

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

IN THE  
SUPREME COURT OF THE UNITED STATES

John Wells — PETITIONER  
(Your Name)

vs.

David Gray, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

6th Circuit U.S. Court of Appeals  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

John Wells  
(Your Name)

P.O. Box 590 (344727)  
(Address)

St. Clairsville, Ohio 43950  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

## Questions Presented

**QUESTION 1:** Does a Federal Court of Appeals deny Due Process by refusing to issue a Certificate of Appealability where the Petitioner's claims exceed the minimal criteria set out in Slack v. McDaniel, 529 U.S. 473, 487 (2000), where the Petitioner shows (1) he was indisputably deprived of his Due Process and Jury Trial rights by the State Trial Court, where, among other things, the Trial Court convicted and sentenced him based upon facts neither submitted to, nor found by the Jury in its Verdicts; and (2) where the Petitioner showed that, as a matter of the State Court record, the procedural bar, i.e., res judicata, was applied by the State Court of Appeals in the timely direct appeal of right from the resentencing hearing, after having previously rendered at least two separate judgments that show the Petitioner's prior Judgment was void and not subject to preclusion by application of res judicata?

**Question 2:** Does a Petitioner show a violation of a Constitutional right where his Claims, based upon the State Court record, shows that the State Trial/Sentencing Court exceeded its Judicial Power/Authority by exercising Judicial power not conferred by the Jury's Verdicts, and rendered judgment of conviction and imposed sentences that are greater than the maximum terms allowed by law solely on the basis of the facts found by the jury in its verdicts?

**Question 3:** Where a State Trial/Sentencing Court exceeded its Judicial Power/Authority by exercising Judicial power not conferred by the Jury's Verdicts, and renders judgment of conviction and imposes sentences that are greater than the maximum terms allowed by law solely on the basis of the facts found by the jury in its verdicts, and otherwise enters judgment and/or a sentence not authorized by law, is that act void under the Federal Illegal Sentence and/or Voidness Doctrine(s)?

**QUESTION 4:** Where a sentence, or portion thereof, is void, and a State Defendant is resentsenced to correct that void sentence; where the defendant raises objections to the correction and reimposition of that void sentence, and/or demands the remaining sentences or portions of sentences be vacated on the basis that essential elements required by law to support sentences were neither submitted to, nor found by, the jury in its verdicts, as well as other deficiencies that cause the judgment and sentence(s) to be void, does a State Court of Appeals deprive the Defendant of Federally protected Due Process, Access to Courts, etc., by application of res judicata to avoid ruling on the merits in a timely appeal of right from the resentencing hearing?

**QUESTION 5:** Where a State Petitioner is resentsenced in a State Court, exhausts his State Appellate process to the State's highest Court, and thereby, satisfies Federal law's requirements for resetting the "second/successive count", as well as the AEDPA's exhaustion requirements; and where the State Petitioner files his Habeas Corpus Petition including one or more Claim(s) that the State COurt of Appeals' application res judicata was done in violation of the State Petitioner's Federally protected Constitutional rights, does a Federal Circuit Court deprive Due Process by dismissing a timely Habeas Corpus Petition, and refusing to issue a Certificate of Appealability, and does a Federal Court of Appeals deprive Due Process by refusing to issue a Certificate of Appealability, based upon the State imposed procedural bar, where the State violation(s) of Federally protected Constitutional rights set out in other Claims are so plainly apparent on the face of the State Court record that they are beyond to argument or debate, without first analyzing whether the State Court application of res judicata was improper, and without providing a written

opinion supporting the application of res judicata? In other words, where a State Petitioner's Habeas Petition is blocked by a State imposed procedural bar, and the Petition raises that application as a claim of State deprived Due Process, does Due Process, at a minimum, require Federal Courts to rule on that claim prior to, or while, dismissing the Petition and refusing to grant a Certificate of Appealability?

**QUESTION 6:** Where Federal Law grants new "First" Petitions to State defendants based upon new Judgments generated by resentencing hearings, does allowing State Courts to block State Defendants' access to the new Federal Habeas Corpus Petition by simply applying an unexplained blanket of res judicata, to timely appeals of right from such resentencing hearings, create a situation where (1) State Court, rather than Federal Courts and/or Federal law, determine which State defendants may access the Federal Courts in the new Habeas Corpus Actions, thereby circumventing Federal law; (2) where State Courts may deprive State defendants of equal protection of Federal law by applying res judicata to some cases, but not all; (3) where State Courts can potentially render Federal Habeas Corpus law all but meaningless by simply applying res judicata to every case?

**QUESTION 7:** Does a new Judgment Entry journalized after a resentencing hearing supersede the old Judgment so as to direct all challenges made in both the timely Appeal of Right from the resentencing, and new Federal Habeas Corpus Petition, to the new Judgment rather than the old, superseded Judgment?

**QUESTION 8:** Where a Judge or a Court imposes a sentence that exceeds the maximum term allowed by law solely on the basis of the facts found by the Jury in its verdict(s) (or admitted by the defendant as part of his guilty plea), is that sentence imposed without Judicial Power void and/or illegal; and can a sentence that is illegal and void as having been imposed without Judicial Power become valid and subject to res judicata?

**QUESTION 9:** Does a Judgment causing several convictions and imposing several sentences for multiple Counts that are identical in substance, span the same dates, make no separation by act or by naming an alleged "victim", violate Federal Due Process and Double Jeopardy Protections, especially in the absence of any evidence or testimony connecting any act or "victim" presented at Trial to any Count?

## 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:

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Note: All Constitutional Provisions involved are referred to, *passim*, by their common descriptions, such as "Due Process", "Double Jeopardy", etc., while not specifically their Amendment numbers.

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 judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 30, 2018.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

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

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The full text of each of the following Constitutional Provisions is at Appendix K.

### **Fifth Amendment to the United States Constitution**

... Nor shall any person be subject for the same offense to be put in jeopardy of life or limb... nor be deprived of life, liberty, or property, without due process of law...

### **Sixth Amendment to the United States Constitution**

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...

### **Eighth Amendment to the United States Constitution**

...Nor cruel and unusual punishment inflicted.

### **Ninth Amendment to the United States Constitution**

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

### **Tenth Amendment to the United States Constitution**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

### **Thirteenth Amendment to the United States Constitution**

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

### **Fourteenth Amendment to the United States Constitution**

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 any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On October 01, 1997, the Petitioner voluntarily accompanied Jefferson County (Ohio) Sheriff Deputy Sgt. Bell and Child Protective Services Caseworker Mary Faith Recinella, to the Jefferson County Sheriff Department for a voluntary interview regarding allegations that the Petitioner had sexually abused his children (made by the Petitioner's now-ex-wife who had a documented habit of making sex-abuse and domestic violence allegations to force the Petitioner to come back home, and otherwise control him, each time he attempted to leave the relationship). The interview resulted in an agreement that the Petitioner would submit to a polygraph test, and he was released.

On October 02, 1997, the Petitioner submitted to a "volunteer" interview which lasted approximately 20-30 minutes of him denying direct accusations made by Jefferson County Sheriff Fred Abdalla. The "interview" ended with Sheriff Abdalla stating "you are not going home tonight". The Petitioner was arrested without a Complaint or warrant.

