No. _____

In The Supreme Court of the United States

Marlow Shelton McDonald, Petitioner

vs.

Jeff Titus, Warden Rush City Correctional Facility, Minnesota, Respondent.

INDEX TO APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3665

Marlow Shelton McDonald

Petitioner - Appellant

v.

Jeff Titus, Warden, Rush City Correctional Facility, Minnesota

Respondent - Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:18-cv-03099-PJS)

JUDGMENT

Before GRUENDER, SHEPHERD, and KELLY, 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.

May 06, 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

MARLOW SHELTON MCDONALD,	Case No. 18-CV-3099 (PJS/TNL)
Petitioner,	
v.	ORDER
JEFF TITUS, Warden, Rush City Correctional Facility, Minnesota	
Respondent.	

Zachary A. Longsdorf, LONGSDORF LAW FIRM, PLC, for petitioner.

Susan B. Devos, BLUE EARTH COUNTY ATTORNEY'S OFFICE; and Matthew Frank, MINNESOTA ATTORNEY GENERAL'S OFFICE, for respondent.

Petitioner Marlow Shelton McDonald was convicted by a jury in state court for committing a first-degree drug offense, a second-degree drug offense, a third-degree drug offense, two firearm offenses, and the offense of fleeing from a peace officer. *State v. McDonald*, No. A15-0268, 2016 WL 596222, at *1 (Minn. Ct. App. Feb. 16, 2016). After the jury found that McDonald had five or more prior felony convictions and that his crimes were committed as part of a pattern of criminal conduct, the state court sentenced McDonald to consecutive sentences of 316 months for the first-degree drug offense and 12 months and 1 day for fleeing a peace officer (and to concurrent sentences for the other offenses). *Id.* at *1-2. His convictions and sentences were affirmed on direct appeal. *Id.* at *9-10; ECF No. 11-8.

After McDonald's direct appeal concluded, the Minnesota Drug Sentencing Reform Act ("DSRA") took effect. 2016 Minn. Laws ch. 160. The DSRA increased the weight thresholds for first-degree drug offenses and generally reduced the sentencing guidelines for drug offenses. The Minnesota Supreme Court held that the increased weight thresholds applied only to crimes committed after the effective date of the DSRA, *State v. Otto*, 899 N.W.2d 501 (Minn. 2017), but that the reduced sentencing guidelines applied to convictions that were not final on the DSRA's effective date, *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017).

In July 2017, McDonald filed a petition for postconviction relief in state court. *See* ECF No. 11-9 at 6. The state trial court granted his petition to the extent that he sought resentencing on his first-degree drug offense under the reduced guidelines, but denied his petition in all other respects. ECF No. 11-9 at 35-45. The state trial court resentenced McDonald to 250 months on the first-degree drug offense. ECF No. 11-9 at 45. The Minnesota Court of Appeals affirmed the trial court's decision, *McDonald v. State*, No. A18-0064, 2018 WL 3614669 (Minn. Ct. App. July 30, 2018), and the Minnesota Supreme Court denied review, *McDonald v. State*, No. A18-0064, Order (Minn. Oct. 24, 2018).

McDonald then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, alleging six grounds for relief. ECF No. 1. In a report and recommendation

("R&R"), Magistrate Judge Tony N. Leung recommended denying McDonald's petition and dismissing with prejudice all of his claims. ECF No. 17. Judge Leung concluded that five of McDonald's claims were procedurally barred and that his sixth claim—an equal-protection challenge to his resentencing—was meritless.

This matter is before the Court on McDonald's objection to the R&R. The Court has conducted a de novo review. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Based on that review, the Court overrules McDonald's objection and adopts the R&R.[1]

I. PROCEDURAL DEFAULT

In his § 2254 petition, McDonald claims that (1) his right to equal protection was violated when the state trial court (a) refused to apply the DSRA's increased weight thresholds to his case and (b) resentenced him under a sentencing scheme that discriminates on the basis of race;[2] (2) his Sixth Amendment right to present a complete defense was violated when the trial court ruled that all of his past convictions would be admissible to impeach him if he testified at trial; (3) his right to due process was violated when the prosecutor engaged in misconduct during the "*Blakely* portion" of his

[1]In his R&R, Judge Leung thoroughly described McDonald's state-court proceedings. The Court will not recount those proceedings again.

[2]McDonald also claims that these decisions violated his right to due process, but McDonald's arguments relate solely to the Equal Protection Clause, and he does not make any distinct arguments under the Due Process Clause. Like Judge Leung, this Court will assume that McDonald's due-process arguments are identical to his equal-protection arguments. ECF No. 17 at 15.

sentencing proceeding; (4) his right to a speedy trial was violated; (5) his right to due process was violated when the State engaged in sentencing manipulation; and (6) his Sixth Amendment right to effective assistance of counsel was violated. *See* ECF No. 1.

A. Failure to Exhaust and Procedural Default

"Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights. 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." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (cleaned up). A federal claim is "fairly presented" if the petitioner refers to "'a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue' in a claim before the state courts." *McCall v. Benson*, 114 F.3d 754, 757 (8th Cir. 1997) (quoting *Myre v. Iowa*, 53 F.3d 199, 200-01 (8th Cir. 1995)).

When a claim is not exhausted because it has not been fairly presented to the state courts, that claim will be found procedurally defaulted—i.e., the petitioner will be barred from pursuing that claim in a § 2254 proceeding—if the state courts would not "accord the petitioner a hearing on the merits" of that claim because the petitioner has

not "complied with state procedural rules governing post-conviction proceedings." *McCall*, 114 F.3d at 757. "If state procedural rules prevent the petitioner from obtaining such a hearing, then the petitioner is also procedurally barred from obtaining habeas relief in a federal court unless he can demonstrate either cause and actual prejudice, or that a miscarriage of justice will occur if [the court does] not review the merits of the petition." *Id.*

1. Speedy-Trial and Sentencing-Manipulation Claims

McDonald objects to Judge Leung's conclusion that McDonald's speedy-trial and sentencing-manipulation claims are unexhausted and procedurally defaulted.

On direct appeal, McDonald was represented by counsel, but the Minnesota Court of Appeals allowed McDonald to file a supplemental pro se brief. In that pro se brief, McDonald raised his speedy-trial and sentencing-manipulation claims. ECF No. 13-1 at 10-14, 15-21. The Minnesota Court of Appeals rejected those claims on the merits. *McDonald*, 2016 WL 596222, at *7-9.

Through counsel, McDonald then filed a petition for review with the Minnesota Supreme Court. ECF No. 11-6. As required by Minn. R. Civ. App. P. 117, subd. 3(a), McDonald included "a statement of the legal issues sought to be reviewed" and described "the disposition of those issues by the Court of Appeals." *See* ECF No. 11-6 at 3-4. In identifying the issues that he wanted the Minnesota Supreme Court to review,

McDonald did not include either his speedy-trial claim or his sentencing-manipulation claim, nor did he describe how the Minnesota Court of Appeals had disposed of those claims. The only mention of those claims was made in a one-sentence footnote, in which McDonald's attorneys noted that, before the Court of Appeals, McDonald had "challenged the violation of his right to a speedy trial and alleged sentencing manipulation" in a "Pro Se Supplemental Brief." ECF No. 11-6 at 3 n.1.

