

No. 23 - 7178

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

SHAWN TITUS — PETITIONER
(Your Name)

vs.

DONALD L. SCHENSE — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

NEBRASKA COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Shawn Titus
(Your Name)

2323 Avenue J. East
(Address)

Omaha, NE 68111
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. COULD THE TRIAL COURT DEPRIVE PETITIONER OF HIS 7TH AMENDMENT RIGHT TO A TRIAL BY GRANTING SUMMARY JUDGMENT BASED SOLELY UPON THE DEFENDANT-EXPERT'S CONCLUSORY, SELF-SERVING AFFIDAVIT IN A CASE OF APPELLATE LEGAL MALPRACTICE?
2. WAS PETITIONER DEPRIVED OF MEANINGFUL, REASONABLE, AND EQUAL ACCESS TO THE COURT DURING THE APPELLATE PROCESS? IF SO, WOULD THIS COURT CONSIDER HIS PETITION TIMELY?

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:

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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 _____ 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 is unpublished.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 _____ 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 is unpublished.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 A 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 is unpublished.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 trial court 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 is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was _____.

[] 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: _____, 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. § 1254(1).

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

The date on which the highest state court decided my case was 2/16/2024. A copy of that decision appears at Appendix D.

[x] A timely petition for rehearing was thereafter denied on the following date: 1/8/24, and a copy of the order denying rehearing appears at Appendix C.

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

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances. U.S. Const. Amend. I.
2. In suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. U.S. Const. Amend. VII.
3. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV.
4. (1) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of subsection (2) of this section.
(2) When the relevance of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
(3) Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness, if he so requests.
(4) The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.
(5) This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility. Neb.Rev.St. §27-104

5. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Neb.Rev.St. §27-403
6. (A) A motion for rehearing and brief in support must be filed within 10 days after the release of the opinion of the court or the entry of the order of the court disposing of the appeal. A motion for rehearing is not permitted following an order of the Supreme Court denying a petition for further review. A motion for rehearing which is timely filed in the Court of Appeals shall toll the time for filing a petition for further review. See §2-102(F). The motion for rehearing and a brief in support are required to be filed. A motion to extend time to file the brief in support of the motion for rehearing may be requested by following the procedure set out in §2-106(F), except that every request must be accompanied by a showing of good cause. Neb.Ct.R. of App. §2-113.
7. (1) The following are final orders which may be vacated, modified, or reversed:
 - a) An order affecting a substantial right in an action, when such order in effect determines the action and prevents judgment;
 - b) An order affecting a substantial right made during a special proceeding;
 - c) An order affecting a substantial right made on summary application in an action after a judgment is entered; and
 - d) An order denying a motion for summary judgment when such motion is based on the assertion of sovereign immunity or the immunity of a government official.

(2) An order under subdivision (1)(d) of this section may be appealed pursuant to section 25-1912 within thirty days after the entry of such order or within thirty days after the entry of judgment. Neb.Rev.St. §25-1902
8. The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in. Neb.Rev.St. §25-323

STATEMENT OF THE CASE

Petitioner, Shawn Titus, commenced this action on August 1, 2022 alleging appellate/postconviction malpractice by his former attorney in his criminal case. Discovery was exchanged by the parties thereafter.

In November of 2022, defendant filed a motion for summary judgment. A hearing on defendant's motion was held in December of 2022. During this hearing, the court received into evidence defendant's affidavit, which averred that, based on his education, training, experience, and his professional opinion, he fully complied with all duties owed under the standard of care of a licensed, practicing attorney in the State of Nebraska, and that no action or inaction on his part caused or contributed to cause any of the damages alleged by Petitioner.

The trial court granted summary judgment in favor of defendant and dismissed the complaint with prejudice. The court indicated that defendant's affidavit set forth a *prima facie* case of lack of negligence, and that his affidavit shifted the burden to Petitioner to produce evidence showing the existence of a material issue of fact preventing judgment as a matter of law. The court found that Petitioner failed to present expert testimony to refute defendant's conclusory, self-serving affidavit, and granted summary judgment in defendant's favor.

On appeal, Petitioner raised several issues relevant to this petition, including:

- I. Trial court erred by granting summary judgment and denying constitutional rights to the redress of a grievance, a jury trial, and to cross-examine witnesses because:
 - a. Admission of [defendant's] affidavit was unfairly prejudicial, and grant of summary judgment based upon it was plain error;
 - b. Expert testimony was not necessary for [Petitioner] to prove his claims;
 - c. [Petitioner] raised genuine, disputed issues of material fact, which fall under the common knowledge exception and require a trial hearing, including:
 - i) State failed to establish commission of a crime using legally sufficient evidence;

- ii) Trial counsel failed to place the plea agreement upon the record;
- iii) Evidence calling the credibility of [defendant's] affidavit into question.

