21-5217

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JEFFREY KELLER – PETITIONER

vs.

PEOPLE OF THE STATE OF ILLINOIS – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Illinois Courts incorrectly found that petitioner's rights were not violated when he was arrested without a warrant inside his office building pursuant to a deceptive plan formulated by the prosecution, the execution of which was calculated to extract incriminating statements from petitioner through numerous tactics offensive to justice, including but not limited to, concealing from petitioner his arrest and reason as well as misleading him as to the ramifications of a waiver of his Miranda rights? _____ **8**

II.

Whether the Illinois Courts erred in refusing to suppress eavesdrop recording where federal eavesdropping law via implied field and implied conflict preemption has preempted Illinois eavesdropping law? _____ **13**

(a) Whether lower court failed to conduct statutory construction analysis and de novo review of numerous state errors in this claim resulting in mistake in decision making?

(b) Whether the Illinois Supreme court is obligated to follow the Supremacy clause and provide a merit ruling on the abrogation of People v. Nieves, 92 Ill.2d 452 (1982), Judicial Supervision of electronic Surveillance with an immediate sealing requirement by law?

_____ **21**

III.

Whether the presiding appellate judge labors under a per se conflict of interest thereby introducing structural error into the appeal? _____ **23**

IV.

Whether affirmative mistakes in decision making and mistaken recall of evidence create a breakdown in the appeal process resulting in standalone Due Process violations? ____ **26**

V.

Whether the Illinois Supreme Court's refusal to recall its mandate denied petitioner a fair direct appeal, Due Process and Equal Protection under the law? _____ **36**

LIST OF PARTIES

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

TABLE OF AUTHORITIES CITED

CONSTITUTIONAL PROVISIONS

STATUTORY PROVISIONS

OTHER AUTHORITIES

TABLE OF CONTENTS

INDEX TO APPENDICES

Jeffrey Keller, pro-se, respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Illinois.

OPINIONS BELOW

The opinion of the highest state court to provide a written order, the Appellate Court of Illinois, Second Judicial District, appears at Appendix A to the petition and is unreported: People v Jeffrey Keller, 2020 IL App (2d) 170750-U; No. 2-17-0750. The Appellate court denial of Petitioners leave to file Supplemental Pro Se Brief is at Appendix B. The opinion of the Illinois Supreme Court on the PLA appears at Appendix C to the petition and is unpublished: No.126094. Leave to File Emergency Motion to Recall Mandate was denied in error on November 20, 2020 and appears at Appendix D to the petition. Motion to Reconsider the denial to file was accepted and Emergency Motion to Recall Mandate filed 12/30/2020, No. 126094. The Illinois Supreme Court denied the emergency Motion to Recall Mandate on January 21, 2021, No. 126094. Motion for Reconsideration of the Denial of Motion to Recall Mandate and Reopen Direct Appeal was denied by the Illinois Supreme Court on March 18, 2021, No. 126094. The actions in denial of the Motion to Recall Mandate appear at Appendix D-G.

JURISDICTION

The final judgment of the Supreme Court of Illinois was entered on March 18, 2021, the motion for reconsideration of the denial of Emergency Motion to recall Mandate and Reopen Direct Appeal. This Court's jurisdiction rests on 28 U.S.C.§ 1257(a) (A denial of review by a states highest court justifies proceeding to the certiorari stage). Melendez-Dias v Massachusetts, 557 US 305, 309 (2009).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part:

> ...The Right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated...

The Fifth Amendment to the United States Constitution provides, in relevant part:

> ...No person...shall be compelled in any criminal cases to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...

The Sixth Amendment to the United States Constitution provides, in relevant part:

...In all criminal prosecutions the accused shall... enjoy right to speedy trial, a trial by an impartial jury...to be informed of the nature and cause, and... assistance of counsel for defense...

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

...No state shall...deprive any person of life, liberty, or property, without due process of law.

STATEMENT THE CASE

A statement following an illegal arrest must be excluded from evidence unless it is attenuated enough from the illegal arrest to purge the primary taint. Brown v Illinois, 422 US 590, 602 (1975). It must be voluntary, an act of free will; if so, the court then must consider the temporal proximity to the illegal conduct, the presence of intervening circumstances, and the flagrancy of the police misconduct, to determine attenuation. Id. At 603-04.

The fact that the petitioner received his Miranda warnings may establish voluntariness, but voluntariness does not end the analysis. Brown, 422 US at 603-04. That is because the question is not simply whether the statement should be excluded as involuntary under the the Fifth Amendment, but under the Fourth Amendment as a product of the illegal arrest. United States v Reed, 349 F3d 457, 464 (7th Cir 2003). Temporal proximity between the illegal arrest and the statement is important but must be considered in conjunction with intervening factors. One such factor involves the defendant freely agreeing to speak to police away from the arrest scene and driving his own vehicle to the meeting. See eg. United States v Fazio, 914 F2d 950, 958 (7th Cir. 1990). As will be seen, no attenuation from the illegal arrest occurred in this case.

Pursuant to a prearranged plan, numerous police officers, most with weapons drawn, confronted petitioner as he was trying to exit the private and secure garage of his office building. (R249-50, 275-76) The police had entered the private area without consent. (R249, 251, 252, 260, 262-63-265, 298) Prior to confronting petitioner, Det. Erin Gibler knew petitioner had made inculpatory statements to his friend in a conversation overheard by law enforcement (R276) one day prior. It is undisputed that from that point on, petitioner would not have been permitted to leave (R294).

The police claimed petitioner did not ask for an attorney and verbally agreed to go to the police station. (R351, 438, 533) Petitioner was not advised of the nature of the crime that was being investigated, that he was a suspect, nor of his Miranda rights prior to arriving at the police

station. (R325) In the interrogation, the police had petitioner sign a Miranda form (R442-43) which did not reflect that the police read petitioner his Miranda rights. (R443) Petitioner was told that signing the form was just a "normal process" several times. When first sitting in the interrogation room Petitioner demanded that he had a right to know why he was there. Det. Jeff Hill told Petitioner "the only way you're going to find out about why you're here [sic} is if you sign that document." (2020 IL App2d 170750-U, ¶ 26). Petitioner then signed a Miranda form. (R442-43) Toward the end of the interview petitioner asked, what is it you think I did? Det. Hill replied I can't say it, you have to say it. (St Exh-Interr Video). At that time, petitioner firmly expressed to the detectives that he did not want to talk any further. (R452) The detectives did not initially honor petitioner's request (R452). Det. Dave Spradling showed petitioner a photograph of petitioner's friend, Schweigert, in an attempt to invoke a response. (R452).

Petitioner testified at the pre-trial motion to suppress as to the circumstances surrounding his arrest (R464). When the police confronted him, Petitioner felt that he would be shot if he made a wrong movement (R469). The police advised him that they "needed" to speak with him about an investigation (R473-74). Petitioner advised that he wanted to "do it here in the office or at the station in the morning but with an attorney" (R474). The police refused to interrogate petitioner at his office and did not allow him to follow them to the police station in his own car (R475). Petitioner requested an attorney more than once before arriving at the police station (R477). The police never offered petitioner any type of phone to make a call to his attorney (R482).

The Court denied Petitioners motion to suppress but declared: "[I]t is clear to the court that the petitioner was under arrest in his office garage. "(R562) As to the sufficiency of the Miranda warnings Petitioner received, the court held: "Here the admonitions given, although not given in the manner the court would prefer to see it done, did convey to the petitioner what is rights were:" (C563) As to the question of whether Petitioner requested an attorney "prior to being Mirandized or after, but prior to indicating he no longer wished to speak with the police," The court found against petitioner. (C563) Finally, as to Petitioner's argument pursuant to 725ILCS 5/103-1(b), the court found that "although police did not say petitioner was being arrested for murder he was told at the scene that they wished to speak to him regarding a homicide investigation (C563).

Petitioner also filed two motions to suppress statements made during eavesdrop recordings (C728, C824) The motions were directed at multiple state violations in gathering recorded statements Petitioner made to ("Schweigert"). Id. After hearing arguments, the court denied Petitioners motions and ruled that the evidence would be admitted. (R748-761); (R838-864)

Schweigert identified Petitioner as a friend he had known for nearly 30-years. (C748) He alleged that on January 9, 2015, Petitioner visited him at his residence in Texas and that, at that time, Petitioner admitted to him he killed Fox. (R771) Schweigert consented to having conversations with Petitioner recorded by the police through an eavesdrop. (R1746-47) Upon the police application for an order authorizing an eavesdropping device (R332), Judge Guerin signed the eavesdrop authorization order on January 13 (R756; C752). On the same day, Schweigert recorded two phone conversations with Petitioner in which Petitioner made incriminating statements to Schweigert. (C448) The state introduced content for the eavesdrop recordings at proceedings on the state's motion to deny bail on January 16, and at the grand jury proceedings on January 20. (C729) Members of the press were present at the denial of bail hearing conducted on the 16th. (C730, R756).

In this judicial proceeding, the prosecution read the content of its motion to deny bail aloud, which included evidence derived from the eavesdrop. (C730) The state first disclosed to the defense that electronic surveillance was used in the case in its initial disclosure tendered on January 21, 2015. (C729) The state served defense counsel with a copy of the court order and accompanying application on March 10, 2015. (C761) Actual recordings were tendered to counsel on April 30, 2015. (R850) The order authorizing eavesdrop recordings was entered by Judge Guerin on January 13, 2015. (C752) Pursuant to this order, the time period for law enforcements use of the eavesdropping device terminated on February 12, 2015. (C752) The return order was completed by Judge Coco. (R850) Because there is no date printed on the return order, the only indicia of when Judge Coco received and reviewed the recordings is the file stamp placed by the clerk thereon, which reflects April 30, 2015-- 77 days after Judge Guerins order expired and 104 days from the denial of bail hearing on January 16, 2015, (C831) where the unsealed, undisclosed, unnoticed evidence used.

