No. 24-6527

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

HAZHAR A. SAYED — PETITIONER
(Your Name)

vs.

THE STATE OF COLORADO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Tenth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Hazhar A. Sayed, #133608
(Your Name)
Limon Correctional Facility
49030 State Hwy. 71
(Address)

Limon, CO. 80826
(City, State, Zip Code)

None (incarcerated)
(Phone Number)

QUESTION(S) PRESENTED

1) **Whether The Doyle v. Ohio, 426 U.S. 610 (1976) violation had a substantial and injurious effect in determining the jury's verdict?**

2) **Whether the trial Court violated Mr. Sayed's procedural due process rights in failing to hold a competency hearing; and his substantive due process rights in allowing him to be tried even though he was incompetent?**

3) **Did Mr. Sayed receive ineffective assistance of counsel when counsel failed to interview and introduce testimony of witnesses?**

4) **Did Mr. Sayed receive ineffective assistance of counsel when counsel failed to consult with an expert witness?**

5) **Whether a defendant must admit to the conduct underlying the charged offense to be entitled to a self-defense jury instruction, and if so, whether admitting to push a correctional officer admits the conduct for second- and third-degree assault?**

6) **Is a pro-se prisoner litigant entitled to liberal construction, which includes readiness into his claim the strongest argument suggested, in this case which is the trial counsel deprived Mr. Sayed of his autonomous right to control the objectives of his defense.**

LIST OF PARTIES

[x] 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

[x] For cases from federal courts:

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

[X] reported at **2025 U.S. App. Lexis 1216**; 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[ ] is unpublished.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 **B** to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from state courts:

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was January 16, 2025.

[X] 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).

[ ] For cases from state courts:

The date on which the highest state court decided my case was_____. A copy of that decision appears at Appendix_____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____(date) on_____(date) in Application No.____A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Five

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment Six

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment Fourteen

"Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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."

STATEMENT OF THE CASE

On June 2, 2015, the government, in Logan County, Colorado, in case Number 15-CR-120, charged Mr. Sayed with the following;(Count one) first degree assault in violation of §18-3-202 (1)(e) C.R.S.; and (count two) first degree assault in violation of §18-3-202 (1)(a) C.R.S.; both class three felonies.

On April 6, 2016, the government filed a "Motion to Amend complaint and Information" and an "Amended complaint and Information." Specifically, the government requested to amend the complaint and information as follows: (1) for count one, the government sought to amend the complaint and information so the Mr. Sayed was charged with first degree assault pursuant to §18-3-202 (2)(b) C.R.S.; a class three felony; (2) for count two, the government sought to amend the complaint and information to §18-3-202 (1)(f) C.R.S.; a class four felony; and (3) the government sought to add count three to the complaint and information, which charged Mr. Sayed with second degree assault pursuant to §18-3-203 (1)(b) C.R.S.; a class four felony. The Court granted the government's request to amend the complaint and information on that same date.

Mr. Sayed tried his case to a jury over the course of three days, January 23-25, 2017. At trial, the government alleged that Mr. Sayed assaulted Captain Micheal Tidwell while incarcerated in the Sterling Correctional Facility. After the presentation of the evidence, the defense requested that, for count three, the court instruct the jury on the lesser-included offense of third degree assault. The court instructed the jury on the lesser included offense of third degree assault for count three pursuant to defense counsel's request.
After deliberation, the jury found Mr. Sayed not guilty of count one, guilty of count two, and guilty of the lesser-included offense for count three, third degree assault.

On May 5, 2017, the court sentenced Mr. Sayed to: (1) three years of incarceration in the Department of corrections ("DOC") for his conviction on count two; and (2) six months incarceration for his misdemeanor conviction on count three. Further, the court ordered that Mr. Sayed's sentence would (1) run consecutive to his sentence in Broomfield case No. 05-CR-70 for count two and (2) run concurrently with his sentence in Broomfield case 05-CR-70 for count three.

Statement of Facts

Mr. Sayed is a devout Muslim and has filed numerous grievances and lawsuits against prison officials to protect his religious rights. While he has been incarcerated in Colorado prison. On May 2, 2015, Mr. Sayed was summoned to the area outside his living unit in Sterling Correctional Facility. Captain Tidwell and other officers confronted him about his many grievances and informed him they had "a cure for such things." At that point, Capt. Tidwell used the intercom system to announce to Mr. Sayed's living unit that he was a sex offender and a federal informant. Such labels can expose inmates to lethal violence from other inmates. Mr. Sayed told Capt. Tidwell that he had a right to file grievances and to practice his faith, and then Capt. Tidwell struck him.

The prosecution charged Mr. Sayed with one count of first degree assault (threatening a peace officer with a deadly weapon); in violation of § 18-3-202 (1)(e) C.R.S., a class 3-felony; one count of second degree assault (knowingly apply physical force against a peace officer while in custody); in violation of § 18-3-203 (1)(f) C.R.S., a class 4-felony; and one count of second degree assault (bodily injury with a deadly weapon); in violation of § 18-3-203 (1)(b) C.R.S., a class 4-felony. The prosecution alleged the deadly weapon was an ink pen.

Pre-trial Continuance Discussion

Alternate defense Counsel Stephanie Stout represented Mr. Sayed at trial. On the morning that trial was set to begin, Ms. Stout told the Court, "Mr. Sayed has asked me to bring to the Court's attention on his behalf that while I believe that I am ready to proceed to trial he

does not believe he is prepare to proceed today." Ms. Stout said she "prepared the case making strategic decisions based upon [her] experience and expertise...." Ms. Stout continued, "But I can tell you on behalf of Mr. Sayed I am requesting a continuance at this time because he believes there is necessary and reasonable investigation and witnesses that will not be here for this particular trial." Ms. Stout offered to go into more detail for the court but requested to do so outside the presence of the prosecution, which she referred to as a Bergerud hearing.[1] The Court then conducted an ex parte discussion with Ms. Stout and Mr. Sayed during which Ms. Stout provided a significant amount of information protected by the attorney-client privilege.

For example, Ms. Stout said she decided not to investigate potential witnesses that Mr. Sayed wanted her to investigate because the assault was on video, and the video was "probably the key piece of evidence." Ms. Stout also said she did not investigate the witnesses because they would mostly be inmates and inmates have "automatic inherent credibility issues." Ms. Stout shared that Mr. Sayed believed the videos of the incident had been edited. Ms. Stout explained that she did not consult with a computer forensic expert because she had someone with a computer science degree review the tape and the person did not think there was evidence of tampering and because the tape came directly from (DOC).

The judge asked Ms. Stout whether the defense would likely raise any affirmative defenses, and Ms. Stout responded as follows:

[1] People v. Bergerud, 223 P.3d 686 (Colo. 2010).

I have discussed affirmative defenses and there are not affirmative defenses that Mr. Sayed wishes to proceed with. So I am limited on my ability, as the Court knows. I can't offer an affirmative defense without his okay. And he is adamant that he was not responsible for the assault that happened and it was not an assault that happened at his hands.

