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Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1642

Lance Arnold Kingbird, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 24, 2023
Affirmed in part, reversed in part, and remanded
Gaïtas, Judge

Beltrami County District Court
File No. 04-CR-14-3347

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Keith Ellison, Attorney General, St. Paul, Minnesota; and

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Considered and decided by Gaïtas, Presiding Judge; Johnson, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Lance Arnold Kingbird appeals the district court's denial of his postconviction petition without an evidentiary hearing. We affirm the district court's determination that most of Kingbird's postconviction claims were barred by law. But

because the district court abused its discretion in denying an evidentiary hearing as to Kingbird's claim of newly discovered evidence, which was based on the complainant's partial recantation of her trial testimony, we reverse in part and remand for a postconviction evidentiary hearing on that claim.

FACTS

In 2014, respondent State of Minnesota charged Kingbird with three counts of first-degree criminal sexual conduct after his 11-year-old daughter A.L. reported that Kingbird had sexually assaulted her. Following a trial, a jury found Kingbird guilty of all counts. The district court imposed three concurrent prison sentences of 156 months, 234 months, and 360 months.

Kingbird filed a direct appeal in this court, which we then stayed to allow him to pursue postconviction relief in district court. In a postconviction petition, he alleged that his trial counsel provided ineffective assistance by failing to call witnesses, impeach witnesses, and present exculpatory evidence. The district court denied Kingbird's petition. Kingbird reinstated his direct appeal, arguing that the district court erred by admitting A.L.'s out-of-court video-recorded statement at trial and by denying his postconviction claim of ineffective assistance of trial counsel. We affirmed. *See State v. Kingbird*, No. A15-2001, 2018 WL 1997342, at *6 (Minn. App. Apr. 30, 2018) (*Kingbird I*), *rev. denied* (Minn. July 17, 2018).

Following the direct appeal, Kingbird again challenged his convictions by filing a second postconviction petition. Kingbird's second postconviction petition alleged that a new witness would testify that A.L.'s mother had a motive to falsely accuse Kingbird.

Additionally, the petition asserted claims of ineffective assistance of trial and appellate counsel, constitutional violations arising from the state's failure to disclose evidence and improper searches and seizures, jury bias, and sentencing error. The district court summarily denied Kingbird's second postconviction petition, and we affirmed. *See Kingbird v. State*, No. A21-0199, 2021 WL 5872864, at *5 (Minn. App. Dec. 13, 2021) (*Kingbird II*), *rev. denied* (Minn. Mar. 15, 2022).

In August 2022, Kingbird filed a third postconviction petition. The primary focus of Kingbird's third postconviction petition was A.L.'s recent recantation of some of her trial testimony. A.L., who is now an adult, spoke with an investigator in May 2022 and stated that some of the conduct underlying Kingbird's convictions never happened. She also signed an affidavit wherein she partially recanted her trial testimony. Kingbird's postconviction petition alleged that A.L.'s statements constituted newly discovered evidence of his innocence, which required an evidentiary hearing. In addition to this claim, Kingbird revived several of the claims he made in his second postconviction petition. The district court denied Kingbird's third postconviction petition without holding an evidentiary hearing.

Kingbird appeals the district court's summary denial of his third postconviction petition.

DECISION

Appellate courts "review the denial of a petition for postconviction relief for an abuse of discretion. A postconviction court abuses its discretion when it has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of

the law, or made clearly erroneous factual findings." *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017) (quotations and citation omitted). The appellate court reviews de novo the postconviction court's resolution of legal questions. *Martin v. State*, 825 N.W.2d 734, 740 (Minn. 2013).

Kingbird's postconviction petition raised two categories of claims. First, he alleged that various legal errors required a new trial, or alternatively, resentencing. Second, he alleged that A.L.'s statements recanting some of her trial testimony constituted newly discovered evidence that warranted a postconviction evidentiary hearing. On appeal, he challenges the district court's summary rejection of both categories of claims.

We conclude that the district court did not abuse its discretion in summarily denying postconviction relief as to the first category of errors. But we agree with Kingbird that he is entitled to a postconviction evidentiary hearing regarding A.L.'s alleged recantation. We address each category of claims in turn.

I. The district court did not abuse its discretion by summarily denying Kingbird's postconviction claims of ineffective assistance of counsel, constitutional discovery violations, denial of the right to confront witnesses, and unlawful sentencing.

