

No. 24-6148

IN THE
SUPREME COURT OF THE UNITED STATES

Ronald Neels — PETITIONER
(Your Name)

vs.

Alejandro Reyes — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ronald Neels
(Your Name)

1412 Wood ST
(Address)

Springfield, SD. 57062
(City, State, Zip Code)

N/A
(Phone Number)

Questions Presented

- I. Whether, an opening statement, counsels' failure to object to it, and the magnitude of the prosecutorial misconduct in the opening statement of a defendants trial requires that their conviction be vacated. In essence, if the evidence is sufficiently strong, do defendants have a right to a fair trial?
- II. What does the Court consider overwhelming evidence or sufficiently strong evidence?
- III. Whether the timing of the challenged comments establishes that a defendant suffered presumptive prejudice?
- IV. Whether, Appellate Court erred in reversing the District Courts Judgements?

The statement of any questions presented (I-IV) is deemed to comprise every subsiding question fairly included there in.

If and when the Petition is granted, due to the importance of the factual issues, Neels respectfully requests for oral arguments before this Honorable Court.

LIST OF PARTIES

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

RELATED CASES

- Neels v. Dooley, No. 29201, South Dakota Supreme Court. Judgement entered, Jan. 1, 2022
- Neels v. Fluke, No. 22-04053, U.S. District Court for the District of South Dakota, Southern Division. Judgment entered Aug. 22, 2022,
- Neels v. Fluke, No. 22-04053, U.S. District Court for the District of South Dakota, Southern Division. Judgement entered Mar. 15, 2023.
- Neels v. Fluke, No. 23-1649, U.S. Court of Appeals for the Eighth Circuit. Judgement entered Jul. 25, 2024.

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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 judgement below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is cited as *Neels v. Fluke*, 109 F.4th 1021 (8th Cir. 2024). A Copy is attached in the Appendix (App. 136-135). The Judgement is attached as well (App. 135). The opinion of the United States District Court is cited as *Neels v. Fluke*, 2023 WL 2529236 (D.S.D. Mar. 15, 2023). A copy is attached in the Appendix (App. 069-096). The opinion of the South Dakota Supreme Court is cited as *Neels v. Dooley*, 969 N.W.2d 729 (SD, Jan. 19, 2022).

JURISDICTION

This is a Petition for a Writ of Certiorari from a Judgement from the United States Court of Appeals for the Eighth Circuit. Neels submits this Petition pursuant to Supreme Court Rules 10(a), (10.c), and 12(2). The Judgement of the Eighth Circuit was entered on July 25, 2024. App. 135. This Petition is timely filed pursuant to Supreme Court Rule 13(1). Jurisdiction is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Case involves:

I. Amendment VI to the United States Constitution, which provides:
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.

II. Amendment XIV to the United States Constitution, which provides:
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 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.

III. TITLE 28 Section 2254, which provides:

(a) The Supreme Court, a Justice thereof, a Circuit Judge, or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgement of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

This case is one involving the crucial importance of the Sixth Amendment to the U.S. Constitution. The cornerstone of this case is whether there are exceptions or instances where a defendant does not get the right to a fair trial by an impartial jury.

The magnitude of the Prosecutorial Misconduct in the opening statement of Neels' trial requires that his conviction be vacated. To do otherwise would allow the State to violate all the prosecutorial misconduct rules without consequence if the defendant faces sufficiently strong evidence. In essence, if the evidence is sufficiently strong, defendants would have no right to a fair trial. App. 095.

As an illustration, the State has already demonstrated how prosecutors across the entire country can and will utilize these exceptions for an unfair advantage. "The prosecutor's opening statement at Neels' 13 trial did not bring up irrelevant matters... It touched on topics ultimately testified to by T.N. ... In fact, every major point brought up in the prosecutor's opening statement was ultimately testified to by T.N." App. 123-24; see chart. The Prosecutor tailored her opening statements to what T.N. was going to testify to. The opening statement was supposed to be "helpful to the jury, without usurping the jury's role of assessing the victim's credibility and whether the abuse actually occurred." *United States v. Kiekie*, 261 F.3d 761, 766 (8th Cir. 2001). Here, the prosecutor not only testified that there was a victim, indicating to the jury that there was abuse, but she asked the jury to place themselves in the shoes of the alleged victim. The prosecutor's opening statement vouched for T.N.'s credibility by opining to exactly what she would

testify to later in the trial.

