21-7732 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OJI KONATA MARKHAM,

Petitioner,

vs.

STATE OF MINNESOTA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES UNDER 28 U.S.C1254 (1)

PETITON FOR WRIT OF CERTIORARI

OFFICE OF THE CLERK
Supreme Court of the United States
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Washington, D.C. 20543

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ATTORNEYS FOR RESPONDENT(S) PETITONER

QUESTION(S) PRESENTED FOR REVIEW

1. Whether the court of appeals properly assess prejudice when it considered the Brady *v. Maryland, 373 U.S. 83 (1963) violation?*

    a. **Rulings below**: The trial court ruled Markham was not entitled to a new trial based on the late disclosure and the court of appeals affirmed.

2. Whether the trial court err and violated Markham's due process right to fair trial by admitting "unduly prejudicial" Jail Call recording between Markham and the complainant at trial?

    a. **Rulings below**: The trial court allowed the state to admit the Jail Call Recording, and the court of appeals affirmed.

3. Whether the trial court err and violated Markham's Sixth and Fourteenth Amendment rights by allowing the state to amend the complaint to add a different, additional offense after the state rested?

    a. **Ruling below**: The district court allowed the state to amend the complaint, and the court of appeals affirmed.

4. Whether the prosecutor commit prejudicial misconduct by misstating the law in closing argument?

a. **Ruling below**: The district court did not consider this issue, and the Court of Appeals affirmed.

5. Whether the evidence was insufficient to convict Markham acted with intent to cause the complainant to fear bodily harm or death where she could not recall or witness much of the alleged incident, could not recall what Markham shouted, and did not suggest Markham threatened her in light of ***Jackson v.Virginia, 443 U.S. 307 (1979)?***

a. **Ruling below**: The Court of Appeals affirmed Markham's conviction.

6. Do Markham's ineffective assistance of trial counsel under ***Strickland v. Washington, 466 U.S. 668 (1984)*** and pro se issues warrant review?

a. **Ruling below**: The Court of Appeals held Markham's ineffective assistance of trial counsel and pro se supplemental issues lacked merit.

7. Judge Wahi, confirm it in her **"Findings of Facts,"** it was in fact only [Officer Hilyar] report in exhibit 1, by labeling it Officer Hilyar "incident report" as exhibit 1. There wasn't any mention of Brooklyn Park Police Department in Judge Wahi, "Findings of Facts." **See Honorable**

Richelle Wahi. Transcripts of Proceedings on March 22. 2016; pg. 10 and "Findings of Facts" filed April 11. 2016; pg. 2.

a. **Ruling below**: The district court did not consider this issue, and the Court of Appeals affirmed.

8. The two main issues on Post-conviction concern the legality of defendant's arrest. Was there probable cause? Did circumstance justify a warrantless, nonconsensual entry of the home? Defendant argues both these questions must be answered no, and, therefore, evidence obtained from his arrest - - most importantly, 911 data and victims' statement to the police - - should have been suppressed.

a. **Ruling below**: The district court did not consider this issue, and the Court of Appeals affirmed.

9. Whether the court of appeals properly assess prejudice when it considered ***Pay ton v. New York. 445 U.S. 573. 586. 100 S. Ct. 1371. 63 L. Ed. 2d 639 (1980))?***

Markham has demonstrated the illegal arrest by the Brooklyn Park Police Department that took place in Hennepin County on January 22, 2016, under the Fourth and Fourteenth Amendments.

(a)The Court of Appeals and the Minnesota Magistrate judge error when refusing to prove and demonstrate [Dakota County] show exigent circumstances did exist to authorize another jurisdiction to arrest Markham without a warrant inside his Brooklyn Park resident [Hennepin County]. There was not a warrant, nor a warrantless or

exigent circumstances exception to arrest Markham in his Brooklyn Park [Hennepin County] resident January 22, 2016. Defendant in a criminal proceeding has the right, under the Fourth and Fourteenth Amendments, subsequent to the Ex parte insurance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant. The documents suppressed by the prosecution. See ***post-conviction brief at 39-40***. The police in this case made a warrantless, nonconsensual entry into a house where Markham was a resident at and arrested him. The issue is whether the arrest violated Markham's Fourth Amendment rights. The State never provided Petitioner an opportunity for a full and fair litigation of a Fourth Amendment claim. Petitioner is entitled for relief in federal habeas corpus on the ground that evidence obtained in an unconstitutional search or seizure was not introduced at his trial.

2. Markham's request relief under rule 60 (b) (6), motion is available only in extraordinary circumstances and judicial precedent explains.

    a. **Ruling below**: The district court did not consider this issue, and the Court of Appeals affirmed.

Markham argue and demonstrate that a procedure ruling barring relief is itself debatable among jurists of reason. There is a reasonable reason jurist would debate that the District Court abused its discretion in reaching the equitable, highly factbound conclusion that they are not, "will rarely occur in the habeas context," 545 U.S. at, 535, 125 S. Ct. 2641, 162 L. Ed. 2d 480, petitioner has shown its debatable that the District Court acted within its discretion in denying *de novo review* and *relief here*. Petitioner's 2254 claim was constitutional in nature. Petitioner's "warrantless, nonconsensual entry or exigent circumstances exception. Fourth Amendment constitutional was violated. Petitioner is claiming that his case presents extraordinary circumstances under Rule 60(b) (6). (SCOTUS) identified precedents regarding the warrantless,

nonconsensual entry or exigent circumstances exception in the Rule 60(b) (6) context.

10. Whether the court of appeals properly assess prejudice when it considered ***Strickland v. Washington. 466 U.S. 668. 684-86. 104 S. Ct. 2052. 2063-64. 80 L. Ed. 2d 674 (1984);***

Markham has demonstrated ineffective assistance of counsel under Strickland.

(a) To satisfy Strickland, a defendant must first show that counsel performed deficientlv.**466 U.S. at 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674**. Markham's trial counsel knew, First, that she was ineffective in not attempting to contact *O.H, Tracy Ogunyemi andS.D nor interview the Police officers* who arrested Markham inside his Brooklyn Park resident which would have enabled Markham's counsel to introduce into evidence the significant discrepancies between O.H's account of the crime and her *three sign written prior inconsistent statements* to investigator.
Second, Markham contends that had his defense counsel done so, the reliability of the *jail recorded phone call* that Detective Ryan Olson testify to was hearsay or the Brooklyn Park Police Department who made the warrantless arrest on behalf of *Dakota County* would have been undermined. Petitioner's claim of failure to properly investigate and interview all known witnesses, failure to call certain witnesses ... are all interrelated.
Neither counsel nor Dakota County [Public Defender] investigator interviewed officer [Tolbert], the arresting officer, S.D, O.H, Markham's land lord [Diana Kaldun], Markham's roommate [Tracy Ogunyemi] and the Dakota County Detective [Ryan Olson] before trial. Defense counsel did not even attempt to interview the witnesses herself. Here, defense counsel made at least some attempt to contact the alibi witness whose name Markham had provide to counsel before pretrial: Defense counsel

had a public defender investigator call and interview [Tracy Ogunyemi] over a phone and O.H came in and sat down with defense investigator after she gave several sign statements recanting her story about the event the night of January 22, 2016. Yet, when the Dakota County investigator took a statement from [Tracy Ogunyemi] who stated she seen Markham home between 12:30 a.m. and 1:00 a.m. Here, the state did not call [Tracy Ogunyemi] as a witness at Markham's trial. Indeed, instead of calling [Tracy Ogunyemi], the state called Detective [Ryan Olson] that works in the Dakota County sheriff's Office/Investigator Electronic Crime Task Force. See. Vol.3, Tr.279.

a. **Ruling below**: The district court did not consider this issue, and the Court of Appeals affirmed.

LIST OF PARTIES

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

No. __-____

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OJI KONATA MARKHAM,

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STATE OF MINNESOTA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

UNDER 28 U.S.C§1254 (1)

Petitioner, Oji Konata Markham, respectfully petition for a writ of Certiorari to review the judgment of the United States District Court, District of Minnesota and the 8th circuit in this case.

Markham, in pro se, in necessity, presents his motion for this court's consideration. In his motion he respectfully moves this honorable court to issue a certificate of appealability pursuant to 28 U.S.C.§2253(c)(2), authorizing him to appeal the denial of his 28 U.S.C.§2254 petition. See **Buck v. Davis, Slack v. McDaniel, 529 U.S. 473,484, 120 S. Ct. 1595,146 L. Ed. 2d 542 (2000): Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029,1039,154 L. Ed. 2d 931 (2003).**

Markham seeks a COA based upon the Court's refusal to satisfy the relief requested in his ***§2254*** petition. The Court, by refusing to admit the truth and/or reality of Markham's claims stands in violation of 28 U.S.C.***§2243***, in plain error. Moreover, Markham avers that he seeks COA for good cause based upon the District Court's deliberate indifference to court rule, law, and/or Constitutional mandates.

When judgment is promptly set forth on a separated document, as should be done when required by ***Fed. R. Civ. P. Rule 58 (b)(1)(c)***, the time for seeking an appeal from the final order begins to run. But in the case in which the Court and Clerk fail to comply with this simple requirement, the time to appeal begins to run after expiration of 150 days from entry of the judgment in the civil docket as required by Rule 79 (a). see Federal Rule of Appellate Procedure, Rule 4(a)(7)(a)(ii), which states in pertinent part that:

"A judgment or order is entered for purpose of this Rule 4(a) if ***Fed. R. Civ. P. Rule 58 (a)*** required a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs: 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a)."

