No. 24-6167

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Rodney J. Lass — PETITIONER
(Your Name)

vs.

Jason Wells — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the 7th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Rodney J. Lass
(Your Name)

S.C.I. 100 Corrections Drive
(Address)

Stanley WI 54768
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

1. Can actual vindictive prosecution be found when a mistrial is declared, not caused by a hung jury, and the Prosecutor responds by bringing additional charges, if so do the statements and actions by the Prosecutor in this case give this court what is needed to establish federal law on actual vindictive prosecution?
2. Can the State overcome either the presumption of or actual vindictive prosecution with an inconsistent, unsworn statement that never faced cross-examination.

LIST OF PARTIES

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

RELATED CASES

- Lass v. Wells United States Court of Appeals, Seventh Circuit. June 26, 2024 105 F.4th 932
- Lass v. Wells United States District Court, E.D. Wisconsin. August 31, 2023 Not Reported in Fed. Supp.2023 WL 5625508
- State of Wisconsin v. Lass Court of Appeals of Wisconsin.June 23, 2020 393 Wis.2d 594, 947 N.W.2d 643 (Table)2020 WL 3428247
- State of Wisconsin v. Rodney Lass Mllwaukee County Circuit Court Post Conviction Decision Case No. 13CF001603 decided November 1, 2018

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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.

On Writ of Certiorari to the United States Court of Appeals for the seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 105 F.4th 932 and can be found at App. A

The opinion of the United States District Court, E.D. Wisconsin is not reported in Fed. Supp. and can only be found in West Law at 2023 WL 5625508, and is listed at App. B

The decision of the Wisconsin Court of Appeals is not published and can be found at 393 Wis.2d 594, and is listed at App. C

The opinion of the Milwaukee County Circuit Court Judge is not reported and can be found at App. D

JURISDICTION

The date on which the United States Court of Appeals decided my case was June 26, 2024.

[X] No petition for rehearing was timely filed in my case.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including November 23, 2024 (date) on August 8, 2024 (date) in Application No. 24 A 131.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS,

United States Constitution, 14th Amendment: Due Process Doctrine:

"No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amdt. 14, § 1

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. Collins v. Harker Heights, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068–1069, 117 L.Ed.2d 261 (1992) (Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them' ") (quoting Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986)). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. Reno v. Flores, 507 U.S. 292, 301–302, 113 S.Ct. 1439, 1446–1447, 123 L.Ed.2d 1 (1993)

For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which *25 must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake. From, Lassiter v. Department of Social Services of Durham County, N. C. Supreme Court of the United States June 1, 1981 452 U.S. 18 101 S.Ct. 2153 68 L.Ed.2d 640

STATUTES AND RULES

S.C.R. 10(a)(c)

OTHER

Blacklaws dictionary 11th Ed.

STATEMENT OF THE CASE

A. INTRODUCTION

To paint a complete picture it's important to note that Lass was originally charged with two counts of misdemeanor battery and one count of disorderly conduct, see Milwaukee County Circuit Court Case No. 2012-CM-003615 (ECF No. 12-2-¶2). For clarity, Lass will refer to this case as the "misdemeanor case" and the "misdemeanor trial" Id. After the Court grants Lass's request for a mistrial the same prosecutor charges Lass with the same two misdemeanor battery counts as well an additional nine felony counts, some of which are to have occurred during the same course of conduct as the original charges, (ECF No. 12-2-¶4) while the rest predate the original misdemeanor charges.

B. THE MISDEMEANOR CASE

At the initial appearance in the misdemeanor case the state is represented by Milwaukee County Assistant District Attorney Kaivon Yazdani. For the next three court appearances the state is represented by Milwaukee County A.D.A. Matthew Westphal. These appearances included a bail bond hearing on July 26, 2012, where Westphal's entire participation was "we wouldn't object to J2KF" (a program that monitors defendant's released on bail) and "state would object to a P.R. bond "(App. E-1-Pgs. 3-4).

At the next hearing, on September 5, 2012 Westphal does nothing more than state his appearance. Finally on October 31, 2012 a motions hearing is held, at this hearing Westphal does explain "some discovery apparently there is a blood draw information that hasn't been turned over yet," (App. E-2-Pg 5) and tell the court "I have had a chance to glance through some of the transcriptions from the calls and text messages in the discovery counsel gave me. I have not done a thorough read of them. My concern

with the transcriptions turned over would be there is no identifying information on the phone call," and finally Westphal confirms the trial date of either November 28, 2012 or December 3, 2012, (App. E-2-Pg. 7). This is the entirety of A.D.A. Westphal's participation in the misdemeanor case before A.D.A. Jennifer Williams (nee Hanson) takes over.

On November 28, 2012 Assistant District Attorney Williams (nee Hanson) makes her first appearance with Ms. Margaret Kunisch who had just recently passed the bar, and was employed by the Milwaukee County District Attorney's Office not as an Assistant District Attorney but as a paralegal in the Homicide/Sexual Assault division, see (App. E-3-Pg.6). At this hearing it is *Williams* that addresses the Court on all issues raised, (App. E-3-Pg.-7) On December 3, 2012 A.M. although the title on the transcript is Jury trial this becomes a motion hearing where again it is *Williams* that does extensive arguing on the state's behalf. *Williams* explains "state moves to dismiss count three," the disorderly conduct charge, (ECF No. 12-10-Pgs 4-5). Then on Pg. 5 *Williams insures the court that she is fully informed of all aspects of this case,*(emphasis added) stating "let me be very clear that my motivation for dismissing count three was that I was able to review the police reports *in depth* only last night... and I don't believe the state can prove count three beyond a reasonable doubt." (ECF No. 12-10-Pg 6) *Williams* goes on to make the state's argument on defenses other acts motion (Id Pgs 6-7). Next, *Williams* makes an extensive argument as to the victims record, how defenses proposed evidence is "prejudicial, completely irrelevant, and remote in time," (ECF No. 12-10-Pg's 19-21). Then after defense counsel gives a list of witnesses that may be called Williams further proves she is the lead prosecutor for the state by attempting to exclude these witnesses, "because those witnesses would have testified to count three, which is now dismissed." (ECF No. 12-10-Pg. 38). This shows it was *Williams* trial strategy to dismiss count three to exclude several witnesses. After the court rules against Williams she makes a significant objection, (ECF No. 12-10-Pgs. 40-42)(emphasis added).

