STATE OF MINNESOTA
COUNTY OF WASHINGTON

DISTRICT COURT
TENTH JUDICAL DISTRICT

Stephen Carl Allwine,
Appellant,

v.

STATE OF MINNESOTA,
Respondent.

MEMORANDUM OF LAW IN SUPPORT OF APPEAL OF AFFIRMATION OF MALTREATMENT DETERMINATION

DISTRICT COURT CASE #: 82-CV-22-4952

TO: Washington County Court Administrator, Washington County Courthouse, 14949 – 62nd Street North, P.O. Box 3802, Stillwater, MN 55082

Washington County Attorney, 15015 62nd Street N., Stillwater, MN 55082

Minnesota Department of Human Services, Appeals Division, P.O. Box 64941, St. Paul, MN 55164-0941

Table of Contents

Table of Authorities

US CONSTITUTION

US SUPREME COURT CASES

8TH CIRCUIT CASES

MN SUPREME COURT CASES

OTHER MN CASES

FOREIGN CASES

STATUTES

RULES

OTHER AUTHORITIES

ARGUMENT

Introduction

Mr. Allwine's parental rights were terminated pursuant to Minn. Stat. §260C.301, Subd. 1

"This is a maltreatment finding of egregious harm which is defined in Minn. Stat. §260C.007 Subd. 14, stating: 'The infliction of bodily harm to a child or neglect of a child which demonstrates a grossly inadequate ability to provide minimally adequate parental care.'"

Maltreatment is an act of physical abuse. "Physical abuse" is defined by Minn. Stat. §626.556, subdivision 2(k) as, "any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child other that by accidental means ...". "Accidental" is defined by Minn. Stat. §626.556, subd. 2(a), "a sudden, not reasonably foreseeable, and unexpected occurrence or event which: (1) is not likely to occur and could not have been prevented by exercise of due care". The abuse is alleged based on the assumption that Mr. Allwine knew his wife was dead; however, the evidence provided in the Appellant's motion shows that the preponderance of the evidence points to Mrs. Allwine dying after Appellant left the house.

The Preponderance of Evidence Shows the Appellant is Not Guilty

Cooter & Gell v. Hartmax Corp.,496 U.S. 384, 405 holds that a district court abuses its discretion if the ruling is based "on a clearly erroneous assessment of the evidence." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) held that "[a] finding is 'clearly erroneous' when although there's evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." In this case, the Human Services Judge claims on page 6

of his decision "The Agency, as the party that determined maltreatment, bears the burden to persuade the Human Services Judge that there is a preponderance of the evidence to conclude that Appellant committed an act that constitutes maltreatment ... The Agency has met its burden here." It's clear that the Human Services Judge didn't review all the testimony and evidence prior to making his determination, because the evidence viewed, as a whole, especially regarding the time of death points to the defendant being innocent, and someone else killing Amy between 5:30-7:00PM.

"It's critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (In re Winship, 397 U.S. 358, 364 (1970))

In the case before the District Court Judge, the State presented a purely circumstantial case that Appellant shot and killed Amy Allwine on November 13, 2016. While the law technically doesn't prefer one kind of evidence over another, for the last 150 years many courts have noted potential issues with cases based solely on circumstantial evidence (Commonwealth v. Webster, 59 Mass 295, 312 (1850)), because they may cause juries to "leap logical gaps in the proof offered and draw unwarranted conclusions based on probabilities of low degree." (State v. Tscheu, 758 N.W.2d 849, 870 (Minn. 2008)) For this reason "The Kaster[1] court, ... accepted the State's evidence but made an independent evaluation of the inferences derived from the circumstantial evidence, and whether they established guilt beyond a reasonable doubt." (Tscheu at 869)

The Human Services Judge should have based his opinion on all the currently available evidence (including exhibits submitted with the Appellant's brief); however, even an unbiased view of just the State's evidence during trial also shows that the appellant is not guilty by a preponderance of the

[1] State v. Kaster, 300 N.W. 897 (1941)

evidence. The State's evidence will be referenced below, and other evidence and testimony will only be brought forward to show the rationality of inferences and not to independently offer proof.

It's well-established law that "if any one or more of the circumstances found proved are inconsistent with guilt, or consistent with innocence, then reasonable doubt as to guilt arises." (State v. Al-Naseer, 788 N.W.2d 469, 474 (2010)) "Each fact which is necessary for the conclusion must be distinctly and independently proved by complete evidence." (Winship at 364)

The State claims the following circumstances support their conclusion that the Appellant and no one else, shot and killed Amy Allwine on November 13, 2016. If a preponderance of the evidence shows these circumstances to be in doubt, then the conclusion fails and the Judge should've reversed the maltreatment decision:

1) Appellant drugged Amy with Scopolamine;
2) The time of death was between 1:30PM and 3:30PM;
3) GSR on the Appellant's hand indicate that he fired the gun;
4) The Appellant moved Amy to her final resting location;
5) The Appellant cleaned up the scene;
6) The Appellant's MacBook had a backup from the Apple iCloud with a deleted note containing Besa Mafia's Bitcoin number;
7) The Appellant used TOR Browser to access the DarkWeb, purchase drugs, and communicate with Besa Mafia;
8) The Appellant sent anonymous emails to Amy;
9) The Appellant killed his wife to avoid a divorce; and
10) There's no one else who would want to harm Amy.

There's no evidence that the Appellant drugged Amy

NMS Labs determined that there was a significant amount of Scopolamine in Amy's blood and gastric contents (13T.33-36)[2]. However, Dr. Mills testified that we don't know how or how often she ingested the drug (16T.49). There was no scopolamine found in the house (16T.16). If the drug was administered

[2] Trial transcripts will be referenced by the volume number (in Arabic numerals) followed by the page number (i.e. 17T.8 = Trial transcript, Vol. 17, page 8)

by Appellant then logic would dictate that he had to purchase, store, and administer the drug, and yet there was no evidence of any of this provided by the State.

Dr. Mills made two potentially flawed assumptions in her opinions: 1) Even though it was a drug with which she wasn't familiar (16T.48) she suggests that it took an hour to absorb, and 2) Even though Trial Exhibit 48 shows partially full beverage containers, she claims that Amy had nothing to eat or drink after 12:15PM. However, even with those assumptions her **only** conclusion is that Amy didn't die prior to 1:30PM (16T.44-45). This should've been the only inference drawn by the judge.

Appellate expert Dr. Arden confirms that these assumptions are "not supportable or reliable" (Motion1.Exhibit B)[3]

The actual time of death was after Appellant left the house

The State makes their claim of a 3:15PM time of death based, not on evidence, but on the answer to a hypothetical question (16T.48), but it doesn't match with the actual evidence or testimony. Dr. Mills' actual testimony on the time of death works backwards from the examination of her investigator (Mr. Jonathan Banks). She testified that Amy died 4-6 hours prior to his examination (16T.45). Dr. Mills was unsure when he arrived onsite (16T.47), so that has to be determined from other testimony. Special Agent Michelle Frascone called Mr. Banks. She was called to the scene at 9:30PM (16T.161), and didn't arrive until 10:14PM (16T.162). She talked to a couple officers (16T.162), did a complete walk-through of a 3,000 sq. ft. house (16T.165-168), and **then** she called Mr. Banks. All of this had to take some finite period of time, 30 minutes is a reasonable estimate, which puts the call to Mr. Banks about 10:45PM. He was 30 minutes away from the site (16T.57). He needed time to take the call and leave the Medical Examiner's office, maybe 5 minutes. That puts him on site at about 11:20PM. Ms. Frascone talked to him

[3] Motion1 = Motion for Reversal of Maltreatment Determination

onsite (16T.170-171) and he had to unload his equipment. If this took 10 minutes that has him examining Amy's body at 11:30PM. These are all reasonable assumptions, because the Crime Scene Log shows him entering the scene at 11:31PM (Motion1, Exhibit A, pg. 2). Therefore, based on Dr. Mills uncontroverted testimony Amy died at 5:30PM at the earliest based on those valid assumptions. (O'Leary v. Wangensteen, 221 N.W.2d 430, 431 – the court **cannot** disregard the positive testimony of an unimpeached witness) The previously mentioned 3:15PM answer to the hypothetical question, must be ignored in favor of the statement of 4-6 hours prior to Mr. Banks' examination, because it's contrary to the facts of post-mortem physiology (Moeller v. St. Paul City Ry, 16 N.W. 2d 289 – the testimony of a witness isn't to be credited if it's contrary to the well-established facts of science).

Further supporting a time of death after 5:30PM, the first responders arrived on the scene about 7:00PM (11T.62-67) and indicated Amy was **warm** and **soft**, and that rigor mortis **had not** set in (11T.62-67). If Amy died at 3:15PM or earlier her temperature should've been about 91°F, which would've felt cool to the first responder. If she died about 6:00PM her temperature should've been about 97°F, which would be warm.[4] These scientific physiological facts match Dr. Mills testimony that if Amy died within an hour of 7:00PM, then she would be warm to the touch, which is what first responders found. That places the time of death close to 6:00PM.

