No. 18-9008

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

EMEM UFOT UDOH,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

On Petition For Writ Of Certiorari
To The Minnesota Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. **Question One:** Whether under the Due Process Clause, there is an impermissible risk of actual bias, likelihood of bias on the part of a trial judge too high to be constitutionally tolerable, appearance of bias, or unconstitutional potential for bias on the issue of witness recantation, when said trial judge earlier had a significant, personal involvement in critical trial decisions regarding Petitioner's case in 2014 that amounts to personal knowledge of disputed evidentiary facts to now be the decision maker in the same case, adjudicating the same question, based on the same facts in a later application for state post-conviction relief in light of *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016); In re Murchison, 349 U.S. 133 (1955)?
2. **Question Two:** Whether under the Due Process Clause, the lower court applied the wrong legal standard to Petitioner's recusal motion in light of this Court precedents in *Williams v. Pennsylvania*, 579 U.S. ___, 136 S. Ct. 1899 (2016); *Rippo v. Baker*, 137 S. Ct. 905 (2017) holding that the proper inquiry is whether "the risk of bias [is] too high to be constitutionally tolerable."?

LIST OF PARTIES

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

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STATE OF MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

Petitioner, Emem Ufot Udoh, respectfully petition for a Writ of Certiorari to review the decision of the Minnesota Court of Appeals in this case.

OPINIONS BELOW

The decision of the Minnesota Court of Appeals appears in the appendix[1] to this petition **Pet. App. 1 - 5,** *infra* and is unpublished. *Udoh v. State*, Nos. 18-1804. The District Court memorandum of law and order is reprinted in **Pet. App. 6 - 10**. The Minnesota Supreme Court's decision denying discretionary review appears at **Pet. App.** 1.

[1] Citations to the Appendix of the Petition for Certiorari are denoted as "**Pet. App.**" or "**(App. -).**"

STATEMENT OF JURISDICTION

The Minnesota Court of Appeals entered its order on January 02, 2019. The Minnesota Supreme Court denied discretionary review on February 27, 2019. This Court's jurisdiction is invoked under 28 U.S.C §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant statutory and constitutional provisions involved in this case are as follows:

The Fourth Amendment provides in relevant part:

> "The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment provides in relevant part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual services in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment of the Constitution provides in relevant part:

> "No State shall ... deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Relevant statutory and constitutional provisions involved in this case are as follows:

The Fourteenth Amendment of the Constitution provides in relevant part:

> "No State shall ... deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Proceedings Below

On April 10, 2018, Petitioner filed a State post-conviction action seeking reliefs. See **App. 11-20 at** ¶9.

On June 15, 2018, the State post-conviction court issued an order denying post-conviction petition in part and granting an evidentiary hearing in part on the issue of witness recantation. **App. 11 - 20**.

On June 18, 2018, the State post-conviction court issued a scheduling order for an evidentiary hearing on July 27, 2018.

On July 11, 2018, the State post-conviction court issued an order denying Petitioner's request for Subpoena(s) of witnesses in part and granting his request in part.

On July 27, July 30, 2018 through August 01, 2018, the State post-conviction court evidentiary hearing was held on the issue of witness recantation. See **App. 32 – 212.**

B. Relevant Facts

On July 27, July 30, 2018 through August 01, 2018, the State post-conviction court evidentiary hearing was held. The transcript of the evidentiary hearing record is attached to the Petition. See **App. 32 – 212**. On October 09, 2018, Petitioner filed a notice to remove the undersigned Judge for cause. Petitioner's Motion for Recusal, Writ of Prohibition and Affidavit of Bias/Prejudice was filed on October 11, 2018. The Chief Judge of the Fourth Judicial District, Honorable Judge Ivy Bernhardson, granted a hearing on Petitioner's motion and denied Petitioner's motion to remove on October 18, 2018 finding no cause at the hearing. The Chief Judge issued her order and memorandum of law on October 23, 2018. Respondent was represented by the **same Prosecutor who actively represented and prosecuted the case at Petitioner's trial in 2014** in the post-conviction proceeding which raises a serious conflict of interest issue and makes the post-conviction proceeding fundamentally unfair. **See App. 1 – 31**.

Petitioner avers that the undersigned Judge (Honorable Judge Tamara Garcia, **same Judge who presided over Petitioner's trial in 2014**) personal involvement and professional relationship with the Prosecutor, at Petitioner's trial in August 2014 (jury trial) through September 2014 (sentencing hearing) is evidence showing that they both had personal knowledge of disputed evidentiary hearing (July 2018 through August 2018) facts on the issue of witness recantations regarding K.K.W. and K.C.W trial testimony. This is a prima facie basis for recusal

and makes fair judgment impossible in this proceeding. **See App. 32 – 212** (disputed evidentiary hearing facts in Tr[2]. 1 - 180). **See App. 1 – 31.**

REASONS FOR GRANTING THE WRIT

First, the issues presented in this case is beyond the particular facts and parties involved but for growing interest of the public, society at large and integrity of the judicial system. The Minnesota Court of Appeals holding cannot be squared or reconciled with this Court's decisions on constitutional law. Most significantly, the Minnesota Court decided important constitutional claims in a way that conflicts with relevant decisions of this Court and has so far departed from the usual and accepted course of judicial proceedings. ***Compare*** *State v. Laughlin*, 508 N.W. 2d 545, 548 (Minn. Ct. App. 1993)("impartiality might reasonably be questioned" standard applies to criminal proceeding); *State v. Poole*, 472 N.W.2d 195 (Minn. Ct. App. 1991)(same) ***with*** *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) (where the Supreme Court held that a Judge's bias violates the Petitioner's due process clause). Because Minnesota tried and convicted an innocent man without due process of law, **(App. 32 - 212)**, allowing such decision to hold will affect other similarly situated in Petitioner's situation and this further underscores the importance of granting review in this case. For the question(s) presented, "[t]he relevant decision for purpose of this assessment is the decision of the last [state] court to rule on the merit of [P]etitioner's claims." *Sanders v. Cotton*, 398 F.3d 572, 579 (7th Cir. 2005). In this case, the last state court opinion is attached in **(App. 2 – 5)**.

