No. 21-6341

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD DEAN FOLTZ JR. PETITIONER

vs.

STATE OF WYOMING RESPONDENT(S)
ON PETITION FOR A WRIT OF CERTIORARI TO

(UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT)
PETITION FOR WRIT OF CERTIORARI

Donald Dean Foltz Jr.
WMCI
7076 Road 55F
Torrington, Wyoming 82240

ORIGINAL

QUESTION(S) PRESENTED

1. Was the seating of juror who should have been dismissed for cause requires reversal because implied biased applies to Juror foreman, 1301, married to the prosecutor's assistant violates petitioners' under the equal protection clause of the Fourteenth Amendment?

2. Was there is insufficient evidence to convict beyond a reasonable doubt standard as required by law, such an error is not subject to harmless-error review because where the error will inevitably signal fundamental unfairness, as has been said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt?

3. Was there prosecutorial misconduct using theories, speculations, and vouching for the credibility of witness further referring to petitioner's silence in the closing arguments to build an inference of guilt violating the virtue of the Due Process Clause of the Fourteenth Amendment because such evidence creates the impression that only the petitioner could be guilt?

4. Was there constitutionally deficient performance of counsel affected petitioner's Sixth and Fourteenth amendment constitutional rights to due process to a fair trial because under the United States Constitution thru Wyoming's Cont. Art. 1, §§ 6, 10 guarantees equal protection?

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:

States Distort Attorney
Ronald Eugene Wirthwein, Jr.
500 South Gillette Ave. Suite #348
Gillette, Wyoming 82716

Attorney General
State of Wyoming
123 State Capitol
Cheyenne, Wyoming 82001

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

[X] reported at **2:19-cv-00195-SWS**; or,

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

[ ] is unpublished.

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

[ ] reported at **20-8063**; or,

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

[ ] is unpublished.

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

The opinion of the highest state court to review the merits appears at Appendix **B** to the petition and is

[X] reported at **CR-7151**; or,

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

[ ] is unpublished.

The opinion of the court appears at Appendix **A** to the petition and is

[X] reported at **No. S-19-0185**; or,

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

[ ] is unpublished.

The opinion of the court appears at Appendix **A** to the petition and is

[X] reported at **No. S-19-0185**; 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 case was ***July 28, 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***, **Appendix F**

[ ] 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 January 16, 2018 .A copy of that decision appears at Appendix **A**.

[ ] 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Foltz's contends that he is entitled to review and the requested relief should be granted on the following claims:

1. Implied biased jury member, a Fourteenth Amendment due process and equal rights violation;

2. Insufficient evidence to convict beyond a reasonable doubt, a Fourteenth Amendment due process and equal rights violation; and

3. Prosecutorial misconduct, a Fifth, Sixth and Fourteenth Amendment due process and equal rights violation.

4. Constitutionally deficient performance of counsel, a Sixth and Fourteenth Amendment due process and equal rights violation;

STATEMENT OF THE CASE

This is an appeal from the United States court of appeals the tenth circuit that denied petitioner's Opening Brief and Certificate of Appealablity. Petitioner moves this Court for writ of certiorari for relief to which he is entitled.

ARGUMENTS

CLAIM 1:

The seating of Juror member, foreman 1301, married to the prosecutor's assistant, should have been dismissed for implied biased because it violates petitioners' Fourteenth Amendment rights.