Dr. Mills testified that rigor wouldn't be "inconsistent with a **short time frame** of what they found at the (sic) 1900 [7:00PM]." This places time of death possibly around 6PM. This timeframe also matches Mr. Heley's testimonial statement (given the day after Amy's death) of two cars speeding out of the neighborhood about 6:00PM.

Since no one argues that Appellant left about 5:25PM, based on the Xfinity security alert on the garage door (Trial Exhibit 113), and had an alibi (Trial exhibit 19, 12T.126-128, 14T.73-74). The **only** logical

[4] "Forensic Science: the basics" (3rd Ed. 2016) Jay A. Siegel, Kathy Mirakovits

hypothesis is that Appellant wasn't at home when she died (Motion1, Ex. M). The other claims by the State are addressed hereafter, but they either directly contradict the State's conclusion or are inconclusive, but none of them prove guilt by a preponderance of the evidence.

Appellant only had a single particle of gunshot residue (GSR) on one hand.

Amy (the victim) had over 50 particles of GSR on both hands (16T.53-54) showing the pervasive nature of GSR. Yet Appellant only had 1 particle on his right hand and nothing reported on his clothing (13T.20-21). This single particle could reasonably come from touching the victim (13T.13-14, 18, 20) and doesn't mean Appellant fired the weapon (13T.22-23). The 911 operator testified that she instructed Appellant to touch Amy and he confirmed that he did (11T.45-46). Since Appellant is right-handed it's a reasonable hypothesis that Appellant touch Amy with his right hand and picked up a single GSR particle from her skin or clothing.

Additionally, there was no blood spatter on Appellant's clothes (14T.31, 57), which you would expect to see (16T.41-42); and the gun had DNA from 3 or more contributors (14T.46-47). Since the Allwine's son (JLA) was eliminated, that leaves only two people in the house to contribute to the DNA profile, so it's a reasonable inference that the shooter was likely the third contributor.

Appellant didn't move Amy's body

Amy was lifted and carried to her final resting place (11T.200, 12T.27, 16T.11-12). Dr. Mills testified that Amy was 239lbs at autopsy (16T.56) and Appellant was 166lbs when he was arrested. It's unlikely that he would be able to lift and carry her. It's also unlikely that Appellant could move her without getting any blood on his clothes, since there was at least one blood smear from her movement (16T.34) The Besa Mafia emails reference a two-person team (Trial Exhibit 85) and that would facilitate her being moved and match the cars racing out of the neighborhood.

The Appellant didn't clean up the scene

There was an area in the hallway that was cleaned up (11T.206). However, the only item in the whole house that had any indication of blood was a single light blue washcloth in the dog kennel area (Trial Exhibit 79). The washcloth reacted to phenolthanlyne (12T.4), but if the substance was blood there wasn't even enough to be typed or DNA tested. The washcloth itself was DNA tested, but the DNA was so weak that over 40% of the general population wouldn't be excluded. The State provides no explanation for how a large area of blood can be wiped up and yet the washcloth had no visible blood stains, the victim's DNA isn't a primary DNA contributor, and yet the washcloth is still dingy (indicating that it wasn't washed). This washcloth couldn't logically have been used to clean up the area. No additional items were found with any blood (14T.31, 57) and the sinks and washing machine didn't have any luminol reactions (12T.25). The State lied to the jury saying that footprints led to the sink (11T.24), but the judge should've been able to see through the lie and notice that this statement wasn't true (Trial Exhibit 78). The footprints were in the middle of the room, heading for the exit (14T.14-15).

The State also claimed the luminol footprints showed guilt, but they are more consistent with a hypothesis of innocence. The footprints were invisible to the naked eye and only showed with luminol. The luminol wasn't sprayed until after Appellant gave his statement (on November 14, 2016) to the police (Trial Exhibit 107), and the footprints match exactly the locations that Appellant said he walked after returning home, thus validating his statement. Appellant walked through the blood residue in the hall 4 times on his 2 trips to and from Amy's body, so that explains how he tracked it through the house. Additionally, there are no footprints in the master bedroom (16T.16), so they prove he didn't move the body; they don't go near the mudroom sink, so he didn't do the cleanup; and the State claims he was walking around for hours, yet the paucity of footprints is more consistent with Appellant walking around for 10 minutes while on the 911 call.

The evidence clearly shows someone else cleaned the area and left with whatever was used.

The Bitcoin Account referenced by the State isn't associated with the Appellant

The State focused on Bitcoin account number 1FUz1iECnhNkw8MUxhZWombbw1TCFVihb (hereafter "the Bitcoin address"). Mr. Lanterman (the State's computer expert) describes a bitcoin account number like a routing and account number for a checking account. (15T.16) It's simply a unique number that identifies a user's account.

We know that Appellant's Bitcoin wallet existed on his Samsung Galaxy phone (12T.149-50), and Mr. Lanterman said it wasn't of interest (15T.63), indicating that it didn't contain the "Bitcoin Address", and didn't sent funds to "the Bitcoin Address", or it would've been of interest.

Mr. Lanterman tries to claim that Appellant created a note containing the "Bitcoin Address" on his phone; however, that claim doesn't match the evidence. Mr. Lanterman testified that he can retrieve deleted items from phones (15T.18) and yet there was no trace of the file on Appellant's phone; therefore, the file likely never existed on Appellant's phone. The file originated in the Internet (Apple iCloud) and was automatically downloaded to the Appellant's MacBook (15T.65), nearly 4 ½ months after it was supposedly created (15T.49,65), but yet didn't exist in previous backups. Since the phone backs up when it's connected to the computer (15T.47-48), it's unlikely that it originated 4 ½ months previously on Appellant's phone. Additionally, Mr. Lanterman testified that the backup didn't trace specifically to the Appellant's phone (15T.65), that it could've been created by someone else (15T.65-66), and that the date/time of the file could've been modified to appear 4 ½ months older than it is. (15T.64). This is a more likely hypothesis because there was no trace of the information on the phone, and this timeline matches the anonymous emails.

Appellant didn't use TOR browser to communicate with Besa Mafia and purchase drugs.

Mr. Lanterman testified that the TOR browser is **required** to access the DarkWeb (15T.13), and he says that it maintains a browser history like Internet Explorer (15T.14). Mr. Lanterman also testified that nothing was found on Appellant's devices identifying dogdaygod, nothing related to the dogdaygod email address, and no TOR browser history (15T.63). Mr. Lanterman's own computer forensic report says that Appellant didn't install TOR browser until November of 2016 (Trial Exhibit 139, pg. 10), so Appellant couldn't have accessed the DarkWeb in early 2016 (February – May). If Appellant didn't access the DarkWeb then someone else did.

Appellant never sent anonymous emails to Amy

Mr. Lanterman points to a GuerrillaMail email sent by the Appellant to Appellant's Gmail account on July 15, 2016, and he uses this to claim that the Appellant sent anonymous emails on 2 separate occasions to Amy later in July. There are three problems with this inference: 1) Appellant never hid that he sent a GuerrillaMail email. It came up in his BCA interview; 2) Mr. Lanterman was able to see the complete history of the GuerrillaMail email (click-by-click and screen-by-screen). This shows that Appellant didn't delete his history; 3) Even though the history was clearly not deleted, there's no evidence of the later emails being sent by Appellant. The evidence contradicts Mr. Lanterman's opinion, and as such the judge should've believed the physical evidence (Moeller at 289).

Appellant didn't kill Amy to avoid a divorce

Motive isn't an element of this crime, and the MN Supreme Court has said, "we reject the dissent's conclusion that motive coupled with other evidence creates a sufficient basis for conviction." (Bernhardt v. State, 684 N.W.2d 465, 479). However, the State still desperately wanted to provide a motive in order to sway the jury to convict the Appellant. Rather than following the evidence they instead chose to invent a motive to mislead the court.

The police interviewed Amy's family (father, mother, sister, and brother), her friends (both in and out of town), coworkers, and neighbors. Anyone who spoke of the Allwine's relationship spoke positively about it. Sharron Middendorf (one of Amy's closest friends) testified that they had a happy marriage (14T.18). Amy herself spoke to two different FBI agents on multiple occasions in-person, via email, and on the phone (12T.91-93) and she always spoke positively about their relationship, and never expressed concern with the Appellant or any possible divorce. The Allwine's son gave the relationship "a million thumbs up" in his interview. There was no testimony or evidence of a divorce or any marital discord, so the State's claim should've been rejected by the judge.

The State's claim that "no one else would want to harm Amy" isn't true

This is a false statement by the State, because Amy (herself) gave the FBI a shortlist of people and told the FBI that she believed Kristin Elmquist was involved (12T.99-100), and considerable circumstantial evidence points to Ms. Elmquist. Amy never indicated any issues or fears of Appellant. Additionally, the State provided no evidence that the Appellant wanted to harm Amy.

