23-5833

No. _____

_____

In the Supreme Court

of the United States

Sean William Roulo – Petitioner

VS.

State of Minnesota – Respondent

Minnesota Court of Appeals

Petition for Writ of Certiorari

Sean William Roulo
OID 263200
1101 Linden Lane
Faribault, MN 55021

I. Questions Presented

1. Was the prosecutor's deliberate refusal to communicate with petitioner after filing formal charges, including withholding the court's summons and the required fair notice of the charges contained in the complaint, an act of outrageous misconduct and a violation of the rights which must be accorded petitioner under the 14th Amendment due process clause? Did these acts and omissions of the prosecutor also directly cause, or contribute to a denial of petitioner's 6th Amendment right to be represented by counsel of his choice?
2. Did Petitioner's convictions resulting from charges added to the Third Amended Complaint occur in violation 14th Amendment Due Process right to advance notice of the specific charges he faced?
3. After hearing witness testimony followed by the prosecutor's admission there wasn't "any evidence" to support charges in counts I & II, the trial court granted the prosecutor's mid-trial motion to drop those charges from the complaint. Did the trial court's action granting the prosecutor's motion constitute an acquittal on the merits for those charges, and if so, did petitioner's continuing jeopardy and later convictions on count's I & II in the 3rd Amended Complaint violate the Double Jeopardy Clause of the 5th Amendment and/or the Equal Protection clause of the 14th Amendment?

4. Do petitioners convictions in this case require reversal because no rational trier of fact could find the evidence in this case met the Due Process proof of guilt beyond a reasonable doubt standard?

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Parties

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

Related Cases

State of Minnesota v. Sean Roulo (St. Louis County District Court # 69DU-CR-20-1977)

Sean William Roulo v. State of Minnesota (MN Court of Appeals #A21-1223)

V. PEITION FOR WRIT OF CERTIORARI

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

VI. OPINIONS BELOW

FROM MN State Courts:

The opinion of the highest state court to review the merits appears at Appendix A and is unpublished.

The Opinion of the Minnesota Supreme Court Appears at Appendix B and is unpublished.

VII. JURISDICTION

FROM MN STATE COURTS:

The date on which the highest state court decided petitioner's case was April 26, 2023 – On this date the Minnesota Supreme Court issued a final order denying Petitioner's petition for further review. A copy of that decision appears at Appendix B

An extension of time to file the petition for a writ of certiorari was granted to and including August 24th, 2023 on June 7th, 2023 by Justice Kavanaugh in application No. 22A1058. The Jurisdiction of this Court is invoked under 28 U.S.C §1257(a)

VIII. Constitutional Provisions Involved

United States Constitutional, 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 subjected 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, without due process of law; nor shall private property be taken for public use, without just compensation

United States Constitutional, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public 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 witnesses 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 XIV; Section 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 rights or privileges 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 to any person within its jurisdiction the equal protection of the laws.

IX. Statement of the Case

Case Summary

Petitioner pleads through this petition that his 3 MN state convictions were secured by the State of Minnesota in violation of; 1) 14th Amendment Due Process principals of Notice and Fundamental Fairness, proof beyond a reasonable doubt standards and equal protection of MN laws, and 2) secured in violation of his 6th Amendment right to be represented by an counsel of his choice and 3) secured in violation of petitioner's 5th Amendment right to be protected against being twice placed in jeopardy for the same offense.

The two alleged victims in this case made accusations of criminal sexual conduct against petitioner. The prosecutor filed charges in the present case without first insuring he had sufficient evidence to convict. Petitioner was acquitted on all of the charges he faced in the criminal complaint (App. C) in effect when jeopardy attached at trial.

To win convictions in the present case the prosecutor refused to meet his obligation to protect Petitioner's right to a fair notice of the charges and a fair trial. The prosecutor's pre-trial tactics were designed to deliberately manipulate the trial process to give himself an unfair advantage by causing the complete and irreversible pre-trial destruction of petitioner and petitioner's ability to control, prepare for, and mount a meaningful defense with counsel of petitioner's choice.

After the prosecutor's key witnesses had testified, it became evident no jury would convict petitioner on the charges the prosecutor had filed. Realizing his dire predicament of losing the case after causing petitioner's pretrial destruction, the prosecutor enlisted the assistance of petitioner's public defender to constructively amend the complaint adding all new charges which, as the prosecutor described it, would "conform" the charges in the complaint to match the changing testimony of his witnesses.

To win conviction in a case he brought to trial without sufficient evidence to convict, the prosecutor repeatedly violated MN rules of criminal procedure and rules of professional conduct. With silent acquiescence from defense counsel, the prosecutor misrepresented material facts about his evidence and the applicable rules and law forbidding mid-trial constructive amendments to a criminal complaint.

Case History

After more than 20 months investigating the allegations of misconduct made against petitioner, St. Louis County Sherriff's investigators lacked sufficient evidence to justify petitioner's arrest or the filing of criminal charges. The only direct evidence the state had that Petitioner committed a crime was contained in the unsubstantiated accusations from the two alleged victims, both of whom had compelling reasons to be biased against petitioner as it had been agreed months earlier petitioner and their mother would be separating and divorcing (T. 782).

After waiting almost 2 years for the Sherriff's criminal investigation to conclude, Petitioner relocated to Florida. Without any new evidence in the case the prosecutor saw an unfair advantage in Petitioner's absence from the state and he filed charges when he knew he lacked probable cause or sufficient evidence.

