No. 21-5148

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY DEW — PETITIONER

vs.

LASHANN EPPINGER, WARDEN — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SIXTH CIRCUIT COURT OF APPEALS

PETITIONER'S MOTION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

FIRST QUESTION PRESENTED FOR REVIEW:

IS A PETITIONER DENIED DUE PROCESS WHEN THE COURTS FAIL TO REVIEW ALL RELEVANT EVIDENCE IN THE OVERALL, NEWLY SUPPLEMENTED RECORD FOR AN ACTUAL INNOCENCE GATEWAY CLAIM AS ENVISIONED IN *House v. Bell*, 547 U.S. 518 (2006), AND HE IS DENIED THE PROVISION OF ADDITIONAL EVIDENCE IN SUPPORT OF SUCH CLAIM?

SECOND QUESTION PRESENTED FOR REVIEW:

IS A PETITIONER DENIED DUE PROCESS WHEN HIS STATE CONVICTION IS BASED ON *EX POST FACTO* LAW, MISAPPLICATION OF A JUDICIAL CONSTRUCT, SELECTIVE REVIEW OF THE EVIDENCE AND IMPROPER JURY INSTRUCTIONS WHICH ARE HELD TO BE CONSTITUTIONALLY SUFFICIENT TO MAINTAIN HIS CONVICTIONS FOR VIOLENT FELONIES IN THE ABSENCE OF SCIENTER, PHYSICAL FORCE OR THREAT THEREOF?

THIRD QUESTION PRESENTED FOR REVIEW:

IS A PETITIONER'S RIGHT TO DUE PROCESS DENIED WHEN FEDERAL COURTS AGREE WITH THE IMPOSITION OF PROCEDURAL BARS FROM A STATE COURT WHEN THOSE BARS ARE IMPROPERLY IMPOSED AS THEY DID NOT COMPORT WITH THE RULE(S), THE STATUTE(S), OR CASELAW AND WERE IN CONFLICT WITH THE PRIMACY OF THE OHIO SUPREME COURT?

FOURTH QUESTION FOR REVIEW:

ARE A PETITIONER'S 4TH AMENDMENT, EQUAL PROTECTION AND ARTICLE IV RIGHTS VIOLATED WHEN A STATE OFFICER IN A STATE CASE PERFORMS A WIRETAP ON TWO INDIVIDUALS OUTSIDE OF STATE JURISDICTION AND IN VIOLATION OF THE LAWS OF THE STATES WHERE THE PARTIES BEING TAPPED ARE LOCATED?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts:**

The opinion of the Unites States court of appeals appears at Appendix A to the petition and is reported at *Dew v. Eppinger*, 2020 U.S. App. LEXIS 25468;

The opinion of the United states district court appears at Appendix B to the petition and is reported at *Dew v. Kelly*, 2020 U.S. Dist. LEXIS 27501.

JURISDICTION

For cases from **federal courts:**

The date on which the United States court of appeals decided my case was February 15, 2020.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 13, 2021 and a copy of the order denying rehearing appears in Appendix C.

An extension of time to file the petition for writ of certiorari was filed, but had not yet been ruled on at the time of the filing of this Petition. Petitioner has filed the Petition timely.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved herein are the following:

Article I, § 0. Cl. 3 of the United States Constitution

No Bill of Attainder or *ex post facto* Law shall be passed.

Article IV, § 1 of the United States Constitution

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"No person shall be deprived of life, liberty, or property, without the due process of law..."

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV:

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

STATEMENT OF THE CASE

Petitioner was interrogated in an investigation for sexual misconduct on 3/15/2007 related to complaints from two women in their thirties who were former athletes, whom Petitioner coached as teenagers some fifteen (15) years prior. That day, Petitioner was arrested for one count of sexual battery for alleged sexual conduct involving one former athlete. Prosecutors and the grand jury found no force or threat of force in any allegation, with the police report stating the interaction was consensual, resulting in an indictment for three counts of sexual battery, a strict liability offense based on a coach/athlete engaging in consensual sexual conduct. No charge was brought for the second athlete, as no charge was available absent force or threat of force. A plea of not guilty was entered to the charges. Petitioner filed a motion to dismiss the indictment which argued actual innocence of a crime and a violation of his right against conviction on *ex post facto* law, which was granted without objection or appeal for the "reasons cited in the memorandum."

Even though the State and grand jury found no probable cause for violence, force, or threat of force for nearly a year prior to the filing of the motion to dismiss, the State repackaged the charges absent new evidence and went back to a grand jury. Petitioner was then indicted for three counts of purposeful, violent, forceful rape for the first complainant (R.C. 2907.02(A)(2)) and one count of purposeful, violent, forceful gross sexual imposition (GSI) (R.C. 2907.05(A)(1)) for the second, for whom no charges were brought initially. The charges in the second indictment were certainly available at the time of the first indictment, were investigated initially, but

were not charged. The second indictment claimed purposeful force or threat of force now existed "because [Petitioner] was [their] coach" and "authority figure," language from *ex post facto* §2907.03(A)(9); the same bases for the dismissed indictment. No age specifications were involved for Petitioner's convictions; the age of consent for sexual interaction in Ohio is thirteen. See R.C. 2907.02, 2907.05 (The women were high school-aged teenagers at the time the offenses were to have been committed.)[1]

Petitioner was indicted on a second set of charges related to adult patient complaints, as Petitioner had become a healthcare provider in the fifteen years since coaching. The charges were based on allegations of three counts of violent, forceful rape related to digital penetration during a therapeutic procedure provided to treat coccygeal pain;[2] twelve counts of GSI for a patient, where Petitioner was to have touched her breast by violent force or threat of force one time per month for twelve months; and three counts of GSI where the patient testified she believed Petitioner brushed against the side of her breast one time during a treatment.