The doctrine of implied bias has been addressed in detail by several circuit courts, including the United States Supreme Court. Courts may use the doctrine of implied bias to dismiss a potential juror in extraordinary circumstances See *Hunley, 975 F.2d at 318; see also Getter, 66 F.3d at 1122.* This helps ensure the right to an impartial jury and a fair trial. A defendant may demonstrate implied bias by showing that the juror has a ***'personal connection to the parties or circumstances'***. It is noted that "a court must excuse a juror for cause if the juror is related to one of the parties in the case, or if the juror has even a tiny financial interest in the case." (citing *Getter v. Wal-Mart stores, Inc. 66 F.3d 1119, 1122 (10th Cir. 1995)*; *Skilling, v. United States, 561 us 358, 130 (US 2010)*; *United States v. Martinez-Salazar, 528 U.S. 304, 316, (2000)* ([19]``[T]he seating of any juror who should have been dismissed for cause . . . require[s] reversal."). In reviewing claims of this type, the deference due to district courts is at its pinnacle: ``A trial court's findings of juror impartiality may be overturned only for manifest error." *Mu'Min, 500 U.S., at 428, 111 S. Ct. 1899, 114 L. Ed. 2d 493* (internal quotation marks omitted). (Citing

Getter, 66 F.3d 1122) (emphasis added). The court so concluded despite assurances from the potential juror during voir dire that she could be fair and impartial. Based on the close relationship between the potential juror and the prosecuting office, the court should have concluded that the potential juror should have been dismissed as a matter of law, noting that "the law errs on the side of caution. Petitioner concludes that Juror member, foreman 1301, should have been removed as a matter of law because of his wife's employment at District Attorney's Office, working as an employee of the party to the case. See *Francone v. Southern Pacific Co., 145 F.2d 732, 733 (5th Cir. 1944); United States v. Haynes, 398 F.2d 980, 984 (2d Cir. 1968).*

The law as authoritatively interpreted by this petitioner means not only that defendants are entitled under law to have impartial jurors but also that State judges are specifically charged with the duty and responsibility of making all inquiries necessary to insure defendants against being tried by prejudiced jurors. (Citing *Getter, 66 F.3d at 1122*) ("We review the district court's refusal to strike a juror for cause for an abuse of discretion, keeping in mind that 'the district court is in the best position to observe the juror and to make a first-hand evaluation of his ability to be fair.'" *Vasey v. Martin Marietta Corp., 29 F.3d 1460, 1467 (10th Cir. 1994)* (citation omitted) (quoting *Wilson v. Johnson-Manville Sales Corp., 810 F.2d 1358, 1361 (5th Cir.), cert. denied, 484 U.S. 828 (1987)*). The district court must grant a challenge for cause, however, if a prospective juror shows actual prejudice or bias. Id. Actual bias can be shown either by the juror's own admission of bias or "by proof of specific facts which show the juror has such a close connection to the facts at trial that bias is presumed."

Neither the legislature nor the State Supreme Court has ever changed that interpretation. Certainly, the judges in the Supreme Court which left petitioners' conviction standing did not impair the old statute or its previously established interpretation. Since the legislature has not changed its law and the Supreme Court has not changed its interpretation, the law of Wyoming remains the same. The law requires judges to protect persons from being tried by prejudiced and biased juries.

This question is not that which the Court treats as crucial, whether there is proof in the record that some individual juror was actually prejudiced against petitioner, but rather the quite different question of whether the judge who impaneled the jury took the precautions required by the statute and its controlling judicial interpretation to insure a jury that would not be tainted by prejudice against petitioner. The record in this case shows beyond doubt that the presiding judge failed to do what the state and federal laws required him to do-try to keep prejudiced persons off the jury. This failure was particularly serious here because of the extraordinary opportunity for prejudgment and prejudice created by the relationship of the juror to an employee of the District Attorney's Office.

FACTS ON THE RECORD

1. During voir dire, Juror 1301 disclosed that his wife was the prosecution team's Nathan Henkes and Ron Wirthwein, legal secretary and ***personal assistant.***
2. Juror member, foreman 1301 personally spoke with petitioner's prosecutors "*once or twice before trial.*" The record does not reflect the nature of these conversations.
3. Prosecutor's office worked on the case for more than two years where Juror 1301's wife assisted prosecutors with collecting and

analyzing evidence, preparing arguments, motions, and reviewing questionnaires from potential jurors.

