No. 20-5626

ORIGIN

Supreme Court, U.S.
FILED
AUG 1 8 2020
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

MONTE WHITEHEAD — PETITIONER
(Your Name)

vs.

STATE OF NEW MEXICO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

NEW MEXICO STATE DISTRICT COURT, FIFTH JUDICIAL DISTRICT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MONTE WHITEHEAD
(Your Name)

P.O. BOX 1059
(Address)

SANTA FE N.M. 87504
(City, State, Zip Code)

N/A
(Phone Number)

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1. Where New Mexico has a double jeopardy anti-waiver statute, can a State court rule that defendant knowingly, intelligently waived his right to be free of double jeopardy at the plea hearing, thus making New Mexico's anti-waiver statute void? If so,

2. Is the decision by the New Mexico District Court contrary to New Mexico's anti-waiver statute and the Federal Courts rulings - regarding double jeopardy - in Valentine v. Konteh and United States v. Broce? And is this due to an unreasonable application of the New Mexico's Supreme Court ruling in State v. Lente?

3. When a state has an anti-waiver statute for double jeopardy, can a State Court hold a defendant to a plea agreement where the defendant waived his constitutional rights but later shows his right to double jeopardy was violated and applies the States anti-waiver statute?

4. Can a defendant knowingly, voluntarilly, intelligently plead to charges that place him in double jeopardy, since double jeopardy would indicate the defendant did not have adequate notice of the charges?

5. Did the New Mexico Court of Appeals correctly interpret and apply United States v. Broce where it determined Broce held: that where there is a statute prohibiting waiver of specific rights, those rights cannot be waived by anything a defendant said at a plea hearing?

6. Can a State Court hold a defendant to a plea agreement claiming the defendant waived all his rights, even if the statute he allegedly violated did not exist at the time of the alleged crime? (ie. can a defendant knowingly, intelligently, and voluntarilly plead to an illegal sentence?).

7. Is Counsel ineffective when he knowingly allows a defendant to be placed in double jeopardy and allows him to be charged with a statute that did not exist at the time of the alleged crime?

8. Is Counsel ineffective if he fails to investigate what may lead to a valid Fourth Amendment violation claim and suppression of evidence where the evidence could be prejudicial, and where he also fails to motion for a Bill of Particulars which might have distinguished identically charged counts and enabled defendant to produce alibis?

9. Does the United States Constitution allow less protection under the Bill of Rights pertaining to due process and double jeopardy when establishing facts and circumstances if the alleged victim is a child? Or, does the Constitution require the same degree of protection to defendants regardless of the age of the alleged victim?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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

RELATED CASES

MONTE WHITEHEAD V. WARDEN VINCENT HORTON, No. D-503-CR-2006-00120

MONTE WHITEHEAD V. STATE OF NEW MEXICO, No. S-1-SC-38245

STATE OF NEW MEXICO V. MONTE WHITEHEAD, No CR-2006-00120

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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.

[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

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

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

The date on which the highest state court decided my case was May 28, 2020. A copy of that decision appears at Appendix B.

[ ] 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), § 2101(c) & (d) and Supreme Court Rule 13

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment Five:

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

United States Constitutional Amendment Six:

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

United States Constitutional Amendment Fourteen; Section One:

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 priviledges 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 any person within it jurisdiction the equal protection of the laws.

NMSA 1978 § 30-1-10; Double Jeopardy Anti-Waiver Statute:

The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution either before or after judgement.

NMSA 1978 § 30-9-11 (D)(1):

Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated (1) On a child 13-18 years of age when the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit.

STATEMENT OF THE CASE

Petitioner, Monte Whitehead, challenges his conviction in State of New Mexico v. Monte Whitehead, D-503-CR-2006-120 for violation of NMSA § 30-9-13(B)(2)(a) as occuring in 1991-1993 and for four identical counts for violating NMSA §30-9-11(D)(1) as occuring between January 12, 2005 to January 12, 2006. These convictions violate Petitioner's double jeopardy rights. Additionally, 30-9-13(B)(2)(a) was not a statute in 1991-1993. The fact Petitioner was put in double jeopardy and convicted of a crime that did not exist are just a couple of examples of Counsel's ineffectiveness.

These charges arose after several law enforcement agencies (DEA, county sheriff, and Pecos Valley Drug Task Force) raided Petitioner's veterinary practice to carry out a "drug raid." No search warrant was presented at the time of the raid. Officers only claimed they had a search warrant. During the raid, agents took Petitioner's sixteen year old step-daughter, LW, who worked part-time at the clinic, to a back office where they briefly asked her if she knew about any illegal narcotic activity. She said no. Then they asked her if she and Petitioner were having sex. After being asked a couple of times she said they were having sex. Agents then brought Petitioner's wife, Robin Sankey, back to question her. She was also a veterinarian at the clinic, but she was not asked about drugs even though she was half owner of the clinic. She was only questioned about her knowledge of a relationship between L.W. and Petitioner. Agents asked

Robin for permission to search hers and Petitioner's home for evidence of the alleged relationship. She consented. At this time agents locked Petitioner in a storage closet to prevent him from knowing what they were doing and to prevent him from objecting to the search of his home. In effect, Petitioner was removed for the purpose of keeping him from objecting to the search of his home. All agents involved in the search of Petitioner's veterinary clinic left except for two. These agents stayed behind to ensure that Petitioner stayed at the clinic and was unable to object to the search and seizure of his home. When Petitioner was let out of the closet, he said he was going to leave. One of the remaining agents said he would arrest Petitioner if he tried to leave. Petitioner asked what for, but no response was given. Once agents completed the search and seizure of Petitioner's home, he was allowed to leave the clinic. This was thirteen hours after the search and seizure initially began at the clinic. No illegal narcotic activity was discovered and no charges were brought against Petitioner for the alleged "diversion of narcotics for unknown purposes." In fact, the DEA closed the case for failure of agents to follow up or submit any reports regarding the raid. However, the day after the raid, Petitioner was charged with <u>fifty-two identical counts</u> of criminal sexual penetration and one count of criminal sexual contact of a minor.

After Petitioner was arrested, Robin filed for divorce. The judge handleing the divorce denied Petitioner access to his assets, so he could not afford to hire counsel. Petitioner's parents offered to pay for attorney Gary

Mitchell. They assumed he was good because he was often in the news defending capital felony cases. Since Petitioner's parents offered to pay for Mr. Mitchell, Petitioner agreed but was reluctant. This was due to the fact that Mr. Mitchell represented Petitioner's first ex-wife in their divorce which was very contentious. Mr. Mitchell did not have Petitioner sign a waiver regarding conflict of interest. Years later, Petitioner learned that his first ex-wife is the one who told authorities that L.W. and Petitioner were having sex.

