No. _____

In The Supreme Court of the United States

Deontray Vershon Tate, Petitioner

vs.

Jeff Titus, Warden, Rush City Correctional Facility, Minnesota, Respondent.

On Petition For Writ of Certiorari To The Eighth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In deciding whether to issue a certificate of appealability under 28 U.S.C. § 2253, may a federal court find that "reasonable jurists would not disagree" about the denial of relief on procedural grounds where other courts have resolved the same issue, on similar facts, in a manner favorable to habeas petitioner's position?

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The Eighth Circuit Judgment in *Tate v. Titus*, No. 18-2522 denying the request for a certificate of appealability (Appendix A) is unreported. The Order of the United States District Court, *Tate v. Titus*, 18-4594(JNE/BRT) (D.Minn. May 31, 2018), appears at Appendix B. The Report and Recommendation of the Magistrate Judge appears at Appendix C. Mr. Tate had an appeal to the Minnesota Court of Appeals, *State v. Tate*, A14-1339 (Minn.App. March 14, 2016). This opinion appears at Appendix D. Mr. Tate petitioned the Minnesota Supreme Court for review. This was denied by an Order dated May 31, 2016, which appears at Appendix E.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered on November 6, 2018. (Appendix A). Petitioner filed a Petition for Panel Rehearing on November 19, 2018. That Petition was denied by an Order dated December 12, 2018. (Appendix F). Petitioner invokes this Court's jurisdiction on the basis of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The questions presented implicate the following provisions of the United States Constitution:

AMEND. XIV, No state shall … deprive any person of life, liberty, or property without due process of law.

AMEND. V, No person shall be … deprived of life, liberty, or property without the due process of law.

AMEND. VI, In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.

The questions further implicate the following statutory provisions:

28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from— (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254, which is reproduced verbatim in the appendix to this section. (Appendix G).

STATEMENT OF THE CASE

Petitioner Deontray Tate seeks a writ of certiorari to the Eighth Circuit from the denial of a certificate of appealability in federal habeas corpus review. Federal court jurisdiction derives from 28 U.S.C. § 2254. The Minnesota Court of Appeals affirmed Mr. Tate's conviction on direct appeal. See Appendix D.

Mr. Tate's habeas petition was denied by the United States District Court for the District of Minnesota. Appendix B. The District Court's Order adopted the Magistrate Judge's Report and Recommendation (Appendix C) and denied a Certificate of Appealability under 28 U.S.C. § 2253 as to all claims. Mr. Tate's timely filed Application for Certificate of Appealability was denied by the Eighth Circuit Court of Appeals on November 6, 2018. (Appendix A). A timely filed petition for rehearing was denied on December 12, 2018.

On the evening of June 25, 2013, Annie Davis and Darnell Reed, an engaged couple, took Davis' two children to a local park to go swimming. (T. 340, 347, 438). Dartanion Hill, Davis's cousin, accompanied them with his son. (T. 341, 347, 461). Davis admitted smoking marijuana and drinking alcohol while the children were swimming. (T. 519, 590). At trial, however, both Davis and Reed falsely testified they did not consume any intoxicating substances while at the park. (T. 348, 462-63). At around 9:00 pm, the group returned to the home of Hill's mother, which was located at the corner of 36th Street and Penn Avenue North in Minneapolis, Minnesota. (T. 347). Davis and Reed intended to change clothes at Hill's mother's house then drive to Wisconsin Dells that night. (T. 445, 463).

Davis and Hill chatted on the sidewalk with Hill's mother. (T. 347). Reed and Davis' two sons remained in Davis' Tahoe. (T. 351, 445-46). Reed was sitting in the driver's seat. (T. 351, 445). Davis' two-year-old son was sitting directly behind Reed and JB, her four-year-old son, was sitting in the middle of the back seat next to his brother. (T. 446). As she talked, Davis noticed two men walk toward them

from the parking lot of the convenience store across the street. (T. 353). One of the men went to the corner of the block and the other walked directly up to the driver's side of the Tahoe. (T. 354). According to Davis, the man on the corner started shooting; Davis ran toward her car to tell Reed to drive away. (T. 354). She then turned around and ran with Hill behind the building where Hill's mother lived. (T. 357-58). While Davis and Hill where behind the building, they heard more shots. (T. 360). Worried about her children, Davis ran back out to the street. (T. 360).

