No.

In The

Supreme Court of the United States

APPENDIX

Javier H. Armengau. A708-691
London Correctional Institution
1580 S.R. 56
London, Ohio 43140

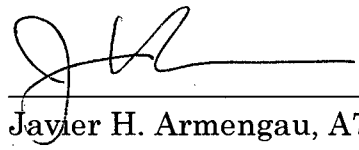
Petitioner

v.

Jenny Hildebrand, Warden
London Correctional Institution
1580 S.R. 56
London, Ohio 43140

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals for the Sixth Circuit



Javier H. Armengau, A708-691

APPENDIX

A

June 1, 2023 Decision and Order denying Petitioner a Certificate of Appealability on his Sufficiency of Evidence claim by Judges Karen Nelson Moore, Richard Allen Griffin and Chad A. Readler.

No. 22-4049

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAVIER H. ARMENGAU,

Petitioner-Appellant,

v.

JENNY HILDEBRAND, Warden,

Respondent-Appellee.

ORDER

Before: MOORE, GRIFFIN, and READLER, Circuit Judges.

Javier H. Armengau, a pro se Ohio prisoner, appeals the district court's judgment denying his second amended petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. The district court granted Armengau a certificate of appealability ("COA") for two claims raised in his habeas petition. Armengau has filed an application to expand his COA to include additional claims. *See* Fed. R. App. P. 22(b). He also moves for release on bail. For the reasons discussed below, this court denies Armengau's COA application and his bail motion.

Armengau was a criminal defense attorney licensed to practice law in Ohio. In May 2013, Armengau was indicted on 18 counts as a result of allegations from women whom he encountered in the course of his legal practice. After a lengthy trial, Armengau was convicted of four counts of sexual battery, two counts of gross sexual imposition, and one count each of rape, kidnapping, and public indecency. He was acquitted of the remaining counts. The trial court imposed an aggregate 13-year prison sentence. On direct appeal, the Ohio Court of Appeals affirmed Armengau's convictions but twice remanded the matter for resentencing. *State v. Armengau*, 93 N.E.3d 284, 320 (Ohio Ct. App. 2017), *perm. app. denied*, 90 N.E.3d 950 (Ohio 2018); *State v. Armengau*, 154 N.E.3d 1085, 1095 (Ohio Ct. App. 2020), *perm. app. denied*, 154 N.E.3d 101

(Ohio 2020). The trial court ultimately resentenced Armengau to a total term of 12 years' imprisonment.

Meanwhile, in March 2019, Armengau filed this § 2254 petition, which he twice amended, raising ten claims: (I) the convictions were supported by insufficient evidence; (II) the indictment did not provide him with fair notice of the charges against him; (III) the trial court violated his rights by allowing the State to constructively amend the indictment and by refusing to instruct the jury that it had to unanimously agree on the factual basis supporting its verdict; (IV) the trial court incorrectly instructed the jury; (V) the prosecutor committed misconduct; (VI) the trial court lacked subject-matter jurisdiction over his case; (VII) the Ohio appellate courts applied the law differently in his case than in other cases with similar facts; (VIII) actual innocence; (IX) his right to a unanimous jury verdict was denied when the trial court refused to give the aforementioned unanimity instruction; and (X) the state trial and appellate judges, rather than the jury, determined the factual bases for his convictions and sentenced him in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the resentencing included allegations that were not presented to the jury.

A magistrate judge determined that Armengau's claims were non-cognizable, procedurally defaulted, or meritless and therefore recommended dismissing the second amended habeas petition. The magistrate judge did, however, recommend granting a COA as to Claims I and III. Over Armengau's objections, the district court adopted the magistrate judge's recommendation as modified, dismissed the second amended habeas petition with prejudice, and granted a COA as to Claims II and III. This appeal followed.

Armengau now seeks to expand the COA issued by the district court to include Claims I, IV, V, IX, and X. Armengau's failure to request a COA as to Claims VI, VII, or VIII in his application means that those claims are abandoned and not reviewable. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with

the district court's resolution of his constitutional claims or that jurists could conclude [that] the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Where the state courts adjudicated the petitioner's claims on the merits, the relevant question is whether the district court's application of § 2254(d) to those claims is debatable by jurists of reason. *Miller-El*, 537 U.S. at 336. When the district court's denial is based on a procedural ruling, the petitioner must demonstrate that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In his application to expand the COA, Armengau first challenges the district court's determination that his sufficiency-of-the-evidence claim (Claim I) is not cognizable on federal habeas review. In that claim, Armengau argued that the State failed to present sufficient evidence to establish what he calls venue for several counts. More specifically, he argued that the State failed to present evidence that those offenses were committed in Franklin County, Ohio, as was alleged in the indictment.

In reviewing a sufficiency-of-the-evidence claim, a federal habeas court asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "Under *Jackson*, federal courts must look to state law for 'the substantive elements of the criminal offense,' . . . but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Coleman v. Johnson*, 566 U.S. 650, 655 (2012) (per curiam) (quoting *Jackson*, 443 U.S. at 324 n.16). As the

district court explained, "under Ohio law, the location and time listed in the indictment are not material elements that must be proven by the prosecution." R.134, PageID# 15776; *see also Geboy v. Brigano*, 489 F.3d 752, 762–63 (6th Cir. 2007).

