

A05-2519; A07-2195

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 STATE OF MINNESOTA  
 IN SUPREME COURT
 

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State of Minnesota,

Respondent,

vs.

Franklin Alan Miller,

Appellant.

Franklin Alan Miller,

Petitioner-Appellant,

vs.

State of Minnesota,

Respondent.

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**RESPONDENT'S BRIEF AND APPENDIX**


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## LEGAL ISSUES

- I. The petit jury was given detailed information about the terms of the co-defendant's guilty pleas yet found appellant guilty. Would this specific information about the pleas have materially affected the grand jury proceeding?

*The trial court ruled in the negative.*

*State v. Lynch*, 590 N.W.2d 75 (Minn. 1999).

- II. The trial court allowed appellant to introduce alternative-perpetrator evidence and a reverse-*Spreigl* incident. Did the trial court abuse its discretion in excluding other reverse-*Spreigl* evidence?

*The trial court ruled in the negative.*

*State v. Jones*, 678 N.W.2d 1 (Minn. 2004).

- III. Has appellant met his burden of establishing that he was prejudiced by any error in admitting limited testimony about the victim's out-of-court statements?

*The trial court ruled that the out-of-court statements were admissible.*

*State v. DeRosier*, 695 N.W.2d 97 (Minn. 2005).

- IV. Did the post-conviction court abuse its discretion in denying relief based on appellant's claims of discovery violations?

*The post-conviction court found that appellant's witness, Sam Miller, was not credible, and that any discovery violations were not prejudicial.*

Minn. R. Crim. P. 9.01

- V. Did the post-conviction court abuse its discretion in concluding that appellant failed to establish Sam Miller perjured himself?

*The post-conviction court concluded that Sam Miller's trial testimony regarding how often he worked as an informant was reasonable and that the prosecutor was not required to correct it.*

*United States v. Nelson*, 970 F.2d 439 (8th Cir. 1992)

VI. Did the post-conviction court abuse its discretion in denying appellant's claim of ineffective assistance of trial counsel?

*The post-conviction court concluded that defense counsel's performance did not fall below an objective standard of reasonableness.*

*Strickland v. Washington, 466 U.S. 668 (1984)*

## STATEMENT OF FACTS

T [REDACTED] H [REDACTED] took appellant's truck, four-wheeler, and a substantial amount of money and methamphetamine. The truck and four-wheeler were eventually located, but the money and drugs were not. Appellant hired Jason Anderson to assist him in collecting the money H [REDACTED] owed appellant. Appellant and Anderson kidnapped H [REDACTED], eventually taking him to Jesse Ridlon's house. The three men assaulted H [REDACTED], bound him with duct tape and placed him in the trunk of a car.<sup>1</sup> H [REDACTED]'s remains were eventually discovered in the woods; he had been shot 11 times.

Ridlon pled guilty to being an accomplice in the kidnapping (T.774). In exchange for his plea and agreement to provide testimony in this case, the state dismissed second-degree murder charges and agreed not to present the matter to a grand jury (T.1299). The state also dismissed separate drug charges against Ridlon (T.1352-53). Anderson also pled guilty to kidnapping and agreed to cooperate in this case (T.966). The state agreed not to seek indictment for first-degree murder (T.1028-29).

Appellant, H [REDACTED], Anderson, and Ridlon were using methamphetamine during the time period in which H [REDACTED] was kidnapped and murdered.

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<sup>1</sup> Anderson collected money from people in order to have his own drug debts forgiven (T.969-71). Anderson testified that he had used violence against people when trying to collect from them (T.987-88). In his trial testimony, Anderson somewhat minimized his involvement in assaulting H [REDACTED]. "T." refers to the trial transcript.

**A. Events Leading Up To The Kidnapping And Murder Of T [REDACTED]  
H [REDACTED].**

On June 18 and 19, 2004, Jesse Ridlon had a tattoo party at his house (T.774-75). Appellant and T [REDACTED] H [REDACTED] were also present (T.776). Olive Long worked on tattoos for Ridlon and H [REDACTED] (T.793). Ridlon left the house around 1:30 a.m., while the others stayed there (T.777-78).

Long testified that H [REDACTED] was acting "manic," and that he was going through Ridlon's belongings (T.794, 803). H [REDACTED] attempted to take some of Long's property outside; he was placing items in the back of appellant's truck (T.778-79, 794-96). A four-wheeler was in the back of the truck (T.795). H [REDACTED] placed a backpack in the truck and left (T.796-97). Some of Long's money was missing, and she believed H [REDACTED] had taken it (T.795-98).

When Ridlon returned to his residence the following afternoon, appellant told him that H [REDACTED] took appellant's truck (T.780-81). Appellant told Ridlon that a four-wheeler was in the truck along with a backpack containing approximately \$7500-8000 and some tools (T.781-82).

The next day appellant told Ridlon that he had put the four-wheeler in the back of the truck and was stepping off the truck when H [REDACTED] jumped inside and left (T.1302-03). Appellant told Ridlon that Ridlon's video camera was on the seat of the truck (T.1303). Appellant again mentioned that \$7500-8000 of cash was in the truck (T.1306). This time, appellant said there were two ounces of methamphetamine (valued at \$6000) in the truck (T.1305-06).

Appellant also told Jason Anderson that H [REDACTED] had stolen appellant's four-wheeler, money, and drugs (T.977-78). Appellant indicated there was \$30,000-40,000 worth of drugs and money taken (T.978). Appellant asked Anderson to assist him in collecting the money from H [REDACTED], saying it would clear Anderson's \$1000 debt to appellant; Anderson agreed (T.971-79).

In June of 2004, H [REDACTED] wrote to his sister, April H [REDACTED], indicating that he had taken appellant's four-wheeler and truck (T.872-74). The letter also mentioned that H [REDACTED] took a backpack with money and drugs worth approximately \$14,000-15,000 (T.873-79). H [REDACTED] claimed he did not remember doing this, and that he awoke talking to bushes (T.873-74). H [REDACTED] said he and Zachary Psick were going to look for the four-wheeler (T.874-75). H [REDACTED] also said he was scared of appellant, did not think he would be able to pay appellant back, and had a plan to leave the area (T.874).

On July 1, 2004, April confronted H [REDACTED] about his claim that he did not remember taking appellant's things (T.875-77). H [REDACTED] admitted taking the items (T.876-77). H [REDACTED] told her the money and drugs were in a backpack in the woods by a barn (T.879).

A couple of days after the tattoo party, H [REDACTED], appellant, and others went to look for appellant's four-wheeler, but they did not find it (T.830-32). Approximately one week after the four-wheeler was taken, H [REDACTED] found it and drove it to a nearby residence (T.848-51, 1304). While there, appellant approached H [REDACTED] (T.852-54). As he was leaving, H [REDACTED] laughed and told Psick, "At least I know [appellant] can't hit

very hard” (T.857). Appellant told Ridlon that he hit H [REDACTED] when the four-wheeler was returned and that H [REDACTED]’s face was a good punching bag (T.1304-05).

Appellant’s abandoned truck was discovered on June 19, 2004 (T.809).

**B. T [REDACTED] H [REDACTED] Is Kidnapped And Murdered.**

On Saturday July 24, 2004, a group of people were at Ridlon’s house smoking methamphetamine and working on dirt bikes and four-wheelers (T.979-82, 1308-11). H [REDACTED] and others were at Ashley Larson’s house smoking methamphetamine (T.909-19, 942-44). Anderson spoke with H [REDACTED] about how much money H [REDACTED] owed appellant and told H [REDACTED] to pay up (T.987).

Anderson went to Ridlon’s house and told appellant that he had seen H [REDACTED] at Larson’s house, and that the people at Larson’s house were partying (T.986-87, 1421). Appellant was mad (T.988-90). At appellant’s suggestion, Anderson called H [REDACTED] and arranged a meeting (T.921-22, 990). Anderson and H [REDACTED] agreed to meet in an hour at the Gladiator Bar (T.992). H [REDACTED] was dropped off at A [REDACTED] H [REDACTED]’s house, where H [REDACTED] had been living sporadically during July (T.946-48, 1089).

H [REDACTED] told H [REDACTED] that he had to meet Anderson in order to talk about things, which H [REDACTED] assumed involved the money H [REDACTED] owed appellant (T.1092-93). H [REDACTED] told H [REDACTED] that he did not think H [REDACTED] should go, and decided to go with H [REDACTED] in case anything happened (T.1093-95). H [REDACTED] drove himself and B [REDACTED] S [REDACTED], while H [REDACTED] walked to the Gladiator (T.1093-94, 1984).

Appellant drove his newly-purchased Cadillac with Anderson to the Gladiator (T.992-93). Anderson went in the bar but could not find H [REDACTED] so he returned to

appellant's car (T.993-94). Appellant was even angrier when he found out H [REDACTED] was not there (T.994). As appellant and Anderson drove around the block, they saw H [REDACTED] in the street at approximately 10:30 to 11:00 p.m. (T.995, 1085-86, 1984).

Anderson jumped out of the Cadillac (T.1097). Anderson shook H [REDACTED]'s hand, talked to him, and then started hitting him (T.1098, 1986-87). As H [REDACTED] walked towards them, appellant jumped out of the car and said to H [REDACTED] "I'll shoot you right now" (T.999-1000, 1098-99).<sup>2</sup> Although H [REDACTED] did not see a gun, he ran away from appellant (T.1100). Anderson testified that when appellant got out of the car, he had a semi-automatic .22 with wooden grips (T.997-98).

Appellant got back into the Cadillac, drove up, jumped out, pointed a gun at H [REDACTED], and told him to get in the car (T.1000-01). Anderson got into the passenger seat while H [REDACTED] got into the backseat (T.1001). A witness noticed three men scuffling, heard a car door slam, and saw the Cadillac speed off (T.1077-81).

Anderson testified that while appellant was driving, appellant was smacking H [REDACTED] and asking where his money was (T.1002). Appellant then picked up a white Mitsubishi, which appellant had previously asked the owner, Mason Johnson, about purchasing (T.1002-03, 1181). Appellant drove the Mitsubishi, while Anderson drove the Cadillac; H [REDACTED] was still in the backseat of the Cadillac (T.1004-06).

They arrived at Paul Gregorich's house after midnight (T.1006-08). Anderson went into Gregorich's house while appellant and H [REDACTED] argued outside (T.1008).

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<sup>2</sup> B [REDACTED] S [REDACTED] testified for the defense that she did not recognize the person who got out of the Cadillac (T.1988-90).

Appellant eventually came inside, telling Anderson that H [REDACTED] was in the trunk (T.1008-09). Appellant's brother, Samuel Miller ("Sam"), and Danielle Frazee received a text message from appellant that he needed gas (T.1776-77). Sam and Frazee went to Gregorich's house with gasoline, staying for about 10 minutes (T.1658-59, 1777-89). Sam testified that Anderson was acting weird (T.1781). Believing Anderson was referring to H [REDACTED] Sam heard Anderson say he grabbed him "gangster-style" (T.1787).

In the early morning hours of July 25th, Anderson telephoned A [REDACTED] H [REDACTED], saying he wanted to meet and talk (T.1102-03). H [REDACTED] knew Anderson was calling about the money H [REDACTED] owed (T.1104-05). H [REDACTED] asked about H [REDACTED], but Anderson did not say anything (T.1103-04). After that conversation, H [REDACTED] tried to call Anderson back but could not reach him (T.1104-05).

Ridlon returned home from work around 7:30 a.m. on July 25th (T.1315). Appellant and Anderson left Gregorich's house around 8:00 or 9:00 a.m. to go to Ridlon's house (T.1012). Anderson drove the Mitsubishi while appellant drove the Cadillac (*Id.*). The Mitsubishi was backed up in front of Ridlon's garage (T.1317). Ridlon thought both appellant and Anderson pulled H [REDACTED] out of the trunk and placed him on the middle of the garage floor (T.1320). H [REDACTED] had some duct tape around his wrists and ankles, but his hands were free (*Id.*). Ridlon thought appellant then shut the garage door (T.1321).

Appellant yelled at and hit H [REDACTED], demanding his money (T.1015-16, 1321). When H [REDACTED] said he did not know how he was going to get the money, appellant slapped H [REDACTED] a few more times and pistol-whipped him (T.1016, 1322). Appellant

struck H [REDACTED] with a fan belt for a car (T.1069-70, 1323). Ridlon testified that appellant "was wound up real tight," and that Anderson was on edge (T.1322). Ridlon saw Anderson striking H [REDACTED] as well (T.1322). Anderson testified that Ridlon kicked H [REDACTED] a couple of times, but not very hard (T.1016). Ridlon acknowledged kicking H [REDACTED] once (T.1322-23). After approximately 10-15 minutes, appellant bound H [REDACTED] with duct tape and put him back in the trunk of the Mitsubishi (T.1068-69, 1073, 1324-25).

Jeremy Finke had been inside Ridlon's house on that Sunday morning (T.1425-27). He saw a Cadillac and Mitsubishi outside (T.1426-27). Ridlon came into the house and told Finke to take a ride; Finke took Ridlon's car and left for a couple of hours (T.1428-29).