The Habeas Court in this case commented on this opening statement, "imagine you're a defense attorney in State v. Neels and you heard (the prosecutor) saying, imagine that you're a little girl and put yourself in place of the victim and violate the golden rule about as blatantly as you can violate it.... I mean two excellent, competent lawyers sitting there don't object to the most blatant violation of the rules of trying a jury trial in criminal court. Why [the prosecutor] thought she could get away with that, but I guess they teach you if you think you can get away with it, nobody objects, you know, all's fair in love, war and litigation." App. 012-013. To the contrary this Court should not agree with this precedent set by the 8th Circuit Court of Appeals and the State as the practice of teaching prosecutors how to get away with things in this manner violates the letter and spirit of fair jury trials. In South Dakota see SDCL 19-19-103(d) ("To the extent practicable, the Court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.").

Finally, the 8th circuit Court of Appeals attempts to minimize the opening statement by stating it "spanned just three pages of the six-volume jury trial transcript that totaled more than 700 pages." App. 154-55. These three pages of opening statements were as severe as it gets. The "golden rule" is a golden rule for a reason and now we're making exceptions allowing the blatant violation of it. In this case the prosecutor provided a detailed and vivid narrative in which the jury was asked to imagine themselves going through a years-long traumatic experience. This obvious violation,

which occurred at the very start of the trial, lasted several minutes. This erraneous opinion by the 8th Circuit Court of Appeals condradicts its earlier opinion by the Court in *United States v. Swift*, 623 F.3d 618 (8th Cir. 2010). The Swift Court found that one factor that mitigated prosecutorial misconduct in closing argument was that "[t]he comments came after two days of trial testimony [3] Id. at 623.

Thus, *Swift* implies that improper comments that occur after an otherwise fair trial are less prejudicial than those that occur before a trial, Id. And that makes sense; an opening statement frames the case for the jury to view the evidence for the entirety of the trial. The jury in Neels' case, for the "entire" trial, received the testimony and exhibits not as impartial jurors, but as victims themselves. (emphasis added),

The 8th Circuit Court of Appeals relies heavily on the alleged strength of evidence in denying Habeas relief. Neels contends that the evidence in this case is entirely hearsay as there is not one shred of physical or scientific evidence. Regardless, the strength of the evidence against Neels does not preclude him from relief, *United States v. Conrad*, 320 F.3d 851, 856 (8th Cir. 2003) (while the evidence is strong in this case, the tenor of the prosecution severely prejudiced the defendant.) This is referring to presumptive prejudice not actual prejudice.

The current precedent that has now been established by the 8th Circuit Court of Appeals has created an exception where a defendant does not have a constitutional right to have a fair trial so long as a prosecutor believes they have sufficient evidence to convict. Which is a subjective opinion because every prosecutor that takes a case to trial believes they have sufficient evidence to convict otherwise they would not go to trial.

Worse the 8th Circuit Court of Appeals has set a standard of allowable misconduct to occur if there is sufficient evidence of guilt. This standard includes,

- (1) a prosecutor can testify for an alleged victim, violating the Golden Rule,
- (2) the prosecutor has to get away with the misconduct; and
- (3) the misconduct must occur at the very beginning of the trial and not span too many pages of jury trial transcripts.

The 8th Circuit Court of Appeals entirely avoided the most important aspect of our criminal justice system's legitimacy. The Court discussed at great length *Strickland v. Washington*, 466 U.S. 668 (1984), however, the Court neglected to discuss that *Strickland* requires that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. The United States Supreme Court has repeatedly recognized that fairness is at the heart of the criminal justice system's legitimacy both in Habeas proceedings and in other contexts. *Engle v. Isaac*, 456 U.S. 107, 126 (1982) "[T]he Writ [of Habeas Corpus] is a bulwark against convictions that violate 'fundamental fairness.'" (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977); *Rosales Mireles v. United States*, 138 S.Ct. 1897, 1908 (2018) "In broad strokes, the public legitimacy of our justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair, and that provide opportunities for error correction."); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (emphasizing that "[c]ommunity participation in the administration of the criminal law 'though a fair jury cross-section' is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system").

