

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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HERBERT TRAVER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent,

—◆—  
**On Petition for Writ of Certiorari  
to the Pennsylvania Supreme Court**

—◆—  
**PETITION FOR WRIT OF CERTIORARI**

—◆—  
Paul P. Ackourey Esq.  
*Counsel of Record*  
Attorney ID No.: PA-38506  
Ackourey & Turel, P.C.  
9 Marion Street  
Tunkhannock, PA 18657  
[Ackoureyandturel@gmail.com](mailto:Ackoureyandturel@gmail.com)  
570-836-3600  
*Attorney for Petitioner*

## I. Questions Presented

A. Did the prosecutor in the trial before the lower court engage in intentional misconduct by employing a known falsehood when questioning the Petitioner on cross examination, thereby depriving him of a fair trial in violation of his Due Process rights under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution?

B. Assuming, arguendo misconduct, was the intent of the prosecutor such as to deny Petitioner his right to a fair trial?

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### III. LIST OF PRIOR COURT PROCEEDINGS

1. On June 27, 2022, the Supreme Court of Pennsylvania issued an Order denying the Defendant's Petition for Allowance of Appeal. Said Order is found in Commonwealth v. Traver filed to No. 49 MAL 2022. (Pet.App. 1a).
2. On January 6, 2022 the Superior Court of Pennsylvania issued a Panel Decision in Commonwealth v. Traver, filed to No. 382 MDA-2021. In said Opinion, the denial of Petitioner's Motion to Bar Re-trial on the grounds of double jeopardy was affirmed. (Pet.App. 2a).
3. On April 16, 2021 the trial court (Court of Common Pleas of the 44<sup>th</sup> Judicial District,

Wyoming County Branch, Pa.) issued an Opinion and Order (order dated March 11, 2021) after remand with instructions from the Superior Court. In said Opinion, the trial court denied Defendant's Motion to Bar Re-Trial on the grounds of double jeopardy. (Pet.App. 35a).

4. On July 21, 2020 the Superior Court of Pennsylvania issued a Panel Decision on Petitioner's Request for Reconsideration in Commonwealth v. Traver, filed to No. 1722-MDA-2019. In said Opinion, the Superior Court's prior order of May 20, 2020 was vacated and the case remanded to the trial court with instructions. (Pet.App. 52a).
5. On May 20, 2020, the Superior Court of Pennsylvania issued a Panel Decision in

Commonwealth v. Traver, filed to No. 1722-MDA-2019. In said Opinion, the trial court's order denying Petitioner's Motion to Dismiss under double jeopardy was affirmed. (Pet.App. 65a).

6. On October 10, 2019, the trial court (Court of Common Pleas of the 44<sup>th</sup> Judicial District, Wyoming County Branch, Pa.) issued an Opinion and Order denying Petitioner's Motion to Dismiss for violation of double jeopardy. (Pet.App. 80a).

#### **IV. PETITION FOR WRIT OF CERTIORARI**

The Petitioner, Herbert Traver, by and through Paul P. Ackourey, Esquire, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the Pennsylvania Supreme Court denying Petitioner's Request for Allowance of Appeal from the decision of the Pennsylvania Superior Court dated January 6, 2022 and filed to No. 382-MDA-2021, which denied Petitioner's Motion to Bar Re-trial on the grounds of double jeopardy. (Pet.App. 1a).

#### **V. OPINIONS BELOW**

On June 27, 2022, the Pennsylvania Supreme Court issued an Order denying a Petition for Allowance of Appeal filed on behalf of the Petitioner, Herbert Traver. (Pet.App. 1a). The action of the

Pennsylvania Supreme Court effectively left untouched the Opinion and Order of the Superior Court of Pennsylvania issued on January 6, 2022 and filed to Commonwealth v. Traver, No. 382-MDA-2021. (Pet.App. 2a). Its Opinion upheld the trial court's denial of Defendant's Motion to Bar Re-trial under the Double Jeopardy provisions of both the Federal and Commonwealth Constitutions, finding the prosecutor's cross examination of petitioner was neither an intentional act to deprive the petitioner of a fair trial nor was it done in reckless disregard of the risk that confronting him with his pre-arrest silence would violate his rights under the 5th Amendment of the United States constitution. (Pet.App. 2a).

## **VI. JURISDICTION**

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257(a), having timely filed this Petition for Writ of Certiorari within ninety (90) days from the denial of his Petition for Allowance of Appeal in the Supreme Court of Pennsylvania.

## **VII. CONSTITUTIONAL AND STATUTORY PROVISIONS**

United States Constitution, Amendment V:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a 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

put twice 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 Constitution, Amendment XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or amenities of citizens of the United States; Nor shall any state deprive any person of life, liberty, or property, without Due Process of law; Nor deny to any person

within its jurisdiction the equal protection of the laws.