At the initial meeting with Counsel in county jail, Petitioner informed Mr. Mitchell about the search and seizure at the clinic and his home where "evidence" was obtained. Counsel said he would look into it. After this meeting, Petitioner wrote Counsel several times asking him to talk to various clinic employees, L.W.'s friends, Robin; and to get copies of time cards, work schedules, travel times and distances from the high school to Petitioner's home and clinic and continuing education schedules; all physical evidence and testimonies that would show the impossibility of carrying out the allegations. Petitioner never received a response to his letters nor were his calls returned.

Almost a year after Petitioner's arrest, he was transported to court for a change of venue hearing requested by the State and "stipulated" to by Mr. Mitchell. Mr. Mitchell did not inform Petitioner that the hearing was going to happen, and he appeared at the hearing telephonically. At the hearing, Mr. Mitchell argued against the change of venue, even though Petitioner wrote him asking him to request a change of venue, and he even had his parents drive to Mr. Mitchell's office in another town to urge him to seek a change of venue. Not only did Mr. Mitchell argue against the change of venue, he changed Petitioner's plea over the phone in court from not guilty to guilty without discussing this with Petitioner or receiving his consent. Since Mr. Mitchell had not spoke with Mr. Whitehead for several months, Petitioner believed Counsel was investigating the things he wrote him about. At the change of venue hearing, Mr. Mitchell told the court that carpet samples taken from Petitioner's home and office came back Positive for Petitioner's DNA. Mr. Mitchell had not even informed Petitioner that the results were in, and he had not discussed with Petitioner possible reasons for his DNA to be found in his home or office. Of course his DNA was going to be found in his home and office carpet.

In two years, from arrest to sentencing, Petitioner spoke with Counsel a total of six times: 1) at their initial meeting in county jail; 2) before the preliminary exam in magistrate court when Mr. Mitchell told Plaintiff to wave the hearing since it was unnecessary, and there would be another one in district court; 3) once on the phone. This was the only call taken by Mr. Mitchell, at which time he told Petitioner to quit writting him so many letters; 4) before the plea hearing in district court; 5) When Mr. Mitchell called Petitioner at county jail to inform him he was going to go to Albuquerque for a pre-sentence evaluation and report; and 6) just a few minutes before sentencing when Counsel asked for the first time if Petitioner wanted anyone to speak on his behalf. There was one other time Counsel spoke with Petitioner at county jail. Petitioner was jumped by five gang members who tried to take his life a few weeks before the change of venue hearing. When Petitioner's mother learned about this she begged Mr. Mitchell to go to Carlsbad to check on Petitioner. He did, but the criminal case was not discussed.

Mr. Mitchell never sought or obtained the affidavit or search warrant to see if there were grounds for suppression of "evidence" through the exclusionary rule based on multiple theories. Furthermore, Petitioner wrote Counsel asking him to explain the charges. Petitioner explained he did not know Robin and L.W. in 1991-1993. Additionally, Petitioner told Counsel there were times when the allegations could be shown to be false if they could be pinned to a date, time, week or even season (summer break, winter break, spring break, etc.). Counsel did not motion for a Bill of Particulars and/or Blockburger test. After the Change of Venue Hearing, Petitioner wrote Counsel and told him he did not want to accept the plea offer. The letter was not responded to, and Counsel did not talk about or explain the plea until fifteen minutes before the plea hearing.

When Counsel met with Petitioner before the plea hearing - one year after Petitioner's arrest - Petitioner asked Counsel again to explain the charges since he had yet to do so. The age on the criminal sexual contact charge changed from thirteen to eighteen years of age to under thirteen. Petitioner pointed out again that he did not even know Robin Sankey or L.W. in 1991-1993.

Mr. Mitchell told Petitioner that if he did not go through with the plea bargain that day everything would get held up, and if Petitioner went to trial he would be found guilty and never get out of prison. If another plea deal was offered later it would be worse than the current one. By this point, Petitioner felt like he had no choice but to accept the plea deal minutes before the plea hearing. Petitioner sat in county jail another year waiting to be sentenced.

After going to prison, Petitioner started to learn the law. He asked his parents to track down the search warrant and affidavit. They ran into numerous roadblocks, and so they hired an attorney to locate it. None of the local law enforcement agencies involved in the raid had a copy of the warrant, not even the Federal DEA office in El Paso Tx. When the new attorney checked with Mr. Mitchell, he learned he never tried to get it. The new attorney finally tracked it down at the DEA headquarters in Springfield Virginia. After filing several requests and freedom of information requests and waiting several months, the DEA provided a highly redacted version of the affidavit and search warrant. The new attorney said he would have to sue in Federal Court to get an unredacted version. Petitioner's family had already spent forty thousand dollars between Mr. Mitchell and the new attorney and could afford no more. Moreover, Petitioner had already been incarcerated for eight years since his arrest and could not go through two more years of civil litigation before filing a habeas corpus.

When Petitioner filed his habeas petition, the district court judge immediately denied it without allowing the Post Conviction Habeas Unit (PCHU) the opportunity to review it per NMRA Rule 5-802(F) & (F)(1). Petitioner filed a motion for reconsideration and noted the court's failure to allow the PCHU to review the habeas petition. Judge Sanchez did not respond to this motion. Therefore, Petitioner filed a Writ of Mandamus. The N.M. Supreme Court ordered Judge Sanchez to respond to the writ. As a result, he forwarded the habeas petition to the PCHU. The State Attorney General notified the Supreme Court that Judge Sanchez forwarded the habeas, and no longer needed to respond.

The PCHU informed the court that Petitioner's habeas had merit and validated the illegal search and seizure claim, double jeopardy claim, illegal sentence claim and ineffective assistance of counsel claim. Petitioner's attorney, Jamshid Askar, filed a supplemental petition that clarified and strengthened the illegal sentence argument (fundamental error). After submitting arguments and getting responses from the state, Jamshid was placed on indeffinate leave from the PCHU for unknown reasons, and Petitioner was assigned a new attorney, Deborah Horne. After taking a few months to get up to speed, she submitted a new argument regarding count one claiming an ex-post facto violation. After several more months of responses and replies, Judge Sanchez denied Petitioner's habeas petition without holding an evidentiary hearing. He stated since Petitioner accepted a plea bargain he waived all of his constitutional rights. Subsequently, Petitioner filed a Writ of Certiorari with the N.M. Supreme Court which denied the writ.