The Court of Appeals consolidated and restated Petitioner's claims, and affirmed the judgment of the trial court without addressing all of the claims and subclaims raised. Petitioner filed a motion for rehearing in the Court of Appeals alleging for the first time that the court did not have jurisdiction over his appeal, because the trial court did not dispose of all issues and failed to join indispensable parties. He also asserted that the court failed to address two issues he raised in his brief, including the danger of unfair prejudice inherent in granting summary judgment based upon the conclusory, self-serving affidavit of the party being sued, and an assertion that the relevance of said affidavit was allowed to limit Petitioner's right to introduce evidence relevant to weight and credibility of defendant's affidavit.

The Court of Appeals found Petitioner's brief in support of his motion for rehearing to be out of time for circumstances beyond his control, as described herein, and denied permission to file his nonconforming brief. Petitioner subsequently filed a motion to reconsider and a motion to dismiss the appeal for lack of jurisdiction. Both motions were overruled. Petitioner requested an extension of time to file his petition for further review in the Supreme Court of Nebraska, and was denied after he had already mailed it. The Supreme Court then denied his petition as untimely.

REASONS FOR GRANTING THE PETITION

I. THIS PETITION IS TIMELY, BECAUSE PETITIONER WAS DENIED MEANINGFUL, REASONABLE, AND EQUAL ACCESS TO THE COURT AND THE RIGHT TO THE REDRESS OF HIS GRIEVANCES BY THE APPELLATE COURTS OF NEBRASKA.

a) Petitioner raised challenge to jurisdiction for the first time within 90 days of filing this petition, and Court of Appeals did not dispose of it on the merits.

After the Court of Appeals issued its opinion, Petitioner filed a motion for rehearing. Petitioner brought up two challenges to the appellate court's jurisdiction for the first time in his brief in support of his motion. He placed his brief into the prison mailbox on 12/20/23, because it was due on 12/28/23. See, [App. E]. On 1/8/24, the appellate court indicated that his brief was not received until 1/4/24, and found his brief to be untimely. See, [App. C].

On 1/16/24, Petitioner filed a motion to "Alter, Amend, or Reconsider" along with a "Motion to Dismiss Appeal for Lack of Jurisdiction," because a lack of jurisdiction can be raised at any time in any proceeding. On 1/25/24, the Court of Appeals overruled his motions. See, [App. F]. This constitutes the first time that any court ruled on Petitioner's jurisdictional challenges, one of which is the basis for this petition.

On 2/2/24, Petitioner mailed a motion for extension of time to file a petition for further review in the Supreme Court, asking for tolling on his pending motions in the lower court. He also filed a request to file a nonconforming brief. On 2/11/24, the Supreme Court denied Petitioner's request for time extension and to file a nonconforming brief. See, [App. G]. On 2/16/24, the Supreme Court denied his petition for further review for being untimely. See, [App. D].

Petitioner asserts that his jurisdictional challenges were not disposed of for the first time until 1/25/24. See, [App. F]. Since the lack of jurisdiction can be raised at any time in any proceeding, the jurisdictional issues should not have been subject to pleading and timeliness requirements, and should have been disposed of on the merits, but were not. Therefore, Petitioner asserts that his

petition for further review to the Supreme Court of Nebraska was timely with regard to the jurisdictional issues raised at the very least, and that his 90 day time period within which to petition for a writ of certiorari in this Honorable Court started on 2/16/24.

- b) Appellate courts refused to grant time extensions or permission to file nonconforming briefs and held Petitioner accountable for inordinate delay in mail services.

Petitioner is an incarcerated inmate at the Omaha Correctional Center in Omaha, Nebraska. He does not have access to word processors or digital access to the courts. The prison law library is scheduled to be open for approximately 24 hours a week, but it is often closed to the general population during these hours and used for other purposes. There are only 4 computers dedicated to legal research and one or two typewriters shared by nearly 800 inmates. Nebraska courts do not recognize a mailbox rule. As a result, it is impossible to comply with a 10 day filing requirement, as required for filing motions for rehearing and for reconsideration, and it is extremely difficult to research, draft, and mail briefs that conform to pleading rules in time to be filed within a 30 day filing requirement.

The first thing Petitioner must always do is draft and file a motion for an extension of time, which takes away from the total time available to complete a brief. In this case, the Court of Appeals granted his requests up until he raised jurisdictional challenges. Then, the Supreme Court followed suit. See, [App. G].