[2] Tr. refers to the transcript record.

Second, under Minnesota law, the appropriate way to obtain review of the denial of a motion to remove for cause is to seek a writ of prohibition. *State v. Dahlin*, 753 N.W.2d 300, 303 (Minn. 2008); *State v. Azure*, 621 N.W.2d 721, 725 n.3 (Minn. 2001); *State v. Cermak*, 350 N.W.2d 328, 331 (Minn. 1984); accord *State v. Poole*, 472 N.W.2d 195, 196 (Minn. App. 1991) (holding "prohibition is the appropriate remedy for the denial of a motion to remove a trial judge for cause"). It is well settled that the proper remedy to pursue when a motion to remove has been denied is to seek a writ of prohibition. See *State v. Azure*, 725 n.3 ("[s]uch writ prevents a judge from proceeding in a matter where he [or she has] been disqualified by a properly filed notice of removal"). Prohibition is the proper remedy to restrain the undersigned Judge from acting in a matter where she is disqualified by an affidavit of prejudice. *State v. Ketterer*, 244 Minn. 127, 69 N.W.2d 115 (1955); *State ex rel. Burk Beaudoin*, 230 Minn. 186, 40 N.W.2d 885 (1950). Also, writ of prohibition are issued to restrain action by a Judge under Minnesota law "where it appears that the court is about to exceed its jurisdiction or where it appears the action of the court relates to matter that is decisive of the case; where the court has ordered the production of information clearly not discoverable and there is no adequate remedy at law; or in rare instances where it will settle a rule of practice affecting all litigants. *Thermorama Inc v. Shiller*, 271 Minn. 79, 135 N.W. 2d 43 (1965); *Jeppesen v. Swanson*, 243 Minn. 547, 68 N.W.2d 649 (1955) (prohibition to prevent enforcement of discovery order); *Bellows v. Erickson*, 233 Minn. 320, 46 N.W.2d 654 (1951) (prohibition to prevent enforcement of order granting temporary

injunction); *Shacter v. Richter*, 271 Minn. 87, 135 N.W. 2d 66 (1965) (prohibition to prevent enforcement of order consolidating actions).

Third, applying the *Larrison's credibility determination* test implicates Petitioner's due process right. Petitioner Due Process requires that a Judge possess neither actual nor apparent bias. *Caperton v. A.T Massey Coal,* Co., 556 U.S. 868, 884 (2009); *In re Murchison*, 349 U.S. 133, 136 – 37 (1955); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927); *Hurles v. Ryan*, 650 F.3d 1301, 1314 (9th Cir. 2011). Any doubt about impartiality, bias and/or prejudice will be resolved in favor of recusal. Although, there is a circuit debate on the question of whether doubt about bias should be resolved in favor of recusal or in favor of allowing the judge to preside over the case. ***Compare*** *U.S. v. Pulido*, 566 F.3d 52, 62 (1st Cir. 2009)(bias resolved in favor of recusal); *U.S. v. Holland*, 519 F. 3d 909, 912 (9th Cir. 2008)(same); *Paterson v. Mobil Oil Corp.*, 335 F. 3d 476, 484 – 85 (5th Cir. 2003)(same) ***with*** *Hoffman v. Caterpillar, Inc.,* 368 F.3d 709, 718 (7th Cir. 2004)(bias resolved in favor of judge); *U.S. v. Oaks*, 606 F.3d 530, 536 – 37 (8th Cir. 2010)(same); *In re McCarthey*, 368 F.3d 1266, 1269 (10th Cir. 2004)(same). Resolving this debate makes this case a proper vehile for granting review.

The Judge's application of the *Larrison's credibility determination* test, in itself is an unfavorable opinion resulting from facts adduced or events occurring at trial or hearing. The Judge's application of the *Larrison's credibility determination* test, in itself constitutes an impermissible bias that displays deep-seated favoritism to Respondent or antagonism towards Petitioners that would render a fair judgment

impossible. *Liteky v. United States*, 510 U.S. 540, 555 (1994). The undersigned Judge **will** cause injury to Petitioner for which there is no other adequate remedy.

I. THIS CASE RAISES A NOVEL QUESTION ON CONSTITUTIONAL LAW THAT WARRANTS THIS COURT IMMEDIATE REVIEW

A. The Same Judge Who Presided At Trial to Now Decide Witness Testimony Bearing on Ultimate Issue Violates Petitioner's Due Process Right to Full and Fair Hearing by an Impartial Judge

First, judging credibility is the sole province of the jury when a Defendant opted to a trial by jury. This is fundamentally inconsistent to *Lord Coke* "Judges do not answer question of facts; Juries do not answer question of law." 1 Sir Edward Coke, *The First Part of the Institutes of the Laws of England,* Lib. 2, Cap. 12 §234 at 155(b) (Hargave and Butler, 16th Ed. 1809) applied in *United States v. Platero,* 72 F.3d 806 (10th Cir. 1995) that

> "[W]hen the Judge decides whether or not a defense is true or false and decides that on the basis of the [credibility or veracity] of witnesses, the Judge is doing what the jury is supposed to do in a serious criminal case covered by the Sixth Amendment." "[The] constitutional problem is the usurpation of the jury's function by the trial judge's determination [herself in her] exclusion of evidence offered in support of the defendant's theory."

Now, allowing the same Judge who presided over the trial and made critical decisions that amounts to personal knowledge of disputed evidentiary facts to now be the decision maker in the same case, adjudicating the same question, based on the same facts in a later application for state post-conviction relief violates the Defendant's right to a full and fair hearing by an impartial adjudicator guaranteed under the Fourteenth Amendment Due Process Clause is infringed in the reasoning of *Blakely v. Washington*, 542 US 296 (2004) which held that the Sixth Amendment

right to jury trial is ... a reservation of jury power ... only to the extent that the claimed judicial power [admitting-legal-conclusion-testimony] infringes on the province of the jury, which is applicable to the states under the Fourteenth Amendment.

