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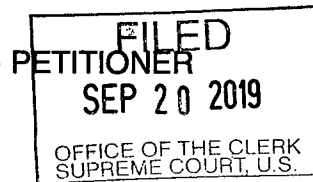
19-6170

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

LYNDAL DALE RITTENBUSH —

(Your Name)



vs.

CLARK BENZOS —

RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

LYNDAL DALE RITTENBUSH

(Your Name)

P.O. Box 250

(Address)

DRAPER, UTAH 84000

(City, State, Zip Code)

Ø

(Phone Number)

QUESTION(S) PRESENTED

1). DID THE STATE VIOLATE THE EX POST FACTO CLAUSE BY ALLEGORICALLY PETITIONER'S OFFENSE BASED SOLEY ON A PRIOR CONVICTION

2). DID THE "ALLEGORICATED" "ELEMENT" REQUIRE PROOF BEYOND A REASONABLE DOUBT.

3). DID THE "ALLEGORICATED" "ELEMENT" REQUIRE A JURY DETERMINATION OF GUILT BEYOND A REASONABLE DOUBT.

4). DID THE COURT EXCEED ITS AUTHORITY BY FIRST: HAVING PETITIONER PLEAD GUILTY TO THE "ALLEGORICATED" OFFENSE.

5). DID THE COURT EXCEED ITS AUTHORITY BY SECOND: SENTENCING PETITIONER TO THE "ALLEGORICATED" OFFENSE WITHOUT A FINDING OF GUILT BY A JURY.

6). DID THE TENTH CIRCUIT COURT OF APPEALS PROPERLY APPLY THE RULE ANNOUNCED IN BUCK V. DAVIS, 137 S.Ct. 759 (2017) TO PETITIONER'S CASE, I.E. DID THE COURT PLACE TOO HEAVY A BURDEN ON THE PRISONER AT THE C O A STAGE.

7). WAS COUNSEL INEFFECTIVE BY FAILING TO FILE A NOTICE OF APPEAL IN ACCORDANCE WITH THE AUTHORITY ANNOUNCED IN GARRA V. JORDAN, 586 U.S. (2019). IS PREJUDICE PRESUMED.

8). DID THE DISTRICT COURT ERROR BY NOT ADDRESSING THE CLAIMS RAISED BY PETITIONER IN HIS 2254 PETITION.

LIST OF PARTIES

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

RELATED CASES

BUCK V. DAUS, 137 S.Ct. 759 (2017) 197 L.Ed.2d 1, 85 USLW 4037

AMZA V. IDAHO, 586 U.S. — (2019)

BEAZELL V. OHIO, 269 U.S. 167, UNITED STATES SUPREME COURT

COLLINS V. YOUNGBLOOD, 497 U.S. 37, UNITED STATES SUPREME COURT

LYNCE V. MATHIS, 519 U.S. 433 (1997) UNITED STATES SUPREME COURT

APPENDI V. NEW JERSEY, 530 U.S. 466 (2000) U.S. SUPREME COURT

KILBOURN V. STATE, 9 Conn. 560, 563 (1833)

UNITED STATES V. WOODWORTH, 68 F. 536, 538 (Kan. 1895)

PLUMBLY V. COMMON-WEALTH, 43 MASS. 413 (1841)

CADDER V. BULL, 3 U.S. 386, 390, 3 DALL. 386, 1 L.Ed. 648 (1798)

EX PARTE CANICE, 85 U.S. 163 (1873) 18 WALL 163, U.S. SUPREME COURT

GREEN V. UNITED STATES, 355 U.S. 184 (1957) U.S. SUPREME COURT

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Ex Parte Canby, 85 U.S. 163 (1873) 18 WALL 163, UNITED STATES SUPREME COURT		
Green v. United States, 355 U.S. 184 (1957), U.S. SUPREME COURT		

STATUTES AND RULES

OTHER

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 C 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 July 16, 2019.

☒ 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 15 MAY 2017.
A copy of that decision appears at Appendix C.

☐ 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 EX POST FACTO CLAUSE

THE SIXTH AMENDMENT TO U.S. CONSTITUTION

THE FOURTEENTH AMENDMENT TO U.S. CONSTITUTION

THE DOUBLE JEOPARDY CLAUSE

STATEMENT OF THE CASE

AT STAKE IN THIS CASE ARE CONSTITUTIONAL PROTECTIONS OF SURPASSING IMPORTANCE: (1) THE PROSCRIPTION OF ANY DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS OF LAW (2) WHETHER THE COURT OF APPEALS AND THE DISTRICT EM BY NOT ADDRESSING PETITIONER'S CLAIMS LISTED IN HIS 2254 HABEAS CORPUS PETITION.

DID THE STATE VIOLATE THE EX POST FACTO CLAUSE BY HAVING PETITIONER PLEAD GUILTY TO AN "ALLEGED" OFFENSE. THAT THE "ALLEGED" OFFENSE REQUIRED PROOF BEYOND A REASONABLE DOUBT, REQUIRING A GUILTY DETERMINATION BY A JURY.

PETITIONER, MR. DALE LITTELOUSHT PLEAD GUILTY TO AN "ALLEGED" OFFENSE BASED SOLELY ON A PRIOR CONVICTION. THE EX POST FACTO CLAUSE MAKES IT CLEAR THAT YOU CANNOT "ALLEGED" AN OFFENSE BASED SOLELY ON A PRIOR CONVICTION.

PETITIONER STATES THAT HE SHOULD HAVE BEEN SENTENCED TO A TYPICAL SECOND DEGREE FELONY REQUIRING A SENTENCE OF 1 TO 15 YEARS IN PRISON.

ONE OF PETITIONER'S CHALLENGES IS THAT THE STATE OVER STEPPED THEIR AUTHORITY WHEN THE STATE WAS SENTENCED PETITIONER TO AN "ALLEGED" OFFENSE WITHOUT FIRST HAVING A JURY DETERMINE THAT THE CHARGE WAS IN FACT "ALLEGED" BASED ON THE "NATURE" OF THE CURRENT OFFENSE.

PETITIONER FURTHER STATED THAT ONCE HE WAS SENTENCED, HE NEVER SEEN HIS ATTORNEY AGAIN, THEN ABANDONING HIM. COUNSEL WAS NEVER CALLED TO CONSULT WITH PETITIONER ABOUT HIS APPEAL RIGHTS AS WELL AS FILE A NOTICE OF APPEAL. NEITHER OF WHICH WAS DONE.

THE TENTH CIRCUIT DID NOT APPLY THE RULE ANNOUNCED IN BLACK V. ROSS, WHEN DETERMINING WHETHER TO ISSUE A C.O.A. PETITIONER STATES THAT THE COURT OF APPEALS PLACED A TOO HEAVY BURDEN ON PETITIONER AT THE C.O.A. STAGE.

BECAUSE OF THE "ALLEGED" CHARGE PETITIONER WAS SENTENCED TO A 5 YEAR TO LIFE SENTENCE. THE BOARD OF PRISONS AND PAROLE INSTRUCTED PETITIONER TO EXPIRATE LIFE PRISON SENTENCE BECAUSE OF THE "ALLEGED" CHARGED OFFENSE.

REASONS FOR GRANTING THE PETITION

THE STATES INCLUDING UTAH ARE CHARGING DEFENDANTS PLEAD GUILTY TO "AGGRAVATED" OFFENSES AND SENTENCING THEM ACCORDINGLY. THE "AGGRAVATED" CHARGE, IS A CHARGE THAT REQUIRE A JURY DETERMINATION OF GUILT. COURTS ARE WITHOUT "AUTHORITY" TO SENTENCE A DEFENDANT TO "AGGRAVATED" OFFENSES WITHIN A JURY DETERMINATION OF GUILT.

STATES ARE DOING THIS ON AN RETAILER BASIS. THE "AGGRAVATED" CHARGE IS AN "ELEMENT" ACCORDING TO APPENDI, AND THIS REQUIRES A DETERMINATION OF GUILT BY A JURY.

APPENDI MAKES CLEAR THAT STATES MUST PROVE EVERY "ELEMENT" BEYOND A REASONABLE DOUBT. THE "AGGRAVATED" "ELEMENT" REQUIRES SUCH PROOF BEYOND A REASONABLE DOUBT.