Ms. Stout told the court:

> I can tell this Court I do appreciate being able to make this record. If this is something that comes up in the future where he is alleging new information or ineffective assistance of counsel, which I think he absolutely will be claimed if we do not win this trial, I think he absolutely will make a 35(c) claim. I think I've made the record that is necessary for him to be able to pursue that if that is necessary.
>
> ....
>
> I do absolutely 100 percent think this will result in an ineffective assistance Of counsel claim if we go forward and we are not successful at trial. Based on the conversations I've had with Mr. Sayed I can tell the Court that that will be the result.

At no point during this discussion did Mr. Sayed waive his right to attorney-client privilege. The Court denied the continuance request.

Mr. Sayed appealed and a division of the Colorado Court of Appeals affirmed those convictions and sentences. See People v. Sayed, Colo. App. 17-CA-0847 (Feb. 13, 2020). Certiorari was sought and denied. See Sayed v. People, Colo. No. 20-SC-0209 (June 29, 2020).

Mr. Sayed sought post-conviction relief, which was denied by the State district court without a hearing. Mr. Sayed appealed and the Colorado Court of Appeals affirmed that denial. See People v. Sayed, Colo. App. No. 20-CA-1527 (Jan. 19, 2023). Certiorari was sought and denied. See Sayed v. People, Colo. No. 23-SC-0130 (July 17, 2023).

In a timely fashion, Mr. Sayed sought federal habeas relief. Mr. Sayed's 28 U.S.C. § 2254 habeas application was dismissed by the Honorable Regina M. Rodriguez of the U.S. District Court of Colorado on June 14, 2024. See Sayed v. Jacques, et al., U.S. District Court of Colorado Case No. 23-cv-01880-RMR. A certificate of applicability was also denied by Judge Rodriguez.

Mr. Sayed filed a timely notice of appeal and combined Opening Brief and request for the issuance of a certificate of applicability to the United States Court of Appeals for the Tenth Circuit. A panel determined Mr. Sayed was not entitled to issuance of said (and/or habeas relief), on January 16, 2025. See Sayed v. Jacques, et al., 2024 U.S. App. LEXIS 1216 (10th Cir. 2025), United States Court of Appeals for the Tenth Circuit Case No. 24-1282. No petition for rehearing was sought and this action is timely filed. (All federal decisions in this case are attached as an appendix to this Petition as required. See Appendix **A & B**).

REASONS FOR GRANTING THE PETITION

7) **Whether the Doyle v. Ohio, 426 U.S. 610 (1976) violation had a substantial and injurious effect in determining the jury's verdict?**

The Fifth Amendment to the United States Constitution provide that no person shall be compelled to testify against himself or herself in any criminal proceedings. See Miranda v. Arizona, 384 U.S. 436, 444 (1966). The Fifth Amendment not only protects the individual from being involuntarily called as a witness against himself or herself, "but also grants a privilege not to answer official questions put to him or her in any other proceedings, civil or criminal, formal or informal, where the answers might incriminate him or her in future criminal proceedings," Lefkowitz v. Turley, 414 U.S. 70 (1973).

In Doyle v. Ohio, 426 U.S. 610, 617-19 (1976), the U.S. Supreme Court made it clear that a defendant's invocation of silence pursuant to Miranda v. Arizona, Supra, 384 U.S. at 436. And the Fifth Amendment to the U.S. constitution cannot be used to impeach a defendant's testimony. Specifically, the Supreme Court held that when a defendant is Mirandized, it would be fundamentally unfair for the government to use the defendant's invocation of his right to remain silent against him at trial. Id; Combs v. Coyle, 205 F.3d 269, 279-80 (6th Cir. 2000). Thus the Court in Doyle held that the government's use of the defendant's post-Miranda silence violated the Due Process Clause of the Fourteenth Amendment. Doyle, 426 U.S. at 617-19.

Here, on the second day of the trial, January 24, 2017, Mr. Sayed testified in his Owen defense. After Mr. Sayed testified, the government called one rebuttal witness, Larry Frese, an investigator with the Colorado Department of Corrections (CDOC), and whom attempt to question Mr. Sayed about the allegations in this case on May 2, 2015, while Mr. Sayed was incarcerated in the Sterling Correctional Facility. This interaction, thus, constituted a custodial interrogation. In response to Mr. Frese' attempts to question him, Mr. Sayed invoked his constitutional right to remain silent.

During the government' direct-examination of Mr. Frese at trial, the following colloquy occurred:
[PROSECUTOR]: Okay. You heard all of the defendant's testimony today?
[MR. FRESE]: Yes.
[PROSECUTOR]: Did he tell you everything today that he told you back on May 2nd when you saw him.
[MR. FRESE]: No.

Because Mr. Sayed was questioned by a (DOC) investigator while he was in custody, the government's testimony on Mr. Sayed's silence is properly considered remarks by the government on Mr. Sayed's post-arrest silence. In response to the government's testimony on Mr. Sayed's post-arrest silence, defense counsel objected stating that such questioning violated Mr. Sayed's constitutional right to remain silent. The Court, however, allowed the government to question Mr. Frese on Mr. Sayed's post-arrest silence. Indeed, after defense counsel's objection, the following colloquy occurred:

[PROSECUTOR]: Allow me to state the question again, Investigator. You heard everything the defendant testified to in court today?

[MR. FRESE]: Yes.

[PROSECUTOR]: Did he tell you the same account back on May 2, 2015, when you met with him?
[MR. FRESE]: No.

Then, during defense counsel's cross-examination of Mr. Frese, the following colloquy occurred:

[DEFENSE COUNSEL]: When you met with him he actually said I have nothing to say to you, turned around, and walked away; right?
[MR. FRESE]: Correct.
[DEFENSE COUNSEL]: He didn't make any statement at all, did he?
[MR. FRESE]: Correct.

[DEFENSE COUNSEL]: Yeah. So it's not that he made a different statement—
[PROSECUTOR]: Your Honor, it's been asked and answered twice now.
[COURT]: Overruled. You can ask.
[DEFENSE COUNSEL]: It's that he didn't make any statement as is right, right?
[MR. FRESE]: Correct.

Thus, the lower court allowed the government, on two occasions, to question Mr. Frese on Mr. Sayed's post-arrest silence. The lower court failed, however, to determine whether a valid evidentiary purpose existed to justify the government's use of Mr. Sayed's post-arrest silence. Indeed, the lower court, before infringing on Mr. Sayed's constitutional right to remain silent, had an obligation to ascertain whether Mr. Sayed's post-arrest silence was indeed inconsistent with his exculpatory trial testimony. See U.S. v. Massey, 687 F.2d 1348, 1354 (10th Cir. 1982). See also, U.S. v. Hale,422 U.S. 171, 176 (1975) ("If the Government fails to establish a threshold inconsistency between silence and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded").

