

No. SCOH NO. 2020-0274

IN THE
SUPREME COURT OF THE UNITED STATES

TIZAZU F. AREGA - PETITIONER

VS.

STATE OF OHIO - RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

TIZAZU F. AREGA
INMATE NO. A658-104
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QUESTION PRESENTED FOR REVIEW

WAS THE DECISION OF THE SUPREME COURT OF OHIO CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW AND THE SUPREME COURT OF THE UNITED STATES PRECEDENT OF Cole v. Arkansas 333 U.S. 196, * 201 - 202 (1948) WITHIN THE MEANING OF 28 U.S.C. 2254(d)(1) IN VIOLATION OF PETITIONER'S BASIC DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT DISMISSED PETITIONER'S CLAIM THAT THE COURT OF APPEALS OF OHIO TENTH APPELLATE DISTRICT AFFIRMED HIS CONVICTION ON THE BASIS OF EVIDENCE AND TESTIMONY PRESENTED AT TRIAL HAD SHOWN THAT THE VICTIM TESTIFIED TO RAPE BY VAGINAL INTERCOURSE AND THE JURY RETURNED VERDICT FINDING PETITIONER GUILTY OF RAPE BY VAGINAL INTERCOURSE ON WHICH THE JURY HAD NOT BEEN INSTRUCTED AND HE HAD NOT BEEN CHARGED?

LIST OF PARTIES

The Supreme Court of Ohio
65 South Front Street
Columbus, Ohio 43215-3431
(614)- 387-9530

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TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASON FOR GRANTING THE WRIT	10
CONCLUSION	18
CERTIFICATE OF SERVICE	20

INDEX TO APPENDICES

Appendix - A - Entry of Supreme Court of Ohio. (Decided on May 13, 2020) .	1, 2, 9, 17
Appendix - B - Decision of the Court of Appeals (Decided on Dec. 06, 2012) 1,4,6, 7	
Appendix - C - Judgement Entry of the trial court (filed on March 02, 2012).	6, 14
Appendix - D - Amended Judgment entry of the trial court (filed Nov. 2, 2017).	15
Appendix - E- State of Ohio Grand Jury Indictment filed on Mar. 01, 2011)	4, 12
Appendix - F The Jury instruction of the trial court (recorded on Feb. 01, 2012)	5, 12
Appendix - G - The Closing Argument of the Prosecuting attorney (recorded Feb.01)	5, 12
Appendix - H - The Jury question. (Recorded on Feb. 02, 2012)	5
Appendix - I _ The Jury verdicts. (Recorded on Feb. 03, 2012)	5, 13

INDEX TO EXHIBITES

Exhibit A - Detective Jason Sprague's Testimony. (Recorded Jan. 31, 2012)	4
Exhibit B - SANE (Sexual Assault nurse Exame) Testimony (Recorded Jan. 31, 2012) ..	4
Exhibit C - Petitioner's Complaint in Original in Procedendo (Filed Feb. 20, 2020)	7, 16
Exhibit D - Motion to Dismiss of the court of Appeal (Filed March 12, 2020)	8,, 16
Exhibit E - Petitioner's Memorandum in Response to the Court of Appeals	9, 17
Exhibit F - Motion for Appointment of Counsel and request the Supreme Court of Ohio to comply with Cole v. Arkansas, 333 U.S. 196	9

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBERS
Cole v. Arkansas, 333 U.S. 196, * 201-202 (1948).....	1, 9, 10, 11, 12, 17, & 18
Dunn v. United States, 442 U.S. 100 (1979)	18
McCormick V. United States, 500 U.S. 257 (1991).....	17
Plyler v. Doe, 457 U.S. 202. (1982)	3
Presnell v. Georgia, 439 U.S. 14. (1978).....	9
Shoop v. Hill, 139 S. Ct. 504	10
State v. Arega, 2012 Ohio 5774, 983 N.E. 2d 863-71 (Dec. 06, 2012)...	1, 4, 6, 7, 12, 14 & 15
State v. Davis, 10th Dist. 18AP-569, 2019 Ohio 1320 * P.2	14
State v. Drummonds, 2011 Ohio 5915, 2011 WL 5620993	14
State ex rel. Arega v. Sadler, 2020-Ohio-2815.....	1
State v. Frazier, 10th Dist. No. 05AP-1323, 2007 Ohio 11.....	14
State v. Jillson, 2012 Ohio 1034, 2012 WL 917166	14
State v. Nicholas, 66 Ohio St. 3d 431	14
White v. Woodall, 572 U.S. 415	10
Wong Wing v. United States, 163 U.S. 228 (1896)	3
STATUTES	
O.R.C. 2907.01(A)(1)	12
O.R.C. 2907.02(A)(2)	6, 7, 8, 12 & 1
O.R.C. 2907.03(A)(6).....	6, 7, & 14
28 U.S.C. 1257(A)	2
28 U.S.C. 2254(d).....	3 & 10
CONSTITUTIONAL PROVISIONS	
United States Constitution , Fourteenth Amendment	1, 3, 6, & 10

