

STATE OF MINNESOTA
COUNTY OF LYON

IN DISTRICT COURT
FIFTH JUDICIAL DISTRICT

OLGA MARINA FRANCO DEL CID,

Petitioner,

File No. 42-CR-08-220

vs.

STATE OF MINNESOTA,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
ORDER AND
MEMORANDUM

The above-entitled matter came before this court on Petitioner's Petition for Postconviction Relief, moving to vacate Petitioner's conviction and sentence and order a new trial. Petitioner is represented by Neal A. Eisenbraun, Attorney at Law, Fridley, Minnesota. Respondent is represented by Richard R. Maes, Lyon County Attorney. A hearing was not held.

Based upon all the files and records herein, the Court makes the following:

FINDINGS OF FACT

1. Petitioner was charged in an Amended Complaint with four counts of Criminal Vehicular Homicide, in violation of Minn. Stat. § 609.21, Subd. 1(1), seventeen counts of Criminal Vehicular Injury, in violation of Minn. Stat. § 609.21, Subd. 1(1), one count of False Name and Date of Birth to a Peace Officer, in violation of Minn. Stat. § 609.506, Subd. 2, one count of Stop Sign Violation, in violation of Minn. Stat. § 169.20, Subd. 3(a), and one count of No Minnesota Driver's License, in violation of Minn. Stat. § 171.02, Subd. 1.
2. On August 6, 2008, after a jury trial before this Court, the jury found Petitioner guilty of all 24 charges.
3. On August 29, 2008, Petitioner filed a Motion for Judgment of Acquittal, on the grounds that there was insufficient evidence to support her conviction.
4. On that same date, Petitioner filed, in the alternative, a Motion for a New Trial, on the following grounds:
 - a. Irregularity depriving Petitioner of a fair trial, based upon (1) pretrial publicity, and (2) this Court's failure to instruct the jury as to an alternative perpetrator defense;
 - b. Prosecutorial misconduct, based upon (1) the State claiming that Petitioner was "pinned in the driver's seat" of the minivan, (2) certain witnesses

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9/18/09
Karen J. Bierman

COURT ADMINISTRATOR
Marshall, Lyon County, Minnesota

- called by the State referring to Petitioner as the "driver," (3) the State implied admissions by Petitioner without foundation, (4) the State improperly attempted to impeach Petitioner's testimony, (5) the State improperly withheld witness information, and (6) the State improperly called a rebuttal witness;
- c. Juror misconduct, based upon the jury improperly requiring Petitioner to prove that she was not the driver of the minivan;
 - d. Surprise, based upon the rebuttal witness testimony and the unavailability of a witness;
 - e. Verdict not justified by evidence;
 - f. Interests of justice, based upon (1) an inaccurate transcription of the statement Petitioner made at the hospital, and (2) false trial testimony of the rebuttal witness.
5. On September 18, 2008, a hearing was held regarding Petitioner's motions for judgment of acquittal and, in the alternative, a new trial.
 6. By Order filed on September 23, 2008, this Court denied both motions. In the Memorandum attached to that Order, this Court addressed each of the grounds asserted in the motions.
 7. On December 29, 2009, Petitioner appealed the conviction to the Minnesota Court of Appeals. The Court of Appeals File No. is A08-2266.
 8. On June 9, 2009, Petitioner filed a Motion to Stay Appeal to Allow Appellant to Renew Her Motion for a New Trial Based on Newly Discovered Evidence.
 9. By Order filed on July 1, 2009, the appellate panel stayed the appeal pending further proceedings in the district court. The appellate panel construed the motion intended to be filed in the district court as a petition for postconviction relief. That Order specifically noted that it should not be construed as an assessment of the merits of any petition filed, nor an opinion on any right to a hearing in district court.
 10. On July 29, 2009, Petitioner filed this Petition for Postconviction Relief. Petitioner raised the following grounds for relief:
 - a. Petitioner was not aware that the Minnesota State Patrol had or would create an animated recreation of the crash sequence;
 - b. DNA analysis, subsequent to the jury trial, establishing Francisco Mendoza's presence in the minivan;
 - c. The State withheld a potentially exculpatory document and argued facts contradicted by that document;
 - d. A post-trial appellate court decision warrants reconsideration of Petitioner's post-trial motion for judgment of acquittal;
 - e. Petitioner's conviction for the charge in Count VIII is contrary to law.
 11. On August 26, 2009, this Court received the State's Answer to Petition for Postconviction Relief.
 12. The Conclusions of Law and Memorandum below are incorporated into these Findings of Fact.

Based upon the above Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

- I. Petitioner has not alleged facts that could prevail on a claim of newly-discovered evidence regarding the animated accident reconstruction.
- II. There is no evidence that the State failed to properly disclose the animated accident reconstruction.
- III. Petitioner has not alleged facts that could prevail on a claim of newly-discovered evidence regarding the presence of Mendoza's DNA in the minivan.
- IV. There is no evidence that the State failed to properly disclose the evidence that Mendoza's DNA was in the minivan.
- V. Petitioner has not alleged facts constituting prosecutorial error regarding the State's argument at trial that the DNA may have been from someone else.
- VI. Any discovery violation regarding the State's failure to disclose the BCA case notes did not cause any prejudice.
- VII. Any discovery violation regarding the State's failure to disclose the BCA case notes was not so egregious or flagrant as to warrant granting a new trial despite the lack of prejudice.
- VIII. The prosecutorial error in the State's opening statement, if any, was harmless beyond a reasonable doubt.
- IX. Any assertion that the State obtained and withheld other evidence is an argumentative assertion without factual support.
- X. State v. Van Tassel does not compel a finding that the evidence of gross negligence was insufficient.
- XI. Petitioner's conviction for the charges in Count VIII is not dependent upon a right of way violation.
- XII. An evidentiary hearing is not appropriate in this matter, as the files and records herein conclusively show that Petitioner is not entitled to relief.