Ridlon's mother came to the house (T.1326). Anderson got into the Mitsubishi and left. (*Id.*). Ridlon's mother only stayed for a couple minutes (T.1371). Anderson was only gone for about ten minutes (*Id.*). When Finke returned around 11:00 a.m. to 12:00 p.m., the Cadillac and Mitsubishi were still in front of the garage (T.1430-31). Ridlon, appellant, and Anderson were sitting in the garage (T.1431). Between 11:30 a.m. and 12:00 p.m., the Mitsubishi was moved to a shed behind the garage (T.1327-28, 1373). Finke and Anderson left (T.1017, 1432-33).

Previously that morning, appellant had left a message for his brother, Sam, asking why the tire on his dirt bike was flat (T.1791-92). Sam and Jeremy Sanders picked up a tire and arrived at Ridlon's house around noon on Sunday (T.1267-68, 1792-93).

Appellant and Ridlon were present (T.1268, 1794). The Cadillac was in the driveway, and the Mitsubishi was parked behind the garage (T.1270-71, 1795).

Appellant left (T.1807). At trial, Sam could not recall telling law enforcement that appellant left in the Mitsubishi (*Id.*). Sam had told the police that appellant had left in the Mitsubishi and driven towards Mooseline (T.1820-21). He also had told police that when appellant returned, he parked behind the garage (*Id.*).

Ridlon continued working on appellant's four-wheeler (T.1329). He could hear H [REDACTED] from inside the trunk of the Mitsubishi (T.1333-34). Appellant went out to the car (T.1333-34, 1799). Ridlon had indicated to Sam that H [REDACTED] was back there so Sam went out back (T.1799). Sam saw H [REDACTED] on the ground (T.1800-01). H [REDACTED] was not bound; Sam told police he saw duct tape on H [REDACTED]'s jeans (T.1804, 1822-23).

Sam went back to the garage, and appellant, who was angry, came in shortly thereafter (T.1805-08). Appellant took a four-wheeler for a test-drive, loaded it up in his truck, and got his riding gear out of the Cadillac (T.1337).

Appellant and Sam made plans to meet up later to ride dirt bikes (T.1808). Appellant told Sam that he had something to take care of first (T.1339-40, 1818-19). Sam heard appellant say, "I'm not going to have nobody do my dirt" (T.1824-25). Appellant drove the Mitsubishi to the front of the house (T.1338). It was approximately 5:00 p.m. (T.1340). Also around the same time, Sam and Sanders left to go riding (T.1276-79, 1336).

When Sanders and Sam left, appellant and Ridlon were still at the residence (T.1276). Ridlon later noticed that appellant and the Mitsubishi were gone (T.1339-41,

1376-77). Finke returned to Ridlon's house around 5:00 or 6:00 p.m.; he had dropped off Anderson at his mother's house (T.1434-36). Finke noticed that Ridlon was home and seemed nervous (T.1436-37).

Meanwhile, Sam and Sanders had started riding dirt bikes at a friend's house (T.1278-79, 1810). It took a couple of hours from the time they left Ridlon's for appellant to show up (T.1810). Appellant, who arrived on his dirt bike, was wearing his riding gear (T.1281, 1297).

When appellant arrived, Sam asked what happened to H [REDACTED]; appellant said he "emptied the clip in him" (T.1812). Sam claimed that appellant was in a joking mood and that appellant said he was only kidding, that he sent H [REDACTED] to Colorado (*Id.*). Sam acknowledged, however, telling law enforcement that something was wrong with his brother and that he had never been like that before (T.1813-14). He had told law enforcement that appellant did not show up, and when he did eventually arrive, his eyes were black and he said he had something to take care of (*Id.*). Sam also told law enforcement that appellant screamed at him saying he wasn't going to have anybody else "do my fuckin' dirt" (*Id.*). Finally, Sam acknowledged telling law enforcement that appellant agreed he had killed H [REDACTED] by filling his head with a clip and that appellant then said he was kidding and had only sent H [REDACTED] to Colorado (*Id.*).

Appellant left around 8:00 p.m. on his dirt bike, saying he was going back to Ridlon's house (T.1817). Just before he left for work, Ridlon saw appellant in the garage wearing his riding gear (T.1341-42). Jeremy Finke also saw appellant asleep on a couch in the garage (T.1439-40).

At around midnight, Mason Johnson, who was the owner of the Mitsubishi and who had just returned from a trip, arrived at Ridlon's house to retrieve his house keys from his Mitsubishi (T.1183-84). Johnson retrieved the keys from the Mitsubishi parked in the backyard and left (T.1184-87, 1443). Appellant eventually woke up and did not make any sense (T.1448). Finke testified that appellant had a gun in his hand, was pacing back and forth, and was mad (T.1448-50). Finke left because he was scared (T.1450). Five minutes later, around 1:00 or 2:00 a.m., appellant got into the Cadillac and left (T.1450-51).

After he and Finke picked up the three-wheeler on Sunday afternoon, Anderson went back to his mother's house and slept (T.1019, 1479-82). Between 10:30 and 11:00 p.m. that night, Danielle Frazee picked Anderson up at his mother's house and they went to Anthony Hill's house (T.1021, 1241-43, 1663-64). Anderson was concerned about H [REDACTED] so he asked Frazee to call appellant and Sam (T.1024). In the early morning hours on July 26, appellant arrived at Anthony Hill's house in the Cadillac (T.1023-26). Anderson asked appellant what happened to H [REDACTED], and appellant told Anderson to keep his mouth shut; he also said "they ain't got enough to indict me" (T.1025). Anderson's girlfriend picked Anderson up and took him back to his mother's house, where he stayed the entire day of July 26th (T.1026-27, 1244, 1483-85).

At 6:30 p.m. on July 25, 2004, H [REDACTED]'s sister reported that her brother was missing (T.1497-98).

### **C. The Gun Is Destroyed.**

Around the time of the tattoo party, Ridlon observed appellant with a .22-caliber semi-automatic pistol (T.1347-48). Anderson testified that on the night he and appellant kidnapped H [REDACTED] at the Gladiator Bar, appellant had a .22 semi-automatic pistol with wooden grips (T.997-98). When they took H [REDACTED] to Ridlon's garage, appellant pistol-whipped H [REDACTED] (T.1016). Sam testified that he had seen a gun clip in Ridlon's garage and ammunition in the Cadillac (T.1815-16). Sam had told law enforcement that appellant said he had a gun (T.1828). Jeremy Finke observed appellant with a gun in the early morning hours of July 26 (T.1448-49).

On approximately July 26 or 27, 2004, Richard McNeill called Frazee, asking her to come to Dean Dunn's house with him (T.1637-69). McNeill and appellant arrived at Dunn's house first (T.1669, 1687-90). McNeill had a .22 semi-automatic pistol (T.1693). McNeill took the clip out of the gun and set it down (T.1693-94). McNeill told Dunn that he was to cut the gun up; Dunn said he did not want to do it (T.1695). Appellant picked up the gun, pointed it at Dunn, and told Dunn to do as he was told (T.1696). Dunn melted the gun with torches, dumping the molten metal in a ditch (T.1697, 1701). The wooden grips from the gun, along with a piece of a cell phone and other items that appellant, Frazee, and McNeill removed from their car, were burned in a fire pit (T.1697-99, 1704). Frazee took McNeill back to his hotel, and then returned to Dunn's house (T.1670-72, 1699-1700).

**D. The Cars Are Abandoned.**

Appellant and Frazee left Dunn's house together (T.1673, 1701). Appellant drove his car, and she followed (T.1673).<sup>3</sup> Appellant dropped his car off and then got into Frazee's car (*Id.*). They went to the Twin Cities together (T.1676-77). After spending one night there, Frazee went home while appellant stayed (T.1677-78).

On Tuesday, July 27, 2004, Ridlon noticed that the Mitsubishi was parked behind his shed (T.1344). Ridlon testified that he was "freaked out" because he did not know if H [REDACTED] was still in the trunk (T.1345). Ridlon towed the Mitsubishi to a friend's house (*Id.*). Ridlon said he was scared of angering appellant and did not want to end up like H [REDACTED] (T.1346).

**E. Telephone Calls Made By Appellant.**

A few days after H [REDACTED] was kidnapped, appellant called A [REDACTED] H [REDACTED] (T.1105-06). H [REDACTED] asked where H [REDACTED] was, and appellant said he had sent him on a one-way ticket somewhere and that H [REDACTED] was not going to come back (T.1106).

After appellant was arrested, his telephone calls placed from the jail were monitored (T.1913-15). Two of the calls appellant made to his girlfriend Kristen Krings were played for the jury (T.1915-18). In the first conversation, Krings told appellant that there was a report in the news that appellant's friends gave a tip to authorities regarding the location of H [REDACTED]'s body (T.1919). During the course of the conversation,

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<sup>3</sup> The state's theory was that appellant was driving the Cadillac at this time. Frazee could not recall what car appellant was driving but said he left it somewhere she was unfamiliar with (T.1674). Frazee was familiar with Ridlon's house (T.1653), where the Mitsubishi was parked (T.1344).

appellant indicated he did not feel well, he needed to sit down, and he would call her back (T.1919-23).<sup>4</sup>

In the second conversation, Krings apologized to appellant and said, "I wish I never would have asked you, you wouldn't have come back" (T.1924). Appellant replied that Krings had nothing to do with it and said "I did it. I'm fucking, you know, -- I pay -- you know, I played, I pay. That's how it goes" (T.1925).

**F. H [REDACTED]'s Body, The Cars, And Other Evidence Is Discovered.**

On Tuesday July 27, 2004, a concerned citizen notified authorities of a Cadillac near her property (T.1396-1402). Racing clothes were found in the trunk of the Cadillac (T.1604). Two fingerprints that were recovered from the inside of the Cadillac belonged to appellant (T.1613, 1627). There was a .22-caliber cartridge casing on the floor of the Cadillac between the driver's seat and the door (T.1614).

On July 29, 2004, Ridlon told law enforcement where the Mitsubishi was located (T.1346, 1537). It was approximately 10 minutes from his property (T.1559). The trunk contained matted duct tape, a belt, H [REDACTED]'s watch, four blood stains, and the odor of urine (T.1538-39, 1541-44). The DNA profile from the blood stains matched H [REDACTED]'s DNA profile (T.1547-49).

Hunters found T [REDACTED] H [REDACTED]'s remains in the woods on September 2, 2004 (T.1509-12). The remains were scattered over a fairly large area, likely by animals (T.1573). An examination of the jaw and dental x-rays indicated that the remains were

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<sup>4</sup> Krings, who is the mother of appellant's child, testified on behalf of the defense (T.1962). She believed that appellant was sick from the food he ate at jail (T.1969).

H [REDACTED]'s (T.1871-74). H [REDACTED]'s remains were located approximately seven to eight miles from Ridlon's residence (T.1513-14).

St. Louis County medical examiner Thomas Uncini testified that there were ten gunshot wounds to the head and one gunshot wound to the shoulder blade (T.1879). H [REDACTED] was likely leaning forward when he was shot in the back of his head and shoulder blade (T.1882-87, 1907-08). The eight wounds on the side of H [REDACTED]'s head were consistent with the shooter standing over H [REDACTED] and pointing the weapon down (T.1890-92). H [REDACTED] also had a fracture to one of his ribs, consistent with being caused by a blow (T.1893-94).

In Dr. Uncini's opinion, the cause of death was gunshot wounds to the head (T.1899-1900). The bullets were likely from a handgun; .22-caliber ammunition was consistent with the size of the wounds observed (T.1898-99).

Six .22-caliber cartridge casings were found at the scene (T.1594-1600). A BCA firearms and tool-mark examiner testified that these six casings, in addition to the one found in the Cadillac, were fired from the same firearm (T.1740-41). The marks and location of the casings are consistent with being fired from a semi-automatic weapon (T.1744-48). A Ruger-type, semi-automatic pistol usually holds ten rounds, but it is possible to fire 11 rounds without reloading if one round is in the chamber (T.1750-51).

Metal fragments found in the decomposed tissue at the scene were fired from the same gun as the casings (T.1601-02, 1752-53). Law enforcement also discovered the melted gun that Dunn had dumped in a ditch; the BCA could not conclusively conclude that it was once a firearm (T.1735).

Blue jeans, a sock, and duct tape were found in the area of H█████'s remains (T.1580-84). The duct tape from the Mitsubishi and some from the scene were similar to some of the duct tape found on Ridlon's property (T.1535-36, 1543, 1593-94). A fan belt, believed to have been used during the assault of H█████, was found in Ridlon's garage (T.1534-35).

**G. The Defense Evidence.**

In addition to calling his girlfriend to testify about his phone calls to her from jail and calling B█████ S█████ to testify about what she observed at the Gladiator, appellant called R█████ M█████. M█████ testified that while at a friend's house one night in April of 2003, Anderson hit him numerous times and, along with others, taped his hands and feet with electrical tape (T.2009-11). M█████ owed somebody money for drugs and Anderson was trying to collect it (T.2010, 2013-14). Anderson put a pistol in his mouth, and stated that if he did not receive the money, he would kill M█████ (T.2010). Anderson and the others took his cell phone, called people who knew M█████, and attempted to collect the money owed (T.2012). They rode with M█████ to a friend's house so he could try to get some money (T.2015). M█████ claimed that he did not follow through after reporting this to the police because he was afraid of the consequences from Anderson (T.2013). Appellant did not testify. The jury convicted appellant on all counts.<sup>5</sup>

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<sup>5</sup> Appellant filed a petition for post-conviction relief. A summary of the evidence elicited at the post-conviction hearing is contained in section IV of this brief.