If a "direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). This "*Knaffla* bar" also applies to postconviction claims "that should have been known on direct appeal." *Reed v. State*, 793 N.W.2d 725, 729-30 (Minn. 2010); *see also* Minn. Stat. § 590.01, subd. 1(2) (2022) ("A petition for postconviction relief after a direct appeal has been completed may

not be based on grounds that could have been raised on direct appeal of the conviction or sentence.”). There are two exceptions to the *Knaffla* bar: “(1) if the claim presents a novel legal issue or (2) if fairness requires review of the claim and the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal.” *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005). Appellate courts review the denial of a postconviction petition based on the *Knaffla* bar for an abuse of discretion. *Reed*, 793 N.W.2d at 729.

The district court determined that Kingbird’s postconviction claims of ineffective assistance of counsel, constitutional discovery violations, denial of the right to confront witnesses, and unlawful sentencing were *Knaffla*-barred. We agree. Kingbird either raised these claims on direct appeal or in his prior postconviction petitions, or he had the opportunity to do so and did not. *See Kingbird I*, 2018 WL 1997342, at *4-6 (reviewing Kingbird’s postconviction claim for ineffective assistance of counsel); *Kingbird II*, 2021 WL 5872864, at *2-5 (reviewing Kingbird’s postconviction claims for (1) an improper sentence, (2) ineffective assistance of counsel, and (3) constitutional discovery violations). Moreover, Kingbird does not contend that an exception to the *Knaffla* bar applies. Thus, the district court did not abuse its discretion when it determined these claims were *Knaffla*-barred.

II. The district court abused its discretion by summarily denying Kingbird’s newly-discovered-evidence claim because Kingbird’s petition alleged facts that satisfy the newly-discovered-evidence exception to the postconviction statute and warranted an evidentiary hearing.

We next turn to Kingbird’s second claim of error—that A.L.’s alleged recantation is newly discovered evidence that requires an evidentiary hearing. Because this issue is

fact intensive, we first consider the two sources of facts in the case, the trial evidence and the new evidence that Kingbird submitted to the district court with his postconviction petition. We then address the applicable law. Applying the law to the facts, we conclude that Kingbird is entitled to a postconviction evidentiary hearing, and therefore, the district court abused its discretion by denying postconviction relief without ordering a hearing.

A. Factual Background

1. The Trial Evidence

A.L.'s trial testimony was the foundation of the state's case against Kingbird.[1] She testified that Kingbird had "molested" her on three different occasions. According to A.L., the first incident—which we refer to here as the "car incident"—occurred near Kingbird's car. A.L. testified that she was with her brother in Kingbird's car. Kingbird instructed her brother to get out and ride his bike while Kingbird gave A.L. driving lessons. A.L. testified that Kingbird then penetrated her vagina with his penis. The second incident that A.L. testified about—the "mattress incident"—occurred on a mattress located on the floor of the family's living room. A.L. testified that while her mother, C.L., was sleeping on the same mattress, Kingbird penetrated A.L.'s vagina with his penis. According to A.L., the third incident—the "couch incident"—occurred when she and Kingbird were on the couch in the living room. A.L. testified that she tried to push Kingbird away when he initiated a sexual encounter. But A.L. testified that her resistance failed, and Kingbird penetrated her vagina with his penis while she was on the couch. A.L. recalled that she saw semen during

[1] The trial took place over three days in August 2015.

at least one of these incidents. Soon after the couch incident, A.L. reported the incidents to C.L., who contacted police. During A.L.'s testimony, the prosecutor asked A.L. whether she had told the truth during a subsequent forensic exam and interview, and A.L. responded "yes."

A nurse who performed A.L.'s forensic exam also testified at Kingbird's trial. According to the nurse, A.L. reported to her that, the day before the exam, she had been sleeping on the couch and had awakened to find Kingbird on top of her. A.L. told the nurse that Kingbird "sticked his thing" into her as she tried to push him away. The nurse testified that, during the exam, A.L. also discussed the mattress incident. After the nurse spoke with A.L. about these two incidents, the nurse physically examined A.L. She swabbed A.L.'s perineum and external genitalia and then examined A.L.'s genital tissue using a colposcope machine. During the exam, the nurse found signs of an infection in A.L.'s vagina, something she testified was not commonly seen in girls around A.L.'s age. The nurse noted that, before the exam, A.L. had showered, eaten, used the bathroom, and changed her clothes.

