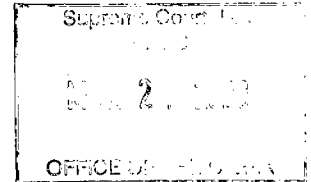


19-1209
No. 19-

ORIGINAL

In the
Supreme Court of the United States



IN RE THOMAS E. NESBITT,

Petitioner,

v.

SCOTT FRAKES,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

The untrained pro se Appellant respectfully attempts to succinctly present from the trial record, compelling justiciable Constitutional reasons of error for the Writ to issue in this exceptional NO-CRIME case of ACTUAL INNOCENCE involving an Accidental Self-Induced Drug Overdose Death, as Law and Justice would require. (28 U.S.C. § 2243).

The 1-28-19 wholly obscure one-line Court of Appeals ignored denials, thoroughly departed from any accepted course of Jurisprudence norms, in direct CONFLICT with this Court's controlling precedents, emphatically calling for the attended exercise of Certiorari authority to resolve these Conflicting Judicial abuses.(App.1a)

1. Does the Appellate Court's obscure Panel Denials, violate the 1996 A.E.D.P.A. Constitutional Due Process Question in Conflict with the Certiorari Decisions of this Court in (1), *Castro v. U.S.*, 540 U.S. 375 (2002), and (2), in *Panetti v. Quarterman*, 551 U.S. 930 (2007), NON-SUCCESSIVENESS precedents, where upon § 2253 C.O.A.'s issued, prohibited § 2254 District and Appellate Courts from wrongly creating "... Troublesome Results ...", "... Procedural Anomalies ..."; "... Closing Courtroom Doors...", contrary to Congress intent? (pp. 8-10)

Did the Court of. Appeals Panel further deny 22 U.S.C. § 2253 C.O.A. in Conflict of this Court's controlling "... ACTUAL INNOCENCE ..." A.E.D.P.A. Habeas "... Gateway Exception ..." substantive Mandate of *McQuiggin v. Perkins*, 569 U.S. 383 (2013), overruling Troublesome Results and Procedural Anom-

alies, wrongly Closing Courtroom Doors denying Habeas relief?

2. Did the Appellate Panel's obscure Denials, violate the Constitutional JEOPARDY Question of "DIRECT ESTOPPEL ISSUE PRECLUSION Law, concerning Nebraska's uncontroverted, NO-PROBATIVE-EVIDENCE Directed Verdicts of the alternative Felony Murder charge and all its underlying "ATTEMPTED" foreclosed Acquitted Motive offenses, in Conflict with this Court's and its own Circuit Court's Stare Decisis Directed Verdict Acquittal precedents?

3. Does Appellate Panel's obscure Denials, violate compelling Constitutional Questions of Law in Conflict with *Brady v. Maryland*, 373 U.S. 83 (1963), substantial Trial safeguards upon State suppressed material and exculpatory vital evidence, diligently uncovered, that should have resulted in a very different outcome upon a confident verdict by an untainted Jury?

4. Does Appellate Panel's obscure Denials, violate compelling Constitutional Questions of Law, separate and apart from the forestated Trial errors, of INEFFECTIVENESS of Trial and Appellate Counsel's deficient prejudicial performances denying a fair trial, in utter conflict with this Court's and its own Circuit Court's controlling Ineffectiveness precedents, upon:

- (i) Rights to Remain Silent without Guilty Infringements;
- (ii)&(iv) Structural Prosecutorial Misconduct violations;
- (iii) Structural requested Jury Instruction violations;

- (v) First Amendment Rights to Free Association violations;
- (vi) Multiple Due Process Admonishment violations;
- (vii) Sufficiency of Evidence violations. (pp. 19-21)

5. Did the Appellate Panel violate the compelling Constitutional substantive Due Process Law vital to all Appellant's forestated prejudicial infringements to a fair trial, when rendering Conflicting Denials to this Court's and other Appellate Courts' controlling precedents, to accord and conduct EVIDENTIARY HEARINGS whenever Burden of Proof is on Movant as in this case at Bar?

LIST OF PROCEEDINGS

United States Court of Appeals for the Eighth Circuit

No. 18-3015

Thomas Edward Nesbitt, Plaintiff-Appellant, v. Scott
Frakes, Defendant-Appellee.

Date of Opinion: January 28, 2019

Date of Rehearing Denial: March 27, 2019

United States District Court for the
District of Nebraska

No. 4:18-cv-3057

Thomas Nesbitt, Petitioner v.
Scott Frakes, Respondent.

Date of Judgment: June 19, 2018

Date of Memorandum Opinion: May 30, 2018

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PETITION FOR A WRIT OF CERTIORARI

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



OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, dated January 28, 2019, appears at App.1a to the petition.

The opinion of the United States United States District Court for the District of Nebraska, dated May 30, 2018, appears at App.4a. The entry of this court's judgment, dated June 19, 2019 appears at App.3a.



JURISDICTION

Petitioner had previously tried to file a timely petition on January 14, 2019. (Dkt. 18-9751). This Court denied Petitioner's ability to file a petition in forma pauperis. See order dated October 7, 2019. The Court rejected a motion for reconsideration on January 13, 2020. Petitioner now presents this petition in the paid, booklet form and invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I

Congress shall make no Law respecting . . . the right of the People to Peaceably Assemble

U.S. Const. amend. V

No Person shall, . . . be subject for the same offense to be twice put in Jeopardy of life or limb; . . . nor be deprived of . . . liberty . . . without due process of law

U.S. Const. amend. VI

In all Criminal prosecutions, the accused shall enjoy the right . . . to be Confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV

No State shall make or enforce any Law which shall abridge the Privileges or Immunities of the Citizens of the United States; nor shall any State deprive any person of . . . Liberty . . . without Due Process of Law, nor deprive any person within its jurisdiction Equal. Protection of the Laws.

