

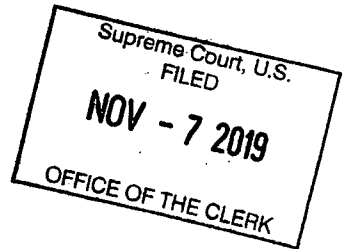
18-0348

No.

19-6648

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Ralph Loren Barenz II — PETITIONER
(Your Name)

vs.

State of Alaska — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Alaska Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ralph Loren Barenz II
(Your Name)

Goose Creek Correctional Center
(Address)

22301 W. Alsop Rd., Wasilla, AK 99623
(City, State, Zip Code)

N/A
(Phone Number)

15-46

QUESTION(S) PRESENTED

Has hate and "community condemnation" of sex crimes deprived the petitioner of due process as seen in the following presented issues:

WAS THE VIOLATION OF A PROTECTIVE ORDER PREJUDICIAL ENOUGH TO GRANT A MISTRIAL AND WAS IT INTENTIONAL THUS VIOLATING THE PETITIONER'S RIGHT TO DUE PROCESS?

DID THE USE OF FALSE TESTIMONY VIOLATE THE PETITIONER'S RIGHTS IN TRIAL AND DID THE RESPONDENT AND THE COURT OF APPEALS DENIE THE PETITIONER DUE PROCESS ON APPEAL?

DID THE PROSECUTOR INTENTIONALLY ALTER THE PETITIONER'S INTERVIEW WITH ALASKA STATE TROOPERS IN ORDER TO SWAY THE JURY, THUS VIOLATING THE PETITIONER'S DUE PROCESS?

HAS ALASKA MISAPPLIED FEDERAL CASE LAW REGARDING MIRANDA TO ALASKAN CASES SINCE 1981, AND DID THIS MISAPPLICATION OF CASE LAW DENIE THE PETITIONER OF DUE PROCESS?

WAS THERE PROSECUTORIAL MISCONDUCT, AND WAS IT EGREGIOUS ENOUGH TO DENIE THE PETITIONER DUE PROCESS?

And if this trend is allowed to continue will it hurt all criminal defendants in this situation here in the United States?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

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

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☐ is unpublished.

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

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

☒ For cases from **state courts**:

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

☒ reported at Barenz v. State, 2019 Alas. App. LEXIS 67; 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

☐ For cases from **federal courts**:

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

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

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

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was May 15, 2019.
A copy of that decision appears at Appendix A.

☐ 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

Alaska Const. Art. I § 7, Due Process

No person shall be deprived of life, liberty, or property without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Alaska Const. Art. I § 9, Jeopardy and Self-Incrimination

No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself.

Alaska Const. Art. I § 11, Rights of Accused

In all criminal prosecutions, the accused shall have the right to a ... impartial jury of twelve, ...

USCS Const. Amend. 5, Criminal actions — Provisions concerning — Due process of law and just compensation clause

No person ... shall be compelled in any criminal case to be witness against himself, ...

USCS Const. Amend. 6, Rights of the accused

In all criminal prosecutions, the accused shall enjoy the right to a ... impartial jury of the State and district wherein the crime shall have been committed, ...

USCS Const. Amend. 14, 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.

Alaska Statute 11.56.610 (a)(1), Tampering with physical evidence

A person commits the crime of tampering with physical evidence if the person destroys, mutilates, alters, suppresses, conceals, or removes physical evidence with intent to impair its verity or availability in an official proceeding or a criminal investigation;

Alaska Statute 11.76.110 (a)(3), Interference with constitutional rights

A person commits the crime of interference with constitutional rights if ... under the color of law, ordinance, or regulation of this state or a municipality or other political subdivision of this state, the person intentionally deprives another of a right, privilege, or immunity in fact granted by the constitution or laws of this state.

STATEMENT OF THE CASE

At the petitioner's trial for charges of, first- degree sexual assault, two counts of third-degree assault, and second-degree of sexual abuse of a minor, there was two errors the petitioner's lawyer objected to:

1) When the petitioner was referred to as "homeless".

2) That the complaining witness lied from day number one and on.

and there was three the petitioner's lawyer missed:

3) The prosecutor over redacted the petitioner's interview with Alaska State Troopers.

4) The petitioner's Statement taken by Alaska State Troopers was taken in violation of his Miranda Rights.

5) That there was prosecutorial misconduct throughout the petitioner's entire case.

The petitioner was found guilty on all counts. But this verdict was formed based on the above seen errors. Thus the petitioner's convictions were gotten by multiple constitutional violations.

The petitioner appealed his conviction as a whole, but the court of appeals affirmed the judgement of the superior court stating, "we find no merit to these claims of error.", (Mem.Op.2). Both the court and the respondent fail to acknowledge the trial record and fail to entertain the full issue of each point the petitioner presented. This puts the courts decision in conflict with the United States Supreme Court and the Alaska Supreme Court and other Federal Courts of Appeals. Also it puts the courts decision in conflict with the United States Constitution and the Alaska Constitution. The petitioner's prayer is that this court will not only hear his case but if this court reviews it that they actually look at the trial record and see that the issues the petitioner claims really did happen.

