ORIGINAL

No. 21-6063

FILED
OCT 15 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

JASON CUSTER, — PETITIONER
(Your Name)

vs.

SCOTT FRAKES, Director - NDCS, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

EIGHTH U.S. CIRCUIT COURT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jason Custer, #79852
(Your Name)

P.O. Box 900
(Address)

Tecumseh, NE 68450
(City, State, Zip Code)

402-335-5998
(Phone Number)

QUESTION(S) PRESENTED

This is a First Degree Murder case, which resulted in the finding of guilt on all charges and a Life Without the Possibility (LWOP) sentence plus and additinal 30 - 70 years for Use of a Weapon, and Possession of a Weapon by a Prohibited Person.

Trial and direct appeal counsel were one and the same, therefore, they wer unable or unwilling to assign ineffectiveness of counsel claims on him/herself on direct appeal, as a result of a myriad of ineffectiveness claim(s) that would have otherwise been assigned and argued.

Additionally, claims of ineffective assistance of counsel **must be brought on direct appeal in Nebraska, otherwise they are forfeited, even though any ineffective assistance of counsel claims brought on direct appeal by the same who represented the defendant at trial are premature and should be addressed at the postconviction stage.**

Under Nebraska law, a defendant waives ineffective assistance of counsel claims unless he or she raises them during their first state collateral review proceeding, even though the trial/postconviciton court **refused to appoint counsel on postconviction, even though the judge knew Custer had had the same counsel at trial and on direct appeal.**

Thus, Custer has had no other member of the Bar review his trial/direct appeal counsel's performance, denying him both equal protection and due proces of law per the 5th, 6th and 14th Amendments of the U.S. Constitution.

Custer's jury instructions were incorrect and incomplete, and prosecutors used his post-Miranda silence to undermine both his credibility and as an indicator of his guilt to the jury.

Question #1: When trial and direct appeal counsel are one and the same, not allowing for direct appeal counsel to assign and argue any ineffective assistance of counsel claims on him/herself on direct appeal, are the due process rights of a pauper defendant undermined when the state postconviction and/or appellate court(s) refuse to appoint counsel for a pauper prisoner's first collateral postconviction attack on his conviction (First Degree Murder/Use of a Weapon/Possession of a Weapon by a Prohibited Person), especially in light of the fact that the State (Nebraska) **mandates** that ineffective assistance of trial/appeal counsel claims be assigned and argued on direct appeal or forfeit thus subjected to procedural bar in subsequent proceedings.?

Question #2: If a requested **"choice of evils"** jury instruction is arbitrarily denied by the trial court as inappropriate on the facts of the case, and/or counsel fails to request, or the court fails to furnish a self-defense instruction, does this undermine the right to due process of law and a fair trial per the 5th, 6th and 14th Amendments?

Question #3: Should a First Degree Murder conviciton be vacated if deliberate and premeditated malice or premeditation were neither instructed nor defined correctly in the jury instructions, which are all requisite elements of the charge upon which the conviction rests, undermining the 5th, 6th and 14th Amendment rights of the defendant?

Question #4: Is it fundamentally wrong per Doyle for prosecutors to repeatedly use a defendant's silence at the time of arrest AND after receiving **Miranda** warnings to argue the defendant's credibility, or lack thereof, or as an indication of guilt, wihout infringing upon fundamental federal constitutional rights preserved in the 5th, 6th and 14th Amendments's of the U.S. Constitution, such as the right to remain silent, the right to speak to a

LIST OF PARTIES

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

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

*State of Nebraska

*Scott Frakes, Director - Nebraska Department of Corrections

RELATED CASES

State v. Custer, 292 Neb. 88, 871 N.W.2d 243 (2015)

State v. Custer, 298 Neb. 279 (2017)

Custer v. Frakes, 2020 WL 4569206

Custer v. Frakes, 2021 WL 4128839

Custer v. Frakes, Case No. 20-2869 (August 12, 2021)

TABLE OF AUTHORITIES

CASES — **PAGE NUMBER**

STATUTES AND RULES

STATUTES AND RULES **PAGE NUMBER**

OTHER

TABLE OF CONTENTS

INDEX TO APPENDICES

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

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at Custer v. Frakes 2021 WL 4128839 (May 27, 2021)
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[X] reported at Custer v. Frakes, 2020 WL 4569206 (August 7, 2020)
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix E to the petition and is (Direct Appeal)

[X] reported at State v. Custer, 292 Neb. 88, 871 N.W.2d 243 (2015)
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Nebraska Supreme Court court appears at Appendix G to the petition and is (Postconviction Appeal)

[X] reported at State v. Custer, 298 Neb. 279 (2017); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 27, 2021.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 12, 2021, and a copy of the order denying rehearing appears at Appendix A.

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

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] 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 this Court is invoked under 28 U. S. C. § 1257(a).

I. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment of the United States Constitution provides:

"Protections against unreasonable search and seizures, protection against the issuance of warrants without probable cause, supported by an oath or affirmation, particularly describing the place to be searched or the persons or things to be seized."

2. The Fifth Amendment of the United States Constitution provides:

"No person shall be...deprived of life, liberty, or property without due process of law; nor shall private property be taken for pulic use, without just compensation."

3. The Sixth Amendment of the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

4. The Fourteenth Amendment of the United States Constitution provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. 28 U.S.C. § 2254

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

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

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

(B)(i) there is an absence of available State corrective process; or
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

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

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

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

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

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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

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

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was prviously unavailable; or

(ii) a factual predicate that could not have been prviously discovered through the exercise of due diligenceñ and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

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

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

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a procedding arising under section 2254.

STATEMENT OF THE CASE

Your pro se, pauper petitioner, Jason Custer, has only had one set of lawyers represent him on this case, including both at trial and on direct appeal, therefore when ineffective assistance of counsel claims are put forward at any postconviction stage of this case, it is applicable to **BOTH INEFFECTIVE ASSISTANCE OF TRIAL AND DIRECT APEAL COUNSEL, WHOM WERE ONE AND THE SAME** - that being a pair of lawyers from the Nebraska Commission on Public Advocacy who worked both the trial and direct appeal stages of the case together.

Custer's jury instructions were incorrect and incomplete, and prosecutors used his post-Miranda silence to undermine both his credibility and as an indicator of his guilt to the jury.

Deliberate and premeditated malice or premeditation were neither instructed nor defined correctly in the jury instructions, which are all requisite elements of the charge(s) upon which the conviction(s) rest.

It was also fundamentally wrong per Doyle for prosecutors to repeatedly use Custer's silence at the time of arrest **AND** after receiving Miranda warning to argue Custer's credibility, or the lack thereof - according to them, or as an indicator of guilt, without infringing upon basic and fundamental federal constitutional rights preserved in the 5th, 6th, 8th and 14th Amendments of the U.S. Constitution.

A timely direct appeal was filed with the Nebraska Supreme Court from the conviction of Custer for First Degree Murder, Use of a Weapon, and Possession of a Weapon by a Prohibited Person, from which he was sentenced to "not less than a period of your natural Life without the possibility of parole" in an institution under the jurisdiction of the Nebraska Department of Correctional Services, and 20 - 50 years for Use of a Firearm, and 10 - 20 years for Possession of a Firearm as a Prohibited Person, with all counts to be served consecutively. After his convictions were affirmed on direct appeal, Custer filed a pro se motion for state postconviction relief on May 10, 2016, as wll as a supplement adding additional argument(s) and legal authorities.

Custer also filed MULTIPLE MOTIONS FOR THE APPOINTMENT OF COUNSEL to the same trial court judge now presiding over his postconvicitoin, and whom knew Custer had had the same counsel at both trial and on direct appeal, so **NO OTHER MEMBER OF THE BAR HAD REVIEWED THE EFFECTIVENESS OR INEFFECTIVENESS OF TRIAL/DIRECT APPEAL COUNSEL ON A FIRST DEGREE MURDER CASE**, of which the only possible sentences were either **Death or Life (LWOP)** (life without the possibility of parole, as stated in the sentencing hearing in this case).