The Court agrees with Judge Leung that McDonald did not exhaust his speedy-trial and sentencing-manipulation claims because he did not fairly present them to the Minnesota Supreme Court. McDonald's claims are nowhere to be found in his list of issues for review. McDonald's petition also did not describe how the Minnesota Court of Appeals had disposed of those claims, nor discuss how the Minnesota Court of Appeals had erred, nor describe why the issues merited review by the Minnesota Supreme Court. The only mention of the issues was in a cursory footnote, which pointed out that McDonald had filed a pro se brief raising these issues in the Court of Appeals. Nothing in McDonald's petition alerted the Minnesota Supreme Court that McDonald was asking *it* to review these issues.

The Court also agrees with Judge Leung that McDonald's speedy-trial and sentencing-manipulation claims are procedurally defaulted under *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976). According to *Knaffla*, after "direct appeal has once been

taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *Id.* at 741. The *Knaffla* rule is well known to judges and attorneys in Minnesota, has been "consistently followed" for decades, and serves as an adequate and independent state-law basis for procedural default. *Murray v. Hvass*, 269 F.3d 896, 899-900 (8th Cir. 2001).

In sum, McDonald did not fairly present his speedy-trial and sentencing-manipulation claims to the Minnesota Supreme Court, and he cannot now present those claims to any Minnesota court because of *Knaffla*. *See, e.g.*, *Murphy v. King*, 652 F.3d 845, 848-51 (8th Cir. 2011) (holding that a habeas petitioner was procedurally barred from raising a claim that he had failed to fairly present to the Minnesota Supreme Court).[3] McDonald's speedy-trial and sentencing-manipulation claims are therefore procedurally defaulted in this § 2254 proceeding.

[3]McDonald attempted to raise his sentencing-manipulation claim during his state postconviction proceedings, but the trial court (unsurprisingly) found that the claim was barred by *Knaffla*. *See McDonald*, 2018 WL 3614669, at *2. The Minnesota Court of Appeals held that McDonald's appeal of the trial court's ruling on the sentencing-manipulation claim was untimely, *id.*, and McDonald did not present the claim to the Minnesota Supreme Court, ECF No. 11-12 at 1-2. This Court does not doubt, however, that if they had ruled on the issue, the Minnesota Court of Appeals and the Minnesota Supreme Court would have agreed with the trial court that McDonald's sentencing-manipulation claim was barred by *Knaffla*.

2. Complete-Defense and Prosecutorial-Misconduct Claims

McDonald objects to Judge Leung's conclusion that McDonald's complete-defense and prosecutorial-misconduct claims are unexhausted and procedurally defaulted. McDonald's complete-defense claim is his argument that his Sixth Amendment right to present a complete defense was violated when the trial court ruled that, if McDonald testified, all of his prior convictions would be admitted to impeach him. McDonald's prosecutorial-misconduct claim is his argument that, during the *Blakely* portion of his sentencing proceeding, the prosecutor violated the Due Process Clause by improperly referring to a number of dismissed charges in front of the jury.

On direct appeal, McDonald argued in his petition for review to the Minnesota Supreme Court that the trial court erred when it ruled that all of McDonald's past convictions could be used to impeach him and when it allowed the prosecutor to refer to the dismissed charges during sentencing. But nowhere in the petition for review did McDonald alert the Minnesota Supreme Court to the *federal* nature of these claims by referring to "'a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue.'" *McCall*, 114 F.3d at 757 (quoting *Myre*, 53 F.3d at 200-01). To the contrary, McDonald's petition for review focused exclusively on alleged errors of *state* law.

Consequently, McDonald did not meet his burden of fairly presenting the substance of his federal claims to the Minnesota Supreme Court.[4]

Both of these claims are also procedurally barred under *Knaffla*, as the claims were raised on direct appeal to the Minnesota Court of Appeals (and therefore "known"), but were not raised in the petition for review to the Minnesota Supreme Court, and thus the claims "will not be considered upon a subsequent petition for postconviction relief." 243 N.W.2d at 741. McDonald's complete-defense and prosecutorial-misconduct claims are therefore procedurally defaulted in this § 2254 proceeding.

3. Ineffective-Assistance Claim

In his state postconviction proceeding, McDonald claimed for the first time that he did not receive the effective assistance of counsel at trial. This claim was not

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[4]McDonald did make the federal nature of his claims clear to the Minnesota Court of Appeals, which, by affirming McDonald's conviction, necessarily rejected his arguments. And McDonald's petition for review to the Minnesota Supreme Court obviously discussed the opinion of the Minnesota Court of Appeals. But this was not sufficient to "fairly present" McDonald's federal claims to the Minnesota Supreme Court. "[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Baldwin v. Reese*, 541 U.S. 27, 32 (2004). To exhaust a federal claim, a petitioner must present the claim "within the four corners of his appellate briefing." *Castillo v. McFadden*, 399 F.3d 993, 1000 (9th Cir. 2005). Here, McDonald did not make the federal nature of his claims apparent within the "four corners" of his petition for review to the Minnesota Supreme Court.

presented to the Minnesota Court of Appeals or the Minnesota Supreme Court on direct appeal, even though the claim is based on facts that are contained in the trial record and that were known to McDonald at the time that he appealed his convictions and sentences. Thus the claim was not exhausted.

Moreover, an ineffective-assistance claim that is based on facts known to the defendant at the time of direct appeal is barred by *Knaffla* if it is not raised on direct appeal. *Reed v. State*, 793 N.W.2d 725, 732 (Minn. 2010) ("The *Knaffla* rule bars a postconviction ineffective-assistance-of-trial-counsel claim if the claim is based solely on the trial record and the claim was known or should have been known on direct appeal."). McDonald's ineffective-assistance claim is therefore procedurally defaulted in this § 2254 proceeding.[5]

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[5]As noted, McDonald petitioned the state trial court for postconviction relief. In his state petition, McDonald included a number of claims, including the sentencing-manipulation, complete-defense, and ineffective-assistance claims that he is pursuing in this § 2254 proceeding. *McDonald*, 2018 WL 3614669, at *2. The trial court issued two orders with respect to McDonald's claims: First, on August 17, 2017, the trial court "granted, in part, McDonald's petition, determining that McDonald was entitled to resentencing for his first-degree controlled-substance crime but denied all other requested relief on the ground that the claims are *Knaffla*-barred." *Id.* Second, on November 14, 2017, the trial court "amended McDonald's 316-month sentence to a 250-month sentence." *Id.*

McDonald appealed from both the August 17 and November 14 orders, but the Minnesota Court of Appeals found that the appeal from the August 17 order was untimely under Minn. R. Crim. P. 28.02. *Id.* Therefore, the Court of Appeals addressed only the issues raised in the November 14 order. *Id.*

(continued...)

B. Waiver of Procedural Default

The Court has found that all of McDonald's claims—save for his equal-protection claim—are procedurally defaulted. McDonald argues, however, that the Court should nevertheless reach the merits of his claims because the State waived its procedural-default defenses by failing to raise them during these proceedings (except with respect to the ineffective-assistance claim, *see* ECF No. 18 at 7).