Within an hour of being arrested, the Petitioner was presented with what was labeled as a one-count indictment for Rape, which neither bore a "Filed" stamp of any Court, named an alleged victim, nor set out any information other than a recitation of R.C. 2907.02(A)(1)(b), as was in effect in October 1997. The Petitioner was then taken before Judge David Scarpone in his private office outside of his venue, for a hearing (initial appearance?) without a Complaint, using the "instant" and "disappearing" one-count "indictment" in place of a Complaint (the Petitioner can find no record of that hearing; and having given his copy to his Counsel when he finally met her the first time at his arraignment, he has been unsuccessful in regaining possession of it as his former Counsel refuses to respond to any written requests).

The Petitioner was then placed in a holding area of the jail, and threatened by deputies when he tried to make a phone call.

Approximately two-three hours after the Petitioner was arrested, he was transferred to the Tuscarawas County Jail in New Philadelphia, Ohio, where he was held without any additional proceedings until October 10, 1997, when he was returned to Jefferson County for what might have been a preliminary hearing. (The Petitioner believes he was placed in the Jefferson County Jail at that time.)

A five-Count Indictment (Appx. E) was filed on October 10, 1997.

The Petitioner was arraigned on October 17, 1997, where, after being appointed three different attorneys who for some reason were not allowed by the Trial Court to stay on the case, the Petitioner was permitted to speak to Counsel for the first time since his arrest, despite repeated requests for Counsel. The Trial was scheduled for December 16, 1997, only 75 days after the Petitioner's arrest.

On or about November 20, 1997, the Petitioner, was released on bond with the help of a friend.

Despite making Motions for Continuances at each of several weekly Motion Hearings, and having offered to sign a waiver of his Speedy Trial Rights, the Trial Court refused to grant a continuance, giving the Petitioner less time to prepare for his trial, with life sentences at stake, than for most of his traffic violation cases. The, on December 16, 1997, the first day of his trial, the Trial Court denied a renewed Motion for Continuance, incredibly stating that if the Petitioner wanted a continuance, he should have requested one before the trial was set to begin.

One the first day of trial, after the State rested, the Trial Court pointed out (Trial Tp. at 217-220; Appx. H) that the State had failed to present any evidence to prove the life-sentence elements "purposely compels submission" required to show that the element "force or threat of force" was used prior to at least one offense to facilitate the offense.

When the case was submitted to the Jury, the Trial Court manipulated the instructions on the element "purpose(ly)", affixing it to engaging in sexual conduct, which is a "strict liability" element not requiring "purpose" under R.C. 2907.02 (Trail Tp. 322-331; Appx. I); failing to inform the Jury that in order to convict for those enhanced offenses (Counts Four and Five), a finding was required that the Petitioner "purposely compelled submission of the "victim" by force or threat of force"; only used the entire phrase once without hint that a finding thereof was required; and leading the Jury to believe that only "force or threat of force" was required to convict.

The Trial Court then submitted Verdict forms (Appx. F) to the Jury that not only set out identical offenses in the first three Counts, as well as the manipulated Counts Four and Five, but also removed the enhancement elements from the main body of the charges in Counts Four and Five, and completely removed "purpose to compels submission" from the Verdict Forms, and thus, the Jury's consideration, setting out only the single element "force or threat of force" in two uncharged, newly created, and non-statutory "specifications".

The Trial Court additionally manipulated the Jury instructions by informing the Jury that they were abstain from considering the age of the alleged "victims", as well as whether the offenses were committed with "force or threat of force" until after they found the Petitioner guilty, creating a legal absurdity and impossibility where each of the delayed elements are essential to a guilty finding, as without them, the remaining elements do not constitute an offense.

On December 17, 1997, the Jury returned its incomplete Verdicts (Appx. F), which were read into the record, and the Jury was dismissed.

On December 24, 1997, the Trial Court imposed sentence upon the Petitioner, beyond the maximum terms allowed by law solely on the basis of the facts found by the jury in its verdicts, including two undefined life sentences setting no minimum

term; during which, the Judge exposed his bias by declaring that he scheduled sentencing for Christmas Eve as a Christmas gift for the Petitioner's children.

The Petitioner's Appeal, wherein his Appellate Counsel failed to recognize and raise the Trial Court's want of sentencing power, was affirmed State v. Wells, 2000 WL 309401 (March 22, 2000); and the Ohio Supreme Court refused Jurisdiction in State v. Wells, 732 N.E.2d 998 (2000).

In 2008, Ohio's 7th Dist. Court of Appeals issued two decisions in State ex rel. Wells v. Jefferson County Common Pleas, 2008 Ohio 6972; and State ex rel. Moore v. Kritchbaum, 2010 Ohio 1541, citing Wells, showing that the Petitioner's Judgment was void and not final, but refused to grant relief.

In December 2014, the 7th Dist. Court of Appeals decided State v. Wells, 2014 Ohio 5504, declaring the Petitioner's sentence void for invalidly imposed postrelease control (PRC), and remanded for resentencing.

After receiving a partial resentencing and a partial Judgment in March 2014, the Petitioner appealed from his resentencing, and was again remanded, mid appeal, July 2015, for a full resentencing hearing, and received a new complete Judgment Entry (Appx. G). During each of these resentencing hearings, the Petitioner raised each of the issues set out in the Habeas Corpus Action below, and at issue herein, as objections to reimposition of PRC and the prison portion of his sentence, and as a demand to vacate the entire sentence and Judgment as being illegal and void.

The 7th Dist. Court dismissed the timely Appeal of Right by blanket application of res judicata, without explaining the legal basis for such, only stating that he had appealed when originally sentenced (Ohio law specifically allows an appeal from the resentencing hearing, which is Federally protected right). See State v. Wells, 2016 WL 884756 (December 12, 2016).

The Ohio Supreme Court refused jurisdiction in State v. Wells, 54 N.E.2d 1268

Relying on Federal law that "resets the second/successive clock" upon the

journalization of a new Judgment Entry after resentencing, the Petitioner filed a timely Federal Habeas Corpus Petition: Wells v. Warden, U.S. Dist. Court, Southern Dist. of Ohio, Case No. 2:17-CV-944, which the District Court dismissed on November 07, 2017, (Appx. B), adopting the Magistrate's Report and Recommendation (Appx. C) applying a procedural bar based upon the State Appellate Court's illegal application of res judicata. The District Court refused to issue a Certificate of Appealability.

The Petitioner filed a timely Notice of Appeal, and Motion for a Certificate of Appealability, and on April 30, 2018, the Sixth Circuit Court of Appeals entered an Order denying the Certificate of Appealability, and dismissing the Appeal.

Ohio law holds that a Judgment that is void for the reasons set out in State ex rel. Wells, and Kritchbaum, is insufficient to form subject matter jurisdiction over an appeal from that judgment, causing the Petitioner's Judgment to be recognized as void and not final prior to the resentencing hearing and appeal that gave rise to this cause, precluding application of res judicata by showing the Petitioner's first appeal was void for want of subject matter jurisdiction.

Also, State v. Fischer (2010), 128 Ohio St.3d 92, shows that the fact that the PRC was illegal and void also prevents a final appealable order, and also precludes subject matter jurisdiction over the first appeal, despite Fischer's attempt to partially validate the Petitioner's original Judgment in retrospect, and attempt to create partially void-partially valid Judgments across the State.

Ohio law regarding void and illegal judgments, follows and is based upon Federal law, and holds that a void Judgment cannot be retrospectively validated, nor can it become final, nor can an attack thereof be barred by res judicata.

