IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JAMES D. HARMON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13364 Trial Court No. 1JU-09-00708 CI MEMORANDUM OPINION No. 7035 — January 4, 2023

Appeal from the Superior Court, First Judicial District, Juneau, Trevor N. Stephens, Judge.

Appearances: Marilyn J. Kamm, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Kenneth M. Rosenstein, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Wollenberg and Harbison, Judges, and Mannheimer, Senior Judge.[*]

Judge MANNHEIMER, writing for the Court and concurring separately.

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

James D. Harmon appeals the superior court's denial of his petition for post-conviction relief.

Harmon was convicted of sexually assaulting and murdering a young woman in Tenakee Springs. This Court affirmed Harmon's convictions on direct appeal.[1] Harmon later filed an application for post-conviction relief, alleging that the two attorneys who represented him at his trial performed incompetently in various respects. The superior court held an evidentiary hearing into Harmon's claims and, based on the parties' pleadings and the evidence presented at the hearing, the court concluded that Harmon had failed to prove his claims of ineffective assistance of counsel. The court therefore denied Harmon's petition for post-conviction relief.

Harmon now appeals the superior court's decision. He claims that the evidence presented to the superior court established three of his claims of ineffective representation.

In the opinion that follows, we explain why we affirm the superior court's resolution of Harmon's claims.

Background facts and general procedural history

In 2002 and early 2003, nineteen-year-old M.W. lived in Tenakee Springs, a community of some one hundred residents located southwest of Juneau on Chichagof Island. M.W. lived alone in a cabin with her dog.

James Harmon, who was then twenty-four years old, had lived in Tenakee Springs on and off for several years. He and M.W. had acquaintances in common, but they did not know each other well.

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[1] *Harmon v. State*, 193 P.3d 1184 (Alaska App. 2008).

On the evening of December 31, 2002, M.W. and her friend D.W. went to a New Year's Eve party, where they encountered Harmon. M.W. and D.W. both became intoxicated at the party, and after the party Harmon accompanied the two women back to M.W.'s cabin. When they arrived at the cabin (in the early morning of New Year's Day 2003), D.W. indicated that she wanted to return to the party for one more drink. When Harmon said that he would help the intoxicated M.W. up the stairs to the cabin, D.W. told Harmon to "be honorable", and that she would be back in fifteen minutes. Shortly thereafter, D.W. returned to M.W.'s cabin. She found Harmon with his pants off, straddling M.W., who was lying on the floor with her pants pulled almost completely off. M.W. was saying "no" and telling Harmon to get off her. Upon observing this scene, D.W. yelled at Harmon to get dressed and get out, and Harmon complied.

About two months later, in late February 2003, M.W. left Tenakee Springs to visit her mother in Juneau. During this visit, M.W.'s mother gave her $1400 in cash for living expenses and to buy a share in a non-profit farm in Belize. M.W. spent approximately $400 of this cash while she was in Juneau — mostly, to buy food for herself and her dog. On March 21st, M.W. took the ferry back to Tenakee Springs.

M.W. was last seen alive four days later, on the afternoon of March 25, 2003, when people observed her walking with her dog toward the Tenakee Springs town area. That evening, residents of Tenakee Springs became concerned after M.W.'s dog was discovered alone and M.W. could not be located.

Three days later, on March 28th, M.W. was still missing, so the town mayor called the Alaska State Troopers. Later that day, the first state trooper arrived in Tenakee Springs to investigate M.W.'s disappearance.

While this state trooper was in Tenakee Springs, he interviewed Harmon. Harmon was a person of interest because several Tenakee Springs residents had seen Harmon walking from the direction of M.W.'s cabin in the days following her

disappearance. In addition, D.W. (the friend who had been with M.W. on New Year's Eve and early New Year's Day 2003) told the trooper about Harmon's attempted sexual assault on M.W. in the early morning of New Year's Day.

When Harmon was interviewed, he stated that he had spent several hours working on an earthen dam near M.W.'s cabin the weekend before her disappearance, but he asserted that he had not been inside M.W.'s cabin since the previous summer. (This was contrary to D.W.'s description of the events of New Year's Day.)

The next day, March 29th, a fingerprint expert working for the Alaska State Crime Lab examined M.W.'s cabin and lifted some two dozen latent prints from locations and items inside the cabin. Nineteen of these prints were later identified as belonging to Harmon. Many of Harmon's prints were lifted from items that had obviously been handled recently, such as an unwashed plate and two unwashed bowls (all containing food residue), plus an opened pretzel bag that still had pretzels in it, and an opened can of olives.

On March 30th, a state trooper investigator conducted a second interview of Harmon. Harmon told this investigator that he had not been inside M.W.'s cabin, and he declared that there was no reason why his fingerprints, or any of his possessions, would be found in that cabin.

Later that same day, Harmon left Tenakee Springs and moved to Juneau. To get to Juneau, Harmon first took a ferry to Sitka, and then he purchased a one-way plane ticket to Juneau. Harmon paid cash for each of these tickets — even though, about a week earlier, Harmon had complained to a friend that he did not have enough money to buy soy sauce.

On April 1, 2003 (*i.e.*, two days after Harmon left Tenakee Springs), M.W.'s body was found buried in the earthen dam near her cabin — the same earthen

dam where Harmon had been working. After M.W.'s body was excavated from the dam, an autopsy revealed that she had been sexually assaulted and then strangled.

On April 4th, the troopers executed a search warrant for Harmon's person. At this point, Harmon had been in Juneau for six days. He was found to be carrying a bank deposit slip showing a $500 deposit into his account on April 1st, as well as receipts for various cash purchases in Juneau (purchases that totaled slightly over $166), and another $109 in cash. Further investigation showed that Harmon's income during this period was only $135: $35 that he received for his work on the earthen dam, plus a gift of $100 from his mother.

Over the next year, Harmon was the primary suspect in the State Troopers' investigation into the rape and murder of M.W. To the public, it appeared that the investigation into M.W.'s death had stalled. However, the State Troopers secretly continued to build a case against Harmon.

Trooper Eric Lorring assisted this investigation by working undercover, pretending to be a sex offender who was hiding from a criminal investigation. In this guise, Lorring befriended Harmon and, over time, Lorring encouraged Harmon to talk about what had happened to M.W. (These conversations were secretly recorded under the authority of a warrant.) Harmon eventually told Lorring that he had sexually assaulted M.W. and that, during their struggle, M.W. died when she "fell over the couch [and] hit her head on something".[2]

On May 20, 2004, at the conclusion of Lorring's undercover investigation, the Troopers arrested Harmon. When Harmon was advised of his *Miranda* rights, he declined to be interviewed. One of the arresting officers, Sergeant Randel McPherron,

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[2] *Harmon*, 193 P.3d at 1188.

read the charges to Harmon and asked if Harmon had any questions. Harmon responded with a rhetorical question, "What took you so long?"

Harmon was indicted on charges of first- and second-degree murder, first-degree sexual assault, and second-degree theft. Harmon was also indicted on a separate charge of attempted first-degree sexual assault, based on the earlier incident involving M.W. that occurred on New Year's Day 2003. [3]

Harmon's trial was held one year later. The trial lasted an entire month — from April 4 to May 5, 2005. At the conclusion of the trial, the jury was unable to reach a verdict on the charge of first-degree murder. However, the jury found Harmon guilty of the remaining charges: second-degree murder, first-degree sexual assault, second-degree theft, and the separate attempted first-degree sexual assault based on the New Year's Day incident.

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[3] More specifically, Count I of the indictment charged Harmon with first-degree murder. (The trial jury was ultimately unable to reach a verdict on this charge.) Count II charged Harmon with second-degree murder (an alternative charge based on the same incident). Count III charged Harmon with first-degree sexual assault, while Count IV charged Harmon with attempted first-degree sexual assault (an alternative charge based on the same incident). Count V charged Harmon with second-degree theft based on his theft of cash from M.W.'s belongings. Count VI charged Harmon with attempted first-degree sexual assault of M.W. based on the separate incident that occurred on New Year's Day 2003.

