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In The Supreme Court of the United States

Keith Henderson, Petitioner

vs.

State of Minnesota, Respondent.

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

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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OPINIONS BELOW

The Eighth Circuit Judgment in *Henderson v. Miles*, No. 19-3165 denying the request for a certificate of appealability (Appendix A) is unreported. The Order of the United States District Court, *Henderson v. Miles*, 18-2828(MJD/BRT) (D.Minn. 8/29/19), appears at Appendix B. The Report and Recommendation of Magistrate Judge Thorson appears at Appendix C. Mr. Henderson had an appeal to the Minnesota Supreme Court, *Henderson v. State*, 906 N.W.2d 501 (Minn. 2018). This opinion appears at Appendix D.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered on February 18, 2020. (Appendix A). Pursuant to an Order issued on March 19, 2020, the deadline for filing a petition for a writ of certiorari was extended to 150 days. 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.

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 E).

STATEMENT OF THE CASE

Petitioner Keith Henderson 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 Supreme Court denied Mr. Henderson's petition for postconviction relief. See Appendix D. Mr. Henderson'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. Henderson's timely filed Application for Certificate of Appealability was denied by the Eighth Circuit Court of Appeals on February 18, 2020. (Appendix A).

Mr. Henderson was charged with first-degree murder and crime committed for the benefit of a gang related to a shooting which took place in Minneapolis on August 7, 1998. He was tried in the State of Minnesota, County of Hennepin, Fourth Judicial District, with the Honorable Thorwald H. Anderson presiding. After a jury trial, on March 25, 1999, Mr. Henderson was convicted of both counts. On April 22, 1999, Mr. Henderson was sentenced to life in prison on the first-degree murder and five (5) years to run consecutive on the crime committed for the benefit of a gang conviction.

Around 11:00 a.m. on August 7, 1998, Juwan Gatlin, known as Wheaty, was shot in an alley near Logan Avenue North in North Minneapolis. (T. 1945). Gatlin was shot between thirteen and fifteen times. (T. 1977). Eleven shell casing were found near his body. (T. 1956). Forensic testing purportedly showed that all eleven shell casings were fired from the same .40 Smith & Wesson handgun. (T. 2109). The gun that fired the shots was not found. (T. 1957).

Juwain Gatlin was a member of a street gang known as the Mickey Cobras. (T. 1981, 1993). Gatlin was murdered because he provided information to the police about the murder of Tony Dawson, a previously unsolved homicide in Minneapolis. (T. 1993, 2223, 3194). As a result of information provided by Gatlin, Arthur Hurd

and Mitchell Douglas were arrested, indicted, and convicted of murdering Tony Dawson. (T. 2001). In exchange for the information he offered, Gatlin received a probationary sentence from the Hennepin County Attorney's Office on a robbery charge that would have otherwise carried with it a prison sentence. (T. 1995-96).

While Hurd was in the Carver County Jail on the murder charge, he mailed a copy of Gatlin's transcribed question and answer statement to Andrew Neal. Attached to the statement was a letter stating that "something needs to get taken care of." (T. 2496-97). When Neal received the statement, he delivered it to Donald Carter, also known as Rock. (T. 2493-95, 3028). Donald Carter was the "Don of Dons" of the Mickey Cobras gang and had the authority to order "hits." (T. 2199, 2232, 3195). According to Herbert Williams, Rock had to authorize a hit, but snitching like Gatlin did would be cause for a hit. (T. 2232-34).

THE STATE'S CASE

Sergeants Mark Lenzen and Michael Carlson were the chief investigators on the case. (T. 1992). Those same two (2) men were also the investigators on the murder of Tony Dawson and Steven Stinson. (T. 1993, 2033-34, 3055). In early June 1997, they received a call from Gatlin. (T. 1993). Carlson met with Gatlin at the jail on June 9th or 10th. (1997). Gatlin was in the jail on charges of robbery and wanted Carlson to take care of his robbery charges in exchange for information about the Dawson murder. (T. 1997). Though Carlson said he did not have the authority to make such a deal, Gatlin provided a detailed statement that was consistent with what the police investigation disclosed. (T. 1997). Gatlin contacted

police about the Dawson murder because he was in jail for a robbery committed by Mitchell Douglas and Douglas had not stepped up to take responsibility for the robbery. (T. 1993-94, 2001). During his initial statement, Gatlin tried to only implicate Mitchell, but not Hurd because Hurd was a Mickey Cobra. (T. 2003-04). Later the county attorney's office worked out a deal with Gatlin for his testimony. (T. 1996). Gatlin told Carlson that he was afraid to testify against Hurd because he was a fellow gang member. (T. 2004).

Over Mr. Henderson's objection, Carlson was allowed to testify about the history of the Mickey Cobra's gang. (T. 2009-20). The prosecuting attorney showed Carlson photographs of purported gang members and had Carlson identify them as gang members, including their purported nicknames. (T. 2022-33). The people identified in the photographs included Mr. Henderson, Gatlin, and many of the witnesses in the case.

On August 18, 1998, Mr. Henderson was arrested for the murder of Gatlin. During a tape-recorded interview, Mr. Henderson stated he had recently quit the Mickey Cobra's gang and was in school and working. (T. 2676-78). He repeatedly denied any involvement in Gatlin's death, stating he was in Chicago for a funeral at the time of the murder. (T. 2691-94, 2715). Mr. Henderson stated that Roy Elliot, his probation agent, and Richard Dillard, his counselor at Phyllis Wheatley, could verify where he was. (T. 2695-2704). The jury was not informed that Mr. Elliot was Mr. Henderson's probation agent. (T. 2756). The videotaped interview was received as Exhibit 64 but was not played for the jury. (T. 2705).