### **VIII. STATEMENT OF THE CASE**

On May 20, 2019, Trial commenced in the Court of Common Pleas of the 44<sup>th</sup> Judicial District, Wyoming County, PA against the Petitioner based upon an amended information charging him with rape of a Child, Corruption of Minors, and two (2) counts of Indecent Assault. Trial centered around allegations lodged against the Petitioner by his step-granddaughter, D.R. At the time of Trial, D.R., then age seventeen (17), testified that Petitioner sexually assaulted her on multiple occasions when she visited the family farm between August 10, 2012 and August 10, 2014. She alleged a forcible rape occurring in the first (1<sup>st</sup>) week of July, 2014. In support of their case, the prosecution also called, as

witnesses, the alleged victim's brother to testify as to inappropriate comments made by Petitioner to the victim; Trooper Sean Cooney, the principal investigating officer; and Veronique Valliere, a psychologist who testified as an expert regarding possible reasons for the delay by child victims in reporting complaints of sexual abuse. In this case, more than two (2) years lapsed from the alleged dates of abuse and a report to law enforcement.

In response, a series of defense witnesses were called, all testifying to Petitioner's good character. Albi witnesses were called to testify that Petitioner was away on vacation during the first (1<sup>st</sup>) week of July, 2014 and not at the family farm as stated by the alleged victim. Petitioner also called medical witnesses who testified as to his clinical blindness, his medications and his physical limitations.

The last individual to testify in the proceeding was Petitioner, who related that he was seventy-two (72) years old having been married for fifty-four (54) years to his wife, Beverly. His past employment history and medical issues were discussed. He further testified to his family relationships and in particular his relationship with the complaining witness, D.R. His testimony further corroborated Albi defense witnesses. Finally, he denied ever touching the complaining witness, D.R., in a sexual manner. He specifically denied touching her breasts, vagina and adamantly denied ever having sexual intercourse with her.

The first (1<sup>st</sup>) question asked of Petitioner on cross examination by the prosecutor was as follows:  
Q. Good afternoon, sir. The things you testified to, you never touched Destiny's breasts, you never

touched her vagina, and you never had sexual intercourse with her, and you were contacted by Trooper Cooney in February, 2016, you never told them that, did you? Petitioner responded "You never asked if I ever touched her." In his next question, Senior Deputy Attorney General Bernard Anderson asked, "Because you never called them back, did you?" With that question, defense counsel objected and moved for a sidebar asking for a mistrial arguing that the Commonwealth intentionally violated Petitioner's rights under the 5<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution as well of provisions of the Pennsylvania Constitution.

During argument before the Trial Court on Petitioner's Motion for Mistrial, Petitioner argued, in part, that the question asked by the prosecutor on cross examination was specifically designed to

mislead the jury. Counsel for Petitioner noted that in Pre-Trial Discovery it was learned that in response to Trooper Cooney's attempt to interview the Petitioner, the trooper received a call from Petitioner's then counsel attempting to schedule a time and date for Petitioner to answer the trooper's questions. Quoting from Discovery, Petitioner's trial counsel noted the following report authored by Trooper Cooney

"I then received a call from Wyoming County Public Defender, Stephen Franko, due to him representing suspect one (1). We attempted to set up interviews, but each time the interview did not occur due to scheduling conflicts. The report will be supplemented once I have contacted suspect one (1). On August 17, 2017, I attempted to contact Attorney Franko on his cell phone regarding suspect one (1) and suspect two (2) being interviewed and both attempts were met with negative results. I left voice messages for my call to be returned. If Attorney Franko fails to schedule an

interview in a timely fashion, the investigation will be submitted to the Wyoming County District Attorney, Jeffrey Mitchell, for review. This report will be supplemented pending contact with Attorney Franko."

When asking his questions on cross examination, it was argued that the prosecutor was fully aware that in fact the trooper's call was returned by Petitioner's then counsel. The prosecutor was fully aware that attempts had been made to schedule an interview through counsel and that it was not the Petitioner, but scheduling conflicts between the trooper and Attorney Franko that prevented such an interview. Petitioner's request for mistrial was granted.

On the rescheduling of Trial, Petitioner filed a Motion to Dismiss alleging a violation of the Double Jeopardy Provisions found in both the

Commonwealth and United States Constitutions. Following argument on said Motion, the Trial Court issued an opinion and Order of October 10, 2019 denying the Double Jeopardy Motion. (Pet.App. 80a). The Court's Opinion and Order were affirmed on Appeal before the Superior Court by decision of May 20, 2020 and filed to Commonwealth v. Traver, 1722-MDA-2019. (Pet.App. 65a). Upon reconsideration, the Superior Court of Pennsylvania vacated its May 20, 2020 Order and remanded the case to the Trial Court for further hearings. Commonwealth v. Traver, 1722-MDA-2019. (Pet.App. 52a). At a hearing conducted before the Trial Court on March 3, 2021, Trooper Cooney testified and stated that his five (5) page report of the attempt to interview the Petitioner were accurate. (Pet.App. 35a). He stated that scheduling

conflicts involving both his schedule as well as the schedule of Petitioner's then counsel prevented such an interview. He confirmed that his five (5) page report regarding the attempted interview was provided to and reviewed with Senior Deputy Attorney Anderson prior to trial. (Pet.App. 47a).

