20-7564

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

NO. __-____

EMEM UFOT UDOH,

Petitioner,

vs.

UNITED STATES DISTRICT COURT, *District of Minnesota,*

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW THE USCA8 CASE NO. 20-2952 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

On April 10, 2018, Appellant initiated a Minnesota State Court post-conviction action raising several issues or claims of constitutional violations and seeking reliefs. Amongst the issues or claims raised for post-conviction relief, Appellant raised the Ground that - Appellant 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. 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 and were entered as evidence into the *Administrative Record*. 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 also noted 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 Petitioner between February 2013 through August 2014, and a trial testimony of sexual abuse against Defendant in August 2014. The first question presented for review on grounds consistent with Petitioner's actual innocence is:

1. Whether Honorable District Judge Paul A. Magnuson Failed To Consider Petitioner's Habeas Claim Titled Or Styled As:

   > 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.**

In Petitioner's Original Habeas Corpus Petition Because No Other Adequate Remedy For Habeas Corpus Relief On That Claim In Light of *Kerr. v. United States District Court*, 426 U.S. 394, 400 (1976); And *Hollingsworth v. Perry*, 558 U.S. 183, 190 – 91 (2010)?

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INTRODUCTION

PLEASE TAKE NOTICE that the above named Petitioner, Emem Ufot Udoh, respectfully petition for a Writ of Certiorari to review the USCA8 case No. 20-2952 in the United States Eighth Circuit Court of Appeals pursuant to 28 U.S.C. §1254(1).

STATEMENT OF JURISDICTION AND VENUE

Petitioner filed a writ of mandamus at the United States Court of Appeals For The Eighth Circuit. Petitioner, respectfully *brought* forth his Petition for a Writ of Mandamus under **Rule 21** of Federal Rules of Appellate Procedure for an Order directing Honorable District Judge Paul A. Magnuson to consider Petitioner's habeas claim titled or styled as:

> **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.**

in his original habeas corpus petition, see ECF No. 1 at 12, Docket No. 1 at 12, see also ECF No. 72-3 at 12, Docket No. 72-3 at 12 because no other adequate remedy for habeas corpus relief on that claim under Federal law exist. The decisions or orders of the court are enclosed in the district court record, see 2017 U.S. Dist. LEXIS 110684 * 1 - *4 (D. Minn. July 17, 2017).

The Eighth Circuit Court of Appeal denied Petitioner's Writ of Mandamus on September 28, 2020. The Eighth Circuit Court of Appeal also denied Petitioner's *timely* petition for rehearing and rehearing en banc on November 13, 2020. See ***Appendix*** and USCA8 No. 20-2952. On March 19, 2020, this Court extended the deadline to file petitions for writ of certiorari in all cases due on or after the date of that March 19, 2020 order to 150 days from the date of the lower court judgment due to the ongoing public health concerns relating to COVID-19. See (ORDER LIST): 589 U.S. ____ (March 19, 2020). Therefore, Petitioner's petition for writ of certiorari is due by April 13, 2021 under this Court's March 19, 2020 Order. 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."

RELIEF SOUGHT

Petitioner seeks an Order directing Honorable District Judge Paul A. Magnuson to consider Petitioner's habeas claim titled or styled as:

> **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.**

in his original habeas corpus petition because no other adequate remedy exist for habeas corpus relief on that claim. See Docket No. 1 at 12 of 24 (evidence showing that Petitioner raised this Ground Four claim in his original petition), Docket No. 2 at 1 – 44 (evidence showing that Petitioner argued this Ground Four claim in his Memorandum of law), Docket No. 9 at 1 – 2 (evidence showing that Attorney John Marti argued that Petitioner raised this Ground Four claim – Admission of Corner House Evidence - in his Ongoing Habeas Corpus

Proceeding), Docket No. 14 at 1 – 2 (evidence showing that Respondent answered this Ground Four claim in Respondent's Answer to the Petition), Docket No. 15 (evidence showing that Respondent argued this Ground Four claim in Respondent's Memorandum in Opposition of the Grant of Habeas Relief).

THE ISSUES PRESENTED FOR MANDAMUS RELIEF

Issue One: Honorable District Judge Paul A. Magnuson Failed To Consider Petitioner's Habeas Claim Titled Or Styled As:

> 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.**

In Petitioner's Original Habeas Corpus Petition Because No Other Adequate Remedy For Habeas Corpus Relief On That Claim?

