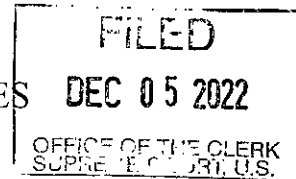


22-6297 ORIGINAL  
NO. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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Kevin W. Malone – Petitioner

V

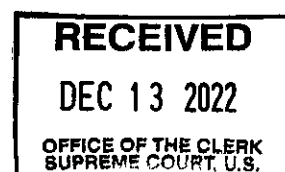
State of Nebraska  
Scott Frakes – Director  
Dept of Corrections – Respondent

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Petition for a Writ of Certiorari

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Pro Se Petitioner  
Kevin W. Malone  
#86027  
PO Box 900  
Tecumseh, NE 68450



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Questions Presented  
(Incidents of First Impression)

- I. Does the trial counsel's fraudulent behavior and conflict of interest violate the Petitioner's 6<sup>th</sup> & 14<sup>th</sup> Amendment right to conflict free counsel?
- II. Is the Nebraska Supreme Court's opinion that the Petitioner rather than the State must establish foundational elements for a valid chemical test correct?
- III. Do the District Court Judge's actions display bias and prejudice and a redacted trial record violate the Petitioner's due process rights under the 14<sup>th</sup> Amendment?

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Parties

Petitioner, pro se:

Kevin W. Malone #86027 PO Box 900, Tecumseh NE 68450

Respondent Scott Frakes, Director of Corrections

Nebraska Attorney General, Doug Peterson PO Box 98920 Lincoln, NE 68509

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## Basis of Jurisdiction

Petitioner Kevin W. Malone is seeking the US Supreme Court review of denial of relief from the Eighth Circuit Court of Appeals. A rehearing by the Eighth Circuit on \_\_\_\_\_.

Jurisdiction is conferred on this Court by US Supreme Court Rules 10(c) and 13(1). The State Court decision was a final adjudication of issues presented per Nebraska Revised Statute 29-3001 et seq. This denial of relief conflicts with the due process clause of the 14<sup>th</sup> Amendment, the confrontation clause of the 6<sup>th</sup> Amendment and the right to conflict free counsel under the 6<sup>h</sup> Amendment.

## Statement of the Case

This case involves a quest for relief from the criminal conviction of the Petitioner on May 5, 2017. The counts were motor vehicle homicide, manslaughter, leaving the scene and driving without an interlock.

At issue were the proximate cause of the death of the victim Justin Hart and the element of impairment.

Trial counsel William McGinn was burdened by conflict of interest that he knew of but did not disclose to the Petitioner upon an agreement for representation. Mr. McGinn is a cousin and blood relative to the victim of the accident Mr. Hart. This conflict relationship led to McGinn refusing to present exculpatory evidence of Dr. Sokol's accident report that showed the proximate cause of Mr. Hart's death was his own illegal act of laying down his motorcycle. McGinn refused to move to suppress a urine toxicology test that did not comport to state regulations under Title 177.

The Nebraska Supreme Court claims it is the duty of the Petitioner rather than the State to establish foundational requirements for a valid chemical test. This theory violates binding case law & the Petitioner's presumption of innocence.

The Petitioner was denied the evidence to prove vital trial transcription is missing from the trial record. The District Court has unlawfully withheld evidence of the trial audio recording. State law says these audio recordings are public record open to anyone. Four witnesses and four jurors present at trial have averred to the missing testimony. These claims appear to be incidents of first impression in that Petitioner could not find any similar claim recorded in Westlaw.