As of right now Needs a man who was provided ineffective assistance of counsel and denied a constitutional right to have a fair trial has been condemned to 75 years in prison; a de facto life sentence. The 8th Circuit Court's justification is: oh well, he was probably guilty anyways. Every defendant, that goes to trial should have a reasonable expectation that his or her trial will be conducted in a fair manner. If this precedent is allowed to move forward, it will render the right to a fair trial meaningless. This Court should have the exact opposite view as the 8th Circuit's flawed view. If a prosecutor believes they have overwhelming evidence to convict someone then there should be absolutely no reason why they should be permitted to severely violate prosecutorial rules. If we were going to believe someone is guilty of a crime, at the bare minimum we need to afford that person a fair trial something our society counts on to happen. To put this case in simplest terms imagine you make a cake. By the time you realize that there were ingredients put in that should never been put in; that cake was not only fully baked but almost completely eaten. You can't just remove the ingredients its way to late. However if you had been able to go back in time and remove those ingredients its more likely then not that the cake would have tasted differently, but at a minimum you would have known the cake was made correctly.

BASIS FOR FEDERAL JURISDICTION

This case raises a question of interpretation of ineffective assistance of counsel and the right to a fair trial under the 6th Amendment to the United States Constitution, the 14th Amendment to the United States Constitution and Title 28 section 2254 (a). The district court had jurisdiction under the general federal question jurisdiction conferred

by 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

I. Conflicts with Decisions of other Courts

The holding of the Courts below that demonstrate defendants are entitled to effective assistance of counsel and a fair trial. When a defendant fails to object to alleged prosecutorial misstatements at trial, as was the case here, Courts review for plain error. *United States v. Modena*, 302 F.3d 626, 634 (6th cir. 2002). 'Plain error is (1) error (2) that was obvious or clear, (3) that affected [the] defendants' substantial rights and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings.' *United States v. Wells*, 623 F.3d 332, 337 (6th cir. 2010) (quoting *United States v. Vonner*, 576 F.3d 382, 386 (6th cir. 2008)). Asking jurors to place themselves in the victim's shoes violates the bar on Golden Rule arguments. *United States v. Al-Maliki*, 787 F.3d 784, 795 (6th cir. 2015). *United States v. Roman* 492 F.3d 803, 806. (7th cir. 2007) Emphasizing that "a 'Golden Rule' appeal in which the jury is asked to put itself in the [victims] position is universally recognized as improper because it encourages the jury to depart from ... neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence"; *Ins. Co. of N. Am. v. Gypsum Co.*, 870 F.2d 148, 154 (4th cir. 1989); *United States v. Moreno*, 947 F.2d 7, 8 (1st cir. 1992); *State v. Reese*, 5975 E.2d 169 (S.C. Ct. App. 2004). Such an opening statement asks jurors to "decide the case on the basis of sympathy rather than from an objective review of the evidence." *Dempsey v. Mac Towing, Inc.*, 876 F.2d 1538, 1540 n. 1 (11th cir. 1989). An unremedied Golden-Rule argument will ordinarily result in reversal. *Id.*

In *Cardona v. State*, 185 SD. 3d 514 (Fla. 2016), it was reversible error in a murder and child abuse case where the prosecutor repeatedly argued for "justice for Lorenzo." The Court explained that when the State uses closing arguments to appeal to the jury's sense of outrage at what happened to the victim and asks the jurors to return a verdict that brings "justice" to the victim, the State perverts the purpose of closing arguments and engages in condemned behavior of the justice system that guarantees a fair trial to every accused. The same thing happened here in this case where the prosecutor asked the jury for sympathy for the alleged victim. The prosecutor's request was equivalent to the prosecutor asking the jury to place themselves in the alleged victim's shoes.

II. Importance of Questions Presented

This case presents a fundamental question of the interpretation of this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). The questions presented (I, II, III, IV) are of great public importance affecting thousands of courtrooms within all 50 states. In view of the large amount of litigation over ineffective assistance of counsel and prosecutorial misconduct, guidance on the questions are also of great importance to defendants, because it affects their ability to receive a fair trial. The issues' importance is enhanced by the fact that the 8th Circuit Court of Appeals in this case has seriously misinterpreted Neels' case. Neels clearly established the merits of his case showing that the "magnitude of the prosecutorial misconduct in the opening statement of Neels' trial requires that his conviction be vacated. To do otherwise would allow the state to violate all the prosecutorial misconduct rules without consequence if the defendant faces sufficiently strong evidence. In essence, if the evidence

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is sufficiently strong, defendants would have no right to a fair trial. "App. 095. All of the questions presented in this case need to be answered and discussed, because since Strickland, the Supreme Court has not clearly indicated that there are exceptions where defendants do not get the right to a fair trial. Additionally, to Neels' knowledge, the Supreme Court has never discussed the "Golden Rule" and its impact. This case presents the most extreme of Golden Rule violations.