STATEMENT OF THE CASE

WAS THE VIOLATION OF A PROTECTIVE ORDER PREJUDICIAL ENOUGH TO GRANT A MISTRIAL AND WAS IT INTENTIONAL THUS VIOLATING THE PETITIONER'S RIGHT TO DUE PROCESS?

Summary

Prior to trial, the petitioner's lawyer moved for a protective order prohibiting any testimony or evidence characterizing the petitioner as homeless. The trial court granted the motion but states the jury would "conclude what they do from the fact [the petitioner] is living in a tent." The court states that the word "homelss", creates "an aura that's not necessary in this trial.", (Tr.34:14-35:3). Thus ruling that the word "homeless" was substantively prejudicial enough to keep out of trial.

When it comes time to play a video interview of the complaining witness and an investigator, outside the presence of the jury the prosecutor lets the court know that the witness "mentions the [petitioner] being homeless." And that the prosecutor "can't take" the "portion out of the video. So" she will "have to do the mute thing for that.", (Tr.484:9-11).

When the jury is summoned the court gives this instruction:

The Court: Ms.Howard is giving you a copy of the transcript of this interview. This transcript is not evidence. It's being provided for you to assist you in listening to the transcript--to the interview. If you hear something different from what's on the piece of paper, trust your ears, not what's on the piece of paper. And we will be collecting these transcripts from you when we're done watching this. All right? Ms.Howard: And there are two-- The Court: And Ms. Howard, I understand there's one piece where you'er going to be hitting the mute button, right? Ms.Howard: Yes. The Court: Okay. There is one piece of this interview that I ruled inadmissible. And you shouldn't speculate as to what it is when she hits the mute button. Go ahead. (Tr.509:20-510:10)

When the prosecutor plays the video evidence at trial she fails to mute the portion that references the petitioner as homeless (Tr.532:24). The petitioner moves for a mistrial. The court and the respondent both state that they didn't hear it. After it is shown that it happened the court offers a "curative instruction", but the petitioner refuses stating that it would only make things worse and

1 argues for the mistrial. The court declines, but admits that there was a "technical
2 violation of the protective order for sure. It doesn't sound like it was intention-
3 al at all.", (Tr.539:14-546:5).

4 On appeal the petitioner argues that "'Generally, when a trial court gives a
5 curative instruction to the jury, the law presumes that it will be sufficient to
6 remove any prejudice from the improper evidence', Justice v. State, 2015 Alas. App.
7 LEXIS 28, 9. The problem with this is it is a presumption and presumptions which
8 prejudice constitutionally guaranteed rights are unconstitutional and may not be
9 employed, Vlandis v. Kline, 412 U.S. 441 ...; Cleveland Bd. of Ed. v. La Fleur,
10 414 U.S. 632 In the current case the constitutional protection that is in
11 jeopardy is the [petitioner's] right to a fair trial by an 'impartial Jury of
12 Twelve', Alaska Const. Art. I § 11; USCS Const. Amend. 6. ... so when the [petit-
13 ioner] said no to the curative instruction because it was only repeating what was
14 not suppose to be said in the first place, and the judge agreed (Tr.541:14-542:13),
15 this proves that the court saw it's action as only add[ing] to the prejudice. In
16 some cases 'the United States Supreme Court has reconized that prejudicial effects
17 cannot be completely overcome by instructions to the jury.' Brunton v. United States
18 391 U.S. 123, 129, 88 S. Ct. 1620,1624, 20 L. Ed. 2d 476, 481 (1968). The Court
19 stated that 'there are some contexts in which the risk that the jury will not, or
20 cannot, follow instructions is so great, and the consequences of failure so vital
21 to the defendant, that the pratical and human limitations of the jury system
22 cannot be ignored.' Id. at 135, 88 S. Ct. at 1627, 20 L. Ed. 2d at 485. The quest-
23 ion becomes whether the remark was so 'highly prejudicial as to be incurable by
24 the trial court's admonition.' United States v. Klein, 546 F.2d 1259, 1263 (5th
25 Cir. 1977) Cited in State v. Martin, 663 P.2d 240, 244 (Ariz. 1982). ... [That] In
26 a case like this were 'community condemnation' (R.000105-000109) is how the people
27 of Alaska view this kind of charge, to add anything that is prejudicial to the

1 trial is wrong and violates the [petitioner's] right to a trial by an 'impartial
2 jury of twelve', ... so the court's ruling was 'clearly unreasonable', Justice, Id
3 at 9 (At.Br.4:1-5:17)(Reply Br.1:13-2:15)."

4 Next we focus on the courts statement that "[i]t doesn't sound like it was
5 intentional at all" (Tr.541:15-16). States witness Inv. Sherry Ferno explains the
6 way the interview room is set up that K.E. was interviewed in (Tr.480:19-25). Then
7 in (Tr.634:7-10) States witness Inv. Adams explains that the [petitioner] was
8 interviewed in the same kind of room. This important because when the prosecution
9 plays the audio of the [petitioner's] interview (Tr.634:19-687:13), she doesn't
10 hit the mute button, but instead redacts the [petitioner's] statement by removing
11 audio completely. This shows that the prosecutor could have done the same with
12 K.E.'s statement. So when the prosecutor says, "so I can't take a portion out of
13 the video. So I'll have to do the mute thing for that", was only to mislead the
14 court, the prosecutor didn't have to redact the video to redact the audio. This
15 shows that what the prosecutor did was "intentional", (At.Br.3:6-20)(Reply Br.3:14-
16 25). ...The State makes it well known that she didn't agree with the protective
17 order (Tr.544:9-12), and thus [the petitioner asserts] she intentionally violated
18 the courts order not to present the word "homeless".(At.Br.6:1-4).