The Court of Appeals failed to perform it's duty to provide meaningful, reasonable, and equal access to the court for the redress of Petitioner's grievances when it overruled his petition for rehearing and motion to submit a nonconforming brief for reasons that were arbitrary, capricious, and beyond his control. Despite the fact that a challenge to jurisdiction can be raised at any time in any proceeding, and in spite of Petitioner's request for findings of fact and conclusions of law, it overruled his jurisdictional challenges without providing a reason.

In May/June of 2023, Petitioner filed a handwritten appellate brief. At the SAME TIME, he filed a motion to submit a nonconforming brief, because by the time he wrote enough to see that it would not comply with page limitations, he did not have the time or resources to ask for an extension of time by mail as any response would arrive AFTER his brief was due. THIS TIME, the court sustained his request to file his handwritten, nonconforming brief. See, [App. H].

The Court of Appeals issued it's opinion on 11/7/23. Petitioner did not receive the opinion until 11/13/23. According to Neb.Ct.R. of App. §2-113, "a motion for rehearing and brief in support must be filed within 10 days after the release of the opinion of the court or the entry of the order of the court disposing of the appeal." Due to this rule, it is IMPOSSIBLE to research, draft, and FILE a motion for rehearing and brief in support in 10 days. He only had 4 days to research, draft, and have his brief in the clerk's hands. The law library is only open 24 hours over the span of 5 days each week, which subtracts at least another 2 days from the 10 days allowed by rule. All he could do was mail a motion for another time extension. On 11/28/23, the court granted the motion, wherein it indicated that "no further extensions will be allowed." See, [App. E]. The brief was due on 12/28/23.

Due to the aforementioned time and resource restrictions, Petitioner did not finish the necessary legal research until around 12/18/23. Due to having no access to word processors, he was unable to determine the actual length of his brief until the final draft was nearly complete. Due to having no access to word processors and inability to efile legal documents from prison, he could neither edit and rewrite it, nor submit a motion to file a nonconforming brief and receive a response with time to spare. He had no choice but to mail his nonconforming brief along with a motion requesting permission to submit it, exactly as he did before. See, [App. H].

On 12/20/23, EIGHT days before it was due, Petitioner placed his brief in support of his motion for rehearing and a motion to file a nonconforming brief in the prison mailbox. Then, in an order dated 1/8/24, and received on 1/10/24, his motion for rehearing was denied, because "no brief in support of his motion was filed until January 4, 2024, and it far exceeds the allowable word count. Additionally, appellant failed to seek a further extension and failed to obtain court approval prior to filing a non-conforming brief." See, [App. C].

Apparently, it took 15 days for Petitioner's brief and motion to travel approximately 50 miles from Omaha, NE to Lincoln, NE by mail, but only 2 days for the court's order to make the same trip. Petitioner could not have predicted or reasonably accounted for this inordinate delay, and should not have been deprived of meaningful, reasonable, and equal access to the court for circumstances beyond his control.

Petitioner immediately filed a motion to alter, amend, or reconsider on various grounds, including the unusual disparity in mailing time, and cited to the court's previous allowance of his request to fila a nonconforming brief under similar circumstances. He also included a motion to dismiss the appeal for lack of

jurisdiction, and mailed them on 1/16/24. In his brief and motion, he assigned 2 grounds for dismissal of his appeal for lack of jurisdiction, because appellate jurisdiction cannot be conferred by action of the parties thereto, and absence of jurisdiction may be asserted at any time during pendency of the litigation. Appeal of Harms, 173 Neb. 687, 114 N.W.2d 713 (1962). Petitioner asserts that the court should have disposed of these jurisdictional challenges, without regard to brief length or alleged tardiness, because lack of jurisdiction can be raised at any time in any proceeding, and it had a duty to determine a jurisdictional challenge. Instead, on 1/25/24, the court overruled both motions without providing a reason. See, [App. F].

Finally, on 2/2/24, Petitioner mailed a motion for extension of time to file a petition for further review in the Supreme Court, asking for tolling on his pending motions in the lower court. On 2/11/24, Petitioner placed his petition for further review to the Supreme Court into the prison mailbox before receiving a response. Normally, a motion to alter, amend, or reconsider a judgment will toll the statute of limitations. However, on 2/12/24, the Supreme Court denied Petitioner's request for a time extension. See, [App. G]. Then, on 2/16/24, it denied his petition for further review for being out of time. See, [App. D].

It should be noted that the dates referring to court orders above are when the orders were issued, not when Petitioner RECEIVED them. The order dated 1/8/24 was received on 1/10/24. The order dated 1/25/24 was received on 1/29/24. The order dated 2/12/24 was received on 2/14/24, and the order dated 2/16/24 was received on 2/20/24.