4. In a pretrial conference on July 21, 2016, Juror 1301's wife was assisting the prosecuting attorney discussing and preparing arguments, motions, and reviewing questionnaires from potential jurors and witness.

5. Juror 1301's wife was present in the courtroom during much of the trial and she was present in the courtroom during times when the trial judge excused the jury to hear arguments from the parties.

The Sixth and Fourteenth Amendment guarantees defendants the right to a trial before an impartial jury. Petitioner has been denied that equal protection of the law, such a singling out would be a classic invidious discrimination and would amount to a denial of his U.S. constitutional Fourteenth Amendment right to due process to a fair trial.

Petitioner argues the fact that Juror 1301 was the husband of the prosecution's legal team violates petitioner Sixth and Fourteenth Amendment right trial by an impartial jury. The implied bias doctrine discussed above was clearly established law at the time of petitioners' conviction and the failure to remove Juror 1301 constitutes manifest injustice a reversible error.

CLAIM 2

Insufficient evidence to convict beyond a reasonable doubt standard as requirement by law, because where the error will inevitably signal fundamental unfairness, as has been the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt.

In the present case, to establish plain error, petitioner "must establish by reference to the record that a clear and obvious violation of a clear and unequivocal rule of law adversely affected a substantial right to such a degree that [petitioner] was materially prejudiced." Vaught v. State, 2016 WY 7, ¶ 14, 366 P.3d 512, 516 (Wyo. 2016); also see

Butler v. State, 2015 WY 119, ¶ 16, 358 P.3d 1259, 1264 (Wyo. 2015).

Petitioner is charged with Murder in the First Degree by killing Braxton Bailey while committing child abuse. A person not responsible for the welfare of the alleged victim. These elements have to be proven by the State beyond a reasonable doubt.

See Wyo. Stat.

> § 6-2-503(a) Child abuse; A person who is not responsible for a child's welfare as defined by W.S. 14-3-202(a)(i), is guilty of child abuse…
>
> §14-3-202(a)(i) "A person responsible for a child's welfare" includes the child's parent, noncustodial parent, guardian, custodian, stepparent, foster parent or other person, institution or agency having the physical custody or control of the child;

See trial transcript vol. Eight, page 1886-1887, ¶18,

> "I want you to look at the Jury Instructions 16 and 15. Nowhere in there does the State have to prove beyond a reasonable doubt… Now the State does have to prove that Donald Foltz abused Braxton Bailey. The State has to prove that Braxton Bailey died".

The Instruction 16 talks about child abuse, so these elements have to be proven by the State beyond a reasonable doubt. An error also counts as structural when its effects are too hard to measure, as is true where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt. (Citing Gonzalez-Lopez, 548 U.S., at 149, n. 4, 126 S. Ct. 2557, 165 L. Ed. 2d 409, and Sullivan v. Louisiana, 508 U.S. 275, 279, (1993)).

The State has the burden of proving all the elements of the charged crime and may not shift that burden to the petitioner. A judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt will inevitably

signal fundamental unfairness causing ``structural" error. This would adversely affected a substantial right to such a degree that petitioner would be materially prejudiced.

The State must prove beyond a reasonable doubt that petitioner was not responsible for a child's welfare as defined by W.S. §14-3-202(a)(i) "A person responsible for a child's welfare" guardian or having the physical custody or control of the child before the State can prove the intentionally or recklessly element "***the actor***" could "***only***" be. This is a clear and unequivocal rule of law that must be followed.

To establish the first element under §6-2-503, and identity "***the actor***" could "***only***" be petitioner, we must first reference to the timelines form the record starting from December 22, 2014, to get a clear understanding of when the injuries were first discovered and reported and who had the opportunity to cause these injuries.

