

19-8519

No. \_\_\_\_\_

IN THE

SUPREME COURT OF THE UNITED STATES

James E. Myers \_\_\_\_\_ — PETITIONER  
(Your Name)

Nebraska Attorney General <sup>vs.</sup>  
Office Doug Peterson \_\_\_\_\_ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Nebraska  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

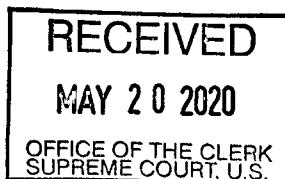
PETITION FOR WRIT OF CERTIORARI

James Myers \_\_\_\_\_  
(Your Name)

P.O. Box 900 - 2725 North Highway 50  
(Address)

Tecumseh, Nebraska 68542  
(City, State, Zip Code)

N/A \_\_\_\_\_  
(Phone Number)



QUESTION(S) PRESENTED

(1). Whether Procedural Due Process, Substantive Due Process, Equal Protection, and Confrontational Clause have been violated by state concluding prior to testing, DNA Testing will not produce exculpatory evidence?

(2). May a convicted prisoner seeking access to Biological Evidence for DNA Testing assert that claim in a Writ of Certiorari action or is such a claim recognizable only in a Petition for Writ of Habeas corpus ?

(i)

## LIST OF PARTIES

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

[x] 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:

The State of Nebraska, Nebraska Attorney General Office,  
et.al.,

## RELATED CASES

- District Attorney's office for Third Judicial Dist. v. Osborne No.08-6 U.S Supreme Court. Judgment entered June 18,2009
- Skinner v. Switzer No. 09-9000, U.S. Supreme Court, Judgment entered March 7,2011
- Routier V.State No. AP-75,517, The criminal District Court No.3 Dallas County Rehearing entered Sept.10,2008.
- State V. Winslow No.S.-06-983, Nebraska Supreme Court, Judgment entered Nov. 2,2007

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### OTHER

(iii)

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 \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; 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 \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; 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 \_\_\_\_\_ to the petition and is

[ ] reported at Myers 304 Neb. 789, 937 N.W.2d 181; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the Nebraska, Douglas County District court appears at Appendix \_\_\_\_\_ to the petition and is

[ ] reported at \_\_\_\_\_; 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 \_\_\_\_\_.

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: \_\_\_\_\_, 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. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was January 10, 2020. A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: February 13, 2020, 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).

CONTINUE

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and constitution provisions are involved in the case

### U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; 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 defence.

### U.S. CONST., AMEND. XIV

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### 28 U.S.C 1254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of certiorari in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody.

in violation of the constitution or laws or treaties of the United States.

(b)(1) An application for a writ of certiorari on behalf of a person in custody pursuant to the judgment of the State court shall not be granted unless it appears that-

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of certiorari may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not have been deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the court of the State, within the meaning of this action, if he has the right under the law by the State, to raise by any available procedure, the question presented.

(d) An application for a writ of certiorari on behalf of a person in custody in pursuant to the judgment of the State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of

CONTINUE

the claims--

- (1) resulted in a decision that was based on an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; Or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of certiorari by a person in custody pursuant to the judgement of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in the State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

- (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
- (ii) a factual predicate that could have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to

CONTINUE

establish by clear and convincing evidence that but for a constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reasons is unable to produce such a part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h)

(h) Except as provided in section 408 of the Controlled Substance Act, in all proceedings brought under this section, and any sub-

sequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

- (i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 1254.

