

No. _____

In The Supreme Court of the United States

Marlow Shelton McDonald, Petitioner

vs.

Jeff Titus, Warden, Rush City Correctional Facility, 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 *McDonald v. Titus*, No. 19-3665 denying the request for a certificate of appealability (Appendix A) is unreported. The Order of the United States District Court, *McDonald v. Titus*, 18-3099 PJS/TNL (D.Minn. 11/6/19), appears at Appendix B. The Report and Recommendation of Magistrate Tony N. Leung appears at Appendix C. Mr. McDonald had an appeal to the Minnesota Court of Appeals, *McDonald v. State*, A18-0064 (Minn.App. July 30, 2018). This opinion appears at Appendix D. Mr. McDonald then petitioned the Minnesota Supreme Court for Further Review. That petition was denied by an Order of the Minnesota Supreme Court dated October 24, 2018. This Order appears at Appendix E.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered on May 6, 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 Marlow McDonald seeks a writ of certiorari to the Eighth Circuit from the denial of a certificate of appealability in federal habeas corpus review. Federal court jurisdiction derives from 28 U.S.C. § 2254. The Minnesota Court of Appeals denied Mr. McDonald's petition for postconviction relief. See Appendix D.

Mr. McDonald'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. McDonald's timely filed Application for Certificate of Appealability was denied by the Eighth Circuit Court of Appeals on May 6, 2020. (Appendix A).

Mr. McDonald was initially charged with six (6) counts: (1) first-degree controlled substance – sale 10 grams or more of methamphetamine in a 90-day period (Minn. Stat. § 152.021, Subd 1(1)); (2) second-degree controlled substances – possession 6 grams or more of methamphetamine (Minn. Stat. § 152.022, Subd. 2(a)(1)), (3) first-degree assault of a peace officer (Minn. Stat. § 609.221, Subd. 2(a)), (4) first-degree assault of a peace officer (Minn. Stat. § 609.221, Subd. 2(a)); (5)

unlawful possession of a pistol (Minn. Stat. § 624.713, Subd. 1(2)); and felon in possession of a firearm (Minn. Stat. § 609.165, Subd. 1(b)(1)), related to drug sales which allegedly took place between April 7 and April 29, 2014 and his arrest on May 7, 2014. On September 9, 2014, additional counts of third-degree controlled substances – possession (Minn. Stat. § 152.023, Subd. 2(a)(1) and fleeing a police officer in a motor vehicle (Minn. Stat. § 609.487, Subd. 3) were added.

Mr. McDonald was tried before a jury from September 9-15, 2014, with the Honorable Judge Kurt Johnson presiding. Mr. McDonald was found guilty of the first, second, and third-degree controlled substance counts, possession of the pistol, felon in possession, and fleeing a police officer in a motor vehicle. He was acquitted of all assault counts. The jury found that Mr. McDonald had five or more previous felony convictions and that the current offense was committed as part of a pattern of criminal conduct.

On November 17, 2014, Mr. McDonald was sentenced to 316 months (a double upward departure) on the first-degree controlled substance crime, 1 year and 1 day on fleeing a peace officer, 60 months on the felon in possession, and 57 months on the third-degree possession count. The first-degree sale and 1 year and 1 day for fleeing a peace officer ran consecutive. The third-degree possession and felon in possession sentences ran concurrently.

In April 2014, an agent at the Minnesota River Valley Drug Task Force received information from LaSueur County investigators that Amanda Robb was interested in working off criminal charges in that county by working for police in the

Mankato area. (T. 66, 165, 167). Robb signed a cash contract with the task force that guaranteed she would receive cash for completed drug buys or information leading to an arrest. (T. 166). The cash for sales compensation worked on a sliding scale, with Robb receiving more cash for the higher degree of drug sale she was able to induce. (T. 68).

On April 7, 2014, Robb contacted agent Johnson about a phone call she received from Mr. McDonald, asking her to contact him if she wanted to buy methamphetamine. (T. 85). According to Robb, Mr. McDonald told her that he had found her phone number in the cell phone of a man who had previously sold Robb meth, and who was currently in jail. (T. 169). Agent Johnson directed Robb to set up a buy. (T. 169).