The judge's affirmation of the maltreatment determination was an abuse of discretion

The United States Supreme Court in Mullaney v. Wilbur, 421 U.S. 684 held "that a state **must** prove every element of an offense. In a circumstantial evidence case, such as this, the "evidence **must** form a complete chain which ... [excludes] **any** reasonable inference other than that of guilt." (State v. Wahlberg, 296 N.W.2d 408, 411) The "complete chain" is a series of connected facts. Webster holds, "When a fact has occurred, with a series of circumstances preceding, accompanying, and following it, we know that these **must** all have once been consistent with each other; otherwise the fact wouldn't be possible. Therefore, if **any one** fact necessary to the conclusion is wholly inconsistent with the hypothesis of guilt of the accused, it breaks the chain of circumstantial evidence upon which the

inference depends; and however plausible or apparently conclusive the other circumstances may be, **the charge must fail**." (Id at 318-19)

The elements that break the chain of evidence for the State's theory are:

1) There was no evidence
    a. of impending divorce
    b. that Appellant sent anonymous emails to Amy
    c. on the Appellant's phone of the Besa Mafia Bitcoin Address
    d. connecting the Appellant's Bitcoin wallet with the Bitcoin Address
    e. of TOR Browser being installed on Appellants computer until 6 months after the Besa Mafia communication
2) The single particle of GSR and no blood on Appellant (or his clothes) isn't consistent with him being the shooter
3) A third party's DNA was on the gun
4) It's unlikely that Appellant could've lifted and carried Amy
5) There are no footprints around her body
6) The washcloth clearly wasn't used to wipe up Amy's blood
7) The Medical Examiner investigator arrived at 11:31PM
8) The time of death was 4-6 hours prior to the investigator's examination
9) The actual time of death was no earlier than 5:31PM
10) Body temperature and Rigor mortis matched a time of death of around 6:00PM
11) The neighbor saw cars fleeing around 6:00PM
12) Appellant left the scene prior to 5:30PM

Based on these facts, it's clear that Appellant didn't kill his wife. If the judge chose to ignore these facts then he abused his discretion. (Cooter&Gell at 405)

Based on the facts contained herein, on the laws of the United States and the State of Minnesota, and on case law, it's clear that the judge abused his discretion by denying the Motion to reverse the maltreatment determination.

The Trial was Rendered Unfair by Ineffective Assistance of Trial Counsel

The Due Process Clause of the Fourteenth Amendment guarantees the right to effective assistance of counsel. This protection also applies on a first appeal as of right in state court. (Evitts v. Lucey, 469 U.S.

387, 396-99 (1985)) The Sixth Amendment right to counsel is right to "effective assistance of competent counsel." (Padilla v. KY., 559 U.S. 356, 364 (2010))

The following documents contradicted the State's theory of the case and corroborated the appellant's innocence, as such trial counsel should have presented this type of evidence to ensure a full and fair hearing.

- Crime Scene Log
- Affidavit from Mr. John Carney (Mr. DeVore's computer expert)
- Affidavit from Mr. Jonathan Arden (Medical expert, hired by appellate counsel)

The central issue with the case was Amy Allwine's time of death, because there was a portion of the day when Appellant was with Amy, and a documented portion of time for his alibi. For Mr. DeVore (trial counsel) to successfully argue an alibi defense he has to show that Amy was likely killed during the alibi window, **and** that it is likely that she wasn't killed while appellant was with Amy.

Trial Counsel was Ineffective for Failing to Present the Crime Scene Log

The Crime Scene Log is pivotal in the Appellant's defense. Dr. Kelly Mills (the State's Medical Examiner) set the time of death at 4-6 hours prior to his arrival (16T.45). The log shows that he arrived at "2331" (11:31PM) (Motion1, Ex. A, pg. 2). This puts the time of death window **completely within** the Appellant's alibi window.

In an alibi defense, the key is to show that the crime happened during the alibi window. (Miller v. Anderson, 255 F.3d 455, 459 (7th Cir. 2001)) Had Mr. DeVore presented this piece of evidence it likely would've caused reasonable doubt. (See "Actual time of death after Appellant left the house", pg. 4)

It cannot be strategic to avoid a document that might set your client free. Mr. DeVore was ineffective if it was provided to him, but he failed to find it. (Rompilla v. Beard, 545 U.S. 374, 390 (2005); Sinsterra v. United States, 600 F.3d 900 (8th Cir. 2010))

This evidence is clearly exculpatory in nature, so if Mr. DeVore did not have it then it would have been due to suppression by the State and would have been a clear Brady violation, which is also a denial of a full and fair hearing.

Trial Counsel was Ineffective for Failing to Present Experts for Appellant's Defense

In determining if experts were needed, we must look at what counsel knew prior to trial (State v. Malak, 2015 Minn. App. Unpub. LEXIS 355 at 13).

Mr. DeVore isn't a medical expert. "Reasonable performance of counsel includes an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories." (Henderson v. Sargent, 926 F.2d 706, 711 (8th Cir. 1991). If Mr. DeVore doesn't hire a medical expert, he cannot develop evidence or a strategy to support a theory that Amy died during the alibi window (his stated strategy) (Miller v. Anderson, 255 F.3d 455, 459 (7th Cir. 2001) – Miller's defense was that he wasn't at the scene, so his attorney had to establish there wasn't evidence placing him there).

Dr. Arden showed numerous issues with the State's analysis of the evidence and opined that Amy had died during the alibi window. With no medical expert Mr. Devore was forced to get his testimony from an adversarial State witness, and it forced him into a major cross-examination error (see Ineffective cross-examination, pg. 15). With Dr. Arden, DeVore could've shown that a time of death during the alibi window was more likely than a time of death of 3:15PM (Rivas v. Fischer, 780 F.3d 529 (2d Cir. 2014) – defense counsel ineffective for failing to bring forward key evidence and witnesses that placed the time of death outside the strong alibi).

Mr. DeVore hired John Carney for his computer expertise and claimed in his affidavit that "Mr. Carney would have to admit that he couldn't dispute Mr. Lanterman's finding." (KDA[5], pg. 3, #12) If this were true then it may be reasonable trial strategy not to utilize him; however, Mr. Carney disputes that claim. (Motion1, Ex. B, pg. 1, #3) Mr. Carney goes on to point out a number of errors with Mr. Lanterman's claims. (Richard v. Bradshaw, 498 F.3d 344, 362-63 (6th Cir. 2007) – "A lawyer cannot be deemed effective where he hires an expert consultant and then either willfully or negligently keeps himself in the dark about what that expert is doing, and what the basis for the expert's opinion is.")

Mr. Carney also pointed out that the digital evidence itself should be challenged for admissibility (Lorraine v. Markel American Insurance Company, 241 F.R.D. 534 (D. Md. 2017)) (Motion1, Ex. B, pg. 2-3, #6). Counsel's failure to make obvious legal arguments that support their given strategy was unreasonable. (U.S. v. Winstead, 890 F.3d 1082, 1089-90 (D.C. Cir. 2018))

Mr. Carney's affidavit showed, and the trial reflected, that Mr. DeVore was unprepared to cross-examine a witness that both the prosecutor and the county attorney called critical to their case[6].

Proper cross-examination of a defense expert would've shown the jury that TOR Browser wasn't even installed until November, 2016; that the "note" didn't originate on the defendant's phone; the Bitcoin address didn't trace to the defendant's Bitcoin wallet; and defendant likely wasn't "dogdaygod".

Trial Counsel was Ineffective Regarding His Cross-examination of Detective Raymond

The State claimed in their opening statement "the company said that the defendant performed absolutely no work functions for either of the two companies for the duration of November 13th. What else was he doing then?"

---

[5] "KDA" = "Affidavit of Kevin DeVore" – (Dated: May 4, 2020)

[6] Bench & Bar of Minnesota, Vol LXXV, Number 111, March 2018, "Stephen Allwine: When crime tries to cover its digital tracks", pg. 10-11

Trial Counsel understood where they were going to go with the line of questioning because he objected to Detective Raymond being questioned about the Optanix report. While trial counsel refers to the nine questions that Detective Raymond asked the Optanix manager, it's equally clear that trial counsel didn't review or understand the questions and answers between the Optanix manager and Detective Raymond.

Mr. Trivision's actual conclusive response was "Mr. Allwine could've been sitting at his computer diligently waiting for a case to come in." Had trial counsel read the responses, he could've brought to the jury's attention that the State was misconstruing the evidence. (Motion1, Ex. D, pg. 58 of 66)

Trial Counsel was Ineffective Regarding His Cross-examination of Dr. Kelly Mills

Dr. Mills testified that Mr. Banks arrived around 7:00PM. With a time of death of 4-6 hours prior to his arrival this puts Amy's time of death between 1:00-3:00PM, a period that is completely outside the Appellant's alibi window. Trial counsel's stated strategy was an alibi defense, so he needed to correct that testimony on cross-examination.

