ORIGINAL

No. 21-5722

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY DEW — PETITIONER

vs.

LASHANN EPPINGER, WARDEN — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SIXTH CIRCUIT COURT OF APPEALS
(*Dew v. Eppinger*, 6th Cir. Case No. 20-3413)

PETITIONER'S MOTION FOR WRIT OF CERTIORARI

GREGORY DEW, #543-986
TRUMBULL CORRECTIONAL INSTITUTION
P.O. BOX 901
LEAVITTSBURG, OHIO 44430
PHONE. NO. N/A

DAVID YOST, ESQUIRE
OHIO ATTORNEY GENERAL
150 E. GAY STREET, 16TH FL.
COLUMBUS, OHIO 43215
PHONE NO. (614) 466-4986

QUESTIONS PRESENTED

FIRST QUESTION PRESENTED FOR REVIEW:

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

SECOND QUESTION PRESENTED FOR REVIEW:

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

THIRD QUESTION PRESENTED FOR REVIEW:

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

FOURTH QUESTION FOR REVIEW:

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

LIST OF PARTIES

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

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

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

OPINIONS BELOW

For cases from **federal courts:**

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

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

JURISDICTION

For cases from **federal courts:**

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

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

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

A Motion to Dismiss a previously filed Petition for Writ of Certiorari for *Dew v. Eppinger*, filed as Case No. 21-5148, was mailed on July 27, 2021, but, as of this filing, has not yet been ruled on. Petitioner files this Petition to be timely and as the true and correct Petition for Writ of Certiorari for *Dew v. Eppinger*, Sixth Circuit Case No. 20-3413.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved herein are the following:

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

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

Article IV, § 1 of the United States Constitution

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

Amendment IV:

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

Amendment V:

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

Amendment VI:

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

Amendment XIV:

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

Ohio Revised Code § 2901.01(A)(9)(a):

(9) "Offense of violence" means any of the following:

(a) A violation of section...2907.02 (rape)...2907.05 (gross sexual imposition)

Ohio Revised Code § 2907.02(A)(2), rape:

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

Ohio Revised Code § 2907.05(A)(1), gross sexual imposition:

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

Ohio Revised Code § 2907.03(A)(9), sexual battery (enacted 1994, *ex post facto*)

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

Ohio Crim.R. 33(B), O.R.C. §2945.80, Motion for New trial, in pertinent part:
Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

STATEMENT OF THE CASE

In October of 2006, two thirty+-year-old women, whom Petitioner coached some 15 years prior, made allegations of sexual misconduct while they were coached. TrT., 311, 330-31.[1] Petitioner never received a copy of these complaints. He was interrogated on 3/15/2007, and arrested for one count of sexual battery involving one former athlete. No force or threat of force was alleged—the detective's report stated the interaction was consensual—hence Petitioner was indicted for three counts of sexual battery (§2907.03(A)(9)) for "Gymnast A," a strict liability offense for consensual coach/athlete sexual conduct.[2] Petitioner pleaded not guilty. Petitioner filed a motion to dismiss the indictment which argued actual innocence of a crime and violation of his right against conviction on *ex post facto* law, which was granted without objection or appeal; trial court agreed any relations were "not a crime" or "innocent when it occurred." PageID#s 140-147.

No probable cause existed to support a violent felony for the year prior to filing the motion to dismiss. After the filing, the State claimed a "mistake" was made, repackaged the charges—absent new evidence—and Petitioner was re-indicted.[3] The second indictment charged three counts of purposeful, violent, forceful rape for Gymnast A (R.C. 2907.02(A)(2)) and one count of purposeful, violent, forceful gross sexual imposition (GSI, R.C. 2907.05(A)(1)) for "Gymnast B," for whom no charges

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[1] Petitioner was not provided any transcripts by Respondent and cannot reference PageID#s.
[2] *State v. McLemore*, 2002 Ohio App. LEXIS 743 ("[R.C. 2907.03] presupposes willing partners...").
[3] *Bragan v. Poindexter*, 249 F.3d 476 (6th Cir. 2001) (The Court "refused to consider the prosecutor's statement that she committed a mistake" and reindictment was impossible in the absence of "governmental discovery of previously unknown evidence and previous legal impossibility.")

were brought initially. Charges in the second indictment were available at the time of the first indictment, investigated initially, but not charged. Petitioner was indicted for violent felonies "because he was [their] coach" and "authority figure," Doc #33, Ex. 10 (bill of particulars), language from *ex post facto* §2907.03(A)(9); the same bases for the dismissed indictment. No conviction was based on age[4], the age of consent for sexual interaction in Ohio being thirteen. R.C. 2907.02, 2907.05 (The women were high school-aged teenagers when the offenses were to have occurred.)

Petitioner was indicted on a second set of charges for adult patient complaints, as he had become a healthcare provider after exiting coaching. Three counts of rape were charged for digital penetration of a patient during lawful, consensual, staff-monitored therapeutic procedures for coccygeal pain; twelve counts of GSI, where Petitioner was to have touched a patient's breast by violent force once a month for twelve months; and three counts of GSI for a patient who believed Petitioner brushed against the side of her breast one time during a treatment.

