

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH J. BUTTERCASE — PETITIONER
(Your Name)

vs.

STATE OF NEBRASKA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Joseph J. Buttercase
(Your Name)
Inmate Number 76999
NEBRASKA STATE PENITENTIARY
P.O. BOX 22500

(Address)

Lincoln, NE 68542-2500
(City, State, Zip Code)

(402) 471-3161
(Phone Number)

QUESTION(S) PRESENTED

1. Whether this Court's holdings in *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) shelters the privately possessed visual depictions of intimate relations between a legally married husband and wife under the age of 18 against prosecutions under 18 U.S.C. § 2251(a), 18 U.S.C. § 2252A(a)(1), 18 U.S.C. § 2252A(a)(5) (B), 18 U.S.C. § 1465, and Neb.Rev.Stat. § 28-813.01?
2. Whether Neb.Rev.Stat. § 29-3001 et seq. is currently a constitutionally adequate corrective process, as commanded by the Fourteenth Amendment to the United States Constitution, in the hearing and determination of claims from State of Nebraska prisoners of violation of federal constitutional guarantees?
3. Whether the Nebraska Court of Appeals decision in *State of Nebraska v. Joseph J. Buttercase*, No. A-15-987 (2017) is "contrary to" this Court's holdings in *Schlup v. Delo*, 513 U.S. 298 (1995); *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny; *Tumey v. State of Ohio*, 273 U.S. 510 (1927); AND, involved an unreasonable application of this Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny?

LIST OF PARTIES

[X] All parties **do not** appear in the caption of the case on the cover page.

A list of all parties to the proceedings in the courts whose judgments is the subject of this petition is as follows:

PETITIONER:

JOSEPH J. BUTTERCASE #76999
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COUNSEL FOR PETITIONER:

pro se (without the assistance
of counsel).

RESPONDENT:

STATE OF NEBRASKA

COUNSEL FOR RESPONDENT:

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INTERESTED PARTY/RESPONDENT:

UNITED STATES OF AMERICA

(NOTE: 28 U.S.C. § 2403(a)
may apply).

COUNSEL FOR INTERESTED PARTY/
RESPONDENT:

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TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	38

INDEX TO APPENDICES

- APPENDIX A: Memorandum Opinion and Judgement on Appeal (Unpublished-12/5/17) from the Nebraska Court of Appeals, No. A-15-987.
- APPENDIX B: Order from the Nebraska Court of Appeals - Overruling Motion for Rehearing, No. A-15-987.
- APPENDIX C: Transcripts, Trial Court Case No. CR 11-124, Appellate Court Case No. A-15-987 (Postconviction Relief Appeal), to include the District Court of Gage County, Nebraska's decision to deny the Petitioner's Motion for Post-Conviction Relief (T23-34).
- APPENDIX D: Orders from the Nebraska Supreme Court denying Petition for Further Review, No. A-15-987.
- APPENDIX E: Order from the Nebraska Supreme Court denying Motion to Reconsider (Rehearing), No. A-15-987.
- APPENDIX F: Memorandum and Order (Unpublished), Findings and Recommendation, Indictment and related motions/documents; **United States v. Joseph Buttercase**, Case No. 8:12-CR-425.
- APPENDIX G: Appeals Briefs, Motion for Rehearing, Petition for Further Review, and Motion to Reconsider (Rehearing), No. A-15-987 (Postconviction Relief Appeal),
- APPENDIX H: Transcripts, Trial Court Case No. CR 11-124, Appellate Court Case No. A-16-182 (Motion to Expand the Record Appeal) to include Brief in Support of Motion for Post-Conviction Relief and Request for Hearing.

INDEX TO APPENDICES - Continued

APPENDIX I: Transcripts, Trial Court Case No. CR 11-124, Appellate Court Case No. A-12-1167 (Direct Appeal).

APPENDIX J: Supplemental Transcripts, Trial Court Case No. CR 11-124.

APPENDIX K: petition Under 28 U.S.C. §2254 For a Writ of Habeas Corpus & Request for An Evidentiary Hearing, **Buttercase v. Frakes**, Case No. 8:18-CV-131.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Boyd v. United States, 116 U.S. 616 (1886)	11
Brady v. Maryland, 373 U.S. 83	i., 28-29
Buttercase v. Frakes, No. 8:18-CV-131 (D.Neb. 2018)	iv., 36
California v. Trombetta, 467 U.S. 479 (1984)	31
Case v. Nebraska, 381 U.S. 336 (1965)	20, 24
Chambers v. Mississippi, 410 U.S. 284 (1973)	21
Crane v. Kentucky, 476 U.S. 683 (1986)	31
Eisenstadt v. Baird, 405 U.S. 438 (1972)	i., 12
Evitts v. Lucey, 469 U.S. 387 (1985)	13
Franks v. Delaware, 438 U.S. 154 (1978)	5, 7, 13-14, 16
Griswold v. Connecticut, 381 U.S. 479 (1965)	i., 11, 13
Groh v. Ramirez, 540 U.S. 551 (2004)	16
House v. Bell, 547 U.S. 518 (2006)	36
In re Winship, 397 U.S. 358 (1970)	36
Irwin v. Dowd, 366 U.S. 717 (1961)	35
Jackson v. Virginia, 443 U.S. 307 (1979)	35
Kentucky v. King, 563 U.S. 452 (2011)	14
Liteky v. United States, 510 U.S. 540 (1994)	32-33
Loving v. Virginia, 388 U.S. 1 (1967)	12
Mapp v. Ohio, 367 U.S. 643 (1961)	11
McDonough Power Equipment v. Greenwood, 464 U.S. 548 (1984)	35
Murray v. Carrier, 477 U.S. 478 (1986)	36
Nardone v. United States, 308 U.S. 338 (1939)	17

TABLE OF AUTHORITIES CITED - Continued

CASES	PAGE NUMBER
Planned Parenthood v. Casey, 505 U.S. 833 (1992)	12
Powell v. Alabama, 287 U.S. 45 (1932)	35
Prince v. Massachusetts, 321 U.S. 158 (1944)	12
Robinson v. California, 370 U.S. 660 (1962)	37
Roe v. Wade, 410 U.S. 113 (1973)	12
Rose v. Clark, 478 U.S. 570 (1986)	35
Schlup v. Delo, 513 U.S. 298 (1995)	36
Skinner v. Oklahoma, 316 U.S. 535 (1942)	i., 12
Stanley v. Georgia, 394 U.S. 557 (1969)	i., 11-12
State v. Buttercase, No. A-15-987 - Unpublished (Neb.App. 2017)	passim
State v. Edwards, 294 Neb. 1 (2016)	20
State v. Mata, 280 Neb. 849 (2010)	20, 23
State v. Robertson, 294 Neb. 29 (2016)	20, 22
State v. Sprunger, 283 Neb. 531 (2012)	17-18
Strickland v. Washington, 466 U.S. 668 (1984)	passim
Tumey v. State of Ohio, 273 U.S. 510 (1927)	i., 31, 35
United States v. Bagley, 473 U.S. 667 (1985)	22, 30
United States v. Buttercase, 8:12-CR-425 - Unpublished (D.Neb. 2012) ..	passim
United States v. Cronin, 466 U.S. 648 (1984)	22, 31
United States v. Nixon, 418 U.S. 683 (1974)	28
United States v. Ortiz-Graulau, 526 F.3d 16 (1st Cir. 2008)	18-19
United States v. Wilson, 565 F.3d 1059 (8th Cir. 2009)	8, 18
Washington v. Texas, 388 U.S. 14 (1967)	25

TABLE OF AUTHORITIES CITED - continued

CASES	PAGE NUMBER
Wiggins v. Smith, 539 U.S. 510 (2003)	27
Wong Sun v. United States, 371 U.S. 471 (1963)	17

