20-7389

IN THE

SUPREME COURT OF THE UNITED STATES

NO. __-____

EMEM UFOT UDOH,

Petitioner,

vs.

BECKY DOOLEY, *Warden, Moose Lake,*

Respondent.

ON PETITION FOR WRIT FOR CERTIORARI TO REVIEW THE USCA8 CASE NO. 20-2577 IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (0:16-CV-4174 (PAM/HB))

PETITION FOR WRIT OF CERTIORARI

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PRO SE PETITIONER

QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE: WHETHER THE DISTRICT COURT APPLIED AN INCORRECT STANDARD OF REVIEW TO PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY ("COA") ON PETITIONER'S GROUND FOUR CLAIM UNDER FED. R. CIV. PRO. 60(B)(6) IS CONTRARY TO ***TENNARD V. DRETKE***, 542 US 274 (2004); ***SLACK V. MCDANIEL***; AND ***MILLER-EL V. COCKRELL***, 537 U.S. 322 (2003); ***RAGLAND V. UNITED STATES***, 756 F.3D 597 (8TH CIR. 2014); ***EVANS V. LUEBBERS***, 371 F.3D 438 (2004); ***FOWLKES***, 326 F.3D 542 (4TH CIR. 2003); ***LAMBRIGHT V. STEWART***, 220 F.3D 1022 (9TH CIR. 2000) **IN LIGHT OF THE NEWLY DISCOVERED EVIDENCE OF PETITIONER'S ACTUAL INNOCENCE CLEARLY DEMONSTRATED IN EXHIBITS 1, 2 AND 3**?

QUESTION TWO: WHETHER CERTIFICATE OF APPEALABILITY SHOULD ISSUE ON PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF BOTH TRIAL AND APPELLATE COUNSEL UNDER ***STRICKLAND V. WASHINGTON*** RAISED IN PETITIONER'S REPLY BRIEF, RULE 59(A)-(E) AND UNDER FED. R. CIV. PRO. 60(B)(6) MOTION BEFORE THE DISTRICT COURT IN LIGHT OF ***UNITED STATES V. HARFST***, 168 F.3D 398 (10TH CIR. 1999) **IN LIGHT OF THE NEWLY DISCOVERED EVIDENCE OF PETITIONER'S ACTUAL INNOCENCE CLEARLY DEMONSTRATED IN EXHIBITS 1, 2 AND 3**?

QUESTION THREE: WHETHER PETITIONER HAS DEMONSTRATED CAUSE AND PREJUDICE UNDER FED. R. CIV. PRO. 60(B)(6) IN LIGHT OF ***MARTINEZ V. RYAN***, 566 US 1 (2012); ***TREVINO V. THALER***, 569 US ___ (2013); ***MASSARO V. UNITED STATES***, 538 US 500 (2003); ***STATE V. ZERNECHEL***, 304 N.W.2D 365 (MINN. 1981); AND ***REAGAN V. NORRIS***, 279 F.3D 651 (8TH CIR. 2002) **BASED ON THE NEWLY DISCOVERED EVIDENCE OF PETITIONER'S ACTUAL INNOCENCE CLEARLY DEMONSTRATED IN EXHIBITS 1, 2 AND 3**?

QUESTION FOUR: WHETHER UNDER FED. R. CIV. PRO. 60(B)(6), A CERTIFICATE OF APPEALABILITY SHOULD ISSUE ON THIS CASE UNDER THE ACTUAL INNOCENCE EXCEPTION, MISCARRIAGE OF JUSTICE EXCEPTION, ENDS OF JUSTICE EXCEPTION, *MANIFEST INJUSTICE* EXCEPTION, OR COLLATERAL CONSEQUENCE DOCTRINE EVIDENCE IN *UDOH V. BARR*, USCA8 NO. 20-2389 **IN LIGHT OF THE NEWLY DISCOVERED EVIDENCE OF PETITIONER'S ACTUAL INNOCENCE CLEARLY DEMONSTRATED IN EXHIBITS 1, 2 AND 3, AND PETITIONER'S LACK OF ACCESS TO THE PRISON LAW LIBRARY RESULTING FROM THE SPREAD OF COVID-19 CORONAVIRUS PANDEMIC IN MINNESOTA DEPARTMENT OF CORRECTIONS**?

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LIST OF PARTIES

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ON PETITION FOR WRIT FOR CERTIORARI TO REVIEW THE USCA8 CASE NO. 20-2577 IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (0:16-CV-4174 (PAM/HB))

Petitioner, Emem Ufot Udoh, respectfully petition for a Writ of Certiorari to review the USCA8 case NO. 20-2577 in the United States Eighth Circuit Court of Appeals pursuant to 28 U.S.C. §1254(1) in light of (a) the showing that This Case Merits Deviation From Normal Appellate Practice Due To The Ongoing Covid-19 Outbreak That Has Clearly Implicated Petitioner's Right Of Access To State And Federal Courts, that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this court, and (b) pursuant to this Court's *Sua Sponte* Order, 28 U.S.C. §1651(a), the **CARES Act** signed into law by the President on March 27, 2020, and the January 20 - 22, 2021 Executive Order Of President Joseph R. Biden That Bans Deportation Or Removability.

STATEMENT OF JURISDICTION

On February 5, 2020, Petitioner filed a Motion to Vacate the Judgement and Order under Fed. R. Civ. Pro. 60(B). See ECF No. 56, **0:16-CV-4174 (PAM/HB).** In his motion, Petitioner included Exhibits 1 through 3. See ECF No. 57. On February 6 2020, the district court denied Petitioner's

motion. See ECF No. 58. Between April 13, 2020 and June 29, 2020, Petitioner notified the district court of the *extraordinary circumstances* and *collateral consequences* that justify the relief he requested. See ECF No. 59 through 69. On June 29, 2020, Petitioner filed a Renewed Motion to Vacate the Judgement and Order pursuant to Fed. R. Civ. Pro. 60(B)(6). See ECF No. 70. In his motion, Petitioner incorporated ECF No. 59 through 69 as supporting evidence, as well as, Exhibits 1 through 3 in ECF No. 57 for relief. On July 14, 2020, the district court denied the renewed motion. See ECF No. 73. The Eighth Circuit Court of Appeal denied on October 26, 2020. See ECF No. 84. Petitioner's petition for rehearing and en-banc hearing was denied on November 19, 2020. See USCA8 No. 20-2577. This Court's jurisdiction is invoked under 28 U.S.C §1254(1) and §1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The Fifth Amendment provides in relevant part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, ... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty, or property without due process of law ... ."

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."

THIS CASE MERITS DEVIATION FROM NORMAL APPELLATE PRACTICE DUE TO THE ONGOING COVID-19 OUTBREAK THAT HAS CLEARLY IMPLICATED PETITIONER'S RIGHT OF ACCESS TO STATE AND FEDERAL COURTS

On October 19, 2020, Petitioner filed an Emergency Motion For Release Pending Appeal Due to COVID-19 Pandemic in Rush City Facility at the District Court Of Minnesota. See *Udoh v. Knutson*, Civil No. 0:19-CV-1311(MJD/HB), Docket No. 106 at 11. Petitioner also filed another Emergency Motion For Release Pending Appeal Due to COVID-19 Pandemic in Rush City Facility in *Udoh v. Dooley*, Civil No. 0:16-CV-4174 (PAM/HB). There are supporting authorities for release. See *Rado v.*

Meachum, 699 F. Supp. 25 (D. Ct. 1988) (a federal court has the inherit power to release a state prisoner on bail pending resolution of his petition). Also see *United States v. Maull*, 773 F.2d 1479, 1483 (8th Cir. 1985)(en-banc)(district court judge is a judicial officer under Bail Reform Act). Furthermore, a Magistrate Judge qualifies as a judicial officer under the Bail Reform Act. 18 U.S.C. §3141, §3156(a)(1); *United States v. Wong-Alvarez*, 784 F.2d 1530, 1531 (11th Cir. 1986)(per curiam).

The right to consideration of bail pending appeal does not exist until after conviction. See *United States v. Ballone*, 762 F.2d 1381, 1383 (11th Cir. 1985) (Petitioner's right to bail pending appeal could not be assessed until after his conviction); 18 U.S.C §3143(b)(pending appeal, convicted defendant must provide clear and convincing evidence to overcome presumption of flight and dangerousness to community). A Petitioner must file a motion for release pending appeal in the district court and the district court must act on release applications. 18 U.S.C. §3143; *United States v. Hochevar*, 214 F.3d 342, 342 (2nd Cir. 2000); *United States v. Hart*, 779 F.2d 575, 576 – 77 (10th Cir. 1985) (the district court appeal has a duty pursuant to §3145(c) and Fed. R. App. P. 9(b) to act on an application for release pending appeal); *United States v. Fisher*, 55 F.3d 481, 487 (10th Cir. 1995) (same).

COVID-19 PRESENCE OF AT THE RUSH CITY FACILITY

Undisputed facts show the presence of COVID-19 virus at the Rush City Facility where Petitioner is currently incarcerated by Respondent. See the Memorandum(s) filed in the district court record regarding the positive COVID-19 cases found in Rush City Facility.

PETITIONER'S PRE-EXISTING AND UNDERLYING CONDITIONS

The Record of Medical Evidence At Hennepin County Medical Center (HCMC) filed on August 7, 2020 in *Udoh v. Knutson*, Civil No. 19-CV-1311(MJD/HB), Docket No. 87 at 1 -7, by Petitioner *clearly* shows Petitioner's *pre-existing and underlying conditions* that places him in the population

most susceptible to COVID-19 at Rush City Facility. This puts Petitioner at a substantially heighten risk of dangerous complication should he contract COVID-19 virus in light of the Internal Memo dated October 02, 2020 regarding the positive COVID-19 cases found in Rush City Facility that suspended programing and activities.

PETITIONER'S IS ACTUALLY INNOCENT TO THE ALLEGED CRIME AND CONVICTION

Petitioner is actually innocent to the alleged crime and conviction. See **Exhibits** 1 through 3 filed on February 5, 2020, and entered on February 6, 2020 in the district court record in *Udoh v. Knutson*, Civil No. 19-CV-1311(MJD/HB), Docket No. 69. Petitioner prays that this court issue an Order for **Immediate Release** or **Stay of Execution of the Remaining Unlawful Sentence** pending the resolution of Petitioner's petition for fairness, integrity, and the public reputation of the judicial system. It is of the public interest against the imposition of wrongful convictions and unlawful sentences. See the University of Michigan, *The National Registry of Exonerations*. (http://www.law.umich.edu/ special/exoneration/Pages/detaillist.aspx). It is of the public interest in preserving family and not separating parent and children. Furthermore, **Judicial Economy** is of the public interest to grant the **Reliefs** requested in this motion.

REASONS FOR A GRANTING THE WRIT

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 state and federal courts holding cannot be squared or reconciled with this Court's decisions on constitutional law, in granting a COA. Most significantly, the lower 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 justice. Because Minnesota tried and convicted an innocent man without due

process of law, 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.