TIMELINES

1. On December 22nd, Amanda Russell "Amanda" took her two-year-old son, BB, to a pediatrician, Doctor Fall, with concerns that BB had been vomiting, complaining of leg pain, and that he was bruising easily. Later this same doctor testified at trial, after reviewing *photos* of BB taken after his death that all the bruising on the child is what he reported on Dec. 22nd.
2. On December 23rd, the next day, Sergeant Michael Hieb of the Campbell County Sheriff's Office accompanied an individual from the Department of Family Services (DFS) followed up on Dr. Fall's report of child abuse. Hieb noted many bruises on BB; however, he concluded that the injuries did not appear to be the result of child abuse.
3. On December 24th, the next day, Amanda took the children to family friends, John and Candace LaValle where they spent the day and night.
4. On December 25th, Amanda picked up the children and took them to her mother Donna Blake where BB stayed the night with his grandmother but, AR went home with Amanda.
5. On December 26th, Amanda picked up BB in the afternoon and took both children back to the LaValle home where they stayed until approximately

noon on December 29th at which time the LaValle returned them home to Amanda and petitioner.

6. On December 30th, BB and AR were playing outside where Amanda could hear them through a window. At about 4:00 p.m. Amanda left the children with petitioner while she visited a friend and was gone approximately forty-five minutes. That evening, after BB had already gone to bed for the night and was asleep, she went to the grocery store to purchase electrolytes for BB because he had been complaining of pain and vomited throughout the day. Foltz, 407 P.3d at 400.

It is clear and obvious from the record that the state failed to establish that the timelines "*prove the beyond a reasonable doubt*" the identity of "***the actor***" that caused the victim's physical injuries and death pursuant to §6-2-101 first-degree murder during the perpetration of child abuse under §6-2-503 "A person who is not responsible for a child's welfare as defined by W.S. §14-3-202(a)(i)." See trial transcript vol. Eight, page 1830, 1851, Amanda (mother) wasn't feeling well and went to visit a friend; she then went to the store to get some Gatorade and steaks.

Here Amanda, BB's mother leaves petitioner in control of the child, giving petitioner physical custody of the children while she was with her friends and at the store that day.

Because the Government did not establish that petitioner was not responsible for a child's welfare includes a guardian or other person having physical custody or control of the child there was insufficient evidence to convict him of violating § 6-2-503(a).

It is also clear and obvious from the record that Sgt. Hieb concluded that the injuries were not the result of child abuse as did Sgt. Pownell, who testified; "There being no evidence to indicate that the deceased came to his homicidal death by unlawful means." See Trial Transcripts Vol. 3, at 616 ¶10-18 and Vol. 6, at 1408, 1409 ¶9-25 and 1-7.

Sgt. Hieb, a State expert witness, that concluded that the injuries were not the result of child abuse and were consistent with what he had seen and documented Dec. 23rd.

Sgt. Pownell, a State expert witness, testified; "There being no evidence to indicate that the deceased came to his homicidal death by unlawful means."

Doctor Donald Habbe, a State expert witness that performed the autopsy the next day concluded that there was no evidence to indicate that the deceased came to his homicidal death by unlawful means. We know for a fact that BB had the clinical signs and was examined by pediatrician, Dr. Fall, Dec. 22nd, which testified there were no new injuries that he could see from the photo. See court transcripts.

Amanda, Blake, Corbett, Jake and Candace, State witness, all had opportunity to cause injuries and were suspects in this case, all got on the stand and testified that "they didn't harm him" and they "didn't see him come to harm. The Court has based its ruling upon an unconstitutional standard of evidence, failing to take into account proper timelines starting from December 22, which were the date the injuries were first reported, the date pediatrician, Doctor Fall, first examined and discovered the injuries, the number of other individuals who had contact with the victim prior to that date through Dec. 30th, the date of the Sergeant Michael Hieb of the Campbell County Sheriff's Office investigated the injuries and submitted his reports and the date Department of Family Services (DFS) made their investigation and report of the injuries, which were clearly addressed on record in this case at trial. See trial transcripts.