#### Statement of Fact

Malone was driving east on West Center Road in Omaha, Nebraska. At the intersection of 140<sup>th</sup> St. and West Center Road, Malone was stopped at a traffic signal. When Malone saw vehicles to his right proceeding through the intersection he looked up and saw a green light and mistakenly believed he had a green light to proceed with a left turn. The green light was for through traffic only. Multiple witnesses observed Malone was stopped and slowly inched into the intersection yielding to on-coming traffic. (B1.247:14-45,259:1-12,364:22,308:14). When Malone was in the intersection, an on-coming vehicle stopped and impeded Malone from completing his turn. An independent witness testified the motorcycle

was 500ft east of Malone's vehicle in the intersection (B1.319:2-10). The impending vehicle remained blocking the intersection, so Malone was boxed in, in the intersection. Motorcycle operator Justin Hart applied his brakes leaving a.41 foot skid mark on the pavement. (B1.486)(T2.49-52). Rather than keeping his brakes properly applied, Hart laid down his motorcycle. The motorcycle proceeded to slide westbound creating 72ft of scratch marks on the pavement. Hart was tethered to the motorcycle for some distance but then separated from the motorcycle. The motorcycle struck the right rear of Malone's vehicle (T2.51-52). The motorcycle continued post impact creating 29ft of scratch marks and stopping about 70ft southwest of Malone's vehicle. Id. Hart's body came to rest approximately 8ft east of Malone's vehicle. Omaha paramedic Paul Koneck testified he witnessed Hart lay down his motorcycle, injuring his head in the process, leaving a long trail of blood on the pavement. (B1.222:5-20). Malone and several bystanders rushed to Hart's side rendering aid & CPR to Hart while waiting for emergency responders. (B1.302:5-12,309:23-25,355:11-17). Mr. Hart did not survive his injuries.

At issue, Defense Counsel William McGinn failed to disclose that he is a cousin and blood relative to accident victim Justin Hart. Rather McGinn accepted a \$25,000 retainer with no mention of this conflict relationship.



The Nebraska Supreme Court claims it is the Petitioner's burden to show foundational elements for a valid chemical test. This opinion violates binding case law and the Petitioner's presumption of innocence.

Petitioner was denied vital public records to insure the printed trial transcription is accurate. Petitioner, witnesses and jurors have averred to the missing testimony in the trial record. It appears the record has been redacted.

## Prior Opinions

1. Conviction on four counts May 5, 2017; CR16-2695, State v. Malone.
2. Direct Appeal to Ne Ct of Appeals affirmed, October 15, 2018.
3. Direct Appeal to Ne Sup Ct for further review denied.
4. Post Conviction Motion filed in Douglas Cty Dist Ct, June 1, 2019.
5. Post Conviction Motion denied by Douglas Cty Dist Ct, January 15, 2020.
6. Douglas County Dist Ct denied Appellant's motions for Judicial Recusal and the trial audio recording w/o benefit of a hearing, January 28, 2020.
7. Records hearing 2-105(B)(5) hearing held in Douglas Cty Dist Ct of Judge Hon. Shelly Stratman on June 8, 2020.
8. Hon Shelly Stratman denied amending the trial record, June 12, 2020.
9. Post Conviction appeal affirmed by Ne Sup Ct, June 18, 2021.
10. Habius Corpus Petition 2254 submitted to Ne Fed Dist Ct, November 9, 2021.
11. Habius Corpus Petition 2254 denied by Fed. Judge Robert Rossitter, June 24, 2022.
12. Habius Corpus Appeal to the Eighth Circuit for Certificate of Appealability submitted, August 1, 2022.
13. Habius Corpus Petition to the Eighth Circuit denied, October 18, 2022, No. 222561.
14. Habius Corpus Petition for rehearing to Eighth Circuit, November 1, 2022.
15. Eighth Circuit denied rehearing, 11-22-2022. *Received by Petitioner on Dec 1, 2022. Writ of Certiorari placed in Institutional US Mail Box on Dec 1, 2022 via Certified Mail USPS Tracking # 9590-9402-2989-7094-5745-78 Certified Mail Receipt 7019-2280-0001-2198-9043 (Article #)*

## Argument I

Petitioner Kevin W. Malone claims and offers evidence that trial counsel William F. McGinn labored under a conflict of interest and engaged in a fraudulent agreement for the representation that denied Malone his right to conflict free counsel under the 6<sup>th</sup> & 14<sup>th</sup> Amendment to the United States Constitution.