19 The respondent argues that:

20 a) A reviewing court generally defers to the trial judge when determining
21 whether a reference to inadmissible evidence can be cured with a cautionary
22 instruction to the jury (or whether a mistrial is needed) because the trial
23 judge "has the opportunity to hear the tainted evidence as it is presented and
24 to observe the impact it has on the jury." Allen v. State, 51 P.3d 949, 955
25 (Alaska 2002)(Ae.Br. 13)

26 The problem with the respondents argument is the judge states he didn't hear the
27 word (Tr.539:14). So the judge wouldn't have been looking for the impact on the
jury.

b) A timely curative instruction is "presumed to remedy the unfair prejudice
that might otherwise arise from inadmissible testimony." Hamilton v. State,

1 59 P.3d 760, 796 (Alaska 2002)(Ae.Br.13)

2 The respondent's argument clearly fails to acknowledge the petitioner's argument
3 already seen here (Id at Supra 6:4-7:3)

4 c) The respondent claims that "the jury's going to conclude what they do from
5 the fact that [the petitioner] is living in a tent,"(Ae.Br.13), and that "the jury
6 saw photographs of the crime scene" (Ae.Br.14), and that "It is very likely the
7 jury came to the conclusion that [the petitioner] was homeless based on the other
8 evidence presented," (Ae.Br.14), and "Finally, the jury heard [the petitioner]
9 himself tell trooper Adams during the audio recording of [the petitioner's]
10 interview that he lived in a tent at Jim Creek.", (Ae.Br.14).

11 The problem with all of this is the jury also heard, "A.E. testified that [the
12 petitioner] was her family's downstairs neighbor, but that he also lived at 'his
13 campsite'"(Ae.Br.13). And "K.E. testified that [the petitioner] lived '[o]ff and
14 on at his campsite and at the apartment below us.'"(Ae.Br.13-14). Lastly the jury
15 would have heard the petitioner say he was out there to get fire wood because thats
16 how he makes money" (Tr.647:25-648:1). So there is no guarante what the jury would
17 have thought, but it doesn't matter because they heard the word "homeless".

18 d) The respondent claims that the jury "heard the word 'homeless' uttered a
19 single time during a 43-minute recorded interview (played once during a six-day
20 trial)" (Ae.Br.14). But we cannot forget that the jury was told to "trust your
21 ears," (Tr.509:23-25), while the recording was being played. Once is all that was
22 needed.

23 e) Lastly the respondent claims, "judge Smith correctly found that the State
24 did not willfully violate the protective order; absent a finding of willful
25 misconduct a mistrial is not warranted. Accord Redfox v. State, No. A-11906, 2017
26 WL 4334031, at * 2 (Alaska App. Sept. 27,2017)(unpublished)(citing Preston v.
27 State, 615 P.2d 594, 603-04 (Alaska 1980)." (Ae.Br.14)

1 The Court of Appeals ruled, "'We review a trial court's decision on a motion
2 for a mistrial for abuse of discretion (Roussel v. State, 115 P.3d 581, 585 (Alaska
3 App. 2005)).' This is a differential level of review because we recognize that the
4 trial court is in the best position to observe the impact of the complained-of
5 statements or evidence on the jury. We will reverse the trial court only when,
6 after reviewing the whole record, we are left with 'a definite and firm conviction
7 that the trial court erred in its ruling (citing Hamilton v. State, 59 P.3d 760,
8 769 (Alaska App. 2002)).' Here, the violation of the protective order was not
9 intentional and the prohibited reference to [the petitioner's] homelessness was
10 brief and in passing. Given the circumstances, we find no abuse of discretion in
11 the trial court's denial of the motion for mistrial. Accordingly, we reject this
12 claim of error on appeal. (Mem.Op.6)"

13 By failing to properly review the record and see the actual prejudicial affect
14 of painting the petitioner as an outcast, and by failing to address the petitioners
15 argument that the prosecutor's action was indeed intentional, the respondent and
16 the court of appeals fail to address important elements of the petitioner's claim.
17 Thus robbing him of due process, Alaska Const. Art. I § 7; USCS Const. Amend. 14.

18 DID THE USE OF FALSE TESTIMONY VIOLATE THE PETITIONER'S RIGHTS IN TRIAL AND DID THE
19 RESPONDENT AND THE COURT OF APPEALS DENIE THE PETITIONER DUE PROCESS ON APPEAL?