On April 8, 2014, Robb called Mr. McDonald and arranged to buy a gram of meth. (T. 90). Before the buy, Robb met with Agent Johnson and other Task Force members for a preoperational briefing. (T. 170). Johnson searched Robb and her car, fitted her with a wire, and gave her \$160.00 of marked bills. (T. 170, 172). Several unmarked cars monitored Robb as she waited at the Holiday parking lot for Mr. McDonald. (T. 90). After she parked, Mr. McDonald arrived in a four-door car. (T. 93). She was unable to recall the color. (T. 93). Agent Johnson testified it was a Chrysler 300. (T. 178). According to Robb, Mr. McDonald entered Robb's car and exchanged money for drugs. (T. 180). Robb was then debriefed, her person and car searched, and the drugs taken from her back the Justice Center. (T. 183). No witness

other than Robb visually identified the seller in this purchase. (T. 180 - Agent Johnson; T. 371 – Officer Matthew Vitale)

Based on his affidavit provided in support of his petition for postconviction relief, Mr. McDonald stated that the person who made the first transaction with Robb was Shamark Jama. Mr. McDonald remained in the vehicle, which was a grey Pontiac and spoke with Robb through his rolled down window. Mr. McDonald would have informed the jury of this had his right to testify and present a defense not been taken by the district court's statement that all of his prior convictions were admissible to impeach him if he testified.

On April 14, 2014, Agent Johnson told Robb to purchase an eight-ball, or 3.5 grams of meth from Mr. McDonald. (T. 199). According to Agent Johnson, Mr. McDonald arrived first, driving the same Chrysler 300 as the first sale. (T. 201). After Robb appeared, Mr. McDonald entered her car and exchanged \$300 for a baggie of meth. (T. 105, 201). Robb returned to the police station and gave Johnson the bag. (T. 202-03).

A week later, on April 21, 2014, Robb arranged to meet Mr. McDonald at the Holiday parking lot purchase seven grams of meth. (T. 280). Mr. McDonald had much less than the 7 grams Robb sought, but Robb bought what he had anyway. (T. 222).

On April 23, 2014, Robb again arranged to buy seven grams of meth from Mr. McDonald. (T. 224). They met at a Burger King parking lot where she exchanged \$600 for several bags of suspected methamphetamine. (T. 229). During her

testimony regarding this purchase, Robb initially stated that it occurred in the MGM parking lot, but was corrected to state it occurred at the Burger King. (T. 121-22).

Though that purchase did take place at Burger King, a separate purchase attempt did take place in the parking lot of the MGM. During that transaction, Mr. McDonald stopped and picked up Shamark Jama on his way into Mankato. When they arrived at the McDonalds, which is adjacent to the MGM parking lot, Jama exited the vehicle and went to Robb to make the delivery of approximately 3.5 grams of methamphetamine. After Jama left the vehicle, Mr. McDonald saw him head toward the MGM store parking lot. Mr. McDonald continued through the McDonald's drive-thru and waited for Jama in the McDonald's parking lot. When Jama returned, he still had the methamphetamine. He stated that Robb did not want to make the purchase, but he did not know why. (McDonald Affidavit). The jury was not informed of this.

On April 29, 2014, Robb again contacted Mr. McDonald to buy 3.5 grams of meth. (T. 237). When Robb and Mr. McDonald met, Mr. McDonald only had a few scrapings, which he sold to Robb for \$80.00. Robb turned the drugs over to Agent Johnson at the police station afterwards. (T. 241).

After the five buys, which got Mr. McDonald just above the first-degree sales threshold, Agent Johnson concluded that further "investigation" of Mr. McDonald would not lead to a drug source. (T. 247). The other "investigation" Agent Johnson testified about was having another officer follow several individuals who had been passengers in Mr. McDonald's vehicle into a Burger King while Mr. McDonald

conducted a drug sale with Ms. Robb. (T. 233). Agent Johnson described this as “Yes, Agent Tim Wendler went inside the Burger King business and watched them more or less.” (T. 233). There was no attempt to get a warrant for phone tapping and Mr. McDonald was not followed after the buys to see where he would go. (T. 290). On one occasion, some female passengers were with Mr. McDonald, but they were not identified. (T. 286). On another occasion, Shamark Jama was with Mr. McDonald, but nothing was done to investigate him because his “m-o was kind of stealing TV’s...”. (T. 288).

On May 7, 2014, Johnson asked Robb to call Mr. McDonald in order to locate him for arrest. (T. 252). Later that day, Robb called Johnson and told him that Mr. McDonald was at an apartment next to a Holiday Inn. When officers arrived, Mr. McDonald’s car was in the parking lot. (T. 253). Agents Johnson, Vitale, and Isaacson, and four Blue Earth deputies met at the parking lot and waited for Mr. McDonald to leave. (T. 262).

