No. 21-5655

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

Timothy D. Leners; Pro-Se Petitioner

vs.

State of Wyoming; Wyoming Attorney General, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

WYOMING SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Timothy D. Leners
(Defendant)

7076 Road 55 F

Torrington, WY 82240

Not available – (incarcerated)
(Phone Number)

QUESTIONS PRESENTED

ONE: Was Defendant's 6th Amend. rightto Effective Counselviolated when 1st chair appointed **counsel testified** at W.R.A.P. 21 hearing for new trial that *"it was not part of trial strategy"* and *"he had no excuse by failing to object"* to late evidence introduction & prosecutorial misconduct that violated all court mandated "Discovery & Criminal Case Management Orders";when in the *"last trial day & 12th hour"*, the D.A. introduced multiple unknown & damaging recorded evidences that both counsels testified**'changed the trial outcome'**? And further, when 2nd chair **counsel testified** she *"was assigned the case too late to come up to speed"*, *"was not a 50 / 50% responsible counsel"*, *"did not review discovery evidence"*. & *"told 1st chair counsel to assign her only specific tasks"*,yet 1st counsel allowed her to continue into trial anyway?

TWO: Did State Defender violate Defendant's Const. rights by refusing to replace assigned counsel; **after Defendant wrote her 1 year before trial that assigned counsel committed unethical misconduct & stated 'Insurmountable Conflicts of Interests' by verbalizing his desire** *not* to defend him, refusing to review his submitted evidence complaining it was *"too much"*, complaining he was *"assigned too many cases and didn't have time"*, refused to obtain - investigate or bring to trial known police reports on an assailant proving his previous attacks on Defendant (causing him to defend his life in the last one), refused to pursue any suggested strategy, and stated contempt for Defendant & his case? **While further at the same general time; her own case before WY Supreme Court provided *her* with relief from *her* complaints** that excessive workloads were preventing her from assigning "competent, diligent & conflict free counsels"; resulting in "unethical representation" & "jeopardizing client's const. right to effective assistance of counsel"?

THREE: Was Defendant's 5th Amend. Constitutional right and desire to participate in his own Appeal/ 'Due Process',**violated** when the Court denied his"*Motion for Permission to file Pro Se Supplemental Brief*", despite *Motion* establishing indisputable fact it was necessary **due to Defendant being effectively and completely involuntary isolated from any communication with his appointed Counsel, and all legal resources for months on end before Counsel filed his *'Brief of Appellant'?*** Further that *'Brief'*established isolation was due to a historic combination of prison "defense destroying 100% Covid lock-downs", and the Public Defender's Office "slashing Counsel's working office hours by over 75%" (to less than 10 'reachable' hrs./wk.), which Defendant presented resulted in destroying any reasonable chance for his appeal's success?

FOUR: Did **'Structural Error', 'Cumulative Error' and / or 'Totality of Cumulative Error Effect'** take place to a sufficient degree to "Prejudice the Defense" or reach the minimum standard; that a "Reasonable Probability" existed that **"Confidence in the Trial Verdict was Undermined"**; when Defendant presented in appeals that his numerous Constitutional 2nd, 5th and 6th Amendment rights were removed from him and violated – thus denying him a fair trial; and further that the Court(s) erred by denying the Defendant's Appeals for a new trial or overturning his conviction by failing to apply known law impartially, **violating** his Constitutional rights?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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B.)

STATUTES AND RULES

WY Criminal Law & Procedure > Counsel > Effective Assistance > Trials:

Wyoming law, criminal law & procedure, effective assistance of counsel at trial states:
A failure to conduct an investigation may be grounds for ineffective assistance of counsel claims.

WY Criminal Law & Procedure > Appeals > Reversible Errors > Structural Errors:

Structural error is a defect affecting the framework within which the trial proceeds, rather than simply errors in the trial process itself. Errors of this type are so intrinsically harmful as to require automatic reversal without regard to their effect on the outcome.

WY Criminal Law & Procedure > Appeals > Reversible Errors > Structural Errors:

Structural errors affect "basic protections" without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. Errors that relate to basic protections are so intrinsically harmful as to require automatic reversal regardless of their effect on the outcome.

WY Criminal Law & Procedure > Counsel > Effective Assistance > Tests:

When a claim of ineffective assistance of counsel can be resolved on the prejudice prong of the applicable test, a court need not address whether trial counsel was deficient. Because a defendant must establish both prongs, a court can decide an ineffective assistance claim on the prejudice prong without considering the deficient performance prong.

WY Criminal Law § 46.3 - right to counsel:

2. The Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.

WY Criminal Law § 46.4 - right to counsel:

4. That a person who happens to be a lawyer is present at trial alongside the accused is not enough to satisfy the Sixth Amendment; an accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to insure that the trial is fair.

WY Criminal Law § 46.4 - ineffective counsel:

7. Counsel can deprive a defendant of the right to effective assistance of counsel simply by failing to render adequate legal assistance.

WY Criminal Law § 46.4 - counsel – effectiveness:

8. The benchmark for judging any claim of the effectiveness of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

WY Criminal Law § 46.4 - counsel - effectiveness – elements:

10. A convicted defendant's claim that his counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components, each of which the defendant must show in order to set <*pg. 677> aside the conviction or death sentence: (1) that counsel's performance was deficient, which requires a showing that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

WY Criminal Law § 46.4 - counsel – duties:

12. In representing a criminal defendant, counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest, a duty to advocate the defendant's cause, a duty to consult with the defendant on important decisions, a duty to keep defendant informed of important developments in the course of the prosecution, and a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

WY Criminal Law § 46.4 - counsel - performance guides:

13. In any case presenting a claim that counsel's assistance was constitutionally ineffective, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances, and prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable, but they are only guides which cannot interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

WY Criminal Law § 46.4 - counsel – prejudice:

25. The test for prejudice resulting from the ineffectiveness of criminal defense counsel requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

WY Criminal Law § 46.4 - counsel – effectiveness:

27. When a defendant challenges a conviction on the ground of prejudicial ineffectiveness of counsel, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

WY Criminal Law § 46.4 - counsel – prejudice:

29. In determining whether prejudice resulted from a criminal defense counsel's ineffectiveness, the court must consider the totality of the evidence before the judge or jury, taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, and then asking if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

C.)

WY Criminal Law § 46.4 - counsel – ineffectiveness:

30. In adjudicating a claim of actual ineffectiveness of criminal defense counsel, the ultimate focus of <*pg. 680> inquiry must be on the fundamental fairness of the proceeding whose result is being challenged and on whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

WY Criminal Law § 46.4; Habeas Corpus 47; New Trial 5 - counsel – ineffectiveness:

33. The principles governing claims of the ineffectiveness of criminal defense counsel apply in federal collateral proceedings such as habeas corpus as well as on direct appeal or in motions for a new trial.

WY Evidence § 234.3 - presumption - counsel – effectiveness:

15. A court must indulge a strong presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

WY Evidence § 419 - presumption - denial of counsel:

22. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.

WY Evidence § 419 - presumption - conflict of interest:

23. Prejudice to a criminal defendant by reason of his counsel's conflict <*pg. 679> of interest is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance.

§ 7-9-102. Order to pay upon conviction.

In addition to any other punishment prescribed by law the court shall, upon conviction for any misdemeanor or felony, order a defendant to pay restitution to each victim as determined under W.S. 7-9-103 and 7-9-114 unless the court specifically finds that the defendant has no ability to pay and that no reasonable probability exists that the defendant will have an ability to pay.

RULES:

Laramie County Wyoming District Court Pre-trial Memorandum Obligations defining "Discovery Rules" and "Criminal Case Management Orders":

"It is required of both parties to file and serve on the opposing party; No Later than Fifteen (15) Days Prior To Trial.... (b) A List With Description Of All Exhibits The Party Intends To Offer At Trial." (R.A., pp. 34-35).

C.)

OTHER - (COURT INTERPRETATION OF THE PRO SE WRIT)

It is respectfully requested the Honorable Court take into consideration this filing by an unlettered Pro Se Defendant.

Roberts v. Wainwright, 666 F.2d 517 (11th Cir.), 459 U.S. 878, 103 S. Ct. 174, 74 L. Ed. 2d 143 (1982):

"The Court should interpret Pro Se petition alleging ineffective assistance of counsel more liberally than it might interpret petition by attorney."

Hill v. Curcione, 657 F.3d 116, 122 (2d Cir. 2011):

We afford a Pro Se litigant "special solicitude [by] interpreting the complaint to raise the strongest claims that it suggests."

Darr v. Burford, 339 U.S. 200, 203, 70 S. Ct. 587, 590, 94 L. Ed. 761 (1950):

"Pro Se filings are liberally construed ..... Therefore, we construe Pro Se petitions liberally "to make [the writ] effective for unlettered prisoners." To present the strongest arguments they suggest."

OTHER - (ORDER OF PRESENTATION OF CASE & RELIEF)

This Petition for Writ is submitted to the United States Supreme Court, and requests the Court have lower Courts deliver their records and judgments; in order that they be properly reviewed.

Defendant presents that considerations for accepting this case are provided in the following primary areas within:

I. Imperative public importance in a great Constitutional question.

II. A conflict between a decision of which review is sought, and a decision of the Wyoming Supreme Court (an appellate court).

III. To bolster and reinvigorate Constitutional Law and Rights so that lower Courts will be provided with needed guidance to apply law and precedence homogeneously; in order to prevent "Denial of Substantial Constitutional Rights" to all citizens.

In addressing all of the Constitutional issues presented in this case; "Statement of the Case"; issues believed to be directly pertinent to the Court's evaluation of this Writ will follow first. After they are presented, "Additional Case Background" will be presented in that category for the Court as well.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[✓] For cases from **state courts**:

The opinion of the highest state court (The Wyoming Supreme Court, Case No. S-20-0001, S-20-0208) to review the merits appears at **Appendix "A"** to the petition and is

[ ] reported at; _____ or,

[✓] has been designated for publication in "Pacific Reporters Third", but is not yet reported; or,

[ ] is unpublished.

The opinion of next lower (trial) Court (The Wyoming First Judicial District Court, Cheyenne Wyoming) appears at **Appendix "B"** to the petition and is

[ ] reported at; _____ or,

[ ] has been designated for publication but is not yet reported; or,

[✓] is unpublished (to the best knowledge of Pro-Se "unlettered" Defendant).

JURISDICTION

[✓] For cases from **state courts:**

[✓] The date on which the highest state court decided my case was **May 14, 2021** and its "Mandate" was issued effective June 2, 2021. Copies of that decision appear at **Appendix "A".**

Most current (2009) Official US Supreme Court Instructions provided by the prison read:
III. The Time for Filing: You must file your petition for a writ of certiorari within 90 days from the date of the entry of the final judgment in the United States court of appeals **or highest state Appellate court (as is the case with this Pro –Se filing);** or 90 days from the denial of a timely filed petition for rehearing.

[ ] A timely petition for rehearing was thereafter denied on the following date:_____, and a copy of the order denying rehearing appears at Appendix _____ .

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____ (date) in Application No._____ A_____.

The jurisdiction of the United States Supreme Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- **U.S. CONSTITUTION, AMENDMENT V.** No person shall be deprived of life, liberty or property, **without due process of law**.

- **U.S. CONSTITUTION, AMENDMENT VI.** In all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor, & have **assistance of counsel** for his defense.

- **WYO. CONST., AMENDMENT XIV.;** **Section 1 Citizenship Rights Not to Be Abridged by State:** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive** any person of life, liberty, or property, **without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

WYO. CONST., Article 1. § 10; **Right of accused to defend:** In all criminal prosecutions **the accused shall have the right to defend in person** and by counsel, to demand the nature and cause of the accusation, to have a copy thereof, to be confronted with the witnesses against him, to have compulsory process served for obtaining witnesses, and to a speedy trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

STATEMENT OF THE CASE

The Defendant, Mr. Timothy Leners, was charged with of one count of Attempted Second Degree Murder through W.S. §6-1-301(a), and W.S. § 6-2-104 on December 27, 2017. His 1st chair Counsel was assigned as Ross McKelvey, but his 2nd chair counsel changed three times before trial from Devon Petersen to Kerri Johnson **and finally to Emily Harris five weeks before**. (Tr., Rule 21 Hearing, p.62), (Tr., Rule 21 Hearing, p.14). Trial began on May 7, 2019 and concluded on May 10, 2019 with the conviction of Mr. Leners. On September 16, 2019 the court sentenced the Defendant to a term of not less than twenty five (25) years, not more than thirty five (35) years. Despite being a 100% "total and permanent disabled U.S. Veteran" and also 100% disabled by Social Security with no real or taxable income or any foreseeable ability to pay, he was nonetheless ordered to pay a total of one hundred fifty five thousand three hundred eighty six dollars and thirteen cents ($155,386.13) in restitution.

After trial, this case began as an appeal based primarily on "Ineffective Assistance of Counsel" from the Judgment and Sentence entered by the First Judicial District of Wyoming. This first progressed as a "*Motion for New Trial (W.R.A.P. Rule 21 hearing)*" before the same Court and Judge (Honorable Steven Sharpe). The hearing was held on July 16, 2020 and Mr. Leners, his appellant counsel Kirk Morgan, and Mr. McKelvey's direct supervisor Brandon Booth attended in person; while 1st chair defense counsel Ross McKelvey and 2nd chair Miss Emily Harris attended via video. At the hearing, the Defendant called three witnesses: Miss Harris, Mr. McKelvey and Mr. Booth. All three witnesses gave testimony in favor of the Defendant's claim of Ineffective Counsel – **even Mr. McKelvey himself**.

The District Court however denied the Defendant's Rule 21 *Motion* for new trial, ruling on the "prejudice prong" only (R.A. p. 556). The Court concluding there was "**no doubt**" the State used **"Exhibit 50"** in violation of court case management & discovery evidence rules, and that exhibit 50 had *"some impact on the jury"*, however the Court said *"some impact"* was in its opinion insufficient to satisfy the prejudice prong in Strickland. (R.A. p. 559). The Court therefore found that the reliability of the jury's verdict is not seriously questioned (R.A. p. 556) and denied the Defendant a new trial. (Appendix "B")

Mr. Leners' appointed Appellate Counsel (Kirk Morgan) and Mr. Leners disagreed with the ruling of the District Court and on 9-17-2020 filed the *"Notice of Appeal"* to the Wyoming Supreme Court. This was followed shortly with Mr. Morgan's filing of his *"Brief of Appellant"* on 11-23-2020 independent of Mr. Leners' input as Mr. Leners was 100% locked down under 'severe defense destroying covid lockdowns' in prison from late September 2020 through February 2021 through no fault or conduct of his own; and well past Mr. Morgan's submission of the "*Brief of Appellant*" and the "*oral arguments*" before the Wyoming Supreme Court. When Mr. Leners received Mr. Morgan's "*Brief*" in December of 2020 (while under these severe lockdowns), **he realized it did not sufficiently reflect all appealable issues he tried to communicate to Mr. Morgan in time, but was not able to because he was prevented from contacting or working with Mr. Morgan due to the lockdowns**; so he had no recourse before the brief was submitted, or for months *after* it was submitted due to the lockdowns.

Mr. Leners' lockdowns did not cease until **after February 20th, 2021**. By then his counsel's *"Brief of Appellant"* and *"oral arguments"* had already taken place. Mr. Leners having no criminal law experience did not know what this meant but tried to quickly find a solution to remedy what he believed to be unconconstitutional denial of his various rights that resulted in his Counsel's Brief being denied.

Mr. Leners (with less lockdowns and more computer, and law access for the first time in several months); was finally able to work on his case beginning in late February 2021, (past the date of his Counsel's "*Brief of Appellant*" and "*oral arguments*"). Mr. Leners pursued creating and filing a *"Motion for Permission to File Pro-Se Supplemental Brief"* and was finally able to submit his *"Motion"* on 4-5-2021. The *Motion* was 52 pages long, and complied with all rules of the Court. (Appendix "C")

On 4-21-2021 Mr. Leners' wife Kathrine E. Leners sent in her own affidavit with 2 attachments and a certificate of service executed on 4-19-2021. The affidavit (Appendix "E") contained facts she was party to in the professional misconduct and suspected "Constructive Denial of Counsel" of Mr. Leners that took place in Feb.- Mar. of 2018 with Mr. Leners' trial counsel McKelvey, when the State Public Defender Diane Lozano refused in writing (Appendix "F") to replace Mr. McKelvey at Mr. Leners' request, when he wrote her about Mr. McKelvey's "Conflict of Interest" in Mr. McKelvey's direct statements to him of contempt for him, his refusal to accept or review evidence complaining "it was too much", and complaining he had "too many cases assigned to him". It also contained facts from her knowledge of Mr. McKelvey's and Miss Harris' "Ineffective Counsel" before & during the trial, as she was involved intimately at every stage and every meeting in the case.

The attachments to Mrs. Leners' Affidavit were: [1.] **An email** she had sent Mr. McKelvey on March 1, 2018 outlining what she believed to be Mr. Mckelvey's failure to represent her husband effectively, which called out his professional misconduct toward Mr. Leners, and [2.] **A letter** from State Public Defender Diane Lozano to Mr. Leners dated March 8, 2018. In this letter, Miss Lozano refused to assign Mr. Leners a different / new Defense Counsel to replace Mr. McKelvey who Mr. Leners informed her had verbally expressed an open derisive desire ***not*** to represent him, ***not*** to accept his evidence, ***complained*** to Mr. Leners his *"caseload was too high and he didn't have time"*, and ***not*** to obtain known previous existing police reports on Chris Trout which Leners told him proved Trout had assaulted Mr. Leners just 3 weeks prior to his assault on him in Cheyenne. Instead of replying to the facts Mr. Leners told her, she instead wrote of things Mr. Leners did *not* tell her in attempts to deflect Mr. Leners claims of Mr. McKelvey's unethical & unlawful behavior. She also denied Mr. Leners the chance to meet with her for e few moments to discuss Mr. McKelvey's behavior, statements of contempt and refusal and his Conflicts of Interest. (Appendix "G" & "F")

On 5-4-2021 the Wyoming Supreme Court denied Mr. Leners' *"Motion for Permission to File Pro Se Supplemental Brief"* (Appendix "D") **stating:** *"The Court notes the captioned case was taken under advisement on February 10, 2021, over two months before Appellant filed his motion, [[[It is therefore denied.....see "Herdt v. State 891 P.2d 793, 795-96 (Wyo. 1995)"]]].* The case law stated by the Court in the denial was reviewed by Mr. Leners, but he could find no discernable parallel with his own case or reason his *Motion* was denied. This was followed 10 days later by the Wyoming Supreme Court's ruling on May 14, 2021 affirming the lower Court's ruling that Mr. Leners be denied a new trial. On June 2, 2021 the Court issued its mandate that the lower Court's sentence be upheld. (Appendix "A")

Following this, it was later discover by Mr. Leners that Mrs. Leners (who had no legal representation and was raining four school aged children alone) misunderstood the submission part of her Affidavit, and had only sent a copy to Mr. Leners in prison (at WMCI) – thinking he was supposed to forward more copies to the parties she certified on her certificate of service (the Court & Atty. Gen.). Mr. Leners discovered this grave but understandable error on his wife's part too late, so it was not submitted before the Wyoming Supreme Court's ruling on 5-4-2021. Thus, Mr. Leners thought he could not then send in her Affidavit after the fact even though it supported the facts in his "*Permission to File*". Mrs. Leners' Affidavit is included with its attachments herein as (Appendix "E", "F" & "G").