Though charges were inflammatory in nature, fifteen+ years apart, products of obvious overindictment, and shared no evidence, a motion for severance was denied with the cases joined for jury trial for "judicial economy." Grand jury proceedings were requested pretrial due to the elevation of charges with no new evidence, but denied after in-camera review by the trial court, who forbade counsel's presence.

Petitioner was convicted of three counts of rape for Gymnast A, one count of GSI for Gymnast B, one count of rape for a patient and one count of GSI for a different

[4] One count of corruption of a minor was merged at sentencing. To claim a conviction exists for a merged offense violates the 5th Amendment. *State v. Underwood*, 124 Ohio St. 3d 365, ¶31 (2010)

patient, and was acquitted of two counts of rape and fourteen counts of GSI. Trial court likened Petitioner to a Nazi concentration camp doctor whom he had read about in a book—who did "God awful" things to prisoners (torture, mutilation and murder)—prior to imposing unjustified maximum and consecutive sentences of 43 mandatory years; a *de facto* life sentence without parole.

Petitioner timely appealed. All convictions in the joined patient case (single counts of rape and GSI) were dismissed due to insufficiency of evidence for force or threat as the patients never testified they believed harm would result if they resisted. *State v. Dew*, 2009-Ohio-6537. Convictions in the athlete-related case were paradoxically affirmed under a different standard of law, though charged under identical statutes. All courts agreed the athletes were never physically forced to interact and no communicated threats were identified, with convictions upheld based on Petitioner's employment as a coach. Joinder was upheld despite dismissal of every charge in the joined case. No resentencing was held. A *de facto* life sentence of maximum and consecutive 31½ years remained for the surviving convictions.

The Ohio Supreme Court did not accept jurisdiction[5] with dissent of Justice Moyer. *State v. Dew*, 124 Ohio St.3d 1510 (2010). Certiorari to the U.S. Supreme Court was not granted. *Dew v. Ohio*, 131 S.Ct. 594 (2010).

Post-trial, Petitioner's family obtained discovery piecemeal through counsel. Investigations were made which produced new information and evidence that was

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

analyzed and reported by expert witnesses who attested to multiple violations of Petitioner's constitutional rights.

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

A Motion for Leave to file a Motion for New Trial was filed and granted unopposed (after jurisdiction of the trial court was established on appeal), which required a finding that the evidence was newly discovered. A hearing was held on the Motion for New Trial where the trial court claimed to be offended by Petitioner (who never spoke at the hearing). Petitioner's direct attacks based on new evidence were angrily denied under the guise of *res judicata*, contradicting the prior ruling granting leave and Ohio Supreme Court precedent. Remedies for the denials were properly exhausted. Petitioner maintained his innocence in all proceedings.

A timely, mixed habeas corpus petition was filed to the U.S. District Court. The petition was stayed due to Petitioner having to exhaust state court remedies and the

court finding Petitioner's claims potentially meritorious. *Dew v. Kelly*, 2013 U.S. Dist. LEXIS 14711. Petitioner exhausted his remedies and filed an amended petition, to include a claim of actual innocence. The State provided an Answer; Petitioner a timely Reply. Petitioner moved for discovery, expansion of the record and an evidentiary hearing for his gateway innocence claim, which were all denied.

The magistrate recommended the petition be dismissed, *Dew v. Kelly*, 2018 U.S. Dist. LEXIS 225949, Petitioner timely objected. The district court dismissed the petition with minimal independent evaluation. Certificate of appealability was denied without prejudice. *Dew v. Kelly*, 2019 U.S. Dist. LEXIS 90692.

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

REASONS FOR GRANTING THE PETITION

Introduction – Petitioner avers the misapplications of law, misuse of judicial constructs, procedural bars, etc., used to justify and maintain constitutional violations and deprive justice must be rectified for the preservation of integrity in the judicial system and uphold the Constitution. The issues are simple and direct.

The current clime related to claims of sexual offenses shows a dramatic increase in awareness and coming forward of victims of sexual insults. Numerous offenses have occurred many years prior to prosecution, with the interweaving of *ex post facto*

law/judicial decision-making into proceedings, to include jury instructions. Novel misuse of *ex post facto* state law and abuse of procedural bars to prevent federal review of constitutional claims must be addressed to protect a real threat to fundamental fairness and justice guaranteed to all citizens by the U.S. Constitution.

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

The lower federal courts' rulings reflect misguided agreement with a state appellate court, in effect "rubber-stamping" errant state court decisions on federal claims. The Sixth Circuit wrongly stated it "cannot interfere with [the state appellate court's] determination of state law," even though *ex post facto*, holding the federal court impotent and the state appellate court infallible on federal claims. The primacy of a state supreme court binds this Court when lower state courts err on state laws and procedures. *Goff v. Nationwide Mut. Ins.*, 825 Fed. Appx. 298 (6th Cir. 2020) (The Court should "refuse to follow intermediate appellate court decisions where we are

persuaded that they fail to reflect state law correctly...") The Court should use the instant case to prevent misuse of law and judicial constructs—which are not law—and the ill use of procedural bars to thwart justice and deny constitutional rights.

In a criminal case, the Court is not bound by *ex post facto* law, or judicial constructs which do not further legislative intent and are inapplicable to the facts in a case, nor a state court's interpretation that does not "construe the...statute in the sense of defining the meaning of a particular statutory word or phrase" and "merely characterized the 'practical effect' of the statute." *Wisconsin v. Mitchell*, 508 U.S. 476, 484. And, "[o]nce any ambiguities as to the meaning of the statute are resolved, [the Court] may form [its] own judgment as to its operative effect." Id.