Finally, Count VII of the indictment charged Harmon with a separate attempted first-degree sexual assault on New Year's Day 2003; this one involving M.W.'s friend D.W. The trial of this charge was severed from the charges involving M.W., and the State later dismissed this count.

Harmon's claim that his trial attorneys were incompetent for failing to seek dismissal of the indictment based on the theory that a portion of the evidence presented to the grand jury was obtained illegally

When the State presented Harmon's case to the grand jury, the State's evidence included various self-incriminating statements that Harmon made to Trooper Lorring during the undercover investigation. The State's evidence also included the rhetorical question that Harmon posed to the state troopers following his arrest: "What took you so long?"

In his petition for post-conviction relief, Harmon asserted that his two trial attorneys acted incompetently when they failed to seek dismissal of Harmon's indictment based on the theory that all of this evidence was obtained illegally and should therefore be suppressed.

(a) The pertinent procedural history from Harmon's criminal case

Harmon's trial attorneys filed a pre-trial motion seeking suppression of all the statements that Harmon made to Trooper Lorring during the time when Lorring was working undercover and pretending to befriend Harmon. In this suppression motion, Harmon's attorneys advanced two theories as to why Harmon's statements to Lorring should be suppressed.

First, the defense attorneys argued that Harmon's self-incriminating statements to Trooper Lorring were "involuntary" for purposes of the Fifth Amendment. Harmon's attorneys argued that Lorring used psychological tactics that put pressure on Harmon to confess, and that Harmon had cognitive and social deficits (as well as potential mental health issues) that made him especially vulnerable to Lorring's tactics. According to the defense attorneys, Trooper Lorring's "intense and relentless

psychological pressure" eventually overbore Harmon's will and effectively coerced Harmon into confessing.

To support these assertions, the defense attorneys told the trial judge that they would present the testimony of Dr. Richard Ofshe, an expert witness who would describe the phenomenon of false confessions, and who would offer the opinion that "Trooper Lorring acted in a manner that potentially overbore James Harmon's will and potentially led him to not only involuntarily confess but also to falsely confess".

The defense attorneys' second theory for suppression was based on the fact that Harmon's stepfather had hired an attorney to advise and represent Harmon after it became clear that Harmon was suspected of murdering M.W. (This attorney was not one of the two attorneys who were later appointed to represent Harmon after he was arrested and charged.)

Based on the fact that an attorney was advising and representing Harmon during the investigative phase of the case, Harmon's trial attorneys argued that Trooper Lorring's undercover interactions with Harmon constituted an illegal interference with this attorney-client relationship.

In support of this theory, Harmon's attorneys asserted that the Juneau District Attorney's Office had either been directing, or at least had played a significant role in supervising, Lorring's undercover investigation. Although Harmon's attorneys conceded that "much [was] not clear" about the precise role of the District Attorney's Office in Lorring's undercover investigation, the defense attorneys argued that it was "apparent" that the state troopers "were not operating independently of the District Attorney's Office". The defense attorneys then argued that, because of the District Attorney's involvement in the investigation, all of Lorring's interactions with Harmon amounted to indirect communications between the Juneau District Attorney and Harmon

— communications that occurred at a time when the District Attorney's Office was aware that an attorney was advising and representing Harmon.

Based on these assertions, Harmon's attorneys argued that the Juneau District Attorney violated Alaska Professional Conduct Rule 4.2 each time that Trooper Lorring engaged Harmon in conversation connected to the murder investigation. Rule 4.2 forbids a lawyer from "communicat[ing] about the subject of the representation with a ... person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer ... is authorized to do so by law".

Even though Harmon's attorneys filed this two-pronged suppression motion, no hearing was ever held on the motion, and the trial judge never rendered a decision on either of the theories set forth in the motion. The judge did, in fact, schedule an evidentiary hearing on the motion — but just before the scheduled hearing, the parties entered into an evidentiary stipulation, and Harmon's attorneys withdrew their suppression motion.

The parties' evidentiary stipulation had three provisions. First, the prosecutor agreed that he would not introduce any evidence of Harmon's statements to Trooper Lorring so long as Harmon did not take the stand at his trial. Second, the parties agreed that, if Harmon chose to take the stand, the admissibility of Harmon's statements to Lorring would be governed by the applicable rules of evidence. And third, the parties agreed that the prosecutor would be allowed to introduce evidence of Harmon's rhetorical question following his arrest ("What took you so long?").

Harmon did not take the stand at his trial. Thus, the trial judge was never called upon to decide the admissibility of Harmon's statements to Lorring. More importantly (for purposes of Harmon's post-conviction relief litigation), Harmon's trial attorneys never presented any evidence to support the arguments they made in their

suppression motion, and the trial judge never made any findings of fact or rulings of law pertaining to the issues raised in the suppression motion.

Even without hearing any evidence of Harmon's statements to the undercover officer, the jury at Harmon's trial found him guilty of second-degree murder, first-degree sexual assault, second-degree theft, and the separate attempted first-degree sexual assault from New Year's Day 2003. The jury was unable to reach a verdict on the first-degree murder charge.

(b) Harmon's post-conviction relief claim, and the litigation of that claim in the superior court

In Harmon's petition for post-conviction relief, he claimed that his trial attorneys were incompetent for failing to pursue two potential suppression motions: a motion seeking suppression of Harmon's statements to Trooper Lorring, and a motion seeking suppression of Harmon's rhetorical question to the officers who arrested him.

Harmon's post-conviction relief attorney did not argue that the trial attorneys' failure to pursue these two potential suppression motions made any difference to the outcome of Harmon's *trial* — apparently because, under the terms of the pre-trial evidentiary stipulation, Harmon's trial jury heard almost none of this evidence (*i.e.*, none of it except Harmon's rhetorical question to the arresting officers).

But Harmon's post-conviction relief attorney argued that Harmon's trial attorneys still should have asked for the suppression of this evidence as it pertained to Harmon's grand jury indictment. The post-conviction relief attorney asserted that this evidence constituted a significant portion of the evidence presented to Harmon's grand jury, and the attorney further asserted that it was obvious that this evidence was obtained illegally. According to the post-conviction relief attorney, if Harmon's trial attorneys

had attacked the indictment by arguing that this evidence was obtained illegally, (1) the trial judge would have granted the request for suppression and, as a consequence, (2) the trial judge would then have dismissed Harmon's indictment.

Whenever a defendant asserts that their trial attorney failed to represent them effectively, the defendant must show that their attorney's actions or inactions fell below the standard of minimum competence required of criminal law practitioners, and that there is a reasonable possibility that the defendant suffered prejudice on account of this incompetent performance. [4]

More specifically, when a defendant's claim of ineffective assistance is based on their attorney's failure to attack a grand jury indictment, the defendant must prove three things:

First, the defendant must show that no competent defense attorney would have failed to attack the indictment on the basis (or bases) proposed by the defendant in their petition for post-conviction relief. [5]

Second, the defendant must show that, if their trial attorney had filed the proposed attack, it would have been successful. [6]

In Harmon's case, this requirement actually meant two things. First, it was Harmon's burden to show that his two proposed suppression motions (one motion to suppress Harmon's statements to the undercover officer, and another motion to suppress Harmon's rhetorical question to the arresting officers) would have been successful — that the trial judge would have granted these motions and ordered suppression of the evidence. And second, Harmon had to show that, if this evidence had been suppressed,

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[4] *Risher v. State*, 523 P.2d 421, 425 (Alaska 1974).

[5] *LaBrake v. State*, 152 P.3d 474, 480 (Alaska App. 2007).