OPINIONS BELOW

The decision of the Minnesota Court of Appeals **(Pet.App.1-15)** is unpublished. *State v. Markham,* Nos. **A16-1548**. The trial court decisions and findings of facts are enclosed as The Minnesota Supreme Court's order denying discretionary review without comment appears.

1. **Markham has demonstrated ineffective assistance of counsel under *Strickland.***

(a) To satisfy ***Strickland,*** a defendant must first show that counsel performed deficiently.**466 U.S., at 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674.** Markham's trial counsel knew, First, that she was ineffective in not attempting to contact *O.H, Tracy Ogunyemi and S.D nor interview the Police officers* who arrested Markham inside his Brooklyn Park resident which would have enabled Markham's counsel to introduce into evidence the significant discrepancies between O.H's account of the crime and her *three sign written prior inconsistent statements* to investigator. Second, Markham contends that had his defense counsel done so, the reliability of the *jail recorded phone call* that *Detective Ryan Olson* testify to was hearsay or the *Brooklyn Park Police Department* who made the *warrantless arrest* on *behalf of Dakota County* would have been undermined.

Petitioner's claim of failure to properly investigate and interview all known witnesses, failure to call certain witnesses ... are all interrelated.
Neither counsel nor Dakota County [Public Defender] investigator interviewed officer [Tolbert], the arresting officer, S.D, O.H, Markham's land lord [Diana Kaldun], Markham's roommate [Tracy Ogunyemi] and the Dakota County Detective [Ryan Olson] before trial. Defense counsel did not even attempt to interview the witnesses herself.

Here, defense counsel made at least some attempt to contact the alibi witness whose name Markham had provide to counsel before pretrial:

Defense counsel had a public defender investigator call and interview [Tracy Ogunyemi] over a phone and O.H came in and sat down with defense investigator after she gave several sign statements recanting her story about the event the night of January 22, 2016. Yet, when the Dakota County investigator took a statement from [Tracy Ogunyemi] who stated she seen Markham home between 12:30 a.m. and 1:00 a.m. Here, the state did not call [Tracy Ogunyemi] as a witness at Markham's trial. Indeed, ... instead of calling [Tracy Ogunyemi], the state called Detective [Ryan Olson], that works in the Dakota County sheriff's office/Investigator Electronic Crime Task Force. See. **Vol.3, Tr.279.** Defense counsel's investigation was far "less than complete." See **Strickland, 466 U.S. at 691.** Defense counsel never personally attempted to contact any of the potential alibi witnesses, and, after the investigator learned from [Tracy Ogunyemi] stating Markham was at his 8164 Brandywine Parkway resident between 12:30 a.m. and 1:00 a.m. See ***Pro se direct appeal addendum.***
Defense counsel did not even attempt to interview [Tracy Ogunyemi] herself. Yet, defense counsel did not present an alibi defense at trial.

Petitioner maintains that counsel's failure to locate and interview potential witnesses was IAC. Defense counsel was aware, that there were 5 witnesses plus detective [Ryan Olson], with no apparent reason to help the defendant, who made statements to the Dakota County public defender investigator that were exculpatory or inconsistent with the prosecution witnesses' statements. The names

and addresses of these witnesses were available to defense counsel; yet, her attempts to locate and interview them were perfunctory at best, including her decision not to put on any witnesses in support of viable theory of defense fall outside the wide range of professionally competent assistance.

Here, trial counsel failed adequately investigate the facts and Law as they related to petitioner's defense that if the court compare O.H's testimony at trial, *three sign written prior inconsistent statements to investigator* and the *undisclosed 911 call*, the record shows O.H's "undisclosed statements directly contradicted [O.H's] testimony," on critical elements of the prosecutor case: identification of who assaulted O.H, whether it was O.H's "*ex-boyfriend*," and on the essential element of *"body harm, physical pain and injury"* required for a successful conviction. Over defense objection, *the court allowed the state to introduce a portion of a call Markham made to Harris from jail on January 22, 2016*, during which Markham suggested Harris say her "*boyfriend was not at the house that night,*" she was crying because they had argued that day, and that she broke her door because she was drunk and locked out. See **Ex.12, and jail recorded Transcripts.**

Had Markham and his defense counsel known about the *911 call withheld evidence*, they could have challenged the state case by raising an alternative theory, namely, that O. H's "*ex-boyfriend*" was liable for the assault, injury and crime.

Markham points this court to the *911 transcript*. The 911 transcripts or Brady material clearly shows O. H's statement to the 911 operator that her *"ex-boyfriend"* not "*boyfriend"* was liable for the alleged offense. It is clear from both the trial and the 911 records that O.H had both a "boyfriend" and an "ex-boyfriend." This contradictory evidence that conflicts with O. H's trial testimony reasonably shows that at the time of the alleged incident, an alternative perpetrator [O. H's "ex-boyfriend"] existed.

The trial record shows that the state's purpose of introducing the jail call recording as argued by the prosecution in **(Vol. 1, Tr. 10 at L-8-12)** ("in light of the fact that they have a domestic relationship, these phone calls also give insight into the relationship between the parties and between Ms. Harris and defendant, and,

therefore, would also be admissible as *relationship evidence* under ***Minn. Stat. 634.20"***) was to show the *relationship* between Markham and O.H.

The trial record also shows that the state's purpose of introducing the jail recording as argued by the state in **(Tr.250-254, 254 16-12)** was because the evidence is "inculpatory in nature because they show a conscious effort on the part of the defendant." Markham argues that the state admitted "unduly prejudicial" jail call recording that was coerced or involuntary inculpatory in native, and relationship evidence against his interest at trial. Markham also argues that the state allowed the jury to re-listen to this jail call recording twice at trial. Trial counsel objected in **(Tr. 254-256, 256-262)** to the admission of the recording at trial, arguing in relevant part that the admission of this evidence against Markham's interest "is inflammatory, it's prejudicial, it's irrelevant and it's cumulative" and renders Markham's trial fundamentally unfair "to confuse and prejudice and inflame the jury about Markham in an unlawful way."

1. **Markham has demonstrated the *illegal arrest* by the Brooklyn Park Police Department that took place in *Hennepin County* on January 22, 2016, under the *Fourth and Fourteenth Amendments.***

(a) The Court of Appeals and the Minnesota Magistrate judge error when refusing to prove and demonstrate [Dakota County] show *exigent circumstances* did exist to authorize another jurisdiction to arrest Markham without a warrant inside his *Brooklyn Park resident* [Hennepin County].

There *was not a warrant, nor a warrantless or exigent circumstances exception* to arrest Markham in his *Brooklyn Park* [Hennepin County] resident January 22,2016. Defendant in a criminal proceeding has the right, under the *Fourth and Fourteenth Amendments,* subsequent to the Ex parte insurance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant. The documents suppressed by the prosecution. See ***post-conviction brief at 39-40***. The police in this case made a *warrantless, nonconsensual entry* into a house where Markham was a resident at and arrested him. The issue is whether the arrest violated Markham's Fourth Amendment rights. The State never provided

Petitioner an opportunity for a full and fair litigation of a Fourth Amendment claim. Petitioner is entitled for relief in federal habeas corpus on the ground that evidence obtained in an unconstitutional search or seizure was not introduced at his trial.

2. **Markham's request relief under rule 60 (b)(6), motion is available only in extraordinary circumstances and judicial precedent explains.**

(a) Relief under Rule 60(b)(6) is available only in "**extraordinary circumstances**." ***Gonzalez, 545 U.S., at 535, 125 S. Ct. 2641,162 L. Ed. 2d. 480.*** Determining whether such circumstances are present may include consideration of a wide range of factors, including "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." ***Liljeberg v. Heath Services Acquisition Corp., 486 U.S. 847, 863-864, 108 S. Ct. 2194, 100 L. Ed. 2d 855.*** The District Court's denial of Markham's motion rested largely on its determination that *Newly Discovered Evidence* that's relevant information prosecution withheld that couldn't have been discovered through Petitioner's *due diligence* before or during trial, which Petitioner discovered after trial on his own, and the *illegal arrest* by the Brooklyn Park Police Department that took place in *Hennepin County* on January 22, 2016. And the undisclosed police records that's shows Brooklyn Park police original statements cast doubt on Officer S. Hilyar, Mendota Heights Police Department Credibility played a *de minimis* role in his sentencing. But there is a reasonable probability that Markham was sentenced because of information prosecution withheld. *This is a disturbing departure from the basic premise that the criminal law punishes people for what they do, not who they are, or withheld evidence from the prosecution the jurors did not see*. That it concerned information prosecution withheld amplifies the problem. Relying on withheld information to impose a criminal sanction "***poisons public confidence"*** in the judicial process, ***Davis v. Ayala, 576 U.S., 135 S. Ct. 2187, 192 L. Ed. 2d 323,*** a concern that supports **Rule 60 (b)(6),** relief. The extraordinary nature of this case is confirmed by remarkable steps Markham itself took in the ***Newly discovered Brooklyn Park original police reports evidence*** **about Markham's *warrantless arrest in another jurisdiction in Addendum 12.***

Although the State attempts to justify its decision to treat Markham differently and ***leap-frogged*** his constitutional violations in his habeas corpus petitions without *demonstrating* or *proving* the Brooklyn Park Police Department *in this case* made a ***Warrantless, nonconsensual entry*** into a house where **Markham** was a resident at and arrested him. The issue is whether the arrest violated Markham's Fourth Amendment rights. The state never provided Petitioner an opportunity for a full and fair ***litigation of a Fourth Amendment claim.*** Petitioner is entitled for ***relief in federal habeas corpus*** on the ground that evidence obtained in an unconstitutional search or seizure was not introduced at his trial.