Petitioner points this court to federal cases that granted release due to COVID-19 pandemic at prison and detention facilities:

> *United States v. Michaels*, 8:16-CR-76-JVS (C.D. Cal. March 26, 2020); *United States v. Colvin*, No. 3:19-CR-179-JBA, 2020 WL 1613943 (D. Conn. April 2, 2020); *United States v. Jepsen*, No. 3:19-CV-00073-VLB, 2020 WL 1640232 (D. Conn. April 1, 2020); *Hartford Courant* (March 24, 2020); *In Re: Court Operations Under The Exigent Circumstances Created By COVID-19* (D. Conn. April 7, 2020); *United States v. Powell*, No. 1:94-CR-316-ESH (D.D.C. March 28, 2020); *United States v. Meekins*, No. 1:18-CR-222-APM (D.D.C. March 31, 2020); *United States v. Jaffee*, No. 19-CR-88-RDM (D.D.C. March 26, 2020); *United States v. Mclean*, No. 19-CR-380 (D.D.C. March 28, 2020); *United States v. Harris*, No. 1:19-CR-356-RDM (D.D.C. March 26, 2020); *United States v. Tovar*, No. 19-CR-341-DCN, Dkt. No. 42 (D. Idaho April 2, 2020); *United States v. Davis*, No. 1:20-CR-9-ELH, 2020 WL 1529158 (D. Md. March 30, 2020); *United States v. Underwood*, No. 8:18-CR-201-TDC (D. Md. March 31, 2020); *United States v. Barkma*, No. 19-CR-0052 (RCJ-WGC), 2020 U.S. Dist. LEXIS 45628 (D. Nev. March 17, 2020); *United States v. Claudio-Montes*, No. 3:10-CR-212-JAG-MDM, Docket No. 3374 (D.P.R. April 1, 2020); *United States v. Copeland*, No. 2:05-CR-135-DCN at 7 (D.S.C. March 24, 2020); *United States v. Hakim*, No. 4:05-CR-40025-LLP (D.S.D. April 6, 2020); *United States v. Kennedy*, 18-CR-20315 (JEL) (E.D. Mich. March 27, 2020); *United States v. Marin*, No. 15-CR-252, Dkt. No. 1326 (E.D.N.Y. March 30, 2020); *United States v. Foster*, No. 1:14-CR-324-02, Dkt. No. 191 (M.D. Pa. April 3, 2020); *United States v. Garlock*, No. 18-CR-00418-VC-1, 2020 WL 1439980 (N.D. Cal. March 25, 2020); *In the Matter of The Extradition of Alejandro Toledo Manrique*, No. 19-MJ-71055-MAG, 2020 WL 1307109 (N.D. Cal. March 19, 2020); *United States v. Bolston*, No. 1:18-CR-382-MLB (N.D. Ga. March 30, 2020); *Mays v. Dart*, No. 20 C 2134 (April 7, 2020); *United States v. Hernandez*, No. 18-CR-20474 (S.D. Fla. April 2, 2020); *United States v. Grobman*, No. 18-CR-20989 (S.D. Fla. March 29, 2020); Amended Order, *United States v. Perez*, No. 19-CR-297-PAE, at 1 (S.D.N.Y. March 19, 2020); *United States v. Resnik*, No. 14-CR-910-CM, 2020 WL 1651508 (S.D.N.Y. April 2, 2020); *United States v. Stephens*, No. 15-CR-95-AJN, 2020 WL 1295155 (S.D.N.Y. March 19, 2020); *United States v. Zukerman*, No. 1:16-CR-194-AT (S.D.N.Y. April 3, 2020); *United States v. Perez*, No. 17-CR-515-3-AT (S.D.N.Y. April 1, 2020); *United States v. Muniz*, No. 4:09-CR-199 (S. D. Tex. March 30, 2020); *United States v. Hector*, No. 2:18-CR-3-002 (W. D. Va. March 27, 2020); see also *United States v. Hector*, No. 18-CR-3 (4Th Cir. March 27, 2020); *United States v. Edwards*, No. 6:17-CR-00003 (W. D. Va. April 2, 2020); *Xochichua-Jaimes v. Barr*, No. 18-CV-71460 (9Th Cir. March 23, 2020); *Castillo v. Barr*, No. 20-CV-605 –TJH-AFM, at 10 (C.D. Cal. March 27, 2020); *Jimenez v. Wolf*, No. 18-10225-MLW (D. Mass. March 26, 2020); *Jovel v. Decker*, No. 12-CV-308-GBD at 2 (S.D.N.Y. March 26, 2020); *Coronel v. Decker*, No. 20-CV-2472-AJN at 10 (S.D.N.Y. March 27, 2020); *Basank v. Decker*, No. 20-CV-2518-AT at 7, 10 (S.D.N.Y. March 26,

2020); *Thakker v. Doll*, No. 20-CV-480-JEJ, at 8 (M.D. Pa. March 31, 2020); and *Karr v. Alaska*, Nos. A-13630/13639/13640 (Alaska March 24, 2020);

These are extraordinary circumstances and exceptional reasons to grant the **Reliefs** requested in this petition.

MOTION FOR REMAND

This appeal concerns the issues of whether Respondent violated Petitioner's clearly established rights or laws under United States Constitutions. Remand for consideration of Petitioner's habeas petition for relief is merited under the principle of Judicial Notice[1] because the record do in fact entail adverse collateral legal consequences, such as the immigration removal proceeding[2], juvenile proceeding[3] and lifetime supervised release.

Remand for consideration of Petitioner's habeas petition for relief is merited under the reasoning applied in *Archuleta v. Hedrick*, 365 F.3d 644, 648 – 49 (8th Cir. 2004) where this court remanded the matter to the district court because petitioner had cognizable claim that could lead to his release under 28 U.S.C. §2241(c)(3). See 28 U.S.C. §2241(c)(3)(when a Petitioner is in custody in violation of the Constitution or laws or treaties of the United States). In this case, Petitioner's motion for release was *denied as moot.*

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[1] See *Smisek v. Comm'r of Pub. Safety*, 400 N.W. 2d 766, 768 (Minn. App. 1987) that "[a]n appellate court may take judicial notice of a fact for the first time on appeal."

[2] See the May 31, 2019 Federal Magistrate Judge Report and Recommendation in 19-CV-1311(MJD-HB) as facts related to the immigration or removal proceeding. See also the *In-Absentia* Order entered on April 17, 2019 in Exhibit 1 at ECF No.1 - 2 at 1 – 21 on 19-CV-1311(MJD-HB), 8 U.S.C. §1101 et seq, 8 U.S.C §1101(a)(43)(A), (F); 8 U.S.C. §1227(a)(2)(E)(i), 8 U.S.C. §1229a.

[3] See the August 06, 2019 (recognizing the termination of parental rights in the juvenile court case 27-JV-18-5208) and September 18, 2019 (recognized the lifetime conditional or supervised release conditions) court orders where this court recognized those proceedings and conditional release. See also Minn. R. Evid. 201; Minn. Stats. §599.04, §599.10.

Remand for consideration of Petitioner's habeas petition for relief is merited under the reasoning applied in *Brewer v. Iowa*, 19 F.3d 1248, 1250 (8th Cir. 1994)(held that a habeas corpus action is moot when there is no possibility that *any collateral legal consequences* will be imposed on the basis of the challenged conviction); *Leonard v. Nix*, 55 F.3d 370, 373 (8th Cir. 1995)(held that *only* the possibility of a collateral legal consequences is needed to avoid *mootness*). This habeas corpus action is *not moot* when there is a possibility of collateral legal consequences already imposed on the basis of the challenged conviction in this case. The *Brewer v. Iowa's* and *Leonard v. Nix's* courts considered the habeas petition because of the possibility of adverse collateral legal consequences. Both courts proceeded to consider the merit of the habeas corpus action. See *Glenn v. Dallman*, 686 F.2d 418, 422 (6th Cir. 1982); *State v. Thompson*, 1996 WL 653951 *3 (Minn. Ct. App. 1996); *In re Welfare of L.B.*, 404 N.W.2d 341 (Minn. Ct. App. 1987); *State v. Jones*, 516 N.W.2d 545, 549 n.1 (Minn. 1994); *Sibron v. New York*, 392 U.S. 40, 55 (1968).

Remand for consideration of Petitioner's habeas petition for relief is merited under the reasoning applied in *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) because that the "end of justice" permits a district court to examine the merits of a successive petition "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." In this case, Petitioner supplemented his constitutional claims "including prosecutorial misconduct, ineffective assistance of counsel," with a colorable showing of actual innocence in the "newly discovered evidence." See *Udoh v. Knutson*, 2019 WL 5150141 *2 (D. Minn. May 31, 2019). The Seventh Circuit in *Mosley v. Atchison*, 689 F.3d 838, 854 (7th Cir. 2012) remanded the habeas petition and directed the district court to consider the evidence presented in the evidentiary hearing, to hold a new hearing, or both, and to determine whether, based on new evidence, trial counsel was, constitutional ineffective.

Remand for consideration of Petitioner's habeas petition for relief is merited under the reasoning applied in *Glenn v. Dallman*, 686 F.2d 418, 422 – 23 (6th Cir. 1982) where the appellate court reversed and remanded with instruction to the district court to reclassify the Petitioner's conviction due to adverse collateral consequences that *could* result if the conviction was not reclassified. See *Udoh v. Williams P. Barr*, Attorney General of the United States, USCA8 Case No. 20-2389 (8TH Cir. 2020).

Remand for consideration of Petitioner's habeas petition for relief is merited because as Petitioner's had no access to the use the prison law library during the pendency of the immigration proceeding. This restriction is inconsistent with this court holding in *Flittie v. Solem*, 827 F.2d 276, 280 (8th Cir. 1987) (held the use of the prison law library on an average of three (3) days per week is a reasonable restriction imposed for a rational reason).

Remand for consideration of Petitioner's habeas petition for relief is merited under the reasoning and in light of *Kucana*; *Pereira*; *Sugule*; *Miah*; *Dada*; and *Williams – Igwonobe v. Gonzales; Ghounem* holding to show that the Board of Immigration Appeal erred in its decision to reopen the In-Absentia Order. *Id.*

PROCEDURAL HISTORY

Petitioner adopts the Procedural Facts and History described in the Docket History Report for brevity purposes. See *Appendix.*

STATEMENT OF FACTS

A. Habeas Petition Ground Four Claim: Admission of CornerHouse Evidence At Trial In 2014

During trial, the district judge admitted into evidence the use of CornerHouse videos as prior statement under Rule 801(d) (1) (b) in relevant part:

> THE COURT: All right. We are going to go back on the record. We are still in the middle of Ms. Groshek's cross-examination of Grace Werner Ray; however, I wanted to make my

ruling on the CornerHouse videos, because I did have an opportunity to review the second transcript, which is Kayla's interview at CornerHouse, and I wanted to rule on this, so we can just keep the flow going.So earlier today the defense objected to the admission of CornerHouse videos as substantive evidence. And after reviewing the transcript of the first video, I overruled that objection and admitted the video as a prior consistent statement. And I have now reviewed the transcript of the second video, and I will admit that video as a prior consistent statement also. And I 'm going to give my reasoning for the record.

An out-of-court statement is not hearsay and is admissible as substantive evidence if (1) the declarant testifies, (2) the declarant is subject to cross-examination concerning the statement, (3) the statement is consistent with the declarant's testimony and (4) the statement is helpful to the jury in evaluating declarant's credibility. And I cite to Minnesota Rule of Evidence 801(d)(1)(B). A witness's credibility must have been challenged before a prior consistent statement will be admitted as substantive evidence. State versus Nunn, 561 N.W.2d 902, 909 (Minn. 1997). The trial testimony and the prior statement need not be identical, but should be reasonably consistent. And that's State versus Zulu, 706 N.W.2d 919, 924 (Minnesota Court of Appeals 2005).In this case both girls testified yesterday and were subject to cross-examination, including cross-examination regarding each of their statements at CornerHouse, which challenged their credibility. And while the statements made at CornerHouse and the testimony yesterday are not identical, I find that they are reasonably consistent. And I find that admission of the witness' prior statements to CornerHouse would be helpful to the jury in evaluating their credibility. And, therefore, the alleged victims' prior statements at CornerHouse are admissible as proof of prior consistent statements under 801(d)(1)(B).

That said, obviously, it's going to be up to Ms. White to lay the foundation for that second video and any objections can be made at that time. All right?

The fact in Defendant's case is materially and factually different from those in *Nunn* and *Zulu's* case. Defendant first note that, *State v. Nunn* was a murder case. Further, in *Nunn* and *Zulu's* case, there was no allegations from the Defense counsel about the victim's motive to fabricate the murder and abuse incidents, Defendants *Nunn* and *Zulu* did not plead actual innocence to the murder and abuse charges at trial, the defense counsel in *Nunn* and *Zulu's* case pleaded a theory of defense that did not involve their actual innocence at trial, and the challenged prior consistent statements in *Nunn* and *Zulu's* case were statements made before the date or time that the actual murder and abuse incidents occurred. Defendant second note that, the trial record in Defendant's case shows that the (x).(x). Defendant third note that, the evidentiary hearing testimony from K.K.W. and K.C.W. shows (x).(x).(x). Defendant fourth note that, the Defense counsel elicited the following testimony from

K.K.W on cross-examination: ... (T.553-54). Defense counsel asked Wallen if K.K.W had a reputation for dishonesty among teachers and peers (T.626). K.K.W's mother testified that K.K.W had problems in school and at home and had a reputation at home for lying (T. 989-99). She testified that KCW is "sneaky" and also has a reputation for dishonesty at home (T. 903, 906). Defendant testified that K.K.W. often got into trouble at school, and at home had a reputation for dishonesty (T.960). The girls' mother Tonya testified on behalf of Defendant (T. 898). She claimed that KKW had a reputation at home for lying and had behavioral problems at school (T. 898-99) ... Tonya also claimed that KCW was "sneaky" and had a reputation at home for being dishonest (T. 903, 906). Tonya denied that the girls told her Defendant was sexually abusing them (T. 907). She claimed that KKW told her she fabricated the abuse because she was mad that Defendant took her phone away (T.908) ... Defendant testified on his own behalf ... He claimed that KKW had reputation at home for dishonest (T.960). He denied [the charges] (T.961-65).

