

No. 20-6829

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH J. BUTTERCASE,

Petitioner,

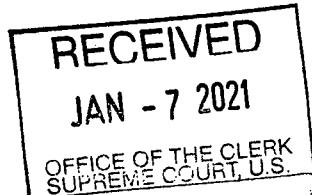
v.

STATE OF NEBRASKA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEBRASKA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI



Joseph J. Buttercase - 76999
pro se Petitioner
Nebraska State Penitentiary
P.O. Box 22500
Lincoln, Nebraska 68542-2500
(402) 471-3161

QUESTIONS PRESENTED

Due to Nebraska law governing procedures for postconviction relief being inconsistent with traditional principles of fundamental fairness, the vast majority of Nebraska prisoners fail to obtain proper testing by the state courts of constitutional issues of the most numerous and important types, in turn, prisoners usually do not receive any fact hearings on their allegations.

In light of the foregoing, this petition presents the following:

1. Whether there is a federal constitutional right for a prisoner to be released upon proof of actual innocence?
2. Whether the state-law procedures for postconviction relief in Nebraska are constitutionally inadequate in the hearing and determination of claims from prisoners of violation of federal constitutional guarantees?
3. Whether a pro se postconviction relief movant in Nebraska should be held to the same standard as one who is represented by counsel?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and decision of the Nebraska Supreme Court.

OPINIONS BELOW

The memorandum opinion and judgment on appeal from the Nebraska Supreme Court appears at Appendix A to the petition and is unpublished. The opinions of the district court of Gage County, Nebraska appears at Appendix B to the petition and is unpublished (S-19-0384/T487-488;Supp.T1-3).

JURISDICTION

The judgment of the Nebraska Supreme Court was entered on June 26, 2020. On March 19, 2020, this Court extended the deadline to file any petition for writ of certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing, due to the covid-19 pandemic. The present petition for writ of certiorari is timely filed by not later than November 23, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in

pertinent part, that: "No state shall make or enforce any law which will abridge the privileges or immunities of the 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."

Neb.Rev.Stat. § 29-2101(5) provides, in pertinent part, that: "A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following grounds affecting materially his or her substantial rights: ... newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at trial; ..."

Neb.Rev.Stat. § 29-3001(1) provides that: "A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion, in the court which imposed the sentence, stating the grounds relied upon and asking the court to vacate or set aside the sentence."

Neb.Rev.Stat. § 29-4120(1)(c) provides, in pertinent part, that: "Notwithstanding any other provision of law, a person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgment requesting forensic DNA testing of any biological material that: ... [w]as not previously subjected to DNA testing or can be subjected to retesting with more current techniques that provide a reasonable likelihood of more accurate and probative results."

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On August 17, 2012, a Gage County, Nebraska jury convicted Petitioner Joseph J. Buttercase of one count of first degree sexual assault, first degree false imprisonment, strangulation, third degree domestic assault, and the jury acquitted Petitioner of one count of terroristic threats. The trial court on December 4, 2012 sentenced Petitioner to imprisonment for a total term of not less than 26 years and 8 months to no more than 41 years. On direct appeal, the Nebraska Court of Appeals affirmed Petitioner's convictions and sentences on November 5, 2013 in **State v. Buttercase**, No. A-12-1167 (Neb.App. 2013), unpublished, further review denied February 20, 2014. Buttercase did not petition this Court for a writ of certiorari on his direct appeal.

Petitioner subsequently sought postconviction relief in the state trial court on February 19, 2015 pursuant to **Neb.Rev.Stat. § 29-3001**. On October 2, 2015, the trial court denied Petitioner postconviction relief and also denied his request for an evidentiary hearing. The Nebraska Court of Appeals affirmed the trial court's denial of Petitioner's motion for postconviction relief without a hearing, motion to amend, and motion to recuse on December 5, 2017 in **State v. Buttercase**, No. A-15-987 (Neb.App. 2017), unpublished, further review denied March 12, 2018.

Petitioner also filed in the trial court on July 14, 2017, a motion for new trial pursuant to **Neb.Rev.Stat. § 29-2101(5)**, motion for DNA testing pursuant to **Neb.Rev.Stat. § 29-4120**, and a motion for appointment of counsel pursuant to **Neb.Rev.Stat. § 29-4122** (2ndSupp.T1-31;Conf.T1-144). Petitioner moved the trial court for a new trial and DNA testing based upon newly discovered evidence concerning prosecutorial misconduct, judicial partiality,

and jury misconduct. Id. On September 15, 2017, a hearing was held in the trial court with respect to Petitioner's motion for new trial and motion for DNA testing (Supp.B.O.E.5:1-12:11). The trial court on November 3, 2017 stayed Petitioner's pending motion for new trial and motion for DNA testing based upon Petitioner's pending postconviction relief appeal in the Nebraska Court of Appeals, *State v. Buttercase*, No. A-15-987.