C. THE MISDEMEANOR TRIAL

On December 4th, 2012 the misdemeanor trial begins. Ms. Kunisch delivers the opening statement and starts the questioning of the state's first witness, the alleged victim Caroline (this is the pseudonym that all parties have used thus far). Shortly into the state's questioning defense counsel, Robert Haney, is forced to request a bench conference, based on the inappropriate response of Caroline (ECF No. 12-11-Pg. 27). While returning from said bench conference the start of Williams animus can be seen in the comment she makes to defense counsel:

"At the conclusion of this conference A.D.A. Williams told Lass's attorney that if he moved for a mistrial and the motion was granted, she should file felony charges against Lass"(ECF No. 46-Pg.2).

Based on this comment Lass did not request a mistrial. Shortly thereafter Caroline again makes what the Court will find "extremely prejudicial" statements, leaving Lass no choice but to formally request a mistrial, over the state's argument, again the argument is made by *Williams*, not Ms. Kunisch (ECF No. 12-11-Pg.36). After hearing all arguments the Court finds:

"[T]his trial certainly needs to be fair to the victim as well as the defendant. He has certain rights as well. [A]nd in terms of what was said.. it was extremely prejudicial... with all that information... and the fact that we should use mistrials sparingly I think a mistrial is appropriate and I will grant your motion."

(ECF No. 12-11-Pg. 39)

D. MISDEMEANOR POST TRIAL

On March 4, 2013 Williams explains:

"[A]lthough her assignment within the Office of the District Attorney were changing she was not going to allow the case against Mr. Lass to be assigned to another A.D.A. Williams went on to state that even if she were to leave the District Attorney's Office and go into private practice, she would return under the District Attorney's pro Bono program to personally see to the prosecution of Mr. Lass."

(ECF No. 46 at *3)

The District Court did find that "Williams did not dispute and the state courts accepted that [Williams] made the averments contained in the affidavit of Lass's attorney, (ECF No. 46 at *5). On March 27, 2013 the State moves to dismiss the misdemeanor case.

E. THE FELONY CASE

Less than two weeks after the dismissal of the misdemeanor case A.D.A. Williams makes good on her threat to add felony charges by adding nine felony counts, all of which are to have occurred during the same course of conduct as the original misdemeanor battery charges, (felony counts six and nine Strangulation and Suffocation and counts seven and ten Felony Intimidation of a victim) or predate the original misdemeanor charges by years.

As early as the initial appearance, on April 5, 2013, defense counsel makes a significant record that the "new charges are of a vindictive nature." (App. E-4-Pg's. 7-10). At a final pretrial hearing, on August 7, 2013 Milwaukee County Circuit Court Judge Stephanie Rothstein questions Williams about the dates of some of these charges, and the following colloquy takes place:

THE COURT: I note that there obviously is a history here, and although these offenses date back to 2008, I note that they were only much more recently reported it sounds like. Unless - - I don't know if any of the previous ones had ever been reported, but according to the interviews that are in the Complaint, those didn't take place until February, April of this year, Is that right?

ATTORNEY HANSON: They were originally reported and then the investigation was revived due to a misdemeanor that was pending in domestic violence court.

THE COURT: Right. Okay. And that was the matter that was before Judge Triggiano where the defendant was represented by Mr. Haney. Correct?

ATTORNEY HANSON: Yes.

(App.-E-5-Pg.4)

This colloquy insures that the State and more importantly *Williams* was aware of all additional felony allegations prior to deciding to go to trial on the original misdemeanor charges (emphasis added). After Lass decided to proceed pro se on 11/3/2015 he did present the Court with a motion asking that the Court dismiss all additional felony charges on the basis of vindictive prosecution. At the next court date of November 18, 2015, MIlwaukee County Justice, Judge Ellen Brostrom, addresses Lass vindictive prosecution motion and questions Williams about the additional charges. Now, *before a different Judge,* Williams changes her story from having Knowledge of all additional charges prior to the misdemeanor trial, see, (App.- E-5-Pg. 4) to:

"I learned about the history of domestic violence... in December during... either before during or after the mistrial."

(ECF No. 12-12-Pg. 8)

This new explanation leads this *new Judge,* Judge Brostrom to rule:

"So I think the connection is, right, that the law would state as problematic if Ms. Williams was effectively filing elevated charges to punish you from exercising a constitutional right or to dissuade you from exercising it, and I just don't think that's what the evidence shows here.

(ECF No. 12-12-Pg. 10)

The felony trial begins on December 7, 2015 and on December 16, 2015 the jury finds Lass guilty on 10 of the 11 counts. Before sentencing Lass presents the Court with a pro se post-conviction motion again asking the Court to dismiss all felony charges as being of the vindictive nature. On the day of sentencing, February 12, 2016, the court dismisses this motion stating:

"I did receive a motion from the Defense and also the State's response. For all the reasons stated in the State's response, I do deny this motion. Mr. Lass, you've effectively brought this motion or some iteration of it in multiple fashions in front of this Court. There are no violations associated with the State's prosecuting of this case.

(ECF No. 12-27-Pgs. 2-3)

F. POSTCONVICTION MOTION

Lass addressed the presumption of vindictiveness as well as actual vindictiveness in his post conviction motion, as can be seen in his Memorandum of Law at pg. 11:

"A persuasive argument may be made that, where a mistrial is required due to misconduct by a state's witness, additional charges create a realistic likelihood of vindictiveness, giving rise to a rebuttable presumption. "To establish a claim of prosecutorial vindictiveness, a defendant must show . . . a realistic likelihood of vindictiveness, therefore raising a rebuttable presumption of vindictiveness . . ."' State v. Williams, 2004 WI App 56, ¶ 43, 270 Wis. 2d 761, 784, 677 N.W.2d 691, 702.

"But, here, in deciding whether to grant Lass an evidentiary hearing, the court need not necessarily decide whether a presumption arises. This is because Lass's motion plainly alleges actual vindictiveness on the part of the prosecutor; and the additional charges that were filed permit an inference that the prosecutor acted vindictively." (Id)

(ECF-31-11-Pgs. 10-11)

G. MILWAUKEE CIRCUIT COURT DECISION

As to Circuit court Judge Wagner's ruling on Lass's claim of vindictive prosecution Judge Wagner leaves a very important word out of his first ellipsis he quotes:

"I learned about the history of domestic violence from the victim in a face-to-face conversation at some point in my interaction with her... during... the misdemeanor trial."

