

No. 21-5450

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD K. COOK,

Petitioner,

v.

TODD WASMER, Warden, et al.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING

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PETITION FOR REHEARING AND SUGGESTIONS IN SUPPORT

COMES NOW Petitioner, Richard K. Cook, Pro Se, and prays this Court to grant Rehearing pursuant to Rule 44, and thereafter, grant him a Writ of Certiorari to review the order of the Eighth Circuit Court of Appeals, which upheld the denial of granting a Petition for a Writ of Habeas Corpus from the U.S. District Court for the District of Nebraska. In support of petition, Mr. Cook states the following:

STATEMENT OF FACTS

Cook was convicted of killing Amy Stahlecker, even though the State's "star" witness - Mike Hornbacher - testified he was with Cook before and after the murder, but not during the murder. Hornbacher's story didn't make sense for multiple reasons:

1. Late requested DNA testing on Hornbacher came back with mixed results indicating his DNA was under the victim's fingernails, an impossibility if Hornbacher was not at the crime scene.

2. Hornbacher and his live-in girlfriend, who'd been fighting earlier in the night, couldn't get their stories straight as to when Hornbacher allegedly returned home.

3. Hornbacher was last seen with the murder weapon, according to Cook's testimony, but police never searched his apartment, car, work, or person after the murder, and only took statements from him and got a late DNA sample. The murder weapon was never recovered.

4. Cook admitted to being at the murder scene, and his DNA was at the crime scene to confirm this, but Cook testified he and Stahlecker were both drunk and had consensual adult sex. The evidence pointed to this being the truth. Further, Cook was excluded as being the male contributor to the DNA under Stahlecker's fingernail(s).

5. Five defense witnesses who were only allowed to testify in-chamber's by giving offers-of-proof in front of the judge and attorneys testified that Hornbacher was lying in multiple critical parts of his testimony that directly related to similar or same actions he'd taken in the instant case, Hornbacher even admitted post-trial he was a drug user, which he'd lied about at trial. This violated Cook's rights to due process, the Confrontation Clause, and also to a fair trial per the 5th, 6th and 14th Amendments to the U.S. Constitution.

6. A report from the Custer Service Rep (CSR) at Hornbacher's cell phone company reported that Hornbacher had reported his cell phone stolen, which was found to be a lie during trial, however, Cook's defense counsel didn't call the CSR as a defense witness, which would have been critical impeachment evidence, showing Hornbacher's lack of truthfulness.

Impeachment of inconsistent statements, or lack of impeachment has led to the reversal of similar cases by the 8th U.S. Circuit Court (See: Driscoll v. Delo, 71 F.3d 701 (CA 8 1995), and has been supported by multiple U.S. Supreme Court decisions.

7. Hornbacher's clothing, shoes, etc. were never recovered from the night of the murder.

8. The facts supporting Cook's testimony included the fact that both Cook's and Stahlecker's footprints could be seen leaving the area that the truck had been parked in, as Cook had testified to, but NO FOOTPRINTS WERE EVER FOUND COMING BACK TO THE TRUCK. MEANING THAT SOMEONE HAD TO HAVE REMAINED IN THE TRUCK TO DRIVE IT UP ONTO THE HIGHWAY, AS COOK TESTIFIED HORNBACHER HAD.

9. Based on Cook's testimony, Hornbacher got mad at Stahlecker when she refused him oral sex after she and Cook had just gotten done having sex. She hit Hornbacher's hand/arm away from her shoulder, which accounts for his DNA under her fingernail(s).

10. The trial judge refused defense counsel's oral request for a trial continuance in order to investigate and gather Hornbacher's clothing, shoes, etc. that were at his apartment, and try to discover the murder weapon that was missing, but this request was refused, Cook's right to discovery was blocked by the combined failures of law enforcement and prosecutors to not investigate, gather, collect, analyze and turn over relevant exculpatory evidence to the defense, and the judge's abuse of discretion to not allow for a continuance that was critical to the facts of a circumstantial evidence case. This case should have been dismissed per Arizona v. Youngblood, 488 U.S. 51 (1988)

11. A bloody footprint found on the door of Cook's truck matched a shoe that was not found in Cook's possession, but purchased by Crime Scene Investigator Dave Kofoed (Kofoed) whom knew Cook and Hornbacher from Gold's Gym and was eventually found guilty of **tampering with and planting DNA evidence in another murder case**, which the Nebraska Supreme Court indicated in their opinion that investigators definitively knew CSI Kofoed had also planted evidence in multiple other murder investigations.