On April 5, 2017, Petitioner moved for sanctions of suppression of eavesdrop recordings based on 725 ILCS 5/108-A8 and affirmatively 5/108 A2 and A7 for unlawful use of evidence in

the denial of bail hearing and the grand jury. (C728) After hearing arguments the trial court denied the motion. (R748)

On May 4, 2017, Petitioner returned to the eavesdrop violations seeking missing or additional information. The state unequivocally refused to provide the information unless ordered. (R832) The state claimed the return to Judge evidence was impounded. (R811)

On May 10, 2017, Petitioner moved in limine to bar the introduction of the eavesdrop recordings in the absence of proof of mandatory statutory prerequisites for use. (C824-31) In this motion, Petitioner argued that, while the Illinois statute governing the use of eavesdrop recordings in criminal trials (725 ILCS 5/108 A-7) controls, its statutory language is properly interpreted in line with the United States Supreme Courts decision in United States v Ojeda Rios, 495 US 257 (1990). In Ojeda Rios, this Court interpreted the Federal eavesdrop statute, 18 USC 2518(a), which contains provisions virtually identical to the Illinois eavesdrop statute. Petitioner further argued that "to the extent that People v Nieves, 92 Ill 2d 452 (1982) and the federal court decisions on which it relied conflict with the later United States Supreme Court decision in Ojeda Rios, they are overruled by it." (C826)

The Circuit court reasoned that the purpose of the Illinois eavesdrop statute's immediacy requirements was to minimize the potential for tampering with the recording. (R862-64) Petitioner twice noticed the court concerning the accuracy of the recordings. (R868: R888) The circuit court denied Petitioner's motion to suppress the eavesdrop recordings (R863)

At the trial, Petitioner, presented a defense of self-defense – accident. (R1297) and alternatively argued reckless homicide. (R3213) The crux of the case was one of credibility between Petitioner and his friend Schweigert and the recollection of the in-person conversation on January 9, 2015. (R3212) The conversation in controversy was either a confession to murder, or Petitioner confiding in his friend to onset depression from the incident leading to Fox's death eighteen days prior, and the moral crisis over whether to go to the police. (R2797; R2827-32) The state presented two inconsistent, mutually exclusive theories of the incident. (R1271; R1512). Physical evidence and testimony of multiple witnesses corroborated petitioner's testimony of the incident. (R2774-83; R1546, R1661-64; R1271; R1447; R2982; R3103; R2950-60; R1775, R1779, R1775)

The state presented evidence that Petitioner shot Fox in his garage at 8:40pm on the evening of December 22, 2014. (R1342-43, 1360-63). Schweigert testified that while he and

Petitioner were drinking, Petitioner said, "I was so mad at somebody that I killed him. " (R1717) Schweigert did not believe petitioner. (Id) But a few days later, Schweigert contacted the police and later spoke with them. (R1724-25). Schweigert agreed to an eavesdrop and Petitioner made incriminating statements; over standing objections, the State played recording to the jury. (R1404-05)

Petitioner testified that Fox was intimidating, threatening, and intended to do him harm. (R2700-03, 2709-11; 2726; 2729; 2728; 2730-31; 2736) After accidently discovering a gun (R2737, 2740), Petitioner took the gun because of recurring panic attacks triggered by the last appearance by Fox at his place of work and Fox's intimidating physicality (6'10", 270 lbs.), deciding to carry the gun as a deterrent. (R2741) He never planned to shoot Fox. (R2742) Petitioner was not interested in the gun and envisioned it solely as a prop in the event the inevitable encounter with Fox became violent. (R2745) He put the gun in his car, and at the time had no idea how best to address the situation with Fox. (R2745)

On the morning of the incident, Petitioner went to Fox's to dissolve the stress of uncertainty and to disarm the issue (R2761) Petitioner drove his Audi Sedan and parked in front of Fox's house in the tight and densely compact neighborhood. (R2762) When Petitioner walked to the front of the townhouse, the gun was in his pocket. (R2762-62) Petitioner believed the gun was not loaded because he did not realize there was a third clip inside the gun as he had disposed of two loose clips that he picked up with the gun. (R2763) No one was home and Petitioner left. (R2764) That evening, Petitioner returned to Fox's house. (R2766) Petitioner parked in front of the house, put the gun in his pocket, and walked to the door. (R2769) Again no one answered, so Petitioner returned to his car and waited for about half an hour. (R2771-72) Then Petitioner saw Fox's car drive up and pull part-way into the driveway. (R2772-74)

Petitioner got out of his car and walked up to the drivers side of Fox's car (R2774) Fox was sitting in the driver's seat looking down at something (R2775) The Driver's door window was partially rolled down; Petitioner walked up and told fox that he would like to speak to him (R2776) Fox threatened him about not ever coming there (R2776) as Petitioner had never directly spoken with Fox as such, he felt that Fox mistook him for someone else. (R2776) Petitioner started to tell Fox that he thought he had mistaken him for someone else when Fox pulled up the driveway and into the garage. (R2776) Petitioner walked to the top of the driveway

feeling nervous and shaky. (R2777) Petitioner dropped his key fob and while he bent down to pick it up, Fox started to get out of his car. (R2777)

The gun was still in Petitioner's pocket at the time. (R2777) When Petitioner looked up after retrieving his key, Fox was rushing at him as he stood behind Fox's car just outside the garage. (R2778) Petitioner took a step back and Fox grabbed his arm. (R2780) He tried to kick Fox and was pulled against the car. (R2781) The gun went off in the struggle and Petitioner pulled away, (R2780). The only words exchanged were on the driveway. (R2781) Petitioner did not know if he pulled the trigger, but the gun went off while in his hand. (R2782) His ears were ringing and sound muffled; the only thing he remembered after that was retreating to his car and driving away. (R2783) He drove back to his office and felt very shaken and paranoid and iced his wrist injured in the event. (R2783-84) Petitioner testified he went to Fox's residence to resolve the issue, but afterwards he felt things were made worse and worried that either Fox or the police would escalate the situation. (R2784) Petitioner did not then know that Fox had been shot, or that Fox had died from a gunshot wound to the shoulder (R2788)

As to Schweigert, Petitioner never told him that he shot three times in the chest with a 45-caliber gun. (R2811-12) Petitioner told Schweigert about how Fox had randomly started appearing in his life and how concerning it was to him (R2812) Petitioner never told Schweigert that he hid in the bushes on December 22, 2014. (R2814) When Schweigert called him on January 13, 2015,Petitioner did not know the conversation was being recorded. (R2826) He recalled telling Schweigert that he was nervous and scared at the beginning of their conversation not because he had committed murder, but because the incident had happened. (R2827-29) Further explaining his statements in the recorded call, Petitioner explained that when he told Schweigert "I've never been as crazied about someone in my life", he was referring to the appearance of Fox (not Cole) in his life on four occasions. (R2831) In the recording Petitioner never said anything akin to, "I'm glad he's dead"; "He made me so mad", or "I had to do it" to indicate he intended to harm Fox. (R2833) Petitioner called Schweigert after the first conversation because he felt like he had burdened Schweigert and wanted to make sure he was okay. (R2834-35)

REASONS FOR GRANTING THIS PETITION

(1) State Law enforcement authorities are always testing the limit of Fourth Amendment Jurisprudence in an effort to narrow its applicable scope. This case involves one of the most egregious abuse of law enforcement power to come before this court. (2) This case contains a blatantly obvious application of Federal Preemption over State Law. (3) Criminal law and procedure should not be a game played by the prosecution of "catch-me-if-you-can." The willful disregard for the Constitution by the State in this matter is an afront to justice. (4) State Appellate Courts continually misapply harmless error doctrine. It is grossly inappropriate to egregiously misapply the law in cited, well preserved errors and then add a conclusory statement of harmless error and overwhelming guilt. In essence placing a fraud upon future courts and review. No legal authority exists to support this "sans error," "sans analysis" conclusory statement used to shield mistakes in decision-making. May this Court sayeth so. (5) Petitioner was denied a constitutionally adequate direct appeal, the effect of which was to have no appeal at all. Post-conviction procedure is no substitute and a clear path in the law is needed, demonstrating a method via recall of mandate to correct such mistakes when they occur. A matter of first, but important, impression for this Court.

I

The Illinois Courts incorrectly found that Petitioner's rights were not violated when he was arrested without a warrant inside his office building pursuant to a deceptive plan formulated by prosecution. The execution of which was calculated to extract incriminating statements from Petitioner through numerous tactics offensive to justice, including but not limited to, concealing from Petitioner his arrest and reason as well as misleading him as to the ramifications of a waiver of his Miranda Rights.

A court viewing the record from a thorough analytical framework of totality and balancing will conclude that the prosecution and law enforcement concocted an elaborate plan of gross deception in order to specifically and deliberately defeat Petitioners constitutional rights. The state knowingly used deceit and confusion in order to create an advantage. Indeed, an overriding ambition to gain a "second" confession via interrogation, despite allegedly gaining one on an eavesdrop the day before (a reciprocating predicate fact noted in the eavesdrop analysis) drove an elite team of law enforcement and a top state's attorney to negligently create and partake in the unlawful plan. With an eye toward protecting constitutional rights this Honorable Court

should move to deter this unacceptable practice of disguising factual arrests and deliberately denying constitutional protections. Doing so will not in any way hamper legitimate law enforcement activities nor impede lawful prosecution. Counsels' failure to competently defend constitutional rights under the Fourth Amendment aids the State in making the judiciary an unwitting party to the State's flagrant misconduct.

Here, Petitioner had a constitutionally protected reasonable expectation of privacy in his place of work. Law enforcement thus violated his Fourth Amendment rights, and a review of the totality of circumstances reveals the depth of the deception and illegality. Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. United States v. United States District Court, 407 US 297, 313 (1972). Fourth Amendment protection extends to any area in which an individual has a reasonable expectation of privacy. See Minnesota v Carter, 525 US 83, 88 (1998).

This Court has made clear that the private areas of the place of employment are entitled to just such a reasonable expectation of privacy. See Marshal v Barlow's Inc, 436 US 307, 312 (1978) ("Merchant's and businessman's premises and products were inspected for compliance with measures that most irritated the colonists, against this background it is untenable that the ban on warrantless searches was not intended to shield places of business as well as residence.") Offices and other workplaces are among the areas in which individuals may enjoy such a reasonable expectation of privacy and absent exigent circumstances, police must have a search warrant to enter any area in a place of business that is off limits to the general public. This Court held in Marshal v Barlow's Inc., at 315 ("the owner of a business has not, by the necessary utilization of employees [ ], thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents."); See also, O'Conner v Ortega, 480 US 709, 716 (1987) ("Within the workplace contexts this court has recognized that employees may have reasonable expectation of privacy against intrusions by police.") See v City of Seattle, 387 US 541, 543 (1967) ("The businessman like the occupant of a residence, has a constitutional right to go about his business free from unreasonable entries upon his private commercial property.") See also, Oliver v United States, 466 US 170, 178 (1984) (mentioning "the Fourth Amendment protection of office and commercial buildings.")

As shown by the evidence presented during the motion to suppress Petitioner had a reasonable expectation of privacy in the protected private areas of the business property to

trigger Fourth Amendment protection. The secured private parking area was contained within the four corners of the building basement and affirmative steps were taken to exclude the public. The secured, temperature-controlled parking area accommodated approximately fifteen business owners and exclusive employees who were granted privileged access via an electronic security system. Here law enforcement broke into the building and specifically defeated the security system in order to facilitate an unlawful intrusion into the private secured area. (R254-56)(R259) Law enforcement then made a non-consensual warrantless entry to arrest Petitioner.

An arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. Payton v New York, 445 US 573, 603 (1980). In the absence of exigent circumstances or consent, a law enforcement officer may legally search for the subject of an arrest warrant in the home of a third party only by first obtaining a particularized search warrant. Steagald v United States, 451 US 204, 205-06 (1981). Therefore, to affect an arrest on the business premises, law enforcement needed both an arrest warrant and a particularized search warrant, or probable cause with either consent or exigent circumstances, to enter the premises to arrest Petitioner. Steagald at 205-06, also Pembaur v. City of Cincinnati, 475 US 469, 474 (1986).

