
IN THE
SUPREME COURT OF THE UNITED STATES
No. 20-7389

EMEM UFOT UDOH,

Petitioner,
vs.

BECKY DOOLEY, *Warden, Moose Lake,*

Respondent.

ON PETITION FOR REHEARING
TO REVIEW THE APRIL 05, 2021 ORDER
ENTERED BY THE CLERK

PETITION FOR REHEARING

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PETITIONER

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QUESTIONS PRESENTED FOR REHEARING

Undisputed facts show the presence of COVID-19 virus in Nigeria with more than 117,000 positive cases and 1485 deaths. Undisputed facts also show that President Joseph R. Biden satisfied one of his campaigned promises of the 2020 election by issuing an executive order on January 20 - 22, 2021 that bans deportation or removability. See *Executive Order No. []*, [] Fed. Reg. [] (January 22, 2020) entitled “[]”. These are the intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented in this case. Thus, the main question presented for rehearing is:

1. Whether The January 20 - 22, 2021 Executive Order Of President Joseph R. Biden That Bans Deportation Or Removability And The Presence Of COVID-19 Virus In Nigeria Constitutes Exceptional, Intervening And/Or Changed Circumstances Or Grounds That Would Warrant Rehearing Of This Proceeding?

In light of the recent binding precedent of this court, dated April 17, 2018, in *Session v. Dimaya*, 200 L. Ed 2d 549, 138 S Ct. 1204, affirming the Ninth Circuit holding that 18 U.S.C. §16(b), as incorporated in the Immigration and Nationality Act, is unconstitutional vague, the second question presented for rehearing is:

2. Whether The Supreme Court holding in *Session v. Dimaya* vacates each and every administrative allegations and charges bearing upon the “residual clause” of 18 U.S.C. §16(b) as a “crime of violence” by Petitioner because the April 17 holding provided that the residual clause of 18 U.S.C. §16(b) defining “crime of violence” was unconstitutionally vague – that is, too arbitrary and indistinct to comport with the constitution’s guaranteed of due process. *Id* 1212 – 13?

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IN THE
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EMEM UFOT UDOH,

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BECKY DOOLEY, *Warden, Moose Lake,*

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ON PETITION FOR REHEARING
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ENTERED BY THE CLERK

Petitioner, Emem Ufot Udooh, respectfully petition for a rehearing to review the April 05, 2021 order entered by the clerk due the intervening circumstances of a substantial or controlling effect of the undisputed facts that shows the presence of COVID-19 virus in Nigeria with more than 117,000 positive cases and 1485 deaths; and in light of the undisputed facts, that clearly show that President Joseph R. Biden satisfied one of his campaigned promises of the 2020 election by issuing an executive order on January 20 - 22, 2021 that bans deportation or removability. See *Executive Order No. [] , [] Fed. Reg. [] (January 22, 2020) entitled [“ ”].* These are the other substantial grounds or circumstances not previously presented in this case.

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.

On April 05, 2021, this Court denied certiorari in an order entered by the Clerk. See **Appendix** at 1. This Court's jurisdiction is invoked under Rule 44 of the Supreme Court Rules, for Rehearing.

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."

STATEMENT OF THE CASE AND FACTS IN SUPPORT FOR REHEARING

This court should "find that [Petitioner] has satisfied these conditions for rehearing. The proffered evidence include[s] the January 20 – 22, 2021 executive order of President Joseph R. Biden that bans deportation or removability, articles [from Google, articles published by the Human Rights Defense Center (Prison Legal News), and a Kite from the Rush City Librarian under Judicial Notice of Changed Country Conditions In Light of The Presence of Coronavirus

(COVID-19) Pandemic In Nigeria] discussing [the] increasing [presence of COVID-19 pandemic in Nigeria]:

In this Rule 44 Certification Of Mr. Emem Ufot Udo, Mr. Udo swear and avers that he has a well-founded fear of severe illness and death if he were returned to Nigeria. Mr. Udo's life and freedom would be threatened by the unprecedented and dangerous risk of death brought on by a global Coronavirus (COVID-19) pandemic in Nigeria due to his age and underlying or pre-existing conditions.

The circumstances in Nigeria have changed due to the COVID-19 epidemic in that country. Public data and information clearly shows that there are more than 117,000 number of positive COVID-19 cases in Nigeria, and more the 1,485 number of COVID-19 related deaths in Nigeria as of April 12, 2021.

This new evidence of COVID-19 status in Nigeria is material evidence that was unavailable at the time of the *in-absentia* removal hearing in April 17, 2019, motion to rescind the *in-absentia* order in June/July 2019, and during his appeal to the Board (BIA) in September 2019 through June 24, 2020.

If Mr. Udo returns to Nigeria, he will be unable to procure the medication used to control the Coronavirus and he would face a death sentence. Mr. Udo's freedom would be threatened upon return to Nigeria on account of the presence of COVID-19 in Nigeria, and for the fact that it is unknown when the Coronavirus (COVID-19) vaccination could be available in Nigeria according to *Reuters*.

Mr. Udo did not present this new evidence to the immigration court or to the Board because he only learned of the COVID-19 status in Nigeria two weeks after he filed his Reply Brief on December 18, 2020, and Mr. Udo had not yet considered the long-term effect of having a life-threatening disease. Mr. Udo recently learned of the COVID-19 state in Nigeria on January 5, 2021 from the MCF – Rush City Librarian.

Mr. Udo avers that there are various public report regarding the COVID-19 epidemic in Nigeria and the Nigerian government failure to manage the problem to date. Mr. Udo notes that there are no treatment centers in Nigeria for COVID-19. Mr. Udo is not aware of any and there are no known information regarding the type of vaccinations or treatments available in Nigeria for COVID-19. If Mr. Udo is returned to Nigeria, Mr. Udo would have no access to medication for COVID-19 at any medical facilities in Nigeria.

Mr. Udo also avers that he suffers from other serious health and medical problems, including asthma, high blood pressure and fluids in his lungs, that has all resulted in Mr. Udo's breathing problems. See the copy of Medical Evidence or Report filed on September 14, 2020 in this court's record from Hennepin County Medical Center.

See also *Udoh v. Knutson*, Civil No. 19-CV-1311 (MJD/HB), Docket No. 87 at 1 - 7 filed on August 7, 2020.

Mr. Udoh avers that he is eligible for asylum and cancellation of removal reliefs by virtue of his continuous residence in the United States for more than ten years. Mr. Udoh avers that removal would result in an extreme hardship and danger to Mr. Udoh's life, to Mr. Udoh's wife (Tonya Udoh), and to Mr. Udoh's children (Carson and Cayden Udoh) given the presence of the global COVID-19 pandemic in Nigeria.