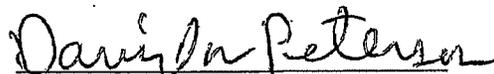
Based upon the above Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED:

1. The Petition for Postconviction Relief is DENIED. An evidentiary hearing will not be held.

Dated: Sept 18, 2009

BY THE COURT:



David W. Peterson
Judge of District Court

MEMORANDUM

APPLICABLE STANDARDS OF LAW

I. Postconviction Relief Generally

This Court must set an early hearing on a postconviction petition, unless the files and records conclusively show that Petitioner is entitled to no relief. Minn. Stat. § 590.04, Subd. 1. This Court can only decide the merits without an evidentiary hearing if there is no material issue of fact. Krominga v. State, 311 N.W.2d 858 (Minn. 1981). Any uncertainty on the issue of whether a hearing should be held should resolve the issue in favor of having a hearing. State ex rel Roy v. Tahash, 152 N.W.2d 301, 305 (Minn. 1967); Ferguson v. State, 645 N.W.2d 437 (Minn. 2002). The petition must be liberally construed, and this Court must look to its substance and waive any irregularities or defects in form. Minn. Stat. § 590.03. However, to warrant an evidentiary hearing, Petitioner must allege facts that, if proved, would entitle her to relief. State v. Kelly, 535 N.W.2d 345, 347 (Minn. 1995). Petitioner must make “more than argumentative assertions without factual support.” Zenanko v. State, 688 N.W.2d 861, 864 (Minn. 2004) (quoting Hodgson v. State, 540 N.W.2d 515, 517 (Minn. 1995)). Petitioner must establish the facts alleged in the Petition by a preponderance of the evidence. Minn. Stat. § 590.04, Subd. 3.

II. Newly-Discovered Evidence

As specifically related to a postconviction claim based upon newly-discovered evidence, the same standards applicable to a motion for a new trial on that basis apply.

State v. Martin, 295 N.W.2d 76, 78 (Minn. 1980). Minnesota Rule of Criminal Procedure 26.04, Subd. 1(1) provides, in part:

The court on written motion of the defendant may grant a new trial on the issue of guilt [...] on any of the following grounds:

[...]

5. Material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial[...]

To prevail on a claim based upon newly-discovered evidence, Petitioner must show:

1. The evidence was not known to Petitioner or her Counsel at the time of trial;
2. It could not have been discovered through due diligence before trial;
3. That evidence is not cumulative, impeaching, or doubtful; and
4. That evidence would probably produce an acquittal or more favorable result.

Rainer v. State, 566 N.W.2d 692, 695 (Minn. 1997).

III. Failure to Comply with Discovery

Minnesota Rule of Criminal Procedure 9.01 and Brady v. Maryland, 373 U.S. 83 (1963) both govern disclosures by the prosecution.

Minn. R. Crim. Pro. 9.01, Subd. 1(2) requires mandatory disclosure of all written statements related to the case. The prosecution's obligations extend to "material and information in the possession or control [...] of any others who have participated in the investigation or evaluation of the case and who [...] with reference to the particular case have reported to the prosecuting attorney's office." Minn. R. Crim. Pro. 9.01, Subd. 1(8). Pursuant to Rule 9.03, the prosecutor has a continuing duty to disclose and supply discovery.

Under Brady, the prosecution's "suppression" of evidence favorable to a criminal defendant violates the guarantee of due process in the United States Constitution "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. A "true Brady violation" contains three elements: (1) the evidence must be favorable to the accused, by being exculpatory or impeaching; (2) it must have been suppressed, whether suppression was willful or merely inadvertent; and (3) there must be prejudice to the accused. Pederson v. State, 692 N.W.2d 452, 459 (Minn. 2005) (citing Strickler v. Greene, 527 U.S. 263, 281-82 (1999)). The first two elements are embodied in Rule 9.01. Id. at 460. Analysis under the third element turns upon whether the evidence is "material," which, in turn, means "there is a reasonable probability" (meaning "sufficient to undermine confidence in the outcome") "that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. (citing United States v. Bagley, 473 U.S. 667, 682 (1985)). This standard is met and the conviction must be reversed upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Youngblood v. West Virginia, 547 U.S. 867, 870 (2006) (per curiam) (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)). It does not require a showing that the disclosure would have resulted in an acquittal. Id.

"We conduct a similar, but not identical, inquiry under the Minnesota Constitution." State v. Hunt, 615 N.W.2d 294, 299 (Minn. 2000). In some cases, a conviction can be reversed without a showing of prejudice if the State's violation of discovery rules was egregious or flagrant. State v. Jackson, 770 N.W.2d 470, 479-80 (Minn. 2009) (citing State v. Kaiser, 486 N.W.2d 384, 386-87 (Minn. 1992) (State told

possibly exculpatory witness to “keep her mouth shut”); State v. Schwantes, 314 N.W.2d 243, 244-45 (Minn. 1982) (State failed to notify defense of a statement that “discredited defendant’s alibi”); State v. Zeimet, 310 N.W.2d 552, 553 (Minn. 1981) (State failed to disclose exculpatory, “important” evidence to defense)). The standard rule, however, is that the accused must show (1) a discovery violation, and (2) prejudice as a result. Id. at 479 (citing State v. Scanlon, 719 N.W.2d 674, 685 (Minn. 2006); State v. Palubicki, 700 N.W.2d 476, 489 (Minn. 2005)).

IV. Prosecutorial Error

The acts of a prosecutor may constitute error if they materially undermine the fairness of a trial. State v. Fields, 730 N.W.2d 777, 782 (Minn. 2007). Error also results from the prosecution’s violation of clear or established standards of conduct, including: rules, laws, orders of a district court, or clear commands in case law. Id. Prosecutorial error can result in a new trial if, viewed in the light of the whole record, it appears to be inexcusable and so serious and prejudicial that defendant’s right to a fair trial was denied. State v. Wahlberg, 296 N.W.2d 408, 420 (Minn. 1980).

If the alleged error was not objected to at trial, the burden is on Petitioner to show that (1) there was prosecutorial error, and (2) that error was plain. State v. Ramey, 721 N.W.2d 294, 302 (Minn. 2006). If that burden is met, the prosecution has the burden of showing that the error did not affect substantial rights. Id.

If the alleged error was objected to at trial, the two-tiered approach of State v. Caron, 218 N.W.2d 197, 200 (Minn. 1974) applies.¹ For error considered less serious, the question is whether it “likely played a substantial part” in influencing the verdict. State v. Wren, 738 N.W.2d 378, 390 n.8 (Minn. 2007). For serious error, it must be certain beyond a reasonable doubt that the error was harmless, meaning that the verdict was “surely unattributable” to the error. State v. Pendleton, 759 N.W.2d 900, 911 (Minn. 2009) (citing Wren, 738 N.W.2d at 390 n.8; State v. Dobbins, 725 N.W.2d 492, 507 (Minn. 2006)).

Specifically regarding error in opening statements, if the facts are stated in good faith, and there were reasonable grounds to believe evidence offered to prove those facts is admissible, there is no error in stating facts that are not evidenced at trial. Tucker v. State, 245 N.W.2d 199, 202 (Minn. 1976).

