No. _____

In The Supreme Court of the United States

Keith Henderson, Petitioner

vs.

Eddie Miles, Warden, Stillwater Correctional Facility, Minnesota, Respondent.

INDEX TO APPENDIX

Appendix A

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

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February 18, 2020

Mr. Zachary Allen Longsdorf
LONGSDORF LAW FIRM
Suite 3
5854 Blackshire Path
Inver Grove Heights, MN 55076

RE: 19-3165 Keith Henderson v. Eddie Miles

Dear Counsel:

Enclosed is a copy of the dispositive order in the referenced appeal. Please note that FRAP 40 of the Federal Rules of Appellate Procedure requires any petition for rehearing to be filed within 14 days after entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. This court strictly enforces the 14 day period. **No grace period for mailing is granted** for pro-se-filed petitions. A petition for rehearing or a motion for an extension of time must be filed with the Clerk's office within the 14 day period.

Michael E. Gans
Clerk of Court

MDS

Enclosure(s)

cc: Ms. Jean Burdorf
Ms. Kate M. Fogarty
Mr. Matthew Frank
Mr. Keith Henderson
Ms. Brittany D. Lawonn

District Court/Agency Case Number(s): 0:18-cv-02828-MJD

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3165

Keith Henderson

Petitioner - Appellant

v.

Eddie Miles, Warden Stillwater Correctional Facility, Minnesota

Respondent - Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:18-cv-02828-MJD)

JUDGMENT

Before COLLOTON, ERICKSON, and KOBES, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

February 18, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Keith Henderson, Civ. No. 18-2828 (MJD/BRT)

Petitioner,

v.

Order

Eddie Miles, Warden, MCF-Stillwater,

Respondent.

Zachary A. Longsdorf, Esq., Longdsorf Law Firm, PLC, counsel for Petitioner.

Brittany D. Lawonn, Esq., Assistant County Attorney, Hennepin County Attorney's Office, counsel for Respondent.

The above matter comes before the Court upon the Report and Recommendation of United States Magistrate Judge Becky R. Thorson dated June 17, 2019. Petitioner has objected to the conclusions and recommendations in the Report and Recommendation.

Pursuant to statute, the Court has conducted a de novo review of the record. 28 U.S.C. § 636(b)(1); Local Rule 72.2(b). Based upon that review, the Court will ADOPT the Report and Recommendation in its entirety.

IT IS HEREBY ORDERED that:

1. Respondent's Motion to Dismiss (Doc. No. 11) is **GRANTED**;

2. Petitioner's petition for a writ of habeas corpus (Doc. No. 1) is **DENIED**;

3. Petitioner's request for a certificate of appealability is **DENIED**; and

4. This action is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: August 28, 2019

s/ Michael J. Davis
MICHAEL J. DAVIS
United States District Court

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Keith Henderson,

Petitioner,

v.

Eddie Miles, Warden, MCF-Stillwater,

Respondent.

Civ. No. 18-2828 (MJD/BRT)

REPORT AND RECOMMENDATION

Zachary A. Longsdorf, Esq., Longdsorf Law Firm, PLC, counsel for Petitioner.

Brittany D. Lawonn, Esq., Assistant County Attorney, Hennepin County Attorney's Office, counsel for Respondent.

BECKY R. THORSON, United States Magistrate Judge.

Petitioner Keith Henderson is serving a life sentence for first-degree murder, plus a five month consecutive sentence for committing a crime for the benefit of a gang. He seeks relief in federal court pursuant to a petition for writ of habeas corpus under 28 U.S.C. § 2254. (Doc. No. 1, Habeas Pet.) Respondent Eddie Miles moves to dismiss. (Doc. No. 11.) For the reasons stated below, this Court recommends that Respondent's motion to dismiss be granted.

I. Background

A. Petitioner's Trial and Direct Appeal

Petitioner was convicted of murdering Juwan Gatlin, a fellow member of a street gang called the Mickey Cobras. *State v. Henderson*, 620 N.W.2d 688, 692–93 (Minn.

2001) ("*Henderson I*"). Gatlin was shot to death at approximately 11:00 a.m. on August 7, 1998, in an alley near Logan Avenue in Minneapolis. *Id.* at 693. He was shot between thirteen and fifteen times with a .40 caliber Smith and Wesson handgun. *Id.*

At trial, Herbert Williams, a member of the Mickey Cobras, testified to a conversation he had with Donte Evans regarding Evans's participation in the Gatlin murder. *Henderson I*, 620 N.W.2d at 694. According to Williams, Evans told him, "T, we got away with it * * * we got [Gatlin], we got [Gatlin]."[1] Evans described to Williams how he, Petitioner, and Daryl McKee went to the back of April Bell's house,[2] that Petitioner pulled out the gun and shot Gatlin and then passed the gun to Evans. Evans told Williams that Gatlin, still alive, said "I'm dead, T, I'm dead." *Id.* at 694–95. Evans then told Williams that he shot Gatlin five times in the head. *Id.* at 695.

