly after 9:08 p.m. on February 18, Zornes abruptly left E.M.'s apartment. When he left the apartment, Zornes took with him a tote bag containing beadwork and a duffel bag filled with clothing. E.M. testified that she was upset about Zornes's abrupt departure, and as a result she took "[q]uite a few" pills, including between 10 and 12 Ambien and Tylenol PM.

About an hour later, at approximately 10:00 p.m., Zornes was seen with Londo and Cadotte in the parking lot of C.C.'s apartment building. More specifically, J.M.'s then-girlfriend saw two men and one woman get out of a small red car and go into C.C.'s apartment. The girlfriend observed that one of the men was carrying a duffel bag. Her description of the man carrying the duffle bag matched Zornes's appearance, and her description of the small red car was consistent with the red Honda Civic owned by Cadotte. J.M.'s girlfriend later saw a photo of Zornes on the Internet and testified at trial that she recognized him right away as the man that she had seen in the parking lot.

Around 11:50 p.m., E.M. received a text message from Cadotte's cellphone—a number that she did not recognize. The text was an inquiry if she was interested in purchasing 100 10-milligram pills. E.M. assumed the pills contained hydrocodone. Because E.M. did not recognize the cellphone number of the phone that was being used to send the text, she asked who the sender was and received the initials "T.Z." E.M.

testified that she understood "T.Z." to mean Tracy Zornes, the only person she knew with those initials. Following this initial exchange, there were many telephone calls and text messages exchanged between Cadotte's and E.M.'s cellphones, but a police detective testified that the phone records indicated the people using the two cellphones were not able to reach each other. E.M. testified that, because she had taken several pills after Zornes left her apartment, she did not remember any of the events from that night or from the early hours of the next morning.

The three apartments in C.C.'s building all shared the same ventilation system, and S.P. testified that the residents shared "everything, every noise, everything." In the early morning hours of February 19, the upstairs residents heard a lot of noise from the downstairs apartment. The noise included "a lot of arguing," music, and the sounds of a small party or "get together." C. and J.M. both testified that they did not think much of the noise because there was frequently arguing in the downstairs apartment. C. testified that he heard the sounds of two male voices and one female voice, while J.M. testified that he heard the sound of one male voice "talking and talking and talking and talking." J.M. said that he could not sleep that night and so he spent much of the night on his computer and looking out of a window in his apartment. While looking out the window, J.M. saw a man wearing a black coat and a hat make two trips in and out of the downstairs apartment and walk along the trail to the parking lot. J.M. said that during at least one of those trips the man was carrying something.

Both C. and J.M. testified that, early in the morning, they heard sounds from the downstairs apartment that sounded like people having sex. S.P., C., and J.M. also all

heard what they described as loud banging or a series of loud smacks. J.M. described the noise as "like a wiffle ball bat hitting a leather couch," and C. described it as "like somebody beating on something." Again, the upstairs neighbors did not think much of the noise because the downstairs residents were often arguing or being disruptive. J.M. testified that at about 6:30 or 6:45 a.m. he saw the same man he had seen walking to the parking lot earlier leave from the downstairs apartment, this time for good.

At about 7:00 a.m., various signs alerted the upstairs residents that there was a fire in the building: S.P. said she awoke to the sound of the carbon monoxide alarm in her apartment; C. felt the floor beneath him get very hot; and J.M. smelled smoke and saw his apartment filling with smoke from the vents. Firefighters were dispatched to the building at 7:07 a.m. J.M. was able to grab his daughter and escape through the heavy smoke, but the fire department had to rescue C. and S.P. Firefighters found that the door to the downstairs apartment was locked so they kicked it in. The apartment was full of smoke, but as the smoke cleared, firefighters found two bodies that were later identified as John Cadotte and Megan Londo. Cadotte's body was on the floor in the living room and Londo's body was on a bed in the bedroom.

The medical examiner who examined the victims determined that the cause of death for both Cadotte and Londo was "multiple blunt and sharp force injuries." Cadotte was struck approximately 21 times in the head by a heavy, blunt object, and had multiple stab wounds stabbed to his back, at the base of his neck, and in his ears. Cadotte also had multiple circular lacerations, consistent with a chair leg or a hammer.

Using overlays of Cadotte's wounds, the medical examiner determined that, given the shape of the injuries and the force of the impact, Cadotte's wounds were most likely inflicted with a claw hammer. The medical examiner concluded that Londo's skull had been struck with significant force, such that the examiner compared the trauma to what is typical for "falls from a great height or motor vehicle collisions." Londo had been stabbed in her heart by a single-edged blade, as well as stabbed in her ears.

The medical examiner was able to determine that neither Londo nor Cadotte was alive when the fire started, but Londo's body was significantly damaged by the fire. The medical examiner administered tests on Londo to determine whether a sexual assault had occurred; testing showed no foreign saliva or semen. Investigators did not find any smoke detectors in the apartment, but identified a place in the apartment's bedroom where it appeared that a smoke detector had been removed from the wall.

There is no statement or testimony from Zornes in the record. But Zornes's whereabouts at the time of the fire can be at least partly ascertained through his statements to acquaintances who later spoke with the police or testified at trial. Zornes's statements to these acquaintances place him at or near C.C.'s apartment until the start of the fire. In the days after the fire, Zornes gave varying accounts to acquaintances about the events on February 18 and 19. Zornes's differing accounts included: that another person started the fire and Zornes barely escaped by getting out through a window; that he went to the apartment building to pick up Londo and was outside when he saw the fire start; that he had been partying with Cadotte and Londo at the apartment, but it was "getting loud" so he went out to Cadotte's car to listen to the radio, then fell asleep only

to wake up and see the fire after it was "too late"; and, again, that he had pulled up outside the apartment after the fire had already started.

