No. _____

In the Supreme Court of the United States

Jerry Arnold Westrom,
Petitioner,

vs.

State of Minnesota,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Minnesota

PETITION FOR A WRIT OF CERTIORARI

Eric J. Nelson
Counsel of Record
HALBERG CRIMINAL DEFENSE
7900 Xerxes Avenue South
Suite 1700
Bloomington, MN 55431
(612) 333-3673
enelson@halbergdefense.com

Attorneys for Petitioner

2024 – Bachman Legal Printing ■ (612) 339-9518

QUESTIONS PRESENTED

A. Whether society is prepared to recognize a reasonable expectation of privacy under the Fourth Amendment in an individual's shed DNA, as evidenced by the laws of several states and rulings of lower courts.

B. Whether State witnesses' testimony as to the contents and veracity of scientific and forensic materials prepared by other analysts violated Petitioner's right to confrontation under the Sixth Amendment and this Court's decision in *Smith v. Arizona.*

C. Whether Petitioner received constitutionally deficient representation from trial counsel in violation of his Sixth Amendment right to the effective assistance of counsel.

PARTIES TO THE PROCEEDING

Petitioner is Jerry Arnold Westrom. Respondent is the State of Minnesota. No party is a corporation.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii).

District Court of Minnesota, Hennepin County:

State of Minnesota v. Jerry Arnold Westrom, No. 27CR193844 (Aug. 25, 2022) (entering judgment of conviction after jury trial)

Supreme Court of Minnesota:

State of Minnesota v. Jerry Arnold Westrom, No. A221679, 6 N.W.3d 145 (2024) (affirming trial court judgment; final judgment entered June 11, 2024)

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OPINIONS BELOW

The order of the Supreme Court of Minnesota is reported at 6 N.W.3d 145. App. 1a–24a. The trial court's written orders and rulings rejecting Petitioner's arguments that the DNA evidence should have been suppressed, denying admission of Petitioner's expert's testimony, and permitting testimony of the State's footprint expert are unreported. App. 27a–62a.

JURISDICTION

The Supreme Court of Minnesota reversed Petitioner's second-degree murder conviction and remanded to the district court to vacate that conviction but affirmed Petitioner's conviction of first-degree

premeditated murder. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause[.]" U.S. Const. amend. IV.

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him;… and to have the Assistance of Counsel for his defence." Const. amend. VI.

STATEMENT

A. Factual Background

On June 13, 1993, Jeanie Childs was found stabbed to death in her Minneapolis apartment. App. 3a. The parties did not dispute that Ms. Childs earned money through prostitution, her clients frequently visited her apartment, and her boyfriend and pimp, Arthur Gray, resided in the apartment with Ms. Childs. App. 4a & n.1. During law enforcement's investigation, multiple DNA samples were found at the crime scene. App. 4a. Mr. Gray became law enforcement's prime suspect due to allegations that he had been violent with Ms. Childs in the past. *Ibid.*

After Mr. Gray provided an alibi, the case went cold. *Ibid*.

In 2018, cold case investigators with the Minneapolis Police Department ("MPD") began working with the Federal Bureau of Investigation ("FBI") to investigate Ms. Childs's murder. *Ibid*. Police sent a DNA sample recovered from the crime scene, developed from one sperm cell found on a towel in the bathroom, to DNA Solutions, Inc. to create a single nucleotide polymorphism ("SNP") DNA profile. *Ibid*; App. 28a. Historically, SNP profiles have not been used by law enforcement. App. 4a & n.2. Rather, law enforcement forensic teams have limited their DNA analysis to short tandem repeat ("STR") profiles. *Ibid*. The amount of information yielded through the analysis of an SNP sample is vastly different from the information that can be obtained from an STR profile. While STR profiles focus exclusively on noncoding segments of DNA and can only be used to distinguish one DNA sample from another, SNP profiles provide much more information about the source of the DNA. *Ibid*. Namely, SNP samples can be used to predict the source's physical appearance, identify genetic relationships, and make medical discoveries such as the source's susceptibility to disease. *Ibid*.

After receiving the SNP profile from DNA Solutions, Inc., law enforcement, through a third-party, non-law enforcement, self-taught "genetic genealogist" arranged for the SNP profile to be uploaded to several commercial genealogy websites, including GEDmatch, Ancestry.com, and MyHeritage. App. 5a. A potential match was located on MyHeritage, suggesting that one online profile was the first cousin of the DNA source at the crime scene. *Ibid*. From this potentially related profile, the "genetic genealogist," at the instruction of law enforcement,

mapped a family tree of the MyHeritage user and concluded that Petitioner and his brother were possible contributors for the uploaded DNA profile derived from the 1993 crime scene based on their presence in the Twin Cities at the time of Ms. Childs' murder. *Ibid*.

The MPD and the FBI began surveilling Petitioner in January of 2019. *Ibid*. After using social media to ascertain his whereabouts, law enforcement followed Petitioner to his daughter's hockey game in Mequon, Wisconsin. *Ibid*; App. 141a. Law enforcement watched Petitioner order food from a concession stand, use a napkin to wipe his face, and discard the napkin in a trashcan. *Ibid*. Investigators then retrieved the napkin from the trashcan and submitted it to the Bureau of Criminal Apprehension ("BCA") for testing. *Ibid*. The BCA generated an STR profile from the residue on the napkin which revealed Petitioner could not be excluded from DNA samples recovered in Ms. Childs's apartment. App. 28a, 29a. After completing the collection and analysis of Petitioner's DNA from the napkin, law enforcement obtained a search warrant to collect a second DNA sample from Petitioner to validate the potential match. *Ibid*.

On February 14, 2019, Petitioner was charged with one count of murder in the second degree in violation of Minn. Stat. § 609.19, subd. 1(1). *Ibid*. On June 25, 2020, Respondent presented its case before the Hennepin County Grand Jury, and Petitioner was indicted for first-degree, premeditated murder in violation of Minn. Stat. § 609.185(a)(1). *Ibid*.

Petitioner's trial counsel did not challenge the creation of the SNP profile from the samples acquired from the 1993 crime scene, or the genealogical analysis conducted using this profile, despite the fact law enforcement violated multiple Minnesota laws in

developing the evidence. App. 10a. Rather, Petitioner's trial counsel argued solely that law enforcement accessing the common genetic information between the known MyHeritage user and the sample of Petitioner's DNA without a warrant, and the analysis of Petitioner's DNA on the discarded napkin were violations of Petitioner's Fourth Amendment rights. App. 30a. On October 4, 2021, the trial court denied Petitioner's motion to suppress the DNA evidence, rejected Petitioner's argument that he had a privacy interest in the MyHeritage user's DNA, and likened his discarded napkin to an abandoned fingerprint. App. 35a, 36a. The trial court noted, however, that "DNA may reveal sensitive personal information, and thereby may implicate constitutional protections," yet concluded, "such an analysis and use did not occur here." App. 35a.

Petitioner's trial counsel's failure to raise vital Fourth Amendment issues was not the only deficiency in his representation. In fact, the case was reassigned to a different district court judge after Petitioner's trial counsel and the original judge had many less-than-friendly exchanges throughout pretrial litigation. For example, the original district court judge questioned trial counsel's due diligence for failing to contact Respondent's experts directly, and again for his failure to independently investigate a potential alternative perpetrator. App. 102a–107a. During the hearing to address alternative perpetrators, following a heated exchange, the district court judge advised Petitioner's trial counsel not to "make this personal." App. 112a. Trial counsel stated he was "going to make a record whether [the judge] liked it or not" and accused the judge of "lying." App. 111a, 113a. Petitioner's trial counsel then attempted to discuss the judge's niece, whom he had previously represented on an unrelated

matter. App. 113a. Discussion ceased when the judge stated she would not take trial counsel's insults and called a recess, stating they would continue once trial counsel "calmed down." App. 114a. The case was ultimately reassigned to a different district court judge.

At trial, Respondent introduced the DNA evidence, and the genealogy data created from the SNP profile derived from the DNA sample acquired at the crime scene. However, the genealogical data was not introduced through an analyst from the crime scene, or through the third-party genealogist. Rather, Respondent introduced this evidence through an FBI agent who could only testify to his understanding of the genealogist's process. App. 135a–140a. Petitioner's trial counsel did not challenge the admissibility of this testimony.

Respondent also called Mark Ulrick, a forensic administrator for the City of Minneapolis, to testify about footprint evidence; Dr. Alicia Wilcox, originally an expert hired by Petitioner and an expert on latent print analysis; as well as medical experts; investigating officers from the MPD and the FBI; and several individuals familiar with Ms. Childs. In response, Petitioner's trial counsel called only two witnesses: Ms. Bonita Reed, a neighbor of Ms. Childs who saw Ms. Childs with a "tall blonde man in a trench coat" prior to her death and witnessed that same man running down the stairwell an hour later; and Sergeant Barbara Moe, a homicide investigator with the MPD who determined a hair found in Ms. Childs' hand belonged to Mr. Gray. Petitioner's case-in-chief lasted only one afternoon out of Petitioner's three-week trial.

Petitioner's proffered footprint expert, Dr. Nirenberg, was precluded from testifying, and his

reports were prohibited at trial. Petitioner's trial counsel failed to acquire any other forensic or medical experts and, likewise, made no efforts to refute Respondent's use of the challenged DNA evidence with an expert. Trial concluded on August 25, 2022, when the jury found Petitioner guilty on both counts. App. 63a–66a. On September 9, 2022, the district court committed Petitioner to the custody of the Minnesota Commissioner of Corrections for life with the possibility of parole after 30 years. App. 67a–70a.

On November 28, 2022, Petitioner filed a direct appeal to the Minnesota Supreme Court. The supreme court issued its opinion on May 8, 2024, affirming Petitioner's conviction for first-degree murder. App. 2a. The supreme court reversed and remanded Petitioner's conviction for second-degree murder because, under Minnesota law, every lesser degree of murder is considered a lesser-included offense, and a defendant cannot be convicted of both. *Ibid*. The supreme court held the district court did not err in denying Petitioner's motion to suppress the DNA evidence, reasoning the DNA analysis was only capable of matching Petitioner's DNA to the DNA found at the crime scene and Petitioner had no reasonable expectation of privacy in this information App. 1a. The supreme court noted that Petitioner had not challenged the creation of the SNP profile from his DNA left at the 1993 crime scene or the genealogical analysis that was conducted using the profile, stating "we focus only on the claims before us and express no opinion on the potential privacy concerns the analysis of such profiles may generate." App. 10a. The supreme court did however, acknowledge, "the earlier SNP profile could reveal personal information beyond merely identity." *Ibid*. Had Petitioner's trial counsel raised the issue in the district court, the SNP profile

issue could have been raised on direct appeal and addressed by the Minnesota Supreme Court.

During the pendency of the appeal in the Minnesota Supreme Court, but after oral argument, the Minnesota Genetic Information Privacy Act was passed, enacted, and on November 11, 2023, codified at Minn. Stat. § 325F.995. The act reads, in pertinent part,

> To safeguard the privacy, confidentiality, security, and integrity of a consumer's genetic data, a direct-to-consumer genetic testing company must:…
>
> not disclose genetic data to law enforcement or any other governmental agency without a consumer's express written consent, unless the disclosure is made pursuant to a valid search warrant or court order[.]

Id. at subd. 2(3); App. 76a. Petitioner brought this newly codified law to the attention of the court prior to its decision. Although the court had determined that trial counsel's failure to challenge creation of the SNP profile from the crime scene DNA meant that the law was not implicated on appeal, it cautioned that "law enforcement should pay heed to these protections, which evidence the privacy interests of Minnesotans as expressed by the Legislature, in future investigations." App. 10a, n.5.

On May 8, 2024, the Minnesota Supreme Court issued its opinion affirming Petitioner's conviction, and the court entered its final judgment on June 11, 2024. App. 26a.

REASONS FOR GRANTING THE PETITION

A. SOCIETY IS PREPARED TO RECOGNIZE A REASONABLE EXPECTATION OF PRIVACY UNDER THE FOURTH AMENDMENT IN AN INDIVIDUAL'S SHED DNA, AS EVIDENCED BY THE LAWS OF SEVERAL STATES AND RULINGS OF LOWER COURTS.

Petitioner's trial counsel moved to suppress the State's DNA evidence linking Petitioner to the crime scene, arguing, *inter alia,* that Petitioner had a reasonable expectation of privacy in his shed DNA that police had collected from a discarded napkin. The trial court denied the suppression motion, concluding that "society has not recognized, as reasonable, an expectation of privacy in identifying information contained within abandoned DNA." App. 37a. The court went on to say,

> [T]he analysis of Defendant's abandoned DNA for identification purposes, and law enforcement's use of the MyHeritage website, are not searches under the Minnesota and U.S. Constitutions. Even if the Court assumes that such acts are searches, they are reasonable searches that do not run afoul of constitutional protections.

App. 40a.

However, contrary to the conclusions of the trial court and the Minnesota Supreme Court, case law and recently enacted legislation clearly demonstrates that society is ready to recognize an expectation of privacy in a free citizen's unavoidably shed DNA; and when law enforcement collects and creates a profile from

such DNA without a warrant, the Fourth Amendment is violated.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers and effects" against "unreasonable [*i.e.,* warrantless] searches and seizures." U.S. Const. amend. IV. Evidence seized in violation of the Fourth Amendment must be suppressed. *Terry v. Ohio*, 392 U.S. 1, 13 (1968).

The Fourth Amendment protects not only property interests but certain expectations of privacy, as well. *Katz v. United States,* 389 U.S. 347, 351 (1967). Thus, when an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith v. Maryland,* 442 U.S. 735, 740 (1979) (internal quotation marks and alterations omitted). The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carroll v. United States,* 267 U.S. 132, 149 (1925). These Founding-era understandings continue to inform this Court when applying the Fourth Amendment to innovations in surveillance tools. *See*, *e.g., Kyllo v. United States,* 533 U.S. 27 (2001); *Carpenter v. United States*, 585 U.S. 296, 296–97 (2018). Applying the Founding-era understandings of what expectations of privacy are reasonable to the facts of this case, it is clear that innovations made in DNA analysis—and the information that can be gleaned from a private citizen's shed DNA—now warrant Four Amendment protection.

The facts of the present case differ significantly from the authority relied on by the lower courts in rejecting Petitioner's motion to suppress, and none of the cases they cited are squarely dispositive, as this issue has not been addressed by this Court. Because Petitioner was not under arrest when his DNA was extracted and sequenced from the napkin, the special-needs exception to the warrant requirement relied on by this Court in *Maryland v. King*—wherein the government had an interest in identifying and processing arrestees—is inapposite. *See* 569 U.S. 435, 463 (2013). As this Court recognized in *King,* "unlike the search of a citizen who has not been suspected of a wrong, a detainee has a reduced expectation of privacy." *Id.* Here, at the time police collected Mr. Westrom's DNA from a discarded napkin, he was subject no legal limitations such as arrest or probation.

Further, DNA is quite different from physical items thrown out in the trash, so cases such as *California v. Greenwood*, 486 U.S. 35 (1988), do not apply. We do not voluntarily discard our DNA when we leave traces of it behind. In fact, the contents of our DNA are never actually visible to the public—sophisticated technology is required to extract genetic information from a sample, like data from a cell phone. Moreover, given the breadth of sensitive information that may be learned about a person just from his DNA, the privacy interest in involuntarily-shed DNA is of a different magnitude than the interest in physical items that were deliberately placed in the trash, including the items that may contain DNA. If anything, DNA is more like a closed, opaque container—officers may seize a container, but if the nature of its contents is not readily apparent, they must obtain a warrant to open it. *See United States v. Ross,* 456 U.S. 798, 812 (1982).

Given recent technological advances in DNA analysis and the acute privacy implications of allowing the government to freely access our entire genome, this Court should reject any effort to extend older cases to justify the warrantless search at issue here. *See Riley v. California*, 573 U.S. 373, 386 (2014) (rejecting "mechanical application" of older rule to new context involving privacy-invading technology); *King*, 569 U.S. 435, 465 (2013) (recognizing that advances in DNA analysis could "present additional privacy concerns," and therefore require greater Fourth Amendment protection). Under the necessarily evolving Fourth Amendment jurisprudence, it only makes sense that warrant—a low bar for law enforcement to overcome—must be obtained before authorities may extract, sequence, and analyze the sensitive DNA we unavoidably leave behind on everyday items such as napkins.

This is not a novel suggestion. In light of the "vast amount of sensitive information ... [that] can be mined from a person's DNA," courts have recognized that all individuals have "very strong privacy interests" in such information. *United States v. Amerson*, 483 F.3d 73, 85 (2d Cir. 2007); *see also King*, 569 U.S. at 481 (Scalia, J. dissenting) (noting the "vast (and scary) scope" of the Court's holding and that analysis of DNA goes beyond mere identification of the person); *People v. Buza*, 413 P.3d 1132, 1152 (Cal. 2018) (court was "mindful of the heightened privacy interests in the sensitive information that can be extracted from a person's DNA"); *State v. Medina*, 102 A.3d 661, 691 (Vt. 2014) (a DNA sample "provide[s] a massive amount of unique, private information about a person. Therefore, ***the extraction of an individual's DNA sample and "the creation of his DNA profile constitute[] a search for Fourth***

Amendment purposes." *United States v. Davis*, 690 F.3d 226, 246 (4th Cir. 2012) (emphasis added). Simply put, officers performed a search when they extracted DNA from Petitioner's discarded napkin and created a DNA profile—even an STR profile.

Nevertheless, relying on *Maryland v. King*, the lower courts in this matter ignored the deeply personal and private nature of individual DNA profiles and, instead, focused on the discarded nature of the napkin. Doing so not only ignored the fact that most of us would not voluntarily choose to discard the type of information contained within our DNA for public dissemination—*e.g.,* to millions of users on a commercial genealogy database—but it also glosses over the fact that Respondent seized and obtained access to all of Petitioner's genetic information via the underlying DNA extraction. As this Court made clear in several post-*King* decisions, the Fourth Amendment is concerned with the entirety of the private information revealed to police through a search and not just the pieces of information the government ultimately considers useful. Indeed, a search that turns up nothing useful is still a search. *See Lankford v. Gelston*, 364 F.2d 197, 202 (4th Cir. 1966).

For example, in *Birchfield v. North Dakota*, this Court evaluated the Fourth Amendment implications of seizing the entirety of a driver's blood sample during blood alcohol testing. The Court recognized that a blood test "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond" what the government claims to seek. 579 U.S. 438, 464 (2016). Thus, even if law enforcement investigators are precluded from testing the blood for any other purpose than to measure alcohol content, the potential for such testing remains and implicates broader privacy

interests. *See id*. The DNA profile here is completely analogous to the blood sample considered in *Birchfield*—and contains even more information.

Similarly, in *Carpenter v. United States*, this Court looked to the full scope of location data collected by the government in that case (127 days) rather than the small portion of the data (16 location points from a few scattered days) that the government relied on to support its theory of the case at trial. In explaining why Carpenter had a reasonable expectation of privacy in his location information, the Court focused on the myriad "privacies of life" that ***could be*** revealed by the entirety of those 127 days of data and not just the isolated details of interest to investigators. *Carpenter*, 585 U.S. at 310-11. "A person does not surrender all Fourth Amendment protection merely by venturing into the public sphere." *Id.* at 310. "[W]hat [one] seeks to preserve as private, even in an area accessible to the public may be constitutionally protected." *Id.* (quoting *Katz,* 389 U.S. at 351-52). United States citizens certainly would seek to preserve as private their DNA data and would not be willing to surrender protection of such information simply by venturing into the public sphere.

Further, in *Riley*, this Court recognized that it is the full breadth and quality of information that exists on a cellphone seized by the government, and therefore, available to be examined, that has constitutional significance. 573 U.S. at 393 (distinguishing cell phones from other objects on an arrestee's person and requiring a warrant to search a phone seized incident to arrest). This same principle applies to government collection of DNA. Whenever law enforcement collects an individual's DNA, it gains access to the entirety of that person's genetic blueprint, not just small amount of genetic

information used to confirm identity—or exclude others as contributors of the DNA.

In addition, since *King* was decided, scientific research has continued to demonstrate that even STR DNA profiles can identify far more about an individual than his identity. The availability of these techniques to law enforcement matters for the Fourth Amendment analysis, which requires courts to "take account of more sophisticated systems that are already in use or in development." *Carpenter*, 585 U.S. at 313. And even in *King*, this Court recognized that if subsequent scientific advances in DNA technology allow law enforcement to learn more about a person than just who they are, future cases "would present additional privacy concerns," *King*, 569 U.S. at 464-65, and "a new Fourth Amendment analysis will be required." *Buza*, 413 P.3d at 1152.

The Fourth Amendment's central aim is to deny "police officers unbridled discretion to rummage at will among a person's private effects," *Arizona v. Gant*, 556 U.S. 332, 345 (2009), and thus "to secure the privacies of life against arbitrary power," *Carpenter*, 585 U.S. at 305. To protect against the "serious and recurring threat to the privacy of countless individuals" posed by unconstrained police incursions into Americans' private affairs, warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Gant*, 556 U.S. at 338, 345. No exception applies here.

This Court has repeatedly cautioned that

> [a]s technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, [courts must seek] to 'assure [] preservation of that degree of privacy

> against government that existed when the Fourth Amendment was adopted.'"

Carpenter, 585 U.S. at 305 (quoting *Kyllo*, 533 U.S. at 34). Courts must therefore avoid "mechanically applying" older doctrines to new types of searches made possible by modem technologies, which can reveal myriad "privacies of life" in ways that are "remarkably easy, cheap, and efficient compared to traditional investigative tools." *Id.* at 311; *see also Riley*, 573 U.S. at 393 ("any extension of [pre-digital] reasoning to digital data has to rest on its own bottom"). Thus, this Court has declined to extend the search-incident-to-arrest exception to permit warrantless searches of cell phones, *Riley*, 573 U.S. at 386; the third-party doctrine to permit warrantless searches of cell phone location information held by a cellular service provider, *Carpenter*, 585 U.S. at 305; and the public-exposure doctrine to permit warrantless surveillance of a home using thermal imaging technology, *Kyllo*, 533 U.S. at 34-36.

The use of commercial genealogy databases and lay "experts" to do the footwork of police investigators and crime labs is one such "remarkably easy" and "cheap" method law enforcement now utilizes to encroach on citizens' right to privacy. For less than $100 and some podcast fodder, police officers can obtain a genetic profile and complete family tree from someone's inevitably shed DNA. The use of such methods creates an additional layer of concern because their use smacks of law enforcement attempting to "deputize" non-government individuals to perform investigative functions and bypass constitutional guardrails, altogether. To echo the concerns of Justice Scalia, this is truly "scary."

Several courts have already recognized the "scary" implications of warrantless DNA collection.

Infra at 13-14. And in the time since this Court decided *King, Riley,* and *Carpenter,* many states, including Minnesota, have enacted laws requiring law enforcement to obtain a warrant, court order, or other legal process prior to accessing individual genetic data from commercial genealogy sites. App. 76a.[1] Clearly, society is ready and willing to recognize an expectation of privacy in the information contained in the DNA of Americans. Or, at the very least, there is a schism among states and courts about whether such expectation should be recognized, and this Court should step in to clarify the extent of Fourth Amendment protection as it pertains to genetic information.

Simply put, it is time for this Court to recognize Americans' reasonable expectation of privacy in personal, individual data that inevitably-shed DNA leaves whenever a citizen ventures into the public sphere.

B. STATE WITNESSES' TESTIMONY AS TO THE CONTENTS AND VERACITY OF SCIENTIFIC AND FORENSIC MATERIALS PREPARED BY OTHER ANALYSTS VIOLATED PETITIONER'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT AND THIS COURT'S DECISION IN *SMITH V. ARIZONA*.

On June 21, 2024, ten days after final judgment had been entered in this matter by the Minnesota

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[1] *See, e.g.,* Az. Rev. Stat. § 44-8002; Cal. Civ. Code § 56.181; Ky. Rev. Stat. § 311.705; Md. Code, Com. § 14-4405; Mont. Code § 30-23-104; Neb. Rev. Stat. § 87-903; Tenn. Code § 47-18-4904; Tex. Bus. & Com. Code § 503A.002; Utah Code § 13-60-104; Va. Code § 59.1-593; Wyo. Stat. § 35-32-102.

Supreme Court, but before expiration of the time limit for petitioning for certiorari, this Court issued its opinion in *Smith v. Arizona*, 602 U.S.—, 144 S. Ct. 1785, 1791 (2024). *Smith* held that "[w]hen an expert conveys an absent analyst's statements in support of the expert's opinion, and the statements provide that support only if true, then the statements come into evidence for their truth." *Id.* at 1788, 1796-1802. In such situations, the Confrontation Clause is, thus, implicated. Here, DNA and genealogical information prepared by absent analysts was introduced at trial through witnesses whose opinions would only be supported if the absent analysts' conclusions were true. The absent analysts were never made available to testify and never subjected to cross-examination. As such, Petitioner's rights under the Confrontation Clause were violated.

The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him. The Clause bars the admission at trial of "testimonial statements" of an absent witness unless she is "unavailable to testify, and the defendant ha[s] had a prior opportunity" to cross-examine her. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). The Confrontation Clause's prohibition thus applies to out-of-court statements that are (1) testimonial and (2) hearsay. *Id.*

Forensic evidence is almost always considered testimonial. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307, 329 (2009) (testimonial certificates of the results of forensic analysis were created "under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial"); *Smith*, 144 S. Ct. at 1792. Therefore, under most circumstances, a prosecutor cannot introduce an absent laboratory

analyst's testimonial out-of-court statements to prove the results of forensic testing. *Id.*; *Smith*, 144 S. Ct. at 1791.

Nevertheless, in the instant case, Respondent offered only the testimony of Christopher Boeckers, a law enforcement agent who testified as to the results of genetic testing performed on an unknown DNA sample from the crime scene that was supplied by law enforcement to a commercial genealogy site.

> Q. And, now, the genealogist was then the one actually doing sort of the uploading of the profile, the comparison of the DNA. And ultimately was the genealogist to give you names of potential people for investigatory leads?
>
> A. Correct. She would provide the investigative leads based on her knowledge of DNA and family tree construction.
>
> Q. And then based upon that, did the genealogist then ultimately get back to you with results that you then later used in your investigation as a lead?
>
> A. She did.
>
> Q. And did she provide you -- and we don't need to say the individual's name on the record here, but did she provide you with a name of an individual who had

uploaded his DNA that was, you know, a relevant lead here?

A. She did. On January 2nd of 2019, she emailed that she -- her words was a fabulous match to the unknown DNA that had been submitted, and she said the person in my heritage would have been potentially a first cousin once removed or a half first cousin to the unknown sample that we had submitted.

***

A. I don't know if that person had listed relatives or if the genealogist had used obituaries and public source information and research tools within the system to then work out from that person and build that person's family tree which ultimately would lead to the questioned sample.

Q. Okay. And then, ultimately, did the genealogist provide you with two names of people who were of interest based upon the unknown profile that she had used to search these databases?

A. She did.

> Q. And was one of those names Jerry Arnold Westrom, date of birth, May 16th, 1966?
>
> A. Yes, that was one of the names.

App. 138a-139a. Neither the analyst from the commercial genealogy site, MyHeritage.com, who had analyzed the unknown DNA sample nor the genealogist who had matched the profile to Mr. Westrom testified at trial. Further complicating matters, Boeckers was asked to testify regarding the role of MPD Sergeant Christopher Karakostas, who had died prior to trial, in the work with the genealogist and commercial DNA testing site.

Clearly, both the DNA and genealogical results were testimonial, as they were prepared at the behest of law enforcement as part of a criminal investigation and in preparation for litigation. Further, the results of the analysis were also hearsay—out of court statements offered for the truth of the matter asserted, *i.e.,* that the DNA profile matched that of the Petitioner. Boeckers' testimony would have been meaningless without reference to the genealogist or the DNA results from MyHeritage.com. And without this evidence, Respondent's case against Petitioner would have crumbled. It formed the entire basis of Respondent's investigation of Mr. Westrom. "[T]he truth of the basis testimony is what makes it useful to the prosecutor; that is what supplies the predicate for—and thus gives value to—the state expert's opinion." *Smith*, 144 S. Ct. at 1798.

Clearly, Boeckers was put on the stand to serve as a surrogate for the MyHeritage.com analyst(s), the genealogist, and Karakostas—and to offer his opinion

that they all got it right when they pointed their fingers at Petitioner in this case. In other words, Boeckers "effectively became [the] mouthpiece," *id.* at 1801, for the absent witnesses. This effectively deprived Mr. Westrom of his right to confront Karakostas, the genealogist, or *anyone* from MyHeritage.com. This case offers an opportunity for this Court to clarify its holding in *Smith* to include government law enforcement witnesses who testify as to the opinions of experts, and certiorari should, therefore, be granted.

C. PETITIONER RECEIVED CONSTITUTIONALLY DEFICIENT REPRESENTATION FROM TRIAL COUNSEL IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS.

The Sixth Amendment to the United States Constitution ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right… to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). "An ineffectiveness claim… is an attack on the fundamental fairness of the proceeding whose result is challenged." *Id.* at 697-98. Hence, "[t]he right to the effective assistance of counsel… is a bedrock principle in our justice system." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012).

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 511 (2003) (citing *id.* at 687). Trial counsel's

performance will be considered constitutionally deficient if his performance fell below the objective standard of reasonableness. *Strickland,* 466 U.S. at 688. The appropriate test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

Here, the performance of Petitioner's trial counsel fell well below the objective standard of reasonableness, and there is a reasonable probability that, but for trial counsel's errors, the outcome of the proceedings below would have been different. Thus, both prongs of the *Strickland* test have been established.

1. Failure to adequately challenge Respondent's DNA evidence.

Constitutional deficiency is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010). The test for measuring an attorney's performance is "reasonableness under prevailing professional norms" considering all the circumstances. *Strickland,* 466 U.S. at 688.

Two standard practices and expectations of the legal community are to challenge illegally obtained evidence and, in challenging this evidence, preserve the issues for appeal. The failure to do so can be ineffective assistance of counsel. *See McDaniel v. Brown,* 558 U.S. 120, 126 (2010) (ineffective assistance may be established when trial counsel fails to object to admission of DNA evidence and fails to preserve valid issues for appeal).

In this case, Petitioner's trial counsel failed to meet prevailing professional norms when he did not address law enforcement's three different violations of

Minnesota law in its obtaining and testing of the original DNA sample from the crime scene and, as a result, failed to preserve the issue for appeal. When investigators disclosed the DNA profile to a non-law enforcement, third-party "genetic genealogist"—and thereby to millions of users of two genealogy websites—without a court order, they illegally disclosed confidential, non-public data, which is a misdemeanor under Minnesota law. *See* Minn. Stat. § 13.09. Moreover, investigators ran afoul of Minnesota's anti-phishing law when they aided and abetted the "genetic genealogist" in her creation of a fake website profile with the intent of obtaining the identity of another person. This is a felony in Minnesota. *See* Minn. Stat. § 609.527, subd. 5a; App. 87a. Finally, as public officers who violated both the law and Minnesota Police Department policy, investigators violated Minn. Stat. § 609.43—another misdemeanor. Investigators' flagrant and willful violations of Minnesota law in their headlong attempt to solve this case—all of which could have been avoided by applying for a warrant or a court order—is exactly the type of behavior the exclusionary rule was designed to punish.

This Court has observed that courts may exclude evidence obtained by "willful disobedience of the law." *United States v. Payner*, 447 U.S. 727 n.7 (1980)); *McNabb v. United States*, 318 U.S. 332 (1943). This is because "[t]he exclusionary rule exists to deter police misconduct." *Utah v. Strieff*, 579 U.S. 232, 241 (2016) (citing *Davis v. United States*, 564 U.S. 229, 236-37 (2011)). Further, the Minnesota Supreme Court has held that evidence collected as a result of "serious violations [of statutes or rules] which subvert the purpose of established procedures will justify suppression." *State v. Jackson*, 742 N.W.2d 163, 168–

69 (Minn. 2007) (quoting *State v. Smith*, 367 N.W.2d 497, 504 (Minn. 1985)).