PETITIONER'S ALLEGATIONS

I. Animated Accident Reconstruction

On or about January 15, 2009, a televised news report indicated that the Minnesota State Patrol had either itself created, or caused to be created, an animated recreation of the crash sequence involved in this case. The Petition and Counsel's Affidavit allege that:

1. The assertion that two distinct movements occurred during the crash, and the analyses of those movements, were imperative to Petitioner's defense at trial;

¹ The Minnesota Supreme Court has noted that the Caron test has been questioned by recent decisions, but that Court has not specifically overruled Caron. See State v. Pendleton, 759 N.W.2d 900, 911 n.3 (Minn. 2009).

2. Petitioner's crash-reconstruction expert opined that an animated recreation would be needed to adequately explain the movements and analyses to the average lay-person;
3. Petitioner would have required funds of at least \$10,000 (for a basic animation) up to \$30,000 (for a precise animation, including movement of vehicle occupants) to procure an animated recreation;
4. At no time prior to January 15, 2009 did Petitioner or her Counsel know that the State Patrol had created or intended to create an animated recreation of the crash sequence.

Because Petitioner could not afford to procure an animated recreation, and did not know that the State Patrol had or would have one, Petitioner was "deprived of information material to her decision to demand a speedy trial." Petitioner, therefore, requests that (1) the State Patrol be ordered to disclose when it decided to create the animation, and when it actually did create it, and (2) Petitioner be granted a new trial so that this evidence can be considered by a jury. The Court construes this argument as relating to either (1) newly-discovered evidence, or (2) a failure by the State to disclose evidence.²

a. Petitioner has not alleged facts that could prevail on a claim of newly-discovered evidence regarding the animated accident reconstruction

As it may relate to an argument for a new trial on the basis of newly-discovered evidence, even if Petitioner's allegations are accepted as true, Petitioner would not prevail on her claim. This particular situation is somewhat novel, as the newly-

² The Petition itself presents no legal argument in support of granting the relief requested. In the interests of justice, the Court analyzes what it believes would be the most applicable analyses. See Minn. Stat. § 590.03 (postconviction petitions are to be liberally construed on substance).

discovered evidence (the animated reconstruction) consists of so-called “demonstrative” or “illustrative evidence.” Demonstrative or illustrative evidence is, unlike substantive evidence, offered to illustrate or express a witness’ testimony, rather than support a fact in issue: State v. Stewart, 643 N.W.2d 281, 293 (Minn. 2002). “The standard for the admissibility of demonstrative evidence and visual aids is whether the evidence is relevant and accurate and assists the jury in understanding the testimony of a witness.” Id. (citing State v. DeZeler, 41 N.W.2d 313, 318-19 (Minn. 1950)).

This Court is not aware of case law applying the Rainer test for newly-discovered evidence to demonstrative evidence.³ Even if the Rainer test is applied, its four factors have not been shown here. Regarding the first factor, arguably the evidence was not known to Petitioner or her Counsel at the time of trial.⁴ As to the second factor, regardless of whether the animated construction existed at the time of trial or did not exist until later, there is no allegation (and, further, no evidence) that Petitioner or her Counsel could not have discovered its existence (or its future existence) before trial. Regarding the third factor, to some extent, demonstrative evidence could be considered cumulative with the testimony the demonstrative evidence is to illustrate. Demonstrative evidence,

³ Arguably, a claim based upon newly-discovered evidence may be wholly inapplicable to demonstrative evidence, because its purpose is to express testimony and, therefore, is not evidence of any fact.

⁴ This would depend upon whether demonstrative evidence is considered “known” when either (1) the underlying testimony to be illustrated was known, or (2) the existence of the demonstrative evidence itself was known. As this Court is not aware of case law applying Rainer to demonstrative evidence, this Court is not aware which of these viewpoints is more appropriate. Since, however, the Court finds that there is no evidence regarding the second and fourth Rainer factors, this Court does not decided whether Petitioner’s allegations would demonstrate the first factor.

however, is still admissible, and, therefore, the Court does not construe its cumulative nature as a failure to show this factor. Regarding the final factor, while (perhaps) not as illustrative as an animated reconstruction, Petitioner's expert witness did use a visual representation to explain his testimony. While Counsel's affidavit contends that the expert opined that an animated reconstruction would be needed to explain his testimony, this is an argumentative assertion without factual support. Zenanko, 688 N.W.2d at 864. There is no evidence that the animated reconstruction would probably produce an acquittal. Even if the Court found that the first and third factors were shown, there is no evidence of the second or fourth factors.

Inasmuch as Petitioner's claim may be a request for a new trial on the basis that the animated accident reconstruction is newly-discovered evidence, Petitioner has not alleged facts that, if proved, would entitle her to relief. Kelly, 535 N.W.2d at 347. Therefore, the files and records conclusively show that Petitioner is entitled to no relief on that basis. Minn. Stat. § 590.04, Subd. 1. The Court denies relief on this claim without an evidentiary hearing.

b. There is no evidence that the State failed to properly disclose the animated accident reconstruction

As the Petition and affidavit clearly demonstrate, Petitioner simply does not know when the animated accident reconstruction was created or when there was any plan to create it.⁵ There is, therefore, not even an allegation that the reconstruction, or even knowledge that a reconstruction might be created, was "within the prosecuting attorney's

⁵ The Court notes that the State's Answer specifically asserts that the animated accident reconstruction was created "a few months" after the trial. Even without that assertion, however, Petitioner has not alleged facts that would entitle her to relief.

possession or control.” Any contention that the State was required to disclose the reconstruction, or knowledge that one might be created, is an argumentative assertion without factual support. Zenanko, 688 N.W.2d 864. While Petitioner now specifically requests that the State Patrol be ordered to disclose when it decided to make, and when it actually did make, the reconstruction, the postconviction statutes and case law make it clear that the petition must allege facts. A rule to the contrary would require evidentiary hearings based upon speculation that the prosecution might have withheld materials that should have been disclosed.

Inasmuch as Petitioner’s claim may be a request for a new trial on the basis that the animated accident reconstruction should have been disclosed during discovery, Petitioner has not alleged facts that, if proved, would entitle her to relief. Kelly, 535 N.W.2d at 347. Therefore, the files and records conclusively show that Petitioner is entitled to no relief on that basis. Minn. Stat. § 590.04, Subd. 1. The Court denies relief on this claim without an evidentiary hearing.

II. Mendoza’s DNA in Minivan

The Petition and Counsel’s affidavit allege that:

1. Analysis by the Bureau of Criminal Apprehension (“BCA”) determined that no DNA on the airbags of the minivan matched Petitioner, but rather came from an “unknown male”;
2. Petitioner’s Counsel informed the State that Petitioner had items belonging to Francisco Mendoza (whom Petitioner asserted was driving the minivan), that may contain Mendoza’s DNA for comparison with the “unknown male”;

3. A search warrant had been executed on the residence of Petitioner and Mendoza, resulting in the seizure of items that may have contained Mendoza's DNA for comparison;
4. Petitioner, at the time of trial, did not have the funds to obtain her own DNA testing, and the State did not test any of Mendoza's items for DNA;
5. After the trial, Petitioner was loaned funding, and DNA comparison of Mendoza's toothbrush with the "unknown male" was a match.