Mr. Udoh avers that he is eligible for voluntary departure relief. Mr. Udoh avers that he is eligible For A Request for A Hearing on A Decision In Naturalization Proceeding Under Section 336 With Form N-336. Mr. Udoh avers that he is eligible For A Notice Of Appeal To The Board From A Decision Of A DHS Officer With Form EOIR-29. Mr. Udoh avers that he is eligible for An Application for Naturalization With Form N-400. Mr. Udoh avers that the January 20 – 22, 2021 executive order of President Joseph R. Biden bans deportation or removability.

A. Petitioner's Petition For Review Of The June 24, 2020 Board's Decision And Pending Appeals In Federal Courts.

Substantive allegations are set forth in *Udoh v. Garland*, Supreme Court Case No. 20-7565 for brevity purposes. The Department of Justice Administrative Record was filed in the Eighth Circuit Court of Appeal Case No. 20-2389 on August 28, 2020.

B. The January 20 - 22, 2021 Executive Order Of President Joseph R. Biden That Bans Deportation Or Removability.

Undisputed facts show that President Joseph R. Biden satisfied one of his campaigned promise of the 2020 election by issuing an executive order on January 20 - 22, 2021 that bans deportation or removability. See *Executive Order No. []*, [] Fed. Reg. [] (January 22, 2021) entitled [“_____”]. Fed. R. Evid. 201. The executive order of President Joe Biden, issued by President Joseph R. Biden as a restraining order or ban on deportation, admirably constitutes *newly discovered evidence* or *new evidence* on this appeal. The executive order of President Joe Biden involves a material change in fact, information or law, as it relates to removability, and this executive order is applicable to all aliens. This executive order merits remanding this case to the Board or Immigration judge, on the ground that the decision of President Joe Biden occurred

between January 20, 2021 and January 22, 2021, couple of days after he assumed office on January 20, 2021.

The substantial evidence of the executive order of President Joe Biden indicates a *material change in circumstances* that has vitiated all grounds of removability to all aliens because the executive order puts a pause or ban on removability or deportation. This executive order is a *public accessible* decision, and was obtained after the date of the immigration judge's or Board's decision in this case. This executive order of President Joe Biden is an intervening order of a final regulation that serves as an *independent* basis for remand. The executive order of President Joe Biden is a new material factor pertinent to the issues of this case, and the provisions of the executive order in its applicability to this case involves a substantial issue of first impression in this court. These underlying circumstances makes this case of general public interest. Thus, there is an *exigent* need to establish a precedent, either in this appellate court or within the Board pursuant to the wisdom of *Feleke v. INS*, 118 F.3d 594, 599 – 600 (8th Cir. 1997), in properly construing the meaning of the new executive order promulgated by President Joe Biden that expressly bans deportation or removability, and the new law in *Session v. Dimaya*, affirming the Ninth Circuit holding that 18 U.S.C. §16(b), as incorporated in the Immigration and Nationality Act, is unconstitutional vague. 200 L. Ed 2d 549, 138 S Ct. 1204.

Therefore, under the extraordinary circumstances created by the executive order of President Joe Biden and the Supreme decision in *Session v. Dimaya*, 200 L. Ed 2d 549, 138 S Ct. 1204 (2018), remand should favor a proper interpretation, and administration of justice to the Board's, the Attorney General, and Petitioner's on the implementation of the January 20 - 22, 2021 executive order of President Joseph R. Biden. Petitioner's decision to remove will harm Petitioners' with U.S. citizen children by depriving them of their liberty interest in family integrity. The right

not to be separated from one's immediate family is well-established. See *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)(holding that plaintiff's right to rejoin her immediate family is a right that ranks high among the interests of the individual).

C. FORM N-336: Petitioner's Eligibility For A Request For A Hearing On A Decision In Naturalization Proceeding Under Section 336.

Substantive allegations are set forth in the *Administrative Record* in *Udoh v. Garland*, Eighth Circuit USCA8 Case No. 20-2389 for brevity purposes.

D. FORM EOIR-29: Petitioner's Eligibility For A Notice Of Appeal To The Board From A Decision Of A DHS Officer.

Substantive allegations are set forth in the *Administrative Record* in *Udoh v. Garland*, Eighth Circuit USCA8 Case No. 20-2389 for brevity purposes.

E. FORM N-400: Petitioner's Eligibility For An Application For Naturalization.

Substantive allegations are set forth in the *Administrative Record* in *Udoh v. Garland*, Eighth Circuit USCA8 Case No. 20-2389 for brevity purposes.

REASONS FOR GRANTING THE PETITION FOR REHEARING IN LIGHT OF THE JANUARY 20 - 22, 2021 EXECUTIVE ORDER OF PRESIDENT JOSEPH R. BIDEN THAT BANS DEPORTATION OR REMOVABILITY AND THE PRESENCE OF COVID-19 VIRUS IN NIGERIA THAT CONSTITUTES EXCEPTIONAL, INTERVENING AND/OR CHANGED CIRCUMSTANCES OR GROUNDS THAT WOULD WARRANT REHEARING OF THIS PROCEEDING

Appellant notes that this court has charitably construed an Appellant's argument on appeal under the reasoning applied in *United States v. Destefano*, 178 Fed. Appx. 613, 615 n.4 (8th Cir. 2006). Appellant respectfully ask this court to liberally construe his arguments. With regards to all issues and claims, Appellant argues under the reasoning applied in *Wever v. Lincoln County*, 388 F.3d 601 (8th Cir. 2004) that this court "consider a newly raised argument [or issues]" for the first time on appeal. See *Wever*; *Winegar v. Des Moines Indep. Com. Sch. Dist.*, 20 F.3d 895, 899 n.2 (8th Cir. 1994). Appellant respectfully ask this court to consider all claims or issues raised because the claims or issues were "[t]hough not artfully pleaded" in the petitions but these claims

and arguments are purely legal, requires no additional factual developments, and manifest injustice would result if these arguments are not considered for appellate review.

Pursuant to *Diaz v. Lynch*, 824 F.3d 758, 760 – 61 (8th Cir. 2016), the Eighth Circuit Court of Appeals held that “[Petitioner] motion to reopen [to apply for asylum] is thus time-barred, unless he demonstrates his application for asylum is “based on changed country conditions. ...” See §1229a(c)(7)(c)(i),(ii). Evidence of the changed conditions must not have been available or discoverable at the time of the [2019] hearing. See §1229a(c)(7)(c)(ii).” This Court’s jurisdiction is invoked under 8 C.F.R. §3.2(c)(1994), because of the changed circumstances in Nigeria as required by 8 C.F.R. §1003.2(c)(3)(ii).

Pursuant to *Feleke v. INS*, 118 F.3d 594, 599 – 600 (8th Cir. 1997), Petitioner respectfully motion for leave to adduce additional evidence and “seeks to supplement the record with additional evidence that was not considered by the Board. *Id.* Although we are not to take evidence, we may remand to the Board to consider newly discovered evidence and to create an adequate record. 28 U.S.C. §2347(c); *Makonnen*, 44 F.2d at 1385. Any additional evidence sought to be adduced must be material and reasonable grounds must be shown for the initial failure to adduce such evidence to the agency. *Id.*” *Feleke*, *Id* at 599.