Background of Appeals:

On appeals Mr. Leners raised FOUR primary issues. The first two primary issues pertain to the use of evidence that was introduced by the prosecution in violation of the Court's "Pre-trial Memorandum Obligations", "Case Management Order Requirements" and "Discovery Rules". The evidence that was introduced in violation of the above court laws, was obtained from Mr. Leners' cell phone (recorded phone calls). This evidence was withheld from the Defense for over a year, was not declared in discovery. It was later introduced as **"Exhibit 50"** on the last day of trial, in the last hour or so before jury deliberation.

The Defendant claimed self-defense and volunteered to police that his phone had recorded the physical attack and assault on him and gave this recording to police to prove he had only defended his life under attack as was allowed by the United States Constitution 2nd Amendment and WY State law. This piece of evidence was reported by police and placed in discovery and later designated as "State's exhibit 15" ***however*** **other evidence** (recorded calls obtained from Mr. Leners' cell that later became **"State's Exhibit 50"** & a "detective's supplemental report") **were not treated the same way by police or the D.A.**, and were withheld from the Defense for over one full year, until the last hour of the last trial day.

The recordings in "Exhibit 50" were systemically withheld from the Defense for over one year from the defense by the prosecution and police until the 12th hour of the last day of the trial. On the Sunday a few hours before trial, trial counsel McKelvey realize he did not have this "supplemental report" that had been generated on May 25, 2018 (an entire year before). Mr. McKelvey testified he failed to recognize its importance or request it until the eve of the trial on Sunday May 5, 2019. (Tr., Rule 21 Hearing, p.67), (Rule 21 Hearing Defense Exhibit B & C). The state later attached the "supplemental report" with txt messages to email, but since McKelvey's request was on a Sunday and no one was in the D.A.'s office to respond, he did not officially receive the "supplemental report" until the day of the trial, so neither he nor 2nd chair Emily Harris reviewed it before trial. Additionally, both counsels testified that neither had heard the recordings of **"Exhibit 50"** until they were played for the first time to the jury during trial.

In the "supplemental report", Detective Hickerson testified provided several new text messages he thought were important. Review of the record indicates that rather than provide the actual text of the messages in context, Detective Hickerson instead often substituted his own paraphrasing or "personal slant" on them. Often the nonfactual comments in the police report appeared to take the color of being pre-disparaging or contemptuous toward Mr. Leners. It must be noted the "*commentary*" often had the end effect of making it appear as if statements otherwise favorable to Mr. Leners (that were verified as truthful by electronic discovery evidence); were somehow suspect or not truthful. Some of the nonfactual comments in his reports seemed to indicate the detective though Mr. Leners was 'morally wrong' for having a relationship with another person. Some even indirectly inferred that this somehow justified Chris Trout attacking him, while the State's Exhibt 15 demonstrated Mr. Leners screaming pleas with Chris Trout to stop his assault on him (indicating Mr. Leners acted in self-defense as he claimed).

In the last hour at trial the District Attorney approached the defense table with the evidence that was later introduced by the D.A. as **"Exhibit 50".** The exhibit contained only the prosecutor's carefully parsed & selected "excerpts" from recorded calls from Mr. Leners' phone. The excerpts were only seconds long, despite being taken from a call over an hour long. This exhibit was introduced by the State during the last day of trial in the final hour before Jury deliberation; in violation of all documented Court "Pretrial Memorandum Obligations", "Discovery Rules" and the "Criminal Case Management Orders" (entered on February 21, 2018) that required both parties to file and serve on the opposing party; "No Later than Fifteen (15) Days Prior To Trial.... (b) A List With Description Of All Exhibits The Party Intends To Offer At Trial." (R.A., pp. 34-35).

"Exhibit 50 relevant background": Detective Hickerson testified in the final hours of the last day of trial *"there came a time"* when he felt additional material was on Mr. Leners' phone that held value (Tr., Trial Vol. II, p. 79), so he obtained a search warrant and Mr. Leners' phone was accessed and additional data recovered (Tr., Trial Vol. II, p. 80). Then on the last day of the trial, hours before jury deliberations; he made a DVD containing **"Exhibit 50"** which was then walked over to the defense table by the D.A. and given to the Defense with a set of headphones. Neither defense (McKelvey nor Harris) had ever listened to the recorded call portions before until Harris did so at the Defense table, during the last hour of trial, while active testimony was taking place.

During the trial without having heard the parsed calls in "Exhibit 50" himself; 1st chair Counsel McKelvey instructed the 2nd chair Counsel Harris to listen to "Exhibit 50" for the very first time during the last hour of the actual trial, at the Defense table, and during active testimony of witnesses. Miss Harris testified later at Mr. Leners' W.R.A.P. Rule 21 hearing that she *"had never heard the (excerpted) calls before"*, *"didn't really know what she was listening for"* and that she *"never exchanged any notes with Mr. McKelvey on discovery or exhibits"*. When Miss Harris finished listening, neither of Mr. Leners' state appointed trial Counsels (1st chair – Ross McKelvey & 2nd chair Emily Harris) lodged any objections to the State's numerous violations of the "Pre-trial Memorandum Obligations", "Case Management Order Requirements" or "Discovery Rules" so the exhibit was admitted without objection, marked "State's exhibit 50" and then played to the jury. (Tr., Trial Vol. III, p. 83-85). After playing the exhibit for the jury, the Defense did not pursue redress or other defensive measures after the introduction of "Exhibit 50".

These facts by Defense Counsel McKelvey & Harris gave rise to the Defendant's claims in appeals of "Ineffective Counsel". "Ineffective Counsel" claims caused the Defendant to present in appeals, that no "Reasonably Competent Defense Counsel" would have erred so egregiously in these numerous respects, and would have instead pursued 'normally diligent and accepted measures' to protect the Defendant's rights, such as (for example) objecting to improper introduction of evidence in violation of Pre Trial Memorandum & discovery laws, seeking to have improperly introduced evidence excluded, seeking other redress for prosecutorial misconduct, asking for a recess to formulate a proper response, or to determine and execute other defensive actions to be taken such as using closing statements to address and place into context, the 'Surprise Exhibit' for the jury. Later in the W.R.A.P. Rule 21 hearing, Mr. McKelvey testified had he known of **"Exhibit 50"**, he would have addressed it in opening / closing statements, that it would have affected trial strategy, and that it would have even affected jury instructions.

Public Defender's Office Chief Trial Counsel Mr. Brandon Todd Booth (Mr. McKelvey's direct supervisor) testified at the W.R.A.P. Rule 21 hearing and wrote a sworn affidavit (Appendix 'H') with facts supporting the Defendant's claim of "Ineffective Counsel". Regarding the prosecutor's late introduction of "Exhibit 50" that violated the Court's laws; Mr. Booth testified (and wrote in his sworn affidavit) that before and during trial he had numerous conversations with Mr. McKelvey well in advance of and during trial, in which he had *"repeatedly instructed"* Mr. McKelvey on exactly how to object to, exclude evidence, or otherwise handle this very occurrence of discovery evidence violation should it happen during trial (including seeking prosecutorial misconduct sanctions that included the barring of late introduction of evidence). (Id. at 88-89).

He further swore the he specifically instructed Mr. McKelvey to: *"Be ready to object at trial based not only on discovery violations, but also to object during trial to any attempts by the State to admit evidence either not previously provided, or based on the State's failure to give specific notice of exhibits, or as otherwise required by pretrial Memorandum obligations connected to the Court's case management order requirements."*

Regarding "Exhibit 50", Mr. Booth testified that he became aware of Mr. McKelvey instructing Miss Harris to listen to "Exhibit 50" for the first time at the defense table, during the trial and during active testimony; through Miss Harris (Tr., Rule 21 Hearing, p. 72). **He testified that** *"he could not imagine a scenario where it would be a reasonable strategy to listen to a newly proposed exhibit during the actual trial for the first time and during testimony"* (that violated case management & discovery laws) (Id. at 97) in the final day and hour of the trial as took place in the Leners' case.

Mr. Booth also testified (referring to detective Hickerson's "detective's supplemental" that was withheld from the Defense for a year); **that** "*complete police reports are absolutely necessary in preparation of a case"* and that *"a reasonably competent defense attorney would have known of and acquired any missing reports well in advance of trial"* (Id. at 92-93). Another key area of testimony by Mr. Booth was about Mr. McKelvey's failure to review all electronic discovery before trial. **Mr. Booth testified** and stated in his affidavit that *"Mr. McKelvey contacted him on numerous occasions well before trial";* and stated that he was *"overly concerned with the amount of discovery"* and didn't know what to do. Mr. Booth stated in multiplicity: *"Mr. McKelvey's primary concern was as to the volume of recordings and not knowing specifically what the state would use at trial, and the amount of time he would need to review them, so we discussed how to handle this."* & *"Mr. McKelvey was still frustrated with the volume of calls"*. Mr. Booth testified he informed Mr. McKelvey multiple times of several ways to handle this.

Mr. Booth indicated through his testimony and affidavit statements that Mr. McKelvey failed to take the necessary time to review the discovery / calls before trial. His statements indicated that Mr. McKelvey instead opted to use his time to lament to Mr. Booth multiple times instead of simply doing the work needed; that he instead wanted the prosecution to point him to exactly what they would use at trial. **Mr. Booth testified** he outlined several ways to more aptly discover which "calls" would be used by the prosecution, to include the filing of various motions or having necessary discussions with the prosecution. The record shows the volume of the electronic discovery that required listening to amounted to approximately 10-15 hours of office time max. The case timeline showed Mr. McKelvey was in charge of Mr. Leners' case for well over a year and a half. The record showed in Mr. McKelvey's testimony later at the W.R.A.P. Rule 21 hearing that these instructions were never carried out by either Defense Counsel McKelvey or Harris.

Miss Emily Harris also testified at the W.R.A.P. Rule 21 hearing and wrote a sworn affidavit with facts supporting the Defendant's claim of "Ineffective Counsel". It was discovered through Miss Harris' sworn testimony and Affidavit (included in Appendix 'I' herein); that the State had only submitted 'tiny excerpts' of the recorded calls and failed to notify the Defense of this fact. This fact and the fact that the Prosecutor had withheld evidence for over a year and introduced "Exhibit 50" in the last hours of trail in violation of the documented Court "Discovery Rules; caused Mr. Leners Appellate Counsel (Kirk Morgan) to designate this prosecutorial tactic as "TRIAL BY AMBUSH" in his *"W.R.A.P Rule 21 Motion For a New Trial"* and his *"Brief of Appellant"*. Appellate Counsel Mr. Morgan outlined suspected prosecutorial misconduct in his Appeals to both the District Court and the Wyoming Supreme Court.

Miss Harris also testified to other pertinent facts at Mr. Leners' W.R.A.P. Rule 21 hearing and in her Affidavit. **Miss Harris testified** that in her opinion the recordings in Exhibit 50 were *"very damaging evidence"* and indicated she thought the evidence was "*disastrous*" to the defense and '*changed the entire outcome of the trial*' and that prior to the introduction of "Exhibit 50"; the trial *"could have went either way"*. **She also testified** she was never made aware before trail by Mr. McKelvey of any possible self-inculpatory statements by Mr. Leners, and also that Mr. Leners seemed unaware of the recorded statements himself and even shocked at the recording in the last minutes of the trial. **She testified** that when she listened to them for this first time at Mr. McKelvey's direction during the trial & during witness testimony; that she *"did not really know what" she was listening to them for other than possibly looking for "some sort of evidentiary basis to object to admission of the exhibit"*(Id. at 19).

She further testified that she '*was assigned to the case too late to come up to speed', 'was not to be considered a "50/50% responsible Counsel"* (Tr., Rule 21 Hearing, p.15), and had told 1st Chair Counsel McKelvey to *"assign her only specific tasks"* (Tr., Rule 21 Hearing, p.15). She testified Mr. McKelvey granted her this request and she was therefore only assigned (by McKelvey) to examine only *"two of the less involved police officers"* and was assigned to jury instructions (Tr., Rule 21 Hearing, p.15, line 12). She further stated that she *"never exchanged notes on discovery or exhibits with 1st Chair Counsel McKelvey"*; and that she *"did not review the electronic discovery of the case due to her late assignment"* to the case. She also stated in her affidavit: ***"I quickly realized I was more uninvolved and unaware of the case than I had ever previously been while serving as 2nd chair"***.

During Mr. McKelvey's testimony at the W.R.A.P. Rule 21 hearing he testified that he ***"had no excuse"***, and ***"it was not part of trial strategy"*** when he failed to object to illegitimate introduction of **"Exhibit 50"** by the D.A. that violated several Court mandated "Criminal Case Management Orders & Discovery Rules". (Tr., Rule 21 Hearing, p. 72) Mr. McKelvey stated he could have objected and moved to exclude evidence or limit witness testimony (Tr., Rule 21 Hearing, p. 71) but failed to do so and had no excuse. **Mr. McKelvey admitted** that he did not make any objections to Exhibit 50, **but *"that he should have objected to Exhibit 50".*** (Id. at 78. 79) **Mr. McKelvey also testified** he only first became aware of the state's intent to use the excerpts of recorded phone calls in Exhibit 50, during trial and that he did not know the phone calls were not complete calls and were instead just excerpts of calls carefully segregated out by the prosecution from much longer calls. (Tr., Rule 21 Hearing, p. 74) He also expressed that the call excerpts (taken out of context) in Exhibit 50 between Mr. Leners and Justin Calkin (A friend of Mr. Leners' whom he lamented to weeks before he went to Cheyenne, where he had no idea Chris Trout would be, or an altercation would ensue); *"was very damaging to Mr. Leners' case"* (Id. at 79) and the outcome.

Likewise, **Mr. McKelvey testified** that he *"failed to notice there was a supplemental report"* that he had never received and did not request it until Sunday, May 5, 2019 (about 24 hours before trial was to begin). (Tr., Rule 21 Hearing, p. 67) **Mr. McKelvey testified** that in preparing for trial, *"Detective Hickerson's Supplemental Report would have been important"* (Tr., Rule 21 Hearing, p. 69) in defense strategy of Mr. Leners' case and would have changed items such as actual jury selection, opening / closing statements, and jury instructions. He admitted that in preparation for trial he had listened only to "some" recorded calls between Mr. Leners and Joyce Trout and Chris Trout's phone numbers; however he failed to listen to any other calls. **Mr. McKelvey testified** that the key phone call he had not listened to was in trial **"Exhibit 50".** (Tr., Rule 21 Hearing, P. 69) The record also verified that when 2nd chair counsel Harris told him she was *"assigned the case too late to come up to speed"* and *"was not to be considered a 50 / 50% responsible counsel"*, **he still allowed her to continue into trial anyway** and did not require her to review discovery.

While Mr. Leners was not permitted to testify at the Rule 21 hearing, he stated in documentation to his Appellate Counsel / the Court; that had he been aware of this evidence before trial *(as he would have been had the Court "Discovery Rules" and "Criminal Case Management Orders" been complied with by the State)*; he would have insisted on testifying at trial to explain his recorded statement (found in a small recorded excerpt- Exhibit 50), **in which he lamented to a friend *"I'd like to kill that guy"*** (referring to Chris Trout who would later next week attack & assault him- something he could not have foreseen).

Despite the testimony & evidence provided in the affidavits of Brandon Booth, Emily Harris, at the W.R.A.P. Rule 21 hearing, and further testimony by Mr. McKelvey that had he been aware of Exhibit 50 before trail, it would have affected his opening / closing statement, how he approached the trial, and even *'changed the way they instructed the jury'*, - a 'framework' feature of trial; the First District Court denied Mr. Leners' *"Motion for New Trial Pursuant to W.R.A.P Rule 21"*. Mr. Leners was then reassigned Wyoming Public Defender Appellate Counsel Kirk Morgan who filed a *"Notice of Appeal"* before the Wyoming Supreme Court, followed by his *"Brief of Appellant"* & finally his "oral arguments".

Before the filing of Mr. Morgan's *"Brief of Appellant"*, Mr. Leners became involuntarily and completely isolated from his Appellate Counsel Kirk Morgan for over 2 months prior to that filing, due to the unprecedented "100% covid lockdowns" at the prison (WSP). During this crucial time Mr. Leners was denied communication with his Counsel, denied computer and case law access, and even denied copy & notary services by the prison. These items are widely understood to be absolutely necessary in the modern age to be able to participate in Constitutionally Guaranteed "Due Process". The prison staff is documented as "slipping unofficial memos under cell doors" stating the denials of these items while Mr. Leners and all prisoners were locked down. The lockdowns were not due to excessive covid infections as infections were rare (less than 1%), but the lockdowns were still enacted by Wyoming Department of Corrections.

At the same time, Mr. Leners was further rendered unable to call his Counsel due the combination of the 100% lockdowns in addition to the new development of the **Public Defender's Office decreasing Mr. Morgan's *'available working hours'* to less than 10 working hours a week** (an over 75% decrease). Thus Mr. Leners held he was rendered completely unable to participate at all in any meaningful way in his final appeal / defense and "Due Process" before Mr. Morgan submitted his *"Brief of Appellant"* independantly.