Dedra Johnson, a former girlfriend of Gatlin and a neighbor of Petitioner, testified that Petitioner told her, "I did it" in reference to Gatlin's murder, but after seeing the shock on Johnson's face, Petitioner told her he was joking. *Henderson I*, 620 N.W.2d at 695. Johnson testified before the grand jury that Petitioner told her he shot Gatlin after pushing him in an alley. *Id.* When Johnson recanted this testimony at trial, the court allowed the prosecution to admit Johnson's grand jury testimony as substantive evidence. *Id.*

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1 "T" was a slang reference for fellow gang members. *Henderson I*, 620 N.W.2d at 694 n.3.

2 April Bell ("Bell") lived in a house in Minneapolis with her mother Melanie Bell. *Henderson I*, 620 N.W.2d at 693. Bell was a member of the Mickey Cobras. The Bell residence was one block from where Gatlin's body was found. *Id.*

Paul Givens testified that while in jail with Petitioner, Petitioner told him that he pushed a guy over in an alley and shot him in the leg, arm, and head. *Henderson I*, 620 N.W.2d at 695. Givens testified that Petitioner told him the victim said, "don't shoot me no more. I'm already dead." *Id.* Although Givens had been declared incompetent to stand trial due to marginal intellectual capacity and dementia from severe head trauma, the district court found him competent to testify in Petitioner's case. *Id.*

The jury found Petitioner guilty of first-degree murder and a crime for the benefit of a gang. *Henderson I*, 620 N.W.2d at 695. He was sentenced to life in prison on the murder count and five years on the benefit-of-a-gang count, to be served consecutively. On January 11, 2001, the Minnesota Supreme Court affirmed Petitioner's conviction on direct appeal. *See id.*

B. Petitioner's 2016 Petition for Postconviction Relief in State Court is Dismissed as Untimely

On May 27, 2016, Petitioner filed a petition for postconviction relief in state court. *See Henderson v. State*, 906 N.W.2d 501, 505 (Minn. 2018) ("*Henderson III*").[3] Petitioner raised claims based on an affidavit from Rajab "Shorty" Jabbar that Petitioner claimed impeached Williams's testimony regarding Williams's motivation to testify and alleged an alternative perpetrator of Gatlin's murder. (Doc. No. 12, App'x Vol. I at 322.) Petitioner alleges that the "most damaging" evidence against him came from Williams,

[3] This was Petitioner's third state court petition. *See Henderson v. State*, 675 N.W.2d 318 (Minn. 2004) ("*Henderson II*"); (Doc. No. 12-1, App'x Vol. II at 4309.) The claims raised in Petitioner's first and second state court petitions are not relevant to this action.

who testified, as noted above, that Evans told him that Evans, Petitioner, and another individual killed Gatlin. Evans died before trial, and over Petitioner's objection, the state court allowed Williams to testify about what Evans allegedly told him, holding that Evans's statement was against his penal interest and that Williams's testimony had indicators of reliability because he claimed to have given police information to protect his friend Rajab Jabbar. According to the prosecution's argument, Williams feared Jabbar was in danger because of information Jabbar had given in an earlier case involving the murder of an individual nicknamed "Steezo." In prison, Petitioner ran into Jabbar, and Jabbar told Petitioner that Williams, not Jabbar, had informed police in the Steezo case. Jabbar further stated that he was with Williams and Evans when Evans allegedly implicated Petitioner, and according to Jabbar, Evans did not implicate Petitioner. Instead, it was Williams who told Jabbar that he (Williams), Evans, and another individual committed the murder and got away with it. (*See* Habeas Pet., Ground One.)

Petitioner also raised claims based on an affidavit from Willie Scott. Petitioner met Scott in prison in late 2015. Scott explained that he saw a newspaper article about Andrew Neal being a confidential informant and then met Neal in prison in St. Cloud. According to Scott, Neal stated that Petitioner did not actually confess to killing Gatlin. Neal explained that he tried to implicate Petitioner in the crime, but the police wanted to hear a confession. Neal knew that he could not get a confession from Petitioner, so he told Dedra Johnson that Petitioner committed the crime and told her that when he brought her cousin Therian over, Dedra needed to tell him that Petitioner had confessed to committing the crime. At trial, Johnson testified that Petitioner did not confess, and the

prosecution impeached Johnson with her grand jury testimony that Petitioner did confess to her. (*See* Habeas Pet., Ground Three.)

Petitioner argued that the Jabbar and Scott affidavits were newly discovered evidence and evidence of false testimony. *Henderson III*, 906 N.W.2d at 505. Petitioner additionally argued that the newly discovered evidence was evidence of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), or in the alternative, demonstrated an ineffective-assistance-of-counsel claim. *See id.* The district court denied relief on November 30, 2016, and on January 31, 2018, the Minnesota Supreme Court affirmed. *Id.* at 503, 508. The court found that the petition was untimely because it was not filed within two years of the conviction becoming final, as required by Minnesota law. *Id.* at 505 (citing Minn. Stat. § 590.01, subd. 4.) The court also found that the affidavits did not meet the newly-discovered-evidence exception to the Minnesota statute of limitations. *Id.* at 506 (citing Minn. Stat. § 590.01, subd. 4(b)(2)). The court reasoned that the facts alleged in the affidavits did not meet the exception's requirement that the evidence would establish Petitioner's innocence by a clear and convincing standard. *Id.* The court reasoned:

> Even accepting the affidavits of [Jabbar] and [Scott] as true, the facts alleged in Henderson's petition are legally insufficient to show his innocence by a clear and convincing standard. At most, [Scott]'s affidavit shows that [Andrew Neal] lied to [Dedra Johnson]. It does not call into question [Johnson's] credibility or her testimony that Henderson told her he 'did it' when referring to Gatlin's murder. Similarly, [Jabbar]'s affidavit states only that [Herbert Williams] was also involved in the murder. It does not exculpate Henderson because multiple people were involved in Gatlin's murder.