U.S. Const. Art. 1, § 9, cl. 1

The Privilege of the Writ of Habeas Corpus shall not be suspended

STATUTORY PROVISIONS

28 U.S.C. § 2241(c)(3)

Habeas Corpus relief for wrongful custody in violation of Constitution and Laws of the United States at Bar;

28 U.S.C. § 2243

Relief as Law and Justice requires;

28 U.S.C. § 2244 (A.E.D.P.A. 1996)

Habeas Corpus Procedural Filing Exceptions, and § 2244-(b)(3)(E)-Certiorari Limitation Exception;

28 U.S.C. § 2253-(c)(1)(3)(1996)

Appealability Procedures (C.O.A.);

**28 U.S.C. F.R.E. § 501-(N.R.S. § 27-513(3)-
Admonishing Jury Instructions;**

Neb. Rev. Stat. § 28-401(1975)

First Degree Murder Statutory Elements;

Neb. Rev. Stat. §§ 29-2101-2103 (LB 245-2015)

New Trial Procedural Amendments.



STATEMENT OF THE CASE

(Verified on Oath)

A '9' year Law Enforcement misdirected. Investigation into the tragic death of, Ms. Mary Harmer, came to unjustly fixate upon the INNOCENT Appellant in this NO-CRIME exceptional case.

The actual probative testimonial evidence from the 1986 trial record, outside of the trial Judge's multiple non-probative findings of suspicious speculative assumptions, established, Ms. Harmer died from a Self-Induced Accidental Drug Overdose at a party, alone in the bathroom of Appellant's domicile, UNCONTROLLED BY ANYONE! (Emphasis Added).

Through-out this period, Appellant constantly exercised his Constitutional *Miranda v. Arizona* and *Doyle v. Ohio* substantive Rights to remain Silent, not to be used as any inference of guilt at trial. But instead, said Guarantees were repeatedly violated by the State throughout Appellant's trial, as matters of Ineffectiveness.

As a Miscarriage of False Imprisonment, Appellant was arrested and charged by the State for First Degree Intentional Murder, (N.R.S. § 28-401 (1975)), and upon the CATCH-ALL underlying MOTIVE charges of the alternative Felony Murder "ATTEMPTED" Offenses. (N.R.S. § 28-401(1975)).

Upon State resting, the Trial Judge, under Nebraska's NO-PROBATIVE-EVIDENCE Directed Verdict Standard, ACQUITTED Appellant of the CATCH-ALL Felony Murder and all its underlying "ATTEMPTED" Sexual Assault MOTIVE Offenses, to wit:

NO PROBATIVE EVIDENCE EXISTS
APPELLANT ENGAGED IN ANY INTENTIONAL ACTS OR CONDUCT OF FORCE, COERCION, OR DECEPTION, EITHER EXPRESSED OR IMPLIED THROUGH WORDS OR BODILY MOVEMENTS, WHERE THE ATTENDED CIRCUMSTANCES SUCH AS APPELLANT BELIEVED

THEM TO BE WOULD HAVE CONSTITUTED A COURSE OF CONDUCT INTENDED TO CULMINATE IN THE COMMISSION OF SEXUAL PENETRATION, OR WHERE SUCH A COURSE OF CONDUCT OR ACTS WOULD HAVE BEEN KNOWN TO CAUSE SUCH A RESULT, OR THAT APPELLANT KNEW OR SHOULD HAVE KNOWN THAT, MARY HARMER, WAS MENTALLY OR PHYSICALLY INCAPABLE OF RESISTING OR APPRAISING THE NATURE OF SUCH ACTS OR CONDUCT! (Emphasis Added).

All these Factual Issues are foreclosed from any probative evidentiary value, resolved favorably to Appellant, Uncontroverted.

In conjunction, also as matters of exceptional importance to the trial Judge' above foreclosed "NO-PROBATIVE-EVIDENCE" Directed MOTIVE Verdicts of Acquittals, is State's Expert Witnesses trial testimonies, to wit:

- (a) NO VIOLENCE exists-testified to by State's Law Enforcement;
- (b) NO FOUL PLAY exists-Nor any CRIMINAL CORPUS DELICTI DETERMINATION OF DEATH exists-testified to by State's Forensic Experts, thereby,
- (c) Forcing State Prosecutor to twice on record, state to the Jury, in Opening and Closing, that it could not prove a Murder occurred, Nor the Defendant committed a Murder! (Emphasis Added).

All forestated Clear and Convincing uncontroverted evidentiary Facts of Trial Record, again resolved favorably to Appellant, warranting a § 2253 C.O.A. be issued by lower Courts.

But the trial Judge, however, for unknown reasons, wrongly refused defendant's justified request to also Acquit on the alternative Intentional Murder charge, or, at least, to properly admonish the now wholly confused and mislead Jury, that these acquitted non-probative Felony Murder CATCH-ALL foreclosed MOTIVE offenses were no-longer any part of this case.

COURT EXHAUSTION REMEDIES: Thereafter, Appellant constantly pursued his violated Constitutional Trial rights with manifest Due Diligence under exceptional prejudicial circumstances, unjustly hindering his guaranteed Constitutional relief upon the Clear and Convincing requested Appellate Records filed. (See: Appellant's 7-23-18 Fed. R. App. P. 10(a)(1) request filed in the District Court for VERIFIED supporting Records on appeal, Filings, #1 thru #17) (App.24a) (See also: Appellant's § 1746(2) VERIFICATION at App. 24a herein; upon this 28 U.S.C. § 2241(c-3) Habeas at Bar.).

State collateral litigation began on 12-7-87, after the State Direct Appeal terminated on 10-13-87. State collateral litigation, unabated, terminated on 5-5-10, with only 55 non-tolled days having expired out of the new A.E.D.P.A. § 2244(d) 365 day limitation period. *State v. Nesbitt*, 409 N.W.2d 312 (Nab. 1987)(Dir. App.).

A.E.D.P.A.: The 1991 pre-A.E.D.P.A. (4:91-CV-3644) habeas, necessarily filed under the *Younger v. Harris*, 410 U.S. 37, 46 (1971), and *Abney v. U.S.*,

431 U.S. 651, 662-63 (1977), Exception to the Abstention Doctrine for Colorful DIRECT ESTOPPEL ISSUE PRECLUSION Jeopardy protections, CREATED NO SUCCESSIVENESS, not even under pre-AEDPA Rule 9.