On August 19, 2014, the jury found Defendant not guilty on one count of the first-degree conduct against K.C.W but found Defendant guilty of the remaining counts. But before the jury reached that August 19, 2014 verdict, the jury requested to re-watch the ConerHouse videos again during their (jury) deliberation on August 18, 2014 as evident in *Index Nos.* 14 through 24. On September 25, 2014, Judge Gracia committed Defendant to a merged prison sentence for 144 months for both convictions on the first and second degree conduct against K.K.W. Defendant also received a concurrent 70 months sentence for one of the second degree conduct against K.C.W., and with an imposition of a lifetime conditional or supervised release.

B. Petitioner's Post-Conviction In 2018

On April 10, 2018, Defendant initiated this State post-conviction action raising several issues or claims of constitutional violations and seeking reliefs. Amongst the issues or claims raised for post-conviction relief, Defendant raised the Ground that - Defendant is entitled to an acquittal and release based on the newly discovered exonerating evidence showing actual innocence which is based on recantations of key material witnesses' testimony for relief as described in Defendant's first post-conviction petition. The first post-conviction petition is supported by **Exhibit A** (Decision of Minnesota Court of Appeal (A1), Detective Melissa Malecha's (Parker) Reports on February 19, 2013 (A2), Don Bartley's Reports on February 21, 2013 (A3), Molly Lynch's Report (A4), CornerHouse Checklist (A5), CornerHouse Forensic Examination on March 6, 2013 (A6), Recantations Affidavits by

K.K.W., and K.C.W. to Judge Tamara Garcia (A7), Report and Recommendations by Magistrate Judge Steven E. Rau (A8), Order by District Judge Paul A. Magnuson (A9)) filed on April 10, 2018. Defendant sought relief for an evidentiary hearing to be held to examine the material facts and allegations surrounding Defendant's first post-conviction petition. On June 15, 2018, the State post-conviction court issued an order denying the post-conviction petition in part and granting an evidentiary hearing in part on the issue of witnesses' recantation. On June 18, 2018, the State post-conviction court issued a scheduling order for an evidentiary hearing to be held on July 27, 2018. On July 11, 2018, the State post-conviction court issued an order **denying** Defendant's request for subpoena(s) of witnesses (Krista White, Christa Groshek, Kelly Moore, Davi E. Axelson, Donothan Bartley, Ann Norton, Melissa Malecha, Molly Lynch, Joanne Wallen, Karen Wegerson, Ann Mock, Bill Koncar, Grace Werner Ray, Dr. Linda Thompson, Catrina Blair, Patricia Harmon) in part and **granting** Defendant's request in part (Mr. Bond, Tonya Udoh, K.C.W., K.K.W., and Bobby Woody).

C. First[4] Evidentiary Hearing In 2018

Amongst the people subpoenaed (Vol. I, Tr. 2, L19 – 25) for this case as witnesses for the evidentiary hearing were Mr. Bond (Vol. I, Tr. 2, Tr. 3 – 110) and Krista White (Vol. I, Tr. 11 – 35). Before receiving evidentiary testimony from both recanting witnesses, Defendant made repeated objections and renewed motions with regards to Krista White's subpoena. That Krista White is a testifying witness at the evidentiary hearing while actively representing the State on the grounds that Krista White's credibility was relevant to the issue of witnesses' recantations because:

> Krista White ("Ms. White") had direct "conversations ... [and interviews] with the girls [recanting witnesses before trial while actively prosecuting this case in 2014] that [Defendant] has questions about" in (Vol. I, Tr. 11, L21 – 23), that Ms. White didn't file a certificate of representation in this post-conviction proceeding on behalf of the State (Vol. I, Tr. 27) and that Ms. White's representation raises a conflict of interest with her acting on behalf of the State, and this will preclude Defendant's due process right to a full and fair evidentiary hearing in (Vol. I, Tr. 11 – 36).

The State was represented by Christina Warren and Krista White (Vol. I, Tr. 1, L16-19; Tr. 2, L13-15; Vol. II, Tr. 150; Vol III. Tr. 350, Vol. IV, Tr. 416). Defendant appeared *pro se* (Vol. I, Tr. 1, L19; Tr.2, L2-11; Vol. II, Tr. 150; Vol III. Tr. 350, Vol. IV, Tr. 416) after the State Public Defender Office declined legal representation as evident in state district court record. Pursuant to §590.04,

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[4] **First** Evidentiary Hearing refers to the evidentiary hearings held on July 27, July 30, 2018 through August 01, 2018.

because the State Public Defender Office represented Defendant on his direct appellate review in A14-2181. The State Public Defender Office declined Defendant's request for legal representation. Defendant was indigent and proceeded in forma pauperis (IFP) at the district court during the first evidentiary hearing (Vol. I, Tr. 22, L13-20) without any legal representation. See *Index No.* 182 (order granting IFP on July 24, 2018) and *Index No.* 183 (supplemental order for proceeding IFP on July 24, 2018). Minn. Stat. §590.04 is unconstitutional to the extent that §590.04 does not contemplate legal representation to indigent prisoners who have been granted an evidentiary hearing because the complete lack of legal representation at the first evidentiary hearing was prejudicial to *pro se* defendant because the evidentiary hearing record clearly shows that this case was "complicated" as recognized by the district court in (Vol. I, Tr. 3, L9 - 12; Tr. 3 – 10; Tr. 34, L21 -25; Tr. 35) on the legal issue of whether or not to advise the recanting witnesses of any Fifth Amendment rights against self-incrimination (that was not given to the recanting witnesses when they testified at trial in 2014) before testifying at the evidentiary hearing in (Vol. I, Tr. 6, 8, 10, 24, 28; 83 – 85; 97 – 106) and by the testimony of Mr. Bond, a legal expert, attorney and notary public in (Vol. I, Tr. 40, L13-19; Tr. 41, L1-7; Tr. 54, L6-9)) that:

> (a) Defendant (*pro se*), not being familiar with the Rules of Criminal Procedure, served him (whose status at the evidentiary hearing was to act as the attorney representing the two recanting witnesses who are coming to testify) with a court ordered subpoena to be a witness in (Vol. I, Tr.3); (b) Defendant does not have the legal knowledge as to know what to object to, as to cross-examinations and questionings of witnesses, in which the rules of evidence that applies to both civil and criminal cases allows to protect Defendant's interest in an evidentiary proceeding in (Vol. I, Tr. 9; Tr. 82, L17 – 25; Tr. 83 -85); (c) anything that will stop Defendant from having access to witnesses would probably be unconstitutional and could potentially affect Defendant's case by precluding the defendant's right to call witnesses, to protect their cases, and the right to confront cases of their adversary in (Tr. 82 – 85); and (d) is one of the reasons why he thinks witnesses would require counsel.

At the July 27, 2018 evidentiary hearing, Mr. Bond testified to the best of his recollection on what the girls (recanting witnesses) told him when he first met the girls back in March 2018 to notarized their affidavits (Tr. 61 – 62). That the two girls (K.K.W. and K.C.W) told him the same thing (Tr. 62, 72 - 73). That K.K.W. and K.C.W. were not under any threat, force, intimidation or no fear (Tr. 43) when they signed the affidavits in his office (Tr. 42 – 43). That they were not promised anything for signing the affidavits (Tr.43 – 44). That they told him that it was their own voluntary

action to sign the affidavits (Tr. 43). To the best of his recollection, Mr. Bond testified that they (recanting witnesses) had been pressured to give a testimony in a criminal charge against their stepfather, Mr. Udoh. (Tr. 41). K.K.W. and K.C.W. told him that they had been *pressured* to give that testimony. That it wasn't really their intention, and they were also afraid for fear of what could happen to them (Tr. 42). That he thinks K.K.W. and K.C.W. indicated also that they had been threats made to them, that if they did not testify in that criminal trial by whoever directed them to so testify, and that if they did not testify the way that they were ordered to testify, that their mother would be in trouble. That their siblings would be separated (Tr. 42).

Mr. Bond also testified to the circumstances under which K.K.W and K.C.W signed the affidavits. That when he spoke to their mother, she told him that, all she did here was to provide transportation for the girls. That this is their (K.K.W. and K.C.W.) voluntary action (Tr. 42). That K.K.W. and K.C.W. told him that nobody in their school asked them to do this (Tr. 43). That nobody asked them (K.K.W. and K.C.W.) to do this (Tr. 43). That when he asked them why, they (K.K.W. and K.C.W.) told him that they had been very sad. That their conscience has been guilty. That they felt that they lied or done some evil and that they wanted to unburden their conscience from what they thought they had done wrong (Tr. 43). That they (K.C.W.) told him that somebody else typed up the affidavit for them (K.C.W.) in (Tr. 62 – 63). That he does not know who typed it (Tr. 63). That their mother did not type the affidavits for them (Tr. 63).

On July 30, 2018, the district court issued a protected person DANCO (no-contact order) with the recanting witnesses against Defendant. On July 30, 2018, the district court filed Defendant's motion for IFP Status and update on the service of his subpoenas in *Index No.* 193. On July 30, 2018, the district court filed Defendant's motion for subpoena(s) of the witnesses' denied-in-part in *Index No.* 192.

I. The Recanting Witnesses' (K.K.W., and K.C.W.) Were Apprised Of Their Fifth Amendment Right

Defendant called his second witness (K.K.W.), one of the recanting witnesses. But before direct and cross-examination, Mr. Geoff Isaacman from Hennepin County Public Defender's Office and the post-conviction court apprised K.K.W (recanting witness) of her Fifth Amendment right against self-incrimination; not to testify in this case and that if she chooses to testify, that it could open her up for the possibility of criminal charges in the future (Vol. II, Tr. 153 – 157). K.K.W. expressed to both the

post-conviction court and Mr. Issaacman that she wanted to testify here today (at the July 30, 2018 evidentiary hearing) and waived her potential Fifth Amendment right to testify to the truth in (Vol II, Tr. 158 - 221).

Defendant called his third witnesses (K.C.W.), the second recanting witness. As with K.K.W., K.C.W was also apprised of her Fifth Amendment right not to testify in (Vol II. Tr. 226 – 231). That she has a right to continue to invoked her Fifth Amendment right to nullify or void any given evidentiary testimony. That the fact that she is a juvenile makes her situation a little bit different than her sister's (K.K.W.). By waiving her Fifth Amendment right, K.C.W. exposure would be as a potential delinquency rather than as a criminal charge. K.C.W informed both Mr. Isaacman and the post-conviction court that she wanted to testify, that she is choosing to testify anyway, that it is her desire to go ahead and testify today (at the July 30, 2018 evidentiary hearing) to the truth in (Vol. II, Tr. 232 – 327).