Petitioner contends that (1) this conclusive evidence that Mendoza was in the minivan should have been available to her, and (2) the State improperly used the absence of this evidence to confuse the jury by implying that the DNA on the airbags could have been from first responders on the scene. The Court construes this argument as relating to either (1) newly-discovered evidence, (2) a failure by the State to disclose this evidence, or (3) prosecutorial error.⁶

a. Petitioner has not alleged facts that could prevail on a claim of newly-discovered evidence regarding the presence of Mendoza's DNA in the minivan

The newly-discovered evidence is the evidence that Mendoza's DNA matches the DNA of the "unknown male" found on the airbags of the minivan. Examination of the Rainer factors (whether the evidence was known; whether it could have been discovered through due diligence; whether it is cumulative, impeaching, or doubtful; whether would probably produce an acquittal or more favorable result) demonstrates that there is no evidence of the second or fourth factors. Regarding the first factor, while this evidence

⁶ See supra footnote 2.

was certainly suspected by Petitioner and her Counsel, at the time of trial they did not know that Mendoza's DNA would, in fact, match the "unknown male" DNA. As for the third factor, there was circumstantial evidence that the "unknown male" DNA was Mendoza's, but the new evidence of the DNA match is certainly not merely cumulative.⁷

Regarding the second factor, however, the Petition and affidavit demonstrate that, in fact, this evidence could have been discovered through due diligence before trial. The only reason it was not discovered was, based upon the Petition and affidavit, because Petitioner did not secure the funds to obtain DNA testing. This Court is not aware of any law that removes the second Rainer factor on the basis of financial difficulty in discovering the evidence. Further, the Court notes that, pursuant to Minn. Stat. § 611.21, an indigent criminal defendant may file an *ex parte* application for "investigative, expert, or other services necessary to an adequate defense in the case." Petitioner in this case did utilize this statutory scheme to obtain certain funding, and none of those requests were denied by this Court. The very existence of this statutory scheme leads to the conclusion that, if the evidence could have been discovered through due diligence before trial, regardless of financial difficulty, a claim based upon newly-discovered evidence must fail. Moreover, evidence independent of DNA put Mendoza in the minivan, thereby allowing Petitioner's Counsel to argue, as they vigorously did, both that Mendoza was the driver and that the State's failure to test the DNA was another example of an incomplete investigation. In short, Petitioner's Counsel's decision not to pursue testing was a strategic decision.

⁷ While the State's Answer suggests that this evidence is doubtful because, essentially, we cannot be sure that it was Mendoza's DNA on the toothbrush, based upon the record, the Court finds that there is a sufficient basis from which to infer that this was Mendoza's DNA.

Petitioner has also not alleged facts that would show that this DNA evidence would probably produce an acquittal or more favorable result, as required by the fourth Rainer factor. In the context of the trial, though the State did not concede that Mendoza was in the minivan, the State explicitly argued that, even if his DNA did match the “unknown male,” the presence of his DNA “doesn’t really mean a lot.” (Tr. at 1255, line 13.) The jury heard significant testimony regarding the facts that Mendoza owned and insured the minivan, that INS/ICE agents had tracked Mendoza to Mexico but could not extradite him, that the first witnesses at the scene saw someone else present, and that Mendoza was picked up down the road shortly after the accident and appeared injured. The jury’s verdict inherently means that the jury believed, beyond a reasonable doubt, that Petitioner was driving the minivan. Adding the presence of Mendoza’s DNA to the other testimony would not “probably produce an acquittal or a more favorable result.” Rainer, 566 N.W.2d at 695.

Inasmuch as Petitioner’s claim may be a request for a new trial on the basis that the confirmation of Mendoza’s DNA in the minivan is newly-discovered evidence, Petitioner has not alleged facts that, if proved, would entitle her to relief. Kelly, 535 N.W.2d at 347. Therefore, the files and records conclusively show that Petitioner is entitled to no relief on that basis. Minn. Stat. § 590.04, Subd. 1. The Court denies relief on this claim without an evidentiary hearing.

b. There is no evidence that the State failed to properly disclose the evidence that Mendoza’s DNA was in the minivan

As with the animated accident reconstruction, no facts have been alleged that, if proven, would constitute a discovery violation regarding Mendoza’s DNA. There is no

allegation that the State “suppressed” the evidence in violation of Rule 9.01 or Brady. As the April 21, 2008 memo from the State Patrol and the May 30, 2008 letter from the BCA, both of which the Petitioner’s Counsel received during discovery, indicate, the airbags from the minivan were going to be tested for a match against Petitioner’s DNA sample. The BCA letter indicated that the testing had the potential to “preclude any further tests or experiments” within the meaning of Rule 9.01, Subd. 1(4). (As Petitioner was able to obtain this later DNA analysis, that potential to preclude further tests apparently did not actualize.) There is no allegation that Petitioner or her Counsel made an attempt to observe any testing. There is no allegation that Petitioner or her Counsel attempted to obtain the airbags to procure their own testing and were refused. There is no allegation that, after learning that the DNA did not match Petitioner, the State withheld that information. The allegation is that the State didn’t also test for Mendoza’s DNA. In the context of Rule 9.01 and Brady, this Court is aware of no legal obligation for the State to have done so.

Inasmuch as Petitioner’s claim may be a request for a new trial on the basis that the State failed to disclose the fact that Mendoza’s DNA was in the minivan, Petitioner has not alleged facts that, if proved, would entitle her to relief. Kelly, 535 N.W.2d at 347. Therefore, the files and records conclusively show that Petitioner is entitled to no relief on that basis. Minn. Stat. § 590.04, Subd. 1. The Court denies relief on this claim without an evidentiary hearing.

c. Petitioner has not alleged facts constituting prosecutorial error regarding the State’s argument at trial that the DNA may have been from someone else

As already noted above, at trial the State did not concede that Mendoza was in the minivan. Petitioner contends that the State erroneously characterized a “near certain fact” and unfairly confused the jury by claiming that the DNA could have come from someone else. The Court notes that, if the prosecution’s characterizations of this alleged error constitute error at all, they were not objected to at trial. Petitioner would, therefore, need to show that there was error and that it was plain. Ramey, 721 N.W.2d at 302. Even accepting Petitioner’s allegations as true, however, this simply does not constitute error. The prosecution’s characterizations and statements that the DNA’s source was unknown, though now known to be incorrect, conformed with the evidence at trial. The evidence at trial was that the DNA matched an “unknown male.” The fact that it is now known to be Mendoza’s DNA does not make the prosecution’s arguments at the trial error.