CONSTITUTIONAL PROVISIONS

U.S. Const. amend I	2, 11-12
U.S. Const. amend IV	2, 11, 13-14, 16
U.S. Const. amend V	passim
U.S. Const. amend VI	2, 13, 25, 28, 35
U.S. Const. amend VIII	2, 35
U.S. Const. amend XIV	passim

STATUTES

Neb.Rev.Stat. § 28-813.01	i., 4
Neb.Rev.Stat. § 29-3001 et seq.	i., 4, 24
Neb.Rev.Stat. § 29-3001(2)	4
18 U.S.C. § 1465	i., 4, 8
18 U.S.C. § 2251	8
18 U.S.C. § 2251(a)	i., 3
18 U.S.C. § 2252A(a)(1)	i., 3
18 U.S.C. § 2252A(a)(5)(B)	i., 3-4
28 U.S.C. § 1257(a)	1
28 U.S.C. § 2403(a)	ii., 8
28 U.S.C. § 2254	iv., 36

TABLE OF AUTHORITIES - Continued

STATUTES	PAGE NUMBER
28 U.S.C. § 2254(b)(1)(B)(i)(ii)	24
RULES	
Neb.Ct.R.Pldg. § 6-1115(a)	23
Neb.Rev.Code.Jud.Cond. § 5-302.8(B)	34
OTHER AUTHORITIES	
Beaney, The Constitutional Right to Privacy, 1962 Sup.Ct.Rev 212	11
Griswold, The Right to be Let Alone, 55 Nw.U.L.Rev. 216 (1960)	11

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 judgments below.

OPINIONS BELOW

[X] 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 unpublished.

The opinion of the Gage County, Nebraska district court (T23-34) appears at Appendix C to the petition and is unpublished.

The opinion of the United States district court appears at Appendix F to the petition and is unpublished.

JURISDICTION

[X] For cases from state courts:

The date on which the highest state court decided my case was March 2, 2018. A copy of that decision appears at Appendix D.

[X] A timely petition for rehearing was thereafter denied on the following date: March 12, 2018, and a copy of the order denying rehearing appears at Appendix E.

There was no extension of time to file this petition for a writ of certiorari and this petition is timely filed by not later than June 11, 2018.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law ... abridging the freedom of speech, ..."

The Fourth Amendment to the United States Constitution provides "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "No person shall be ... deprived of ... liberty, or property, without due process of law, ..."

The Sixth Amendment to the United States Constitution provides, in pertinent part. that "In all criminal prosecutions, the accused shall enjoy the right to ... public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... 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 defence."

The Eighth Amendment to the United States Constitution provides, in pertinent part, that "nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides that "All persons born or naturalized in the United States, and subject to the

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."

18 U.S.C. § 2251(a) provides, in pertinent part, that "Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct ... shall be punished as provided under subsection (e) ... if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate commerce ..."

18 U.S.C. § 2252A(a)(1) provides that "Any person who -- knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography."

18 U.S.C. 2252A(a)(5)(B) provides that "Any person who -- knowingly possesses, or knowingly accesses with the intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or in or affecting interstate commerce by any means, including by computer, or that was produced using

materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;"

18 U.S.C. § 1465 provides, in pertinent part, that "whoever knowingly produces with intent to transport or distribute in interstate commerce, for the purpose of sale or distribution of any obscene material ... shall be fined under this title or imprisoned not more than five years, or both."

Neb.Rev.Stat. § 28-813.01 provides that "It shall be unlawful for a person to knowingly possess any visual depiction of sexually explicit conduct as defined in section 28-1463.02, which has a child, as defined in such section, as one of its participants or portrayed observers."

Neb.Rev.Stat. § 29-3001(2) provides that "Unless the motion and files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, and determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence the prisoner or grant a new trial as may appear appropriate. Proceedings under the provisions of sections 29-3001 to 29-3004 shall be civil in nature. Costs shall be taxed as in habeas corpus cases."

STATEMENT OF THE CASE

On July 16, 2011, Petitioner Joseph J. Buttercase was arrested for an alleged physical/sexual assault upon his ex-girlfriend Tessa Fulton that was also alleged to have occurred at the Petitioner's home (A-12-1167/B.O.E. 762:1-79:5). Petitioner was subsequently charged with First Degree Sexual Assault, three (3) counts of Possession of Child Pornography, First Degree False Imprisonment, Terroristic Threats, Strangulation, and Third Degree Domestic Assault (A-12-1167/T1-9).

On December 2, 2011, the Petitioner's trial counsel, Jason Troia (also Petitioner's direct review Appellate Counsel), filed a Motion for Franks Hearing in the District Court of Gage County, Nebraska (id./T10-29). Also on December 2, 2011, trial counsel filed Petitioner's first Motion to Suppress evidence obtained from the July 20, 2011 illegal STATE search warrant (id./T30-31). On January 18, 2012, the trial court held a hearing on the Motion for Franks Hearing (A-12-1167/B.O.E. 15:1-63:9), and on February 10, 2012, the trial court denied suppression of any and all evidence obtained from the July 20, 2011 STATE search warrant and found that no Franks violations had occurred (id./T32-36). The trial court held a hearing on Petitioner's first Motion to Suppress on March 12, 2012 finding that Officer Murphy acted in good faith in looking for evidence of the assault (id./T37-40).

On March 23, 2012, the Petitioner's trial counsel filed a Motion to Sever counts for trial (id./T41-42), and on April 17, 2012, the trial court did sever the child pornography Counts II, III, and IV (id./T43).

The Nebraska Attorney General's Office sought and obtained for the first time on March 16, 2012 a search warrant to search the contents of Petitioner's

computer hard drives. On August 3, 2012, the Petitioner's trial counsel filed a second Motion to Suppress in the trial court for evidence obtained pursuant to the March 16, 2012 STATE search warrant (Appendix J; CR 11-124/T6-7). A hearing was held in the trial court pursuant to Petitioner's second Motion to Suppress on August 13, 2012 (A-12-1167/B.O.E. 98:1-106:11). The trial court overruled Petitioner's second Motion to Suppress at the hearing on August 13, 2012 (id./B.O.E. 105:3-11).

Following a jury trial on August 17, 2012, Petitioner Joseph J. Buttercase was found guilty of First Degree Sexual Assault, First Degree False Imprisonment, Strangulation, and Third Degree Domestic Assault. Petitioner was found not guilty of Terroristic Threats (A-12-1167/T55-56). Petitioner was subsequently sentenced to a total of twenty-six (26) years and eight (8) months to forty-one (41) years of incarceration with credit for 126 days served on Count I (id./T67-68).

On November 8, 2012, the Petitioner's trial counsel filed a Motion for New Trial (id./T57-59)—this motion based upon an Affidavit by the Petitioner's next-door neighbor attesting that, on the morning of July 16, 2011, she witnessed both the alleged victim, who appeared uninjured and casually walking with a normal gait, and Petitioner Buttercase, who appeared normal without anything in his hands (id./T60-62). The trial court held a hearing on the Petitioner's first Motion for New Trial on November 20, 2012 (A-12-1167/B.O.E. 973:1-1022:66), and on November 29, 2012, the trial court denied Petitioner a new trial incorrectly finding that Petitioner failed to meet his burden of proof that the testimony of Sondra Aden (Petitioner's next-door neighbor), if offered and admitted at trial, would have produced a substantial difference in the result (id./T63-66).

On December 12, 2012, the Petitioner's trial/appellate counsel timely filed a Notice of Appeal (A-12-1167/Direct Review). On November 5, 2013, the Nebraska Court of Appeals entered its unpublished Memorandum Opinion in Appeal No. A-12-1167 affirming the trial court's and jury's verdicts. On January 3, 2014, the Nebraska Court of Appeals denied a rehearing in Case No. A-12-1167. On February 20, 2012, the Nebraska Supreme Court denied Petitioner's Petition for Further Review in Appeal No. A-12-1167. On March 10, 2014, the trial court entered its Judgment on Mandate that made Petitioner's direct review final.

