THE SUPREME COURT OF THE UNITED STATES

AUGUSTINE CAVITTE, Petitioner,

vs.

STATE OF NEBRASKA, Respondent.

On Petition for Writ of Certiorari to

The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1) Did the lower courts err in finding Ms. Cavitte's statements admissible contrary to present *Miranda* standards?
    a. Did the Nebraska Court of Appeals err in creating an arbitrary exception to the *Miranda* requirement for "questions regarding a suspect's apparent injuries?"
    b. Did the Nebraska Court of Appeals fail to properly address the voluntariness of Ms. Cavitte's statements due to violations committed by law enforcement under *Seibert*.
2) Did the prosecutor commit prosecutorial misconduct when he commented on Ms. Cavitte's failure to divulge her claim of self-defense to the prosecution or law enforcement prior to the trial?

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Petition for a Writ of Certiorari

Augustine Cavitte respectfully petitions for a writ of certiorari from the Nebraska Supreme Court.

Opinions Below

The opinion of the Nebraska Court of Appeals is reported at 28 Neb.App. 601, 945 N.W.2d 228 (2020). The Nebraska Supreme Court denied petition for further review.

Statement of Jurisdiction

The Nebraska Court of Appeals delivered its opinion on July 7, 2020. The Nebraska Supreme Court denied petition for further review on September 15, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved

I. The Fifth Amendment to the United States Constitution guarantees that "[n]o person 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." U.S. Const. Amend. V.

II. The Sixth Amendment to the United States Constitution guarantees all citizens the right to "be informed of the nature and cause of the accusation." U.S. Const. Amend. VI.

III. The Fourteenth Amendment to the United States Constitution guarantees "[n]o state shall…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." U.S. Const. Amend XIV.

Statement of the Case

On April 30, 2018, Omaha Police were dispatched for report of an assault. (3: 20-23). Officers immediately placed Augustine Cavitte ("Ms. Cavitte") in handcuffs in a police cruiser where an interrogation was conducted at first by Sergeant Baines ("Baines") and then later at

Omaha Police Headquarters by Detective Kreikemeier ("Kreikemeier"). (E1,1, 10, 10 & E2, 1, 24, 24). Before questioning began, Baines was aware that a female allegedly cut a male, that Ms. Cavitte admitted to stabbing Michael Cavitte ("Mr. Cavitte"), but he did not yet know the relationship between Mr. Cavitte and Ms. Cavitte. (20-24; 7:7-12; & 8: 13-23). While Ms. Cavitte was handcuffed sitting in a police cruiser, Baines began questioning Ms. Cavitte before *Miranda* warnings were administered. (E1,1, 10, 10 & 11: 24). Ms. Cavitte was crying and slurring her words. (13: 16-25 & 14: 1-4& E1,1, 10, 10). Baines asks her name, date of birth, phone number, and address. (E1,1, 10, 10). He leaves her in the cruiser for seven minutes. (E1,1, 10, 10). Baines returns asking her how she knows Mr. Cavitte, she responds that he is her husband. (E1,1, 10, 10). Thereafter the following exchange occurs:

Baines: "What's been going on tonight? What were we doin'? Just drinking, and talkin?"

Ms. Cavitte: "Yeah, that's about it"

Baines: "About it? Ok, how'd you get down here?"

Ms. Cavitte: "My daughter."

Baines: "Your daughter drove you down here?"

Ms. Cavitte: (nods affirmatively)

Baines: "What time did you come over?"

Ms. Cavitte: "Earlier."

Baines: "Earlier? Ok, and you're not injured at all?

Ms. Cavitte: "No, I'm not."

Baines: "I saw some scratches on your neck so did you get hurt at all?"

Ms. Cavitte: "No, I didn't."

Baines: "How'd you get the scratches on your neck?"

Ms. Cavitte: "I didn't know I had 'em."

Baines: "You have a couple on you, toward the back of your shoulder there too."

Ms. Cavitte: "I didn't know I had 'em."

Baines: "You didn't know how that happened?"

Ms. Cavitte: "I said I didn't know I had em."

Baines: "If they happened, and they did happen, how do you think they happened?"

Ms. Cavitte: "A disagreement."

Baines: "A disagreement with your husband?

Ms. Cavitte: "Yes."

Baines: "What were you disagreeing about?"

Ms. Cavitte: "We have been going through a lot."

Baines: "Yeah?"

Ms. Cavitte: "In our marriage."

Baines: "Ok, yeah, it's rough, I understand, you guys still love each other and it can get emotional, I understand."

Ms. Cavitte: either responds: "We hurt each other at times." or "We married each other two times."

Baines: "Yup."

(15:13-25 & 16:1-11 & E1,1, 10, 10). Then Baines leaves mentioning to a fellow officer that he needs to do a rights advisement. (E1,1, 10, 10). Baines returns and continues to ask follow up questions regarding their marriage. (E1,1, 10, 10). Baines says, "Anything you can tell me will be helpful, is there anything you want to tell me?" (E1,1, 10, 10). Ms. Cavitte does not appear to respond so Baines leaves again and returns where *Miranda* warnings were finally administered.

(E1,1, 10, 10). Baines beings the conversation reminding Ms. Cavitte what she had previously just said. (16: 18-25 – 17: 1-8 & & E1,1, 10, 10). Statements continued regarding the altercation with Mr. Cavitte. (E1,1, 10, 10).