There is a risk that the judge "would be so psychological wedded" to his previous decision that would violate the Due Process Clause in Petitioner's post-conviction Petition. *ld* at 1910. Petitioner has overcome that presumption in light of *In re Murchison,* where this court concluded there that the Due Process was violated when a judge adjudicates the same question, based on the same facts, in the same case, in favor for recusal." *ld* at 1911. The problem in *In re Murchison* is present in this case. The same question regarding the guilt or innocence of the Defendnat using the same credibility of witness standard under the *Larrison* test (by comparing both 2014 trial testimony and 2018 evidentiary hearing testimony) based on the same facts and witnesses the she had already considered as jurist in the same case.

B. Petitioner Has a Statutory Right to Counsel Under Minn. Stats. 590.01-06 When a Judge Order's an Evidentiary Hearing and Failure to Appoint Counsel is Cause for Recusal

First, Petitioner expressly requested for an appointment of counsel in this matter for the scheduled evidentiary hearing because Petitioner has a statutory right to counsel and to be represented by counsel under §590.01-06 when a court orders an evidentiary hearing. The evidentiary hearing record shows that this court appointed counsel to the children during the July 27, 2018 and July 30, 2018

evidentiary hearing because the court found that to be a "critical stage" requiring such appraisal of the children's constitutional rights. This acts shows that Petitioner's evidentiary hearing is a "critical stage" and the doctrine governing "critical stages" applies to this proceedings. See *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 (2008) where the court defined "critical stages" as "proceeding between an individual and agents of the State ... that amounts to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or ... meeting his adversary.' " *ld* at 212 n.16. *State v. Maddox*, 825 N.W.2d 140, 144 (Minn. 2013)(same).

Furthermore, clearly established laws have repeatedly held that the Sixth Amendment right extends to all critical stages of the criminal process. *Iowa v. Tovar*, 541 U.S. 77, 80 – 81 (2004). Minnesota post-conviction proceeding and evidentiary hearing is arguably part of Minnesota criminal process, so all Petitioner's Sixth Amendment rights applies to this proceedings. *Green v. United States*, 262 F.3d 715 (8th Cir. 2001)(post- conviction proceeding is a continuation of a criminal case). Courts have also held evidentiary hearing on --- (a) preliminary and pretrial issues; (b) sufficiency of complaint or an indictment issues; (c) hearsay and incompetent issues like competency and in camera review hearing; (d) illegally obtained evidence such as suppression hearing --- to be "critical stages" requiring a counsel presence. Therefore, an appointment of counsel is required in this case under the doctrine governing critical stages.

Appointment of counsel is required under the circumstances of this case for fundamental fairness where (a) this court lacks jurisdiction and venue to receive any testimony thereon or such on the issue of witness' recantation from Respondent under the governing strictures of Minn. Stats §590.01 – 06 or *Larrison* test in light of section X arguments; (b) this evidentiary hearing is part of Minnesota criminal process; (c) Petitioner's evidentiary hearing is a "critical stage" of the proceeding because it is at this stage that the constitutional right to equal and meaningful access to courts under *Bounds v. Smith,* 430 U.S. 817 (1977), particularly through effective representation by counsel attaches; (d) this court has already appointed counsel to witnesses in this case; and (e) the two-year statute of limitation makes Petitioner's evidentiary hearing a "critical stage" for his first post-conviction as of right.

Liberally construing Minn. Stats §590.01 – 06 entitles indigent petitioner granted IFP status and evidentiary hearing to an appointment of counsel for fundamental fairness and integrity of the proceeding. Any argument to the contrary would simply implement Minn. Stats Minn. Stats §590.01 – 06 to be facially and as applied unconstitutional in the grounds of fundamental unfairness because Minn. Stats §590.01 – 06 does not explicitly read, ("A"), like Rule 8 of 28 U.S.C. §2254 on the appointment of counsel to indigent Petitioner granted IFP status and evidentiary hearing. Any argument to the contrary would simply implement Minn. Stats Minn. Stats §590.01 – 06 to be facially and as applied unconstitutional in the grounds of fundamental unfairness with presumed prejudice that "offends some

principle of justice so noted in the tradition and conscience of out proper as to be ranked as fundamental" because in federal cases the appointment of counsel is required by post-conviction statute. *Green v. United States*, 262 F.3d 715 (8th Cir. 2001)(such defect constitutes a structural error); *Cooper v. Oklahoma*, 517 U.S. 348, 363-65(1996)(a state law or practice that betrays a fundamental principle of justice offends the Due Process Clause); *Chamber v. Mississippi,* 410 U.S. 284, 294 (1973) (a state court's error in applying a state rule can have constitutional implications); *United States v. Vasquez,* 7 F.3d 81 (5th Cir. 1993)(failure to appoint counsel necessitates a reversal); *United States v. Bendolph,* 409 F.3d 155 (3rd Cir. 2005)(prejudice must be presumed when Petitioner statutory right to counsel is thus abridged). Respondent have not cited to any Minnesota case law holding that state law must not conform to principle of justice or that indigent Petitioner granted IFP status and evidentiary hearing has no statutory right to appointment of counsel. Petitioner is unaware of any Minnesota case law. In fact, Petitioner case is factually and materially distinguishable and thus, no Minnesota case law addresses the peculiar nature of his case.

Thus, Petitioner is entitled to have counsel appointed for fundamental fairness, unless Respondent can show that Petitioner's request is made for a bad faith purpose.

C. Cause is Shown since the Appointment of Counsel is Necessary for Subpoenas of witnesses Denied in Part For Evidentiary Hearing Because the Post-Conviction Court is Prohibiting Indigent Pro se Representation From His Ability to Call and Present Witnesses on His Own Behalf Under the Compulsory Process and Due Process Clause.

