

A-05-2519

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

v.

Franklin Alan Miller,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATE OF MINNESOTA

IN SUPREME COURT

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Appellant.

PROCEDURAL HISTORY

1. July 24, 2004: T [REDACTED] H [REDACTED] kidnapped outside a bar in Gilbert, Minnesota.
2. August 4, 2004: Franklin Miller was charged by Complaint with three counts of kidnapping in connection with H [REDACTED]'s disappearance; Rule 5 hearing held in court.
3. September 2, 2004: Human remains found in wooded area south of Gilbert that are later identified as the remains of H [REDACTED]'s body.
4. September 8, 2004: Rule 8 hearing held.
5. October 4, 2004: Hearing held.
6. October 18, 2004: Hearing held; state's motion to amend

complaint granted.

7. November 15, 2004: Bail motion taken under advisement.
8. December 13, 2004: Scheduling conference held.
9. February 18, 2005: Indictment returned charging two counts of first degree murder and two counts of kidnapping.
10. February 25, 2005: Rule 5 hearing held.
11. April 25, 2005: Omnibus hearing held.
12. June 2, 2005: Contested omnibus hearing held.
13. August 26, 2005: Change of venue motion made; taken under advisement.
14. August 30, 2005: Change of venue motion denied.
15. September 12-29, 2005: Jury trial commenced, Judge Florey presiding; verdicts of guilty returned; Miller sentenced to life in prison without the possibility of release.
16. December 23, 2005: Notice of Appeal filed.
17. April 3, 2006: Transcripts received by Office of State Public Defender.
18. May 31, 2006: Motion to extend time to file Appellant's Brief to July 17, 2006, granted.

LEGAL ISSUES

1. Did the court err by denying the motion to dismiss the Indictment where the evidence showed that the prosecutor failed to disclose to the grand jury the full extent of the criminal liability of two witnesses in the death of the victim and the inducements for their testimony?

State v. Lynch, 590 NW2d 75 (Minn. 1999)

State v. Johnson, 441 NW2d 460 (Minn. 1989)

State v. Moore, 438 NW2d 101 (Minn. 1989)

2. Did the court deprive Miller of a fair opportunity to defend against the state's accusations when it applied an arbitrary evidentiary rule incorrectly and excluded alternative perpetrator evidence—including “reverse-Spreigl” evidence—which tended to incriminate Anderson and cast a reasonable doubt on the state's case against Miller?

Holmes v. South Carolina, 547 US ___ (2006)

Chambers v. Mississippi, 410 US 284 (1973)

State v. Blom, 682 NW2d 578 (Minn. 2004)

State v. Jones, 678 NW2d 1 (Minn. 2004)

3. Did the court's erroneous hearsay rulings, admitting out-of-court statements without the opportunity for cross-examination, result in the denial of Miller's state and federal constitutional right to a fair trial?

State v. DeRosier, 695 NW2d 97 (Minn. 2005)

Bernhardt v. State, 684 NW2d 465 (Minn. 2004)

State v. Haney, 23 NW2d 369 (Minn. 1946)

STATEMENT OF THE CASE

The state alleged that Franklin Miller and Jason Anderson kidnapped T████ H████ on July 24, 2004, in Gilbert, Minnesota, because he stolen a large amount of drugs and money from Miller a month earlier. On September 2, 2004, H████'s remains were found: he had been shot in the head approximately ten times. While the state claimed that Miller shot and killed H████, Miller pleaded not guilty and pointed to evidence of the involvement of Jason Anderson in H████'s disappearance and death.

On August 4, 2004, a Complaint charging Miller with kidnapping was filed in St. Louis County. Later, on February 18, 2005, an Indictment was returned by a grand jury charging two counts of first degree murder and two counts of kidnapping. The case proceeded to jury trial in September, 2005, with Judge James Florey presiding. On September 29, 2005, the jury returned verdicts of guilty on all counts and the court immediately sentenced Miller to life in prison without the possibility of release. It is from this judgment of conviction and sentence that Miller now appeals.

STATEMENT OF FACTS

Overview. On July 25, 2004, at 6:30 p.m., a Gilbert police officer took a missing person report on 26 year-old T ██████ H ██████. (T 1497-98).¹ H ██████'s sister reported that she had heard from witnesses who had seen Jason Anderson (Anderson) and Franklin Miller (Miller) force H ██████ into a car outside a bar in Gilbert around midnight on July 24, 2004. The Bureau of Criminal Apprehension was contacted. (T 1500). On July 27, 2004, after some witness interviews, Anderson was arrested and charged with false imprisonment. On July 28th or 29th, Jesse Ridlon was arrested in connection with H ██████'s disappearance. (T 1550-51). Miller was arrested as he appeared in court on another matter on August 2, 2005. Two days later, Miller was charged with kidnapping. (T 1913, 1925).

On September 2, 2004, two hunters contacted authorities about suspicious objects they had seen in the woods outside of the Palo-Markham area, south of Gilbert and Aurora. (T 1506, 1509-13, 1522-28, 1552). The objects were ultimately identified as the remains of T ██████ H ██████ (T 1866-74). An autopsy determined that H ██████ had died of multiple gunshot wounds to the head. (T 1858, 1863, 1875, 1878-82, 1898-99). Six bullet casings were found near H ██████'s remains. (T 1735-41). H ██████'s

¹ "T" refers to the transcript of the trial.

remains were found 15 minutes away from Ridlon's house. (T 1349-50).

The state made plea bargains with Anderson, 29, and Ridlon, 29, in return for their testimony against Miller before the grand jury and the petit jury. Anderson pleaded guilty to kidnapping H [REDACTED]; the state agreed not to seek an indictment against him for the first degree murder of H [REDACTED]; and he would testify at other defendants' trials. (T 965-66, 1028-29). Ridlon pleaded guilty to kidnapping H [REDACTED]; the remaining counts of the complaint filed against him, which included a count of second degree murder of H [REDACTED], would be dismissed; the state agreed not seek an indictment against him for the first degree murder of H [REDACTED]; he would testify at other defendants' trials; and the state would dismiss two separate felony drug cases, with charges of controlled substance crime in the first and second degree, that were pending against him. (T 774, 1299, 1352-53).

Trial: state's case: June 18, 2004 to July 23, 2004. Around June 18, 2004, there was a "tattooing" party at Jesse Ridlon's home, located outside Aurora in St. Louis County. Ridlon, T [REDACTED] H [REDACTED], 26, Miller, 29, and Olive Long, 27, the tattoo artist, were among those present. (T 773, 775-76, 790-93, 818-19, 870-71, 1300). H [REDACTED]'s behavior later that night was described by Long as "[a] little manic." (T 794). She saw him taking property belonging to others. (T 794-96). According to Long, H [REDACTED] got

into Miller's truck saying he would pull it around. H [REDACTED] then drove off down the road in Miller's truck. (T 779, 796-97). Long and others ran after the truck but couldn't stop it. (T 797-98).

On June 19, H [REDACTED] called a friend asking for a ride, saying he did not know where he was or why he was there. Another person with H [REDACTED] told the friend that H [REDACTED] was near the town of Cotton, some distance from Aurora. His friend picked him up there. (T 818-22, 829, 845-46).

On June 19 and 20, Miller told Ridlon about H [REDACTED]'s theft, saying that on the night of the tattoo party Miller had just finished loading his four-wheeler on his truck and stepped off the truck tailgate when H [REDACTED] jumped into the driver's seat and took off. (T 780-82, 1302-03). Miller said Ridlon's video camera and a backpack with \$8000 were in the truck when it was taken. (T 780-82, 787).

On June 19, 2004, an abandoned truck was reported in a remote rural area 16 miles from Aurora. (T 807-09). There was no ATV in the back of the truck. The doors were open and a number of items were in the truck, including a video camera. (T 810-11). No money was found in the truck and a marijuana pipe was the only drug or drug-related item found in the truck. (T 897). The truck was identified as one recently bought by Frank Miller. (T 891-94).

A day or two later, H [REDACTED], Miller, and some other people went to Cotton and looked for Miller's four-wheeler. (T 831-34). They didn't find it. (T 839).

Around this time, H [REDACTED] wrote his sister, April H [REDACTED], a letter saying he had taken Frank Miller's truck, four-wheeler, and a backpack with \$14,000-15,000 of drugs and money; he didn't remember doing it; and he woke up talking to bushes he thought were two of his friends. (T 872-73, 875).² H [REDACTED] wrote that he was scared of Miller; that he and A [REDACTED] H [REDACTED] had a plan to get out of the area; and that he was going to try to pay Miller back but didn't think he'd be able to do so. (T 874, 882).

