No. 19-6515

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ANDRE VERLIN ANDERSON - PETITIONER

VS.

VICKI JANSSEN, WARDEN - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ANDRE VERLIN ANDERSON
OID # 224372
MCF-LINO LAKES
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LINO LAKES, MN 55014
NO PHONE NUMBER AVAILABLE

QUESTIONS PRESENTED

QUESTION ONE:

Did the district court commit reversible error by denying Petitioner's motion to suppress the unduly suggestive photographic lineup?

QUESTION TWO:

Did the district court commit reversible error when it prohibited Petitioner's expert on eyewitness identification from testifying at trial?

QUESTION THREE:

Did the United States Court of Appeals for the Eighth Circuit commit reversible error in denying Petitioner's application for certificate of appealability?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinions of the *United States Eighth Circuit Court of Appeals* appear at **Appendix A** and **Appendix E** to the petition and are

[ ] reported at _____;or
[ ] has been designated for publication but is not yet reported; or
[X] unpublished.

The opinions of the *United States District Court for the District of Minnesota* appear at **Appendix B**, **Appendix C**, and **Appendix D** to the petition and are

[ ] reported at _____;or
[ ] has been designated for publication but is not yet reported; or
[X] unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court, *The Minnesota Supreme Court*, to review the merits appears at **Appendix F** to the petition and is

[ ] reported at _____;or
[ ] has been designated for publication but is not yet reported; or
[X] unpublished.

The opinion of the *Minnesota Court of Appeals* appears at **Appendix G** to the petition and is

[ ] reported at _____;or
[ ] has been designated for publication but is not yet reported; or
[X] unpublished.

JURISDICTION

[X] For cases from **federal court**:

The date on which the United States Court of Appeals decided my case was August 09, 2019.

[X] A timely petition for rehearing en banc and petition for rehearing by the panel was denied by the United States Eighth Circuit Court of Appeals on the following date: October 15, 2019, and a copy of the order denying rehearing appears at **Appendix E**.

The jurisdiction of this Court is invoked under **28 U.S.C. § 1254(1)**.

[ ] For cases from **state court**:

The date on which the highest state court, The Minnesota Supreme Court, decided my case was on June 20, 2017. A copy of that decision appears at **Appendix F**.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

QUESTION ONE:

Anderson is entitled to a new trial because the district court erroneously denied his motion to exclude the unduly suggestive pretrial photographic lineup evidence and its admission at trial violated his due process rights. The erroneous admission of the identification evidence was not harmless. The U.S. constitution guarantees all criminal defendants due process of law. **U.S. Constitution Amendment XIV**

QUESTION TWO:

The trial court deprived Anderson of his constitutional right to present a complete defense by prohibiting him from calling his expert witness on eyewitness identification. This error was not harmless beyond a reasonable doubt therefore Anderson's conviction must be reversed. A criminal defendant has a constitutional right to a fair trial by an impartial jury. **U.S. Constitutional Amendment VI**

QUESTION THREE:

Pursuant to Title 28, United States Code, Section 2254, a petitioner my not appeal a district court's adverse ruling unless the district court grants the party a certificate of appealability. **28 U.S.C. § 2253(c)(1)** A Certificate of Appealability may be issued only if the habeas petitioner "has made a substantial showing of the denial of a constitutional right." **28 U.S.C. § 2253(c)(2)** This standard requires a showing that "reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong." ***Slack v. McDaniel*, 529 U.S. 473, 484 (2000)** Anderson has made such a showing.

STATEMENT OF THE CASE

INITIAL COMPLAINT

Petitioner, Andre Verlin Anderson, was charged by complaint in St. Louis County District Court with aiding and abetting: 1) attempted second-degree murder, Minn. Sat. § 609.19, subd. 1(1) (2014); 2) first-degree assault, Minn. Sat. § 609.221, subd. 1 (2014); 3) second-degree arson, Minn. Sat. § 609.562 (2014); 4) first-degree aggravated robbery, Minn. Sat. § 609.245, subd. 1 (2014); and 5) theft of a motor vehicle, Minn. Sat. § 609.52, subd. 2(a)(1) (2014).

Before trial, the Honorable John DeSanto denied Anderson's request to suppress pretrial photo lineup identification evidence, and granted the state's request to exclude Anderson's expert witness on eyewitness identification. During the jury trial, the state dismissed the aggravated robbery charge and amended the arson charge to a third-degree. The jury acquitted Anderson of aiding and abetting arson in the third-degree, but convicted him of aiding and abetting attempted murder, first-degree assault, and theft of a motor vehicle. Judge DeSanto sentenced Anderson to 213 months in prison for attempted murder and a concurrent 30 months for motor vehicle theft.

DETAILS OF THE CASE

On the night of August 19, 2014, Chad Johnson, who was high on heroin, picked up his friend Steve Hager and a second man in West Duluth. CJ had never seen the second man before, and later there would be nothing in particular that stood out in his mind from this first meeting. The second man got into the back seat of CJ's truck, while Hager sat in the front passenger seat, and they began to drive. Then, CJ was told to pull

over to retrieve a cigarette package containing drugs left by the side of the road. There were no streetlights, and it was dark and foggy.

As CJ was looking for the drugs, the second man began stabbing CJ in his back. CJ was able to call 911, but never gave a description of his assailant to the dispatcher, to the responding officer, or to the investigating officer who later interviewed him at the hospital.

The next day, August 20, police showed CJ a photo lineup that included Petitioner, CJ did not identify anyone in the lineup.

