IN THE

SUPREME COURT OF THE UNITED STATES

APPLICATION NO. __-____ (FOR CERTIORARI NOS. 20-7389 & 20-7390)

20-7563, 20-7564, 20-7565

EMEM UFOT UDOH,

Petitioner,

vs.

BECKY DOOLEY, *Warden, Moose Lake*,
NATE KNUTSON, *Warden, Moose Lake*,

Respondents.

APPLICATION TO **HONORABLE JUSTICE BRENT M. KAVANAUGH** FOR **AN APPLICATION FOR A CERTIFICATE OF APPEALABILITY IN THE ABOVE FILED PETITIONS FOR REHEARING ON A WRIT OF CERTIORARI IN SCOTUS CASE NOS. 20-7389 AND 20-7389**, 20-7563, 64, 65

EMEM U. UDOH
7600 525TH Street
Rush City
MN 55069

PRO SE PETITIONER

TABLE OF CONTENTS

LIST OF PARTIES

For Petition For Rehearing On Writ of Certiorari Nos. 20-7389 And 20-7390:

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

EMEM UFOT UDOH
MCF – Rush City
OID No. 245042
7600 525TH Street
Rush City, MN 55069

INTRODUCTION AND PURPOSE

1. Pursuant to Rule 22 of the Supreme Court of the United States, Petitioner, Emem Ufot Udoh respectfully make this application to Honorable Justice Brent M. Kavanaugh For An **Application For A Certificate Of Appealability ("COA")** In The Above Filed Petitions For Rehearing On A Writ Of Certiorari In SCOTUS Case Nos. 20-7389 And 20-7389. In support of this application for Certificate of Appealability, Petitioner asserts the following:

BASIS FOR JURISDICTION AND JUDGMENT(S) SOUGHT TO BE REVIEWED

2. **For *Udoh v. Knutson*, Writ of Certiorari No. 20-7390 That Originated From** U.S. Eighth Circuit Court of Appeals USCA8 Consolidated Cases Nos **20-2949** and **20-3033**: The Eighth Circuit Court of Appeals entered its judgment on October 27, 2020, and denied Petitioner's petition for Rehearing on December 04, 2020. See USCA8 No. 20-3033 and 20-2949. On April 5, 2021, this Court denied certiorari and on April 13, 15, 2021, Petitioner mailed out his petition for rehearing under Rule 44 of this Supreme Court. Therefore, this Court's jurisdiction is invoked under 28 U.S.C. 2253(c)(1), 28 U.S.C 1254(1) and Rule 22 of the Supreme Court for COA. See ***Appendix*** at 1 – 19.

3. **For *Udoh v. Dooley*, Writ of Certiorari No. 20-7389 That Originated From** U.S. Eighth Circuit Court of Appeals USCA8 Case No. **20-2577**: On February 5, 2020, Petitioner filed a Motion to Vacate the Judgement and Order under Fed. R. Civ. Pro. 60(B). See ECF No. 56, **0:16-CV-4174 (PAM/HB).** In his motion, Petitioner included Exhibits 1 through 3. See ECF No. 57. On February 6 2020, the district court denied Petitioner's motion. See ECF No. 58. Between April 13, 2020 and June 29, 2020, Petitioner notified the district court of the *extraordinary circumstances* and *collateral consequences* that justify the relief he requested. See ECF No. 59 through 69. On June 29, 2020, Petitioner filed a Renewed Motion to Vacate the Judgement and Order pursuant to Fed. R. Civ. Pro. 60(B)(6). See ECF No. 70. In his motion, Petitioner incorporated ECF No. 59 through 69 as supporting evidence, as well as, Exhibits 1 through 3 in ECF No. 57 for relief. On July 14, 2020, the district court denied the renewed motion. See ECF No. 73. The Eighth Circuit Court of Appeal denied on October 26, 2020. See ECF No. 84. Petitioner's petition for rehearing and en-banc hearing was denied on November 19, 2020. See USCA8 No. 20-2577. On April 5, 2021, this Court denied certiorari and on April 13, 15, 2021, Petitioner mailed out his petition for rehearing under Rule 44 of this Supreme Court. Therefore, this Court's jurisdiction is invoked under 28 U.S.C. 2253(c)(1), 28 U.S.C 1254(1) and Rule 22 of the Supreme Court for COA. See ***Appendix*** at 1 – 19.

4. These are the judgments and orders sought to be reviewed by this Honorable Court. Also, a copy of the opinions (none issued by the Eighth Circuit Court of Appeals and by this Court), and any orders respecting to rehearing are materials already reproduced in the ***Appendix*** to the already filed Certiorari petitions and petition for rehearing in SCOTUS[1] Case Nos 20-7389 and 20-7390. Rule 13.5.

AUTHORITY TO GRANT THE CERTIFICATE OF APPEALABILITY ("COA") REQUESTED

5. This Court has the authority to grant to an **Application For A Certificate Of Appealability ("COA")** in Petitioner's already filed Certiorari petitions and petition for rehearing in SCOTUS Case Nos. 20-7389 and 20-7390 pursuant to Rule 22, Rule 13.5, Rule 30.2 and Rule 30.3 of the Supreme Court of the United States, and under 28 U.S.C. 2253(c)(1) because the AEDPA language permits a COA to be issued from a "circuit justice" or "circuit judge" and it has been interpreted to include certification by a "circuit justice" such as from Honorable Justice Brent M. Kavanaugh as the current a "circuit justice" the cases that originated from the United States Court of Appeals For The Eighth Circuit. See ***Appendix*** at 16 – 19. The Supreme Court may review a lower court denial's of an application for **Certificate Of Appealability**. *Hohn v. United States*, 524 U.S. 236, 238 – 41 (1998)(held the Supreme Court has jurisdiction to review a circuit judge or an appellate panel denial of COA because an **application is a case under 28 U.S.C 1254(1)**). See also *United States v. Apker*, 174 F.3d 934, 936 (8th Cir. 1999).

SPECIFIC REASONS WHY A CERTIFICATE OF APPEALABILITY ("COA") IS JUSTIFIED IS BECAUSE OF THE DISTRICT COURT'S MISAPPLICATION OF THE MILLER-EL AND SLACK STANDARDS ON THE DENIAL OF CERTIFICATE OF APPEALABILITY (COA) THAT WARRANTS THIS JUSTICE ATTENTION

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

[1] SCOTUS refers to the Supreme Court of the United States.

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

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

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

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

8. The Fifth and Ninth Circuits accept Petitioner's allegations in his Habeas petition or complaint as true and resolve all ambiguities in Petitioner's favor. See *Lambright v. Stewart*, 220 F.2d 1022, 1028 (9th Cir. 2000); *Petrocelli v. Angelone*, 248 F.3d 877, 855 (9th Cir. 2001); *Nardi v. Stewart*, 354 F.3d 1134, 1139 (9th Cir. 2004). The lower court displayed no such assessment on July 14, 2020 even where the Fifth and Ninth Circuits "will resolve any doubt about whether the petitioner has met the [*Barefoot, Miller-El*, or *Slack*] standard in his favor." See *Ramirez v. Drekte*, 398 F.3d 691 (5th Cir. 2005); *Braden v. Walmart Stores, Inc.*. 588 F.3d 585, 595 (8th Cir. 2009); *Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991)(consistent with the court's admonition in [*Barefoot*], we have warned that any doubt whether [COA] should be issued are to be resolved in favor of the petitioner); *Graves v. Cockrell*, 351 F.3d 143 (9th Cir. 2003)(any doubt regarding whether to grant a COA is

resolved in favor of the Petitioner, and the severity of the penalty may be considered in making this determination); *Fuller v. Johnson*, 114 F.3d 491 (5th Cir. 1997)(same).

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

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

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

10. In the wake of *Slack* and having found debatable procedural bar, the lower court displayed no such assessment on July 14, 2020 on Ground 4 (admission of CornerHouse evidence) claim as the Third, Fourth, Seventh, Ninth and Tenth Circuit have determined that the court should simply take a "quick look" at the face of the complaint or habeas petition to determine whether the petitioner "facially alleged the denial of a constitutional right." *Lambright v. Stewart, ld* at 1026 (as two other circuits have recently held, we will simply take a "quick look" at the face of the complaint to determine whether the petitioner has "facially alleged the

denial of a constitutional right"). The *Lambright v. Stewart* court granted COA because petitioner has "facially alleged" the denial of his constitutional right and assuming the district court's procedural ruling is debatable. *Christian v. Farris*, 701 Fed. Appx. 717 (10th Cir. 2017)(held it seems prudent to follow the approach of our sister circuits to take a "quick look" at petitioner's constitutional claims); *Mateo v. United States*, 810 F.3d 39, 41 (1st Cir. 2002)(same); *Gerber v. Varano*, 512 Fed. Appx. 131, 134 (3rd Cir. 2013)(same); *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002)(same); *Jefferson v. Welborn*, 22 F.3d 286 (7th Cir. 2000)(same).

