23-6112

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DEREK SMYER — PETITIONER
(Your Name)

vs.

STUART SHERMAN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court, Central District of CA.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Derek Smyer
(Your Name)

SATF-Corcoran State Prison
P.O. Box 5244 [900 Quebec Avenue]
(Address)

Corcoran, California 93212
(City, State, Zip Code)

None | Incarcerated
(Phone Number)

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix 'A' to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix 'B' to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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None.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 30, 2023.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution's 5th, 6th and 14th Amendments are involved, as well as 28 U.S.C. §§ 2254; 1254(1).

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LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

There are no "related cases" with regard to the instant case that this Petitioner is aware of.

QUESTION(S) PRESENTED

I. WHETHER THE UNITED STATES NINTH CIRCUIT COURT OF APPEALS ERRED WHEN IT FAILED OR REFUSED TO ISSUE A CERTIFICATE OF APPEALABILITY (COA) ON ONE OR MORE OF PETITIONER'S CLAIMS FOR RELIEF; AND IF SO, WHETHER THIS COURT SHOULD ISSUE A COA ON ONE OR MORE OF PETITIONER'S CLAIMS FOR RELIEF?

II. WHETHER OR NOT REASONABLE JURISTS COULD DIFFER AS TO THE QUESTION OF WHETHER THE U.S. DISTRICT CORRECTLY DETERMINED THAT THE STATE TRIAL COURT'S EXCLUSION OF THIRD-PARTY CULPABILITY EVIDENCE DOES NOT PRESENT A FEDERAL CLAIM OR BASIS FOR RELIEF?

STATEMENT OF THE CASE

On August 30, 2023, the Ninth Circuit Court of Appeals denied the Petitioner a Certificate of Appealability, and in so doing, found that Petitioner "ha[d] not shown that 'jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of resson would find it debatable whether the district court was correct in its procedural ruling.'" (See: Appendix 'A')

Similarily, the U.S. District Court - for the Central District of California, dismissed, without an evidentiary hearing, Petitioner's pro se Petition for Writ of Habeas Corpus and subsequently denied a Certificate of Appealability, on April 29, 2022. (See: Appendix 'B', 'C', 'D', and 'E')

On July 24, 2019, that California Supreme Court denied review on petitions for review as they related to Petitioner's criminal conviction and sentence. (See: Appendix 'F')

On April 4, 2019, the California Court of Appeal for the Second Appellate District, Division Eight, filed its Opinion affirming judgments in Petitioner's case. (See: Appendix 'G')

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REASONS FOR GRANTING THE PETITION

The Ninth Circuit Court of Appeals erroneously concluded that the Petitioner had failed to meet the requirements for that court to issue a Certificate of Appealability (hereafter "COA"). This Court has original jurisdiction under **28 U.S.C. §§ 2254; 1254(1)**, and should issue a COA in light of several U.S. Constitutional violations which had taken place in the Petitioner's Criminal State prosecution - proceedings, that led to his unconstitutional imprisonment for Life Without the Possibility of Parole. Below, are the relevant procedural history and facts of the case --

In a five-count information, Petitioner and his co-defendant, Skylar Jefferson Moore (hereinafter "Moore" or "Mr. Moore") were charged with the murder of Ms. Taylor on September 25, 2001, and the murder of a human fetus on that same date (counts 1 and 2; Cal. Penal Code § 187 (a)). The prosecution alleged special circumstance allegations as to both counts; those being, solicitation of the murders by Petitioner for financial gain, commission of more than one offense, and commission of the murders by lying in wait. (Cal. Penal Code § 190.2 (a)(1), (3) and (15).) Count 3 charged Petitioner and Moore with conspiracy to comit the murder, with three overt acts alleged. (Cal. Penal Code §§ 182 (a)(1); 187.) Counts 4 and 5 alleged that Petitioner solicited Moore to commit the murders (Cal. Penal Code § 653f (b)). On all counts, it was alleged Moore personally used/

discharged a firearm. (Cal. Penal Code § 12022 (a)(1)). (3 S.C.T. 1-7; 4 R.T. 918-922.)[1/]

Both Petitioner and Mr. Moore pled not guilty. (3 C.T. 518.) The case was severed and Petitioner and Moore were tried before duel juries. (5 C.T. 1265; 4 R.T. 913-914.)

Petitioner's jury returned its verdict on May 8, 2017: On count 1, the jury found Petitioner guilty of the second degree murder of Taylor, found true the allegation that Petitioner solicited the murder for financial gain (Cal. Penal Code § 190.2 (a)(1)). On count 2, the jury found Petitioner guilty of first degree murder, and found true that he solicited the murder for financial gain (Cal. Penal Code § 190.2 (a)(1)), and that, a principal was armed with a firearm (Cal. Penal Code § 12022 (a)(1)). The jury found true the multiple murder special circumstance (Cal. Penal Code § 190.2 (a)(3)). On count 3, the jury found Petitioner guilty of conspiracy (Cal. Penal Code § 182 (a)(1)) and found Petitioner guilty of solicitation of murder (Cal. Penal Code § 653f (b)). On count 4, the jury found true that a principal was armed with a firearm (Cal. Penal Code § 12022 (a)(1)). On count 5, the jury found true that a principal was armed with a firearm (Cal. Penal Code § 12022 (a)(1). (6 C.T. 1501-1508; 14 R.T. 5703-5706.)