First, the Chief Judge failed to address (**Addendum 8** at 42 – 46) this claim of partiality of Judge Garcia. Allowing Respondent's witnesses who were not part of the substantial evidence contained in the trial court's record and denying Petitioner's requested witnesses is cause for recusal. Unlike Attorney(s) practicing in the State of Minnesota, *pro se* litigants or petitioners or *pro se* representations are not allowed to subpoena any witness, except through a Judge order. See Minn. Crim. Pro 22, subd. 3 (*pro se* representation may obtain a subpoena only by court order). Petitioner filed a motion pursuant to Minn. Crim. Pro. 22, subd. 3 requesting subpoenas of witnesses for the evidentiary hearing. On July 11, 2018, the court issued an order denying in part subpoenas for several witnesses, precluding *pro se* representation a meaningful opportunity to call and present witnesses on his own behalf at the scheduled evidentiary hearing on the issue of witness' recantation for full and fair presentation. *State v. Ashing*, 2010 WL 4068691 *28 (Minn. Ct. App. 2010) (Petitioner has the right to compulsory process for obtaining witnesses. U.S. Const. Amend. VI; Minn. Const. Art I, §6. A district court has some responsibility to respond to a *pro se* request for subpoenas).

Second, Minn. Crim. Pro. 22, subd. 3 does not expressly read or set forth any statement or standard for a court to deny in part subpoenas for relevant witnesses to prohibit *pro se* representation an adequate opportunity to be heard (CJC Rule 2.6) at the evidentiary hearing on the issue of witnesses' recantation. The court did not impose any standard for Respondent to call or subpoenas witnesses, but do impose standards on pro se representation. Respondent has no subpoena-limitations

of any kind to call any witnesses at the evidentiary hearing, but *pro se* representation does have subpoena-standard in the court. Respondent does not have to show or establish anything before the court to secure witnesses or subpoenas because they are attorney(s), but *pro se* representation do. This proceeding is fundamentally unfair and is cause for recusal.

Third, during the July 27, 2018, July 30 – August 01, 2018 evidentiary hearing, evidence through testimony was received in this court demonstrating that Respondent, Ms. White and Ms. Warren on numerous occasions attempted to interrogate K.K.W. and K.C.W. without first obtaining an order from this court to open discovery. Thus, writ of prohibition is appropriate to restrain the production of information clearly not discoverable. There is no right to discovery in a post-conviction proceeding. Respondent attempted interrogations despite these court orders on June 15 and July 11, 2018 is fundamentally unfair to *pro se* representation. This is cause for recusal because the court is in a way opening discovery for Respondent **alone** without any order explaining **why** or demonstrating that Respondent has **sufficiently shown good cause** by allowing testimony from Deputy Pat Chelues and Detective Cuomo or any other witness about privileged communications contained in the DOC and jail visitation logs and recorded phone calls at the evidentiary hearing. This is a double standard to *pro se* representation and violates the reasoning of *Jaffee v. Redmond*, 518 U.S. 1, 9 – 10 (1996) that Respondent cannot discover confidential communications such spousal and attorney-client privileges.

Fourth, in Petitioner's petition for post-conviction relief, Petitioner raised an issue of ineffective assistance of both trial and appellate counsel:

> That the Petitioner also alleges such other Grounds relating to the Constitution and laws of United States and/or the State of Minnesota which appears from the records and proceedings herein, and such Grounds that the court may decide to have litigated even through not specifically raised by the Petitioner, such as ... his rights to counsel and his rights to effective assistance and representation.

In both Petitioner's petition with opening memorandum and Reply memorandum, Petitioner alleged and argued that both counsels were ineffective:

> Respondent cases fails to address Petitioner's IAC claims based on counsel failure to conduct "thorough investigation" in light of *State v. Nicks*, 831 N.W.2d 493 (Minn. 2013)(conducting "thorough investigation" is a professional obligation and failure constitutes ineffective assistance under *Strickland*). Petitioner's Attorneys' failures to conduct "thorough investigation" so directly related to Petitioner's theory of defense on: possible discovery of the "new evidence" showing actual innocence;

Petitioner also alleged and argued that his trial counsel was ineffective by reason of his trial attorney not discovering the exculpatory evidence contained on the issue of witness recantations under *State v. Nicks*, 831 N.W.2d 493 (Minn. 2013); *Strickland v. Washington*, 466 U.S. 668, 690 (1984)(ineffectiveness is generally clear in the context of complete failure to interview and investigate [K.K.W., K.C.W., and Molly Lynch]). Petitioner then requested subpoenas of his counsels: Christa Groshek, Kelly Moore and Davi Axelson. The court's failure to address this meritorious claim or issue, and to grant subpoenas of his trial and appellate counsels is cause for recusal.

D. The Transcripts of the Held July 27, 2018, and July 30 through August 01, 2018 Evidentiary Hearing is Required For

Petitioner to Adequately Prepare and Present His Case for Relief and Failure to Grant IFP Status is Cause for Recusal

In light of sections IV through VIII facts and arguments, the Chief Judge failed to address (**Addendum** 8 at 42 – 46) this claim of partiality of Judge Garcia. Pursuant to Minn. Stat. §590.02, Subd. 2 (Cost – the filing of the petition and any document subsequent thereto and all proceedings thereon shall be without costs or any fee charged to the Petitioner). Thus, Petitioner under the statutory provisions of §590.02 is not required to pay any cost related to §590.01-06 proceeding. Petitioner was granted IFP status by Federal Judge Paul Magnuson due to financial incapacity to pay court fees. See Exhibit A9 attached to the Post-Conviction Petition. Furthermore, the post-conviction court denial of Petitioner's In Forma Pauperis (IFP) status on September 13, 2018 in this post-conviction proceeding is cause for recusal.