The day after the fire, February 20, S.W., Zornes's nephew, returned to his home in Naytahwaush. Upon his return, S.W. saw a red car that he did not recognize parked outside of his home. This car was later determined to be Cadotte's red Honda Civic. When S.W. entered his home later in the afternoon, he was surprised to discover his uncle—Zornes—was in the home. Zornes gave S.W. an account of the fire at C.C.'s apartment, stating that he was "scared" and that he had "seen a fire" and "was outside" when the fire started. Because Londo was from Naytahwaush, word had already reached the community about the fire and Londo's death, so S.W. already knew about the fire. S.W. did not know about Cadotte at that time or any details about the victims' deaths.

Zornes remained at S.W.'s home while S.W. left for a while. Upon his return, S.W. informed Zornes that he had seen the police in the area. Zornes then asked S.W. if the two of them could "get out of here" and if S.W. could help him find some gas. After S.W. provided a gas can, the two of them drove away in different vehicles. Zornes was in the lead, driving Cadotte's Honda Civic, and S.W. was following, driving his own vehicle. Zornes drove out to the middle of the country, pulled off on a dirt road, and then set fire to Cadotte's Honda Civic using the gas from the can that S.W. had provided. S.W. later testified that he was "scared" at this time. After gathering some supplies, Zornes had S.W. drive him to a remote wooded area in rural Mahnomen County, where Zornes got out of S.W.'s vehicle and said, "Well, I'm just going to stay here then." Zornes then walked off into the wooded area.

Months later, one of S.W.'s sisters found items hidden in a closet at S.W.'s home that C.C. identified as belonging to her. C.C. testified that she had stored the items in the bedroom closet in her apartment before she traveled to North Dakota the day before the murders and the fire. The implication of C.C.'s testimony was that Zornes stole the property from C.C.'s bedroom closet and then hid it in S.W.'s Naytahwaush home during his flight from the police.

On Sunday, February 21, a passerby found the burnt remains of Cadotte's Honda Civic. The police were called, and during the subsequent processing of the car, investigators recovered the remains of a smoke detector. By that time, police investigators had also obtained the victims' cellphone records and noted the extensive contacts between Cadotte's cellphone and E.M.'s cellphone on the night of the murders. There were up to thirty-five calls between the two phones.

The police interviewed E.M. and, based on information from E.M. and the phone records, they made a connection between Zornes and the murders. The police then identified Zornes as a "person of interest." The police began to search for Zornes and interviewed S.W. twice on February 21, the same day that the passerby reported finding the remains of Cadotte's car. During the interview with S.W., the police learned about Zornes's involvement in the burning of Cadotte's car. The police then intensified their search for Zornes, but were unable to locate him for approximately two weeks. During that time, Zornes apparently received additional supplies from several friends and family members. Zornes told one friend that he "felt bad" for Londo's family, but that Zornes could not contact any family members because there was an unrelated outstanding

warrant for his arrest. Zornes did in fact have outstanding warrants for his arrest that had been issued by Becker County authorities.

On March 4, 2010, police investigators persuaded one of Zornes's friends, who had been helping Zornes while he was hiding from the police, to reveal Zornes's location to them. After some difficulty given the remote nature of the hiding place, the police were able to locate Zornes at a makeshift campsite in a wooded area and arrested him. During a routine pat down search of Zornes conducted as part of this arrest, the police recovered a folding knife. The police also recovered a hammer, screwdriver, utility knife, and scissors from Zornes's campsite. Zornes was then taken to the Mahnomen County Law Enforcement Center. While Zornes was being transported from the campsite, the police officers told him that he was being taken to the law enforcement center so that they could collect evidence and that "after collecting evidence law enforcement would get a search warrant."

After arriving at the law enforcement center, Bureau of Criminal Apprehension (BCA) Special Agent Eric Jaeche and Moorhead Detective Ryan Nelson began to examine Zornes. Zornes was first given a *Miranda* warning. Zornes invoked his *Miranda* rights after receiving the warning and the questioning was halted immediately. Jaeche and Nelson then "processed" Zornes. This processing included: itemizing his clothing; examining his body for any injuries, cuts to the hands, or other defensive injuries; and photographing Zornes's body. While processing Zornes, Jaeche and Nelson were speaking with him and telling him what to do, such as which items of clothing to

remove. The officers were not discussing the arson or murder charges or interrogating Zornes during the processing.

After processing Zornes, Jaeche told Zornes that they were going to utilize a sexual assault kit to take DNA samples from Zornes's cheek and penis. Zornes frowned when Jaeche made that statement and Nelson testified that he heard Zornes say either "this wasn't anything sexual" or "it wasn't sexual related." Jaeche testified that he did not hear Zornes make any statement "to [him] directly." The investigators collected samples from inside Zornes's cheek and from his penis. Three and a half hours later, the police obtained a search warrant to allow them to take DNA samples from Zornes.

A Clay County grand jury indicted Zornes on two counts of first-degree premeditated murder, two counts of second-degree intentional murder, first-degree arson of a dwelling, and theft of a motor vehicle. Following the indictment, Zornes brought several pretrial and trial motions to suppress much of the evidence against him. More specifically, he sought to suppress: the results of all evidence obtained from him during Jaeche and Nelson's March 4, 2010 search; the results of the DNA testing using the samples collected during the search; and his statement made during that search. The district court found that there was no practical reason why the police could not have waited to obtain a search warrant and concluded that none of the exceptions that allow the admission of evidence obtained during a warrantless search applied. The court then suppressed the DNA samples taken from Zornes. However, the court found that Zornes made his statement before being physically touched by the police officers and thus concluded that the search did not begin until Jaeche had physically touched Zornes to

gather the samples. Based on this finding, the court concluded that Zornes's potentially incriminating statement was not part of the unlawful search and would not need to be suppressed.

On September 15, 2011, Zornes brought a motion to limit the admissibility of his prior felony convictions. The district court found that the convictions the State sought to admit were recent enough that they were not barred by statute as being too old, and concluded that mitigating or balancing factors did not require that the convictions be excluded. The court then allowed Zornes's prior convictions to be admitted for purposes of impeachment.