So reasonable jurists would not debate the district court's conclusion that Claim I did not raise a federal constitutional question. *See* 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Armengau next argues that the district court wrongly concluded that he procedurally defaulted his jury-unanimity claim (Claim IX) by failing to present it to the Ohio Supreme Court on direct appeal. *Cf. Wagner v. Smith*, 581 F.3d 410, 418 (6th Cir. 2009) ("For a claim to be reviewable at the federal level, each claim must be fairly presented at every stage of the state appellate process." (citing *Hafley v. Sowders*, 902 F.2d 480, 483 (6th Cir. 1990))). But Armengau does not contest the district court's alternative basis for denying him habeas relief on his jury-unanimity claim—namely, that it fails on the merits because he failed to show that the state court either contravened or unreasonably applied clearly established federal law when it adjudicated that claim on direct appeal. *See* 28 U.S.C. § 2254(d). He has therefore abandoned any challenge to the district court's alternative, dispositive rationale in his application to expand his COA. *See Elzy*, 205 F.3d at 886. Armengau is not entitled to a COA on this claim.

Armengau further seeks to expand his COA to include his "claims as they pertain to his right to a fundamentally fair trial" that he says he raised in Claims I, II, III, IV, V, IX and X. Armengau has abandoned Claims IV, V, and X by not specifically addressing the district court's unfavorable disposition of those claims. *See id.*; *see also United States v. Bradley*, 917 F.3d 493, 509 (6th Cir. 2019) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (quoting *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997))). And, as previously mentioned, the district court has already certified Claims II and III, and Armengau has not made the requisite showing to obtain a COA on Claims I and IX. *See Miller-El*, 537 U.S. at 327.

Finally, Armengau asks this court to release him on bail. Release pending an appeal from the denial of habeas relief is governed by Federal Rule of Appellate Procedure 23(b). *United States v. Cornish*, 89 F. App'x 569, 570 (6th Cir. 2004). "In order to receive bail pending a decision on the merits, prisoners must be able to show not only a substantial claim of law based on the facts surrounding the petition but also the existence of 'some circumstance making [the motion for bail] exceptional and deserving of special treatment in the interests of justice.'" *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir. 1990) (alteration in original) (quoting *Aronson v. May*, 85 S. Ct. 3, 5 (1964) (Douglas, J., in chambers)). "There will be few occasions where a prisoner will meet this standard." *Id.*

Armengau asserts that two circumstances make his bail motion exceptional and deserving of special treatment. He first argues that, at his second resentencing hearing on October 19, 2022, the trial court violated his constitutional rights by failing to fully credit him for the time that he has already served in prison. He argues that this error will keep him in prison beyond June 27, 2023—the date that he claims that his custodial sentence should expire. Because the record is not sufficiently developed to allow us to fairly evaluate this argument—which challenges the duration of Armengau's confinement—we decline to consider it without prejudice to collateral review. Armengau is free to raise any argument concerning his most recent resentencing hearing in a new habeas petition. *See Panetti v. Quarterman*, 551 U.S. 930, 944-47 (2007) (holding that claims that are not ripe at the time of the petitioner's first habeas petition are not required to satisfy AEDPA's requirements governing second or successive habeas petitions); *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010) ("[A] numerically second petition is not properly termed 'second or successive' to the extent it asserts claims whose predicates arose after the filing of the original petition.").

Second, Armengau argues that his family circumstances warrant his release on bail. More specifically, he notes that his adult daughter was recently indicted on a state burglary charge and fears that she may "be incarcerated for a significant period of time," thus leaving her unable to care for her own daughter. Assuming this could satisfy the exceptional circumstance requirement, *see Dotson*, 900 F.2d at 79, although Armengau asserts that he will "be able to provide a viable

placement option and permanent support for his granddaughter once he is released from custody," he has not shown that he is an essential caregiver to his granddaughter. Indeed, Armengau acknowledges that his granddaughter is currently residing with other family members. *Cf. United States v. Martin*, No. 20-6324, 2021 WL 2012561, at *2 (6th Cir. Mar. 30, 2021) (concluding that defendant was not entitled to compassionate release when the available record did not support his claim that he was an essential caregiver for his children and their mother).

For these reasons, Armengau's application to expand the COA and motion for release on bail are **DENIED**. The clerk's office is **DIRECTED** to issue a briefing schedule with respect to the two claims certified by the district court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 06/01/2023.

Case Name: Javier Armengau v. Jenny Hildebrand
Case Number: 22-4049

Docket Text:
ORDER filed: Armengau's application to expand the COA and motion for release on bail are DENIED. The clerk's office is DIRECTED to issue a briefing schedule with respect to the two claims certified by the district court. Karen Nelson Moore, Circuit Judge; Richard Allen Griffin, Circuit Judge and Chad A. Readler, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Mr. Javier H. Armengau
London Correctional Institution
P.O. Box 69
London, OH 43140

A copy of this notice will be issued to:

Ms. Jerri L. Fosnaught
Mr. Richard W. Nagel

No. 22-4049

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 13, 2023
DEBORAH S. HUNT, Clerk

JAVIER H. ARMENGAU,

Petitioner-Appellant,

v.

JENNY HILDEBRAND, WARDEN,

Respondent-Appellee.

ORDER

Before: MOORE, GRIFFIN, and READLER, Circuit Judges.

Javier H. Armengau, a pro se Ohio prisoner, petitions the court to rehear en banc its June 1, 2023, order denying his application to expand the certificate of appealability ("COA") issued by the district court in his 28 U.S.C. § 2254 proceeding. The petition has been referred to the original panel of three judges for an initial determination on the merits of the petition for rehearing. Upon careful consideration, we conclude that we did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, decline to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX

B

June 28, 2023 Decision and Order denying Petition for Rehearing/Reconsideration En Banc on Petitioner's Request for a Certificate of Appealability on his Sufficiency of Evidence claim by Judges Karen Nelson Moore, Richard Allen Griffin and Chad A. Readler.

Armengau v. Hildebrand, 2023 U.S. App. LEXIS 16376

United States Court of Appeals for the Sixth Circuit

June 28, 2023, Filed

No. 22-4049

JAVIER H. **ARMENGAU**, Petitioner-Appellant, v. JENNY HILDEBRAND, WARDEN, Respondent-Appellee.