E. Appointment of Counsel is Required to Adequately Assist Petitioner in Accessing the Confidential Materials Enclosed in the Legal CDs under Petitioner's Constitutional Right To Access To Court in light of Bound at the Evidentiary Hearing and Failure to Appoint Counsel is Cause for Recusal

In light of sections IV, V, VI, VII facts and arguments, the Chief Judge failed to address (**Addendum** 8 at 42 – 46) this claim of partiality of Judge Garcia. Petitioner's fundamental constitutional and substantive rights is violated by restricting Petitioner's access to courts through these inaccessible CDs. *Bounds v. Smith,* 430 U.S. 817, 828 (1977) (Prisoner have fundamental constitutional right to *adequate, effective and meaningful access to court to challenge violations of constitutional rights*); *Kristian v. Dep't of Corr.,* 541 N.W.2d 623, 628 (Minn. Ct.

App. 1996)(prison inmate have a constitutional right to access to the court that derives from the due process). During the evidentiary hearing, Petitioner was given two CDs from Ms. White (Hennepin County Prosecutor). Petitioner has not been provided by Ms. White, Respondent or the Court with any computer or electronic resources to adequately access the confidential materials enclosed in the Legal CDs. As such, this unreasonably interferes with Petitioner's due process right to adequately prepare for the upcoming evidentiary hearing. This inaccessible CD materials by Respondent also unreasonably interferes with Petitioner's fundamental right to access to court under *Bounds v. Smith*; *Kristian v. Dep't of Corr.*. Per Department of Correction ("DOC") policy and regulations, Petitioner cannot access the contents of the two legal CDs. The post-conviction court failure to appoint counsel is cause for recusal.

Petitioner respectfully request an appointment of counsel to adequately assist him to access the contents of the two (2) legal CDs to adequately prepare for the upcoming October 11 and 12 evidentiary hearing. Petitioner is asking the court, Ms. White and Respondent for a computer or electronic resources to adequately access the confidential materials enclosed in the CDs. The post-conviction court failure to appoint counsel is cause for recusal.

F. Petitioner's Procedural And Substantive Due Process Right Under The Fourteenth Amendment Were Violated In This Proceeding

First, Petitioner has a substantive and procedural due process right to fundamental fairness under the Fourteenth Amendment in this post-conviction proceeding. See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 293 n.3

(1998)("if a state establishes post-conviction proceedings, these proceedings must comport with due process").

On June 15, 2018, this court ordered an evidentiary hearing on the issue of witness recantations. On June 18, 2018, this court issued a scheduling order for the evidentiary hearing. This court's order mandated Petitioner's appearance at the courtroom for the July 27, 2108 evidentiary hearing. On June 18, 19 2018, Respondent obtained a writ to secure Petitioner presence at the courtroom evidentiary hearing. On July 26, 2018, Petitioner was transported to Hennepin County Detention Center for the sole purpose of attending the evidentiary hearing as a *pro se* representation.

During the evidentiary hearing, Ms. White gave Petitioner two CDs, allegedly containing "DOC and jail visitation logs and recorded phone calls" of Petitioner's stay at the Hennepin County Detention Center for the duration of the evidentiary hearing and at Minnesota Department of Correction ("DOC") for the duration of his wrongful incarceration. Petitioner never consented to Ms. White's and Respondent's action. See sections IV, V, VI and VIII of this motion. Ms. White intended to call Deputy Pat Chelues, Detective Cuomo and other witnesses to testify on these DOC and jail visitation logs and recorded phone calls at the evidentiary hearing without due process of law, and the court was going to allow such testimony. That is indeed a clear case of impermissible entrapment by the court in allowing such testimony, and by Respondent and their agents to engage in such entrapment. There is nowhere in this court's orders that authorized Ms. White,

Respondent and their agents actions. There is no case law that supports the courts intention to allow such testimony, Ms. White, Respondent's and their agents' intention to use and disclose such DOC and jail visitation logs and recorded phone calls in a post-conviction proceeding. These actions clearly violate Petitioner's due process right to fundamental fairness. *State v. Krause*, 817 N.W.2d 136, 146 – 47 (Minn. 2012)(in an evidentiary hearing, the criminal defendant is entitled to appropriate due process protections, including adequate notice, the assistance of counsel, the ability to present evidence, and to confront and cross-examine witnesses, an impartial decision maker, a decision on the record [on Petitioner's motions] and a full explanation for the decision). *Mathews v. Eldridge*, 424 U.S. 319 (1976)(same).

Second, once a state has provided Petitioner's with the right to first post-conviction, due process requires that such first post-conviction be fundamentally fair to vindicate the substantive rights provided. *Medina v. California,* 505 U.S. 437 (1992) governs the process due a prisoner seeking evidence for the purpose of obtaining post-conviction relief. See *State v. Rey,* 905 N.W.2d 490 (Minn. 2018) (noting *Medina* framework but applying *Mathews* balancing test on procedural due process right); *Newton v. City of New York,* 779 F.3d 140 (2d Cir. 2015)(*Medina* governs the process *due* in post-conviction proceedings). In the same vein, once a state court's order has provided an indigent prisoner with a mandatory evidentiary hearing authorizing Petitioner's appearance at the courtroom, due process requires that such evidentiary hearing be fundamentally adequate to vindicate Petitioner's

state-created liberty interest in demonstrating his innocence with new evidence. *Osborne,* 667 U.S. 52, 68 (2009)(held Petitioner does have a liberty interest in pursuing the post-conviction relief granted by the state). This is a state created substantive right or liberty interest in post-conviction relief. *ld* at 68. The *Osborne* court found such liberty interest in state statutes providing post-conviction relief procedures. *ld* at 2319.