On August 22, police presented another photo array to CJ. There were six photos, one of which was the Petitioner's booking photo taken upon his arrest on August 21st, 2014. Petitioner was the only person who appeared in both photo lineups shown to CJ. Police handed CJ the entire stack of pictures all at once and flipped through them. Without indicating any particular level of certainty, he circled the small number underneath Petitioner's picture. The officers, who showed CJ the August 22 photo lineup, were involved in the investigation, knew the Petitioner was the suspect, and which photo was his. They knew that this second lineup contained Petitioner's booking photo, and that CJ had not identified anyone in the first lineup. The police officers involved in the creation and presentation of the photo lineups had not received formal training on photo lineups, and the department had no written of formal policies on eyewitness identification procedures at the time.

After a contested omnibus hearing, the district court denied Petitioner's motion to suppress the eyewitness identification. Petitioner then noticed his intent to call an expert

witness on eyewitness identification, and proffered a report from Dr. Ralph Haber, detailing his experience, qualifications, and the specific procedural problems of CJ's identification. After a hearing, the district court granted the state's motion to exclude Dr. Haber's testimony.

Petitioner moved for reconsideration, and filed a supplemental report from Dr. Haber that addressed not just the specific facts and circumstances of CJ's identification, but also why scientific research shows these procedures to be unreliable, and why expert testimony would be useful to the jury. The court denied Petitioner's request for reconsideration, as well as his renewed motion during trial to allow Dr. Haber to testify, each time the court relying on *State v. Helterbridle*.

During trial, Hager testified that Petitioner was the person who attacked CJ. CJ did not identify Petitioner in court as his assailant. But, CJ and multiple officers testified about CJ's pretrial identification of Petitioner, and the jury saw the photo array itself; CJ's identification of Petitioner was thus the primary evidence used by the state to corroborate Hager's accomplice testimony. The jury found Petitioner guilty.

DIRECT APPEAL

On appeal, the court of appeals affirmed the district court's rulings admitting the photo lineup and excluding Dr. Haber's testimony, relying on the presence of the *Helterbridle* safeguards. Judges Ross and Rodenberg concurred specially, expressing their belief that under current Minnesota law, criminal defendants are prevented from adequately informing the jury about the limitations of eyewitness-identification testimony.

Anderson, then petitioned the Minnesota Supreme Court to review the decision of the Court of Appeals. Anderson also filed a Pro Se petition for review to the Minnesota Supreme Court. In addition, there was a petition of Peter N. Thompson seeking leave to file brief as amicus curiae and a petition from the Innocence Project of Minnesota, Minnesota Innocence Network, and Innocence Project, INC. for leave to participate as amici curiae. These were filed alongside Anderson's petitions to the Minnesota Supreme Court. On June 20th, 2017 the Court issued an Order denying review of Petitioner's request for review.

HABEAS CORPUS PETITION –FEDERAL DISTRICT COURT

Anderson then petitions the United States District Court for the District of Minnesota under 28 U.S.C. § 2254 seeking review and granting of writ of habeas corpus.

Upon initial review the district court, on August 9, 2018 issued a Report and Recommendation by United States Magistrate Judge Franklin L. Noel that recommended GRANTING Petitioner's writ of habeas corpus on ground two.

After this (R&R) was issued the Respondent objected on August 21, 2018. Petitioner then filed a response to R&R objections dated September 9, 2019. After review, the district court issued an "Order Rejecting Report and Recommendation and Denying Petition for Writ of Habeas Corpus" dated February 21, 2019. That order did not clarify whether or not Petitioner could appeal. Petitioner asserts his desire to appeal this adverse ruling by the Court. In an effort to seek clarity on this issue the Petitioner filed a "Motion for Clarification: Namely, Seeking a Ruling on Whether to Issue a Certificate of Appealability" on February 26, 2019. The district court issued an

additional unfavorable order on March 11, 2019 denying Petitioner's Motion for a Certificate of Appealability stating that this issue is not "debatable or wrong."

HABEAS CORPUS PETITION – FEDERAL COURT OF APPEALS

After the unfavorable ruling from district court the case moved to United States Court of Appeals for the Eighth Circuit. On March 20, 2019 the next document was filed with that Court which was entitled, "Petitioner's Notice of Appeal and Motion Requesting a Certificate of Appealability with the Eighth Circuit" filed by Robert Meyers and Kelly Nizzari, attorneys for the Appellant. Additionally, Appellant filed with the Court, *pro se*, on March 20, 2019 which was a document entitled, "Brief in Support of Application for Certificate of Appealability." On March 22, 2019 that Court issued an Order docketing the appeal giving it a case number of 19-1601. Lastly, on August 09, 2019 that Court issued a Judgement denying Appellant's application for certificate of appealability and dismissing his appeal.

Petitioner Anderson filed a "Petition for Rehearing En Banc" with the Eighth Circuit Court of Appeals on August 14, 2019. On October 15, 2019 the Eighth Circuit Court of Appeals denied the petition for rehearing en banc and the petition for rehearing by the panel.

PETITIONER NOW PETITIONS the Supreme Court of the United States for Writ of Certiorari for the ensuing reasons:

REASONS FOR GRANTING THE PETITION

Petitioner, Andre Verlin Anderson, is in state custody in violation of the constitution. The State court judgment is in violation of the United States Constitution, United States Supreme Court cases, and Federal law. Petitioner thus seeks to secure release from illegal custody by means of writ of habeas corpus. Petitioner rebuts the presumption of correctness of the State court's determination of factual issues as correct by clear and convincing evidence in all the documents filed herein. Petitioner contends that the State court's decisions are based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Petitioner requests this Court to review whether the State court decisions contradicted a holding of the United States Supreme Court or reached a different result on a set of facts materially indistinguishable from those at issue in a United States Supreme Court decision, or whether the State court unreasonably applied controlling United States Supreme Court precedent to the facts of Petitioner's case.

Petitioner further requests this Court to review whether the United States Court of Appeals for the Eighth Circuit reached a decision that is contradicted by a holding of the United States Supreme Court in not issuing a certificate of appealability from the United States District Court for the District of Minnesota in Petitioner's writ for habeas corpus.