Counsel: [*1] JAVIER H. **ARMENGAU** (#708691), Petitioner - Appellant, Pro se, London, OH.

For JENNY HILDEBRAND, Warden, Respondent - Appellee: Jerri L. Fosnaught, Assistant Attorney General, Office of the Attorney General, Columbus, OH.

Judges: Before: MOORE, GRIFFIN, and READLER, Circuit Judges.

ORDER

Javier H. **Armengau**, a pro se Ohio prisoner, petitions for rehearing en banc of this court's June 1, 2023, order denying his application to expand the certificate of appealability ("COA") issued by the district court in his 28 U.S.C. § 2254 proceeding. The petition was initially referred to this panel of three judges. After review of the petition, this panel issued an order announcing its conclusion that the original application to expand the COA was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

Appendix B

APPENDIX

C

Copy of Motion for En Banc Consideration

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAVIER H. ARMENGAU,

Petitioner / Appellant

v.

JENNY HILDEBRAND, Warden

Respondent / Appellee

CASE NO. **22-4049**

DISTRICT CASE NO. 2:19-cv-01146

PETITION FOR REHEARING OR RECONSIDERATION EN BANC

Now comes Appellant and respectfully petitions this Honorable Court for a rehearing or reconsideration *en banc* of the panel's June 1, 2023 decision denying Appellant a *Certificate of Appealability* on Claim I, his *Sufficiency of the Evidence* claim. The magistrate Judge recommended the certificate on the claim and the district judge denied the certificate; however, a certificate was granted on Claims II and III, *Notice of the Charges* and *Double Jeopardy* claims. *Reconsideration is appropriate where there is a clear error of law in the court's conclusion.*

1. En banc consideration is necessary in this case in order to secure and maintain uniformity of this Court's decisions, as well as uniformity with other decisions throughout the United States that have analyzed and decided the same issue, in the same manner. **F. R. App. P. 35(a)(1)**

2. En banc consideration is necessary because the issue involves a question of exceptional importance in that the current decision in this Appellant's case, denying the certificate, will allow district court's to apply the wrong standard and analysis to sufficiency of the evidence cases where a defendant is not tried or convicted for the crime for which he is charged or indicted, leading to a Constitutionally impermissible conviction. **F. R. App. P. 35(a)(2)**

Appendix C

3. The decision in this Appellant's case at the district court level and currently in this Court is in direct conflict with other cases analyzed and decided by this Court (and the district court in prior cases) on the issue of whether the prosecution is required to prove the charge as identified and contained in the indictment. The cases that are in conflict with Appellant's case are *Kolvek v. Foley,* 2022 U.S. App. LEXIS 11462 (6th Cir.), *In re Caraway,* 2022 U.S. App. LEXIS 4054 (6th Cir.); *also,* 2023 U.S. App. LEXIS 10876 and *Geboy v. Brigano,* 489 F.3d 752, 763 (6th Cir. 2007).

4. A state's *highest court determines the requirements for a criminal conviction.* Elements to be proven are determined by state statutes *and* case law. *Foy v. Donnelly,* 1992 U.S. App. 12881 (5th Cir.); *Stovall v. Cockrell,* 2002 U.S. Dist. LEXIS 5725 (N.D. Tex.).

5. The District Court agreed that "the prosecution must prove every **material** element of a crime beyond a reasonable doubt and state law determines which elements of a crime are material." (Doc. 134 at 41).

6. The Magistrate Judge confirmed – The Ohio Supreme Court's decision in *State v Hampton,* 2012-Ohio-5688 - "**does hold location of the offense as alleged in the indictment must be proved beyond a reasonable doubt**." (Doc. 97, PageID 15108).

7. In *Hampton,* on the specific issue in Appellant's case, the Ohio Supreme Court cited to their decision in *Knight v. State,* 54 Ohio St. 365 (1896).

8. In *Knight* the *Ohio Supreme Court* emphasized:

> "Now can it be said that the ***place of the offense***, i.e. ***the county***, was not necessary to be proven, for **how could a conviction be sustained without it**? Neither can it be said that the *question of place* did not affect the substantial rights of the defendants, **for how, *if not alleged, could they intelligently prepare their defense***, or **how could the record serve the defendants to a bar to a second prosecution for the same offense**? In general terms it may be said that as to this defect that **the indictment fails** to aver ***all material facts necessary to a conviction***. *And such failure is fatal,* as well since ***the statute*** as at common law.". *Id.*

9. This *specific passage* (¶ 8) confirms the element issue. *Knight* is strictly a sufficiency, double jeopardy protection and notice case on the *exact issue* in Appellant's case.

10. The Ohio Supreme Court specifically attached the element requirement pertaining to "the County" to statutory offenses – i.e. "*And such failure is fatal,* as well since ***the statute*** as at common law.", thereby making it a substantive element required to be proven.

11. With the exception of *this* Appellant's case, this Court has treated the element requirement consistent with the Ohio Supreme Court's requirement for a criminal conviction.

12. In *Geboy*, this Court, consistent with its prior *and* future decisions, noted that the **indictment** for the relevant counts provided a limited time frame and that the offenses occurred "within the County of Logan.". In fact, this Court went on to highlight that:

> "Apart from **the *limitation* to Logan County** – a ***limitation*** that Petitioner does not challenge – these two counts do not specify that the charged offenses occurred at any particular locations.".
>
> This Court noted that the indictment ***limited the location*** to the **County of Logan**. The Court continued – "The *indictment alleges only* that Petitioner committed his offenses in Logan County" and "Petitioner has not suggested that the indictment was deficient under Ohio law for *lack of a* ***more specific*** *location* where these offenses were allegedly committed.". *Id.*

This Court was correct; Ohio law does not require a "more specific location" *beyond* "the County" of where the crime was committed to be proven beyond a reasonable doubt. The panel now in this Appellant's case is disregarding the analysis and conclusion in *Geboy*.