[1/] Throughout "R.T." refers to the Reporter's Transcript; "C.T." refers to the Clerk's Transcript; "1 S.C.T." to the Supplemental C.T. filled 11-21-2017; "3 S.C.T." to the Supplemental C.T. filled 11-18-2017.

Petitioner was sentenced on June 1, 2017. On each of counts 4 and 5, soliciting murder (Cal. Penal Code § 653f (b)), the court imposed a concurrent determinate six-year midterm plus one year for the section 12022 (a)(1) enhancement. On count 1, second degree murder, the court imposed an indeterminate term of 15 years to life, plus one year for the firearm (Cal. Penal Code § 12022 (a)(1)) enhancement. On count 2, first degree murder with special circumstance, the court imposed life without parole, consecutive to count 1, plus one year for the section 12022 (a)(1) enhancement. On count 3, conspiracy to commit murder, the court imposed and stayed an indeterminate term of 25 years to life plus one year for the section 12022 (a)(1) enhancement. (Cal. Penal Code § 654.)) A $10,000 restitution fine was imposed. The court awarded presentence custody credits. (6 C.T. 1514-1517; 14 R.T. 6027-6029.)

Petitioner's conviction was affirmed on direct appeal with the judgment amended to reflect that the six-year midterm sentences on counts 4 and 5 are imposed and stayed and to reflect the armed enhancement for count 5 is stricken.

Thereafter, Petitioner filed a timely federal Habeas Corpus Petition in the United States District Court for the Central District of California, in pro se, which has now been denied on the merits, and dismissed with prejudice; without an evidentiary hearing being held.

Based on the denial and dismissal of his federal Habeas Corpus Petition, Petitioner filed a timely Notice of Appeal in the United States District Court, Central District of California.

Petitioner sought a COA from the Ninth Circuit Court of Appeals, following a denial from the aforementioned District Court. That Court denied COA on April 29, 2022. (See: Appendix 'B', 'C', 'D', and 'E')

Petitioner now seeks a COA from this Court, following a denial of COA in the federal Appellate Court.

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STATEMENT OF RELEVANT FACTS

On September 25, 2001, Ms. Taylor was shot in the Lobby of her apartment building in Hawthorne, California. She died from a single gunshot wound to the head. Taylor was five months pregnant. The fetus died as a result of her death. (4 R.T. 983; 5 R.T. 1348; 1353; 8 R.T. 2243.)

Mr. Moore was identified as a suspect. In 2002, he was charged with the murder of Taylor and her fetus. Initially, Moore was held to answer but the charges were subsequently voluntarily dismissed by the presecution due to weakness in the case and witnesses' inability to positively identify him. (9 R.T. 2619, 2638-2639.)

In 2011, the investigation was reopened. (9 R.T. 2633-2634.) Based on new evidence, the case was refiled against Petitioner and Moore. Both were held to answer on July 16, 2012. (9 R.T. 2634, 2639; 3 C.T. 518.) The prosecution's theory was that Petitioner conspired with Moore, and solicited him to kill Taylor and the fetus, and aided and abetted the killing, because, Taylor refused to have an abortion and Petitioner did not want to pay child support. (4 R.T. 937-939.)

Severance was granted for jury trial, and Petitioner was tried alone. In Petitioner's first trial in 2016, after being given immunity by the trial court (Year 2016, Trial

Transcripts at pp. 915-917), Moore testified as a witness and testified that he had never met Petitioner, Petitioner never solicited nor conspired with him to murder Taylor and the fetus, and he (Moore) did not murder Taylor. Moore further testified that his out-of-court statement against Petitioner was fabricated in pursuit of law enforcement's promise to get him out of the hole as he was already incarcerated. (Year 2016, Trial Transcripts at pp. 919-952.) Petitioner's first jury hung and a mistrial was declared in 2016. (5 R.T. 1149.) In 2017, Petitioner was retried with Moore, and having separate juries empanelled through the grant of severance, where Moore did not testify. (5 R.T. 1265.) Petitioner's jury returned its verdicts on May 8, 2017, finding Petitioner guilty on all counts.