The Court should also address the improper warrantless wiretap by a state actor of persons in other state jurisdictions that ignores the rights afforded under Article IV, the 4th & 14th Amendments to the Constitution.

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

Due process is denied when evidence to support of a claim is not provided resulting in improper denial. Lower courts denied the issue based on the lack of newly discovered evidence or use of evidence outside the trial record. While some evidence *was* newly discovered, innocence gateway claims do not require newly discovered, but "newly presented" evidence "not presented at trial." *House v. Bell*, 547 U.S. 518 (2006) All evidence referenced met this standard which "does not require absolute certainty about the petitioner's guilt or innocence" and "it may be enough for the petitioner to

introduce credible new evidence that undermines the evidence supporting the jury's verdict." Id., 553-54. Courts are required to assess how reasonable jurors would treat the *overall, newly supplemented record.* If new evidence so requires, reconsideration of the credibility of the witnesses presented at trial may occur. *Schlup v. Delo*, 513 U.S. 298. Federal courts review the "newly supplemented record" under the "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" standard. Id.

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

Lower courts implied the gateway claim was barred by *res judicata.* A gateway claim overcomes bars to include "failure to develop facts in state court...and failure to observe state procedural rules, including filing deadlines," which would include *res judicata. McQuiggin v. Perkins*, 569 U.S. 383, 393, 398-399.

The federal reviewing courts did not address or evaluate the myriad of evidence provided and requested to support the gateway claim, but focused on a partial rendition of a phone interview. The full interview, removed from the hearing of the jury, revealed the adult witness telling police they were not in "any kind of a forcible

situation," could say "no," did so, and Petitioner would "respect it," relations occurred because they "let" it happen, Gymnast A considered Petitioner her "boyfriend" and she "never thought of [any interaction] as rape...or sexual abuse, even." Doc# 1, Ex. 6; Doc# 24, Appx J; *Lewis v. Wilkinson,* 307 F.3d 413 (6th Cir. 2002) (prior denial of relief reversed as exclusion of evidence of consent not harmless) The foregoing negate violent victimization; a legitimate claim of innocence and not a claim of mere insufficiency. The ability to say "no," Petitioner's "respect[ing] it," and the denial of "any kind of forcible situation" is inapposite to a violent felony by force. *United States v. Casal,* 915 F.2d 1225, 1229 (8th Cir. 1990) (demonstrated ability to say "no" showed voluntariness), cert. denied, 499 U.S. 941 (1991) *Villanueva v. City of Scottsbluff,* 2014 U.S. Dist. LEXIS 27349, *37 (no sexual abuse when complainant could say "no.")

A portion of other newly presented evidence not addressed was as follows:

1) A police report stating Gymnast A told police the interaction was consensual, negating any claim of force or rape, which would require reconsideration of the credibility of the officer's testimony and the second indictment as vindictive. Doc#24, Appx. A;
2) Affidavit evidence from an eyewitness fellow-gymnast showing an absence of any behavior by Petitioner as a coach that could be considered angry, aggressive, punitive or unfair, and that both women "couldn't have pursued [Petitioner] any harder" to establish a physical relationship. PageID#s 3414-3415, Doc# 34;
3) A coach/position of authority was found *ex post facto* prior to trial with the acts alleged to be rape agreed and held to be "not a crime" and "innocent when it occurred." PageID#s 140-146, 147;
4) Unsolicited affidavit from a juror in the case—accepted as newly discovered evidence without objection (PageID# 1812)—attested he would not have found Petitioner guilty[6] but for incorrectly believing employment as a coach (*ex post facto* and wrongfully portrayed as equivalent to a parent in the jury instructions) supplanted the requirement for force or threat of force, which has never been the law.

[6] Fulfilling the "reasonable juror" standard.

Other evidence of actual innocence was requested via motion and request for an evidentiary hearing, which were denied, making the record incomplete for this issue resulting in denial of the "newly supplemented record" envisioned in *Schlup*[7], violating due process. Evidence requested included four audio/video recorded statements (two made by each woman),[8] initial grand jury transcripts that were absent force (no new evidence of force was ever provided), etc. Doc#s 24 & 26.

Per the clear language of the Court, if Petitioner shows he is not guilty of the offenses at issue, he has shown his actual innocence of the crimes for which he was convicted.[9] To overcome his convictions, Petitioner must show the acts did not occur, did not occur under purposeful threat of violent force, or the acts were consensual. The lower courts stated proof of consent was a sufficiency argument, which conflicts with the Court and Ohio law.[10] Consent "negatives" rape—*volenti non fit injuria*—showing an absence of evidence, not insufficiency, consistent with innocence. *Rupp v. Warden*, 2012 U.S. Dist. LEXIS 171098 (N.D. Ohio)

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[7] "If the record ultimately proves to be incomplete, deference to the state court's judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d). [citations omitted]. New, material evidence, introduced for the first time during federal habeas proceedings, may therefore require a *de novo* review of petitioner's claim." *Winston v. Kelly*, 592 F.3d 535 (4th Cir. 2010); *Haines v. Kerner*, 404 U.S. 519 (1972) (inmate's case improperly dismissed as he was "entitled to offer proof" of the allegations of his claim.)

