

SUPREME COURT OF THE UNITED STATES

20-8090

No. ~~A20-0633~~ → ~~A19-1129~~ → A20-0633

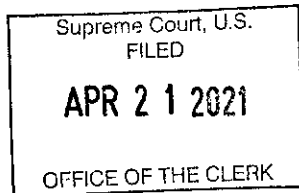
OFFICE OF
APPELLATE COURTS

IN THE

MAR 16 2021

Supreme Court of Minnesota

FILED



EMEM UFOT UDOH,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

On Petition for a Writ of Review **For Certiorari**

To The MINNESOTA COURT OF APPEALS IN ~~A19-1129~~ → A20-0633

PETITION FOR A WRIT OF REVIEW **FOR CERTIORARI**

KEITH ELLISON
State Attorney General
1800 Bremer Tower
445 Minnesota Street
St Paul, MN 55101

EMEM U UDOH
Pro Se Litigant
7600 525TH Street
Rush City, MN 55069

MICHAEL O. FREEMAN
Hennepin County Attorney

JORDAN W. RUDE
Assistant Hennepin County Attorney
C-2000 Government Center
Minneapolis, MN 55487

ATTORNEYS FOR RESPONDENT

PETITIONER (PRO SE)

SUPREME COURT OF THE UNITED STATES:
TO: SUPREME COURT OF MINNESOTA:

Petitioner, Emem Ufot Udoh, respectfully submits this Petition for Review.

QUESTIONS PRESENTED

1. *Rulings Below:* The District Court denied relief and the Court of Appeals affirmed. The federal constitutional claim presented on grounds consistent with Petitioner's actual innocence is:

Issue One: Whether Petitioner Is Entitled To An Acquittal Or New Trial On The Newly Discovered Exonerating Evidence Showing Actual Innocence Based On Recantations Of Key Material Witnesses' Testimony In Light Of The Evidence Received At The Held July 27, 2018, July 30, 2018 Through August 01, 2018 Evidentiary Hearing?

Apposite Authority

Larrison v. United States, 24 F. 2d 82 (7th Cir. 1928)
Rainer v. State, 566 N.W.2d 692 (Minn. 1997)
Herrera v. Collins, 506 U.S. 390 (1993)?

2. *Rulings Below:* The District Court denied relief and the Court of Appeals affirmed. The federal constitutional claim presented is:

Issue Two: Whether Petitioner Received Minn. Const. Art I, §6, §7, §10 And Sixth Amendment Ineffective Assistance Of Trial Counsel Under *State v. Nicks*, 831 N.W.2d 493 (Minn. 2013) And *Strickland v. Washington* For Failure To (A) Interview And Investigate To Discover The New Exonerating Evidence Showing Actual Innocence Based On Recantations Of Key Material Witnesses' Testimony In Ground One, (B) Advise Petitioner His Due Process Right To Consular Assurances, (C) Object To Credibility Vouching By Ms. White, And (D) Object To Inadmissible Interrogatory Recordings And Statements Obtained Without Consent, *Miranda* And *Tennessen* Warnings?

Apposite Authority

State v. Nicks, 831 N.W.2d 493, 503 (Minn. 2013)
Strickland v. Washington, 466 U.S. 668, 690 (1984)

3. *Rulings Below:* The District Court denied relief and the Court of Appeals affirmed. The federal constitutional claim presented is:

Issue Three: Whether Petitioner Received Minn. Const. Art I, §6, §7, §10 And Sixth Amendment Ineffective Assistance Of Appellate Counsel Under *State v. Nicks*, 831 N.W.2d 493 (Minn. 2013) And *Strickland v. Washington* For Failure To Effectively And Adequately Raise Ineffective Assistance Of Trial Counsel Claim During Direct Appeal For Trial Attorney Failure To (A) Interview And Investigate To Discover The New Exonerating Evidence Showing Actual Innocence Based On Recantations Of Key Material Witnesses' Testimony In Ground One, (B)

Advise Petitioner His Due Process Right To Consular Assistances, (C) Object To Credibility Vouching By Ms. White, And (D) Object To Inadmissible Interrogatory Recordings And Statements Obtained Without Consent, *Miranda* And *Tennessen* Warnings?