At 7:34 a.m. on September 25, 2002, Hawthorne Police Officer Robbie Williams (hereinafter "Officer Williams") responded to a call of "shots fired and someone down" at the apartment building at 12700 Kornblum Avenue in the City of Hawthorne. (8 R.T. 2242-2243.) Taylor was on the floor of the Lobby with a gunshot to her head. (8 R.T. 2243.) She was five months pregnant. She died from the gunshot wound. The fetus died because she died. (5 R.T. 1348, 1353.)

Taylor lived at her apartment building with her 9-year-old son Jovonta. (4 R.T. 975.) Her rental agreement included a May 11, 1999 Child Support Order for $185 per month payable by Javonta's

father, Kenneth Woods. (5 R.T. 1333-1336.)

When Officer Williams arrived on scene, Taylor was on the floor in the Lobby, near the doorway to the parking area. A photograph of her son Javonta was on the floor near her body. (4 R.T. 1014-1015; 9 R.T. 2665, 2671-2672.) A Hawaiian Punch can was found next to a white car in the parking area. (8 R.T. 2270.)

Multiple school children were outside when the shooting occurred. (9 R.T. 2594-2595.) 11-year-old Chavonna Hall (hereinafter "Hall") and her friends were walking to school on Kornblum Avenue. They heard an argument coming from Taylor's building and stopped to listen. (6 R.T. 1561-1564, 1598.) Hall heard a man and woman yelling at each other and then heard a single gunshot. (6 R.T. 1565, 1598.) Then a man came out of the building by jumping the fence, ran past them, got into a black vehicle driven by someone else, and left the area. (6 R.T. 1569, 1575, 1590.) Hall described the black vehicle as a Thunderbird (6 R.T. 1607.), or a four-door full-sized passenger car. (6 R.T. 1639.) Neither Moore nor Petitioner had a black vehicle or access to one. (9 R.T. 2649-2650; 10 R.T. 3076.)

At trial in 2017, Hall described the suspect as wearing all black, with a bandana and hoodie on his head. She did not get a good look at his face. (6 R.T. 1568-1569, 1589, 1599.) In her September 27, 2001 interview, Hall described the suspect as

wearing a blue button-down shirt, khaki pants, and a blue baseball cap. (6 R.T. 1599; 10 R.T. 3029-3030.) Hall changed her description to all black clothing at Petitioner's first trial. (6 R.T. 1600.) The suspect had an object in his hand, possibly a pistol. He dropped it in the bushes. (6 R.T. 1571-1572; 10 R.T. 3030.) Hall directed law enforcement to that area. (6 R.T. 1584.) No firearm was ever found. (8 R.T. 2292-2293; 10 R.T. 3030.)

Walter Ohaeri (hereinafter "Ohaeri") a neighbor in Taylor's building, was looking out his window that morning. (7 R.T. 1807.) He saw a man wearing a white hooded sweatshirt with a band around his forehead enter the adjacent alley. (7 R.T. 1808-1809, 1812; 10 R.T. 3029.) He did not see the man enter the property. (7 R.T. 1831.) Ten minutes later, Ohaeri heard what he thought was a firecracker. (7 R.T. 1809, 1852.) Someone from the next building shouted that someone had been shot. After the gunshot, Ohaeri saw the same man run away from the building. (7 R.T. 1812, 1835;1836.)

At the 2001 Preliminary Hearing, when Moore and Petitioner were both seated at counsel's table, Ohaeri initially identified Petitioner as the man that he saw at the building, but then corrected his identification and said it may have been Moore. At trial in 2017, he was "positive" Moore was the man he saw on September 25, 2001, based on skin color and shape of nose. (7 R.T. 1820-1825; 1847, 1874.)

Officer Williams determined Taylor's identity and where she worked. He and his partner drove to her workplace. (8 R.T. 2245-2246.) From Taylor's co-worker, Jana Poletto (hereinafter "Poletto") and Denice Palmer (hereinafter "Palmer"), Officer Williams learned that Taylor had been dating Petitioner, who worked nearby. (8 R.T. 2247.) Petitioner was the initial sole suspect. (9 R.T. 2601.) Officer Williams and his partner drove Poletto and Palmer to Smyer's workplace. Petitioner's Mustang was not in the parking lot. They then drove to nearby Anderson Park, based on information that Petitioner and Taylor initially met there and would meet there at lunchtime. (8 R.T. 2248-2249, 2259.) They arrived at Anderson Park at around 12:30 p.m., and Petitioner's Mustang was in the lot.

Petitioner was detained and questioned. His vehicle and his residence, located 22 miles from the crime scene, were searched. (8 R.T. 2260; 9 R.T. 2596-2597, 2606, 2684.) A 2001 search of Petitioner's residence, computer, cell phone, and daily planner revealed no evidence connecting Petitioner to the shooting. (8 R.T. 2271-2272; 10 R.T. 3042.)

Poletto testified that Petitioner was not angry. (8 R.T. 2381.) Poletto told Petitioner that Taylor did not want money from him, that Taylor was perfectly willing to take care of the child on her own. (8 R.T. 2380.) Petitioner asked Poletto to keep him informed. (8 R.T. 2380.)