20 Summary

21 At the petitioner's trial during the complaining witnesses testimony there is
22 a discussion on hearsay and how prior inconsistent and consistent statements come in
23 during trial (Tr.328:3-17). After the testimony is done there is another discussion
24 on this issue but in this discussion the witness is accused of fabricating/lying
25 about what happened (Tr.336:23-342:22). In this discussion it is determined that
26 "she's been lying all along, from the beginning and throughout.", (Tr.340:11-12).
27 The court clarifies what this means for the record, "the the prior consistent
statements that were read to [the jury] are coming in to evaluate credibility [of

1 the witness], not for their truth.", Nitz v. State, 1986 Alas. App. LEXIS 260 (Tr.
2 340:13-342:22). No where in this record does the trial court or the prosecution
3 object to the petitioner's assertion that the witness is/has been fabricating/
4 lying.

5 On appeal the petitioner, after reviewing the trial records, see mistakes made
6 by the court and prosecution. The first mistake the petitioner claims in his
7 argument is the trial court misapplied Nitz,

8 Under Alaska R. Evid. 801 (d)(1)(B), three conditions are required to be met
9 before a prior consistent statement may be admitted as non-hearsay. First, the
10 prior statement must be consistent with testimony given by the declarant at
11 trial. Second, the statement must be admitted to rebut an express or implied
charge of recent fabrication or improper influence or motive. Third, the prior
statement must be shown to have been made before the asserted improper influence
or motive arose. Nitz, Id. at 22

12 The petitioner argued that since the courts ruling was based on the testimony
13 being false from the "beginning and throughout", it was inadmissible (At.Br.16:1-
14 17:2)(Reply Br.5:4-12).

15 The second mistake the petitioner claims in his argument is that the prosecu-
16 tion's use of false testimony was intentional because the prosecution leads into
17 the complaining witness changing her statement (Tr.92:25-93:23). That the prosec-
18 utor even used some of the new statement in her opening argument (Tr.191:21-22;
19 195:16-18). And because of this NAPUE v. ILLINOIS, 360 U.S. 264, 270 (1959)
20 applies:

21 The principle that a state may not knowingly use false evidence, including
22 false testimony, to obtain a tainted conviction, implicit in any concept of
23 ordered liberty, does not cease to apply merely because the false testimony
24 goes only to the credibility of the witness. The jury's estimate may well be
25 determinative of guilt or innocence, and it is upon such subtle factors as the
26 possible interest of the witness in testifying falsely that the defendant's
27 life or liberty may depend. It is of no consequence that the falsehood may bear
upon a witness' credibility rather than directly upon a defendant's guilt. A lie
is a lie, no matter what it's subject, and, if it is in any way relevant to
the case, the prosecutor has the responsibility and duty to correct what he
knows to be false and elicit the truth. (At.Br.17:13-15)(Reply Br.5:13-6:11)

1 The respondent fails to acknowledge Nitz completely and fails to acknowledge
2 the trial record where the court rules that the complaining witness is lying, and
3 fails to acknowledge the record where the prosecutor leads into using the false
4 testimony. Instead the respondent argues that the petitioner shows "inconsistent
5 testimony" about "inconsequential details" and the sufficiency of the evidence.",
6 (Ae.Br.16-17).

7 The court of appeals also fails to acknowledge Nitz completely, and the trial
8 record where the court rules that the complaining witness is lying, and the trial
9 record where the prosecutor leads into the false testimony. Instead the court
10 states that the petitioner has identified "incinsistencies" in the testimony but
11 not that they are false, and since the petitioner hasn't shown "perjury" they
12 "find no merit to this claim of error on appeal.", (Mem.Op.6-7).

13 Since both parties have failed to apply the trial court record they have failed
14 to apply the proper standard of law and deprived the petitioner of his rights.

15 Now the petitioner must admit that when he wrote his appeal he made a mistake
16 when citing Nitz because in his youthfullness he onle cited the headnote that was
17 cited above. If you review Nitz you will see that it goes on to say:

18 Under our interpretation of rule 801 (d)(1)(B), the admission of prior consis-
19 tent statements made after a motive to falsify has arisen should be treated as
20 a question of relevance, for determination on a case-by-case basis. In each
21 insrance where admission is sought, the trial court must begin by determining
22 whether the prior statement is actually relevant "to rebut an express or implied
23 charge of recent fabrication or improper influence or motive...." A.R.E.
24 801(d)(1)(B). Next, if the court finds that the statement to be actually
25 relevant, it must proceed to balance the probative value of the statement
26 against its potential for creating unfair prejudice. A.R.E. 402, 403. Finally,
27 if the court determinds the statement to be admissible, it must instruct the
jury that the statement should be considered for the limited purpose of
determining the credibility of the declarant's trial testimony and that it
should not be considered directly as proof that the matters asserted in it are
true. Nitz v. State, 1986 Alas. App. LEXIS 260, 36

After reading the above, the only way for the trial court in the current case
could allow the statements in for "determining the credibility of the declarant's
trial testimony" is if the judge did a "case-by-case" determination of each

1 statement. Therefore the trial court ruling was still erroneous. Had the court of
2 appeals or the respondent reviewed the record they would have seen this. Further-
3 more Nitz has been shown to be incorrect in Tome v. United States, 513 U.S. 150.
4 In this case which discusses the same principles, the majority decision was that
5 the out of court statements must have been made prior to the asserted improper
6 influence or motive arose. This therefore shows the Alaska standard incorrect.