"[I]n order to determine if a particular violation of [a] statute subverts the basic purpose of the statute, [Minnesota courts] must, with the historical context in mind, make further inquiry to more precisely define the interest being protected." *Jackson*, 742 N.W.2d at 170.

Starting with Minn. Stat. § 609.527, subd. 5a, it is a felony for anyone who,

> with intent to obtain the identity of another, uses a false pretense in an email to another person or in a web page, electronic communication, advertisement, or any other communication on the Internet….
> it is not a defense that:
> (1) the person committing the offense did not obtain the identity of another;
> (2) the person committing the offense did not use the identity; or
> (3) the offense did not result in financial loss or any other loss to any person.

App. 91a-92a. Here, it simply cannot be disputed that investigators and the third-party genealogist conspired to "obtain the identity of another person" through the use of "a false pretense… in a web page" when they created two fake profiles on two difference genealogy websites and uploaded Petitioner's DNA to them. A court order could have permitted this same action, however, investigators chose, instead, to commit a crime. The fact that the trial court characterized the "false pretense… in a web page" as a "pseudonym" does not change the nature of the act: It was a felony. *See* App. 29a.

In so doing, law enforcement officials broadcast Petitioner's DNA profile to millions of users under a false name to obtain his identity. This is exactly what the anti-phishing statute is designed to protect against. Investigators' actions clearly subverted the basic purpose of the statute. As such, had trial counsel raised this issue, all evidence obtained from law enforcement's violation of the statute may well have been suppressed. *See Jackson*, 742 N.W.2d at 170. If the trial court had not suppressed the evidence obtained in violation of the statute, the issue would have been preserved for appeal and could have been addressed by the Minnesota Supreme Court. Instead, trial counsel's constitutionally deficient performance allowed this flagrant violation of Minnesota law to go unchecked, permitted admission of the DNA evidence at trial, and prevented it from being addressed on direct appeal.

Had Petitioner's trial counsel diligently researched relevant Minnesota law and brought these violations to the attention of the trial court, there exists a reasonable probability that trial court would have suppressed the illegally obtained DNA evidence. If the trial court misinterpreted Minnesota law and admitted the DNA evidence, the issue would have still been preserved for appeal, and the Minnesota Supreme Court would have had the opportunity to address the illegally obtained DNA evidence.

Because law enforcement clearly violated the law in its headlong rush to investigate Petitioner, trial counsel erred when he failed to use these violations of Minnesota law as a bases for a suppression motions in the district court, and, in turn, failed to preserve the issue for appeal—alone, sufficient evidence of ineffective assistance of counsel and prejudice to the Petitioner. *See McDaniel,* 558 U.S. at 126.

In addition to his failure to address the multiple Minnesota laws violated by law enforcement in the collection and analysis of the SNP profile, trial counsel failed to present evidence to combat the reliability of Respondent's DNA evidence. "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Harrington v. Richter,* 562 U.S. 86, 106 (2011). Because Respondent's case against Petitioner was entirely reliant on forensic evidence recovered decades before Petitioner was charged, this was such a case. In such instances, the use of expert witnesses is integral to the administration of justice, because

> [s]erious deficiencies have been found in the forensic evidence used in criminal trials.... One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60 percent of the cases.

Melendez–Diaz, 557 U.S. at 319 (citing Garrett & Neufeld, "Invalid Forensic Science Testimony and Wrongful Convictions," 95 *Va. L.Rev.* 1, 14 (2009)). "This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses." *Hinton v. Alabama*, 571 U.S. 263, 276 (2014).

For example, in *Hinton*, the State relied heavily on a toolmark expert to prove the defendant's gun had been the one to fire in two deadly robberies. *Id.* at 265. Defense counsel recognized a meaningful defense necessitated the rebuttal of the State's toolmark expert witness but failed to request the amount of funding available under Alabama law to hire an

expert. *Id.* at 266. Defense counsel instead hired an expert for the lesser amount awarded by the court who was "badly discredited" by the state at trial. *Id.* at 269. This Court determined defense counsel "had been ineffective in failing to seek additional funds available to him under Alabama law to hire a better expert, knowing an expert was essential to mount a defense, and [the defendant] had been prejudiced by that failure." *Id.* at 274.

In the present case, trial counsel's failure to acquire an expert to challenge Respondent's DNA evidence was a more flagrant violation of Petitioner's Sixth Amendment right than that in *Hinton.* Here, there is no indication that funding would have prevented the hiring of a competent DNA expert. Petitioner's trial counsel knew Respondent's case hinged on DNA evidence and that the "only reasonable and available defense strategy require[d] consultation with experts or introduction of expert evidence." *See Harrington,* 562 U.S. at 106. Petitioner's trial counsel, "knowing an expert was essential to mount a defense," not only failed to hire a *competent* expert, like the attorney in *Hinton*, but failed to hire a DNA expert at all. *Hinton*, 571 U.S. at 274. Since Petitioner was tied to the 1993 crime scene solely through Respondent's DNA evidence, it was certainly below the objective standard of reasonableness for Petitioner's trial counsel to fail to obtain an expert on the subject. *Strickland,* 466 U.S. at 688.

In addition to trial counsel's failure to hire a DNA expert, when the genealogical evidence was introduced at trial, neither investigators at the 1993 crime scene, nor the third-party "genealogist" testified to provide foundation. Rather, an FBI agent, lacking the proper knowledge and expertise, described the process. App. 135a–140a. Petitioner's trial counsel

failed to challenge the introduction of this evidence, violating not only Petitioner's right to effective assistance of counsel, but also, as demonstrated *supra*, his rights under the Confrontation Clause.

Lastly, trial counsel missed key challenges to the collection and analysis of Petitioner's DNA by failing to raise legitimate Fourth Amendment challenges in his motion to suppress the DNA. Had trial counsel challenged the creation of the SNP profile from the samples acquired from the 1993 crime scene, or the genealogical analysis conducted using this profile, the trial court may have made a different decision regarding the admissibility of the DNA evidence. Alternatively, these challenges would have been preserved for appeal and could have been decided favorably by the Minnesota Supreme Court. Trial counsel's failure to make these challenges, his failure to hire an expert on DNA, and his failure to challenge the method through which the State's genealogical evidence was introduced were certainly below the "practice and expectations of the legal community" and amounted to ineffective assistance of counsel. *See Padilla*, 559 U.S. at 357.

But for trial counsel's failure to adequately challenge the DNA evidence, there is more than a reasonable probability the outcome of Petitioner's case would have been different. *See Strickland,* 466 U.S. at 694.

2. Conflict of interest.

"Representation of a criminal defendant entails certain basic duties…a duty of loyalty, a duty to avoid conflicts of interest." *Strickland*, 466 U.S. at 688. While the two-prong *Strickland* test applies to standard ineffective assistance of counsel claims, "a defendant who shows that a conflict of interest

actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980). In other words, "prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692.

Although conflicts of interest are "not quite the per se rule of prejudice" that exists when defendants are afforded no representation, prejudice is presumed if "counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id.* (quoting *Cuyler*, 446 U.S. at 350). "Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person." Model Rules of Prof'l Conduct R. 1.7 (2024). An "actual conflict of interest mean[s] precisely a conflict that affected counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 163 (2002) (internal quotations omitted).

Here, trial counsel breached his duty of loyalty to Petitioner when he failed to disclose his representation of the judge's niece until shortly before the scheduled trial date. This previous representation of the judge's niece is the only explanation for the blatant animosity between trial counsel and the district court judge—evidence that this conflict "adversely affected [Petitioner's] lawyer's performance." *See Cuyler*, 446 U.S. at 350. Because trial counsel breached this "most basic of counsel's duties," the duty of loyalty, it is presumed that Petitioner was prejudiced by this conflict. *Strickland*, 466 U.S. at 692.

Had trial counsel addressed the conflict immediately when the trial court judge was appointed

to the case, the case could have been reassigned, the conflict may not have adversely affected pretrial litigation, and evidentiary rulings may have been made more favorably to Petitioner. The Minnesota Supreme Court incorrectly assumed Respondent was the only party likely to be prejudiced by the conflict. App. 22a. However, it was clear from the unfriendly nature of pretrial court appearances when Petitioner's trial counsel appeared in front of the judge, that this was not the case.

Trial counsel even admitted the conflict was an issue, stating "the Board" would take issue with his failure to disclose his prior representation. App. 96a. The Model Rules of Professional Conduct affirm his concerns and indicate a concurrent conflict can occur as a result of counsel's representation of a "former client." Model Rules of Prof'l Conduct R. 1.7 (2024). Even so, trial counsel did not disclose the conflict until the eve of trial, which precluded Petitioner from obtaining new counsel before the suppression and expert testimony matters had been decided. As was evident at trial, these rulings made a significant difference in Petitioner's defense.

As such, there is indisputable evidence that trial counsel's representation of his former client, the district court judge's niece, adversely affected Petitioner. Since prejudice is presumed, this conflict alone is sufficient evidence that trial counsel was ineffective, certiorari must be granted, and the Minnesota Supreme Court's decision must be reversed.

3. Other deficiencies.

Trial counsel's failure to investigate may be considered evidence of ineffective assistance of counsel if this failure "stemmed from inattention, not strategic

judgment." *Wiggins,* 539.U.S. at 512; *see also Wood v. Allen*, 558 U.S. 290, n. 3 (2010). Trial counsel failed to diligently investigate on multiple occasions, including the investigation of a potential alternative perpetrator. This failure certainly "stemmed from inattention," because, as the district court judge noted, trial counsel "did have all of this information, or [he] knew about all of [the information regarding the alternative perpetrator] from the start of the case" but "didn't do due diligence and investigate this matter on [his] own." App. 106a. Even though the alternative perpetrator evidence would have surely been an advantage to Petitioner, trial counsel "expect[ed] the State to do the work for [him]" in gathering this information beneficial to Petitioner's defense. App. 107a. This failure was certainly below the objective standard of reasonableness and could not have been a strategic decision. Had trial counsel diligently investigated alternative perpetrators, there is a reasonable probability this investigation would have led to a different outcome.

In addition, trial counsel disregarded instruction by the district court judge on multiple occasions. For example, in arguing to exclude the testimony of Respondent's expert, Mark Ulrick, trial counsel ignored the district court's instruction

> to submit written memorand[a] on the qualifications of State expert Ulrick, with specific attention on whether he was generally qualified as an expert under Minnesota Rule of Evidence 702. [The district court] remarked that it did not see this issue as a *Frye-Mack* issue, since the science used by Ulrick was generally accepted by the scientific community.

App. 42a. "Despite this instruction," trial counsel "submitted a 9-page written memorandum primarily focused on both prongs of the *Frye-Mack* analysis." *Ibid.*

Trial counsel also failed to offer sufficient documentation to support introduction of testimony from defense footprint expert Dr. Michael Nirenberg at trial and untimely disclosed another of Dr. Nirenberg's reports. This resulted in preclusion of any defense expert to counter Respondent's footprint experts at trial. In fact, Respondent called Dr. Wilcox, a previous defense expert who testified for the State at trial, during its case in chief.

The fact that trial counsel only called two witnesses at trial, both of which were questioned during one afternoon of the three-week trial, is further evidence of his constitutionally deficient performance. There is simply no reasonable strategic explanation for failing to present a meaningful case-in-chief when representing a defendant facing life imprisonment—particularly in a case with such significant trial and evidentiary issues. Simply put, trial counsel failed to perform "reasonabl[y] under prevailing professional norms." *Strickland,* 466 U.S. at 688.

But for trial counsel's constitutionally deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. *Id.* at 694. As such, Petitioner's Sixth Amendment right to counsel was violated by trial counsel's performance, this Court should grant certiorari, the Minnesota Supreme Court's ruling must be reversed, and the case must be remanded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Eric J. Nelson
Counsel of Record
HALBERG CRIMINAL DEFENSE
7900 Xerxes Avenue South
Suite 1700
Bloomington, MN. 55431
(612) 333-3673
enelson@halbergdefense.com

September 5, 2024

STATE OF MINNESOTA
IN SUPREME COURT

A22-1679

Hennepin County Hudson, C.J.

State of Minnesota,
Respondent,

vs. Filed: May 8, 2024
Office of Appellate Courts

Jerry Arnold Westrom,
Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and
Mary F. Moriarty, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota, for respondent.
Eric J. Nelson, Halberg Criminal Defense, Bloomington, Minnesota, for appellant.

SYLLABUS

1. The district court did not err in concluding that the genetic analysis of a napkin discarded by appellant was not a search because the analysis was only capable of matching appellant's DNA to the DNA found at the crime scene and appellant had no reasonable expectation of privacy in his identifying information.

2. Any error in precluding appellant from presenting alternative-perpetrator evidence at trial was harmless beyond a reasonable doubt.

3. The district court did not abuse its discretion when it excluded testimony from appellant's expert as late discovery because the district court properly exercised its authority to respond to violations of the Minnesota Rules of Criminal Procedure.

4. The State did not commit prosecutorial misconduct during its closing argument because none of the prosecutor's statements constituted error.

5. The circumstantial evidence presented at trial was sufficient to support the jury's verdict that appellant was guilty of first-degree premeditated murder, and appellant advances no reasonable hypothesis inconsistent with appellant's guilt.

6. Appellant did not receive ineffective assistance of counsel in violation of his constitutional rights because appellant has not demonstrated that trial counsel's personal interests materially limited the representation, and appellant was not prejudiced by the representation.

7. No cumulative errors denied appellant his right to a fair trial where only one potential error was present, and the error was harmless beyond a reasonable doubt.

8. It was error to convict appellant of both first-degree felony murder and the lesser-included offense of second-degree intentional murder.

Affirmed in part, reversed in part, and remanded.

O P I N I O N

HUDSON, Chief Justice.

A jury found appellant Jerry Arnold Westrom guilty of first-degree premeditated murder under Minn. Stat. § 609.185(a)(1) (2022) and second-degree intentional murder under Minn. Stat. § 609.19, subd. 1(1) (2022). The district court entered judgments for conviction on both counts and imposed a sentence of life with the possibility of parole after 30 years. On direct appeal to our court, Westrom challenges the district court's evidentiary rulings regarding DNA evidence, alternative-perpetrator evidence, and expert testimony. He also argues that the State committed prejudicial prosecutorial misconduct, that there was insufficient evidence to support his convictions, that he received ineffective assistance of counsel, and that cumulative errors denied him his right to a fair trial. Because the district court did not commit any error requiring reversal, Westrom's constitutional rights were not violated during his trial, and the State presented sufficient evidence, we affirm Westrom's conviction of first-degree premeditated murder. But because the district court violated Minn. Stat. § 609.04 (2022) when it entered a conviction on the lesser-included second-degree murder offense in addition to the conviction for first-degree premeditated murder, we reverse the second-degree murder conviction and remand to the district court to vacate that conviction.

FACTS

On June 13, 1993, Jeanie Childs was found stabbed to death in her South Minneapolis apartment. Her body was lying face-up on the floor of her bedroom, naked except for a pair of socks. The bed was soaked with blood, and blood covered the walls of the bedroom and the adjoining bathroom. While investigating the crime scene, police noted several bloody footprints on

the floor of the bedroom, a bloodstained towel hanging on the bathroom wall, and a bloodstained washcloth on the toilet seat. The Bureau of Criminal Apprehension ("BCA") took lifts of the footprints and catalogued several of the items in the apartment for forensic analysis. Childs' autopsy revealed that she had been stabbed about 65 times. She had a stab wound to her heart, and several of the wounds appeared to have been made after she had died. A large, deep slash ran across her abdomen. Hairs were found on her hands, which had suffered multiple defensive wounds.

Police initially investigated Childs' boyfriend, Arthur Gray, who held the lease of the apartment where Childs was killed. Gray was unemployed but had been described as Childs' trafficker or pimp.[1] He had allegedly physically abused Childs previously in the apartment where she was killed. Gray was identified as the source of the hairs on Childs' hands, and his DNA was found on the comforter of the bed. Gray had an alibi, though, as he was purportedly with a friend at a motorcycle rally in Wisconsin at the time of the murder. Ultimately, the case went cold.

In 2018, the police began working with the FBI to review Childs' murder. They sent a DNA sample from the crime scene to DNA Solutions, Inc. to create a single nucleotide polymorphism ("SNP") profile[2] that

[1] The parties do not appear to dispute that Childs earned money through prostitution or that her clients frequently visited the apartment.

[2] A single nucleotide polymorphism ("SNP," pronounced "snip") profile extracts highly informative segments from a DNA sample and can be used to predict the source's physical appearance, identify distant genetic relationships, and indicate susceptibility to disease. Erin Murphy, *Law and Policy Oversight of Familial Searches in Recreational Genealogy Databases*, 292 Forensic Sci. Int'l. e5, e5–e6 (2018). By contrast, law enforcement has traditionally utilized short tandem repeat ("STR") profiles in

could be compared with profiles on commercial genealogical databases to identify the source's relatives. After receiving the SNP profile, police arranged for it to be uploaded to several commercial genealogical websites, including GEDmatch, Ancestry.com, and MyHeritage. A potential match was located on MyHeritage that appeared to be a first cousin to the source of the crime scene DNA. Law enforcement then used the match to construct a family tree that identified Westrom as the likely source.

After learning that Westrom would be attending a hockey game in Mequon, Wisconsin, police followed him to the game and watched him order food from a concession stand. Westrom wiped his mouth with a napkin and threw it away in a trash can. Investigators took the napkin out of the trash can and sent it to the BCA for analysis. The BCA generated a short tandem repeat ("STR") DNA profile from the residue on the napkin and found that it matched the crime scene sample. Police then obtained a search warrant to collect a known sample of Westrom's DNA (to validate the match) and took Westrom into custody. He was subsequently charged with second-degree intentional murder in violation of Minn. Stat. § 609.19, subd. 1(1). A grand jury later indicted Westrom for first- degree premeditated murder in violation of Minn. Stat. § 609.185(a)(1).

Westrom moved to suppress all evidence stemming from the police's comparison of the SNP profile created from DNA gathered from the crime scene with other profiles on commercial genealogical databases. His motion also contested the admissibility

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forensic investigations. *Id.* STR profiles focus exclusively on noncoding segments of DNA that do not yield information about the source but can be used to easily distinguish individuals from each other. *Id.*

of evidence obtained through the STR analysis of DNA taken from his discarded napkin. The district court denied Westrom's motion and concluded that no search had occurred because Westrom held no expectation of privacy in the information contained within his DNA when police only used his DNA for the purpose of identification.

The State arranged for Mark Ulrick, a forensics administrator for the City of Minneapolis, to testify about the friction ridge footprint analysis he had performed that identified Westrom as the source of three bloody footprints left at the crime scene. Westrom hired Dr. Michael Nirenberg to dispute these results using the Reel Method of forensic podiatry, which analyzes a subject's morphological features by measuring multiple dimensions of a footprint. The State challenged Dr. Nirenberg's methodology, and a *Frye-Mack*[3] hearing was held. During the hearing, the State confronted Dr. Nirenberg with evidence that the footprint samples he relied on from Westrom were collected using a different procedure from what Dr. Nirenberg assumed in his analysis. In response, Dr. Nirenberg stated, "it weakens my findings significantly."

About 4 months after the hearing, and shortly before trial was scheduled to begin, Westrom disclosed a new report from Dr. Nirenberg that utilized two additional methods of forensic podiatry: the Visual Overlay Method (which examines a footprint's traced outline) and the Gunn Method (which measures the distance between various points on a footprint). The

[3] Minnesota uses the *Frye-Mack* standard for judging the admissibility of expert testimony that involves "a novel scientific theory" or "emerging scientific techniques." *State v. Garland*, 942 N.W.2d 732, 746 (Minn. 2020) (citations omitted) (internal quotation marks omitted).

district court ordered that Westrom be precluded from offering evidence related to any of the forensic podiatry methods, because the Reel Method did not meet the *Frye-Mack* standard and the other methods were disclosed too late. It also found that forensic podiatry in general was unreliable for purposes of identification and that the Gunn and Visual Overlay Methods would not have met the *Frye-Mack* standard even if they had been presented sooner.

Around that same time, Westrom's counsel approached the State about a possible conflict of interest: he had represented the district court judge's niece in a personal injury case. At the State's request, a hearing was held, and it was determined that the representation was "successfully completed in 2017." This information allayed the State's concerns about any potential bias in favor of Westrom's counsel. During a subsequent hearing to set a new trial date, the judge criticized Westrom's counsel for not investigating alternative-perpetrator evidence sooner, and counsel accused the judge of "personalizing it."

Westrom moved next to introduce alternative-perpetrator evidence. He named Arthur Gray, as well as three other people who had been subjects in the original investigation. In a reply memorandum, Westrom named an additional individual who had also been investigated. The district court determined that Westrom had proffered sufficient foundational evidence to connect Gray to the crime but not the other four people.

At trial, the State presented the DNA evidence linking Westrom to the crime scene and called Ulrick and Dr. Alicia Wilcox, an expert witness on latent print analysis, to testify about their findings that connected Westrom to the bloody footprints. Dr. Nirenberg's reports and testimony were precluded, and Westrom

called no forensic or medical experts at trial. The jury found Westrom guilty of both charged counts. The district court sentenced Westrom to life in prison with the possibility of parole after 30 years. Westrom appealed to our court.

ANALYSIS

Westrom advances seven challenges to his convictions for first-degree premeditated murder and second-degree intentional murder. We address each argument in turn before considering an additional issue that was not raised by the parties.

I.

Westrom first claims that his constitutional rights were violated when police generated and analyzed an STR profile containing DNA gathered from his discarded napkin. We review the district court's legal conclusions on the constitutionality of searches and seizures de novo. *State v. Anderson*, 733 N.W.2d 128, 136 (Minn. 2007). Both the United States and Minnesota Constitutions guarantee people the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10.[4] A search occurs when the government intrudes upon a "reasonable expectation of privacy" to gain information. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). This expectation of privacy must also be maintained

[4] Although our state constitution "provide[s] greater protection against suspicionless law enforcement conduct than the Fourth Amendment," *State v. Leonard*, 943 N.W.2d 149, 156 (Minn. 2020), Westrom does not argue that we should interpret our state constitution more broadly than the federal constitution here.

subjectively, *State v. Gail*, 713 N.W.2d 851, 860 (Minn. 2006), and it is usually lost if an object is abandoned. *City of St. Paul v. Vaughn*, 237 N.W.2d 365, 370–71 (Minn. 1975).

Even if the seizure of an object does not violate an expectation of privacy, the subsequent testing of the object to reveal further information may yet implicate additional privacy interests. *See Skinner v. Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 616 (1989) (finding a further invasion of privacy in the "ensuing chemical analysis" of a lawfully obtained biological sample). But the United States Supreme Court has held that when the analysis of an STR sample lawfully obtained from an arrestee can only reveal the identity of the source—and not more personal information such as "predisposition for a particular disease or other hereditary factors not relevant to identity"—a search has not occurred. *Maryland v. King*, 569 U.S. 435, 464–65 (2013). In *King*, the Court wrote, "[i]n this respect the use of DNA for identification is no different than matching an arrestee's face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee's fingerprints to those recovered from a crime scene." *Id.* at 451.

Here, Westrom asserts no property interest in the discarded napkin as an "effect," but maintains that he nevertheless held an expectation of privacy in the genetic information police extracted from the DNA and used to link him with evidence from the crime scene. Noting the "deeply personal and private nature of DNA profiles," Westrom claims that the seizure of his napkin gave police "access to *all* of [his] genetic information." But the facts before us reflect otherwise. The STR profile generated from Westrom's discarded napkin was analyzed using the same method as the

STR profile in *King*. Both analyses gave police access to only the noncoding parts of the subjects' DNA; thus, the analyses were incapable of "revealing information beyond identification." *King*, 569 U.S. at 464 (citation omitted) (internal quotation marks omitted). Because the police had lawfully acquired possession of the napkin and did not extract from it information beyond the equivalent of a genetic "fingerprint," their analysis of the napkin was not a search.

We note that Westrom has not challenged on appeal the creation of a SNP profile from his DNA left at the 1993 crime scene or the genealogical analysis that was conducted using this profile. Although the earlier SNP profile could reveal personal information beyond merely identity, we focus only on the claims before us and express no opinion on the potential privacy concerns the analysis of such profiles may generate.[5] Accordingly, we find that the district court

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[5] Westrom submitted a citation of supplemental authority directing us to a new Minnesota law, the "Genetic Information Privacy Act," which prohibits direct-to-consumer genetic testing companies from collecting, testing, or disclosing any Minnesotan's genetic data without first obtaining the consumer's express consent. *See* Minn. Stat. § 325F.995, subd. 2(a)(2), *as amended by*, Act of May 23, 2023, ch. 57, art. 4, § 18. The law also provides that companies must not disclose genetic data to law enforcement "unless the disclosure is made pursuant to a valid search warrant or court order." *Id.*, subd. 2(a)(3). Because Westrom does not challenge the handling of his genetic data recovered from the crime scene and sent to genetic testing companies for analysis, this law is not implicated in his appeal. We note, however, that law enforcement should pay heed to these protections, which evidence the privacy interests of Minnesotans as expressed by the Legislature, in future investigations.

Westrom also claims that the police violated Minnesota law during their investigation and that these violations warrant suppression of his DNA evidence. Specifically, he alleges that the police used a "false pretense" to identify Westrom by using a fake MyHeritage account in violation of Minn. Stat. § 609.527 (2022),

did not err in concluding that the genetic analysis of a napkin discarded by Westrom—capable only of matching his DNA to the DNA found at the crime scene—was not a search under the United States or Minnesota Constitutions.

II.

Westrom next claims that he was denied the right to a fair trial when the district court precluded him from introducing evidence of four alleged alternative perpetrators. We review the exclusion of alternative-perpetrator evidence by the district court for an abuse of discretion. *State v. Woodard*, 942 N.W.2d 137, 141 (Minn. 2020). Yet even if the district court erred, we must further find that the error was not harmless beyond a reasonable doubt to reverse the district court's decision. *State v. Ferguson*, 804 N.W.2d 586, 590 (Minn. 2011). The exclusion of evidence is harmless beyond a reasonable doubt when, "assuming the potential damage of the excluded evidence were fully realized, a reasonable jury 'would have reached the same verdict.'" *Troxel v. State*, 875 N.W.2d 302, 308 (Minn. 2016) (quoting *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994)).

Criminal defendants have a constitutional right to present a complete defense by introducing evidence

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disseminated confidential investigative data to third parties by uploading the crime scene profile to MyHeritage in violation of Minn. Stat. § 13.09(a) (2022), and violated Minn. Stat. § 609.43 (2022) when they committed the previous two offenses as public employees. Westrom did not raise these claims before the district court, so we will not consider them here. *See State v. Myhre*, 875 N.W.2d 799, 807 (Minn. 2016) ("When . . . a defendant fails to preserve issues for review at every level of the judicial process and provides no excuse for his failure, those issues are forfeited and we will not consider them.").

that shows an alternative perpetrator committed the crime, *id.* at 590–91, but "[t]his right is not absolute." *State v. Jenkins*, 782 N.W.2d 211, 224 (Minn. 2010). We require defendants to satisfy the two-step test outlined in *State v. Hawkins* before admitting alternative-perpetrator evidence. 260 N.W.2d 150, 159 (Minn. 1977). First, a defendant must make a foundational proffer that has "an inherent tendency to connect [a third party] with the actual commission of the crime." *Id.* (citation omitted) (internal quotation marks omitted). Second, "evidence of a motive of the third person to commit the crime, threats by the third person, or other miscellaneous facts which would tend to prove the third person committed the act" may be introduced if the ordinary rules of evidence are satisfied. *Id.*

Although the district court admitted evidence concerning one of Westrom's alleged alternative perpetrators—Arthur Gray—it denied Westrom's proffers concerning four other people: G.V., J.E., J.C., and T.K. Westrom contends that his proffers as to each of these four other individuals satisfied the *Hawkins* test and that the district court abused its discretion in finding otherwise.

Westrom's proffer as to G.V. included evidence that G.V. was Childs' client, that G.V. had an appointment with her the day of her death, and that G.V. was described by a witness as a "fatal attraction." Westrom's proffer as to J.E. included evidence that J.E.'s appearance was like a man seen leaving Childs' apartment building the day of the murder and his blood was found in the building's stairwell. Westrom's proffer as to J.C. included evidence that J.C.: (1) was convicted of murdering a woman in 1994, where the victim was found lying naked with multiple knife wounds in her blood-spattered apartment with no

signs of forced entry; (2) could not be excluded as a contributor of the DNA found on Childs' comforter; and (3) admitted to having been in Childs' apartment building before. Finally, Westrom's proffer as to T.K. included evidence that T.K. lived two doors down from Childs, was "in and out" of his apartment the day of the murder, waved a knife threateningly at residents the next day while referring to Childs as "the prostitute," and had multiple convictions for criminal sexual conduct.

We need not decide here whether any of Westrom's proffers were sufficient under the *Hawkins* test. Even if the jury had been presented with the evidence contained in *all* of these proffers (and if the "potential damage" of the evidence had been fully realized), we are convinced that a reasonable jury would have returned the same verdict. *Troxel*, 875 N.W.2d at 308. There was strong forensic evidence inculpating Westrom. *See State v. Vance*, 714 N.W.2d 428, 439 (reasoning that the exclusion of alternative-perpetrator evidence was harmless beyond a reasonable doubt because "the evidence incriminating [the defendant] was strong."). Although there was evidence (of varying strength) that may arguably have tended to connect one or more of these alleged alternative perpetrators to the commission of the crime, there was no evidence that any of these alleged alternative perpetrators stood barefoot in Childs' blood when she died, as was the case for Westrom.[6] We therefore conclude that the exclusion of the evidence contained in all of Westrom's proffers "did not affect the outcome of the trial" and that any error in excluding it was harmless beyond a reasonable doubt.

[6] J.C.'s footprints were compared with one of the prints left at the crime scene, and the result was inconclusive.

Id.

III.

Westrom asserts that Dr. Nirenberg's second report was wrongly excluded as late discovery and that he was entitled to a *Frye-Mack* hearing to assess the reliability of the two additional methods of forensic podiatry introduced by the second report. District courts enjoy considerable discretion in enforcing the rules of discovery. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979).

If a party "fails to comply with a discovery rule or order, the court may, on notice and motion, order the party to permit the discovery, grant a continuance, or enter any order it deems just in the circumstances." Minn. R. Crim. P. 9.03, subd. 8. When ordering the preclusion of evidence as a sanction for violating discovery rules, we have held that judges should consider: "(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors." *Lindsey*, 284 N.W.2d at 373.

Here, Westrom's late disclosure of Dr. Nirenberg's second report shortly before the scheduled trial violated Minn. R. Crim. P. 9.02, subd 1., which required him to disclose all expert reports before the Rule 11 Omnibus Hearing. Thus, upon the State's motion to preclude this report as late discovery, the district court was entitled to enter any order it deemed just in the circumstances, including the preclusion of the report. The *Lindsey* factors support this decision. First, the district court found that "nothing in the record indicat[ed] that defense counsel or Dr. Nirenberg were prevented from inquiring" earlier into the faulty procedure employed in gathering the data

for the first report. Second, the late disclosure significantly prejudiced the State's ability to prepare for trial, which was at that time set to begin just 1 month later.[7] Third, a continuance would not have been feasible, given the time necessary for a *Frye-Mack* hearing and the 2½ years the case had already been pending. Considering the wide berth given the district court in managing discovery matters, we conclude the district court did not abuse its discretion in precluding the testimony of Dr. Nirenberg regarding his second report.[8]

IV.

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[7] Westrom's argument that the trial was continued 2 days after the ruling excluding Dr. Nirenberg's testimony (thus alleviating concerns of delay) misunderstands our standard of review. Logically, we must examine whether the district court abused its discretion by considering the circumstances as they existed *at the time the district court's decision was made*. *Cf. State v. Harris*, 589 N.W.2d 782, 790 (Minn. 1999) (disregarding facts relevant to a district court's probable cause determination because those facts were "unknown . . . at the time the warrant was issued"). Given the sequence of events here, the district court's concern about discovery-induced delay was valid.