Herbert Williams

At trial, the state sought to admit testimony of Herbert Williams, also known as Duke, describing an alleged conversation with Dante Evans, also known as Dougie, about Gatlin's murder. (T. 2118, 2122). According to the offer of proof, Evans was involved in the murder of Gatlin, but was unavailable because he was killed in Chicago. (T. 2120-2122). Evans had a conversation with Herbert Williams on August 10, 1998. (T. 2121). The conversation took place in a car and then in a hallway outside Williams' apartment. (T. 2123). According to Williams, his cousin was present for the conversation in the car. (T. 2123). In the car, Evans allegedly told Williams that "We did it, T, we got away with it," referring to Gatlin's murder. (T. 2122-23). At the apartment, Evans told Williams that he, Black, and DMC killed Gatlin while on the way to a steakhouse. (T. 2123)

During discussions regarding the admissibility of Mr. Williams' testimony of what Evans allegedly told him, Mr. Henderson argued the statement was inadmissible hearsay and deprived Mr. Henderson of his Sixth Amendment right to confront witnesses against him since Evans was unavailable to be cross-examined. (T. 2124, 2136). In arguing in favor of admissibility of the statement, the state asserted that the reason Mr. Williams came forward was because Evans told him that the Mickey Cobras intended to clean house to get rid of snitches and that Williams' good friend "Shorty" was on the list. (T. 2128). The state argued that the statement was against Evans' penal interest when he made it and that it had sufficient indicators of reliability to be admissible under the confrontation clause

because it satisfied a hearsay exception. (T. 2126-2130). After extensive argument on that issue, the trial court allowed in both Evans' purported statement from the car and from the hallway, holding that the statements were against Evans' penal interest and had sufficient indicators of reliability. (T. 2176-2182).

On the stand, Williams testified he had been a member of the Mickey Cobras. Williams identified Mr. Henderson, Gatlin, and several other people as Mickey Cobras. (T. 2195-2202). According to Williams, the Mickey Cobras sold drugs and ripped people off to make money. (T. 2230).

Williams learned of Gatlin's death from a man he and Gatlin had bought marijuana from the day before Gatlin was killed. (T. 2203). Williams did not know the man's name. (T. 2235). Williams lived in New Hope with Rajab Jabbar, also known as Shorty. (T. 2205). The police stopped by their apartment to ask questions about Gatlin's murder. (T. 2207). Williams knew the officers that stopped by, Carlson and Lenzen, because they were investigating the murder of "Steezo." (T. 2206). When the officers came by, they asked Williams and Shorty why they had killed Gatlin. (T. 2207). Williams told the officers he had nothing to do with it. (T. 2207).

The day before the police stopped by, Williams allegedly had a conversation with Evans while they were in a car on their way to purchase marijuana. (T. 2209). Williams claimed that Evans said: "T, we got away with it." (T. 2210). Evans then stopped talking because Williams' cousin, who was never identified, was in the back of the car. (T. 2212). Their conversation then continued in the hallway of Williams'

apartment building. (T. 2213). Williams claims Evans told him: “[W]e got Wheaty. It was like me, Black, DMC, QC, Rock, Lonney.” (T. 2214). Evans then explained how they did it. They told Gatlin they were going to have a meeting with all the gang members to talk about the murder of “Steezo.” (T. 2215-16). Evans told Williams that Gatlin got into the car with them and they went to April Bell’s house. (T. 2217). Evans said that DMC wanted to break Gatlin’s neck, but Evans didn’t want him to because they would need to carry the body out. (T. 2218). According to Evans, Mr. Henderson then took Gatlin to a weed house to buy marijuana while the rest of them waited by a garage; when Mr. Henderson and Gatlin walked by, Mr. Henderson pulled a gun and shot Gatlin. (T. 2219). Mr. Henderson then passed the gun to Evans and Evans shot Gatlin five (5) times in the head. (T. 2220). Evans told Williams it felt good to shoot Gatlin and that he could see Gatlin’s brains “spilling out.” (T. 2220).

Evans was at Williams’ apartment the next day when police came by and overheard them asking about the Gatlin murder. (T. 2222). After the police left, Evans asked Williams to take him home to pack and then to the Greyhound station where Evans caught a bus for Chicago. (T. 2222). Williams never saw Evans again. According to Williams, he reported the conversation he had with Evans to police because Evans told him that Shorty was next on the kill list because Shorty had given information to the police about the murder of Steezo. (T. 2227, 2240). Williams feared that if they came for Shorty, they would get him too because he and Shorty were always together, because they were best friends. (T. 2227, 2200-01).

After Williams' motivation for coming forward with was challenged on cross-examination, Williams was asked on redirect, "Q: Now, the information that Shorty gave to the police about Steezo's death, did it have anything to do with Penny? A: Yes. Q: It was that Penny killed Steezo, right? A: Right." (T. 2251).

April Bell

In August 1998, April Bell was living at 3126 Knox Avenue North, a block from Logan Avenue North, in Minneapolis, where Gatlin's body was found. (T. 2259-60). She had been a member of the Mickey Cobra's gang since she was fifteen because her boyfriend was a member of the gang. (T. 2260). She identified other members of the gang during her testimony, including Mr. Henderson and Gatlin. (T. 2261-64).