Had the lower court engaged in such an analysis, it would not have permitted the government to utilize Mr. Sayed's post-arrest silent at trial. Specifically, unlike People v. Davis, 312 P.3d 193, 199-201 (Colo. App. 2010), where the prosecution properly used the defendant's post-arrest silence because the defendant's silence was indeed contrary to his trial testimony. However, Mr. Sayed' silence was not relevant to his testimony or the case. Indeed, the government used Mr. Sayed's post-arrest silence only to create an implication that Mr. Sayed was guilty because he refuse to speak with the (DOC) investigator on May 2, 2015, Mr. Frese, i.e., the government used Mr. Sayed's post-arrest silence to punish the exercise of his constitutional right to remain silent. This was wholly improper because (1) silence, in and of itself, has little to no probative value; and (2) there are countless reasons why a defendant may choose not to speak with the government. See Hale, supra, 422 U.S. at 177 "[a]t the time of the arrest and during custodial interrogation, innocent and guilty alike perhaps particularly the innocent may find the situation so intimating that they may choose to stand mute. A variety of reasons may influence that decision. In these often

emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply...He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to hostile and perhaps unfamiliar atmosphere surrounding his detention." As a result, the lower court violated Mr. Sayed's constitutional right to remain silent and reversible erred when it permitted the government to ask Mr. Frese about Mr. Sayed's post-arrest silence without a valid evidentiary purpose that warranted such an infringement on his constitutional right to remain silent.

Respectfully, the decisions rendered by the lower courts in this case are flawed.

In the Tenth Circuit's opinion (see id, at * 3), respectfully, the Court relying on the U.S. District Court of Colorado's decision denying Mr. Sayed habeas relief, that Mr. Sayed failed to demonstrate the (CCA)'s harmless determination itself was unreasonable. Problematic with this determination is the fact that the U.S. District Court relied on the State Court of Appeals decision which found that the error was harmless. See Appendix B, at * 3), (see Appendix A, at 6-10). This decision is clearly contrary to or an unreasonable application of the U.S. Supreme Court law and/or an unreasonable determination of the facts of Mr. Sayed's case in light of those rulings. See Doyle v. Ohio, 426 U.S. 610, 618-19 (1976); Wainwright v. Greenfield, 474 U.S. 284, 291 (1986) (The law requires that there was clear invocation of Defendant's right to remain silent for the case law to be effective).

Unfortunately the claim is not harmless because, the evidence against Mr. Sayed was not overwhelming—as the jury acquitted him on count one and found him guilty of a lesser-included offense for count three. Moreover, a real possibility exists that the jury convicted Mr. Sayed because he invoked his constitutional right to remain silent. Simply put, no other valid evidentiary reason existed that justified admission of evidence regarding Mr. Sayed's post-arrest silence and the jury possibly used evidence of infer guilt. Thus, it cannot be said that the jury's guilty verdict was surely attributable to the error and that decision is clearly contrary to or an unreasonable application of the U.S. Supreme Court law and/or an unreasonable determination of the facts of Mr. Sayed's case in light of those rulings. See Doyle; Wainwright; supras.

Mr. Sayed thus respectfully moves this Court to grant certiorari on this issue. This as well as any and all other available relief is respectfully requested.

2) **Whether the trial Court violated Mr. Sayed's procedural due process rights in failing to hold a competency hearing; and his substantive due process rights in allowing him to be tried even though he was incompetent?**

Due process prohibit the trial of an incompetent defendant. Dusky v. U.S., 363 U.S. 402-403 (1960). A defendant is incompetent if he/she is suffering from a mental disease or defect which renders the defendant incapable of understanding the nature and course of the proceedings against him/her or of participating or assisting in the defense or cooperating with defense counsel. Dusky, supra, 362 U.S. at 402 (holding that the test for competence is whether defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him.). If a "sufficient doubt" of competency has been raised, a trial court's failure to make a competency determination violates a defendant's right to due process. See Bishop v. U.S., 350 U.S. 961 (1956).Similarly, a defendant's right to due process is violated if a trial court does not afford an accused an adequate hearing concerning his/her competency. Pate v. Robinson, 383 U.S. 375, 378 (1966).

The statutory procedures governs competency determinations are contained in § 16-8.5-101 C.R.S. § 16-8.5-118 C.R.S. § 16-8.5-102 (2)(a) C.R.S., provides that "If the judge has reason to believe that the defendant is incompetent to proceed, it is the judge's duty to suspend the proceeding and determine the competency or incompetency of the defendant pursuant to § 16-8.5-103 C.R.S." § 16-8.5-103 C.R.S., in turn, provides the procedure the court must follow once the court has reason to believe that the defendant may be incompetent to proceed to trial. A court's non-compliance with the competency statutory procedures, which provide the safeguards necessary to insure against the prosecution of an incompetent defendant, constitutes error so prejudicial as to be characterized as one of constitutional deprivation. Drope v. Missouri, 420 U.S. 162, 181-83 (1975).

Here, sufficient doubt as to Mr. Sayed's competency existed. Bishop v. U.S., supra, 350 U.S. at. 961. Specifically, evidence existed that Mr. Sayde was suffering from a mental disease or defect which rendered him incapable of (1) understanding the nature and course of the proceedings against him and (2) participating or assisting in the defense or cooperating with defense counsel. Dusky, supra, 362 U.S. at 402 (holding that the test for competence is whether defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him."). The trial court's decision to not have Mr. Sayed undergo a competency examination, therefore, violated Mr. Sayed's due process rights.

1. **Understanding the Nature and Course of the Proceedings:**

On the first day of trial, January 23, 2017, defense counsel informed the court that:

- Mr. Sayed believed that additional investigation needed to be completed;
- Mr. Sayed believed "there to be witnesses who could testify that he was not responsible for the assault that took place in this case...[but] the entire assault in this case is on video-tape and that videotape is probably the key piece of evidence...;" and
- Mr. Sayed believed "there to be tampering on the videotape itself...Mr. Sayed believes there to be obvious evidence of tampering. He believes his previous counsel believes this, although previous counsel indicated to me that he hasn't looked into that particular issue to the extent that Mr. Sayed thinks that may be he did. I don't think that he had looked into that really at all..."

Further, Mr. Sayed stated that (1) further investigation needed to be completed—interviewing 120-(DOC) inmates about what they saw on the date of the alleged incident, and (2) the video footage of the assault had been tampered with.

The prosecutor also stated "[t]he defendant simply—I don't know if he's playing games or if he truly think he's innocent and just looks at the world a bit off kilter. But his request is not reasonable. The position is not reasonable. There are no other witnesses that he alleges."

Due to Mr. Sayed's conduct, defense counsel asked the Court to look at Mr. Sayed's competency, noting that Mr. Sayed's conduct made her "question whether...we have any

issues with competency to proceed based on some of the more fantastic ideas that Mr. Sayed has about how this all unfolded." Thus, defenses counsel stated "So I guess I'm asking if we could have a very short discussion as to whether or not the Court believes that some of these more fantastic claims, do they rise to [the level of possible incompetency]."

