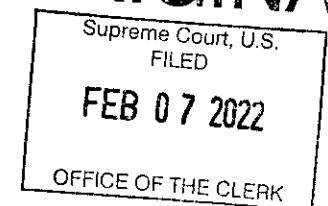


No. 21-7548

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL



SERGEY GENADIEVICH NOVITSKIY,

Petitioner

vs.

STATE OF COLORADO.

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF COLORADO

PETITION FOR WRIT OF CERTIORARI

Sergey Novitskiy, Pro Se, homeless, however, mail can be
sent to: 19758 E. Radcliff Pl., Centennial, CO 80015

QUESTIONS PRESENTED

1. Whether Petitioner's choice to proceed to a bench trial, instead of a jury trial, in a criminal case, lowers/lessens the prosecution burden of proof, from beyond a reasonable doubt standard to preponderance of evidence standard, and whether such choice in a criminal proceeding, constitutes as defendant's waiver of an application of beyond a reasonable doubt standard.

LIST OF PARTIES

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

[x] 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:

Sergey Genadievich Novitskiy
Homeless, nevertheless, pertinent
to the case mail can be sent to:

19758 E. Radcliff Pl.,
Centennial, CO 80015
State of Colorado,
Phillip J. Weiser, Colo. Att. General,
1300 Broadway, 10th Floor
Denver, CO 80203

RELATED CASES

Sergey Genadievich Novitskiy v. The People of the
State of Colorado, Colorado Supreme Court's case #
2021SC602.

The People of the State of Colorado v. Sergey
Genadievich Novitskiy, Colorado Court of Appeals' case #
19CA1686.

The People of the State of Colorado v. Sergey
Genadievich Novitskiy, Trial/District Court's case #
18CR206.

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A Copy of the Colorado Court of Appeals' mandate, denying a petition for rehearing, issued on 07/22/2021, is attached to this Petition as Appendix B.

A Copy of the Colorado Supreme Court's mandate, issued on 12/13/2021, denying Cert. Petition is attached to this Petition as Appendix C.

A Copy of an actual Cert. Petition, (without attachments) filed with the Colorado Supreme Court is attached to this Petition as Appendix D.

A copy of the Supplemental authority, filed on 11/10/2020, by Colo. Att. General in Colorado Court of Appeals , in the case # 19CA1686 is attached to this Petition as Appendix E.

TABLE OF AUTHORITIES CITED

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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 **state courts**:

A copy of Colorado Court of Appeals' unpublished opinion, affirming a felony DUI conviction, issued on 07/01/2021 is attached to this Petition as Appendix A.

JURISDICTION

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

The date on which the Colorado Court of Appeals' issued its unpublished opinion, affirming a felony DUI conviction, was 07/01/2021.

The date on which the Colorado Court of Appeals' denied a petition for rehearing, was 07/22/2021.

The date on which the Colorado Supreme Court denied a Cert. Petition was 12/13/2021.

Therefore, the jurisdiction of this Court is properly invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

INVOLVED

Fifth, and Fourteenth Amendments of the United States Constitution, C.R.S. 42-4-1301(1)(a).

STATEMENT OF THE CASE AND FACTS

On 08/26/2018, the Petitioner was arrested and charged in the case at hand with one count of Vehicular Eluding, in violation of C.R.S. 18-9-116.5; one count of a felony DUI, in violation of C.R.S. 42-4-1301(1)(a); one count of DUR, in violation of C.R.S. 42-2-138(1)(d); and one count of speeding, in violation of C.R.S. 42-4-1101(1).