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 _____ 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 _____ 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 A to the petition and is

reported at State ex rel. Arega v. Sadler, 2012 Ohio 281; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the State of Ohio Tenth Judicial District court appears at Appendix B to the petition and is

reported at State v. Arega, 2012 Ohio 5774, 983 N.E. 2d 863-71 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 _____.

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 May 13, 2020. A copy of that decision appears at Appendix A.

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 Fourteenth Amendment to the United States Constitution provides that " All person born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprived 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 law. " This means that all persons within the territory of the United States are entitled to the protection guaranteed by the Fourteenth Amendment. See Wong Wing v. United States 163 U.S. 228 (1896) & Plyler v. Doe, 457 U.S. 202 (1982).

28 U.S.C.S. 1257(a) provides that final judgment or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by a writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the constitution, treaties, or laws of the United States where any title, right privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States .

28 U.S.C. 2254(d)(1) provides that habeas relief may be granted only if the State court's adjudication resulted in a decision that was contrary to or involved an unreasonable application of Supreme Court precedent that was clearly established at the time of the adjudication.

STATEMENT OF THE CASE

The present conviction is under a grand jury true bill of indictment which specified the types of Rape had been committed. The Court of Appeals of the State of Ohio Tenth Appellate District recognized that on March 1, 2011, Appellant was indicted on one count of rape by vaginal penetration and one count of rape by anal penetration, both in violation of O.R.C. 2907.02 and one count of Sexual battery in violation of R.C. 2907.03. (Appendix - B Page 1, * P. 2 or State v. Arega, 2012 Ohio 5774, 983 N.E. 2d 863 * P. 2 (Decided Dec. 06, 2012)

The Court of Appeals found that N.B., the victim testified appellant-petitioner entered her room, closed the door and began kissing her. Appellant then pushed N.B. over and instructed her to be quiet. Thereafter, appellant proceeded to engage in vaginal intercourse..(Appendix - B- Page 12, *P. 29, lines 3-7 or State v. Arega, 2012 Ohio 5774, 983 N.E. 2d 868-70, * P. 29, (Decided Dec. 06, 2012))

Detective Jason Sprague of the Columbus Police Department conducted the investigation and interviewed the N.B.. (Tr. 92). He testified that the way she described it to him was that it was kind of -- the way he pictured it, it was kind of both, both leaning onto her over the bed. She said she could feel him. He pictured it that way. (Exhibit A Vol. 1 Tr. Page 115, lines 7-1)

Mary Mesi , SANE nurse at the Riverside Hospital and examined N.B. testified that N.B. had told her that she was a patient at a long term care facility. And that a nurse's aide entered her room and had began kissing her and then pulled her pants down from behind. Ms. Mesi think she recalled correctly. And N.B. felt either she couldn't -- she said she felt something hard -- Ms. Mesi believe was her term -- in her vagina and then in her rectum. (Exhibit B Vol.1 Tr. page no. 138, lines 7-14)

Amoreena Pauley, a forensic Biologist employed at the Columbus Police Department Crime lab and State's D.N.A expert testified that DNA analysis for

vaginal swab was not performed to determine whether semen to be that of Appellant or Petitioner because the vaginal swabs was very very weak result for semen. (Tr. 161-71). She also indicated that she could not answer conclusively semen was present on the vaginal swabs within a reasonable degree of scientific certainty. (Tr. Page 179)

