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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Edgar Barrientos-Quintana,

Petitioner,

v.

State of Minnesota,

Respondent.

Court File No. 27-CR-08-53942

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 20, 2024, Petitioner filed a petition for postconviction relief. On September 23, 2024, the Hennepin County Attorney's Office filed the State's Answer to the Petition. In its Answer, the State waived any statutory or procedural bars in Minn. Stat. § 590.01, subd. 1, as well as any procedural bar established in *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). In addition, the State informed the Court that it no longer has confidence in the integrity of Petitioner's convictions. It requests that the Court grant the Petitioner's postconviction relief and vacate his convictions.

On September 26, 2024, the Court found that an evidentiary hearing would be held pursuant to Minn. Stat. § 590.04, subd. 1 and scheduled the hearing for October 11, 2024. At the evidentiary hearing the parties presented the court with an 80-page Factual Stipulation containing 541 factual stipulations. In addition, the Petitioner offered the following into evidence in support for the parties' Factual Stipulation:

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Exhibit 1 Filed confidentially: key to then-juvenile witness names and initials

Exhibit 2 Filed confidentially: Police reports of the Metro Gang Strike Taskforce: #MP_08-117708, #MP_08-066229, #MP_07-255699

Exhibit 3 Filed confidentially: Investigative Reports of the Minneapolis Police Dept. MP-08-315289

Exhibit 4 Filed under seal: grand jury transcript with key to redacted names

Exhibit 5 Filed under seal: juvenile records of Marcelo Hernandez

Exhibit 6 Filed under seal: unredacted Minnesota AG Conviction Review Unit (hereafter "CRU") report

Exhibit 7 Filled under seal: CRU unredacted appendices A-D

Exhibit 8 Filed under seal: CRU unredacted appendices E-G

Exhibit 9 *The First 48* Television Episode

Exhibit 10 Photograph of Arber Meko from Prosecution File

Exhibit 11 Booking Photo of Edgar Barrientos-Quintana, October 22, 2008

Exhibit 12 Investigative Request of Hillary Caligiuri and Susan Crumb to Robert Dale and Christopher Gaiters, November 24, 2008

Exhibit 13 Baptism Party Video Stills, October 11, 2008

Exhibit 14 Cub Foods Surveillance Video Stills, October 11, 2008

Exhibit 15 Star Tribune Article, September 24, 2024

Exhibit 16 Minneapolis Police Department, 9-Person Sequential Lineup Shown to Luis Pliego, October 11, 2008

Exhibit 17 Partial Transcript of undisclosed Lineup with Luis Pliego, October 11, 2008

Exhibit 18 Partial Transcript of undisclosed Lineup with Luis Pliego,

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October 15-16, 2008

Exhibit 19 Hillary Caligiuri and Susan Crumb, Summary of Witness Meeting with William Fajardo, May 8, 2009

Exhibits 1 through 19 were received by the Court without objection. The parties later filed on October 25, 2024, a Supplemental Stipulation, which offered two further exhibits that the Court received without objection:

Exhibit 20 Partial Transcript of the March 3, 2009, Interrogation of Marcelo "Sharky" Hernandez

Exhibit 21 Partial Audio Recording of the March 3, 2009, Interrogation of Marcelo "Sharky" Hernandez

Having reviewed the parties' factual stipulations, the evidence received, and all the files and records herein, the Court makes the following:

FINDINGS OF FACT

JESSE MICKELSON'S MURDER

1. On October 11, 2008, Jesse Mickelson was shot to death in the alley behind his house at 4140 29th Avenue South in Minneapolis.

2. His family was celebrating his cousin J.G.'s thirteenth birthday party.

3. After briefly joining J.G. and his friends in a game of football, Jesse Mickelson walked across the alley to join a group of his high school classmates who were standing in a driveway off the alley. The group consisted of Aron Bell-Bey, William Fajardo, and Luis Pliego.

4. Luis Pliego's home was across the alley from Jesse Mickelson's home, where the birthday party was taking place.

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5. At the same time, J.G. and the group of younger boys continued playing football in another part of the alley across from where Jesse Mickelson now stood with his friends. (Supp. 13, 14).[1] That group included J.G., A.L., J.B., C.H., E.P-N., and E.O. (collectively the "Alley Witnesses"). *Id.*

6. The alley where the shooting occurred makes the shape of the letter "L" rotated 90 degrees clockwise. The Alley Witnesses were playing football in the section of the northern section of the alley, which ran east/west. Jesse Mickelson and his friends were in the southern part of the alley that ran north/south. (PC Appendix 1.C).[2]

7. Luis Pliego's older brother Jael Pliego (nicknamed "Puppet") was the leader of the group South Side Raza ("SSR"), a faction of the larger Sureños 13 gang. (T. 591, 878).[3]

8. Although some witnesses testified that Jael Pliego was inside the residence at the time of the incident, (T. 553, 620, 678, 690, 852), the CRU believes he was outside at that time given the details provided by a witness who said she saw him there.[4]

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[1] Citations to "Supp." are to Minneapolis Police Department Case File #2008-315289, Case Supplements which are found at PC Confidential Exhibit 3.

[2] Citations with "PC" refer to the respective exhibits and appendices attached to Petitioner's Postconviction filing dated August 20, 2024.

[3] Citations to "T." are to the transcript of the trial in this matter held from May 15, 2009, to May 28, 2009, in the Minnesota District Court, Fourth Judicial District, before the Honorable Judge Jeannice M. Reding (District Court File No. 27-CR-08-53942).

[4] Jesse Mickelson's sister recalled seeing Jael Pliego fleeing from the scene when the shooting began. He was on crutches at the time. (PC Appendix 1 p.16).

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9. Jesse Mickelson himself was not affiliated with a gang at the time of his death, and it is likely that he was not the intended target of the shooting. (T. 1093).

10. Jesse Mickelson was talking to William Fajardo, Aron Bell-Bey, and Luis Pliego for about five minutes when a white Dodge Intrepid drove down the alley. (T. 437–39, 557, 664).

11. The vehicle drove west past the Alley Witnesses before moving south next to the group of teenagers, which included Jesse Mickelson.

12. Several shots were fired from the rear window on the passenger side of the vehicle. (T. 558, 561, 664, 673). Witness accounts regarding the number of gunshots fired ranged from four to seven shots. (T. 426, 444, 563, 667, 748).

13. According to William Fajardo and Aron Bell-Bey, the first shots were fired at the ground and successive shots progressed upward. (T. 561, 563–64, 670).

14. William Fajardo, Aron Bell-Bey, and Luis Pliego turned and ran when the shooting started. (Supp. 23).

15. After she heard the shots, but before calling 911, J.G.'s mother, Paula Gizachew, ran outside to get the Alley Witnesses into the house and upstairs to a safe area. (T. 427). She called 911 after she brought them into the house. *Id.* Ms. Gizachew's was the first 911 call for the shooting and was received at 6:53 p.m. (T. 403).

16. Given that this 911 call was received at 6:53 p.m., and Ms. Gizachew called 911 after the kids were secured inside of her home, the shooting occurred some time prior.

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17. Tragically, Jesse Mickelson was shot and collapsed in the driveway. (T. 564, 668). Attempts to revive him were unsuccessful. He died at the scene. (T. 429).

18. Hennepin County Medical Examiner Dr. Agnieszka Rogalski, who performed the autopsy, concluded that the cause of death was the gunshot wounds to Jesse Mickelson's chest and the manner of death was homicide. (T. 520).

19. Aron Bell-Bey received a minor injury from a bullet fragment to his calf.

MINNEAPOLIS POLICE DEPARTMENT INVESTIGATION

20. Investigating police Sergeants Robert Dale and Christopher Gaiters from the Minneapolis Police Department ("MPD") arrived at the scene around 8:50 p.m. and began the investigation. (T. 1174).

21. At the time of the incident, both sergeants had worked in the homicide unit for under a year. This was their first murder investigation. (Exhibit 9, T. 1055 as to Sgt. Gaiters).

22. The night of the shooting, after transporting them to the police headquarters in downtown Minneapolis, Sergeants Dale and Gaiters separately interviewed eyewitnesses Aron Bell-Bey, William Fajardo, and Luis and Jael Pliego. (T. 1176).

23. Although none of the witnesses identified a shooter, each one stated that the shooter was likely Hispanic and had a shaved head or was bald. *Id*.

24. Mr. Bell-Bey initially stated that the shooter had a "shiny bald head." (T. 678).

25. Luis Pliego and William Fajardo also described the shooter as having "bushy" and/or "arched" eyebrows. (Supp. 54; PC Appendix 1 p. 20, 22).

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26. MPD also interviewed the Alley Witnesses. Those that were able to provide a description of the shooter also described the shooter as bald or as having a shaved head. (Supp. 14, 44, 46, 47).

27. The formal complaint filed by the State contained three references to the fact that the shooter in this incident was bald.

EYEWITNESS IDENTIFICATION PROCEDURES AND EVENTUAL IDENTIFICATION OF MR. BARRIENTOS-QUINTANA

28. On the day of the shooting, police interviewed Luis Pliego and showed him a nine-person lineup.

29. This lineup was never disclosed to defense counsel, nor did MPD generate any reports about this lineup. (PC Appendix 1 p.164).

30. Luis Pliego viewed the lineup once and did not identify the shooter. He then paused and commented that photo number three looked similar to the shooter because they had similar eyebrows. He said his confidence level was 50 to 60 percent. *Id.*

31. This lineup included a photograph of Ramiro Pineda, the owner of the white Dodge Intrepid. Pliego did not identify Pineda. *Id.*

32. In interviews that started on October 15 and lasted until the very early hours of October 16, Sgts. Dale and Gaiters separated Luis and his brother, Jael Pliego, and questioned them for more information. (PC Appendix 1 p.18).

33. Luis Pliego told investigators that he remembered the shooter was in the front seat of the car, and there were three people in the back. *Id.* He said that the shooter stuck half of his body outside of the car window when he fired the

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gun. *Id.* Luis Pliego described the shooter as bald, with a black bandana around his neck, and having a "little mustache" and an athletic body. *Id.* He said that he thought the shooter had plucked eyebrows. *Id.*

34. Luis Pilego mentioned "Sharky" as a suspect, but that his friend Aron Bell-Bey doubted that "Sharky" was the shooter because Sharky was his friend and would not shoot at him. *Id.*

35. "Sharky's" real name is Marcelo Hernandez.

36. Sgts. Dale and Gaiters accused Luis Pliego of holding back information and told him that his brother Jael had told them the truth.

37. Luis was then shown a six-person lineup, that was also never disclosed to defense counsel, in which he again did not identify anyone.

38. While this interrogation was occurring, Luis' brother, Jael Pliego, was providing Sgts. Dale and Gaiters with names of potential suspects. *Id.* One name Jael mentioned was "Smokey," who he described as a 28-year-old former member of a rival gang to SSR.

39. Law enforcement believed the "Smokey" Jael Pilego referred to was Edgar Barrientos-Quintana.

40. On October 20, 2008, nine days after the shooting, and five days after Jael identified "Smokey" as a potential suspect, MPD interviewed his little brother, Luis, for a third time (Appendix 1 p.19). Here Luis changed his story: it was "Smokey" that shot Jesse Mickelson.

41. Luis was shown the same six-person photo lineup as William Fajardo (discussed below, with the photographs in the same order). This lineup was non-blind, meaning that Sgts. Dale and Gaiters—the investigators who conducted the photo lineup—knew who their suspect was and where he appeared in the photo array. After looking at each photo twice, Luis identified Mr. Barrientos-Quintana: "This is Smokey. He's the one who did it." (Supp. 25, 34).

42. Police interviewed William Fajardo a second time on October 17, 2008, six days after the murder of his friend, and the same day that Luis Pliego told investigators that "Smokey" committed the crime.

43. During this interview, as a tactic to elicit answers from the teenager, investigators showed William Fajardo an image of Mickelson and said, "speak to Jesse," and to tell them who committed the crime. (PC Appendix 1 p.101).

44. At this point, William Fajardo said one of the people in the lineup looked like the man who had punched him a few weeks earlier at the Flag Foods store. He named "Smokey" as that man and, after further prompting by MPD, named him as a possible shooter that killed Mr. Mickelson. (Supp. 34).[5]

45. The photo lineup that Luis Pliego and William Fajardo viewed contained six people, including an old photograph of Mr. Barrientos-Quintana, in which his hair was short, as if it had recently been shaved (Trial Ex. 80). This photograph of Mr. Barrientos-Quintana did not resemble him as he looked when the murder

[5] Given the timing, the CRU believes that Jael Pliego provided his brother Luis with the name "Smokey." Edgar Barrientos-Quintana was a former gang member of a rival gang of Jael Pliego. (PC Appendix 1 p.19).

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occurred, as seen in two videos of him taken that same day, both before and after the murder. In both videos Mr. Barrientos-Quintana has a full head of hair—notably longer than his hair was in the lineup photograph.

46. Further, only three of the six people in the lineup had shaved heads.

47. William Fajardo went through the lineup twice. He identified Mr. Barrientos-Quintana as "Smokey," who he had seen in front of Flag Foods, and wrote, "Kinda looks like the shooter" below the photo. (Trial Ex. 80).

48. This lineup was also non-blind.

49. In October 2016, the Great North Innocence Project interviewed Fajardo. He told Ms. Priya Sunkara, a clinical student in the Innocence Clinic, that he did not believe Mr. Barrientos-Quintana was the shooter, and that he felt pressured by investigators to identify Mr. Barrientos-Quintana. He further denied knowing the identity of the shooter because it was dark outside, and he did not get a good look at the shooter. (*See* PC Appendix 3). Fajardo has since passed away.

50. After two unsuccessful attempts to get Mr. Bell-Bey to name a shooter, Dale and Gaiters threatened him with criminal charges if he did not cooperate.

51. Sgts. Dale and Gaiters went to Bell-Bey's school and interviewed him in his principal's office.

52. During his first interview, Bell-Bey had described the shooter as having a "shiny bald" head. (Supp. 33).

53. Bell-Bey's second interview ended after Sgts. Dale and Gaiters threatened him, suggesting that he could do time for failing to name the shooter. (PC Appendix 1 p.103).

54. Sgts. Dale and Gaiters accused him of holding back: "we know you know a little more than what you're telling us." Gaiters asked Bell-Bey, who himself was a victim of the shooting, "maybe you had something to do with it, did you shoot Jesse?" *Id.* Gaiters further threatened Bell-Bey with "consequences" if he did not name a suspect. *Id.*

55. These coercive tactics led to an identification. In his principal's office, from a photo lineup, Bell-Bey eventually identified Mr. Barrientos-Quintana as the shooter. *Id.* at 104.

56. This lineup administration, like many others, was not recorded, was not blind, and used an old photograph of Mr. Barrientos-Quintana, even though he had already been arrested and a more recent photo was available. *Id.* Moreover, it yielded an identification only after many leading questions. *Id.*

57. On November 7, 2008, MPD showed J.G. a photo lineup that included Mr. Barrientos-Quintana.[6] This lineup procedure was likewise flawed. Only three lineup members had a bald or shaved head. J.G., like the others, was allowed to go through the lineup more than once. Once again, this lineup was non-blind.

[6] Minneapolis Police Department, Sequential Line-up Photo Identification Report for J.G., Nov. 7, 2008; *see also* PC Appendix 1 p.110.

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58. J.G. pointed out a filler photograph and opined that the person looked similar to the shooter. J.G. ignored the photograph of Mr. Barrientos-Quintana.

59. J.G.'s lineup in which he did not identify Mr. Barrientos-Quintana as the shooter is notable for two reasons. First, he was the only one of the Alley Witnesses that later testified at trial. Second, he observed the shooter from 2–3 feet away before the shooting, before there was any perceived threat. (Supp. 44, 47). J.G. told MPD that the shooter had a bald rather than shaved head. *Id*.

60. Despite his proximity, J.G. never identified Mr. Barrientos-Quintana as the shooter, either in the photo array, during police interviews, or at trial. (Supp. 44, 47; T. 438, 449).

POLICE INTERROGATION OF MR. BARRIENTOS-QUINTANA

61. On October 22, 2008, Mr. Barrientos-Quintana was arrested at work. (T. 1082).

62. After being advised of his *Miranda* rights, Mr. Barrientos-Quintana was interrogated for approximately five hours by Sgts. Gaiters and Dale. (T. 1083, 1199).

63. Mr. Barrientos-Quintana noted that he heard about the shooting, and was aware that others identified him as the shooter, but denied any involvement. (T. 1085, 1200–01).

64. Mr. Barrientos-Quintana said he was previously a member of the Sureños 13, but that he was not a member anymore. (T. 1100).

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65. Mr. Barrientos-Quintana told Sgt. Gaiters that, on the day of the offense, he was staying at 2605 Conway Avenue East in Maplewood, Minnesota. The Maplewood home was occupied by Marcia Cruz-Nolasco, her daughter Itzel Chavarria-Cruz, and her son Ricardo Chavarria-Cruz. (T. 1086, 1094).

