No. 22-7512

**ORIGINAL**

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Eric Scott KINDLEY — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Eighth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ERIC SCOTT KINDLEY #47000-112
(Your Name)

Federal CORRECTIONAL COMPLEX-MED
P.O. Box 1000
(Address)

Petersburg, VA 23804
(City, State, Zip Code)

NONE
(Phone Number)

# QUESTIONS PRESENTED.

① whether the jury needs to be unanimous, in finding on elements, that are the causation of deprivation under 18 USC 242, and where specifically instructing not to be unanimous on the specific act(s) is constitutional error: in violation of Due Process.

② whether a private person can be convicted of 18 USC 242 where that private person is not acting jointly with a public official, and that this is Constitutional error.

③ whether a conviction may stand where it was obtained through False testimony and False evidence provided by government agents and their witnesses, violates Due Process.

④ whether a government Agent Expert witness report that is not handwritten to include all relevant Facts and science, and where it deliberately obfuscates info exculpatory to the Petitioner is Constitutional error.

# LIST OF PARTIES

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

# Table of Contents

# TABLE OF AUTHORITIES

| | | |
|---|---|---|
| U.S. V Classic | 313 US 299 | 21 |
| U.S. V Cooney | 217 F Supp 417 | 16, 21, 23 |
| U.S. V Davila | 569 US 597 | 15, 16 |
| U.S. V Espinoza | 684 F 3d 766 | 24 |
| U.S. V H.B. | 695 F 3d 931 | 19 |
| U.S. V Holly | 488 F 3d 1298 | 15 |
| U.S. V Machado-Erazo | 901 F 3d 326 | 34 |
| U.S. V Price | 383 US 787 | 16, 21, 23 |
| U.S. V Ragen | 314 US 513 | 17 |
| U.S. V Rodella | 2015 US Dist Lexis 19605 | 20 |
| U.S. V Shaw | 891 F 3d 441 | 19 |
| U.S. V Trierweiler | 52 F Supp 4 | 16, 22, 23 |
| U.S. V White | 863 F 3d 784 | 20 |

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

## OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished. 2022 US App Lexis 32634

The opinion of the United States district court appears at Appendix ____ to the petition and is N/A

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**: N/A

The opinion of the highest state court to review the merits appears at Appendix ____ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ______________________ court appears at Appendix ____ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

## JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 11/28/22.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 2/7/23, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______ (date) on ______ (date) in Application No. __A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**: N/A

The date on which the highest state court decided my case was ______. A copy of that decision appears at Appendix ____.

[ ] A timely petition for rehearing was thereafter denied on the following date: ______, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______ (date) on ______ (date) in Application No. __A____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment - No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property; without due process of law; nor shall private property be taken for public use, without just compensation.

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

18 USC 242 - Whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any person in any state, territory, commonwealth, possession, or district to the deprivation of any rights, privileges or immunities secured or protected by the constitution or laws of the United States, or to different punishments, pains or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title, or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

# STATEMENT OF THE CASE

Petitioner Appeals his life sentences AND Final judgement in the Eastern District of Arkansas, following guilty verdicts rendered on 3/12/20, After A Five day jury trial on three counts, including two counts of deprivation of rights, AND one count of possession of A firearm in Furtherance of A Crime. Petitioner is Not A public official, Nor vested with police powers, or Acting with A public official present in conjunction with. And the jury was instructed not to be unanimously on elements of CNT 2. This is A case where "She-SAID" false testimony, False testimony of government agents AND witnesses, along with False evidence, was used to gain A conviction Against the petitioner, where direct evidence the Government had contradicted the False testimony AND tends to show undeniable evidence of innocence. AND where the proverbial wool was pulled over the eyes of the jury.

Petitioner was Arrested on 6/1/17 Following A brief, wreckless investigation by FBI of Allegations by (2) Female inmates against him of Aggravated sexual Abuse they say he committed Against them while he transported them as A private prisoner transporter.

The charges were initially filed in District of Arizona, then in Eastern District of Arkansas, then in California As well. The Arizona case was dismissed After the Petitioner was released on PreTrial release.

The Petitioner had the initial Arkansas warrant so he was transferred there in custody. The judge, in Arizona, during the Pretrial hearing commented "I'm just not seeing the evidence." the AZ case was dismissed shortly after Petitioner arrived in Arkansas, to appear on that case. Sometime during the AR case the Government filed a similar case in California using one of the victims from the AZ case, then alledging that the details of the CA case happened entirely in CA (forgetting the AZ allegations) and where another victim in the CA case (M.P.) testified in the AR case, that the conduct in the CA case happened in AZ. (Petitioner would later learn significant, digital forensic evidence directly contradicted her testimony, and would show Petitioner over 150 miles west of where M.P. said she was assaulted; in a different time zone, making it absolutely impossible for her story to be true; as Petitioner knew already and the Government should have known. Incidently the CA case was dismissed after Petitioner moved the CA court to represent himself and asked for subpenas.

This entire case was circumstantial, where the Government used all manner of false testimony and false evidence; and where direct evidence offered by the Government refuted the stories of the victims.

