19-5809

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

LLOYDE DUBRY,

Petitioner,

vs.

THE STATE OF KANSAS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Kansas

Lloyde Dubry
Inmate No. 42412
Oswego Correctional Facility
2501 West 7th Street
Oswego, Kansas 67356

Pro Se

QUESTIONS PRESENTED

1. Whether the petitioner, Lloyde Dubry, was denied his remedy by due course of law -- in violation of the Sixth or Fourteenth Amendment to the United States Constitution -- because of the disparate conclusions Kansas courts of last resort made concerning whether State v. Wetrich, 307 Kan. 552 (2018), and Descamps v. United States, 570 U.S. 254 (2013), apply retroactively to this petitioner under the circumstances of his case?

2. Whether the petitioner, Lloyde Dubry, was denied his remedy by due course of law -- in violation of the Sixth or Fourteenth Amendment to the United States Constitution -- because of the unlawful discriminatory practices employed against him during the appellate process by the Kansas courts of last resort?

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OPINION BELOW

On June 28, 2019, BILES, J., of the Kansas Supreme Court entered its opinion affirming the judgment of the Court of Appeals for the State of Kansas. The opinion of the Kansas Supreme Court is reported as State of Kansas v. Lloyd Dubry, Appellate Case No. 114-050; 2019 Kan. LEXIS 116; 2019 WL 2667970.

JURISDICTION

This Court's jurisdiction rests on 28 U.S.C. 1257(a). Although the Supreme Court's June 28th, 2019, decision addresses mixed state and federal law issues, the judgment below does not rest on an adequate and independent state-law ground. See, e.g., Florida v. Powell, 559 U.S. 50, 56-57 (2019).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 6, in pertinent part, reads:

"In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed[.]"

Amendment 14, Sec. 1., in pertinent part, reads:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Constitution, article 1, section 10, in pertinent part, reads:

"No State shall enter into any Treaty, Alliance, or Confederation . . . pass any . . . ex post facto Law."

Kan. Stat. Annotated ("K.S.A.") 21-6811, in pertinent part, reads: "[e](3) The state of Kansas shall classify the crime as person or nonperson. In designating a crime as person or nonperson, comparable offenses under the Kansas criminal code in effect on the date the current crime of conviction was committed shall be referred to. If the state of Kansas does not have a comparable offense in effect on the date the current crime of conviction was committed, the out-of-state crime shall be classified as a nonperson crime."

K.S.A. 22-3504, in pertinent parts, read: "(a) The court may correct an illegal sentence at any time while the defendant is serving such sentence.

(b) Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

(c) For the purposes of this section:

(1) "Illegal sentence" means a sentence: Imposed by a court without jurisdiction; that does not conform to the applicable statutory provision, either in character or punishment; or that is ambiguous with respect to the time and manner in which it is to be served at the time it is pronounced. A sentence is not an "illegal sentence" because of a change in the law that occurs after the sentence is pronounced.

(2) "Change in the law" means a statutory change or an opinion by an appellate court of the state of Kansas, unless the opinion is issued while the sentence is pending an appeal from the judgment of conviction.

(d) The amendments made to this section by this act are procedural in nature and shall be construed and applied retroactively.

K.S.A. 21-3503, in pertinent part, read: "(a) Indecent liberties with a child is engaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age:

(1) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or

(2) Soliciting the child to engage in any lewd fondling or touching the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another."

Wyo. Stat. § 14-3-105 (1978): "Any person knowingly taking immodest, immoral or indecent liberties with any child or knowingly causing or encouraging any child to cause or encourage another child to commit with him any immoral or indecent act is guilty of a felony, and upon conviction shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) or imprisoned in the penitentiary not more than ten (10) years, or both."

STATEMENT OF THE CASE

Petitioner respectfully adopts the succinct statement of the case set forth in the opinion of the Kansas Supreme Court in this case. *See* Appendix to Petition for Writ of Certiorari, ("Pet. App."), at pages ___ - ___.