66. Mr. Barrientos-Quintana described his day as follows: he got up around 10:00 a.m. and left the residence for a brief period. (T. 1095). At around 2:00 p.m., he went to an Asian grocery store in St. Paul with Marcia Cruz-Nolasco. At around 5:30 p.m., he went to his brother Carlos's home in Minneapolis to see a dog. (T. 1095). He returned to the Maplewood home at around 7:00 p.m. (T. 1096). At around 8:30 or 9:00 p.m., he went to a liquor store. At around 9:30 p.m., he left the Maplewood residence with Itzel and Ricardo Chavarria-Cruz, and they went to a baptism party in Minneapolis. (T. 1089–99).

67. During the interrogation, Sgts. Gaiters and Dale repeatedly lied to him, refused to accept his explanations, refused to investigate his alibi, encouraged him to stop asking for a lawyer so they could continue to talk to him, and gave him a false impression that Ms. Chavarria-Cruz implicated him (discussed below). (PC Appendix 1 p.31).

POLICE INTERROGATION OF ITZEL CHAVARRIA-CRUZ

68. While Mr. Barrientos-Quintana was waiting in a different interview room, Sgts. Dale and Gaiters interviewed high-schooler Itzel Chavarria-Cruz.

69. For more than two hours, Ms. Chavarria-Cruz faced two investigators who accused her of lying and threatened her with jail time. (PC Appendix 1 p.25).

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70. The investigators never read her any *Miranda* warnings.

71. When asked about the day of the murder, Ms. Chavarria-Cruz said that Mr. Barrientos-Quintana was at her house until they went to a baptism party.

72. Sgt. Dale interrupted her and asked if she wanted to start over. Ms. Chavarria-Cruz said, "I am telling the truth, and you are saying I am not telling the truth." *Id.* at 26. Dale told her they thought she had a good idea of who was responsible for the murder.

73. As Sgt. Dale left the room, Ms. Chavarria-Cruz asked, "When can I leave?" *Id.* Ms. Chavarria-Cruz was then locked in the interview room alone. *Id.* She began knocking on the door and asking to leave. *Id.*

74. When the investigators returned, they continued to accuse her of lying and threatened her with her own criminal sanctions if they were to find out that she was "covering" for the perpetrator. *Id.*

75. Sgt. Gaiters told Ms. Chavarria-Cruz that they had spoken to Mr. Barrientos-Quintana, and therefore knew that "more took place." *Id.* at 27.

76. Despite all these tactics, Ms. Chavarria-Cruz stood firm and insisted that she had nothing to do with the shooting, and neither did Mr. Barrientos-Quintana. *Id.* She said, "If he said that it was him, it's a lie because he was at my house, so he has no reason to say it was him when it wasn't him. He was at my house." *Id.*

77. Ms. Chavarria-Cruz also recalled that they went to Cub Foods at one point during the day. *Id.*

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78. Dissatisfied with her answers, the investigators continued to interrogate her. Sgt. Dale told Ms. Chavarria-Cruz that she had to make them believe her. *Id.* at 28. She cried, "I'm not going to sit here and try to beg some people to fucking believe me when you guys aren't going to believe me! All I want to do is go home. I don't want to sit here and talk to you guys no more 'cause you guys keep telling me this thing over and over, and I'm telling the truth, and you won't believe me!" *Id.*

79. Ms. Chavarria-Cruz was eventually able to leave the police station. On her way out, Sgt. Gaiters told her that the information about Cub Foods was helpful, even if she thought it was insignificant. *Id.* at 29.

80. Sgt. Gaiters did not request any video from Cub Foods for the time that Ms. Chavarria-Cruz told him she was there with Mr. Barrientos-Quintana. *Id.*

MPD INVESTIGATION OF SUSPECT ARBER "SANDWICH" MEKO

81. In early November, Sgts. Dale and Gaiters interrogated Arber "Sandwich" Meko about the shooting.

82. He had been a suspect since the day after the shooting, when Sgt. Fors notified Sgt. Dale about Meko's gang ties and the proximity of his home to the alley where the gun was thought to be discarded. (PC Appendix 1 p.25).

83. Meko was an active Sureños 13 gang member.

84. In April 2008, Meko had been shot in the leg in front of the Rodeo Bar on Lake Street in Minneapolis, while meeting another Sureños 13 gang member.

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85. In March 2008, Meko and Valentin "Beaver" Olivera, were pulled over in a vehicle leaving a funeral after the police received information that a retaliatory strike was going to occur. (Confidential Exhibit 2, #MP_08-066229). Police found a loaded handgun in the glovebox. *Id.*

86. In August 2007, Meko was stopped in his car with "Manny," another Sureños 13 member, after someone reported gunshots fired from a car with a matching description. Officers found a black revolver in Meko's car in the front floorboard. (Confidential Exhibit 2, #MP_07-255699).

87. Beyond his gang ties, proximity to the shooting, and access to firearms, Meko was a logical suspect because he more closely matched witnesses' descriptions of the shooter. (Exhibit 10). Meko's hair is notably shorter than Mr. Barrientos-Quintana's hair was at the time of Mr. Barrientos-Quintana's arrest, as seen from his booking photo on October 22, 2008. (Exhibit 10). Meko also has arched bushy eyebrows as described by other witnesses. (Supps. 25, 45, 54; PC Appendix 1 p.22, 94; PC Appendix 1.A).

88. As established above, Mr. Barrientos-Quintana did not have a bald or shaved head at the time of the murder. Meko's hair far better reflects that description. (PC Appendix 1 p.23).

89. During his interrogation, Meko lied to Sgts. Dale and Gaiters about his Sureños 13 gang ties.

90. Sgt. Dale said that he was "almost 100 percent sure" that Meko was in the car on October 11, or that he knew who was. *Id.*

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91. Sgt. Dale revealed to Meko that a witness, Michael McGlynn, saw the drive-by car stop behind Meko's house, about 30 seconds after the shooting. The witness heard a car door open and shut. (Supp. 20).

92. Sgt. Dale employed the same tactic he used during interrogations of the other witnesses, urging Meko to make the choice between being a witness or a suspect, and that he would help Meko become a witness. *Id.*

93. Meko did not change his account or otherwise cooperate with the investigation, and his interrogation ended. *Id.*

MPD INVESTIGATION OF MARCELO "SHARKY" HERNANDEZ

94. Prosecutors asked Sgts. Dale and Gaiters to "[t]ake another run at Sharky," because they thought he was almost certainly in the car. (PC Appendix 1 p.38; Exhibit 12).

95. Sgts. Dale and Gaiters interviewed Marcelo Hernandez, aka "Sharky," three times over a five-month period (November 2008, January 2009, and March 2009) while he was at a juvenile detention center.

96. In each interview, Sgts. Dale and Gaiters provided Hernandez with details of the crime through leading questions that aligned with their theory that Edgar Barrientos-Quintana was the shooter.

97. During the November interview, Mr. Hernandez stated that he had nothing to do with Jesse Mickelson's murder. (T. 828). He said that "Slappy" was the driver and "Manny" was the shooter. (PC Appendix 1 p.39). Mr. Hernandez denied hearing that "Smokey" was involved. *Id.*

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98. In the January interview, Sgt. Gaiters pushed Mr. Hernandez to admit he was in the car and to identify the shooter. Sgts. Dale and Gaiters then told Mr. Hernandez that they already arrested Mr. Barrientos-Quintana for the crime. *Id.*

99. Despite this, Mr. Hernandez did not identify Mr. Barrientos-Quintana as being involved. *Id.*

100. They reminded him no less than seven times that there is a difference between a witness and a suspect: suspects get in trouble, witnesses do not, and that they were really after the shooter and the driver.

101. They also reminded Mr. Hernandez that Mr. Barrientos-Quintana was in custody for the crime:

> Q: I mean you're telling us that Manny's the shooter, but Smokey's in jail as the shooter; can't be two shooters, right? Only gotta be one.
>
> A: Only one
>
> Q: Yeah. Do you know what my point is?
>
> A: Somebody is lying
>
> Q: Mean somebody is lying
>
> A: I don't know if Smokey was there.
>
> Q: How could it be? If two people are supposed to be in the car[], so how could he be?
>
> A: Yeah I don't know. (PC Appendix 4).

102. Despite this coercive questioning, Hernandez still did not identify Mr. Barrientos-Quintana as the shooter. *Id*.

103. Marcelo "Sharky" Hernandez was interviewed again on March 3, 2009, and Sgts. Dale and Gaiters told him that witnesses to crimes do not go to prison, while suspects do. (T. 889). Finally, he amended his story and said that he was in the car during the shooting.

104. According to him, he was cruising Lake Street with Valentin "Beaver" Olivera and Romero "Slappy" Pineda around 4 p.m., when Mr. Pineda got a call about an SSR party. (Supp. 83). Mr. Pineda then called Mr. Barrientos-Quintana in order to get a weapon. *Id.* They told Mr. Barrientos-Quintana that Itzel Chavarria-Cruz was at an SSR party, and he should bring a gun. *Id.* They picked up Mr. Barrientos-Quintana about 20–25 minutes later. *Id.* Mr. Barrientos-Quintana parked on the south side of Powderhorn Park in an alley and called them to pick him up. Mr. Hernandez said there was no one else in Mr. Barrientos-Quintana's vehicle when they picked him up. *Id.* Mr. Hernandez said that Mr. Barrientos-Quintana was wearing suspenders/overalls, a white t-shirt, and a blue sweater. (Ex. 20, 21). Once they picked him up, they went cruising for a while and parked away from the party, waiting for it to get dark. (Supp. 83). Once they got to the alley behind the Pliego home, Mr. Barrientos-Quintana rolled down his window and shot, while Mr. Hernandez hid on the floor. (Supp. 81, 83).

105. MPD eventually obtained Mr. Barrientos-Quintana's cell phone records for the day and night of the shooting. There is no record of the calls Mr. Hernandez alleged, either the incoming call (to bring a gun) or the outgoing call (to tell them to pick him up at the park). (Trial Ex. 87, 88).

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106. MPD also eventually received a video of Mr. Barrientos-Quintana with Itzel Chavarria-Cruz at a Maplewood Cub Foods recorded less than 34 minutes before the shooting. While he appears to be wearing a white t-shirt at that time, he was wearing neither suspenders/overalls, nor a blue sweater, as described by Mr. Hernandez. (Ex. 14).

107. Furthermore, based on Mr. Hernandez's account, MPD began investigating Mr. Olivera as the driver of the car and accomplice to the murder. Their investigation of him ended, however, when Olivera provided alibi witnesses that accounted for his whereabouts during the entirety of the evening. (Supp. 120, 128).

108. That Mr. Olivera could not have been at the scene of the murder undercut Mr. Hernandez's credibility a great deal. (Ex. 20, 21).

MR. BARRIENTOS-QUINTANA'S ALIBI

109. In February of 2009, MPD finally obtained surveillance video from Cub Foods in Maplewood from the night of the shooting. (Supp. 107).

110. The video showed that Mr. Barrientos-Quintana and Itzel Chavarria-Cruz were together inside the store at 6:19 p.m.[7] on the date of the offense (T. 1127–28, 1214). They can be seen smiling and do not appear to be rushing out of the store.

[7] The exact time on the surveillance video was 6:19 p.m. and 54 seconds. Trial Ex. 84.

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111. Since Mr. Barrientos-Quintana was in Maplewood, at least as early as 6:19 p.m., and the shooting in South Minneapolis occurred shortly before 6:53 p.m., Sgt. Gaiters did two test drives from the Cub Foods to Powderhorn Park (where Mr. Hernandez claimed that Mr. Barrientos-Quintana met the group) to the scene of the shooting. It took him 28 minutes to make those trips (T. 1129–30, 1216–17, 1250–51).

112. Sgt. Gaiters measured the time of these drives from when he left the parking lot, not from inside the store where Mr. Barrientos-Quintana and Ms. Chavarria-Cruz are seen on the video at 6:19 p.m. and 54 seconds. Sgt. Gaiters did not include in his test drives the time it would have taken Mr. Barrientos-Quintana and Ms. Chavarria-Cruz to walk to their car, unlock it, start it, and exit their parking spot. *Id.*

113. In addition, for these drives, Sgt. Gaiters stopped only momentarily at Powderhorn Park before proceeding to the scene of the shooting, even though Mr. Hernandez said that the group had to find Mr. Barrientos-Quintana at the park, cruise around for a while, and then wait until dark[8] to go shoot-up the party. *Id.*

114. A private investigator hired by trial counsel for Mr. Barrientos-Quintana drove from the Cub Foods in Maplewood to Powderhorn Park to the scene of the shooting (T. 1469–70). He left Cub Foods on a Saturday at 6:20 p.m. and, driving the most direct route with no obstructions, arrived at the scene in 33 minutes (T. 1472–74).

[8] *See* Supp. 81

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115. Neither Sgt. Gaiters's drives nor the private investigator's drive accounted for the time it would have taken Mr. Barrientos-Quintana to leave the store and get into his vehicle, or to park and switch vehicles at Powderhorn Park, or for the time in Mr. Hernandez's account that they drove around until dark before the murder.

116. As outlined in his 2023 affidavit, retired MPD Sgt. Dale Burns also conducted three separate test drives of the route in question on three separate Saturdays. He started from inside the Cub Foods, where Mr. Barrientos-Quintana was seen on video. He walked to his car in the parking lot, then drove the most direct route to where Marcelo "Sharky" Hernandez claimed Mr. Barrientos-Quintana joined them. He waited 15 seconds, and then he drove to the scene. The fastest of these three drives from inside Cub Foods to the crime scene was 33 minutes. (PC Appendix 1.E).

117. Sgt. Burns' test drives did not include any time to account for Mr. Barrientos-Quintana to change clothing, such that his appearance would be consistent with Mr. Hernandez's account of what he wore.

118. According to Sgt. Burns, the state's theory that Mr. Barrientos-Quintana drove to the murder scene in just 28 minutes fails when accounting for all the variables in the journey.

119. Sgt. Gaiters's test drives ignored multiple crucial factors: (1) the 90-second walk from inside the Cub Foods to the car brings the journey to 29.5 minutes; (2) the additional minutes it takes to drive the longer route to the south end of

Powderhorn Park, putting the drive time over 31 minutes; and (3) the time for Mr. Barrientos-Quintana to change cars, putting the drive time to approximately 32 minutes. (Appendix 1.E).

120. Furthermore, the State's timeline of Mr. Barrientos-Quintana's purported drive to the murder also doesn't account for the (at least) one-minute delay from the time of the shooting to the 911 call, which means that Mr. Barrientos-Quintana had only 32 minutes to get to the scene of the crime. (PC Appendix 1.E)

121. These small corrections to the timeline demonstrate that there was not "more than enough" time to get to the scene of the crime, as the state argued at trial. (T. 1131; Vol. XV T. 70[9]).

122. Last, none of these test drives account for how Itzel Chavarria-Cruz got home from Cub Foods if Mr. Barrientos-Quintana did not drive her home before he drove to the party (where Mr. Hernandez told MPD she was) to commit the shooting.

123. Mr. Barrientos-Quintana is seen on video less than 33 minutes prior to the shooting across town with Ms. Chavarria-Cruz.

124. There were no witnesses that testified that Ms. Chavarria-Cruz was either in Mr. Barrientos-Quintana's vehicle in Powderhorn Park or in the suspect vehicle at the time of the shooting.

[9] Citations to "Vol. XV T." refer to the transcript of the closing arguments in this matter, held on May 22, 2009.

125. The drive from the Maplewood Cub Foods to Itzel Chavarria-Cruz's apartment was approximately four to five minutes. After dropping her off, Mr. Barrientos-Quintana would have had to drive an additional four minutes to get back to the freeway to drive the most direct route to Minneapolis. (PC Appendix 5). If Mr. Hernandez's story is to be believed, Mr. Barrientos-Quintana would have had to leave Ms. Chavarria-Cruz at Cub Foods, since there was no time for him to drop her off at her home and arrive at Powderhorn Park on time.

126. Marcia Cruz Nolasco said that Mr. Barrientos-Quintana and Ms. Chavarria-Cruz were gone from her apartment for approximately 20 minutes for their trip to Cub Foods. (Supp. 57).

127. Since Itzel Chavarria-Cruz was with Mr. Barrientos-Quintana in the Maplewood Cub Foods, and there is no evidence that she was ever at the party, Mr. Hernandez's purported motive for the shooting (described above) was false.

128. In addition, none of these timelines account for the fact that Mr. Barrientos-Quintana is clearly seen in the video at Cub Foods just before 6:20 p.m. not wearing suspenders/overalls, and a blue sweater as described by Mr. Hernandez. The investigators never addressed this obvious discrepancy between the Cub Foods video and Hernandez's description of what Mr. Barrientos-Quintana was wearing when he was picked up in Powderhorn Park. Nor do they offer any explanation as to why Mr. Barrientos-Quintana would have changed his clothing, where he would have changed his clothing, or how long it would have taken. This too seriously undercuts Mr. Hernandez's claimed version of the events.

