

22-6018  
No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

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OFFICE OF THE CLERK

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IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

David Lee Hering — PETITIONER  
(Your Name)

vs.

Patti Wachtendorf — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For The Eighth Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David Lee Hering 6345575  
(Your Name)

P.O. Box 316  
(Address)

Fort Madison, Iowa 52627  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

**ORIGINAL**

### QUESTION(S) PRESENTED

1. When using insanity as a tool in the defense of a criminal defendant who plead not guilty and is strongly asserting their innocence. Does defense counsel render ineffective assistance by failing to hold the State to it's burden of proving the defendant guilty beyond a reasonable doubt, concedeing their guilt, and denying them of the adversarial trial that the Sixth Amendment of the United States Constitution guarantees them?
2. When a criminal defendant, who plead not guilty and is asserting their innocence, agrees to let defense counsel use insanity as a tool within their defense. Do they "automatically" grant counsel the authority to concede their guilt, waive their constitutional right to an adversarial trial, and relieve counsel of their duty to hold the State to it's burden of proving them guilty beyond a reasonable doubt?
3. When defense counsel does not explain, discuss, or disclose, to a criminal defendant the trial strategy they are planning to use at trial. Do they render ineffective assistance?
4. When defense counsel does not obtain a criminal defendants express approval to use the strategy that they used at trial. Do they render ineffective assistance?.

## LIST OF PARTIES

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

Patti Wachtendorf was the Warden of the Iowa State Penitentiary at the time Hering's Petition For Writ of Habeas Corpus was filed and she represents the State of Iowa

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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 B to the petition and is

☐ reported at \_\_\_\_\_; 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 C to the petition and is

☐ reported at \_\_\_\_\_; 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 \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 26, 2019.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 13, 2019, 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).



## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 6. The 6th amendment established that in all criminal prosecutions the accused shall have the assistance of counsel for his defense. This court has recognized that the right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington* 466 U.S.668,686 104 S.Ct.2052,80 L.Ed.2d 674 (1984)

United States Constitution, Amendment 5. The 5th amendment established that no person shall be deprived of life,liberty,or property,without due process of law.

United States Constitution, Amendment 14. Section 1 of the 14th amendment established that no State shall deprive any person of life,liberty,or property,without due process of law,nor deny to any person within it's jurisdiction the equal protection of the laws. The prohibitions of the 14th amend. are adressed to the States. *Ex Parte Virginia* 100 U.S.339,346,10 Otto 339,1879 WL 16561 (U.S.Va.) 25 L.Ed.679 (1879) Whoever by virtue of public position under a State government,deprives another of property,life,or liberty, without due process of law denies or takes away the equal protection of the laws violates the constitutional inhibition. *Id.*347

## STATEMENT OF THE CASE

Nature of the Case: Petitioner David Lee Hering is asking this Court to grant this petition for writ of certiorari following his jury trial and unsuccessful attempts to have his convictions to the charges of murder in the first degree in violation of Iowa Code § 707.1 and 707.2(1)(2003) and two counts of attempt to commit murder in violation of Iowa Code § 707.11(2003) vacated by the lower State and Federal Courts.

Course of the Proceedings: In proceedings that began in the Iowa District Court For Muscatine County in State of Iowa v. David Lee Hering case no. FECR 027417 the State filed a criminal complaint on August 7, 2003 with the clerk of court charging Hering with murder in the first degree Iowa Code section 707.2 for the death of his wife Lisa Hering.

On September 11, 2003 the State filed it's Trial Information charging Hering with Count I: Murder in the first degree; Count II and III attempt to commit murder; and Counts IV and V child endangerment; all for acts alleged to have been committed by Hering on August 6, 2003. Arraignment took place on September 19, 2003 where Hering plead Not Guilty to the charges.

Also on September 19, 2003 a petition for the appointment of an involuntary conservatorship for David Hering was filed in the Iowa District Court For Muscatine County by Kathleen Franks, In The Matter of the Conservatorship of David Hering. case no. GCPR08298.

This petition alleged that Hering's decision making capacity

is so impaired that the person is unable to make, communicate, or carryout important decisions concerning the proposed wards financial affairs. On October 6,2003 the Judge who presided over Hering's criminal trial granted the petition.

On October 8,2003 Trial attorney's J.E. Tobey III and David Treimer filed an appearance.and on December 8,2003 prior to obtaining any discoverable material they filed a notice to rely on a defense of insanity and/or diminished capacity.

Jury trial began on May 24,2004 prior to the commencement of the trial, the State amended the Trial Information to pursue only Counts I through III. The State also limited it's theory on Count I to premeditated murder. On June 4, 2004 the jury returned a verdict of guilty to each charge.

On July 9,2004 Hering was sentenced to life in prison without the possibility of parole for the murder in the first degree conviction.and to a term not to exceed twenty five years for each count of attempt to commit murder to be served consecutively to each other but concurrent with the life sentence.