13. This Court had an identical issue in *In re Caraway*, 2022 U.S. App. LEXIS 4054 (6th Cir.); *also*, 2023 U.S. App. LEXIS 10876. In *Caraway*, a pastor was convicted of having sex with a

young girl. Claiming he was convicted for crimes outside the scope of the indictment, this Court stated:

> He states that the indictment charged him with crimes that allegedly took place at the Loyall Church of God on May 9 and 21, 2011, but that at trial, the prosecutor introduced evidence of a "new and different crime . . . that allegedly took place on May 6, 2011[,] some 10 miles from the church.".
>
> **The indictment was not as specific as Caraway claims**. Rather, **for *each count***, it stated that "**during the month of May, 2011, in Harlan County, Kentucky**," Caraway committed the charged offenses. An Indictment must contain the elements of the offense, "sufficiently apprise [] the defendant of what he must be prepared to meet," and protect the defendant against double jeopardy. *Russell v. United States*, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962) (quoting *Cochran v. United States*, 157 U.S. 286, 290, 15 S. Ct. 628, 39 L. Ed. 704 (1895)). **Nothing in the indictment limited the prosecution to introducing evidence of only incidents that took place on May 9 and 21, 2011 at the Loyall Church of God.**

According to this Court, the indictment limited the prosecution to proving the charged conduct occurred in **Harlan County**, Kentucky. The defendant in *Caraway* was *tried and convicted* for his conduct in the *County* as alleged in the indictment, consistent with Ohio Supreme Court precedent.[1]

14. In *State v. Lewis*, 21 Ohio St. 2d 203 (1970) the **Ohio Supreme Court** held:

> "The indictment, information, or affidavit in a criminal prosecution, **necessarily confines the state to the [*211] charge made against the defendant**, in order that the defendant shall know, as the Constitution provides, the nature of the accusation against him.".

15. The *confinement* referenced by the Ohio Supreme Court in *Lewis* is the "limitation" referenced in *Caraway* and *Geboy*. **The facts for which one is tried must fit the terms of the indictment**. The panel in *this* Appellant's case is disregarding the analysis and conclusion in *Caraway*.

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1 While Caraway is a Kentucky case, the issue and this Court's analysis is relevant to Appellant's case as to what is required under Ohio law.

16. Appellant provided the district court with this Court's decision in *Kolvek v. Foley*, 2022 U.S. App. LEXIS 11462 (6th Cir.)[2], where that district court noted that the state is required to prove that the crimes resulting in conviction occurred in the "County" alleged in the indictment - ("according to the indictment, **the *conduct had to have occurred*** in Summit County, Ohio" and "the *indictment alleged only* that **the crimes took place** in Summit County, Ohio") *Id.* [3] – **consistent with Ohio Supreme Court precedent**. The panel now in *this* Appellant's case is disregarding the analysis and conclusion in *Kolvek*.

17. *Geboy* was indicted for alleged crimes that occurred in Logan County, Ohio and he was convicted for alleged crimes that occurred in Logan County, Ohio. *Caraway* was indicted for alleged crimes that occurred in Harlan County, Kentucky and he was convicted for alleged crimes that occurred in Harlan County, Kentucky. *Kolvek* was indicted for alleged crimes that occurred in Summit County, Ohio and he was convicted for alleged crimes that occurred in Summit County, Ohio. Appellant was indicted for alleged crimes that were alleged to have occurred in Franklin County, Ohio but where convicted, assuming a unanimous or *even majority verdict*, was convicted for alleged crimes in Marion County, Ohio. The defendants/petitioners/appellants in *Geboy*, *Caraway* and *Kolvek* argued that they were tried for alleged crimes different than those supporting the indictment. But this very court held, *repeatedly*, that the indictment limited the proof required to the "county" as alleged.

18. Notably, in this Honorable Court's June 1, 2023 decision denying the certificate on Claim I, *only cited to Geboy*, even though *Geboy* is based on a different pattern of facts and actually

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2 Supplemental Authority, filed May 8, 2022 (Doc. 126, Doc. 127

3 The trial court in *Kolvek* actually confirmed that the conduct had to occur in Summit County but that "it could be anywhere in Summit County".

supports and confirms Appellant's claim. Nowhere in this Court's decision does the Court even mention any of the precedent presented by Appellant in his *Application to Expand the Certificate*.

19. In *Nash v. Eberlin*, 258 Fed. Appx. 761 (6th Cir. 2007), this Court held:

> "Where the elements of a state crime are sufficiently clear **as a matter of state law**, we cannot automatically uphold a conviction with insufficient proof of one of the elements on the theory that the state court in the very case has eliminated that element as a requirement. It would undermine the federal sufficiency-of-proof requirement to do so." *Id.*

20. The **Ohio Supreme Court** has further held:

> "We have *also* stated that it is not essential that the ***venue of the crime*** be proven in express terms, provided it be established by all the facts and circumstances in the case *beyond a reasonable doubt*, that ***the crime was committed*** in the *County* and State **as alleged in the indictment**." (*Hampton*, ¶19).

21. "A *conviction* for rape requires positive evidence, either direct or circumstantial, that sexual conduct of the type alleged in the indictment occurred on or about the time **and place** specified.". *State v. Lucas*, 2001 Ohio App. LEXIS 4227.

22. In *Angeloff v. State*, 91 Ohio St. 361 (Ohio 1914), the Ohio Supreme Court held that the *factual basis of the incident* that was indicted must be the *same one* that is tried.