THE EX POST FACTO SPECIFICALLY STATES THAT STATES CANNOT "AGGRAVATE" A CHARGE BASED SOLELY ON A PRIOR OFFENSE.

THE "AGGRAVATED" CHARGE MUST BE BASED ON THE NATURE OF THE CURRENT OFFENSE, NOT A PRIOR.

STATES WILL BE REQUIRED PRIOR TO CHARGING A DEFENDANT WITH A "AGGRAVATED" OFFENSE, TO MAKE SURE THE "AGGRAVATED" CHARGE IS BASED ON THE NATURE OF THE CURRENT OFFENSE. IN OTHER WORDS THE CRIME HAS TO BE WORTH ATTACHING THE "AGGRAVATED" LABEL TO IT, NOT SIMPLY BECAUSE HE HAD THAT CHARGE BEFORE.

AND ALSO, TO PUT DEFENSE ATTORNEY'S ON NOTICE, THAT FAILURE TO FILE A NOTICE OF APPEAL IS "ABANDONED" / "ABANDONMENT" FOR CONSTITUTIONAL PURPOSES.

STATES ARE ALLOWING ATTORNEY'S TO "QUIT" ON THEIR CLIENTS AFTER SENTENCING. MANY DEFENDANTS NEVER SEE THEIR ATTORNEY'S AGAIN AFTER SENTENCING. AND MOST ATTORNEY'S WHO NEVER SEE THEIR CLIENTS AFTER SENTENCING, NEVER FILE A NOTICE OF APPEAL, NEVER REMOVE THEMSELVES FROM THE RECORD, NEVER ASK THE COURT FOR PERMISSION FOR PERMISSION TO BE REMOVED FROM THE CASE, AS IN THIS CASE.

ATTORNEY'S ARE GETTING AS MUCH MONEY AS THEY CAN OUT OF THEIR CLIENTS, THEN ABANDONING THEM, WITHOUT FILING A NOTICE OF APPEAL, THEREBY VIOLATING THE SIXTH AMENDMENTS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL. THIS IS A NATION WIDE PROBLEM.

IN THE
SUPREME COURT OF THE UNITED STATES

LYNDAL O. RUTENBUSH
PETITIONER,

PETITION for writ
of CERTIORARI

v.

LARRY BENZOS, warden
RESPONDENT.

I, LYNDAL O. RUTENBUSH, PETITIONER, PRO SE, COMES
NOW BEFORE THIS HONORABLE COURT AND SUBMITS THIS PETITION
FOR WRIT OF CERTIORARI AND STATES THE FOLLOWING:

AT STAKE IN THIS CASE ARE CONSTITUTIONAL PROTECTIONS
OF SURPASSING IMPORTANCE: (1) THE PROSCRIPTION OF ANY DEPRIVATION
OF LIBERTY WITH "DUE PROCESS OF LAW," VIOLATION OF THE
FOURTEENTH AMENDMENT, AND (2) INEFFECTIVE ASSISTANCE OF COUNSEL,
WHETHER COUNSEL WAS INEFFECTIVE FOR CONSTITUTIONAL PURPOSES FOR
FAILING TO FILE A NOTICE OF APPEAL, THEREABANDONING PETITIONER,
AND (3) WHETHER THE TENTH CIRCUIT COURT OF APPEALS ERRED BY NOT
APPLYING THE TWO(2) STEP ANALYSIS ANNOUNCED IN BLACK V. DESS,
137 S.Ct. 759 (2017).

THIS PETITIONER STATES THE FOLLOWING: DID THE STATE
VIOLATE THE EX POST FACTO CLAUSE BY "MISREPRESENTING" PETITIONER'S

OFFENSE BASED SOLELY ON A PRIOR CONVICTION.

THE EX POST FACTO CLAUSE

THE DEFINITION OF AN EX POST FACTO LAW AS ONE THAT (1) PENALIZES AS A CRIME AN ACT PREVIOUSLY COMMITTED, WHICH WAS INNOCENT WHEN DONE (2) MAKES MORE BURDENSOME THE PENALTY FOR A CRIME, AFTER ITS COMMISSION, OR (3) DEPRIVES ONE CHARGED WITH A CRIME OF ANY DEFENSE AVAILABLE ACCORDING TO LAW AT THE TIME WHEN THE ACT WAS COMMITTED, BEAZELL V. OHIO, 269 U.S. 167, IS FAITHFUL TO THIS COURT'S BEST KNOWLEDGE OF THE ORIGINAL UNDERSTANDING OF THE CLAUSE: LEGISLATORS MAY NOT "RETROACTIVELY" ALTER THE DEFINITION OF CRIMES OR "INCREASE" THE PENALTY FOR CRIMINAL ACTS:

Collins v. Youngblood, 497 U.S. 37, UNITED STATES SUPREME COURT: JUSTICE CHASE'S NOW FAMILIAR OPINION IN "CALDER" EXPANDED THOSE LEGISLATIVE ACTS WHICH IN HIS VIEW IMPLICATED THE "CORE" CONCERN OF THE EX POST FACTO CLAUSE: IT IS #2 AND #3 THAT CONCERN MR. LITTELDASH:

#2. EVERY LAW THAT "AGGRAVATES" A CRIME, OR MAKES IT GREATER THAN IT WAS, WHEN COMMITTED.

#3. EVERY LAW THAT CHANGES THE PENALTY, AND INFLECTS A "GREATER PENALTY" THAN THE LAW ANNEXED TO THE CRIME WHEN COMMITTED.

EVEN THE STATE OF UTAH ADMITS THAT MR. LITTELDASH'S CHARGE WAS "AGGRAVATED" BASED SOLELY ON A PRIOR CONVICTION.

NOT ONLY DID THE "AGGRAVATED" OFFENSE CHANGE THE

Punishment, it also violated Double Jeopardy.

In 1984, when Mr. Littlejohn brought his charge it was an atypical felony II offense, requiring a sentence of 1 to 15 years incarceration.

But, because the state of Utah "Abolished" the offense based on a prior conviction, and not the "nature" of the current offense, bumped the offense level up an entire degree, from a felony II offense, to a felony I offense, thus exposing the defendant to a life imprisonment term, violates both the ex post facto clause to the United States Constitution as well as the Double Jeopardy clause.

Early opinions of the court portrayed this as an exclusive definition of ex post facto laws. Fletcher v. Peck, 6 Cranch 87, 138 (1810), Commings v. Missouri, 4 Wall 277, 325-326 (1867), id., at 381 (Miller, J. dissenting) ("This exposition of the 'nature' of ex post facto laws has never been denied, nor has any court or any commentator on the constitution added to the classes of laws here set forth, as coming within that clause"). Gut v. State, 9 Wall. 35, 38 (1870). So well accepted were these principles that the court in Beazell v. Ohio, 269 U.S. 167 (1925), was able to confidently summarize the meaning of the clause as follows:

"It is settled by decisions of this court, so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time

when the act was committed, is prohibited as ex post facto," *Id.*, at 169-170.

ALSO SEE LYNCE V. MATHIS, SUP. TOMOKA CORP. INSTITUTION, ET AL., 519 U.S. 433 (1997), UNITED STATES SUPREME COURT: IN CALIFORNIA DEPT. OF CORR. V. MORALES, 514 U.S. 449 (1995); WE STATED THAT THE RELEVANT INQUIRY IS WHETHER THE "CHANGE ALTERS THE DEFINITION OF CRIMINAL CONDUCT OR INCREASES THE PENALTY BY WHICH CRIME IS PUNISHABLE." *id.*, at 507, n.3.

THE AGGRAVATED "ELEMENT"

THE QUESTION PRESENTED IS WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT A FACTUAL DETERMINATION AUTHORIZING AN INCREASE IN THE MAXIMUM PRISON SENTENCE FOR AN OFFENSE FROM 1 TO 15 YEARS IMPRISONMENT TO 5 YEARS TO LIFE IMPRISONMENT BE MADE BY A JURY ON THE BASIS OF PROOF BEYOND A REASONABLE DOUBT.