A.L. also met with a forensic interviewer, who asked A.L. to recount what happened. A video of A.L.'s forensic interview was played for the jury. During that interview, A.L. told the interviewer about the car incident, the mattress incident, and the couch incident, and she included more details about each incident than she did during her trial testimony.

A law enforcement officer testified about the police investigation in the case. He explained that his team took cuttings from the couch for laboratory testing. Those cuttings

and the swabs collected from A.L. during the forensic exam were submitted to a laboratory for DNA testing.

A laboratory analyst testified that the swabbing of A.L.'s perineum contained sperm, but that DNA could not be recovered from the sample. According to the analyst, the cuttings from the couch contained both sperm cells and nonsperm cells. The DNA from the sperm cells matched Kingbird's DNA. As to the nonsperm cells, the analyst testified that there was a mixture of DNA. The major DNA profile matched A.L. and did not match C.L. or Kingbird. And the minor DNA profile excluded C.L. but did not exclude Kingbird.

Finally, Kingbird called two trial witnesses. One of these witnesses testified that he worked near the scene of the alleged car incident, and that he had frequently observed Kingbird and Kingbird's children there. The second witness, one of Kingbird's coworkers, testified that Kingbird was scheduled to work on the date when at least one of the alleged incidents may have occurred. Kingbird did not testify at trial.

2. The Postconviction Evidence

In support of his postconviction petition, Kingbird submitted a transcript of an investigator's interview with A.L. in May 2022 and an affidavit signed by A.L. on June 14, 2022. During the interview, A.L., who was then 19 years old, explained that she had reached out to Kingbird through a family member because she felt guilty and wanted to recant part of her trial testimony. A.L. told the investigator that she had been truthful about the mattress incident. But she said that she had lied about the car incident and the couch incident.

As to the car incident, A.L. told the investigator that "the whole situation that I brought up in court was the road incident where [Kingbird and I] were driving, um, nothing happened." A.L. said that she sat on Kingbird's lap as he taught her to drive, but he never touched her inappropriately. The investigator asked, "[Y]ou just told me about learning how to drive, because apparently one of the times you talked about being assaulted by your father was that instant where you were driving, but that didn't happen." A.L. responded, "[Y]eah."

As to the couch incident, A.L. told the investigator that, "Um, we were joking around, like I was, uh, tickling [Kingbird] and like [Kingbird] was tickling me. And then, um, there was a point where I got off the couch and that's pretty much all, I don't recall any sexual things happening."

A.L. did not recant her trial testimony regarding the mattress incident. But during the discussion with the investigator, A.L. stated that C.L. was also involved in the mattress incident, and she believed C.L. should also be in jail. According to A.L., she did not previously reveal C.L.'s involvement in the sexual abuse because she had worried that she would be separated from her brother and placed in foster care if both parents were implicated. A.L. also told the investigator that C.L. had coached her on what to say at Kingbird's trial.

In A.L.'s affidavit, she made the following sworn statements:

> 3. As I stated in that interview, my testimony at trial was not 100% accurate.
>
> 4. The incident on the road and the incident on the couch that I testified about never happened.

> 5. My dad had been teaching me to drive, but there was no sexual assault.
>
> 6. There was also a time when my father was tickling me on the couch, but there was no sexual assault.

A.L.'s affidavit also explained that C.L. was involved in the mattress incident, but that C.L. told A.L. not to disclose this information.

Having identified the relevant facts, we next consider Kingbird's argument that A.L.'s May 2022 interview with an investigator and her June 2022 affidavit constitute newly discovered evidence that necessitates a postconviction evidentiary hearing. This argument requires us to first decide whether Kingbird's claim of newly discovered evidence—brought four years after his convictions became final—falls under an exception to the postconviction statute, which provides a two-year limitations period. Minn. Stat. § 590.01, subd. 4(a) (2022).

B. Because Kingbird's claim of newly discovered evidence satisfies an exception to the postconviction statute's two-year time bar, the district court abused its discretion in determining that Kingbird's claim is time-barred.