On April 6, 2018, Petitioner filed in the trial court a motion to vacate (postconviction relief) pursuant to *Neb.Rev.Stat.* § 29-3001 and a motion for appointment of counsel pursuant to *Neb.Rev.Stat.* § 29-3004 (T28-29;T31-317). Petitioner moved the trial court to vacate his convictions and sentences based upon insufficient evidence to convict him beyond a reasonable doubt, newly discovered ineffective assistance of trial/appellate counsel claims, prosecutorial misconduct claims, judicial partiality claims, jury misconduct claims, and he also challenged the constitutionality of the Nebraska Post-conviction Act Id. Petitioner filed in the trial court on July 11, 2018, a supplemental motion for new trial pursuant to *Neb.Rev.Stat.* § 29-2101(5) (T320-461). Petitioner supplemented his original motion for new trial based upon additional newly discovered evidence concerning further prosecutorial misconduct and jury misconduct that was unknown when the original motion was filed. Id.

The trial court entered its order dismissing Petitioner's motion to vacate (postconviction relief), motion for appointment of counsel, and supplemental motion for new trial—along with his requests for evidentiary hearings on March 20, 2019 (T487-488) (Appendix B). Petitioner timely filed in the trial court March 26, 2019, a motion to alter or amend pursuant to *Neb.Rev.Stat.* § 25-1329 and a motion to reconsider (T490-595). On April 24, 2019, the trial

court entered its Order overruling Petitioner's motion for DNA testing and his originally filed motion for new trial (Supp.T1-3) (Appendix B). Petitioner timely filed in the trial court on April 24, 2019, a motion to alter or amend pursuant to **Neb.Rev.Stat. § 25-1329** and a motion to reconsider (2ndSupp.T44-46;T51-70). On May 1, 2019, Petitioner timely filed in the trial court a motion to reconsider (2ndSupp.T71-73).

Pursuant to **Neb.Rev.Stat. § 25-1912(3)**, the aforementioned post-judgment motions to alter or amend and motions to reconsider reset the running of the thirty (30) days time to file notice of appeal until after the trial court issued its order on May 2, 2019 (2ndSupp.T74). Petitioner timely filed his Notice of Appeal in the trial court on April 19, 2019 from the denials of his motion to vacate (postconviction relief), motion for appointment of counsel, and supplemental motion for new trial. Petitioner also filed in the trial court with his Notice of Appeal a motion for leave to proceed in forma pauperis and supporting poverty affidavit. The trial court granted Petitioner leave to proceed with his appeal in forma pauperis on the same day of April 19, 2019. Petitioner timely filed his second Notice of Appeal in the trial court on May 16, 2019 from the denials of his motion for DNA testing and his originally filed motion for new trial. Petitioner also filed in the trial court with his second Notice of Appeal a motion for leave to proceed with appeal in forma pauperis, and supporting poverty affidavit. The trial court granted Petitioner leave to proceed with his appeal in forma pauperis on the same day of May 16, 2019.

After briefing and oral argument, the Nebraska Supreme Court on June 26, 2020 affirmed the trial court's denials of Petitioner's supplemental and motion for new trial, motion for DNA testing, motion to vacate (postconviction relief),

and motion for appointment of counsel in *State v. Buttercase*, No. S-19-0384 (Neb. 2020), unpublished (Appendix A).

B. STATEMENT OF FACTS

Joseph J. Buttercase was convicted in 2012 for the alleged rape and assault of his ex-girlfriend Tessa Fulton. The jury convicted Buttercase on the word of Fulton whose testimony was inherently unreliable. There was not any physical evidence to support Fulton's allegations that she was physically or sexually assaulted at Buttercase's home in the living room, hallway or kitchen. There was not any evidence on Buttercase's person, such as abrasions or scratches, to support Fulton's allegations that he used his fists to punch her on all parts of her body for three and a half hours with only little breaks taken. There was an absence of marks on Buttercase's knuckles and no defense wounds. Buttercase would have managed to commit this alleged assault without leaving any external bruising or markings on Fulton as well, as witnessed by Megan Breedon (Fulton's sister) that testified "her appearance was'nt any different other than missing jewelry ..." (A-12-1167/B.O.E.221:4-9). Fulton also testified that Buttercase had never assaulted her at any time during their 2½ year relationship (id./304:13-14;317:24-318:5;323:17-18).