The most significant document are the January 20 – 22, 2021 Executive Order Of President Joseph R. Biden That Bans Deportation Or Removability and two [articles dated May 2020 and June 2020, and a kite Response dated January 5, 2021, from the Library at MCF-Rush City], an administrator of [MCF-Rush City Library], outlining [the current state of COVID-19 Pandemic in Nigeria] and [Petitioner’s Rule 44 Certification Of Mr. Emem Ufot Udo] expressing a belief that [he] would be subject to [a great and unforeseen risk of severe illness or death brought on by a global pandemic], on his return to [Nigeria]. This court should “believe that consideration of this

evidence is crucial to the development of an adequate record in this case. Accordingly, we remand to the Board pursuant to 28 U.S.C. §2347(c). See *Makonnen*, 44 F.3d AT 1385.” *Feleke*, *Id* at 599.

In this motion, Petitioner seeks to adduce evidence on the issue of his eligibility for cancellation of removal, voluntary departure under §1229c(b)(See *Dada v., Mukasey*, 554 U.S. 1, *6 (2008)) because while his appeal in this court and in state court (A20-0633) has been pending, he has became eligible, by virtue of continuous residence in the United States for more than ten years. See IIRIRA; 8 U.S.C. §1254(a)(1)(Supp. 1996); 8 U.S.C. §1229b(b)(1)(A)(Supp. 1997); 8 U.S.C. §1229b(d)(1)(Supp. 1997). Therefore, under, the reasoning and remedy applied in *Feleke v. INS*, *Id* at 600, this matter, including whether and to what extent IIRIRA is applicable to Mr. Udoth, is for the Board to consider in the first instance. *Id.*

Petitioner ask this court to include an Rule 44 Certification Of Mr. Emem Ufot Udoth or declaration as newly discovered evidence of the January 20 – 22, 2021 executive order of President Joseph R. Biden that bans deportation or removability and “changed country conditions” or as new evidence of such particularized and worsening conditions in Nigeria under Judicial Notice of the recent public data, evidence, report, and information regarding the presence of COVID-19 virus in Nigeria. This court, as well as other circuits used 28 U.S.C. §2347(c) to invoke discretionary authority to remand immigration cases in which 8 U.S.C. 1105a(a)(4) applied, so that new, non-record evidence could be admitted on appeal and remanded for consideration by the Board. See e.g., *Makonnen v. INS*, 44 F.3d 1378, 1384 -86 (8th Cir. 1995). Pursuant to *Diaz v. Lynch*, 824 F.3d 758, 760 – 61 (8th Cir. 2016), this court held that “[Diaz] motion to reopen [to apply for asylum] is thus time-barred, unless he demonstrates his application for asylum is “based on changed country conditions. ...” See §1229a(c)(7)(c)(i),(ii). Evidence of the changed conditions must not have been available or discoverable at the time of the [2019] hearing. See §1229a(c)(7)(c)(ii).”

Petitioner claims that he recently learned of the January 20 – 22, 2021 executive order of President Joseph R. Biden that bans deportation or removability and the changed conditions in Nigeria due the presence of the coronavirus (Covid-19) pandemic in Nigeria. This fact demonstrates a change in conditions in Nigeria between the *in-absentia* 2019 hearing and his current petition for review of the June 24, 2020 order denying the motion to reopen. See *Zheng v. Mukasey*, 523 F.3d 893, 896 (8th Cir. 2008). Thus, remand is merited in this case, so that the BIA can consider the motion to reopen the in-absentia order of removal on the basis of new and material evidence relating to Petitioner's potential eligibility to apply for voluntary departure under §1229c(b), asylum and/or withholding of removal under 8 U.S.C. §§§1101, 1158, and 1231, or to raise these new issues before the immigration judge ("IJ"). *Bracic v. Holder*, 603 F.3d 1027 (8TH Cir. 2010)(remanded the matter to the IJ for a for determination of whether the alien was entitled to a discretionary grant of [voluntary departure,] asylum and/or withholding of removal in light of all the evidence on the record); *Id* at 1032(a court reviews an alien due process challenge *denovo*, as the question of whether an immigration hearing violates due process is a pure legal issue); *Id* at 1033.

Petitioner failure to file a brief at the BIA was due to the lack of access to the prison law library due to Coronavirus pandemic in light of *Flittie v. Solem*, 827 F.2d 276, 280 (8th Cir. 1987)(meaningfully access to court would require at least 3 days per week at the Prison law library under restricted status); *Bound v. Smith*, 430 U.S. 817 (1977) (prisoner's right of access to court). The Board of Immigration Appeals should have granted Petitioner's request for an extension of time for lack of access to the Prison Law Library and to obtain the record and transcripts of the immigration hearings to meaningfully, adequately and fairly present his case at the Board of Immigration Appeal, in light of *Bound v. Smith*, 430 U.S. 817 (1977) (prisoner's right of access to

court); *Hebbe v. Pliler*, 627 F.3d 338, 342 – 43 (9th Cir. 2010)(possible constitutional violation when prisoner denied access to prison library, preventing him from filing a brief in appeal of the [government's order]) reasoning; *Skinner v. Switzer*, 131 S. Ct. 1289, 1293 – 94 (2011)(held prisoner's Fourteenth Amendment right of access to evidence to undergo a civil proceeding or testing in [government] or federal court); *Kennedy v. Lockyer*, 379 F.3d 1041, 1054 (9th Cir. 2004) (held that failure to provide Defendant with a complete transcript of prior proceedings had a "substantial and injurious effect on the jury verdict"); *Britt v. North Carolina*, 404 U.S. 226, 227 (1971) (the agency must provide an indigent defendant with a transcript when that transcript is needed for an effective defense or appeal); *United States v. MacCollom*, 426 U.S. 317, 320 – 21 (1976)(same); *State v. Beecroft*, 813 N.W.2d 814, 842 (Minn. 2012)(recognized that a "meaningful access to justice and the due process right to present a complete defense encompass a right to the basic tools of an adequate defense"). This implicates [Petitioner's] right of access to court under *Bound v. Smith*.

The constitution guarantees prisoners the right to a meaningful access to the courts. *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). Thus under *Bounds v. Smith*, Petitioner has a right to the adjudication of his [immigration or removal] appeal. As such, not reopening the removal proceeding will unreasonably interfere with Petitioner's due process and fundamental right to access to court under *Bounds v. Smith*; *Kristian v. Dep't of Corr* and under *Marbury v. Madison* holding, *ld* at 137, where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded. *ld. Christopher v. Harbury*, 536 U.S. 403,

415 (2002) (to establish an unconstitutional denial of access to the courts, a prisoner must show a lost opportunity to pursue a non-frivolous claim).