Sometime after looking for the ATV with Miller and others, H [REDACTED] and a friend returned to Cotton by themselves to look for Miller's four-wheeler. (T 847-49). This time, they found it. (T 850). Eventually Miller came to the area and talked to H [REDACTED]. H [REDACTED] and his friend then drove back to town. (T 852-54). H [REDACTED] told his friend, "At least I know Frankie can't hit very hard" and then laughed. (T 857). When Miller talked to Ridlon after the four-wheeler had been returned, Miller told Ridlon that H [REDACTED]'s face was a good punching bag. (T 782, 1304-05). Miller also told

² April told police in September, 2004, while her brother still had not been found, that H [REDACTED] wrote that he had taken stuff worth \$12,000. She did not mention either drugs or money. (T 884-85).

Ridlon that two ounces of methamphetamine (valued at about \$6,000) were in the bag that was taken with the truck. (T 1305-06).

April H [REDACTED] talked to her brother on July 1 and told him he was lying about not remembering taking the truck because H [REDACTED] had taken money from her a few years earlier and told her the same story about talking to bushes. H [REDACTED] then admitted he remembered taking Miller's property. (T 876-78, 883, 1123-24). He told his sister the money and drugs were in a backpack in the woods by a barn. (T 879).

Between July 20 and 26, 2004, Daniel Heidelberger sold his mother's dark blue Cadillac to Miller, who had come to get the car in a Dodge Neon with another person. (T 972-75, 1160, 1166-70, 972-75). Anderson said he was with Miller when he went to buy the car. (T 977-79).

Anderson claimed that on the way to pick up the car and afterward, Miller told him H [REDACTED] had stolen his four-wheeler and some drugs worth \$30,000 to \$40,000 and owed Miller a "bunch" of money. Miller told Anderson he would clear Anderson's drug debt if he "helped him get" H [REDACTED]. (T 977-79).³

³ Anderson said that in July, 2004, he owed Miller about \$1,000 and he owed Ridlon a couple hundred dollars for methamphetamines. (T 970). In the past when Anderson owed people money for methamphetamines, in exchange for forgiving his drug debt, he would sometimes collect money that other people owed them. Anderson said he collected for Miller, Ridlon,

July 24, 2004. On the afternoon of July 24, 2004, Ridlon, Miller, Anderson, Jeremy Finke, and a few other people were at Ridlon's house. (T 980, 1308-10). Some people were working on Miller's four-wheeler and motorcycle; many were using methamphetamines. (T 982, 1310-11).

Later in the afternoon, Anderson and Finke went to Virginia to try and pick up a three-wheeler for Ridlon. (T 982-83, 1311-12). They were going through Ashley Larson's boyfriend to get the three-wheeler and stopped by her house, stayed about 20 minutes, and then left. (T 917-18, 944-45, 984-85).⁴ H [REDACTED] and some other people were at Larson's house. (T 909-10, 956-57, 986). While there, Anderson said he asked H [REDACTED] about the money he owed Miller and told H [REDACTED] to pay up. (T 987).

Around 9:30 p.m., Anderson and Finke returned to Ridlon's without the three-wheeler. (T 983, 986, 1312). Samuel Miller (Samual), 32, Frank Miller's brother, Anthony Hill, and Jeremy Sanders were at Ridlon's. (T 1229-30, 1261, 1759-60, 1765). As Ridlon was leaving for work, Anderson told Miller he had seen H [REDACTED] "partying" at Larson's house. (T 987, 1313, 1768). While Anderson said Miller got mad (T 988), other witnesses said Anderson was "amped up" (T 1264), wanting a ride to get H [REDACTED] and

and others. (T 970-71, 1066).

⁴ Ashley Larson said that in July, 2004 Jason Anderson was not "allowed at" her house. (T 964).

work off the debt Anderson owed Miller. (T 1766).

After he and Miller talked about arranging a meeting with H [REDACTED], Anderson called a cell phone at Larson's house with Miller's phone and talked to H [REDACTED]. They agreed to meet at the Gladiator Bar in Gilbert an hour later. (T 921-22, 947, 961-62, 990-92).

H [REDACTED] left Larson's house with his old girlfriend, Jaime VonWald, and went to meet Anderson. (T 920-22, 933-34, 946-49, 962-63). H [REDACTED] was dropped off at the house of his friend, A [REDACTED] H [REDACTED] in Gilbert. (T 1087-88).⁵ H [REDACTED] and B [REDACTED] S [REDACTED] were there. (T 1091-92, 1982-83). H [REDACTED] told H [REDACTED] he was going to meet Jason Anderson downtown and talk about "some stuff." (T 1092). H [REDACTED] believed H [REDACTED] was going to talk to Anderson about the money H [REDACTED] owed Frank Miller, which H [REDACTED] had told H [REDACTED] about earlier. (T 1093, 1122, 1993-94).

H [REDACTED] walked to the Gladiator; H [REDACTED] and B [REDACTED] S [REDACTED] drove there. (T 1093-94, 1983-84). While S [REDACTED] waited in the car, H [REDACTED] and H [REDACTED] went into the bar but Anderson wasn't there. (T 1096-97). According to H [REDACTED] and B [REDACTED] S [REDACTED], as H [REDACTED] and H [REDACTED] walked out of the bar towards H [REDACTED]'s car, a Cadillac pulled up and Anderson got out. H [REDACTED] walked

⁵ A [REDACTED] H [REDACTED] and April H [REDACTED], H [REDACTED]'s sister, were in a long-term relationship. (T 1089).

towards the Cadillac. (T 1097, 1986). H ■ watched from near his car. Anderson shook H ■'s hand, talked to him, and then started hitting him. (T 1098, 1986-88). When H ■ started toward the Cadillac, Miller got out of the driver's side of the car and said if H ■ was there for backup, he'd shoot him right now. H ■ ran away. (T 1098-1100, 1988).⁶

According to Anderson, he and Miller drove to the Gladiator in the Cadillac. (T 992-93). Miller had a .22 pistol with him. (T 997). Anderson went into the bar but H ■ wasn't there. He and Miller drove around and tried to find a phone number for H ■. (T 993-95). They then saw H ■ in front of the bar. (T 995). Miller pulled the Cadillac over and Miller and Anderson jumped out. (T 996-97). Miller started running after A ■ H ■, telling him to back off or he'd shoot him. Anderson ran after H ■, who was running away, and tripped him. Miller pulled up with the car, got out, pointed a gun at H ■ and told him to get in. H ■ got into the back seat of the car. (T 998-1001).

As they drove, Miller asked where his money was. H ■ said he'd

⁶ B ■ S ■ originally told police Frank Miller got out of the car, but she didn't know Miller. (T 1989-90). Around 11:00 p.m. on July 24, 2004, a man leaving Nick's Bar, which was across the street from the Gladiator Bar in Gilbert, saw an older Cadillac parked in the middle of the street 70 yards from the Gladiator and three guys scuffling. He thought it was just a "bunch of kids screwing off." (T 1076-80, 1085). He later heard a car door slam and the Cadillac sped off. (T 1081).

get it. Miller was “smacking” H [REDACTED]. (T 1002). They stopped in Aurora where Miller picked up another car—a white Mitsubishi Diamante that belonged to Mason Johnson. (T 1003).⁷ Miller drove that car; Anderson drove the Cadillac. (T 1004, 1006).

Miller and Anderson drove to the house of a friend, Todd Gregorich. (T 1006). Anderson claimed he went into the house, leaving Miller arguing with H [REDACTED] in the car. Miller came into the house later but H [REDACTED] did not. (T 1008). Miller told Anderson that H [REDACTED] was in the trunk. (T 1009).

Miller was looking for his brother Samual and Danielle Frazee. (T 1132-35, 1141, 1147-50, 1154, 1658-60). Samual and Frazee went to Gregorich’s house after receiving a text message from Miller’s phone asking them to bring gas for Miller’s car. (T 1776-77). They went in and saw Miller, Anderson and Gregorich. (T 1778). Samual said that Anderson was acting “all weird.” (T 1781). Anderson said he grabbed him, referring to H [REDACTED], gangster-style. (T 1787). According to Anderson, Miller told Samual that he had H [REDACTED]. (T 1010). Samual and Frazee left after about

⁷ Earlier, Miller talked with Mason Johnson and left him a voice mail saying he was interested in buying a Mitsubishi Diamante Johnson was selling and wanted to test drive it. Johnson, who had gone out of town, left the car with a friend. Witnesses said Miller tracked down the car, which had the keys in the ignition, and was allowed to take it just before midnight on July 24th. (T 1174-81, 1188, 1194, 1197-98, 1202-06, 1213-15, 1219-20).

10 minutes. (T 1137-39, 1780, 1790). Miller and Anderson stayed until daylight. (T 1138).

A [REDACTED] H [REDACTED], who eventually returned to his car and drove around with S [REDACTED] for about an hour before returning to Gilbert, said Anderson called him later that night wanting to talk to him about things. H [REDACTED] asked about H [REDACTED] but received no response. H [REDACTED] later tried to call Anderson but was unsuccessful. (T 1100-1104).