7 The petitioner wasn't given due process, Alaska Const. Art. I § 7; USCS Const.
8 Amend. 14, ~~on~~trial by impartial jury of twelve, Alaska Const. Art. I § 11;
9 USCS Const. Amend. 6.

10 DID THE PROSECUTOR INTENTIONALLY ALTER THE PETITIONER'S INTERVIEW WITH ALASKA
11 STATE TROOPERS IN ORDER TO SWAY THE JURY, THUS VIOLATING THE PETITIONER'S DUE
PROCESS?

12 Prior to trial two protective orders were got by the petitioner, 1) to preclude
13 the petitioner's pending drug case and 2) the characterization of the petitioner as
14 "homeless" (Tr.27:20-29:5; 34:11-35:3). In order to admit the audio of the
15 petitioner and troopers, the prosecutor had to redact it in compliance with the
16 above orders. Now while reviewing the trial record for appeal the petitioner
17 realized the respondent over redacted the interview and believes this was intent-
18 ional in order to influence the jury. On appeal the petitioner argues this error
19 by showing several examples (At.Br.18-26)(Reply Br.8-10). The petitioner shows
20 that "the altered version made it appear that [the petitioner was] incriminating
21 himself" which the court of appeals has recently ruled is not allowed, Mayuyo v.
22 State, 2017 Alas. App. LEXIS 96, 7. The petitioner's claim is that the respondent's
23 action should be seen as a violation of AS 11.56.610 (a)(1), Tampering with
24 Evidence, "A person commits the crime of tampering with physical evidence if the
25 person... alters... phisical evidence with intent to impair its verity...". Which
26 is a violation of AS 11.76.110 (a)(3), Interference with Constitutional rights,
27 "A person commits the crime of interference with constitutional rights if, the

1 under color of law, ... the person intentionally deprives another of a right,
2 privilege, or immunity in fact granted by the constitution or laws of this state."

3 This argument was made for first time on appeal so it was made under Alaska R.
4 Crim. Proc. 47 (b), plain error as applied in Adams v. State, 261 P.3d 758, 765
5 (2011):

6 Alaska Criminal Rule 47 (b) allows appellate courts to notice plain error or
7 defects affecting substantial rights although they were not brought to the
8 attention of the court. Plain error is an error that: (1) was not the result
9 of intelligent waiver or a tactical decision not to object; (2) was obvious;
10 (3) affected substantial rights; and (4) was prejudicial. Plain error involves
11 such egregious conduct as to undermine the fundamental fairness of the trial
12 and contribute to a miscarriage of justice." (At.Br.25:19-26:7)(Reply Br.10:11-
13 22)

14 In the respondent's reply they claim that, a) the petitioner puts the blame on
15 the "trial court" and not the prosecutor, b) that the petitioner cannot establish
16 error in redactions that were done to conform with the protective orders, c) that
17 "it is logical to assume that if reference to [the petitioner's] pending drug case
18 was prohibited by his motion to limine, reference to trooper interaction that
19 occurred during the pending drug case would also necessarily be prohibited.", d) if
20 "prior negative trooper interaction" had been left in, it would have "been unhelp-
21 ful" to the petitioner, and e) the complained redactions are just errors in
22 transcription (Ae.Br.26-29).

23 The court of appeals states that:

24 We find no plain error here. Because there is nothing in the current record to
25 suggest that the [respondent] overredacted the interview or that the redactions
26 were made for reasons other than compliance with the protective order, there
27 was no prejudice to [the petitioner] at trial.

28 We note that [the petitioner] also points out various discrepancies between the
29 transcript of the interview that was originally prepared by the [respondent]
30 and the transcript of this evidence prepared by the court system. The [respon-
31 dent] asserts that these discrepancies were caused by the low quality of the
32 recording. We have reviewed the alledged discrepancies and we see no reason to
33 believe, based on the record currently before us, that these minor discrepan-
34 cies in transcription would have resulted in any prejudice to [the petitioner]."
35 (Mem.Op.8-9)

36 The respondent and the court are wrong. 1) Removing the petitioner's military

1 history had nothing to do with the protective orders, 2) a "no in the place of,
2 Yeah", is not a "minor discrepancy" and changes the answer completely, and 3) the
3 statement, "I did not rape her.", instead of, "I didn't do nothing with her.", also
4 is not a "minor discrepancy" and makes the petitioner look like he had a guilty
5 conscience (Reply Br.8:21-9:17)(This is only a few of the examples given.). All of
6 this violated the petitioner right to due process, Alaska Const. Art. I § 7; USCS
7 Const. Amend. 14, and trial by impartial jury of twelve, Alaska Const. Art. I § 11;
8 USCS Const. Amend. 6.

9 HAS ALASKA MISAPPLIED FEDERAL CASE LAW REGARDING MIRANDA TO ALASKAN CASES SINCE
10 1981, AND DID THIS MISAPPLICATION OF CASE LAW DENIE THE PETITIONER OF DUE PROCESS?