On warrantless arrests generally, People v Bass, 2019 Il App (1st) 160640, ¶ 62 ("taking together the text of our constitution and its historical interpretation by our Supreme Court, we conclude that the Illinois Constitution requires, in the ordinary case, a warrant to issue before an arrest can be made. Arrests based on investigative alerts violate that rule.") It has been widely held since Payton, warrantless entries into private premises are per se unreasonable absent probable cause coupled with exigent circumstances.

This was an arrest disguised by a plan to deceive Petitioner into thinking it was not an arrest. The deceptive plan consisted of two parts. First eight to twelve officers in tac-gear with guns drawn charged Petitioner to conduct a "terry stop". This was followed by two detectives who were staged down the street, separate and apart from the assault team, arriving in "nice clothes" and asking "nicely" that Petitioner voluntarily "accompany them to the station;" essentially serving the community caretaking function. Clearly from facts adduced, the prosecutor devised the plan. Just as in People v White, 177 Ill 2d 194, 220 (1987), the Illinois supreme Court concluded the state cannot make a credible claim that an exigency existed. It is

simply not possible that Petitioner was believed to be so dangerous that there was no need to arrest him.

There is no dispute that there was a deliberate and culpable multi-part plan designed with purposeful intent to disguise an arrest as a consensual encounter, to claim untoward advantage from the coerced statement, with the intention of obtaining a "second" "confession." See Brown v Illinois, 422 US 590 (1975); United States v Reed, 349 F3d 457, 466 (7th Cir 2003). Instead of trying to coerce Petitioner's consent, law enforcement should have submitted an affidavit to a magistrate rather than deploying their flagrantly abusive plan.

Det. Spradling admitted that part of the plan was to conceal from Petitioner the fact that he would be under arrest from the moment of confrontation, and that the prosecutor devised the plan. (R337, R349) Police made admissions evincing deliberate confusion. Det Hill admitted he did not tell what kind of investigation he "needed help with" (R436), and that his intention was to get Petitioner to make incriminating statements (R438) Thirty hours elapsed between the point where arguable probable cause was established and the time of the unlawful arrest. Indeed, it was found the plan was to use deliberate deceit to confuse Petitioner into thinking he was not under arrest for the purpose of eliciting incriminating statements. The trial courts denial of Petitioner's motion cannot be harmonized with the facts. This Court should intervene and grant the writ on these facts alone.

The use of a Terry stop, or a community caretaking conversation by themselves and in the proper setting suffices to conform to lawful conduct. Using them in pre-planned combination turns a law enforcement shield for on-the-spot maneuvering into a sword to gain untoward advantage to the detriment of Constitutional rights. Here, the primary illegality is the plan of gross deception used as a means to deliberately evade and recklessly disregard constitutional requirements. By Illinois statute = Official Misconduct. In following the state sponsored subterfuge, multiple violations occurred. Law enforcement made multiple illegal entries to the building, (R254-56) breached the security system, (R259) and unlawfully seized evidence while conducting a warrantless arrest and seizing Petitioner's vehicle. The police also failed to provide notice of arrest and for what cause. When Petitioner demanded he "had a right to know why he was at the police station," the detective used the void in notice to broker a Miranda waiver. These are not mere technical errors committed in neither and on-the-spot judgment nor unintentional miscalculations in the heat of the moment. This is a willful neglect of duty. There

is a law which governs arrest. That law is binding upon police officers, and arrestees obviously have a right to invoked it. While the two most common factors determining of a lawful arrest are probable cause and exigent circumstances, most often the common analysis omits the notice provision.

The testimony presented by the state at the pretrial hearing has all appearances of having been tailored to nullify constitutional objections. This is not surprising, given the deceptive plan that was obviously designed to isolate from Constitutional scrutiny, the initial stage of the contact between the police and Petitioner. Of course, if there was no arrest then no constitutional or privacy protections apply. The trial court ruled that Petitioner's statement was voluntary but criticized the police for the manner in which the Miranda warnings were given. One of the most egregious tell-tell signs of the intentional and willful intent to violate Petitioner's constitutional right is the quid-pro-quo demand; the detectives refused to tell Petitioner why he was at the police station (as in the interrogation video) unless or until Petitioner signed the waiver of Miranda. Petitioner was forced to give up one constitutional right in order to secure another constitutional right. All while, the Prosecutor observed from the adjacent room. (R486)

In People v Foskey, 136 Ill 2d 66, 86 (1990) (citing Brown at 605) the Illinois Supreme Court dimensionalized "flagrant officer conduct as that which is carried out in quality of purposeful or intentional misconduct." In People v White at 228, the court stated that a long delay after the police believe they have probable cause and the arrest of Defendant, plus the failure to seek a warrant, should be deemed flagrant conduct. The White court declared "police conduct may have been motivated-perhaps by the hope of a later finding that the defendant had not really been arrested," White at 228. Here, this Court need not speculate on what the motives may have been, the objective intent was clearly stated in the hearing.

In general, evidence garnered by illegal means must be suppressed if the evidence was obtained by exploitation of the initial illegality and not by means sufficiently distinguishable to be purged of the primary taint. Wong Sun v United States, 371 US 471,487-88 (1963). Miranda warnings do not automatically purge the taint of an unlawful arrest when flagrant misconduct is present, Brown at 603-04. Additionally, attenuation never occurred in this case. Petitioner requested to be interviewed in his office which was denied. Subsequently Petitioner requested to drive his own vehicle to the police station. This request was also denied. Petitioner was forced to go to the police station in the back of a police car with a detective sitting beside him.

Temporal proximity between the illegal arrest and the statement is important but must be considered in conjunction with intervening factors. One such factor involves the defendant freely agreeing to speak to police away from the arrest scene and driving his own vehicle to the meeting. United States v Fazio, 914 F2d at 958. Petitioner was not allowed to drive his own vehicle to the police station; hence, no attenuation occurred. Thus, the full deterrent effect of exclusion is warranted in this matter. This statement and all derivative evidence obtained by exploitations of these violations is subject to suppression. From the Illinois Supreme Courts opinion in Leflore, one can reason that when illicit conduct is present, the deterrent rational maintains its full force and exclusion is invoked due to conduct that was both "sufficiently deliberate and culpable", such that deterrence is effective and outweighs the cost of suppression. Id at 2015 IL 116799, ¶ 24. The prosecutor and law enforcement took an intolerable risk to abandon lawful conduct in an effort to gain incriminating statements. When viewed holistically, the State's handling of the unlawful arrest goes hand in glove with the eavesdrop violations and misconduct.

II

The Illinois Courts erred in refusing to suppress eavesdrop recordings where Federal law, via implied field and implied conflict preemption, has preempted Illinois eavesdropping law.

(a) The appellate court failed to conduct statutory construction analysis and de novo review of the numerous state errors in this matter. People v Keller, 2020 Il App (2d) 170750-U, ¶ 74, ¶ 78. In the absence of proper standard of review and analysis of the preemption of state law, the appellate court also made errors in legal decision-making and mistaken recall of evidence from the record.

The Illinois legislature provided one comprehensive statutory Article/Chapter 725 ILCS 5/108 A & B to regulate judicial supervision of electronic eavesdropping. In so doing the State of Illinois (a 2-party consent state) went a 'step beyond' by enforcing judicial supervision of all electronic eavesdropping consistent with broad constitutional values. The United States Congress preempted the field in electronic eavesdropping with Title IIII of the Omnibus Crime Control and Safe Streets Act of 1968. The Illinois legislature complied with the preemption of Title III and the model code set forth in 18 USC 2510 et seq. As expected, the overlapping language is precise, context consistent, and the intent self-evident.

A review of both statutory chapters, 18 USC 2510 et seq and Illinois Compiled Statute Article 725 ILCS 5/108 A & B et seq reveals deliberate and purposeful symmetry. While it is understood that the federal statute does not presently regulate one party consent, the Illinois legislature has long adopted the preemptive mandates and statutory construction of judicial supervision in Title III for consensual eavesdrop in Illinois. The language in Illinois 5/108 subpart A (consensual) matches subpart B (nonconsensual) in all pertinent parts, echoing one stated goal of Title III preemption – "provide a structured judicial process to avoid the possibility of divergent practices."

Further review of Federal and state statutes (USC 2510 and ILCS5/108) reveals that both legislative committees foresaw the potential for abuse wherein they designed the safeguard system to include two evidentiary sanctions to compel strict compliance with the prohibitions of the scheme. This includes both a general suppression remedy, intended to require suppression where there is a failure to satisfy any of those requirements that directly and substantially implement congressional intent, and a second punitive exclusionary remedy for non-compliance with the immediate sealing requirement. The statutory scheme equally balances requirements between pre and post recording procedure, indicating equal importance. One cannot think that Congress perversely required law enforcement officials to jump through statutory hoops it considered unnecessary. The State claimed that post recording rules were mere technical errors. Petitioner argues a pattern of egregious prosecutorial misconduct.

Under both Illinois and Federal wiretap laws, eavesdrop recordings must be (1) returned to the judge who issued the eavesdrop order; (2) returned immediately upon the expiration of the order; (3) sealed immediately upon the expiration of the order; and (4) all the above shall be a prerequisite for the use or disclosure of the contents or any evidence derived therefrom. Here, the prosecution failed to meet all these requirements. The content was introduced to the press post arrest, in the denial of bail hearing and the grand jury without prior notice as required by 725 ILCS 5/108A-(8)(c), and without mandatory foundational prerequisite for use and disclosure 725 ILCS 5/108A-7 and 725 ILCS 5/108A-2. The prosecution disregarded 100% of post recording requirements meant to protect 4th, 5th, 6th, and 14th Amend rights. These violations infringe identical statutory provisions found in 18 USC 2515, 2517, and 2518; 725 ILCS 5/108B-2, B9, B11 and B12; and 5/108A-2; A7 and A8. The recordings should have been suppressed because Illinois law has been preempted by Title III.

Federal law preempts state law under the supremacy clause in any one of the following three circumstances: (1) express preemption where the United States congress has expressly preempted state action; (2) implied field preemption where the United States congress has implemented a comprehensive regulatory scheme in an area, thus removing the entire field from the state realm; or (3) implied conflict preemption, where state action actually conflicts with federal law. The key inquiry in any preemption analysis is to determine the intent of the United States Congress. Carter v SSC Odin Operating Co., LLC, 237 Ill 2d 30 (2010). In the case before the court both (2) comprehensive regulatory scheme and (3) implied conflict preemption apply. See People v Allard, 2018 Il App(2d) 160927, ¶ 25 (regulatory filed of electronic surveillance); Sprietsma v Mercury Marine, 197 Il 2d 112, 117 (2001) (State action conflicts with federal law). The key preemption inquiry, determining congressional intent, has been completed by a unanimous U.S. Supreme Court in 1990. See U.S. v Ojeda Rios, 495 US 257, 259-60. The Court in essence affirmed the plain language of 18 USC § 2518, resolving a split among Federal Circuit Courts.