Under the Antiterrorism and Effective Death Penalty Act of 1996, (AEDPA), *Pub. L. No. 104-132. 110 Stat. 1214* a federal court may not grant writ of habeas [corpus] to a petitioner in state custody with respect to any claim adjudicated on the merits in state court unless (1) the state court's decision "was contrary to, or involved an unreasonable

application of, clearly established Federal law, as determined by the Supreme Court." ... or (2) the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings." *Taylor v. Withrow, 288 F. 2d 846, 850 (6th Cir. 2002)* (quoting 28 U.S.C. § 2254 (d)).

A state-court decision is considered "contrary to ... clearly established Federal law" if it is "diametrically different, opposite in character or nature, or mutually opposed." *Williams v. Taylor, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389, (2000)* Alternatively, to be found an "unreasonable application of ... clearly established Federal law," the state court decision must be "objectively unreasonable," not simple erroneous or incorrect. *Id. At 409-11, 120 S. Ct 1495.* If a state-court decision meets either of these two "preconditions" for habeas relief – thereby establishing a constitutional error – the reviewing federal court must still determine whether the error is harmless within the meaning of *Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710, 123 Ed. 2d 353 (1993). Fry v. Pliler, 551 U.S. 112, 127 S. Ct. 2321, 2327-28, 168 L. Ed. 2d 16 (2007)* (noting the AEDPA "sets forth a precondition to grant habeas relief ..., not an entitlement to it," and "in §2254 proceedings a [federal] court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht*"). *Brecht* applies "whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman v. California, 386 U.S. 18, 24, 87 S Ct. 824, 17 L. Ed. 2d 705 (1967) Id. at 2328.*

The second line of analysis under AEDPA examines the findings of fact made by the state courts. AEDPA requires federal courts to accord a high degree of deference to such factual determinations unless clear and convincing evidence is offered to rebut this presumption. Petitioner rebuts the presumption of facts by the state court as correct.

Petitioner meets these requirements and respectfully asks this Court to review the following three questions:

QUESTION ONE

Did the district court commit reversible error by denying Petitioner's motion to suppress the unduly suggestive photographic lineup?

The identification of Anderson in a photo-lineup was impermissible suggestive and there was a substantial likelihood of misidentification; consequently, admission of this evidence violated Anderson's due process rights. When a constitutional error occurs at trial the conviction must be overturned because the error reasonably could have impacted upon the jury's decision.

Before trial, Anderson challenged Johnson's pretrial eyewitness identification. Contested omnibus hearings were held on March 18th, 2015 and April 9th, 2015. Judge DeSanto denied Anderson's motion, ruling that "the identification evidence was not unnecessarily suggestive and its admission would not violate due process". (Omnibus Order, 6/12/2015 Trial Doc# 52 at 508) Consequently, Johnson and various officers testified about his pretrial identification of Anderson, and the jury saw the photo array itself.

The district court erred. The pretrial eyewitness identification was unnecessarily suggestive, created a substantial likelihood of misidentification, and its admission violated due process of law. Because the state cannot show the verdict was surely

unattributable to the wrongfully admitted identification evidence, Anderson must have his conviction overturned.

A. Standard of review

The court reviews whether the admission of pretrial-identification evidence denied a defendant due-process rights.

B. Johnson's pretrial identification was unreliable and its admission violated due process.

The United States Constitution guarantees all criminal defendants due-process of law. U.S. Const. amend. XIV. The admission of pretrial identification evidence violates due process if the procedure "was so impermissible suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247 (1968)*

Also, the Constitution protects a defendant against a conviction based on evidence of questionable reliability. The lineup in question in this case was both impermissible suggestive and lacked elements of reliability. See *Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199; Foster v. California, 394 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401; Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401;* and *Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140.* These cases detail the approach used to determine whether due process requires suppression of eyewitness identification tainted by police arrangement and of questionable reliability.

First, due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary. *Biggers, 409 U.S., at*

198 93 S. Ct. 375. Due-process requires courts to assess on a case-by-case basis, whether improper police conduct created a "substantial likelihood of misidentification." "[R]eliability [of the eyewitness identification] is the linch pin" of the evaluation. *Brathwaite, 432 U.S., at 114, 97 S. Ct. 2243.* Where the "indicators of [a witness'] ability to make an accurate identification" are "outweighed by the corrupting effect" of law enforcement suggestion, the identification should be suppressed. Id., at *114, 116, 97 S. Ct. 2243.*

Over the past three decades more than two thousand studies related to eyewitness identification have been published. One state Supreme Court recently appointed a special master to conduct an exhaustive survey of the current state of the scientific evidence and concluded that "[t]he research ... is not only extensive," but "it represents the 'gold standard' in terms of the applicability if social science research to law.'" *State v. Henderson, 208 N.J. 208, 283, 24 A. 3d 872, 916 (2011)*

To assess reliability, courts must consider five factors adopted from *Neil v. Biggers:* (1) the "opportunity of the witness to view the criminal at the time of the crime"; (2) "the witness's degree of attention"; (3) "the accuracy of his prior description of the criminal"; (4) "the level of certainty demonstrated at the time of the confrontation"; and (5) "the time between the crime and confrontation" (citing *Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L. Ed. 2d 401, 411 (1972)*) Those factors are to be weighed against "the corrupting effect of the suggestive identification itself." Overall, the reliability determination is to be made from the totality of the circumstances.

To evaluate whether there is evidence of suggestiveness the court must consider the following:

1.) Blind Administration
2.) Pre-identification Instructions
3.) Line-up Construction
4.) Feedback
5.) Recording Confidence
6.) Multiple Viewings
7.) Show-ups
8.) Private Actors
9.) Other Identifications Made

When this non-exhaustive list is applied to the lineup in this case, there is actual proof of suggestiveness present. There are at least 7 out of the 9 factors present in this photo lineup to question its suggestiveness.