The postconviction motion was overruled without an evidentiary hearing, even though meritorious claims that would have been debatable amongst jurists of reason were presented for adjudication. The Nebraska Supreme Court subsequently affirmed the denial of postconviciton relief.

Custer filed his Petition for A Writ of Habeas Corpus per 28 U.S.C. §2254 on May 22, 2018, which was denied and dismissed with prejudice on August 7, 2020. A timely Notice of Appeal followed.

The U.S. Court of Appeals for the 8th Circuit denied a Certificate of Appealability on May 27, 2021. A timely petition for rehearing was denied by same on August 12, 2021.

In its' order denying relief, the U.S. District Court also denied a COA. The Court's order denying relief in this case re-organized the grounds for relief in the petition.

The U.S. District Court made a critical error in its' analysis of the instant case, where on page 21 of its8 Memorandum and Orer, there is a footnote from Judge Kopf stating:

"The court does not believe that Martinez or trevino v. Thaler, 569 U.S. 413 (2013), applies in Nebraska. See Kidder v. Frakes, 400 F.Supp. 3d 809, 81 n.4 (D. Neb. 2019). This is because Nebraska demands that ineffective assistance of trial counsel claims be raised on direct appeal when appellate counsel is different than trial counsel. State v. Filhom, 848 N.W.2d 571, 576 (Neb. 2000)

This footnote is clearly erroneous, due to the FACT that Custer had the same counsel on direct appeal as he did at trial, therefore could or would not assign and argue ineffective assistance on themselves.

Judge Kopf's **legal logic is fatally flawed,** and fails due to an inaccurate review of the facts of this case.- that being trial and direct appeal counsel being one and the same, therefore nullifying the ability of counsel to raise ineffectiveness on direct appeal, **where Custer had appointed counsel, as the direct appeal is considered a "critical stage" of the criminal proceedings, and where Custer was then denied apointed counsel at the postconviction stage, which automatically becomes another "critical stage" of the proceedings, due to the (in)effective assistance of counsel claims that are still unlitigated.**

Thus, Custer's right to both due process and equal protection have been undermined by the above decisions by lower appellate courts.

Also, access to the courts by a pro se, pauper prisoner, as well as the concept of fundamental fairness are also abridged if Custer is not allowed to litigate his ineffective assistance of trial (and appeal) counsel claims on state postconviciton/federal habeas corpus, again contrary to the 5th, 6th and 14th Amendments of the U.S. Constitution.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit erred in not granting a Certificate of Appealability to reverse the decisions of the lower courts to not appoint postconviction counsel to Custer, as he had the **same counsel at both trial and on direct appeal**, therefore, had **no opportunity to have alternate appellate counsel to review the (in)effectiveness of trial counsel in a First Degree Murder case, in a State (Nebraska) that mandates all ineffective of trial counsel claims be brought on direct appeal, or forfeited,** thus denying Custer due process of law, equal protection, as well as his right to full and fair access to the courts per the 5th, 6th and 14th Amendments of the U.S. Constitution.

II. The Eighth U.S. Circuit Court erred by ignoring or incorrectly applying the precedent cases of this Court of Martinez v. Ryan, 132 S.Ct. 1309, 566 U.S 1 (2012); Trevino v. Thaler, 569 U.S. 413, 133 S.Ct.1911 (2013); and Buck v. Davis, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017).

III. The Eighth U.S. Circuit Court of Appeals erred in upholding the denial of a certificate of appealabiity by determining that Custer's ineffective assistance of trial counsel claim(s) did not meet the standards set forth by this Court in Strickland, Hill and Fulminate, failing to recognize the equitable exceptions provided for by these precedent cases and the fact this case distinguishes itself as a new question of law revolving around the constructive denial of a requested "choice of evils" jury instruction, and the subsequent structural error that affected the framework of the trial itself. (See: Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 64 (1932)

IV. The Eighth U.S. Circuit Court erred by ignoring the fact that Custer meets the cause and prejudice requirement to allow for review of his habeas corpus petition on its' merits, or for an evidentiary hearing to be granted Maples v. Thomas, 565 U.S. 266, 132 S.Ct. 912 (2012)

V. The Eighth U.S. Circuit Court ignored the fact that the failure of the lower court's to honor a "choice of evils" instruction requested by the defense was a legally incorrect and reversible error, as the jury instructions were inadequate to inform the jury of this exception to a convicted felon using a weapon for self-defnse, thus nullifying the self-defense defense, and nullifying a citizen's 2nd Amendment right to bear arms in self-defense of his person when his life is in danger, which is contrary to the 2nd, 5th, 6th and 14th Amendments of the U.S. Const.

VI. The Eighth U.S. Circuit Court erred in ignoring the fact that it is fundamentally wrong per Doyle for prosecutors to repeatedly use a defendant silence at the time of arrest AND after receiving Miranda warnings to argue the defendant's credibility, or lack thereof, or as an indicator of guilt, which undermines the 5th, 6th and 14th Amendments to the U.S. Constitution.

IV. ARGUMENTS AMPLIFYING REASONS FOR WRIT

Question #1: When trial and direct appeal counsel are one and the same, not allowing for direct appeal counsel to assign and argue any ineffective assistance of counsel claims on him/herself on direct appeal, are the due process rights of a pauper defendant undermined when the state postconviction and/or appellate court(s) refuse to appoint counsel for a pauper prisoner's first collateral postconviction attack on his conviction (First Degree Murder/Use of a Weapon/ Possession of a Weapon by a Prohibited Person), especially in light of the fact that the State (Nebraska) mandates that ineffective assistance of trial/appeal counsel claims be assigned and argued on direct appeal or forfeited, thus subjected to procedural bar in subsequent proceedings?

FURTHER ARGUMENT: The lower appellate courts erred in upholding the arbitrary decision by the state district court in denying Custer appointment of counsel at the postconviction stage and dismissing the motion for postconviction relief without an evidentiary hearing, contrary to the precepts of the Due Process and Equal Protection Clauses of the 5th and 14th Amendments of the U.S. Constitution which also denied Custer access to the courts' full and fair review of his First Degree Murder conviction, which resulted in him receiving a Life without the Possibility of Parole (LWOP) sentence, as announced in open court during the sentencing proceedings.

Simultaneously, the arbitrary decision by the postconviction/trial judge was contrary to the Nebraska Post-Conviction Act (Neb. Rev. St. §29-3001 to §29-3004), which affords a pauper prisoner appointment of postconviction counsel, especially in light of the fact that Custer had had **the same counsel at both trial and on direct appeal, THEREFORE HAD HAD NO OPPORTUNITY TO ASSIGN INEFFECTIVENESS ASSISTANCE OF TRIAL COUNSEL CLAIMS ON DIRECT APPEAL and HIS FIRST OPPORTUNITY TO ASSIGN INEFFECTIVENESS OF EITHER TRIAL AND/OR DIRECT APPEAL COUNSEL, WHOM HAD BEEN ONE AND THE SAME, WAS ON HIS FIRST STATE POSTCONVICTION MOTION.**

Additionally, Nebraska is one of the State's that mandates that ALL ineffective assistance of counsel claims be presented on direct appeal, or otherwise forfeited, **meaning that to date, NO OTHER MEMBER OF THE BAR HAS HAD A CHANCE TO REVIEW THE RECORD IN THIS CASE FOR TRIAL/DIRECT APPEAL INEFFECTIVE AND ANY ATTEMPT TO PRESENT INEFFECTIVENESS CLAIMS OF SINGULAR COUNSEL IS NOW BEING MET WITH THE ERECTIONS OF A PROCEDURAL BAR**, that was the fault of trial/ direct appeal counsel, for not assigning ineffectiveness claims on themselves, which by Nebraska law itself is improper, to wit:

> "Claims of ineffective assistance of counsel raised on direct appeal by same counel who represented the defendant at trial are premature and will not be addressed on direct appeal." State v. Dunster, 278 Neb. 268 (2009)

This decision was inconsistent with both the statutory and case law prevailing in the State of Nebraska, as well as running afoul of Custer's 5th, 6th and 14th Amendment rights held in the U.S. Constitution's own fundamental protections of pauper defendant's.

