

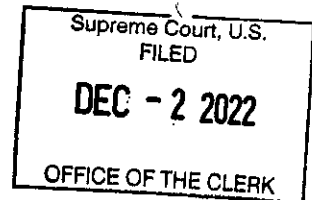
No. **22-6311**

**ORIGINAL**

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---



MASSEY L. ALLEN, JR.,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE NEBRASKA COURT OF APPEALS

---

PETITION FOR WRIT OF CERTIORARI

---

Massey L. Allen, Jr., #213403  
Nebraska State Penitentiary  
P.O. Box 22500  
Lincoln, Nebraska 68542-2500  
(402) 471-3161

PRO SE PETITIONER

### QUESTIONS PRESENTED

1. Whether there was sufficient evidence adduced at trial to convict Petitioner of the offense beyond a reasonable doubt under this Court's holding in *Jackson v. Virginia*, 443 U.S. 307 (1979)?

2. Whether the Fourteenth Amendment prohibits citizens from being prosecuted for a mutual consent fight or combat resulting in death?

3. Whether Petitioner's Fourteenth Amendment due process rights were violated under this Court's holding in *Doyle v. Ohio*, 426 U.S. 610 (1976), when the prosecution used Petitioner's post-Miranda silence for impeachment at trial?

## TABLE OF CONTENTS

|   |    |
|---|----|
| OPINIONS BELOW .....  | 1  |
| JURISDICTION .....  | 1  |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....  | 1  |
| STATEMENT OF THE CASE .....   | 2  |
| A. PROCEDURAL HISTORY .....   | 2  |
| B. STATEMENT OF FACTS .....   | 3  |
| REASONS FOR GRANTING THE WRIT .....   | 10 |
| I. CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THERE WAS<br>SUFFICIENT EVIDENCE ADDUCED AT TRIAL TO CONVICT PETITIONER<br>OF THE OFFENSE BEYOND A REASONABLE DOUBT UNDER <u>VIRGINIA V.<br/>        JACKSON, 443 U.S. 307 (1979)</u> . .... | 10 |
| II. CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE<br>FOURTEENTH AMENDMENT PROHIBITS CITIZENS FROM BEING<br>PROSECUTED FOR A MUTUAL FIGHT RESULTING IN DEATH. ....   | 12 |
| III. CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER PETITIONER'S<br>FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED UNDER<br><u>DOYLE V. OHIO, 426 U.S. 610 (1976)</u> . ....  | 13 |
| CONCLUSION .....  | 16 |

## INDEX TO APPENDICES

- APPENDIX A: Memorandum Opinion and Judgment on Appeal from the Nebraska Court of Appeals, **State v. Allen, No. A-21-553 (Neb.App. June 28, 2022)**, unpublished.
- APPENDIX B: Sentencing order from the district court of Douglas County, Nebraska, **State v. Allen, No. CR 20-1714 (Douglas Cty. Dist. Ct. June 25, 2021)**, unpublished.
- APPENDIX C: Order from the Nebraska Supreme Court denying petition for further review, **State v. Allen, No. A-21-553 (Neb. Sept. 6, 2022)**, unpublished.

## TABLE OF AUTHORITIES

### CASES

|  |           |
|--|-----------|
| Chapman v. Chapman, 386 U.S. 18 (1967) .....                           | 15        |
| Doyle v. Ohio, 426 U.S. 610 (1976) .....                               | passim    |
| Fletcher v. Weir, 455 U.S. 603 (1982) .....                            | 13        |
| Jackson v. Virginia, 443 U.S. 307 (1979) .....                         | i, ii, 10 |
| State v. Allen, No. A-21-553 (Neb.App. 06/28/2022) .....               | passim    |
| State v. Allen, No. CR 20-1714 (Douglas Cty. Dist. Ct. 06/25/2021) ... | passim    |
| State v. Carmen, 292 Neb. 207 (2015) .....                             | 12        |
| State v. Figures, 308 Neb. 801 (2021) .....                            | 15        |
| State v. Lofquest, 227 Neb. 567 (1988) .....                           | 13, 14    |
| State v. Packett, 206 Neb. 548 (1980) .....                            | 15        |

