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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON TENTH JUDICIAL DISTRICT

Stephen Carl Allwine,

Petitioner,

vs.

State of Minnesota,

Respondent.

STATE'S MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR POSTCONVICTION RELIEF

Court File No. 82-CR-17-242
County Attorney File No. CR-2016-1851

INTRODUCTION AND PROCEDURAL HISTORY

A jury found Petitioner guilty of the first-degree murder of his wife, A.A.[1] The State presented overwhelming evidence that Petitioner threatened A.A., tried to hire a hitman to kill A.A., and ultimately killed A.A. The Honorable B. William Ekstrum sentenced Petitioner to life in prison without the possibility of parole.

Petitioner filed a direct appeal to the Minnesota Supreme Court. The appeal was stayed to allow Petitioner to file a petition for postconviction relief. This Court denied relief. Petitioner filed three motions that amounted to motions to reconsider. This Court denied all three motions.

The Minnesota Supreme Court reinstated Petitioner's direct appeal and consolidated the direct appeal with Petitioner's appeal of this Court's denial of postconviction relief. The supreme court then affirmed Petitioner's conviction and the denial of postconviction relief. *State v. Allwine*, 963 N.W.2d 178 (Minn. 2021). Petitioner, acting pro se, has filed a second petition for

1 The Court is well aware of the facts underlying Petitioner's murder of his wife. As a result, this memorandum will discuss the relevant procedural history of this case. Any relevant facts about the crime and specific information regarding the prior decisions of this Court and the supreme court will be discussed as relevant in the argument section.

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postconviction relief.

ARGUMENT

In his second petition for postconviction relief, Petitioner asserts two main categories of claims: alleged misconduct of a juror and alleged ineffective assistance of appellate counsel. Pet. for Postconviction Relief at 11-24. All of Petitioner's claims are meritless. The juror misconduct claim is also procedurally barred. After a discussion of relevant procedural law, this memorandum will discuss each category of claims in turn.

A. Petitions for postconviction relief and the procedural bars for second and subsequent petitions.

"A petition for postconviction relief is a collateral attack on a conviction that carries a presumption of regularity." *Hummel v. State*, 617 N.W.2d 561, 563 (Minn. 2000). A petition for postconviction relief does not warrant an evidentiary hearing if "the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1. Put another way, to be entitled to an evidentiary hearing, a postconviction petitioner must "allege facts that, if proven, would entitle him to the requested relief." *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004). A petition "must allege more than argumentative assertions without factual support." *Nissalke v. State*, 861 N.W.2d 88, 91 (Minn. 2015) (internal quotations and citations omitted).

"[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." *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). "A petition for postconviction relief after a direct appeal has been completed may not be based on grounds that could have been raised on direct

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appeal of the conviction or sentence." Minn. Stat. § 590.01, subd. 1 (2018).[2]

A court "may summarily deny a second or successive petition for similar relief . . . when the issues raised in it have previously been decided by the Court of Appeals or the Supreme Court in the same case." Minn. Stat. § 590.04, subd. 3 (2018). Claims of ineffective assistance of trial counsel that are known or should have been known on direct appeal are *Knaffla*-barred if raised in a subsequent petition for postconviction relief. *Sontoya v. State*, 829 N.W.2d 602, 604 (Minn. 2013).

The *Knaffla* bar may be subject to two exceptions: 1) If an issue known on direct appeal was so novel "that its legal basis was not reasonably available when direct appeal was taken;" and 2) "when fairness so requires and when the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal." *Sanchez-Diaz v. State*, 758 N.W.2d 843, 846-47 (Minn. 2008).[3]

B. Petitioner has failed to show any juror misconduct.

Petitioner contends that a juror in his trial told Petitioner's former pastor that "the jury was not convinced that Petitioner pulled the trigger on the gun that killed" A.A. and that "they were told that Mr. Allwine just had to be involved and therefore voted to convict." Pet. at 11.

Petitioner's claim is *Knaffla*-barred. Petitioner could have raised this issue on direct appeal or in his prior postconviction petition. Petitioner provides no explanation of why he could not have raised the claim before. As a result, the claim is procedurally barred.