On December 19, 2012, the United States of America indicted Petitioner in Case No. 8:12-CR-425 based upon the illegal July 20, 2011 and March 16, 2012 STATE search warrants (Appendix F; Doc #1 Indictment, Case No. 8:12-CR-425). On January 2, 2013, the State of Nebraska filed a Motion to Dismiss Without Prejudice in the trial court—seeking dismissal of STATE Child Pornography Counts II, III, and IV—stating in said motion that if the United States Attorney's Office chooses not to move forward with its indictment against Petitioner that the State would re-file the Child Pornography charges (A-12-1167/Supp. T1-3), and on January 7, 2013, the trial court did grant State's Motion to Dismiss Without Prejudice (id./Supp. T4).

On April 18, 2014, the Petitioner's retained federal defense counsel James Martin Davis filed a Motion and Memorandum Brief for a Hearing Pursuant to Franks v. Delaware in the United States District Court for the District of Nebraska for Case No. 8:12-CR-425 (Appendix F; Doc #41 and #42, Case No. 8:12-CR-425), and defense counsel Davis also filed a Motion and Memorandum Brief to Suppress in the same said court on April 21, 2014 (Appendix F; Doc #46 and #47, Case No. 8:12-CR-425). These motions based upon the illegal July 20, 2011 and March 16, 2012 STATE search warrants. On November 24, 2014, the United

States Magistrate Judge recommended that the Petitioner's Motion to Suppress be denied in its Findings and Recommendation (Appendix F; Doc #67, Case No. 8:12-CR-425). The magistrate judge's findings to include:

"Section 2251, under which Defendant is charged, does not make marriage a defense to the production of child pornography. 18 U.S.C. § 2251. The Eighth Circuit declared that "sexually explicit materials involving persons under the age of 18 enjoy no constitutional protection." United States v. Wilson, 565 F.3d 1059, 1067 (8th Cir. 2009). Therefore Defendant's argument for suppression based on an alleged violation of his constitutional rights fails."

United States v. Joseph Buttercase, No. 8:12-CR-425; Appendix F, Doc. #66 p. 5

On December 3, 2014, Petitioner timely objected to the Magistrates findings and recommendations (Appendix F; Doc #67, Case No. 8:12-CR-425), and on December 19, 2014, the United States District Judge denied Petitioner's motion to suppress, overruled Petitioner's objections to the Magistrate's findings and recommendation, and adopted the magistrate judge's findings and recommendation in its entirety (Appendix F; Doc #68, Case No. 8:12-CR-425).

The United States District Court for the District of Nebraska has not, according to Petitioner's knowledge and pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question.

On March 25, 2016, Petitioner pled guilty to Count I 18 U.S.C. § 1465 of an Information (Appendix F; Information, Case No. 8:12-CR-425) pursuant to Plea Agreement due to retained defense counsel, James Martin Davis, withdrawing as counsel—abandoning Petitioner right prior to trial. Petitioner was sentenced to 36 months imprisonment in the Federal Bureau of Prisons to run consecutively to the sentence imposed by the State of Nebraska (Appendix F; Sentencing Doc #108, Case No. 8:12-CR-425).

On February 19, 2015, the Petitioner's retained postconviction counsel

timely filed Petitioner's STATE Motion for Postconviction Relief (A-15-987/T1-4, & etc.). On June 17, 2015, Petitioner timely submitted Petitioner's Brief in Support of Motion for Post-Conviction Relief and Request for Hearing to the trial court (Appendix H; A-16-182/T21-33). On June 26, 2015, Petitioner filed a Motion to Recuse in the trial court (A-15-987/T13) based upon: A) the trial judge chastising Petitioner in open court and with the jury present during trial (A-12-1167/B.O.E. 810:17-21)(A-16-182/T26, ¶4), and B) a formal complaint that Petitioner filed against the trial judge for his misconduct or chastisement during trial (A-15-987/E122,1:14,15)(A-16-182/16:8-24). The Petitioner's postconviction counsel also did submit Facebook messages in Petitioner's Brief in Support of Post-Conviction Relief and Request for a Hearing to the trial court proving the trial judge's bias towards Petitioner and conflicts of interests with the same said trial judge (A-16-182/T29,&T33).

On June 29, 2015, Petitioner timely filed (before the trial court's denial of Petitioner's Motion for Post-Conviction Relief without an evidentiary hearing) a Motion to Amend his Motion for Post-Conviction Relief based upon additional prosecutorial misconduct unknown to Petitioner at the time of his initial filing (id./T14). On August 12, 2015, the trial court held a hearing for Petitioner's pending Motion to Recuse and Motion to Amend (A-15-987/B.O.E. 12:1-38:11), and the trial court denied Petitioner's Motion to Recuse incorrectly finding that trial judge did not demonstrate any bias toward the Petitioner and minimized said chastisement/misconduct to a mere admonishment (A-15-987/T18-19). The trial court also denied Petitioner's Motion to Amend his motion for postconviction relief on September 16, 2015 incorrectly finding that the proposed amendment raises a distinctly new factual allegation of ineffective assistance of counsel and that Petitioner is attempting to avoid

the one-year statute of limitations (id./T21). On October 2, 2015, the trial court denied Petitioner's Motion for Post-Conviction relief without an evidentiary hearing (id./T23/-33), even though—Petitioner DID raise factual allegations, which WOULD have been proven through expansion of the record from an evidentiary hearing, constituting infringements of Petitioner's rights under the United States Constitution and the Constitution for the State of Nebraska.

On October 20, 2015, Petitioner timely filed his Notice of Appeal and his Poverty Affidavit, and the trial court granted Petitioner leave to proceed with appeal in forma pauperis on October 21, 2015. In an unpublished memorandum opinion entered on December 5, 2017 for Appeal No. A-15-987, the Nebraska Court of Appeals affirmed the trial court's denial of Petitioner's motions to recuse, to amend, and for postconviction relief without an evidentiary hearing (**State v. Buttercase, No. A-15-987; Appendix A**). On January 26, 2018, the Nebraska Court of Appeals denied Petitioner's Motion for Rehearing (Appendix G).

On March 2, 2018, the Nebraska Supreme Court denied Petition for Further Review in Appeal No. A-15-987 (Appendix D). On March 12, 2018, the Nebraska Supreme Court denied Petitioner's Motion to Reconsider (Rehearing)(Appendix E), and also denied Petition for Further Review again on March 12, 2018 (Appendix D).

Petitioner timely filed his Petition for Writ of Habeas Corpus & Request for An Evidentiary Hearing in the United States District for the District of Nebraska on March 26, 2018 (Appendix K).

This Petition for Writ of Certiorari is timely filed on or before June 11, 2018.

REASONS FOR GRANTING THE PETITION

1. ALL PERSONS IN THE UNITED STATES OF AMERICA THAT ARE LEGALLY MARRIED, AND UNDER THE AGE OF 18 ARE UNCONSTITUTIONALLY SUBJECT TO PROSECUTIONS OF FEDERAL/STATE CHILD PORNOGRAPHY AND OBSCENITY STATUTES, IN VIOLATION OF SAID MARRIED PERSONS FEDERAL CONSTITUTIONAL RIGHTS OF FREEDOM OF SPEECH, PRIVACY, DUE PROCESS OF LAW, AND EQUAL PROTECTION OF LAWS, AS GUARANTEED BY THE FIRST, FOURTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner Buttercase has a reasonable expectation of privacy in the conduct of his intimate relations. The videos and photographs subject to Petitioner's federal prosecution in Case No. 8:12-CR-425 stemmed from the illegal search warrants involving intimate relations between Petitioner and his wife. Married couples are entitled to the constitutionally protected right to privacy in the conduct of their most intimate relations, and that viewing of any images depicting Petitioner and his wife's intimate relations is a violation of the Petitioner and his wife's (now ex-wife) Fourth Amendment right to privacy.