On August 5,2004 Hering filed notice of appeal. The Iowa Court of Appeals denied Hering's appeal on October 26,2005. State v. Hering 707 N.W.2d 337(Table)(No.04-1222) The Iowa Supreme Court then granted further review and entered an order on January 11,2006 affirming Hering's conviction and sentence. State v. Hering No. 04-1222 Jan. 11,2006 unpublished, 2006 WL 60678.

On April 10,2006 in the Iowa District Court For Muscatine County Hering filed a pro-se application for postconviction relief.

David Hering v. State of Iowa case no. PCCV 016622

On July 16, 2013 a partial hearing was held at an undisclosed location somewhere within Scott County, Iowa. Hering was forced to attempt to participate via an ICN system that was not functioning properly.

On November 25, 2013 the district court issued a ruling denying Hering's application for postconviction relief. (App. E) On December 10, 2013 the district court denied Hering's motion to enlarge, amend, or modify it's November 25, 2013 ruling. (App. F)

On December 11, 2013 Hering filed notice of appeal and on June 15, 2016 the Iowa Court of Appeals Affirmed the district courts ruling. David Hering v. State of Iowa S.Ct. No. 13-1945, 2016 WL 3269454 (Iowa Ct.App. June 15, 2016) (App. D) On August 29, 2016 the Iowa Supreme Court issued an order denying further review of the Court of Appeals decision.

On October 31, 2016 in the United States District Court For The Southern District of Iowa Hering filed a pro-se Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus. David Lee Hering v. Patti Wachtendorf case no. 4:16-cv-00574 JEG.

On September 25, 2018 the district court issued an order that denied Hering's Petition For Writ of Habeas Corpus, dismissed the case and denied a certificate of appealability. (App. C)

On October 2, 2018 Hering filed a notice of appeal and request for certificate of appealability. On April 26, 2019 the United States Court of Appeals For The Eighth Circuit denied Hering's application for certificate of appealability and dismissed the appeal. David Lee

Hering v. Patti Wachtendorf case no. 18-3144 (App. B) On May 9, 2019 Hering's Petition For Panel Rehearing was filed in the United States Court of Appeals For the Eighth Circuit. On June 13, 2019 Hering's Petition was denied by the Court of Appeals. (App. A)

Facts Relevant to the Claim Presented For Review: The tragedy that lead to David Hering's arrest and subsequent convictions took place on the Hering families century farm.

Lisa and David Hering were high school sweethearts who got married. They had four children who at the time Lisa was shot to death were the following ages Amy 14, Amber 12, and twins Autum and Dustin 10. The Hering family lived on the farm that was located in rural Muscatine County, Iowa. Lisa and David loved and adored each other. They spent time with their children and worked the family farm.

David Hering's dad died on August 10, 1998 after his death David and Lisa started having problems with people coming onto their farm at night messing with their equipment, buildings, livestock etc.

Hering's mom and sister were not happy about the fact that his dad had left him the farmland that he had worked for. Circumstantial evidence indicates that they and some other family members (the Riessens) had orchestrated a plan to have people come onto the farm to mess with them and try to set David Hering up on some kind of drug set-up.

The Riessens had a family member who works for the Iowa Division of Criminal Investigation and he is as crooked and lazy as they come. They also have a family member who works at the

Scott County Courthouse where legal documents pertaining to Donald Hering's estate were being falsified.

July of 2001 Hering found substances used to manufacture methamphetamine planted on the farm. This find took place right after a suspected undercover cop had attempted to set David Hering up with a drug deal.

After making this find Hering called the Muscatine County Sheriff's Office they laughed at him on the phone and refused to send any-one out to the farm to investigate this find and the illegal activity that was taking place.

So David Hering went to the manager of Sweetland Ag Tech to talk to him about the anhydrous ammonia that someone had planted on his farm. The manager said that when he makes a report like that to the Sheriff's Office they always send someone right out. The manager called his cousin who worked for the Sheriff's Office and the Officer C. Ryan showed up at the farm to make a report. He clearly did no investigation. It appeared from C. Ryan's demeanor that he knew or was involved with the cops planting this stuff on the Hering farm.

In the summer of 2003 some people the Hering's knew, daughter, brought some Mexican people to the farm. They wanted to buy a hog for a hog roast. She had gotten in some trouble and Hering had heard her mom say they would do anything to get her out of it.

A week prior to this tragedy these Mexicans showed back up at the farm wanting to buy another hog to butcher they also gave the Hering's some Mexican food and raw tomatoes. Hering ate some of the

tomatoes a couple of days before this tragedy and started feeling rather odd and was hallucinating at times. He thought he had been involuntarily drugged or poisoned.