LEGAL ARGUMENTS

A. NO BAR TO RAISING DOUBLE JEOPARDY CLAIM OR FUNDAMENTAL ERROR

As far back as Ex Parte Lange, 85 U.S. 163 ~~xx~~ 1-4, this Honorable Supreme Court recognized that due process and double jeopardy violations are so serious that even when the term has passed in which the court can address such violations, in the interest of justice, the Supreme Court will address and correct these egrigous errors. Additionally N.M. has no procedural bar to prevent review of double jeopardy claims from being heard, even when a plea bargain is made and/or a conviction is confirmed on appeal.

U.S. Constitutional Amendment Five states "No person shall... be subject for the same offense to be twice put in jeopardy of life, or limb... nor be deprived of life, liberty, or property without due process of law." In fact, if double jeopardy has occured there cannot have been due process of law. Without due process of law a plea cannot be knowingly, intelligently, voluntarily made. The Supreme Court determined the right to be free from double jeopardy so inviolate and violations so grave that it was obligated to discharge prisoners upon discovery of double jeopardy. In Lange, the Supreme Court determined there is a period of time in which courts have the authority to make changes to judgments and sentences, orders and decrees as justice may require. However, that this hard and fast rule where courts loose jurisdiction cannot be an excuse to allow Federal double jeopardy rights to be violated once a courts term has ended. In Lange, the Court wrote:

> Where a person shows he is held under judgment... made without authority of law, the Supreme Court will by writs of habeas corpus and certiorari, look into the record so far as to ascertain that fact, and if it is found to be so, will discharge the prisoner. The general principle asserted as applicable to... criminal cases that set aside or modified as law and justice require. But it also declared that this power cannot be so used as to violate the guarantees of personal rights found in the common law and the Constitution of the States and the Union. If there is anything settled in the jurisprudence of England and America, it is that no man shall be twice punished by judicial judgments for the same offense. Id ¶¶ 1-3. Emphasis added.

Even though the term of the court may expire, a claim of double jeopardy is not barred from being raised. Moreover, N.M. considers double jeopardy so grave that it codefied law that prevents defendants from being able to wave this right even upon a plea agreement. NMSA 1978 §30-1-10 reads:

> The defense of double jeopardy may not waived and may be raised by the accused at any stage of a criminal prosecution either before or after judgment. Emphasis added.

New Mexico's anti-waiver statute gives the United States Supreme Court authority to hear Petitioner's double jeopardy claim. In United States v. Broce, 109 S.Ct. 757(1989), the U.S. Supreme Court determined that a double jeopardy attack may be waived unless there was a statute barring such waiver. The Broce Court stated that a double jeopardy attack on a sentence will be allowed when:

> where on face of the record the court had no power to enter a conviction or impose the sentence. Id 762.

The New Mexico Court of Appeals relying on Broce and N.M's anti-waiver statute ruled:

> To the extent that it is argued that defendant expressly waived any appellate double jeopardy claim during the plea hearing, we must reject that position as well. In New Mexico, double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment... While not reaching the issue, this court questioned whether section 30-1-10 allows a defendant to expressly waive double jeopardy protection. Being bound by the broad, clear language of section 30-1-10, we reject any argument that defendant successfully waived his double jeopardy claim at the plea hearing. The State attempts to avoid the effect of section 30-1-10 by relying on Broce. However, Broce was addressing only constitutional issues. It did not consider a statutory provision such as 30-1-10 which explicitly states that a defendant cannot waive a particular type of constitutional claim. Thus, section 30-1-10 and the exception to Broce apply here. State v. Jackson, 860 P.2d 772, 774-75 (1993)

Therefore, by statute, Petitioner was not allowed to waive his right to any double jeopardy claims. Because of this right, and the fact Petitioner is in double jeopardy, the sentencing court had no power to enter the convictions or impose sentence on Petitioner. Furthermore, the exception to Broce and N.M's anti-waiver statute give the U.S. Supreme Court jurisdiction and authority to review this case.

In State v. Riley, 2010-NMSC-005, the N.M. Supreme Court ruled that even though defendant did not raise double jeopardy concerns in court, it could be raised for the first time on appeal. This is contrary to what Judge Sanchez wrote in his order dismissing Petitioners claim. State v. Nunez, 129 N.M 63 ruled:

> The New Mexico double jeopardy clause differs from its federal counterpart... New Mexico specifies double jeopardy protections that are only implicit in the Federal versions... This constitutional protection is reiterated and expanded upon by our double jeopardy statute... New Mexicos constitutional and statutory protection against double jeopardy on its face, is of a different nature, more encompassing and inviolate. Id 24-26.

Nunez determined jeopardy attatched the moment a plea is made and stated:

> In the case of a guilty plea... jeopardy attaches at the time the court accepts the guilty plea. Id 28.

Moreover,

> As we have stated above, under the New Mexico Anti-waiver statute, the double jeopardy defense may be raised at any time, both before and after judgment. Section 30-1-10; See State v. Breit, 1996-NMSC-67 ("The right to be protected from double jeopardy is so fundamental, that it cannot be relinquished even if a conviction is confirmed on appeal.") A plea agreement which may result in the waiver of other potential claims, has no effect on a defendants right to raise double jeopardy defense. Id 96. Emphasis added.

Not only does this Court have authority under Lange and Broce to review this case, it also has jurisdiction because the N.M. courts have made judgments "contrary to" N.M. law and "unreasonably applied the law." Moreover, Petitioners case is identical to Valentine v. Konteh, 395 F.3d 626 (C.A. 6 2005). N.M. Courts have relied heavily on this Federal Court of Appeals case. Nevertheless, in Petitioner's case, the court has made judgments "contrary to" the Federal Courts and it has "unreasonably applied the law" in Petitioner's case. In Valentine the court wrote:

> No principle of procedural due process is more clearly established than that notice of the specific charge and a chance to be heard in a trial of the issues raised by the charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal... Madden v. Tate, 1987 WL 4409 at 3 (6th Cir. 1987)("The Due Process Clause of the Fourteenth Amendment mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him to permit adequate preperation of his defense. Id 19-20. Emphasis added,

B. DOUBLE JEOPARDY

Double jeopardy attached once Petitioner and the court accepted the State's plea offer. There is no way Petitioner or the court can tell which count goes with criminal accusation (i.e. date, location, accused act, etc.) since all counts but one are identical. The multiple undifferentiated charges in the criminal information, plea agreement and judgment and sentence violate Mr. Whitehead's rights to notice, and his right to be protected from double jeopardy.