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

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

> **Ground Four – Argued as Ground Two on Memorandum of Law:**
> **The District Court *erred in admitting evidences that were in violation of appellant's due process clause under the Fourteenth Amendment* and denied appellant's constitutional right to a fair trial.**

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

Reconsideration on Ground 4 claim and the district court ruled that the admission of interview evidence as procedurally barred or unexhausted on July 17, 2017. See 2017 U.S. Dist. LEXIS 110684 * 1 - *4.

13. Second, a COA should issue with respect to Ground 4, in light of the arguments already presented in Petitioner's Habeas memorandums (opening and reply briefs) at the district court in ECF No. 70, in which Petitioner incorporate as if re-alleged herein for brevity purpose. This Ground 4 claim is meritorious. Petitioner moves this court to consider under Fed. R. Civ. Proc. 201 on judicial notice, the Magistrate Court findings in *Udoh et al v. Minnesota Department of Human Services et al*, 2017 U.S. Dist. LEXIS 96018 * 1 - *13 (D. Minn. May 5, 2017) in Civ. No. 16-cv-3119 (PJS/SER) that supports the conclusion that Petitioner raised Ground 4 – admission of Interview and CornerHouse evidence in state court and that his claim is not procedurally barred and unexhausted. Fair-minded jurist will find reasonable debate between (a) Magistrate court conclusion that Petitioner raised the issues in Ground four before the state court and (b) the habeas court conclusion on July 14, 2020 that Petitioner did not raised the issues in Ground Four before the state court before the state court and is therefore procedurally barred and unexhausted. For the above reasons standing alone, Ground Four deserves an encouragement to proceed further for granting a COA.

14. 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).

15. The district court assessments that Petitioner's Ground 4 – admission of evidence claim for relief was not exhausted in state court, is not supported by the record and is debatable amongst jurist of reason. Petitioner argues in light of *Dye v. Hofbauer*, 546 U.S. 1 (2005); *Baldwin v. Reese*, 541 U.S. 27 (2004) holdings and under the reasoning of *Tamapua v. Shimoda*, 796 F.2d 261 (9th Cir. 1986); *Cox v. Burger*, 398 F.3d 1025 (8th Cir. 2005); *Scott v. Schriro*, 567 F.3d 573 (9th Cir. 2009); *Jones v. Sussex I State Prison*, 591 F.3d 707 (4th Cir. 2010) all supporting Petitioner's position that he has "exhausted" the available state remedies on this admission of evidence claim for relief under 28 U.S.C. §2254(B) (1) (A), 28 U.S.C §2254(c). To reasonably support his stand and for brevity, Petitioner adopts the already presented arguments in Exhibit A2, see **Pet. App. 81-92(PETITIONER HAS EXHAUSTED STATE REMEDIES AND IS NOT PROCEDURALLY DEFAULTED ON THE GROUNDS PRESENTED FOR HABEAS RELIEF).**

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

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

fairly presented this claim to the state court in light of the *Second Circuit* decision in *Davis v. Strack*, 270 F. 3d 111, 122 (2nd Cir. 2001) that *point header* can 'fairly present' a federal claim to a State Court and Petitioner did the same in this claim. See **App. 160** where Petitioner argued in a *point header that he* expressly alerted the Minnesota Courts in his *pro se* briefs the federal nature of this claim on *Ground Four (4)* – admission of evidence. The lower court decision "overlooked" the standards this Court articulated in *Sullivan v. Minnesota*, 818 F.2d 664, 666 (8th Cir. 1987) which were designed to enforce the mandate of the due process challenges to admission of evidence. See also *State v. Minor*, 1990 WL 204280 (Minn. App. 1990); *State v. Arndt*, 285 N.W.2d 478, 480 (Minn. 1979) and their progeny regarding the admission of evidence under Minnesota Rule 801(d)(1)(B), in which explicitly reads or states a pre-motive requirement on prior consistent statement. But the

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

17. Finally, any error in this case was not harmless and had "substantial and injurious effect" on the jury verdict in light of *Parker v. Gladden*, 385 U.S. 363 (1966)(per curiam)(that lengthy hours of juror deliberations in a trial "indicat[ed] a difference among them as to the guilt of petitioner"); *Fry v. Pliler*, 168 L. Ed 2d 16, 26 & n.4(collecting cases where "[c]ourts often have been unwilling to find error harmless where record, as in this case, affirmatively shows that jurors struggled with their verdict"). Like in this case, the jury deliberated for almost two days and had to re-watch the CornerHouse videos again is "one point during their deliberations, the jurors indicated that they might be unable to reach a unanimous verdict." *Medina v. Barnes*, 71 F.3d 363, 369 (10th Cir. 1995); *Fry v. Pliler*, *ld* at 26 n.4 (same). Because the claims – admission of CornerHouse evidence and "improper credibility vouching" have not been properly developed at the district court, remand to the district court is necessary under the reasoning of *Mateo v. United States*, 810 F.3d 39, 41 (1st Cir. 2002)(Nevertheless, *Mateo* does assert that he has a constitutional claim, and it may have not been properly developed because the district court accepted the state procedural bar arguments. Under these

circumstances, the matter should be remanded to give the district court a first crack at the constitutional claim) and *Gerber v. Varano*, 512 Fed. Appx. 131, 134 n.2 (3rd Cir. 2013)(COA stage is preliminary, and "while our sister circuits disagree somewhat" but generally concur that the "threshold level of review" is appropriate, especially when, as here, only minor development of the record has occurred below on these claims).

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

18. Undisputed facts show that, this Habeas case is devoid of any Magistrate Judge findings of facts, report and recommendations. The adequacy of this habeas proceeding is very questionable and the lower court assessments or resolution of this case violates the procedural requirement of 28 U.S.C. §2243 by denying Petitioner's substantive rights and opportunity to a Magistrate Judge findings of fact, objection to or adoption of, on all Grounds raised for relief. In this case, Petitioner adequately raised his ineffective assistance of both trial and appellate counsels ("IAC") at the district court in light of *United States v. Harfst*, 168 F.3d 398 (10th Cir. 1999) reasoning for granting COA when Petitioner raised such new IAC claim in an objection or motion within the prescribed time limits. The *Harfst* court found cause to excuse procedural default and proceeded to review the substance of *Harfst's* claim. That reasoning applies to this case because Petitioner raised the IAC claims in his Habeas Reply Brief **(App. 184-189)** and in his Rule 59 Motion for Reconsideration. *Sanders v. Cotton*, *ld* at 580 ("attorney errors that constitutes ineffective assistance of counsel is cause to set aside a procedural default").

SPECIFIC REASONS WHY A CERTIFICATE OF APPEALABILITY ("COA") IS JUSTIFIED IS BECAUSE CONSIDERATION BY THIS JUSTICE IS NECESSARY TO SECURE AND MAINTAIN UNIFORMITY IN RESOLVING BOTH INTRA-CIRCUIT DEBATE AND INTER-CIRCUIT CONFLICTS ON FEDERAL CLAIMS REVIEWED UNDER PLAIN-ERROR STANDARD

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

19. 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.

20. The district court concluded in its memorandum and order, did not address or even mention to these improper credibility vouching claim and that "those claims are procedurally barred." The lower court resolution of this claim conflicts with the decision of this court in *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003)("[w]e may not grant respondent's habeas petition, however, if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the [Minnesota] court of appeal applied harmless-error review in an 'objectively unreasonable' manner."). In this case, the Minnesota court harmless-error review was "objectively unreasonable" in light of the arguments presented in this petition.

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

22. 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).

23. "Similarly, in *Slack*, the Supreme Court recently held that an issue apparently settled by the law of our [Eighth Circuit] remained debatable for the purposes of issuing a COA, *Slack*, 120 S. Ct at 1064." *Lambright v. Stewart*, at 1026. Therefore, under "*Slack* [and *Miller-El*], it is thus clear that lower court should not deny a [petitioner] an opportunity to persuade the [Court] through full briefing and argument to reconsider circuit law that apparently forecloses [relief on meritorious claims such as serious prosecutorial misconduct on

improper credibility vouching of state key witnesses reviews under the plain error standard]. *ld* at 1606-07." *ld.* Therefore, consideration by this court is necessary to maintain uniformity in the federal courts.