The word missing is before. See transcript of (ECF No. 12-12-Pg. 8), which states:

"I learned about the history of domestic violence from the victim in a face -to face conversation at some point in my interaction with her. I know for a fact, in December, during -- either before , during , or after the misdemeanor trial."(emphasis added)

The word before is important because if Williams knew about all felony allegations before committing to trial on the misdemeanor charges the ruling on vindictive prosecution should or at least could have been different. Judge Wagner denies Lass' post conviction motion without holding an evidentiary hearing on the claim of both the presumption of vindictiveness, as well as actual vindictiveness.

H. LASS' COURT OF APPEALS BRIEF

Lass addressed in his argument both the presumption of vindictiveness as well as actual vindictiveness

to the Wisconsin Court of Appeals:

"Here, the situation is hybrid. The additional charges did not arise out of the "give-and-take" of pretrial negotiations. Rather, the additional charges were filed only after Lass exercised his constitutional right to a fair trial, which, the court later ruled, could only happen if a mistrial were granted. Thus, in many respects, the situation is very similar to that where a defendant successfully exercises his right to appeal, and then the prosecutor responds by filing additional charges."

(ECF No.12-5-Pg 28-29)

"But, here, in deciding whether to grant Lass an evidentiary hearing, the court need not necessarily decide whether a presumption arises. This is because Lass's motion plainly alleges actual vindictiveness on the part of the prosecutor; and the additional charges that were filed permit an inference that the prosecutor acted vindictively. "

Id. at:29

I. LASS' REPLY BRIEF TO THE WISCONSIN COURT OF APPEALS

In Lass' reply brief Counsel makes sure to clear the record and assure that Williams herself admitted to

the court, before Judge Rothstein, that she was aware of all allegations of domestic violence by Lass

before the misdemeanor trial took place.(emphasis added)

"For example, at a final pretrial in the felony case (the second case) the following colloquy took place between the prosecutor and the court:"

THE COURT: . . . I note that there obviously is a history here, and although these offenses date back to 2008, I note that they were only much more recently reported it sounds like. Unless — I don't know if any of the previous ones had ever been reported, but according to the interviews that are in the Complaint, those didn't take place until February, April of this year. Is that right?

ATTORNEY HANSON: They were originally reported and then the investigation was revived due to a misdemeanor that was pending in domestic violence court.

THE COURT: Right. Okay. And that was the matter that was before Judge Triggiano where the defendant was represented by Mr. Haney. Correct?

ATTORNEY HANSON: Yes

(ECF-12-7-Pgs.5-6)

Unambiguously, the prosecutor told the court that the older offenses-- the ones dating back to 2008-- were originally reported, apparently not charged, but then "revived" due to the misdemeanor case that was pending in domestic violence court.

"Moreover, the state's own statement of the facts wholly undermines any claim that the new charges were based upon new evidence that only recently came to the prosecutor's attention. The state writes, "Five of the newly charged felonies arose from the same conduct that the State had charged in the original misdemeanor case. (emphasis provided); (State's brief p. 4)

(ECF No. 12-7-Pg 5)

J. WISCONSIN COURT OF APPEALS DECISION.

The Wisconsin Court of Appeals does agree that at least several of the additional felony charges were to have occurred during the same course of conduct as the original misdemeanor charges. The Court specifically stated at:

In April 2013, the State filed a complaint to initiate what we will refer to as "the felony case," including "the felony trial." The felony case complaint had eleven counts, each charged as a crime of domestic abuse against Caroline, overlapping in part but not wholly with the alleged conduct charged in the misdemeanor case. (emphasis added)

(ECF No. 12-2-¶4)

This Court continues to confuse the issue of exactly when Williams learned of the additional allegations when one views ¶15 compared to what the Court writes at ¶17:

¶15 At a pretrial hearing in the felony case, the prosecutor who filed the felony case complaint represented to the court that she learned about the additional, prior domestic violence history meriting additional charges from Caroline, and that this did not occur "until after we had informed [Caroline] that the [c]ourt granted the motion for mistrial."

¶17 At a subsequent pretrial motion hearing, the court rejected the vindictive prosecution claim. The prosecutor represented at this hearing that, in the same month as the misdemeanor trial, "either before, during, or after the misdemeanor trial," the prosecutor learned from Caroline about a "history of domestic violence" by Lass that extended beyond the conduct charged in the misdemeanor case.

(ECF No. 12-2)

This Court rules the same as the circuit court and finds:

¶21 We conclude that Lass's postconviction motion fails to allege facts that, if adduced at an evidentiary hearing, would entitle him to relief, either based on proof of a realistic likelihood of prosecutorial vindictiveness or of actual vindictiveness.

(ECF No. 12-2)

K. LASS' BRIEF TO THE U. S. DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Lass does address actual vindictive prosecution:

"This is because Lass's motion plainly alleges actual vindictiveness on the part of the prosecutor; and the additional charges that were filed permit an inference that the prosecutor acted vindictively."

(ECF-28-Pg. 31)

L. LASS' REPLY BRIEF TO THE EASTERN DISTRICT COURT OF WISCONSIN

Lass does point out in his reply brief to the district court that:"In the state court, the prosecutor simply gave an unsworn and unconfronted "explanation" to the court about why she issued the additional charges. This "explanation" by the prosecutor is the sole basis for the court denying Lass a hearing." And then:

"An evidentiary hearing should have been held so that the prosecutor's "explanation" would be under oath and subject to cross-examination. Instead, the lower courts blithely accepted the "explanation" and denied Lass a hearing."

(ECF-45-Pg. 3)

Again explaining the need for a proper hearing to complete the record on the issue of vindictive prosecution defense counsel went on to explain how Justice Blackmun ruled in the dissenting opinion in Bordenkircher v. Hayes, 434 U.S. 357, 368, 98 S. Ct. 663, 670, 54 L. Ed. 2d 604, 614, 1978 :

*21 "Prosecutorial vindictiveness in any context is still prosecutorial vindictiveness. The Due Process Clause should protect an accused against it, however it asserts itself. The Court of Appeals rightly so held, and I would affirm the judgment."'