On 05/22/19, the Petitioner appeared in Gilpin County District Court of Colorado, for the scheduled jury trial. Prior to beginning of the jury trial, the parties agreed

to a conditional resolution. (T. Tr. Pages 4-5) The Petitioner, through counsel, stipulated to waive a jury trial, proceed to a bench trial, at which time he also agreed to admit to all of the necessary elements, forming a sufficient factual basis to be found guilty beyond a reasonable doubt of the lesser offense of DWAI, in violation of C.R.S. 42-4-1301(6)(a)(11), and further stipulated to the admission of the blood-test results. (T. Tr. Pages 4-5) However, the Petitioner did not stipulate, or admit that he was convicted of three prior alcohol-related offenses, (T. Tr. Page 5, lines 6-18) but instead agreed to proceed to the next phase of the trial, where both parties mutually agreed for the prosecution to prove, the existence of three prior alcohol-related convictions, by the preponderance of evidence standard. (T. Tr. Pages 4-5) In exchange, the prosecution agreed to dismiss, and ultimately, did dismiss three other remaining counts. (T. Tr. Pages 8-9).

At the conclusion of the first phase of the criminal trial, the Court on the record had found the Petitioner

guilty beyond a reasonable doubt of DWAI offense, and at the conclusion of the second phase of the trial, the Court had found by the preponderance of evidence, that it is in fact Petitioner's fourth alcohol-related conviction, and elevated his DWAI conviction to a felony conviction.

The Petitioner timely ensued his appeal, where amongst other issues, he primarily argued that the existence of three necessary prior predicates, which elevates a DUI crime to a level of felony, are the essential element of the offense and not just simply a sentence enhancer, which must be proven by the prosecution beyond a reasonable doubt, and that the trial court committed a structural constitutional error, during a criminal trial, when assessed the existence of three prior alcohol-related offenses by the preponderance of evidence standard.

On 07/01/2021, in its unpublished opinion, the Colo. Court of Appeals ruled that since the Defendant waived his right to be tried by the jury, he also waived his right to an

application of beyond a reasonable doubt standard. See page 5 of the unpublished opinion. The Petitioner timely filed a petition for rehearing which was ultimately denied on 07/22/2021. Soonthereafter, the petitioner filed a timely Petition for Writ of Certiorari, in front of the Colorado Supreme Court, which ultimately, without an opinion, denied the Petition. (A copy of the Colorado Supreme Court's denial order is attached to this Petition as Appendix C). That's why the Petition for Writ of Certiorari in front of the U.S. Supreme Court has been ensued.

REASONS FOR GRANTING THE PETITION

1. Petitioner's choice to proceed to a bench trial, instead of a jury trial, in a criminal case, does not lowers/lessens the prosecution burden of proof, and does not constitute a waiver of application of beyond a reasonable doubt standard.

A. Standard of review

During the pendency of the Petitioner's appeal in Colorado Court of Appeals, Colorado Supreme Court issued a mandate in *Linnebur v. People*, 2020 CO 79M, agreeing with Linnebur that prior predicates in DUI case, which elevate the crime from a misdemeanor to a felony, is an element of the offense, and must be proven to a jury beyond a reasonable doubt. The Petitioner believes that *Linnebur's* case is applicable to the case at hand.

B. Discussion.

This case contains an issue of national importance, and warrants U.S. Supreme Court's intervention.

In re Winship, 397 U.S. 358, (1970), the United States Supreme Court's decision held that "Proof beyond a reasonable doubt, which required by the Due Process Clause in criminal trials, is among the " essentials of due process and fair treatment" required during the adjudicatory stage when a juvenile is charged with an act

that would constitute a crime if committed by an adult. Pp.
397 U.S. 361-368.

Petitioner's interpretation of the meaning of the context of the U.S. Supreme Court's decision in *Winship's* case, is that the due process clause of the fifth and fourtheenth amendments protects the accused against conviction except upon proof beyond a reasonable doubt of evey fact necessary to constitute the crime charged." It establishes this burden in all cases in all states.

It is Petitioner's position that prosecution's standard of proof in a criminal trial, does not differentiate based on the type of the trial, whether it is a bench or a jury trial.