Law enforcement believed that there must be a second suspect. (9 R.T. 2601.) Investigators learned at the crime scene that Taylor has a boyfriend who drove a black truck. He had not been seen at the apartment building in the last several months. (10 R.T. 3086.) Taylor had dated another man, Dino Sherman, prior to dating Petitioner. (4 R.T. 1008-1009.)

On September 30, 2001, investigators got a tip from a Taylor family member from a neighbor that the shooter was a gang member with the moniker "Little C-Styles." (9 R.T. 2601.) Little C-Styles was identified as defendant Moore. The moniker is associated with the 190 East Coast Crips gang, whose territory includes Anderson Park. (9 R.T. 2306, 2602-2603; 12 R.T. 3967.)

Detective Smith conducted the search of Moore's residence. No black or white hoodie and no blue button-down dress shirt, were found. (10 R.T. 3065.) No gun was found. (9 R.T. 2680.) No evidence connecting Moore to Petitioner was found. (8 R.T. 2292.)

When the six-pack was prepared, Williams commented that he thought Moore resembled the man he saw talking with Petitioner at Anderson Park, but he was not sure and could not make a positive identification. Moore was arrested on October 28, 2001, and was charged with the murders. (8 R.T. 2266, 2288, 2317; 9 R.T. 3017.)

It was determined that Moore had checked in with his probation officer in Inglewood at 9:21 a.m., on September 25,

2001. (10 R.T. 3031.) Searches of Petitioner's and Moore's residences and property revealed no evidence connecting Moore and Petitioner or Moore and Taylor. (8 R.T. 2271-2272, 2275, 2291; 10 R.T. 3082.) The charges against Moore were dismissed at the presecution's request due to weakness in the case. (9 R.T. 2619, 2638-2639; 10 R.T. 3078-3082.) Moore was subsequently convicted of an unrelated murder and was sentenced to state prison. (3 C.T. 530.)

Detective Smith reopened the investigation in late June 2011. (9 R.T. 2633-2634.) Poletto testified both that she had not seen Moore prior to September 25, 2001, and had not seen the two men together prior to September 25, 2001. (8 R.T. 2361, 2384-2385; 9 R.T. 2510, 2511, 2532.)

Petitioner's residence, phone and computer were searched again. No texts, phone calls, emails or other evidence connected him to Moore or the shooting of Taylor. (8 R.T. 2272-2273, 2275, 2296-2297.)

O'Shay Slaughter (hereinafter "Slaughter") was a child on his way to school on the morning of September 25, 2001. (6 R.T. 1533, 1537, 1547.) From across the street, Slaughter saw someone walk through the unlocked front enterance to Taylor's apartment building. (6 R.T. 1537-1539.) A few minutes later, he heard a gunshot. The same man came out of the building, lit a

cigarette, and walked off. (6 R.T. 1539.) Slaughter did not see him discard anything. (6 R.T. 1545.) Slaughter was confused about whether he saw this man run from the carport area and jump a wall and fence. (6 R.T. 1550.) There were no other school children near Slaughter. (6 R.T. 1546.) Slaughter was unclear about what the man was wearing. He described him as having hazel eyes and brown skin tone. (6 R.T. 1540-1541.)

Slaughter identified a suspect in a six-pack photo lineup. (6 R.T. 1541-1544, 1556.) He testified he made a mistake in this identification and now would pick a different person from the same lineup. (6 R.T. 1544.)

Slaughter lived across the street and had seen this man at Taylor's apartment building before. The man was a father and had young kids, around 8 or 9 years old. (6 R.T. 1551, 1554, 1557.) Slaughter surmised it was the man's apartment, but the lady didn't want him there, "so he just popped up one morning and bang." Slaughter did not hear any screaming or argument prior to the gunshot. (6 R.T. 1552.)

Norma Smith testified. She was 12 years old and on her way to school with Hall and others. (10 R.T. 3138.) A black male wearing a black hoodie ran in front of them and into Taylor's building. (10 R.T. 3140-3141.) He went through the unlocked door to the complex. (10 R.T. 3143.) Then she heard a "commotion" -

people in the building speaking loudly and "not friendly." She could not tell their gender. (10 R.T. 3144, 3151.) The argument lasted about a minute, then there was a gunshot and she saw a black male run out of the building and hope the fence. He was wearing a black hoodie and had sonething in his hand. She did not see him throw anything. She did not know if it was the same person she saw enter the building. (10 R.T. 3145-3146.)