Petitioner testified that he claimed that he did not recall he put his penis or any other object inside the N.B. vagina. (Tr 183-209). He also stated that he did not rape the victim. (Tr. 208-210). Moreover, he testified that he did not force or threaten the victim by any shape or form. (Tr. 208-210)

On Feb. 01, 2012, the trial court judge instructed the jury count one of the indictment as follows: "The Defendant is charged with Rape in Count One of the indictment. Before they can find the Defendant, Tizazu Arega, guilty of Rape, they must find beyond a reasonable doubt that on or about the 1st day of September, 2010, in Franklin County, Ohio Tizazu Arega engaged in sexual wit, vaginal penetration with N.B. , not his spouse, and Tizazu Arega purposely compelled N.B. to submit by force or threat of force. (Appendix F- the Jury Instruction.)

In Closing argument of the Prosecuting attorney after the jury instruction, she contended that only two people know what happened in that room. One of them N.B. told at least six people that very night that the defendant raped her. That he put -- she did use different terms -- something long and hard into her vagina and into her anus. They know from the testimony she described penile penetration. Never any doubt, no equivocation, he raped her. They know that it was his penis because of the physical evidence. There was semen in her vaginal canal near her cervix. And there was semen on her shorts. The defendant may claim not to know where his penis went, but his semen tells them otherwise . (Appendix G)

The jury submitted a question and the judge read it as follows; Are they able to get a copy of detective Sprague's interview with N.B.? The judge answered "No" (Appendix H) On Feb. 03, 2012, the jury found petitioner guilty of count one . (Appendix - I)

On March 02, 2012, the State trial Court filed the Judgment Entry on Sentencing which states that on the 30th and 31th days of Jan. 2012 and the 1st day of Feb. 2012, Count One , Two, and Three of the Indictment were tried by a jury which returned a verdict on Feb. 03, 2012, finding the Defendant - Petitioner guilty of the following offenses:

" Count One of the indictment, to wit: RAPE, in violation of Section 2907.02 of the Ohio Revised Code, a felony of the 1st degree, and Count Three of the Indictment, to wit; Sexual Battery, in violation of Section 2907.03 of the Ohio Revised Code, a felony of the 3rd degree.

" The jury found the Defendant - Petitioner not guilty of Count Two of the indictment, to wit: RAPE, in violation of Section 2907.02., a felony of the 1st degree. The Court sentenced the Defendant for Nine (9) prison term in ODRC. (Appendix B -the Judgment entry of the State trial court.) That court also appointed Attorney Todd Barstow for purposes of appeal. (Appendix - C Page 2)

On March 26, 2012, the Appellant-Petitioner through the Court appointed Appellant counsel Mr. Barstow filed timely direct appeal in the case no. 12AP-263 and raised the following assignment of error in the Appellate Court of the State of Ohio for Tenth Judicial District as:

¶ THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF RAPE AND SEXUAL BATTERY AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. (Appendix - Decision of the State Court of Appeal Page 3, P. 8 or State v. Areaga, 2012 Ohio 5774, 983 N.E. 2d, 863-4 * P. 8)

Regarding the Appellant -Petitioner's Sexual Battery conviction, the Appellate court of the State of Ohio for Tenth Judicial District found that based on the evidence and testimony presented at trial, the essential element of sexual battery, as indicted under O.R.C. 2907.03(A)(6), could not be proven beyond a reasonable doubt. That court sustained the Appellant-

the petitioner's assignment of error and remanded the matter to the trial court with instruction to enter a judgment of acquittal on the charge for Sexual Battery indicted under O.R.C. 2907.03(A)(6). (Appendix - B Page 12 * P. 27, Lines 2-4 or State v. Arega, 2012 Ohio 5774, 983 N.E. 2d 865, P. 27 & *P. 31)

Regarding the Appellant-Petitioner's Rape conviction, the Appellate court of the State of Ohio for Tenth Judicial District recognized that the Appellant -Petitioner was indicted on one count of Rape by vaginal penetration and one count of Rape by anal penetration, both in violation of O.R.C. 2907.02, and one count of Sexual Battery in violation of O.R.C. 2907.03. (Appendix - B Page 1, P. 2, Lines, 1-3 or State v. Arega, 2012 Ohio 5774, 983 N.E. 2d, 863. *P. 2) That court also held that "After deliberations, the jury returned verdicts : finding appellant - petitioner guilty of Rape by vaginal intercourse, guilty of sexual battery, and not guilty of Rape by anal intercourse. The State trial court merged the convictions for purposes of sentencing, and appellant was sentenced to nine years incarceration. (Appendix B- Page 3, *P. 7, Lines 1-4)or State v. Arega, 2012 Ohio 5774, 983 N.E. 2d 863, P.7)