MR. ATTORNEY GENERAL ASSETS THAT FOR THE STATE OF UTAH TO "AGGRAVATE" HIS OFFENSE/SENTENCE VIOLATES BOTH THE UNITED STATES CONSTITUTION AND THERE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

SEE APPENDIX V. NEW JERSEY, 530 U.S. 466 (2000); UNITED STATES SUPREME COURT: OUR REEXAMINATION OF OUR CASES IN THIS AREA, AND OF THE HISTORY WORK WHICH THEY RELY, CONFIRMS THE OPINION THAT WE EXPRESSED IN JONES. OTHER THAN THE FACT OF A PRIOR CONVICTION, ANY FACT THAT INCREASES THE PENALTY FOR A CRIME BEYOND THE PRESCRIBED STATUTORY MAXIMUM MUST BE SUBMITTED TO A JURY, AND PROVEN BEYOND A REASONABLE DOUBT. WITH THAT EXCEPTION, WE ENDORSE THE STATEMENT OF THE RULE SET

FORTH IN THE CONCURRENCE OPINIONS IN THAT CASE. "IT IS UNCONSTITUTIONAL FOR A LEGISLATURE TO REMOVE FROM THE JURY THE ASSESSMENT OF FACTS THAT INCREASE THE PRESCRIBED RANGE OF PENALTIES TO WHICH A CRIMINAL DEFENDANT IS EXPOSED. IT IS EQUALLY CLEAR THAT SUCH FACTS MUST BE ESTABLISHED BY PROOF BEYOND A REASONABLE DOUBT." 526 U.S. AT 252-253 (OPINION OF STEVENS, J.); SEE ALSO *id.*, AT 253 (OPINION OF SCALIA, J.)^{F167}

ALL OF THESE CONSTITUTIONAL PROTECTIONS TURN ON DETERMINING WHICH FACTS CONSTITUTE THE "CRIME," THAT IS WHICH FACTS ARE THE "ELEMENTS" OR "INGREDIENTS" OF A CRIME. IN ORDER FOR AN ACCUSATION OF A CRIME (WHETHER BY INDICTMENT OR SOME OTHER FORM) TO BE PROPER UNDER THE COMMON LAW, AND THUS PROPER UNDER THE CODIFICATION OF THE COMMON-LAW RULES IN THE FIFTH AND SIXTH AMENDMENTS, IT MUST ALLEGE ALL "ELEMENTS" OF THAT CRIME. LIKEWISE, IN ORDER FOR A JURY TRIAL OF A CRIME TO BE PROPER, ALL "ELEMENTS" OF THE CRIME MUST BE PROVEN TO THE JURY AND, UNDER "WINSHIP" PROVED BEYOND A REASONABLE DOUBT. SEE J. STORY, COMMENTARIES ON THE CONSTITUTION §§ 928-929, PP. 660-662, § 934, P. 664 (1833); J. ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES *41, *99-*100 (HEREINAFTER ARCHBOLD).

THUS, IT IS CRITICAL TO KNOW WHICH FACTS ARE "ELEMENTS." THIS QUESTION BECAME MORE COMPLICATED FOLLOWING THE COURT'S DECISION IN *McMillen v. Pennsylvania*, 477 U.S. 79 (1986), WHICH SPOWNED A SPECIAL SORT OF FACT KNOWN AS A SENTENCING ENHANCEMENT. SEE *ANTE.* AT 478, 485, 494. SUCH A FACT INCREASES A DEFENDANT'S PENITMENT BUT IS NOT SUBJECT TO THE CONSTITUTIONAL PROTECTIONS TO WHICH "ELEMENTS" ARE SUBJECT.

SENTENCING ENHANCEMENTS MAY BE NEW CREATURES, BUT THE QUESTION THAT THEY CREATE FOR COURTS IS NOT, "NOT." COURTS HAVE

ONE HAD TO CONSIDER WHICH FACTS ARE "ELEMENTS" IN ORDER TO DETERMINE THE SUFFICIENCY OF AN ACCUSATION (ESPECIALLY AN INDICTMENT). THE ANSWER THAT COURTS HAVE PROVIDED REGARDING THE ACCUSATION TELL US WHAT AN "ELEMENT" IS, AND IT IS THEN A SIMPLE MATTER TO APPLY THAT ANSWER TO WHATEVER CONSTITUTIONAL RIGHT MAY BE AT ISSUE IN A CASE, HERE "UNSHIP" AND THE RIGHT TO TRIAL BY JURY. A LONG LINE OF ESSENTIALLY UNIFORM AUTHORITY ADDRESSING ACCUSATIONS, AND STRETCHING FROM THE EARLIEST REPORTED CASES AFTER THE FOUNDING UNTIL WELL INTO THE 20TH CENTURY, ESTABLISHED THAT THE ORIGINAL UNDERSTANDING OF WHICH FACTS ARE "ELEMENTS" WAS EVEN BROADER THAN THE RULE THAT THE COURT ADOPTS TODAY.

THIS AUTHORITY ESTABLISHES THAT A "CRIME" INCLUDES EVERY FACT THAT IS BY LAW A BASIS FOR IMPOSING OR INCREASING PUNISHMENT (IN CONTRAST WITH A FACT THAT MITIGATES PUNISHMENT). THUS, IF THE LEGISLATURE DEFINES SOME CORE CRIME AND THEN PROVIDES FOR INCREASING PUNISHMENT OF THAT CRIME UPON A FINDING OF SOME "AGGRAVATING" FACT-OF-WHATEVER SORT, INCLUDING THE FACT OF A PRIOR CONVICTION - THE CORE CRIME AND THE "AGGRAVATING" FACT "TOGETHER" "CONSTITUTE" AN "AGGRAVATED" CRIME. JUST AS MUCH AS GRAND LARCENY IS AN "AGGRAVATED" FORM OF PETIT LARCENY.

THE "AGGRAVATING" FACT IS AN "ELEMENT" OF THE "AGGRAVATED" CRIME. SIMILARLY, IF THE LEGISLATURE, RATHER THAN CREATING GRADES OF CRIMES, HAS PROVIDED FOR SETTING THE PUNISHMENT OF A CRIME BASED ON SOME FACT, SUCH AS A FINE THAT IS PROPORTIONAL TO THE VALUE OF STOLEN GOODS - THAT FACT IS ALSO AN "ELEMENT."

NUMEROUS OTHER CASES TREATING THE FACT OF A PRIOR CONVICTION

AS AN "ELEMENT" OF A CRIME TAKE THE SAME VIEW. THEY MAKE CLEAR, BY BOTH THEIR HOLDINGS AND THEIR CONCLUSIONS, THAT WHEN A STATUTE INCREASES PUNISHMENT FOR SOME "CORE" CRIME BASED ON THE FACT OF A PRIOR CONVICTION, THE "CORE" CRIME AND THE FACT OF A PRIOR CONVICTION / CRIME TOGETHER CREATE A NEW, "ABSTRACTED" CRIME. KILBARN V. STATE, 9 Conn. 560, 563 (1833) (NO PERSON OUGHT TO BE, OR CAN BE, SUBJECTED TO A CUMULATIVE PENALTY, WITHOUT BEING CHARGED WITH A CUMULATIVE OFFENSE), PEMBLY, *supra* at 414 (CONVICTION UNDER RECIDIVISM IS "ONE CONVICTION, UPON ONE "ABSTRACTED" OFFENSE"); HINES V. STATE, 26 Ga. 614, 616 (1859) (REVERSING ENHANCED SENTENCE IMPOSED BY TRIAL JUDGE AND EXPLAINING: "THE QUESTION, WHETHER THE OFFENSE WAS A SECOND ONE, OR NOT, WAS A QUESTION FOR THE JURY." "THE ALLEGATION" OF A PRIOR OFFENSE IS CERTAINLY ONE OF THE FIRST IMPORTANT TO THE ACCUSED, FOR IF IT IS TRUE, HE BECOMES SUBJECT TO A GREATLY INCREASED PUNISHMENT). SEE ALSO COMMONWEALTH V. PHILLIPS, 28 MASS. 28, 33 (1831) ("UPON A THIRD CONVICTION, ~~AND FOR~~ THE COURT MAY SENTENCE THE CONVICT TO HARD LABOR FOR LIFE, THE PUNISHMENT IS TO BE ORDERED UPON THAT CONVICTION, AND FOR THE OFFENSE OF WHICH HE IS THEN AND THERE CONVICTED.").