Around 10:30 a.m., Miller and Anderson went to Ridlon's, taking both cars: Miller drove the Cadillac and Anderson drove the Mitsubishi Diamante. (T 1012, 1316-17, 1426). The Cadillac was parked off the driveway. (T 1318-19). Anderson backed the Mitsubishi Diamante up to the large garage door. (T 1013-14, 1317-18). Ridlon testified that Anderson and Miller pulled H [REDACTED] out of the Mitsubishi Diamante trunk and put him in the middle of the garage floor. (T 1320). According to Anderson, Ridlon opened the garage door and Miller must have pulled H [REDACTED] out of the trunk, though Anderson didn't see that, because H [REDACTED] was sitting on the garage floor. (T 1013-15). He was not bound at that time, though he had been bound with duct tape earlier: he had pieces of duct tape on his wrists

and ankles but was “pretty much” free. (T 1015-16, 1069, 1320).⁸

The garage door was closed. (T 1015, 1321). According to Ridlon, Miller and Anderson slapped H [REDACTED] in the face while Miller asked where was his money. (T 1321, 1365-67). When H [REDACTED] said he didn’t know, Miller slapped him a few more times. (T 1322). Ridlon admitted he kicked H [REDACTED] in the chest when Miller and Anderson stopped hitting H [REDACTED] and Miller asked if there was anything Ridlon wanted to say to H [REDACTED]. (T 1323, 1366). According to Anderson, Miller asked H [REDACTED] about his money and smacked and pistol-whipped him; Ridlon kicked H [REDACTED] a few times. Anderson said he did not do anything to H [REDACTED] but watch and ask where the money was. (T 1015-16, 1058). Miller also hit H [REDACTED] with a fan belt. (T 1069-70, 1323).⁹ After 10 or 15 minutes according to Ridlon, or 30-60 minutes according to Anderson, they stopped hitting H [REDACTED], Miller put duct tape on him, and H [REDACTED] was put back in the trunk of the white Mitsubishi Diamante. (T 1017, 1325-26).¹⁰

According to Ridlon, the white Mitsubishi Diamante was in Ridlon’s front yard until Anderson moved it when Ridlon’s mother stopped at the

⁸ While Anderson admitted using violence to collect drug debts, he denied using duct tape to bind the subjects he was collecting from. (T 987, 1067).

⁹ Police recovered a fan belt and duct tape from Ridlon’s garage. (T 1534-36).

¹⁰ Ridlon told police Anderson put H [REDACTED] back in the trunk. (T 1384).

house. Anderson was gone with the car about 10 minutes. Then Anderson returned, parking in front of the garage, and later moved the white car down by the shed. (T 1326-28, 1371-73). According to Anderson, Finke called him out of the garage saying they were going to get the three-wheeler. (T 1017-18). According to Finke, he went into the garage where Anderson, Miller, and Ridlon were sitting and asked about getting the three-wheeler. He and Anderson left about 30-45 minutes later. (T 1431-33). After getting the three-wheeler, Finke dropped Anderson off at his mother's house. (T 1018, 1434-35). Anderson did not return to Ridlon's house. (T 1017-18, 1329-30, 1435).

Samual Miller and some friends wanted to go dirt biking that day but they had to go to Ridlon's first because Miller's tire was flat again. Samual and Jeremy Sanders arrived around noon. (T 1258, 68, 1331-33, 1791-93). Later that day, Ridlon worked on Miller's four-wheeler. (T 1329-30). Samual and Sanders did not see Anderson at Ridlon's. (T 1268, 1285, 1794, 1796-97). A blue Cadillac was parked in the driveway and a white Mitsubishi Diamante was behind the garage at Ridlon's. (T 1270-71, 1795).

At some point, Ridlon heard H [REDACTED] banging on the car and then Miller went to the white Mitsubishi Diamante. (T 1333-34). Ridlon told Samual that H [REDACTED] was back there and Samual joined Miller behind the

first garage by the white Mitsubishi Diamante. (T 1275, 1334, 1799-1800, 1841).

At the car, Samuel saw H [REDACTED] laying on the ground and talking to Miller. (T 1800-01). H [REDACTED] was not bound but had strips of silver hanging off his pants. (T 1823). They were there about 10 minutes before Samuel walked back to the garage with Miller following him. When Samuel said something about H [REDACTED], Miller told him to mind his own business. (T 1350-51, 1802-03). At some point, Samuel asked about the Olive that was mentioned and Ridlon said “Yeah, it is all playing out,” that she had been up to something. (T 1803). Miller stopped following Samuel and then was back by the white Mitsubishi Diamante with Ridlon. Miller and Ridlon were making phone calls and H [REDACTED] was still in the same spot. (T 1804-05).

While Samuel was loading vehicles on a truck, Miller was getting his riding gear. (T 1806). Samuel asked Miller if he was coming riding, and Miller said he’d be there but he had to take care of something. (T 1339-40, 1819). Samuel and Sanders left to go riding around 1 or 2:00 p.m. (T 1808-09). After Samuel and Sanders left, according to Ridlon, Miller threw his riding gear on the garage floor and drove off in the white Mitsubishi Diamante. (T 1336-39).

Samuel and Sanders went to a friend’s house and waited for Miller

before they started riding. (T 1278-79). Samuel thought a couple of hours passed before Miller arrived and they went riding (T 1810-11), while Sanders thought Miller rode up on his dirt bike, wearing riding clothes, a short time after they arrived. (T 1278-81). At some point, Samuel asked Miller about H [REDACTED] and Miller said he emptied a clip in him and then said he was joking, he sent him to Colorado. (T 1812). They rode until almost dark. While they were riding, Miller left and said he was going back to Ridlon's. (T 1278-79, 1284, 1816-17).

When Mason Johnson arrived in Hoyt Lakes near midnight on July 25th -26th, he learned his Mitsubishi Diamante was at Ridlon's house and went there to get his house keys from the car. (T 1183-84). He found the car parked behind the garage. Johnson also saw a blue Cadillac at Ridlon's. Johnson took the keys from the Mitsubishi Diamante. (T 1185-87).

On the July 26, Anderson went to Anthony Hill's house with Danielle Frazee. (T 1023, 1241-42). Anderson said he was worried about H [REDACTED] and asked a friend to call Miller. (T 1023-24). Miller came to Anthony Hill's and talked to Anderson. (T 1666). When Anderson asked Miller about H [REDACTED], Miller told him to keep his mouth shut, that "[t]hey ain't got enough to indict me." (T 1025).

Ridlon said he found the white Mitsubishi Diamante a few days later

out in a field behind the big shed. (T 1341, 1343-44). Ridlon, not sure whether H [REDACTED] was still in the car or not, towed the car over to a friend's yard. (T 1345). Eventually, Ridlon brought officers to the car. (T 1346, 1382, 1537-38).¹¹

Officers went into the trunk of the white Mitsubishi Diamante to see if H [REDACTED] was still in there—he wasn't. (T 1537-38). The trunk of the white car contained matted duct tape, a belt, a broken watch, apparent blood stains, and an odor of urine. (T 1538). Mason Johnson had not seen those items in the trunk when he had the car. (T 1190-92). The blood was matched to H [REDACTED]'s DNA profile and did not match the other profiles to which it was compared. (T 1544-1549). A [REDACTED] H [REDACTED] identified the watch found in the back of the white Mitsubishi Diamante as H [REDACTED]'s watch. (T 1107-09, 1541). The duct tape was similar to some found at Ridlon's house, sauna, and garage. (T 1543).

A few days after July 25, Frank Miller called A [REDACTED] H [REDACTED]. H [REDACTED] asked about H [REDACTED]. Miller said he gave H [REDACTED] a one-way ticket somewhere and he wasn't going to come back. (T 1106).

¹¹ Ridlon's story conflicts with Mason Johnson's testimony that when he came out Sunday night at midnight, he saw the white car parked behind the small shed where it had been earlier. (T 1185-87).

Around July 26-27,¹² Miller, Danielle Frazee, and Richard McNeil went to the home of Dean Dunn, a man they had known about a year. (T 1667-68, 1684-86). McNeil and Dunn went out to the garage and then Miller joined them. (T 1689-90). McNeil brought out an automatic .22 pistol and told Dunn he was going to cut it up. (T 1693-95). When he hesitated, Dunn said Miller picked up the gun, pointed it at him and said he would do what he was told. (T 1695-96). Dunn told McNeil to take the wooden grips off the pistol. Dunn took torches and cut the gun up, with the remains ending up in a garbage can (T 1696-98), and later in a ditch. Dunn recovered them for authorities. (T 1701-03, 1722).¹³ In addition to the wooden grips and other items, a SIM card for a cell phone was burned at Dunn's. (T 1698-99, 1704).

On Friday, July 30, 2004, police were contacted about a blue Cadillac connected with H [REDACTED]'s disappearance. (T 1396, 1554-55). A Zim resident had seen a car fitting that description parked in the area a few days earlier. (T 1396-97, 1401). The blue Cadillac was recovered. A search of

¹² On July 26 and 27, 2004, Andrea Emery and Richard McNeil stayed at a motel in Virginia. (T 1637-38, 1645-46). Danielle Frazee later went to hotel with McNeil. (T 1670-71). She later drove to the Twin Cities with Miller. (T 1673-77).