The First 5-25-10 post-AEDPA (4:10-CV-3099) habeas filed after Exhaustion of State remedies, was wrongly ignored and denied, "WITHOUT PREJUDICE" by the District Court, in CONFLICT with the controlling precedents of this Court, and the Court of Appeals of *Lindh v. Murphy*, 521 U.S. 320, 322, 326, 336 (1997), and *Barrett v. Acevedo*, 169 F.3d 1155, 1161 (8th Cir 1999), for pre-1996 NON-SUCCESSIVENESS mandates, clearly requiring § 2253 C.O.A. be issued.

Consistent with *Banks v. Dretke*, 540 U.S. 668, 690-91 (2004), and *Mayfield v. Ford*, 664 F. Supp. 1285, 1287-88 (D. Neb. 1987), precedents, Exhaustion of available State and Federal remedies concerning the herein GROUND I and II violated Questions of Law, all occurred prior to the 5-25-10 (4:10-cv-3099) habeas filing, as well as, before the 2013 (8:13-cv-75) post-AEDPA filing.

Both habeas actions were wrongly ignored and denied "... WITHOUT PREJUDICE ...", in CONFLICT with this Court's, *Lindh v. Murphy* and *Barrett v. Acevedo*, controlling precedents, *supra*.

Plus, both habeas cases were also ignored and denied in direct CONFLICT with this Court's Certiorari cases, *Castro v. U.S.*, 540 U.S. 375, 380 (2002), and *Panetti v. Quarterman*, 551 U.S. 930, 936 (2007), prohibition mandates against AEDPA Successiveness, almost identical in Factual and Legal substance to Appellant's case at Bar.

NOTE: 28 U.S.C. § 2253(a), (c) C.O.A.'s were issued in *Castro* (290 F.3d at 1272), and *Panetti* (448 F.3d 816), plus in *McQuiggin* (569 at 392), cases, all contrary to Appellant's wrongful denials at Bar.

In addition, this Diligent Exhaustion, likewise encompasses the I-C *Brady v. Maryland*, 373 U.S. 83 (1963) multiple Constitutional violated substantial Questions of Law, presented under the AEDPA § 2244 (b)(2)(B) provision, after the State's Amended NEW TRIAL 2015 Law (LB-245) litigation. These Laws now allow for State and Federal, Exhaustion, at any time upon Non-Ineffectiveness *Brady* Trial Errors. (See: N.R.S. §§ 29-2101 to 29-2103 (2015)).

Supporting Material and Exculpatory Documentation of Record, Diligently Uncovered, secreted in an updated 1992 Presentence Investigation Report (PSI) upon a 2000-2001 posttrial investigation of this case, first became fully available for Federal litigation in this 2018 4:18 CV-3057 habeas case, and this (18-3015) Appeal therefrom at Bar.

These multiple Constitutional violated *Brady* Questions of Law, exhausted under *Bankes v. Dretke*, *supra*, precedent, also issued a § 2253(a) & (c) C.O.A., contrary to Appellant's ignored C.O.A. denials.

The Circuit Panel on 4-3-19, even ignored in this No-Crime case of Actual Innocence, Appellant's requested F.R.A.P., R. 41(d)(1), (2) Stay of Mandate, pending this Justiciable Meritorious Certiorari filing for long overdue warranted Justice. (App.8a, Appellant's Court of Appeal's Rehearing Petition.).



REASONS FOR GRANTING THE PETITION

I-A-1. FIRST IMPORTANT CONSTITUTIONAL A.E.D.P.A. (1996) VIOLATED SUBSTANTIAL DUE PROCESS QUESTION OF LAW, CONCERNS THE COURT OF APPEALS OBSCURE 1-28-19 AEDPA DENIALS IN CONFLICT WITH THIS COURT'S AEDPA MANDATES

The lower Federal Courts' total disregard Denials for this Court's controlling A.E.D.P.A. mandates of Non-Successiveness, were not only in direct Conflict with this Court in *Lindh v. Murphy*, 521 U.S. 320, 322, 326, & 336 (1997), but also as adopted fully by the Circuit Court in *Barrett v. Acevedo*, 169 F.3d 1155, 1161 (8th Cir. 1999).

Both *Lindh* and *Barrett* Courts hold No-Successiveness is created by any § 2254 Habeas case filed before the 1996 AEDPA, Chapter 153 Changes by Congress, warranting a § 2253 C.O.A. issued.

The Appellate Panel not only egregiously violated its own *Barrett* Circuit mandate of the NON-SUCCESSIVENESS prior Panel precedent, as well as *Lindh's* precedent. *See: Mader v. U.S.*, 654 F.3d 794, 810 (8th Cir. 2011), and *Neidenbach v. AMICA Mutual Insurance Company*, 842 F.3d 560, 566 (8th Cir. 2016), to wit: "It is a Cardinal Rule in our Circuit that one Panel is bound by the decision of a prior Panel." *Id.*

Appellant's 1991 (4:91-cv-3644) Pre-AEDPA Habeas as was necessarily filed under this Court's Exception to the Abstention Doctrine of *Younger* and *Abney* colorful JEOPARDY prohibitions, *ante*, continuously flaunted and violated wrongly by the State Courts at

Trial and on Appellate review, in violation of Constitutional DIRECT ESTOPPEL JEOPARDY prohibitions of ISSUE PRECLUSION under manifest erroneous Sufficiency of Evidence evaluations. (See, SECOND I-B Constitutional Question of Error presented, *infra*).

The Federal District and Court of Appeals were both prohibited from utilizing the 4:91-cv-3364 Habeas case from creating any Successiveness to anything, even under prior AEDPA, Rule '9' procedures.

Included in this FIRST Constitutional violated AEDPA Due Process Question, concerns this Court's further controlling AEDPA exceptions to the § 2244 (b)(3)(E) review provision for Successiveness, found not to be Self-Defining. *Panetti, infra*, 551 U.S. at 943-44. A subsequent § 2254 Habeas filing may be allowed, even after a first post-AEDPA Habeas filing was actually adjudicated on the merits, not involved here. See, *Panetti v. Quarterman*, 551 U.S. at 944, also adopted by the Eighth Circuit in *Nooner v. Norris*, 499 F.3d 832, 834 (8th Cir. 2007).