During argument at the same hearing, the prosecutor, Bernard Anderson, Esquire informed the Trial Court that he "absolutely intentionally" asked the Petitioner questions on cross-examination regarding Petitioner's failure to schedule an interview. Petitioner argued to the trial court that as a consequence it was clear that the prosecutor was attempting to mislead the jury with a known falsehood. On April 16, 2021, the trial court, following hearing, denied Petitioner's Motion to Dismiss on Double Jeopardy grounds. (Pet.App.

35a). Thereafter, an Appeal was filed with the Superior Court and on January 6, 2022, the Superior Court of Pennsylvania issued a Panel Decision in the case of Commonwealth v. Traver, 382-MDA-2021 denying Petitioner's Motion to Bar Re-Trial on the grounds of Double Jeopardy. (Pet.App. 2a). A Petition for Allocator was filed with the Pennsylvania Supreme Court and denied on June 27, 2022. (Pet.App. 1a). This Petition for Writ of Certiorari follows.

## **IX. REASONS FOR GRANTING THE WRIT**

The Double Jeopardy Clause of the Fifth (5<sup>th</sup>) Amendment protects a defendant from repeated prosecution for the same offense. United States v. Dinitz, 424 U.S. 600, 606, 96 S.Ct. 1075, 1079, 47 L.Ed. 2d 267 (1976). The standard of analysis to be

applied to re-trial under the Double Jeopardy Provision hinges upon the manner in which the initial trial was terminated. When trial is terminated over the defendant's objection, this Court has applied a "manifest necessity" standard. See: Arizona v. Washington, 434 U.S. 497, 509, 98 S.Ct. 824, 832, 54 L.Ed. 2d 717 (1978). In cases where a mistrial is declared at the request of the defendant, this Court has applied a different standard. While defendant enjoys a right to have his trial completed by the first jury impaneled, he is generally deemed to have waived that right by requesting a termination of the proceedings. This Court has recognized a narrow window where the Double Jeopardy Clause would serve as a bar to re-trial where a defendant moved to terminate a proceeding. This Court has held that the Double

Jeopardy Clause protects a defendant against governmental actions intended to provoke mistrial requests thereby subjecting the defendant to the substantial burden imposed by multiple prosecutions. United States v. Dinitz, 424 U.S. 600, 611, 96 S.Ct. 1075, 1081, 75 L. Ed. 2d 267 (1976). In discussing a prosecutor's obligation at trial, this Court stated, "while he may strike hard blows, he is not at liberty to strike foul ones." United States v. Figueroa, 900 F.2d 1211, 1215 (8<sup>th</sup> Cir. 1990), citing Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). A prosecutor, seeking a conviction, has a special duty as a government agent to ensure his actions at trial further the interests of justice. See United States v. O'Connell, 841 F.2d 1408, 1428 (8<sup>th</sup> Cir. 1988).

In Oregon v. Kennedy 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), this Court has held that for the purposes of the Double Jeopardy Clause, re-trial is barred where the prosecutor took actions designed to provoke the Defendant into moving for mistrial.

In the case at bar, it is clear that the prosecutor was aware, prior to trial that the investigating officer had attempted to interview the Petitioner, pre-arrest. He was aware that arrangements were attempted between said officer and Petitioner's then-counsel to schedule a convenient time and date for such interview to take place. Finally, he was aware that the failure to interview the Petitioner was not a product of Petitioner's reluctance to speak but rather an inability of both the officer and defense counsel to schedule a meeting. Nonetheless, in his

first question on cross-examination he attempted to convey to the jury the impression that Petitioner now claiming innocence, failed to do so pre-arrest. In granting Petitioner's Motion, the trial court recognized the prosecutor's questions had the unavoidable effect of tainting the jury. The prosecutor's preparedness in having case law at hand when the motion for mistrial was made at sidebar reflects the fact that the prosecutor was aware that his questions would provoke a motion for mistrial. The fact that the prosecutor's actions were intentional is reflected by his admission at argument before the trial court on remand from the Superior Court of Pennsylvania, wherein the prosecutor said he absolutely intentionally asked questions giving rise to the mistrial motion. (Pet.App. 35a). Under Oregon v. Kennedy 456 U.S. 667, 102 S. Ct. 2083, 72

L.Ed.2d 416 (1982), this intentional prosecutorial act designed to provoke a mistrial triggers the Double Jeopardy Provisions found in the 5<sup>th</sup> Amendment of the United States Constitution applicable to the States through the 14<sup>th</sup> Amendment.

## X. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

BY: 

Paul P. Ackourey, Esq.  
*Counsel of Record*  
Attorney ID No.: PA-38506  
Ackourey & Turel, P.C.  
9 Marion Street  
Tunkhannock, PA 18657  
[Ackoureyandturel@gmail.com](mailto:Ackoureyandturel@gmail.com)  
570-836-3600

*Attorney for Petitioner*