129. Records from Mr. Barrientos-Quintana's cell phone showed that, on the date of the shooting, his phone neither placed nor received calls from 4:37 p.m. through 7:31 p.m. (T. 1148–49; 1153, 1232, 1248).

130. Given the phone records, there is no explanation for how Mr. Barrientos-Quintana would have found out about the party and, further, how he would have been able to call the others to let him know where he was parked at Powderhorn Park.

131. Mr. Barrientos-Quintana's alibi is not only corroborated by the Cub Foods surveillance video, but also by his phone records obtained after the shooting.

132. Through listening to jail calls, the CRU also discovered that Mr. Barrientos-Quintana had a memory of being inside Ms. Chavarria-Cruz's apartment less than an hour after the shooting occurred. (PC Appendix 1 p. 69). Before obtaining phone records that confirmed his account, Mr. Barrientos-Quintana independently remembered a specific phone call from Ms. Chavarria-Cruz's brother around 7:20 p.m., which occurred about 28 minutes after the shooting, to the land-line phone at Ms. Chavarria-Cruz's apartment. *Id.*

133. The 7:20 p.m. phone call timing was consistent with Mr. Barrientos-Quintana's account that he was with Ms. Chavarria-Cruz at her apartment after leaving Cub Foods.

134. The 7:20 p.m. phone call also conflicts with Mr. Hernandez's account that Mr. Barrientos-Quintana spent at least an hour with the gang members after the shooting. (T. 824).

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135. Mr. Barrientos-Quintana's appearance did not match the consistent, repeated, and undisputed descriptions of the shooter provided by all the witnesses.

136. Both the surveillance video from Cub Foods and video taken later that evening at a baptism party show that Mr. Barrientos-Quintana's head was not bald or shaved, but rather that he had a full head of hair. (Exhibit 13, Exhibit 14).[10]

137. Had MPD and the Prosecutors fully explored, documented, and considered the aforementioned factors during their investigation, they would have found Mr. Hernandez's credibility as a witness compromised and Mr. Barrientos-Quintana's alibi buttressed.

THE FIRST 48 TELEVISION SHOW

138. In April 2009, one month before Mr. Barrientos-Quintana's trial started, a television show, *The First 48*, aired an episode about the murder of Jesse Mickelson. (Exhibit 9).

139. Parts of the episode were scripted. (PC Appendix 6).

140. In the episode, events happened out of order, and Sgts. Dale and Gaiters staged scenes for the producers that were not a part of the investigation. *Id.*

141. What is more, the episode failed to include other, actual portions of the investigation, painting a wholly inaccurate picture of how the MPD investigation unfolded. (Exhibit 9).

[10] Exhibit 13 contains screenshots from the baptism video, which was Trial Ex. 128. Likewise, Exhibit 14 contains a screenshot from the Cub Foods surveillance video, which was Trial Ex. 84.

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142. The episode never mentioned that witnesses had first named Marcelo "Sharky" Hernandez as the potential shooter. *Id.*

143. The episode also omitted the crucial, consistent, fact that every witness who saw the shooter said that he had a bald or shaved head. *Id.*

144. The episode ended with MPD informing Jesse Mickelson's family that they had caught the person who murdered their son. In this scene, captured on TV, the family expressed their extreme gratitude for all the police did to "solve" the case. *Id.*

145. When this scene was filmed Sgts. Dale and Gaiters had not yet received the Maplewood Cub Foods video showing Mr. Barrientos-Quintana on the other side of town approximately 32 minutes before the murder. (PC Appendix 1 p.79).

146. Some witnesses knew of this episode before trial. Aron Bell-Bey admitted to prosecutors before trial that he had watched the episode and had seen Mr. Barrientos-Quintana being arrested. *Id.* at 44. William Fajardo said he knew the episode had aired but claimed he did not watch it. *Id.*

JURY TRIAL

147. Mr. Barrientos-Quintana's criminal trial commenced on May 15, 2009, before the Honorable Judge Jeannice M. Reding in Hennepin County District Court.

148. Assistant Hennepin County Attorneys Hilary Caligiuri and Susan Crumb appeared on behalf of the state. Mr. Barrientos-Quintana was represented at trial by Benjamin Myers, Bridget Landry, and Geoffrey Colosi.

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149. In 2015, Benjamin Myers was disciplined and his license to practice law in Minnesota was suspended (Disciplinary Order of the Minnesota Supreme Court, A15-0728).

150. In 2022, Geoffrey R. Colosi was disbarred for swindling an elderly woman out of her life savings. He was engaged in this behavior during Mr. Barrientos-Quintana's trial. (*In re Disciplinary Action Against Colosi,* 977 N.W.2d 802 (Minn. 2022)).

151. Mr. Barrientos-Quintana's first attorney, Kristi McNeilly, who withdrew from the representation weeks before the trial began, was convicted of theft by swindle when she took money from a client, claiming that she was bribing the police in an ongoing investigation. *State v. McNeilly*, 6 N.W.3d 131 (Minn. 2024). McNeilly's license to practice law has been suspended pending resolution of her Disciplinary case. *See In re Petition for Disciplinary Action Against Kristi D. McNeilly*, Appellate Case No. A22-0574.

152. Mr. Barrientos-Quintana had been indicted on four counts of first-degree murder for Jesse Mickelson's death: premeditated murder for the benefit of a gang under Minn. Stat. §§ 609.185(a)(1), 609.229, subd. 2, 609.05 (2008) (count 1); premeditated murder under Minn. Stat. §§ 609.185(a)(1), 609.05 (count 2); murder committed during a drive-by shooting for the benefit of a gang under Minn. Stat. §§ 609.185(a)(3), 609.229, subd. 2, 609.05 (2008) (count 3), and murder committed during a drive-by shooting under Minn. Stat. §§ 609.185(a)(3), 609.05 (count 4).

Additionally, Mr. Barrientos-Quintana was indicted on four counts for the attempted first-degree murder of Aron Bell-Bey.

153. Excluding jury selection, the trial lasted six days and concluded on May 21, 2009. (T. 1373).

154. The state's case largely relied upon the unsupported testimony of Marcelo "Sharky" Hernandez and the inconsistent testimony of eyewitnesses.

Eyewitness Testimony

155. Three eyewitnesses—J.G., William Fajardo, and Aron Bell-Bey—testified for the state.

156. None of the eyewitnesses identified Mr. Barrientos-Quintana as the shooter in court.

157. Thirteen-year-old J.G. was the first eyewitness called by the state. Jesse Mickelson had been attending J.G.'s birthday party just before the incident. J.G. and a group of his friends were playing football in the alleyway behind Jesse Mickelson's home after the party. (T. 436). Jesse Mickelson briefly joined the game before crossing the alley to join his friends at the site of his eventual death. (T. 437). Before the shooting in the alley began, the car containing the shooter drove slowly past J.G. and his friends. (T. 439).

158. Although J.G. had initially told the police he believed the car was a Chrysler, he later stated he thought it was a Dodge Intrepid (T.438).

159. J.G. was about two to three feet away from the passenger side of the car and told the police he saw three, not four, people in the car. (T.439).

160. He was able to see into the backseat of the car and testified that he thought the person in the back was Mexican, did not have a lot of hair, and was wearing a gray sweatshirt with a hood. (T. 440).

161. After the car passed their group, J.G. saw an elbow come out of the backseat passenger side of the car with a gun and heard four shots. (T. 442).

162. As mentioned above, during the investigation, J.G. was shown a lineup that contained Mr. Barrientos-Quintana's photo. He did not choose Mr. Barrientos-Quintana, but instead pointed out a filler's photo. (T. 448).

163. At no point did J.G. identify Mr. Barrientos-Quintana as the person he saw in the backseat of the car, either in court or out of court. Instead, the State had J.G. acknowledge that he saw a lineup and that the individuals in the lineup generally looked similar to the shooter, but that he was unable to determine if any of the people in the lineup were the shooter. (T. 448–49).

164. During cross-examination, J.G. was asked only to confirm that he was close to the car and that the person he saw in the backseat of the car had "really short hair." (T. 450). Mr. Barrientos-Quintana's trial counsel did not ask J.G. about his choosing a filler in a lineup where Mr. Barrientos-Quintana's photo was present. *Id*.

165. No other eyewitness from the group of children playing football testified to what they had seen that day.

166. Seventeen-year-old William Fajardo attended school with Jesse Mickelson and was standing with him at the time of the shooting. (T. 551).

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167. At trial, William Fajardo testified to seeing "maybe a Dodge Intrepid" and twice stated that it was brown, not white. (T. 557). Mr. Fajardo did not see the car until it was stopped next to the group and could not tell how many people were in the car. (T. 558).

168. After being prompted by the state, William Fajardo recounted that he had told the police that he deduced from the shadows that there were three to four people in the car. (T. 558–559).

169. Mr. Fajardo saw an arm with a gun come out of the back window on the passenger side and heard three shots (T. 561). After the third shot was fired, Mr. Fajardo ducked down and hid behind a nearby car and was hit in the eye by rocks that were flying up due to the shots. (T. 562).

170. William Fajardo only saw the shooter from the nose up and did not immediately recognize him (T. 569). Only by "thinking back" on the incident and after comparing his memory "to the photos that police gave [him]" was Mr. Fajardo able to identify Mr. Barrientos-Quintana as the person he saw from the nose up. (T. 569).

171. Mr. Fajardo had previously encountered Mr. Barrientos-Quintana at Flag Foods and stated that they "didn't get along," as Mr. Barrientos-Quintana had asked Fajardo if he hangs out with SSR. (T. 571).

172. Mr. Fajardo did not identify Mr. Barrientos-Quintana as the shooter from the witness stand.

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173. On cross-examination, Mr. Barrientos-Quintana's counsel tried to start a line of questioning regarding a kidnapping of a member of the Vatos Locos gang, and a bench conference was called regarding the admissibility of the questions. (T. 596).

174. During this time, Mr. Fajardo was caught texting on his phone while on the stand. (T. 602).

175. The court room was cleared while counsel and the court discussed these issues. *Id*. Mr. Barrientos-Quintana's defense counsel agreed to drop that line of questioning. (T. 613).

176. When the examination resumed, Mr. Fajardo admitted that he could not see into the car and only partially saw the shooter. (T. 620).

177. Mr. Fajardo also stated that he had described the shooter as bald in all police interactions and had initially identified the shooter as someone with the nicknames "Smokey" or "Sharky," aka Marcelo Hernandez (T. 627, 634).

178. Mr. Fajardo confirmed that, directly after the incident, he told Luis and Jael Pliego and Aron Bell-Bey that he believed the shooter was "Sharky," aka Marcelo Hernandez. (T. 628).

179. On re-direct, Mr. Fajardo clarified that the police had initially brought up "Sharky" to him and that he informed police that he did not know if the shooter was "Sharky." (T. 636).

180. Aron Bell-Bey was with Jesse Mickelson at the time of the shooting. (T. 655).

181. Mr. Bell-Bey testified that he saw a white "kind of sporty car" coming up the alley. (T. 663).

182. Mr. Bell-Bey described the shooter as a man with a shaved or bald head and facial hair. (T. 666).

183. Mr. Bell-Bey testified that the shooter leaned his head and arm out of the window with the gun while shooting. (T. 669).

184. Seeing Jesse Mickelson fall after three shots, Mr. Bell-Bey ran around the garage as he heard more shots being fired. (T. 667).

185. Mr. Bell-Bey did not realize that he had been injured during the event until officers came to speak with the group. (T. 672). He was subsequently transported to the hospital, where a bullet fragment was found in his left calf. (T. 672–73).

186. The jury eventually heard about Mr. Bell-Bey's identification of Mr. Barrientos-Quintana during a photo lineup, but like the other witnesses, he failed to make any in-court identification. (T. 673).[11]

187. On cross-examination, Mr. Barrientos-Quintana's counsel once again confirmed that Aron Bell-Bey knew of Jael Pliego and tried to start a line of questioning regarding the Vatos Locos. (T. 678). Counsel withdrew this line of questioning after the state's objections were sustained. (T. 683).

[11] In this regard *The First 48* episode likely influenced the prosecutors' trial strategy. The CRU uncovered a memo, not previously disclosed to defense counsel (discussed *infra* at 96), noting that Mr. Bell-Bey admitted to seeing the episode before it aired. (PC Appendix 1 p. 172) The prosecutors concluded that this "tainted" his in-court identification because he "had seen a significant portion of *The First 48* episode, including the Defendant being arrested and interviewed." They also noted Mr. Fajardo was aware that Mr. Barrientos-Quintana was featured on the show. (PC Appendix 1 p.172) These undisclosed witness interviews may explain why prosecutors never asked Bell-Bey or Fajardo to identify the shooter in court. *See* PC Appendix 6.

188. Mr. Bell-Bey went on to confirm that he described the shooter as having a shiny bald head. (T. 686–87).

189. Mr. Bell-Bey also admitted that Luis and Jael Pliego and William Fajardo came up with a story to tell the police that involved lying about the shooter wearing sunglasses and a bandana (T. 690).

190. On re-direct, Mr. Bell-Bey noted that the group lied about the shooter's attire because they did not want the police to think they knew anything about the shooting, as they did not want to get involved. (T. 694).

Marcelo "Sharky" Hernandez's Testimony

191. Marcelo "Sharky" Hernandez was the only one of the alleged occupants of the car to testify at trial.

192. He testified that, on the day of the incident he was with two fellow Sureños 13 members, nicknamed "Slappy" (Romero Pineda) and "Beaver" (Valentin Olivera). (T. 788).

193. The two men picked him up in Mr. Pineda's car, a white Dodge Intrepid, around 4:00 p.m. (T. 792). The group proceeded to drink, smoke pot, and drive around Lake Street. *Id*.

194. During this ride, Mr. Pineda received a phone call informing him of a party being held by the SSR gang, the rival faction of Sureños 13 led by Jael Pliego, "Puppet." (T. 793).

195. Jael Pliego had shot at Marcelo "Sharky" Hernandez the week before at Flag Foods. (T. 855)

196. Marcelo "Sharky" Hernandez testified that, given the existing rivalry, the group called Mr. Barrientos-Quintana to meet them at Powderhorn Park with a gun so they could go to the party and "shoot." (T. 811).

197. According to Mr. Hernandez, Mr. Barrientos-Quintana was most motivated to shoot because Ms. Chavarria-Cruz was at this party, an allegation that was false given the Maplewood Cub Foods surveillance video. (T. 808).

198. Mr. Hernandez stated that the group slowly drove up to the house, with no target in mind, and that Mr. Barrientos-Quintana got out of the car and shot his firearm four to five times. (T. 812). In contrast, every other eyewitness stated that the gun was shot through the open window.

199. The group then quickly drove away. (T. 816). Mr. Hernandez was not aware of what happened to the gun. (T. 816).

200. He further testified that after the shooting, all the occupants of the car went to Marcos's house, and that Mr. Barrientos-Quintana stayed there for 1 to 1.5 hours before leaving with "Rider." (T. 824).

201. Mr. Hernandez stated that he did not talk about who shot Jesse Mickelson, as talking to the police would go against gang rules. (T. 827). He admitted, however, that he did tell the police twice that a person named "Manny" had committed the crime because he was "scared of telling the truth." (T. 828).

202. Mr. Hernandez said he was part of the Sureños 13 gang for four to five years. (T. 828–829). His group did not get along with the SSR. (T. 841).

203. During his cross-examination, defense counsel asked Mr. Hernandez many questions that merely repeated what he had already testified to during direct exam, earning an admonishment from the court. (T. 853).

204. In describing the three times that he met with police, Mr. Hernandez stated that in the first two interrogations, he told them he was not involved and thought the shooter was "Manny." (T. 857). He did not begin to tell them the truth until their third encounter, after Sgts. Gaiters and Dale explained to him the difference between a witness and a suspect. (T. 889).

205. Although it was later determined that Mr. Hernandez was, in fact, an accomplice to the crime as described, defense counsel did not think this was the case, at one point even asking Hernandez "Isn't it true… that you were not in the car on October 11 of 2008…?" (T. 858).

206. Despite this, soon thereafter, defense counsel asked Mr. Hernandez to confirm that he, Mr. Olivera, Mr. Pineda, and Mr. Barrientos-Quintana were driving in a car at 6:20 p.m. on October 11, 2008, to which he said they were. (T. 862). This could not have been true, given the Cub Foods surveillance video footage at 6:19 p.m. Yet, defense counsel failed to even mention this unbelievable aspect of Mr. Hernandez's account during closing arguments.

207. Further, defense counsel failed to inquire about other faults in Mr. Hernandez's timeline, including the lack of evidence of Mr. Barrientos-Quintana's phone calls regarding the murder, Mr. Barrientos-Quintana not wearing what Mr.

Hernandez said he was, or Ms. Chavarria-Cruz's presence with him in Cub Foods, all of which would have shown Mr. Hernandez was lying.