[6] *State v. Steffensen*, 902 P.2d 340, 341–42 (Alaska App. 1995).

his indictment would have been dismissed for lack of a sufficient evidentiary basis under the test set out by this Court in *Stern v. State*, 827 P.2d 442, 445–46 (Alaska App. 1992).

Finally, a defendant must show that, if the indictment had been dismissed on the grounds proposed in the defendant's petition for post-conviction relief, the State would have been unable to re-indict the defendant. [7]

With regard to the first element Harmon was required to prove — that no competent defense attorney would have failed to attack Harmon's indictment by asking the superior court to suppress Harmon's statements to Trooper Lorring and Harmon's rhetorical question to the arresting officers — the sole evidence that Harmon's post-conviction relief attorney introduced in support of this claim was testimony given by one of Harmon's trial attorneys. This trial attorney asserted that, in any serious felony case, "if there's any colorable [claim] that you can make[,] ... you have to file a motion to dismiss the grand jury indictment. I think it's *pro forma*."

But despite what this attorney said about their preferred litigation strategy, Alaska law does not require defense attorneys to file any and all grand jury motions that might be "colorable" (*i.e.*, non-frivolous). As we pointed out in *State v. Steffensen*, "the number of colorable suppression motions (those that have some possibility of success) is greater than the number of winning ones. Many colorable motions are ultimately denied because, under the law and the facts of the case, they turn out to be meritless." [8]

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[7] *Shetters v. State*, 751 P.2d 31, 36 (Alaska App. 1988).

[8] *State v. Steffensen*, 902 P.2d 340, 341–42 (Alaska App. 1995).

The constitutional guarantee of effective assistance of counsel does not oblige a defense attorney to pursue every available non-frivolous motion.[9] Thus, when the ultimate merit of a motion is unknown and the motion remains merely arguable, a claim of ineffective assistance of counsel cannot rest simply on the assertion that the defendant's attorney had no particular reason for not filing the motion.[10]

Moreover, as the superior court noted in its post-conviction relief decision, the record showed that one of Harmon's trial attorneys had thoroughly reviewed the grand jury record, and that the two trial attorneys affirmatively considered filing an attack on the indictment, but they ultimately decided not to do so.

By the time of the post-conviction relief evidentiary hearing, neither of Harmon's two trial attorneys could recall why they decided not to attack the indictment by seeking suppression of the evidence. However, given the fact that Harmon's attorneys had reached a favorable stipulation with the prosecutor regarding the use of this evidence at Harmon's trial, the superior court found that a competent defense attorney could reasonably decide that filing such a motion (*i.e.*, a suppression motion attacking the use of this evidence at grand jury) was not worth the risk — because the defense

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[9] *Steffensen v. State*, 837 P.2d 1123, 1126 (Alaska App. 1992) ("Steffensen's primary argument is that, since there was everything to gain and nothing to lose by filing a suppression motion, his attorney must have been acting incompetently when he decided not to file such a motion. This argument — that a defense attorney is obliged to pursue every non-frivolous motion — was squarely rejected in *State v. Jones*."). *See State v. Jones*, 759 P.2d 558, 572 (Alaska App. 1988) ("[A] defendant is not entitled to perfection but to basic fairness. In the real world, expenditure of time and effort is dependent on a reasonable indication of materiality.").

[10] *See Grinols v. State*, 10 P.3d 600, 619 (Alaska App. 2000), *affirmed in pertinent part*, 74 P.3d 889 (Alaska 2003), where this Court declared: "[W]hen a defendant challenges the competence of the attorney who represented them [previously], the defendant must do more than prove that their [former] attorney failed to raise ... a [merely] colorable legal issue."

attorneys' act of filing this motion might lead the prosecutor to withdraw from the evidentiary stipulation.

All this, by itself, would be a sufficient basis for the superior court to reject Harmon's claim of ineffective assistance of counsel. But as we have explained, and as the superior court noted in its decision, Harmon was also required to prove that his proposed suppression motion would have succeeded — and the superior court found that Harmon failed to meet this burden as well.

To support the claim that the evidence in question was obtained illegally, Harmon's post-conviction relief attorney simply attached a copy of the suppression motion that Harmon's trial attorneys had filed in the underlying criminal case. But because this suppression motion was later withdrawn after Harmon's trial attorneys reached their stipulation with the prosecutor, no evidence was ever presented to the trial court in support of this suppression motion — and Harmon's post-conviction relief attorney did not offer any evidence to support the suppression motion during the post-conviction relief proceedings.

Instead, the post-conviction relief attorney simply asked the superior court to assume, based on the unsupported motion itself, that the motion was meritorious and that it would have been granted if it had been pursued.

In its post-conviction relief decision, the superior court noted that the potential success of Harmon's suppression motion hinged on assertions of fact that had never been supported by evidence. In particular, no evidence was ever presented to support Harmon's assertion that his statements to the undercover officer were involuntary (in the legal sense), or to support Harmon's assertion that the Juneau District Attorney was so intimately involved in formulating the undercover officer's approach to Harmon that the officer's ensuing interactions with Harmon constituted communica-

tions between Harmon and the Juneau District Attorney for purposes of Professional Conduct Rule 4.2.

The superior court also questioned one of the main legal arguments in Harmon's suppression motion: the contention that, if the Juneau District Attorney's Office participated in planning or supervising Trooper Lorring's undercover investigation of Harmon, then — as a legal matter — anything that Lorring said to Harmon would be an attorney communication that violated Professional Conduct Rule 4.2. The superior court noted that this Court has held that the police can lawfully employ an undercover agent to engage in conversations with a criminal suspect even if that suspect has hired an attorney to advise them, so long as no formal criminal proceedings have yet been instituted. *See State v. Garrison*, 128 P.3d 741, 747 (Alaska App. 2006), and *Thiel v. State*, 762 P.2d 478, 481–83 (Alaska App. 1988).

Moreover, the superior court found that, even if Harmon had won his proposed suppression motion, Harmon still failed to meet his burden of establishing the next element of his ineffective assistance of counsel claim — *i.e.*, that the suppression of this evidence would have led to the dismissal of his indictment.

The superior court noted that, under *Stern v. State*, 827 P.2d 442 (Alaska App. 1992), it was Harmon's burden to show either that (1) absent the challenged evidence, the grand jury evidence was insufficient to support the indictment, or that (2) even if the remaining evidence was legally sufficient to support the indictment, the probative force of this remaining evidence was so weak, and the unfair prejudice engendered by the improper evidence was so strong, "that it appears likely that the improper evidence was the decisive factor in the grand jury's decision to indict." *Stern*, 827 P.2d at 445–46.

The superior court concluded that Harmon had failed to show that his indictment would have been dismissed under the *Stern* test. The superior court first

found that, even if Harmon's proposed suppression motion had been pursued and the motion had been granted, the remaining grand jury evidence was sufficient to support the charges in Harmon's indictment. The superior court next concluded that Harmon had failed to show that the challenged evidence was so strong, and the remaining grand jury evidence so weak, that the challenged evidence must have been the decisive factor in the grand jury's decision to indict Harmon.

The superior court pointed out that Harmon's post-conviction relief attorney had not offered any analysis of the evidence presented to the grand jury, nor had the attorney offered any specific explanation as to how that evidence might have been insufficient under the *Stern* test if the trial judge had suppressed Harmon's statements to Trooper Lorring and Harmon's rhetorical question to the arresting officers. Instead, as the superior court noted in its decision, Harmon's post-conviction relief attorney presented only conclusory arguments that the remaining evidence would be insufficient under the *Stern* test.

Finally, the superior court found that Harmon had failed to establish the last required element of his ineffective assistance of counsel claim — proof that, if the indictment had been dismissed on the grounds proposed by Harmon, the State would have been unable to obtain a re-indictment based on the remaining evidence. The superior court noted that Harmon's *trial* jury found him guilty of second-degree murder, first-degree sexual assault, second-degree theft, and attempted first-degree sexual assault even though the trial jurors did not hear any evidence of Harmon's statements to the undercover officer.