REASONS FOR GRANTING THE WRIT

I. There is a split among the Kansas Supreme Court justices, and panels of the Kansas Court of Appeals, on whether State v. Wetrich, 307 Kan. 552 (2018) -- which employ the principles in Descamps v. United States, 370 U.S. 254 (2013), and Apprendi v. New Jersey, 530 U.S. 466 (2000) -- should retroactively extend *Wetrich's* interpretation given K.S.A. 21-6811 for K.S.A. 2017 Supp. 22-3504 purposes.

Much of the split stems from Kansas Supreme Court justices (Justice Johnson's and Justice Biles') disparate conclusions concerning whether *Wetrich* constitutes a "change in the law." See State v. Wetrich, 307 Kan. 552, 558-59, 412 P.3d 984

(2018) -- JOHNSON, J., writing the Opinion -- ("Nevertheless, the extent to which the federal identical-or-narrower rule is constitutionally mandated after Apprendi, Descamps, and Mathis [579 U.S. ___, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016)] is a question we need not decide today. We can resolve the issue presented here on the basis of statutory interpretation."); *versus* State v. Newton, 309 Kan. ___, 2019 WL 2399484, at *3 (No. 116,098, filed June 7, 2019) (holding defendant sentenced before Wetrich could not rely on Wetrich in motion to correct an illegal sentence);[1]

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[1] Even further, several panels of the Court of Appeals have now addressed this issue, all concluding that *Wetrich* was not a "change in the law" as meant by K.S.A. 2017 Supp. 22-3504(3). See State v. Smith, 2018 WL 4374273, at *7 (2018) *pet. for rev. filed* Sept. 26, 2018) (Unpublished Opinion); State v. Montes, No. 117, 916, 2018 WL 4039484, at *6 (Kan. App. 2018) *pet for rev. filed* Sept. 10, 2018 (Unpublised Opinion). In those cases, the Court of Appeals recongized that this Court's ruling in *Wetrich* was a judicial interpretation of an existing statute, not a "change in the law" within the meaning of K.S.A. 22-3504. Smith, 2018 WL 4374273, at *7; Jones, 117,808, 2018 WL 4656409, at *9; Montes, 2018 WL 4039494, at *6. In particular, because the judicial construction of the statute is the authoritative statement of its meaning before and after the decision, it does not change the law, such as an amendment to the statute would. Smith, 2018 WL 4374273, at *7. Like those panels have found, *Wetrich* was not a change in the law as it was, by its own terms, simply an authoritative statement of what "comparable" has meant since the origination of the Kansas Sentencing Guidelines Act (KSGA), and, therefore, at the time the Lloyde Dubry was sentenced in this case.

and State v. Weber, 309 Kan. ___, 2019 WL 2479316, at *4-5 (No. 113,473, filed June 14, 2019) (holding motion to correct a sentence that was imposed before Wetrich decision was governed by the law in effect at time of sentence.) -- (BILES, J., wrote the Opinions for *Newton* and *Weber*).

This split is further grounded in part on whether defendants sentenced before *Wetrich* and *Descamps* was decided should have his or her prior out-of-state conviction considered under the "comparable" or "identical-or-narrower" test.

Kansas courts have had varying opinions as to what it means to be a comparable offense for out-of-state conviction classification purposes. Previously, the Kansas Supreme Court has held that "the offenses need only be comparable, not identical. State v. Vandervort, 276 Kan. 164, 179, 72 P.3d 925 (2003). This court explained that "[o]ffenses may be comparable 'even when the out-of-court statute encompasssed some acts not necessarily encompassed by the Kansas statute.'" State v. Buell, 52 Kan. App. 2d 818, 826, 377 P.3d 1174 (2016) (quoting State v. Riolo, 50 Kan. App. 2d 351, 356-57, 330 P.3d 1120 [2014]). However, the Kansas Supreme Court recently clarified what it means to be a comparable offense in *Wetrich*, 307 Kan. 553, 412 P.3d 984. There, the court held that "the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced." 307 Kan. at 562.

