No. _____

In The Supreme Court of the United States

Lamar James Crump, Petitioner

v.

Kathy Halvorson, 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 *Crump v. Halvorson*, No. 19-2912, denying the request for a certificate of appealability (Appendix A) is unreported. The Order of the United States District Court, *Crump v. Halvorson*, 18-1334 (MJD/ECW) (July 30, 2019), appears at Appendix B. The Report and Recommendation of the Magistrate Judge appears at Appendix C. Mr. Crump had an appeal to the Minnesota Court of Appeals, *State v. Crump*, A15-1690 (Minn.App. November 21, 2016). This opinion appears at Appendix D. Mr. Crump petitioned the Minnesota Supreme Court for review. This was denied by an Order, which appears at Appendix E. Judgment was entered by the Minnesota Supreme Court on February 15, 2017. See Appendix F.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered on October 31, 2019. (Appendix A). 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 Lamar Crump 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. Crump's conviction on appeal. See Appendix D.

Mr. Crump'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. Crump's timely filed Application for Certificate of Appealability was denied by the Eighth Circuit Court of Appeals on November 27, 2018. (Appendix A).

At approximately 6:20 a.m. on June 26, 2014, emergency responders were dispatched to an apartment in South St. Paul following a 911 call concerning a possible cardiac arrest of a 15-month-old male. (T. 65, 66, 73, 74, 215). Upon arriving at the apartment building, paramedics went to the apartment of Melissa Fercho and her mother, Jan Williams. (T. 73, 179). They found 15-month old RH laying on the living room floor. (T. 75, 216). He was breathing, but listless and unresponsive to any stimulus. (T. 66, 75, 77). At one point while being evaluated, he appeared to have a seizure. (T. 67, 77). Also present in the apartment were Fercho and Petitioner, Lamar Crump. (T. 67, 78). Petitioner was on the phone with RH's mother, Rebekah Sabin. (T. 188, 217). According to Sabin, Mr. Crump was "freaking out" and not making any sense. (T. 101, 140). He told Sabin RH was unresponsive and having seizures, so the paramedics were taking him to the hospital. (T. 101). Sabin was aware that RH's father and his family had a history of seizures. (T. 112). So, she initially thought RH's condition might be related to that. (T. 112).

RH was transported by ambulance to the hospital where it was determined he had a subdermal hematoma, which is considered a life-threatening neurosurgical emergency, requiring immediate surgery. (T. 79, 268, 301, 302). Although surgery successfully reduced the pressure in RH's skull, the injury caused permanent brain damage. (T. 278-79, 282, 307). Given the severity of the injury, it was estimated that it occurred sometime after midnight on June 26th, which would be within approximately seven (7) hours of arriving at the hospital. (T. 327).

In addition to the subdural hematoma, other injuries were also detected, including a lacerated liver, bruises all over his body, and a lump on his forehead. (T. 273, 319, 350). Several of RH's doctor testified. None of them could say with absolute certainty what caused the subdural hematoma or the injury to the liver, but they all surmised that it most likely resulted from a forceful impact to RH's head and abdomen. (T. 271, 308, 317, 351-52, 353). While none of them completely ruled out the possibility of the injuries being the result of a household accident, they considered the scenario to be highly unlikely. (T. 271, 274, 292, 351, 352).

Because these injuries were suspicious for child abuse, a police investigation was conducted. (T. 221, 270, 348). Interviews with Sabin, Williams, Fercho, and Crump were largely consistent as to background information. Sabin and Fercho were best friends since childhood and Sabin considered Fercho and Williams to be family. (T. 83, 151, 179). They all lived in the same apartment building. (T. 149, 179). Williams and Fercho lived in apartment 17 on the third floor. (T. 88, 149, 179). Sabin lived in apartment 9 on the second floor. (T. 85-86, 153). Prior to

moving into her apartment, Sabin had lived with Williams. (T. 84, 152, 180). This included the time during which she was pregnant with RH and for a short period following his birth. (T. 84, 152, 180, 181). Williams had helped Sabin care for RH and continued to do so even after Sabin moved into her own apartment. (T. 85, 154).