McDonald is correct that the State generally forfeits procedural-default defenses by not raising them. *See Jones v. Norman*, 633 F.3d 661, 666 (8th Cir. 2011) ("When a state fails 'to advance a procedural default argument, such argument is waived.'" (quoting *Robinson v. Crist*, 278 F.3d 862, 865 (8th Cir. 2002))). As with most general rules, though, there is an exception: A court may raise procedural default sua sponte if (1) the State did not expressly waive the defense and (2) both parties are afforded fair notice and an opportunity to be heard on the issue. *See* 28 U.S.C. § 2254(b)(3) ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon

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[5](...continued)

Judge Leung cited McDonald's failure to bring a timely appeal of the August 17 order as an additional reason why some of McDonald's claims should be deemed procedurally defaulted. ECF No. 17 at 9-10. The Court has determined that those claims are procedurally defaulted for reasons unrelated to McDonald's alleged violation of Rule 28.02. Therefore, the Court need not address Judge Leung's analysis of Rule 28.02, nor McDonald's arguments (1) that a violation of Rule 28.02 cannot be an independent and adequate state ground for dismissal of a claim and (2) that McDonald can demonstrate cause and prejudice.

the requirement unless the State, through counsel, expressly waives the requirement."); *Dansby v. Hobbs*, 766 F.3d 809, 824 (8th Cir. 2014) ("A federal court has discretion to address procedural default in a habeas corpus case despite the State's failure to present the issue properly. The Supreme Court has held that before a court may address sua sponte a different procedural defense—timeliness of a habeas petition—it must give the parties fair notice and an opportunity to present their positions. The same requirements of notice and opportunity to be heard should apply when a federal court chooses to address procedural default on its own initiative." (citations omitted)); *Chavez-Nelson v. Walz*, No. 17-CV-4098 (PJS/SER), 2019 WL 332200, at *1 (D. Minn. Jan. 25, 2019) ("When a state fails to raise an affirmative defense to a habeas petition (such as failure to exhaust or procedural default), a court may nevertheless rely on the defense as long as the state did not expressly waive it.").

In this case, the State did not expressly waive any defense relating to exhaustion or procedural default. "'[T]he plain and ordinary meaning of the term 'express' means directly stated or written, and is meant to distinguish situations where a message is implied or left to inference.'" *Chavez-Nelson*, 2019 WL 332200, at *2 (quoting *Grinnell Mut. Reinsurance Co. v. Villanueva*, 798 F.3d 1146, 1148 (8th Cir. 2015)). With respect to all of McDonald's claims (except his ineffective-assistance claim), the State was silent about the issues of exhaustion and procedural default. The State's silence plainly does

not constitute an *express* waiver. *See Hampton v. Miller*, 927 F.2d 429, 431 (8th Cir. 1991) (holding that an express waiver exists when the State "unequivocally concedes in pleadings" that the petitioner exhausted his claims in state court).

In addition, both parties were provided with notice and an opportunity to be heard on the issues of exhaustion and procedural default. The R&R put McDonald and the State on notice that the Court might rely on exhaustion and procedural default to dismiss most of the claims raised in McDonald's § 2254 petition. And the opportunity to object to the R&R gave McDonald and the State a reasonable opportunity to be heard on the matter. *See, e.g.*, *Chavez-Nelson*, 2019 WL 332200, at *2 (holding that an R&R recommending dismissal based on the doctrines of exhaustion and procedural default provided "notice" to the parties and that the parties' opportunity to object to the R&R provided a "full opportunity to be heard"); *see also Magouirk v. Phillips*, 144 F.3d 348, 359 (5th Cir. 1998) (applying an abuse-of-discretion standard to the district court's sua sponte application of procedural default and concluding that "the Magistrate Judge's Memorandum and Recommendation placed Magouirk on notice that procedural default was a potentially dispositive issue" and that the petitioner's opportunity to object to the R&R provided "a reasonable opportunity to oppose application of the procedural default doctrine").

As it has done in the past, *see Chavez-Nelson*, 2019 WL 332200, at *2, this Court will apply the exhaustion and procedural-default doctrines, notwithstanding the State's failure to assert those defenses in its pleadings and briefs. Those defenses are designed not just to protect the interests of the parties to a particular lawsuit, but "to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). For the reasons described above, then, the Court holds that all of McDonald's claims are procedurally defaulted, save for his equal-protection challenge to his resentencing under the DSRA.

II. MERITS

McDonald's equal-protection claim consists of two distinct arguments:

McDonald first argues that the State violated the Equal Protection Clause by punishing him more harshly than similarly situated defendants based solely on when he committed his offense. McDonald sold approximately 13 grams of methamphetamine. ECF No. 11-9 at 28. Prior to the enactment of the DSRA, selling 13 grams of methamphetamine was a first-degree controlled-substance offense. After enactment of the DSRA, selling 13 grams of methamphetamine is a second-degree controlled-substance offense. According to McDonald, providing different

punishments to defendants who commit identical crimes based solely on the timing of those crimes violates the Equal Protection Clause.

Of course, if McDonald's argument had merit, neither the federal government nor any state could ever increase or decrease the punishment for *any* crime—something that the federal government and states have routinely done since the founding of the Republic—because changing the penalties for a crime *always* results in pre-change defendants being treated differently from post-change defendants based solely on when they committed their offenses. Fortunately, McDonald's argument does not have merit.

"The Equal Protection Clause generally requires the government to treat similarly situated people alike." *Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994). A corollary to this principle is that "[d]issimilar treatment of dissimilarly situated persons does not violate equal protection." *Id.* A person who sold 13 grams of methamphetamine before the DSRA was enacted is not similarly situated in all material respects to a person who sold 13 grams of methamphetamine after the DSRA was enacted. McDonald decided to sell 13 grams of methamphetamine at a time when such a sale was classified as a first-degree controlled-substance offense and punished accordingly. Someone who decides to sell 13 grams of methamphetamine today is doing so at a time when such a sale is classified as a second-degree controlled-substance offense and punished accordingly. The two individuals are making different decisions

to violate different laws carrying different penalties. Thus, the two individuals are not similarly situated in all material respects. *See Moffett v. Collier*, No. A-10-CA-676 SS, 2011 WL 2173589, at *4-5 (W.D. Tex. June 2, 2011) (rejecting the petitioner's "novel view of equal protection" under which "all prisoners, regardless of the date each committed his criminal offense, are 'similarly situated'").

McDonald also argues that he was sentenced in violation of the Equal Protection Clause because African Americans (such as McDonald) make up a disproportionate share of those arrested, convicted, and imprisoned for drug offenses. The Court dismisses McDonald's claim for the reasons explained by Judge Leung.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, the Court OVERRULES petitioner's objection [ECF No. 18] and ADOPTS the R&R [ECF No. 17]. IT IS HEREBY ORDERED THAT:

1. McDonald's petition for a writ of habeas corpus under 28 U.S.C. § 2254 [ECF No. 1] is DENIED.
2. This action is DISMISSED WITH PREJUDICE.
3. No certificate of appealability will issue.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: November 6, 2019

s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Marlow Shelton McDonald,

Petitioner,

v.

Jeff Titus, Warden, Rush City Correctional Facility, Minnesota

Respondent.

Case No. 18-cv-3099 (PJS/TNL)

REPORT AND RECOMMENDATION

Zachary A. Longsdorf, Longsdorf Law Firm, PLC, 5854 Blackshire Path, Suite 3, Inver Grove Heights, MN 55076 (for Petitioner); and

Susan B. DeVos, Assistant Blue Earth County Attorney, Blue Earth County Attorney's Office, PO Box 3129, Mankato, MN 56002 (for Respondent).