STATEMENT OF JURISDICTION

The jurisdiction to issue a COA is invoked pursuant to 28 U.S.C.§1291: §2253: §2254: §2255: Federal Rule of Civil Procedure, Rule 58: Federal Rule of Appellant Procedure, Rule 4(a)(7)(a)(ii): Federal Rule of Civil Procedure, Rule 60(b)(6), Federal Rule of Criminal P. 16 (a)(1)(e), ***28 U.S.C.S. § 1254 (1)***."

Markham relies on ***Hohn v United States, 524 U.S 236,*** the Court found that it had jurisdiction under ***28 U.S.C.S. § 1254*** to review denial of applications for Certificates of Appealability were judicial in nature, and the court had power to review judicial decisions.

Under ***28 U.S.C.S. § 1254 (1),*** the United States Supreme Court has jurisdiction, on ***certiorari*** to review a denial, by a circuit judge or a panel of Federal Court of Appeals, of a certificate of appealability, as (1) The Antiterrorism and effective Death Penalty Act of 1996 (AEDPA) amended ***28 U.S.C.S §2253*** to include a provision in ***28 U.S.C.S §2253 (c),*** that unless a "circuit justice or judge" issue a certificate of appealability, an appeal may not be taken to a court of appeals from the final order in (a) a habeas corpus proceeding involving a state prison, or (b) a proceeding under ***28 U.S.C.S §2255; (2)*** an application for a ***2253 (c)*** certificate such as the application at issue, which resulted in denial, by a panel of a court of appeals, of a certificate of appealability concerning a Federal District Court's denial of an accused's ***2254 habeas*** petition and ***2255*** motion to vacate his conviction on a ***Fourth Amendment Warrant Clause violations, Newly Discovered Evidence, Brady violation,*** **Ineffective assistance of trial counsel and ineffective assistance of appellate counsel,** meet the ***1254 (1)*** description which confines the Supreme Court's certiorari jurisdiction under ***1254 (1)*** to "[c]ases in" the Courts of Appeals; and (3) the Supreme Court will overrule the portion of ***House v. Mayo***

(1945) 324 U.S 42, 89 L Ed 739, 65 S. Ct. 517, in which the court held that because cases in which certificates of probable cause were refused were not "in" a Court of Appeals, the Supreme Court lacked statutory certiorari jurisdiction to review refusals to issue certificates of probable cause—the term "certificate of probable cause" having been used in ***2253,*** before AEDPA's enactment, instead of the term ***"certificate of appealability"*** for (a) this portion was erroneous and should not be followed, and (b) stare decisis concerns do not require the Supreme Court to adhere to this portion of ***House v. Mayo.***

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Constitution are reproduced below:

To wit: "This court has jurisdiction to issue a Certificate of Appealability in Markham's case because the district court denied his ***§2254*** and ***§2255*** in violation of ***Clisby v Jones,*** *see* ***28 U.S.C. § 2253.***

Markham filed his ***§2254,*** I showed the sentencing court where the law forbids his sentence and conviction. The district court denied the ***§2254*** petition immediately without issuing a show cause order. The district court brazenly violated the ***Eleventh Circuit's*** holding in ***Clisby v Jones;*** and failed to address the issue of a certificate of appealability. As you can see, you have an innocent man in prison in violation of the ***Thirteenth Amendment***, a district court violating every rule and law conceivable.

The Fifth Amendment of the Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law: nor shall private property be taken for public use without just compensation.

The Sixth Amendment of the Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.

The Fourteenth Amendment of the Constitution provides in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV.

The Fourteenth Amendment of the Constitution provides in relevant part:

Fourteenth Amendments, subsequent to the Ex parte insurance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant. The documents suppressed by the prosecution. See ***post-conviction brief at 39-40***. The police in this case made a *warrantless, nonconsensual entry* into a house where Markham was a resident at and arrested him. The issue is whether the arrest violated Markham's Fourth Amendment rights. The State never provided Petitioner an opportunity for a full and fair litigation of a Fourth Amendment claim. Petitioner is entitled for relief in federal habeas corpus on the ground that evidence obtained in an unconstitutional search or seizure was not introduced at his trial.

PROCEDURAL HISTORY

January 22, 2016:	Police respond to a burglary report in Mendota Heights, Minnesota.
January 25, 2016:	Complaint filed in Dakota County District Court Charging Oji Konata Markham, the appellant, with one count of First-degree burglary (assault), in violation of Minn. Stat. 609.582, subd. 1(c).
April 19, 2016:	Jury trial begins and, the Honorable David L. Knutson, presiding.
April 20, 2016:	The State rests. Complaint is amended, adding a charge of first-degree burglary (assault-intent to cause fear).
April 21, 2016:	Jury finds Markham guilty of one count of first-degree Burglary, (assault-fear, involving Oxana Harris) and not guilty of one count of first-degree burglary (assault-harm, involving Shawn Davis).
June 27, 2016:	Honorable Judge Knutson sentenced Markham to a presumptive executed term of 111 month(s).
September 26, 2016:	Markham files his Notice of appeal.

September 11, 2017: Minnesota Court of appeals affirms Markham's conviction.

November 28, 2017: Minnesota Supreme Court denied Markham's petition for review.

March 05, 2018: This Honorable Court granted Markham's request for extension of time to file Certiorari.

1. Petition under 28 U.S.C.§2254 (DKT.1) w/memorandum of law (DKT.2) filed 12-18-2019.
2. Motion under 28 U.S.C.§2254 for a discovery request (DKT.3) filed 12-18-2019.
3. Errata sheet (DKT.9) filed 1-8-2020, w/additional memorandum of law (DKT.10) filed 1-8-2020, w/ application to proceed in District Court without prepaying fees or costs (DKT.11) filed 1-8-2020.
4. Order denying [3] Motion for Discovery [9] Motion for Discovery [11] application to proceed in District Court without prepaying fee or cost (DKT.12) filed 1-15-2020.
5. Respondent's answer (DKT.13), respondent's memorandum of law is support of answer, (DKT.14) certificate of compliance (DKT.14-1), certificate of service by mail (DKT.16) filed 1-13-2020.
6. Motion to Expand the record (DKT.17) filed 3-13-2020 w/ appellant's reply brief (DKT.18) filed 3-13-2020.
7. Order denying [17] Motion to Expand record (DKT.19) filed 4-16-2020
8. Motion to Object to report to DOC. No. [17] re [19] order on motion for miscellaneous relief (DKT.20) filed 5-4-2020
9. Judicial Notice of the court record (DKT.22, 22-1) filed 7-6-2020
10. Motion requesting an evidentiary hearing (DKT.24,24-1) 7/15/2020
11. Motion to Expedite Consideration, Motion to Compel judgment Pursuant to Fed. R. Civ. Pro. 12 (c), Motion for release pending the decision of this court (DKT.26) filed 10-2-2020
12. Motion Covid-19 motion for release (DKT.27) filed 10-7-2020
13. Report and Recommendation re [26] Motion to Expedite, Motion to Compel, Motion for Release Pending the decision of this Court filed, [1] Petition for writ of habeas corpus [24] motion Requesting an Evidentiary hearing (DKT.28) filed 10-28-2020
14. Motion for Extension of time to file objection to [28] Report and Recommendation (DKT.29) filed 11-12-2020
15. Exhibit re [29] Motion for Extension of Time to file response/reply as to [28] Report and Recommendation (DKT.30) filed 11-12-2020
16. Motion for Extension of time to file objection as to [28] Report and Recommendation (DKT. 32) filed 11-20-2020

17. Motion seeking a Two to Three-month extension, object to the Report and Recommendation [32] Markham's motion is granted in part and denied in part (DKT.33) filed 11-23-2020
18. Report and Recommendation re [27] Motion covid-19 motion for release (DKT.34) filed 12-11-2020
19. Objection to [28] Report and Recommendation (DKT.37) filed 10-25-2021 w/ exhibit index and exhibits in support of [37] objection to [28] Report and Recommendation re [26] Motion to Expedite Motion to Compel, Motion for Release Pending the Decision of this Court [1] Petition for writ of habeas corpus [24] Motion re attachment Exhibit 1-6 (DKT.38), w/ Certificate of Service (DKT.39) filed 1-25-2021.
20. Motion under Rule 60 (b)(6), for relief from judgments extraordinary circumstances (DKT.44) filed 3/8/2021.
21. United States Court of Appeals for The Eighth Circuit denied Petitions Certificate of Appealability and Motion to supplement the record on 10/22/2021
22. United States Court of Appeals for The Eighth Circuit filed a mandate In accordance with the judgment of 10/22/2021, pursuant to the of Federal Rule of Appellate Procedure 41 (a), on 11/12/2021.
23. Here Now, Markham files his Motion for Issuance of Certificate of Appealability. Petitioner seeks relief from the District Court's deliberate indifference to law, United States Court Rule, and the congressional mandates concerning Subject-matter jurisdiction.

STATEMENT OF THE CASE

On January 22, 2016, Oji Konata Markham, the Petitioner, was charged by complaint with one count of first-degree burglary. During trial, the prosecutor moved to amend the complaint to add (charge). Petitioner was acquitted on that charge and was convicted of one count of first-degree burglary (assault-intent to cause fear), following a jury trial in Dakota County District Court. After trial, the Honorable David L. Knutson denied Markham's motion for a new trial. On January 22, 2016 Markham filed his appeal from the judgment of conviction asserting the following errors: trial court committed plain error by allowing the state to add a new and different charge after it rested, the prosecutor committed misconduct in closing argument by misstating the law, the evidence was insufficient to convict him, and

state withheld exculpatory evidence from the defense. The Minnesota Court of Appeals upheld Markham's convictions. The Supreme Court of Minnesota denied review. Markham files this writ of certiorari to review the judgment of the state courts.