These remarks about Mr. Sayed's fantastical beliefs raised sufficient doubt as to whether Mr. Sayed had a sufficient grasp of reality to understand the nature and course of the proceeding. Dusky, supra, 362 U.S. at 402. Put another way, the remarks by defense counsel, the prosecution, and Mr. Sayed gave the judge "reason to believes that [Mr. Sayed was] incompetent to proceed;" thus, the judge had a duty to suspend the proceedings and determine competency or incompetency of the defendant pursuant to §§ 16-8.5-102 and 16-8.5-103 C.R.S.

The lower court failed to fulfill this duty. Instead of having Mr. Sayed submit to a competency evaluation, the court stated that, "[e]ven though I refer to his theories as somewhat fantastical or conspiratorial, nothing that Mr. Sayed has presented to me, either in writing or in his presence today, suggested to me that I would raise competency." Thus, the court, after having only met Mr. Sayed one time—at the pretrial hearing—concluded that the statements demonstrating Mr. Sayed's possible incompetency assessed by an evaluator.

Because the weight of the evidence presented during the first day of trial demonstrated that sufficient doubt existed as to Mr. Sayed's competency and ability to understand the nature and course of the proceedings, and because the court disregard such evidence, the lower court's competency determination was in violation of Mr. Sayed's due process right to a fair trial under the Fourteenth Amendment.

2. Participating or Assisting in the Defense or Cooperating with Defense Counsel:

Throughout the proceedings in this case, Mr. Sayed demonstrated that he could not cooperate with defense counsel. Dusky, supra, 362 U.S. at 402.

First, Mr. Gervey represented Mr. Sayed. On September 18, 2016, Mr. Sayed filed a pro-se "Motion to Dismiss Counsel of Record and Appointment of the Office of Alternate Defense Counsel" wherein he alleged that (1) counsel was ineffective (2) counsel was "not vigorously acting in his best interest" and (3) a conflict with the public defender's office existed. On October 1, 2015, at a dispositional hearing, the court addressed Mr. Sayed's pro-se motion to dismiss the public defender's office and appoint (ADC). Specifically, the court allowed Mr. Sayed to express why he believed that public defender's office should be removed as court appointed counsel and Mr. Sayed stated that there were motions he believed to be meritorious that the public defender refused to file. The Court, however, found that the motions Mr. Sayed sought to pursue had no merit and, therefore, concluded that no ground existed for the appointment of (ADC).

On October 15, 2015, Mr. Gervey filed a "Motion to withdraw Because of a Total Breakdown in Communication between Counsel and Mr. Sayed." In that motion, Mr. Gervey alleged that Mr. Sayed refused to visit with him thus rendering representation "unreasonably difficult" for him. On October 15, 2015, the trial court granted Mr. Gervey's request to withdraw and appointed Thor Bauer—from (ADC)—to represent Mr. Sayed.

On December 2, 2015, Mr. Bauer filed a "Motion to Withdraw" wherein he asked the court to issue an order permitting him to withdraw because no conflict existed between Mr. Sayed and the public defender's office. On December 3, 2015, the trial court issued its "Order Re: Motion to withdraw" wherein it denied Mr. Bauer's motion to withdraw because "the public defender's office determines whether such conflicts exist, subject to court review." Not (ADC) attorneys.

On December 9, 2015, Mr. Sayed filed, pro-se, "Defendant's objection to Counsel's Motion to Withdraw" wherein he alleged that a conflict of interest existed between him and Mr. Bauer but objected to Mr. Bauer's statement that no conflict existed between him and the public defender's office. Thus, Mr. Sayed requested that new (ADC) counsel be appointed. On December 9, 2015, Mr. Sayed also filed a pro-se "Response to Counsel's Motion to Withdraw and Motion for Appointment of Alternate Conflict Free Counsel". In that document, Mr. Sayed alleged that Mr. Bauer had a conflict of interest which prevented him from adequately and completely representing him. Thus, Mr. Sayed again requested that the court appoint new (ADC) counsel.

On April 6, 2016, at the schedule preliminary hearing, the court found that Mr. Sayed waived his preliminary hearing and pleaded not guilty. In response, Mr. Sayed stated that he did not knowingly, voluntarily, and intelligently waive his right to a preliminary hearing because he felt that he was coerced into doing so by the prosecutor's failure to turn over certain items of discovery. In response, Mr. Bauer stated that he was "in a very precarious position as [Mr. Sayed's] attorney" because Mr. Sayed waived his right to a preliminary hearing, but then stated that he did not do so voluntarily. Thus, Mr. Bauer asked to set Mr. Sayed's case for a preliminary hearing and stated, "if Mr. Sayed's not happy with that decision that I'm making then I have difficulties with my continued representation."

In response to Mr. Bauer's requests and statements, the court stated:

I'm not going to allow the withdrawal of the not guilty plea because I feel like we are being whipsawed by your client. He's playing games. He's pretending to be an attorney and won't let you do your job as an attorney. His job is to help you in defense, but not be the attorney. He thinks he's an attorney. He's not. Not even close. And I don't mean to say that to insult him, but he's not an attorney...And Mr. Sayed is going to have to let you, Mr. Bauer, do your job as an attorney and let you be in charge of the law. You're the captain of the ship. He makes three decisions... All the other decisions are left to Mr. Bauer, who is perfectly capable of handling these things. Been practicing for 20 years, for crying out loud. So I'm very confident Mr. Bauer has a good handle on the law and what it requires. But I'm not going to let ourselves be played Mr. Sayed any further...I'm not delaying this thing anymore for this Defendant who thinks he's a lawyer and he's not. End of story and I don't want to hear anything more.

On June 1, 2016, Mr. Sayed filed a pro-se "Motion to Dismiss Assigned Counsel and Request for Appointed New Counsel, Ineffective Assistance". In that motion, Mr. Sayed alleged that Mr. Bauer (1) failed to file the motions Mr. Sayed wanted to file (2) provided ineffective assistance of counsel and (3) had a conflict of interest.

On June 3, 2016, Mr. Bauer filed a "Motion to Withdraw" wherein he stated that (1) he denied Mr. Sayed's ineffective assistance of counsel allegations (2) the court had previously dismissed the public defender's office due to a breakdown in communication with Mr. Sayed and (3) Mr. Sayed's actions in court demonstrated that he "[did] not wish to either have counsel or listen to the advice of counsel". Thus, Mr. Bauer requested to withdraw a counsel for Mr. Sayed.

On June 24, 2016, the trial court issued am "Order to Withdraw" wherein the court allowed Mr. Bauer to withdraw and stated that it would appoint substitute (ADC) counsel. On August 1, 2016, the court appointed (ADC) counsel Stephanie Stout to represent Mr. Sayed. On August 4, 2016, Ms. Stout entered her appearance as counsel for Mr. Sayed.