A week prior to this incident Hering had kicked some very strange man off of the farmyard. He showed up in a light blue pickup came up to Hering and asked him if he thought he was going to heaven.

Hering replied hell yes and at that this man went into a rage telling him that he was a sinner etc. Hering told him to get his ass off of the yard. This crazy man eventually got into his pickup and left vowing to return.

That same evening at dusk three of the Hering's kids witnessed a person sneaking through the pine trees that were behind there house(windbreak) When Hering and his wife returned from the other farm and were informed of this sighting he told his son to go into the house and get him a shotgun the old long tom and some shells because he had no shells for his 10 ga. shotgun, the alleged murder weapon. On the day Lisa Hering was shot David Hering only had 4 deer slugs for his 10 ga. shotgun and Lisa was not shot with deer slugs. A fact David learned through testimony at his trial.

The sunday night before this incident one of the mexicans showed up at the farm with 4 or 5 people. He tried to get Hering to buy or just take 5lbs. of marijuana from him. Hering declined however the mexican was wearing a wire things got hairy and Hering ended up escorting these people out of the yard at gunpoint. They were definitely up to no good.

On August 2, 2003 one of Hering's shotguns that he carried on a

tractor ends up missing and the next day it shows back up. So he took that gun and a couple others and put them into Lisa's dad's machine shed. He knew somebody was trying to set him up with some type of crime and he did not know what had been done with that gun. He only kept his 10 ga. and 7mm.

On August 3, 2003 Hering found a large bag of white powder that had been planted in some old freezers that were on his farmland. He pushed the freezers onto a brush pile with a tractor and lit it on fire to destroy the white powder. Looked like another failed drug set up had just taken place.

On August 5, 2003 Hering received a threatening phone call it seemed to be from one of the people who Hering had escorted off the yard at gunpoint days earlier. Lisa was not home at the time so Hering had his oldest daughter call Lisa's mom to see if she was up there and he went looking for Lisa because he was concerned for her safety.

On August 6, 2003 the day of this tragedy when Hering awoke and looked out the window there was a white van parked on the road at the end of the lane. It looked similar to the van that the Mexican had showed up with during the attempted drug set-up. Hering lived a quarter of a mile off of the road. He got in his pickup and went to investigate the van took off and he never caught up to it.

The Hering's went about the day and took their four kids and the two kids who were visiting over to the timber for a noon picnic. After lunch they went back to the building site the kids played and Lisa and David took a bedroom break (had sex) proven by DNA after that Lisa went to the store. When she returned from the store as



she was coming down the lane she thought she saw someone in the field south of the barns.

She told David and he grabbed his shotgun loaded it with deer slugs and they went out to the field to investigate. Once they got back into the field far enough to see the back of the field. David Hering got out of the pickup with his gun and walked back to the barns to check them for intruders. Lisa was supposed to continue around the perimeter of the field and return through the other field entrance that lead to the houseyard. Tire tracks prove that she did drive around the perimeter of the field. Lisa was alive when David walked out of that field.

Once Hering got done checking the barns for intruders he went to the house-yard where the kids were. They told him that they had not seen Lisa return with the pickup. So he checked the house to see if Lisa was inside after not finding her in the house he walked back out to the field looking for Lisa and the pickup. He found the pickup and returned to the yard with it. Hering did not find the pickup in the spot where Lisa's body was later found. This fact is proven by diagrams the police obtained from Cody and Tara Anderson two of the children that were present.

There were five kids standing on the Hering's farmyard who witnessed David and Lisa get into the pickup and drive out to the field. Their attention was clearly on the field and they did not hear any shotgun blasts between the time David and Lisa drove out to the field and seeing David return on foot. Lisa had been shot at a distance of about three to four hundred yards from the kids location. A shotgun blast can be heard at a range of over a mile.

If David Hering had shot Lisa the kids would have heard the shotgun blasts.

The same kids heard the pickup start when David found it in the field. A shotgun blast is a lot louder than a pickup starting.

The search was on for Lisa, Hering's oldest daughter found her and called 911. The kids never told Hering that they had found Lisa or that they had called 911.

When the cops arrived Hering was in the house and his 10 year old son told him that there was a cop car coming down the lane. He thought another attempted drug set-up was in progress so he grabbed his 7mm and went out the back way walked through the fields to the timberland where he had found and attempted to destroy the bag of white powder days earlier. His objective was to make sure that there was nothing else over there that needed to be destroyed.

Officer McClanahan was the first cop to arrive at the Hering farm. He witnessed a man milling around on the farmyard the man had a gun and ended up walking in a southerly direction and went behind a barn where McClanahan could no longer see him. (David Hering was in the house at this time.)