In *Griswold v. Connecticut*, this Court held:

"The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred in *Mapp v. Ohio*, 367 U.S. 643, 656, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.' See *Beane, The Constitutional Right to Privacy*, 1962 *Sup.Ct.Rev.* 212; *Griswold, The Right to be Let Alone*, 55 *Nw.U.L.Rev.* 216 (1960) Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965).

In *Stanley v. Georgia*, 394 U.S. 557 (1969), this Court invalidated the

conviction of a defendant under a Georgia statute prohibiting the possession of obscene materials. The obscene films at issue in the case were found during the execution of a search warrant at petitioner's house. *Id.* at 558. The Defendant argued that obscenity statute, insofar as it punished the mere possession of obscene materials violated the First and Fourteenth Amendments to the United States Constitution. *Id.* at 559. This Court agreed, holding that "the mere private possession of obscene matter cannot constitutionally be made a crime." *Id.* This Court noted that whatever the justifications behind statutes regulating obscenity, they cannot reach into the privacy of one's home. *Id.* at 565. This Court further observed that:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Id. Petitioner's conviction was invalidated. *Id.* at 568.

Clearly the right to privacy, specifically in marital relationships, is recognized as one of the most fundamental and accepted principles immersed in the concept of ordered liberty. There are other important individual and personal decisions as to which government intrusion cannot be tolerated. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (procreation); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (family relationships); and *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (the decision as to whether bear or beget child); see also *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The essential idea in all these decisions is that there are limits as to what type of conduct the government can criminalize.

Modern technology has enabled married couples to record their most

intimate conduct, sexual and otherwise. If that conduct is intended to remain private, personal property of the married couple, the constitutional protection of that right to privacy must be applied. To paraphrase Griswold, to allow the police to search the sacred precincts of marital bedrooms and seize those recordings of intimate sexual relations is an idea that is repulsive to the notions of privacy surrounding the marriage relationship. Such an invasion of privacy CANNOT constitutionally stand. There is simply no constitutional justification under the Griswold rationale for the seizure and viewing of the Petitioner's privately secured videos of his intimate sexual relations with his wife in the confines of their own marital bed.

1A. BUTTERCASE'S STATE APPELLATE COUNSEL FAILED TO ASSIGN AS ERROR AND ARGUE THE TRIAL COURT'S DENIAL OF RELIEF FROM BUTTERCASE'S MOTION FOR FRANKS HEARING, FIRST MOTION TO SUPPRESS, AND SECOND MOTION TO SUPPRESS IN THE DIRECT REVIEW APPEAL BRIEF, IN VIOLATION OF BUTTERCASE'S FEDERAL CONSTITUTIONAL RIGHTS AGAINST UNREASONABLE SEARCHES SEIZURES, PRIVACY, EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"A first appeal as of right ... is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of counsel." Evitts v. Lucey, 469 U.S. 387, 396 (1985).

In this case, the Nebraska Court of Appeals concluded that because the charges were ultimately severed and dismissed, the evidence gathered from the search warrants in question is not part of the trial record in this case. (State v. Buttercase, No. A-15-987; Appendix A, p. 11, ¶2). And with virtually no legal analysis whatsoever, the Appellate Court stated:

Therefore, the district court noted that "there was no logical reason" to raise the alleged error on appeal. We agree.

State v. Buttercase, No. A-15-987; Appendix A, p. 11.

"To void a search warrant under Franks, a defendant must show by a

preponderance of evidence that (1) the affiant included in the warrant affidavit 'a false statement knowingly or intentionally, or with reckless disregard for the truth,' and (2) 'the affidavit's remaining content is insufficient to establish probable cause.' **Franks v. Delaware**, 438 U.S. 154, 155-56 (1978).

In this case, the Nebraska Court of Appeals also concluded that Buttercase did not identify which of the two motions provide grounds for his ineffective assistance claim in his postconviction motion. (**State v. Buttercase**, No. A-15-987; Appendix A, p. 10, ¶3). And with virtually little legal analysis whatsoever, the Appellate Court stated:

Thus, the trial court correctly concluded that the ineffective assistance claim connected with the motions to suppress was refuted by the record and insufficiently pleaded to require an evidentiary hearing.

State v. Buttercase, No. A-15-987; Appendix A, p. 10.

The text of the [Fourth] Amendment ... expressly imposes two requirements. First, all searches seizures must be reasonable. Second, a warrant must not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity. (emphasis added) **Kentucky v. King**, 563 U.S. 452, 459 (2011).

Investigator Erin Byrne of the Beatrice, Nebraska Police Department admitted that he knew prior to the drafting of his Affidavit in support of the July 20, 2011 STATE search warrant that Buttercase was NOT alone in his residence, and in fact Investigator Byrne knew that Buttercase DID leave his residence at the same time as the alleged victim, Tessa Fulton (A-12-1167/B.O.E. 48:4-58:24). Therefore, there was no time for Buttercase to have uploaded some imaginary video of an imaginary sexual assault that did NOT even

happen. The Beatrice Police Department was on a fishing expedition.

Fulton stated that she told Investigator Byrne several times that Buttercase never had time to download any videos from his video camcorder to his computer equipment. Fulton maintains that she never made any statements to any law enforcement officers justifying the seizure of Buttercase's computer equipment. See, Appendix F; Doc. #44 Emails between attorney Jason Troia and Tessa Fulton from December 5-7, 2012, Case No. 8:12-CR-425.

Officer Jay Murphy of the Beatrice Police Department testified at his sworn deposition on July 22, 2011, that Investigator Byrne instructed him to search the computer equipment seized from Petitioner's residence for videos and images of Buttercase's "sexual escapades ... as well as any other type of sexual explicit photos or videos...". Officer Murphy used a program called "Fast Scan" to search Petitioner's computer equipment. The search warrant for the computer equipment ONLY authorized a search of Petitioner's residence for "Photos and videos in various forms of parties involved in this crime, ..." (A-12-1167/T27-28).

After challenging the illegal July 20, 2011 STATE search warrant in the trial court, on March 16, 2012 the Nebraska Attorney General's Office sought and obtained for the first time a warrant to search the contents of the Petitioner's hard drives. A forensic examination report of Investigator Christina Vath performed on May 8, 2013, indicates that a search of the computer hard drives was performed on July 19, 2011, which is one (1) day before the original search warrant was issued. The Beatrice Police Department performed an illegal warrantless search of Petitioner's computer equipment before obtaining a search warrant, clearly a Fourth Amendment violation. Then after the Beatrice Police finally obtained a search warrant, pursuant to an

Affidavit that included false statements made knowingly or intentionally, or with reckless disregard for the truth, said Law Enforcement officers exceeded the scope of the search authorized for the search warrant. See, Appendix F; Motion for Franks Hearing Pursuant to **Franks v. Delaware** (Doc. #41), Memorandum Brief of Defendant in Support Motion for Franks Hearing (Doc. #42), Motion to Suppress (Doc. #46), and Defendant's Memorandum Brief in Support of Motion to Suppress (Doc. #47), Case No. 8:12-CR-425.

On July 19, 2011, Joseph Buttercase was incarcerated at the Gage County, Nebraska Detention Center, and none of Buttercase's family had access to or extra keys to Buttercase's residence or any of his computer equipment. See, Appendix F; Affidavit of Philip Buttercase, Affidavit of Maria Buttercase, Affidavit of Stephen Buttercase, and Affidavit of Tami Buttercase, Case No. 8:12-CR-425.