[8] The district court further determined that the entire field of forensic podiatry— which differs from the print-based friction ridge analysis employed by the state—did not meet the *Frye-Mack* standard for admissibility. After conducting a *Frye-Mack* hearing at which Dr. Nirenberg testified about the Reel Method and about forensic podiatry in general, the district court concluded that "there is much more work to be done before foot morphology for identification purposes, using things such as size and shape measurements, can be generally considered scientifically accepted and reliable." Because the Gunn and Visual Overlay Methods are similarly rooted in the field of forensic podiatry, the district court reasoned that they would not have met the *Frye-Mack* standard, even if they were timely disclosed. We agree.

Westrom claims that the State committed prosecutorial misconduct during its closing argument and that this misconduct warrants a new trial. When a defendant fails to object to alleged prosecutorial misconduct at trial—as Westrom did—we apply the modified plain-error test of *State v. Ramey*, 721 N.W.2d 294, 299–300 (Minn. 2006), under which "the defendant has the burden to demonstrate that the misconduct constitutes (1) error, (2) that was plain." *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010). "If the defendant is successful, the burden then shifts to the State to demonstrate that the error did not affect the defendant's substantial rights." *Id.* If the defendant satisfies the first two prongs and the State fails to satisfy the third prong, we determine "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.*; *see also State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017).

In making a closing argument, the State may "vigorously argue its case" by pointing out the lack of merit in a particular defense, but it "may not belittle the defense, either in the abstract or by suggesting that the defendant raised the defense because it was the only defense that may be successful." *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005). Additionally, the State may present "all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence." *State v. Pearson*, 775 N.W.2d 155, 163 (Minn. 2009). But it may not "speculate without a factual basis." *Id.*; *see also State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016). Neither may the State improperly call attention to the fact that the defendant did not testify at trial. *State v. Naylor*, 474 N.W.2d 314, 321 (Minn. 1991).

Here, Westrom takes issue with three

statements made by the prosecutor during closing argument. First, he argues that the prosecutor belittled his defense and argued facts not in evidence when he referred to the defense theory as "fantasy" and equated the probability of its truth to that of winning the lottery. Second, he claims that the prosecutor's mention of "wet semen" improperly speculated that Westrom's semen was deposited in Childs' apartment at the time of the murder. And third, Westrom contends that the prosecutor's response of "no, no, no, no, no" to the notion that Westrom could argue he had left DNA evidence at the apartment on a prior occasion—when he previously told police that he had never been there—improperly called attention to Westrom's decision not to testify at trial. He also claims that this statement suggested that Westrom's conduct after Childs' death sufficiently proved his guilt, contrary to this court's holding in *State v. McTague*, 252 N.W. 446, 448 (Minn. 1934).

None of Westrom's prosecutorial misconduct arguments succeed. We have previously held that a prosecutor's use of the word "fantasy" in reference to the defense's theory was, when put in the proper context, a comment on the "merits or the supporting evidence of possible defenses," and not a belittlement of the defense. *State v. Davis*, 982 N.W.2d 716, 727 (Minn. 2022). Here, the context shows that the prosecutor was pointing out the difficulty in squaring the theory that Westrom had never visited the apartment with the evidence in this case—the idea that someone other than Westrom "magically transported" his bloody footprints and DNA to the crime scene was a "fantasy." Because this comment was a critique of the merits of Westrom's transfer theory, and not an abstract belittlement of Westrom's defense, it was not misconduct. Similarly, the

prosecutor's statement that the chances of the physical crime scene evidence appearing the way it did without Westrom having ever visited the apartment are as low as winning the lottery was not "speculation" but rather a "proper inference" drawn from the extreme unlikelihood of the transfer theory.

Next, the prosecutor's mention of "wet semen" did not imply that the semen was deposited at the time of the murder, but rather, for the transfer theory to be true, "somebody or something would have had to have Mr. Westrom's wet semen on them or on the object . . . and then deposited the semen on the comforter, all while leaving no trace of themselves." When looking at the context in which the prosecutor discussed this subject, then, it is apparent that that the prosecutor was only claiming that Westrom's semen must have been "wet" whenever it was deposited, not that it was deposited contemporaneously with the murder.

Finally, the statement that Westrom's testimony to police was inconsistent with any explanation other than the transfer defense was not a comment on his failure to testify. In context, the statement suggests that, if the defense argues that Westrom left DNA at Childs' apartment on a prior occasion, it would be "[i]nconsistent with his statement" that he had never visited the apartment before. This statement is a comment on the testimony Westrom *did* give, not his failure to testify. This comment does not implicate *McTague* in any way. That case dealt with reference to evidence of flight, escape, or passing under an assumed name—circumstances not present here. *See McTague*, 252 N.W. at 448. Because none of the prosecutor's statements constituted error, we need not proceed further in the modified *Ramey* test; Westrom's arguments on this issue lack merit.

V.

Westrom next claims that the circumstantial evidence was insufficient to support his convictions. When a conviction is based on circumstantial evidence, we apply a "two- step analysis" to decide whether the evidence is sufficient. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, we identify the circumstances proved, winnowing down the evidence presented at trial to a subset of facts consistent with the jury's verdict, and disregarding evidence inconsistent with the verdict. *State v. Hassan*, 977 N.W.2d 633, 640 (Minn. 2022). Second, we independently examine the reasonable inferences that can be drawn from the circumstances proved, when viewed as a whole. *State v. Cox*, 884 N.W.2d 400, 412 (Minn. 2016). Circumstantial evidence is sufficient only if "the reasonable inferences are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis other than guilt." *Hassan*, 977 N.W.2d at 640.

Here, the circumstances proved, when viewed as a whole, support a reasonable inference that Westrom murdered Childs and did so with premeditation. The circumstances proved are as follows: Childs was stabbed 65 times, with many of the stab wounds in vital areas of her body. Some of the wounds were inflicted after she died. Blood splatter and autopsy evidence showed that Childs' attacker pursued her across multiple rooms, targeted vital parts of her body, and kept stabbing her after she died. Westrom's DNA was present on several items in the areas where the attack occurred. Westrom left three bare footprints in Childs' blood while facing the window in her bedroom.

These circumstances proved support a reasonable inference that Westrom committed

premeditated murder. *See, e.g.*, *State v. Fox*, 868 N.W.2d 206, 225–26 (Minn. 2015) (determining that 48 stab wounds to vital parts of the victim's body supported premeditation); *State v. Chomnarith*, 654 N.W.2d 660, 665 (Minn. 2003) (determining that the use of an industrial grade knife to inflict "precise wounds to vital areas" supported premeditation).

Westrom advances two hypotheses that are inconsistent with guilt. First, he claims that he could have "happened upon the murder scene, where there were footprints from other people and DNA from other men, when coming to visit the victim, in whose apartment his DNA had been deposited on a previous visit . . . and fled." Second, he argues that something could have triggered him to kill Childs in a "heat of passion."

But when the circumstances proved are viewed as a whole, neither of these hypotheses are reasonable. It strains credulity to conclude that Westrom simply happened upon the scene of the crime and chose to walk barefoot through Childs' blood to stand in front of the window—where her body lay on the floor next to him—and then leave. There is simply no set of reasonable inferences that could lead to this result. Was Westrom hypnotized into walking up to Childs' body? Was he directed at gunpoint to stand barefoot in her blood? The totality of the circumstances here "exclude beyond a reasonable doubt" both the ultimate and "intermediate" inferences which would have to be drawn to align Westrom's first hypothesis of innocence with the circumstances proved. *State v. Colgrove*, 996 N.W.2d 145, 155 (Minn. 2023); *id.* at 162 (Thissen, J., dissenting).

Westrom's second hypothesis, that he killed Childs in a heat of passion, fails because there is no evidence that suggests Westrom was "provoked" into

the killing, as is required under a heat of passion defense. *State v. Johnson*, 719 N.W.2d 619, 627 (Minn. 2006). Because this hypothesis is not supported by any evidence in the record, it cannot be deemed a rational inference. *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008) ("[The defendant] must . . . point to evidence in the record that is consistent with a rational theory other than guilt"). Accordingly, because the circumstances proved are consistent with an inference of guilt and inconsistent with any inference contrary to guilt, we conclude that there was sufficient evidence to convict Westrom of first-degree premeditated murder.

VI.

Westrom argues that he received ineffective assistance of counsel in violation of his constitutional rights. We use the test set out in *Strickland v. Washington* to evaluate ineffective assistance of counsel claims. 466 U.S. 668, 687 (1984); *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). Under this test, a party must demonstrate that: (1) counsel's performance fell below an "objective standard of reasonableness"; (2) and there is a reasonable probability that, but for counsel's error, the outcome would have been different. *Strickland*, 466 U.S. at 669, 688. "We need not address both the performance and prejudice prongs if one is determinative." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697. When a defendant shows that a conflict of interest "actually affected the adequacy of his representation," he "need not demonstrate prejudice in order to gain relief." *Gustafson v. State*, 477 N.W.2d 709, 713 (Minn. 1991) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349–50

(1980)) (internal quotation marks omitted). "But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.* (citation omitted) (internal quotation marks omitted).

Here, Westrom claims that a personal interest of his trial lawyer led to a material limitation of his representation. But the record shows only that Westrom's trial counsel found it necessary to disclose a *possible* conflict of interest due to his prior representation of the district court judge's niece. That matter was "successfully completed in 2017." Here, the *State* was the party vulnerable to prejudice from the potential conflict of interest. Yet after learning that there was no overlap in the dates of representation, the State communicated to the judge that it had no further concerns. Because Westrom has not demonstrated that his trial counsel had a personal interest that led to a material limitation of his representation, we conclude that his claim for ineffective assistance of counsel, based on conflict of interest, fails.

Westrom also alleges that other deficiencies by his trial counsel affected his representation. But even if trial counsel had acted as Westrom claims he should have— investigating J.C. as an alternative perpetrator sooner, objecting to the prosecutor's statements during closing arguments, and disclosing Dr. Nirenberg's second report in a timely fashion—it would not have changed the outcome of Westrom's case, for reasons we have given above. Thus, even if the performance of Westrom's trial counsel fell below an objective standard of reasonableness, he did not receive ineffective assistance because he was not prejudiced by his counsel's representation.

VII.

Westrom's final argument is that his convictions must be overturned due to errors that, "when taken cumulatively, had the effect of denying [him] a fair trial." *State v. Keeton*, 589 N.W.2d 85, 91 (Minn. 1998). Specifically, he points to five alleged errors that occurred at the district court: (1) failure to suppress DNA evidence; (2) exclusion of alternative-perpetrator evidence; (3) exclusion of the testimony of Dr. Nirenberg; (4) prosecutorial misconduct; and (5) ineffective assistance of counsel. But because we find the potential for error (and harmless error, at that) in only the exclusion of alternative- perpetrator evidence, there is no evidence of *cumulative* error here.

VIII.

We also consider one issue not raised on appeal. We have previously addressed sua sponte the issue of a district court's error in entering judgments of conviction for both first-degree felony murder and second-degree intentional murder. *See State v. Cruz*, 997 N.W.2d 537, 556 (Minn. 2023). Under Minn. Stat. § 609.04, subd. 1 (2022), a defendant "may be convicted of either the crime charged or an included offense, but not both." "In Minnesota, every lesser degree of murder is an included offense." *State v. Zumberge*, 888 N.W.2d 688, 697 (Minn. 2017); *see also State v. Leinweber*, 228 N.W.2d 120, 125 (Minn. 1975). Here, the district court entered judgments of conviction for both first-degree felony murder and second-degree intentional murder after the jury returned guilty verdicts on both charges. Entering judgments of conviction on both of these murder charges was error. Accordingly, we remand to the district court to vacate the second-degree

intentional murder conviction but otherwise leave the guilty verdicts in place.

CONCLUSION

For the foregoing reasons, we affirm Westrom's conviction of first-degree premeditated murder but reverse and remand for the district court to vacate the second-degree murder conviction.

Affirmed in part, reversed in part, and remanded.

STATE OF MINNESOTA SUPREME COURT

JUDGMENT

State of Minnesota, Respondent,

vs.

Jerry Arnold Westrom, Appellant.

Appellate Court #A22-1679
Trial Court #27-CR-19-3844

Pursuant to a decision of the Minnesota Supreme Court duly made and entered, it is determined and adjudged that the decision of the Hennepin County District Court, Criminal Division herein appealed from be and the same hereby is affirmed in part, reversed in part, and remanded. Judgment is entered accordingly.

Dated and signed: June 11, 2024

FOR THE COURT

Attest: Christa Rutherford-Block
Clerk of Appellate Courts

By: s/
Clerk of Appellate Courts

STATE OF MINNESOTA SUPREME COURT

TRANSCRIPT OF JUDGMENT

I, Christa Rutherford-Block, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,
In the City of St. Paul *June 11, 2024*
Dated

Attest: Christa Rutherford-Block
Clerk of the Appellate Courts

By: s/_____
Clerk of Appellate Courts

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Jerry Arnold Westrom,

Defendant.

Court File No. 27-CR-19-3844
Judge Martha Holton Dimick

ORDER DENYING MOTION TO SUPPRESS

The above-entitled matter came on before the Honorable Martha Holton Dimick, Judge of District Court, on written submissions. Plaintiff is represented by Assistant Hennepin County Attorney Michael Radmer, Esq. Defendant is represented by Steven Meshbesher, Esq.

On June 3, 2021, Defendant filed his Memorandum in Support of Motion to Suppress Evidence. On June 25, 2021, the State filed their Memorandum in Opposition to Defendant's Motion to Suppress. On July 9, 2021, Defendant filed their Reply to State's Response to Defendant's Memorandum in Support of Motion to Suppress Evidence. The Court thereafter took this matter under advisement. The Court subsequently requested from both parties a waiver of the typical 30-day timeline for a ruling on the matter, to which both parties consented.

Based on the arguments of the parties and

counsel, and all the files, proceedings and records herein, the Court makes the following:

ORDER

1. Defendant's motion to suppress evidence is hereby **DENIED.**

2. The Clerk of Court shall serve a copy of this Order via e-service upon counsel of record, or the parties by U.S. mail if *pro se* at their last known addresses on file with the Court, which shall be good and proper service for all purposes.

BY THE COURT:

Dated: October 4, 2021

s/
Martha A. Holton Dimick
Judge of District Court

MEMORANDUM

FACTS

According to the Complaint, on June 13, 1993, a woman, J.C. (the "Victim"), was found dead in a Minneapolis apartment from multiple stab wounds. A large amount of evidence was gathered from the crime scene. Among the items collected included a bed comforter, a blue towel hanging in the bathroom, a washcloth found on the toilet seat, a red t-shirt found on the toilet seat, and a scraping of a blood stain from the sink. DNA testing was performed on many of the items, revealing the presence of many DNA profiles. A male DNA profile (the "DNA Profile") was developed from a single source sperm cell: fraction found on the

blue towel in the bathroom. This profile matched DNA found on the comforter, and could not be excluded as a source of DNA present in the DNA mixture found on the washcloth, the t-shirt, and a scraping from the bathroom sink. At the time, the DNA Profile was never matched to a known individual. Despite a full investigation, no one was charged and the case went cold.

In 2018, further genetic analysis was conducted by investigators to create a DNA Single-Nucleotide Polymorphism data file. In January 2019, investigators, with help from a genetic genealogist, submitted this data file to commercial genealogical websites FamilyTreeDNA and MyHeritage under the pseudonym Steve Bell. MyHeritage indicated that the DNA Profile had genetic similarities to that of another user of the site (the "User"). The genetic and genealogical information obtained from the site indicated that the DNA Profile likely belonged to the User's first cousin once removed. Further investigation narrowed down the source of the DNA Profile to Defendant or his brother, both of whom were the User's first cousin once removed. Defendant was also believed to have lived in the Minneapolis metropolitan area at the time of the homicide and has a history of soliciting prostitutes.

Investigators began surveilling Defendant in January 2019 in order to obtain a sample of his DNA. Defendant was attending a hockey game where he ordered food from a concession stand. Defendant used a napkin to wipe his mouth and discarded the napkin in a trashcan. Investigators obtained the napkin and submitted it for DNA testing. The major male profile contained in the DNA taken from the napkin matched the DNA Profile from the crime scene. Defendant was subsequently taken into custody and a known DNA

sample was taken from him. This sample was analyzed and also matched the DNA Profile from the crime scene.

On February 14, 2019, Defendant was charged with one count of Murder in the Second Degree, in violation of Minn. Stat. § 609.19 Subd. 1(1). On June 25, 2020, Defendant was charged, by indictment, with one count of Murder in the First Degree, in violation of Minn. Stat. § 609.185 Subd. (a)(l).

Defendant now argues that an unlawful search occurred when investigators, without a warrant, accessed the genetic information Defendant held in common with the User on MyHeritage. Defendant also argues that the analysis of the DNA found on the discarded napkin was an additional unlawful search. Because of these violations, Defendant argues that all evidence obtained as fruits of these acts should be suppressed.

ANALYSIS

I. The analysis of Defendant's abandoned DNA for identification purposes, and law enforcement's use of the MyHeritage website, were not searches under the U.S. or Minnesota Constitutions.

The U.S. and Minnesota Constitutions protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. These protections are not triggered unless the individual has a legitimate expectation of privacy in the invaded space. *State v. Perkins,* 588 N.W.2d 491, 492 (Minn. 1999). This analysis is a two-step process: the first step is to determine if the defendant exhibited an actual subjective expectation of privacy in the item

searched, and the second is whether the expectation is reasonable. *State v. Gail,* 713 N.W.2d 851, 860 (Minn. 2006). In the first step, the court should focus on the defendant's conduct and whether he sought to preserve something as private. *Id.* The Minnesota Supreme Court has found that a defendant illustrates a subjective expectation of privacy when they attempt to conceal activity or items. *Id.* An expectation of privacy is reasonable when "it is one that society is prepared to recognize as reasonable." *Perkins,* 588 N.W.2d at 493.

Here, Defendant is not challenging the collection of the items that contained the genetic material, or the seizure of the genetic material itself. Rather, Defendant argues that the analysis of the DNA found on the napkin was an unlawful search, as is the matching of his DNA profile to that of the User on MyHeritage. Defendant argues that he has a legitimate expectation of privacy in his genetic material that contains incredibly sensitive, private information, and that an analysis of this material constitutes a search for the purposes of the Fourth Amendment. He also argues that he maintains a similar expectation of privacy in his genetic information contained in the DNA of his relatives, and the access and use of his relative' s genetic information violates his own legitimate expectations of privacy. However, Defendant has failed to show that law enforcement used his DNA to uncover any of the sensitive information he claims it contains, and has failed to show that Defendant had an expectation of privacy in the general identification information gleaned from the DNA analysis in this case.

First, it should be noted that the present case is distinguishable from much of the relevant case law available on the matter of DNA analysis and Fourth

Amendment rights. Much of the case law that addresses DNA analysis does so in the context of physical intrusions of the person, either through a blood draw or, more commonly, a buccal swab. These cases quickly conclude that a search has occurred because a person is subject to the physical intrusion of the collection process, which implicates the legitimate expectation of privacy we have in our own bodies. Here, there was no physical intrusion of Defendant. The DNA that is the subject of this motion was naturally deposited on a napkin and subsequently discarded into a public trash can. The privacy concerns relevant to Defendant, and the legal analysis required, are different than those of an individual that has been seized by law enforcement, forced to submit to the physical intrusion of a cheek swab or blood draw, and then subject to DNA analysis. The question before the court is whether the analysis of Defendant's abandoned DNA itself, without any physical seizure or intrusion of Defendant's person, is a search that triggers constitutional protections, and whether the submission of the crime scene DNA Profile to commercially available genealogical websites likewise constitutes a search. As Defendant notes, the answers to these questions are not settled law.

Going back to the two-step analysis, Defendant does not provide any evidence or argument that he exhibited, through his conduct, a subjective expectation of privacy in his genetic material or its subsequent analysis. The US Supreme Court has held that the Fourth Amendment does not provide protection for "what a person knowingly exposes to the public." *Katz v. United States,* 389 U.S. 347, 351, (1967). In today's society, it is common knowledge that genetic information is contained in the cells of our body and that those cells are shed constantly,

throughout the day, wherever we go. It is unclear how one would demonstrate an attempt to conceal this constantly shedding material. It is also unclear how one would demonstrate an attempt to prevent this abandoned DNA from being analyzed, surreptitiously, in a faraway lab.

As to the second step, Defendant has failed to show that society recognizes as reasonable a privacy interest in identifying information contained within abandoned DNA.

Defendant references Minnesota's Genetic Privacy Act to illustrate society's expectation of privacy in genetic information. However, this act defines genetic information as "information about an identifiable individual derived from the presence, absence, alteration, or mutation of a gene, or the presence or absence of a specific DNA or RNA marker... " and "medical or biological information collected from an individual about a particular genetic condition that is or might be used to provide medical care to that individual or the individual's family members." Minn. Stat. § 13.386 Subd. l(a); Minn. Stat. § 13.386 Subd. l(b). The information subject to protection under this statute includes genetic details beyond simple identification, with an emphasis on genes and sensitive medical information. Similarly, Defendant references HIPPA to demonstrate a privacy interest in genetic information, but the driving purpose of those regulations is the protection of sensitive medical information gathered and stored by healthcare providers and insurers. These statutes may demonstrate a privacy interest in sensitive medical information, but the Court does not find that they demonstrate a privacy interest in information derived for purely identification purposes.

The U.S. Supreme Court has analyzed the

privacy implications of DNA analysis used for the purposes of identification in *Maryland v. King*. Although the legal analysis in *King* was in the context of a post-charge buccal swab, the holding is instructive here. The Court held that one of the reasons the DNA analysis used in *King* did not intrude on the defendant's privacy in an unconstitutional way was because it was used for identification purposes and did not reveal genetic traits, predispositions for particular diseases, or other hereditary factors not relevant to identity. *See Maryland v. King,* 569 U.S. 435, 464-65 (2013). The Court further noted that even if the genetic material could yield this private information, law enforcement did not use it for purposes outside of simple identification. *Id.* at 464. The Court in *King* indicated that the way in which the DNA was analyzed, and the way this analysis was used, was a relevant factor in the Fourth Amendment legal analysis. It indicates that just because DNA analysis can provide protected private information, it does not necessarily follow that all DNA analysis, and their uses, are treated equal in the context of the Fourth Amendment. Similarly, the U.S. Supreme Court also indicates as much in the context of drug tests administered to student athletes in public schools, stating, "it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic." *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646,658 (1995).

The DNA analysis in this case did not involve a deep dive into the medical predispositions of Defendant. Instead, the analysis provided law enforcement with a genetic dataset that could be used for comparison with other genetic datasets analyzed from DNA samples found in the physical world, or

genetic datasets uploaded to electronic databases and websites. This analysis is akin to fingerprinting. A fingerprint is analyzed to reveal unique characteristics. These characteristics are compared to other fingerprint samples to reveal similarities and differences. Society has not evidenced an expectation of privacy in fingerprints, or their analysis, a biological identifier that is deposited on most things we touch. The U.S. Supreme Court has noted, "Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis v. Mississippi,* 394 U.S. 721, 727 (1969).

This Court finds no reason to treat the collection and analysis. of abandoned genetic material any differently from the collection and analysis of abandoned fingerprints, so long as the genetic analysis is limited to identifying information and does not reveal information society deems private.

Defendant references multiple cases that deal with the use of technology to surreptitiously gather information about an accused. Defendant argues that his DNA analysis is akin to tapping a public telephone booth, using a device to monitor the heat escaping from a residence, or using a tracking device to log a person's movements. *Katz v. United States,* 389 U.S. 347 (1967); *Kyllo v. United States,* 533 U.S. 27 (2001); *United States v. Jones,* 565 U.S. 400 (2012); *Carpenter v. United States,* 138 S. Ct. 2206 (2018). The information gathered in these cases were the contents of private conversations, data about a person's activities performed within the privacy of their own home, and detailed information of all their comings and goings. As stated previously, although DNA may reveal sensitive personal information, and thereby may implicate constitutional protections, such an

analysis and use did not occur here. Law enforcement's analysis simply matched abandoned genetic material of an unknown individual to the abandoned genetic material of a known person. The sanctity of Defendant's home, his person, his private conversations, and any other detailed personal information was not violated.

Defendant provides no authority for the argument that society has recognized, as reasonable, a privacy interest in the gathering of naturally shed and discarded genetic material and its analysis for identification purposes. Therefore, the collection of Defendant's DNA, and its analysis, was not a search that would implicate protections under the Minnesota or U.S. Constitution.

Because of the foregoing, Defendant therefore also does not have a legitimate expectation of privacy in his identifying information contained within the DNA of his family members. If Defendant does not have an expectation of privacy in his own genetic identifying information, there seems no reason to find that Defendant would somehow have a greater expectation of privacy in the identification information shared with other people.

As this Court has found, the identifying information gleaned from MyHeritage is not information society deems private for purposes of the Fourth Amendment. The function of the website itself illustrates this. MyHeritage charges individuals a fee to analyze their DNA and host the subsequent dataset on their website so that the public can compare their genetic identifying information to find familial matches. The User voluntarily uploaded his DNA profile for the express purpose of being freely compared to millions of other DNA profiles. This shows how little privacy value society places on the

identification information contained within an individual's DNA. The fact that Defendant himself did not voluntarily broadcast his shared genetic identifying information though MyHeritage is not particularly relevant because the information at issue does not implicate constitutional protections. Accessing this freely available identification information is not a search for constitutional purposes. Law enforcement's possible violation of MyHeritage's service agreement may subject them to action from MyHeritage, but the Court does not see any reason why this violation of a private company's terms would implicate constitutional protections.

In summary, the Court finds that society has not recognized, as reasonable, an expectation of privacy in identifying information contained within abandoned DNA. As such, the analysis of Defendant's DNA does not run afoul of the protections of the Minnesota or U.S. Constitutions. Similarly, the uploading of the DNA Profile to MyHeritage, and the information gleaned from the comparison of this profile to that of the User, is likewise not a violation.

II. **Even if the Court assumes, *arguendo*, that the analysis of Defendant's abandoned DNA for identification purposes, and law enforcement's use of the MyHeritage website, were searches, these searches were reasonable under the U.S. and Minnesota Constitutions.**

Even if the Court were to find that the analysis of Defendant's DNA was a search, and that the use ofMyHeritage was also a search, Defendant's motion still fails.

The Minnesota Supreme Court has held:

> The Fourth Amendment to the U.S. Constitution states that [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. The language of Article I, Section 10, of the Minnesota Constitution is identical. The touchstone of the Fourth Amendment is reasonableness....

State v. Johnson, 813 N.W.2d 1, 5 (Minn. 2012) (internal quotations and citations omitted). Whether a search is reasonable "requires a court to weigh 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'" *King,* 569 U.S. at 448. (quoting *Wyoming v. Houghton,* 526 U.S. 295,300 (1999)).

For many of the same reasons provided above, an analysis of Defendant's DNA for identification purposes involves a very minor intrusion upon an individual's privacy, if any, as does a comparison of this identification information to readily available public databases. Law enforcement collected Defendant's DNA from a homicide crime scene and an abandoned napkin placed in a public trash receptacle. There was no seizure of Defendant's person and no intrusion into his body. There was likewise no intrusion into his home or any of his personal effects. The information gained from the DNA analysis was used to compare DNA samples and to reveal identity matches. If this is ċ;}.11 intrusion at all for the purposes of the Fourth Amendment, it is extremely slight.

In comparison, there is a significant and

legitimate governmental interest in exonerating the innocent, identifying offenders of past crimes, and bringing closure for victims of unsolved crimes. *State v. Bartylla,* 755 N.W.2d 8, 18 (Minn. 2008). Given the state of this case and other cold cases, the sort of DNA analysis performed here may be the only method available to law enforcement to solve these crimes. These interests strongly outweigh the Defendant's privacy interest in his identifying information contained in his abandoned DNA. It also strongly outweighs any privacy interest he may have in the genetic information he shares with his family or any interest he may have in having his identifying information compared to public DNA databases for identification purposes.

Courts have found that the suspicionless taking of buccal swabs from convicted or merely charged defendants, and subsequent DNA analysis and submission to databases, are not unreasonable searches. *Maryland v. King,* 569 U.S. 435 (2013); *State v. Bartylla,* 755 N.W.2d 8 (Minn. 2008). Here, although Defendant arguably had greater privacy interests than those in these cases, given his status as an uncharged suspect, he was not subject to, in any way, what is often the hallmark of unreasonable searches or seizers, i.e. physical restraint or intrusion, of either his person or effects. Given the exceedingly small privacy intrusion involved in this case, and the significant and legitimate government interest in solving crimes and exonerating the innocent, especially in cases where DNA is the only remaining lead, the analysis of Defendant's DNA for identification purposes was a reasonable search.

In addition, the Court sees no reason to find the search of MyHeritage unreasonable. Defendant's family member voluntarily shared his genetic

identifying information to the world through the website for the express purpose of being matched to other individuals. Although Defendant did not consent to his shared genetic identifying information being broadcast in this way, the privacy concerns involved here are small. Any privacy interests the Defendant claims to have in this shared identifying information is heavily outweighed by the substantial government interests as laid out above.

In conclusion, the analysis of Defendant's abandoned DNA for identification purposes, and law enforcement's use of the MyHeritage website, are not searches under the Minnesota and U.S. Constitutions. Even if the Court assumes that such acts are searches, they are reasonable searches that do not run afoul of constitutional protections. Therefore, Defendant's Motion to Suppress is denied.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota, Court File No. 27-CR-19-3844

Plaintiff, **ORDER DENYING MOTION**
v.

Jerry Arnold Westrom,

Defendant.

The above-entitled matter came on before the Honorable Martha Holton Dimick, Judge of District Court, for hearings on July 13, 2021 and July 14, 2021. The State is represented by Senior Assistant Hennepin County Attorney Michael Radmer, Esq. Defendant is represented by Steve Meshbesher, Esq.

Based upon all files, records, and proceedings in this matter, the Court makes the following:

FINDINGS OF FACT AND PROCEDURAL HISTORY

On July 13 and July 14, this Court heard testimony from City of Minneapolis forensic expert Mark Ulrick ("Ulrick") and latent print analysis expert witness, Dr. Alicia Wilcox ("Dr. Wilcox"). Ulrick is a supervisor of forensic science in the Minneapolis Crime Lab Unit, and he has been employed there for approximately 15 years. Over the last 15 years, he has accumulated approximately 600 hours of training in crime scene processing. Ulrick's testimony concerned

his usage of ACE-V (Analysis, Comparison, Evaluation and Verification) in his analysis of latent prints discovered at the scene of the crime. Defendant challenged the adherence of Ulrick's methods to the ACE-V procedure in his examination of multiple fingerprints and footprints discovered at the scene of the crime. On cross-examination, Ulrick testified that his methods follow the standard operating procedures ("SOP"), and that the notes he took complied with the SOP and national standards.

In response, Dr. Alicia Wilcox testified. Notably, Wilcox herself did not adhere to the ACE-V method in her independent analysis of Ulrick's work. Despite this, Dr. Wilcox alleged a variety of defects in Ulrick's methods including, but not limited to, a failure to document minutiae during the analysis phase, insufficient ridge tracing of the prints, a failure to sufficiently investigate whether the prints matched John Eschwine, delayed recording and updating of the case in the LIMS database[1], and that Ulrick's analysis was potentially tainted by confirmation bias.

At the conclusion of the two-day hearing, this Court instructed the parties to submit written memorandum on the qualifications of State expert Ulrick, with specific attention on whether he was generally qualified as an expert under Minnesota Rule of Evidence 702. This Court remarked that it did not see this issue as a *Frye-Mack* issue, since the science used by generally accepted by the scientific community. Despite this instruction, on September 14, 2021, Defendant submitted a 9-page written memorandum primarily focused on both prongs of the

[1] On cross-examination, it was clarified that this delayed recording was due to a database transfer of paper notes being uploaded to the electronic Laboratory Management Information System ("LIMS") database.