The Crime Scene Log would've demonstrated she was lying about the 7:00PM arrival time, and trial counsel, with minimal discovery and witness interviews, could've shown the jury, a recent time of death is the only scientific answer. Trial counsel was ineffective for not investigating the medical evidence (Gersten v. Senkowski, 426 F.3d 588, 609-610 (2d Cir. 2005)). United States v. Orr, 636 F.3d 944, 951-52 (8th Cir. 2011) also states that failure to impeach a witness constitutes ineffective assistance when there's a reasonable probability that, absent counsel's failure, jury would have reasonable doubt of defendant's guilt. It's difficult to believe that shifting the time of death from when the Appellant is alone with Amy to a period of time when he wasn't even at the house wouldn't have changed at least one juror's mind.

Trial Counsel was Ineffective for failing to impeach Mr. Lanterman, because of poor discovery

Mr. DeVore attempted to impeach Mr. Lanterman, so we know that it was his trial strategy. If Mr. DeVore had done basic research and read through the Grand Jury transcripts then he would've been able to show that Mr. Lanterman tends to lie and self-aggrandize.

We see elsewhere that Mr. Lanterman lied about how many times he's qualified as an expert, and about appellant having TOR Browser installed in early 2016 (Trial Exhibit 139, pg. 10).

Mr. Lanterman testified that the Apple note came from a backup in the iCloud, that the note was deleted in March of 2016, and that the note was downloaded to Appellant's computer in August of 2016. Apple's documentation states deleted notes are removed from the iCloud after 30 days (Motion1, Ex. O). This would correlate to a fake note being created in July about the time of the anonymous emails to Amy. Showing that the note likely never originated on Appellant's iPhone (which is why Mr. Lanterman saw no trace of it there).

Had Mr. DeVore done some research on computer forensics, he would've found reports like the one supplied in the Postconviction petition (Motion1, Ex. N, pg. 15-16) which would demonstrate for the jury that computer forensics is inherently biased and they "should not be presumed to be objective and credible." With all the other evidence, this would demonstrate that Mr. Lanterman (the State's key witness) is likely unreliable.

If the court feels that all of this wouldn't have impacted Mr. Lanterman's credibility, then he is essentially unimpeachable and it further strengthens the argument that trial counsel should've had his own expert. When "cross-examination alone could weaken the Prosecutor's expert evidence, but not to the point of denying it the essential corroborative value for which the prosecutor was using it ... it was irresponsible of the lawyer not to consult [and listen to] experts." (Miller v. Anderson, 255 F.3d 455, 457, 459 (7th Cir. 2001))

Trial Counsel was Ineffective for Eliciting Damaging Testimony

It was trial counsel's hypothetical question that brought up the 3:15PM or earlier time of death that the State latched onto and judges continue to cite as "fact". Prior to Mr. DeVore bring up this time window in his cross-examination, the only one to mention an earlier time of death was the State during their opening statement. Dr. Mills had actually testified to a 4-6 hour time of death window from when Mr. Banks began his investigation (11:31PM). If trial counsel knew when Mr. Banks was on the scene, then Mr. DeVore could've avoided this entire line of questioning, and he could've presented the facts and the real time of death window to the jury. Trial counsel was ineffective for eliciting damaging testimony from a prosecution witness. (United States v. Villalpando, 259 F.3d 934, 939 (8th Cir. 2001); Andrus v. Texas, 140 S. Ct. 1875 (2020))

Trial Counsel was Ineffective for Not Completing A Full Investigation into Amy's Mental and Physical State

During the trial the State presented two browser queries "duy" (made from Amy's iPhone at 11/13/2016 at 1:49:52PM) and "diy vwhh" (made from Amy's iPhone at 11/13/2016 at 1:50:33PM). They used these two queries alone to tell the jury that Amy was incapacitated by drugs prior to 2:00PM. However, if Mr. Devore had reviewed the evidence, the evidence also shows that she successfully searched "vertigo" in the minute previous to the first query (1:48PM), "eye" in between the two queries, and successfully browsed to the Apple website and navigated to the "MacBook Pro" site 10 minutes after the last query. These are hardly the action of an individual that is incapacitated by drugs.

Additionally, discovery (that could've been found by Mr. DeVore) contained a screenshot of Amy's email (Motion1, Ex. K) indicating that has a read message from 3:29PM (15 minutes after the State claims that she was dead). This shows that she was mentally and physically able to browse to her email website, login (remembering her username and password), and select a message to read.

This information was available as part of discovery and directly supports the trial counsel's stated strategy that the Appellant didn't kill Amy. This evidence would've shown the jury that the State's time of death was incorrect, and that the State's claim that Amy was incapacitated by drugs was incorrect. In an alibi defense, that relies specifically on the time of death, any evidence that speaks to time of death is material. The only explanation for not using the evidence above is that he was unaware of it.

Trial Counsel was Ineffective for Not Completing a Full Discovery Regarding Divorce in the United Church of God ("UCG")

Appellant had mentioned several people to Mr. DeVore who were Elders in UCG and whom he believed had divorces while members of UCG. Trial counsel was ineffective for not requesting divorce decrees for two elders in UCG. (Motion1, Ex. F, G) Both of these men maintained their positions in the church. These documents would've shown the jury direct evidence that the State's motive of divorce wasn't logical.

Trial Counsel was Ineffective for Not Interviewing Witnesses

Henderson v. Sargent, 926 F.2d 706, 711 (8th Cir. 1991) held that, "the decision to interview a potential witness isn't a decision related to trial strategy. Rather it's a decision related to adequate preparation for trial." Sear v. Upton, 130 S. Ct. 3259 (2010) holds that part of trial counsel's investigation must be the interviewing of witnesses. Trial counsel stated in his affidavit that it was an alibi defense (KLA, pg. 3, #13), and the time of death is critical to that defense. Yet in the notes that he sent to Appellate counsel there's no evidence that he interviewed the Medical examiner or her investigator, nor anyone from Optanix. Considering that trial counsel didn't even know the Optanix Manager's name, calling him "Mr. Wade" instead of "Mr. Trivision", it's clear that he wasn't interviewed. Tosh v. Lockhart, 879 F.2d 412 (8th Cir. 1989) held that counsel was ineffective for failing to call an alibi witness. The Optanix supervisor and manager are the alibi witnesses to the Appellant's time from 1-5PM. All engineers are logged into an instant messaging client and team chat group. If Appellant was away from his computer for a significant portion of time, as suggested by the State, the Supervisor would've been notified and would

try to find him via email, text, and/or phone call. Since none of these exist, the jury could've surmised that he was near his computer, contrary to the State's theory of the case (see False Testimony and Confrontation Clause violation, pg. 28)

"Counsel has a duty ... to investigate **all** witnesses who allegedly possessed knowledge concerning [Appellant's] guilt or innocence." (Henderson at 711; Sear at 3264) Counsel's failure was a dereliction of duty.

Trial Counsel Was Ineffective for an Ineffective Closing Argument

Trial counsel's closing argument showed his lack of preparation and attention to detail through the trial. Trial counsel was ineffective for destroying his own trial strategy with his closing argument (Bell v. Cone, 535 U.S. 685, 697 (2002)).

Trial counsel, in support of his trial strategy, brought Dean Cranston in as an eyewitness because he saw Amy over an hour and a half after the State claimed she was dead. Then in his closing argument he discredits his own witness by saying that his testimony is inconsistent with the Medical Examiner (17T.61). However, Mr. Cranston's testimony is only inconsistent with the hypothetical situation elicited by trial counsel in his cross-examination. Had trial counsel paid attention to S.A. Frascone's testimony and timeline, then he would've recognized that Mr. Cranston's testimony is completely consistent with the actual 4-6 hour time of death window given by the medical examiner, and shows the complete consistency between all the testimonies (State and Defense) and the alibi time window. (Yarborough v. Gentry, 540 U.S. 1,6 (2003) – closing argument should sharpen and clarify issues for the trier of fact)

Trial counsel continues to subvert his own trial strategy by misrepresenting the arrival time of S.A. Frascone and the investigator, Mr. Banks. (17T.41, 60) He claims that S.A. Frascone arrived at 8:30PM and that Mr. Banks arrived at 9:00PM (17T.41), instead of 11:31PM, completely undermining his **only** trial strategy of an alibi defense. With the time of death being 4-6 hours prior to Mr. Banks arrival, the

9:00PM arrival time moves the time of death from wholly inside the Appellant's alibi window (5:31-7:00PM) to completely outside the alibi window (3:00PM-5:00PM) and adds support to the State's timeline. (State v. Huisman, 944 N.W.2d 464, 467 – when conceding guilt without the client's consent counsel's performance is deficient and prejudice is presumed)

This inattention to detail is the epitome of ineffective assistance of counsel. Had counsel used accurate times, as laid out previously herein, he would've shown the jury that all the testimony matches a time of death of around 6:00PM and points to Appellant's innocence. With a time of death shown to be inside the alibi window there's a reasonable chance the outcome could've been different. Trial counsel undermining his one and only strategy is so blatant, it was ineffective assistance of appellant counsel not to raise this issue, which by the record alone, could get appellant a new and fair trial.