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

24. Undisputed facts shows that some Eighth circuit case laws in *Mark v. Caspari*, 92 F.3d 637, 641 (8th Cir. 1996); *Sweet v. Delo*, 125 F.3d 1144, 1150 (8th Cir. 1997); *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999) have repeatedly held that a federal court can consider claims decided by state court plain-error review. So Petitioner's Ground 4 – Prosecutorial Misconduct on Improper Credibility Vouching should have been reviewed under *Mark v. Caspari* and their progeny. See *Alaimalo v. United States*, 645 F.3d 1042 (9th Cir. 2011).In this circumstance, undisputed facts shows that lower district courts within this jurisdiction have been applying *Clark v. Bertsch* to foreclose habeas relief. That current practice is contrary to the circuit precedent in *Toua Hing Chang v. Minnesota*, 521 F.3d 828 n.3 (8th Cir. 2008)("[w]hen there is an intra-circuit split, we are free to choose which line of cases to follow") because *Clark v. Bertsch* does not give the federal habeas district court any liberty or discretion to choose which line of cases to follow. This practice conflicts with the doctrine of "stare decisis" and the decision of *United States v. Hessman*, 495 F.3d 977, 982 – 983 (8th Cir. 2007) (held "a panel of this circuit court [like in *Clark v. Bertsch*] may not overrule circuit precedent [such as *Mark v. Caspari*; *Sweet v. Delo*; *James v. Bowersox* holding that a federal court can consider federal claims decided by state court plain error]") because "only the court enbanc can overruled circuit precedent" or Eighth Circuit approved procedures held in *Mark v. Caspari* and their progeny. Consideration by this court is necessary to provide important guidance to federal habeas court.

25. 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.

26. Moreover, while there is contrary Eighth Circuit authorities, the majority of the circuits hold no procedural bar to plain-error review of a federal claim or issue. That in itself is a prima facie showing that deserve encouragement to proceed further in light of *Sanders v. Cotton, ld* at 579 – 580; *Harding v. Sternes* (same); *Clinkscale v. Carter* (same); *Riley v. Taylor* (same). The lower court decision not to consider this *improperly credibility vouching claim* in light of Petitioner's *independent ineffective assistance of both trial and appellate counsel claim* in failure to object during trial and to raise this claim in direct appeal on these prosecutorial improper credibility vouching of state's key witness claim under the reasoning of *Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996)(held trial counsel failure to object to prosecutor's improper comments constitutes "cause" under the cause and prejudice standard to excuse federal habeas procedural default of constitution claims) is contrary to the authoritative decisions of this court in *Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 569 U.S. 413 (2013); *Massaro v. United States*, 538 U.S. 500 (2003), all holding that if the state court reviews the merit of a federal issue, whether by plain error review or by other review, the issue reviewed is not procedurally barred, even in the dare circumstances where the Petitioner did not raise the federal issue in state courts, if Petitioner can demonstrate cause due to ineffective assistance of (trial and appellate) counsel under the cause and prejudice standard.

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

27. Petitioner is entitled to habeas review under the fundamental miscarriage of justice exception of his independent constitutional claims on Ground 4 (admission of Interview and CornerHouse evidence, and improper credibility vouching) in light of the newly discovered exonerating evidence showing actual innocence

based on the recantation affidavits of key material witnesses' testimony in Exhibit 1, 2, and 3. *Schlup v. Delo*, 513 U.S. 298, 316 (1995). This new evidence is sufficient to overcome any state-procedural default rule and does entitle Petitioner to proceed for federal habeas relief on Ground 4. *House v. Bell*, 547 U.S. 518 (2006).

28. Ground 4 – Admission of CornerHouse evidence claim is meritorious under *United States v. Beaulieu,* 194 F. 3d 918 (8th Cir. 1999); *Tome v. United States*, 513 U.S. 150 (1995) which is the landmark Supreme Court decision on this subject – admission of evidence under Rule 801(d)(1)(B). See the enclosed excerpted-copy of the Memorandum submitted at the District Court in which Petitioners adopts as re-alleged herein for merit review and why this admission of evidence was not harmless under both *Chapman v. California,* 386 U.S. 18 (1967) and *Brecht's* standards.

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

CONCLUSION

For the foregoing reasons, Petitioner prays that this court grants the **Application For A Certificate Of Appealability ("COA")** in the above Filed Petitions For Rehearing On A Writ Of Certiorari In SCOTUS Case Nos. 20-7389 And 20-7389 for appeal.

Respectfully Submitted,

Dated: April 19, 2021

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

CERTIFICATE OF COMPLIANCE

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

Respectfully Submitted,

Dated: April 19, 2021

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

IN THE

SUPREME COURT OF THE UNITED STATES

APPLICATION NO. __-____ (FOR CERTIORARI NOS. 20-7389 & 20-7390)

EMEM UFOT UDOH,

Petitioner,

vs.

BECKY DOOLEY, *Warden, Moose Lake*,
NATE KNUTSON, *Warden, Moose Lake*,

Respondents.

APPENDIX

Pages

UNITED STATES COURTS OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2577

Emem Ufot Udoh

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)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Stras did not participate in the consideration or decision of this matter.

November 19, 2020

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

/s/ Michael E. Gans

Neutral
As of: March 15, 2021 1:28 PM Z

Udoh v. Dooley

United States District Court for the District of Minnesota

July 14, 2020, Decided; July 14, 2020, Filed

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

Reporter
2020 U.S. Dist. LEXIS 123571 *; 2020 WL 3977079

Emem Ufot Udoh, Petitioner, v. Becky Dooley, Warden, MCF - Moose Lake Prison, Respondent.

Subsequent History: Certificate of appealability denied Udoh v. Dooley, 2020 U.S. App. LEXIS 41164, 2020 WL 8269698 (8th Cir. Minn., Oct. 26, 2020)

Motion denied by, Petition denied by Emem Ufot Udoh v. Dooley, 2021 U.S. App. LEXIS 2705 (8th Cir. Minn., Feb. 1, 2021)

Prior History: Udoh v. Dooley, 2017 U.S. Dist. LEXIS 104908, 2017 WL 2881126 (D. Minn., July 5, 2017)

Core Terms

habeas petition, state court, recantations, asserts, merits, vacate

Counsel: **[*1]** Emem Ufot Udoh, Petitioner, Pro se, Moose Lake, MN.

For Becky Dooley, Warden, Moose Lake, Respondent: Kelly O'Neill Moller, Hennepin County Attorney's Office, LEAD ATTORNEY, Minneapolis, MN; Matthew Frank, LEAD ATTORNEY, Minnesota Attorney General's Office - Ste 1800, St Paul, MN.

Judges: Paul A. Magnuson, United States District Court Judge.

Opinion by: Paul A. Magnuson

Opinion

ORDER

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

Udoh was convicted in state court of criminal sexual conduct involving contact with his two minor stepdaughters. State of Minnesota v. Udoh, No. A14-2181, 2016 Minn. App. Unpub. LEXIS 181, 2016 WL 687328 (Minn. Ct. App. Feb. 22, 2016). Udoh sought federal habeas relief, raising six grounds for relief. This Court denied Udoh's habeas petition on the merits on July 6, 2017. (Docket No. 19.) Udoh then moved under Rule 59 to amend his judgment, which this Court denied because Udoh presented additional argument on a claim he had failed to present to the state courts. (Docket No. 31.) Udoh then requested that this Court reconsider its decision to deny a certificate of appealability. Udoh's request was denied and the Eighth Circuit affirmed. (Docket Nos. 43, 49.)

Approximately two years later, Udoh sought to **[*2]** reopen this proceeding; the Eighth Circuit denied Udoh authorization to file a successive habeas petition. (Docket No. 54.) Udoh then moved in this Court under Rule 60(a) to vacate judgment asserting that victims had recanted their trial testimony. This Court denied Udoh's request because a state postconviction matter was still

expressed by these courts undercut any extraordinary **[*6]** 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 **[*7]** (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

End of Document

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Emem Ufot Udoh,

Petitioner,

v.

Becky Dooley, Warden,

Respondent.

Case No. 16cv4174 (PAM/HB)

ORDER

This matter is before the Court on Petitioner Emem Ufot Udoh's Emergency Motion for Release. Udoh contends that the Court should release him pending his two federal appeals because of the presence of COVID-19 in his state prison facility.

Udoh offers no legal authority allowing a federal court to order the compassionate release of a state prisoner, and the Court has found none. Moreover, there is no pending appeal in this matter. The Eighth Circuit denied Udoh's appeal on September 28, 2020. (Docket No. 82.) Udoh's only pending appeal is in an immigration matter over which this Court has no jurisdiction.