Due to the heavy rain and late hour, Agent Johnson only noticed Mr. McDonald’s car leaving the parking lot by its headlights. (T. 263, 265). Johnson radioed the deputies and other agents to block the car. (T. 264). Agent Vitale, who was driving an unmarked truck, passed Mr. McDonald and attempted to block the back of the car, but the turn was too tight. (T. 387). Another officer activated his lights and blocked the front of the car. Vitale saw Mr. McDonald’s vehicle come to a quick stop and reverse, striking the left front of his truck. (T. 392). The car then went forward, jumping the curb and speeding across the parking lot. (T. 394). As the

car jumped the curb, Vitale heard three to seven shots ring out. (T. 393). Deputy Brian Martin testified that he got out of his squad after Mr. McDonald hit Vitale's truck. When Mr. McDonald started to move forward again, Martin started to walk backwards and tripped over the curb. (T. 494-95). Martin fired his gun because he thought the car was going to hit him. Instead, it veered over the curb and away from police. (T. 498). No more than ten second elapsed from the time Mr. McDonald left the parking lot to when shots were fired. (T. 412).

After a brief chase, police forced the car off the road, causing it to drop off a steep embankment. (T. 442). The pursuit covered .75 miles. (T. 470). Mr. McDonald along with Abdullahi Mohamed were removed from the car and arrested. (T. 444, 448). Police searched the car and found marijuana, a loaded hand gun, and meth. (T. 317-19, 557, 566, 587).

PRETRIAL PROCEEDINGS

On May 9, 2014, Mr. McDonald made his first appearance in this matter. At that time, he entered a speedy trial demand on his own behalf. (May 9, 2014 Hearing T. 6). Counsel then waived the Rule 8 and requested an omnibus hearing within 28 days. (Id. T. 7). Mr. McDonald appeared before the court for his omnibus hearing on June 6, 2014. At that hearing, counsel for Mr. McDonald informed the court that despite being on for an omnibus hearing, the prosecution had yet to disclose the identity of the informant. (June 6, 2014 T. 2). In response the district court stated "Well I am sure Mr. McDonald will tell you who it is." (Id. T. 3). Counsel also pointed out that other evidence, including video related to the purported assaults, had not

been disclosed. (Id. T. 3). Mr. McDonald then made a second speedy trial request. (Id. T. 4). In response, the prosecution argued that it did not want to disclose the identity of the informant until closer to trial and that it had not received the assault evidence from the officers yet. (Id. T. 4-5). The court ordered Mr. McDonald to bring a motion regarding disclosure of the identity of the informant and set a trial date for August 6, 2014, with a pretrial date of July 29, 2014. (Id. T. 5-6).

On June 12, 2014, counsel for Mr. McDonald filed a motion for discovery, suppression, and dismissal. In that motion, counsel requested that the prosecution be ordered to identify and produce the informant and disclose all information related to her, that the prosecution's motion for an upward departure at sentencing be denied, ordering disclosure of evidence related to the purported assaults, or in the alternative dismissing the assault counts, dismissing Count One due to sentencing manipulation, dismissing all charges due to lack of probable cause, and ordering that Abdullahi Mohamad be considered a co-defendant for trial purposes.

At the July 2, 2014 hearing on the motion, the district court stated:

My position is this – we will have an omnibus hearing on the issues you have raised in your motion or you can have your speedy trial, we can't do both; we are not going to try to do both, it is not possible; your motions that you have raised here – have waived your issue of a speedy trial if that is what you choose to do; I don't know why I am giving you an option; I don't have any of this information at all; there is no possible way that the Court can make any determination with regard to any of the motions that you brought here without these matters being litigated without an omnibus hearing being held and without counsel briefing the issues and provide the court documents, I have no information whatsoever. I can't possible rule on any of these issues – um – without that information, so you can have an omnibus hearing and I will give you an omnibus hearing or we can proceed with your speedy trial, I don't think there is any issue one way or the other; they will give you the name

of the CRI – material witness and we will go from there. I believe you have waived your speedy trial already because you made this motion.

(July 2, 2014 Hearing T. 14-15). The court then instructed Mr. McDonald that he either needed to withdraw his motions in writing if he wanted a speedy trial or they would schedule an omnibus hearing for August 1, 2014. (Id. T. 16-17).

Following this, by a letter dated July 1, 2014, the prosecution argued to the trial court that because Mr. McDonald brought a motion, he had waived his speedy trial rights and requested that the trial date be moved out. Mr. McDonald pointed out that while the prosecution had divulged the identity of the informant, that was all it had done and he objected to being forced to choose between having proper disclosure regarding the informant and the assault charges against him or having a speedy trial in a letter dated July 9, 2014. On an Order dated July 17, 2014, the district court ordered the speedy trial deadline was extended from 60 days to 120 days for the good cause of Mr. McDonald having brought a motion. In a hearing on July 30, 2014, Mr. McDonald waived his claims and demanded a speedy trial. (July 30, 2014 Hearing T. 14). The court affirmed its prior order delaying trial. (Id. 15). Trial did not start until September 10, 2014, 122 days later.