## STATEMENT OF THE CASE CONTINUE

Ms. Lynette Mainelli was killed in her apartment on or about September 17-18, 1995. Mr. Myers was arrested in the murder of Ms. Mainelli in 1996 and was convicted at trial in 1997 of Ms. Mainelli many years before Nebraska enacted the DNA Testing Act. Witnesses testified at trial that "Mr. Myers layed down in the bed with Ms. Mainelli and shot her". Other witness testified that "Mr. Myers possessed the gun that killed Ms. Mainelli". Even though Ms. Mainelli boyfriend (Demond Briggs) was charged with possessing the murder weapon. Mr. Myers was convicted of first degree murder and use of a weapon to commit a felony. Mr. Myers appealed the decision, the Nebraska Supreme Court affirmed the decision. In 2016 Mr. Myers applied for Nebraska post-conviction DNA Testing Act to test (26) items Omaha police investigators confiscated for evidentiary value from Ms. Mainelli apartment and the gun Myers was accused of using in Ms. Mainelli murder. The District Court denied Myers for Post-conviction DNA Testing of the items pursuant to Nebraska DNA statute on February 23, 2018, "for failure to produce exculpatory evidence", (prior to testing). The Nebraska Supreme Court Reversed and Remanded for Further Proceedings, on November 30, 2018. On March 26, 2019 the District Court once again denied Myers post-conviction DNA Testing, stating "testing will not produce exculpatory evidence" (prior to testing). Myers Appealed the District Court decision and on January 10, 2020, the Nebraska Supreme Court Affirmed stating "testing

will not produce exculpatory evidence", (prior to performing).  
testing). Myers filed for rehearing, the Nebraska Supreme Court  
overruled and denied the rehearing on Febyary 13,2020, received  
by Myers on Febuary 18,2020 by postage.

All Myers post-conviction DNA Testing was denied PRIOR TO  
PERFORMING TESTING for reason that testing of biological  
material will NOT produce exculpatory evidence. See: DISTRICT  
ATTORNEY's OFFICE FOR THIRD JUDICIAL DISTRICT V. OSBORNE 557  
U.S. 52, 129 S.Ct. 2308 (2009), SKINNER V. SWITZER, 562 U.S.  
521, 131 S.Ct. 1289, ROUTIER V. STATE, 273 S.W.3d. 241,  
257 (2008), STATE V. WINSLOW, 740 N.W.2d. 794, 274 NEB.  
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REASONS FOR GRANTING THE PETITION CONTINUE

The State, Nebraska DNA Testing Act or portions and Nebraska Supreme Court Applications there of violates Mr. Myers Procedural Due Process imposing procedural limitations on protected ~~entitlement~~ entitlement, to release biological evidence for DNA Testing.

Has deprived Mr. Myers of his liberty interest and Actual Innocence in utilizing State procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction of his sentence.

The State and lower Courts made a determination concluding Mr. Myers DNA Testing will not produce exculpatory evidence, "PRIOR TO TESTING OF COURSE". The Court refusing to provide for DNA Testing by the lower Court application and interpretation of Nebraska DNA Testing Act and concluding an outcome of TECHNOLOGY, that can only come from SCIENTIFIC RESULTS, see Neb. Rev. Stat.

29-4118(2) procedurally state's "because of its scientific precision and reliability, DNA Testing, can in some cases, conclusively establish the guilt or innocence..."

The Nebraska DNA Testing Act or portions and Nebraska Supreme Court interpretation and applications there of, violate Mr. Myers Procedural Due Process, fifth, sixth, and fourteenth Amendment by refusing DNA Testing of Biological Material which could possibly lead to the Discovery of exculpatory evidence.

Nebraska's Supreme Court interpretation and application of a unconstitutional Nebraska DNA Testing Act denied fundamental Due Process Rights by failing to allow Post-conviction access to Biological DNA testing. Nebraska 's DNA Testing Act statute

is a Deprivation of Mr. Myers Liberty Interest contrary to the Fifth Amendment, Sixth Amendment, Fourteenth Amendment and any Constitutional Amendment thereafter that the Nebraska lower Courts, the State and Nebraska Supreme Court application and interpretation thereof of the Nebraska DNA Testing Act or portions thereof Neb. Rev. stat. 29-4116 to 29-4125, denies petitioner access to NEW SCIENTIFIC TECHNOLOGY. NEBRASKA DNA TESTING ACT IS IN UNCORPORATION OF 18 U.S.C.A § 3600

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

*Tanner Myers*  
James Myers

Date: May 10, 2020