"It is a 'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable'." **Groh v. Ramirez, 540 U.S. 551, 559 (2004).**

Because the videos and images for the alleged child pornography of the Petitioner's ex-wife "Samantha" were obtained pursuant to the illegal July 20, 2011 and March 16, 2012 STATE search warrants that subsequently led to the United States Indictment and Conviction in Case No. 8:12-CR-425 against Petitioner, it is obvious that appellate counsel Troia should have assigned as error and argued the District Court of Gage County, Nebraska's denial of relief from the Motion for Franks Hearing, first Motion to Suppress, and second Motion to Suppress in Buttercase's STATE direct review appeal brief. Buttercase was prejudiced by appellate counsel Troia's failure to assign as error and argue the denial of relief from the Motion for Franks Hearing,

first Motion to Suppress, and second Motion to Suppress inasmuch because the Affidavit that was submitted by Investigator Byrne included false statements made knowingly, or with reckless disregard for the truth; there was a warrantless search performed by law enforcement on the day before the actual search warrant was obtained; if the police would have checked with the Petitioner's neighbors (Sondra Aden) first—there was no probable cause to begin with because the alleged sexual/physical assault did NOT even occur; Petitioner had a reasonable expectation of privacy in his intimate relations; and, law enforcement exceeded the scope allowed in the original illegal July 20, 2011 STATE search warrant—the exclusionary rule would reach not only the illegal July 20, 2011 STATE search warrant, but also the evidence later discovered and found in the March 16, 2012 STATE search warrant "derivative of an illegality or "fruit of the poisonous tree"." **Nardone v. United States, 308 U.S. 338, 341 (1939)**. The illegal July 20, 2011 STATE search warrant "extends as well to the indirect products" of unconstitutional conduct. **Wong Sun v. United States, 371 U.S. 471, 484 (1963)**. Furthermore, at sentencing in Case No. 8:12-CR-425, Buttercase's ex-wife "Samantha" stated that she was of age when the videos and photographs in question were taken.

There is a reasonable probability that if appellate court counsel Troia would have assigned as error and argued the denial of relief from the Motion for Franks Hearing, first Motion to Suppress, and second Motion to Suppress, the State of Nebraska Appellate Courts would have vacated the illegal July 20, 2011 STATE search warrant as it did in **State v. Sprunger, 283 Neb. 531 (2012)**, and the fruits of the illegal search—the March 16, 2012 STATE search warrant, and the United States Indictment/Conviction for Case No. 8:12-CR-425 would be excluded as "fruit of the poisonous tree", and the outcome would

have been different.

There was no tactical or strategic reason for appellate counsel's failure to assign as error and argue the trial court's failure to assign as error and argue the trial court's denial of relief from Butteracse's Motion for Franks Hearing, first Motion to Suppress, and second Motion to Suppress in the Petitioner's STATE direct review appeal brief. Petitioner's appellate counsel, Jason Troia, was also the appellant counsel of record in **State v. Sprunger**, 283 Neb. 531 (2011), and Troia was capable of obtaining relief by appeal for his client in that case with very similar circumstances as Petitioner's case. Consequently, appellate counsel Troia's failure to assign as error and argue the denial of relief from the Motion for Franks Hearing, first Motion to Suppress, and second Motion to Suppress in Buttercase's STATE direct review appeal brief was not within the range of competence demanded of attorneys in criminal cases. Appellate counsel's deficient performance with respect to the foregoing did NOT equal to that of a lawyer with ordinary training and skill in criminal law in the area, and his conduct "so undermined the proper functioning of the adversarial process that the [direct appeal] cannot be relied upon as having produced a just result." **Strickland v. Washington**, 466 U.S. 668, 686 (1984).

1B. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S DECISION IN United States v. Wilson, 565 F.3d 1059 (8th Cir. 2009) CONFLICTS WITH THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUITS DECISION IN United States v. Ortiz-Graulau, 526 F.3d 16 (1st Cir. 2008).

The Eighth circuit held that "Although the First Amendment protects non-obscene adult pornography, sexually explicit material involving persons under the age of 18 enjoy no constitutional protection." **United States v. Wilson**, 565 F.3d 1059, 1067 (8th Cir. 2009).

The First Circuit held that "Despite the language of the statute, Congress may well not have intended to make it criminal for a husband and wife to take intimate photographs of each other for their private use; this is so even if the instigator were twenty-one and the other spouse seventeen, thus falling within the plain terms of the statute's prohibition. If the government brought such a case, judges might seek to devise limits even on "plain" language; indeed, some judges have even suggested constitutional objections based on marital or consenting—adult privacy right." **United States v. Ortiz-Graulau**, 526 F.3d 16, 19 (1st Cir. 2008).

The right of privacy in intimate marital relationships has long been recognized in American jurisprudence. Statutes criminalizing visual depictions taken in the privacy of a valid intimate marital relationship cannot be constitutionally applied to Petitioner Buttercase, and any other legally married persons in the United States under the age of 18, as valid exercise of Congress' Commerce Clause power. Because the facts and circumstances in Buttercase's case reveal that Congress did not contemplate enforcement of child pornography statutes in a situation where a defendant produces depictions of his wife for private personal use only, in the context of a valid intimate marital relationship, Federal and State Child Pornography statutes as applied to Buttercase and all legally married persons in the United States under the age of 18 is unconstitutional application of the said statutes.

The District Court of Gage County, Nebraska's decision and the Nebraska Court of Appeals decision in rejecting Petitioner's foregoing substantial ineffective assistance of appellate counsel claims is "contrary to" this Court's clearly established precedent.

This Court should grant review of the foregoing ineffective assistance

of counsel claims that is necessary to prevent a fundamental miscarriage of justice.

To correct the foregoing substantial constitutional violations, the July 20, 2011 illegal STATE search warrant must be vacated and the fruits of the search March 16, 2012 STATE search warrant, and **United States v. Buttercase**, Case No. 8:12-CR-425 must be excluded as "fruits of the poisonous tree".

Accordingly, Petitioner Buttercase's conviction and sentence in **United States v. Buttercase**, Case No. 8:12-CR-425 must also be vacated as a derivative of the illegal July 20, 2011 STATE search warrant. A writ of certiorari should issue on this basis.

2. THE TREMENDOUS INCREASE IN FEDERAL HABEAS CORPUS APPLICATIONS BY STATE OF NEBRASKA PRISONER'S IS CAUSED BY NEBRASKA'S UNCONSTITUTIONALLY INADEQUATE POSTCONVICTION ACT, IN VIOLATION OF STATE OF NEBRASKA PRISONER'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

After Certiorari was granted, the Nebraska legislature enacted a statute providing a postconviction procedure. Neb.leg.Bill 836, Seventy-fifth Session, effective April 12, 1965. **Case v. Nebraska**, 381 U.S. 336, 337 (1965).

In this case, the Nebraska Court of Appeals found that Buttercase's reliance on **State v. Mata**, 280 Neb. 849, 790 N.W.2d 716 (2010), for his position that the district court should have liberally construed his original motion for postconviction relief in order to find his later amendment sufficiently related back to his original claims is no longer relevant in light of our Supreme Court disfavoring the application of the more liberal civil pleading rules to postconviction proceedings. See **State v. Robertson**, 294 Neb. 29, 881 N.W.2d 864 (2016). (**State v. Buttercase**, No. A-15-987; Appendix A, p. 8, ¶3). And the Appellate Court stated:

Therefore, as set forth in *State v. Edwards, supra*, we review the district court's order denying Buttercase's motion to amend his postconviction relief for an abuse of discretion, and we find none.

State v. Buttercase, No. A-15-987; Appendix A, p. 8.

Due to the State of Nebraska's suppression of material exculpatory evidence, Petitioner's postconviction counsel was unable to include all of Petitioner's federal case disclosed evidence when his original postconviction motion was filed because not all of the said newly discovered evidence was even known of yet. In an attempt to cure these defects in the original motion for postconviction relief, Petitioner's postconviction counsel filed a motion for leave to amend. The denied motion to amend was filed by the Petitioner's postconviction counsel in the trial court on June 29, 2015 (A-15-987/T14), and the trial court denied Petitioner's leave to amend on September 16, 2015 (A-15-987/T20-22), all before the trial court denied the Petitioner's Motion for Post-Conviction Relief on October 2, 2015 (A-15-987/T23-34).