Before trial, the prosecution moved to impeach Mr. McDonald with his prior convictions if he testified. Defense counsel filed a motion in opposition. The day before trial, the prosecution brought the motion to the district court's attention. (September 9, 2014 Hearing T. 5). The trial court ruled that Mr. McDonald could be impeached with all of his prior convictions, stating:

[T]he State cannot bring in anything more in their case in chief with regard to the prior criminal history obviously unless Mr. McDonald chooses to testify and once Mr. McDonald chooses to testify, everything and anything comes in – is fair game and that will come into evidence to the extent the State wants to.

(September 9, 2014 Hearing T. 6). On the day of trial, defense counsel informed the court that Mr. McDonald would not testify in light of the court's ruling that he would be impeached with all of his prior convictions if he testified. (T. 4). At the close of the prosecution's evidence, the prosecutor noted that the trial court had not provided the parties an analysis pursuant to *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1987). (T. 670). The trial court referred to its earlier ruling and stated that if Mr. McDonald testified, "it's free game." (T. 670).

TRIAL

Defense counsel conceded that Mr. McDonald did have contact with Robb and that some drug transactions did occur, but only in the third-degree amount. (T. 44, 743, 764). Mr. McDonald also conceded that he was driving at the time of his arrest. (T. 677). Mr. McDonald, however, continued to deny he intended to assault police officers during his arrest. (T. 749-54).

The jury found Mr. McDonald guilty of first-degree sale, the lesser-included second-degree sale, two counts of third-degree possession, possession of a pistol, prohibited person in possession of a firearm, and fleeing police. (T. 775-76). The jury acquitted Mr. McDonald of two counts of first-degree assault and two counts of second-degree assault. (T. 776).

After returning its verdict, the jury was asked to determine if Mr. McDonald had “five or more previous felonies” and whether “the present offenses [were] committed as part of a pattern of criminal behavior.” (T. 777). The prosecution introduced records documenting the following felony convictions:

- Aggravated forgery (8/10/04)
- Falsely impersonating another (8/10/04)
- Fifth-degree controlled substance crime (8/10/04)
- Fifth-degree controlled substance crime (1/4/05)
- Fifth-degree controlled substance crime (7/13/05)
- Felon in possession of a firearm (12/22/05)
- Fifth-degree controlled substance crime (3/1/12)

(T. 780; Exhibits 52-58). Without any additional evidence whatsoever, the prosecution argued Mr. McDonald was a career criminal. (T. 788). It argued that the four drug possession felonies showed a pattern with the current convictions because they all involved controlled substances, that the firearms offenses were a pattern of conduct, and that the impersonating another was similar to his fleeing conviction in the present case. (T. 787-88). It also argued that the aggravated forgery charge showed Mr. McDonald was a career criminal. (T. 788).

Counsel for Mr. McDonald argued that merely showing a fifth-degree controlled substance conviction didn’t really show anything regarding an intent to sell, since even having some residue in a baggie would support that charge. (T. 790, 791, 792). He also pointed out that a forgery charge and impersonating another on

their face had nothing to do with drug charges. (T. 791). The jury returned a special verdict finding that Mr. McDonald had been convicted of five or more previous felonies and had committed the present offense as part of a pattern of criminal behavior. (T. 794).

SENTENCING

On November 17, 2014, Mr. McDonald appeared for sentencing. The trial court denied his motion alleging sentencing manipulation. (S. 3). The prosecution urged the court to sentence Mr. McDonald to 316 months on the first-degree count. (S. 10). Mr. McDonald argued that a sentence within the guideline range was proper. (S. 14). The trial court sentenced Mr. McDonald to 316 months on the first-degree count, to run consecutive to a 1 year and 1-day sentence on fleeing a police officer. He was also given concurrent sentences of 60 months on the felon in possession and 57 months for the third-degree possession count. (S. 19-20).

DIRECT APPEAL

On direct appeal, Mr. McDonald argued that the trial court erred by failing to evaluate the *Jones* factors on the record before allowing all his prior convictions in if he testified, that there was insufficient evidence presented at the *Blakely* hearing to support the career offender sentence, that the prosecutor committed misconduct by emphasizing the similarity to prior dismissed charges without presenting any evidence related to the dismissed charges during the *Blakely* hearing, and that the district court abused its discretion by imposing a double upward durational sentencing departure based on Mr. McDonald's alleged danger to public safety. In

his pro se brief, Mr. McDonald argued that the district court violated his speedy trial rights when it granted the prosecution a continuance and forced him to choose between litigating omnibus issues and having a speedy trial, that his trial judge was biased against him, and that his first-degree controlled substance conviction and sentence were the result of sentencing manipulation.