Petitioner's plea and disposition agreement reads in part:

> The defendant agrees to plead guilty to the following offenses: Count One: Criminal Sexual Contact of a minor and Counts two, three, four, and five: Criminal Sexual Penetration in the second degree, as contained in the criminal information. (Attachment G) Emphasis added.

Counts two through five are not differentiated in any way or tied to any particular event. The criminal information reads in part:

Counts 2 through 53: Criminal Sexual Penetration, contrary to section 30-9-11 (D)(1), NMSA 1978 and alleges that said defendant did unlawfully and intentionally cause Lauren Wilson, a child 13 to 16 years of age while the defendant was in a position of authority to coerce the child to submit, to engage in sexual intercourse or felacio, and that this did happen on or between January 12, 2005 and January 12, 2006 in Eddy County N.M. (Attachment F).

Furthermore, the Plea and Disposition Agreement states the State will nolle prosequi counts 6 through 53. The State filed a Nolle Prosequi as to counts 6 through 53 which reads:

> Comes now D-Ann Read, Senior Trial Attorney, N.M. for the Fifth Judicial District, State of N.M., and hereby enters a Nolle Prosequi as to counts 6 through 53 only for reasons that the State and Defendant have entered into a plea and disposition agreement as it relates to the remaining counts. (Attachment I).

Petitioner's Judgment and Sentence (Attachment H) reads in part:

> Criminal sexual penetration, a second degree felony, contrary to § 30-9-11(D)(1) NMSA 1978, occuring on or between January 12 2005 and January 12, 2006; as charged in Count 2 of the criminal information;
>
> Criminal sexual penetration, a second degree felony, contrary to § 30-9-11(D)(1) NMSA 1978, occuring on or between January 12 2005 and January 12, 2006; as charged in Count 3 of the criminal information;
>
> Criminal sexual penetration, a second degree felony, contrary to § 30-9-11(D)(1) NMSA 1978, occuring on or between January 12 2005 and January 12, 2006; as charged in Count 4 of the criminal information;
>
> Criminal sexual penetration, a second degree felony, contrary to § 30-9-11(D)(1) NMSA 1978, occuring on or between January 12 2005 and January 12, 2006; as charged in Count 5 of the criminal information.

The facts in Valentine are indistinguishable from the present case.

In Valentine, the State estimated the number of counts and did not differentiate them. The Valentine Court wrote:

> Valentine was convicted of 20 carbon-copy counts of child rape each of which was identically worded so that there was no differentiation among the charges and 20 counts of felonous sexual penetration each of which was also identically worded ... The indictment and conviction violated Valentines federal due process rights to notice of the crime charged with sufficient specificity so that he would not again be put in jeopardy of the same crime. Id 1 ... [H]e had no way to otherwise identify what he was to defend against in the repetitive counts and no way to determine what charges of a similiar nature could be brought against him in the future if he were reindicted. Id 2.

Additionally, the Valentine Court noted:

> Multiple undifferentiated charges in the indictment violated Valentine's rights of notice and his right to be free from double jeopardy. The failure of the Ohio Court of Appeals to rectify these violations constitutes an unreasonable application of well-established constitutional law as announced by the Supreme Court. Id 17. Emphasis added.

Likewise, the failure of the N.M. Courts to rectify these violations constitutes an unreasonable application of well-established law.

New Mexico District Court Judge Sanchez dismissed the habeas petition without holding an evidentiary hearing, even in the face of conflicting testimonies and even in spite of the N.M. P.C. H.U. stating Petitioner had valid claims. Judge Sanchez stated that when Petitioner made the plea agreement, he waived all claims, even to double jeopardy. This is clearly contrary to N.M. and federal standards. The criminal information, plea agreement and judgment and sentence do not make one scintilla of distinction between counts. The plea and disposition agreement only refers to what is in the criminal information. All use cookie cutter language.

Furthermore, the criminal complaint makes allegations that Petitioner and L.W. had sex at various times in various locations such as at home or the veterinary clinic, but there is no link to specific counts, dates or acts to distinguish the counts. Petitioner cannot tell which alleged acts (home, clinic, dates, weeks, or seasons) he is in prison for. Is count two for the home or the clinic. On what date, week, season or even year (2005 or 2006) did the count occur? Is count three for the home or clinic? What date, week, season or year (2005 or 2006) did this count occur and where did it occur? Petitioner cannot tell which counts are for which alleged acts, days, weeks, seasons, year or locations: home or clinic. Which acts did he plead to, those that occured in weeks 1-4 of 2005 or weeks 1-2 of 2006 and weeks 51 and 52 of 2005? Which counts were dismissed without prejudice, those that occurred in weeks 1-48 or those that occured in weeks 5-52? Does Count 2 go with the week of January 12, 2005 to January 19, 2005, or a different week? Were these counts tied to the home or clinic? What guarantee does Petitioner have that he will not be charged and convicted with the dismissed counts, and how can he prove that he already served time for the counts he plead to? What distinguishes Count 2 from Count 6? What protects Petitioner from being tried for a crime he has already served time for? As it stands now, Petitioner can never have finality to his sentences because he does not know what he has served time for. Double jeopardy attatched to Petitioner when he accepted the plea. Moreover, Petitioner could not have made a knowing, voluntary and intelligent plea to such counts because he could not have known what he was pleading to. Also, since he has no way of knowing what alleged crime he is serving his sentence for, and counts 6-53 were Nolle Prosequi, he could not have knowingly, voluntarilly and intelligently put himself in jeopardy and understood that without distinction he could be tried and sentenced to the same crime over and over. There is no bar to prevent the state from raising the claims over and over, and there is nothing to distinguish the charges plead to and served from those dismissed without prejudice. Had Mr. Mitchell filed for a Bill of Particulars and a Blockburger Test, Petitioner could have shown weeks, (dates) when he did not work at the veterinary clinic or take emergency calls. He could have also shown weeks when he was at continuing education to maintain his veterinary license and also out of state when L.W. was not there. There were times of the year when L.W. was gone on summer vacation to her grandparents and to a friends in Alamogordo. There were other weeks when the whole family went on vacation to Alamogordo and Robin and L.W. would stay with Robin's parents and Petitioner would stay with his parents. In the criminal complaint, L.W. stated that on the days she did not drive to the high school, Petitioner would pick her up and take her home and have sex with her before taking her to the clinic to work. However, Petitioner only picked her up ocassionally. Robin and the office manager also picked LW up from the high school. Moreover, when LW did not drive to the High school and she was picked up by Petitioner or Robin, her friends were also picked up and taken home by Petitioner or Robin before LW was taken to work. Prior to the plea, the dates were easy to determine when LW was picked up and by who based on when she drove and from the clinic appointment book. Petitioner could have disproven many allegations (maybe all of them). <u>But which ones?</u> Those on week 2, 5, 10, 12, 15, 30? Moreover, had Counsel been effective, Petitioner would have shown that LW's claim of having sex after school was physically impossible. Petitioner, Robin and the office manager would pick up Lauren when school let out at 3:35 p.m. By the time L.W. made it to the parking lot and Petitioner was able to get out of the high school parking lot it would be 3:45 p.m. Then, Petitioner would still have to take L.W.s friends home. On the days Petitioner picked L.W. up, her clock in times were no later than 4:05 p.m. On the days Robin picked her up, her clock in times were between 4:05 to 4:10 p.m. On the days Lauren drove herself, her clock in times could be as late as 4:30 p.m. Furthermore, Petitioner's home was out in the country in the opposite direction of the veterinary practice. The practice was completely on the other side