REASONING SIMILAR TO "PERLEY" AND THE TEXAS CASES IS EVIDENT IN OTHER CASES AS WELL. SEE JONES V. STATE, 63 Ga. 141, 143 (1874) (WHERE PUNISHMENT FOR BURGLARY IN THE DAY IS 3 TO 5 YEARS IN PRISON AND BURGLARY AT NIGHT IS 5 TO 20, TIME OF THE BURGLARY IS A "CONSTITUENT" OF THE OFFENSE, INDICTMENT SHOULD "CHARGE ALL THAT IS REQUISITE TO RENDER PLAIN AND CERTAIN EVERY "CONSTITUENT" OF THE OFFENSE"); UNITED STATES V. WOODNEFT, 68 F. 536, 538 (Kan. 1895) (WHERE EMBEZZLEMENT STATUTE "CONTEMPLATES" THAT THERE SHOULD AN ASCERTAINMENT OF THE EXACT SUM FOR WHICH A FINE MAY BE IMPOSED" AND A JURY DID NOT DETERMINE AMOUNT, JUDGE LACKED AUTHORITY TO IMPOSE FINE, "ON SUCH AN ISSUE

THE DEFENDANT IS ENTITLED TO HIS CONSTITUTIONAL RIGHT OF TRIAL BY JURY.

IN 1878, MARYLANDS HIGHEST COURT, IN MALCUNE V. STATE, 47 MD. 485, STATED THE RULE AND THE REASON FOR IT IN LANGUAGE INDISTINGUISHABLE FROM THAT OF "TUTTLE" A QUARTER CENTURY BEFORE:

"THE LAW WOULD SEEM TO BE WELL SETTLED, THAT IF THE PARTY BE PROCEEDED AGAINST FOR A SECOND OR THIRD OFFENSE UNDER THE STATUTE, AND THE SENTENCE PRESCRIBED BE DIFFERENT FROM THE FIRST, OR SEVERER, BY REASON OF ITS BEING SUCH SECOND OR THIRD OFFENSE, THE FACT THERE RELIED ON MUST BE AVERRED IN THE INDICTMENT; FOR THE SETTLED RULE IS, THAT THE INDICTMENT MUST CONTAIN AN AVERMENT OF EVERY FACT ESSENTIAL TO JUSTIFY THE PUNISHMENT INFLICTED." MALCUNE, SUPRA, AT 496, (CITING ENGLISH CASES, PHEMBLY V. COMMONWEALTH, 43 MASS. 413 (1841), WHARTON, AND BISHOP. IN GOELLER V. STATE, 119 MD. 61, 85 A. 954 (1912).

THE SAME COURT REAFFIRMED "MALCUNE" AND VOIDED, AS CONTRARY TO MARYLAND'S NOTICE CLAUSE, A STATUTE THAT PERMITTED THE TRIAL JUDGE TO DETERMINE THE FACT OF A PRIOR CONVICTION. THE COURT EXTENSIVELY QUOTED BISHOP, WHO HAD, IN THE COURT'S VIEW, TREATED THE SUBJECT "MORE FULLY", PERHAPS, THAN ANY OTHER LEGAL WRITER, AND IT CITED, AMONG OTHER AUTHORITIES, "A LINE OF MASSACHUSETTS DECISIONS" AND "RULES" (QUOTED SUPRA, AT 512). 119 MD. AT 66, 85 A. AT 955. IN LEWIS, 34, OHIO ST. AT 600-601, THE SUPREME COURT OF OHIO IN AN OPINION CITING ONLY BISHOP, REVERSED A CONVICTION UNDER A RECIDIVISM STATUTE WHERE THE INDICTMENT HAD NOT ALLEGED ANY PRIOR CONVICTION. THE DEFENDANT HAD ALSO RELIED ON PHEMBLY, SUPRA, AND KILBOURN V. STATE, 9 CONN. 560 (1833). AND IN STATE V. ADAMS, 64 N.H. 440, 13 A. 785 (1888), THE COURT, RELYING ON BISHOP, EXPLAINED THAT "THE FORMER

conviction being a part of the description and character of the offense intended to be punished, because of the lighter penalty imposed it must be alleged," *Id.* at 442, 13 A. at 786. The defendant had been "charged with an offense 'Aberrated' by its repetitious character" *Id.* see also *Evans v. State*, 150 Ind. 651, 653, 50 N.E. 820 (1898) (similar); *Shiffert v. Commonwealth*, 114 Va. 876, 877, 77 S.E. 606, 607 (1913) (similar).

Even without any reliance on Bishop, other courts addressing recidivism statutes employed the same reasoning as did we and the above cases - that a crime includes only facts to which punishment attaches. One of the leading cases was *Wood v. People*, 53 N.Y. 511 (1873). The statute in *Wood* provided for increased punishment if the defendant had previously been convicted of a felony then discharged from the conviction. The court, repeatedly referring to the "Aberrated offense", *Id.* at 513, 515, held that the facts of the prior conviction and of the discharge must be proved to the "jury" for both entry into and make part of the offense.... Subjecting the prisoner to the increased punishment, *Id.* at 513; see *Id.* b. (fact of prior conviction was an "essential" ingredient of the offense. See also *Johnson v. People*, 55 N.Y. 512, 514 (1874) ("A more severe penalty is denounced by the statute for a second offense, and all the facts to bring the case within the statute must be alleged in the indictment and established on the trial"). *People v. Sickles*, 156 N.Y. 541, 544-545, 51 N.E. 288, 289 (1898) (reaffirming "Wood" and "Johnson" and explaining that "the charge is not merely that the prisoner has committed the offense specifically described, but that, as a former convict, his second offense has subjected him to an enhanced penalty").

This Petitioner states that not only did the court impose

A SENTENCE IT HAD NO AUTHORITY TO IMPOSE, THE IMPOSITION OF SAID SENTENCE VIOLATED NOT ONLY THE EX POST FACTO CLAUSE BUT ALSO THE DOUBLE JEOPARDY CLAUSE OF BOTH THE STATE OF UTAH AND THE UNITED STATES CONSTITUTION.

SEE WILCE V. MATHIS, 519 U.S. 433, 441, 117 S.Ct. 891, 132 L.Ed.2d 63 (1997) ("THE BUCK OF OUR EX POST FACTO JURISPRUDENCE HAS INVOLVED CLAIMS THAT A LAW HAS INFLICTED A GREATER PUNISHMENT, THAN THE LAW ANNEXXED TO THE CRIME, WHEN COMMITTED. WE HAVE EXPLAINED THAT SUCH LAWS IMPLICATE THE THE CENTRAL CONCERNS OF THE EX POST FACTO CLAUSE: "THE LACK OF FAIR NOTICE AND GOVERNMENTAL RESTRAINT WHEN THE LEGISLATURE INCREASES PUNISHMENT BEYOND WHAT WAS PRESCRIBED WHEN THE CRIME WAS CONSUMMATED") (QUOTING CALDER V. BELL, 3 U.S. 386, 390, 3 DALL. 386, 1 L.Ed. 648 (1798); WEAVER V. GRAHAM, 450 U.S. 24, 30, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

PETITIONER'S CONTINUED DETENTION ON THE BASIS OF HIS PAST CONVICTION VIOLATES THE DOUBLE JEOPARDY CLAUSE BY "PUNISHING TWICE," OR ATTEMPTING A SECOND TIME TO PUNISH CRIMINALLY, FOR THE SAME OFFENSE." HENDRICKS, 521 U.S. AT 346, 117 S.Ct. 2072.

SEE ALSO BLAKELY V. WASHINGTON, 542 U.S. 296 (2004); UNITED STATES SUPREME COURT: AS IN THIS CASE, PETITIONER WAS SENTENCED TO YEARS ABOVE THE 1 TO 15 YEAR SENTENCE BECAUSE THE STATE "AGGRAVATED" HIS OFFENSE. THE FACTS SUPPORTING THAT FINDING WERE NEITHER ADMITTED BY PETITIONER NOR FOUND BY A JURY. OUR PRECEDENTS MAKE CLEAR, HOWEVER, THAT THE "STATUTORY MAXIMUM" FOR APPENDI PURPOSES IS THE MAXIMUM SENTENCE A JUDGE MAY IMPOSE SOLELY ON THE BASIS OF THE FACTS REFLECTED IN THE JURY VERDICT OR ADMITTED BY THE DEFENDANT. SEE NINE, SUPRA, AT 602.