The accusations of sexual misconduct the two alleged victims made to law enforcement were implausible and inconsistent. The allegations would end up either changing at trial or they would be rejected by the jury.

The trial court impermissibly the prosecutor's motion to constructively amend the complaint on the 5th day of trial, on the day the defense planned on delivering closing arguments to the jury. (Third Amended Complaint – 4/20/2020 – Appendix D).

Granting the prosecutor's motion to add additional and different charges to the complaint violated court rules, statutes, common law precedents and U.S. and M.N. constitutional provisions established to insure petitioner's right to receive fair notice of the precise charges he faced and not to be placed in jeopardy twice for the same offenses. Petitioner argues he was wrongfully convicted of the 3 charges added to the 3rd Amended Complaint on the 5th day of trial in this petition and seeks reversal.

Direct Appeal

After his conviction, the realities of petitioner's imprisonment included COVID-19 cell lockdowns, law library closures, and arbitrary rules established by prison law library staff

which limited his meaningful access to law library resources. These realities negatively impacted petitioner's ability to create and timely file his direct appeal briefs. Under these constraints imposed by the MN Department of Corrections, Petitioner was unable to raise and plead all the issues with his convictions in his direct appeal.

Petitioner motioned the MN Court of Appeals and provided evidence to of these constraints affecting his ability to timely prepare his appeal briefs but was refused a final filing extension. Petitioner did however timely file a Pro Se direct appeal brief (Appendix E) on 7/18/22, squarely pleading numerous issues.

This Pro Se appeal brief was accepted and filed by the MN Court of Appeals and was not returned to petitioner. Despite accepting this pro se brief for filing the MN Appeals Court completely ignored the issues petitioner squarely raised, labeling the brief as 'incomplete' as its only reasoning. Petitioner's brief *was* timely filed and accepted by the MN Appeals Court clerk as separately evidenced by the 20-page Reply brief filed by the MN Attorney General's office (Appendix F) and accepted by the MN Appeals Court, and by petitioner's Response briefs (App. G & H) (Petitioner's Part II brief (app. H) was stricken from the record).

A Minnesota Appellate Public Defender was assigned to represent petitioner as in Minnesota is required by law. However, this attorney independently filed an amicus curiae style brief without petitioner's review, permission or consent and filed it against his written instructions. This Appellate attorney acted more like a 'friend of the court'

representing more the interests of the state rather than petitioner's interests. Under identical circumstances, this Court has held such conduct from appellate counsel is constitutionally ineffective.

Petitioner filed a motion to the MN Supreme Court (Appendix I) raising these issues with the appellate defense counsel's conduct and ineffectiveness requesting the MN Supreme Court to allow him to restart the appeal process and be assigned new appellate counsel. Petitioner's motion was denied.

Petitioner timely filed a petition for further review to the MN Supreme Court, but the petition was denied (App. B) without comment in their Order issued April 26, 2023.

Petitioner faces the identical issues of lack of effective counsel and lack of meaningful law library access in preparing this petition and prays this Court will considers these limitations construe this pleading liberally.

Issues

Question #1

Was the prosecutor's deliberate refusal to communicate with petitioner after filing formal charges, including withholding the court's summons and the required fair notice of the charges contained in the complaint, an act of outrageous misconduct and a violation of the rights which must be accorded petitioner under the 14th Amendment due process clause? Did these acts and

omissions of the prosecutor also directly cause, or contribute to a denial of petitioner's 6th Amendment right to be represented by counsel of his choice?

While living in Florida Petitioner was telephoned from a friend living in Duluth, MN who advised him the prosecutor filed charges in the present case. Petitioner immediately contacted the prosecutor in this case by telephone requesting *only* to be served the summons and complaint and specifically informing the prosecutor that he was not, and never was, a fugitive from justice.

In a deliberate plan to hide the trial court's summons and complaint the prosecutor refused to take or return Petitioner's call. The voicemail Petitioner left requesting the prosecutor to provide service of the summons and complaint was admitted at trial and was played for the jury.

The prosecutor deliberately refused to communicate or assist with service of the court's summons and complaint so that petitioner would be instead served with a warrant for his arrest. This would allow the prosecutor to keep petitioner imprisoned in a Florida county jail for over a month before finally extraditing him.

The prosecutor's intentional and transparent act of withholding fair notice contained in the summons and complaint and his deliberate refusal to communicate with petitioner was an abuse of the criminal process very skillfully calculated to cause

Petitioner's complete pre-trial destruction before petitioner would even know the accusations being made against him.

Petitioner's complete financial destruction resulting from the loss of his home, his possessions and his employment as a result of the prosecutor's decision to leave petitioner waiting in Florida jail for a month undermined Petitioner's 6th Amendment right to control the conduct of his defense with private counsel of his choice which he could afford to hire.

When petitioner was absent for the first appearance hearing it was a lack of candor amounting to affirmative misrepresentation for the prosecutor to not advise the trial court that Petitioner contacted him directly in attempt to receive the Court's summons and complaint, and that despite his obligations as a minister of justice he had refused Petitioner's simple request to be mailed a copy of the summons and complaint.

Instead of communicating with petitioner the prosecutor would communicate with the MN Governor requesting petitioner's arrest and extradition, (Minn. Stat. 629.23) in "certifying that, in the opinion of the prosecuting attorney, the ends of justice require the arrest and the return of the accused".