Inasmuch as Petitioner’s claim may be a request for a new trial on the basis that the State committed prosecutorial error regarding the fact that Mendoza’s DNA was in the minivan, Petitioner has not alleged facts that, if proved, would entitle her to relief. Kelly, 535 N.W.2d at 347. Therefore, the files and records conclusively show that Petitioner is entitled to no relief on that basis. Minn. Stat. § 590.04, Subd. 1. The Court denies relief on this claim without an evidentiary hearing.

III. Withholding of Potentially Exculpatory Evidence, and Argument Contrary to Withheld Evidence

The Petition and Counsel’s affidavit allege that:

1. Petitioner's Counsel received the BCA's file for the purpose of comparing the DNA in the minivan to Mendoza's toothbrush;
2. In that file, Counsel found a fax, dated July 18, 2008, from the State to Amy Liberty, the forensic scientist who testified at trial; that fax requested "notes indicating where on the airbags the samples that were analyzed were located";
3. A handwritten note on that fax indicates, "faxed case notes pgs. 1-3 on 7/21/08";
4. The State never informed Petitioner's Counsel that the State had these case notes or provided these case notes to Counsel; the only BCA materials the State disclosed were the spoliation notice and the examiner's report.

Attached to the affidavit (filed under seal) is what appears to be the three pages of case notes. Petitioner contends that these notes show (1) more blood stains on the driver's-side airbag than on the passenger's-side airbag, and (2) bloodstains were found on the back of the driver's-side airbag but not on the back of the passenger's-side airbag. Petitioner contends that (1) the State improperly failed to disclose these notes, (2) the State's opening statement stated facts contrary to what those notes would show, and (3) Petitioner is unaware whether the State obtained and withheld any other evidence. The Court construes this argument as relating to either (1) a failure by the State to disclose evidence, or (2) prosecutorial error.⁸

**a. Any discovery violation regarding the State's failure to disclose the
BCA case notes did not cause any prejudice**

Assuming that Petitioner's allegations are true, the State violated the discovery rules. See Minn. R. Crim. Pro. 9.01, Subd. 1(2) (mandatory disclosure of all written

⁸ See supra footnote 2.

statements related to the case). Likewise, the first two elements of a “true Brady violation” are met. First, these case notes are favorable to Petitioner inasmuch as they show more blood stains on the driver’s-side airbag, which corroborates Petitioner’s trial testimony that Mendoza was bleeding and was the driver. Second, assuming Petitioner’s allegations are true, the prosecution specifically requested these notes, the handwritten note on that fax indicates the notes were sent, and, even if (through some error) the prosecution did not receive those notes, they should have been disclosed. See Minn. R. Crim. Pro. 9.01, Subd. 1(8) (prosecution obligation extends to material possessed by others that have participated in case and reported to prosecution).⁹

Even assuming Petitioner’s allegations are true, however, the third element of a Brady violation has not been met. There is not a reasonable probability, sufficient to undermine the confidence in the outcome, that the result of the proceeding would have been different if these case notes had been disclosed. Amy Liberty, who tested the airbags, described “a small amount” of blood (Tr. at 887, line 14) and testified that “there was not a lot of blood on either of the air bags.” (Id. at lines 16-17.) She also testified that “on the driver’s air bag there was blood on both the top and the bottom and the back of the air bag.” (Tr. at 888, lines 12-14.) When specifically asked whether a larger amount of blood was found on one bag or the other, she testified, “They were similar.” (Tr. at 889, line 22.) She also testified that “we [the BCA] have seen” cases in which the

⁹ In its Answer, the State “asserts that all documents received by the prosecutor’s office from the BCA lab were provided to the defense in this case.” The Court notes, however, that in determining whether to hold an evidentiary hearing, the question is whether Petitioner alleged facts that, if proved, would entitle her to relief. Kelly, 535 N.W.2d at 347. Therefore, this Court’s current analysis assumes that, as Petitioner has alleged, the only BCA materials the State disclosed were the spoliation notice and the examiner’s report.

blood of one person was on both airbags. (Tr. at 897, line 24-25.) Petitioner specifically elicited the testimony that this could be caused by a bloodied driver reaching into the passenger's side of the vehicle. (Tr. at 898, line 14-17.)

With this testimony in mind, the Court finds that disclosure of the case notes would not have changed the result of the proceedings. First, while Petitioner argues that these notes show a greater number of stains on the driver's-side airbag, those notes do not show the actual amount of blood. Liberty testified that, in that regard, the airbags were similar. If these notes had been disclosed, Petitioner may have elicited evidence that there were more (a greater number of) stains on the driver's-side airbag, but that would not change the evidence before the jury about (1) the amount of blood present (despite the number of stains), (2) that it was from one, male source, and (3) the possibility that the bloodied person was the driver. In this context, the additional information about the number of stains would not, with any reasonable probability, have changed the outcome of the proceedings.

Second, while Petitioner argues that the notes show blood stains on the back of the driver's-side airbag, Liberty specifically testified to that fact. Petitioner's argument that she should have had this information to corroborate her testimony ignores the fact that the jury, in fact, heard that information. If that testimony had surprised Petitioner during the trial, because Petitioner did not know Liberty would testify that blood was found on the back of the driver's-side airbag, Petitioner might have requested a continuance of some length to explore that. Petitioner's Counsel at trial made no comment about surprise caused by this testimony. In this context, the Court cannot find that knowing this information earlier (as would have been the case if the notes had been

disclosed) would, with any reasonable possibility, have changed the outcome of the proceedings.

Assuming Petitioner's allegations are true, the prosecution did violate the rules of discovery. This, however, did not result in any prejudice. Petitioner's Counsel had the spoliation notice and report, and Liberty was specifically listed as a trial witness on the State's response to discovery (dated July 9, 2008). Liberty literally testified to the facts that Petitioner alleges were not disclosed. This evidence could not "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Youngblood, 547 U.S. at 870. There was, therefore, no Brady violation.

Inasmuch as Petitioner's claim may be a request for a new trial on the basis that the State violated Brady by not disclosing the case notes, Petitioner has not alleged facts that, if proved, would entitle her to relief. Kelly, 535 N.W.2d at 347. Therefore, the files and records conclusively show that Petitioner is entitled to no relief on that basis. Minn. Stat. § 590.04, Subd. 1. The Court denies relief on this claim without an evidentiary hearing.

b. Any discovery violation regarding the State's failure to disclose the BCA case notes was not so egregious or flagrant as to warrant granting a new trial despite the lack of prejudice

As noted above, under the Minnesota Constitution, a showing of prejudice is not required if the State's violation was egregious or flagrant. Jackson, 770 N.W.2d at 479-80. This Court, however, concludes that, even if Petitioner's allegations are true, the violation here does not rise to that extreme level. In comparing this case with others, the

Court concludes that this case is more analogous to those in which Minnesota courts have required a showing of prejudice.