> Moreover, other evidence of Henderson's guilt remains regardless of whether the affidavits are true. The evidence does not affect [April Bell]'s testimony that Henderson was at the murder scene, [April Bell]'s mother's testimony that Henderson helped dispose of the gun, [April Bell]'s cousin's testimony that Henderson encouraged others to lie to police about his whereabouts at the time Gatlin was killed, or Henderson's inculpatory statements to [Paul Givens] about details of the murder.

Henderson III, 906 N.W.2d at 507–08 (internal citations omitted). Petitioner petitioned for a writ of certiorari, which was denied on October 1, 2018. (Doc. No. 12, App'x Vol. I at 32, 385.)

C. Petitioner's Request for Federal Habeas Relief

Petitioner filed this action on October 2, 2018. (*See* Habeas Pet.) Petitioner asserts three claims for relief in his petition: (1) the prosecution's failure to provide newly-discovered exculpatory evidence before trial, as set forth in the Jabbar Affidavit, violated *Brady v. Maryland*, 373 U.S. 83 (1963); (2) as an alternative to the *Brady* claim, if the newly-discovered evidence in the Jabbar Affidavit was known to Petitioner's counsel, Petitioner received ineffective assistance of counsel at trial when counsel failed to use that evidence at trial; and (3) the state court made an unreasonable determination of fact regarding newly-discovered evidence set forth in the Scott Affidavit that he did not confess to murdering Gatlin. (Doc. No. 1, Habeas Pet.) This Court concludes the petition should be dismissed because Petitioner's claims are procedurally defaulted. In the alternative, this Court also concludes that Petitioner's first two claims are untimely under the one-year limitations period set forth in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), and Petitioner's third claim does not present a cognizable claim for review in this federal habeas action.

II. Analysis

A. Procedural Default and Exhaustion

Procedural default and exhaustion are distinct but related concepts. Before seeking a federal writ of habeas corpus, a state prisoner must generally exhaust available state remedies. 28 U.S.C. § 2254(b)(1)(A). This requirement gives the State "the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). "To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Id.*; *see also O'Sullivan v. Boerckel*, 535 U.S. 838, 845 (1999). "If a prisoner has not presented his habeas claims to the state court, the claims are defaulted if a state procedural rule precludes him from raising the issues now." *Middleton v. Roper*, 455 F.3d 838, 855 (8th Cir. 2006).

The exhaustion requirement is satisfied if a procedural bar precludes further proceedings in state court. *See Gray v. Netherland*, 518 U.S. 152, 161–62 (1996) (explaining that because the exhaustion requirement "refers only to remedies still available at the time of the federal petition," the exhaustion requirement "is satisfied if it is clear that the habeas petitioner's claims are now procedurally barred under state law"). However, while the exhaustion requirement is satisfied in that instance, "the procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the

defaulted claim." *Id.* at 162 (citing *Teague v. Lane*, 489 U.S. 288 (1989) and *Wainright v. Sykes*, 433 U.S. 72 (1977)).

Procedural default may be excused if the petition alleges facts to demonstrate that: (1) there exists cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) failure to consider the claim will result in a fundamental miscarriage of justice, as in actual innocence. *See Weaver v. Kelly*, Case No. 1:18-cv-01048, 2019 WL 2134617, at *3 (W.D. Ark. Apr. 24, 2019) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

B. Petitioner's Claims are Procedurally Defaulted

Petitioner's claims are premised upon the Jabbar and Scott affidavits. (*See* Doc. No. 16, Ex. 1, Affidavit of Rajab Jabbar ("Jabbar Aff."); Ex. 2, Affidavit of Willie Scott ("Scott Aff.").) In state court, as noted above, Petitioner argued that these affidavits were newly-discovered evidence and evidence of false testimony. *Henderson III*, 906 N.W.2d at 505. Petitioner also argued that the newly discovered evidence established a *Brady* violation, or in the alternative, demonstrated that his trial counsel was ineffective. *Id.* The postconviction court found that Petitioner's action was untimely and failed to satisfy the newly-discovered-evidence exception to untimeliness under Minnesota state law. *See id.* (citing Minn. Stat. § 590.01, subd. 4(b)(2)). The Minnesota Supreme Court affirmed, finding that facts alleged in the petition were legally insufficient to satisfy the requirement to establish the existence of evidence which, if true, would establish Petitioner's innocence by clear and convincing evidence. *Id.* at 506. Accordingly, Petitioner's claims are procedurally defaulted because they were found to be untimely

under Minnesota state law. Respondent argues that only ground two—Petitioner's ineffective assistance of counsel claim—is procedurally defaulted. (Doc. No. 10, Resp't's Mem. 19–20.) To the contrary, this Court concludes that all of Petitioner's claims are procedurally defaulted. The Minnesota Supreme Court refused to consider the merits of any of Petitioner's claims. *See Henderson III*, 906 N.W.2d at 508 n.7.