State v. Penkaty, 708 N.W.2d 185, 196 (Minn. Supreme Court 2006);

> "a prosecutor is a Minister of Justice whose obligation is to guard the rights the accused as well as to enforce the rights of the public" (citations omitted).

The ends of justice required only that the prosecutor fulfill his obligation as a minister of justice to guard petitioner's right to receive fair notice contained in the court's summons and criminal complaint.

In Mooney v. Holohan, 294 U.S. 103 S. Ct. (1935);

> "[the prosecutor] has no power to adjudge, to sentence or by his order to deprive anyone of life, liberty or property"

By refusing to communicate and by intentionally withholding the trial court's summons and complaint the prosecutor could instead certify to the MN Governor justice required petitioner to be adjudged a 'fugitive' and sentence petitioner to a month in jail.

Petitioner's mental and physical destruction resulting from being left in a Florida jail for a month before his extradition and his resulting inability to control the conduct of his defense through hiring an attorney of his choice *completely* skewed the fairness of the trial in the prosecutor's favor. This was no blunder by the prosecutor, it was insurance the prosecutor needed to win convictions in a case he filed without sufficient evidence to convict.

In a destroyed physical and mental state – and literally in a state of shock, Petitioner confronted the prosecutor at his first appearance hearing before the trial court asking him to explain why he could not simply have provided Petitioner with

court's summons and complaint as petitioner had requested. The prosecutor actually laughed at petitioner's destroyed condition and stated;

"I'm not his attorney". (This reply from the prosecutor is missing from the official transcript of the hearing. Petitioner motioned the MN Court of Appeals to issue a stay of his direct appeal so he could have the trial transcripts corrected but the motion to do so was denied.)

The prosecutor misinformed the jury of his obligations in his closing argument;

"he [Petitioner] leaves a voicemail message that you have heard now that I had no obligation to respond to" (Trial transcript at p. 1123)

> "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." United States v. Agurs 427 U.S. 97 S. Ct. (1976)

The prosecutor's refusal to guard petitioner's right to receive fair notice in service of the summons and complaint so that he could instead destroy petitioner with his 30-day imprisonment before trial could only have had destructive impact on petitioner's ability to prepare and mount a meaningful defense and to frustrate Petitioner's VI Amendment right to a speedy trial.

In Berger v. United States, 295 U.S. 78 (1935) this court held;

> "government attorney is the representative "of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done".

Petitioner prays that this Court finds the prosecutor's intentional act of interfering with service of the summons and complaint and leaving petitioner in a Florida jail for a month so Petitioner would be utterly destroyed before he even saw the accusations being made against him was the exact and polar opposite of governing impartially.

Lambert v. California 355 U.S. 225 S.Ct. (1957)

> "Engrained in our concept of Due Process is the requirement of Notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for a mere failure to act".

ABA standards for Prosecution Function 3-5.3d states;

> "a prosecutor should take steps to ensure that any court order issued to the prosecution is transmitted to the appropriate persons necessary to effectuate the order".

The prosecutor took intentional steps to withhold the notice contained trial court's order as the summons (App. C) states the following dire warning to a defendant;

> "IF YOU FAIL TO APPEAR in response to this SUMMONS, a WARRANT FOR YOUR ARREST shall be issued".

Justice never required the prosecutor to withhold this notice from petitioner.

Powell v. Ala., U.S. Lexis 5 S.Ct. (1932) this Court held;

> "the necessity of due notice and an opportunity of being heard is described as among the immutable principles of justice which inhere in the very

idea of free government which no member of the union may disregard. And Mr. Justice Field, in an earlier case, Galpin v. Page, 18 Wall. 350, 368-369, said that the rule that *no one shall be personally bound* until he has had his day in court was as old as the law, and it meant that *he must be cited to appear and afforded an opportunity to be heard*. Judgement without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered." (emphasis added, internal quotations omitted)

Petitioner prays this Court agrees that the prosecutor's act of intentionally withholding the court's summons and notice of the charges contained in the criminal complaint could only be a transparent and unmistakable act deliberately calculated to falsely imprison and to destroy Petitioner's mental and physical health, and was an action intended by the prosecutor to *permanently* bound Petitioner's ability to financially support himself before and during trial, and ultimately to interfere with petitioner's ability to control the conduct of his defense through a private attorney.

United States v. Bissel, 866 F.2d 1343 (1989);

"...a primary purpose of the Sixth Amendment is to grant a criminal defendant effective control over the conduct of his defense. An obviously critical aspect of making a defense is choosing a person to serve as an assistant and representative. ...lodging the selection of counsel with the defendant generally will promote the fairness and integrity of criminal trials."

United States v. Gonzalez Lopez, 548 U.S. 140, 147-148, 126 S.Ct. 2557, 165 L. Ed. 2d 409;

"The right to select counsel of one's choice" is thus "the root meaning" of the Sixth Amendment right to counsel. ...*Constitutional rights protect the necessary prerequisites for their exercise."*

With the prerequisite's petitioner needed in his home and employment to afford to hire an attorney of his choice destroyed, Petitioner was forced to make the choice between retaining any form of control over his defense or having any form of assistance of counsel with a public defender. After literally losing everything after his monthlong imprisonment, petitioner was in a complete state of shock and not capable of understanding or even making this critical decision.

In Miller v. Smith, 99 F. 3d 120 (CA 4 1996) (Quoting Simmons v. United States, 390 U.S. 377, 394 (1968)) the court held;

> "Forcing a criminal defendant to surrender one constitutional right 'in order to assert another' is 'intolerable'".