23. In *State of Ohio v. Palmer-Tesema*, 2020-Ohio-907 (8th Dist.) the court stated - the state cannot argue a **different rape, at a different time, at a different place.**

24. In *Dye v. Sacks*, 173 Ohio St. 422 (Ohio 1962) the **Ohio Supreme Court** held that an amendment was proper as it ***did not change*** the ***time or place*** of the crime charged.

25. The **District Court confirms** - "[t]he initial indictment[4] against [Appellant] alleged that the conduct underlying the charges occurred in Franklin County, but he was ultimately

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4 There was only one indictment in Appellant's case. Appellant only had witnesses subpoenaed for allegations pertaining to 2002 and 2008 and for allegations in Franklin County for Counts 8-18 which is the relevant time frame and location in the indictment. The trial court denied Appellant's counsel's repeated requests for a mistrial.

convicted for events that took place in Marion County on Counts 8, 10, 14-18." (Doc. 134 at 35).

26. The United States Supreme Court held in *Garner v. Louisiana,* 368 U.S. 157 (1961), that the Court must look to Louisiana law *as set by the Louisiana Supreme Court* to analyze the evidence as to *what is required for conviction.*

27. In *Cooper v. Warden,* 2020 U.S. Dist. LEXIS 115972 (S.D. Ohio 2020) the court noted - "To convict him *of that count,* the **state was obliged to prove** beyond a reasonable doubt that **at the *time and place alleged,*** he was in fact operating a motor vehicle and his ability to do so was appreciably impaired by alcohol.".

28. In *State v. Gordon,* 2018-Ohio-2682 (5th Dist.) the court held that "[a] reasonable person could have found beyond a reasonable doubt that defendant operated her vehicle in **Delaware County**, Ohio on May 9, 2017 ***as alleged in the complaint***...accordingly, *there was sufficient evidence* to support conviction".

29. In *State v. Johnson,* 1994 Ohio App. LEXIS 5112 (4th Dist.), the court noted:

> "Witnesses testified that the crime occurred outside 1149 Fourth Street at Waller Hill. The trial court, when overruling appellant's Crim. R. 29(A) motion for acquittal, in effect took judicial notice that that this location is within Scioto County. Appellant makes no argument that the location is outside Scioto County..., we find substantial competent, credible evidence upon which a jury could conclude appellant was the perpetrator of the crime *and the crime occurred in Scioto County.*". *Id.*

30. The ***location of the crime*** is a material element of the crime. *State v. Robinson,* 1994 Ohio App. LEXIS 4985 (9th Dist.).

31. In *Moore v. State,* 1861 Ohio LEXIS 153 (Ohio 1861) the **Ohio Supreme Court** held that the "[l]ocation is a relevant *element* of the offense. **The *county* was a material question with regard to the *conviction***".

32. In *Foster v. State,* 19 Ohio St. 415 (Ohio 1869) the **Ohio Supreme Court** held that "[b]y correctly naming "Williams County" as the *location of the crime*, the record cannot provide a "more effectual bar" to a future prosecution for the same offense] [5].

33. In *Spencer v. State,* 13 Ohio 401 (Ohio 1844) the **Ohio Supreme Court** determined that the "[l]ocation of the warehouse pertaining to the burglary charged was *properly described in the indictment* by stating ***the county*** in which it was situated". See, *Harris v. Morgan,* 2011 U.S. Dist. LEXIS 155529 (N.D. Ohio 2011) [indictment informed petitioner of the charges he faced by providing the exact nature of the charges, **including** the ***date, time*** and ***place*** of the offense]. *State v. Heidelburg,* 2009-Ohio-5520 (12th Dist.) [**constitutional requirements satisfied** - indictment included *date,* ***location*** and nature of the offense].

34. In *State v. Mbodji,* 129 Ohio St. 3d 325 (Ohio 2011), the **Ohio Supreme Court** determined that where the complaint stated that "...Mbodji, on or about the 16th day of April, 2009, **in Hamilton County**, State of Ohio, did knowingly cause physical harm..." the complaint stated "***the essential facts of the crime charged***.".

35. This Court has held that "[i]t is *settled law* that when a person is placed upon trial for a violation of a criminal statute, he is to be convicted, if at all, on evidence showing his guilt of the *particular* offense charged in the indictment, and proof which shows that the accused is guilty of **other crimes at other times** even though of the same nature, is **not evidence of the commission of the crime charged**.". *Banning v. United States,* 130 F.2d 330 (6th Cir. 1942).

36. The prosecution in Appellant's case, in *closing*, confirmed that the *County* is a material element that they were *required to prove*. The state advised the jury that they were required to prove that

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5 An "effectual bar to a future prosecution for the same offense" relates to a material element of the indicted offense not to where a trial is ultimately held. *Foster* is another Ohio Supreme Court case.

the crimes occurred in **Franklin County for Counts 1-8** (Doc. 1-6, PageID 181-185). See, Doc. 72, PageID 13413, Tr. 3647 - "these are the **elements** *the state has to prove to you* beyond a reasonable doubt, in **Franklin County, Ohio**, the defendant did…". *Id.* If prosecutors agreed that they had to prove that the crimes in Counts 1-8 occurred in Franklin County, because that is what they indicted, then they were also required to prove that the crimes occurred in Franklin County for Counts 9-18 – *because that is what they also indicted.*

37. Under Ohio law, Appellant could not be convicted in Counts 8, 10, 14, 15, 16, 17 or 18 *unless he was indicted (or charged) for incidents* occurring in Marion County, Ohio. See, *Blake v. Morford,* 563 F.2d 246 (6th Cir. 1977) [federal court was required to follow Tennessee law as "laid down" by the *Tennessee Supreme Court*].