Although the charges were of an extremely inflammatory nature, more than a decade apart, the product of obvious overindictment, and shared no overlapping evidence, the trial court denied a motion for severance and joined the cases for a jury trial for "judicial economy." A pretrial motion for grand jury proceedings was filed

[1] One count of corruption of a minor was merged at sentencing and is not a conviction under Ohio law. The Supreme Court of Ohio held a "conviction" requires a finding of guilt and a sentence, *State v. Williams,* 148 Ohio St. 3d 403 (2016). To claim a conviction exists for a merged offense is prejudicial and violates the 5th Amendment. *State v. Underwood,* 124 Ohio St. 3d 365at ¶31 (2010)

[2] The treatment was lawful, testimony of the adult patient was she consented to treatment which was monitored by staff, giving Petitioner consent and license to perform it, which provided her the only relief from her coccygeal pain in more than 20 years.

and denied after in-camera review of the proceedings by the trial court, who forbid counsel's presence during the review.

Despite the record being devoid of violence, force or threat, Petitioner was found guilty of three counts of rape involving the first athlete, one count of GSI involving a second athlete, one count of rape regarding a patient and one count of GSI regarding a different patient. He was acquitted of two counts of rape and fourteen counts of GSI. Trial court compared Petitioner to a Nazi concentration camp doctor whom the court had read about in a book—who did "God awful" things to his patients (torture, mutilation and murder)—prior to imposing maximum and consecutive sentences without justification for a total of 43 mandatory years of incarceration; a *de facto* life sentence without possibility of parole.

Petitioner timely appealed his wrongful convictions. The state reviewing court eliminated all patient-related convictions in the joined case by dismissal of single counts of rape and GSI due to insufficiency of evidence for force or threat thereof due to the women never testifying they believed harm would result if they resisted. Convictions for the athlete-related cases were arbitrarily affirmed under a different standard of law, though charged under identical statutes. All courts agreed the athletes were never physically forced to engage in any act and no verbal threats were ever claimed or identified, making the convictions based solely on purposeful threats of violent force based on Petitioner's employment as a coach. Joinder was upheld despite acquittal of all charges in the joined case. *State v. Dew*, 2009-Ohio-

6537. No resentencing was held. Petitioner's sentence remained a *de facto* life sentence of maximum and consecutive 31½ years for the remaining convictions.

The Ohio Supreme Court did not accept jurisdiction on appeal without rationale and with dissent of Justice Moyer.[3] *State v. Dew*, 124 Ohio St. 3d 1510 (2010). Certiorari to the U.S. Supreme Court was initially sought, but not granted. *Dew v. Ohio*, 131 S. Ct. 594 (2010).

After his trial, Petitioner's family obtained discovery piecemeal through counsel, and investigations were made, to include obtaining additional information, evidence and professional expert witnesses' evaluation of the same. The investigations produced new evidence of multiple violations of Petitioner's constitutional rights attested to and reported by expert witnesses.

Petitioner submitted several post-trial filings to address the newly discovered evidence showing constitutional violations. A second Motion for Grand Jury Proceedings was filed post-trial to address the variances between the indictment and bill of particulars compared to the evidence and testimonies provided at trial. A properly filed App.R. 9(E) motion was filed to correct omissions in the appellate record. Two affidavits to disqualify the trial court were filed, with only one being provided to the lower courts by Respondent—the one related to a procedural bar. The first was denied as untimely following trial as nothing was pending before the trial court; the second was properly filed to disqualify the judge from hearing the

[3] The district court wrongly claimed, "The Ohio Supreme Court denied leave to appeal; it dismissed the petitioner's appeal as not involving any substantial constitutional question." The ruling was "APPEAL NOT ACEPTED FOR REVIEW" without basis for the judgment.

issues on the Motion for New Trial due to prior bias (he unwarrantedly labeled Petitioner a Nazi and other acts), but was denied.

A motion for leave to file a Motion for New Trial was filed and granted by the trial court without objection (after jurisdiction of the trial court was established on appeal), which granting required a finding that the evidence was newly discovered. A hearing was held on the Motion for New Trial. After the trial court claimed to be offended by Petitioner, his post-trial motions based on new evidence were angrily denied under the guise of *res judicata*, contradicting Ohio Supreme Court precedent. All remedies for the denials were properly exhausted. Petitioner maintained and argued his innocence throughout all proceedings and filings.

Petitioner filed a timely, mixed federal habeas corpus petition with the Northern District of Ohio. The petition was stayed, due to Petitioner having to exhaust his state court remedies and the court finding Petitioner's claims potentially meritorious. *Dew v. Kelly*, 2013 U.S. Dist. LEXIS 14711. Petitioner exhausted his issues and filed an amended petition, which included a claim of actual innocence. The State provided a Return of Writ. Petitioner filed a timely Reply. Petitioner also moved for an evidentiary hearing, discovery, and expansion of the record for his gateway innocence claim, which were denied by the district court without a hearing.

The magistrate recommended Petitioner's petition be dismissed. *Dew v. Kelly*, 2018 U.S. Dist. LEXIS 225949. Petitioner filed timely objections, showing that there was not a proper review of Petitioner's actual innocence claim, the improper imposition of procedural bars, the use of *ex post facto* law, selective review of the

evidence, etc. The district court concurred with the magistrate with minimal independent evaluation and a misinterpretation of the applicable law and evidence. Certificate of appealability was denied without prejudice. *Dew v. Kelly*, 2019 U.S. Dist. LEXIS 90692. A timely reconsideration was filed with the district court due to conflicts with the evidence, issues and applicable law. The reconsideration was denied with instruction to take an appeal. *Dew v. Kelly*, 2020 U.S. Dist. LEXIS 27501.

Petitioner sought redress from the Sixth Circuit Court of Appeals, but was denied when the appellate court parroted the decision of the district court and claimed inability to address constitutional issues due to state appellate court rulings. *Dew v. Eppinger*, 2020 U.S. App. LEXIS 25468. A timely Petition for Rehearing was denied. It is from this denial that Petitioner seeks relief to this Honorable Court.