Remand should apply to this case when the prison “restrictions” or regulation due to COVID-19 is a “systematic denial” of the right of access constituting such a “fundamental deprivation that it is an injury in itself.” *Blaise v. Fenn*, 48 F.3d 337, 340 (8th Cir. 1995)(quoting *Hershberger v. Scaletta*, 33 F.3d 955, 956 (8th Cir. 1994). The “restrictions” in this case, does rise to the level of a systematic deprivation, and therefore Petitioner respectfully move this court for A Leave to Reopen under these circumstances. See *State v. Udo*h, Case No. A19-1129 (Minn. December 9, 2020) Order from the Chief Justice of the Minnesota Supreme Court noting that “Petitioner’s motion includes information on restrictions imposed by the Department of Corrections during the pandemic.” There is no statutory provision for the reopening of a removal proceeding, and the regulations do not specify the condition under which a motion to reopen must be granted. *Khalaj v. Cole*, 46 G..3d 828, 833 (8th Cir 1995)(citing *INS v. Doherty*, 502 U.S. 314, 321 -23 (1992)). The applicable regulation indicates that a motion to reopen for additional evidence must state new and material facts that were not available and could not have been discovered or presented at the prior hearing. 8 C.F.R. §3.2(c)(1994), such as the changed circumstances in Nigeria as required by 8 C.F.R. §1003.2(c)(3)(ii).

Remand is merited in this case because the BIA or IJ does not know and has not appreciated the seriousness of the January 20 – 22, 2021 executive order of President Joseph R. Biden that bans deportation or removability and these changed country conditions due the presence of COVID-19 in Nigeria, that both federal and state courts in:

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-AM, 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);

have held to constitutes a showing, sufficient for extraordinary or change circumstances for extraordinary reliefs, including the January 20 – 22, 2021 executive order of President Joseph R. Biden that bans deportation or removability. Remand is merited under these circumstances

because the BIA or IJ has a discretionary decision in reopening the proceeding on its own motion, *sua sponte*, as permitted by 8 C.F.R. §1003.2(a) to give Petitioner a reasonable opportunity “to apply or reapply for [voluntary departure,] asylum or withholding of [removal that is] based on changed circumstances arising in the country of nationality,” 8 C.F.R. §1003.2(c)(3)(ii), which applies to this motion.

This court has repeatedly held that because an allegation of wholesale failure to consider evidence implicates due process, remand is appreciated for the BIA or IJ to review this constitutional question. See *Tun v. Gonzales*, 485 F.3d 1014, 1025 (8th Cir. 2007)(stating that the Fifth Amendment’s Due Process Clause entitles an alien to fair hearing in removal proceeding where he may “fairly present evidence, offer arguments, and develop the record”); See also 8 U.S.C. §1229a(b)(1)(“[t]he immigration judge shall receive evidence”). The record does support Petitioner’s claim that neither the immigration judge nor the BIA had considered his new and material evidence submissions, and this lack was due to the *in-absentia* order and the BIA’s failure to grant Petitioner the record and extension of time to file an opening brief due to the COVID-19 pandemic at the MCF-Rush City Facility where Petitioner is detained, does implicates Petitioner’s due process argument. Remand is merited in this case because the alien had reasonably explained his failure to initially request voluntary departure, asylum, and/or withholding of removal reliefs on the basis of newly discovered evidence due to the *in-absentia* order. Remand gives Petitioner the opportunity to make a timely application for voluntary departure, or to apply for asylum and withholding of removal until his pending federal and state court cases are resolved in light of the supporting changed country conditions due to the presence of COVID-19 in Nigeria allegations and Rule 44 Certification Of Mr. Emem Ufot Udo set forth in this motion. Reversal and Remand allows Petitioner a reasonable opportunity to file the motion in the removal proceeding, seeking to

present new evidence to support his claim for relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I. L. M. 1027.

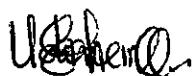
In this case, Petitioner has shown how the procedural error would have changed the outcome of the immigration removal proceeding because he has offered new evidence or advanced new issues that would have established his entitlement to asylum, voluntary departure and/ or withholding of removal. Because he has done so, Mr. Udoth has shown prejudice, to the extent, that he has established a *prima facie* case for the underlying substantive relief sought. According, just like in *Feleke*, *Id* at 599 - 600, where this court remands for consideration of two unsworn letters that were never presented to the agency and indeed were not written by the author, until after the Board of Immigration appeals decision under review pursuant to the authority of 28 U.S.C. §2347(c) and this court decision in *Makonnen*, 44 F.2d at 1385, this court should grant a similar relief in this case consistent with *Feleke*'s opinion, *Id*, to give Petitioner an opportunity to apprise the immigration judge of thesees changed conditions in Nigeria because Petitioner did not know of the COVID-19 status in Nigeria at the time of his original proceedings and never failed to notify the immigration judge of theses changed conditions in 2018 through 2019 because the evidence was not previously available.

CONCLUSION

Wherefore, Petitioner pray the court reopens this proceeding.

Dated: April 12, 2021

Respectfully Submitted,



Emem U. Udoth, 245042
Pro se Litigant,
7600 525TH Street
Rush City, MN 55069

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 33.2(b), Petitioner certifies that this Petition complies with the page limitation in that rule. According to Microsoft Word 2019, the word processing program used to produce this Petition, it contains 14 pages.

Dated: April 12, 2021

Respectfully Submitted,

Udoh

Emem U. Udoth,
Pro se Litigant, 245042
7600 525th Street
Rush City, MN 55069

CERTIFICATE OF SERVICE

On April 12, 2021, Petitioner hereby certify that a copy of the following documents:

1. Motion for Leave to Proceed In Forma Pauperis On Rehearing;
2. Petition For Rehearing; and Rule 44 Certification Of Mr. Emem Udoth; and
3. Appendix.

was served upon the Clerk of the United States Supreme Court, properly addressed to Clerk's Office at One First Street North East, Washington, D.C. 20543, and on every other person required to be served by U.S. Mail as follows:

KEITH ELLISON
Minnesota Attorney General
1400 Bremer Tower, Suite 1800
445 Minnesota Street
St. Paul, MN 55101

MICHAEL O. FREEMAN
Hennepin County Attorney
JONATHAN P. SCHMIDT
Assistant Hennepin County Attorney
C-2000 Government Center
300 South Sixth Street
Minneapolis, MN 55487

Dated: April 12, 2021

Respectfully Submitted,

Udoh

Emem U. Udoth,
Pro se Litigant, 245042
7600 525th Street
Rush City, MN 55069

IN THE
SUPREME COURT OF THE UNITED STATES
No. 20-7389

EMEM UFOT UDOH,

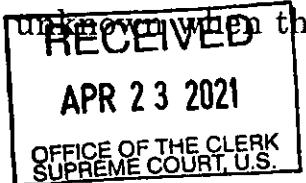
Petitioner,
vs.