The Petitioner's proposed amendment pertained to seized videos captured by Petitioner's camcorder showing Tessa Fulton's previous consent of acts to being "choked out" and having her "hair pulled" during sexual intercourse, as well as oral sex, and intercourse while she is bleeding "everywhere" from her period that Fulton later alleged on July 16, 2011 to have been done without her consent (A-15-987/B.O.E. 12:1-38:11)(A-15-987/E123,1:22,23).

The State courts denial of Petitioner's Motion to Amend his Motion for Post-Conviction Relief prejudiced the Petitioner inasmuch due the State of Nebraska's failure to disclose the material exculpatory sex tapes could have been offered as evidence at trial by the defense under *Chambers v. Mississippi*, 410 U.S. 284 (1973) to confront the State's primary witness, Tessa Fulton, against him to prove the truth of the matters asserted therein. The exclusion

of these said sex tapes of previous consent to acts later alleged done without Fulton's consent violated Petitioner's Federal Constitutional rights to confront Fulton and due process of the law. The [non] disclosure of [this material exculpatory] evidence prejudiced [Petitioner's] ability to have a fair trial and effective assistance of counsel (A-15-987/T2, ¶7).

"[O]n some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into actual conduct of the trial." **United States v. Cronin**, 466 U.S. 648, 659-60 (1984).

There is a reasonable probability that if the trial court would have granted amendment of Petitioner's Motion for Post-Conviction Relief, the Petitioner would have been able to prove his substantial prosecutorial misconduct claims in showing the court of the importance of the State's non-disclosed videos through an evidentiary hearing to serve as the procedural mechanism whereby these factual bases could be adequately developed on the record, and the outcome would have been different (most likely a new trial).

Consequently, the State Court's denial of Petitioner's Motion to Amend "undermine[d] confidence in the outcome of the [Petitioner's] trial." **United States v. Bagley**, 473 U.S. 667, 682 (1985).

The Petitioner's case cannot be compared to **State v. Robertson**, 294 Neb. 29, 881 N.W.2d 864 (2016) as the Nebraska Court of Appeals suggested, due to the fact that in **Robertson** the motion for leave to amend was requested AFTER the denial of the motion for postconviction relief whereas Petitioner's Motion to Amend was requested BEFORE the denial of Petitioner's Motion for Post-Conviction Relief.

Does a prisoner sentenced to death enjoy more constitutional rights to due process of law than a prisoner with a substantial length of imprisonment? The Nebraska Court of Appeals finds that a prisoner sentenced to death does in its analysis:

In *Mata*, our Supreme Court stated that a prisoner's ability to amend his postconviction motion was governed by Neb.Ct.R.Pldg. § 6-1115(a), and under that rule, leave shall be freely given when justice so requires. Looking to federal courts' interpretations of the rule, our Supreme Court said, "A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated." *State v. Mata*, 280 Neb. at 855, 790 N.W.2d at 720. The Supreme Court concluded it was an abuse of discretion to deny the prisoner leave to amend his motion for postconviction relief under the circumstances of that case. The Court noted the prisoner, who has been sentenced to death, may have viable ineffective assistance of counsel and other claims which, if not allowed to amend his motion, would result in the prisoner being put to death. The circumstances described in *Mata* are not present here, ... *State v. Buttercase*, No. A-15-987; Appendix A, p. 7.

This is not only a violation of Petitioner's Federal Constitutional Rights to Due Process of Law, but also clearly a violation of Petitioner's Federal Constitutional Rights to Equal Protection of the Laws as well, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

With Nebraska's current case law for its Postconviction Act, this Court

would have found it necessary to answer the question in *Case v. Nebraska*, 381 U.S. 336 (1965).

"State statutes should provide a postconviction process at least as broad in scope as existing Federal Statutes under which claims of violation of constitutional rights asserted by State prisoners are determined in Federal courts under the Federal habeas corpus statute, ..." (emphasis added). *Id.*, 381 U.S. at 346.

The procedure should be .. simple[and] sufficiently comprehensive to embrace all federal constitutional claims[, i] should eschew rigid and technical doctrines of forfeiture, waiver, or default[, and i]t should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings. *Id.*, 381 U.S. at 346-47 (BRENNEN, J., concurring).

If the Petitioner was not allowed amendment of his substantial prosecutorial misconduct claim that was not even know of at the time of the filing of his Motion for Post-Conviction Relief, and the proposed amendment even relates back to the Petitioner's original Motion for Post-Conviction Relief, the Nebraska Postconviction Act is clearly an unconstitutionally inadequate State corrective process, and Nebraska's current case law for *Neb. Rev.Stat. § 29-3001* renders such process ineffective to protect the rights of the Petitioner and all State of Nebraska prisoners. See 28 U.S.C. § 2254 (b)(1)(B)(i)(ii).

The District Court of Gage County, Nebraska's decision, and the Nebraska Court of Appeals' decision to deny Petitioner's Motion to Amend his Motion for Post-Conviction Relief is "contrary to" this Court's clearly established precedent. The Nebraska Postconviction Act must provide broader procedures

that are more hospitable to federal constitutional claims to relieve the federal courts from strain on the federal writ of habeas corpus by State of Nebraska prisoners.

This Court should grant review of the foregoing unconstitutional Nebraska Postconviction Act claim that is necessary to prevent a fundamental miscarriage of justice.

Petitioner Buttercase is entitled to a new trial to correct the foregoing substantial constitutional violations, and that he may be able to fairly present his confrontation videos to the jury for his defense with the effective assistance of counsel. A writ of certiorari should issue on this basis.

3. THE DISTRICT COURT OF GAGE COUNTY, NEBRASKA AND THE NEBRASKA COURT OF APPEALS HAVE SANCTIONED SUCH A HIGH DEGREE OF DEPARTURE FROM THIS COURT'S CLEARLY ESTABLISHED PRECEDENT AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER, MAKING GRANT OF WRIT OF CERTIORARI NECESSARY.

"The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecutions to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecutions witness for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. The right is a fundamental element of due process of law." **Washington v. Texas**, 388 U.S. 14, 19 (1967).

3A. PETITIONER'S TRIAL COUNSEL FAILED TO INVESTIGATE AND DISCOVER EYE WITNESS SONDRADEN, IN VIOLATION OF THE PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, COMPULSORY PROCESS, AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Sondra Aden, Petitioner's next-door neighbor, testified at Petitioner's first Motion for New Trial that she witnessed the alleged victim leave the

residence of the Petitioner on the morning of July 16, 2011 at approximately 9:00 a.m. without any marks or apparent injury (A-12-1167/B.O.E. 973:1-1022:66)(A-12-1167/T57-62).

In this case, the Nebraska Court of Appeals found that Petitioner raised the issue of Aden's testimony in his motion for new trial and on direct appeal. (*State v. Buttercase*, No. A-15-987; Appendix A, p. 10, ¶2). And with virtually no legal analysis whatsoever, the Appellate Court stated:

The district court correctly concluded that this claim is procedurally barred.

State v. Buttercase, No. A-15-987; Appendix A, p. 10.

Petitioner's trial counsel failed to discover and interview eye witness next-door neighbor Sondra Aden prior to trial. Petitioner's defense was prejudiced by trial counsel Troia's failure to discover eye witness next-door neighbor Sondra Aden inasmuch that Aden's testimony proves the Petitioner's innocence. Aden's testimony would have established that Tessa Fulton left Buttercase's residence with no signs of apparant injury as she was walking to her car as if she did not have a care in the world gently swinging her sandals back and forth. Aden's testimony would have established that Fulton had no visible signs of injury including blood stains or discolored skin. Aden's testimony would have established that Buttercase left at the same time, thereby eliminating any time for him to clean up what would have been a bloody crime scene by Fulton's description. Aden's testimony would have established that Buttercase was not carrying a bag or anything that could conceal evidence of a crime, thereby eliminating that Buttercase stole Fulton's jewelry or tore her underwear.