Evidence shows McGinn knew of but did not disclose his familial blood relationship to accident victim Justin Hart as required by the Nebraska Code of Professional Conduct 3-501.4 and 3-501.7. With no knowledge of this relationship, Malone provided McGinn with a \$25,000 retainer that McGinn claimed was non-refundable. Three months later McGinn blindsided Malone with this information at a pretrial hearing before the district court judge.

Court documents show McGinn admits to knowing about a civil wrongful death lawsuit to be filed against Malone by Hart's family. McGinn claimed this information was communicated to him by attorney Jason Ausman who was handling the estate of Justin Hart and that this took place on September 1, 2016 prior to an agreement for representation. However Jason Ausman swore by letter and affidavit that he never once

communicated with McGinn and actually was not retained by the Hart family until February 2017 or six months later. So the only way McGinn would be privy to this information approximately twelve hours after the accident was direct communication with the Hart family, McGinn's blood relatives. McGinn had an obligation to disclose this relationship to Malone on September 1, 2016 as the law prescribes. However McGinn failed to do this. Any agreement was fraudulent in nature.

McGinn's knowledge of the pending lawsuit against Malone and the fact McGinn is supposed to be defending the man accused of killing his cousin present a direct conflict of interest. McGinn's performance in the criminal case directly impacted the financial situation of McGinn's extended family in the civil suit. This is not a hypothetical situation, it actually occurred resulting in Malone paying tens of thousands of dollars to the Hart family in the civil case after his conviction in the criminal trial. (See Nebraska case CI17-91)

McGinn knew or reasonably should have known that his family's goal was to seek a conviction in the criminal trial with maximum punishment and to extract money from Malone in the civil suit. And that the two directly conflict with each other. This eventually led

to McGinn refusing to pursue certain avenues of defense requested by Malone months before trial. (T2.124,125) .

Dr Ted Sokol PhD, PE was hired by McGinn to reconstruct the accident and render an opinion on causation and the proximate cause of Mr Hart's death. Dr Sokol concluded that Mr Hart's action of laying down his motorcycle was unlawful, "extremely dangerous" and absent this voluntary act, "Hence there would be no collision" (T2.49-52) (Neb Rev Stat 60-6307). However McGinn never presented Dr Sokol's finding. McGinn claimed Dr Sokol's report would "upset" the Hart family and McGinn didn't want to "beat up on a dead guy." (T2.273)

The State of Nebraska claimed this to be an incident of first impression in that they have never encountered a conflict such as this. Indeed the Petitioner could not find a similar conflict relationship published in Westlaw.

McGinn faced a situation of divided loyalties and actually acted against Malone's interests and acted in McGinn's personal interest. 1. McGinn was paid a \$25k retainer upfront and had a financial incentive to keep his conflict relationship hidden. 2. He refused to present Dr Sokol's findings for fear of upsetting Mr Hart's family (McGinn's relatives). 3. McGinn failed to

impeach false testimony of the States key witness. 4. McGinn failed to challenge the State's accusations of impairment and an invalid toxicology test. 5. The civil lawsuit resulted in financial prejudice to the Petitioner & financial gain to the McGinn family.

On November 10, 2016 a pretrial hearing was held in the Douglas County District Court of Hon. Shelly Stratman. With no prior notice to Petitioner, McGinn claimed he was just informed he was a distant, unknown to him, relation to Justin Hart. (T2.6:1-14). This distant, unknown relationship described by McGinn is dispelled as he knew of the civil lawsuit a mere twelve hours after the accident. McGinn used the element of surprise to induce an unknowing and unintelligent oral wavier of this conflict. Malone was not informed of this relationship until McGinn announced this in open court. McGinn claimed he discussed this with Malone. Yet when questioned, there are court documents that show McGinn could not state a time, date or location where any advisement took place. If this had taken place as McGinn claimed, common sense would dictate that a written waiver would have been obtained at that time. The record shows Judge Stratman solicited McGinn to make this announcement at this hearing. (T2.5:15-22). This indicates the judge's foreknowledge of this

relationship, yet she did not question McGinn about the ethical implications of this conflict relationship nor did she or McGinn advise Malone about the risks, consequences or alternatives available. Informed Consent Rule 3-501.7 goes into great detail that a client should be advised of these risks and alternatives. It says failure to do this voids any waiver.