[8] Statements of October 2006 were never provided. Audio/video interviews were provided for every witness save these two women, denying due process. Deprivation of the interviews occurred after the filing to dismiss the first indictment. The assistant prosecutor for the case, Dawn Kruger-Cantalamessa, was recently suspended/resigned for withholding evidence in other cases.

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

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

Petitioner provided and requested sufficient evidence to support his actual innocence of the crimes for which he was convicted. In the agreed absence of force by all courts and allegations related to a coach/position of authority found *ex post facto* and "not a crime" prior to trial, the evidence presented and requested surely shows innocence of violent felonies by threat of force and suffices to overcome the state imposed procedural bars.

The Court must clarify the standard for an actual innocence claim, and clarify the framework of due process for provision of material evidence via expansion of the record, discovery, and evidentiary hearings for an actual innocence gateway claim.

II. THE COURT SHOULD GRANT THE WRIT TO PREVENT USE OF *EX POST FACTO* LAW TO FABRICATE AND DECREASE THE QUANTUM OF EVIDENCE REQUIRED AND/OR INSTRUCT THE JURY, AND PREVENT THE SELECTIVE USE OF EVIDENCE TO CREATE THE ILLUSION OF SUFFICIENCY. THE COURT MUST CLARIFY THRESHOLD EVIDENCE NECESSARY TO DISTINGUISH BETWEEN SEXUAL MISCONDUCT AND VIOLENT FELONY OFFENSES IN THE CURRENT CLIME OF AWARENESS.

The case herein addresses a novel constitutional claim of insufficiency of the evidence. Denial of due process espoused in the Fifth, Sixth and Fourteenth Amendments in any form must be prevented.

A continuum of conduct exists ranging from sexual misconduct to felony offenses of violence. The case before the Court is an excellent vehicle for discerning variances between these offenses. The Court established force requisite to commit a felony offense of violence, though not specific for sexual offenses: "[I]t is clear that in the context of a statutory definition of 'violent felony,' the phrase 'physical force'

means violent force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133 (2010).[11] The recent increase in sexual offense claims requires further universal clarification of evidence sufficient to support convictions for violent felony sexual offenses defined as such in any law.

Federal due process rights are implicated when a state does not follow its own laws. *Wolf v. McDonnell,* 418 U.S. 539, 558 (1974) (A person's liberty "is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)."); *Hicks v. Oklahoma*, 447 U.S. 343 (1980), syllabus (protected is "a liberty interest that the Fourteenth Amendment preserves against arbitrary deprivation by the State.")

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

The Court must address the violative use of *ex post facto* law in charging offenses, at trial, in jury instructions and on appeal to create an illusion of sufficiency,

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

which right must be protected in all circumstances. *Calder v. Bull*, 3 U.S. 386 (1798), (illegal is "(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.") Due process bars courts from applying novel constructions of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. *Marks v. United States*, 430 U.S. 188; U.S. Const. Art. I, §9, cl.3; §10, cl.1.

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

Selective review of the evidence was utilized to infer a threat when no determinable inference of a threat existed, even in a light most favorable to the prosecution, with inferences unsupported and refuted by the record where no deference could be afforded.

Lower courts found Petitioner's convictions for purposeful, violent felonies by threat of force[12] were supported by the pillars of "position of authority" and "grooming." *Dew v. Eppinger*, 2020 U.S. App. LEXIS 25468 *Neither pillar is an element of the offenses at issue* and were misused to create the illusion of sufficient evidence to support violent felony convictions. Both pillars topple when illuminated

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

by relevant law and clear and convincing evidence from the record.

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

It is axiomatic that appellate courts must apply law as interpreted by a supreme court at the time of the offenses due to preeminence, especially when a judicial construct is involved and no legislative act or intent can be relied upon. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) "[I]t is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one."; *State v. McDermott*, 72 Ohio St. 3d 570, (A Supreme Court decision "is not to be construed as being broader than the facts of that specific case warrant.") The Court is bound by state law as interpreted "by the highest court of the State," not an errant appellate court. *Groppi v. Wisconsin*, 400 U.S. 505, 507 (1971).

"Position of authority" is not an element of any charged offense. The Ohio Supreme Court constructed the "position of authority" theory of force "based solely on the recognition of the amount of control that parents have over their children, particularly young children." *State v. Schaim* (1992), 65 Ohio St.3d 51, clarifying *State v. Eskridge*, 38 Ohio St. 3d 56; *State v. Waites*, 1994 Ohio App. LEXIS 3651 ("[A]t this point, the Supreme Court of Ohio has limited its statement in *Eskridge* to situations when a parent has overcome the will of a young child.")

In *State v. Dye*, 1998-Ohio-234, Ohio's highest court held the "position of authority" construct applicable to a "non-parent caregiver" who "occupies the same

position of authority as the parent traditionally would." The *Dye* court was specific: "a person in a position of authority over a child under thirteen may be convicted of rape of that child with force pursuant to R.C. 2907.02(A)(1)(b) and (B) without evidence of express threat of harm or evidence of significant physical restraint [the *Eskridge* instruction]."