In the early morning of July 16, 2011, Buttercase received a ride home from Fulton. Upon arrival at Buttercase's home in Beatrice, Gage County, Nebraska, Fulton invited herself in as Buttercase stated that he just wanted to pass out because he was drunk (id./749:7-750:6;751:13-752:4). Fulton insisted that she and Buttercase have sexual relations while she was at Buttercase's home. Fulton stated that she wanted to become a couple again with Buttercase when they woke up in the morning. Fulton became angry at Buttercase when he refused, stating "Fuck You. My name is no longer Tessa. It is now

Karma." and then she left his home at approximately 9:00 a.m. (id./762:1-18; 764:3-19;788:8-791:1). Thereafter on the same day of July 16, 2011, Buttercase was wrongfully arrested and falsely charged by the Beatrice Police Department with various crimes to include, but not limited to, domestic and sexual assault of Fulton (A-12-1167/T5-9).

After trial, Sondra Aden (Buttercase's next-door neighbor) testified before the trial court at an evidentiary hearing for Buttercase's first motion for new trial that she witnessed Tessa Fulton leave Buttercase's residence the morning of July 16, 2011, at approximately 9:00 a.m. Aden saw Fulton walking to her car from Buttercase's home swinging her sandals. Fulton turned back to look at Buttercase, he waved, and she then got into her vehicle. It did not appear to Aden that Fulton was in any kind of pain or discomfort while walking to her car. Nor did Aden observe any injuries or blood to her face from a distance of about three car lengths when Fulton had looked back toward Buttercase. The lighting was bright and sunny at the time (A-12-1167/T57-62) (A-12-1167/973:1-1022:21).

Tessa Fulton's whole story of Joseph Buttercase's actions and consequently all of the charges that he was convicted of is a lie. Buttercase did NOT sexually assault Tessa Fulton, physically assault her, strangle her or falsely imprison her (id./797:3-798:20). Rather, Tessa Fulton concocted the entire story because she wanted to get back at Buttercase for not wanting to resume their dating relationship (id./788:8-21). Fulton still wanted to be in a relationship with Buttercase (id./305:23-306:1). They continued having sexual relations from March of 2011, when Buttercase broke up with her, until the middle of June of 2011 while they were having sex while she was menstruating (id./250:6-251:21;877:22-24;683:17-25).

Fulton also claimed that Buttercase had her sign over to him a bunch of her electronics (id./243:18-24). Fulton testified that Buttercase took "every bit and piece of my belongings" before he moved out for good (id./249:13-22). Megan Breedon testified that she was aware that Fulton had been trying to get property out of Buttercase's home that she claimed to be hers, and Breedon had also expressed concern of her own to Investigator Bryne about the releasing of Buttercase's seized car that had also been claimed by Fulton to be hers (id./219:13-22). Irene Snell (Fulton's friend) gave testimony that she never liked Buttercase and that Fulton continued to sleep with him to get her things back (id./185:19-23;190:21-191:2). Snell was interviewed by Investigator Erin Byrne on August 30, 2011, wherein Byrne told Snell that people were saying Fulton had made up the false accusations against Buttercase as a revenge story. Snell said the thought had crossed her mind due to the fact that Fulton sounded awfully cheerful (id./184:12-185:1;191:9-11). Fulton had also filed a civil lawsuit against Buttercase for the property she claimed Buttercase had taken from her (id./304:18-305:13).

Attorney, Jason Troia #21793, was hired by Buttercase's family to represent Petitioner at his trial and direct appeal. Because the prosecution failed to disclose material exculpatory and impeaching evidence to the defense prior to trial, Troia's cross-examination of Fulton barely scratched the surface of establishing her utter lack of credibility. New evidence came to light during state postconviction proceedings, including, but not limited to, material exculpatory DNA evidence that included mixed sperm cell fractions, material exculpatory eye witness next-door neighbor Sondra Aden, material exculpatory/impeaching sex tapes of Tessa Fulton and Joseph Buttercase of previous consent to acts later alleged on July 16, 2011, to have been done without her consent,

and material exculpatory/impeaching Facebook messages between Tessa Fulton and Samantha Peck (Buttercase's ex-wife) that also supports a judicial partiality claim. Buttercase, throughout state court proceedings, had the misfortune of being represented by ineffective counsel who did virtually no investigation on his behalf. Consequently, Buttercase went to trial without any reasonable, independent investigation into his actual innocence.

Based upon all of the newly discovered evidence of innocence, Petitioner filed in the trial court motions for new trial, motion for DNA testing, motion to vacate (postconviction relief), and motions for appointment of counsel on July 14, 2017, April 6, 2018, and July 11, 2018. These motions raised 30-plus constitutional violation claims, including actual innocence claims, under federal and state law, and requested evidentiary hearings (2ndSupp.T1-31;Conf.T1-144) (T28-29;T31-317) (T320-461). The trial court denied these motions on March 26, 2019 and April 16, 2019 (T487-488;Supp.T1-3) (Appendix B).