Petitioner, herein, documents, that as early as the Notice of Experts was Filed (DCD #84, Attachments 1-4) that the Government was presenting the court with expert witness reports that failed to show all of the data and science that should have been presented. Instead, i.e., Agent Young's "report" Failed drastically to show all of the science (DCD #84 atch #1 Ex A CV Young) (See also Gov Exhibit 50 - trial) As outlined to be needed in precedent case. (see United States v Machado-Erazo, 901 F. 3d 326 (D.C. Cir, 2018) to contrast) The report was completely void of cellular data, which (as Petitioner later learned) showed movement, no stops or "static" pings, and operated on sectors of the cellular tower that Young purposely omitted from his report and Gov Ex 16! He went on, under direct examination during his trial testimony, to create a false, "dormant" 43 minute time period, using the calls only (hiding the data) to corroborate E.S. (Cnt 2) false testimony. Agent Young's response when asked what could have caused the span of 43 minutes between calls was; "there was no use by the 4821 phone of the ATT Network between those times. (TR Vol 3, 324-326) This made it appear that for 43 minutes, Petitioner and E.S were unaccounted for and neatly corroborated her assault story. The problem is that Young deliberatly covered up the data use which also used the same sectors and towers, but the entire investigation was wreckless and the prosecuters along with FBI moved to their own narrative, pre-supposed and without facts. The case did not get stronger after conviction, it got weaker. That is because Petitioner was finally able to pin-point the deceptions of witnesses and learn new exculpatory evidence.

The case charged Petitioner, a private person, with no vested police authority (not a public official) and who was not acting with a public official in his presence or in conjunction with or at the direction of a public official, with violations of 18 USC 242; a statute where without a public official present, a private person cannot violate the statute. Beginning with the indictment; which failed to properly convey "under color of law" or "willfulness", continuing with submission of expert witness reports (where FBI purposely obfuscated exculpatory information) through trial where false testimony was elicited and false evidence presented; the Government manipulated a conviction of 18 USC 242 against a private person; steaming ahead with verifiable untruths in pleadings and statements made during court hearings. Their pattern of prosecutorial misconduct ran central throughout this case, and caused a wrongful conviction, violating Petitioners rights.

Another, critical, sector Agent Youngs testimony left out. And just like he said that the calls handing off from tower to tower showed movement, the data usage hand-off from tower to tower, sector to sector, showed that the vehicle (phone) was ① in constant motion, ② on a sector that placed Petitioner out of the area on the freeway, ③ that there were no "static" pings; ③ that more than (3) sectors were used by the phone; and ④ that during the "dormant" 43 minute period, the phone initiated (7) separate data events for signifigant amounts of data and which started at (7) different times during the 43 minute time period, where Young testified there was "no activity". This data usage info that the jury never heard proved beyond a reasonable doubt that E.S. testimony was also false, and was a critical piece of information. Young's testimony was not a mistake. (see Gov. Ex 50 - CSLI, call records voice, pg 156 v data use pg 1920-1925.) Ironically E.S. testimony cooberates the high data use (E.S., TR, Vol 2, 56 - "... if he wasn't on his phone talking... or checking his social media accounts or or whatever he was doing on his phone.")

The Government continued it's misconduct to the end, using false testimony and false evidence to cooberate the testimony of E.S., Talaseck, & Sweet.

without a doubt the government violated the 5th Amendment rights of the Petitioner, as clearly outlined in Napue v Illinois 360 US 364, Miller v Pate 386 US 1 and the holdings in Giglio v US 405 US 150 and US v Agurs 427 US 97.

If this conviction is left standing it tells prosecutors that it is ok to convict a private person of 18 USC 242, and creates dark incentives to continue to use all manner of prosecutorial and police misconduct to secure a conviction, in spite of the fact that 18 USC 242 conveys no criminal liability to a private person, even if they are transporting prisoners. Such a conviction, gives dark incentives to convict private persons of 18 USC 242 who have been found liable under 1983 of the Constitution, placing them a risk for criminal prosecution should they run afoul of 1983. It also tells prosecutors it is ok to not find unanimously on all the elements making up causation. the conviction in this case was obtained wrongfully through multiple violations of the Fifth and Sixth Amendment, which cannot be allowed to stand.

Accordingly Petitioner requests that the Court hold in Petitioner's favor and in favor of it's own holdings, and grant Certiorari, vacating the judgement of the lower courts.

~~THERE IS NO PAGE 10~~

# Reason's For Granting The Petition

The Court should hold that: (a) that the jury must be UNANIMOUS IN it's verdict on the cause of a deprivation IN CASES OF 18 USC 242, as the cause is an element (ACT); that jury instructions improperly charge the jury to not be UNANIMOUS ON an element; that verdict Forms that ask For A Finding of guilty, prior to discussing the elements misstate law and mislead the jury; and that the Court should prescribe a UNIFORM practice to be Followed by all of the Courts, where currently, practices vary, (b) that a private person, who is not with or acting in conjunction with a public official, cannot be held criminally liable under 18 USC 242, the court should exercise it's supervisor power as this matter is of National importance, (c) False testimony and false evidence is misconduct, And may never be used to obtain convictions, that the false testimony and false evidence in this case violated the due process of the Petitioner, that the court exercise it's supervisory power as this matter is of National importance, (d) that obfuscation of relevant Factual And scientific data from Young's expert witness report amounts to constitutional error, that expert reports on cell tower testimony must contain all of the relevant facts on calls, data used, SMS, MMS and all usage of a cellular device on a cellular network, and that this information be fully disclosed in writing, that the Court should prescribe a UNIFORM practice to be followed by all of the circuits concerning cell tower expert witness reports where, currently, practices vary.