Defense counsel Troia failed to conduct a reasonable investigation of the

events of Petitioner's case. Fulton alleged that Buttercase had subjected her to a violent rape over a period of almost four hours. At a minimum, trial counsel should have interviewed Petitioner's neighbors to see if anyone had heard any evidence of an argument or struggle. Had trial counsel done so, he would have discovered Sondra Aden and could have called her as a witness at Petitioner's trial to rebut the testimony of Tessa Fulton.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

There is a reasonable probability that if Sondra Aden had been called to testify at Petitioner's trial, her testimony would have created reasonable doubt in the minds of the jury, and the outcome would have been different (most likely an acquittal of all charges). Sondra Aden had no interest in the outcome of the case, and had a specific recollection of the State's witness (Tessa Fulton) leaving on the day in question. It can be fairly said that any time a witness is not called to testify on behalf of the Defendant when said witness can directly contradict the primary witness for the State on a material issue, the Defendant has been prejudiced.

There was no tactical or strategic reason for trial counsel Troia's failure to investigate and discover eye witness Sondra Aden, and defense counsel performed deficiently in failing to investigate and discover Sondra Aden to present her testimony at Petitioner's trial. Consequently, defense counsel's failure to introduce Aden's testimony at trial was not within the range of competence demanded of attorneys in criminal cases. Defense counsel Troia's deficient performance with respect to this claim did NOT equal that of a

lawyer with ordinary training and skill in criminal law in the area, and this deficient conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." **Strickland**, 466 U.S. at 686.

"We have elected to employ an adversary system of criminal justice in which parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgment were to be founded on a partial or speculative presentation of the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." **United States v. Nixon**, 418 U.S. 683, 709 (1974).

3B. PETITIONER'S TRIAL COUNSEL FAILED TO OBJECT, PURSUANT TO THE DISCOVERY ORDER OF THE COURT AND **BRADY V. MARYLAND**, TO THE STATE'S INTRODUCTION OF THE NON-DISCLOSED EXHIBITS 40, 41, AND 52 THROUGH 64 AT TRIAL, IN VIOLATION OF PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, CONFRONTATION, AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court has held that due process requires the prosecution to disclose evidence favorable to an accused upon his request when such evidence is material to guilt or punishment. **Brady v. Maryland**, 373 U.S. 83, 87 (1963).

In this case, the Nebraska Court of Appeals found, that the Petitioner did not identify or describe the photographs, describe the objection he believes trial counsel should have made, or how an objection would have affected his case. (**State v. Buttercase**, No. A-15-987; Appendix A, p. 11, ¶6). And with virtually little legal analysis whatsoever, the Appellate Court stated:

Without identifying the subject of his allegations, e.g. specific

photographs, Buttercase cannot show how his counsel's performance was deficient or that any defective performance prejudiced his defense.

State v. Buttercase, No. A-15-987; Appendix A, p. 12.

At Petitioner's trial the State presented tape measure photographs depicting injuries of Tessa Fulton. Trial counsel failed to object based on failure to disclose pursuant to the discovery Order of the Court and **Brady v. Maryland, 373 U.S. 83 (1963) (A-12-1167/B.O.E. 310:6-9;458:12-17)(A-12-1167/E40-41,1:310,310; E52-64,1:458,458).**

The defense was prejudiced by the late disclosure of these exculpatory tape measure photographs in that Petitioner was NOT able to review these said photographs with the assistance of medical expert Jennifer Johnson. Also, the defense was prejudiced by trial counsel's deficient failure to object to these first-time State introduced photographs in that said deficient conduct resulted in this issue not being preserved for appeal.

If trial counsel Troia would have objected to the introduction of these said photographs, pursuant to the discovery Order of the Court and **Brady v. Maryland**, the [Petitioner] would have had the opportunity to prevent the State from using said evidence at trial, or in the alternative, would have had the opportunity to ask for a mistrial or a delay in the trial to allow him sufficient time to review said photographs with the assistance of [medical expert Jennifer Johnson] (A-15-987/T2, ¶8). These photos would be considered important pieces of evidence because they are somewhat objective in nature and were used to corroborate Ms. Fulton's testimony (A-16-182/T23, ¶2). Further, because of the late disclosure of the photos, Mr. Buttercase would not be able to properly plan his defense and hire a medical doctor to testify as to the probative value of the photos (A-16-182/T23, ¶2).

Moreover, if trial counsel Troia, a forensic pathologist, and medical expert Jennifer Johnson would have been able to subject the said tape measure photographs to meaningful adversarial testing including, but not limited to, forensic comparisons of the depicted injuries when compared to Petitioner's hands, fists, feet, and any other expert recommended areas—there is a reasonable probability that the portrayed injuries would have been proven NOT to have been caused by Petitioner, created reasonable doubt in the minds of the jury, and the outcome would have been different (most likely acquittal of all charges). The late disclosure of [this exculpatory] evidence prejudiced [the Petitioner's] ability to have a fair trial and effective assistance of counsel (A-15-987/T2, ¶7).

There was no tactical or strategic reason for trial counsel Troia's failure to properly object to Exhibits 40, 41, and 52 through 64 at Petitioner's trial. Consequently, defense counsel's failure to properly object to said tape measure photographs at trial was not within the range of competence demanded of attorneys in criminal cases. Defense counsel's deficient performance with respect to this claim did NOT equal to that of a lawyer with ordinary training and skill in criminal law in the area and his deficient conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686.

Favorable evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the evidentiary suppression undermines confidence in the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Under *Bagley*, "prosecutors have a duty to present material exculpatory evidence even if defense never requests the evidence." *Id.*

Similarly, if counsel fails to subject the prosecutions case to meaningful

adversary testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself unreliable. *United States v. Cronin*, 466 U.S. 648, 659 (1984).

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

3C. THE STATE TRIAL JUDGE PAUL W. KORSLUND WAS PARTIAL AT PETITIONER'S HEARINGS TO INCLUDE TRIAL, IN VIOLATION OF PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY, DUE PROCESS OF LAW, AND EQUAL PROTECTION OF THE LAWS, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The failure to accord an accused a fair hearing violates even the minimal standards of due process. *Tumey v. State of Ohio*, 273 U.S. 510 (1927).

In this case, the Nebraska Court of Appeals concluded that the admonition was well within the bounds of proper courtroom administration during trial; the district court did not abuse its discretion on grounds that Buttercase had filed a complaint with the Nebraska Judicial Qualifications Commission; and, because Buttercase first mentions alleged Facebook messages on appeal, he did not properly present them to the trial court and we will not address them. (*State v. Buttercase*, No. A-15-987; Appendix A, pp. 4-5). And with virtually little legal analysis whatsoever, the Appellate Court stated:

The district court did not abuse its discretion by denying Buttercase's motion to recuse.

State v. Buttercase, No. A-15-987; Appendix A, p. 5.

After Petitioner's postconviction counsel filed Petitioner's Motion for Post-Conviction Relief, counsel filed a Motion to Recuse (A-15-987/T13), post-conviction counsel based the motion upon the trial judge chastising the Petitioner in open court with the jury present and Petitioner filing a formal complaint with the Nebraska Judicial Qualifications Commission against Judge

Korslund (A-15-987/E122,1:14,15)(A-15-987/B.O.E. 16:8-24). Petitioner's post-conviction counsel also did present the Facebook messages to the trial court in Petitioner's Brief in Support of Motion for Post-Conviction Relief and Request for Hearing (A-16-182/T29, & T33). But the trial court minimized said chastisement to a mere "admonishment", and asserted that any bias was mitigated by the trial court's instruction to the jury to not draw any negative inferences from it (A-15-987/T18)(A-12-1167/B.O.E. 810:7-812:25). A ball that was erroneously called a strike cannot be cured after the baseball game.