## ARGUMENT

### I. THERE IS NO BASIS TO OVERTURN THE GRAND JURY'S INDICTMENT.

Appellant claims that the prosecutor failed to present to the grand jury evidence of the inducements given to Jason Anderson and Jesse Ridlon, and that this materially affected the grand jury's decision to indict. Appellant is wrong. The grand jurors were told of Anderson's and Ridlon's involvement in the disappearance of H [REDACTED] and their subsequent guilty pleas. The petit jury was informed of the specific terms of the plea agreements yet still found appellant guilty beyond a reasonable doubt. Thus, the state's failure to provide specific information about the plea agreements to the grand jury would not have materially affected the grand jury proceeding.

Appellant also claims the grand jurors should have been informed about Sam Miller's "favorable treatment." Specifically, appellant claims the grand jurors should have been told that his unrelated felony charge would be dismissed as a result of his cooperation in this matter (App. Br. 14). The post-conviction court, however, rejected Sam Miller's claim that such a deal existed.

#### A. Standard Of Review

A grand jury determines whether there is probable cause to believe the accused has committed the crime. *State v. McDonough*, 631 N.W.2d 373, 386 (Minn. 2001). "A presumption of regularity attaches to the indictment and it is a rare case where an indictment will be invalidated." *Id.* A criminal defendant "bears a heavy burden" in seeking to overturn an indictment; this burden is heightened after a petit jury finds the

defendant guilty beyond a reasonable doubt. *Id.*; *State v. Lynch*, 590 N.W.2d 75, 79 (Minn. 1999).

With respect to a prosecutor's failure to disclose exculpatory evidence, a dismissal of the indictment is required only "if the evidence would have materially affected the grand jury proceeding." *Lynch*, 590 N.W.2d at 79. "The effect of the grand jury proceeding must be judged after looking at all of the evidence that the grand jury received." *Id.* It is also proper to consider the petit jury's guilty verdict when "the defendant has a full opportunity to impeach the witnesses and discredit the state's case using the information that was not disclosed to the grand jury." *Id.* at 79-80; *State v. Robinson*, 604 N.W.2d 355, 365 (Minn. 2000).

**B. Additional Information About The Terms Of Anderson's and Ridlon's Plea Agreements Would Not Have Materially Affected The Grand Jury's Indictment.**

Appellant argues that his convictions should be vacated and the indictment dismissed because the prosecutor did not inform the jury that in exchange for Anderson's and Ridlon's cooperation, the state agreed not to seek indictments for first-degree murder and also agreed to dismiss the remaining counts against Ridlon (App. Br. 13). Appellant, however, has not met his heavy burden of establishing that this evidence would have materially affected the grand jury proceeding.

First, the grand jury knew about Ridlon's and Anderson's involvement in the events surrounding H [REDACTED]'s disappearance and death. This Court in *Lynch*, 590 N.W.2d at 79, held that although the grand jury was not informed about all the inducements the witnesses received, such evidence would not have materially affected

the proceedings when considered in light of what the grand jury did know about the witnesses.

Here, Anderson admitted he worked off his drug debt to appellant by collecting money from others who owed appellant (GJ.56-59).<sup>6</sup> Both Anderson and Ridlon knew H [REDACTED] owed appellant money (GJ.66-68, 151-53).

Anderson told appellant that he had seen H [REDACTED] that evening (GJ.70). He admitted calling H [REDACTED] to arrange a meeting, and he admitted going with appellant to the Gladiator to meet with H [REDACTED] (GJ.71-75). Anderson admitted chasing after H [REDACTED] and tripping him; A [REDACTED] H [REDACTED] said Anderson hit H [REDACTED] before that (GJ.82-83, 123-26). Anderson admitted he asked H [REDACTED] about appellant's money (GJ.83-86). He also testified that he stayed at Gregorich's house partying even though he believed appellant had placed H [REDACTED] in the trunk (GJ.88-92). Anderson acknowledged driving one of appellant's cars back to Ridlon's residence in spite of his belief that H [REDACTED] was in the trunk of one of the cars (GJ.93). Ridlon testified that Anderson slapped H [REDACTED] and assisted appellant in putting H [REDACTED] back in the trunk (GJ.164-69). A [REDACTED] H [REDACTED] testified that Anderson called him and demanded \$14,000 ransom money for H [REDACTED] (GJ.129-30).

Ridlon admitted to the grand jury that he kicked H [REDACTED] once in the chest (GJ.164). Ridlon admitted working in his garage in spite of the fact that H [REDACTED] was in the trunk of a car parked on Ridlon's property (GJ.171). Ridlon also acknowledged

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<sup>6</sup> "GJ." refers to the grand jury transcript.

trying to call the tattoo artist, who H [REDACTED] believed might have assisted in stealing appellant's property (GJ.182).

This evidence implicated Anderson and Ridlon in the kidnapping and assault of H [REDACTED], and the grand jury was aware that both witnesses pled guilty to kidnapping (GJ.53-54, 138). Appellant makes no argument that this evidence was not presented to the grand jury. Rather, his complaint involves the amount of information given about the terms of the plea agreements. That information would not have materially affected the grand jury proceeding where the grand jury was well aware of the extent of Anderson's and Ridlon's involvement in H [REDACTED]'s disappearance.

Second, appellant has not met his burden of establishing that more evidence regarding the plea agreements would have materially affected the proceeding because there was substantial evidence supporting the grand jury's probable cause determination. A "[d]efendant's characterization of [excluded exculpatory] evidence must be reviewed not in a vacuum but in context with the other evidence presented to the grand jury." *State v. Olkon*, 299 N.W.2d 89, 106 (Minn. 1980), *cert. denied*, 449 U.S. 1132 (1981); *see also, State v. Roan*, 532 N.W.2d 563, 570 (Minn. 1995).

In this case, even excluding Anderson's and Ridlon's grand jury testimony, there was substantial evidence presented to the grand jury that supported its decision to indict. A [REDACTED] H [REDACTED] and Sam testified that H [REDACTED] had stolen money from appellant (GJ.120-21, 192-93). H [REDACTED] testified that H [REDACTED] also took two ounces of methamphetamine (GJ.120-21). When H [REDACTED] attempted to assist H [REDACTED], who was being attacked by Anderson at the Gladiator bar, appellant threatened to shoot H [REDACTED] (GJ.126).

Sam testified that he saw appellant and H [REDACTED] at Ridlon's house around noon on July 25, 2004; they were discussing who else might have been involved in the theft (GJ.210-11). Sam left to ride his dirt bike; appellant arrived two to three hours later, and when asked about H [REDACTED], said he emptied a clip in his head (GJ.214-17).<sup>7</sup> At this point in time, the body had not been found. A few days later, when H [REDACTED] asked appellant where H [REDACTED] was, appellant said he sent him on a one-way ticket somewhere and that it would be awhile before anyone talked to H [REDACTED] (GJ.133):

When H [REDACTED]'s remains *were* found on September 2, 2004, it was evident that H [REDACTED] had in fact been shot numerous times in the head (GJ.275, 285). A .22-caliber bullet casing, which was fired from the same gun as the casings found at the scene, was found in appellant's Cadillac (GJ.299, 305); the car also contained appellant's fingerprints (GJ.300-01). Danielle Frazee was with appellant when he parked the Cadillac and abandoned it (GJ.253-54).

Appellant abandoned his car after going to Dunn's house to have a .22-caliber gun destroyed (GJ.221-32). When Dunn refused to destroy the gun, appellant pointed it at Dunn and told him to do as he was told (GJ.228). After the gun was melted, appellant said, "let's see them use that for evidence." (GJ.232). Appellant did not want to take the remnants of the gun (GJ.231). Items were taken out of appellant's Cadillac and placed in Dunn's burn pit (GJ.232-34, 251-52).

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<sup>7</sup> According to Sam, appellant then said he was kidding and had sent H [REDACTED] to Colorado (GJ.217).

All of this evidence on its own strongly supported the grand jury's indictment. And when this evidence is considered in light of all the additional evidence from Ridlon and Anderson, there is no question that more specific information about the plea agreements would not have had a material affect on the grand jury proceeding.

Finally, appellant has failed to meet his burden where all the terms of the plea agreements were presented to the petit jury and the petit jury found appellant guilty beyond a reasonable doubt. This Court considers the petit jury's guilty verdict when the defendant has had the full opportunity to impeach witnesses and discredit the state's case with the information that was not disclosed to the grand jury. *Lynch*, 590 N.W.2d at 79-80 (stating, "We are further persuaded by the fact that after a trial on the merits and the opportunity to impeach these three witnesses with the inducements that were not disclosed to the grand jury, a petit jury convicted Lynch of first-degree felony murder"); *McDonough*, 631 N.W.2d at 386.

The petit jury in this case was well-informed of the terms of Ridlon's and Anderson's plea agreements. The plea agreement was mentioned in opening statements by both the prosecutor and defense counsel (T.759, 771). Ridlon testified that he pled guilty to being an accomplice in H [REDACTED]'s kidnapping and promised to cooperate with the state and provide testimony in appellant's case (T.774). The state also agreed to drop other counts, including second-degree murder, and not to seek an indictment for first-degree murder (T.1299, 1352). In addition, the state dismissed Ridlon's two separate drug files (T.1352-53).

Anderson testified that he pled guilty to kidnapping and agreed to cooperate with the investigation and prosecution, including providing testimony (T.966). In addition, the state agreed not to seek an indictment for first-degree murder (T.1028-29).

In his closing argument, defense counsel suggested that in giving deals to Ridlon and Anderson, the state “made a pact with the devil” (T.2094-96). He discussed the terms of those deals (T.2090, 2094, 2106-07).

In spite of all of this evidence and the arguments by defense counsel, the jury found appellant guilty beyond a reasonable doubt. Therefore, appellant cannot meet his burden of establishing that had more detailed plea-agreement evidence been presented to the grand jury, it would not have found probable cause to indict appellant.

Appellant relies on *State v. Moore*, 438 N.W.2d 101 (Minn. 1989), and *State v. Johnson*, 441 N.W.2d 460 (Minn. 1989), but those cases do not support reversal in this case. In *Moore*, 438 N.W.2d at 105, this Court held it “unlikely that the omitted evidence, which tends to discredit the witnesses, would change the grand jury’s indictment.” In *Johnson*, 441 N.W.2d at 464-67, this Court did dismiss the indictments. The error, however, was based on a number of incidents in which the prosecutor subverted the independence of the grand jury. *Id.* Unlike in *Johnson*, the error alleged in this case is not one related to subversion of the grand jury’s independence. This case is more similar to *Lynch*, where the prosecutor’s failure to tell the grand jury about all of the inducements to the witnesses did *not* have a material affect on the grand jury proceedings.

**C. As The Post-Conviction Court Found, The State Did Not Agree To Dismiss Sam Miller's Unrelated Felony Charge In Exchange For His Cooperation In This Case.**

Appellant argues that the grand jury was not informed that Sam Miller's felony charge would be dismissed as a result of his cooperation in the proceedings against appellant (App. Br. 14). The grand jury was not informed of this because such a deal never existed.

In post-conviction proceedings, appellant claimed that the state failed to disclose this deal. The post-conviction court rejected this claim, finding, "there was no express or implied deal between Sam Miller and the State and that his testimony is not credible." (Findings at 4). Appellant ignores the post-conviction court's credibility determinations. This Court on appeal gives "considerable deference" to a post-conviction court's credibility decisions because the post-conviction court "is in a unique position to assess witness credibility." *Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006). As explained in more detail in section IV below, appellant has offered no basis for rejecting the post-conviction's determination that Sam Miller is not credible.

Because there is no evidence of a deal between the state and Sam Miller to drop Miller's felony charge in exchange for his cooperation in the proceedings against appellant, appellant has failed to establish that such information was improperly withheld from the grand jury.

Appellant's attack on the indictment should be rejected.

**II. THE TRIAL COURT PERMITTED APPELLANT TO INTRODUCE ALTERNATIVE-PERPETRATOR EVIDENCE. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN LIMITING REVERSE-*SPREIGL* EVIDENCE.**

The trial court determined that appellant could introduce alternative-perpetrator evidence regarding Jason Anderson and Jesse Ridlon. The court also allowed appellant to introduce a reverse-*Spreigl* incident involving Anderson. In arguing that the trial court improperly excluded alternative perpetrator and reverse-*Spreigl* evidence, appellant makes claims that were not made below. He argues for the first time on appeal that the clear-and-convincing standard should not be applied to reverse-*Spreigl* evidence. He also argues that the trial court did not properly consider the admissibility of two pieces of alternative-perpetrator evidence; defense counsel, however, never asked the court to rule on the admissibility of this particular evidence. Appellant has failed to establish that the trial court's ruling limiting the admissibility of reverse-*Spreigl* evidence was an abuse of discretion. Moreover, he has failed to establish prejudice.