During jury voir dire on October 19 and 20, the district court excluded E.M. and Cadotte's brother from the courtroom. On October 19, it was pointed out to the court that E.M., who was on the joint witness list, was in the courtroom during voir dire. Without objection, the court ruled that voir dire was part of the trial process and therefore any sequestration of E.M. included voir dire. The court then asked E.M. to leave the courtroom, which she did. The following day, defense counsel asked that Cadotte's brother, who was in the courtroom and also on the joint witness list, be required to watch the proceedings from an observation room "so we don't have the jurors in eye contact with him." Without objection, the court granted the request.

On October 27, Zornes moved to suppress the admission of the folding knife taken from him on the day of his arrest as well as the hammer, utility knife, scissors, and other tools recovered from his campsite. Zornes asserted that because the items were not sufficiently connected to the scene of a crime, they were not relevant and should be

excluded from evidence. The following day the district court held a hearing on this motion and ruled from the bench that the items could be admitted into evidence. The court reasoned that the proper weighing of the items' relevance and connection to the crime scene was a question that belonged to the jury.

Zornes's jury trial lasted until November 9, when the jury found Zornes guilty of: the first-degree premeditated murder of Megan Londo, in violation of Minn. Stat. § 609.185, subd. (a)(1) (2012); the first-degree premeditated murder of John Cadotte, in violation of Minn. Stat. § 609.185, subd. (a)(1); first-degree arson, in violation of Minn. Stat. § 609.561, subd. 1 (2012); and theft of a motor vehicle, in violation of Minn. Stat. § 609.52, subd. 2(17) (2012). The jury found Zornes not guilty on both charges of second-degree murder. The district court then convicted Zornes and, on December 16, sentenced him to two consecutive life sentences without the possibility of parole for the two first-degree premeditated murder convictions, a consecutive 48-month sentence for the arson conviction,[1] and a 30-month sentence for the motor-vehicle theft conviction to run consecutive with the other sentences.

Zornes raises four issues in his direct appeal to our court. First, Zornes argues that the district court's removal of two persons from the courtroom during voir dire violated his right to a public trial under the United States and Minnesota Constitutions. Second, he argues that the court violated his Fourth Amendment rights when it admitted a

[1] The court found "substantial and compelling reasons" for departing from the sentencing guidelines by imposing a consecutive, rather than a concurrent, sentence for the arson. The court stated that "[t]his arson is, beyond any doubt, the most serious crime of arson that has ever occurred before this Court."

statement he made to the police that he claims was made during an unlawful search. Third, Zornes argues that the court abused its discretion when it admitted into evidence several items that were found with him when he was arrested. Finally, Zornes argues that the court abused its discretion when it ruled that, if he chose to testify at trial, the State could attempt to impeach him with three prior felony convictions. We consider each issue in turn.

I.

Zornes first argues that the policies underlying sequestration orders do not apply to voir dire and therefore the unwarranted removal from the courtroom of E.M. and Cadotte's brother violated his constitutional right to a public trial. We disagree.

Zornes cites a United States Supreme Court holding that, before a court hearing can be closed to members of the public, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced." *Waller v. Georgia*, 467 U.S. 39, 48 (1984). The Court has "made it clear" that a defendant's Sixth Amendment right to a public trial extends to the states. *Presley v. Georgia*, 558 U.S. 209, 212 (2010) (citing *In re Oliver*, 333 U.S. 257, 273 (1948)). Zornes further cites the recent Supreme Court decision in *Presley* in which the Court concluded that the right to a public trial extends to voir dire. *See id.* at 213. But, the Supreme Court has said that witnesses may be excluded from a courtroom, and that "exclusion of witnesses from [the] courtroom [is] a time-honored practice designed to prevent the shaping of testimony by hearing what other witnesses say.' " *Perry v. Leeke*, 488 U.S. 272, 281 n.4 (1989) (quoting *United States v. Johnston*, 578 F.2d 1352, 1355 (10th Cir. 1978)). We have held

that the ability to sequester witnesses "rests in the sound discretion of the trial court." *State v. Garden*, 267 Minn. 97, 112, 125 N.W.2d 591, 601 (1963).

The sequestration issue raised by Zornes is a question of constitutional law and we review questions of constitutional law de novo. *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009) (citing *State v. Mahkuk*, 736 N.W.2d 675, 684 (Minn. 2007)). But we have also held that a district court has "substantial discretion in conducting voir dire" and will not be reversed absent an abuse of discretion. *State v. Chambers*, 589 N.W.2d 466, 474 (Minn. 1999); *see also State v. Jackson*, 770 N.W.2d 470, 486 (Minn. 2009). The Supreme Court has held that trial judges have "broad power to sequester witnesses before, during, and after their testimony." *Geders v. United States*, 425 U.S. 80, 87 (1976). Thus, the extent of Zornes's Sixth Amendment right to have a public trial is reviewed de novo, but determining whether the conduct of the court during voir dire fell within the contours of that right is a question that we review for an abuse of discretion.

The question of whether a defendant's Sixth Amendment rights allow a court to exclude either a member of the general public or a potential witness from the courtroom during voir dire is a question of first impression for our court. While there is some overlapping analysis between the exclusion of E.M. from the courtroom and the assignment of Cadotte's brother to an observation room, the circumstances are distinct enough that we will consider each event separately.

1. *E.M.*

E.M. was Zornes's girlfriend and was potentially a significant witness at trial. In fact, E.M. played a key role in Zornes's planned alibi defense. E.M. attended voir dire on

October 18 and then again on October 19. E.M. was on the joint witness list prepared by both sides. On October 19, counsel brought to the district court's attention the fact that a potential witness was in the courtroom.[2] The court stated that witnesses were to be excluded during the trial process and that because the court "determined that voir dire selection is part of the trial process [the court] cannot allow any potential witnesses to be present." The court went on to note that excluding witnesses from voir dire "is an intricate and complex legal issue that, frankly, we haven't researched before, but, it's [the court's] judgment that the safest thing to do is to order all witnesses sequestered throughout the voir dire process and the trial." E.M. was then excluded from the courtroom for the remainder of the voir dire proceedings.