Davis, Reed, and another bystander testified that the man who walked up to the Tahoe was African-American and dressed in black except for white tube socks. (T. 166, 354, 447). The man reached into the Tahoe and shot Reed. (T. 448). A bullet also hit JB in the leg. (T. 361). By the time Davis made it back around the building, the shooters were running off and people were calling 911. (T. 360-61). Davis found JB and tried to calm him. (T. 362).

When the police first arrived, at 9:41 pm, the scene was chaos. (T. 216, 282, 556, 564). People were crying, screaming and running around. (T. 216, 560). By her own admission, Davis was hysterical and belligerent. (T. 363-64, 400). Davis resisted officers' attempts to take JB from her so they could provide medical treatment. (T. 365, 398). Eventually, officers succeeded in placing JB in an ambulance, but they would not immediately allow Davis in with him. (T. 365-66). Davis swore and screamed at the officers. (T. 364, 402, 405, 566). She also repeatedly tried to get into the Tahoe to get her phone and cigarettes despite officers telling her to stay away because the Tahoe was a crime scene. (T. 402, 565).

Officers placed Davis in a squad car in hopes it would calm her. (T. 566). Instead, Davis became even more enraged; she thrashed about, banged her head, attempted to vomit, and nearly hyperventilated. (T. 366, 570). When officers let her out, Davis spit on one of them and declared "I ain't going to tell you shit." (T. 402, 568-70).

Medical personnel transported JB and Reed to the hospital where they were treated for gunshot wounds. (T. 263, 277). The shot to JB's lower right leg fractured his tibia. (T. 265). The doctor placed the leg in a splint to stabilize the fracture and then discharged him for further outpatient surgery. (T. 267). Davis testified that JB was in a wheelchair while his leg healed and could not ride a bike or swim for the rest of the summer. (T. 375). JB was scared of fireworks over the Fourth of July and had nightmares about the shooting. (T. 375-76). Reed sustained two gunshot wounds, one to his right buttock and other to his left thigh. (T. 268). Neither bullet hit any arteries or bones. (T. 268-69). Reed testified he does not walk the same and cannot play sports in the way he could before the injury. (T. 455). He has numbness in his heel and worries that his leg will give out unexpectedly. (T. 378, 455).

Davis eventually made her way to the hospital, but she and other family members were so disrespectful and combative that they were escorted off the premises by security and the hospital went into lockdown mode. (T. 406-07, 431, 572, 574-75). Davis refused to talk with police or even give them a description of

the shooter. (T. 367, 413). Reed told the officer at the hospital he did not know who shot him. (T. 451, 465).

One witness at the scene, Willy Riley, was somewhat more cooperative. (T. 183). Riley lived at 3611 Penn Avenue and his upstairs bedroom faced the street. (T. 184). He was watching television in his bedroom when he heard shots. (T. 186). He looked out his window and saw a man standing next to the driver's side of an SUV. (T. 189-90). Riley told an officer that the man was **between 18 and 20 years old** and was wearing jeans; he was not sure what sort of shirt the man had on. (T. 191, 558). Riley described the man as heavyset and between 5'9" and 6'1" tall. (T. 191). Riley said he was able to see the man's face, even though it was 9:40 at night; and he was sure the man was a light skinned African-American. (T. 207, 209, 558). Riley also told police he heard eight shots, which he believed were from two different guns. (T. 212-13).

Police investigator David Voss was assigned the case the following day. (T. 230). He retrieved a surveillance video from the convenience store across the street. (T. 232). The tape showed two men, one dressed in dark clothing and another dressed in a light-colored, patterned shirt and jeans, walking across the store's parking lot. (T. 237). A few minutes later, the video showed people running from the area. (T. 238). The two men then reappeared in the video, also running away. (T. 238). The men in the video fit the general description given by witnesses at the scene, but the video was not clear enough to determine their identities. (Exhibit

31). The last clip of the surveillance video showed the two men jumping into a van, which then quickly drove away. (T. 238-39).