Frye-Mack analysis. Defendant alleges that since the methods used by Ulrick are not generally accepted by the scientific community, and are additionally unreliable, he should be precluded from testifying.

On October 1, the State submitted its responsive 1-page letter brief to Defendant's motion. The State argued that any critiques and deficiencies regarding the thoroughness of Ulrick's methods should be reserved for the jury. Thereafter, this Court toot the matter under advisement.

Based on the foregoing, the Court makes the following:

CONCLUSIONS OF LAW

Minnesota applies the two-pronged standard for the admissibility, of novel scientific evidence. *See State v. Dixon,* 822 N.W.2d 664,671 (Minn. App. 2012) (internal citations omitted). Under *Frye,* the proponent of novel scientific evidence is "required to show that the scientific principle or test about which an expert is to testify is generally accept d within the relevant scientific community. *Id.* (citing *Goeb v. Tharaldson,* 615 N.W.2d 800, 809, 814 (Minn. 2000). Under *Mack,* the "proponent of particular evidence derived from the application of the scientific principle or test must 'establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.'" *Id.* (internal citations omitted). When the scientific technique that produces the evidence is no longer novel or emerging, then the pretrial hearing should focus on the second prong of the *Frye-Mack* standard. *Id.* (citing *State v. Roman Nose,* 649 N.W. 2d 815, 819 (Minn. 2002).

Due to Defendant's insistence on analyzing this

as a *Frye-Mack* issue under both prongs, this Court will briefly explain why it claimed that it did not see this as a *Frye-Mack* issue. This Court would also note that the relief requested by the Defendant, restriction of Ulrick testimony,[2] is a rather extreme remedy in consideration of applicable Minnesota law. Courts have stated that "experts in the relevant scientific field widely accept the ACE-V methodology and individualization and believe that the ACE-V methodology produces scientifically reliable results admissible at trial." *State v. Dixon,* 822 N.W.2d 664, 674 (Minn. App.12012). During cross-examination, Ulrick testified that his methods adhered to the SOP and national standards. As such, this Court finds that Ulrick followed the same methodology widely accepted in the relevant scientific field of latent print analysis. This Court sees little reason to depart from the reasoning in *Dixon,* and this Court similarly concludes that the ACE-V method is generally accepted in the scientific community and by experts in the field. *See State v. Hull,* 788 N.W.2d 91, 103 (Minn. 2010). As such, the first prong of the *Frye-Mack* standard is satisfied.

Regarding the second prong, the reliability of the science, Defendant relies on arguments already discredited by the *Dixon* case-that because the ACE-V metho relies on subjective component to the analysis of print analysis, it is therefore unreliable. *See Dixon,*

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[2] Defendant states in its brief that it is requesting that Ulrick should be barred from "offer[ing] an opinion to a reasonable degree of scientific certainty, that the latent print anti the exemplar print share the same source." Defendant is likely trying to avoid the result reached in *Dixon.* 822 N.W.2d at 670. There, the district court held that fingerprint examiner "max offer an opinion, to a reasonable degree of scientific certainty, that [a] latent print and the exemplar print share the same source." *Id.*

822 N.W.2d at 674 (stating that the fact that there is a "subjective component to print analysis does not mean that the analysis is not reliable or accurate, but only means that the testimony about the conclusions should be related to an examiner's experience and knowledge.") This Court similarly finds that Ulrick's testimony concerning his conclusions was supported by his considerable experience.

Second, Defendant's critiques of the thoroughness of Ulrick's testimony concern For example) this Court finds that simply because Ulrick may have failed to fully comply with a "minutiae" phase of the ACE-V method on every latent print, this does not discredit the ACE-V method under Minnesota law. Like in *Dixon,* this Court is satisfied that Ulrick adhered to procedures necessary to ensure reliability despite any alleged failures to "completely document every step of the process." *Id.* at 675. Therefore, the second prong of the Frye-Mack analysis is also satisfied.

In summary, based on the decision in *Dixon,* and the hearing's record, Ulrick's usage of the ACE-V method satisfies both prongs of the *Frye-Mack* analysis. Now, this Court will examine the issue which it requested briefs on-whether Ulrick is qualified to testify under Minnesota Rule of Evidence 702.

Under Minn. R. Evid. 702, admission of expert testimony falls within the district court's broad discretion. *State v. Litzau,* 650 N.W.2d 177, 185 (Minn. 2002). The additional remaining prongs of the qualification of expert witness testimony relate to whether the witness qualifies as an expert, and whether the expert's testimony will be helpful to the trier of fact. *See State v. Obeta,* 796 N.W.2d 289, 282 (Minn. 2011). Ulrick has 15 years of experience as

forensic crime scene examiner, and he has considerable, demonstrable training. As such, he qualifies as an expert witness. This Court is satisfied that his testimony will be helpful to the trier of fact. *See State v. Thompson,* 218 N.W.2d 760, 762 (Minn. 1974) (finding that a police officer is able to testify as an expert witness when he did not have any formal training in field of fingerprint identification).

Here, Ulrick is qualified to testify as an expert, and his testimony will be helpful to the trier of fact. The *Thompson* case demonstrates both the low standard to find that a witness is qualified to be an expert, and the discretion a district court has in making determination. This determination is based on his considerable expertise, knowledge of latent print analysis, and his examination of the prints at issue in this case. Any alleged deficiencies and thoroughness regarding his examination of the prints at issue should be reserved for the trier of fact. Accordingly, at this time, Ulrick's testimony, including his opinion that the latent print and the exemplar print share the same source, will be admissible at trial.[3]

[3] This Court is not preliminarily barring Defendant from making objections on this issue during trial. Defendant is able to renew his objections regarding Ulrick's testimony during the trial.

ORDER

1. Defendant's motion to preclude the testimony of expert witness Ulrick is **DENIED.**
2. The Clerk of Court shall serve a copy of this Order via e-service upon counsel of record, or the parties by U.S. mail if *pro se* at their last known addresses on file with

BY THE COURT:

Dated: October 8, 2021

s/_____
Martha Holton Dimick
Judge of District Court

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,

Court File No. 27-CR-19-3844
Judge Martha Holton Dimick

Plaintiff,

ORDER PRECLUDING THE TESTIMONY OF DR. NIRENBERG

v.

Jerry Arnold Westrom,

Defendant.

The above-entitled matter came on before the Honorable Martha Holton Dimick, Judge of District Court, for an evidentiary hearing on June 10, 2021. Plaintiff was represented by Assistant Hennepin County Attorney Michael Radmer, Esq. Defendant was represented by Steven Meshbesher, Esq.

At the June 10 hearing, the Court received testimony from Dr. Michael Nirenberg regarding forensic podiatry and the Reel Method of footprint measurement. Defendant wishes to admit footprint evidence using this area of science. On September 9, 2021, Defendant submitted his Memorandum Re: Testimony of Dr. Nirenberg. On September 24, 2021, the State submitted their Memorandum of Law in Opposition to Admitting Testimony of Dr. Michael Nirenberg. The Court thereafter took this matter under advisement.

Based on the arguments of the parties and counsel, and all the files, proceedings and records

herein, the Court makes the following:

ORDER

1. Defendant is hereby precluded from offering testimony or exhibits regarding forensic podiatry methods utilizing footprint size and shape analysis to derive identification information. This includes the Reel Method, Gunn Method, and Visual Overlay Method, or other methods using similar footprint size and shape analysis and comparisons.

2. The Clerk of Court shall serve a copy of this Order via e-service upon counsel of record, or the parties by U.S. mail if *pro se* at their last known addresses on file with the Court, which shall be good and proper service for all purposes.

BY THE COURT:

Dated: October 8, 2021

s/
Martha Holton Dimick
Judge of District Court

MEMORANDUM

FACTS

The charges underlying this case stem from the murder of a woman, J.C., who was found stabbed to death in a Minneapolis apartment on June 13, 1993. Among the items of evidence documented at the scene were a set of bloody footprints. After significant investigation, the case eventually went cold. The case

was subsequently reevaluated in 2018 using modem DNA techniques and Defendant was later considered a prime suspect. After linking Defendant's DNA to DNA evidence found at the scene, Defendant was charged on February 14, 2019 with one count of Murder in the Second Degree, in violation of Minn. Stat.§ 609.19 Subd. 1(1). On June 25, 2020, Defendant was charged, by indictment, with one count of Murder in the First Degree, in violation of Minn. Stat. § 609.185 Subd. (a)(l).

As part of his defense, Defendant enlisted the services of Dr. Nirenberg to apply the principles of forensic podiatry to the footprints found at the scene of the crime. It is the Court's understanding that Dr. Nirenberg was provided pictures of the crime scene footprints as well as exemplar footprints from Defendant, taken by the State's investigators. According to his testimony, Dr. Nirenberg used the Visual Overlay Method to compare both crime scene footprints to Defendant's footprints. Dr. Nirenberg also used the Reel Method to compare the right footprints only, because the left footprint was not suitable for this sort of comparison.

The Reel Method is a system of footprint measurement used in forensic podiatry to analyze certain morphological features of footprints. The method was created by Dr. Sarah Reel in approximately 2008 and typically consists of a series of footprint measurements taken from the tips of each toe to the bottom of the heel, along with measurements of the widest part of the heel and forefoot.

Dr. Nirenberg issued a report using the aforementioned methods that presumably concluded that Defendant was not the source of the footprints found at the scene of the crime. The State requested a

hearing to challenge the admissibility of this report and Dr. Nirenberg's testimony, specifically calling into question the Reel Method's reliability and acceptance in the forensic community.

At the June 10, 2021 hearing, Defendant provided a series of exhibits for the Court's consideration and provided the testimony of Dr. Nirenberg. Toward the end of the hearing, the State questioned Dr. Nirenberg regarding footprint collection methods. Through this line of questioning it was revealed to Dr. Nirenberg that the exemplar footprints taken from Defendant were collected by inking his foot and rolling a piece of paper over it. Dr. Nirenberg indicated this collection process could significantly alter the reliability or weight of the report's conclusions.

Subsequent to the June 10, 2021 hearing, on approximately October 1, 2021, Defendant disclosed to the State a new report authored by Dr. Nirenberg using new exemplar prints from Defendant, presumably taken using the correct technique. The Court held a hearing to address the admissibility ofthis report on October 6, 2021, after the State filed a motion to preclude it as late discovery, among other grounds. At the October 6 hearing, the Court denied a request for an additional *Frye-Mack* hearing regarding the Overlay Method and Gunn Method, the methods used by Dr. Nirenberg in his latest report. The Court also precluded Defendant from offering the new reports as evidence at trial given their late disclosure.

ANALYSIS

I. Defendant has failed to show that the methods of forensic podiatry used by Dr.

Nirenberg are generally accepted within the relevant scientific community.

Minnesota applies the two-pronged standard for the admissibility of novel scientific evidence. *See State v. Dixon,* 822 N.W.2d 664,671 (Minn. App. 2012). Under *Frye,* the proponent of novel scientific evidence is "required to show that the scientific principle or test about which an expert is to testify is generally accepted within the relevant scientific community." *Id.* (citing *Goeb v. Tharaldson,* 615 N.W.2d 800, 809 (Minn. 2000). Under *Mack,* the "proponent of particular evidence derived from the application of the scientific principle or test must 'establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability." *Id.* (internal citations omitted). When the scientific technique that produces the evidence is no longer novel or emerging, then the pretrial hearing should focus on the second prong of the *Frye-Mack* standard. *Id.* (citing *State v. Roman Nose,* 649 N.W. 2d 815, 819 (Minn. 2002).

Here, Defendant is the proponent of the Reel Method of forensic podiatry. Forensic podiatry in general is the application of podiatric knowledge and experience to forensic investigations to show the association of an individual to a crime scene or otherwise provide information regarding the foot or its function. One area of forensic podiatry involves the analysis of footprints by taking measurements of footprint length and width, or analyzing the footprint's overall shape and features. The information derived from these measurements can then be used, for example, to study how foot shape and size might determine things like height, sex, race, age, and weight of the footprint's owner. Forensic podiatry may also be

used to compare unknown footprints to known footprints in an attempt to derive identification information from the analysis. Depending on the method employed, the comparison between prints may be by the overall shape of the print, or measurements taken between various landmarks on the print.

The Reel Method is one of multiple systems of footprint measurement. The measurements typically include the distances from the tip of each toe to the bottom of the heel, along with width measurements of the widest parts of the heel and forefoot. In order to analyze the acceptance and reliability of the Reel Method, the Court must also investigate the acceptance and reliability of forensic podiatry as it relates to identification generally. The Reel Method is just a system of measuring a footprint. It is a separate question whether the footprint measurements derived from this system can be used to reliably derive identification information.

As to the issue of identification generally, Defense counsel provides no authority from Minnesota courts addressing the area of forensic podiatry for purposes of identification. The Court's own search has similarly found none. The literature provided by Defendant discusses some casework, but it appears sparce and limited to other jurisdictions. (Ex 13, 8-9) Dr. Nirenberg testified that he knew some state courts use it, but could only name Wisconsin and Virginia as examples. Thus, the Court must look to the articles provided by Defendant and the testimony of Dr. Nirenberg to analyze this area of science.

The majority of the literature provided by Defendant are studies of narrow issues of analysis, such as which methods of footprint measurement are more reliably repeatable, how the time of day may influence the size and shape of a footprint, how bare

footprints may differ from sock clad footprints or insole prints, etc. (Ex. 10; Ex. 18; Ex. 8; Ex. 7) All of these studies only briefly address, through reference to other studies not provided here, the claim that footprints are distinct and can be reliably used to derive identification information using print measurements.

The literature that Defendant does provide that addresses this area does not clearly establish that it is currently an accepted and reliable area of forensic sciences. A 2015 article titled, "Emergence of forensic podiatry-A novel sub-discipline of forensic sciences," describes how feet are unique to a person due to innumerable morphological and anatomical variations. (Ex. 13, 2) This article states that a footprint may also exhibit individualistic variations, referencing articles by L.M. Robbins and an article by R.B. Kennedy. *Id.* at 5. However, a 2020 article co-authored by Dr. Reel, entitled "Examination and Interpretation of Bare Footprints in Forensic Investigations," states,

> In the mid-1980s, Robbins' work on footprints (as well as in the other related area of identification using the wear features of footwear) was shown to be highly problematic and Robbins was subsequently discredited. The associated controversy was widely publicized and as a result, skepticism of the value of the use of footprints as an aid to forensic human identification began, particularly where such work was not being undertaken by mainstream forensic practitioners.

(Ex. 11, 2-3). Dr. Nirenberg testified that he agreed that Robbins was discredited for making unscientific leaps and is now more of a historical reference. The referenced article from R.B. Kennedy, an article

published in 2005 and titled "A large-scale statistical analysis of bare footprint impressions," is one often cited in Defendant's other articles to support a claim that footprints are distinctive among individuals and is the source of the often quoted statistic that the chance of a random match of bare footprints is one in 1.27 billion. *(See* Ex. 7; Ex. 17; Ex. 21) However, the aforementioned 2020 article casts some doubt on this study and corresponding statistic, stating, "it is not clear if the calculation was based on the measurements of all the footprints included in the study database of 24,000 footprints, or whether the smaller heterogeneous sample of 134 footprints investigated primarily for footprint inter-variation, was used for the statistical analysis which led to this suggestion." (Ex.I 1, 2)

The 2015 article also describes doubts about the robustness of statistical conclusions in the area of forensic podiatry and indicates that footprint uniqueness is not scientifically verified:

> To utilize, Bayesian and Likelihood ratios for conclusions i.e. 'The likelihood that Mr. XX made the footprint in question is YYY,' we need to look at the deformities in the footprint and look at the population for these deformities and multiply them out. Of course it would be ideal to be able to do such but whether totally possible in this field is still undetermined at this time... There are currently in development studies in the U.K. to determine factors that are anecdotally acknowledged, such as 'foot uniqueness' but not scientifically verified.

(Ex. 13, 10). The 2020 article further casts doubt on the current status of forensic podiatry, stating,

> [W]hilst research in this area has indicated that footprint shape may be highly individual or even possibly unique, this is not certain.
>
> [W]hen dealing with an open population it is highly unlikely that a positive identification can be made through the comparison of two footprints unless unique and individualizing features are apparent within the compared footprints, for example, ridge detail or scarring... It is essential that more discriminatory studies with larger homogeneous samples are undertaken in order to further understand the subject of the uniqueness of the morphology of a person's footprint.

(Ex. 11, 2; Ex. 11, 10). These recent articles, one co-authored by Dr. Reel herself, acknowledge that there are indications that footprints are distinctive or unique, but that there is not enough data to scientifically verify this. The 2020 article explains that this lack of data or understanding prevents identification using footprints unless something individualizing is present, such as ridge detail or scarring. Methods of footprint measurement and size comparison using overlays generally do not appear to capture these sorts of unique characteristics.

Generally speaking, based on the literature provided by Defendant that directly addresses the reliability of forensic podiatry used for identification, the field appears to be in the midst of development. Although it is clear that the literature indicates there is promise in this area, it also indicates that there is much more work to be done before foot morphology for

identification purposes, using things such as size and shape measurements, can be generally considered scientifically accepted and reliable.

As it relates to the Reel Method specifically and the analysis by Dr. Nirenberg, Defendant has provided no authority or literature that addresses the Reel Method's reliability as to identification. The reliability studied in the various articles provided by Defendant is the repeatability or reproducibility of the measurement system, such that multiple people can measure the same footprint and reliably produce the same measurements, or a single person can measure the same footprint multiple times and repeatedly produce consistent results. Some other measurement systems may have issues with reliability/repeatability because their points of measurement introduce more room for variance, such as systems that measure from the perceived center of a toe or perceived center of the heel. Although the Reel Method appears to be a system of measurement that can be reliably repeated, this says nothing about what conclusions can be reliably drawn from the raw measurement data.

There is a significant lack of information provided by Defendant to show that Reel Method measurements, or any method using size or shape analysis, can be used to reliably match or distinguish an individual based on a series of footprints. The purpose of Dr. Nirenberg's testimony at trial appears to be the conclusion that the crime scene footprints do not match the exemplar footprint from Defendant. The studies provided by Defendant do not illustrate how the Reel Method can be used to draw conclusions about identification by comparing an unknown footprint to a known footprint. The studies provided investigate: whether identical twins create similar insole impressions with their feet (Ex. 4); the differences

between bare footprints and insole footprints from the same individual (Ex 7); difference between bare footprints and sock clad footprints from the same individual (Ex 8); how footprint measurements can be used to predict height (Ex. 14; Ex. 19); how footprints of the same individual differ when standing versus walking or jumping (Ex. 17); how the time of day influences footprints. (Ex. 18) None of these studies, except the studies regarding height, attempt to derive any sort of identification information from the collected data. One study regarding height notes that it is limited by sample size, while the other is considered a preliminary study. (Ex. 14; Ex. 19) As a whole, the literature provided does not show that the Reel Method is generally accepted as a means to derive identification information from footprints.

Dr. Nirenberg's testimony does not move the needle in any significant way. Much of the testimony was commentary and summation regarding the aforementioned studies. There was little in the way of describing how, for example, the distance between the tip of the big toe and the bottom of the heel can distinguish or match two footprints, how reliable such a conclusion can be, and what methods and studies were used to confirm that these techniques are scientifically sound. Although Dr. Nirenberg testified that forensic podiatry and the Reel Method can be used to reliably answer criminal forensic questions, there is insufficient evidence in the record to show that forensic podiatry is accepted in the forensic community as a means to derive identification information in the way Defendant is attempting to. The facts of this particular case seem to add to the unknowns, given that the crime scene footprints were recovered in 1993 and the exemplars were provided more than 25 years later. It is unclear if there are studies investigating how an

individual's footprints change through time and if that affects the conclusions drawn from measuring systems like the Reel Method.

In summary, the Court finds that morphological footprint comparison and analysis using shape and size measurement techniques such as the Reel Method to derive identification information is a novel area of science that Defendant has failed to demonstrate is accepted within the forensic community.

II. Defendant has failed to show that the test and analysis by Dr. Nirenberg is reliable and conformed to the procedure necessary to ensure reliability.

The second prong the Court should consider is whether Defendant has established that the test itself is reliable and that its administration in this particular instance conformed to the procedure necessary to ensure reliability.

Here, there seems to be a significant issue with Dr. Nirenberg's initial report. At the June 10, 2021 evidentiary hearing, Dr. Nirenberg was first informed how the exemplar prints were taken from Defendant. According to the State, Defendant's foot was inked and a piece of paper was rolled over Defendant's foot by the investigator. This is in contrast to the normal method whereby a person walks naturally onto an inkpad then naturally steps onto a piece of paper where the print is deposited, or, for static prints, where a foot is inked and a person stands on a piece of paper placed on the ground. The articles provided by Defendant use methods whereby the person steps or stands on the collection substrate; they are not collected by pressing or rolling the substrate onto the foot.

When asked if this collection method would alter

the conclusions or weight of evidence contained in the report, Dr. Nirenberg said it would weaken the findings significantly. He clarified that the issues stemming from the error in collection would impact both the Reel Method evaluation and the visual overlay comparison. Defendant subsequently provided new footprints to Dr. Nirenberg which he used to create a new report. This shows that the original prints were flawed in such a way that the original report could not be relied upon.

Given the collection method used to gather the exemplars, the Court finds that the analysis included in Dr, Nirenberg's initial report does not conform to the procedure necessary to ensure its reliability. The method of collection used here is nothing like the methods used in the many studies provided by Defendant, and Dr. Nirenberg himself noted that the flaw significantly impacts his conclusions.

In summary, the Court finds that morphological footprint comparison and analysis using shape and size measurement techniques such as the Reel Method to derive identification information is a novel area of science that Defendant has failed to demonstrate is accepted within the forensic community. Furthermore, the initial report from Dr. Nirenberg did not comply with the no1711al processes needed to ensure reliability. As such, Dr. Nirenberg is precluded from testifying about these methods of forensic podiatry and Defendant is precluded from offering the flawed report or other evidence using similar methods.

III. <u>The second report from Dr. Nirenberg, disclosed to the State on or about October 1, 2021, is inadmissible as late discovery and as evidence based on novel science not accepted by the relevant scientific</u>

community.

On approximately October 1, 2021, Defendant disclosed to the State a new report authored by Dr. Nirenberg. This new analysis was conducted after Dr. Nirenberg discovered the flawed footprint collection process. This analysis used new exemplar prints, presumably taken according to standard practices, and utilized the Visual Overlay Method as well as the Gunn Method of footprint measurement. The Court held a hearing to address the admissibility of this report on October 6, 2021, after the State filed a motion to preclude it as late discovery, among other grounds. At the October 6 hearing, the Court denied a request for an additional *Frye-Mack* hearing regarding the Visual Overlay Method and Gunn Method. The Court also precluded Defendant from offering the new report as evidence at trial given their late disclosure. At the time the report was disclosed, the case against Defendant had been pending for more than 2.5 years and a trial was set to begin a month later on November 1, 2021. The length of time the case was pending provided ample opportunity for timely footprint analysis. Defendant argues that the report is not untimely because they were first made aware of the print collection flaw at the June 2021 hearing. However, a proper collection process is an important step in the forensic analysis and there is nothing in the record indicating that defense counsel or Dr. Nirenberg were prevented from inquiring how the prints were collected. It is unclear if the State explicitly disclosed the collection method to defense counsel or whether it is their duty to do so. Regardless, defense counsel has not claimed any wrongdoing on the part of the State. The delayed disclosure of this report falls on defense counsel and Dr. Nirenberg. As such, the report has

been precluded from admission at trial due to late disclosure.

Even if the report was not precluded as late, as the Court has ruled above, the methods of forensic podiatry used in this new report by Dr. Nirenberg are not admissible. The Gunn Method is a system of footprint measurement similar to the Reel Method which uses a series of measurements between landmarks on a footprint. The Visual Overly Method involves tracing the outline of a footprint onto a transparent sheet and placing this tracing over another footprint for comparison purposes. Both of these methods use foot morphology and print shape and size to derive identification information from footprint comparisons. As discussed above, Defendant has failed to show that these sorts of methods are accepted by the relevant scientific community. As such, any report or testimony regarding these methods is inadmissible.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota, MNCIS Case No. 27-CR-19-3844

Plaintiff,

GUILTY VERDICT

v.

JERRY ARNOLD WESTROM,

Defendant.

We, the jury, find the defendant, JERRY ARNOLD WESTROM, guilty of Murder in the Second Degree, on or about June 13, 1993, in Hennepin County.

Dated: **08/25/2022**

s/
Foreperson

Time: **3:01 p.m.**

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,

MNCIS Case No. 27-CR-19-3844

Plaintiff,

GUILTY VERDICT

v.

JERRY ARNOLD WESTROM,

Defendant.

We, the jury, find the defendant, JERRY ARNOLD WESTROM, guilty of Murder in the First Degree - Premeditation, on or about June 13, 1993, in Hennepin County.

Dated: **08/25/2022**

s/_____
Foreperson

Time: **3:01 p.m.**

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota, MNCIS Case No. 27-CR-19-3844

Plaintiff,

v.

JERRY ARNOLD WESTROM,

Defendant.

NOT GUILTY VERDICT

We, the jury, find the defendant, JERRY ARNOLD WESTROM, not guilty of Murder in the Second Degree, on or about June 13, 1993, in Hennepin County.

Dated: _____

Time: _____

s/_____
Foreperson

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota, MNCIS Case No. 27-CR-19-3844

Plaintiff,

v.

JERRY ARNOLD WESTROM,

Defendant.

NOT GUILTY VERDICT

We, the jury, find the defendant, JERRY ARNOLD WESTROM, not guilty of Murder in the First Degree - Premeditation, on or about June 13, 1993, in Hennepin County.

Dated: _____

Time: _____

s/_____
Foreperson

The State of Minnesota District Court

Hennepin County 4th Judicial District

Hennepin Criminal Downtown

State of Minnesota vs ORDER
JERRY ARNOLD WESTROM

Case Number: 27-CR-19-3844

CURRENT DEFENDANT INFORMATION			
Known Address:	27192 Bayshore CIR Isanti, MN 55040	Correspondence Address:	27192 Bayshore CIR Isanti, MN 55040
Phone Number:	(H) 763-444-4756	Sex:	Male
	(C) 218-766-8898	DOB:	05/16/1966
		SID:	MN 04002440

CASE CHARGES				
Ct	Statute	Type	Description	Disposition
1 Amended	609.185 (1)	Charging	Murder -1st Degree - Premeditated	Convicted
	609.185	Penalty	Murder - 1st Degree	
2	609.19. 1(1)	Charging	Murder - 2nd Degree - With Intent-Not Premeditated	Convicted

TERMS OF DISPOSITION OR SENTENCE:
COUNT 1

Date Pronounced: September 09, 2022

Offense Information

Ct	Offense Date	Statute	Description	Offense Disposition
1	06/13/1993	609.185(1)	Murder – 1st Degree - Premeditated	Convicted
	MOC at Filing	GOC	Controlling Agency	Controlling No.
	H1H30	Not applicable - GOC	Minneapolis Police Department	93152901

Sentence Details

Commit to Commissioner of Corrections – Adult

Report on: 09/09/2022 at 8:30 AM

This sentence consists of a minimum term of imprisonment equal to two-thirds of the total executed sentence, and a maximum supervised release term equal to one-third of the total executed sentence, unless the sentence is life of life without the possibility of release.

Was this a departure from the sentencing guidelines? No.

Per Judge Hoyos: Must serve at least 30 years before being Eligible for Parole under MN Statue 609.185 * has Credit of 39 days

Status: Active Status Date: 09/09/2022

Conditions – Adult

Defendant is placed under the following conditions:

Condition	Location	Amt	Effective	End
Give a DNA sample when directed.			09/09/2022	

Fees

Law Library Fees	$3.00		(waived)
County/Sheriff & Felony Fines	$0.00		(waived)
Subtotal	$0.00	Due	09/09/2027

Restitution $3,636.60
Subtotal $3,636.60 Due 09/09/2022

TERMS OF DISPOSITION OR SENTENCE: COUNT 1

Date Pronounced:	September 09, 2022		
Offense Information			
Offense Date	Statute	Description	Offense Disposition
06/13/1993	609.19.1(1)	Murder - 2nd Degree - With Intent-Not Premeditated	Convicted
MOC at Filing	GOC	Controlling Agency	Controlling No.
		Minneapolis Police Department	93152901
Sentence Details			
None			

GRAND TOTALS

Date of Sentence: 09/09/2022
Due Date: 09/09/2027 Original Amount: $3,636.60

The court may refer this case for collection if you fail to make a payment, and collection costs will be added. You have the right to context a referral for collection based on inability to pay by requesting a hearing no later than the due date. M.S. §§ 480.15, subd. 10c; 609.104

SIGNATURE

s/_____ Judge Juan Hoyos

Sentenced pronounced on 09/09/2022 by District Court Judge

Court Administrator: Sara Gonsalves 612-348-2040

If you have questions regarding the terms of your sentence or disposition, please contact your attorney STEVEN J MESHBESHER 612-332-2000, your probation agent or court administrator.

Amendment IV. Searches and Seizures; Warrants, USCA CONST Amend. IV-Search...

U.S.C.A. Const. Amend. IV - Search and Seizure; Warrants
Amendment IV. Searches and Seizures; Warrants

Currentness

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for this amendment.>

U.S.C.A. Const. Amend. IV-Search and Seizure; Warrants, USCA CONST Amend. IV-Search and Seizure; Warrants Current through P.L. 118-78. Some statute sections may be more current, see credits for details.

Amendment VI. Jury trials for crimes, and procedural rights..., USCA CONST Amend....

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights [Text & Notes of Decisions subdivisions I to XXII]

Currentness

<Notes of Decisions for this amendment are displayed in multiple documents.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Notes of Decisions (6297)

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials
Current through P.L. 118-78. Some statute sections may be more current, see credits for details.

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male

citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV
Current through P.L. 118-78. Some statute sections may be more current, see credits for details.

325F.995 GENETIC INFORMATION PRIVACY ACT.

Subdivision 1. **Definitions.** (a) For purposes of this section, the following terms have the meanings given.

(b) "Biological sample" means any material part of a human, discharge from a material part of a human, or derivative from a material part of a human, including but not limited to tissue, blood, urine, or saliva, that is known to contain deoxyribonucleic acid (DNA).

(c) "Consumer" means an individual who is a Minnesota resident.

(d) "Deidentified data" means data that cannot reasonably be used to infer information about, or otherwise be linked to, an identifiable consumer and that is subject to:

(1) administrative and technical measures to ensure the data cannot be associated with a particular consumer;

(2) public commitment by the company to (i) maintain and use data in deidentified form, and (ii) not attempt to reidentify the data; and

(3) legally enforceable contractual obligations that prohibit any recipients of the data from attempting to reidentify the data.

(e) "Direct-to-consumer genetic testing company" or "company" means an entity that: (1) offers consumer genetic testing products or services directly to consumers; or (2) collects, uses, or analyzes genetic data that was (i) collected via a direct-to-consumer

genetic testing product or service, and (ii) provided to the company by a consumer. Direct-to-consumer genetic testing company does not include an entity that collects, uses, or analyzes genetic data or biological samples only in the context of research, as defined in Code of Federal Regulations, title 45, section 164.501, that is conducted in a manner that complies with the federal policy for the protection of human research subjects under Code of Federal Regulations, title 45, part 46; the Good Clinical Practice Guideline issued by the International Council for Harmonisation; or the United States Food and Drug Administration Policy for the Protection of Human Subjects under Code of Federal Regulations, title 21, parts 50 and 56.

(f) "Express consent" means a consumer's affirmative written response to a clear, meaningful, and prominent written notice regarding the collection, use, or disclosure of genetic data for a specific purpose. Written notices and responses may be presented and captured electronically.