The Nebraska Supreme Court affirmed the trial court's denial of the aforementioned postconviction motions on June 26, 2020 in *State v. Buttercase*, No. S-19-0384 (Neb. 2020), unpublished (Appendix A). The present petition for writ of certiorari is now before this Court for its consideration.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE UNANSWERED QUESTION OF WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBIT THE CONTINUED INCARCERATION OF A PRISONER WHO PRESENTS PERSUASIVE POSTCONVICTION CLAIMS OF INNOCENCE.

The facts of this case present this Court with an ideal opportunity to resolve the unanswered questions and confusion spawned by this Court's decision *Herrera v. Collins*, 506 U.S. 390 (1993), regarding whether due process and the cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments

prohibits the incarceration of an innocent prisoner. The **Herrera** decision has created a great deal of confusion and conflicts between the various state and federal courts that have addressed whether innocent prisoners have a due process right to postconviction relief where credible and substantial freestanding claims of innocence are advanced.

In the aftermath of **Herrera**, federal circuit court of appeals are divided on whether **Herrera** precludes federal habeas petitioners from obtaining habeas corpus relief under 28 U.S.C. § 2254 based on freestanding claims of actual innocence. See, e.g., **Burton v. Dormire**, 295 F.3d 839, 848 (8th Cir.2002) (finding innocence claims not cognizable); **Stephenson v. Neal**, 2017 WL 3319296 (7th Cir.8/4/17) (considering and denying innocence claim on the merits). The question of whether the federal constitution precludes the incarceration of an innocent prisoner has also divided many of the state courts who have addressed the issue. The Illinois Supreme Court determined that this Court's "conflicted" decision in **Herrera** barred a federal due process claim grounded upon actual innocence and instead relied upon the Illinois Constitution to grant the prisoner a new trial. **People v. Washington**, 665 N.E.2d 1330, 1335 (Ill. 1996). Several other state courts have taken a similar path to grant innocent prisoners relief under constitutions. See, e.g., **People v. Hamilton**, 115 A.D.3d 12 (N.Y. 2014); **Montoya v. Ulibarri**, 142 N.M 89, 97 (2007).

However, in states, such as Nebraska, where neither legislation nor the state constitution has been interpreted to permit innocent prisoners to obtain postconviction relief, innocent prisoners have no legal recourse to obtain any meaningful judicial review despite compelling evidence that they are imprisoned or even condemned to die for a crime that they did not commit. The Nebraska Supreme Court held in **State v. El-Tabech**, 610 N.W.2d 737, 748 (Neb. 2000),

that in light of **Herrera** and the language of the state's postconviction act, an innocent prisoner had no legal recourse in Nebraska courts unless the legislature intervened to expand the scope of the state's postconviction review act. On the other hand, some states have found that postconviction relief is available to innocent prisoners because the failure to provide postconviction relief under these circumstances would violate the due process clause of the United States Constitution. **Ex parte Thompson**, 153 S.W.3d 416 (Tex. Crim. App. 2015).

It is also important to note that these restrictive interpretations of the **Herrera** decision to categorically preclude constitutional claims advanced by prisoners with freestanding claims of innocence are demonstrably wrong. In the last decade, this Court has made it clear that **Herrera**, in which the petitioner had only made a weak showing of innocence, did not actually resolve the issue of whether the constitution precludes the continued incarceration or execution of an innocent prisoner. See, **McQuiggin v. Perkins**, 133 S.Ct. 1924, 1931 (2013); **House v. Bell**, 547 U.S. 518, 554-555 (2006).

This Court's decision in **In re Davis**, 557 U.S. 952 (2009), also strongly suggests that freestanding claims of innocence are constitutionally viable. In that case, this Court remanded a prisoner's original petition for a writ of habeas corpus under 28 U.S.C. § 2241 to the district court for an evidentiary hearing on his claim of innocence. *Id.* After a hearing was conducted, the district court found that "executing an innocent person would violate the Eighth Amendment" but that Davis did not establish his innocence. **In re Davis**, 2010 WL 3385081 (S.D. Ga. 8/24/10) at *61.

Herrera recognized that the central purpose of any system of criminal justice is to convict the guilty and free the innocent. **Herrera**, 506 U.S. at

398. In addition, the concept of "liberty from bodily restraint has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). Because an innocent person "has a liberty interest in remaining free from punishment," the execution or continued incarceration of an innocent person violates elementary fairness and "runs afoul" of that person's due process rights. *Hamilton*, 115 A.D.3d at 26.