Also in Conflict to this Court's controlling AEDPA precedent, includes *Castro v. U.S.*, 540 U.S. 375, 380-81 (2002), holding on Certiorari, that irregardless of § 2244(b)(3)(E) AEDPA provision to the contrary, the *Castro* Court found the actual issues presented on Appeal, were not the Court of Appeals § 2244(b)(3)(E) Decision. Thus this Court's Certiorari review is therefore not prohibited. (540 U.S. at 380-81). Instead, the *Castro* Court, very similar to Appellant's case at Bar, found the District Court had wrongly changed a Fed. R. Crim. P. 33, Motion for New Trial, into a wrongful 28 U.S.C. § 2255 Habeas case, and thereafter erroneously claiming Successiveness, where none existed! (540 U.S. at 378-79 & 384).

In Appellant's case at Bar, the District Court had also changed Appellant's 1991 42 U.S.C. § 1983 Civil Case, into a § 2254 Habeas, also wrongly claiming Successiveness where none never existed! (*See*: both 4:10-cv-3099, and 8:13-cv-75, wrongly adjudicated habeas cases as somehow successive.)

Further in Conflict with the Panel's wrongful Denials, is this Court's precedent of *Panetti v. Quarterman*, 551 U.S. 390 (2007), controlling AEDPA Certiorari review, similar in substance and Law to Appellant's case at Bar. *Panetti* Court found the FORD claim, like Appellant's herein Ground I-D INEFFECTIVENESS Claims of exhausted errors, *infra*, were neither ripe nor available for Habeas adjudication, prior to Appellant's 5-25-10 habeas filing for relief. (551 U.S. at 943-46). (*See, State v. Nesbitt*, 650 N.W.2d 766 (2002)).

Thus, in direct Conflict with *Castro* and *Panetti*, the District. Court and the Court of Appeals, both created: "... Troublesome Results ...", "... Procedural Anomalies ...", "... Closing Courtroom Doors ...", all prohibited in Conflict under *Castro*, 540 U.S. at 380-81, and *Panetti*, 551 U.S. at 946, mandates! § 2253(a)&(c) C.O.A.'s were issued in both *Castro*, 290 F.3d at 1272, and *Panetti*, 448 F.3d at 816, cases.

I-A-2. SECOND A.E.D.P.A. IMPORTANT “ACTUAL INNOCENCE” DUE PROCESS GATEWAY EXCEPTION VIOLATED QUESTION OF LAW BY COURT OF APPEALS PANEL, CONCERNS ITS ADDITIONAL CONFLICT WITH THIS COURT’S CONTROLLING PRECEDENT OF “ACTUAL INNOCENCE” OF *MCQUIGGIN V. PERKINS*, 569 U.S. 383 (2013) MANDATE

McQuiggin, earlier, had remanded to the lower Court’s for plenary review by way of holding an EVIDENTIARY HEARING. *Id.* at U.S. 396. Unlike Appellant’s case at Bar, a § 2253(a & c) C.O.A., was also granted in this controlling *McQuiggin* case. (569 U.S. at 392).

MCQUIGGIN’S GATEWAY EXCEPTION INNOCENT mandate, (569 U.S. at 383, 386, & 392-93), to any AEDPA limitation, was denied in direct CONFLICT by the Lower Court’s in Appellant’s ongoing exceptional case, further resulting in an egregious Miscarriage of Justice upon Appellant’s ACTUAL INNOCENCE.

The Clear and Convincing Factual Substance establishing Appellant’s Innocence, set forth in part in the I-B important DIRECT ESTOPPEL ISSUE PRECLUSION substantial JEOPARDY Question, post, and in part through-out Appellant’s requested Trial Records, together, should warrant vacating with a remand to the lower Courts, as Law and Justice would require (§ 2243) in this exceptional No-Crime case. A 28 U.S.C. § 2253(a), (c) C.O.A. was also issued in the *McQuiggin* case, (569 U.S. at 392), contrary to Appellant’s ignored and denied Constitutional Claims and requested C.O.A., plus an Evidentiary Hearing.

I-B. SECOND IMPORTANT FUNDAMENTAL CONSTITUTIONAL VIOLATED QUESTION, CONCERNS ISSUE PRECLUSION DIRECT ESTOPPEL JEOPARDY PROHIBITION LAW IN UTTER CONFLICT WITH THE PANEL DENIAL DECISION AND THIS COURT'S PRIOR PRECEDENTS

The Court of Appeal's Panel and lower District Courts, mandated by this Court's controlling precedent, *Migra v. Warren*, 465 U.S. 75, 77, 81 (1984), were required to use the Trial Judge's same Nebraska controlling "NO PROBATIVE-EVIDENCE" Directed Verdict of Acquittal Standard. (See, *State v. Johnson*, 602 N.W.2d 253, 258 (1999) and precedents.). Appellant stands favorably ACQUITTED upon a "No-Probative-Evidence" Judgment of the alternative FELONY Murder charge (N.R.S. § 28-401 (1975)), and ALL its Underlying "ATTEMPTED" Sexual Assault Acquitted "MOTIVE" offenses. (See, Directed Verdicts of Acquittals in Statement of Case section, at pp. 4-5; and all State's Factual Elementary Essential Elements and Issues resolved favorably to Appellant by State's Witnesses at pp. 5, *ante*). As this Court further holds in *U.S. v. Agurs*, 427 U.S. 97, 113 (1976):

"If the verdict is already of questionable validity, [as in this case], additional evidence of minor importance, [like a lack of Motive], might be sufficient to create reasonable Doubt." U.S. at 113. See, *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991).

No probative evidence exists in this no-crime case of actual innocence beyond any doubt, (let alone by a preponderance or clear & convincing evidence), to establish the remaining Intentional Murder § 28-

401(1975) alternative offense essential Elements, to wit:

i.e., Corpus Delicti-Defendant physically Kills Another, Purposely, Deliberately, and Premeditatedly, with Malice, in Nebraska.