At petitioner's first meeting with his assigned public defender petitioner raised the issue of the prosecutor's refusal to communicate or effectuate service of the summons a complaint and the resulting loss of Petitioner's employment, his home and his ability to hire an attorney of his choice. The public defender essentially responded; "it's doesn't matter, you're here in Minnesota now and I am an experienced attorney. ...I went to a good law school".

Petitioner's home, his possessions and employment and his mental state were the prerequisites Petitioner needed to hire an attorney of his choice - the public

defender refused to advise Petitioner that these prerequisites he needed to exercise his 6th amendment rights were themselves protected under the 6th Amendment.

United States v. Gonzalez Lopez;

> "'Depravation of the right' to counsel of Defendant's choice is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants."

Defense counsel's failure to advise petitioner of his 6th Amendment rights demonstrates that from the very beginning defense counsel worked to assist and protect the prosecutor in this case.

Petitioners public defender instead advised petitioner that the prosecutor's pre-trial conduct was okay. Petitioner prays this Court disagrees.

When Petitioner was given the opportunity to address the trial court directly (T. 981), he attempted to raise this issue with the court directly that the prosecutor intentionally refused to effectuate service of the court's summons and complaint. Petitioner was cut off from speaking by his attorney, who interrupted him from speaking with; "That, you can testify to".

The trial court in this case allowed the public defender to prevent petitioner from directly raising issues with the court, and he also allowed the public defender to speak *for* the court telling petitioner when he was and was not *allowed* to speak or otherwise raise issues of his own at his trial.

After being told he could only raise this issue by testifying, during his testimony petitioner again confronted the prosecutor (T. 1061-1062);

> Petitioner: "I just simply asked you to please send me a copy of the complaint and summons so I could understand what was going on"
>
> Prosecutor: "you understand now there's a formal process for that. Right? For learning about charges against you?"
>
> Petitioner: "I figured it would be you and your office since you were the ones that filed them. Yes, that was my understanding, and I believe right now, it still is."

Petitioner begs this Court consider for only a few moments how psychologically devastating and destructive the experience of being taken from your home in handcuffs, spending a month confined to the floor of an overcrowded jail, witnessing the loss of your home, possessions and employment would be to endure – without ever having even seen the criminal complaint to know the details of the crimes you have been accused of. It was *severe* suffering and psychological damage that was intentionally calculated by the prosecutor to invoke a PTSD like state of shock in petitioner that would put petitioner into a cloud of fear and confusion *before, during and years after his trial.*

This deliberate plan of the prosecutor's worked perfectly, and it's what gave the prosecutor, in his mind, reason to laugh at his success after seeing petitioner's destroyed condition at the initial appearance hearing.

This potential for absolute pre-trial destruction is real, and it is precisely the reason why a summons, rather than a warrant, must issue in Minnesota per Minn. R. Crim. Proc. §3.01;

Issuance. ...a summons rather than a warrant must issue unless a substantial likelihood exists that the defendant will fail to respond to a summons, the defendant's location is not reasonably discoverable, or the defendants arrest is necessary to prevent imminent harm to anyone.

In Mooney v. Holohan, 294 U.S. 103 S. Ct. (1935);

"...That requirement [of due process], in safeguarding the liberty of the citizen against depravation through action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.

...if the acts or omissions of a prosecuting attorney have the effect of withholding from a defendant the notice which must be accorded him under the due process clause, or if they have the effect of preventing a defendant from presenting such evidence as he possesses in defense of the accusations against him, then such acts or omissions of the attorney may be regarded as resulting in a denial of due process of law.

...[due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if the state has contrived a conviction through the pretense of a trial which in truth is used but a means of depriving defendant of liberty through a deliberate deception of court and jury by the testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. The action of prosecuting officers on behalf of the State, like that of administrative officers in

> the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers." (internal quotations and citations omitted)

Petitioner implored his public defender to submit evidence of inconsistent statements of the prosecution witnesses for impeachment. He refused. Petitioner implored his public defender to submit evidence petitioner provided him with that would demonstrate potential serious biases of the state's key witnesses. He refused.

By destroying the pre-requisites petitioner needed to mentally and financially prepare for trial and control and conduct a meaningful defense the prosecutor was effectively able to prevent petitioner from presenting "such evidence as he possessed in defense of the accusations against him". Petitioner prays that this Court agrees.

In Mooney this court also held;

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that constitution".

In every respect a prosecutor is a minister of justice and an officer of the MN judicicary. Petitioner prays this Court agrees it is the prosecutor's obligation to guard and enforce every one of petitioner's rights secured by the Constitution.

The pre-trial destruction petitioner endured could only "have the effect of preventing him from presenting such evidence as he possesses in defense of the

accusations against him". Petitioner was left to review the evidence of prosecutor's case while living in a tent on the streets of Duluth in the middle of winter.

Frank v. Magnum, 237 U.S. 309 (1915);

> "...The due process clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice, ... are not interfered with."

Berger v. United States;

> "... It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to produce a just one"

Rochin v. California 342 U.S. 165 S. Ct. (1952);

"Convictions cannot be brought about by methods that offend a sense of justice."

Petitioner prays this court finds the prosecutor's intentional act of refusing to communicate with or to protect petitioner's right to receive constitutionally required fair notice, and his acts or omissions in allowing Petitioner to remain suffering in a Florida jail for a month while petitioner slowly lost everything are not legitimate means to secure convictions in the United States, and are acts that deeply offend this Court's conceptions of fundamental fairness, justice and equality under the law which lie at the base of our civil and political institutions.