BECKY DOOLEY, *Warden, Moose Lake,*

Respondent.

RULE 44 CERTIFICATION OF MR. EMEM UFOT UDOH

1. In this Certification, Mr. Udooh swear and avers that he has a well-founded fear of severe illness and death if he were returned to Nigeria. Mr. Udooh's life and freedom would be threatened by the unprecedented and dangerous risk of death brought on by a global Coronavirus (COVID-19) pandemic in Nigeria due to his age and underlying or pre-existing conditions.
2. Mr. Udooh avers that this petition is presented in good faith and not for delay because the circumstances in Nigeria have changed due to the COVID-19 epidemic in that country. Public data and information clearly shows that there are more than 117, 000 number of positive COVID-19 cases in Nigeria, and more the 1, 485 number of COVID-19 related deaths in Nigeria as of April 12, 2021.
3. Mr. Udooh avers that this petition is presented in good faith and not for delay because this new evidence of COVID-19 status in Nigeria is material evidence that was unavailable at the time of the *in-absentia* removal hearing in April 17, 2019, motion to rescind the *in-absentia* order in June/July 2019, and during his appeal to the Board (BIA) in September 2019 through June 24, 2020.
4. Mr. Udooh avers that this petition is presented in good faith and not for delay because if Mr. Udooh returns to Nigeria, he will be unable to procure the medication used to control the Coronavirus and he would face a death sentence. Mr. Udooh's freedom would be threatened upon return to Nigeria on account of the presence of COVID-19 in Nigeria, and for the fact that it is ~~unknown when the~~



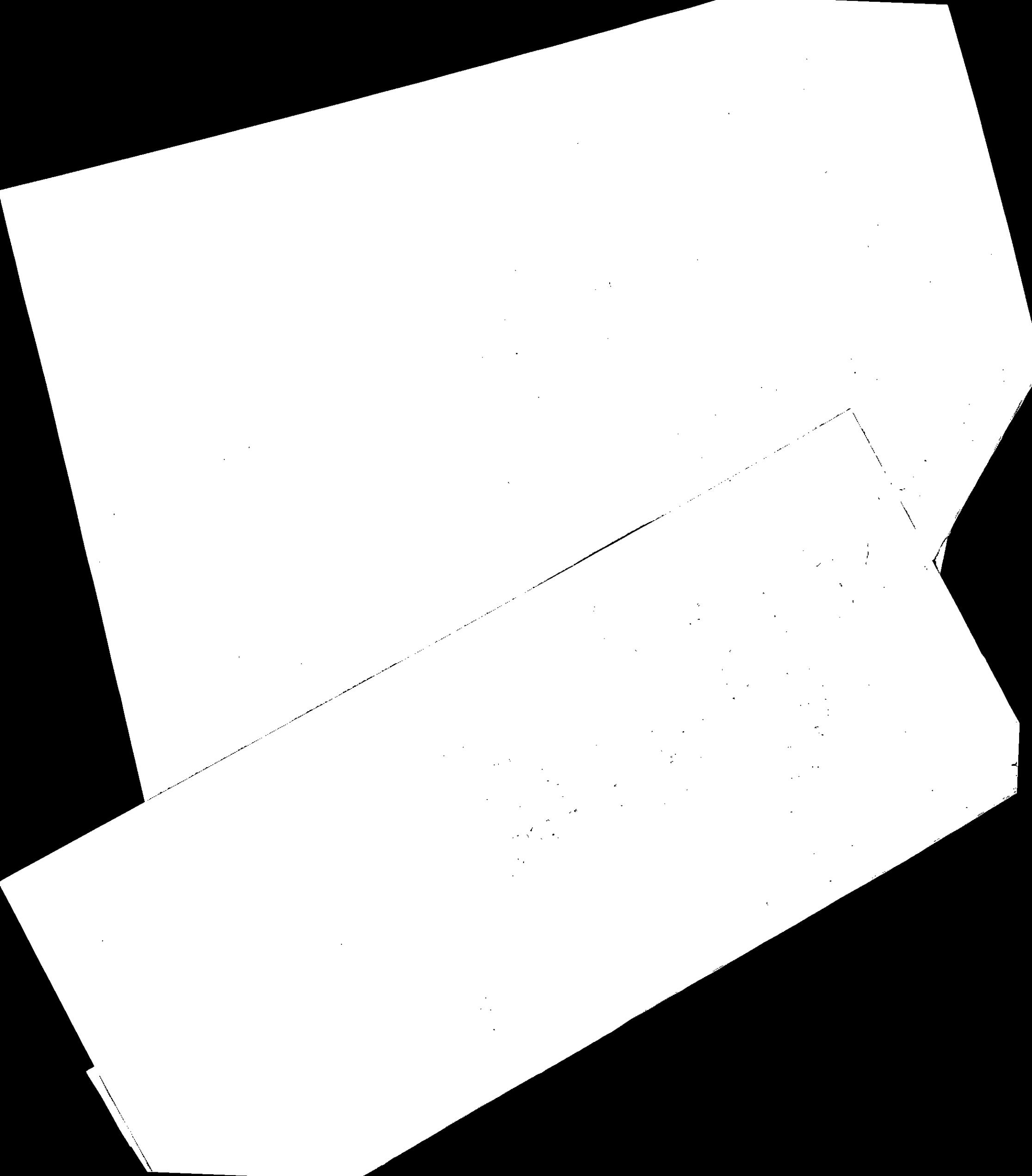
ion could be available in Nigeria according to

cition is presented in good faith and not for delay this new evidence to the immigration court or to the end of the COVID-19 status in Nigeria two weeks after December 18, 2020, and Mr. Udoth had not yet Coronavif rm effect of having a life-threatening disease. Mr. Udoth Reute COVID-19 state in Nigeria on January 5, 2021 from the Librarian.

L

12. that this petition is presented in good faith and not for delay are various public report regarding the COVID-19 epidemic in beana the Nigerian government failure to manage the problem to date. Mr. 13. states that there are no treatment centers in Nigeria for COVID-19. Mr. is not aware of any and there are no known information regarding the type becinations or treatments available in Nigeria for COVID-19. If Mr. Udoth is bared to Nigeria, Mr. Udoth would have no access to medication for COVID-19 The u is true. Udoth also avers that this petition is presented in good faith and not for delay forego-cause he suffers from other serious health and medical problems, including sthma, high blood pressure and fluids in his lungs, that has all resulted in Mr. Udoth's breathing problems. See the copy of Medical Evidence or Report filed on September 14, 2020 in this court's record from Hennepin County Medical Center. See also *Udoth v. Knutson*, Civil No. 19-CV-1311 (MJD/HB), Docket No. 87 at 1 - 7 filed on August 7, 2020.