Petitioner argues that the procedural bar applied by the Minnesota courts is not an independent and adequate basis to cause the forfeiture of his claims in federal court. (Doc. No. 27, Pet'r's Mem. 27–30.) Procedural default of a claim under state law may constitute an independent and adequate state ground to bar consideration in federal court, but only if the state procedural rule is firmly established, regularly followed, and readily ascertainable. *White v. Bowersox*, 206 F.3d 776, 780 (8th Cir. 2000). The Supreme Court has stressed that "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)). In addition, state courts "may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Id.* Thus, the "relevant inquiry" is to "determine if the rule is strictly or regularly followed," and then to "determine if the rule has been applied evenhandedly to all similar claims." *Echols v. Kemna*, 511 F.3d 783, 786 (8th Cir. 2007).

In support of his argument, Petitioner cites Minnesota cases that did not apply or disregarded the limitations period in Minn. Stat. § 590.01, subd. 4(a). *See, e.g., Vang v. State*, 788 N.W.2d 111, 114 (Minn. 2010) (declining to time bar a petition under

§ 590.01, subd. 4(a), where petitioner's sentence was void due to lack of subject-matter jurisdiction); *Carlton v. State*, 816 N.W.2d 590, 623 n.3 (Minn. 2012) (Page, J. dissenting) (providing a list of cases in which the Minnesota Supreme Court "reviewed the merits of appeals that were deemed untimely for one reason or another"). Even though the limitations period has not been applied in a variety of contexts for a variety of reasons, it does not follow that the rule is inadequate to bar federal review in the instant case. *See White v. Minnesota*, Civil No. 14-3459 (ADM/BRT), 2015 WL 5672984, at *2 (D. Minn. Sept. 23, 2015) (stating that the court is "satisfied" that the limitations period is "firmly established and regularly followed") (collecting cases).

Moreover, the correct inquiry in this case is whether the *exception* to the limitations period set forth in subdivision 4(b)(2), in particular the requirement that the newly-discovered evidence "establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted," is "strictly or regularly followed," and is "applied evenhandedly to all similar claims." Several cases have found the exception not satisfied because the newly-discovered evidence did not establish innocence under the clear and convincing standard. *See, e.g.*, *Rhodes v. State*, 875 N.W.2d 779, 788 (Minn. 2016) ("We conclude that, even if the scientific evidence alleged in Rhodes's fourth petition were proven to be true at an evidentiary hearing, it would not satisfy the innocence prong of the newly-discovered-evidence exception."); *Scott v. State*, 788 N.W.2d 497, 502 (Minn. 2010) (concluding that evidence did not establish the defendant's innocence by a clear and convincing standard because "there was still a significant amount of properly admitted evidence supporting

[his] guilt"). Therefore, the exception is regularly followed and applied to bar claims, such as those brought by Petitioner, based on newly-discovered evidence that does not establish innocence under the clear and convincing standard. *See, e.g.*, *Echols*, 511 F.3d at 788 (finding a state procedural rule adequate to bar petitioner from federal habeas relief because "the rule is applied consistently to similarly situated defendants").

Based on the foregoing, this Court concludes that Petitioner's claims are procedurally defaulted.

C. Procedural Default Will Not Result in a Fundamental Miscarriage of Justice

Petitioner argues that his claims should be considered because if they are procedurally defaulted, it would result in a fundamental miscarriage of justice. (Pet'r's Mem. 30–33.) To satisfy this exception to the procedural bar against defaulted claims, a petitioner must "present new evidence that affirmatively demonstrates that he is innocent of the crime for which he was convicted." *Murphy v. King*, 652 F.3d 845, 850 (8th Cir. 2011). "First, the petitioner's allegations of constitutional error must be supported with new reliable evidence that was not presented at trial. Second, the petitioner must establish that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Weeks v. Bowersox*, 119 F.3d 1342, 1351 (8th Cir. 1997).

As explained by the Minnesota Supreme Court, Petitioner's newly-discovered evidence does not undermine evidence of Petitioner's guilt, such as testimony about his presence at the crime scene, that he helped dispose of the murder weapon, that he encouraged others to lie about his whereabouts, and that he made inculpatory statements.

Henderson III, 906 N.W.2d at 507–08. Petitioner's evidence does not establish actual innocence. "Due to important comity and finality interests, the actual innocence gateway is very limited. Few petitions are 'within the narrow class of cases implicating a fundamental miscarriage of justice.'" *Weeks*, 119 F.3d at 1351 (quoting *Schlup v. Delo*, 513 U.S. 298, 315 (1995)).

Therefore, the procedural default of Petitioner's claims would not result in a fundamental miscarriage of justice.