Apposite Authority

State v. Nicks, 831 N.W.2d 493, 503 (Minn. 2013)

Strickland v. Washington, 466 U.S. 668, 690 (1984)

4. *Rulings Below*: The District Court denied relief and the Court of Appeals affirmed. The federal constitutional claim presented on grounds consistent with Petitioner's innocence is:

Issue Four: Whether The Government And Ms. White Violated Petitioner's Clearly Established Minn. Const. Art I, §6, §7, §10 And Constitutional Due Process Right Of The Fifth And Fourteenth Amendment Under *Brady v. Maryland* And Its Progeny In Light Of The Evidence Received At The Held July 27, 2018, July 30, 2018 Through August 01, 2018 Evidentiary Hearing Which Materially Impacted The Fairness Of Petitioner's Trial?

Apposite Authority

Brady v. Maryland, 373 U.S. 83 (1963)

State v. Zeimet, 310 N.W.2d 552 (Minn. 1981)

State v. Hall, 315 N.W.2d 223 (Minn. 1982)

State v. Schwantes, 314 N.W.2d 243 (Minn. 1982)

State v. Hunt, 615 N.W.2d 294 (Minn. 2000)

Gorman v. State, 619 N.W.2d 802 (Minn. Ct. App. 2000)

State v. Miramontes, 2008 WL 2572818 (Minn. Ct. App. 2008)

5. *Rulings Below*: The District Court denied relief and the Court of Appeals affirmed. The federal constitutional claim presented on grounds consistent with Petitioner's innocence is:

Issue Five: Whether The Government And Ms. White Violated Petitioner's Clearly Established Minn. Const. Art I, §6, §7, §10 And Constitutional Due Process Right Of The Fifth And Fourteenth Amendment Under *Mooney V. Holohan*, 294 U.S. 103, 112 (1935); *Pyle V. Kansas*, 317 U.S. 213 (1942); *Napue V. Illinois*, 360 U.S. 264, 269 (1959); *Giglio V. United States*, 405 U.S. 150, 152 – 55 (1972) And Their Progeny In Light Of The Evidence Received At The Held July 27, 2018, July 30, 2018 Through August 01, 2018 Evidentiary Hearing That Seriously Undermines The Fairness Of Petitioner's Trial?

Apposite Authority

Mooney v. Holohan, 294 U.S. 103 (1935)

Pyle v. Kansas, 317 U.S. 213 (1942)

Napue v. Illinois, 360 U.S. 264 (1959)

Giglio v. United States, 405 U.S. 150 (1972)

6. *Rulings Below*: The District Court denied relief and the Court of Appeals affirmed. The federal constitutional claim presented is:

Issue Six. Whether Ms. White's Credibility Vouching Of K.K.W. And K.C.W. Testimony Violated Petitioner's Clearly Established Minn. Const. Art I, §6, §7, §10, Fifth And Fourteenth Amendment Constitutional Rights?

Apposite Authority

State v. Reardon, 245 Minn. 509 73 N.W.2d 192 (1955)

State v. Mayhorn, 720 N.W.2d 776 (2006)

State v. Ramey, 721 N.W.2d 294 300 (Minn. 2006)

OPINIONS BELOW

The opinion of the Minnesota Court of Appeals decision filed on February 01, 2021 and is unpublished and appears in the Appellate Court record to the Petition for Review.

JURISDICTION

The Supreme Court of Minnesota has appellate jurisdiction in all cases. This Court's jurisdiction is invoked under Minn. R. Civ. App. Pro. 117, Minn. Const. Art VI, §2 and in light of the federal constitutional and due process grounds consistent with Petitioner's innocence in the Appellate Court record to the Petition for Review.

LIST OF PARTIES

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

PROCEDURAL HISTORY

Appellant Adopts the "Procedural Posture And [Findings] Of Facts" described in the District Court Orders dated June 15, 2018, February 5, 2019 and March 02, 2020 for brevity purposes.

STATEMENT OF THE CASE AND FACTS

On April 10, 2018, Appellant initiated this State post-conviction action raising several issues or claims of constitutional violations and seeking reliefs. Amongst the issues or claims

raised for post-conviction relief, 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 as described in Appellant's first post-conviction petition.