According to Bell, on the day Gatlin was shot, she saw Darrell McKee, known as DMC, and Dante Evans at her house. She was in the shower around 11:00 a.m. when she heard DMC call her name. (T. 2267). DMC said they were going to kill Gatlin and was looking for a bag of guns he had brought over a week prior. (T. 2268). Evans entered the room shortly after that. (T. 2269). Over Mr. Henderson's hearsay objection, Bell testified about the conversation that took place. DMC explained the plan: Evans and "Black" would take Gatlin down the street, separate from him, and then shoot him. (T. 2270). Bell was concerned they would kill Gatlin in the house but DMC assured her they would take Gatlin to a steakhouse several blocks away. (T. 2271). DMC and Evans left and returned two (2) to five (5) minutes later with Mr. Henderson. (T. 2273). DMC changed into clothes he had

brought over to Bell's house the previous week when he brought the guns over. (T. 2275). Evans changed his shirt; Mr. Henderson did not change his clothes. (T. 2276). Bell stated that Evans was wearing a red shirt, Mr. Henderson a white, blue, and yellow hockey type shirt, and DMC was wearing a turquoise jersey. (T. 2352-53).

DMC asked Bell if she heard the shots, but she said she could not because it was raining. (T. 2277). Evans and DMC made comments about killing Gatlin, but not Mr. Henderson. (T. 2282). DMC then told Bell, who was nine (9) months pregnant, they were giving her a ride to her doctor's appointment that afternoon. (T. 2278-81). They left Bell's house about 11:45, went to a house to buy marijuana, to a restaurant, and then to her doctor's appointment. (T. 2278-81). Over a hearsay objection, Bell was allowed to testify about statements purportedly made by the men in car and at the doctor's office. (T. 2282-2286). According to Bell, Evans said, "Damn, Wheaty was shocked." (T. 2285). DMC told her that Gatlin said, "I'm already dead, T" and DMC responded, "Nigger, you ain't dead, you just trying to talk yourself out of being dead." (T. 2285-86).

Bell dropped Evans and Mr. Henderson off at a house on the way back from her doctor's appointment, and she and DMC returned to her house. (T. 2292). DMC told Bell to drive by the alley where they left Gatlin to see if anyone had found him yet; as they drove by, they saw the homicide van. (T. 2291). After they returned to Bell's house, DMC took a nap for about half an hour and then had Bell drive him to the grocery store and then to Donald Carter's house. (T. 2295). While DMC and

Bell were at Carter's house, Carter, DMC, and another man went into Carter's room so DMC could tell them something. (T. 2297). Bell then left and went home alone. (T. 2298). Later, DMC came over and gave her a copy of the transcript of Gatlin's statement, telling her to put it with his bag of clothes. (T. 2298). The next day, DMC picked up his clothes and said he was heading to Chicago. (T. 2300). DMC left the pistol used in the shooting and the Uzis in Bell's house in a bag. (T. 2301). Bell moved the guns from her room to the basement. (T. 2302). Donald Carter picked up the Uzis the following day, but left the pistol hidden under some clothes. (T. 2303). Bell asked Mr. Henderson to get the pistol out of her house because she did not know how to get in touch with DMC or Evans and because homicide detectives has been at her house asking questions about the murder. (T. 2305). Mr. Henderson said he would get the pistol later and told Bell to tell detectives that he did not know anything. (T. 2305).

On cross-examination, Bell was clear that she did not see Mr. Henderson at her house before the murder. (T. 2324). She admitted that in her prior statement, she said nothing about Evans coming into her room or about DMC laying out the plan to kill Gatlin on the way to the steakhouse. (T. 2328, 2331). On August 18, police searched Bell's home and arrested her for aiding and abetting or accomplice to murder. (T. 2347). Prior to her arrest, Bell told police she knew nothing about the murder. (T. 2343-44). She continued to deny any knowledge until police threatened her with prison time and told her they would arrange a deal so she

would not go to prison if she cooperated. (T. 2348-49). The county attorney later told her that if she continued to cooperate, she would not be charged. (T. 2350).

Melanie and Aicheria Bell

Bell's mother and cousin also testified. According to Bell's mother Melanie, Mr. Henderson and two (2) other men stopped by Bell's home when April was not there. (T. 2379). Melanie told Mr. Henderson to get the gun out of the house and they went to the basement, where Mr. Henderson found the gun under some old clothes. (T. 2380). Melanie described the gun as silver with a black butt. (T. 2381). Mr. Henderson allegedly put some socks on his hand, picked the gun up, put the clip in, stuck the gun in his pants, and left. (T. 2382).

Aicheria Bell testified that April told her that Mr. Henderson, DMC, and Evans were at her place with Gatlin before Gatlin got shot. (T. 2396). She also said that she had a telephone conversation with Mr. Henderson where Mr. Henderson told her that he had nothing to do with the murder and told her to tell April to tell the police he did not have anything to do with it. (T. 2397). However, on cross, Aicheria explained that Mr. Henderson was not telling her to tell the police he had nothing to do with it, he was just explaining to her that he had nothing to do with it; she did not believe it was an instruction to lie for him. (T. 2399-2400). Although Mr. Henderson did tell her to tell April to tell the police he had nothing to do with the murder, she did not mean it the way it was made to appear in the statement. (T. 2404).