**A. Standard Of Review**

Evidentiary rulings lie within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Appellant has the burden of proving that the district court abused its discretion and that the error was prejudicial. *Id.*

A criminal defendant has the right to introduce evidence supporting his theory that an alternative perpetrator committed the crime. *State v. Blom*, 682 N.W.2d 578, 621 (Minn. 2004). But “with that right comes the obligation to comply with procedural and evidentiary rules.” *Id.* Alternative perpetrator evidence is admissible “if it has an

inherent tendency to connect the alternative party with the commission of the crime.” *State v. Jones*, 678 N.W.2d 1, 16 (Minn. 2004). Once this foundation is laid, the defendant can introduce evidence of a motive of the alternative perpetrator to commit the crime, threats by the alternative perpetrator, or other miscellaneous facts tending to prove the alternative perpetrator committed the crime. *Id.*

A defendant can introduce reverse-*Spreigl* evidence -- other crimes or bad acts committed by the alternative perpetrator -- if certain requirements are met. *Id.* If the defendant has met the threshold requirement of connecting the alternative perpetrator to the commission of the crime, the defendant must then 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.

*Id.* at 16-17 (footnote and citations omitted).

Any error in excluding alternative-perpetrator or reverse-*Spreigl* evidence is harmless beyond a reasonable doubt if the verdict rendered was “surely unattributable to the error.” *Blom*, 682 N.W.2d 578, 622 (Minn. 2004) (quotations omitted). “If . . . there is a reasonable possibility that the verdict might have been different if the evidence had been admitted, then the erroneous exclusion of the evidence is prejudicial.” *Id.* at 623 (quotations omitted).

Appellant has failed to meet his burden of establishing both error and that he was prejudiced by the alleged error.

**B. Appellant Has Waived His Claim That The Clear-And-Convincing Standard Should Not Be Applied To Reverse-*Spreigl* Evidence.**

In order for reverse-*Spreigl* evidence to be admissible, the defendant must have clear and convincing evidence that the alternative perpetrator participated in the reverse-*Spreigl* incident. *E.g. Jones*, 678 N.W.2d at 16-17. Appellant argues that the clear-and-convincing rule should not be applied to reverse-*Spreigl* evidence (App. Br. 18-20).<sup>8</sup> Appellant never made this argument below, however. In fact, defense counsel even acknowledged that the clear-and-convincing rule applied with respect to the proffered reverse-*Spreigl* evidence (9/16/05 Memo. at RA 4-5; T.1933).<sup>9</sup>

Because appellant actually argued that the clear-and-convincing rule applied, he has waived his claim now that a lower standard should have instead been applied. The firmly-established general rule is that issues that are not raised in the district court ordinarily will not be considered for the first time on appeal. *See, e.g., State v. Bell*, 719 N.W.2d 635, 639 (Minn. 2006).

Even if this Court considers this issue, however, the clear-and-convincing rule was properly applied in this case. Appellant has not shown any error, much less plain error in the court's application of this rule.<sup>10</sup> This Court has consistently applied the clear-and-

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<sup>8</sup> Respondent refers to the rule regarding the application of the clear-and-convincing standard to reverse-*Spreigl* evidence as the "clear-and-convincing rule."

<sup>9</sup> "9/16/05 Memo." refers to the Defense Memorandum Of Law Regarding Third Party Perpetrator And Reverse-*Spreigl* Evidence, a copy of which is attached in respondent's appendix.

<sup>10</sup> *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998), described the test for plain error as follows:

(Footnote Continued on Next Page)

convincing rule with respect to the admissibility of reverse-*Spreigl* evidence. *See, e.g., State v. Profit*, 591 N.W.2d 451, 464 (Minn. 1999), *cert. denied*, 528 U.S. 862 (1999); *Jones*, 678 N.W.2d at 16-17; *Blom*, 682 N.W.2d at 622, n.20; *Huff v. State*, 698 N.W.2d 430, 438 (Minn. 2005); *State v. Vance*, 714 N.W.2d 428, 437 (Minn. 2006). While this Court has noted in dicta that the clear-and-convincing rule “may have the potential to operate unconstitutionally” in some situations, *Jones*, 678 N.W.2d at 17, n.6 (citing *State v. Richardson*, 670 N.W.2d 267, 280 (Minn. 2003)), this Court has never actually reached that conclusion. For all of these reasons, appellant has failed to establish that the trial court’s use of the clear-and-convincing rule amounted to clear or obvious error.

Moreover, application of the clear-and-convincing rule in this case did not deprive appellant of his constitutional right to present a defense. Appellant was allowed to and did in fact call a reverse-*Spreigl* witness, R■■■■ M■■■■, who testified about a time when Anderson bound him, assaulted him, and threatened him over a drug debt (T.1950-52, 2005-12).

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(Footnote Continued From Previous Page)

The United States Supreme Court has established a three-prong test for plain error, requiring that before an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs were met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.

*Id.* (citing *Johnson v. United States*, 520 U.S. 461 (1997)). In order to constitute plain error, the law on the issue must be clear or obvious. *See id.* at 741.

In arguing that the clear-and-convincing rule is “arbitrary,” appellant relies on *Holmes v. South Carolina*, 547 U.S. 319 (2006) (App. Br. 19). Appellant’s reliance is misplaced. In *Holmes*, the Supreme Court disapproved of a state rule that prevented the defendant from presenting any alternative-perpetrator evidence when the state’s evidence of defendant’s guilt was strong. *Id.* at 328-31. The Supreme Court determined the rule was arbitrary because evidence was excluded even if it had great probative value and did not “pose an undue risk of harassment, prejudice, or confusion of the issues.” *Id.* at 329.<sup>11</sup>

Unlike the rule in *Holmes*, the clear-and-convincing rule with respect to reverse-*Spreigl* evidence is not arbitrary. The clear-and-convincing standard applies when the state seeks to introduce *Spreigl* evidence. *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006). Minn. R. Evid. 404(b), which governs other-crimes evidence, does not distinguish between *Spreigl* evidence and reverse-*Spreigl* evidence.<sup>12</sup> That rule states that evidence of bad-acts “is not admissible to prove the character of a person in order to show action in conformity therewith.” The clear-and-convincing rule as applied to both *Spreigl* evidence and reverse-*Spreigl* evidence helps safeguard against the use of bad-act evidence to prove character. In addition, the clear-and-convincing rule minimizes

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<sup>11</sup> The *Holmes* Court cited with approval a rule making alternative-perpetrator evidence admissible if there was proof of connection with the crime, such as “a train of facts or circumstances, as tends *clearly* to point out such other person as the guilty party.” *Id.* at 328 (emphasis added). The clear-and-convincing rule with respect to reverse-*Spreigl* evidence is consistent with this rule.

<sup>12</sup> Appellant’s argument suggests that the state does not always have to meet the clear-and-convincing standard (App. Br. 19). Appellant, however, cites to cases that do not involve Rule 404(b) evidence.

confusion to the jury. If reverse-*Spreigl* evidence did not have to meet this requirement, there could be multiple trials within the trial to establish if the other bad act did in fact happen.

Appellant also asserts that the trial court misapplied the clear-and-convincing rule by making a credibility determination in excluding the reverse-*Spreigl* evidence (App. Br. 20-23). Under Minn. R. Evid. 404(b), the bad act and participation in it “by a relevant person are proven by clear-and-convincing evidence.” “The clear-and-convincing standard is met when the truth of the facts sought to be admitted is ‘highly probable.’” *State v. Kennedy*, 585 N.W.2d 385, 390 (Minn. 1998). In considering this factor, trial courts make credibility determinations. *Ness*, 707 N.W.2d at 686 (upholding the trial court’s determination that the *Spreigl* witness was credible). While the clear and convincing rule does not apply with respect to admissibility of alternative-perpetrator evidence, it does apply for reverse-*Spreigl*. *Jones*, 678 N.W.2d at 16-17. A credibility assessment has been held improper with respect to alternative perpetrator evidence, *Blom*, 682 N.W.2d at 621, but it has not been held by this Court to be improper with respect to reverse-*Spreigl* evidence. Thus, the trial court did not plainly error in considering the credibility of the reverse-*Spreigl* witnesses.

**C. The Trial Court Did Not Abuse Its Discretion In Limiting Reverse-*Spreigl* Evidence.**

**1. Trial court’s ruling**

Defense counsel argued that Jason Anderson and Jesse Ridlon were alternative perpetrators (9/16/05 Memo. at RA 1). Defense counsel sought to introduce evidence of

prior bad acts by Anderson, but did not specify these prior bad acts; instead, the memorandum contained an attachment with statements by Casey Moravitz and Jesse Lundeen.<sup>13</sup>

When appellant's motion was discussed, defense counsel again argued that Anderson and Ridlon were alternative perpetrators (T.1930-32). Defense counsel did not articulate what specific alternative-perpetrator evidence he sought to introduce, but instead said, "we would be seeking to provide testimony from certain persons relative to the fact that they could have or did commit this crime" (T.1932). Defense counsel went on to discuss the reverse-*Spreigl* evidence the defense sought to introduce (T.1933). Defense counsel mentioned three incidents: (1) Moravitz's statement that Anderson bragged about using duct tape on people to collect money; (2) Lundeen's statement that he witnessed Anderson using duct tape to collect from C ■■■ T ■■■■; and (3) R ■■■ M ■■■' statement that Anderson attempted to collect money from him by binding him with duct tape and assaulting him (T.1934-35).

The trial court determined that Anderson and Ridlon were alternative perpetrators (T.1942). The court noted that some alternative-perpetrator evidence had already been admitted (T.1942-43). The court ruled that Moravitz could testify that she was at Miller's birthday party (T.1946).

The court determined, however, that Moravitz would not be allowed to testify to the statements she claimed Anderson made regarding a prior abduction in which he used

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<sup>13</sup> These statements are reproduced in appellant's appendix.

duct tape (T.1946-48). The court considered the fact that Moravitz did not give her statement until 13 months after H [REDACTED]'s murder, there was no date or location given regarding the alleged duct-tape incident, there was no indication the incident itself was reported to law enforcement, it referenced only a small amount of money, and Moravitz had some familiarity with appellant (T.1946-47). The court concluded that there was no clear-and-convincing evidence presented to permit Moravitz to testify about the alleged statements (T.1947-48).

With respect to Lundeen's statement, the court concluded that there was no clear-and-convincing evidence of Anderson assaulting C [REDACTED] T [REDACTED] (T.1948-49). The court considered that Lundeen gave his statement to a defense investigator only 11 days before trial, that the incident was not reported to law enforcement, and that there was no corroboration by T [REDACTED] (*Id.*).

The court also excluded testimony by Lundeen that C [REDACTED] R [REDACTED] told Lundeen about being assaulted and duct-taped by Anderson (App. Appendix 23-24; T.1949).<sup>14</sup> The court determined that R [REDACTED]'s statement was hearsay (T.1949). The court also excluded testimony about this alleged incident because there was no indication of timing, no law enforcement involvement, and no description of where the incident allegedly happened (*Id.*).

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<sup>14</sup> Appellant appears to argue that Anderson told Lundeen about this incident (App. Br. 24). The trial court said the statements made about the R [REDACTED] incident were made by either R [REDACTED] or Anderson (T.1949). Lundeen's actual statement, however, indicates that Lundeen learned about this incident from R [REDACTED], not Anderson (App. Appendix 23).

The court determined that the reverse-*Spreigl* requirements had been satisfied, however, with respect to R ■ M ■' testimony that he had been bound and assaulted by Anderson over a drug debt (T.1950-52). The court did not allow Lundeen to testify about what he heard regarding this incident (T.1949-50). The court explained that the details described by Lundeen were different from those described by M ■ (T.1950). The court determined Lundeen's statement about this matter was hearsay and was not clear and convincing (*Id.*).

## 2. Moravitz's statement

The trial court did not abuse its discretion in limiting the reverse-*Spreigl* evidence to R ■ M ■' testimony. The court properly exercised its discretion in concluding that there was no clear-and-convincing evidence that Anderson was involved in a prior abduction in which he used duct tape, as Moravitz claimed Anderson told her. The information allegedly given to Moravitz by Anderson lacked details indicative of reliability.<sup>15</sup>

In addition, this evidence was not relevant to whether or not Anderson killed H ■. This Court has defined reverse-*Spreigl* evidence as:

crimes of a similar nature [that] have been committed by some other person when the acts . . . are so closely connected in point of time and method of

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<sup>15</sup> Contrary to appellant's assertion on page 22 of his brief, the trial court properly considered the suspect circumstances under which Moravitz, a friend of appellant's girlfriend, gave the statement. In determining whether there is clear-and-convincing evidence that an alternative perpetrator participated in a reverse-*Spreigl* incident, the trial court can consider the circumstances surrounding how the evidence comes to light. *See, e.g., Profit*, 591 N.W.2d at 465-66.

operation as to cast doubt upon the identification of defendant as the person who committed the crime charged against him.

*State v. Johnson*, 568 N.W.2d 426, 433 (Minn. 1997) (quotation omitted). The reverse-*Spreigl* act must also be “relevant” and “material” to the defendant’s case. *Id.* at 434. In this case, Anderson admitted to participating in the abduction of H [REDACTED], and evidence was presented that he assaulted H [REDACTED] (T.998-1001, 1322). Anderson also admitted that he collected debts for people, including appellant (T.969-79). He acknowledged using violence to collect debts (T.987-88). The issue in this case was the identity of the shooter. Therefore, Anderson’s alleged prior abduction of some unnamed person to collect a debt was not relevant to whether he shot H [REDACTED].