Upon receipt of the *"Brief of Appellant"* from Mr. Morgan in January 2021, Mr. Leners reviewed it (under 100% lockdown) and found it to be woefully insufficient and incomplete with respect to the record. He was still under 100% lockdown and thus had no immediate and timely recourse (due to the aforementioned obstructions to his due process). It was at this point Mr. Leners found it necessary to try to pursue his own *"Motion for Permission to File Pro Se Supplemental Brief"*; to try to address omissions / errors his Appellate Counsel's *"Brief of Appellant"* that he had not been able to communicate to Mr. Morgan in time.

The "100% lockdown" (for Mr. Leners) sufficiently loosened on or about 2-19-2021 (due to his move to a different facility – WMCI). By this time however it was too late in that Mr. Morgan had already submitted the *"Brief of Appellant"* and also already completed his "oral arguments" before the Wyoming Supreme Court – due to required timelines. Mr. Leners was also denied his right to attend or listen to the oral arguments in his Counsel's Appeal before the Wyoming Supreme Court as a result of the lockdowns.

Beginning in late February 2021 (having no criminal legal experiencel), Mr. Leners began earnestly trying to assemble a *"Motion for Permission to File Pro Se Supplemental Brief"* in spite of his VA & SSA diagnosed and certified disabilities of PTSD & MDD. The *Motion* outlined the "100% lockdowns" and his Appellate Counsel's 75%+ reduction in office hours in depth; and how both factual barriers in combination caused his complete isolation from his Appellate Counsel (and thus from "due process" and his defense). **His Pro Se Motion stated its purpose was for the chance to rectify the insufficient *"Brief of Appellant"* that was earlier filed by Mr. Morgan without his participation.** (Appendix "C")

As further justification for his *"Motion for Permission to File Pro Se Supplemental Brief"* to be accepted by the Wyoming Supreme Court, Mr. Leners presented unique evidence with initial arguments (as was required) and appropriate law references to demonstrate that had he been able to work with his Counsel and participate in his own appeal / defense; he would have ensured his Counsel include these and other substantial arguments in his *"Brief of Appellant"*. **Mr. Leners' unique appealable items included** Constructive Denial Of Competent Trial Counsel, Ineffective Counsel (of not just one, but both) of his appointed public defenders simultaneously, Demonstrated Severe Conflict of Interest by trial Counsel McKelvey, and Constructive Denial of Counsel by the State Public Defenders Office (when he petitioned to have Mr. Mckelvey replaced, but State Public Defender Diane Lozano refused to do so in writing by deliberately misdirecting Mr. Leners concerns about McKelvey's unethical behavior and open refusal to defend him – even mocking his case). **NONE OF THESE ITEMS WERE INCLUDED IN MR. MORGAN'S *"BRIEF OF APPELLANT"* WHICH FURTHERED MR LENERS' NEED TO FILE HIS *"MOTION FOR PERMISSION TO FILE PRO-SE SUPPLEMENTAL BRIEF".***

In the interest of keeping this writing as succinct as possible for the Honorable US Supreme Court, the herein described *"Motion for Permission to File Pro Se Supplemental Brief"* is located in Appendix "C", and should be reviewed for complete details that will demonstrate the *Motion* was both lawfully justified and required to preserve the Defendant's Constitutional rights. The *Motion* was docketed 4-12-21 by the court.

Additionally Mr. Leners' spouse (Kathrine Leners) prepared her own sworn Affidavit to the Court in support of facts in the Defendant's Motion she was privy to. On 4-19-2021 she signed, notarized and executed the certificate of service. Her Affidavit is located in Appendix "E." herein. Mrs. Leners also included with her Affidavit two pertinent evidential items of fact as attachments:

1.) An email (dated 3-1-2018) from herself to trial Counsel McKelvey regarding a meeting he had with the Defendant in late February 2018 (in Laramie County jail 3 months after his arrest). The email sought to guide Mr. McKelvey from his contemptuous and "Insufficient Counsel" conduct and open refusals to defend the Defendant. In the email to Ross McKelvey, Mrs. Leners gave McKelvey factual evidence in the case and of Mr. Leners' character/ crime free life, seeking to set him on a right course to represent Mr. Leners instead of refusing to help him. This email is located in Appendix "G." herein.

> **(Background):** Mr. Leners had relayed to his wife on a phone call home from jail following the late February meeting in jail where Mr. McKelvey had refused to review or act on approximately 30 pages of evidential writings from Mr. Leners, and refused to accept or act on his requests for Mr. McKelvey to obtain and investigate previous police reports filed against the assailant Chris Trout (by Chris Trout's own wife Joyce Trout) in Nebraska. He told Mr. McKelvey one report taken in Fremont Nebraska demonstrated Chris Trout had attacked Mr. Leners before. Mr. Leners reported that Mr. McKelvey complained in the meeting saying: ***"well Tim! You wrote me like 50 pages!"***, and he ***'had no time'*** as ***"he had been assigned too many case"*** by State Public Defender Diane Lozano. He also told Mr. Leners in the short meeting that (in his opinion), **'Mr. Leners had *shot* his attacker and was going down for that regardless of self defense'.** Mr. Leners believed these statements and refusals to accept or investigate evidence on his behalf violated his rights to "Effective Counsel" and demonstrated a severe "Conflict of Interest" on Mr. McKelvey's part, and would doom his defense.
>
> **Mr. Leners immediately wrote State Public Defender Diane Lozano, outlining the unethical and unlawful conduct**, and pleaded with her to at least meet him; but **for her to replace McKelvey** with a trial Counsel who would fulfill the '6th Amendment Advocate' role guaranteed by US Const. 6th Amendment. **State Public Defender Diane Lozano refused, sending a reply letter back to Mr. Leners on 3-8-2018.** In that reply, Miss Lozano refused to address the demonstrated Conflict of Interest or unlawful behavior by Mr. McKelvey. Miss Lozano ignored Mr. Leners' informing her that Mr. McKelvey had verbally expressed contempt & desire ***not*** to represent him, ***not*** to accept his evidence, and ***not*** to obtain existing police reports on Trout which proved Trout had assaulted him just 3 weeks prior to assaulting him in Cheyenne. He also ***complained*** to Leners his *"caseload was too high & he didn't have time"*. Miss Lozano's reply was a dishonest misdirection to protect McKelvey. **Miss Lozano openly refused to replace Mr. McKelvey or meet Mr. Leners .** This letter is located in Appendix "F" herein.

Mrs. Leners having no legal or criminal law experience herself, then sent her notarized and executed Affidavit with the two attachments to Mr. Leners at WMCI just 14 days after Mr. Leners had submitted his own *"Motion for Permission to File Pro Se Supplemental Brief"* to the Wyoming Supreme Court.

On 5-4-21, the WY Supreme Court denied Defendant's *"Motion for Permission to File Pro Se Supplemental Brief" stating*: *"After careful review of the motion/file, the Court finds Appellant's motion should be denied. See Herdt v. State, 891 P.2d 793, 795-96 (Wyo. 1995). The Court notes the captioned case was taken under advisement of 2-10-21, two months before Appellant filed his motion."* (Appendix "D." herein.) On 5-14-2021 (10 days after Denial of Defendant's *Motion for Permission*), The Wyoming Supreme Court denied the Defendant's Appeal from conviction; and issued its opinion with stated intent to publish it. The Court affirmed the lower Court's ruling and issued its Mandate on June 2, 2021 that the sentence be upheld.

In its writings, the Wyoming Supreme Court stated the known multiple violations and misconduct by the Prosecution was ***"not to be condoned"***; but then denied to hold the State accountable for any of its multiple violations of its lawful Pre-trial Obligations or rectify same with approving Mr. Leners' Appeal. An action of this sort does in logical effect and fact, actually condone the prosecutor's misconduct that Mr. Leners' Appellate Counsel Kirk Morgan had previously documented with case law as "TRIAL BY AMBUSH".

The final primary issue appealed by the Defendant to the Wyoming Supreme Court was seeking improper & excessive restitution amounts to be removed. This issue was "partially" addressed by the Wyoming Supreme Court, but further remedy / release from restitution is sought & should be adjudicated.

As a result of the Appeal, the District Court was instructed by the Wyoming Supreme Court to remove the amount of one hundred two thousand six hundred dollars ($102,600.00) from restitution originally awarded to Chris Trout, as it was discovered during Mr. Leners' Appeal that Chris Trout had fraudulently stated and sought this restitution with no proof of income or loss of same. It was also discovered the Prosecution enabled these misrepresentations through further misconduct. As a result it was established the District Court did err in awarding that restitution amount to Chris Trout. Therefore on 7-7-2021, the District Court issued its *"Amended Judgment and Sentencing"* following suit. As part of the *"Amended Judgment and Sentencing"* it was also ordered by the District Court that **"The Court finds Mr. Leners has no ability to pay the ordered fees (of $5,000.00)** to the State of Wyoming Public Defender's Office and they are waived"; **yet all other restitution totaling nearly $60,000.00 was left in place in spite of the fact** that the Court already recognized "***the Defendant has no ability to pay***" (him being 100% disabled by the VA & Social Security).

> **WY § 7-9-102. Order to pay upon conviction. The law states:** *In addition to any other punishment prescribed by law the court shall, upon conviction for any misdemeanor or felony, order a defendant to pay restitution to each victim as determined under W.S. 7-9-103 and 7-9-114 unless the court specifically finds that the defendant has no ability to pay and that no reasonable probability exists that the defendant will have an ability to pay.*

The aggregate amounts left in place still total $59,096.13 and are derived from the following -- (($200.00 to the Victim's Compensation Fund, $15,000.00 to Victim Services, $37,786.13 to the Cheyenne Regional Medical Center, $75.00 to the Clerk of the District Court, $25.00 court automation fee, and $10.00 for legal service fee.))

By law, when the Defendant has "no foreseeable ability to pay", restitution shall not be awarded – Mr. Leners is a "total and permanently" disabled veteran as following appendices states, & fits into this category.

Reference Appendix "J" herein: (U.S. Veterans Administration Certification of Defendant's 100% Disability Status for Major Depressive Disorder and PTSD

Reference Appendix "K" herein: (U.S. Social Security Administration Certification of Defendant's 100% Disability Status for Major Depressive Disorder, PTSD, Heart Disease and Degenerative Disk Disorder

After the denial of his Appeal before the Wyoming Supreme Court and as soon as was practically possible; Mr. Leners set about with his best possible efforts as a preparing this *"Writ of Certiorari"* for the United States Supreme Court. Mr. Leners has strived to fulfill the rules & requirements for this Writ to be selected and pursued by the Esteemed US Supreme Court. **It is believed the Constitutional issues here to be reviewed by the Court; are monumental and glaringly important for the continued honest and diligent application of the "Rule of Law" to preserve the various "Constitutional Rights of the Accused"; not only for the Defendant; but for American Citizens in every state and from every walk of life who believe in and depend on the impartial and accurate application of Justice.**

Additional Case Background & Relevant Procedure

By all accounts during 2017, Joyce Trout was in a struggling marriage with her estranged husband Chris Trout. In January of 2017 Joyce Trout took her 8 year old child from her husband Chris Trout, and left her home in South Dakota for Nebraska to seek a divorce. Having no previous contact or arrangement with Mr. Leners' the defendant, she moved to Mr. Leners' home state of Nebraska, into an apartment in Bellevue / Omaha NE (40 miles from Mr. Leners home in Fremont NE where he lived with his wife of 25 years and four children). Joyce Trout having been previously married and divorced from a (now deceased) high school friend of Mr. Leners, sought out and contacted Mr. Leners on Facebook. Joyce Trout romantically propositioned & pursued Mr. Leners with a proposed 'paramour' type of relationship despite her knowing he was happily married with 4 children. **Mr. Leners accepted on his own accord and responsibility**, and by March 2017, Joyce Trout and Mr. Leners were in a romantic relationship. Joyce Trout claimed to the Defendant that her reason for leaving her husband Chris Trout was to protect herself from a 2nd rape by him, protect her minor child from his neglect & abuse, and to protect both of them from his abusive drinking. She told Mr. Leners she had left Chris Trout for at least two other men before him, giving him their names.

Joyce's Facebook postings documented she and Mr. Leners were each *'divorcing their perspective spouses so they could eventually be married'*. Kathrine Leners filed for a divorce when she learned about Joyce Trout. During this time, Mr. Leners regularly visited his children and continued to provide them all financial needs, means of living, a vehicle, and care for all other needs. Mr. Leners remained a significant part of his children's lives by seeing them often, calling and texting them and even driving them to school often (in great contradiction to fictional propaganda later invented and disseminated by Cheyenne Police detective Joel Hickerson who arrested Mr. Leners on the eve of December 23rd, 2017 after electronic discovery proved by way of a voice recording; that Mr. Leners had been physically attacked and assaulted by Chris Trout in Cheyenne Wyoming), where he had gone at Joyce Trout's invitation urging to see her on 12-23-2017.

The relationship between Tim Leners & Joyce Trout lasted from March 2017 until mid-November 2017 when Mr. Leners left Joyce Trout in a home in Fremont NE he had been renting for him, her and her 8 year old daughter. Mr. Leners left her when he learned Joyce Trout was secretly seeing Chris Trout again for money (her current estranged husband she was divorcing). Mr. Leners went home to his wife and children and pursued efforts to reconcile. These efforts were supported by his wife and his four children.

After Mr. Leners moved out, Chris Trout soon arrived at the Nebraska home where Timothy & Joyce had lived and brought a U-Haul to take Joyce to Cheyenne Wyoming with him. After he arrived, discovery evidence recorded calls and texts on Mr. Leners' phone proved Joyce Trout began having second thoughts and started to contact Mr. Leners, begging him to come back to the house they had lived in for months as she had changed her mind. Joyce told Mr. Leners she wanted Trout gone and out of the house, and she wanted Mr. Leners to return. Mr. Leners told Joyce he would come back. Joyce then told Chris Trout to leave the home, that she would not be going to Wyoming with him, and that he should go to a hotel until he could leave town (Fremont NE). Arguments ensued between Joyce & Chris Trout and eventually Trout took a firearm from the home he claimed was his and claimed Joyce had stolen from him. He went to a hotel in Fremont about 2 miles from the rental house. After Trout left, Joyce called Mr. Leners and told him it was safe to go to her. Mr. Leners returned to the home to talk with Joyce. Joyce began to have severe "stress seizures" and so Mr. Leners began to care for her medical needs as he had already done for months.

About 2 am in the morning, Joyce spotted her estranged husband Chris Trout quickly walking toward the house in the dark. Trout had walked the 2 miles from the hotel he was staying at, back to Mr. Leners' rental home and was intoxicated. **The Fremont Nebraska Police report filed by Joyce Trout about her husband Chris Trout's attack on Mr. Leners and the home; document all that followed.** Trout immediately went toward Mr. Leners' vehicle and appeared to try to vandalize it. Mr. Leners, knocked on the window of the home to alert him not to do it, but fearing for his safety stayed in the home.

At this time, Chris Trout broke off from Mr. Leners' vehicle and sprinted to the half closed window Mr. Leners was looking out of. **The police report stated Chris Trout then punched the window out and the police investigation showed all the glass landed in the house and then threatened Mr. Leners. Trout made a death saying: *"Get out here you you mother#cker!!! I'm gonna f#cking kill you!!"***. The police report indicated all the glass landed inside the house (indicating the direction of force was from the outside of the house). Some of it cut Mr. Leners as he was close to the window when it was punched out by Trout. Mr. Leners backed away from the window when it was broken and refused to go outside or escalate the situation.

At this time, Joyce Trout, having witnessed these happenings lost her temper and stormed outside alone to confront her husband Chris Trout. A screaming match ensued and Joyce Trout called the Fremont, NE police department on her cell as she screamed at Trout to leave the property. Joyce told Trout she was not going back with him and for him to never come back and leave town. After he saw and heard Joyce on the phone talking to Fremont NE Police, Chris Trout ran from the scene. When police arrived, they interviewed Joyce Trout and Mr. Leners. Joyce filed a report on Chris Trout's attack on Mr. Leners, stating Trout had punched the window out trying to get to Mr. Leners to harm or kill him, and that he was armed with a firearm he had stolen from her earlier that day. Mr. Leners was also asked to file a report and his report corroborated hers in the details that involved him. Police then left the house to purse Chris Trout. They later found him and told him to leave town expediently or be arrested.

Mr. Leners stayed until daylight and then left the house to return home to his kids and wife. He then fell asleep at home and in the meantime Joyce had tried to call him numerous times. When he awoke, he called Joyce back and learned she had once again taken up with Chris Trout despite his attack on Mr. Leners, his rental home and her just hours before. Mr. Leners then told Joyce that she was on her own with Trout.

Within hours, Joyce Trout left Nebraska for Cheyenne Wyoming in the U-Haul with Chris Trout. She reported to friend and later Mr. Leners that she had an "arrangement" with Chris Trout that he would pay for a private apartment for her and her 8 year old daughter, a new car, all her living expenses and a trip to Disneyland; all on the condition she would let him to see his and her 8 year old daughter Morgan. Lease records showed Chris Trout rented his own separate apartment in the same complex, but did not live with Joyce. He lived several doors away with his adult daughter Kyla Trout from another marriage. These facts were verified on electronic discovery found in Mr. Leners' phone and also through Joyce Trout's electronic messages in discovery that she had sent to other people. One electronic discovery message by Joyce to a person named "Brandie" on 12-8-2017 stated: ***"Morgan and I have an apartment by ourselves in Cheyenne"*** (Report of Investigation case# 17-75857 on 12-08-2017 at 1545 hours UTC-7)

In late December 2017 after a couple weeks in Cheyenne without Mr. Leners, all electronic discovery evidence documented that Mr. Leners and Joyce Trout started to contact each other again on social media and text. These texts and recorded phone calls are in Detective Hickerson's police report, supplemental report, and recorded phone calls on Mr. Leners' phone. In these contacts, Joyce Trout pleaded with Mr. Leners several times that she'd *"made the worst mistake of her life ever going back to Chris)"*. She told Mr. Leners that Chris Trout was again drunk all the time and abusing her. She reminded Mr. Leners that Trout had raped her in the past and that she was afraid. She stated to Mr. Leners that Trout was again neglecting her 8 year old daughter Morgan, and was again drinking heavily and drunk all the time.