1. Jury instructions that do not require a unanimous decision on the elements causing a deprivation under 18 USC 242, and treating those elements as merely means; not instructing on all of the elements, improperly instructing on "under color of law" and "willfullness", misstating law, that mislead jurors, and where the verdict forms allow finding of guilty before reaching a decision on the elements, and where the elements are not properly stated in the indictment, violates Due Process, and the court should prescribe a uniform practice to be followed by all of the circuits where, currently, practices vary.

JURY NOT UNANIMOUS

Petitioner asserts that his conviction was obtained by and through, a defective superseding indictment that failed to state all of the elements; through defective jury instructions that erroneously instructed the jury to treat the elements causing the deprivation as "means" by instructing them that they did not need to be unanimous in their decision on the conduct that caused the deprivation (what violation of underlying statute); that "under color of law" was soley attributable to his employment and "willfullness" (intent) could be shown by merely a bad act. The jury instructions and superseding indictment violated Apprendi (Apprendi, 530 U.S. 466 ) by permitting the jury to convict on conduct less than required to satisfy the elements of Aggravated Sexual Abuse, (one deprivation theory offered) that impermissably increased the punishment, without the jury being unanimous, violating Petitioners Due Process rights. (see DCD# 123, pg 6, INT# 13)

See DCD# 123, pg 19
1st paragraph = conduct
2nd paragraph = "Need not be unanimous: which of the two ways he did so."

Calling the individual conduct in violation of statute; the cause of a deprivation, under 18 USC 242, establishes that conduct as an element of 18 USC 242. "If the statute makes each violation a separate element, then the jury must agree unanimously about which [deprivation violations] the defendant committed". "Calling a particular kind of fact an element carries certain legal requirements" (Richardson V United States 526 US 813) To say that, in this case, digital penetration and groping of the breast are merely means to how a deprivation occurred, is contrary to supreme court precedent in Richardson V US, Here, in this case we are not talking about the number of crimes committed, but that each crime is a specific offence of deprivation, requiring that the jury be instructed to find unanimously, that on each act, and it's underlying elements, and beyond a reasonable doubt, Petitioners guilt. If part of the jury did not find unanimously that digital penetration occurred, i.e, then they could not have unanimously found that the deprivation was achieved through Aggravated Sexual Abuse, which has: a domino effect on the other elements, and seriously increased the maximum penalty to Petitioner resulting in prejudice and in violation of Apprendi (Apprendi V New Jersey 530 US 466)
Each act of deprivation is an element (i.e. Bodily injury is listed in the instructions and statute as an element) and it stands to reason that all of the deprivation acts were required to be listed as elements, and instructions given that they were to be found unanimously and

supports (2) different prosecution theories

beyond a reasonable doubt. The fact is, that jury instruction #13 (DCO, 123, pg 16) "states "digitally penetrating... or touching... breast" sets up the foul ball here. And "you Need Not be unanimous as to which of the two Alleged ways (digital penetration or touching) he did so" language specifically tells the jury they need not be unanimous on an element of the offense. This improper jury instruction cannot be cured.

Deprivation conduct is an act contrary to law. Jurys are entrusted to decide whether the conduct occurred, and to decide unanimously and beyond a reasonable doubt. without a unanimous decision on the conduct that caused the deprivation, a conviction under 18 USC 242 cannot lie. In this case the deprivation may have been caused by digital penetration (a sexual act, as defined in 18 USC 2246, an element of Aggravated Sexual Abuse, triggering the most severe punishment or touching the breast (sexual contact as defined in 18 USC 2246, which is not an element of Aggravated Sexual Abuse) which triggers no enhancements at all rendering the deprivation conduct a misdemeanor. But one thing is certain; you can't have Aggravated Sexual Abuse if any single juror found that the deprivation conduct was caused by touching the breast (see 18 USC 242, 18 USC 2241 and definitions 18 USC 2246). "If each alternative carries a different penalty, then to comply with Apprendi (Apprendi v New Jersey 530 US 466) the jury must unanimously agree on one of them, meaning that

A drastic difference in punishment penalties

Prosecution presented 404/413 witnesses of relevant conduct

the alternatives must be elements (Mathis v United States 579 US 500).
"Permitting the jury to avoid discussion of the specific factual details of each violation will cover up a wide disagreement among jurors about just what the defendant did or didn't do... jurors unless required to focus on specific factual detail will simply fail to do so, simply concluding from testimony, say of bad reputation, that where there is smoke there must be fire." (Richardson v United States 526 US 813)
"We have noted that an instruction that did not unanimously on all the elements of an offense is a violation of the Constitutional right of Due Process." (United States v Holly 488 F 3d 1298, 1307 N.7, 10th cir 2007)

By way of not being unanimous on the deprivation conduct, then it was not possible to find beyond a reasonable doubt on if the conduct amounted to Aggravated Sexual Abuse created the deprivation (the sexual act). Reasonable doubt is entertwined in the reasons a jury must be unanimous. Normally, when say a lone juror cannot find beyond a reasonable doubt, the product of that uncertainty is a hung jury. In erroneously instructing that it was unnecessary to be unanimous on an element, created a manifest, defacto, doubt to exist. "one could only speculate what a properly charged jury would have done." (Sullivan v Louisiana 508 US 275) "this error contributed to the error obtained." (Neder v United States 527 US 1. as such it is not harmless error; harmless beyond a reasonable doubt.