38. In *State of Ohio v. Nathaniel Brunner,* 2015-Ohio-4281 (10th Dist.), comparing Counts 1 and 5, in Count 1, where the *indicted* crime occurred in **Franklin County**, the court instructed the jury:

> "Before you can find the defendants guilty of Aggravated Robbery, you must find beyond a reasonable doubt that on or about the 24th day of July, 2013, **in Franklin County**, Ohio, the defendants, in attempting or committing a theft offense…".

For Count 1, the **venue of the trial was in Franklin County and the venue of the crime was in Franklin County**. In Count 5, where the indicted crime occurred in **Madison County**, the court instructed the jury:

> "Before you can find the defendants guilty of Aggravated Robbery, you must find beyond a reasonable doubt that on or about the 27th day of July, 2013, **within *Madison County*, Ohio,** but Franklin County having venue as a result of the offenders, as part of a course of criminal conduct, having committed the offenses in different jurisdiction…".

For Count 5, the **venue of the trial was in Franklin County and the venue of the crime was in Madison County**. (See, Doc. 54, Exhibit V).

39. In *State v. Steele,* 2012-Ohio-3777, defendant was indicted for 12 counts of Rape, Unlawful Sexual Conduct with a Minor and Gross Sexual Imposition, *all indicted as occurring in Delaware*

County, Ohio. The court granted defendant's Crim. R. 29 motion as to the *location of the crime* on Count 12. While trial under §2901.12 was proper in Delaware County, the evidence required for conviction *for that count* was insufficient due to the crime occurring in Franklin County when the indictment charged it as occurring in Delaware County. "A conviction for an *uncharged crime* is fundamental error.". *Jean v. Fla. Dept. of Corr.*, 2019 U.S. Dist. LEXIS 115559 (S.D. Fla. 2019).

40. This Court's analysis and determinations as contained within *Geboy*, *Kolvek* and *Caraway* are consistent with what the Ohio Supreme Court requires for a criminal conviction.

41. The panel in denying the certificate stated - "As the district court explained 'under Ohio law, the location and time listed in the indictment are not material elements that must be proven by the prosecution' R. 134, PageID#15776; see also *Geboy v. Brigano*, 489 F.3d 752, 762-63 (6th Cir. 2007).". The district court reads *Geboy* out of context.

42. In *Geboy*, *Kolvek* and *Caraway*, the defendants argued that they were tried for conduct at different locations *within the county alleged* in the indictment. This Court, in referring back to each indictment concluded that the state's obligation was to prove that the crimes occurred at the locations (the County) *as stated in the indictment*.

43. Appellant submitted Exhibits G, K-P and S-X (Doc. 54, Doc. 108, Doc. 71) for consideration as each exhibit is an indictment from various counties across the state, all which, for each count, identify the "county" where the charged criminal conduct occurred, as required by the Ohio Supreme Court.

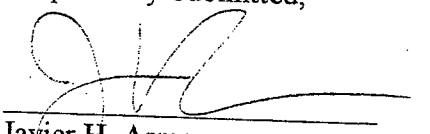
44. "Under Ohio law, apart from the Ohio Supreme Court's holdings in *Hampton, Knight and Grummond*, under **O.R.C. §2941.08(F)**, an indictment *must state the location of the charged crime*

at least once within the indictment (Doc. 123 at 45). "Each count in an indictment is regarded as a separate indictment.". *State v. Gardner*, 118 Ohio St. 3d 420 (Ohio 2008) citing *United States v. Powell* (1984), 469 U.S. 57, 62, 105 S. Ct. 471, 83 L.Ed.2d 461, quoting *Dunn v. United States* (1932), 284 U.S. 390, 393, 52 S. Ct. 189, 76 L. Ed. 356. "Marion County" was never mentioned in the indictment.

45. This Court should have authorized the appeal on the sufficiency of the evidence claim. The "AEDPA does not require petitioners to prove, before the issuance of a Certificate of Appealability, that some jurists would grant the petition for habeas corpus.". *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed 2d 931 (2003). "At the COA stage the only question is whether the claim is reasonably debatable.". *Buck v. Davis*, 580 U.S.___, 137 S.Ct. 759, 197 L.Ed 2d 1 (2017).

Appellant respectfully prays that an en banc panel of this Court will consider Appellant's request and grant him a Certificate of Appealability on his Sufficiency of the Evidence claim. While not relevant to this petition, Appellant has never assaulted a woman or committed a crime. Appellant appreciates the Court's time and consideration.

Respectfully Submitted,



Javier H. Armengau
1580 S.R. 56
London, Ohio 43140

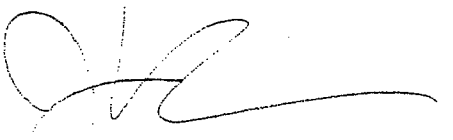
VERIFICATION

Appellant verifies that this document complies with the word limitation of 3900 words. This document contains 3592 words.

Javier H. Armengau

CERTIFICATE OF SERVICE

This is to certify that a copy of this petition was forwarded to Jerri Fosnaught, Assistant Attorney General, 150 E. Gay Street, 16th floor, Columbus, Ohio 43215 and to 30 East Broad Street, Columbus, Ohio 43215 by Regular U.S. Mail this 5th day of June, 2023.



Javier H. Armengau

APPENDIX

D

Petitioner's Motion to the Sixth Circuit requesting the Court Certify the Question to the Ohio Supreme Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAVIER H. ARMENGAU,

Petitioner / Appellant

v.