Furthermore, appellant failed to meet the relevancy requirement with respect to Moravitz’s testimony because there was no indication about when and where the alleged assault occurred. “To satisfy the relevancy requirement when reverse *Spreigl* evidence is offered to establish the identity of the perpetrator, the reverse *Spreigl* incident must be similar to the charged offense either in time, location, or modus operandi.” *State v. Whittaker*, 568 N.W.2d 440, 449 (Minn. 1997). In this case, there is no evidence of time or location, and there is no similar modus operandi because the prior attack did not involve Anderson shooting or killing someone.

The trial court also correctly found that the statement was hearsay and that no exceptions applied (T.1946-47). In introducing evidence that an alternative perpetrator has committed a crime, appellant must comply with evidentiary rules. *Blom*, 682 N.W.2d

at 621. Moravitz's testimony regarding the alleged reverse-*Spreigl* incident was based on hearsay and was therefore improper.

It appears that appellant sought to introduce this evidence for an improper purpose. Defense counsel explained that Moravitz's testimony would rebut Anderson's testimony that he did not use duct tape in collecting debts (T.1934). Appellant continues to advance this argument in his brief (App. Br. 27). Extrinsic evidence of a collateral matter, however, is inadmissible. Minn. R. Evid. 608(b). Moreover, appellant sought to introduce reverse-*Spreigl* evidence to attack Anderson's character. For example, appellant claims, "Since Anderson minimized and distorted his debt collection work and his contact with H [REDACTED], the excluded evidence was crucial to establishing his true *character* and a proper defense in this case" (App. Br. 27) (emphasis added). Appellant also asserts that the reverse-*Spreigl* evidence "would have established that Anderson was violent and capable of murder" (*Id.*). Reverse-*Spreigl* evidence, like *Spreigl* evidence, is inadmissible to show a person's character in order to prove that the person's conduct was in conformity with that character. *See* Minn. R. Evid. 404(b). Because appellant sought to introduce this evidence for an improper purpose and because it does not meet the reverse-*Spreigl* requirements, the court properly exercised its discretion in excluding it.

### 3. Lundeen's statements

The court also properly exercised its discretion in excluding Lundeen's testimony regarding Anderson's alleged prior bad acts. As the court concluded, there was no clear-and-convincing evidence that Anderson assaulted C ■ T ■. There was no corroboration by T ■ law enforcement was not notified of the alleged assault, and the circumstances surrounding Lundeen's statement were suspicious.

Furthermore, for the same reason Moravitz's testimony was irrelevant, so was this testimony. Lundeen claimed that Anderson helped him collect money from C ■ T ■ by assaulting T ■. The evidence presented at trial already established that, in this case, Anderson assisted appellant in kidnapping and assaulting H ■ because of money owed by H ■. The incident involving T ■, unlike the charged incident, did not involve Anderson killing anyone. Therefore, the prior incident was not similar in modus operandi and was not relevant.

The trial court also did not abuse its discretion in concluding that Lundeen's testimony regarding C ■ R ■'s statements about Anderson constituted inadmissible hearsay. Moreover, there was no clear-and-convincing evidence of the alleged assault, which was not even relevant to the crime charged here.

### 4. The R ■ M ■ incident

The court allowed appellant to introduce reverse-*Spreigl* evidence. R ■ M ■ testified that in April of 2003, Jason Anderson and three others bound him with electrical tape and assaulted him over a drug debt (T.2009-11). M ■ said Anderson put a pistol in

M■■■■' mouth and threatened to kill him (T.2010). Anderson also tried to collect the money M■■■■ owed by calling acquaintances of M■■■■ and making threats (T.2012). M■■■■ explained that Anderson collected money for people (T.2014).

The trial court did not abuse its discretion in excluding Lundeen's testimony regarding what he heard about this incident. First, it is inadmissible hearsay. Second, as the trial court found, inconsistencies between M■■■■' description of the assault and Lundeen's statement (T.1950) did not corroborate M■■■■ account of the assault, as appellant claims in his brief (App. Br. 27-28). In any event, corroboration is not a proper purpose to admit the evidence.

Third, evidence of the assault came in through M■■■■. As this Court recently held, the number of reverse-*Spreigl* incidents admitted may be limited "to assure the line between demonstrating the alternative perpetrator's modus operandi and impugning his or her character does not become blurred." *Huff*, 698 N.W.2d at 442 (citing Minn. R. Evid. 403, which states that "needless presentation of cumulative evidence" may be controlled). Lundeen's testimony about the M■■■■ incident was properly excluded.

##### **5. Reputation for violence**

Appellant suggests that the trial court excluded evidence regarding Anderson's reputation for violence (App. Br. 23). Defense counsel, however, never asked the trial court for a ruling on whether Lundeen or Moravitz could testify about Anderson's reputation. Therefore, he has forfeited this argument for appeal. In any event, various witnesses described Anderson's reputation for and use of violence (T.969, 987-88, 1992, 2009-11).

**D. Any error in excluding reverse-*Spreigl* evidence was harmless.**

Even if this court considers the exclusion of any of the reverse-*Spreigl* evidence erroneous, any error was harmless. As explained above, Anderson admitted collecting debts for others, including appellant, and participating in H█████'s abduction. Evidence was also presented about Anderson assaulting H█████ on the night he was kidnapped. The fact that Anderson had kidnapped and assaulted other people had no bearing on whether he killed H█████.

Furthermore, any error was harmless given the overwhelming evidence of appellant's guilt. Appellant clearly had a motive to kill H█████ based on the amount of money and drugs H█████ took from appellant. When appellant and Anderson met H█████ at the Gladiator bar, appellant threatened to shoot A█████ H█████ when H█████ tried to assist H█████. Appellant assaulted H█████ numerous times that evening and into the morning, demanding his money. Appellant duct-taped H█████ and put him in the trunk of a car. Anderson left Ridlon's house; H█████ was still alive when Anderson left. Appellant told his brother that he would meet up with him later, but he had something to take care of first. Appellant said he was not going to have anybody "do my dirt." When appellant met up with his brother later, appellant said he emptied a clip in H█████'s head; when the body was later discovered, H█████ had in fact been shot in the head ten times. A .22-caliber casing, matching those found with H█████'s remains, was located in appellant's Cadillac. Appellant abandoned the Cadillac and also threatened

Dean Dunn to destroy a .22-caliber pistol. Finally, appellant made incriminating statements to both his girlfriend and Anderson.

**E. Defense Counsel Never Asked For A Ruling On The Other Alternative-Perpetrator Evidence That Appellant Now Claims Should Have Been Admitted.**

Appellant argues for the first time on appeal that the trial court should have admitted other alternative-perpetrator evidence, namely Moravitz's testimony that he heard Anderson say he was going to "swoop up" H [REDACTED], and Lundeen's testimony that Anderson liked to carry guns (App. Br. 26). Defense counsel never specifically asked for a ruling on the admissibility of this evidence.

Because appellant failed to argue for the admissibility of this evidence, his argument is forfeited. As this Court explained in *Jones*, 678 N.W.2d at 21, "Defense counsel are well-advised to make the most specific offer possible, even to the point of stating that witness X will testify as follows and witness Y will testify as follows." It was not plain error for the trial court to not *sua sponte* rule on this evidence, which defense counsel never specifically argued was admissible.

In any event, appellant has failed to establish that any error amounted to plain error affecting his substantial rights. Evidence was presented that Anderson was directly involved in kidnapping and assaulting H [REDACTED] and that he had previously used a gun against M [REDACTED]. Therefore, any error in excluding the statement Anderson made about "swooping up" H [REDACTED] and Anderson's gun possession did not affect appellant's substantial rights.

Finally, as argued above, the evidence against appellant was overwhelming. Appellant has not established error or prejudice as a result of the trial court's rulings on alternative-perpetrator and reverse-*Spreigl* evidence.

**III. APPELLANT HAS FAILED TO ESTABLISH PREJUDICIAL ERROR WITH RESPECT TO THE ADMISSION OF OUT-OF-COURT STATEMENTS BY H [REDACTED].**

Appellant argues that a number of out-of-court statements by H [REDACTED] were improperly admitted hearsay. With respect to most of these statements, appellant does not specify what the statements were, let alone explain how he was prejudiced by them. Therefore, appellant has not met his burden of establishing prejudicial error with respect to these statements. Appellant only specifically argues prejudice with respect to H [REDACTED]'s statement in a letter to his sister that he was fearful of appellant. Appellant has not established that any error in admitting this statement was prejudicial.

**A. Standard Of Review**

Evidentiary rulings by a trial court will not be reversed absent a clear abuse of discretion. *State v. Rhodes*, 627 N.W.2d 74, 84 (Minn. 2001). An appellant claiming the trial court erroneously admitted evidence "bears the burden of proving the admission was erroneous and prejudicial." *State v. Lee*, 645 N.W.2d 459, 465 (Minn. 2002).

In determining whether evidentiary errors are prejudicial, the reviewing court does not require a new trial "unless there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003). Appellant incorrectly states that the harmless error standard is whether the evidence was harmless beyond a reasonable doubt (App. Br. 33). As this

Court explained in *Asfeld*, 662 N.W.2d at 544, however, the harmless error standard for improperly admitted evidence is whether the evidence significantly affected the verdict; the beyond-a-reasonable-doubt harmless error standard is reserved for evidentiary rulings of constitutional magnitude.

Appellant has failed to meet his burden of establishing that any of the alleged errors significantly affected the verdict.

**B. Appellant Has Failed To State With Specificity What Statements Were Improperly Admitted And Has Not Explained How He Was Prejudiced By Them. In Any Event, Admission Of The Out-Of-Court Statements He Appears To Complain About Were Harmless.**

Appellant claims that a number of out-of-court statements by the victim were improperly admitted. With the exception of H [REDACTED]'s statement to his sister that he feared appellant, appellant neither specifies the statements he finds problematic nor explains how he was prejudiced by them. Accordingly, appellant has failed to meet his burden of establishing that the trial court abused its discretion in admitting H [REDACTED]'s statements. He has also failed to establish prejudice.

At the end of his argument on this issue, appellant states "there was no evidence of many of the out-of-court statements" and cites a few statements in a footnote (App. Br. 33, n.12). For the sake of argument, respondent assumes that these are the statements he claims were improperly admitted. Appellant's footnote mentions the following: (1) H [REDACTED]'s statements to his sister April via letter that he had taken appellant's truck, four-wheeler, money and drugs valued at \$14,000 to \$15,000 and that he did not remember taking these items (T.872-74); (2) H [REDACTED]'s statements via letter to April that

he was scared of Miller, that he did not think he could repay appellant, and that he was planning to leave the area (T. 874); and (3) H [REDACTED]'s subsequent statements to his sister that he did in fact remember taking these items and that he knew where the money and drugs were located (T.875-79).

Appellant only specifies that he was prejudiced by H [REDACTED]'s statement that he was scared of appellant. That argument is addressed in section C below. Assuming for the sake of argument that these other statements were improperly admitted, appellant has failed to meet his burden of establishing that he was prejudiced by any of them. Because the burden is on appellant to establish prejudice, *Lee*, 645 N.W.2d at 465, and because he has not articulated any prejudice with respect to these statements, appellant has failed to meet his burden.

In addition, most of this evidence was cumulative of other evidence, thus decreasing any prejudicial impact. *See State v. DeRosier*, 695 N.W.2d 97, 105-06 (Minn. 2005). For example, April's testimony that H [REDACTED] wrote her a letter in which he stated he had taken appellant's truck, four-wheeler, money and drugs did not significantly affect the verdict because other witnesses testified to H [REDACTED]'s taking these items, thus supporting the state's theory regarding appellant's motive to kill H [REDACTED] (*see* T.778-79, 794-97). Appellant himself told a number of witness that H [REDACTED] took his belongings (T.780-82, 1302-06, 977-79).<sup>16</sup>

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<sup>16</sup> Appellant does not argue that his own statements were improperly admitted, nor can he. Appellant's statements are not hearsay under Minn. R. Evid. 801(d)(2) (admissions by a party opponent). Appellant claims the statements made by H [REDACTED] to April were (Footnote Continued on Next Page)

There was other evidence that H [REDACTED] took appellant's things and that appellant wanted repayment. On two occasions, H [REDACTED] searched for the four-wheeler, eventually finding it and returning it to appellant (T.830-32, 848-54). On the night H [REDACTED] was kidnapped, Anderson and appellant spoke to him about the money he owed appellant and told him to pay up (T.987, 1002). Appellant continued to demand the money from H [REDACTED] in Ridlon's garage (T.1015-16). Because there was overwhelming evidence regarding H [REDACTED]'s theft from appellant and appellant's motive to kill H [REDACTED], H [REDACTED]'s statements to April about taking appellant's things did not significantly affect the verdict.

Any error in admitting testimony that H [REDACTED] eventually acknowledged to his sister that he did remember taking appellant's things had no significant effect on the jury. Whether or not H [REDACTED] remembered taking appellant's things had no bearing on the verdict. In addition, any error in admitting testimony that H [REDACTED] told his sister the drugs and money were located in a backpack by a barn did not significantly affect the verdict; the money and drugs were never found.

Appellant simply has not met his burden of establishing prejudice with respect to the admission of these particular statements. Because any error in admitting this evidence was harmless, this Court need not determine if admission of the evidence was erroneous.