Sometime in 2020, Colorado Supreme Court interpreted the ambiguity within the language of C.R.S. 42-4-1301, and concluded that prior alcohol-related factor, which elevates the level of the DUI offense, is an actual element of the offense, which must be proven to a jury beyond a reasonable doubt, and not just a sentence

enhancer, which must be proven by the preponderance of evidence. *Linnebur v. People*, 2020 CO 79M

In its unpublished opinion, the Colorado Court of Appeals acknowledged the retroactive applicability of *Linnebur's* decision to the case at hand, nevertheless, improperly concluded that by proceeding to a bench trial, the Defendant waived the application of the reasonable doubt standard. *See* page 5 of the unpublished opinion.

Furthermore, it is unclear from reading the decision in *Linnebur's* case whether the Colorado Supreme Court meant that the prosecution's (beyond a reasonable doubt) burden of proof only applicable in jury trials.

Additionally, at the time of the commencement of the bench trial, the courts across the Colorado treated the assessment of the prior alcohol-related convictions as a sentence enhancer and not as an element of the offense. Only after the interpretation of C.R.S 42-4-1301 in *Linnebur's* case, it became apparent that such factor is an

element of the offense and must be proven to a jury beyond a reasonable doubt. Therefore, the Defendant at the time was unable to waive a non-existent rule of law.

Moreover, the Court of Appeals improperly concluded that the Petitioner entered into a plea agreement. The Petitioner has never changed his not guilty plea to a guilty plea.

The conditional agreement that he has entered into required him to go to a bench trial, with stipulations to admit that he drove the motor vehicle while his ability to operate was impaired to a slightest degree, and the judge was required to make a finding of guilt beyond a reasonable doubt, which he ultimately did, before proceeding to a second phase of the trial. (The entire transcript from a bench trial is attached to this Petition as Appendix F)

Assuming arguendo that the Court of Appeals was correct in its finding that the Petitioner entered into a plea agreement, by pleading guilty to a charge of DWAI, the

allegation which the Petitioner disputing and firmly assuring this Court that it never occurred, nevertheless, it is undisputable factor that the Petitioner did not stipulate to have been convicted of three prior alcohol-related offenses, and therefore, this statutory important element, in Petitioner's opinion must be proven to the court, or a jury, beyond a reasonable doubt. Therefore, both, the highest and lower appellate courts of Colorado egregiously erred in its findings.

Intervention of this Court is truly important to the nation, so that the courts within the state of Colorado, and the courts across the United States will treat the criminal defendants , in criminal prosecutions equally/uniformaly, otherwise, if Colorado Supreme Court's decision will be allowed to stand, it will deter criminal defendants from trying their cases in front of the judges.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, based on the foregoing reasons and authorities, Mr. Novitskiy respectfully requests that this Court grants the Petition and subsequently reverse the improperly acquired felony conviction, and remands the case for a new trial with directions to assess prior predicates beyond a reasonable doubt.

Respectfully submitted by the Petitioner Pro Se
Sergey Novitskiy 03/29/2022

CERTIFICATE OF SERVICE

I, Sergey Genadievich Novitskiy, declare under the
penalty of perjury, that the true copy of the Petition, along
with appendices, with postage prepaid, were mailed
on 03/29/2022, to the following parties:

Clerk of the U.S. Supreme Court
1 First Street, NE
Washington, DC 20543

Phillip J. Weiser, Colo. Att. General,
1300 Broadway, 10th Floor
Denver, CO 80203

The Petitioner Pro Se
Sergey Novitskiy

CERTIFICATE OF COMPLIANCE

SERGEY GENADIEVICH NOVITSKIY

Petitioner

vs.

STATE OF COLORADO

Respondent.

As required by Supreme Court Rule 33, I, sergey Genadievich Novitskiy, certify the the Petition for Writ of Certiorari contains 2,170 words.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 03/29/2022.

The Petitioner Pro Se
Sergey Novitskiy