The Trial Court and State manipulated the law, and committed several blatant violations of the Petitioner's Constitutional Rights in order to create the appearance of a conviction, and to impose what amounts to, but is not, life without

parole, in order to cover up (the Petitioner believes) the many illegal procedures and violations of his Constitutional rights occurring between his arrest and "Trial". (Despite the fact that the Petitioner has witnesses, and knows that name and address of the doctor, in West Virginia, outside of Ohio subpoena power) who performed medical exams of the "victims", the Trial Court refuses to conduct a hearing and refuses to order the State to turn over these "Brady Materials"; which, while not subject to this action, shows additional Constitutional violations and cover-ups by the Trial Court.)

The State Court of Appeals, who cannot possibly believe a life sentences imposed without a Jury finding of every essential element is legal and valid, has repeatedly assisted the Trial Court in covering up the illegal procedures and many Constitutional violations.

The Federal Circuit Court and Court of Appeals simply took the State's illegal and Unconstitutional application of res judicata as a valid act of a State Court of Appeals, and applied it as a procedural bar.

As shown below, this is a case where the Courts have departed from the law and Constitution to such a degree as to require the United States Supreme Court to intervene and exercise its supervisory powers to correct the manifest injustice set out hereinafter; whether by completely reversing the sentences and judgment imposed on the Petitioner without the requisite power granted by a Jury finding of every element essential to the convictions and sentences; or by declaring the law of the United States Constitution as it relates to limitations of Judicial Power upon the return of a Verdict lacking a finding of every essential element, as well as the application of res judicata to attacks of illegal and/or void judgments and sentences, and as procedural bars to a State Prisoner's Federal Habeas Corpus Petition.

## REASONS FOR GRANTING THE PETITION

The United States Supreme Court has made many strong statements and holdings regarding State defendants' right to Jury Trials, a Jury's finding of every element essential to a conviction and/or sentence, and right to be free from conviction and/or sentence in the absence of a Jury finding of every element essential to such. Yet State Courts continue, whether by accident or intent, to craft clever ways to bypass restrictions on Judicial Power set by the United States Constitution, Federal Law, and the decisions of the United States Supreme Court exposing such limits.

While the Constitution certainly provides an exception by which an individual's liberty may be deprived, due process of law, it provides no exception to its guarantee to Due Process of Law, Equal Protection, and prohibitions against Double Jeopardy, Involuntary Servitude (such as being forced to work for a State prison), etc., except by Due Process of Law where a person is "duly convicted".

In Hicks v. Oklahoma, 447 U.S. 343 (1980), the United States Supreme Court held that "a State defendant has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the Jury... and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State."

These deprivations of Constitutional rights are frequently in the form of well-intended statutes that errantly grant Courts power to invade the province of the Jury by making findings essential to the Court's sentencing power.

But the other side of the coin, which is much more insidious and dangerous to liberty, is where the law is within Constitutional boundaries, a Jury fails to make findings essential to the exercise of Judicial Power, and a Court manipulates the law to impose and preserve sentences vastly greater than the law allows solely on the basis of the facts found by the Jury in its verdicts.

The Tenth Amendment to the United States Constitution holds that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

The power to convict and impose sentence upon an individual subject to a jury trial without submission to a jury of every element made essential to the conviction and sentence, by law, and without a finding of every such element by the jury in its verdicts, is not only not "delegated to the United States by the Constitution," but is specifically "prohibited by it to the States." In fact, it is a power so hated by the People that their opposition to it is expressly stated in the Constitution and laws of this Nation; and such power being strictly prohibited and withheld from Courts by the People, cannot be assumed or usurped by the Courts by the ignorance on the part of the individual victim to such act, by the passage of time, or, as has occurred in this case, by the application of res judicata facilitated by State Courts' refusal to address the merits of the Petitioner's claims until, and after, the law could be changed, in part by judicial fiat, so a judgment, already admitted to be void by the State Court of Appeals, could be made to appear valid, so as to subject it to preclusion by application of res judicata.

The United States Supreme Court has stated many times that the jury's verdicts are binding upon the Trial Court and the judgment in a case must conform to the jury's verdict. See Smith v. McCool, 83 U.S. 560; Slocum v. N.Y. Life Ins. Co., 228 U.S. 364; Snydam v. Williamson, 61 U.S. 427.

The Supreme Court of the United States has also stated many times that a Trial Court has no authority to impose a sentence greater than the maximum term allowed by law on the basis of the facts, alone, found by the jury in its verdict, or admitted by the defendant as part of his guilty plea. See U.S. v. Jones, 119 S.Ct. 1215 (1999); Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington,

542 U.S. 296 (2004). (This is a jury trial case where no facts were admitted by the Petitioner.)

See also, Brede v. Powers, 263 U.S. 4 (1923), holding that a sentence cannot transcend the statute(s) under which it is imposed.

Note that while Brede was decided decades before the Petitioner's case, the Petitioner's direct appeal was pending when Apprendi was decided.)

The United States Supreme Court has also repeated that, as part of the rights guaranteed by the Sixth Amendment, without a jury finding of every essential element there can be no conviction. See U.S. v. Gaudin (1995), 515 U.S. 506; Cabana v. Bullock (1986), 474 U.S. 376.

See also, Harris v. United States (2002), 122 S.Ct. 2406; Jones v. U.S. (1999), 526 U.S. at 240-241.

Further, the United States Supreme Court held that removal of essential elements from jury consideration is a violation of Due Process. See Sandstrom v. Montana, 442 U.S. 510.

Yet the Petitioner remains imprisoned for multiple consecutive sentences, including two consecutive life terms, based upon jury verdicts in which the jury failed to set out and find several elements the law makes essential to the sentences.

In fact, the biggest part the problem that led to the Jury's failure to find and set out the several essential elements in its verdicts was known to the Trial Court at least the day before the case was submitted to the jury: as shown by the record (Trial Transcript Pages 217-220), after the closing of State's evidence, the Trial Court informed the parties that the State had failed to present any evidence to prove several of the omitted elements, and after argument by the State, the Trial Court gave the State until the next morning to point to evidence within the record supporting the elements.

The elements relevant to this discussion, "purposely" and "compel submission",

are required by the version of law effective at the time of trial and sentencing, to be established with the additional (alternative) element of "force or threat of force" in order to impose life terms under Ohio Revised Code Section 2907.02(B).

The State, having presented evidence regarding "threat of force", was required by the Trial Court to point to evidence that such "threat of force" was used prior to at least one alleged offense, to "purposely compel submission" of the alleged, but unnamed "victim(s)". However, the next morning, the State filed a "Force Memorandum" that evaded the issue by setting out the Ohio Appellate Standard that the level of force involving a child victim was lesser than that involving an adult victim, while completely failing to point to any evidence that would tend to establish that the alleged "threat of force" was used by the Petitioner prior to at least one alleged offense for the "purpose" to "compel submission" of the alleged "victim". As stated by the Trial Court, in other words, based upon the language of R.C. 2907.02(B), it doesn't matter much what was said after an offense because the elements are directed to the time before an offense in order to facilitate the offenses subject to the provision.

When the Jury was instructed on the elements of the several counts, the Trial Court failed to instruct the Jury that "purpose to compel submission" was connected to and required with "force or threat of force" in order to convict for the offenses charged in Counts Four and Five.

When the Jury was presented with Verdict Forms, the offenses charged in Counts Four and Five had been carved into lesser counts identical to the first three Counts, and "FORCE SPECIFICATIONS" that were neither charged in the indictment, nor appear anywhere in Ohio law as elements that may be charged separately a Specification.