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(Footnote Continued From Previous Page)

prejudicial because the state argued they were the best evidence of motive (App. Br. 34; T.865). For the reasons stated above, the prosecutor's comment does not establish that H [REDACTED]'s statement to his sister significantly affected the verdict.

**C. Appellant Has Failed To Meet His Burden Of Establishing That H[REDACTED]'s Statement To His Sister That He Feared Appellant Substantially Affected The Verdict.**

Appellant correctly states that hearsay evidence regarding the decedent's statements of fear of the defendant is generally inadmissible unless certain conditions are met. *See, e.g., State v. Blanchard*, 315 N.W.2d 427, 432 (Minn. 1982) (explaining that such evidence is admissible when (1) the victim's state of mind is admissible such as when the defendant raises the defense of accident, suicide, or self-defense, (2) the trial court weighs the probative value against the risk of unfair prejudice, and (3) a limiting instruction is given). Even when these conditions are not met, and the hearsay evidence is improperly admitted, a defendant bears the heavy burden of establishing that the evidence substantially influenced the jury to convict. *Id.* at 433.

Appellant has failed to meet this heavy burden for four reasons. First, the evidence of guilt was overwhelming. *Cf. Blanchard*, 315 N.W.2d at 433 (noting that there was overwhelming evidence of guilt and holding that the decedent's statements did not substantially influence the jury to convict). This evidence is summarized above in section II.

Second, April testified that she confronted H[REDACTED] about the contents of the letter and he admitted that some of what he told her was not true (*see* T.873-78). Therefore, by H[REDACTED]'s later admissions to his sister that he was not entirely truthful in his letter, it is questionable whether he was truly afraid of appellant.

Third, H[REDACTED]'s own actions indicate that he was not afraid of appellant, minimizing any impact of his statement to April. H[REDACTED] actually went with appellant in

the same car look for the four-wheeler (T.830-35). There was no fighting between them, and witnesses described the atmosphere between appellant and H [REDACTED] as “friendly” (T.838-39). Once he found the four-wheeler, H [REDACTED] met with appellant in order to return it (T.851-54).<sup>17</sup> After H [REDACTED] returned it, he laughed and told his friend, “At least I know [appellant] can’t hit very hard” (T.857). H [REDACTED] also agreed to meet with Jason Anderson, even though Anderson had just told H [REDACTED] to reimburse appellant (T.987, 992, 1092-93). H [REDACTED] went to the Gladiator Bar in order to talk to Anderson, even though H [REDACTED]’s friend warned him not to go (T.1092-93). All of these actions by H [REDACTED] indicate that, contrary to what he told his sister, he did not have a plan to leave the area and he was not afraid of appellant.

Fourth, H [REDACTED]’s statements to his sister April did not substantially affect the verdict because April was effectively impeached on cross-examination. For example, defense counsel elicited from April that when she first spoke with the police she never mentioned the conversation she had with H [REDACTED] on July 1, 2004 (T.883-85). April had multiple convictions related to dishonesty (T.872, 885-86). She also acknowledged using methamphetamine in 2004 (T.888). All of these factors likely decreased the impact of April’s testimony on the jury.

Appellant has failed to meet his heavy burden of establishing that he was prejudiced by the admission of any of H [REDACTED]’s out-of-court statements.

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<sup>17</sup> The evidence indicates H [REDACTED] sent the letter to April before he found the four-wheeler, because H [REDACTED] mentioned in the letter that he was going to look for the four-wheeler (T.874-45).

**IV. THE POST-CONVICTION COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING APPELLANT RELIEF ON HIS CLAIMS OF DISCOVERY VIOLATIONS.**

Appellant sought post-conviction relief based on alleged discovery violations, which included the following claims: (1) that the state failed to disclose a deal it had with appellant's brother Sam; (2) that the state failed to disclose Sam's felony convictions; and (3) that investigators failed to disclose all of their conversations or contacts with Sam. In rejecting appellant's post-conviction petition, the post-conviction court found that Sam was not credible regarding his claim of a deal. With respect to appellant's other claims, the post-conviction court determined that appellant failed to establish any prejudice. The post-conviction court did not abuse its discretion in denying post-conviction relief.

**A. Standard Of Review**

The findings of a post-conviction court are reviewed under an abuse-of-discretion standard. "We afford great deference to a district court's findings of fact and will not reverse the findings unless they are clearly erroneous. The decisions of a postconviction court will not be disturbed unless the court abused its discretion." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). When a defendant pursues post-conviction relief on the basis of an alleged discovery violation, this Court gives deference to the post-conviction court's denial of relief. *See Woodruff v. State*, 608 N.W.2d 881, 886 (Minn. 2000).

Citing this Court's decision in *Santiago v. State*, 644 N.W.2d 425, 439 (Minn. 2002), appellant states that when a defendant files a direct appeal, moves to stay the

appeal to pursue post-conviction relief, and then appeals from the post-conviction court's decision, the appellate court uses the same standard it would apply on direct appeal (App. Br. 35). *Santiago* involved the trial court's denial of the defendant's pretrial and midtrial severance motions. *Id.* In *Santiago*, unlike in this case, the post-conviction issue had been raised at trial. Because appellant here did not raise any alleged discovery violations at trial, this case should not be analyzed as if appellant had done so. Here, the abuse-of-discretion standard of review applies.

Even if this Court applies *Santiago* to this situation and analyzes this case under a direct-appeal standard, the post-conviction court's determinations regarding credibility of post-conviction witnesses and the lack of prejudice to appellant as a result of any discovery violations is still entitled to deference. When discovery violations are alleged on direct appeal, this Court reviews them *de novo*. *State v. Bailey*, 677 N.W.2d 380, 397 (Minn. 2004). Deference is given to the trial court's decision regarding what, if any, sanctions to impose as a result of discovery violations. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). In considering the appropriate sanction for a discovery violation, the district court should take into consideration the reason for nondisclosure, the extent of prejudice, the feasibility of rectifying any prejudice by a continuance, and any other relevant factors. *Id.* ("Indeed, the trial court is in the best position to determine whether any harm has resulted from the particular violation . . ."). It follows that even under a direct-appeal standard of review, this Court should give deference to the post-conviction

court's determination that there was no prejudice as a result of the alleged discovery violations.<sup>18</sup>

### **B. Relevant Facts**

Appellant's brother Sam was arrested and charged with fleeing stemming from an incident occurring in February 2004 in the City of Eveleth (PC.57).<sup>19</sup> Sam inquired about working as a narcotics informant (*Id.*). It is the policy of the Eveleth Police Department to inform every person who seeks to "work off" a charge in exchange for favorable treatment that the police "cannot promise anything but [can] contact the prosecuting attorney and . . . advise them that they are being cooperative." (PC.59). Sam supplied information to the Eveleth Police that led to the issuance of a search warrant and the discovery of marijuana (*Id.*). After that, Chief Brian Lillis told Sam that he needed to do more drug projects for Eveleth "in exchange for a favorable recommendation to the prosecuting attorney on the fleeing charge." (PC.60). Bruce Williams was appointed to represent Sam on the fleeing complaint in April 2004 (PC.20).

On July 25, 2004, T [REDACTED] H [REDACTED] was reported missing (T.1497-98). On July 29th Sam was interviewed by police about the disappearance of H [REDACTED] (Ex.13).<sup>20</sup> Sam admitted that he was present at Ridlon's house but denied seeing H [REDACTED] there (*Id.* at 9). Officers told Sam if he did not tell the truth, he would be back in jail (*Id.* at 10).

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<sup>18</sup> Indeed, the Court of Appeals has remanded the issue of prejudice to the post-conviction court after concluding there was a discovery violation. *See Gorman v. State*, 619 N.W.2d 802, 807 (Minn. Ct. App. 2000), *rev. denied* (Minn. Feb. 21, 2001).

<sup>19</sup> "PC." Refers to the post-conviction transcript.

<sup>20</sup> "Ex." Refers to the Exhibits admitted at the post-conviction hearing.

Sam eventually admitted that he had heard “that kid” was “snatched up,” but maintained that appellant had not done anything to H [REDACTED] (*Id.* at 11, 15). Sam was arrested and jailed after the interview (Ex.14 at 3).

Later that evening, Sam told police he wanted to be “fuckin’ totally honest” with them (*Id.*). Sam told police that he was scared of appellant who “told me he’d kill me if I say a fuckin’ word.” (*Id.* at 5). Sam admitted that Jason Anderson described how he and appellant grabbed H [REDACTED] off the street “mafia style” and stuffed him in the trunk of a car (*Id.* at 19-20). Sam eventually admitted that: he saw appellant with H [REDACTED] at Ridlon’s; he heard appellant talking to H [REDACTED] about the money H [REDACTED] stole from appellant; appellant had a gun; appellant said he was “not gonna have nobody do [his] dirt”; appellant said he “filled [H [REDACTED]’s] head with the clip” but then said he was kidding and he shipped him away on a plane to Colorado; when Sam pressed appellant about whether H [REDACTED] was dead, appellant told him it was not any of his business and “you don’t wanna know” (*Id.* at 39-48). Appellant’s girlfriend Kristen Krings told Sam that appellant said, “he’ll fuckin’ kill you” if Sam snitched (*Id.* at 48). Police warned Sam to come clean with absolutely everything (*Id.* at 60). Sam said appellant and Krings are partners, who pick up Mexican meth “from the main guy” (*Id.* at 72-73). Sam repeatedly said he did not want to be in jail (*Id.* at 76-82).

Sam spoke to police the next day and said he remembered more (Ex.15 at 1). Sam asked why he was being held, said he was a “reliable informant” “on drugs and other things,” and would help find appellant by wearing a wire (*Id.* at 3-7). Sam recalled that

he overheard appellant and Ridlon discuss melting down a gun (*Id.* at 5). Sam told the officers that he wanted to “help you guys” to prove his innocence (*Id.* at 27).

Sam was not charged and was released on July 30th (PC.113). Sam continued to be willing to help police locate appellant and/or H [REDACTED] (PC.114-15).

BCA Agent Koneczny talked to Sam over the telephone on August 2, 2004 (PC.117). Appellant had an unrelated court appearance scheduled that day and Koneczny asked Sam if he thought appellant would show up (*Id.*). Sam told Koneczny that Richard McNeil may have helped appellant (*Id.*).

Appellant was arrested on August 2, 2004. T [REDACTED] H [REDACTED]'s body was found on September 2, 2004.

On August 13, 2004, BCA agents learned that appellant was having people collect drug money customers owed him so he could pay his defense attorney (PC.74). Sam was alleged to be participating in the collection efforts (PC.76). Sam cooperated with BCA agents, saying he had been solicited by Kristen Krings to collect money owed to appellant (PC.120-22). He showed them text messages verifying that he had received a list of names to collect from, none of whom were involved in the H [REDACTED] murder (PC.97-98, 122). Agent Koneczny wrote a report about this (PC.121). Later that evening, Sam provided the agents with the actual list (PC.127; Ex.10).

Koneczny knew that Sam had done some work as a narcotics informant for the Eveleth Police to receive consideration on his pending fleeing charge and thought that police might be able to use Sam to set up Krings and other people still in the methamphetamine network (PC.124-26). Koneczny asked Sam “if he would be

interested in cooperating with us on the drug end of this relating to Kristen Krings and some of the other individuals; and in consideration for that, I told him that I would contact the Chief at Eveleth Police Department and see if they would take that into consideration towards his cooperation that he had already provided in their cases” (PC.126).<sup>21</sup> BCA Agent Gherardi learned that Sam was going to provide them with narcotics information (PC.78). Neither Koneczny nor Gherardi made any representations to Sam regarding favorable treatment in his fleeing case in exchange for cooperation in the H [REDACTED] matter (PC.99, 143).

Koneczny hoped that Sam would be able to provide the BCA with information so they could make “a relatively quick and easy” bust of Krings (PC.141). Koneczny was interested in information about “when [Krings] was going to be making a trip; where she was going; if he knew where the drugs were going.” (*Id.*). Sam provided information on specific drug dealers in the area (PC.83). An August 23, 2004, report documented that Sam gave Gherardi the name of a person believed to be traveling with Krings to meet her methamphetamine “source” in Hinckley, Minnesota, and then to pay appellant’s attorney (PC.84; Exhibit 12).

Sam was unable to provide the BCA with information sufficient to arrest or prosecute Krings for drug trafficking; Koneczny believed that Sam’s inability was the product of a police “screw up” (PC.131). Based on a conversation or information

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<sup>21</sup> Koneczny told Lillis he was thinking of using Sam as a narcotics informant (PC.61, 130). Koneczny asked Lillis if he would make a favorable recommendation regarding Sam’s fleeing case if Sam cooperated (PC.62).

contained in police reports and disclosed to appellant, Krings believed Sam could not be trusted (PC.131, 142). Despite his failure to successfully set up Krings, Sam “agreed to continue to try to do stuff in the future.” (PC.131). Koneczny relayed this information to Lillis (*Id.*).

On September 13, 2004, Agent Gherardi interviewed Sam about new information in the murder (PC.80). The interview was reported (*Id.*). After the interview, Sam gave Gherardi names of three people involved in local methamphetamine trafficking (PC.93-94, 100; Exhibit11). One of the individuals named continues to work as a narcotics informant for police (PC.101).