(ECF-45-Pgs.-4-5)

M. DECISION OF THE EASTERN DISTRICT OF WISCONSIN

Magistrate Duffin's decision at pages two could lead reviewing courts to believe that Ms. Margaret Kunisch Was an Assistant District Attorney in the Milwaukee County District Attorney's Office at the time of the misdemeanor trial:

"Assistant District Attorney Margaret Kunisch took the lead role at trial, although Assistant District Attorney Jennifer Williams, who at that time had the surname Hanson, also appeared. " (ECF No. 46-*2).

Margaret Kunisch was not hired by the Milwaukee County District Attorney's Office until February of 2013. This can be verified by checking Ms. Kunisch's bar number of 1088883

As indicated above it is *Williams* who explains at the time of the discovery being prepared in the felony case, she had the help of Margaret Kunisch "who was then employed as a homicide/sexual assault paralegal."(App.-E-6-Pg. 6). As a paralegal Ms. Kunisch could not have been any chair on the record of any case. As explained earlier that it was *Williams* who argued all points of law during the misdemeanor trial Duffin's comments support that it was in fact *Williams* who argued against the defense's mistrial motion:

"This answer led to another conference, and this time Lass moved for a mistrial. (ECF No. 12-11 at 35, 37-38.) The state, by *Williams,* opposed the motion (ECF No. 12-11 at 36), but the court granted it" (ECF No. 12-11 at 38-39).(emphasis added)

(ECF No. 46-*2)

Just as the lower courts have found Duffin agrees that at least four of the felony charges are to have occurred during the same course of conduct as the original misdemeanor charges:

"But with respect to the two June 2012 incidents, in addition to misdemeanor charges of battery, the state added to each incident felony charges of strangulation and intimidation of a victim."

(ECF No. 46-*3)

It's also important to note that Duffin seems to agree that there could have been more done to insure a complete hearing was done to get to the bottom of the reasons the additional charges were brought:

"Lass moved to dismiss the felony charges on the ground that they were brought to punish him for exercising his right to a mistrial. Rather than holding a formal hearing where Lass would have been able to cross-examine Williams, Judge Brostrom accepted Williams's *vague explanation* for the new charges"(emphasis added)

(ECF No. 46-*3)

Duffin explains that this Court has never established federal law even on a presumption of vindictiveness to the specific situation presented in this case, that being a mistrial not caused by a hung jury:

"Because the new charges against Lass were added following a mistrial, "[t]he present case falls in between the Supreme Court's pretrial/post-conviction dichotomy." Lane v. Lord, 815 F.2d 876, 878 (2d Cir. 1987)... As Lass correctly observes, "Whether a presumption of vindictiveness arises where the prosecutor increases the charges following the defendant's successful motion for mistrial is an open question in the federal law."'

(ECF No. 46-*4)

Next Duffin does explain:

"Williams did not dispute, and the state courts accepted, that she made the averments contained in the affidavit of Lass's attorney."

(ECF No. 46-*5)

And then goes on to explain:

"The only material uncertainty is precisely when Williams learned that facts existed supporting felony charges. If she knew the full scope of the allegations and the evidence against Lass before the misdemeanor trial began, the fact that she chose to pursue felony charges only after Lass obtained a mistrial would tend to support an inference of vindictiveness..."

"Williams obviously knew by December 4, 2012, that there was a factual basis for a felony charge, when she threatened to bring felony charges if Lass obtained a mistrial. But the extent of her knowledge is unclear. She could have been referring simply to the prospect of charging Lass with felony strangulation, which ADA Kunisch referred to in her opening statement (ECF No. 12-11 at 7) and Caroline testified to"

(ECF No. 46-*6)

Magistrate Duffin ultimately finds:

"In sum, Lass has failed to establish a basis for an evidentiary hearing or prove that Williams's actions were the result of actual vindictiveness. There are reasonable, non-vindictive explanations for Williams's decision to pursue felony charges following the mistrial in the misdemeanor case. Because the court cannot say that the court of appeals' decision was contrary to or involved an unreasonable application of federal law, Lass is not entitled to relief on his vindictive prosecution claim."

(ECF No. 46-*7)

But goes on to state:

"Because the court finds that it *must* deny Lass's petition, the court must consider whether to grant him a certificate of appealability."(emphasis added)

"Lass has presented a colorable claim of vindictive prosecution supported by statements by the prosecutor from which one reasonable inference is that she acted with actual vindictiveness. Although the court has concluded that Lass cannot prevail on this claim under the high standard posed by AEDPA, the court nonetheless finds the constitutional claim sufficiently debatable that a certificate of appealability as to this claim is appropriate. Accordingly, the court grants Lass a certificate of appealability as to Ground One of the petition ."

(ECF No. 46-*11)

N. LASS' BRIEF TO THE SEVENTH CIRCUIT COURT

On pages 25-26 Lass again argues:

"[t]hat it is an unreasonable application of federal law for the lower courts to have held that he failed to establish actual vindictiveness..."

(App.-F-1-Pgs 25-26)

O. THE DECISION OF THE SEVENTH CIRCUIT

The Seventh Circuit first explains:

"All along his primary contention has been that the second set of charges were the product of an unconstitutional vindictive prosecution."

(App.-A-*934)

The Court goes on to continue the false narrative that A.D.A. Williams was second chair in the misdemeanor trial:

"About a year later Assistant District Attorney Jennifer Williams, who second chaired the first case..."

(Id. at-*934)

Also in the seventh Circuit's decision they explain "When dealing with attorney Haney's affidavit this Court finds:"Haney's statement got the trial court's attention, with the judge asking ADA Williams to explain the new wave of broader, more serious felony charges against Lass. ADA Williams then appeared in open court and stated: "I learned about the history of domestic violence from the victim in a face-to-face conversation at some point in my interaction with her, I know for a fact, in December, during—either before, during, or after the misdemeanor trial."(Id. at-*934)

And again based on this version of Williams explanation of when she learned of the additional charges the Court stated:

"The trial court credited this explanation, finding that the new charges were not vindictive because ADA Williams did not learn of the full range of Lass's criminal conduct until the misdemeanor prosecution was underway. Even more specifically, the court determined that the prosecutor could not have charged Lass with the felony counts the first time around because she did not yet have knowledge of the full scope of his criminal conduct. So the trial court denied Lass's request to dismiss the second case."