### CONSTITUTIONAL PROVISIONS

|                             |        |
|-----------------------------|--------|
| U.S. Const. amend XIV ..... | passim |
|-----------------------------|--------|

### STATUTES

|                               |       |
|-------------------------------|-------|
| 28 U.S.C. § 1257 .....        | 1     |
| Neb.Rev.Stat. § 28-305 .....  | 2, 10 |
| Neb.Rev.Stat. § 28-310 .....  | 2, 10 |
| Neb.Rev.Stat. § 28-1409 ..... | 2, 12 |

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 and decision of the Nebraska Court of Appeals.

OPINIONS BELOW

The memorandum opinion and judgment on appeal from the Nebraska Court of Appeals appears at Appendix A to the petition and is unpublished. The sentencing order of the district court of Douglas County, Nebraska, appears at Appendix B to the petition and is unpublished (T74-75).

JURISDICTION

The judgment of the Nebraska Court of Appeals was entered on June 28, 2022. The order of the Nebraska Supreme Court denying further review was issued September 6, 2022. There was no extension of time to file this petition and it is timely filed by not later than December 5, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "No state shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws."

Neb.Rev.Stat. § 28-305(1) provides that "A person commits manslaughter if he or she kills another without malice upon a sudden quarrel or causes the death of another unintentionally while in the commission of an unlawful act."

Neb.Rev.Stat. § 28-310(1) provides, in pertinent part, that "A person commits the offense of assault in the third degree if he ... [i]ntentionally, knowingly, or recklessly causes bodily injury to another person."

Neb.Rev.Stat. § 28-1409(1) provides, in pertinent part, that "[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such person on the present occasion."

#### STATEMENT OF THE CASE

##### A. PROCEDURAL HISTORY

On March 26, 2021, a Douglas County, Nebraska jury convicted Petitioner Massey L. Allen, Jr. of Manslaughter with the predicate offense being Assault in the Third Degree, a Class I Misdemeanor (T49). The trial court on June 25, 2021, sentenced Petitioner to imprisonment for a total term of not less than 20 years to no more than 25 years. On direct review, the Nebraska Court of Appeals affirmed Petitioner's conviction and sentence on June 28, 2022, in **State v. Allen, No. A-21-553 (Neb.App. 2022)**, unpublished, further review denied September 6, 2022.

On October 19, 2020, the State sought leave to file an Amended Information adding count 2, that charged Petitioner with being a habitual offender (6:22-7:4). Additionally, Petitioner spoke up indicating that he wanted a motion for a deposition on all five (5) of his witnesses as soon as possible. In response,

one of his trial attorneys requested a hearing date for mid-November (10:17-22). The Court scheduled the matter for November 24, 2020, at 11:00 a.m. (10:15). On March 24, 2021, the parties met outside the presence of the prospective venire to take up a motion by the State to file a second amended Information that sought to amend the dates alleged in count 1 to "on or about the 25th day of March 2020 through April 14th 2020" and to remove the alternative theory of intentional manslaughter leaving just the theory of involuntary manslaughter (12:1-13:16). Petitioner's counsel did not object and advised the Court she had been put on notice the prior week (13:12-16).

#### **B. STATEMENT OF FACTS**

Massey L. Allen, Jr. was convicted for Manslaughter with the predicate offense being Assault in the Third Degree, a Class I Misdemeanor (T49). The jury convicted Allen on the word of the prosecution whose argument and its witnesses were inherently unreliable. Allen went to the J-N-J Grocery Store on March 25, 2020, in his 2010 Cadillac, DTS, with his friend Ennis Prince whom he had known since they were young kids starting out school (397:12-20; 400:7-20). While there they came into contact with two friends, Charles Smith and Robert Drake (401:11-12; 403:1-20). Allen agreed to give both Smith and Drake a ride home (403:7-20). Both Prince and Smith passed away between that date and Allen's trial, and were therefore unavailable to testify at the trial (397:22-25; 401:16-17).