The warnings were given while Ms. Cavitte was detained in the cruiser, in the dark, with Baines asking the questions and Officer Miller writing down the responses. (17: 9-25 E1,1, 10, 10). The advisory form was never shown to Ms. Cavitte. (18: 3-5). Baines resumes the interrogation by reminding Ms. Cavitte what she had just admitted to the officers. (17:6-8 & E1,1, 10, 10). After this interrogation, Ms. Cavitte was transported to Omaha Police Headquarters and placed in a small interrogation room. (E1,10: 10, page where exhibit is found & E2, 1, 24, 24).

Recordings of the interrogation begin at 12:35 a.m. (E2, 1, 24, 24). An hour later, at 1:25 a.m. Kreikemeier checks on Ms. Cavitte, when she requests to use the restroom. (E2, 1, 24, 24). At 1:48 a.m., photographs are ten by lew enforcement of Ms. Cavitte's injuries. (E2, 1, 24, 24). Finally, at 1:53 a.m., Ms. Cavitte is allowed to use the restroom. (E2, 1, 24, 24). At 1:57 a.m., Kreikemeier resumes the interrogation of Ms. Cavitte. (E2, 1, 24, 24). Kreikemeier notices the odor of alcohol emanating from Ms. Cavitte. (27: 18-20 & E2, 1, 24, 24). Throughout the interrogation, Ms. Cavitte was crying, belching, mumbling, slurring her words, speaking in tangents, and constantly had to be redirected. (35: 3-18 & 38: 8-9 & E2, 1, 24, 24). Kreikemeier used profane language and raised his voice. (33:5-12). *Miranda* warnings were not administered prior to the interrogation by Kreikemeier of Ms. Cavitte. (E2, 1, 24, 24).

On January 4, 2019, the trial court held a hearing on Ms. Cavitte's motion to suppress all evidence. (Appendix C & 23-43). During the hearing, Baines was asked if Ms. Cavitte stated "We hurt each other?" Baines responded, "I believe so." (16:11-12). Judge Thomas A. Otepka ("Judge Otepka") found that while Ms. Cavitte was questioned by Baines, cuffed, and detained in

a police cruiser, before *Miranda* warnings were administered, Ms. Cavitte was in fact in custody and interrogated for *Miranda* purposes. (Appendix D). Instead of suppressing that initial interrogation, Judge Otepka held that, "As in *Juranek*, Cavitte's pre-*Miranda* statements did not render the *Miranda* warnings ineffective when they were given approximately two minutes later. Also, in light of Ms. Cavitte's *Miranda* waiver, the statements she made before given the *Miranda* warnings are admissible and Ms. Cavitte's Fifth Amendment rights were not violated." (Appeldix D). Conversely, the Court of Appeals of Nebraska, agreed that Ms. Cavitte was in custody but Baines' questions, "were not intended to elicit an incriminating response." *State v. Cavitte*, 28 Neb. App. 601, 609, 945 N.W.2d 228, 237 (2020).

Subsequently, a jury trial was conducted where Mr. Cavitte, the alleged victim, did not testify, during closing argument, the prosecutor continuously referred to Ms. Cavitte's failure to divulge her claim of self-defense to law enforcement or the prosecution in the months leading up to trial by arguing the following:

> "... ten and a half months after this took place when [Ms. Cavitte] was in an interview room with a detective for over an hour and during no time did [she] state anything about [Mr. Cavitte] using any threats against [her], prior to [her] cutting him?..."

(437: 14-20).

> "...nowhere in the ten and a half months leading up to this trial was there any evidence that [Ms. Cavitte] tried to reach out to law enforcement to change her story."

(437: 22-24).

> "Does it make sense that you're advised of your rights and you're given an opportunity to give your version of events with not only one officer, but two officers, and you're with officers for hours and nowhere in there do you bring up any fact of being attacked, stating

that you're the victim? Wouldn't that be relevant information that law enforcement would want to know in gathering their reports? Is that what happened here? No. The elephant in the room did not come up when she had the opportunity to do so. Detective Kreikemeier at the end of the interview was, like, is there anything else I should know? No."

(440: 6-18).

"It doesn't make sense that Augustine Cavitte, mere hours after the assault and after being in contact with law enforcement for hours, intending to get her side of the story from her, is just now informing us of this self-defense ten and a half months after the assault took place."

(442: 13-18).

After the prosecutor concluded his argument, but before Ms. Cavitte began her argument, Ms. Cavitte objected to the statements made by the prosecutor and moved for mistrial. (445-446:1-19). The objection was overruled. (446: 20-23). Ms. Cavitte next requested a curative instruction, that the jury be instructed on Ms. Cavitte's right against self-incrimination, and that the jury be admonished to not consider the statements made in deliberations. (446:24-25 – 447: 1-8). The court simply stated: "with respect to counsel's statement about the defendant having ten months to say something, disregard that." (447:11-13). After closing arguments were finished, the matter was submitted to the jury who returned a guilty verdict. (479: 23-25). On March 27, 2019, Ms. Cavitte moved for a new trial. (Appendix G). On May 31, 2019, the trial court overruled that motion. (Appendix H).

On appeal, the Nebraska Court of Appeals upheld Ms. Cavitte's conviction. *Cavitte*, 28 Neb. App. 601, 945 N.W.2d 228. The Nebraska Supreme Court denied Ms. Cavitte's petition for further review and this Petition followed pursuant to 28 U.S.C. § 1254.

Reasons for Granting the Writ

Both the trial court and the Court of Appeals of Nebraska ignored this Court's landmark decisions and instead have crafted a new exception to the *Miranda* requirement. Instead of applying decades old precedent, the court of appeals justified law enforcement misconduct with flagrant violations of Fifth Amendment rights. The lower courts in this case failed to apply this Court's holdings in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) and *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682 (1980) which rendered their *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601 (2004) analysis useless. If this Court denies this petition, it is leaving Nebraska with unconstitutional binding case law.