JENNY HILDEBRAND, Warden

Respondent / Appellee

CASE NO. **22-4049**

DISTRICT CASE NO. 2:19-cv-01146

MOTION TO CERTIFY APPELLANT'S SUFFICIENCY OF THE EVIDENCE QUESTION TO THE OHIO SUPREME COURT

Now comes Appellant and respectfully moves this Honorable Court to certify the following question to the Ohio Supreme Court as it pertains to the sufficiency of the evidence issue before the Court on Appellant's *Petition for En Banc Rehearing* on the denial of the Certificate of Appealability on the relevant claim:

"Pursuant to the Ohio Supreme Court's decision in *Knight v. State*, 54 Ohio St. 365 (1896), cited at ¶ 22 in *State v. Hampton*, 2012-Ohio-5688, whereby the Court determined:

> "Now can it be said that the ***place of the offense***, i.e. ***the county***, was not necessary to be proven, for **how could a conviction be sustained without it**? Neither can it be said that the *question of place* did not affect the substantial rights of the defendants, **for how, *if not alleged, could they intelligently prepare their defense***, or **how could the record serve the defendants to a bar to a second prosecution for the same offense**? In general terms it may be said that as to this defect that **the indictment fails** to aver ***all material facts necessary to a conviction***. *And such failure is fatal*, as well since ***the statute*** as at common law.". *Id.*

Is the prosecution in a criminal case required to prove beyond a reasonable doubt that the crime submitted to the jury for conviction occurred in the County and State as alleged in the indictment in order to sustain a conviction?"

This motion is supported by the accompanying memorandum.

Appendix D

Respectfully Submitted,

Javier H. Armengau
1580 S.R. 56
London, Ohio 43140

MEMORANDUM

On June 16th, 2023, Appellant received an Order from the Court whereby in response to his *Petition for En Banc* consideration of his sufficiency of the evidence claim as it pertains to his request to expand the *Certificate of Appealability*, the original panel determined that "we did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, decline to rehear the matter.". The Order was filed June 13, 2023.

Respectfully, either the original panel does inadvertently misapprehend the facts and law as it pertains to the sufficiency of the evidence claim presented by Appellant, or the panel wishes to ensure that review of the claim, which has been supported by both Ohio Supreme Court precedent, and their requirement for conviction, and this Honorable Court's extensive precedent on the *exact* issue, be summarily and pre-emptively eliminated from possible consideration.

En banc consideration is necessary in this case in order to secure and maintain uniformity of this Court's decisions, as well as uniformity with other decisions throughout the United States that have analyzed and decided the same issue, in the same manner **(F. R. App. P. 35(a)(1))**. The decision in this Appellant's case at the district court and currently in this Court is in **direct conflict with other cases analyzed and decided by this Court** (and the district court in prior cases) on the issue of whether the prosecution is required to prove the charge as identified and contained in the indictment. The cases that are in conflict with Appellant's case are *Kolvek v. Foley*, 2022 U.S.

App. LEXIS 11462 (6th Cir.), *In re Caraway*, 2022 U.S. App. LEXIS 4054 (6th Cir.); *also*, 2023 U.S. App. LEXIS 10876 and *Geboy v. Brigano,* 489 F.3d 752, 763 (6th Cir. 2007).

The original panel in summarily denying Appellant's request refused to acknowledge the referenced cases from this Court. In light of this Court's precedent, it may be worth consideration that, since the state's *highest court determines the requirements for a criminal conviction* and elements to be proven are determined by state statutes *and* case law, the Magistrate Judge confirmed – The Ohio Supreme Court's decision in *State v Hampton,* 2012-Ohio-5688 - "**does hold location of the offense as alleged in the indictment must be proved beyond a reasonable doubt**." (Doc. 97, PageID 15108). With the exception of *this* Appellant's case, *this* Court has treated the element requirement consistent with the Ohio Supreme Court's requirement for a criminal conviction. In *State v. Lewis*, 21 Ohio St. 2d 203 (1970) the **Ohio Supreme Court** held:

> "The indictment, information, or affidavit in a criminal prosecution, **necessarily confines the state to the [*211] charge made against the defendant**, in order that the defendant shall know, as the Constitution provides, the nature of the accusation against him.".

In light of *Knight, Hampton* and *Lewis*, and this Court's prior decisions, the question requested to be certified is clearly appropriate.

Troubling to Appellant, who has never committed a crime, is that he provided the district court with this Court's decision in *Kolvek v. Foley,* 2022 U.S. App. LEXIS 11462 (6th Cir.)[1], where that district court noted that the state is required to prove that the crimes resulting in conviction occurred in the "County" alleged in the indictment -("according to the indictment, **the *conduct had to have occurred*** in Summit County, Ohio" and "the *indictment alleged only* that **the crimes**

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1 Supplemental Authority, filed May 8, 2022 (Doc. 126, Doc. 127

took place in Summit County, Ohio") *Id.* [2] – **consistent with Ohio Supreme Court precedent**. The panel now in *this* Appellant's case is disregarding the analysis and conclusion in *Kolvek*.

In *Nash v. Eberlin*, 258 Fed. Appx. 761 (6th Cir. 2007), *this* Court held:

> "Where the elements of a state crime are sufficiently clear **as a matter of state law**, we cannot automatically uphold a conviction with insufficient proof of one of the elements on the theory that the state court in the very case has eliminated that element as a requirement. It would undermine the federal sufficiency-of-proof requirement to do so." *Id.*

The **District Court confirmed** - "[t]he initial indictment against [Appellant] alleged that the conduct underlying the charges occurred in Franklin County, but he was ultimately convicted for events that took place in Marion County on Counts 8, 10, 14-18." (Doc. 134 at 35). This conclusion by the district court analyzed against this Court's decisions in *Kolvek*, *Caraway*, and *Geboy*, confirm the insufficiency of evidence claim in Appellant's litigation.

The United States Supreme Court held in *Garner v. Louisiana*, 368 U.S. 157 (1961), that the Court must look to Louisiana law *as set by the Louisiana Supreme Court* to analyze the evidence as to *what is required for conviction*. Since it appears the panel may be disregarding or misunderstands the Ohio Supreme Court's requirement for conviction, the requested certification and question is not only appropriate but necessary.