Paul Givens

Over Mr. Henderson's objection, Paul Givens was allowed to testify about a statement Mr. Henderson allegedly made to him about Gatlin's murder while the two (2) were in the Hennepin County Jail. (T. 2412). Mr. Henderson argued that Givens lacked competency to testify because he had borderline intellectual functioning and dementia and had been found incompetent to proceed in a pending felony assault case. (T. 2412). The court questioned Givens and determined he understood the oath and was capable of remembering his conversation with Mr. Henderson, even though a month before trial, he could not recall Mr. Henderson's name. (T. 2422).

According to Givens, out of nowhere, Mr. Henderson started to talk to him about Gatlin's murder. (T. 2457-58). Mr. Henderson told him that he and another guy were going to buy some marijuana when Mr. Henderson pushed the other guy over and shot him in the arm, leg, and head. (T. 2446). Mr. Henderson also told Givens about blood on clothes and clothes in a backpack. (T. 2457-58). Mr. Henderson told Givens the guy he shot was Wheaty and Wheaty said "Don't shoot me no more, I'm already dead." (T. 2447). After Wheaty was shot, they went to a lady's house and hid the gun in the basement. (T. 2447).

During his testimony, Mr. Givens claimed he told police about what he learned because he wanted to be a good citizen. (T. 2459-60). Despite the fact he had in fact received a deal on his own assault charge for his testimony, Givens testified he was not receiving a deal from the county attorney's office. (T. 2443-44,

2459-60, 2468). Mr. Givens also had to admit that he did not tell police about what Mr. Henderson purportedly told him until after his own motion to reduce his bail was denied, meaning he would not be able to get out of jail. (T. 2459).

Dedra Johnson

Dedra Johnson was an old girlfriend of Gatlin's. She testified she found out about Gatlin's death on a Friday from Andrew Neal, who is also known as "T-Bone" or "Bone." (T. 2522). Mr. Henderson was present when Neal told Johnson Gatlin was dead, but did not say anything because Neal and Mr. Henderson did not get along. (T. 2523). After Neal left, Mr. Henderson said "I did it," but then quickly added that he was "playing," and they both started to laugh. (T. 2524-25, 2622).

At the time, Mr. Henderson was living with Kerrye Ruberg, who lived next door to Johnson. (T. 2780, 2528). Johnson talked to Mr. Henderson again the following Sunday, when he came over after an argument with his ex-girlfriend, Tameka Day. (T. 2530-34, 2707). Johnson initially testified that Mr. Henderson told her he was going to "beat [Tameka's] butt: because she would not let him see his baby. (T. 2535). During her grand jury, testimony, Johnson testified that Mr. Henderson told her that he would do to Tameka what he did to Gatlin. (T. 2537-38). At trial, Johnson denied that Mr. Henderson ever said that to her. (T. 2537-38). She explained that she was badgered by investigators who threatened to send her to jail, so she told them the things they wanted to hear about Mr. Henderson so they would let her go. (T. 2540, 2551, 2562). The prosecuting attorney was allowed to present Johnson's grand jury testimony as substantive evidence under Minn. R.

Evid. 801(d)(1). (T. 3257). In her prior grand jury testimony, Johnson testified that Mr. Henderson told her that he was involved in the murder and that he and Gatlin were getting weed when Mr. Henderson pushed Gatlin into an alley and shot him. (T. 2549).

On cross, Johnson explained that some of her grand jury testimony was false. Specifically, the part where she said that Mr. Henderson said that he would do to Tameka what he did to Gatlin and the part of Mr. Henderson admitting his involvement in the murder were false. (T. 2572-73, 2624). Johnson stated she learned about Mr. Henderson's alleged involvement from investigators during her interrogation and from Andrew Neal. (T. 2619). The reason she testified falsely was because she was receiving constant calls and threats from the homicide detectives on the case and because when she denied that she knew anything, she was arrested on the day of her daughter's birthday while running errands for the party. (T. 2576-77). Johnson was told that she would be charged with being an accomplice to murder and that she could go to prison for half as long as the killer. (T. 2580, 2598-99). She sat in the jail for several hours that day before calling police and telling them what they wanted to hear. (T. 2606-08). Johnson felt that was the only way to get out for her daughter's party. (T. 2652). After Johnson was released, she continued to get regular calls from detectives insisting that she knew more and an officer told her that since she had been taken in, if she saw Rock, she should duck. (T. 2608-09, 2579). Johnson was afraid that she would be put back in jail if she did not say what they wanted her to say. (T. 2609-10).

Johnson was clear at trial that the only part of her testimony that was true was that on Friday night, Mr. Henderson told her that he did it, but then quickly said he was joking, and that she did not take this statement seriously. (T. 2574, 2660). She was also clear that she made up everything Mr. Henderson was alleged to have said on Sunday night. (T. 2618-19). Ms. Johnson also testified that she was with Mr. Henderson when Mr. Henderson had his Cobra tattoo covered with a panther. (T. 2627). This was prior to Gatlin's murder. (T. 2627).

Richard Dillard

Richard Dillard was a counselor at Phyllis Wheatley in the summer of 1998. (T. 3295). He reluctantly testified for the state that Mr. Henderson had told him he was going to Chicago for family business. (T. 3298, 3302). After thinking about the timing of the class Mr. Henderson was taking part in, Mr. Dillard felt the trip must have taken place in August. (T. 3302).