(g) "Genetic data" means any data, regardless of the data's format, that concerns a consumer's genetic characteristics. Genetic data includes but is not limited to:

(1) raw sequence data that results from sequencing a consumer's complete extracted DNA or a portion of the extracted DNA;

(2) genotypic and phenotypic information that results from analyzing the raw sequence data; and

(3) self-reported health information that a consumer submits to a company regarding the consumer's health conditions and that is (i) used for scientific research or product development, and (ii) analyzed in connection

with the consumer's raw sequence data.

Genetic data does not include deidentified data.

(h) "Genetic testing" means any laboratory test of a consumer's complete DNA, regions of a consumer's DNA, chromosomes, genes, or gene products to determine the presence of genetic characteristics.

(i) "Person" means an individual, partnership, corporation, association, business, business trust, sole proprietorship, other entity, or representative of an organization.

(j) "Service provider" means a person that is involved in the collection, transportation, analysis of, or any other service in connection with a consumer's biological sample, extracted genetic material, or genetic data on behalf of the direct-to-consumer genetic testing company, or on behalf of any other person that collects, uses, maintains, or discloses biological samples, extracted genetic material, or genetic data collected or derived from a direct-to-consumer genetic testing product or service, or is directly provided by a consumer, or the delivery of the results of the analysis of the biological sample, extracted genetic material, or genetic data.

Subd. 2. **Disclosure and consent requirements.** (a) To safeguard the privacy, confidentiality, security, and integrity of a consumer's genetic data, a direct-to-consumer genetic testing company must:

(1) provide easily accessible, clear, and complete information regarding the company's policies and procedures governing the collection, use, maintenance, and disclosure of genetic data by making available to a

consumer all of the following written in plain language:

(i) a high-level privacy policy overview that includes basic, essential information about the company's collection, use, or disclosure of genetic data;

(ii) a prominent, publicly available privacy notice that includes at a minimum information about the company's data collection, consent, use, access, disclosure, maintenance, transfer, security, retention, and deletion practices of genetic data; and

(iii) information that clearly describes how to file a complaint alleging a violation of this section, pursuant to section 45.027;

(2) obtain a consumer's express consent to collect, use, and disclose the consumer's genetic data, including at a minimum:

(i) initial express consent that clearly (A) describes the uses of the genetic data collected through the genetic testing product service, and (B) specifies who has access to the test results and how the genetic data may be shared;

(ii) separate express consent, which must include the name of the person receiving the information, for each transfer or disclosure of the consumer's genetic data or biological sample to any person other than the company's vendors and service providers;

(iii) separate express consent for each use of genetic data or the biological sample that is beyond the primary purpose of the genetic testing product or service and inherent contextual uses;

(iv) separate express consent to retain any biological sample provided by the consumer

following completion of the initial testing service requested by the consumer;

(v) informed consent in compliance with federal policy for the protection of human research subjects under Code of Federal Regulations, title 45, part 46, to transfer or disclose the consumer's genetic data to a third-party person for research purposes or research conducted under the control of the company for publication or generalizable knowledge purposes; and

(vi) express consent for marketing by (A) the direct-to-consumer genetic testing company to a consumer based on the consumer's genetic data, or (B) a third party to a consumer based on the consumer having ordered or purchased a genetic testing product or service. For purposes of this clause, "marketing" does not include customized content or offers provided on the websites or through the applications or services provided by the direct-to-consumer genetic testing company with the first-party relationship to the customer;

(3) not disclose genetic data to law enforcement or any other governmental agency without a consumer's express written consent, unless the disclosure is made pursuant to a valid search warrant or court order;

(4) develop, implement, and maintain a comprehensive security program and measures to protect a consumer's genetic data against unauthorized access, use, or disclosure; and

(5) provide a process for a consumer to:

(i) access the consumer's genetic data;

(ii) delete the consumer's account and genetic data; and

(iii) request and obtain the destruction of the

consumer's biological sample.

(b) Notwithstanding any other provisions in this section, a direct-to-consumer genetic testing company is prohibited from disclosing a consumer's genetic data without the consumer's written consent to: (1) any entity offering health insurance, life insurance, disability insurance, or long-term care insurance; or (2) any employer of the consumer. Any consent under this paragraph must clearly identify the recipient of the consumer's genetic data proposed to be disclosed.

(c) A company that is subject to the requirements described in paragraph (a), clause (2), shall provide effective mechanisms, without any unnecessary steps, for a consumer to revoke any consent of the consumer or all of the consumer's consents after a consent is given, including at least one mechanism which utilizes the primary medium through which the company communicates to the consumer. If a consumer revokes consent provided pursuant to paragraph (a), clause (2), the company shall honor the consumer's consent revocation as soon as practicable, but not later than 30 days after the consumer revokes consent. The company shall destroy a consumer's biological sample within 30 days of receipt of revocation of consent to store the sample.

(d) A direct-to-consumer genetic testing company must provide a clear and complete notice to a consumer that the consumer's deidentified data may be shared with or disclosed to third parties for research purposes in accordance with Code of Federal Regulations, title 45, part 46.

Subd. 3. **Service provider agreements.** (a) A contract between the company and a service provider must prohibit the service provider from retaining,

using, or disclosing any biological sample, extracted genetic material, genetic data, or information regarding the identity of the consumer, including whether that consumer has solicited or received genetic testing, as applicable, for any purpose other than for the specific purpose of performing the services specified in the service contract. The mandatory prohibition set forth in this subdivision requires a service contract to include, at minimum, the following provisions:

(1) a provision prohibiting the service provider from retaining, using, or disclosing the biological sample, extracted genetic material, genetic data, or any information regarding the identity of the consumer, including whether the consumer has solicited or received genetic testing, as applicable, for any purpose other than providing the services specified in the service contract; and

(2) a provision prohibiting the service provider from associating or combining the biological sample, extracted genetic material, genetic data, or any information regarding the identity of the consumer, including whether that consumer has solicited or received genetic testing, as applicable, with information the service provider has received from or on behalf of another person or persons, or has collected from the service provider's own interaction with consumers or as required by law.

(b) A service provider subject to this subdivision is subject to the same confidentiality obligations as a direct-to-consumer genetic testing company with respect to all biological samples, extracted genetic materials, and genetic material, or any information regarding the identity of any consumer in the service provider's possession.

Subd. 4. **Enforcement.** The commissioner of commerce may enforce this section under section 45.027.

Subd. 5. **Limitations.** This section does not apply to:

(1) protected health information that is collected by a covered entity or business associate, as those terms are defined in Code of Federal Regulations, title 45, parts 160 and 164;

(2) a public or private institution of higher education; or

(3) an entity owned or operated by a public or private institution of higher education.

Subd. 6. **Construction.** This section does not supersede the requirements and rights described in section 13.386 or the remedies available under chapter 13 for violations of section 13.386.

History: *2023 c 57 art 4 s 18*

609.185 MURDER IN THE FIRST DEGREE.

(a) Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life:

(1) causes the death of a human being with premeditation and with intent to effect the death of the person or of another;

(2) causes the death of a human being while committing or attempting to commit criminal sexual conduct in the first or second degree with force or violence, either upon or affecting the person or another;

(3) causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit burglary, aggravated robbery, carjacking in the first or second degree, kidnapping, arson in the first or second degree, a drive-by shooting, tampering with a witness in the first degree, escape from custody, or any felony violation of chapter 152 involving the unlawful sale of a controlled substance;

(4) causes the death of a peace officer, prosecuting attorney, judge, or a guard employed at a Minnesota state or local correctional facility, with intent to effect the death of that person or another, while the person is engaged in the performance of official duties;

(5) causes the death of a minor while committing child abuse, when the perpetrator has engaged in a past pattern of child abuse upon a child and the death occurs under circumstances manifesting an extreme indifference to human life;

(6) causes the death of a human being while committing domestic abuse, when the perpetrator has engaged in a past pattern of domestic abuse upon the victim or upon another family or household member and the death occurs under circumstances manifesting an extreme indifference to human life; or

(7) causes the death of a human being while committing, conspiring to commit, or attempting to commit a felony crime to further terrorism and the death occurs under circumstances manifesting an extreme indifference to human life.

(b) For the purposes of paragraph (a), clause (4), "prosecuting attorney" has the meaning given in section 609.221, subdivision 2, paragraph (c), clause (4).

(c) For the purposes of paragraph (a), clause (4), "judge" has the meaning given in section 609.221, subdivision 2, paragraph (c), clause (5).

(d) For purposes of paragraph (a), clause (5), "child abuse" means an act committed against a minor victim that constitutes a violation of the following laws of this state or any similar laws of the United States or any other state: section 609.221; 609.222; 609.223; 609.224; 609.2242; 609.342; 609.343; 609.344; 609.345; 609.377; 609.378; or 609.713.

(e) For purposes of paragraph (a), clause (6), "domestic abuse" means an act that:

(1) constitutes a violation of section 609.221, 609.222, 609.223, 609.224, 609.2242, 609.342, 609.343, 609.344, 609.345, 609.713, or any similar laws of the United States or any other state; and

(2) is committed against the victim who is a family or household member as defined in section 518B.01, subdivision 2, paragraph (b).

(f) For purposes of paragraph (a), clause (7), "further terrorism" has the meaning given in section 609.714, subdivision 1.

History: *1963 c 753 art 1 s 609.185; 1975 c 374 s 1; 1981 c 227 s 9; 1986 c 444; 1988 c 662 s 2; 1989 c 290 art 2 s 11; 1990 c 583 s 4; 1992 c 571 art 4 s 5; 1994 c 636 art 2 s 19; 1995 c 244s 12; 1995 c 259 art 3 s 12; 1998 c 367 art 2 s 7; 2000 c 437 s 5; 2002 c 401 art 1 s 15; 2005 c 136 art 17 s 10; 2014 c 302 s 1; 2023 c 52 art 20 s 18*

609.527 IDENTITY THEFT.

Subdivision 1. **Definitions.** (a) As used in this section, the following terms have the meanings given them in this subdivision.

(b) "Direct victim" means any person or entity described in section 611A.01, paragraph (b), whose identity has been transferred, used, or possessed in violation of this section.

(c) "False pretense" means any false, fictitious, misleading, or fraudulent information or pretense or pretext depicting or including or deceptively similar to the name, logo, website address, email address, postal address, telephone number, or any other identifying information of a for-profit or not-for-profit business or organization or of a government agency, to which the user has no legitimate claim of right.

(d) "Financial institution" has the meaning given in section 13A.01, subdivision 2.

(e) "Identity" means any name, number, or data transmission that may be used, alone or in conjunction with any other information, to identify a specific individual or entity, including any of the following:

(1) a name, Social Security number, date of birth, official government-issued driver's license or identification number, government passport number, or employer or taxpayer identification number;

(2) unique electronic identification number, address, account number, or routing code; or

(3) telecommunication identification information or access device.

(f) "Indirect victim" means any person or entity

described in section 611A.01, paragraph (b), other than a direct victim.

(g) "Loss" means value obtained, as defined in section 609.52, subdivision 1, clause (3), and expenses incurred by a direct or indirect victim as a result of a violation of this section.

(h) "Unlawful activity" means:

(1) any felony violation of the laws of this state or any felony violation of a similar law of another state or the United States; and

(2) any nonfelony violation of the laws of this state involving theft, theft by swindle, forgery, fraud, or giving false information to a public official, or any nonfelony violation of a similar law of another state or the United States.

(i) "Scanning device" means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on a computer chip or magnetic strip or stripe of a payment card, driver's license, or state-issued identification card.

(j) "Reencoder" means an electronic device that places encoded information from the computer chip or magnetic strip or stripe of a payment card, driver's license, or state-issued identification card, onto the computer chip or magnetic strip or stripe of a different payment card, driver's license, or state-issued identification card, or any electronic medium that allows an authorized transaction to occur.

(k) "Payment card" means a credit card, charge card, debit card, or any other card that:

(1) is issued to an authorized card user; and

(2) allows the user to obtain, purchase, or

receive credit, money, a good, a service, or anything of value.

Subd. 2. **Crime.** A person who transfers, possesses, or uses an identity that is not the person's own, with the intent to commit, aid, or abet any unlawful activity is guilty of identity theft and may be punished as provided in subdivision 3.

Subd. 3. **Penalties.** A person who violates subdivision 2 may be sentenced as follows:

(1) if the offense involves a single direct victim and the total, combined loss to the direct victim and any indirect victims is $250 or less, the person may be sentenced as provided in section 609.52, subdivision 3, clause (5);

(2) if the offense involves a single direct victim and the total, combined loss to the direct victim and any indirect victims is more than $250 but not more than $500, the person may be sentenced as provided in section 609.52, subdivision 3, clause (4);

(3) if the offense involves two or three direct victims or the total, combined loss to the direct and indirect victims is more than $500 but not more than $2,500, the person may be sentenced as provided in section 609.52, subdivision 3, clause (3);

(4) if the offense involves more than three but not more than seven direct victims, or if the total combined loss to the direct and indirect victims is more than $2,500, the person may be sentenced as provided in section 609.52, subdivision 3, clause (2);

(5) if the offense involves eight or more direct victims, or if the total, combined loss to the direct and

indirect victims is more than $35,000, the person may be sentenced as provided in section 609.52, subdivision 3, clause (1); and

(6) if the offense is related to possession or distribution of pornographic work in violation of section 617.246 or 617.247, the person may be sentenced as provided in section 609.52, subdivision 3, clause (1).

Subd. 4. **Restitution; items provided to victim.**

(a) A direct or indirect victim of an identity theft crime shall be considered a victim for all purposes, including any rights that accrue under chapter 611A and rights to court-ordered restitution.

(b) The court shall order a person convicted of violating subdivision 2 to pay restitution of not less than $1,000 to each direct victim of the offense.

(c) Upon the written request of a direct victim or the prosecutor setting forth with specificity the facts and circumstances of the offense in a proposed order, the court shall provide to the victim, without cost, a certified copy of the complaint filed in the matter, the judgment of conviction, and an order setting forth the facts and circumstances of the offense.

Subd. 5. **Reporting.** (a) A person who has learned or reasonably suspects that a person is a direct victim of a crime under subdivision 2 may initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction where the person resides, regardless of where the crime may have occurred. The agency must prepare a police report of the matter, provide the complainant with a copy of that report, and may begin an investigation of the facts, or, if the suspected crime was committed in a different

jurisdiction, refer the matter to the law enforcement agency where the suspected crime was committed for an investigation of the facts.

(b) If a law enforcement agency refers a report to the law enforcement agency where the crime was committed, it need not include the report as a crime committed in its jurisdiction for purposes of information that the agency is required to provide to the commissioner of public safety pursuant to section 299C.06.

Subd. 5a. **Crime of electronic use of false pretense to obtain identity.** (a) A person who, with intent to obtain the identity of another, uses a false pretense in an email to another person or in a web page, electronic communication, advertisement, or any other communication on the Internet, is guilty of a crime.

(b) Whoever commits such offense may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

(c) In a prosecution under this subdivision, it is not a defense that:

(1) the person committing the offense did not obtain the identity of another;

(2) the person committing the offense did not use the identity; or

(3) the offense did not result in financial loss or any other loss to any person.

Subd. 5b. **Unlawful possession or use of scanning device or reencoder.** (a) A person who uses a scanning device or reencoder without

permission of the cardholder of the card from which the information is being scanned or reencoded, with the intent to commit, aid, or abet any unlawful activity, is guilty of a crime.

(b) A person who possesses, with the intent to commit, aid, or abet any unlawful activity, any device, apparatus, equipment, software, material, good, property, or supply that is designed or adapted for use as a scanning device or a reencoder is guilty of a crime.

(c) Whoever commits an offense under paragraph (a) or (b) may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Subd. 6. **Venue.** Notwithstanding anything to the contrary in section 627.01, an offense committed under subdivision 2, 5a, or 5b may be prosecuted in:

(1) the county where the offense occurred;

(2) the county of residence or place of business of the direct victim or indirect victim; or

(3) in the case of a violation of subdivision 5a or 5b, the county of residence of the person whose identity was obtained or sought.

Subd. 7. **Aggregation.** In any prosecution under subdivision 2, the value of the money or property or services the defendant receives or the number of direct or indirect victims within any six-month period may be aggregated and the defendant charged accordingly in applying the provisions of subdivision 3; provided that when two or more offenses are committed by the same person in two or more counties, the accused may be prosecuted in any county in which one of the offenses was committed for all of the offenses

aggregated under this subdivision.

Subd. 8. **Release of limited account information to law enforcement authorities.** (a) A financial institution may release the information described in paragraph (b) to a law enforcement or prosecuting authority that certifies in writing that it is investigating or prosecuting a crime of identity theft under this section. The certification must describe with reasonable specificity the nature of the suspected identity theft that is being investigated or prosecuted, including the dates of the suspected criminal activity.

(b) This subdivision applies to requests for the following information relating to a potential victim's account:

(1) the name of the account holder or holders; and

(2) the last known home address and telephone numbers of the account holder or holders.

(c) A financial institution may release the information requested under this subdivision that it possesses within a reasonable time after the request. The financial institution may not impose a fee for furnishing the information.

(d) A financial institution is not liable in a criminal or civil proceeding for releasing information in accordance with this subdivision.

(e) Release of limited account information to a law enforcement agency under this subdivision is criminal investigative data under section 13.82, subdivision 7, except that when the investigation becomes inactive the account information remains confidential data on individuals or protected nonpublic data.

History: *1999 c 244 s 2; 2000 c 354 s 3; 2003 c 106 s 1-3; 1Sp2003 c 2 art 8 s 9; 2005 c 136 art 17 s 32-36; 2010 c 293 s 2-4; 2021 c 25 s 1; 2023 c 52 art 9 s 3,4*

OFFICE OF THE HENNEPIN COUNTY ATTORNEY

MICHAEL O. FREEMAN COUNTY ATTORNEY

October 25, 2021

The Honorable Martha Holton Dimick
Judge of District Court
300 South Sixth Street
Minneapolis, MN 55487
Delivered via email
RE: *State v. Jerry Westrom*
Court File 27CR193844

Dear Judge Holton Dimick:

The State writes to the Court to document the events of the last weeks since defense counsel disclosed prior representation that gave rise to concern over potential conflicts of interest. A timeline is provided from the State's perspective:

> On October 6, 2021, a hearing was held before the Court on the admissibility of defense expert Dr. Nirenberg's latest report. The Court found that the report constituted late discovery and would not be admitted at the trial date of November 1, 2021. After court, Mr. Darren Borg and I attempted to meet with defense counsel regarding potential settlement offers in the hallway outside the courtroom. However, Mr. Meshbesher abruptly informed the State that he did not want to talk. Shortly thereafter, I was informed that Mr. Meshbesher had arrived at the County Attorney's Office and wanted to speak with me.

The following information was told to me by Mr. Meshbesher. It is being offered to show the State's understanding of the disclosure as of October 6, 2021. It is not as being offered as an attempt to demonstrate the underlying facts of the prior representation:

> • Mr. Meshbesher was visibly rattled and said he had something to disclose. He went on to tell me that Judge Holton Dimick had previously called him to her chambers to ask him to represent Her Honor's niece in a civil case related to a car accident. Mr. Meshbesher said that he and his firm took on the case and represented the Judge's niece. Mr. Meshbesher indicated that a favorable outcome was reached in that case. Following that, Mr. Meshbesher reported that he went back to Judge Holton Dimick to thank her for the referral.
> • Mr. Meshbesher further stated that he had only recently disclosed this representation to Jerry Westrom, who was quite upset to hear of it and questioned why it was only being disclosed at this point. Mr. Meshbesher reported that Mr. Westrom was concerned about appearing in front of Judge Holton Dimick given this prior relationship and wanted her removed. Mr. Meshbesher said he asked his staff to pull the file from Judge Holton Dimick case and was going to file "a motion" in Mr. Westrom's case as a result.
> • Mr. Meshbesher said he was concerned about the potential conflicts involved and was worried "the Board" would take issue with it. He said it is his experience that "the Board"

> will find issue with what practicing lawyers do when really no such issue exists.

Mr. Meshbesher **did not** indicate the dates of this representation. Given the nature of the disclosure and Mr. Meshbesher's temperament while making the disclosure, the State was left with the distinct impression the representation was occurring or had occurred during the pendency of this criminal case. It is for this reason that the State believed a conflict of interest may exist and led to the State's request for a chambers conference.

On October 8, 2021, the parties had a chambers conference with the Court and subsequently placed the information on the record. At the hearing, Mr. Meshbesher had the file from the prior representation, but was unable to answer basic questions as to the dates of representation and the results of settlement. He did note that the attorney from his firm who handled the case was on vacation and could provide additional information to the parties the following Monday, October 11, 2021. Based on the Court's calendar and the proximity to the trial date of this disclosure, the decision was made to strike the November 1, 2021 trial date.

On October 13, 2021, the State received an inquiry from WCCO. The inquiry reported that Mr. Meshbesher shared that he had recently made the disclosure about the prior representation and that the County Attorney's Office saw that as a potential conflict. WCCO sought further comment from the State.

> On October 18, 2021, the State sent an email to Mr. Meshbesher requesting the information he indicated he was going to provide the Court and counsel. Shortly thereafter, Mr. Kevin Gregorius sent a memo dated October 14, 2021, and authored by Mr. Richard Student providing additional cursory information about the prior representation.

Based on all available information, the State does not believe the prior representation poses a conflict of interest. Even though the underlying facts of the prior representation are not completely clear, what is clear is that the case concluded before the commencement of the instant action. The State appreciates the Court's patience as it worked to obtain and review the applicable information.

In light of the disclosure made by Mr. Meshbesher, which initially did not include necessary dates and timelines, and given other statements made during the disclosure, it was reasonable for the State to request the hearing and clarify this issue further with the Court and counsel.

The question remains as to why defense counsel chose to disclose this information on the eve of trial and after a series of adverse rulings, including a ruling by the Court to exclude defense expert testimony due to late discovery. The latter adverse ruling, of course, occurred immediately prior to the disclosure and ultimately resulted in a continuance of the trial date. The State has concerns that this disclosure was made at that particular time knowing it would result in a continuance and thus alleviating the issue of late discovery.

Sincerely,

s/
Michael J. Radmer
Assistant County Attorney

cc: Steven Meshbesher, Counsel for Jerry Westrom

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

Transcript of Proceedings
Court File No. 27-CR-19-3844

vs.

Jerry Arnold Westrom,
Defendant.

The above-entitled matter came before the Honorable Martha Holton Dimick, one of the Judges of the above-named court, in Courtroom 753, Hennepin County Government Center, 300 South Sixth Street, Minneapolis, Minnesota, on the 1st day of November, 2021, at 10:41 a.m.

APPEARANCES

Michael Radmer and Darren Borg, Assistant Hennepin County Attorneys, appeared as counsel for and on behalf of the Plaintiff.

Steven Meshbesher, Meshbesher and Associates, appeared as counsel for and on behalf of the Defendant.

Andrew Tyler, Tyler Law, appeared as counsel for and on behalf of the Defendant.

Defendant, Jerry Westrom, appeared in person.

Tyler Jensen
Official Court Reporter
Minneapolis, Minnesota

PROCEEDINGS

THE COURT: This is the matter of *The State of Minnesota versus Jerry Westrom*, court file number is 27-CR-19-3844. Could the parties please note their appearances started with the State?

MR. RADMER: Mike Radmer and Darren Borg for the State.

MR. MESHBESHER: Your Honor, Steve Meshbesher and Tyler -- Tyler Andrew [*sic*] for the Defense --

THE COURT: Okay.

MR. MESHBESHER: -- and the Defense is present -- the Defendant is present, Your Honor.

THE COURT: We're here today to get a new trial date, so let's get a new trial date. The Court did realize after the arguments by Counsel the last time we were here that any conflict doesn't exist in this case with regards to Mr. Meshbesher's representation of my niece in 2013. The Court did hear at that time that that representation ended in 2017, and I believe Mr. Westrom's case wasn't charged until two years later, which was sometime in 2009 -- 2019, so there's no conflict here, so let's get on with this case. This case is extremely old. I'd like to get this done and scheduled as soon as possible. I think you all have my latest order. I think we've addressed all the issues in this case; any pretrial issues, they've all been handled. I would assume people are prepared for trial so we shouldn't have to have a long trial day, other than to allow the State to have enough time to subpoena their

witnesses. So, let's pick a date. What do we have available?

MR. MESHBESHER: Your Honor, may I state something for the record, please?

THE COURT: Yes, you may.

MR. MESHBESHER: Thank you.

I received a supplemental report on Friday, October 29th, from the State, and it is -- this is a several page report from an investigator with the County Attorney's Office, Investigator Martinson. He states in that report that on October 6th, he received a request from Mr. Borg and Mr. Radmer to interview a potential witness in prison, Oak Park Heights, maximum security, who's serving a life prison sentence on a first-degree murder case. He then made arrangements with this other investigator to go to Oak Park Heights and they – he says he went on Monday, October 25th, and the two of them interviewed Mr. Carlton. They -- somebody read his *Miranda* warning, I don't know who, because I don't have their notes and I don't have the digital recording. They asked him a series of questions, took notes, and recorded it. I don't have the notes and I don't have the digital recording. Evidently, Mr. Carlton was a suspect in this case going back to 1993. His DNA was found on a comforter on the bed in which Ms. Childs was found murdered. The BCA said they could not exclude him with the DNA profile. And the investigator was able to show that he was out in the community at the time of Ms. Childs' murder, and then evidently a year later, he committed another murder, and he was found guilty.

I still have not received a witness list from the

State. I have received that recent disclosure, and -- on Friday, and I then would like him to be Writted in as a witness. I'm going to need the assistance of the Court to sign a Writ, or the State has got to acknowledge they're going to Writ him in, but one of us has to Writ him in. I'm going to need him in Court. I need the – I made a supplemental disclosure of witnesses on October 29th, on Friday, after I received this. I then made a second supplemental disclosure of witnesses because I found out this Investigator Krenz, who was part of this interview on October 25th, works for the Department of Corrections. I don't know if he works at Oak Park Heights or not. I do know him by name from reading the summary. Investigator Krenz evidently took notes; I don't have those notes.

The two officers -- investigators, who interviewed Mr. Carlton, tried to figure out if he was free at the time of this murder, and they talked to three witnesses, Tammi Larson, Tamara Foley, and Stacy Torgerson. I don't have their reports or statements. Evidently, when he was -- he was also convicted of two rape cases in 1978. He got out of prison, and he was free at the time of Ms. Childs' murder, and there was another murder a year later. The Hennepin County Probation Department issued a PSI determining where he lived at the time of Ms. Dover's (phonetic) murder, but it also included the time of Jeanne Childs' murder. He has been assigned a case worker; I don't know that person's name at Oak Park Heights. I gave the State notice on Saturday. I then filed a motion in limine on Friday, and then I did another disclosure of witnesses, but what I don't have is -- on Saturday I filed a supplemental demand for discovery to, one, the records -- arrest records, Complaints, police reports, statements, audio recordings, video recordings, and documents,

regarding this Mr. Carlton, who is in prison now for murder, and a probation violation for forgery. The records regarding the rape and murder of Jodie Dover (phonetic), which occurred a year after this one, I have the file number but I don't have the file, and I'm demanding the discovery of that file.

I'm also asking for the discovery in the two rape cases from 1978 so I can identify the people who he raped and interview them with my investigator, who's a formal federal agent. I want the police file involving Mr. Carlton regarding these cases, cause evidently the State told their investigator to go out and there and interview him, so I want to read these reports that they looked at for relevancy to this case. I don't know if this interview -- they made reference to the interview being recorded, but not -- I don't know if it was video recorded, so I need to find out if there's a video of this recording. It occurred last Monday, so I apologize. I don't have these things. There was reference in the summary where the investigator told Mr. Carlton – or asked Mr. Carlton, can they come back and interview him again with some photographs, but they want to speak to Mr. Borg and Mr. Radmer first before they do that, and evidently Mr. Carlton answered that reply.

So, there's a lot of things that wound up on my desk on Friday. I've been working all weekend to try to keep the Court up to snuff. I sent a copy of them to the State. I think that's pretty much it, but I don't know. I'm only going by what I got on Friday, and I'm making those demands as to working this weekend, Saturday and Sunday. I don't know if you even have a copy, Judge. I sent them to you electronically. Yes, this is an old case, it was a cold case. Mr. Carlton was a suspect since 1993. His name is on a suspect list. And the State evidently felt they should go interview

him in prison, and instead of not answering questions, he agreed after they read him a *Miranda* warning. He also told them during the interview that if he says something, that they want -- the State wants to use, he refused to say those things in Court cause he doesn't want to be labeled a snitch in prison cause he's there for the rest of his life.

So, I have some work to do on Mr. Carlton based upon the information I just received on Friday. I would apologize to the Court if I had known about these things prior to Friday, but I didn't. I found about it on Friday, and after I read the report by Investigator Martinson, who works in the County Attorneys Office, not the case agent for the cold case with the Minneapolis Police, and then he met another investigator with the Department of Corrections and the two of them went into the prison to interview Mr. Carlton, and he agreed to the interview after being read a *Miranda* warning. So, I have a lot of things that I have to obtain in order to adequately defend Mr. Westrom.

THE COURT: Mr. Radmer?

MR. RADMER: Thank you, Judge. As a preliminary note, the case agent in this case, Sergeant Karakostas, is retired and living on the east coast. We asked Investigator Bernie Martinson from our office to do the interview. It's my understanding he had to meet with an investigator from DOC to gain access to the facility which is not uncommon. Judge, I would note that as Mr. Meshbesher noted, Mr. Carlton has been on the State's radar and the Defense radar since his first notice in the case since 1993.

THE COURT: I know that.

MR. RADMER: The Defense and I had conversations about Mr. Carlton. In fact, Mr. Meshbesher has, in previous conversations, indicated to me that they believe he's the suspect in this case, so this is not a massive surprise to the Defense. It was merely in case preparation. We wanted to have an updated statement from Mr. Carlton given the length of time that passed from '93 until today, so we asked our investigator to go obtain that. I'm happy to provide the recording of that to Defense.

THE COURT: Okay. How soon can you get that to the Defense?

MR. RADMER: I'll ask Ms. Fling (phonetic), our paralegal, to do it today.

THE COURT: Okay. And long did this interview take?

MR. MESHBESHER: It lasted approximately 35 minutes, Your Honor.

THE COURT: Okay.

MR. MESHBESHER: But there were handwritten notes by the two investigators, and I need the notes. And then I need the underlying police reports, and then I made a demand for discovery of witnesses because of the identity issue.

THE COURT: Mr. Meshbesher, isn't it true that you did have all of this information, or you knew about all of this from the start of this case? And I'd like to know why it is that you didn't do due diligence and investigate this matter on your own if you knew

this was a potential suspect in the case? And why would you now expect the State to do the work for you? And what the State has already done, I think, limits exactly what needs to be produced here. There is specifically an interview that took place. Was that interview taped?

MR. RADMER: Yes, it was, Judge.

THE COURT: Okay. And so, you can provide a copy of the taped interview?

MR. RADMER: Of course, Judge.

THE COURT: Okay. And then along with a transcript of that interview?

MR. RADMER: Judge, we will make a transcript if that's the Court's desire.

THE COURT: Okay. If there's -- let's get a transcript to Mr. Meshbesher.

MR. MESHBESHER: Your Honor, as long as we're on that topic. It was a video?

MR. RADMER: I believe I saw the file's an mp3, which I think is audio only, but I will have to see if there is video.

HE COURT: And was there any subsequent police report that was generated from this interview?

MR. RADMER: There was a report by Investigator Martinson, which is the one Mr. Meshbesher is referring to, but nothing into the MPD

file that I'm aware of.

THE COURT: Okay. If you could just get that produced?

MR. RADMER: It already has, Judge.

THE COURT: Thank you. And then you said you can get this to him, like, this week?

MR. RADMER: Judge, I will do the recording today, and I'll ask our transcription unit to get working on the transcript as soon as possible.