> "Recording shall be done in such a way as will protect the recording from editing or other alterations;" "[i]mmediately upon the expiration of the period of the order or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions." Section 2518 (8)(a) has an explicit exclusionary remedy for noncompliance with the sealing requirement, providing that "[t]he presence of the seal provided for by this subsection or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517." Id. 495 US at 259-60.

As established, Illinois statutory law tracks the foregoing language in Ojeda Rios and §2518(8)(a). In Petitioner's case, the return was to a non-issuing associate judge and was 77 days after the order expired and 104 days after the contents were first exposed to the press and unlawfully used in the denial of bail hearing. No explanation whatsoever, let alone a reasonable explanation for absence of a seal was given making the recordings in question inadmissible; yet, the trial court admitted the recordings. This error was upheld by the appellate Court and exhausted with the Illinois Supreme court, in denial of due process. Ojeda Rios requires that any such explanation must have been presented in the trial court. In failing to tender the recordings to the issuing judge the state also offered no explanation and in fact attempted to obstruct the transparency of the issue. (R811-14, R827, R832; R854-R857). This Court in Ojeda Rios

expressed the "danger of permitting the Government to avail of a minimally restrictive eavesdrop suppression regime." Here, the government view of mere technical errors creates the anomalous result that the prosecution could ignore all post recording requirements without risking a penalty. Ojeda Rios at 263; People v Keller, supra.

In People v Nieves, 92 Ill 2d 452, 458 (1982), eight years prior to Rios, the Illinois supreme Court found that the relevant language in the Illinois and Federal statutes "is virtually identical in all pertinent respects." The Illinois Supreme Court, in noting this as a matter of first impression in Illinois, relied on Federal Courts of Appeal interpretation of the federal eavesdrop statute when interpreting the immediate sealing prerequisite of Article 108. The state supreme court did not distinguish its holding on the basis of consent. Nieves happened to be a consensual eavesdrop case but could have easily been a nonconsensual case. In full effect, Nieves is controlling of judicially supervised eavesdrop with an immediate sealing prerequisite in Illinois (5/108 A&B). The Nieves court determined that the issue of consent and non-consent is "not apples and oranges." Rather, the Nieves court examined the two issues together and articulated its test in express reliance on the analysis of the wrong side of a split among federal circuits, citing: Chun, 503 F2d 533, 541-42 (9th Cir, 1974); Lawson, 545 F2d 557, 564 (7th Cir. 1975); and Angelini, 565 F2d 469, 471 (7th Cir. 1977). This Court in Ojeda Rios (1990) resolved the dispute, providing the proper interpretation of congressional intent. Thereby, the Nieves, (Lawson, Angelini) test has been preempted by the strict reading of Title III and the correlated state counterparts. Illinois has been in implied conflict preemption since 1990, where action following Nieves directly conflicts with existing federal law.

Paradoxically, 5/108A exists as both a 'step beyond' Title III and at the same time is preempted by Title III. It is a 'step beyond' because it regulates consensual overhear where the federal statute does not. At the same time, 5/108A is preempted by federal law and Title III via its symbiotic existence with 5/108B in the comprehensive statutory article to regulate Judicial Supervision of electronic eavesdropping. The identical overlapping language and self-evident intent, as held in Ojeda Rios, prevails. 5/108A holds two simultaneous truths, argument to the contrary defies a rational assessment of the issue.

It is clearly established law that state laws governing the field of wiretap are preempted when they are less restrictive. In examining the different standards with which state courts have determined whether state wiretapping statutes are "less restrictive legislation" than Title III the

Illinois 2nd Dist. Appellate Court in People v Allard, 2018 Il App2d 160927 ¶ 4, considered as persuasive authority State v Bruce, 295 Kan 1036, 287 P3d 919 924-25 (2012) (holding that State officials must follow the federal wiretap statute to the letter), and Pulawski v Blais, 506 A2d 76, 77 (R.I. 1986) (noting how title III has "preempted the field in wiretap and established minimum standards for the admissibility of evidence procured through electronic or mechanical eavesdropping, "and holding that" the scope of Title III's authority extends to both federal and state courts," such that state courts must adhere closely to the limitations articulated in Title III on the use of eavesdrop recordings). The Allard court reasoned: "by enacting Title III to delineate how states may authorize applications for wiretap orders (18 USC §2516), Congress preempted the regulatory field of electronic surveillance, and therefore Illinois may not enact standards that are less stringent than the requirements set by the federal statute." Allard at ¶ 25. This is the same Appellate District as at issue in this Petition. A more well-reasoned analysis led a different panel of judges to determine that strict adherence to Title III is required. In this case, the lower court's conclusion to the contrary is against the manifest weight of the evidence and its findings are unreasonable and arbitrary.

A central question raised in this petition is the abrogation of People v Nieves (1982) due to federal preemption. However, a larger threat to fundamental fairness is a complete failure to follow, enforce, and administer statutory law. This failure is by judicial and quasi-judicial actors at all levels. The gross indifference to regulated eavesdrop law is indicative of a process out of control and belies the legislative intent and unambiguous language of the law. The statute is treated as an inconvenience not a comprehensive law requiring strict adherence. This case is illustrative of fatally broken procedure. Petitioner respectfully requests the Court to intervene, using its authority to restore due process via enforcement of the intent of strict adherence to these requirements.

Courts reviewing the general suppression clause under the eavesdrop statute also look generally whether there were intentional efforts to evade statutory requirements. This would include where the integrity of the recording is challenged, affirmative evidence of bad faith, whether the government gained advantage, or if the defendant was prejudiced by government violations. All of these factors apply to this case. (See 5/108A-9; 5/108B-12, 18 § 2518 (10)(a))

In Petitioner's Emergency Motion to Recall Mandate [petitioning the denial of the PLA] see Appx H, twenty-one violations or procedural breaches detail a collective failure to comply

with and enforce the fidelity of the eavesdrop law. Petitioner asks the Court to consider the cumulative failures in this matter, raising the question of where is the fiduciary duty to protect the fundamental rights of the defendant? Bad actors do exist. The police and prosecution were personally responsible for a deluge of publicity in post-arrest press and in the denial of bail hearing, unnecessarily creating a public sensation by unlawful disclosure and fabrication of evidence. The bail denial hearing epitomizes the misconduct.

An objective look at the bond hearing shows it as nothing more than a staged media event produced for the state's advantage. In order to capitalize on the saturation media coverage generated the day prior, the state filed a motion for expanded media coverage. This was done with purpose. The prosecutor insisted on reading his motion aloud in the media bowl cum courtroom. In so doing the state further revealed information in direct violation of trial publicity rules. This included the use of the eavesdrop device, contents therein and referring to it as a recorded "confession" which it was not. Evermore egregious, the proffer included other material misrepresentation and undeniable evidence fabrication. Aside from the alleged 'confession' the state proffered items of evidence that do not exist and were never offered at trial. The fabrications and misrepresentations were used to corroborate the story in order to satisfy guilt by presumption and deny liberty. The state also chose to include inflammatory comment that served no legitimate judicial purpose other than to create public sensation and outrage aimed at prejudicing defendant.

These efforts were timed to have maximum impact. It is difficult to think that the state went to such effort and took such risk with fair trial rights, if there was no substantial likelihood of success. Indeed, despite a demand for an immediate trial, petitioner was advised to forgo that right due to the bias created by this spectacle.

In the quasi-judicial minister of justice role the prosecution had a duty to self-regulate, to not disclose and fabricate evidence in a media event disguised as bond hearing. See Bridges v California, 314 US 252, 263 (1941), also Shelton v Tucker, 364 US 479, 488 (1960) ("even though the governmental purpose be legitimate and substantial that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.") In the eavesdrop suppression oral argument the prosecutor stated, "there was absolutely nothing that was wrong about what anybody did at that bond hearing." The Appellate Court could not find the "hint of a whisper" of prejudice to the Petitioner (Keller, ¶ 64). The

Appellate Court chastised Petitioner (Id ¶ 63) for needlessly "making" the court read the fourteen page transcript, but could find no eavesdrop violation or prejudice [1]. The Appellate Court concludes that "by failing to interpose a contemporaneous objection, [Petitioner] has forfeited this issue. Petitioner argues the bail denial hearing was constitutionally invalid for numerous reasons and the proper judicial objective could have been achieved without violating such fundamental rights if one were so inclined.

The prosecutorial overreach surrounding the constitutionally invalid hearing violates mandatory requirements under two statutes and the Rules of Profession Conduct.

1. The rules governing trial publicity are codified in Illinois Supreme Court Rules and are to be treated as law. Rules of Prof. Con. 3.6 comment 5-subj 1-6 and 8 and 3.8 Smith-Hurd Anno. [2]
2. The interoperable eavesdrop clauses 5/108A-2 disclosure, A-7 Immediate sealing prerequisite, and A-8 Notice, as established in this petition above, mandate the admissibility of evidence and provide remedy for non-compliance.
3. The bail denial statue has its own mandatory evidentiary requirement, mirroring that required by 5/108A. See 725 ILCS 5/110-6.1(c)(1)(a) "The state shall tender to the defendant, prior to the hearing, copies of defendant's criminal history, and any written or recorded statements and the substance of any oral statements made by any person, if relied upon by the state in its petition."

The 1/16/15 hearing was constitutionally deficient for additional reasons. The trial court failed to properly weigh bail denial factors and failed to acknowledge or consider any release

---

(1) The presiding Appellate judge, as named plaintiff in Devine v Robinson, 131 F. Supp2d 963 (7th Cir. 2001) Argued IL. S. Ct. RPC (trial publicity) 3.6 and 3.8 were infringements that 'chilled' the prosecution and disallowed speech prosecution wished to engage in. Fair trial rights prevailed in the 7th Circuit in 2001.

(2) US v Brown, 218 F3d 415, 423 (5th Cir. 2000) (pretrial publicity poses significant and well-known dangers to a fair trial); Gentile v State Bar of Nev., 501 US 1030, 1075 (1991) (attorneys have extraordinary power to undermine or destroy the efficacy of the criminal justice system); Chi Council of Lawyers v Bruce, 522 F2d 242, 250 (7th Cir. 1975) (attorneys statements are often the source of prejudicial publicity); Estes v Texas, 381 US 532, 540 (1965) (consequently, when irreconcilable conflicts do arise, the right to a fair trial guaranteed by the 6th Amendment to criminal defendants and to all persons by the due process clause of the 14th Amendment, must take precedence over the right to make comments about pending litigation by lawyers who are associated with that litigation if such comments are apt to threaten the integrity of the judicial process).

conditions. [5/110-6.1(c) and 5/110-10(b)]. The court further failed to admonish Petitioner that he could appeal the denial or that he was entitled to bail if the state failed to bring the matter to trial withing 90 days. [5/110.6.1(f) and (g)].