1. LW's work schedule was from 4:00 to 5:30 p.m.

of town. It was a physical impossibility for Petitioner to take L.W. home to have sex and get back to the clinic by the time her clock-in times would have shown. Whatsmore, since Petitioner and Robin Sankey worked together, they were always with each other. The only time L.W. could have made the at home claim was after school, but as Petitioner could have shown, it was not physically possible. The States charging scheme (and Counsel's ineffectiveness) denied Petitioner the ability to disprove anything. Which counts were designated for home after school, and which counts were designated for the clinic.

Allegations of sex at the clinic could have been disproven as well. The veterinary clinic Petitioner owned was a three doctor practice. Petitioner and Robin would alternate the on call with the other doctor. Petitioner and Robin would usually go on small animal (dogs and cats) emergency calls together since these were handled at the clinic. L.W. and Petioner's and Robin's youngest daughter would come if it was early in the evening or during the day on the weekend. Otherwise, L.W. would stay home and babysit her little sister. The only times L.W. would go with Petitioner alone is if there was a large animal call. Robin did not like working with large animals, so she would stay home with their youngest daughter. Large animal emergency calls were not handled at the clinic. The clinic did not have large animal facilities. Furthermore, every other week, there were no emergency calls to go on because the associate veterinarian took calls. Again, Petitioner could have disproven allegations, but which ones? Which counts were tied to the clinic or home? Which counts were assigned to which days, weeks, seasons or even years? Were counts 3, 5, 17, 19 and 23 assigned to weeks and allegations of sex at the clinic when the associate veterinarian was on call? The State's cookie cutter, boiler plate charging scheme left Petitioner without fair notice of the allegations he was facing and put him in double jeopardy, since he cannot tell what allegations he is serving time for and may be charged for again.

The States charging scheme with identical cookie cutter counts denied Plaintiff any opportunity to defend himself or know which allegations (times or locations) he plead to. Plaintiff cannot prove or show which alleged action he is in prison for. The N.M. Supreme Court determined such charging schemes illegal.

> It is necessary for an information to allege such facts as are necessary to give the defendant notice of the crime charged in sufficient detail to enable him to prepare his defense...[T]he record reflects the defendant did not know which act of sodomy he was being charged. As a result, his defense was prejudiced. <u>Failure to charge defendant with specific acts, violates his right to be informed of the charges against him</u> and denies him due process of law. <u>State v. Foster,</u> (1974) 87 N.M. 155. Emphasis added.

Petitioner has demonstrated that his case satisfied the conditions established by 28 U.S.C. § 2254(d)(1). In Petitioners case, the decisions of the N.M. courts have resulted in decisions contrary to Williams v. Taylor, 529 U.S. 362 (2000). Petitioner has established that the N.M. court decisions have resulted in decisions "contrary to" and also involved an "unreasonable application" of law in Petitioner's case. (Valentine at 10-12). These decisions require review by this Court under the "contrary to" clause and "unreasonable application" clause in 28 U.S.C §2254(d)(1). Petitioner's case is materially indistinguishable from Valentine. Furthermore, the State courts' decisions are objectively unreasonable since: 1) the criminal information did not sufficiently apprise the defendant of what he must be prepared to meet, and more obviously; 2) that if other proceedings are taken against him for similiar offenses or the state reinstitutes the counts that were Nolle Prosequi (dropped without prejudice), the record does not show with clarity what crimes defendant has already plead to and served time for. Therefore, Petitioner's conviction violates the decisions established in Russel v. United States, 369 U.S. 749, 763-764 regarding sufficiency of a criminal information. As a result, Petitioner's sentence violates his due process and double jeopardy rights since he was not: 1) given adequate notice of charges; and 2) he is not protected from double jeopardy. Valentine stated:

> [A]n indictment is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant from double jeopardy... [C]ourts have found that the due process rights enunciated in Russell are required not only in federal indictments but also state criminal charges. Id 16. Emphasis added.

The N.M. Court of Appeals noted in State v. Cook, No. 24957 (June 13, 2006):

> Because defendant was charged with two counts of tampering with evidence, the double jeopardy issue raised in the appeal arises from a subset of multiple punishment claims: a unit of prosecution claim. That is defendant was charged with more than one violation of the same statute... "The pivotal question in multiple punishment cases is whether the defendant is being punished twice for the same offense"... In such cases we first inquire "whether the legislature intended punishment for the entire course of conduct or for each discrete act".. We then look to see "whether the charged acts were sufficiently distinct." Id 9.

The Cook Court went on to claim that when acts are not sufficiently distinct:

> We apply the "rule of lenity" because criminal statutes should be interpreted in defendants favor when insurmountable ambiguity persists. Id 10... In [determining whether defendants acts have sufficient "indicia of distinctness"] we consider the timing, location, and sequencing of the acts, the existence of an intervening event, and defendants intent... Id 13. Emphasis added.