Voss went to the hospital to interview Reed and Davis. Davis was much calmer and more pleasant than she was the night before. (T. 474). Both Reed and Davis gave a general description of the shooters but said they did not recognize either of them. (T. 475, 478, 530-31). Davis told Voss that she was not "beefing" with anyone and did not suggest any possible suspects. (T. 476-77, 518).

A few days into his investigation, Voss learned that Davis had gotten into a fight with a woman named Somer French on the afternoon of the 25th. (T. 479-80). Voss believed that French's husband, Deontray Tate, matched the general description of the shooter. (T. 479). Voss interviewed Davis a second time on July 1, 2013 and showed her the surveillance tape. (T. 480). Davis had a strong reaction while watching the video and said the man in the black clothing was Tate. (T. 481). Voss then put together a lineup and showed it, separately, to Davis and Reed. (T. 483). Davis and Reed identified the shooter at the SUV as Tate. (T. 485-86). Voss showed the same lineup to Riley, he also identified Tate as the man outside of the SUV. (T. 502).

At trial, Davis claimed she knew all along it was Tate, and that she saw him pull out a gun as he walked up to her vehicle. (T. 355). Davis also said that, minutes before the shooting, she saw Somer French and Tate drive by in a van she recognized as theirs. (T. 350, 352). Davis never mentioned seeing French or a van in any previous statement before being shown the surveillance video with the van.

(T. 428). Reed testified that he knew Tate was the man who shot him, even though he had only seen Tate once before. (T. 441, 456, 468).

The prosecution presented evidence that Davis and French and been involved in two prior disputes. The first, in May 2013, started when Davis chastised French's son and French took umbrage with Davis' criticism. (T. 343). This argument was not physical, but the police were called to address it. (T. 383). Approximately six weeks later, on June 25th, Davis and French ran into each other again in a corner grocery store. (T. 343). French was with her twelve-year-old daughter; Davis with Reed and another woman. (T. 385). Davis waited outside the store and entered into a physical fight with French when she came out. (T. 344, 387). Davis stole French's cell phone and keys and French tried to defend herself with a tire iron. (T. 389). Eventually Davis and Reed drove away. (T. 345).

Officers processed Davis' Tahoe and the surrounding area for evidence and searched the home and van that belonged to Tate and French. (T. 487-88). In Voss's opinion, the bumper of Tate's Saturn van looked like the bumper of the van in the surveillance video. (T. 490). Officers found no usable prints on the Tahoe and nothing of forensic value in Tate's van. (T. 492, 511). The officers gathered some black clothing from Tate's home, but Voss acknowledged that the clothing was not distinct and many people owned similar items. (T. 488, 536). Although officers received three discharged shell casings from the scene, they never found a gun with which to compare them. (T. 297, 496).

Alicia Roberts, a good friend of Somer French, testified that she was with Tate and French on the evening of the 25th. (T. 578). Roberts explained she went over to French's house to comfort her because French was scared and upset about the fight with Davis earlier in the day. (T. 579). Roberts testified she and French stayed outside that evening and she would have known if the van or Tate left the residence. (T. 580-81, 594). Roberts was sure neither French nor Tate left their home that evening. (T. 582, 599).

During Mr. Tate's trial, his wife, Somer French, Davis, Davis' friend Takesha Ransom, and another person were arrested after a fight occurred in the Courthouse. (T. 241.) The prosecution stated that there were allegations Davis had issued a threat toward French. (T. 234). In discussing this, counsel for Mr. Tate also informed the court that Mr. Tate's home had been shot at the prior weekend, with Ms. French being grazed by a bullet. (T. 243). Mr. Tate's counsel also stated that some of the parties taken into custody in the fight had claimed responsibility for shooting at Mr. Tate's house. Mr. Tate moved for a mistrial based on the fight and the shooting at his home. (T. 245). That motion was denied. (T. 248).