Moore's mother, Sherri Thompson (hereinafter "Thompson"), testified that Moore lived with her and attended El Camino College. September 25, 2001, was Moore's birthday. Moore was home with her from 5:00 to 8:15 a.m. when she left for work. (11 R.T. 3451-3455, 3457, 3466-3467.) Moore routinely walked his three young siblings to school on Kornblum. (11 R.T. 3455-3456.) He did not have a car or access to a car; he took the bus to college. Thompson had never seen him with a black Thunderbird, SUV, truck or other vehicle, and he had no access to such vehicles on September 25, 2001. (11 R.T. 3458-3459.) That day, he had a 9:00 a.m. appointment with his probation officer and planned to take the bus there. (11 R.T. 3457-3458.)

On the morning of the shooting, Thompson and Moore talked about his birthday dinner celebration they had planned for that evening at home. (11 R.T. 3454, 3466.) Thompson got home from work at about 5:30 p.m. They celebrated Moore's birthday that day. (11 R.T. 3467.)

Petitioner testified on his own behalf. In April 2001, Petitioner met Taylor at Anderson Park during his lunch break. (12 R.T. 4411-4217.) When Petitioner met Taylor, she told him she was in a relationship. (12 R.T. 4217.) Several weeks later, she gave him her phone number and they became intimate. She was not his girlfriend and their relationship was not exclusive or consistent. (12 R.T. 4218, 4220.) They continued to meet at the Park. She was always alone. He stayed at her apartment several times. On those occasions he carpooled to work with Javonta. The relationship ended toward the end of May 2001, about a month after it started. (12 R.T. 4220-4224.)

In June or July 2001, Taylor told him she had missed her period and she was going to get a pregnancy test. She told him the test was negative. On July 23, 2001, he got an email from Poletto, informing him that Taylor was pregnant. Poletto told him not to tell Taylor that she had reached out to let him know. (12 R.T. 4225-4226, 4229.) Petitioner went to Taylor's apartment. Her sister Michele was present. Petitioner and Taylor went into the bedroom to talk privately. (12 R.T. 4227.) Taylor told him she was pregnant and that she had gone to an abortion clinic, but had not gone through with an abortion. (12 R.T. 4228.)

Petitioner called Poletto the next day. He told Poletto he had talked to Taylor about the pregnancy and that, as Poletto

wished, he had not let Taylor know that Poletto had emailed him. (12 R.T. 4229.) Petitioner was not angry with Taylor and did not think her keeping the baby would ruin his life. He was not worried about paying child support and was prepared to take care of his responsibility. (12 R.T. 4230.) Petitioner met with Taylor at the Park at least once after this, in August. (12 R.T. 4231.) Petitioner called her landline, cell phone, and work phone multiple times from July 24th into September 2001, to find out how she was doing. (12 R.T. 4243-4245, 4287.) He did not know she was in Texas and did not talk to her while she was there. (12 R.T. 4244-4245.)

Petitioner called Taylor's workplace on September 21, 2001, and learned that Taylor had gone to Texas and would be back on Monday, September 24th. He called Taylor on September 24th. They talked about her trip to Texas and her mother's illness. (12 R.T. 4238.) Taylor was not crying or upset during the phone call, and Petitioner did not threaten her or tell her to get an abortion. (12 R.T. 4238-4239.)

On the night of September 24, 2001, Petitioner withdrew $60 from the ATM on 135th Street. He was in that area to visit his Aunt who lived nearby. His mother had asked him to take a cooking item to his Aunt. He never met Moore and had never seen or heard of him prior to this case. He had no contact with gang members that night, he never knew any 190 East Coast Crips gang members, never hung out with gang members, and was never in a

gang. On September 24, 2001, he was not with Moore and he was not at Taylor's apartment building or on her street corner. (12 R.T. 4235-4236.) When he left his Aunt's house that night, he got gas and went home to his parent's house in Cerritos. (12 R.T. 4233-4238.)

Petitioner was detained for questioning on September 25, 2001 when he was driving away from Anderson Park. (12 R.T. 4246-4247.) He had set up an interview for his friend Akil Carter (hereafter "Carter") at Petitioner's place of employment, Browne, Inc., for 1:30 p.m. that day. (12 R.T. 4247-4248.) He planned to meet with Carter prior to the interview, and Carter was supposed to pick him up at Browne for lunch. But Carter could not find the Browne location, so Petitioner arranged to meet him at Anderson Park. (12 R.T. 4249.) Carter arrived at the Park in his Black SUV. The two men talked outside their vehicles and Petitioner reviewed Carter's cover letter. (12 R.T. 4250-4252.) They left the Park 45 minutes later. (12 R.T. 4255.) When Petitioner drove away from the Park in his own vehicle he was detained by police. (12 R.T. 4257.) He cooperated with police and was released hours later. (12 R.T. 4260.)

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THE COA LEGAL STANDARD

In this Court's decision in Miller-El v. Cockrell, 538 U.S. 322, 123 S.Ct. 1029 (2003), the Court clarified the standards for issuance of a COA:

> "... A prisoner seeking a COA need only demonstrate a 'substantial showing of the denial of a constitutional right.' A prisoner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."