Both the *Herrera* decision itself and subsequent decisions clearly indicate that strong procedural and substantive due process arguments can be made that the continued incarceration or execution of an innocent prisoner would violate both procedural and substantive due process under the Fourteenth Amendment. *Herrera*, 506 U.S. at 437 (Blackmun, J., dissenting). Although the majority of the court in *Herrera* declined to find that substantive due process would be violated by the execution of an innocent prisoner, at least six members of the court did agree that a truly persuasive case of actual innocence would render a conviction unconstitutional. *Id.*, 506 U.S. at 417. The Illinois Supreme Court in *Washington* found that the continued imprisonment of an innocent person would violate both substantive and procedural due process. The court in *Washington* held that procedural due process required postconviction relief because "to ignore such a claim would be fundamentally unfair." *Washington*, 665 N.E.2d at 1336. The court in *Washington* also held that "imprisonment of the innocent would also be so conscience shocking as to trigger operation of substantive due process." *Id.*

This Court in *House v. Bell*, 547 U.S. 518 (2006), observed that "[t]he sequence of the Court's decisions in *Herrera* and *Schlup v. Delo*, 513 U.S. 298 (1995)—first leaving unresolved the status of freestanding claims and then

establishing the gateway standard—implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*." *House v. Bell*, 547 U.S. 518, 555 (2006). Together, *House* and *Schlup* indicates that the burden of demonstrating a freestanding claim of actual innocence is (1) "extraordinarily high," *Herrera*, 506 U.S. at 417, (2) more demanding than the actual innocence standard applied in the procedural default context, *House*, and (3) based on the perspective of a "reasonable juror." *Schlup*, 513 U.S. at 329; Brian R. Means, *Postconviction Remedies* § 6:17 (July 2020 Update).

The continued incarceration or execution of an innocent prisoner would violate the Eighth Amendment to the United States Constitution. A sentencing process that does not comport with "evolving standards of decency that mark the progress of a maturing society" violates the cruel and unusual punishment clause of the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551, 561 (2005); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). In determining whether an Eighth Amendment violation occurs under the evolving standards of decency test, the best indicator of contemporary values is legislation enacted by the states. See, *Atkins v. Virginia*, 536 U.S. 304, 313 (2002).

In the more than two decade since the *Herrera* decision, the vast majority of the states either through legislation, court rule, or by the interpretation of its constitution, have created a postconviction review system that allows wrongfully convicted postconviction relief if they can present a compelling case of actual innocence. See, Brooks, Simpson, and Kaneb, *If Hindsight Is 20/20, Our Justice System Should Not Be Blind To New Evidence of Innocence: A Survey Of Post-Conviction New Evidence Statutes And A Proposed Model*; 79 Alb. Rev. 1045 (2015/2016). This expansion of the rights of innocent prisoners to seek legal redress has also undoubtedly been accelerated as a result of the

spate of DNA exonerations resulting from scientific advances in that technology. However, as mentioned earlier, for those innocent prisoners in the federal system and the handful of states such as Nebraska that do not provide adequate legal remedies for innocent prisoners, this Court under **Simmons** and **Atkins** should grant review in this case in order to recognize that the United States Constitution requires that innocent prisoners have a right to be heard and obtain new trials on freestanding claims of actual innocence under the evolving standards of decency test.

Another central concern of the Eighth Amendment is its protection against disproportionate punishment. See, **Montgomery v. Louisiana**, 136 S.Ct. 718, 732 (2016). This Court has identified four "penological justifications" for imposing a life without parole sentence in **Montgomery**: (1) retribution; (2) deterrence; (3) incapacitation; and (4) rehabilitation. *Id.*, at 733. None of these purposes are served and are, in fact, undermined when the convicted individual is actually innocent. Therefore, because punishment of an actually innocent person is inherently disproportionate to the acts committed by that person, such punishment violates the constitutional prohibition on cruel and unusual punishment. **Hamilton**, 115 A.D.3d at 26. This Court in **Robinson v. California**, 370 U.S. 660, 667 (1962), hypothesized an extreme example of disproportionate punishment when it noted that "even one day in prison would be a cruel and unusual punishment for the crime of having a common cold."

The state legislative and legal developments involving innocence jurisprudence in the aftermath of **Herrera** dictate that its holding should be abandoned, reexamined, and clarified. Evolving standards of decency clearly dictate that it is constitutionally impermissible to allow prisoners to remain incarcerated or forfeit their lives if they have a substantial claim of

innocence.

The state's case against Buttercase was a he said—she said case. Fulton and Buttercase had consensual intercourse at his home while she was on her period. Fulton was not physically or sexually assaulted by Buttercase. Fulton was free to leave Buttercase's home at anytime, in fact, she invited herself into his house to have sexual relations with him in hopes of becoming a couple again. Buttercase was dating one of Fulton's lady friends at this time in 2011 and, he was out with some of her other lady friends the night of July 15-16, 2011 as well. Fulton felt used when Buttercase refused to become an exclusive couple again the morning of July 16, 2011. Fulton replied to Buttercase that "my name is no longer Tessa, it is now Karma. Fulton also believed that Buttercase had property of hers, to include her car. This Court has held that "It is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970).