208. Altogether, these failures by defense counsel were inexcusable.

Defense Witnesses

209. To establish Mr. Barrientos-Quintana's alibi, the defense called Itzel Chavarria-Cruz's brother Ricardo, her mother Marcia Cruz-Nolasco, and Itzel Chavarria-Cruz herself. Mr. Barrientos-Quintana's brother Carlos also took the stand.

210. Defense counsel did not call other potential witnesses that could have aided in Mr. Barrientos-Quintana's defense. This includes other alleged occupants of the car during the incident (Valentin Olivera and Romero Pineda), Valentin Olivera's family, who proved his alibi and thereby disproved "Sharky" Hernandez's version of events, or the other children playing in the alley, even though J.B. and A.L. had previously told the police that there was only one person in the backseat of the car and that person was bald. (Supp. 14).

211. During their initial police interviews, Marcia Cruz-Nolasco and Ricardo Chavarria-Cruz were mistaken about their days of the week and provided their account of October 12, instead of October 11. Shortly thereafter, Ms. Cruz-Nolasco and Mr. Chavarria-Cruz informed the police about the mix-up and amended their statement to provide an accurate account of what happened on October 11. (Supp. 36).

212. The witnesses stated that, before noon on October 11, Ms. Chavarria-Cruz, her mother Marcia Cruz-Nolasco, and Mr. Barrientos-Quintana were in the Cruz-Nolasco home. (T. 1432). They went food shopping together and then went home. *Id*. Ms. Chavarria-Cruz and Mr. Barrientos-Quintana visited his brother Carlos in Minneapolis around 4:00 p.m., before returning to the Cruz-Nolasco home. (T. 1479, 1499). After returning to her mother's home, Ms. Chavarria-Cruz and Mr. Barrientos-Quintana went to the Cub Foods to pick up limes for the meal that Ms. Cruz-Nolasco was making, as depicted in the Cub Foods surveillance video. (T. 1436). Around 10:00 p.m., Mr. Barrientos-Quintana went with Itzel Chavarria-Cruz and Ricardo Chavarria-Cruz to a baptism party. (T. 1408).

213. Video of the group at the baptism party, which shows that Mr. Barrientos-Quintana had a full head of hair, was shown to the jury. (T. 1465).

214. During the direct examination of Ms. Cruz-Nolasco and Mr. Chavarria-Cruz, defense counsel failed to ask them to explain whether there had ever been a different version of events than those they testified to at trial. Thus, the jury did not hear about their mistake regarding the date of October 11 until cross-examination. (T. 1401–10, 1414–19,1430–38, 1439–40).

215. The same thing occurred with Carlos Barrientos-Quintana's testimony, regarding whether he had shown his brother Edgar Barrientos-Quintana a dog on the day of the murder. (T. 1480–82).

216. The inconsistencies were referenced by the State during their closing statement. The prosecution described their testimony as "the process of trying to

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construct an alibi," rather than simple confusion over the dates. (Vol. XV T. 66–68). Defense counsel's failure to address these inconsistencies before the State provided the State with the opportunity to amplify them to Mr. Barrientos-Quintana's detriment.

217. Their corrected statements were proven true once the Cub Foods video was found, but again, defense counsel inexplicably failed to highlight this for the jury.

Jury Deliberations

218. During deliberations, the jury sent two notes to the Court reporting they were unable to reach a unanimous verdict. The first note explained that there were three jurors who were "a strong 3 for not guilty." (PC Appendix 7). The second note asked the Court to re-read the transcript of Mr. Hernandez, so they could review the State's questioning of him. *Id.* The Court read his testimony to the jury with some redactions. (T. 1791).

219. In the end, on May 28, 2009, the jury found Mr. Barrientos-Quintana guilty of all four counts of first-degree murder for the death of Jesse Mickelson and all four counts of attempted first-degree murder related to Aron Bell-Bey.

220. On June 4, 2009, Mr. Barrientos-Quintana was sentenced to life in prison without the possibility of parole for each murder charge. The district court also imposed a 192-month sentence for each attempted-murder charge.

APPEAL AND POST-CONVICTION

221. After his conviction, Mr. Barrientos-Quintana appealed.

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222. He argued that the district court's failure to give a statutorily-required jury instruction regarding accomplice testimony constituted a plain error. *State v. Barrientos-Quintana*, 787 N.W.2d 603, 606 (Minn. 2010). Mr. Barrientos-Quintana argued that the instruction would have informed the jury that their findings could not have been based on the uncorroborated testimony of an accomplice. *Id*. at 609. Furthermore, given that the jury asked to read Mr. Hernandez's testimony after about two days of deliberating, in order to "break the impasse" between jurors, it is clear that his testimony was critical to the verdict. *Id*. at 610.

223. Appellate counsel did not address the multitude of errors made by trial counsel, as detailed herein.

224. Appellate counsel did argue that, by entering convictions and imposing sentences on all eight counts, the district court erred. This error, while true, would not actually affect Mr. Barrientos-Quintana's life-without-parole sentence.

225. Affirming in part, vacating in part, and remanding, the Minnesota Supreme Court held that Hernandez could be liable as an accomplice, such that the accomplice testimony jury instruction was required. But, despite this error, the Supreme Court found that there was sufficient corroboration for Mr. Hernandez's testimony, and that Mr. Barrientos-Quintana was not prejudiced by the district court's failure to give the accomplice testimony jury instruction.

226. The Supreme Court found that the district court erred by entering convictions and sentences on alternative counts for a single criminal act against the same victim. The court subsequently vacated convictions 2–4 and 6–8 and

remanded the case to the district court to correct the formal adjudication and impose sentences on counts 1 and 5 alone. *Id*. at 614. On October 28, 2010, the district court corrected Mr. Barrientos-Quintana's sentence.

227. Justice Paul Anderson dissented from the Minnesota Supreme Court's decision. He believed that the error in failing to provide the jury instruction, even when defense counsel did not request it, was not harmless:

> Hernandez's testimony unquestionably formed the heart of the State's case against Barrientos-Quintana. The only evidence corroborating Hernandez's testimony came from W.F. and A.B.—two teenage eyewitnesses who were associated with the South Side Raza (SSR) gang that was the target of the shooting. W.F. named "Smokey" as the shooter after first denying any knowledge, and later W.F. made a very tentative photo lineup selection, stating that Barrientos-Quintana "kinda looks like the shooter." A.B. chose Barrientos-Quintana from a photo lineup. This corroborating testimony was thin evidence of guilt relative to Hernandez's detailed account of Barrientos-Quintana's guilt. (*Id*. at 616).

228. Justice Anderson went on to say that, given the inconsistencies in the testimony of Fajardo and Bell-Bey, it was very possible that the jury could have rejected their testimony altogether, and therefore an accomplice instruction would have been crucial to Mr. Barrientos-Quintana defense. *Id.*

229. He also observed that Mr. Hernandez was an "untrustworthy witness" whose "testimony simply did not hold up when scrutinized." *Id.* at 617.

230. Following the direct appeal, Mr. Barrientos-Quintana filed for post-conviction relief on September 10, 2012. *Id*. at #6.[12] The petition argued that, due

[12] Order, *State v. Barrientos-Quintana*, 27-CR-08-53942 (Minn. Dist. Ct. January 8, 2013).

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to ineffective assistance of counsel, Mr. Barrientos-Quintana should be granted a new trial. *Id*.

231. The ineffective-assistance-of-counsel claim was only based on his trial counsel's failure to (1) provide Mr. Barrientos-Quintana with discovery until after he was in prison; (2) object to the introduction of accomplice testimony; and (3) object to the trial court reading the jury a partial transcript of the testimony of the accomplice. *Id*. at #13.

232. None of these claims addressed the multitude of errors by trial counsel, as detailed herein, and instead attempted to relitigate the issue regarding the accomplice-testimony jury instruction (*id*. at #24), along with a claim regarding discovery documents that did not impact the conviction.

233. The district court found that the petition failed to prove, by a fair preponderance of the evidence, that any of the claims would satisfy the *Strickland* standard for ineffective-assistance claims. *Id*. at #32–38.

THE MINNESOTA CONVICTION REVIEW UNIT INVESTIGATION

234. In 2021, the Minnesota Attorney General's Office formed a Conviction Review Unit (the above-mentioned CRU).

235. Conviction review units have been formed across the country to review criminal convictions for cases of actual innocence.

236. The CRU finalized its report on *State v. Barrientos-Quintana* on July 29, 2024 (PC Appendix 1).

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237. The CRU investigated Mr. Barrientos-Quintana's case for over three years. After that intensive investigation it determined that Mr. Barrientos-Quintana played no role whatsoever in the tragic murder of Jesse Mickelson.

238. The report concludes: "Considering the entirety of the evidence the CRU reviewed, Barrientos could not be found guilty, beyond a reasonable doubt, of any crime related to the murder of Jesse Mickelson. Therefore, the CRU recommends that his conviction be vacated, and the charges dismissed." (PC Appendix 1 p.180).

EXHIBIT 15

239. The parties stipulated to the introduction of Exhibit 15, a September 23, 2024, article from The Minnesota Star Tribune regarding a press conference of Hennepin County Attorney Mary Moriarty. While this exhibit has been stipulated to by the parties, it contains unreliable hearsay, and has therefore been disregarded by this court in reaching its decision. (Exhibit 15).

CONCLUSIONS OF LAW

THE STANDARD APPLICABLE TO POSTCONVICTION PETITIONS

240. To obtain postconviction relief, the petitioner, must show, " a fair preponderance of the evidence," that there are facts to support that relief. *State v. Nicks*, 831 N.W.2d 493, 504 (Minn. 2013); Minn. Stat. § 590.04 subd. 3.

241. When considering whether to grant a petitioner's request for an evidentiary hearing, the court presumes the facts alleged in the petition to be true and

construes them in the light most favorable to the petitioner, *State v. Vang*, 881 N.W.2d 551, 557 (Minn. 2016).

242. In this matter, the State has waived the statutory time bar and procedurals bars found in Minn. Stat. 590.01 and *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976), due to the unique circumstances of this case and because Mr. Barrientos-Quintana qualifies under the interests of justice exception to the *Knaffla* bar.

243. In light of these standards, and the State's waiver, this court granted an evidentiary hearing, which was held on October 11, 2024.

INEFFECTIVE ASSISTANCE OF COUNSEL

244. The Sixth Amendment to the United States Constitution provides that "(i)n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defense." U.S. Const., Amend. VI. The U.S. Supreme Court has long held that the right to counsel means the right to the "effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970) (citations omitted).

245. The right to counsel exists to protect a defendant's fundamental right to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684 (1984) (citations omitted). Because the purpose of the right is to ensure a fair trial, the benchmark for judging ineffective assistance of counsel claims is whether defense counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. at 686.

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246. To determine if defense counsel is so ineffective as to violate the Sixth Amendment, Courts utilize the two-prong *Strickland* test. The claimant must show that, one, counsel was deficient to a degree below an "objective standard of reasonableness," and two, that, but for the ineffective counsel, there probably would have been a different result. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013).

247. The first prong, as to deficiency, is a matter of context. Whether counsel is ineffective to an objective degree depends on what a reasonable attorney would have done in the situation. *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009 (citations omitted). There is a "strong presumption" that an attorney's "conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. As to trial strategy, counsel is afforded wide latitude. *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013). Courts show strategic decisions, such as whether to object to evidence, "particular deference." *Zumberge v. State*, 937 N.W.2d 406, 413 (Minn. 2019).

248. In *Strickland* the Supreme Court clarified the second prong to provide that "when a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695. The Supreme Court has further stated that "a reasonable probability" is one that "undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (citation omitted).

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I. Eyewitness Identification Evidence

a. Photo Lineup Practices and Policies

249. The two categories of evidence that supported Mr. Barrientos-Quintana's convictions were (1) the accomplice testimony of Marcelo "Sharky" Hernandez and (2) the eyewitness identifications.

250. Minnesota Statute § 634.04 provides that "A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

251. Because of the need to corroborate accomplice testimony, the eyewitness evidence the State relied on to convict Mr. Barrientos-Quintana was paramount. In any case, such as this, which hinges on eyewitness identification, any reasonable defense attorney understands the need to exclude or impugn such evidence within the law.

252. Likewise, a reasonable defense attorney appreciates that eyewitness evidence poses misidentification risks that have been well documented for decades.

253. Courts have long held that unreliable identifications that result from suggestive lineup procedures must be suppressed given the risk of misidentification—a threat to the fundamental fairness of the trial.

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254. The United States Supreme Court observed that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined." *United States v. Wade*, 388 U.S. 218, 229 (1967).

255. The International Association of Chiefs of Police published training guidelines in which it concluded that, "[o]f all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work." Int'l Ass'n of Chiefs of Police, *Training Key No. 600, Eyewitness Identification* 5 (2006).

256. According to one study, approximately 7,500 of every 1.5 million annual convictions for serious offenses may be based on misidentifications. *See* Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* 7 (1995). The introduction of DNA analysis and the subsequent exoneration of defendants convicted by faulty witness identification have demonstrated the fragility of eyewitness identification evidence. The Innocence Project reports that more than 69 percent of convictions overturned due to DNA evidence involved eyewitness misidentification.[13]

[13] Innocence Project, "DNA Exonerations in the United States," https://innocenceproject.org/dna-exonerations-in-the-united-states.

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257. Dr. Nancy Steblay reviewed the eyewitness identification evidence in this case and prepared an expert report (PC Appendix 1.D).

258. Dr. Steblay is a Professor Emeritus in Psychology at Augsburg University. Dr. Steblay has conducted research on eyewitness memory, police procedures, and eyewitness evidence for over thirty years. She has published numerous peer-reviewed scientific articles and chapters on eyewitness topics. Her field and laboratory experiments have been funded by the National Institute of Justice and the National Science Foundation. Audiences for her recent professional presentations include prosecutors, defense attorneys, law enforcement personnel, policymakers, judges, and forensic scientists.

259. In 2005, the lead prosecutor in this case, Hilary Caligiuri, co-authored a law review article with Dr. Steblay, who had conducted the field study that led MPD to adopt new protocols to increase the reliability of eyewitness identifications in Hennepin County. *See* Amy Klobuchar, Nancy Steblay, and Hilary Caligiuri, "Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project," (PC Appendix 2).

260. The lead prosecutor in this case co-authored another law review article that explained the Hennepin County Attorney's Office partnership with the MPD to study and revise the eyewitness identification procedures to secure more reliable identifications and to prevent wrongful convictions. (PC Appendix 8).

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261. Mike Freeman[14], Hennepin County Attorney at the time of this case, mandated that all lineup procedures in Hennepin County be sequential and double-blind as a part of a program that was operative at the time of MPD's investigation of Jesse Mickelson's murder. *See* Amy Klobuchar, Nancy Steblay, and Hilary Caligiuri, "Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project," (PC Appendix 2).

262. A lineup is double-blind if the individual administering the lineup does not know who the suspect is or where the suspect is located in the lineup.

263. Double-blind lineup administration is widely viewed among experts as "the single most important characteristic that should apply to eyewitness identification procedures. Its purpose is to prevent an administrator from intentionally or unintentionally influencing a witness' identification decision." *State v. Henderson*, 27 A.3d 872, 896 (N.J. 2011).

264. Research has shown that lineup administrators familiar with the suspect may leak suggestive information to the witness by "consciously or unconsciously communicating to witnesses which lineup member is the suspect." Sarah M. Greathouse & Margaret Bull Kovera, "Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification," 33 *Law & Hum. Behav*. 70, 71 (2009).

[14] Paragraph 268 of the parties' Stipulation of Facts incorrectly identified Amy Klobuchar as the Hennepin County Attorney at the time at the time of this case.

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265. A non-blind procedure can induce the witness "to feel that they made a good lineup decision, even when that decision was heavily directed by a police officer towards their choice of suspect. The risk of false confidence in a mistaken identification is therefore significantly increased with non-blind lineup administration." (Steblay at 27).[15]

266. Properly constructed lineups do not suggest the identity of the suspect to the witness but instead "test a witness' memory and decrease the chance that a witness is simply guessing." *Henderson*, 27 A.3d at 897.

267. Best practices in photo lineups further recommend that any lineup procedure be fully recorded, so that all police conversations are captured, because verbal exchanges between law enforcement and witnesses can indicate witness indecision, qualifiers to the decision, or investigator influence.

268. Cautionary instructions to the witness serve to inform them that the suspect may not be in the lineup, that they are not required to identify a suspect, that the investigation will continue regardless of whether they identify anyone, and that it is as important to exclude innocent persons as it is to identify a suspect.

269. Failure to provide these instructions implies to the witness that the suspect is in the lineup, and that their task is to identify them. This approach encourages a witness to select a suspect contrary to their own memory. (Steblay at 33).

[15] Citations to "Steblay" are to the expert report of Dr. Nancy Steblay, dated December 14, 2021, attached as Petitioner's Appendix 1.D.

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270. Best practices likewise dictate that fillers (non-suspects) in a photo lineup resemble the suspect on key descriptors to provide for a meaningful comparison.

271. Lineups with fillers who obviously do not resemble the suspect, tend, by process of elimination, implicate the suspect.