Discovery evidence proved she urged Mr. Leners to come to Cheyenne expediently to live with her and her 8 year old daughter there until she could move back to Nebraska with him.

Joyce Trout stated in all matter of discovered electronic discovery evidence (To Timothy Leners) that:

- *"Chris knows you are coming and is ok with that because I told him I want you".*
- *"Chris is going to give me the divorce I want".*
- *"I live here alone with Morgan, Chris doesn't live here, he lives in his own apartment with Kyla".*

  (The detective and D.A. however repeatedly denied this evidence throughout the case and trial and deliberately lied on numerous occasions to the jury and in official reports saying Trout lived with Joyce) (T., Vol. I, p. 119)

- That she desired Mr. Leners to take her back to Nebraska with him soon as *"she wasn't safe with Trout".*
- That she *"Loved him (Tim) and couldn't live without him".*
- **Joyce texted to Mr. Leners: *"my address is5419 Imperial Court #2".***
- In the calls and texts, Joyce authored, she repeatedly bore down on the expression to Timothy that they were *"Soulmates"*- (an expression Detective Hickerson and the D.A. latched onto in the case and placed at the feet of only Mr. Leners, using it as a derogatory term in apparent efforts to make him look obsessed).
- She had told Chris Trout she was *"Tired of his sh#t and to get out!".*
- She told Chris Trout and that she *"Never had a connection with him and couldn't live without Tim".*

Mr. Leners reciprocated his feelings for Joyce, but expressed doubt on the calls and texts that Chris was "ok" with things as Joyce told him. **Joyce repeatedly assured Mr. Leners she was telling the truth and repeatedly told Mr. Leners to come**. There were several unsavory messages exchanged between Timothy Leners and Joyce Trout at this time including Mr. Leners alluding to his committing suicide. Discovery evidence showed Timothy expressed worry for Joyce's safety, even calling Cheyenne Wyoming Police & the local Wyoming Sheriff from Nebraska, asking them to look into her safety.

Eventually in discussions and with the reluctant agreement of his wife, Mr. Leners decided he would go to Cheyenne. Saying a temporary goodbye to his wife and children, he told them he would return right after Christmas. Mr. Leners then drove toward Cheyenne Wyoming at Joyce Trout's invitation starting 12-23-2017. During the drive, Mr. Leners texted Joyce and initially she responded. When the responses lessened and stopped, Mr. Leners became suspicious and worried. Police reports, electronic discovery & Chris Trout's admission next showed that Mr. Leners learned that Chris Trout had taken Joyce's phone after giving her drugs that rendered her unconscious; and was impersonating Joyce on the phone. Mr. Leners soon discovered Trout's deception and confronted him in text. **The police report and electronic discovery showed that during the remainder of the drive to Cheyenne, Mr. Leners was repeatedly threatened by Chris Trout with severe bodily harm on both text messages and phone calls from Chris Trout.** The texts and recorded calls from Chris Trout showed Mr. Leners repeatedly telling Trout that he (Trout) *"needed to calm down",* that they *"could get along"*, that *"they were not going to fight or have an altercation as that would be stupid",* and *"I'll bring police with me if needed to make sure Joyce is ok".*

Detective Hickerson's report showed he acknowledged in writing that Trout had repeatedly made several serious & credible threats against Mr. Leners, but also showed Hickerson excused them in his own report writings and during the videoed police interrogation (demonstrating again that Hickerson personally believed that because Trout was still technically married to Joyce, he had a right to threaten & even later attack Mr. Leners); even though all evidence showed Joyce had repeatedly stated and shown she did not want to be with Trout and had left him before numerous times with their 8 year old daughter in tow; for Timothy & several other men before him.

After the drive, Mr. Leners arrived at Joyce's apartment around 5:00pm on December 23rd, 2017 and evidence showed Chris Trout himself gave him final directions on the phone and then welcomed Mr. Leners in, shaking his hand. The two sat down and started to converse at a kitchen table.

Chris Trout was drinking and continued to drink heavily during the rest of the day. During this time he threatened Mr. Leners several times with serious bodily harm. As before on the phone calls from Trout, Mr. Leners diffused the threats reporting to police he was only there for Joyce, not to have an altercation with Trout. Joyce Trout was still unconscious from the drugs Chris Trout had given her, but started to awake. Chris attempted to drug her again but Mr. Leners told police he talked him out of doing that. As soon as Joyce sat down and joined the table conversation, Chris Trout became enraged and violently started slamming his fist into the table and threatening both Mr. Leners and Joyce saying she had lied to him and a number of other things. **Mr. Leners told police that he became worried for their safety at this point and activated a voice recorder app on his cell phone and sat it on the table.** (State's Exhibit 15)

THE REST OF THE HAPPENINGS OF THE DAY, ALL CONVERSATIONS BETWEEN MR. LENERS & THE TROUTS, AND THE SELF DEFENSE SHOOTING THAT OCCURRED; **ARE ALL VERBALLY RECORDED IN CLEAR DETAIL ON THAT VOICE RECORDING (Later labeled State's Exhibit 15) AND INDISPUTABLE.** THE TRIAL RECORD SHOWED HOWEVER THAT MUCH OF THE TESTIMONY FROM DETECTIVE HICKERSON, CHRIS AND KYLA TROUT, AND THE D.A. SHOWED THE FACTS WERE FALSIFIED ON THE STAND TO THE JURY & THE COURT.

The recording later designated at trial as Exhibit 15, shows that perjured testimony was supported by the D.A.. (The trial record also showed none of the perjured testimony was pursued through cross-examination or exposed or put into context for the Court or the jury by Mr. Leners' Trial Counsels McKelvey or Harris). Mr. Leners told police that although he was afraid Chris might hurt either of them, he stayed to make sure Joyce was ok. The recording demonstrated that Chris had at this point consumed several alcoholic drinks in quick succession, and as Joyce joined them, she and Chris both continued to drink heavily, whereas Mr. Leners can be heard on the recording requesting only water when asked if he wanted a drink. **The incident recording verified Joyce told Chris Trout several times to leave and that she had invited Mr. Leners and that Mr. Leners was staying with her in her apartment.** Chris Trout testified he learned earlier in the afternoon before Mr. Leners arrived, that Joyce Trout had invited Mr. Leners to Cheyenne to live with her in her apartment (T., Vol. I, pp. 117, 129), something he previously denied during official police questioning.

Mr. Leners' cell phone recording app remained on from this point forward until the actual arrival of police after the incident. Chris Trout went to and fro several times from violent outbursts, to complacency during the 'table discussions' between the three. There were frequent episodes of Chris Trout threating Mr. Leners with severe bodily harm, slamming the table, & screaming in rage almost insanely at Joyce & Tim.

((At this point in trial, perjured testimony took place by Kyla Trout (Chris Trout's oldest adult daughter from another marriage, whom he lived alone with in a separate apartment). Kyla Trout, testified that she entered the apartment and observed Chris & Joyce Trout and Mr. Leners sitting at the table talking calmly ***(T., Vol. I, pp. 138-139)****. Kyla testified that Mr. Leners had on a jacket and had a gun holstered on his hip* ***(T., Vol. I, pp. 139)****. This testimony was shown to be false by the actual verbal recording that demonstrated Kyla never came in during the 'table discussion'. Statements of all other witnesses contradicted Kyla Trout's testimony and the recording proved Kyla Trout never entered the apartment until over an hour AFTER the 'table discussion' between the three had already ended and Mr. Leners was cleaning the kitchen.*

At each threat and violent outburst by Chris Trout directed at Mr. Leners, Mr. Leners is heard on the recording responding calmly with statements to the effect of *"No we aren't going to fight Chris"*, and *"Let's just calm down"*. Mr. Leners was shown on the incident recording to have participated very sparsely in the recorded conversation at the table. When he did participate, the recording showed him to be conciliatory and attempting to peacefully disarm Trout's direct threats. There were no occurrences of aggressive behavior or threatening speech by Mr. Leners on any portion of the recording at the table or anywhere else in the day's recording; in stark contrast to Chris Trout's several threats of violence & outbursts directed at Mr. Leners.

Joyce Trout, when confronted by Chris Trout about her inviting Mr. Leners to Cheyenne to live with her, readily, proudly admitted she had done so. When Trout accused her of lying to him she also readily stated that she had lied to him and to Mr. Leners *"about everything"*. **She went on to make statements to Trout that:** *'She and Trout had never had anything between them and never would'*, that: *'she couldn't live without Mr. Leners and they were 'soulmates'*, that; *'Mr. Leners was not going to a hotel, he was to stay with her and she wanted Chris Trout to leave and for Mr. Leners to move in'* (among others).

After more violent outbursts by Chris Trout he is heard on the recording telling Mr. Leners and Joyce Trout that he didn't care anymore and was leaving the two to be together because they "deserved each other" (T., Vol. I, p. 130). **Trout then specifically gave Mr. Leners the rent and the deposit amounts, and told Mr. Leners he wanted him to take over those responsibilities.** The recording indicated Trout fully released his interest in Joyce (who'd already been w/ Mr. Leners for 8 mo.+); and Joyce's apartment where she lived alone with her 8 year old (as he admit to next on the recording).

Chris Trout then stated on the recording CLEARLY: ***"I guess I'll go clean off MY bed in MY Apartment"***, indicated that he was going to clean off *his* bed in *his* apartment where he lived with *his* oldest daughter (Kyla) **(T., Vol. I, pp. 129, 130).** *((This fact was repeatedly lied about in perjured testimony by Detective Hickerson in his reports and testimony and by the prosecutor who also lied in court to the jury. Both Chris and Kyla Trout made false statements to police about the fact that Chris Trout lived with her and not Joyce, and also gave perjured during trial on this point that was proven false by the incident recording. The prosecutor and police refused to admit that Chris Trout did not live with Joyce in efforts to portray Mr. Leners as an "intruder" when all electronic discovery proved he was in fact an invited guest of Joyce Trout into **her own** apartment.))* Additional discovery evidence also proved Joyce Trout lived alone without Chris Trotu in her own apartment, as she so stated to Mr. Leners in discovery evidence and again in text messages to friends. In one named "Brandie" on 12-8-2017, she stated: ***"Morgan and I have an apartment by ourselves in Cheyenne***: (Report of Investigation case# 17-75857 on 12-08-2017 at 1545 hours UTC-7) All electronic evidence contradicted the false testimony and reports by detective Hickerson, the D.A. and the Trouts. Mr. McKelvey did not expose this massive perjury to the jury even though Mr. Leners told him of it.

Chris Trout testified that he then left the apartment and the incident recording indicated he understood Mr. Leners was staying at Joyce's invitation and moving in (T., Vol. I, p. 120). The incident recording showed Mr. Trout at this time made his most severe direct death threat to Mr. Leners stating ***"And if you f*ck up, I'll f*cking kill you and they will never, ever, ever find your body!!"*** This was the most blatant death threat by Trout against Mr. Leners, and it occurred less than one hour before Trout was heard on the recording assaulting Mr. Leners.

Mr. Leners is again heard on the recording calming Trout and then by all accounts Trout shook Mr. Leners hand and 'congratulated him'. The recording demonstrated he then told Mr. Leners to *"take care of Joyce"*. Shortly after this, Chris Trout left Joyce's apartment, presumably not to return; and Mr. Leners started moving his things into the house. Later as Mr. Leners was cleaning the kitchen and Joyce was in bed, **Kyla Trout came into the apartment and aggressively confronted Mr. Leners on the recording stating** *"who do you think you are to live with my step mom!!"* as well as other incendiary comments to Mr. Leners. **(T., Vol. I, pp. 142, 143).** Mr. Leners can be repeatedly heard on the recording responding politely and conciliatorily toward Kyla, stating *'You will have to discuss this with your dad Kyla, it's not my place to tell you these private things'*. Kyla Trout then told Mr. Leners on the recording that he *"had better leave the patio door unlocked all night so she could get in any time she wanted"* (even though she didn't live there). Kyla is then heard screaming at Mr. Leners *"I hope you burn in hell!!"*before storming out.

Kyla testified she left the apartment and called Chris Trout to inform him it looked like Mr. Leners was moving into the apartment (the recording proved Chris Trout already knew Mr. Leners was moving in with Joyce but this was denied by the prosecution and the D.A. at trial). Kyla said she informed Trout she was going to call the sheriff. (id. At 144) She testified that she heard her father's truck return and knew he was home. Chris Trout testified that in the call he received, Kyla told him Mr. Leners had *"disrespected her"* although the incident recording indicated Mr. Leners had treated her with respect. (id. At 131). (Later when Chris Trout returned and forcefully re-entered Joyce's apartment, he was heard during the assault on the incident recording screaming repeatedly: *"You disrespect my Daughter!! GTFO!!"*, indicating he'd returned because he thought Kyla had been "disrespected" and not because of Joyce; whom he had already left.)

The incident recording played for the jury demonstrates at this time that Mr. Leners is heard discussing Kyla's behavior with Joyce Trout in the bedroom after Kyla left. Mr. Leners expressed to her that Kyla had no reason to behave so disrespectfully and that he was not able to live with such a person constantly barging into where he lived and that he would not be safe with the patio door unlocked all night in such a bad area of town. Joyce is heard insisting he would be safe and defending Kyla's behavior. At this point an argument ensued between Joyce Trout and Mr. Leners. Several unsavory and name calling comments were made by Mr. Leners about the Trouts being *"trashy"* and how they would ruin any possible relationship between them. Joyce Trout can be heard making some unsavory replies, yet she still tried to convince Mr. Leners to stay. Mr. Leners can then be heard on the incident recording in clear and repeated speech stating to Joyce Trout: ***"I am leaving!!...I have a wife and kids 500 miles away and I'm going home!!"***. At this point Mr. Leners told police he started to re-pack his things and take them to the living room (near the front door) to take to his pickup truck across the street. Mr. Leners told police he at this time clipped his small gun (which had been in Joyce's bedroom with his belongings) to his waist band to carry it out with his belongings. Joyce Trout can be heard following Mr. Leners room to room and arguing with him that she wanted him to stay. Mr. Leners reported to police he kept packing and stating to Joyce Trout (as she followed him room to room) that he was *"leaving and going home"*. The recording confirms this and that Joyce is heard on the recording trying to convince him to stay. Sounds of packing & carrying things can be heard on the recording and Joyce Trout's statements to police (and later her screams at Chris Trout during his attack on Mr. Leners of *"He is!! He Is!!"* [leaving]) all agreeded that Mr. Leners was indeed packing and trying to leave.

The recording demonstrates it was at this time that Chris Trout forcefully re-entered the apartment by surprise to both Joyce Trout and Mr. Leners. A loud banging can be heard on the door and Joyce Trout is heard saying *"Is that Kyla again??"*. Mr. Leners is heard replying *"I don't kn... "*. Just then a loud crash is heard as the apartment door was forced open. Mr. Leners reported to police that it *"nearly knocked the door off its hinges"*. The recording shows Chris Trout is heard forcefully storming into the room while screaming madly in rage at Mr. Leners: ***"You disrespect my daughter! Get the F#ck out!!"*** repeatedly.

According to his testimony, Trout said he was 'upset' and returned to the apartment. According to his testimony, he *cordially "asked"* Mr. Leners to leave the apartment. **The actual recording of the incident however showed Chris Trout's testimony and detective Hickerson's reporting and testimony to be a false narrative compared to Trout's actual threatening screams at Mr. Leners upon re-entering Joyce's apartment.** This false narrative was repeated numerous times by the prosecution to the jury.

As the altercation ensued (id. At 132), the actual recording of the incident showed Chris Trout is heard coming into the apartment in complete loss of control of himself and screaming madly and incoherently at times at Mr. Leners. Trout screamed the same mantra repeatedly on the recording: ***"You disrespect my daughter!!! Get the F#ck out!!!"***. The incident recording demonstrated Joyce Trout screaming back at Chris Trout ***"HE IS!! HE IS!!"*** each time Trout screamed ***Get the F#ck out!!!"*** Mr. Leners can also be heard screaming in terror on the recording **"WHOA WHOA! *NO!! NO!! STOP!! LET ME EXPLAIN!!"***, in addition to other pleadings for Trout to break off his assault.

The recording demonstrated (and Mr. Leners told police) he was screaming defensive things *("No! Let me explain!")* in desperation as he tried to exit the apartment. He reported to police that Chris Trout would not let him leave and kept pushing him back and assaulting him more. Detective Hickerson however created a false mantra that Mr. Leners 'was trying to stay'; which took holed through repetition during the entire trial. Detective Hickerson also stated in his report and testified at trial that "no sounds of blows landing" on Mr. Leners could be heard on the recording. This testimony was disputed by an expert witness with pictures of Mr. Leners' bruising. *(Additionally, later in W,R,A,P 21 testimony, Mr. McKelvey stated the sounds of blows landing on Mr. Leners were clearly heard on the recording- exhibit 15)*

Nurse Jessica Eastman's expert testimony at trial and pictures of Mr. Leners' "severe bruising" supported the clear sounds of "blows landing on Mr. Leners" in the incident recording **(exhibit 15).** She testified that she had taken pictures of Mr. Leners' bruising on Mr. Leners' left chest, inner arm, bicep and inner legs **(Trial Vol. III, p. 137).** She further testified the bruising was **"severe bruising";** which contradicted Chris Trout's testimony who said he and Mr. Leners only *"got into a little pushing match"* (id. At 122). The clear sounds of a physical altercation and blows landing on Mr. Leners, as well as this expert witness Nurse Eastman's testimony and the bruising pictures contradicted detective Hickerson's testimony of "no sounds of blows landing". Mr. Leners told police that at that time of the fight, his cell phone was in his back pocket and unbeknownst to him; still recording.

Trout then testified he *"moved some of (Mr. Leners') stuff outside"*. The incident recording however showed there was no pause the action of Trout's assault on Mr. Leners from the second the door is heard crashing open to the single gunshot. Additionally and again in contradiction with the actual recording, Trout said Mr. Leners went to his pickup to return some of his items (id. At 133). The incident recording showed Trout's testimony was false as it showed not one seconds' pause between Trout throwing the door open, the attack ensuing, and the gunshot being heard. **It was not mentioned in the trial that Mr. Leners' truck was across the street over 50 yards away – further showing Trout's testimony of events was not accurate as Mr. Leners being disabled with multiple heart attacks and spinal fusion injury could not possibly have covered over 100 yards back and forth carrying heavy items in the time of zero seconds.** The incident recording showed that from the second Trout is heard forcefully entering Joyce's door until the sound of the single gunshot by Mr. Leners; only a few seconds had passed with no pauses.