This Court should grant this Petition for Certiorari to prevent destruction of Fifth Amendment rights committed by the lower courts in this case. The lower court trampled on Fifth Amendment protections by first carving out an arbitrary blanket exception to the *Miranda* requirement for "questions regarding a suspect's apparent injuries." See *Cavitte*, 28 Neb. App. at 608, 945 N.W.2d at 237. In creating this new exception, the Nebraska Court of Appeals applied the wrong law in direct conflict with United States Supreme Court holdings, blatantly ignoring decades of precedent. The lower courts continued its attack on the Fifth Amendment by allowing the prosecution to comment on Ms. Cavitte's silence in the months leading up to her trial specifically arguing that the defense failed to present evidence that she divulged her claim of self-defense to the prosecution or law enforcement in the months leading up to trial. Such an issue has no clear answer and is ripe for analysis.

I.

The lower courts err in finding Ms. Cavitte's statements admissible contrary to present *Miranda* standards

A) The Nebraska Court of Appeals erred in creating an arbitrary exception to the *Miranda* requirement for "questions regarding a suspect's apparent injuries."

It was arbitrary and unconstitutional when the Nebraska Court of Appeals created a new exception to the *Miranda* requirement for "questions regarding a suspect's apparent injuries." See *Cavitte*, 28 Neb. App. at 608, 945 N.W.2d at 237. In the landmark *Miranda* decision, this Court established safeguards whenever a person is in custody and interrogated. *State v. Williams*, 26 Neb. App. 459, 490, 920 N.W.2d 868, 892, (2018); *Miranda*, 384 U.S. 436, 86 S.Ct. 1602; *Oregon v. Mathiason,* 429 U.S. 492, 97 S.Ct. 711, (1977). It is undisputed that a person who is handcuffed and placed in a police cruiser's back seat is in custody. *Williams,* 26 Neb. App. at 490; see *Thompson v. Keohane,* 516 U.S. 99, 116 S.Ct. 457 (1995); and see *New York V. Quarles*, 467 U.S. 649, 104 S.Ct. 2626 (1984). An interrogation includes express questioning, its functional equivalent, and any police conduct that police officers ought to know is reasonably likely to elicit incriminating responses. *Williams,* 26 Neb. App. at 490-491; and *Innis*, 446 U.S. 291, 100 S.Ct. 1682. The appeals court in this case failed to apply the historic progeny of cases following *Miranda* and instead applied the wrong law.

Instead of applying current law, the court of appeals falsely cited to other jurisdictions to justify Baines' conduct thus creating a blanket exception to the *Miranda* requirement, allowing officers to question about a suspect's apparent injuries. *Cavitte*, 28 Neb. App. at 608, 945 N.W.2d at 237 ("other jurisdictions have found that a law enforcement officer's pre-*Miranda* questions regarding a suspect's apparent injuries are valid"). Besides ignoring the rest of the interrogative questioning between Baines and Ms. Cavitte, the Nebraska Court of Appeals cites to cases taken out of context which inevitably do not stand for what the appellate court asserts when developing this unprecedented exception.

First in *State v. Ramos*, the Nebraska Court of Appeals asserted that the Supreme Court of Connecticut held that a police officer's question of "what happened to you?" made to defendant covered with blood was not to elicit incriminating response. *Id.* In reality, after applying the standard set in *Innis*, the court in *Ramos* did hold that officers' questioning "are you hurt, are you okay?" or "what happened to you?" were not intended to elicit an incriminating response; however the courts were quick to point out that the latter of the two questions "could constitute interrogation in certain contexts." *State v. Ramos*, 317 Conn. 19, 31, 114 A.3d 1202, 1209 (2015); and see *Innis*, 446 U.S. at 301, 100 S.Ct. at 1690. Moreover, the court upheld the trial court's findings of fact which included that Ramos twice called into the police claiming that he was injured and that there was a third party perpetrator. *Ramos,* 317 Conn. at 23, 114 A.3d at 1205. Throughout the night, officers asked several times whether Ramos needed medical attention, during this time officers were not sure whether Ramos was a suspect or a victim. *Id.* at 23-26, 114 A.3d at 1205-06. Officers observed that Ramos was covered in blood with blood pooling under him all before again asking if he needed medical attention when the officer "'basically said, 'what happened to you'?'" *Id.* at 25, 114 A.3d at 1206. At that point, Ramos lifted his pant leg displaying his injury and said, "I stabbed myself." *Id.* After which officers retrieved a first aid kit, bandaged him up, and administered his *Miranda* rights. *Id.* Given the findings of fact made by the trial court, it was clear to the trial and appellate court that, "the police should not have been expected to know their questions would have elicited an incriminating response as opposed to a response as to whether he needed medical attention." *Id.* at 31, 114 A.3d. 1209.

The second case the Nebraska Court of Appeals cited is clearly distinguishable from the case at hand. In *Archanian*, the officer approached Archanian, put Archanian in custody, informed Archanian that he was a suspect for murder, and performed a pat-down search at which point

Archanian appeared as though he was going to faint. *Archanian v. State*, 122 Nev. 1019, 1037, 145 P.3d 1008, 1021 (2006). Without questioning, Archanian informed the officer that he felt faint. *Id.* The officer sat Archanian down in a cruiser, retrieved some water, and asked "if he had any medical conditions which would cause him to feel this way, in case he had a...medical problem that we would need to get paramedics to respond..." *Id.* Archanian answered in the negative. *Id.* No other questions were asked at that time. *Id.* The Supreme Court of Nevada, in applying *Innis*, held that the officers' questions were not designed to elicit an incriminating reply and instead were "sought to ascertain what he perceived to be a potential medial problem..." *Id.* at 1033, 145 P. 3d at 1022. The court further explained that the "inquiry was reasonable under the circumstances." *Id.* The above cases have one major thing in common, they follow well settled case law set forth in *Innis*.