REASONS FOR GRANTING PETITION

Introduction – Although filing this Petition *pro se*, Petitioner prays the Court not discredit or excuse with disbelief his arguments based on his lack of legal experience. The issues are simple and direct, and the Court will be shown the constitutional violations suffered by Petitioner need to be addressed to clarify and rectify misapplications of law—to include *ex post facto* law—misuse of a judicial construct, procedural bars, etc., that were used to justify violations of the Constitution and deprive justice. The novel misuse of *ex post facto* law and abuse of

procedural bars to prevent federal review of constitutional claims must be addressed to protect fundamental fairness and justice guaranteed by the U.S. Constitution.

It was decided by the Court that, under AEDPA, a habeas court must "train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims." *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018). When the Court finds the state court's 'specific reasons' for denying relief, the next question is whether that explanation was reasonable thereby requiring the Court's deference. Id, There is still some question as to the interpretation of *Wilson*, which the Court can clarify. *Sheppard v. Davis*, 967 F.3d 458, 467 n.5 (5th Cir. 2020) ("We observe, without deciding, that it is far from certain that *Wilson* overruled *sub silentio* the position—held by most of the courts of appeals—that a habeas court must defer to a state court's ultimate ruling rather than to its specific reasoning.")

The lower federal courts' rulings on the issues herein reflect misguided agreement with a state appellate court. The Sixth Circuit stated it "cannot interfere with [the state appellate court's] determination of state law," holding the federal court impotent and the state appellate court infallible, which are incorrect. *Ziebart Int'l Corp. v. CNA Ins. Cos.*, 78 F.3d 245, 250 (6th Cir. 1995) (The Court should "refuse to follow intermediate appellate court decisions where we are persuaded that they fail to reflect state law correctly...") The primacy of a state supreme court binds this Court when lower state courts err on state laws and procedures.

Further, the Court should not be bound to *ex post facto* law or a judicial construct that does not apply to the facts in the case and does not further legislative

intent, and the Court is *not* bound by a state court's interpretation that does not "construe the [ ] statute in the sense of defining the meaning of a particular statutory word or phrase" and "merely characterized the 'practical effect' of the statute." *Wisconsin v. Mitchell*, 508 U.S. 476 at 484. But, "[o]nce any ambiguities as to the meaning of the statute are resolved, [the Court] may form our own judgment as to its operative effect." Id.

The case before the Court involves the misuse of law, a judicial construct that is not the law, and procedural bars to thwart justice and deny constitutional rights. Federal rights are violated when a state does not follow its own laws. *Wolf v. McDonnell,* 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government.") The same should hold true when a state does not follow its own procedures and improperly claims bars to relief.

I. THE COURT SHOULD GRANT THE PETITION TO BETTER ESTABLISH A THRESHHOLD FOR AN ACTUAL INNOCENCE GATEWAY CLAIM AND WHAT IS REQUIRED BY A COURT UNDER DUE PROCESS TO MEET THE "NEWLY SUPPLEMENTED RECORD."

A petitioner is denied due process when issues are improperly denied and evidence in support of a claim is not provided. The Sixth Circuit misconstrued the ground by stating Petitioner claimed all the evidence involved was newly discovered, which was incorrect, and intimated a denial of the issue based on the lack of newly discovered evidence. However, actual innocence gateway claims do not require newly discovered evidence, but "newly presented" evidence "not presented at trial." *House v. Bell*, 547 U.S. 518 (2006) All evidence for the claim met this standard which "does not require

absolute certainty about the petitioner's guilt or innocence" and "it may be enough for the petitioner to *introduce* credible new evidence that undermines the evidence supporting the jury's verdict." Id. at 553-54. The inquiry requires the federal court to assess how reasonable jurors would react to the *overall, newly supplemented record.* If new evidence so requires, this may include consideration of the credibility of the witnesses presented at trial. *Schlup v. Delo*, 513 U.S. 298. The federal court reviews the "newly supplemented record" under the "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" standard. Id.

Further, "comity and finality . . . 'must yield to the imperative of correcting a fundamentally unjust incarceration" and "the standard of review in two provisions of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2244(b)(2)(B)(ii) and 2254(e)(2), is inapplicable here, because the standard does not address a district court's independent judgment as to whether reasonable doubt exists, a ruling in [Petitioner's] favor does not require the showing of clear error as to the District Court's specific findings." Id.

The Sixth Circuit also intimated the actual innocence claim was procedurally barred by *res judicata.* The Supreme Court held a gateway claim overcomes bars to include "failure to develop facts in state court...and failure to observe state procedural rules, including filing deadlines," which would include *res judicata. McQuiggin v. Perkins*, 569 U.S. 383 at 393, 398-399.

The federal reviewing court also did not review the myriad of evidence provided and requested to support the gateway claim and addressed only a partial rendition of

a phone interview. The full interview had the adult witness telling police they were not in "any kind of a forcible situation[4]," could say "no" to Petitioner, did so, and Petitioner would "respect it," that any interaction occurred because they "let" it happen, Gymnast A considered Petitioner her "boyfriend" and she "never thought of [any interaction] as rape...or sexual abuse, even," all of which negates violent victimization; a legitimate claim of innocence and not a claim of mere insufficiency. The ability to say "no" shows voluntariness. When a denial is respected, force is absent and no crime committed.

Other newly presented evidence not addressed was as follows:

1) A police report stating Gymnast A told police the interaction was consensual, negating any claim related to force, which would require reconsideration of the credibility of the officer's testimony and the vindictive second indictment;
2) Affidavit evidence from an eyewitness fellow-gymnast showing an absence of any behavior by Petitioner as a coach that could be considered angry, aggressive, punitive or unfair, and both women "couldn't have pursued [Petitioner] any harder" to establish a physical relationship;
3) Crimes related to a coach/position of authority were found *ex post facto* " prior to trial with the acts alleged to be rape agreed and held to be "not a crime" and "innocent when it occurred;
4) Unsolicited affidavit from a juror in the case—accepted as newly discovered evidence without objection (Doc# 27-1, PageID# 1812)—attested he would not have found [Petitioner] guilty[5] but for incorrectly believing employment as a coach (*ex post facto* and wrongfully portrayed as equivalent to a parent in the jury instructions) supplanted the requirement for force or threat of force, which has never been the law, etc.