The Court of Appeals Panel ignored this rudimentary Structural criminal mandate of Issue Preclusion Direct Estoppel Jeopardy Law, in direct Conflict with this Court's and Court of Appeals following Direct Estoppel Issue Preclusion Acquittal precedents in the same trial context, to wit:

- (i) *Bobby v. Bies*, 556 U.S. 825, 829, 835 (2009) (Reiterating Issue Preclusion Estoppel prohibition, adopted from-Charles A. Wright, 18 Fed. Prac. Proc. § 4418 (3rd Ed.)-Issue Preclusion (Direct Estoppel) within a Single Trial Claim.);
- (ii) *U.S. v. McBride*, 862 F.2d 1316, 1319 (8th Cir. 1988) (Applying corresponding Direct Estoppel Issue Preclusion principles upon favorable Directed Verdict Acquittal Judgments within a Single Trial.);
- (iii) *Peru (Bird) v. U.S.*, 4 F.2d 881, 884 (CA8 1925) (Also applying corresponding Direct Estoppel Issue Preclusion principles upon favorable Directed Verdict Acquittal Judgments within a Single Trial.); and,
- (iv) not last nor least, See the Directed Verdict Issue Preclusion Direct Estoppel Judgment resolutions of *Smalis v. Pennsylvania*, 476 U.S. 140, 145-46 (1986) (holding: "... teaches that Acquittals, unlike convictions, terminate

the initial Jeopardy, . . . not only when it might result into a second trial, . . . but also if it would translate into further proceedings of some sort, devoted to the resolution of the factual issues going to the elements of the offense charged.”;

This includes, “. . . from being relitigated even in an Appellate Court.” *Kepner v. U.S.*, 195 U.S. 100, 103 (1904).

Direct Estoppel Issue Preclusion prohibitions were repeatedly violated through-out this exception case and Appellate processes, in direct violation of both Constitutional Jeopardy Safeguards, warranting this Court to grant the Writ in this no-crime case as Law and Justice would require. (§ 2243).

I-C. THIRD IMPORTANT CONSTITUTIONAL VIOLATED QUESTIONS OF LAW, CONCERNS THIS COURT’S *BRADY V. MARYLAND*, 373 U.S. 83 (1963) CONTROLLING PRECEDENTS, WRONGLY DENIED IN CONFLICT WITH THIS COURT’S AND THE PANEL’S OWN PRIOR *BRADY* PRECEDENTS (See, *Brady* precedential cases set forth alphabetically in the Table of Authorities, and through-out these following Constitutional I-C substantial *Brady* violations.)

These below A.E.D.P.A. § 2244(b)(2)(B) pertinent and succinctly condensed *Brady v. Maryland*, 373 U.S. 83 (1963), Constitutional violated Claims were presented for exhaustion purposes, under Nebraska’s 2015 New Trial (N.R.S. §§ 29-2101 to 29-2103, LB245), procedural Amendments. Whereby, diligently discovered State suppressed material and exculpatory substantial Trial evidence, (Non-Ineffectiveness), may now be properly

brought on Habeas under the § 2244 (d)(1)(D) AEDPA equitable tolling provision.

These Constitutional meritorious *Brady* Claims, in and of themselves, readily would establish, Appellant's trial would have resulted in a substantially different confident verdict by an untainted. Jury.

This supporting Court's precedent in *Stricker v. Greene*, 527 U.S. 263, 280-81 (1999) holds under its controlling *Brady* precedents:

" . . . that the suppression by the prosecutor of evidence favorable to an accused upon request violates Due Process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecutor. 373 U.S. at 87. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *U.S. v. Agurs*, 427 U.S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *U.S. v. Bagley*, 473 U.S. 667, 676 (1985). Such evidence is material if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* U.S. at 282; *see also, Kyles v. Whitely*, 514 U.S. 419, 433-34 (1995). Moreover, the rule encompasses evidence known only to police investigators and not to the prosecution. *Id.* at 438. In order to comply with *Brady*, therefore, the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. *Kyles*,

514 U.S. at 437.” *Id.* 527 U.S. at 280-81. *See*:
White v. Hellings, 184 F.3d 937, 943-946
 (8th Cir. 1999) (citing to *Strickler v. Greene*).

This diligently discovered material-exculpatory *Brady* evidence, still requiring an Evidentiary Hearing review, (*see, Hefferman v. Lockhart*, 834 F.2d 1431, 1436 (8th Cir. 1987), includes among other State deliberately suppressed exculpatory documentation, to wit:

1. The 9-13-16 District Court Clerk’s letter from its Bill of Exceptions file Department’s Check-out Log;
2. Witness Ray’s Sworn 7-16-77 Statements to OPD Miller in RB505K case;
3. The 7-19-77 OPD Miller’s perjured Affidavit to 7-19-77 Search Warrant under RB505K case;
4. Witness Ray’s 4-20-84 (pp. 1 & 28 of 29) Sworn Statements to OPD Miller under RB505K case;
5. Witness W. Bieber’s 4-25-84 (p. 1 of 32) Intimidated Immunity promise and Statements under RB505K case;
6. OPD Gorgen’s 4-8-78 Voice Stress Test results of Ray under RB505K case;
7. OPD Salerno’s 5-28-78 Polygraph Test of Ray under RB505K case;
8. OPD Miller’s 7-7-84 Doc. F84-4883 Perjured Affidavit;
9. 11-29-84 Miller’s Perjured Affidavit to Governor’s Warrant;

10. Other now Known interrelated Perjured case Documentation; and,
11. The 2-11-92 "Updated" suppressed PSI Report of case Doc. 117, page 261 (CR 9010892).

These forestated newly discovered material and favorable exculpatory evidence Documents, could not have been presented at the 1986 Trial, upon Appellant's 1985 discovery requests of same, due to State's deliberate suppression of it.

The State Courts' summarily ignored this presented vital *Brady v. Maryland*, newly discovered substantial exculpatory evidence at Trial and Appeal, (Doc. S-16-711 (3-13-17 Sum. Judg., and (4-10-17) R. Hrg. of same, both unpublished.).

Therein, State prosecutor and his OPD Law Enforcement Cohorts, Conspired together, (as documented), to INTIMIDATE, COERCE, AND SUBORN PERJURED Testimonies of its (3) three Immunized Main Principle Witnesses, Kathy Ray, Wayne Bieber, and third party, Michele McKeever.