More problematic than the judicial creation of nonstatutory "specifications" is the fact that only the singular element of "force or threat of force" was set out for Jury consideration in the so called "specifications", which entirely omitted

the two essential elements of "purposely" and "compels submission"; which, in retrospect, is not surprising, given the fact that the Trial Court pointed out to the parties that the State had submitted no evidence to support or prove the omitted elements, which would have resulted in acquittal of those two charges as the Jury was not given any way to find guilt on lesser offenses, except through manipulation of the charges and elements in the verdict forms.

Thus, it is an unchangeable, and inarguable matter of record that the elements "purposely compels submission" (of the alleged victim(s)) that the version of R.C. 2907.02 in effect when the Petitioner was originally sentences in December 1997, makes absolutely essential to imposition of life sentences, was not submitted to the jury, and not found by the Jury in its verdicts, depriving the Trial Court of judicial power to convict and impose life terms under R.C. 2907.02(B); and thus, the Trial Court lacked Judicial Power to impose PRC based upon such illegal and void conviction and life sentences, either originally, or in the resentencing hearing that should have granted the Petitioner the same right to appeal and to a new Federal Habeas Corpus Petition as is granted to other similarly situated State Defendants ("Similarly siutated" means subject to resentencing and a new Judgment Entry, regardless of the underlying sentence).

It is also Federal law that a judgment or sentence that does not comply with statute is void and illegal. In fact, the Ohio Supreme Court relied on the Federal Voidness and Illegal Sentencing Doctrines when making its decision in State v. Fischer (2010), 128 Ohio St.3d 92, wherein, at footnote 1, the Ohio Supreme Court stated that "illegal" is the proper term for a sentence that is imposed by a court where the court fails to do what the General Assembly has commanded.

The Ohio Supreme Court also restated, in Fischer, the age-old principle, which is also Federal law, that res judicata attaches to final judgments, whereas an illegal sentence is void and not final, and therefore res judicata does not attach.

Federal law also holds that while an act, such as sentencing, may be within a court's general jurisdiction, the act is unauthorized and therefore void, where a condition to the exercise of judicial power is wanting. See, e.g., Wade v. Bethesda Hosp., 337 F.Supp. 671 (S.D. Ohio 1971), which Ohio adopted as its own law in Wade v. Bethesda Hosp., 61 Ohio Op.2d 147 (1971).

Thus, under Ohio and Federal law, at the very least, the Petitioner's life sentences are illegal and void, and not subject to res judicata.

This is but one of several reasons the Petitioner's sentences are void and/or illegal, but the Petitioner states with this because this shows a *prima facie* violation of the Petitioner's Jury Trial and Due Process rights and, *per se*, establishes one prong of the standard for granting a Certificate of Appealability, as well as helping demonstrate that the applied "procedural bar" of res judicata was incorrectly applied by the State Appellate Court to deprive the Petitioner of his right to appeal after having been resentenced, as also stated in Fischer, and by the Federal Court to deprive the Petitioner of his right to seek Federal relief through Habeas Corpus proceedings.

The Petitioner's Right to seek Federal Review and Relief in Habeas Corpus Proceedings:

The United States Supreme Court and the Sixth Circuit Court of Appeals have held that when a State defendant is resentenced, and a new Judgment Entry is journalized, it resets the "second/successive count" for Federal Habeas Corpus proceedings. See Magwood v. Paterson, 561 U.S. 320 (2010); In re Stansell 828 F.3d 412 After holding that this includes resentencings to correct a void/illegal term of postrelease control (PRC), the Sixth Circuit has narrowed this rule by stating that the new Judgment Entry must set out a harsher sentence than the original in order to reset the "second/successive count."

After the State Court of Appeals declared the Petitioner's PRC void in

State v. Wells, 14JE 5, he was partially resentenced in February 2015 to correct the void PRC; then fully resentenced ~~July~~ 28 2015, mid appeal, after the State Court of Appeals determined that the new Judgment Entry was insufficient.

The Petitioner stated several objections to reimposition of PRC based upon the lack of essential elements in the Jury's Verdicts leading to void/illegal sentences, not only depriving the Trial Court of authority to impose PRC, but requiring the Trial Court to vacate the illegal and void judgment and sentences.

Because these objections directly related to the power of the Trial Court to correct and reimpose PRC, there were valid issues that arose at the resentencing hearing as specifically allowed by State law as stated in Fischer, and properly raised in the Petitioner's timely Appeal of Right from the resentencing hearing, State v. Wells, 15JE 7

However, in order to avoid the merits of the Petitioner's challenges to the illegal and void judgment and sentences, which could only result in vacation of the void/illegal sentences and judgment, the State Court of Appeals entered judgment dismissing the Appeal, without explanation, as being barred by res judicata.

The State Court of Appeals' application of res judicata to dismiss the timely Appeal of Right was surprising to the Petitioner because Ohio law specifically guarantees the right to appeal the judgment from a PRC resentencing in Fischer, and the appeal in which res judicata was applied was the first and only opportunity to raise the issues that arose in the resentencing hearing; not to mention that the law is such that a void judgment cannot be barred by res judicata.

(The Petitioner notes that the "first and only opportunity" to raise issues from the resentencing hearing means that he raised the issues as objections to resentencing, and as a reason to vacate the remaining sentences, then timely appealed to the State Court of Appeals, where he should have received a merit decision as the issues were valid objections to resentencing at the resentencing

hearing. The Petitioner had previously raised similar issues in collateral attacks, including a State Habeas Corpus action, (Wells v. Hudson? case no. unavailable) where the Richland County Court of Common Pleas, and the Fifth District Court of Appeals, converted the basis of the claims from lack of Jury findings to insufficient evidence, to facilitate dismissal as a non-cognizable claim.)

It should be noted that res judicata is an affirmative defense which the State Court of Appeals raised sua sponte after the State failed to file a Merit Brief, and remained completely silent throughout the appellate process. In fact, there has been no State involvement at all in the Petitioner's case following the resentencing hearings, as the Federal District Court refused to consider the fact that the State Court of Appeals improperly applied res judicata to void judgments and sentences and both State and Federal law prohibit application of res judicata to the void judgment and sentences, as well as to the timely Direct Appeal from the resentencing hearing. Court application of res judicata to block timely appeals and challenges to void/illegal judgments and sentences, without so much as requiring State argument, amounts to judicial advocacy in favor of States, as well as deprivation of equal protection and access to Courts where the Courts, rather than the law, decide which of similarly and identically situated defendants are allowed to appeal and receive a merit decision, and which are allowed benefit of the reset Federal "second/ successive count" and Federal Habeas Corpus review.

Federal Courts have held that the State is the proper party to raise the issue of procedural bar, as the State could also waive a valid procedural bar, which, obviously, could not be done where it is raised by a Court.

Further, but just as troubling, this also allows State Courts to preclude individual access to Federal Courts after resentencing by simply applying, without explanation, a blanket of res judicata. But, then again, any attempt to explain its application of res judicata to a timely appeal of right, and a challenge to

void/illegal sentences would necessarily expose that such application is not possible under any legal theory.

After the State court of Appeals avoided the Merits by improper application of res judicata to his timely Appeal of Right, and Void/illegal judgment/sentences challenges, the Petitioner timely sought review in the Ohio Supreme Court in a Claimed Appeal of Right, State v. Wells, 2015-\_\_\_\_\_, but the Ohio Supreme Court refused jurisdiction on \_\_\_\_\_.