As illustrated above, the timing of everything was completely thrown off due to an inordinate delay in mail services and the lack of electronic access to the courts. Yet, both appellate courts held Petitioner accountable for the delay in mailing time, even though they could see that his envelope was postmarked on 12/21/23. It was unreasonable for the court to spontaneously require that he make a request to file a nonconforming brief ahead of time, when there is no rule or precedent requiring as much, it previously granted such a request during this very appeal, and he was not aware of this necessity until it was too late to seek permission in advance, due to the mailing time required. It was also unreasonable to refuse to address a jurisdictional question raised for the first time "during pendency of the litigation." Finally, it was contrary to normal practice to refuse tolling on a pending first time challenge to jurisdiction, or a motion to alter,

amend, or reconsider a judgment. Petitioner was diligent as he could possibly be given the lack of resources at his disposal, but the appellate courts insisted on depriving him of meaningful, reasonable, and equal access to the court.

c) The Court of Appeals consolidated and restated Petitioner's claims in order to avoid addressing three meritorious issues raised in his brief.

In it's opinion, the Court of Appeals "consolidated and restated" Petitioner's assignments of error. See, [App. A, p. 3]. However, there was no legal or factual basis to consolidate and restate Petitioner's claims, nor did the court cite to any. Petitioner asserts that the court did this in order to AVOID addressing certain meritorious claims, and to hide the fact that it was violating his 1st Amendment right to the redress of specific grievances, while maintaining the illusion that it was performing it's ministerial duties. The result was a ~~denial~~ constructive denial of access to the court.

In Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), this Court held that pro se litigants' pleadings are to be construed liberally and held to less stringent standards than pleadings drafted by lawyers; if a court can reasonably interpret pro se pleadings to state a cognizable claim on which a litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence structure, or litigant's unfamiliarity with pleading requirements. See, e.g., Boag v. MacDougall, 454 U.S. 364, 102 S.Ct. 594, 70 L.Ed.2d 551 (1982); Fazzini v. Northeast Ohio Corr'l Center, 473 F.3d 229 (6th Cir. 2006); Gomez-Diaz v. U.S., 433 F.3d 788 (11th Cir. 2005).

The first assignment of error that the court's consolidation and restatement swallowed was Petitioner's assertion that the "[a]dmission of Appellee's affidavit was unfairly prejudicial, and grant of summary judgment based upon it was plain error." See, (Br. of App., pp. 18-22). He asserted that the defendant's conclusory, self-serving affidavit should not have been admissible due to the danger of unfair prejudice inherent in allowing an interested party to exonerate himself, without giving Petitioner the opportunity to cross-examine him. See, generally, (Br. of App., pp. 18-22);(Mot. in Opp. to App. Mot. for Sum. Aff., p. 1).

The court acknowledged Petitioner's assertion of the danger of unfair prejudice in it's opinion, but did not actually address it. See, [App. A, p. 3]("the district

court... erred in granting summary judgment in favor of Schense because the admission of Schense's affidavit was unfairly prejudicial"). It did not indicate whether or not Neb.Rev.St. §27-403 would apply to prevent the danger of unfair prejudice inherent to admitting and granting summary judgment based upon the conclusory, self-serving affidavit of the party being sued, or whether such testimony could be admitted without cross-examination, nor were these issues addressed in the cases cited by the court in denying his "consolidated and restated" claim.

The second assignment of error that the court's consolidation and restatement swallowed was Petitioner's assertion that he DID raise a genuine disputed issue of material fact- the defendant's credibility. He raised 3 subclaims under the assigned error that, "[Petitioner] raised genuine, disputed issues of material fact, which fall under the common knowledge exception and require a trial hearing... [including] [e]vidence calling the credibility of Appellee's affidavit into question." See, (Br. of App. pp. 24 and 28-30). Neither the district or appellate court acknowledged or addressed Petitioner's submission of evidence during the summary judgment hearing challenging defendant's credibility, which the jury should have been allowed to consider.

The relevance of the defendant-expert's affidavit was allowed to limit Petitioner's right to introduce before the jury evidence relevant to weight and credibility, in violation of Neb.Rev.St. §27-104(5) and his 1st, 7th, and 14th Amendment rights. The Court of Appeals denied his right to the redress of this grievance by refusing to acknowledge and address this subclaim, or the fact that he submitted testimonial evidence contesting defendant's credibility and the basis for his opinion, and that the admission of defendant's affidavit limited his right to introduce that evidence.

The third assignment of error that the court's consolidation and restatement swallowed was Petitioner's assertion that, "[e]xpert testimony was not necessary for Appellant to prove his claims." See, (Br. of App., pp. 22-24). He asserted that his case was a case of appellate legal malpractice, which meant that, "success on [his] claims [was] a question of the proper application of the law to the facts in the underlying case, and that such was for a judge to determine." See, (Br. of App., p. 23).