D. Petitioner's First Two Claims are Untimely Under the AEDPA

The AEDPA establishes a one-year limitations period that begins to run from the latest of a series of dates, including, as relevant here, "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," 28 U.S.C. § 2244(d)(1)(A), and "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," § 2244(d)(1)(D). Respondent argues, and this Court agrees, that Petitioner's *Brady* and ineffective assistance of counsel claims are untimely, whether the limitations period begins to run based on either of these provisions. (Resp't's Mem. 12–16.)

In response, Petitioner argues that the untimeliness of these claims should be excused because he can make a showing of actual innocence. (Pet'r's Mem. 22–24); *see McQuiggin v. Perkins*, 133 S. Ct. 1924, 1935–36 (2013) (holding that a *Schlup* actual innocence showing provides a gateway past the AEDPA statute of limitations). As discussed above, however, Petitioner's newly-discovered evidence falls short of demonstrating actual innocence.

E. Petitioner's Claim that the State Court Made an Unreasonable Determination of Fact

Petitioner's third claim is that the state court made an "unreasonable determination of fact" regarding the newly-discovered evidence in relation to his confession. This claim seems to take issue with the state court's conclusion that the newly-discovered Scott Affidavit, even if presumed to be true, does not establish Petitioner's innocence by clear and convincing evidence.

As discussed above, this Court concludes that all three of Petitioner's claims are procedurally defaulted. An additional problem with this claim, however, is that it does not appear to be tied to an independent constitutional violation that occurred at Petitioner's trial. *See Herrerra v. Collins*, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for habeas relief absent an independent constitutional violation occurring in the *underlying state criminal proceeding*.") (emphasis added). Moreover, to the extent that Petitioner may be arguing that his due process rights were violated during the postconviction proceedings, procedural violations during state collateral proceedings are issues unrelated to the cause of detention and cannot form the basis for habeas relief. *See Johnson v. Florida Dep't of Corr. Sec'y*, Case No. 4:17cv93/WS/EMT, 2018 WL 3056700, at *3 (N.D. Fla. May 16, 2018) (collecting cases); *see also Williams-Bey v. Trickey*, 894 F.2d 314, 317 (8th Cir. 1990); *Williams v. State*, 640 F.2d 140, 143–44 (8th Cir. 1981) ("[I]nfirmities in the state's post-conviction proceeding do not . . . render a prisoner's

detention unlawful or raise constitutional questions cognizable in habeas corpus proceedings.").

Therefore, even if not procedurally defaulted, Petitioner's third claim would fail on the merits.

III. Certificate of Appealability

Finally, this Court notes that a § 2254 habeas corpus petitioner cannot appeal an adverse ruling on his petition unless he is granted a Certificate of Appealability ("COA"). 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b)(1). A COA should not be granted unless the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a habeas petition is denied on procedural grounds without reaching the underlying merits, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Jurists of reason would not debate whether the state procedural rule is adequate to bar Petitioner's claims, or that Petitioner has not presented evidence demonstrating actual innocence. Therefore, this Court recommends that a COA should not be issued.

RECOMMENDATION

Based on the foregoing, and on all of the files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED** that:

1. Respondent's Motion to Dismiss (Doc. No. 11) be **GRANTED**;

2. Petitioner's petition for a writ of habeas corpus (Doc. No. 1) be **DENIED**;

3. Petitioner's request for a certificate of appealability be **DENIED**; and

4. This action be **DISMISSED WITH PREJUDICE**.

Date: June 17, 2019.

s/ Becky R. Thorson
BECKY R. THORSON
United States Magistrate Judge

NOTICE

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals. Under Local Rule 72.2(b)(1), "a party may file and serve specific written objections to a magistrate judge's proposed finding and recommendations within 14 days after being served a copy" of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set for in LR 72.2(c).

Appendix D

STATE OF MINNESOTA

IN SUPREME COURT

A17-0124

Hennepin County — Hudson, J.

Keith Henderson,

Appellant,

vs.

Filed: January 31, 2018
Office of Appellate Courts

State of Minnesota,

Respondent.

Zachary A. Longsdorf, Longsdorf Law Firm, PLC, Inver Grove Heights, Minnesota, for appellant.

Lori Swanson, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

S Y L L A B U S

1. A postconviction court must accept the facts alleged in the petition as true when deciding whether a postconviction petition may be denied without holding an evidentiary hearing.

2. The postconviction court did not abuse its discretion when it summarily denied appellant's third petition for postconviction relief because the petition did not clearly and convincingly establish appellant's innocence in order to satisfy the newly-discovered-evidence exception under Minn. Stat. § 590.01, subd. 4(b)(2) (2016).

Affirmed.

Considered and decided by the court without oral argument.

O P I N I O N

HUDSON, Justice.

This case is an appeal from the denial of Keith Henderson's third petition for postconviction relief, which asserts several claims based on facts alleged in two sworn affidavits. The postconviction court summarily denied Henderson's petition because it was filed after the statute of limitations in Minn. Stat. § 590.01, subd. 4(a) (2016), expired, and failed to meet the newly-discovered-evidence exception in subdivision 4(b)(2). Because the affidavits are legally insufficient to establish that Henderson is innocent of the offenses of which he was convicted, the postconviction court did not abuse its discretion when it summarily denied the petition as untimely filed. We affirm.