Eskridge and *Dye* are distinguishable from this case, as the perpetrators were a parent or *in loco parentis* and charged with statutory rape under R.C. 2907.02(A)(1)(b) and (B), with victims under thirteen, Ohio's age of consent for sexual interaction. *State v. Meade*, 2010-Ohio-2435, ¶¶26-27. Petitioner was not charged under applicable statute(s) and persons involved were not under thirteen.

Critically, the Ohio Supreme Court held sexual conduct between a teacher/coach and a student/athlete was "wrong in the eyes of his profession and...society," but "not considered a criminal wrong by the state of Ohio," eliminating the position of authority of coach as a basis for a crime. *State v. Noggle*, 67 Ohio St. 3d 31 (1993); *Calder*, supra. Also, a teacher/coach cannot be *in loco parentis* or equivalent to a parental caregiver or father figure and *not* a "position of authority" under applicable law as would be required by *Eskridge* and *Dye*. Id. (being a teacher/coach "is no more relevant than being a firefighter, an accountant, or a flight attendant," and—eliminating any possible legislative intent—"[h]ad the General Assembly sought to forbid sexual conduct between teachers and students, it would have done so specifically." *Butler v. Warden*, 2012 U.S. Dist. LEXIS 123381 ("'person *in loco parentis*'...applies to a person who has assumed a dominant parental role and is relied

upon by the child for support," and "was not designed for teachers, coaches, scout leaders, or any other persons who might temporarily have some disciplinary control over a child.") In 1990-92, a coach was not part of any law.

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

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

Retroactive application of R.C. 2907.03(A)(9)[13], amended to include a coach into the law two years after the offenses were to have occurred, is not constitutionally permissible and cannot suffice to support Petitioner's convictions. *Calder*, supra.

> "[R]etroactive application of [a statute] to a crime committed before the effective date of the statute acts to decrease the quantum of proof required for criminal conviction. As such, this application of the statute is in violation of Section 10, Article I of the United States Constitution."
> *State v. Jones*, 67 Ohio St. 2d 244 (1981)

Rape and GSI as charged are not status or strict liability offenses and to apply the position of coach to force or threat of force via a judicial construct—which is not the law—does not comport with legislative intent. When the Ohio legislature included the position of a coach into the law in 1994, it did so under the sexual battery statute, *not the rape or GSI statutes*, enacting the position exerts "unconscionable advantage" in gaining the consent of an athlete for sexual interaction, and *not* force or threat

[13] O.R.C. § 2907.03(A)(9): No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply: (9) The other person is a minor, and the offender is the other person's athletic or other type of coach...or is a person with temporary or occasional disciplinary control over the other person.

thereof. *Giles,* supra.

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

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

The second pillar, "grooming," is insufficient to show a threat of violent force. "'[G]rooming' is the process whereby a sex offender earns the trust and confidence of a victim before engaging in a sexual act." *United States v. Batton*, 602 F.3d 1191 (10th Cir. 2010) A position of trust is not force or threat thereof. Ohio law "does not criminalize sexual [acts] based on any special position of trust that the offender may occupy. There must be evidence the offender used force..." *State v. Roy*, 2014-Ohio-5186; R.C. 2907.02 & 2907.05.

The adult women's testimony belied the claim that "grooming" was a threat of any kind, as Petitioner was to have told them "always that he loved us," TrT., 233-34, lines 23, 1-2, they felt "good" and "special," id. 227 lines 14-18; 229 lines 17-19, and "he had this way of convincing us that if we loved him and if he loved the two of us—everything was fine no matter what we did. And it was-that's why it was okay to do these things because we loved him." Id., 288. The women testified they lied to their parents to be with Petitioner, grounds for insufficiency. Id., 289; *State v. Haschenburger*, 2007-Ohio-1562. No threat was relayed from others, as testimony was "everyone thought [Petitioner] was so great." TrT., 227. No communication by

Petitioner was provided as intimating a threat by any witness.

While "grooming" is surely reprehensible and wrong, expressing love for the women and convincing them they loved Petitioner as motivation for interaction is insufficient to support a threat of force for a violent felony. Even if grooming was considered coercive, coercion is not force under Ohio law. *State v. Wilkins*, 64 Ohio St. 2d 382 (1980); *Peterson v. Rupprigh*t, 2020 U.S. Dist. LEXIS 113383 (N.D. Ohio)

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

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

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

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[14] Identical patient convictions claiming fear were dismissed "as [fear] involves more than merely a subjective component. [citation omitted] In other words, just because a person is too fearful to react does not mean the actor is purposefully compelling that person to submit by implicit threat of force. Rather, in addition to the victim professing that her will was overcome by fear or duress and the jury believing this, there must be objectively quantifiable behavior from the defendant which allows a rational person to infer that a threat of force was made." *State v. Dew*, 2009-Ohio-6537, ¶118; *Elonis*, infra.

[15] Petitioner was never indicted for a gun specification or weapon.

Omitted was Gymnast A's emphatic testimony regarding the weapons: "**He didn't ever threaten me with them.**" TrT., 245-246. A belief Petitioner carried weapons is insufficient, the witness must be threatened with them. The testimony wholly eliminated any inference of a threat of force.