8. Mr. Udoth avers that this petition is presented in good faith and not for delay because he is eligible for asylum and cancellation of removal reliefs by virtue of his continuous residence in the United States for more ten years. Mr. Udoth avers that removal would result in an extreme hardship and danger to Mr. Udoth's life, to Mr. Udoth's wife (Tonya Udoth), and to Mr. Udoth's children (Carson and Cayden Udoth) given the presence of the global COVID-19 pandemic in Nigeria.
9. Mr. Udoth avers that this petition is presented in good faith and not for delay because he is eligible for voluntary departure relief.
10. Mr. Udoth avers that this petition is presented in good faith and not for delay because he is eligible For A Request For A Hearing On A Decision In Naturalization Proceeding Under Section 336 With Form N-336.



IN THE
SUPREME COURT OF THE UNITED STATES
NO. 20-7389

EMEM UFOT UDOH,

Petitioner,

vs.

BECKY DOOLEY, *Warden, Moose Lake,*
Respondent.

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON THIS
PETITION FOR A ~~WRIT OF CERTIORARI~~ REHEARING**

Petitioner, Emem Ufot Udooh, hereby move this court for leave to proceed in forma pauperis ("IFP") on this petition for rehearing.

Petitioner, Emem Ufot Udooh, motion for leave to proceed *in forma pauperis* on appeal was granted on July 29, 2020 by The Hon. Paul A. Magnuson in *Udooh v. Dooley*, 16-cv-4174-PAM-HB (D.Minn. July 19, 2020 Order). Petitioner, Emem Ufot Udooh, has attached an affidavit or declaration to support this motion for leave to proceed *in forma pauperis*.

Petitioner, Emem Ufot Udooh, the undersigned declare under penalty of perjury that the foregoing information contained herein is true and correct. 28 U.S.C. §1746; Minn. Stat. §358. 116.

Executed on: April 12, 2021

Respectfully Submitted,



Emem U. Udooh,
Pro se Litigant, 245042
7600 525th Street, Rush City, MN 55069

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Emem Ufot Udoth,

Civ. No. 16-4174 (PAM/HB)

Petitioner,

v.

ORDER

Becky Dooley, Warden, MCF – Moose
Lake Prison,

Respondent.

This matter comes before the Court on Petitioner Emem Ufot Udoth's Motion for Leave to Proceed In Forma Pauperis on Appeal.

The Court previously granted Udoth leave to proceed in a previous appeal without payment of fees or costs. (Docket No. 43.) Udoth has submitted documentation showing that he remains unable to pay such costs. (Docket No. 76-1.) Udoth may proceed with his appeal in forma pauperis. 28 U.S.C. § 1915; see Fed. R. App. P. 24(a)(3) ("A party who was permitted to proceed in forma pauperis in the district-court action . . . may proceed on appeal in forma pauperis without further authorization . . .").

The Rule also provides that an appeal may not be taken in forma pauperis if the Court certifies that it is not taken in good faith. Id. R. 24(a)(3)(A). While the Court is convinced that it correctly interpreted Udoth's Rule 60(b) motion as a successive habeas petition and dismissed it for lack of prior authorization from the Eighth Circuit, his appeal is not frivolous.

Accordingly, **IT IS HEREBY ORDERED** that Petitioner Emem Ufot Udooh's Motion for Leave to Proceed In Forma Pauperis on Appeal (Docket No. 76) is **GRANTED**.

Dated: July 29, 2020

s/ Paul A. Magnuson

Paul A. Magnuson
United States District Court Judge

IN THE
SUPREME COURT OF THE UNITED STATES
NO. 20-7389

EMEM UFOT UDOH,
Petitioner,
vs.

BECKY DOOLEY, Warden, Moose Lake,
Respondent.

**AFFIDAVIT OR DECLARATION IN SUPPORT FOR MOTION FOR LEAVE TO PROCEED IN
 FORMA PAUPERIS ON PETITION FOR REHEARING
 (Long Form)**

Affidavit in Support of the Motion

I am a plaintiff or petitioner in this case and declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested. I declare under penalty of perjury that the information below is true and understand that a false statement may result in a dismissal of my claims.

Signed: Umem Udo

Instructions

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Date: April 12, 2021

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amount, that is, amounts before any deductions for taxes or otherwise.

| Income source | Average monthly income amount during the past 12 months | | Income amount expected next month | |
|---|---|--------------------------|-----------------------------------|--------------------------|
| | You | Spouse | You | Spouse |
| Employment | \$ <input type="radio"/> 0 | \$ <input type="radio"/> | \$ <input type="radio"/> 0 | \$ <input type="radio"/> |
| Self-employment | \$ <input type="radio"/> 0 | \$ <input type="radio"/> | \$ <input type="radio"/> 0 | \$ <input type="radio"/> |
| Income from real property (such as rental income) | \$ <input type="radio"/> 0 | \$ <input type="radio"/> | \$ <input type="radio"/> 0 | \$ <input type="radio"/> |

| | | | | |
|--|----------------|----------------|----------------|----------------|
| Interest and dividends | \$ 0 | \$ | \$ 0 | \$ |
| Gifts | \$ 0 | \$ | \$ 0 | \$ |
| Alimony | \$ 0 | \$ | \$ 0 | \$ |
| Child support | \$ 0 | \$ | \$ 0 | \$ |
| Retirements (such as social security, pensions annuities, insurance) | \$ 0 | \$ | \$ 0 | \$ |
| Disability (such as social security, insurance payments) | \$ 0 | \$ | \$ 0 | \$ |
| Unemployment payments | \$ 0 | \$ | \$ 0 | \$ |
| Public-assistance (such as welfare) | \$ 0 | \$ | \$ 0 | \$ |
| Other (specify): | \$ 0 | \$ | \$ 0 | \$ |
| Total monthly income: | \$ 0.00 | \$ 0.00 | \$ 0.00 | \$ 0.00 |

2. List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

| Employer | Address | Dates of employment | Gross monthly pay |
|----------|---------|---------------------|-------------------|
| NIA | NIA | NIA | \$ 0 |
| NIA | NIA | NIA | \$ 0 |

3. List your spouse's employment history for the past two years, most recent employer first (Gross monthly pay is before taxes or other deductions.)

| Employer | Address | Dates of employment | Gross monthly pay |
|----------|---------|---------------------|-------------------|
| | | | \$ |
| | | | \$ |
| | | | \$ |

4. How much cash do you and your spouse have? \$ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

| Financial institution | Type of account | Amount you have | Amount your spouse has |
|-----------------------|-----------------|-----------------|------------------------|
| NIA | NIA | \$ 0 | \$ |
| NIA | NIA | \$ 0 | \$ |

| | | | |
|-----|-----|------|----|
| N/A | N/A | \$ 0 | \$ |
|-----|-----|------|----|

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

| Assets owned by you or your spouse | |
|------------------------------------|------|
| Home (Value) | \$ 0 |
| Other real estate (Value) | \$ 0 |
| Motor vehicle #1 (Value) | \$ 0 |
| Make and year: | |
| Model: | |
| Registration #: | |
| Motor vehicle #2 (Value) | |
| Make and year: | |
| Model: | |
| Registration #: | |
| Other assets (Value) | \$ 0 |
| Other assets (Value) | \$ 0 |