As to whether such a right can be found in substantive and procedural due process, courts first look at whether the Petitioner has a liberty interest that is protected by the due process clause. Petitioner does have liberty interest in his fundamental right to privacy in personal confidential matters, communications and information under federal and state constitutions, statutes and laws. Petitioner does have liberty interest in his fundamental right to marry, including marital privacy and privileges in personal confidential matters, communications and information under federal and state constitutions, statutes and laws. Petitioner does have liberty interest in his fundamental right to the care, custody and management of his children and his fundamental right to the privacy of his familial decisions on the matters of his family under federal and state constitutions, statutes and laws. Petitioner does have liberty interest in his fundamental right to privacy against use and disclosure of personal confidential matters, communications and information without informed consent under federal and state constitutions, statutes and laws. *See Cooksey v. Boyer*, 289 F.3d 513 (8th Cir. 2002); *Hopkins v. Jegley*, 2017 U.S. Dist. Civ No. 4:17-cv-00404-KGB (E.D.Ark. 2017)(collecting cases

applying *Cooksey v. Boyers* and *Ferguson* holdings on confidential, individual, and medical information disclosure). Also, Petitioner, who was convicted of a crime he did not commit, had a liberty interest under state post-conviction statute in demonstrating his innocence with new evidence. *Newton, ld* at 147 – 48.

Whether a given situation, such as Petitioner's circumstances, constitutes a due process violation, the United States Supreme Court has noted that the analytical framework set forth in *Mathews v. Eldridge*. The Minnesota Supreme Court applied this *Mathews* factors in criminal cases. See *State v. Krause*, 817 N.W.2d 136 (Minn. 2012)(applying *Mathews'* factors to evidentiary hearing on forfeiture of counsel). The U.S. Supreme Court has also noted a different analytical framework set forth in *Medina v. California*, 505 U.S. 437 (1992) that governs whether the process is due. Petitioner argues under both *Mathews* balancing test and *Medina* framework that the due process "procedural safeguard" of allowing the state's discretion is subject to the minimum requirement of the Fourteenth Amendment because the deprivation of a person's liberty has the same effect on the confined person (criminal defendants and criminal post-conviction petitioner) when jailed after civil or other types of proceedings as to when imprisoned after conviction for an alleged false offense. Petitioner is entitled to appropriate due process protections. *Whisman v. Rinehart*, 119 F.3d 1303, 1322 (8th Cir. 1997) (if ... a state statute gives specific directives to the decision maker that if the statute's substantive predicates are present ... a liberty interest protected by the Fourteenth Amendment is created). Established law shows that Minnesota post-conviction

provision is a state-created liberty interest and as such, must accord due process of law to indigent Petitioner's granted IFP status and evidentiary hearing in this proceeding. Under *Mathews* balancing test and in light of *State v. Krause* reasoning, Petitioner's due process has been violated. Also, under *Medina's* framework and in light of *Newton's* court reasoning, Petitioner's due process has been violated.

Third, Petitioner's procedural due process in this proceeding requires adequate written notice of the witnesses Respondent intends to call at the evidentiary hearing. Petitioner did not receive any *Witness List* form Respondent for the July 27, 2018 evidentiary hearing. Petitioner has not received any *Witness List* so far from Respondent regarding the October 11, 2018 evidentiary hearing. As already discussed in section III of this motion, Petitioner respectfully request Respondent's disclosures for fundamental fairness.

Fourth, Petitioner's procedural due process in this proceeding requires Respondent to give Petitioner an "informed notice" of the nature and cause of Respondent's witness testimony on how their testimony is relevant to the issue of witness recantations before the evidentiary hearing. Petitioner did not receive any informed notice from Respondent for the July 27, 2018 evidentiary hearing. Petitioner has not received any informed notice so far from Respondent regarding the October 11 and 12, 2018 evidentiary hearing. This court's August 03, 2018 order shows that Respondent intends calling Deputy Pat Chelues to testify on Petitioner's DOC and Jail visitation logs and recorded phone calls. As already discussed in sections I through X, these DOC and jail visitation logs and recorded phone calls

violates federal and state constitutions and laws and are inadmissible. The DOC and jail visitation logs and recorded phone calls are not relevant or material to the issue of witness' recantations. Petitioner respectfully request Respondent's disclosures of an informed notice of the nature and cause of Respondent's witnesses' testimony on how their testimony is relevant to the sole issue of witness' recantations.

Fifth, Petitioner's procedural due process requires adequate opportunity to be heard on the issue of witness' recantations and right to present material evidence in a timely manner on the issue of witness' recantations. Courts have noted that cross-examinations effectively preserve Petitioner's due process rights in these hearings. As already discussed in sections I through X of this motion, subpoenas of these identified witnesses are required and the transcripts of the evidentiary hearing held on July 27, 2018, and July 30 through August 01, 2018 are required, so this court does not mistakenly impede Petitioner's compulsory process and due process rights on his ability to call witnesses, to cross-examine witnesses, to adequately prepare and present evidence on the issue of witness' recantations at the October 11 and 12, 2018 evidentiary hearing.

Sixth, Petitioner's procedural due process protection requires he be given fundamental fairness on the issue of witness' recantations. Petitioner contends that limiting the scope of – his (a) July 27, 2018, July 30 – August 01, 2018, and October 11 & 12, 2018 evidentiary hearing; and (b) Ground Nine (9) claim for relief on the issue of witness recantation to the application of *Larrison* test only, and not

extending the scope to meet *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419, 433 – 35 (1995); *United States v. Agurs*, 427 U.S. 97 (1976); *Giglio v. United States*, 405 U.S. 150, 152 – 55 (1972); *Schlup v. Delo*, 513 U.S. 298, 316 (1995); *House v. Bell*, 547 U.S. 518 (2006); *Strickland v. Washington* (ineffective assistance of counsel on complete failure to interview and investigate K.K.W., and K.C.W., and Molly Lynch) constitutional errors on a conviction of one that is actually innocent deprives him of substantial and procedural due process of law. Petitioner contends that applying *Larrison* test alone on this Ground Nine (9) claim for relief on the issue of witness recantation violates his due process right to full and fair evidentiary hearing, his due process right to full and fair judicial review and his due process of law. Petitioner contends that failure to grant discovery and issuance of subpoena(s) on these additional witness on Ground Nine (9) claim for relief violates his due process of law under *Mooney*; *Pyle*; *Napue*; *Brady*; *Kyles*; *United States v. Agurs*; *Giglio*; *Schlup v. Delo*; *House v. Bell*; and *Strickland v. Washington.*