Other evidence of actual innocence was requested via motion and request for an evidentiary hearing, which were denied, making the record incomplete for this issue

[4] The only time a witness was questioned directly about force.
[5] Fulfilling the "reasonable juror" standard.

resulting in denial of the "newly-supplemented record" envisioned in *Schlup*[6], violating due process. Per the plain and unambiguous language of the Court, if Petitioner shows he is not guilty of the offenses at issue by disproving an element of an offense, he has shown his actual innocence of the crimes for which he was convicted.[7] To overcome his convictions, Petitioner must show the acts did not occur, or did not occur under purposeful threat of violent force, or the acts were consensual, as consent "negatives" rape, showing more than an insufficiency of evidence, but an absence of the same consistent with innocence. *Rupp v. Warden*, 2012 U.S. Dist. LEXIS 171098 (N.D. Ohio) The district court stated that proof of consent was a sufficiency argument, which conflicts with the Supreme Court and Ohio law. [8]

Evidence withheld included the two women's original audio/video recorded statements,[9] initial grand jury transcripts that were absent force (no new evidence of force was ever provided), etc.

The Court is asked to find that in the agreed absence of force by all courts and acts related to a coach/position of authority found *ex post facto* and "not a crime" prior

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[6] "If the record ultimately proves to be incomplete, deference to the state court's judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d). [citations omitted]. New, material evidence, introduced for the first time during federal habeas proceedings, may therefore require a *de novo* review of petitioner's claim." *Winston v. Kelly*, 592 F.3d 535 (4th Cir. 2010); *Haines*, supra, (an inmate's case improperly dismissed as he was "entitled to offer proof" of the allegations of his claim.)

[7] "Although '[a] prototypical example of 'actual innocence' . . . is the case where the State has convicted the wrong person of the crime,' *Sawyer*, 112 S. Ct. at 2519, *one is also actually innocent if the State has the 'right' person* ***but he is not guilty of the crime with which he is charged.*** See *Schlup*, 115 S. Ct. at 864 (noting prisoner interest in relief "'if he is innocent of the charge for which he was incarcerated'" (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986) (plurality opinion)))." *Jones v. Delo*, 56 F.3d 878 (8th Cir.) [emphasis added]

[8] "With respect to the presence or absence of the element of consent, it is true, of course, that however reluctantly given, consent to the act at any time prior to [sexual interaction] deprives the subsequent inter[action] of its criminal character." *Giles v. Maryland*, 386 U.S. 66 (1967); *Rupp*, supra.

[9] Audio/video interviews were provided for every witness save these two women, which provision is mandatory for due process; the deprivation occurred after the filing to dismiss the original indictment. The statements were again requested later, but denied. No denial of their existence was made.

to trial, the evidence presented and requested surely shows innocence of violent felonies by threat of force, which should overcome the state imposed procedural bars.

Petitioner provided and requested sufficient evidence to support his actual innocence of the crimes for which he was convicted, he prays the Court will clarify the standard for an actual innocence claim, or clarify the framework of due process via the provision of supportive evidence through the expansion of the record, discovery, and/or an evidentiary hearing for an actual innocence gateway claim.

II. THE COURT SHOULD GRANT THE WRIT TO PREVENT THE USE OF *EX POST FACTO* LAW TO FABRICATE LEGAL STANDARDS, INSTRUCT THE JURY, AND PREVENT THE SELECTIVE USE OF EVIDENCE TO CREATE THE ILLUSION OF SUFFICIENCY. THE COURT MUST ESTABLISH THRESHHOLD EVIDENCE NECESSARY TO DISTINGUISH BETWEEN SEXUAL MISCONDUCT AND FELONY OFFENSES OF VIOLENCE IN THE CURRENT CLIME OF AWARENESS OF SEXUAL OFFENSES.

The issue is to correct the denial of due process as espoused in the Sixth and Fourteenth Amendments. The current clime related to claims of sexual offenses shows a dramatic increase in awareness and coming forward of victims of sexual wrongdoing. A continuum of offenses exists ranging from sexual misconduct to felony offenses of violence. The case before the Court is an excellent vehicle for distinguishing variances between these offenses. Although this task was started in *Johnson v. United States*, 559 U.S. 133 (2010), the extraordinary increase in claims of sexual offenses in recent years requires a clarification of evidence sufficient to support convictions for a felony offenses of violence defined as such in state law.

The Court should also address the surreptitious use of *ex post facto* law in the charging of an offense, the jury instructions to gain a conviction, and the maintenance of convictions on appeal. The Court should establish that ex post facto law is prohibited for use in any circumstances. *Calder v. Bull*, 3 U.S. 386 (1798), (which makes illegal "(1) Every law that makes an action done before the passing of the law, and *which was innocent when done*, criminal; and punishes such action."); Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope, see, e.g., *Marks v. United States*, 430 U.S. 188, *Rabe v. Washington*, 405 U.S. 313 (1972); U.S. Const. Art. I, § 9, cl. 3; id. § 10, cl. 1.

"Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,'" which is present here. *Harrington v. Richter*, 562 U.S. 86 (2011) Asserted is "[t]he state court unreasonably applied *Jackson*, in violation of 28 U.S.C.S. § 2254(d)(1)." *Tanner v. Yukins*, 867 F.3d 661 (6th Cir. 2017) The Due Process Clause of the Fourteenth Amendment "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." *In Re Winship*, 397 U.S. 358 (1970); see *Jackson v. Virginia*, 443 U.S. 307 (1979).

The case herein addresses a novel constitutional claim of insufficiency of the evidence. The Court has clearly established force requisite to commit a felony offense of violence.[10] "[I]t is clear that in the context of a statutory definition of

[10] Ohio defines rape and GSI as felony offenses of violence involving force or threat of force. R.C. 2901.01(A)(9)(a), 2907.02(A)(2) & 2907.05(A)(1), respectively.