THE COURT: Okay. And Mr. -- is this -- do we have a witness list? A more current witness list?

MR. MESHBESHER: I've never received one from the State. I have provided one, they have not.

MR. RADMER: And Judge, it was the State's intention to provide one in advance of trial knowing that we weren't here for trial, we didn't produce it yet, but we will certainly get one to Mr. Meshbesher.

THE COURT: Okay. Let's get a -- cause I'll need that, too; a copy of the witness list -- the State's witness list.

MR. MESHBESHER: Your Honor, I have provided two witness lists. One is a supplement to the first.

THE COURT: All right. That's fine. Okay. And can I have an estimate as to how long this trial is going to take?

MR. RADMER: Judge, I would believe it would be two weeks.

THE COURT: Okay. Okay. Well, let's pick a date.

MR. RADMER: And Judge, for the Court's knowledge, we've talked to three of our primary witnesses, Sergeant Karakostas, Mark Ulrick, and Andrea Feia, who is the DNA analyst. We do have their conflicts through March, so we -- we hope we can find something that works.

THE COURT: All right.

MR. MESHBESHER: Your Honor, I should note, I'm reading from the Investigator Martinson's summary saying that -- that Mr. Carlton said that he would look at a photo display if one was presented to him, and --

THE COURT: Was one presented to him?

MR. RADMER: To my knowledge, there was not.

THE COURT: Okay. And then are you planning on presenting one perhaps during the trial or at any point --

MR. RADMER: Not at this time --

THE COURT: -- during your case in chief?

MR. RADMER: I'm sorry, Judge. Not at this time.

THE COURT: Okay. Let's get a trial date.

THE CLERK: I'll look a month. When do you want to start with?

THE COURT: As soon as possible. We've got time this month and we've got times next month.

THE CLERK: So, December, we have the 6th --

MR. MESBESHER: Your Honor, if I may answer your earlier questions why I didn't do that because I was under the pre -- assumption after trying several cases that if they had submitted a witness list with Mr. Carltons name, it would be their obligation to provide these things to me under the Rules of Criminal Procedure and Evidence. They didn't follow with that.

THE COURT: I'm not going to argue with you, Mr. Meshbesher, about this, because as far as I'm concerned, this case has been pending since February of 2019, so come February of 2022, we're looking at three years, and it's already a cold case. I think you all, as experienced attorneys, know what your responsibilities are, know what your due diligence is. I understand, Mr. Meshbesher, you have had several attorneys; I think there have been probably about four or five attorneys working with you on this case, and I just believe that things might have been handled a little differently by both parties.

MR. MESHBESHER: Your Honor, I'm not going to argue with the Court --

THE COURT: Let's pick a date.

MR. MESHBESHER: Excuse me. I need to make a record. I'm not going to argue with the Court either, but I think the Court's wrong.

THE COURT: That's your prerogative, Mr. Meshbesher.

MR. MESHBESHER: It is, but it's also the Supreme Court's prerogative.

THE COURT: Okay.

MR. MESHBESHER: And I'm going to make a record whether you like it or not.

THE COURT: You go ahead, and you make your record, Mr. Meshbesher.

MR. MESHBESHER: I'm going to make my record, Your Honor.

THE COURT: You've got the floor.

MR. MESHBESHER: Thank you. The deal is, Judge, Mr. Carlton, if they were going to call him as a witness, if they were going to interview him, that's a very key component to this case, and now that I have it, under the Rules of Evidence, they have to provide that to me. And then I, because my client, I thought, in my experience, is presumed to be innocent, and I don't have to do anything unless they provide a list of people. So, I can prepare based on that list. I never received the list. I gave them a list. And I am going off of advanced knowledge of what they were supposed to give me because the rules require it. I'm not making up rules; I'm going by the rules. Your Honor, I'm not

arguing with the Court, I'm following the rules of the Court. So, you can look at me and stare at me if you'd like to, and I don't care. What I'm doing is trying to defend my client on a first-degree murder case where he's presumed innocent, and they have the burden of proof.

THE COURT: Let's not make this personal, Mr. Meshbesher.

MR. MESHBESHER: Well, Your Honor --

THE COURT: I hear you --

MR. MESHBESHER: -- you are personalizing it -

THE COURT: I hear you. No. I hear you.

MR. MESHBESHER: -- and I'm responding to your personalization.

THE COURT: I hear you.

MR. MESHBESHER: No, you don't.

THE COURT: Anything else?

MR. MESHBESHER: And the Supreme Court's going to listen to it.

THE COURT: Anything else?

MR. MESHBESHER: Yes.

THE COURT: That's pertinent to this case?

MR. MESHBESHER: Yes, Your Honor. You are making it personal.

THE COURT: No, I'm not.

MR. MESHBESHER: You, you were.

THE COURT: No, I'm not.

MR. MESHBESHER: Yes, you were.

THE COURT: I'm not going to argue with you.

MR. MESHBESHER: And I resent that. Now you're lying about it.

THE COURT: Oh.

MR. MESHBESHER: Yeah.

THE COURT: Okay.

MR. MESHBESHER: Yeah.

THE COURT: All right.

MR. MESHBESHER: And when it came to your niece --

THE COURT: Anything else?

MR. MESHBESHER: Well, wait a minute, I'm not done.

THE COURT: Anything else?

MR. MESHBESHER: You said I had the floor,

Your Honor.

THE COURT: I'm done listening to you, Mr. Meshbesher.

MR. MESHBESHER: You said you couldn't even remember it.

THE COURT: I'm not going to take your insults, Mr. Meshbesher. I think we'll take a recess and perhaps when I come back people will have calmed down and we can resume picking a trial date. Thank you.

MR. MESHBESHER: Goodbye, Judge.

(Off the record from 11:05 a.m. through 11:15 a.m.)

THE COURT: Okay. We're going to do a reset here. And I just have a couple questions for the State. Mr. Radmer, are you planning on putting Mr. Carlton on your witness list?

MR. RADMER: Not at this time, Judge. No.

THE COURT: When -- ever? Is there any point in reconsidering this? Or --

MR. RADMER: Perhaps, Judge. But right now, I don't see the State calling the Defense's alternative perpetrator if that's how he's identified.

THE COURT: Okay.

MR. RADMER: He's --

THE COURT: All right. And did any of the information that you discovered during this interview, did -- is there anything new about the information? Anything of any relevance?

MR. RADMER: Not from the State's perspective, Judge. Mr. Carlton denied being involved in the instant case. He has confessed to another murder and, I believe, two criminal sexual conduct cases, but said he did not kill Ms. Childs in this instance.

THE COURT: All right. And with regards to the reference to the photos, do you know which photos were being -- were going to be presented to him and what the reason was for presenting those photographs?

MR. RADMER: I don't, Judge, know which photographs, and I'd only be able to speculate as to the reasons, as whether or not, at that time in the 90s, Mr. Westrom would have been known to Mr. Carlton at any point, but beyond that, I think it was just Mr. Martinson doing his due diligence as an investigator.

THE COURT: Okay. Okay. All right. I'm satisfied. Let's get a trial date.

MR. RADMER: Judge, in looking at the schedule of the State and its witnesses, the State is asking for mid-February, otherwise we'd have witness unavailability or State unavailability in the interim.

THE COURT: Okay. And who was -- who was unavailable?

MR. RADMER: And I apologize, Mr. Borg has rejoined us. He was summoned by Judge Quam, so --

THE COURT: Oh, okay. That's fine.

MR. RADMER: Sergeant Karakostas is unavailable January through mid-February. Mr. Ulrick is unavailable the last two weeks in January. Ms. Feia is unavailable mid-March, but we would hope to have it in before then.

THE COURT: Okay. And then -- and you're saying two weeks?

MR. RADMER: Yes, Judge. That's our best estimate.

THE COURT: All right. And Mr. Meshbesher, any objection to a February trial date?

MR. MESHBESHER: Well, Your Honor, I talked to Mr. Radmer about my desire to have Mr. Carlton brought in as a witness, and I have to get all this discovery that I believe he's entitled to give me, but you seem to think that it's my obligation to do it on my own, so I think a March date would be appropriate, so I can get all this stuff. And then I also have to do a Writ. I talked to Mr. Radmer briefly when the Court was off the bench and Mr. Radmer explained that he's not going to do it, and if I want him, I have to do it. So, I'm going to have to prepare a Writ for your signature, and I'm told that it's about a four-to-six-week process to get arrangements with the Hennepin County Sheriff to bring him in from Oak Park Heights. I don't know that, that is the best guesstimate that I have. I am just telling you what I've been told on a guesswork basis. So, I thought March would make it safer, but I am going to Writ him in. I might Writ in these other people involved with Mr. Carlton because Mr. Carlton also

admitted during the interview, that the State forgot to mention, that he had -- during the interview process with Investigator Martinson that he had been in the Horn Tower, where this murder took place. He then admitted he'd been there a couple of times. He stated that he'd gone there to smoke crack cocaine with somebody.

THE COURT: What dates do we have in March?

THE CLERK: March dates, we would have the 7th and the 14th.

MR. MESHBESHER: The 14th would work for me, Your Honor.

MR. RADMER: Judge, Ms. Feia, who is a analyst in this case is out 11th through the 21st.

THE COURT: In March?

MR. RADMER: Yes.

MR. MESHBESHER: The 28th works.

THE COURT: The -- which one is? From what date to what date?

MR. RADMER: She said out from the 11th to the 21st, so if we get Monday the 21st, that way she'll be back in the Country or back from her trip.

THE COURT: Why not the 7th?

MR. RADMER: Judge, with jury selection, I'm not sure we'd have her on by that Friday.

THE COURT: All right. So, you're asking for March. What's my next trial date?

THE CLERK: The 28th is a trial date.

MR. MESHBESHER: That works.

MR. RADMER: That works.

THE COURT: All right. We have a March 28th trial date in 2022. Anything else?

MR. RADMER: Not from the State, thank you.

THE COURT: All right. We are adjourned.

(The proceedings were adjourned at 11:22 a.m.)

STATE OF MINNESOTA)

COUNTY OF HENNEPIN)

COURT REPORTER'S CERTIFICATE

I, TYLER JENSEN, an Official Court Reporter in and for the Fourth Judicial District of the State of Minnesota, do hereby certify that I have transcribed the foregoing transcript from the CourtSmart audio recording, and that the foregoing pages constitute a true and correct transcript of the proceedings taken in connection with the above-entitled matter to the best of my ability.

Dated: February 5th, 2023

/s/*Tyler Jensen*
Tyler Jensen
Official Court Reporter
C859 Government Center
300 South Sixth Street
Minneapolis, MN 55487
(612) 596-6576

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ATTORNEY MESHBESHER: No, Your Honor.

THE COURT: Okay. We're off the record. Thank you.

(Recess taken.)

THE CLERK: All rise for the jury.

(Jury summoned.)

THE COURT: All right. Please be seated. And we're back on the record. Mr. Borg.

ATTORNEY BORG: Thank you, Your Honor. The State calls Special Agent Chris Boeckers.

ATTORNEY MESHBESHER: Your Honor, before we begin, I was going to make a record of something before Mr. Boeckers starts his testimony. Can we excuse the jury for about five minutes? Or how do we want to do this?

THE COURT: Counsel, approach.

(Sidebar discussion between attorneys and judge.)

ATTORNEY MESHBESHER: Your Honor, I'll be right back.

THE COURT: Yes.

(Pause.)

THE COURT: All right.

ATTORNEY MESHBESHER: Thank you, Your Honor.

THE COURT: Yes. So we're back on the record. And why don't you call your next witness again, please, Mr. Borg. again

ATTORNEY BORG: Absolutely. State calls Special Agent Christopher Boeckers.

THE COURT: Good afternoon, sir.

THE WITNESS: Good afternoon.

THE COURT: Please approach the witness stand. And when you get to the chair, please remain standing.

THE CLERK: Please raise your right hand.
(Witness first duly sworn on oath.)

THE CLERK: Please have a seat.

THE COURT: Yeah, it's been a little touchy today, so it's best you don't touch it. Sir, please state your full name for the record and spell it.

THE WITNESS: Christopher J. Boeckers, B-O-E-C-K-E-R-S.

THE COURT: All right. Thank you. Go ahead, Mr. Borg.

ATTORNEY BORG: Thank you.

DIRECT EXAMINATION

BY ATTORNEY BORG:

Q. Good afternoon, sir.

A. Good afternoon.

Q. What is your current employment status?

A. I'm currently a contract employee with the US Attorney's Office here in Minneapolis.

Q. All right. So let's go back. And, first of all, describe for the jury, please, your post-high school education.

A. I have a four-year degree from St. John's University, bachelor of arts in psychology and a coaching license and a master of arts in counseling from the University of North Dakota.

Q. And after your schooling, or perhaps during your schooling for some of those more advanced degrees, what jobs have you held relative to law enforcement? And let's start with the first, please.

A. Originally I was a professional support employee with the FBI here in Minneapolis. And then I was a deputy sheriff, patrol deputy, in Wright County, Minnesota.

Q. Let me stop you there. So initially you worked for the FBI. What years was that?

A. December 1991 until June of 1994.

Q. And describe your duties with the FBI during that period.

A. I was a dispatcher and a file clerk.

Q. And then you transferred to the sheriff's office, yes?

A. Yes.

Q. And what year was that?

A. First I obtained my POST, Minnesota Peace Officer Standards and Training license, and then was hired by the Wright County Sheriff's Office in May of 1995.

Q. And how long did you work for the Wright County Sheriff's Office?

A. I worked for Wright County until November 1998.

Q. And for those who may not be familiar with Wright County, where is it in relation to us here in Hennepin County?

A. It's adjacent to Hennepin County just northwest of here. The area I patrolled, Rockford and Delano, and the county extended up to St. Michael, Otsego and west to Clearwater and Cokato.

Q. And describe your duties for the Wright County Sheriff's Office.

A. Originally I did park patrol in the first summer and then was hired as a dispatcher. And then when a position opened as a patrol deputy, I transferred into the patrol.

Q. And what year did you leave the Wright County Sheriff's Office?

A. I left November 1998.

Q. And then where did you go from there, professionally speaking?

A. In November 1998, I went to Quantico, Virginia, for the FBI Academy, new agent academy.

Q. And did you complete the training to become an FBI agent?

A. I did.

Q. And what year did you complete such training?

A. That was in March of 1999.

Q. And then once you completed the training, were you then a member of the FBI or Federal Bureau of Investigation?

A. I was.

Q. And why don't you walk the jury then through your years working with the FBI?

A. In March of 1999, I reported to Detroit field office where I was assigned to the violent crime major offender squad and primarily worked bank robberies and violent crime in Detroit. In 2001, I transferred to the Grand Forks, North Dakota, resident agency where I primarily worked violent crime on the Spirit Lake Indian Reservation and crimes throughout northeastern North Dakota. And a case that took up a lot of our time was the kidnapping and murder of Dru Sjodin, and I was the case agent for that.

While in Grand Forks resident agency, I also was the primary coordinator for the FBI field division here for the Behavioral Analysis Unit. I was a Crimes Against Children coordinator and on the Evidence Response Team. I also was selected as one of the original members of the FBI's national Child Abduction Rapid Deployment Team.

Q. All right. And then following that assignment?

A. I was promoted to Washington, DC, as a supervisor for an 18-month detail at the Indian Country/Special Jurisdiction Unit where I had program oversight over the FBI's responsibilities to Indian reservations throughout the United States as well as the squad -- unit oversaw crimes on high seas or airplanes.

Q. And then following that assignment?

A. I returned to Minnesota and worked for ten months on the international terrorism squad here in Minneapolis before I was promoted to be the supervisor over the outstate resident agencies here in

Minnesota where I oversaw all the programs that the FBI has jurisdiction over within the outstate.

Q. So what year are we talking here?

A. That would have been in the fall of 2011 until the fall -- until March of 2015.

Q. And then in March of 2015, did your assignment change?

A. It did.

Q. Tell the jury, please.

A. In March of 2015, I was still the supervisor. However, in November of the previous year, I had done a cold case review of the Jacob Wetterling investigation. And so in March of that year, I knew that I expected that there was going to be some positive developments that were going to require attention.

Also at that time Dr. Karie Gibson from the FBI had been working with Sergeant Chris Karakostas on some cold case murder investigations, and she was promoted in March of 2015 to the Behavioral Analysis Unit and she asked if I would be willing to take her position on a task force that there was proposed to work with the Minneapolis Police Department on cold case murders.

Q. All right. And then that explains your involvement in this particular case here, yes?

A. Yes.

Q. All right. So Dr. Gibson, FBI agent, was promoted and you assumed her role in a joint task force with the Minneapolis Police Department to investigate cold cases?

A. That's correct.

Q. And I know that we've thrown around the term cold case. What is a cold case?

A. Cold case is a popular term for cases that have gone unresolved for a while or that there just doesn't seem to be any recent viable leads for those cases. I prefer to use the term long-term unsolved or just unresolved cases.

Q. All right. Now, you mentioned the name Sergeant Christopher Karakostas of the Minneapolis Police Department. Was he the individual from the Minneapolis Police Department homicide unit that was tasked to be partnered with the FBI on looking at such cases?

A. Yes, he was.

Q. And as -- during the course of your testimony over the rest of today and probably the first part of tomorrow morning, we'll be talking about efforts that both you and Sergeant Karakostas made to try to resolve the case that brings us here before this jury, yes?

A. Yes.

Q. And at present, is Sergeant Karakostas present – is he with us or has he since passed on?

A. He's -- he -- Sergeant Karakostas passed away in early December of last year.

Q. Now, when you took over this assignment for your predecessor, Dr. Gibson of the FBI, was there any particular type of unresolved or cold case, whatever term you want to apply to it? Any particular type of case that was being looked at?

A. Not necessarily.

Q. All right. So just any unresolved case that maybe Minneapolis had on their books that the FBI was assisting to try to help resolve?

A. Correct. Minneapolis or within the three-state area.

Q. Now, as part of working on a long-term unresolved case, I think to use your preferred term, is one of the first things that's important to do to try to obtain all existing police reports that exist on a case to try to determine what was done?

A. Yes.

Q. And why is it important to try to determine what was done? Does that help frame needs that might be still yet to be done?

A. Correct.

Q. And in so doing, did you and your partner, Sergeant Karakostas, review all available police reports related to the death of Jeanie Childs on June 13th of 1993?

A. We did multiple times.

Q. And in so doing, first of all, why don't you tell us when this work initially began? When was it that you and Sergeant Karakostas began looking at this case here?

A. We started looking at it in the spring of 2015 and opened a formal case with the FBI in May of 2015 and then met with the BCA forensic scientists. We met with Laura Nelson and Andrea Feia in mid-July of 2015.

Q. And why was it important during your initial steps here to meet with members of the Bureau of Criminal Apprehension?

A. When looking at -- when looking at successful resolutions of long-term unsolved cases, one of the things that, as a best practice, is to look at what technology hasn't been applied previously and look at the actual evidence at the crime scene or evidence that had been obtained earlier and look at ways maybe that either the technology has changed or new technology that could be applied to the case. And we wanted to meet with Laura and Andrea for education on our purposes and to get their input on what they thought might be best to -- in this case, to potentially test. And also we wanted to get more information on the CODIS database and why people would hit or not hit on the databases in Minnesota.

Q. Sure. And all right. So you're reviewing police reports and you're also consulting with the BCA to, you know, try to see what they've done and maybe what they can do in the future, given new technology.

In your review of the police reports back on this case, did you learn that after initial scene investigation, this case had been turned over to a Detective Solitros of the Hennepin County Sheriff's Office?

A. We did.

Q. And based upon your early review of the case, did you learn that Detective Solitros, by the time you and Karakostas got involved, did you learn that Detective Solitros had, in fact, passed on as well?

A. He had.

Q. And in reviewing the case, and why don't you give the jury sort of a thumbnail sketch of your understanding of the case as it was left by investigators. And we'll talk a little bit more about Solitros's work. But what was your understanding of the case?

A. On our initial review, we read the crime scene reports and the interview reports and also had looked at Sergeant Barb Moe of the Minneapolis Police Department. She had also looked into the case in 2012 as part of a cold case review, and so we reviewed her notes as well. We were aware that there was items at the crime scene that potentially could be tested as well as unknown footprints left in blood on the floor of the bedroom at the crime scene.

Q. Now, in reviewing the reports, specifically those of Detective Solitros, did you come to understand that he had -- he was one of the people who had attended the autopsy of Ms. Childs?

A. He did.

Q. And were you also made aware that Detective Solitros, on June 14th of 1993, had gone to the Horn Towers to try to locate potential witnesses to this case?

A. Yes, that was in his report.

Q. And based upon that, did Detective Solitros indicate any eyewitnesses had ever been located? And when I say eyewitnesses, I mean people who actually saw the crime being committed.

A. No. There was nothing in the report indicating that anyone actually observed the murder taking place.

Q. And from reviewing reports prepared by Detective Solitros, what was your understanding as to whether or not a murder weapon had ever been recovered?

A. No murder weapon had ever been located.

Q. And in reviewing the reports of Detective Solitros, did you come to learn that on June 15th of 1993 that Detective Solitros had interviewed Mr. Arthur Gray?

A. Yes.

Q. And did you also learn from reviewing the reports of Detective Solitros that he had also interviewed a Mr. Maurice Hampton?

A. Yes.

Q. And in reviewing the reports of the Minneapolis Police Department, in particular, a Sergeant McKenna, did you learn that a search had been conducted for the presence of a possible weapon on the grounds of the apartment complex?

A. Yes. The window to the apartment was -- the screen was missing. So officers had searched on the ground level to see if any evidence had been thrown out the window.

Q. And based upon your review of the file, again, had any murder weapon or suspected murder weapon ever been recovered from the grounds around the apartment complex?

A. No.

Q. Did you learn from reviewing the reports of Detective Solitros that on or about September 8th of 1993, he made arrangements for Mr. Gray to come down and submit to fingerprint and footprints?

A. Yes.

Q. And in reviewing the reports and also consulting with the BCA, did you learn that Mr. Gray had, in fact, provided fingerprints, palm prints, footprints as well as a DNA sample?

A. Yes, he did. I think it would have been considered a blood sample in '93, not a DNA sample.

Q. Yes. Thank you for correcting me. I'm,

unfortunately, stuck using contemporary terms. But in 1993, the sample would have been a blood sample for whatever testing was available at the time?

A. That's correct.

Q. Now, over your review of the file that was left behind, did you come to understand that over the weeks, months and even years following the murder that Detective Solitros had attempted to locate and identify persons of interest?

A. Yes.

Q. And did you come to learn that persons of interest, as they'd come up, would then be excluded?

A. Correct.

Q. Now, in reviewing the reports of Detective Solitros, despite all the efforts, had a suspect ever been formally identified and/or charged?

A. No.

Q. And, again, just to repeat, was a murder weapon ever found?

A. No.

Q. Now, based upon this, the status of the case, a few moments ago you mentioned that Sergeant Barb Moe of the Minneapolis Police Department in 2012 had some involvement. Was she also a sergeant with the Minneapolis Police Department who at that time in 2012 was working cold hit cases?

A. That's correct.

Q. And in reviewing the file, are you familiar with her work?

A. I am.

Q. And why don't you summarize the work that she did as you understand it?

A. She had taken items of evidence to the BCA for additional DNA testing, in particular, a blue towel that was in the bathroom at the crime scene.

Q. And from consulting with the BCA in -- around that time of 2012, were you made aware that at that time an unidentified DNA profile had appeared on a number of items from the apartment that at least matched to each other?

A. Correct.

Q. And based upon the fact that there was an unidentified DNA profile from multiple items in the apartment that matched to itself, was it sort of a priority to try to determine whether or not you could find someone who would match that profile and thus matched to those items within the apartment?

A. Yes.

Q. Now, as you and Sergeant Karakostas, knowing that there was that unidentified DNA profile within the apartment and knowing that that might be of importance, besides that, was there also your understanding of some bloody or foot – bare footprints

that appeared to be made in blood within that apartment?

A. There was.

Q. And at the time that you took over the case, had those bloody footprints ever been attributed to or identified to any particular individual?

A. They had not.

Q. And based upon your review of the case, did you form the opinion that identifying the donor or maker, if you will, of those fingerprints might be of assistance in resolving the case as well?

A. Definitely.

Q. Now, let's take you to June of 2018. At this time had you and Sergeant Karakostas been able to develop any suspects at that time?

A. We hadn't.

Q. And based upon that and based upon, again, knowing that there's this unknown DNA profile from several items within the apartment, did you try to use a technique to try to identify the potential source of that unknown DNA profile?

A. We did.

Q. And in order to use this technique, did you consult with FBI agents in other jurisdictions who had used a similar technique?

A. We did.

Q. Why don't you describe this technique and to whom you consulted for the jury, please?

A. We became aware that in April 2018 that FBI and local police agencies in California had used genealogy techniques to identify Joseph DeAngelo as the Golden State Killer. And so in July of 2015, I called out to California and spoke with the agents that worked on that case to determine how they went about doing it and how we could go about using that technique here in Minnesota.

Q. Okay. And you said a minute ago July of 2015. Is that --

A. I'm sorry. That would be July 2018.

Q. 2018, okay. And now you're not a genealogist, are you?

A. I'm not.

Q. Okay. And but, nonetheless, what is your understanding of the technique that a genealogist would be using to try to help the investigation get some sort of lead?

A. Using DNA that's in the proper format for the commercial genealogy databases, when a result is obtained, they would compare that result -- say an unknown DNA sample. When they break that down into the proper SNPs format, it would then be put into these commercial databases as a research entry and then compared to others within the commercial

databases.

Q. So, for example, some of these commercially available databases are such things as 23andMe?

A. 23andMe, MyHeritage, yes.

Q. Ancestry.com?

A. Ancestry.com, GEDmatch, multiple databases.

Q. And are these typically databases where, you know, users will submit their DNA in the hopes of finding long-lost relatives perhaps or helping establish a family tree?

A. That's correct.

Q. And within these databases, do individuals who submit their DNA oftentimes also, you know, list who their family members are like brothers, parents, cousins, et cetera?

A. Correct.

Q. And in order for the genealogist to perform her work in this case, was a sample -- or not sample, but was the unidentified DNA profile that the BCA had developed, was that profile obtained and converted into a format that the genealogist could then use to do her work?

A. Correct. The private lab provided their results to Sergeant Karakostas, and he uploaded the

data that he had received into the data -- into the commercial database and then he shared his profile and his password with the genealogist that we were using. She had worked with the FBI on the Golden State Killer case and had a doctorate, and she was assisting us in building the family trees.

Q. And, now, the genealogist was then the one actually doing sort of the uploading of the profile, the comparison of the DNA. And ultimately was the genealogist to give you names of potential people for investigatory leads?

A. Correct. She would provide the investigative leads based on her knowledge of DNA and family tree construction.

Q. And then based upon that, did the genealogist then ultimately get back to you with results that you then later used in your investigation as a lead?

A. She did.

Q. And did she provide you -- and we don't need to say the individual's name on the record here, but did she provide you with a name of an individual who had uploaded his DNA that was, you know, a relevant lead here?

A. She did. On January 2nd of 2019, she e-mailed that she -- her words was a fabulous match to the unknown DNA that had been submitted, and she said the person in my heritage would have been potentially a first cousin once removed or a half first cousin to the unknown sample that we had submitted.

Q. Okay. So to be clear, the person whose name we're not going to list here out of privacy concerns had a profile in one of these commercial sites?

A. That's correct.

Q. And this individual had listed some relatives, yes?

A. I don't know if that person had listed relatives or if the genealogist had used obituaries and public source information and research tools within the system to then work out from that person and build that person's family tree which ultimately would lead to the questioned sample.

Q. Okay. And then, ultimately, did the genealogist provide you with two names of people who were of interest based upon the unknown profile that she had used to search these databases?

A. She did.

Q. And was one of those names Jerry Arnold Westrom, date of birth, May 16th, 1966?

A. Yes, that was one of the names.

Q. And was the other name of interest an individual said to be Mr. Westrom's brother, Kevin Loren Westrom, date of birth, July 12th of 1972?

A. Correct. That's the other name.

Q. And the information that you had is that

these two individuals would have been brothers?

A. Correct.

Q. But they have different dates of birth and are thus six years apart?

A. They are.

Q. And so thus not identical twins?

A. Not identical twins.

Q. And was there any other -- now you've got these two names of potential leads here, Kevin Westrom and Jerry Westrom. Did your investigation ultimately focus on Jerry Westrom initially as opposed to Kevin Westrom?

A. It did.

Q. And why did you and Sergeant Karakostas focus on Jerry Westrom rather than Kevin Westrom?

A. Our investigation indicated both were potentially in the area in 1993, but the private lab report that we had received said that the unknown sample contributor would have had brown eyes. And in looking at information, Jerry Arnold Westrom did have brown eyes and his brother had hazel eyes. And we could -- saw a photo that supported that, that his eyes were lighter or hazel-colored. So we focused on the person with brown eyes.

Q. And that was Mr. Jerry Westrom?

A. That's correct.

Q. Now, this -- fairly put, at this time this is just a lead.

A. That's correct, a lead.

Q. And so now that you got a lead to look at Mr. Jerry Westrom, did you and Sergeant Karakostas then undergo an effort to try to learn about Mr. Jerry Westrom in terms of where he is now, where he might work, things of that nature?

A. We did.

Q. And in an effort to try to learn a little bit about Jerry Westrom, did you use social media?

A. We did.

Q. What types of social media did you use?

A. Facebook.

Q. Now, Facebook, is it true that a person can have some private content and some public content?

A. That's true.

Q. And when you were looking at Mr. Westrom's Facebook content, were you looking at private content or content that he made public?

A. Public information only.

Q. And based upon a review of Mr. Westrom's public Facebook content, did you learn that he had a daughter who had played college hockey?

A. We did. She was playing at that time.

Q. And based upon -- and we don't need to say the name of the school, but did you learn the school which Mr. Westrom's daughter was playing college hockey at that time?

A. We did.

Q. And then based upon that, did you then believe that, you know, perhaps going to or attending some of these college hockey games might allow you an opportunity to take a viewing of Mr. Westrom?

A. We believed that.

Q. And based upon that, did you look at the college hockey schedule for Mr. Westrom's daughter and start attending some games to see if you could surveil or view Mr. Westrom?

A. We did.

Q. Now, before I go -- continue down that thread, besides looking at his public Facebook page, did you also look at databases available to law enforcement to obtain such things as driver's license photographs to see what he looked like contemporaneously?

A. Yes, we did.

Q. And did you also use records available to law enforcement to try to ascertain a potential place of business?

A. Not law enforcement, but just public online information is what we used to try and determine where he might be working.

Q. And thank you for that correction. So it was public online sources that revealed his potential place of employment?

A. That's correct.

Q. And we don't need to say the name of the company, but in what area of the state was Mr. Westrom said to be working or having an office?

A. He was working in Waite Park, Minnesota, a suburb of St. Cloud.

Q. And as we'll follow here in a little bit, ultimately was some surveillance done of Mr. Westrom up in the area of his place of employment up near St. Cloud?

A. Yes.

Q. And in addition, and, again, we don't need to put any addresses out here on the record or in the open, but may I presume that you and Sergeant Karakostas also became aware of where Mr. Westrom was living at the time?

A. We did.

Q. And, again, we'll refrain from putting any of that into the record here. Now, getting back to following the hockey schedule of his daughter, on January 4th of 2019, did you and Sergeant Karakostas travel to Duluth, Minnesota?

A. We did.

Q. And what was the purpose of that?

A. There was a hockey game scheduled that night, and we anticipated that Mr. Westrom might attend. My own daughter played college hockey at the time, so I knew if -- I would be there so.

Q. Now, besides conducting just surveillance, was there any other purpose in trying to locate and view Mr. Westrom?

A. We went up there to potentially obtain any items that he might discard for potential testing of DNA material.

Q. Okay. And, again, we don't need to name the schools involved in the interest of maintaining some family privacy here, but this game that was up in Duluth, did you see Mr. Westrom present?