In Kaiser, the prosecutor told a witness "to keep her mouth shut," broke a promise to tell the defense of the victim's new telephone number and address, failed to disclose information the prosecutor knew prior to trial that cast doubt on the victim's identification of the defendant, and falsely emphasized in closing argument that the victim had always been consistent in her claim that the defendant attacked her. 486 N.W.2d at 387. In Schwantes, after the defense had copied the prosecution's file, the prosecution received a report of a prior inconsistent statement by the defendant's wife that would impeach the wife's alibi testimony. 314 N.W.2d at 244. The prosecution never disclosed that prior statement, the defense waived the marital privilege, and the prosecution did impeach the wife's alibi testimony. Id. at 244-45. In Zeimet, involving the deaths of two children in a house fire, the children's grandmother had told the prosecution that the children's mother (1) abused the children, (2) sometimes gave the children drugs to put them to sleep, (3) had life insurance policies on the children, and (4) told the grandmother "Mom, I killed my babies," shortly after the children's deaths. 310 N.W.2d at 553-54, n.1. Despite being aware of this information, the prosecution never disclosed this to the defense. Id. at 553.

On the other hand, in Scanlon, the district court concluded that the prosecution committed three discovery violations. 719 N.W.2d at 685. In the first, the prosecution failed to disclose that a preliminary evaluation of evidence indicated that shot pellets used in the shooting were five-shot pellets (which undermined the defendant's argument that the pellets were six-shot), and that evidence first was disclosed when mentioned by the

detective at trial. Id. at 685-86. The second violation involved a brief interview between a man incarcerated with the defendant and a detective that was not disclosed. Id. at 686. The third violation involved an undisclosed interview with the defendant's father, in which the father denied helping the defendant get rid of the murder evidence. Id. The defendant, on appeal, also alleged that four other discovery violations occurred. Id. at 686-87. The Supreme Court concluded that, even cumulatively, none of these violations (or alleged violations) would be prejudicial. Id. at 687. The Supreme Court further refused to exercise its power to overturn a verdict based on discovery violations absent prejudice and said, "The violations here appear to be the result of oversight or mistake, not deliberate attempts to hide facts or surprise the defense." Id. While the prosecution "was not scrupulous," there was "no evidence of bad faith here, and the information would not have prompted a change in trial strategy, nor was it exculpatory." Id. In Palubicki, the prosecution (and the trial court) violated the discovery rules by failing to disclose the substance of witnesses' statements because they were not "new or different." 700 N.W.2d at 489-90. The prosecution also violated the discovery rules by failing to timely disclose three witnesses to be called at trial. Id. at 490. The Supreme Court found no prejudice, and, while the defendant requested an exercise of the Supreme Court's supervisory powers, that Court "decline[d] to do so on [that] record." Id.

In this case, even assuming that the State violated the discovery rules, this Court concludes that this violation does not rise to the extreme level of those in Kaiser, Schwantes, and Zeimet. As Scanlon illustrates, the Kaiser-rule is limited to cases in which "the evidence was concealed in bad faith or was very important to the defense." 719 N.W.2d at 687. As this Court's analysis above demonstrates, the case notes were not

very important to the defense. Further, there is no allegation (and this Court's review of the record does not support a finding) of bad faith. On the contrary, the State's direct examination of Liberty at trial shows no attempt to conceal or mislead the jury regarding the facts that Petitioner alleges are important in the case notes (i.e. the amount of blood on each airbag and the presence of bloodstains on the back of the driver's-side airbag). See, e.g. Tr. at 887, lines 12-13 ("Was this a large amount of blood, a small amount, or how would you describe that?"; Id. at lines 21-23 ("[D]o you take and measure the – the stains or the drops or whatever you test?"); Tr. at 888, lines 4-5 ("[W]ere there several spots where there were blood, were – was it a limited number, or don't you know?"). Likewise, giving Petitioner's Counsel the spoliation notice (referencing Rule 9.01, Subd. 1(4) and outlining that the BCA could delay testing of the airbags) is not consistent with bad faith. In a complicated case, involving voluminous discovery, this was the only mistake. The allegation is that, despite requesting and (presumably) receiving Liberty's three pages of handwritten notes, the State failed to turn them over to Petitioner's Counsel. This, however, is not telling a witness to stay quiet (indeed, Liberty specifically testified as to the substance of the case notes). This is not failing to disclose an impeaching prior statement of a witness. This is not failing to disclose an admission by a third party to committing the crime. Rather, this is much more analogous to the first discovery violation in Scanlon. Not only was that violation not sufficient to warrant use of the Kaiser-rule, it was not sufficient even when coupled with two other proven violations and an additional four potential violations. The Court, therefore, concludes that prejudice would need to be shown to warrant a new trial. As the Court concluded above, even if Petitioner's allegations are true, prejudice could not be shown.

Inasmuch as Petitioner's claim may be a request for a new trial on the basis that, despite a lack of prejudice, the State flagrantly or egregiously violated discovery rules, Petitioner has not alleged facts that, if proved, would entitle her to relief. Kelly, 535 N.W.2d at 347. Therefore, the files and records conclusively show that Petitioner is entitled to no relief on that basis. Minn. Stat. § 590.04, Subd. 1. The Court denies relief on this claim without an evidentiary hearing.

c. The prosecutorial error in the State's opening statement, if any, was harmless beyond a reasonable doubt

Petitioner contends that the State falsely suggested to the jury that, if Mendoza was in the minivan, the presence of more blood on the passenger's-side airbag implies that Mendoza was the passenger. During the State's opening statement, the State asserted:

You'll hear from the BCA agent who will tell you, "Well, I – I did find a little bit of blood on the air bags. I found some not only on the driver's air bag, but a little bit – a little bit on the driver's air bag, and quite a bit on the passenger air bag.["]

(Tr. at 636, lines 10-14.) This assertion does not comport with Liberty's testimony, as already outlined above, that "there was not a lot of blood on either of the air bags" (Tr. at 887, lines 16-17) and that there was a "similar" amount of blood on both airbags. (Tr. at 889, line 22.)

The Court notes that the State's opening was not even internally consistent with the statement Petitioner now challenges. The very next statement made in the State's opening was:

I think the BCA agent will also tell you that, you know, "Aside from the little bit of blood that I saw [...]"