11 After reviewing the trial record the petitioner came to the conclusion that his
12 Miranda rights had been violated so he filed this claim for first time on appeal
13 under the Adams plain error test (Id. at Supra 13:4-10). Furthermore under Moreau
14 v. State, 588 P.2d 275, 280-81:

15 An appellant raising an error as plain error on appeal must shoulder the heavy
16 burden of demonstrating that the alleged misconduct raises a substantial and
17 important question. Furthermore such error must be 'obviously prejudicial.'

18 So after Miranda had been read the petitioner stated in response, "I just want
19 to know why I'm here first" (Tr.643:9-13), "If it's something serious, I might just
20 ask for a lawyer" (Tr.643:17-18). "The Miranda Fifth Amendment right to counsel
21 attaches only by making a clear and unequivocal request for counsel", Davis
22 v. United States, 512 U.S. 452, 458-59. However, in Alaska, if the invocation is
23 ambiguous or equivocal, further questioning may be permissible but "limited to
24 clarifying that request until it is clarified.", Hample v. State, 706 P.2d 1173,
25 1180-81 (Alaska App. 1985); Smith v. State, 2009 Alaska App. LEXIS 42, (At.Br.29:-
26 10-30:8)(Reply Br.13:25-14:18). Thus the troopers job was to clarify why the
27 petitioner was there, but instead he lied and said he didn't know why (At.Br.16:-
14-27:16). This violated the petitioner's Miranda rights, therefore the interview

1 fell under the exclusionary rule which is ment to deter police misconduct (At.Br.
2 30:9-19). The petitioner then shows that this error "had substantial and injurious
3 effect or influence in determining the jury's verdict.", Kotteakos v. United States,
4 328 U.S. 750, 776 (1946), (At.Br.30:20-31:8). And that the interview was untrust-
5 worthy but would have been trustworthy had a lawyer been present, Miranda v.
6 Arizona, -384 U.S. 436, 470 (1966), (At.Br.31:9-20). And lastly the petitioner
7 argues that troopers, lawyers, and the trial court have the responsibility to up-
8 hold the constitutional rights of all citizens including criminal defendants (At.
9 Br.31:21-32:9).

10 The respondent claims that since the petitioner makes his claim for "first time
11 on appeal" and failed to file a motion to suppress, and as such there is no factual
12 record for this courts review" that "absent egregious violation, justice does not
13 ... require that [plain error] be applied on appeal where it is not urged at trial"
14 and because of this "the claim is forfeited.", (Ae.Br.30-31). That "An officer has
15 no duty to affirmatively inform a supect, prior to comencing n interview, that
16 criminal charges are contemplated.", Strehl v. State, 722 P.2d 226, 228 (Alaska
17 1986)(Ae.Br.32). That "the Alaska Supreme Court has affirmed the voluntariness of
18 inculpatory statements even if induced by police 'trickery and misrepresentation
19 of evidence.'", Breavers v. State, 998 P.2d 1040, 1045 (Alaska 2000)(Ae.Br.32).
20 And "Finally, the record supports the conclusion that [the petitioner] knowingly
21 and voluntarily relinquished his Miranda rights. McMahan v. State, 617 P.2d 494,
22 498 (Alaska 1980). A Miranda waiver is knowing and intelligent [if] the record
23 shows the [petitioner] 'had a basic understanding of the Miranda rights and what a
24 waiver of those rights entailed.'" Forster v. State, 236 P.3d 1157, 1163 (Alaska
25 2010)(Ae.Br.32-33).

26 The respondent fails to acknowledge Hample and Smtih. Next the respondent's
27 reliance on Strehl is misplaced because it misinterpits United States v. McGrary,

1 643 F.2d 323, 329 (5th Cir. 1981):

2 It is undisputed that a waiver of the right to remain silent and the right to
3 counsel must be made knowingly, intelligently and voluntarily in order to be
4 effective. It is difficult to discern how a waiver of these rights could be
5 knowin, intelligent and voluntary where the suspect is totally unaware of the
6 offense upon which the questioning is based. A valid waiver of constitutional
7 rights does not occur in a vacuum. A waiver of the right to counsel and the
8 right to remain silent occurs in response to a particular set of facts involving
9 a particular offense.

10 Thus the petitioner did have the right to know why he was there (Reply Br.13:1-9).

11 Also the respondent's view of Breavers is incorrect:

12 that a per se approach might result in the loss of reliable and probative
13 confessions. We have thus expressly "rejected a per se which would condemn
14 any incriminatory statement obtained by means of a promissory inducement,"
15 and have instead adopted a "totality of circumstances" approach in examining
16 the voluntariness of an accused's confession. We have employed this multi-factor
17 analysis even when police have engaged in improper conduct to induce confessions
18 and we have affirmed the voluntariness of inculpatory statement's induced by
19 police trickery and misrepresentation of evidence. Breavers, Id. at 1045

20 The petitioner's statement isn't a confession, it's not reliable, not obtained by
21 means of a promissory inducement, and the court of appeals should have examined
22 this point with a "totality of circumstances" approach.