During questioning of the jury following the incident, it became apparent a juror witnessed at least some of the events. (T. 252-53). The juror explained that as he returned from lunch, he saw a woman in handcuffs and heard several others yelling. (T. 253-54). The juror stated he did not know what was being said and was unsure he could identify anyone involved. (T. 254). He also stated that if the

women were witnesses, it would not have any impact on him evaluating their credibility. (T. 254). No further action was taken on the subject.

The jury acquitted Tate of second-degree assault, the count that involved Dartanion Hill. (T. 673). The jury convicted Tate of two counts of first-degree assault, the counts that involved JB and Reed. (T. 672-73). Tate moved for judgment of acquittal or a new trial following the verdict. Without analysis, the court denied the motion. (Sentencing T. 3-4). The court sentenced Tate, who had no meaningful criminal history, to 309 months in prison, imposing both a double upward durational departure and a consecutive sentence. (Sentencing T. 23-26).

After sentencing, Tate stayed his direct appeal and filed a postconviction petition arguing that he was denied his right to present a complete defense because the trial court excluded evidence that, four days prior to the shooting, Reed and Davis were involved in a violent armed home invasion. He also argued that his trial counsel was ineffective for failing to make an offer of proof regarding the violent armed home invasion.

Mr. Tate tried to present evidence related to a home invasion Davis and Reed had been involved in four days prior to the shooting. Davis, Reed, and at least one other person entered the home of KC, who was home with several other adults and four children. Upon entering the home, Reed held the occupants at gun point and told them that Davis was going to fight KC while the others stayed out of it. Eventually, Davis, Reed, and the other person left. KC made a police report, but it is unclear if anyone ever faced any charges. Despite police identifying two people

closely associated with KC who also matched the descriptions of the shooter, Mr. Tate was not allowed to present this evidence to the jury, even though the prosecution's motive theory was that Mr. Tate shot at Reed and Davis because of a fight his wife had with Davis.

The postconviction court denied the petition without a hearing, and ruled the evidence would have been inadmissible because it was not alternative perpetrator evidence, it was irrelevant, and it would likely confuse the jury. (Postconviction Order P. 10-12). The postconviction court acknowledged that Tate's trial attorney failed to make a complete offer of proof regarding the evidence, but found their representation was still effective because the court would have excluded the evidence regardless of the offer of proof. (Postconviction Order P. 13-14).

Based on the above events, Mr. Tate raised claims that he was denied his right to present a complete defense (Ground 1), that he received ineffective assistance of counsel (Ground 2), that there was insufficient evidence to support a first-degree assault conviction related to JB (Ground 3), and that his due process rights were violated by prosecutorial misconduct (Ground 4). Mr. Tate's claims were denied by an Order dated May 31, 2018.

REASONS FOR GRANTING THIS PETITION

I. The Eighth Circuit applied a heightened standard in denying a COA on Mr. Tate's claims.

Mr. Tate was required to secure a certificate of appealability as a prerequisite to his appeal of the District Court's dismissal of his habeas petition. See 28 U.S.C. § 2253(c)(1)(B). Under AEDPA, an application for a COA must demonstrate "a

substantial showing of the denial of a constitutional right." Id. at (b)(2). A COA must issue if either: (1) "jurists of reason could disagree with the district court's resolution of his constitutional claims" or (2) "that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Id. Where the petition has been denied for some procedural issue and the district court did not reach the merits in the petition, the COA should issue if the petitioner shows a valid claim of denial of constitutional rights and that jurists of reason would find it debatable whether the district court was correct in its procedural decision. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). A petitioner need not show "that the appeal will succeed." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). This Court has stated that, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

Grounds 1 and 4.

After review of Mr. Tate's claims, the Eighth Circuit concluded that no reasonable jurists would disagree with the district court's denial of Mr. Tate's petition, including Grounds 1 and 2, despite the existence of very similar cases in which relief was granted by other reasonable jurists.

In Ground 1 of his habeas petition, Mr. Tate asserted that he was denied his right to confront witnesses and present a complete defense because the court refused to allow him to present evidence about how Davis mislead investigators into not having information that might have led them to a different shooter. Ground 2

argued that his trial attorney was ineffective for failing to make a complete offer of proof related to the Reed and Davis violent armed home invasion.