(Id at-*935)

For a second time the Court explains its reasoning for denying Lass's petition:

"Most important on the factual front is to return to what happened in the Wisconsin trial and post-conviction proceedings. Lass's contention that the felony prosecution was vindictive—exposing him to substantial prison time and coming as it did on the heels of the misdemeanor case ending a mistrial—did not fall on deaf ears. To the contrary, the Wisconsin trial court required ADA Williams to come to court and explain on the record the basis for the felony charges. The court did so fully aware of defense counsel Robert Haney's affidavit recounting ADA Williams's statements about her personal resolve to see that Lass face felony charges. The trial judge then made an express finding that there was no evidence showing that the state brought the felony charges against Lass to retaliate against or punish him for moving for and receiving a mistrial in the initial misdemeanor prosecution. Put most simply, the trial court found ADA Williams's explanation credible."

(Id. at-*938)

This is pointed out to insure that all lower courts have accepted Williams unsworn explanation and although it was "on the record" it did not face any type of cross-examination as is required before any Court can accept her explanation as part of the evidence the Court uses in making a factual finding or ruling on any manner. The Seventh Circuit court ultimately determines:

"In the final analysis, we see no basis for federal habeas relief under § 2254(d) on Lass's vindictive prosecution claim. No aspect of the Wisconsin Court of Appeals' rationale is contrary to or reflects an unreasonable application of clearly established U.S. Supreme Court precedent."(emphasis added)

(Id. at-*939)

REASONS THIS PETITION SHOULD BE GRANTED

This petition is ripe for adjudication, and should be granted, as it presents questions of imperative public importance that to this point have no well established federal law, (S.C.R. 10(c)). Because there is no well established federal law there is a divide in how Federal Circuit Courts have handled similar cases to the one at hand (S.C.R. 10(a). Before getting into the particulars of Lass' petition it is important to show how the federal Circuit courts are divided. The federal courts have adopted a variety of competing secondary tests when dealing with vindictive prosecution. While these tests can appear ad-hoc, they can be grouped into two broad categories. One set of courts has emphasized the need to avoid an appearance of vindictiveness that may deter future defendants from exercising their rights. A second set of courts has emphasized the need to protect individual defendants from actual retaliatory conduct.

Courts in the First, Third, Fifth, Sixth, and Ninth Circuits belong to the first group and apply a presumption of vindictiveness when the prosecution's actions are likely to have a chilling effect on other defendants. (See, e.g., United States v. DeMarco, supra, 550 F.2d at p. 1227; United States v. Krezdorn (5th Cir. 1983) 718 F.2d 1360, 1364–1365 (en banc); United States v. Andrews (6th Cir. 1980) 633 F.2d 449, 453–454 (en banc) [examining the prosecutor's actions and stake in deterrence to determine whether a reasonable person would find a realistic likelihood of vindictiveness]; *824 United States v. Schoolcraft (3d Cir. 1989) 879 F.2d 64, 68 ["The defendant bears the initial burden of proof in a vindictive prosecution claim and is required to establish the appearance of vindictiveness."]; United States v. Young (1st Cir. 1992) 955 F.2d 99, 108 [following Krezdorn]; Lovett v. Butterworth (1st Cir. 1979) 610 F.2d 1002, 1005–1006 [citing DeMarco and Andrews, discussing prophylactic nature of the doctrine, and emphasizing irrelevance of prosecutors' subjective motivations].) Because those courts are most concerned with the appearance of vindictiveness, they do not typically consider the subjective

motivations driving the State's actions. For example, in the Fifth Circuit, courts assess whether a defendant has presented evidence sufficient to establish a presumption of vindictiveness by examining the prosecutor's actions in the context of the entire proceedings and asking whether "any objective event or combination of events in those proceedings should indicate to a reasonable minded defendant

that the prosecutor's decision to increase the severity of charges was motivated by some purpose other than a vindictive desire to deter or punish appeals[.]" (United States v. Krezdorn, supra, 718 F.2d at pp. 1364–1365.)

Courts in the Second, Fourth, Seventh, Eighth, Tenth, and District of Columbia Circuits, on the other hand, belong to the second group, and require defendants to prove a reasonable likelihood of actual vindictiveness. (See, e.g., United States v. King (2d Cir. 1997) 126 F.3d 394, 397; United States v. Wilson (4th Cir. 2001) 262 F.3d 305, 314–315; United States v. Falcon (7th Cir. 2003) 347 F.3d 1000, 1004 [to obtain evidentiary hearing on vindictive prosecution, defendant must offer sufficient evidence to raise a reasonable doubt that the government acted properly]; United States v. Chappell (8th Cir. 2015) 779 F.3d 872, 879–881 [" 'a defendant may, in rare instances, rely upon a presumption of vindictiveness,' (citation)" if he establishes a reasonable likelihood of actual vindictiveness]; United States v. Raymer (10th Cir. 1991) 941 F.2d 1031, 1042 [court must determine whether " 'there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or punitive animus towards the defendant because he exercised his specific legal right.' "]; United States v. Safavian (D.C. Cir. 2011) 649 F.3d 688, 692 [to establish a presumption of vindictiveness, defendant must show prosecutor's actions were "more likely than not" attributable to actual vindictiveness].) Those courts therefore focus

on whether the prosecutor harbored genuine animus toward the defendant. For example, to establish a presumption of vindictiveness in the Fourth Circuit, the defendant "must show that the circumstances 'pose a realistic likelihood of [actual] vindictiveness.' " (United States v. Wilson, supra, 262 F.3d at pp. 314–315.) This is a "rigorous" standard that requires defendants to overcome "a significant barrier." (Ibid.) That is, the showing must be "sufficiently strong to overcome the presumption of prosecutorial regularity." (Ibid.)

Finally, courts in the 11th Circuit take a hybrid approach. They apply a presumption of vindictiveness when the State substitutes more serious charges for the original charges concerning the same conduct, but require the defendant to prove actual vindictiveness when the prosecution adds new and separate

charges. (United States v. Jones (11th Cir. 2010) 601 F.3d 1247, 1260–1261 & fn. 5; United States v. Kendrick (11th Cir. 2012) 682 F.3d 974, 981–982.)