When a postconviction petition "is filed outside the statute of limitations" the district court may summarily deny the petition. *Andersen v. State*, 913 N.W.2d 417, 423 (Minn. 2018); *see* Minn. Stat. § 590.01, subd. 4 (2022). A postconviction petition is outside the statutory time limit if it is filed "more than two years after the later of: (1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court's disposition of petitioner's direct appeal." Minn. Stat. § 590.01, subd. 4(a). There are five exceptions to the two-year limitations period. *See* Minn. Stat. § 590.01, subd. 4(b)(1)-(5). When the petitioner "has alleged facts that, if true, would meet one of

the five exceptions," a district court may consider an otherwise untimely petition. *Odell v. State*, 931 N.W.2d 103, 106 (Minn. 2019).

There is no dispute that Kingbird's third postconviction petition was filed well outside the two-year statutory limitations period. Before the district court, and now on appeal, Kingbird argues that his petition satisfies two of the exceptions to the two-year time bar: the exception for petitions alleging newly discovered evidence and the exception for petitions that should be considered in the interests of justice. *See* Minn. Stat. § 590.01, subd. 4(b)(2), (5). We agree that Kingbird's petition satisfies the exception for petitions alleging newly discovered evidence. Thus, the district court abused its discretion by denying the petition as time barred.

To qualify under the exception for petitions alleging newly discovered evidence, a postconviction petition must allege that: (1) newly discovered evidence exists, (2) the new evidence "could not have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the two-year time period for filing a postconviction petition," (3) "the evidence is not cumulative to evidence presented at trial," (4) the evidence is not being used for impeachment purposes, and (5) the evidence "establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted." Minn. Stat. § 590.01, subd. 4(b)(2). "All five criteria must be satisfied to obtain relief." *Riley v. State*, 819 N.W.2d 162, 168 (Minn. 2012). We address each of these requirements in turn.

1. Newly discovered evidence exists.

Kingbird argues that A.L.'s recantation of her trial testimony is newly discovered evidence. The district court did not consider whether A.L.'s statements are new evidence. But the state, relying on *Onyelobi v. State*, 966 N.W.2d 235 (Minn. 2021), argues they are not. In *Onyelobi*, the appellant was convicted of first-degree murder "under an accomplice theory of criminal liability." 966 N.W.2d at 236. After the two-year statutory limitations period had passed, the appellant filed a postconviction petition and submitted an affidavit from a codefendant whom she did not call to testify at her trial. *Id.* at 236-37. The affidavit stated that, while the appellant was with the codefendant at the time of the murder, he had pulled the trigger and had never communicated to the appellant his intent to commit murder. *Id.* at 237. But the Minnesota Supreme Court rejected the appellant's argument that her codefendant's affidavit was newly discovered evidence. *Id*. at 239. It observed that the evidence was not unknown to the appellant because she was "admittedly present at the time of the events the witness purports to describe." *Id*. at 238. The supreme court reasoned that the appellant "knew or should have known at trial that [the codefendant] never communicated [to appellant] his intent to kill the victim." *Id.* at 239. Thus, because the evidence was not truly newly discovered, the appellant did not satisfy the exception for newly discovered evidence. *Id.*

The state argues that the supreme court's ruling in *Onyelobi* also means that A.L.'s statements are not newly discovered evidence. The state observes that because Kingbird was present at the time of the alleged offenses, he knew that A.L.'s trial testimony was false.

We are not persuaded by this argument. The "new" evidence in *Onyelobi* was provided by a codefendant who did not testify at trial. By contrast, A.L. was the complainant. A.L. testified at Kingbird's trial and was cross-examined. Now, according to A.L.'s new statements, some of her trial testimony was false. Even if Kingbird was aware at the time of trial that A.L.'s testimony was false, he had no way to procure A.L.'s new evidence until A.L. chose to recant. A.L.'s recantation is therefore newly discovered evidence.

2. A.L.'s recantation could not have been ascertained during the two-year limitations period by the exercise of due diligence.

Kingbird argues that A.L.'s statements could not have been ascertained within the limitations period, even with the exercise of due diligence. The district court determined that Kingbird failed to meet this element of newly discovered evidence because Kingbird "failed to establish that due diligence was exercised, even in the seven years since the trial, to obtain A.L's new statement." According to the district court, Kingbird made "no showing of any efforts he made in the intervening years to obtain a statement from A.L."