Courts have found fundamental fairness to include right to counsel and notice of this right under the Fifth and Fourteenth Amendments, even where the Sixth Amendment right to counsel did not apply. See *Evitts v. Lucey*, 469 U.S. 392, 396 (1985)(reasoning that a first appeal [or post-conviction] as of right ... is not adjudicated in accordance with due process of law if the indigent Petitioner [granted IFP status and evidentiary hearing] does not have the effective assistance of an

Attorney). This result is hardly novel. These courts' reasoning persuasively applies to this post-conviction proceeding. See *Gagnon v. Scarpelli,* 411 U.S. 778, 790 (1973) (in certain proceedings, fundamental fairness requires right to counsel). Fundamental fairness requires an appointment of counsel under Petitioner's §§590.01 - 06 statutory right to counsel. Fundamental fairness requires an appointment or assistance of counsel under the circumstances of this case to subpoena witnesses on Petitioner's behalf for full and fair evidentiary hearing. Fundamental fairness requires an appointment or assistance of counsel under the circumstances of this case to adequately access the contents of the two CDs provided by Respondent in preparation for the scheduled October 11 and 12, 2018 evidentiary hearing. Fundamental fairness requires dismissal of Respondent's witnesses not part of the substantial trial court's record for lack of jurisdiction. Fundament fairness requires Petitioner be judged by an impartial decision-maker. Fundamental fairness requires Petitioner be given equal protection of law by an impartial decision-maker.

Petitioner respectfully moves this Honorable Court to read a narrow exception tailored at indigent Petitioners granted IFP status and evidentiary hearing at a post-conviction proceeding.

II. THE DECISION BELOW CONFLICTS WITH CLEARLY ESTABLISHED LAW AND DECISIONS OF THIS COURT ON A FUNDAMENTAL CONSTITUTIONAL ISSUE AND FEDERAL LAW

Petitioner's Due Process was violated because the lower court's decision conflicts with the authoritative decisions of this Court under *Williams v. Pennsylvania* and

Rippo v. Baker standards in considering Petitioner's motion for recusal and in light of the reasoning of *Gordon v. Lafler*, 710 Fed. Appx. 654, 659 (9th Cir. 2017) that the "[t[he Supreme Court has held that a state court decision is "contrary to" clearly established federal law "if the state court *applies a rule* different from the governing law set forth in our cases ... In such a scenario, "that decision would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposed' to our clearly established present." *ld* at 659, n.3. That the proper inquiry is ... what was clearly established when the state court ruled on Petitioner's claim in October 2018 and January 02, 2019. See *Echavarria v. Filson*, 896 F.3d 1118, 1127 (9th Cir, 2018)(the district court held that the [state court] had not adjudicate [the Petitioner's] claim that there was an intolerable risk of judicial bias ..." *ld* at 1127.

For the reasons discussed and in light of *Rippo v. Baker*, this Court should vacate the lower court decision and remand for further proceeding "because it applied the wrong legal standard. ..." [. Since the lower court] ... "did not ask the question our precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable.

III. CONSIDERATION BY THIS COURT IS NECESSARY UNDER THE FUNDAMENTAL MISCARRIAGE OF JUSTICE EXCEPTION BASED ON THE NEWLY DISCOVERED EVIDENCE OF ACTUAL INNOCENCE ON: GROUND 4 – ADMISSION OF EVIDENCE AND PROSECUTORIAL MISCONDUCT ON IMPROPER CREDIBILITY VOUCHING BECAUSE THESE CONSTITUTIONAL VIOLATIONS "RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT" UNDER MCQUIGGIN V. PERKINS 133 S. Ct. 1924 (2013).

Petitioner is entitled to review under the fundamental miscarriage of justice exception of his independent constitutional claims on Ground 4 (admission of Interview and CornerHouse evidence, and improper credibility vouching) in light of the newly discovered exonerating evidence showing actual innocence based on the recantation affidavits of key material witnesses' testimony in **Pet. App. 32 - 212**. *Schlup v. Delo*, 513 U.S. 298, 316 (1995). This new evidence is sufficient to overcome any state-procedural default rule and does entitle Petitioner to proceed for review for relief on Ground 4. *House v. Bell*, 547 U.S. 518 (2006).

Ground 4 – Admission of CornerHouse evidence claim is meritorious under *United States v. Beaulieu,* 194 F. 3d 918 (8th Cir. 1999); *Tome v. United States*, 513 U.S. 150 (1995) which is the landmark Supreme Court decision on this subject – admission of evidence under Rule 801(d)(1)(B). Ground 4 - Prosecution Improperly Vouching For the Credibility of Key State's witnesses claim is meritorious because it was a serious error.

Third, Petitioner argued previously in his opening petition for writ of certiorari that he is entitled to review under the fundamental miscarriage of justice exception of his independent constitutional claims on Ground 4 (admission of Interview and CornerHouse evidence, and improper credibility vouching) in light of the newly discovered exonerating evidence showing actual innocence based on the recantation affidavits of key material witnesses' testimony in **Pet. App. 32 – 212** (filed on June 04, 2018 with Petitioner's petition for writ of certiorari). *Schlup v. Delo*, 513 U.S. 298, 316 (1995); *House v. Bell*, 547 U.S. 518 (2006).