Officer Furnas was the next cop to arrive and he witnessed a bearded man with a gun appear on the farmyard this subject walked across the yard and ended up behind the same barn as the subject McClanahan had witnessed. (David Hering had no Beard)

The bearded man then opened a door on the barn that the two unidentified subjects had went behind and allegedly fired a shot at McClanahan and Furnas. They shot back. Hering was walking through the fields at this time and it sounded like fire-works were going off.

Other Officers were arriving and the lane leading to the farmyard was lined with cops. During the time McClanahan, Furnas, and the unidentified bearded man were shooting at each other. Officer Remley was witnessing Officer Benson who with a pair of binoculars was witnessing a man peering out of a barn window. This was a different barn than the one the bearded man was in.

McClanahan, Furnas, and Remleys minutes of testimony establish that they had witnessed two armed men on Hering's farmyard shortly after Lisa Hering was murdered and they have never been identified and no one ever tried to identify these subjects.

During this standoff between the cops and the two unidentified men Larry and Tammy Lyman drove onto Hering's farmyard. They had used the back entrance that lead to the farmyard. This fact proves that the area had not been properly secured by law enforcement. If you could enter you could also leave and that is what the two unidentified subjects did.

Larry Lyman also had a 10 ga. shotgun with him and the State is claiming that Lisa Hering was shot with a 10 ga. shotgun. However the State did not produce any evidence to prove that she was shot with a 10 ga. shotgun.

David Hering was witnessed returning from the timberland by Officer Tovar, at dusk, Tovar said Hering was just strolling up the lane he proceeded to the machine shed turned on the lights, as he was preparing to do chores, he then strolled up to the house where the cops who were hiding in the dark attempted to execute him. They had no probable cause to arrest Hering and they gave no warnings such as police stop they simply started shooting fully automatic

weapons at him.

After Hering was shot and savagely beaten by the swat team he was taken to the hospital and prior to being taken into surgery he was charged with murdering his wife. There was no investigation into who these two unidentified subjects were. It was we shot you so you did it.

The objective of the so called investigation that started the day after Hering was charged was to frame the evidence to fit the charges. Competant law enforcement officers investigate and then file the charges.

There was a contact or point blank range shot that killed Lisa Hering and there was no blood on Hering's shotgun. The alleged murder weapon.

There were two different types of BBB load ammunition used in the shooting of Lisa. David Hering never owned or had in his possession two different types of BBB load ammunition. Fact is on the day of the murder Hering only had four deer slugs for his 10.ga. shotgun. The search confirmed the fact that Hering had no live shotgun shells loaded with BBB size ammunition in his possession on the day of the murder. The search turned up live 10 ga. ammunition in Larry Lymans pickup it was not BBB.

The State exhibited a 10 ga. shotgun shell and implied that it was used in the shooting of Lisa Hering. Fact is Tara and Cody Anderson witnessed this shell on the picnic table outside of the Hering's house prior to this incident and it had already been fired. This shell was not used in the murder of Lisa Hering. There was spent 12 ga. shells found at the crime scene and no shotgun to tie them to.

Nobody witnessed David Hering enter or exit any of the barns during the time the police were supposedly being fired upon by suspects who were within the barns. Nobody witnessed David Hering shoot or shoot at any-body.

Sheriff Orr testified that he made contact with someone on Hering's cellphone and he insinuated that it was Hering who he had contacted. However Hering had no cellphone on him when shot by the police. His cellphone has never been found. It was in the pickup and the two unidentified men must have taken it with them after they shot Lisa Hering.

The video from Furnas's squad establishes that the gunshots that are allegedly being fired by Hering at the police are being fired to close together to be coming from a bolt action rifle. Hering was accused of shooting at the police with a bolt action rifle that was missing the bolt and would not function. The 7mm. rifle that Tovar witnessed Hering carrying did not have a bolt in it so it would not function. He could not have used it to shoot at the police as the gun will not function with the bolt missing.

There is no ballistics evidence that ties any of Hering's guns to these crimes. There is no evidence of gunpowder residue on David Hering's hands. If he had done all the shooting he was accused of his hands would have been covered with gunshot residue. There is none?

Lisa Hering had approximately three hundred dollars in her pants pocket prior to being shot and it is missing.

David Hering routinely kept a gun in his pickup and tractors

and he and Lisa had went out to the fields thousands of times when there was a gun in the vehicle or tractor. This was normal not unusual.

The State falsified evidence by opening a barn window and then photographing it in the open position. This was done to bolster Officer Gray's identification testimony. He falsly testified that he saw Hering peering out of a window the facts prove that Gray is a liar and a perjurer.

There is no motive for David Hering to shoot Lisa. There were no marital problems and he was not mad at his wife about anything. Fact is he had reason to keep her alive as she was the only one privy to what had been going on pertaining to the mishandling of his dads estate, to the fact that people had been coming onto their farm at night who were up to no good, to the fact that people had been planting meth and/or meth manufacturing products on their farm and to the fact that cops had tried on several occassions to set David Hering up with drug buys. They wanted to sell him drugs and then arrest him.