This following unlawful suppression of this material and favorable exculpatory evidence, prejudicially denied Appellant his substantial DUE PROCESS AND COMPULSORY rights, and his other associated SIXTH and FOURTEENTH Amendment Guaranteed Safeguards to CONFRONTATION and EFFECTIVE ASSISTANCE OF COUNSEL, to prepare and present a vital and effective Trial Defense to an untainted Jury. (See: *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302 (1973) (Compulsory Rights), and *Pointer v. Texas*, 380 U.S. 400, 403-05 (1965) (Confrontation Rights)).

Asserted in Appellant's State and Federal Court Filings of Record, none of these State's main principle witnesses (Ray-Bieber-McKeever), ever claimed they could testify to what occurred at the 1975 party.

However, Ray and Bieber through their respective nine-year old "... Hazy ...", "... Foggy ...", and "... Lack of Memories ...", upon this forced fed subornation of perjured fabricated evidence of the prosecutor and Law Enforcement ORCHESTRATED MEMORY REFRESHERS, thereby falsely testified only about Appellant's so-called alleged later-on conduct, after the early morning of the 11-30-75 party. (*State v. Nesbitt*, 409 N.W.2d 312, 315-16 (Neb. 1987)).

The actual case Trial Record of evidence, as stated by the Trial Judge himself, was not only wholly Circumstantial, but amounted to no more than weak Suspicious Speculative Connective value. The mislead and confused jury, after the multiple. Acquittals, necessarily by Law, had only to rely solely on the State's Suborn Perjured testimonies of Ray and W. Bieber, plus the non-probative Third party McKeever's Leniency fabrications, in order to wrongly convict Appellant.

The following uncovered suppressed and Redacted (by white-out) Police Reports and further Falsified Judicial documents used by State as fabricated Memory Refreshers of Record, were confirmed as relied upon by Ray's Attorney's testimony at Trial.

This physical and mental outright Coercion and Intimidation of these main principle State witnesses, remains extremely unfair and prejudicial, again denying Appellant a Fair Trial contemplated and guaranteed by both the State and Federal Constitutions' Safeguards.

(State's vital Principle Witness—W. Bieber)

The State and its Law Enforcement Cohort's Criminal Intimidation of W. Bieber to testify falsely, stems directly from this most extraordinary Discovery of State's physical Criminal Kidnapping, Torture and Rape of Bieber's wife, Bridgette, for several days. These egregiously uncovered Law Enforcement unlawful Cohorts, posing as Mobsters, also burned-up W. Bieber's domicile as further criminal Intimidation of State's witnesses to testify falsely. (See, *U.S. v. Smith*, 478 F.2d 976, 979 (D.C. Cir. 1973) ("A prosecutor may impeach a witness in Court, but he may not intimidate him or her in or out of Court." *Id.*).

The State prosecutor had promised Bieber suppressed immunity protection for his perjured testimony, but became highly unsatisfied when W. Bieber Recanted all of it on Redirect. (See, *Sanders v. Sullivan*, 863 F.2d 218, 222-25 (2nd Cir. 1988) (Reversed upon false inculpatory testimony, Uncorrected, after Recantation). Thereafter, the prosecutor, nevertheless, went further. in Closing Rebuttal to the still confused Jury, and falsely twisted Bieber's uncorrected perjury. The prosecutor, then falsely exclaimed to the Jury, that Bieber's perjury had emanated from Appellant as extreme unfair prejudice, attempting to establish the prosecutor's failed essential Structural PREMEDITATED element of the remaining Offense charged through Appellant. See: *Napue v. Illinois*, 360 U.S. 264, 270 (1979) (Subornation of Perjury prohibited); and *Weary v. Cain*, 136 S.Ct. 1002, 1006 (2016) (Prohibition against suppression of perjured evidence by way of immunity cover-ups); plus, *Burger v. U.S.*, 295 U.S. 78, 84-88 (1935), and *U.S. v Beckman*, 222 F.3d 512, 526-

27 (8th Cir. 2000) (Prohibiting prosecutors falsifying evidence to Jury.).

(State's Third-Party McKEEVER Witness)

The suppressed LENIENCY COERCION of State's witness, Michele McKeever, wholly concocted a fabricated third-party story and testified falsely. thereof, (an alleged prior kidnapping and sexual assault-out of whole cloth), contrary to the Documented Law Enforcement Statements. This was uncovered stemming from McKeever's HIDDEN MOTIVE of personal BIAS AND GAIN OF LENIENCY to have her prior charged and confessed to, repeated, CRIMINALLY FALSE STATE AND FEDERAL CRIMINAL BANK FRAUD charges, dismissed by these same involved known Law Enforcement Cohorts, which occurred!

In this Court's recent per curiam case, *Weary v. Cain*, 136 S.Ct. 1002 (2016), holds today in Conflict with the Appellate Court's Panel's Denials, that:

“[A] witness's attempt to obtain a deal before testifying, is material because the jury might well have concluded that this witness had fabricated testimony to curry prosecutor favor. *Napue v. Illinois*, 360 U.S. 270.” *Id.* S.Ct. at 1006.

See also, State v. Johnson, 587 N.W.2d 546, 552 (Neb. 1988) (*Crimen Falsi* evidence admissible as material-exculpatory evidence to show fabricated falsified *Brady* evidence for guilt or innocence.).

After the prosecutor first granted Ray and W. Bieber suppressed immunity promises, their respective “Hazy”, “Foggy” and “Lack of Memories”, were further subtly suborn by inducing Ray and W. Bieber

to rely solely on these uncovered falsified and perjured 1977-1978. and 1984 Police Reports and Judicial Documents to refresh their respective memories for testifying falsely at Trial.

This Court in *Gigilo v. U.S.*, 405 U.S. 150 (1972) continues to hold and remand today upon non-disclosure violations of false evidence, to wit:

“As long ago as *Mooney v. Holohan*, 294 U.S. 193 (1935), it made clear the deliberate deception of a court and jurors by the presentation of known false evidence, is incompatible with rudimentary demands of justice. *Pyle v. Kansas*, 317 U.S. 213 (1942). In *Napue v. Illinois*, 360 U.S. 264 (1959), we said the same results obtain when the State, although not soliciting fake evidence, allows it to go uncorrected when it appears. *Id.* at 269. Thereafter, *Brady v. Maryland*, 373 U.S. 87, held, that suppression of material evidence justifies a New Trial irrespective of good faith or bad faith of the prosecutor. . . . When the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence is required under *Brady, supra.* . . . A New Trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the Jury. . . . *Napue, supra*, at 271.” *Id.* 405 U.S. 153-54.