Id., 123 S.Ct. at 1034, citing Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595 (2000). Reduced to its essentials, the test is met where the petitioner makes a showing that "the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encoragement to proceed further'." Id., at 1039, citing Barefoot v. Estelle, 463 U.S. 880 (1983). This means that the petitioner does not have to prove that the lower district court was necessarily "wrong" - just that its resolution of the constitutional claim is "debatable":

> "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurists of reason might

> agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in Slack, where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253 (c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

Applying the above standard for granting a COA, the Ninth Circuit has acknowledged that the standard is "relatively low." (See: Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002) [citing Slack, at 483].) Moreover, because the COA ruling is not an adjudication on the merits of the claims, it does not require a showing that the claims will succeed (Miller-El v. Cockrell, supra, 537 U.S. at 337.). Fianlly, doubts about the propriety of granting a COA must be resolved in this Petitioner's favor. (Lambert v. Stewart, 220 F.3d 102, 1025 (9th Cir. 2000) [en banc].)

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1. REASONABLE JURISTS COULD DIFFER AS TO WHETHER THE DISTRICT COURT CORRECTLY DETERMINED THAT THE STATE TRIAL COURT'S EXCLUSION OF THIRD-PARTY CULPABILITY EVIDENCE DOES NOT PRESENT A FEDERAL CLAIM OR BASIS FOR RELIEF

The District Court Erroneously Concluded That The Exclusion Of Third-Party Culpability Evidence In Petitioner's Case Does Not Present A Federal Habeas Claim For Review Or Relief:

In denying and dismissing this claim in the Habeas Corpus Petition, the district court concluded, at the outset, that the state trial court's discretionary exclusion of third-party culpability evidence does not present a federal claim for review or relief. The district court concluded that this is true since this Court "has not squarely addressed whether a trial court's exclusion of evidence under a rule requiring it to 'balance factors and exercise its discretion' may violate due process, nor has it established a 'controlling legal standard' for evaluating discretionary decisions excluding evidence under such a rule." (See: Magistrate Judge's "Report and Recommendation" adopted by the U.S. District Court Judge on April 29, 2022, at p. 25; Appendix 'E'.)

Here, Petitioner asserts that jurists of reason could find the district court's legal analysis and conclusion regarding the unavailability of federal Habeas review or relief on this claim 'debatable or wrong", within the meaning of Barefoot v. Estelle, 463 U.S. 880 (1983); Slack v. McDaniel, 529 U.S. 473

(2000). This position is advanced in light of the fact that clearly established federal law provides that, evidence of potential third-party culpability evidence must be admitted when, under the "facts and circumstances" of the individual case, its exclusion would deprive the defendant of a fair trial. For example, in Chambers v. Mississippi, 410 U.S. 284, 303, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the exclusion of evidence of a third-party confession was found by this Court to violate due process where the excluded testimony was crucial to the defense. More, the Ninth Circuit Court of Appeals, in Lunbery v. Hornbeak, 605 F.3d 754, 760-61 (9th Cir. 2010), found that the exclusion of a statement by a third-party that he had killed defendant's husband deprived the defendant in that case of their right to present a defense, because, the "excluded testimony ... bore substantial guarantees of trustworthiness and was critical to [the defendant's] case."

Moreover, the federal Constitution guarantees to criminal defendants the right to present a defense. (See: Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986).)) This includes the right to present reliable evidence that another person committed the charged crime. (See: Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed. 2d 503 (2006).)) State rules establishing standards for the admissibility of third-party culpability evidence are

constitutionally permissible, as long as they are rationally related to the legitimate purpose of excluding evidence that has only a weak logical connection to the central issue at trial. Id. at 326-330.

In this case, the exclusion of the third-party culpability evidence denied Petitioner his federal Constitutional rights to due process and a fair trial. The would-be circumstancial evidence presented by the prosecution, against this Petitioner, purporting to show that he was involved in a conspiracy with Moore, and ultimately the murders of Ms. Taylor and the fetus, rested on nothing more than law enforcement's ever-changing theories and conjecture. Here, there was not a scintilla of credible evidence directly linking Petitioner to Mr. Moore or to the senseless murders of Ms. Taylor or the fetus. Conversely, the motive, opportunity, and eyewitness testimony evidence that was erroneously excluded pointed to Mr. Woods as being the likely killer; evidence which Petitioner submits was clear, plausible and strong. That is to say, Ms. Taylor and Mr. Woods had a long and continuous history of confrontation and disagreement over the custody and care of the child (Javonta) that they shared together. Woods was reportedly failing to adhere to court ordered child support payments, and, in turn Ms. Taylor was apparently limiting or completely preventing him from seeing their son.