The Minnesota Court of Appeals affirmed his conviction and sentence in an unpublished opinion dated February 16, 2016. The Court of Appeals held that it was an error when the district court failed to go through the *Jones* factors, but the error was harmless because four of the five factors weighed in favor of admission. *State v. McDonald*, A15-0268, P. 2-3 (Minn.App. February 16, 2016). It also held there was no prosecutorial misconduct related to the use of Exhibit 58. *Id.* P. 3-4. After stating that it was improper to use a conviction without evidence of the factual basis for the crime to determine if a pattern of criminal conduct exists, the Court of Appeals held that there was still sufficient evidence to support the determination Mr. McDonald committed this crime as a part of a pattern of criminal conduct because “McDonald’s four prior controlled-substance crimes were facially identical to one another and facially similar to his present controlled-substance crimes, and his prior firearms crime was facially identical to one of his present firearms crimes and facially similar to the other of his present firearms crimes.” *Id.* P. 4.

The Court of Appeals also affirmed the imposition of a double upward sentencing departure because of the pattern of criminal conduct finding by the jury. *Id.* P. 5. In addressing Mr. McDonald’s pro se arguments, the Court of Appeals held

Mr. McDonald was not denied his right to a speedy trial, that he failed to show judicial bias, and that, even if Minnesota recognized the doctrine of sentencing manipulation, Mr. McDonald could not show it had occurred because he did not attempt to refute the state's evidence of legitimate law enforcement goals. *Id.* P. 5-7.

POSTCONVICTION

On July 17, 2017, Mr. McDonald filed a petition for postconviction relief and memorandum in support of that petition. (Docket Id. # 150, 151). In that petition, Mr. McDonald raised the following claims:

IV. GROUNDS FOR RELIEF

1. Mr. McDonald should be resentenced under the 2016 Minnesota Drug Sentencing Reform Act of 2016, under which the amount of methamphetamine he sold, under Minn. Stat. § 152.022, Subd. 1(1) (2016) is only a second-degree offense, which carries with it a presumptive sentence of 108 months and a range of 92 to 129 months under the new Drug Offender Sentencing Grid.

2. Mr. McDonald's sentence under the pre Minnesota Drug Sentencing Reform Act of 2016 violates his due process and equal protection rights.

3. Mr. McDonald's Sixth Amendment right to present a defense by testifying on his own behalf was violated when he was told that any and all of prior conviction would be admissible for impeachment purposes if he testified.

4. Mr. McDonald's Due Process Rights under the Fifth and Fourteenth Amendments to the United States Constitutions were violated due to the conduct of the state by sentence manipulation.

5. Mr. McDonald received ineffective assistance of counsel during the *Blakely* portion of his trial where counsel failed to object to the use of Exhibit 58 with the dismissed charges on it, where counsel failed to explain that a 5th degree controlled substance offence could occur without actually possessing any measurable amount of the controlled substance itself, where counsel failed to show evidence that

Mr. McDonald did not have any prior controlled substance sales convictions, and where counsel failed to show that jury that some convictions came as the result of a plea agreement where there was no specific conduct matching the charge, but Mr. McDonald plead guilty anyway to have a different charge dismissed.

(Petition for Postconviction Relief P. 3-4, Docket Id. 150).

By an Order, dated August 17, 2017, the district court granted in part and denied in part Mr. McDonald's petition for postconviction relief. (Add. 1-2). The district court granted Mr. McDonald's request for resentencing under the 2016 Drug Sentencing Reform act, which correlated to Grounds 1 and 2 of Mr. McDonald's petition for postconviction relief, and denied the remainder of his claims, corresponding to Grounds 3-5. (Add. 4-8).

The resentencing hearing was scheduled and held on October 6, 2017. At that hearing, the district court took the matter under advisement and stated it would issue a written order with regard to Mr. McDonald's sentence. In an Order, entitled "Order for Amended Sentence on Count 1", dated November 14, 2017, the district court amended Mr. McDonald's sentence on Count 1 from 316 months to 250 months. (November 14, 2017 Order, Doc. Id. # 175, Addendum P. 11). In that Resentencing Order, the district court stated "The matter was before the Court because the Court granted Defendant's petition for post-conviction relief to resentence him on his conviction for Count 1 (First-Degree Controlled Substances Crime-Sale) under the 2016 Drug Sentencing Reform Act (DSRA)." (Id. P. 1).

In its Findings of Fact, the district court stated:

3. Defendant was convicted in Count 1 of first-degree controlled substances crime, which is a severity level 9 offense under the

Sentencing Guideline Grid. Under the DSRA, the amount of methamphetamine Defendants sold, under Minn. Stat. § 152.022, subd. 1(1), is a second-degree controlled substances crime, which is a severity level D8 under the Drug Offender Sentencing Grid.