Petitioner submits that this error, combined with the defective, deficient indictment (lacks elements of the crime), is structural error requiring automatic reversal (U.S. v Davila 569 US 597, Rivera v

ILL. 556 US 148) as it "undermine(s) the Fairness of a criminal proceeding as a whole" (U.S. V Davila 569 US 597) "structural errors are fundamental constitutional errors that defy analysis by harmless error standards. Nonetheless, this error is not harmless beyond a reasonable doubt.

UNDER COLOR OF LAW (Jury inst # 12 & 13)

Jury instructions state Petitioner operated "under color of law" by virtue of being a private prisoner transporter. However to be criminally liable under 18 USC 242 a private person must be acting with a public official present, as co-engaged in the deprivative conduct. "must share a common objective of the conspiracy" (Taylor V List 820 F 2d 1040, 9th cir, 1989). Private persons must be participating jointly with state agents (US V Price 383 US 787, 808) Petitioner had no legal capacity to violate 18 USC 242 as he was not acting under color of law. "acts of private parties who possess no power or authority under state law, are not acts under color of authority (US V Cooney 217 FSupp 417, D. Colo, 1963) Private persons have no capacity to violate 18 USC 242 (U.S. V Trierweiler 52 FSupp 4, D. IL, 1943). The jury instructions nor the indictment state Petitioner was acting with an official or involvement by a government official. Petitioner had no official "vested" or "sworn" authority as a public official. Instead he was the employee of a independant contractor of a public agency. The public agency had no direct oversight over Petitioner and was not present. Clearly more was required to be shown and instructed that Petitioner was acting under color of law. Merely transporting inmates is not enough. Since no instruction was given or evidence provided that the deprivation was driven by the state, these instructions violate Due Process.

Willfully (intent)(Jury Inst 12 & 13)

The opinion in Screws (Screws v US 325 US 91) made it quite clear "that the word 'willful' implies not merely a conscious purpose to do wrong on the part of an officer in beating or otherwise mistreating an inhabitant while acting under color of law, but that there must be a specific intent to deprive him of a Federal right". (Screws v U.S. 325 US 91). "In that event something more is required than doing of the act proscribed by the statute. (U.S. v Balint 258 US 250) "An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime" (Spurr v U.S. 174 US p 734)(U.S. v Murdock 290 US p 395) "and that issue must be submitted to the jury under appropriate instructions." (U.S. v Ragen 314 US 513). In this case the government failed to instruct or show the requisite "willfullnes", or acting "under color of law". The statute (18 USC 242) requires a deprivation, not just that the deprivation conduct of itself created the causation of the deprivation, but that there was specific intent. In other words a mere intent to commit the deprivation conduct of sexual assault requires intent to commit the assault for some reason, other than ones own personal ambit. It must be to "payback" or "punish". I.E. trial by jury and not by ordeal. In Screws, the Court found that while Screws was acting under color of law (arresting the victim) there was not the sufficient jury instructions to prove that he meant the deprivation conduct towards the victim, for any other reasons than his own personal hatred of African-Americans.

The government failed to instruct or Articulate or prove beyond a reasonable doubt that Petitioner had an intent with the specific intent, beyond Petitioners interests. "The acts of officers in the Ambit of their personal pursuits are plainly excluded" (Screws 325 at 111). The instructions on both counts are Constitutionally deficient and violate Due Process of the Petitioner, as to willfullness.

Force, Fear, & Consent (Jury Inst #12 & 13)

In both jury instructions 12 and 13, the government offered varied prosecution theories; allowed confusion between force and fear; instructed against finding actual force; instructed that mental coercian would support force; and allowed the jury to believe that non-consent was enough to support a finding of Aggravated Sexual Abuse. (see DCD# 123 - Inst 12/13). Under "Right To Bodily Integrity", the text discusses "Sexual Acts" done without consent, then states "can include unwanted, forced, or coerced sexual activity". "... deprived of... right to bodily integrity by causing... against her will. For the sexual act to be unlawful, it must have been authorized and without the consent of... it is not necessary to find that Kindley used physical force against... instead you should consider the totality of circumstances... relative posititions of power and authority... disparity in size... and the use of mental coercian ... does not consent if she is coerced". Under Aggravated Sexual Abuse - "... you need not find that he was violent ... uses force... when he employs... restraint... to coerce or compel submission."

Non-Consent though and mental coercian is not equivalent to use of Actual force (see U.S. v Zehrbach, 47 F 3d 1252, 1264, 3rd cir, 1995) To convict on the Aggravated Sexual Abuse element, it "requires a showing of Actual Force" (U.S. v H.B. 695 F 3d 931, 936, 9th cir, 2012) (U.S. v Shaw 891 F 3d 441, 448, 3rd cir, 2018) The jury instructions allowed the jury to drift through these confusing and misleading theories. a shotgun style instruction collapsed the distinction between the greator and lesser offenses of 2241 (Aggravated Sexual Abuse) and 2242 (Sexual abuse). It allowed the jury to convict on an element of 2242, fear. And 2242 as an element does not raise the maximum penalty enhancement like 2241 (Aggravated sexual Abuse). The indictment also fails to charge fear, force, or coercian, and any inference one might draw about the victims state of mind would be inadequate to show beyond a reasonable doubt that Petitioners conduct constituted the required element of 2241. These instructions misstate law and fail to explain the crucial relationship of consent, force, and causation. By focusing on consent & coercian the jury was wrongfully instructed and distracted from the elements of the charge. Additionally instructions about coercion were framed in the negative describing what would constitute a lack of consent rather than provide a proper definition of consent. As such, these jury instructions were constitutionally deficient and violated the Due Process rights of the Petitioner.