Gymnast B testified interaction regarding the platform was that of a "**casual joking relationship**" and further testified she was ***"not afraid."*** TrT., 279. Danger of harm related to the platform could not be inferred, as she further testified, "**Of course I could have gotten down anyplace. He didn't help me get down,**" agreed "**there were three other places on the platform that [she] could have gotten down from that day**" and "**jumped down**" on her own and flippantly "**told [Petitioner she] loved him because [she] wanted to get to her next event or whatever.**" Id., 279, 322-323. Any testimony of being "scared" was because she "cared about [Petitioner]" and "didn't want him to get in trouble." Id. Neither woman ever professed a belief they were in danger and stated directly they were not motivated by threat or fear of harm during any incident.

An inference is a permissive deduction from the evidence or a "conclusion reached by considering other facts and deducing a logical consequence from them." Black's Law Dictionary, 897 (10th ed. 2014). No gaps of evidence or conflicting inferences existed in the record that required deduction or consideration of other facts when the testimony entirely refuted the state court's claims. To infer a threat in this case requires a leap unsupported by the record, not permitted by the Constitution, federal law or rule, and outside the bounds of reasonable under *Jackson* and *Wilson*,

supra. The Court should not and must not take it.

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

Consistent with *Johnson*, supra, the state appellate court dismissed all patient charges based on insufficiency of the evidence as the women "did not testify that [they] feared resisting [Petitioner] would lead to immediate harm." *State v, Dew*, 2009-Ohio-6537, ¶¶117-118. Based on this standard, the record being devoid of any belief the former athletes would suffer any harm or be forced to do anything, evidence was insufficient to support the convictions. *Jackson, Wilson,* supra. To use a different standard for convictions under identical statutes violates Equal Protection.

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

The state appellate court found sexual conduct was initiated under very specific circumstance and time:

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

Complete testimony specifically defined when Petitioner "asked" (TrT., 230) her to engage in intercourse, which she stopped. Testimony was this first attempt of sexual conduct occurred in Petitioner's wife's house, *"during the summer," while "he was married."* TrT., 259-260. The indictment required rape occur "between March 10, 1990 and December 31, 1990." PageID# 148. Petitioner was married November 23, 1990, well after the summer of 1990 ended, TrT., 541, and testimony and evidence

showed he did not reside at his wife's house prior to marriage. TrT., 629, 795-796; Def. Trial Exhibit B. Therefore, the first instance of sexual conduct could only have occurred the summer of 1991, making any charge of rape prior to this time impossible. A memory from 16 years prior cannot suffice to overcome concrete temporal events that negate any possibility of sexual conduct prior to 1991.

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

Conviction required proof of the *mens rea* "purposely" to threaten violent force. R.C. § 2901.22(A), *Winship*, *Johnson*, supra. Threat requires

> "a serious expression of an intent to harm" [which] "requires proof that a communication was transmitted and that it contained a threat. The 'presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct'" [and] "'the crucial element separating legal innocence from wrongful conduct' is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains a threat."
> *Elonis v. United States*, 135 S. Ct. 2001 (2015), citing *X-Citement Video* (1994), 513 U.S. at 72.

"It is possible for a person to compel another to engage in sexual conduct by force or threat of force knowingly but not purposely. A person could subjectively believe that there is consent where there is none..." *State v. Wilkins*, 64 Ohio St. 2d 382 (1980). If being a coach was an implicit threat of force—though *ex post facto* and absent from any statutory definition—Petitioner knew he was a coach, but did not know of, or purposely use, an implicit threat from his position as required by law, and the law did not encompass a coach at the time the offenses were to have been committed. Id. Neither woman testified Petitioner threatened them with his position of coach, and could distinguish the difference. TrT., 226.

H. Jury instructions defined offenses with *ex post facto* law R.C. 2907.03(A)(9) and eliminated the State's burden of proof of threat of force, which misled the jury and vitiated their findings.

Lower courts found the jury instructions proper under state law. When a jury instruction "stated a correct rule or principle of law and also a prejudicially incorrect rule or principle of law on the same subject matter, no presumption arises that the correct rule or principle of law was followed and applied by the jury." *Westropp v. E. W. Scripps Co.*, 148 Ohio St. 365 (1947) "An omission or an incomplete instruction is less likely to be prejudicial than a misstatement of law." *Henderson v Kibbe*, 431 U.S. 145, 155. Read in reverse, the misstatement of law was more likely to be prejudicial.

Errors are clear when the *ex post facto* law and jury instructions are compared:

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

Ex post facto law was used in the jury instructions over strenuous objections, which also errantly equated a coach with the authority of a parent; both errors of law.

The Ohio Supreme Court held coach/athlete sexual conduct was "not a criminal act." *Noggle*, supra. A coach was inapplicable under the law and not defined as a position of authority until 1994, and cannot equate to a parental caregiver, id., required by the judicial construct used in both *Eskridge* and *Dye*, supra.

To instruct a jury that rape/GSI can occur "without any evidence of expressed threat of harm" in the absence of force removes the State's burden of having to prove the required element of a threat, which demands "that a communication was transmitted and that it contained a threat." *Elonis, Winship,* supra; Black's Law Dictionary, 9th Ed., 1619 "threat: a communicated intent to inflict harm." No further instruction corrected the error, tantamount to a directed verdict of guilt. The errant instructions clearly "vitiate[d] all of the jury's findings." *Neder v. U.S.*, 527 U.S. 1, 11.