On the first day of trial. January 23, 2017, defense counsel—Ms. Stout—began the proceedings by stating:

Judge I was discussing with Mr. Sayed this morning issues and Mr. Sayed has asked me to bring to the Court's attention on his behalf that while I believe that I am ready to proceed to trial he does not believe that he is prepared to proceed today. He believes that there is investigation that is remaining. He believes that there are potential witnesses who he believes are necessary. I have prepared the case and made certain strategic decisions, as are my responsibly pursuant to the statute and the Rules of Professional Conduct, and believe [sic] that I have complied with what I need to comply with. However, Mr. Sayed is not comfortable proceeding today and he is requesting that this Court continue the trial. He is not comfortable with the way that I have prepared the case at this point...I think the record is sufficient that I have prepared the case making strategic decision based upon my experience and expertise and the way that I believe that the case needs to proceed. But my life is not the one that is impacted and Mr. Sayed's life is. And he is not satisfied with proceeding today in the manner that I have determined is how I would proceed.

In response, the prosecutor stated:

You Honor, the People object to any further continuance of this case...This case has been delayed mostly—well, not mostly, almost entirely because of the defendant's actions. He originally had the public defender's office representing him. At I believe his first or second hearing with the public defender he asked the Court to fire him. He said he can no longer work with that attorney and asked for a new attorney to be appointed. That was granted. I believe it was Judge Singer who granted that request.

The defendant was then appointed alternate defense counsel Thor Bauer. Mr. Bauer first appearance with the defendant in October of 2015...And then we were set for trial in this case back in the fall of 2016...And at a hearing right before that the defendant claimed Mr. Bauer was not doing the investigations that he wanted Mr. Bauer to do, that there was witnesses [sic] that could prove his innocence that Mr. Bauer wasn't finding or wasn't interviewing, things to that extent. So he basically asked the Court then to fire Mr. Bauer as well and for third attorney to be appointed.
This was again granted...The defendant has filed no complaints about MS. Stout or anything to that degree. But at this point even if he had he's complaining about how she's preparing for trial.
The defendant has now had three attorneys, neither [sic] of which he apparently finds satisfactory. I

think that reflects more on his inability to know what he's talking about that on the defense attorney's capability to prepare for trial...[H]e's filed numerous frivolous motions. Other motions to dismiss, a couple dozen pro-se motions, even though he's been represented by an attorney the entire time. All of those motions have been denied or dealt with by Judge Singer leading up to trial.
The defendant simply—I don't know if he's playing games or if he truly thinks he's innocent and just looks at the world a bit off kilter. But his request is not reasonable. The position is not reasonable. There are no other witnesses that he alleges...

The court then held a People v. Bergerud, 223 P.3d 686 (Colo. 2010), hearing out of the presence of the prosecution. During the Bergerud hearing, defense counsel stated:

There were a few issues that were raised by Mr. Sayed and he continues to raise. He believes there to be witnesses who could testify that he was not responsible for the assault that took place in this case... the entire assault in this case is on videotape and that videotape is probably the key piece of evidence...And I understand that Mr. Sayed believes there are other people who could testify. I believe that the people that he wants to look into are mostly inmates in maximum security in the Department of Corrections, and so we would be put in a position of maybe one or two people then testifying against up to as many as five (DOC) guards who are supported by the videotape...
The second part is he believes there to be tampering on the videotape itself. I had the videotape reviewed by a person who has a degree in computer science and works in in the computer industry...Mr. Sayed believes there to be obvious evidence of tampering. He believes his previous counsel believes this, although previous counsel indicated to me that he hasn't looked into that particular issue to, the extent that Mr. Sayed thinks that may be he did. I don't think that he had looked into that really at all...
He does not believe that we have sufficiently met and discussed this and I did not visit the (DOC) facility, where he is because he is very far away from my office. He has at all-time had my contact information and has not arranged any contact with my office through his case manager or through anyone at the (DOC) facility, which is something I have had numerous clients in the past do... I don't want to attribute any kind of motive as to why he may or may not have chosen to stay in contact...But he had the opportunity and did not feel it necessary to bring that up until Friday...

After defense counsel's statements, the court gave Mr. Sayed an opportunity to speak and Mr. Sayed reiterated that he believes that (1) further investigation needed to be completed—interviewing 120 (DOC) inmates about what they saw on the date of the alleged incident; (2) the video footage of the assault had been tampered with; and (3) counsel had failed to visit and communicate with him.

This evidence demonstrated that there was sufficient doubt as to whether Mr. Sayed could cooperate with defense counsel. Dusky, supra, 362 U.S. at 402. Put another way, Mr. Sayed's continuous inability to (1) work with defense counsel (2) communicate with dense counsel (3) allow defense

counsel to prepare the case based on their skill and experience demonstrated that there was "reason to believe that [Mr. Sayed was] incompetent to proceed;" thus the judge had a duty to suspend the proceedings and determine competency or incompetency of the defendant pursuant to § 16-8.5-103 C.R.S.; Dusky, supra, 362 U.S. at 402.

The lower Court failed this duty. Instead of ordering Mr. Sayed to submit to competency evaluation, the court stated that, based upon reviewing the court file and meeting Mr. Sayed one time, it did not have concern about Mr. Sayed's competency. Thus, the court, after having only met Mr. Sayed one time—at the pretrial hearing—concluded that Mr. Sayed's continuous inability to cooperate with defense counsel was of no import and that there was no need to have his competency assessed by an evaluator.

Because the weight of the demonstrated that sufficient doubt existed as to Mr. Sayed's competency and inability cooperate with defense counsel, and because the court disregarded such evidence, the trial court's competency determination was in violation of Mr. Syed's due process right to a fair trial under the Fourteenth Amendment. Dusky, supra, 362 U.S. at 402.

Respectfully, the decisions rendered by the lower courts in this case are flawed.

In the Tenth Circuit's opinion (see id, at * 4-5), respectfully, the Court relying on the U.S. District Court of Colorado's decision denying Mr. Sayed habeas relief, that Mr. Sayed failed to demonstrate the (CCA)'s decision was based on an unreasonable apply clearly established federal law as determined by the Supreme Court, nor did Mr. **Sayed** present evidence to rebut the presumption that the CCA's factual findings were correct. However, the problematic with that decision is clearly contrary to or an unreasonable application of the U.S. Supreme Court law and/or an unreasonable determination of the facts of Mr. Sayed's case in light of those rulings. See Drope v. Missouri, 420 U.S. 162, 181-83 (1975); Pate v. Robinson, 383 U.S. 375, 378 (1966)(Failure to order competency evaluation).

Because the proceeding was not delayed to conduct a competency hearing, Mr. Sayed was permitted to testify in his defense, during which he relayed his conspiratorial and fantastical theories to the jury, which likely prejudiced him. Also, because the proceedings were not delayed to conduct a

competency hearing, counsel had to proceed to trial without Mr. Sayed's competence assistance, which likely substantially prejudiced the defense.