Verdict Forms

The verdict forms did not accurately reflect the elements of the charged offense and misstated law.

They did not require the jury to find whether Petitioner violated the rights of A.M. or E.S before finding of guilty, in violation of Apprendi. In CNT 2 it allowed the jury to find guilty for CNT 3 prior to finding of guilty on the elements on CNT 2. (See U.S. V Rodella 2015 US DIST LEXIS 19605) The verdict forms echo the confusion and misstatements of the jury instructions and are misleading.

Jury Instructions Deficiency Conclusion

The jury instructions on unanimous affecting inst #13 as to causation of the deprivation is structural error, as it also defacto erroneously instructed on reasonable doubt. Instructions on "under color of law" failed to state properly that Petitioner was acting with a public official, and improperly stated Petitioners employment made him a state actor; instructions on "willfully" failed to articulate or instruct on the required specific intent. Instructions on force allowed the jury to convict on less than physical force. The instructions misled the jury (see U.S. V white 863 F 3d 784, 790, 8th cir 2017) ("we will reverse if the instructions contain errors that misled the jury or had a probable effect on the jury's verdict.") (See also Quercia V U.S. 289 US 466). There can be no doubt these erroneous instructions had a probable effect on the jury's verdict. These instructions as a whole violate Due Process of the Petitioner.

2. Permitting a conviction of a private person, who was not acting with a public official present and not in conjunction or conspiracy with a public official, where the required "under color of law" and "willfullness" have not been shown or properly instructed (see Item 1), sets a dangerous precedent, and the court should exercise it's supervisory powers, as private persons have no criminal liability under 18 USC 242.

The conviction of Petitioner, a private person, was constitutional error. Petitioner was not acting in conjunction with or in conspiracy with a public official, and no public official was present co-engaged in the deprivation conduct in either cnt 1 or cnt 2 of this case. The cases hold that a private person cannot be held criminally liable under 18 USC 242, even if the person incurs civil liability under 42 USC 1983. There are limited exceptions. This case is not one of those exceptions. It is also well held case law that one does not operate "under color of law" by simple virtue of their job status. Nor does merely committing a bad act give way to "willfully" in the sense the statute proscribes.

Not every assault, excessive use of force, or even murder, is a deprivation of rights under 18 USC 242. And again a private person cannot deprive another of a right, in the sense that the statute speaks of, unless jointly acting with a public official. Petitioner cites: (U.S. v Price 383 US 787) (Screws v U.S. 325 US 91) (U.S. v Classic 313 US 299) (U.S. v Cooney 217 F Supp 417, 422, D. Colo, 1963)

(Brown v U.S. 204 F2d 247, 6th Cir, 1953)(U.S. v Trierwiler 52 F Supp 4, D. ILL, 1943)(Canty v Richmond Virginia police Dept, 383 F Supp, E.D. VA, 1974)(Ark Use of Temple v Central Surety & INS Corp 102 F Supp 444, 8th Cir, 1952) as Authorities For this Arguement.

The immediate case states Petitioner acted "under color of law" by virtue of being a private prisoner transporter. Among other cases, they cite West v Atkins 487 US 42, and other cases (that involved actual police) as their Authority. Specifically that West v Atkins holds "under color of law" means the same for 42 USC 1983 as it does 18 USC 242. However West v Atkins merely states that deprivation conduct in a 242 case would also cause a liability under 1983. It does NOT hold that a private person, under 242, who is working independant of a public official, or as a private contractor incurs criminal liability for deprivation conduct. In other words and i.e., Dr Atkins could not be held criminally liable in West v Atkins. Even though he was a private person, contracted to the prison, operating with a degree of some authority, under their policy. He took independant steps to create the 1983 liability. Although Atkins was liable under 1983 (deliberately indifferent causing an injury) he was not acting in the direct presence of a public official and was not a direct employee of the prison. This mirrors Attributes of Petitioner's case. The fact is, Atkins, and in this case Petitioner were contractors. The cases hold that Atkins was not criminally liable, even though privately contracted to the prison.

neither was Petitioner criminally liable by virtue of transporting prisoners. Like Atkins, Petitioner has no police powers and unlike Atkins, Petitioner was not operating "under color of law" in the sense 18 USC 242 means. "Acts of private parties who possess no power or authority under state law are not acts under color of authority." (U.S. v Cooney 217 F Supp 417, D. Colo 1963) Private persons have no capacity to violate 18 USC 242 (U.S. v Trierweiler 52 F Supp 4, D. ILL, 1943). Private persons must be participating jointly with state agents (U.S. v Price 383 US 787, 868). Petitioner had no legal capacity to violate 242. (Brown v U.S. 204 F 2d 247, 6th Cir, 1953) The government was required to show involvement between government and private conduct (Taylor v List 880 F 2d 1040, 9th Cir, 1989). "Must share a common objective or the conspiracy". Petitioner was acting alone.

Because this conviction errantly charges that, because of ones employment, as a private person, engaged in tasks, contracted to the state, that this meets the definition of "under Color of Law", it suggests that any private person, working alone, in a private capacity for a public agency, who runs afoul of 42 USC 1983, could be arrested for a criminal violation of 18 USC 242. But in looking at the Committee Notes on 18 USC 242, Congress did not intend for 242 to encompass private persons. The cases hold the same. This conviction violates the Due Process rights of Petitioner

see also the Model Jury instructions For the 9th circuit showing A private person must be directly involved with A public official

3. Permitting a conviction, that was obtained by way of False testimony and with false evidence; violates the Due Process rights of the Petitioner; and the court should exercise it's supervisory powers.

obtaining a conviction through false testimony and False evidence is prosecutorial misconduct; plain and simple. It is always a Due Process violation of the Accused rights, and in this case it is not harmless error. To substantiate this claim note that the Court has held this position many times. (see Napue v Illinois 360 US 264, Giglio v U.S. 405 US 150, Agurs 427 US 97, and Miller v Pate 386 US 1.