This matter is before the Court, U.S. Magistrate Judge Tony N. Leung, on a Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody. (Pet., ECF No. 1). This action has been referred to the undersigned magistrate judge for a report and recommendation to the Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota, under 28 U.S.C. § 636 and Local Rule 72.2(b). Based on all the files, records, and proceedings herein, and for the reasons set forth below, this Court recommends that the petition be denied and dismissed with prejudice.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. State District Court

Following a May 2014 arrest, the State of Minnesota charged Petitioner Marlow McDonald with first-degree and second-degree controlled substance crimes, two counts of first-degree assault, possession of a firearm by a prohibited person, and qualifying person in possession of a firearm. *State v. McDonald*, 2016 WL 596222, at *1 (Minn. App. 2016).[1] Petitioner's first-degree controlled substance charge was based on allegations that he sold more than 10 grams of methamphetamine within a 90-day period. *Id*. Following trial, the jury found appellate guilty of a first-degree controlled substance crime, a second-degree controlled substance crime, a third-degree controlled substance crime, possession of a firearm by a prohibited person, qualifying person in possession of a firearm, and fleeing a peace officer in a motor vehicle. *Id*.

The state moved for "an upward departure sentence" based in part on Petitioner's "status as a career offender." *Id*. At a separate sentencing proceeding, the jury found that Petitioner had five or more previous felonies and "that his present crimes were committed as part of a pattern of criminal conduct." *Id*. The state trial court sentenced Petitioner to 316 months' imprisonment for the first-degree controlled substance crimes and to concurrent sentences of varying lengths for the other offenses. *Id*. at * 2. The sentence constituted a double-upward durational departure from the presumptive 158-month sentence. Minn. Sent. Guidelines 4.A (2013).

[1] A copy of this decision can be found at ECF No. 11-5.

B. Petitioner's Direct Appeal

Petitioner, through counsel, appealed to the Minnesota Court of Appeals. He argued that the state trial court erred by admitting evidence of his previous convictions for impeachment purposes, that the prosecutor committed misconduct by referencing a number of dismissed charges against Petitioner in the sentencing portion of his trial, that there was insufficient evidence for the jury to find that Petitioner committed his offenses as a pattern of criminal conduct, and that the state trial court abused its discretion in imposing an aggravated durational departure in its sentence. *Id*., at *2-*7. Petitioner also filed a pro se supplemental brief in which he argued that his speedy trial rights were violated, that the trial judge was biased against him, and that the State engaged in sentencing manipulation. *Id*. at *7-*10. The Minnesota Court of Appeals affirmed Petitioner's convictions and sentences.

Petitioner then filed a petition for review with the Minnesota Supreme Court. (ECF No. 11-6). He sought review on four issues: (1) whether the state trial court erred by admitting Petitioner's prior convictions for impeachment purposes; (2) whether there was sufficient evidence to support the jury's finding that Petitioner was a career criminal; (3) whether the prosecutor committed misconduct by emphasizing the similarity of prior dismissed charges to the current offenses; and (4) whether the state trial court abused its discretion in sentencing Petitioner to a double durational upward departure. The Minnesota Supreme Court denied review on April 19, 2016. (ECF No. 11-8).

C. Petitioner's Postconviction Petition

Following Petitioner's conviction and sentencing, the Minnesota Legislature passed the 2016 Minnesota Drug Sentencing Reform Act ("DSRA"). 2016 Minn. Session Laws, Chapter 160. Among other things, the DSRA increased the weight necessary for a person to be convicted for first-degree sale of a controlled substance from 10 grams of methamphetamine to 17 grams. *See id*. In addition, the DSRA amended the Minnesota Sentencing Guidelines to provide new presumptive sentences for persons convicted of controlled substance crimes. Under the new guidelines, the presumptive sentence for a first-degree sale of a controlled substance for a person with Petitioner's criminal history was 125 months' imprisonment, with a sentencing range between 107 and 150 months. Minn. Sent. Guidelines 4.C (2016). The presumptive sentence for a second-degree sale of a controlled substance crime for a person with Petitioner's criminal history was 108 months, with a sentencing range between 92 and 129 months. *Id*.

Petitioner filed a postconviction petition for relief in the Blue Earth District Court, seeking resentencing under the DSRA. *McDonald v. State*, 2018 WL 3614669, at *1 (Minn. App. 2018).[2] Petitioner argued that under the DSRA's new weight limits, failure to resentence him for a second-degree sale of a controlled substance would violate his equal protection and due process rights. *Id*. at *2. He also claimed that the State engaged in sentencing manipulation, that he received ineffective assistance of counsel, and that the state trial court "committed evidentiary errors." *Id*. at *2. On August 17, 2017, the

[2] A copy of this decision may be found at ECF No. 11-11.

postconviction court granted Petitioner's motion for resentencing on the first-degree controlled substance offense, but denied relief on all grounds, concluding that Petitioner's other claims were barred by the rule announced in *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). *Id*. On November 14, 2017, the postconviction court amended Petitioner's sentence to 250 months' imprisonment. *Id*. The amended sentence represented a double upward durational departure from the presumptive 125-month sentence in place for first-degree controlled substance crimes following passage of the DSRA. *Id*. The postconviction court's decision was consistent with Minnesota Supreme Court precedent holding that the new presumptive sentences for controlled substance crimes applied retroactively, but that the new weight requirements did not. *See id*. at *2-*3. Accordingly, the postconviction court concluded that Petitioner was only entitled to be resentenced under the new guidelines range for a first-degree controlled substance crime. *Id*.

In January 2018, Petitioner filed a notice of appeal from both the August 17 and November 14 orders. The Minnesota Court of Appeals questioned whether it had jurisdiction over any appeal from the August 17 order, noting that the 60-day period provided for filing a postconviction appeal under Minnesota Rule of Criminal Procedure 28.02 had already expired. *McDonald v. State*, A18-0064, Order (Minn. App. Jan. 17, 2018). Following additional briefing on the issue, the Minnesota Court of Appeals concluded that Minnesota Rule of Criminal Procedure 28.02 applied to any appeal taken from the postconviction court's August 17 order and that as a result, Petitioner's appeal from that order was untimely. *Id*., Order (Minn. App. Feb. 20, 2018). The Minnesota Court of Appeals dismissed Petitioner's appeal from the August 17 order and accepted

jurisdiction over his appeal from the November 14 order. *Id*. Petitioner filed a petition for review with the Minnesota Supreme Court, which was denied. *See McDonald v. State*, A18-0064, Order (Minn. May 15, 2018).

As a result, the Minnesota Court of Appeals considered the merits of only the following argument in Petitioner's postconviction appeal:

> whether the postconviction court's refusal to characterize his first-degree controlled-substance sale conviction as a second-degree controlled-substance sale conviction based on the DSRA's updated weight thresholds violates McDonald's constitutional right to equal protection because it treats offenders differently based on the dates of their crimes and because the pre-DSRA sentencing guidelines disparately impacted African Americans.

McDonald, 2018 WL 3614669, at *2. The Minnesota Court of Appeals rejected Petitioner's argument, concluding that he did not demonstrate how the application of new sentencing laws created a "racial classification in practice." *Id*. at *3.

Petitioner then filed a petition for review with the Minnesota Supreme Court. (ECF No. 11-12). Again, he sought review on a single legal issue – whether the Minnesota Court of Appeals "erred in concluding that the reduced quantity thresholds of the Drug Sentencing Reform Act of 2016 . . . did not apply to [Petitioner's] case." (ECF No. 11-12, p. 1). The Minnesota Supreme Court denied review on October 24, 2018. *McDonald v. State*, A18-0064, Order (Minn. Oct. 24, 2018).