Markham contends that his defense counsel introduction of this evidence violated his *Sixth Amendment rights* to the *effective assistance counsel*, the reliability of the *jail recorded phone call* that *Detective Ryan Olson* testify to was hearsay or the *Brooklyn Park Police Department* who made the *warrantless arrest* on behalf of *Dakota County* would have been undermined.
Petitioner's *ineffective-assistance-of-counsel* claim of failure to properly investigate and interview all known witnesses, failure to call certain witnesses ... are all interrelated.

Neither counsel nor Dakota County [Public Defender] investigator interviewed Officer [Tolbert], the *Brooklyn Park Police arresting officer*, S.D, O.H, Markham's land lord [Diana Kaldun], Markham's roommate [Tracy Ogunyemi] and the Dakota County Detective [Ryan Olson] before trial. Defense counsel did not even attempt to interview the witnesses herself. The Brooklyn Park Police reports (Addendum 12) of these interviews were in the prosecution possession. The police reports that outlined statements by witnesses. Diana Kaldun (who did not testify at trial). Markham ... offers substantial evidence that the documents were not, in fact, turned over prior to trial. It seems clear enough that Markham did not have access to the police reports before trial violate his due process, and Brady. See ***United States v. Almonte-Baez, 857 F.3d 27; 2017 U.S. App. Lexis 8472; 2017 WL 1963465***."

STATEMENT OF THE FACTS

With regards to Question Presented One (1), Mendota Heights Police Officer Stephen Hilyar responded to a call involving domestic dispute around 3:00 a.m. on January 22, 2016. (T 210, 216). He was met by Oxana Harris, who lived in the home, and a black male. (T 211). Hilyar thought Harris had been crying because her mascara was running. (T 211- 212). Hilyar could smell alcohol on her breath. (T 211-212). In her call to 911, Harris claimed she had been hit in the mouth and her mouth

was bleeding. *See* 911 Audio Trans. (attached at **Pet.App.5-7**).[1] By contrast, Harris told Hilyar she had been hit and had a bloody nose. (T 224). Hilyar did not see any blood on Harris' face or nostrils, however. (T 224). And, while Harris also claimed that she had been pushed to the ground, there were no visible marks on her body. (T 212, 224).

The black male at Harris's home provided several false names, but Hilyar eventually identified him as Shawn Davis. (T 212, 223). Hilyar was "baffled "about why Davis gave a false name, though he did not arrest Davis for providing false information to a police officer. (T 219, 223). Davis refused to allow Hilyar to photograph a scratch on his cheek. (T 218-219, 228). Like Harris, Davis had been drinking. (T 224).

Hilyar was at Harris's home for about three hours. (T 232). During that time, Harris received several calls and text messages, which Harris claimed were from Markham. (T 214). Hilyar did not document those calls or messages, however. (T 223). And, he did not note the time stamp on the text messages. (T 229). At one point, Hilyar spoke to the caller and told him to stop calling. (T 214).

Hilyar noted damage to Harris's front door, flat tires on two cars in the driveway, and damaged clay pots or ceramic pieces inside the home. (T 215). While Harris claimed that the tires had been slashed, Hilyar inspected the tires with a flashlight and did not see any evidence of tampering. (T 211, 218, 225-226).

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[1] The 911 call was not disclosed prior to trial despite several requests. Petitioner raised this issue in a motion for new trial, and attached a copy of the transcript to one of his post-trial motions.

Hilyar attempted to take statements from Harris and Davis, though he did not separate them. (T 226). Davis interrupted Harris several times. (T 226-227). Hilyar said to Davis, "I don't have a reason to believe what you're saying because you lied to me about your name." (T 227). Harris told Davis to leave. (T 227). Hilyar did not conduct a PBT or field sobriety tests before Davis drove away. (T 228, 232-233, 235).

Hilyar returned to Harris's home at about 8:00 p.m. on January 22nd. (T 222). Harris did not smell of alcohol at that time; she was sober and less emotional. (T 231). She was not complaining of any pain and Hilyar did not see any bruises or marks. (T 231). Harris showed Hilyar the doorframe and her tire, which had been fixed. (T 220-221). She did not want to press charges against Markham. (T 231).

Hilyar did not believe Harris or Davis was intoxicated when he responded to the call during the early morning hours of January 22nd. (T 233). Harris's and Davis's trial testimony, however, revealed that both were intoxicated and had hazy recollections of the incident.

Harris testified as follows: She dated Markham for about six months prior to January 22nd. (T 172-173). Harris claimed Markham had been disrespecting her and talking about sharing intimate photos. (T 202). She received calls and texts from Markham that day, and knew he was on his way over. (T 173-174). She told him not to come to her house. (T 174). Harris and Davis had been drinking vodka and socializing for a couple hours before Markham arrived. (T 174, 197). She did not remember how much she drank, but she was "very intoxicated." (T 174).

Harris initially testified that she was in her bedroom at the back of the house when Markham arrived, pounded on the front door, and shouted. (T 174). She later stated that she was at the front door with Davis when Markham arrived. (T 175). She claimed Markham walked around the outside of her house and knocked on her bedroom window. (T 175-176). Harris was in her room when she heard a noise, which she thinks was the door being broken, and then more shouting from inside the house. (T 176-177, 198). Harris was so intoxicated that she could not remember what Markham was doing or what he was shouting. (T 175-176).

Harris remembered running to the car, slipping on ice, and ending up in the snow. (T 177, 180, 183). She saw Markham as she ran past him. (T 179). Her tire was flat, and she could not drive away. (T 179). She went back inside and did not see Markham again. (T 180). Harris called 911. (T 179).

Harris claimed that she continued to receive calls and messages from Markham after he left. (T 181). She said that Markham threatened to show friends her "personal pictures" if she went to court. (T 182). The following day, Markham and a "hired hand" came to her house to fix the door and change her tire. (T 185).

Harris did not recall what she told the responding officer. (T 183-185). She was very intoxicated and did not remember the entire incident. (T 185). She also made clear that she did not see who broke her door, damaged items in her home, or flattened her tire. (T 185, 204). Later, when she was sober, she told the officer that she would like to drop the charges. (T 185, 200-201). She was feeling upset and disappointed in Markham when she was drunk and made the allegations. (T 201, 203, 208).

With regards to Question Presented Two (2), while Harris and Markham's relationship was far from perfect, she did speak with him several times after the incident and she helped him by putting "money on his books." (T 188). Over defense objection, the court allowed the state to introduce a portion of a call Markham made to Harris from jail on January 26, 2016, during which Markham suggested Harris say her **boyfriend** was not at the house that night, she was crying because they had argued that day, and that she broke her door because she was drunk and locked out. *See* **Ex. 12 at Trial, and exhibit 5-7.**

Davis, who recalled even less than Harris, testified as following: Davis was drinking with Harris at her home in January 2016. (T 271, 276). He recalled that they were drinking vodka and he was drunk. (T 276). Around 3:00 a.m., someone came to the house, though Davis did not know whether the person came inside. (T 272-273). The person pounded on the door, the door opened, and Davis got hit in the face. (T 273). Davis did not know whether he was hit by something, nor did he remember what he was doing before he got hit. (T 273, 276). Davis went into the bathroom to splash water on his face and police were there when he came out. (T 273). The police told him to leave, then helped him push his truck down the driveway and watched him go. (T 274, 277). Davis thought the police were going to pull him over. (T 274).

With regards to Question Presented Three (3), Four (4) and Five (5), the state charged Markham with one count of first-degree burglary (assault) three days after the incident. ***See* Complaint exhibit 12.** The complaint did not specifically allege assault-harm, but the probable cause section made clear there was an allegation of

physical harm; it stated "[Harris] stated she ran out the door and was pushed to the ground by Defendant and that Defendant tried to kick her. [Harris] stated that Defendant beat on her, causing her to get a bloody nose." *Id.* From the probable cause section, Markham was on notice the charge was first-degree burglary (assault-harm).

After the state rested; it moved to amend the complaint to add a second count of first-degree burglary, asserting Markham committed assault-harm against Davis, and assault-fear against Harris. (T 288- 293). Regarding the assault-fear allegation, the state misstated the law and argued in closing,

> Looking first at Ms. Harris, the term assault in that case, fear of - - intent to cause fear means an act done with intent to cause fear of immediate bodily harm or death.
>
> * * *
>
> The evidence supports she was in fear of immediate bodily harm or death, and the defendant caused that. Looking at the totality of the circumstances in the middle of the night, somebody outside the house screaming and yelling, door gets broken open, property damage, you go outside and your car tire is slashed. What other reason would someone do all that but to cause fear? Those were not accidental. The amount of force used to break open that door was not an accident. Two tires on two different vehicles both being flattened, not an accident. Those were intentional acts. (T 311-312).

With regards to Question Presented Six (6), the jury found Markham not guilty of the assault-harm count, and guilty of the count of assault-fear. (T 336-337). Markham asked the trial court to discharge his attorney for ineffective representation following trial and filed several post-trial motions. The court granted Markham's motion to discharge his attorney and proceed *pro se*, but denied the remainder of his motions. Judge Knutson sentenced Markham to an executed term of 111 months,

which is in the presumptive range for first-degree burglary. (S 15). This appeal follows.