The right to a Jury Trial includes full protection of the reasonable doubt standard. See, e.g., Ab/2 ✓ Fulminante, 499 U.S. 291, citing Cool v. U.S., 409 U.S. 100, 104 (1972); In re Winship, 397 U.S. 358, 364 (1970).

It includes the right to a Jury Instruction on the State's burden to prove all charges beyond a reasonable doubt. Fulminante; Jackson v. Virginia, 443 U.S. 307, 320 (1979), that does not dilute the reasonable doubt standard. U.S. v. Gonzalez-Lopez, 548 U.S. at 148, 149.

In this case, again, the Trial Court, after the closing of State's evidence, informed the parties that the State failed to present any evidence to support the omitted essential elements "Purposely" and "compels submission" (Trial Tp. 220, 217, 220) then failed to instruct the Jury that those elements were required, in addition to "force or threat of force" to convict; then the Trial Court submitted Jury Verdict Forms to the Jury that (1) carved these elements, as well as "force or threat of force", out of the offenses charged in Counts Four and Five, (2) set out the single element of "force or threat of force" in non-statutory "Force Specifications" that appear nowhere in Ohio law; and (3) completely removed the essential elements of "purpose" and "compels submission" from the Jury's consideration by completely leaving them out of the otherwise unlawfully bifurcated Verdict Forms. (TP 322-331).

The United States Supreme Court has repeatedly held that these types of violations of Jury Trial rights are structural and subject to automatic reversal; 18

Federal law also holds that while an act, such as sentencing, may be within a court's general jurisdiction, the act is unauthorized and therefore void, where a condition to the exercise of judicial power is wanting. See, e.g., Wade v. Bethesda Hosp., 337 F.Supp. 671 (S.D. Ohio 1971), which Ohio adopted as its own law in Wade v. Bethesda Hosp., 61 Ohio Op.2d 147 (1971).

Thus, under Ohio and Federal law, at the very least, the Petitioner's life sentences are illegal and void, and not subject to res judicata.

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#### The Petitioner's Right to seek Federal Review and Relief in Habeas Corpus Proceedings:

The United States Supreme Court and the Sixth Circuit Court of Appeals have held that when a State defendant is resentenced, and a new Judgment Entry is journalized, it resets the "second/successive count" for Federal Habeas Corpus proceedings. See Magwood v. Paterson, 561 U.S. 320 (2010); In re Stansell 828 F.3d 412 After holding that this includes resentencings to correct a void/illegal term of postrelease control (PRC), the Sixth Circuit has narrowed this rule by stating that the new Judgment Entry must set out a harsher sentence than the original in order to reset the "second/successive count."

After the State Court of Appeals declared the Petitioner's PRC

it is never harmless. See., e.g., Gonzalez-Lopez; U.S. v.

esses the above Claim, although there are several more claims use it is the easiest to show a prima facie violation of the itutional rights; while the fact that all issues were raised as sentencing and in support of the Petitioner's Motion to Vacate the id Judgment and Sentences, that were then raised in a timely direct in the "res judicata" at issue was applied by the State Appellate Court, ows that the State application of res judicata was improper, and thus, ral District and Circuit Court of Appeals reliance upon the State application judicata was errant.

This more than satisfies the standard for issuing a Certificate of Appealability which requires only a showing that reasonable jurist would argue that (1) a Petition raises claim showing a constitutional violation, and (2) that reasonable jurists would argue that the Circuit Court improperly relied upon the State imposed procedural bar.

While the Petitioner is confident that an Appeal would be decided in his favor, as the Constitutional errors are grievous, and apparent upon the face of the Record without any addition evidence or testimony, the standard does not require a showing that the will succeed. See Miller v. Cockrell, 537 U.S. 322 (2003).

If the Supreme court does not intervene in this case, the Petitioner, who has already been subjected to over 20 years of incarceration on life terms without a full and valid Jury Verdict, and in excess of any power the Trial Court had to sentence on the basis of the facts found by the Jury in its verdict, will lose at least 50 years of his life and liberty, based only upon the Petitioner's ignorance of law, and his reliance upon the lawyers and legal professionals previously involved in his case. Allowing an individual to remain in prison after a Jury Trial in which

the Jury failed to find every element essential to the conviction and sentence is not justice. Nor is it equitable, fair, or anything else related to the purpose of the Constitution and laws of this land. The law, essentially a fiction without people and Courts willing to enforce it, is essentially a fiction, rendering statutes and even decisions of the United States Supreme Court worthless. Where Courts so openly depart from the law as to ignore it in opposition to not only Constitutional, and statutory law, as well as decisions of other Court, but also to their own decisions in other cases, there can be no justice, Due Process, or Equal Protection of the law.

While the Petitioner, and many others, has already been harmed by illegal imprisonment without a full and valid Jury finding of every essential elements, if the United States Supreme Court fails to intervene, these Constitutional violations, and indifference to them, can only get worse, as the lack of oversight and supervisory intervention would demonstrate that these departures from the law, and Constitutional violations, are acceptable in a land where individual liberty is supposedly the most sacred right of all.

The remaining Constitutional violations, and reasons the procedural bar was improperly applied are set forth below as stated to the Federal Circuit Court:

The District Court dismissed the Petition on December 15, 2017, and declined to issue a Certificate of Appealability addressing Claims 4 and 5 separately, and procedurally barring the remaining claims based upon the State Court of Appeals' Unconstitutional, unlawful, and in fact illegal, application of res judicata.

Because Claims 4, and 5, are less complex, those are addressed first:

Claim 4: In this Claim, the Petition alleges that the State Court of Appeals deprived the Petitioner of Due Process by applying res judicata to evade the merits of his Assignments of Error. At page 3 of the Opinion and Order the District Court errantly adopted the Magistrate's opinion that this claim does not provide a basis for federal habeas corpus relief.

It has long been held, and firmly established, that State defendants have no Constitutional right appeal criminal judgments, but when a State establishes an appellate system and provides State defendants a State-level right to appeal, the appeal itself becomes a protected property right of which the State defendant cannot be deprived without Due Process.

Ohio's appellate Courts and its jurisdiction are created and established by Article IV, §3, of Ohio's Constitution, while its procedures are set out and governed by Statute and Rules of Appellate Procedure.

Further, while the District Court errantly stated that the "...Petitioner has procedurally defaulted all of the claims he now raises challenging his initial judgment entry of conviction and sentence, which claims he failed to raise in his first direct appeal," the Petition shows that it is not the "initial judgment entry of conviction and sentence" that is challenged in the Petition below; rather, it is the new Judgment Entry of Conviction and Sentence that is challenged.

As a matter of law, in order for the Petitioner to have been resentenced, the "initial judgment entry of conviction and sentence" was replaced by the new Judgment Entry, and is of no force or effect whatsoever regardless of its previous condition of voidness or validity. It follows that attacking the old Judgment would be akin

to trying to kill a dead horse, as success, even if possible, would result in nothing.

In order to determine what process is due a State defendant, a Federal Court must look to what the State process is, and what it requires. In Ohio, the Supreme Court has held that where a defendant is resentenced to impose an enforceable term of PRC, he then has a right to appeal issues arising at the resentencing hearing. See State v. Fischer (2010), 128 Ohio St.92.