Specifically, during postconviction proceedings, Mr. Tate made an offer of proof showing that four days before Annie Davis and Darnell Reed were shot at, they, along with another female and another male, entered the home of the mother of Reed's child with a knife and a gun, for the purpose of allowing Davis to fight one of the women in the home. Reed held a gun and warned the occupants of the home to stay away. When the occupants of the home reported the violent home invasion to police, officers learned that two male associates of the occupants of the home generally matched the description of the shooters recorded on video.

Mr. Tate attempted to present evidence of this at his trial, both to show others had a motive to harm Davis and Reed and to show that other possible suspects were not adequately investigated due to Reed and Davis obstructing the investigation. The state district court precluded Mr. Tate from presenting this evidence, even though the prosecution was permitted to present extensive evidence about altercations between Mr. Tate's wife and Davis as Mr. Tate's motive. The basis for the exclusion was the evidence did not meet the requirement for alternate perpetrator evidence. The exclusion of this evidence prevented Mr. Tate from presenting a complete defense and prejudiced him in a case where the witnesses against him made numerous conflicting statements about their ability to observe the shooter.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006), quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). It has been said that "The right of the accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). "[A] person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend." *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). This right to defend includes the right to compulsory process, the right to be informed of any and all evidence, including exculpatory evidence, the right to cross examine witnesses, the right to the assistance of counsel, and firmly established trial rights. *Herrera v. Collins*, 506 U.S. 390, 397 (1993).

In discussing the importance of a defendant's right to offer testimony of witnesses in his favor, the Supreme Court has stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Webb v. Texas, 409 U.S. 95, 98 (1972) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967). Unreasonable limitations placed on a defendant's ability to present a defense can be as basis for reversal. *See Odlen v. Kentucky*, 488 U.S. 227, 232 (1988) (state

court's refusal to allow defendant to cross-examine a witness about her motive to lie is unreasonable restriction on defense.)

The state district court precluded Mr. Tate from presenting evidence related to Davis and Reeds' violent armed home invasion on the basis that the evidence was alternate perpetrator evidence, and Mr. Tate could not put the victim of the violent armed home invasion at the scene of the crime. (T. 133; Addendum P. 185-87; Postconviction Order P. 10-12). These limitations on his cross-examination effectively prevented him from highlighting the possible biases of the government witnesses. *See Davis v. Alaska*, 415 U.S. 308, 317, 317-18 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."); *Delaware v. Van Arsdall*, 475 U.S. 673, 679-80 (1986); *Kyles v. Whitley*, 514 U.S. 419, 446 (1995) (failure to disclose evidence linking an individual named "Beanie" to the crime undermined the defendant's opportunity to raise a reasonable doubt by eliminating the "common trial tactic" of discrediting the caliber of investigation and decision to charge the defendant).

In initially bringing up the violent armed home invasion Davis had taken part in just days before the shooting, counsel for Mr. Tate stated:

> I guess the basis to offer it would be for impeachment purposes obviously because when -- initially when she was interviewed by the police she said there wouldn't be any person that would be involved in this. She didn't see why there would be a beef with anyone. And then the police do a little further investigating, find out that she was involved in these altercations. She was involved in other altercations with Mr. Tate's wife as well. So we would like to bring that in -- or ask her about that for impeachment purposes because when she was asked by the police she did talk about it and admit that she was involved in this altercation.

(T. 128-29). Just prior to Davis taking the stand, the district court heard argument regarding Mr. Tate's desire to ask Davis about the armed home invasion she had perpetrated just days before the shooting. In explaining why the evidence was admissible and why he should be allowed to question Davis about this, counsel for Mr. Tate stated:

> Mr. Lewis: Correct, Judge. But part of the defense theme will be that the witnesses themselves and the victims hindered the investigation. When an investigating officer who's spending time at the - - this is right at the scene and shortly thereafter, asks is there anyone else that you're beefing with that could have done this, any enemies, anybody that's hostile, and she says no, that curtailed the investigation right then and there until about a week later. So, I think it clearly goes to truthfulness –

(T. 335-36). In further explaining why he wanted to ask Davis about the home invasion, Mr. Tate's counsel stated "That's what it's come - - I'm not offering any of that for the truth of whether she did it. It's the fact that she wasn't forthright with the officer that asked her that." (T. 338).