("THE MAXIMUM HE WOULD RECEIVE IF PENITENCED ACCORDING TO THE FACTS REFLECTED IN THE JURY VERDICT ALONE" (QUOTING APPENDI, SUPRA, AT 483)); HARRIS V. UNITED STATES, 536 U.S. 545, 563 (2002) (PLURALITY OPINION) (SAME); cf. APPENDI, SUPRA, AT 488 (FACTS ADMITTED BY THE DEFENDANT). IN OTHER WORDS, THE RELEVANT "STATUTORY MAXIMUM" IS NOT THE MAXIMUM SENTENCE A JUDGE MAY IMPOSE AFTER FINDING ADDITIONAL FACTS, BUT THE MAXIMUM HE MAY IMPOSE "WITHOUT" ANY ADDITIONAL FINDINGS. WHEN A JUDGE INFLECTS PENITMENT THAT THE JURY'S VERDICT ALONE DOES NOT ALLOW, THE JURY HAD NOT FOUND ALL THE FACTS "WHICH THE LAW MAKES ESSENTIAL TO THE PENITMENT," BISHOP, SUPRA, § 87 AT 55, AND THE JUDGE EXCEEDS HIS PROPER AUTHORITY.

WHETHER THE JUDGE'S AUTHORITY TO IMPOSE AN ENHANCED SENTENCE DEPENDS ON FINDING A SPECIFIED FACT (AS IN APPENDI) ONE OF SEVERAL SPECIFIED FACTS (AS IN KING), OR ANY "AGGRAVATING" FACT (AS HERE), IT REMAINS THE CASE THAT THE JURY'S VERDICT ALONE DOES NOT AUTHORIZE THE SENTENCE. THE JUDGE ACQUIRES THAT AUTHORITY ONLY UPON FINDING SOME ADDITIONAL FACT.

PETITIONER, MR. RITTENBUSH, WAS SENTENCED TO LIFE IN PRISON, YEARS BEYOND WHAT THE LAW ALLOWED FOR THE CRIME TO WHICH HE CONFESSED, ON THE BASIS OF A DISPUTED FINDING THAT HIS CASE WAS "AGGRAVATED" BASED ON A PRIOR CONVICTION, NOT THE NATURE OF THE CURRENT OFFENSE. THE FRAME'S WOULD NOT HAVE THOUGHT IT TOO MUCH TO DEMAND THAT, BEFORE DEPRIVING A MAN OF YEARS OF HIS LIBERTY, THE STATE SHOULD SUFFER THE MODEST INCONVENIENCE OF SUBMITTING ITS ACCUSATION "TO THE UNANIMOUS SUFFRAGE OF TWELVE OF HIS EQUALS AND NEIGHBORS," 4 BLACKSTONE, SUPRA, AT 343, RATHER THAN A LONE EMPLOYEE OF THE STATE.

THE BACK ANALYSIS

THE QUESTION PRESENTED IS WHETHER THE COURT OF APPEALS APPLIED THE PROPER ANALYSIS WHEN DECIDING WHETHER OR NOT TO ISSUE A C.O.A. AT THE C.O.A. STAGE.

AT THE CERTIFICATE OF APPEALABILITY (COA) STAGE OF A HABEAS PROCEEDING, THE ONLY QUESTION IS WHETHER THE APPLICANT HAS SHOWN THAT JURISTS OF REASON COULD DISAGREE WITH THE DISTRICT COURT'S RESOLUTION OF HIS CONSTITUTIONAL CLAIMS OR THAT JURISTS COULD CONCLUDE THE ISSUES PRESENTED ARE INADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER; THIS THRESHOLD QUESTION SHOULD BE DECIDED WITHOUT FULL CONSIDERATION OF THE FACTUAL OR LEGAL BASES ADDUCED IN SUPPORT OF THE CLAIMS. 28 U.S.C.A. § 2253(c)(2).

DID THE COURT OF APPEALS SIDESTEP THE CERTIFICATE OF APPEALABILITY (COA) PROCESS BY FIRST DECIDING THE MERITS OF AN APPEAL IN A HABEAS PROCEEDING, AND THEN JUSTIFYING ITS DENIAL OF A COA BASED ON ITS ADJUDICATION OF THE ACTUAL MERITS, IT IS IN ESSENCE DECIDING AN APPEAL WITHOUT JURISDICTION. 28 U.S.C.A. § 2253(c)(1).

THE COURT OF APPEALS SHOULD LIMIT ITS EXAMINATION OF THE CERTIFICATE OF APPEALABILITY (COA) STAGE OF A HABEAS PROCEEDING TO A THRESHOLD INQUIRY INTO THE UNREASONABLE MERIT OF THE CLAIMS, AND ASK ONLY IF THE DISTRICT COURT'S DECISION WAS DEBATABLE. 28 U.S.C.A. § 2253(c)(1).

DID THE TENTH CIRCUIT EXCEED THE LIMITED SCOPE OF THE COA ANALYSIS. THE COA STATUTE SETS FORTH A TWO-STEP PROCESS: AN INITIAL DETERMINATION WHETHER A CLAIM IS REASONABLY DEBATABLE, AND IF SO, AN APPEAL IN THE NORMAL COURSE. 28 U.S.C. § 2253. AT THE FIRST STAGE, THE ONLY QUESTION IS WHETHER THE APPLICANT HAS SHOWN THAT "JURISTS OF REASON COULD DISAGREE WITH THE DISTRICT COURT'S

redemption of his constitutional claims ... or could conclude the issues presented are adequate to deserve encouragement to proceed further." *Muller v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931. The question for the Court of Appeals was whether jurists of reason could devote that issue.

MR. LITTELBRECHT STATES THAT HE HAS DEMONSTRATED A VIOLATION OF THE EX POST FACTO CLAUSE, A VIOLATION OF THE RULE ANNOUNCED IN *APPENDI*, THE DOUBLE JEOPARDY CLAUSE VIOLATION, INEFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS VIOLATIONS AND A GROSS MISCONDUCT OF JUSTICE, HAS ALL BEEN DEMONSTRATED BY THIS PETITIONER.

THE DOUBLE JEOPARDY CLAUSE

SEE *EX PARTE LAMUE*, 85 U.S. 163 (1873), 18 WALL 163, UNITED STATES SUPREME COURT: IF THERE IS ANYTHING SETTLED IN THE JURISPRUDENCE OF ENGLAND AND AMERICA, IT IS THAT NO MAN CAN BE TWICE LAWFULLY PUNISHED FOR THE SAME OFFENSE. AND THOUGH THERE HAVE BEEN WIDE QUESTIONS IN THE APPLICATION OF THIS RULE TO CASES IN WHICH THE ACT CHARGED WAS SUCH AS TO COME WITHIN THE DEFINITION OF MORE THAN ONE STATUTORY OFFENSE, OR TO BRING THE PARTY WITHIN THE JURISDICTION OF MORE THAN ONE COURT, THERE HAS NEVER BEEN ANY DOUBT OF ITS ENTIRE AND COMPLETE PROTECTION OF THE WHEN A SECOND PUNISHMENT IS PROPOSED IN THE SAME COURT, ON THE SAME FACTS, FOR THE SAME STATUTORY OFFENSE.