The N.M. Court of Appeals in Cook then went on to referr to Valentine noting how that a case indictment containing identical counts presented due process problems because of lack of notice. The Cook Court stated:

> Double jeopardy problems arose because "The undifferentiated counts introduced the very real possibility that Valentine would be subject to double jeopardy in his initial trial by being punished multiple times for what may have been the same offense" since it was unclear which facts supported which charges. Id 17.

The same year, the N.M. Supreme Court decided State v. Bernal, 140 N.M. 644 (N.M. 2006).

> If acts are not sufficiently distinct, then the rule of lenity mandates an interpretation that the legislature did not intend multiple punishments, and a defendant cannot be punished for multiple crimes. Id 14.

In the present case, the State relied on State v. Lente, 2019-

NMSC - 020 (Oct. 31, 2019) to rebut Petitioner's and PCHU's arguments for double jeopardy. In Lente, The N.M. Supreme Court went to great lengths to push the limits of due process and double jeopardy. Lente claimed he was charged identical counts that were not distinguishable. Lente went through the appellate procedure and the N.M. Court of Appeals and the Supreme Court affirmed his convictions. On a pro se habeas petition, the State District Court overturned the convictions based on the Sixth Circuits decision in Valentine and another N.M. precedental case (State v. Dominguez, 2008-NMCA-029). In Lente, the State District Court concluded:

> Lente's indictment included "carbon copy" charges - charges that are truly identical, and not distinguishable by time or date or by specification that each charge was predicated on different acts - that impermissibly subjected him to double jeopardy. Id 2.

The State appealed to the N.M. Supreme Court which overturned the district court stating Lente's charges were not carbon copies. This conclusion was based upon the indictement which tied acts to specific units of time within the charging frame. However, in Petitioner's case, Judge Sanchez erred in agreeing with the State that Lente applied to this case. Lente's charges were broke into discrete acts over six month periods. Although still vague and questionable, this is way more information than Petitioner was given. There is not one act, date, or location tied to the counts Petitioner was charged. Petitioners case is easily distinguishable from Lente. Moreover, the N.M. Supreme Court erred in deciding Lente when it went against N.M. Legislatures anti-waiver statute, stating, "The objection that the indictment is multiplicitous must be asserted before trial or the defense is waived." Id 26. N.M.s anti-waiver statute states double jeopardy defense cannot be waived and can be raised at any time. In deciding Lente, the N.M. Supreme Court gave lip service to Valentine but sided more with the dissent attempting to nueter Valentine.

Nevertheless, Valentine is still precedental and Petitioner's case is identical to Valentine. The N.M. District Court and the N.M. Supreme Court have gone against this states own anti-waiver statute and ignored The Supreme Court's exception to raising a double jeopardy claim as allowed in Broce and Lange. As recently as 2017 the State Court of Appeals in State v. Huerta-Castro restated the rulings in a long line of cases. Citing Dominguez, 2008-NMCA-029 it wrote:

> We have never held the State may move forward with a prosecution of supposedly distinctive offenses based on no distinguishing facts or circumstances at all, simply because the victim is a child. Huerta-Castro at 17.

Furthermore,

> What is required is an especially diligent scrutiny of the facts of the incident as they may be disclosed. The aim is to narrow the time frame of the occurence as complained of - if not to the extent of an exact date or dates, then possibly in respect of seasons of the year, or incidents in the victims life such as death in the family or a change in a family members job routine or the beginning of the school year or of vacation time or of extracurricular activities. When the trial court is satisfied that these sources of information have been exhausted, it will then be in a position to strike the necessary balance to determine when "fair notice" has been given. Id 20.

In Petitioner's case, the N.M. State District Court misapplied the facts and failed to show that the criminal information, plea and disposition agreement and judgment and sentence showed any indicia of distinctness that would even allow the decision in Lente to apply to Petitioner's case. The denial of the N.M. Supreme Court to review the case has resulted in a miscarriage of justice and a misapplication of N.M. statute, and it goes against numerous State judicial decisions as well as Federal decisions in Valentine and Broce. New Mexico Courts have, until recently, relied heavily on Valentine. It appears that not since Russel v. United States, 369 U.S. 749 (1962) has the Supreme Court addressed the issue of "carbon copy" counts, especially as they pertain to allegations of sex crimes where minors are involved. Until such a time, the Sixth Circuits decisions in Valentine appear to be precedent. If so, Mr. Whitehead's right to due process and to be free of double jeopardy has been denied. The decision of the N.M. District Court and denial by the N.M. Supreme Court has resulted in decisions "contrary to" and involved an "unreasonable application" of law.

C. FUNDAMENTAL ERROR: ILLEGAL SENTENCE

The "fundamental error" doctrine is an exception to the rule that issues cannot be raised for the first time on appeal. See Castor v. State, 365 So. 2d 701, 703 (Fla. 1978).

> 'Fundamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action. Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970).

If state courts do not provide adequate means of challenging the errors, then a federal court has jurisdiction to hear the claim. See Ake v. Oklahoma, 470 U.S. 68 (1986). The Supreme Court held in Coleman v. Thompson that a petitioner who failed to comply with a timeliness requirement in a state court could nevertheless plead their claims on the merits in federal court if he can show that "failure to consider the claims would result in a fundamental miscarriage of justice" United States v. Stoneman, 870 F.2d 102, 105 (3rd Cir. 1989). Petitioner raised the fundamental error claim in his habeas petition which was denied by the N.M. District Court and The N.M. Supreme Court. Like double jeopardy, there is no procedural bar to raising the claim of illegal sentence. Petitioner could not have knowingly, intelligently, willfully plead to a crime that did not exist. Moreover, The court did not have the authority to enter the conviction or impose the sentence it did. Broce at 762.

The criminal information regarding the illegal sentence charged

Petitioner with criminal sexual contact of a minor, a second degree felony contrary to § 30-09-13 (B)(2)(a) in 1991-1993. This was count one. However, this statuted did not exist in 1991 through 1993. Petitioner wrote Counsel early on asking him to explain the charge and the years. Mr. Mitchell did not respond to letters or phone calls. When Counsel met with Petitioner right before the plea hearing Petitioner asked Counsel about this count again. He told Mr. Mitchell he did not even know L.W. back then nor did he live in Carlsbad. Moreover, the age of L.W. had changed in this count from what it originally had been. It originally read from 13 to 16 years of age, but at the time of the plea it read under 13 years of age.

