

21-7986  
IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.  
FILED

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INMATE INITIALS SAG

CASE#: \_\_\_\_\_

IN RE: STEPHEN GOSCH

PETITIONER.  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

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SUPREME COURT, U.S.

### **QUESTIONS PRESENTED FOR REVIEW**

1. Did the state court violate the petitioner's right to due process of law as guaranteed by the Fourteenth Amendment where the prosecution failed to timely disclose evidence to the defense?
2. Did the state court violate the petitioner's right to due process of law as guaranteed by the Fourteenth Amendment where the state trial court admitted inflammatory evidence at trial over the defendant's objections?
3. Did the state court violate the petitioner's right to due process of law as guaranteed by the Fourteenth Amendment in giving an erroneous instruction to the jury at trial?

## **PARTIES**

Stephen Gosch, petitioner in this court

State of Florida, respondent in this court.

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### **TABLE OF AUTHORITIES**

*Gosch v. State*, 252 So. 3d 1168 (1<sup>st</sup> DCA, 2017)

*Gosch v. State*, 2020 Fla. App. LEXIS 7009 (1<sup>st</sup> DCA, 2020)

*Cone v. Bell*, 556 U.S. 449, 472, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009)

*Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)

*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)

*Straight v. State*, 397 So. 2d 903 (Fla. cert. den., 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981)

*Keen v. State*, 775 So. 2d 263 (Fla. 2000)

*Bozeman v. State*, 698 So. 2d 629 (Fla. 1997)

*Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)

*Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973)

*Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)

*Lesko v. Owens*, 881 F. 2d 44, 50 (3<sup>rd</sup> Cir. 1988)

### **OFFICIAL CITATION TO OPINION ON REVIEW**

The case under review is reported at *Gosch v. State*, 47 Fla. L. Weekly D568(a) (Fla. App. 1<sup>st</sup> DCA, 2022).

### **PRIOR PROCEEDINGS**

Petitioner's direct appeal of his conviction and sentence were affirmed. *Gosch v. State*, 252 So. 3d 1168 (1<sup>st</sup> DCA, 2017) The petitioner previously fled a motion for postconviction relief which was denied by the state court and this denial was affirmed. *Gosch v. State*, 299 So. 3d 355 (1<sup>st</sup> DCA, May 21, 2020).

### **BASIS FOR INVOKING JURISDICTION**

The order on review was rendered by the Florida First District Court of Appeal on March 2, 2022. The jurisdiction of the Court is conferred and invoked pursuant to 28 U.S.C. § 1651(a). Petitioner seeks a writ of certiorari directing his immediate and unconditional release from custody. This case involves egregious violations of the petitioners constitutional rights which the state courts have unjustifiably refused to rectify. Wherefore, petitioner tenders the instant petition for writ of certiorari.

### **CONSTITUTIONAL PROVISIONS INVOLVED**

The Due Process Clause of the Fourteenth Amendment states: "[n]o State shall ... deprive any person of life, liberty, or property without due process of law." U.S. CONST. AMEND. XIV.

### **STATEMENT OF THE CASE AND FACTS**

Petitioner, a prisoner in state custody, was charged with and convicted of numerous offenses in state court. Petitioner's convictions and sentences were affirmed on direct appeal. See *Gosch v. State*, 252 So. 3d 1168 (1<sup>st</sup> DCA, 2017). Petitioner later unsuccessfully sought postconviction relief in state court. *Gosch v. State*, 2020 Fla. App. LEXIS 7009 (1<sup>st</sup> DCA, 2020).

At trial the petitioner's wife, Tricia Gosch, testified that at the time of the events in this case, the son Kevin (the alleged victim) was under the age of 18. Tricia Gosch testified that she traveled frequently for work purposes. She further testified that she never observed the petitioner and Kevin engage in any inappropriate behavior.

Kevin testified at trial that on the evening in question, the petitioner met a woman named Beverly and invited her over to his house for a drink. Kevin testified that the petitioner and Beverly left the room and when he went to see what the pair were doing, Kevin observed them undressing. Kevin then went to his own bedroom to play a computer game. Petitioner, then allegedly entered Kevin's bedroom and asked him to com "fuck this bitch." Kevin testified that he complied and the trio engaged in various sex acts.

Kevin testified that a few days later, he and the petitioner were drinking. Kevin further testified that he got sick during this drinking bout and went to the bathroom and vomited. Kevin testified that the petitioner came into the bathroom and rubbed his hands over his body. Kevin further testified that the petitioner later digitally penetrated him and then had anal sex with him. Kevin stated that he passed out during sex and when he woke up the next morning in bed, the petitioner was fondling him. Kevin later presented these allegations to his mother and law enforcement was contacted. Investigator Paul Osborn of the Tallahassee Police Department later sent text messages to the petitioner from Kevin's phone pretending to be Kevin. At trial, screen shots of these text messages were admitted into evidence. Investigator Osborn also interviewed the petitioner and portions of this interview were published at

trial.

At trial the petitioner testified in his own defense and he denied any inappropriate behavior with Kevin.



## ARGUMENT

### **PETITIONER IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION AND LAWS OF THE UNITED STATES**

#### **I.**

As his first contention in support of the instant petition, Mr. Gosch asserts that his conviction was obtained through unconstitutional means. Specifically, Mr. Gosch asserts that the prosecution violated the Fourteenth Amendment to the United States Constitution, by admitting screen shots of text messages sent between the petitioner and Investigator Paul Osborn.

At trial, the prosecution introduced the text messages in question during its case-in-chief. Defense counsel interposed a timely objection, stating that these text messages had not been previously disclosed to the defense. The trial court overruled he objection.