Lloyde Dubry moved to correct his sentence several years after it was imposed, arguing the sentencing court improperly scored a prior Wyoming conviction as a person crime. The sole issue was whether the Court of Appeals erred in affirming the district court's denial of the motion on the basis that the Wyoming offense's classification was correct. Justice Biles, in delivering the opinion, affirmed based on State v. Murdock, 309 Kan. 585, 439 P.3d 307 (2019) (Murdock II) (holding sentence that was legal when pronounced does not become illegal if the law subsequently changes).

Were it not for Justice Biles' retroactive application of K.S.A. 2017 22-3504, subsection (c), to Dubry's case, his prior Wyoming conviction for immodest, immoral, or indecent liberties with a child would have been scored as nonperson offense; thus operating to substantially reduce his term of imprisonment.

Justice Biles' opposing view is initially premised on the assertion that *Wetrich* is a beneficial change in the law occurring after Mr. Dubry's sentence was pronounced. Mr. Dubry disagrees.

At this juncture it is important to answer what constitutes a "change in the law" pursuant to the new amendments to K.S.A. 22-3504(3), to determine the appropriate for Mr. Dubry among the Kansas Supreme Court's *disparate conclusions*.

First, see Rivers v. Roadway Exp., Inc., 511 U.S. 298, 312-13, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994); see also Bousley v. United State, 523 U.S. 614, 118 S. Ct.

1604, 140 L. Ed. 2d 828 (1998) (applying substantive statutory interpretation occurring in a case after conviction was final to collateral attack).

Secondly, the *Wetrich* opinion makes clear it is only interpreting an existing statute based upon language that has been in existence since the origin of Kansas Statutes Annotated ("K.S.A."). 307 Kan. at 560; see also State v. Moore, 307 Kan. 599, at 602, 412 P.2d 965 (2018) (2018) (noting *Wetrich* construed "K.S.A. 2017 Supp. 21-6811(e)(3), and its ancestors"). To that extent, *Wetrich* falls in line with the understanding expressed in *Rivers* that Justice Johnson of the Kansas Supreme Court simply provided an authoritative statement of what the law meant both before and after the desision. Thus, there is no issue of a change in the law or retroactive application because *Wetrich* simply explained the law in effect at the time Mr. Dubry was sentenced, rather than changed the law after he was sentenced. This understanding is further reinforced by the Kansas Supreme Court's holding in *Moore*, which applied *Wetrich's* clarification of the law to a K.S.A. 22-3504 motion filed years after the defendant's conviction was final. 307 Kan. at 602 (In fact, procedurally speaking, Mr. Dubry is in the same position as the defendant in *Moore*).

Further, if this Court concurs that *Wetrich* constituted a "change in the law," the 2017 amendments to K.S.A. 22-3504 still would not foreclose relief to Mr. Dubry; based on the principles pronounced in *Descamps* and *Apprendi*. That is, "the Wyoming and Kansas offenses could not be deemed comparable without judicial

fact-finding that violated his Sixth and Fourteenth Amendment rights under the United States Constitution. See Descamps v. United States, 570 U.S. 254, 260, 133 S. Ct. 2276, 186 L. ed. 2d 438 (2013) (holding prior conviction can qualify as predicate offense for sentencing enhancement under the federal Armed Career Criminal Act only if offense's elements are identical to or narrower than elements of generic offense); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. St. 2348, 147 L. Ed. 2d 435 (20000) (holding facts that increase maximum penalty for crime, other than prior conviction, must be submitted to jury and proved beyond a reasonable doubt)."