However, the court erroneously determine that "this malpractice claim is grounded in Schense's conduct." See, [App. A, p. 7]. In this case, proximate cause hinged

upon questions of trial and appellate counsel's ineffectiveness and Petitioner's innocence in the UNDERLYING case that were NOT raised or disposed of on direct appeal or during postconviction proceedings. Probability of success on these claims would ultimately determine whether or not the defendant was negligent, not his own expert testimony. The court MISCHARACTERIZED Petitioner's underlying claims of ineffective assistance of counsel as questions of fact for a jury, denying his right to the redress of this grievance, and giving the appearance of having properly adjudicated it.

The purpose of Haines was to ensure that valid claims do not go unadjudicated. Instead, the court used it as a free pass to avoid addressing Petitioner's meritorious claims. He assigned these claims and subclaims to SPECIFICALLY PREVENT the court from mischaracterizing them or leaving them unaddressed by lumping them in with other arguments- which is exactly what it did anyway. The court did not indicate that he failed to cite proper authority, had poor syntax or sentence structure, confused legal theories, or any other reason for consolidating and restating his assignments of error. The consolidation and restatement of his claims was an excuse to avoid it's duty to address meritorious claims, while providing cover for the deprivation of his 1st and 14th Amendment right to meaningful, reasonable, and equal access to the court for the redress of his grievances.

II. ABSENCE OF GUIDING PRECEDENT RESULTED IN APPEAL FROM NONFINAL ORDER, DEPRIVING COURT OF APPEALS OF JURISDICTION OVER APPEAL FOR TWO REASONS:

- a) Trial court did not dispose of all issues.

The trial court's order granting summary judgment was not a final, appealable order, because it did not diminish Petitioner's underlying claims of ineffective assistance of counsel of actual innocence. As a result, the order does not prevent him from obtaining relief from judgment in the underlying case, or prevent him from obtaining judgments against both trial and appellate counsel based upon the same underlying claims of ineffective assistance of counsel that defendant did not raise.

The trial court characterized Petitioner's claims as questions of fact for a jury, and granted summary judgment for defendant based upon his own conclusory,

self-serving affidavit. However, reliance on current precedent allowing this to occur is misplaced, because it only provides guidance for disposing of claims of legal malpractice, not APPELLATE legal malpractice. The Court of Appeals erred in refusing to address this jurisdictional issue, and in upholding the trial court's decision.

Appellate jurisdiction cannot be conferred by action of the parties thereto, and absence of jurisdiction may be asserted at any time during pendency of the litigation. Appeal of Harms, 173 Neb. 687 (1962). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. Williams v. Baird, 273 Neb. 977, 735 N.W.2d 383 (2007). An order is "final" for purposes of appeal if it affects a substantial right and 1) determines the action and prevents judgment, 2) is made during a special proceeding, or 3) is made on summary application in an action after judgment is rendered. Id.

Whether the effect of an order is "substantial," for purposes of the statute providing that an order affecting substantial right is a final order, depends on whether it affects with finality the right of the parties in the subject matter. State v. Reames, 308 Neb. 361, 953 N.W.2d 807 (2021). An order affects a substantial right, for purposes of determining whether the order is a final order, if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is now appealing. Id. It is not enough that the right itself be substantial, to satisfy the element of a final order for purposes of appeal; the effect of the order on that right must also be substantial. Dugan v. State, 297 Neb. 444, 900 N.W.2d 528 (2017).

Petitioner's case is a case of APPELLATE LEGAL MALPRACTICE, also known as a "case-within-a-case," because the issue of proximate cause was dependent upon the probability of success on direct appeal and postconviction proceedings in the underlying case had certain claims been raised. As illustrated below, other jurisdictions differentiate between legal malpractice and APPELLATE legal malpractice.

To prove proximate cause, the client must satisfy the "case within a case" doctrine by showing that, but for the attorney's misconduct, the outcome of the underlying litigation would have been more favorable for the client. Dan Nelson Constr., Inc. v. Nodland & Dickson, 608 N.W.2d 267,271 (N.D. 2000). Determination