FACTS

In 1998, Juwan Gatlin was killed by fellow gang members in an alleyway in Minneapolis.[1] He was shot between 13 and 15 times. Following a police investigation,

[1] The facts underlying Henderson's crimes are set forth in detail in *State v. Henderson*, 620 N.W.2d 688, 693–95 (Minn. 2001).

Henderson was indicted for first-degree premeditated murder, Minn. Stat. § 609.185(1) (2016), and a crime committed for the benefit of a gang, Minn. Stat. § 609.229 (2016). Donte Evans and Darryl McKee were also indicted for Gatlin's murder.

Henderson, McKee, Evans, and Gatlin were all members of a street gang known as the Mickey Cobras. Gatlin was killed because he gave information to police that led to the arrest of two other Mickey Cobra members for an unsolved murder. At trial, the State presented several witnesses who testified to Henderson's involvement in Gatlin's murder. The testimony of H.W., A.N., and D.J. is relevant to this appeal.

H.W., another Mickey Cobra, testified that Evans told him about Henderson's involvement in Gatlin's murder. H.W. described two conversations with Evans, one in a car and one in a hallway. H.W. said that he, his "little cousin," and Evans were in a car together when Evans said, "T, we got away with it . . . we got [Gatlin], we got [Gatlin]."[2] The "little cousin" to whom H.W. referred at trial was R.J., although the identity of the "little cousin" was not known at trial.

The other conversation, which took place in a hallway, occurred later that same day. During that conversation, Evans provided more detail about Gatlin's murder. Evans told H.W. that he, Henderson, McKee, "QC," "Rock," and "Looney" were involved in killing Gatlin. According to H.W., Evans told him that Henderson shot Gatlin first, then passed the gun to Evans, who shot Gatlin several more times. Evans also told H.W. that Gatlin said, "I'm dead, T, I'm dead."

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[2] "T" is a slang term that the Mickey Cobras use to refer to each other.

During the investigation into Gatlin's death, H.W. and R.J. were initially considered suspects. H.W. later told police what Evans had told him about the murder. H.W. testified that he went to the police because R.J. was next on the gang's "hit" list, and H.W. was afraid that he would also be killed because he was always with R.J. When asked why R.J. was on the "hit" list, H.W. testified that "[Evans] didn't ever say why they wanted to kill [R.J.]. They just said he was off his square or something like that, messing with his girlfriend," but also said that R.J. was on the "hit" list because R.J. told police that "Penny" was involved in an unrelated murder.[3]

A.N., another Mickey Cobra, testified that he went to the police several times following Gatlin's murder. He told police that he believed that D.J., Gatlin's former girlfriend and Henderson's neighbor, had information about the murder. A.N. also testified that he spoke directly to D.J. about Gatlin's death, and that A.N. and Henderson did not get along.

D.J. testified that she heard details about the murder from A.N. She also testified that Henderson told her "I did it" in reference to Gatlin's murder, but when she expressed surprise, Henderson said he was joking. D.J. had previously testified before the grand jury that Henderson told her that he shot Gatlin after pushing him in an alley, but she recanted this testimony at trial. The trial court admitted her grand jury testimony as substantive evidence of Henderson's guilt.

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[3] "Penny" appears to be a street name. The identity of this person is unknown.

Several other witnesses provided evidence of Henderson's involvement in Gatlin's murder. A.B. testified that Henderson was at the murder scene. A.B.'s mother testified that Henderson helped dispose of the gun used to kill Gatlin. A.B.'s cousin testified that Henderson told her to tell A.B. that she should tell police that Henderson was out of town at the time of the murder. P.G., one of Henderson's fellow inmates, testified that Henderson told him that he pushed a guy over in an alley and shot him in the leg, arm, and head, and the victim said, "[d]on't shoot me no more. I'm already dead."

Henderson was convicted of first-degree premeditated murder following a jury trial. We affirmed Henderson's convictions and sentences on direct appeal. *State v. Henderson*, 620 N.W.2d 688 (Minn. 2001). Between 2001 and 2004, Henderson filed two petitions for postconviction relief, both of which were denied. In 2016, Henderson filed a third petition for postconviction relief based on facts alleged in two affidavits signed by R.J. and W.S. Both affidavits are notarized.

R.J.'s affidavit is dated April 2015 and contradicts aspects of H.W.'s trial testimony. His affidavit provides three pieces of relevant information: (1) R.J. is H.W.'s "little cousin," who was present during the conversation in the car, and it was H.W., not Evans, who said "T, we got away with [killing Gatlin]"; (2) H.W. told R.J. that H.W. shot Gatlin three or four times and provided other details about the murder; and (3) it was H.W., not R.J., who told police that "Penny" was involved in an unrelated murder.

W.S.'s affidavit is dated December 2015 and relates to A.N.'s and D.J.'s trial testimony. His affidavit provides two pieces of relevant information: (1) A.N. told W.S.

that he lied to D.J. about Henderson's involvement in the murder to frame Henderson; and (2) A.N. gave the false information because he did not like Henderson.