¹³ Some molten metal was examined but it could not be determined whether it had once been a gun. (T 1735-36).

the car found some dirt bike riding gear. (T 1554-55, 1603-08). Two prints located in the car—one on a sticker and one on a seat belt latch—were identified as Miller's. (T 1608-09, 1613). A .22 caliber cartridge casing was found on floor between the driver's seat and the door. (T 1614).

While Samuel saw a clip at Ridlon's and ammunition in the Cadillac, (T 1816),¹⁴ the Heidelbergs had never found spent .22 casings in the car. (T 1163, 1170-71). The casing found in the blue Cadillac was compared with the six bullet casings found near H [REDACTED]'s remains and was determined to have come from the same gun. (T 1735, 1738-41).¹⁵

After his arrest, Miller talked to his girlfriend Kristen Krings over the jail phones. Two recordings were played for the jury. (T 1918-23, 1923-25). In one, Krings told Miller that reports suggested the authorities were soon to recover H [REDACTED]'s body after which Miller said he was sick and had to sit down. (T 1919, 1922). Krings testified that Miller was complaining about the food when he said he didn't feel well. (T 1969). In the other call, Krings apologized for Miller being in jail after she had encouraged him to come back at which point Miller said he played so he pays. (T 1924-25).

¹⁴ Ridlon said Miller had a semi-automatic .22 gun at the tattoo party. (T 1347-48).

¹⁵ Three bullet fragments were also analyzed and could have been fired from any gun—handgun or long gun—with the same rifling patterns. (T 1752-53).

Defense case. After establishing that Ridlon and Anderson met the criteria as alternative perpetrators, the court found that the defense was permitted to present some alternative perpetrator evidence, including some reverse-Spreigl evidence, but not other evidence.¹⁶ (T 1951-53).

The court admitted evidence that in April, 2003, Anderson and three others jumped R■■■ M■■■, 26, bound him with electrical tape, and secured his hands and feet with an electrical cord. Anderson threatened to kill M■■■ with a pistol over a supposed drug debt. Anderson hit M■■■ a number of times. After taping him up, Anderson went through M■■■' cell phone, calling his friends telling them what would happen to M■■■ if the money owed wasn't paid. (T 2007-13).

The jury found Miller guilty of first degree murder and kidnapping.

¹⁶ The court excluded testimony from Casey Moravitz that, among other things, on July 23, 2004, Jason Anderson was bragging about this prior abduction activity and his use of tape. (T 1946-48). The court also excluded testimony from Jessie Lundeen that he hired Jason Anderson to collect money from a person in March, 2003, that Anderson collected money from C■■■ R■■■ and threatened to tape R■■■ up, and that Anderson told him about the R■■■ M■■■' incident. (T 1948-50).

ARGUMENTS

I.

Where the state failed to present the grand jury with exculpatory evidence—that the two key witnesses before it were more involved with H [REDACTED]’s death and received inducements related to that greater involvement in exchange for their testimony against Miller—the court erred by denying the motion to dismiss the indictment.

The defense moved to dismiss the grand jury Indictment because the jurors were not informed of the full extent of the involvement of two grand jury witnesses—Jason Anderson and Jesse Ridlon—in the disappearance and death of T [REDACTED] H [REDACTED], the cause they were investigating. (T 743-44); Appendix 1-2. The court denied the motion to dismiss. (T 745-46). Because the exculpatory evidence that was not presented “would have materially affected the grand jury proceeding,” the convictions must be vacated, the Indictment dismissed, and the case returned to the district court for further proceedings.

A grand jury proceeding determines whether there is probable cause to believe the accused has committed a crime. State v. Inthavong, 402 NW2d 799, 801 (Minn. 1987). A presumption of regularity attaches to the indictment, id., and a criminal defendant bears a heavy burden when seeking to overturn an indictment, a burden which is heightened when the defendant has been found guilty following a fair trial. State v. Scruggs, 421 NW2d 707,

717 (Minn. 1988).

However, “[t]he grand jury is not intended to be a tool of the prosecution or the defense. It is an arm of the judiciary and, as such, it shall be used in a fair, impartial and independent manner or not at all.” State v. Johnson, 441 NW2d 460, 466 (Minn. 1989). A prosecutor’s failure to present exculpatory evidence to the grand jury requires dismissal of the indictment if that evidence would have materially affected the grand jury proceeding. State v. Moore, 438 NW2d 101, 105 (Minn. 1989). Exculpatory evidence includes inducements given witnesses in exchange for their testimony. See State v. Lynch, 590 NW2d 75, 79 (Minn. 1999) (testimony of witnesses was tainted by the failure to disclose all of the inducements); Moore, 438 NW2d at 104-05 (not all evidence bearing on the credibility of the state’s witnesses materially affects the grand jury’s decision to indict). The effect on the grand jury proceeding must be judged after looking at all of the evidence that the grand jury received. State v. Olkon, 299 NW2d 89, 106 (Minn. 1980), cert. denied, 449 US 1132 (1981).

The prosecutor failed to present exculpatory evidence of the inducements given to the two prime witnesses before the grand jury, Jason Anderson and Jesse Ridlon. While the witnesses testified at length, (GJ 52-

109, 138-189),¹⁷ the prosecutor questioned them briefly about their legal involvement in H [REDACTED]'s kidnapping, eliciting only testimony that they had pled guilty to kidnapping H [REDACTED] and were awaiting sentencing when they testified. (GJ 54, 138-39).

Anderson and Ridlon, however, had more involvement in the H [REDACTED] matter than the kidnapping to which they pled guilty. Legally, they were responsible for any other crimes committed which were reasonably foreseeable and in pursuance of the kidnapping. Minn. Stat. § 609.05, subd. 2. Given their testimony which acknowledged the presence of a gun, they could have been legally responsible for H [REDACTED]'s murder under a number of different degrees of murder, i.e., first degree premeditated; first degree intentional during a kidnapping; second degree intentional; and second degree felony murder.

This "hypothetical" nature of the witnesses' involvement in H [REDACTED]'s murder was removed by the terms of the plea agreement the state made with each witness. The state and the defendants negotiated on the basis that these codefendants were potentially liable for H [REDACTED]'s murder. The state agreed to dismiss the remaining counts of the complaint against Ridlon, which included a count of second degree murder for H [REDACTED]'s murder, and the

¹⁷ "GJ" refers to the transcript of the grand jury proceedings.

state agreed not seek to an indictment against Ridlon for the first degree murder of H [REDACTED]. (T 774, 1299, 1352-53).¹⁸ The state agreed not to seek to indict Anderson for first degree murder in connection with H [REDACTED]'s murder. (T 965-66, 1028-29). The plain terms of the plea bargains established the witnesses' deeper involvement in H [REDACTED]'s murder. Despite this greater involvement and the strong inducement for the key witnesses' testimony, which was directly related to the case the grand jury was investigating, the grand jurors were not told about this critical information.

Unlike Lynch, where the grand jurors had been told that one witness had made a deal with prosecutors to ensure he would not be charged in connection with the murder, Lynch, 590 NW2d at 79, the grand jurors hearing this case did not know that Anderson and Ridlon had made a deal with prosecutors to ensure they would not be charged in connection with the H [REDACTED]'s murder. The failure to present the inducements in the presentation by the prosecutor misled the jurors into concluding that Anderson and Ridlon had no legal involvement in H [REDACTED]'s murder and had no reason to lie in their testimony.

The grand jury in this case recognized the significance of "charges."

¹⁸ The inducements received by Ridlon also included the dismissal of two separate drugs charges. (T 774, 1299, 1352-53). The grand jury did not hear of this significant inducement either.

Grand jurors asked about Anderson's charge as well as the charges against McNeil, Dunn, and Miller (GJ 110, 318-21), demonstrating the importance of the charges and inducements to the jurors in evaluating probable cause. Despite the specific question about Anderson's charge, the prosecutor did not present any other evidence of the "charges"—i.e., the negotiation which prevented the prosecutor from seeking first degree murder charges against either Anderson and Ridlon or that Ridlon was charged with second degree murder.¹⁹ The record is silent and misleading about the "interests" these witnesses had in testifying as they did before the grand jury. It was error for the state to fail to present the grand jury with the exculpatory evidence of the inducements Anderson and Ridlon received, based on their criminal liability for H [REDACTED]'s murder, in exchange for their testimony. Lynch, 590 NW2d at 79; Moore, 438 NW2d at 104-05. Clearly, avoidance of first and second degree murder charges is the kind of inducement which could "materially affects the grand jury's decision to indict." Moore, 438 NW2d at 104-05.

This Court's concerns about the misuse of the grand jury process—it

¹⁹ The state's presentation of Ridlon's testimony about what happened to H [REDACTED] also failed to inform the grand jury that Ridlon moved the white car, which he suspected had H [REDACTED]'s body in it, or that he initially failed to tell police about that. See (GJ 290-91, 294). But for a grand juror's questions, this evidence would not have been presented to the grand jury. (GJ 312, 313, 315).

is a process that must be used fairly or not at all—has included consideration of the appropriateness of and justification for what might be seen as a harsh remedy for misuse of that process.