Accordingly, **IT IS HEREBY ORDERED that** Petitioner's Emergency Motion for Release Pending Appeal (Docket No. 87) is **DENIED**.

Dated: October 29, 2020

s/Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3473

Emem Ufot Udoh

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, ERICKSON, and GRASZ, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

December 03, 2020

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

/s/ Michael E. Gans

UNITED STATES COURTS OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2040

Tonya Udoh; Emem Ufot Udoh, Individually, and on behalf of their minor children, K.K.W. and K.C.W.

Plaintiffs - Appellants

v.

Minnesota Department of Human Services; Charles E. Johnson; Donothan R. Bartley; Ann Norton; Daniel Engstrom; Catrina Blair; City of Maple Grove; Melissa Parker; City of Maple Grove Police Department; City of Plymouth; City of Plymouth Police Department; Molly Lynch; Kelvin Pregler; Independent School District, No 279; Joanne Wallen; Karen Wegerson; Ann Mock; Cornerhouse; Patricia Harmon; Bill Koncar; Grace W. Ray; Linda Thompson

Defendants - Appellees

Appeal from U.S. District Court for the District of Minnesota
(0:16-cv-03119-PJS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 10, 2020

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2040

Tonya Udoh; Emem Ufot Udoh, individually, and on behalf of their minor children, K.K.W. and K.C.W.

Plaintiffs - Appellants

v.

Minnesota Department of Human Services; Charles E. Johnson; Donothan R. Bartley; Ann Norton; Daniel Engstrom; Catrina Blair; City of Maple Grove; Melissa Parker; City of Maple Grove Police Department; City of Plymouth; City of Plymouth Police Department; Molly Lynch; Kelvin Pregler; Independent School District No. 279; Joanne Wallen; Karen Wegerson; Ann Mock; Cornerhouse; Patricia Harmon; Bill Koncar; Grace W. Ray; Linda Thompson

Defendants - Appellees

Appeal from U.S. District Court for the District of Minnesota
(0:16-cv-03119-PJS)

JUDGMENT

Before COLLOTON, WOLLMAN, and KOBES, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

Appellants' motion for appointment of counsel is denied as moot.

September 23, 2020

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

/s/ Michael E. Gans

IN THE

SUPREME COURT OF THE UNITED STATES

APPLICATION NO. __-____ (FOR CERTIORARI NOS. 20-7389 & 20-7390)

20-7563, 20-7564, 20-7565

EMEM UFOT UDOH,

Petitioner,

vs.

BECKY DOOLEY, *Warden, Moose Lake,*
NATE KNUTSON, *Warden, Moose Lake,*

Respondents.

APPLICATION TO **HONORABLE JUSTICE BRENT M. KAVANAUGH** FOR **AN APPLICATION FOR A CERTIFICATE OF APPEALABILITY IN THE ABOVE FILED PETITIONS FOR REHEARING ON A WRIT OF CERTIORARI IN SCOTUS CASE NOS. 20-7389 AND 20-7389,** 20-7563, 64, 65

EMEM U. UDOH
7600 525TH Street
Rush City
MN 55069

PRO SE PETITIONER

TABLE OF CONTENTS

LIST OF PARTIES

For Petition For Rehearing On Writ of Certiorari Nos. 20-7389 And 20-7390:

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

EMEM UFOT UDOH
MCF – Rush City
OID No. 245042
7600 525TH Street
Rush City, MN 55069

INTRODUCTION AND PURPOSE

1. Pursuant to Rule 22 of the Supreme Court of the United States, Petitioner, Emem Ufot Udoh respectfully make this application to Honorable Justice Brent M. Kavanaugh For An **Application For A Certificate Of Appealability ("COA")** In The Above Filed Petitions For Rehearing On A Writ Of Certiorari In SCOTUS Case Nos. 20-7389 And 20-7389. In support of this application for Certificate of Appealability, Petitioner asserts the following:

BASIS FOR JURISDICTION AND JUDGMENT(S) SOUGHT TO BE REVIEWED

2. **For *Udoh v. Knutson*, Writ of Certiorari No. 20-7390 That Originated From** U.S. Eighth Circuit Court of Appeals USCA8 Consolidated Cases Nos **20-2949** and **20-3033**: The Eighth Circuit Court of Appeals entered its judgment on October 27, 2020, and denied Petitioner's petition for Rehearing on December 04, 2020. See USCA8 No. 20-3033 and 20-2949. On April 5, 2021, this Court denied certiorari and on April 13, 15, 2021, Petitioner mailed out his petition for rehearing under Rule 44 of this Supreme Court. Therefore, this Court's jurisdiction is invoked under 28 U.S.C. 2253(c)(1), 28 U.S.C 1254(1) and Rule 22 of the Supreme Court for COA. See ***Appendix*** at 1 – 19.

3. **For *Udoh v. Dooley*, Writ of Certiorari No. 20-7389 That Originated From** U.S. Eighth Circuit Court of Appeals USCA8 Case No. **20-2577**: On February 5, 2020, Petitioner filed a Motion to Vacate the Judgement and Order under Fed. R. Civ. Pro. 60(B). See ECF No. 56, **0:16-CV-4174 (PAM/HB).** In his motion, Petitioner included Exhibits 1 through 3. See ECF No. 57. On February 6 2020, the district court denied Petitioner's motion. See ECF No. 58. Between April 13, 2020 and June 29, 2020, Petitioner notified the district court of the *extraordinary circumstances* and *collateral consequences* that justify the relief he requested. See ECF No. 59 through 69. On June 29, 2020, Petitioner filed a Renewed Motion to Vacate the Judgement and Order pursuant to Fed. R. Civ. Pro. 60(B)(6). See ECF No. 70. In his motion, Petitioner incorporated ECF No. 59 through 69 as supporting evidence, as well as, Exhibits 1 through 3 in ECF No. 57 for relief. On July 14, 2020, the district court denied the renewed motion. See ECF No. 73. The Eighth Circuit Court of Appeal denied on October 26, 2020. See ECF No. 84. Petitioner's petition for rehearing and en-banc hearing was denied on November 19, 2020. See USCA8 No. 20-2577. On April 5, 2021, this Court denied certiorari and on April 13, 15, 2021, Petitioner mailed out his petition for rehearing under Rule 44 of this Supreme Court. Therefore, this Court's jurisdiction is invoked under 28 U.S.C. 2253(c)(1), 28 U.S.C 1254(1) and Rule 22 of the Supreme Court for COA. See ***Appendix*** at 1 – 19.

4. These are the judgments and orders sought to be reviewed by this Honorable Court. Also, a copy of the opinions (none issued by the Eighth Circuit Court of Appeals and by this Court), and any orders respecting to rehearing are materials already reproduced in the ***Appendix*** to the already filed Certiorari petitions and petition for rehearing in SCOTUS[1] Case Nos 20-7389 and 20-7390. Rule 13.5.

AUTHORITY TO GRANT THE CERTIFICATE OF APPEALABILITY ("COA") REQUESTED

5. This Court has the authority to grant to an **Application For A Certificate Of Appealability ("COA")** in Petitioner's already filed Certiorari petitions and petition for rehearing in SCOTUS Case Nos. 20-7389 and 20-7390 pursuant to Rule 22, Rule 13.5, Rule 30.2 and Rule 30.3 of the Supreme Court of the United States, and under 28 U.S.C. 2253(c)(1) because the AEDPA language permits a COA to be issued from a "circuit justice" or "circuit judge" and it has been interpreted to include certification by a "circuit justice" such as from Honorable Justice Brent M. Kavanaugh as the current a "circuit justice" the cases that originated from the United States Court of Appeals For The Eighth Circuit. See ***Appendix*** at 16 – 19. The Supreme Court may review a lower court denial's of an application for **Certificate Of Appealability**. *Hohn v. United States*, 524 U.S. 236, 238 – 41 (1998)(held the Supreme Court has jurisdiction to review a circuit judge or an appellate panel denial of COA because an **application is a case under 28 U.S.C 1254(1)**). See also *United States v. Apker*, 174 F.3d 934, 936 (8th Cir. 1999).

SPECIFIC REASONS WHY A CERTIFICATE OF APPEALABILITY ("COA") IS JUSTIFIED IS BECAUSE OF THE DISTRICT COURT'S MISAPPLICATION OF THE MILLER-EL AND SLACK STANDARDS ON THE DENIAL OF CERTIFICATE OF APPEALABILITY (COA) THAT WARRANTS THIS JUSTICE ATTENTION

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

[1] SCOTUS refers to the Supreme Court of the United States.