We reject the district court's analysis. The postconviction statute requires that new evidence be such that it "*could not have been ascertained*" with the exercise of due diligence. Minn. Stat. § 590.01, subd. 4(b)(2) (emphasis added). It does not require a petitioner to demonstrate that due diligence *was* exercised. (And, in a case such as this one, where the recanting witness is also the complainant in a criminal sexual conduct case who has only recently reached adulthood, that is likely for good reason.) Because there is no record basis to conclude that Kingbird could have ascertained the new evidence with

due diligence, we agree with Kingbird that this requirement of the newly-discovered-evidence exception is satisfied.

3. A.L.'s recantation is not cumulative.

Next, Kingbird asserts that A.L.'s recantation is not cumulative to the evidence presented at trial. The district court did not consider this requirement, but the record clearly shows that A.L.'s recantation is not cumulative to the trial evidence. At trial, there was no evidence that A.L. had changed or recanted her allegations. Thus, we agree with Kingbird that A.L.'s statements, which constitute a recantation of some of her trial testimony, are not cumulative to the trial evidence.

4. A.L.'s recantation is not merely impeaching evidence.

Kingbird argues that A.L.'s statements, which partially recant her trial testimony, constitute substantive, and not impeaching, evidence. He contends that the district court erred in concluding that "the purpose of the statement is to impeach A.L.'s own trial testimony," which "is specifically prohibited by statute."

"Evidence must be more than merely impeaching to satisfy the newly discovered evidence exception." *Andersen v. State*, 982 N.W.2d 448, 455 (Minn. 2022). Although new evidence can impeach the credibility of a trial witness, it must also "establish by a clear and convincing standard that [the petitioner] is innocent, as [the exception for newly discovered evidence under the postconviction statute] requires." *Id.* at 455-56.

Although A.L.'s statements would certainly impact the credibility of her trial testimony, they are not merely impeaching. A.L. asserted that two of the three sexual assaults that she alleged at trial *did not happen*. If believed, A.L.'s statements would

establish that Kingbird is innocent of two of the three counts of conviction. *See Roby v. State*, 808 N.W.2d 20, 27 (Minn. 2011) (reasoning that affidavits stating that trial witnesses were on drugs at the time of the crime were merely impeaching because they solely addressed the credibility of the witnesses and did not provide evidence regarding the innocence of the defendant); *see also infra* section II.B.5 (concluding that A.L.'s recantation provides clear and convincing evidence of Kingbird's innocence).[2] The district court therefore abused its discretion in determining that A.L.'s statements recanting her trial testimony were merely impeaching.

5. A.L.'s recantation provides clear and convincing evidence of Kingbird's innocence.

Finally, Kingbird argues that he satisfies the fifth requirement for the newly-discovered-evidence exception to the statutory time bar because A.L.'s statements are clear and convincing evidence of his innocence. The district court determined that A.L.'s recantation, even if true, did not establish Kingbird's innocence. It observed, "[A.L.] clearly states that one sexual assault occurred. [Kingbird] seems to think that if the other two assaults were false, then this one sexual assault should magically disappear . . . ." The district court also determined that A.L.'s recantation was not particularly strong and was belied by some of the trial evidence.

[2] The district court also stated that, because Kingbird has already attacked A.L.'s credibility in his direct appeal and his second postconviction petition, the third petition alleging that A.L. has recanted is *Knaffla*-barred. Because we determine that A.L.'s recantation is newly discovered evidence and because Kingbird's previous attacks on A.L.'s credibility were not based on her recantation, this claim is not *Knaffla*-barred. *See Kingbird I*, 2018 WL 1997342, at *2-6; *Kingbird II*, 2021 WL 5872864, at *2-5.

To qualify for the newly-discovered-evidence exception, "the petitioner is not required to produce evidence in his initial petition that actually proves his innocence. . . . Rather, the petitioner is required to sufficiently *allege the existence* of evidence which, if true, would establish the petitioner's innocence by clear and convincing evidence." *Miles v. State*, 800 N.W.2d 778, 783-84 (Minn. 2011) (emphasis added). "[T]here must be more than an uncertainty about the petitioner's guilt." *Henderson v. State*, 906 N.W.2d 501, 506 (Minn. 2018) (quotation omitted). When making this determination, the district court must assume that the evidence alleged in the petition is true and cannot weigh the credibility of the evidence. *Id.* at 507.