Mr. Sayed respectfully moves this Court to grant certiorari on this issue. This as well as all other available relief is respectfully requested.

3) **Did Mr. Sayed receive ineffective assistance of counsel when counsel failed to interview and introduce testimony of witnesses?**

All criminal defendants have a Sixth Amendment right to receive the effective assistance of counsel during all critical stages of a criminal proceeding. See Jay Lee v. U.S., 137 S.Ct. 1958, 1964 (2017). In order to demonstrate a violation of this Sixth Amendment right, a defendant must show that counsel's representation "'fell below an objective standard of reasonableness' and that he was prejudiced as a result." Id, 137 S.Ct. at 1364 (quoting Strickland v. Washington, 466 U.S. 668, 692 (1984)). A criminal defendant may satisfy the prejudice component if he shows that there is a "'reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.'" Id, 137 S.Ct. at 1964 ((quoting Roe v. Flores-Ortega, 528 U.S. 470, 482 (2000)); see also, Strickland supra, 466 U.S. at 694.

In this case, Mr. Sayed was required to argue that the trial counsel was ineffective when she failed to investigated witnesses who heard the intercom system announcement, especially when Mr. Sayed indicated he wanted to testify. Providing more evidence that Tidwell's credibility immensely and made it more likely he attacked Mr. Sayed without justification or provocation. Moreover, providing evidence to support Mr. Sayed's testimony about the announcement would have bolstered his credibility general in front of the jury. See People v. Melendez, 102 p.3d 315, 321 (Colo. 2004) ("even if the evidence is somewhat cumulative, it is admissible if it is the only evidence introduce to corroborate the defendant's own statement").

his counsel made a strategic choice. However, the decisions rendered by the lower courts in this case are flawed, because Ms. Stout did not need to even conduct basic investigation related to the potential witnesses because she said during the pretrial continuance discussion that she had credibility concern with any inmate witness. However, the lower courts does not dispute that defense attorneys have a duty to investigate in all cases nor that part of investigating includes interviewing witnesses. Where an alleged crime occurred in prison, it is most likely the witnesses are (DOC) staff or inmates. To hold that an attorney does not need to even interview potential witnesses because they are inmates would essentially create two standards: one for non-incarcerated defendants—where their attorneys must interview potential witnesses—and one for incarcerated defendants—where their attorneys need not even interview potential witnesses if the witnesses are inmates. Defendants accused of committing crimes in prison are still guaranteed the right to effective assistance of counsel. The lower courts does not explain why it would be logical to think that a testifying defendant (who is an inmate) alone would be more credible than the defendant corroborated by other inmate witnesses. Mr. Sayed alleged that likely 120 other inmates heard the announcement and Ms. Stout failed to interview any of them. Mr. Sayed argument is not premised on the notion that to be competent, Ms. Stout needed to interview all 120 inmates; rather, her conduct was deficient in failing to interview any of the many potential witnesses who may have heard the intercom announcement. The lower courts does not dispute that witnesses testifying about an intercom announcement would have bolstered Mr. Sayed's credibility and undermined Tidwell's credibility. Instead, the lower courts attempts to undermine the importance of the credibility of the defendant and alleged victim by pointing to the fact that there was a video. The audio-less, choppy video with different angles was far from dispositive as to what occurred, and in particular, it did not clearly show what Mr. Sayed's actions were during the encounter and whether Mr. Sayed acted in self-defense. If anything, the video corroborated Mr. Sayed's claim of self-defense as it shoed Tidwell as the first to physically engage when he pushed Mr. Sayed against the wall, and it showed Mr. Sayed being pummeled by (DOC) staff. Tidwell and Mr. Sayed provided different accounts of how the encounter began. While Tidwell admitted he was the first to physically engage Mr. Sayed, he testified that Mr. Sayed said, "we're going to fight," several times and made a "flinching movement" toward him. Mr. Sayed testified that the encounter began when Tidwell asked Mr. Sayed why he gave information to a (DOC) major and the federal courts, and then Tidwell pushed and punched Mr. Sayed. Tidwell and Mr. Sayed also both gave very different accounts of what happened during the encounter. Thus, the credibility of the alleged victim (Tidwell) and the defendant (Mr. Sayed), both of whom testified, was extremely

relevant to the outcome of the case. It would have been particularly relevant had Ms. Stout requested a jury instruction on self-defense, as constitutionally adequate counsel would have done, and that decision is clearly contrary to or an unreasonable application of the U.S. Supreme Court law and/or an unreasonable determination of the facts of Mr. Sayed's case in light of those rulings. Accord, Strickland v. Washington, 466 U.S. 684, 691(1984); Kimmelman v. Morrison, 477 U.S. 365, 385-90 (1986).

Respectfully, Mr. Sayed submits that the U.S. Court District Court should have granted his request for habeas relief and the U.S. Court of Appeals Should have issued a certificate of appeal-ability, as reasonable jurists would have debated that his habeas application was incorrect decided. See Buck v. Davis, 137 S.Ct. 759 (2017).

Mr. Sayed respectfully moves this Court to grant certiorari on this issue. This as well as all other available relief is respectfully requested.

4) **Did Mr. Sayed receive ineffective assistance of counsel when counsel failed to consult with an expert witness?**

Counsel has a continuing duty to conduct reasonable investigations and/or make reasonable decisions which make such investigations unnecessary, as information about the case becomes available. See Strickland supra, 466 U.S. at 691.

In this case, Ms. Stout's performance was deficient when she did not consult with a computer forensic expert when Mr. Sayed informed her that the videos had been edited to exclude the intercom announcement. The duty to investigate and properly prepare for trial van also include a duty to consult with an expert. See McWilliams v. Dunn, 582 U.S. 183 (2017). See also, Hinton v. Alabama, 571 U. S. 263, 273 (2014) (holding that counsel rendered ineffective assistance by failing to understand relevant law relating to expert testimony at trial). After Ms. Stout consulted with the expert, she could have decided whether to call the expert as a witness, and at a minimum, the expert could have assisted Ms. Stout to understand how to cross-examine the prosecutions rebuttal witnesses regarding the (DOC) video system and Exhibit 12. Indeed, at trial, Ms. Stout did not conduct any cross-examination related to the videos. If after conducting sufficient investigation, Ms. Stout found

no corroborating evidence, she could have adequately advised Mr. Sayed regarding whether he should testify. See Standard 4-5.1(b) ("Before significant decision-points...defense counsel should advise the client with candor concerning all aspect of the case..."). Mr. Sayed submits that as assessed under Strickland's requirements, his trial counsel's performance was both deficient and prejudicial. See e.g., Rogers v. Dzurenda, 25 F.4th 1171, 1182-84 (9th Cir. 2022); Saranchak v. Sec. Pa., Dep't. of Corr., 802 F.3d 579, 594-96 (3rd Cir. 2015) (addressing a virtually identical issue to Mr. Sayed's and granting relief based upon a Sixth Amendment violation), were all well-established when defense counsel failed to conduct the necessary expert consultation. Had counsel consulted with the necessary expert, she could have decided to call the expert as a witness, and at a minimum, the expert could have assisted counsel to understand how to cross-examine the prosecution's rebuttal witness regarding the (DOC) video system. Further, if after conducting sufficient investigation counsel found no corroborating evidence of the video tampering, then she could have adequately advised Mr. Sayed whether he should testify.