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

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

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

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

8. The Fifth and Ninth Circuits accept Petitioner's allegations in his Habeas petition or complaint as true and resolve all ambiguities in Petitioner's favor. See *Lambright v. Stewart*, 220 F.2d 1022, 1028 (9th Cir. 2000); *Petrocelli v. Angelone*, 248 F.3d 877, 855 (9th Cir. 2001); *Nardi v. Stewart*, 354 F.3d 1134, 1139 (9th Cir. 2004). The lower court displayed no such assessment on July 14, 2020 even where the Fifth and Ninth Circuits "will resolve any doubt about whether the petitioner has met the [*Barefoot*, *Miller-El*, or *Slack*] standard in his favor." See *Ramirez v. Drekte*, 398 F.3d 691 (5th Cir. 2005); *Braden v. Walmart Stores, Inc.*. 588 F.3d 585, 595 (8th Cir. 2009); *Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991)(consistent with the court's admonition in [*Barefoot*], we have warned that any doubt whether [COA] should be issued are to be resolved in favor of the petitioner); *Graves v. Cockrell*, 351 F.3d 143 (9th Cir. 2003)(any doubt regarding whether to grant a COA is

resolved in favor of the Petitioner, and the severity of the penalty may be considered in making this determination); *Fuller v. Johnson*, 114 F.3d 491 (5th Cir. 1997)(same).

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

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

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

10. In the wake of *Slack* and having found debatable procedural bar, the lower court displayed no such assessment on July 14, 2020 on Ground 4 (admission of CornerHouse evidence) claim as the Third, Fourth, Seventh, Ninth and Tenth Circuit have determined that the court should simply take a "quick look" at the face of the complaint or habeas petition to determine whether the petitioner "facially alleged the denial of a constitutional right." *Lambright v. Stewart, ld* at 1026 (as two other circuits have recently held, we will simply take a "quick look" at the face of the complaint to determine whether the petitioner has "facially alleged the

denial of a constitutional right"). The *Lambright v. Stewart* court granted COA because petitioner has "facially alleged" the denial of his constitutional right and assuming the district court's procedural ruling is debatable. *Christian v. Farris*, 701 Fed. Appx. 717 (10th Cir. 2017)(held it seems prudent to follow the approach of our sister circuits to take a "quick look" at petitioner's constitutional claims); *Mateo v. United States*, 810 F.3d 39, 41 (1st Cir. 2002)(same); *Gerber v. Varano*, 512 Fed. Appx. 131, 134 (3rd Cir. 2013)(same); *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002)(same); *Jefferson v. Welborn*, 22 F.3d 286 (7th Cir. 2000)(same).

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

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

> **Ground Four – Argued as Ground Two on Memorandum of Law:**
> **The District Court *erred in admitting evidences that were in violation of appellant's due process clause under the Fourteenth Amendment* and denied appellant's constitutional right to a fair trial.**

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

Reconsideration on Ground 4 claim and the district court ruled that the admission of interview evidence as procedurally barred or unexhausted on July 17, 2017. See 2017 U.S. Dist. LEXIS 110684 * 1 - *4.

13. Second, a COA should issue with respect to Ground 4, in light of the arguments already presented in Petitioner's Habeas memorandums (opening and reply briefs) at the district court in ECF No. 70, in which Petitioner incorporate as if re-alleged herein for brevity purpose. This Ground 4 claim is meritorious. Petitioner moves this court to consider under Fed. R. Civ. Proc. 201 on judicial notice, the Magistrate Court findings in *Udoh et al v. Minnesota Department of Human Services et al*, 2017 U.S. Dist. LEXIS 96018 * 1 - *13 (D. Minn. May 5, 2017) in Civ. No. 16-cv-3119 (PJS/SER) that supports the conclusion that Petitioner raised Ground 4 – admission of Interview and CornerHouse evidence in state court and that his claim is not procedurally barred and unexhausted. Fair-minded jurist will find reasonable debate between (a) Magistrate court conclusion that Petitioner raised the issues in Ground four before the state court and (b) the habeas court conclusion on July 14, 2020 that Petitioner did not raised the issues in Ground Four before the state court before the state court and is therefore procedurally barred and unexhausted. For the above reasons standing alone, Ground Four deserves an encouragement to proceed further for granting a COA.

14. 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).

15. The district court assessments that Petitioner's Ground 4 – admission of evidence claim for relief was not exhausted in state court, is not supported by the record and is debatable amongst jurist of reason. Petitioner argues in light of *Dye v. Hofbauer*, 546 U.S. 1 (2005); *Baldwin v. Reese*, 541 U.S. 27 (2004) holdings and under the reasoning of *Tamapua v. Shimoda*, 796 F.2d 261 (9th Cir. 1986); *Cox v. Burger*, 398 F.3d 1025 (8th Cir. 2005); *Scott v. Schriro*, 567 F.3d 573 (9th Cir. 2009); *Jones v. Sussex I State Prison*, 591 F.3d 707 (4th Cir. 2010) all supporting Petitioner's position that he has "exhausted" the available state remedies on this admission of evidence claim for relief under 28 U.S.C. §2254(B) (1) (A), 28 U.S.C §2254(c). To reasonably support his stand and for brevity, Petitioner adopts the already presented arguments in Exhibit A2, see **Pet. App. 81-92(PETITIONER HAS EXHAUSTED STATE REMEDIES AND IS NOT PROCEDURALLY DEFAULTED ON THE GROUNDS PRESENTED FOR HABEAS RELIEF).**

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

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

fairly presented this claim to the state court in light of the *Second Circuit* decision in *Davis v. Strack*, 270 F. 3d 111, 122 (2nd Cir. 2001) that *point header* can 'fairly present' a federal claim to a State Court and Petitioner did the same in this claim. See **App. 160** where Petitioner argued in a *point header that he* expressly alerted the Minnesota Courts in his *pro se* briefs the federal nature of this claim on *Ground Four (4)* – admission of evidence. The lower court decision "overlooked" the standards this Court articulated in *Sullivan v. Minnesota*, 818 F.2d 664, 666 (8th Cir. 1987) which were designed to enforce the mandate of the due process challenges to admission of evidence. See also *State v. Minor*, 1990 WL 204280 (Minn. App. 1990); *State v. Arndt*, 285 N.W.2d 478, 480 (Minn. 1979) and their progeny regarding the admission of evidence under Minnesota Rule 801(d)(1)(B), in which explicitly reads or states a pre-motive requirement on prior consistent statement. But the

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

17. Finally, any error in this case was not harmless and had "substantial and injurious effect" on the jury verdict in light of *Parker v. Gladden*, 385 U.S. 363 (1966)(per curiam)(that lengthy hours of juror deliberations in a trial "indicat[ed] a difference among them as to the guilt of petitioner"); *Fry v. Pliler*, 168 L. Ed 2d 16, 26 & n.4(collecting cases where "[c]ourts often have been unwilling to find error harmless where record, as in this case, affirmatively shows that jurors struggled with their verdict"). Like in this case, the jury deliberated for almost two days and had to re-watch the CornerHouse videos again is "one point during their deliberations, the jurors indicated that they might be unable to reach a unanimous verdict." *Medina v. Barnes*, 71 F.3d 363, 369 (10th Cir. 1995); *Fry v. Pliler*, *ld* at 26 n.4 (same). Because the claims – admission of CornerHouse evidence and "improper credibility vouching" have not been properly developed at the district court, remand to the district court is necessary under the reasoning of *Mateo v. United States*, 810 F.3d 39, 41 (1st Cir. 2002)(Nevertheless, *Mateo* does assert that he has a constitutional claim, and it may have not been properly developed because the district court accepted the state procedural bar arguments. Under these

circumstances, the matter should be remanded to give the district court a first crack at the constitutional claim) and *Gerber v. Varano*, 512 Fed. Appx. 131, 134 n.2 (3rd Cir. 2013)(COA stage is preliminary, and "while our sister circuits disagree somewhat" but generally concur that the "threshold level of review" is appropriate, especially when, as here, only minor development of the record has occurred below on these claims).

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

18. Undisputed facts show that, this Habeas case is devoid of any Magistrate Judge findings of facts, report and recommendations. The adequacy of this habeas proceeding is very questionable and the lower court assessments or resolution of this case violates the procedural requirement of 28 U.S.C. §2243 by denying Petitioner's substantive rights and opportunity to a Magistrate Judge findings of fact, objection to or adoption of, on all Grounds raised for relief. In this case, Petitioner adequately raised his ineffective assistance of both trial and appellate counsels ("IAC") at the district court in light of *United States v. Harfst*, 168 F.3d 398 (10th Cir. 1999) reasoning for granting COA when Petitioner raised such new IAC claim in an objection or motion within the prescribed time limits. The *Harfst* court found cause to excuse procedural default and proceeded to review the substance of *Harfst's* claim. That reasoning applies to this case because Petitioner raised the IAC claims in his Habeas Reply Brief **(App. 184-189)** and in his Rule 59 Motion for Reconsideration. *Sanders v. Cotton, ld* at 580 ("attorney errors that constitutes ineffective assistance of counsel is cause to set aside a procedural default").