Finally in *Johnson v. State*, a case preceding *Innis*, the Supreme Court of Indiana held that the officer's singular question, "what happened?" was not the product of an interrogation. 269 Ind. 370, 380 N.E.2d 1236 (1978). That court found that officers had just exited their vehicles, were approaching a known murder suspect, who appeared as though he had just been in a fight, and had blood all over his face. *Id.* at 377, 380 N.E.2d. at 1240. The court reasoned that the officer's singular "opening remark was...a greeting intended more for its calming effect than for obtaining an admission." *Id.* The court further explained that Johnson's statement that he shot the man "was a spontaneous voluntary statement unsolicited by police." *Id.*

What all three of these cases have in common is that the trial court, as the finder of fact, concluded that the questions where not interrogational. Furthermore, the prosecutors in each case elicited evidence to support the respective conclusions. None of the above courts took the opportunity to override the trial court's factual findings to address the issue *sua sponte* as the

Nebraska Court of Appeals did in this matter. Conversely, in *Cavitte*, no evidence was elicited to support the argument that the officer was attempting to inquire about Ms. Cavitte's well-being nor did the prosecution, nor the attorney general, make such an argument.

Moreover, other jurisdictions have split on this matter and instead have found that an officer's questions regarding a defendant's apparent injuries are interrogational. See *State v. Dobbs*, 392 Wis. 2d 505, 548, 945 N.W.2d 609, 631 (2020) (The Wisconsin Supreme Court agreed, as the State conceded, that officers "questions and statements about ...Dobb's...injuries...where intended to elicit incriminatory admissions..."). In *Franks v. State*, the Supreme Court of Georgia found, "the question of how a suspect received an obvious injury is more likely to elicit an incriminating response because the suspect's injury may be directly related to the crime he is suspected of committing." 268 Ga. 238, 240, 486 S.E.2d 594, 597 (1997). In that case an officer asked a murder suspect how he received his bandage. *Id.* at 239, 486 S.E.2d 596. The prosecutors argued that the question was part of "routine booking questions," to which the trial court agreed. *Id.* Notably, the court in that case reasoned, "the relationship of the information sought to the crime is highly relevant in determining whether the question was equivalent to 'interrogation.'" *Id.* at 240, 486 S.E.2d 598. Therefore, the court concluded the trial court committed clear error when admitting the statement into evidence at trial. *Id.* Conversely, in the instant case, not only did the Nebraska Court of Appeals create an arbitrary exception to the *Miranda* requirement, they also failed to apply this court's holding in *Innis*.

The appellate court applied the wrong law in direct conflict with this Court's holding in *Innis* when it determined Ms. Cavitte's pre-*Miranda* statements were admissible because they were not incriminating. *Cavitte*, 28 Neb. App. at 609, 945 N.W.2d at 237 (neither [the statement that 'we hurt each other'] nor [Ms.] Cavitte's assertion that a disagreement occurred is

incriminating...). Such analysis is irrelevant. This Court has made clear "'incriminating response' refers to any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial." *Innis*, 446 U.S. at 301, n. 5, 100 S.Ct. at 1694 (emphasis supplied). As this Court has explained:

> "No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement." *Id.* (citing *Miranda*, 384 U.S.at 476–477, 86 S.Ct. at 1629)(emphasis supplied).

Furthermore, the court of appeals invaded the province of the jury when determining Ms. Cavitte's responses were not incriminating. In addition to failing to apply the appropriate law, the court of appeals mischaracterized the conversation between Ms. Cavitte and Baines. The Nebraska Court of Appeals ignored the fact that by asking Ms. Cavitte about her domestic relationship with Mr. Cavitte, Baines was inherently asking questions that would elicit an incriminating response. Not to mention, the trial court previously found that the questions by Baines' were interrogational. (Appendix D).

The lower court further misapplied the law when reviewing what constitutes an interrogation for *Miranda* purposes. In its analysis, the lower court incorrectly reviewed Baines' express questions subjectively. *Cavitte*, 28 Neb. App. at 609, 945 N.W.2d at 237 ("Therefore, because Baines' question...was not intended to elicit an incriminating response..."). This Court has consistently reiterated that an objective standard is applied when determining whether a defendant's response was the result of interrogation. *Innis*, 446 U.S. at 301, 100 S.Ct. at 1690. "For this reason, whether a defendant was being interrogated does not depend on the officer's intent in asking the question that elicited an incriminating response." *State v. Janurek*, 287 Neb. 846, 855, 844 N.W.2d 791, 800-01(2014) (emphasis supplied) (interpreting *Innis*, 446 U.S. at 301, 100 S.Ct. at 1690). Current law holds an interrogation can be "express questioning" or "any words or actions ... [by] police... that [they]...should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 303, 100 S.Ct. at 1689; and *Janurek*, 287 Neb. at 855, 844 N.W.2d at 800-01. Therefore, when the Nebraska Court of Appeals viewed Baines' express questions to Ms. Cavitte purely subjectively, they misapplied the law in direct conflict with this Court's prior precedent.