Markham, filed in the District Court a 28 U.S.C.§2254 petition, to the best of his ability as a pro se Petitioner, after being denied constitutionally *effective counsel*, and his *Fourth Amendment Warrant Clause* rights.

1. Ineffective assistance of trial counsel who refused to develop the alibi defense that was known to the government, the court, and all trial counsel.
2. Ineffective assistance of trial counsel who refused to seek *Brady evidence*. It is a known fact that the government had possession of the ***Bate-Stamped undisclosed 911 transcripts and data,*** and the ***Brooklyn Park "arresting officer's original police reports (addendum 12).*** The ***Brooklyn Park "original police report,"*** with record testimony from Petitioner's landlord ***[Dian Kaldun].*** Prosecution withheld evidence during trial which is a *Brady violation* and *Newly Discover evidence* that was withheld from the defendant before and during trial.
3. Ineffective assistance of trial counsel who refused to seek *Brady evidence.* It is a known fact that the government never had a *warrant* to authorize another jurisdiction to arrest Markham inside his *Hennepin County* residence.
4. Trial counsel caused a conflict of interest when she allowed prosecution to introduce a jail recording phone call between the alleged victim and defendant who didn't take the stand nor was the victim there to be cross-examine, but Dakota County Detective Ryan Olson who monitor jail phone calls was allowed to elicit testimony from that jail recording.
5. Trial counsel provided constitutionally ineffective assistance of counsel when she refuses to develop the alibi defense that was known to the government.
6. Trial counsel provided constitutionally ineffective assistance of counsel by refusing to refine Markham's claims, that he raised in pro se, in his motion to dismiss for lack of evidence.
7. Markham provided constitutionally ineffective assistance of appellate counsel by refusing to raise the Court's plain error, of entering an order of conviction without subject-matter jurisdiction in Markham's direct appeal.
8. Ineffective assistance of trial counsel who refused to seek the Confrontation Clause when prosecution allowed a recoded jail phone call during trial after the witnesses was excuse. There wasn't nobody to be cross-examined which sway the jurors to find the defendant guilty. The theory of deliberate indifference would repeal the law of Monell in favor of the law of large numbers. Brady mistakes are inevitable. So are all species of error routinely

confronted by prosecutors: authorizing a bad warrant; losing a Brady claim; crossing the line in closing argument; eliciting hearsay testimony that violates the Confrontation Clause.

REASONS FOR GRANTING THE PETITION

The issues presented in this case is beyond the particular facts and parties involved but for growing interest of the public, society at large and integrity of the judicial system. The Minnesota Court of Appeals holding cannot be squared or reconciled with this court's decisions on *Brady's materiality test*. Most significantly, the Minnesota Court decided important constitutional claims in a way that conflicts with relevant decisions of this court and has so far departed from the usual and accepted course of justice. Because Minnesota tried and convicted Markham without due process of law, allowing such decision to hold will affect other similarly situated in Markham's situation further underscores the importance of granting review on Markham's Brady claim.

The charges against Markham were built on the hazy and shifting stories of Harris and Davis. The complaint, based on one of those stories, put Markham on notice that he was charged with one count of first-degree burglary (assault-harm), but he was acquitted of that charge. He was convicted of first-degree burglary (assault-fear) following two substantial errors: First, the trial court allowed the state to amend the complaint to add the assault-fear count in violation of Markham's Fifth, Sixth and Fourteenth Amendment rights to the notice, nature and cause of the accusations or charges, despite the fact that it was a new and different offense and the state had rested. Second, the prosecutor misstated the law in closing argument, suggesting the jury could convict Markham of the assault-fear count based merely upon intentional acts, rather than a specific intent to cause fear. The erroneous argument likely led the jury to find Markham guilty despite Harris's hazy recollection and in the absence of sufficient evidence. Moreover, following trial, Markham received only the transcripts of Harris's 911 calls from the state. Harris's story in the call differed from her statement to police, and both differed from her trial testimony. If Markham had the 911 recording prior to trial, he could have used the call to further

damage Harris's credibility. Had it heard evidence of the 911 call, the jury, which clearly questioned the state's evidence, likely would have acquitted him of both charges.

1. REVIEW IS NECESSARY TO ADDRESS HOW REVIEWING COURTS MUST ASSESS PREJUDICE WHEN THE STATE COMMITS A BRADY VIOLATION.

Petitioner requested the 911 call recording before trial, and the state concedes but offers no explanation for why it was not disclosed. There is no question the 911 call should have been disclosed, as it differed from the statement Harris gave to Hilyar at the scene and from her trial testimony. On this issue, Petitioner argued on appeal the only question: whether the *Brady* violation was harmless beyond a reasonable doubt?

The Court of Appeals concedes that the 911 call had impeachment value, but determined the *Brady* violation was immaterial because Harris' credibility had already been attacked. The Court of Appeals failed to give petitioner the benefit of harmless beyond a reasonable doubt standard. The Court failed to looked primarily to the weight of the state's case, and to specifically address the possible outcome if the *Brady* material would have reached its full damaging potential. *Markham*, No. A16-1548, slip op. at 10-11; see e.g. *State v. Taylor*, 869 N.W.2d 1, 12-14 (Minn. 2015)(applying the harmless beyond a reasonable doubt standard). Review is necessary to address how courts assess harm when the state commits *Brady* violations.

First, the trial court found that Markham was not prejudiced because Markham cannot show an alternative perpetrator. That finding and conclusion of law

was clearly erroneous because it is not supported by the trial record. O.H. testimony at trial, see (T 172-174), strongly supported an inference that Markham was O.H's "boyfriend" and not "ex-boyfriend." Markham points this court to the challenged "unduly prejudicial" evidence admitted at trial to support this reasonable inference. See **exhibit 12** (Markham allegedly told O.H. that she should tell the investigator that her "boyfriend" was not there at the time of the alleged incident). Although, the trial record does shows a relationship between Markham and O.H. to be far from perfect, but the material fact remains that Markham was O.H's "boyfriend" at the alleged time of offense.

> Vol.1, Tr.10 at L3-4 ("Ms. Harris is the former - - either former or current – girlfriend depending on which phone call you listen to"); Vol.3, Tr. 251 at L6-25 (shows prosecution arguments on admission of jail recording and referring to Markham as "my boyfriend ..." meaning as O.H's "boyfriend" not "ex-boyfriend"); Tr. 180 at L23-25, 181 at L1-14 (admitted evidence on the state case showing Markham's as O.H's "boyfriend" not "ex-boyfriend"); Tr. 210 at L7-8 ("something to the effect that a boyfriend/girlfriend dispute").

All these evidence points to the fact the "during the incident" O.H's "saw – my friend was there," Vol.5, Tr.316 (same), and had Markham and his defense counsel known about the 911 call withheld evidence, they could have challenged the state case by raising an alternative theory, namely, that O.H's "ex-boyfriend" was liable for the assault, injury and crime.

Markham points this court to the 911 transcript. See **Pet.App.5-7**. The 911 transcripts or Brady material clearly shows O.H's statement to the 911 operator that her "ex-boyfriend" not "boyfriend" was liable for the alleged offense. It is clear from both the trial and 911 records that O.H. had both a "boyfriend" and an ex-boyfriend."

This contradictory evidence that conflicts with O.H's trial testimony reasonably shows that at the time of the alleged incident, an alternative perpetrator (O.H's "ex-boyfriend") existed. The Prosecution failure to give Markham this withheld evidence seriously harmed Markham from a meaningful opportunity to present an alternative perpetrator defense that was consistent with the withheld 911 transcript that O.H's "ex-boyfriend" not Markham as her "boyfriend" was liable for the alleged misconducts. This is so because, at the very least, without some meaningful inquiry into this "boyfriend" and "ex-boyfriend" material facts or determinative issues bearing solely on the identification of who actually committed the crime under the reasoning of *Leka v. Portuondo*, 257 F.3d 89, 107 (2nd Cir.2001) (the "[911 call] would have likewise cast doubt on [O.H's "ex-boyfriend" not "boyfriend"] identification"). The Prosecution failure to disclose this 911 record before and during trial was material because the Prosecution precluded Markham's defense counsel the meaningful opportunity to adequately "prepare for trial and develop an intelligent defense strategy" under the reasoning of the Third Circuit in *United States v. Lee*, 573 F. 3d 155, 164-65 (3rd Cir. 2009) (held *Brady* material to be prejudicial because "[Markham] was deprived of any opportunity to prepare meaningfully for trial, to design an intelligent trial strategy, or to address the strongest evidence [O.H's testimony] linking him to the [crime]").

Second, the record before this court shows that the Minnesota Court of Appeal prejudice analysis or Brady materiality test was clearly erroneous, deficient and cannot be squared or reconciled with this court's clearly established precedents in

United States v. Agurs, 427 U.S. 97 n.21 (1976) (requesting lower courts to access the weight of evidence against Defendants); *Smith v. Cain*, 565 U.S. 73,76 (2012) requiring lower courts to find immateriality where the evidence of guilt is "overwhelming "or "so strong." This is not the case. There is nothing in the record or in the lower court's analysis or findings of immateriality based on overwhelming evidence against Markham or any conclusion of law in support thereof. Markham points the court to his counsel's appellate brief, see **pro se brief**, where his counsel at direct appeal argued that prejudice was ensured because the state evidence against Markham was weak.