(c) Harmon's arguments on appeal

Harmon attacks the superior court's resolution of his claim on various grounds.

First, Harmon argues that the superior court relied on a mistaken view of the law when the court found that Harmon had failed to establish the first element of his claim — *i.e.*, that no competent defense attorney would have failed to attack the grand jury indictment by seeking suppression of Harmon's statements to Trooper Lorring and suppression of Harmon's rhetorical question to the arresting officers.

Specifically, Harmon argues that, with regard to the issue of whether his trial attorneys made a tactical choice not to attack the indictment on the grounds proposed by Harmon, the superior court wrongly required Harmon to present evidence "ruling out virtually any possibility" that his trial attorneys' failure to attack the grand jury indictment was the result of tactical choice. Harmon points out that his burden of proof on this issue (and on all other issues of fact) was the lesser burden of "clear and convincing evidence" specified in AS 12.72.040. [11]

But the wording of the superior court's decision in Harmon's case shows that the court applied the correct burden of proof when it evaluated Harmon's claim.

It was Harmon's burden to establish that any competent defense attorney would have pursued Harmon's proposed suppression motion. Harmon attempted to satisfy this burden by presenting the testimony of one of his trial attorneys, who took the

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[11] See *State v. Laraby*, 842 P.2d 1275, 1279 (Alaska App. 1992), where we held that when a petitioner for post-conviction relief challenges the competence of their trial attorney's action (or inaction), the petitioner does not need to prove that there was "virtually [no] possibility" that their attorney's conduct was based on a reasonable tactical choice. Rather, the petitioner's burden of proof on this issue is the lesser burden specified in Alaska's post-conviction relief statutes.

position that whenever there is any arguable ground for attacking the indictment in a serious felony case, a competent defense attorney should always attack the indictment.

But Alaska law does not require defense attorneys to pursue every arguable (*i.e.*, non-frivolous) motion unless there is some affirmative reason for *not filing* the motion. Rather, when a defendant claims that their attorney was incompetent for failing to file a suppression motion, the defendant must prove that there was an affirmative reason for *filing* the proposed motion — and that this reason was so obvious and strong that any competent defense attorney would have filed the motion. Harmon could not obtain post-conviction relief merely by showing that his trial attorneys had no particular reason for not filing the proposed suppression motion. [12]

The superior court found that Harmon had failed to prove this element of his claim — and the court's finding was a sufficient basis for denying the claim altogether.

But in addition, the superior court found that Harmon's trial attorneys had had a sound tactical reason for *not* filing the proposed suppression motion — because, if Harmon's trial attorneys had filed this motion, their action might have prompted the prosecutor to withdraw from the stipulation that restricted the government's ability to introduce evidence of Harmon's statements to the undercover officer at Harmon's trial. The collapse of this stipulation would not have hurt Harmon if the suppression motion had succeeded, but the loss of the evidentiary stipulation would have significantly disadvantaged Harmon if the suppression motion was litigated and then denied.

In short, the superior court's decision is supported by the record, and it was based on the correct law.

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[12] *Steffensen v. State*, 837 P.2d 1123, 1126 (Alaska App. 1992).

Harmon makes a separate attack on a related portion of the superior court's ruling: the superior court's conclusion that Harmon failed to show that his proposed suppression motion would have succeeded.

First, Harmon argues that the superior court's ruling on this point "overlooks" the fact that the trial prosecutor agreed not to introduce evidence of Harmon's statements to the undercover officer unless Harmon took the stand.

Harmon's appellate attorney does not explain how this trial stipulation relates to the question of whether Harmon's proposed suppression motion would have been successful. Apparently, Harmon's theory is that, because the prosecutor was willing to enter into this evidentiary stipulation, the prosecutor must have believed that Harmon's trial attorneys would have succeeded if they had pursued their motion to suppress Harmon's statements to the undercover officer.

There are two flaws in this theory. First, the prosecutor's willingness to enter into the evidentiary stipulation does not demonstrate that the prosecutor believed that Harmon's suppression motion would be successful. Rather, it merely suggests that the prosecutor wished to avoid litigating the various arguments raised in the suppression motion unless there was a real need to do so.

The evidentiary stipulation laid out two rules for the challenged evidence. If Harmon did not take the stand at his trial, then the prosecutor would not introduce evidence of Harmon's statements to the undercover officer. If Harmon did take the stand, then the prosecutor could attempt to introduce this evidence, and the admissibility of Harmon's statements to the undercover officer would be governed by the applicable Alaska evidence rules.

Alaska Evidence Rule 412 provides that, generally speaking, evidence is not admissible if it was obtained unlawfully. But subsection (1)(B) of Rule 412 makes

an exception for statements obtained in violation of the *Miranda* rule[13] if the statements are offered to impeach the defendant and if the statements were "otherwise voluntary and not coerced". (The rule further requires that the statements were recorded if the statements were made under circumstances where recording was required by law.)

If Harmon's suppression motion had been based on an asserted *Miranda* violation, then the prosecutor's willingness to enter into the evidentiary stipulation might suggest that the prosecutor believed that this hypothetical *Miratnda* argument had merit, and that Harmon's statements would not be admissible unless Harmon took the stand, thus triggering the exception codified in Rule 412(1)(B).

But Harmon's suppression motion was not based on a *Miranda* claim. Rather, as we have explained, the suppression motion was based on claims that (1) Harmon's statements to the undercover officer were psychologically coerced and therefore involuntary, and that (2) the undercover officer's interactions with Harmon were prohibited by Alaska Professional Conduct Rule 4.2 (on the theory that everything the undercover officer said to Harmon was, in effect, a communication initiated by the Juneau District Attorney).

Because Harmon's suppression motion was based on these claims, rather than on a *Miranda* claim, it made no difference under Evidence Rule 412 whether Harmon took the stand or not. Even if Harmon took the stand — an action which, according to the terms of the stipulation, would allow the prosecutor to offer evidence of Harmon's statements to the undercover officer — the prosecutor would still have to litigate the merits of Harmon's suppression motion if Harmon's attorneys raised a Rule 412 objection to this evidence.

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[13] *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Thus, the prosecutor's willingness to enter into the evidentiary stipulation implied very little about whether the prosecutor believed that Harmon would ultimately prevail on his suppression claims. Rather, the prosecutor's decision to agree to the stipulation merely showed that the prosecutor did not want to litigate these issues unless Harmon took the stand and, based on Harmon's testimony, the prosecutor concluded that the government had a real need to introduce evidence of Harmon's statements to the undercover officer.

But perhaps more importantly, it ultimately does not matter whether the prosecutor might have thought that Harmon's suppression motion would likely be successful if it was ever fully litigated. Harmon could not obtain post-conviction relief by proving that the *prosecutor* believed that Harmon's proposed suppression motion might be successful. Rather, Harmon had to prove that the *trial judge* would have granted the proposed suppression motion. And, based on the evidence and the arguments presented in the post-conviction relief proceedings, the superior court concluded that Harmon had failed to prove this.

As we pointed out earlier, the superior court noted that Harmon's proposed suppression motion rested on several factual assertions that were never supported by any evidence. With respect to the suppression motion dealing with Harmon's statements to the undercover officer, Harmon's trial attorneys withdrew this motion before there was an evidentiary hearing on their claims. With respect to the potential suppression of Harmon's rhetorical question to the officers who arrested him, Harmon's trial attorneys never filed a motion to suppress this evidence. (Instead, they stipulated that the prosecutor could introduce this evidence.) And with respect to all of the factual issues involved in these various suppression claims, Harmon's post-conviction relief attorney did not present any testimony or other evidence on the merits of these issues.