272. Mistaken identifications "are more likely to occur when the suspect stands out from other members of a live or photo lineup." Roy S. Malpass et al., "Lineup Construction and Lineup Fairness," in 2 *The Handbook of Eyewitness Psychology: Memory for People* 155, 156 (R.C.L. Lindsay et al. eds., 2007).

273. Best practices "require that the witness's response to *each* photo be recorded." (Steblay at 30).

274. At the time of Mr. Barrientos-Quintana's case, MPD protocol required that a confidence statement be taken from an eyewitness at the time of identification. (Steblay at 35).

275. When MPD investigated Jesse Mickelson's murder in 2008, both they and the Hennepin County Attorney's Office knew of these best practices for eyewitness identification procedures. (PC Appendix 2). As much as anyone, given her scholarship on the issue, the lead prosecutor knew, or ought to have known, these practices and their importance to the integrity of photo lineup evidence.

276. As of 2020, given the inherent unreliability of eyewitness identifications, including photo lineups, Minnesota law requires photo lineups to be blind, to inform the witness that the perpetrator may or may not be in the lineup, to ensure that non-suspect fillers closely resemble the witness's description of the suspect,

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and to have witnesses provide confidence statements. Minn. Stat. § 626.8433, subd. 1.

b. The Lineups Used to Convict Mr. Barrientos-Quintana

277. The lineup procedures used to convict Mr. Barrientos-Quintana's were rife with failures to follow these Hennepin County Attorney's Office and MPD practices. They also run contrary to the statutory law cited above.

278. All the lineup procedures in this case were non-blind. All were conducted by investigators convinced of Mr. Barrientos-Quintana's guilt and dismissive of the prospect of his innocence.

279. The problems with non-blind administration of lineup procedures are illustrated in the transcript of William Fajardo's identification of Mr. Barrientos-Quintana. The investigators used leading questions, leading Mr. Fajardo to identify Mr. Barrientos-Quintana, as illustrated in the excerpt below:

> Q: Do you recognize him from anywhere else?
>
> A: I saw him up close. I never, I never seen him before than you know than that store that was my first time I seen him.
>
> Q: You write that down here. On this photograph.
>
> A: Write what I said?
>
> Q: Yeah like how you, you told me how you recognized him. You recognized him as who?
>
> A: Smokey.
>
> Q: You said he's the one that assaulted you?
>
> A: Yeah.
>
> . . .

Q: We got a couple of issues with this here. Remember when we're talking about earlier? And how you said that Smokey was in the car? Smokey was the shooter? Remember when you told us that? Okay. ***You didn't tell us that when you looked at this photo. Why is that?*** We just need to know. And we need to clarify. That's the same Smokey that you saw in the car.

. . .

Q: Is that the Smokey that assaulted at Flag Foods? [sic]

A: Hmm (affirmative).

Q: Yeah. And you told us that that was the same Smokey that was, that was shooting from the car. Is that correct [redacted]?

A: Yeah.

. . .

Q: Yeah, you wanna write, you know how you wrote it before where the uh, the part where the store took place. That simple part and just wrote it out, right? Okay. Here's another pen.

A: So what should I write?

Q: Well we can't, you know we can't tell you what to write. That's not what we're here for. You know how you just wrote about the store there. You can just write about the same deal with the car . . . and you say he kinda looks like the shooter? Is he the same dude that, he's the same dude that punch you in the face right?

A: Yeah.

Q: Okay. And you were telling us how it's the same dude that was the shooter?

A: Yeah. (PC Appendix 9 at 28–30) (emphasis added).

280. Sgts. Gaiters and Dale told Mr. Fajardo what to write under the photograph, even after stating they should refrain from doing so.

281. Sgts. Gaiters and Dale were intentionally leaking information that suggested Mr. Barrientos-Quintana was the suspect. They directed Mr. Fajardo to identify Mr. Barrientos-Quintana even after he resisted doing so.

282. While William Fajardo's eyewitness identification procedure was recorded, the identifications made by Luis Pliego and Aron Bell-Bey were not recorded contemporaneously with their initial view of the photo arrays.[16] Because they were recorded after the fact it is unknown to what extent the investigators used suggestive tactics or otherwise violated best practices. That MPD recorded these afterwards shows at best that they forgot, and at worst, that they used those tactics and violated those procedures.

283. Since Mr. Fajardo's interview was recorded, investigators had the ability to record the entire identification process.

284. Because there are no contemporaneous recordings for Luis Pliego's and Aron Bell-Bey's lineups, there is no way to know what happened or what was said leading up to their eventual identifications of Mr. Barrientos-Quintana.

285. There is no documentation that MPD gave either witness the aforementioned cautionary instructions before they identified Mr. Barrientos-Quintana.

[16] As discussed in the government misconduct section of the Factual Stipulation, *infra* at paragraphs 483–489, Luis Pliego did view two other photo arrays where he made tentative identifications of fillers who did not look like Mr. Barrientos-Quintana. Those photo arrays were not disclosed to the defense, and although those identifications (or lack thereof) were recorded, they were not transcribed in any form as had been done in the other "successful" identification procedures.

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286. The lineups were constructed in ways that failed to provide for a sufficiently robust test of the witnesses' memories.

287. Witnesses described the shooter as a Hispanic male, bald or shaved head, with facial hair, and bushy eyebrows.

288. The lineups shown to Aron Bell-Bey, William Fajardo, and Luis Pliego included only three lineup members with shaved heads.[17] Accordingly, this lineup was "a functional size of three members, a truncated lineup biased against the three members with shaved heads." (Steblay at 27).

289. Instead of using an up-to-date photo of Mr. Barrientos-Quintana that reflected his appearance at the time of the crime, the investigators used an older photo in which he had a shaved head. (Trial Ex. 80). Through this combination of using only three shaved/bald head photographs, and an inaccurate photograph of Mr. Barrientos-Quintana with a shaved head, the investigators stacked the deck against him and produced unreliable evidence.

290. The three identifications were based on non-blind photo lineups containing an outdated photo of Mr. Barrientos-Quintana, which differed materially from his appearance at the time of the crime, and made him appear similar to the only two other adequate fillers in the photo array.

291. No confidence statements pertaining to the witnesses' identification of Mr. Barrientos-Quintana are documented in this case.

[17] *See* PC Appendices 10–13.

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292. There is no record or explanation as to why each witness engaged in two laps through the lineup. The need for a second lap indicates a lack of confidence in the identifications.

293. Without any confidence statements or justifications as to why witnesses need to see each image twice, juries are unable to compare "courtroom confidence with confidence expressed at the time of identification." *Id.*

294. Despite their knowledge of best practices and policies, in order to convict Mr. Barrientos-Quintana, the prosecutors utilized photo lineups that violated those practices and policies. In light of the other evidence used against Mr. Barrientos-Quintana, most of all the false accomplice testimony of the their primary witness, Mr. Hernandez, the State's reliance on these flawed lineups was both crucial and egregious.

c. Defense Counsel's Failure to Suppress or Impugn the Photo Lineup Evidence

295. Despite these failures by the State, defense counsel did not seize on the opportunity to undermine the State's evidence. On February 17, 2009, defense counsel sought to suppress "any and all" witnesses' statements identifying Mr. Barrientos-Quintana because they were the product of "unlawfully suggestive identification procedures as well as coercive tactics engaged in by the state."[18] Yet counsel failed to submit any affidavit(s) or any memorandum citing the legal

[18] *See* Def's First Notice of Demand for Omnibus Hearing, *State v. Barrientos-Quintana*, 27-CR-08-53942 (Filed Feb. 12, 2009). Attorneys for Mr. Barrientos-Quintana sought to suppress "any and all" witness statements identifying him as the assailant in their request for an omnibus hearing. This hearing took place on February 17, 2009.

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standard for suppression. The argument was limited to three incoherent sentences:

> And so that's what I would like to suppress if the video shows, which I don't have that video, if the video actually shows that identification is suggestive. (T. 106–07) . . . I was just trying to give you a sample of the actual issue, Your Honor. I do intend to challenge all of the identifications of all witnesses in this matter as being coercive and suggestive, but I was trying to give you an exact example of what was going on of why I need the videos to – in order to challenge it properly. (T. 109–10).

296. Subsequently, the State submitted several exhibits regarding the eyewitness identification procedures to which defense counsel stipulated. (T. 110-112).

297. The defense never again argued, in writing or on the record, to suppress the eyewitness identifications. Defense counsel's cursory request to suppress was denied.[19]

298. With that request defense counsel failed to at all articulate why the eyewitness identification evidence ought to be suppressed. It lacked clarity, precedent, and detail. This failure clearly fell below an objective standard of reasonableness and was not the result of reasonable professional judgment. Rather, it demonstrates that defense counsel's failure was outside the wide range of reasonable professional work.

299. In addition, Defense counsel for Mr. Barrientos-Quintana failed to adequately cross-examine the police investigators as to their failure to follow best

[19] Order, *State v. Barrientos-Quintana*, 27-CR-08-53942 (Minn. Dist. Ct. Feb. 24, 2009).

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practices in conducting the photo lineups. This failure too fell below an objective standard of reasonableness.

300. On the whole, Defense counsel's deficient performance as to the photo lineup evidence was inadequate. It prejudiced Mr. Barrientos-Quintana. But for counsels' errors, the eyewitness lineup evidence central to the State's case would have been excluded, and the results of the proceeding probably would have been different.

d. The Eyewitnesses' Accounts of the Murder

301. The conditions of Mr. Mickelson's murder provided a poor foundation for witness memory, in particular encoding of the offender's face. *Id.* at 13.

302. MPD Officers interviewed many bystanders to the crime. Most were unable to provide a lot of detail about the shooting.

303. Dr. Steblay notes that this is "not surprising," as the witnesses each "differed in their position in the alley, the point in sequence of events that drew their attention, where their attention was focused, and in their after-the-fact interpretation of their perceptions." (Steblay at 13).

304. Because this was a nighttime drive-by shooting it was difficult to encode a strong memory of the shooter's face. *Id.*

305. As described by witnesses in the most elementary detail, a car drove up, a stranger shot a gun from the car window into a group of people at close range, and the car immediately drove away. This incident was brief, unexpected, and extremely stressful.

306. Furthermore, the view of the shooter's face would have been "limited by the angle of the culprit's position inside the car window." (Steblay at 13).

307. Witnesses reported differences in many key aspects of their accounts of the crime. They differed in the color of the vehicle (white, cream, brown), the number of men in the car (3 to 5), the clothing of the shooter (black, blue, grey), whether the windows were up or down, the number of shots fired, and the gun itself (black revolver, a cowboy gun, silver revolver).

308. There was a substantial delay between the date of the crime and when the lineups were administered (6–27 days).

309. This delay allowed for an "opportunity for damaging interference on memory." (Steblay at 11).

310. Prior to the lineup, three central witnesses speculated about other persons who could be the shooter (notably, Marcelo "Sharky" Hernandez or "Brownie").[20]

311. Dr. Steblay stated that this speculation indicates that "memory for the shooter was minimal and that witness narratives were shaped by external (non-memory) information about who the culprit might/could be." (Steblay at 11).

[20] "Brownie" is believed to be Francisco Valencia-Bonilla. Luis Pliego initially told police that the suspect was someone named "Brownie," a member of the Vatos Locos. (MPD Supp. 54). Aaron Bell-Bey also mentioned that he heard "Brownie" committed the shooting. (MPD Supp. 55). Mr. Bell-Bey told investigators that he sent Luis Pliego a message over Myspace that an individual named "Brownie" committed the shooting. Mr. Bell-Bey said that he heard that "Brownie" was the shooter from William Fajardo. Mr. Bell-Bey also stated that Luis Pliego showed him a photo of "Brownie," and from that photo he assumed that "Brownie" was the shooter because he had a bald head and the shooter looked like "Brownie." (MPD Supp. 55, interview w/ Bell-Bey 10-16-2008). It is not clear from MPD notes or reports whether they investigated "Brownie." That these witnesses discussed the identity of the shooter before their identifications of Mr. Barrientos-Quintana further raises concerns as to their ability to independently recall the face of the shooter apart from their peers' accounts.

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312. Eyewitness memory is vulnerable to rapid decay. The greatest loss of memory is "within the first 24 hours after an event… [and t]he drop in memory for details is precipitous within the first 9 hours." (Steblay at 21).

313. Aron Bell-Bey testified at trial that he, William Fajardo, and Luis Pliego were together for two hours discussing what they saw prior to their initial interviews with police. (T. 690).

314. Mr. Fajardo testified that he had told Sgts. Dale and Gaiters that the shooter might be Marcelo "Sharky" Hernandez and admitted that he told his friends on the night of the shooting that he believed it was Mr. Hernandez. (T. 628).

315. Information from external sources can become a part of a witness' "memory story," such that the effects of external intrusions and suggestions "are not easily separated from a person's memory of the original event." (Steblay at 20).

316. All four central eyewitnesses (Aron Bell-Bey, Luis Pliego, William Fajardo, and J.G.) provided descriptions that deviate from Mr. Barrientos-Quintana's appearance to an extent that belies confidence that he was the shooter.

317. The State prepared a chart summarizing the statements of every witness at the scene: Aaron Bell-Bey, Luis Pliego, William Fajardo, E.P.-N., J.B., J.G., A.L. (PC Appendix 1.A).

318. In this chart prepared by the State, every witness is noted as saying the shooter had either a bald head, a shiny bald head, or a shaved head. *Id*.

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319. On November 24, 2008, prosecutors asked Sgts. Dale and Gaiters to "check to see whether the liquor store Smokey went to still has video from that night (to show he was bald)." (Exhibit 12). Prosecutors were looking for proof that their suspect—Mr. Barrientos-Quintana—matched the witnesses' descriptions, rather than seeking a suspect that fit those descriptions.

320. Video footage from a baptism celebration and from a Cub Foods on the day of the murder both show that Mr. Barrientos-Quintana was not a match to the descriptions provided by the witnesses. (Trial Ex. 84, 128).

321. Anyone viewing these images can see that Mr. Barrientos-Quintana did not at all have a bald or shaved head at the time of the crime. Mr. Barrientos-Quintana's appearance at the time of the crime is incompatible with even the most basic descriptions of the four eyewitnesses.

322. Typically, only the "gist of what is in view (size, race, gender, hair color) is engaged when strangers are encountered only briefly." (Steblay at 17).

323. According to Dr. Steblay, whether the assailant had hair would be one of the few features that an eyewitness would be able to discern.

324. If all four central witnesses agreed that the assailant had a bald or shaved head, then the shooter was not and could not have been Mr. Barrientos-Quintana.

325. The fact that J.G. claimed that an innocent lineup filler looked like the shooter is significant.

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326. When looking at filler #1 (depicting Ramiro Beltran), J.G. noted the similarities between Mr. Beltran and the assailant and stated that he "had really short hair and he had a goatee, and the way it looked, like, it was the same skin tone, and that's it." (Supp. 44).

327. As such, either J.G. has "a weak or unreliable memory of the culprit or the innocent filler looks more like the culprit than does the police suspect." (Steblay at 27).

328. Furthermore, Mr. Barrientos-Quintana was in the lineup shown to J.G., and J.G. did not select him as the shooter; rather, J.G. suggested that a filler looked more like the shooter than Mr. Barrientos-Quintana did.

329. According to Dr. Steblay, "a filler identification should not be considered a 'non-event.' Filler identifications are a form of exculpatory evidence for the suspect in the lineup and reflect poorly on the witness's ability to take on future identification tasks." (Steblay at 26).

330. The presence of a gun in this case gives rise to the phenomenon commonly known as "weapons focus."

331. When a visible weapon is used during a crime, it can distract a witness and draw their attention away from the culprit and onto the weapon.

332. This "weapons focus" phenomenon can significantly impair a witness's "ability to make a reliable identification and describe what the culprit looks like." *Henderson*, 27 A.3d at 905.

333. A meta-analysis of 19 studies of weapons focus, involving over 2,000 identifications, found that the average accuracy of identifications decreased approximately 10 percent when a weapon was present, in addition to substantially diminishing witnesses' ability to describe the perpetrator. *See* Nancy M. Steblay, "A Meta-Analytic Review of the Weapon Focus Effect," 16 *Law & Hum. Behav*. 413, 415–17 (1992).

334. Aron Bell-Bey recounted the position of the gun, stating that it started out pointing towards the ground and then came up to point at the victim. (T. 669). Mr. Bell-Bey was injured with bullet fragments.

335. Luis Pliego told police that he saw one gun, which he believed to be a .38 revolver. (Supp. 54).

336. William Fajardo testified to seeing a gun coming out of the window of the car (T. 560).

337. J.G. testified that he saw a "pistol-ish gun." (T. 442).

338. That the four witnesses could recount seeing the gun (albeit in varying details) shows that this interaction transitioned from a routine gathering into something much more memorable, and the witnesses' attention was likely directed at the gun.

339. Each of the identifying witnesses almost certainly experienced high levels of stress once they saw an unknown man shoot at them and hit their friend at close range.