Sabin worked the nightshift at Super America from 9:00 p.m. to 4:00 a.m. (T. 85, 152). She would take RH to Williams' apartment around 8:30 on the evenings she worked. (T. 91, 152). Then she would pick him up by 5:00 a.m. the following morning so that Williams could leave for her job at a hotel in Edina. (T. 85, 151). In July 2014, Sabin's hours were extended to 6:00 a.m. (T. 92, 155). After this, Sabin made arrangements to have Williams bring RH to her apartment, where Petitioner would take care of RH until Sabin returned home. (T. 92, 155). Sabin and Crump had been dating for about four months. (T. 90). This plan was executed successfully a handful of times before RH was injured. (T. 93, 155).

June 25, 2015, was no different. Sabin took RH to Williams' apartment around 8:30 p.m. and went to work. (T. 96, 155). RH was a bit fussy when Sabin dropped him off, but after he started playing with Williams' six-year-old grandson, he seemed fine. (T. 96, 160-61). According to Williams, RH ate dinner around 9:00 p.m. and then went to bed between 10:00 and 10:30 p.m. (T. 161).

Fercho, who had been out with friends, returned home between midnight and 1:00 a.m. (T. 183). She heard RH "scuffle a little bit" in his crib while she was getting ready for bed. (T. 183, 190). She gave him his pacifier and he went back to

sleep. (T. 183). Then, around 3:30 a.m., RH began crying and Williams gave him some juice and his pacifier and he went back to sleep. (T. 162).

Petitioner arrived at Sabin's apartment a little before 5:00 a.m. on the 26th. (Ct. Ex. 80A at 2). He had been out all night, which irritated Sabin. (T. 141. Ct. Ex. 17A at 16-17; Ct. Ex. 80A at 2). Williams arrived at Sabin's apartment with RH a little after 5:00 a.m. (T. 163). Williams testified RH was asleep and "perfectly fine" when she left him with Crump, who was on the phone with Sabin when she arrived. (T. 99, 163, 170).

For Mr. Crump's part, he had very little contact with RH for the hour he was with him. (Ct. Ex. 80A at 3-4, 19). He was on the phone with Sabin when Williams arrived. (T. 163, Ct. Ex. 17A at 8, Ct. Ex. 80A at 2). Crump told police that RH seemed perfectly fine when he arrived. (Ct. Ex. 80A at 19). Crump took a shower and a short nap while waiting to pick Sabin up from work. (Ct. Ex. 17A at 8; Ct. Ex. 80A at 3, 16). When he went to lift RH out of his crib, RH was still asleep. (Ct. Ex. 80A at 3). When he took RH to the car, Petitioner became alarmed when RH was seemingly unable to hold his head upright and his eyes rolled back in his head. (T. 113, Ct. Ex. 17A at 8-9, 11, 12; Ct. Ex. 80A at 4). So, he carried RH to Fercho's apartment and banged on the door. (T. 184; Ct. Ex. 17A at 9; Ct. Ex. 80A at 4). When Fercho answered the door, Petitioner was visibly upset and distressed over RH's condition. (T. 185, 191, 411). Fercho placed RH on the living room floor and called 911. (T. 185, 186).

Sabin, Fercho, and Williams all testified they had observed Petitioner with RH from time to time and believed that he treated RH well and cared for him. (T. 142, 143, 172, 196, 411). Mr. Crump had never been seen to lose his temper while in RH's presence. (T. 172).

Also interviewed were three (3) of Sabin's neighbors. They all reported that on the morning of June 26th, during the same time that Crump was with RH, they heard a loud sound, like a thump or a banging, coming from Sabin's apartment. (T. 421, 426, 434). One neighbor said that he heard a high-pitched scream that sounded like a child. (T. 434).