In open court with the jury present and after Petitioner simply responded to an asked question, the trial judge yelled at Petitioner as if he were a small child because the judge did not like Petitioner's answer (id./B.O.E. 810:7-21). Petitioner's response had already been previously testified to at his trial by Tessa Fulton (id./B.O.E. 238:20-239:8).

[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to counsel, the parties, or their case, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favortism or antagonism as to make a fair judgment impossible. (emphasis added). **Liteky v. United States**, 510 U.S. 540, 555 (1994).

There is post-trial newly discovered evidence of the trial judge's bias that was presented to the trial court. Prior to trial, on Petitioner's birthday no-less, Tessa Fulton connected with Petitioner's ex-wife via Facebook and stated "Plus my attorney and this judge play golf together and he likes me ..." (A-16-182/T29, T33). This post-trial newly discovered evidence supports a significant bias of the trial judge for both "favortism [and]

antagonism that [made] fair judgment impossible." Id.

A calm admonition from trial Judge Korslund to Petitioner to not volunteer information and a simple instruction to the jury to disregard would have at least appeared less biased to the jury. Also, it would have appeared less biased to the jury if Judge Korslund would have equitably "admonished" Tessa Fulton and Investigator Byrne when they would volunteer non-requested information that had not been testified to by any witnesses (A-12-1167/B.O.E. 328:1-8, & etc; 520:15-524:2, & etc.). The trial judge never did once yell at any of the other witnesses when they would volunteer non-requested information for that matter. If trial Judge Korslund felt the need to yell at the Petitioner as a parent might do to a small child, judge should have excused the jury first. Furthermore, since Jurror Horrocks and Judge Korslund know each other, it can easily be said that there is a reasonable probability that this chastisement to Petitioner from the trial judge influenced his mind to a verdict of guilty before the conclusion of Petitioner's trial (A-15-987/Supp. B.O.E 72:1-8).

The trial judge's one-sided "admonishment" was NOT "ordinary and even-handed" as the Nebraska Court of Appeals tried to diminish said chastisement to, and it was NOT within the bounds of proper courtroom administration. An "ordinary and even-handed" admonition would NOT have required a bench conference (A-12-1167/B.O.E. 811:2-812:22). The trial judge stated "You know, I don't like to do that, but he keeps volunteering information. He did it yesterday too." (id./B.O.E. 811:4-6), which is referring to the judge's tone of voice, or as previously stated, yelling at Petitioner in the jury's presence. Petitioner's trial counsel stated at the bench conference "I don't know -- I'm a little sensative to the way he was -- no offense, Your Honor, but the way he

was admonished." (id./B.O.E. 811:18-19), also referring to the tone of voice the trial judge used towards Petitioner with the jury present.

According to **Nebraska Revised Code of Judicial Conduct § 5-302.8(B)** "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals with in an official capacity, ..." Judge Korslund also stated "I don't mean to be impatient with him. But I think he really crossed the line a lot of times." (id./B.O.E. 811:20-22), wherein the judge even admitted to being impatient with the Petitioner.

The filing of a formal complaint against Judge Korslund by the Petitioner to the Nebraska Judicial Qualifications Commission created a conflict of interest between Petitioner and said judge in that the complaint DID have merit and the Commission could have disciplined the judge for his conduct at Petitioner's trial. The significant bias that Judge Korslund has against Petitioner should have resulted in this judge recusing himself before trial and for sure at the postconviction proceedings where amelioration of the significant damages from Petitioner's trial were sought.

Trial Judge Korslund's bias against Petitioner and favoritism towards Tessa Fulton was demonstrated or was cumulative throughout the record. Any reasonable person who knew the circumstances of Petitioner's case would question Judge Korslund's impartiality under an objective standard of reasonableness.

Trial Judge Korslund prejudiced the defense inasmuch due to his outburst/chastisement towards Petitioner in the jury's presence that influenced their minds to a verdict of guilty before the conclusion of Petitioner's trial. There is a reasonable probability that if Judge Korslund would have recused himself from Petitioner's court proceedings prior to trial, Petitioner would have been

able to present his case before an impartial jury that would have been able to base its verdict solely on the evidence presented before them at trial, and the outcome would have been different.

Consequently, Judge Paul W. Kerslund's "failure to accord [Petitioner] a fair hearing violates even the minimal standards of due process." *Tumey v. State of Ohio*, 273 U.S. 510 (1927).

The State of course must provide a trial before an impartial judge. Without these basic functions, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, see *Powell v. Alabama*, 287 U.S. 45 (1932), and no criminal punishment may be regarded as fundamentally fair. *Rose v. Clark*, 478 U.S. 570, 577-78 (1986); *Tumey v. State of Ohio*, 273 U.S. 510 (1927).

One touchstone of a fair trial is an impartial trier of fact—"a jury capable and willing to decide the case solely on the evidence before it." *McDonough Power Equipment v. Greenwood*, 464 U.S. 548 (1984).

'A fair trial in a fair tribunal is a basic requirement of due process'. *Irwin v. Dowd*, 366 U.S. 717, 722 (1961).

3D. PETITIONER IS ACTUALLY INNOCENT OF THE CRIMES FOR WHICH HE WAS ACCUSED OF COMMITTING IN HIS CONVICTIONS, IN VIOLATION OF PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS TO LIBERTY, DUE PROCESS OF LAW, AND RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"[A] properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a judge sitting as a jury." *Jackson v. Virginia*, 443 U.S. 307, 317 (1979). When such a situation arises, the conviction cannot constitutionally stand. *Id.*

According to this Court, a fundamental miscarriage of justice occurs when

the petitioner presents a compelling claim of actual innocence. *House v. Bell*, 547 U.S. 518, 521 (2006); *Schlup v. Delo*, 513 U.S. 298, 319-22 (1995). As this Court held in *Schlup*, prisoners asserting innocence as a gateway to have a defaulted claim considered must establish that in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. The new evidence referred to in *Schlup* includes "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." (emphasis added). *Id.*, at 324.

In this case, Petitioner has satisfied all three in his compelling claims of his actual innocence. Said claims to include, but not limited to, DNA evidence that includes mixed sperm cell fractions, trustworthy eyewitness next-door neighbor Sondra Aden, Facebook messages between Tessa Fulton and Petitioner's ex-wife, and sex tapes of Tessa Fulton and Joseph J. Buttercase showing previous consensual acts later alleged on July 16, 2011 to have been done without Fulton's consent.

The **Carrier** standard requires the habeas petitioner to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

The foregoing claims contained within this petition are only the tip of the iceberg when compared to ALL the substantial constitutional violations that has been inflicted upon Petitioner in obtaining his convictions. See, Appendix K; Petition Under 28 U.S.C. §2254 For Writ of Habeas Corpus & Request for An Evidentiary Hearing, *Buttercase v. Frakes*, Case No. 8:18-CV-131.

"It is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970).

"Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." Robinson v. California, 370 U.S. 660, 667 (1962).

The District Court of Gage County, Nebraska's decision, and the Nebraska Court of Appeals decision in rejecting Petitioner's foregoing substantial ineffective assistance of counsel, judicial partiality, and unconstitutional statutes claims are "contrary to" this Court's clearly established precedent; AND, involved an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984) and its progeny.

This Court should grant review of the foregoing substantial ineffective assistance of counsel, prosecutorial misconduct, judicial partiality, and unconstitutional statutes claims that is necessary to prevent a fundamental miscarriage of justice.

Joseph Juan Buttercase's convictions and sentences in Case Numbers CR 11-124 and 8:12-CR-425 must be vacated accordingly. A writ of certiorari should issue on this basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Joseph J. Buttercase, pro se

Date: May 27, 2018