340. The scientific literature shows that, even under the best viewing conditions, high levels of stress can severely diminish an eyewitness's ability to recall and make an accurate identification. (Steblay at 16–17).

341. A meta-analysis of sixty-three studies showed "considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details." Kenneth A. Deffenbacher et al., "A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory," 28 *Law & Hum. Behav.* 687, 699 (2004).

342. These findings apply to each of the four eyewitnesses.

343. A car drove up, a stranger shot a gun from a car window into a group of people at close range, and the car immediately drove away. This incident was brief and unexpected.

344. This would have been an exceedingly high stress scenario for the four eyewitnesses.

345. Further, a "fight or flight" response is typical in threatening and stressful situations, "with the result being that limited attention is paid to the face of the perpetrator." (Steblay at 13).

346. In this case, three witnesses engaged in a "flight" response, and thus, their encoded memory from the event is fragmented and likely confused. *Id.*

347. Mr. Fajardo, for example, told police that he ran into the house when the shooting started, and later reported ducking behind a car during the shooting. (Supp. 33; 51).

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348. The eyewitness identifications served as one of the central pieces of evidence in the state's case against Mr. Barrientos-Quintana.

349. Without the eyewitness identification evidence, there is no other evidence to tie Mr. Barrientos-Quintana to the crime besides Hernandez's problematic accomplice testimony. This was the only corroboration evidence.

e. Defense Counsel's Failure to Cross-Examine the Eyewitnesses

350. Defense counsel failed to meaningfully cross-examine the eyewitnesses and to, at a minimum, point out how Mr. Barrientos-Quintana could not have matched their descriptions of the shooter.

351. None of the three eyewitnesses (Aron Bell-Bey, William Fajardo, J.G.) called at trial was asked to or made an in-court identification.

352. Defense counsel never argued that none of the eyewitnesses made an in-court identification in closing argument (T. 89–104).

353. Investigators interviewed J.G. twice on October 11, and both times he described the shooter as "bald." (Supp. 11, 14).

354. Defense counsel failed to question J.G. about his failure to identify Mr. Barrientos-Quintana in the lineup, that he described the shooter as bald, or that he thought that a filler was more likely the shooter. (T. 450).

355. On cross examination, defense counsel asked only the following about J.G.'s descriptions to the police:

> Q: When you talked to the officers you stated – you gave a description of who you saw in the car; correct?

A: Yes.

Q: And you stated, as to his head, that he had more of a bald head; correct?

A: Yes.

Q: And you – you were pretty close to the vehicle?

A: Yes.

Q: So when you stated that he was more of a bald, was he – was he like shiny bald or like really short hair like Mr. Myers' hair?

A: Yes, about like his.

Q: Like his haircut. Okay. All right. Thank you. (T. 450).

356. This botched line of questioning cleared the way for the state to argue in closing that the "defendant had short hair," which directly contradicted J.G.'s initial accounts of a bald shooter, as well as the other witnesses' accounts.

357. Defense counsel never asked about the notations made on the lineup exhibit that were in different pens, written at different times, and accompanied by significant coaching from law enforcement. (Trial Ex. 80).

358. Defense counsel did not focus their cross-examination of Mr. Fajardo on his inconsistent statements. (T. 595–634).

359. Defense counsel began asking about Mr. Fajardo's involvement in gang activity. (T. 595). Defense counsel asked Mr. Fajardo about a shooting at Roosevelt High School allegedly involving Jael Pliego. The state objected and demanded a good faith basis for believing that the shooting had happened. Defense counsel said: "And I believe there was a report, and I apologize as a massive amount of information . . . Well I'm trying to establish – I'm trying to find

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out if he was in fact expelled because of the shooting or if it was some other engagement between the SSR and the Vatos Locos. I don't know the answer to that question, that's why I'm asking it." (T. 630–31). When the court questioned the relevance of this line of questioning, counsel astonishingly did not even have an answer, and instead said: "I'm going to have to go back to my binder and pull that out for you. Give me a couple of seconds to find that. There's a massive amount of information I'm trying to figure out." (T. 632). Again, the court questioned the relevance, and eventually the defense withdrew the line of questioning, and subsequently ended the cross-examination shortly thereafter failing once again to ask key questions that were actually material to the case. (T. 633, 634). In the middle of trial defense counsel lacked even a basic grasp on the relevant information.

360. Defense counsel failed to ask Mr. Bell-Bey about his statements to police that the shooter had a "shining" bald head, which was in direct contrast with Mr. Barrientos-Quintana's appearance at the time of the shooting.

361. Defense counsel asked a series of improper questions having nothing to do with the deficiencies with Mr. Bell-Bey's identification and instead demonstrated counsel's ignorance of the rules of evidence. (Bergman at 10).[21]

362. Defense counsel asked what Mr. Bell-Bey might have heard about why Jael Pliego was shot. When he asked, "Did [Jael Pliego] ever tell you why he was using

[21] Citations to "Bergman" are to the expert report of Ms. Barbara Bergman attached to the CRU report, Appendix 1.F. Both parties stipulate that Barbara Bergman is qualified as an expert on ineffective assistance of counsel.

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crutches?" the state objected on hearsay grounds. Counsel's response was: "Your Honor, this would have been testimony that was provided directly to him." The court responded: "That's what hearsay is." (T. 679).

363. Defense counsel did demand discovery for other police reports regarding gang activity that had been investigated by the Metro Gang Strike Force.

364. The Court signed a pretrial order allowing defense counsel to receive reports with some limited redactions. *State v. Barrientos-Quintana*, Case No. 27 CR 08-53942, Hennepin County District Court (March 25, 2009).

365. Defense counsel never questioned any witnesses about Arber Meko, who matched the descriptions given of the shooter far more than Mr. Barrientos-Quintana.

366. Defense counsel never questioned any witness about Francisco Valencia-Bonilla (aka "Brownie"), whom Aaron Bell-Bey, William Fajardo, and Luis Pliego had all identified as possibly being the shooter.

367. All the evidence of the identifications of the shooter should have been helpful to Mr. Barrientos-Quintana's defense, because it showed how problematic the identifications were.

368. There were many opportunities for defense counsel to highlight how the eyewitness identifications of the shooter did not describe Mr. Barrientos-Quintana.

369. Instead of challenging the eyewitness identification evidence, defense counsel, on cross-examination, focused on pointless and irrelevant details, consistently being reprimanded by the judge.

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370. Expert Jed Stone states in his affidavit: "Trial counsel failed to present evidence to challenge this identification testimony or indeed to effectively cross-examine these witnesses about the discrepancies between their initial reports to law enforcement . . . and their trial testimony." (Stone at 31).[22]

371. Expert Jed Stone states in his affidavit, "The transcript is full of incidents where it is clear that counsel did not understand basic rules of evidence such as hearsay and relevance. This is particularly obvious in their efforts to introduce gang ties and possible alternate perpetrators while questioning Fajardo and Bell-Bey. Ultimately, they were unable to get either of those theories before the jury. Their time would have been much better spent thoroughly questioning both witnesses about the discrepancies in their identifications." (Stone at 36).

372. Jed Stone states in his affidavit: "[T]he ethical duty of a defense lawyer does not end with merely noting or identifying exculpatory evidence. Instead, the attorney has an obligation to present the exculpatory evidence in a manner that the factfinder can understand with the support of existing law and required jury instruction." (Stone at 8–9). Defense counsel failed to present so much exculpatory evidence.

373. There could be no strategic reason for trial counsel's failure to effectively cross examine these eyewitnesses. These multitude individual failures represented a deficient performance well below an objective standard of

[22] Citations to "Stone" are to the affidavit of expert Mr. Jed Stone, attached to the CRU report, Appendix 1, as Appendix G. Both parties stipulate that Jed Stone is qualified as an expert on ineffective assistance of counsel.

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reasonableness. Again, defense counsel's deficient performance prejudiced Mr. Barrientos-Quintana. But for these errors, the eyewitness identification testimony, crucial to the State's case, would have undermined it to an extent that the result of the trial would have been different.

f. Defense Counsel's Failure to Call the Alley Witnesses

374. When the Alley Witnesses observed the shooter and his vehicle, they were less stressed, and better positioned to observe, because no bullets had been fired.

375. All the Alley Witnesses described the shooter as bald or as having a shaved head. Yet, J.G. was the only Alley Witness to testify.

376. Defense counsel did not call A.L. or J.B. to testify that the shooter was bald and that they only saw three people in the car when the shooting occurred.

377. Defense counsel was aware that A.L. and J.B. were eyewitnesses to the crime for which their client was facing charges because their interviews with law enforcement were included in discovery provided to the defense.

378. Defense counsel should have known that the Alley Witnesses' testimony would support Mr. Barrientos-Quintana's defense by undermining the credibility of the state's eyewitness identification of him as the shooter.

379. By not calling A.L. and J.B. to testify, defense counsel failed to demonstrate for the jury that their descriptions of the shooter—more inherently reliable than the others witnesses—were inconsistent with Mr. Barrientos-Quintana.

380. Jed Stone states in his affidavit, "Trial counsel failed to call the occurrence witnesses who both described the shooter as "bald" and only saw three people in

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the car when the shooting occurred[23]… In this manner, defense counsel failed to challenge the reliability of Hernandez's claim that four people were in the car and failed to affirm the description of the shooter was not, and could not have been, Mr. Barrientos-Quintana." (Stone at 33-34).

381. Because defense counsel did not make a serious attempt to exclude the eyewitness identification evidence in the pretrial proceedings, it was even more important to cast doubt on the identifications during the trial itself.

382. There could be no strategic reason for the failure to call the Alley Witnesses. Yet again, defense counsel's performance fell below an objective standard of reasonableness. This was not poor judgment, it was the lack of it. But for this failure, there would have been eyewitness evidence at trial supporting Mr. Barrientos-Quintana's innocence, rather than his guilt.

II. The Failure to Rebut the Testimony of Marcelo "Sharky" Hernandez

a. Cross Examination

383. Mr. Hernandez's testimony was riddled with lies and inconsistencies. Defense counsel had a plethora of opportunities to attack his credibility.

384. These lies and inconsistencies were apparent once defense counsel received the Cub Foods video and Mr. Barrientos-Quintana's phone records.

385. Defense counsel failed to attack the blatant falsehoods in Mr. Hernandez's statements. In effect, key portions of his testimony were unchallenged.

[23] Mr. Stone is describing the Alley Witnesses when he writes "occurrence witnesses."

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386. Significant portions of Mr. Hernandez's testimony are also demonstrably false.

387. Itzel Chavarria-Cruz is seen on video with Mr. Barrientos-Quintana minutes before the shooting, proving that the motive for Mr. Barrientos-Quintana's to commit the crime offered by Mr. Hernandez was false.

388. Defense counsel did not argue in closing that Mr. Hernandez's story about Mr. Barrientos-Quintana's "purported motive made no sense and the Cub video of the defendant with [Cruz-Chavarria] contradicted that." (Bergman at 18).

389. Mr. Hernandez also claimed that the group called Mr. Barrientos-Quintana about the party, and then he called them when he arrived at Powderhorn Park before the murder.

390. Mr. Hernandez made it clear that these calls were to and from Mr. Barrientos-Quintana's cell phone, as noted in his exchange with MPD:

> Q: Do you remember where he called Smokey, like did he call Smokey's cell phone number?
>
> A: Cell phone.
>
> Q: You know that for sure?
>
> A: Yes.

(Supp. 81). Yet, defense counsel failed to even mention that Mr. Barrientos-Quintana's cell phone records were collected and there was no record of either of those calls. (T. 1153, 1232, 1248). Mr. Hernandez's assertions about Mr.

Barrientos-Quintana's phone calls had no merit at all. Defense counsel let that go unchallenged.

391. Next, Mr. Hernandez claimed that the group met at Powderhorn Park before driving to the scene of the shooting. He said Mr. Barrientos-Quintana was wearing suspender/overalls and a blue sweater when they picked him up at the park. The Cub Food video some 30 minutes prior contradicts Mr. Hernandez on this point too. Mr. Barrientos-Quintana was not wearing those clothes. Mr. Hernandez offered no explanation, and was not challenged on how, or why, Mr. Barrientos-Quintana would have changed clothes before the murder, despite coming from across town.

392. Defense counsel also failed to challenge Mr. Hernandez's account that after they picked up Mr. Barrientos-Quintana at the park they drove around waiting for it to get dark before driving to the party. (Supp. 83). As discussed above, given that Mr. Barrientos-Quintana was at the Maplewood Cub Foods 32 minutes before the murder, there was not time—it was not possible—for this to have happened. They let go another opportunity to show the jury that Mr. Hernandez was a self-serving liar.

393. Defense counsel's cross-examination of Mr. Hernandez was akin to useless.

394. Defense counsel also failed to attack Mr. Hernandez's credibility based on his motivation to lie at the hands of MPD investigators. Mr. Hernandez had "every motivation to lie and had been given many hints by the detectives about what they wanted him to say." (Bergman at 17).

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395. Prosecutors asked the investigators to interview "Sharky," because they thought he was in the car.

396. Investigators reminded Hernandez of the difference between witnesses and suspects.

397. Yet in closing argument, defense counsel made minimal reference to the potentially threatening effect of Sgt. Dale and Sgt. Gaiters telling Hernandez that he could be a suspect or a witness. This was yet another opportunity to attack the State's primary witness's credibility that defense counsel failed to seize. (Vol. XV T. 92).

398. Jed Stone states in his affidavit: "Hernandez was the only one of the alleged occupants of the car that testified at trial. His credibility was central to the State's case and the defense had many tools to show he was lying, but counsel failed to use those tools to do so." (Stone at 24).

399. The trial court initially included the accomplice testimony instruction in its proposed instructions but removed it upon the unopposed request by the state. (Vol XV T. 3–4).

400. This was a major issue raised in Mr. Barrientos-Quintana's direct appeal to the Minnesota Supreme Court. *Barrientos-Quintana*, 787 N.W.2d at 611–12 (Minn. 2010).

401. There was no strategic reason or excuse for defense counsel to not object to the State's request to remove the accomplice testimony instruction. If defense counsel had objected to the state's request, it is very likely that the trial court

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would have given it, since it was in the original instructions that the court had planned to give.

402. Jed Stone states in his affidavit that this is "evidence of trial counsel's ineffective assistance of counsel." (Stone at 12).

403. The Minnesota Supreme Court concluded that it was plain error not to give the instruction, because the evidence supported a finding that Mr. Hernandez was an accomplice. He knew "exactly what was about to transpire." The Court went on to state:

> [Mr. Hernandez] further acknowledged his knowing role in the commission of the shooting through other statements and actions. [Mr. Hernandez] testified that he, [Romero Pineda], and [Valentin Olivera] made the plan together to call [Mr. Barrientos-Quintana] and meet him at Powderhorn Park, then drive to the SSR house for the purpose of shooting someone. [Mr. Hernandez] chose to remain with the group, knowing that the crime was about to be committed, during the casing of the location, the commission of the shooting, and the flight from the scene and the hiding from the police that occurred afterwards. And when the police eventually questioned him about the shooting, [Mr. Hernandez] lied about his role in the offense until the police assured him that a mere "witness" would not spend time in prison because witnesses are not the same as suspects. *Id*.

404. A defendant cannot be convicted solely on the uncorroborated testimony of an accomplice.

405. Mr. Hernandez's credibility was central to the state's case: he was the only trial witness who claimed to be in the car at the time of the shooting.

406. The jury clearly found Mr. Hernandez's testimony to be important because they insisted that portions of it be re-read to them. (T. 1722, PC Appendix 7).

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407. After hearing that testimony, the jury returned shortly thereafter and convicted Mr. Barrientos-Quintana. This shows that Mr. Hernandez's testimony played a decisive role in their decision to convict.

408. Defense counsel failed to show the jury that Mr. Hernandez had a motive to lie, that his account was ripe with impossibilities and inconsistencies, and that his uncorroborated account was not as a matter of law enough to convict Mr. Barrientos-Quintana.

409. There could be no strategic reason for any of these failures. On the most fundamental level, Defense counsel abdicated their duty to represent Mr. Barrientos-Quintana. These systemic failures did not even approach an objective standard of reasonableness. They show that defense counsel was not up to the task owed to Mr. Barrientos-Quintana or demanded by law. Above all their deficient performance prejudiced Mr. Barrientos-Quintana. Had defense counsel challenged Mr. Hernandez's testimony as they should have—as any reasonable counsel would have—his testimony, which the jury found critical, would have been undermined to the point of a different verdict.

b. The Failure to Call Witnesses That Would Have Undermined Marcelo "Sharky" Hernandez's Testimony about Valentin Olivera

410. Mr. Hernandez claimed that Mr. Olivera was in the car during the murder, however, Mr. Olivera had a solid alibi.

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411. Defense counsel failed to call Mr. Olivera or any of his many family members who provided his alibi. It would have been that simple to show once more that Mr. Hernandez was a liar whose testimony held no weight.

412. Jed Stone states in his affidavit that "Mr. Barrientos-Quintana's trial counsel had a duty to challenge the believability of Hernandez's uncorroborated claims. Yet counsel failed to call Olivera or his many family members who proved this alibi as witnesses." (Stone at 23).