This is critically meaningful information. As in other waivers of fundamental rights, there should be mandatory admonishment (See eg. Glasser v United States, 315 US 60, 70-71), tied to clearly established relinquishment (See eg. Johnson v Zerbst, 304 US 458, 464). Here, the allegedly altered evidence was returned to a non-issuing judge 104 days after it was unlawfully broadcast in the hearing and well after the 90-day requirement. The only admonishment by the trial court was about "escaping from jail and having a trial in abstentia." (R20)

Finally, pertaining to the denial of bail hearing, the Appellate Court ruled the issue was forfeited for failure to raise a contemporaneous objection. Keller at ¶ 63 This is manifest error, a state instigated misapprehension of the law. See 110-6.1(c)(1)(b), pertinently: "The rules concerning the admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing." This guidance combines with "suppression motions will not be entertained, and that unlawful search and seizure is not relevant to this state of the prosecution." As such, the rules of evidence do not apply. An objection would have been futile, and thus unnecessary. This issue was not forfeited, it was wrongly decided.

The bail denial statute (presupposing ethical conduct) anticipates the prejudice caused by a proceeding designed to defeat the presumption of innocence. (5/110-6.1(f) and (i)) Idealistic statutory construction fails to meet practical reality, particularly when judicial and quasi-judicial actors fail to adhere to the law. The current presumption of innocence case law also misses the mark based on the facts of this case. The clear conclusion is that the presumption of innocence cannot be neatly compartmentalized only at trial when misconduct creates an unconstitutional public record and deliberately manipulates publicity and procedure to state advantage.

The loss of pre-trial liberty due to the State's misconduct is more prejudicial. At the time of the eavesdrop suppression motion petitioner had been incarcerated for over two years and was confronting witnesses who counsel claimed were biased by the publicity and public presumption of guilt. Witnesses who either refused multiple requests to be interviewed for trial preparation or stated they were aware of guilt by publicity – exhibiting demeanor bias. (R750-51) The very thing jurors are instructed to observe to determine credibility. With certainty, witnesses carried

this biased demeanor with them to the stand. This was not, as the appellate court said, speculation. It was a tangible impairment to a fair trial. Other indications of petitioner and the case being prejudiced in favor of guilt were present. Consider: i) cumulative health effects of jail living conditions including denial of private psychological service to confront trauma and P.T.S.; ii) prohibitive restrictions and impediments to participating in the preparation of the defense; iii) prevented from substituting lead counsel with counsel of choice (see: R597, R747, R806-07, R827-28) Petitioner was actively working to replace counsel due to an obvious lack of preparedness and infirm grasp of critical legal arguments; iv) unable to freely and privately conduct trial preparation; v) substantial loss of personal finance and business ownership. Undoubtedly there is an immediate negative impact to the loss of liberty, but most harmful is the non-linear attack on sixth amendment autonomy interests. The exponential deleterious consequences are incalculable and indeterminate to a reviewing court but hauntingly present to the accused. By law, petitioner should have been given bail after 90 days. Criminal law and procedure should not be a game, played by prosecution, of 'catch me, if you can'. In the quasi-judicial minister of justice role prosecution had a duty to protect constitutional rights. This proceeding, one snapshot of an egregious pattern of misconduct, was used to fraudulently deny pretrial liberty, destroy the presumption of innocence, and effectively defeat petitioners speedy trial demand. The compounding effect on fundamental rights and fairness "affects the frame-work within which the trial proceeds." The arguable facts support consideration under structural error jurisprudence.(3) The egregious misconduct existed from the moment of the plan for the unlawful arrest, through publicity-building press releases and denial of bail hearing, and the grand jury through the use of the unlawful content from the allegedly altered eavesdrop. The negative synergistic effect of material prejudice is analyzed more deeply in petitioners Motion to Recall the Mandate Appx H and I.

(b) The Illinois Supreme Court is obligated to follow the Supremacy Clause and provide a merits ruling on the abrogation of People v Nieves, 92 Ill 2d 452 (1982), Judicial Supervision of Electronic Surveillance with an immediate sealing requirement by law.

The Illinois Courts have an absolute duty to the Supremacy Clause of the United States Constitution. U.S.C.A. art.vi, cl.2. Thus, state law is null and void if it conflicts with federal

(3) See United States v Gonzalez-Lopez, 548 US 140, 150 (2006)

law. Sprietsma v Mercury Marine, 197 Ill 2d 112, 117 (2001). Under the authority of Canons of Statutory Construction – Canon of Avoidance; Omnibus Crime Control and Safe Streets Act ("Title III"); United States v Ojeda Rios, 495 US 257 (1990); Clark v Martinez, 543 US 371 (2005), acknowledged by the Illinois Supreme Court in People v Gutman, 2011 IL 110338, ¶ 25; and 725 ILCS 5/108 B-7 (g)(2) ("When the language of this Article is the same or similar to the language of Title III of P.L.90-351 (82 Stat.211etseq.,codified at 18 USC 2510 et seq), the courts of this state in construing this article shall follow the construction given to Federal Law by the United States Supreme Court or United States Court of Appeals for the Seventh Circuit"); this court must rule that People v Nieves, 92 Ill 2d 452 (1982) is null and void, ie, abrogated. As established in this petition above, Federal law preempts state law under the Supremacy Clause in any one of the following three circumstances: (1) express preemption; (2) implied field preemption; or (3) implied conflict preemption. The key inquiry in any preemption analysis is to determine the intent of the United States Congress. In this case, as shown in the earlier analysis, both (2) implied field preemption (Title III); and (3) implied conflict preemption (Nieves/Ojeda Rios) apply. Congressional intent was stated by this court in
1990. See US v Ojeda Rios, 495 US 257.

In Clark v Martinez, 543 US 371 (2005) this Court rejected "the notion that the same word in the same statutory provision could have different meaning in different factual contexts." People v Gutman, 2011 IL 110338 ¶ 25. In Martinez the issue was the same immigration detention provision whereas here it is the same sealing provision. In Martinez the government attempted to distinguish between admitted aliens and non-admitted aliens. Here, it is between consent and non-consent. This Court made clear that these distinctions cannot prevail under the Cannon of Avoidance. Martinez, 543 US at 381-82 (the cannon is thus a means of giving effect to congressional intent, not of subverting it. And when a litigant invokes the cannon of avoidance, he is not attempting to vindicate the constitutional rights of others, he seeks to vindicate his own statutory rights).

The analysis in part (a) above showed the identical overlapping language across federal and state statutes as well as the symbiotic relationship within Illinois Article 108. The same context. The same purpose. In pari materia. A logic consistent with the Law of Transient Properties in mathematics. If: a=b, and b=c, then A=C. This is consistent with a primary goal of

Title III, to safeguard the field of electronic eavesdropping against divergent practices (to wit: implied field preemption). It is irrefutable fact that ILCS 5/108 is preempted by Title III (see 5/108 B-7(g)(2)). Illinois courts are operating under implied conflict where current state action under Nieves conflicts with federal law in Ojeda Rios (1990). Martinez, 543 US 371; Gutman, 2011 IL 110338; SSC Odin Operating Co. 237 Ill 2d 30; Sprietsma, 197 Ill 2d at 117.

Nothing in the Nieves holding specifies that this law pertains only to consensual overhear. Nor could it. No court would make a holding based, by design, on unequal treatment. See Martinez, 543 US 371. Nieves interpreted a sixteen-day delay, law enforcements failure to comply with statutory laws (rights) and provided relief to non-compliance by applying a factor test. A judicially created relief, created by 1970 era federal courts interpreting identical language in the federal statute. The test was based on US v Chun, (9th Cir, 1974); US v Lawson, (7th Cir 1975); and US v Angellini (7th Cir, 1977), which were specifically overruled by the Rios Court in 1990. Nieves is ensnared in bad law.

In the present matter the appellate court romanticized the bad law from the federal courts. (Keller, at ¶ 78) To conclude, as the state courts have, that a case (Nieves) founded on identical language to federal statute based entirely on the 1970 era federal courts' erroneous and unlawful determination of said identical language, and in which all the cases used for foundation were overruled by Ojeda Rios, was no longer relevant because the State has now determined that the federal legal underpinnings are irrelevant (to wit: inconvenient) to their case, is perverse circular logic. Affirmative evidence of a mistake in decision making by the appellate court and supreme court of Illinois.

The path that led the Nieves Court astray, federal interpretation of identical language, is the path that leads to the prevailing operative law. The one path preemption and the supremacy clause require per the authorities above. Anything less violates Petitioner's right to due process and equal protection, and places Illinois in continuous conflict with federal law.

III and IV

Issues III and IV were presented to the Supreme Court of Illinois in the form of pro-se filings thereby providing the State the opportunity to address their merits. See Kizer v Uchtman, 165 Fed Appx 465 (7th cir., 2005); Clemmons v Delo, 124 F 3d 944 (8th Cir 1997) ("if counsel refuses to include a claim requested by the petitioner and the petitioner then moves for leave to

file a supplemental brief pro-se asserting the claim, a subsequent default by the state court for failing to raise the claim may be excused").

III

The presiding appellate judge labors under a per se conflict of interest thereby introducing structural error into the appeal.

The Administration of the law should be free from all temptation and suspicion, so far as human agencies are capable of accomplishing that feat. The Illinois Supreme Court in People v Coslet, 67 Ill 2d 127, 133 (1977) established a per se conflict of interest rule to describe situations in which an absolute disabling conflict of interest exists, thereby removing the necessity to prove prejudice. Analysis shows that Coslet restated the doctrine set forth in People v Gerold, 265 Ill 448 (1914) which established the per se conflict of interest term. In Gerold the court stated:

> "The rule has been firmly established that an attorney cannot represent conflicting interests or undertake to discharge inconsistent duties....this rule is a rigid one, designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties." Gerold, 265 Ill at 478-79.

The reviewing courts of Illinois have utilized the per se conflict of interest rule in numerous instances. See eg., People v Stoval, 40 Ill 2d 109 (1968); People v Bradshaw, 171 Ill App 3d 971 (1988); People v Kester, 66 Ill 2d 162 (1977); People v Washington, 101 Ill 2d 104 (1984); People v Spreitzer, 123 Ill 2d 7 (1988); People v Precup, 73 Ill 2d 7 (1978); People v Fife, 76 Ill 2d 418 (1979). Additionally, Illinois revised statutes, chapter 110A, paragraph 61 (c) (4) states:

> "Avoidance of Impropriety. A judge's official conduct should be free from impropriety and the appearance of impropriety."

Established case law shows that petitioner has a protected right to a fair and impartial direct appeal. Case law further shows a judge has an obligation to assuring the public that justice is administered fairly because the appearance of bias or prejudice can be as damaging to the public confidence as would be the actual presence of bias or prejudice. There must be a concerned interest in ascertaining whether public impression will be favorable and the rights of a defendant protected even though the judge is convinced of his own impartiality. People v Austin, 116 Ill App 3d 95 101-102 (1983). The judiciary is bound to maintain a favorable

impression that all defendants receive impartial review and that justice is administered fairly. This obligation to our system of justice remains steadfast even though a judge is unequivocally sure that he is not partial to either side in a case before the court. See ABA Standards for Criminal Justice, Criminal Appeals, Stnd 21; Il Supreme Court Rule 62.