See also: Pyle v. Kansas, 317 U.S. 213, 214-16 (1942), along with, *Davis v. Alaska*, 415 U.S. 308, 316-18 (1974) (Prohibiting suppression of perjured or falsified evidence upon immunity protections.).

(State's Vital Principle Witness Ray)

Among the uncovered prejudicial perjury injected and suborn by the prosecutor and its Law Enforcement cohorts, prior Sworn upon Oath, "... DIRT ..." Statements, now becomes perjured "... Blood ..." testimony that Ray falsely claims she cleaned-up, where none existed as Sworn to Under Oath by Ray in 1977 through 1984. Also, sexual inferences were created out of whole cloth in 1977, and again in 1984, by the OPD Miller and his perjured Affidavits, where no sexual inferences ever existed by anyone, period! See this Court's controlling case *Miller v. Page*, 386 U.S. 1 (1972), prohibiting falsified 'Blood' testimony, where:

"More that 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a State conviction obtained by the knowing use of false evidence, *Mooney v. Holohan*, 249 U.S. 103. There has been no deviation from this established principle. *Napue v. Illinois*, 360 U.S. 264, and *Pyle v. Kansas*, 317 U.S. 213. . . . There can be no retreat from this principle here." *Id.* U.S. at 7.

See also, Curren v. Delaware, 259 F.2d 707, 712-13 (2nd Cir. 1958) (Where the Court consistently holds: "... the knowingly false testimony [of a vital witness] was sufficient to cause the Defendant's trial to pass the line of tolerable imperfection and fall into the field of fundamental unfairness." *Id.* at 713.

At Trial, Ray and her then Attorney of Record, as stated earlier herein, both testified under oath, that they relied solely on this induced injection of the then unknown, 1977 and 1984 falsified Police Reports

and Judicial Documents used to refresh Ray's "... Foggy ..." and "... Hazy ..." memory, to wit: ("... as the NOTES read it must have been ..."). *See, Smith v. Cain*, 565 U.S. 73, 75-76 (2012) (Where this Court also prohibiting perjured testimony upon unlawfully suppressed evidence, Contrary to Appellate Court's Panel Denials.).

These perjured testimonies of Ray and W. Bieber, along with the fabricated perjured character assault of Appellant by the third party, McKeever, under promise of Leniency, became, and remains crucial to the State's imaginary and its sole but foreclosed Issue Preclusion Theory of a "non-probative MOTIVE" Acquittals, all resolved favorably to Appellant upon the Felony Murder Directed Verdicts. (*See*, I-B Question Claim, *ante*.).

These forestated substantial Constitutional *Brady* Trial violations of Appellant's guaranteed Safeguards, would also warrant the grant of Certiorari to vacate and remand this extraordinary No-crime case of Actual Innocence for an EVIDENTIARY HEARING to the Lower Courts', as Law and Justice would require. (§ 2243). *See: Fuentes v. Shevin*, 407 U.S. 68, 80 (1977), and *Hefferman v. Lockhart*, 834 F.2d 1431, 1436 (8th Cir. 1987), *infra*, at Question Claim II-EVIDENTIARY HEARING Due Process Controlling Requirement Precedents.

I-D. FOURTH CONSTITUTIONAL VIOLATED QUESTION OF LAW, SEPARATE FROM THE FORESTATED CLAIMS OF TRIAL ERRORS, CONCERNS INEFFECTIVENESS OF TRIAL AND APPELLATE COUNSEL OF RIGHT DEFICIENT PREJUDICIAL PERFORMANCES IN UTTER CONFLICT WITH THIS COURT'S AND THE PANEL'S OWN CIRCUIT COURT'S PRIOR CONTROLLING INEFFECTIVENESS PRECEDENTS

The Panel's 1-28-19 wrongful Denials are in direct Conflict with the below Court of Appeals, and this Court's controlling INEFFECTIVENESS precedents, all properly exhausted through-out this exceptional case. (See, Table of Authorities, Alphabetically, and through-out these following I-D Constitutional INEFFECTIVENESS Factual Predicate violated Claims.

These substantial *Strickland v. Washington*, 466 U.S. 668 (1984) Ineffective Assistance Claims of the same Trial and Direct Appeal P.D. Counsel, are brought under this Court's *Williams v. Taylor*, 529 U.S. 362 (2000) Ineffectiveness precedent on the following concisely summarized underlying Constitutional Ineffective predicate violations, denying a Fair Trial. These prejudicial Ineffectiveness Claims below, are necessarily brought under § 2244(d)(2) AEDPA Equitable Tolling Jurisdiction, as Law and Justice would require. (28 U.S.C. § 2243).

Said Claims were all raised, exhausted, and properly re-raised in this exceptional case, in the 2010 (4:10-CV-3099), the 2013 (8:13-cv-75), and current 2018 (4:18-cv-3057) Habeas actions. These Habeas actions were all DISMISSED WITHOUT PREJUDICE, wrongly, as "LEGAL NULLITIES", with No Adjudication on the Merits. (Appx.-D pp. 3-4). See, *Slack v. Daniels*, 529 U.S. 473, 489-90 (2000), and *Crouch v. Norris*, 251

F.3d 720, 723-24 (8th Cir. 2001) (AEDPA Dismissed Without Prejudice as Legal Nullities controlling precedent.).