II. Evidentiary Hearing Testimony Of The Recanting Witnesses' (K.K.W., and K.C.W.) For Newly Discovered Evidence, Ineffective Assistance of Trial And Appellate Counsel, Prosecutorial Misconducts, *Brady/Discovery* Violation, *Giglio* Violation, and *Tome v. United States*, 513 US 150 (1995) Standards For Admission Of Evidence Under Rule 801(d)(1)(B)

K.K.W. and K.C.W. remembered Defendant as their step-father. K.K.W. and K.C.W. remembered living with Defendant and their biological mother around the age of thirteen for K.K.W., and eleven for K.C.W. (Tr. 232 – 234). That during that time, K.K.W. was attending Maple Grove Junior High School from April 2012 through February 2013 (Tr. 159) and K.C.W. was attending Oak View Elementary during June 2012 through February 2013 (Tr. 233). K.K.W. and K.C.W. were removed from their family home in February 2013 and was placed at St. Joseph home because of a story that K.K.W (her sister) made up (Tr. 233, 241). That they remembered telling that story to Don Bartley (hereinafter as "DB"); CornerHouse Interviewers[5], Grace Ray (hereinafter as "GR") and Bill Koncar (hereinafter as "BK"); Dr. Linda Thompson (hereinafter as "LT"), to a therapist lady named Elizabeth Bergman (hereinafter as "EB") in (Tr. 160, 188 – 189) before testifying at Defendant's trial. K.K.W. and K.C.W. remembered testifying against Defendant in a trial in August 2014 (Tr. 234). That during that time, K.K.W. and K.C.W. were living with their biological father (Tr. 161 – 162, Tr. 234,

[5] Referring to Ex. 4 and 7 in the trial record on the CornerHouse videotaped interview of K.K.W and K.C.W on February 25, 2013.

250, 255, 258, 280) and not with their biological mother (Tr. 259). K.K.W. and K.C.W. remembered Krista White, who was their lawyer or attorney (Prosecutor of the case: Attorney-client communication) in (Tr. 162, Tr. 241). That they (K.K.W. and K.C.W.) talked to Ms. White in her office before trial more than once (Tr. 162, Tr. 241, 246 – 247, 273, 281). That when they spoke to Ms. White in her office, Molly Lynch (hereinafter as "ML") was also present (Tr. 162 – 163, Tr. 241-242, 273). K.C.W. testified that her sister (K.K.W.) was also there (Tr. 242) at some point (Tr. 273 – 274, 276). That they have never heard of the word "victim advocate" and don't know what a victim advocate is (Tr. 163, 276). K.C.W testified that she don't remember meeting and talking to anyone like that, and does not recognized the name "Anne Burgoyne" (Tr. 276). K.K.W testified that there was no person, who identified herself or himself as a "victim advocate" present at the office meetings with Ms. White (Tr. 163).

K.K.W testified that one her classmate (Hannah) in Junior High School told her to say that Defendant did touched her in an inappropriate way (Tr. 173-174, 188-189) to get her phone back (Tr. 217, L17-19). That when she (K.K.W) testified at Defendant's trial, she had to say that the incident did happen (Tr. 164, Tr. 217, L6-10). K.C.W. testified that her sister (K.K.W.) lied about being sexually abused by her stepdad for all those years (Tr. 300 – 301). That her sister (K.K.W.) made all of that story up because her (K.K.W.) phone got taken away, and K.K.W. was upset (Tr. 300 – 301). That when she (K.C.W.) testified in 2014 at trial, that Defendant touched her inappropriately (Tr. 235), she did that because she was scared, threatened, intimidated and she (K.C.W.) testified out of fear (Tr. 235, 281). K.K.W testified that when she (K.K.W.) was removed from her home in February 2013, she was not taking her medications (Tr. 184). That she (K.K.W.) took medications for epilepsy and ADHD (Tr. 183). That when she (K.K.W.) talked to Ms. White, DB, GR, LT and EB before trial, that Ms. White, DB, GR, LT and EB never asked her if she was on her medications (Tr. 184 – 185). That when she (K.K.W.) testified at Defendant's trial, she was not taking her medications (Tr. 184). That she had fell under depression at the time she had to do the testifying and trial stuff, and it just led her to a point where she got confused on everything (Tr. 184). K.C.W. testified that she takes no medications (Tr. 249). That her sister (K.K.W.) takes medications for ADHD and seizures (Tr. 249). That sometimes her sister (K.K.W.) forgets to take her medications (Tr. 250). That she don't think her sister (K.K.W.) was taking her medications or pills during Defendant's trial in 2014 (Tr. 251). That when her sister (K.K.W.) don't take her pills, she kind of acts a certain way and now, K.C.W.

understands how medications can affect somebody at that age (Tr. 300 – 301). K.K.W. testified that she took her medications for epilepsy and ADHD before testifying at the evidentiary hearing (Tr. 183).

K.K.W. and K.C.W. testified that they have not heard of the words – "*Miranda Warning*" and "*Tennessen Warning*" before (Tr. 182, Tr. 248). That Ms. White, Joanne Wallen (hereinafter as "JW"), DB, GR, BK, LT, and EB never gave them those warnings when they talked to them (Tr. 182 – 183, Tr. 249) before trial. K.K.W. testified that she has never heard of the word "*Perjury*" and does not know the meaning of the word (Tr. 180). That nobody told her about the penalty of perjury or the possibility of being charged if she lied on stand at the time she testified in 2014 (Tr. 181). That even if somebody had told her about the penalty of perjury, she would still had testify (Tr. 181) because of the threat that was made towards her (Tr. 181 – 182) about her mother and brothers. K.C.W. testified that she just heard of the word "*Perjury*" today at the beginning of the evidentiary hearing when she was being advised by Mr. Isaacman (Tr. 248). That if they had warned her about the penalty of perjury before testifying at Defendant's trial in 2014, she wouldn't have said the same thing because it will scare her (Tr. 248). That her and her sister (K.K.W) lied about being sexually abused (Tr. 307). That she didn't want her sister ever to get in trouble (Tr. 301).

K.K.W. and K.C.W. testified that they don't feel threatened by Defendant and Ms. White (Tr. 163, 242). That they felt safe and comfortable by Defendant and Ms. White asking them questions at the evidentiary hearing related to what they had said in 2013 to Detective Melissa Parker (hereinafter as "MP"), Ms. White, JW, DB, GR, BK, LT, and EB or to what they had testified to in Defendant's trial in August 2014 (Tr. 163 – 164, 242). That they are testifying today (at the July 30, 2018 evidentiary hearing) because they want to come clean (Tr. 218). That their biological mother didn't force them to testify and that nobody threatened them to give a testimony (Tr. 244) at the July 30, 2018 evidentiary hearing. That they (K.K.W. and K.C.W.) wanted to do this all on their own (Tr. 218, 269, 294). That their life is not in any danger right now (Tr. 221). K.C.W. testified that she (K.C.W.) wanted her mom in court to feel comfortable while testifying (Tr. 296). That she was not told what to say by Mr. Eric Bond or by her mother before testifying at the July 30 evidentiary hearing. K.K.W. testified that her mother never discusses or told her (K.K.W.) that if Mr. Udoh gets deported she (her mother) is going to leave with him and move to Nigeria with her brother (Tr. 298). That nobody or no-one told her (K.K.W) that Mr. Udoh was going to be deported (Tr. 319). That she (K.K.W) is not doing this and did not *write or draft* the affidavit because Mr. Udoh is going to be deported (Tr. 319). K.K.W. testified that she saw her mother in the courtroom (Tr. 176, 207 – 208). That her mother wasn't present in the

courtroom when Mr. Isaacman was advising her about her rights (Tr. 177). That she wasn't really paying attention to who's back there (Tr. 220). That she was focusing on Defendant and his questions (Tr. 220). That she don't see her mother anymore in the courtroom (Tr. 178). That she didn't know whether or not her mother *was not supposed* to be in the courtroom (Tr. 207) or *when* her mother actually came into the courtroom (Tr. 220). That she doesn't know if her mother was a witness to this evidentiary hearing (Tr. 284). That her mother never told her (K.C.W.) that she (mother) was a witness to this evidentiary hearing (Tr. 284 – 285). That she *wanted* and *preferred* her mother to be present in the courtroom (Tr. 208, Tr. 213 – 214), just so she could feel *comfortable* and not *traumatized* by those questions in the courtroom (Tr. 213 – 214).

K.K.W. testified that she told them (MP, JW, DB, GR, LT, and EB) that those alleged incidents of inappropriate touching by Defendant and exposure of Defendant's private body to her never happened (Tr. 171). That she never told her mother about any alleged incident of inappropriate touching and exposure (Tr. 174). That she "told Don Bartley, when he was questioning [her] at the school, that this [alleged incident of abuse] never happened. When he [DB] was recording [her] at the time that we were -- that [K.K.W.] was being questioned, [K.K.W.] had told him it never happened, although he did stop his recording and had told [her] that that is not what [her] sister had said" (Tr. 205, L15-21; Tr. 215). That DB recorded her (K.K.W.) twice (Tr. 214 – 215)[6]. That in the first recording, K.K.W. said that none of these things happened (Tr. 215). That she (K.K.W.) "had told them that this never happened" (Tr. 205). K.C.W. testified that what she told DB In the beginning that it never happened was the truth (Tr. 243). That she told DB that Defendant never touched her inappropriately or abused her (Tr. 238 – 240, 255). That she said the truth at that point in time (Tr. 240, 243, 255, 275, 291, 300). That she was scared at trial to say the truth (Tr. 251, 278, 325).

K.K.W. testified that Defendant never told her (K.K.W) not to tell anyone or her biological mother (Tr. 203). K.C.W. testified that what she told her mother about what her stepdad was allegedly doing to her was not true, that she mad that up too (Tr. 256, 293, 324). That when she spoke to Ms. Bergman (EB) and LT, they <u>did not record</u> her conversations with them (Tr. 282, 316). That she felt traumatized, uncomfortable and abused when she went through the medical examination (Tr. 292, 301-302, 316-317)[7]. That she (K.C.W.) <u>recanted</u> to the therapist (EB) before trial (Tr. 313 – 314, 323) that these things never happened. That Ms. Bergman (EB, the therapist) did not show her a copy of

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[6] Referring to the undisclosed Don Bartley's audiotaped interview with K.K.W on February 21, 2013.
[7] Refers to the CornerHouse Forensic Examination conducted on March 6, 2013 by Dr. LT.

what she (K.C.W.) said during their sessions (Tr. 282 – 283, 316). That assuming EB had shown her a copy of her conversation, she would have corrected her (Tr. 283). That she felt like, she knew everything that she was telling Ms. Bergman, that Ms. Bergman was also telling or informing the prosecutorial team, Ms. White (Tr. 279, 314). That while they were living with Defendant and their mother, that Defendant never touched them, either with his finger or his private part, inappropriately in their private part (Tr. 169, 253 – 254) or to check her (K.C.W.) to see if she was having sex (Tr. 253 – 254). That Defendant never exposed his private part to them (Tr. 169, Tr. 237, 257, 253, 280, 293, 300, 302, 316 – 317, 325). K.C.W. testified that the allegation that Defendant touched or exposed his private parts to her inappropriately between June 2012 through February 19, 2013 is not true (Tr. 237, 253, 280, 293, 300, 302, 316, 317, 325). That Defendant never touched her private part with his hand or finger (Tr. 237, 252 – 253). That those alleged touching incidents in her trial testimony was false (Tr. 243, 253 – 254, 293). That she lived outside Minnesota, in Arkansas with her grandma before trial or before we started it (Tr. 320). That somebody threaten and force her to give a testimony in Defendant's trial (Tr. 249). That it was against her will to testify against Defendant at trial in 2014 (Tr. 249).

That those alleged incidents that they told JW, DB, MP, BK, about Defendant touching and exposing himself to them, was not true and never happened (Tr. 170 – 171, 141, 255). That they never told her biological mother about any incident with regards to Defendant acting sexually inappropriately towards them (Tr. 174, 187, 203, 256, 293, 324). That her (K.K.W.) mother never told her (K.K.W) that she should always go with her sister (K.C.W.) to defendant's room (Tr. 174). That when Defendant called her to his room, it was mainly for, to talk about school-related stuff (Tr. 175) but was never for touching and exposing himself towards her. That those alleged incidents that they testified in 2014 about defendant's touching and exposing himself to them, is not true and never happened (Tr. 169, Tr. 237, 253, 280, 293, 300, 302, 316, 317, 325). K.K.W. and K.C.W. remembered being shown at trial in 2014, a picture of an anatomical diagram of a male and a female private parts. K.K.W. testified that she knew of those specific private parts (on a guy and a female) through a health class (Tr. 171 - 172). K.C.W. testified that she was showed or shown the anatomy picture during the Cornerhouse interview and that it wasn't new to her at that point or during her trial testimony (Tr. 243 – 244). That she already knew about those body parts (Tr. 243 – 244). That about four (4) years after trial in 2014, her mother never talked to or discussed with them about what happened to Mr. Udoh's or about Mr. Udoh's case (Tr. 187, Tr. 261, 306, 318) or about her (mother's) trial testimony

with them (Tr. 257, 261, 300). That her mother don't discussed her (mother's) life problems or situations with her (K.C.W) in (Tr. 260, 284 – 285, 297, 300, 309). That during visitation before trial, she (K.C.W) was told not to and wasn't allowed to talk about the case with her mother (Tr. 325 – 326). That was the reason why she (K.C.W.) hasn't talked to her mother about this (Tr. 326). That her mother talked to or discussed with her (K.C.W) about her (Mother's) life in general (Tr. 187).