Thus, while we recognize that dismissing indictments may result in serious ramifications, we know of no other way to preserve the integrity of the judicial process and maintain the independence of the grand jury. With the vast state resources available for the investigation and prosecution of crime, there is no need to disregard the safeguards which took 700 years to develop within the English and American common law systems. The grand jury is not intended to be a tool of the prosecution or the defense. It is an arm of the judiciary and, as such, it shall be used in a fair, impartial and independent manner or not at all. This decision is necessary to protect not only the defendants, but all of us as well.

Johnson, 441 NW2d at 466.

Dismissal is the appropriate remedy here. The state's failure to inform the grand jurors about the inducements leading to the testimony of Anderson and Ridlon materially affected the decision to indict. Moore, 438 NW2d at 105. Moreover, even though one grand juror asked about Anderson's charge, the prosecutor did not present any other evidence about the interests of these witnesses in testifying as they did, which exacerbated instead of corrected, this error. For these reasons, in furtherance of the historical significance of the grand jury safeguards, and in protection of not only "defendants, but all of us as well," the convictions must be vacated, the Indictment dismissed, and the case remanded for further proceedings.

II.

By excluding alternative perpetrator evidence, including evidence of other similar bad acts committed by Jason Anderson, an acknowledged alternative perpetrator, which cast a reasonable doubt on the state's theory that Miller committed the murder, the trial court committed reversible error.

While the court found that Jason Anderson was an alternative perpetrator, it excluded admissible alternative perpetrator evidence regarding him, including “reverse-Spreigl” evidence. There is a reasonable possibility that the admission of the erroneously excluded evidence, which cast doubt on the state’s claim that Miller killed H [REDACTED], might have resulted in a more favorable verdict to Miller. The court committed reversible error and a new trial is necessary.

The state and federal constitutional guarantees of due process grant the accused “the right to a fair opportunity to defend against the State’s accusations.” Chambers v. Mississippi, 410 US 284, 294 (1973); State v. Jones, 678 NW2d 1, 15-16 (Minn. 2004). In exercising this right, the accused may introduce evidence that tends to show that someone else committed the crime, known as alternative perpetrator evidence. State v. Blom, 682 NW2d 578, 621 (Minn. 2004); Jones, 678 NW2d at 15-16; State v. Hawkins, 260 NW2d 150, 158-59 (Minn. 1977). This Court has characterized evidence that a third party told others he had committed the

crime charged or evidence that he could have committed the crime charged as alternative perpetrator evidence. Jones, 678 NW2d at 18-20.

In exercising the right to defend against the state's accusations, the accused may also present evidence of other crimes, wrongs, or bad acts committed by an alternative perpetrator to establish reasonable doubt about the about identification of the accused as the person who committed the crime charged. This has been referred to as "reverse-Spreigl" evidence. State v. Gutierrez, 667 NW2d 426, 436-37 (Minn.2003); Woodruff v. State, 608 NW2d 881, 885 (Minn. 2000). This Court has characterized evidence that a third party had a history of violence as "reverse-Spreigl" evidence. Jones, 678 NW2d at 18-20.

This Court has recognized that these different theories of relevance have different standards of admissibility. In determining the admissibility of alternative perpetrator evidence, the individual proffered to be an alternative perpetrator must be connected to the commission of the crime charged. Huff v. State, 698 NW2d 430, 436 (Minn. 2005); Jones, 678 NW2d at 16.

Evidence that has an "inherent tendency" to connect the alternative party with the commission of the crime is admissible. Jones, 678 NW2d at 16 (citing State v. Gutierrez, 667 NW2d 426, 436 n. 8 (Minn.2003)). The evidence that an alternative perpetrator committed the crime must also

satisfy the ordinary evidentiary rules of admissibility. Huff, 698 NW2d at 436; Gutierrez, 667 NW2d at 436.

The standard to determine the admissibility of “reverse-Spreigl” evidence is provided by Minn. R. Evid. 404(b) and this Court’s decision in State v. Spreigl, 139 NW2d 167 (Minn. 1965):

***, the defendant must show (1) clear and convincing evidence that the alleged alternative perpetrator participated in the reverse-Spreigl incident; (2) that the reverse-Spreigl incident is relevant and material to defendant’s case; and (3) that the probative value of the evidence outweighs its potential for unfair prejudice.

Woodruff, 608 NW2d at 885 (citation omitted). Only “reverse-Spreigl” evidence, not all alternative perpetrator evidence, is subject to the special rules governing the admission of evidence of other bad acts, including the heightened clear and convincing standard. Jones, 678 NW2d at 16-17.

Defense counsel’s proffer/trial court’s rulings. Defense counsel filed notice that he intended to offer alternative perpetrator evidence as well as “reverse-Spreigl” evidence, attaching the transcribed statements of Casey Moravitz and Jessie Lundeen to the notice. See Appendix 3, 4-29.²⁰ The court considered the witnesses’ statements as well as counsel’s summaries. (T 1946, 1948). The alternative perpetrator evidence offered by the defense

²⁰ The writing and markings on the statements, see, i.e., Appendix 8, 25, appear to be the court’s comments.

included: (A) Anderson told Moravitz and Lundeen that he duct taped people and beat them over debts; Appendix 5-8, 22 23-24; (B) Lundeen saw Anderson kick a door and beat a man to collect the \$180 debt owed to Lundeen; Appendix 20-21; (C) R■■■■ M■■■■ reported that Anderson had bound him with tape in order to collect a debt; (D) M■■■■ told Lundeen what Anderson had done to him, Appendix 24-25; and (E) Anderson had a reputation for violence. Appendix 12, 14, 19-20, 28. See (T 1933-35).

The court found that Jason Anderson was an alternative perpetrator and admitted evidence of his involvement in the H■■■■ kidnapping, assault, and murder (T 1942-43), and the court allowed M■■■■ to testify about what Anderson did to him. (T 1951-53). However, the court excluded “reverse-Spreigl” evidence about Anderson’s statements to Moravitz and Lundeen about his prior activities, Lundeen’s observations of Anderson’s prior activities, and M■■■■’ statements to Lundeen about Anderson’s prior activities finding the witnesses’ statements did “not meet the clear and convincing standard” (T 1946-48), “doesn’t reach the level of clear and convincing evidence”, were “too speculative” to allow, and “would not . . . amount to clear and convincing evidence.” (T 1948-50).

Admissibility standard for “reverse-Spreigl” evidence. The constitutional right to defend against charges may not be abridged by

“arbitrary” evidentiary rules. Holmes v. South Carolina, 547 US ___, ___, 126 S Ct 1727, 1734-35 (2006) (“arbitrary” state rule precluding defendant from introducing proof of third party’s guilt if state introduced forensic evidence was unconstitutional).

The trial court first erred by applying an arbitrary clear and convincing standard to the admission of this evidence. This Court has already questioned the justification for the admissibility requirement of clear and convincing evidence of the alternative perpetrator’s participation in the reverse-Spreigl act. See Jones, 678 NW2d at 17 n. 6 (citing State v. Richardson, 670 NW2d 267, 280 (Minn. 2003) (“Sixth Amendment concerns may enter into picture when it is the defendant who is seeking to present other crimes evidence and...there may...be situations when the clear and convincing rule may have the potential to operate unconstitutionally”)).

Where the rules for admission already require a connection between the crime charged and the third party as well as a weighing of probative value of the evidence versus its potential for prejudice, the additional requirement that the participation be established by clear and convincing evidence is arbitrary and beyond the rational ends served by rules governing admissibility of such evidence. See Holmes, 547 US at ___ & n.*, 126 S Ct at 1733 & n.*.

Moreover, this Court has recognized that “evidence of prior domestic abuse does not need to be proven by clear and convincing evidence in first-degree domestic abuse homicide cases” because the acts were offered “as direct evidence, offered to prove an element of the offense with which the defendant was charged.” State v. Cross, 577 NW2d 721, 725 (Minn. 1998); see State v. McCoy, 682 NW2d 153, 160 (Minn. 2004). Where the state’s introduction of evidence is not subject to a clear and convincing threshold, there is no reason to condition alternative perpetrator evidence on clear and convincing evidence. This dichotomy again demonstrates the arbitrariness of the clear and convincing requirement for “reverse-Spreigl” evidence.

Given this heightened clear and convincing standard of admissibility, the state “significantly undermined fundamental elements of the defendant’s defense[,]” and exclusion of evidence on this basis will be declared unconstitutional. See United States v. Scheffer, 523 US 303, 315 (1998). This Court should find the clear and convincing requirement for reverse-Spreigl evidence is an arbitrary abridgment of the right to defend against the charges and discard it. Richardson, 670 NW2d at 281 n. 10. The trial court erred by excluding evidence with an unconstitutional standard.