After Sam’s fleeing case was continued and sometime in late 2004, Sam met with his attorney, Bruce Williams, to discuss his fleeing case (PC.45, 172). Williams recalled that Sam told him he “was cooperating in the homicide investigation of T [REDACTED] H [REDACTED], where his brother was the prime suspect” (PC.29-30). Recognizing the potential conflict because Williams was representing one of appellant’s co-defendants, Williams told Sam “Stop. I don’t want to know anything more.” (PC.31). When asked at the post-conviction hearing if Sam expected the fleeing case to be dismissed because of his cooperation, Williams replied, “I believe at that time he indicted to me that he -- he thought -- that is correct, yeah” (PC.30).

Williams called prosecutor Karl Sundquist to verify whether Sam was cooperating (and was a potential witness) in the H [REDACTED] case (PC.31, 38, 46). Williams did not discuss Sam’s claimed “deal” (PC.38). Sundquist did not know about Sam’s cooperation but called back confirming that Sam was a potential witness in the murder case (PC.33).

Sundquist said nothing to Williams about a “deal” or dismissing Sam’s fleeing case (PC.36, 47). Williams told Sam that there was a conflict and that Sam might need a new attorney. (PC.33).

On December 1, 2004, Agents Koneczny and Gherardi interviewed Sam again about new information in the H [REDACTED] investigation (PC.86, 132). Sam did not say anything to them indicating that he expected his fleeing case to be dismissed in exchange for his cooperation in the H [REDACTED] case (PC.89).

On January 27, 2005, Williams sent a letter to Sam’s newly-appointed attorney describing the conflict (Ex.9). Williams noted that Sam “provided information to the authorities on the Frank Miller case and since I represent the co-defendant, it does not look good.” Williams also wrote that Sam’s “felony fleeing on a snowmobile should ultimately be dismissed as a result of Sam Miller’s cooperation with the BCA.” Williams’ reference to cooperation was based “solely” on what Sam told him and not any representations from the government (PC.39, 47).

After learning of Williams’ conflict, the prosecutor in appellant’s case, Gordon Coldagelli, asked St. Louis County Sheriff investigators to interview Sam on February 4, 2005, to determine if he had had substantive conversations with Williams about the H [REDACTED] case (PC.51, 172).

During the interview, Sam claimed Koneczny talked to Eveleth and they would drop the charge in exchange for his “cooperation.” (Ex.7 at 2). Sam repeated later that “I heard the prosecutor tell me and [Williams] over the phone that he talked to [Koneczny] and that [Koneczny] ah, said my cooperation or whatever that yah he, had told me that it

was washed” (*Id.* at 3). Sam told the investigators that he did not discuss the specifics of his cooperation or deal with Williams (*Id.* at 4-6). At the post-conviction hearing, Sam claimed on cross-examination that the transcript was inaccurate and that he had in fact told Williams that the fleeing case would be dismissed in exchange for his cooperation in the murder investigation (PC.209-11).

Coldagelli did not do any further investigation of Sam’s reference to a “deal” because he knew “there was no deal” with Sam in the H [REDACTED] case (PC.174). The only deal Coldagelli was aware of with Sam was “relative to drug investigations not associated with the H [REDACTED] investigation.” (*Id.*).

Coldagelli talked to Sam in his office prior to Sam’s testimony before the grand jury; they did not talk about a “deal” made for Sam’s cooperation or testimony (*Id.*). During his testimony, Sam could no longer remember if appellant owned a gun and did not recall some of the inculpatory statements he made on July 25, 2004 (*see* GJ.218).

Sundquist was not certain precisely when he made the decision to dismiss Sam’s fleeing charges (PC.152-53). A combination of factors led to the decision to dismiss: (1) one of the main witnesses in the case was involved with Sam and it was questionable how she would testify or what her statement would be; (2) the other proof in the case was weak, as Sam was not caught right away but was found at home; and (3) the fact that Sam worked for the Eveleth Police Department as an informant. (PC.153). Sundquist recalled having a conversation with Chief Lillis regarding Sam’s work as a narcotics informant and felt that since he faced an “uphill battle” on the fleeing case, “if Chief Lillis wanted to use it in order to get some benefit out of it, then I was fine with

that.” (*Id.*). Sundquist was “certain” that Sam’s cooperation in the H [REDACTED] case had nothing to do with the dismissal of the fleeing complaint; Sundquist made no representations to that effect (PC.162-63).

Sundquist filed the written dismissal on March 1, 2005 (Ex.3). Sundquist thought it was dismissed “without prejudice” based on his normal practice when dismissing a case (PC.155).

At the post-conviction hearing, Sam testified that when he was in Williams’ office and heard Williams call Sundquist, Sam understood that the fleeing case would be dismissed (PC.191). Sam claimed Agent Koneczny told him that his fleeing case would be dismissed as a result of his cooperation in the H [REDACTED] case (PC.187-88). Sam at first testified that this conversation occurred after he met with Williams (PC.188, 196); Sam later testified that this conversation occurred before the meeting with Williams (PC.197). Sam agreed he provided the Eveleth Police with information hoping to get consideration in his fleeing case (PC.198); he also agreed that the BCA agents asked him to be a drug informant (PC.203). Sam claimed that Krings *never* gave him a list of people who owed appellant drug money (PC.200). Sam denied that the agents ever asked him to set Krings up in a drug sting (PC.202-03). Sam could not recall telling police that appellant said he emptied a clip into H [REDACTED]’s head (PC.207-08). Sam claimed at that time he was high on methamphetamine and told the police what they wanted to hear for fear of being charged in the H [REDACTED] case (*Id.*). He agreed that at the time he gave the police a statement, he probably did not have a deal with the police (*Id.*).

The post-conviction court denied relief, finding that Sam was not credible.

**C. The Post-Conviction Court's Finding That Sam Miller Was Not Credible And That There Was No Deal, Is Not Clearly Erroneous.**

Appellant claims that the state committed a discovery violation by failing to disclose a "deal" between the state and Sam that involved dismissal of Sam's fleeing charge in exchange for Sam's cooperation in the H [REDACTED] murder. In making this argument, appellant completely ignores the post-conviction court's credibility determination that Sam was simply *not credible* (Findings at 4, 11-13). The court said, "Sam Miller's testimony was so poorly delivered that his lack of credibility was apparent." (*Id.* at 12). The post-conviction court noted that only Sam claimed there was such a deal while "all related prosecution, law enforcement and even his attorney of record at the time of this alleged deal do not recall any such deal for Sam Miller's cooperation." (*Id.* at 11). The court concluded that Sam cooperated with the police as a result of his self interest in being released from custody and not being charged in the murder case (*Id.*). The court found Sam's claim of a deal suspect given that the fleeing charge was dismissed after Sam's grand jury testimony and prior to his trial testimony (*Id.* at 12).

The trial court's conclusion that there was no deal to dismiss his fleeing case in exchange for his cooperation in the murder case is not clearly erroneous and is supported by the record. The only person that ever claimed there was such a "deal" was Sam Miller. Sam's attorney, Williams, prosecutors Sundquist and Coldagelli, and BCA

Agents Gherardi and Koneczny testified that they were not aware of any such deal.<sup>22</sup> Koneczny testified that if Sam thought his fleeing case was dismissed as a result of his cooperation in the murder investigation, he was wrong. (PC.144).

To the extent there was ever a “deal” to dismiss the fleeing charge, it was related to Sam’s cooperation in an unrelated drug sting. After Sam was charged with fleeing, and *prior* to H [REDACTED]’s disappearance, Sam provided information that led to a search warrant and discovery of marijuana. Sam needed to do more projects before Chief Lillis would make a positive recommendation to the prosecutor in Sam’s fleeing case.

After H [REDACTED]’s disappearance, Agents Gherardi and Koneczny asked Sam if he would assist in targeting people involved in the methamphetamine business, specifically Krings and the people still left in the network. Koneczny told Sam that if Sam cooperated with them regarding Krings, he would ask the Eveleth Police to take that into consideration towards the cooperation he had already provided to Lillis as an informant.

Contrary to appellant’s claim in his brief, any “deal” related to an unrelated drug investigation into Krings was not required to be disclosed in appellant’s murder case. Minn. R. Crim. P. 9.01, subd. 1(2), requires disclosure of “relevant” “statements which relate to the case.” The drug operation was not related to appellant’s murder case or relevant to it. Indeed, Sam’s initial cooperation with authorities as a drug informant after his arrest for fleeing occurred *before* H [REDACTED] was even kidnapped. While the

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<sup>22</sup> While Sam possibly told his attorney Williams that such a deal existed, the information Williams received from prosecutor Sundquist did not establish the type of deal Sam had described.

information about Krings may have come to light because of the H [REDACTED] investigation, the information Sam supplied about narcotics “was taking a turn towards a narcotics investigation and hav[ing] two investigations” (PC.94). The list Sam provided on August 13<sup>th</sup> containing names of people who owed appellant drug debts did not contain anybody who was involved in the H [REDACTED] murder. Sam provided additional narcotics information on August 23<sup>rd</sup> and September 13<sup>th</sup>. Agent Gherardi used this information to identify other dealers and users on the Iron Range (PC.101). Any “deal” Sam had regarding cooperation in this drug investigation was not related to appellant’s case.

Disclosure of Sam’s cooperation in an unrelated narcotics investigation was not required under *Brady v. Maryland*, 373 U.S. 83 (1963). To prevail on a *Brady* claim, a defendant must prove: (1) the evidence at issue must be favorable to him either because it is exculpatory or impeaching, (2) the evidence was suppressed by the government, and (3) the evidence was material and its suppression resulted in prejudice to the defendant. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Evidence is material if there is a “reasonable probability” that if the evidence was disclosed, the result of the proceeding would have been different. *Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005).

Any deal to dismiss Sam’s fleeing case in exchange for his cooperation as a drug informant against Krings was not favorable to appellant nor material to his case. Moreover, the state has a legitimate interest in protecting the identity of persons who provide information to law enforcement and has a “privilege to withhold from disclosure the identity of persons who furnish information of violations of the law to officers charged with enforcement of that law.” *Roviaro v. United States*, 353 U.S. 53, 59 (1957);

*McCray v. Illinois*, 386 U.S. 300, 308 (1967). Courts have held that a prosecution witness's status as an informant for the government in unrelated investigations is not material and need not be disclosed to the defense. See, e.g., *People v. Stern*, 641 N.Y.S.2d 248, 251 (N.Y. Sup. Ct. 1996); *United States v. Tahipour*, 964 F.2d 908, 910-11 (9th Cir. 1992), cert. denied, 506 U.S. 899 (1992); *United States v. Bellamy*, 815 F.2d 74 (4th Cir. 1987) (unpublished).

Moreover, the fact that Sam received consideration for that work does not lessen the state's interest in keeping the relationship confidential. Contrary to appellant's claim, the information provided was not related to Sam's cooperation in the H [REDACTED] case. As such, the prosecution did not violate *Brady* by failing to disclose Sam's status as a narcotics informant or by failing to disclose the consideration he received for that work.

Finally, even if there was some discovery violation with respect to this information, appellant was not prejudiced by it. Appellant has failed to establish any prejudice where information about Sam's cooperation in the Krings investigation in exchange for favorable consideration in his fleeing case would not have impeached Sam, whose credibility at trial was already highly questionable. As the post-conviction court found, when Sam testified at trial "he repeatedly needed to be impeached by the prosecutor and was an overall poor witness for the State." (Findings at 5).<sup>23</sup> Appellant's trial attorney testified that he impeached Sam numerous ways throughout Sam's testimony (PC.222-24). This Court considers impeachment of a witness through other

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<sup>23</sup> His impeachment at trial is described more fully in section D below.

means when considering the prejudicial impact, if any, as a result of a discovery violation. *See State v. Smith*, 541 N.W.2d 584, 588 (Minn. 1996).

Furthermore, the most damaging statements Sam made regarding his brother occurred long before there was any discussion with BCA agents about cooperating in the Krings investigation. When Sam told the police that appellant said he “emptied a clip” in H [REDACTED]’s head, he had just been arrested for his involvement in the H [REDACTED] matter. Even Sam admitted that at the time he made the statement, he probably did not have any deal with the police (PC.208). This evidence establishes that Sam cooperated with law enforcement in the murder investigation because he did not want to be implicated in H [REDACTED]’s murder. His cooperation was not based on any “deal.”

**D. The Prosecutor Conducted And Provided To Defense Counsel A Computerized Background Check Of Sam Miller, Which For Some Unknown Reason, Did Not Include Sam’s Felony Convictions. This Computer Error Does Not Mean The State Committed A Discovery Violation.**

Prosecutor Coldagelli provided defense counsel Sand with complete discovery of all the police reports (PC.165). He also gave Sand the computerized criminal history records for all of the prosecution’s witnesses, including Sam (PC.165, 179-80). Prosecutor Coldagelli explained that he typically has someone from his office contact the sheriff’s department to run a person’s criminal history; that department then provides the printout listing any convictions (PC.179-80). In this case, Coldagelli received an envelope full of printouts, which Coldagelli provided to appellant’s trial counsel (*Id.*). Coldagelli did not look at the printouts prior to giving them to defense counsel (PC.170). Coldagelli had no specific knowledge about Sam’s conviction history (*Id.*). The highest

level conviction on Sam's printout was a gross misdemeanor (Ex.8). Sam actually had four felony convictions from St. Louis County which were not contained in the report (Ex.1).