Apposite Authority

Kerr. v. United States District Court, 426 U.S. 394, 400 (1976)
Hollingsworth v. Perry, 558 U.S. 183, 190 – 91 (2010)

REASONS FOR GRANTING THE PETITION

1. Under Rule 21 of Federal Rules of Appellate Procedure, the failure to grant the Mandamus **Reliefs** requested will "result in a fundamental miscarriage of justice." See *Udoh v. Vicki Janssen*, Warden - Rush City, USCA8 Case No. 20-2391 (8TH Cir. 2020) (Petitioner has filed an application to the Eighth Circuit Court seeking authorization to file a second or successive habeas corpus petition based on evidence that demonstrate and establish Petitioner's actual innocence).
2. **Grounds Four** set forth in the §2254 petition is a substantial claim and a closed question that could result in a vacatur, new trial or reversal of these wrongful convictions and unlawful sentences. This demonstrates a likelihood of success that the §2254 petition will prevail on the merit with regards to this claim. This is an extraordinary circumstance and exceptional reason to grant the **Reliefs** requested in this petition. During Petitioner's trial, the State introduced this prejudicial evidence - **Admission of CornerHouse Evidence At Appellant's 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?

3. A Writ of Mandamus (we command) is issued by this federal court to compel performance of an act. Fed. R. App. P. 21. This writ may be issued to an individual, corporation or a public official if the act is to compel the performance of a ministerial duty in which the official must perform, where the right to the writ is clear and indisputable. *Id.* This court has the power to issue all writs necessary to ensure substantial justice. *Id.* This federal court has the power to issue such writ only when appeals cannot lie under the circumstances of this case (28 U.S.C. §1291 and §1292), and the right to the writ is *appropriate* or is *clear and indisputable*. *Kerr. v. United States District Court*, 426 U.S. 394, 400 (1976) (issuance of writ is an "extraordinary remedy"); *Hollingsworth v. Perry*, 558 U.S. 183, 190 – 91 (2010) (defendants right to petition for writ of mandamus to prevent district court rules was clear and indisputable).

4. **Mandamus** Relief should issue because 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.

5. **Mandamus** Relief should issue because 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 [ ] 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).

6. **Mandamus** Relief should issue because the lower court assessment on July 14, 2020 failed to liberally construed Petitioner's Habeas **Petition** (ECF No. 1, Docket No. 1 at 1 – 24) and **Exhibits** (A - I) attached, see Docket No. 1-1 through 1-10: ECF No. 1-1: Exhibit A (71 Pages), ECF No. 1-2: Exhibit B (30 Pages), ECF No. 1-3: Exhibit C (88 Pages), ECF No. 1-4 Through 1-8: Restricted, ECF No. 1-9: Exhibit I (10 Pages), and ECF No. 1-10: Exhibit J (Civil Coversheet), **expansion** of the record and for **evidentiary hearing** under the reasoning of *Houser v. Dretke*, 395 F.3d 560, 562 (5th Cir. 2004) that courts look at the application for relief, 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 relief. 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).

7. **Mandamus** Relief should issue because in the wake of *Slack* and having found debatable procedural bar, see section III arguments, 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 relief 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).

8. **Mandamus** Relief should issue because undisputed facts shows that, in this case, Petitioner's complaint or habeas petition stated this Ground 4 claim. See 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). See Docket No. 1-1, ECF No. 1-1: Exhibit A (71 Pages) for supporting factual prove. 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.

9. **Mandamus** Relief 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 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 Mandamus.

10. 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).

11. 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 Docket No. 1-1, ECF No. 1-1: Exhibit A at Pages. 60 – 71 **(PETITIONER HAS EXHAUSTED STATE REMEDIES AND IS NOT PROCEDURALLY DEFAULTED ON THE GROUNDS PRESENTED FOR HABEAS RELIEF).**

12. In this case, defense counsel made an objection at trial on the prosecutor's use of the CornerHouse evidence and/or to the admission of the unduly prejudicial CornerHouse evidence at trial against Defendant. The fact in Appellant's case is materially and factually different from those in *Nunn* and *Zulu's* case. Appellant 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. Appellant second note that, the trial record, and the evidentiary hearing testimony from K.K.W. and