Petitioner prays that this Court therefore finds these acts and omissions of the prosecutor outrageous government misconduct which violated petitioner's 14th

Amendment right to Due Process and his 6th Amendment right to be represented by an attorney of his choice. Petitioner prays that in finding for petitioner this Court reverses his convictions and orders the County of St. Louis and the State of MN to expeditiously find a way to effectuate Petitioner's immediate return to his home state of Florida and any other relief this court may find appropriate.

Question #2

Did Petitioner's convictions resulting from charges added to the Third Amended Complaint occur in violation 14th Amendment Due Process right to advance notice of the specific charges he faced?

The prosecutor made the frank confession to the trial court (T. 385);

> "(her testimony) was not consistent with my understanding of the statements she had made to law enforcement... I don't think there is any evidence of penetration to meet a first-degree charge. ... I probably will have no choice but to amend the complaint to conform with that testimony".

However, the statement "(her testimony) was not consistent with my understanding" was a fraud upon the court because the prosecutor understood precisely the only inconsistencies were in S.H.'s accusations. The probable cause section of the complaint reflects S.H. law enforcement interview that was recorded on video tape and the prosecutor admitted on the trial record to meeting with S.H. before trial to discuss her precise accusations and the resulting criminal charges he had filed.

The prosecutor's statement to the trial court that the inconsistency lie with his "understanding of the statements she made to law enforcement", however subtle, was a deliberate misrepresentation crafted to conceal the core material fact that it was S.H.'s accusations which she made at trial that were wildly inconsistent with the accusations she made to law enforcement.

This false representation the prosecutor made to the trial court was material to the case because of the multiple inconsistencies with S.H.'s courtroom accusations compared to the accusations she initially alleged to law enforcement affected the essence of S.H.'s credibility as a witness. The accusations in S.H.'s testimony was the only direct evidence the prosecutor had to support the charges in counts I & II. S.H.'s credibility was the key to the prosecutor's case and the prosecutor could either admit that most of S.H.'s accusations made at trial were inconsistent with what she made to law enforcement and therefore admit he filed charges without proper investigation into the case - or he could intentionally misrepresent hide the material facts of S.H.'s testimony and inconsistent accusations to the trial court.

The prosecutor chose to continue to misrepresent the facts of S.H.'s testimony when he made the further statement to the trial court;

> "I don't think the facts of the allegation have changed significantly other than the issue of penetration or no penetration."

This misrepresentation the prosecutor made to the trial court was not subtle.

As the probable cause section of the criminal complaint (App. C) clearly states S.H. initially alleged to investigators she was sexually abused approximately 1-2 times per week (300-600 times) over a six-year period starting when she was 10 years old. At trial she changed her accusations and testified she was abused two times in total, and the two incidents occurred within a year of each other (T. 339).

> Holets: (prosecutor; direct examination): Those are the two [incidents] you remember the best or those are the only two?
>
> S.H.: Those are the only two.

(T. 361).

> Shaw (defense counsel): So, both incidents would have been – occurred within a year –
>
> S.H: yes

S.H. then continued to further change her accusations, testifying on both cross and redirect examination that she was not between 10-15 years old, but instead she would have been "working age", or around 19 years old at the time of the alleged acts. Another essential element of the charges requires that S.H. was *under* 16 years old at the time of the alleged acts.

//

(T. 363-364)

Shaw (Defense Counsel): ... you worked long hours and you at your job and so you'd be really out of it and tired? Is that Right?

S.H.: yes

Shaw: So, you would have been about 19 at the time?

S.H.: I believe so, yes.

Making it clear he would not accept this answer the prosecutor on redirect would immediately ask S.H. the exact same question;

(T. 364-365)

Holetz: ...Mr. Roulo touching you...

S.H.: Yes.

Holets: Right? Were you working – were you of working age? Where you 19 years old when that happened?

S.H.: Yes.

Only after being repeatedly badgered by the prosecutor who refused to accept the S.H.'s testimony that she was 19 years old at the time, would S.H. feel pressured to change her answer to; "I can't remember if I was older or younger than 18".

S.H.'s accusations lacked credibility from multiple inconsistencies in her law enforcement interview compared to her trial testimony; (1) the required element of her age at the time of the alleged acts, (2) the number of alleged acts of abuse she claimed

occurred and the 6-year weekly duration, *in addition* to the inconsistency about (3) required element of being sexually penetrated.

The *sum* of these inconsistencies in her age, the number of alleged acts from 300-600 acts to now 2 acts in total when she was 19 years old, meant her testimony could not be used as substantive, direct evidence to prove petitioner's guilt beyond a reasonable doubt. The prosecutor had no other direct evidence in the case other than S.H.'s testimony, in his mind he had once chance to win and that chance required him to misrepresent the facts of S.H.'s testimony.

S.H.'s initial accusations which the defense was given fair notice in the probable cause section of the complaint were wildly different than the accusations in her courtroom testimony.

After S.H. recanted both the required element of sexual penetration and the required element she was under 16 years old at the time of the acts, how could the defense rationally respond to this surprise?

No rational jury could find proof beyond a reasonable doubt of the required element of the crime that S.H. was under 16 years old at the time of the acts as her mother would later testify at trial S.H. did not have a job, and therefore could not have been 'working age' or working "double shifts" until *after* she turned 16.