The questions that need answered are; I. Do the statements and actions of the prosecutor in this case equate to an actual vindictive prosecution? II. Was Lass punished for exercising a legally protected statutory and Constitutional right to a fair trial? III. Does a mistrial that ends, not because of a hung jury, fall into the pretrial or post trial settings as explained in United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74

I. Do the statements and actions of the prosecutor in this case equate to an actual vindictive prosecution:

"The Fifth Amendment, Due Process Clause, has been interpreted to prohibit the government from prosecution a defendant because of some specific animus or ill will on the prosecutor's part or to punish the defendant for exercising a legally protected statutory or Constitutional right." United States v. Benson 941 F 2d 598,611 (7th Cir. 1991)(Citing United States v. Goodwin 457 U.S. 368, 372 (1982); United States v. DeMichael 692 F 2d 1059, 1061-62 (7th Cir. 1982); United States v. Adams 870 F 2d 1140,1145 (6th Cir. 1989)).

It is Lass' belief that the above quote can and should be broken down into two parts. The first part being, The Fifth Amendment prohibits the government from prosecuting a defendant because of some specific animus or ill will on the part of the prosecutor. Goodwin at *372 went on to state "The Due Process Clause of the Fifth Amendment prohibits the Government from bringing more serious charges...unless the prosecutor comes forward with *objective evidence to show the increased charges*

could not have been brought before the defendant exercised his rights," (quoting North Carolina v. Pearce, Supra, and Blackledge v. Perry, Supra.)(emphasis added)

In the misdemeanor case Lass faced a maximum penalty of 18 months in the county jail and fines of $20,000. After exercising his right to a fair trial, which the court stated,"This trial certainly needs to be fair to the victim as well as the defendant. He has certainly rights as well. And in terms of what was said...it was extremely prejudicial...with all that information...and the fact that we should use mistrials sparingly I think a mistrial is appropriate and I will grant your motion," (ECF-12-11-Pgs. 38-39). Lass then faced 118 years in state prison and fines totalling $325,000. Asking yourself would anyone in Lass' position exercise their Constitutional rights in a similar circumstance? The answer is no!

This Court did explain in Blackledge v. Perry 417 U.S. 21 at 30-31 94 S. Ct. 2098, 40 L.Ed.2d 628 (1974)

"Having chosen originally to proceed on the misdemeanor charges in the District Court, the State of North Carolina was, under the facts of this case , simply precluded by the Due Process Clause from calling upon the respondent to answer the other more serious charges in the Superior Court."

The particulars of Lass' petition and the above are similar. Lass was originally in domestic court facing misdemeanor charges but after exercising his right to a fair trial he faced several new felony charges. The only difference seems to be that the Due Process violation in Lass' case happened after he successfully acquired a mistrial. "The facts of this case plainly fit within the petition of Pearce and Blackledge. There was no, "give and take negotiation" between Lass and the prosecutor, and there was

the "unilateral imposition of a penalty" in response to Lass' choice to exercise a legal right'" Goodwin at *391-92.

As was detailed in the statement of the case there can be no doubt that A.D.A. Williams was the only A.D.A. employed by the Milwaukee District Attorney's Office at the time of the misdemeanor case as such she was fully vested in the original misdemeanor trial, as only Williams argued all pretrial motions and on more than one occasion Williams explains she "was able to review the police reports in depth..."(ECF 12-10-Pg.5) and even more precisely stated by *Williams* when questioned by the court, on February 17, 2014 about the additional felony charges that predate the 2012 misdemeanor allegations Williams leaves no doubt that she was aware of all allegations prior to going to trial on the misdemeanor charges:

> THE COURT: I note that there obviously is a history here, and although these offenses date back to 2008, I note that they were only much more recently reported it sounds like. Unless - - I don't know if any of the previous ones had ever been reported, but according to the interviews that are in the Complaint, those didn't take place until February, April of this year, Is that right?
>
> ATTORNEY HANSON: They were originally reported and then the investigation was revived due to a misdemeanor that was pending in domestic violence court.
>
> THE COURT: Right. Okay. And that was the matter that was before Judge Triggiano where the defendant was represented by Mr. Haney. Correct?
>
> ATTORNEY HANSON: Yes.

(App.-E-6-Pg.6)

The question for this court boils down to, after Williams tells the court that what becomes the felony charges were "originally reported" and investigated prior to the misdemeanor trial does Williams explanation of:"I learned about the history of domestic violence from the victim in a face-to-face conversation at some point in my interaction with her, I know for a fact, in December, during -- either *before, during or after* the misdemeanor trial," equate to objective evidence? If this explanation is accepted Lass asks this court how could any defendant ever prove actual vindictiveness, if the

prosecutor covers all bases and states they do not remember if they knew of what will become the new charges before during or after the original trial begins?

As this court has previously stated the State must prove through objective evidence that the higher charge could not have been brought at the time the original charge was brought to overcome the appearance of vindictiveness, see U. S. v. Goodwin 457 U.S. 368 and 372, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982) Objective evidence as defined in Blacklaws dictionary 11th Ed. is:

"A legal standard that is based on conduct and perceptions external to a particular person."

With that definition in mind Lass does not believe the prosecutor has presented objective evidence showing the increased charges could not have been brought before the defendant exercised his right to a fair trial. To present objective evidence the Court must ask itself "Is it possible that the fear of such vindictiveness may unconstitutionally deter a person in respondent's position form exercising his statutory and constitutional right to [a fair trial]? See North Carolina v. Pearce, supra 385 U.S. at 725, 89 S.Ct. at 2080. The answer to [this] question is plainly "yes." Goodwin at *389 (Justice Brennan, with whom Justice Marshall joins dissenting) See also: United States v. Krezdorn 718 F 2d 1360, 1370 (5th Cir. 1984)"Would a criminal defendant trying to decide whether to assert a legal right look at the facts of the instant case and presume the prosecutor had acted vindictively?" Again the answer is plainly yes.