Trout next testified that Mr. Leners returned from his truck with a pistol and pointed it at him, but since the recording proved Mr. Leners never left the area once the assault stated, this is known to be another perjured statement by Chris Trout. Additionally, Mr. Leners told police in his interview that when he started to pack his things, he clipped his small permitted hand gun to his waist. Trout testified that he *"backed away and slipped and fell on the ice and fell on his back"*. Scene pictures showed there was no ice on the ground. Mr. Leners reported to police that he was tackled on his way out the door and pictures of Mr. Leners' palms on his hands taken by police during interrogation showed Mr. Leners had defensive wounds / punctures / scraps on his palm. The defensive wounds on Mr. Leners' hands indicating he was pushed or taken to the ground, were never presented in testimony by Hickerson. Trout the testified that Mr. Leners *"stood over the top of him straddling him"*, but that he somehow managed to grab the pistol and hold the slide so that the shell never ejected (id. At 124). He testified that Mr. Leners pointed the gun and shot him.

Mr. Leners reported to police that the two *"rolled on the ground"* after Trout tackled him and this is when he was forced to remove his concealed carry from its holster, and that it was *"smashed between them"* when he fired it. The medical report on Trout's wound contradicted Trout's version and indicated Mr. Leners' version was more accurate by documenting that Chris Trout had contact powder burns (that could only occur if the gun were in contact with him as Mr. Leners told police it was). Also contradicting his testimony, Chris Trout gave a written statement to police *before* trial that stated the two "rolled on the ground".

Physics also indicated Trout's version did not occur as he testified he was flat on his back when he reached up and grabbed the hand gun slide because he said Mr. Leners was ***"standing above him"***. With Mr. Leners being 5'11" in height, and Trout having a large stomach and short arms; it would seem physically impossible for Trout to lay flat on his back as he told police, yet still have been able to reach up that far to grab the slide.

Police pictures of Mr. Leners' clothing given as exhibits at trial showed Mr. Leners' clothing and body was soaked in Trout's blood after the shooting. Had Mr. Leners been standing above Trout, this could also never have happened. The defense did not cross examine or expose any of the nonfactual testimony to the jury.

Mr. Leners reported to police that he could not breathe with Trout on top of him. Records showed him to have had multiple heart attacks and spinal fusion injury with Soc. Sec. & V.A. disability. He reported that Trout was 290lbs compared to his 150 lbs. and he could not get away. Mr. Leners told police he feared for his life and believed Trout to be armed as Joyce had told him that Trout often carried two or three pistols at once. Mr. Leners told police he eventually managed to get his concealed carry out and thought he was pointing it at Trout's shoulder but that the struggle disoriented him, his head was buried in Trout's body and he was being fully controlled & could not see. Mr. Leners stated to police his intent was only to stop the fight and get away with his life, not to kill Chris Trout. When Mr. Leners did fire the weapon, he fired only once and it hit Trout in the right chest area not far from his shoulder. Medical reports showed the bullet went through & **also proved Trout had powder burns on his clothing and skin supporting Mr. Leners' version.** The medical report did not support Trout's version that Mr. Leners was "standing above him straddling him" and firing from a standing position well above him which would have left no powder burn. Mr. Leners was soaked in Trout's blood which could have only happened in Mr. Leners' version of events.

Joyce Trout did not testify but in multiple versions of police reports she stated she performed all manner of heroic action and speech during the fight. Her statements varied wildly and she was not called on to testify. She stated in police reports she repeatedly struck Mr. Leners, screamed several things during the fight and said she had even threw both of the two grown men back from each other more than once. The incident recording proved all assertions by Joyce Trout to be false reports.

Trout testified after he was shot, Mr. Leners *"ran away"* and he stood up and cursed at him to *"come back and finish the job"* (id. At 126). The incident recording proved this testimony by Trout was fictio**nal** and Trout never made these statements. Mr. Leners told police that when he was finally able to separate himself from Trout's grasp, he stepped far enough away so as not to be attacked again. At this time Mr. Leners reported he retreated from Trout for his own safety and Joyce (who had been standing a few feet away screaming) came and drug Trout to the apartment doorway. **Mr. Leners reported to police that once he felt Trout was no longer a danger, he went back to help him.** The incident recording proved this accurate & proved Mr. Leners came back to Mr. Trout and tried to help him / treat him for shock by kneeling close to him and reassuring Trout that help was soon on the way and to stay calm. The recording proved at this point that Trout again threatened Mr. Leners with death saying: ***"This isn't over!! I'm gonna f*cking kill you!!".***

Mr. Leners reported to police that he then went to his truck across the street and called 911. At this point Mr. Leners took him phone from his back pocket and noticing it was still recording, was taken aback and began to hyperventilate because he knew the recording would prove his innocence. The prosecution however made Mr. Leners' breathing into a "put on" to the jury and since Mr. Leners did not testify at trial the false demonization was not corrected at trail. The 911 call played for the jury showed Mr. Leners stated he had been afraid for his life after being attacked and that he told law enforcement he would be unarmed by his pickup when they arrived. Officer Mair testified that he responded to the situation and when he arrived Mr. Leners was standing next to his vehicle waiting unarmed just as he said (Tr., Trial Vol. I, p. 163). Officers took Mr. Leners into custody with full cooperation and retrieved both the gun that was used, which was sitting on Mr. Leners' vehicle, as well as Mr. Leners' cell phone, which Mr. Leners told the had recorded the entire incident.

As indicated, Mr. Leners had recorded the entire incident and the events leading up to the shooting. Police told him to drop his phone and since it was in the snow, Mr. Leners can be heard telling officers to be sure to retrieve it. **The recording was played as state's exhibit 15.** Officer Lewis testified he was in the patrol car with the Defendant after the incident and that Mr. Leners voluntarily told him:

"He told me that he had just moved to Cheyenne that day. He told me that he was moving there to be with Joyce Trout who invited him. He told me that the two of them had been in a long relationship and were in the process of divorcing the significant others, and would then get married." "He described the entire incident and told me while he was moving his belongings in earlier in the day. He said Chris Trout's daughter (Kyla) had approached him in the kitchen and asked him what gave him the right to move in with Joyce Trout. Mr. Leners told her that it was a decision she would have to take up with Joyce (the police misspoke, Mr. Leners said Chris- not Joyce). *At that point he said that Joyce's daughter had told him to 'burn in hell' and stormed out. He told me he felt disrespected by this and he went to talk to Joyce about it as he felt disrespected by what* ***his*** *[sic] daughter said to him and that Joyce's response was she had every right to feel that way;* (another mistake in testimony - Kyla was Trout's daughter, not Mr. Leners' or Joyce's). *At this point Joyce Trout and Mr. Leners began to argue. During the course of this argument is when Mr. Leners decided that moving into this household was not for him and he began to move his items back out of the house to his truck telling Joyce he was leaving and going home. While he was packing he said that Chris Trout arrived back at Joyce's apartment and was incredibly angry and aggressive and attacked him. He told me that Trout immediately attacked him yelling at him about how he had disrespected his daughter. He said Trout began to attack him and how he knew if Trout got him on the ground he was going to die. He said Chris Trout grabbed him and threw him to the ground when he tried to get out of the door, and told me he felt his firearm was his only choice to defend himself. He said he pulled out his gun and shot Trout, but he did tell me he was trying to wound him, not kill him.* (id. At 34-35).

Although police told Mr. Leners (on the patrol car video) that the video & voice recorder was not working in the car, this was found to be false as the recording was in discovery evidence and showed Mr. Leners praying to Jesus for the safety of all involved in the incident & that police would discover the truth of what happened. At this point Mr. Leners was taken to police headquarters and the interrogation process took place.

ARGUMENTS OF MERIT

QUESTION ONE: Did the Court err and **violate** the Defendant's US Constitutional 6th Amendment guarantee against 'Ineffective Counsel' in denying Defendant's Appeals for a new trail; **when** his 1st chair appointed trial counsel testified at his W.R.A.P. Rule 21 hearing that he ***"had no strategy"***, ***"had no excuse"***, and ***"it was not part of trial strategy"*** when he failed to object to multiple instances of prosecutorial misconduct / violations of several **Court mandated** "Discovery Rules" and "Criminal Case Management Orders"; AND **when** his 2nd chair appointed counsel testified she was ***"assigned the case too late to come up to speed"***, ...***"was not a 50 / 50% responsible counsel"***, and that she specifically ***"told the 1st chair counsel to assign her only specific tasks"*** *(and yet the 1st chair counsel allowed her to continue into trial anyway)*?

> Prejudice occurs when there is a reasonable probability that, absent counsel's deficient assistance, the outcome of **appellant's trial would have been different**). .....(Further that "**a reasonable probability does not mean** that the defendant would more likely than not have received a different verdict, but means only that the likelihood of a different result is only great enough to undermine the confidence in the outcome of the trial)
>
> (Winters v. State, at ¶ 11, 446 P.3d at 198)

Mr. Leners trial began on 5-7-2019 and ended on 5-10-2019 with a guilty verdict. **"Ineffective Assistance of Counsel" by both Ross McKelvey and Emily Harris was a primary foundational defect in the trial** under which numerous "Structural Errors" were committed that denied Mr. Leners a fair trial by inevitably prejudicing the defense & rending the verdict not only questionable; but tainted & unreliable. Minus the "Ineffective Assistance of Counsel", more than a "Reasonable Probability" existed that the verdict would have been different / more favorable to Mr. Leners. Additionally a "Reasonable Probability" does not mean the verdict would have *more likely than not* been different, but means ONLY THAT the likelihood of a different result is only great enough to undermine confidence in the trial outcome." All evidence demonstrated this was the case.

Before and during trial, Mr. McKelvey committed multiple instances that showed he was "Ineffective Counsel". None of them were harmless errors or just procedural blunders, they were structural defects. Later in W.R.A.P. 21 testimony, Emily Harris (2nd chair) testified that not only was Mr. McKelvey "Ineffective Counsel", **but that she too by her own admission was as well.** Not even Appellate Counsel Morgan recognized this unheard of **"Double Ineffectiveness of Counsel".**

Mr. Morgan also failed to argue in either of Mr. Leners' appeals, the UNIQUE pivotal point of the cumulative effect of ***BOTH*** Mr. Leners' counsels being "Ineffective" simultaneously (while the D.A. had THREE well prepared Counsels who were on the case for over a year), and the "Epic Cumulative Effect Of Failure" that this "Full Denial of Effective Assistance Of Counsel" caused the Defense. As a result, this also went unrecognized in his appeals before the District Court & the Wyoming Supreme Court **and the Courts too then also failed to recognize this "Perfect Storm of Ineffective Assistance of Counsel"** and thus erred in denying Mr. Leners a new trial (or granting his appeal), thus violating his 6th Amendment Right to "Effective Assistance of Counsel". Because Mr. Leners was isolated from Counsel (Mr. Morgan) for months on end before he filed his "brief of appellant" to the Wyoming Supreme Court, he could not effectively communicate several arguments & needs to Mr. Morgan in time for the filing. This and other missing arguments in Mr. Morgan's brief and oral arguments gave rise to him submitting his own *"Permission to File Pro-Se Supplemental Brief"* later.

The first primary example of "Ineffective Counsel" by Mr. McKelvey was outlined in Mr. Morgan's appeals before the District Court and Wyoming Supreme Court. Both appeals centered on a primary example of "Ineffective Counsel" by Mr. McKelvey failing to act as a "Reasonably Competent Defense Counsel" when he first failed to recognize the absence of, or request a "detective's supplemental report" until just hours before trial even though the report had existed for over a year and had been withheld from the defense by the D.A. and police. Mr. Morgan outlined that no "Reasonably Competent Defense Counsel" would have made such a mistake. This was echoed by Mr. McKelvey's direct supervisor- **Chief Trial Counsel Brandon Booth's W.R.A.P. 21 testimony and sworn affidavit when he stated**: "C*omplete police reports are absolutely necessary in preparation of a case"* and that "*a 'reasonably competent defense attorney' would have known of and acquired any missing reports well in advance of trial"*.

Mr. McKelvey admitted in his W.R.A.P. 21 testimony that he ***"failed to notice there was a Supplemental Report"*** that he had never received and stated he did not request it until Sunday, May 5, 2019 (less than 24 hours before trial was to begin). Mr. McKelvey then testified that: ***"Detective Hickerson's Supplemental Report would have been important in preparing for trial,"***. He further stated that the report would have changed his defense strategy items such as actual jury instructions / selection, and opening / closing statements (all of which are recognized as "pivotal cornerstone & foundational" items that change any trial.

The second and more serious primary example of "Ineffective Counsel" by Mr. McKelvey was outlined by Mr. Morgan regarding illicit introduction of evidence by the State (**"State's Exhibit 50"**). The record demonstrates that **during the last hour of trial in the final hour before Jury deliberation**, a new exhibit was introduced by the D.A. that had never been placed in Discovery Evidence and was in complete violation of all documented Court "Pretrial Memorandum Obligations", "Discovery Rules" and the "Criminal Case Management Orders" that required *"Both Parties To File And Serve On The Opposing Party; No Later than Fifteen (15) Days Prior To Trial.... (b) A List With Description Of All Exhibits The Party Intends To Offer At Trial."* The record also showed **"Exhibit 50" contained only the prosecutor's undeclared carefully parsed & selected "excerpts" from recorded calls** from Mr. Leners' phone. This practice conflicts with all case law. The excerpts were only seconds long, despite being sectioned from a call over an hour long. Niether of Mr. Leners' trial counsels were aware of these "out of context" excerpts.

Although neither Mr. McKelvey nor Miss Harris had ever heard the parsed calls in **"Exhibit 50"** before trial; 1st chair Counsel McKelvey **nonetheless instructed the 2nd chair Counsel Harris to listen to "Exhibit 50" for the very first time during the last hour of the actual trial, at the Defense table, and during active testimony of witnesses.** Miss Harris testified later at Mr. Leners' W.R.A.P. Rule 21 hearing that when she listened to them for this first time at Mr. McKelvey's direction during the trial & during witness testimony; that she ***"did not really know what she was listening to them for other than possibly looking for some sort of evidentiary basis to object to"*** and that she: ***"had never heard the (excerpted) calls before"***, and that she ***"never exchanged any notes with Mr. McKelvey on discovery or exhibits".***

Chief Trial Counsel Brandon Booth was alerted to this during trial by 2nd Chair Counsel Harris (that she was listening to exhibits at the Defense table during trial) and was disturbed. He testified (and wrote in his sworn affidavit) at the W.R.A.P. 21 hearing: ***"I can't imagine a scenario where it would be a reasonable strategy to listen to a newly proposed exhibit during the actual trial for the first time and during testimony"*** (that violated case management & discovery laws and was in the final day and hour of the trial as took place here). Mr. Booth also testified that before and during trial he had numerous conversations with Mr. McKelvey well in advance of and during trial in which he had ***"repeatedly instructed" Mr. McKelvey on exactly how to object to, exclude evidence, or otherwise handle this very occurrence (including seeking prosecutorial misconduct sanctions that could include the barring of late introduction of evidence***, should it happen during trial. He further swore specifically the he instructed Mr. McKelvey to: ***"Be ready to object at trial based not only on discovery violations, but also to object during trial to any attempts by the State to admit evidence either not previously provided, or based on the State's failure to give specific notice of exhibits, or as otherwise required by pretrial Memorandum obligations connected to the Court's case management order requirements."*** The record showed Mr. McKelvey followed none of these instructions at trial given to him repeatedly by his direct supervisor.

Mr. McKelvey stated in his testimony at the W.R.A.P. Rule 21 hearing that he ***"had no excuse"***, and ***"it was not part of trial strategy"*** when he failed to object to illicit introduction of **"Exhibit 50"** by the D.A. that violated several **Court mandated** "Discovery Rules" and "Criminal Case Management Orders". Mr. McKelvey stated ***'he could have objected and moved to exclude evidence or limit witness testimony but failed to do so and had no excuse'***. He admitted that he did not make any objections to "Exhibit 50", **but that he *"should have objected to "Exhibit 50"***. Mr. McKelvey also testified he only first became aware of the state's intent to use the excerpts of recorded phone calls (that were "Exhibit 50"), during trial and that he did not know the phone calls were not complete calls and were instead just excerpts of calls taken out of context and carefully segregated out by the prosecution from much longer calls. He also expressed that the call excerpts (taken out of context) in "Exhibit 50" between Mr. Leners and Justin Calkin (Mr. Leners' friend whom he lamented to one night weeks before he went to Cheyenne where he had no idea Chris Trout would be and an altercation would ensue); ***"was very damaging to Mr. Leners' case and the outcome***".

The "Exhibit 50" recorded excerpts taken out of context from much longer calls featured Mr. Leners lamenting to a friend over a week before he was attacked in Cheyenne by Chris Trout. In the seconds long recording, Mr. Leners "preached to the choir" to his friend (who was also not a fan of Chris Trout's either as Trout had caused his mother and father's divorce). His friend made like statements, but Mr. Leners did say ***"If I got him alone he wouldn't be at work the next day"*** (referring to Chris Trout who would later attack & assault him over a week later, something he couldn't have foreseen), & ***"I'd like to kill that guy".***

Since neither of Mr. Leners' appointed trial counsels lodged any objections to this or the State's other numerous violations of the lawful "Pre-trial Memorandum Obligations", "Case Management Order Requirements" and "Discovery Rules"; the exhibit was then played for the jury and contained two previously unknown very damaging excerpts of Mr. Leners lamentations to his friend (Justin Calkin). This was over a week before he was in Cheyenne where he was attacked by Chris Trout as an incident recording later proved (and defended his life with his handgun with one shot that wounded Trout). Mr. McKelvey had never heard either call before and failed to react or object in any way at trial – a "Structural Error".