Allen noticed Horace Steen at the J-N-J whom he had known for over 20 years and someone he considered a friend (404:5-12; 430:5-12; 430:16-20). Allen and Steen had given each other rides over the years and drank together (404:13-22). As Smith was getting ready to enter Allen's Cadillac, Smith

handed his beer to Steen (406:2-11; 432:23-25). As Allen left the J-N-J to take Drake home first he heard Steen say something similar to "get the [fuck] out of here you fucking pedophile before you go to jail" (409:6-8; 433:3-22). Allen had been parked next to a white car with females standing outside or sitting in the car (408:4-13). Allen did not know them or interact with them (408:13-15). Allen responded to Steen telling him to "watch your mouth" (409:17). In response, Steen said "come back and I'll whoop your ass" while he pointed at Allen's car and lifted his hands up (409:17-19; 410:1-6). Allen reversed his car and went back to the J-N-J to verbally confront Steen for his comments (410:10-19; 434:6-18; 435:17-21; 442:7-11). At the same time Steen began advancing toward Allen's Cadillac "... like he's going to fight" (411:4-11).

When Allen returned to the J-N-J and exited his vehicle he positioned his back to the wall so that he could keep an eye on the people that he believed to be on Steen's side (412:2-10). Steen challenged Allen by saying "come on, you ready" (415:4-7). He approached Allen and attempted a swing at him while the guys around him were telling him to knock Allen out (415:20-25; 417:1-3; 418:10-13; 445:9). Allen explained he kept his hands down as Steen approached him (441:5-7). Allen described Steen's attempt to swing at him as bending down and lurching or flinching like he was going to hit him (419:11-15; 420:9-15; 442:23-443:5; 444:4-7). That was when Allen struck him, and why Allen struck him (419:15; 420:1-3; 420:22-25; 443:6-7; 444:22-25). Duane Montgomery also witnessed Steen make a forward lunging motion when Allen hit Steen (471:4-17). When crossed by the State on Allen's possible influence over his testimony, Montgomery indicated that Allen told him to tell the jury what he had



witnessed (473:9). William Wright also testified that he witnessed Steen acting like he was going to hit Allen, when Allen jumped and came back with a punch (490:1-8; 491:4-22). Wright considered Steen a good friend, but said Steen was acting "a damn fool" that day (498:6-15).

Robert Drake testified he was at the J-N-J during the incident on March 25, 2020, following celebrating his friend's, Charles Smith's, birthday (319:14-321:25). Drake had known Allen for 15 to 20 years (316:24-317:23). Drake considered himself an acquaintance of Steen (326:10-13). Drake observed Steen to be intoxicated at that time (340:19-341:1). Steen was further described as being rowdy, disruptive and talking tough (341:2-7). Drake testified he had entered Allen's vehicle in the rear passenger seat while it was parked at the J-N-J following the offer from Allen to give him a ride (325:15-17; 327:15-20; 341:8-15). Drake heard Steen call Allen a pedophile (328:20-329:2). Following the name calling, Allen proceeded to drive off with Drake, Ennis Prince and Charles Smith in the vehicle (325:9-12; 327:15-328:1; 329:19-25). Drake believed Allen to be upset as he pulled away from the J-N-J (330:8-23). Allen stopped the vehicle and began backing up and returned to the J-N-J (331:18-332:24).

Once returning to the J-N-J, Allen exited the vehicle (333:15-17). Drake had seen some video of the incident and recalled seeing Steen remove his jacket or coat and flinch prior to being struck by Allen (333:7; 334:17-336:13; 343:1-3). Exhibit 7, a DVD copy of a cell phone video was offered and received over Petitioner's objection (304:17-309:19). Drake explained that Exhibit 7 was only a partial video of what he had seen, and the portion of the video wherein Steen flinched was not included (343:11-24). When Allen returned to

the vehicle, he stated that he had hit Steen (336:14-337:3). Allen drove off (335:5-7).