In the Petitioner's case there exists an appearance of impropriety that creates a per se conflict of interest. The presiding judge only a few years removed, was the direct supervisor of the midcareer prosecutor accused of Official Misconduct – a class 3 felony in Illinois. As head of the State Attorney's Office ("SAO") the Assistant State Attorney ("ASA") was one of his key reports, someone whose career he advocated for and promoted. This was not a short term relationship but one that existed for an extended number of years. To place oneself in a position to decide between alleged felonious conduct of your former direct report and a fair unbiased criminal direct appeal is an untenable conflict and directly presents the appearance of impropriety. This is further underscored by the arbitrary and unreasonable analysis on this issue as well as other questionable analysis in the appeal.

This circumstance compares to the assignment of a special prosecutor in the Chicago Police, John Burge torture commission investigation. In 2002 Judge Biebel, presiding judge from Cook County determined that State Attorney Devine labored under a per se conflict of interest. The judge determined that State Attorney Devine's former law firm, several years prior, had represented Burge and that while Devine was not the State's Attorney at that time he was still tainted by the firms prior representation. Judge Biebel also determined that a statute of limitations did not apply and although Devine was not a State's Attorney at the time, his taint extended to the entire Cook County State Attorney's Office. The disqualification of the entire State Attorney's Office served to avoid the appearance of impropriety. (See Mem. Opin. Order, Misc 4) By parity in reasoning petitioner submits that this association between judge and Assistant State Attorney played an integral role in the administration of justice and is not subject to any statute of limitations. That the presiding Appellate judge was affected at least subliminally by the conflict is natural. In People v. Bradshaw, 171 Ill App 3d 971 (1988), the holding was prophylactic in nature, meant both to extinguish the possibility that extra judicial factors would come into play and to maintain the appearance of propriety. It is the right of the defendant to have an impartial direct appeal and the duty of a court to avoid any appearance of impropriety.

IV.

Affirmative mistakes in decision making and mistaken recall of evidence create a breakdown in the appeal process resulting in standalone due process violations.

The appellate court found no error using mistaken decision making and then found all non-errors harmless due to overwhelming evidence. In order to find overwhelming evidence the court did not accurately recall or consider crucial defense evidence when reaching its judgment. Petitioner therefore did not receive a fair appeal. The mistakes in recall are many.

An appellate court on review of a criminal conviction may do more, but not less, in incisive consideration and close scrutiny of the record and applicable law. No matter the strength of the record and advocacy, when an issue is before the court, the court retains independent power to identify facts and apply the law. See Kamen v Kemper Financial Services, Inc., 500 US 90, 99 (1991), Illinois courts of review have held that the failure of a court to recall and consider evidence that is crucial to a defendant's defense is a denial of the defendant's due process right. People v Mitchell, 152 Ill 2d 274, 323 (1992); People v Bowie, 36 Ill App 3d 177, 180 (1976) (Conviction reversed where the court failed to recall crucial evidence of the defense). A judge must consider all the matters in the record before deciding the case. People v Bowen, 241 Ill App 3d 608, 624 (1992). Where the record affirmatively shows that the court failed to recall crucial defense evidence when entering judgment, the defendant did not receive a fair proceeding. People v Simon, 2011 Il App (1st) 091197, ¶ 91; Bowen, 241 Ill App 3d at 624; Bowie, 36 Ill App 3d at 180.

Here, the appellate court found no errors by using mistaken decision making and then found all non-errors harmless due to overwhelming evidence. In its overwhelming evidence judgment the court did not accurately recall or consider crucial defense evidence when reaching its conclusion. The appellate court's mistaken decision making and overwhelming evidence portrayed in the Rule 23 order constitutes affirmative evidence that it did not remember or consider the crux of the defense nor consider a shred of evidence favorable to the defense. Bowie, 36 Ill App 3d at 180. Whether intentional or inadvertent this failure to recall crucial evidence places a fraudulent record before this court. This deceptive record is in the appellate court's written order so it is obvious it was the root of the court's decision making process.

Without question, an appellate court on review of a criminal conviction may do more, but not less, in incisive consideration and close scrutiny of the record and applicable law. No matter the strength of the record or advocacy, when an issue is before the court, the court retains independent power to identify facts and apply the law. Kamen, 500 US at 99. Under Illinois Supreme Court Rule 366 (a)(5), it is within the court's right to act sua sponte. Additionally, problematic to the appellate court's mistaken recall of evidence is the State's failure to comply with Illinois Supreme Court Rule 341 (h)(6) and (i). Rule 341 (h)(6) requires the appellant to provide an accurate statement of facts, outlining the pertinent facts accurately and fairly without argument or comment. The Rule does not require the appellee to include a statement of facts. However, if he or she chooses to do so, the appellee must follow Illinois Supreme Court Rule 341 (h)(6). The rules of procedure concerning appellate briefs are rules and not mere suggestions. Niewold v Fry, 306 Ill App 3d 735, 737 (1999). Failure to comply with the rules regarding appellate briefs is not an inconsequential matter. Busmac Metal v West Bend, 356 Ill App 3d 471, 478 (2005). Where a brief has failed to comply with the rules, the court may sanction the offender by striking or disregarding non-compliant portions. Hall v Naper Gold Hosp., LLC, 2012 Il App (2d) 111151, ¶ 9.

In this case, the first failure to recall crucial evidence is the appellate court's statement "...defendant does not allege that the (eavesdrop) recordings were altered in any way." People v Keller, 2020 Il App (2d) 170750-U, ¶ 5. This is an egregious failure to recall the record in light of the court's statement that pretrial proceedings were the focus of the issues raised on appeal so the court explicitly focused its review on these facts in the record. Id; Kemper, 500 US at 99. The record affirmatively evinces trial counsel correcting the record concerning this allegation on May 10, 2017, with both the trial court and the state affirmatively acknowledging the allegation. (R868) The allegation was reiterated by trial counsel on May 15, 2017, and for a second time both the court and the state verbally acknowledged the allegation. (R888) The state fails to include this fact in their brief. Naper Gold Hosp. LLC, 2012 Il App (2d), 111151, ¶ 9.

Second, the appellate court fails to recall significant affirmative evidence of doubt as to where and how the incident occurred. "Fox was shot in his garage as 'he attempted to exit his car.'" Keller, 2020 IL App (2d) 170750-U ¶ 5. Here, the record affirmatively shows the appellate court failed to recall evidence crucial to the defense and crucial to reasonable doubt as

to the incident and ultimately to the crux of the defense--credibility. People v Mitchel, 152 Ill 2d at 323; Bowie, 36 Ill App 3d at 180; Bowen, 241 Ill App 3d at 624.

By example, the police affidavit for the overhear application clearly states that Fox was found leaning against the drivers' side of his car. The officer who arrived at the scene "only a minute after the 911 call" testified the car door was swung open and that Fox was sitting, butt on the garage floor leaning back in the hinge between the open door and the frame of the car. His back was against the door and he was facing toward the back of the car. Petitioner testified that the altercation occurred at the back quarter-panel – trunk of the car. That after the gun fired petitioner pulled himself free from Fox's grasp and retreated from the scene. Both shell casings were back and to the right of the driveway where, as the prosecutor stated, you would expect them to be if (Fox was) shot from the rear area of the car. (R1271) The second prosecutor testified, by way of leading questions on re-direct of a state witness, that Fox was shot while seated in the car at point blank (but greater than 24") range. (R1512) A defense witness testified to a notable bruise on petitioner's left wrist a day or so after the incident. (R3103-04) Petitioner testified to the injury resulting from the altercation. (R2937-38)

Third, the appellate court recalled the state's theory of the case, Keller, 2020 Il App (2d) 170750-U, ¶ 86, that petitioner waited in the shrubbery yet failed to recall that the evidence technician stated on direct examination that he was an expert in tire track and shoe track evidence collection. (R1546) At Petitioner's encouragement this was opportunistically developed on cross examination confirming that it was raining the night of the incident and that the evidence technician diligently inspected the crime scene for footprints. Importantly, this included the wet receptive uncovered soil in the shrubbery area where the state insisted petitioner was hiding. The evidence technician confirmed that there were no footprints nor any mud tracked onto the driveway or garage floor. (R1662-64)

The court recalls the testimony of the medical examiner. "She found no evidence of close-range firing, meaning within 24 inches", Keller 2020 Il App 2d 170750-U, ¶ 83. Here, again the appellate court fails to recall the facts established on cross-examination. This determination was essentially junk science, (R1522) based on nothing more than an inconclusive visual inspection of multiple layers of textiles that had been heavily handled by that time. "I'm not an expert in textile, analysis." (R1523-24) Not even a basic swab test for GSR was performed on the clothing. The evidence affirmatively shows the medical examiner's comment

on close-range firing was not credible nor reliable. The appellate court fails to recall evidence crucial to the crux of the defense and, again the state fails to comply with Illinois Supreme Court Rules by failing to include this point and the footprint evidence in their statement of facts. Argument by omission is persuasion favoring the case to the state's advantage – neither accurate nor fair and in violation of Illinois Supreme Court Rule 341 (h)(6). Naper Gold Hosp. LLC., 2012 Il App (2d) 111151 ¶ 9; Burmac Metal, 356 Ill App 3d at 478. The court failed to recall any of the foregoing facts from the record.

Fifth, the appellate court recalls in its order that defendant was driving a rental car, restating another theory of the State. However, the court fails to recall that the evidence affirmatively shows petitioner drove his own car – affirmed via state toll booth evidence the day of the incident.

Sixth, the appellate court fails to recall the testimony of the incident witness neighbor who lived across the street. The court mischaracterized the testimony as seeing a "dark colored car leaving" when in actuality the witness stated he saw a "black or dark sedan" leaving "similar to a Chevy Malibu." The state theorized a full-size SUV. Petitioner owned a black sedan. This is another failure in recall of crucial evidence. Petitioner was not trying to conceal his identity or commit a pre-planned murder. Also, here again the state violates Illinois Supreme Court Rule 341 (h)(6) in their brief before the court.

Seventh, citing this same witness, the husband Mr. Evangelista, the court states that he did "not hear arguing". Mr. Evangelista actually said voices. But more to the point, it was developed by cross examination and a different defense witness (Mrs. Evangelista) that the husband was inside the garage at a workbench and preoccupied with hurrying the wife up so as not to lose the heat in his garage – he was working on a hobby. The wife, nearly across from the incident, was unloading groceries from the back of her car in the driveway and heard "arguing" as she was bringing in the last bag of groceries. (R2982) This testimony corroborated petitioner's testimony of a short, hostile exchange on the street. The appellate court fails to recall this witness (the wife) and her credible testimony which was crucial to the defense and indicative of reasonable doubt. It is also noteworthy that Mrs. Evangelista was suffering from an inner ear issue at the time of testifying and had an issue with her balance, needing assistance to and from the witness stand. As referenced in the trial misconduct in the Motion to Reconsider denial of the Motion to Recall the Mandate. (Appx I), the state seized upon this slight frailty and

chose to assail her mental health to the jury twice during closing rebuttal when the defense had no opportunity to respond. Furthermore, the state never presented any evidence about Mrs. Evangelista's mental acuity, evincing misconduct.