The Appellate court of the State of Ohio for Tenth Judicial District found that N.B. the victim testified that Appellant entered her room, closed the door and began kissing her. Appellant then pushed N.B. over and instructed her to be quiet. Thereafter, appellant proceeded to engage in vaginal intercourse. Construing this evidence in a light most favorable to the prosecution, that court concluded the State presented sufficient evidence to support appellant - Petitioner's conviction for Rape. See Robinson. (Appendix B Page 12, *P. 29 Lines 3-7 or State v. Arega, 2012 Ohio 5774, 983 N.E. 2d 864-5, *P. 29)

On Feb. 20, 2020, the Petitioner filed complaint in Procedendo to compel the Judges Court of Appeals for the Tenth District to pass upon his the validity of his conviction on timely filed direct appeal in the case No. GEN-2020-0274 in the Supreme Court of Ohio.(Exhibit-C). In his complaint,

the Petitioner alleges that the Appellate court affirmed his conviction as though he had been tried and convicted of Rape by vaginal intercourse when in truth he had been charged, tried, and convicted of Rape by vaginal penetration, an act which could constitute digital and mechanical penetration. (Exhibit - C Page 6 of 9 P. 14). He also claimed that the Appellate court affirmed his conviction on the ground that the evidence and testimony adduced at the trial had shown that the victim testified to the vaginal intercourse and the jury found the Appellant -Petitioner guilty of Rape by vaginal intercourse in count count which describes an offense separate and distinct from the offense described in count one of the indictment, the jury instruction, and the judgment entry of the trial court. (Exhibit C - Relator's complaint Page 1 of 9, P. 2)

As pointed out his complaint, Petitioner sought the Supreme Court of Ohio for an order granting an alternative or a peremptory writ of procedendo to compel the Appellate Court of the State of Ohio for Tenth District to pass upon the validity of his conviction for Rape by vaginal penetration, an act which could constitute digital and mechanical penetration in violation of O.R.C. 2907.02(A)(2), a felony of the first degree of which he was charged, tried, and convicted and enter final judgment entry. (Exhibit -C Relator's Complaint Page 1 of 9 P) He also contended that he is entitled to have the validity of his conviction appraised on consideration of the case as it was tried and as the issues were determined in the trial court. (Exhibit C - Relator's complaint Page 7 of 9 P. 17)

On Feb. 21, 2020, Clerk of Court Supreme Court of Ohio issued and served summons with the Petitioner's Complaint to the Appellate Court of the State Ohio for Tenth District. On March 12, 2020, the Appellate court filed Motion to Dismiss of the Tenth District Court of Appeals because the petitioner has not alleged any pending Motion or case before the Tenth District, as is required to

state a claim in procedendo, (Exhibit - D - Motion to dismiss of Respondents Tenth District Court Appeals Page 1, filed March 12, 2020).. On April 09, 2020, petitioner pro se filed his Memorandum in Response to the Respondents' Motion to Dismiss of Respondent Tenth District Court of Appeals and claimed that the record before the Supreme Court of Ohio does not have disposition of petitioner's conviction of Rape by vaginal penetration and his case. As a result, the court of Appeals can not show that petitioner's case is final and closed. Id. (Exhibit E)

The petitioner contended in his Memorandum in response that pursuant to Cole v. Arkansas, 333 U.S. 196, * 201-202 (1948), he has a clear legal rights to have the validity of his conviction appraised on consideration of the case as it was tried and as the issues determined in the trial court.(Exhibit E page 2 of 7, P. 3). He also claimed that pursuant to Cole v. Arkansas, 333 U.S. 196, * 202, the Court of Appeals has a clear legal duty to proceed with the contention which challenge the validity of his conviction appraised on cosideration of the case as it was tried and the issues were determined in the trial court. (Exhibit E, Page 3 of 7.) Lastly, he argued that he lacks adequate remedy in the ordinary course of the law because the court refused to consider and to make disposition of the petitioner's conviction appraised on consideration of his case as it was tried and the issues were determined in the trial court. (Exhibit - E - page 6 of 7) .