"Introduction of False testimony is material if the evidence reasonably could have affected the verdict" (Wearry v Cain 136 S. Ct. 1002, 1006, 194 L Ed 2d 78; N.6, 2016)" To prove prosecutorial use of false testimony, a defendant must show that; (1) the prosecution used perjured testimony; (2) the prosecution should have known or actually knew of the perjury; and (3) there was a reasonable likelihood that the perjured testimony could have affected the jury's verdict", quoting U.S. v Espinoza 684 F 3d 766, 780 (8th cir, 2012). it's "Not just because the case(s) involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." (Agurs 427 US at 104). In the immediate case there was much corruption in the truth seeking process. This allowed the Government to obtain a conviction as the result of corrupt behavior.

since this case was founded on entirely circumstantial evidence, it was important to properly portray that evidence. And the government used false testimony to cooberate E.S. testimony (TR, Vol 2, pg 91-92, 130, 144 Line 19-25 - in CNT 2) and the testimony of A.M. (CNT 1). In order to cooberate they needed some hard evidence, which the found in the expert witness report of expert witness, FBI Geoffry Young (DCD #84, Atch 1-4, Ex A-CV), his testimony (TR, Vol 3, pg 326) false evidence he made (Gov Exhibit 16), Rowdy Sweets testimony thereon (TR, Vol 3, pg 364) (based on Gov Ex 16), the false testimony of jailer Robert Talaseck, and of course the now debunked sexual assault testimony of E.S. they offered no cooberation of A.M. story other than unverified 404/413 testimony. And through this painted a story that the conduct had gone since 2012 with many victims beginning with M.P. in 2012. (her testimony is now debunked as completely false). So the government relied heavily on this false testimony and false evidence to cooberate E.S. testimony, as you will see clearly.

The cornerstone of this case was to prove that CSLI (call data records - found on Gov Ex 50 phone data) Cooberated E.S. story of being sexually assaulted, in a dark remote location, while the van was stopped. As a whole the records showed evidence of actual innocence, exculpatory enough to have likely affected the jury's verdict, namely that the van was continuously moving.

The records are proof that E.S., Robert Talaseck, and FBI Young provided False testimony and that the testimony of Rowdy Sweet was based on False evidence (Gov Ex 16).

A look at Gov Ex 50 reveals, that the exact starting point of hiding of the details, began with the Faulty expert witness report (Rule 16 report - DCD#84) and continued with the presentation of False evidence (Gov Ex 16) that Young testified to as the sum total of facts, about a 43 minute time period, claimed to be dormant, where E.S. was alleged to have been assaulted. (see DCD# 174, 174-1 & Pro Se supplemental brief (8th Cir Appeal). But he purposely left out exculpatory information (Facts that should have been included in his report) and deliberately deceived the jury during direct testimony. Gov Ex 16 is False evidence (See Miller v Pate ). On direct examination Young said he examined (3) calls on (3) separate towers, and only (3) cell tower sectors. (the portion of the tower a cellular device uses to conduct calls or data, sms & email). The First call happened at 18:48:17 on CID 64524810 (A panel covering the 240° sector. The second call was made at 19:31:36 on CID 64583958 (a panel covering the 0° sector). Tower 1 (CID 64524810) is depicted as being near "Happy Bend", and Tower 2 is located South of Atkins. There is about 3-5 miles, straight-line distance between the towers. There was approx 43 minutes between calls. This so called dormant time period is where E.S. and the government say she was sexually assaulted. North of Happy Bend or South of the Atkins tower. Tower 3 is irrelevant.

Note (see Gov Ex 16) Ex 16 shows dots with open wedges portraying a radius of coverage in Atkins, Ark. - Leaves out 120° sector

Corroborated by Rowdy Sweet's testimony.

see George V State (Ala, 2021 "if the person travels during the call (or data use) the call will be passed off from tower-to-tower

The lynchpin of the case came down to testimony about this "dormant" 43 minute time period. It was not dormant at all. In response to a question about what would have caused the "dormant" 43 minute, between calls, FBI Young stated "... there was no use by the 4821 phone of the ATT Network between those times". (TR, VOL 3, pg 326) The Jury was left to assume that there was no activity or calls, to cooberate the governments theory that Petitioner was off in some remote area, assaulting E.S. The CSLI for the (2) calls (tower 1 & 2) are located at pg 156 (record #'s 2151-2153). However for that period of time a lay person review based on FBI Youngs testimony, that tower hand-off shows movement (TR, VOL 3, 324-326) and complete CSLI review shows a high amount of data usage, with tower-hand off (no static pings) and with (7) instances of data use events starting - they cover approximately (9) pages, front & back, showing nothing but high data traffic (almost 65 tower hand-off) events in the data record details. But Petitioner calls the Courts Attention to data records 19313, 19314, 19317, that during the "dormant" period, began transmitting on sector 120° of the Happy Bend tower, a sector that Young deliberately ommitted from Gov Ex 16, and his expert witness report. This clearly shows that his testimony is false. (see Petitioners Pro Se Supplemental Brief, EX A3 - shows data starting on different sectors.