Petitioner's claim, based only on hearsay, is also wholly unsupported by the record.

2 This memorandum will generally refer to the similar procedural bars of *Knaffla* and Minn. Stat. ch. 590 collectively as the *Knaffla* bar.

3 Amendments to the postconviction statute enacted in 2005 may have abrogated the interests-of-justice exception to the *Knaffla* bar, but the supreme court has not yet decided that question. *See Fox v. State*, 913 N.W.2d 429, 433 n. 2 (Minn. 2018).

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Contrary to Petitioner's claim, the jury was not told that Petitioner "just had to be involved" in order to convict. The jury was instructed on the elements of first-degree premeditated murder. *See* 17T. at 8-9. Specifically, the jury was told the State had to prove that A.A. was deceased, that Petitioner caused A.A.'s death, that Petitioner acted with intent and premeditation, and date and venue. *Id.* The record contradicts Petitioner's vague claims, which fail as a matter of law.

Even if Petitioner's vague accusation is true, there is no evidence of misconduct here. Indeed, the rules of evidence prohibit the inquiry Petitioner seeks:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror, or as to any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict, or as to whether a juror gave false answers on voir dire that concealed prejudice or bias toward one of the parties, or in order to correct an error made in entering the verdict on the verdict form.

Minn. R. Evid. 606(b).

Petitioner does not claim that any extraneous prejudicial information was improperly brought to the jury's attention, that any outside influence was brought to bear on a juror, or that there were any threats or acts of violence against a juror. Petitioner fails to allege any misconduct, much less misconduct that could entitle him to relief.

But even if Petitioner's claim were factually true, it would not matter. On direct appeal, Petitioner argued that evidence that came to light after trial showed that "Yura," not Petitioner, shot A.A. 963 N.W.2d at 188. Petitioner argued that, because the indictment did not allege an aiding and abetting theory, he could not be convicted of first-degree premeditated murder. *Id.* at

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188 n. 15. The supreme court concluded that Petitioner failed to properly support this argument. *Id.* But the court went on to wholly reject the claim: "Even if we reached this argument, however, we would reject it because 'aiding and abetting is *not* a separate substantive offense, but rather is a theory of criminal liability.'" *Id.* (quoting *State v. Ezeka*, 946 N.W.2d 393, 400 n. 1 (Minn. 2020)). Thus, even if the jury decided that Petitioner only aided and abetted the crime—a theory nobody argued at trial—Petitioner would still have been properly convicted.

Petitioner's claim of juror misconduct is *Knaffla*-barred and meritless.

C. Petitioner did not receive ineffective assistance of appellate counsel.

Claims of ineffective assistance of appellate counsel are not *Knaffla*-barred in the first petition for postconviction relief filed after a direct appeal because the issue could not have been raised on direct appeal. *Erickson v. State*, 725 N.W.2d 532, 537 (Minn. 2007).

"When an ineffective assistance of appellate counsel claim is based on appellate counsel's failure to raise an ineffective assistance of trial counsel claim, the appellant must first show that trial counsel was ineffective." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007). "A petitioner is entitled to an evidentiary hearing for ineffective assistance claims only if he alleges facts in the petition that, if proved, would show both that counsel's performance was not objectively reasonable and, but for counsel's errors, the result of the proceeding would have been different." *Evans v. State*, 788 N.W.2d 38, 44-45 (Minn. 2010) (quotations and citation omitted).

"Appellate counsel need not raise all possible claims on direct appeal, and a claim need not be raised if appellate counsel could have legitimately concluded that [it] would not [prevail]." *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (quotation and citation omitted). Indeed, "[l]awyers representing appellants should be encouraged to limit their contentions on appeal at

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least to those which may be legitimately regarded as debatable." *Dobbins v. State*, 788 N.W.2d 719, 729 (Minn. 2010) (quoting *Case v. State*, 364 N.W.2d 797, 800 (Minn. 1985)). Appellate counsel need not raise issues merely because their client wants them to. *Id.* (citing *Dent v. State*, 441 N.W.2d 497, 500 (Minn. 1989)). The only question is whether counsel's representation was "reasonable in the light of all the circumstances." *Id.* (quoting *Dent*, 441 N.W.2d at 500).