In addition, as the superior court also explained in its decision, Harmon's proposed suppression claims rested on legal grounds that were questionable or at least debatable — and Harmon's post-conviction relief attorney did not address these legal issues.

In sum, the record shows that the superior court had valid reasons for concluding that Harmon failed to meet his burden of proving that the suppression motion inevitably would have succeeded.

Harmon also attacks another aspect of the superior court's ruling: the court's finding that Harmon failed to prove that his indictment would have been dismissed if his proposed suppression motion had been successful.

As we explained earlier, when the superior court analyzed the evidence presented to Harmon's grand jury using the test set forth in *Stern v. State*, the superior court concluded that even if Harmon's statements to the undercover officer had been suppressed, and even if Harmon's rhetorical question to the arresting officers had likewise been suppressed, the indictment would still survive. In other words, the superior court found that the remaining evidence presented to the grand jury was sufficient to support the indictment, and that the evidence of Harmon's statements to the troopers was not the deciding factor in the grand jury's decision.

On appeal, Harmon argues that the superior court's ruling on this issue is so conclusory as to make it impossible for this Court to adequately review the ruling on appeal. But the superior court supported its *Stern* ruling with a sixteen-page summary of the testimony offered by all eighteen witnesses who appeared before the grand jury — Trooper Lorring (the undercover officer), Investigator Eric Burroughs (who testified about Harmon's rhetorical question, "What took you so long?"), and each of the remaining sixteen witnesses.

Finally, Harmon challenges the superior court's finding that, even if Harmon's indictment *had* been dismissed on the grounds proposed by Harmon, the State could still have secured a new indictment without relying on the statements that Harmon made to the undercover officer and to the arresting officers.

In his brief to this Court, Harmon acknowledges that the trial jury convicted him of four of the charges contained in the indictment — second-degree murder, first-degree sexual assault, second-degree theft, and attempted first-degree sexual assault — even though the trial jurors did not hear any evidence of Harmon's statements to the undercover officer. (The jury was unable to reach a verdict on the most serious charge, first-degree murder.)

Nevertheless, Harmon asserts that these four guilty verdicts "[do] not mean that [Harmon] would have been re-indicted on the remaining [counts]."

But Harmon does not explain why it matters whether the State could have secured a re-indictment on the remaining counts of his indictment — *i.e.*, the charges on which Harmon was not convicted. The State did not seek a retrial of the mistried first-degree murder charge, and the State chose not to pursue the other remaining count of the indictment.

But even if it did somehow make a difference, the fact that the grand jury *might not* have re-indicted Harmon on these two remaining counts is not sufficient to support Harmon's request for post-conviction relief. It was Harmon's burden to show that the State *could not* have secured a re-indictment on these counts if his proposed suppression motion had been granted. [14]

For all these reasons, we uphold the superior court's ruling on Harmon's claim that his trial attorneys were ineffective for failing to attack the grand jury

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[14] *Shetters v. State*, 751 P.2d 31, 36 (Alaska App. 1988).

indictment by seeking suppression of a portion of the evidence presented to the grand jury.

Harmon's claim that his trial attorneys were incompetent for failing to use all of their available peremptory challenges during the jury selection at Harmon's trial

(a) Background facts

Harmon's case was tried in Juneau, and the case engendered significant pre-trial publicity there. Nevertheless, the voir dire examinations of the jurors in Harmon's case revealed that none of the people who sat on Harmon's jury had been following this media publicity closely. In fact, several of the jurors had not been following the media publicity at all: they were not even aware of the allegations against Harmon until they heard the indictment read in court. With regard to the remaining members of Harmon's jury, none of them knew much more about the case than a general description of the crime. Only one member of the jury, Juror Ju.L., knew that Harmon had made statements before he was arrested — but Ju.L. was unaware of the nature of those statements, and she did not know that Harmon had made those statements to an undercover officer. [15]

Harmon's trial attorneys challenged Juror Ju.L. for cause based on the fact that Ju.L. knew that Harmon had made pre-trial statements of some kind. But the trial judge denied this challenge, explaining that Ju.L. still had only limited knowledge of the

[15] *Harmon v. State*, 193 P.3d 1184, 1199 (Alaska App. 2008).

case, and also that the jurors *would* hear evidence that Harmon had made pre-trial statements to various friends.[16]

Later during the jury selection process, when the time came for the parties to exercise their peremptory challenges, Harmon's trial attorneys decided not to peremptorily challenge Juror Ju.L. As Harmon's lead trial attorney explained on the record at the time, the defense team decided not to peremptorily challenge Ju.L. because they concluded that the prospective jurors who were left — *i.e.*, the people who would be called to the jury box if Ju.L. was removed — were less favorable for Harmon.

(Harmon's trial attorneys were able to make this assessment because the trial judge had allowed the attorneys for both sides to engage in voir dire questioning of *all* the prospective jurors (a little more than six dozen) before the attorneys were asked to exercise their peremptory challenges.)

Just after jury selection was completed, Harmon's trial attorneys asked the superior court to change the venue of the trial (*i.e.*, to move the trial out of Juneau) because of the pre-trial publicity and its potential effect on the jurors. In particular, the defense attorneys noted that some of the newspaper articles mentioned the fact that Harmon had made statements to an undercover officer. (Remember that the parties had stipulated that the jury would not hear any evidence of Harmon's statements to Trooper Lorring so long as Harmon did not take the stand at his trial.)

The trial judge acknowledged that Harmon's case had generated substantial pre-trial publicity. But the judge concluded, based on the answers given during the jury selection process, that the jurors selected to serve on Harmon's jury were not prejudiced by this pre-trial publicity (or for any other reason). The judge therefore denied the

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[16] *Id.* at 1195 n. 12.

defense attorneys' motion for a change of venue. This Court upheld the trial judge's decision when we decided Harmon's direct appeal.[17]

(b) The specifics of Harmon's claim, and the superior court's decision

In Harmon's petition for post-conviction relief, he claimed that his trial attorneys performed incompetently when, during jury selection, they failed to use all of Harmon's peremptory challenges. However, Harmon's post-conviction relief attorney presented an unusual theory as to *why* Harmon's trial attorneys were incompetent for failing to use all of their available peremptory challenges.

The post-conviction relief attorney did not assert that Juror Ju.L. was an obviously unfair juror, or that any of the other seated jurors were obviously unfair jurors, or that any of the prospective jurors who would have been seated if Ju.L. had been challenged were obviously unfair jurors. Indeed, during the post-conviction relief proceedings, Harmon's post-conviction relief attorney offered absolutely no evidence regarding any of these jurors or prospective jurors, nor did the post-conviction relief attorney rely on the voir dire testimony given by these jurors and prospective jurors during the jury selection process at Harmon's trial.

Rather, the post-conviction relief attorney argued that Harmon's trial attorneys were incompetent for failing to adopt the *tactic* of using up all of their peremptory challenges — without regard to which jurors they would have challenged.

Harmon's post-conviction relief attorney claimed that if Harmon's trial attorneys had used up all of their available peremptory challenges, this might have "swayed" the trial judge to accept the defense attorneys' contention that it was

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[17] *Id.* at 1188–1193 & 1196–1200.

impossible for Harmon to receive a fair trial in Juneau — thus leading the trial judge to grant the defense motion for a change of venue.

But at the post-conviction relief evidentiary hearing, when Harmon's trial attorney (the one who conducted jury selection for the defense) was asked to testify about this matter, the trial attorney explained that Harmon's defense team affirmatively decided not to use all of Harmon's available peremptory challenges, and to accept Juror Ju.L. as a member of the jury. The defense team made this decision because they concluded that Juror Ju.L. was better for Harmon than any of the prospective jurors who would have been called to the jury box if the defense team had peremptorily challenged Ju.L. Harmon's trial attorney noted that he had explained his reasoning to the trial judge, on the record, when jury selection was concluding.