This Court has re-examined carefully and often the principles which control this case. The supporting facts below track how this decision was originally, and arbitrarily, made:

1. The Cheyenne County (Nebraska) District Court denied counsel for Custer to pursue his meritorious constitutional claims in both the context of appointment of counsel and to an evidentiary hearing as guaranteed by the Nebraska Postconviction Act, as related above.

2. On his postconviction appeal, the Nebraska Supreme Court also denied Custer appointment of counsel, as would have been otherwise appropriate based on the facts of this case, the legal issues raised, and the simple fact Custer could not afford an attorney on his own, as he is a prisoner.

3. The Nebraska Supreme Court, and every court in this case, has accepted Custer's in forma pauperis applications and affidavits.

4. Based on the facts presented in the postconviction motion, the bill of exceptions and transcipt of the trial, there were multiple serious ineffectiveness of trial and/or direct appeal counsel Custer needed to present for adjudication. This also is evident from the Petition for a Writ of Habeas Corpus per 28 U.S.C. §2254 and the subsequent Certificate of Appealability and Motion for Re-Hearing in the U.S. District Court and 8th U.S. Circuit Court of Appeals.

5. The 5th, 6th and 14th Amendments to the U.S. Constitution protect pauper prisoner defendant's from not receiving adequate, competent or effective legal assistance and access to the courts via the Due Process Clause and the Equal Protection Clause.

6. This is especially true when the petitiner/defendant, as Custer, had **never had any other lawyer examine or work his case from pre-trial through direct appeal, aside from lawyers from the Nebraska Commission on Public Advocacy** (James Mowbray and Sarah Newell worked the case from trial to the conclusion of the direct appeal stages. They are the only law firm to have been assigned to the case, and were unable to assign/argue ineffective assistance of counsel claims on themselves).

7. A criminal defendant has the right under both the U.S. and Nebraska Constitutions to be represented by an attorney(s) at all critical stages of a criminal prosecution. Critical stages are those stages in which the substantial rights of a defendant may be affected.

8. The initial collateral attack on a First Degree Murder conviction, which presents an array of ineffective assistance of counsel (trial and direct appeal), prosecutorial misconduct and abuse of judicial discretion claims, which on their face present substantial and complex legal questions as to the constitutional validity of the underlying conviction(s) meets the standard for appointment of counsel per the Nebraska Postconviction Act, in relation to a pauper defendant.

9. The lower courts failed to give effect to these uncontradicted facts when they denied counsel and an evidentiary hearing, and/or denied relief in the lower appellate courts.

10. Findings of fact by the trial judge are binding on the Supreme Court where supported by evidence. Affidavits appearing in the record uncontradicted, **must** be taken as true and as a part of the findings by the Court.

11. The appellate record rarely shows that the failure to object to alleged prosecutorial misconduct was the result of counsel's incompetence and generally such claims are more appropriately litigated on postconviction, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored.

12. A habeas petitioner asserting ineffectiveness based on an actual conflict of interest (Habeas Corpus Claim #5 re: Atty Kelly Breen of the Commission not being called as a witness due to being a co-worker of Atty's Mowbray & Newll) need only demonstrate that the conflict of interest existed and it significantly affected counsel's performance. Edwards v. Lewis, 283 Ga. 345, 658 S.E.2d 116 (2008).

13. The state postconviction and habeas grounds presented included both ineffectiveness of counsel claims re: the failure to object to very seious prosecutorial misconduct, which has been the basis for the reversal of other very similar cases. Also, multiple grounds call into question the failure of the district court to provide proper jury instructions, alongside the need for trial/appeal counsel testifying to determine the trial strategy as well as controverted facts in the case, in relation to almost every single ground in the habeas/postconviction petitions, which which **warrant exploration of facts outside the current record in the context of an evidentiary hearing**.

14. There is a presumption that an evidentiary hearing will be held if the records do not show that a defendant is entitled to no relief or the legal claims presented fall outside the scope of the current record.

15. An entire trial record cannot be said to fall within the definition of a "judicially noted fact". See Joyce C. v. Frank S., 6 Neb. App. 23, 571 N.W.2d 301 (1997)

16. The phrase "files and records of the case" in statute(s) governing proceedings refers to existing files and records of the case before the prisoner filed a postconviction action, not to testimony taken for the postconviciton act.

17.. Where record shows a justiciable issue of law or fact is presented to court in postconviction action, indigent defendant is entitled to appointment of counsel. State v. Victor, 242 Neb. 306 (1993); rehearing denied 114 S.Ct. 1872, 511 U.S. 1101, 128 L.Ed.2d 492 (1994)

18. An evidentiary hearing on a motion for postconviction relief must be granted when motion contains allegations that if proven, constitute infringement of movant's constitutional rights.

19. Custer's case should have been evaluated by an attorney appointed by the federal district court, with an evidentiary hearing held as soon as that lawyer can have time to complete all necessary review, discovery and prepare for said hearing as put forward in rules 6, 7 and 8 of the U.S. District Court rules in re: habeas actions.

20 This should have been done in the interests of justice and due process and to uphold precedent as has been set by the U.S. Supreme Court.

21. In the alternative, the case should be remanded to the state district court with orders to appoint counsel, allow for any amendment of the post-

conviction motion that was filed pro se originally, due to the Nebraska courts refusal to follow their own rules, statutory authority, and the constitutional mandates set forth in both the Nebraska and U.S. Constitutions.

One may pause since Custer received a sentence of Life Without Parole, plus 20 - 50 years for a weapon, and 10 - 20 years for being in possession of a weapon by a prohibited person, but one must remember that the appointment of counsel in a First Degree Murder case **HAS TO MEET GUIDELINES** for the "Appointment and Performance of Defense Counsel in Death Penalty Cases" because the defendant is exposed to the possibility of the Death Penalty if a guilty verdict is found in **any First Degree Murder case in Nebraska, the options being Death or LIfe (LWOP in this case) otherwise called the "Alternate Death Penalty").**

Notwithstanding the fact that mitigation factors in this case obviously outweighed other facts in the sentencing judges' view, it is still important that the standards related above by the ABA are subscribed to. The "Guideline" set forth a national standard of practice for the defense of capital cases, or potential capital cases as the one at bar, in order to ensure a high quality of legal representation for all persons facing the possible impostion or execution of a death sentence by any jurisdiction." (Guidline 1.1 - Objective and Scope of Guidelines)

Further, the "Guidelines" apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, postconviction review, clemency proceedings, and any connected litigation." Id.

Further, "The case remains subject to these Guidelines until the imposition of the death penalty is no longer a legal possibility." This means that Custer **should have definatley been apponted counsel per the American Bar Association (ABA) "Guidelines"** due to the fact that if any of his postconviciton actions (state or federal) were successful in reversing his conviction(s), remanding him for a new trial, he would again be subjected to the possibility of receiving the Death Penalty." Id. at 1.1 (History of Guidelines, last paragraph)

The 8th U.S. Circuit Court denied a COA regarding U.S. District Court Judge Kopf's abuse of his judicial discretion, when he failed to further appoint counsel during the habeas corpus proceedings in U.S. District Court, as the "Guidelines" require. Judge Kopf knew Custer had not been appointed counsel by the state postconviction judge, but still failed to act. Not only was this an abdication of his duties, by not fairly and judiciaously performing his duties as a judge of the federal district court, but it should be pointed out

that this has become a pattern of behavior for Judge Kopf, who routinely is dismissive of prisoner's habeas corpus actions misusing procedural bars to avoid holding evidentiary hearings or granting relief in ANY prisoner habeas corpus actions, simultaneously curtailing or preventing any merits analysis.

Bacause the decision of the Eighth Circuit is in conflict with the past decisions of this Court, certiorari should be granted.

Question #2: If a requested "choice of evils" jury instruction is arbitrarily denied by the trial court as inappropriate on the facts of the case, and/or counsel fails to request, or the court fails to furnish a self-defense instruction, does this undermine the right to due process of law and a fair trial per the 5th, 6th and 14th Amendments?