Miss Harris testified that in her opinion the recordings in Exhibit 50 were ***"very damaging evidence"*** and indicated she thought the evidence was ***"disastrous"*** to the defense and ***'changed the entire outcome of the trial'*** and that prior to the introduction of "Exhibit 50" ***"the trial could have went either way"***. She also stated she was never made aware before trail by Mr. McKelvey of any possible self-inculpatory statements by Mr. Leners, and also that Mr. Leners seemed unaware of the recorded statements himself and even shocked at the recording in the last minutes of the trial.

> Specifically, a trial error is generally subject to a harmless-error analysis. Malicoat v. Mullin, 426 F.3d 1241, 1249-50 (10th Cir. 2005) (noting that "most errors can be harmless"). **But a structural error**, which occurs in a very limited class of cases, **is a fundamental deficiency** in the trial process and is not subject to a harmless-error {2020 U.S. Dist. LEXIS 8} analysis. Id. **(stating that examples of structural errors include "the total deprivation of the right to counsel at trial, a biased presiding judge, the denial of the right to self-representation at trial, and a defective reasonable doubt instruction).**
>
> Malicoat v. Mullin, 426 F.3d 1241, 1249-50 (10th Cir. 2005)

In both of the previous "First" & "Second" "Primary Arguments" Mr. Morgan argued for Mr. Leners in his appeals with his writings, that the Defendant was subjected to TRIAL BY AMBUSH". Further, in the denial of Mr. Leners appeal, the Wyoming Supreme Court stated the known multiple violations and sub-par conduct by the Prosecution was ***"not to be condoned"***; but then denied and failed to hold the State accountable for any of its multiple violations of its lawful Pre-trial Obligations. This action by the court conflicts with all known law, case law and does in logical effect and fact; actually condone the prosecutor's misconduct that Mr. Leners' Appellate Counsel Kirk Morgan had previously documented with substantial case law as "TRIAL BY AMBUSH". Mr. Leners has also found the additional case law to support this.

> **A key policy goal of requiring parties to keep their disclosures current is 'to avoid trial by ambush'.**
>
> Gallegos v. Swift & Co., No. 04-cv-01295-LTB-CBS, 2007 U.S. Dist. LEXIS 5440, 2007 WL 214416, at *3 (D. Colo. Jan. 25, 2007) (citing Macaulay v. Anas, 321 F.3d 45, 50 (1st Cir. 2003)).

Further, as defendant's motion candidly acknowledges, to avoid trial by ambush, any potential prejudice or surprise can be cured by allowing defendant to depose these witnesses; given the scope of the testimony and defendant's familiarity with the individuals, the court anticipates this will be a short process that can be completed without disrupting the trial setting.

Morgan v. Cent. RV. Inc., 2018 U.S. Dist. LEXIS 42581 (D. Kan., Mar. 15, 2018)

The Tenth Circuit has explained that the purpose of which has been variously described as "to inform the defendant of the testimony which he will have to meet, and to enable him to prepare his defense," United States v. Chandler, 996 F.2d 1073, 1098 n.6 (11th Cir. 1993), **"to eliminate any element of surprise,"** United States v. Greene, 497 F.2d 1068, 1082 (7th Cir. 1974), **and "to prevent trial by ambush where a defendant's life is at stake."** Fulks, 454 F.3d at 422.United States v. Barrett, 496 F.3d 1079, 1116 (10th Cir. 2007).

United States v. Chandler, 996 F.2d 1073, 1098 n.6 (11th Cir. 1993), United States v. Greene, 497 F.2d 1068, 1082 (7th Cir. 1974), Fulks, 454 F.3d at 422.United States v. Barrett, 496 F.3d 1079, 1116 (10th Cir. 2007).

"The federal rules promote broad discovery so that all relevant evidence is disclosed as early as possible, making a trial 'less a game of blind man's bluff and more a fair contest'." (quoting United States v. Proctor & Gamble Co., 356 U.S. 677, 682, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958)); Brandon v. Mare-Bear, Inc., 225 F.3d 661 (9th Cir. 2000) **(stating that the principal goal of the discovery rules is to prevent trial by ambush and surprise)**.

The third primary example of "Ineffective Counsel" was entirely missed in his arguments by Appellate Counsel Mr. Morgan, but not by Mr. Leners. In fact Mr. Leners told Mr. Morgan to argue the following before the Wyoming Supreme Court in his appeal, but Morgan inexplicably denied doing so.

This third primary example of "Ineffective Counsel" came in Miss Harris herself when she testified about Mr. McKelvey's ineffective assistance. Her testimony revealed that she too was "Ineffective Counsel"; yet this 'white elephant in the room' was overlooked by Mr. Morgan and the Courts. *((The "100% covid lockdowns" Mr. Leners had been under for months prior to Mr. Morgan's "Brief of Appellant" and oral arguments, prevented him from communicating in time that this should have been a key argument of his appeal. This was an unconstitutional denial of due process and is argued later in the Writ in Section "Arguments of Merit"-"Question Three"))*. Miss Harris testified she ***'was assigned to the case too late to come up to speed', "Did not review any of the electronic discovery"*** (as she was told by Mr. McKelvey it was so extensive). She swore in testimony that she ***"was not to be considered a "50/50% responsible Counsel"***, and had told 1st Chair Counsel McKelvey to ***"assign her only specific tasks"***. She testified Mr. McKelvey granted her this request to be limited to almost NO RESPONSIBILITY AT TRIAL, and she was therefore ***"only assigned (by McKelvey) to examine only two of the less involved police officers"*** and ***"was assigned to jury instructions"***.

The fact that Mr. McKelvey allowed Miss Harris to continue into a murder trial with her actually having petitioned him to effectively recuse her from virtually any responsibility at all that a 1st year law student could not have performed – cements the fact that Mr. McKelvey was "Ineffective Counsel". The fact he granted her that request and so limited her responsibility to the point that it was 'ok with him' she didn't even review any of the electronic discovery in the case, is unfathomable. **No Reasonably Competent Attorney would have allowed any of this to happen in a misdemeanor trial, let alone a felony trial** and Mr. Morgan also failed to verbally argue this in his oral arguments at any of Mr. Leners' appeals. Just because Mr. Leners had counsel *'at the table'*, this does not mean he had **Sixth Amendment "Effective Counsel".**

> That a person who happens to be a lawyer is present at trial alongside the accused is not enough to satisfy the Sixth Amendment; an accused is entitled to be assisted by an attorney, whether retained or appointed, **who plays the role necessary to insure that the trial is fair.**
>
> **WY Criminal Law § 46.4 - right to counsel: 4.**

Finally, her testimony concluded with in trial: ***"I quickly realized I was more uninvolved and unaware of the case than I had ever previously been while serving as 2nd chair".*** All of Miss Harris' testimony about Mr. McKelvey being Ineffective Counsel, also demonstrated clearly that she herself as also "Ineffective Counsel" and the two paired together at a murder trial where the prosecutor had no less than THREE well prepared attorneys- most of whom were on the case over a year (while Miss Harris testified she had only been assigned to the case just a few short weeks before trial and was the THIRD assignment of Counsel to the Leners' case); was beyond disastrous. Mr. Leners had not even one "Effective Counsel"

This situation that took place with Miss Harris satisfied both prongs of the "Strickland Test" without question all by itself, and was further compounded by lead attorney Mr. McKelvey by failing in his duties to actually allowing Miss Harris to proceed into a murder trial when she admitted she was not a ***"50/50% responsible counsel"***, and ***"could only be assigned specific tasks"*** because she ***"did not review any of the electronic discovery"***. Both prongs of the "Strickland Test" are satisfied because no one could argue that going into a murder trial with one attorney who was not prepared or capable, and a lead attorney who failed in multiple instances to protect his client's rights to fair trial; did *not* have "**Reasonable Probability**" of prejudicing the results of the final trail outcome, especially when the Prosecution had three well prepared Counsels. Further it must be realized now that Appellate Counsel Kirk Morgan (as a reasonably diligent Attorney himself), should have without a doubt recognized (even without Mr. Leners' help) and made these facts part of his "*Brief of Appellate*" & verbal arguments to the Supreme Court. **This raises the question of Mr. Morgan being "Ineffective Counsel"** for failing to bring forth this issue of Miss Harris asking to be recused from any meaningful role as a Defense Counsel during Mr. Leners' trial, and McKelvey agreeing.

> Appellate counsel's filing frivolous appellant's brief amounted to no counsel at all, which actually or constructively denied defendant the right to appellate counsel, **and prejudice prong of *Strickland* test is not required.**"
>
> *Lombard*, 868 F.2d 1475 (5th Cir. 1989). See also *Harlow*, 2008 U.S. Dist. (Wyo).

Mr. Leners was denied a fair trial because the record and all testimony – **even by both his Trial Counsels themselves, showed Mr. Leners did not have even one Counsel that fulfilled the 6th Amendment Guarantee of "Effective Assistance of Counsel".** Even though Mr. Leners' Appellate Counsel failed to fully recognize this fact or argue it to this degree to either the District Court or the Wyoming Supreme Court; one or both of the Courts still should have recognized this unfathomable denial of Effective Counsel and thus the Defendant's Constitutional Right to a fair trial.

QUESTION TWO: Did the State Public Defender **violate** Defendant's US Constitutional rights when she refused to change his Counsel; **after Defendant wrote her well before trial that his assigned Counsel had demonstrated severe misconduct and stated 'Insurmountable Conflicts of Interests"** when he mocked the Defendant, stating contempt for him & his case, verbalized the desire *not* to defend him, refused to read his written evidence complaining it was *"too much"*, complained he was *"assigned too many cases and didn't have time"*, refused to pursue any suggested strategy, and refused to obtain or investigate or bring to trial known previous police reports on an assailant which proved he had previously attacked the Defendant (which caused him to defend his life); **even though her own case before the WY. Supreme Court provided *her* with relief from *her* complaints** that excessive workload was preventing her from

assigning "competent, diligent or conflict free representation"; resulting in "unethical representation" and "jeopardizing client's constitutional rights" to "effective assistance of counsel"?

Mr. Leners was arrested on the eve of December 23rd, 2017 in Cheyenne Wyoming after he told police he was attacked by Chris Trout in the apartment of Joyce Trout (where discovery evidence showed she had invited him to come, stating she lived there alone with her 8 year old daughter); after having lived with Mr. Leners in Nebraska for over 8 months. An "incident recording" made by the Defendant's phone showed that after his arrival at Joyce Trout's apartment, he was attacked by her estranged husband Christ Trout. A disabled Mr. Leners defended his life, wounding Trout with one shot from his legally permitted weapon. Mr. Leners was interned in the Laramie County Jail for over 3 months before his assigned trial Counsel Ross McKelvey came to visit him in late Feb 2018 after his numerous requests in writing to discuss the case. When Mr. McKelvey finally did come to the jail; the resulting meeting showed **Mr. McKelvey had "Severe Conflicts Of Interest" and absolutely refused to defend Mr. Leners. McKelvey openly stated his open contempt for Mr. Leners and his case, refused to accept or review evidence from him, complained of his excessive caseload, mocked his self defense claim, and even refused to obtain a previous known police report of Chris Trout attacking Mr. Leners in his own home in Fremont Nebraska**, that proved he had attacked Mr. Leners just 3 weeks before his second deadly attack on him (in which Mr. Leners, a seriously disabled Vet.; was arrested for defending his life).

Mr. Leners was so disturbed by McKelvey's unconstitutional/ unlawful conduct **he immediately wrote State Public Defender Diane Lozano, outlining the unlawful conduct, and pleaded with her to replace Mr. McKelvey** with a trial counsel who would fulfill the '6th Amendment Advocate' role guaranteed by US Const. 6th Amendment or at least meet him. **Miss Lozanos' replied in writing deliberately misdirected and absolutely refusing both of Mr. Leners' reasonable requests which resulted in "Constructive Denial of Counsel"** to Mr. Leners, by way of violating his right to not just an 'attorney of his choosing' (a "specific" attorney was **NOT** sought by Mr. Leners); but his Constitutional right to ***any*** competent / loyal, conflict free "6th Amendment Advocate". (Appendix "F")

The following meeting took place between Ross McKelvey and Mr. Leners in the jail in late Feb 2017: In this meeting Mr. McKelvey made several statements to Mr. Leners demonstrating he had severe "Conflicts of Interest", and even open contempt for Mr. Leners and his case. Specifically in the meeting, Mr. Leners asked Mr. McKelvey if he was going to review or act on the multiple pages of evidence he had written to Mr. McKelvey. Showing his complete refusal to even look at the evidence, Mr. McKelvey replied with: ***"Tim, you wrote me like 50 pages! How am I supposed to go through that!?"*** As the trial record demonstrated over a year later, Mr. McKelvey failed to present even one evidentiary item from Mr. Leners' writings. He openly stated and refused to accept evidence from Mr. Leners or act as any "Reasonably Competent and Loyal 6th Amendment Advocate" would act. This proved Mr. McKelvey's initial contempt and disregard for Mr. Leners' evidence and case as a whole held true from the beginning to the end; resulting in an unreliable and unjust guilty verdict over a year later due to "Conflict of Interest".

In the same meeting, Mr. Leners told Mr. McKelvey that he was innocent and that the self-defense case was self-evident and they needed to argue that the physical attack on Mr. Leners by Chris Trout was actually recorded (State's exhibit 15) and demonstrated for instance that Trout had threatened Mr. Leners over ten times with severe bodily harm or death just hours and minutes before he attacked him with deadly force. Mr.

Leners asked Mr. McKelvey if he had reviewed any portion of the "incident recording" and Mr. McKelvey stated: ***"NO – I don't have time, I have too many other cases!"***. Mr. Leners expressed his alarm at this and asked McKelvey how they could even effectively discuss the case if he was not going to review evidence of such importance. Mr. McKelvey gave no other direct reply for his conflict of interest or dereliction and shrugged it off indifferently. **The record showed the recording Mr. Leners wanted and *needed* counsel McKelvey to review was only 2-3 hours long, yet the trial record and McKelvey's own W.R.A.P. 21 testimony proved that Mr. McKelvey never reviewed all the electronic evidence or the entire recording before trial over a year later.** A 'Reasonably Competent 6th Amendment Advocate'; diligent or loyal to his client, would never exhibit such dereliction or fail to review such **vital** evidence.

> **Prejudice is not required where the ineffectiveness of counsel is "so pervasive that a particularized inquiry into prejudice would be 'unguided speculation.'"** We so hold here. The haphazard nature of the Atkinses' defense, the failure to develop strategy of any consequence, and absenting themselves from crucial portions of the trial constitutes no representation at all. Given the totality of the circumstances, ineffectiveness of trial counsel has been amply shown.
>
> *Washington v. Strickland*
> 693 F.2d at 1259, n. 26 (1984).

Mr. Leners then told Mr. McKelvey the content of the several threats recorded on that "incident recording" by Trout and that in the worst threat Trout could be heard telling Mr. Leners: ***"I'll f*cking kill you and they will never, ever, ever find your body!!"*** just moments before he attacked him. In the portion of the recording where Chris Trout attacked and assaulted Mr. Leners, Trout could be heard screaming insanely and often incoherently at Mr. Leners, while Mr. Leners was heard screaming back in obvious terror for Trout to stop his assault with expressions like: *"Whoa! NO! No! STOP! Let Me Explain!!"* as he tried to retreat from **Trout** (who was twice his size, not disabled like Mr. Leners, was drunk and suspected armed). Additionally sounds of blows landing on Mr. Leners could also be heard on the recording as well (that were later verified as true by expert witness testimony at trial by RN Nurse Mrs. Eastman, who testified with pictures of Mr. Leners' bruising that she categorized as "severe"). In reply to Mr. Leners at that meeting in 2018, Mr. McKelvey crossed his arms, leaned back in his chair with disgust & contempt replied: ***"Well Tiiiiiiim! you packed your belongings, came to Wyoming at Christmas time and shot Chris Trout!".***

Effectively Mr. McKelvey had just told Mr. Leners: *"LOOK, YOU BROUGHT A GUN* (legally licensed) *TO WY AND SHOT YOUR ATTACKER, IT DOESN'T MATTER IF IT WAS SELF DEFENSE, YOU ARE GOING DOWN AND I'M NOT WASTING MY TIME!* Mr. McKelvey's statements and refusals to accept or even investigate evidence positively doomed his defense and violated his right to "Effective Counsel" free of "Conflict of Interest". All of Mr. McKevely's statements to Mr. Leners prior to trial were later manifested true in the trial by his numerous "Structural Errors" and severe failures that irreparably prejudiced Mr. Leners' defense, denying him a fair trial.

No 'Reasonably Competent Defense Counsel' would have ever refused evidence or to investigate and obtain police reports on his assailant for his client. A Competent attorney without conflicts of interest would have instead exposed such significant evidence in trial; but the trial record showed McKelvey failed to act on any evidence. It showed his failure to even question either Trout or police, or

cross examine Trout, and place into context for the jury; that key recording full of Trout's threats to Mr. Leners. Had McKelvey done even this one thing differently, the jury would have been confronted with the fact that Trout threatened Mr. Leners many times and then violently attacked him just minutes later. That in itself would have created a reasonable probability of a not guilty verdict being returned. But because of Mr. McKelvey's severe defense debilitating conflict with his lawful duty and Miss Lozano's refusal to replace Mr. McKelvey; Mr. Leners was doomed from that fateful day in late Feb 2018 until his trial in May 2019.

> **Defense Counsel's admitted failure to investigate facts is unconscionable and falls below level of performance of counsel required by Sixth Amendment**; while it is not necessary that counsel be private investigator in order to discern every possible avenue which may hurt or help client, counsel must make effort to investigate obvious.
>
> House v. Balkcom, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).)

After the meeting, Mr. Leners was so disturbed at Mr. McKelvey's unlawful conduct in his statements to him that he immediately called his wife from jail and told her every detail of the meeting. Mrs. Leners immediately wrote Mr. McKelvey an email expressing her alarm at some of Mr. McKelvey's stated conflicts and refusals to effectively represent her husband the Defendant. (Appendix "G") Mr. McKelvey never replied to this even though Mr. Leners signed releases stating Mrs. Leners was fully authorized.

The matter was soon to get even worse when defendant notified state public defender Diane Lozano of her employee's conduct and his refusal to defend him; and she refused to act / correct the situation even though soon she would herself have a case before the Wyoming Supreme Court in which she would claim (at the same time as Mr. Leners case) her office staff was over worked and understaffed, and she stated was suffering from the same things Mr. Leners had just stated to her that his case was suffering from. – The court provided her relief (that she denied Mr. Leners).