"[T]here is no presumption of prejudice in an ordinary case involving a claim of ineffective assistance of counsel where there is no claim of a conflict of interest by defense counsel." *Gates v. State*, 398 N.W.2d 558, 562 (Minn. 1987) (citing *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984)). A defendant claiming ineffective assistance of counsel "must show that counsel's errors 'actually' had an adverse effect in that but for the errors the result of the proceeding probably would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 693-94). In determining whether prejudice has been shown, "the court must consider the totality of the evidence." *Id.*

Petitioner claims that appellate counsel was ineffective in numerous ways. In every instance, appellate counsel exercised the strategy and judgment that an appellate attorney must make. Throughout the postconviction and appellate proceedings, counsel exercised professional judgment in deciding what issues to raise and vigorously represented Petitioner by filing a lengthy petition for postconviction relief, obtaining discovery from the State, and litigating several motions.

Petitioner has not shown that appellate counsel's representation fell below an objective standard of reasonableness. Nor has Petitioner even approached demonstrating prejudice on any of his claims. For the sake of completeness, however, this memorandum will (at times quite briefly) address Petitioner's claims in turn. For ease of reference, this memorandum will reference the page

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numbers of the petition after the description of each issue.

1. Failure to introduce evidence into postconviction record before the record was closed (Pet. 11-12)

Petitioner first points to appellate counsel's failure to introduce two expert reports and a crime scene access log into the record before this Court closed the record. Petitioner argues that this failure prejudiced him because the supreme court stated that his related ineffective assistance of trial counsel claim was rendered a mere argumentative assertion due to the lack of evidence.

Petitioner's argument ignores this Court's previous findings. In its order denying postconviction relief, this Court discussed trial counsel's hiring of experts and concluded that trial counsel exercised trial strategy by deciding which experts to hire and which witnesses to call to testify. Doc. 250 at 13. That conclusion was not disturbed by the supreme court on appeal.

In its order denying Petitioner's first motion to reconsider, Petitioner argued that he believed he had more time to submit expert reports before the record was closed. Doc. 264 at 2. In response, this Court reasoned in part, "The Court ruled in the Postconviction Order that trial counsel was not ineffective for failing to hire certain experts. Thus, even if Defendant produced a report from an expert that differed from what was presented at trial, he is not entitled to relief." *Id.* at 3. Again, this conclusion was not disturbed by the supreme court on appeal.

Petitioner has therefore failed to show that any unreasonable representation by appellate counsel prejudiced him. As this Court already concluded, trial counsel engaged in trial strategy by deciding which experts to hire and call as witnesses at trial. The reports by the experts were therefore irrelevant. This Court has made clear that the result of the first postconviction petition would have been the same even if appellate counsel had timely filed the expert reports.

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2. Raising issues without merit (Pet. 12)

Petitioner next contends that appellate counsel raised a meritless issue regarding discovery after trial. What issues to raise is a quintessential part of appellate strategy, which reviewing courts do not second-guess. Nor does Petitioner even attempt to demonstrate that, if appellate counsel had not raised this issue, the result of the appeal would have been different.

3. Failure to introduce additional evidence before the record was closed (Pet. 12)

Petitioner next argues that appellate counsel was ineffective by not timely submitting evidence relating to an alleged alternative perpetrator, K.E. But this Court already concluded that trial counsel's investigation into K.E. was protected trial strategy. Doc. 250 at 14. And the supreme court affirmed that holding: "Under well-established law, the decision to pursue alternative perpetrators is a matter of trial strategy that we do not scrutinize." 963 N.W.2d at 190 n. 19.

Again, even if appellate counsel acted unreasonably by failing to submit information regarding K.E., it did not affect the outcome of the postconviction petition or appeal. Trial counsel's decision as to whether and how to pursue an alternative perpetrator defense was a matter of trial strategy.