'violent felony,' the phrase 'physical force' means violent force--that is, force capable of causing physical pain or injury to another person." *Johnson*, supra. The record is devoid of any evidence of a threat of any type.

The state and federal reviewing courts relied on the use of law held to be *ex post facto* prior to trial to create a recognized "position of authority" and then applied the position to a judicial construct which the constructing court—the Ohio Supreme Court—expressly determined to be inapplicable. These errors resulted in a conviction for violent felony offenses in the absence of evidence of force or any claim of language consistent with a threat.

A selective review of the evidence was utilized to justify a threat, when there was no determinable inference of a threat, even in a light most favorable to the prosecution. Impermissible inferences were made regarding the evidence that were unsupported and refuted by the record and where no deference could be afforded.

The state and lower federal courts agreed Petitioner's convictions for purposeful, violent felonies by threat of force[11] were based on the pillars of "position of authority" and "grooming." *Dew v. Eppinger*, 2020 U.S. App. LEXIS 25468 Both of these pillars were misused to create the illusion of sufficient evidence to support Petitioner's convictions. Both pillars topple when illuminated by relevant law, caselaw and clear and convincing evidence from the record.

A. The "position of authority" judicial construct does not apply to Petitioner, per the Ohio Supreme Court, and is not an element of the offenses charged.

[11] All courts agreed there was no physical force present in any interaction.

Due to primacy of the courts, it is axiomatic that lower appellate courts must apply the law as interpreted by a higher court, especially when a judicial construct is involved and no legislative act or intent can be relied upon. *State v. McDermott*, 72 Ohio St. 3d 570, (A Supreme Court decision "is not to be construed as being broader than the facts of that specific case warrant.") The Court is bound to follow state law as interpreted "by the highest court of the State," not an erring, overzealous appellate court. *Groppi v. Wisconsin*, 400 U.S. 505, 507 (1971).

The Ohio Supreme Court judicially constructed the "position of authority" theory of guilt related to force "based solely on the recognition of the amount of control that parents have over their children, particularly young children." *State v. Schaim* (1992), 65 Ohio St.3d 51, clarifying *State v. Eskridge*, 38 Ohio St. 3d 56. In *State v. Dye*, 1998-Ohio-234, used to maintain Petitioner's convictions (though *ex post facto* judicial decision-making), Ohio's highest court held the "position of authority" construct was found applicable to a "non-parent caregiver" who "occupies the same position of authority as the parent traditionally would." The *Dye* court was specific "that a person in a position of authority over a child under thirteen may be convicted of rape of that child with force pursuant to R.C. 2907.02(A)(1)(b) and (B) without evidence of express threat of harm or evidence of significant physical restraint [the *Eskridge* instruction]."

Eskridge and *Dye* are distinguishable, as the perpetrators were a parent or *in loco parentis* and charged with statutory rape under, R.C. 2907.02(A)(1)(b) and (B), and victims were under thirteen, Ohio's age of consent for sexual interaction.

Petitioner was not charged under the applicable statute(s) and the persons involved in the case were not under thirteen.

Additionally, the Ohio Supreme Court held in *State v. Noggle*, 67 Ohio St. 3d 31 (1993), that sexual conduct between a teacher/coach and a student/athlete was "wrong in the eyes of his profession and in the eyes of society," but "not considered a criminal wrong by the state of Ohio," holding a teacher/coach cannot be *in loco parentis*, is not equivalent to a parental caregiver and *not a "position of authority"* under the law as would be required by *Eskridge* and *Dye*. Id. (being a teacher/coach "is no more relevant than being a firefighter, an accountant, or a flight attendant," and "[h]ad the General Assembly sought to forbid sexual conduct between teachers and students, it would have done so specifically." Id., see *Butler v. Warden*, 2012 U.S. Dist. LEXIS 123381 ("[t]he phrase 'person *in loco parentis*'...applies to a person who has assumed a dominant parental role and is relied upon by the child for support," and "was not designed for teachers, coaches, scout leaders, or any other persons who might temporarily have some disciplinary control over a child.") In 1990-92, no statute mentioned a coach as part of any law.

Therefore, it is wholly unreasonable to find or maintain Petitioner's convictions on the basis of "position of authority." *Wilson*, supra.

B. The "position of authority" used to show sufficiency of the evidence for a threat of force came from a 1994 statute defining a coach under the law—unrelated to force or threat thereof—was ruled *ex post facto* and Petitioner was found innocent of a crime related to being a coach prior to trial.

The retroactive application of R.C. 2907.03(A)(9)[12], amended in 1994 to incorporate a coach into the law (two years after the offenses were to have occurred), is not constitutionally permissible and cannot suffice to support Petitioner's convictions. *State v. Jones*, 67 Ohio St. 2d 244 (1981) ("retroactive application of [a statute] to a crime committed before the effective date of the statute acts to decrease the quantum of proof required for criminal conviction. As such, this application of the statute is in violation of Section 10, Article I of the United States Constitution.") The *ex post facto* statute was incorporated *in toto* and embellished in the jury instructions, addressed below.

Further, to apply the position of coach to force or threat of force via a judicial construct—which is not the law—does not comport with legislative intent. When the Ohio legislature inserted the position of a coach into the law in 1994, it did so under the sexual battery statute, *not the rape statute*, enacting the position provides "unconscionable advantage" in gaining the consent of an athlete for sexual conduct, and not force or threat thereof.

Therefore, it is wholly unreasonable to find Petitioner guilty beyond a reasonable doubt on the basis of ex post facto law "position of authority." *Wilson*, supra. The first pillar claimed to show sufficiency of the evidence must fall under the foregoing indisputable presentation of the facts and law.

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[12] Ohio Revised Code § 2907.03(A)(9): No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply: (9) The other person is a minor, and the offender is the other person's athletic or other type of coach, is the other person's instructor, is the leader of a scouting troop of which the other person is a member, or is a person with temporary or occasional disciplinary control over the other person.