WE ARE OF OPINION THAT WHEN THE PRISONER, AS IN THIS CASE, BY REASON OF A JUDICIAL JUDGMENT, HAD FULLY SUFFERED ONE OF THE ALTERNATIVE PUNISHMENTS TO WHICH ALONE THE LAW SUBJECTED HIM, THE POWER OF THE COURT TO PUNISH FURTHER WAS "GONE." THAT THE PRINCIPLE WE HAVE DISCUSSED THEN INTERPOSED ITS STAY AND FORBID THAT HE SHOULD BE PUNISHED AGAIN FOR THAT OFFENSE. THE RECORD OF

THE COURT'S PROCEEDINGS, AT THE MOMENT THE SECOND SENTENCE WAS RENDERED, SHOWED THAT IN THAT VERY CASE, AND FOR THAT VERY OFFENSE, THE PRISONER HAD FULLY PERFORMED, COMPLETED, AND ENDURED ONE OF THE ALTERNATIVE PENALTIES WHICH THE LAW PRESCRIBED FOR THAT OFFENSE. IT THUS SHOWED THE COURT THAT ITS POWER TO PENIT FOR THAT OFFENSE WAS AT AN END. UNLESS THE WHOLE DOCTRINE OF AER JURISPRUDENCE, BOTH THE CONSTITUTION AND THE COMMON LAW, FOR THE PROTECTION OF PERSONAL RIGHTS IN THAT REGARD, ARE A NULLITY, THE AUTHORITY OF THE COURT TO PENIT THE PRISONER WAS "GONE." THE POWER WAS EXHAUSTED; ITS FURTHER EXERCISE WAS PROHIBITED. IT WAS ERROR, BUT IT WAS ERROR BECAUSE THE POWER TO RENDER ANY FURTHER JUDGMENT DID NOT EXIST.

GREEN V. UNITED STATES, 355 U.S. 184 (1957), UNITED STATES SUPREME COURT: THE CONSTITUTIONAL PROHIBITION AGAINST "DOUBLE JEOPARDY" WAS DESIGNED TO PROTECT AN INDIVIDUAL FROM BEING SUBJECTED TO THE HARASSMENT OF TRIAL AND POSSIBLE CONVICTION MORE THAN ONCE FOR AN ALLEGED OFFENSE.

ACCORD TO MAIN TERMS, THE GOVERNMENT CONTENTS THAT IN ORDER TO SECURE THE REVERSAL OF AN ERRONEOUS CONVICTION OF AN OFFENSE, A DEFENDANT MUST SURRENDER HIS VALID DEFENSE OF FORMER JEOPARDY NOT ONLY IN THAT OFFENSE BUT ALSO ON A DIFFERENT OFFENSE FOR WHICH HE WAS NOT CONVICTED AND WHICH WAS NOT INVOLVED IN HIS APPEAL, OR STATED IN THE TERMS OF THIS CASE, HE MUST BE WILLING TO ABATE HIS CONSTITUTIONAL PROTECTION AGAINST A SECOND PROSECUTION FOR AN OFFENSE PUNISHABLE BY DEATH AS THE PRICE OF A SUCCESSFUL APPEAL FROM AN ERRONEOUS CONVICTION OF ANOTHER OFFENSE FOR WHICH HE WAS SENTENCED TO FIVE TO TWENTY YEARS IMPRISONMENT. AS THE COURT OF APPEALS SAID IN ITS FIRST OPINION IN THIS CASE, A DEFENDANT FACED WITH SUCH A "CHOICE" TAKES A "DESPERATE" CHANCE IN SEEKING THE REVERSAL OF THE ERRONEOUS CONVICTION. THE LAW SHOULD

NOT, AND IN OUR JUDGMENT DOES NOT, PLACE THE DEFENDANT IN SUCH AN INCREDIBLE DILEMMA. CONDITIONING AN APPEAL OF ONE OFFENSE ON A COERCED SURRENDER OF A VALID PLEA OF FORMAL JEOPARDY ON ANOTHER OFFENSE EXACTS A FORTITUDE IN PLAIN CONFLICT WITH THE CONSTITUTIONAL BAR AGAINST "DOUBLE JEOPARDY."

INEFFECTIVE ASSISTANCE OF COUNSEL "ABANDONMENT"

MR. LITTELBUSH STATED THAT HIS ATTORNEY AT THAT TIME, MR. REED RICHARDS, "ABANDONED" HIM AFTER SENTENCING. MR. LITTELBUSH ALSO STATES THAT AFTER SENTENCING, THE WEBER COUNTY DEPUTIES WAITED AS LONG AS THEY COULD TO ALLOW MR. LITTELBUSH TIME TO CONSULT WITH HIS ATTORNEY, BUT MR. RICHARDS NEVER SHOWED UP. TIL THIS DATE MR. LITTELBUSH WAS NEVER SEEN NOR HEARD FROM MR. RICHARDS. MR. LITTELBUSH FURTHER STATED THAT IF MR. RICHARDS WAS REALLY CONCERNED FOR HIS CLIENT, THIS ACTION WOULD HAVE BEEN BROUGHT 30 YEARS AGO.

SEE GALZA V. IDAHO, 586 U.S. (2019), SUPREME COURT OF THE UNITED STATES: JUSTICE SOTOMAYOR DELIVERED THE OPINION OF THE COURT. IN ROE V. FLORES-ORTEGA, 528 U.S. 470 (2000), THIS COURT HELD THAT WHEN AN ATTORNEY'S DEFICIENT PERFORMANCE COSTS A DEFENDANT AN APPEAL THAT THE DEFENDANT WOULD HAVE OTHERWISE PURSUED, PREJUDICE TO THE DEFENDANT SHOULD BE PRESUMED "WITH NO FURTHER SHOWING FROM THE DEFENDANT OF THE MERITS OF HIS UNDERLYING CLAIMS." Id., at 484. THIS CASE ASKS WHETHER THAT RULE APPLIES EVEN WHEN THE DEFENDANT WAS, IN THE COURSE OF PLEADING GUILTY, SIGNED WHAT IS OFTEN CALLED AN "APPEAL WAIVER," THAT IS, AN AGREEMENT FORGOING CERTAIN, BUT NOT ALL, POSSIBLE APPELLATE CLAIMS. WE HOLD THAT THE PRESUMPTION OF PREJUDICE

RECOGNIZED IN FLORES-ORTEGA APPLIED "NEGLIGENT" OF WHETHER THE DEFENDANT HAS SIGNED AN APPEAL WAIVER.

THE SIXTH AMENDMENT GUARANTEES CRIMINAL DEFENDANTS "THE RIGHT... TO HAVE THE ASSISTANCE OF COUNSEL FOR (THEIR) DEFENSE." THE RIGHT TO COUNSEL INCLUDES "THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL." STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) (QUOTING McMANN V. RICHARDSON, 397 U.S. 759, 771, N. 14 (1970)). UNDER STRICKLAND, A DEFENDANT WHO CLAIMS INEFFECTIVE ASSISTANCE OF COUNSEL MUST PROVE (1) THAT COUNSEL'S REPRESENTATION FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS, 466 U.S. AT 687-688, AND (2) THAT ANY SUCH DEFICIENCY WAS "PREJUDICIAL TO THE DEFENSE," *id.*, AT 692.

"IN CERTAIN SIXTH AMENDMENT CONTEXTS", HOWEVER, "PREJUDICE IS PRESUMED." *Ibid.* FOR EXAMPLE, NO SHOWING OF PREJUDICE IS NECESSARY "IF THE ACCUSED IS DENIED COUNSEL AT A CRITICAL STAGE OF HIS TRIAL," UNITED STATES V. CRONIC, 466 U.S. 648, 659 (1984), OR LEFT "ENTIRELY WITHOUT THE ASSISTANCE OF COUNSEL ON APPEAL," PERSON V. OHIO, 488 U.S. 75, 88 (1988). SIMILARLY, PREJUDICE IS PRESUMED "IF COUNSEL ENTIRELY FAILS TO SUBJECT THE PROSECUTION'S CASE TO MEANINGFUL ADVERSARIAL TESTING." CRONIC, 466 U.S. AT 659. AND, MOST RELEVANT HERE, PREJUDICE IS PRESUMED "WHEN COUNSEL'S CONSTITUTIONALLY DEFICIENT PERFORMANCE DEPRIVES A DEFENDANT OF AN APPEAL THAT HE OTHERWISE WOULD HAVE TAKEN." FLORES-ORTEGA, 528 U.S. AT 484. WE HOLD TODAY THAT THIS FINAL PRESUMPTION APPLIES EVEN WHEN THE DEFENDANT HAS SIGNED AN APPEAL WAIVER.