Applying the correct binding law, this Court should find when Ms. Cavitte was immediately cuffed, completely bypassing paramedics, and placed in the back of cruiser, Baines should have known that his express questions were reasonably likely to elicit an incriminating response from Ms. Cavitte. (E1,1, 10, 10). Moreover, Nebraska Court of Appeals' explanation that the questions were admissible because they regarded her injuries, fails to address all of the incriminating questions posed by Baines. Such an analysis does not review the issue under the totality of the circumstances and instead, cherry picks the most interrogational question in an attempt to justify Baines' conduct. As in the *Franks* case, the lower court should have considered

the relationship of the information sought to the crime before addressing the issue *sua sponte*. Had it done so, it would have agreed with the trial court and found that Baine's questions where interrogational. Because it did not, the appellate courts' conclusion that Baines' questions were not the product of an interrogation is erroneous and not supported by factual findings.

Baines' expressly asked Ms. Cavitte questions regarding the nature of what happened and about her domestic relationship with Mr. Cavitte while Ms. Cavitte was in custody. This Court should take the opportunity to prevent the erosion of Fifth Amendment rights the lower courts committed by creating an arbitrary exception to the *Miranda* requirement and grant Ms. Cavitte's petition for certiorari. Because Nebraska courts applied the wrong law regarding Ms. Cavitte's initial interrogation, it follows that the lower courts did not properly address Ms. Cavitte's argument pursuant to *Seibert*, 542 U.S. 600, 124 S. Ct. 2601.

B) The Nebraska Court of Appeals failed to properly address the voluntariness of Ms. Cavitte's statements due to violations committed by law enforcement under *Seibert*.

Ms. Cavitte's Fifth Amendment rights were violated when the trial court admitted statements made before and after *Miranda* warnings were administered because the statements were the product of an unlawful two-step interrogation. This Court has found that when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and deprive a defendant of knowledge essential to her ability to understand the nature of her rights and the consequences of abandoning them. *Juraneck*, 287 Neb at 859, 844 N.W.2d at 803 (citing *Seibert*, 542 U.S. 600, 124 S. Ct. 2601). The threshold issue when officers question first and warn later is thus whether it would be reasonable to find in these circumstances the warnings could function effectively as *Miranda* requires. *Siebert*, 542 U.S. at 611-12, 124 S.Ct. at 2610. Where the warning is not effective to place an arrestee in a position to make an informed

choice to stop talking, there can be reason neither to accept the warning as compliant with *Miranda* nor to treat the second stage of interrogation as separate from the first, inadmissible stage. *Siebert*, 542 U.S. at 611-12, 124 S.Ct. at 2610.

To determine whether a midinterrogation *Miranda* warning is sufficient to warrant the admission of post-*Miranda* statements, this Court has previously considered five factors: (1) the completeness and detail of the questions and answers in the first round of interrogation, (2) the overlapping content of the two statements, (3) the timing and setting of the first and second, (4) the continuity of police personnel, and (5) the degree to which the interrogator's questions treated the second round as continuous with the first. *Siebert*, 542 U.S. at 612, 124 S.Ct. at 2610. Because a court cannot possibly foresee all facts that may render a *Miranda* warning ineffective, the facts in each case need to be weighed under a totality of the circumstances. See *Bobby v. Dixon*, 565 U.S. 23, 31, 132 S.Ct. 26, 32 (2011).

When reviewing these first five factors, this Court should conclude that the initial questions posed by Baines were intended to elicit incriminating responses. (E1,1, 10, 10). Baines knew to cut off his interrogation and *Mirandize* Ms. Cavitte due to these incriminating questions and responses. After *Mirandizing* Ms. Cavitte, Baines reminds Ms. Cavitte of what she said previously in order to get her to again repeat what she said in the first part of the interrogation which is the type of police conduct specifically proscribed by the court. (E1,1, 10, 10). There was no actual break in the interrogations conducted by Baines. The content of the first interrogation with Baines and second interrogation with Kreikemeier does overlap. In both, Ms. Cavitte admits there is a disagreement where she admits culpability in hurting Mr. Cavitte. In both, she discusses her tumultuous marriage to Mr. Cavitte which is inherently incriminating in a domestic violence case. In both, officers begin the interrogation by asking how she got her injuries. The two-step

interrogation tactic used by Baines and Kreikemeier misled Ms. Cavitte and deprived her of the knowledge essential to her ability to understand the nature of her rights and the consequences of abandoning her rights--all of which were exacerbated by her intoxication.

Besides failing to meet constitutional standards under the previously cited five factors to render *Miranda* effective, Ms. Cavitte encourages this Court to consider additional factors of failuring to re-administer *Miranda* and Ms. Cavitte's intoxication as reasons why Ms. Cavitte's Fifth Amendment rights were violated. After the first interrogation law enforcement could have potentially cured the taint of the illegal interrogation by re-administering *Miranda* warnings. Clearly, *Miranda* warnings once given, cannot be accorded unlimited efficacy or perpetuity. *In re Miah S.*, 290 Neb 608, 612, 861 N.W.2d 406, 412 (2015); and *United States v. Hopkins,* 433 F.2d 1041, 1045 (5th Cir.1970). There is no exact time span or set of circumstances that will dictate when *Miranda* needs to re-administered, instead the issue is determined by the totality of the circumstances. *Miah S.*, 290 Neb at 613, 861 N.W.2d at 412. Initial warnings must be re-administered if, "the circumstances changed so seriously that [the suspect's] answers no longer were voluntary, or unless [the suspect] no longer was making a 'knowing and intelligent relinquishment or abandonment' of her rights." *Id.* (citing *Wyrick v. Fields*, 459 U.S. 42, 47, 103 S.Ct. 394 (1982)). In this case, *Miranda* should have been re-administered given Ms. Cavitte's intoxication and the two hour time lapse from the *Miranda* advisory.