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

| Person owing you or your spouse money | Amount owed to you | Amount owed to your spouse |
|---------------------------------------|--------------------|----------------------------|
| N/A | \$ 0 | \$ |
| N/A | \$ 0 | \$ |
| N/A | \$ 0 | \$ |

7. State the persons who rely on you or your spouse for support.

| Name (or, if under 18, initials only) | Relationship | Age |
|---------------------------------------|--------------|-------|
| C.U. | Son | 8 yrs |
| C.U. | Son | 8 yrs |
| | | |

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show that monthly rate.

| | You | Your Spouse |
|---|-------|-------------|
| Rent or home-mortgage payment (<i>including lot rented for mobile home</i>) Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No | \$ 0 | \$ |
| Utilities (<i>electricity, heating fuel, water, sewer, and telephone</i>) | \$ 10 | \$ |
| Home maintenance (<i>repairs and upkeep</i>) | \$ 0 | \$ |
| Food | \$ 40 | \$ |
| Clothing | \$ 10 | \$ |
| Laundry and dry-cleaning | \$ 10 | \$ |
| Medical and dental expenses | \$ 10 | \$ |
| Transportation (<i>not including motor vehicle payments</i>) | \$ 0 | \$ |
| Recreation, entertainment, newspapers, magazines, etc. | 0 | |
| Insurance (<i>not deducted from wages or included in mortgage payments</i>) | N/A | |
| Homeowner's or renter's: | \$ 0 | \$ |
| Life: | \$ 0 | \$ |
| Health: | \$ 0 | \$ |
| Motor Vehicle: | \$ 0 | \$ |
| Other: | \$ 0 | \$ |
| Taxes (<i>not deducted from wages or included in mortgage payments</i>) (specify): | \$ 0 | \$ |
| Installment payments | N/A | |
| Motor Vehicle: | \$ 0 | \$ |
| Credit care (<i>name</i>): | \$ 0 | \$ |
| Department store (<i>name</i>): | \$ 0 | \$ |
| Other: | \$ 0 | \$ |
| Alimony, maintenance, and support paid to others | \$ 0 | \$ |

| | | |
|---|-----------------|----------------|
| Regular expenses for operation of business, profession, or farm (attach detailed statement) | \$ 0 | \$ |
| Other (specify) | \$ 30 | \$ |
| Total monthly expenses: | \$ 11 00 | \$ 0.00 |

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes No If yes, describe on an attached sheet.

10. Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? \$ _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money or services in connection with this case, including the completion of this form? Yes No

If yes, how much? \$ _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the cost of these proceedings.

Currently incarcerated and the district court granted IFP to proceed on appeal.

13. Identify the city and state of your legal residence.

Your daytime phone number: NIA

Your age: NIA Your years of schooling: NIA

NIA

Executed on April 12, 2021

Udoeh

*Emem U. Udoeh, 245042
7600 525th Street
Rush City, MN 55069*

IN THE
SUPREME COURT OF THE UNITED STATES
No. 20-7389

EMEM UFOT UDOH,

Petitioner,

vs.

BECKY DOOLEY, *Warden, Moose Lake,*

Respondent.

APPENDIX

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| Eighth Circuit Judgment..... | 3 – 3 |
| District Court Order..... | 4 – 8 |

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

April 5, 2021

**Scott S. Harris
Clerk of the Court
(202) 479-3011**

**Mr. Emem Ufot Udoth
Prisoner ID #245042
7600 525th Street
Rush City, MN 55069**

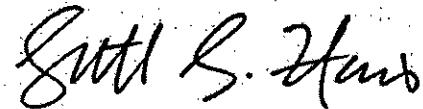
**Re: Emem Ufot Udoth
v. Becky Dooley, Warden
No. 20-7389**

Dear Mr. Udoth:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



Scott S. Harris, Clerk

W A I V E R

SUPREME COURT OF THE UNITED STATES

No. 20-7389

Emem Ufot Udoh

Becky Dooley, Warden

(Petitioner)

V.

(Respondent)

I DO NOT INTEND TO FILE A RESPONSE to the petition for a writ of certiorari unless one is requested by the Court.

Please check the appropriate box:

I am filing this waiver on behalf of all respondents.

I only represent some respondents. I am filing this waiver on behalf of the following respondent(s):

Please check the appropriate box:

I am a member of the Bar of the Supreme Court of the United States. (Filing Instructions: File a signed Waiver in the Supreme Court Electronic Filing System. The system will prompt you to enter your appearance first.)

I am not presently a member of the Bar of this Court. Should a response be requested, the response will be filed by a Bar member. (Filing Instructions: Mail the original signed form to: Supreme Court, Attn: Clerk's Office, 1 First Street, NE, Washington, D.C. 20543).

Signature: Jon Schmidt Digitally signed by Jon Schmidt
Date: 2021.03.15 10:26:02 -05'00'

Date: 3/15/21

(Type or print) Name Jonathan P. Schmidt

Mr. Ms. Mrs. Miss

Firm Hennepin County Attorney's Office

Address C2000 Government Center, 300 S. 6th Street

City & State Minneapolis, Minnesota Zip 55487

Phone 612-543-4588 Email Jon.Schmidt@hennepin.us

A copy of this form must be sent to petitioner's counsel or to petitioner if *pro se*. Please indicate below the name(s) of the recipient(s) of a copy of this form. No additional certificate of service or cover letter is required.

cc: Emem Ufot Udoh, OID # 245042
MCF - Moose Lake
1000 Lake Shore Drive
Moose Lake, MN 55767

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 20-2577

Emem Ufot Udoth

Petitioner - Appellant

v.

Becky Dooley, Warden, Moose Lake

Respondent - Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:16-cv-04174-PAM)

JUDGMENT

Before LOKEN, COLLTON, and BENTON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

October 26, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans



UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Emem Ufot Udoth,

Civ. No. 16-4174 (PAM/HB)

Petitioner,

v.

ORDER

Becky Dooley, Warden, MCF – Moose
Lake Prison,

Respondent.

This matter comes before the Court on Petitioner Emem Ufot Udoth's Renewed Motion to Vacate the Judgment and Order under Rule 60(b)(6).