SEE ALSO ROE V. FLORES-ORTEGA, 528 U.S. 470 (2000): UNITED STATES SUPREME COURT: WHERE APPEAL IS AVAILABLE AS A MATTER OF RIGHT, A DECISION TO SEEK OR FORGO REVIEW IS FOR THE COUNSEL ITSELF,

NOT HIS LAWYER, JONES V. BARNES, 463 U.S. 745, 751 (1983), WHO OWES A DUTY OF EFFECTIVE ASSISTANCE AT THE APPELLATE STAGE, EVITTS V. LUCEY, 469 U.S. 387, 396 (1985); PERSON V. OHIO, 488 U.S. 75, 85 (1988). IT FOLLOWS, AS THE MAJORITY NOTED, THAT IF A DEFENDANT REQUESTS COUNSEL TO FILE AN APPEAL, A LAWYER WHO FAILS TO DO SO IS, WITHOUT MORE, INEFFECTIVE FOR CONSTITUTIONAL PURPOSES. BUT, AS THE COURT SAYS, A LESSER INFIDELITY THAN THAT THEY MAY FAIL THE TEST OF LAWYER COMPETENCE, UNDER STUCKLAND V. WASHINGTON, 466 U.S. 668 (1984), WHICH GOVERNS THIS CASE.

SEE CHRISTENSON V. ROPEL, 135 S.Ct. 891 (2015), UNITED STATES SUPREME COURT: HARWITZ AND BUTTS, AS THEY HAVE SUBSEQUENTLY ACKNOWLEDGED, "FAILED" TO MEET WITH CHRISTENSON UNTIL MORE THAN SIX WEEKS AFTER HIS PETITION WAS DUE. SEE APP. TO PET. FOR CERT. 93a. THERE IS NO EVIDENCE THAT THEY COMMUNICATED WITH THEIR CLIENT AT ALL DURING THIS TIME. THEY FINALLY FILED THE PETITION ON AUGUST 5, 2005, 117 DAYS TOO LATE. THEY HAVE SINCE CLAIMED THAT THEIR FAILURE TO MEET WITH THEIR CLIENT AND TIMELY FILE HIS HABEAS PETITION RESULTED FROM A SIMPLE MISCALCULATION OF THE "AEDPA" LIMITATION PERIOD (AND IN DEFENDING THEMSELVES, THEY MAY HAVE DISCLOSED PRIVILEGED COMMUNICATIONS). SEE *id.*, AT 90a-92a, 135a. BUT A LEGAL ETHICS EXPERT, REVIEWING COUNSEL'S HANDLING OF CHRISTENSON'S HABEAS PETITION, STATED IN A REPORT SUBMITTED TO THE DISTRICT COURT: "IF THIS WAS NOT ABANDONMENT, I'M NOT SURE WHAT WOULD BE."

SEE ALSO DOUGLAS, ET AL. V. CALIFORNIA, 372 U.S. 353 (1963), AND EVITTS V. LUCEY, 469 U.S. 387 (1985).

MR. BITTERBUSH STATED THAT ALTHOUGH HE PLEAD GUILTY, HE STILL HAD A CONSTITUTIONAL RIGHT TO AN APPEAL. AND, AS MENTIONED BEFORE,

AFTER SENTENCING, MR. RITTENBUSH NEVER SEEN MR. RICHARDS AGAIN.

PETITIONER STATES AGAIN THAT IT IS THE SENTENCE HE'S ATTACKING HERE NOT THE CONVICTION. THIS PETITIONER FURTHER STATES THAT THERE ARE SEVERAL REASONS WHY A DEFENDANT MAY PLEAD GUILTY, BUT THOSE REASONS NEED NOT BE ADDRESSED IN THIS PETITION.

PETITIONER STATES THAT HE IS PROCEEDING PRO SE, WITH THE ASSISTANCE OF INMATES. PETITIONER STATES THAT HE IS NOT EDUCATED IN THE LAW, NOR, HAS ACCESS TO LAW BOOKS. THE EFFORTS TAKEN BY INMATES TO FILE THIS PETITION ON BEHALF OF MR. RITTENBUSH WOULD BE TAKEN AS AN HOSTILE ACT AGAINST THE PRISON SHOULD PRISON AUTHORITIES BECOME AWARE OF THE EFFORTS INVOLVED IN FILING THIS PETITION. IN OTHER WORDS WE ARE NOT ALLOWED LAW BOOKS, AND WE ARE NOT ALLOWED TO HELP EACH OTHER.

SEE WOLFE V. McDONNELL, 418 U.S. 539 (1974), UNITED STATES SUPREME COURT; IN JOHNSON V. AVERY, AN INMATE WAS DISCIPLINED FOR VIOLATING A PRISON REGULATION WHICH PROHIBITED INMATES FROM ASSISTING OTHER PRISONERS IN PREPARING HABEAS CORPUS PETITIONS. THE COURT HELD THAT "UNLESS THE STATE PROVIDES SOME REASONABLE ALTERNATIVE TO ASSIST INMATES IN THE PREPARATION OF PETITIONS FOR POST-CONVICTION RELIEF" INMATES COULD NOT BE BANNED FROM FURNISHING ASSISTANCE TO EACH OTHER, 393 U.S. AT 490. THE COURT EMPHASIZED THAT THE WRIT OF HABEAS CORPUS WAS OF FUNDAMENTAL IMPORTANCE IN OUR CONSTITUTIONAL SCHEME, AND SINCE THE BASIC PURPOSE OF THE WRIT "IS TO ENABLE THOSE UNLAWFULLY INCARCERATED TO OBTAIN THEIR FREEDOM. IT IS FUNDAMENTAL THAT ACCESS OF PRISONERS TO THE COURTS FOR THE PURPOSE OF PRESENTING THEIR

complaints "MAY NOT BE DENIED OR OBSTRUCTED." Id.,
at 485.

MURRAY V. CHAILAN, 477 U.S. 478 (1986), UNITED STATES SUPREME COURT: IN HENSLEY V. MUNICIPAL COURT, 411 U.S. 345-349, 350 (1973), THE COURT SIMILARLY EMPHASIZED THIS APPROACH, STATING:

"OUR RECENT DECISIONS HAVE REASONED FROM THE PREMISE THAT HABEAS CORPUS IS NOT A "STATIC, RIGID, FORMALISTIC REMEDY," JONES V. CUNNINGHAM, 371 U.S. 236, 243 (1963), BUT ONE WHICH MUST RETAIN THE "ABILITY TO CUT THROUGH OBSTACLES OF FORM AND PROCEDURAL MAZES". HARRIS V. NELSON, 394 U.S. 286, 291 (1969). SEE FRANK V. MANGUM, 237 U.S. 309, 346 (1915) (HARRIS, J. DISSENTING). THE VERY NATURE OF THE WRIT DEMANDS THAT IT BE ADMINISTERED WITH INITIATIVE AND FLEXIBILITY ESSENTIAL TO INSURE THAT MISDEADENDS OF JUSTICE WITHIN ITS REACH ARE SURFACED AND CORRECTED." HARRIS V. NELSON, SUPRA, AT 291."

"THUS, WE HAVE CONSISTENTLY REJECTED INTERPRETATIONS OF THE HABEAS CORPUS STATUTE THAT WOULD SUFFOCATE THE WRIT IN STIFLING FORMALISM OR NOBBLE ITS EFFECTIVENESS WITH THE MANACLES OF ARCAIC AND SCHOLASTIC PROCEDURAL REQUIREMENTS."

ACCORDINGLY, THE STATUTORY MANDATE TO "DISPOSE" OF THE MATTER AS LAW AND JUSTICE REQUIRE "CLEARLY REQUIRES AT LEAST SOME CONSIDERATION OF THE CHARACTER OF THE CONSTITUTIONAL CLAIM."

ATTEMPTED NATURE OF THE OFFENSE

MR. ATTORNEY GENERAL ASSERTS THAT NOT ONLY WAS THE SENTENCE

IMPOSED "I LLUENAL" BUT THAT HE SHOULD HAVE BEEN
GRANTED AN OFFENSE LEVEL REDUCTION BASED ON THE "ATTEMPTED"
NATURE OF THE OFFENSE.

SEE 76-4-101 UTAH CODE: ATTEMPT - ELEMENTS OF
OFFENSE:

(1) FOR PURPOSES OF THIS PART A PERSON IS GUILTY OF
AN "ATTEMPT" TO COMMIT A CRIME IF, ACTING WITH THE
KIND OF CULPABILITY OTHERWISE REQUIRED FOR THE COMMISSION
OF THE OFFENSE, HE ENGAGED IN CONDUCT CONSTITUTING A
SUBSTANTIAL STEP TOWARD COMMISSION OF THE OFFENSE.