23 And lastly the respondent fails to acknowledge that the petitioner showed that
24 he "had a basic understanding of the Miranda rights" which is why he stated that
25 "I just want to know why I'm here first", "if it's something serious, I might just
26 ask for a lawyer".

27 The court of appeals relied on the respondent's argument and thus fails to look
at the facts that the petitioner presented. Both the court and the respondent denie
the petitioner due process, Alaska Const. Art. I § 7; USCS Const. Amend. 14. A
trial by impartial jury, Alaska Const. Art. I § 11; USCS Const. Amend. 6. Lastly
self-incrimination, Alaska Const. Art. I § 9; USCS Const. Amend. 5.

WAS THERE PROSECUTORIAL MISCONDUCT, AND WAS IT EGREGIOUS ENOUGH TO DENIE THE
PETITIONER DUE PROCESS?

This point wasn't preserved at trial so the petitioner raised it under plain

1 error as seen in Adams, (Id. at Supra 13:6-10).

2 The prosecutor's job in a criminal prosecution is to seek justice, Berger v.
3 United States, 295 U.S. 78, 88 (1935). Therefore, the prosecutor should
4 prosecute with earnestness and vigor, but may not use methods calculated to
5 produce a wrongful conviction. to reverse a conviction, a claim of prosecutorial
6 misconduct requires proof of improper conduct by the prosecutor that, taken in
the context of the trial as a whole, violated the defendant's due process
rights, United States v. Sanchez, 659 F.3d 1252, 1256-60 (9th Cir. 2011). Cited
from: GEORGETOWN LAW JOURNAL Forty-Second Annual Review of Criminal Procedure
(2013) pp.643-644

7 In this writ you see four points stated above that show prosecutorial mis-
8 conduct. All of which were brought up in the petitioner's appeal (At.Br.33:21-34:5)
9 (Reply Br.14:26-15:17), along with two points that will be explained here.

10 1) The prosecutor's "opening statement [was] improper because it contains
11 sufficiently questionable evidence to make it unreasonable to refer to such evide-
12 nce," United States v. Brockington, 849 F.2d 872, 875 (4th Cir. 1988). We see this
13 in the prosecutor's remarks, "the [petitioner's] you know, nipping on the vodka,
14 who can drink more? You know, let's see.", (Tr.190:8-9). This statement is false
15 based on the testimony of the troopers (Tr.354:6-8), and the State's witness K.E.
16 (Tr.287:11-12; 516:23-25), and the prosecutor's own statement (Tr.190:15-17). So
17 the prosecutor's statement was clearly false and was meant to confess the issue of
18 the petitioner's level of intoxication and makes it look like the petitioner is
19 drinking less with the intent to get K.E. and A.E. drunk. The prosecutor is trying
20 to inflame the jury (At.Br.34:6-20)(Reply Br.15:18-26).

21 2) The prosecutor's closing statement was also improper because;

22 a) The prosecutor play an audio recording of K.E. that "serve[d] no purpose
23 other than to appeal to the emotions and sympathies of the jury", United States v.
24 Berrios, 676 F.3d 118, 135 (3rd Cir. 2012). We see this in, "(Audio plays as fol-
25 lows:) UNIDENTIFIED VOICE: What's wrong, [K.E.]? [K.E.]: He raped me. He raped me.
26 Just please go and get her now."

27 b) The prosecutor vouched for the credibility of K.E. (Tr.730:10-11, 732:8-9,

1 740:7-12,740:19), after the trial judge ruled that the testimony was false (Tr.336:
2 23-342:22) and the prosecutor agreed to the judges ruling. The prosecutor vouched
3 for State's witnesses Erin Rocky and Dr.Del Duca (Tr.734:22-25). It is improper for
4 the prosecution to vouch for the credibility of a witness, United States v. Young,
5 470 U.S. 1, 18-19 (1985).

6 c) The prosecutor misstated some of the facts and evidence from trial. She
7 misstated the distance between the [petitioner's] camp and the camp K.E. went too
8 (Tr.730:14, 731:23). The distance she used is 300 yards, which came from (Tr.608:
9 14-609:3). The correct distance is 200 yards (Tr.591:5). The prosecutor also mis-
10 states vaginal "brusing" (Tr.734:8-9). The State's medical witness at first called
11 it a "questionable bruse" (Tr.460:21-25), but then went on to label it K.E.'s
12 "normal mucosa" (meaning normal coloring)(Tr.463:7-13; 469:18-23; 470:23-25). The
13 prosecutor had enough time to prepair her closing statement, there is no reason for
14 the misstated facts and evidence. "It is improper for attorneys, especially
15 prosecutors who generally have the confidence of juries, to misstate evidence",
16 United States v. Carter, 2001 U.S. App. LEXIS 632, 22.

17 The respondent argues that, "[The petitioner] has not established that prose-
18 cutor misconduct occurred, let alone such egregious conduct as to justify a new
19 trial. Further, [the petitioner] did not establish any error other than the States
20 inadvertent failure to mute an audio recording at the moment when [the petitioner]
21 was referred to by the complaining witness as 'homeless' ..."(Ae.Br.37). The
22 respondent fails to acknowledge the record. K.E.'s "normal mucosa" is not vaginal
23 "brusing".