The State of Nebraska appears to dismiss the gravity of this conflict relationship. They simply point to the November hearing and claim this is a valid waiver. The State ignores the elements of informed consent, McGinn's fraudulent behavior, the judge's foreknowledge of this conflict, the Rules of Professional Conduct and case law.

State v Pullen 281 Neb 828 (2011) states that any waiver must not be the product of deceptive behavior. McGinn's behavior was a deception of the truth.

Nebraska and other jurisdictions have held that a defendant is to be advised of the risks and consequences to a waiver; "After the defendant has been fully informed of the conflict, the trial court should seek a narrative response on the record indicating a description of the conflict and risks at issue." People

v Delgadillo 275P3d772COA33(2112); State v Turner 218Neb125(1984).

Because Malone was not informed of potential risks of McGinn's conflict of interest, he was not aware that McGinn would refuse to submit exculpatory evidence such as Dr Sokol's report. Dr Sokol did not publish his findings until after the November hearing. The US Federal Court has held that a "defendant cannot knowingly and intelligently waive what he does not know." Hoffman v Leeke 903F2d280,289(1990) and that "it is incumbent upon the state to prove an intentional relinquishment or abandonment of a known right." Brewer v Williams 430US387(1977).

Dr Sokol's report would have, at a minimum, created reasonable doubt as to the proximate cause of Mr Hart's death, leading to an acquittal on the major charges. (T2.49-52). Dr Sokol made an implication the proximate cause of Hart's death was laying down his motorcycle when there was ample room to safely stop. With this knowledge it would be the jury's duty to determine proximate cause. Severe prejudice occurs when a defendant is denied an appreciable chance for an acquittal. State v Knutson 288Neb823(2014).

The facts presented here demonstrate McGinn was not forthcoming about his relationship to Justin Hart and



entered into a fraudulent agreement for representation. McGinn's actions demonstrate divided loyalties with prejudicial effect under a Cuyler or Strickland Standard and violation of 6<sup>th</sup> & 14<sup>th</sup> Amendment rights.

Rules of Profession Conduct 3-501.0(6) and 3-508.4(c) forbids fraudulent behavior and states this voids any waiver. State v Pullen 281Neb828(2011).

## Argument II

The Nebraska Supreme Court acknowledges that a urine chemical test must be performed according to the methods approved by the NE Dept of Health and Human Services under Title 177NAC; Neb Rev Stat 60-6201(3); State v Rothenberger 294Neb810(2016). (Ne Sup Ct Opinion 959). The irony is the standards of Title 177NAC were violated by the State.

At issue, the Nebraska Supreme Court claims it is the burden of the Petitioner to prove foundational elements of Title 177NAC were not strictly adhered to. (Ne Sup Ct Opinion 960). This opinion is not consistent with binding case law and violates a sacred tenant of our legal system and that is the presumption of innocence. State v Casillas 297Neb820(2010), established that it is the burden of the proponent of evidence to establish necessary foundation for admission of evidence, including scientific reliability.

During Voire Dire, lead prosecutor Ryan Lindberg told the prospective jurors the defendant has the presumption of innocence and the State would have to prove each and every element. Mr Lindberg stated at trial; "Title 177 prescribes for the State of Nebraska how testing is done and carried out" (B1.798:8-10).

With that said, Title 177 requires evidence and documentation of quality controls, cut off levels and a confirmatory testing. No evidence exists to show these were done.