Based on these two affidavits, Henderson filed his third petition for postconviction relief, arguing that the affidavits were newly discovered evidence and also evidence of false testimony. He additionally asserted that the newly discovered evidence was evidence of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), or alternatively, demonstrated an ineffective-assistance-of-counsel claim. Henderson requested an evidentiary hearing.

The postconviction court denied Henderson's petition without holding an evidentiary hearing, concluding that his petition was filed after the statute of limitations in Minn. Stat. § 590.01, subd. 4(a) had expired, and that his petition failed to satisfy the newly-discovered-evidence exception in subdivision 4(b)(2). The court also found that Henderson's *Brady* and ineffective-assistance-of-counsel claims lacked factual support. Henderson challenges the postconviction court's conclusion that his petition did not meet the newly-discovered-evidence exception, and its decision to deny relief without holding an evidentiary hearing, in this appeal.

ANALYSIS

"We review a denial of a petition for postconviction relief, as well as a request for an evidentiary hearing, for an abuse of discretion." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). A postconviction court does not abuse its discretion unless it has "exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Brown v. State*, 863 N.W.2d 781, 786 (Minn. 2015) (citation omitted) (internal quotation marks omitted). A petitioner is entitled

to an evidentiary hearing unless the "petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2016). "[A] postconviction evidentiary hearing is not required when the petitioner alleges facts that, if true, are legally insufficient to grant the requested relief." *Rhodes v. State*, 875 N.W.2d 779, 786 (Minn. 2016) (citations omitted).

Henderson argues that the postconviction court abused its discretion when it summarily denied his petition as untimely. We disagree. Minnesota Statutes § 590.01, subd. 4 (2016), provides the framework for determining a postconviction petition's timeliness. Subdivision 4(a) provides the statute of limitations for postconviction petitions. Minn. Stat. § 590.01, subd. 4(a). A petition must be brought within 2 years of the later of: "(1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court's disposition of [a] petitioner's direct appeal." *Id.* If a petitioner's conviction became final before August 1, 2005, like Henderson's did, the 2-year limitations period began on August 1, 2005. *See* Act of June 2, 2005, ch. 136, art. 14, § 13, 2005 Minn. Laws 901, 1097.

Henderson's petition was undoubtedly filed after the limitations period in subdivision 4(a) had expired.[4] But a petition filed after the 2-year period in subdivision

[4] Henderson filed his third postconviction petition nearly 9 years after the deadline. His conviction became final in April 2001, 90 days after our disposition of his direct appeal. *See Berkovitz v. State*, 826 N.W.2d 203, 207 (Minn. 2013) (explaining that a decision becomes final 90 days after our decision when no petition for certiorari is filed with the Supreme Court of the United States). Because Henderson's conviction became final before August 1, 2005, he was required to file his petition within 2 years of August 1, 2005.

4(a) has expired may still be timely under one of the five exceptions in subdivision 4(b). Minn. Stat. § 590.01, subd. 4(b). A petition invoking an exception must be filed within 2 years of the date the claim under an exception arises. Minn. Stat. § 590.01, subd. 4(c). A claim arises on the date that the petitioner "knew or should have known of the claim" giving rise to the exception. *Sanchez v. State*, 816 N.W.2d 550, 560 (Minn. 2012).[5]

Henderson argues that his petition is timely because the affidavits meet the newly-discovered-evidence exception in subdivision 4(b)(2). The newly-discovered-evidence exception requires a petitioner to show that the evidence: (1) is "newly discovered"; (2) "could not have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the 2-year period for filing a postconviction petition"; (3) is "not cumulative to evidence presented at trial"; (4) is "not for impeachment purposes"; and (5) "establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted." Minn. Stat. § 590.01, subd. 4(b)(2). All five requirements must be met for this exception to apply. *Riley*, 819 N.W.2d at 168.

The postconviction court concluded that the affidavits failed the third, fourth, and fifth requirements of the newly-discovered-evidence exception, and therefore, Henderson's petition was untimely. Henderson argues that the postconviction court's conclusion was

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[5] The postconviction court did not consider whether Henderson timely invoked the exception under subdivision 4(c). Because the State does not argue that the petition is untimely under subdivision 4(c), this argument has been forfeited. *See Carlton v. State*, 816 N.W.2d 590, 601 (Minn. 2012) ("[T]he statute of limitations in Minn. Stat. § 590.01, subd. 4(c), is not jurisdictional . . . .").

erroneous. The State challenges the postconviction court's determination that Henderson met the first and second requirements of the newly-discovered-evidence exception.

We need not consider all five requirements of the newly-discovered-evidence exception here because the facts alleged in the petition are legally insufficient to establish the fifth requirement: that the evidence would establish Henderson's innocence by a clear and convincing standard. *See* Minn. Stat. § 590.01, subd. 4(b)(2). This requirement is "more stringent" than the *Rainer* standard, which applies to timely filed petitions. *Rhodes*, 875 N.W.2d at 783, 788. Thus, there must be "more than an uncertainty" about the petitioner's guilt. *Brown*, 863 N.W.2d at 787–88. A petitioner is not required to establish that the evidence *proves* his innocence, but rather must "sufficiently allege *the existence* of evidence, which, *if true*, would establish the petitioner's innocence by clear and convincing evidence." *Miles v. State*, 800 N.W.2d 778, 784 (Minn. 2011) (second alteration added). In determining whether a summary denial of a petition is appropriate, a postconviction court must determine whether the evidence would, "on its face," demonstrate the petitioner's innocence by a clear and convincing standard. *Id.* at 783.