The next issue to consider in looking at the reliability of the identification and determining its admissibility, the Court must consider the following:

1.) Stress:
2.) Weapon Focus:
3.) Duration:
4.) Distance and Lighting:
5.) Witness Characteristics:
6.) Characteristic of Perpetrator:
7.) Memory Decay:
8.) Race-bias:
9.) Opportunity to view the criminal at the time of the crime:
10.) Degree of Attention:
11.) Accuracy of prior description of the criminal:
12.) Level of certainty demonstrated at the confrontation:
13.) The time between crime and the confrontation:

In assessing the reliability of this identification made by Johnson at least 10 out of the 13 variables are present to question the reliability. According to *State v. Henderson, 208 N.J. 208, 283, 27 A. 3d 872, 916 at 290-293 (2011),* if any of these 13 variables are

present in an identification there are reasons to question the reliability of that identification. See *Henderson* for a detailed approach the Court should take in weighing both suggestiveness and reliability of this photo lineup.

1. The Facts:

Officers from the St. Louis County Sheriff's Department showed Johnson two photo lineups. The first, prepared by Investigators Olson and Voltze and shown to Johnson on August 20th, 2014 by Investigator Olson, contained a 2011 photo of Anderson. Olson knew which photo was Anderson; she had, in fact, not heard of the term "double-blind procedure." Before presenting the lineup, police did not do anything to determine whether the photo of Anderson looked like the suspect as they had zero description of Johnson's assailant. And, police had not asked Johnson for, and therefore did not have, a description of his assailant's physical characteristics. Olson held the photos one at a time. Johnson did not identify anyone in the first photo lineup. According to St. Louis County's new policy #611 after a victim is shown a line up and fails to identify a suspect the first time, no further lineup should be shown of the same suspect to the victim, to prevent the risk of mug-shot exposure and a misidentification.

Police arrested Anderson late on the night of August 20th, 2014. Investigator Voltze, the main investigator on the case, created a second photo lineup, substituting Anderson's booking photo from August 20th, 2014 arrest for the 2011 photo used in the first lineup. This second photo lineup contained six photos – Anderson's booking photo obtained from St. Louis County Jail and five other photos obtained from the BCA's photo database based on characteristics entered by Voltze. Once again, none of the photos were

based on any physical description of the assailant and Johnson was not asked to give and did not give a description of his assailant before being shown the second lineup. This was error and deviated significantly from best practices.

Sgt. Donahue presented the second lineup to Johnson on August 22nd, 2014. A second officer, Sgt. Borchards, was present. Donahue handed the photos in to Johnson "as a stack". Johnson "paged through" each photo. At this point again according to policy #611 the lineup should have been over. The photos in the array should be looked at one at a time and either a yes or no recorded. Then the process is over. It is wrong to keep thumbing over the photos multiple times after an initial non-identification the first time. Then went back and looked at photo number two, Anderson's photo, and according to Donahue, "stated that was the person that stabbed him." He did not express any level of certainty. Donahue testified he did not try to influence Johnson as he showed him pictures though despite having a tape recorder with him, he did not record the identification process. At trial, Borchards and Donahue testimony of how this second photo lineup was administered at the hospital differs. The two officers contradicted each other on the stand in regards to how the lineup was presented to Johnson.

Borchards (and Donahue) were involved in the investigation, knew that Anderson was the suspect, and which photo was his, that this second lineup contained Anderson booking photo when arrested the day before for the stabbing, and that Johnson had not identified anyone in the first line up which contained Anderson's photo. Like Olson, Borchards had not heard the term double-blind.

While they received on-the-job training, none of the police officers involved in creation or presentation of the photo lineups had received formal training on photo lineups, and in August, 2014, *the St. Louis County Sheriff's Department had no written or formal policies on eyewitness identification procedures*. Anderson was the only person who appeared in both photo lineups shown to Johnson. Multiple viewings of the same suspect leads to misidentification.

2. The photo lineup was impermissibly suggestive.

Impermissibly suggestive photo lineups can occur when the defendant's image is unduly emphasized. *Simmons, 390 U.S. at 383, 88 S. Ct. at 971* (discouraging use of single photo or photos of several persons among which a single individual appears multiple times or whose image is emphasized)

The photo lineup procedure from which Johnson made his eyewitness identification was unnecessarily suggestive. First, Anderson's picture is dissimilar from the others, and is unduly emphasized. Anderson's face takes up the entire image, whereas the five other photos depict not just the person's face, but also their shoulders, neck, and upper torso. Anderson's shirt is not pictured at all, while the shirts of the other men are visible and clear. And, Anderson's photo bears a different quality; it is unquestionably blurrier, and lacks the clarity and sharpness of the other five photos. The district court, while ultimately finding that Anderson was not singled out, recognized these differences. (Omnibus Order agreeing that Anderson's photo is "different in regards to his shoulders and image quality") (Trial Document #53 at 5) Certainly, photos in a

photo lineup need not be identical. But Anderson's photo was so markedly different that, combined with the other problems, it rendered the lineup unduly suggestive.

Second, Johnson identified Anderson from the second photo array, after having failed to identify Anderson's picture in the first photo lineup. Thus, he had already seen Anderson's photo.

The third problem is that the police practices used in this case deviated significantly from best practices recognized to ensure reliability of eyewitness identifications. In this case, the double-blind procedure was not used. Officer Borchards, who presented the lineup to Johnson, was involved in the investigation and came to the hospital on August 22nd, 2014 armed with an array of information: he knew that Anderson was the suspect, he knew which photo was his, and he knew that Johnson had not identified anyone in the first lineup. The identification procedure was not recorded, even though police had a recorder with them which they started using immediately after the identification ended.