Although this court has not set precedent law explaining if actual vindictiveness can be found after the defendant exercises a Constitutional Right to a fair trial and receives a mistrial, several Circuit courts have, see U.S. v Wilson 262 F 3d 305, 314 (4th Cir. 2001):

"It is now well established that a prosecutor violates the Due Process Clause of the Fifth Amendment by exacting a price for a defendant's exercise of a clearly established right or by punishing the defendant

for doing what the law plainly entitles him to do. See United States v. Goodwin, 457 U.S. 368, 372, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982); North Carolina v. Pearce, 395 U.S. 711, 724, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Thus, if a prosecutor responds to a defendant's successful exercise of his right to appeal by bringing a more serious charge against him, he acts unconstitutionally. See Blackledge v. Perry, 417 U.S. 21, 28–29, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). Such retaliatory conduct amounts to vindictive prosecution and is unconstitutional. Indeed, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the [United States] to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' " Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) (citations omitted). See also, U.S. v. Jamison 505 F 2d 407, 416, 164 U.S.App.D.C. 300 (D.D.C. 1974), after the defendants' exercise of procedural rights, suspicious timing alone would be insufficient to indicate prosecutorial animus. Id. However, the court must view differently a prosecutor's actions that come following the initiation of a jury trial that resulted in a mistrial. See also, U.S. v. LaDeau 734 F.3d 561 (6th. Cir. 2013) LaDeau's successful suppression motion forced the government to restart its prosecution from square one in order to prevent him from "going free"—almost exactly the sort of burden that Blackledge identified as supporting a presumption of prosecutorial vindictiveness. 417 U.S. at 27, 94 S.Ct. 2098. We reject the government's invitation to narrowly construe Blackledge where Goodwin does not require it, and we agree with LaDeau that the district court did not abuse its discretion in determining that the requisite prosecutorial stake existed on the circumstances of his case. See also, U.S. v Castillo Not Reported in F.Supp.2d2007 WL 3046223 (E.D. Wisconsin.October 17, 2007) *3 When this court initially reviewed the defendants' claims of vindictive prosecution, essentially the only evidence of vindictiveness the defendants presented was the timing of the superseding indictment and specifically the fact that it came soon after a mistrial was declared. If the defendants' motions came in the pretrial stage and after the defendants' exercise of procedural rights, suspicious timing alone would be insufficient to indicate prosecutorial animus. Id. However, the court must view differently a prosecutor's actions that come following the initiation of a jury trial that resulted in a mistrial.

Next when addressing actual vindictiveness on the part of the Prosecutor this court has no precedent federal law, but Lass was able to find a District Court opinion with similar characteristics that found the Prosecutor's charging decision was actually vindictive, see U.S. v. In Hyuk Kim Not Reported in F.Supp.2d 2009 WL 5033934 (District Court of Guam. 2009). The prosecutor in IN Hyuk Kim stated:

"No, it was the filing of his motions that made this government determine to bring everything that it could to bear on the trial."

...

You file motions in this court, and we start looking for more charges to bring.

...

"But as a result of his filing motions, we began an investigation to see if there were other charges that should and could be brought."

"In theory, we could have gone ahead and tried this one [against the Defendant], which involved just the undercover sting operation, and then brought a separate charge concerning Ms. An and then two more separate indictments for separate trial dates concerning the other two aliens.... But if we're going to trial on this issue, we're not going to break this down into four trials because that would be a huge burden on the court's resources, so we bring everything that we have that we believe is provable in the superseding indictment. But unquestionably, we are punishing him for filing those motions, and that's the truth."

In Hyuk Kim at *5

The prosecutor "flatly dispute[d] that vindictiveness was involved at all" in this case, and maintained that "[t]her is no distinction between the 'appearance of vindictiveness' and 'actual vindictiveness' for purposes of applying this doctrine," at *6. The In Hyuk Kim court went on to find:

"After a thorough review of the caselaw, this court recognizes that it is very rare for a court to make a finding of actual vindictive prosecution. Even the Supreme Court opined that such a case would rarely occur. The Court in Goodwin stated: "It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter." 457 U.S. at 381. Despite the Supreme Court's doubt that such a situation could arise, the Prosecutor here specifically expressed her unquestionable intent to punish the Defendant for filing motions, and based on her words, this court would be hard-pressed to reach a contrary conclusion. It is clear that the Prosecutor's words constitute objective and direct evidence of actual prosecutorial vindictiveness, and thus, a violation of the Defendant's due process rights."

I'd at *7

When objectively compared to the totality of the statements made by the prosecutor in the instant case they would appear to at least be in the same ballpark, if not on the same base. As the case of In Hyuk Kim. Williams first states to attorney Haney if he "again requested a mistrial and it was granted Williams would file felony charges against Mr. Lass," (See Haney's affidavit at 4). compared to "No, it was the filing of his motions that made this government determine to bring everything that ir could," or You file motions in this court and we start looking for more charges to bring," Next when questioned by the court about the dates of the additional felony charges Williams admitted "They were originally reported,

speaking of what will become the additional nine felony charges, and then the investigation was revived due to a misdemeanor that was pending in domestic violence court, (Tran 8-7-2013 Pgs. 3-4), compared to "but as a result of his fining motions, we began an investigation to see if there were other chargers that should and could be brought," In Hyuk Kim at *5.

The In Hyuk Kim court went on to explain the particulars of the case of State v. Halling 672 P 2d 1386 (Or. App. Ct. 1983), which is also a valuable guide in deciding whether the Court should accept this petition. In Halling an Oregon trial judge faced a situation similar to the one here. In Halling, the parties met on May 6, 1982, for a pretrial conference district attorney Johnson offered to recommend a six-year sentence on exchange for defendant's plea of guilty to the charge of attempted murder. Defendant's attorney consistently maintained that he intended to try the case and on May 19, 1982 he informed Johnson that he "expected three or four days of pretrial motions" before the trial could commence. The following day, Johnson telephoned defendant's attorney and made the following remark; "Larry, I have a brilliant idea. I have just thought of a way to cause further evid to poor Mr. Halling." I'd at 1387. The prosecutor then said that "she intended to charge the defendant with additional crimes unless he accepted her previous [plea] offer." Id. After making that comment, the prosecutor then filed two additional indictments against Mr. Halling. The trial judge dismissed the two indictments for prosecutorial; vindictiveness and the Oregon Court of Appeals affirmed. Finding the dismissal was proper, the appellate court stated:

"As previously noted, the trial judge found that the additional charges against defendant were brought in "reprisal" for defendant's rejection of a plea bargain. We agree with defendant that that is tantamount to a finding that "the prosecutor's charging decision was motivated by a desire to punish" defendant for insisting on a jury trial.

Id. at 1388.

Again it would seem there is a remarkable likeness in the comments made by the prosecutors. First the Halling prosecutor states:

"Larry I have a brilliant idea. I have just thought of a way to cause further evil to poor Mr. Halling." The prosecutor then said that "she intended to charge the defendant with additional crimes unless he accepted her previous [plea] offer."