of proximate cause in legal actions is usually a question of fact. Millhouse v. Wiesenthal, 775 S.W.2d 626 (Tex. 1989). However, determining causation in appellate legal malpractice actions requires appraisal of whether the appeal in the underlying action would have been successful but for the attorney's negligence. Id. In cases of appellate legal malpractice, where issue of causation hinges on possible outcome of an appeal, causation issue is to be resolved by court as a question of law. Id. See, also, Klein v. Reynolds, Cunningham, Peterson & Cordell, 923 S.W.2d 45 (1st Dist. Tex. 1995)(question of whether appeal would have been successful depends on analysis of law and procedural rules, which is to be resolved by court as a question of law); Governmental Interinsurance Exchange v. Judge, 221 Ill.2d 195, 850 N.E.2d 183, 302 Ill.Dec. 746 (Ill. 2006) (issue of proximate cause in an appellate legal malpractice action is inherently a question of law for the court and not a question of fact for the jury); Cabot, Cabot & Forbes v. Brian, Simon, Peragine, Smith & Redfearn, 568 F.Supp. 371 (E.D. LA. 1983)(in appellate legal malpractice action, court noted that, before any trial on the merits of the malpractice claim could proceed, resolution of underlying legal issues was necessary, and ordered briefs submitted on those issues).

The Court of Appeals erroneously determined that "this malpractice claim is grounded in Schense's conduct." See, [App. A, p. 7]. In this case, proximate cause hinged upon questions of trial and appellate counsel's ineffectiveness and Petitioner's innocence in the underlying case. The probability of success on these claims would ultimately determine whether or not defendant was negligent, not his own conclusory, self-serving expert testimony. In denying relief, the trial and appellate courts have characterized Petitioner's underlying claims of ineffective assistance of counsel as questions of fact for a jury.

Justice requires that a court decide the underlying claims as a matter of law in cases of appellate or postconviction malpractice. If the Court of Appeals' position is allowed, then errant juries may find a defendant liable on the basis of an incorrect interpretation of the law, and that finding may become immune from effective judicial review.

Furthermore, any analogy to medical or engineering cases is inapposite. If the "laws of science" dictate a particular result with which reasonable persons may not disagree, then summary disposition is appropriate- only when scientific probabilities conflict does the jury resolve an issue. Unlike medicine or science, however, claims of ineffective assistance of counsel for failure to raise meritorious claims on direct appeal or during postconviction proceedings are not resolved by conflicting probabilities.

Underlying the Court of Appeals' position is the implicit assumption that appellate courts will differ in their application of the law to allegations of ineffective assistance of counsel and actual innocence, and that no correct answer to such legal issues exists. However, it is well settled that the proper disposition of such claims is a question of law for which expert testimony is inadmissible. See, e.g. State v. Morgan, 286 Neb. 556, 837 N.W.2d (2013)(claim that defense counsel ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law); Sports Courts of Omaha, Ltd. v. Brower, 248 Neb. 272, 534 N.W.2d 317 (1995)(expert testimony is relevant and admissible only if it tends to help trier of fact understand evidence or to determine fact issue, and expert testimony concerning status of law does not tend to accomplish either of these goals; expert testimony concerning question of law is generally not admissible in evidence).

Since this is a case of APPELLATE legal malpractice, defendant's affidavit was not admissible for the purpose of foreclosing the underlying claims of ineffective assistance of counsel or actual innocence, and whether or not Petitioner would have been successful on direct appeal or during postconviction proceedings. The order granting summary judgment was not final, because the trial court did not determine if trial and appellate counsel's performance in the underlying case was deficient, and whether or not Petitioner suffered prejudice as a result.

The order appealed from did not dispose of any issues, substantially affect Petitioner's substantial rights, or prevent judgment, as required for an order to be final. It did not diminish his claims of ineffective assistance of counsel or actual innocence. It does not prevent him from obtaining relief from judgment in the underlying case, or prevent him from obtaining judgment against both trial and appellate counsel based upon the same underlying claims.

In short, causes of action still exist. To hold otherwise, would grant more relief than defendant requested or was entitled to, as well as relief for unjoined parties. Therefore, the Court of Appeals should have dismissed the appeal for lack of jurisdiction, and remanded the cause for the trial court to determine the probability of success on Petitioner's underlying claims as a matter of law.

b) Trial court did not join indispensable parties.

The absence of guiding precedent means that the disposition of cases of appellate legal malpractice in favor of defendant-experts on summary judgment will affect

the rights of indispensable parties, and grant more relief than allowed or asked for. In this case, the trial court's order was not final, because the court failed to join indispensable parties.