Incredibly, at the time of the identification, the Sheriff's Department had no formal or written policies in place to ensure reliable and, even unconsciously, tainted identifications. The importance of these practices is reflected in the fact that just ten days before the September 25th, 2015 hearing in this case on this issue, the St. Louis County Sheriff's Department had adopted a policy advising the use of these very safeguards during photo lineup creation and administration. (Hearing 9/24/2015) (Trial Exhibit #72) for the actual policy. The deviations from best practices in photo lineups, combined with other circumstances being laid out in this case, render the identification procedure used in

this case to be unnecessarily suggestive. If the newly adopted policy were to be applied to this lineup it would not pass the standard set in the policy and would be considered a non-identification.

3. The identification had no independent origins.

Moreover, there is no adequate independent origin for Johnson's identification that might, notwithstanding its suggestive nature, ensure its reliability. Johnson did not have a good opportunity to view his assailant, nor did he ever exhibit a high degree of attention on the suspect. The entire encounter occurred at night, under poor lighting conditions, and Johnson was high on heroin. Johnson admitted to "shooting-up" within the hour before he was attacked. The assailant sat in the back seat during the drive, and nothing ever drew Johnson's attention to the suspect. On Hicken Road, where there were no streetlights, Johnson was first searching through a ditch in the dark with his back to the suspect, then defending himself from the attack. While Johnson had his cell phone in his hand during the stabbing, his testimony makes clear that the light did not help him see.

The complete absence of the third factor, the accuracy of the witness's prior description of the suspect deeply undercuts any finding of independent reliability. Johnson never gave a description of the suspect's physical characteristics until after he made the identification on August 22nd, 2014. Even then, all he described was the picture he identified, not the person who attacked him. Again, this stands in stark contrast to other cases, where the witness's prior description buttressed the reliability of the identification.

Moreover, the state offered no evidence at the contested omnibus hearing relating to any specific degree of certainty about Johnson's identification. Significantly, Johnson did not identify Anderson in court as his assailant.

The final factor is the amount of time between the crime and the confrontation. Just hours after the attack took place Johnson was unable to identify a suspect in a photo lineup which contained Anderson's photo. Two days later when Johnson was shown a second photo lineup with Anderson's picture in it – after seeing him for the second time in a lineup – then and only then did Johnson make an identification of Anderson. This only happened after Johnson was allowed or encouraged to keep looking at the photos. He made no identification the first time through the pictures in the second lineup he was shown. Again, according to best practices and policy #611 the lineup is over at that point with no identification made. Prior to this lineup Johnson never gave a description of his assailant, and after his unrecorded identification Johnson never identified his assailant as being Anderson who was in court sitting at the defense's table. This is simple not a case where the circumstances demonstrate the reliability of Johnson's identification despite its suggestive nature.

The identification was impermissibly suggestive and there was a substantial likelihood of misidentification; consequently, admission of this evidence violated Anderson's due process rights.

When a constitutional error occurs at trial, a new trial is required unless the state can prove beyond a reasonable doubt that the verdict is surely unattributable to the error.

This was a case that was at its heart, about identity. (Prosecutor in opening statement describing issue for the jury as "who did this?") (Prosecutor during closing arguing, "we heard testimony that Chad Johnson and Steve Hager and another person, which is the crux of the issue, met sometime about 10:30 on August 19th, 2014 ... Again, the crux of the issue ...") Johnson's identification testimony was introduced through Johnson himself, his taped statement, physical exhibits, and multiple police officers. The prosecutor referred to the photo lineup and reliability of Johnson's identification extensively during closing argument. Importantly, the jury wanted to hear Johnson's taped statement during deliberations, which included questions and answers about the identification he had made.

Johnson's out-of-court eyewitness identification, moreover, was critical to the state's case because it corroborated parts of Hager's accomplice testimony that Anderson was the assailant. The importance of this evidence is clear from the record; for instance, arguing against Anderson's motion for Judgment of Acquittal, the state specifically relied on Johnson's eyewitness identification as corroborative evidence.

Further, Johnson did not identify Anderson in court as his attacker. Thus, the jury relied on the pretrial identification, which prosecutor admitted was discussed "ad naseum" during trial.

Finally, there was not overwhelming other evidence of Anderson's guilt. There was, for instance, no physical of forensic evidence. (Prosecutor admitting during closing argument, "I will admit that the lack of physical or forensic evidence in this case is frustrating") There was no motive, or confession. Under these circumstances, it cannot

be said that the verdict was surely unattributable to the wrongful admission of the pretrial eyewitness identification. This error is not harmless. Anderson is therefore entitled to have his conviction overturned.

QUESTION TWO

Did the district court commit reversible error when it prohibited Petitioner's expert on eyewitness identification from testifying at trial?

The trial court deprived Anderson of his constitutional right to present a complete defense by prohibiting him from calling his expert witness on eyewitness identification. This error was not harmless beyond a reasonable doubt; therefore Anderson's conviction must be reversed.

Both before and during trial, the district court precluded Anderson calling Dr. Ralph Haber, his proffered expert witness on eyewitness identification. The court seriously erred. Dr. Haber's testimony was highly relevant, helpful, and outside the experience and knowledge of the jury, and the exclusion of this evidence violated Anderson constitutional right to present a defense. Because the full damaging potential of Dr. Haber's testimony could have changed the result of the verdict, Anderson is entitled to have his conviction overturned and granted a new trial.

A. Standard of review

Evidentiary rulings are reviewed for abuse of discretion. The district court abused its discretion by refusing to allow defense expert witness to testify.