CLAIM 3

Prosecutorial misconduct using theories, speculations, vouching for the credibility of witness and referring to petitioner's silence in the closing arguments to

build an inference of guilt is violating the virtue of the Due Process Clause of the Fourteenth Amendment because such evidence creates the impression that only the petitioner could be guilt.

The State has the burden of proving all the elements of the charged crime and may not shift that burden to the petitioner as the prosecutor did in the closing arguments in this case, creating the impression that petitioners' silence as guilt vouching for witness because they said "they didn't harm him" so "it just leaves Mr. Foltz", petitioner that didn't testify. See Condra v. State, 100 P.3d 386, 390-91 (Wyo. 2004); Tortolito v. State, 901 P.2d 387, 390-91 (Wyo. 1995). The prosecutor used petitioner's silence to build an inference of guilty and give substance to the reasonable-doubt standard violated petitioner's Fifth Amendment right not to testify and vouched for the witness. The law is equally clear that a prosecutor cannot personally vouch for the credibility of a witness.

In reviewing the language used in the closing comments by prosecutor in this case are very similar to those we found improper in Fennell. Which the Court concluded was prosecutorial misconduct because that the prosecutor's statements involved his own opinion as to the quality of the investigation. Here in this case, he vouched for the witness and referred to petitioners right not to testify as guilt. See "Tr." Vol. 8, at 1849-50 ¶12-1, quoting prosecutor;

"So now the big question is, how do you, the jury, know it was Mr. Foltz who caused all these injuries?

1. Who was around?
2. He was around Amanda, He was around A.R., he was around Mr. Foltz.
3. He was around Jake and Candace.

4. You got to hear from Jake and Candace.

5. They didn't harm him.

6. They didn't see him come to harm.

7. Amanda got on the stand and said no, I didn't hurt him.

8. She didn't cause these.

9. A.R., no indication from anybody that A.R. touched him that day.

10. None.

11. It just leaves Mr. Foltz."

It is clear that the language used by prosecutor was manifestly intended to be a comment on the petitioners Fifth Amendment right not to testify, and was of such character that the jury naturally and necessarily took it to be such a comment, violating the Griffin rule. Griffin v. California, 380 U.S. 609, (1965). The Tenth Circuit Court asks whether the language used by the prosecution was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. The prosecutor in this case in the final argument made much of the failure of Griffin to testify. Even if the prosecutor's improper remarks do not impact a specific constitutional right, it infected the trial with unfairness and a denial of due process. Donnelly, 416 U.S. at 643.

The prosecutor made improper golden rule argument during his closing argument; instead of properly commenting on the evidence and asking the jurors to weigh the evidence using their common sense and life experiences, prosecutor played on the juries sympathies with photos of a dead child, vouched for the witness and referred to

petitioner's silence as guilt. The prosecutor's improper comments affected petitioner's right to a fair trial because the State's case depended entirely on the jury finding evidence beyond a reasonable-doubt to identify the element of "*the actor*" to establish it could "*only*" be petitioner's that committed the "*act*" of child abuse found in § 6-2-503.

At its core, it is prosecutorial misconduct that threatened petitioner's right to a fair trial and is enough to establish the reasonable probability that the outcome would have been more favorable to petitioner's if not for the prosecutorial misconduct. Petitioner's has identified a clear and unequivocal rule of law that has been violated and caused him to suffered prejudice because of this violation. Prosecutorial misconduct during trail and/or in the closing arguments to the jurist constitutes plain error and is cause for reversal.

CLAIM 4:

Counsel constitutionally deficient performance violated petitioner's U.S. Sixth and Fourteenth Amendment Constitutional rights to due process under the Wyoming's Cont. Art. 1, §§ 6, 10

In Wyoming, there is no available State corrective process when appellant counsel's representation amounts to the level of incompetence under the 'prevailing professional norms that hinders petitioner of a constitutional right to effective assistance during the appeal process. The due process clause of the Fourteenth Amendment that guarantees a criminal defendant the effective assistance of counsel throughout the criminal process that must be reviewed de nova when the proceedings are constitutionally inadequate.