SPECIFIC REASONS WHY A CERTIFICATE OF APPEALABILITY ("COA") IS JUSTIFIED IS BECAUSE CONSIDERATION BY THIS JUSTICE IS NECESSARY TO SECURE AND MAINTAIN UNIFORMITY IN RESOLVING BOTH INTRA-CIRCUIT DEBATE AND INTER-CIRCUIT CONFLICTS ON FEDERAL CLAIMS REVIEWED UNDER PLAIN-ERROR STANDARD

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

19. 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.

20. The district court concluded in its memorandum and order, did not address or even mention to these improper credibility vouching claim and that "those claims are procedurally barred." The lower court resolution of this claim conflicts with the decision of this court in *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003)("[w]e may not grant respondent's habeas petition, however, if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the [Minnesota] court of appeal applied harmless-error review in an 'objectively unreasonable' manner."). In this case, the Minnesota court harmless-error review was "objectively unreasonable" in light of the arguments presented in this petition.

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

22. 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).

23. "Similarly, in *Slack*, the Supreme Court recently held that an issue apparently settled by the law of our [Eighth Circuit] remained debatable for the purposes of issuing a COA, *Slack*, 120 S. Ct at 1064." *Lambright v. Stewart*, at 1026. Therefore, under "*Slack* [and *Miller-El*], it is thus clear that lower court should not deny a [petitioner] an opportunity to persuade the [Court] through full briefing and argument to reconsider circuit law that apparently forecloses [relief on meritorious claims such as serious prosecutorial misconduct on

improper credibility vouching of state key witnesses reviews under the plain error standard]. *ld* at 1606-07." *ld.* Therefore, consideration by this court is necessary to maintain uniformity in the federal courts.

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

24. Undisputed facts shows that some Eighth circuit case laws in *Mark v. Caspari*, 92 F.3d 637, 641 (8th Cir. 1996); *Sweet v. Delo*, 125 F.3d 1144, 1150 (8th Cir. 1997); *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999) have repeatedly held that a federal court can consider claims decided by state court plain-error review. So Petitioner's Ground 4 – Prosecutorial Misconduct on Improper Credibility Vouching should have been reviewed under *Mark v. Caspari* and their progeny. See *Alaimalo v. United States*, 645 F.3d 1042 (9th Cir. 2011).In this circumstance, undisputed facts shows that lower district courts within this jurisdiction have been applying *Clark v. Bertsch* to foreclose habeas relief. That current practice is contrary to the circuit precedent in *Toua Hing Chang v. Minnesota*, 521 F.3d 828 n.3 (8th Cir. 2008)("[w]hen there is an intra-circuit split, we are free to choose which line of cases to follow") because *Clark v. Bertsch* does not give the federal habeas district court any liberty or discretion to choose which line of cases to follow. This practice conflicts with the doctrine of "stare decisis" and the decision of *United States v. Hessman*, 495 F.3d 977, 982 – 983 (8th Cir. 2007) (held "a panel of this circuit court [like in *Clark v. Bertsch*] may not overrule circuit precedent [such as *Mark v. Caspari*; *Sweet v. Delo*; *James v. Bowersox* holding that a federal court can consider federal claims decided by state court plain error]") because "only the court enbanc can overruled circuit precedent" or Eighth Circuit approved procedures held in *Mark v. Caspari* and their progeny. Consideration by this court is necessary to provide important guidance to federal habeas court.

25. 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.

26. Moreover, while there is contrary Eighth Circuit authorities, the majority of the circuits hold no procedural bar to plain-error review of a federal claim or issue. That in itself is a prima facie showing that deserve encouragement to proceed further in light of *Sanders v. Cotton, ld* at 579 – 580; *Harding v. Sternes* (same); *Clinkscale v. Carter* (same); *Riley v. Taylor* (same). The lower court decision not to consider this *improperly credibility vouching claim* in light of Petitioner's *independent ineffective assistance of both trial and appellate counsel claim* in failure to object during trial and to raise this claim in direct appeal on these prosecutorial improper credibility vouching of state's key witness claim under the reasoning of *Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996)(held trial counsel failure to object to prosecutor's improper comments constitutes "cause" under the cause and prejudice standard to excuse federal habeas procedural default of constitution claims) is contrary to the authoritative decisions of this court in *Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 569 U.S. 413 (2013); *Massaro v. United States*, 538 U.S. 500 (2003), all holding that if the state court reviews the merit of a federal issue, whether by plain error review or by other review, the issue reviewed is not procedurally barred, even in the dare circumstances where the Petitioner did not raise the federal issue in state courts, if Petitioner can demonstrate cause due to ineffective assistance of (trial and appellate) counsel under the cause and prejudice standard.

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

27. Petitioner is entitled to habeas review under the fundamental miscarriage of justice exception of his independent constitutional claims on Ground 4 (admission of Interview and CornerHouse evidence, and improper credibility vouching) in light of the newly discovered exonerating evidence showing actual innocence

based on the recantation affidavits of key material witnesses' testimony in Exhibit 1, 2, and 3. *Schlup v. Delo*, 513 U.S. 298, 316 (1995). This new evidence is sufficient to overcome any state-procedural default rule and does entitle Petitioner to proceed for federal habeas relief on Ground 4. *House v. Bell*, 547 U.S. 518 (2006).

28. Ground 4 – Admission of CornerHouse evidence claim is meritorious under *United States v. Beaulieu,* 194 F. 3d 918 (8th Cir. 1999); *Tome v. United States,* 513 U.S. 150 (1995) which is the landmark Supreme Court decision on this subject – admission of evidence under Rule 801(d)(1)(B). See the enclosed excerpted-copy of the Memorandum submitted at the District Court in which Petitioners adopts as re-alleged herein for merit review and why this admission of evidence was not harmless under both *Chapman v. California,* 386 U.S. 18 (1967) and *Brecht's* standards.

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

CONCLUSION

For the foregoing reasons, Petitioner prays that this court grants the **Application For A Certificate Of Appealability ("COA")** in the above Filed Petitions For Rehearing On A Writ Of Certiorari In SCOTUS Case Nos. 20-7389 And 20-7389 for appeal.

Respectfully Submitted,

Dated: April 19, 2021

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

CERTIFICATE OF COMPLIANCE

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

Respectfully Submitted,

Dated: April 19, 2021

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

IN THE

SUPREME COURT OF THE UNITED STATES

APPLICATION NO. __-____ (FOR CERTIORARI NOS. 20-7389 & 20-7390)

EMEM UFOT UDOH,

Petitioner,

vs.

BECKY DOOLEY, *Warden, Moose Lake,*
NATE KNUTSON, *Warden, Moose Lake,*

Respondents.

APPENDIX

Pages

UNITED STATES COURTS OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2577

Emem Ufot Udoh

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)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Stras did not participate in the consideration or decision of this matter.

November 19, 2020

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

/s/ Michael E. Gans

Udoh v. Dooley

United States District Court for the District of Minnesota

July 14, 2020, Decided; July 14, 2020, Filed

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

Reporter
2020 U.S. Dist. LEXIS 123571 *; 2020 WL 3977079

Emem Ufot Udoh, Petitioner, v. Becky Dooley, Warden, MCF - Moose Lake Prison, Respondent.

Subsequent History: Certificate of appealability denied *Udoh v. Dooley, 2020 U.S. App. LEXIS 41164, 2020 WL 8269698 (8th Cir. Minn., Oct. 26, 2020)*

Motion denied by, Petition denied by *Emem Ufot Udoh v. Dooley, 2021 U.S. App. LEXIS 2705 (8th Cir. Minn., Feb. 1, 2021)*

Prior History: *Udoh v. Dooley, 2017 U.S. Dist. LEXIS 104908, 2017 WL 2881126 (D. Minn., July 5, 2017)*

Core Terms

habeas petition, state court, recantations, asserts, merits, vacate

Counsel: **[*1]** Emem Ufot Udoh, Petitioner, Pro se, Moose Lake, MN.

For Becky Dooley, Warden, Moose Lake, Respondent: Kelly O'Neill Moller, Hennepin County Attorney's Office, LEAD ATTORNEY, Minneapolis, MN; Matthew Frank, LEAD ATTORNEY, Minnesota Attorney General's Office - Ste 1800, St Paul, MN.