Mr. Mitchell explained that if Petitioner went to trial he would be found guilty. Additionally, that if he did not take this plea he would be held in county jail longer and if the State offered another plea deal it would be worse than this one. He told Petitioner that the State insisted on these charges. Count one is not the result of a typographical error. This was the time frame on this count from the beginning and even when the State revised the age in the count they kept the years the same. Also, Counsel told Petitioner this is what the State insisted on. Counsel knowingly let Petitioner plead guilty to an illegal sentence. Petitioner cannot voluntarily, knowingly, intelligently plead to a crime that did not exist. The N.M. District Court erred when it determined an illegal sentence cannot be overturned when it is accepted as part of a plea deal. The decisions of the N.M. courts regarding the illegal sentence have resulted in decisions "contrary to" and involved "unreasonable applications of law." Campos v. Bravo, 161 P.3d 846 (N.M. 2007) held it is fundamental error to convict a defendant of a crime that does not exist.

INEFFECTIVE ASSISTANCE OF COUNSEL

From the beginning Counsel was ineffective. Before he ever met with Petitioner in county jail he filed forms with the court waiving Petitioner's speedy trial rights. Petitioner never signed off on this. Additionally he failed to reasonably communicate with Petitioner and keep him informed of how the case and investigation was progressing. When Petitioner wrote Counsel letters asking him to seek a change of venue he would not respond. In fact, he did not respond to any letters sent to him. When Petitioner's family drove to Ruidoso to ask him in person to seek a change of venue he told them "its not gonna happen". When the State sought a change of venue because of the publicity of the case and the number of people in the community that knew Mr. Whitehead, Counsel supposedly stipulated to it. Then when the change of venue hearing occured, he appeared telephonically and argued against it. What's worse, at the change of venue hearing he changed Petitioner's plea without discussing this with

Petitioner. Mr. Mitchell had the opportunity to get evidence suppressed as fruit from a poisionous tree. He never even attempted to obtain the affidavit or warrant. When it was apparent that the States charging documents are vague, duplicatous have a wide time frame and do not tie acts to locations or times or weeks, he should have asked for a more deffinate statement and challenged the State with a Motion for a Bill of Particulars and Blockburger Test. Any reasonably competent attorney would have done so. Mr. Mitchell failed to file the following crucial motions: 1) Suppresion of evidence through the exclusionary rule; 2) Motion for a Bill of Particulars; 3) Motion for Blockburger Test; 4) Motion for Change of Venue. What's more, he failed to seek expert testimony that would have discredited the State's DNA "evidence". Petitioner's DNA was going to be found in Petitioner's home and office carpet whether a sex crime occured or not. Petitioner's DNA was not found on Lauren or anything she possessed. L.W. did not even go through a S.A.N.E. exam. Mr. Mitchell filed a total of three motions for extensions of time. Even worse, Counsel did not interview one single person he was asked to speak with, and he did not investigate one single thing he was asked to investigate (Travel times, time cards, appointment schedules, emergency calls, etc.). Mr. Mitchell never even provided a billing statement to show what he did even though he was paid. Mr. Mitchell was friends with Petitioner's first ex-wife's husband, and he represented Petitioner's first ex-wife in their divorce. The fact that Petitioner's first ex-wife made the allegations of sex abuse which was likely the real reason behind the search and seizure of the veterinary clinic; and the fact that once L.W. claimed she and Petitioner were having sex the search for diversion of narcotics ended; and the fact that Mr. Mitchell never bothered to investigate the search and seizure makes his actions highly suspect.

Under Strickland v. Washington, 466 U.S. 668, 687 (1984) Petitioner must show that Counsel's performance was deficient and that this defficiancy created

> a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id 689.

Had Counsel performed the acts of a reasonable attorney and done what he was paid to do, Counsel could have forced the State to be more specific and give Petitioner actual notice and a real opportunity to disprove the allegations. Counsel's failures put Petitioner in double jeopardy, allowed him to be convicted of a statute that did not exist, allowed law enforcement to get away with neferious conduct, and denied Petitioner effective assistance. Petitioner could have shown the actual impossibility of many claims, but which ones. The State would have been forced to change it charging scheme, thus resulting in a greater likely hood for trial. The proceedings would have been different. What's more a reasonable attorney would not even change a clients plea without first talking to his client, and he would not go against his clients wishes when he says he does not want to accept the plea deal.

The N.M. District Court erred when it determined Petitioner could not challenge Counsel's ineffectiveness since he took a plea deal and did not address Counsel's defficiency sooner. Judge Sanchez stated.

> The defendant claims dissatisfaction with trial counsel's peformance but does not address the decision to accept the terms of the plea ... in exchange for receiving sentences on fewer charges and the risk of conviction on a greater number of charges. (Attachment A)

First off, had Counsel been effective, the number of charges would likely been significantly reduced and "evidence" suppressed. Counsel's failure to interview witnesses, file meritorious pretrial motions, communicate with his client and his failure to act adversarial means the plea cannot have resulted from an informed choice.

> The fact that the trial court made the correct inquiries as to the voluntariness of defendants plea of guilty was not the result of a plea bargain is not the issue ... Instead the issue is simply whether ... the defendant had effective assistance of Counsel. [and] ... if defendants attorney does not provide effective assistance of counsel prior to entry of guilty plea ... plea ... could not have been freely, intelligently or knowingly made. State v. Kincheloe, 87 N.M. 34, 36 (1974)

Furthermore,

> Without reasonable effective assistance ... in connection with a decision to plead guilty, a defendant cannot enter a knowing and voluntary plea because the plea does not represent an informed choice. McCoy v. Wainwright, 804 F.2d 1198 (11th Cir. 1986)

Also,

> Counsel whose client pled guilty was ineffective in failing to make an independent investigation of the facts and circumstances in order to offer an informed [choice] as to the best course to follow in that counsel only spent seven hours conducting any sort of external investigation. Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1994)

Petitioner could not have been informed when he made the decision to accept the plea since he did not know if he could have evidence excluded; since he could not know which alleged acts, locations or times went with which counts he plead to; and since he did not know how many - if not all - of the counts he could disprove without Counsel speaking with witnesses and gathering physical contradictory evidence.