When the prosecutor made this misrepresentation to the court that the facts of the allegation hadn't changed significantly other than the issue of penetration or no penetration defense counsel made the regretful choice to remain silent and acquiesce to this fraud.

Without an objection from defense counsel the trial court would accepted this obvious fraud upon the court.

After himself plainly giving up in cross examination of S.H. when she stated she was 19 at the time of the 2 alleged acts, the public defender's silence to this serious misrepresentation made by the prosecutor is evidence of the public defender's conflict of interest and his overriding loyalty to his bar colleague the county prosecutor and the county which employs him. This moment of silent acquiesce from defense counsel defined the fatal breakdown of the adversarial process. The public defender clearly abandoned his duty of loyalty to petitioner and effectively ceased to function as defense counsel.

S.H.'s trial testimony combined with the later admission from the prosecutor there wasn't "any evidence" of sexual penetration to support the charges was the basis the trial court's ruling granting prosecutor's motion to drop the two first-degree charges in counts I & II from the complaint.

In both form and substance, the court's ruling to drop these two first-degree charges from the complaint represented a resolution of factual element of sexual penetration in petitioner's favor.

At the time of trial court's ruling the judge plainly commented on the record about the changing testimony of the witnesses and the resulting unfairness to the defendant;

> "... it seems unfair to the defendant in the case to have the complaint and the charges changing on almost a daily basis based on the testimony of the witnesses changing". (T. 828)

This Court held in In re Ruffalo, 390 U.S. 544 (1968) that amending the complaint based upon changing testimony violates procedural due process;

> "...The charge must be known before the proceedings commence.
>
> ...They become a trap, when the after [the proceedings] are underway, the charges are amended on the basis of changing testimony...
>
> ...How the charge would have been met had it been originally included in those leveled against petitioner... no one knows.
>
> This absence of fair notice as to... the *precise* nature of the charges deprived petitioner of procedural due process"

If S.H. now claimed there was no penetration and she would have been working age, working 'double shifts' and around 19 years old at the time of the two acts, what could the defense possibly do? This surprise in the state's evidence was the definition

of fundamental unfairness to the defense – there was no rational response or strategy possible in light of this testimony. This *was* the trap this Court identified in *Ruffalo*. "All right... that's all I have for you", was the only rational response that defense counsel could possibly make.

As matter of MN law, Petitioner was entitled to an acquittal. In a concurring opinion In State v. Sahr, 812 N.W. 2d 83 (MN Supreme Court 2012) Justice Anderson wrote;

> "... we observed [in State v. Ewing] the state is required to establish by proof beyond a reasonable doubt all of the essential elements of the crime with which the defendant is charged in the indictment. In the absence of such a degree of proof of the defendant's guilt he is entitled to an acquittal. 250 Minn. 436, 442, 84 N.W.2d 904, 909-10 (1957)" (internal quotations omitted)

To convict Petitioner's on three new and different charges for which Petitioner had no advance notice, charges for which he was not tried upon, and charges which Petitioner could not have even *considered* a strategy to defend without knowing in advance the surprise that was coming in the changing accusations and testimony, is an unfairness this Court had consistently held violates the principles embodied in the Due Process clause;

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Jackson v. Virginia, 443 U.S. 307 S. Ct. (1979);

"It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. ...a person cannot incur the loss of liberty for an offense without notice and meaningful opportunity to defend"

In Cole V. Arkansas 333, U.S. 196 S. Ct. (1948);

"It is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

...Under any reasonable construction 1943 Ark. Acts 193, §1 creates separate offenses, as does 1943 Ark. Acts 193 §2, and an indictment that alleges crimes covered by a part of §1 does not impose upon a defendant a duty to defend under §2..."

At the start of trial when Jeopardy attached petitioner was charged (App. C) with violating Minn. Crim. Stat. 609.342.1(g), 609.342.1(h)(iii) and 609.343.1(h)(iii). Petitioner was convicted of 3 counts of violating 609.343.1(g), without fair notice of these charges and without being tried.

The mid-trial amendment of the complaint violated prophylactic rules established in MN Rules of Criminal Procedure and MN Supreme Court decisions designed to strengthen procedural due process and fair notice standards in criminal trials.

MN Rules of Criminal Procedure §17.05;

"Amendment of Indictment or Complaint.
The court may permit an indictment or complaint to be amended at any time before verdict if no additional or different offense is charged and if the defendant's substantial rights are not prejudiced."

State v. Smith, 313 N.W. 2d 429 Minn. Supreme Court (1981);

"Once jeopardy attaches, the court may not allow any amendment which charges a different or additional offense or which prejudices the defendant's substantial rights".

When the prosecutor suggested to the trial court that he was planning on adding different charges to the complaint, instead of citing Rule 17.05 and *State v. Smith* which both forbid mid-trial constructive amendments of the complaint after jeopardy attached, petitioner's trial counsel would state to the trial court judge "it's hard to object to that possibility".

Defense counsel's apparent ignorance of rules and law so fundamental to criminal prosecutions can only represent another breakdown of the adversarial process. Without loyal counsel willing to explain the law or stand up for petitioner's right to equal treatment petitioner would be incapable of knowing the prosecutor's act of constructively amending the complaint was unlawful.

This action from the prosecutor to add additional and different charges at what was planned by the defense to be the last day of trial was an effort designed to deliberately manipulate the trial proceedings in an attempt to sidestep petitioner's procedureal due process rights to fair notice and Double Jeopardy protection.