(Arguments presented seperately as A. Choice of Evils and B. Self Defense)

FURTHER ARGUMENT: A.If a requested "choice of evils" jury instruction is arbitrary denied at the instruction conference after the defense requested a "choice of evils" instruction per State v. Mowell, 267 Neb. 83 (2003) and Neb. Rev. St. §28-1407 (Reissue 2008), but the trial court denied the instruction on the facts of the case, this should be adjudicated as legally incorrect and is reversible error.

Reversible error exists when the tendered instruction was a correct state of the law, the evidence warranted the instruciton, and Custer was prejudiced by the trial court's refusal to give said instruction. State v. Brouilette, 265 Neb. 214 (2003).

In Mowell, the court considered whether the choice of evils defense found at Neb. Rev. St. §28-1407 applies to Neb. Rev. St. §28-1206 (Reissue 2008), Felon in Possession of a Firearm. In its analysis, the Court explained that Nebraska's "choice of evils" instruction recognized a defendant's constitution right to self-defense and reflects "the legislature's policy that certain circumstances legally excuse conduct that would otherwise be criminal." Mowell 267 Neb. at 94. A defendant's illegal conduct is excusable under the "choice of evils" defense if the defendant:

(1) acts to avoid a greater harm;

(2) reasonably believes that the particular action is necessary to avoid a specific and immediate harm; and

(3) reasonably believes that the selected action is the least harmful alternative to avoid the harm either actual or reasonably believed by the defendant to be certain to occur.

(State v. Cossens, 241 Neb. 565, 571 (1992)

The Mowell decision did not address the specific wording of Mowell's proposed instruction, noting that it must first determine whether a choice of evils defense applies to §28-1206. In State v. Harrington, 236 Neb. 500 (1990) this Court concluded that self defendse does not apply to Felon in Possession of a Firearm charges. Yet the Mowell court noted that some courts have recognized a limited choice of evils defense for felony possession statutes when harm was imminent. See, e.g., U.S. v. Paolello, 951 F.2d 537 (3d Cir. 1991) (recognizing defense where, during bar altercation, defendant knocked gun from attacker's hand to prevent him from shooting defendant's stepson and then picked up gun

from floor to prevent attacker from retrieving it); United States v. Panter, 688 F.2d 268 (3d Cir. 1982)(recognizing defense where defendant, pinned to floor after being stabbed in abdomen, reached under bar for club and instead retrieved pistol); Vasquez v. State, 830 S.W.2d 948 (Tex.Crim.App. 1992)(recognizing defense where defendant presented evidence that he grabbed firearm from kidnappers in attempt to free himself). The Mowell Court did not ultimately address the issue of whether an imminent harm choice of evils defense exists in Nebraska because the facts in Mowell did not support one either way, concluding that Mowell was not facing immediate harm when he first obtained the firearm, nor later when he obtained it again, shortly before the victim's death.

The MowelL court further explained that a "choice of evils" instruction is appropriate only when the defendant's actions were necessary to avoid specific and immediately imminent harm. Mowell, 267 Neb. at 96. Immediate or imminent harm is more than a general or abstract fear; instead, it is a threat or harm that leaves the defendant no reasonable or viable alternative other than to violate the law. See State v. Graham, 201 Neb. 659, 662 (1978). Accordingly, a central issue in this case is whether Custer was under imminent or immediate harm.

The Mowell court rejected his "choice of evils" defense on two grounds. First, the court characterized the gang-related threat and statement by the victim that "it's not over", as "so vague that it could not have triggered more than a generalized fear for his safety." Id. Second, the Court emphasized the length of time that Mowell possessed the firearm. Instead of grabbeing the gun in reasction to a sudden and imminent threat, Mowell obtained the gun weeks prior to the actual crime. Implicit in this discussion is the Court's rejection of a "choice of evils" defense that permits felons to obtain and the possess firearms in anticipation of a potentially violent encounter. In the time between obtaining the weapon and using it, Mowell had "ample opportunity to go to the police, request a restraining order, or stop associating with the victim." Id. at 97.

The present case is distinguishable from Mowell both as to the nature of the threats and the circumstances surrounding using the weapon. First, McCormick threats were far more repeated, direct, and unambiguous. Rather than using intimidating overtures and veiled threats like "it's not over," McCormick repeatedly made specific threats to "slice" Custer up, and "fuck (him) so hard like you never seen." (E50, 93:22-95:1). These threats were made by text, over the phone, and in person. McCormick also took steps to carry out these threat making numerous aggressive overtures towards Custer and Fields prior to the

altercation, like showing up at their home unannounced with a larger cohort and ambushing the two in the alley outside the bar. (1031:1:1-1034:4/ 1034:25-1035:11; 198:15-204:22;135:19-22;203:7-204:5). Not only did McCormick threaten to "slice" them up, but he was known to carry a knife on his belt and may have presented it during each of the above confrontations. (Id.; E50, 93:22-95:1).

Sidney, Nebraska is a small town and McCormick (the victim) made it clear by ambushing Custer at his home and in the alley, that he would not let things go. Further, McCormick continued his aggression after Custer and Leal had agreed to settle the debt without involving McCormick Despite wouking out a plan to avoid further convlicts, McCormick continued to threaten Custer and Fields with progressively aggressive behavior. Thus, simply not associating with McCormick was not an option. Further, contacting police would not have abated the conflict because McCormick's efforts to ambush Fields and Custer with violence demonstrate his disregard for the law.

It is also worth noting, that when Custer tried to resolve the matter in the only effective way - paying McCormick the money he owed him ($150) - he tried to do so through McCormick's friend Leal, just Custer and Leal being involved in the transaction alone, leaving McCormick completely out of it due to McCormick's continued aggressiveness towards Custer. (1065:3-18; 1063:2-1079:2). It was only once Custer arrived at Leal's and saw McCormick, whom he was told went home, that he felt ambushed again and looked for a weapon. While Fields testified that Custer borrowed the gun from Roberts to deal with McCormick, Roberts and Coomes were both very clear that it was Fields who borrowed the gun weeks earlier and that Custer was not even part of the conversation about the gun. (507:2-527:25;584:16-594:1; 589:7-593:18). Thus Custer's behavior is more akin to the immediate threats cases discussed in Mowell than Mowell itself.

Custer testified that he did not know the gun was in the truck until he pulled up and saw McCormick. This statement is reasonable because Custer is too tall to fit in the back seat and was not meaningfully involved in prior conversations about the gun. Similarly, the amount of clutter in Fields' truck and the dearth of ammunition in the gun. (507:2-527:25; 584:16-594:1; 589:7-593:18). Thus, Custer's behavior is more akin to the immediate threats cases discussed in Mowell, once again, which also supports this statement. If Custer had known about the gun and taken it to the house with the intention to use it, he would have secured more ammunition or simply fired it from the cab of the truck rather than approaching the trio in his vulnerable state. No evidence was presented about where the gun was stored since Fields borrowed it from Roberts weeks prior. Even if the gun remained in the truck during those weeks that Custer drove with Fields in Fields'

truck, there is no evidence supporting the idea that he knew it was there, nor that he possessed it in any meaningful way. Thus, Custer's case is distinguishable from Mowell because he did not carry the gun in anticipation of a vague possibility of conflict; he merely possessed it during the critical time of the actual conflict.

Custer testified he only took the gun at the last moment in order to be prepared for any possible threat or ambush because when he went to the house, **it was Custer's understanding, as had been previously agreed upon between by he and Leal, AND confirmed via test message, which turned out to be incorrect, so Custer thought it was a possible set-up, which turned out to the case, as Wright's testimony confirmed that Leal and McCormick seemed like they wanted to fight Custer than night also corroborates this point. (Id. BOE 730: 5-733:7)**

So, Custer went to Leal's house thinking McCormick had left (E50, 93: 22-95:1; 1062: 6-18) (1065:19-1079:2), which turned out **NOT TO BE THE CASE, SO Custer simply took a precaution that a majority of similarly situated people would do. Custer should NOT HAVE THIS OPTION TAKEN AWAY FROM HIM (SELF-PROTECTION) just due to the fact he is a convicted felon.**

This is the logical basis for giving the "choice of evils instruction" to the jury, and this set of facts matches the requirements for Custer's actions to be simply cautious in nature and meant for purposes of self-defense only.