12. Prosecutors told the jury that there were no injuries to Hornbacher's body, yet investigators never looked at or took photographs of Hornbacher's **body**, so this was both inaccurate, misleading and serious prosecutorial misconduct illustrating how prosecutors, whom are supposed to be officers of the court, and there to ascertain the truth of the matter, misled the jury, due to the fact you can't find what you don't look for, right!?

CAUSE AND PREJUDICE

Cook can demonstrate cause and prejudice to overcome the procedural defaults erected in the state and federal appellate courts, by supplying the "extraordinary circumstances beyond his control" exception to lift the state procedural bar to his federal petitions for a writ of habeas corpus and writ of certiorari. There were state appellate procedurs that were applied differently to Cook's case than past cases of defendant's whom were the same or similarly situated and had been appointed counsel in First Degree Murder post-conviction actions, regarding the refusal of the Nebraska Supreme Court to consider Cook's pro se supplemental brief(s) on interlocutory and final post-conviction appeal that would have allowed for a merits review of all of Cook's claims, and cured the procedural default erected by ineffective postconviction counsel.

REASONS MERITING REHEARING

1. The Eighth Circuit's disregard of serious, even felonious law enforcement and prosecutorial misconduct in this case warrants reversal of the decision of the court(s), with serious consideration given to outright dismiss with prejudice of the case, as the lower courts failed to uphold the precedent cases of the U.S. Supreme Court and the 5th, 6th and 14th Amendments of the U.S. Constitution. Brady v. Maryland, 83 S.Ct. 1194, 373 U.S. 83 (1963); Berger v. United States, 295 U.S. 78, 55 S.Ct. 629 (1935)

The lower appellate courts committed reversible error and Cook's murder conviction is invalid due to the trial and/or U.S. District Court's refusal to hld an evidentiary hearing surrounding a patern of intentional misconduct and evidence planting by CSI David Kofoed, whom was eventually convicted of DNA tampering and planting in another murder case (State v. Kofoed, 283 Neb. 767, 817 N.W.2d 225 (2012) Cook alleges and can prove that CSI Kofoed planted blood evidence in or on his truck door, and this fabricated evidence caused irreversible prejudice to Cook, as it was presented to the jury as a critical fact supporting Cook's guilt in the matter at bar.

Further, there was a warrantless entry into Cook's truck by Investigator Kracl that cross-contaminated the issue of Cook's truck, warranting both the suppression of all evidence related to the truck, that further prejudiced Cook in the eyes of the jurors.

It is debatable as to whether or not the issue is properly exhausted in the state courts. This is the only question holding up reversal of Cook's conviction, or at minimum, the grant of an evidentiary hearing on the matter.

Cook has submitted affidavit(s) and testified in a postconviction deposition hearing that he power-washed his truck after the murder, which means it is impossible for blood evidence to exist on the truck exterior.

CSI Kofoed has stated on multiple occasions that "I didn't plant evidence, but if I were to plant evidence I would plant it on the shoes.". (See: NETV report that aired on 11/19/10; also see: Kofoed statement on 6/30/08 Ex. 316 at pg. 81 in State v. Edwards, 284 Neb. 382, 821 N.W.2d 680 (2012))

To plant, alter, hide or delay the turning over of critical DNA evidence is contrary to Brady v. Maryland, meeting the cause and prejudice standard to warrant relief in this case.

NSP forensic chemist Michael Auten testified he'd analyze fibers for defense purposes if ordered to do so by the court. (TBOE: 1300: 7 - 1301: 23) Defense counsel requested the trial court to order production of Hornbacher's clothing (shoes) from April 28, 2000 for fiber analysis (BOE 1302: 4 - 11) and asked for a continuance to search for other physical evidence, which was improperly denied.

"When a continuance will cure the prejudice caused by belated disclosure of evidence, a continuance should be requested by counsel and granted by the trial court.". Arizona v. Young, 488 U.S. 51 (1988) (Habeas corpus motion pg. ID#29: 1 - 19). This should have resulted in the dismissal of the case. The failure to ask for a mistrial based on this prejudicial act was ineffective assistance of trial counsel, abuse of judicial discretion, and also undermined Cook's right to due process of law and equal protection, as law enforcement failed to pursue a rudimentary, much less thorough, investigation into Hornbacher, even after his DNA test results came back with mixed results.