The Fourteenth Amendment to the United States Constitution provides that "no person shall be deprived of life, liberty, or property without due process of law." "When the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the 14<sup>th</sup> Amendment." *Cone v. Bell*, 556 U.S. 449, 472, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009). "Although the State is obliged to prosecute with earnestness and vigor, it is as much its duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)). In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States Supreme Court held that when a State suppresses evidence favorable to an accused that is material to guilt or to punishment, the State violates the defendant's right to due process, "irrespective of the good faith or bad faith of the prosecution." *Id.*, at 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215.

In this case, defense counsel specifically placed the state trial court on notice that the

prosecution had failed to disclose to the defense text messages which the prosecution had held from prior to the trial. By failing to timely disclose the evidence in question, the prosecution impeded the petitioner's ability to subject the prosecution's case to meaningful adversarial testing. The petitioner suffered great prejudice from the prosecution's discovery violation as the text messages were introduced in the midst of trial, essentially ambushing the petitioner. Upon trial counsel's timely objection, the state trial court should have granted the defendant a mistrial due to the prosecution's impermissible actions.

The conduct of the prosecution in this action is inexcusable and it deprived the petitioner of his right to a fair trial. The state trial court erred in not sustaining the petitioner's timely objection. This resulted in the petitioner's unconstitutional conviction. This court should therefore grant the instant petition and command that the petitioner be released forthwith.

## II.

As his second contention, the petitioner asserts that the state court erred in admitting a portion of the petitioner's video-taped police interview wherein it was revealed that on one occasion the petitioner allegedly masturbated in Kevin's presence. The prosecution asserted that this incident was admissible to show the nature of the relationship between the petitioner and the minor victim. The state trial court allowed this evidence to be presented to the jury, ruling that the evidence of this incident was inextricably intertwined with the remaining evidence.

Petitioner contends that the trial court erred in admitting this evidence over objection. Assuming an inadmissible statement is inextricably intertwined with other statements in a recorded interview, the normal procedure would be to redact or exclude that part of the interview. That procedure was not followed in this case.

Petitioner contends that the evidence concerning his alleged masturbation in the victim's presence was unfairly prejudicial and therefore inadmissible. Under section 90.403, Fla. Stat., evidence

is inadmissible if it is unfairly prejudicial. The evidence in question impermissibly suggested that the petitioner had committed an uncharged bad act. The erroneous admission of this sort of evidence is presumptively harmful. See *Straight v. State*, 397 So. 2d 903 (Fla. cert. den., 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981)). Evidence that suggests a defendant has committed other crimes or bad acts can have a powerfully negative effect on the results at trial.

The prejudice sustained by the petitioner cannot be overstated. The prosecution's evidence in this case can be properly characterized as weak. There was no physical evidence corroborating the alleged victim's allegations. The petitioner did not confess or otherwise make any incriminating statements and the remainder of the state's evidence was far from overwhelming. It is highly likely that he jury relied on this improper evidence to convict the petitioner thereby depriving him of due process of law. See *Keen v. State*, 775 So. 2d 263 (Fla. 2000); *Bozeman v. State*, 698 So. 2d 629 (Fla. 1997). Federal law is clear on this point. When it must be said that the probative value of such evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission, then use of such evidence by a state may rise to the posture of fundamental fairness and due process of law. *Lesko v. Owens*, 881 F. 2d 44, 50 (3<sup>rd</sup> Cir. 1988). The evidence's probative value was so conspicuously outweighed by its inflammatory content, as to violate the petitioner's constitutional right to a fair trial. In light of these unconstitutional acts, the petitioner is entitled to a writ of certiorari directing his immediate and unconditional release from custody.

### III.

As his third contention, the petitioner asserts that the state trial court violated his constitutional rights in giving the jury an erroneous instruction.

The petitioner was charged with sexual battery on a child between the ages of 12 and 18 by a person in familial or custodial authority. Count 1 charged penetration of the victim's anus by an object, the petitioner's finger. Count 2 charged union or penetration of the victim's anus by the petitioner's

penis. Under Florida law, when sexual battery involving a sex organ is charged, the prosecution may prove its case by either "union" or "penetration." However, the crime of sexual battery by an object is committed only if penetration is proved. See § 794.011, Fla. Stat.

In this case the jury was instructed as to Count I n sexual battery by a person in familial or custodial authority as follows:

Sexual battery means the anus ... was penetrated by an object. The definition of an object includes a finger.

Under Florida law, "an object includes a finger. Union means contact."

The error in this instruction was repeated in the instruction on the lesser offense of sexual battery which read:

"...An object includes a finger. Union means contact."

Petitioner points out, however, that even though Count II charged sexual battery by penile-anal sex only, the jury instruction on this count also included the language that "an object includes a finger. Union means contact." By instructing the jury on an offense that was materially different from the one charged, the jury returned a verdict for an offense that was not alleged in the charging information filed in this case. This served to deprive the petitioner of the right to be put on notice of the charges against him. To obtain federal relief for an erroneous jury instruction, a petitioner must show that the instruction by itself so infected the entire trial that the resulting conviction violates due process. See *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973); see also *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)

In this case, the petitioner was charged with a specific offense in Count II, however, the jury was instructed that they could convict the petitioner of an offense with which he had not been charged. This constitutes a violation of due process of law and this court should grant the instant petition,

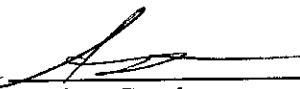
commanding the petitioner's immediate release from custody.

**CONCLUSION**

The issues raised in this petition were fairly and adequately presented to the state court, however, the state courts unjustifiably refused to remedy these errors. 'This Court should therefore grant the instant petition.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the Foregoing petition has been furnished to the Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050 via U.S. Mail on this 13<sup>th</sup> day of May, 2022.



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**APPENDIX**  
(Opinion of Florida First District Court of Appeal)