Based on this evidentiary record, the superior court rejected Harmon's contention that his trial attorneys were incompetent for failing to exhaust all of their available peremptory challenges.

The superior court found that Harmon's trial attorneys "clearly had tactical reasons for not exercising all of the available preempts, based on their evaluation of who then [would] be seated in the jury box if they did [exercise all their peremptory challenges]." And the superior court found that Harmon had failed to prove that all competent defense attorneys would have rejected his trial attorneys' approach and, instead, would have adopted Harmon's proposed tactic of using up all of the available peremptory challenges, regardless of which jurors and prospective jurors were challenged.

Finally, the superior court found that Harmon had failed to prove that, if the defense team had used all of their allotted peremptory challenges, the trial judge would have granted the defense motion for a change of venue.

(c) Harmon's arguments on appeal

On appeal, Harmon broadly asserts that his trial attorneys were incompetent because they failed to peremptorily challenge Juror Ju.L. "and the other biased jurors who succeeded her" (*i.e.*, the prospective jurors who would have been seated if Ju.L. had been peremptorily challenged).

But in his brief, Harmon cites no evidence to support his assertion that Juror Ju.L. and the other prospective jurors were so biased that any competent defense attorney would have peremptorily challenged every one of them.

In fact, Harmon failed to preserve any claim that Juror Ju.L. and the other prospective jurors were biased at all. As the superior court noted in its decision, Harmon's post-conviction relief attorney never affirmatively litigated the issue of juror bias. The post-conviction relief attorney did not engage in any discussion of the jurors who would have been seated if Juror Ju.L. had been peremptorily challenged, nor did the attorney present any evidence relating to the purported biases or unsuitability of Juror Ju.L. and the other prospective jurors.

In his brief to this Court, Harmon cites one portion of the post-conviction relief record — two sentences contained in the affidavit that one of Harmon's trial attorneys filed for inclusion in Harmon's post-conviction relief pleadings. Harmon claims that, in this passage of the trial attorney's affidavit, the attorney conceded that he made a mistake when he failed to peremptorily challenge Juror Ju.L. But in the affidavit, the trial attorney says no such thing. [18]

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[18] Here is what the trial attorney said in his affidavit: "I did not use all of my peremptory challenges, although I explained to the trial court why I was not using them. This may have been a reason why the trial court denied our change of venue motion."

More importantly, the trial attorney's affidavit is not admissible evidence for this purpose. The superior court did not decide Harmon's case on the pre-trial pleadings. Rather, the superior court held an evidentiary hearing — essentially, a bench trial — on Harmon's post-conviction relief claims. At this hearing, the court heard the testimony of the trial attorney who had earlier submitted the affidavit. Thus, the evidence in this case is the attorney's *testimony* at the hearing, not the attorney's affidavit.[19]

In sum, Harmon failed to preserve his claim that Juror Ju.L. and all the other prospective jurors were so biased against Harmon that any competent defense attorney would have peremptorily challenged all of them.

Instead, the only argument that Harmon preserved was the argument that his trial attorneys should have exhausted all of Harmon's peremptory challenges as a *tactic* (regardless of which jurors would have been challenged). In his brief, Harmon argues that his trial attorneys' failure to exhaust all of their peremptory challenges "meant that Harmon might have waived his right to appeal from the denial of [his] motion for change of venue."

But this argument ignores the superior court's finding that Harmon's attorneys had a valid tactical reason for *not* peremptorily challenging Juror Ju.L. and for deciding to accept the jury panel.

In addition, it is clear that the trial attorneys' failure to exhaust all their available peremptory challenges did *not* prejudice Harmon's ability to appeal the trial

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[19] We addressed this point in *Lockuk v. State*, unpublished, 2011 WL 5027060 (Alaska App. 2011). *Lockuk* involved a post-conviction relief action that went to trial. We noted that, because the case went to trial, Lockuk could not rely on the witness affidavits that he filed before trial. Rather, "absent a stipulation between the parties, or absent some other provision of law relaxing the preference for live testimony[,] ... Lockuk had the burden of presenting evidence [at trial] to support his claims." *Id.* at *5.

judge's denial of his motion for a change of venue. Far from being waived, Harmon's challenge to the trial judge's venue ruling was the major issue addressed in Harmon's direct appeal. *See Harmon v. State*, 193 P.3d at 1192–1200.

For all these reasons, we uphold the superior court's ruling on Harmon's claim regarding his trial attorneys' failure to use all of their peremptory challenges.

Harmon's claim that his trial attorneys failed to adequately prepare for his trial

In his petition for post-conviction relief, Harmon claimed that his trial attorneys' preparation for trial was so inadequate that it amounted to ineffective assistance of counsel.

During the post-conviction relief litigation, Harmon's trial attorneys repeatedly expressed discomfort regarding their level of preparation for Harmon's trial. In addition, the defense investigator who worked on Harmon's case testified that she was worried about the trial attorneys' level of preparation.

In Harmon's brief to this Court, his appellate attorney cites these statements of the trial attorneys and the investigator, and the appellate attorney asserts that there were many instances where Harmon's trial attorneys could have prepared more thoroughly or more promptly.

But to prove this claim of inadequate trial preparation, Harmon cannot rely solely on his trial attorneys' post-trial expressions of discomfort or regret — because, as this Court noted in *Simeon v. State*, a defense attorney's negative evaluation of their own performance "may be more a reflection of [their] dedication to [the] representation of

[their] client, and [their] remorse at a disappointing result, than it is an objective assessment of [their] representation."[20]

Instead, Harmon was required to show that his attorneys' trial preparation was deficient in one or more specific ways *and* that these specific deficiencies in the attorneys' trial preparation actually prejudiced Harmon in identifiable ways.

Thus, for example, in *State v. Savo*, 108 P.3d 903, 911–12 (Alaska App. 2005), this Court held that when a defendant seeks post-conviction relief by attacking their trial attorneys' failure to pursue independent testing of the physical evidence, or additional pre-trial investigation, or other avenues of cross-examination, it is the defendant's burden to produce evidence "to show that independent testing would likely have yielded exculpatory evidence, [or] that potential [additional] witnesses would actually have given favorable testimony, or that additional cross-examination would have weakened the state's case".[21]

In Harmon's case, with the exception of one issue that we will discuss later, Harmon fails to identify any particular way in which a more prompt or thorough trial preparation would have resulted in the discovery of additional favorable evidence, or would have led his attorneys to adopt a significantly better litigation strategy, or would have allowed his attorneys to more effectively confront or answer the government's case.

As the superior court noted in its decision, Harmon's post-conviction relief attorney failed to identify "a single defense theory that should have been pursued but was not because of his [trial attorneys'] lack of preparation", or "any physical evidence that

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[20] *Simeon v. State*, 90 P.3d 181, 185 (Alaska App. 2004), citing and paraphrasing *Dolchok v. State*, 639 P.2d 277, 295 (Alaska 1982).

[21] Quoting *State v. Jones*, 759 P.2d 558, 573–74 (Alaska App. 1988). *See also Allen v. State*, 153 P.3d 1019, 1024–25 (Alaska App. 2007), and *Bailey v. State*, unpublished, 2018 WL 4635682 at *2–3 (Alaska App. 2018).

reasonably could have been presented but was not" — nor did Harmon's post-conviction relief attorney identify "a single witness, expert or lay, [who] should have been called by the defense but was not", or "a single question that should have been asked [of] a witness, on cross or direct [examination], that was not asked".

Thus, with the one exception that we are about to discuss, Harmon failed to make any argument in the post-conviction relief proceedings — much less actually demonstrate — that he was prejudiced in some specific, identifiable way by his attorneys' trial preparation.