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

13. Appellant had a clearly established due process right to a fair trial. See *In re Welfare of D.D.R*, 713 N.W2d 891 (Minn. 2006) (held that the cumulative effect of errors denied defendant's right to a fair trial); *Estelle v. McGuire*, 502 U.S. 62, 67-70 (1991)(recognized 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)(whether prosecutor's use of evidence or statements violated the due process); *Estelle v. Williams*, 425 U.S. 501, 503 (1976)(recognized that the right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment); *Chamber v. Mississippi*, 410 U.S. 284 (1973)(evidentiary ruling that rises to a due process violation). The evidentiary hearing record shows that the CornerHouse recordings and statements from the recanting witnesses (K.K.W. and K.C.W.) were obtained without *Consent, Miranda, Privacy Notice, Tennessen Warnings.* Appellant argues that, even if a challenge to any evidence obtained

without *Consent*, *Miranda*, *Privacy Notice*, *Tennessen Warnings* are personal standing rights, such as K.K.W. and K.C.W.'s standing or rights under the law, but that argument does not mitigate the prejudicial effect of Defendant's trial and appellate counsel's failure to properly object and to raise these issues because the unduly prejudicial interrogatory recordings obtained without *Consent*, *Miranda*, *Privacy Notice*, *Tennessen Warnings* and the requirements set forth in *Tome v. United States*, 513 U.S. 150 (1995) should have been suppressed or excluded at Appellant's trial. This is because there is a reasonable probability that, but for trial and appellate counsel unprofessional errors, the result of the proceeding would have been different.

14. Appellant points this court to its cases laws that already reasoned or adopted the bright line *pre-motive rule* for Rule 801(d)(1)(B) under the reasoning applied in *Weitzel v. State*, 868 N.W. 2d 276, 279 (Minn. 2015) where this court recognized that "[i]n the absence of binding precedent within Minnesota, we may look to federal law for guidance," because the failure to adopt *Tome's* reasoning implicates Appellant's constitutional right to a fair trial and the admission of said evidence becomes unduly prejudicial to Defendant when used at trial. See *State v. Minnesota*, 818 F.2d 664, 666 (8th Cir. 1987); *State v. Minor*, 1990 WL 204280 (Minn. App. 1990); *State v. Arndt*, 285 N.W.2d 478, 480 (Minn. 1979). Appellant's trial counsel's failure to properly object and appellate counsel's failure to raise trial counsel ineffectiveness claim on this issue, was objectively unreasonable under *Tome v. United States*, which held that Federal Rule 801(d)(1)(b) embodies the common-law temporal requirement to include only those prior statements made before the charged fabrication, ..., conditions that were not established in this case. At trial, the defense called into question K.K.W. and K.C.W. credibility as a witness. During cross-examination of K.K.W. and K.C.W., the defense counsel identified several inconsistences between K.K.W. and K.C.W. trial testimony, and certain statements they made in a February 25, 2013 interview with GR and BK at CornerHouse. Defense counsel also alleged that K.K.W. and K.C.W. had fabricated those abuse incidents. Appellant argues that Rule 801(d)(1)(B) would only allow admission of prior

consistent statements made before a motive to fabricate arises, and that K.K.W. and K.C.W. statements at CornerHouse to GR and BK were made after a motive to fabricate the abuse arose.

15. The *Tome's* analysis and rule interpretation is directly on point in this case and this court should agree with it. At trial, the State used Rule 801(d)(1)(B) as its only foundation for the admission of the CornerHouse evidence. But K.K.W. and K.C.W. interview with GR and BK at CornerHouse occurred after the alleged motive for K.K.W. and K.C.W to fabricate the abuse arose. Therefore, K.K.W. and K.C.W. "reasonably consistent" statements were not made prior to the time the alleged motive to fabricate the abuse arose as required by the Rule 801(d)(1)(B). See *United States v. Quinto*, 582 F. 2d 224 (2nd Cir. 1978); *United States v. Frederick*, 78 F.3d 1370 (9th Cir. 1996); *United States v. Beaulieu*, 194 F. 3d 918 (8th Cir. 1999); *United States v. Davis*, 726 F. 3d 434 (3rd Cir. 2013).