I. First¹ Evidentiary Hearing In 2018 Was Held And Appellant Discovered Newly Discovered Evidence For Ineffective Assistance of Trial And Appellate Counsel, Prosecutorial Misconducts, *Brady/Discovery* Violation, *Giglio* Violation, And *Tome v. United States*, 513 US 150 (1995) Standards For Admission Of Evidence Under Rule 801(d)(1)(B)

See (Vol. I; Vol. II; Vol III; and Vol. IV) for brevity purposes.

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

See (Vol II, Tr. 158 - 221) and (Vol. II, Tr. 232 – 327) for brevity purposes.

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

See (Tr. 159 – 348). The recantation affidavits from K.K.W and K.C.W were re-signed by K.K.W and K.C.W. at the evidentiary hearing. Both the re-signed signatures from K.K.W and K.C.W matched the March 2018 affidavits. The recantation affidavits from K.K.W and K.C.W were entered as evidence into the evidentiary hearing record without an objection (Tr. 166 – 167; Tr. 235 – 237) as Exhibits 1 and 2 in (Vol. II) transcripts. The recantation affidavits and recantation testimony are *exculpatory facts* clearly showing that no incident of sexual abuse happened between April 2012 through February 2013 in Defendant's home or within the

¹ First Evidentiary Hearing refers to the evidentiary hearings held on July 27, July 30, 2018 through August 01, 2018.

Hennepin County Jurisdiction. The recantation affidavits and recantation testimony are *impeachment evidence* related to the threats, the demands, the pressure, the coaching, the coercions, the benefits, and the promises made to K.K.W. and K.C.W. to give a statement of sexual abuse against Defendant between February 2013 through August 2014, and a trial testimony of sexual abuse against Defendant in August 2014.

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

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

On September 27, 2018, Appellant filed a second petition for post-conviction relief in *Index No. 234*.

REASONS FOR GRANTING THE PETITION

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. Further review of this case is merited *on grounds consistent with Petitioner's innocence, on grounds consistent with the violations of Petitioner's federal constitutional rights and on grounds consistent herein that this case presents important federal constitutional claims* which this Supreme Court should rule. The *weighty national importance* of this Court's jurisdiction on deciding these *federal-nature claims* are overwhelming *because it will reoccur to others similarly situated, unless resolved by this Court pursuant to Minn. R. Crim. P. 29.04, Subd. 4 (1) - (5)*.

First, on all grounds presented for consideration, Petitioner, Emem Ufot Udoh, incorporates and adopts as if re-alleged herein the factual allegations and arguments presented in his principal brief at the Minnesota Court of Appeals.

Second, on all grounds presented for consideration, Appellant argues that the interests of justice exception or rules allows this court to hear any matter in this appeal pursuant to Minn. R. Civ. App. P. 103.04 (permitting our review of any matter as the interests of justice may require); *Whitten v. State*, 690 N.W.2d 561, 564 (Minn. Ct. App. 2005)(recognized that the Court of Appeals of Minnesota has invoked Minn. R. Civ. App. P. 103.04 to address constitutional issues despite an appellant failure to properly raise the issues for review). See also Minn. R. Crim. P. 28.02, Subd. 11 (allowing review as the interests of justice may require). Appellant has adequately invoked the interests-of-justice in this court for the review of all Appellant's claims under the reasoning applied in *Wallace v. State*, 820 N.W.2d 843, 849 (Minn. 2012) (construing liberally an accompany motion or memorandum filed in the court to conclude that a petitioner had sufficiently invoked the interest of justice exception).

The "interest of justice require [This Court] consideration" *State v. Sorenson*, 441 N.W.2d 455 (1989) because not granting relief seriously compromises the fairness, integrity, and public reputation of the judicial proceedings because Appellant's claims have not been previously decided by the lower court or the Supreme Court under the reasoning applied in *Burch v. State*, 2004 Minn. App. LEXIS 814 (Minn. Ct. App. 2004); Minn. Stat. §590.04, Subd.3 (2018); and *Markham v. State*, 2019 WL 3293797 *5 (Minn. Ct. App. 2019) where the courts addressed the claims on their merit despite the *Knaffla*-bar because of said Appellants (*Burch* and *Markham*) good-faith attempts in prior proceedings.