When counsel attempted to cross examine Davis about the prior incident and whether she reported it to police, the prosecution asked to approach, and the district court stated "I'll sustain the objection." (T. 412).

In seeking postconviction relief, Mr. Tate's appellate counsel argued that the district court erred in considering the violent armed home invasion evidence solely through the lens of alternate perpetrator evidence, when the evidence was relevant and material to Tate's defense, even if he could not identify a specific alternate perpetrator, because the evidence he sought to introduce went toward his argument

that the case was not properly investigated because Davis withheld information. (Memorandum of Law in Support of Postconviction Relief P. 13; Doc Id. 33).

Counsel also argued that foreclosing the defense from presenting evidence Davis had been involved in a prior violent armed home invasion, where a gun and a knife were used in the presence of children, was improper because the prosecution was permitted to present extensive evidence about the purported problems between Davis and French, even though there was no proof that Mr. Tate was in involved in either altercation. (Memorandum of Law in Support of Postconviction Relief P. 13; Doc Id. 33).

The primary theme of Mr. Tate's case focused on Davis' lack of credibility and the fact that she actively hindered police investigation into the crime, at a time when it was most likely that police would find the true perpetrator, by misleading investigators about who might have a reason to harm her or retaliate against her. (T. 627; T. 630; T. 631; T. 633; T. 637, T. 639). Even if Mr. Tate was unable to meet the standard to present evidence and testimony regarding the violent armed home invasion as alternate perpetrator evidence, he still should have been allowed to question Davis, Reed, and Investigator Voss about that incident in an effort to show that the investigation that lead to his arrest was incomplete and had been actively thwarted by Davis herself from the very beginning. *See Alvarez v. Ercole*, 763 F.3d 223, 230-31 (2nd Cir. 2014); see also *Cudjo v. Ayers*, 698 F.3d 752 (9th Cir. 2012), *cert. denied sub nom. Chappell v. Cudjo*, 133 S.Ct. 2735 (2013) (A majority of the Ninth Circuit panel granted guilt-or-innocence phase relief in California capital

case, finding that the California Supreme Court's decision upholding the exclusion of critical defense evidence pointing to a different perpetrator was "contrary to" *Chambers v. Mississippi*, 410 U.S. 284 (1973), and that the error was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

Because Mr. Tate was precluded from doing this, his right to present a complete defense was denied.

The *Alvarez* case is instructive in showing how precluding Mr. Tate from presenting any evidence, or questioning witnesses, about the violent armed home invasion, resulted in the denial of Mr. Tate's right to present a complete defense.

Alvarez sought to question the lead detective regarding a report the detective had received that an individual named Vazquez had told officers that a longtime acquaintance named "Julio" told Vazquez that he (Julio) had taken care of a problem with a man who had argued with Julio's wife. *Alvarez v. Ercole*, 763 F.3d 223, 226-27 (2nd Cir. 2014). Vazquez also told the investigator that Julio drove a car similar to one witnesses saw at the scene and generally matched the description witnesses had given of the shooter. *Id.* Despite receiving this information, and a phone number and address for Julio from Vazquez, police officers did nothing to track down Julio. *Id.* When defense counsel received this information, he called the phone number, identified the individual as Julio Guerrero, and was able to learn that Julio drove a vehicle consistent with that witnesses reported being at the scene. *Id.*

Alvarez attempted to cross-examine the lead detective on the case about the report, asking the detective to explain why the Julio lead was never investigated. *Id.* at 228. Alvarez argued that he should be able to question the detective regarding the report because it was evidence of shoddy police work because officers did not attempt to track down Julio. *Id.* The state trial court excluded the evidence, preventing Alvarez from questioning detectives about it, holding that it was hearsay and also excluding it because the evidence did not establish a clear link between the potentially culpable third party and the charged crime. *Id.*

The habeas court granted his petition, holding that denying Alvarez's request to examine the detective regarding the Julio report was an unreasonable application of Supreme Court precedent interpreting the confrontation clause, and finding that the error prevented Alvarez from receiving a fair trial. *Id.* at 230. The Second Circuit Court of Appeals affirmed the habeas grant.