D. Federal Habeas Petition

Petitioner now seeks habeas relief on six grounds. (ECF No. 1). First, he argues that the state trial court's refusal to resentence him under the DSRA for second-degree sale of

a controlled substance violated his due process and equal protection rights. Second, he argues that the state trial court violated his due process right to present a complete defense by ruling that "any and all" of Petitioner's prior convictions would be admissible for impeachment purposes. Third, he argues that the state violated his due process rights by engaging in misconduct during the sentencing portion of his trial. Fourth, he argues his right to a speedy trial was violated. Fifth, he argues that the state violated his due process rights by engaging in sentence manipulation. Finally, he argues that he received ineffective assistance of counsel during the sentencing portion of his trial.

On February 4, 2019, the Court ordered Respondent to answer the petition within 30 days. (ECF No. 6). Respondent did not do so. On March 12, 2019, the Court ordered Respondent to answer on or before March 19, 2019. (ECF No. 7). This time, Respondent answered, but omitted certain documents required by the Rules Governing Section 2254 Cases in the United States District Courts. (ECF No. 10). The Court ordered Respondent to provide those documents on or before March 27, 2019 and ordered Petitioner to file a reply within 30 days of those documents being filed. (ECF No. 10). Because of delays in locating certain materials, Respondent did not provide a complete set of the requested documents until April 12, 2019. (ECF Nos. 11, 13, and 14). Petitioner filed his response on May 13, 2019. (ECF No. 16).

II. ANALYSIS

The Antiterrorism and Effective Death Penalty Act of 1996 governs a federal court's review of habeas corpus petitions filed by state prisoners. Section 2254 is used by state prisoners alleging they are "in custody in violation of the Constitution or laws or treaties

of the United States." 28 U.S.C. § 2254(a). A federal court may not grant habeas corpus relief to a state prisoner on any issue decided on the merits by a state court unless the proceeding "(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 it "(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." 28 U.S.C. § 2254(d).

A state prisoner "must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *see* 28 U.S.C. § 2254(b)(1). "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." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citation omitted). "To be fairly presented 'a petitioner is required to refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue.'" *Cox v. Burger*, 398 F.3d 1025, 1031 (8th Cir. 2005) (quoting *Barrett v. Acevedo*, 169 F.3d 1155, 1161-62 (8th Cir. 1999)). "Presenting a claim that is merely similar to the federal habeas claim is not sufficient to satisfy the fairly presented requirement." *Id*. Additionally, "a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a

similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Baldwin*, 541 U.S. at 32.

Petitioner did not fairly present his speedy trial, sentencing manipulation, and ineffective assistance claims to the state courts. Petitioner raised his speedy trial claim in a *pro se* supplemental brief with the Minnesota Court of Appeals, but did not present this claim to the Minnesota Supreme Court in a petition for review. *See Baldwin*, 541 U.S. at 29 (holding that a claim is fairly presented only if raised to a state supreme court with discretionary powers of review). Likewise, though Petitioner attempted to present his sentencing manipulation and ineffective assistance of counsel claims to the Minnesota Court of Appeals, that court rejected his appeal from the postconviction court's order denying relief on those claims as untimely. *See McDonald v. State*, A18-0064, Order (Minn. App. Feb. 20, 2018). The Minnesota Supreme Court declined to review that decision.

A "claim has not been fairly presented to the state courts when the state court has declined to decide the federal claim on the merits because the petitioner violated a state procedural law." *Hall v. Delo*, 41 F.3d 1248, 1250 (8th Cir. 1994); *cf. Rivera v. King*, No. 10-cv-3954, 2011 WL 4458729, at *6 (D. Minn. Aug. 12, 2011) (finding that a claim in an unaccepted *Pro Se* Supplemental Petition for Review to the Minnesota Supreme Court was unexhausted), *report and recommendation adopted by Rivera v. King*, 2011 WL 4436149 (D. Minn. Sept. 23, 2011); *Blevins v. Dept. of Corr.*, No. 13-cv-2796, 2014 WL 4966910, at *11-*12 (D. Minn. Oct. 3, 2014) (same). In this case, the state courts declined to consider the merits of Petitioner's sentencing manipulation and ineffective assistance of counsel

claims because his appeal on those two claims was untimely under Minnesota Rules of Criminal Procedure 28.02 Because the state courts relied on state procedural law to dispose of these two claims, the Court concludes that Petitioner did not fairly present them to the state courts and that they are unexhausted as a result.

Petitioner also did not fairly present his claims regarding the use of prior convictions to impeach him and prosecutorial misconduct to the state courts. Though Petitioner raised each of these claims to the Minnesota Court of Appeals and argued that each error violated his federal constitutional rights, he did not make the same arguments before the Minnesota Supreme Court. In his petition for review, regarding his claim of improper impeachment evidence, Petitioner claimed only that that the state trial court failed to "conduct an "on-the-record evaluation of how the Jones factors applied to each of petitioner's prior convictions[.]" (ECF No. 11-6, p. 3). Regarding his prosecutorial misconduct claim, Petitioner asked that the Minnesota Supreme Court grant review on whether "the prosecutor improperly invite[d] the jury to find petitioner was a career offender by emphasizing the similarity between prior dismissed charges and the current offenses where the State did not present any facts related to the dismissed charges[.]" (ECF No. 11-6, p. 3).

Petitioner did not fairly present these claims to the Minnesota Supreme Court because he did not "refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue" in his petition for review. *Cox*, 398 F.3d at 1031. Regarding the use of prior convictions for impeachment purposes, Petitioner referred only to *Jones*, a

Minnesota Supreme Court case that sets forth factors for determining whether a prior conviction is admissible under the Minnesota Rules of Evidence. *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978). Petitioner did not refer to any federal law or case referencing federal law. Likewise, regarding his prosecutorial misconduct claim, Petitioner "did not mention [in his petition] the Due Process Clause of the Fourteenth Amendment, any federal cause discussing prosecutorial misconduct, or a state case which discussed the federal standard of review." *Smith v. Wengler*, 08-cv-1113, 2009 WL 6338557, at *6 (D. Minn. Apr. 27, 2009), *report and recommendation adopted by* 2010 WL 1427276 (D. Minn. Apr. 8, 2010) (dismissing prosecutorial misconduct claim as procedurally defaulted). The Court therefore concludes that these claims are unexhausted.

The fact that Petitioner referenced federal constitutional law in his brief to the Minnesota Court of Appeals is insufficient to present them to the Minnesota Supreme Court for review. A claim is not fairly presented if the reviewing court must look beyond the brief or petition to understand the nature of the claim. *See Baldwin*, 541 U.S. at 32. In addition, though Petitioner attached the Minnesota Court of Appeals decision to his petition, nothing in that decision discusses the constitutional nature of those claims, nor alerts the Minnesota Supreme Court to the federal nature of his claims.

If a habeas petition contains claims that have not been exhausted in the state courts, the reviewing court "must then determine whether the petitioner has complied with state procedural rules governing post-conviction proceedings, i.e., whether a state court would accord the petitioner a hearing on the merits." *McCall v. Benson*, 114 F.3d 754, 757 (8th Cir. 1997) (citing *Harris v. Reed*, 489 U.S. 255, 268-70 (1989) (O'Connor, J., concurring)).

"A state prisoner procedurally defaults a claim when he violates a state procedural rule that independently and adequately bars direct review of the claim by the United States Supreme Court." *Clemons v. Luebbers*, 381 F.3d 744, 750 (8th Cir. 2004) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). Thus, "a state prisoner who fails to satisfy state procedural requirements forfeits his right to present his federal claim through a federal habeas corpus petition, unless he can meet strict cause and prejudice or actual innocence standards." *Id*. (citing *Murray v. Carrier*, 477 U.S. 478, 493-96 (1986)).