The Court of Appeals, to avoid the requirements in *Apprendi*, *Descamps*, and *Wetrich*, *postured*: "We have not made any factual findings regarding *how* Dubry violated each statute [Wyoming and Kansas]" See State v. Dubry, 379 P.3d 1129, 2016 Kan. App. Unpub. LEXIS 700, at 10 (Kan. Ct. App., Aug. 26, 2016). Arguably, the Wyoming statute is an alternative law. See Wyo. Stat. 14-3-105. And when the crime in question is an out-of-state offense with alternative means-- some of which would not be comparable to Kansas person crimes -- the State's burden is to establish that the Defendant committed a version of the offense supporting the person classification. See State v. Obregon, 2019 Kan. LEXIS 115, at *14; 2019 WL 2677913, (illustrating factual determination necessary); see also Obregon, at *14-15 ("On appeal, the district court's finding that the State met its crime classification burden must be supported by substantial competent evidence to withstand scrutiny.

290 Kan. at 162. The presentence investigation summary frequently can satisfy the State's burden absent defendant's objection, but more is required when the summary does not indicate which version of the out-of-state offense the defendant committed. See K.S.A. 2018 Supp. 21-6814(b), (c). And failing additional proof, the person-crime classification is erroneous as a matter of law.").

This blurring of the line between facts and elements, and the facts necessarily required by the elements, is a significant shift in the law beyond that espoused by the Court in *Beltran-Munguia*, and *Dunn*, infra. "Elements" are those necessary and sufficient facts that, if proven (or admitted), support a conviction for a particular crime. See United States v. Beltran-Munguia, 489 F.3d 1042, 1045 (9th Cir.2007) ("To constitute an element of a crime, the particular factor in question needs to be a constituent part of the offense [that] must be proved in every case to sustain a conviction under a given statute." See also, State v. Dunn, 304 Kan. 733, 375 P.3d 332 (2016) ("The plain language of Kan. Stat. Ann. § 22-3201(b) is relatively clear: A charging document shall state essential facts constituting the crime charged, and the document shall be deemed sufficient if it is drawn in the language of the statute. The statute's emphasis on facts rather than elements is repeated in other related statutes and legally significant. A Kansas charging document should be regarded as sufficient now when it has alleged facts that would establish the defendant's commission of a crime recognized in Kansas. Because all crimes are statutorily defined, this is a statute-informed inquiry.

The legislature's definition of the crime charged must be compared to the State's factual allegations of a defendant's intention and action. If those factual allegations, proved beyond a reasonable doubt, would justify a verdict of guilty, then the charging document is statutorily sufficient.").

K.S.A. 22-3504, subsection (c)(1), provides: "A sentence is not an 'illegal sentence' because of a change in the law that occurs after the sentence is pronounced." Subsection (c)(2) thereof defines "change in the law," in pertinent part, as: "a statutory change or an opinion by an appellate court of the state of Kansas". And provides in subsection (d): "The amendments made to this section by this act are procedural in nature and shall be construed and applied retoractively."

Justice Biles, in ruling against Mr. Dubry, stated *Murdock II* bars *Wetrich's* application to Dubry's motion to correct his sentence." See 2019 Kan. LEXIS 116, at *9; 2019 WL 2667970 (June 28, 2019, Opinion FIled). The problem is, Justice Biles ignored the entirely relevant statement he concurred in, in *Murdock II*; i.e., "true changes in the law cannot transform a once legal sentence into an illegal sentence, but developments in the law may shine new light on the original question of whether the sentence was illegal when pronounced." 439 P.3d 307, at 312. This "statement" flies directlly in the face of Justice Biles' holding in Mr. Dubry's case; to the effect that, "a sentence that was legal when pronounced does

not become illegal if the law subsequently changes."

The retroactive provision in K.S.A. 22-3504 is triggered only when an individual attempts to make use of "a statutory change or an opinion by an appellate court of the state of Kansas". The statute does not prevent Mr. Dubry from utilizing another state, federal or United States Supreme Court precedent to shine new light on the original question of whether the sentence was illegal when pronounced.