B. The district court's exclusion of Anderson's expert witness on eyewitness identification was error.

"[E]very criminal defendant has the right to be treated with fundamental fairness and 'afforded a meaningful opportunity to present a complete defense.'" *State v. Richards, 495 N.W. 2d 187, 191 (Minn. 1992) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984))*; U.S. Const. amends. VI and XIV; Minnesota Const. art. 1 § 7. This includes the opportunity to develop the defendant's version of the facts, so the jury may decide where the truth lies. *Richards, 495 N.W. 2d at 194.* Consequently, a criminal defendant has a right to call and examine witnesses, subject to the limitations imposed by the rules of evidence. *Id.* At 195.

Minnesota evidentiary rule 702 permits an expert to testify "in the form of an opinion" if the expert's specialized knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. "The basic consideration in admitting expert testimony under Rule 702 is the helpfulness test – that is, whether the testimony will assist the jury in resolving factual questions presented." *State v. Grecinger, 569 N.W. 2d at 195 (Minn. 1997)* (citations omitted). Expert testimony should add 'precision or depth to the jury's ability to reach conclusions[.]" *State v. DeShay, 669 N.W. 2d 878, 885 (2006)* (*citing State v. Helterbridle, 301 N.W. 2d 545, 547 (Minn. 1980)*).

1. The facts:

Before trial, Anderson noticed his intent to call Dr. Ralph Haber as an expert witness on eyewitness identification. (Trial Document #78, 79) The state moved to preclude the testimony, arguing that it would not be helpful. (Trial Document #80)

Anderson submitted a report from Dr. Haber, detailing his experience, qualifications, and the specific procedural problems of Johnson's identification. (Trial Document #82)

After a hearing on September 24th, 2015, the court issued a written order granting the state's motion to exclude Dr. Haber's testimony, finding that, "this Court believes a lay jury has the knowledge and experience to analyze the evidence regarding Chad Johnson's eyewitness identification, including the manner in which the lineups were conducted, to determine whether Johnson's identification is reliable – without the use of an expert." (Order 10/1/2015) (Trial Document #88 at 13, 4-14).

Anderson requested reconsideration of the order, and filed a supplemental report from Dr. Haber. (Trial Document #116, 117) Dr. Haber's supplemental report addressed not just the specific facts and circumstances of Johnson's identification, but also why scientific research shows these procedures to be unreliable, and why expert testimony would be useful to the jury. (Trial Document #117) The court denied Anderson's request for reconsideration, noting that Dr. Haber's supplemental report "did not change the facts as the Court considers the issue." The court did, however, allow the defense to renew its motion during trial, if the evidence so warranted.

After Sgt. Borchards testified, Anderson asked the court to reconsider its eyewitness identification expert testimony ruling. Noting that if the case "solely" concerned eyewitness identification, then it might allow Dr. Haber's testimony, the court denied the request. This was the wrong standard to apply whether or not an expert witness's testimony would be helpful and outside the knowledge of the lay jury in this case. Expert testimony does not hinge on the sufficiency of "other evidence" in the case.

2. Dr. Haber's expert testimony would have been helpful and added precision and depth to an area outside the jury's knowledge.

In Minnesota, "expert testimony relating to the accuracy of eyewitness identification may, in fact, be helpful to the jury" in some cases. *State v. Miles, 585 N.W. 2d 368, 372 (Minn. 1998) The* Minnesota Supreme Court has, in a series of cases, fleshed out when this may be so. In *Helterbridle*, the high court in Minnesota affirmed the lower court's decision to exclude eyewitness identification expert testimony, but acknowledged the importance of reliable eyewitness identification. *State v. Helterbridle, 301 N.W. 2d 545, 547 (Minn. 1980)* The court suggested that safeguards, other than expert testimony, could prevent convictions of innocent people based upon unreliable identification, such as the prosecutor's charging authority, suppression of unreliable identifications, effective cross-examination and argument, proper jury instructions, jury unanimity, and appellate review could prevent wrongful convictions. (*Id.*) Those safeguards failed in this case, especially in light of Ground Two of this petition, and in looking at the court's ruling in regards to Ground Three of this petition.

In this case, under these facts, the expert testimony would have been helpful, and the trial court abused its discretion. First, Dr. Haber's testimony, unlike the proposed testimony in *Mosley* and *Miles*, related to the reliability of a specific witness, and specific evidence, in his case. *State v. Mosley, 583 N.W. 2d 789, 800 (Minn. 2014)* ("Mosley's proffer was very general and nonspecific to his case...Notably, the proposed testimony did not go to the particular circumstances surrounding the daycare parent's perceptions" of the incident); *State v. Miles, 535 N.W. 2d 368, 371 (Minn. 1998)* ("there is nothing in

the record to suggest that expert testimony on the accuracy of eyewitness identification ion general would be particularly helpful to the jury in evaluation the specific eyewitness testimony introduced against appellant") As defense counsel argued, "Dr. Haber has produced a report with seven specific procedural problems that he has identified as part of these particular photo identifications that took place in this case." Thus, Haber's testimony would have been helpful to evaluate the reliability and accuracy of the specific eyewitness testimony introduced against Anderson.

Second, the eyewitness evidence was extremely important to the state's case. It was critical to corroborating Hager's testimony; unlike in Miles, there was no motive, forensic, physical or confessional evidence present. *Miles, 585 N.W. 2d at 371-372* (finding no abuse of discretion in part because the eyewitness identification was not overly important in light of the other evidence).

Third, the district court relied on the fact that the eyewitness identification was not the sole evidence against Anderson. That, however, is not the correct standard under rule 702 or 403; **nothing** in case law pins the admissibility of expert testimony on whether the subject matter of the testimony is the only issue in the case.