There was clear and convincing “Reverse-Spreigl” evidence. Even if the Constitution allowed a “clear and convincing” requirement for

admissibility of this type of evidence, the court erred in ruling that the reverse-Spreigl evidence was not admissible. Despite the court's intent and effort to get its rulings right, see (T 1929, 1940-41, 1952), the court erred (i) by misapplying the clear and convincing standard, and (ii) by improperly making credibility assessments of the proffers.

Under this Court's clear and convincing requirement, Miller was only required to show clear and convincing evidence that Anderson *participated* in the "reverse-Spreigl" incidents. See Woodruff, 608 NW2d at 885. The trial court, however, required that the *statements themselves* be clear and convincing and excluded them after finding they were not. See Jones, 678 NW2d at 17 & n. 7 (both state and defense applied the clear and convincing standards to the wrong questions).

It is clear that, applying the standard correctly, this prong for admission was satisfied. As justices on this Court have recognized, "proffered testimony [of] an eyewitness . . . would be based on first-hand knowledge and clearly satisfies any foundation requirements." Richardson, 670 NW2d at 289 (Hanson, J., concurring in part, dissenting in part); Id. at 292 (Meyer, J., joined in Hanson, J., concurrence and dissent). The trial court erred by excluding information obtained first hand.

Lundeen's statement included his personal observation of Anderson

assaulting C [REDACTED] T [REDACTED] in order to collect a drug debt. Appendix 20-21.

Lundeen's eyewitness account satisfied the foundational requirements.

R [REDACTED] M [REDACTED]' testimony about his incident with Anderson was also based on first-hand knowledge (T 1935, 2007-13), and was found to be "clear and convincing for reverse-Spreigl." (T 1950-51). The court's assessment of Lundeen's statements about the M [REDACTED]' incident, saying they "would not . . . amount to clear and convincing evidence" (T 1950), was incorrect. The court erred by excluding Lundeen's statements about these incidents.

The witnesses' statements, together with Anderson's own admission that he was a drug debt collector and used violence on occasion, (T 970-71, 987, 1066-67), establish by clear and convincing evidence the Anderson was involved in the incident with C [REDACTED] R [REDACTED], Appendix 23-24, and the incident Anderson described to Moravitz on July 23. Appendix 5-8. These statements were admissible under a correctly applied clear and convincing standard.

This Court has held that in determining the admissibility of alternative perpetrator evidence, it is improper for the court to make a "credibility assessment" in rejecting this type of evidence. Blom, 682 NW2d at 621.

It is the jury's role to assess the credibility of the evidence and the state may present rebuttal evidence for the jury to consider in making its decision.

Id., at 621-22; Cf. State v. Dahlin, 695 NW2d 588, 596 (Minn. 2005)

(“credibility determinations and the weighing of evidence are tasks reserved to the jury”). The question for the court is, if the witness statements are true, is the evidence admissible. In rejecting the reverse-Spreigl proffers regarding Moravitz’s statement, the court, noting that she appeared to have some relationship to Miller, questioned the nature of the information and the timing in which it was given. (T 1946-47). Regarding Lundeen’s statements, the court noted its belief that his “timing” was “very suspect.” (T 1949). The court also noted the differences between Lundeen’s statement and M [REDACTED]’ statement to police, saying it “weighs against its credibility.” (T 1950).²¹ In this case, the court also erred by excluding this evidence on the basis of credibility.

“Reverse-Spreigl” evidence was admissible. The proffered “reverse-Spreigl” evidence also met the other evidentiary requirements for admissibility. In order to be relevant and material, the Spreigl evidence should be similar to the charged offense either in time, location, or modus operandi. State v. DeWald, 464 NW2d 500, 503 (Minn. 1991); State v. Norris, 428 NW2d 61, 69 (Minn. 1988).

The excluded “reverse-Spreigl,” that Anderson engaged in and

²¹ The court’s explanation seems to require a higher level of consistency from “reverse-Spreigl” evidence offered by the defense than of Spreigl evidence when offered by the state.

bragged about very similar conduct to that to which H [REDACTED] was subjected and that Anderson had a reputation for violence was relevant and material: it tended to cast a reasonable doubt on the state's claim that Miller killed H [REDACTED] by indicating that Anderson killed H [REDACTED]. The facts that Anderson had committed strong-arm debt collections many times in the past, sometimes armed with and using a gun, even where those crimes did not result in death, tended to show that Anderson—not Miller—killed H [REDACTED]. See State v. Lewis, 547 NW2d 360, 362-64 (Minn. 1996) (under Rule 404(b), prior robberies are admissible to prove identity—in murder case—of perpetrator who killed while committing a robbery). His reputation for violence, Appendix 12, 14, 19-20, 28, also supported the defense claim that Anderson killed H [REDACTED]. See Jones, 678 NW2d at 18-20.

Moreover, there was a factual question for the jury about the degree and nature of Anderson's involvement in the kidnapping and murder. While Anderson testified that he was not an active participant but simply a casual or interested observer, his testimony was refuted by numerous witnesses, from the start outside the bar in Gilbert to Ridlon's garage the next day. The nature and degree of Anderson's involvement was highly relevant.²²

²² The court's attempt to differentiate the incidents by reciting minor factual differences with the charged case, (T 1946-47), or between versions given by different witnesses (T 1950), misses the point of the evidence: to cast

While the court noted that some of the evidence was hearsay and could find no exceptions, (T 1946, 1949, 1950), the court again erred. Anderson told Lundeen and Moravitz that he duct taped people and beat them over drug debts. Anderson's statements were statements against his penal interests: an exception to the hearsay rule. See Minn. R. Evid. 804 (b) (3); Minn. R. Evid. 803 (24) (catch-all exception). As another example, M████ told Lundeen what Anderson did to him. For Lundeen to testify to what M████ told him for the truth of the matters asserted would be hearsay. However, Lundeen's statements could be admissible as corroboration of M████' testimony, which would not be hearsay. See, e. g., State v. Hesse, 281 NW2d 491, 492 (Minn. 1979) (where the evidence was admitted for corroborative purposes, it was not even hearsay under Rule 801(c), Rules of Evidence).²³

The defense role in presenting alternative perpetrator evidence is similar to that of the state prosecuting the defendant. For this reason, the admission of alternative perpetrator statements should be governed by the

reasonable doubt on the state's case. From this true big picture perspective, these minor differences go to weight not admissibility of the evidence.

²³ The court's approach to these hearsay questions raised by the defense proffer stand in marked contrast to defense hearsay objections to the state's evidence, where the court with relative ease came up with exceptions to the hearsay rule. See (T 824-27, 854-56, 861-69).

rules for admission of a defendant's statements: they are generally admissible if relevant and material. See State v. Hjerstrom, 287 NW2d 625, 627 (Minn. 1979). Since a defendant's statements to others about other crimes are admissible, an alternative perpetrator's statements about the offense should also be admissible.

As this Court noted, there could be little unfair prejudice in admitting the reverse-Spriegl evidence because Anderson was not on trial. This was especially true since Anderson admitted some of the behaviors referred to in this evidence. (T 1952). See Richardson, 670 NW2d at 280 ("risks of unfair prejudice do not appear or take on a very different shape. There is no possibility of arousing the jury in ways that would be harmful to the third person"); State v. Williams, 593 NW2d 227, 233 (Minn. 1997) (applying reverse-Spriegl standard "there was little concern about [the evidence] being unfairly prejudicial" because defense offered the evidence).

While Anderson's involvement may have implicated Anderson as an accomplice rather than eliminating Miller's responsibility for the killing, (T 1941-42), Anderson's conduct was nonetheless exculpatory for Miller. In addition to casting doubt on Anderson's testimony about Miller, exculpating Miller at the actual killer, this evidence presented an additional defense argument to the jury that Miller: was Miller liable for the murder committed

by Anderson because the murder was in pursuance and reasonably foreseeable as a probable consequence of the intended crime, a kidnapping? See State v. Pierson, 530 NW2d 784, 789 (Minn. 1995); Minn. Stat. § 609.05, subd. 2. The “reverse-Spreigl” evidence was admissible.

Other alternative perpetrator evidence was admissible. While the court limited its consideration of the proffered evidence to the reverse-Spreigl evidence, the proffer included alternative perpetrator evidence—evidence that tended to show that Anderson killed H [REDACTED]. Appendix 9-10, 26. As foundation for admitting this type of evidence, Miller was only required to present evidence having an inherent tendency of linking Anderson to H [REDACTED]’s murder. Jones, 678 NW2d at 16.

The witnesses’ statements contained information that tended to incriminate Anderson for H [REDACTED]’s murder. The *day before* H [REDACTED] was abducted, Moravitz heard Anderson talking in a violent, tough manner, saying that he was going to “swoop up” H [REDACTED] and give him “what was coming to him.” Appendix 9-10, 14. Similar to a third-party confession to a cellmate, Blom, 682 NW2d at 621-22, this statement of a perpetrator’s intent to kidnap and give H [REDACTED] what he deserved—which could include killing him—was relevant and material to the question of who killed H [REDACTED].