24 The court of appeals states, "Many of the alleged instrunces of the prosecut-
25 orial misconduct have already been addressed in this decision. ... [The petitioner]
26 also challenges various statements made by the prosecutor during her opening
27 statement and closing argument. We have reviewed the challenged comments, none of

1 which were objected to by [the petitioner's] attorney and many of which appear to
2 ba fair inferences to be drawn from the record. To the extent that some of these
3 statements may have been inaccurate, we conclude that those inaccurcies were
4 relatively minor and adequately addresses by the trial courts admonition to the
5 jury that attorney statements are not evidence. [The petitioner] argues that the
6 doctrine of cumulative error requires reversal of his conviction. ... In the
7 current case, we have not found any error, and the doctrine of cumulative error is
8 therefore inapplicable.", (Mem.Op.10-11).

9 Same as the respondent the court fails to acknowledge the record. Furthermore
10 in United States v. Sanchez, 659 F.3d 1252, 1258-60 (9th Cir. 2011) we see:

11 We have held that curative instructions fail to "neutralize the harm" of
12 improper statements by a prosecutor when "[t]hey [dō] not mention the specific
13 statements of the prosecutor and [are] not given immediately after the damage
14 [is] done." ... [That] "Advising a jury that lawyer's statements are not
15 evidence is not equivalent to advising it to consider only the facts of the
16 immediate case," ... [And] "even in the absence of objections by defense
17 counsel, a trial judge should be alert to deviations from proper argument and
18 take prompt corrective action as appropriate."

19 The respondent and the court of appeals ignore the record therefore they denied
20 the petitioner's right to due process, Alaska Const. Art. I § 7; USCS Const. Amend.
21 14. Which gave the petitioner an unfair trial by tainting the jury which is a
22 violation of impartial jury of twelve, Alaska Const. Art. I § 11; USCS Const.
23 Amend. 6. The "aim of due process is not the punishment of society for the mis-
24 deeds of the prosecutor but avoidance of an unfair trial to the accused.", Smith
25 v. Phillips, 455 U.S. 209, 219-20.

REASONS FOR GRANTING THE PETITION

The State of Alaska by and through its prosecution and the Alaska court of appeals has made decisions that conflict with the Federal court of appeals and the United States Supreme Court that affect all Alaskan's.

The first conflicting decision we see is between Nitz v. State, 1986 Alas. App. LEXIS 260 and Tome v. United States, 513 U.S. 150. Nitz is doing what the majority in Tome steared away from because Nitz is using the "balancing approach". In Tome we read, "The Advisory Committee has rejected this approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, [and] enhancing the difficulties of preparation for trial." Advisory Committee's Introduction, Supra, at 771. Tome, id at 165.

The second conflicting decision we see is between Strehl v. State, 722 P.2d 226 228 (Alaska 1986) and United States v. McCrary, 643 F.2d 323, 329 (5th Cir. 1981). McCrary makes very clear that a person has a right to know why they are be questioned and what it is about.

When you look at the above conflicting cases there can be no doubt, they do affect Alaskan's as a whole and have been stare decisis since the 1980's. The Untied States Supreme Court must step in.

The next matter I ask this court to look at is the substandard of due process that was applied in this case. It is the petitioner's belief that it is the nature of his crime, a sex crime, that he did not recieve the proper standard of due process. It is a foundational aspect of our government and law that all people be able to seek protection of the law.

The very essence of civil liberty certainly consists in the right of every indivual to claim the protection of the laws, whenever he recieves an injury. One of the first duties of government is to afford that protection. ... Where there is a legal right there is also a legal remedy by suit or action at law, when that right is invaded. Marbury v. Madison, 5 U.S. 137, 163 (1803)

It is the petitioner's belief that the substandard of due process seen through-

1 out his entire case is because of the hate and "community condemnation" that is
2 seen in Alaska and the rest of the United States for sex crimes. The problem is
3 that even in the prosecution of sex crime, prosecutors and judges must follow the
4 law and not just do what they want to get a conviction.

5 When we consider the nature and theory of our institutions of government, the
6 principles upon which they are suppose to rest, and review the history of their
7 development, we are constrained to conclude that they do not mean to leave room
for the play and action of purely personal and arbitrary power. Yick Wo v.
Hopkins, 118 U.S. 365, 370 (1886)

8 It is the petitioner's belief that if this court doesn't enforce qual due process
9 for all crimes, then the hate for sex crimes will deprive anyone charged with this
10 type of crime everywhere. And in States like Alaska where does one turn when the
11 courts fail him? This court is the petitioner's last real hope.

12 The government of the United States has been emphatically termed a government
13 of laws, and not of men. It will certainly ceas to deserve this high appellation
if the laws furnish no remedy for the violation of a vested legal right.
14 Marbury v. Madison, 5 U.S. 137, 163 (1803)

15 The petitioner requests that this court reverse his convictions and because of
16 the egregious conduct by the respondent and State courts, that his case be
17 dismissed with prejudice.

18 CONCLUSION

19 The petition for a writ of certiorari should be granted.

20
21 Respectfully submitted,

22
23 *R. L. H. B. - II*

24 Date: Nov. 6, 2018