MR. HENDERSON'S CASE

Tawan Barker

Mr. Henderson called Barker to impeach the testimony of April Bell. (T. 2841). Barker was arrested for assaulting Bell and while he was in jail, he spoke with investigators. The assault was prompted by an argument he had with Bell about her involvement in the Gatlin murder. Although Bell did not say who committed the murder, she told him who was at her house the day of the murder. (T. 2843-44). At trial, Barker testified that Bell told him it was "DMC, Black, and some other dude's name." (T. 2843). In his prior statement to police, however,

Barker said that Bell told him that Q, D, and Mike were at her house with Wheaty on the day of the murder, but did not mention Mr. Henderson's name. (T. 2846, 2849). At trial, Barker testified that officer made a mistake, because Barker had said more names than were written down. (T. 2846-47).

Andrew Neal

Neal testified that his nickname is Bone and he was a member of the Vice Lords gang. He knew the Mickey Cobras, including Donald Carter and Arthur Hurd, and he was friends with them. (T. 3022-25). He knew Mr. Henderson but did not like him because they had fought in the past. (T. 3025). Neal testified he received Gatlin's statement from Hurd and gave it to Donald Carter. (T. 3027). After he found out about Gatlin's death, he went to Dedra Johnson's house to talk to her about it and saw Mr. Henderson on the front porch. (T. 3030-01). After the police searched his house looking for the question and answer statement Hurd had sent him, he decided to tell police what he knew about Gatlin's murder. (T. 3032, 3034). He then brought Therian Johnson to talk to Sgt. Lenzen and told Lenzen he might be able to convince Dedra Johnson to talk to them as well. (T. 3033, 3035).

Peter Batterman

Peter Batterman is Neal's probation officer. He testified that in September 1996, Neal was on probation for two (2) counts of second-degree assault and first-degree tampering with a witness. (T. 2990). He was still on probation for these convictions in August 1998, with a stayed sentence of 72 months for the second-degree assault assaults (36 months each, consecutive) and 18 months for witness

tampering. These sentences could have been executed if Neal violated his probation. (T. 2992-93).

Sgt. Lenzen

Sgt. Lenzen was involved in the investigation of Gatlin's murder. He interviewed Tawan Barker after Barker called and asked for some consideration on his assault charge in exchange for information on April Bell's involvement in Gatlin's murder. (T. 3057). Barker told Lenzen that Bell told him that Gatlin had been at her house on the day of the murder along with "DMC, QC, and somebody named Mike." (T. 3059). After Lenzen talked to Barker, police executed a search warrant at Bell's house and arrested her. (T. 3172).

Lenzen also testified regarding Neal's participation in the investigation. On August 12, 1998, Neal came by the office claiming to have information about Gatlin. (T. 3060). Neal obtained the information from Therian Johnson, who heard from Marvin Johnson, who learned from Dedra that Mr. Henderson killed Gatlin. (T. 3142). According to the fourth-hand information Neal provided, it was QC, DMC, and Black with Gatlin when he was killed. (T. 3146). Neal also told police that he learned that Gatlin, along with Black, QC, and DMC, were in a car and when Gatlin got out of the car, Black ran around a garage and shot him. (T. 3143). After hearing from Therian Johnson, Neal brought Therian to the police station to talk. (T. 3144). Therian volunteered to wear a wire and talk to Dedra so police could record their conversation about the murder. (T. 3069). In the meantime, Lenzen told Neal not to talk to Dedra, but Neal talked to her anyway. (T. 3061). The next

day Neal and Therian went to Dedra's and Dedra told Therian what Mr. Henderson allegedly told her about the murder. (T. 3069). A portion of the tape, Exhibit 66, was played for the jury but not transcribed. (T. 3066, 3076). The information from the tape led to Dedra's arrest for aiding an offender. (T. 3072, 3081).

Lenzen also interviewed Dedra Johnson. The first interview lasted an hour and Johnson denied any knowledge. (T. 3088). Lenzen was trying to convince Dedra this was a serious matter and told her that she could go to prison. (T. 3097). Dedra was then put in a cell, where she then decided to talk with officers so that she could go home. (T. 3103-04). Lenzen agreed that he told Dedra that if she did not tell the truth, she would go back to jail. (T. 3125). The second interview lasted several hours and it was during that interview that Dedra told Lenzen that Mr. Henderson had said he did it, but then that it was a joke. (T. 3107). Dedra did not believe that Mr. Henderson was capable of shooting Gatlin. (T. 3109).

Tylese Campbell

Tylese Campbell was living in North Minneapolis near where Gatlin's body was found. On August 7, 1998, she heard gunshots, looked out her window, and noticed three (3) men running toward Lowry. (T. 2896). She spoke with police and provided descriptions on August 7, 1998. (T. 2897). She described the man she saw with a gun as being about 5'9", with lengthy black hair and clean shaven. (T. 2902). He wearing a plaid long sleeved shirt that looked too big for him that was checkered and light blue in color with blue jeans. (T. 2902). He also had on a white shirt under his checkered shirt and white tennis shoes. (T. 2902). As that man went by,

he said "Come on, come on." (T. 2903). She described the second man as wearing a white t-shirt with regular blue jeans. (T. 2905). He was about 18 years old, 5'5" or 5'6", and weighed about 140 to 150 pounds. (T. 2905). He had black hair, with no hat, and was clean shaven. (T. 2905). He also wore a silver medium chain. (T. 2905). Ms. Campbell gave the following description of the third man. He had on a red hockey jersey with a white logo in the middle of it and a white stripe on the bottom. (T. 2906). He was about 18 years old, 5'4" or 5'5", and around 150 pounds. (T. 2906). He had short black hair, not facial hair, and wore a silver watch on his left hand. (T. 2906).