Eighth, the appellate court fails to recall evidence that goes to the credibility of petitioner and Schweigert, the crux of the defense. As stated above, the footprint evidence, shell casings, close-range firing, petitioners injury (bruises), how and where the incident occurred, where Fox ended up after the shooting, the black sedan similar to a Malibu (not a full-size SUV), and the voices raised in verbal exchange all corroborate petitioner's testimony – all either misstated or not recalled by the appellate court. In its order the court restates Schweigert's claim that petitioner referred to Mrs. Cole as "Katie." Keller, 2020 Il App (2d) 170750-U, ¶ 84; the court then claims Mrs. Cole testified "he (petitioner) called her Katie". Id at ¶ 91. The obvious intent of the appellate court is to corroborate Schweigert. This is problematic recall as the court fails to recall the accurate testimony of Mrs. Cole who states unequivocally "he called me Kate". (R1963) This fact is also evinced by email evidence wherein the text of the referenced emails clearly says Kate. Keller, ¶ 95 The court restates another Schweigert claim that petitioner "didn't want to use his own phone," Id at ¶ 85, but fails to recall definitive multi-sourced testimony from witnesses confirming that petitioner's phone was inoperable the days in question. Many mitigating points of credible evidence between petitioner and the State's key witnesses. Far from all there is the ripe record, but the court failed to recall a single one. Perhaps the most problematic failure to recall crucial evidence at the crux of the case, is the fact that Schweigert was intoxicated at the time of the conversation in controversy while the petitioner was sober. The court recalls evidence that they had "dinner at Schweigert's house." Id at ¶ 84. The court simultaneously failed to recall testimony from both petitioner and Schweigert that showed Schwiegert drinks whisky with a splash. On the night in question he had four to five "generous three finger pour" whiskeys in a high-ball tumbler in a little over three hours. (R1758), (R1775-76), (R1782), (R2799), (R2802-04), (R2957-61) The testimony shows it is also possible that he had one additional drink in a to go cup while driving to retrieve petitioner and also some cannabis during the evening. The court fails to recall this evidence while portraying the events as just dinner. Yet again, mistakenly recalling evidence crucial to petitioner's defense and to reasonable doubt. Bowen, 241 Ill App 3d at 624; Bowie, 36 Ill App 3d at 180.

Further to the mistaken recall of the credibility gap is evidence affirmatively demonstrating that Schweigert was not only intoxicated on the night in question but that he has a larger problem with alcohol. (R1758) First, the court fails to recall a court ordered divorce stipulation (in effect at the time) that he was not to consume alcohol within days before and during his joint custody visitations with his then 10-year old son. His son was present on the evening in question. Secondly, the court fails to recall evidence from the exhibit of the unsealed "altered" recording. (State exhibit) In the recording petitioner is heard chastising Schweigert, saying "if I call you after 8 o'clock at night you will be drunk and not remember the next day. "Without hesitation, Schweigert responds "yeah that's somewhat true." (R2799) This was said because when petitioner called Schweigert the night prior to meeting there was an agreement for petitioner to call the next afternoon at 4:00 pm to firm up plans to meet. Schweigert was surprised by the call and displayed notable gaps in memory to what was agreed upon the night before. The Appellate Court mistakenly fails to recall all evidence of the alcoholic, or at best intoxicated witness and the credibility issues crucial to the crux of the defense. Mitchell, 152 Ill2d at 323; Bowie, 36 IllApp3d at 180; Bowen 241 Ill App3d at 624. Many more examples exist in the record. Prior to speaking with police the intoxicated witness spoke to friends and family producing a story over nearly a dozen interactive tellings while interpreting and gap filling based on those exchanges plus whatever else fit from the creation of his own mind. (R1742) The gap filling was evinced in the tone and tenor of the altered recording which the petitioner described as cognitive dissonance once it was understood what Schweigert recalled from the evening. A fact unknown at the time of the call, and thus the dissonance in the use of "it," "this," "that." The recording contains none of the fantastical commentary of the night alleged by Schweigert and is missing the exculpatory expression due to the tampering. The unrelenting conflation between the two evidentiary sources is reckless and mercilessly distorts and taints the record. Conflation on conflation and inference on top of inference distinctly distorts the truth-seeking process. Here, the Appellate Court adds to the distortion by failing to recall this evidence.

This was a two-week trial and the record is ripe with other affirmative evidence in support of the defense. There is indeed ample evidence circumstantially confirming the interpersonal relationships involved, many of which are more prejudicial than they are probative and arguably were erroneously introduced at trial. They are the subject of misrepresentation and

mischaracterization by the State and are subject to hindsight and confirmation bias. Petitioner testified at length and subjected himself to cross examination to it all. And again, with credibility at the crux of the case, the Appellate Court failed to recall any of Petitioners testimony. Mitchell, 152 Ill 2d at 321 ("failure to recall defendant's testimony is a violation of due process rights.") Whether a defendant's due process rights have been denied is an issue of law, and is reviewed de novo, People v KS, 387 Ill App3d 570, 573(2008). Under the de novo standard of review, the Court owes no deference to the lower court. Townsend v. Sears Roebuck & Co., 227 Ill 2d 147, 154 (2007).

Aside, from the failure to recall trial evidence, the Appellate Court also demonstrates a mistaken recall of briefed claims fundamentally crucial to the appeal. The written order reveals that these failures in recall were part and partial to its mistaken decision-making process. By example, consider the following points:

First, the Appellate Court states, "[i]f defendant was simply asking us to construe section 108-A-7(b) and pointed to section 2518(8)(a) as persuasive authority, we could certainly consider it in this manner. However, defendant is asking us to hold that Nieves, a case issued by our Supreme Court (a court we lack authority to overrule) is no longer good law in light of subsequent developments in federal law." Keller, at ¶78. While there are fundamentally a number of fatal mistakes in decision-making evinced in the Appellate Court's order, this particular one shows affirmatively, a failure to recall the claims made in petitioner's brief. It is hard to imagine the purpose of conducting an appeal when the court fails to recall issues properly before the court. Kamen, 500 US at 99 (when an issue is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.") See also Ill S. Ct. Rule 366(a)(5) ("it is well within its duty to decide the issue without defendant asking"). Petitioner did raise the construction issue in this matter. This failure to recall the issue is made more troubling by the fact that the court had just prior scoped the genesis of the issue. See Keller at ¶ 70 (explaining that the Illinois Supreme Court in Nieves recognized that as a "matter of first impression, looked to federal courts to see how the 'virtually identical' language had been construed.") The Appellate Court went on to state that "issues of statutory construction are

subject to de novo review of course; however, we find the trial court's analysis persuasive." Id at ¶ 74.[4] Affirmative evidence that the court recognized the need for de novo statutory construction analysis and then chose not to do so despite authority to the contrary. Issues of law are reviewed de novo. People v KS, 387 Ill App3d at 573. Under the de novo standard the court owed no deference to the lower court. Townsend, 227 Ill2d at 154. The order and the authorities evince an affirmative mistake in decision -making process.

In the issue pertaining to suppression of statement and Illinois Complied Statutes ("ILCS"), Article 103 "Rights of the Accused", (Keller at ¶ 52), the court fails to recall petitioner's due process and fundamental fairness claim. Statutory rights and constitutional rights are not co-extensive, and petitioner raised comprehensively both issues. Here, the Appellate Court fails to recall the briefed issue and makes its judgment in mistake by failing to address the federal and state constitutional issues in its decision-making.

The Appellate Court continues and repeats a similar failure in recall and mistaken decision-making in the Article 108 analysis. The court states "to the extent that defendant argues recordings should be suppressed as they were obtained in violation of Illinois law, Nieves would control the question of admissibility. "Id at ¶ 65. Assuredly, the brief claims – to all extent— that the recordings should have been suppressed as they violated Illinois law. Once again, this is affirmative evidence that the court failed to consider evidence of petitioner's brief, leading to failure to apply the analysis or recall the need to address the claim. People v. Williams, 2013 Ill App(1st) 111116, ¶ 104; People v KS, 387 ILApp3d at 573.

The totality of the analysis in the Emergency Moton to Recall Mandate and the Motion to Reconsider Denial[5] with its amendments demonstrate cumulative mistakes in decision-making and in the judgment of "No" errors. The affirmative evidence in this motion (See Appx H), and its amendments (see Appx I), show the court did not recall or consider crucial trial evidence at

---

(4) The Trial court "analysis" contained two red flags: "This is an interesting question and I do not purport to have the answer..." and "shall doesn't always mean shall" – far from compelling justification to forgo de novo review.

(5) The Ill S. Ct. originally refused to recall the mandate stating it no longer had jurisdiction. Petitioner's motion to reconsider denial to file showed the court did have jurisdiction to recall the mandate. The court then filed the Emergency Motion to Recall Mandate ad subsequently denied the filed Motion to Recall Mandate, ultimately denying the Motion to Reconsider Denial of the Emergency Motion to Recall Mandate and reopen direct Appeal.

the crux of the defense for their harmless error (of non-error) conclusion. The motion also evinces that the court failed to recall and analyze evidence and misapplied the law to the crux of the issues briefed on appeal. Lastly, the motion demonstrates sufficient cause for the court to determine that Appellate Counsel was ineffective in his assistance. These are stand-alone due process violations. Mitchel, 152 Ill2d 274; Bowie, 36 Ill App3d 177; Simon 2011 Il App(1st) 091197; and Bowen, 241 Ill App3d 608. The Court must review de novo the question of whether the record reveals that the Appellate Court made affirmative mistakes in its decision-making process. Williams 2013 IL App(1st) 111116, ¶ 104 (due process violations are reviewed de novo).

Pertaining to harmless error analysis more generally, and in addition to the Appellate Court's demonstrable failure to recall crucial evidence at the crux of the defense and their mistaken decision-making of harmless error, petitioner respectfully requests the Court view harmless error pursuant to Sullivan v. Louisiana, 508 US 275, 279 (1993) ("the question is not whether, in a trial that occurred without error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributed to the error"). An appellate Court making harmless error determination "does not... become in effect a second jury to determine whether a defendant is guilty." Neder v. US, 527 US 1, 19 (1999); Mest v Cabot, 449 F3d 502, 516 (3rd Cir 2003)(The Appellate standard parallels the trial standard, reviewing courts must be confident beyond a reasonable doubt that the error had no influence in the jury's judgment).