Drake was asked about his contact with Allen during the pendency of the case (337:23-338:23). When they discussed the case, Allen never told him what to say, nor did he cause him to change his story (339:9-18). Allen's attorney asked Drake what else Steen had said to Allen besides calling him a "pedophile" and the Court sustained a hearsay objection by the State (340:6-18). Drake was also asked what Steen was shouting at Allen as Allen was leaving and the Court sustained a hearsay objection by the State (342:15-22).

Out of fear Steen's support would retaliate, Allen got in his car and drove off (421:7-11; 449:6-19). When challenged by the State on the voices heard or not heard in the video (Exhibit 7), Allen explained that he has seen an additional video containing the statements he testified to (446:7-25). During the State's cross-examination of Allen, the State asked him "You never spoke to law enforcement-(interrupted)" (450:5). Allen was the one that interrupted him stating "I got arrested the next day, less than 24 hours" (450:6). The State began to rephrase the same question in response asking "Again, you-" when Allen's trial counsel objected and requested to approach (450:7-10). At that time the defense moved for a mistrial based upon the State's questioning of Allen's silence (450:12-451:8). It was overruled by the Court (459:6-11).

Omaha Police officer August Hogan testified that he was dispatched on March 25, 2020, to 3247 N. 42nd Street, the location of the J-N-J grocery store at approximately 8:13 p.m. in response to an assault/disturbance (177:17-179:6). Upon arrival medics were tending to an individual referred to alternatively as "the victim" and Horace Steen (182:22-25). Hogan observed

Steen lying in a parking stall unconscious with a pool of blood coming from the back of his head (183:4-6). There were approximately eight to ten civilian onlookers (183:8-10).

Captain T.J. Korpela from the Omaha Fire Department was dispatched to the J-N-J responding at approximately 8:16 p.m. (233:3-4). Korpela learned that Steen had been punched and fell backward striking his head on the concrete (236:8-9). Steen was 49 years old with an estimated weight of 230 pounds (246:5-22). Steen sustained significant blood loss estimated to be 500 milliliters (236:17-21). He was unable to identify any other injuries that would have caused the bleeding (237:2-5). The medical staff put a "C" collar on him and initiated rapid sequence intubation prior to his transportation to the hospital (238:3-239:23). Korpela opined that Steen would not have survived but for the medical intervention done that evening (244:10-18).

Once Steen was loaded into the ambulance, Hogan set out to identify the initial 911 caller, Taylor Brown (191:23-192:8). While Hogan was speaking to Brown and obtaining a general understanding of what happened, a woman, Natalie Hawkins had interjected with her version of events (192:15-21). Based upon his conversations with Brown and Hawkins, Hogan was able to generate a suspect, a suspect vehicle and possible location of the suspect (194:15-24). Hogan spoke with an employee of the J-N-J to obtain surveillance footage (199:2-17). Hogan looked at one camera angle and viewed what he believed to be the entire incident (199:20-25). Detective Molek had arrived at the scene on March 25, 2020, approximately 30 to 40 minutes after being notified of the incident (257:12-14). He was familiar with the time stamp on the J-N-J surveillance footage being 29 minutes fast (265:4-10).

On March 26, 2020, Hogan initiated a traffic stop on Petitioner Allen as he was near his residence arresting him on an assault warrant that had been recently issued for the incident the night prior at the J-N-J (203:22-205:8). Molek observed Allen at the police department to have a contusion on one of his knuckles on his right hand and a small laceration to the middle finger on his right hand (293:21-24).

Steen passed away on April 14, 2020 (300:3-5). Dr. Michelle Elieff conducted the autopsy (354:19-22). Steen had been admitted to the hospital with an expanding brain bleed that pushed his brain from right to the left and down his spinal column (363:9-13). A portion of his skull had been removed to relieve pressure and eminent death (363:13-16). Steen also presented with pneumonia in both lungs, puss in his abdomen, and his organs were generally swollen (367:2-10). Dr. Elieff explained that the condition of the organs was not uncommon given the hospitalization with shock and prolonged illness (367:8-10). The pneumonia was consistent with a person who was unable to breath on their own or clear their airway (369:21-25). Dr. Elieff testified that the cause of death was blunt force head injuries and complications from those injuries (368:23-25; 373:6-15). Further, Dr. Elieff testified that the blunt force head injury present on Mr. Steen was consistent with the report from law enforcement that he had fallen and hit his head (369:1-10). Beyond Steen being above .1 on his alcohol testing which was an amount higher than the legal limit of alcohol allowed for driving, Dr. Elieff could give no further specifics and no testimony was offered regarding what the .1 stood for (372:3-24). Dr. Elieff did have access to and reviewed Steen's medical records that predated March 25, 2020, and she was not aware of any preexisting conditions

that would have altered her cause of death determination (374:20-25).