Further, if this Court somehow concur the *Wetrich* opinion constituted a "change in the law," the 2017 amendments to K.S.A. 22-3504 would not apply retroactively to cases like Mr. Dubry's which was currently pending on appeal. That is, for the following reasons: (1) arguably, the statute is substantive law; (2) if procedural in nature, the statute doesn't meet the three factors which come into play for considering if a law violates Dubry's vested rights (i.e., his vested right in having his illegal sentence corrected and remedy by due course of law); (3) new constitutional problems follow the State's construction of the 2017 amendments to K.S.A. 22-3504 (i.e., would violate due process rights relating to the retroactivity of statutes; would seem to leave Dubry's sentences to be determined by a pre-*Wetrich* ambiguous form of the sentencing statutes; retroactive application of the 2017 amendments may violate Article 1, Section 10, of the United States Constitution that provides "[n]o State shall . . . pass any . . . ex post facto Law"; and, finally, the State's proposed construction is bad policy because it took away the previously enjoyed right Dubry had when he entered his *Alford* guilty plea which was ability to

correct an illegal sentence "at any time").

The general rule prohibiting retroactive application of *Descamps*, or *Wetrich* (employing *Descamps'* principles), remains superseded by the legislative directive in K.S.A. 22-3504 that the court may correct an illegal sentence "at any time". See State v. Martin, 52 Kan. App. 2d 474, 483-84, 369 P.3d 959 (2016). Therefore, by reserving for another day the determination of "the extent to which the federal identical-or-narrower rule is constitutionally mandated after *Apprendi*, *Descamps* and *Mathis*" (*Wetrich*, 307 Kan.at 508) -- in the context of K.S.A. 21-6811's applicability to Mr. Dubry's case -- such compounded and even precipitated the lack of uniformity and disparate conclusions concerning the nature of *Wetrich* and its application to Mr. Dubry's case.

II. **Whether the petitioner, Lloyde Dubry, was denied his remedy by due course of law because of the unlawful discrimination in the application of *Descamps* and *Wetrich* employed by the Kansas Supreme Court against Mr. Dubry.**

Due course of law under the state constitution and due process of law under the federal constitution mean the same thing. See Griggs v. Hanson, 86 Kan. 632, 121 P. 1094 (1912).

The Kansas Supreme Court in Farley v. Engelken, 241 Kan. 663, 671-72, 740 P.2d 1058 (1987), acknowledged "remedy by due course of law" means: ". . .the reparation for injury, ordered by a tribunal having jurisdiction, in due course of procedure and after a fair hearing." Therein recognizing, "The right of the plaintiff involved in [a] case is the fundamental constitutional right to have a remedy for an

injury to person or property by due course of law. This right is recognized in the Kansas Bill of Rights § 18 [the Fourteenth Amendment's counterpart], which provides that all persons, for injuries suffered in person, reputation or property, shall have a remedy by due course of law, and justice administered without delay."

Mr. Dubry asserts that once the statutory right to appeal has been extended him, due process mandates the minnimum requirements of notice ***and a meaningful opportunity to be heard.*** Nguyen v. IBP, Inc., 266 Kan. 580, 588, 972 P.2d 747 (1999).; see also K.S.A. 22-3602.

"[D]ue process emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation are treated." State v. Chiles, 254 Kan. 888, 902, 869 P.2d 707 (1994); Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974).

The Kansas Court of Appeals was not being truthful when it stated "our Supreme Court has never applied the specific rule Dubry seeks to invoke ("the "identical-or-narrower rule) [from *Descamps*] in the circumstance of his case -- the classification of an out-of-state offense as a person or nonperson crime." See *Dubry,* 2016 Kan. App. Unpub. LEXIS 700, at *9-10; 379 P.3d 1129; 2016 WL 4498520. ("But we would not expect such a rule to apply under K.S.A. 2015 Supp. 21-6811(e)(3) since it tells us to decide whether it's a person offense by looking to "comparable

offense under the Kansas criminal code.").