When the harmless error doctrine has been applied outside an analytical framework, it has been criticized as conclusory. See Chapel, The Irony of Harmless Error, 51 Okla.L.Rev. 501, 505-06, N.29 (1998). "A 'guilt-based approach' to harmless error" overlooks much in its myopic fixation on perceived factual guilt and usurps the role of a jury." Edwards, Harry, To Err is Human, But Not Always Harmless, 70 NYU L. Rev. 1167, 1192 (1995).

The beyond a reasonable doubt standard says that even small effects are worrisome, if they can be distinguished from harmless "null" effects. In considering a single error, for example, a difference between error and no error condition of 5%, which is to say for anyone juror there is a 95% likelihood that she will be unaffected by the error. The probability that all of the petitioners twelve jurors were unaffected is thus 95% raised to the 12th power, which is 54%, leaving a 46% chance that one would have been affected. Even a much lower difference would

raise substantial worries of prejudice. Even a 1% difference would yield an 11% chance that at least one juror was affected by the error. It is highly challenging to conduct a linear regression assessment of one error in a trial with limited evidence and twelve jurors, expand the difficulty when considering well over a hundred elements of evidence with multiple cumulative errors to weigh across twelve jurors and the challenge is not achievable with any degree of confidence.

Here, the court through mistaken decision-making found no errors and failed to recall any evidence crucial to the defense. Petitioner submits there are multiple errors, plus evidence derivative there from that was also affected and never properly considered by the Appellate Court. Critically, there is also intentional and purposeful misconduct, the total cumulative effect of which (trial and pre-trial) has yet to be briefed and considered, let alone factored into a harmless error analysis. See Chapman v. California, 386 US 18, 52, N7 (1967) (Harlan, J dissenting) (certain types of official misbehavior require reversal simply because society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct). Petitioner prays the Court will consider the causal and procedural issues and protect the jurys' role and petitioner's right to a fair trial.

There exists a final point of consideration. The intrinsic contradiction between the tenets of Illinois Sup Ct. Rule 23 and the Appellate Court's order. The court announces multiple issues of first impression, new rules of law in Illinois and a substantive ruling of federal preemption. Emblematic of the court's mistaken decision-making, and evincing some reluctance perhaps, is the issuance of an unpublished order, when such weighty matters have been ruled upon. Consider:

1) Established a new rule of law regarding a broad statutory Article, Article 103 – Rights of the Accused (725 ILCS 5/103 et seq.) Holding that violations under Article 103 have their own remedy, official misconduct, and suppression is never a remedy. (See Appx I)

2) In determining the sole remedy for Article 103 violations, the Appellate Court, for the first time since the 1966 decision, interprets the Illinois supreme court in People v McGuire, 35 Ill2d 219 (1966), in the dicta pertaining to Article 103. In adopting State's argument, the Appellate Court creates conflict with long established Article 103 authority. (See Appx I)

3) The Appellate Court ruled that contemporaneous objections are required in denial of bail hearings. This is in direct conflict with the statutory language controlling these

proceedings and an applied understanding of the rules of evidence. Thereby creating another apparent conflict with existing authority. A cursory review suggests this too is an issue of new law and first impression.

4) The court declared a new rule of law relative to Article 108, Judicial Supervision of Electronic Surveillance. The Appellate Court held that the "Issuing Judge" is not relevant or critical to the statutory scheme of regulating the use of electronic surveillance.

5) The Appellate court also held that Article 108 post-recording requirements and statutory safeguards are technical issues not central to the statutory scheme. This includes the introduction of evidence in proceedings. This is another matter of first impression, ie., introducing and using evidence without allowing the accused to inspect the evidence.

6) The Appellate Court holds that under preemption and the Supremacy Clause, People v Nieves, 92 Ill2d 452 (1982), is distinguished from US. V Ojeda Rios, 495 US 257 (1990). As a matter of first impression and in explanation of existing law, the Appellate Court rules that statute for a judicially supervised electronic surveillance with an immediate sealing requirement and satisfactory explanation test is NOT required to comply with identical federal law. This ruling places Illinois' statutory language in continual implied conflict with Title III.

The Appellate Court burdens these new and influential judgments under Il Sup Ct. Rule 23(e)(1) precluding parties from citing these determinations of new precedent. This appears to be in conflict with Illinois Supreme Court Rules and pre-existing federal law established by this Court.

V.

The Illinois Supreme Court failed to recall its mandate thereby denying petitioner an adequate direct appeal, due process, and equal protection of the law.

In the cause herein petitioner did not receive a constitutionally fair or adequate direct appeal, the effect of which is to have no first appeal as of right. The remedy requested by petitioner was for the Illinois Supreme Court to exercise its inherent power to recall its mandate and reopen the direct appeal. The breakdown in the appeal caused the Illinois Supreme Court to overlook or misapprehend points law and facts critical to the Court's denial of the petition for leave to appeal.

The longstanding principles of equity are at the very foundation of the recall of the mandate motion, and case-law shows recall of the mandate serves wide purposes. Inherent in them all is the need to correct injustice or preserve integrity of the judicial process. See Hazel-Atlas Glass Co. v Hartford-Empire, Co. 322 US 238, 244-45 (1944) (Power to recall mandate is longstanding, having been firmly established in English practice long before the foundation of our republic); see also, Calderone v. Thompson, 523 US 538, 549-50 (1998) (Reviewing courts are recognized to have inherent power to recall their mandates...and do so in extraordinary circumstances). In Price v. Philip Morris, Inc., 2015 IL 117687 the Illinois Supreme Court stated that pursuant to Sup Ct Rules and practice, after the mandate of the reviewing court has issued, the appropriate means to bring to the reviewing court's attention factual matters that, if known to the court before entry of judgment, would have precluded entry of judgement, is by filing a motion to recall the mandate. Id., at ¶ 43. Here, petitioner points to the Illinois Supreme Court's denial of the leave to appeal given the breakdown in petitioners direct appeal. The remedy petitioner requested was neither extreme nor untimely and has been diligently pursued by petitioner. Recalling the Illinois Supreme Court's mandate and reopening the direct appeal to facilitate adequate briefing is in line with the principles of equity. The Illinois Supreme Court has stated this procedure permits justice and fairness to be achieved. Price, 2015 IL 117687, ¶ 42, ¶ 70; IL S. Ct. Rule 361(a), 368(c).

In this case, petitioner asked the Illinois Supreme Court to recall its mandate and to reopen the direct appeal under the extraordinary circumstances describe, supra—discussing overlooked or misapprehended points of law and facts critical to the Illinois Supreme Court's denial of the petition for leave to appeal. Had the court realized the facts supra, such as failure to comply with the Supremacy Clause, the facts would have prevented entry of judgment. Yet, the Illinois Supreme Court 'initially' told petitioner it did not have jurisdiction to even recall its mandate. Only after a motion to reconsider did the court acknowledge it had jurisdiction to recall the mandate. Subsequently, the Illinois Supreme Court filed petitioner's motion to recall the mandate. The Illinois Supreme Court ultimately denied Petitioner's Emergency Motion to Recall the Mandate. Thereafter, Petitioner filed an even more detailed Motion to Reconsider Recalling the Mandate, which also was denied.

In Illinois there is a constitutional and statutory right to appeal a criminal conviction. See (Ill Const. 1970) Art. VI § 6; 730 ILCS 5/5-5-4.1 (West 2015). If a state creates Appellate

Courts as an integral part of the system for finally adjudicating the guilt or innocence of a defendant, then the procedures used in deciding appeals must comport with the demands of the due process and equal protection clauses of the United States Constitution. Evitts v Lucey, 469 US 387, 393 (1985). Due process requires that criminal defendants have effective assistance of counsel, paid or appointed, guaranteed as of right during a first appeal. Id at 393. Accordingly, Illinois' statutory right to an appeal is subject to the due process clauses of the Federal (USCA Const. Amend. XIV) and State (Ill. Const. 1970) Art 1 §§ 2, 9)) Constitutions.

A right to a timely and fair appeal also emanates from the Illinois Constitution of 1970, Art I, § 12, the open courts provision or the certain remedies clause which provides: "every person shall find a certain remedy in the laws for all injuries and wrongs which he received to his person, privacy, property or reputation. He shall obtain justice by law freely, completely and promptly.' See People v Sistrunk, 259 Ill App3d 40, 54 (1994) (if this has any real meaning in the context of our system of justice, it must surely refer to denial of prompt consideration of a criminal appeal). *Petitioner asserts that no comparable remedy exists to fairly and promptly alleviate this harm. Post-conviction procedure is not a substitute for direct appeal. Injudicious denial places an unfair tax on liberty and access to justice injecting inordinate delay into the rightful appeal of the defective trial.*

The Illinois Supreme Court reflected this philosophy in Price. "Petitioners are entitled to a procedure and a forum for asserting their claims." Price at ¶ 42. Federal courts echo the sentiment in long established holdings. Williams v US, 307 F2d 366, 368 (9th Cir. 1962) ("if an appeal is improvidently dismissed the remedy is by way of a motion to the court asking for a recall of the mandate."); US v Winterhalder, 721 F2d 109, 111 (10th Cir.1983)(same); Watson v US., 508 F2d 75, 81 (DC Cir 1986) (a motion to recall the mandate is the appropriate avenue to take in presenting a "Lucey claim," ineffective assistance of Appellate counsel). These courts have ruled that motions to recall the mandate due to ineffective assistance of Appellate counsel (IAAC) will be examined if they have on their face sufficient merit, and if so the court will recall the mandate and reopen the direct appeal and determine the merit. Watson, 508 F2d at 81. The movant must set forth in detail a persuasive case.

The question of whether Petitioner was denied equal protection or due process in the appeal is a question of law that is subject to de novo review. The due process clause of the United States and Illinois Constitutions protect individuals from the deprivation of life, liberty,

or property without due process of law. USCA Const Amend XIV; (Ill Const 1970), Art I, §§ 2, 9; Williams, 2013 IL App(1st) 111116, ¶75; K.S., 387 Ill App3d at 573. Under the de novo standard of review and this Court's discretionary right to review, no deference is owed to the Appellate court's fraudulent record. Townsend, 227 Ill2d at 154.

Petitioner respectfully asks this Court to utilize its inherent power to provide equitable relief. Within this Petition, Petitioner sets forth a sufficient showing of cause for the invocation of this Court's use of discretion in regaining Petitioner's Constitutional Right to a fair and adequate direct Appeal.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Jeffrey Keller, Pro-se
Register No. Y24060
P.O. Box 1000
Menard, IL 62259-0100

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JEFFREY KELLER – PETITIONER

vs.

PEOPLE OF THE STATE OF ILLINOIS – RESPONDENT

I, Jeffrey Keller, do swear or declare that on this date July 18, 2021, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and *PETITION FOR WRIT OF CERTIORARI* on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid, or by delivery to a third party commercial carrier for delivery within three calendar days.

The names and address of those served are as follows:

Kwama Raoul
Office of the Attorney General
500 South Second St.
Springfield, Illinois 62706

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 18, 2021

Jeffrey Keller
Register No. Y-24060
P.O. Box 1000
Menard, IL 62259-0100

Petitioner, Pro-se