We first acknowledge that A.L.'s recantation does not provide clear and convincing evidence of Kingbird's innocence of all three acts underlying his three convictions. A.L.'s statements only disavowed the car incident and the couch incident.

However, as to those two incidents, A.L.'s statements, if true, establish clear and convincing evidence of Kingbird's innocence. A.L. denied that the two incidents occurred.

The district court's determination that A.L.'s statements were not clear and convincing evidence of innocence because "A.L. is very clear that [Kingbird] sexually assaulted her on one occasion" is flawed. Under the circumstances here, where Kingbird was convicted of and sentenced for three separate counts based on three separate acts, evidence showing Kingbird's innocence of any one of those acts would trigger the exception.

Moreover, the district court erred in considering the credibility of A.L.'s statements and in weighing A.L.'s statements against her trial testimony and other trial evidence. The

law is clear that the district court must assume the truth of the new evidence in deciding whether it clearly and convincingly proves innocence. *See Henderson*, 906 N.W.2d at 507. And "a postconviction court should not make witness credibility determinations without first holding an evidentiary hearing." *Bobo v. State*, 820 N.W.2d 511, 517 n.4 (Minn. 2012).

Because A.L.'s statements allege that Kingbird is innocent of two sexual assaults that he was convicted of and sentenced for, if true, they establish Kingbird's innocence of those two sexual assaults. Thus, this final requirement of the newly-discovered-evidence exception is satisfied.

Kingbird's petition and evidence satisfy each of the requirements for the newly-discovered-evidence exception to the two-year time bar under the postconviction statute. Thus, the district court abused its discretion when it denied Kingbird's petition as untimely.[3]

Because we conclude that Kingbird's petition is not time-barred, we must next consider whether the district court also erred in denying the petition without an evidentiary hearing.

C. The district court abused its discretion by denying Kingbird's request for an evidentiary hearing.

"Upon filing a petition for postconviction relief, an evidentiary hearing must be held unless the petition and the files and records of the proceeding conclusively show that the

[3] Because Kingbird's petition satisfies the newly-discovered-evidence exception in subdivision 4(b)(2), we do not address whether the interests-of-justice exception also applies.

petitioner is entitled to no relief." *Andersen*, 913 N.W.2d at 422 (quotation omitted); *accord* Minn. Stat. § 590.04, subd. 1 (2022). In determining whether an evidentiary hearing is necessary, the district court must "consider[] the facts alleged in the petition as true and construe[] them in the light most favorable to the petitioner." *Andersen*, 913 N.W.2d at 422-23 (quotation omitted). A petitioner's allegations in support of a hearing "must be more than argumentative assertions without factual support," *Brocks v. State*, 753 N.W.2d 672, 674 (Minn. 2008) (quotation omitted), and "[i]f material facts that would entitle a petitioner to relief are in dispute, the court must grant a hearing," *Reed v. State*, 925 N.W.2d 11, 18 (Minn. 2019). An appellate court reviews "the ultimate decision by the postconviction court to grant or deny an evidentiary hearing for an abuse of discretion." *Caldwell v. State*, 853 N.W.2d 766, 770 (Minn. 2014).

When a postconviction petition relies on the recantation of a witness's testimony, the district court must determine if the recanted testimony meets the test laid out in *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928), before ordering a new trial. *See Campbell v. State*, 916 N.W.2d 502, 508 (Minn. 2018).[4]

> The *Larrison* test requires that: (1) the court is reasonably well-satisfied that the testimony given by a material witness is false; (2) without that testimony the jury might have reached a different conclusion; and (3) the party seeking a new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after trial.

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[4] *Larrison* was overruled in *United States v. Mitrione*, 357 F.3d 712, 718 (7th Cir. 2004). However, "Minnesota courts continue to apply the *Larrison* test in cases involving witness-recantation and false-testimony claims." *Campbell*, 916 N.W.2d at 506 n.2; *Ortega v. State*, 856 N.W.2d 98, 103 n.6 (Minn. 2014).

Campbell, 916 N.W.2d at 507. While the first two requirements of the *Larrison* test must be met, "the third prong, while relevant, is not a requirement for relief." *Id.* (citing *Ortega*, 856 N.W.2d at 103). The petitioner has the burden of proving by a preponderance of the evidence that the facts alleged in the recanted testimony meet the requirements of the *Larrison* test. *Wilson v. State*, 726 N.W.2d 103, 106 (Minn. 2007).