In *Presley*, the Supreme Court made clear that courtroom closure is a serious issue that, absent a specific finding by a district court can lead to the violation of a defendant's Sixth Amendment rights. 558 U.S. at 213-14. We acknowledge and agree with this strong statement by the Supreme Court regarding a defendant's Sixth Amendment right to a public trial. But the Court's holding in *Presley* does not support Zornes's argument because the exclusion of E.M. is distinguishable from the facts in *Presley*. The exclusion of E.M. is more similar to the facts in another Supreme Court case, *Leeke*, and one of our

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[2] In its brief, the State asserts that Zornes's counsel brought this matter to the court's attention. However the record does not fully support this assertion. The trial transcript quotes defense counsel as saying that "I think counsel want to approach for an issue that is not related to Mr. Miller if we could." Following this statement by defense counsel, an off-the-record bench conference was held. Defense counsel's reference to trial counsel is in the plural and also refers to "we"—the implication being that this is a matter both sides were ready to discuss.

cases, *Garden*. *See Leeke*, 488 U.S. 272; *Garden*, 267 Minn. 97, 125 N.W.2d 591. The key difference between *Leeke* and *Presley* is that *Leeke* dealt with the exclusion of a defendant *in his role as witness* and *Presley* dealt with the exclusion *of the public*. *Compare Leeke*, 488 U.S. at 282 (allowing the district court to restrict a defendant from speaking with his counsel if the court concluded such conversation risked tailored testimony), *with Presley*, 558 U.S. at 212 ("[T]he *voir dire* of prospective jurors must be open to the public . . . ."). Here, when E.M. was excluded from the courtroom she was a potential witness, which makes her distinct from the "public" generally and places her in the class of persons over whom district courts have broad discretion to exclude from the courtroom. As we have previously stated, "while discretionary, in practice sequestration [of witnesses] is rarely denied in criminal cases and rarely should be denied." *State v. Posten*, 302 N.W.2d 638, 640 (Minn. 1981).

The public policy most often articulated for sequestering witnesses is preventing some witnesses from tailoring their testimony in response to hearing the testimony of other witnesses. As the Supreme Court has said, "witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say." *Leeke*, 488 U.S. at 281. We have echoed the logic behind excluding witnesses by saying that "[t]he basic reason for sequestration of witnesses, of course, is to remove any possibility that a witness waiting to testify may be influenced." *State v. Ellis*, 271 Minn. 345, 364, 136 N.W.2d 384, 396 (1965). Zornes highlights this public policy but then attempts to distinguish it by arguing that allowing witnesses at voir dire cannot thwart

APPENDIX III

this objective and, therefore, excluding witnesses during voir dire is the same as excluding the public from voir dire.

But the questioning of prospective jurors at voir dire can be wide ranging and cover details of trial strategy, and we have stated that "[t]he scope of voir dire is committed to the district court's sound discretion." *State v. Carridine*, 812 N.W.2d 130, 147 (Minn. 2012) (citation omitted) (internal quotation marks omitted). The public policy aims of voir dire and witness sequestration therefore are not at odds—it is conceivable that a witness could tailor his or her testimony in response to what is overheard during voir dire. We conclude that the district court is best suited to protecting the integrity of the trial process by managing witnesses and the content of voir dire as the court sees fit. In order to find error on this issue, we would need to conclude that the district court abused its discretion by excluding E.M. from the courtroom—a high bar for Zornes to meet in light of the discretion courts have on these issues.

Based on the Supreme Court's holding in *Leeke* and our holding in *Garden*, a district court has substantial discretion to sequester witnesses from the trial process. The Supreme Court held in *Presley* that voir dire is part of the trial process. Applying those holdings to the facts of this case, we conclude that the sequestration of E.M. fell within the bounds of the district court's discretion. *See Presley*, 558 U.S. at 213-14; *Leeke*, 488 U.S. at 281-82. Therefore, we hold that the district court did not violate Zornes's constitutional right to a public trial when it sequestered E.M. from voir dire.

2. *Cadotte's Brother*

The circumstances leading to the removal of Cadotte's brother from the courtroom and his placement in an observation room are more complicated than the sequestration of E.M. The day after the district court sequestered E.M., Zornes's trial counsel alerted the court to the fact that Cadotte's brother was in the courtroom during voir dire. At the time, the brother was on the witness list. Zornes's trial counsel stated that it was his "understanding that the state may be willing to remove [the brother] from [the witness] list and in return we would not be objecting if [the brother] wants to watch from the observation room so we don't have the jurors in eye contact with him." The State agreed to this proposal, removed the brother from the witness list, and allowed him to watch the trial proceedings from an observation room.

We have held that not all courtroom restrictions implicate a defendant's Sixth Amendment right to a public trial. *E.g.*, *State v. Lindsey*, 632 N.W.2d 652, 660-61 (Minn. 2001). We have identified four factors that lead us to conclude that a courtroom exclusion is too trivial to implicate the Sixth Amendment: (1) the courtroom was never cleared of all spectators; (2) the trial remained open to the general public and the press; (3) there was no period of the trial in which members of the general public were absent during the trial; and (4) at no time was the defendant, his family, his friends, or any witness improperly excluded. *Id.* at 661. After our careful review of the record, we determine that under the four factors from *Lindsey* the removal of Cadotte's brother from the courtroom was trivial. Because we conclude that the removal of the brother was too trivial to implicate Zorne's Sixth Amendment right to a public trial, we need not, and do

not, decide the status of Cadotte's brother as a witness; whether the alleged error was invited by the defendant; to what extent, if any, removal of the brother amounted to a partial courtroom closure; or the significance of his placement in an observation room.

II.

Zornes claims that the district court erred when it admitted his March 4, 2011 statement that "this wasn't anything sexual" or "it wasn't sexual related." One or the other of these statements were made by Zornes during a search following his arrest. Zornes agrees that the court correctly concluded that the warrantless search of his person was unconstitutional and that the court properly suppressed the DNA test results from samples taken from his cheek and penis during that search. But, Zornes claims that the court erred when it did not suppress the alleged statement he made at that time. Zornes argues that the court erred both factually and legally when it determined that his statement did not occur during the unlawful search. Zornes asserts that the court's finding that his statement occurred before the search began was clearly erroneous because Officer Nelson is the only person who heard the statement and Nelson stated "I don't know if [Zornes's statement] was prior to or during the collection [of the DNA samples from Zornes]."