The habeas petition contains copies of unanswered letters to Counsel that ask him to explain the charges, to investigate certain things (H.P. pp 72--79), interview certain people and what the investigation would prove and how this would benefit Petitioner's defense (H.P. pp. 81-83 and 86-87). Mr. Mitchell did none of it. The habeas petition has copies of letters from Petitioner and his family to Counsel raising concern about his lack of communication (Exhibits 27-29 of H.P.). In one letter, Petitioner tells Counsel he does not to take the States plea offer but instead go to trial. (H.P. pp. 133-134, exhibit 25). The letter was not responded to. Petitioner did not make "bare allegations" as Judge Sanchez claimed. Petitioner states with specificity what Counsel failed to do and provides proof with documentation. Petitioner also shows how this would have changed the outcome. Had Counsel investigated the search and seizure of the veterinary clinic he could have shown numerous constitutional violations. The habeas petition contains fifty pages detailing what was done and how the actions of agents were illegal. The Unites States Supreme Court noted:

> We reject the suggestion that criminal defendants should not be allowed to vindicate through habeas review their right to effective assistance of counsel where counsel's primary error is failure to make a timely request for exclusion of illegally obtained evidence. Kimmelman v. Morrison, 477 U.S. 365 (1986)

The Supreme Court in Kimmelman held that attorneys can be found ineffective and defendants prejudiced when counsel fails to motion for suppression of evidence based on valid Fourth Amendment claims. In Kimmelman, the district court was ordered to hold an evidentiary hearing concerning the Fourth Amendment claim. Moreover, like double jeopardy, N.M. has greater Fourth Amendment protections than provided in the U.S. Constitution.

> Protection under New Mexico Constitution against unreasonable searches and seizures are more extensive than those provided under Fourth Amendment of the United States Constitution. Re Shon Daniel K. 959 P.2d 553 (N.M. Ct. App. 1998).

New Mexico District Court Judge Sanchez stated in his denial of the habeas petition that:

> Among the defenses that defendant claims he had was the illegality of the search warrant that was executed on defendant's place of business, an issue not developed in the case by trial counsel who defendant alleges was ineffective. (Attachment A)

This is one of the reasons Counsel was ineffective!!! He did not challenge the illegality of the search and seizure. Judge Sanches also stated:

> The defendant does not demonstrate how the warrant was illegal and presents a list of bare allegations of trial counsel's inadequacies. The petition is vague and seeks to establish fact by mere assertion without pointing to fact or reason. (Attachment A)

Judge Sanchez could not have read the habeas petition. The raid began before the Federal Magistrate Judge signed off on it. The CI had never been used before and officers did not verify her allegations. The affidavit only claims that the petitioning agent "believes narcotics are being diverted from the clinic for unknown reasons" however, no investigation was carried out prior to the raid. The allegation was based on the here-say of an unvalidated CI. Agents went beyond the scope of the warrant which severely restricted what agents could seize and look into. The lead agent in the affidavit even states he is inexperienced in the area of investigating medical practices. What's more, agents locked Petitioner in a closet. In effect, they removed him from the premises from being able to object to the consentual search and seizure of his home which Robin approved under duress. There are more allegations than this in the habeas petion all supported with facts and evidence. Had Counsel interviewed staff he could have validated the claims made about the search and seizure and verified statements made by Robin Sankey to officers during the raid that there was no way Petitioner could have taken L.W. home after school to have sex then be back at the clinic by the time they did. Mr. Mitchell failed to obtain valuable impeachment testimony. This is the kind of information contained in the habeas petition that Judge Sanchez refused to hold an evidentiary hearing on even though the PCHU supported the petition. Had Counsel acted adversarial, Petitioner would have been in a better position for trial; "evidence" might likely have been excluded, and the State would have been forced to modify its charging scheme. Amazingly Counsel did not file one motion on Petitioner's behalf or act adversarial to the State in any way. Petitioner sat in county jail for a year hoping and thinking Counsel was looking into the things he wrote him about. Counsels' actions at the change of venue hearing left Petitioner horrified and feeling helpless, caught in a system of mechanics and routine instead of intelect and justice.

REASONS FOR GRANTING THE PETITION

This Honorable Court should grant this petition because, not only was the N.M. District Courts ruling erroneous, the N.M. Courts have decided important Federal questions in ways that conflict with the case decisions of the United States Court of Appeals (6th Circuit)-a precedental case - and with the decisions of the United States Supreme Court. Moreover, the N.M. Supreme Court's decision not to review Petitioner's case along with statements made in Lente indicates the N.M. Supreme Courts recently developed intention to ignore constitutional laws enacted by N.M.'s legislature, that though constitutional, it does not like and even tries to discredit when it states double jeopardy claims must be made before a conviction at trial or a plea (see Lente at 26). The decision of the N.M. District Court is in conflict with Valentine and Broce. Moreover, to allow this decision to stand would mean courts can ignore laws like N.M.'s anti-waiver statute § 31-1-10 if they do not agree with the statutes. New Mexico Courts in the past claimed N.M. provided greater protections regarding double jeopardy and search and seizure. That is, it provided greater protections than the Fourth and Fifth Amendments to the United States Constitution. If N.M. Courts made such claims in the past, then obviously, the legislative intent behind § 31-1-10 would be that no matter what, double jeopardy rights cannot be waived. The N.M. Supreme Court's decision not to review Petitioner's case and its recent statements in Lente go against N.M anti-waiver statute and overturn a centuries worth of judicial decisions without specifically stating it is doing so. This case may have great significance on the power that is intended to be equally distributed among our three branches of government. Allowing courts to ignore constitutional laws passed by a duly elected legislature and ignore precedence set by Federal Courts can only lead to chaos and anarchy.

PRAYER FOR RELIEF

Petitioner requests this Honorable Supreme Court find the N.M. State District Court made decisions "contrary to" and "misapplied the law" in this case. Moreover, that due to double jeopardy, Petitioner's case be overturned, and to prevent further double jeopardy, that if the State chooses to charge again, it can only charge him with one count of violating NMSA § 30-9-11(D)(1). Additionally, that the illegal sentence be vacated as well. Since Petitioner has already served and completed this illegal sentence, that he not be allowed to be recharged for this again. Finally, Petitioner prays that his Counsel, Gary Mitchell, was grossly negligent for not even verifying that the charging documents were legal and for not acting adversarial to the State in any way. Petioner prays this Honorable Supreme Court will accept this Writ of Certiorari for review.

I, Monte Whitehead, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, and/or swear that the foregoing statements are true and accurate to the best of my knowledge.

Monte Whitehead August 17, 2020

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
Monte Whitehead
Monte Whitehead

Date: August 17, 2020