After Hering was arrested on August 6, 2003 to the time his trial started on May 24, 2004 defense counsel Tobey and Treimer spoke to him one time at the County Jail regarding the facts of the case. Hering informed them of the afore listed facts and maintained the fact that he was innocent.

The date was January 21, 2004 this was after they had already decided to use insanity as the sole defense. Tobey spoke with Hering for 1.75 of an hour and Treimer for .60 of an hour.

According to their bills Defense Counsel spent a combined

14.35 of an hour investigating the case 3.25 of that was spent researching all Iowa cases on insanity/diminished capacity. They did not read the 911 pages of police reports, witness statement, minutes of testimony, etc. They did not attempt to discover and present to the jury the mitigating evidence that was available to them. The evidence that supported the fact that Hering is innocent was not investigated and presented to the jury.

After their conversation on January 21, 2004 the only time Hering spoke to defense counsel was on March 25, 2004 when Tobey stopped by the County Jail to inform Hering that he was going to be taken to Des Moines for a mental health evaluation. The next time he saw them was on May 23, 2004 when they brought clothes to the jail for Hering to wear at his trial that started the next day.

Tobey or Treimer never told Hering that if he agreed to let them use the insanity/diminished capacity as part of the defense their plan was to relieve the State of its heavy burden of proving him guilty beyond a reasonable doubt, to concede his guilt and to deny him of an adversarial trial. So ultimately after the trial he would be assured of being held captive by the State of Iowa either in a prison for the rest of his life or a mental institution for possibly the rest of his life. Fact is prior to the trial Tobey had told Hering he was going to get him home.

The few times Hering had spoke with defense counsel prior to the trial he always maintained the fact that he is innocent and informed them of the fact that he thought he had been involuntarily drugged or poisoned.

Hering was under the impression that the insanity defense was being used as a tool within his defense. He never agreed for it to be used as a concession of guilt.

Defense Counsel fraudulently told the jury that Hering was guilty and that the true facts were delusions, they claimed Hering was delusional. However the afore listed facts that took place after Hering's dad's death were true facts not delusions.

Hering never consented to any defense tactic that involved relieving the State of their burden of proving him guilty beyond a reasonable doubt, he never waived his constitutional right to an adversarial trial, and he never agreed to any tactic that involved telling the jury or any-one else that he was guilty.

In his postconviction relief action case no. PCCV 016622 he argued that defense counsel was ineffective by not holding the State to it's heavy burden of proof, denying him of an adversarial trial, and conceding his guilt.

In disposing of this claim the district court found that the overwhelming credible evidence before this court shows that criminal defense counsel made a well reasoned and informed strategic decision to pursue an insanity defense on applicants behalf and that the applicant approved of the strategy at the time. The evidence of the applicant being the person who killed his wife and fired shots at law enforcement officers who responded to his child's 911 call is virtually irrefutable. (App. E, p44)

In disposing of Hering's motion to enlarge, amend, or modify the previous ruling (App. E) the district court found that when the applicant agreed to the defense strategy of pursuing an



insanity defense, he also agreed to not contest the underlying murder. (App. F, p.47)

In disposing of this claim the Iowa Court of Appeals found that Hering agreed to the presentation of an insanity defense, rather than a general denial he committed the offenses. (App. D, p.35) and the Court relied on Treimers testimony that the evidence was substantial that he had actually shot his wife. Id. at p.36

At the conclusion of Hering's trial the judge who was in the best position to evaluate the evidence stated; "Fact is we don't have any evidence as to what happened in that field"(Cr.Tr.Tr. p.1058) The field being the site of the murder.

So the trial court judges assessment of the evidence differs substantially from defense counsels and the reviewing State Courts.

In disposing of this issue the United States District Court For the Southern District of Iowa relied on the erroneous findings of the State Courts. (App. C, p.16-18)

Bottom line is Hering was convicted of killing his wife with a gun he had no shells for and for attempting to kill two law enforcement officers with a gun that would not function.

The State of Iowa calls this justice.

## REASONS FOR GRANTING THE PETITION

The claim that Hering argued in the lower courts was that Defense Counsel was ineffective in their representation of him by not holding the State of Iowa to it's heavy burden of proving him guilty beyond a reasonable doubt, conceding his guilt, and denying him of the adversarial trial that the constitution guarantees him.

The lower courts all denied Hering's claim based on a finding that he had agreed to defense counsels use of an insanity defense. (App.C p.16-18, D p.35, E p.44, F p.47.) and because the evidence of Hering's guilt was described as being substantial (App. D p.36) and virtually irrefutable. (App. E p.44, C p.16-18)

The lower courts all failed to articulate just what this substantial and virtually irrefutable evidence is supposed to be. and Hering was not disputing whether or not he had agreed to defense counsels use of an insanity defense.