We have held that a district court's legal conclusions related to a Fourth Amendment search and seizure are reviewed de novo. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005) (citing *State v. Lee*, 585 N.W.2d 378, 382-83 (Minn. 1998)). The court's factual findings are reviewed for clear error, *id.*, but the de novo standard applies

to the application of the facts to the Fourth Amendment, *see State v. Lemieux*, 726 N.W.2d 783, 787 (Minn. 2007).

After Zornes was arrested at his makeshift campsite, he was brought to the Mahnomen County Law Enforcement Center. Zornes was given a *Miranda* warning and he promptly invoked his right to have an attorney advise him. Zornes was placed in a small holding room and then Jaeche and Nelson explained to him that they would be "collecting some evidence from him at the time" and "would be following up with a search warrant after the collection of the evidence." After the *Miranda* warning was given and Zornes stated that he did not want to talk to the officers, the officers collected Zornes's clothing one item at a time. Nelson then photographed Zornes's body to document any physical injuries. After the photographs were taken, Jaeche obtained some swabs and began the steps needed for a sexual assault test, meaning a swab of Zornes's cheek and genitals. Nelson testified that, after Jaeche proceeded with administering the sexual assault kit, he saw that Zornes "kind of, maybe lowered his eyebrows or just kind of made a look, leading me to believe that he was kind of confused or kind of wondering why." Nelson testified that he then heard Zornes make a comment, "something to the effect, 'It wasn't a sexual thing or sexual related,' something along those lines."

The district court concluded that the collection of the DNA samples constituted an unlawful search and therefore suppressed the test results obtained from those samples. The court carefully reviewed several exceptions that allow admission of evidence obtained without a search warrant, but the court concluded that none of the exceptions applied. Because the State is not contesting the court's conclusion that the search itself

was unlawful, and because we conclude that the court properly considered and rejected the available exceptions for conducting a search without a warrant, we accept the district court's analysis and proceed to the next step in our analysis.

Zornes argues that, under our standard from *State v. Hardy*, 577 N.W.2d 212, 215-16 (Minn. 1998), a statement alone from investigating officers is sufficient to begin a search, if the statement is made for an investigatory purpose. We need not address Zornes's argument under *Hardy* because we conclude that the admission of Zornes's statement was harmless beyond a reasonable doubt. Further, we need not address when the search of Zornes began or the elements for determining when the potentially erroneous admission of evidence warrants a new trial under the Fourth Amendment. *See State v. Hall*, 764 N.W.2d 837, 845 (Minn. 2009) (declining to reach the merits of a defendant's argument because even if error was present it was harmless). We have outlined five factors relevant to determining if an error was harmless beyond a reasonable doubt: (1) the manner in which the evidence was presented; (2) whether the evidence was highly persuasive; (3) whether the evidence was used in closing argument; (4) whether the evidence was effectively countered by the defendant, and (5) whether the other evidence of guilt was overwhelming. *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005); *see also State v. Caulfield*, 722 N.W.2d 304, 314-15 (Minn. 2006).

1. *Manner in Which the Evidence Was Presented*

Zornes's statement was mentioned four times at trial: once during defense counsel's opening statement; once during Nelson's testimony; and once during each side's closing arguments. Nelson's direct testimony spans 42 pages in the trial transcript;

his total testimony covers 52 pages. Therefore, Zornes's statement was mentioned on one line out of approximately 1,300 lines of Nelson's testimony. The State's closing argument covers 124 pages, meaning Zornes's statement was mentioned on one line out of 3,100 lines in the State's closing argument. In *Caulfield*, we stated that, given the short nature of the bench trial in that case, there was "no chance" that the disputed evidence "was lost among a plethora of other evidence." 722 N.W.2d at 314. The present case is distinguishable from *Caulfield* given the extensive nature of the trial and proceedings, of Nelson's testimony, and of the State's closing argument. We conclude that the inclusion of Nelson's testimony about Zornes's statement was only a minimal factor in the overall context of his trial.

2. *Whether Evidence Was Highly Persuasive*

In *Caulfield*, the disputed evidence was a lab test result that was "highly persuasive evidence" demonstrating that a disputed substance was in fact cocaine. *Id.* In this case, the admitted statement is ambiguous. It is not clear from the record whether, at the time the statement was made, Zornes had been informed that he was being investigated for murder and arson. Further, Zornes had allegedly been hiding from police because of outstanding warrants from Becker County. In Zornes's statement—that "it" was not sexual in nature—the antecedent of "it" is ambiguous. The statement could have been in reference to the murders of Londo and Cadotte, or in reference to the Becker County warrants, or it could have related to some other event altogether. In addition, Jaeche did not hear Zornes's statement despite being the person who was conducting the

search, a point highlighted by the defense. Thus, we conclude that, at best, Zornes's statement was only somewhat persuasive evidence against him.

3. *Reference to Evidence in State's Closing Argument*

As mentioned above, the State made one reference to Zornes's statement in a 124-page, 3,100-line closing argument. As the State points out in its brief, the State made no effort to point out why the statement was significant or inculpatory. Thus, we conclude there was only minimal use of Zornes's statement by the State in its closing argument.

4. *Effective Counterweight to the State's Evidence by the Defendant*

In *Caulfield*, the defense did not rebut the lab report that was the disputed evidence in that case. *Id.* at 315. In *State v. Wright*, we balanced the "dramatic and highly persuasive nature" of disputed statements and the "manner in which they were presented and used by the [S]tate" with the "counterweight [the defendant] provided through cross-examination and closing argument" and held the counterweight was "insufficient." 726 N.W.2d 464, 478 (Minn. 2007). Here, the defense pointed out that, despite having a tape recorder with him, Nelson did not have the recorder on, and that even though the room was very small, Jaeche did not hear the statement. Given the low profile of the State's presentation of Zornes's statement at trial and the mixed persuasiveness of the evidence in the first place, the defense's rebuttal provided an effective "counterweight" to balance the district court's allegedly erroneous admission and the State's use of Zornes's statement.