On May 01, 2020, Petitioner filed Motion for Appointment of Counsel and requested the Supreme Court of Ohio to comply with clearly esablished federal law and protect petitioner's basic due process of law pursuant to Cole v. Arkansas , 333 U.S. 196, 68 S. Ct . 514, 92 L. Ed. 644* 201 - 202 & Presnell v. Georgia, 439 U.S. 14 15, 56 L. Ed 207, SZ. Ct. 235 (1978) . On May 13,, 2020, the Supreme Court of Ohio granted the Respondent's Motion to dismiss and dismissed the cause without opinion. (Appendix - A - Entry)

REASON FOR GRANTING PETITION FOR WRIT

THE DECISION OF THE SUPREME COURT OF OHIO WAS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW AND THE SUPREME COURT OF THE UNITED STATES PRECEDENT OF Cole v. Arkansas, 333 U.S. 196, * 201-202 (1948) WITHIN THE MEANING OF 28 U.S.C. 2254(d)(1) IN VIOLATION OF PETITIONER'S BASIC DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT DISMISSED PETITIONER'S CLAIM THE COURT OF APPEALS OF OHIO THE TENTH APPELLATE DISTRICT AFFIRMED HIS CONVICTION ON THE BASIS OF EVIDENCE AND TESTIMONY PRESENTED AT TRIAL HAD SHOWN THAT THE VICTIM TESTIFIED TO RAPE BY VAGINAL INTERCOURSE AND THE JURY RETURNED VERDICT FINDING PETITIONER GUILTY OF RAPE BY VAGINAL INTERCOURSE ON WHICH THE JURY HAD NOT BEEN INSTRUCTED AND HE HAD NOT BEEN CHARGED. (Appendix - A, B, and C)

QUESTION PRESENTED FOR REVIEW

Was the Decision of the Supreme Court of Ohio contrary to clearly established federal law and the Supreme Court of the United States precedent of Cole v. Arkansas 333 U.S. 196, * 201-202 (1948) within the meaning of 28 U.S.C. 2254(d)(1) in violation of Petitioner's basic due process of law under the Fourteenth Amendment to the United States Constitution when it dismissed Petitioner's claim the court of Appeals of Ohio the Tenth Appellate District affirmed his conviction on the basis of evidence and testimony presented at trial had shown that the victim testified to Rape by vaginal intercourse and the jury returned verdict finding Petitioner guilty of Rape by vaginal intercourse on which the jury had not been instructed and he had not been charged? The short answer to this question is definitely " YES. "

The federal habeas statutes as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) important limitation on the power of the federal courts to overturn the judgment of State Courts in criminal cases. The Statute respects the authority and ability of the State Courts and their dedication to the protection of constitutional rights. Thus, under the Statutory provision at issue here. 28 U.S.C. 2254(d)(1), habeas relief may be granted only if the State court's adjudication resulted in a decision that was contrary to or involved an unreasonable application of Supreme Court precedent that was clearly established at the time of the adjudication. Shoop v. Hill, 139 S. Ct. 504, Also see White v. Woodall, 572 U.S. 415, 419-420, 134 S. Ct. 1697, 188 L. Ed. 2d 698. (2014)

The petitioner relies on Cole v. State of Arkansas, 333 U.S. 196, 197, 68 S. Ct. 514, 92 L. Ed. 644 * 201 - 202 (1948) to show the decision of the Supreme Court of Ohio was contrary to clearly established federal law and the Supreme Court of the United States precedent of Cole v. State of Arkansas, 333 U.S.C. 196 * 201-202 in violation of Petitioner's basic due process of law under the Fourteenth Amendment to the United States Constitution. In Cole, 333 U.S. 196, petitioners were convicted at trial of one offense, but their convictions were affirmed by the Supreme Court of Arkansas on the basis of evidence in the record indicating that they had committed another offense on which the jury had not been instructed. The Supreme Court of the United States concluded that the Petitioners Cole convictions could not stand because Petitioners were unconstitutionally convicted of offense for which they were not charged.

