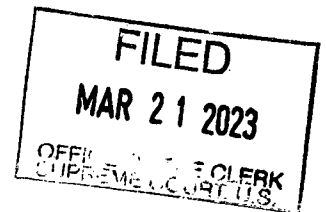


No. **22-7186 ORIGINAL**



IN THE
SUPREME COURT OF THE UNITED STATES

Daniel Ray Mann — PETITIONER
(Your Name)

Doug Clark, warden, SDDoc, and ^{vs.}
Attorney General for South Dakota — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court of South Dakota, Southern District
and the United States Court of Appeals, Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Daniel Ray Mann #48594, Pro Se
(Your Name)

1412 Wood Street
(Address)

Springfield, SD, 57062
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Are the "rules of evidence" laws?
2. Is a due process constitutional (5th or 14th) right recognized as the related right presented under "plain error" review?
3. Can appellate counsel's failure to review submitted claims with client prior to submission of appeal, to state supreme court, on appeal as of right, constitute cause and prejudice under Strickland review?
5. Do Prosecutor's repeated use of questions which evoke vouching responses from the state's witness (a seasoned police officer & an expert at testifying at trial) violate due process (5th & 14th Amendment) under "plain error" review, or prosecutorial misconduct?
4. Does Prosecutor's statement bolstering / vouching for the expert witness, the interview, & answers of the state's main witness, constitute prosecutorial misconduct, or a violation of due process under "plain error" review, where only circumstantial evidence is presented?
6. If the state Supreme Court does not specifically state that its decision is based on a procedural default, which should be identified by the court explicitly, and District Court makes a finding of a procedural default, should petitioner be granted an opportunity to respond to the District Courts de novo assessment?
7. Can cumulative error by prosecution constitute prosecutorial misconduct, or violate due process under "plain error" review?
8. Can counsel's consistent failure to use objections (verbal & on motion) violate the 6th Amendment & Strickland standard or "plain error" review?
 - a) for leading questions or prosecutorial guarantee of truthfulness?
 - b) for vouching / bolstering by state's witness?
 - c) for improper burden shifting on pre-trial silence?
9. Is the AEDPA Constitutional under the suspension clause, as the country is neither under invasion, nor under rebellion?
10. Can the Supreme Court address the circuit court split between on vouching testimony and Fed Rule 702 & related state laws? (re. 3rd, 7th, & 8th Circuits)
11. On Strickland claims of ineffective counsel, where a certificate of probable cause issued, did the District Court incorrectly interpret whether the standard was met, as the State Habeas Court was the last reasoned judgement that was not a summary disposition?

Question(s) Presented (continued)

12. Under "prevailing professional norms", such as they exist, does counsel become ineffective for presenting in closing argument confusing standard of proof which deviates from a "reasonable doubt"?
13. Under *Strickland v. Washington*, can an "objective standard of reasonableness" be identified by the "Rules of Evidence" which are dually reviewed by the United States Supreme Court prior to enshrinement in law, as well as where states choose to enshrine virtually similar laws under statute?

in the District Court.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix K to the petition and is

☒ reported at Mann v. Clark, 2022 U.S. App. LEXIS 36956; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix G to the petition and is

☒ reported at Mann v. Clark, 2022 U.S. App. LEXIS 136100; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix E to the petition and is

☒ reported at Mann v. Young, 957 N.W. 2d 206; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the South Dakota Supreme court appears at Appendix A to the petition and is

☒ reported at State v. Mann, 918 N.W. 2d 641; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 4, 2022.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 21, 2022, and a copy of the order denying rehearing appears at Appendix K.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was March 29, 2021. A copy of that decision appears at Appendix E.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Statement of the Case