The state only wanted Buttercase's conviction, without a care that he is actually innocent. It is the duty of the prosecutor to seek justice, and not merely to convict. *Berger v. United States*, 295 U.S. 78 (1932). The due process clause of the Fourteenth Amendment protects criminal defendants from the prosecution's use of false evidence:

As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Plyle v. Kansas*, 317 U.S. 213 (1942).

Giglio v. United States, 405 U.S. 150, 153-154 (1972). Here, the prosecution had a duty to refrain from the use of Fulton's testimony which they knew or should have known to be false. "In *Napue v. Illinois*, 360 U.S. 264 (1959), we said, 'the same result obtains when the State, although not soliciting false

evidence, allows it to go uncorrected when it appears.'" *Giglio*, 405 U.S. at 154. Instead of complying with their constitutional duty, the prosecution sat silently by and took advantage of the windfall that came their way by reason of Fulton's false and misleading testimony.

Under Napue and *Giglio*, Buttercase is entitled to postconviction relief due to the false or misleading evidence affecting the deliberation of the jury:

It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.... That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

Napue, 360 U.S. at 270. That standard is unquestionably met in Buttercase's case, where the prosecution's case was built entirely on the false testimony of Tessa Fulton that is uncorroborated by the physical evidence and newly discovered evidence. Because the state allowed Fulton's false testimony to go uncorrected in violation of Buttercase's right to due process, Buttercase's conviction must be vacated. This Court's discretionary review is necessary to ensure that innocent prisoners, such as Buttercase, have adequate judicial process to litigate their claims.

II. CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE INADEQUATE STATE-LAW PROCEDURES FOR POSTCONVICTION RELIEF IN NEBRASKA VIOLATES THE FOURTEENTH AMENDMENT.

The fundamental principles of due process that are implicated in this case are of substantial importance to prisoners in Nebraska seeking postconviction relief. After Certiorari was granted, the Nebraska legislature enacted a statute providing a postconviction procedure. *Neb.leg.Bill. 836*, Seventy-fifth Session, effective April 12, 1965. *Case v. Nebraska*, 381 U.S. 336, 337 (1965).

In *State v. Buttercase*, No. A-15-987, 2017 WL 6016428 (Neb.App. 2017), the Nebraska Court of Appeals found that:

Buttercase's reliance on *State v. Mata*, 280 Neb.849, 70 N.W.2d 716 (2010), for his position that the district court should have liberally construed his original motion for postconviction relief in order to find his later amendment sufficiently related back to his original claims is no longer relevant in light of our Supreme Court disfavoring the application of the more liberal civil pleading rules to postconviction proceedings. See *State v. Robertson*, [294 Neb. 29, 881 N.W.2d 864 (2016)].

The Nebraska Court of Appeals then held: "Therefore, as set forth in *State v. Edwards*, *supra*, we review the district court's order denying Buttercase's motion to amend his postconviction relief for an abuse of discretion, and we find none." *State v. Buttercase*, No. A-15-987, 2017 WL 6016428 (Neb.App. 2017) (T18,¶4) (T170-171). Due to the state's suppression of material exculpatory evidence, Buttercase's postconviction counsel was unable to include all claims of relief in the original motion for postconviction relief because not all the new evidence had been discovered yet. In an attempt to cure the defects in the original postconviction motion, Buttercase's postconviction counsel moved the trial court for leave to amend. The motion to amend was filed in trial court on June 29, 2015 (A-15-987/T14), and the trial court denied Buttercase leave to amend on September 16, 2015 (id./T20-22), all before the trial court denied Buttercase's motion for postconviction relief on October 2, 2015 (id./T23-34). Buttercase's proposed amendment pertained to seized sex tape videos of Fulton and Buttercase of previous consent to acts of being "choked out" and having her "hair pulled" as well as oral sex, and sexual intercourse while she is bleeding "everywhere" that Fulton later alleged done on July 16, 2011, without her consent. (A-15-987/12:1-38:11) (A-15-987/E123,1:22,23) (T171,¶1-3).