(Add. 10). The characterization of Mr. McDonald's offense as a "second-degree controlled substance crime" notwithstanding, the court went on to find offense level D8, which is a first-degree offense, and its presumptive sentence of 125 months applied to Mr. McDonald because of his criminal history score of 6. (Add. 2). The court issued an amended sentence of 250 months for Count 1, with all other terms and conditions of the November 17, 2014 Order/Warrant for Commitment remaining in effect. (Add. 11).

POSTCONVICTION APPEAL

On January 12, 2018, Mr. McDonald filed a notice of appeal, seeking review of all issues raised in his petition for postconviction relief.

On January 17, 2018, the Court of Appeals issues an Order questioning jurisdiction and requesting written submissions on issues: (1) of whether appeal from August 17, 2017 Order was timely, (2) if it was not timely, must appeal from August 17, 2017 Order be dismissed, and (3) whether portion of appeal from November 14, 2017 Resentencing Order be treated as sentencing appeal. The parties submitted written submissions on February 6, 2018. By an Order dated February 20, 2018, the Court of Appeals accepted jurisdiction over the sentencing appeal from the November 14, 2017 Resentencing Order and dismissed the appeal from August 17, 2017 Order denying in part petition for postconviction relief. Mr. McDonald filed a petition for

review with the Minnesota Supreme Court on March 21, 2018. This was denied by an Order dated May 15, 2018.

In his brief, Mr. McDonald argued to the Court of Appeals that his equal protection and due process rights had been violated when the state district court refused to apply the higher drug quantity amounts in the Drug Sentencing Reform Act of 2016 during his resentencing. By an opinion dated July 30, 2018, the Minnesota Court of Appeals held Mr. McDonald's equal protection and due process rights were not violated. Mr. McDonald filed a petition for review with the Minnesota Supreme Court on August 29, 2018. That was denied on October 23, 2018.

REASONS FOR GRANTING THIS PETITION

I. This Court should grant review to determine whether a 13 to 1 racial disparity rate in imprisonment rates that lead to a change in drug possession laws should be reviewed using strict scrutiny.

Mr. McDonald's request that his equal protection claim be examined using the strict scrutiny standard was denied because the lower courts concluded he was unable to show either a racial impact of the law or a discriminatory intent in enacting the law.

It is Mr. McDonald's position that the combination of the Minnesota Supreme Court decision in *State v. Russell*, 477 N.W.2d 886 (Minn. 1991), the subsequent legislative changes, and the undisputed facts showing a disparate racial impact, in combination, are sufficient to trigger strict scrutiny review and provide him with relief. The lower courts viewed the Minnesota case law and subsequent legislative changes and the statistical truth about those laws in practice separately to reach

their conclusions. But they are not separate and should not be viewed as such. Together these facts show both the requisite discriminatory intent in the law and a discriminatory impact.

Minnesota Sentencing Guidelines Commission research shows that, from 2011 to 2013 in Minnesota, black adults made up 30% of people in prison for drug crimes, even though they only made up 4% of the total population of the state. White adults, however, made up 49% of people in prison for drug crimes, while being an overwhelming 86% of the total state population. This correlates to a 13 to 1 disparity rate¹.

This 13 to 1 disparity in imprisonment rates cannot be justified by the relative rates that blacks and whites in Minnesota commit serious drug offenses. *See* Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 Stanford Law and Policy Review 257, 266-68 (2009) (arguing that blacks and whites commit drug offenses, including trafficking offenses, at roughly the same rate); Tonry and Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 Crime & Justice 1, 25-27 (2008) (same). University of Minnesota Law School Professor Richard Frase cites other evidence showing that any disparity in offense rates is likely not enough to explain the disparity in black imprisonment rates. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations*, 38 Crime & Justice 201, 238-241 (2009). According to the Minnesota

¹ See October 20, 2015 Memorandum from Commissioner Mark Wernick to Minnesota Sentencing Guidelines Commission, https://mn.gov/sentencing-guidelines/assets/5B%20Wernick%20Submission_tcm30-78113.pdf.

Bureau of Apprehension, the 4% of Minnesota's adult population that is black account for 21% of adult drug arrests. The racial disparity in imprisonment rates for drug offenses is largely attributable to racial disparity in arrest rates, and not any significant difference in rates of offenses actually committed².

This was the result of the harsher penalties and reduced drug amounts constituting a first-degree crime under the pre – Drug Sentencing Reform Act that were put in place because the Minnesota Supreme Court held the different treatment of crack and powder cocaine offenses violated the state's equal protection clause. *See State v. Russell*, 477 N.W.2d 886 (Minn. 1991). The drug laws and sentencing requirements Mr. McDonald was sentenced under, where 10 grams was a first-degree amount, arose after the Minnesota Supreme Court determined the disparate impact on black defendants resulting from the powder/crack cocaine distinction violated the equal protection clause of the Minnesota Constitution. *State v. Russell*, 477 N.W.2d 886 (Minn. 1991).