①

The District Court in this case pointed to a California holding that the "Federal Rules of Evidence are not 'laws' or 'rights' that apply in state court criminal proceedings." *Hurtado v Long*. In reply Petitioner would note that "It is within acknowledged power of legislature to prescribe which shall be received, and effect of that evidence in courts of its own government." *Fong Yue Ting v. United States*. regard U.S.C.S. Const. Art. I §8, Cl. 8. In re Oil Spill by the Amoco Cadiz, the 7th Circuit held, "The Federal Rules of Evidence are statutes, and district judges may not disregard statutes no matter how inconvenient or cumbersome they believe the rules to be." The 1975 Bill enacted by Congress 93, H.R. 5463 was enacted to "establish rules of evidence for certain courts and proceedings," which were adopted only after review by the Supreme Court. Any amendments are made by legislature after review by the Supreme Court. In regards to the State of South Dakota, in 1978 pursuant to S.D. Supreme Court Rule 78-2 adopted Rule 702, among others, to reflect the Federal Rules of evidence. SDCL 19-19-702 states "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case."

There is literally a verbatim reading between USCS Fed. Rules Evid. R. 702 and the above statute. Petitioner's contention is that both are statutes, both are enshrined as codified law, and as they are identical the effect is similar, if not identical. While they may not be rights, they are laws generally speaking, and they implicate rights guaranteed by the constitution of the United States.

②

"Due Process" under the 5th Amendment, and separately under the 14th Amendment which §1 provides "due process under law" and "equal protection" even as states attempt to embrace laws on a state level, they cannot "abridge" rights afforded to United States citizens under the Constitution of the

② (continued)

United States of America. Rule 52(b) states "plain error that affects rights may be considered even though it was not brought to the courts attention." presumably this attention is made through objection or motion typically. Rule 103(e) additionally states "a court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved." South Dakota has also incorporated this rule as SDCL 19-19-103(e) "a court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved." again presumably attention and preservation is through objection or motion. This Supreme Court has stated in *United States v. Olano* that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Though not defined, I assume "substantial rights" to be constitutionally guaranteed rights, such as 5th amendment "due process" and separately 14th amendment "due process". When presenting a claim to the state Supreme court petitioner's counsel brought up both vouching/bolstering as well as prosecutorial misconduct under the "plain error" review standard, and although it was not specifically stated as follows "Under the 5th Amendment due process the prosecutor's repeated questions eliciting vouching testimony denied the defendant of a fair trial, also the 14th amendment due process right was violated. Additionally the prosecutor's attempt to highlight pre-trial silence violated both due process under 5th and 14th amendment, as well as equal protection. defendant requests "plain error" review." This would have been what I would have presented to the court, however counsel submitted a claim for "plain error" review;

"whether the introduction of testimony that the alleged victim was telling the truth improperly vouched for the credibility of the child witness."

Vouching testimony invaded the province of the Jury, and may cross the threshold into violation of "due process" rights by creating an unfair trial, and where counsel fails to preserve for appeal the violation of a defendant's constitutionally protected rights, the only recourse is to request "plain error" review.

Petitioner understands the District Court's findings, however

② continued

where the District Court cited *Turnage v. Fabian* "It is not enough to recite only the facts necessary to state a claim for relief... or to make a general appeal to a constitutional guarantee as broad as due process." petitioner calls back to the "plain error" standard for 5th & 14th amendment, Rule 103(e), & Rule 52(b) where the "substantial right" similar to "broad guarantee" is due process. "It is not sufficient that a somewhat similar state law claim" i.e. SDCL 19-19-103(e) "was made. Yet, the petitioner need not have cited 'book and verse' of the federal constitution" *McCandless v. Vaughn*. Similarly "the procedures used in deciding appeals must comport with the demands of Due Process and Equal Protection Clauses of the [United States] Constitution. *Evitts v. Lucey*."