The Petitioner was resentenced, wherein he raised all of the issues that form the claims set out in his Petition; the Trial Court ignored his objection, and the Petitioner appealed as a matter of right in his first direct appeal from the new Judgment entered as a result of that resentencing hearing, which replaced the vacated "Initial" judgment; the Petitioner timely appealed and raised the issues that he raised in the resentencing hearing, that the Ohio Supreme Court held the Petitioner has a right to appeal.

Notwithstanding the merits of his claims, reasonable Jurists would argue that because the "initial" judgment was vacated by operation of law and was replaced with a new judgment that was journalized as a result of resentencing, and because the Ohio Supreme Court recognized an already-existing right to appeal issues arising from that resentencing, not only does the Petitioner have a right to appeal issues from that resentencing hearing, but because such appeal necessarily resulted from the new judgment, and was timely, res judicata could not be applied to bar consideration of the timely asserted Assignments of Error, and that the State Appellate Court's application of res judicata to bar judgment on the merits Unconstitutionally deprived the Petitioner of his property right of appeal, which is in fact a Constitutional Due Process Claim subject to Federal Habeas Corpus review and relief. If not, States could wait until a defendant has received Judgment in the Federal Courts, <sup>22</sup> resentence him violation any Constitutional law and rights,

and simply rely on application of res judicata to prevent federal intervention.

Simply stated, Ohio law sets out the process of appeal and specifically stated in Fischer that the very type of resentencing that occurred in this case is subject to appeal, and the State Court of Appeals' deprivation of that process by applying res judicata in the first and only direct appeal of right from the resentencing hearing appealed is a deprivation of the process that is due the Petitioner per Ohio law, and thus, is a violation of the Petitioner's Constitutional right to Due Process.

Also, while on a different subject, the District Court cited, in footnote 1, In re Stansel, 828 F.3d 412, 419 (6th Cir. 2016), showing that a new §2254 petition is allowed as "...it creates a 'new judgment' that does not implicate successive petition concerns." While this "new judgment" language should have indicated to the District Court that the new judgment is the object of challenge, this citation should also have alerted the District Court to the fact that the Sixth Circuit also held that the "new judgment" reopens challenges to all parts of the conviction, including guilt and sentence, which could not be done if res judicata applied to the direct appeal of the resentencing hearing to bar consideration of the very matters that occurred and were raised at that hearing. The fact is that the Petition raises challenges that arose at the resentencing hearing, and does not raise claims relating to any prior sentencing or judgment, with the exception of Ground 5 discussed separately below. See also, Crangle v. Kelly, 838 F.3d 673 (6th Cir. 2016).

Finally, but for the Magistrate's, and District Court's error that the challenges relate to the "initial judgment," and if it is recognized that the challenges relate to the new Judgment superceding the "initial judgment," no reasonable jurist would argue that issues raise in objection at the very sentencing hearing appealed could be barred from consideration in that first direct appeal of right by application of res judicata; nor that such improper application of res

judicata could stand as procedural bar to Federal Habeas Corpus review. And, in fact, because the State Courts have each refused to consider the Petitioner's validly presented claims on their merits, not only is the Petition and its claims properly before the Federal Courts, but the standard of review in the Federal Courts is DE NOVO.

Claim 5: This Claim raises a challenge to the multiple charges, "convictions", and sentences as violating Constitutional Double Jeopardy prohibitions as set out in Valentine v. Konteh, 395 F.3d 626 (2005, 6th Cir.).

This Ground, while raised in the Petition attacking the prior, now defunct, Judgment and sentence, is permitted by the 6th Circuit's, and/or U.S. Supreme Court's, holdings that a new Petition is to be treated as a continuation of a prior Petition attacking the former Judgment.

In the Petitioner's case, as shown by the record, several things are apparent and beyond rebuttal:

- (1) the indictment charges five counts of the same offense, with Counts 4 and 5 charging additional facts designed to enhance the offense and increase the penalty from a maximum of ten years to a term of "life" with an unspecified minimum term (recognized by the State Court of Appeals as not being "life without parole);
- (2) none of the several counts create any separation by failing to specify or identify any alleged "victim", specific act, or other matter that would permit separate identification of any count;
- (3) while counts 1, 2, and 3, set out identical dates (and are otherwise identical in every aspect), Count 4 sets out slightly different dates that overlap and include dates set out in Counts 1, 2, and 3, and Count 5 sets out a "date" covering 7 years that not only overlap, but encompasses all dates set out in Counts 1 through 4, making it impossible to determine whether the charges "occurred" on separate or the same date and time;

(4) Three people were presented at Trial as "witnesses/victims" (the record does not show that a fourth person, the Petitioner's son, was presented to the Grand Jury, but was dropped as a "witness" and a "victim" prior to Trial after he admitted his testimony was false and he was told to lie);

(5) no physical evidence, written medical reports, nor expert testimony regarding physical evidence was presented at trial despite the obvious fact that the size and age difference between the Petition and the alleged "victims" surely would have resulted in obvious physical trauma and scarring had anything remotely close to the testimony ever actually occurred (the Petitioner was trained in this matter by the January 1997 Ohio Peace Officers Training Academy held in Jefferon Community College in Steubenville, Ohio, and is competent to testify to this matter), and in fact, the State denies that any physical exams were conducted, though the procedure is routine in such cases (the Petitioner has witnesses and evidence that shows exams were conducted with the Det.Sgt. Bell and CPS Case Worker Mary Faith Recinella present, at the office of now retired Dr. Richard Feder in Wheeling, Wv., outside of the subpoena power of Ohio Courts);

(6) No testimony or other evidence was presented to connect any specific Count to any Specific alleged "victim";

(7) The lack of evidence or testimony separating the charges into distinct offenses, or even vaguely connecting any Count to any "victim" precludes any jurist, or even the original jury, from determining what Counts related to which "victims", or if all Counts related to one "victim" and the other two were merely witnesses, or if all counts represented a single alleged offense charged multiply, or if the Jury believe one "victim" but could not decide between Counts, or whether the jury believed some elements from some Counts and other elements from other Counts but could not separate them, possibly resulting in a lump-sum all or nothing conviction

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The Magistrate's and District Court's position could only be reasonably argued

if the number of counts matched the number of "victims", or had some other manner of separation. As the record stands, it cannot even be determined, especially in light of the conversation between the Trial Court and State at the Closing of State's evidence (Trial Tp. at <sup>217</sup>~~220~~) where the Judge asked "You got that from Tara's testimony", and the State replied "We were here, we all know Tara's testimony was lacking" (paraphrased; not a true quote). Given this exchange, showing the state failed to present any evidence at all to prove the enhancement elements of Counts 4 and 5, and that Tara's testimony was lacking, it is entirely possible and plausible, that the Jury did not believe Tara was a victim; but given the lack of evidence separating the counts or connecting them to any "victim", it is impossible to determine which "witness" the Jury believed was a victim.

This is a weird case involving weird circumstances unlike any the Petitioner has found in any other case. One such incident add danger of a Constitutional Double Jeopardy violation relating to the possibility that the Jury may have considered elements from one Count in considering guilt in another: that is the Trial Court's order for the Jury to not consider the age element, essential to all counts, until after finding the Petitioner guilty. Ignoring the presupposed guilt determination language of Until after you find him guilty, this removed that essential element from the guilt determination where it belongs, and allowed it to be considered separately, which has a potential to allow a lump-sum or mixed consideration.