16. Although, Minnesota Rule 801(d)(1)(B) does not explicitly reads or states a *pre-motive requirement* on prior consistent statement, but this court could reasonably conclude from the Minnesota Supreme and Appellate Court holding in *State v. Minnesota*, 818 F.2d 664, 666 (8th Cir. 1987); *State v. Minor*, 1990 WL 204280 (Minn. App. 1990); *State v. Arndt*, 285 N.W.2d 478, 480 (Minn. 1979) and its progeny, that Minnesota Rule 801(d)(1)(B) implicitly and explicitly incorporated *Tome's pre-motive rule* because the admitted prior consistent statement under Rule 801(d)(1)(B) in both *Nunn* and *Zulu* cases were prior consistent statement made before the murder and abuse incidents happened. In the alternative, Appellant argues that a modification of law is reasonably required under *Tome v. United States*, which is the landmark Supreme Court decision on this subject – admission of evidence under Rule 801(d)(1)(B). Appellant's good faith reliance and "arguments for an extension, modification, or reversal of existing law" under *Tome v. United States* is supported by other state jurisdictions which have adopted and applied *Tome's* reasoning. See *State v. Bujan*, 142 P.3d 581, 587 (Utah Ct. App. 2006)(we are persuaded that the *Tome* approach is the better view and therefore adopt the *pre-motive requirement* that appears to be the prevailing position among state jurisdictions as well as the requirement under the federal rules of

evidence); *Bouye v. State*, 699 N.E.2d 620 (Ind. Sup. Court. 1998) (although we are not bound by decisions interpreting the federal counterpart, we find this *Tome's* reasoning persuasive); *Thomas v. State*, 429 Md 85 102-03, 55 A.3d 10, 20 (Md. 2012) (collecting federal and state cases applying *Tome's* reasoning). Appellant also points this Court to the vast majority of other States in the Eighth Circuit jurisdiction such as Arkansas-(Rule 801(d)(1)(ii)), Iowa-(Rule 5.801(d)(1)(b)), Nebraska-(27-801 Rule 801(4)(a)(ii)), North-Dakota-(Rule 801(d)(1)(b)(i, ii)), South-Dakota-(Rule 19-19 801(d)(1)(b)), and Missouri which have adopted plainly and explicitly the common-law rule and are consistent with Federal rule on admission of prior consistent statements under Rule 801(d)(1)(B).

17. The *Tome v. United States* court decision also found that, the admission of this evidence under Rule 801(d)(1)(b) to be *prejudicial* against Defendant Tome. Appellant argument is supported by the reasoning applied in *United States v. Quinto* where the court held such erroneous admission under Rule 801(d)(1)(B) to severely prejudiced Defendant's right to a trial warranting reversal. The court in *United States v. Frederick* held the same. The Eighth Circuit court in *United States v. Beaulieu* also held the same. The court in *United States v. Davis* upheld *Tome's pre-motive rule*. The court in *United States v. Al-Moayad*, 545 F.3d 139 (2nd Cir. 2008) found a reversible error in such erroneous admission. Counsel's unprofessional errors in failing to properly object at trial and appellate counsel unprofessional error in failing to raise trial counsel ineffectiveness claim on direct appeal as it relates to *Tome's* reasoning *prejudiced* Appellant because the use of the CornerHouse videos factored into the jury' decision to convict Appellant, even where the State's case regarding penetration was very weak and far from overwhelming. The State conceded at trial that the CornerHouse evidence was their "best evidence" as compared to the recanting witnesses' in-court trial testimony. Counsel's unprofessional errors was objectively unreasonable and unduly prejudicial to Appellant under the reasoning applied in *State v. Farrah*, 735 N.W.2d 336, 344 - 45 (Minn. 2007) that "when a witness' prior statement contains assertions about events that have not been described by the witness in trial testimony, those assertions are

not helpful in supporting the credibility of the witness and are not admissible under Rule 801(d)(1)(B) Comm. Cmt. – 1989. "What seems important is that the exception should not be the means to prove new [events, e.g. essential element of penetration-and-intrusion on Count-1 conviction] not covered in the testimony of the [declarant or recanting witness]." *Christopher B. Mueller & Laird C. Kirkpatrick*, Federal Evidence 405 (2d ed. 1994). See also *E. Cleary*, McCormick on Evidence, §49, p. 105 (2d ed. 1972) and *People v. McClean*, 69 N.Y.2d 426, 430 (1987).