On May 3, 2020, while working off-duty Hogan was approached by a food vendor that was aware of a video circulating of the incident (206:25-207:4). Hogan obtained a copy and provided it to Molek (207:10-16). Based upon his investigation, Hogan believed the video obtained was not the complete version of the original video, but he was not certain (390:20-392:23; 394:15-19). He was never able to obtain the full version (393:8-11).

Following the State's rest, Allen moved for a judgment of acquittal (388:2-12). The motion was denied (388:13-15). That motion was not renewed at the close of the case. The jury returned a verdict of guilty (550:3-8). On May 10, 2021, an enhancement hearing was held wherein Allen was found to be a habitual offender (559:17-560:5). On June 25, 2021, Allen was sentenced to a period of twenty (20) to twenty-five (25) years in prison at the Nebraska Department of Correctional Services with credit for 98 days time served. At sentencing, Allen's trial counsel stipulated to the amount of \$1,500.00 being paid to the victim's family as restitution out of his bond. Because of the Habitual enhancement, his parole eligibility was deemed to be fifteen (15) years less his 98 days credit (578:8-12).

The Nebraska Court of Appeals affirmed Allen's conviction and sentence on direct review in *State v. Allen*, No. A-21-553 (Neb.App. 06/28/2022), further review denied September 6, 2022 (Appendices A & C). The present petition for writ of certiorari is now before this Court for its consideration.

## REASONS FOR GRANTING THE WRIT

- I. CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THERE WAS SUFFICIENT EVIDENCE ADDUCED AT TRIAL TO CONVICT PETITIONER OF THE OFFENSE BEYOND A REASONABLE DOUBT UNDER VIRGINIA V. JACKSON, 443 U.S. 307 (1979).

A defendant is entitled to relief "if is found upon the record evidence adduced at the trial no rational trier of fact could find guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). As this Court noted in *Jackson*, "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a judge sitting as jury." *Id.*, at 317. When such a situation arises, the conviction cannot constitutionally stand. *Id.* This is one such situation. Indeed, this case presents the most egregious of all situations—the conviction of an innocent man.

To sustain a conviction in Nebraska for Manslaughter with the predicate offense of Third Degree Assault (*Neb.Rev.Stat. §§ 28-305(1), 28-310(1)*); the State was required to prove beyond a reasonable doubt that Allen caused the death of Steen while in the commission of intentionally, knowingly, or recklessly causing bodily injury to Steen. The State was also required to prove beyond a reasonable doubt that Allen did not act in self-defense, that Steen did not use or threaten force against Allen, and that under the circumstances as they existed at the time, Allen did not reasonably believe that the force he used against Steen was immediately necessary to protect himself against such used or threatened force by Steen (T50-51).

The evidence in this case, even when taken in light most favorable to the State, fell woefully short of establishing that Allen caused the death of

Steen while in the commission of assaulting Steen in the Third Degree and that Allen did not act in self-defense. Allen was prosecuted by the State on a theory of involuntary manslaughter while in the commission of an unlawful act, Third Degree Assault. The State of Nebraska must meet its burden of proof to convict Allen beyond a reasonable doubt. The prosecution presented the jury at Allen's trial with unreliable, irrelevant, and inadmissible evidence, and false testimony.