For the federal court to enforce a state procedural bar, it must be clear that the state court would hold the claim procedurally barred. *Id*. The relevant question then becomes "whether there is, under the law of [Minnesota], any presently available state procedure for the determination of the merit of th[ese] claim[s]." *Thomas v. Wyrick*, 622 F.2d 411, 413 (8th Cir. 1980). In this case, Minnesota law provides that once the petitioner has directly appealed his sentence "all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976); *McCall v. Benson*, 114 F.3d 754, 757 (8th Cir. 1997). Likewise, "claims asserted in a second or subsequent postconviction petition are procedurally barred if they could have been raised . . . in the first postconviction petition." *Schleicher v. State*, 718 N.W.2d 440, 449 (Minn. 2006). "Claims are considered 'known' [under the *Knaffla* rule] if they were available after trial and could have been raised on direct appeal." *Vann v. Smith*, No. 13-cv-893, 2015 WL 520565, at *6 (D. Minn. Feb. 9, 2015) (citing *Townsend v. State*, 723 N.W.2d 14, 18 (Minn. 2006)).

Each of Petitioner's unexhausted claims is procedurally barred. They were all known to him following trial or his first postconviction petition for relief. Petitioner therefore cannot bring them in a subsequent postconviction petition. *See Knaffla*, 243 N.W.2d at 741; *Schleicher*, 718 N.W.2d at 449. They are therefore procedurally defaulted.

"Out of respect for finality, comity, and the orderly administration of justice, a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default." *Dretke v. Haley*, 541 U.S. 386, 388 (2004). "The cause and prejudice requirement shows due regard for States' finality and comity interests while ensuring that 'fundamental fairness remains the central concern of the writ of habeas corpus.'" *Id.* at 393 (quoting *Strickland v. Washington*, 466 U.S. 668, 697 (1984)). "This rule is nearly absolute, barring procedurally-defaulted petitions unless a habeas petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or show actual innocence." *Reagan v. Norris*, 279 F.3d 651, 656 (8th Cir. 2002) (internal citations and quotation omitted); *Martinez v. Ryan*, 566 U.S. 1, 9-10 (2012); *Coleman*, 501 U.S. at 750-51. If a prisoner fails to demonstrate cause, the court need not address prejudice. *Mathenia v. Delo*, 99 F.3d 1476, 1481 (8th Cir. 1996).

To obtain review of a defaulted constitutional claim, "the existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). "Some examples of factors external to the defense which prevent a petitioner from developing the factual or

legal basis of a claim are interference by the state, ineffective assistance of counsel, conflicts of interest, and legal novelty." *Mathenia v. Delo*, 99 F.3d 1476, 1480-81 (8th Cir. 1996). Ineffective assistance of counsel claims generally must "be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray*, 477 U.S. at 488-89.

Petitioner does not claim cause or prejudice. Nor does he allege actual innocence. The only claim Petitioner makes to excuse his default is that Minnesota courts do not strictly and regularly enforce Minnesota Rule of Criminal Procedure 28.02. Accordingly, Petitioner argues, regarding his ineffective assistance claim,[3] that this Court should not rely on the Minnesota Court of Appeals' dismissal of his August 17 postconviction appeal for lack of jurisdiction as a basis to conclude this claim is procedurally defaulted. In support of his argument he cites to *Pearson v. State*, 891 N.W.2d 590 (Minn. 2017). He claims in that case, the Minnesota Supreme Court did not dismiss an appeal as untimely filed and instead considered the issues raised in that appeal on the merits. The Court does not find Petitioner's argument persuasive.

Petitioner is correct that, for a claim to be procedurally defaulted on the basis of a state procedural law, the state law must be firmly established, regularly followed, and readily ascertainable. *White v. Bowersox*, 206 F.3d 776, 780 (8th Cir. 2000). But a citation to a single case where the state court did not follow the procedural rule at issue "is insufficient . . . for purposes of overcoming the procedural bar to a federal *habeas* petition."

[3] Though Petitioner makes this argument only regarding his ineffective assistance of counsel claim, it would also apply to his sentencing manipulation claim as well.

McPeak v. Sharp, No. 13-cv-6091, 2016 WL 4698541, at *2 (W.D. Ark. Sept. 7, 2016) (emphasis in original). A procedural rule need not be applied in every case to be adequate, so long as it is applied "[i]n the vast majority of cases." *Byrd v. Collins*, 209 F.3d 486, 521 (6th Cir. 2000) (citing *Dugger v. Adams*, 489 U.S. 401, 410, n. 6 (1989)). In this district, it is well established that Minnesota Rule of Criminal Procedure 28.02 is firmly applied in the majority of cases and that Minnesota state courts regularly enforce this rule. *See Don v. Hammer*, No. 16-cv-103, 2017 WL 2623795, at *5 (D. Minn. Mar. 28, 2017), *report and recommendation adopted by* 2017 WL 2623822 (D. Minn. June 16, 2017).[4] Petitioner therefore fails to show sufficient cause to excuse his default.

Accordingly, the Court concludes that five of Petitioner's claims are procedurally barred.[5] The Court recommends these claims be dismissed with prejudice. Petitioner has, however, properly exhausted his claim that the state violated his due process and equal protection rights by refusing to resentence him under the DSRA.[6] The Court will therefore consider the merits of this claim.

[4] It should also be noted that because the defendant in *Pearson* had been convicted of first-degree murder, his appeal was subject to Minnesota Rule of Criminal Procedure 29.02, rather than Rule 28.02. *See Pearson*, 891 N.W.2d at 594-96 (noting conviction for first-degree murder). Though the two rules are virtually identical, the Court cannot assume they are necessarily applied the same in Minnesota state court.

[5] The Court recognizes that because the State did not raise the procedural-default or exhaustion defenses for several of Petitioner's claims, Petitioner was not on notice that the Court would rely on those defenses to evaluate his claims. This Report and Recommendation, however, puts Petitioner on notice of those defenses and, through the objection process, allows him the opportunity to be heard on those issues. *See Chavez-Nelson v. Walz*, No. 17-cv-4098, 2019 WL 332200, at *2 (D. Minn. Jan. 25, 2019) (concluding a habeas petitioner is given proper notice when provided the opportunity to object to a report and recommendation); *Jackson v. Symmes*, No. 09-cv-2946, 2011 WL 1300930, at *6 (D. Minn. Jan. 18, 2011) (same), *report and recommendation adopted by* 2011 WL 1256617 (D. Minn. Apr. 4, 2011).

[6] As ground one in his petition, Petitioner contends that "his rights to due process and equal protection . . . were violated" when the state courts refused to resentence him. His argument, however, relates only to his rights under the Equal Protection Clause. The Court therefore presumes that Petitioner's due process challenge is identical to his equal protection challenge.

The federal Equal Protection Clause prohibits States from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "The Equal Protection Clause keeps governmental decisionmakers from treating disparately persons who are in all relevant respects similarly situated." *Bills v. Dahm*, 32 F.3d 333, 335 (8th Cir. 1994). Though the Equal Protection Clause protects every person within the State's jurisdiction from intentional and arbitrary discrimination, it "does not guarantee" that all persons will "be dealt with in an identical manner." *Mills v. City of Grand Forks*, 614 F.3d 495, 500 (8th Cir. 2010). A law implicates the federal equal protection clause when it either facially discriminates against a discrete group or there are facts to show it has a disparate impact on a protected group and is enacted with a discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 238-42 (1976).