> The evidence in this case was extremely weak. Neither Harris nor Davis fully recalled the incident and Harris's story changed with each telling. She told the 911 operator someone broke her car door, pushed her down, and her mouth was bleeding. See 911 Audio Trans. At 1-2. She told Hilyar her nose was bleeding, though Hilyar explained that he did not see any blood on her face or in her nostrils. (T224). At trial, she testified she did not recall Markham giving her a bloody nose and she did not claim Markham pushed her. (T202). Rather, she explained that she slipped on the ice and hurt her leg. (T202).
>
> The jury clearly did not find the state's evidence entirely persuasive; it acquitted Markham of burglary (assault-harm) charge, likely because Davis's testimony was --- like Harris's – hazy. But Davis was further impeached by his odd behavior on the night of the incident of providing a false name and refusing to allow Hilyar to photograph his injury. If the jury had additional reason to doubt Harris, such as the 911 call that offered yet another version of events, the jury very well could have concluded the state failed to prove the burglary (assault-fear) charge beyond a reasonable doubt. Because the error was not harmless beyond a reasonable doubt, Markham's conviction must be reversed.

The state response failed to even address Markham's argument bearing on weak weight of evidence to effectively and adequately access prejudice or materiality question – whether or not overwhelming evidence of guilt exist?

Remand is necessary in light of *Smith v. Cain*, and under the reasoning of the *United States v. Washington*, 263 F. Supp. 2d 413, 424 (D. Conn. 2003) (materiality is the more likely conclusion where guilt is supported by evidence not overwhelming); *Leka v. Portuondo*, 257 F. 3d 89, 104 (2nd Cir. 2001) (same) because the state have not even explained or argued to any court with necessary findings and conclusion of law to affirm on this Brady determinative or materiality factor. This is so because the evidence against Markham was weak, based solely on testimony of O.H (recounted by Hilyar) under the reasoning of the *United States v. Holmes*, 413 F. 3d 770,776 (8th Cir.2005) (held state's case was not strong because the state case was less than overwhelming); *Blackston v. Rapelje*, 780 F. 3d 340, 360-62 (6th Cir. 2015) (state's case was not strong because it rested solely on testimony of witness); *Guzman v. Sec. Dep't of Corr.*, 663 F. 3d 1336,1355-56 (11th Cir. 2011) (held in a case, error is harmful requiring relief when there are significant weakness in state case against [Markham], such as where trial boils down to a swearing match "essentially to credibility contest" between defense's and state's witnesses).

Under these arguments, and for the prima facie fact of an acquittal in this case and with no physical evidence linking Markham to the crime, it does follow that the withheld 911 call was material because the state and trial record cannot sustain a showing of overwhelming evidence of guilt.

Third, like in this case, the court of appeals agreed that "the 911 call has impeachment value" and the record shows that O.H's testimony was the only evidence linking Markham to the crime. Courts have found in such cases a Brady violation to

be material in light of *Smith v. Cain* (held material since [Markham's] guilt determination rested solely on [O.H's] testimony because [O.H's] testimony was the only evidence linking [Markham] to the crime, and the witness's (O.H's) undisclosed 911 call directly contradicted the witness's testimony); and under the reasoning of *United States v. Washington*, 263 F. Supp. 2d 413, 424 (D. Conn.2003) (evidence of impeachment value will be considered material "if the witness whose testimony is attacked supplied the only evidence linking the defendant [ ] to the crime"); *State v. Hall*, 315 N.W. 2d 223 (Minn.1982) (failure to comply with disclosure rules held to require new trial); *State v. Schwantes*, 314 N.W. 2d 243 (Minn.1982) (same); *State v. Zeimet*, 310 N.W. 2d 552 (Minn.1981) (same). See also *Wearry v. Cain*, 136 S. Ct. 1002 (2016) (held failure to disclose a material evidence because the only evidence directly linking inmate was the first witness testimony of [O.H.] which was corroborated by a second witness [officer Hilyar]). Based on this determinative factor, the withheld 911 call was material and prejudicial to Markham.

This is so because if the court compares O.H's testimony at trial and the undisclosed 911 call, the record shows O.H.'s "undisclosed statements directly contradicted [O.H's] testimony" *Smith v. Cain, Id.* at 73-77, on critical elements of the prosecutor case: identification of who assaulted O.H; whether it was O.H's "ex-boyfriend;" and on the essential element of "bodily harm, physical pain and injury" - required for a successful conviction. The prosecution was required to proof these essential elements beyond a reasonable doubt under the due process mandates of *Winship*, 397 U.S. 358,364 (1970) (held that the state must prove "every fact

necessary to constitute the crime" beyond a reasonable doubt"); *LaFave*, Criminal Law §1.8 (5th ed.2010); *McCormick*, Evidence §§ 336-337 (6th Cir.2006); *Fiore v. White*, 531 U.S. 225,228-29 (per curiam)(2001) (same).

The 911 call stated on essential element of "bodily harm, physical pain and injury" that:

> **DCC**: Are you injured at all?
> **OH**: Yes, my mouth was bleeding but I think it's OK now.
> **DCC**: Did he hit you?
> **OH**: Yeah, he pushed me on the ground. He left; I don't know where is he.

O.H. testimony at trial stated she did not recall these incidents, and the jury was instructed on Tr. 303-304 (intent to cause fear, bodily harm, physical pain or injury) this critical element that,:

> "Body Harm" means physical pain or injury, illness, or any impairment of a person's physical condition. It is not necessary for the State to prove that the Defendant intended to inflict bodily harm or death, but only that the Defendant acted with intent that Oxana Harris would fear that the defendant would so act. In order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted.

Markham's case creates a novel set of circumstances for this court to reasonably conclude that the withheld 911 call was material in a case where the defendant did not testify at trial (as advised by his trial counsel) because the undisclosed 911 call was admissible evidence for trial having an 'impeachment value" bearing directly (a) on the credibility of O.H, who was a key or critical witness in the prosecutor's case –in—chief and without O.H, the prosecution would have no case against Markham; (b) on O.H's 'character for truthfulness" which would have cause jurors to reasonably disbelieve O.H's testimony at trial in light of the recantation evidences in **Pet.App.8-9,10-11**; (c) on O.H's and Hilyar testimony regarding critical

elements or essential matters being trial – "ex-boyfriend" suspect identification, bodily harm, physical pain and injury; (d) on O.H's testimony which was the only direct evidence linking Markham to the crime; and (e) the acquittal of Markham on SD's charges signifies that the jury reasonably discredited SD's testimony at trial.

Under these circumstances and "where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case," *United States v. Washington, ld.* at 425, state and federal courts have found the withheld 911 information to be material in light of *Smith v. Cain, ld.* at 73-77; *Wearry v. Cain, ld.* at * 1003-1008 (on suspect identification); and under the reasoning of *Monroe v. Angelone*, 323 F. 3d 286,317 (4th Cir.2003) (undisclosed evidence was material because it would have impeached key prosecution witnesses and undermine proof of critical element of premeditation and malice); *Mahler v. Kaylo*, 537 F. 3d 494, 503-04 (5th Cir.2008) (held material because evidence had impeachment value on the element of struggle); *United States v. Tavera*, 719 F.3d 705,713-14 (6th Cir.2013) (held material because witness testimony was the only direct evidence of defendant's intent which was a critical element); *Crivens v. Roth*, 172 F.3d 991,999 (7th Cir.1999) (held material because the undisclosed evidence would have impeached the credibility of key prosecution witness). Assuming the jury heard the 911 call, there exist "reasonable probability" that the jury may have as well discredited O.H's testimony to undermine the state's theory of case. Thus, undermines the confidence that Markham received a fair trial in the State of Minnesota.

Fourth, the Minnesota Court of Appeals assessment of Petitioner's Brady materiality test or prejudice shows the following deficiencies. The Court of Appeals concluded that "a timely disclosure of the 911 call would not have resulted in a different verdict." But that conclusion is so lacking because it was not based on the enunciated "reasonable probability" and/or "harmless beyond reasonable doubt" standard in light of *Smith v. Cain*, *Id* at 75-76 (evidence is "material" within the meaning of *Brady* when there is a "reasonable probability" that, had the evidence been disclosed, the result of the proceeding would have been different); *Wearry v. Cain*, *Id* at *1006 that evidence "qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury. To prevail on his Brady claim, a defendant need not show that he more likely than not would have been acquitted . . . he must show only that the new evidence is sufficient to undermine confidence in the verdict." In Markham's case, once the lower court had agreed that the withheld 911 call had "impeachment value," it cannot be said that the "impeachment value" on key or critical witness, on key witness character for truthfulness and credibility, on critical elements of "ex-boyfriend" suspect identification, bodily harm, intent to cause fear, physical pain and injury is not sufficient to undermine confidence in a verdict where the jury's determination of Markham's guilt or innocence hinged entirely on the credibility of O.H.

The Court of Appeals conclusion as stated above is missing the correct standard "likely" another word some court have used to replace the phrase "reasonable probability" in reaching their conclusion. That Minnesota State Court

conclusion was clearly erroneous and objectively unreasonable because the Court of Appeals applied an *heightened or wrong* standard for *Brady* materiality in light of *Gates v. State*, 398 N.W. 2d 558, 561 (Minn. 1987)("whether that [withheld] evidence likely would have changed the outcome of the trial.")