Lundeen stated that Anderson liked to carry guns and preferred .22s.

Appendix 26. Since H [REDACTED] was killed with a .22 firearm, this evidence is relevant and material to the identification of Anderson as H [REDACTED]'s killer. See Blom, 682 NW2d at 622 (evidence that tended to incriminate alternative perpetrator included he had a shirt like the one worn in crime scene video and “asked a friend to get rid of a knife for him that he claimed was tainted”). This evidence tended to incriminate Anderson in H [REDACTED]'s death and was admissible. To the extent the court the court failed to consider the admission of this evidence, it erred, Blom, 682 NW2d at 622; to the extent it excluded the evidence, it also erred.

Miller's state and federal constitutional guarantees of due process—“the right to a fair opportunity to defend against the State's accusations”—were denied by the exclusion of alternative perpetrator evidence. Chambers, 410 US at 294; Jones, 678 NW2d at 15-16.

A defendant is entitled to a new trial if he can demonstrate that he was prejudiced by the court's erroneous exclusion. State v. Amos, 658 NW2d 201, 203 (Minn. 2003). “Reversal is warranted...when the error substantially influences the jury's decision,” State v. Nunn, 561 NW2d 902, 907 (Minn. 1997), i.e., where there is a reasonable possibility that, had the excluded evidence been admitted, the verdict might have been more favorable to the defendant. State v. Post, 512 NW2d 99, 102 n. 2 (Minn. 1994).

There is a reasonable possibility that had this evidence been admitted the verdict might have been more favorable to Miller. While Anderson testified about his debt collection work and his contact with H [REDACTED], Anderson minimized and distorted both matters. The alternative perpetrator evidence, including the “reverse-Spreigl” evidence, was crucial to establishing his true character and proper defense in this case.

While Anderson denied using duct tape to bind people he was collecting debts from, (T 987, 1067), testimony from Moravitz, Appendix 6-8, and Lundeen, Appendix 23-24, about statements to the contrary made to them by Anderson were critical in evaluating and determining the degree of Anderson’s involvement. Lundeen’s first-hand account of how Anderson operated when he collected debts would have been especially influential on the jury in deciding Anderson’s involvement in H [REDACTED]’s disappearance and death, especially since Lundeen had hired Anderson to collect a \$180 debt: Anderson kicked the door in and was going to use a gun to pistol whip O [REDACTED] T [REDACTED]; Lundeen had a hard time keeping Anderson off T [REDACTED]. Appendix 20-21. Anderson’s statements to Moravitz and Lundeen would also have established that Anderson was violent, Appendix 12, 14, 19-20, 28, and capable of murder.

While R [REDACTED] M [REDACTED] was permitted to testify about his encounter with

Anderson and his collection tactics, (T 2007-13), there was no corroboration of his testimony and the incident, if believed at all, had the appearance of an isolated occurrence. Testimony from Lundeen would have corroborated the critical details of M [REDACTED]'s claims, i.e., the kidnapping; binding him with tape; putting him in a trunk, and beating him. Appendix 25. The other “reverse-Spreigl” evidence would have put this horrific incident and Anderson’s actions as a debt collector in their proper context for the jury deliberating the question of Miller’s guilt for H [REDACTED]’s murder.

The other alternative perpetrator evidence also pointed to Anderson’s guilt for the murder. Anderson made statements about kidnapping H [REDACTED] *and giving him what he deserved the day before it happened.* Appendix 9-10, 14. Anderson liked to carry a .22 firearm—the type of firearm that killed H [REDACTED]. Appendix 26. This evidence tended to incriminate Anderson in a way that no other evidence did and was crucial to maintenance of proper defense. Hawkins, 260 NW2d at 160. This evidence was not cumulative. See Huff, 698 NW2d at 437-38 (where two witnesses testified that alternative perpetrator admitted killing victim, evidence was cumulative).

Because there is a reasonable possibility that, had the erroneously excluded evidence been admitted, the verdict might have been more favorable to Miller, the convictions must be vacated and a new trial ordered.

III.

The court's error in admitting out-of-court statements over hearsay objections violated Miller's state and federal constitutional right to a fair trial.

The court overruled defense hearsay objections to H [REDACTED]'s out-of-court statements and allowed his hearsay statements to be admitted into evidence.²⁴ The court's analysis, however, was wrong: the statements were hearsay, to which no exception applied, and were inadmissible. Because the statements prejudiced Miller, their admission violated his state and federal constitutional right to a fair trial. A new trial must be ordered.

Minn. R. Evid. 801 (c) defines hearsay as a statement, not made while the declarant is testifying in court, offered to prove the truth of the matter asserted. Hearsay is generally not admissible unless it fits within a recognized exception to the hearsay rule, Minn. R. Evid. 802, State v. DeRosier, 695 NW2d 97, 104 (Minn. 2005), or is otherwise excluded from the definition of hearsay, like a prior statement of witness, admissions by party-opponent, and statements of co-conspirators. Minn. R. Evid. 801 (d).

There are a large number of exceptions to the hearsay rule, including Minn. R. Evid. 803 (3), "Then existing mental, emotional, or physical

²⁴ Because H [REDACTED]'s out-of-court statements were not testimonial, the right to confrontation is not applicable. See Crawford v. Washington, 541 US 36, 59 (2004).

condition,” alternatively known as the “state of mind” exception, and Minn. R. Evid. 804 (b) (5), “other exceptions,” also referred to as the “catch-all” exception. DeRosier, 695 NW2d at 104-05. See also Minn. R. Evid. 803 (24) (“Other exceptions” declarant’s availability immaterial).

The dispute over hearsay evidence began when the state asked what decedent H [REDACTED] said about why he was in the Cotton area the day after stealing Miller’s truck and the defense made a hearsay objection. (T 824). The state argued that the out-of-court statement was admissible under the “catch-all” exception. (T 825). The court, citing the Court of Appeals decision in State v. Iverson, 396 NW2d 599, 607 (Minn. App. 1986), overruled the objection, finding that the statement was admissible (i) under the exception for existing mental, emotional, or physical state, (ii) under the catch-all exception, (iii) as corroboration of another witness, and (iv) because the statement was not offered for truth of matter asserted. (T 827-28). The witness testified that H [REDACTED] said he didn’t know why he was in the Cotton area. (T 829).

When the state also offered the contents of a letter H [REDACTED] wrote to his sister around June 19, 2004, and the statements H [REDACTED] made to his sister on July 1, 2004, (T 862-63), the defense again objected. (T 863-64). The state claimed admissibility based on the statements being the best

evidence of motive and state of mind. (T 865). The court overruled the objection, finding the statements were admissible under the state of mind exception and Iverson and that the prejudice did not outweigh the probative value. (T 866-69).

As a result of this ruling, H [REDACTED]'s sister told the jury about the letter where H [REDACTED] wrote that he had taken Frank Miller's truck, four-wheeler, and a backpack with \$14,000-15,000 of drugs and money; that he didn't remember doing it; and that he woke up talking to bushes he thought were two of his friends. (T 872-73, 875). H [REDACTED] wrote that he was scared of Miller; that he and A [REDACTED] H [REDACTED] had a plan to get out of the area; and that he was going to try to pay Miller back but didn't think he'd be able to do so and that's why he wanted to run. (T 874, 882). H [REDACTED]'s sister also told the jury that on July 1, H [REDACTED] admitted he remembered taking Miller's property, (T 876-78, 883, 1123-24), and the money and drugs were in a backpack in the woods by a barn. (T 879).

The court was wrong in its analysis and wrong in its conclusion that all of these out-of-court statements made by H [REDACTED] were admissible: the out-of-court statements were hearsay; and none of these out-of-court statements were admissible under the state of mind exception or any other exception.

Minn. R. Evid. 803 (3) provides:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

To be admissible under the state-of-mind exception,

[T]he statement must be contemporaneous with the mental state sought to be proven. [T]here must be no suspicious circumstances suggesting a motive for the declarant to fabricate or misrepresent his or her thoughts. [T]he declarant's state of mind must be relevant to an issue in the case. 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 803.05[2][a], at 803-28, 803-29 (Joseph M. McLaughlin ed., 2d ed.2005) (internal footnotes and numbering omitted).

DeRosier, 695 NW2d at 105-06. In a number of recent decisions, this Court has revisited the "state of mind" exception to the hearsay rule. See, e.g., DeRosier, 695 NW2d at 104-05; Bernhardt v. State, 684 NW2d 465, 474 (Minn. 2004); State v. Bradford, 618 NW2d 782, 798 (Minn. 2000); State v. Bauer, 598 NW2d 352, 367 (Minn. 1999); State v. Buggs, 581 NW2d 329, 340 (Minn. 1998).²⁵

Ordinarily, a homicide victim's state of mind is not relevant to whether the defendant committed the crime. In Bernhardt, 684 NW2d at

²⁵ In light of these decisions, it is questionable whether State v. Iverson, 396 NW2d 599 (Minn. App. 1986), is still good law.