K.K.W. testified at the July 30, 2018 evidentiary hearing that before she testified at Defendant's trial in 2014, that a lady just told her once in the morning (Tr. 175 – 176) that: if her story didn't match with her sister's (Tr. 182), her mother was going to go to jail, her little brothers (C.U. and C.U.) was going to be taken away from her mother, and she was not going to be able to see them again (Tr. 172). That she was scared of the people (Tr. 173) and what would have happen if she admitted to it (Tr. 173). That was the reason why she testified against Defendant in trial (Tr. 172 – 173, 182). That her sister was also in the room with her when the lady had said it (Tr. 176). That the police officer, NOT detective Molly Lynch ("ML") told her: "[t]hey said that [she] was lying and told [her] to shut up and get in the car" in (Tr. 200, L1-9). K.K.W. also testified at the July 30, 2018 evidentiary hearing that ML also threatened her (Tr. 200 - 201, 216) that: if her story didn't match with her sister's, her mother would go to prison and she would no longer get to see her brothers. That Ms. White was present (Tr. 201) when ML said that at the Juvenile Justice Center in a conference room. That this incident happened before she testified at Defendant's trial in 2014 (Tr. 202) at the Hennepin County Government Center. That she testified the way she did at Defendant's trial because of ML's threats (Tr. 202 – 204).

K.C.W. testified that it was a girl (lady) that threatened her (Tr. 251 – 252). That the girl or lady threatened her more than one time (Tr. 252, 276). That someone told her that her mother will go to prison (Tr. 247, 275). That she was told by ML that her mother wasn't cooperating and that her mother had their stepfather living in the house (Tr. 275 – 276). That this incident of threat also happened before she went to CornerHouse interview (Tr. 298). That during that time, her (K.C.W.) and her sister (K.K.W.) were talking about it (Tr. 299, 301, 307). That she thinks in her opinion, that this threat was made to scare or frighten her in some type of way (Tr. 247). That she believed them (Tr. 247). That those are the words that made her fear or threatened (Tr. 252). That the second time this incident of threat was before the trial (Tr. 276). That (Ms. White and ML) mostly just told her repeatedly just to match her story with her sister and everything would be done quickly (Tr. 247, 273,

276, 281, 283, 291, 312). K.C.W. also testified that somebody promised her about matching statements (Tr. 247). That this threat and promise incidents happened:

> well, the first time was when they (K.C.W. and K.K.W.) were in a lobby (Tr. 276), and there was a bunch of chairs (multiple chairs) at the Juvenile Justice Center. That it wasn't in, like, the courtroom or Hennepin Government Center (Tr. 274, 299). That they pulled her into a room by herself ("myself"), and they told her that, as long as her (K.C.W.) story matches her sister's (K.K.W.), we (they) would be done quickly (Tr. 252, 273 – 277, 281 – 282, 299).

That there were two girls (ladies) with her (Tr. 252). That she knew her story had to match with her sister's (K.K.W.), so she had to tell the other people about it (abuse) too (Tr. 292). So she thought she can go home with her mother and see her brothers again and everything would be fine (Tr. 247).

K.K.W. and K.C.W. remembered signing and notarizing the statement they made in Mr. Eric Bond's Office on March 18, 2018 (Tr. 164 – 165, 196; Tr. 245, 269, 285 – 286, 288, 311). That her mother just drop them off at Mr. Bond's Office (Tr. 259). That her mother wouldn't be in the room with them at Mr. Bond's Office (Tr. 259, 267 – 269). That Mr. Bond was their Attorney (Tr. 267 – 269, 289 – 290). **That her mother's phone number changed (Tr. 323)**. K.K.W. testified that she didn't know it was going to be an affidavit (Tr. 191 – 192) at the time when she decided to write it just as a letter. K.K.W. was living in Texas (Tr. 186, 189 – 195) when she drafted the contents of the letter that finally became a recantation affidavit (Tr. 167, 189 – 195). K.C.W. also testified that K.K.W. currently lives in Texas (Tr. 268, 291). K.K.W. was living with her father in Glencoe, Minnesota before she moved to Texas (Tr. 186, 191). K.C.W. currently lives with her biological father (Tr. 234, 268). That nobody gave them (K.K.W. and K.C.W.) an idea to write this recantation affidavit (Tr. 175, 189; Tr. 244). That her mother or dad had no idea that she was writing or drafting the contents of the recantation affidavits (Tr. 178 – 179, 189, 193 – 194).

K.K.W. and K.C.W. testified that they wrote or drafted the contents of these affidavits (Tr. 185; Tr. 235, 261). That neither Defendant nor Mr. Bond asked them to *draft or write* these affidavits (Tr. 179, 193; Tr. 245 – 246). That Defendant have never being in contact with them (Tr, 17, 187, Tr.245), even through their mother (Tr. 294). That they were not threatened by anyone to *write or draft* these recantation affidavits (Tr. 179, Tr. 245 - 246). That they were not promised by anybody for signing these recantation affidavits (Tr. 179, 246). That they weren't or wasn't under any kind of threat, force, fear or intimidation, or danger when they *drafted and signed* the recantation affidavits (Tr. 179, Tr.

245 – 246). That no one or nobody forced them to *draft or write* these recantation affidavits (Tr. 179; Tr. 245, 288, 294).

K.K.W. testified that the reason she drafted the recantation affidavit was basically how she was feeling of the whole situation and that she wanted to come forward and clear her conscience (Tr. 167, 175). That she was sacred of the whole thing with the police, social worker and all of the people that she was told to talk to (Tr. 168). That at the time when she (K.K.W) was living in Texas, she would get flashbacks of the moments and it took a very hard toll on her. That she (K.K.W) started feeling guilty for it. It led to the point where she got depression and she needed to come clean and to tell the truth because she felt guilty of what she did (Tr. 169 – 170, 192, 196, 218). That she did not discuss the contents of her recantation affidavits prior to her *writing or drafting* it (Tr. 193). That she (K.K.W.) talked to her sister about the affidavits after her draft (Tr. 192, 193). That she showed her sister her drafted letter (Tr. 192 – 193). That it was her sister's (K.C.W.) own idea to *write or draft* her own letter that finally became a recantation affidavit (Tr. 192 – 193). That she knew she wanted to send the affidavit to the court or judge (Tr. 318 – 319) to tell the truth, to clear her conscience and to come clean (Tr. 319)

K.C.W. testified that she came forth with this information because she feel guilty because she lied, and she wants to come forward and tell the truth and just let it off her conscience (Tr. 233, 237, 244, 285, 289, 293 – 294, 318 – 319, 326). That she came clean because the she felt guilty now, and it's just been haunting her and weighing on her for a really long time (Tr. 251). That she didn't want to talk about it (Tr. 261). That she did not tell her dad or her dad's wife (Jenny) because she was scared of how people would look at her (Tr. 295). That she talks to nobody before she wrote the affidavit (Tr. 261 – 262). That she initially wrote her letter first and then talk to her sister about it (Tr. 262). That they (K.K.W. and K.C.W.) both talked about how they felt guilty in brief moments in those four (4) years (Tr. 308 – 309) and she told her sister that "we should probably come out and say something about it" (Tr. 262, 308 - 309). That she knew she needed an affidavit through her own independent research on **Google** to recant her statements (Tr. 265 – 266, 288, 303). That she did not write the affidavit because she missed or felt pity for her mother (Tr. 283 – 285). That she is not doing this because of her mother (Tr. 294) or because of Mr. Udoh is being deported (Tr. 298, 319). That she wrote the affidavit first, and then her uncle Richie Heng (hereinafter as "RH") helped her typed it (Tr. 244, 269 – 270, 287) because an employee of Wells Fargo Bank told her that she (K.C.W.) needs to type it (the affidavit) before it can be notarized for court purpose (Tr. 286 – 287). That the Wells Fargo

Bank employee told them that, it has to be a typewritten affidavit (Tr. 262 – 265), instead of a **handwritten** version for it to get notarized (Tr. 263 – 265). That her uncle did not make any changes (Tr. 270, 272, 287). That she was with him when he was typing it (Tr. 271 – 272, 287). That there were some "rewords" changes she made (Tr. 287). That the final version of the affidavit was "only the one [she] wrote, just the one [she] wrote" (Tr. 272). That her mother only knew about the affidavit or letter because she (K.C.W.) couldn't notarize the **handwritten** version on Saturday, March 17, 2018 at the Bank (Tr. 287 – 288). That her mother has a copy of the one **she wrote or drafted by hand** (Tr. 244, 285). That her sister (K.K.W.) wrote her own affidavit by herself without her (K.C.W) help or assistance (Tr. 262).

The recantation affidavits from K.K.W and K.C.W were re-signed by K.K.W and K.C.W. at the evidentiary hearing. Both the re-signed signatures from K.K.W and K.C.W matched the March 2018 affidavits. The recantation affidavits from K.K.W and K.C.W were entered as evidence into the evidentiary hearing record without an objection (Tr. 166 – 167; Tr. 235 – 237) as Exhibits 1 and 2 in (Vol. II) transcripts. The recantation affidavits and recantation testimony are *exculpatory facts* clearly showing that no incident of sexual abuse happened between April 2012 through February 2013 in Defendant's home or within the Hennepin County Jurisdiction. The recantation affidavits and recantation testimony are *impeachment evidence* related to the threats, the demands, the pressure, the coaching, the coercions, the benefits, and the promises made to K.K.W. and K.C.W. to give a statement of sexual abuse against Defendant between February 2013 through August 2014, and a trial testimony of sexual abuse against Defendant in August 2014.

After receiving evidentiary hearing testimony from K.K.W. and K.C.W., Defendant re-requested or renewed his motion for subpoena(s) to call - Ms. White, Christa Groshek, Kelly Moore, Davi E. Axelson, Donothan Bartley, Ann Norton, Melissa Malecha, Molly Lynch, Joanne Wallen, Karen Wegerson, Ann Mock, Bill Koncar, Grace Werner Ray, Dr. Linda Thompson, Catrina Blair, Patricia Harmon - as witnesses to the case because he has produced enough evidence for them to be a witness in this case (Tr. 340 – 348).

On July 27, July 30, 2018 through August 01, 2018, the State post-conviction court first evidentiary hearing was concluded after the court granted Defendant's request for a continuance to October 18, 2018.

D. Defendant's Good-Faith Attempt to Appeal The June 15, 2018 Post-Conviction Order Was Dismissed As Premature

August 17, 2018, the Chief Judge dismissed Defendant's appeal of the June 15, 2018 Post-Conviction Order.

E. Defendant's Good-Faith Attempt to File A Second Petition For Post-Conviction Relief Based On The Evidence Received At the First Evidentiary Hearing

After the conclusion of the first evidentiary hearing, Defendant filed a motion to dismiss Respondent's witnesses on September 13, 2018 (See *Index No.* 222). On September 19, 2018, Defendant filed a written objection to the State's (Respondent) witness list (See *Index No.* 228). On September 27, 2018, Defendant filed a second petition for post-conviction relief in *Index No.* 234[8].

F. Defendant's Motion For Recusal, Writ Of Prohibition And Affidavit Of Bias/Prejudice In 2018

On October 09, 2018, Defendant filed a notice to remove the post-conviction judge for cause. Defendant'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[9] on Defendant's motion. The Chief Judge denied the motion to remove on October 18, 2018, finding no cause at the hearing. The Chief Judge issued an order and memorandum of law on October 23, 2018. On November 06, 2018, Petitioner filed a petition for a writ of prohibition at the Court of Appeals to appeal the Chief Judge's denial to remove the post-conviction judge. Petitioner also filed several motions on November 15, 2018 to stay and for continuance of the post-conviction proceeding. The writ and motion to stay were denied by the Court of Appeals on January 02, 2019. The Minnesota Supreme Court denied Defendant's petition for further review (PFR) on February 27, 2019 and the U.S. Supreme Court declined certiorari on June 03, 2019.