Mr. Leners wrote Miss Lozano immediately following his meeting with Mr. McKelvey and told her of all the things he had said to him, how he had refused to investigate his evidence, stated he was assigned too many case and had no time for him, refused to obtain police reports of Chris Trout's previous attack on Mr. Leners that he knew existed; and all other manner of his unlawful conduct that indicated to Mr. Leners that Ross McKelvey had no intention of defending him at all (an assumption that proved true at trial). Mr. Leners' requests of Miss Lozano and categorizations to her of Mr. McKelvey as basically a **'hostile counsel to his defense'**, were all born out and held true in the trial itself; which proved to be a mockery to the Constitutionally Guaranteed Right to a Fair Trial and "Effective Counsel" free of "Conflicts of Interest". Mr. McKelvey several trial errors were "Structural Errors" that were not harmless.

> P4 Ms. Lozano explained the public defender policies on maximum workloads, how those policies were derived, and how she applied the standards contained in the policies. **She further explained:**
>
> In essence, if the public defender field offices have workloads that exceed 100%, **the right to counsel is jeopardized; a lawyer with an excessive workload cannot provide competent, diligent or conflict free representation**. These attributes of effective assistance of counsel are required not only by case law but are requirements of the Code of

Responsibility. The State Public Defender and Bar Counsel have worked closely on this matter and he agrees **that excessive workloads result in unethical representation. When an attorney cannot meet his/her ethical obligations, she not only jeopardizes the client's constitutional rights**, she jeopardizes her license to practice law.

(State Public Defender Lozano v. Circuit Court of the Sixth Judicial District. 2020 WY 44: 460 P.3d 721: 2020 Wyo. LEXIS 45 S-19-0121 April 1, 2020. Decided by SUPREME COURT – WY).

In spite of her own arguments to the Wyoming Supreme Court that were soon to take place on her own behalf, (and free her from contempt of Court); On March 8, 2018, Miss Lozano replied with misdirecting statements in writing to Mr. Leners and vehemently denied his lawful request to relieve him of Mr. McKelvey's severe conflict of interests and unethical behavior, or even to simply meet with him to discuss the matter. In doing so, Diane Lozano denied the Defendant not just his right to his 'counsel of choice'; (Mr. Leners was not requesting a "specific person"); **but to *any* acceptable and qualified diligent loyal attorney.** (Appendix "F" herein) This Appendix shows Miss Lozano's refusals to Mr. Leners; **TO BE IN COMPLETE CONTRADICTION TO WHAT SHE TOLD THE WYOMING SUPREME COURT DURING THE SAME EXACT TIME PERIOD.**

Erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.

United States v. Gonzalez-Lopez 548 U.S. 140, 140-41, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).

Miss Lozano had to know her office's problems were not limited only to misdemeanor cases or a specific county. She was now aware of Ross McKelvey's statements of severe conflicts of interest and that they proved the Public Defender's problems providing Competent Counsel free of conflicts of interest to *any* Defendant did not develop overnight & had been going on for some time. ***According to Mr. McKelvey,* the same problems were occurring in Cheyenne where Mr. Leners' case was taking place (same time period),** and yet this was a murder trial no less & not a misdemeanor case, making it even more severe.

This problem of Mr. Leners' case continuing to be denied "Competent Counsel Free of Conflict of Interest", was further proven when Mr. Leners 2nd chair counsel was changed 3 times, **the final time being when Miss Emily Harris was appointed to his case only a few weeks before the trial and stated on the stand later she** "*did not have time to come up to speed*", was "*not a 50/50% responsible counsel*", "*did not review the discovery evidence*" and asked Mr. McKelvey "*to assign her only specific tasks*".

Because of Diane Lozano's "Constructive Denial of Competent Counsel" to Mr. Leners that was free of "Conflict of Interest" (and the Defender's proven problems of being able to retain competent counsel on the Leners case or virtually any case **according to Lozano's own statements to the WY Supreme Court**); she failed in responsibilities as the State Public Defender by denying Mr. Leners (basically) "any" Counsel free of "Conflicts of Interest" because having a counsel *'at the table'* does not fulfill the 6th Amendment guarantee or Wyoming law. Miss Lozano erred in observing the US Constitutional guarantee and the Wyoming law by failing to ensure Mr. Leners was provided with those rights. Just because Mr. Leners had counsel ***'at the table'***, that did not mean he had **Sixth Amendment Guaranteed "Effective Counsel".** Mr. McKelvey *not* being replaced after such stated "Conflicts" with Mr. Leners case proved catastrophic.

WY Criminal Law § 46.4 - right to counsel: 4.
That a person who happens to be a lawyer is present at trial alongside the accused is not enough to satisfy the Sixth Amendment; an accused is entitled to be assisted by an attorney, whether retained or appointed, **who plays the role necessary to insure that the trial is fair.**

> Specifically. a trial error is generally subject to a harmless-error analysis. Malicoat v. Mullin, 426 F.3d 1241, 1249-50 (10th Cir. 2005) (noting that "most errors can be harmless"). **But a structural error, which occurs in a very limited class of cases, is a fundamental deficiency** in the trial process and is not subject to a harmless-error {2020 U.S. Dist. LEXIS 8} analysis. Id. **(stating that examples of structural errors include "the total deprivation of the right to counsel at trial, a biased presiding judge, the denial of the right to self-representation at trial, and a defective reasonable doubt instruction).**
>
> Malicoat v. Mullin, 426 F.3d 1241, 1249-50 (10th Cir. 2005)

Additionally Because State Public Defender Lozano refused to replace Mr. McKelvey after all the evidence showed he was not willing to defend Mr. Leners; Mr. McKelvey's conduct worsened all the way to trial and was further evidenced in the following witnessed facts included in affidavit herein (Appendix "E").

When Mr. Leners went home on bond for over a year, he continued to work on his case while Mr. McKelvey completely ignored it. During Mr. Leners' bond period, he made several phone calls from his home in Nebraska to Mr. McKelvey with valuable evidentiary items & pleadings for Mr. McKelvey to gather & investigate evidence that the Cheyenne Police detective refused to acknowledge or investigate. **An extremely key item Mr. Leners asked Mr. McKelvey to obtain in his defense & present at trial were two police reports on his attacker Chris Trout.** One report was from the Fremont Nebraska police and another from the Bellevue Nebraska police department. Both reports were filed by Joyce Trout.

The Fremont police report stated that Chris Trout had attacked Mr. Leners in his Fremont NE home just two weeks before he did it again in Cheyenne Wyoming – actually punching a window out of Mr. Leners' rental home, in Mr. Leners face; and then trying to drag him through it to assault him. Although Mr McKelvey never obtained it or presented it in trial, this report was verified accurate in Exhibit 15 (the incident recording made by Mr. Leners' phone of Trout's attack on him in Joyce's apartment 12-23-2017); when it demonstrated Chris Trout bragging on it to Mr. Leners saying: ***"Yeah, I could have dragged you through that window if I really wanted to!!"***. As Mr. McKelvey never obtained the report and didn't address this to the jury / court, or cross examine Trout or question police why they didn't take this report into account when Mr. Leners told them of it; this watershed admission went completely unnoticed. This single report could have changed the entire outcome of the trial and resulted in a "not guilty" verdict.

The Bellevue police report stated Chris Trout had called Joyce Trout her after she left him for Nebraska, and threatened her and her 8 year old child in her previous Bellevue NE apartment (before she moved to Mr. Leners' rental). She reported that Trout threatened to kidnap her daughter & withhold money from her.

Both reports clearly demonstrated Chris Trout was an out of control, dangerous aggressor and law breaker with a pattern of attacks on others. When Mr. Leners told Mr. McKelvey of the value of these reports to his defense – particularly the Fremont report demonstrating Chris Trout had a history of physically attacking Mr. Leners; Mr. McKelvey completely disregarded Mr. Leners' requests and actually told him on the phone: **"Just mow your lawn and let us handle this!"**. Mr. Leners' wife Kathrine witnessed the phone call and wrote of it in here sworn affidavit. (Appendix "E" herein)

> **Defense Counsel's failure to investigate facts is unconscionable and falls below level of performance of counsel required by Sixth Amendment**; while it is not necessary that counsel be private investigator in order to discern every possible avenue which may hurt or help client, counsel must make effort to investigate obvious.
>
> House v. Balkcom, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

When Mr. Leners was out on bond for over a year he also submitted numerous emails to Mr. McKelvey with substantial high quality evidence, including **an easily referenced spreadsheet that cross referenced critical items like every impeachable statement of witnesses in comparison to each item of true discovery evidence or with another conflicting written or verbal statement by the same or other witness(es) (to include police)**. Just like in "Calene", Mr. Leners pre-identified each witness to Mr. McKelvey and their impeaching testimony through their own statements to police, cross referencing them with proof of impeachability in the discovery evidence. The trial record showed that again that Mr. McKelvey failed to use **even one item** to question or even cross examine witnesses who made known perjured statements at trial. He also failed to bring evidence before the Court that Mr. Leners gave or expose in any way to the Jury; other key evidence using various accepted trial procedure/ practices.

The end result of Miss Lozano's original "Constructive Denial of Competent Counsel" to Mr. Leners proved to be the "Very Cornerstone Foundational Structural Defect" that sunk the Defendant's entire trial before it even began. To say her inaction was far reaching would be an understatement. The numerous "Structural Errors" by Mr. McKelvey were effectively foreseen by Mr. Leners after Mr. McKelvey's conduct and statements to him in February 2018; but State Public Defender Lozano refused to act to preserve his rights to a fair trial. Inevitably this set off the catastrophic domino effect of the Defense being prejudiced, which rendered the verdict not only questionable; but entirely unreliable.

A Defense attorney who refuses to defend his client is like a cracked and shattered foundation corner stone. To know that stone is cracked and shattered, *and yet refuse to replace it before building the entire house on top of it*; is unfathomable but this is what the State Public Defender did. She refused to replace that stone (Mr. McKelvey) even though Mr. Leners factually told her it was faulty & incapable of bearing any weight.

Had Mr. McKelvey been replaced with a Counsel who embodied the role of a 6th Amendment Advocate; **more than a "Reasonable Probability" existed that the verdict would have been more favorable to Mr. Leners**, especially given all Mr. McKelvey's openly stated conflicts of interest and contempt for the Leners case. Additionally, a "Reasonable Probability" does not mean the verdict would have *more likely than not* been different, but means only that the likelihood of a different result is only great enough to undermine confidence in the trial outcome." All evidence demonstrated this was the case here.

> Prejudice occurs when there is a **reasonable probability** that, absent counsel's deficient assistance, the outcome of **appellant's trial would have been different**. Further that "**a reasonable probability does not mean** that the defendant would more likely than not have received a different verdict, but means only that the likelihood of a different result is only great enough to undermine the confidence in the outcome of the trial.
>
> Winters v. State, at 11, 446 P.3d at 198.

The end result was that Mr. Leners was "Constructively Denied Counsel" who was free of "Conflicts of Interest" and capable of / willing to, fulfill the Constitutionally guaranteed role of "Sixth Amendment Advocate"; without which the "Adversarial Process" lost all integrity and denied Mr. Leners a fair trial.

QUESTION THREE: Was Defendant's 5th Amendment Constitutional **right** and desire to participate in his own Appeal / 'Due Process', **violated** when the Court denied his "*Motion for Permission to file Pro Se Supplemental Brief*", although the *Motion* established indisputable fact it was constitutionally necessary **due to Defendant being effectively & involuntary isolated from any meaningful communication with his appointed Counsel and legal resources for months before Counsel filed his "*Brief of Appellant*";** due to the historic combination of prison "defense destroying 100% Covid lock-downs", and the Public Defender's Office "slashing Counsel's working office hours by over 75%" (to less than 10 reachable hrs./ wk.), which Defendant presented resulted in destroying any reasonable chance for his appeal's success?

Mr. Leners was denied his "5th Amendment Right to Due Process" and his right to participate in his own defense due to the prison's "Severe defense destroying 100% covid lockdowns" that lasted from late September until well past Mr. Morgan's submission of the "*Brief of Appellant*" & "*oral arguments*" before the Wyoming Supreme Court. The lockdowns made it impossible for him to contact his counsel in any way to work on his appeal with him before counsel filed his brief on his own; **without Mr. Leners' input**. All remedies requested by Mr. Leners were refused by the prison (WSP-Wyoming) to work on his case. As if the lockdowns were not enough, his Counsel's working hours were slashed by the public defender by over 75% to less than 10 hours of "reachable office time" a week. Because Mr. Leners had no way to anticipate the schedule of the lockdowns or his Counsel's availability, he could only live day by day and hope the lockdowns that were destroying his case; would soon end and he'd be able to contact his Counsel again and try to participate in his own appeal/ defense, in some lawful meaningful way, as was his Constitutional Right.

The combination of these factors destroyed Mr. Leners' appeal and when he tried to remedy it by filing a "*Motion for Permission to File Pro-Se Supplemental Brief*" (Appendix "C"); the Wyoming Supreme Court denied it without acknowledging or addressing facts in it that proved the *Motion* was both legally justified, and **constitutionally necessary** in light of denial of due process that took place. (Appendix "D")

Almost immediately after Appellate Counsel Kirk Morgan filed a "*Notice of Appeal*" on 9-17-2020 to the Wyoming Supreme Court from the District Court's denial of Mr. Leners' "W.R.A.P. 21 new trial motion"; **Mr. Leners was involuntarily and completely isolated from his Counsel through no conduct or fault of his own.** Thus from late September 2020, Mr. Leners was not able to participate at all in any meaningful or constitutionally guaranteed way in his Appeal before Mr. Morgan filed his "*Brief of Appellant*" on 11-23-2020; which was 100% independent of Mr. Leners' input. This resulted in a completely inadequate "Brief".

> Appellate counsel's filing frivolous appellant's brief amounted to no counsel at all, which actually or constructively denied defendant the right to appellate counsel, **and prejudice prong of *Strickland* test is not required**."
>
> *Lombard*, 868 F.2d 1475 (5th Cir. 1989). See also *Harlow*, 2008 U.S. Dist. (Wyo).

These lockdowns did systematically prevented Mr. Leners' from participating effectively (or even at all) in his Appeal & Defense from late September 2020 through February 19, 2021 (This is over a four month period). During this time period, WSP prison in Wyoming subjected Mr. Leners (and all inmates) to severely abusive and defense destroying 'Covid lockdowns' which did keep Mr. Leners completely isolated from being able to use a computer in any effective way, access electronic law (Lexis), and even use phones to contact his Appellate Counsel for weeks and months on end.

No factual argument could deny that if a man is prevented from participating in his own defense or appeal, his Constitutional Rights have been more than "substantially violated". Likewise, no one could argue that such isolation from one's own defense did not cause the appeal to fail, because no one knows the details and evidence greater than the accused himself, and if the accused cannot relay or discuss things with appointed counsel; any chance of success is below dismal. Such systematic & complete denial and removal from one's ability to defend themselves is nothing less than unconstitutional, unlawful & tragic.

Beginning in September 2020 and lasting through February 2021 (well after Mr. Morgan filed his Brief and performed his oral arguments) Mr. Leners was 100% isolated from his Counsel by the prison's historic and tragic "unprecedented 100% Covid lockdowns". During the 100% lockdowns Mr. Leners was:

- **DENIED** phone use during any of Mr. Morgan's reduced working hours
- **DENIED** effective computer use to write Mr. Morgan-competing for 2 keyboards with 84 other inmates
- **DENIED** computer / Lexis law and case law access- competing for 1 of 2 keyboards with 84 inmates
- **DENIED** copy services and notary services
- **DENIED** mental health services (Mr. Leners being a VA 100% mentally disabled US Veteran)

Prison staff even slipped hastily typed "unofficial memos" under cell doors stating the denial of all computer services – even going so far as to say that even *"research for your case and copy services are suspended until further notice"*. The prison also shut down all physical and mental health services, instead slipping photocopied "cross word puzzles" under cell doors with typed "notes" telling prisoners to *"use coping skills"*. Showers often didn't happen for days on end, all food was cold and bacteria ridden, and computer / phone use during business hours all but stopped. Inmates were given 15 minutes out of cell every few days to shower and call home. All of this violated numerous Federal laws.

For months prior to his "*Brief of Appellant*" and oral arguments, Mr. Leners was in his cell 24/7 with no idea when the lockdowns would end and with no communication with Mr. Morgan. The effect was catastrophic and resulted in Mr. Leners' WY Supreme Court appeal failing. Mr. Leners' opportunity at his one time Supreme Court Appeal was destroyed before it ever got off the ground. All of Mr. Leners' efforts to prepare with his Attorney Kirk Morgan, any sort of substantially complete appeal; were fully disenfranchised by the lockdowns and the **prison's denial of constitutionally necessary resources required in the modern age to even hope to participate in one's defense against a veritable army of prosecutors, lawyers and courts with untold technology and unlimited access**.

As if the lockdowns were not already the last nail in the coffin, **The Wyoming Public Defender's Office sealed Mr. Leners' fate and that of likely several other prisoners in appeals; by absolutely slashing all Appellate Counsel working hours by over 75% to less than 10 hours a week or "contactable hours".** This meant that even though Mr. Leners and other inmates who already could not contact their Public Defenders anyway; were most certainly without ANY hope at all now because this "slashing of hours" was:

- **NOT** sent out in writing by the Public Defender's Office
- **NOT** published in any way for inmates to be aware of
- **MADE EVEN WORSE** by inmate competition to get to a phone to contact their assigned counsel
- **WAS FURTHER REDUCED** by attorney absences and meetings during the miniscule hours they were supposedly available to take inmate calls – even further reducing those hours by up to 50% more.

Mr. Leners didn't even learn of this "slashing of hours" until one day when he actually ***was*** lucky enough to be able to get a phone for a miniscule 15 minutes to call Mr. Morgan, only to be told by his staff on the phone that he ***"wasn't available for calls"*** that day due to a meeting or because he was on another call.