③ Counsel which represented petitioner for his initial appeal as of right was sick to the point where she was unable to present the following claims to petitioner for review prior to submission;

(1) whether the introduction of testimony that the alleged victim was telling the truth improperly vouched for the credibility of the child witness;

(2) whether improper statements by the prosecution prejudiced him. The third claim presented prompted the question when petitioner was able to review the claims, "why wasn't a constitutional right brought up for these claims." Petitioner cannot get direct evidence of the post-appellate counsel meeting at the penitentiary, but petitioner previously submitted a letter noting the issue in the District Court Habeas as an exhibit. Petitioner posits "Cause" under the cause and prejudice test must be something external to the petitioner, something that cannot be fairly attributed to him. The existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some factor external to the defense impeded counsel's efforts to comply with the states procedural rule." *Coleman v. Thompson*. and "an error amounting to constitutionally ineffective assistance 'is imputed to the state' and is therefore external to the prisoner." *Murray v. Carrier*, and even though "absent contrary evidence the court assumes that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." *Roe v. Delo*. In this case the evidence is in the appellate courts own letter to her client.

③ Cont.

additionally "unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards to distinguish the American System of justice, a serious risk of injustice infects" the appeal as of right. *Cuyler v. Sullivan*. "U.S. Const. Amend. XIV [and VI] guarantees a criminal defendant the right to counsel on his first appeal as of right." *Furth v. Lucey*. And lastly "Just as a transcript may by rule or custom be a prerequisite to appellate review, the services of a lawyer for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits." *Furth v. Lucey*.

④ "Improper [prosecutorial] vouching may occur when the government... (2) implies a guarantee of trustworthiness" *United States v. Beasley*.

"Impermissible vouching may also occur when the government implies a guarantee of a witness's truthfulness" *id.* where the prosecutor at trial implied through one witness the veracity of the state's main witness when she stated that the expert "conducted over 500 plus forensic interviews... she knows how to ask non-suggestive questions to get to the truth."

This bolstered the state's witness and overtly implied that the testimony of the state's main witness was "the truth". The South Dakota Supreme Court has stated "the credibility of a witness - whether a witness is telling the truth - is a question for the jury." *State v. Bucholtz*. Considering this the petitioner requests consideration of this claim by this court, understanding "where a defendant does not object at trial to the prosecutor's [remark] the appellate court reviews claims for plain error." *United States v. Bentley*. Noting that "Expert testimony may not be used to determine the credibility of the [alleged] victim" *United States v. Wright*. The Supreme Court found in *United States v. Young* "the prosecutor's opinion... may induce the jury to trust the Government's judgement rather than its own view of the evidence. (also see *Berger v. United States*).

⑤ At trial the state's witness, a 35 year veteran police officer, was repeatedly asked questions which elicited vouching statements, re: "it was [his] job to tell the truth", "allegations of abuse were credible", "no further investigation needed", alleged victim "telling the truth", defendant was "lying", "I believe what [alleged victim] was saying happened", and he did not submit evidence for 18 months because he had "made up his mind". The prosecutor was not checked

⑤ cont.

when the District Court made it's de novo review of the claim it assumed that the SD Supreme Court rested upon a procedural default, although there was no direct implicit statement that the Supreme Court of South Dakota based its decision, but rather that it reached the merits. Per *Harris v. Reed* the Supreme Court of the United States found that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly states that its judgment rests on a state procedural bar." This court can review, as "Requiring a state court to be explicit in its reliance on a procedural default does not interfere with state judicial decision-making" *id.* The trial court was held to the state law SDCL 19-19-103(2) "to the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." and in this case there was not one isolated instance, but many and varied instances rendering the trial fundamentally unfair. Regard *Chambers v. Miss.* "multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." Petitioner requested of the District Court for a remand to present any "unexhausted" claims and per *Rhines v. Weber* "Federal Courts ordinarily have the authority to issue stays, where such a stay would be a proper exercise of discretion." Petitioner seeks this court to review the propriety of a stay to exhaust this claim properly to the state supreme court. Petitioner would point to the propriety of a stay and remand, in that "the United States Supreme Court rejected the idea in *Harris v. Reed* that "if a state court decision is ambiguous as to whether the judgment rests on a procedural bar, the federal Court should presume that it does. As to prejudice "evidence is unfairly prejudicial when it would improperly influence the jury to decide the case on an improper basis." *U.S. v. Zephier*, and lastly Prosecutors should "refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*