Harmon's claim relating to the crime scene photograph that showed one of M.W.'s socks lying on the ground outside her cabin

The one claim of identifiable prejudice that Harmon put forward during the post-conviction relief litigation was a claim involving a sock that was found on the ground outside M.W.'s cabin. In order to explain Harmon's claim, we need to briefly recapitulate the events of the investigation into M.W.'s disappearance and death, as described in this Court's decision in *Harmon*, 193 P.3d at 1187 (Harmon's direct appeal), and as supplemented by the testimony presented at Harmon's underlying criminal trial.

(a) Background facts, and the relevant portion of the proceedings at Harmon's criminal trial

On March 28, 2003, because of concerns voiced by several Tenakee Springs residents that M.W. was apparently missing, the town mayor called the State Troopers. Later that day, the first state trooper arrived in Tenakee Springs to investigate M.W.'s disappearance. While this state trooper was there, he interviewed Harmon.

The next day (March 29th), a fingerprint expert working for the State Crime Lab examined M.W.'s cabin and lifted some two dozen latent prints from locations and items inside M.W.'s cabin. Nineteen of these prints were later identified as belonging to Harmon.

The following day (March 30th), a state trooper investigator conducted a second interview of Harmon. Harmon told the investigator that he had not been inside M.W.'s cabin, and that there was no reason why his fingerprints, or any of his possessions, would be found in M.W.'s cabin.

Later that same day (March 30th), Harmon left Tenakee Springs — first taking a ferry to Sitka, and then buying a one-way airplane ticket to Juneau.

On April 1, 2003 — *i.e.*, two days after Harmon left Tenakee Springs — M.W.'s body was found buried in an earthen dam near her cabin. Later, after M.W.'s body was excavated from this dam, the troopers discovered that she was mostly naked, but that she had a sock on her left foot.

After M.W.'s body was found, but before it was excavated, yet another state trooper — Investigator Eric Burroughs — was instructed to assemble an investigative team and travel to Tenakee Springs. When Burroughs arrived in Tenakee Springs, he conferred with one of the other troopers who had come to Tenakee Springs earlier to investigate M.W.'s disappearance. This other trooper walked Burroughs through M.W.'s cabin and the surrounding area, then out to the earthen dam where M.W.'s body had been discovered and was about to be excavated. Along the way, this other trooper showed Burroughs a sock that was found lying between two fuel tanks located outside M.W.'s cabin. It turned out that this sock was the mate to the sock that was found on M.W.'s left foot when her body was excavated from the earthen dam later that day.

On March 29th, during the initial investigation that took place before Investigator Burroughs arrived in Tenakee Springs, investigators took several

photographs of the area surrounding M.W.'s cabin. One of these photographs showed the sock lying on the ground between the fuel tanks outside M.W.'s cabin.

But even though this March 29th photograph showed the sock lying between the fuel tanks, this photograph was not *focused* on the sock. The photograph was taken before M.W.'s body was excavated from the earthen dam — *i.e.*, before the matching sock was found on M.W.'s left foot, and before the troopers understood that the sock lying between the fuel tanks was the other sock of the pair.

So rather than focusing on the sock, the March 29th photo encompassed a larger view of the ground. One could see that there was a dark object between the fuel tanks, but it was difficult to identify this object as the matching sock unless one knew what to look for, or unless one used a magnifying glass to get a closer look at the printed photo, or unless one viewed the digital version of the photo on a computer screen and selected an enlarged view.

Either the trial prosecutor or a member of the State's investigative team examined the photo under magnification and identified the object lying between the fuel tanks as M.W.'s other sock. But Harmon's defense team missed this aspect of the photo.

When Investigator Burroughs testified at Harmon's trial, the prosecutor showed him an enlarged version of the photograph — an enlargement which clearly showed that the object between the fuel tanks was M.W.'s matching sock — and the prosecutor asked Burroughs to verify that this object was M.W.'s matching sock. In response, Harmon's trial attorney claimed surprise — and, the next morning, Harmon's attorney asked for a mistrial.

In arguing this motion to the trial judge, the defense attorney noted that he had mentioned the sock during his opening statement. (As we explain later in this opinion, the defense attorney mentioned this sock in one sentence of his 15- to 20-minute opening statement.) The defense attorney then asserted the presence of the sock in the

March 29th photograph "prejudice[d] ... the theories that were presented in [that] opening statement." However, the defense attorney never explained what theory or theories he was referring to, or how the presence of the sock in the March 29th photograph might have undercut those theories. Instead, the defense attorney simply declared that, if the defense team had known that the sock was present in the photograph, "we certainly wouldn't have been talking about it in opening statement."

The trial judge denied the defense motion for mistrial. The judge admitted that he "[didn't] recall exactly what was said about the sock in [the defense] opening statement", but the judge declared that the defense team had not "placed all its eggs in that basket, by any stretch of the imagination".

Harmon's trial attorney offered no response to the judge's characterization of the defense opening statement. In particular, the trial attorney did not assert that the judge had failed to remember some significant aspect of the opening statement, nor did the attorney offer any further explanation of how Harmon's defense might have been prejudiced by the presence of the sock in the photograph.

And Harmon did not attack the trial judge's ruling when he pursued his direct appeal of his convictions.

(b) The litigation of this issue in the post-conviction relief proceedings

The trial attorney's assertion — that the presence of the matching sock in the March 29th photograph tended to undercut one of the defense theories of the case — was finally explained during the testimony at the post-conviction relief evidentiary hearing.

At the evidentiary hearing, Harmon's lead trial attorney — the one who delivered the defense opening statement at Harmon's trial, and who made the motion for

a mistrial — again asserted that, if he had known that the March 29, 2003 photograph showed M.W.'s matching sock lying between the fuel tanks outside her cabin, he would not have mentioned the sock in his opening statement. The attorney explained that Harmon's defense team had developed a theoretical "timeline" of events in which someone other than Harmon had transported M.W.'s body to the earthen dam and buried her there *after* Harmon left Tenakee Springs on March 30, 2003.

In addition, Harmon's post-conviction relief attorney argued that the presence of the sock in the March 29th photograph had prejudiced Harmon in a different, more indirect way. Specifically, the post-conviction relief attorney argued that the presence of the sock in the March 29th photograph showed that Harmon's trial attorney had misdescribed the evidence in the case when he gave the defense opening statement. According to the post-conviction relief attorney, the trial attorney's misdescription of this evidence was a factor that tended to undermine the defense team's efforts to establish their own credibility and to win the trust of the jury.

Harmon's lead trial attorney did not provide any testimony to explain or support this alternative theory of prejudice. Rather, the explanation was offered through the testimony of the defense attorney who served as second chair at Harmon's trial.

This attorney asserted that the presence of the matching sock lying on the ground between the fuel tanks outside M.W.'s cabin on March 29th was "very damning, damaging to [Harmon's] defense" because it tended to undermine the personal credibility of Harmon's defense team in the eyes of the jury:

> *Defense Attorney*: So much of what happens in a jury trial is [the] building of trust between the lawyers and the jurors. And when we had told them something was true, and that it helped our case, and then that [assertion] became [demonstrably] not true, that changes ... the tone and the tenor

> completely of the lawyers' relationship with the jurors. They're human beings. ... It was a big problem.

Later, in her closing argument to the superior court, Harmon's post-conviction relief attorney echoed the second-chair attorney's assertion — arguing that the presence of M.W.'s sock in the March 29th photograph led to a "humiliating undermining" of the trial attorneys' defense.

But the superior court rejected this characterization of the record. The court found that Harmon's trial attorney "did not materially rely on the sock in his opening statement". Rather, the attorney "only made a passing reference to a sock" when he delivered the defense opening statement, "and [this] reference was not part of an explanation of a timeline [of events]."

(The superior court also noted that when the trial prosecutor argued the case to the jury, he never asserted that Harmon's defense lawyer had made unfulfilled promises about the evidence in his opening statement.)