G. Defendant's Motion For Continuance And For Rebuttal Witnesses

At the beginning of the October 18, 2018 evidentiary hearing, the district court informed Defendant that she is going to give Defendant an opportunity to make any *closing arguments* that Defendant wants to make in writing (Tr. 583). That Defendant will be able to give the court as much details regarding any and all evidence that has been submitted in the case (Tr. 583, Tr. 596 – 599, 602). Ms. White was in agreement and also argued that it was the State's intention to respond in writing, because Defendant has filed so many motions and has made so many allegations (Tr. 596).

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[8] See the January 13, 2020 appellate court order from this court (recognizing Appellant's second petition for post-conviction relief filed on 09/18/2018).

[9] The recusal motion hearing was held on October 18, 2018.

The district court issued a briefing schedule at the hearing (Tr. 596 – 599). Defendant's submissions were due by November 16, 2018 (Tr. 598 – 599). Ms. White's submission was due by December 5, 2018 (Tr. 598 – 599). Defendant then orally requested more time at the evidentiary hearing to submit his written closing arguments because he has a brief or petition in a different case that is due by November 30, 2018 (Tr. 599). Then on November 15, 2018, after the second evidentiary hearing, Defendant filed a written motion for continuance and extension of time to file his closing arguments in *Index No.* 256. The motion for continuance, extension of time, and rebuttal witnesses were denied by the district court on November 29, 2018.

H. Defendant's Writ For Mandamus In 2019 For Post-Conviction Appeal

On August 06, 2019, this Court treated Defendant's Writ of Mandamus as a Notice of Appeal to appeal the Post-Conviction June 15, 2018 and February 05, 2019 Court Orders. That appeal was dismissed because Defendant could not filed an opening brief due by March 16, 2020.

I. Petitioner's Fed. R. Civ. Pro. 60(B), (B)(6) Motion To Vacate Judgment At The Federal Court

On February 5, 2020, Petitioner filed a Motion to Vacate the Judgement and Order under Fed. R. Civ. Pro. 60(B). See ECF No. 56. In his motion, Petitioner included Exhibits 1 through 3. See ECF No. 57. On February 6 2020, the district court denied Petitioner's motion. See ECF No. 58. Between April 13, 2020 and June 29, 2020, Petitioner notified the district court of the *extraordinary circumstances* and *collateral consequences* that justify the relief he requested. See ECF No. 59 through 69. On June 29, 2020, Petitioner filed a Renewed Motion to Vacate the Judgement and Order pursuant to Fed. R. Civ. Pro. 60(B)(6). See ECF No. 70. In his motion, Petitioner incorporated ECF No. 59 through 69 as supporting evidence, as well as, Exhibits 1 through 3 in ECF No. 57 for relief. On July 14, 2020, the district court denied the renewed motion. See ECF No. 73.

I. THE DISTRICT COURT'S MISAPPLICATION OF THE MILLER-EL AND SLACK STANDARDS ON THE DENIAL OF CERTIFICATE OF APPEALABILITY (COA) WARRANTS THIS COURT'S ATTENTION ON:

The legal standard held in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) explains that section 2253(c)(2) provides that a COA "may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." This Court has explained that a state prisoner whose habeas petition has been denied by a Federal District Court meets the standard for a COA if he shows that

"reasonable jurist could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented [are] 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)(quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). That is, a COA must issue where the Petitioner "demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, *ld* at 330 (2003); *Tennard v. Dretke*, 542 U.S. 274 (2004)(same).

a. The Lower Court's Decision Conflicts with Authoritative Decisions of Other Circuits in light of *Slack* and *Miller-El* Standards in Considering an Inmate Punishment as a Relevant Factor to Grant COA.

The Fifth and Ninth Circuits have relied on *Barefoot*, *Slack*, and *Miller-El* when construing and applying the standard of COA that "the nature of the penalty is properly considered in determining whether to issue a [COA]". *Barefoot*, 463 U.S. at 893. The lower court assessment on July 14, 2020 displayed no such consideration, even with prima facie showing of lifetime supervisions and registrations imposed on Petitioner should be a relevant factor in support for the issuance of COA in this case. See *Lambright v. Steward*, *ld* at 1025; *Ramirez v. Drekte*, 398 F.3d 691 (5th Cir. 2005).

b. The Lower Court's Decision Conflicts with Authoritative Decisions of Other Circuits in light of *Slack* and *Miller-El* Standards Construing Petitioner's Allegations in His Habeas Petition as True and Resolving any Doubt in Petitioner's Favor to Grant COA.

The Fifth and Ninth Circuits accept Petitioner's allegations in his Habeas petition or complaint as true and resolve all ambiguities in Petitioner's favor. See *Lambright v. Stewart*, 220 F.2d 1022, 1028 (9th Cir. 2000); *Petrocelli v. Angelone*, 248 F.3d 877, 855 (9th Cir. 2001); *Nardi v. Stewart*, 354 F.3d 1134, 1139 (9th Cir. 2004). The lower court displayed no such assessment on July 14, 2020 even where the Fifth and Ninth Circuits "will resolve any doubt about whether the petitioner has met the [*Barefoot*, *Miller-El*, or *Slack*] standard in his favor." See *Ramirez v. Drekte*, 398 F.3d 691 (5th Cir. 2005); *Braden v. Walmart Stores, Inc.*. 588 F.3d 585, 595 (8th Cir. 2009); *Buxton v. Collins*, 925 F.2d

816, 819 (5th Cir. 1991)(consistent with the court's admonition in [*Barefoot*], we have warned that any doubt whether [COA] should be issued are to be resolved in favor of the petitioner); *Graves v. Cockrell*, 351 F.3d 143 (9th Cir. 2003)(any doubt regarding whether to grant a COA is resolved in favor of the Petitioner, and the severity of the penalty may be considered in making this determination); *Fuller v. Johnson*, 114 F.3d 491 (5th Cir. 1997)(same).

c. The Lower Court's Decision Conflicts with Authoritative Decisions of Other Circuits in light of *Slack* and *Miller-El* Standards and under *Haines v. Kerner*, 404 U.S. 519 (1972); *Erickson v. Pardus*, 551 U.S. 89 (2007); *Stone v. Harry*, 364 F.3d 912 (8th Cir. 2004) and *Solomon v. Petray*, 795 F.3d 777 (8th Cir. 2015) Held Courts to Liberally Construed a *Pro se* Habeas Petition or Complaint and Exhibits Attached in Civil Actions.

The lower court assessment on July 14, 2020 failed to liberally construed Petitioner's Habeas petition and exhibits (A - I) attached, (expansion of the record and evidentiary hearing) under the reasoning of *Houser v. Dretke*, 395 F.3d 560, 562 (5th Cir. 2004) that courts look at the application for COA, his original petition, the district court opinion, the record and briefs, Petitioner's memorandum of law, and Petitioner's Habeas Reply Brief filed in the district court, and findings all ambiguities in Petitioner's favor for COA. The lower courts assessment conflicts with *Stone, Solomon, Haines v. Kerner*, 404 U.S. 519 (1972); *Erickson v. Pardus*, 551 U.S. 89 (2007) holdings and their progeny, which held Federal Courts to be liberal and give generous interpretation of *pro se* litigant claims in civil actions. See *Williams v. Lockhart,* 849 F. 2d 1134, 1138 (8th Cir. 1988) (liberally construing *pro se pleading*); *Turner v. Armontrout*, 922 F.2d 492, 493 n.1 (8th Cir. 1991)(*pro se* habeas petition are construed liberally); *Rainey v. Varner,* 603 F. 3d 18, 198 (3rd Cir. 2010) (generously construing *pro se pleading*); *Roy v. Lampert,* 465 F. 3d 964, 970 (9th Cir. 2006) (liberally construing *pro se litigators* do not lose right to *hearing* on the merit of their claim).

d. The Lower Court's Decision Conflicts with Authoritative Decisions of Other Circuits in light of *Slack* and *Miller-El* Standards Held Prudent to Follow the Federal Circuit "Quick Look" Approach on Procedurally Barred Claims to Grant COA.

In the wake of *Slack* and having found debatable procedural bar, the lower court displayed no such assessment on July 14, 2020 on Ground 4 (admission of CornerHouse evidence) claim as the Third, Fourth, Seventh, Ninth and Tenth Circuit have determined that the court should simply take a "quick look" at the face of the complaint or habeas petition to determine whether the petitioner "facially alleged the denial of a constitutional right." *Lambright v. Stewart, ld* at 1026 (as two other circuits have recently held, we will simply take a "quick look" at the face of the complaint to determine whether the petitioner has "facially alleged the denial of a constitutional right"). The *Lambright v. Stewart* court granted COA because petitioner has "facially alleged" the denial of his constitutional right and assuming the district court's procedural ruling is debatable. *Christian v. Farris*, 701 Fed. Appx. 717 (10th Cir. 2017)(held it seems prudent to follow the approach of our sister circuits to take a "quick look" at petitioner's constitutional claims); *Mateo v. United States*, 810 F.3d 39, 41 (1st Cir. 2002)(same); *Gerber v. Varano*, 512 Fed. Appx. 131, 134 (3rd Cir. 2013)(same); *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002)(same); *Jefferson v. Welborn*, 22 F.3d 286 (7th Cir. 2000)(same).

e. Under *Slack* and *Miller-El* standards and in Light of the Authoritative Decisions Holding Prudent to Simply Take a "Quick Look" at the Face of the Habeas Petition, to Liberally Construe the Habeas Petition and Exhibit Attached While Taking the Allegations Therein as True, to Consider the Inmate Punishment as a Relevant Factor and to Resolve any Doubt or Debatable Issues (such as plain-error review standard, Magistrate Findings in *Udoh et al v. Minnesota Department of Human Services et al*, 2017 U.S. Dist. LEXIS 96018 * 1 - *13 (D. Minn. May 5, 2017) in Civ. No. 16-cv-3119 (PJS/SER) to Support that the Admission of Interview and CornerHouse Evidence Claim was raised in State Court) in Petitioner's Favor, the lower court assessment contains errors of facts and laws in the denial of certificate of Appealability.

First, undisputed facts shows that, in this case, Petitioner's complaint or habeas petition stated this Ground 4 claim. See the enclosed excerpted-copy of the Petition submitted at the District Court:

Ground Four – Argued as Ground Two on Memorandum of Law:

The District Court *erred in admitting evidences that were in violation of appellant's due process clause under the Fourteenth Amendment* and denied appellant's constitutional right to a fair trial.

Petitioner also added supporting facts to the Ground 4 claim via Exhibit A1-A4 (referencing to Exhibit A1 for Ground 4 facts); (actual Ground 4 facts but labeled as Ground 2); (referencing to Exhibit A2 for procedures used to exhaust Ground 4 claim for relief); (showing Petitioner's has exhausted state remedies on Ground 4 claim for relief). Undisputable facts shows that the Minnesota courts of appeals recognized the Ground 4 claim – Udoh raises several issues that "the district court erred by admitting certain evidence." ("Udoh next challenges the admission of evidence regarding the CornerHouse Interviews"); *State v. Udoh*, No. A14-2181, 2016 WL 687328 (Minn. Ct. App. 2016). Undisputable facts also shows that the district court memorandum and order, in 2017 WL 2881126 *1 - *16 on July 6, 2017, did not address or even mention to this Ground 4 claim on admission of evidence. Undisputed facts show that Petitioner filed a Rule 59 Motion for Reconsideration on Ground 4 claim and the district court ruled that the admission of interview evidence as procedurally barred or unexhausted on July 17, 2017. See 2017 U.S. Dist. LEXIS 110684 * 1 - *4.