Fourth, the uniquely unreliable nature of eyewitness identification, and the leading role it plays in wrongful convictions, is now beyond dispute. *E.g., Perry v. New Hampshire, 132 S. Ct. 716 (2012)* (noting both "the importance [and the fallibility of eyewitness identifications" and that "the annuals of criminal law are rife with instance of mistaken identification."); *State v. Guilbert, 49 A. 3d 705, 720 (Conn. 2012)* (observing "widespread judicial recognition that eyewitness identifications are potentially unreliable

countering sincere but mistaken beliefs." *Guilbert, 306 Conn. 243; United States v. Bartlett, 567 F. 3d 901, 906 (7th Cir. 2009)* (rejecting argument that eyewitness identification expert testimony is unnecessary because cross-examination is sufficient to assess reliability, noting "The problem with eyewitness testimony is that witness who think they are identifying the wrongdoer – who are credible because they believe every word they utter on the stand – may be mistaken.") Further, while cross-examination "may expose the *existence* of factors that undermine the accuracy of eyewitness identifications, it cannot effectively educate the jury about the *importance* of these factors." Id. (emphasis in original) Thus, cross-examination cannot elucidate what an expert like Dr. Haber could – why the eyewitness identification is unreliable.

Similarly, counsel's closing argument is an "inadequate substitute for expert testimony" because absent evidentiary support, the jury rightly views it as mere partisan arguments of counsel. Id. See also *Forensic v. Birkett, 501 F. 3d 469, 482 (6th Cir. 2007)* ("The significance of the [expert] testimony cannot be overstated. Without it, the jury ha[s] no basis beyond defense counsel's word to suspect the inherent unreliability of the [eyewitness's] identification.") Accordingly, courts across the country are increasingly concluding:

> that the reliability of eyewitness identifications frequently is not a matter within the knowledge of an average juror and that the admission of expert testimony on the issue does not invade the province of the jury to determine what weight to give the evidence. Many of the factors affecting the reliability of eyewitness identifications are either unknown to the average juror or contrary to common assumptions, and expert testimony is an effective way to educate jurors about the risks of misidentification.

Guilbert, 306 Conn. 218, 251-252 (concluding that trial court abused its discretion by concluding that expert testimony on reliability of eyewitness identifications was matter of common knowledge and would be unhelpful); See also *People v. Lerma, 47 N.E. 3d 985, 993 (Ill. 2016)* (finding trial court abused its discretion in denying defendant's request to allow expert witness identification testimony); *Forensic, 501 F, 3d at 470* (affirming *grant of habeas corpus relief* based on denial of defendant's right to present a defense through expert testimony on eyewitness identification).

In short, Dr. Haber's testimony would have added precision and depth to an area on which lay jurors lack knowledge and experience. The district court abused its discretion, and consequently violated Anderson's right to fully present his defense.

C. Anderson is entitled to a new trial.

When the court's exclusion of evidence violates a defendant's constitutional right to present a defense, the defendant is entitled to a new trial unless the error was harmless beyond a reasonable doubt. *State v. Kelly, 435 N.W. 2d 807, 813 (Minn. 1989).* Evaluating whether the improper exclusion of defense-proffered evidence was harmless, the court asks "whether, assuming that the damaging potential of evidence was fully realized, a reviewing court might nonetheless say the error was harmless beyond a reasonable doubt." *State v. Pride, 528 N.W. 2d 862, 867 (Minn. 1995) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986))*

Here, the potential for expert testimony to damage the state's case was high. Had the jury heard from an expert about the vagaries of human memory, the intricacies of how people recall events, and the particular fallibilities of the photo lineup in this case, it

would have had an evidentiary basis for assessing the arguments that defense counsel made about the procedures and reliability of the identification; as a result, it could have discounted Johnson's identification testimony altogether, leaving a legally insufficient amount of corroborating evidence for Hager's testimony. As discussed in Ground Two, supra, the state's case was not strong, the lineup identification was a significant part of the case, and the jury focused on Johnson's statement during deliberations. Anderson's expert witness proffer was compelling, specific, and would have been helpful to the jury.

Therefore, assuming the damaging potential of a defendant expert testimony on eyewitness identification was fully realized, there is a very real change that the verdict would have been different. The error in excluding this testimony was not harmless, and Anderson is entitled to have his conviction overturned.

QUESTION THREE:

Did the United States Court of Appeals for the Eighth Circuit commit reversible error in denying Petitioner's application for certificate of appealability (COA)?

A COA is warranted for the issue of the impermissibly suggestive photographic-lineup and the denial of the expert witness on eyewitness identification which are grounds two and three of Petitioner's writ of habeas corpus. Petitioner meets the standard for such a COA to be issued by showing that a "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. at 484

In looking at the Report and Recommendation (R&R) the U.S. Magistrate Judge recognized the merit of constitutional claim in ground two of Petitioner's habeas corpus petition and thus recommended that the petition should be granted, the conviction overturned, and the sentence vacated. The magistrate judge correctly concluded that the

Minnesota Court of Appeals' decision to the contrary was an unreasonable application of clearly established federal law under § 2254(d)(1) and recommended that Mr. Anderson's conviction be vacated. The district court ultimately disagreed with the magistrate judge, rejected the R&R, and denied Mr. Anderson's writ of habeas corpus. This is a judicious showing that a reasonable jurist could debate this issue and argue that it should be decided differently contrary to the court's order dated February 26, 2019.