Here, the Supreme Court of Ohio dismissed the Petitioner's claim the court of Appeals of Ohio the Tenth Appellate District affirmed his conviction on the basis of evidence and testimony presented at trial had shown that the victim testified to Rape by vaginal intercourse and the jury returned verdict finding petitioner guilty of Rape by vaginal intercourse on which the jury had not been instructed and he had not been charged. Thus, the decision of the Supreme Court of Ohio was contrary to clearly established federal law and the Supreme Court of the United States precedent of Cole, 333 U.S. 196, *201-202 in violation of the Petitioner's basic due process of law.

On Feb. 20, 2020, Petitioner claimed that the Court of Appeals of Ohio for the Tenth Appellate district affirmed his conviction on the ground that the evidence and testimony adduced at the trial had shown that the victim testified to vaginal intercourse and the jury found the petitioner guilty of Rape by vaginal intercourse in count one which describes an offenses separate and distinct from the offense described in the count one of the indictment, the jury instruction, and the Judgment Entry of the trial court in the Supreme Court of Ohio. (Exhibit - C Page No. 1 of 9, * P. 2 filed Feb. 20, 2020)

The present conviction is under a grand jury true bill of indictment for count one of the indictment which specified the type of rape had been committed. On March 01, 2011, the Count One of the Indictment charged: petitioner as follows;

" ... Tizazu Fekadu Arega did engage in sexual conduct, to wit: vaginal penetration with N.B., not his spouse, and the said Tizazu Fekadu Arega having purposely compelled N.B. to submit by force or threat of force" (Appendix - E - State of Ohio Grand jury Indictment filed on March 01, 2011)

Clearly, the indictment specifically charged petitioner with Rape by vaginal penetration.

On Jan. 30, 2012, the jury trial commenced in the Franklin County, State of Ohio. In the present State of record, the trial judge read count one of the indictment to the jury. He then instructed them as follows:

" The defendant is charged with Rape in count one of the indictment. Before they can find the Defendant Tizazu Arega, guilty of Rape, they must find beyond a reasonable doubt that on or about the 1st day of September, 2010, in Franklin County, Ohio, Tizazu Arega engage in sexual conduct, to wit, vaginal penetration with N.B., not his spouse, and Tizazu Arega, purposely compelled N.B. to submit by force or threat of force or threat of force. " (Appendix F- Tr. Page No. 247)

This instruction described the offense in the same terms as the Count One of the Indictment.

The record shows that the trial judge read the definition of Sexual Conduct as follows:

" Sexual Conduct means vaginal intercourse between a male and female, anal intercourse, fellatio, and cunnilingus between person regardless of sex; and without privilege to do so, the insertion, however slight, of any part of the body or instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse. " (Appendix - F Tr. Page No. 248)

This definition of sexual conduct clearly includes digital and mechanical penetration.

In her closing argument after the jury instruction, the Prosecuting attorney stated as follows:

" Only two people know what happened in that room. One of them, N.B. told at least six people that very night that the defendant raped her. That he put -- she did use different terms -- something long and hard into her vagina and into her anus.

They know from the testimony she described penile penetration. Never any doubt no equivocation, he raped her. They knew that it was his penis because of the physical evidence. There was semen in her vaginal canal near her cervix. And there was semen on her shorts. The defendant may claim not to know where his penis went, but his semen tells them otherwise." (Appendix - G Tr. Page No. 252)

The prosecuting attorney's contention clearly told the jury that the trial of the petitioner was for Rape by vaginal penetration, an act which could constitute digital and mechanical penetration and was not for Rape by vaginal intercourse.

On Feb. 03, 2012, the jury found the defendant guilty of rape as he stands charged in count one of the indictment ... (Appendix - I Tr. Page No. 294) Petitioner argued that the jury returned a verdict findig him guilty of Rape by vaginal penetration, an act which could constitute digital and mechanical penetration.