Petitioner argued previously that this Court should grant writ of certiorari because an innocent man was convicted without due process of law in the State of Minnesota. Granting a writ in this case will give Petitioner an opportunity, so he may proceed on remand to address his alleged procedurally defaulted constitutional claims at the federal court. Petitioner in this case has demonstrated his claim of actual innocence to overcome this procedural hurdle in light of the these orders from Honorable District Judge Tamara Garcia, dated June 15, 2018, June 18, 2018, July 11, 2018, evidentiary hearing held by Honorable District Judge Tamara dated July 27, 2018, July 30 through August 01, 2018, all addressing intervening matter, **App. 11 - 20** at ¶2:

> The recantations come in the form of notarized affidavits signed by the [complainants] themselves, thus they bear sufficient indicia of trustworthiness for the Court to consider them. Assuming then, as it must, that the allegations laid out in Petitioner's claim as supported by the affidavits are true, the Court is persuaded that but for the [complainants'] alleged false testimony, the jury might have reached a different conclusion. While it is true, as the State points out in its brief, that both [complainants] were impeached with their character for untruthfulness and that the motives for fabrication were presented in part at trial, the fact that the recanting witnesses are the [complainants] is trial is significant. The State did produce other evidence of Petitioner's abuse of the [complainants] at trial, however, all of that evidence was ultimately based on the statements of the two [complainants]. The Court is not convinced that if these two witnesses had testified at trial consistent with the affidavits attached to Petitioner's petition or were to do so at a new trial, the jury would reach the same conclusion.

This Court should grant review to reverse and remand for further proceedings consistent with this Court decision in *House v. Bell*, 547 U.S. 518 (2006); *Bousley v. United States*, 523 U.S. 614 (1998) where this Court held that a showing of actual

innocence by *House, Bousley* would allow his claim to go forward under the actual-innocence or miscarriage of justice exemption.

Like in *Schlup v. Delo*, 513 U.S. 298 (1995), this Court concluded that *Schlup's* claim of innocence is procedural, rather than substantive. *ld* at 312-15. This Court concluded that because *Schlup* has been unable to establish "cause and prejudice" sufficient to excuse his failure to present his constitutional claims, *Schlup*, may nonetheless obtain review of his constitutional claims only if he falls within the "narrow class of cases ... implicating a fundamental miscarriage of justice." *ld* at 312-15. With these orders from Honorable District Judge Tamara Garcia, dated June 15, 2018, June 18, 2018, July 11, 2018, evidentiary hearing held by Honorable District Judge Tamara dated July 27, 2018, July 30 through August 01, 2018, all addressing intervening matter, Petitioner's claim of innocence calls the attention of this Court about intervening matters to bring him within this "narrow class of cases," and has satisfied the gateway standard set forth in *Schlup*.

With these orders from Honorable District Judge Tamara Garcia, dated June 15, 2018, June 18, 2018, July 11, 2018, evidentiary hearing held by Honorable District Judge Tamara dated July 27, 2018, July 30 through August 01, 2018, all addressing intervening matter, Petitioner has demonstrated a claim of innocence as a gateway through which any petitioner must pass to have his otherwise alleged barred constitutional claim considered on the merit. Petitioner has established that the otherwise barred constitutional errors or claims in:

> Ground 4 - Whether the erroneous admission of evidence (admission of Interview and CornerHouse evidence, see **Pet. App. 11 - 20**) obtained

> without the provisions of the Fourth, Sixth and Fourteenth Amendments denied Petitioner a fundamentally fair trial and whether the cumulative effects of Prosecutorial misconducts in this case (prosecutor's improperly vouching for the credibility of K.K.W. and K.C.W.) deprived Petitioner's constitutional right to a fair trial

has "probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Bousley, ld* at 622-24; *House, ld* at 537. The *Carrier* standard "does not require absolute certainty about the petitioner's guilt or innocence." *House, ld* at 538, nor is "the mere existence of sufficient evidence to convict" outcome determinative. *Schlup, ld* at 330. Rather, the standard as this Court noted is a probabilistic one that requires a petitioner to show that upon consideration of the new evidence "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. **App. 11 - 31**; *Schlup, ld* at 327. See *Rivas v. Fisher*, 687 F.3d 514, 546 – 47, 552 (2d Cir. 2012) (procedural default excused under the actual-innocence exception); *Henderson v. Sargent*, 926 F.2d 706, 713 – 714 (8th Cir. 1991)(same); *Gonzalez v. Abbott*, 967 F.2d 1499, 1504 (11th Cir,. 1992)(same), *amended by* 986 F.3d 461 (11th Cir. 1993).

The dated June 15, 2018 post-conviction order from Honorable District Judge Tamara Garcia, **App. 11 - 20** demonstrates that "in light of all the evidence", "it is more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 327; *Bousley*, ld at 622-24. The federal court refusal to hear Petitioner's alleged defaulted claims would be a "miscarriage of justice." *House, ld* at 556. Just like in *House v. Bell*, 547 U.S. 518 (2006), the central or key material witnesses linking Petitioner to the alleged false offense has been called into

question on the evidentiary hearing held on July 27 – August 01, 2018. Petitioner put forward substantial exculpatory evidence in these orders from Honorable District Judge Tamara Garcia, dated June 15, 2018, June 18, 2018, July 11, 2018, evidentiary hearing held by Honorable District Judge Tamara dated July 27, 2018, July 30 through August 01, 2018, all addressing intervening matter, pointing to the fact that the alleged false offense never occurred and that he is actually innocent. The dated June 15, 2018 post-conviction order from Honorable District Judge Tamara Garcia, **App. 11 - 20**, also demonstrates that had the jury heard all the conflicting testimony – it is more likely than not that no reasonable juror would have convicted him in light of the new evidence (notarized recantation affidavits of key material witnesses' testimony in **Pet. App. 32 – 212**). See *Schlup*, *ld* at 324, 327; *House*, *ld* at 537. Petitioner has made the requisite showing of actual innocence by producing the notarized recantation affidavits as "new reliable evidence" all supported by the testimony of K.C.W. and K.K.W. at the state evidentiary hearing on July 27 – August 01, 2018. Thus, on remand, Petitioner should be entitled to have his otherwise alleged defaulted claims considered on the merit.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Minnesota Court of Appeals.

April 22, 2019

Respectfully Submitted,

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