While Wyo. Stat. Ann. § 7-14-103(a)(iii), is the basis for concluding that a claim of ineffective assistance of appellate counsel may provide a "**portal**" through which

otherwise waived claims of trial error may be raised, **no "stand-alone"** claim of ineffective assistance of appellate counsel has thereby been created. Therefore the ineffective assistance of appellate counsel claim is procedurally barred denying petitioner an available State corrective due process.

Petitioner respectfully contentions that the overall performance of his trial counsel and appellant counsel was inadequate failing to exercise the skill, judgment and diligence of a reasonably competent defense attorney as guaranteed by the Wyoming's Cont. Art. 1, §§ 6, 10. See *Richter, 562 U.S. at 105* ("The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom."); *Evitts v. Lucy, 469 U.S. 392, (1985)*; ("The due process clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on a first appeal as of right; nominal representation on such an appeal does not suffice to render the proceedings constitutionally adequate.") *Malone v. State, 293 P.3d 198, 206, (2013)*. ("[T]he issue is whether counsel exercised the skill, judgment and diligence of a reasonably competent defense attorney in light of his overall performance."); *Wiley v. State, 199 P.3d 877, 879, (2008)*. ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.") Also see *United States v. Cronic, 466 U.S. 648, 659, (1984)* (recognizing that a defendant may be denied counsel, despite actually having counsel, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"). (Quoting *Strickland 466 US. at Ft. 2, Cronic, ante, at 659-660; Javor v United States, 724 F.2d 831, 834 (CA9 1984)* ("Prejudice is inherent in this case because unconscious or

sleeping counsel is equivalent to no counsel at all").

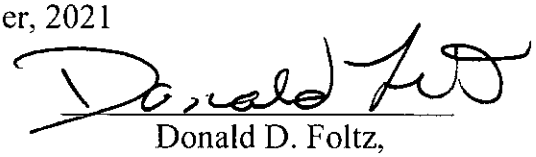
When a first appeal is not adjudicated in accord with the due process of law, the Court must assess both the strength of the claims raised or failed to raise. *Smith v. Murray, 477 U.S. 527, (1986)*; ("Only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of [appellate] counsel be overcome.") *Dufresne v. Palmer, 876 F.3d 248 (6th Cir. 2017)*; quoting *Fautenberry v. Mitchell, 515 F.3d 614, 642 (6th Cir. 2008)*; failure to raise an issue can amount to ineffective assistance. *McFarland v. Yukins, 356 F.3d 688 (6th Cir. 2004), citing Joshua, 341 F.3d at 441; Lucas v. O'Dea, 179 F.3d 412, 419 (6th Cir. 1999);* and *Mapes v. Coyle, 171 F.3d 408, 427-29 (6th Cir. 1999)*. Counsel can be ineffective by failing to raise a "dead-bang winner," defined as an issue which is obvious from the trial record and which would have resulted in a reversal on appeal, even if counsel raised other strong but unsuccessful claims. Mapes, supra, citing *Banks v. Reynolds, 54 F. 3d 1508, 1515 n.13 (10th Cir. 1995); Mapes v. Tate, 388 F.3d 187, 192 (6th Cir. 2004); see also Page v. United States, 884 F. 2d 300, 302 (7th Cir. 1989)*; Stated differently, failure to raise a significant and obvious claim can amount to reversible error.

The Tenth Circuit has also explained, the omission of a "dead-bang winner" by counsel is deficient performance that may result in prejudice; *United States v. Challoner, 583 F.3d 745, 749 (2009); United States v. Cook, 45 F.3d 388, 394 (1995); United States v. Challoner, 583 F.3d 745, 749 (10th Cir. 2009)*; deficient performance for appellate counsel to omit argument that is dead-bang winner amount to reversible error.