⑥ Petitioner, to avoid repetition of the argument, would note that most of the citations above apply to this question as well. Specifically *Harris v. Reed*, *Rhines v. Weber*, *Harris v. Reed*, and *U.S. v. Zephier*. Additionally in *U.S. v. Young* the U.S. Supreme Court found "The plain-error doctrine of Federal Rules of Criminal

⑥ cont.

Procedure 52(b) tempers the blow of a rigid application of the contemporaneous-objection requirement." as well, "counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds." *Id.* Federal Rules of Civil Procedure 9(b) states "dismissal [is] inappropriate unless it appears beyond a reasonable doubt that [petitioner] can prove no set of facts in support of his claim which would entitle him to relief." and per *Ashcroft v. Iqbal* "to survive a motion to dismiss a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" The U.S. Supreme Court in *Cone v. Bell* held that Federal Courts "have no concomitant duty to apply state procedural bars where state courts have themselves declined to do so." and lastly in *Lawhorn v. Haley* "Under the plain statement rule, a federal district court may consider a habeas claim when a state court's decision created an ambiguity over whether the decision was based on the merits."

⑦ Cumulative or multiple errors of course are viewed against the backdrop of the entire trial, and in context i.e. not in a vacuum. But when like a bell rung the peal carries its own resonance, the plural errors cause a dissonance in juxtaposition to the true tone of fairness. The effect drowning out fundamental fairness. Regard *U.S. v. Nicochea* "although individual errors looked at separately may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal. In reviewing for cumulative error, the court must review all errors preserved for appeal and all plain errors. Even if a particular error is cured by an instruction, the court should consider any "traces" which may remain." also again under Rule 52(b) petitioner requests review of "plain error". "The central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence; and to this end it is important that both the defendant [through counsel] and the prosecutor conduct the trial so that each of them has the opportunity to meet fairly the evidence and arguments of the other." *United States v. Robinson*. Elicited vouching testimony repeatedly produced by prosecutor from witness, as well as vouching statement by prosecution, and additionally the accumulation of the Governmental seeming stamp of

Authenticity of the States Case, and the volume and cacophony that could no more be overcome by a jury instruction, let alone several. Please also regard question 1, 2, 3, 4, 5, 8, & 10 as related to this question.

⑧ "An evidentiary hearing must be held if relevant facts are disputed and a fair evidentiary hearing was not granted in state court" *Camillo v. Wyrick*. Where three lawyers appointed to an indigent defendant, and only one lawyer of the three presented evidence at the habeas hearing and 1/3 of the picture was presented. Petitioner seeks this court to reverse and remand to District Court to allow petitioner to present to South Dakota's Third District both co-counsel to ascertain if trial strategy of one lawyer overrode their independent trial strategy. Petitioner would also request the ability under 28 USC § 2254(c)(2)(A)(ii) to present evidence previously inaccessible through diligence which has come to petitioner's knowledge. To that end petitioner would ask to be able to take testimony from three witnesses to round out the record and rebut some claims made by the states witness in chief, which are pivotal to this case. There are three witnesses that petitioner would need permission to gather affidavits to enter into evidence information which if admitted would upend the case and show by clear and convincing evidence that in light of the presumed factual predicate the conviction is not sound and that the petitioner should have a new trial, if not to have his conviction vacated with prejudice. Petitioner would request permission to gather affidavits from Sarah Hunter, Christine Gray, and Miranda Figland to this end. Petitioner asks this court to take *Apprendi v. New Jersey* into consideration "The Due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." These witnesses have three separate pieces of evidence which obviate and negate those very "facts". And Rick Ribstien and Anthony Tetsdale, petitioner's trial lawyers, would clarify for the record their own trial day decisions which would inform the court on ineffective assistance of counsel claims made by the petitioner throughout appeal and through 2254 Habeas.