Udoth was convicted in state court of criminal sexual conduct involving contact with his two minor stepdaughters. State of Minnesota v. Udoth, No. A14-2181, 2016 WL 687328 (Minn. Ct. App. Feb. 22, 2016). Udoth sought federal habeas relief, raising six grounds for relief. This Court denied Udoth's habeas petition on the merits on July 6, 2017. (Docket No. 19.) Udoth then moved under Rule 59 to amend his judgment, which this Court denied because Udoth presented additional argument on a claim he had failed to present to the state courts. (Docket No. 31.) Udoth then requested that this Court reconsider its decision to deny a certificate of appealability. Udoth's request was denied and the Eighth Circuit affirmed. (Docket Nos. 43, 49.)

Approximately two years later, Udoth sought to reopen this proceeding; the Eighth Circuit denied Udoth authorization to file a successive habeas petition. (Docket No. 54.) Udoth then moved in this Court under Rule 60(a) to vacate judgment asserting that victims

had recanted their trial testimony. This Court denied Udoх's request because a state postconviction matter was still ongoing. (Docket No. 58.) Udoх moves anew under Rule 60 to vacate judgment.

When reviewing a purported Rule 60(b) motion following dismissal of a habeas petition, courts are to conduct "a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack under either 28 U.S.C. § 2255 or § 2254." Boyd v. United States, 304 F.3d 813, 814 (8th Cir. 2002). A Rule 60(b) motion constitutes a successive habeas claim if it asserts "a federal basis for relief from a state court's judgment of conviction" or attacks the "federal court's previous resolution of the claim on the merits." Williams v. Kelley, 858 F.3d 464, 470 (8th Cir. 2017) (quotation and emphasis omitted). Conversely, no habeas claim is presented if the Rule 60(b) motion attacks a defect in the previous federal habeas proceedings or a previous ruling precluding a merits determination was in error. Id. (citing Gonzalez v. Crosby, 545 U.S. 524, 532 n.4 (2005)).

Here, Udoх's Rule 60(b) motion attacks this Court's previous resolution of his habeas claim on the merits. Udoх seeks to vacate this Court's decision, arguing that a March 2, 2020, state court decision concludes that Udoх exhausted a particular claim on direct appeal. (Docket No. 70, at 3–4.) But contrary to Udoх's arguments that this Court found his claims to be unexhausted and procedurally barred, this Court decided Ground Four of his habeas petition—the claim he asserts was decided in error—on the merits, finding that the state courts' resolution of the claim was not unreasonable or contrary to federal law. (Docket No. 19, at 8–10.)

Rather than correct an error in the previous judgment, Udoh seeks to litigate his habeas claim, asserting “Respondent perpetrated fraud on the Court and on Petitioner” by excluding exculpatory evidence. (Id. at 23–24.) The evidence Udoh references is “impeachment evidence related to the threats, demands, the pressure, the coaching, the coercions, the benefits, and the promises made to [the two minor victims] to give a trial testimony against [Udoh] in 2014.” Id. at 24.) Udoh then explains a lengthy cause-and-effect chain: withholding this evidence denied Udoh due process, which denied him the right to full and fair access to the courts, which impugns the federal habeas proceeding leading to denial of his habeas petition. (Id.) Thus, Udoh asserts that the previous habeas decision is invalid because “this court did not consider these alleged misrepresentations, mistake, inadvertence, surprise, excusable neglect, fraud, etc., by Respondent when this court denied [Udoh’s] writ of habeas corpus.” (Id.) Habeas petitions, not Rule 60, are the proper vehicle to relitigate or make new claims for relief from a conviction. United States v. Matlock, 107 F. App’x 697, 698 (8th Cir. 2004) (“This court has consistently held that inmates may not bypass section 2244(b)(3)’s requirement for authorization by purporting to invoke some other procedure.”).

Moreover, Udoh fails to demonstrate “extraordinary circumstances” that would justify relief from judgment under Rule 60(b)(6). Gonzalez, 545 U.S. at 535. While Udoh himself does not describe in detail the facts that constitute the fraud upon which he relies, another court in this District observed in one of Udoh’s cases stemming from his state court conviction:

In April 2018, Emem sought post-conviction relief in state court on various grounds, including two affidavits allegedly written by K.K.W. and K.C.W. In those affidavits, K.K.W. and K.C.W. recanted their prior testimony and swore that Emem had not sexually abused them. The affidavits were filed in Hennepin County District Court, and an evidentiary hearing was held to determine whether Emem was entitled to post-conviction relief based on the victims' recantations. On direct examination by Emem (appearing pro se), both girls testified that Emem had not sexually abused them and that they had been coerced into testifying against Emem at his 2014 trial. The court found that the girls' testimony was not credible, that the Udohs had orchestrated the girls' recantations, and that Emem was not entitled to post-conviction relief.

Udoh v. Minn. Dep't of Human Servs., No. 16-cv-3119, 2020 WL 2468743, at *1 (D. Minn. May 13, 2020) (Schiltz, J.) (citations omitted). The court further explained:

The [state] court's decision was based in part on a series of recorded jail calls between the Udohs. In one call, Emem spelled the word "recantation" for Tonya. In others, the Udohs quoted sections of what would ultimately become the victims' affidavits back and forth to each other, editing as they went. And in yet another, the Udohs discussed questions that their daughters were likely to face at the upcoming evidentiary hearing along with proposed answers.

Id. at *1 n.3. The serious doubts as to the veracity of Udoh's claims expressed by these courts undercut any extraordinary circumstances that could underpin Udoh's Rule 60 motion.

Because Udoh's Rule 60 motion is a second or successive habeas claim, this Court must either dismiss it or transfer it to the Eighth Circuit Court of Appeals. 28 U.S.C. § 2244(b)(3); Boyd, 304 F.3d at 814. Because Udoh has already brought a version of the present claim in a prior habeas petition, this Court will dismiss it. 28 U.S.C. § 2244(b)(1). Udoh has demonstrated he understands that he must seek approval from the Eighth Circuit prior to filing additional habeas claims. (Docket No. 54 (January 27, 2020 Eighth Circuit



Order denying authorization for file a successive habeas petition).) Accordingly, it is appropriate to dismiss Udoh's filing for noncompliance with § 2244(b)(3).

Finally, this Court concludes no certificate of appealability shall issue. See United States v. Lambros, 404 F.3d 1034, 1036 (8th Cir. 2005) (per curiam). Reasonable jurists cannot differ as to whether Udoh has received authorization from the Eighth Circuit to file a successive habeas claim. See Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997) (noting standard for Certificate of Appealability).

Accordingly, **IT IS HEREBY ORDERED** that:

1. Petitioner Emem Ufot Udoh's Renewed Motion to Vacate the Judgment and Order under Rule 60(b)(6) (Docket No. 70) is **DENIED**;
2. Petitioner Emem Ufot Udoh's Motion and Application to Proceed IFP in this Court and for Any Subsequent Appeal (Docket No. 69) is **DENIED AS MOOT**; and
3. A Certificate of Appealability is **DENIED**.

Dated: July 14, 2020

s/Paul A. Magnuson

Paul A. Magnuson
United States District Court Judge