State v Montoya 305Neb820(2020) held the state must describe four foundational elements for valid chemical test. 1. The testing equipment was functioning properly at the time of testing. 2. The test was conducted by a valid permit holder. 3. The testing complied with approved methods of Title 177. 4. All other statutes are satisfied. These requirements have existed for many years. State v Royer 276Neb173 (2007).

Petitioner Kevin Malone performed two chemical tests at the request of the State. A. An infrared absorption test for blood alcohol content (bac). This resulted in a bac of 0.00x2 tests. This was documented to be in calibration and conducted by a valid permit holder. (Trial exhibit 61)(Trial exhibit 67). B. The second chemical test was urine toxicology test analyzed by the Neb State Patrol laboratory. This test did not comply with three of the four required elements described in Montoya. One, no evidence exists to show the testing equipment was functioning properly. Presenting proper quality control ranges and documentation would satisfy this element. Two, the

testing was done by a valid permit holder. This element was satisfied. Three, all elements of Title 177 must be met. No evidence exists to show quality controls, cutoff levels & confirmatory testing was done. Dr Henry Nipper PhD testified to this. (B1.791:18-792:19). Four, statute were not satisfied. Neb Rev Stat 60-6201(3). Title 177 statutes 7.002.01. 7.006.05d, 7.006.05d2. Montoya established the State will not re-interpret laws that are plain, direct and unambiguous.

Cutoff levels. Statute 7.002.01 states; "To validly determine the presence of a drug, a laboratory finding must be equal to or greater than the cutoff level." 7.001.01 defines cutoff levels as the amount of a drug that determines the absence or presence of a drug. Although Statute 7.002.01 does not list cutoff levels for the prescribed medications in Malone's urine sample, it does mandate that the State describe a cutoff level for each medication in Malone's urine sample. There were four medications reported by the State but no cutoff levels when there should have been four reported. An amount of medication below the cutoff level is absent from the urine sample by statutory law. This statute uses mandatory language & does not list any exceptions. Without knowing the cutoff levels used by the State or the concentration of purported

medications in the urine sample the test is not valid. Presenting this to a jury is presenting them with false evidence and therefore prejudicial. If the State had done a confirmatory test it would have given a finite amount or concentration of each medication preset. The State did not do this. (B1.792:13-18). This is required by Title 177.

Quality Controls. It is quality control documentation that determines if the testing machines are functioning properly at the time of testing. No evidence exists to show quality controls were done or if they were within acceptable levels. (Trial exhibit 62,72).

Statute 7.006.05(d)(2) of Title 177 states; "A quality control sample shall be included for each drug reported." There were no quality controls reported in Malone's urine toxicology when there should have been four reported. (E62,72). Statute 7.006.05(d) states, "Quality Control error ranges must be within acceptable levels." (plus or minus three standard deviations). No evidence exists to show quality controls were done or were within acceptable limits. These statutes use mandatory language. Quality controls are required as the law prescribes. It is incumbent upon the State (not the defendant) as the party submitting the evidence to

insure the required foundational elements are satisfied. State v Casillas 297Neb820(2010). This was not done.

Iowa has nearly identical urine chemical testing as Nebraska. Both are part of the Eight Circuit. Iowa case State v Meyers 924NW2d(2019) provides a thoughtful analysis by the Iowa Supreme Court. The Iowa Supreme Court determined that to support a conviction beyond a reasonable doubt, the test must identify the amount of controlled substance in the Confirmatory Test. There is no other way to determine if an excessive amount of medication was taken or if it is at a level above or below the cutoff level. In Meyers, the Iowa High Court vacated his convictions. The State argued there was corroborating evidence (i.e. HGN, field sobriety tests) that show signs of impairment. The Iowa Supreme Court found these tests did not meet the 'beyond a reasonable doubt' standard for impairment.

Other jurisdictions have held the State to a meticulous standard to follow testing regulations as a defendant has the presumption of innocence.

A. State v Tripothy 2260rApp522(2009) (Oregon).

Marijuana and amphetamines in his urine. Case reversed for lacking proper foundation.