This decision meant that the higher quantity thresholds of powder cocaine governed all cocaine offenses. In response to this, the Minnesota legislature decreased the quantity threshold for first-degree controlled substances offenses to the levels formerly set for crack. Previously, 10 grams was a third-degree offense, but became a first-degree offense. The Minnesota Drug Sentencing Reform Act was implemented, at least in part, out of recognition that the implementation of the crack cocaine quantity threshold for all drug offenses was not motivated by any new

² Id.

evidence about drug distribution markets or the dangers of illegal drugs and reflected the acknowledgement that the lowered quantity thresholds implemented after the *Russell* decision did not accurately reflect the levels of drugs that indicated a large scale seller.

The Report and Recommendation concluded that the *Russell* decision provides no support for the conclusion that the state court decisions resulted in an unreasonable application of federal law because Minnesota uses a different rational basis test. (Report and Recommendation P. 17, n. 7). Minnesota does use a different rational basis test, but the reason the *Russell* decision is important is not the exact test it used, but for the fact that laws at issue were overturned because of their racial impact and for the legislative changes that came in direct response to that conclusion. It was that decision, and then the legislative response that lead to the quantity thresholds Mr. McDonald's case was prosecuted under, and it was, at least in part, recognition that these changes were made in order make sure that crack cocaine quantity thresholds remained at the lower levels despite the *Russell* decision, and not on the basis of any fact or scientific evidence, that resulted in the quantity thresholds being increased.

This is a case where the need for the changes that took place with the 2016 DSRA stemmed from changes made in the early 90s that were not based in any way on science or fact, but rather came in response to the Minnesota Supreme Court striking down drug quantity thresholds on the basis of disparate racial impact. Given that this was the reason for the quantity thresholds that were changed, along with

the disparate racial impact, should result in the claim in this case being reviewed using strict scrutiny.

This Court should grant review to determine whether the circumstances presented in this case warrant review of Mr. McDonald's claim under the strict scrutiny standard.

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

Mr. McDonald 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. McDonald’s claims, the Eighth Circuit concluded that no reasonable jurists would disagree with the district court’s denial of Mr. McDonald’s petition. This included the district court’s conclusion that Mr. McDonald’s claims were time barred and procedurally barred despite the unusual circumstances that lead to the state courts deciding the claims on procedural grounds.

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. McDonald a COA given that he has stated a viable equal protection claim. 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 his appeal involves questions susceptible to debate and that a COA should therefore issue.

II. This court should review this matter to determine whether the prosecution's failure to raise procedural default and exhaustion defenses should preclude their applicability.

The defenses contained in Habeas Rule 5(b) are treated like affirmative defenses in that, if they are not raised, they are waived. *Robinson v. Crist*, 278 F.3d 862, 865 (8th Cir. 2002). If the defenses are not raised by the Respondent, they can only be applied in exceptional circumstances. *Wood v. Milyard*, 132 S.Ct. 1826, 1835-36 (2012).

Respondent's Answer in this matter, (Document 8), does not assert any of the defense set forth in Rule 5(b). In its Memorandum in opposition to Mr. McDonald's petition, Respondent briefly asserted that Mr. McDonald's ineffective assistance of trial counsel at sentencing claim was procedurally defaulted. (Document 9 – Respondent's Memorandum P. 13). No other defenses contained in Rule 5(b) were raised or asserted related to any other claim.

Despite this, the majority of Mr. McDonald's claims were denied as procedurally barred or defaulted, over Mr. McDonald's objection. Mr. McDonald contends that by failing to raise any of the defenses in Rule 5(b) in its Answer and Memorandum, Respondent has waived those defenses and they should not serve as a basis to avoid review of the merits of Mr. McDonald's claims. This Court should grant review to provide necessary guidance on this issue.

III. This court should review this matter to determine whether a purported, but never used, state procedural rule is an independent and adequate basis for procedural default.

The basis for the procedural default in this matter is not an adequate state procedural ground. Generally, a habeas court will not consider a habeas claim if the state courts found the claim to have been procedurally barred under some state defined procedure. *Weeks v. Bowersox*, 119 F.3d 1342, 1350-51 (8th Cir. 1997). The basis for the procedural default rule is the independent and adequate state grounds doctrine. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). A state procedural rule is an independent ground for denial of a claim when it is the actual reason for denying the claim; rather than a denial on the merits. A state procedural ground is adequate if it is based on a rule that is firmly established and strictly, regularly, and uniformly followed by the state. *White v. Bowersox*, 206 F.3d 776, 780 (8th Cir. 1999). State procedural requirements which are not strictly and regularly enforced cannot serve as a basis for a procedural default. *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). Other recent state court decisions in which the procedural rule at issue was not applied consistently are evidence that it is not a strictly or regularly followed rule which will prevent federal review. *Hathorn v. Lovorn*, 457 U.S. 255, 263-64 (1982).