Petitioner contends that failure to resentence him for a second-degree controlled substance offense violates his equal protection rights in two ways. First, he argues that the statutes and guidelines under which he was sentenced discriminate against individuals on the basis of race. (ECF No. 1, p. 5) Second, he claims that "he was treated differently than others in all relevant aspects similarly [situated] based solely on an arbitrary date." (ECF No. 1, p. 5). The Court does not find either argument persuasive.

First, regarding the application of the controlled substance statutes and guidelines under which he was sentenced, Petitioner provides no information to show that those authorities facially discriminate against a discrete group. Nor does he provide any facts or information to show those guidelines were enacted with discriminatory purpose. *See Washington*, 426 U.S. at 238-42. Petitioner argues only that research shows there is a "13

to 1 disparity in imprisonment rates" between African American and white offenders, despite the fact that each group commits drug offenses at approximately the same rate. (ECF No. 16, p. 21). Statistical evidence concerning the racially disparate impact of a sentencing structure does "not indicate a violation of equal protection in the federal constitutional sense." *United States v. Lattimore*, 974 F.2d 971, 974 (8th Cir. 1992). "[E]ven if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional . . . only if that impact can be traced to a discriminatory purpose." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). Thus, absent any evidence to show that the State of Minnesota enacted the controlled substance statutes and sentencing guidelines "because of" their effects on a minority group, Petitioner cannot show that application of those guidelines was contrary to, or an unreasonable interpretation of, clearly established federal law. *See United States v. Maxwell*, 25 F.3d 1389, 1397 (8th Cir. 1994) (citing *United States v. Johnson*, 12 F.3d 760, 763-64 (8th Cir. 1993). Petitioner's first argument fails.[7]

Second, Petitioner cannot establish that the state trial court's refusal to resentence by applying the new weight limits of the DSRA was a violation of his constitutional rights. "[T]here is absolutely no constitutional authority for the proposition that the perpetrator of a crime can claim the benefit of a later enacted statute which lessens the

[7] Petitioner claims further support for his argument may be found in the Minnesota Supreme Court's decision in *State v. Russell*, 477 N.W.2d 886 (Minn. 1991). There, the Minnesota Supreme Court concluded that discrepancies related to sentencing for crack and power cocaine offenses violated defendants' equal protection rights under the state constitution. *Id*. at 891. In doing so, the Minnesota Supreme Court noted that, "in equal protection cases, [it] articulated a rational basis test that differs from the federal standard." *Id*. at 888. As a result, nothing in this decision lends any support to Petitioner's claim that application of the DSRA to him resulted in an unreasonable application of federal constitutional law.

culpability level of that crime after it was committed." *United States v. Haines*, 855 F.2d 199, 200 (5th Cir. 1988). Furthermore, the determination of what version of Minnesota Sentencing Guidelines or the controlled substance laws is based on the petitioner's offense date. *See generally* Minn. Sent. Guidelines 2 (2013). Because classification based on the date a petitioner committed an offense does not implicate a fundamental right or a suspect class, any challenge to the effective date of those laws and guidelines would be subject to rational basis review. *See United States v. Binkholder*, 909 F.3d 215, 218-19 (8th Cir. 2018) (reaching same conclusion regarding an equal protection challenge to federal guidelines). And the purpose of the controlled substance laws and the Minnesota Sentencing Guidelines contain a "single, rational goal," *see id.*, to establish rational and consistent sentencing standards that reduce sentencing disparity based on an offender's offense date. Minn. Sent. Guidelines (2013) 1(A); 2. *see also Binkholder*, 909 F.3d at 218-19 (noting such a scheme satisfies rational basis review because it puts all defendants in the same position). Petitioner's second argument therefore fails as well.

III. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11 of the Rules Governing § 2254 cases, the Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Federal district courts may not grant a certificate of appealability unless the prisoner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this standard, the petitioner must show "that the issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir. 1994). For purposes of appeal

under 28 U.S.C. § 2253, this Court concludes that it is unlikely that reasonable jurists would find the question of whether to dismiss Petitioner's petition debatable, or that some other court would decide this petition differently. This Court therefore recommends that a certificate of appealability not issue.

In addition, this Court recommends that no evidentiary hearing be held. The dispute can be resolved on the basis of the record and legal arguments submitted by the parties. *See Wallace v. Lockhart*, 701 F.2d 719, 729-30 (8th Cir. 1983).

IV. RECOMMENDATION

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

1. The Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, (ECF No. 1), be **DENIED** and **DISMISSED WITH PREJUDICE**.

2. A certificate of appealability not issue.

Date: May 29, 2019

s/ Tony N. Leung
Tony N. Leung
United States Magistrate Judge
District of Minnesota

McDonald v. Titus
Case No. 18-cv-3099 (PJS/TNL)

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 COURT OF APPEALS
A18-0064

Marlow Shelton McDonald, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 30, 2018
Affirmed
Halbrooks, Judge

Blue Earth County District Court
File No. 07-CR-14-1678

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

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for respondent

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant challenges a postconviction court's order amending his sentence under the Minnesota Drug Sentencing Reform Act. We affirm.

FACTS

Appellant Marlow Shelton McDonald was arrested after selling approximately 12 grams of methamphetamine to a confidential informant in five separate controlled purchases throughout April 2014. The state charged McDonald with the following: one count of first-degree controlled-substance sale under Minn. Stat. § 152.021, subd. 1(1) (2012); one count of second-degree controlled-substance possession under Minn. Stat. § 152.022, subd. 2(a)(1) (2012); two counts of first-degree assault for using deadly force against a peace officer under Minn. Stat. § 609.221, subd. 2(a) (2012); one count of unlawful possession of a firearm under Minn. Stat. § 624.713, subd. 1(2) (2012); and one count of ineligible person in possession of a firearm (felon convicted of a crime of violence) under Minn. Stat. § 609.165, subd. 1b(a) (2012). The state charged by amended complaint one count of third-degree controlled-substance possession under Minn. Stat. § 152.023, subd. 2(a)(1) (2012), and one count of fleeing a peace officer in a motor-vehicle under Minn. Stat. § 609.487, subd. 3 (2012).

A jury found McDonald guilty of the first-degree controlled-substance crime, second-degree controlled-substance crime, third-degree controlled-substance crime, both unlawful-possession-of-a-firearm crimes, and the fleeing-a-peace-officer crime. The jury acquitted McDonald of the first-degree-assault charges. The district court then held a sentencing trial, and the jury found that McDonald had five or more prior felony convictions and that his present crimes were committed as part of a pattern of criminal conduct.

The district court committed McDonald to the commissioner of corrections for 316 months for the first-degree controlled-substance conviction,[1] 60 months for one of the unlawful-possession-of-a-firearm convictions, and 57 months for the third-degree controlled-substance conviction to be served concurrently, and 12 months and 1 day for the fleeing-a-peace-officer conviction to be served consecutively with his other sentences.

McDonald appealed the district court's judgment and sentence to this court, arguing that (1) the district court committed evidentiary errors; (2) the evidence was insufficient to support the jury's finding that his present offenses were committed as part of a pattern of criminal conduct; (3) the prosecutor engaged in misconduct; (4) the district court abused its discretion by departing upward from the presumptive sentencing guidelines; (5) he was denied his constitutional right to a speedy trial; (6) the district court was biased against him; and (7) the state engaged in sentencing manipulation. *State v. McDonald*, No. A15 0268, 2016 WL 596222, at *1 (Minn. App. Feb. 16, 2016), *review denied* (Minn. Apr. 19, 2016). We determined that McDonald was not entitled to relief on any of these grounds and affirmed McDonald's convictions and sentence. *Id.* at *1-9.