5. *Whether Evidence of Guilt Is Overwhelming*

There is no direct eyewitness testimony about Zornes having committed the murders and there is no forensic evidence connecting him to the murders or the scene of the crime. But there is significant evidence connecting Zornes to the victims, the murder scene, the arson, and the car theft. Zornes was seen entering the apartment with Londo and Cadotte and no other individuals were seen with the victims or in the apartment around the time of the murders. There was extensive telephone and text message contact between E.M.'s cellphone and Cadotte's cellphone on the night of the murders, despite the fact that the two did not know each other. There is testimony that Zornes was using Cadotte's cellphone, thus placing him with the victims. A neighbor who lived in the apartment building heard "two males and a female" in the apartment beneath him. The apartment door was locked and Londo, who was last seen alive with Zornes, had the only key. Zornes made repeated, inconsistent statements to acquaintances that placed him in the vicinity of the apartment at the time of the murders and arson. Zornes stole Cadotte's car and set fire to it in a remote area. An investigation of the apartment revealed a location where it appeared a smoke detector had been removed and a smoke detector was subsequently found in Cadotte's car. It is highly likely that Zornes removed the smoke detector from the apartment and placed it in Cadotte's car. Zornes was found at a remote, hidden campsite, where he had in his possession the types of implements most likely to have been used in the murders. The recovery of C.C.'s possessions from S.W.'s home, possessions that C.C. had stored in her apartment, also demonstrates Zornes was likely to

have been at the scene of the murders and arson. When all of this evidence is combined, we conclude that overwhelming evidence of Zornes's guilt was presented at trial.

After weighing all of the forgoing five factors for assessing harmless error and then placing them in context with the minimal use of Zornes's statement at trial, the effective rebuttal of the statement by Zornes's trial counsel, the overall minimal persuasive weight of the statement, and the overwhelming evidence showing that Zornes caused the deaths of Cadotte and Londo, we conclude that the admission of Zornes's statement was harmless beyond a reasonable doubt. Therefore, we hold that the court's admission of Zornes's statement did not constitute reversible error.

III.

The third issue raised by Zornes is whether the district court erred by admitting into evidence a folding knife, utility knife, scissors, screwdriver, and hammer found on or with him at his campsite at the time of his arrest. Zornes argues that these items were not relevant under Minn. R. Evid. 401 and thus were not admissible. The State claims the items were relevant because they were the type of objects that could have caused the deaths of Cadotte and Londo. The State has the better argument on this issue.

We have held that "[a] trial court's admission of physical evidence will be upheld unless it constitutes an abuse of discretion." *State v. Daniels*, 361 N.W.2d 819, 827 (Minn. 1985) (citing *State v. Webber*, 292 N.W.2d 5, 9 (Minn. 1980)); *see also State v. Stewart*, 514 N.W.2d 559, 564 (Minn. 1994) (reviewing the admission of evidence under the abuse-of-discretion standard).

The Minnesota Rules of Evidence state that only "relevant" evidence is admissible. Minn. R. Evid. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. We have held that "physical objects connected with a crime or which are the subject matter of an investigation are admissible," as are objects that connect the defendant to the crime scene. *State v. Olek*, 288 Minn. 235, 242, 179 N.W.2d 320, 325 (1970). We have defined what constitutes relevant physical evidence in two leading cases: *Olek*, 288 Minn. 235, 179 N.W.2d 320, and *State v. Kotka*, 277 Minn. 331, 341, 152 N.W.2d 445, 452 (1967). In *Olek*, we held that objects connected to the crime scene or the investigation can be admitted; the fact that the objects are not directly tied to a defendant only affects the weight of the evidence. 288 Minn. at 242, 179 N.W.2d at 325-26. If there is "no question" that the victim died from a wound consistent with a type of weapon possessed by the defendant, then the weapon is admissible. *Kotka*, 277 Minn. at 341, 152 N.W.2d at 452. We also have held that "[p]roof that the defendant possessed the type of weapon with which the crime was committed is sufficient to make that weapon admissible." *Daniels*, 361 N.W.2d at 827.

Zornes acknowledges that "physical objects connected with a crime scene are relevant and admissible," as are objects that connect the defendant to the crime scene. But Zornes cites our decision in *State v. Lubenow* to argue that evidence is not admissible merely because it "could have" caused a victim's injuries. 310 N.W.2d 52, 56 (Minn. 1981). Zornes concludes by arguing that, given the lack of direct evidence linking him to

the crime scene, the admission of the items described above was highly prejudicial to him. The State responds by distinguishing the present case from *Lubenow* by noting that *Lubenow* was a sufficiency-of-the-evidence decision and therefore did not alter our analysis in *Kotka* and *Olek*. The State further argues that Zornes has not carried his burden of showing that the admission of the items prejudiced him by "substantially influencing the jury verdict."

In *Lubenow*, we articulated a somewhat stricter standard for admitting this type of evidence. 310 N.W.2d 52. The defendant in that case had been found with hunting arrows in his vehicle. *Id.* at 56. At trial, a doctor testified that the victim's injuries "could" have been made by the arrows,[3] but conceded that "any number of other instruments could also have made the injuries." *Id.* We stated in *Lubenow* that if there is only a mere possibility that evidence was connected to a crime, with no forensic or other connection, the evidence is not relevant. *Id.* We then held that the arrows in *Lubenow* were not relevant and should have been excluded. *Id.* We also excluded the victim's nonverbal deathbed responses, found that the evidence at trial was consistent with the defendant's innocence, found prejudicial errors by the district court and the State, and ultimately concluded that there was insufficient evidence to sustain the conviction. *Id.* at 56-58.

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[3] The injury in *Lubenow* was distinctive: the victim had been pierced by a "long, narrow, and very sharp" object that had entered through her vagina, run through several organs, and into her right lung. *Id.* at 53.