Finally, the superior court noted that even though the photograph showed M.W.'s sock lying outside her cabin on March 29th, this fact did not foreclose Harmon's defense team from arguing that someone other than Harmon buried M.W.'s body in the earthen dam. Rather, as the court explained, the record showed that Harmon's defense team "could and did" argue this theory to the jury.

The superior court acknowledged that, because of the March 29th photo, the defense team could not argue that M.W.'s sock was not present on the ground outside her cabin until sometime after Harmon left Tenakee Springs on March 30th. But the superior court pointed out that the presence of the sock in the March 29th photo did not preclude the defense team from arguing that someone buried M.W.'s body in the earthen dam after Harmon left town — and, in fact, at Harmon's trial, the defense presented several witnesses to support this theory.

The record fully supports the superior court's findings.

Here is the portion of the defense opening statement that Harmon's post-conviction relief attorney relied on to support Harmon's claim for post-conviction relief. The reference to M.W.'s sock occurs in a sentence fragment toward the end of this passage:

> *Defense Attorney*: Those are the main things in the puzzle that tries to piece together James Harmon. And this evidence is going to show that these things don't fit. There's crucial physical evidence that doesn't tie James Harmon to this. There's evidence found in the cabin that you're going to hear about, and evidence that's not found with regard to fingerprints, with regard to where they're found, with regard to pants and jeans that are found in the cabin. There's evidence found on [M.W.]'s body. At the autopsy, there's this — [what] Trooper Burroughs characterized [as] a fingernail-like substance — that's removed from her. It doesn't tie James Harmon to this. There's evidence found around the search area. Evidence that's found after James Harmon has left Tenakee, which may seem innocuous at first, but kind of adds up. Minor details. Socks that are found after he's left. Shovels. The possibility of dirt being moved from one side of the [earthen] dam to another. This occurred after James Harmon left Tenakee.

When Harmon's second-chair attorney was cross-examined at the post-conviction relief evidentiary hearing, she conceded that this passing reference to the sock was a single sentence of an opening statement that was fifteen to twenty minutes long. The attorney further acknowledged that, leaving aside the March 29th photograph, Harmon's defense team presented several witnesses whose testimony either tended to affirmatively suggest that someone other than Harmon might have killed M.W., or tended to otherwise cast doubt on the government's assertion that Harmon killed M.W.,

or tended to cast doubt on whether Harmon was even present in Tenakee Springs when M.W. was killed.

(c) Harmon's argument on appeal

On appeal, Harmon challenges the superior court's ruling on this issue, but his argument is cursory: Harmon asserts that the superior court "overlooked the importance of the sock to the defense timeline [of events] outlined by [the lead trial attorney] in his opening statement" — and then Harmon quotes the same portion of the defense opening statement that the superior court addressed in its decision.

The record shows that the superior court did not "overlook" Harmon's claim. Rather, the superior court addressed Harmon's claim and rejected it, based on the record of Harmon's trial and on the testimony presented at the post-conviction relief evidentiary hearing.

Because the record supports the superior court's decision, we uphold the superior court's ruling on Harmon's claim regarding his trial attorneys' purportedly incompetent trial preparation.

Conclusion

For the reasons explained here, we AFFIRM the judgement of the superior court.

Judge MANNHEIMER, concurring.

I write separately to address an issue of appellate law: identifying the standard of review that an appellate court should apply when reviewing a trial court's ruling under the *Stern* test.

The test set forth in *Stern v. State*, 827 P.2d 442, 445–46 (Alaska App. 1992), governs situations where a defendant claims that their indictment should be dismissed because the grand jury heard inadmissible evidence. Under the *Stern* test, even if the defendant shows that the challenged evidence was inadmissible, the defendant still bears the burden of showing either (1) that without the challenged evidence, the grand jury evidence is not sufficient to support the indictment, or (2) that even if the remaining evidence is legally sufficient to support the indictment, the probative force of this remaining evidence is so weak, and the unfair prejudice engendered by the inadmissible evidence is so strong, "that it appears likely that the improper evidence was the decisive factor in the grand jury's decision to indict."

In the *Stern* decision itself, this Court declared that we would use the "abuse of discretion" standard of review when we evaluated a trial judge's ruling under the *Stern* test. *Id.* at 447. In other words, this Court stated that we were required to show deference to the trial court's assessment of this matter, and that we would only reverse the trial court's ruling if the court's reasoning was clearly untenable. [1]

But in our cases since *Stern*, this Court has not used the "abuse of discretion" standard of review. Instead, in our post-*Stern* cases, this Court has consistently decided the *Stern* issue *de novo*, without deference to the trial court. In

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[1] *See Gonzales v. State*, 691 P.2d 285, 286 (Alaska App. 1984) (under the "abuse of discretion" standard, a reviewing court is to reverse only "if the trial court's decision is clearly untenable or unreasonable").

many of these cases, we did not even *mention* the trial court's decision — or we mentioned it only in a single conclusory sentence in which we announced that the trial court's ruling on the *Stern* issue was being affirmed or reversed. See the sixteen cases listed in the following footnote.[2]

These post-*Stern* cases all rest on the principle that when a decision on appeal requires an appellate court to apply the law to uncontested facts — facts such as the nature of the arguments presented in trial court pleadings or the contents of a grand jury record — this Court will independently assess whether those uncontested facts meet the governing legal standard. *See*, *e.g.*, *Mustafoski v. State*, 867 P.2d 824, 829 n. 1 (Alaska App. 1994) (holding that an appellate court owes no deference to, and can independently review, a trial court's ruling on the validity of an indictment when the issue was litigated solely on the pleadings and the pre-existing grand jury record).

Strictly speaking, it is not necessary to clarify this issue of appellate law in Harmon's case, because Harmon does not claim that the superior court reached the wrong result under the *Stern* test. Rather, Harmon argues that the superior court's *Stern* ruling is so terse and conclusory that it does not allow for meaningful appellate review.

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[2] Published: *Pletcher v. State*, 338 P.3d 953, 959–60 (Alaska App. 2014); *Rae v. State*, 338 P.3d 961, 964–65 (Alaska App. 2014); *Haag v. State*, 117 P.3d 775, 779 (Alaska App. 2005); *Morrow v. State*, 80 P.3d 262, 265 (Alaska App. 2003); *State v. Case*, 928 P.2d 1239, 1241 (Alaska App. 1996); *Ryan v. State*, 899 P.2d 1371, 1384 (Alaska App. 1995).

Unpublished: *Estate of Ferguson v. State*, 2019 WL 2524289 at *2 (Alaska App. 2019); *Collins v. State*, 2018 WL 2363462 at *2 (Alaska App. 2018); *Le v. State*, 2015 WL 4387489 at *3 (Alaska App. 2015); *Dreves v. State*, 2011 WL 6450914 at *3 (Alaska App. 2011); *Cleveland v. State*, 2010 WL 2245585 at *2 (Alaska App. 2010); *Adams v. State*, 2008 WL 1914340 at *3 (Alaska App. 2008); *Sudbury v. State*, 2007 WL 293129 at *3 (Alaska App. 2007); *McReynolds v. State*, 2003 WL 21279422 at *5 (Alaska App. 2003); *Keiper v. State*, 2001 WL 322192 at *2 (Alaska App. 2001); *State v. Bourdon*, 1999 WL 61016 at *2 (Alaska App. 1999).

As explained in this Court's lead opinion, Harmon's argument is refuted by the text of the superior court's decision: the superior court supported its *Stern* ruling with a detailed sixteen-page summary of the testimony offered by all of the witnesses who appeared before the grand jury — the two state trooper witnesses who gave the challenged testimony, plus the other sixteen grand jury witnesses.

Nevertheless, the question of the proper standard of review is important for future *Stern* cases — and I therefore offer this concurrence.