A. Whether, an opening statement, counsel's failure to object to it, and the magnitude of the prosecutorial misconduct in the opening statement of a defendant's trial requires that their conviction be vacated. In essence, if the evidence is sufficiently strong, do defendants have a right to a fair trial?

The prosecutorial misconduct in this case is not only blatant and egregious, but a clear Golden Rule violation. The 8th Circuit Court of Appeals none the less held that the admission of the prosecutor's opening statement was harmless error. The Court reached this holding after applying an incorrect harmless error standard and disregarding compelling record evidence of prejudice. Because the Court below clearly misapplied existing law in a manner that denies fundamental justice, Neels requests a right to have a fair trial.

The danger this case presents is that the jury might give inordinate weight to the prosecutor's opening statement. Applying that principle here, this Court should conclude that the prosecutor's opening statements exceeded the scope permissible for a fair and impartial trial in violation of Neels' Constitutional rights to due process and a fair trial. The reason being the prosecutor vouched for the credibility of the alleged victim

while using the prestige and dignity of her office to bolster the State's case. This Court should find that the prosecutor's opening statements amounted to a structural error because the statements violated Neels' right to a "presumption of innocence." (Emphasis added). The opening statements in this case caused the jury for the entire trial, to receive the testimony and exhibits not as impartial jurors, but as victims themselves.

The 8th Circuit Court of Appeals reversed the District Court's ruling, finding that the opening statement was a harmless error. The Court reasoned erroneously that the overwhelming evidence introduced at the trial was sufficient to support Neels' conviction, concluding the opening statement was harmless.

Had the proper harmless-error standard been applied, there was a reasonable possibility the evidence complained of might have contributed to the conviction. The ultimate question has been whether a prosecutor's conduct so "infected the trial with unfairness as to make the resulting conviction a denial of due process," *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

The Court in *United States v. Young*, 470 U.S. 1 (1985) identified at least "two dangers" to help determine whether misconduct rises to the level of a due process violation. *Id.* at 18. First, a prosecutor may convey to the jury the impression that the prosecutor is aware of information, unknown to the jury, that suggests the defendant's guilt. *Id.* Second, the prosecutor's opinion may "carry with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.* at 18-19. When these dangers arise, they implicate due process because they "jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury." *Id.* at 18.

This case presents both dangers discussed in *Young*. The District Court therefore had correctly concluded, in its decision that the magnitude of prosecutorial misconduct requires Neels' conviction be vacated. The prosecutor vouched for the alleged victims' credibility, opining that the jurors were to imagine themselves as the alleged victim in this case. Most explicitly, the prosecutor's opening statement mirrored the statements later made by the alleged victim bolstering its effect significantly.

Finding that the prosecutor's opening statement rose to the level of a due process violation does not end the matter, because constitutional errors may nevertheless be harmless. In assessing whether this error was harmless, however, the 8th Circuit Court of Appeals applied a standard that is contrary to settled precedent. The 8th Circuit Court of Appeals found the error harmless because the evidence at trial supports defendants' convictions, even excluding the prosecutor's opening statement. At no point did the 8th Circuit Court of Appeals consider the specific effect of the prosecutor's opening statements on the jury's verdict. In other words, 8th Circuit Court of Appeals reasoning with respect to the contested counts of conviction was based solely on the sufficiency of the evidence that remained after excising the prosecutor's opening statements.

The United States Supreme Court has repeatedly repudiated such an approach. As a species of harmless-error review generally, review of constitutional error in a criminal trial does not ask an appellate Court to assess "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993); see also *Kotteakos v. United States*, 328 U.S. 750, 765 (1946) (holding, as a general matter that the harmless-error inquiry "cannot be merely whether there was enough to

Support the result, apart from the phase affected by the error"). Instead, *Chapman v. California*, 386 U.S. 18 (1967), requires that the government bear the burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *Id.* at 24, with the appellate Court focusing on "the guilty verdict actually rendered in this trial," *Sullivan*, 508 U.S. at 279. That must be so, because to hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings to support that verdict might be - would violate the jury-trial guarantee," *Id.* at 279-80.