A. We did.

Q. And was there ever an opportunity to collect any items that he had, perhaps touching with his hands or his mouth, that you could have obtained and then performed DNA testing on over at a laboratory?

A. There was no opportunity where we could have affirmatively said that that was the item that he was touching at that time.

Q. And then drawing your attention to apparently the following night, January 5th of 2019, did you and Sergeant Karakostas attend another college hockey game where Mr. Westrom's daughter was said to be playing?

A. Only Sergeant Karakostas attended that game the next night.

Q. And based upon working with Sergeant Karakostas, did you come to learn whether or not Sergeant Karakostas was able to obtain any discarded items by Mr. Westrom that would help potentially submitting items for DNA testing?

A. He was not.

Q. Now, between the time period of January 11th through the 22nd of 2019, did you and Sergeant Karakostas conduct some actual surveillance up at Mr. Westrom's place of employment?

A. Yes, we did.

Q. And were a number of photographs taken depicting the area of his place of employment as well as the vehicle that he would have been driving?

A. Yes.

ATTORNEY BORG: May I approach the witness?

THE COURT: Yes.

BY ATTORNEY BORG:

Q. Special Agent Boeckers, I'm showing you what's been previously marked for identification as Exhibits 88 through 94, ask you to take a moment to look at those, please. Have you had a chance to look at those, sir?

A. I have.

Q. And those photographs there, do they depict actually multiple surveillance of events that we'll be talking about here in your testimony?

A. That's correct.

Q. And are these photographs that either you or your partner, Sergeant Karakostas, would have taken during your surveillance work?

A. Yes.

ATTORNEY BORG: Your Honor, move for admission of Exhibits 88 through 94.

ATTORNEY MESHBESHER: No objection.

THE COURT: All right. 88 through 94 are received.

ATTORNEY BORG: And permission to publish, Your Honor?

ATTORNEY MESHBESHER: No objection.

THE COURT: Go ahead.

ATTORNEY BORG: Thank you.

BY ATTORNEY BORG:

Q. All right, first exhibit that I wish to publish is Exhibit 88. This is titled -- I'm sorry. We probably should have put Mr. Westrom's truck. Our apologies for just using the name without the appropriate salutation. Mr. Westrom's truck in St. Cloud, 1-15-19. Tell the jury what we're looking at here. First of all, where is this photograph taken, what area of the state and what are we looking at?

A. This is in Waite Park, Minnesota, in the public parking lot of the location where Mr. Westrom was employed, and it's a strip mall setting. And this is a photo of the work vehicle that we observed him regularly driving.

Q. And in order to get this photograph, you're in a public place outside where anyone could have been standing or snapping photographs?

A. That's correct. There were multiple businesses here.

Q. Moving ahead to Exhibit 89, what is depicted here?

A. This is the public entrance into the strip mall where Mr. Westrom was employed, and his company would be just -- just after you go through these doors and kind of to your left.

Q. And in the interest of, you know, because the company is not on trial here, we'll refrain from naming the company specifically, okay. Moving ahead to Exhibit 90, is this another photograph of Mr. Westrom's truck in that lot?

A. That's correct.

Q. And, again, without putting it on the record, but Exhibit 91 here, is this a photograph of Mr. Westrom's work truck from the side?

A. Yes.

Q. Now, when you were up at that place of employment, did you or Sergeant Karakostas go into publicly open areas and either go into the business or look into the business to see if there was anything that concretely associated Mr. Westrom with that business there at the strip mall?

A. I did.

Q. Describe, please.

A. I went inside near the end of the business day, and the office was -- the walls were clear plexiglass walls, so you could see into the interior. And I saw there were about four desks in there, and one of the desks right nearest the public walkway, there was a desk with Mr. Westrom's nameplate on it.

Q. And during this particular surveillance trip on January 15th, were you or Sergeant Karakostas able to obtain any items, any discarded items from Mr. Westrom that could be used for DNA testing?

A. No.

Q. Now, in the days that followed, did you and Sergeant Karakostas continue to monitor Mr. Westrom's public Facebook postings?

A. Periodically.

Q. And I want to draw your attention now to January 25th of 2019. Did you or Sergeant Karakostas observe a public Facebook posting on Mr. Westrom's Facebook account that announced perhaps some future activity of his?

A. I did.

Q. Please describe.

A. On his public Facebook, Mr. Westrom had said – posted with a photo that he was in Madison, Wisconsin, that day.

Q. And moving ahead to Exhibit 92, is this a screenshot of that, again, public Facebook posting by Mr. Westrom announcing that he was in the Madison area?

A. That's correct. That's what I saw.

Q. And for what purpose did you learn, again, from reviewing Mr. Westrom's public Facebook posting, why was he said to be in the Madison area?

A. That he was attending an organic conference in the Madison area.

Q. And in addition to that organic conference that Mr. Westrom's public Facebook posting indicated he would be attending, did you also consult, again, this college hockey schedule of his daughter to see if there would be any games of college hockey around that same area or same time?

A. I knew before seeing the Facebook post that the hockey team was going to be north of Milwaukee that weekend.

Q. And, specifically, any particular city?

A. The game was going to be in -- I think it's pronounced Mequon, Wisconsin.

Q. Now, based upon that, did you and Sergeant Karakostas then contact hotels in that area to see whether Mr. Westrom had been checked in as a guest at any of those local hotels in that area?

A. I did. I Googled hotels in the Mequon area and called the Holiday Inn Express was the first call I made. And I asked to speak to Jerry Westrom, and the clerk asked -- clarified the last name and then the call was transferred. And the phone started ringing and so I hung up.

Q. All right. And so this was at a Holiday Inn Express in what city in Wisconsin?

A. Brown Deer, I believe.

Q. And all right. So based upon the fact that the desk clerk transferred you purportedly to a room rented by Mr. Westrom, did you or Sergeant

Karakostas then contact the Brown Deer Police Department and ask them if they could go to the Holiday Inn Express parking lot to determine whether Mr. Westrom's known vehicle was there?

A. Sergeant Karakostas contacted the local police department in Wisconsin and provided the vehicle description and license plate and asked if the officer could do a drive-by to see if that vehicle was in the hotel parking lot.

Q. And as it affected your investigation, did that Brown Deer officer get back to you or Sergeant Karakostas with information?

A. They did and confirmed that the vehicle was in the parking lot.

Q. I want to go ahead to Exhibit 94 and just jump ahead a little bit. Exhibit 94 is before the jury. Did you and Sergeant Karakostas then leave the Twin Cities and drive to Brown Deer, Wisconsin?

A. We did. First we contacted the local -- we obtained permission from management to go to Wisconsin and then we contacted FBI in Milwaukee to get permission to go there and we left at 8 p.m. that night.

Q. And you and Sergeant Karakostas ultimately arrived in the Holiday Inn Express parking lot at Brown Deer, Wisconsin?

A. We did, at two a.m.

Q. And then ultimately I'm assuming at

some point when this picture was taken it was light out?

A. This picture is taken in the parking lot of the hockey arena the following day.

Q. Okay. And that's where I was going to go next. And then, ultimately, did you follow Mr. Westrom to a hockey game?

A. We did. When we arrived in Brown Deer, we did see his pickup in the parking lot and confirmed that he was there and then checked in.

Q. All right. And in this photograph here, Exhibit 94, this is a photograph of Mr. Westrom's vehicle parked, not at the Holiday Inn Express lot, but the hockey game parking lot?

A. Correct.

Q. Okay. Now, if I understand correctly, you and Sergeant Karakostas arrived quite late the night before the hockey game?

A. We did.

Q. Or maybe early the morning of the hockey game?

A. It was about two in the morning that we arrived.

Q. So then that morning, if I understood you correctly, the two of you had also checked into the same hotel?

A. We did.

Q. And may I presume that you were, you know, undercover; you weren't wearing police uniforms or anything that would alert anyone to your presence?

A. We weren't in uniform.

Q. And the morning of your arrival then or later that morning, did you observe Mr. Westrom in the lobby area of the Holiday Inn Express?

A. We did. There was a continental breakfast available at 6:30, so we were down there by then in the hopes that Mr. Westrom would come and potentially get a cup of coffee or have some breakfast down at the lobby area.

Q. Again, is the goal to try to recover something that he has discarded and preserve it for DNA testing?

A. Correct. Andrea Feia from the BCA said that ideally for her to obtain a sample off an item, it would be something that would come in contact with the mouth or bodily fluids. So we were hoping to get something that would have touched his mouth or that he may have drank out of, a straw, a corner of a cup.

Q. Now, let's then fast-forward to that night, January 26th of 2019. Did you attend a college hockey game there in Wisconsin? In the Mequon area where Mr. Westrom's daughter was said to be playing as well?

A. We did.

Q. And did you establish surveillance, and that is just to say, keep eyes on Mr. Westrom during the hockey game?

A. Yes, we did.

Q. And, ultimately, did you observe Mr. Westrom make his way to a concession area?

A. At the end of the first period of the game, he went into the lobby area, to the concession stand.

Q. I'm going to go back here. Exhibit 93 is before the jury. What is depicted here, Special Agent?

A. This is a picture of the lobby and concession area at the hockey arena. This is about -- this is where Sergeant Karakostas and I would have been standing while we were in there. And the person that's standing at the concession stand is unknown. This picture was taken after we retrieved an item.

Q. All right. And I want to emphasize this just to be clear, in the background there, maybe roughly center of the image slightly to the left, there appears to be an individual standing on the customer side of the concession window, yes?

A. That's correct.

Q. And to be clear, that is not Mr. Westrom?

A. That is not.

Q. All right. And would it be fair to say that the -- you're not photographing Mr. Westrom because

you don't want to give yourselves away, right?

A. Correct.

Q. All right. But, nonetheless, in the area where this individual is standing relative to where the photograph is taken, is this a view of Mr. Westrom that you would have later obtained?

A. We would have observed Mr. Westrom earlier than this.

Q. Sure. But when he was at the concession stand?

A. Yes. And then he sat in the very first seat that was available in that corner of that table nearest the concession stand and the video games.

Q. All right. So as we're looking at Exhibit 93 way off in the distance on the left edge, there appears to be some video arcade games up against the wall with the table in front of it?

A. Correct.

Q. Is that the table where Mr. Westrom was eventually observed seated?

A. He was. I think the -- if those are water fountains or bubblers in Wisconsin, he'd have been in front of those.

Q. Before I have you describe what you observed, let's point out one more thing here. If we're looking from the camera or the photographer's vantage

point sort of along that right concession wall there, there appears to be a garbage can, yes?

A. That's correct.

Q. And is that garbage can going to figure into our story as we continue what you observed?

A. It will.

Q. All right. So the end of the first period, you observe Mr. Westrom do what, sir?

A. He purchased a food item from the concession stand and then sat down at the far table.

Q. And did he consume, to the best of your ability to see, the food item?

A. Yep. He was eating. And then when he finished or when he was ready to leave, he took a napkin and wiped his mouth, particularly on the left side of his mouth.

Q. And based upon observing Mr. Westrom use a napkin to wipe his mouth, did it become, you know, sort of the assignment here, if you could, to retrieve that napkin once Mr. Westrom had discarded it?

A. Yes.

Q. And now after Mr. Westrom used the napkin to wipe his mouth, what did you observe him do then?

A. He immediately went to the garbage can that you see in the photograph and put the box and the napkin into the garbage can.

Q. And did he then walk away, abandoning the item?

A. He did. He walked in -- there's two sets of doors there, and he walked into the far set back into the actual arena portion of the arena.

Q. All right. So then abandoned property here, what did you or Sergeant Karakostas do?

A. We walked over to the garbage can, and Sergeant Karakostas walked past it to keep an eye on Mr. Westrom. And I stood at the garbage can and looked inside the garbage can.

Q. And tell the jury what you saw.

A. I saw sitting about three-quarters of the way, it was about half to three-quarters full, but sitting on top was the container and the napkin that Mr. Westrom had used.

Q. And prior to you getting to the garbage can, did anyone else in that concession area discard any items into that trash can before you got there?

A. No.

Q. Now, and once you get up to the garbage can and make that observation, what did you do?

A. I looked around to see who else was in the

lobby and who -- and the traffic within the arena. And I observed about a ten-year-old male within the arena walking towards the lobby, and he was holding a very large cherry-flavored ice Slurpee that was about half gone and he made eye contact. When I looked at him, he didn't come in, but he had me concerned that he was going to throw the Slurpee into the garbage can. And I was also aware of others behind me. And with the period just about to begin, I made the decision that we had come this far and so I reached into the garbage can and pulled out the container and the -- and the napkin, touching only the container.

Q. All right and so what can you tell the jury about, you know, how the container and the napkin presented in the garbage? Were they tipped over, upright, one inside the other? Tell us.

A. Sitting upright as if it was -- the container was upright with the napkin visible within the cardboard container.

Q. Now, what were you wearing on your hands at that time?

A. I was wearing winter gloves.

Q. Obviously best practice is when you're trying to obtain evidence would be to get nitrile gloves, yes?

A. Best practice would have been and we had those with us. But time seemed of the essence at that moment because we didn't know who was going to be coming in and out trying to use the garbage can and we were trying to be discreet in what we were doing.

Q. All right. So, ultimately, notwithstanding best practices suggesting you grab nitrile gloves, did you then use your winter glove to reach into the garbage and grab the item?

A. I did. I'd also point out that you can see the concession employee that's sitting there, and he was also right there at the time that we were at the garbage can. So I reached in with my winter glove and grabbed the corner of the cardboard container.

Q. Did you ever touch the napkin with your gloved hand?

A. I did not.

Q. Did you ever touch the napkin with your, you know, bare hand?

A. No.

ATTORNEY BORG: Madam Clerk, could I have the -- thank you. May I approach the witness?

THE COURT: Yes.

BY ATTORNEY BORG:

Q. All right. Showing you -- let's start with this one. Showing you what's been previously marked for identification as Exhibit 119, do you recognize this item, sir?

A. I do.

Q. And is this the food container that you've been referring to that was placed upright in the garbage can by Mr. Westrom with a napkin inside?

A. It is, food container or boat.

ATTORNEY BORG: Sure. Move for admission of Exhibit 119?

ATTORNEY MESHBESHER: No objection.

THE COURT: 119 is received.

ATTORNEY BORG: Permission to publish?

ATTORNEY MESHBESHER: No objection.

THE COURT: Go ahead.

BY ATTORNEY BORG:

Q. And as I walk past the jury, just for the record, I'll present it first with the, you know, maybe the food side up and then I'll flip it around to the backside, yes?

A. Sure.

Q. I'm now on the way back. I'll just show the jury the backside of the item. All right. Realizing it's in packaging and it might be a little bit clumsy, with the Court's permission, if you could please hold this item.

THE COURT: That's fine.

BY ATTORNEY BORG:

Q. And stand and show the jury the orientation of the item as it sat in the garbage, please.

THE COURT: Go ahead.

THE WITNESS: The item was sitting just like this in the garbage can.

BY ATTORNEY BORG:

Q. Upright?

A. Upright.

Q. And then the napkin was where within that item, sir?

A. Within the cardboard container.

Q. All right. And then you also have before you Exhibit 120, yes?

A. Yes.

Q. And Exhibit 120 was introduced through an earlier witness, but is this what's contained in the packaging here, the napkin that was sitting inside that food boat or container that you would have collected without touching?

A. Yes.

ATTORNEY BORG: Your Honor, Exhibit 120 has been previously introduced. May I publish it to the

jury, please?

ATTORNEY MESHBESHER: No objection.

THE COURT: Go ahead.

BY ATTORNEY BORG:

Q. And as it's packaged here, there are two sides. I'll walk it with the side first with the exhibit sticker, and then I'll flip it to the backside, okay?

A. Okay.

Q. And then flipping it around to the backside. Now, once that -- those items, the food container and the napkin inside, once they were taken by you out of the garbage can, what was done with them?

A. We went out to our vehicle and put on purple nitrile gloves, and Sergeant Karakostas packaged and sealed the items.

Q. And during the time of its collection in the garbage can to the time that nitrile gloves were put on, at any time did either you or Sergeant Karakostas touch that napkin with your bare hands?

A. No.

Q. At any time did either you or Sergeant Karakostas touch that napkin with a personal glove like a mitten or glove that you would -- that you said you had on at the time?

A. No.

Q. Now, once you had that napkin, was that napkin then transported back to Minnesota and delivered by you and Sergeant Karakostas to the Bureau of Criminal Apprehension for potential DNA testing?

A. Yes.

ATTORNEY BORG: Your Honor, just in keeping with the earlier discussion --

THE COURT: Yeah. Why don't you -- Counsel, approach, please.
(Sidebar discussion between attorneys and judge.)

THE COURT: We're back on the record. Is it Agent Boeckers?

THE WITNESS: Boeckers.

THE COURT: Boeckers. I'm so sorry, sir. We're going to excuse you for the day, sir, and have you come back tomorrow, please, at -- I know Mr. Borg and his staff will inform you at about what time. I assume it will be about 9 o'clock and to resume your testimony.

THE WITNESS: Okay. Thank you.

THE COURT: Thank you so much. Have a good night, sir.

All right. Now we're outside the presence of Agent Boeckers, our witness. The jury is present.

Members of the jury, I promised you an update today, and I want to give you that update. I'm told that

the State will finish their presentation of their case to you by tomorrow morning with the completion of Agent Boeckers' testimony. It is also anticipated that you're going to get the case for your consideration, I mean, you'll be deliberating on this matter on Thursday. And so I know we said midweek. It's close to midweek, so but that's the best update I have. And just so you know that the case will be submitted to you by Thursday.

We're going to have you just go to the jury room, 657, for, I think, a brief moment and with the suspicion that you'll be excused very quickly after that. But please go back to 657 at this time, and then we'll also see you tomorrow morning. All right.

Please rise for the jury.

(Jury excused.)

THE COURT: All right. Please be seated. We're now we're outside the presence of the jury. Counsel is present. Mr. Westrom, of course, is present. And we had had some discussions off the record earlier today, again, regarding a potential witness of the defense, a -- I believe it's Ms. Bonnie Reed. Mr. Meshbesher had asked respectfully that he be able to make a record on this matter.

And did you want to go ahead, Mr. Meshbesher?

ATTORNEY MESHBESHER: Yes, Your Honor. Your Honor, I'm going to have, for the record, a unmarked, as best I can give you, Narrative Text No. 3 by Detective Solitros that was done as a supplement on June 21st, 1993. This is where he spoke with Bonnie Reed in Apartment 708. The record should reflect these were the -- whereas the basis of where I was going to ask questions of Bonnie Reed. The next exhibit -- I will approach the bench in a moment.

We'll mark --

THE COURT: Sure.

ATTORNEY MESHBESHER: -- and admit them. Will be a Narrative Text No. 32. This one is a supplement by Sergeant Karakostas. This was done, if I read this correctly, on November 4th, 2015, and related on January 5th, 2017. So it had not been typed right away, it appears. I'm going to submit that for the record.

This is an interview of Bonnie – Bonita Reed. This interview was by Karakostas, Sergeant Karakostas, and FBI Agent Boeckers. This was, as best I can tell, the interview was related date of June 10th, 2019, obviously well before today's date. And this is an interview, audio recorded, and I have a copy of the interview of her.

And, finally, for purposes of the record, I'm going to submit a copy of the subpoena that we have given Ms. Bonnie Reed who is, I believe, in the hallway. The date of the subpoena is March 28th, 2022. It's signed, notarized February 25th, 2022, by the process server. I'm going to ask that those be marked and made part of the record.

For purposes of Ms. Reed, she is in the hallway. I have been informed by her that she was going to go on a cruise. The cruise, she has indicated to me when I asked her if she could wait. She did so temporarily until tomorrow where she has to leave at 7 a.m. I was going to ask that she be allowed to testify out of order today.

To the extent that the Court would not interrupt the State's case, the Court indicated that there's a possibility we can do it by, I think, Zoom would be the format. She's going to be on a Carnival cruise, which is a very large ship. I will need some time to arrange

that with the company, Carnival, because they do have the technology, but I'm going to have to arrange it with them for that process.

But for purposes of the record, Your Honor, I want to approach the bench and make these exhibits.

THE COURT: Yes, go ahead, please.

ATTORNEY MESHBESHER: There's one, there's two, there's three and then there's the subpoena.

THE COURT: All right.

ATTORNEY MESHBESHER: Your Honor, I have her in the hallway. I can ask that she come inside here.

THE COURT: All right. Before you do that and before we get there, so this issue has been addressed on the record before, and I can't remember when. I believe it was earlier this week. And there were some court exhibits that were received. I think there was a subpoena also of Ms. Reed.

The subpoena that I have before me now that you just submitted, Mr. Meshbesher, is for trial that was scheduled for March 28th of 2022. And obviously we're here and this is now July – August 23rd of 2022. This matter, the trial was rescheduled to -- for trial on August 8th, 2022.

The subpoena already submitted by you, Mr. Meshbesher, for the record is a subpoena of Ms. Bonnie Reed for her to appear on August 8th of 2022. It's dated July 28th of 2022. I'm not sure when she was served with the subpoena. It looks like she was served indeed, I believe, by the sheriff's office on July 30th of 2022 at

2:10 in the afternoon. So that's one week before the scheduled trial in this matter.

And I also have a -- it was also a submission. It's a Waypoint Incorporated report interview of Ms. Reed, I believe, by an investigator employed by Mr. Meshbesher on behalf of Mr. Westrom. There are also some pictures, some photographs that were submitted. I believe these are possible exhibits, including a picture of Ms. Childs, one that's labeled, a picture of Mr. Arthur Gray and then other individuals.

I had ruled in the past that -- and the State had objected to Ms. Reed testifying out of order. I believe the position of the State was that they did not want to interrupt the flow of their case and their presentation of their case. I had indicated that I would -- had no problem with calling a witness out of order if there was agreement between the parties.

In the last few days, I've encouraged both the State and the defense to work on this issue and come to an agreement as to possible resolution, including recording a deposition, including a possible Zoom appearance. I also, I believe, on the record discussed the rule regarding depositions in a criminal case which is quite rare and which delineates the reasons for when the position can be taken or presented to a jury in a trial in a criminal case. And I think the circumstances, at least that have been put forward, do not meet those requirements under the rule, but I did discuss that with the parties.

The State is about to rest its case, as I've indicated. Mr. Meshbesher did approach me at -- the Court off the record, of course with Mr. Borg present -- I believe it was at noon today; it is now 4:30 on August 23rd -- indicating that he wanted again to make a record regarding this issue.

In the middle of the afternoon today I suggested

to Mr. Meshbesher that I was inclined to maybe allow a Zoom testimony by Ms. Reed. It's -- this is a extremely serious matter. It's a criminal case. And Mr. Westrom, of course, has the right to have any witnesses appear in front of him in person. But I indicated that I would entertain that – and please correct me if I'm -- if I've stated -- misstated anything for the record or any of the interactions we've had regarding this matter. Please let me know, Counsel. I just want to make a clear record about this issue.

But, Mr. Borg, I'll let you go -- Actually, do you want to supplement what I said, Mr. Meshbesher, or correct anything I said?

ATTORNEY MESHBESHER: No, Your Honor.

THE COURT: All right. Go ahead, Mr. Borg.

ATTORNEY BORG: Thank you, Your Honor. And the one thing I will supplement, part of the State's earlier objection to taking Ms. Reed out of order, it wasn't just the flow of the State's case, it was the more pressing concept which was the State had a number of witnesses last week when this issue came up, witnesses that, if we didn't, you know, use them, we were going to, quote/unquote, losethem.

I believe Mr. Radmer indicated to the Court that there was a Mr. Anjel White who had a surgery last week that we had already, you know, lost due to that. Then throughout last week there were a number of witness, and I would be lying if I said I could recall all the names, but there were multiple, including Dr. Baker, who we had to get on the stand, you know, otherwise we would lose him to other commitments.

And I think the State had made the argument as far as last week's request that we were literally in

the same situation the defense was. And because it was our case in chief, to allow a defense witness to jump in there would do irreparable harm to the State's ability to present its own case. So that's the only supplement that I would add to last week's request.

I would also note that it was represented to the Court last week that Ms. Reed had travel plans last week, that she was going to be getting on a plane last week. Now apparently she's on a plane tomorrow. And I'm not trying to suggest defense counsel is misrepresenting. Anything I take them at their word. Perhaps she's changed her travel plans. I don't know.

Now, Mr. Meshbesher today did ask that Ms. Reed be allowed to come on this afternoon. Again, I objected. And I hate doing this because ultimately we all try to work together to get the work done and get the case to the jury. But Officer Frost this afternoon, if he didn't get on today, he's gone for several weeks. Then I have the same problem we had last week.

More pressingly, Your Honor, Ms. Reed was going to be a witness that was going to be handled by Mr. Radmer. We all know that Mr. Radmer is not here right now, and he's not going to be here for the rest of the trial. And I'll put on the record right now that the reason Mr. Radmer is not here is I got a text at 3-something this morning that I didn't – you know, I don't answer the phone at 3:30 in the morning. But as I was going to the park-and-ride this morning, I received another text from Mr. Radmer --

THE COURT: And, Mr. Borg, I -- it was a health issue. I don't know if you -- I mean, it's --

ATTORNEY BORG: No, no. Mr. Radmer has allowed me to put this on the record.

THE COURT: Okay. Go ahead.

ATTORNEY BORG: He specifically gave me authorizations.

THE COURT: All right.

ATTORNEY BORG: I don't believe I'm violating HIPPA here. Mr. Radmer and I did speak this morning at around just after six o'clock this morning as I was heading in, and Mr. Radmer indicated that he had been admitted to the hospital for a medical condition and is undergoing surgery later today.

The reason I bring that up is, number one, to explain the context here. Mr. Radmer's work today would have been all of the BCA people, and he was also responsible for handling any cross-examination of Ms. Reed. And I will tell the Court, I've known for years obviously the BCA results in this test, but I've actually never read the BCA reports. That's a fact. I know what happened. I know what the results are. I have a working knowledge, but I've never actually worked on that part. That was going to be Mr. Radmer's part of the case, as well as Ms. Reed. I'm familiar with, generally speaking, with what she said, but I have never prepared her as a witness 'cause that was just part of the case he was handling.

Due to Mr. Radmer's unavailability due to his medical situation, I spent an hour and a half this morning when I got in learning 30 years of DNA work in an hour and a half, and I was then responsible for calling and handling the direct examination of, I believe, those three DNA witnesses that we had today. I did not, however, have time to digest or devolve into the Ms. Reed situation. And so the bottom line is to

allow the defense to call her this afternoon would not only have put me in jeopardy of losing Officer Frost but would have also put a defense witness in the middle of my case where I didn't have the opportunity to play catchup and prepare the examination of her that Mr. Radmer was prepared to do.

So the bottom line is, again, this goes to jeopardizing the State's ability to present its case. So I respectfully objected to allowing her to come in when I'm not prepared, given all my morning time was spent dealing with learning 30 years of DNA in the course of an hour and a half. I take responsibility for that, but it's just an unavoidable situation and so I objected.

And now the State's on its last witness. We are very close to resting. We have a little bit more with Agent Boeckers, but we will be done tomorrow morning. Thank you.

THE COURT: Mr. Borg, it's 4:35. I'm going to let the jury go now. I'm sorry. I – I wasn't sure what I was going to -- what I was going to do so I wanted the jury to still be here. So I'm going to let them go home.

But, Mr. Meshbesher, did you want to supplement the record at all? And I do have a question.

ATTORNEY MESHBESHER: Your Honor, the only thing I'd supplement is I did offer an alternative if we stayed late tonight or continued the case until -- I'm just repeating myself – or continued the case until after she's back from that preplanned cruise that's been previously paid for. I have her in the hallway. I'm prepared to have you question her if you'd like to.

THE COURT: Mr. Meshbesher, I can do that. I'm happy to do that. But I -- this is obviously a murder in the first degree case. Mr. Westrom is receiving an excellent defense as usual with you, Mr. Meshbesher and Mr. Tyler, but my ruling is going to be I'm going to order Ms. Reed to remain here in Minnesota to testify in this case under subpoena. That's my order. And if she's not willing to comply with that order, you're an experienced lawyer. You know what my options are, Mr. Meshbesher.

ATTORNEY MESHBESHER: Your Honor, could I bring her in --

THE COURT: Yeah.

ATTORNEY MESHBESHER: -- so you could tell her your order?

THE COURT: Yep, absolutely.
(Ms. Reed summoned.)

THE COURT: Hi, Ms. Reed. Good afternoon. Thank you for waiting, ma'am. If you could come up, please, Ms. Reed.

MS. REED: Come up where?

THE COURT: You can just stand right here in front of the bench. And I apologize for putting you on the spot. I'm Judge Hoyos. Nice to meet you.

MS. REED: Nice to meet you.

THE COURT: You are Ms. Bonita Reed, and that's B-O-N-I-T-A, last name R-E-E-D?

MS. REED: Correct.

THE COURT: Ms. Reed, I understand that you've been subpoenaed to testify in this matter; is that correct?

MS. REED: Yes.

THE COURT: And I know that defense counsel, Mr. Meshbesher, and maybe others from his staff have talked to you about testifying in this case. Is that right?

MS. REED: Yes.

THE COURT: And, in fact, I think you've been interviewed by investigators about this matter.

MS. REED: Yes.

THE COURT: And, Ms. Reed, my understanding is that you have travel plans out of the country.

MS. REED: Yes.

THE COURT: Tell me about those plans.

MS. REED: Yes. Tomorrow going to the Bahamas with my son for my birthday.

THE COURT: Okay. And what time is your flight?

MS. REED: We leaving at seven o'clock in the morning, but I don't know what time the flight yet. It

supposed to be a surprise. That's just all I know.

THE COURT: All right. Well, Ms. Reed, you've been subpoenaed, which means it's a court order by me or by this Court for you to testify in this case. Mr. Meshbesher has tried very hard to accommodate your travel plans in this matter, but this is a really complicated matter. It's a first-degree murder case, as you know, from allegations 29 years ago. And, unfortunately, the only way you can testify in this matter and comply with the Court's order is for you to testify tomorrow sometime. And so I'm going to order you not to go to the Bahamas tomorrow and remain here in Minnesota under the court order to testify in this matter.

Now I'm doing that -- I apologize for that. I understand how hard it is to make travel plans. And it is with your son and it's your birthday. But this is a very, very, very serious matter and I don't have another choice but to ask you and to order you to stay here to be a witness in this case.

Now, if there's anything I can do to help you with an airline or a cruise line or anything from this Court that would help you in any way travel later tomorrow or the next day or to facilitate your travel, but I don't have another option but to have you testify here in this case tomorrow. It's a court order, and that's the only choice I have. And I'm very sorry. I know you're very upset, but are you willing to comply with the Court's order?

THE WITNESS: I have no choice.

THE COURT: I appreciate that. And I am very, very sorry. So please stay in touch with Mr. Meshbesher, and we'll have you testify in this matter

tomorrow. And, again, if there's anything I can do to help regarding your travel plans --

THE WITNESS: I don't know yet.

THE COURT: Well, let me know. Just let me know. Again, I'm very, very sorry. So I'll have you step out and then we'll have you testify in this matter tomorrow.

(Ms. Reed excused.)

ATTORNEY MESHBESHER: Thank you, Your Honor.

THE COURT: Yeah. Anything else for the record, Mr. Tyler?

ATTORNEY TYLER: Judge, I'd like a moment to talk with Mr. Borg about when we might possibly reach an agreement about closings. There's a lot of variables for this case. I'd like an opportunity to talk with him about are we potentially going to have closings tomorrow or Thursday morning.

THE COURT: That's fine.

ATTORNEY TYLER: And if we can informally talk with the Court maybe for a minute or two where we're at.

THE COURT: Mr. Meshbesher, anything else you want to place on the record regarding Ms. Reed?

ATTORNEY MESHBESHER: No. Only that one follow-up. I should note for the record that we sent Mr. Radmer a letter on February 4th, 2022, with a copy

of the interview of Ms. Reed and the attachments to Ms. Reed. So they've had this for some time. And I sent it to him. They've had it. But I sent it to Mr. Radmer. It's part of the file.