4. Introduction of *Spreigl* evidence (Pet. 12)

Petitioner contends that appellate counsel should have appealed the admission of *Spreigl* evidence. What issues to raise on appeal is a quintessential example of appellate strategy and is not second-guessed by reviewing courts.

Petitioner also does not specify what *Spreigl* evidence was erroneously admitted. Indeed, the State is unaware of any *Spreigl* evidence admitted. The State did introduce relationship evidence. Regardless of its label, Petitioner does not even attempt to demonstrate that the evidence

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should not have been admitted. Petitioner has therefore failed to show either that counsel unreasonably failed to raise the issue or that the failure to raise the issue was likely to change the result.

5. Denial of motion for judgment of acquittal (Pet. 12)

Petitioner next claims that appellate counsel should have appealed the denial of Petitioner's judgment of acquittal after the State rested its case. This is another question of what issues appellate counsel should have raised, which is a question of strategy that is not scrutinized by reviewing courts.

Additionally, Petitioner fails to show that there is any reasonable likelihood this claim would have succeeded on appeal. In finding the evidence sufficient to support his conviction, the supreme court relied on facts presented during the State's case, not during Petitioner's case. *See* 963 N.W.2d at 187-88. Petitioner has failed to establish that, had appellate counsel raised this issue, that it was reasonably likely to succeed.

6. Alleged *Brady* violations (Pet. 13)

Petitioner next contends that the State committed *Brady* violations by allegedly failing to disclose certain evidence and that appellate counsel was ineffective for failing to raise this issue. Again, what issues to raise on appeal are questions of strategy that are not second-guessed by reviewing courts. That should end the inquiry.

Second, Petitioner has failed to demonstrate any *Brady* violations. A violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), occurs when the State suppresses material and exonerating evidence. Petitioner fails to demonstrate that he requested the evidence at issue. And Petitioner fails to show that the evidence was material or exonerating. Indeed, most of the claimed violations

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were the subject of testimony at trial. Simply put, Petitioner has failed to show any—much less all—of the elements of a *Brady* violation. Appellate counsel's strategic decision not to raise the issue was neither unreasonable nor prejudicial.

7. Ineffective assistance of trial counsel (Pet. 15)

Petitioner next argues that appellate counsel should have raised a claim of ineffective assistance of trial counsel based on the apparent decision of trial counsel not to subpoena and call to the stand a witness from a company called Optanix.

As this Court already observed in evaluating similar claims, which witnesses to call is a question of trial strategy. Doc. 250 at 13 (citing *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999)). Appellate counsel therefore reasonably decided not to challenge this issue on appeal. And Petitioner cannot show that the result of his appeal would have been different had appellate counsel raised the issue.

8. Alleged failure to correct misleading testimony (Pet. 15-16)

Petitioner next argues that appellate counsel was ineffective for failing to argue that the prosecutors committed misconduct at trial by failing to correct misleading witness testimony. Again, what issues to raise on appeal is a clear question of appellate strategy that is not scrutinized by reviewing courts, and this Court need go no further.

Petitioner also fails to demonstrate that there was any misconduct. Petitioner quibbles with the evidence but presents no evidence that the prosecutors knowingly elicited false testimony or knowingly failed to correct false testimony. Petitioner has failed to show that appellate counsel acted unreasonably by not raising these claims of prosecutorial misconduct or that the outcome would have been different.

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9. Prosecution turning over evidence to a third party (Pet. 16-17)

Petitioner next contends that appellate counsel should have argued that prosecutors committed misconduct by allowing a third party, Mark Lanterman, to examine various electronic devices. Yet again, this is a question of which issues to raise on appeal, a strategic question not scrutinized by reviewing courts.

Petitioner cites no authority for the proposition that it is misconduct to have a "third party" examine evidence in a case, nor is Respondent aware of any such authority. As a result, Petitioner has also failed to demonstrate that reasonable appellate counsel would have raised this issue or that raising the issue would have been reasonably likely to lead to a different outcome on appeal.

10. Alleged misconduct in closing argument (Pet. 17-18)

Petitioner next argues that appellate counsel should have raised various claims of prosecutorial misconduct in closing argument. Again, what issues to raise on appeal are questions of appellate strategy that reviewing courts do not scrutinize.