2. The Eighth Circuit refused to grant a certificate of appealability on the U.S. District Court's error to NOT consider all of the evidence in the record. Both that which was admitted at trial and that which is developed at the postconviction stage, as are the standards set forth by this Court in Strickland v. Washington, Rompilla v. Beard, 545 U.S. 374 (2005) and Wiggins v. Smith, 539 U.S. 510 (2003).

Under this test, it is inappropriate to consider the evidence in the light most favorable to the verdict. It is clear that the Nebraska Supreme Court's and U.S. District Court's disregard for this principle was in error. The 8th Circuit Court of Appeals has truncated the scope of Strickland v. Washington, prejudice review, meaning this Court should grant certiorari to correct the disregard for its' existing precedent being ignored by lower appellate courts.

The additional evidence produced during the postconviction process that would reverse the finding of guilt in this case includes, but is not limited to: deposition testimony of Cook after the postconviction evidentiary hearing which was supposed to be weighed against the verdict as if Cook had been allowed to give said testimony in trial. This testimony included statements made by Hornbacher before, during and after the death of the victim. At trial

Cook testified he'd actually tried to stop Hornbacher from shooting Stahlecker but was unsuccessful. Cook also testified he tried to stop Hornbacher from shooting Stahlecker repeatedly up on the highway, and was forced by Hornbacher to help move Stahlecker's body off of the highway, as Hornbacher still had the gun and ordered Cook to do so. Cook testified he did check Stahlecker for a pulse and to see if she was breathing, but she was not, and asked Hornbacher why he'd shot her.

This and additional testimony that was omitted by trial court orders was highly relevant, exculpatory evidence that a jury should have heard per the rules of evidence and Cook's right to testify in his own behalf.

The testimony is presented as Exhibit #40 in the habeas corpus exhibits, which was also part of the postconviction record on appeal to the Nebraska Supreme Court. This would have come in at TBOE Vol. VII: 1672:3-13, and also at 1671: 8-9, after defense counsel stated to the judge that "at the appropriate time, I'd like to make an offer of proof." (in regards to Cook's planned testimony that the judge would not allow) Trial counsel never made the offer of proof, exhibiting highly prejudicial ineffectiveness of counsel.

There is additional proffered testimony by Cook that would have been given if the trial court had not sustained the prosecution's objection at TBOE Vol. VII: 1725: 3-9) regarding the threats made against Cook by Hornbacher after the killing of Stahlecker by Hornbacher. Cook believed Hornbacher was also just as capable of hurting his family, so stayed silent initially. It was further ineffective for direct and postconviction counsel not to effectively present this error to the Nebraska Supreme Court.

3. The Eighth Circuit Court erred in not granting rehearing, and reversing the lower courts' decision on the basis that there was a conflict of interest that was known to exist by the State and postconviction judge regarding Cook's postconviction counsel appointed by the judge to replace prior counsel, whom had worked for the same law firm as Jerry Soucie, Cook's newly appointed post-conviction counsel, for over a decade.

Atty Soucie, contrary to the rules of professional and ethical conduct dictating attorney behavior, contacted Cook while he was a lawyer for the Nebraska Commission on Public Advocacy, requesting all of the DNA evidence in Cook's case, as he believed CSI Kofoed had planted evidence in Cook's case, as in other murder cases. At the time, Cook was represented by other counsel. Atty Soucie was eventually offered and accepted the appointment of being Cook's counsel by the postconviction court, who knew Soucie had been a Commission lawyer, as had been Rob Kortus, who'd also been previously appointed by the court, but was removed due to a pre-existing conflict of interest.

Kortus and Soucie were former co-workers and friends for over a decade who'd recently worked in the same law firm, including at the time Soucie requested Cook's DNA evidence from his case to be sent to him, whilst Cook had other Counsel.

Atty Soucie, who had over 35+ years of practicing criminal law preceded to erect procedural bars to every one of Cook's postconviction issues, as if he didn't understand the basic concepts of assigning and arguing each argument you wished to have reviewed on its' merits, as well as not assigning both ineffectiveness of trial AND appeal counsel, as Cook had had different counsel on direct appeal than at trial.

