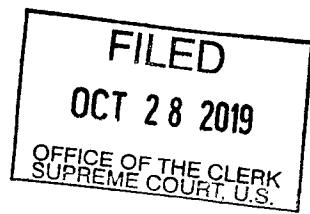


Case No. 19-5880



**IN THE UNITED STATES SUPREME COURT**

ANDREW LARSON

Movant,

vs.

WARDEN PACHECO, WYOMING STATE PENITENTIARY (WSP),

Respondent.

\*\* All Parties to this litigation are contained within the above Caption. \*\*

**MOTION FOR REHEARING  
ON US SUPREME COURT'S DENIAL OF WRIT OF CERTIORARI**

**COMES NOW**, H.R.H. Andrew J. Avitabile (Andrew), Movant *pro se*, and moves this court for a rehearing *en banc* and in camera. Rule 44 (Rehearing) allows any petition for the rehearing of any judgement or decision of the Court on the merits.

1. In light of the *prima fascia* unconstitutionality of the Wyoming Statute in question, it seems a further miscarriage of justice to allow this statute to remain when it contradicts everything the United States stands for and the entire basis for the establishment of the United States' Court System. To further add insult to justice, the actions of the Wyoming State Courts (Wyoming) and the Wyoming Attorney General (AG) have made a mockery of jurisprudence in that Wyoming appears to have relegated their duties to the AG because a mere rewording of the AG's decisions gets rubber-stamped.
2. Andrew points out to this Court that the facts are uncontested because they are true and therefore conceded because of a lack of opposition. Rule 15.2 in pertinent part states: "Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Courts attention in the brief in opposition."

Under this Court's Rule 15.2, the partygoers' failure to contest these factual assertions at the certiorari stage waived their right to do so at the merits stage. See *Carcieri v. Salazar*, 555 U.S. 379, 395-396, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009).

"The facts are drawn from the uncontested allegations in plaintiff's complaint and are taken as true for the purposes of deciding this motion. *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., Div. of Ace Young Inc.*, 109 F.3d 105, 108 (2d Cir. 1997)." See *Eichenblatt v. Nattali Kugel, Mayore Industries, Inc.*, 2018 U.S. Dist. Lexis 82731.

Appellant's failure to contest the district court's summary judgment finding has important consequences, however. By failing to contest this finding, he is deemed to have conceded that there were proper grounds for his expulsion. *Cf. Strickland Tower Maintenance, Inc. v. AT&T Communications, Inc.*, 128 F.3d 1422, 1426 (10th Cir. 1997)

Given this concession, we must determine whether he is entitled to any relief. *National Association For The Advancement Of Colored People v. Tucker*, 1998 U.S. App. Lexis 20161; 1998 Colo. J. C.A.R. 4362 (10<sup>th</sup> Cir 1998).

3. The issue of entitled relief should have been the only question before this Court because once the case was accepted and docketed, Wyoming chose not to contest Andrew's claims; and thereby conceded them as true, warranting a ruling in his favor.

4. Andrew understands that *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 70 S. Ct. 252, 94 L. Ed. 562 (1950) does not obligate the Court to provide an explanation for its denial; however, with no disclosure of the opinions of the Justices as to the merits for dismissal Andrew is left to speculate in this petition for rehearing. The violations that took place in this case as well as the unconstitutional statute jeopardize and leave the contract of the Constitution as the issue before this Court.

5. If someone gave you a new name against your wishes that was not yours, one that you had never used and then convicted and incarcerated you under that name, that claim should hold merit before this Court. If the Constitutions of the United States and Wyoming are superior to the court rules, state and federal laws, the contradiction of that should hold merit before this Court. If the Constitutions of the United States and Wyoming were disregarded by state legislator and state officials like the AG's, this claim should hold merit before this Court. If the Wyoming Governor and the AG refused their Constitutional duty to investigate their own (Wyoming Officials) for malfeasance, the criminal activity of breaking the law and violating people's rights and used their influence so that lesser courts abandoned their duty to provide fair and equitable rulings, this travesty should hold merit before this Court.

6. If the due process and equal protection, fairness, morality, and justice of the Federal Constitution can be overruled by lesser laws such as Wyoming Statute §6-2-311, "Corroboration of a victim's testimony is not necessary to obtain a conviction for sexual assault.", which actually means "corroboration of an allegation is not necessary to obtain a conviction", this changed

Blackstone's formulation from: "It is better that ten guilty persons escape than that one innocent suffer" to "It is better that a hundred innocent suffer than that one guilty persons escape" because an accusation equals a conviction. This issue should hold merit before this Court. The clear bias demonstrated against this litigant in the effort to support "the cause" or to serve political agendas instead of supporting justice is in direct violation of the Wyoming and US Constitutions by Wyoming's courts and government officials' just to keep their prisons full. This should hold merit before this Court.