C. "Grooming" is not an element of any offense charged and was not consistent with any threat of force.

The second pillar relied upon by the Court was that "grooming" was sufficient to show a threat of violent force. The women's own testimony dispels any threat of any kind. "'[G]rooming' is the process whereby a sex offender earns the trust and confidence of a victim before engaging in a sexual act." *United States v. Batton*, 602 F.3d 1191 (10th Cir. 2010) A position of trust is not force or threat thereof. Ohio law "does not criminalize sexual [interaction] based on any special position of trust that the offender may occupy. There must be evidence the offender used force, created or took advantage of an impairment caused by an intoxicant, or victimized someone under the age of 13." *State v. Roy*, 2014-Ohio-5186; R.C. 2907.02 & 2907.05.

The adult women testified the "grooming" was Petitioner telling them "always that that he loved us," and "he had this way of convincing us that if we loved him and if he loved the two of us—everything was fine no matter what we did. And it was that's why it was okay to do these things because we loved him." These statements were devoid of threat, and no communication by Petitioner was provided as intimating a threat by any witness.

While this "grooming" is certainly inappropriate and wrong, expressing love for them and convincing them they loved Petitioner as motivation for interaction is insufficient to support a threat of force for a violent felony. Even if grooming was considered coercive, coercion is not force under Ohio law. *State v. Wilkins*, 64 Ohio St. 2d 382; *Peterson v. Rupprigh*t, 2020 U.S. Dist. LEXIS 113383 (N.D. Ohio)

D. The Court relied upon selective testimony taken out of context without looking at the complete record.

"[A] decision based upon a selective review of the record or an incomplete record is arbitrary and capricious." *Moon v. Unum Provident Corp.*, 405 F.3d 373, 381 (6th Cir. 2005); *Lamere v. Slaughter*, 458 F.3d 878 (9th Cir. 2006) ("in deciding whether to grant a writ of habeas corpus under 28 U.S.C. § 2254, a federal court evaluating the evidence under *In re Winship* and *Jackson v. Virginia* should take into consideration all of the evidence presented at trial.")

Because the record is devoid of any language consistent with a threat, and fear (absent here) is insufficient to support a threat of violent force[13], evidence claimed sufficient was provided as follows: Gymnast A's "belief that [Petitioner] carried weapons[14], and Gymnast B testified about an incident where [Petitioner] would not let her down from a gym platform unless she professed her love for him." *Dew v. Eppinger*, 2020 U.S. App. LEXIS 25468 at *15.

Omitted was Gymnast A's emphatic testimony regarding the weapons: "He didn't ever threaten me with them." Sufficiency requires not a belief Petitioner carried weapons, but whether the witness was threatened by them. The testimony eliminates any possible inference of a threat of force.

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[13] An identical charge for to a patient who claimed fear was dismissed "as [fear] involves more than merely a subjective component. See [*State v. Rupp*, 7th Dist. No. 05MA166, 2007 Ohio 1561]. In other words, just because a person is too fearful to react does not mean the actor is purposefully compelling that person to submit by implicit threat of force. Rather, in addition to the victim professing that her will was overcome by fear or duress and the jury believing this, there must be objectively quantifiable behavior from the defendant which allows a rational person to infer that a threat of force was made. Id. at ¶¶41, 43, 51, 55." *State v. Dew*, 2009-Ohio-6537 at ¶118; *Elonis*, infra.

[14] Petitioner was never indicted for a gun specification or committing a crime with a weapon.

Gymnast B testified the interaction with Petitioner regarding the platform incident a "casual relationship" and further testified she was *"not afraid."* Danger from being on the platform could not be inferred, as she further testified, "Of course I could have gotten down [from the platform] anyplace. He didn't help me get down," agreed "there were three other places on the platform that [she] could have gotten down from that day" and "jumped down" on her own and only "told [Petitioner she] loved him because [she] wanted to get to her next event or whatever." The witness never professed any belief she was in danger and stated directly that she was not motivated by fear of harm or threat of any kind during this or any other incident.

An inference is a permissive deduction from the evidence or a "conclusion reached by considering other facts and deducing a logical consequence from them." BLACK'S LAW DICTIONARY 897 (10th ed. 2014). There was no gap of information or conflicting inferences in the record that would require deduction or consideration of other facts when the testimony wholly refutes the state court's claims. To infer a threat in this case requires a leap unsupported by the record, not permitted by the Constitution, federal law or rule, and outside the bounds of reasonable under *Jackson* and *Wilson*, supra. The Court should not and must not take it.

E. The witnesses never testified they believed they would be subject to "immediately harm" if they resisted Petitioner.

Consistent with the Court in *Johnson*, supra, the state appellate court stated the standard for dismissal of the charges based on insufficiency of the evidence related to patient allegations was the women "did not testify that [they] feared resisting [Petitioner] would lead to immediate harm." *State v, Dew*, 2009-Ohio-6537

at ¶¶117-118. Based on this standard, the record being devoid of any similar claim by the former athletes, the evidence was insufficient to support his convictions based on the state and this Court's standard, and to use a different standard for offenses under identical statutes violates Equal Protection.

The standard for dismissal of the convictions has been met, as no witness testified they believed they would suffer any harm, or be forced to do anything. The foregoing facts were overlooked by the courts and unaddressed in any opinion.

F. Clear and convincing evidence from the record, not considered by the lower courts, also showed it impossible for the first count of rape to have occurred.

Lower courts did not fully review the record and address the finding by the state appellate court that sexual conduct was initiated under very specific circumstance and time:

> One time when [Gymnast A] went to [Petitioner's] home for lunch between practices, [he] attempted vaginal intercourse with her, but she stopped him because it hurt. *[She] stated that, at around that same time,* [he] began performing oral sex on her...
> *State v. Dew*, 2009-Ohio-6537 at ¶¶ 8&9 [emphasis added].