(Tr. at 636, lines 14-16.) A couple sentences later, the State said:

I believe she'll also tell you that, "I found some [non-blood DNA] on the passenger air bag, [...] and that that DNA also matched the little bit of blood that was found in the vehicle."

(Tr. at 636, lines 21-25 and 637, line 1.) The Court further notes that immediately after discussing what the State expected Liberty's testimony to be, the State continued as follows:

Now, through the course of this trial people aren't going to agree as far as what that shows or what they believe it shows, and that's the case in any trial, otherwise we wouldn't be here. That ends up being your responsibility. I only ask that you listen closely, as the Judge indicated. Bear in mind that my statements, Mr. Guerrero's, or other members of his team's statements, that's not evidence. We're just attempting to assist each and every one of you with getting to the facts in this case and helping you make a decision.

(Tr. at 637, lines 2-10.) The Court had, before opening statements, already instructed the jury that what the attorneys say is not evidence. (Tr. at 628, line 20.) The Court also gave a similar instruction at the end of the case. (Tr. at 1308, lines 20-24.) The Court notes that, based upon the examination of Liberty, it appears that the State was not aware, until that time, that Liberty's testimony would not comport with the State's opening statement. The State specifically asked about the amount of blood (Tr. at 887, lines 12-13), any measurements of the sizes of blood drops (Id. at lines 21-23), the number of spots (Tr. at 888, lines 4-5), and the comparative amounts on each airbag (Tr. at 889, lines 19-21) during the State's direct examination. As already noted above, the case notes did not specify the amount of blood on either airbag, and the BCA reports themselves (Ex. 21, 22, and 23) did not mention it. Finally, the Court has thoroughly reviewed the entire record, particularly the remainder of the State's opening statement and the State's final arguments. At no other point in the trial did the State incorrectly state the facts regarding the amount of blood found on either air bag, and at no point did

the State explicitly argue what Petitioner says is suggested by the false statement in the State's opening: namely, the State never explicitly contended that, because there was more blood on the passenger's-side air bag, Mendoza was the passenger.

With this background in mind, the Court concludes that there was no error warranting a new trial. First, the Court would need to find that the State had failed to assert the facts in good faith. Tucker, 245 N.W.2d at 202. Second, even if lack of good faith could be shown, under every standard for prosecutorial error, harmless error does not warrant a new trial. Ramey, 721 N.W.2d at 302 (under plain error analysis, new trial is warranted if error affected substantial rights); Wren, 738 N.W.2d at 390 n.8 (for "less serious" objected-to error, new trial is warranted if error "likely played a substantial part" in influencing the verdict); Pendleton, 759 N.W.2d at 911 (for serious objected-to error, new trial is warranted unless error is harmless beyond a reasonable doubt).¹⁰ In the context of the entire trial, the Court finds that the record conclusively shows that any error was harmless beyond a reasonable doubt. This was one brief statement of fact, during the State's opening, which did not comport with the testimony itself. There was no argument based upon the misstated fact. The State never repeated the misstatement, and at times the State correctly stated that there was only a "little bit" of blood. Liberty's testimony regarding the blood on the air bags was clear and without contradiction. Just after the misstatement, the State told the jury that his remarks were not evidence, and the

¹⁰ The Court notes that, in this specific situation, the prosecutorial error alleged was not objected to, and, therefore, plain error analysis would apply. On the other hand, Petitioner alleges that she could not have objected to the error, because she was not aware (at the time) that it was error. Because the record conclusively shows that any error in this respect was harmless, this Court makes no ruling regarding which of the three standards would apply.

Court so instructed the jury at least twice. This error, if error at all, was harmless beyond a reasonable doubt.

Inasmuch as Petitioner's claim may be a request for a new trial on the basis that the State committed prosecutorial error misstating the evidence in opening statement, Petitioner has not alleged facts that, if proved, would entitle her to relief. Kelly, 535 N.W.2d at 347. Therefore, the files and records conclusively show that Petitioner is entitled to no relief on that basis. Minn. Stat. § 590.04, Subd. 1. The Court denies relief on this claim without an evidentiary hearing.

d. Any assertion that the State obtained and withheld other evidence is an argumentative assertion without factual support

To warrant an evidentiary hearing, Petitioner must allege facts that, if proved, would entitle her to relief. Kelly, 535 N.W.2d at 347. Petitioner must make "more than argumentative assertions without factual support." Zenanko, 688 N.W.2d at 864 (quoting Hodgson, 540 N.W.2d at 517). Petitioner's concern that the State may have withheld other evidence is inherently such an argumentative assertion without factual support. While the Court understands that Petitioner explicitly requests a hearing to determine whether the State did withhold other evidence, such a request is without basis in the postconviction statutes or case law.

IV. State v. Van Tassel Does Not Compel a Finding that the Evidence of Gross Negligence was Insufficient

The Petition and Counsel's affidavit allege that based upon "new appellate authority," Petitioner's post-trial motion for judgment of acquittal should be

reconsidered. Subsequent to the trial and post-trial motions of Petitioner, the Minnesota Court of Appeals, in a split decision, issued an unpublished opinion in State v. Van Tassel, No. A08-0390, 2009 WL 1684072 (Minn. Ct. App. June 16, 2009). Minnesota law is clear that “[u]npublished opinions of the Court of Appeals are not precedential.” Minn. Stat. § 480A.08, Subd. 3(c). It is erroneous for a district court to cite them as binding precedent. Vlahos v. R&I Const. of Bloomington, 676 N.W.2d 672, 676 n.3 (Minn. 2004). Further, inasmuch as this is purely a legal claim, arguably this claim should be addressed on appeal. In the interests of justice, however, this Court addresses the legal merits of the claim.

The facts of Van Tassel can be summarized as follows. On December 19, 2005, Van Tassel (age 19) and a friend (age 18) were driving to visit Van Tassel’s father. Traveling on a county road, as the opinion indicates, “Van Tassel was driving too fast—an estimated fifteen miles above the speed limit—for the icy road condition[...].” She braked for an approaching intersection with a stop sign, but her car slid. She put the car in neutral. She looked and saw no other cars driving on the intersecting road. Therefore, she decided that it was safer to go through the stop sign than to attempt (and, in her opinion, likely fail) to stop for the stop sign. At the rise in the middle of the intersection, her car fishtailed. Van Tassel corrected, but her tires caught the snow-covered shoulder. She lost control, and the car went into the ditch and rolled. Van Tassel and her friend were ejected from the car. Her friend died an hour later at the hospital.