Second, a COA should issue with respect to Ground 4, in light of the arguments already presented in Petitioner's Habeas memorandums (opening and reply briefs) at the district court in ECF No. 70, in which Petitioner incorporate as if re-alleged herein for brevity purpose. This Ground 4 claim is meritorious. Petitioner moves this court to consider under Fed. R. Civ. Proc. 201 on judicial notice, the Magistrate Court findings in *Udoh et al v. Minnesota Department of Human Services et al*, 2017 U.S. Dist. LEXIS 96018 * 1 - *13 (D. Minn. May 5, 2017) in Civ. No. 16-cv-3119 (PJS/SER) that supports the conclusion that Petitioner raised Ground 4 – admission of Interview and CornerHouse evidence in state court and that his claim is not procedurally barred and unexhausted. Fair-minded jurist will find reasonable debate between (a) Magistrate court conclusion that Petitioner raised the

issues in Ground four before the state court and (b) the habeas court conclusion on July 14, 2020 that Petitioner did not raised the issues in Ground Four before the state court before the state court and is therefore procedurally barred and unexhausted. For the above reasons standing alone, Ground Four deserves an encouragement to proceed further for granting a COA.

On this Ground 4, in the admission of CornerHouse evidence under Rule 801(d)(1)(B), this court and Federal Circuit has a clearly established law on the admission of evidence under Rule 801(d)(1)(B) in light of *Tome v. United States*, 513 U.S. 150 (1995)(clearly established precedent standard for admission of evidence under Rule 801(d)(1)(B)). The circuit courts in *United States v. Beaulieu*, 194 F.3d 918 (8th Cir. 1999) (held [CornerHouse] evidence about abuse inadmissible under Rule 801(d)(1)(B) in light of *Tome v. United States* holding). See also *United States v. Frederick*, 78 F.3d 1370 (9th Cir. 1996) (statement under Rule 801(d)(1)(B) inadmissible under *Tome v. United States* because statements failed to meet the "temporal" requirement); *United States v. Davis*, 726 F.3d 434 (3rd Cir. 2013)(held inadmissible under Rule 801(d)(1)(B) because inconsistency alone is not a charge of recent fabrication). Because the question whether the admission of CornerHouse evidence is "unduly prejudicial" or caused "undue prejudice" to Petitioner's trial is debatable under *Anderson v. Goeke*, 44 F.3d 675, 678 – 679, n.2 (8th Cir. 1995); *Estelle v. McGuire*, 502 U.S. 62, 67-70 (1991)(whether admission of evidence violates Petitioner's fundamental due process right to fair trial); *Kansas v. Carr*, 577 U.S. ___ (2016)(same); *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)(same); *Darden v. Wainwright*, 477 U.S. 168, 179 – 183 (1986)(same).

The district court assessments that Petitioner's Ground 4 – admission of evidence claim for relief was not exhausted in state court, is not supported by the record and is debatable amongst jurist of reason. Petitioner argues in light of *Dye v. Hofbauer,* 546 U.S. 1 (2005); *Baldwin v. Reese,* 541 U.S. 27 (2004) holdings and under the reasoning of *Tamapua v. Shimoda,* 796 F.2d 261 (9th Cir. 1986); *Cox*

v. Burger, 398 F.3d 1025 (8th Cir. 2005); *Scott v. Schriro,* 567 F.3d 573 (9th Cir. 2009); *Jones v. Sussex I State Prison,* 591 F.3d 707 (4th Cir. 2010) all supporting Petitioner's position that he has "exhausted" the available state remedies on this admission of evidence claim for relief under 28 U.S.C. §2254(B)(1)(A), 28 U.S.C §2254(c). To reasonably support his stand and for brevity, Petitioner adopts the already presented arguments in Exhibit A2, see **Pet. App. 81-92(PETITIONER HAS EXHAUSTED STATE REMEDIES AND IS NOT PROCEDURALLY DEFAULTED ON THE GROUNDS PRESENTED FOR HABEAS RELIEF).**

On this Ground 4 –admission of evidence claim for relief, Petitioner's *point header* in:

> **The District Court *erred in admitting evidences that were in violation of appellant's due process clause under the Fourteenth Amendment* and denied appellant's constitutional right to a fair trial.**

fairly presented this claim to the state court in light of the *Second Circuit* decision in *Davis v. Strack,* 270 F. 3d 111, 122 (2nd Cir. 2001) that *point header* can 'fairly present' a federal claim to a State Court and Petitioner did the same in this claim. See **App. 160** where Petitioner argued in a *point header that he* expressly alerted the Minnesota Courts in his *pro se* briefs the federal nature of this claim on *Ground Four (4)* – admission of evidence.

The lower court decision "overlooked" the standards this Court articulated in *Sullivan v. Minnesota,* 818 F.2d 664, 666 (8th Cir. 1987) which were designed to enforce the mandate of the due process challenges to admission of evidence. See also *State v. Minor,* 1990 WL 204280 (Minn. App. 1990); *State v. Arndt,* 285 N.W.2d 478, 480 (Minn. 1979) and their progeny regarding the admission of evidence under Minnesota Rule 801(d)(1)(B), in which explicitly reads or states a pre-motive requirement on prior consistent statement. But the district court ignored that Petitioner's claim for relief in his original habeas petition. The lower court assessments "overlooked" these debatable issues of law and facts. This decision contains error of law and facts. The lower court denial of application of

COA on admission of CornerHouse evidence, and ineffective assistance of both trial and appellate counsels conflicts with the decision of *Slack*; *Miller-El*; *Williams v. Taylor*, 529 U.S. 362 (2000)(granting COA on ineffective assistance of counsel claim); *Valerio v. Crawford*, 306 F.3d 742, 748-793(9th Cir. 2002) (granting COA on the following claims – admission of prejudicial evidence, Sixth Amendment confrontation clause, sufficiency of evidence, prosecutorial misconduct and ineffective assistance of counsel claims); *Lambright v. Stewart*, 220 F.3d 1022, 1025 – 1031(9th Cir, 2000)(granting COA on improper credibility vouching, admission of prejudicial evidence, jury instructional error and ineffective assistance of counsel claims); *Desai v. Booker*, 882 F.Supp. 2d 926 (E.D. Mich. 2012)(delineated clearly established law as at 2012 on admission of prejudicial evidence that violates due process); *Petrocelli v. Angelone*, 248 F.3d 877, 885 (9th Cir, 2001)(same); *Nardi v. Stewart*, 354 F.3d 1134, 1139 (9th Cir. 2004)(same). Therefore, consideration by this court is necessary to resolve these conflicts and maintain uniformity with the federal courts on these issues.

Finally, any error in this case was not harmless and had "substantial and injurious effect" on the jury verdict in light of *Parker v. Gladden*, 385 U.S. 363 (1966)(per curiam)(that lengthy hours of juror deliberations in a trial "indicat[ed] a difference among them as to the guilt of petitioner"); *Fry v. Pliler*, 168 L. Ed 2d 16, 26 & n.4(collecting cases where "[c]ourts often have been unwilling to find error harmless where record, as in this case, affirmatively shows that jurors struggled with their verdict"). Like in this case, the jury deliberated for almost two days and had to re-watch the CornerHouse videos again is "one point during their deliberations, the jurors indicated that they might be unable to reach a unanimous verdict." *Medina v. Barnes*, 71 F.3d 363, 369 (10th Cir. 1995); *Fry v. Pliler*, *ld* at 26 n.4 (same). Because the claims – admission of CornerHouse evidence and "improper credibility vouching" have not been properly developed at the district court, remand to the district court is necessary under the reasoning of *Mateo v. United States*, 810 F.3d 39, 41 (1st Cir.

2002)(Nevertheless, *Mateo* does assert that he has a constitutional claim, and it may have not been properly developed because the district court accepted the state procedural bar arguments. Under these circumstances, the matter should be remanded to give the district court a first crack at the constitutional claim) and *Gerber v. Varano*, 512 Fed. Appx. 131, 134 n.2 (3rd Cir. 2013)(COA stage is preliminary, and "while our sister circuits disagree somewhat" but generally concur that the "threshold level of review" is appropriate, especially when, as here, only minor development of the record has occurred below on these claims).

I. THE LOWER COURT'S MISAPPLICATION OF THE AUTHORITATIVE DECISIONS OF BUCK V. DAVIS, 137 S. CT. 759 (2017); WELCH V. UNITED STATES, 136 S. CT. 1257(2016); MARTINEZ V. RYAN, 566 U.S. 1 (2012); TREVINO V. THALER, 569 U.S. 413 (2013); MASSARO V. UNITED STATES, 538 U.S. 500 (2003) ON THE CAUSE AND PREJUDICE STANDARD BASED ON HIS CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL (RAISED IN PETITIONER'S HABEAS REPLY BRIEF AND IN RULE 59 MOTION FOR RECONSIDERATION) WARRANTS THIS COURT'S IMMEDIATE ATTENTION

Undisputed facts show that, this Habeas case is devoid of any Magistrate Judge findings of facts, report and recommendations. The adequacy of this habeas proceeding is very questionable and the lower court assessments or resolution of this case violates the procedural requirement of 28 U.S.C. §2243 by denying Petitioner's substantive rights and opportunity to a Magistrate Judge findings of fact, objection to or adoption of, on all Grounds raised for relief. In this case, Petitioner adequately raised his ineffective assistance of both trial and appellate counsels ("IAC") at the district court in light of *United States v. Harfst*, 168 F.3d 398 (10th Cir. 1999) reasoning for granting COA when Petitioner raised such new IAC claim in an objection or motion within the prescribed time limits. The *Harfst* court found cause to excuse procedural default and proceeded to review the substance of *Harfst's* claim. That reasoning applies to this case because Petitioner raised the IAC claims in his Habeas Reply Brief **(App. 184-189)** and in his Rule 59 Motion for Reconsideration. *Sanders v. Cotton*,

Id at 580 ("attorney errors that constitutes ineffective assistance of counsel is cause to set aside a procedural default").

I. CONSIDERATION BY THIS COURT IS NECESSARY TO SECURE AND MAINTAIN UNIFORMITY IN RESOLVING BOTH INTRA-CIRCUIT DEBATE AND INTER-CIRCUIT CONFLICTS ON FEDERAL CLAIMS REVIEWED UNDER PLAIN-ERROR STANDARD ON:

a. This Case Present an Exceptional Importance In Resolving Inter-Circuit Conflict Within the Federal Circuits On Whether A Federal Claim Reviewed On the Merit Under Plain-Error Standard Forecloses Habeas Relief.

In this case, it is undisputable that the Minnesota court of appeals recognized and reviewed the merit of the serious prosecutorial misconduct error on improper credibility vouching of state's key witnesses but found the federal error to be "harmless" error. *State v. Udoh*, No. A14-2181, 2016 WL 687328 (Minn. Ct. App. 2016). That decision undoubtedly constitutes an adjudication of Petitioner's constitutional claim "on the merit" in light of *Davis v. Ayala*, 192 L. Ed. 2d 323, 334 (2015)("[t]here is no dispute that the [Minnesota] Court held that any federal error was harmless beyond a reasonable doubt under *Chapman*, and this decision undoubtedly constitutes an adjudication of [Petitioner's or *Ayala's*] constitutional claim 'on the merit'."). See e.g., *Mitchell v. Esparza*, 540 U.S. 12, 17-18 (2003)(per curiam). It is also undisputable that the state argued in Respondent brief, that Petitioner's improper credibility vouching claim was procedurally barred under *Clark v. Bertsch*, 789 F.3d 873 (8th Cir. 2015)(our decision in plain error review and procedural bar are in apparent disagreement). The district court accepted the state's procedural-bar argument, which contravenes to *Harris v. Reed*, 489 U.S. 225 (1989) reasoning because the last state court rendering a judgment in this case did not clearly and expressly states that it judgment rests on a procedural bar.

The district court concluded in its memorandum and order, did not address or even mention to these improper credibility vouching claim and that "those claims are procedurally barred." The lower

court resolution of this claim conflicts with the decision of this court in *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003)("[w]e may not grant respondent's habeas petition, however, if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the [Minnesota] court of appeal applied harmless-error review in an 'objectively unreasonable' manner."). In this case, the Minnesota court harmless-error review was "objectively unreasonable" in light of the arguments presented in this petition.