Petitioner also fails to explain how the statements he alleges are misconduct were misstatements of the evidence at trial, as opposed to accurate statements of or reasonable inferences from the evidence. Petitioner thus fails to show that failure to raise these claims was unreasonable or that raising the claims were reasonably likely to change the outcome on appeal.

11. Additional alleged misconduct in closing argument (Pet. 18)

Petitioner next alleges additional claims of misconduct in closing argument. This argument fails for the same reason as the previous one: what issues to raise a matter of appellate strategy, and Petitioner has failed to show any misconduct, so not raising the issue on appeal was both reasonable and not prejudicial.

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12. Alleged misstatement of facts by trial counsel (Pet. 18-19)

Petitioner next argues that appellate counsel should have raised an ineffective assistance of trial counsel claim based on statements trial counsel made during his closing argument. Again, what issues to raise on appeal is a question of appellate strategy that is not second-guessed by a reviewing court.

Petitioner also mischaracterizes trial counsel's closing argument. Counsel argued that the witnesses called by the defense provided an accurate timeline of when A.A. was still alive. 17T. 59-63. Trial counsel argued that the jury should *not* accept the medical examiner's stated time of A.A.'s death. *Id.* Appellate counsel was not ineffective for failing to claim ineffective assistance of trial counsel when trial counsel was not ineffective, and failure to raise the issue did not change the outcome of the appeal.

13. Additional alleged misconduct in closing argument (Pet. 18-19)

Petitioner next claims that appellate counsel should have raised yet another claim of prosecutorial misconduct in closing argument. The issues counsel chooses to raise on appeal are questions of appellate strategy and are not second-guessed by reviewing courts. Petitioner also fails to cite any authority for the proposition that the prosecutor committed misconduct. Petitioner has failed to show that appellate counsel was ineffective for not raising the issue or that the failure to do so changed the outcome of the appeal.

14. Alleged failure to appellate counsel to 'fulfill the duty of a full and complete discovery' (Pet. 20-24)

Petitioner next alleges that appellate counsel failed to obtain a large amount of information outside of the trial record. This claim implicates the question of which arguments to raise on appeal, a question of appellate strategy that reviewing courts do not second-guess. There is no

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reason for this court to second-guess appellate counsel, who exercised professional judgment in deciding what issues to raise and vigorously represented Petitioner, filing a petition for postconviction relief, obtaining discovery from the State, and litigating several motions.

Petitioner cites no authority for the proposition that appellate counsel acted unreasonably by not subpoenaing or otherwise obtaining the numerous records Petitioner describes in his petition. Petitioner has therefore failed to meet his burden of showing that appellate counsel's representation fell below an objective standard of reasonableness. Petitioner has also failed to allege prejudice. Petitioner's bare assertions—still unsupported, despite the passage of more than four years since his conviction—do not demonstrate prejudice.

15. Failure to challenge 'the overall fairness of the trial' (Pet. 24)

Finally, Petitioner contends that appellate counsel was ineffective for failing to challenge "the overall fairness of the trial." Again, what issues to raise on appeal is a question of appellate strategy that reviewing courts do not second-guess.

Petitioner also cites no authority in support of this proposition. Indeed, neither this Court nor the supreme court have found any errors at trial, whether by the judge, prosecutor, or defense counsel. Appellate counsel did not act unreasonably by not making a claim that the trial was unfair from a broader perspective. Nor did the failure to raise the claim affect the outcome of the appeal.

CONCLUSION

Petitioner's claim of juror misconduct is *Knaffla*-barred and meritless. Petitioner's numerous claims of ineffective assistance of appellate counsel similarly fail. Appellate counsel exercised strategic judgment in deciding what issues to raise, and reviewing courts do not scrutinize that judgment.

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Petitioner requests an evidentiary hearing, but all of Petitioner's claims fail as a matter of law. There are no disputed facts that, if proven, would entitle Petitioner to relief. This Court should therefore deny the petition without a hearing.

Dated: May 6, 2022

Respectfully submitted,

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