Fifth, Markham argues that the State Court failure to apply the required legal standards violates a Petitioner's fundamental and substantive due process right to access to court to challenge violations of constitutional rights and right to judicial review. The set of circumstances governing these violations is that:

(a) The Minnesota Court of Appeals failed to apply these State and federal legal standards:

> ***de novo* judicial review** in light of and under the reason of *State v. Wells*, 2007 WL 2769686 *6-7 (Minn. Ct. App.2007) (when due process issues are involved in matters of trial procedure, this court reviews the district court's decision *de novo*); *State v. Heath*, 685 N.W.2d 48, 55 (Minn. App. 2004) (same); *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006) ("whether the admission [or exclusion] of evidence violates a criminal defendant's right under the Confrontation Clause is a question of law the appellate court reviews *de novo*"); *State v. Blanche*, 696 N.W.2d 351 (Minn. 2005) (same),
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> **harmless-error judicial review** in light of *Neder v. United States*, 527 U.S. 1(1999) (during appeal, for purpose of reviewing a criminal defendants' conviction, erroneous admission of evidence and/or erroneous exclusion of evidence is subject to harmless-error analysis; *Carston v. Radtke*, Civ No. 70-cv-07-17210, 2009 LEXIS 161 *12,*26-27 (Minn. Dist. 2009) (concluded that an improper evidentiary ruling resulting in the erroneous admission or exclusion of evidence will only compel a new trial if it result in prejudicial error to the complaining party. *Kroning v. State Farm Auto Ins. Co*, 567 N.W.2d 42 (Minn. 1997); *Poppenhagen* at 79-80. An evidentiary error is prejudicial if it might reasonable have influenced the jury and change the result of the trial. *George v. Estate of Baker*, 724 N.W. 2d 1, 9-10 (Minn. 2006). "As stated previously, the Harmless Error Rule applies to evidentiary rulings and jury instructions"); *Blanche* (same), and

prejudicial judicial review analysis in light of *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (the court of appeals reviews evidentiary rulings for an abuse of discretion and for prejudice to the appellant);

(b) if the State Court had applied these state and federal constitutional legal standards to the claims presented for appellate review, there is a reasonable probability that the outcome of the appellate review would have changed; and (c) the state court failure to apply these legal standards during direct appeal and/or to review the claims presented for harmless constitutional error caused the loss of appeal and resulted in an actual injury of one who is innocent for continued wrongful incarceration without a first effective and substantive judicial review to challenge violations of constitutional rights.

The state court was "fundamentally unfair" under the reasoning of and unconstitutionally usurps Petitioner's substantive due process right under Minnesota and Federal constitutional by restricting Petitioner's access to courts to adequately adjudicate these claims (Questions Presented One (1) – Six (6)) under these legal standards, and thus violates Petitioner fundamental and substantive due process right to judicial review. *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (Petitioner have fundamental constitutional right to adequate, effective and meaningful access to court to challenge violation of constitutional rights); *Kristian v. Dep't of Corr.*, 541 N.W.2d 623,628 (Minn. Ct. App. 1996) (prison inmate have a constitutional right to access to the court that derives from due process); *New Creative Enterprise, Inc., v. Dick Hume & Assoc., Inc.*, 494 N.W. 2d 508, 511 (Minn. Ct. App. 1992) (Minnesota Supreme Court has stated that due process includes the right to judicial review);

Spann, Id at 870 (in Minnesota, a convicted defendant is entitled to at least one right to review by an appellate court); Minn. R. Crim. P. 28.02, Subd. 2(1) (appeal as of right from final judgment, and Petitioner's right to judicial review). Petitioner's due process right to access to the court of this state, and right to judicial review are protected liberty interest at stake. These due process rights are also fundamental and substantive right protected by the due process clause under U.S. Const. V, VI, XIV, Minn. Const. Art I, §2 (equal protection of law), §7 (procedural and substantive due process) and by state legislative statutes.

Like in the case at hand where a party has properly preserved at trial, a *state and federal constitutional right to judicial review* on trial court evidentiary rulings for appellate review (constitutional issues raised during trial), it is beyond doubt that the state court failure to address under the "reasonable probability" and/or "harmless beyond reasonable doubt" standards does invariably implicates Petitioner's fundamental due process rights (right of access to court and right to judicial review), because if Petitioner choses to go back to the same state court for effective and adequate review on these claims, the state will use *State v. Knaffla*, 309 Minn. 246, 243 N.W. 2d 737,741 (Minn. 1976) (addressed all matters raised therein in direct appeal) to bar the claims. This practice allows state court to fall short of applying effective and adequate standard of review (*de novo judicial review, harmless-error judicial review, and/or prejudicial review analysis)* for reversal during direct appeal where knowing that inmates would be subsequently barred in a later post-conviction proceeding to preclude substantive review of a state and federal constitutional

meritorious claim. The practice is contrary to the well settled law that it is "[u]pon the state courts, equally with the union, rests the obligation to guard and enforce every right secured by the Constitution." *Mooney v. Holohan* (quoting Robb. Connolly, 11 U.S. 624, 637). For these reasons standing alone, this court should grant review by exercising its supervisory power to correct this fundamental error.

The state court failure does prejudice Petitioner's fundamental and substantive due process right to judicial review to effectively and adequately appealing his or her conviction in court. The state court failure positions inmates to a procedurally and substantively disadvantage in any action of re-litigating the merit of constitutional errors that the state court initially failed to effective and adequately address on direct appeal. This is so because every inmate is entitled by law to *de novo judicial review, harmless-error judicial review,* and/or *prejudice judicial review analysis* once raised in trial, and in direct-appeal appellate brief, because these review standards are available and critical to any successful appellate review. Novel circumstances are prima facially present under these set of circumstances where after properly preserving these constitutional issues at trial and in direct appeal appellate brief, it was definitely impossible for any Appellant (Petitioner) to have known the mind of the court – on whether or not the court in making its final decision would apply these *de novo judicial review, harmless-error judicial review,* and/or *prejudice analysis judicial review, even where these state and federal constitutional legal standard of reviews are available at the state court disposals* and there is no other procedural means or platforms to adequately re-litigate these issues. In fact,

the state procedural framework (*Knaffla* bar) makes it impossible to do so. Therefore, the failure to apply these legal standards during direct appeal and later using *Knaffla* to bar meritorious review now violates Petitioner's substantive and procedural due process rights requiring a *"full and fair hearing"* on all claims under the reasoning of *Sample v. Diecks,885* F.2d 1099,1115-16 (3rd Cir. 1989) (due process violation where inmate denied meaningfully hearing of claim because interest in avoiding wrongful incarceration outweighed any administrative burden on state or courts).

Furthermore, the state courts applications of these standards to certain state's cases *applying de novo review, harmless-error review and prejudice analysis,* and failure to apply these same legal standards to Petitioner's *claims* even when requested in direct appeal appellate briefs violates Petitioner's rights to equal access to the court and to equal protection of law guaranteed by the Fourteenth Amendment of United States Const. XIV and Minn. Const. Art I, section §§ 2,7.

Sixth, not only did the state court improperly evaluate the materiality of the 911 call, the state court also failed to uphold this court's "cumulative evaluation of the materiality" requirement held in *Wearry v. Cain, ld* at *1007 by looking into the closeness of the case, the centrality of issues implicated and emphasizing on the "reasons [why questions] a juror might disregard new evidence [911 call] while ignoring reasons [they or a juror] might not." With that been said, it is reasonable for this court or any court to also conclude that the withheld 911 call evidence having such "impeachment value" also implicates Markham's Sixth Amendment Confrontation Clause right to effectively and adequately cross-examine O.H on these

(10th Cir.2013) (same); *Banks v. Dretke*, 540 U.S. 668,692 (2004) (prosecutor must disclose evidence favorable to the defendant if the defendant so request); *Strickler v. Greene*, 527 U.S. 263,281-82 (1999) (same).

Eight, The Court of Appeals violated the Petitioners 5th and 14th Amendment rights when ruling on evidences that wasn't admitted in trial, by doing this the Court of Appeals committed reversal errors, where it rule upon the 911 calls transcripts and the government's failure to disclose O.H.'s testimony regarding the inaccuracy of a time stamp, or to inform the petitioner that the time stamp was inaccurate, violate state and federal **Rule 16. (See *pro se* brief, Pet. App. 5-7).** The state violated **Rule 16** by failing to provide an accurate copy of the 911 transcript and data. The 911 calls were not disclosed prior to trial, it is unclear on how the court of appeals can make such a ruling without the transcript being introduced to a jury, and it's unfound and unlawful for the state court to make this ruling.

Markham argues that the state failure to disclose O.H. 911 transcript and data regarding the inaccuracy of the time stamp, or to inform the Petitioner that the time stamp was inaccurate, did violate state and federal Rule 16. Petitioner relies on *United States v. Lee*, 573 F. 3d 155 (3d Cir.2009), in support of his contention that the state's failure to disclose the inaccuracy of the time stamp constituted a *Rule* 16 violation. In *Lee*, the government provided to the defendant a photocopy of the front of a hotel registration card, which indicated that the defendant had rented a hotel room for one night. *Id.* at 159-60. The Third Circuit found that the government had committed a Rule 16 violation. *Id* at 165. The facts of the instant case are materially the same to those involve in *Lee*. In *Lee*, the government violated *Rule* 16 by failing to provide an accurate copy of the hotel registration card that it presented at trial.

On the non-time stamped 911 transcript and data, Petitioner argues that the prosecution's failure to extract the data with timestamps and produce original recording and turn them over to the Petitioner in advance of trial violates the *Brady* rule and entitles Petitioner to a new trial. If a prosecutor possesses exculpatory evidence that had it been disclosed to the defense might have induced a reasonable

jury to acquit, failure to provide it to the defense would be a reversible error. *Brady v. Maryland*, 373 U.S. 83 (1963); see also *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999); *Kyles v. Whittey*, 514 U.S. 419, 437-40 (1995); *Gantt v. Roe*, 389 F. 3d 908, 912-13 (9th Cir. 2004). The *Brady* rule has been extended to include investigators and other members of the "prosecutorial team" broadly understood. *Kyles v. Whittey*, supra, 514 U.S. at 437-38; *United States v Wilson*, 237 F. 3d 827,832 (7th Cir.2001); *United Stated v. Hall*, 434 F.3d 42,55 (1st Cir.2006); *United States v Wood*, 57 F.3d 733,737 (9th Cir. 1995). Otherwise investigators assisting in a prosecution could conceal from the prosecutor's exculpatory evidence that the investigation had revealed and then the evidence would never be revealed to the defense. In this case the police officers and prosecutor were part of the prosecutorial team.