The question of who actually killed Taylor — which resulted in the death of the fetus — was the central issue being decided in Petitioner's trial, and any evidence seeming to establish that Woods was the likely killer, including the eyewitness testimony of Slaughter, was critical to the Petitioner's defense. Ergo, the defense's anticipated presentation of the third-party culpability evidence suggesting that Woods was the actual killer, instead of Mr. Moore, was essential to him presenting a viable defense. It is because of these case-specific circumstances, that federal Habeas review of this claim was appropriate and why Petitioner has stated a federal claim for relief. (See: Lunbery v. Hornbeak, supra, 605 F.3d at 760-61.). Based on the forgoing, Petitioner asked the Ninth Circuit Court of Appeals to find that the district court's legal analysis and conclusion was either "debatable or wrong". The Appellate Court declined in error.

REASONABLE JURISTS COULD DIFFER OVER WHETHER THE DISTRICT COURT CORRECTLY DETERMINED THAT THE STATE COURT PROPERLY EXCLUDED THE THIRD-PARTY EVIDENCE

Jurists Of Reason Could Find The District Court's Conclusion That The State Trial Court Properly Restricted The Presentation Of Evidence, That Being That A Third Person Had Committed The Murders, Debatable Or Wrong:

Petitioner contends that he was denied the right to defend by the state trial court's restrictions of the presentation of third-party culpability evidence suggesting that Woods was the actual killer. This violated his rights to due process and a fair trial

as guaranteed by the 5th, 6th, and 14th Amendments to the U.S. Constitution. (See: Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).)) Below, Petitioner will set forth facts that this Court is asked to consider in making a determination with regard to whether his defense should have been allowed to present the contested third-party culpability evidence, and if the district court's subsequent conclusion that he should not have, meets the legal threshold of being "debatable or wrong".

i. Prior to trial, Petitioner moved to admit evidence of third-party culpability with regard to Mr. Woods. The motion set forth Mr. Woods' motive and other evidence linking Woods to the crimes through eyewitness testimony.

ii. Third-party motive evidence and facts were derived from the defense's interview with Mr. Woods, that being:

a. Woods was the father of Taylor's 9-year-old son, Javonta.

b. Woods' relationship with Taylor was contentious and clearly strained. Ms. Taylor would limit or prevent visitation between Woods and his son depending on what kind of mood she was in, and the two regularly argued over visitation.

c. Taylor had a Child Support Order for $185 per month against Woods, who would not meet his obligations to pay it on a regular basis.

d. By 2001, Woods owned back pay on Child Support, his paycheck was being heavily garnished, and he could not afford his own apartment. Taylor refused to negotiate the term of the Child Support, although he offered a solution that would have put more money into her pocket.

e. Shortly before her death, Taylor refused visitation by Woods with Javonta. On July 21, 2001, Woods' Driver's License was suspended due to the unpaid Child Support, making it difficult for him to work, because he could not drive. Woods referred to Taylor as an "evil person."

iii. Additional facts linking Woods to the murders:

a. Motive to pay Child Support — On February 28, 2001, Ms. Taylor sent an email to Tiffany Cannon stating, "Still waiting on Child Support!!!" Attached to the email was a photo of a skeleton dressed as an old lady holding a baby. (SM, p. 5 Schneider Dec., Exh. J.

b. Evidence the perpetrator knew the victim — Taylor was killed after a 5-7 minute loud and angry argument with a man, according to eyewitness Hall. The man and woman

were yelling at each other from inside the apartment building, after 5-7 minutes there was a pause for 1-2 seconds and then a gunshot. (SM, p. 6:14-17 Schneider; Dec., Exh. L, pp. 473-475.)

c. Immediately after the shooting, a man was seen running north from the scene, in the direction of the home where Mr. Woods stayed the night before the shooting. (SM, p. 7-9, p. 8:25-26; Schneider, Dec., p. 2, Paragraph 12; Schneider, Dec., Exh. F, pp. 324-325, Exh. K [map and directions from crime scene to home].)

d. Crime scene photo of plotted plant next to the exterior door to the building (SM, p. 9, Paragraph 4, Schneider, Dec. Exh., G, p. 6. [photo with Evidence Marker "G", potted plant at doorway]) evidence supporting defense theory that Taylor propped the door open to allow Woods to enter the Lobby and the plant was knocked over in their ensuing argument.

e. A photo of Taylor and Woods' son Javonta was found on the floor near Taylor's body at the crime scene. (SM, p. 7:23-26, Schneider, Dec., Exh. G, p. 9 [photo with evidence Marker #6, depicting photograph of Javonta on the floor at the crime scene]; Evidence supporting defense theory that Woods shot Taylor after an an angry argument regarding Child Support and Visitation.)

f. Crime scene photo shows Taylor's purse on the trunk of a car in the building's carport, unzipped and containing a folded envelope. (SM, p. 8:1420, Schneider, Dec., Exh. G, pp. 2-5 [purse on trunk of white car]) Evidence in support of defense theory that Taylor set her purse on the car and was arguing with Woods about Javonta.