The presence of necessary parties is jurisdictional. Butler County Dairy, L.L.C. v. Butler County, 285 Neb. 408, 827 N.W.2d 267 (2013). An "indispensable" or "necessary party" to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest. Id. A court has a duty to require an indispensable party be added to the litigation *sua sponte* when one is absent, and a court is statutorily deprived of the authority to determine a controversy absent all indispensable parties. Midwest Renewable Energy, LLC v. American Engineering Testing, Inc., 296 Neb. 73, 894 N.W.2d 221 (2017). "Subject matter jurisdiction" includes a court's power to hear and determine a case in the general class or category to which the proceedings in question belong, but it also includes a court's power to determine whether it has the authority to address a particular question within a general class or category that it assumes to decide or to grant the particular relief requested. Id. The absence of an indispensable party to a controversy deprives the court of subject matter jurisdiction to determine the controversy and cannot be waived. Id. When a lower court lacks the power, that is, the subject matter jurisdiction, to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. Id. When it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court, an appellate court will remand the cause for the purpose of having such parties brought in. Id.

In this case, Petitioner sued postconviction counsel for failing to assert claims of ineffective assistance of trial and appellate counsel and actual innocence that should have been raised on direct appeal or during postconviction proceedings. Both trial and appellate counsel had an interest in the subject matter of the controversy, because defendant's alleged negligence was dependent upon their alleged negligence. The trial court's failure to join trial and appellate counsel, as required by Neb.Rev.St. §25-323, deprived it of subject matter jurisdiction, which, in turn, deprived the Court of Appeals of jurisdiction over the appeal.

III. POSTCONVICTION COUNSEL SABOTAGED PETITIONER'S ABILITY TO EXONERATE HIMSELF AND OBTAIN RELIEF FROM PREJUDICIAL CONSTITUTIONAL VIOLATIONS OF HIS RIGHTS, AND NEBRASKA COURTS ILLEGALLY DEPRIVED HIM OF HIS RIGHT TO SUE BY GRANTING SUMMARY JUDGMENT AGAINST HIM BASED ON THE CONCLUSORY, SELF-SERVING AFFIDAVIT OF THE DEFENDANT IN A CASE OF APPELLATE LEGAL MALPRACTICE, RESULTING IN A MISCARRIAGE OF JUSTICE.

a) Admission of defendant-expert's conclusory, self-serving affidavit was unfairly prejudicial.

Petitioner asserted in his brief that defendant's conclusory, self-serving affidavit should not have been admissible due to the danger of unfair prejudice inherent in allowing an interested party to exonerate himself, without giving Petitioner the opportunity to cross-examine him. See, (Br. of App. pp. 18-22); (Mot. in Opp. to App. Mot. for Sum. Aff. p. 1);[App. A, p. 3].

Four preliminary questions must be answered in order to determine whether testimony is admissible as expert testimony: 1) whether the witness qualifies as an expert; 2) whether the expert's testimony is relevant; 3) whether the expert's testimony will assist the trier of fact to understand the evidence or determine a controverted factual issue; and 4) whether the expert's testimony, even though relevant and admissible, should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations. Perry Lumber Co., Inc. V. Durable Services, Inc., 271 Neb. 303, 701 N.W.2d 584 (2006).

"Unfair prejudice," under rule providing for exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, means an undue tendency to suggest a decision based on an improper basis. State v. Devers, 306 Neb. 429, 945 N.W.2d 470 (2020).

The Court of Appeals found that, "despite the self-serving and conclusory nature of Schense's affidavit, it was uncontested and established a prima facie case for purposes of summary judgment." [App. A, p. 6]. The court admitted that defendant's affidavit was conclusory and self-serving, but did not address Petitioner's assertion that it's admission was unfairly prejudicial, nor did the cases cited in the opinion. See, [App. A, pp. 5-6]. His affidavit was comparable to a plea of

not guilty in a criminal case. A criminal defendant cannot have his case dismissed with prejudice by plea of not guilty, and he has more at stake than a defendant in a civil case. Yet, due to the lack of guiding precedent, summary judgment was granted in favor of defendant based upon what amounts to no more than a plea of not guilty.

Petitioner asserts that it is highly unlikely that the defendant would readily admit to the negligence alleged by Petitioner at the summary judgment stage, because he has no reason to do so. The danger of denying Petitioner his 7th Amendment right to a jury trial and his 1st Amendment right to the redress of his grievance by granting summary judgment based upon a sham affidavit, far outweighed the probative value of the defendant's conclusory, self-serving affidavit. For these reasons, the denial of Petitioner's 1st and 7th Amendment rights without concern for the danger of unfair prejudice inherent in allowing an interested party to exonerate himself with a conclusory, self-serving affidavit was a miscarriage of justice.

b) Relevance of defendant-expert's affidavit limited Petitioner's right to introduce evidence relevant to weight and credibility.