The *complete* testimony was specific about when Petitioner "asked" (not ordered) her to engage in the attempted intercourse, which she stopped, never stating she did not want to engage in the act. She testified the first attempt of sexual conduct occurred in Petitioner's wife's house, *during the summer, while he was married.* TrT., pgs. 259-260. Petitioner's first count of rape was to have occurred "between March 10, 1990 and December 31, 1990." Doc# 6-1, PageID# 148. The record irrefutably showed Petitioner was married on November 23, 1990, well--

after the summer of 1990 ended, TrT., pg. 541, and uncontested testimony and evidence showed he did not reside at his wife's house prior to marriage. TrT., pgs. 629, 795-796, Def. Trial Exhibit B. The "summer" referred to could only be that of 1991, making any charge of rape prior to this time impossible. Claim an act occurred via memory from 16 years prior cannot suffice to overcome concrete temporal events that negate any claim of sexual conduct prior to 1991.

G. No evidence for the scienter "purposeful" was ever provided at trial as required by applicable law.

The law required proof Petitioner acted purposely to threaten violent force. R.C. § 2901.22(A), *Johnson*, supra. The Court defined a threat as "a serious expression of an intent to harm" and "requires proof that a communication was transmitted and that it contained a threat. The 'presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct'" and "'the crucial element separating legal innocence from wrongful conduct' is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains a threat." *Elonis v. United States*, 135 S. Ct. 2001 (2015), citing *X-Citement Video* (1994), 513 U.S. at 72.

The Ohio Supreme Court held, "It is possible for a person to compel another to engage in sexual conduct by force or threat of force knowingly but not purposely. A person could subjectively believe that there is consent where there is none..." *State v. Wilkins*, 64 Ohio St. 2d 382 (1980). If Petitioner's position as a coach was held as an implicit threat of force—although not conceded, *ex post facto* and absent from any

statutory definition—Petitioner knew he was a coach, but did not purposely know of, or use, an implicit threat from his position as required by law, because the law did not exist regarding a coach at the time the offenses were to have been committed. Id. Neither woman ever testified Petitioner threatened them using his position of coach.

H. The jury instructions cited *ex post facto* law R.C. 2907.03(A)(9) *in toto*, violating the Constitution, which misled the jury and vitiated the findings of the jury.

"A principle often announced and frequently applied is that, where a court in the course of the instructions to the jury stated a correct rule or principle of law and also a prejudicially incorrect rule or principle of law on the same subject matter, no presumption arises that the correct rule or principle of law was followed and applied by the jury." *Westropp v. E. W. Scripps Co.*, 148 Ohio St. 365 (1947)

The trial court included unconstitutional *ex post facto* law in the jury instructions as part of the rape and GSI statutes and equated a coach with the authority of a parent over strenuous objections; both errors of law. A coach was not part of any applicable law and not defined as a position of authority until 1994, and cannot equate to a parental caregiver required by the judicial construct in both *Eskridge* and *Dye*, supra. [15]

The error of law is clearly manifest in comparison of the *ex post facto* law and jury instructions:

[15] *Noggle*, supra.

Ex post facto statute R.C. 2907.03(A)(9) for which original indictment was dismissed: "No person shall engage in sexual conduct with another, when...the other person is a minor, and the offender is the other person's **athletic or other type of coach**, is the other person's instructor...or is a **person with temporary or occasional disciplinary control** over the other person."	Errant jury instruction including the *ex post facto* statute *in toto* and illegally equated a coach with a parent: "When the relationship is one of a **child or parent**, for example, or a child and a **coach or some other similar authority figure**, or a person with **occasional disciplinary control over the other person**... Sexual activity between a **coach and a minor** child is not comparable to sexual activity between two adults with a history consensual intercourse. The youth and vulnerability of children coupled with the power inherent in a **coach's...position of authority**, can create a unique situation of dominance and control...So when a person in a **position of authority** over a child or when that situation exists, that person may be convicted of rape of that child with force **without any evidence of expressed threat of harm or evidence of significant restraint**." Doc# 44, PageID#s 3818-3819; citing and embellishing the inapplicable instruction from *Eskridge*, supra.

To instruct a jury a threat can occur "without any evidence of expressed threat of harm" removes the burden on the State of having to prove every element of the offense; here, a threat as defined by the Court in *Elonis*, supra. *Winship,* supra.

The unconstitutional instruction was clearly a misstatement of law. "An omission or an incomplete instruction is less likely to be prejudicial than a misstatement of law." *Henderson v Kibbe*, 431 U.S. 145 at 155. Read in reverse, the misstatement of law is more likely to be prejudicial than an omission or incomplete instruction. The errant instructions clearly "vitiate[d] all of the jury's findings." *Neder v. U.S.*, 527 U.S. 1 at 11.

applied in particular situations as fairness and justice require, and * * * is not to be applied so rigidly as to defeats the ends of justice or so as to work an injustice.'" [multiple citations omitted]
State v. Stansell, 2021-Ohio-203 (8th Dist.), ¶30.

The federal courts did not address the misapplication of procedural bars by the state courts. The issue of judicial bias, a structural error, was properly filed to the Supreme Court of Ohio via affidavit when Petitioner's Motion for New Trial was pending. Respondent prejudicially omitted this filing from the record. Exhaustion occurred with the filing, as there is no other court to elevate an appeal. The issue was also properly and timely raised on direct appeal of the denial of Petitioner's Motion for New Trial due to prejudicial bias being present in those proceedings. The issue was fully and timely exhausted. No procedural bar could be invoked.

The following were also overlooked or are errors of law:

The issue of grand jury transcripts was made post-trial, where a change of circumstances existed and the need for secrecy was severely reduced, if not eliminated. The particularized need was that the evidence varied from the grounds for prosecution provided prior to trial, which did not exist at the time a pretrial motion was filed. *Res judicata* was an impossibility due to change of circumstances. *Maxwell Co. v. NLRB*, 414 F.2d 477 (6th Cir. 1969); *Set Prods. v. Bainbridge Township Bd. of Zoning Appeals* (1987), 31 Ohio St. 3d 260.