474, this Court, citing State v. Blanchard, 315 NW2d 427 (Minn. 1982), stated that the victim's state of mind is generally relevant only where the defendant raises the defense of accident, suicide, or self-defense. Bernhardt, 684 NW2d at 474; Bauer, 598 NW2d at 367 (Minn. 1999); see also Buggs, 581 NW2d at 340 (excluding homicide victim's hearsay statements reflecting defendant's past threats and abuse); State v. Ulvinen, 313 NW2d 425, 428 (Minn. 1981) (the homicide victim's state of mind was not at issue).

While some of the out-of-court statements may in some way address H [REDACTED]'s state of mind, others clearly did not. About half of the statements contained in the letter and all the statements contained in the July 1 conversation dealt with what H [REDACTED] had done, remembered, or felt in the past. Minn. R. Evid. 803 (3) specifically excludes these memories or facts remembered as proof of the matters remembered.

The state and the court both referred to these statements by H [REDACTED] in terms of "motive": "this is the best evidence that we can present with regard to motive" for the murder (T 865); "as proof of motive in this case." (T 867). To the extent that these comments suggest that the statements were admissible because they proved "motive," they are wrong. While Minn. R. Evid. 803 (3) lists as examples of state of mind "intent, plan, motive, . . .,"

the examples refer to the declarant's motive, not the motive of someone else. In this case, the state and the court suggest H [REDACTED]'s out-of-court statements were admissible to prove *Miller's* motive. The statements do not fit the exception for state of mind.²⁶

Where the statements could be said to reflect H [REDACTED]'s state of mind, his state of mind at that particular time was not at issue or relevant to any of the issues in the case. While H [REDACTED]'s statement that he did not know why he was in the Cotton area and that he talked to bushes thinking they were people reflect his disoriented state of mind at that time, his state of mind was not at issue. Ulvinen, 313 NW2d at 428.

The out-of-court statements—that H [REDACTED] was afraid of Miller and had made a plan to leave town—reflect his state of mind but they were nonetheless inadmissible. In Bernhardt, this Court specifically addressed hearsay statements of the victim's fear of the defendant:

In State v. Blanchard, 315 NW2d 427 (Minn. 1982), we held that evidence of a victim's fear of a perpetrator is admissible only when all three of the following conditions are met:

- a. The victim's state of mind must be a relevant issue. The victim's state of mind is generally relevant only where the defendant raises the defense of accident, suicide, or self-

²⁶ Even if reliance on State v. Iverson, 396 NW2d 599, 607 (Minn. App. 1986), were appropriate, the decedent's statement there—that he was preparing for a drug deal with the defendant and another man—was admissible as showing the *declarant's* intentions—not the defendant's intentions—before he was murdered.

defense. * * *

Bernhardt, 684 NW2d at 474.²⁷ The threshold prerequisite for admission of evidence of H [REDACTED]'s state of mind was not met in this case: his fear was not a relevant issue because Miller did not raise the defense of accident, suicide, or self-defense. The state of mind exception did not apply.

Even if H [REDACTED]'s state of mind were relevant,

[a]dmissibility of state-of-mind hearsay also turns on weighing probative value against the danger of unfair prejudice, confusion of the issues, or misleading the jury. See State v. Ulvinen, 313 NW2d 425, 428 (Minn. 1981) (state-of-mind hearsay extremely prejudicial); Minn. R. Evid. 403.

DeRosier, 695 NW2d at 105.²⁸

Defense counsel cited the particular prejudice from these out-of-court

²⁷ The Court also cited other safeguards necessary where the victim's fear of the defendant is admissible: "b. The trial court must weigh the probative value of the evidence against the risk of unfair prejudice to the defendant. c. A proper limiting instruction must be given to the jury. Id. at 432-33. According to Blanchard, these conditions are necessary because of 'the risk that the jury will consider the victim's statements of fear as a true indication of a defendant's intentions or actions.' Id. at 432 (citing Campbell v. United States, 391 A2d 283, 287 (D.C.App. 1978))." Bernhardt, 684 NW2d at 474.

²⁸ While the court excluded hearsay offered by the defense due to concerns about the timeliness of its disclosure, (T 1946-47, 1949), it permitted H [REDACTED]'s sister to testify about details to H [REDACTED]'s statements she added a year later—which meant she wasn't candid with police while her brother was still missing—saying cross-examination was appropriate. (T 866-68). In addition to the troubling appearance of a double-standard, the admission of this evidence surely presented a danger of misleading the jury, even with cross-examination.

statements. (T 863-64). The statement that H [REDACTED] was afraid, so afraid he had made a plan to leave town, may have unfairly persuaded the jury as a true indication of Miller's intentions or actions—i.e., that he killed H [REDACTED]. Blanchard, 315 NW2d at 432 (noting the “risk that the jury will consider the victim's statements of fear as a true indication of a defendant's intentions or actions.”). This was clearly prejudicial. In addition, there was very little probative value to the statements.²⁹ It was error to admit these out-of-court statements.

A finding of error does not require a new trial if the error was harmless beyond a reasonable doubt. State v. Juarez, 572 NW2d 286, 291

²⁹ In addition to the admission of these statements, there is another instance where this same error occurred. When the state asked what H [REDACTED] said after meeting with Miller after the four-wheeler was returned, the defense made a hearsay objection. (T 854). The state claimed the H [REDACTED]'s statement was admissible under the excited utterance or existing mental, emotional, or physical state, or the catch-all exception. (T 855). The court overruled the objection, finding the statement was of existing mental, emotional, or physical state, and not offered for truth of matter asserted—that Miller didn't hit hard. (T 856). The witness said H [REDACTED] stated, “At least I know Frankie can't hit very hard” and laughed. (T 857). The statement was offered for truth of underlying premise—Miller hit H [REDACTED]—and was hearsay. For the same reasons, this was not admissible under the state of mind exception. DeRosier, 695 NW2d at 105 (hearsay about what defendant was alleged to have done, was unrelated to the declarant's state of mind, and therefore was not admissible under that exception); Bradford, 618 NW2d at 798 (holding that homicide victim's statements about what the defendant had done to her did not fall within this hearsay exception because they did not get to the declarant's state of mind).

(Minn. 1997). In determining whether error was harmless, the basis upon which the jury rested its verdict must be examined, and if the verdict was “surely unattributable” to the error, it is harmless. Id. at 292 (quoting State v. Jones, 556 NW2d 903, 910 (Minn. 1996)).

In this case, there was no other evidence that H [REDACTED] was afraid of Miller other than the erroneously admitted hearsay statements. After expressing this fear, H [REDACTED] contacted Miller to let him know where his four-wheeler was located and waited for Miller to come to that spot. H [REDACTED] met with Miller and then laughed about being struck by him. Unlike the victim in Bernhardt, 684 NW2d at 474 (who spent the night elsewhere, changed his phone number, and purchased new door locks for his home), the evidence did not show that H [REDACTED] took any steps out of a concern for his safety. The jury was not given a limiting instruction on the use of this hearsay evidence, as required when statements of a victim’s fear of the defendant are properly admitted. Id.; Blanchard, 315 NW2d at 432-33. The erroneously admitted statements were prejudicial and not cumulative.³⁰

The Fifth and Fourteenth Amendments to the United States

³⁰ While some of Miller’s statements addressed H [REDACTED]’s theft, the state characterized H [REDACTED]’s statements as “the best evidence that we can present with regard to motive” for the murder (T 865). This demonstrates the harm to Miller caused by the wrongful admission of this evidence.

Constitution and Art. I, § 7 of the Minnesota Constitution, however, guarantee to the accused the right to due process. Fundamental in the due process guarantee is the right to a fair trial. State v. Reardon, 73 NW2d 192 (Minn. 1955). In this regard, this Court has stated:

An accused, whether guilty or innocent, is entitled to a fair trial, and it is the duty of the court, and of the prosecuting counsel as well, to see that he gets one. There must be no conduct either by argument or the asking of irrelevant questions, the effect of which is to inflame the prejudices or excite the passions of the jury against the accused.

State v. Haney, 23 NW2d 369, 370 (Minn. 1946); see also State v. Elli, 125 NW2d 738 (Minn. 1964) (defendant has the right to have the case against him put fairly). Here, the use of prejudicial, inadmissible hearsay evidence deprived Miller of his constitutional right to a fair trial. A new trial must be ordered.

CONCLUSION

For these reasons, Franklin Alan Miller, asks this Court to vacate his conviction and dismiss the Indictment, or in the alternative to reverse and remand the case for a new trial.

Dated: July 17, 2006

Respectfully submitted,

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A-05-2519

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

CERTIFICATION OF BRIEF LENGTH

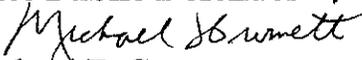
Franklin Alan Miller,

Appellant.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a proportional font. The length of this brief is 12,407 words. This brief was prepared using Microsoft Word 2003.

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