Atty Soucie's sabotage was an extension of the conflict of interest(s) that he had with Cook's case and was operating under. Cook argues that amongs other errors, the lower court's erred in its' decision by analyzing and not following the Courts' wishes in relation to the effectiveness of postconviction counsel in First Degree Murder cases, which result in either Life or Death, as has been illustrated by *Martinez v. Ryan*, 132 S.Ct. 1309, 566 U.S. 1 (2012); *Trevino v. Thaler*, 569 U.S. 413, 133 S.Ct. 1911 (2013); and *Buck v. Davis*, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017).

Cook believes his case should be decided by this Court in this same line of legal precedent, but Cook'also argues his case is distinct and separate from this line of cases, as his case also involves a pre-existing conflict of interest, that led to deliberate sabotage of his case by a State actor, or an attorney appointed by the State, with a known existing conflict existing.

Cook argues he meets the cause and prejudice requirement to allow for review of his petition on its' merits, or for an evidentiary hearing to be granted per *Maples v. Thomas*, 565 U.S. 266, 132 S.Ct. 912 (2012).

Nebraska's and the federal court systems have become deeply flawed and this is to the detriment of a pauper prisoner litigant such as Cook. Among many dire shortcomings of these systems is the failure to adequately provide competent counsel for indigent defendants/appellants, especially for those with capital or Life sentences hanging in the balance.

This is true at the trial, direct appeal and postconviction stages of this case and others, a number of which have meritorious constitutional state and federal claims that warrant a reversal of the conviction, or at least an evidentiary hearing, but are ignored due to petty procedural issues, creating a "form over substance" due process and equal protection problem for many pro se litigants saddled with either no or incompetent counsel, and who otherwise aren't allowed to attend any, or relatively few postconviction court hearings or proceedings, severely curtailing their ability to effectively argue their

case to the court.

The U.S. Supreme Court leads in these failures, having become overly politicized, heavily saturated with Ivy League elitist, whom have little to no connection or empathy for pro se pauper prisoner litigants who did not go to law school, or have an Ivy League education.

Neutral, third-party oversight is needed to reshape the judiciary and its approach to upholding constitutional rights of the poor and disenfranchised, whose constitutional rights are held less important than petty procedural rules, often difficult for under-educated pauper prisoners to find, understand or comprehend in terms of their application to complex briefs involving complex litigation, better handled by members of the bar.

Many of the convictions, like Cook's, are inherently unreliable, and proper functioning of the postconviction review process is critical and needs reform. In the instant case, Nebraska's postconviction act (Neb. REV. ST. sections 29-3001 to 29-3004) mandate that appointed counsel must be both competent and effective, a law ignored by the federal judiciary, and seemingly the State as well. This is a denial of due process of law and equal protection

From the overarching plague of ineffectiveness of trial, appeal and/or postconviction counsel, to allegations concerning serious prosecutorial misconduct, errors in the instruction of the jurors, and abuse of judicial discretion, as well as overt police misconduct - all federal constitutional rights which are then ignored by the judiciary, akin to an emergency room physician refusing to treat a pauper patient due to not having the hospital form filled out correctly, as they bleed out on the table from a wound that would otherwise be easily mended with proper medical intervention.

All of Cook's claims were summarily dismissed. Having been denied a full and fair postconviction or habeas corpus evidentiary hearing(s), to review these claims through no fault of his own, Cook now faces life in prison with no hope of release to a daughter serving our country in the U.S. Army as a Information Technology (I.T.) cybersecurity warrior fighting for the same rights as her father is being deprived from by the judiciary, who due to their wealth and elitist attitudes and thought processes ride the backs and trample the constitutional rights of the poor and working classes, acknowledging these rights only when it is convenient for their application to those they deem worthy.

Nebraska's and the federal court's system of postconviction, including habeas corpus review in First Degree murder cases is exceedingly complex and rife with pitfalls - even attorneys and judges often must struggle to understand and comply with its procedures. Further, Nebraska stands with few other states in not mandating counsel for Lifer's on postconviction review, and even

though it has a statute mandating effective and competent counsel in postconviction review for those deemed needing appointed counsel to fairly vindicate their claims.