THUS, with force and any evidence of a verbal or physical act constituting a threat being absent, the improper use of *ex post facto* law, the selective use of the record to support unsupportable inferences, and the improper jury instructions which defined offenses by *ex post facto* law, equated a coach with a parent, and jettisoned the requirement that a threat be expressed, this case provides the Court with an opportunity to address these issues both legal and factual, in whole or piecemeal, to better define the high bar of beyond a reasonable doubt constitutionally required for a violent felony. The bases of Petitioner's convictions were not sufficient or reasonable pursuant to *Jackson, Winship,* or *Wilson,* and should not be permitted to subvert constitutional principles. Errors were constitutional, prejudicial, not harmless and had "substantial and injurious effect or influence" on the verdict and improperly used

to obtain and maintain the convictions. *Kotteakos v. United States*, 328 U.S. 750.

III. THE COURT SHOULD GRANT THE PETITION ON THE GROUNDS THAT IMPROPER PROCEDURAL BARS WERE UTILIZED REPEATEDLY TO PREVENT FEDERAL ADJUDICATION OF CONSTITUTIONAL VIOLATIONS.

The law must serve justice, not procedure. Federal habeas review is not barred when a state improperly applies a procedural bar, and adequacy is a federal question. *Lee v. Kemna*, 534 U.S. 362 (2002). Improper imposition of a procedural bar constitutes a violation of due process under the Sixth and Fourteenth Amendments. "To qualify as an 'adequate' procedural ground," capable of barring federal habeas review, "a state rule must be 'firmly established and regularly followed." *Beard v. Kindler*, 558 U.S. 53, 60 (2009)

Res judicata is inapplicable in this case. *Hudlin v. Alexander*, 63 Ohio St.3d 153 (1992) (*res judicata* inapplicable because "'conventional notions of finality of litigation have no place where life or liberty is at stake...'") citing *Sanders v. United States* (1963), 373 U.S. 1; *State v. Stansell*, 2021-Ohio-203 (8th Dist.), ¶30.

The federal courts did not evaluate misapplication of procedural bars by the state courts, but merely agreed with them. The following were also overlooked:

1) The issue of judicial bias, a structural error, was properly filed to the Supreme Court of Ohio via affidavit when Petitioner's Motion for New Trial was pending. No judge could fairly adjudicate further proceedings after, minimally, equating a defendant with a murderous Nazi. Respondent prejudicially omitted this filing from the record. Exhaustion occurred with the filing to the state supreme court. The issue was also properly and timely raised on appeal after the denial of Petitioner's Motion

for New Trial due to ongoing prejudicial bias in those proceedings. The issue was fully and timely exhausted. No procedural bar could be invoked.

2) The lower courts deemed Petitioner's pretrial motion against prejudicial joinder was based on constitutional grounds, but perplexingly, not on his direct appeal where the same arguments were presented. Petitioner argued due process violations and denial of a fair trial. Misjoinder is not *per se* unconstitutional, but rises to that level if it results in prejudice so great as to deny a defendant his due process right to a fair trial. *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986). The claim was improperly denied on the issue of fair presentation.

3) A state's lack of subject matter jurisdiction is subject to federal review. *Ex parte Watkins*, 28 U.S. 193 (1830). Procedural bar was impossibly claimed.

> Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time. *United States v. Cotton* (2002), 535 U.S. 625, 630...It is a "condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void." [citation omitted]
> *Pratts v. Hurley*, 102 Ohio St. 3d 81 (2004)

When Petitioner was ruled innocent of a crime based on his position of coach, loss of subject matter jurisdiction and vitiated probable cause required for the second indictment occurred, which charged greater offenses from identical subject matter and *ex post facto* theory of guilt, Doc #33, Ex. 10, sans new evidence. "[T]he ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). A defendant cannot be innocent and guilty of a crime for the same acts based on the same facts.

When error occurs regarding the finding of probable cause, it "impermissibly infect[s] the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Vasquez v. Hillery*, 474 U.S. 254, 263. Such error provides "difficulty of assessing its effect on any given defendant, [and] requires [the Court's] continued adherence to a rule of mandatory reversal." Id.

4) Petitioner was never informed by appellate counsel on his direct appeal of his right or time to file a post-conviction petition or an Application to Reopen his Appeal pursuant to App.R. 26(B). PageID# 2158. This ineffective assistance of counsel excuses procedural default via cause and prejudice. *Roe v. Flores-Ortega*, 528 U.S. 470, 483-484 (2000)

5) A motion for grand jury transcripts was made post-trial, where a change of circumstances existed and the need for secrecy was severely reduced or eliminated. Particularized need that did not exist when the first motion for proceedings was filed was the variance between bases for prosecution and evidence at trial. *Res judicata* cannot bar motions based on a change of circumstances and events that postdate the original filing. *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292, 2305.

6) The Motion for New Trial (issues of jury packing, case steering, incomplete/withheld/altered evidence), which "suspends the finality of a judgment," *Morse v. United States*, 270 U.S. 151 (1926), was denied as being *res judicata.* The Motion for Leave, which included the evidence at issue, was titled with unambiguous statutory language, "Motion for an Order Finding that the Defendant was Unavoidably Prevented from the Discovery of the Evidence Upon Which He Must

Rely" (see Crim.R. 33, R.C. §2945.80), was *granted* by the trial court without objection, a clear ruling the evidence supplied was newly discovered.