On March 02, 2012, the trial court filed a Judgment entry on sentencing and stated as follows:

" On the 30th and 31st days of Jan. 2012, and the 1st day of February 2012 count one, ... were tried by a jury which returned a verdict on Feb. 03, 2012, finding Defendant guilty of the following offense:

Count One of the Indictment, to wit; Rape, in violation of Section 2907.02

found that based on the evidence and testimony presented at trial, the essential element of sexual battery, as indicted under O.R.C. 2907.03(A)(6), could not be proven beyond a reasonable doubt. That court sustained the Petitioner's assignment of error and remanded the matter to the trial court with instruction to enter a judgment of acquittal on the charge for sexual battery indicted under O.R.C. 2907.03(A)(6). (Appendix B- or State v. Arega, 2012 Ohio 5774, 983 N.E. 2d 863 * 27 (Decided Dec. 06, 2012)

Regarding the petitioner's rape conviction, the court of Appeals of Ohio for the Tenth Appellate District recognized that petitioner was indicted on One Count of Rape by vaginal penetration in violation of O.R.C. 2907.02(A)(2). (Appendix B Page No. 1, * P.2 or State v. Arega, 2012 Ohio 5774, 983 N.E. 2d 863, * P. 2. (Dec. 06, 2012)). That court also held that " After deliberations the jury returned verdicts finding petition guilty of Rape by vaginal intercourse. (Appendix B- Page No. 3, * P. 7 lines 1-2 (Dec. 06, 2012) or State v. Arega, 2012 Ohio 5774, 983 N.E. 2d 863, * 865 * P. 7 (Dec. 06, 2012)). The court of Appeals found that N.B. the victim testified petitioner entered her room, closed the door and began kissing her. Petitioner then pushed N.B. over and instructed her to be quiet. Thereafter, petitioner proceeded to engage in vaginal intercourse Construing this evidence in a light most favorable to the prosecution, the court concluded the State presented sufficient evidence to support petitioner's conviction for rape and affirmed petitioner's rape conviction. (Appendix B Page No. 12 * P. 29 & * p. 31 or State v. Arega, 2012 Ohio 5774, 983 N.E. 2d 863, 871 at * P. 29 (Dec. 06, 2012)).

Lastly, the court of Appeals stated that the Petitioner's DNA matched semen found in N.B, victim vagina..(Appendix B Page 3, * P. 5, or State v. Arega, 2012 Ohio 5774, 983 N.E. 2d 863, * P.5 (Dec. 06, 2012) That is incorrect. Amoreena Pauley, a forensic Biologist employed at the Columbus Police Department Crime Lab and the State of Ohio D.N.A expert testified that D.N.A analysis for vaginal swabs

was not performed to determine whether semen to be that of petitioner because the vaginal swabs was very very weak result for semen. (Vol. 1 Tr. Page No. 161- 71 on Feb. 01). She stated that she could not answer conclusively that there was semen present on the vaginal swabs within a reasonable degree of scientific certainty. (Vol. 1 Tr. Page No. 165- 179 Feb.01). That court also indicted that Petitioner testified on his own behalf. At trial, petitioner admitted to engage in vaginal intercourse with N.B. on Sept. 1, 2010, but testified it was consensual (Appendix - B Page 3 , * P. 6 or State v. Arega, 2012 Ohio 5774, 983 N.E. 2d 863, * P. 6 (Dec. 06, 2012) . That is incorrect. Petitioner testified on his own behalf at trial, he stated that he did not recall he put his penis or any other object insider the victim vagina. (Tr. Page No. 188-209 recorded on Feb. 01, 2012) He also testified that he did not rape the victim. (Tr. No. 208-9 recorded Feb. 01, 2012) Moreover, he stated that he did not force or threat the victim by any shape or form . (Tr. No. 206-8 recorded on Feb. 01, 2012.) , In her closing argument Prosecuting attorney told the jury that the petitioner may claim not to know where his penis went.(Appendix - G Page no. 252 Lines 17-19)

On Feb. 20, 2020, Petitioner alleged in the Supreme Court of Ohio in the case No. GEN 2020-0274 that the court of Appeals of Ohio for the Tenth Appellate District affirmed his conviction on the ground that the evidence and testimony adduced at the trial had shown that the victim testified to vaginal intercourse and the jury found petitioner guilty of Rape by vaginal intercourse in count one of the indictment which describes an offense separate and distinct from the offense described in count one of the indictment, the jury instruction, and the judgment entry. of the trial court. (Exhibit C - Relator's complaint Page 7 of 9 * p. 17)

On Feb. 21, 2020, , the summon and complaint were served by the clerk of the Supreme Court of Ohio to the Court of Appeals of Ohio , for the Tenth Appellate District..On March 12, 2020, the court of Appeals filed Motion to Dismiss of the Tenth Appellate District Court. (Exhibit - D)