That Court first held that the Julio evidence was relevant and admissible for the purposes of allowing Alvarez to demonstrate that the NYPD had failed to take obvious preliminary steps to investigate leads that pointed to suspects other than Alvarez. *Id.* at 830. It went on to hold that precluding Alvarez from examining the detective regarding the evidence because of a lack of a "clear link" was erroneous because Alvarez was not presenting the evidence as third-party culpability evidence, but rather to show that obvious investigative steps were not conducted, which resulted in an incomplete investigation that prematurely concluded Alvarez was the guilty party. *Id.* It went on to note that the Julio evidence showing that

viable suspect was never investigated could have led the jury to seriously doubt the adequacy of the investigation. *Id.* at 231.

That these same considerations are present in this case is made clearer when it is understood that the prosecution exploited this ruling by arguing during closing that Davis Reed's initial reticence to assist investigators was the product of being from a different world. Mr. Tate was unable to counter that argument because he had been precluded from presenting evidence that Davis and Reed attempted to hide the existence of someone else with the motive to commit the crime to cover up their own involvement in a violent armed home invasion. In a reasonable doubt case, the idea that the jury being made aware of what Davis and Reed actually hid would have no impact is contrary to Supreme Court precedent on the issue. *See Kyles v. Whitley*, 514 U.S. 419, 446 (1995) ("When, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise the possibility of fraud, implications of conscientious police work will enhance probative force and slovenly work will diminish it.")

Given the factual similarities between the *Alvarez* case and Mr. Tate's case, and the fact that a Federal Judge in New York and Justices on the Second Circuit Court of Appeal all concluded that Mr. Alvarez was entitled to relief, it is at least debatable whether other reasonable jurists could disagree with this Court's ruling in this case. Therefore, Mr. Tate should have been granted a COA on Grounds 1 and 4.

Ground 2.

Ground 2 of Mr. Tate's petition was dismissed as lacking merit because it was reasonable for the jury to determine that the gunshot wound suffered by JB constituted "great bodily harm", even though "substantial bodily harm" specifically includes the "fracture of a bodily member" in its definition. (Report and Recommendation P. 14-15).

A defendant is guilty of first-degree where "great bodily harm" is inflicted. Minn. Stat. § 609.221, Subd. 1. A defendant is guilty of third-degree assault where "substantial bodily harm" is inflicted. Minn. Stat. § 609.223, Subd. 1.

"Substantial bodily harm" is defined as: "Bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member." Minn. Stat. § 609.02, Subd. 7a.

"Great bodily harm" is defined as: "Bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ other than serious bodily harm." Minn. Stat. § 609.02, Subd. 8.

The prosecution failed to prove that JB suffered great bodily harm as defined by the statute. Evidence regarding the nature and extent of J.B.'s injuries came from Davis' and Dr. Mark Ahrendt, the trauma surgeon who treated JB. Dr. Ahrendt treated JB in the ER, placing his leg in a splint. (T. 267). JB later saw an orthopedic surgeon and was discharged. (Id.) Dr. Ahrendt was not involved, but he

testified JB would have undergone a surgery where he was put to sleep and then his leg aligned and put in a cast. (Id.).

Nothing about JB's injuries created a "high probability of death … serious permanent disfigurement … or permanent or protracted loss or impairment of the function of any bodily member" necessary for a first-degree assault conviction. Although Davis testified that JB's leg was a bit crooked and had small marks from the shooting, that harm does not rise to the level of serious permanent disfigurement or protracted loss or impairment of function. *See State v. Gerald*, 486 N.W.2d 799, 802 (Minn.App. 1992) (holding two small scars did not constitute serious permanent disfigurement); *contrast State v. McDaniel*, 534 N.W.2d 290, 293 (Minn.App. 1995) (highly visible scars on neck and chest were serious permanent disfigurement).