In *Lambright v. Stewart, Justice Ferguson* opined that the "Supreme Court has made clear that the application of an apparent controlling rule can nevertheless be debatable for purpose of meeting the [*Barefoot, Miller-El,* and *Slack*] standard in several cases," see *Lozada v. Deeds*, 498 U.S. 430, 431-32 (1991). The Supreme Court held that even though a question may be well settled in a particular circuit, like in this case on the federal question of plain error review barring habeas merit-review, the petitioner meets the modest [COA] standard where another circuit has reached a conflicting view. On this question, the circuit courts have reached conflicting view on the question of whether state court plain error merit-review bar habeas merit-review. See *Sanders v. Cotton*, 398 F.3d 572, 579 – 580 (7th Cir. 2005) (state court's reliance on procedural bar was not sufficiently explicit to bar review because reference to procedural issue was immediately followed by consideration of the merits of the ground for relief); *Harding v. Sternes*, 380 F.3d 1034, 1043 – 1044 (7th Cir. 2004)(same); *Clinkscale v. Carter*, 375 F.3d 430, 442 (6th Cir. 2004)(same); *Riley v. Taylor*, 277 F.3d 261, 273-275 (3rd Cir. 2001)(same).

The lower court decision is contrary to the Second, Ninth and Tenth Circuits in *Roy v. Coxon*, 907 F.2d 385 (2nd Cir. 1990)(plain error review precluded a findings of procedural default); *Brown v. Greiner*, 409 F.3d 523, 532-533 (2nd Cir. 2005)(same); *Walker v. Endell*, 850 F.2d 470 (9th Cir. 1987)(same); *Huffman v. Ricketss*, 750 F.2d 798 (9th Cir. 1984)(same); *Cargle v. Mullin*, 317 F.3d 1196, 1205 (10th Cir. 2003)(same) all holding that if the state court reviews the merit of a federal issue,

whether by plain error review or by other review, the issue reviewed is not procedurally barred. See *Adkins v. Warden*, 710 F.3d 1241, 1249 (11th Cir. 2013) (no procedural default because claim was adjudicated on the merit).

"Similarly, in *Slack*, the Supreme Court recently held that an issue apparently settled by the law of our [Eighth Circuit] remained debatable for the purposes of issuing a COA, *Slack*, 120 S. Ct at 1064." *Lambright v. Stewart*, at 1026. Therefore, under "*Slack* [and *Miller-El*], it is thus clear that lower court should not deny a [petitioner] an opportunity to persuade the [Court] through full briefing and argument to reconsider circuit law that apparently forecloses [relief on meritorious claims such as serious prosecutorial misconduct on improper credibility vouching of state key witnesses reviews under the plain error standard]. *Id* at 1606-07." *Id.* Therefore, consideration by this court is necessary to maintain uniformity in the federal courts.

b. This Case Present an Exceptional Importance In Resolving Intra-Circuit Debate Within the Eighth Circuit Because In light of the Doctrine of "Stare Decisis" and *United States v. Hessman*, 495 F.3d 977 (8th Cir. 2007), A Panel of a Circuit Court May Not Overrule Circuit Precedent Granting Habeas Relief on Federal Claims Reviewed Under the Plain-Error Standard.

Undisputed facts shows that some Eighth circuit case laws in *Mark v. Caspari*, 92 F.3d 637, 641 (8th Cir. 1996); *Sweet v. Delo*, 125 F.3d 1144, 1150 (8th Cir. 1997); *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999) have repeatedly held that a federal court can consider claims decided by state court plain-error review. So Petitioner's Ground 4 – Prosecutorial Misconduct on Improper Credibility Vouching should have been reviewed under *Mark v. Caspari* and their progeny. See *Alaimalo v. United States*, 645 F.3d 1042 (9th Cir. 2011).

In this circumstance, undisputed facts shows that lower district courts within this jurisdiction have been applying *Clark v. Bertsch* to foreclose habeas relief. That current practice is contrary to the circuit precedent in *Toua Hing Chang v. Minnesota*, 521 F.3d 828 n.3 (8th Cir. 2008)("[w]hen there is

an intra-circuit split, we are free to choose which line of cases to follow") because *Clark v. Bertsch* does not give the federal habeas district court any liberty or discretion to choose which line of cases to follow. This practice conflicts with the doctrine of "stare decisis" and the decision of *United States v. Hessman*, 495 F.3d 977, 982 – 983 (8th Cir. 2007) (held "a panel of this circuit court [like in *Clark v. Bertsch*] may not overrule circuit precedent [such as *Mark v. Caspari*; *Sweet v. Delo*; *James v. Bowersox* holding that a federal court can consider federal claims decided by state court plain error]") because "only the court enbanc can overruled circuit precedent" or Eighth Circuit approved procedures held in *Mark v. Caspari* and their progeny. Consideration by this court is necessary to provide important guidance to federal habeas court.

Furthermore, the *Clark v. Bertsch* principle of adhering to the very first panel decision, moreover, that principle is still debatable under the reasoning of *McMellon v. United States*, 387 F.3d 329, 361 n.3 (4th Cir. 2004)(enbanc)(*Motz. J* dissenting, "I note that agreement [or principle] among court of appeals on an issue – even in thoughtful, well-reasoned opinions – does not invariable garnish Supreme Court approval [... collecting cases where Supreme Court ...] rejected a holding previously reached by most of the federal courts of appeal"). Most especially, in cases such as this, that absolutely forecloses any habeas relief for innocent people.

Moreover, while there is contrary Eighth Circuit authorities, the majority of the circuits hold no procedural bar to plain-error review of a federal claim or issue. That in itself is a prima facie showing that deserve encouragement to proceed further in light of *Sanders v. Cotton, ld* at 579 – 580; *Harding v. Sternes* (same); *Clinkscale v. Carter* (same); *Riley v. Taylor* (same). The lower court decision not to consider this *improperly credibility vouching claim* in light of Petitioner's *independent ineffective assistance of both trial and appellate counsel claim* in failure to object during trial and to raise this claim in direct appeal on these prosecutorial improper credibility vouching of state's key witness claim

under the reasoning of *Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996)(held trial counsel failure to object to prosecutor's improper comments constitutes "cause" under the cause and prejudice standard to excuse federal habeas procedural default of constitution claims) is contrary to the authoritative decisions of this court in *Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 569 U.S. 413 (2013); *Massaro v. United States*, 538 U.S. 500 (2003), all holding that if the state court reviews the merit of a federal issue, whether by plain error review or by other review, the issue reviewed is not procedurally barred, even in the dare circumstances where the Petitioner did not raise the federal issue in state courts, if Petitioner can demonstrate cause due to ineffective assistance of (trial and appellate) counsel under the cause and prejudice standard.

V. 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 habeas 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 Exhibit 1, 2, and 3. *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 federal habeas 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). See the enclosed excerpted-copy of the Memorandum submitted at the District Court in which Petitioners adopts as re-alleged herein for merit review and why this admission of evidence was not harmless under both *Chapman v. California,* 386 U.S. 18 (1967) and *Brecht's* standards.

Ground 4 - Prosecution Improperly Vouching For the Credibility of Key State's witnesses claim is meritorious because it was a serious error, and in light of the enclosed excerpted-copy of the Memorandum submitted at the District Court in which Petitioners adopts as re-alleged herein for merit review and why this improper credibility vouching was not harmless under both *Chapman* and *Brecht's* standards.

V. CONSIDERATION BY THIS COURT IS NECESSARY BECAUSE THE REVIEW APPLIED IN THIS CASE IS FACIALLY AND AS-APPLIED UNCONSTITUTIONAL AND VIOLATES PRISONER'S FUNDAMENTAL AND SUBSTANTIVE DUE PROCESS RIGHT TO ACCESS TO COURT AND RIGHT TO JUDICIAL REVIEW

All matters raised in this case were not effectively and adequately reviewed in Petitioner's direct appeal at the state court and in his Habeas corpus action at the federal court. These deficient reviews denied Petitioner a *full and fair hearing* of his claims as guaranteed by Petitioner's procedural and substantive due process rights, and equal protection of law under the Fourteenth Amendment. The set of circumstances governing this case to find violation of Petitioner's substantive and procedural due process right to access to court and right to judicial review is that:

(1) The Minnesota Court of appeals and Habeas Court failed to apply these state and federal legal standards requiring:

> *Denovo judicial review* in light of and under the reasoning of *State v. Wells,* 2007 WL 2769686 *6 -7 (Minn. Ct. App. 2007); *State v. Heath,* 685 N.W.2d 48, 55 (Minn. App. 2004)(same); *State v. Caulfield,* 722 N.W.2d 304 (Minn. 2006)(same); *State v. Blanche,* 696 N.W. 2d 351 (Minn. 2005)(same); *State v. Ferguson,* 808 N.W.2d 586, 590 (Minn. 2012)(same); *State v. Marchbanks,* 632 N.W.2d 725, 731 (Minn. App. 2001)(same),

Harmless-error judicial review in light of *Neder v. United States*, 527 U.S. 1(1999); *Carston v. Radtke*, Civ No. 70-cv-07-17210, 2009 LEXIS 161 *12, *26-27 (Minn. Dist. 2009)(same, "[as] stated previously, the Harmless Error Rule applies to evidentiary rulings and jury instructions"),

Prejudice judicial review analysis in light of *Kotteakos v. United States*, 328 U.S. 750 at 764-65 (1946)(court must determine that error did not influence or only had slight effect on jury); *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003)(same); *Minn. Rule 103. Rulings on Evidence, Committee Comment – 1989* (collecting cases),

Brecht "substantial and injurious effect" standard under *Fry v. Pliler*, 551 U.S. 112 (2007)(held in all 28 U.S.C. §2254 proceedings, a federal court must assess the prejudicial impact of an alleged constitutional error in a state-court criminal trial under *Brecht* "substantial and injurious effect" standard whether or not the state appellate court recognize the error ... [t]hat *Brecht* applies in all §2254 cases).

(2) Petitioner was entitled to a Magistrate Judge findings of fact, report and recommendations once assigned to this case under 28 U.S.C. §2254, §2241, §2242, §2243, §636, and Rule 72(b);

(3) If the state and federal court had applied these legal standards to the claims presented for relief, there is a reasonable probability that the outcome of the appellate and habeas review would have changed; and (4) the state and federal court failure to apply these legal standards and/or to review the claims presented for harmless constitutional error caused the loss of relief and resulted in an actual injury of one who is actually innocent for continued wrongful incarceration without a first effective and substantive judicial review to challenge violations of his constitutional rights. See *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); *New Creative Enterprise, Inc., v. Dick Hume & Assoc., Inc.,* 494 N.W 2d 508, 511 (Minn. Ct. App. 1992) (Minnesota Supreme Court has stated that the due process includes the right to judicial review); *Spann, ld* at 870 (in Minnesota, a convicted defendant is

entitled to at least one right to review by an appellate or post-conviction court); Minn. R. Crim. P. 28.02, Subd. 2(1)(appeal as of right from a final judgment, and Petitioner's right to judicial review).

> This deficient review is contrary to the well settled law that it is "[u]pon the state courts, equally with the union, rests the obligation to guard and enforce every right secured by the Constitution." *Mooney v. Holohan*, 294 U.S. 103 (1935) (quoting *Robb. Connolly*, 111 U.S. 624, 637) and position inmates to a procedurally and substantively disadvantage in any action of re-litigating the merit of their constitutional errors that the state and federal court initially failed to effective and adequately address. This is so because these legal review standards are available and critical to any successful appellate review where (a) it was definitely impossible for any Appellant (Petitioner) to have known the mind of the court – on whether or not the court in making its final decision would apply these *legal standards, even where these state and federal constitutional legal standard of reviews are available at the court's disposals;* and (b) there is no other procedural mean or platform to adequately re-litigate these issues. In fact, the state and federal procedural framework (*State v. Knaffla,* 243 N.W. 2d 737, 741 (Minn. 1976) and AEDPA *second/successive petition* bar) makes it impossible to do so. Thus, violates Petitioner's substantive and procedural due process rights requiring *"full and fair hearing"* on all claims.

Furthermore, the state and federal courts applications of these legal standards to certain cases, and failure to apply these same standards to Petitioner's *pro se claims* even when requested in direct appeal appellate and habeas corpus briefs violates Petitioner's rights to equal access to the court and to equal protection of law guaranteed by the Fourteenth Amendment of United States Constitution and Minn. Const. Art I, section §§2, 7. Petitioner was entitled to these legal standards by law.

CONCLUSION

For the foregoing reasons, Petitioner prays that this court grants the writ and issue a Certificate of Appealability to review the judgment and opinion of the District Court.

Dated: February 1, 2021

Respectfully Submitted,

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