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One year after deciding *Lubenow*, we affirmed the admission into evidence of a bullet because it was found on the defendant and "could have produced" the flashes that the victim had seen coming from a gun, and was thus sufficiently connected to the crime. *State v. Gayles*, 327 N.W.2d 1, 2 (Minn. 1982). More recently, in *State v. Taylor*, we held that the fact that the victim's blood was on a die stamp, the purported murder weapon, *tended* to show that the die stamp was the murder weapon. 650 N.W.2d 190, 205 (Minn. 2002). Further, we held that the die stamp being the murder weapon was consistent with the medical examiner's testimony that the murder weapon was a heavy, man-made object, which was sufficient to connect the die stamp to the murder. *Id.* The holding in *Taylor* mirrors a pre-*Lubenow* holding in which we allowed a knife into evidence because the knife "felt like the object" that the victim had been forced to touch. *State v. Coy*, 294 Minn. 281, 287, 200 N.W.2d 40, 44 (1972).

Ruling from the bench in this case, the district court held that "in light of the unique claims of the parties and the unique facts of this case," the contested items would be admitted into evidence. The court stated that *Lubenow* did not need to be read literally based on the line of cases decided after it. The court found that the items would not be overly prejudicial because none of them were "originally designed and intended as a weapon," and that in this case the State should be able to present its evidence and allow the jury to weigh it because "[e]ven though the relevance is not high, it is there."

As already stated, absent an abuse of discretion we will not overturn the district court's evidentiary rulings. In this case, the first factor in considering the relevancy of the physical evidence—the connection between the defendant, Zornes, and the disputed

items—is not contested. Zornes was found with the disputed items either on or near his person, in a remote location that only he had access to. Thus, our analysis of this issue turns on the second factor, whether the items were sufficiently connected to the crime scene. The medical examiner who examined the victims' bodies used overlays of the shape of different instruments and the wounds on the victims and determined that a hammer was the most likely blunt-force weapon used to kill Londo and Cadotte and that a single-sided knife was used on both victims.

Here, the connection between the items collected from Zornes and the crime is at least as strong as the flash that was witnessed in *Gayles*, in which we noted that the bullet allowed into evidence "could have" been the cause. 327 N.W.2d at 2. We have also previously held that, if a defendant possesses the same type of weapon that was used in a crime, then that weapon can be admitted into evidence. *Daniels*, 361 N.W.2d at 827. While a strict reading of *Lubenow* alone could lead to the conclusion that the disputed items should have been suppressed, as the district court and the State both articulate, *Lubenow* was a special case because it also involved serious doubts by our court about the overall sufficiency of the evidence. 310 N.W.2d at 57.

Significant evidence in the case before us connects Zornes to the scene of the crime and to the victims. While the utility knife, scissors, and screwdriver were not explicitly tied to the crime scene or the murders, they were directly tied to Zornes and were the same type of weapon use in the crime. The utility knife, scissors, and screwdriver were also not mentioned by the State during the case and thus their admission was not sufficiently prejudicial to outweigh their probative value. The items

were mentioned once by the defense, during opening argument. Therefore, we hold that the district court did not abuse its discretion when it admitted the disputed items.

IV.

The fourth and final issue that Zornes raises is his assertion that the district court abused its discretion when it ruled that the State could impeach him with three prior felony convictions if he chose to testify at trial. More specifically, Zornes argues that the probative value of his prior felonies was outweighed by their prejudicial effect, and admission of the convictions prevented him from testifying at his own trial out of fear of being impeached with the convictions. Zornes's argument incorporates the factors we articulated in *State v. Jones*, and he asserts that, because he wished to assert an alibi defense, the importance of his testimony outweighed the other factors from *Jones*. *See* 271 N.W.2d 534, 538 (Minn. 1978). The State counters by conducting its own review of the *Jones* factors and asserting that the appropriate weighing of those factors means that Zornes's prior felony convictions were admissible.

We have held that we will not reverse a district court's ruling on the impeachment of a defendant with his prior conviction absent an abuse of discretion. *State v. Williams*, 771 N.W.2d 514, 518-20 (Minn. 2009). Our rules of evidence set forth two requirements for the admission of prior convictions as impeachment evidence. Minn. R. Evid. 609(a). First, the prior conviction will be admitted only if

> the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment.

Id. Second, "[e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction." Minn. R. Evid. 609(b). We apply this same standard to defendants who wish to testify in their own defense. *See Williams*, 771 N.W.2d at 517-18.

As the parties discuss, in *Jones*, we laid out five factors relevant to determining if a prior conviction is more probative than prejudicial: (1) the impeachment value of the prior crime; (2) the date of conviction and the defendant's subsequent history; (3) the similarity of the past crime with the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. 271 N.W.2d at 537-38; *see also Williams*, 771 N.W.2d at 518-20 (applying *Jones* factors).

In the present case, the State sought to impeach Zornes with three prior felony convictions and Zornes moved to have them excluded. The district court denied Zornes's motion and ruled that, if Zornes were to testify, the State could impeach him with the felony convictions. Zornes subsequently elected not to testify. Zornes's three prior felony convictions were:

- A January 7, 1997 conviction of felony introducing contraband into a state prison. Zornes committed the offense on December 7, 1995, but because Zornes was already incarcerated his sentence was presumptively consecutive and he did not finish serving the sentence for this conviction until June 11, 2000.
- A June 29, 2001 conviction for felony possession of stolen explosives, for which Zornes received a sentence of 77 months.
- An April 29, 2008 conviction of felony driving under the influence of alcohol.

All three of Zornes's prior convictions fall within the admissibility standard under Rule 609(a). Moreover, because of the consecutive nature of Zornes's sentence for the 1997 conviction, 10 years had not elapsed between his release from confinement for that conviction and the perpetration of the crimes he was charged with in this case. Therefore, the *Jones* balancing test factors apply to all three convictions.

Impeachment value of the prior crimes. We have held that "*any* felony conviction is probative of a witness's credibility" because it allows the fact-finder to see the whole person and his "general lack of respect for the law." *State v. Hill*, 801 N.W.2d 646, 651-52 (Minn. 2011). But crimes that have some bearing on dishonesty have more impeachment value than other crimes. *See State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980). While Zornes's prior felonies were not crimes of dishonesty, they were still felonies and thus this factor weighs in favor of their admission.