2. REVIEW IS NECESSARY TO ADDRESS HOW REVIEWING COURTS MUST ASSESS "UNDULY PREJUDICIAL" EVIDENCE WHEN THE STATE COMMITS A BRADY VIOLATION AND THEN ADMITTED JAIL PHONE CALL RECORDINGS BETWEEN MARKHAM AND O.H.

In light of the arguments presented in Section 1, Markham argues that the trial court denied him due process of law by admitting Jail Call recording as evidence during his trial. In cases where Petitioner alleges that both the court's action in admitting the evidence and the prosecutor's action in presenting the evidence violate due process, courts have conflated the two issues and applied the same test, looking to see whether the admission of the evidence was so egregiously improper as to deny Markham a fair trial. See *Anderson v. Goeke*, 44 F.3d 675,678-79 & n.2 (8th Cir.1995); *Estelle v. McGuire*, 502 U.S. 62, 70 (1991) (addressing whether the admission of evidence of battered syndrome at trial violates due process); *Darden v. Wainwright*, 477 U.S. 168 (1986); *Payne v. Tennessee*, 501 U.S. 808 (1991).

On this issue, the Minnesota Court of Appeal concluded that "we decline to address appellant's harmless-error claim." Markham argues that in assessing the prejudicial impact of the admission of jail phone recording, this court in *Estelle* as well other appellate courts consider (a) the cumulative effect and pervasiveness of the jail phone evidence; (b) the weight or strength of the properly admitted evidence supporting guilt; and (c) the curative actions taken by the trial court to the jury on

how to properly use the Jail Phone Call evidence during deliberation. *Anderson, ld* at 679.

The trial record shows that the state's purpose of introducing the jail call recording as argued by the prosecution in Vol. 1, Tr. 10 at L8-12 ("in light of the fact that they have a domestic relationship, these phone calls also give insight into the relationship between the parties and between Ms.Harris and the defendant, and, therefore, would also be admissible as relationship evidence under Minn.Stat. 634.20") was to show the relationship between Markham and O.H. The trial record also shows that the state's purpose of introducing the jail call recording as argued by the state in Tr.250-254,254 L6-12 was because the evidence are "inculpatory in nature because they show a conscious effort on the part of the defendant."

Markham argues that the state admitted "unduly prejudicial" jail call recording that was coerced or involuntary inculpatory in native, and a relationship evidence against his interest at trial. Markham also argues that the state allowed the jury to re-listen to this jail call recording twice at trial. Trial counsel objected in (Tr.254-256,256-262) to the admission of the recording at trial, arguing in relevant part that the admission of this evidence against Markham's interest "is inflammatory, it's prejudicial, it's irrelevant and it's cumulative" and renders Markham's trial fundamentally unfair "to confuse and prejudice and inflame the jury about Markham in an unlawful way."

It is undisputable that the jail recording was a form of relationship evidence and the trial court failed to instruct the jury, see Tr. 303-304, on the lack of **no relationship evidence instruction** under state law warranting reversal. Markham refers to this Jail Call recording as "relationship evidence," an evidence of similar conduct by Markham against the alleged victim of domestic abuse. See Minn. Stat. §634.20 (2012). Evidence of the relationship between Markham and OH does require a special jury instruction. See *State v. Word*, 755 N.W.2d 776, 783,785 (Minn. App. 2008)(defining relationship evidence and stating that such evidence requires a cautionary instruction).

It is indisputable that the state in relevant part used these jail recording in its closing argument in Vol.5, Tr.315-17 that "[t]he defendant acknowledge in that recorded phone call to causing the damage" an essential elements for jury to determine, and in rebuttal argument in Tr.326 ("[w]hat about that phone call. . . seem like involuntary conversation. . .") to seek conviction. It is indisputable that the jury had to re-listen to the jail recording before finally rendering a verdict. See Vol.5, Tr.332-35 (can we listen to the recorded calls?). Trial counsel also objected in Tr.332-34 to allowing the jury to re-listen to the recording over and over again.

Under these circumstances, and taking into consideration that the court of appeal findings on "**specific intent**" to cause fear under the circumstantial-evidence standard rested solely on the facts in the Jail Call recording, the jail recording was "inflammatory, it's prejudicial, it's irrelevant and it's cumulative" and "so infected the trial fundamentally unfair" in light of *Kansas v. Carr*, 577 U.S. __ (2016) concurring that "it is the due process clause that wards off the introduction of 'unduly prejudicial evidence' that would 'render the trial fundamentally unfair,'" and under the reasoning of *Payne, Id* at 825 which held that in the event that evidence is introduced that is unduly prejudicial that it renders Markham's trial fundamentally unfair, the due process clause of the Fourteenth Amendment provides a mechanism for relief. *Darden, Id* at 179-83.

3. REVIEW IS NECESSARY TO ADDRESS LATE AMENDMENTS TO CRIMINAL COMPLAINTS WHEN THE STATE COMMITS A BRADY VIOLATION.

In light of the arguments presented in Section 1 and 2, in this case, the state initially charged Markham with one count of first-degree burglary (assault). While the complaint also did not specify "assault-harm," it made clear through the probable cause section that the theory was assault- harm. The Court of Appeals rejected Markham's argument that the amendment was improper; reasoning it merely "restated with particularity the original complaint." *Markham*, No. A16-1548, slip op. at 4-6. Review is necessary to address the circumstances under which amending the complaint to add an additional charge is permissible in presence of a *Brady* violation.

4. REVIEW IS NECESSARY TO ADDRESS THE POINT AT WHICH A PROSECUTOR'S MISLEADING ARGUMENT CONSTITUTES MISCONDUCT WHEN THE STATE COMMITS A BRADY VIOLATION.

In light of the arguments presented in Section 1 through 3, during closing arguments, the state initially articulated the correct standard for assault-intent to cause fear, acknowledging the element requires an act be done "with an intent to cause fear of immediate bodily harm or death." But, then the prosecutor said," [The acts of yelling, breaking a door, and slashing two tires] were not accidental. The amount of force used to break open that door was not an accident. Two tires on different vehicles both being flattened, not an accident. Those were intentional acts."

Markham argued on appeal this argument likely confused the jury by suggesting the jury could convict based on intentional acts, rather than the specific intent to cause fear. The Court of Appeals rejected Markham's argument, reasoning the prosecutor was merely using circumstantial evidence to support an argument that Markham acted with intent. *Markham*, No. A16-1548, slip op. at 8-9.

While the Court might be right that the prosecutor did not intent to misstate the law, the argument was confusing at best, misleading at worst. The jury likely relied on the arguments to provide context and definition for the instructions. This case presents the question at what point does an argument become so misleading as to constitute prosecutorial misconduct or error in the presence of a *Brady* violation. Addressing this issue, which is likely to arise again, will provide guidance to the lower courts.

5. REVIEW IS NECESSARY BECAUSE THE LOWER COURTS DEPARTED FROM THE USUAL, ACCEPTED COURSE OF JUSTICE BY FINDING THE EVIDENCE WAS SUFFICIENT TO CONVICT MARKHAM.

In light of the arguments presented in Section 1 through 4, to prove assault—fear, the state was required to prove Markham specifically intended to cause Harris to fear bodily harm or death. Markham argued on appeal the state failed to do so because there was a rational hypothesis other than guilt, namely that Markham was merely expressing frustration over his and Harris' recent breakup and the fact that Harris was with another man. The Court of Appeals rejected this argument.

Markham, No. a16-1548, slip op. at 6-8. Markham respectfully disagrees with the Court of Appeals' decision and asks this Court to review the sufficiency of the evidence.

6. REVIEW IS NECESSARY BECAUSE MARKHAM RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER STRICKLAND V. WASHINGTON STANDARD.

In light of the arguments presented in Section 1 through 5, Markham also asks this Court to accept review of all of the issued raised in his *pro se* supplemental brief on ineffective assistance of trial counsel. Markham claims and argues that his trial attorney (public defender) "relied solely on evidence the state and [Markham] had provided" *Wearry v. Cain, ld* at *1005-06, and his trial attorney failure to uncover or inquire into this alternative perpetrator theory of defense constitutes ineffective assistance of trial counsel under *Strickland v. Washington* standard.

CONCLUSION

For the reasons, a writ of Certiorari should issue to review the judgment and opinion of the Minnesota Court of Appeals.
A focus on what the jury did not know establishes the substantial likelihood of a different outcome at a new trial. Collectively, counsel's errors "have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." Strickland, 466 U.S. at 698-699. Where, Markham respectfully request remand for discovery, subpoena, expansion of record, suppress evidence, and evidentiary hearing to properly address his warrantless arrest and ineffective assistance of trial and appellate counsel's claim and relief is granted and vacated.

Wherefor now, Markham urges this honorable court to issue a Certificate of Appealability authorizing him to appeal the District Court's denial of his constitutional and procedural claims presented herein. In the alternative, this court may grant a C.O.A. and remand for further proceedings.

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Respectfully Submitted,

Oji Markham

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