18. Appellant's right to a fair trial was violated from the unduly prejudicial effect of a jury watching-and-rewatching CornerHouse videotapes and receiving said videotapes recordings and testimony from CornerHouse interviewers (GR and BK) in *substantive form* to prove the truth of the matter not covered by the testimony of the recanting witnesses where most courts that have adopted *Tome's* pre-motive rule, have held it to apply when the prior consistent statements are admitted as substantive evidence under the reasoning applied by the Utah Supreme Court in *State v. Bujan*, No. 20060883, decided on July 18, 2008, in affirming the opinion of the court of appeals in 142 P.3d 581 that even if the evidence should have been admitted for rehabilitative purposes, that the trial court erred in admitting the evidence *substantively*. *Id* at ¶9. This is because the CornerHouse evidence was admitted *substantively* under rule 801(d)(1)(B) and no limiting instructions was provided to the jury that the CornerHouse evidence was only admitted for rehabilitative purposes. *Id* at ¶9. As such, the CornerHouse evidence was inappropriate hearsay and its admission was improper. *Id* at ¶9. The Utah Supreme Court in *State v. Bujan* also concluded that said CornerHouse evidence would likewise be inadmissible under the rule of completeness because it went beyond the information necessary to rebut the charges of recent fabrication, *Id* at ¶10, because GR and BK testified to their entire conversation with K.K.W. and K.C.W., recounting chronologically everything they could remember of what K.K.W. and K.C.W. told them. *Id* at ¶10. In this case, GR and BK were not asked to complete or rebut any particular statements from K.K.W. and K.C.W. prior testimony. *Id* at ¶10. Therefore, CornerHouse evidence as well as GR and BK

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.

21. 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 relief on admission of CornerHouse evidence conflicts with the decision of *Slack*; *Miller-El*; *Williams v. Taylor*, 529 U.S. 362 (2000)(granting relief on claims); *Valerio v. Crawford*, 306 F.3d 742, 748-793(9th Cir. 2002) (granting relief on the following claims – admission of prejudicial evidence and prosecutorial misconduct); *Lambright v. Stewart*, 220 F.3d 1022, 1025 – 1031(9th Cir, 2000)(granting relief on the admission of prejudicial evidence claim); *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.

22. 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*, *Id* 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)(relief 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).

23. **Mandamus** Relief should issue because 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 relief 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").

24. **Mandamus** Relief should issue because 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.

25. 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 section I and IV of this petition.

26. 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 [Mandamus] 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).

27. 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).

28. "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 MANDAMUS, *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.

29. **Mandamus** Relief should issue because 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).

30. 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.

31. 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.

32. 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*, *Id* 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.

33. **Mandamus** Relief should issue because 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 **Exhibits** 1, 2, and 3 **filed** in the district court record on February 5, 2020, and **entered** in the district court record on February 6, 2020. *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).

34. 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 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.

35. 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 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.

36. **Mandamus** Relief should issue because all matters raised in this case were not effectively and adequately reviewed in Petitioner's 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: (a) The United States District Court and Habeas Court failed to apply these federal legal standards requiring: *Denovo judicial review; Harmless-error judicial review; 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); and *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) on this Ground Four Claim.

37. 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). If the federal court had applied these legal standards to the claims presented for relief, there is a reasonable probability that the outcome of the habeas review would have changed; and (4) the 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).

38. 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 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.

39. Furthermore, the 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.

40. **Mandamus** Relief should issue because there is absolutely no adequate remedy at law to address this Ground Four claim" raised in Petitioner's habeas corpus petition. This Ground Four claim is a "closed question" that also involve Petitioner's substantive and procedural due process liberty interest that is protected by the Due Process Clause

41. The Habeas Corpus §2254 Statute, under its terms, conferred on Petitioner a legal right to redress of his Ground Four Claim to adequately satisfy substantive and procedural due process under the Fifth and Fourteenth Amendments. Thus, Petitioner had a right to the redress and consideration he demanded from the United States District Court Judge. *Marbury v. Madison*, (1 Cranch) 5 U.S. 137, 2 L. Ed 60 (1803). The Fifth and Fourteenth Amendments prohibit the government, such as the United States District Court Judge, from depriving an inmate of life, liberty or property without due process of law. U.S. CONST. Amends V, XIV. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Wilkinson v. Austin*, 545 U.S. 209, 220 – 24 (2005) (due process clause prohibit government form infringing on prisoner's liberty interest or legal rights without due process of law). **Mandamus** Relief should issue because Petitioner protected liberty interest or legal right was created by the Due Process Clause because Therefore, Habeas Corpus §2254 Statute is a federal-created liberty interest or legal right to federal relief. Thus, Petitioner had a right to the redress and consideration he demanded from the United States District Court Judge on Ground Four claim.