As the video clearly shows, Ms. Cavitte was intoxicated. (E2, 1, 24, 24). The trial court also concluded that Ms. Cavitte was intoxicated. (Appendix D). However, the Nebraska Court of Appeals concluded that *Miranda* did not need to be re-administered because there was only a two-hour delay between reading her rights and Kreikemeier's interrogation and "Cavitte responded that she remember the rights advisory and did not need to hear it again." *Cavitte*, Neb. App. 612,

N.W.2d 239. However, the record clearly shows that Kreikemeier should have re-administered the warnings because Kreikemeier needed to repeat himself several times and only once did Ms. Cavitte actually agree that she remembered. (E2, 1, 24, 24). The second time Kreikemeier asks if she recalls the rights advisory, two hours after the original advisory, Ms. Cavitte responds irrationally, "If I recall am I going to jail?" (E2, 1, 24, 24).

During the hour and a half Ms. Cavitte was waiting in the interrogation room, Ms. Cavitte observably becomes still and lifeless with her head hung. (E2, 1, 24, 24). Clearly, Ms. Cavitte was passed out from intoxication during these instances. Kreikemeier also commented to Ms. Cavitte directly that he could tell that she had been drinking and that he could smell it on her. (E2, 1, 24, 24). Throughout the second interrogation, Kreikemeier constantly had to redirect Ms. Cavitte as she trails off topic mumbling and slurring her words. (E2, 1, 24, 24). Given Ms. Cavitte's level of intoxication, Kreikemeier should have taken the time to re-administer her *Miranda* warnings to ensure a knowing, intelligent, and voluntary waiver.

Overall, Kreikemeier does not ask if she understood her rights, does not ask if she remembers what the rights were, does not ask if she is willing to speak, does not remind her that she has the right to remain silent, nor does he remind her of her right to speak to an attorney. Instead, he simply asks if Ms. Cavitte remembers the form she was never shown. Moreover, Ms. Cavitte did not have the soundness of mind necessary to invoke her *Miranda* rights and as explained above, she previously made incriminating statements before she was ever advised of her rights. Such tactics confused Ms. Cavitte into thinking she had already previously waived her right. Combining the two-part interrogation tactic with her intoxicated state, and the failure to re-administer *Miranda*, this Court should find that Ms. Cavitte's statements to Kreikemeier were not a knowing, intelligent, or voluntary waiver of her rights, and grant this petition.

II.

The prosecutor committed prosecutorial misconduct when he commented on Ms. Cavitte's failure to divulge her claim of self-defense to the prosecution or law enforcement prior to the trial.

This case also presents the Court with the opportunity to address an issue which has no clear answer and is ripe for analysis. This Court has held "the Fifth Amendment 'forbids...comment by the prosecution on the accused's silence...'" *United States v. Robinson*, 485 U.S. 25, 30, 108 S.Ct. 864, 868(1988) (citing *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233 (1965)). Moreover, the Due Process Clause of the Fourteenth Amendment requires that the prosecutor prove every ingredient of an offense beyond a reasonable doubt and not shift the burden of proof to the defendant. *Patterson v. New York*, 432 U.S. 197, 215, 97 S.Ct. 2319, 2329 (1977). Because the burden of proof always remains with the prosecutor, it cannot comment on a defendant's failure to produce evidence to refute an element of the crime. *Jackson v. State*, 575 So. 2d 181, 188 (Fla. 1995); *United States v. Saint Louis*, 889 F. 3d 145, 156 (4th Cir. 2018); *United States v. Simon*, 964 F,2d 1082, 1086 (11th Cir. 1992); (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970)). These two fundamental principles of our criminal justice system were violated when the prosecutor delivered his closing arguments.

This case presents an unanswered dilemma: may the prosecution comment on the defendant's failure to divulge her self-defense claim prior to trial? In this case, the prosecutor argued the following:

> "... ten and a half months after this took place when [Ms. Cavitte] was in an interview room with a detective for over an hour and during no time did [she] state anything about [Mr.

Cavitte] using any threats against [her], him using any force against [her], prior to [her] cutting him?..."

(437: 14-20).

"...nowhere in the ten and a half months leading up to this trial was there any evidence that [Ms. Cavitte] tried to reach out to law enforcement to change her story."

(437: 22-24)(emphasis supplied).

"Does it make sense that you're advised of your rights and you're given an opportunity to give your version of events with not only one officer, but two officers, and you're with officers for hours and nowhere in there do you bring up any fact of being attacked, stating that you're the victim? Wouldn't that be relevant information that law enforcement would want to know in gathering their reports?"

(440: 6-13).

"It doesn't make sense that [Ms.] Cavitte, mere hours after the assault and after being in contact with law enforcement for hours, intending to get her side of the story from her, is just now informing us of this self-defense ten and a half months after the assault took place."

(442: 13-18).

Because case law does not provide a clear answer, Ms. Cavitte urges this Court look to cases which address similar principles involved.

Other courts have found misconduct in similar arguments made by prosecutors. In *Hayes* the prosecutor, over defense objection, inquired whether the defense had requested its own testing of scientific evidence, which it had not. *Hayes v. State*, 660 So.2d 257, 265 (Fla. 1995). The Supreme Court of Florida explained that because the burden of proof always remains with the

prosecution, it cannot comment on a defendant's failure to produce evidence to refute an element of the crime. *Id.* Doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence. *Id.* The court found that the prosecutor's comments were misconduct and prejudicial because they may have led the jury to believe the defendant had an obligation to test the evidence in order to prove his innocence. *Id.* Thus, the court properly found that the comments were improper misconduct reversing his conviction even though a curative instruction was provided. *Id.* at 266.