B. People v Henry 398ILLApp3d1019(2010) (Illinois).  
State failed to strictly comply with foundation  
regulations. Case Reversed.

C. State v Stitts 12WasApp2d1052(2020) (Washington).  
State failed to document a Confirmatory Test. Case  
Reversed.

Trial Counsel Wm McGinn hired Henry Nipper PhD to  
evaluate the State's toxicology evidence. Dr Nipper is  
a Harvard University trained laboratory scientist and  
former Director of Creighton University's Toxicology  
Lab. Dr Nipper published his report on Feb 3, 2017 and  
available to McGinn three months before trial. Dr  
Nipper's written report and trial testimony said the  
State did not report quality controls, cutoff levels  
and confirmatory testing method. (E62,72) (B1.791:17-  
792:19). McGinn was ineffective as he did not follow  
the advice of the very expert he hired & failed to move  
to suppress the toxicology report and failed to object  
to it's admission at trial. This result is a violation  
of Petitioner's 6<sup>th</sup> and 14<sup>th</sup> Amendment rights.

### Argument III

Upon receiving a copy of the printed trial transcription, called the Bill of Exceptions (BOE) in Nebraska, Petitioner Kevin W. Malone observed that some of his trial testimony with lead prosecutor Ryan Lindberg was missing. This prompted the Petitioner and his post conviction counsel to request a records hearing on this matter. This is referred to as a 2-105(b)(5) hearing named after the specific Nebraska statute.

The Clerk of the Nebraska Supreme Court and Court of Appeals ordered a 2-105(B)(5) hearing to be held in the District Court of the trial court judge, in an attempt to resolve discrepancies to the bill of exceptions.

On June 8, 2020 a 2-105(B)(5) hearing was held in the Douglas County District Court of the Hon. Shelly Stratman. Petitioner Kevin Malone testified and described in detail three dialogue exchanges between himself and prosecutor Ryan Lindberg that are missing from the printed BOE(B3.15:14-18:14). Malone presented four witnesses that were present at trial and each testified they recall at least one of the missing dialogue exchanges. (B3.30:7-19,40:7-25,60:1-12). In addition, licensed private investigator Tony Infantino



interviewed five jurors from the trial and four of the jurors recall at least part of the missing exchanges. The remaining jurors could not be located or declined to be interviewed. (T3.13-17). State Attorney Katie Benson presented no witnesses and no impeachment of defense witnesses.

The Nebraska Supreme Court had previously determined that the party seeking an amendment to the record is to provide evidence the BOE is inaccurate. State v Kays 299Neb360(2014)C791. Malone requested the Court to play the fifty minute audio file of the trial testimony in question at the 2-105 hearing.(B3.11:2-8). Judge Stratman denied this request.(B3.13:3-6). It is impossible to provide conclusive evidence of omissions (the audio file) when this evidence is denied by the district court. In Kays, the Nebraska Supreme Court criticized the defense counsel for failing to submit the audio recording and stenographer's notes in evidence. Kays c788.

Malone alleges it is a conflict of interest for Judge Stratman to adjudicate potential irregularities in her court room. Malone filed two motions asking for the judge's recusal. These were denied without a hearing. This appears to be a violation of Judicial Canon I, 5-301.2, appearance of impropriety. Further the Ne Rules

of Evidence 27-605, along with Nebraska Case Law; "the judge must disqualify himself if he has personal knowledge of disputed evidentiary facts concerning the proceeding." Cline v Franklin Park 201Neb238(1981).

After the 2-105 hearing adjourned and in a private setting, Judge Stratman directed her current court reporter Matisha Stratton to retrieve the trial audio file from the Clerk of the Court, listen to it and file an affidavit. According to Ms Stratton's affidavit there was no missing testimony. (T3.33-34). Ms Stratton's affidavit underwent no cross examination, she did not testify at the 2-105 hearing and she was not present at trial. This is the same evidence denied to the Petitioner at the 2-105 hearing. Thus the judge creates her own evidence and Ms Stratton becomes an unsworn witness. This violates the Confrontation Clause of the Sixth Amendment. Again, this appears to violate Judicial Canon I, 5-301.2 appearance of impropriety.