Contrary to appellant's claim, the prosecutor did not commit a *Brady* violation. Under *Brady*, the prosecution is required to disclose known criminal records of its witnesses. *United States v. Jones*, 34 F.3d 596, 599 (8th Cir. 1994), *cert. denied*, 516 U.S. 1067 (1995). The government is not required to discover potential impeachment evidence that it neither possessed nor of which it was aware. *Id.* In *Jones*, the defendant claimed that the prosecution violated *Brady* by failing to discover and disclose a witness's out-of-state felony convictions. *Id.* The prosecutor had checked local records and found nothing. *Id.* The defendant argued that the prosecution should be "deemed" to have possessed the criminal record because it could have discovered the information by doing more extensive checking. *Id.* The Eighth Circuit rejected this argument, concluding that the government's failure to make further inquiry about the other convictions did not put the government in "constructive possession" of the records for *Brady* purposes. *Id.* at 599-600.

Coldagelli did not violate *Brady* because he did not suppress criminal records that were known to him. Coldagelli had no specific knowledge about Sam's prior felony convictions. Per his standard practice, he obtained computerized records for all of the

state's potential witnesses.<sup>24</sup> This is a system that is routinely used by law enforcement. See Minn. Stat. § 299C.46 (2006) (describing the BCA's computerized system).<sup>25</sup> Coldagelli was not required under *Brady* to make "further inquiry" or discover convictions that were not known to him.

Under Minnesota law, the prosecution must disclose a witness' prior convictions "within the prosecuting attorney's actual knowledge." Minn. R. Crim. P. 9.01, subd. 1(1)(a). Because Coldagelli did not have any specific knowledge of Sam's prior convictions, he was not required under this rule to inquire beyond the computerized background check. In *State v. Jackson*, 346 N.W.2d 634, 638 (Minn. 1984), the prosecutor ran a records check that did not reveal a witness' record. This Court could not determine whether the prosecutor violated the rules, but held any violation was not prejudicial. *Id.*

Appellant claims that because members of Coldagelli's office apparently prosecuted Sam's prior felonies years ago, that this information should be imputed to Coldagelli. His argument is contrary to Rule 9.01, which says the prosecuting attorney shall disclose convictions "within the prosecuting attorney's *actual* knowledge."

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<sup>24</sup> The witnesses referred to the check as a NCIC (federal) check. The actual printout appears to be a check run through the state BCA which also examines the federal NCIC records (see Ex.8; included in Respondent's Confidential Appendix). Although prosecutors can request such background checks, they typically are not trained to conduct those tests themselves; the BCA trains, monitors, and audits these operators. See Criminal Justice Information Systems (CJIS) Responsibilities at RA7; see also, Minn. Stat.

§ 299C.48 (2006).

<sup>25</sup> The BCA's website explains that if fingerprints are not received for an offense, the information about the offense will not be a part of the criminal history record (RA8).

Because Coldagelli did not have knowledge of any other prior convictions, he was not required to survey others from his office to determine if they had such knowledge. While this Court in *State v. Hunt*, 615 N.W.2d 294, 298, n.4 (Minn. 2000), discussed imputed knowledge with respect to discovery, the case did not involve discovery of prior convictions.

Even if there was a *Brady* or rule violation in this case, appellant has failed to establish he was prejudiced. Sam was not a cooperative prosecution witness at appellant's trial (PC.181). During his direct testimony, Sam's memory required impeachment and refreshing numerous times. (See T.1801-07, 1812-14, 1819-22, 1824-28, 1830).

On cross-examination, defense counsel emphasized Sam Miller's claim that he was high on methamphetamine during the events of July 25, 2004 (T.1841-43). Sam also agreed that he was high during his police interviews, and that he lied to the police (T.1844-47). Sam agreed that his "main interest" when he spoke to police was to "get out of jail" and that he was willing "to tell them whatever they wanted to hear in order to get out of jail" (T.1848). Sam also admitted that he "had a criminal background" (T.1850). Defense counsel testified at the post-conviction hearing that he was able to impeach Sam, and he gave several examples. Finally, the evidence against appellant was strong, as previously described.

Because Coldagelli's actions were reasonable and he made a good faith effort to comply with his discovery obligations, there was no *Brady* or rule violation. Even if there was, however, appellant was not prejudiced.

**E. Any Technical Violation Of Minn. R. Crim. P. 9.01 Regarding Disclosure Of A Witness' Oral Statements Did Not Prejudice Appellant.**

BCA Agent Gherardi testified that he did not make a notation of general conversations he had with Sam Miller to keep in touch with him; if there was something new to the investigation, however, he would have written a report (PC.72, 85-86). Agent Koneczny also did not make a report of every contact he had with Sam, explaining that he had phone conversations to touch base with Sam and to see if “he had found anything out” or heard anything (PC.119-20, 127-29). The post-conviction court concluded that appellant was not prejudiced by any technical violation of Minn. R. Crim. P. 9.01. The post-conviction court relied extensively on this Court’s decision in *State v. Palubicki*, 700 N.W.2d 476 (Minn. 2005).

Minn. R. Crim. P. 9.01, subd. 1(2), provides:

The prosecuting attorney shall disclose . . . any relevant written or recorded statements which relate to the case within the possession or control of the prosecution, the existence of which is known by the prosecuting attorney, and shall provide defense counsel with the substance of any oral statements which relate to the case.

In *Palubicki*, 700 N.W.2d at 489, the defense demanded disclosure of every communication the state had with two of its witnesses. The state argued that under Rule 9 it was only required to disclose “the substance of a witness’s oral statements when the witness discloses something ‘new or different’ from previously disclosed statements.” *Id.* at 489-90. This Court ruled that under Rule 9.01, the state erred in not disclosing every statement relating to the case. *Id.* at 490. This Court concluded there was no prejudice to the defendant and declined to exercise its supervisory powers. *Id.*

*Palubicki* was decided in 2005, after the challenged contacts/conversations occurred in this case. As Agent Gherardi explained, he did not document every contact with Sam unless new information was provided. It was not unreasonable for the investigators in this case to so interpret Minn. R. Crim. P. 9.01 prior to *Palubicki*.

Even after *Palubicki*, it is questionable whether every *contact* with a witness needs to be documented. As the agents explained, their undocumented “keeping in touch” contacts with Sam likely did not result in “statements which relate to the case” requiring disclosure under Rule 9.01. The word “statement” has been defined as “a formal and exact presentation of the facts” and an “account of a person’s (usu. a suspect’s) knowledge of a crime, taken by police pursuant to their investigation of the offense.” Black’s Law Dictionary at 1444 (8th ed. 2004). Under this definition, any contacts where the investigators and Sam Miller were just keeping in touch did not require disclosure.

In any event, the post-conviction court did not abuse its discretion in concluding that appellant was not prejudiced by this alleged violation of the discovery rules (Findings at 16). Because the investigators disclosed all new information about the case, appellant was not prejudiced by any failure to provide redundant information. Indeed, in his brief appellant does not specify how he was prejudiced by this alleged discovery violation.

**V. THE PROSECUTOR DID NOT ALLOW “FALSE” TESTIMONY BY SAM MILLER TO GO UNCORRECTED AT TRIAL.**

Appellant’s claim that the prosecutor allowed false testimony by Sam at trial to go uncorrected is frivolous. There is simply no merit to appellant’s claim that Sam’s trial testimony regarding the number of times he acted as an informant was false.

It is a violation of the Due Process Clause for the government to introduce or elicit testimony known to be false, or to allow false testimony to stand uncorrected. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Giglio v. United States*, 405 U.S. 153 (1972). “However, no constitutional violation occurs when the government has no reason to believe that the testimony was false.” *United States v. Nelson*, 970 F.2d 439, 443 (8th Cir. 1992), *cert. denied*, 506 U.S. 903 (1992).

The following exchange occurred at trial during Sam’s cross-examination:

Q. Do you recall talking with police officers on July 30, 2004?

A. I just remembered talking. I don’t know the dates.

Q. Okay. Do you recall saying that, “I’m a reliable informant for them. I work with the cops. I’m a reliable informant for them.” Do you recall saying that to them?

A. Something like that.

Q. Have you been a reliable informant for the police in the past?

A. One time.

Q. Did you testify in court?

A. Nope.

(T.1849). There is no indication that this testimony was “false” as appellant claims in his brief.

While Coldagelli was aware that Sam had done work as an undercover narcotics informant, he had no reason to believe that Sam’s testimony was false. Sam’s answers must be viewed in context. Defense counsel had just asked Sam whether he remembered speaking to officers on July 30, 2004, and telling them that he was a reliable informant. It was not unreasonable for Sam to interpret defense counsel’s next question about Sam working as a reliable informant in relation to the statement Sam made on July 30th, prior to his later agreement to work as an informant against Krings. In the alternative, Sam may have considered *all* of the information he provided to work off his fleeing case -- the information related to discovery of marijuana and that related to Krings -- to constitute “one” project, rather than a series of discrete transactions. The post-conviction court concluded that Sam’s response was appropriate because he was asked about working as an informant “in the past.” Sam’s cooperation in the present, ongoing investigation was not “in the past” (Findings at 17). For all of these reasons, it is evident that Sam’s testimony on this point was not unmistakably false. There was no reason for the prosecutor to correct Sam’s answer on this issue.

**VI. APPELLANT HAS FAILED TO ESTABLISH THAT HIS TRIAL COUNSEL WAS INEFFECTIVE.**

Appellant asserts that trial counsel was ineffective for relying on the computerized printout of Sam’s prior convictions rather than conducting his own criminal history check, which “would have put defense counsel on notice that there may be some deal,

causing further inquiry” (*Id.*). Appellant’s claims are wholly without merit and were properly rejected by the post-conviction court.

It is firmly established that in order to succeed on an ineffective assistance claim, the defendant must affirmatively prove that his counsel’s representation “fell below an objective standard of reasonableness” and “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, (1984)).

Appellant has not satisfied either prong of the *Strickland* test. First, he has not established that counsel’s reliance on the computerized information fell below an objective standard of reasonableness. As discussed previously, the computerized check is used by prosecutors to comply with their discovery obligations. Defense counsel testified that that he did not have access to criminal records better than those utilized by the prosecution (PC.220).<sup>26</sup>

Appellant also asserts that had defense counsel performed his own background check, he would have received information causing him to inquire about a “deal” with Sam (App. Br. 62).<sup>27</sup> Defense counsel, however, explained that the information he

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<sup>26</sup> Appellant suggests defense counsel should have checked with the county clerk’s office. Often criminal convictions are in multiple counties. Surely defense attorneys are not required to check with every clerk’s office to determine if there is a conviction that was not included on the statewide system.

<sup>27</sup> Exhibit 8, the background report, does indicate that the fleeing charge was dismissed; therefore, it is unclear what additional information about this defense counsel would have received by conducting a separate background check.

received from appellant about a potential deal for Sam, along with some references in the discovery, caused him to question Coldagelli about it; Coldagelli told him he was unaware of any such deal (PC.220-21). It was not unreasonable for defense counsel to rely on this representation. Indeed, Coldagelli was forthcoming in describing the deals the state had with Anderson and Ridlon (PC.226). Failure to investigate further does not amount to ineffective assistance. *See People v. Olinger*, 680 N.E.2d 321, 362 (Ill. 1997) (rejecting a claim that defense counsel must independently investigate the possibility of testimonial deals because, “[i]n our view, trial counsel was entitled to rely on the State’s response to his discovery request and assume that the State had accurately disclosed to him all the impeaching information within the knowledge of the State’s agents.”). Defense counsel’s reliance on Coldagelli’s representation was not outside the wide range of acceptable performance.

Appellant has also failed to satisfy the prejudice prong of the *Strickland* test. There is no reasonable probability that the outcome would have been different had defense counsel discovered additional impeachment evidence, either in the form of prior felony convictions<sup>28</sup> or more information about Sam’s cooperation in the unrelated drug investigation. As explained above, Sam was not a cooperative witness for the state, and he was effectively impeached by defense counsel. As the post-conviction court explained in rejecting appellant’s claim of prejudice, “Most significant was Sam Miller’s continued

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<sup>28</sup> This assumes that the trial court would have admitted these prior felony convictions under *State v. Jones*, 347 N.W.2d 796 (Minn. 1984). These convictions were old, from 1994, 1995, and 1997.

assertion was that he lied, was high and/or could not remember. This was his demeanor at the evidentiary hearing and it was his demeanor at the trial stage.” (Findings at 20). Finally, as explained above, the other evidence against appellant was strong.

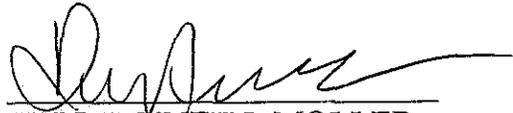
### CONCLUSION

Respondent respectfully requests that this Court affirm appellant’s conviction.

Dated: March 12, 2008

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

**WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that the Brief submitted herein contains 18,186 words, pursuant to the Court's order granting an extension of words from 14,000 to 18,500 words, and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.

A handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to be the name of the undersigned.