The state court's denial of Buttercase's Motion to Amend his postconviction motion prejudiced Buttercase inasmuch due to the prosecution's failure to

disclose the material exculpatory sex tapes could have been offered as evidence at trial by the defense under *Chambers v. Mississippi*, 410 U.S. 284 (1973) to confront the state's primary witness against him, Tessa Fulton, to prove the truth of the matters asserted therein. The exclusion of these material videos of previous consent to acts later alleged done without Fulton's consent violated Buttercase's federal constitutional rights under the confrontation clause and due process of law. There is a reasonable probability that if the trial court would have granted Buttercase leave to amend his postconviction motion, Buttercase would have been able to prove by the preponderance of the evidence during an evidentiary hearing that there was such a denial or infringement of his state and federal constitutional rights as to render his judgment void or voidable under the state and federal Constitutions, and the outcome would have been different (most likely a new trial for Buttercase). Consequently, the state's denial of Buttercase's motion to amend "undermines confidence in the outcome of [Buttercase's] trial." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The Nebraska Court of Appeals holding in Buttercase also implies that a capital prisoner enjoys more constitutional rights to due process of law than a similarly situated prisoner with a substantial length of imprisonment:

In *Mata*, our Supreme Court stated that a prisoner's ability to amend his postconviction motion was governed by Neb.Ct.R.Pldg. § 6-1115(a), and under that rule, leave shall be freely given when justice so requires. Looking to federal court's interpretations of the rule, our Supreme Court said, "A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated." *State v. Mata*, 280 at 855, 790 N.W.2d at 720. The Supreme Court concluded it was an abuse of discretion to deny the prisoner leave to amend his motion for postconviction relief under the circumstances of that case. The Court noted the prisoner, who had been sentenced to death, may have viable ineffective assistance of counsel and other claims which, if not allowed to amend his motion, would

result in the prisoner being procedurally barred from ever bringing those claims before being put to death. The circumstances in Mata are not present here, ... (emphasis added).

State v. Buttercase, No. A-15-987, 2017 WL 6016428 (Neb.App. 2017) (T17, ¶3).

Buttercase and Mata are both similarly situated Nebraska prisoners. The equal protection clause of the Fourteenth Amendment imposes upon a state the requirement that all similarly situated persons should be treated alike. *Plyler v. Doe, 457 U.S. 202, 216 (1982)*. The Eighth Circuit Court of Appeals has also held that "[t]he Equal Protection Clause of the Fourteenth Amendment requires the government to treat similarly situated people alike, a protection that applies to prison inmates."(emphasis added). *Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 984 (8th Cir.2004)*. Generally, legislation or a court decision will be presumed to be valid if the disparate treatment of a class of citizens is rationally related to a legitimate state interest. See, *Vance v. Bradley, 440 U.S. 93, 97 (1979)*. However, strict scrutiny of state laws is required if a suspect class is involved or "When state laws impinge on personal rights protected by the Constitution." *Cleburne v. Cleburne Living, Inc., 473 U.S. 432, 440 (1985)*. The Nebraska Court of Appeals holding in Buttercase clearly violates Buttercase's federal constitutional rights to due process of law and equal protection of the laws. Also, Buttercase's case is distinguishable from *Robertson*, unlike the Nebraska Court of Appeals suggested, because in *Robertson* the motion for leave to amend was requested AFTER the denial of his motion for postconviction relief, whereas Buttercase's motion to amend was requested BEFORE the denial of his motion for postconviction relief.

This Court has cited in *Case, supra*, that:

"'State statutes should provide a postconviction process at least as broad in scope as existing Federal statutes under which claims of violation of constitutional right asserted by State prisoners are determined

in Federal courts under the Federal habeas corpus statutes, "..." (emphasis added). *Case v. Nebraska*, 381 U.S. at 346 (PER CURIAM) (Brennan, J., concurring); citing 1954 Report of the Special Committee on Habeas Corpus of the Conference of Chief Justices, H.R. Rep. No. 1293, 85th Cong., 2d Sess., p. 7 et seq. In deciding to grant leave to amend, federal courts are guided by five factors: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of the amendment; and (5) whether the party previously amended its pleadings. See, e.g., *Foman v. Davis*, 371 U.S. 178, 182 (1962). Also, "[t]he court should freely give leave when justice so requires." Fed. R Civ. P. 15(a). The application of Neb. Rev. Stat. § 29-3001 et seq. (Nebraska Post-conviction Act) is unreasonable without the liberal civil pleading rules, and thus violates Buttercase's federal constitutional due process and equal protection rights.

It is well recognized that states are not obligated to provide a post-conviction relief procedure. *State v. Lotter*, 278 Neb. 466 (2009). See also, *Murray v. Giarrantano*, 492 U.S. 1, 10 (1989). However, a state may erect reasonable procedural requirements for triggering the right to an adjudication, be they statute of limitations or in an appropriate case, filing fees, and state accords due process when it terminates claim for failure to comply with reasonable procedural or evidentiary rule; what Fourteenth Amendment does require, however, is opportunity granted at meaningful time and in meaningful manner. (emphasis added). *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). Since Nebraska has a postconviction relief procedure, its procedural or evidentiary rules must be reasonable to accord due process of law.