Even with effective counsel, no defendant could be expected to develop an effective trial strategy during the lunch hour to defend against different charges based upon new and different accusations made at trial on the day it had planned on delivering closing arguments to the jury.

It was not possible for the defense to go back in time and utilize opportunities to object to evidence, testimony, or alter its cross examinations of the state's witnesses in light of the new and different charges added to the complaint at the end of petitioner's trial.

The defense strategy for all three of the new charges would have to be different. For Counts I & II added to the Third Amended Complaint, the defense would have needed transcripts of the law enforcement interviews to impeach S.H.'s changing accusations in her trial testimony. The defense did not have these transcripts prepared because it had no notice of this evidentiary surprise coming in S.H.'s sworn testimony.

For the other new charge added to 3rd Amended Complaint as Count III, the defense was never tasked with nor had a strategy to defend that alleged victim B.H. was abused only one time on a specific occasion, despite her accusations to law enforcement, courtroom testimony and charges in the complaint that she assaulted once per week sometimes 3 times per week, and possibly "1000" times over 11 years. It's self-evident a defense strategy to defend against a single specific incident would be different than a strategy for a charge that 1000 possible acts occurred. On this charge

of '1000' multiple acts which the defense actually had fair notice petitioner's defense strategy prevailed and he was acquitted of the charge by the jury.

The earlier trial experiences and impressions of the jury could not be simply cured or undone with further proceedings *after* the new charges were added at the end of trial. Like *in Ruffalo,* "How the charge would have been met had it been originally included in those leveled against petitioner... ...no one knows."

When granting the prosecutor's motion to add new and different charges the trial court stated on the record (T. 848);

> "I think it's fair to say that Mr. Holets [the prosecutor] was surprised by some of the testimony..."

Berger v. United States, 295 U.S. 78,79, 55 S. Ct. (1935);

> "The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at trial..."

Petitioner prays this Court reverses his 3 convictions reaffirming procedural due process forbids a prosecutor from passing on surprises in his witnesses' testimony to a defendant in the form of different and additional charges amended into the complaint after jeopardy attaches at trial.

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Question #3

After hearing witness testimony followed by the prosecutor's admission there wasn't "any evidence" to support charges in counts I & II, the trial court granted the prosecutor's mid-trial motion to drop those charges from the complaint. Did the trial court's action granting the prosecutor's motion constitute an acquittal on the merits for those charges, and if so, did petitioner's continuing jeopardy and later convictions on count's I & II in the 3rd Amended Complaint violate the Double Jeopardy Clause of the 5th Amendment and/or the Equal Protection clause of the 14th Amendment?

After S.H. testified, the prosecutor conceded on the record;

> "I don't think there is any evidence to meet a first-degree penetration charge... her testimony was clear, there was no penetration... I will have no choice but to amend."

The trial court referenced the "changing" testimony of the witnesses at the time it granted the prosecutor's motion to drop the charges containing the element of sexual penetration;

> "... On the other hand, it seems unfair to the defendant in the case to have the complaint and the charges changing on almost a daily basis based on the testimony of the witnesses changing".

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Evans v. Michigan, 568 U.S. 313 (2013);

> "we hold that a midtrial acquittal in these circumstances is an acquittal for double jeopardy purposes as well. ...the court's oral ruling leaves no doubt that it made its determination on the basis of '[t]he testimony' that the state had presented"

In United States v. Martin Linen Supply Co., 430 U.S. 564 (1977);

> "we have emphasized what constitutes and "acquittal" is not to be controlled by the form of the Judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged...
>
> ...A judgement of acquittal, whether based on a jury verdict of not guilty or on a ruling by the trial court the evidence is insufficient to convict, may not be appealable and terminates the prosecution..."

After the prosecutor admitted there wasn't any evidence of penetration to support the charge the trial courts action allowing first-degree charges to be dropped from the complaint was, and could only have been, a resolution of the required first-degree element of sexual penetration in petitioner's favor.

After the mid-trial acquittal on the merits, the double jeopardy clause barred further proceedings on the two new second-degree charges added to the Third Amended Complaint (as counts I & II) as they were the "same offense" for double jeopardy purposes as the first-degree charges' petitioner received an acquittal on the merits.

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Smalis v. Pennsylvania 476 U.S. 140 S. Ct. (1986);

> "Subjecting the defendant to post acquittal fact finding proceedings going to guilt or innocence violates the Double Jeopardy Clause"

In a case with identical operative facts, it has been established in Minnesota that Second-Degree Criminal Sexual Conduct is the same offense as First-Degree Criminal Sexual Conduct for Double Jeopardy purposes and an acquittal on the merits of First-Degree conduct forbids the kind of further proceedings which occurred in this case.

In State v. Sahr, 812 N.W. 2d 83 (MN Supreme Court 2012)

> "the district court held 'the second-degree criminal sexual conduct charge was the "same offense" as the first-degree criminal sexual conduct charge in the original complaint for double jeopardy purposes... Because Jeopardy had attached, signing the amended complaint [after an acquittal on the merits] would violate Minn. Stat § 609.04, Subd. 2, and double jeopardy principals.'"

On appeal, the Minnesota Court of Appeals reversed the trial court's decision in Sahr finding;

> "double jeopardy did not bar a new trial for second-degree criminal sexual conduct".

The MN Supreme Court then reversed the Court of Appeals, finding;

> "the trial court's dismissal of the complaint based on the finding there was insufficient evidence to convict Sahr of first-degree criminal sexual conduct

constituted an acquittal on the merits" and "consequently, we reverse the [MN] court of appeals and reinstate the district court's order denying the State's motion to file a new complaint".