ATTORNEY BORG: And I believe I was able to find it, so you can disregard your request.

ATTORNEY TYLER: Okay. Good.

THE COURT: All right. Anything else for the record then on the Reed matter?

ATTORNEY BORG: No.

THE COURT: Okay.

ATTORNEY BORG: Do you have time informally just to chat about --

THE COURT: Of course, yeah. So anything else for the record at all on this matter?

ATTORNEY MESHBESHER: Not for today, no, your Honor.

THE COURT: All right. Thank you. And we're off the record and thank you.

(Proceedings concluded.)

CERTIFICATE

I, CARRIE L. FRANCKOWIAK, an Official Stenographic Court Reporter in and for the District Court of the 10th Judicial District, County of Washington, State of Minnesota, do hereby certify that

the foregoing is a true and correct transcript of all the proceedings had and testimony taken in the above-entitled matter, as the same are contained in my original stenographic notes on the said trial or proceeding.

Dated this 4th day of April, 2023.

s/_____

Carrie L.Franckowiak, RMR, CRR, CRC, RDR
Court Reporter
14949 62nd Street North
Stillwater, MN 55082
(651)413-8108

[from page 172 to 208, cont'd Court proceedings, dated November 1, 2021]

…witness, Rachel Klick, again, did her work prior to Mr. Westrom even being connected with the case. Therefore, she would have no independent knowledge of Mr. Westrom or his profile and the testimony today will be limited to identify -- identification of two blood samples in the stairwell that belonged to the victim.

THE COURT: All right. And, Mr. Tyler.

ATTORNEY TYLER: That is correct, and thank you for putting that on the record to clarify this important point that we've argued about a lot. And that is, the boundaries of where we're going to go in complying with the Court's order about alternative perpetrator evidence.

THE COURT: All right. Thank you. And I want to thank counsel for clarifying that. I appreciate it. So let's bring the jury in, please. And we're off the record.

THE CLERK: All rise for the jury.
(Jury summoned.)

THE COURT: All right. Please be seated. Mr. Radmer, when you're ready, sir.

ATTORNEY RADMER: The State calls Rachel Klick.

THE COURT: And good afternoon, ma'am. Please approach the witness stand and remain standing next to the chair.

THE CLERK: Please raise your right hand.
(Witness first duly sworn on oath.)

THE CLERK: Thank you.

THE COURT: Please have a seat. Please state your full name for the record and spell it.

THE WITNESS: My name is Rachel Klick. It's spelled R-A-C-H-E-L, last name K-L-I-C-K.

THE COURT: Thank you. And, Mr. Radmer.

ATTORNEY RADMER: Thank you, Judge.

DIRECT EXAMINATION

BY ATTORNEY RADMER:

Q. Good afternoon, Ms. Klick.

A. Good afternoon.

Q. Ms. Klick, at present, is it my understanding you're presently employed as a teacher?

A. That's correct.

Q. What do you teach?

A. I teach secondary high school science.

Q. Prior to that -- or how long you been a teacher for?

A. Approximately seven and a half years.

Q. Prior to that, did you work for the Bureau of Criminal Apprehension?

A. I did.

Q. And how long did you work for the BCA?

A. I was employed at the BCA from 2007 until 2014, so approximately seven years.

Q. And could you describe briefly for the jury what assignments you held with the BCA?

A. At the BCA, I was employed as a forensic scientist within the biology section where my duties included the examination of evidence for the presence of biological fluids like blood, semen and saliva. That's referred to as serology. I would also perform DNA testing on items of evidence for nuclear DNA, and then sometimes testing for male specific DNA of the Y chromosome.

Q. And to get into such a position, do you have a formal education that's rooted in science?

A. Yes.

Q. And could you describe what that includes?

A. My undergraduate degree is a biochemistry degree from the University of Rochester and a master's of forensic science from the University of Florida.

Q. And when did you obtain those respective

degrees?

A. My undergraduate degree was in 2007 and 2014 for my master's.

Q. Now, Ms. Klick, we're going to be talking about DNA in just a moment and your work in processing samples or evidence for DNA evaluation. But before we get there, can we step back and can you help us explain a little bit about what DNA is at a fundamental base level?

A. So DNA stands for deoxyribonucleic acid. Everyone has DNA within their cells of their body. This nuclear DNA that's contained within a structure called the nucleus is unique to each individual because we receive half of that information from our mother and half of that information from our father. So DNA can be used for identification purposes. Biologically speaking, within the body, it helps make us unique and determine physical traits and blood type and things like that.

Q. And in the forensic world, are there different types of, I guess, DNA processes or DNA types maybe is a better term that are examined for identification?

A. There are. So in the cell, the type of DNA testing that's most routinely performed is referred to as nuclear DNA testing. Again, that's the DNA that's in the nucleus and it's unique to each individual with the exception of biological twins. You can also perform Y-chromosomal DNA testing. That's only done for male samples because that's looking at the Y chromosome, which only males possess. And you can

also perform mitochondrial DNA testing because the cell structures of the mitochondria each also have a unique DNA sequence within them.

Q. Are you familiar with the term autosomal DNA?

A. Yes.

Q. And is that one of those you just described?

A. Autosomal DNA is used sometimes interchangeably to talk about nuclear DNA.

Q. In the type of DNA testing that you performed back at the BCA, did that include the evaluation of blood for DNA?

A. Yes.

Q. And what would you look for in terms of blood?

A. So sometimes another scientist would identify those biological fluids, and then samples would come to me for DNA testing. Those samples could be samples on which blood was previously detected.

Q. And is that similar in that semen may be detected and then you would submit it for -- you would do the testing upon that?

A. Yes. Biological fluids contain our cells, and so those cells contain our DNA. So that biological

fluid could also be semen.

Q. Now, that raises an interesting question. So when a piece of evidence comes into the BCA, for the sake of this hypothetical, say a shirt comes into the BCA, and it appears that it may have a blood-like substance on it, do you take that T-shirt and put it into a machine and examine the DNA, or is there a step before that in order to get to your process?

A. So an item of evidence will come in and be examined by a serologist for the presence of biological fluids. If a blood-like substance is detected, then a small portion of that item is cut out or swabbed and given to the DNA scientist to perform the multistep DNA testing.

Q. And a minute ago, I mentioned semen. And I understand we'll have a diagram in a little bit here to help us with this, but is semen treated differently in the lab than other substances, or can it be treated differently?

A. So in the steps of DNA testing, one of the steps that we perform is called extraction. That's the step we perform to get the DNA out of the cells. And if there's a sample that's been identified as containing semen, we actually end up with two different samples because we want to kind of isolate the DNA from the semen from the DNA from any other cells that are present within it.

Q. And why is that?

A. If we were to perform just DNA testing on the sample without that attempt at differential

extraction, it would not give straight unique single-source DNA profiles. It could be a mixture and hard to interpret.

Q. Where does Y-chromosomal testing fit into all that we've discussed so far?

A. So Y-chromosomal DNA testing, as I said, is specific for male testing because only males possess the Y chromosome. It's often used in instances where we're looking to detect male DNA, and it's oftentimes more sensitive than that autosomal or nuclear DNA testing.

Q. Is a male's Y-chromosomal profile unique?

A. So a male individual will have the same Y-chromosomal DNA profile as their biological father and any biologic-related male siblings.

Q. So to recap, we have -- and forgive me if I sound redundant, but we have autosomal testing, we have Y-chromosomal testing and we have mitochondrial testing, correct?

A. Correct.

Q. And in this case was there any mitochondrial testing?

A. I did not perform any. To the best of my knowledge, none was done.

Q. So for today for our purpose here now, we're going to talk about the autosomal or nuclear

DNA testing and Y-chromosomal testing, correct?

A. Correct.

Q. And within that testing, there was instances where you employed the testing to determine semen versus non-semen samples as well.

A. So that work would have been done by another scientist. I would have then received any of those like portions of the item they had cut out.

Q. Okay. Now, in preparation for -- to become an analyst in the lab, did you have to go through any type of specific training with the BCA in order to be an analyst or any certifications you might have held at that time?

A. So I underwent a yearlong training program in which we worked to identify those biological fluids on practice samples, performed DNA analysis on nonevidentiary samples, had my work reviewed by other scientists before being allowed to handle evidentiary work.

Q. Now, going back in time, and in 2008 when you worked -- excuse me -- 2012 when this work was done, were you up to date on all training as required by the BCA?

A. Yes.

Q. Now, before we get into specific analysis, I want to take a minute to talk about the process that goes through with testing, kind of the basic terms. So as an analyst, again, you might get the serology, they

extract the blood or semen sample for you to test. And how does that come to you then?

A. So once a serologist has taken samples that are going to be undergoing DNA testing, they're put in small individual tape-sealed envelopes. Those then come to me, and I undergo the DNA analysis, which is a multistep process.

Q. And let's break that down, that process as simply as we can. What is the first step of the process?

A. The first step of the process is referred to as DNA extraction. So in DNA extraction, we are applying chemicals to get the DNA isolated from all the other cellular components. And as I mentioned, there's two types, either an extraction for samples that don't contain semen or samples that do contain semen.

Q. After that, what is the second step?

A. The second step is called quantification. That's where we are trying to determine how much DNA we have to work with. That becomes important for our next step, so we put the samples into an instrument that will then detect the amount of DNA.

Q. And what is the next step?

A. The third step is called amplification. This is a process called PCR, and that stands for polymerase chain reaction. And in this step, I like to describe it almost like a chemical Xerox machine or chemical photocopier. We're putting in a starting amount of DNA. And what PCR does is it makes billions, an exponential amount of copies of that DNA

so that we have enough to analyze.

Q. And then what happens?

A. And then the last step is that once we have all those identical copies of the DNA, the sample is put on what's called a genetic analyzer. That genetic analyzer will detect the different DNA types that are present in the sample. Those are sometimes called alleles. And it will give us what's called the DNA profile to interpret.

Q. Throughout the process, through those steps, are there controls in place to ensure quality assurance?

A. Yes, there is.

Q. And can you describe briefly what that includes?

A. So during extraction, there is what's called a reagent blank. That is a sample that we start alongside all the other samples, and that's to determine that the chemicals we're using are DNA-free. When we are doing amplification, we run two samples. One is a positive control that's known to give a result, and one is a negative control that should be blank. That control ensures us that that PCR process is working properly. And then when we do the analysis on the genetic analyzer, there's a sample that's run alongside all the evidence samples and that's called a DNA ladder. That DNA ladder contains all the known DNA types and that helps the instrument interpret the peaks or types that show up in the evidence samples.

Q. So at the end of the process, does the computer tell you if there was a DNA match or a DNA, I guess, sample identified? Does it just tell you or is there some interpretation to it?

A. So the genetic analyzer will give the DNA profile. There's the additional step of interpretation where the scientist needs to determine is the sample a mixture, does the sample appear to be a single source or from one individual, or is the sample not interpretable because it's not meeting thresholds or levels that we've set within our laboratory for interpretation.

Q. And that process is where you would be relying on that previously mentioned training and standard operating procedures for your lab?

A. Correct.

Q. Additionally, after your work is done on a case, does your work become subject to review?

A. Yes. Everything that I've done in a case is then peer-reviewed by a second fully trained scientist before the report is issued.

Q. Now, Ms. Klick, in preparation for your testimony today, did you have the opportunity to review your work back in 2012 at the BCA even though you're no longer in their employ?

A. I did, yes.

Q. And we're specifically talking about the work as it relates to S923-4596, your laboratory

number?

A. That's correct.

Q. When you get items for testing from serology, do you know anything about the underlying case itself?

A. So from my recollection, there would often be a brief synopsis provided by the submitting agency, and I would sometimes talk with a serologist about which samples to test. Sometimes more samples are tested by the serologist than are actually tested in DNA, and sometimes there's multiple rounds of DNA testing depending on outcomes.

Q. In any given case, is it common that there are samples that go untested if there are a large quantity of them?

A. Yes, that was common.

Q. And is part of having that paragraph of information in talking to serologists identifying which items are best subject for testing?

A. Yes.

ATTORNEY RADMER: Your Honor, may I approach the witness?

THE COURT: Yes.

BY ATTORNEY RADMER:

Q. Ms. Klick, I'm handing you what's been

identified as Exhibit No. 150. Do you recognize what I'm handing you?

A. Yes.

Q. And is that a PowerPoint presentation that includes the results of your analysis in this case?

A. Yes, it does.

Q. Would this assist the jury in understanding the work that you did in this matter?

A. I do believe so.

ATTORNEY RADMER: Judge, I offer Exhibit 150 as a demonstrative court exhibit only.

ATTORNEY MESHBESHER: No objection.

THE COURT: All right.

ATTORNEY RADMER: Permission to publish?

THE COURT: Mr. Meshbesher, Any objection to publishing the exhibit?

ATTORNEY MESHBESHER: No, Your Honor. Thank you.

THE COURT: All right. Please go ahead, Mr. Radmer. And then 150 is received, one-five-zero is received as a demonstrative exhibit.

ATTORNEY RADMER: Thank you, Judge.

BY ATTORNEY RADMER:

Q. All right. We're waiting for our screens to boot up here. Okay. So on the first slide, there is a list of items examined. Are those items that you looked at in this particular case?

A. So I would have received samples that a serologist would have taken from the items listed.

Q. Fair enough. You were not the one to actually collect these items at the scene, correct?

A. No, I was not.

Q. But a serologist would look at these items and then give you the necessary materials for DNA testing?

A. Correct.

Q. We'll get to each individually in turn. On Item 21A, when it says two samples tested, what does that mean?

A. So from the underwear, a serologist had previously identified two samples on which semen was identified, and those were labeled as BCA Items No. 21A-3, 21A-4.

Q. And similarly with Item 14, there was a comforter -- comforter obtained from the bed. Three samples were tested. Are those delineated in those bullet points?

A. Yes.

Q. And, similarly, with Item 20, again, two samples were tested, 20-2 and 20-4, from a blue towel in the bathroom, correct?

A. Correct.

Q. And what significance -- or I guess let me rephrase that. Down on Item 20, it notes that there was blood and semen present. Based on your review of the file, were those from two different locations on the towel?

A. To the best of my recollection, they were.

Q. And that's why they're delineated as two separate items, 20-2 and 20-4?

A. Correct. They would have been two samples or cuttings taken from those areas.

Q. Before I move on, is there anything else on this slide that is important for the jury to know as part of your analysis?

A. Not that I can see.

Q. Let's go on to each individual item. Item 18 was a condom that was recovered from the a dresser. The result there is listed as no Y-chromosomal DNA profile was obtained. What does that mean?

A. So when the sample underwent those four steps I referred to, extraction, quantification, amplification and the genetic analysis, there was no detectable Y-chromosomal DNA types in that sample.

Q. Not enough to -- to not even move along in the process to get to an interpretation or to look at the – any underlying data.

A. Correct.

Q. Do you know of any other -- I'm going to skip ahead one slide here. On the screen now is a title – or slide titled differential extraction. Is this that semen separation or sperm sample that you talked about earlier?

A. Yes. So when we have a sample that has semen present within it, it will start off, you know, as Item 1-1. But then we'll end up actually with two separate fractions or potentially two separate DNA profiles there at the end. The steps that we take, as you see there, we will spin down the sample, those sperm cells going to the bottom of the tube. And we'll treat those two samples differently for quantification, determining how much is there, any amplification, the copying process. So that at the end, we end up with a DNA profile for what we call the sperm cell fraction, the DNA from the sperm pellet, and DNA profile from the non-sperm cell fraction.

Q. And a logical assumption would be that condoms may include semen. Was this process used for the condom?

A. I would have to refer to my extraction.

Q. Would doing so refresh your memory?

A. It would.

ATTORNEY RADMER: Judge, may --

THE COURT: Yes, go ahead. Yep.

THE WITNESS: So 18-1 was treated with a nondifferential extraction, so it was not -- it did not undergo this process.

BY ATTORNEY RADMER:

Q. And no useful data was obtained from that condom, correct?

A. Correct.

Q. In terms of genetic or DNA profiles?

A. No Y-chromosomal profile was obtained.

Q. Is there anything particular about condoms that might pose a barrier for obtaining DNA from them?

A. So it really depends on the brand of condom. There's been instances where like any of the chemicals may inhibit --

Q. The spermicide?

A. To the best of my recollection, from my training and experience, yes, for condom samples.

Q. With regard to Item 21A, underwear that was recovered from the bedroom floor on the west wall, speaking to 21A-3 first, tell us about 21A-3.

A. So 21A-3, there was a non-sperm cell fraction. Again, if you think back to that previous slide, it was a sample that -- that logically should not contain any sperm based on our extraction procedure. That was determined to be a mixture of DNA from two or more individuals, and then I did a comparison in which Arthur Gray was excluded from being a contributor, which means that the DNA types that are present in Arthur Gray's known sample were not present in that DNA mixture.

Q. What does the first line mean, a mixture of DNA of two or more? Can you break that down for us?

A. Sure. So as I mentioned previously, we get half of our DNA from our mother and half of our DNA from our father. We can get the same DNA type at a location, which means we would have the same one type, or we can get two different meaning we would have two peaks or two DNA types. When we see three DNA types at a location, that's an indication to us that there are two individuals contributing their genetic information to that sample.

Q. And are you able to make any educated analyses on those mixtures of those two or more individuals or separate out profiles to see who may or may not be in them?

A. So for DNA mixtures, sometimes there's an indication that one individual's DNA is more prevalent or predominant than the other. Sometimes the mixture could be of equal amounts of DNA and we can't deconvolute that, and so we can just say if someone is there or not there in the sample.

Q. And so is the "not there" here Arthur Gray?

A. Correct. The term excluded means the DNA types from Arthur Gray are not present within that mixture.

Q. And in order to make that conclusion did you have to have a known sample taken from Arthur Gray?

A. Yes.

Q. And, again, you didn't take that sample in this case but had it available to you?

A. Correct.

Q. Additionally, from the same pair of underwear was a second spot, 21A-4. Going back to our sperm and non-sperm cell slide, it looks like both were analyzed in this case. Starting with the sperm cell fraction, what can you tell us?

A. So the DNA profile obtained from the sperm cell fraction of 21A-4 was a mixture of DNA from two individuals, and Arthur Gray was also excluded from being a contributor to that mixture.

Q. And of the non-sperm cell fraction, 21A-4, that part had a DNA profile that matched Jeanie Childs?

A. Yes.

Q. An, again, in order to make that

determination that it matched Jeanie Childs, you presumably had a known sample available to you for that comparison?

A. Correct.

Q. Going to Item 14, a comforter recovered in this case, looking at 14-17, the sperm cell fraction, what can you tell us about that?

A. So 14-17, using that differential extraction, the DNA profile developed from the sperm cells, a male DNA profile was developed that did not match Arthur Gray. And this was determined to be an unknown male DNA profile.

Q. Is that unknown male profile held for later comparison?

A. It is.

Q. And on the non-sperm cell fraction of 14-17, what were you able to glean?

A. The non-sperm cell fraction, again, was a mixture of two or more individuals. Jeanie Childs could not be excluded as a contributor, but Arthur Gray could be excluded as contributing his DNA.

Q. And, Ms. Klick, on a comforter from a bed, is this the entire comforter tested at one time, or is it looked at for different sites for potential analysis?

A. So the serologist will examine the whole item and just take small samples. The whole comforter is not tested from top to bottom.

Q. Okay. And both the sperm cell and the non-sperm cell fraction, as it notes, were maintained by the BCA for later comparison?

A. Correct.

Q. Such that if another known sample was submitted, regardless of who that individual was, it could be compared against these two samples?

A. Yes.

Q. Now, again, additionally from the comforter, we're seeing 14-1 and 14-2, are those two additional sites collected by the serologist?

A. Yes, they are.

Q. And these were both submitted to Y-chromosomal profiling?

A. Yes.

Q. As to 14-1, what can you tell us?

A. So 14-1 was consistent with being a mixture of DNA from four or more male individuals. Again, we say male because only males possess the Y chromosome. And from this, Arthur Gray could not be excluded.

Q. When it says a mixture of four or more male individuals, are you able to tell us sitting here today who else is in that four or more?

A. No, I cannot.

Q. 14-2, looks like a similar result, but in that instance there was a mixture of three or more individuals?

A. Correct.

Q. Same question, you can't tell us who or who else was in that mixture?

A. No, I cannot.

Q. Are mixtures -- can they be sufficiently complicated where regardless if you have a known sample or not, that they just simply can't provide useful information for comparison purposes?

A. So based on the standing operating procedures in place at the time of the BCA, I deemed that these were suitable for comparison purposes. The validation that goes into play in determining if something is suitable or not may have since changed since my time of employment.

Q. So at this time, which -- would they have been suitable for additional comparison or not?

A. Yes. Those would have been suitable for comparison purposes.

Q. Back in 2012.

A. Correct.

Q. But you're familiar, though, that since you've left the lab that now is not the case, correct?

A. I can't speak if those profiles are still considered suitable for comparisons. I can't speak to the techniques currently being used.

Q. Fair enough. I should rephrase the question. But are you aware that there may have been changes in the process since you did this analysis 'til 2022 or today?

A. Correct.

Q. Looking at Item 20, a blue towel from a bathroom, let's talk first about the first line there, the 20-4, another sperm cell fraction. What can you tell us about that particular sample?

A. So from the sperm cell fraction of 20-4, again, that was a sample from the blue towel in which semen was identified. There was a male profile that did not match Arthur Gray. This profile, however, was identical to the profile from the comforter's sperm cell fraction.

Q. So from the sample from the blue towel to the sample to the comforter, you're able to compare those two samples to one another?

A. Yes. I can look at all those locations and DNA types and say that they are identical.

Q. And then presumably then from the same person, absent there being a twin?

A. Correct.

Q. 20-4, again, a non-sperm cell fraction,

what can you tell us about that?

A. So the non-sperm cell fraction had a mixture of three or more individuals with a predominant male DNA profile. So in this mixture, it was clear that there was a stronger contribution or there was more of one individual's DNA. So we call that predominant or major male DNA profile. This predominant male profile was the same as the male profile of the sperm cell fraction from the same sample of 20-4, the comforter. And in comparing to the other DNA types in that mixture, I could exclude Arthur Gray from contributing his DNA types.

Q. And the last line there, 20-2, there was blood identified on the towel?

A. Yes.

Q. And that was done by serology?

A. That was, yes.

Q. And what was the result of that blood analysis or DNA?

A. The profile obtained from 20-2 matched Jeanie Childs.

Q. And all three -- or both of these samples, 20-4 and 20-2, came from that same blue towel?

A. Correct.

Q. Now as to those unknowns, those profiles were maintained by the BCA, again, for later

comparison should additional known samples be submitted.

A. Yes.

Q. Additionally, there was some work -- and I know you weren't at the scene -- that was conducted outside of the immediate apartment in which these items were recovered, specifically two bloodstains. Are you familiar with Item No. 1 and Item No. 5 as submitted to the BCA crime lab?

A. Yes.

Q. And those were identified as two bloodstains from a stairwell, correct?

A. Correct.

Q. And to whom, if anyone, did those two blood – or blood samples match in terms of DNA?

A. The DNA profile obtained from those two blood samples matched the DNA profile of Jeanie Childs.

Q. And, again, we'll have other witnesses to talk about where those were and what -- appreciate you're a little out of order today. Ms. Klick, throughout your analysis, was there any indication that the process did not proceed according to your standard operating procedure? In other words, were the controls sound?

A. In reviewing my case file, there did not seem to be any indications either at the time when it

was peer-reviewed or even now that there was any deviation from standard operating procedure. All the controls worked as expected.

Q. And was the totality of the results here as presented to the jury submitted to peer review before publishing?

A. Yes, they were.

ATTORNEY RADMER: I have nothing further. Thank you, Ms. Klick.

THE COURT: Thank you. Mr. Tyler.

CROSS-EXAMINATION

BY ATTORNEY TYLER:

Q. Good afternoon.

A. Good afternoon.

Q. How you doing today?

A. Good. Thank you.

Q. I have a couple of questions. You did mention mitochondrial DNA. I got to follow up with that just for a moment. Mitochondrial DNA is passed down maternally?

A. Correct.

Q. I inherit it from my mother?

A. Correct.

Q. She inherited it from her mother?

A. Correct.

Q. But if I -- if a male has a child, that – their mitochondrial DNA is not passed on to either a son or daughter; is that correct?

A. Correct.

Q. How do you -- when you're doing this testing, how do you kind of separate mitochondrial DNA from the nuclear DNA?

A. So I am not a trained analyst in mitochondrial DNA testing. The way it's determined if a sample is suitable for mitochondrial DNA testing happens prior to the case being assigned to me. When we are performing autosomal DNA testing, however, that step of PCR, that copying step that I referred to, we can change the chemical components so that we're only targeting or copying nuclear DNA. And if mitochondrial testing was to be performed, they would use a different copying procedure.

Q. So there was somebody before you who had done an exam that said, this is nuclear DNA and this is mitochondrial DNA?

A. No. I'm not sure what you're asking.

Q. Okay. Well, you did DNA profiling.

A. Yes, I performed autosomal DNA

profiling. I --

Q. Okay. I'm just curious, how do you know that it's nuclear DNA and not mitochondrial DNA?

A. So getting into the specifics of PCR, the way that we're able to target nuclear DNA is we have these short sequences called primers that will only stick to nuclear DNA. They're not specific for mitochondrial DNA. The mitochondrial DNA process is a separate laboratory analysis, different chemicals, a different kit for the copying. So the kit or chemicals we use for copying nuclear DNA wouldn't even be able to find the mitochondrial DNA.

Q. Okay. Thank you.

A. Yeah.

Q. How many reports did you review in this matter?

A. Prior to testimony?

Q. Yes.

A. I reviewed, I believe, two.

Q. Okay. Was it Report 19?

A. I'm going to have to refer to the numbers on them. The reports I have in my discovery do not have the number on them. If you can tell me the items of evidence or the date on the bottom that I would be able to know which one we're referring to.

Q. Okay. Does that refresh your -- did you look at the report?

A. It does. This is the report I issued on April 4th, 2012.

Q. I don't mean to be picky with you, but please forgive me. When I ask you to refresh your memory, do you mind just turning the document over when you testify?

A. Sure.

Q. Okay. I -- it's just there's this part about the formalities of what we do. So you worked on Report 19. Is that correct?

A. Correct.

Q. Okay. Were you at all involved in any of the collection of these DNA samples from the apartment?

A. No, I was not.

Q. Okay. Were you involved in any of the steps where they kind of identified different possible biological stains on evidence?

A. No, I was not.

Q. Your work on this matter was simply doing DNA profiling on a number of samples; is that correct?

A. Correct.

Q. Okay. Let me ask, and you've kind of talked about it, in your report for 19, how many different profiles were created?

ATTORNEY RADMER: Objection. Judge, approach?

THE COURT: Yes.

(Sidebar discussion between attorneys and judge.)

THE COURT: All right. We're back on the record. Ms. Klick and members of the jury, thanks for your patience. We're ready to proceed. We're back on the record. Mr. Tyler, please go ahead, sir.

BY ATTORNEY TYLER:

Q. I'm sorry about that delay. Could you explain what you mean by -- I'm looking at 14-1, consistent with a mixture of DNA from four or more male individuals. Could you explain that?

A. The part that refers to how many male individuals are present?

Q. Yes.

A. So for a Y-chromosomal DNA profile, there's oftentimes only one type at the location. So if we see the presence of four types at a location, it indicates to us that four males could be contributing to that sample.

Q. Is there any way in the work that you've done to be able to figure out when these -- when these

DNA samples were left on the comforter?

A. No.

Q. There's no way to date it?

A. To my training and experience, I am not aware of any in 2012. I can't --

Q. You've got radiocarbon --
(Both parties speaking at the same time.)

THE COURT: Let her finish, please. You got to let her finish, Mr. Tyler.

THE WITNESS: I can't speak to any current techniques or research that has undergone any work since I left in 2012.

BY ATTORNEY TYLER:

Q. Okay. Thank you. So we have, you know, carbon dating for certain things, potassium-argon dating for millions and billions of years. But this we can't figure out when these samples were deposited. Is that correct?

A. The carbon dating wouldn't be relevant to forensic DNA testing. That's not something the BCA has a capacity to do to the best of my knowledge. These samples, I can't tell from looking at them how long they've been present on there, no.

Q. Okay. Okay. And let me go back just a moment. There was a condom that was tested, and you said there's -- what was it, no Y-chromosome profile

created?

A. Correct.

Q. Was there any other data that you were able to retrieve? I don't quite -- I understand there's no Y profile. Was there any DNA information that you were able to determine?

A. So no profile means there was no DNA types detected in our analysis.

Q. Okay. Thank you. And then on the comforter, you did, if I'm correct, 14-1, 14-2 and 14-17; is that correct?

A. That's correct.

Q. Are you aware or not aware of any other testing on any other objects in this case; you're only familiar with facts with report -- with 19?

A. Correct.

Q. Okay. And then in 21A-3, it's a mixture of two or more individuals. When we talk about two or more, how many more can we be talking about?

A. So the reason it's -- to the best of my recollection, the reason that language was used in the standard operating procedure for report writing is because, again, you can receive the same DNA type from your parents, in which case it would show up as one. You can receive two different DNA types in which case it would show up as two. So if you saw three types at a location, most likely it could be two individuals but

possibly three with all the -- with all different types. But I can't really speak to why that language was selected for it.

Q. I haven't heard of this standard operating -- can you explain that?

A. Standard operating procedure are all the documented formal laboratory techniques and policies that are in place within a laboratory. The BCA has to undergo accreditation and show to the association of crime laboratory directors that we have robust standard operating procedures in place. This ensures that all scientists are following the same techniques and we have consistency.

Q. Okay. Thank you.

A. Yep.

Q. Let me go back just a moment. It's one of my last questions. You talked about there was a sample with four or more male individuals. We don't know if they were left at different times, different weeks, different months. Is there any way to determine that?

A. There's no way to determine is that.

ATTORNEY TYLER: Okay. I have no further questions, Judge.

THE COURT: All right. Mr. Radmer, anything else?

ATTORNEY RADMER: No, Judge. The State

has nothing further.

THE COURT: All right. Ms. Klick, thank you so much. You're free to go. Have a great rest of the evening.

Members of the jury, that concludes the evidence presentation for today. We're going to come back -- I hope you don't mind that we're leaving a little bit early today. We'll come back tomorrow then at nine o'clock, please. And remember again not to talk to your family or friends about the case. Don't talk about details of the case. And remember, please, leave your notebooks facedown on your chairs. And we'll come back tomorrow -- we'll have you come back then to 657 and we'll resume the trial at that time. Thank you again for your attention today. Have a great night.

Please rise for the jury.

(Jury excused.)

THE COURT: Please be seated. All right. We're now outside the presence of the jury. For the record, Mr. Meshbesher, go ahead.

ATTORNEY MESHBESHER: Nope, nothing, Your Honor. I was just organizing.

THE COURT: All right. No problem. Anything from the State?

ATTORNEY RADMER: No, Your Honor. Thank you for your patience. It went a little quicker this afternoon than I thought we would so.

THE COURT: That's fine. It's a complicated case. So we'll see you tomorrow morning then, and we'll resume at nine o'clock.

ATTORNEY RADMER: Very good. I appreciate that.

THE COURT: All right. Have a great night everyone.

ATTORNEY TYLER: Thank you, Judge.

THE COURT: Thank you.
(Proceedings concluded.)

CERTIFICATE

I, CARRIE L. FRANCKOWIAK, an Official Stenographic Court Reporter in and for the District Court of the 10th Judicial District, County of Washington, State of Minnesota, do hereby certify that the foregoing is a true and correct transcript of all the proceedings had and testimony taken in the above-entitled matter, as the same are contained in my original stenographic notes on the said trial or proceeding.

Dated this 2nd day of April, 2023.

s/_____
Carrie L. Frankowiak, RMR, CRR, CRC, RDR
Court Reporter
14949 62nd Street North
Stillwater, MN 55082
(651) 413-8108