There are two cases demonstrating our Kansas Supreme Court -- Justice Biles, *in particular* -- has applied the "rule" from *Descamps* retroactively to crimes final when it (a presumptively non-retroactive case) was decided. See State v. Donaldson, 306 Kan. 514, 394 P.3d 1180 (Donaldson's first-degree murder/Sale of Cocaine occurred, respectively, in 2001-2002; appeal finalized in 2005; filed illegal sentence motion in 2014; yet, Justice Biles applied the principles from *Descamps* and *Wetrich* retroactively to determine Donaldson's sentence illegal); see also *Obregon*, 2019 Kan. LEXIS 115, at *6-7; 2019 WL 2677913 ("But Obregon seeks the benefit of *Wetrich* , which announced a different interpretation on March 9, 2018 -- more than a year after Obregon was sentenced, and a month after the Court of Appeals decision rejecting his criminal history-score challenge.").

In short, the Kansas Supreme Court unlawfully discriminated against Mr. Dubry in their treatment of him via their uneven application of the constitutional protections he, Donaldson, and Obregon share; and by not applying United States Supreme Court precedent fairly to him when warranted. Mr. Dubry's right to appeal was not only discriminately applied by the *disparate conclusions* Justice Johnson and Justice Biles made concerning whether *Wetrich* constituted a "change in the law", but, discriminately so, by applying otherwise applicable law to others besides Dubry despite their cases were finalized before *Descamps* and *Wetrich*

were decided.

A. The petitioner, Lloyde dubry, received an illegal sentence based upon an incorrect criminal history score.[2]

The district court and Kansas court of Appeals found Mr. Dubry's 1981 Wyoming conviction for Immodest, Immoral, or Indecent Liberties with a Child was comparable to a Kansas person offense. However, the Wyoming crime is not comparable to a Kansas person offense because it criminalizes a broader (and nearly undefined) range of conduct than any Kansas offense, including acts that would be legal in Kansas. As such, Mr. Dubry received an illegal sentence that was erroneously enhanced using an incorrect criminal history score.

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[2] Most of that which would settle whether Mr. Dubry's sentence is illegal must be reserved for another day; i.e., for that day when Dubry's appeal doesn't hinge on disparate conclusions involving the same subject nor unlawful discriminatory application of this relevant precedent. See Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (The U.S. Supreme Court will not assume that a state-court decision rests on adequate and independent state grounds when the state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.).

This issue involves the classification of an out-of-state felony conviction as person or nonperson pursuant to the KSGA. See K.S.A. 21-6811(e). Generally speaking, the KSGA sets up a system where a person's prior felony and misdemeanor convictions are used to increase the punishment of his or her current offense. See K.S.A. Supp. 21-6801 *et seq.* The prior convictions are further classified as person or nonperson offenses, with prior person felony offenses leading to the most severe punishment. See, e.g., K.S.A. 2016 Supp. 21-6805 (Drug Grid). While Kansas statutorily labels its crimes as person or nonperson, other states do not, requiring Kansas courts to classify out-of-state convictions as person or nonperson by referring to "comparable offenses under the Kansas criminal code[.]" K.S.A. 2016 Supp. 21-6811(e)(3). If there is no comparable crime in Kansas, an out-of-state felony conviction is considered nonperson. K.S.A. 2016 Supp. 21-6811(e)(3).

In State v. Wetrich, 307 Kan. 552, Syl 3, 412 P.3d 984 (2018), Justice Johnson recently clarified an ambiguity in the KSGA, explaining that for an out-of-state conviction to be "comparable" to an in-state offense "the elements of the out-of-state crime cannot be broader than the elements of the Kansas crime." The *Wetrich* opinion made clear its ruling rested upon interpreting an ambiguous statute and was based upon language that has been in existence since the origination of the KSGA. 307 Kan. at 560-62; see State v. Moore, 307 Kan. at 602 (2018) (Noting *Wetrich* construed "K.S.A. 2017 Supp. 21-6811(e)(3), and its ancestors" and vacating defendant's sentence challenged via K.S.A. 22-3504 motion).

Thus, the *Wetrich* opinion explained the meaning of "comparable" at the time of Mr. Dubry's crime of conviction and his sentencing hearing. See *Moore,* 307 Kan. at 600 (Applying *Wetrich* to crime of conviction occurring in 2005). Therefore, in order to be comparable to a person felony, the Wyoming conviction needed to be identical to, or narrower than, a Kansas person felony. *Wetrich,* 307 Kan. at 562.