There was evidence adduced that Allen struck Steen who fell and struck his head on the concrete sustaining injuries. The circumstances under which he did were at issue. Allen acted in self-defense and he was not the initial aggressor. All the evidence pointed to Steen provoking Allen by name calling and using fighting words. The only evidence offered that Allen could have been considered the initial aggressor was that he completed his punch before Steen did. However, the testimony offered at trial established that Steen made a motion consistent with initiating a punch at Allen that Allen reacted to when he punched Steen. Allen described Steen's attempt to swing at him as bending down and lurching or flinching like he was going to hit him (419:11-15; 420:9-15; 442:23-443:5; 444:4-7). Duane Montgomery also witnessed Steen make a forward lunging motion when Allen hit Steen (471:4-17). Robert Drake testified concerning the same flinch and further explained that Exhibit 7 did not contain the entire video he had seen wherein the flinch had been recorded (333:7; 334:17-336:13; 343:1-24). Finally, William Wright also testified that he witnessed Steen acting like he was going to hit Allen, when Allen jumped and came back with a punch (490:1-8; 491:4-22).

Under the facts presented at trial, Allen could rely on clearly established

Nebraska law of self-defense.

[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

Neb.Rev.Stat. § 28-1409(1) (Reissue 2016), (in pertinent part). Based upon the evidence presented, there was insufficient evidence offered to establish that the State proved beyond a reasonable doubt Allen did not act in self-defense when striking Steen. No fair minded jurist or rational trier of fact could agree with the jury at Allen's trial that sufficient evidence exists to convict him beyond a reasonable doubt. Accordingly, Allen's conviction and sentence should be vacated. A writ of certiorari should issue on this basis.

**II. CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE  
FOURTEENTH AMENDMENT PROHIBITS CITIZENS FROM BEING  
PROSECUTED FOR A MUTUAL FIGHT RESULTING IN DEATH.**

The facts of this case present this Court with an ideal opportunity to resolve the unanswered question whether the due process clause of the Fourteenth Amendment prohibits the prosecution for a mutual fight or combat resulting in death. In *State v. Carman*, 292 Neb. 207 (2015), the Nebraska Supreme Court held that because the Legislature did not specifically exclude mens rea from the language of the offense, the State must show mens rea to sustain a manslaughter conviction. The case involved traffic infractions as the predicate offense for death. Because traffic infractions are public welfare offenses which do not require a showing of mens rea, they are insufficient by themselves to support a conviction for "unlawful act" manslaughter or "involuntary" manslaughter. *Id.*

This present case at bar deals with a fight by mutual consent rather than



a traffic infraction. However, a fight by mutual consent contains that very important concept of "consent." It is consent that prevents athletes from being charged and convicted with involuntary manslaughter when a death results in a sporting contest from a pitch hitting a player's chest or head, a prize fighter knocking out an opponent, or a football player making a violent hit that results in a death of the opposition. The boxing match example fits the definition of a fight by mutual consent to a T. Allen was challenged to a fight by Steen when he told him he would whoop his ass, removed his jacket, set his beer down and advanced toward Allen as he was backing into the J-N-J. Allen was able to strike his punch before Steen was able to get his punch fully initiated. All the witnesses present at the scene testified consistent with this interpretation of the evidence. Consent by Steen to engage in hand-to-hand combat should preclude the State from relying on a fight by mutual consent case to act as a sufficient predicate offense for manslaughter. This Court's intervention is necessary to address this novel issue that will undoubtedly recur in future cases. Allen is asking this Court to issue the writ and vacate his conviction and sentence.

III. CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED UNDER DOYLE V. OHIO, 426 U.S. 610 (1976).

In *Doyle v. Ohio*, 426 U.S. 610 (1976), this Court held that the due process clause of the 14th Amendment forbids prosecutors from using a defendant's post-arrest, post-Miranda silence for impeachment purposes. *Id.* In *Fletcher v. Weir*, 455 U.S. 603 (1982), this Court limited the *Doyle* holding that a prosecutor's remarks referring to post-arrest, pre-Miranda silence do not necessarily violate a defendant's due process rights. *Id.* In *State v. Lofquest*, 227 Neb.