In addition to the interviews, police executed a search warrant at Sabin's apartment and found that the shirt RH had been wearing when Sabin dropped him off with Williams had been stretched out and thrown into the corner of the bedroom. (T. 115, 119, 120). Both Petitioner and Williams, however, denied that they had changed RH's clothes. (T. 164, Ct. Ex. 80A at 8). They also found a stuffed toy that was later shown to have RH's vomit on it. (T. 482-84). Sabin, however, denied that the vomit had been on the toy when she left for work and that RH had been sick or vomiting lately. (T. 124). Crump also denied that RH had vomited while in his care that morning. (Ct. Ex. 80A at 11-12). It was also discovered that the shirt he had been wearing had RH's blood on it. (T. 486).

On June 27, 2014, Petitioner was charged with first-degree assault. He pleaded not guilty and proceeded to a trial by jury. During closing arguments, while the court and counsel were preparing jury instructions, defense counsel

commented that he was not challenging the fact that great bodily harm occurred. (T. 451). When the court questioned counsel about whether Petitioner was stipulating to that element, defense counsel responded, "In terms of formality, I'm not going to stipulate to it, but I – I believe there's enough evidence present." (T. 461). The court cautioned defense counsel that if he was going to admit during closing argument that great bodily harm occurred, along with any other elements, then Petitioner would need to waive his right to a jury determination on those elements. (T. 461-62). A break was taken so that counsel could consult with Petitioner. (T. 463, 466).

When court reconvened, a record was made that Petitioner understood that in his defense counsel's closing argument, he was likely to reference the fact that great bodily harm had occurred. (T. 466-71). There was no record concerning counsel's admission to any other element. But, within the first few sentences of defense counsel's closing argument, he stated:

> The State is required to prove each and every element of this offense. And we sit her, in your case, and as I stand here today, we still don't know exactly or even close to exactly what happened to [RH]. Something. Something non-accidental. That's as close as we get.

(T. 517).

Counsel continued to tell the jury another five times that the one certainty about this case is that RH's injuries were no caused accidentally. (T. 529-30, 534). Petitioner was found guilty of first-degree assault. A *Blakely* hearing followed where the jury found that (1) RH was 15 months old at the time of the assault, (2) that Petitioner knew or should have known that due to RH's age, he could not

defend himself, (3) that Petitioner knew or should have known that due to RH's age, he could not call for help during the assault, (4) the Petitioner knew or should have known that RH was unable to escape from the assault, and (5) Petitioner had been entrusted to care for RH by his mother. (BH. 12-13).

Based on the admissions made by his trial counsel, Mr. Crump filed a petition for writ of habeas corpus arguing that he was denied his right to the effective assistance of counsel and to have every element of the charges against him decided by a jury when trial counsel repeatedly admitted an element of the first-degree assault charges to the jury without his consent or acquiescence. Mr. Crump's claims were denied on their merits, based on the conclusion that his trial counsel did not admit an element of the crime to the jury and because Mr. Crump was challenging a jury instruction that was based on state law.

REASONS FOR GRANTING THIS PETITION

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

Mr. Crump 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. 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.

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

A. Mr. Crump has a clearly established constitutional right to have a jury, and not his trial counsel, decide his guilt.

The Sixth Amendment guarantees the accused in a criminal proceeding the right to have the "Assistance of Counsel for his defence." U.S. Const. Amend. VI. "It does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Id.* at 819-20. The right of a defendant to decide whether to admit guilt or hold the prosecution to its burden of proof on each element is also guaranteed by the Sixth Amendment. *In re Winship*, 397 U.S. 358, 364 (1970); *State v. Hinton*, 702 N.W.2d 278, 281 (Minn.App. 2005). Even when represented by counsel, the accused retains "the ultimate authority to make certain fundamental decisions regarding the case," including "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). When counsel admits a defendant's guilt, that

error is a structural error subject to reversal. *Neder v United States*, 527 U.S. 1, 7 (1999); *McCoy v. Louisiana*, 584 U.S. ___ 2018) P. 11 ("Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review."); *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003).