7. The Supreme Court is responsibility to overturn unconstitutional legislation as a necessary consequence of their sworn oath of office to uphold the Constitution as mandated in Article Six of the Constitution. All unconstitutional laws are invalid and unenforceable. Higher law, the Constitution, means that no law may be enforced by the government unless it conforms with certain universal principles (written or unwritten) of fairness, morality, and justice; when a government, even though acting in conformity with clearly defined and properly enacted legal rules, still produces results which many observers find unfair or unjust. Beyond a reasonable doubt is the highest burden of proof in any court in the United States. Criminal cases must be proven beyond a reasonable doubt. Except in Wyoming where an accuser's testimony is all that is necessary to obtain a conviction. That clearly conflicts with the ruling of *In re Winship* (1970) "[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Also "Presumption of innocence" serves to emphasize that the prosecution has the obligation to prove each element of the offense beyond a reasonable doubt and that the accused bears no burden of proof. The legal precedents are unchallenged and deserving of a ruling in favor of your Andrew.

In 1803, *Marbury v. Madison* was the first Supreme Court case where the Court asserted its authority for judicial review to strike down a law as unconstitutional. At the end of his opinion in this decision,<sup>[4]</sup> Chief Justice John Marshall maintained that the Supreme Court's responsibility to overturn unconstitutional legislation was a necessary consequence of their sworn oath of office to uphold the Constitution as instructed in Article Six of the Constitution.

In U.S. constitutional law, a facial challenge is a challenge to a statute in which the plaintiff alleges that the legislation is always unconstitutional, and therefore void. It is contrasted with an as-applied challenge, which alleges that a particular application of a statute is unconstitutional.

If a facial challenge is successful, a court will declare the statute in question facially invalid, which has the effect of striking it down entirely. This contrasts with a successful as-applied challenge, which will result in a court narrowing the circumstances in which the statute may constitutionally be applied without striking it down. In some cases—e.g., *Gonzales v. Carhart* or *Crawford v. Marion County Election Board*, a facial challenge has been rejected with either the court or concurring Justices intimating that the upheld statute might be vulnerable to an as-applied challenge.

In First Amendment cases, another type of facial challenge is enunciated in the overbreadth doctrine. If a statute reaches to include substantially protected conduct and speech in relation to the legitimate reach of the statute, then it is overbroad and thus void on its face.

The rule according to a higher law means that no law may be enforced by the government unless it conforms with certain universal principles (written or unwritten) of fairness, morality, and justice; when a government, even though acting in conformity with clearly defined and properly enacted legal rules, still produces results which many observers find unfair or unjust. "Higher law" can be interpreted in this context as the Constitution.

The *Rechtsstaat* doctrine (legal state, state of right, constitutional state, constitutional government) was first introduced by the German philosopher Immanuel Kant. Kant's approach is based on the supremacy of country's written constitution created using principles of the Higher Law. This supremacy meant creating guarantees for the implementation of his central idea: a permanently peaceful life as a basic condition for the happiness and prosperity of the citizens. Kant was basing his doctrine exclusively on the idea of constitutionalism and constitutional government.

Beyond a reasonable doubt is the highest burden of proof in any court in the United States. Criminal cases must be proven beyond a reasonable doubt.

The U.S. Supreme Court first discusses the term in *Miles v. United States* (1880): "The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt."

*In re Winship* (1970) "[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

The presumption of innocence is the principle that one is considered innocent unless proven guilty. It was traditionally expressed by the Latin maxim *ei incumbit probatio qui dicit, non qui negat* ("the burden of proof is on the one who declares, not on one who denies").

In many states, presumption of innocence is a legal right of the accused in a criminal trial, and it is an international human right under the UN's Universal Declaration of Human Rights, Article 11. Under the presumption of innocence, the legal burden of proof is thus on the prosecution, which must collect and present compelling evidence to the trier of fact. The trier of fact (a judge or a jury) is thus restrained and ordered by law to consider

only actual evidence and testimony presented in court. The prosecution must, in most cases prove that the accused is guilty beyond reasonable doubt. If reasonable doubt remains, the accused must be acquitted.

"Presumption of innocence" serves to emphasize that the prosecution has the obligation to prove each element of the offense beyond a reasonable doubt and that the accused bears no burden of proof.<sup>[19]</sup> This is often expressed in the phrase *innocent until proven guilty*, coined by the English lawyer Sir William Garrow (1760–1840).<sup>[20]</sup>

This right is so important in modern democracies, constitutional monarchies and republics that many have explicitly included it in their legal codes and constitutions:

- The Universal Declaration of Human Rights, article 11, states: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."
- Although the Constitution of the United States does not cite it explicitly, presumption of innocence is widely held to follow from the 5th, 6th, and 14th amendments. The case of *Coffin v. United States* (1895) established the presumption of innocence of persons accused of crimes. See also *In re Winship*.