A new trial based on a witness's recantation is usually disfavored. *Id.* at 107 (relying on *Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006)). But postconviction courts should be cautious "not to determine that a recantation is unreliable without first taking the opportunity to evaluate the credibility of the witness at an evidentiary hearing." *Id.* This is because "it is difficult if not impossible" to test which of a recanting witness's conflicting statements are true without examining the witness under oath. *Id.*; *see also Caldwell*, 853 N.W.2d at 772-73 ("An evidentiary hearing is ordinarily required to determine the credibility of a recantation because a postconviction court must assume the truth of the allegations in a petition when it determines whether to grant an evidentiary hearing. Stated differently, an evidentiary hearing is the means by which a court generally must determine the credibility of a witness." (citation omitted)).

For this reason, "[t]he showing required for a petitioner to receive an evidentiary hearing is lower than that required to receive a new trial." *State v. Ferguson*, 742 N.W.2d 651, 659 (Minn. 2007); *see also Vance v. State*, 752 N.W.2d 509, 517 (Minn. 2008) ("The burden of proof for a postconviction evidentiary hearing is lower than the burden for new trial."). The three *Larrison* prongs must still be evaluated, but at this stage "the postconviction court must assume the truth of the allegations in the petition." *Ortega*, 856

N.W.2d at 103; *see also Campbell*, 916 N.W.2d at 508. "Any doubts about holding a hearing should be resolved in favor of the [petitioner]." *Ferguson*, 742 N.W.2d at 659; *see also State v. Turnage*, 729 N.W.2d 593, 598 (Minn. 2007) ("Any doubts by the court about whether to hold an evidentiary hearing should be resolved in favor of the [petitioner]."). Under this standard, we conclude that the district court abused its discretion by not granting Kingbird an evidentiary hearing on A.L.'s recantation.

1. A.L.'s recantation bears sufficient indicia of reliability.

To satisfy the first *Larrison* requirement—that the postconviction court "is reasonably well-satisfied that the testimony given by a material witness is false," *Campbell*, 916 N.W.2d at 507—"a simple statement contradicting earlier testimony is not sufficient, nor is a determination that a witness is generally unreliable." *Opsahl*, 710 N.W.2d at 782. Instead, "the court must be 'reasonably certain that the recantation is genuine.'" *Id.* (quoting *State v. Walker*, 358 N.W.2d 660, 661 (Minn. 1984)). And while evidentiary hearings are generally required to assess the reliability and credibility of a recantation, "the allegations in the petition must have factual support that carries sufficient indicia of trustworthiness to justify the expense and risk" of having an evidentiary hearing in the first place. *Caldwell*, 853 N.W.2d at 770 (quotations and citation omitted).

The district court stated that it was "not satisfied" that A.L.'s statements actually recanted her trial testimony. But this finding is contrary to the facts in the record. A.L. told an investigator that the car incident never happened, and that Kingbird did not sexually assault her during the couch incident. She signed an affidavit stating that "[t]he incident on the road and the incident on the couch that [she] testified about never happened," and

that "there was no sexual assault" on the couch or near the car. Because the district court's finding that A.L.'s statements did not recant her trial testimony is contrary to the facts in the record, it is an abuse of discretion. *See Tscheu v. State*, 829 N.W.2d 400, 403 (Minn. 2013) (stating that a postconviction court abuses its discretion when its decision is against logic and the facts in the record).

The district court, relying on perceived inconsistencies between A.L.'s statement to the investigator and her affidavit, also stated that A.L.'s statements did not have sufficient indicia of trustworthiness. For example, the district court remarked that, in A.L.'s affidavit, she states that the car incident and the couch incident never happened. But during her statement to the investigator, when asked about the couch incident, she responded, "I don't quite recall that actually." By focusing on alleged inconsistencies, the district court improperly weighed the evidence. Whether A.L.'s recantation is credible cannot be determined based on inconsistencies between the two statements. As the supreme court has recognized, "it is difficult if not impossible" to assess the credibility of a recanting witness's statements without examining the witness under oath. *Wilson*, 726 N.W.2d at 107.