The 14th Amendment compels the State of Minnesota to provide petitioner equal protection of Minn. Stat § 609.04, Subd. 2.;

> "A conviction or acquittal of a crime is a bar to further prosecution of any included offense, or other degree of the same crime."

Petitioner prays this Court finds similar as the Minnesota Supreme Court ruled in State v. Sahr, that petitioner's convictions of Second-Degree criminal sexual conduct in count's I & II resulted from further prosecution on the "same offense" for which he was acquitted on the merits, and therefore those convictions were obtained in violation of the Double Jeopardy Clause of the 5th Amendment and/or in violation of petitioner's 14th Amendment right to Equal Protection of Minn. Stat § 609.04, Subd. 2 barring further prosecution of any included offense, or other degree of the same crime.

Question #4

Do petitioners convictions in this case require reversal because no rational trier of fact could find the evidence in this case met the Due Process proof of guilt beyond a reasonable doubt standard?

The charges the prosecutor filed in the instant case hinged upon bare accusations. If one of the alleged victims took the stand and testified the alleged acts

never occurred, without any other direct evidence to substantiate the charges the prosecutor would be forced to admit he didn't have any evidence a crime was committed. The prosecutor's evidence would not just be weak or insufficient, there would be *no evidence*.

The trial record demonstrates this is precisely what occurred at petitioner's trial, and he was acquitted on all charges in the criminal complaint for which he was extradited and placed in jeopardy. When the accusations against petitioner changed at trial, all new charges had to be added to the complaint at essentially the end of trial because, as even the trial court noted, the charges literally hinged upon accusations that kept changing.

Under these circumstances such as the ones that exist in the present case, where the only direct and substantive evidence to support a charge hinges solely upon a string of words from a single witness it is plain there exists no difference between the amount of evidence which would suffice to sustain a verdict in a civil case versus sustain a verdict in a criminal case.

Once the 'string of words' which the state's charges hinged upon in the witness testimony changed at trial, as it did in the present case, the prosecutor had no choice but admit on the record that he didn't think there was "any evidence" to support counts I & II and would have 'no option' but to drop those charges from the complaint. This admission from the prosecutor proves that only a string of words from a single witness

was present and the prosecutor could claim he had "proof beyond a reasonable doubt", or the words *were missing* and he would be forced to admit there wasn't "any evidence". This is precisely what occurred in this trial, with both accusers and all charges, and it is a situation which violates the reasonable doubt standard the Due Process requires as this Court established in In re Winship, 399 U.S. 358 (1970);

> "the standard provides concrete substance for the presumption of innocence – that bedrock "axiomatic and elementary" principal whose "enforcement lies at the foundation of the administration of our criminal law"
>
> "... we agree "a person accused of a crime... would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case"

A case such as the instant one, where the only direct and substantive proof of guilt hinges like a thread upon a string of words from a single witness fails to meet this rule established in Winship. Petitioner's convictions in this case weakens the presumption of innocence which this Court has held is the axiomatic and elementary principal whose enforcement lies at the foundation of the administration of our criminal law.

Such a situation as the present case also violates Petitioner's 5th Amendment right not to be a witness against himself. Without any other substantive evidence in the case other than "he touched me" with which Petitioner can challenge or devise a strategy to defend against – there simply is no evidence to contest;

> "It is unnecessary to consider whether this statute, which puts the defendant against whom no evidence of guilt has been offered in a procedural situation from which he can escape conviction only by testifying, compels him to give evidence [against himself]." Tot. v. United States 319, U.S. 463

When the trial court asked petitioner if he chose to relinquish his right not to testify, petitioner could only respond he felt compelled because the jury would need to hear him profess his innocence. It could be his only defense in a case without any substantive evidence other than bare accusations.

Petitioner prays this court will find the evidence presented by the prosecutor in this case leaves no distinction in the evidence that would suffice in a civil trial and reaffirm it's ruling in Winship remains valid and reverse Petitioner's 3 convictions upon the grounds no rational juror, while considering the presumption of innocence, could find petitioner guilty beyond a reasonable doubt of these crimes.

X. REASONS FOR GRANTING THE PETITION

The actions and omissions of the prosecuting attorney were calculated to deliberately interfere with petitioner's right to receive the fair notice contained in the court's summons and complaint so the prosecutor could cause petitioner's pretrial destruction. The prosecutor intentionally misrepresented material facts of his evidence, misrepresented or concealed applicable law and binding court rules in an effort to mislead the court, the jury and even the MN Governor, improperly manipulating the trial process to his advantage in violation of petitioner's constitutional rights and the

fundamental fairness due process requires. As a result petitioner has received a life sentence for crimes he did not commit.

For what purpose would the trial court judge in this case feel compelled, on his own volition, to announce the "seeming unfairness" to petitioner when allowing new charges to be amended into the complaint? Do criminal trials not even need to "seem" fair?

Petitioner prays this court grants this writ and reaffirms these most fundamental and axiomatic rights guaranteed to U.S. citizens.

XI. Conclusion

For the foregoing reasons, Mr. Roulo respectfully requests that this court issue a Writ of Certiorari to review the Judgement of the Minnesota Court of Appeals.

Dated: 10/6/23

Sean Roulo

Sean William Roulo
OID 263200
1101 Linden Lane
Faribault, MN 55021