413. There could be no strategic reason for the failure to call crucial witnesses that would have undermined Marcelo "Sharky" Hernandez's testimony. This was another failure on the immense pile that was defense counsel's inadequate performance. No question this fell below an objective standard of reasonableness.

III. Additional Errors and Omissions by Defense Counsel

414. Mr. Barrientos-Quintana had several alibi witnesses (Itzel Chavarria-Cruz, Maria Cruz-Nolasco, Ricardo Chavarria-Cruz, and Carlos Barrientos-Quintana), who all accounted for Mr. Barrientos-Quintana's whereabouts on October 11, 2008.

415. Mr. Chavarria-Cruz and Ms. Cruz-Nolasco were first interviewed by the police on October 24, 2008. The following day, Mr. Chavarria-Cruz contacted Sgt. Gaiters to explain that he and his mother mixed up the dates of October 11 and October 12, and they both wanted to amend their statements. They went to the police station and corrected their accounts.

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416. These corrections were proven to be accurate once MPD obtained the Cub Foods video.

417. This mistake of mixing up the days was easy to explain and innocuous, yet, defense counsel did not address it on direct examination. (T. 1401–10, 1414–19).[24] This gave the State the opportunity to raise it for the first time on cross-examination and set the tone for the jury. By not addressing this mistake first, and defusing it, defense counsel put the jury in a position to think that it was something to hide, rather than an innocent mistake.

418. On direct examination of Ms. Cruz-Nolasco, defense counsel did not mention the mistaken dates, and again, it was only on cross-examination that the State asked about the changed story. (T. 1430–38, 1439–40).

419. Defense counsel also never asked Carlos Barrientos-Quintana about giving an inconsistent statement to MPD regarding whether he showed Edgar Barrientos-Quintana a dog on October 11. Here again, it came out for the first time on cross-examination. (T. 1480–82).

420. Only on re-direct did defense counsel establish that Carlos Barrientos-Quintana was interviewed by police on January 29, 2009, a full three-and-a-half months after the incident. (T. 1490).

[24] The CRU report provides useful research that shows that innocent people struggle to give detailed and consistent alibis. *See* PC Appendix 1, p. 59–61. As the research shows, "providing an alibi is an extremely difficult task, and most people do not understand the difficulty of providing a detailed, accurate, and consistent account of what they did days or weeks later." *Id.* at 60.

421. All the alibi witnesses had explanations for their confusion about the relevant date. The failure of defense counsel to diffuse the impact of the changed statements—three times—left it for the state to "paint a picture of a concocted story." (Bergman at 21). And that is exactly what the state did in closing argument, describing the witnesses' testimony as "the process of trying to construct an alibi." (Vol. XV T. 66).

422. In addition to these alibi issues, during the trial, defense counsel repeatedly asked inappropriate, irrelevant, and pointless questions, and otherwise demonstrated a fundamental lack of knowledge relevant to criminal law and the trial. Below are some, but not all, examples:

a. Defense counsel often needed help from the state to formulate proper questions. (T. 779, 876, 1384).

b. Defense counsel frequently asked pointless questions of witnesses Bachmeier, Rogalska, and Lecy that did not advance any conceivable theory of the defense. (T. 472–73, 511–12, 516, 518, 709–710).

c. Defense counsel did not know that they needed to make a record of Mr. Barrientos-Quintana's decision not to testify. (T. 1543).

d. Defense counsel was unable to articulate an objection to the admission of a jail phone call, at one point claiming the call had not been transcribed, despite the state having given them a copy of the transcript days before. (T. 1554).

These errors demonstrate that defense counsel's failures were not isolated, but the norm—in other words, their collective standard for trial was inadequate.

423. Jed Stone states in his affidavit: "The transcript is full of incidents where it is clear that counsel did not understand basic rules of evidence such as hearsay and relevance…." (Stone at 36).

424. While questioning Itzel Chavarria-Cruz, defense counsel had the opportunity to play recorded jail calls for the jury that would have shown that Mr. Barrientos-Quintana did not pressure her or her family, and only wanted them to say what they remembered. (PC Appendix 1 p. 81).

425. Defense counsel acknowledged that they received several CDs with recorded jail calls made by Mr. Barrientos-Quintana. (T. 1554). But when the state sought to use a small snippet of those calls that, taken out of context, appear to show his client suggesting to Itzel that they "get our stories straight," counsel was completely unprepared to object because they had not reviewed the calls. Instead, defense counsel told the court, "This is not one we've transcribed ourselves, so I can't even speak to whether or not it is completely out of context." (Appendix 1 p.81).

426. Ms. Chavarria-Cruz testified on Thursday, May 21, 2009. (T. 1493).[25] The State disclosed the transcript of the recorded jail call that they intended to use the prior Monday. (T. 1554).

[25] *See* https://www.calendar-365.com/calendar/2009/May.html.

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427. The State used this jail call transcript on rebuttal to discredit Itzel Chavarria-Cruz and her family and used it again in closing argument for the same purpose. (T. 1555, Vol. XV T. at 70–71).

428. Defense counsel knew or should have known what the State's plan was for these jail calls. They had the opportunity to review the calls and address the issue with Ms. Chavarria-Cruz to be ready.

429. Defense counsel should have preempted the state's attack on Ms. Chavarria-Cruz's credibility by asking her about the calls on direct examination, showing the jury the true nature of the calls she had with Mr. Barrientos-Quintana.

430. Defense counsel would have been able to show that, far from attempting to coerce Ms. Chavarria-Cruz and her family into providing him with an alibi, Mr. Barrientos-Quintana was trying to remember what they did that day. He was trying to recall the truth. He wanted them to tell the truth.

431. The State presented this single, out-of-context, phone call in rebuttal, so not only did they present it to the jury first, but it was the last evidence heard by the jury. Defense counsel's failure ceded to the State the upper hand for the umpteenth time.

432. The CRU listened to approximately 160 hours of Mr. Barrientos-Quintana's jail calls and found them to be exculpatory. (PC Appendix 1 p.70).

433. As discussed in paragraphs 149-151, with the exception of Bridget Landry, Mr. Barrientos-Quintana's counsel before and during trial have been disciplined for serious ethical violations. Their immense ethical failings—their basic failures to

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serve their clients—add relevant context to their inexcusable representation of Mr. Barrientos-Quintana.

434. The opening and closing arguments for the defense were done by Ms. Landry, who had just passed the bar a few months prior to trial. Mr. Barrientos-Quintana was facing a life sentence without the possibility of parole and the last words the jury heard on his behalf were given by an attorney who had been practicing for less than six months.

IV. Defense Counsel's Decision to Defer an Opening Statement

435. Opening statements are a critical part of a trial. Professor Thomas A. Mauet explains, in his book Trial Techniques and Trials (11th ed) (page 73):

> First impressions are lasting impressions . . . the opening statement is each side's first opportunity to tell the jury its themes, what the case is all about from its point of view, and why the jurors should return a favorable verdict. It forms the framework from which the jurors will evaluate the evidence, the parties, and the lawyers for the rest of the trial. Because of this, opening statements have a powerful influence on the eventual verdict.

436. Yet against all reason defense counsel deferred their opening statement. They failed to provide the jury with a roadmap and theme of their case at the outset of trial.

437. The State gave its opening statement on May 15, 2009, and then presented its entire case-in-chief over the course of almost five days. The defense did not give an opening statement until the morning of May 21, and presented its entire case that day. By deferring their opening statement, defense counsel let the State set the tone. With Mr. Barrientos-Quintana's fate in the jury's hands, defense

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counsel chose not to make a first impression that could sow the seeds of reasonable doubt. As a result, the State made the first impression in the jury's mind, unchallenged. A professional sports team deciding to sit out the first quarter of a game would make no less sense.

438. Jed Stone states in his affidavit: "Defense counsel also waived opening argument. This might make sense in certain cases, but did not in this case, where defense had both a strong alibi and a powerful case for mistaken eye-witness identification, none of which would be a surprise to the State. Defense counsel should have provided the jury with a roadmap of its case before the prosecution called its first witness but failed to do so. I cannot imagine a strategic reason to do so in a case like this." (Stone at 35).

439. Professor Bergman states in her report, "the jury heard from twenty-five state witnesses before the defense took any opportunity to talk to the jury about its defense and how they should evaluate the evidence they heard." (Bergman at 19).

V. The Cumulative Failures of Defense Counsel

440. According to the expert report of Professor Barbara Bergman, defense counsel's combined errors show that:

> … there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial would have been different. The State's case was very weak and based largely on the testimony of Sharky, an uncorroborated co-conspirator who changed his story multiple times and was factually inaccurate regarding many details including the timing, phone calls, and Itzel's presence at the party as the motive for the shooting. In addition,

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> the eyewitness identifications were weak, and none of the eyewitnesses who testified were asked to make an in-court identification of the defendant. Moreover, the defendant's appearance on the night of the shooting did not match any of the initial descriptions given by the eyewitnesses describing the shooter as bald or having a shaved head since photos taken of the defendant that night showed him with a full head of hair. Finally, the defendant had an alibi that completely accounted for his whereabouts during all the relevant times. Because the state had such a weak case and the defense had strong mis-identification and alibi defenses, the defendant was prejudiced under the *Strickland* standard by the multitude of errors made by defense counsel.
>
> Overall, time and again defense counsel's performance fell below reasonable professional norms. As a result, there is more than a reasonable probability that but for counsel's unprofessional errors, the outcome of the trial would have been different. (Bergman at 24).

441. Jed Stone states in his affidavit: "The trial court record reveals no strategic reason of any of the above-identified failures by Mr. Barrientos-Quintana's trial attorneys. Indeed, there can be no valid strategic reason for failing to offer proper, accepted jury instructions challenging Hernandez's testimony as an accomplice. There was no valid strategic reason to fail to call witnesses to undermine the believability of Hernandez's testimony or the identification of Mr. Barrientos-Quintana." (Stone at 42).

442. Stone further states in his affidavit: "It is my professional opinion that the trial attorneys' representation of Mr. Barrientos-Quintana was constitutionally deficient and not in keeping with the professional norms of defense counsel. It is my opinion that but for these errors, there is a reasonable probability that Edgar Rene Barrientos-Quintana would have been acquitted. The failure of defense counsel

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to prepare and present the defense rendered the trial court's findings unreliable." (Stone at 43).

443. This Court agrees with these expert conclusions. Any one of the failures noted throughout this section would result in a finding of ineffective assistance of counsel. Altogether they demonstrate, without a doubt, that because his counsel was simply not qualified for this case, Mr. Barrientos-Quintana did not receive a fair trial. The Court can conclude only that, were it not for these myriad of colossal failures, Mr. Barrientos-Quintana would have received a different result—most likely, because all charges hinged on his presence at the murder, a full acquittal. The Court has every reason to conclude that had his counsel done their job he would not have been in prison all these years. On these grounds alone, Mr. Barrientos-Quintana is entitled to have his convictions vacated and be granted a new trial.

THE STATE'S PROBLEMATIC PRACTICES

I The State's Failure to Disclose all Exculpatory Evidence

444. "The suppression by the prosecution of evidence favorable to an accused…violates due process where the evidence is material to guilt or punishment, irrespective of the good or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Minnesota Rules of Criminal Procedure and Constitution offer additional protections. *State v. Hunt*, 615 N.W.2d 294, 298 (Minn. 2000). A prosecutor's duty to disclose exculpatory evidence, including impeachment, applies even in the absence of a request from the defendant.

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United States v. Bagley, 473 U.S. 667, 676 (1985); *Hunt*, 615 N.W.2d at 299 (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)).

445. The Minnesota Rules of Criminal Procedure require the disclosure of "any material or information within the prosecuting attorney's control that tends to negate or reduce the guilt of the accused as to the offense charged." Minn. R. Crim. P. 9.01, subd. 1(6). This obligation covers not only those things within the personal knowledge of the prosecutor, but "material and information in the possession or control of members of the prosecution staff." Minn. R. Crim. P. 9.01, subd. 1a(1). In effect this provides for an open-file discovery policy. Minn. R. Crim. P. 9.01, subd. 1. Prosecutors cannot circumvent the requirement of open-file discovery "by not taking notes or by not putting things in the file that belong in the file." *Id*. End-arounds are not allowed.

446. A defendant is entitled to new trial when the undisclosed evidence is material, i.e., when there is a reasonable probability that had the evidence been disclosed the outcome would have been different. *Cone v. Bell*, 556 U.S. 449 (2009). A reasonable probability does not mean more likely than not: it merely means that the suppressed evidence is enough to "undermine confidence in the outcome." *Campbell v. State*, 916 N.W.2d 502, 511 (Minn. 2018) (citations omitted).

447. In Minnesota, when the State violates discovery rules in criminal cases, courts apply a standard more favorable to the defendant than the United States Constitution affords. Minnesota courts have evaluated discovery violations under

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a harmless error analysis, granting a new trial if the undisclosed evidence "could have affected the judgment of the jury." *State v. Hunt*, 615 N.W.2d 294, 298 (Minn. 2000).

448. Suppression of evidence favorable to the accused violates due process whether the evidence was suppressed willfully or inadvertently. *Brady*, 373 U.S. at 87.

449. In effect there are three components of a *Brady* violation:

(1) The evidence was willfully or inadvertently suppressed by the State.

(2) The suppressed evidence is exculpatory or impeaching, and

(3) The defendant suffered prejudice.

See *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

450. In this matter, defense counsel requested information on Marcelo Hernandez in their Second Demand for Disclosure dated January 9, 2009, but never received any of his juvenile records, nor were they made available to the court for in-camera review.

451. Specifically, the State never disclosed the juvenile adjudications for two felony cases of their crucial witness and alleged co-conspirator, Marcelo Hernandez. (*see* Sealed PC Exhibit 5).

452. This case was the subject of a television program called *The First 48,* in which a crew from that show was embedded with a police department as the investigators attempted to solve a crime within the titular 48 hours. The episode about this case is titled *Drive-By*. (Exhibit 9).

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453. Producers, camera, and sound crews followed Sgts. Gaiters and Dale as they investigated the case. Their footage showed Sgts. Dale and Gaiters visiting Mr. Mickelson's family at the end of episode.

454. In a memo to their supervisor dated 6/8/2009 (less than two weeks after Petitioner was convicted), Susan Crumb and Hillary Caligiuri outlined problems caused by *The First 48* and how they were handled at trial. (PC Appendix 6). In that memo, the prosecutors wrote that "production staff 'scripted' damaging contents for an investigator" to read. *Id.*

455. The scripted investigator was Sgt. Dale, because only Sgt. Gaiters testified at trial. (Exhibit 9).

456. The CRU, however, found no witness statements from Sgts. Dale or Gaiters disclosing that Sgt. Dale had been told what to say by the producers of *The First 48.* (PC Appendix 1 p.167–68).

457. Sgt. Dale was the lead investigator in the case and was the most active participant during the witness interviews. (PC Appendix 1 p.172).

458. He presented the photo lineups to almost every witness (violating Hennepin County protocol for the double-blind line-up procedure). *Id.*

459. Several crucial police reports bear only his name, and at times he was the only investigator questioning a witness. *Id.*

460. Additionally, prosecutors wrote that "the order of occurrences during the investigation was edited to make it appear that certain portions of the investigation happened in an order that they did not." (PC Appendix 6).

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461. In that memo, the prosecutors state that "[g]iven the 'scripting' and 'editing,'" they did not call Sgt. Dale "in hopes of avoiding cross-examination that would have been damaging to [their] case;" *Id.*

462. The State never disclosed to defense counsel the effect that *The First 48* had on their pretrial decisions about which witnesses to call. The information that one investigator's statement had been scripted for a reality TV crew during the investigation could have been used to impeach both Sgts. Dale and Gaiters. As a result of the State's failed disclosure, the jury did not hear testimony from a crucial witness—the lead investigator. This is no minor omission. Because the prosecutors were concerned that the fallout from *The First 48* show could hurt their case, they hid that concern.

463. In that same memo, the prosecutors also detaiedl to their supervisor that they decided not to call Luis Pliego because he had run away, and after he was arrested on a witness warrant, was "uncooperative after his arrest and [they] determined calling him to testify would be too risky." *Id.* The State never disclosed to defense counsel that one of the eyewitnesses, Luis Pliego, was uncooperative and that calling him to testify would be too risky to their case.

464. The State also failed to disclose two photo lineups shown to Luis Pliego in interviews conducted on October 11 and October 15–16. (PC Appendix 1 p.164).