The date of conviction and defendant's subsequent history. We have recognized that a history of lawfulness since a conviction can limit a conviction's probative value; but, if a witness is convicted again or sent back to prison, then the witness's "history of lawlessness" enhances an otherwise "stale" conviction's probative value. *See State v. Ihnot*, 575 N.W.2d 581, 586 (Minn. 1998). Zornes spent most of his time following his first felony conviction in prison. While Zornes's oldest felony conviction occurred 9 years and 8 months before the date of the offenses he was charged with in this case, he spent most of that time in prison. This factor weighs strongly in favor of the probative value of the convictions and thus in favor of their admission.

The similarity of past crime with the charged crime. We have held that if a prior conviction is similar to the crime a defendant is charged with, then the prejudicial effect of admitting the prior conviction increases. *Bettin*, 295 N.W.2d at 546. There is little similarity between Zornes's past crimes and the crimes he was charged with in this case. Therefore, the prejudicial concern lessens compared to the probative value and this factor weighs in favor of the admission of the prior convictions.

Importance of defendant's testimony. A defendant has a constitutional right to present his version of events to a jury. *State v. Richardson*, 670 N.W.2d 267, 288 (Minn. 2003). And we have held that a district court may exclude a defendant's prior convictions if their admission for impeachment purposes might cause the defendant not to testify *and* it is more important in the case to have the jury hear the defendant's version of the case than to allow him to be impeached. *Bettin*, 295 N.W.2d at 546. Zornes claims that his testimony would have been highly important in establishing his alibi defense. Zornes alleged that he was with E.M. on the morning of the murders. But, E.M. testified that she was not with Zornes that morning. Therefore, we conclude that Zornes's E.M.-alibi testimony would have had, at best, mixed persuasive value.

Centrality of the credibility issue. We have held that when a defendant's credibility is a central issue, "a greater case can be made for admitting the impeachment evidence [of the prior convictions], because the need for the evidence is greater." *Id.* The district court stated that Zornes's credibility "will be central to the case." There are no eyewitnesses to the crime in this case and no direct physical evidence. Therefore, the

credibility of the various witnesses was central and this factor weighs strongly in favor of admitting the prior convictions.

After applying and weighing the *Jones* factors in this case, we hold that the district court did not abuse its discretion when it ruled that the State could impeach Zornes with three prior felony convictions if Zornes chose to testify at trial.

Affirmed.

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Appendix E

Excerpt of Transcript
Juror Voir Dire
(slip op.)

A Sure.

Q All right. Now if you are selected on this jury you would undoubtedly be one of the more educated individuals. Would you be careful to allow everybody else to express their opinions fully and freely?

A I believe so. I think teaching in a classroom environment teaches you that ability.

Q To listen?

A To listen to other people regardless of opinion.

Q All right. And you understand that a good juror is not only a good speaker of his own mind, but also a good listener.

A Yes.

THE COURT: All right. That's all the questions I have, Mr. Miller. I'll turn it over to the attorneys, starting with Mr. Parise.

MR. PARISE: Thank you, Judge. Did you use the list for --

THE COURT: I did ask him about Exhibit A.

MR. PARISE: On another unrelated matter --

THE COURT: Oh, you mean the

questionnaire?

MR. PARISE: No. No. I think counsel want to approach for an issue that is not related to Mr. Miller if we could.

THE COURT: All right. Just hold on for a minute, Mr. Miller.

(WHEREUPON, a discussion was held off the record at the bench.)

THE COURT: So the record will show that we are -- it's 9:18. We are still in the process of voir dire of Mr. Miller, but counsel have brought up an issue and -- we have a potential witness, Ms. McPherson, would you come forward, please. You'll need to go to a microphone. All right. Your name is Elizabeth McPherson?

MS. MCPHERSON: Yes.

THE COURT: Yeah. You were in court yesterday; correct?

MS. MCPHERSON: Yep.

THE COURT: And you understand that you are definitely going to be a witness in this case; is that correct?

MS. MCPHERSON: Yes.

THE COURT: Now under our court rules witnesses are to be sequestered during the trial

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process. In this case, I have determined that voir dire selection is part of the trial process so I cannot allow any potential witness to be present during a trial process prior to the time that they testify in court so I have to order you out of you the courtroom?

MS. MCPHERSON: I asked these guys the other day if I could participate in this and --

THE COURT: I understand that. I understand that. And that's an intricate and complex legal issue that, frankly, we haven't researched before, but it's my judgment that the safest thing to do is to order all witnesses sequestered throughout the voir dire process and the trial and so that's what my order will be. So you will have to leave the courtroom.

MS. MCPHERSON: All right.

THE COURT: All right. Thank you. Then please proceed, Mr. Parise.

MR. PARISE: Thank you.

BY MR. PARISE EXAMINATION

Q Good morning, Mr. Miller.

A Good morning.

Q Mr. Miller, the Judge talked to you a little bit about whether your job would create any

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Appendix F

Letter
Tracy Zornes Letter to State Appellate Attorney

To: Steven P. Russett 1-14-1

fr: Tracy Zornes

Dear Mr. Russett,

I've been over, and over these issues; but I do now that I really have anything constructive to add. Although there are a couple of points that bother me.

Elizabeth Mcpherson never attended voire dire on the 8th. Court was done before she was hooked up with an ankle bracelet and released from jail. It just seemed important in light of the fact that the state says she was excluded on a motion of the defense.

Heidi Davis (Prosecuter) pointed her out to Mr. Parris and made motions - gestures, which was why the bench conference was held. We requested her presence, not exclusion; however the record may appear.

An empty courtroom could hardly be considered Trial Strategy or even within the perveue of representation.

* with the removal of Mcpherson and Stivers, the courtroom was effectively cleared of all spectators - twice.

* the witness list contains 20+ immediate family members, sisters, nieces - 1st cousins - neices - nephews (only my sister Lisa Zornes and nephew Shannon Wadena were on his numerous friends

* Voire Dire compromised a significant portion of the trial. 10 days = 56%

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