See Pro se Supplemental Brief (Direct Appeal) Ex A4, A6, A7, A8, A9 showing device stopped, pinging

The significance of this data usage is that it shows that the van (iphone) ① was moving the entire 43 minutes (see Tr, Vol 3, pg 324-326)(George v. State (ALA, 2021); ② that it does not show being stopped or pinging; ③ does not tend to show the phone was closed; ④ that there was active data useage being done on the phone; ⑤ AND that almost 50% of the data events, starting during the 43 minutes, started on sector 120° of tower 1, which places Petitioner on the highway, out of the Atkins area, traveling east. (one GPS waypoint among the data use showed a hit on a tower 35 miles east, which would have happened during the time E.S. says the van was stopped and she was being assaulted).

But the jury heard "... there was no use by the 4821 phone of the AT network between those times." (TR, Vol 3, 326) Of course that testimony is false and Ex 16 made to support it is false evidence. There was NO DORMANT TIME. The data events completely cover that time. The government offers no evidence or analysis to say why those data use events are insignifigant. Even so, it would still be up to a jury to evaluate that data use information. This information fully rebutts E.S. testimony in a signifigant way; that one cannot be assaulted outside of a moving vehicle, or by an attacker using an iphone 6+, thumbing through mobile apps. Certainly this would have caused doubt in the mind of the jury. And there is a reasonable probability that had the jury known of the data use, there would have been a different outcome. FBI Young, FBI Roberts, and the government attorneys knew FBI Youngs testimony was false. Remarkably E.S. said "..if he wasnt on the phone talking about coffee or checking his social media accounts or whatever he was doing on his phone (TR, Vol 2, pg 56). Incidently a look at the CSLE for the entire day shows high calls and data being used all the way from Alabama to Arkansas. This supports the high data use as outlined.

Young knew about the data. FBI Roberts knew about the data (see Tr, Vol 3, Vol 4, 490-491). And the government attorneys prepared and submitted the expert witness report and Gov Ex50 at trial, showing their joint knowledge.

But this one of (5) noteable events. E.S. testified that upon being dropped off at the Apache jail Petitioner stayed there 1½ hrs to prevent her from reporting (TR, Vol 2, 112) and Robert Talaseck testified that Petitioner stated 2-3 hours (TR, Vol 2, 158) in cooberation of E.S. story. CSLE for that time/date (Gov Ex 50, pg 163, Record #2240-2241) and other details (see DCD 174, 174-1) about Petitioners hotel show he was at the jail 20 minutes. Certainly the normal amount of time to drop off an inmate and go to ones hotel. The Government knew or show have known E.S. and Robert Talaseck testimony was false.

The testimony of Rowdy Sweet was false theory, based on Gov Ex 16 (false evidence) designed to show Petitioner was under the Happy Bend cell tower in Atkins and that driving from there to "remote areas" North and south of Atkins would result in certain travel time. BUT his testimony is directly contradicted by the CSLI (Gov Ex 50), in where there was no tower usage or "pings" in those tower sectors covering that area, which shows false theory based on the Rule 16 (Gov Ex 16) Atkins cell tower coverage map he had been shown by FBI.

The government further referenced the false testimony in closing arguements. (Tr, Vol 5, 650) "where he was... was not.. consistent... towers (CSLI)".. "cell site data ... proves E.S. assault happened," "back roads", "stopping" (pg 655) "dark secluded location," (pg 681) "Rowdy Sweet ...told you... cell tower in his grandfathers back yard ... he was right here." This shows prejudice to Petitioner.

The testimony of M.P. was false. She alleged that she was picked up from Las Vegas Metro jail (Nevada) (CCDC-Las Vegas, NV) then taken to Kingman, AZ, then to her jail in French Camp, CA. And that she and Petitioner were alone the entire time. That there were (2) signifigant stops; (1) a stop along the road (2) hours after leaving Las Vegas to "re-cuff her in front" and; (2) that some time after that Petitioner drove her off highway to "a place to hike" where she was sexually assaulted; (3) she was certain these events did not happen in California (Tr, Vol 3, 269, 270, 284); and (4) that going by way of Kingman, AZ was not the way to CA.

This testimony is entirely false, proven by way of a Facebook post made by Petitioner (on mobile, with GPS waypoint) while traveling through Mountain Pass, CA. Later review of basic business records (CSI transport records) and social media posts by Petitioner show; (1) Petitioner arrived at Las Vegas Jail on 7/26/12 at 1400 (not a departure time) and later arrived at Merced Cnty Jail at 0010 hrs to pick up and then transport Timothy Plumber (who traveled with M.P. to her jail). Using M.P. testimony, the total miles traveled would be over 600 miles (mini van can travel 400 miles without refueling) and it would require a food and fuel stop between Las Vegas, Kingman and Merced, in addition to the lengthy stops M.P. said took place. Simple science and Google map research debunks her testimony, because if there were that many stops, Petitioner could never have arrived in Merced by 0010 hrs. Petitioner was not flying an Apache. But further research of social media (by Petitioner after trial) shows that at the time M.P. alleged she was in Kingman, Petitioner updated his Facebook page via mobile device, creating a GPS waypoint attachment as being located (posted from) Mountain Pass, CA. This is approx 150 driving miles west of Kingman, and in another time zone. (see DCD# 174/174-1, Facebook post, annotated Google map showing Las Vegas, Kingman and Mountain Pass, CA relative positioning. This completely debunks M.P.'s horrible allegations.