> "[T]he trial court could have only properly granted appellant's request for leave to file his motion for new trial if it found he clearly and convincingly demonstrated that he was unavoidably prevented from discovering the facts upon which he based his motion for new trial..."
> *State v. Jackson*, 2015-Ohio-6, ¶32; see *State v. Carusone*, 2013-Ohio-5034 (multiple citations, ¶31)

The lower federal courts unreasonably agreed the granting of the Motion for Leave was *not* a "Finding that the Defendant was Unavoidably Prevented from the Discovery of the Evidence Upon Which [Petitioner] Must Rely;" an absurdity.[16]

The Ohio Supreme Court held *res judicata* inapplicable to posttrial expert witness affidavits/reports, provided in the Motion, even for evidence available at trial. *State v. Davis*, 131 Ohio St.3d 1 (posttrial evidence evaluation by expert witness "could not have been raised on direct appeal and decided by this court, because it rests upon evidence not considered by the trial court.")

The courts did not follow Ohio procedural rules as interpreted by all other state courts, which cannot meet the standard in *Beard*, supra. "A state procedural rule, improperly applied, is not sufficiently 'adequate' to preclude habeas review." *Amos v. Scott*, 61 F.3d 333, 338. The Court should hear the issue to prevent the bar of federal review of state prisoner's constitutional claims under the improper application of

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[16] Petitioner's family investigated and discovered evidence posttrial, which was examined by experts. *Carusone*, supra (Defendant was unaware of the "existence of that evidence and of the proposed grounds for a new trial until his mother's diligent posttrial investigation uncovered the evidence and expert analysis revealed its significance. Thus, the motion, on its face, showed that [Defendant] had been unavoidably prevented from timely discovering, and from timely presenting in a new-trial motion, evidence material to his actual-innocence and fair-trial claims.")

procedural bars that were contrary to the holdings of a state supreme court, every other appellate court, and the clear language of procedural rules and statutes.

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

Petitioner argued violations of the Fourth and Fourteenth Amendments, and Article IV regarding the search and seizure of a conversation by a state law enforcement officer of two people outside his state jurisdiction. Lower courts denied a violation of the Constitution occurred. This was a state case involving state police with no federal authority, which involved people in three different states.

The Court must look to the three state laws involved, not the federal. The federal wiretap statute, 18 U.S.C. 2516(2), requires federal courts to defer to state law on the validity of a wiretap obtained in state court under state law, "the lone exception concerning interception by state officers for state prosecutions, the federal statute does not defer to the states." *United States v. McNulty*, 729 F.2d 1243, 1266 (10th Cir. 1983) (For the validity of a state ordered wiretap, the more stringent state requirements must be respected by federal courts.); *United States v. Hall*, 543 F.2d 1229 (9th Cir. 1976), cert. denied, 429 U.S. 1075 (1977), (California state law applicable when "the evidence was obtained by state officers for state prosecution in violation of a state statute."); *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95 (all party consent required, law inclusive of incoming and outgoing calls, no federal preemption of state law.) Petitioner was in Pennsylvania and Gymnast B was in California (the recording officer was in Ohio and not a party to the conversation); both

states require all party consent and no warrant was obtained.

Danger of forum-shopping is also present if allowed to stand.

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

An interception occurs where words are "utter[ed] into the mouthpiece[s]" of devices being tapped; here CA and PA. *Katz v. United States*, 389 U.S. 347. As Petitioner did not receive fair adjudication of all issues, *Stone v. Powell*, 428 U.S. 465, is inapplicable. *Stone* does not preclude federal courts from hearing Fourth Amendment claims from state court proceedings, shown by federal rulings in *Collins v. Virginia*, 138 S.Ct. 1663 (2018) and *Utah v. Strieff*, 136 S.Ct. 2056 (2016).

Petitioner was also denied equal protection under the laws of PA as required by the 14th Amendment, and CA law applies to calls entering and leaving the state.

> "Use of the phrase 'within its jurisdiction' thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory...Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States—he is entitled to the equal protection of the laws that a State may choose to establish."
> *Plyler v. Doe*, 457 U.S. 202, 215.

Both PA and CA have provided greater protection than that afforded by the Constitution, *Cooper v. California*, 386 U.S. 58, 62 (1967), and prohibit surreptitious recording without all party consent. *Commonwealth v. Schaeffer,* 370 Pa. Super. 179; *Shively v. Carrier IQ, Inc.*, 2012 U.S. Dist. LEXIS 103237, *21-22 (no preemption of

CA law by federal statute). A state officer in Ohio performed warrantless searches and seizures outside of his state-limited jurisdiction, failing to give full faith and credit to the laws of PA and CA required under Art. IV of the U.S. Constitution and denied equal protection to a victim of the illegal interception. The Court should not permit state law enforcement to ignore the laws of the states where parties are located when intercepting communications.

CONCLUSION

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

Respectfully submitted,

Date: September 1, 2021

Gregory Dew, #543-986
Trumbull Correctional Institution
P.O. Box 901
Leavittsburg, Ohio 44430
Petitioner, *pro se*