The Court of Appeals indicated that summary judgment was appropriate, because Petitioner's failure to produce expert testimony would leave defendant's expert testimony uncontested at trial. See, [App. A, p. 6]. However, Petitioner raised 3 subclaims under the assigned error that, "[Petitioner] raised genuine, disputed issues of material fact, which fall under the common knowledge exception and require a trial hearing... [including] [e]vidence calling the credibility of Appellee's affidavit into question." See, (Br. of App. pp. 24 and 28-30). Neither the district or appellate courts acknowledged or addressed this subclaim, or the submission of evidence challenging defendant's credibility, which the jury should have been allowed to consider.

The principals underlying the right to confront witnesses as part of the factfinding process are applicable in civil cases. In re Estate of Clinger, 292 Neb. 237, 872 N.W.2d 37 (2015). Evidentiary rules contemplate cross-examination of witnesses in all cases. Id. [The relevancy of witness testimony] does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility. Neb.Rev.St. §27-104(5).

The relevance of defendant-expert's affidavit was allowed to limit Petitioner's right to introduce before the jury evidence relevant to weight and credibility, in violation of Neb.Rev.St. §27-104(5) and his 1st, 7th, and 14th Amendment rights. Therefore, the Court of Appeals erred by failing to acknowledge Petitioner's presentation of evidence that defendant's credibility and basis for his opinion WOULD have been contested at trial, and that admission of defendant's affidavit limited Petitioner's right to introduce that evidence.

IV. ONLY A HANDFUL OF APPELLATE COURT JURISDICTIONS DISTINGUISH BETWEEN CASES OF LEGAL MALPRACTICE AND APPELLATE LEGAL MALPRACTICE, OR ACKNOWLEDGE THE TRIAL COURT'S DUTY TO DETERMINE PROXIMATE CAUSE IN CASES OF APPELLATE LEGAL MALPRACTICE, RESULTING IN A GRANT OF VIRTUAL IMMUNITY FROM SUCH CLAIMS IN STATES SUCH AS NEBRASKA THAT APPLY THE SAME STANDARD OF DISPOSITION FOR BOTH.

As of the submission of this petition, a Westlaw search of appellate courts in all 50 states and all federal jurisdictions for "appellate legal malpractice" only returned 59 results for Petitioner- and not one of them was decided by this Court. Only 18 state appellate courts have addressed the issue directly, and only 8 total cases are listed as "criminal" in nature. However, a search of all cases of "legal malpractice" in all state and federal jurisdictions returns the maximum of 10,000 results. The number of appellate legal malpractice claims that were disposed of as claims of legal malpractice could easily number in the 10's of thousands or more.

Citing to current state precedent, the trial and appellate courts deprived Petitioner of his 1st Amendment right to the redress of his grievances and his 7th Amendment right to a trial on his claims, based on what amounts to a plea of not guilty by the defendant, rendering his right to access the court virtually meaningless. The fact that this Court has never addressed the fundamental difference between cases of legal malpractice and appellate legal malpractice in a criminal case means that many such cases have been resolved, and will continue to be resolved by granting summary judgment against the plaintiff in like manner.

CONCLUSION

In his lawsuit, Petitioner showed that he is actually innocent of the crime he pled to by merely submitting and citing to the record of his criminal case, which defendant did not refute by doing the same. He also showed that he has been imprisoned as a result of prejudicial constitutional violations, and that defendant knowingly prevented him from obtaining relief. Now, the trial and appellate courts have deprived him of his constitutional rights, in order to avoid disturbing his illegal conviction and false imprisonment. This is oppressive and fundamentally unfair, and he would be grateful for the assistance of this Honorable Court. Even a writ commanding the Court of Appeals to address the issues it refused to address, as described above, would be beneficial.

For the trial and appellate courts to deny Petitioner his right to the redress of his grievance and his right to a trial, by granting summary judgment based upon the defendant-expert's conclusory, self-serving affidavit, was a miscarriage of justice by itself. Further, it allowed for numerous fundamental breakdowns in the trial and appellate process, including significant jurisdictional issues.

Most jurisdictions do not even acknowledge the fundamental differences between claims of legal malpractice and appellate legal malpractice in criminal cases. From the beginning, Petitioner asserted that the trial court should have determined the issue of proximate cause, but was ignored. In absence of precedent differentiating between the two and establishing the proper constitutional procedure for disposing of cases of appellate legal malpractice, negligent counsel in criminal cases cannot be held accountable. Guiding precedent is needed for quality control purposes, and to ensure that actually innocent defendants have the the ability to enforce their right to effective counsel at trial and on direct appeal, and their right to the redress for negligent counsel in any proceeding, through subsequent civil action. It will also help to ensure the integrity of the trial and appellate process in both criminal and related civil proceedings. For these reasons, Petitioner prays that the Supreme Court of the United States address this issue for the first time by granting his petition for a writ of certiorari.

Respectfully submitted,

Shaun Titus

Date: March 7, 2024