(2) FOR PURPOSES OF THIS PART, CONDUCT DOESN'T CONSTITUTE
A SUBSTANTIAL STEP UNLESS IT IS STRONGLY CORROBORATIVE
OF THE ACTORS INTENT TO COMMIT THE OFFENSE.

SEE 76-4-102 UTAH CODE: ATTEMPT CLASSIFICATION OF
OFFENSE:

CRIMINAL ATTEMPT TO COMMIT:

(1) A CAPITAL FELONY IS A FELONY OF THE FIRST DEGREE:

(3) A FELONY OF THE SECOND DEGREE IS A FELONY OF THE
THIRD DEGREE:

MR. LITTENBUSH STATED HE SHOULD HAVE BEEN SENTENCED
TO A SECOND DEGREE FELONY, THEN REDUCED BY (1) LEVEL BASED
ON THE "ATTEMPTED" NATURE OF THE OFFENSE.

STATEMENT OF FACTS

THE STATE MOVES THAT MR. LITTENBUSH'S PETITION SHOULD BE
DISMISSED WITH PREJUDICE BECAUSE HE FAILED TO FILE A TIMELY
APPEAL.

BUT THE STATE "failed" TO MENTION THAT UPON SENTENCING, MR. RITTENBUSH WAS ALLOWED TO WAIT AS LONG AS HE COULD TO CONSULT WITH HIS ATTORNEY, MR. REED NICHOLDS ABOUT AN APPEAL, BUT MR. REED NICHOLDS NEVER SHOWED UP, AND TO THIS DAY, THIS PETITIONER HAS SEEN NOR HEARD FROM MR. REED NICHOLDS, THERE ABANDONING HIM.

THE STATE WAS ALSO "failed" TO MENTION THAT THERE WAS NO SUCH THING AS THE "AEDPA" WHEN THIS PETITIONER WAS SENTENCED. THE TENTH CIRCUIT IN SENA V. NEW MEXICO STATE PRISON, 109 F.3d 652 (1997) STATED: WE HAVE REFUSED TO APPLY RETROACTIVELY THE SUBSTANTIVE PORTIONS OF THE "AEDPA" IN A SIMILAR CASE, SEE EDERS V. HANNIGAN, 87 F.3d 1109, 1111 N.1 (10TH Cir. 1996).

THE STATE ALSO STATES THAT MR. RITTENBUSH WAITED FOR OVER 30 YEARS TO FILE HIS PRESENT PETITION. THE STATE OVERLOOKS THE FACT THAT THESE ISSUES SHOULD HAVE BEEN ADDRESSED 35 YEARS AGO. (MR. RITTENBUSH WAS SENTENCED IN 1984, THE PRESENT YEAR IS 2019). TO SUGGEST THAT MR. RITTENBUSH SAT IN PRISON FOR THE PURPOSE OF AVOIDING STATE REMEDY, IS AS FAR FETCHED AS THE SENTENCE IMPOSED IN THIS CASE.

AGAIN, THE STATE RAISE THE "RUSS RIZZO" ARGUMENT, BUT, THE STATE IN A EFFORT TO SMEAR THE PETITIONER, AGAIN, FAILED TO MENTION THEIR CHARGE WAS DISMISSED.

A PATTERN OF BEHAVIOR THAT HAS MATERIALIZED OVER THE YEARS, IS THAT MANY UTAH ATTORNEYS "ABANDON" THEIR CLIENTS AFTER SENTENCING, ESPECIALLY WHEN IT IS DETERMINED THAT THE DEFENDANT HAS NO MORE MONEY. THE STATE HAS THUS TAKEN AWAY THE DEFENDANTS ABILITY TO APPEAL.

ONCE CONVICTED, THE DEFENDANT IS IMMEDIATELY TRANSPORTED TO ORPEL STATE PRISON. HE IS THEN PLACED IN MAXIMUM SECURITY LOCK-UP, WHERE HE IS HOUSED UNTIL CLASSIFIED, WHICH CAN TAKE NO LESS THAN TWO (2) MONTHS, IN THE BEST CASE SCENARIO. THERE ARE NO LAW LIBRARY HERE, AND THE CONTRACT ATTORNEY'S HERE ARE USELESS.

IN ORDER TO GET HELP FROM THE CONTRACT ATTORNEY'S, AN INMATE MUST SUBMIT A REQUEST, ON AN ENVELOPE, IT TAKES AT LEAST 3 WEEKS FOR THEM TO RESPOND, IF THE REQUEST IS NOT "LOST". LOST REQUEST HAPPEN MOST OF THE TIME. IT TAKES 3 WEEKS TO GET COPIES, AND AGAIN, MOST REQUESTS ARE "LOST." LEGAL COPIES (I.E. LEGAL MAIL) ARE SHARED WITH PRISON OFFICIALS, AND ANY ATTEMPT TO EXERCISE A PRISONER'S CONSTITUTIONAL RIGHTS, THE PAROLE BOARD IS IMMEDIATELY NOTIFIED AND THE PETITIONER UPON A PAROLE BOARD HEARING IS GIVEN A LENGTHY PENDING DATE UNDER THE GUESE OF "NOT ACCEPTING RESPONSIBILITY." THIS TYPE OF ENLARGED BEHAVIOR BEGS THE QUESTION? "IS THIS THE UNITED STATES?"

IT IS A NOTORIAL FACT THAT ANY ATTEMPT TO EXERCISE AN INMATE'S CONSTITUTIONAL RIGHT TO CHALLENGE WHAT HE OR SHE BELIEVES TO BE UNLAWFUL, IS STRONGLY MET BY RESISTANCE BY PRISON STAFF AND ESPECIALLY THE PAROLE BOARD.

THE "ADEOPA" ALLOWS A PETITIONER TO FILE WITHIN ONE (1) YEAR OF "THE DATE ON WHICH THE LOGICAL PREDICATE OF THE CLAIM... PRESENTED COULD HAVE BEEN DISCOVERED THROUGH THE EXERCISE OF DUE DILIGENCE."

AGAIN, THERE ARE NO "LAW LIBRARY" HERE AT ORPEL. MR. NITENBUSH STATED AGAIN, IN 2017, HE JUST SO HAPPEN TO RUN ACROSS AN INMATE WHO JUST HAPPEN TO HAVE A WHAT CODE BOOK, AND AT THAT TIME HE BELONG TO STUDY-UP ON THE OFFENSE IN WHICH

HE WAS CHARGED. IT WAS AT THAT TIME HE DECIDED TO
FILE PETITION FOR HABEAS CORPUS.

ALTHOUGH MR. RITTENBUSH DID NOT HAVE THE HELP OF THE
CONTRACT ATTORNEYS, AND ALTHOUGH THE PETITION MAY BE PRIMITIVE,
HE AND THE HELP OF HIS FELLOW INMATES, AND HENERBY SUBMITS
THIS PETITION.

AND, EVEN IN A GUILTY PLEA, MR. RITTENBUSH STILL HAVE A
CONSTITUTIONAL RIGHT TO AN APPEAL. THE FACT THAT MR. RITTENBUSH'S
ATTORNEY "ABANDONED" HIM DEPRIVED THIS PETITIONER OF HIS
SIXTH AMENDMENT RIGHT TO APPEAL.

THEREFORE, MR. RITTENBUSH RESPECTFULLY ASKS THIS HONORABLE COURT
TO VACATE HIS ILLGAL SENTENCE AND REMAND THIS CASE BACK TO
THE STATE DISTRICT COURT FOR RESENTENCING.

RESPECTFULLY, REQUESTED

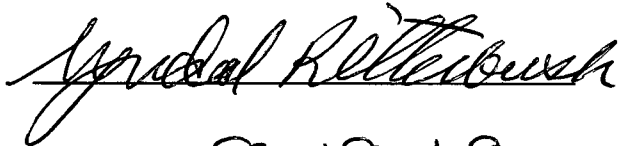
8-18-19
DATED

Yondal Rittenbush
SIGNED

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 8-18-19