Later that same day, Campbell was taken to the scene of a traffic stop where she indicated that one of the people from the car looked like a person she saw running through the alleyway. (T. 2908). Mr. Henderson attempted to call officers involved in identification. (T. 2939-2962). The district court did not allow the questions. However, it was established outside the presence of the jury that Campbell identified an individual named Paul Harvey as one of the males she saw running through the alley. (T. 2956).

Michael Barhorst

Michael Barhorst lived near where Gatlin's body was found. On August 7th, he was drinking beer in his garage, waiting for the rain to stop so that he could go fishing. (T. 2930). He heard what sounded like firecrackers: six pops, a pause, and then several more pops. (T. 2920-21). He went to the window and saw two (2) black men walking quickly in the alley toward Lowry. (T. 2922). One of them was

wearing a red and white tank shirt and the other was wearing a dark blue or black short-sleeved shirt. (T. 2922-27). The one in red was trying to pull his shirt out and over something. (T. 2927). He never saw the men from the front. (T. 2923-24).

Theresa Doss

Mr. Henderson introduced evidence that he had altered his tattoo of a cobra and that people typically do that when they leave a gang. (T. 2784). Theresa Doss testified she worked as a recruiter at Summit Academy, which provided job skills training. (T. 2963). They have a program for at-risk students to help them out of gangs. (T. 2698). She worked with Mr. Henderson from April to August 1998 and met with him more than six (6) times. (T. 2967). According to their conversations, Mr. Henderson was looking for a job at night so he could go to school in the morning. (T. 2965).

NEWLY DISCOVERED EVIDENCE

Rajab “Shorty” Jabbar

On or around May 29, 2014, Mr. Henderson saw an individual he knew as “Shorty” at the Stillwater Correctional Facility. (Doc. Id. # 28 - Exhibit A to Memorandum of Law in Support of Petition – Jabbar Affidavit ¶ 11). At that time, Mr. Henderson asked Shorty if he (Shorty) had told police that Penny killed Steezo, like Williams had testified. Shorty stated that he had not ever given police such information. (Id.)

Shorty described that on July 7, 1998, he was at a halfway house on Portland Avenue when Sergeants Lenzen and Carlson came to talk to him about the death of

a man named Steezo. Shorty went on to state what he told police about the day Steezo was shot. Shorty was with Steezo. (Id. ¶ 3). They stopped by where Steezo was staying so that Steezo could grab some stuff. (Id.) After a little bit, Steezo came running out of the house and ran past the car, yelling for Shorty to get out of the car. (Id.) As Shorty was getting out, a person came out of the house and started to walk south. (Id.) Shorty was asked by police if he would recognize the man if he saw him again, and he said “yes.” (Id.) The officers then asked Shorty to show them where he last saw Steezo, and after Shorty took the officers to the area, they found Steezo’s body. (Id. ¶ 4).

The officers then asked Shorty if he knew Steezo’s girlfriend. (Id. ¶ 5). Shorty said he did and took the officers to Williams’ house, because he believed she might be there. (Id.) Once there, the officers told Tyronda, Steezo’s girlfriend, that Steezo was dead. (Id.) Tyronda ran from the room. (Id.) The officers then asked Williams if he knew anyone that might have wanted to hurt Steezo. (Id.) Williams stated that Steezo had an altercation with someone named Penny. (Id.) Tyronda then returned to the apartment and when she was asked if she knew of anyone who would want to hurt Steezo, she said that Steezo had problems with Penny. (Id.) Williams and Tyronda then told officers that Shorty knew that it was Penny who killed Steezo. (Id. ¶ 6). Officers then spoke with Williams off on his own and then took Shorty downtown. (Id.) Once downtown, Shorty told officers that he did not know the person who he saw come out of the house, but would recognize the person if he saw him again. (Id.)

Shorty also provided the following information about what happened after Gatlin was killed. Shortly after Gatlin was killed, Shorty and Williams saw Lenzen and Carlson outside Williams' apartment. (Id. ¶ 7). When the officers approached, they asked Shorty and Williams why they had killed Gatlin. (Id.) Shorty said he had nothing to do with it, and after determining he was not under arrest, walked away. (Id.)

The next day, Shorty was with Williams at his apartment when Lenzen and Carlson came back and asked them to go downtown. (Id. ¶ 8). Downtown, Shorty and Williams were put in different rooms. (Id.) Shorty continued to tell officers he knew nothing about Gatlin's death. (Id.) After some time, the officers asked Shorty to go talk to Williams. (Id.) When Shorty came in the room, Williams was crying and told Shorty that he was not "going down for this shit." (Id.) Shorty told Williams that if he wasn't involved, he would not get in trouble and then asked investigators if he could leave. (Id.) He was told he could, so he left. (Id.)

The following day, Shorty was outside of Williams' apartment building when Williams arrived in a car with Evans. (Id. ¶ 9). Williams asked Shorty if he wanted to go with them to get some weed, so Shorty did. (Id.) During that car ride, Williams asked Evans if he could tell Shorty something. (Id.) When Evans said he could, Williams told Shorty that they "got away with smoking that nigga Wheaty." (Id.) Williams then went on to state that it was him, DMC, and Evans, who killed Gatlin. (Id.) They had seen Gatlin on the street and picked him up to get some weed with them. (Id.) Gatlin looked like he wanted to run, but got in the car. (Id.)