After a jury trial, Van Tassel was convicted of Criminal Vehicular Homicide. The Court of Appeals reversed the conviction, concluding that the evidence of Van Tassel’s driving conduct was not sufficient to prove that she was grossly negligent. The

Court of Appeals noted that speeding (driving 70 mph in a 55 mph zone) while approaching an intersection that proved to be slippery, was too fast for the conditions, but not gross negligence. The Court of Appeals noted that there was no evidence that Van Tassel was inattentive, driving fast for thrills or excitement, or failed to maintain her car. Rather, the evidence showed that she saw the stop sign and tried to brake, she tried to slow down by putting the car in neutral, she looked for other traffic before deciding it was safer to go through the intersection, and she tried to correct the car when it fishtailed. The Court of Appeals concluded that the record could not establish the "absence of even slight care."

Even if Van Tassel was binding authority, it would not compel the legal conclusion that Petitioner's conviction here was based upon insufficient evidence of gross negligence. Van Tassel was driving too fast for conditions and slid when she attempted to stop. In this case, the evidence was that the minivan consistently traveled near the speed limit, and no attempt was made to stop at the stop sign. Van Tassel tried to slow down by putting the car in neutral. In this case, there was no evidence of any attempt to slow down. Van Tassel looked for other traffic and made the conscious decision that it was safer to drive through the stop sign. In this case, there was no evidence of any such decision; there was no evidence of a calculated risk-assessment. Van Tassel tried to correct the vehicle when it fishtailed. In this case, there was no evidence of an attempt to correct the minivan's course.

While the Court of Appeals did not phrase it as such, the tragic events evaluated in Van Tassel occurred despite Van Tassel's care, not because of a lack of care. Van Tassel did make a mistake: she was driving too fast for conditions. Perhaps she was

driving sufficiently fast that she was not exercising due care. But, as the Court of Appeals concluded, that alone was not gross negligence; it was not the “absence of even slight care.”

In examining the sufficiency of the evidence of gross negligence in this case, however, it is a mischaracterization to say that the minivan was simply going too fast to stop at the stop sign. As this Court noted, when addressing Petitioner’s motion for judgment of acquittal at the end of the State’s case in chief, the evidence produced by the State was that:

- It was a clear day;
- Petitioner was in a vehicle on a county road approaching a well-marked, non-obscured stop sign at the state highway;
- The intersection itself was not obscured;
- The minivan was traveling up to 50 mph and did not brake or swerve;
- The minivan collided with a school bus, which would have been large and yellow.

(Tr. at 940, line 21 to 941, line 11.)

Additionally, this case can be further distinguished based upon the evidence of Petitioner’s lack of driving experience. When a criminal defendant introduces evidence after the denial of a motion for judgment of acquittal, subsequent review for sufficiency of the evidence is based upon the entire record. See State v. Currie, 143 N.W.2d 58, 59 (Minn. 1966); State v. Tsiolis, 277 N.W.2d 409, 412 (Minn. 1938). The evidence at trial included Petitioner’s testimony that, when she lived in Montevideo, she drove her sister’s car once and was stopped by the police for driving too slowly and never drove again. (Tr. at 1074, line 21 to 1075, line 23.) There was also evidence that Petitioner had never

had a driver's license (Tr. at 1078, lines 11-12) and testimony that Petitioner "can't drive." (Tr. at 973, line 22.) From this evidence, the jury could infer that Petitioner was an inexperienced driver, without the training that would come with a license, whose only experience (before the date of the accident) behind the wheel was poor enough to result in a police stop.¹¹ Choosing to drive with this almost total lack of driving experience allows a jury to infer that Petitioner did not even use scant care necessary to learn the rudiments of driving before getting behind the wheel.

In each relevant instruction read to the jury, they were informed, "'Grossly negligent' means with very great negligence or without even scant care." See 10 Minnesota Practice, CRIMJIG 11.63, 11.69, 11.73, and 11.75. The jury's verdicts indicate that they found gross negligence beyond a reasonable doubt. Even in light of the decision in Van Tassel, this Court cannot say that the evidence was insufficient to support such a finding.

Petitioner has not alleged facts that, if proved, would entitle her to relief on this basis. Kelly, 535 N.W.2d at 347. Therefore, the files and records conclusively show that Petitioner is entitled to no relief on it. Minn. Stat. § 590.04, Subd. 1. The Court denies relief on this claim without an evidentiary hearing.

**V. Petitioner's Conviction for the Charges in Count VIII is Not Dependent
Upon a Right of Way Violation**

¹¹ The Court notes that the State also presented the rebuttal testimony of Officer Stendahl as evidence that Petitioner had, in fact, driven on other occasions. As this Court reviews the sufficiency of the evidence of gross negligence, however, the Court views the evidence in the "light most favorable to the conviction." State v. Webb, 440 N.W.2d 426, 430 (Minn. 1989).

Petitioner contends that her conviction for the charges in Count VIII is contrary to law. Petitioner contends that her conviction for this count was based upon Minn. Stat. § 169.20, Subd. 3(a) dealing with the right of way. Under subdivision 1(d) of that statute, a person driving above the speed limit does not have the right of way. The evidence at trial established that James Hancock was driving 63 mph at the time of the crash, and that the speed limit was 60 mph. Petitioner contends that, because Hancock did not have the right of way, Petitioner could not have failed to yield the right of way to Hancock. Therefore, Petitioner contends that her conviction for Count VIII is contrary to law. This contention has no merit.

The State alleged in Count VIII that Petitioner:

operated a motor vehicle in a grossly negligent manner which resulted in great bodily harm to another, to wit: [Petitioner], who was driving a 1998 Plymouth Voyager without a valid driver's license, failed to stop for [a] stop sign and struck a school bus and said act resulted in great bodily harm to James Mark Hancock who received a fracture to his leg requiring metal rod support, injury to his hip and broken knuckles.

The charge itself is not based upon a violation of Hancock's right of way. The criminal statute is also not based upon a violation of a victim's right of way. Minn. Stat. § 609.21, Subd. 1 provides, in part:

A person is guilty of criminal vehicular [...] operation [...], if the person causes injury to [...] another as a result of operating a motor vehicle:

(1) in a grossly negligent manner[...]

This Court is aware of no law saying that, even if a person has injured another as result of what would otherwise be grossly negligent operation of a vehicle, the person must have also violated the other's right of way. The jury in this case heard the testimony establishing that Hancock was speeding. It still found Petitioner grossly negligent. Even

though Hancock did not have the right of way, the evidence was sufficient to support this finding.

Petitioner has not alleged facts that, if proved, would entitle her to relief on this basis. Kelly, 535 N.W.2d at 347. Therefore, the files and records conclusively show that Petitioner is entitled to no relief on it. Minn. Stat. § 590.04, Subd. 1. The Court denies relief on this claim without an evidentiary hearing.

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