The Report and Recommendation stated that Mr. McDonald identifying one case in which appeal was taken in the same manner is insufficient to show that the rule applied to Mr. McDonald is not firmly established and regularly followed. Mr. McDonald is also able to identify a Minnesota Court of Appeals case with a similar set of circumstances where review of all issues was conducted despite separate orders

addressing different parts of the petitioner's claims. *See Sanchez-Sanchez v. State*, A18-1310 (Minn.App. May 28, 2019). Further, while it is true Mr. McDonald presented one recent case to support his earlier contention, the preference for avoiding piecemeal appeals is long standing in Minnesota. *See Emme v. COMB, Inc.*, 418 N.W.2d 176, 178-79 (Minn. 1988).

In the *Emme* case, the Minnesota Supreme Court observed that, since even before Minnesota became a state, it has “almost peremptorily asserted jurisdiction with the observation that appellate jurisdiction has been generally understood to mean that, in all judicial proceedings, the judgment which finally determines the rights of the parties is subject to review by this court ... and has, on the other hand, consistently dismissed appeals from orders that did not finally determine either the action or some positive legal right of the appellant relating to the action. *Emme*, 418 N.W.2d at 178-79 (internal quotations and citations omitted). The Supreme Court went on to state “Basically, however, the thrust of the rules governing the appellate process is that appeals should not be brought or considered piecemeal.” *Emme*, 418 N.W.2d at 179. The reasons for this include conserving judicial resources, avoiding delay and expense for litigants, not having appellate courts decide issues which may become moot or irrelevant by the end of the district court proceedings, and allowing trial judges to supervise their pretrial and trial procedures without undue interference. *Emme*, 418 N.W.2d at 179.

“[T]he filing of a timely and proper appeal suspends the trial court’s authority to make any order that affects the order or judgment appealed from, although the

trial court retains jurisdiction as to matters independent of, supplemental to, or collateral to the order or judgment appealed from.” Minn. R. Civ. App. P. 108.01, Subd. 2. “The purpose of this rule is to avoid confusion and waste of time potentially arising from having the same issue before two courts at the same time.” *State v. Dwire*, 409 N.W.2d 498, 502 (Minn. 1987) (quotation omitted). Matters over which this district court retains jurisdiction after a notice of appeal is filed include “those which are ancillary or supplemental to the appeal as in aid of its proper presentation, such as orders to correct the record, to make and certify a settled case or bill of exceptions.” *State v. Barnes*, 81 N.W.2d 864, 866 (Minn. 1957).

In a recent unpublished opinion, a panel of this Court held that the district court lacked jurisdiction to consider a motion to correct sentence because the motion challenged the validity of his convictions and that issue was pending appeal. *See Bakdash v. State*, A16-1575 (Minn. App. April 10, 2017). The panel in *Bakdash* noted that the district court’s jurisdiction is suspended when the district court must consider the merits of an issue on appeal. *Bakdash v. State*, A16-1575 P. 4. It then determined that because Bakdash’s “motion to correct sentence” actually challenged the validity of his convictions, the district court lacked jurisdiction to decide the petition. *Id.*

Four (4) of the five (5) claims Mr. McDonald made were related to his sentencing, including seeking resentencing under the DSRA, arguing that refusal to apply the lower quantity laws to his case would violate his due process and equal protections rights, arguing that his due process rights were violated due to sentencing

manipulation, and that he received ineffective assistance of counsel during the sentencing portion of his trial. The issue that remained open following the state district court granting his petition in part and denying his petition in part had to do with his sentence and how the DSRA would apply to it, meaning he would have been appealing the same sentence that the district court still retained jurisdiction over had he appealed the portion of the petition that was denied.

With the longstanding caselaw and policy regarding when an appeal should be taken, that pre-exists even statehood, Mr. McDonald had no reason to expect that he would be precluded from pursuing appeal of those issues simply by waiting for the district court proceedings related to his sentence to be decided by that court before initiating his appeal. The manner in which Mr. McDonald was precluded from pursuing his appeal related to this claim is not a firmly established and strictly, regularly followed rule in Minnesota for these reasons.

This Court should grant review to provide necessary guidance for determining when a state procedural ground constitutes an independent and adequate basis for procedural default.

CONCLUSION

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

Respectfully submitted.

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