The issues related to the Motion for New Trial were denied as being *res judicata*. The Motion for Leave, which included the evidence at issue[16], was titled

[16] Petitioner's family investigated and discovered evidence post-trial and had it examined by expert witnesses. *State v. Carusone*, 2013-Ohio-5034 (Defendant was unavoidably prevented from the "existence of that evidence and of the proposed grounds for a new trial *until his mother's diligent posttrial investigation uncovered the evidence and expert*

with unambiguous statutory language as a "Motion for an Order Finding that the Defendant was Unavoidably Prevented from the Discovery upon Which He Must Rely," see Crim.R. 33, which was *granted* by the trial court, a clear ruling the evidence supplied was newly discovered.

> "We therefore note at the onset that the trial court could have only properly granted appellant's request for leave to file his motion for new trial if it found he clearly and convincingly demonstrated that he was unavoidably prevented from discovering the facts upon which he based his motion for new trial..." *State v. Jackson*, 2015-Ohio-6 at ¶ 32. See *State v. Stevens*, 2010-Ohio-556 at ¶ 11; *State v. York*, 2000 Ohio App. LEXIS 550, *State v. Shuster*, 2017-Ohio-2776; *State v. Carusone*, 2013 Ohio 5034, (includes many supporting citations at ¶ 31), etc.

The lower federal courts unreasonably agreed the granting of this Motion was not a "Finding that the Defendant was Unavoidably Prevented from the Discovery upon Which [Petitioner] Must Rely;" an absurdity.

The Ohio Supreme Court held new evidence in the form of expert witness affidavits and reports, provided in the Motion, are not barred by *res judicata*. *State v. Davis*, 131 Ohio St.3d 1 (newly discovered evidence in the form of an expert witness affidavit "could not have been raised on direct appeal and decided by this court, because it rests upon evidence not considered by the trial court.")

The trial court did not follow the procedure as set forth under Ohio rules or interpreted by any other state court, which cannot meet the standard set forth in *Beard*, supra. "A state procedural rule, improperly applied, is not sufficiently 'adequate' to preclude habeas review." *Amos v. Scott*, 61 F.3d 333 at 338. The Court

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analysis revealed its significance. Thus, the motion, on its face, showed that Carusone had been unavoidably prevented from timely discovering, and from timely presenting in a new-trial motion, evidence material to his actual-innocence and fair-trial claims.")

should hear this issue to prevent the barring of federal review of state prisoner's claims under the improper application of procedural bars by an appellate court that are contrary to the holdings of a state supreme court and the procedural rules.

IV. THE COURT SHOULD GRANT THE WRIT ON THE GROUNDS OF AN ILLEGAL WIRETAP WHICH VIOLATED ART. IV, AND THE FOURTH AND FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

The lower courts denied this issue on the basis of the Fourth Amendment. Petitioner argued violations under the Fourth Amendment, Equal Protection and Article IV regarding the search and seizure of a conversation by a state law enforcement officer of two people outside his state jurisdiction. This was a state case involving state police with no federal authority, and state law involving people in three different states.

The Court must look to the three state laws involved, not the federal. The federal wiretap statute, 18 U.S.C. 2516(2), requires federal courts to defer to state law on the question of the validity of a wiretap obtained in state court under state law, as "the lone exception concerning interception by state officers for state prosecutions, the federal statute does not defer to the states." *United States v. McNulty*, 729 F.2d 1243, 1266 (10th Cir. 1983) (Both *Vazquez* and *Sotomayor* recognize that where the issue involves the validity of a state ordered wiretap, the more stringent state requirements must be respected by federal courts.) See *United States v. Tavarez*, 40 F.3d 1136 (10th Cir. 1994); see also *United States v. Hall*, 543 F.2d 1229 (9th Cir. 1976), cert. denied, 429 U.S. 1075 (1977), (where the court recognized that California state standards are applicable when "the evidence been obtained by state officers for state prosecution in

violation of a state statute.") Petitioner was in Pennsylvania and Gymnast B was in California with the recording officer in Ohio; both states require all party consent and no warrant was obtained. The danger of forum-shopping is present if allowed to stand.

> "Since a state's protection of privacy normally reflects principles central to its social and governmental order, our failure to respect its more stringent protection of privacy rights would not only violate principles of federalism, but encourage state and federal law enforcement officials to by-pass state law and to engage in federal forum-shopping of tainted evidence."
> *United States v. Sotomayor*, 592 F.2d 1219 (2nd Cir. 1979)

An interception occurs where the words are "utter[ed] into the mouthpiece[s]" of the devices being tapped; here CA and PA. *Katz v. United States*, 389 U.S. 347. As Petitioner did not receive a fair adjudication of all issues, *Stone v. Powell*, 428 U.S. 465, is inapplicable. *Stone* clearly does not prevent federal courts from hearing Fourth Amendment claims from state court proceedings, as held by the lower courts, as this Court has accepted jurisdiction on certiorari for these types of cases since *Stone*. See *Collins v. Virginia*, 138 S. Ct. 1663 (2018) and *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

Petitioner was denied equal protection under the laws of the state where he was located. A state officer in Ohio performed warrantless searches and seizures outside of his state-limited jurisdiction and afforded Petitioner no protection from of the laws of other states entitled under the Equal Protection Clause and Art. IV of the U.S. Constitution.

> "Use of the phrase 'within its jurisdiction' thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory...Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction -- either voluntarily, or involuntarily

in accordance with the Constitution and laws of the United States --- he is entitled to the equal protection of the laws that a State may choose to establish." *Plyler v. Doe*, 457 U.S. 202 at 215.

Both PA and CA have legislation prohibiting surreptitious recording without all party consent. See *Commonwealth v. Brion*, 539 Pa. 256 and *Shively v. Carrier IQ, Inc.*, 2012 U.S. Dist. LEXIS 103237 at *21-22 (no preemption of CA law by federal statute). The Court should not permit state law enforcement to ignore the laws of the states where parties are located when intercepting communications.

CONCLUSION

The Petition for Writ of Certiorari should be granted review due to the ground(s) presented herein and to further clarify the issues in relation to the Constitution of the United States and fundamental fairness.

Respectfully submitted,

Date: 7/16/2024

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