Judges: Paul A. Magnuson, United States District Court Judge.

Opinion by: Paul A. Magnuson

Opinion

ORDER

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

Udoh was convicted in state court of criminal sexual conduct involving contact with his two minor stepdaughters. *State of Minnesota v. Udoh, No. A14-2181, 2016 Minn. App. Unpub. LEXIS 181, 2016 WL 687328 (Minn. Ct. App. Feb. 22, 2016)*. Udoh sought federal habeas relief, raising six grounds for relief. This Court denied Udoh's habeas petition on the merits on July 6, 2017. (Docket No. 19.) Udoh then moved under *Rule 59* to amend his judgment, which this Court denied because Udoh presented additional argument on a claim he had failed to present to the state courts. (Docket No. 31.) Udoh then requested that this Court reconsider its decision to deny a certificate of appealability. Udoh's request was denied and the Eighth Circuit affirmed. (Docket Nos. 43, 49.)

Approximately two years later, Udoh sought to **[*2]** reopen this proceeding; the Eighth Circuit denied Udoh authorization to file a successive habeas petition. (Docket No. 54.) Udoh then moved in this Court under *Rule 60(a)* to vacate judgment asserting that victims had recanted their trial testimony. This Court denied Udoh's request because a state postconviction matter was still

expressed by these courts undercut any extraordinary **[*6]** 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 **[*7]** (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

End of Document

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Emem Ufot Udoh,

Petitioner,

v.

Becky Dooley, Warden,

Respondent.

Case No. 16cv4174 (PAM/HB)

ORDER

This matter is before the Court on Petitioner Emem Ufot Udoh's Emergency Motion for Release. Udoh contends that the Court should release him pending his two federal appeals because of the presence of COVID-19 in his state prison facility.

Udoh offers no legal authority allowing a federal court to order the compassionate release of a state prisoner, and the Court has found none. Moreover, there is no pending appeal in this matter. The Eighth Circuit denied Udoh's appeal on September 28, 2020. (Docket No. 82.) Udoh's only pending appeal is in an immigration matter over which this Court has no jurisdiction.

Accordingly, **IT IS HEREBY ORDERED that** Petitioner's Emergency Motion for Release Pending Appeal (Docket No. 87) is **DENIED**.

Dated: October 29, 2020

s/Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3473

Emem Ufot Udoh

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, ERICKSON, and GRASZ, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

December 03, 2020

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

/s/ Michael E. Gans

UNITED STATES COURTS OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2040

Tonya Udoh; Emem Ufot Udoh, Individually, and on behalf of their minor children, K.K.W. and K.C.W.

Plaintiffs - Appellants

v.

Minnesota Department of Human Services; Charles E. Johnson; Donothan R. Bartley; Ann Norton; Daniel Engstrom; Catrina Blair; City of Maple Grove; Melissa Parker; City of Maple Grove Police Department; City of Plymouth; City of Plymouth Police Department; Molly Lynch; Kelvin Pregler; Independent School District, No 279; Joanne Wallen; Karen Wegerson; Ann Mock; Cornerhouse; Patricia Harmon; Bill Koncar; Grace W. Ray; Linda Thompson

Defendants - Appellees

Appeal from U.S. District Court for the District of Minnesota
(0:16-cv-03119-PJS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 10, 2020

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2040

Tonya Udoh; Emem Ufot Udoh, individually, and on behalf of their minor children, K.K.W. and K.C.W.

Plaintiffs - Appellants

v.

Minnesota Department of Human Services; Charles E. Johnson; Donothan R. Bartley; Ann Norton; Daniel Engstrom; Catrina Blair; City of Maple Grove; Melissa Parker; City of Maple Grove Police Department; City of Plymouth; City of Plymouth Police Department; Molly Lynch; Kelvin Pregler; Independent School District No. 279; Joanne Wallen; Karen Wegerson; Ann Mock; Cornerhouse; Patricia Harmon; Bill Koncar; Grace W. Ray; Linda Thompson

Defendants - Appellees

Appeal from U.S. District Court for the District of Minnesota
(0:16-cv-03119-PJS)

JUDGMENT

Before COLLOTON, WOLLMAN, and KOBES, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

Appellants' motion for appointment of counsel is denied as moot.

September 23, 2020

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

/s/ Michael E. Gans

Udoh v. Minn. Dep't of Human Servs.

United States District Court for the District of Minnesota

May 13, 2020, Decided; May 13, 2020, Filed

Case No. 16-CV-3119 (PJS/SER)

Reporter
2020 U.S. Dist. LEXIS 84151 *; 2020 WL 2468743

TONYA UDOH and EMEM UDOH, individually, and on behalf of their minor children, K.K.W., and K.C.W., Plaintiffs, v. MINNESOTA DEPARTMENT OF HUMAN SERVICES; CHARLES E. JOHNSON; DONOTHAN BARTLEY; ANN NORTON; DANIEL E. JOHNSON; CATRINA BLAIR; CITY OF MAPLE GROVE; CITY OF MAPLE GROVE POLICE DEPARTMENT; MELISSA PARKER; CITY OF PLYMOUTH; CITY OF PLYMOUTH POLICE DEPARTMENT; MOLLY LYNCH, KELVIN PREGLER; INDEPENDENT SCHOOL DISTRICT, NO. 279; JOANNE WALLEN; KAREN WEGERSON; ANN MOCK; CORNERHOUSE; PATRICIA HARMON; BILL KONCAR; GRACE W. RAY; and LINDA THOMPSON, Defendants.

Subsequent History: Affirmed by, Motion denied by, As moot *Udoh v. Minn. Dep't of Human Servs., 2020 U.S. App. LEXIS 37338 (8th Cir. Minn., Sept. 23, 2020)*

Prior History: *Udoh v. Minn. Dep't of Human Servs., 2017 U.S. Dist. LEXIS 96018 (D. Minn., May 5, 2017)*

Core Terms

recantations, filing fee, Correction, lawsuit, vacate

Counsel: **[*1]** Tonya and Emem Udoh, Pro se.

Frederic J. Argir, MINNESOTA ATTORNEY GENERAL'S OFFICE, for defendants Minnesota Department of Human Services and Charles E. Johnson.

Christiana Martenson and Daniel D. Kaczor, HENNEPIN COUNTY ATTORNEY'S OFFICE, for defendants Donothan Bartley, Ann Norton, Daniel E. Engstrom,[1] Catrina Blair, and Linda Thompson.

Nathan Midolo, UPTON & HATFIELD, and Paul D. Reuvers, IVERSON REUVERS CONDON, for defendants City of Maple Grove, City of Maple Grove Police Department, Melissa Parker, City of Plymouth, City of Plymouth Police Department, Molly Lynch, and Kelvin Pregler.

John P. Edison and Michael J. Waldspurger, RUPP, ANDERSON, SQUIRES & WALDSPURGER, for defendants Independent School District No. 279, Joanne Wallen, Karen Wegerson, and Ann Mock.

John R. Marti, DORSEY & WHITNEY LLP, and and Lauren O. Roso, U.S. ATTORNEY'S OFFICE, for defendants CornerHouse, Patricia Harmon, Bill Koncar, and Grace Ray.

Judges: Patrick J. Schiltz, United States District Judge.

Opinion by: Patrick J. Schiltz

Opinion

[1] The caption incorrectly lists Engstrom's last name as "Johnson."

multiple reasons.

To begin with, the motion is untimely. Under Rule 60(c), a motion for relief under subdivisions (b)(1)-(3) must be brought no later than one year after the entry of judgment by the trial court. The one-year period was not tolled, as the Udohs assert, until the date that the United States Supreme Court denied certiorari. *See* Jones v. Swanson, 512 F.3d 1045, 1048-49 (8th Cir. 2008) (one-year limitations period for Rule 60 motion began running on date initial **[*5]** judgment was issued); The Tool Box, Inc. v. Ogden City Corp., 419 F.3d 1084, 1088-89 (10th Cir. 2005) ("[T]he one-year time limit in Rule 60(b) runs from the date the judgment was 'entered' in the district court; it does not run from the date of an appellate decision reviewing that judgment."); Fed. Land Bank of St. Louis v. Cupples Bros., 889 F.2d 764, 766-67 (8th Cir. 1989) ("It is well established that the pendency of an appeal does not toll the one-year maximum period for filing motions under Rule 60(b)(1)-(3)." (collecting cases)). This Court entered judgment on September 12, 2017, and the Udohs did not move for Rule 60(b) relief until February 5, 2020. The Udohs' request for relief pursuant to Rule 60(b)(1), (b)(2), and (b)(3) is therefore denied as untimely.