Given this state of facts and evidence, established by the record beyond argument, reasonable jurists would argue that it is impossible to determine, beyond guessing, any separation between any Count, any connection between any "victim" and any one or more Counts, whether the Jury believed one or more "witness" was an actual victim; whether the several Counts were several distinct offenses or a single offense charged severally; whether the jury found guilt for any Count on all essential elements, or whether the Jury mixed the elements from Counts to make

a guilt determination; or whether the Jury thought they could not acquit the Petitioner of unproven Counts or elements since there was no way of separating or distinguishing the Counts, resulting in the same all-or-nothing situation spoke of in Valentine.

The State would be procedurally barred from raising the Affirmative Defense of Res Judicata:

Notwithstanding that res judicata cannot be applied to bar attacks of void judgments as exist in the Petitioner's case, nor can it be applied to bar determination of the Merits on the first Direct Appeal of Right from the very sentencing or resentencing hearing wherein the appealed issues were raised, the State, by remaining silent, has waived any claim or defense of res judicata.

It is a matter of the State Court of Appeals' record that, after the Petitioner was partially resentenced for PRC, filed his Appeal of Right and Merit Brief, to which the State did not respond by filing a Brief; was again resentenced in a full hearing while the appeal was held in abeyance pending this full resentencing hearing, and after the Petitioner sought leave and filed his supplemental Merit Brief based upon the full resentencing hearing, the State again failed to file a Merit Brief, and remained silent during the appeal.

It is well settled that res judicata is an affirmative defense that is waived if it is not raised, and that the Magistrate Judge should have allowed the State to respond in order to determine whether the State would have raised or waived it as a defense. However, even had the State responded and raised the affirmative defense, the Petition would have been able to show that the State waived the defense at the State Court of Appeals by failing to file any Merit Brief in response.

Therefore, the State would be procedurally barred from raising res judicata as a defense in this action even if it applied, which, for several reasons set out in the Objection, including that the appeal below was a timely Appeal of Right

of a resentencing hearing that Federal law holds as resetting the "second/successive count" as limiting procedural bars to one party would be bias and prejudice.

Federal law holds that this Petition is a continuation of the Petitioner's earlier Petition cited in the Objection:

The Petitioner objected to reimposition of PRC at his resentencing hearing, and demanded that four of five sentences be vacated and not reimposed as a result of Federal law and Constitutional Double Jeopardy Protections as set out in Valentine v. Konteh 395 F.3d 626. In his earlier Petition attacking his original Judgment and sentences, the Petitioner argued that the lack of differences in the five counts precluded any reasonable jurist from determining what evidence related to which count, which alleged "victim" related to each count, or whether each count were separated offenses or one offense charged, convicted, and sentenced multiply, or whether this affected the Jury's ability to arrive at a unanimous verdict.

The Sixth Circuit Court of Appeals has held that a substantially identical claim raised in a new Petition, and in fact the new Petition, after PRC resentencing is to be treated as a continuation of the first Petition; but this is merely academic as this issue was directly addressed at the resentencing hearing in objection to the new Judgment before it was made, and raised in the timely Direct Appeal of Right from that new, superseding judgment.

The Petitioner's previous judgment was void, and the earliest possible correction and finalization was at the resentencing hearing appealed:

Crim.R. 32(C): As shown in the Petition and Objections to the Magistrate's Report and Recommendation, the State Court of Appeals, in State ex rel. Wells v. Henderson, 2008 Ohio 6972, recognized that the Petitioner's initial Judgment Entry did not comply with Ohio Crim.R. 32(C), which under Ohio law at the time meant the judgment was void, and required the Petitioner be resentenced. While the Court of Appeals, in Wells, held that State ex rel. Culgan v. Medina County (2008), 119

Ohio St.3d 535, did not apply and declined to grant relief, the Court later ruled in State ex rel. Moore v. Krichbaum, 2010 Ohio 1541, that it was incorrect in failing to apply Culgan in Wells.

Despite this showing by two State Court of Appeals decisions relating directly to the Petitioner's case that the Petitioner's initial Judgment Entry was void and not final, each level of State Courts refused to grant relief, until the Petitioner was resentenced for for different reasons when the same State Court of Appeals recognized that the Petitioner's PRC was illegal and void, and ordered resentencing, which resulted in the new Judgment subject to this action, which is the first time the void Judgment was subject to correction and (possible) finalization.

PRC: The Petitioner's "initial" judgment was imposed, as was his void and illegal term of PRC, in 1997. While it was not until late 2014 when the State Court of Appeals recognized this and ordered the Petitioner resentenced, the law regarding the treatment of illegal and void PRC was not changed by Ohio Supreme Court decision until 2010, in State v. Fischer (2010), 128 Ohio St.3d 92. Until Fischer, the entire Judgment was void, and required De Novo resentencing.

Not only is it a well established and settled principle of law that a void judgment cannot be retrospectively validated by any act or thing whatsoever, but the Ohio Supreme Court expressly stated this in State v. Singleton (2007), 117 Ohio St.3d ..., in regards to the Ohio General Assembly's attempt to retrospectively validate judgments that were entirely void for failing to set out a valid term of PRC; and it is also well established and settled that even though not specifically set out in the Constitution as is the Legislative prohibition against retrospective laws, no Court may accomplish by decision what Legislature is prohibited by the Constitution from doing.

void until, at a minimum, he was resentenced and the Judgment appealed and subject to the Petition below was journalized. Therefore, under Ohio law, Article IV, §3, of Ohio's Constitution, as well as R.C. § 2953.02, the lack of finality of the "initial" Judgment deprived the State Court of Appeals of Jurisdiction over the Subject Matter of the Appeal taken from the "initial" Judgment, causing the Appeal from the resentencing hearing, being the first possible correction and validation of the Judgment, to be the first and only Appeal wherein the Petitioner would have been allowed by Ohio law to raise and issue or claim at all, and again, res judicata cannot be applied.

Each of the 9 Claims set out in the Petition raises a Claim that the Petitioner's Constitutional Rights were violated:

Each of the 9 Grounds set out in the Petition state a violation of the Petitioner's Constitutional rights, including violations of the 5th, 6th, 8th, and 14th, whereas (1) any conviction or sentence without submission to, and finding by, a Jury of all essential elements also violates Due Process; (2) imposition of any sentence without a valid judgment of conviction violates Due Process; (3) rendering a Judgment of Conviction and imposing sentence without subject matter jurisdiction is a violation of Due Process; (4) denial of access to the established appellate process is a Due Process violation by deprivation of the procedure as well as the accompanying property right of the appeal itself; (5) imposition of multiple sentences for several Counts that constitute a single offense violate both Double Jeopardy and Due Process; (6) imposition of a prison term that does not inform the defendant what his sentence is, such as a term of "life" that is undefined by setting no minimum term, and which is recognized by the State Court of Appeals as not being a term of "life without Parole", is a violation of Due Process; (7) imposition of a prison term ("bad time") that is Unconstitutional violates Due Process; (8) imposition of prison terms greater than what the law allows on the

basis of the facts found by the Jury in its verdicts alone, is a violation of Due Process as well as Cruel and Unusual Punishment, as it surpasses the maximum statutorily allowable penalty of 10 years, to impose "life", which could be anything from one year over the maximum, to 20, 30, 40 years, over, or to the death of the Petitioner even if he lives to over 100 years old; and (9) the State Trial Court's failure to comply with all "mandatory statutory sentencing provisions" not only makes the sentence void under Ohio law, but it deviates the process which is due the Petitioner, and violates his Due Process rights.