His argument was that by agreeing to use the insanity defense as "one" of the tools to defend himself he did not "automatically" relieve defense counsel of their duty to hold the State to it's heavy burden of proving him guilty beyond a reasonable doubt, waive his constitutional right to an adversarial trial or grant defense counsel the authority to concede his guilt.

The lower courts misconstrued the argument that was placed in front of them by Hering and they failed to cite any authorities to support their ruling that implies when a criminal defendant who

is maintaining the fact that they are innocent agrees to use insanity as a tool within their defense. They "automatically" relieve defense counsel of their duty of holding the State to it's heavy burden of proving them guilty beyond a reasonable doubt, waive their constitutional right to an adversarial trial, and grant counsel the authority to concede their guilt.

To allow defense counsel to have this type of control over a defendants defense would be reminiscent of the Star Chambers and would allow for constitutionally defective legal representation.

In the lower courts Hering argued that this claim should be reviewed under the Cronic standard and that counsels conduct created a structural error within his criminal trial.

Under Cronic counsel must hold the prosecution to it's heavy burden of proof beyond a reasonable doubt. United States v. Cronic 466 U.S. 648,657 (1984) If counsel entirely fails to subject the prosecutions case to meaningful adversarial testing, then their has been a denial of Sixth Amendment rights that makes the adversarial process presumptively unreliable. No specific showing of prejudice is required. Id. at 659

The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he was charged. In re Winship 397 U.S. 358,363-64 (1970) The major purpose of the constitutional standard of proof beyond a reasonable doubt announced in Winship was to overcome an aspect of a criminal trial that substantially

impairs the truth finding function. Murray v. Carrier 477 U.S. 478, 495 (1986)

Hering has always maintained the fact that he is innocent and he never intentionally relinquished or abandoned his constitutional right to an adversarial trial, one in which the State was required to prove that he had committed the charged crimes beyond a reasonable doubt.

There is a presumption against the waiver of constitutional rights and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege. Brookhart v. Janis 384 U.S. 1,4 (1966)

Agreeing to the use of the affirmative defense of insanity/diminished capacity does not mean Hering intentionally relinquished or abandoned his constitutional right to an adversarial trial and fact is he never "legally" agreed to the use of the insanity defense being used at his criminal trial. Because the following documents were either obtained under the presumption of fraud or not filed in a timely manner by attorneys who lacked the legal authority to file them.

Hering had been adjudicated to be incompetant by the trial court judge and an involuntary conservator was appointed to make his decisions. So all contracts he entered into after September 19, 2003 are presumed to be a fraud against his rights and interests. Iowa Code § 633.638

The notice to rely on a defense of insanity and/or diminished

capacity was filed on December 8, 2003 by lawyers who lacked the legal authority to file it because the contract between them and Hering was signed after September 19, 2003 so it is presumed to be fraudulent. All documents they filed on Hering's behalf have no legal binding force or effect and Iowa R.Crim.P. 2.11(4) and 2.11(11)(b)(1) required the notice to be filed within 40 days of arraignment Hering was arraigned on September 19, 2003 so the notice was untimely filed.

Failure of a defendant to timely raise defenses constitutes waiver. Iowa R.Crim.P. 2.11(3) This Court has been firm in holding unexcused late motions constitutes waiver. State v. Froning 328 N.W. 2d 333, 335 (Iowa 1983) So Hering had actually waived his right to utilize the insanity defense as one of his defense tools.

Iowa R.Crim.P. 2.11(11)(b)(2) required counsel to file written notice of their intent to call an expert witness within the 40 day requirement of Iowa R.Crim.P. 2.11(4) so the defenses expert witness should not have been allowed to testify on the insanity defense. Because counsel did not file written notice of their intent to call an expert witness or if they did file one it was untimely.

Counsel's failure to abide by the law cited above prevented them from presenting evidence of insanity/diminished capacity unless they complied with the requirements of Iowa R.Crim.P. 2.11(11)(d) and obtained a leave of court granting them permission to present such evidence.

No leave of court exists so counsel was therefore barred from presenting evidence of insanity/diminished capacity to the jury

through an expert witness.

Whether the insanity defense was waived or not it's use did not "automatically" relieve defense counsel of their essential duty of making the State of Iowa prove that Hering was guilty beyond a reasonable doubt. Hering never agreed to any tactic that would lessen the State's burden of proof and he never agreed to any tactic that involved defense counsel repeatedly telling the jury that he was guilty of committing the charged crimes.

Hering agreed to the use of the insanity defense being utilized as a tool in his defense "only" if it was going to be structured in the form of an inconsistent defense or fail safe, not as a concession of guilt.