As a preliminary matter, Henderson argues that the postconviction court erred when it assessed the credibility of the affidavits from R.J. and W.S in summarily denying his petition. We agree. When determining whether an evidentiary hearing is required—that is, when the court may deny a petition without holding a hearing—a postconviction court must accept the facts alleged in the petition "on [their] face." *Id.* at 783–84. Only if the facts alleged in the petition, accepted as true, fail to establish the petitioner's innocence by a clear and convincing standard may a court summarily deny the petition. *See* Minn. Stat.

§ 590.04, subd. 1 (stating that a petitioner is entitled to an evidentiary hearing unless the record "conclusively show[s] that the petitioner is entitled to no relief"). A petitioner is otherwise entitled to an evidentiary hearing, and the postconviction court may assess the credibility of the evidence at that stage. *See id.*

In *Gassler v. State*, when discussing the clear-and-convincing standard generally, we said that "[t]he burden of clear and convincing evidence . . . is met when the truth of the fact to be proven is 'highly probable.' " 787 N.W.2d 575, 583 (Minn. 2010) (citations omitted). We also said that "to prove a claim by clear and convincing evidence, a party's evidence should be unequivocal, intrinsically probable and credible, and free from frailties." *Id.* (citation omitted). We concluded that Gassler's alleged evidence failed to prove his innocence because other evidence of his guilt existed. *Id.* In *Miles*, we clarified that under *Gassler*, the newly discovered evidence must show the petitioner's innocence by a clear and convincing standard "on its face." 800 N.W.2d at 783–84. We reaffirm now that when determining whether to summarily deny relief, a postconviction court must accept the evidence as true. *Id.* To the extent that *Gassler* can be read to hold that a postconviction court may assess the credibility of evidence without holding an evidentiary hearing, that reading is incorrect. *See, e.g.*, *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012) ("An evidentiary hearing provides the postconviction court the means for evaluating the credibility of a witness." (citations omitted)); *State v. Turnage*, 729 N.W.2d 593, 598 (Minn. 2007) ("[A]bsent a[n evidentiary] hearing, the postconviction court cannot make a judgment about which story is true and which is false." (citation omitted) (internal quotation marks omitted)).

Although the postconviction court improperly assessed the credibility of the affidavits, we still affirm the postconviction court's decision. Even accepting the affidavits of R.J. and W.S. as true, the facts alleged in Henderson's petition are legally insufficient to show his innocence by a clear and convincing standard. *See Rhodes*, 875 N.W.2d at 786 (stating that an "evidentiary hearing is not required" when the alleged facts, "if true, are legally insufficient to grant the requested relief" (citations omitted)). At most, W.S.'s affidavit shows that A.N. lied to D.J. It does not call into question D.J.'s credibility or her testimony that Henderson told her he "did it" when referring to Gatlin's murder. Similarly, R.J.'s affidavit states only that H.W. was also involved in the murder.[6] It does not exculpate Henderson because multiple people were involved in Gatlin's murder.

Moreover, other evidence of Henderson's guilt remains regardless of whether the affidavits are true. *See, e.g.*, *Scott v. State*, 788 N.W.2d 497, 502 (Minn. 2010) (concluding that evidence did not establish the defendant's innocence by a clear and convincing standard because "there was still a significant amount of properly admitted evidence supporting [his] guilt"). The evidence does not affect A.B.'s testimony that Henderson was at the murder scene, A.B.'s mother's testimony that Henderson helped dispose of the gun, A.B.'s cousin's testimony that Henderson encouraged others to lie to police about his whereabouts at the time Gatlin was killed, or Henderson's inculpatory statements to P.G. about details of the murder. *See Henderson*, 620 N.W.2d at 694–95, 705.

[6] The information in R.J's affidavit regarding who told police that "Penny" was involved in a different murder equally does not show that Henderson is innocent of the crimes committed in this case.

In sum, the alleged facts do not clearly and convincingly show Henderson's innocence and therefore fail to satisfy the fifth requirement of the newly-discovered-evidence exception. Accordingly, Henderson's petition was untimely filed. Because the facts are legally insufficient to show that Henderson meets the newly-discovered-evidence exception, the district court did not abuse its discretion when it denied the petition as untimely without conducting an evidentiary hearing.[7]

CONCLUSION

For the foregoing reasons, we conclude that the postconviction court did not abuse its discretion when it summarily denied Henderson's petition for postconviction relief.

Affirmed.

[7] Because Henderson's postconviction petition is untimely, we do not reach the merits of his claims. *See, e.g.*, *Berkovitz*, 826 N.W.2d at 207 (stating that this court considers the merits only if the petitioner has first satisfied an exception in Minn. Stat. § 590.01, subd. 4(b)).

Appendix E

28 U.S. Code § 2254 - State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.