This Court should also look to the decision in *Valarde v. Shulsen*, 757 F. 2d 1093 (10th Cir. 1985). In *Shulsen*, the prosecutor committed misconduct when commenting on Shulsen's failure to make exculpatory statements at the time of his arrest. *Id.* at 1095. The relevant problematic question in that case was: "So you have elected to go forward with this entire criminal prosecution, be arrested for vehicle theft, and wait until today for the first time to give your version of what happened?" *Id.* at 1096. The court found that the examination "was in effect, an inquiry into petitioner's silence at the time of his arrest...[and] ...not related to prior inconsistent statements as allowed by *Anderson v. Charles*, 447 U.S. 404, 100 S.Ct. 2180 (1980) and instead controlled by *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976)." *Id.* at 1095. Therefore, the prosecutor's inquiries regarding petition's failure to give his version of the story at the time of the arrest was reversible error. *Id.* at 1096.

In *Commonwealth v. Amirault*, the Supreme Court of Massachusetts addressed the prosecutor's comment on defendant's post-arrest silence. 404 Mass. 221, 236, 535 N.E.2d 193, 203 (1989). The prosecutor argued:

> "[T]he Commonwealth is forbidden by law from approaching a defendant and talking to him after he's been arrested. But, the law...does not forbid a defendant from approaching

the Commonwealth to tell his side of the case, if he wants to...[Y]ou have heard no evidence that the defendant ever tried to do that in this case."

Id. That court only upheld the comments because, "[d]efense counsel clearly invited the prosecutor's comments." *Id.*[1] However, the court did find that "the prosecutor's comments were improper because they violated the defendant's right to remain silent after his arrest." *Id.* at 237, N.E.2d 203 citing *Commonwealth v. Teixera*, 396 Mass. 746, 752, 488 N.E.2d 775, 779-80 (1986). ("prosecutorial comments on a defendant's silence at times when the defendant is constitutionally entitled to remain silent...are impermissible.")

In upholding the prosecutor's statements in this case, the Nebraska Court of Appeals relied on *Anderson v. Charles* to justify the prosecutor's comments. 447 U.S. 404, 100 S.Ct. 2180 (1980). That case held that the prosecution was allowed to pose questions and comment about a defendant's inconsistencies. *Id.* However, this Court also clearly reasoned that the questions "were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." *Charles,* 447 U.S. at 409, S.Ct. 2182 (emphasis supplied). That is not what happened here.

Here, the prosecutor argued that Ms. Cavitte failed to produce evidence that she divulged her self-defense claim in the months leading to trial. This argument misstates the law and caused the jury to believe that Ms. Cavitte carried the burden of proving self-defense[2]. It also caused the jury to believe that Ms. Cavitte had an obligation to come forward to law enforcement or the prosecution with her claim of self-defense prior to trial in order to prove her innocence. Not only

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[1] It should be noted that in *Cavitte*, the questionable comments were made during the prosecution's initial closing, not rebuttal.

[2] While there is an exception to the rule in instances where the defense asserts self-defense, once the defendant has produced sufficient evidence to raise the defense, the issue is then one the prosecution must disprove. *State v. Kinser*, 252 Neb. 600, 607, 567 N.W.2d 287, 292 (1997). As the State conceded themselves, enough evidence was produced to warrant the self-defense jury instruction, thus shifting the burden back to the State to disprove self-defense. (T89).

does this argument constitute burden shifting, it also affects Ms. Cavitte's right against self-incrimination.

The prosecutor constantly referred to Ms. Cavitte's silence after being afforded an attorney and her failure to bring forward her self-defense testimony to law enforcement or the prosecutor in the months leading up to trial. (437: 14-20 & 22-24; 440: 6-18; 442: 8-20). This argument suggests that Ms. Cavitte was required to waive her right against self-incrimination when Nebraska law has made it clear that "[a] defendant is not required to plead and give notice of an affirmative defense of ...self-defense." *State v. Kinser*, 252 Neb. 600, 607, 567 N.W.2d 287, 292 (1997). The prosecutor's argument invited jurors to speculate about an investigation that might as easily have taken place if Ms. Cavitte had divulged her self-defense claim earlier. The prosecutor specifically commented, on numerous occasions that Ms. Cavitte should have waived her right against self-incrimination and come forward to law enforcement or the prosecution prior to trial after being afforded an attorney.

Overall, the prosecutor encouraged the jury to place themselves in the position of the defendant by arguing, "you're advised of your rights and you're given the opportunity to give your version of events with not only one officer, but two officers, and you're with officers for hours and nowhere in there do you bring up any fact of being attacked, stating you're the victim..." (440: 6-17). This argument suggests to the jury that they should think about what they would have done if they were the defendant. This type of argument is "universally condemned because it encourages the jury to depart from neutrality and decide the case on the basis of personal interest and bias rather than on evidence." *United States v. Palma*, 473 F. 3d 899, 902 (8th Cir. 2007).

In the instant case, the court of appeals mischaracterized the record when it found the prosecutor's comments during closing were not misconduct and instead solely made in reference

to Ms. Cavitte's credibility[3]. *Cavitte*, 28 Neb. App. at 607, 945 N.W.2d at 242. The lower court in this case claimed that they examined the comments "in the context of the full trial" however, the court blatantly ignored the prosecutor's stated purpose for the comment. see *Id.* After Ms. Cavitte moved for mistrial, the prosecutor was given the opportunity to respond to the questionable comments and explained by stating:

> "[I]t's the [prosecutor's] position that we're just now hearing of the self-defense claim, and that [Ms. Cavitte] had ample opportunity to provide law enforcement—when she's speaking with them, to provide them information about this. The [prosecution]'s just referencing the lack of information provided by the defendant during the case."