As a result, those who are fortunate enough to have attorneys must rely on pro bono or court-appointed counsel, most of whom either practice far from Nebraska or are flawed attorney's that live on court appointments because no or few paying clients will contract with them.

This system has become a labyrinth in which many a hapless inmate has become hopelessly lost, sometimes through no fault of their own, as in the instant case..

The complexities and pitfalls cannot be overstated, particularly as applied to indigent defendant's and their attorneys. In this case, the "system" created a deeply flawed combination, upon appointing conflicted counsel, making the process inadequate and incomplete, on top of being flawed from the beginning. *Maples v. Thomas*, id.

4. The lower courts committed reversible error when it was evident that it was either prosecutorial or law enforcement misconduct to undermine Cook's due process rights and his 6th Amendment right to remain silent, consult an attorney, help in the preparation of his defense and testify on his own behalf when prosecutor Leigh Ann Retelsdorf was found to have received a direct or indirect monetary payment from the Cook family due to a lawsuit that her husband's law firm filed against and served Cook the night before he was set to testify, and she didn't reveal this sustained conflict of interest(s) to the trial court until it was pointed out by defense counsel in-chambers during trial, resulting in no hearing, no admonishment, nor removal of the conflicted prosecutor from the prosecution team. This was highly prejudicial, unethical and illegal conduct between her public prosecutorial job and her husband's private law practice monetizing one of her prosecutions. *Doyle v. Ohio*, 426 U.S. 610 (1976); *Miranda v. Arizona*, 5th & 14th Amendment, U.S. Constitution

5. The lower courts committed reversible error by ignoring Cook's denial of due process and effective assistance of counsel, as well as equal protection per the 5th, 6th and 14th Amendments, as well as a potential structural error for the trial court to not instruct or be asked by conflicted counsel, who offered no instructions to give an accomplice jury instruction, as this was the ONLY DEFENSE OFFERED BY COOK TO THE MURDER CHARGE? LEAVING THE JURY WITH-
OUT AN INSTRUCTION FROM THE DEFENSE OR THE COURT ON BEHALF OF Cook.

6. The lower courts committed reversible error and/or structural error and it was an abuse of judicial discretion and ineffective assistance of counsel for a court to allow Cook to proceed with conflicted counsel, whom had formerly

threatened civil and driminal charges against Cook, and made a series of highly prejudicial and verdict changing decisions, such as having Cook show an and tell the jury about the 50,000 volt shock restraint strapped to his arm, having no prior reason nor felony record for such an extreme security measure, coupled with uniformed deputies sitting just to the side of the defense table in close proximity to Cook, and Cook being forced to wear an orange jail jumpsuit to his last day of trial where the verdict was read as given by the now highly prejudiced jury, where the oragnge jail jumpsuit and shackles to Cook's arms and writs and legs were visible to the jury, making the verdict a foregone conclùsion. Fulminante, 499 U.S. at 309, 111 S.Ct. 1265. Also see: Cuyler v. Sullivan, 446 U.S. 1, 100 S.Ct. 1708 (1980) "Failure of a retained counsel to provide adequate representation can render a trial so fundamentally unfair as to violate the 14th Amendment and require habeas corpus relief."

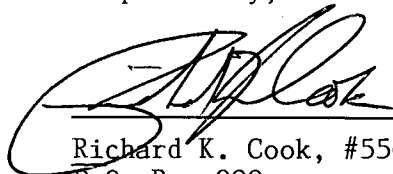
7. The lower courts committed reversible error, violating Cook's rights per the 5th and 14th Amendments, and access to the state courts for a federal U.S. District Court judge to deny a pro se pauper litigant's motion for a "stay and abeyance" of his habeas corpus petition per 28 U.S.C. section 2254 and section 2241(d)(1) once he had shown "good cause" for the "stay and abeyance" AND the questions of law being presented needed to first be adjudicated and/or exhausted in the state courts of Nebraska and they revolved around the State postconviction process, specifically the Nebraska Postconviction Act, id. and directly impacted the exhaustion requirement(s) of the federal courts, thereby denying Cook both due process and equal protection.

CONCLUSION

For the reasons stated, this Court should grant the Motion for Rehearing of its' judgment entered on October 12, 2021, and issue a Writ of Certiorari to hold the Eighth Circuit accountable for failing to properly apply the law of this Court and grant Mr. Cook relief.

Dated this 26th day of October, 2021.

Respectfully,



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