I'd at 1387

Compare this to Williams statement of "if defense attorney Haney again moved for a mistrial and it was granted, she would file felony charges..." leaving attorney Hany to believe these statements to be a threat that he should not zealously represent Mr. Lass and that the State be allowed to secure a conviction through improper means of face dire consequences, (Haney's aff. at 4 and 5). After making that comment, the prosecutor then filed two additional indictments against Mr. Halling. The prosecutor in Lass' case filed an additional nine felony charges. To show how the instant case is even more severe than that of In Hyuk Kim, or Halling, Williams even went on to explain:

"At a subsequent conference Williams told defense counsel that she was personally dedicated to prosecuting Lass, and even though her assignment within the District Attorney's Office was changing, she was going to start in the case. She further said that, even if she left the District Attorney's Office, she would come back and prosecute Lass pro bono."

(ECF No. 12-5 at 72, ¶ 10)

As explained in Lass' reply brief to the Seventh Circuit what more is needed to prove actual vindictiveness than a statement from the prosecutor explaining she would work for free to insure the prosecution of Lass?

In conclusion just as the In Hyuk Kim court recognized that:

"'retaliatory motivation' may be difficult to prove in any individual case," and it is only when prosecutorial actions stem from an animus toward the exercise of a defendant's rights that vindictive prosecution exists." (Citation omitted) and ultimately found that this was that rare case where there is an expressed "animus toward the exercise of a defendant's rights." The animus is evident in the Prosecutor's separate statements, which, taken as a whole , evince a "retaliatory motivation" and lead this court to the inescapable conclusion that there was a deliberate intent to punish the Defendant for filing motions. Without a doubt, it is impossible to argue otherwise. It cannot be questioned that there was governmental action to penalize the Defendant.

U.S. v. In Hyuk Kim at *8

The same should be found here. The statements by williams are just as damaging as the statements in the above two examples, where the courts found the prosecutor's statements to constitute actual vindictiveness. Also important to remember both of these cases are to have occurred in the *pretrial* stage, where in Lass' case the statements were made after the initial trial had commenced. (emphasis added)

II. Was Lass punished for exercising a legally protected statutory and Constitutional right to a fair trial?

The only question left to address is was Lass punished for exercising a legally protected Statutory and Constitutional right of Due Process?

"To punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort." Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604. In a series of cases beginning with North Carolina v. Pearce and culminating in Bordenkircher v. Hayes, the Court has recognized this basic—and itself uncontroversial—principle. For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right."

(Fn. 4")[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' " Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 32–33, n. 20, 93 S.Ct. 1977, 1986, n. 20, 36 L.Ed.2d 714).

U. S. v. Goodwin 457 U.S. 368, 372, 102 S.Ct. 2485, 73 L.Ed.2d 74 (S. Ct. 1982)

Goodwin went on to state:

"As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to "presume" an improper vindictive motive. " Id. 373.

As has been explained in nauseam Lass was severely punished for exercising his Constitutional right to a fair trial. Lass is essentially serving a life sentence for what started out, at the most, county jail time!

Everything the State used to bring the additional felony charges, 911 cade reports, police reports and medical records were all on file and available to Williams before she chose to proceed to trial on the original misdemeanor battery charges. The state has never been required to present; "objective information concerning identifiable conduct on the part of [Lass] occuring after the time of the original charging decision" North Carolina v. Pearce 395 U.S. at 726, 89 S. Ct. at 2081, as required by this court.

Without this objective evidence, remembering vindictive prosecution " is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." United States v. Armstrong 517 U.S. 456, 463, 116 S.Ct. 1480, 134 L. Ed. 2d 687 (1996). It would seem Lass is entitled to the same right this Court provided Perry:

"the right" Perry "asserts and that we today accept is the right not to be haled into court at all upon the felony charge" since "[t]he very initiation of the proceedings" against Perry "operated to deprive him due process of law." Id., at 30–31, 94 S.Ct. 2098; See also, Class v United States 583U.S. 174, 179, 138 S.Ct. 798 (2018).

Conclusion

No matter what ruling the Wisconsin Court of Appeals, or any court thereafter made in this case it would not have been contrary to or reflect an unreasonable application of clearly established United States Supreme Court precedent because there is no well established federal law on actual vindictiveness by the prosecutor. And for that reason alone Lass should be allowed to fully brief this issue, giving this Court the chance to once and for all establish federal law on what constitutes actual vindictiveness by a prosecutor.

While the Department of justice has the responsibility to protect the citizens of this nation against those who pose a threat to the safety of the community y, it must do so within the reach of the Constitution. Maddox v. Elize 83 F. Supp 2d 113 (D.D.C. 1999). The state in this case did not act within the Due Process Clause of the Fifth Amendment of the Constitution, resulting in erroneous rulings by the lower courts.

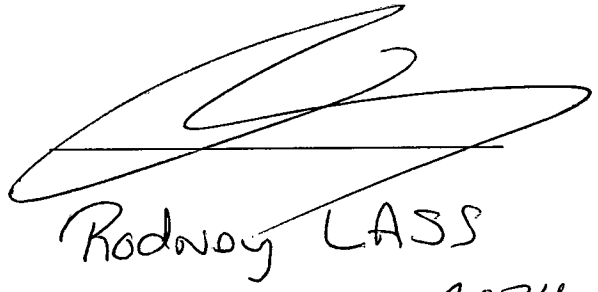
Remembering this case has been litigated through the Seventh Circuit if this Court does not grant this petition, where these arguments can be fully litigated giving this Court what is needed to either establish precedent federal law on what is needed to prove actual vindictiveness by the prosecutor, or in the alternative rule the lower courts ruling was erroneous because Lass was in fact punished for

exercising his Constitutional Due Process right to a fair trial this will effect more than just Lass, Any Prosecutor that has read the lower courts rulings will know all the prosecutor needs to do is feign ignorance as to when they learned of additional information, either before, during or after the initial trial, to bring additional charges when the result of the first trial does not go their way. Thus, giving the prosecutor another bite at the apple while effectively destroying the Due Process Clause of the Fifth Amendment of our Constitution.

Finally Lass asks this Court to remember: "Allegations of pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers." Estelle v. Gamble 429 U.S. 97, 106, 97 S.Ct. 285, 50 L. Ed. 2d 251 (1976); Haines v. Kerner 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652, 16 Fed.R.Serv.2d 1, and grant this petition so it can be fully briefed by competent attorneys

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Date: November 18, 2024

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