No. 20-8432

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT GARZA — PETITIONER
(Your Name)

vs.

DONALD KLEINE; DOUG PETERSON — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROBERT GARZA
(Your Name)

P.O. BOX 900
(Address)

ORIGINAL

TECUMSEH, NE 68450
(City, State, Zip Code)

(402) 335-5998
(Phone Number)

QUESTION(S) PRESENTED

1. Does a judge exceed his legal authority by making factual findings by a preponderance of the evidence which expose a defendant to the elevated upper term sentence ?

2. Does a violation of the six month speedy trial constitute a violation of the Sixth Amendment under the U.S. Constitution ?

LIST OF PARTIES

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

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

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[X] is unpublished.

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

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[X] is unpublished.

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

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

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[ ] is unpublished.

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

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[ ] is unpublished.

JURISDICTION

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

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

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 10, 2020, and a copy of the order denying rehearing appears at Appendix A.

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

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

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

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional right to trial by jury as illustrated in the various U.S. Supreme Court decisions, particularly Cunningham v. California, 127 S.Ct. 856 (2007), Montgomery v. Louisiana, 136 S.Ct. 718 (2016).

STATEMENT OF THE CASE

On March 17, 1983, Garza was arrested for Kidnapping, Attempted Murder in the Second Degree, and Use of a Firearm to Commit a Felony, by the Omaha Police Division.

The case proceeded to trial on all three counts in the Douglas County District Court.

While the jury was deliberating, trial counsel received a sworn affidavit from the victim recanting her initial story given to police, that Garza used force by placing her head down in between his legs and caused her serious bodily injury.

Instead of counsel bringing that matter to the attention of the Court, he waited until after trial, and brought it up in a Motion For New Trial. The trial court ruled that it was brought up too late, and that he failed to bring forward the victim, and the affidavit was hearsay.

It is very important to note that the prosecutor was aware of the affidavit and failed to take corrective measures by informing the appropriate authorities of after-acquired or other information that cast doubt on the correctness of the conviction. Imbler v. Pactman , 424 U.S. 409 (1976).

The U.S. Supreme Court has consistently held in its deci-

sion in U.S. v. Augur, 96 S. Ct. 2392 (1976), that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

There is no doubt that the perjured testimony affected the judgment of the jury, because the victim was the only witness to the crime, and she had already perjured herself during trial, and had a change of heart and gave counsel the affidavit while the jury was deliberating.

The jury returned a verdict of guilty on all three counts. However, the Kidnapping offense carries a prison term of either 1 to 50 years or life, depending on whether the victim was released in a safe place without having suffered serious bodily injury.

Attached hereto is a copy of the JUDGMENT AND SENTENCE which clearly illustrates that the Judge alone made the factual finding that Garza did not voluntarily release the victim in a safe place without suffering serious bodily injury.

That is a determination that must be made by the jury beyond a reasonable doubt, not the Judge by a preponderance of the evidence.

It is important to note that the Nebraska Legislature allows the Judge under Neb. Rev. Stat. § 28-313 to find facts as

it relates to whether he can impose a Class II or life sentence in prison.

Attached hereto also is a copy of the jury verdict which clearly shows that the jury found Garza guilty of Kidnapping. The verdict does not illustrate whether the victim was voluntarily released.

A sentencing scheme that allows a judge, not a jury, to find facts that increase a sentence beyond the statutory maximum by a preponderance of the evidence is unconstitutional. Hurst v. Florida, 136 S. Ct. 616 (2016).

The "statutory Maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, not the maximum sentence a judge may impose after finding additional facts. Blakely v. Washington, 124 S. Ct. 2531 (2004).

The maximum sentence Garza could be sentenced to was 1 to 50 years imprisonment, because that was what was reflected in the jury verdict for the offense of Kidnapping.

The trial court exceeded its authority by finding that Garza did not voluntarily release the victim, which was a fact that increased the sentence from 1 to 50 years to life in prison, and should have been found by the jury beyond a reasonable doubt.

And, Garza did not admit to any aggravating circumstances.

Additionally, 28-313 is facially unconstitutional, because there are no circumstances by which the statute can be constitutional.

The statute allows Judges in Nebraska to exceed their legal authority by finding facts that increase a sentence by a preponderance of the evidence, which violates the Separation of Powers Doctrine, the Due Process Clause, and the Sixth Amendment to the U.S. Constitution.

The U.S. Supreme Court held in its decision in Montgomery v. Louisiana, that a conviction or sentence obtained under an unconstitutional statute is not only erroneous, but void, and cannot be a cause of imprisonment.

The trial court record shows that on august 22, 1983, trial counsel, William Gallup, appeared before the District Court of Douglas County, Nebraska and waived Garza's right to a speedy trial, in Garza's absence and without his permission.

According to the transcript of the trial, Gallup informed the Court that it was necessary for him to waive the speedy trial to give Garza adequate time to prepare an insanity defense.

On October 17, 1983, Garza appeared in Court with Gallup to ratify the waiver of the speedy trial.

However, the ratification occurred after the speedy trial clock had ran its course. The record shows that the Information

was filed on April 8, 1983. The ratification occurred nine (9) days after the speedy trial clock ran.

REASONS FOR GRANTING THE PETITION

The Nebraska Supreme Court, the U.S. District Court, and the U.S. Court of Appeals for the Eighth Circuit has refused to acknowledge that defendants in Nebraska has been convicted and sentenced in direct contradiction of the several decisions rendered by this Court, as it relates to allowing Judges to find facts by a preponderance of the evidence that increase a sentence beyond the statutory maximum.

Additionally, the same Courts have refused to address the facial unconstitutionality of Neb. Rev. Stat. § 28-313, the Kidnapping statute in Nebraska.

As currently written, the Legislature still allows Judges to determine by a preponderance of the evidence whether a defendant can be exposed to the elevated upper term sentence. Nebraska regards these factors as sentencing factors, rather than elements of the offense which must be sent to the jury and proven beyond a reasonable doubt.

Conviction obtained through use of false testimony, known to be such by representatives of the State is a denial of due process, and there is also a denial of due process, when the State, though not soliciting false evidence, allows it to go uncorrected when it appears. Napue v. People of the State of Ill., 360 U.S. 264 (1959).

Attached hereto is a copy of the Affidavit provided to counsel during the trial, which illustrates that the victim recanted her original report given to police. She had already perjured herself during the trial, but had a change of heart and decided to tell the truth.

The State became aware of the Affidavit while the jury was deliberating, and refused to take corrective measures.

To reiterate, the victim was the only witness to the alleged crime, and was the State's star witness. Had the jury known of the Affidavit, they would have rendered a totally different verdict.

It is also noteworthy to mention, the State in 1998, on its own motion asked the trial court to dismiss the attempted second degree murder conviction, which it did.

Had the trial court at least sentenced Garza to the Class II offense of Kidnapping, the most he could have received was 50 years, which would have put his discharge date at March 17, 2008.

Garza in in custody in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution, because he should have been released from the three charges referenced herein when the State violated his right to a speedy trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert L Sargis

Date: Jan 26-2021