The INEFFECTIVENESS Claims succinctly constitute, to wit:

- (i) Post *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Doyle v. Ohio*, 426 U.S. 610 (1976), multiple unfair prejudicial guilty incrimination infringements by prosecutorial misconduct upon Appellant's repeated exercise rights to remain silent, to an attorney, and not to be used at trial against Appellant's Constitutional guaranteed Due Process Safeguards. *Freeman v. Glass*, 95 F.3d 639, 644 (8th Cir. 1996);
- (ii) Prosecutorial unfair prejudicial Closing Rebuttal misconduct infringements misstating Lack of Evidence to establish essential PRE-MEDITATION element, misleading the already confused Jury in Appellant's long '5' week trial, in Conflict with this Court in *Berger v. U.S.*, 295 U.S. 78, 84-88 (1935), plus, *U.S. v Beckman*, 222 F.3d 522, 526-27 (8th Cir 2000);
- (iii) Trial Court's 14th Amendment Due Process infringement Denial to requested CORPUS DELICTI 'Structural' essential element (*i.e.* defendant physically KILLS ANOTHER) Jury Instruction; in Conflict with *Regan v. Norris*, 365 F.3d 616, 621-22 (8th Cir. 2004); Plus, *Treppish v. State*, 252 N.W. 388 (Neb. 1934), and *State v. Doyle*, 287 N.W.2d 59, 61-64

(Neb. 1980) (Overturned Lack of Corpus Delicti cases);

- (iv) Prosecutorial unfair prejudicial Closing Argument misconduct infringement, of excluding Corpus Delicti 'Structural' essential element from province of the confused mislead Jury, again violating *Berger v. U.S.*, *supra*, precedent;
- (v) Repeated unfair prosecutorial prejudicial misconduct infringements of Substantial FREEDOM OF ASSOCIATION First Amendment prohibited Safeguards, *U.S. v. Roack*, 924 F.2d 1426, 1434 (8th Cir. 1991)-Exactly on Point;
- (vi) Trial Court's and Counsel's 14th Amendment Due Process repeated Denials to several requested by law, necessary NO-INFERENCE ADMONISHMENT Jury INSTRUCTION Infringements to the confused and mislead Jury-(i.e., *Doyle v. Ohio*, ISSUE PRECLUSION, and FREEDOM OF ASSOCIATION, 28 U.S.C. § F.R.E., Rule 501-(N.R.S. § 27-513(3), Constitutional Safeguards; and,
- (vii) *Jackson v. Virginia*, 443 U.S. 307 (1979), plus *U.S. v. Beck*, 659 F.2d 875, 876-77 (8th Cir. 1981), 14th Amendment Due Process INSUFFICIENT PROBATIVE EVIDENCE violations upon each and every Essential 'Structural' element of the remaining accusation charged of Intentional 1st Degree Murder (N.R.S. § 28-401 (1975))-(i.e., KILLS ANOTHER by Physical Act of defendant, PURPOSELY, DELIBERATELY, PREMEDITATEDLY, with MALICE, in Nebraska.

These forestated substantial and Structural Constitutional INEFFECTIVENESS Infringements of P.D. appointed Counsel at Trial and on Direct Appeal, Prejudicially Denied Appellant to a Fair Trial as guaranteed by both Constitutions, that should readily warrant this Court to grant Certiorari, vacate and remand to the Lower Courts this exceptional No-Crime case of Actual Innocence for further necessary Exploration of these Constitutional violations of Law upon EVIDENTIARY HEARINGS as Law and Justice requires. 28 U.S.C. § 2243).

II. FIFTH IMPORTANT CONSTITUTIONAL VIOLATED QUESTION OF SUBSTANTIVE DUE PROCESS LAW VITAL TO ALL APPELLANT'S PREJUDICED INFRINGEMENTS DENYING 5.7511, TRIAL, CONCERNS IN DIRECT CONFLICT WITH THIS COURT'S CONTROLLING PRECEDENTS TO ACCORD FULL THROATED EVIDENTIARY HEARINGS

The Burden of Proofs through-out this Habeas litigation were placed on Appellant to establish his Justiciable Meritorious Constitutional Errors in this No-crime exceptional case of Innocence, all Denied in violation of, to wit:

Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (holding, "For more than a Century the meaning of procedural Due Process has been clear. Parties whose rights are to be affected are entitled to be heard, *Baldwin v. Hale*, 1 Wall 223, 233.");

Fuentes v. Shewin, 407 U.S. 68, 80 (1977) (Declaring, whenever Burden of Proof is placed on the movant, Due Process accords an EVIDENTIARY HEARING be conducted);

Williams v. Taylor, 529 U.S. 420, 437 (2000) (Declaring EVIDENTIARY HEARING Standard to be accorded Habeas Corpus cases; Adopted in *Wright v. Bowersox*, 720 F.3d 979, 987 (8th Cir. 2013);

McQuiggin v. Perkins, 569 U.S. 383, 396 (2013), and *Griffin v. Delo*, 33 F.3d 895, 906-08 (8th Cir. 1994) (Declaring EVIDENTIARY HEARINGS required on Claims of Actual Innocence);

Hefferman v. Lockhart, 834 F.2d 1431, 1436 (8th Cir. 1987), and *Crawford v. Minnesota*, 698 F.3d 1086, 1087-88 (8th Cir. 2012) (Declaring EVIDENTIARY HEARING required upon diligent *Brady* violations); and,

Freeman v. Glass, 95 F.3d 639, 644 (8th Cir. 1996) (EVIDENTIARY HEARINGS accorded on *Miranda* and *Doyle*, *supra*, prejudicial violations of Prosecutorial misconduct upon Exercise Rights to remain Silent Infringements.).

Plus Compare: the 1-28-19 Panel Judge, Colloton in *Nelson v. U.S.*, 909 F.3d 964, at 981 (8th Cir. 2018) where judge Colloton, as Justice required, *granted Rehearing*, an EVIDENTIARY HEARING, and further modification of a C.O.A., on INEFFECTIVENESS Claims, as opposed to ignoring and Denying the same relief of Justice warranted in Appellant's case at Bar! (Emphasis Added)

Denials to Justiciable Due Process EVIDENTIARY HEARINGS for establishing Appellant's herein Constitutional violated meritorious Questions of Law in this exceptional No-Crime case of Actual Innocence, should clearly warrant this Court to grant Certiorari relief, and

to vacate and remand this extraordinary case to the Lower Courts to explore upon EVIDENTIARY HEARINGS, all Appellant's herein Constitutional substantial prejudicial violations of Law denying a Fair Trial, as Law and Justice would require. (28 U.S.C. § 2243). (*See* App.40a, Request for Appointment of Counsel at the District Court and Court of Appeals in this case, also Denied!).



CONCLUSION

The petition for a writ of certiorari should be granted, as Law and Justice requires. 28 U.S.C. § 2243.

Respectfully submitted,

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