Given that JB's injuries exactly fit the definitions of substantial bodily harm, but not great bodily harm, there was insufficient evidence to support the first-degree assault conviction, and the state court decisions concluding that the evidence was insufficient are an unreasonable determination of fact in light of the evidence presented. Therefore, Mr. Tate should have been granted a COA.

Ground 3.

Prosecutorial misconduct can rise to the level where it renders proceedings fundamentally unfair and denies the defendant the due process to which he is entitled under the 14th and 5th Amendments of the United States Constitution. *See Darden v. Wainwright*, 477 U.S. 168 (1986). "The relevant question is whether the

prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). Misconduct rises to the level of denying due process where it manipulates or misstates the evidence, or where it implicates "other specific rights of the accused such as the right to counsel or the right to remain silent." *Darden*, 477 U.S. at 182. It is also present where arguments involve race or ethnicity. *See e.g. McClesky v. Kemp*, 481 U.S. 279, 309 n. 30 (1987). Vouching for a witness can also violate due process. *Maurer v. Minnesota Department of Corrections*, 32 F.3d 1286, 1290-91 (8th Cir. 1994).

Mr. Tate argued that the prosecutor committed misconduct where she aligned herself with the jury early and often and where she made repeated arguments that the witnesses were from a different world than the jurors. (Addendum P. 61-63, Appellant's Brief P. 38-40).

This included telling the jury that:

- "[w]e may not quite understand the world that Annie Davis lives in, the world Darnell Reed lives in, where you wouldn't help the cops right away in an investigation so serious and so important. It might not be something that any of us here can grasp." (T. 610).
- "[a]gain, we're not in that world. We don't necessarily understand how Annie Davis looks at some altercation she had with Somer French a month ago and says, yeah, come on, let's go, and has a fight with her. We

> may not get that. Might not be the way we would handle things, but it was." (T. 610).

In discussing Darnell Reed, the prosecutor told the jury that he is from a "world of mistrust." (T. 611). Again adopting an "us versus them" approach, she said, "whether we agree with it or not, they don't trust the police." (T. 611). She maintained "[t]hat's the world that they're in … whether we understand it or not." (Id.)

To explain the fact that Reed and Davis did not identify Tate until a week after the incident, the prosecutor told the jury, "it's a world we don't necessarily always understand." (T. 614). She then acknowledged to the jury that she wished Reed and Davis would have cooperated right away and had no issues with chemical use, but that was "[j]ust not the world we're in." (T. 645).

In rebuttal, the prosecutor resumed her stance of unity with the jury. In noting the suspect had on white socks, she stated "we all probably have a few pairs of white socks." (T. 648). Another example appealed to the jury's passion and prejudices, by stating that "we all are" concerned about how Reed and Davis hindered the investigation by failing to cooperate. (T. 644). She went on to argue, "Not a single one of us has gone through this. Nobody here knows what it's like to see your child shot and injured in the leg and bleeding like that at the scene. There's not a single one of us who knows that because it would have come out in jury selection. We would have talked about that." (T. 644).

In his pro se supplemental brief, Mr. Tate also argued that the prosecutor had vouched for witness Willie Riley, by telling the jury he (Riley) was "not pulling any punches, he's not trying to lie or make himself look any better … Willie Riley is a darn good witness, and he was pretty candid with you and pretty straight forward." (T.615, 645).

That this argument, which appealed to racial and socioeconomic factors that are precluded under Minnesota law (see *State v. Ray*, 659 N.W.2d 736, 746 (Minn. 2003)), was misconduct, should be obvious. It was made using impermissible factors in an attempt to mislead the jury about Davis and Reed and to cover up for their lies. In a case where Mr. Tate was precluded from being able to show the jury the real reason Davis and Reed lied and mislead the investigation, which was to hide evidence of their involvement in a violent armed home invasion, this misconduct cannot be ignored.

Under these circumstances where the argument was clearly improper because of the appeal to race and where it was done mislead the jury, there was misconduct and prejudice sufficient to warrant reversal because of it.

CONCLUSION

For the reasons stated above, Mr. Tate respectfully requests that this Court grant this petition for cert. and allow him to have the merits of his claims addressed.

Respectfully submitted.

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