This Court recently ruled that when a client expressly asserts that the objective of "his defense" is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt. U.S. Const. Amend. 6 (emphasis added) McCoy v. Louisiana 584 U.S. (2018)(slip.op. at 7) Defense Counsel could not interfere with McCoy's telling the jury "I was not the murderer". Although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction. Id. (slip op. at 8)

There is nothing particularly unusual or unconstitutional about going to the jury on two different theories of defense, particularly where a mans life is at stake. Brown v. Rice 693 F.Supp. 381,398 (W.D. North Carolina 1988) Petitioner counsel acted less

like an adversary and more like an advocate for the State when he made his unsolicited and unassented to declarations of petitioners guilt. Id. at 397 A prisoner who insists that he did not commit a crime can hardly be forced by his counsel to confess it in order to support a tenuous defense of insanity. Snider v. Cunningham 292 F.2d 683,685 (4th Cir.1961) An attorney cannot deprive his or her client of the right to have the issue of guilt or innocence presented to the jury as an adversarial issue on which the State bears the burden of proof without committing ineffective assistance of counsel. Brown 693 F.Supp. at 396.

It is the right of the accused to utilize any and all defenses in his behalf and to present as many defenses as he has or thinks he has. State v. Broughton 425 N.W.2d 48,50(Iowa 1988) The right to defend is given directly to the accused, for it is he who suffers the consequences if the defense fails. Farretta v. California 422 U.S. 806,819 (1975)

Regardless of what defense counsel said about using the defense strategy of, first, that, no crime was committed by the defendant and secondly, that, if the defendant did commit the crime he was not guilty by reason of insanity. (App. D p.36) That is the defense strategy Hering agreed to use.

There is no logical inconsistency between the two defenses . they come to this that the defendant did not do the acts charged and he would not be responsible for them if he did them. Whittaker v. United States 281 F.2d 631,632 U.S. App.D.C. 268 (D.C.1960)

The Supreme Court has noted that the adversary system requires

that all available defenses are raised so that the government is put to it's proof. McQueen v. Swenson 498 F.2d 207,216 (8th Cir. 1973)

Under Iowa's scheme when the defense of insanity/diminished capacity is used the burden of proving all elements of the crime beyond a reasonable doubt, including the element that David Hering was guilty of committing these crimes was placed on the State and remained there throughout the trial.

The jury was instructed that David Hering is presumed innocent and not guilty. The presumption of innocence remains with the defendant throughout the trial unless the evidence establishes guilt beyond a reasonable doubt.(Instruction No.4) The defendant claims he is not guilty by reason of insanity. You first determine if the State has proven all of the elements of the crime charged beyond a reasonable doubt. If you find the State has proved all of the elements, then you consider the issue of defendants sanity. (Instruction No.25)

To convict the jury was required to find each element of the crime had been proved beyond a reasonable doubt, by the State, based on the evidence. The jury was to consider the evidence of insanity only if it was convinced that the State had proven beyond a reasonable doubt that Hering was guilty of committing the charged crimes.

The Iowa Supreme Court and this court have ruled that even when an insanity defense is used Due Process entitles a defendant to certain minimal safeguards, including the requirement that the



prosecution must prove every element of the crime charged beyond a reasonable doubt. State v. McMullin 421 N.W.2d 517,519 (Iowa 1988) Although a plea of insanity was made, the prosecution was required to prove beyond a reasonable doubt every element of the crime charged. Leland v. Oregon 343 U.S. 790,794 (1952)

The jury instructions conformed with this basic procedural safe-guard. As the jury was told. this burden did not shift, but rested upon the State throughout the trial, just as, according to the instructions appellant (Hering) was presumed to be innocent until the jury was convinced beyond a reasonable doubt that he was guilty. The jurors were to consider seperately the issue of legal sanity per-se an issue set apart from the crime charged to be introduced by a special plea and decided by a special verdict. On this issue the appellant(Hering) had the burden of proof. Leland 343 U.S. at 795-96

The authorities that require the State to prove a defendant guilty beyond a reasonable doubt prior to the jury considering evidence of insanity makes perfect sense because if the State has not proven a defendant guilty beyond a reasonable doubt it does not matter if they were sane or insane at the time someone else committed the crimes a defendant is charged with.

Defense Counsel turned the guilt phase of Hering's trial into a sham and a mockery of justice by conceding his guilt and denying him of the adversarial trial that the constitution guarantees him consequently the State was relieved of it's heavy burden of proving Hering guilty beyond a reasonable doubt.