The forensics and location of the physical evidence also corroborates this fact set, including the FACT McCormick was found with a knife in his possession.

Custer has shown the the lower appellate courts' decisions were unreasonable in light of the evidence presented, and jurors of reason would find their adjudication or assessment debatable or wrong, therefore the decision should be reversed. **Slack v. McDaniel**, 529 U.S. 473, 484 120 S.Ct. 1595, 146 L.Ed.2d 541 (2000).

SELF-DEFENSE ARGUMENT: Custer did not kill McCormick intentionally. He only intended to defend himself from McCormick's direct knife attack on him, that was sudden and unprovoked. The only action premeditated between Custer and McCormick was McCormick premeditating an attack on Custer, and talking about it with his two friends that were with him.- Wright and Leal.

Contrary to the U.S. District Court's findings, affirmed by the 8th U.S. Circuit Courts' denial of a Certificate of Appealability, Custer did in fact put forward arguments in his pro se postconviction motion (pgs. 16-17, Claim #49) and supplement (pgs. 6-7, Claim G). This proves without a doubt that the jury instructio arguments **were in front of the state postconviction court,** meaning the U.S. District Court misread these documents, or made an error around a set of fundamental constitutional errors which were highly prejudicial to

Custer Not until you have read all of the way to jury instruction No. 10 do you find a self-defense (deadly force) instruction. It is perplexing as to why the self-defense instruction was not instructed as part and parcel of a seperate or the same "Not Guilty" verdict. In this case, a "Not Guilty" verdict can only be tied to a self-defense option, as Custer **admitted to shooting the drug dealer in self-defense, who was high on meth and drunk when he attacked Custer with a knife, that he'd threatened to use on Custer before this incident.**

An idea yet to be rejected by this Court - that is, that a State may not, consistent with the Due Process Glause, impose on a defendant in a criminal trial the burden of persuasion with respect to a self-defense defense, with reference to what a State may characterize and manipulate as "affirmative" defenses, derived from the rule articulated in In re Winship, 397 U.S. 358, 364 (1970). Under this principle, the concept of self-defense (because it brings into question, or seeks to negate, an element of the crime charged) must be disproven beyond a reasonable doubt. Patterson v. New York, 432 U.S. 197, 202-205 (1977).

Additionally, logic supports the idea that the State "may not palce the burden of persuasion on an issue upon the defendant, if the truth of the defense would necessarily negate an essential element of the crime charged." Holloway v. McElroy, 632 F.2d 605, 625 (5th Cir. 1980), in regards to defenses of mitigation, such as heat of passion and duress, which go to the distinction between Murder and Manslaughter. The point here is that Nebraska, which the federal appellat courts have supported to date, CANNOT REQUIRE A DEFENDANT TO PROVE SELF-DEFENSE

Viewed in this light, it makes no sense to agree that Custer could rightly be required to prove that he lacked criminal intent to suffer a guilty verdict Undeniably, the criminal intent aspect of any felonious homicide is irreconcilable with self-defense. It follows that requiring one to disprove criminal intent offends fundamental criter. Isaac, v. Engle, 646 F.2d 1129, 1136 (6th Cir. 1980) (concurring opinion) If the Court relies on Patterson, it would work as authorizing the evisceration of the concept of self-defense, and cannot survive for other equally cogent reasons. This much seems certain, "proof of self-defense would clearly negate...(any) malice element" of murder. Hopper v. Perin, 641 F.2d 444 - 6 (6th Cir. 1980).

As put forward above, Due Process is violated when on the basis of the instructions given the jury, the accused could be convicted of a murder when it **was just as likely he acted in self-defense.** Possibly the most critical of all points made throughout this brief are those made under this segment of the argument. What those points show is that it's certainly one thing for a reviewing court to reason (as the Court did in Patterson) that due process is not offended when a jury convicts one as a murderer when it is just as likely

they were only guilty of a lesser charge.

Whereas, it is quite another for atrial judge to actually tell a jury they must convict if the evidence is in equipose on the issue of self-defense. (This, of course, is actually what happened here. For our jurors were precisely told that if they had any doubt that Custer had sustained his burden of proof on the self-defense issue, then he failed to sustain it and their verdict should be guilty.

The Court in Patterson only dealt with a defense that mitigated the severity of the charged offense. There was no contention in Patterson that the killing was lawful. By way of contrast, whenever self-defense is the issue, the contention is made that the killing was lawful. Every theory suggests that both members of this Court and scholars results in the conclusion that the State of Nebraska has **violated Custer's rights by requiring him to prove he acted in self-defense.**

ELEMENTS OF THE OFFENSE: The State of Nebraska must prove beyond a reasonable doubt whatever it labels an element of First Degree or Felony Murder. Thus, requiring a defendant to prove self-defense has the effect of requiring Custer to disporve elements of the offense. That is clearly unconstitutional under any interpretation of the relevant line of cases related above.

THE TEST OF HISTORY: Justice Powell has argued that a State cannot shift the burden of proof to a defendant on an issue that makes, and has historically made, a significant difference in punishment and stigma. Patterson, 432 U.S. at 216-232. Again, as demonstrated, self-defense is an ancient and still universally accepted defense to a charge of murder. Its' establishment results in a finding of innocence that carries no stigma or punishment. (Note: In the instant case, it is possible that a finding of self-defense may have resulted in a conviction of the lesser-included crime of manslaughter, either voluntary or involuntary.)

PROPORTIONALITY IN PUNISHMENT: The fundamental constitutional concern with protecting a defendant's liberty interest, as articulated in Winship can be fully satisfied only **IF** the procedural safeguard of the reasonable doubt standard is linked to a substative standard guaranteeing that the State's definition of criminal conduct is fair and does not carry the potential for disproportionate punishment." Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices, 94 Harvard L. Rev. 321, 343 (1980).

FAILURE TO GIVE LIMITING INSTRUCTIONS IN LIEU OF NO "CHOICE OF EVILS" INSTRUCTION:

The failure of the trial court, and the ineffectiveness of counsel led to no limiting instruction being given regarding Custer's prior conviction, and the fact that the "Posession of a Firearm by a Prohibited Person" **was tried together with the Murder and Use of a Weapon charges severely prejudiced Custer, and prevented him from receiving a fair trial.**

All of the Circuits seem to agree that trying a felon in possession count together with other felony charges creates a very dangerous situation, because the jury might improperly consider the evidence of a prior conviction when deliberating about the other felony charges. U.S. v. Nguyen, 88 F.3d 812, 815 (9th Cir. 1996)

Even **if a limiting instruction was given, the prejudicial impact on Custer for the prosecutors and court, much less defense counsel to allow this was both highly prejudicial, contrary to the law of the land, and an example of how a pauper defendant can be subjected to a combination of ineffective assistance of trial/appeal counsel, prosecutorial misconduct, and abuse of judicial discretion simultaneously, to his detriment.**

This should be noted by the Court as plain error.

Evidence of a prior conviction is so prejudicial, studies show, that its effect on jurors cannot be mitigated by a judge's limiting instructions.

In a study of 105 participants given a summary of a real bank robberty trial transcript, 40% of the subjects voted to convict when told that the defendant had a prior conviction, versus only 17% that didn't know about the prior conviction. (See Edith Greene and Mary Dodge, The Influence of Prior Record Evidence on Juror Decision Making, 19 L. and Human Behavior 67, 70-72 (1995). Jurors who learned of the prior conviciton also viewed the defendant as "less credible and more dangerous." Id. at 74.