B. Counsel conceded RH was assaulted.

During closing argument, Mr. Crump's counsel conceded that two of the elements had been proven. He conceded that great bodily harm had been proven and that the injuries were not caused accidentally, which, by definition, means they were intentional. 10 Min. Prac., Jury Instr. Guides – Criminal, CRIM JIG 13.01; (T. 517, 529, 530, 534).

Within the first minute of counsel's closing argument, he stated:

> The State is required to prove each and every element of this offense. And we sit here, in your case, and as I stand here today, we still don't know exactly or even close to exactly what happened to RH. Something. Something non-accidental. That's as close as we get.

(T. 517). Counsel then went on to state, as approved by Mr. Crump:

> [Y]ou didn't hear any evidence regarding the extent of [RH's] injuries being in dispute. Does that fit great bodily harm? Sure.

(T. 517). Counsel then went on to state another five (5) times that the only certainty in the case was that RH's injuries were not caused accidentally:

> We know the injuries were **not likely accidental**. That's what we know. But what is the thing that Mr. Crump supposedly did? You're left to guess. Use your imagination. Understandably, there aren't always definitive explanations for injuries, but you really weren't given any. Didn't fall off the chair. Okay. Well, we've got that figured out. He didn't fall off the chair. Is this consistent with a kicking injury?

> Punching? Was there some object of some kind used? Nobody even came close to offering some explanation. **It was just not accidental.** That's what you're left with. **It's not accidental.** We don't know how. We don't know why. **But it's not accidental.** So, apparently, it's Mr. Crump's problem.

(T. 529-30) (emphasis added). Later, in closing, defense counsel again conceded this issue when he stated:

> I don't know that, because no one has bothered to tell me what these injuries were caused by, or even close to what might have caused these. **It's just not accidental.** That's all we know.

(T. 534) (emphasis added).

These statements must be considered in light of both the instructions given to the jury and the arguments made by the prosecution. Below are the instructions given to the jury on the first-degree assault charge:

> The State must convince you by evidence beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant has no obligation to prove innocence. The defendant has the right not to testify. This right is guaranteed by the federal and state constitutions. You should not draw any inference from the fact that the defendant has not testified in this case.
>
> Intentionally Defined. Intentionally means that the actor either has a purpose to do the thing or cause the results specified or believes that the act performed by the actor, if successful, will cause the result. In addition, the actor must have knowledge of those facts that are necessary to make the actor's conduct criminal and that are set forth after the word intentionally.
>
> Assault Defined. The statutes of Minnesota provide that whoever does an act with intent to cause fear in another person of immediate bodily harm or death or intentionally inflicts or attempts to inflict bodily harm upon another is guilty of a crime.
>
> Bodily harm means physical pain or injury, illness, or any impairment of a person's physical condition.

> Assault in the First Degree. Assault with Great Bodily Harm Defined. The statutes of Minnesota provide that whoever assaults another person and inflicts great bodily harm is guilty of a crime.
>
> Assault in the first degree. Assault with Great Bodily Harm Elements. The elements of assault in the first degree are, first, the defendant assaulted [RH]. An assault is the intentional infliction of bodily harm upon another.
>
> Second, the defendant inflicted great bodily harm upon [RH]. Great bodily harm means bodily harm that creates a high probability of death, causes serious permanent disfigurement, or causes a permanent or protracted loss or impairment of the function of any part of the body or other serious bodily harm.
>
> It is not necessary for the State to prove that the defendant intended to inflict great bodily harm, but only that the defendant intended to commit assault.
>
> Third, that the defendant's act took place on June 26, 2014, in Dakota County.

(T. 500-01). In argument immediately following these instructions, the prosecution argued:

> Now, the next element, that he intentionally assaulted [RH] and that it resulted in great bodily harm.
>
> Again, just understand the State does not have to prove that he intended great bodily harm. He had to have intended an assault. An assault can include just pain or any harm. If that results in great bodily harm, that's when it's first degree assault.

(T. 515).