They then went to a house, where DMC, Gatlin, and Evans went inside. (Id.) After a while they came out and back to the car, where DMC handed Williams a gun. (Id.) The men then went into an alleyway where Williams pulled the gun and shot Gatlin three (3) or four (4) times before the gun jammed. (Id.) Gatlin then said something about already being dead and laid on the ground. (Id.) Evans then took the gun from Williams and shot Gatlin in the head. (Id.)

The following morning, Shorty was in Williams' apartment, along with Evans, when Lenzen and Carlson came back. (Id. ¶ 10). The officers asked the men if they knew anyone who lived in the area where Gatlin was killed. (Id.) Shorty mentioned that April lived in the area and the officers left. (Id.) Both Williams and Evans were very nervous and unhappy that Shorty said April lived in the area. (Id.) Evans then told Williams he needed a ride to the bus station, so Williams gave him a ride. (Id.) When Williams returned to his apartment, he told Shorty that Shorty needed to leave so Williams and his wife could do some things. (Id.)

Willie Scott

On or around December 31, 2015, Mr. Henderson also obtained a statement from an individual named Willie Scott. Mr. Scott provided the following information. While at the Ramsey County Jail, Scott saw a newspaper article, claiming that a suspect in a shooting was once a police informant. The article had a photograph of a friend of his, Andrew Neal. (Doc. Id. # 28 - Exhibit 2 to Memorandum of Law in Support of Petition - Scott Affidavit). While at the St. Cloud Correctional Facility, Scott ran into Mr. Neal and asked him if he was an

informant in the case against Mr. Henderson like the article said. (Id.) Mr. Neal appeared upset and said he would tell Scott about it later. (Id.)

When they talked again later, Mr. Scott asked if Mr. Henderson had actually confessed to killing Gatlin. (Id.) Neal said Mr. Henderson had not. (Id.) Scott also asked Mr. Neal if he got someone to wear a wire to get information about Gatlin's murder. (Id.) Neal said he had. (Id.) Neal went onto explain that he told police it was Mr. Henderson who killed Gatlin, but the police wanted a confession. (Id.) Neal knew he couldn't get a confession from Mr. Henderson, so he asked a woman named Dedra to say that Mr. Henderson pushed Gatlin into an alley and then shot him. (Id.) Neal said that he told Dedra that he needed her to tell this information to her cousin Therian. (Id.) When Therian came to Dedra's house, she said what Neal told her too. (Id.) When Scott asked Neal why he would do this, Neal said that he never liked Mr. Henderson. (Id.)

2016 Postconviction

Based on this evidence, Mr. Henderson filed a petition for postconviction relief making claims of a *Brady* violation, ineffective assistance of trial counsel, and a claim for a new trial under the *Rainer* standard based on the newly discovered evidence related to Jabbar. (Doc. Id. #s 1, 2 – Petition for Postconviction Relief and Memorandum of Law in Support of Petition). Mr. Henderson also made a claim for a new trial under the *Larrison* test based on the newly discovered evidence related to Scott. (Id.) The district court denied these claims, holding that Mr. Henderson could not satisfy the newly discovered evidence exception standard of Minn. Stat. § 590.01,

Subd.4(b)(2). (Appendix B - P. 9-18). The district court also held that Mr. Henderson was not entitled to an evidentiary hearing because the evidence he presented, even if true, would not entitle him relief for his *Brady* and ineffective assistance of counsel claims because those claims were supported by mere argumentative assertions without factual support. (Appendix B - P. 15-18).

The Minnesota Supreme Court affirmed the denial. However, it first held that the district court abused its discretion by weighing the evidence and determining its credibility without an evidentiary hearing, but ultimately held the evidence, even if true, did not show Mr. Henderson's innocence, and therefore it was proper to dismiss his petition as untimely. *Henderson v. State*, A17-0124, (Minn. Jan. 31, 2018).

REASONS FOR GRANTING THIS PETITION

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

Mr. Henderson 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.

After review of Mr. Henderson’s claims, the Eighth Circuit concluded that no reasonable jurists would disagree with the district court’s denial of Mr. Henderson’s petition. This included the district court’s conclusion that Mr. Henderson’s petition, based on newly discovered evidence showing serious violations of his constitutional rights through the presentation of false testimony, were time barred and procedurally barred.

Mr. Henderson has identified cases from numerous Circuits which show that, under the factual circumstances presented, with new evidence, reasonable jurists can disagree with the conclusion that his claims were time barred for failure to exercise due diligence.

In *Starns v. Andrews*, 524 F.3d 612 (5th. Cir., 2008), that court held that due diligence did not require that the defendant learn of exculpatory grand jury testimony where the state downplayed the exculpatory nature of the grand jury testimony and where defendant’s counsel in a wrongful death suit learned of the exculpatory evidence in a deposition years after the conviction became final, even though criminal defense counsel had been given the witness’ address prior to trial.