Under the cirucumstances of this case, there is no argument that would permit a finding of harmless error. For this, and the reasons found herein to find in favor of the Petitioner, it is asked that the Petitition for a Writ of Certiorari be granted. The lower courts clearly erred by both not giving a "choice of evils" instruction under State v. Mowell, 267 Neb. 83 (2003), which is line with other federal cases allowing for a former felon to possess a weapon inorder to protect his life, even whilst he is committing a felony in the process by the simple act of possessing a weapon by a felon, or in this case, a "prohibited" person. The courts further erred in first, forcing Custer to prove he acted in self-defense, and then virtually ignoring this proper and long used defense in just such a circumstance, or at least a series of cases with very similar situation as Custer found himself in. At the end of the day, you can NOT ask a former felon to sacrifice himself to an armed drug dealer, whom has threatened violent action repeatedly against your Petitioner, when your Petitioner was simply trying to resolve the small $150 debt between them amicably.

Therefore, reasonable jurists would assuredly find the lower court's assessment of the federal constitutional claims debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595 (2000).

FURTHER ARGUMENT RE: procedural default of "CHOICE OF EVILS" instruction:

As related to the Court in Argument #1, the petitioner's direct appeal and trial lawyers were the **same, so were not able to, or refused to claim inef - fective assistance of counsel on themselves at the direct appeal stage**, and so not only is the ineffectiveness of trial/appeal counsel **NOT** procedurally defaulted, but it was certinly material and prejudicial to the appellant's case for them to not make sure the "choice of evils" instruction was part of the appellate record in front of the Nebraska Supreme Court.

Any further attempt to find a procedural bar(s) as to this claim is misguided at best, as the U.S. District Court itself says that "even if we favor Custer with various assumptions", meaning that the court itself believes or could believe that since trial counsel undeniably **requested the "choice of evils" instruction during the jury instruction conference in-chambers, and the trial court indicated that it had the instruction "on file", then even though the trial court refused to give said instruction, it's failure to forward the required instruction to the Nebraska Supreme Court as part of the record on appeal, that it had indicated it had "on file" regarding the requested "choice of evils" instruction it ultimately refused to give, contrary to the wishes of defense counsel, is a procedural failure attributable to the district court**, and was not of the appellant's making, and Custer can't be faulted for errors of the court or its' staff, prosecutors, or lastly, by the failure of his trial and appeal counsel (one and the same) to ensure the "choice of evils" instruction was part of the record forwarded by the trial court to the Nebraska Supreme Court on direct appeal of the conviction. If the latter,is true, then this is a simple case of ineffective assistance of trial/appeal counsel, and is indicative of a verdict reversing mistake on the part of appointed counsel, or an appeal reversing error, which was highly prejudicial to Custer.

The Petitioner turns the Court's attention to the Nebraska Supreme Court Rules of Procedure, Rules of Appellate Practice, section 2-105 which dictates the "making preserving, transcribing and delivery of the record of (a) trial or other proceeding." §2-104(A)(1) states that "Court reporting personnel, ... shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceedings...., and §2-105(A)(2) states that it should be a verbatim record of **anything and everything said or done by anyone in the course of trial or any other proceeding**, pretrial matters, the voir dire exam- ination; opening statements; arguments, including arguments on objections; any motion, comment, or statements made by the court in the presence of potential jurors or the trial jury; and any objection to the cour's **proposed instruction or to the instructions tendered by any party**, together with the courts' ruling

thereon, and any post-trial proceeding."

Further, §2-105(B)(c) states that "if the appellee shall, within 10 days after service of the request for BOE, the appellee shall, within 10 days after service of the request for BOE filed by the appellant, file a supplemental request for preparation of BOE. The State Attorney General's office/prosecutors have an inherent duty as officers of the court to also ensure all material evidence and requested jury instructions are available in the appeal record for the court's review, not only as a matter of law, but also one of fairness and professionalism in protecting the fundamental federal and state due process and equal protection rights of a pauper defendant, per the 5th, 6th and 14th Amendments of the U.S. Constitution. Assuredly, not allowing a merits review of a critical, verdict altering jury instruction outweighs prosecutors trying to win a case on a procedural faux pas not directly the fault of the pauper defendant, but of his **appointed counsel, or the court or prosectors themselves**

Surely, the trial court read aloud the requested "choice of evils" instruction in-chambers that it indicated was "on file" aloud in the in-chambers jury instruction conference, **before ultimately deciding whether or not to reject the defense request to have the jury instructed on the "choice of evils" defense.**

Therefore, the proposed jury instruction should have been **in a second place in the trial record** before the Nebraska Supreme Court, both in the BOE and in the trial (and jury instruction conference) transcripts.

For it to not be in either place is utterly indefensible, as to both the trial court, in neglecting its' duties as to the procedures set forth above, to the prosecution, as to the procedures set forth above, and to defense counsel, **all of whom have an inherent and sworn duty to protect the federal and state due process rights of a pauper defendant, whom is relying on the court and its officers to perform their duties professionally and competently.**

Further, Custer has demonstrated that the state courts' factual determination concerning the applicability of the "choice of evils" defense was an unreasonable determination in light of the facts presented, due to the **FACT** that Nebraska's "choice of evils" instruction (that wasn't given) recognized a defendant's constitutional right to self-defense and reflects the Nebraska legislature's policy that certain circumstances legally excuse conduct that would otherwise be criminal. Mowell, id at 267 Neb. at 94 staes "that a defendant's illegal conduct is excusable under the "choice of evils" defense if the defendant:

(1) acts to avoid a greater harm;
(2) reasonably believes that the particular action is necessary to avoid a specific and immediate harm, and;
(3) reasonably believes that the selected action is the least harmful alternative to avoid the harm either actual or reasonably believed

by the defenant to be certain to occur.

Custer's case is dintinguishable from Mowell because he did not carry the gun in anticipation of a vague possibility of conflict, he merely possessed it during the critical time right before and during the actual occurrence of the conflict. Jurists of reason certainly would disagree as to the lower courts decision, therefore the decision not to issue a COA should be reversed and a petition for a writ of certiorari should issue.

Question #3 Should a First Degree Murder conviction be vacated if deliberate and premeditated malice or premeditation were neither instructed nor defined correctly in the jury instructions, which are all requisite elements of the charge upon which the conviction rests, undermining the 5th, 6th and 14th Amendment rights of the defendant?

After roughly five hours of deliberations, the jury convicted Custer of First Degree Murder, a Class IA Felony under Neb. Rev. St. §28-303 (Reissue 2008). (T45) When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt. State v. Jackson, 264 Neb. 420, 427, 648 N.W.2d 282, 289 (2002). In order to secure a conviction for First Degree Murder, the State has the burden of proving beyond a reasonable doubt that Custer killed McCormick purposely and with deliberate and premeditated malice on November 3, 2012 in Cheyenne County, Nebraska, and that he did not do so in self defense. (T20 - 21) Because Custer acknowledged shooting McCormick, the State's burden of persuasion was effectively limited to proving that Custer killed McCormick purposely and with deliberate and premeditated malice and not in self defense or upon a sudden quarrel since **provocation negates malice.** Each will be discussed

An erroneous jury instruction that omits an element of the charged offense, is subject to the harmless error analysis. Neder v. U.S., 527 U.S. 1, 119 S. Ct. 1827 (1999).

The jury was instructed on multiple theories of guilt and said multiple theories are legally incorrect, that being those that included premeditation.

Jury Instruction No. 7 "Definitions" incorrectly defined "Premeditation": as

> "means to form the intent to do something before it is done. The time needed for premeditation may be so short as to be instantaneous provided that the intent to act is formed before the act and not simultaneously with the act."

The above definition is simply misleading and not accurate, to wit: For premeditation to be possibly "instantaneous" as is necessary in this case for any guilty finding to be sustainable, since Custer testified that he didn't

shoot McCormick **until McCormick lunged at him with a knife**, meaning that Custer's testimony best fits Jury Instruction No. 10 "Self-Defense" (Deadly Force) due to the fact that McCormick not just threatened prior to this incident, but now was acting on his previous threats to "cut up" Custer. (1031:1-1034:4;1034:25-1035:11;198:15-204:22;135:19-22;203:7-204:5; E50, 93:22-95:1)

The prosecution wants to completely undermine the "sudden quarrel" element of manslaughter by offering "**instantaneous premeditation**" in its' place. This improper definition of premeditation effectively undermines any defense of self-defense, thereby leaving the jury with only 3 guilty options. It is neither possible to have "instantaneous premeditation" nor is this what happened in the case at bar. "Instantaneous premeditation" is a paradoxical attempt to define premeditation, and confused the jury to the point, that they felt self-defense due to a "sudden quarrel" was not just a virtual impossibility due to the improper defintion, but an absolute impossibility, essentially taking the guilty or not guilty option away from the jury.