567 (1988), the Nebraska Supreme Court held that the State violated the defendant's constitutional right to due process because his questioning as to his silence was vague and imprecise as to whether it was pre- or post-**Miranda** making it a violation of the **Doyle** principle. *Id.*

During the State's cross-examination in this case, the State asked Allen "You never spoke to law enforcement - (interrupted)" (450:5). Allen was the one that interrupted him stating "I got arrested the next day, less than 24 hours" (450:6). The State began to rephrase the same question in response asking "Again, you - " when Allen's trial counsel objected and requested to approach (450:7-10). At that time the defense moved for a mistrial based upon the State's questioning of Allen's silence (450:12-451:8). It was overruled by the trial court (459:6-11). The trial court ruled against Allen finding that to the extent the question or questions were asking about his silence to law enforcement, they equated to pre-**Miranda** silence thereby not violating his constitutional right. That finding was based upon the timing of the questioning in relation to some previous questions covering the timeframe after the mutual fight but before the arrest.

The State's preceeding questions in reverse chronological order were:

- (1) You never called 911 when you left the scene?;
- (2) Those same individuals you're scared of that were just cheering for you in Exhibit 7, correct?;
- (3) Instead you drove off, correct?; and
- (4) Yes or no, did you stop and provide medical aid to Horace Steen?  
Again, yes or no?

(449:12-450:2). Additionally, the trial court noted that Allen had interrupted the questioning. The trial court found that the questioning did not convince

her that the State was trying to elicit and impeach Allen on his post-Miranda silence. However, countering that point and in light of Doyle, the State prosecutor used the adverb "never" in the question about calling 911 and in the question about speaking to law enforcement. It was left ambiguous as to whether his questioning was referring to pre- or post-Miranda silence thereby triggering the Doyle principle.

Although Miranda warnings, i.e., warnings of right to counsel and right to remain silent will carry no penalty, such assurance is implicit to any person who receives the warnings and, hence, it would be fundamentally unfair and a deprivation of due process to allow a defendant's silence at time of arrest to be used to impeach an exculpatory story proffered for the first time at trial, regardless of whether reliance on Miranda warnings is offered as a justification in objecting to such cross-examination.

Doyle, at 618. The State's impermissible questioning of Allen at trial about him not talking to the police concerning their investigation was not harmless beyond a reasonable doubt. Federal law governs whether there can ever be harmless constitutional error and whether such error was harmless. *Chapman v. Chapman*, 386 U.S. 18, 20-21 (1967). Harmless error looks to the basis on which the trier of fact actually rested its verdict. *State v. Figures*, 308 Neb. 801 (2021) (inquiry is whether the actual guilty verdict rendered was surely unattributable to the error). *State v. Packett*, 206 Neb. 548, 552 (1980) (errors which require reversal of a cause are those prejudicial to the right of the accused, or which constitute the denial of a substantial legal right). In this case, Allen's actions and inactions were called into question by the State based upon Allen's self-defense claim. Allen's military training was used against him due to not rendering aid. If Allen was acting in self-defense, then why did he choose not to stick around, call the police, report a crime,

or the like?

Based upon the nature of this case, the State's impeachment, and the defense presented, it cannot be found that this Doyle violation was harmless beyond a reasonable doubt. Since the prosecution's question relating to Allen's silence was clearly pertaining to his post-Miranda silence, Allen was unquestionably prejudiced under Doyle because this influenced the minds of the jury for a guilty verdict due to Allen not speaking to the police. The trial court clearly violated Allen's federal constitutional rights to due process of law by not granting a mistrial.

Certiorari should be granted to address whether Allen's due process rights under the Fourteenth Amendment was violated under Doyle, when the prosecution used Allen's post-Miranda silence for impeachment at trial and the trial court's refusal to grant Allen's mistrial motion thereafter. This Court's discretionary intervention is necessary to address this important issue, if left undisturbed, will result in a constitutionally intolerable conviction.

#### CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

By: Massey L. Allen, Jr.  
Massey L. Allen, Jr., #213403  
Nebraska State Penitentiary  
P.O. Box 22500  
Lincoln, Nebraska 68542-2500  
(402) 471-3161  
PRO SE PETITIONER

December 2, 2022