42. **Mandamus** Relief should issue because 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). This right of access to courts imposes an affirmative duty on the United States District Court Judge to "meaningfully" address and consider all the inmate claims that are exhausted and not procedurally barred. Thus under *Bounds v. Smith*, Petitioner had a right to the redress and consideration he demanded from the United States District Court Judge on Ground Four claim. As such, the United States District Court Judge actions unreasonably interferes 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, *Id* 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. *Id.* Petitioner had a legal right, and this right was obviously violated by the United States District Court Judge refusal to address and consider his Ground Four claim. *Id.*

Thus, prohibiting Petitioner from *meaningfully*, *adequately* and *effectively* appealing these wrongful convictions and a remedy under the United States laws is due. *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*).

43. **Mandamus** Relief should issue because the due process requires that Federal proceedings be *fundamentally fair* and *adequate* to vindicate Petitioner's federal-created liberty interest. *Osborne,* 667 U.S. 52, 68 (2009)(held Petitioner does have a liberty interest in pursuing the post-conviction relief granted by the [statute]). This is a federal created substantive right or liberty interest in post-conviction relief. *Id* at 68. The *Osborne* court found such liberty interest in state statutes providing post-conviction relief procedures. *Id* at 2319. See also *Whisman v. Rinehart*, 119 F.3d 1303, 1322 (8th Cir. 1997) (if ... a state statute gives specific directives to the decision maker that if the statute's substantive predicates are present ... a liberty interest protected by the Fourteenth Amendment is created).

44. The issuance of **Mandamus** Relief in this case is necessary because the Ground Four claim presented or raised in Petitioner's original petition would **otherwise escape review entirely** under the reasoning of *Sampson v. United States*, 724 F.3d 150, 161 (1st Cir. 2013)(writ of advisory mandamus granted where claims or issues would otherwise escape review entirely.). The United States District Court Judge actions in refusing to consider and address this Ground Four claim, for which there is no other means of relief **clearly contravenes** to *United States v. Higdon*, 638 F.3d 233, 245 (3rd Cir. 2011) (writ granted when improper jury charge error constituted clear and indisputable error for which there was no other means of relief). This is a prejudicial structural error and an "error of the most fundamental character" that cannot be remedied without granting a writ "in aid of jurisdiction."

45. This court has the power to issue all writs necessary to ensure substantial justice as law and justice require. *Id.* This federal court has the power to issue such mandamus writ for relief for the resolution of Petitioner's habeas corpus petition claim under Rule 21 of Federal Rules of Appellate Procedure because Petitioner suffers serious irreparable harm by the United States District Court Judge actions in refusing to consider and

address this Ground Four claim under the reasoning of *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 37 (2nd Cir. 2014) (writ granted because Petitioner would suffer serious harm by exposure of confidential information); *In re Lott*, 424 F.3d 446, 450 (6th Cir. 2005)(writ granted directing district court to vacate order granting discovery request for privileged communication because no other adequate remedy on final appeal). There is absolutely no other remedy and absolutely no threat or likelihood of harm to Respondents with the Reliefs requested.

46. For the foregoing reasons above, Petitioner prays that this court issue a **Mandamus** for the resolution of Petitioner's Ground Four claim raised in his original habeas 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. See *Shuti v. Lynch*, 828 F.3d 440, 450 – 51 (6th Cir. 2016) concluding that "[Petitioner] is set to begin "life sentence of exile from what has [been his] home" ... deprived of his "established means of livelihood" and separated from "his family of American citizens." See *Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J. *dissenting*). Furthermore, **Judicial Economy** is of the public interest to grant the **Reliefs** requested in this motion.

47. The undersigned declares under penalty of perjury that the information contained therein is true and correct. 28 U.S.C §1746, 18 U.S.C §1621.

CONCLUSION

48. Wherefore, Appellant pray the court grants the writ and issue the relief sought on **Ground Four** claim.

Dated: March 8, 2021

Respectfully Submitted,

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7600 525th Street
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IN THE
SUPREME COURT OF THE UNITED STATES
No. ___ - _____

EMEM UFOT UDOH,

Petitioner,

vs.

UNITED STATES DISTRICT COURT, *District of Minnesota*,

Respondent.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 33.2(b), Petitioners 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 25 pages.

Dated: March 8, 2021

Respectfully Submitted,

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