Under these circumstances, the repeated references to RH's injuries being non-accidental is the direct equivalent of saying that RH was assaulted. Assault was defined as "an act with the intent to cause fear in another person of bodily harm, *or intentionally inflicts or attempts to inflict bodily harm*." (T. 500-01,

quoting CRIM JIG 13.01) (emphasis added). If RH's injuries, and the fact that those injuries were not caused accidentally, are conceded, then they had to be caused intentionally

There are two (2) things that Mr. Crump could contest related to the first element of the assault charge, that RH was assaulted, and that he did it. By telling the jury that RH's injuries were non-accidental, Mr. Crump's counsel took the question of whether RH was assaulted from the jury, leaving for the jury only the question of whether or not it was Mr. Crump who caused RH's non-accidental injuries.

A statement, made by the prosecution when discussing counsel's plan to admit great bodily harm existed accurately sums up why Mr. Crump should be granted relief in this matter. In expressing concern that Mr. Crump, and not his counsel, had to make the decision of whether to admit any element of the charges against him, the prosecutor stated:

> Judge, I guess I'm – I'm still a little bit concerned. And maybe there could just be a clarification of what Mr. Miller meant when he said, I will be arguing no opposition to great bodily harm. I still don't know if he means he will be affirmatively arguing that they're no opposing that idea, or if he simply means we won't be argument against it; in other words, the lack of argument, which I think are two distinct differences. **And regardless of which way it goes, if he's going to making statements that appear to agree that that element has been met, I think we need to have some further conversations about the right to a jury on that issue.**

(T. 468) (emphasis added).

The prosecution's worry regarding the concession of the great bodily harm element was exactly what happened with counsel repeatedly stating that RH's

injuries were non-accidental. Counsel made arguments that agreed that an element of the crime, in this case, that the injuries were caused intentionally, was satisfied based on the prosecution evidence presented. There is nothing in the record to give any indication that Mr. Crump agreed with that, because he was never asked about it.

It is appropriate for a defendant to be granted relief under these circumstances where an element of the crime is admitted by counsel. *See Francis v. Spraggins*, 720 F.2d 1190, 1194 (11th Cir. 1983) (In this death penalty case, Eleventh Circuit upheld grant of habeas relief, where, even though the client had entered not guilty plea, during closing counsel told the jury he believed his client was guilty and should get life in prison. In affirming, that Court held that counsel may not concede guilt even in the face of strong evidence because it nullifies the client's right to have a jury decide guilt or innocence.); *U.S. v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991) ("A lawyer who informs the jury that it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to "subject the prosecution's case to meaningful adversarial testing."); *Christian v. State*, 712 N.E.2d 4, 7 (Ind.App. 1999) (Counsel admitted penetration had occurred in a criminal sexual conduct case despite client's testimony it had not occurred, with the court holding that "Counsel's performance resulted in a breakdown of the adversarial process that rendered the resulting convictions fundamentally unfair and unreliable.").

The statements made by counsel at Mr. Crump's trial are particularly troubling when the jury is then invited by counsel to speculate whether RH was kicked, or punched, or hit with an object. It was Mr. Crump who pled not guilty and had the right to have a jury, not his attorney, decide whether the prosecution had proven beyond a reasonable doubt every element of the charged offense. Counsel deprived Mr. Crump of that right when he, without Mr. Crump's consent, conceded that RH had been assaulted. *See United States v. Chronic*, 466 U.S. 648, 656, n. 19 (1984) ("[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt.").

Where Mr. Crump wished to put the prosecution to its burden on all elements except for great bodily harm, and where the prosecution's medical experts were unwilling to rule out an accidental injury, it was Mr. Crump, who would face the consequences of a guilty verdict, who should have been making the determination of what he wanted to admit the prosecution had proven. He was not allowed that opportunity in this case.

Given that there are many cases in which a defendant has obtained relief when counsel admitted an element of a crime, it is at least debatable whether other reasonable jurists could disagree with this Court's ruling in this case. Therefore, Mr. Crump should have been granted a COA to further pursue his claims.

CONCLUSION

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

Respectfully submitted.

Dated: January 24, 2020

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