Even if the Udohs' Rule 60(b) motion were timely, the Court would deny the motion on the merits. The 2018 recantations of K.K.W. and K.C.W. do not demonstrate "mistake, inadvertence, surprise, or excusable neglect" within the meaning of Rule 60(b)(1). *Cf.* Union Pac. R.R. Co. v. Progress Rail Servs. Corp., 256 F.3d 781, 783 (8th Cir. 2001) (default due to faulty record-keeping excused under Rule 60(b)(1)); Ceridian Corp. v. SCSC Corp., 212 F.3d 398, 404 (8th Cir. 2000) ("excusable neglect" refers to, for example, failure to comply with an ambiguous procedural rule). Nor have the Udohs alleged fraud, misrepresentation, or misconduct *in this litigation* by an opposing party under Rule 60(b)(3).[5]

And finally, the Udohs are not entitled **[*6]** to relief based on "newly discovered evidence" under Rule 60(b)(2). To succeed under Rule 60(b)(2), the Udohs must show that the evidence is "material," meaning that "'there is a reasonable probability that the outcome of the proceeding would have been different if the evidence had been disclosed.'" Holmes v. United States, 898 F.3d 785, 792 (8th Cir. 2018) (quoting United States v. Hernandez, 299 F.3d 984, 990 (8th Cir. 2002)). Here, the 2018 recantations of K.K.W. and K.C.W. would have no impact on the outcome of the Udohs' civil lawsuit.

In dismissing this lawsuit in 2017, this Court found that the individual defendants were entitled to qualified immunity because their actions were "'properly founded upon a reasonable suspicion of child abuse.'" ECF No. 163 at 4-5 (quoting K.D. v. Cty. of Crow Wing, 434 F.3d 1051, 1056 (8th Cir. 2006)).[6] The fact that K.K.W. and

---

[5] The Court notes that, in their recantation testimony, K.K.W. and K.C.W. purported to identify defendant Molly Lynch as one of the individuals who pressured them to provide false testimony against Emem in 2013. *See* ECF No. 186-1 at 16-17, 54-58, 70; ECF No. 186-3 at 17, 50, 73, 87. But this is part of the alleged "fraud" for which Lynch was *sued*. *See* ECF No. 1 at ¶ 98 (alleging that Lynch "conducted the interrogation of K.K.W. and K.C.W. in an incompetent manner with powerful and coercive influences designed to elicit false accusations"). It is not "fraud" that occurred *in connection with the litigation*, which is the "fraud" to which Rule 60(b)(3) refers. *See* Roger Edwards LLC v. Fiddes & Son, Ltd., 427 F.3d 129, 134 (1st Cir. 2005) (Rule 60(b)(3) addresses "fraud or misstatements perpetrated in the course of litigation or other misconduct aimed directly at the trial process," and not "non-litigation conduct"); *see also* Murphy v. Mo. Dep't of Corr., 506 F.3d 1111, 1117 (8th Cir. 2007) ("To prevail on a motion under Rule 60(b)(3), the movant must show, with clear and convincing evidence, that the opposing party engaged in a fraud or misrepresentation that prevented the movant from fully and fairly presenting its case." (quotation marks and citations omitted)); Jones v. Jefferson City Pub. Sch., No. 2:18-CV-4054, 2019 U.S. Dist. LEXIS 80986, 2019 WL 2110578, at *2 (W.D. Mo. May 14, 2019) ("[T]he fraud Mr. Jones alleges concerns the merits of the case, not the process of the litigation. Relief thus is not available to Jones under Rule 60(b)(3).").

Moreover, even if Lynch's alleged "fraud" occurred in connection with this litigation, the Udohs have not established the existence of that "fraud" by clear and convincing evidence, and therefore they would still not be entitled to relief. *See* Cook v. City of Bella Villa, 582 F.3d 840, 855 (8th Cir. 2009) (to prevail on a Rule 60(b)(3) motion, a plaintiff must show fraud, misrepresentation, or misconduct by clear and convincing evidence).

To the extent that the Udohs intend to allege fraud on the part of a third-party witness under Rule 60(b)(6) rather than fraud by an opposing party under Rule 60(b)(3), their motion is denied for the same reasons. *See* Lester v. Empire Fire and Marine Ins. Co., 653 F.2d 353, 354 (8th Cir. 1981) ("[I]t would be unreasonable, absent special circumstances, to permit reopening of a judgment on grounds of third-party fraud when a similar motion based on fraud by a party would be barred by Rule 60(b)(3)."); *see also* Jones v. Swanson, 512 F.3d 1045, 1049 (8th Cir. 2008).

SUPREME COURT OF THE UNITED STATES

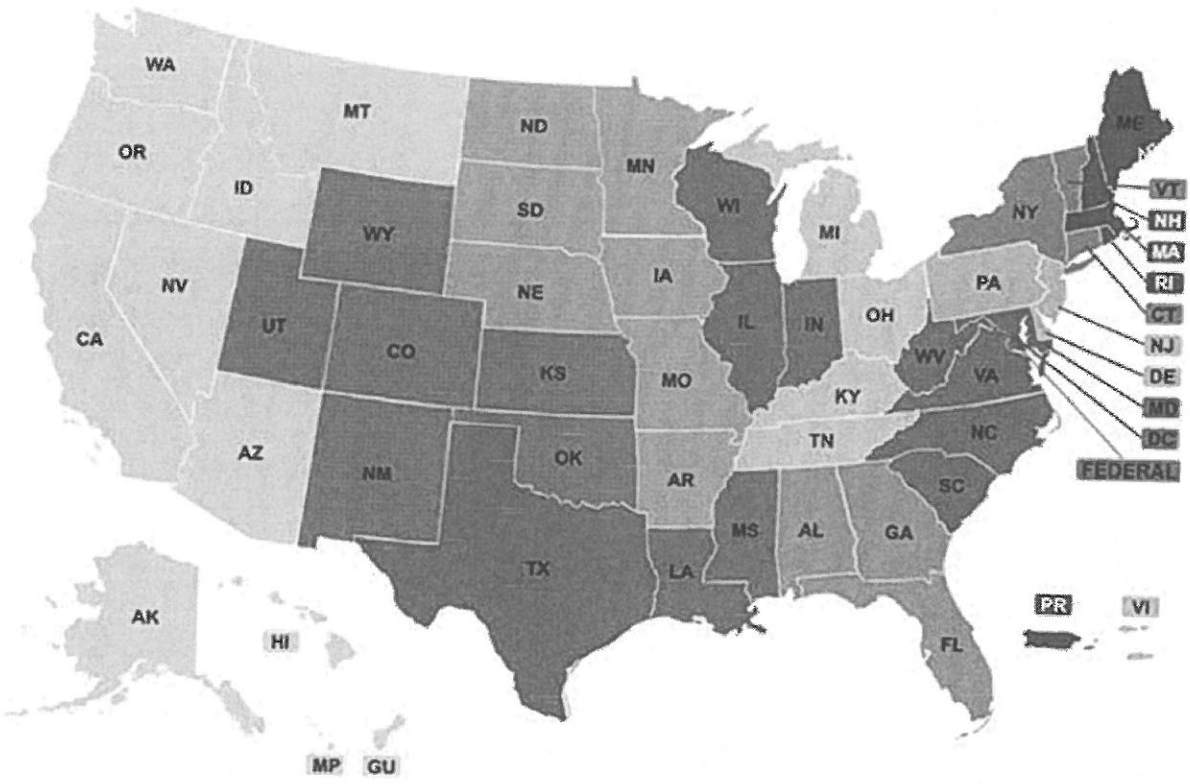
Search

HOME > ABOUT THE COURT > JUSTICES > CIRCUIT ASSIGNMENTS

Circuit Assignments

It is ordered that the following allotment be made of The Chief Justice and the Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42 and that such allotment be entered of record, effective November 20, 2020.

- **For the District of Columbia Circuit - John G. Roberts, Jr., Chief Justice**
- **For the First Circuit - Stephen Breyer, Associate Justice**
  (Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island)
- **For the Second Circuit - Sonia Sotomayor, Associate Justice**
  (Connecticut, New York, Vermont)
- **For the Third Circuit - Samuel A. Alito, Jr., Associate Justice**
  (Delaware, New Jersey, Pennsylvania, Virgin Island)



OPINIONS

Opinions of the Court

Opinions Relating to Orders

In-Chambers Opinions

U. S. Reports

Online Sources Cited in Opinions

Media Sources

Case Citation Finder

FILING & RULES

Electronic Filing

Rules and Guidance

Supreme Court Bar

ORAL ARGUMENTS