Had trial counsel not made these significant errors, the jury would have had a completely different view of the case: Amy would have been shown to be alive, cognitively aware, and not concerned for her life up to nearly 5:00PM; the scientific evidence would point to a time of death during the alibi window; the Appellant would not have been able to be dogdaygod implying that someone else was; the Appellant would have shown to have been working during the afternoon when the State claimed that he was killing Amy and cleaning the scene; and the State's motive for the crime would have been eliminated.

The State Committed Egregious Malfeasance Rendering the Trial Unfair

"The Government's interest ... in a criminal prosecution isn't that it shall win a case, but that justice shall be done." (Turner v. United States, 137 S. Ct. 1885, 1893) It's apparent from the breadth of misconduct in this case that the prosecutors in this case ignored their duty to be a "minister of justice". Included here will be violations of withholding material evidence, violations of the Confrontation Clause, unwillingness to correct false evidence, eliciting false evidence from witnesses, misstating evidence, and referring to "facts" that weren't included as part of the evidence.

The State Committed Prosecutorial Misconduct Through Multiple Brady Violations

In Brady v. Maryland, 373 U.S. 83, 87 the Supreme Court held that due process requires the prosecution to disclose evidence favorable to an accused upon his request when such evidence is material to guilt or punishment. Evidence qualifies as material when there's any reasonable likelihood it could've affected the judgement of the jury." (Wearry v. Cain, 577 U.S.385, 392 (2016)) It doesn't matter if there was a request for the information or not, and any questionable material should be resolved in favor of disclosure. (United States v. Agurs, 427 U.S. 97, 107-08)

The disclosure duty also extends beyond the prosecution to include government agents and officers included in the investigation. (Kyles v. Whitley, 514 U.S. 419, 437 (1995))

A structural discovery error occurs when the government withholds material evidence favorable to the defendant. (Brady, at 87) Once unconstitutional suppression error is found then harmless error review is improper. (Kyles at 435)

The State Withheld Appellant's Bitcoin Address in Violation of Brady

The State based its case on dogdaygod being the person who killed or planned Amy's murder. Therefore, any evidence that goes to prove that the Appellant isn't dogdaygod also goes to prove that he didn't participate in Amy's death.

During the State's discovery they analyzed the Appellant's cell phones and found a bitcoin wallet on Appellant's Samsung phone. All Bitcoin transactions are logged on a Bitcoin ledger (much like a bank statement). The State collected the Bitcoin ledgers that were associated with the Besa Mafia emails. If the Bitcoin wallet address from the Appellant's Samsung phone doesn't appear on the Bitcoin ledger for Besa Mafia then it shows that the Appellant didn't send Besa Mafia any funds and therefore isn't dogdaygod. The State never produced this potentially exculpatory evidence.

As part of discovery the State provided trial counsel with emails between dogdaygod and Besa Mafia. Those emails ended with an email dated 04/22/2016, 07:22:48 PM (Trial Exhibit 85); however, there were additional emails that continued until 05/20/2016. Since the emails were originally given to the FBI (a State actor), the Prosecution is considered to be in possession of these documents for Brady purposes. In these emails, which are still being held by the State, the emails specify another Bitcoin address that was used by Besa Mafia and it states that malware was placed on dogdaygod's computer. The State's computer expert testified that there wasn't malware or viruses installed on the Appellant's computer. This would've been used as further evidence that the Appellant isn't dogdaygod.

The jury was already told that there was nothing of value found on 64 of the 66 devices collected by the State (15T.63), that there was no evidence linking Appellant to dogdaygod@hmamail.com (the email used by dogdaygod to communicate with Besa Mafia), that there was nothing on the MacBook identifying dogdaygod (15T.63), that the date and time on the backup file in the Internet could've been manipulated (15T.64), that there was no serial number tracing the backup file in the Internet to the Appellant's iPhone (15T.65), that the backup file could've been created by a third party (15T.65), and that there was no evidence of "tails" on any of the Appellant's devices (15T.66). There's a reasonable probability that adding the additional knowledge that a malware program that was installed on dogdaygod's computer didn't exist on the Appellant's computer, and that the Appellant's Bitcoin wallet address didn't show up on Besa Mafia's Bitcoin ledgers would've provided reasonable doubt that the Appellant isn't dogdaygod.

The State May Have Withheld the Crime Scene Log in Violation of Brady

There is a legal question as to whether or not Mr. DeVore had access to the Crime Scene Log, and that can **only** be answered at an evidentiary hearing with Mr. DeVore, Ms. Groshek, and Mr. Fink questioned under oath. Appellate counsel asked the State multiple times specifically for the Crime Scene Log and

didn't receive it until about April of 2020. This evidence is clearly exculpatory in nature, so suppression of it by the State is a clear Brady violation. This document places the time of death during a window of time when the Appellant wasn't on site, and couldn't have killed Amy and therefore is clearly exculpatory. Had the jury heard a later time of death and that Appellant wasn't home when Amy died, then it creates a reasonable possibility that the outcome would've been different. This makes this document material.

The State Withheld Jonathan Banks' Investigator's Notes in Violation of Brady

Additionally, it came to light that the investigator took notes during his initial crime scene investigation. Dr. Mills used data from those notes to arrive at her 4-6-hour time window. The Appellant has repeatedly requested those notes and has been denied by the State. Based on standard practice, these notes should contain at least the body temperature at the time of the investigation, the state of rigor mortis, and the progression of lividity. These are all key to determining an accurate time of death. The Investigator's notes are a document that directly relates to the time of death, so they are clearly material in a case with an alibi defense.

The State Withheld HemoTrace Test Results in Violation of Brady

The State never mentions specifically what they use to differentiate between dog blood and human blood, they call it a "HemoTrace" test strip. They used this to test the blood in the hallway, so they would've used it to test the washcloth next to the dog kennels. The defense claims that if there was blood on the washcloth it was dog blood, in which case the HemoTrace would come back negative. Defense was never given the results of this test, yet the State claims multiple times that the washcloth was used to clean up Amy's blood, so it's an exculpatory test result that should've been disclosed.

The State Withheld Mr. Lanterman's Record of Expert Testimony in Violation of Brady

Mr. Lanterman is the only one who suggests that Appellant is dogdaygod, so his credibility is material to the case. The United States Supreme Court held in Youngblood v. W. Virginia, 547 U.S. 867, 126 S. Ct. 2188, 2190 (2006) "This Court has held that the Brady duty extends to impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676 (1985)" And this Court has held in State v. Burrell, 697 N.W.2d 579, 601 (Minn. 2005) that "In a criminal trial, a court has a heightened duty to monitor expert testimony." Brady violations occur even if the information is only known to the state actors and not the prosecutors themselves. (Kyles at 514)

In addition to his other lies documented herein, he testified under oath on March 22, 2017 (to the Grand Jury) that he qualified as an expert 2,093 times. (GJ[7].218) On January 29, 2018, he testified under oath that he qualified as an expert about 2,500 times. That equates to about 407 times in just 44 weeks or over 1.5 times per business day (while maintaining a fulltime job, giving 40-60 classes per year, and being faculty at 5 different institutions). The jury deserves to know if it's being lied to by a State expert. Appellant requested his records for dates that he has testified as an expert and was denied by the State. This is clearly impeachment evidence and qualifies as a Brady violation under Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

"The State's trial evidence resembles a house of cards, built on crediting [one witness'] account rather than [Appellant's] alibi." (Wearry at 392-93) Demonstrating that Mr. Lanterman is lying to the jury brings his whole testimony and timeline into question.

The State Withheld BCA Photos in Violation of Brady

As part of the State's discovery appellate counsel was given the BCA crime scene photos, but based on the filenames (Motion1, Ex. C) there are about 45 missing photos. The State's photos use the prefix "KAN" and begin with a sequence number of "9244". As an example of the "missing photos" after

[7] "GJ" = Grand Jury Transcripts

"KAN_9288" the next photo is "KAN_9293", so the sequence numbers 9289, 9290, 9291, and 9292 are missing. The pictures appear to be selectively pulled out. We know some must be the sinks and counters, because during the Grand Jury testimony the state's witness indicated that they sprayed all surfaces (GJ.154-55, 160) and yet there are no pictures of sinks, or unlocked rear door.

This is exculpatory, since the State claims the Appellant cleaned the scene. Showing the jury that luminol didn't react in the sinks would demonstrate that the State's theory about Appellant cleaning the scene was false. If Appellant didn't clean the scene, then someone else did, likely the actual perpetrator.

The other pictures must have been removed for a reason, and the State continues to violate Brady by suppressing these images.

The State Withheld Surveillance Video from SuperAmerica in Violation of Brady

Sgt. Nickle claimed during trial that he had a SuperAmerica surveillance video that showed the Appellant wasn't there on 11/13/2016. This suggests to the jury that Appellant was lying about his alibi. Defense was never given this video. This is also a violation of the confrontation clause, because the defense needs an opportunity to explain why it doesn't show the appellant there.