Respectfully, the decisions rendered by the lower courts in this case are flawed.

In the Tenth Circuit's opinion (see Appendix A, at * 6-7), respectfully, the Court relying on the U.S. District Court of Colorado's decision denying Mr. Sayed habeas relief, that his counsel consulted an individual she believed to be knowledgeable concerning Mr. **Sayed**'s theory, and that individual told her there were no signs the video had been tampered with. The (CCA) therefore held counsel's decision not to pursue Mr. **Sayed**'s theory was a strategic one based on a reasonable exercise of professional judgment. ("[C]ounsel's decision to cut short her pursuit of [Mr.] **Sayed**'s tampering theory was based on her reasonable professional judgment."). However, the lower courts does not dispute that the duty to investigate and properly pre pare for trial can also include a duty to consult with an expert. The lower courts points to Ms. Stout's statement to the court during the pretrial countenance discussion that she had consulted with a person who had a degree in computer science. See id, at * 6-7. However, strategic decisions are only "virtually unchallengeable" if made "after thorough investigation of law and facts relevant to plausible options". Strickland, 466 U.S. 668, at 690-91. Here, the defense counsel did not complete a "thorough investigation" related to the video editing because she did not even consult with an expert. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation". See id; see also, Reynoso v. Giurbino, 426 F.3d 1099, 1112

(9th Cir. 2006)("counsel cannot be said to have made a tactical decision without first procuring the information necessary to make such a decision"). Reasonably competent counsel would have consulted with an expert where counsel believes the video is the key piece of evidence at trial (as defense counsel claimed in the pretrial countenance discussion) and where her client claimed some of the incident was missing from the videos. This is particularly true when counsel knew her client believed the videos had been edited and planned to testify. Accordingly, Mr. Sayed submits that decision is clearly contrary to or an unreasonable application of the U.S. Supreme Court law and/or an unreasonable determination of the facts of Mr. Sayed's case in light of those rulings. Accord, Strickland v. Washington, 466 U.S. 684, 691(1984); Kimmelman v. Morrison, 477 U.S. 365, 385-90 (1986).

Respectfully, Mr. Sayed submits that the U.S. Court District Court should have granted his request for habeas relief and the U.S. Court of Appeals Should have issued a certificate of appeal-ability, as reasonable jurists would have debated that his habeas application was incorrect decided. See Buck v. Davis, 137 S.Ct. 759 (2017).

Mr. Sayed respectfully moves this Court to grant certiorari on this issue. This as well as all other available relief is respectfully requested.

5) **Whether a defendant must admit to the conduct underlying the charged offense to be entitled to a self-defense jury instruction, and if so, whether admitting to push a correctional officer admits the conduct for second- and third-degree assault?**

The Due Process Clause requires the prosecution to prove each element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). Moreover, the U.S. Supreme Court held that, a defendant need not admit to the conduct of a offense to raise self-defense. See Mathews v. United States, 485 U.S. 58 (1988). In considering whether a defendant was entitled to an entrapment instruction, the Mathews Court held that, "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment". Id, 485 U.S. at 62. In so holding, the Court explained, "as a general proposition a defendant is entitled to an instruction at to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor". Id, 485 U.S. at 63.

At trial Mr. Sayed testified to the following:

- On May 2, 2015, an Officer contacted him through the intercom in his cell to discuss a grievance he had filed;
- Then, he was escorted by Captain Tidwell and Lieutenant Page to the case manager's office;
- En route to the case manager's office, Captain Tidwell punched him on his right eye;
- Then Captain Tidwell threw down his notepad and punched him several times;
- He tried to talk to Captain Tidwell, but then Captain Tidwell "tried to punch [him] again. And [he] raised [his] hand trying to block the punches because he was hurting [him] really bad";
- Captain Tidwell punched him, and he raised his hand to try to block the punches;
- Captain Tidwell kicked him four or five times, and then Captain Tidwell slipped and fell;
- After Captain Tidwell slipped, other officers began to grab him, and he pushed them back to get them off of him;
- When Captain Tidwell was punching him, he put up both of his hands to block the punches;
- After he was restrained, Captain Tidwell broke his finger and said, "we are even now";
- When Captain Tidwell was punching him, he raised his hands to block the punches, but didn't know if his hands/arms were "waiving" around; and
- Although the video showed Mr. Sayed's hands coming toward Captain Tidwell, he was only trying to "block his punches to protect [himself] as a self-defense".

After the presentation of evidence at trial, defense counsel never requested a self-defense instruction and the court never provided the jury with an instruction on self-defense (see entire record).

In this case, Mr. Sayed argued that, Ms. Stout's conduct was deficient when she did not request a self-defense instruction after Mr. Sayed and Tidwell testified he acted in self-defense. Both Mr. Sayed and Tidwell testified that Tidwell was the first to make physical contact and that Mr. Sayed made physical contact with Tidwell in response. The failure to request a self-defense instruction was particularly deficient (and prejudicial) because there was essentially no defense to second- and third-degree assault. See e.g., Lee v. Clarke, 781 F.3d 114, 123 (4th Cir. 2015)("[I]t is clear from the testimony that arose during [the defendant's] trial that a competent attorney would have requested [a

heat of passion] instruction in this case"). Ms. Stout's explanation at the pretrial continuance discussion for why she would not request an affirmative defense jury instruction further indicated her conduct was deficient for failing to request a self-defense instruction. Ms. Stout claimed that she needed Mr. Sayed's permission to request a self-defense jury instruction. While an attorney should always consult with her client, an attorney need not receive permission from her client to request a jury instruction. See Bergerud, supra, 223 P.3d at 693-94 (describing decisions that cannot be made by defense counsel including whether to plead guilty, waive a jury trial, or appeal); see also, Arko v. People, 183 P.3d 555, 557-58 (Colo. 2008)(holding a defense attorney may request a lesser non-included offense instruction without the client's permission, because this strategy call is distinguishable from pleading guilty); Standard 4-5.2(b)(listing decisions to be made by the client and not listing whether to request a jury instruction on an affirmative defense). Mr. Sayed detailed that if Ms. Stout had investigated the necessary witnesses, consulted with a computer forensic expert, and requested a self-defense jury instruction, there is a reasonable probability that the jury would have had reasonable doubt based on his defense of self-defense. Ms. Stout's failure to adequately advise Mr. Sayed about self-defense prejudiced Mr. Sayed because Ms. Stout (mistakenly) believed that she needed to defer to Mr. Sayed when requesting a jury instruction and she believed Mr. Sayed did not wish to raise any affirmative defenses. The errors, individually and cumulatively, would meet the prejudiced prong because Mr. Sayed essentially had no defense to the second-degree and third-degree assault counts.