Again, the 8th Circuit Court of Appeals, failed to apply the proper standard. First, and most obviously, the Court did not assess what effect the error had upon the guilty verdict in the case at hand, *Sullivan*, 508 U.S. at 279. The Court failed to ask, let alone attempt to answer, the core question: What effect did the prosecutor's extensive opening statement, including her wide-ranging commentary on and vouching for the alleged victims credibility, and her request for the jurors to imagine themselves as victims in this case, have on the jury's deliberations? That inquiry, the United States Supreme Court has explained time and again, is the core of assessing harmless error. *Yates v. Evatt*, 500 U.S. 391, 408 (1991) (Harmless-error analysis requires determining whether the error "contributed to the jury's verdict"); *Arizona v. Fulminate*, 499 U.S. 279, 296 (1991) (analyzing harmless-error by asking whether the error contribute[d] to [the defendant's] conviction"); *Harrington v. California*, 395 U.S. 250, 254 (1969) (harmless-error analysis "must be based on our own reading of the record and on what seems to us to have been the probable impact of the [error] on the minds of an average jury"); *Chapman*, 386 U.S. 23-24 ("An error in admitting plainly relevant evidence which

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possibly influenced the jury adversely to a litigant [like in Neels' case] cannot... be conceived of as harmless"); *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963) ("We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction"). Instead of heeding this precedent, the 8th Circuit Court of Appeals imagined a hypothetical trial where the prosecutor did not make an opening statement, and concluded that sufficient evidence supported conviction. That is exactly the inquiry that the United States Supreme Court's harmless-error cases forbid.

Under the correct standard, the prosecutor's opening statements were clearly not harmless-error. By using the weight of her office to vouch for and validate the alleged victim's credibility, and by directing the jurors to imagine themselves as the alleged victim in this case created a legitimating lens through which the jury was invited to view the entirety of the State's case. It is thus impossible to say beyond a reasonable doubt that her pervasive testimony did not contribute to the jury's verdict. These two instances in particular illustrate how fully her opening statements colored the jury's deliberations.

Our criminal justice system holds prosecutors to a high standard. The prosecutor is "the representative not of an ordinary party to a controversy but of a sovereignty," *Berger v. United States*, 295 U.S. 78, 88 (1935). From that special role, "improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Id.* It is inescapable truth that the "power and force of the government tend to

impart an implicit stamp of believability to what the prosecutor says." *Hall v. United States*, 419 F.2d 582, 583-84 (C.A.5 1969). In this case the prosecutor validated the alleged victims credibility, requested the jurors to view the entire case as victims, and because there was no objection or curative instruction the opening statement the jury had no reason not to believe what the prosecutor said.

These principles demand careful scrutiny of the rare cases in which a prosecutor violates the Golden Rule in opening statements with no objection by the defense. Because this case presents one of the most egregious instances of prosecutorial misconduct, Neels request the right to have a fair trial.

B. What does the Court consider overwhelming evidence or sufficiently strong evidence?

The state and the 8th Circuit Court of Appeals believes that two points make overwhelming evidence of guilt. The first being "every major point brought up in the prosecutor's opening statement [which should have never happened] was ultimately testified to by T.V." App. 124. The second point is Neels' alleged confession.

In regards to the 1st point, the State relies on the prosecutor's statements as a bolstering effect. There is no doubt the prosecutor's unconstitutional opening statements did enhance the alleged victims credibility with the jury. That is precisely the problem in this case as was discussed in detail above.

The second point, was Neels' alleged confession. "As he spoke with Sergeant Walsh, Neels characterized T.V. as a chronic liar who was angry with Neels. He asserted that her anger stemmed from his discipline for her conduct, which included "boozing and bays"... For the first hour

and 31 minutes of the interview, Neels denied any inappropriate sexual activity between him and T.N. There after, he confessed to certain events". App. 143. As is often the case in America people tend to give up at some point. After 91 minutes of interrogation he realized he was never going to leave unless he gave them something. An effective attorney would have at least tried to get the confession thrown out.

The State's alleged overwhelming evidence consists of just words. According to the State the prosecutor's alleged statement validates the alleged victim's testimony and Neels after denying wrong doing for 91 minutes creates overwhelming evidence. This is not overwhelming evidence. There was no physical, no scientific, and no DNA evidence or something that is iron-clad. Moreover, "for fourteen years" T.N. told no one about this alleged abuse. App. 098. Not even a friend, sister, or mother. That is because it did not happen.