The State Withheld Trialcam Photos in Violation of Brady

Dean Cranston was the Allwines' neighbor across the street. He was an eyewitness that claimed that while he was mowing his lawn he saw Amy alive and functioning normally, in the garage, between 3-5PM. The only Xfinity alert for the garage door in that timeframe is 4:40PM. The logical assumption is that Amy was alive and not in fear of her life almost 1.5 hours after the State claimed that she died.

The State didn't argue that Mr. Cranston didn't see her, nor that he saw her between 3-5PM, but they claimed that he was confused about the day. However, Det. Raymond's report says that there are trailcam photos showing Mr. Cranston mowing on 11/13/2016 (Motion1, Ex. D, pg. 39 of 66).

So, the State not only withheld these photos that are date and time stamped, and could've been used by the defense to rehabilitate the witness, but they also lied to the jury about Mr. Cranston being confused (17T.68) when they had evidence demonstrating his veracity. This clearly is exculpatory evidence because it not only shows that she was alive almost 1.5 hours after the State claims that she died, but she was alone, so if she thought that appellant drugged her then she could've run to the neighbor for help. It also provides corroboration to the Appellant's statement to the police that she was the one who didn't want to go to the clinic, because she was calming moving boxes, alone.

Brady Violations Were a Clear Denial of Appellant's Right to a Fair Trial

The State clearly violated the Appellant's Due Process right, through their numerous Brady violations creating a structural error that rendered "the criminal trial fundamentally unfair" and an "unreliable vehicle for determining guilt" (Washington v. Recuenco, 548 U.S. 212, 218-19 (2006)).

When evidence is unconstitutionally suppressed under Brady it's considered cumulatively, under the standard of "reasonable probability" of different outcome, and not higher preponderance of evidence standard. (Kyles v. Whitley, 514 U.S. 419, 421, 454 (1995); U.S. v. O'Conner, 64 F.3d 355, 359-60 (8th Cir. 1995))

Had the State not suppressed all of the evidence mentioned above, the jury would've learned that Mr. Lanterman wasn't a credible witness, that the Bitcoins don't link to the Appellant, that Appellant's alibi was true and correct, that the washcloth didn't contain Amy's blood, that there was no evidence of Appellant cleaning the scene, that Amy was alive and well up to almost 5:00PM, and that the time of death was about 6:00PM. Cumulatively, these combine to provide powerful evidence for the Appellant's innocence, and undermines the confidence of the verdict.

The Court in Bagley held that "a constitutional error occurs, and the conviction **must be** reversed ... if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." As such, the criminal trial was not a full and fair hearing.

Prosecution Committed Misconduct by Failing to Correct and Eliciting False Testimony

The Due Process Clause of the Sixth Amendment to the United States Constitution is violated when a Prosecutor knowingly fails to correct false testimony or elicits false testimony from a witness. (Napue v. Illinois, 360 U.S. 264, 269-70 (1959)) Giglio v. U.S., 405 U.S. 150, 153-55 (1972) then extended the Napue rule to the elicitation of false testimony even where particular prosecutor was unaware of falsity. "'A lie is a lie, no matter what its subject, and if it's in any way relevant to the case' reversal must follow if the prosecutor, knowing of the lie, leaves it uncorrected." (Kyle v. United States, 297 F.2d 507 (2d Cir. 1961), quoting Napue at 269-70); Mooney v. Holohand, 294 U.S. 103)

"The district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." (Napue at 269-70; United States v. Foster, 874 F.2d 491, 495 (8th Cir. 1988))

1) Dr. Mills said that Jonathan Banks arrived about 7:00PM (16T.45), however, the State had access to the Crime Scene Log (Motion1, Ex. A, pg. 2) that shows that Mr. Banks didn't arrive until "2331" (11:31PM), over 4.5 hours later than Dr. Mills stated. This isn't harmless as it puts the time of death completely with the Appellant's alibi window. (U.S. v. Miller, 621 F.3d 723, 732 (8th Cir. 2010))
2) Mr. Lanterman (the State's computer expert) stated that he traced a Bitcoin address back to Appellant's iPhone (15T.78, 84), but the cell phone forensic report (included in State's discovery) showed that there was no Bitcoin wallet on that phone. Det. Raymond (a cell phone forensic specialist) indicated that the Bitcoin wallet was on the Samsung Galaxy phone (Motion1, Ex. D,

pg. 60). Mr. Lanterman indicated that there was nothing of interest on the Samsung Galaxy phone (15T.63). The State knew that the Bitcoin account didn't trace to Appellant's phone, and that is why they have continued to suppress that evidence in violation of Brady.

Prosecution Committed Misconduct by Failing to Correct False Testimony and by Violating the Confrontation Clause

The Confrontation Clause prohibits the "admission of testimonial statements of a witness who didn't appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (Crawford v. Washington,541 U.S. 36, 53-54 (2004)) The Confrontation Clause of the Sixth Amendment is violated by admission of testimonial evidence through a different witness who didn't create the testimonial affidavit and without showing preparing analyst was unavailable. (Bullcoming v. N.M., 564 U.S. 647, 652, 659 (2011))

The State chose to have Detective Raymond testify and draw conclusions about a testimonial document that they received from Optanix (Appellant's employer). The testimonial report (Grin v. Fisher, 816 F.3d 296, 298-99 (5th Cir. 2016)) was prepared by Optanix staff. Detective Raymond submitted several "interview" questions to Mr. Mitchell Trivision (Appellant's manager) (Motion1, Ex. D, pg. 58). The State's primary purpose of the conversation was to "create an out-of-court substitute for trial testimony". (Mich. V. Bryant, 562 U.S. 344, 358 (2011))

Mr. Trivision stated that based on the information he had the Appellant could've been diligently waiting for a call all afternoon.

Contrary to this response from Mr. Trivision, Detective Raymond offered the opinion that Appellant did no work on the afternoon of Amy's death and therefore had opportunity to kill her and clean up the scene.

The clause violation isn't harmless when the State relies on the statements that are not cumulative of other evidence (U.S. v. Cameron, 699 F.3d 621 (1st Cir. 2012)). There was no other "proof" that Allwine wasn't diligently working at his computer all afternoon.

The product of the interrogation is testimonial (Davis at 826); therefore, the State violated the Confrontation Clause and appellant's Due Process Rights.

Prosecution Committed Misconduct by Violated the Confrontation Clause and Brady

The State commented on how vital the computer evidence was in their case. This evidence was never given to the Defense. It was provided to a third-party company, which was run by their expert, Mr. Lanterman. Allwine's counsel requested images and were told they would cost $750/image and there were 66 devices in total. The State's expert would've made almost $50,0000 for evidence that defense was entitled to receive and evaluate for free. Since the defendant didn't have the money to **purchase** his evidence, he was denied the opportunity to examine it. "The right of cross-examination is more than a desirable rule of trial procedure. It's implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' ... significant diminution calls into question the ultimate 'integrity of the fact-finding process.'" (Chambers v. Miss., 410 U.S. 284, 309, 295) This was a clear violation of the confrontation clause and rendered the criminal trial unfair.

Prosecution Committed Misconduct by Elicited False Testimony

Amy was killed at 3:15PM or earlier (16T.58-59)

Defense counsel errored in his cross-examination of Dr. Kelly Mills by posing a hypothetical situation to her. He said **if** someone testified to a time of death of 3:15PM or earlier **could** you agree with it. (16T.48) She said that it was in the afternoon, so she could agree with it. The State purposely changed the auxiliary verb, on redirect, from "could" to "would" to elicit false testimony on a time of death prior to

3:15PM when they knew that Mr. Banks arrived at 11:31PM, and the real time of death was 4-6 hours prior to that (5:31-7:00PM) (Dow v. Virga, 729 F.3d 1041, 1050 (9th Cir. 2013) – prosecutor's knowing introduction of false testimony and subsequent arguments relying on that testimony was improper.) We know that this statement was prejudicial because even after being directly challenged in the Appellant's Motion1 the judge continues to use this false time as a statement of "fact", when it was merely an answer to a hypothetical question. This cannot be held harmless because it's related to the central element of the case (Miller at 732).

The Prosecution Committed Misconduct by Misstating Evidence to the Jury

The Defendant dragged Amy (17T. 32, 36)

The actual testimony was that Amy was lifted and carried (16T. 11-14) from one place to another. The State knew that it wasn't feasible for the appellant to lift and carry Amy due to her size, so he told the jury that she was dragged instead.

[Appellant] was violent and angry (17T.13)

There was no evidence of the Appellant being violent and angry, and in fact he was described the opposite: a loving parent (12T.51-52); calm and not one to lose his temper (12T.52); kind, polite, responsible, reliable, predictable (14T.127); and never aggressive, didn't yell, and didn't even swear (14T.139).