This undermines the most basic concepts of both the Due Process and Equal Protection Clauses of the 5th and 14th Amendments, as well as the right to a fair trial by an impartial jury and effective assistance of counsel per the 6th Amendment of the U.S. Constitution, and disregards the **FACT** that provocation **negates malice, an essential element of First Degree Murder.**

Therefore, the Nebraska Supreme Court's finding, supported by the lower federal appellate courts, were inadequate is simply a bad decision that doesn't comport with existing U.S. Supreme Court precedent.

Custer's trial attorneys **did object** to the proposed language in as far as it was different from the statutory definition of premeditation (1158:4-13)

Neb. Rev. St. §28-302(3) (re-issue 2008) in its entirety states that:

> "Premeditation shall mean a design formed to do something before it is done."

This definition was first enacted by the Nebraska Unicameral in 1977 and has **NOT** changed since.

However, the trial court did **NOT** follow the statutory authority, and gave a premeditation instruction found in Nebraska Jury Instructions 2d Criminal 4.0. The **statutory definition requested by Custer did not contain the language** "the time needed for premeditation may be so short as to be instantaneous." The "instantaneous" language comes from the Nebraska Supreme Court case law used prior to the adoption of the 1977 statutory definition, which has persisted despite, the **definition's codification into Nebraska law.**

The Nebraska Supreme Court's **refusal to follow statutory authority** in this case undermined Custer's right to Due Process and Equal Protection. It also is violative of the Seperation of Powers Clause. They ruled opposite of

the plain meaning of the statutory authority, as well as their **own precedent**.

The U.S.District Court erred when it upheld this argument presented in the pro se habeas corpus petition, just as the 81th U.S. Circuit Court erred in not granting a certificate of appealability (COA) on this error. The Nebraska Supreme Court ruling was not only contrary to its' own former holding in State v. Burlison, 255 Neb. 190 (1998), when the Court said "it is fundamental principle of statutory construction that penal statutes are to be strictly construed.".

Statutory language is to be given plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. State v. Atkins, 250 Neb. 315 (1996)

Both of the above rulings by the Nebraska Supreme Court came **after the legal definition of premeditation was legislated into law in 1977**.

To allow a court to use the phrase "instantaneous premeditation" in the context of the jury instructions created an oxymoron for the jurors, who were then relegated to finding Custer guilty of one of the three counts of guilty, since the not guilty and/or manslaughter options were effectively taken off of the table due to the poor wording of the jury instruction defining premeditation

Sudden Quarrel

Similarly, the State failed to prove Custer did not kill McCormick as the result of a sudden quarrel. Although this is not technically an element of the offense, it is relevant insofar as provocation negates malice, which is an element of First Degree Murder. Following State v. Trice, 286 Neb. 183 (2013), the court instructed the jury that:

> "Sudden Quarrel means a legally recognized and sufficient provocation which causes a reasonable person to lose normal self control. It does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative bodily contact between the defendant and the victim. The question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment. Provocation negates malice which is not an element of Second Degree Murder or Voluntary Manslaughter. It is not the provocation alone that reduces the grade of the crime, but, rather the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason. (T27).

It is unequivocally true that Custer believed McCormick was gone because Davis sent him a text message, clearly telling him as much (E50, 93:22-95:1;1062:6-18). Upon arrival at Leal's house and finding McCormick still there, Custer simply still hoped to discuss the matter and work things out as originally

intended. (1062:24-1112:24). He did not intend to kill McCormick. If he had, he would have used a lot more than 2 bullets, when he had 3 people he was set to approach. This indicates Custer likely didn't even check to see how many, if any ammunition was in the weapon at all, and thought just pulling the gun out if the situation went awry, would suffice. Otherwise, Custer risked being overpowered or killed himself. Without getting into all of the evidence that is in Custer's favor, let's consider the aforementioned definition, as it then becomes clear how well sudden quarrel manslaughter fits the fact set of Custer's case. Being confronted with a knife after weeks of being threatened to get "sliced up" in phone calls and texts is sufficient provocation to cause a reasonable person to lose self control, even though the evidence shows Custer actually retained some level of control, and tried to simply stop McCormick's attack, not kill him, as he shot him in the leg, then the shoulder of the arm which the knife was carried in that hand.

While sudden quarrel does not require an exchange of angry words or an altercation contemporaneous with the killing, McCormick's statement, "I'll settle it", followed by rushing and lunging at Custer with a knife did force Custer's automatic reaction of trying to **defend himself against severe injury or death**. (1073:1-25; 1034:25-1035:11;198:15-204:22;135:19-22; 203:7-204:5). Having your life threatened after finding yourself outnumbered is also to be considered sufficient to disturb a reasonable person's power of reasoning enough to react rashly without due deliberation and reflection rather than actual judgment. The sudden happening of McComick's knife wielding lunge is the epitome of provocation rendering Custer's mind **incapable of reflection.**

When your life is in immediate danger, you don't have time to think, instead you just react, as Custer did instinctively. **This does not fit the** definition of murder but self-defense, and if the jury had been properly instructed, Custer would have been acquitted, or at worst, found guilty of manslaughter. Wright testified that Leal and McCormick wanted to fight Custer that night, so you don't have to believe the defense, believe the prosecution witness instead.

The evidence in this case was certainly not overwhelming as to the issue of intent, and as illustrated in the above sentence related to Wright's testimony there was **exculpatory evidence produced by the testimony of a prosecution witness (Wright) that directly contradicted the verdict.**

An erroneous presumption on a contested element of the offense charged can **never be harmless** since it is the equivalent of a directed verdict on that element and an impermissible comment on the evidence. This case merits reversal.

This was burden shifting by State prosecutors, which is both highly illegal and in this case, highly prejudicial, changing the outcome of the verdict.

Question #4: Is it fundamentally wrong per Doyle for prosecutors to repeatedly use a defendant's silence at the time of arrest AND after receiving Miranda warnings to argue the defendant's credibility, or lack thereof, or as an indication of guilt, without infringing upon fundamental federal constitutional rights preserved in the 5th, 6th and 14th Amendment's of the U.S. Constitution, such as the right to remain silent, the right to speak to a lawyer, the right to assist in the preparation of your own defense, the right to testify in your own defense, and the right to a fair trial by an impartial jury?

FURTHER ARGUMENT: During the trial of this matter, the State prosecutors asked Custer repeatedly during cross-examination and pointed out three (3) times in closing arguments, including twoice in rebuttal closing arguments, that Custer did not report his self-defense claim to police, implying instead that Custer had made it up after having reviewed all of the last year in the 15 months that preceded trial. Prosecutors repeatedly emphasized that: " Jason Custer wrapped his story around the forensics after having 15 months to look at it by hearing the testimony about seeing -- here's the angle here and know that Adam got wounded right here." (1197:19-22).

In Doyle v. Ohio, 426 U.S. 610 (1976), this Court held that the use of a post arrest, post-Miranda silence violates the Due Process Clause of the 14th Amendment. Specifically, the State may not "seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda warnings at the time of his arrest." Id. at 611. This rule recoginized the "fundamental unfairness" of giving defendants a right to remain silent, and then exploiting that silence as an indication of guilt. See State v. Lopez, 274 Neb. 756, 766-67 (2008)

The lower federal appeals courts supported the fact that the Nebraska Supreme Court has implicity interpreted the "fundamental unfairness" reasoning of Doyle as embodying an element of juror speculation. Juror speculation may arise if the prosecutor's implicit or explicit invocation of the defendant's silence either:

(1) invites the jury to question the defendant's reasons and motives for remaining silent, or;

(2) encurages the jury to consider what may have happened if the defendant spoke to law enforcement.