8. The Rechtsstaat doctrine (legal state, state of right, constitutional state, constitutional government) was first introduced by the German philosopher Immanuel Kant. Kant's approach is based on the supremacy of country's written constitution created using principles of the Higher Law. This supremacy meant creating guarantees for the implementation of his central idea: a permanently peaceful life as a basic condition for the happiness and prosperity of the citizens. Kant was basing his doctrine exclusively on the idea of constitutionalism and constitutional government.

9. Fairness, morality, and justice are all the Andrew has asked for of this Court, of the lesser courts, and from the government officials as guaranteed by the United States Constitution throughout the life of this case. The US Constitution is the original Contract between the people and the government of this country on which the entire Nation has been built. Breaching this contract isn't merely a minimal violation of business that only violates the agreements and nullifies said contract, reverting the signatories to their pre-contract state. It's a violation of such an important Contract that its breach theoretically invalidates the contract establishing the entire nation. This isn't merely another piece of paper; it's the foundation for the Country and safety

net for the people, protecting their freedoms and rights. Ergo this Contract between the People and their government giving the right to govern the people MUST be protected at all costs. Theoretically, its nullification reverts this Country back to an English Colonial Status.

10. The issues addressed in this claim individually are breaches of the US Constitutional contract and the guarantees enumerated therein between the people and the Government. The breach of this contract allows either party of said contract to declare it ended and each party reverted back to their standing before said contract. Andrew has declared a breach of contract and could pronounce the contract concluded due to the Wyoming Government's breach of both the US and Wyoming Constitutions. This would potentially returns the State of Wyoming back to a territorial status; making all arrests, prosecutions, convictions, incarcerations and all collected taxes within Wyoming illegal. Andrew does not want to see this type of damage to the United States, so he only asks that this Court correct the injustices as well as eradicate the unconstitutional statute. This aligns perfectly with Andrew's oath to protect the United States, her People and her Constitution.

11. Furthermore, Andrew states that the evidence shows that Wyoming has been incarcerating innocent men under this statute since 1982 when the statute was established. This means that 37 years of this injustice has passed with this unconstitutional statute on the books and nobody has done anything to correct this illegal behavior, which is about to be exposed publically.

12. Finally on this matter, Andrew states that he has personally known at least 10 men for whom the evidence clearly shows actual innocence that have been incarcerated, with 4 of them remaining imprisoned to their deaths. This is not why so many men and women have voluntarily given their lives and limbs to protect the Constitution or this Country, especially since Wyoming has consciously chosen to ignore federal court rulings such as that of Judge Brimmer when he

overturned the Wyoming decision in relation to James Harlow. Wyoming still refers to the State decision to rule against inmates even though Judge Brimmer's decision contradicts it.

13. Andrew prays that the wise men and women of this Court may hear and know that which they have never considered: the Constitution is a contract with the people. The Court has their sworn duty under their oath of office to uphold the Constitution as required in Article Six of the Constitution. If this the highest court in the land cannot enforce the guaranteed rights of the Constitution and provide fairness, morality, and justice to the least of the least then the system is truly broken and the contract of the Constitution has been terminated by the Government. Andrew is only asking the Court to uphold the Constitution; the rights and privileges that are already guaranteed him.

14. Thus, Andrew has suggested new reasons why Courts initial decision denying certiorari, in which his argument as to mitigating factors was rejected, was incorrect. [Per Rehnquist, J., as Circuit Justice.] *Richmond v. Arizona*, 434 U.S. 1323, 98 S. Ct. 8, 54 L. Ed. 2d 34 (1977). He has also demonstrated a *prima facie* showing that substantial issue would be tendered by petition for rehearing. *Flynn v. United States*, 75 S. Ct. 285, 99 L. Ed. 1298 (1955).

**WHEREFORE**, Andrew prays this Court will allow him a rehearing and provide a ruling that comports with the mandates of the US Constitution so that this unconstitutional statute and the unconstitutional practices of Wyoming will be rectified so that justice is served.

**DECLARATION UNDER PENALTY OF PERJURY**

I declare under penalty of perjury pursuant to W.S. 6-5-301; 28 USC 1746; 18 USC 1621 that the above information contained in the foregoing filing is true and correct to the best of my knowledge.

I therefore place my hand as seal upon this document on October 28, 2019.



A handwritten signature in black ink that appears to read "Andrew Joseph Avitabile".

H.R.H. Andrew Joseph Avitabile