Timing of when footprints were laid down

The State said, "You heard Lindsey Garfield tell you that someone wearing socks was the source of the prints ... during the cleanup" (17T.33), yet Ms. Garfield made no reference to timing or that they were laid down during the cleanup.

Claiming that Mr. Cranston didn't see Amy in garage on Sunday

The State said in their closing, "I think it's clear, in view of all the other evidence, that Mr. Cranston was simply mistaken." (17T.68) The State was in possession of the Trailcam photos which showed Mr. Cranston mowing his lawn on Sunday afternoon. This was a clear violation of their duty to the truth-finding function of the trial. (KY. V. Stincer, 482 U.S. 730, 737 (1987))

"[Appellant] was looking for a divorce" (9T.12, 17T.12, 16)

The Prosecutor commits plain error when he repeatedly misstates evidence and misrepresents the [appellant's] *mens rea*. The prosecutor repeatedly told the jury that Appellant didn't want to be married to Amy Allwine anymore and that he killed her to avoid a divorce (11T.25) There was never any evidence of an impending divorce or even any discord in the relationship.

Appellant called A.H. after Amy's death (4T.14, 13T.46-47)

The state claimed that a call took place between Appellant and A.H. in mid-November. Appellant's phone records were requested as part of discovery and denied by the State and the District Court Judge. The State had Appellant's phone records, so if the call had taken place, they would've submitted it as evidence.

Amy was incapacitated by drugs

Previously, we saw that she made intelligent queries on her phone and accessed her email.

Appellant Accessed the DarkWeb

The prosecution mentioned to the jury multiple times that the Appellant accessed the DarkWeb in early 2016, we saw earlier that TOR Browser wasn't installed for over 6 months after the State claimed the DarkWeb access happened.

Appellant drugged Amy

The prosecution claimed that the Appellant drugged Amy earlier in the day; however, there was no evidence of how the scopolamine got into Amy's system.

The Prosecution Committed Misconduct by Presenting Facts That Were Not in Evidence

Life Insurance

During closing the prosecutor brought up life insurance policy for Amy. This policy was taken out 10-years prior to her death, at the birth of their child, and Defense had no opportunity to explain the victim's life insurance policy to the jury.

"Someone cleaned the floor in the master bedroom" (17T.7)

The State had to explain why there were no footprints in the master bedroom around Amy's body, so they claimed that someone cleaned the carpet in the master bedroom. There was no testimony or evidence about this.

"The note was deleted from the [Appellant's] phone" (17T.27)

Appellant's phone was analyzed by Det. Raymond (cell phone forensics specialist) and Mr. Lanterman (State's computer expert). While Mr. Lanterman says repeatedly that "Deleted doesn't mean deleted" and that even deleted items will leave traces (15T.18), there's no evidence of this file ever being on the appellant's phone. The only actual evidence presented was that it existed in the Apple iCloud. (15T.65)

The Prosecution Committed Misconduct When He Made Improper Comments about Defense Counsel and His Theory of The Case

Defense wants you to park your common sense

The prosecutor is insinuating that the defense case is nonsensical, when in reality it's the only theory that matches the evidence. U.S. v. Rodriguez, 581 F.3d 775, 802 (8th Cir. 2009)

Conclusion

In Napue, the false testimony was merely one answer that was only one sentence long. However, in this case, the State's misconduct permeated the entire judicial process (from beginning to end). It's clear that the prosecution's zeal for conviction supplanted their duty as a minister of justice in a fair trial. As such the criminal trial was not a full and fair hearing.

The Trial was Rendered Unfair by the Trial Judge's Abuse of Discretion Allowing Spreigl Evidence

In the case at bar, the rules regarding the admittance of Spreigl evidence are clear and specific, and the judge ignored them.

Minn. R. Crim. P. 7.02, subd. 1 states, "The prosecutor **must** notify the defendant or defense counsel in writing of any crime, wrong, or act that may be offered at the trial under Minn. R. Evid. 404(b). The notice **must be given at or before** the Omnibus Hearing (Minn. R. Crim. P. 7.02, subd. 4a).

The Omnibus hearing was on July 12, 2017 and notification wasn't given until after a Defense Motion on Nov 27, 2017 to exclude witnesses that were designed to besmirch the Defendant's character.

Spreigl evidence "**may not be received** unless there has been notice as required by State v. Spreigl, 272 Minn 488." (State v. Billstrom, 276 Minn. 174 (1967))

The judge abused his discretion. While the allowing of Spreigl evidence is considered to be governed by judicial discretion, the Minn. Code of Judicial Conduct Rule 1.1 says, "A Judge **shall comply** with the law, including the Code of Judicial Conduct." The rule is one sentence long in its entirety and there's no ambiguity in that sentence.

The provisions governing the interpretation of statutes govern all rules as well (Minn. Stat. §645.001). Minn. Stat. §645.08(1) says that words and phrases are construed according to their common approved usage, and Minn. Stat. §645.44, subd. 15a states "Must" is mandatory.

The law and case law states specifically what must happen for Spreigl evidence to be allowed, including:

- The state **must** give notice of its intent to admit the evidence.
- The notice **must** be given **prior** to the Omnibus hearing.
- The state **must clearly** indicate what the evidence is offered to prove.
- There **must** be a prior **crime** in which the defendant participated.
- The evidence **must** be relevant to the state's case
- The probative value of the evidence **must not** be outweighed by potential unfair prejudice to the defendant.
- If the admission of evidence is a close call, it should be **excluded**." (State v. Kennedy, 585 N.W.2d 385, 389)
- If it's unclear if the evidence comes within an exception to the general exclusionary rule the accused is entitled to the benefit of the doubt and the testimony should be **rejected**.

It's only after the requirements of the law have been met that it's up to judicial discretion to allow or deny the evidence. If the law regarding its admission is violated, and the law must be followed by the judge, then the judge is required by his oath to deny the admittance of that evidence. It was therefore an abuse of judicial discretion for the evidence to be allowed. (Cooter & Gell at 405) Like State v. Berndt, 392 N.W.2d 876 "Jury members may have convicted [Appellant] because they were offended by his morals."

The Trial Was Rendered Unfair by Inappropriate Jury Communications

The Due Process Clause of the Fifth Amendment to the US Constitution and Article I, Section 7 of the Minnesota Constitution requires that a court conduct a fair and public trial, and the Sixth Amendment of the US Constitution and Article I, Section 6 of the Minnesota Constitution require that a trial be held by an impartial jury. Part of this Due Process guarantee is the requirement to follow the rules and procedures for criminal trials.

Both at the Federal and State levels, once a jury receives instructions from the judge and they retire for deliberation, they are supposed to be free from any extraneous influences. (Minn. Stat. §631.09)

Minn. R. Crim. P. 26.03, Subd. 19(6) requires the court "to instruct the jury on all matters of law necessary to render a verdict."

Recognizing that the jury may only use the instructions provided by the judge, and that the judge isn't allowed in the deliberation room with the jury, Minn. R. Crim. P. 26.03, Subd. 20(3) states, "If the jury asks for additional instructions on the law during deliberation, the court **must** give notice to the parties. The court's response **must** be given in the court room."

In the case at bar, there was information that came out after the verdict was rendered that indicates that these rules and instructions weren't followed by the jury during deliberation.

Following the trial, juror G.W.M. spoke to a third party about the deliberation process and the verdict. According to the third party, juror G.W.M. said that the jury couldn't decide if Mr. Allwine pulled the trigger on the gun that killed Amy Allwine, so they asked for clarification and heard that Mr. Allwine just needed to be involved, at which point they deliberated further and found him guilty.

Minn. R. Crim. P. 26.03 Subd. 20(6) clearly states that Juror affidavits are not admissible to impeach a verdict, and states that "the jurors must be examined under oath and their testimony recorded" through what is generally referred to as a Schwartz hearing at the State level and a Remmer hearing at the Federal level.

The court should be liberal in granting a Schwartz hearing to eliminate the need to harass jurors regarding the deliberation process (Schwartz v. Minneapolis Bus Co., 104 N.W.2d 301 (1960) and Olberg v. Minneapolis Gas Co., 191 N.W.2d 418, 424-25). As such it should be granted even in the case of oral assertions of misconduct or hearsay affidavits. It's precisely because it wasn't stated on the record that

Allwine "had to be involved" that a Schwartz hearing is required to determine who told the jury that information and what precipitated the communication.

Appellant requests this court to hold a Schwartz hearing to determine if misconduct took place (Smith v. Phillips, 455 U.S. 209, 215 (1982)).

The Cumulative Effects of Errors in This Case Rendered the Trial Unfair

"Even if an error at trial, standing alone, wouldn't be sufficient to require reversal, the cumulative effect of the errors may compel reversal." (State v. Houston, 654 N.W.2d 727, 737; U.S. v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996))

In the case at bar, the errors spread through the entire judicial process. Prior to trial, there were numerous Brady violations by the State, Discovery issues by trial counsel, and the judge allowing Spreigl evidence that should've been denied. During trial the issues continued with the State violating the rules on how Spreigl is to be presented, allowing false testimony by their witnesses in violation of Napue, eliciting false testimony from their witnesses in violation of Giglio, and completely disregarding their duty as a minister of justice by saturating their closing argument with false or misleading statements and presenting numerous facts without evidence. Trial counsel made the errors even worse by being unprepared for cross-examination of the two key witnesses of the State (Mr. Lanterman and Dr. Mills), discredited his own witness, and undermined his only trial strategy by misrepresenting clear and obvious facts.