465. The undisclosed photo line-up shown to Luis Pliego on October 11 contained nine photographs. (Exhibit 16). Defense counsel never learned that Luis paused and commented on photo number three, depicting a person who

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was wearing an earring in the photo. They never learned that Luis said photo number three looked like the shooter because they had similar eyebrows. They also never learned that, when asked how confident he was that number three was the shooter, Luis said he was 50 to 60 percent sure. (Exhibit 17). Last, they never learned that Romero "Slappy" Pineda, the owner of the white Dodge Intrepid used in the drive-by shooting, was in this nine-person lineup, and that Luis did not pause when looking at his photo. *Id.*

466. The State never transcribed the portion of the interview when investigators showed Luis this photo lineup. None of this information was included in Sgt. Gaiter's police report. *Id.*

467. The undisclosed photo line-up shown to Luis Pliego on October 15–16, contained 6 photographs, including a photograph of "Venom," who was a possible suspect in the case. *Id.* at 165.

468. In his October 15–16 interview with Sgt. Gaiters, Luis Pliego paused and focused on photo number three for a long time, making several comments about the person's facial hair and eyes. While in the end not positively identifying anyone, Luis Pliego said, again looking back at photo three, "I'm not sure, it looks kinda looks like him . . . I think I saw him in the car." (Exhibit 18).

469. Despite this statement, Sgt. Gaiters wrote that Luis Pliego said none of the people he viewed in this line-up were in the car. *Id.*

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470. The State also failed to disclose to defense counsel a photo of Arber Meko that shows his appearance is consistent with descriptions of the shooter given by witnesses to the shooting. (PC Appendix 1 p.165; Exhibit 10).

471. The photo of Arber Meko shows that he matched the bald and shaved-head description provided by witnesses, as well as the distinct eyebrows description provided by Luis Pliego. (Exhibit 10; PC Appendix 1, p.164)

472. Clearly the State understood that this photo had some bearing upon their case as the State sought to have this photograph admitted at trial. Defense counsel objected, however, because they had not seen it before. (T. 820).

473. Following this objection, the State admitted they had not disclosed the photo. (T. 820).

474. Defense counsel also argued that, had it been disclosed prior to trial, they could have used it to interview the Alley Witnesses to see if they recognized Arber Meko as the shooter. (T. 820).

475. The trial court did not receive the photograph and reserved a ruling on this issue, but ultimately the issue was never revisited, and the photograph was never admitted. (PC Appendix 1 p. 165).

476. Police interrogated Mr. Meko on November 3, 2008, shortly after the shooting. (PC Appendix 1 p.166).

477. The video of the interrogation shows Meko lying to Sgts. Dale and Gaiters about his Sureños 13 gang ties until Dale and Gaiters aggressively confront Meko with photographs showing him with several Sureños 13 members. *Id.*

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478. Sgt. Dale was "almost 100 percent sure" Meko was in the car on October 11.

479. A witness described seeing a car and hearing a car door slam near Meko's home about 30 seconds after the shooting.

480. Sgt. Dale informed Meko that he could be a witness or a suspect.

481. Mr. Meko was previously pulled over in a car with Olivera; a loaded handgun was found in the glovebox.

482. Mr. Meko was previously stopped in his car after a "shots fired" call; officers found a black revolver in his car.

483. Mr. Meko was previously shot in the leg in what appeared to be a gang-related shooting.

484. A few weeks after this interview, the prosecutors requested that Sgts. Dale and Gaiters "take another run" at Mr. Meko because they thought he was "certainly in that car." (Exhibit 12).

485. The prosecutors wrote in their investigative request, "Do they want to be a witness or a defendant?" *Id.*

486. Arber Meko lived in the house where the white Dodge Intrepid stopped just after the shooting, according to witnesses. (PC Appendix 1 p.167).

487. MPD investigators thought the gun was discarded at Meko's house. *Id.*

488. The prosecutors themselves thought Mr. Meko was likely in the car. (PC Appendix 1 p.166).

489. In a photo lineup, J.G. focused on a filler that resembled Mr. Meko. *Id.* at 164.

490. Mr. Hernandez's initial story to MPD put "Slappy" Pineda, owner of the white Dodge Intrepid used in the drive-by shooting, in the car with "Manny" and said the gun was dropped off with either Arber "Sandwich" Meko or Valentino "Beaver" Olivera. (PC Exhibit 3, Supp. 66).

491. The State delayed disclosing the video of Arber Meko's interrogation until April 23, 2009, a few weeks before the trial began in mid-May. *Id.*

492. This is a litany of evidence that defense counsel could have used to make hay. They could have emphasized the point that Mr. Barrientos-Quintana did not match the eyewitnesses' descriptions of the shooter. They could have impeached Sgts. Gaiters and Dale and their entire investigation. They could have cast doubt by pointing to Mr. Meko as a possible shooter. None of these avenues, that were foreclosed to defense counsel because of the State's failure to disclose exculpatory evidence, is minor. The prosecutors had a duty to disclose them and failed. No doubt had the prosecutors done their duty and disclosed the evidence it "could have affected the judgment of the jury." *Hunt*, 615 N.W.2d at 298. The cumulative effect undermines the Court's confidence in the jury's verdict. *Campbell*, 916 N.W.2d at 511. The prosecutors' *Brady* violations also entitle Mr. Barrientos-Quintana to a new trial.

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II. The Prosecution's Failure to Correct Sgt. Gaiters's Testimony Regarding Marcelo "Sharky" Hernandez Being a Known Suspect

493. In *United States v. Agurs*, The United States Supreme Court held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside, if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. 427 U.S. 97, 103–104 (1976).

494. At trial, prosecutors elicited direct examination from Sgt. Gaiters regarding Marcelo "Sharky" Hernandez:

> Q: All right. Had you heard [the name Sharky] at some point during your investigation?
>
> A: Yes ma'am.
>
> Q: All right. Did anyone ever indicate to you that Sharky was the shooter?
>
> A: No, no one ever indicated that. (T. 1131).

495. But the prosecutors knew that just a week after the shooting, a school resource officer, Officer Tapp, had emailed the MPD investigators and said that a Roosevelt High School student "picked a Marcelo Giron Hernandez . . . out of a photo book as being in the car, possibly the shooter." (PC Exhibit 3; Supp. 52).

496. Prosecutors also knew that in his first interview on the night of the shooting, Jael Pliego said he overheard his brother Luis, Aron Bell-Bey, and William Fajardo all saying that they thought "Sharky" was the shooter. Jael Pligo repeated this several times in his interview with investigators. (PC Appendix 1 p.16).

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497. During his October 15th interview with investigators Jael Pligo reiterated that those three witnesses were saying the shooter was Sharky. *Id.* at 18.

498. Sgt. Dale later confronted William Fajardo: "We have a feeling you guys know a lot more than what you are telling us . . . What's Sharky's last name?" *Id.* at 155.

499. After Mr. Fajardo said he didn't know if "Sharky" was in the car, Dale asked:

> Q: You and Aron and Luis? Were you guys talking about it might be [Sharky?]
>
> A: Yeah, Luis was talking about it. Like he's saying that it could've been him.
>
> Q: That it could've been Sharky?
>
> A: Yeah. (*Id.*).

500. Mr. Fajardo testified that in his first interview he told Sgt. Gaiters that he thought "Sharky" (aka Marcelo Hernandez) was the shooter. (T. 627)

501. He further testified that, on the night of the shooting, he told Luis Pliego and Aron Bell-Bey that he believed the shooter was "Sharky." (T. 628).

502. Mr. Bell-Bey said that he did not think the shooter was "Sharky," but he said that Luis Pliego had indicated that he thought the shooter looked like "Sharky," and that the others said that the shooter "kinda look like Sharky cause he's bald." (PC Appendix 1 p.156).

503. Sgts. Dale and Gaiters both confronted Mr. Hernandez himself with this information. During a March 3, 2009, interview, Sgt. Dale told him: "[W]e've also learned or received from other people that, you know, you have actually, you

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may have actually been involved in this." When Mr. Hernandez replied, "What with the shooting . . . me?" Dale responded, "Yeah, you." *Id.*

504. The prosecutors' summary of a witness meeting with Mr. Fajardo (witness B) shows that he told them that he heard Luis Pliego (witness A) mention "Sharky" the night of the shooting. (Exhibit 19).

505. In testifying that nobody indicated to him that "Sharky" may have been the shooter, Sgt. Gaiters either forgot one of the most relevant facts from the start of the investigation, or he perjured himself to try to convict Mr. Barrientos-Quintana. The prosecutors knew or should have known this. They let it go. They did not make any attempt to correct the record to reflect the truth.

506. The fact that Marcelo "Sharky" Hernandez was named as a shooter before trial by multiple witnesses was highly exculpatory for Mr. Barrientos-Quintana. It shows that Mr. Hernandez had a significant motive to lie and say that Mr. Barrientos-Quintana was the shooter. The investigators pressured him, threatened to treat him as a suspect, and left him in a position to fear prison lest he give them what they want. Further, had the jury been aware that witnesses first indicated to Sgt. Gaiters that Mr. Hernandez was the shooter, when their memories were most fresh about what happened, it would have undermined the entirety of Mr. Hernandez's accomplice testimony, not to mention the prosecutors' and MPD's entire case. There is a reasonable likelihood this false testimony from Sgt. Gaiters could have affected the verdict—which was close—such that it renders the convictions unjust. *Agurs*, 427 U.S. at 103–104.

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III. The Prosecution's Reference to the Presumption of Innocence During Closing Argument

507. During closing argument, the prosecution stated that, since the evidence in the case had all been presented, Mr. Barrientos-Quintana was no longer presumed innocent: "Ladies and gentlemen, as the Judge has told you, the defendant is presumed innocent until and unless proven guilty beyond a reasonable doubt. At this point, the defendant has lost that presumption of innocence because of the evidence received over the course of this trial." (Vol. XV T. 46).

508. Then again, at the end of closing argument, the prosecution said "The defendant has lost his presumption of innocence, and I ask you for the only verdict that fits with the facts and the law that the defendant is guilty on all counts." *Id.* at 89.

509. Petitioner argues that "It is axiomatic that criminal defendants are presumed innocent until proven guilty beyond a reasonable doubt." *State v. Portillo*, 998 N.W.2d 242, 250 (Minn. 2023). The Minnesota Supreme Court has addressed this issue several times. The Court made it clear that "[t]he presumption of innocence is a fundamental component of a fair trial under our criminal justice system," a "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *State* v. *Peterson*, 673 N.W.2d 482, 486 (Minn. 2004) (quoting *In Re Winship*, 397 U.S. 358, 363 (1970)). Only "[o]nce a defendant has been afforded a fair trial and convicted of the

offense for which he was charged" does the presumption disappear. *Portillo*, 998 N.W.2d at 25.

510. As noted in the CRU Report (at p. 170), however, "In applying this principle, the Court has danced around it, finding error in the same argument the prosecutors made in Barrientos's closing, but often finding that the error did not rise to 'plain error.'" The CRU Report (at p. 170) also noted, "It is true, under the caselaw in effect in 2009, the state may have won this issue on appeal if raised by the defense." (citing *State v. Young*, 710 N.W.2d 272, 280 (Minn. 2006)).

511. While the Court does not condone the prosecution's remarks about the presumption of innocence during closing argument, given the status of the law at the time of Mr. Barrientos-Quintana's trial, it cannot find that those remarks constituted "plain error," or that they would have resulted in his convictions being overturned.

IV. The Interrogation Tactics of Sgts. Dale and Gaiters

512. In his Petition, Petitioner references the tactics used by Sgts. Dale and Gaiters during their interrogations of various witnesses as grounds for post-conviction relief. These concerns are also noted in the Factual Stipulation of the Parties. These concerns are myriad:

1) ¶529: William Fajardo was pressured by police to make an identification of Mr. Barrientos-Quintana. (PC Appendix 1, p.100).

2) ¶530: In one of the few video-recorded interviews in the case, Sgt. Gaiters leans in close to Fajardo and tells him the other witnesses are talking to law enforcement about the shooting. *Id.*

3) ¶531: Sgts. Dale and Gaiters tell him that even "Puppet" cried, and that Luis Pliego, who is younger than Fajardo, was brave enough to talk to them. *Id.* at 101.

4) ¶532: *See paragraph 43* (Sgt. Gaiters mimicked Mr. Mickelson's voice, begging Fajardo to help him).

5) ¶533: Sgts. Dale and Gaiters also threatened Aron Bell-Bey, who was a juvenile. Although not all of their interrogations with the juveniles were recorded, in one that was, they told Bell-Bey, himself a victim injured in the shooting, that he could do time for not naming the shooter—that there would be consequences if he did not help them. (PC Appendix 1, p.103).

6) ¶534: Sgts. Dale and Gaiters also interrogated Itzel Chavarria-Cruz, a juvenile, and locked her in a room at the police station. *Id.* at 26.

7) ¶535: They kept her in that room for more than two hours, during which time she asked to leave at least eight times. *Id.* at 25–26.

8) ¶536: They threatened Ms. Chavarria-Cruz with jail time after she told them Mr. Barrientos-Quintana is innocent and that she was certain he was with her at the time of the shooting. *Id.* at 25.

9) ¶537: Sgts. Dale and Gaiters also pressured Marcelo Hernandez, who was at a juvenile detention facility at the time of their questioning. *Id.* at 131.

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10) ¶538: They questioned him three different times. Although multiple witnesses initially identified Mr. Hernandez as the shooter, investigators did not give him his *Miranda* warnings until his third interrogation. *Id.*

11) ¶539: In Hernandez's third interrogation, Sgts. Dale and Gaiters told him that this was his last opportunity, and he could either be a witness or a defendant. *Id.* at 42.

12) ¶540: Sgts. Dale and Gaiters did not record significant parts of their interrogations, including when they gave Mr. Hernandez details about the crime and when they claimed he "hung his head and began to cry," and said "Smokey." *Id.* at 132, 136.

513. As noted in the CRU Report the coercive interrogation tactics used by Sgts. Dale and Gaiters were outdated and have been shown to lead to false identifications. Likewise, the lineup protocol used by these investigators was outdated. They failed to follow MPD "best practices" at the time, which was known to them and the prosecutors. Despite this, there is no indication that these tactics rise to the level of misconduct. Rather, the use of these tactics opened the investigators to the complete exclusion at trial of the most important evidence they had acquired. Even if the evidence had not been excluded, their tactics opened them to significant and damaging cross-examination that would have dramatically impacted the jury's deliberations. Had this case been in the hands of competent defense counsel, this Court believes that that is just what would have occurred.

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THE PROSECUTION'S RESPONSE

514. On September 26, 2024, this Court received some correspondence, with an attachment, from Susan B. Crumb, one of the two Assistant Hennepin County Attorneys who prosecuted Mr. Barrientos-Quintana. Shortly into the correspondence it became clear that Ms. Crumb was taking issue with the CRU Report and the Response to the petition filed by the Hennepin County Attorney's Office. Since this was communication from a non-party, and was not properly before the Court, pursuant to any statute, rule, or other known law, the Court did not review the attachment and directed its law clerk to return the documents to Ms. Crumb with the message that there was no basis to consider them.

515. While the Court could not receive Ms. Crumb's submission, it notes that, in the CRU Report, there is reference to her having been interviewed as part of its investigation.

516. For all those involved in the prosecution of Mr. Barrientos-Quintana, I wish to leave you with these important words, of Associate Justice George Alexander Sutherland, as to the duties of a prosecutor:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

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Berger v. United States, 295 US 78, 88 (1935).

CONCLUSION

517. This Court must determine whether Mr. Barrientos-Quintana's petition, and the applicable law, entitles him to the new trial he seeks. The Court has reviewed the petition, the stipulations, and the exhibits received from the parties. The State's case was weak. The jury's verdict, as shown by the three strong holdouts, and the request to review Mr. Hernandez's testimony, was close. Defense counsel's ineptitude, and the prosecutors' *Brady* violations, each alone undermines the Court's confidence in that result. *Campbell*, 916 N.W.2d at 511; *Leake*, 767 N.W.2d at 10. Together the effect is immense. The Court simply cannot express any confidence that, if Mr. Barrientos-Quintana had reasonable counsel, or if the prosecutors had complied with their duty to disclose, the jury would still have convicted him. That the Hennepin County Attorney's Office argues to this Court it lacks confidence in the convictions its own attorneys obtained says it all. Mr. Barrientos-Quintana did not receive the fair trial to which he was entitled. The Court must grant his petition and order a new one.

ORDER

Based upon the file, record, and proceedings herein, **IT IS HEREBY ORDERED:**

1. Mr. Barrientos-Quintana's second Postconviction Petition, filed August 20, 2024, is hereby **GRANTED**.
2. Mr. Barrientos-Quintana's convictions dated May 29, 2009, as amended

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on October 28, 2010, and his sentences herein, are hereby **VACATED**.

3. A **NEW TRIAL** on all counts is hereby **ORDERED**.
4. The Minnesota Department of Corrections (DOC) shall forthwith transfer Mr. Barrientos-Quintana to the custody of the Hennepin County Sheriff, at the Hennepin County Public Service Facility (PSF), where he shall be held, without bail, pending further proceedings in this action before this Court.
5. When Mr. Barrientos-Quintana has been returned to custody at the PSF, the parties shall contact the Court to schedule a hearing to address further proceedings before this Court.

Dated:

BY THE COURT:

McBride, John
2024.11.05
16:24:59
-06'00'

John R. McBride
Senior Judge of District Court