On March 25, 2020, Petitioner filed his Memorandum in Response to the Respondent's Motion to dismiss of the Court of Appeals for the Tenth Appellate District and claimed that the record before the Supreme Court of Ohio does not have disposition of petitioner's conviction of Rape by vaginal penetration and his case. As a result, the court of Appeals can not show that petitioner's case is final and closed. Id. (Exhibit - E). Petitioner also contended in his Memorandum to Response that pursuant to Cole v. Arkansas, 333 U.S. 196, * 201-202, he has a clear legal rights to have the validity of his conviction appraised on consideration of the case as it was tried and as the issues determined in the trial court. (Exhibit- E Page no.2 Of 7 * P. 3 file April 09, 2020)

In his Memorandum to response, Petitioner alleged that pursuant to Cole v. Arkansas, 333 U.S. 196, * 202, the Court of Appeals for the Tenth Appellate District has a clear legal duty to proceed with the contention which challenge the validity of his conviction appraised on consideration of the case as it was tried and the issues were determined in the trial court. (Exhibit - E - Page No. 6 of 7)

In his Memorandum to Response, Petitioner claimed that he lacks adequate remedy in the ordinary course of the law because the Court of Appeals of Ohio for the Tenth Appellate District because the court refused to consider and make disposition of the petitioner's conviction appraised on consideration of the case as it was tried and the issues were determined in the trial court in his direct appeal and incomplete his direct review. Id. (Exhibit - E Page no.6 of 7)

On May, 13, 2020, the Supreme Court of Ohio concluded that upon consideration of the Respondent's Motion to dismiss, it is ordered by the court that the Motion to dismiss is granted. Accordingly, this cause is dismissed. (Appendix - A)

In McCormick v. United States, 500 U.S. 257, 270 n. 8, 111 S. Ct. 1807, 114 L. Ed. 2d 307. (1991), the Supreme Court of the United States held that Appellate courts are not permitted to affirm conviction on any theory they please simply because the facts necessary to support the theory were presented to the jury .

In Dunn v. United States, 442 U.S. 100, 106, 99 S. Ct. 2190, 60 L. Ed 2d 743 (1979), the Supreme Court of the United States has expressly held that " To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury offends the most basic notions of due process."

In Cole, 333 U.S. 196, * 201-202 (1948), the Supreme Court of the United States held that " No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts State or Federal . " " That court also stated in Cole " IT IS AS MUCH A VIOLATION OF DUE PROCESS TO SEND AN ACCUSED TO PRISON FOLLOWING CONVICTION OF A CHARGE ON WHICH HE WAS NEVER TRIED AS IT WOULD BE TO CONVICT HIM UPON A CHARGE THAT WAS NEVER MADE."

* 201. To conform to due process of law, petitioner's were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court. The court reversed and remanded the judgment to the State Supreme Court. * 202. Thus, the decision of the Supreme Court of Ohio was contrary to clearly established federal law and the United States Supreme Court precedent in violation of Petitioner's basic due process of law when it dismissed petitioner's claim that the Court of Appeals of Ohio for the Tenth Appellate District affirmed his conviction on the basis of evidence and testimony presented at trial had shown that the victim testified to Rape by vaginal intercourse and the jury returned verdict finding petitioner guilty of Rape by vaginal intercourse on which the jury had not been instructed and the petitioner had not been charged pursuant to Cole, 333 U.S. 196, * 201-202.

CONCLUSION

In the light of existing the Supreme Court of the United States precedent of Cole v. Arkansas, 333 U.S. 196, * 201 - 202 (1948), the petitioner respectfully requests the Supreme Court of the United States must grant this petition for a

a writ of certiorari. He also humbly requests the Honorable Supreme Court of the United States may issue an order petitioner's immediate release from his wrongful conviction and confinement because he is nearing the end of his maximum nine (9) year prison term and his out date is Jan. 24, 2021 and is concerning about COVID-19 virus. It is extremely contagious conditions in detention and correctional facilities favor its more rapid transmission. The measure the BOP implemented to lesson contagion met with limited success at Ohio Prison. Thousands of inmates and staffs have contracted the virus and several have died. He also faces high risk of illness and death.

Respectfully submitted

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