Here, the State did both. By overtly arguing Custer fabricated his version of events to fit the evidence, the State not only invited the jury to question his motive for remaining silent, but said he did so for tactical reasons due to his guilt. Similarly, the State implied that if Custer's version of events were true, he would have reported the incident to police immediately so that they could verify his story.

This Court limited the Doyle rule in Fletcher v. Weir, 455 U.S. 603 (1982) when it held that a prosecutor's remarks to postarrest, pre-Miranda silence do not necessarily violate a defendant's due process rights, Doyle survives in Nebraska in the post-arrest, post-Miranda context. The Nebraska Supreme Court addressed juror speculation and the invocation of a defendant's post-arrest, post-Miranda silence in State v. Lopez, 274 Neb. 756 (2008). There, the prosecutor's during closing arguments said, "(the defendant) knows she doesn't have to answer questions, and she won't..."Id. This comment, according to the court, implicit invited jurors to speculate as to the defendant's motive for remaining silent; thus, violated this Court's rule in Doyle. Id.

Also, in State v. Lofquest, 227 Neb. 567 (1988), the Nebraska Supreme Court held that prosecutors violated the defendant's due process rights when they invoked his post-Miranda silence on cross-examination. Responding to the defense's objection, the prosecutor said that the defendant's silence "affected his credibility because he gave no statements before this time. Id. at 596. He then directly confronted the defendant on the stand, asking "(isn't today) the first time you've told this story to anyone in law enforement...?" Id. Finally, during closing arguments, the prosecutor asked the jurors to imagine themselves in a similar situation: "If you were picked up by the police for a crime that you didn't do and you had an explanation...wouldn't you tell (the police)? I would id. at 597 These statements, according to the court, "were so egregious and prejudicial that they were not harmless beyond a reasonable doubt." Id. at 598 The court remanded the case for a new trial.

The Nebraska Supreme Court distinguished pst-arrest, pre-Miranda silence in Loftquest, from the more nebulous post-arrest statements. It noted in the pre-Miranda context that "in the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a Stae to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." Fletcher, 455 U.S. at 607. The Lofquest courted found the prosecutors' generalized statements problematic because it was impossible to discern for Doyle purposes whether pre-Miranda or post-Miranda statements were implicated. The court ultimately determined that "the prosecutors remarks could be construed as referring to appellant's silence from the first police contact through the moment before (defendant) told his story at trial." Lofquest, 227 Neb..at 570

The Lofquest facts are very similar to the instant case. Not only did the Stae impugn Custer's credibility by arguing that a truthful person wuld report the incident to police at first opportunity, but it also emphasized repeatedly throughout cross-examination, closing, and rebuttal, that the first time Custer

had told his story was in court at trial. As in Lofquest, the State clearly implicated Custer's silence from the first opportunity for police contact through the very moment he testified at trial, emphasizing that Custer has had the opportunity to review discovery and listen to witness testimony when, "wrapping his story around the forensics." (See 1204:20-22). Finally, the State also implied that Custer did speak to police because he wished to conceal evidence such as the gun used. (1201:22-1202:20)

As the Lofquest court reasoned, "we cannot allow porsecutors to sidestep the Doyle protections by skirting the edge of the law with vague and imprecise references to a defendant's silence." Lofquest, 227 Neb. at 570. It is clear from the State's repetition of the point, that their primary theory and means of attacking Custer's testimony and credibility was to emphasize his failure to tell this version of events at an earlier time. Not only does this punctuate that he invoked his right to remain silent, it punishes him for exercising that right by using his invocation against him. The same can be argued for Custer' s rights to speak to a lawyer, assist in the preparation of his defense, and his rights to both testify on his own behalf and be tried in a fair trial by an unbiased jury.

The jury need not speculate that Custer invoked his right so that he would have more time to come up with a better story, because the State said so our-right numerous times, in direct contrast to Doyle. Allowing these types of arguments chills the exercise of not only the right to remain silent, but to the panalopy of Custer's rights asserted above as well. This chilling effect is particularly intolerable where, as here, Custer has been consistent in his version of events, telling his counsel rather than law enforcement as the law permits and encourages. (1222:6-18)

Trial counsel was ineffective for not objecting to these questions and comments from State prosecutors, nor asking for a mistrial, thereby failing to protect their clients' most fundamental constitutional and legal rights. This Court should reach this issue either on plain error or on the evident ineffectiveness of counsel, for which no competent trial strategy would erase such a blatant and obvious failure to at least object, much less ask for a mistrial, when their client was under such repeated and intense attack from State prosecutors regarding his free exercise of a fundamental constitutional and/or legal right(s).

Given the intense similarity between Lofqueest and the facts at bar, the nature of this error is evident, and it is perplexing as to why the Nebraska Supreme Court and the lower federal courts didn't act on this clear error.

The U.S. District Court correctly related the prosecutorial misconduct to Berger v. United States, 295 U.S. 78, 84 (1935), **BUT** incorrectly interpreted the prosecutorial misconduct in the instant case to not have risen to the level of that in Berger, Id., in which the Eighth U.S. Circuit Court upheld. The Berger case reversal pivoted on the same or similar issues in trial, and mirrors the prosecutorial misconduct in the instant case to a large degree.

In Berger, the Court found the prosecutor had mis-stated facts to witnesses This is true as well in Custer's case, in that Custer acknowledged to one of his trial lawyer's partners - Kelly Breen - that he had pulled a knife on McCormick at an earlier date when pulling knives on each other, but was told by his lead Commission lawyer, James Mowbray, not to admit that. Mowbray was at that point conflicted and should have recused himself and the rest of the Commission on Public Advocacy, since a conflict also loomed over his refusal to call Kelly Breen as a witness, since he was Mowbray's co-worker. This was a conflict that was exposed not only when Mowbray refused to call Kelly Breen and/or Todd Lancaster as witnesses, both co-worker's of Mowbray's, but also failed to call Dr. Eischenschmidt, whom had performed the toxicology tests on the victim and was a toxicologist, in addition to failing to object or call for a mistrial on the prosecution's relentless attacks on Custer for exercising his right to remain silent (and testify in his own behalf).

So, in effect, as in Berger, prosecutors also assumed facts **NOT** in evidence when they relied on a non-expert (Dr. Schilke) to relate the toxicology results to the jury, or interpret Dr. Eischenschmidt's test results, when Dr. Schilke himself was not a toxicologist, but Dr. Eischenschmidt was, but was not called as a critical defense witness by Mowbray due to his conflicted status.

So, if you were to eightthese 2 cases against each other, you would likely determine that it was more damaging to a defense to not call 2 critical defense witneses vs. question them in an "indecorous and improper manner" as in the Berger case.

A timely objection to this attack on Custer's credibility would have been sustained and a motion for mistrial as well, due to the incredible prejudicial and verdict changing effects on the trial. As pointed out in the U.S. District Court's "Memorandum and Order", this attack on Custer's decision to invoke his rights to remain silent, assist in the preparation of his defense, and testify in his own defense was continued during closing arguments.

Jurists of reason could certainly differ on this determination, therefore, the petition for a writ of habeas corpus should have been granted or a COA at least, as it is more likely than not that the result of the trial would have been different if this line of questioning had not been heard by the jury.

This gives this Court a sound reason to grant this Petition for a Writ of Certiorari.

CONCLUSION

Petitioner, Jason Custer, has been deprived of basic fundamental rights guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and seeks relief in this Court to restore those rights. Based on the arguments and authorities presented herein, Petitioner's guilty verdict was sustained in violation of due process and equal protection. Petitioner was deprived of his right to effective assistance of counsel at both the trial and direct appeal stages of this case, considered to both be critical stages of the case. Jason Custer, therefore, prays that this Court will issue a writ of certiiorari and reverse the judgment of the Eighth U.S. Circuit Court of Appeals.

If this Court elects not to address the issues presented in this petition at this time, it is requested that the writ issue and the matter be remanded to the Eighth U.S. Circuit Court of Appeals for reconsideration in light of this Court's opinions in Strickland, Slack, In re Winship, Patterson, Doyle, Miranda and/or Fletcher, or Berger, all supra.

Respectfully submitted on this 12 day of October, 2021.

Sincerely,

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