(466:2-11)(emphasis supplied).

This Court does not have to limit itself to the above statements made in closing when determining the illegality of the arguments made. During a motion in limine, the prosecutor argued that Ms. Cavitte should be precluded from presenting evidence of Mr. Cavitte's character for violence through the testimony of Ms. Cavitte alleging that the defense was required to produce such evidence to the prosecutor before trial. (51:19-25 & 52: 1-17 & T66-72). The prosecutor was not referencing Ms. Cavitte's prior inconsistent statements. He was misstating the law by arguing that Ms. Cavitte was required to disclose her claim of self-defense in the months leading up to trial.

There is a difference between attacking the credibility of the defendant's testimony and shifting the burden. There is a difference between pointing out prior inconsistent statements and commenting on a defendant's silence after being afforded an attorney. There is a difference

[3] Ms. Cavitte agrees that because she did not remain silent after *Miranda* warnings, questions and comments about the inconsistency of her statements do not violate due process. See *Anderson v. Charles* 447 U.S. 404, 100 S.Ct. 2180 (1980).

between "nowhere in the ten and a half months leading up to this trial was there any evidence that Ms. Cavitte tried to reach out to law enforcement to change her story" and commenting on the time Ms. Cavitte had to develop her testimony. (437: 22-24)(emphasis supplied). The clear words of distinction here are that the prosecutor specifically said "evidence that she tried to reach out to law enforcement" which makes it clear that the prosecutor was illegally commenting on the defendant's failure to produce evidence. Not to mention, the prosecutor was clearly intending to draw meaning from Ms. Cavitte's silence after being afforded an attorney when he specified the time period of "the ten and half months leading up to this trial." Because the prosecutor specified that he was referring to the time period of silence after Cavitte had been afforded an attorney, and because the prosecutor specified that the defense failed to provide evidence explaining such silence, he committed misconduct. Here, the lower court mischaracterized the record in its review of the case and because guidance from this Court is necessary, this Court should take the opportunity to grant certiorari.

Since the Nebraska Court of Appeals did not find the prosecutor's comments unlawful, it did not review the case for prejudice. Here, the remarks by the prosecutor were extensive and mislead and unduly influence the jury. As the Court can see from above, this was not a singular passing remark. The depth and frequency of the misconduct was littered throughout the entire case. From the motion in limine to the comments made in the closing argument, the prosecutor made clear to the jury that Ms. Cavitte's testimony was not to be believed because she failed to divulge her self-defense claim to law enforcement and prosecution in the months before trial. Ms. Cavitte did object to this misstatement of the law by moving for a mistrial which was not adequately handled by the trial court.

It should be noted that after Ms. Cavitte's motion for mistrial was overruled, an admonishment was provided but was inadequate. This court should look again to *Hayes* when determining the adequacy of an admonishment. In *Hayes*, after the trial court unlawfully admitted the prosecutor's arguments that the defense could have tested the scientific evidence themselves, the court gave a curative instruction: "the defense had no obligation to test the evidence collected at the crime scene, it did have the opportunity to have it tested." *Hayes*, 660 So. 2d at 266. The Supreme Court of Florida reasoned that "'[o]pportunity' implies an obligation and we are unwilling to assume that the jury could have found a measurable distinction between the terms." *Id.* Thus, the court concluded that the curative instruction could not cure the errors identified and could not be harmless beyond a reasonable double. *Id.*

In the instant case, the trial court simply stated: "with respect to counsel's statement about the defendant having ten months to say something, disregard that." (447: 11-13). The trial court failed to review what the prosecutor argued from the record, failed to provide the full statements that were improper, and failed to explain why the statements could not be used in deliberations. The admonishment was inadequate at best. In addition to requesting an admonishment, Ms. Cavitte requested the jury be instructed that Ms. Cavitte's right against self-incrimination cannot be used against her. (447: 3-7). While the jury was instructed that Ms. Cavitte is presumed innocent and the burden never shifts to the defense, the trial court failed to include a curative instruction regarding Ms. Cavitte's right against self-incrimination. The jury in this case was allowed to believe that because Ms. Cavitte did not divulge her self-defense claim to prosecution or law enforcement in the months leading up to her trial, after being provided the assistance of an attorney, she was not to be believed. Such an assertion is unconstitutional and

violates the structural integrity of our criminal justice system. The action, or inaction, by the court weighs in favor of finding prejudice.

Ms. Cavitte's failure to divulge her self-defense claim in the months before trial played a major role in the jury's evaluation of the veracity of her story as there were no other witnesses to the alleged attack on Mr. Cavitte. The prosecutor's illegal argument cannot be inconsequential passing remarks. Since this is a case where there were no other witnesses—where the alleged victim did not testify—the importance of Ms. Cavitte's credibility is so significant, the prosecutorial misconduct is not only prejudicial, but cannot be harmless beyond a reasonable doubt. The remaining evidence that was not tainted by the prosecutor's misconduct is weak, thus the prosecutor's comments weigh strongly in favor of prejudice.

CONCLUSION

For these reasons, Augustine Cavitte respectfully requests this Court grant certiorari, reverse the decisions of the Nebraska Court of Appeals in *State v. Cavitte*, 28 Neb. App. 601, 945 N.W.2d 228 (2020) and remand for a new trial.

Respectfully submitted,

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