Third, the “interest of justice require [This Court] consideration” **due to Petitioner’s lack of access to the prison law library to complete and to file his principal brief in State v. Udoh, A19-1129 that resulted from the spread of covid-19 coronavirus pandemic in Minnesota Department of Corrections** 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); *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 implicates Petitioner’s right of access to court under *Bound v. Smith*.

Appellant argues that this court could still address the merit of his claims under Minn. R. Civ. P. 103.04 because the interests of justice, newly discovered evidence in the 2018 evidentiary hearings and affidavits after Appellant’s trial, Appellant’s due diligence and good-faith in A14-2181 and A18-1804, this Court’s August 06, 2019 finding of *good-cause* in A19-1129, and judicial economy favor ensuring Appellant’s right to review under the reasoning applied in *Boitnott v. State*, 631 N.W. 2d 362, 369 – 70 (Minn. 2001) and *Walker v. State*, 394 N.W.2d 192, 195 (Minn. Ct. App. 1986) where the courts addressed the claims on their merit despite the fact that said appellants’ (*Boitnott* and *Walker*) claims were not within one of the exceptions to *Knaffla* and were procedurally barred.

In light of the fact that the post-conviction court granted Appellant an evidentiary hearing, Appellant requested subpoena(s) of his trial and appellate counsels but the post-conviction court denied the request on July 11, 2018. Appellant now points this court to *Doppler v. State*, 660 N.W.

2d 797 (Minn. 2003) and *Leake v. State*, 737 N.W. 2d 531, 536 (Minn. 2007) to support his argument that his claim of ineffective assistance of appellate counsel is not barred by the *Knaffla* rule in this post-conviction appeal without additional fact findings in light of the reasoning applied in *Tate v. State*, 2019 WL 1007771 *2 (Min. Ct. App. 2019) where the lower court materially distinguished *Doppler* because the record does not indicate what Appellant discussed with his appellate counsel with regards to these claims, whether Appellant was aware of the fact that his counsel failed to bring these claims or if Appellant had the opportunity to discuss these claims with his appellate counsel. Accordingly, the evidentiary hearing record does not conclusively show that Appellant's claim of ineffective assistance of appellate counsel is *Knaffla*-barred without additional fact findings on Appellant's attorney-client communication.

Appellant's claim of ineffective assistance of trial and appellate counsel is not *Knaffla* barred because state procedural framework which typically made meaningful opportunity to raise ineffective assistance of trial counsel claim on direct appeal and on his first post-conviction due to Petitioner's lack of access to the prison law library to complete and to file his principal brief in *State v. Udoh*, A19-1129 that resulted from the spread of covid-19 coronavirus pandemic in Minnesota Department of Corrections highly unlikely is clearly supported by the Supreme Court in *State v. Zerneckel*, 304 N.W.2d 365, 367 (Minn. 1981) where the court recognized that direct appeal is not the most appropriate way of raising an issue concerning ineffective assistance of trial counsel because we do not have the benefit of all the facts concerning why defense counsel did or did not do certain thing. Such claim is more effectively presented in a post-conviction proceeding because the trial record is insufficient for a review on the reasonings and motivations of defense counsel's action. See *Harris v. State*, 470 N.W.2d 167, 169 (Minn. Ct. App.

1991)(ineffective assistance of counsel claim is properly raised in a post-conviction proceeding and not in direct appeal); *Berg v. State*, 557 N.W.2d 593, 595 (Minn. Ct. App. 1996)(same). Such claim is not *Knaffla*-barred when the claim requires examination of evidence (2018 evidentiary hearing and recantation affidavits) outside the trial record and additional fact-findings by the post-conviction court is required because it cannot be resolved solely on the basis of the trial record and the briefs. See *Massaro v. United States*, 538 U.S. 500 (2003) and the U.S. Supreme Court decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012); and *Trevino v. Thaler*, 569 U.S. 413 (2013). Appellant relies on *Martinez* and *Trevino* to challenge the lower court findings of fact and conclusion of law.