The district court abused its discretion by making findings unsupported by the record and by weighing the evidence. But it also abused its discretion by overlooking the fact that A.L.'s recantation bore significant markers of reliability. A.L. provided two statements, which were largely consistent. One statement was made to an investigator. It was recorded and transcribed. The other statement was signed. Moreover, A.L. spoke at length to the investigator about both her rationale for providing false trial testimony and

for recanting. Given these circumstances, the district court abused its discretion in denying an evidentiary hearing based on unreliability. *Compare Vance*, 752 N.W.2d at 514-15 (concluding that a recantation is not reliable if it is too vague or if it does not contain information as to why the memory of a witness is stronger at the time of recantation than it was at trial), *and Campbell*, 916 N.W.2d at 508 (stating that while a sworn statement may be reliable, a letter recanting testimony is not if it is handwritten and does not contain a clear author), *with Wilson*, 726 N.W.2d at 104-05, 107 (concluding that a jailhouse informant recanting in writing is reliable), *and Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002) (concluding that a notarized statement from a witness's father stating that the witness had confessed to testifying falsely is reliable).

2. If A.L. had testified consistent with her recantation, the jury may have reached a different conclusion.

"In considering whether the jury might have reached a different verdict, [appellate courts] do not analyze the impact of the recantation, but rather 'the effect that the absence of the false testimony would have had on the result in the original trial.'" *Reed*, 925 N.W.2d at 19 (quoting *Dukes v. State*, 621 N.W.2d 246, 258 (Minn. 2001)). Reviewing courts do not ask "whether the evidence is *sufficient* to convict the defendant in the absence of the recanted testimony. Instead, for an evidentiary hearing to be required, [a petitioner] need only show that it *might* have made a difference to the jury's verdict if the recanted testimony had not been presented at trial." *Ortega*, 856 N.W.2d at 104 (citation omitted). "Might" has been interpreted to mean "something more than an outside chance although much less than would probably." *Id.* (quotation omitted). Again, the showing required to

obtain an evidentiary hearing is lower than the showing required for a new trial. *See Ferguson*, 742 N.W.2d at 659; *Vance*, 752 N.W.2d at 517. And doubts about whether there should be an evidentiary hearing must be resolved in the petitioner's favor. *Ferguson*, 742 N.W.2d at 659.

In considering this requirement of the *Larrison* test, the district court erroneously applied a preponderance-of-the-evidence standard. The district court stated that it was "not satisfied that the purported recantation shows, by a preponderance of the evidence, that [A.L.'s] trial testimony was false." And the district court stated that, given the other trial evidence, it was "not satisfied that [Kingbird] has shown a preponderance of the evidence that the jury might have reached a different verdict." Based on these determinations, the district court concluded that Kingbird "failed to meet the threshold for an evidentiary hearing." By requiring Kingbird to satisfy the wrong standard to obtain an evidentiary hearing, the district court abused its discretion. *See Pearson*, 891 N.W.2d at 596 (stating that a district court abuses its discretion by basing a decision on an erroneous view of the law).

We have already concluded that A.L.'s recantation, if true, establishes by clear and convincing evidence that Kingbird is innocent of two of his three convictions. *See supra* section II.B.5. Kingbird's petition therefore also satisfies the second requirement of the *Larrison* test, which is a lower standard.

3. The third *Larrison* element is not dispositive.

Finally, we turn to the third element of the *Larrison* test, which addresses whether a petitioner was "surprised" at trial by a witness's false testimony. *See Campbell*, 916

N.W.2d at 507. As noted, this element of the *Larrison* test, "while relevant, is not a requirement for relief." *Id.* (citing *Ortega*, 856 N.W.2d at 103). The district court did not discuss this element in its order denying postconviction relief, and the state does not mention it on appeal. Under the circumstances, we conclude that the third *Larrison* element weighs neither for nor against granting an evidentiary hearing.

Because Kingbird satisfied the first and second requirements of the *Larrison* test, he was entitled to an evidentiary hearing on his postconviction claim of recanted testimony. In denying Kingbird's request for a postconviction evidentiary hearing, the district court abused its discretion. We therefore reverse the district court's order denying postconviction relief as to Kingbird's claim of newly discovered evidence, and we remand for an evidentiary hearing on that claim. On remand, and following the evidentiary hearing, the district court should apply the *Larrison* test to decide whether A.L.'s recantation requires a new trial.

Affirmed in part, reversed in part, and remanded.