- ⑨ Petitioner requests this Court to review the A.E.D.P.A. against the Suspension Clause of U.S.C.S. Constitutional Article I, §9, Cl. 2. The Suspension Clause enacted in 1789 forbids "Congress from suspending access to the writ unless when in cases of rebellion or invasion public safety may require it." neither of which were or are the case when congress encroached upon the ancient writ. "at minimum, this provision (the Suspension Clause) protects against congressional infringement of [the] writ as it existed when [the] constitution was drafted and ratified" *Prost v. Anderson re. Boumediene v. Bush*.
- ⑩ The District Court identified a circuit split in regards to addressing vouching testimony, and Rule 702 along with their related state statutes. The District court pointed to three cases; *Adesiji v. Minnesota*, *McCandless v. Vaughn*, and *Hoglund v. Neal*. Now the 8th Circuit has found in *United States v. Azure* that "it is hornbook law that the credibility of a witness and the weight to be given [their] testimony rests exclusively with the jury. In this question *per Michigan v. Long*. "It is incumbent upon the Supreme Court to ascertain for itself whether an asserted non-federal ground independently and adequately supports the judgment." and citing *re Oilspill by the Amoco Cadiz* "The Federal Rules of Evidence are statutes, and district judges may not disregard statutes no matter how inconvenient or cumbersome they believe the rules to be."
- ⑪ Regarding *Strickland v. Washington* application of review to ineffective counsel, in this case a certificate of probable cause issued, per Appendix D, the court found pursuant to SDCC 21-27-18.1 that "an appealable issue exists" specifically VI amendment violation of Effective Assistance of Counsel. for the COPC to issue the court, it would seem, found that a substantial showing of a constitutional right was made and that reasonable jurists would debate. Petitioner asks this court to review the record to determine if the District court incorrectly applied the standard in this case.
- ⑫ Tim Hogan, one of the three lawyers representing petitioner at trial introduced a confusing standard of proof in closing. "Overwhelming possibility" and "real possibility" are not "Beyond a Reasonable Doubt". The District Court inexplicably attributed this statement to the prosecution, which

⑫ cont.

Under the circumstances makes sense, but per the record of this case it was the "defense" not the prosecutor. Reasonably, the Defense would not have objected to himself, if the prosecutor had made this statement he would have. Bearing this in mind the review and finding was faulty in the court below. The court should have compared these statements against the standard. First under *Douglass v California* "an indigent criminal defendant has a right to appointed counsel." and *Lawhorn v Haley* "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Under Rule 52(b) the court can apply plain-error review to this statement by the defense. Per *United States v Young* "Counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds."

⑬ Petitioner would ask this court to review the holding in *Strickland v. Washington* against the accepted and codified Federal Rules of Evidence to ascertain if an "objective standard of reasonableness" is contained or at least outlined.

REASONS FOR GRANTING THE PETITION

For the above reasons, and under the record of the courts below, petitioner humbly submits this petition for consideration by this

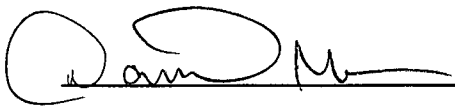
Supreme Court of the United States,

on the appeal of one convicted against the holdings of this Supreme Body and the Constitution of the United States. In the interest of solving conflict in the circuits below, and as well, in the interest of justice itself. Petitioner request this court to vacate, and/or remand with instructions, and/or remand for retrial, and/or hear additional oral arguments on the case contained herein and below. and to either appoint counsel, approve petition for "in forma pauper" status, and/or allow petitioner to seek representation if allowed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

 #48594
Pro Se

Date: March 21, 2023