In *Moore v. Knight*, 368 F.3d 936 (7th Cir. 2004), that Court held that the habeas petition was timely as filed within one year of when petitioner obtained investigative report and affidavits showing improper judicial contact with the jury. *Id.* at 938-40. This was the case, even though the judge had reported the contact with the jury, off the record, prior to sentencing, because the judge presented the contact as benign. *Id.* at 439. Review of the timing in the case is helpful to understanding why reasonable jurists can disagree with the conclusion that Mr. Henderson's claims were untimely. Moore's conviction became final on March 28, 1997. *Id.* at 938. In early 1997 Moore first learned through a friend, who had overheard conversations, that the judge's contact with the jury was more than the judge had reported. *Id.* At that same time, Moore asked his friend to investigate this further. *Id.* On May 18, 1998, the friend provided an investigative report and two (2) affidavits from jurors which indicated that they felt the judge's communications contained commentary on the credibility of witnesses. *Id.* Petitioner filed for postconviction relief in state court on January 5, 1998 and then "after following proper procedural routes appeared before United States District Court for Northern District of Indiana" seeking habeas relief. *Id.* at 939. That Court held that lag of time between initially learning of possible improper conduct in early 1997 and receiving affidavits in May 1998 did not show lack of due diligence because petitioner was in prison. *Id.* at 940. It also held that May 18, 1998 was the proper date for the factual predicate since that was the date that petitioner obtained actionable information to make his claim. *Id.* at 940.

Mr. Henderson has also identified the following cases which support his claims.

See Wilson v. Beard, 426 F.3d 653 (3rd Cir. 2005) (The defendant's conviction became final in 1985. *Id.* at 655. On March 31, 1997, after the prosecutor from Wilson's trial decided to run for district attorney, a video tape of the prosecutor explaining that it was his preference to strike black jurors, and explaining how he did it in a way to get past *Batson* analysis, was released. *Id.* at 657. Wilson learned of the existence of the tape on or around April 6, 1997 from his prior attorney. *Id.* at 660. Wilson then filed a petition for relief in state court based upon the video on June 2, 1997. *Id.* at 659. That petition was pending until March 22, 2001. *Id.* Wilson then filed for habeas relief on January 23, 2002. *Id.* If Wilson knew or should have known of the video between April 1 and April 5, 1997, his habeas petition would be untimely. The Third Circuit Court of Appeals held that Wilson did not fail to exercise due diligence in failing to learn of the tape until April 6, 1997, when he was told about it by counsel, because due diligence did not require him to continuously monitor the news on the remote possibility of learning facts helpful to his case. *Id.* at 661-62); *See also Easterwood v. Champion*, 213 F.3d 1321 (10th Cir. 2000) (Here the defendant was tried and convicted of first-degree murder. He defended using an insanity defense. *Id.* at 1322. His appeal was denied in 1982. *Id.* On April 10, 1997, the Tenth Circuit Court of Appeals issued an opinion in a separate case in which it held that the medical expert the state had presented in Easterwood's case to establish that he was sane at the time of the crimes was suffering from undiagnosed bipolar disorder in 1979 that was severe enough to impair and distort his diagnostic judgment. *Id.* at 1323.

Easterwood discovered the case in the prison law library on August 12, 1998. *Id.* He filed a petition seeking to file a subsequent habeas petition on October 5, 1998. *Id.* The district court denied the petition as untimely because October 5, 1998 was more than a year after the April 10, 1997 opinion release. *Id.* The Tenth Circuit Court of Appeals reversed, first stating that for a prisoner, a case does not become discoverable through the exercise of due diligence until it becomes available in the prison law library. *Id.* at 1323. That Court went on to state, taking into account the periods where time was tolled because of petitions filed in state court and in seeking permission to file a second habeas petition, the petition was timely. *Id.* at 1323-24); *See also Wims v. U.S.*, 225 F.3d 186 (2nd Cir. 2000) (Petition held to be timely even though claim is based on counsel failing to file for a direct appeal, which happened on September 22, 1997, and petition was not filed until after petitioner learned no appeal had been filed by writing to the court on January 18, 1999).

These cases show that it is unreasonable to hold that a claim is time barred under these circumstances. *Wilson* and *Moore* are particularly instructive because they involved actions that took place outside the petitioner's presence and knowledge and show that, where the petitioner is in prison due diligence does not require that he gain knowledge of events that took place outside of his presence until he is actually informed of them. Because the reasonable jurists in those cases, on similar facts, reached a different conclusion, a COA should have issued here.

The phrase "susceptible to debate among jurists of reason" is a term of art that gained currency in this Court's retroactivity analysis following *Teague v. Lane*, 489

U.S. 288 (1989). This Court has held that disagreement between circuit judges on the application of Supreme Court precedent to a particular set of facts is per se evidence that an issue “was susceptible to debate among reasonable minds.” *See Butler v. McKellar*, 494 U.S. 407, 494 (1990). This Court has reached the same result where jurists of a state supreme court have similar disagreement as to application of precedent to a certain set of facts. *See Sawyer v. Smith*, 427 U.S. 227, 236 (1990) (holding that the rule announced in *Caldwell v. Mississippi* was susceptible to debate on the basis of the Mississippi Supreme Court decision in *Caldwell v. State*).

Had the above standard been applied, the Eighth Circuit would have been required to grant Mr. Henderson a COA given that reasonable jurists can and do disagree regarding the timeliness of the claims. Certiorari should be granted in this case to make clear that, where a habeas petition can show that a reasonable jurist, on similar facts, has decided a similar issue in the manner advocated by the petitioner in his case, the petitioner has made a sufficient showing that is appeal involves questions susceptible to debate and that a COA should therefore issue.

CONCLUSION

For the reasons stated above, Mr. Henderson respectfully requests that this Court grant this petition for certiorari.

Respectfully submitted.

Dated: 7/13/2020

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