Respectfully, the decisions rendered by the lower courts in this case are flawed.
In the Tenth Circuit's opinion (see Appendix A, at * 7-8), respectfully, the Court relying on the U.S. District Court of Colorado's decision denying Mr. Sayed habeas relief, "[b]ecause Under Colorado law, "a defendant is not entitled to an affirmative defense instruction if he denies committing the charged crime." See id. However, the precedent from the U.S. Supreme Court support the notion that a defendant need not admit to the conduct of an offense to raise self-defense. See Mathews v. United States, 485 U.S. 58 (1988). In considering whether a defendant was entitled to an entrapment instruction, the Mathews Court held that, "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment". Id, 485 U.S. at 62. In any event, the lower courts here erred

in holding that pushing a correctional officer is not sufficient evidence that Mr. Sayed knowingly or recklessly caused bodily injury (third-degree assault) and knowingly and violently applied physical force (second-degree assault). Indeed, the jury was instructed that the definition of bodily injury includes "physical pain".

Respectfully, Mr. Sayed submits that the U.S. Court District Court should have granted his request for habeas relief and the U.S. Court of Appeals Should have issued a certificate of appeal-ability, as reasonable jurists would have debated that his habeas application was incorrect decided. See Buck v. Davis, 137 S.Ct. 759 (2017).

Mr. Sayed respectfully moves this Court to grant certiorari to address what is required to receive a self-defense jury instruction only where the defendant has admitted to the conduct underlying the crime. This Court should address this question because such requirement clearly contrary to or an unreasonable application of the U.S. Supreme Court law and/or an unreasonable determination of the facts of Mr. Sayed's case in light of those rulings. See Mathews v. United States, 485 U.S. 58 (1988)(a defendant need not admit to the conduct of an offense to raise self-defense). This as well as all other available relief is respectfully requested.

6) **Is a pro-se prisoner litigant entitled to liberal construction, which includes readiness into his claim the strongest argument suggested, in this case which is the trial counsel deprived Mr. Sayed of his autonomous right to control the objectives of his defense.**

It is well-established by this Court that an indigent defendant has a Sixth Amendment guarantee of assistance of counsel in pursuit of his/her defense. See McCoy v. Louisiana, 138 S.Ct. 1500, 1507 (2018). When discussing this issue, the court went on to find that in acceptance of such assistance, the defendant "[n]eed not surrender control [over the objective of his/her defense] entirety to counsel." Id, at 1508 (Citing Farreta v. Calif., 422 U.S. 806, 819-20 (1975); Jones v. Barnes, 463 U.S. 745, 751 (1983)). In McCoy the Court found that the defendant has an autonomous right "to decide the objectives of the defense..."regardless of advice or opinion from counsel to the contrary. Id.

The Court in McCoy did reaffirmed that when a defendant accepts the assistance of counsel, the defendant cedes control to counsel over areas that are considered strategic in nature, e.g., such as which witness to call. However, counsel is not entitled to make an admission of a defendant's guilt or refuse to adopt the defense a defendant wishes to pursue regardless of counsel's beliefs as to the merits of said. Id, at 1509-10.

Finally, the Court determined that when counsel does so, he/she intrudes upon a defendant's autonomous right to control the objectives of his/her defense and structural error occurs, in turn warranting reversal of the defendant's conviction due to violations of his/her Sixth and Fourteen Amendment rights. Id, at 1511-12. Moreover, this Court Has long held that pro-se prisoner litigant are entitled to liberal construction when having their pleadings reviewed. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); see also, e.g., Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007).

In this case, Mr. Sayed argues on appeal that the U.S. District Court of Colorado had an obligation to grant him liberal construction when reviewing his affirmative defense of self-defense argument, which included reading into said the strongest argument suggested. (This Court has never exactly stated that there is such a requirement under liberal construction, however, the U.S. Court of Appeals for the Tenth Circuit, relying on this Court's decision in Haines supra, held that it is so. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991)).

This issue/argument presented on appeal by Mr. Sayed was that the U.S. District Court failed to read into his initial arguments that the trial counsel did not require the trial court to assess from Mr. Sayed whether he wished to waive his right to the affirmative defense of self-defense, as allowed under § 18-1-704 C.R.S., even though Mr. Sayed testified at trial that he was acting in self-defense. (Counsel knew what Mr. Sayed testify and it seems as if she deliberately sabotaged Mr. Sayed's defense by depriving him of this defense). Consequently, counsel waived Mr. Sayed's autonomous right to control the objective of his defense, allowing in turn structural error. See McCoy v. Louisiana, supra, 138 S.Ct. 1500, 1511-12 (2018).

Mr. Sayed in turn submits that counsel's performance was constitutionally deficient and prejudicial, in turn satisfying both prongs of the Strickland test, warranting reversal of his convictions because Mr. Sayed would have raised the defense of self-defense but for counsel's failure to explain to him the particulars of that defense (counsel had a constitutionally imposed duty to explain to Mr. Sayed that if

he raised the affirmative defense of self-defense, that he would not be admitting that he assaulted correctional staff, but rather that his actions were in defense of himself and hence justified). In turn there is a reasonable probability that "but for" counsel's ineffectiveness, i.e., intrusion into Mr. Sayed's personal rights, Mr. Sayed would not have been convicted.

The Tenth Circuit in its decision found that Mr. **Sayed** did not make this argument before the district court. See Appendix A, pp. 8-9. Simply put, this isn't true. Moreover, based on the argument raised by Mr. Sayed, liberal construction would require that Mr. Sayed's claim could be interpreted to indicate this as the right to control the objectives of his defense. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991)(citing Haines v. Kerner, 404 U.S. 519, 520-21 (1972), and holding that the liberal construction rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements). Consequently, this claim could have been construed in this fashion even if it was exactly stated this was (Mr. Sayed raised a claim of ineffective assistance of trial counsel for deprived Mr. Sayed of his autonomous right to control the objectives of his defense). See Appendix B, at 20. In other words, the structural error alone should require reversal of Mr. Sayed's convictions as counsel deprived him of his autonomous rights to control the objectives of his defense. Given this, the only question is whether the U.S. District Court should have read in to his affirmative defense of self-defense argument the strongest argument suggested, i.e., the trial counsel deprived Mr. Sayed of his autonomous right to control the objectives of his defense.

Mr. Sayed respectfully submits that this was clear error on the part of the Tenth Circuit panel rendering the decision in Mr. Sayed's case. See McCoy v. Louisiana, 138 S.Ct. 1500, 1507 (2018), and thus moves this Court to grant certiorari on this claim. This as well as all other available relief is respectfully requested.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Hazhar A. Sayed, #133608

Date: 01-28-2025