On July 17, 2017, McDonald petitioned the district court for postconviction relief, arguing that he should be resentenced under the 2016 Minnesota Drug Sentencing Reform Act (DSRA), 2016 Minn. Laws ch. 160, §§ 1-22, at 1-17, for his first-degree controlled-substance crime because his sale of approximately 12 grams of methamphetamine would only constitute a second-degree offense under Minn. Stat. § 152.022, subd. 1(1) (2016).

[1] The sentence was a double upward departure based on the finding that McDonald committed these crimes as part of a pattern of criminal conduct.

McDonald also argued that his sentence violated his due-process and equal-protection rights, the district court committed evidentiary errors, the state engaged in sentencing manipulation, and he received ineffective assistance of counsel. The state conceded that McDonald should be resentenced under the DSRA but argued that his remaining claims were *Knaffla*-barred. *See State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (providing that claims that were raised on direct appeal, or were known or should have been known but were not raised on direct appeal, are procedurally barred).

On August 17, 2017, the postconviction court granted, in part, McDonald's petition, determining that McDonald was entitled to resentencing for his first-degree controlled-substance crime but denied all other requested relief on the ground that the claims are *Knaffla*-barred. The state asked the postconviction court to grant its request for a double upward durational departure and to sentence McDonald to 250 months of incarceration. McDonald requested a presumptive sentence of 125 months. On November 14, 2017, the postconviction court amended McDonald's 316-month sentence to a 250-month sentence. McDonald appeals from both the August 17 and November 14 postconviction orders. Because his appeal from the August 17 order is untimely, we accepted jurisdiction only over the appeal of the November 14 order.

D E C I S I O N

The sole issue before us is whether the postconviction court's refusal to characterize his first-degree controlled-substance sale conviction as a second-degree controlled-substance sale conviction based on the DSRA's updated weight thresholds violates McDonald's constitutional right to equal protection because it treats offenders differently

based on the dates of their crimes and because the pre-DSRA sentencing guidelines disparately impacted African Americans.

The U.S. Constitution's Equal Protection Clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause of the Minnesota Constitution provides that "[n]o member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." Minn. Const. art. I, § 2. To show that a statute violates an appellant's equal-protection rights, the appellant bears the heavy burden of proving beyond a reasonable doubt that the statute treats similarly situated persons differently. *State v. Johnson*, 813 N.W.2d 1, 10 (Minn. 2012). Under the similarly situated test, a state violates equal protection if it "prescribes different punishments or different degrees of punishment for the same conduct committed under the same circumstances by persons similarly situated." *Id.* at 12. The Equal Protection Clause "does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike." *Id.* (quotation omitted). "We review the constitutionality of a statute de novo." *Deegan v. State*, 711 N.W.2d 89, 92 (Minn. 2006).

The DSRA became law on May 22, 2016, and changed Minnesota's drug-sentencing guidelines by reducing sentences for low-level, nonviolent drug offenders. 2016 Minn. Laws ch. 160, §§ 1-22, at 1-17. In *State v. Kirby*, the supreme court applied the "amelioration doctrine," which provides that an amended criminal statute applies to crimes committed before its effective date if: (1) the legislature has made no statement

clearly establishing that it intends to abrogate the amelioration doctrine; (2) "the amendment mitigate[s] punishment"; and (3) final judgment has not been entered as of the effective date. 899 N.W.2d 485, 490 (Minn. 2017). The supreme court held that the amelioration doctrine applies to section 18 of the DSRA, which amended the sentencing grid for drug offenses and became effective on May 23, 2016. *Id.*; *see also* 2016 Minn. Laws ch. 160, § 18, at 15-16; Minn. Sent. Guidelines 4.C (2016).

In *State v. Otto*, the supreme court clarified that the DSRA amendments to the weight requirements for drug offenses do not apply to crimes that were committed before August 1, 2016. 899 N.W.2d 501, 503-04 (Minn. 2017). The supreme court reasoned that because the DSRA states that the weight requirements for first-, second-, and third-degree drug sale became "effective August 1, 2016, and appl[y] to crimes committed on or after that date," the legislature's intent was "crystal clear: to abrogate the amelioration doctrine." *Id.* (citing 2016 Minn. Laws ch. 160, §§ 4-5, at 2-6). Therefore, under *Otto*, a district court cannot amend the degree of an offender's drug conviction based on the DSRA's updated weight requirements. *Id.*

In resentencing McDonald under the DSRA, the postconviction court determined that the presumptive sentence was 125 months of incarceration. But the postconviction court doubled the presumptive sentence based on the jury's determination that McDonald is a career offender. *See* Minn. Stat. § 609.1095, subd. 4 (2012) (providing that a district court "may impose an aggravated durational departure from the presumptive sentence up to the statutory maximum sentence if the factfinder determines that the offender has five or more prior felony convictions and that the present offense is a felony that was committed

as part of a pattern of criminal conduct"). The postconviction court correctly applied the DSRA's updated sentencing grid to McDonald's first-degree controlled-substance sale conviction, *see Kirby*, 899 N.W.2d at 487, without applying the DSRA's updated weight thresholds to amend the degree of McDonald's conviction, *see Otto*, 899 N.W.2d at 503.

McDonald argues that the postconviction court's refusal to apply the DSRA's weight thresholds to persons convicted before August 1, 2016, violates equal-protection guarantees because he received a more serious sentence than those who committed the same conduct after August 1, 2016. We must first consider whether McDonald is being treated differently than others similarly situated who committed the same conduct under the same circumstances. *Johnson*, 813 N.W.2d at 11. An offender who violates the 2012 version of the controlled-substance statute is not "in all relevant respects alike" to an offender who violates a 2016 version of the controlled-substance statute. A 2012 offender committed his crime at a different time than a 2016 offender and violated a different version of the statute. *Cf.* Minn. Stat. § 152.022, subd. 1(2) (2016); Minn. Stat. § 152.021, subd. 1(1) (2012).

McDonald next contends "that the racial disparity in drug case sentencing violates his right to equal protection." To show that a statute violates the Equal Protection Clause based on race, an appellant must show "that the statute classifies individuals on the basis of some suspect trait." *State v. Frazier*, 649 N.W.2d 828, 832 (Minn. 2002). If the statute itself does not classify on the basis of race, an appellant must demonstrate that the statute creates a racial classification in practice. *Id.*

McDonald does not argue that the legislature's refusal to apply the DSRA weight thresholds to acts committed before August 1, 2016, classifies individuals on the basis of a suspect trait. Instead, he argues that the statute creates a racial classification in practice. McDonald cites literature that states there is racial disparity between African American and white offenders for arrest and imprisonment rates related to drug crimes. Although McDonald discusses overall disparity rates for drug crimes, he has not demonstrated how the legislature's decision not to apply the DRSA's weight thresholds retroactively causes those disparities, and therefore he has not demonstrated that the DSRA creates a racial classification in practice.

The postconviction court did not abuse its discretion in amending McDonald's sentence.

Affirmed.

Appendix E

STATE OF MINNESOTA

IN SUPREME COURT

A18-0064

Marlow Shelton McDonald,

Petitioner,

vs.

State of Minnesota,

Respondent.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Marlow Shelton McDonald for further review be, and the same is, denied.

Dated: October 24, 2018

BY THE COURT:

Lorie S. Gildea
Chief Justice

Appendix F

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.