Defense Counsel turned the use of the insanity/diminished capacity defense into the equivalent of a guilty plea by telling the jury over 30 times that Hering was guilty. Concessions of guilt by your own counsel is "damning and the prejudice evident" Hays v. Farwell 482 F.Supp.2d 1180,1198 (D.Nevada 2007)

Hering never agreed to any tactic that involved defense counsel conceding his guilt. This fact is proven by a statement counsel made in closing argument when he stated "whether David Hering likes hearing me say it or not David Hering shot Lisa Hering". He shot her with a deadly weapon, a gun, with which he was familiar. He was familiar with what it could do to an animal and a person and those things are not in doubt.(Cr.Tr.Tr.p.1077) If Hering had agreed to counsel conceding his guilt he would not have had a problem with hearing what counsel said, would of he. Explicit concessions of reasonable doubt in closing argument per se prejudicial. McGurk v. Stenburg 163 F.3d 470,474 (8th cir. 1998)

Due process is violated when defense counsel repeatedly tells the jury that the defendant is guilty because there is a reasonable likelihood that counsels concessions of guilt would permit a jury to convict a defendant on less than proof beyond a reasonable doubt.

Such admissions blocks the defendants right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyers concession of his clients guilt. McCoy 584 U.S. (slip op. at 12)

It is not within the province of an adversarial trial for defense counsel to repeatedly tell the jury that a defendant is guilty. In this case Counsel sided with the prosecution and helped the State obtain a conviction in a case where the evidence of Hering's guilt was circumstantial and nowhere close to being substantial or irrefutable. The States fiction story went unchallenged. The conduct of defense counsel was reminiscent of the Star Chambers that were swept away in 1641. Hering had a right to seek out the truth in the process of defending himself. Davis v. Alaska 415 U.S. 308, 320 (1974)

Defense Counsels dereliction of duty created a structural error in the criminal prosecution of David Hering. Structural errors are not merely errors in the legal proceeding but errors affecting the framework within which the trial proceeds. Arizona v. Fulminante 499 U.S. 279, 310 (1991) Violations of a defendants Sixth Amendment secured autonomy ranks as error of the kind our decisions have called structural. McCoy 584 U.S., (slip op. at 11)

Although an attorney has a right to make tactical decisions regarding trial strategy. Farretta v. California 422 U.S. at 820 The determination to plead guilty or not guilty is a matter left completely to the defendant. Jones v. Barnes 463 U.S. 745, 751 (1983) The due process clause does not permit an attorney to admit facts that amount to a guilty plea without the clients consent. Brookhart v. Janis 384 U.S. 1, 9 (1966) The dividing line between a sound defense strategy and ineffective assistance of counsel is whether

or not the client has given his or her consent to such a strategy.  
Francis v. Spraggins 720 F.2d 1190 (11th Cir.1983)

At his arraignment Hering entered a not guilty plea. By pleading not guilty he exercised his right to make a statement in open court that he intended to hold the State to it's strict proof beyond a reasonable doubt as to the offense charged. Byrd v. United States 342 F.2d 939,941 (D.C.1965) Unquestionably, the constitutional right of a criminal defendant to plead "not guilty" or perhaps more accurately "not to plead guilty" entails the obligation of his attorney to structure the trial of the case around his clients pleas. Wiley v. Sowders 647 F.2d 642,650 (6th Cir.1981) Counsel can-not waive clients basic trial rights over clients objections and is only permitted to make strategic choices faithful to defendants basic elections. Don v. Nix 886 F.2d 203,207 (8th Cir. 1989)

Defense counsel did not structure the defense of the case around Hering's pleas and he never agreed to any defense tactic that involved conceding his guilt and he did not waive his constitutional right to an adversarial trial.

In the process of questioning the States witnesses defense counsel avoided asking any questions and/or presenting any evidence that would have raised a doubt about whether or not Hering had actually committed these crimes.(TR.Tr.) Counsel avoided impeaching the States witnesses allowing their fiction story to go unchallenged. The lead investigator and the first cop to arrive at the scene were not asked a single question.

Hering was thus denied the right to effective cross-examination

which would be constitutional error of the first magnitude and no amount of showing of prejudice would cure it. Davis 415 U.S. at 318.

Defense Counsel did not explain, disclose, or discuss, their proposed trial strategy with Hering and they did not obtain his express approval to use the strategy that they used at his trial. He was not allowed to make his own choices about the proper way to protect his own liberty.

The afore listed facts and authorities support the conclusion that by agreeing to use insanity as "one" of the tools within his defense Hering did not "automatically" grant defense counsel the authority to concede his guilt, waive his constitutional right to an adversarial trial, and relieve counsel of their essential duty of making the State prove him guilty beyond a reasonable doubt.

Defense Counsels legal representation and trial conduct can only be called inept and constitutionally ineffective as it created structural errors in the criminal prosecution of David Hering.

The lower courts need your unbiased guidance in answering the questions presented in this case as the constitution does not allow for the law to be that when a criminal defendant agrees to use insanity as "one" of the tools within their defense they "automatically" grant defense counsel the authority to concede their guilt and waive their afore listed constitutional rights.

#### CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted

David Hering  
Date: August 20, 2019