Neels requests this Court to elaborate as to what is overwhelming evidence.

C. Whether the timing of the challenged comments establishes that a Defendant suffered presumptive prejudice.

The 8th Circuit Court of Appeals stated that the "trial court did not give a specific curative jury instruction in response to the prosecutor's opening statement (because Neels' [3] counsel failed to object to the improper comments), the trial court did instruct the jury that "statements made by attorneys were not evidence and that statements made by attorneys that were not supported by evidence should not be considered."... We have previously found such an instruction sufficiently curative." App. 153-54.

This view is in direct conflict with the 6th Circuit Court of Appeals. General curative instructions given after closings, and not right after the prejudicial statements might not cure their prejudicial impact. *United States v. Carter*, 236 F.3d 777, 787 (6th Cir. 2001) (finding that a general curative instruction that "arguments made by lawyers are not evidence" failed to cure prejudice because it was a routine instruction given after closings and a recess and did not address the prosecutor's statements). See *United States v. Acosta*, 924 F.3d 288, 308-09 (6th Cir. 2019) (holding that a "general instruction" "given only after closing arguments had been completed" telling the jury that arguments and statements by lawyers are not evidence did not remedy the statements' prejudicial effect). See *Girts v. Yanai*, 501 F.3d 743, 759 (6th Cir. 2007) (lack of "a prompt, curative instruction in response to the highly prejudicial statements" can lead to a "very strong likelihood that [the] prosecutor's prejudicial statements mislead the jury").

This Court needs to intervene and provide guidance on which Circuit is correct (6th Circuit or 8th Circuit). The 8th Circuit's interpretation is oh it was just the first three pages of a 700 page jury trial transcript so it had a small effect on the case. App. 154-55. Thus, a routine instruction cured it. The 6th Circuit has a firmer grip on reality realizing that the opening statement frames the case for the jury to view the evidence for the entirety of the trial. Simply if Neels was in the 6th Circuit, the Court would have affirmed the District Court's ruling that his conviction must be vacated. For the entirety of the trial the jurors viewed the evidence as victims themselves not impartial jurors, the cake was baked. The prosecutor's conduct in this case "diminishes the

dignity of our criminal justice system and undermines respect for the rule of law. "Calhoun v. United States, 568 U.S. 1206, 1208 (2013).

D. Whether, Appellate Court erred in reversing the District Court's Judgements.

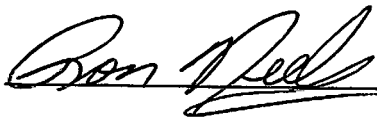
The 8th Circuit Court of Appeals demonstrably erred with respect to Neels' case. As was clearly articulated above Neels did not receive effective assistance of counsel. Neels did not receive a fair trial, and the magnitude of prosecutorial misconduct requires Neels conviction be vacated. In regards to the prosecutorial misconduct the 8th Circuit Court of Appeals and the State's view is "why [the prosecutor] thought she could get away with that, but I guess they teach you if you think you can get away with it, nobody objects, you know, all is fair in love, war and litigation." App. 012-013. This is precisely why this Court must intervene and hold the prosecutor accountable for their egregious misconduct to do otherwise would allow this dangerous precedent to continue with long lasting rippling consequences.

As the State said "In the end, the ultimate question at Neels's trial was whether the jury believed T.N.'s detailed testimony about the extensive abuse she suffered." App. 113. Neels disputes that should be the "ultimate question" because Strickland made clear "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged," at 696. Moreover even assuming the State's view on its face, the jurors were improperly instructed to imagine themselves as T.N. in this case, without objection. Thus, Neels conviction must be vacated.

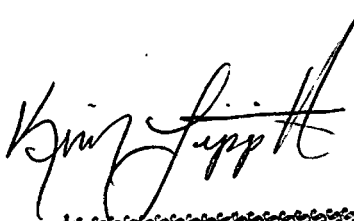
CONCLUSION

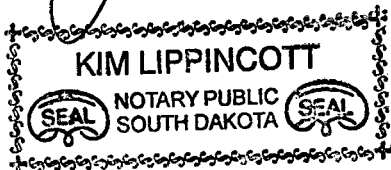
The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: December 5, 2024

 12/5/25



My Commission Expires Feb. 14, 2029