The arguments appellant counsel ignored were obvious from the trial record and

would have resulted in a reversal on appeal. Indeed, appellant counsel's incompetence was so serious that it rises to the level of a constructive denial of counsel altogether and constitutes constitutional error because unconscious or sleeping counsel is equivalent to no counsel at all and prejudice is inherent in this case and must be corrected to protect petitioners constitutional rights. Strickland 466 US. at Ft. 2, Cronic, at 659-660; Javor, at 834.

Respectfully submitted this 10th day of November, 2021



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REASONS FOR GRANTING THE PETITION

Petitioner's Constitutional rights were violated to a fair trial due to the following:

The Wyoming Court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. They have decided an important federal question in a way that conflicts with a decision by a state court of last resort and departed from the accepted as to call for an exercise of this Court's supervisory power;

1. The seating of implied biased juror foreman, 1301, married to the prosecutor's personal assistant it violates petitioners' equal protection clause of the Fourteenth Amendment to a fair trial call for an exercise of this Court's supervisory power and requires reversal because it is an important federal question that the Wyoming Court of appeals has entered a decision in conflict with other state court of last resort and departed from the accepted decisions by the United State Court of Appeals.

2. The insufficient evidence to convict beyond a reasonable doubt as requirement by law call for an exercise of this Court's supervisory power and requires reversal because it is an important federal question that the Wyoming Court of appeals has entered a decision in conflict with other state court of last resort and departed from the accepted decisions by the United State Court of Appeals.

3. Prosecutorial misconduct uses theories, speculations, vouching for the credibility of witness, referring to petitioner's silence in the closing arguments to build an inference of guilty violates the virtue of the Due Process Clause of the Fourteenth Amendment that calls for an exercise of this Court's supervisory power and requires

reversal because it is an important federal question that the Wyoming Court of appeals has entered a decision in conflict with other state court of last resort and departed from the accepted decisions by the United State Court of Appeals.

4. The constitutionally deficient performance of counsel affected petitioner's Sixth and Fourteenth amendment constitutional rights to due process to a fair trial call for an exercise of this Court's supervisory power because it is an important federal question that the Wyoming Court of appeals has entered a decision in conflict with other state court of last resort and departed from the accepted decisions by the United State Court of Appeals

CONCLUSION

The petition for a writ of certiorari should be granted for the following reasons as stated above.

Respectfully submitted this 10th day of November, 2021

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SUPREME COURT Of THE UNITED STATES

DONALD D. FOLTZ Jr., Petitioner **V.** **EDDIE WILSON** Et., all, Respondents	Case No.

MOTION FOR COURT APPOINTED COUNSEL

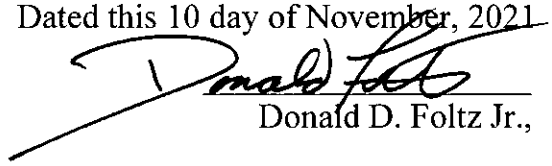
COMES NOW; petitioner pro-se and moves this court to appoint counsel. Petitioner filed a writ of certiorari on November 10, 2021, presenting four claims for relief. Petitioner asserts that appointing counsel is in the interest of justice, and judicial economy. To this point in the appellate process, petitioner has had to find, research, and present claims without assistance or counsel. This has caused him to forgo meritious claims because of his lack of knowledge in legal reasoning alone with having lower courts deny claims for procedural default rather than the substance of the claims.

If petitioner had had adequate appellate counsel in lower courts it is very likely that his claims for relief would have been granted. Petitioner understands that he has no right

to appointed counsel. However, he begs the court to recognize that his life is at stake here and that only a trained attorney can adequately represent his interests. The impact on the State of Wyoming and other government's interests would be minimal, considering that the alternative is to incarcerate the petitioner for the next 40-50 years until his death.

Wherefore petitioner respectfully moves this court to appoint counsel for matters before this court.

Dated this 10 day of November, 2021



Donald D. Foltz Jr.,