Subsequently, Mr. Anderson appealed that decision by the district court and the district court's later order denied his motion for a certificate of appealability (COA). He respectfully requested that the United States Court of Appeals for the Eighth Circuit issue a COA so that he may appeal the district court's adverse judgement. *See Cox v. Norris, 133 F. 3d 565, 569 (8th Cir. 1997)*

To grant a COA, a court must find that a habeas petitioner has made a "substantial showing of the denial of a federal constitutional right." *Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).* This showing is met when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id. at 484* (internal quotation marks omitted). When the magistrate and district court's opinions differ as to whether to issue habeas relief, a petitioner "has made the necessary showing... for a certificate of appealability to issue." *Lobholt v. Burt, 219 F. Supp. 2d 977, 1001 (N.D. Iowa 2002)* That is precisely what has occurred in the present case: the magistrate judge recommended that Mr. Anderson's petition be granted based on the photo-lineup issue and the district judge rejected this recommendation and denied the

petition. Because two reasonable jurists have in fact disagreed over how to resolve the petition, Mr. Anderson has exceeded the showing necessary to issue a COA: namely, that jurists of reason could debate the district court's decision to deny his petition. This Court should therefore issue a COA.

This Court should issue a COA so that the court of appeals can review the question whether the photographic lineup used to identify Mr. Anderson was impermissibly suggestive and resulted in an unreliable identification that violated his due process rights.

A. Legal standard for issuing a COA

In order to appeal the denial of his federal habeas petition, Mr. Anderson must obtain a certificate of appealability from a district or circuit judge. See U.S.C. § 2253(c). For a court to issue a COA "a habeas petitioner must make a substantial showing of the denial of a constitutional right." *Slack v. McDaniel 529 U.S. 473, 483-84 (2000)*; accord 28 U.S.C. § 2253(c); see also Fed. R. App. P. 22(b)(1). This showing is met if the habeas petitioner can show that "reasonable jurists **could debate** whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel, 529 U.S. at 484* (internal quotation marks omitted)(emphasis added). "The standard demands modesty; Courts must acknowledge when they have ruled on a difficult issue that deserve[s] encouragement to proceed further." *Sanders v. White, 2017 U.S.* Dist. LEXIS 74002 at *7(E.D. Ky., May 16, 2017)(quoting *Slack, 529 U.S. at 484*) (internal citation and quotation marks omitted).

Disagreement between the magistrate's R&R regarding habeas relief and the district court's ultimate order on the petition has been found to constitute "a substantial showing of the denial of a constitutional right" that merits issuing a COA.

Instead of recognizing that a reasonable jurist had already disagreed with its decision – a showing that exceeds the legal standard necessary to obtain a COA, which requires only that reasonable jurists *could debate* whether the petition should have been resolved differently – the district court concluded that "[i]n light of the well-established standard of review, as applied in the Court's February 21, 2019 Order, no reasonable jurist would find this Court's assessment of Anderson's constitutional claims to be either debatable or wrong." (DE 68) But the record belies this conclusion: because reasonable jurists have disagreed about whether to grant his petition, Mr. Anderson has exceeded the necessary showing that jurists of reason *could debate* the district court's decision to deny his petition. *See, e.g., Lomholt v. Burt, 219 F. Supp. 2d 977, 1001 (N.D. IOWA 2001)* ("The Court finds that [the petitioner] has made the necessary showing here for a certificate of appealability to issue in this case, not least because of the difference in opinion on the key issues between [the magistrate judge] and the [district court]"). As shown next, reasonable jurists could reach a different conclusion than the district court did here as to whether the photographic lineup used to identify Mr. Anderson violated his due-process rights because it was impermissible suggestive and resulted in an unreliable identification. This Court should therefore issue a COA and allow an appeal.

B. Mr. Anderson's due process rights were violated when the prosecution introduced an impermissible suggestive lineup that resulted in an unreasonable identification.

In *Stovall v. Denno, 388 U.S. 293 (1967)*, the Supreme Court made clear that the prosecution can violate a criminal defendant's due-process rights by introducing identification evidence at his or her trial which derives from impermissibly suggestive identification procedures. Refining this rule, the Supreme Court later pinpointed precisely when a defendant's due-process rights are violated: when the suggestive procedures result in the likelihood of misidentification. *Neil, 409 U.S. at 198.* So a two-part analysis is used in determining whether the constitution requires excluding the identification evidence. First, a court must decide whether an identification was in fact the product of an impermissibly suggestive procedure. *See Neil, 409 U.S. at 198-99.* If the answer to this first inquiry is yes, a court must then consider whether the resulting identification is nonetheless reliable enough to permit its introduction at trial, using the following factors: the witness's opportunity to view the suspect; the witness's degree of attention during the crime; the accuracy of the witness's description before the identification; the witness's level of certainty about the identification; and the length of time elapsed between the crime and the confrontation. *Id. at 199-200.* See argument for question two for more details in regards to this line-up.

The Minnesota Court of Appeals found that sufficient safeguards were employed to ensure that the identification procedures were not unduly suggestive and that even if they were impermissibly suggestive, the identification was nonetheless reliable under the circumstances. As the magistrate judge found, both conclusions amounted to "an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(2), because the lineup

procedures carried "a very substantial likelihood or irreparable misidentification" and that "[v]ery little about Johnson's pretrial identification of Anderson gives reason to believe that the identification was reliable." (DE 59 at 23-26.) Both criteria under *Neil* are met here; certainly the matter is fairly debatable such that a COA is appropriate and necessary. This eight-page photographic lineup can be found in color at Docket Entry (DE) 46-3.

CONCLUSION

Petitioner, Andre Verlin Anderson, respectfully requests that this Court review his case and answer the three questions in this petition which are of national importance and have implications not only across the state of Minnesota but across the country. Petitioner has vehemently argued the errors committed by the St. Louis County District Court by all means available. After these unproductive attempts the Eighth Circuit Court of Appeals further erred in denying Petitioner the opportunity to appeal the adverse ruling in light the United States District Court for the District of Minnesota decision being highly debatable. It is imperative that this Court review these questions. The petition for a writ of certiorari should be granted.

Respectfully submitted,

October 15, 2019
Date

Andre V. Anderson
Signature of Petitioner

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