Fourth, on all grounds presented for consideration, Appellant argues that this court could easily conclude that because the record do in fact entail adverse collateral legal consequences, such as the immigration removal proceeding, juvenile proceeding and lifetime supervised release, Appellant's claims are not barred by *Knaffla* or moot under the reasoning applied in *State v. Thompson*, 1996 WL 653951 *3 (Minn. Ct. App. 1996); *In re Welfare of L.B.*, 404 N.W.2d 341 (Minn. Ct. App. 1987); *State v. Jones*, 516 N.W.2d 545, 549 n.1 (Minn. 1994); *Sibron v. New York*, 392 U.S. 40, 55 (1968); *Brewer v. Iowa*, 19 F.3d 1248, 1250 (8th Cir. 1994)(recognizing that a collateral post-conviction action is moot when there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction); *Leonard v. Nix*, 55 F.3d 370, 373 (8th Cir. 1995)(noting that *only* the possibility of a collateral legal consequences is needed to avoid mootness) where the courts found those cases and claims not *moot or barred* because of the possibility of adverse collateral legal consequences and proceeded to consider the merit of the case or claims. See the Federal Magistrate Judge's report and recommendation in *Udoh v. Knutson*, 2019 WL 5150141 *3 (D. Minn. May 31, 2019) where the Magistrate Court

recognized the adverse collateral legal consequences of Defendant's conviction that resulted in the ongoing immigration or removal proceeding, that have been carried out *in absentia* in violation of Defendant's due process right.

Fifth, on all grounds presented for consideration, the interests of justice favors merit review of all Appellant's claims because Appellant has alleged a claim of *structural error* and a claim of *Brady/Discovery* violation that would relief Appellant of any procedural default, such as *Knaffla*-bar, in this case under the reasoning applied in *Amadeo v. Zant*, where the Supreme Court held that the State's concealment of evidence constitutes cause for Appellant's failure to raise a timely challenge. 486 U.S. 214, 224 – 27 (1988). The Supreme Court noted that the district court correctly formulated the legal rule that "cause" exist for a procedural default when, as a result of interference by officials, the otherwise defaulted claim was reasonably unknown to Appellant's lawyer and Appellant's lawyer made no intentional decision to forego the claim. See *Banks v. Dretke*, 540 U.S. 668, 698 (2004)(state's withholding of exculpatory evidence at trial constituted cause for Appellant's failure to present evidence to support his federal claim in state court) and *Fairchild v. Lockhart*, 979 F.2d 636, 640 (8th Cir. 1992)(state's inadvertent possession of exculpatory evidence constituted sufficient cause to excuse procedural default). The interests of justice favors merit review under the reasoning applied in *Onyelobi*, 932 N.W.2d 272 (Minn. 2019)(considering the merit by assuming that Appellant's is refining her argument, rather than raising new arguments on appeal) because Appellant's claims are refined (not new) arguments from the supporting facts retrieved from the 2018 recantation affidavits and evidentiary hearings testimony, public record, and district court record.

With regards to all Appellant's claims, including Appellant's ineffective assistance of trial and appellate counsel claims, there is a recognized third *Knaffla* exception to these claims when further factual inquiry or additional fact finding in the 2018 evidentiary hearings and recantation affidavits is required to fairly address the substance of these claims. The additional facts in the newly discovered evidence such as attorney-client communication, the 2018 recantation affidavits and testimony is necessary in order to evaluate the merit of Appellant's claims. These factual and legal basis for raising all Appellant's claims was not available at the time of Appellant's direct appeal because these claims arose during the 2018 post-conviction proceedings, and the 2018 evidentiary hearings was necessary for Appellant to develop the facts and legal basis in support of his claims.

Sixth, on all grounds presented for consideration, Appellant argues under *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986)(holding that the "end of justice" permits a court to examine the merits of a successive petition "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence") that because of his factual or actual innocence to these wrongful and false accusations, his claims including any claim that was previously decided in A14-2181 *should not be Knaffla barred*.

CONCLUSION

Wherefore, Petitioner seeks relief for a new trial because his substantial and constitutional rights to a fair trial were violated and this resulted in a fundamental miscarriage of justice. Appellant prays that this court orders a new trial, release and an acquittal.

Dated: February 19, 2021

Respectfully Submitted,

Udoh

Emem U. Udoh, 245042, 7600 525TH Street, Rush City, MN 55069