Mr. Morgan's office 'covid procedures' limiting hours to less than 2 days a week **minus** lunch, other calls, meetings, absences, etc.; disastrously exacerbated the already impossible conditions under which Mr. Leners tried to defend himself in this Appeal and made all his efforts impossible. Even every few random days (out of several days in a row with no calls or out of cell time), when Mr. Leners *was* let out of his cell for a miniscule 15 minutes; he was ***still*** unable to call, work on the computer or access law; because he was required to shower during the same insufficient 15 min. period, compete with 84 inmates for a computer, or it was on a day or during hours Mr. Morgan was not in the office or unavailable to take calls.

The lockdowns and his Counsel not being available in the office for calls had the exact same end result as if Mr. Leners had been constructively denied any Counsel at all. This was a "Constitutional Crisis" and Mr. Leners and likely many others suffered the resulting appeal losses.

> Specifically, a trial error is generally subject to a harmless-error analysis. Malicoat v. Mullin, 426 F.3d 1241, 1249-50 (10th Cir. 2005) (noting that "most errors can be harmless"). **But a structural error**, which occurs in a very limited class of cases, **is a fundamental deficiency** in the trial process and is not subject to a harmless-error {2020 U.S. Dist. LEXIS 8} analysis. Id. **(stating that examples of structural errors include "THE TOTAL DEPRIVATION OF THE RIGHT TO COUNSEL AT TRIAL, a biased presiding judge, THE DENIAL OF THE RIGHT TO SELF-REPRESENTATION AT TRIAL, and a defective reasonable doubt instruction).**
>
> Malicoat v. Mullin, 426 F.3d 1241, 1249-50 (10th Cir. 2005)

> **A defendant who elects to be represented, however, does not 'surrender control entirely to counsel.'**
>
> *United States v. Rosemond* 958 F.3d 111, 119 (2d Cir. 2020) (citing to *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508, 200 L. Ed. 2d 821 (2018)).

When Mr. Leners did receive Mr. Morgan's **independently filed** *"Brief of Appellant"* in January 2021 (after it was too late), Mr. Leners reviewed it (under 100% lockdown) and found it to be woefully insufficient, inaccurate/ incomplete with respect to the full record and his desired arguments. He still had no recourse due to the aforementioned lockdowns and drastically reduced public defender hours and all manner of other resulting obstructions to his due process. Mr. Leners having no criminal law experience did not know what he could do to remedy the situation but tried to quickly find a solution to remedy the unconstitutional results of his failed appeal. **Mr. Leners had no choice but to wait for the lockdown to lessen as the prison refused to provide remedy in spite of written requests for relief and computer access.**

For Mr. Leners' the lockdowns did not reduce enough for him to work on his case or contact Mr. Morgan until well **after February 20th, 2021**. By then his counsel's *"Brief of Appellant"* and *"oral arguments"* had already taken place. It was at this point Mr. Leners found it necessary to try to pursue his own *"Motion for Permission to File Pro Se Supplemental Brief"*; to remedy Appellate Counsel's insufficient *"Brief of Appellant"* that didn't contain several appealable issues he wasn't able to convey to Mr. Morgan in time. Mr. Leners started working on it fervently (having no criminal law experience whatsoever and although he is a "100% Total & Permanent Disabled Marine Veteran" by the V.A. for PTSD & Major Depressive Disorder, and not "functional" in the sense it is widely understood by the 'normal' population). Mr. Leners was still subject to a "computer to inmate ratio" of less than 5% and still experienced debilitating lockdowns/ other chaotic obstructions; but **he was finally able to submit his *"Motion for Permission to File Pro-Se Supplemental Brief"* on 4-5-2021.** The *Motion* complied with all rules of the Court (Appendix C).

Despite delays by further lockdowns and prison circumstances, such as a less than 1.6% computer to inmate ratio and a nearly impossible "access window" in which he had to compete with others for a keyboard He submitted it as soon as it was humanly possible (4-5-2021). **His *"Motion for Permission to File Pro-Se Supplemental Brief"* was received by the Wyoming Supreme Court well before they ruled,** yet it was denied anyway on 5-4-21 and his full appeal denied on 5-14-21. On 6-2-2021 the Court issued its Mandate upholding his conviction. The grounds he stated in the "Pro-Se" were never addressed.

THE SCHEDULE OF LOCKDOWNS FOLLOWS IN HEREIN ("APPENDIX L");

REASONS FOR GRANTING THE PETITION

Defendant presents to the United States Supreme Court that a ruling on each specific Question corresponding Argument of Merit; they will right severe miscarriages of justice that affect every citizen. They will **establish new precedence in "Watershed" issues and thus promote and ensure Nationwide Homogeneity in law.**

IN RULING ON QUESTION ONE, THE COURT WILL restore & refresh the true meaning of "Ineffective Counsel"; which has been LOST over time. It will set new precedence using a **"Gold Standard"** case, and instruct lower courts responsible for allowing that standard & justice to wane to a point of near uselessness. The Court will restore accurate use of precedence to effect justice for all & ensure Constitutional Rights are re-invigorated.

In selecting this Writ and this specific "Question / Argument" to rule on; **the US Supreme Court will set precedence in showing a case that represents the "Gold Standard of Ineffective Counsel"**; cannot be ignored for the imperative good of the public, the Law; the Nation and the Constitution itself. The court would show by ruling that when gross incompetence of multiple defense Counsels in a felony trial, simultaneously and on so many levels and ways- both before and after trial; reaches "Constitutional Dimensions", yet most importantly somehow ***still*** goes unrecognized and un-remedied by two lower courts despite the overwhelming evidence and testimony showing "foundational and structural incompetence" of a 1st and 2nd chair defense counsel combined; **IT CANNOT GO unanswered for future posterity & justice.**

The Court would establish that when a 1st Counsel exhibits professional misconduct or incompetence from the onset with a client, refuses to accept evidence from a client, refuses to investigate or obtain known police reports for trial that could vindicate the defendant, fails to review the discovery evidence, complains to his immediate supervisor repeatedly that he wants the prosecutor to tell him what evidence he should review before he reviews any of it, fails to obtain all the police reports generated in the case over a year before trial until less than 12 hours before trial, mocks the defendant's innocence and self defense, fails to act nearly at all in trial to cross-examine known perjured testimony by witnesses / police, failed to maintain the integrity of the "Adversarial Process" and hold the prosecution to **Court mandated** "Discovery Rules" and "Criminal Case Management Orders" by failing to object to late evidence introduction **so damaging that both defense counsels admitted in later testimony it changed the outcome of the trial** – and instead allows "Trial by Ambush" to occur only an hour before jury deliberation by doing unprecedented things such as listening to recorded exhibits at the defense table, during trial, on the last day and in the last hour for the very first time; **The court would establish NEEDED precedence that lower courts MUST be held accountable for failing to recognize and right such unconstitutional ineffective representation.**

The Court would furthermore establish that when circumstances of "Ineffective Counsel" reach such unreal proportions, it cannot be ignored by a just Nation for fear of it reoccurring many times. **The Court would also show by ruling here that a 2nd chair counsel is NOT EXCUSED from "Effective Representation in a 6th Amendment Role" just because they are second chair;** and that their incompetence or lack of preparation or effort to defend the client, is just as severe as the primary counsel- especially when a prosecutor is represented by multiple attorneys. The court would recognize circumstances such as a 2nd chair counsel telling the 1st chair counsel to excuse and effectively "recuse" and remove them from having to review **any** of the discovery evidence before trial and from performing ***ANY*** meaningful role at all during a felony murder trial. They would recognize that pre-trial statements by a 2nd chair to the 1st chair counsel that they were "assigned too late to the trial" to be expected to do anything except "very specific tasks" and that they were **not** a "50/50% responsible counsel"; also constitutes "Ineffective Counsel". And most importantly the Court would establish that if any of these things were to occur before trial - and yet the 1st chair counsel still allowed the 2nd chair to continue into a felony trial where a man's life, liberty and freedom were at stake;

that it CANNOT GO unaddressed and uncorrected lest a disastrous, unlawful, and unconstitutional precedence be forever set in the nation, rendering the term "Ineffective Counsel" to be so degraded – that is becomes useless and meaningless, which would be catastrophic for the Law and "We the People".

It is presented that if the gross examples of "Ineffective Counsel" in this case are ignored and not corrected by instructing lower courts in their error, **"Case Law Precedence" will be forever degraded to the point that all lower courts *could* effectively never hold a Counsel responsible for being Ineffective again.** When both defense counsels are so totally ineffective, one openly states their ineffectiveness to the 1st chair counsel, and yet the 1st chair allows them into a trial anyway where the prosecutor has more than three well trained and capable attorneys who *ARE* familiar with all the discovery evidence and *ARE* capable in a "100% responsible" way; the "ineffectiveness" has reached unheard of proportions **and the "Dam Of Justice" must be restored,** lest it be breached so many times following, that it is eventually destroyed entirely. By not ruling on this Question, the damage wreaked on a justice system that is reliant upon "case law" would be unquantifiable and furthermore virtually un-repairable once allowed to propagate. It is submitted that the requirements for "Ineffective Counsel" **must be restored by the Court for the Nation and its people.**

IN RULING ON QUESTION TWO, THE COURT WILL resolve a conflict resulting from a ruling set forth by the Wyoming Supreme Court that granted State Public Defender relief, yet this same relief was then denied to the Defendant by the State Public Defender; resulting in the very 'Constructive Denial of Counsel' and 'Unethical Representation' the State Public Defender's case was about to begin with.

The Court will Nationally establish when unethical behavior by Counsel resulting from "Conflicts of Interests" to include verbal refusals by a Defense Counsel to defend his client or investigate evidence; will not be allowed to deny a Defendant a fair trial. The ruling will establish that relief given to the State Public Defender by a State Supreme Court, shall also follow through to the Defendant; whom the office is charged with defending and for whose benefit the relief was sought and provided in the first place.

In selecting this Writ and this specific "Question / Argument" to rule on; the US Supreme Court **will resolve a conflict between the decision of a State Supreme Court,** and the actual contrary actions of the State Public Defender (to its clients) who the decision gave relief to. **This will also prevent future disagreements among all lower Courts** about the issues of "Constructive Denial of Counsel" and "Unethical Representation"; and establish a homogeneous standard for all to follow so a Defendant is not constructively denied effective counsel when a defense counsel's unethical or incompetent actions or statements, indicate to a Public Defender's Office; that replacement of that counsel is NECESSARY to ensure a fair trial through effective and loyal representation by a true "6th Amendment Advocate" who fervently pursues the "Integrity of The Adversarial Process", and accepts and discharges those lawful responsibilities so justice is preserved.

The Court would announce to our Great Nation of Law by ruling on this matter Nationally, **that "across the board" standards apply to all public Defender Offices** when a client who is appointed counsel by the Court; brings to their attention that the appointed counsel is demonstrating one of several professionally unacceptable or unethical behaviors by alerting the State Public Defender that his/her appointed counsel has verbally stated or demonstrated any 'Conflict of Interest' or "Unethical Refusal To Defend" said Defendant. The Court would establish that a court appointed counsel **must be evaluated and possibly discharged** from a case by the Public Defender's Office when the client reports to the State Defender **that said counsel has verbalized or documented to the client**; an (effective) **desire *not* to defend** them, a ***refusal*** to accept or thoroughly evaluate the client's lucid and legible submitted evidence (evidenced by complaints such the evidence is *"too much"*), a ***complaint*** to the client that counsel is *"assigned too many cases and doesn't have the time/desire to defend them due to excessive workload"*, ***a refusal to investigate*** or pursue known evidence or police reports that the client makes them aware could vindicate the client in trial, or ***open mocking of the client*** or their defense/ case; ESPECIALLY WHEN the Public Defender's Office submitted a case to a higher Court in which they themselves have sought (and/or were awarded) RELIEF from

complaints by the Office that the excessive workload of the office is preventing them assigning "competent, diligent or conflict free representation" to assigned clients that the State Public Defender has told the Appeals Court is resulting in "unethical representation" and "jeopardizing client's constitutional rights" to "effective assistance of counsel". **In so ruling, the US Supreme Court would thus establish a "Benchmark" for all State Public Defenders to follow**, which is of great importance to the public at large; any of whom could find themself involved in a case at any time; and be thus subject to assignment of counsel by that State office.

Additionally and as important; **the US Supreme Court's ruling will provide relief to those who have come before and have proof they were denied effective / competent / loyal counsel, *OR* denied review of appointed counsel's misconduct** that they made the Public Defender aware of, *OR* have documented proof from the State Defender they were denied a change in counsel at their request after reporting suspect "Conflicts Of Interest" or "Unethical Behavior" by an assigned counsel. When such deficiencies occur to a Defendant due to Defense Counsel's actions or statements - and/ or the refusal of the Public Defender to act on said deficiencies of Counsel when so alerted by the Defendant; The Court will be able to establish the actions necessary to overcome the unconstitutional result or denial of fair trial / justice. **In so doing, the US Supreme Court protects the People from denial of Constitutional Rights and recognizes and establishes Nationwide and even across the Globe; that that an assigned counsel who acts more like a prosecutor, is far more destructive in a trial than no counsel at all.**

***IN RULING ON QUESTION THREE, THE COURT WILL* be able to set world-wide precedence** in a matter never set before any court before. The US Supreme will have a once in a century opportunity to establish **desperately needed emergency precedence** to ensure that Constitutionally Guaranteed "Access to Due Process" and "Ability to Participate in One's Defense" **during recent and future** world-wide Pandemics(or other crisis)in prisons (or other places); is **not** violated. The precedence could be International.

The Courts' ruling may further benefit society in that if these rights be violated by 'management practices' in said facilities *(that often abuse rights without any medical justification, written law, and habitually result in substantial denials of access to required computer resources / electronic case law, or ample communication with Defense & Appellate Counsels before and during "Time Sensitive Defenses And Appeals"; which has without doubt prevented thousands of Defendants from participating in their own "Time Sensitive Defenses & Appeals"- resulting in loss of appeals and other once in a lifetime opportunities at vindication)*; **that Court precedence will be directly referenced in any new laws created, that may prescribe new or specialized avenues for official redress to correct unlawful obstruction of Defendants; from effectively participating in their own defenses & appeals during crisis they can't control.**

In selecting this Writ and this specific "Question / Argument" to rule on; the US Supreme Court will set forth badly needed guidance in a "world gone crazy" with pandemics and crisis abound; that have been the VEHICLE to remove virtually all observance of "Constitutionality" from Defendants in incarceration or other locations, where they have no ability to speak for themselves or effect their own defense without cooperation from their housing authorities or captors. **America should set the precedence for the world!**

In these types of living situations, the Defendant **DEPENDS** on the honesty, effort and provided **REQUIRED** technology and resources to be able to "participate" and defend their own rights. This is a right of "Due Process". That type of "honesty" is often an endangered commodity to begin with, but *"at the drop of a hat"*, any slight or severe crisis that arises is often used as a vehicle to completely deny residents access to REQUIRED computer resources / electronic case law, and even ample communication with Defense & Appellate Counsels before and during "Time Sensitive Defenses And Appeals". This has most certainly and without doubt prevented thousands of Defendants from participating in their own "Time Sensitive Defenses & Appeals" (Due Process). Even when a resident or inmate petitions said facility, "management" / the State even goes so far as to call those needed and REQUIRED resources; "privileges".

Ample (not minimal) access to Computer resources / electronic case law, copy & notary services, and especially ample communication with Defense & Appellate Counsels well before and during "Time Sensitive Defenses & Appeals"; are not "privileges". These things are required in the modern age to contest against veritable armies of the well-trained-legal-professionals equipped to the teeth with untold technologies, 24/7access to law & communication in their efforts to oppose a Defendant. May it please the Court, this simply cannot go on. This path of decline has degraded to the point where it is nearly impossible even in the best circumstances for Defendants in these situations to participate at all in their own defense. In our Great Country of Law & Justice for all, the bleeding of rights must be stopped before the patient is dead.

No US or International standard or law exists to protect Defendants incarcerated or otherwise "out of control" and unable to effect their rights during these involuntary unconstitutional denials. Thus the Court *must* act so as to preserve a Defendant's Constitutional Rights to participate **not minimally,** but effectively in their defense and do so without undue hindrance so their rights be preserved from complete isolation due to pandemics, unique crisis, abuse and other acts of God and man that are beyond a Defendant's control and not due to his actions-yet they still disenfranchise him from defending himself in the modern age.

It is respectfully proposed the Court *must* act for the Imperative Public Importance in this Great Constitutional Question to prevent continued disenfranchisement from Constitutional rights to one's own defense and Due Process. Should the Court choose not to act, "Unlettered" Defendants will have no Advocate and society will suffer. Additionally, if brought before lower courts, this complicated and weighty historic matter will be interpreted and ruled on in a thousand different conflicting ways. **May it please the US Supreme Court to act in this Historic Constitutional Question for the County, its people&the Law.**

IN RULING ON QUESTION FOUR, THE COURT WILL provide severely needed direction to lower courts who have all but lost their ability to recognize overtly apparent 'Structural **Error', 'Cumulative Error' and/ or 'Totality of Cumulative Error Effect'** when it takes place to a sufficient degree that it "prejudices the defense" and reached a minimum standard that a "Reasonable Probability" exists that **"Confidence in any Trial Verdict Was Undermined".**

In this case is believed to be an unparalleled "Perfect Storm" of numerous Substantial Denials of Constitutional Rights. Many lower courts have "lost their way" and case law has degraded to a point where lower Courts even make statements like *"the Court does not condone that _____ rights denial happened however we STILL uphold the verdict and deny the appeal".* **This sort of statement was made in this case by the Wyoming Supreme Court and it contradicts the law, and every principle of a fair trial to admit the wrong was done, but openly fail to address it and provide just recompense.** May it please the Court that it must rule here so that all lower courts will once again apply the required homogeneous approach and resolve solutions so that Justice and Fair Trials are upheld & tyranny put down.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted, Timothy D. Leners

Date: Aug 1, 2021

In the State of Wyoming

County of Goshen;

Document (Petition For Writ Of Certiorari) signed & sworn before me on date: August 2 ,2021 by;

TIMOTHY D. LENERS; Defendant,

LISA L. NUSS - NOTARY PUBLIC
COUNTY OF GOSHEN
STATE OF WYOMING
My Commission Expires May 13, 2022

Lisa L. Nuss
Notary Public for the State of Wyoming

My Commission Expires:

May 13, 2022