All of these were violations of Appellant's Constitutional rights. The cumulative effect of the errors violated the Due Process guarantee of fundamental fairness and necessitate a new trial (Taylor v. Kentucky, 436 U.S. 478, 487-88, n.15 (1978); United States v. Holmes, 413 F.3d 770, 774-75 (8th Cir. 2005); State v. Mayhorn; 720 N.W.2d 776)

It's likely that knowing all of the correct facts would've introduced reasonable doubt into at least one juror's mind and might have resulted in a different outcome.

Initial Appeal was not A Full and Fair Hearing because Appellate Counsel was Ineffective for Raising Meritless Issues

The Due Process Clause of the Fourteenth Amendment guarantees the right to effective assistance of counsel on a first appeal as of right in state court. (Evitts v. Lucey, 469 U.S. 387, 369-99 (1985))

The United States Supreme Court has held that the Strickland standard governs claims of ineffective assistance of appellate counsel. (Smith v. Robbins, 528 U.S. 259, 285-86)

The Federal Courts have held that the direct appeal of ineffective assistance claims are inappropriate where the record wasn't fully developed and facts were not developed outside of record before court. (U.S. v. Long, 721 F.3d 920, 926 (8th Cir. 2013); U.S. v. Lloyd, 901 F.3d 111 (2d Cir. 2018))

In the present case, Appellate counsel specifically requested a Stay from the Direct Appeal in order to develop the record for Ineffective Assistance of Counsel. (LDA[8], pg. 4, #9)

However, they didn't complete any of their stated objectives and failed to expand the record because they missed their deadline, which rendered several of their arguments meritless assertions.

When Appellate counsel bypasses clear and obvious issues like: Brady violations; violations of court rules (allowing Spreigl after the deadline); Napue violations; and abuses of judicial discretion, counsel's failure has been deemed unreasonable. (U.S. v. Winstead, 890 F. 3d 1082, 1089-90 (D.C. Cir. 2018); United States v. Allmendinger, 894 F.3d 121, 126 (4th Cir. 2018))

[8] "LDA"="Affidavit of Lucas J.M. Dawson Re: Post-conviction Proceedings" - (Dated: March 29, 2019)

Courts have concluded that Appellate counsel was ineffective for failing to raise argument that likely would've reversed conviction without any strategic rationale. (Allmendinger At 126-28, 130-31)

On direct appeal Appellate counsel raised four issues: 1) the evidence was insufficient to sustain the jury's verdict that he's guilty of first-degree premeditated murder; 2) the State committed prosecutorial misconduct for not providing potentially exculpatory evidence that arose after trial; 3) Trial counsel was ineffective for not hiring experts; and 4) the District Court judge abused his discretion by not granting an evidentiary hearing. (State v. Allwine, 963 N.W.2d 178, 185-86)

Issue 1 was weakened by Appellate counsel not fully understanding the evidence and the transcripts (pg. 1).

Issue 2 was a meritless issue when they filed the direct appeal because the U.S. Supreme Court already ruled that the Brady rule doesn't extend to new postconviction evidence (DA's Office v. Osborne, 557 U.S. 52, 68). The Supremacy Clause (Art. VI of the United States Constitution) is applied to the State Judiciary under Amendment XIV of the United States Constitution, so the MN Supreme Court cannot overrule the US Supreme Court.

Issue 3 was rendered ineffective by appellate counsel failing to meet the deadline to expand the record. (U.S. v. Long, 721 F.3d 920, 926 (8th Cir. 2013)).

Issue 4 was also meritless because appellate counsel missed the deadline and the record was closed, so there was no evidence upon which the judge could've ruled. Appellate counsel was ineffective for ignoring clearly stronger issues (included herein) than those selected for appeal. (Smith v. Robbins, 528 U.S. 259, 288)

Conclusion

"The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach." (Kyle v. United States, 297 F.2d 507 (2d Cir. 1961)) The law is black and white. It's a set of rules that must be followed by every prosecutor, lawyer, and judge to ensure that everyone is treated fairly by the law and receives a fair trial. (Marcrum v. Luebbers, 509 F.3d 489, 502 (8th Cir. 2007) – It's not the court's commission to invent strategies that could've prompted counsel's actions, when a Appellant shows that counsel's actions were a result of inattention or neglect, rather than reasoned judgement.) Judges never have the discretion to deny constitutional rights.

The initial trial of the Appellant was not a Full and Fair Hearing and as such it was a miscarriage of justice and Res Judaica does not apply. "the miscarriage of justice exception would allow successive claims to be heard if the petitioner 'establishes that under probative evidence he has a colorable claim of factual innocence.'" (Sawyer v. Whitley, 505 U.S. 333, 339 (1992))

Because the Appellant never received a full and fair hearing on the previous claim in the criminal court, collateral estoppel cannot apply to the existing claim. Kramer v. Chem. Constr. Corp., 456 U.S. 461, 480-81 says, "We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair' opportunity to litigate the claim or issue."

Regardless of whether res judicata or collateral estoppel exist in this case, they are procedural rules governed by the court and as such do not apply when the Petitioner is claiming actual innocence. The United States Supreme Court said, "We hold that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in Schlup and House, or as in this case, expiration of the statute of limitations." (McQuiggin v. Perkins, 569 U.S. 383, 386 (2013)) The preponderance of evidence in this case points to the innocence of the Appellant, and should have been reviewed by the Human Services Judge.

Based on the pleadings contained herein, and on the rules and laws of the United States of America and the State of Minnesota, the Appellant requests that you reverse the decision of the Human Services Judge and Determine that the Preponderance of Evidence shows that Appellant did not commit maltreatment of a minor, because he was not involved in his wife's death.

Due to the complexities of this case Appellant requests a plenary evidentiary hearing and oral argument on this case.

Dated: 11/30/2022

Respectfully Submitted

Stephen Allwine (in pro se)

Stephen Allwine #256147
MCF – Stillwater
970 Pickett St. N
Bayport, MN, 55003-1490

Exhibit List of Motion for Reversal of Maltreatment Determination

Exhibit A – Crime Scene Access Log

Exhibit B – Carney/Arden

Exhibit C – Lanterman Article

Exhibit D – Police reports

Exhibit E – Fink reprimand

Exhibit F – Kubik divorce

Exhibit G – Moody divorce

Exhibit H – Woodbury Interview

Exhibit I – Search warrants

Exhibit J – Chris Boecker emails

Exhibit K – Amy's email screenshot

Exhibit L – Elmquist / dogdaygod

Exhibit M – Proposed Timeline

Exhibit N – Digital Forensics Report

Exhibit O – Apple Docs

Exhibit P – CFS Report

Exhibit Q – GSR Sheet

Exhibit R – Bitcoin Transaction Logs

Exhibit S – Picture of Beverage Containers by the bed

Exhibit T – Picture Blue Washcloth

Exhibit U – Picture clean up

Exhibit V – Picture Mud room

Exhibit W – Bench Press

Exhibit X – Kristin Interview Dog show alibi

Exhibit Y – Kreuser Scopolamine

Exhibit Z – Besa Mafia Emails

Exhibit AA – Groshek Affidavit

Exhibit AB – Groshek Subpoena

Transcripts Included with Motion for Reversal of Maltreatment Determination

Criminal Complaint pg (TOR installed, prior to 3:15PM)

GJ.91, 108, 111-114, 117, 152-153, 155-156, 160, 168, 177, 179, 215, 217-220, 222, 224-225, 232, 234, 237, 242, 245, 278-279, 289, 294-297, 301, 317, 328

11T.24-25, 27, 45-46, 56-57, 62-67, 109, 131-133, 200, 206

12T.4, 25, 27, 38, 44-45, 47-48, 50, 51-55, 91-93, 95-96, 99-100, 103, 111, 115-118, 126-128, 149-150

13T.13-14, 18, 20-23, 33-36

14T.14-15, 18, 31, 57, 73-74, 127, 139, 172-174, 197-198

15T.6-7, 10, 13-14, 16, 18, 47-49, 53, 63-66, 78, 84, 97, 99, 108-112

16T.11-12, 16, 28, 32-35, 41-45, 48, 49, 52-54, 57, 72-76, 161-162, 165-168, 170-171

17T.17

Trial Exhibit Referenced in Motion for Reversal of Maltreatment Determination

Trial Exhibit 19 – Gas Station Receipt

Trial Exhibit 107 – Defendant's Statement

Trial Exhibit 113 – Xfinity Door Sensors

Trial Exhibit 128