Applying Wetrich's holding to the statutes in question makes it clear that Mr. Dubry's Wyoming conviction is not comparable to any Kansas person felony. The Wyoming crime, titled "immoral or indecent act" defines the crime as follows:

Wyo. Stat. § 14-3-105 (1978):

> "Any person knowingly taking immodest, immoral or indecent liberties with any child or knowingly causing or encouraging any child to cause or encourage another child to commit with him any immoral or indecent act is guilty of a felony, and upon conviction shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) or imprisoned in the penitentiary not more than ten (10) years, or both."

The Kansas Court of Appeals' decision found the Wyoming crime was comparable to Kansas' crime of indecent liberties with a child, which criminalized:

> "(a) Indecent liberties with a child is engaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age:
>
> (1) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or
>
> (2) Soliciting the child to engage in any lewd fondling or touching the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another." K.S.A. 21-3503.

The first problem with finding the two crimes comparable was actually recognized in the Court of Appeals' decision, "The Wyoming statute doesn't specify what physical contacts qualify as immodest, immoral, or indecent, while the Kansas statute specifies that it is only violated by 'lewd fondling or touching' done to arouse sexual desires or solicit a child to participate in those acts." *Dubry,* 2016 WL 4498520, at *3. As such, "Kansas defines the crime more specifically, while Wyoming (at least in 1981) did it in more general terms." *Dubry,* 2016 WL 4498520, at *3. Even the Court of Appeals acknowledged the elements of the Wyoming crime are facially broader, meaning it is not comparable. *Dubry,* 2016 WL. 4498520, at *6-7.

Even further, Wyoming case law reinforces the broad, and undefined, nature of the conduct criminalized, despite accompanying vagueness challenges. See Sorenson v. State, 604 P.2d 1031, 1034 (Wyo. 1979); Griego v. State, 761 P.2d 973, 975 (Wyo. 1988). For example, the Wyoming Supreme Court has found the statute "punishes conduct which includes not only sexual intrusion, but also sexual contact and consensual sexual intecourse." Derkson v. State, 845 P.2d 1383, 1388 (1993). Likewise, the conduct necessary for a conviction under the Wyoming law does not require physical contact, and can include displays of acts or display of lewd photographs. Ruby v. State, 2006 WY 113, *P7, 114 P.3d 425, 429 (Wyo. 2006).

The Wyoming law criminalizes conduct going far beyond even the core conduct prohibited in the Kansas indecent liberties statute, which is limited to fondling or touching of a person.

Finally, the Wyoming law criminalized behavior that is entirely lawful in Kansas by, *inter alia*, treating the law as a broad age of consent statute. In particular, the word "child" under the version of the Wyoming law in effect at the time referred to a person under the age of nineteen. Campbell v. State, 709 P.2d 425, 427 (WYo. 1985). In contrast, Kansas law considers sixteen years old to be the age of consent for most sex crimes, including indecent liberties. See K.S.A. 21-5501, *et seq.* Thus the Wyoming law criminalized acts that would have been considered consensual and lawful sexual contact between two people of consenting age in Kansas. This goes far beyond the core conduct criminalized in the Kansas indecent liberties statute and is not comparable to any Kansas person felony. See also Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1568 (2017) (Applying categorical analysis to statutory rape offenses, determining states with higher age of consent than the Federal standard of sixteen encompass broader conduct, and therefore, cannot be "aggravated" offenses).

Mr. Dubry's 1981 Wyoming conviction is for an offense that criminalized broader conduct than a Kansas person offense, including conduct that would not be criminal in Kansas.

The elements of the out-of-state crime are broader than the elements of the Kansas crime used for comparison. As such, the crime cannot be scored a person offense and must be scored as a nonperson offense. K.S.A. 2016 Supp. 21-6811(e)(3).

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Submitted: August 20, 2019