The government confirms that they knew; that they gave copies of these Facebook records to defense (see reply to Rule 33 motion). So, ① they knew M.P. was not alone, ② that Petitioner posted on his Facebook 150 miles away, and ③ that the drive time M.P. alledged was impossible. It is complete evidence of False testimony and reckless investigation.

The government "purposely ignored evidence suggesting the defendant's innocence" (Atkins v Epperly 588 F3d 1178, 8th Cir, 2009), a substantive Due Process violation not mere negligence. "The Prosecuter had the duty to present all material evidence to the jury, was not fulfilled and constitutes a violation of Due Process.." (Giglio v US 405 US 150). The government had the duty to correct the False testimony and did not (see Napue v Illinois 360 US 364). Even "intentionally or recklessly failed to investigate thereby shocking the conscience" (Carmine v Brooks, 8th Cir. 2008) (see also: Wilson v Lawrence Cnty 260 F3d 946, 8th Cir, 2001). When prosecutor and law enforcement act in concert, it is required to treat the Constitutional standard "as if it had substantial and injurious effect or influence on the jury's verdict" (Jimerson v Payne 957 F3d 916, 8th Cir, 2020) A reversal is required if there is any reasonable likelihood that the False testimony could have affected the judgement of the jury. The Petitioners burden is not for sure. Instead it's a reasonable probability of a different outcome. This misconduct was calculated to mislead a jury. And it violated Petitioner's Due Process rights.

4. Expert cell phone tower reports that fail to provide all relevant factual and scientific data (calls, data, SMS, MMS, internet use) to form their basis of opinion; provide only maps with-dots and open wedges and no articulation of methodology used to arrive at their conclusion are dificient & constitutionally prevents the defense from presenting a meaningful defense.

FBI Young presented a constitutionally defective expert witness report, that failed to articulate all tower sectors used in conjunction with all calls, data use, SMS, MMS, & email used during the time E.S. alleges that she was assaulted in the Atkins, AR area. He then duplicated the Google map with 3 dots and open wedges as trial Ex 16, to depict a dormant 43 minute period of time he later testified was dormant. He then testified beyond the boundaries of his report, and also provided lay testimony where the government had not laid the foundation. The non-disclosure of relevant data usage in the Atkins area, the untimely testimony of specic ranges & distances, and lay testimony violated Due Process and prevented the defense from mounting a meaningful defense to the E.S. assault testimony.

The government Notice of Expert witness (DCD 84, pg 4 & relevant attachments did nothing to show how FBI Young used all of the CSLI (complete - calls, data, SMS, MMS, Email - Gov Ex 50) to form his analysis or opinions, or why for example he would leave out data usage on those towers, from his report or testimony. (see Gov Ex 16, Tr Vol 3, 303, 312, 329 where it's hidden).

He did SAY he reviewed the "Call Detail Records" (Tr, Vol 3, 312, 313, 314, 324-326) completely to form his analysis and EX 16. Presumeably he did the same for his "report" which was much like EX 16 with (3) towers plotted as dots with open wedges on a Google map. With no explanation one is left to wonder what it means, and certainly without full disclosure, one would be unaware of the need to evaluate and plot the data usage in that report. Rule 16(A)(1)(G) states in part "...government must give to the defendant a written summary of any testimony that the government intends to use under Rule 702... at trial. the summary... must include the witness opinions, the basis and reasons for those opinions, and the witness qualifications." "Additionally... summary should cover not only written and oral reports, tests and investigation but any information that might be recognized as a legitimate basis for opion". Certainly FBI Youngs report fails to articulate his basis for opinion that excluded data use. In fact this hides those details, yet he testified falsley about their non existence. Other FBI, police, and other experts use data use in conjuction with their analyses to locate people in the present (fugitives) and historical. The report is constitutionally defective, as it fails to summarize ALL OF FACTS. It was never vetted as per Rule 702. In U.S. v Machado-Erazo 901 F 3d 326 D.C. Cir, 2018, the court ruled that an almost exactly similar map style report failed as being defective in form and without explanation or clarification.

Both in Machado And this case, the Agents testified beyond the scope of their expertise (specific distances, ranges of distances). and because the testimony was Neither disclosed or vetted (Rule 16 / Rule 702) it caused a Due Process error. In this case, it was constitutional error to withold data from the report and then testify falsely using that report and testimony to mislead the jury that there was a "dormant" 43 minute time period, where Petitioner could have assaulted E.S. With the data usage in mind the report fails to articulate how in 45 seconds one could be from the Happy Bend tower to the Atkins tower; or Articulate how the device managed to not hit any Northern sectors of the Happy Bend tower or Any southern portions of the Atkins tower; or discuss in any way how 50% of the data use, began at separate times on secter 120° of the Happy Bend tower. During trial Young (Tr, Vol 3, 326) testified to specific distances of the towers, highway speeds and traffic pattern. He also elicited lay testimony that one could travel one way for 15 minutes and then back again 15 minutes. The government never established a foundation for that lay testimony as per Rule 701. Together it is "junk science" to establish Petitioners location as being in a remote location assaulting E.S. And the report fails Rule 702 (d) test as it did not "reliably apply the principls and methods to the case. This requires reversal, and is prejudicial.

## CONCLUSION

This court should grant the Petition for a writ of certiorari and set the case for arguement.

Respectfully submitted

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