g. Woods' statements to the defense about his whereabouts on September 24, 2001, conflicted with those given to police, during the course of their investigation. (SM, p. 6:18-25, Schneider, Dec., Exh., I and K); this was evidence that would have been used to impeach Woods.

iv. Arguments on the motion:

a. The defense argued that the strong evidence of Woods' motive and the ongoing arguments between Taylor and Woods, combined with the angry argument heard by Hall just before the shooting, the photo of Javonta at the crime scene, Woods' location the night before the incident, and the other evidence presented, was substantial enough to meet the test for admissibility of third-party perptrator evidence. Admission of the evidence was especially required to meet the prosecution's theory the killer's motive was to avoid paying Child Support. Whereas the Petitioner's paternity of Taylor's child was not even known at the time of her death, it was an established

fact that Woods was the father of Taylor's 9-year-old son, was under court ordered Child Support, was in arrears on payment, and had tried to negotiate, unsuccessfully, the prior terms with Taylor, which she had rejected even though the new terms offered would have been additional benefit to her. (2 R.T. C 17-22.)

v. The court excluded evidence of third-party culpability. R.T., C 16-22.)

vi. The defense renewed the motion to admit third-party culpability evidence after Slaughter testified that the man he saw at Taylor's building on September 25, 2001, was someone he had seen before with an 8 or 9-year-old boy, and he believed the man to be the father of that boy. (7 R.T. 1801-1803.) [renewal of motion]; 6 R.T. 1554, 1558 [Slaughter's testimony].) Counsel argued Slaughter's testimony supported the defense theory that the actual killer was Woods, the father of Taylor's son. (7 R.T. 1802.) The trial court determined, independently, and absent a mental health evaluation, that Slaughter's testimony was reliable and declined to change its ruling excluding third-party culpability evidence. (7 R.T. 1803.)

Here, Petitioner contends that the trial court erroneously found that eyewitness Slaughter was mentally unfit to testify in

the trial for the defense. This is based on the fact that the trial court did not establish itself as an expert in psychology, and therefore, its decision to exclude him on that basis had no foundation in evidence; it too was conjecture. The prosecution's case here was built on the motive that the killing was committed to avoid Child Support payments, and Woods had a stronger motive under that theory since he had been previously shown to be the father of Javonta, and ordered to pay Child Support in the sum of $185 per month. However, the basis upon which the trial court excluded the testimony of Slaughter was based on an erroneous interpretation of the applicable standards for admissibility.

There is little or no chance the jury would have been misled or confused by the evidence. The prosecution made its theory very clear. That is to say, evidence that a third-party was linked to Taylor and the crime scene was relevant, and there was no clear danger of such evidence confusing or misleading the jury had it been allowed to be admitted. The evidence linking Woods to Taylor and the crime scene, was required under federal law because it was critical to Petitioner's defense.

The exclusion of the evidence violated Petitioner's rights to due process and a fair trial under the federal Constitution, and worked to effectively disable his defense to the charges against him. During jury deliberations, the jury had sought additional information concerning Woods and his involvement, but the court

refused to provide the jury with such information. The request shows that it was reasonable to consider other perpetrators and theories, especially Mr. Woods. Specifically, the jury asked the court: "Can we ask for more information on Javonts['s] father?" The court responded, "No. You are to decide this case solely on the evidence received." (6 R.T. 1496; 14 R.T. 5402-5303.) Here, the jury question indicates that the jury was scrutinizing the prosecution's motive theory, and having some degree of difficulty accepting the case without more information about Javonta's father. They had evidence of his existing Child Support obligation (see: 5 R.T. 1333-1336.) and Slaughter's testimony that the person Slaughter saw at the scene was the father of a young boy. (6 R.T. 1554, 1558.) Given the physical evidence and motive that seemed to link Woods to the crimes, it cannot be shown that the exclusion of the evidence was harmless. (See: Chapman v. California, 386 U.S. 18 (1967).))

The jury's concern demonstrates that Petitioner may have obtained a more favorable outcome at trial, but for the trial court's error in excluding the third-party culpability evidence. For purposes of granting the COA in this case, Petitioner submits that the district court, and Ninth Circuit Court of Appeals', analysis and conclusions at it relates to this claim are truly "debatable or wrong". Moreover, this Court is a court that has original jurisdiction over the case, and so, if it is found that this Court has not yet addressed this question and rendered its

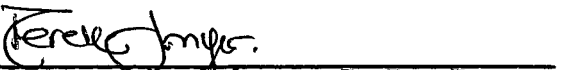
position, then this Court should grant COA in order to settle any aspect of the would-be open question.

CONCLUSION

Based on the foregoing, Petitioner should be granted a COA on the issue designated herein.

Dated: November 5, 2023

Respectfully Submitted



Signature of Petitioner, In Pro Per
DEREK PAUL SMYER

cc: California Attorney General