Each of the foregoing outlines, enumerated to match their respective Ground numbers, are claims that set out one or more Constitutional violation on their face and thus, establish, and surpass, the standard requiring a minimal showing that Jurists of reason would debate that they raise one or more Constitutional claims.

The Petitioner had no duty to object to the Jury Instructions or Forms:

Notwithstanding that the District Court's comment on this pertained to the State Court of Appeals' statements in the 2000 decision from the Appeal taken from the "initial" void Judgment, Ohio law, if not Federal, shows the State had the duty to object, and the Petitioner had no such duty, and such "failure" to object does not validate the resulting convictions or sentences, which remain void and illegal.

Another of Ohio's many "mandatory statutory sentencing provisions" is R.C. 2945.75(A)(2), which mandatorily binds Ohio's Courts to a Jury's Verdict, and restricts such Courts' jurisdiction, legal power, and/or authority, to both render judgment of conviction and impose sentence. See State v. Pelfrey (2007), 112 Ohio St.3d 422; State v. English, 21 Ohio App.2d

R.C. 2945.75(A)(2) specifically restricts a Trial Court's authority to render Judgment of Conviction and to impose sentence by stating that if a Jury's Verdict fails to set out addition facts, or the degree of the offense, the Defendant may be convicted for only the least degree of the offense. Pelfrey, English, and many

other decisions, construe this, as an obvious result, as mandatory requirement that the Trial Court impose only the sentence available for the offense of the least degree.

This is relevant in two manners: first, if there are no valid conviction based upon the Jury's Verdicts, then the Trial Court is restricted to Judgment of Acquittal and no sentence at all; and second, if there is a valid ~~sentence~~, at least for Counts 4 and 5, which set out additional elements designed to enhance the sentence to "life", since the elements "purposely" and "compels submission" were never submitted to the Jury, and thus, never found by the Jury in its verdicts, R.C. 2945.75(A)(2) restricts the Trial Court's sentencing power to within the mandatory provisions of R.C. 2929.14, and which precludes the "life" terms required by R.C. 2907.02(B) (1997 version) upon proper presentation to, and finding by, the Jury of these elements in the Verdicts.

Just as important is Pelfrey's restatement of the fact that a failure of the defendant to object does not relieve the Trial Court of the duty to impose the least degree of conviction and resulting sentence. In fact, it has long been held that not only does a defendant not have a duty to object to Jury Instructions or a verdict form that benefits him by reducing the degree of conviction and/or penalty, but it is the State's duty to object when either prejudice the State.

But an objection by the Stater would never have occurred in this case, as the State intentionally removed the elements of "purpose" and "compel submission" from the Jury's consideration in order to secure a fraudulent conviction and sentences after the Trial Court informed the State, after the closing of State's evidence, that the State failed to present any evidence to prove these elements; and, not wanting to see an acquittal of the entire charges set out in Counts 4 and 5, the State first separate the singular alternative element "force or threat of force" into "Force Specifications" that do not exist in Ohio law, and entirely removed the

essential elements "purpose" and "compels submission", which essentially redefined the offenses to much lesser than the law requires, in order to remove these elements from the Jury's consideration, and create the appearance that conviction could be had on the enhanced offenses of Counts Four and Five on the singular additional element of "force or threat of force".

The reason for this, being merely academic, is obvious: Because the Trial Court pointed out, on the record, that no evidence was submitted to support the omitted elements, allowing the Jury to consider these omitted elements would have required a verdict of acquittal on the life-sentence Counts Four and Five, as the Trial Court also failed to provide the Jury with any means of convicting for lesser offenses; and while this is obvious prosecutorial misconduct, the important issue is the effect of depriving the Petitioner of his liberty in violation of several Constitutional provisions, including those guaranteeing Due Process and a Jury Trial.

If a State can deprive an individual of his Due Process, Jury Trial, and other rights, by manipulation of Jury Verdicts, resulting in a judgment of conviction and sentences rendered and imposed with a lack of Judicial Power, and those illegal and void judgments and sentences may later become validated by State application of res judicata to a timely Direct Appeal of Right from a re-imposition (resentencing) of the illegal and void judgment and sentences, then the words set out in the Constitution do not provide much of a "guarantee" at all.

The Court in which this started, the Jefferson County Court of Common Pleas, and the Judge, John J. Mascio, who started it, are no strangers to misconduct. In fact, former Judge Mascio was forced to resign over a scandal that occurred in late 1999, and early 2000. The current "Court" is simply attempting to protect the Court's reputation by refusing to correct the injustices of the previous regime.

Had the indigent Petitioner had funds for counsel, or had the type of family  
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who would not remain silent where his own voice is silenced by a prison fence and

lack of access to the public's ear, this injustice would have been heard and corrected years ago. But the "best" legal system in the world is not concerned with an individual's financial means, and is designed to give a voice to the voiceless; and its main concern is said to the protection of individual rights from government infringement.

In a system so concerned with individual rights, it is dangerous to liberty to allow Courts, rather than the law, to decide which individuals will be permitted to access the Federal Habeas Corpus process, and which are entitled to Due Process, Jury Trials, and a Jury finding of every element essential to a conviction and/or sentences.

If any individual is guaranteed Due Process, a Jury Trial, and a Jury finding of every essential element, so is the Petitioner.

If any individual is permitted by State law to appeal to a merit decision in a timely Direct Appeal of Right after resentencing, so is the Petitioner.

If any individual is permitted to access the Federal in a Habeas Corpus action after a State resentencing hearing has "reset the second/successive count and reopened the attack of all part of a case, including guilt and sentence, as repeatedly held by the very same Federal Circuit and District Courts that refused such access to the Petitioner, then the Petitioner must be afforded the same access, which cannot be blocked by a State Court's application of res judicata to judgments and sentences the State Trial Court had no power to make.

The Petitioner has easily exceeded the two-part standard of Slack v. McDaniel, 529 U.S. 473, 487 (2000), showing at least one prima facie denial of a Constitutional right, and that Jurists of reason would argue that the procedural bar of res judicata was improperly applied to a void and illegal judgment and sentences.

The State prosecutor, and the State Trial Court have soiled the reputation of the local judicial system at the cost of the Petitioner's liberty, while the

State Court of Appeals has protected the Trial Court's illegal actions. The deviations from the law, the violations of State and Federal law, and the resulting deprivations of Constitutional rights, followed by the Courts' refusal to correct the same, demand that the United States Supreme Court accept jurisdiction and GRANT a Writ of Certiorari in this Case.

At a minimum, the United States Supreme Court could Grant certiorari and simply remand to the Circuit Court of Appeals to allow the attempted appeal to proceed.

What is needed to prevent further and future injustices, and to correct those that have already occurred, is for the United States Supreme Court to Grant Certiorari and issue a full written opinion answering each of the important questions set out in this Petition; the most important of which, in the Petitioner's opinion, is the question that should have been answered as part of Blakely v. Washington, and Apprendi v. New Jersey : where a Judge imposes a sentence that exceeds the maximum term allowed by law solely on the basis of the facts found by the Jury in its Verdict (or admitted by the defendant as part of his plea), is that sentence imposed without judicial power void and/or illegal; and can a sentence that is illegal and void as having been imposed without Judicial Power become valid and subject to res judicata?

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## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

  
Jim Wells

Date: July 26, 2010

Note: A full copy of the foregoing Petition and all supporting documentation, has been mailed to a friend of the Petitioner to be uploaded onto social media cites.

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