Ordinarily, violation of firmly established and regularly followed state rules will be adequate to foreclose review of a federal claim in a state case;

however, there are exceptional cases which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question. *Lee v. Kemba*, 534 U.S. 362, 376 (2002). This Court also held "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.). The state-law procedures for postconviction relief in Nebraska are inconsistent with traditional principles of justice and recognized principles of fundamental fairness, and thus violates Buttercase's federal due process and equal protection rights. The Nebraska Supreme Court's abolishment of liberal civil pleading rules to postconviction relief procedures is contrary to this Court's precedent and renders the Nebraska Postconviction Act unconstitutional. The Nebraska Supreme Court exercised its discretion in this case in an unfair manner.

Certiorari should be granted to address whether the postconviction relief procedures in Nebraska are inadequate under the due process clause of the Fourteenth Amendment. This Court's discretionary intervention is necessary to address this important issue that will undoubtedly recur in future cases.

III. CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE FOURTEENTH AMENDMENT PROHIBITS STATE COURTS FROM HOLDING PRO SE POSTCONVICTION MOVANTS TO THE SAME STRINGENT STANDARDS AS ATTORNEYS.

The manner in which the Nebraska Supreme Court evasively refused to address the merits of Buttercase's claim concerning the district court's determination in denying his motion to vacate (postconviction relief) "lack substance" and is "not procedurally correct" (T488), implicates substantial constitutional

concerns under the Fourteenth Amendment. This Court should intervene to address whether the due process clause prohibits state courts from holding a pro se postconviction movant to the same standard as one who is represented by counsel. See, *Erickson v. Pardus*, 551 U.S. 89 (2007) (PER CURIAM). This Court has held that "[a] document filed pro se is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Id.*, 551 U.S. at 94; citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The Eighth Circuit Court of Appeals has also held that "[p]ro se habeas filings are to be construed liberally." *Earl v. Fabian*, 556 F.3d 717, 723 (8th Cir.2009), which is equivalent to Buttercase's motion to vacate (postconviction relief) (T31-317).

The Nebraska Supreme Court has held that [a] pro se postconviction movant is held to the same standard as one who is represented by counsel. *State v. Marshall*, 272 Neb. 924 (2007), which is contrary to this Court's holdings in *Erickson* and *Estelle*, *supra*. In 2011, the Nebraska Legislature enacted a one year statute of limitations for filing a verified motion for postconviction relief. Laws 2011, LB 137, § 1, effective August 27, 2011. See, *Neb.Rev.Stat.* § 29-3001(4). Most convicted prisoners cannot afford to hire postconviction counsel to objectively evaluate the trial errors from their conviction. Consequently, most prisoners must learn legal procedures, case law (and its application to the individual prisoner's circumstances), and then must apply what was learned to a cogent motion for postconviction relief before the lapse of the 1-year statute of limitations. The state-law procedures of holding a pro se postconviction movant in Nebraska to the same stringent standards as an attorney is inconsistent with traditional principles of justice and recognized principles of fundamental fairness, and thus violates Buttercase's federal due

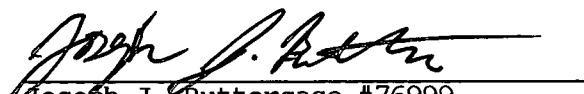
process rights. Law students do not even gain the knowledge to perfect a post-conviction relief petition in their first year of study, whereas convicted prisoners with often limited education must do so.

This Court held in *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986), that "[a] layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance, consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case." (citations omitted). The state-law postconviction relief procedures in Nebraska are unquestionably contrary to the fundamental principles of fairness and violates convicted prisoners, such as Buttercase, federal constitutional rights to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution. Even Buttercase's first motion for postconviction relief, drafted and filed by retained counsel, was determined by the Nebraska courts to be inadequate. See, *State v. Buttercase*, No. A-15-987, 2017 WL 6016428 (Neb.App. 2017). The Nebraska Supreme Court's avoidance to address the merits of this claim undermines the integrity of the criminal justice system and, if left undisturbed, will result in a constitutionally intolerable conviction and the the most egregious of all situations—the conviction of an innocent man. A writ of certiorari should issue on this basis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Joseph J. Buttercase #76999
Nebraska State Penitentiary
P.O. Box 22500
Lincoln, Nebraska 68542-2500
(402) 471-3161
PRO SE PETITIONER

November 19, 2020

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH J. BUTTERCASE,
Petitioner,

v.

STATE OF NEBRASKA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEBRASKA SUPREME COURT

APPENDIX

Joseph J. Buttercase - 76999
pro se Petitioner
Nebraska State Penitentiary
P.O. Box 22500
Lincoln, Nebraska 68542-2500
(402) 471-3161

APPENDIX

A