The injustice in this specific case is the BOE appears to be purposely altered. The three missing dialogue exchanges did not occur in consecutive sequence, so accidental omission is not likely. Purposeful omission is tampering with physical evidence and a Class IV felony. This is concerning as this

district court has a history of corruption to court records. See State v Charles Kays 299Neb260(2014).

The relevance of the missing testimony is profound. In two of the exchanges, prosecutor Lindberg accused Malone of not being truthful in his trial testimony. In the third, Malone spoke of Dr Ted Sokol's accident report. The first missing exchange was a heated dialogue after Lindberg entered the witness stand, raised his voice and berated Malone. The prosecutors conduct violates rule 3-503.4(a) of the rules of professional conduct. This brought no response by the Court.

Malone has requested to listen to, inspect and copy the trial audio file but was denied by the District Court. The Nebraska Statutes that allow for inspection and copying are Ne Rev Stats 29-3520 & 29-3521.

Statute 29-3520 states in relevant part, 'complete criminal history information maintained by a criminal justice agency shall be a public record, open to inspection and copying by any person...'

Statute 29-3521 states in relevant part, 'In addition to public records under section 29-3520, information consisting of the following classifications shall be considered public record for purposes of

dissemination...(3) Court records of any judicial proceeding.'

A public record is defined as any record belonging to any branch of the state, regardless of the physical form. Ne Rev Stat 84-712(1).

State actors were permitted to check out and take physical possession of the trial audio file on two separate occasions, but denied to the Petitioner. Specifically, Ms Stratton as stated in her affidavit and Asst Douglas County Attorney Tess Moyer as confirmed in her email. (T3.33-34), (B3.14:11-17). This was also confirmed by Mr John Friend, Clerk of the District Court (CI19-466, page 110:12-16).

Chain of custody Rule 4-16 was violated on both occasions by the State. This is a Fourth Judicial District rule that requires a judges order and a receipt left with the Clerk's office to obtain these records. There is no order in Justice and no receipt with the clerk's office. Again, this district court has a history of altering court records. (See Kays 2014).

The bizarre behavior of the district court is beyond explanation. Denying the Petitioner the audio recording in the hearing and then going outside the record and ordering her stenographer Ms Stratton to retain the same evidence after the 2-105 hearing

adjourned demonstrates bias and prejudice by the district court judge. Bias is demonstrated by restricting evidence to state actors. Prejudice is shown as the audio recording contained evidence of prosecutor misconduct, exculpatory evidence of the motor vehicle accident and the appellate courts have an incomplete record for review. Bias and prejudice violates Judicial Canon II 5-302.3.

Following the 2-105 hearing, the judge allowed State Attorney Katie Benson an opportunity to present a written objection to Malone's evidence of missing testimony. But denied defense counsel an opportunity to present a written objection to Ms Stratton's affidavit. Again, more bias and prejudice.

There was a previous case adjudicated by Judge Stratman where prosecutors made similar opinion statements that drew criticism by the Nebraska Supreme Court. *State v Stricklin* 300Neb794(2018). It is likely the Judge recognized the similarities and redacted the offending statements.

"A proper administration of the law demands not only that judges refrain from actual bias but also that they avoid all appearances of unfairness." *Gibilisco v Gibilisco* 263Neb27(2002), This is a 14<sup>th</sup> Amendment violation.

Spoliation or destruction of evidence indicates fraud and a desire to suppress the truth. Richter v City of Omaha 273Neb281(2007).

Conclusion. Due to violations of the Petitioner's rights of the 5<sup>th</sup>, 6<sup>th</sup>, and 14<sup>th</sup> Amendment to the US Constitution and Article 1, Sections 3,11,12 and 23 of the Nebraska Constitution, the Petitioner respectfully requests the Writ of Certiorari be granted.

*Kevin W. Malone 12-1-2022*

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