The original panel summarily disregards all the supporting precedent, both state and federal, on the critical issue, that Appellant submitted in his Application and in the current petition. The prosecution in Appellant's case, in *closing*, confirmed that the *County* is a material element that they were *required to prove*. The state advised the jury that they were required to prove that the crimes occurred in **Franklin County for Counts 1-8** (Doc. 1-6, PageID 181-185). See, Doc. 72, PageID 13413, Tr. 3647 - "these are the **elements** *the state*

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2 The trial court in *Kolvek* actually confirmed that the conduct had to occur in Summit County but that "it could be anywhere in Summit County".

has to prove to you beyond a reasonable doubt, in **Franklin County, Ohio**, the defendant did…". *Id.* If prosecutors agreed that they had to prove that the crimes in Counts 1-8 occurred in Franklin County, because that is what they indicted, then they were also required to prove that the crimes occurred in Franklin County for Counts 9-18 – *because that is what they also indicted.* The original panel even disregards what prosecutors confirmed they are required to prove. Courts shouldn't follow the law when it supports conviction but disregard that same law when it requires acquittal.

Appellant respectfully requests that the Court certify the question as presented herein to the Ohio Supreme Court. Appellant appreciates the Court's time and hopefully its consideration.

Javier H. Armengau

CERTIFICATE OF SERVICE

This is to certify that a copy of this petition was forwarded to Jerri Fosnaught, Assistant Attorney General, 30 East Broad Street, Columbus, Ohio 43215 by Regular U.S. Mail this 16th day of June, 2023.

Javier H. Armengau

APPENDIX

E

Petitioner's State Indictment in Case No. 13 CR 2217

Counts relative to consideration of the Petition for Writ of Certiorari are Counts 8, 10, 14, 15, 16, 17 and 18 (Pages 3-8).

Case No. 13 CR 2217

State of Ohio,
Franklin County, ss:

INDICTMENT FOR: Kidnapping (2905.01 R.C.) (F-2) (3 Counts); Public Indecency (2907.09 R.C.) (M-4) (1 Count); Gross Sexual Imposition (2907.05 R.C.) (F-4) (3 Counts); Rape with Specification (2907.02 R.C.) (F-1) (6 Counts) and Sexual Battery (2907.03 R.C.) (F-3) (5 Counts); (Total: 18 Counts)

In the Court of Common Pleas, Franklin County, Ohio, of the Grand Jury term beginning May thirteenth the year of our Lord, Two Thousand Thirteen.

Count 1

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Javier Armengau late of said County, on or about the 4th day of April in the year of our Lord, 2013, within the County of Franklin aforesaid, in violation of section 2905.01 of the Ohio Revised Code, did, by force, threat, or deception, restrain another, to wit: Catherine Collins, of her liberty, with the purpose to engage in sexual activity as defined in section 2907.01 of the Ohio Revised Code, with the said Catherine Collins, against her

Count 2

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Javier Armengau late of said County, on or about the 4th day of April in the year of our Lord, 2013, within the County of Franklin

Appendix E

find and present that Javier Armengau late of said County, from on or about August 1, 2008 to August 31, 2008, within the County of Franklin aforesaid, in violation of section 2905.01 of the Ohio Revised Code, did, by force, threat, or deception, restrain another, to wit: Lisa Griffey, of her liberty, with the purpose to engage in sexual activity as defined in section 2907.01 of the Ohio Revised Code, with the said Lisa Griffey, against her will,

Count 6

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Javier Armengau late of said County, from on or about January 1, 1998 to December 31, 2010, within the County of Franklin aforesaid, in violation of section 2907.03 of the Ohio Revised Code, did engage in sexual conduct, to wit: fellatio, with another, to wit: Angela Current, not his spouse, when the said Javier Armengau knowingly coerced the said Angela Current to submit by means that would prevent resistance by a person of ordinary resolution,

Count 7

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Javier Armengau late of said County, from on or about January 1, 1998 to December 31, 2010, within the County of Franklin aforesaid, in violation of section 2907.05 of the Ohio Revised Code, did have sexual contact with Angela Current, not his spouse, the said Javier Armengau having purposely compelled Angela Current to submit by force or threat of force,

Count 8

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do

find and present that Javier Armengau late of said County, from on or about August 8, 2008 to September 17, 2008, within the County of Franklin aforesaid, in violation of section 2907.05 of the Ohio Revised Code, did have sexual contact with Kimberly Russell, not his spouse, the said Javier Armengau having purposely compelled Kimberly Russell to submit by force or threat of force.

Count 9

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Javier Armengau late of said County, from on or about January 1, 2002 to December 31, 2008, within the County of Franklin aforesaid, in violation of section 2907.02 of the Ohio Revised Code, did engage in sexual conduct, to wit: vaginal intercourse, with Luz Marina Melean, not his spouse, and the said Javier Armengau having purposely compelled Luz Marina Melean to submit by force or threat of force, SPECIFICATION ONE TO THE ELEVENTH COUNT, in accordance with section 2941.148 of the Ohio Revised Code, the Grand Jurors further find and specify that said Javier Armengau is a sexually violent predator,

Count 10

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Javier Armengau late of said County, from on or about January 1, 2002 to December 31, 2008, within the County of Franklin aforesaid, in violation of section 2907.02 of the Ohio Revised Code, did engage in sexual conduct, to wit: fellatio, with Luz Marina Melean, not his spouse, and the said Javier Armengau having purposely compelled Luz Marina Melean to submit by force or threat of force, SPECIFICATION ONE TO THE TWELFTH COUNT, in accordance with section 2941.148 of the Ohio Revised Code, the

Grand Jurors further find and specify that said Javier Armengau is a sexually violent predator,

Count 11

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Javier Armengau late of said County, from on or about January 1, 2002 to December 31, 2008, within the County of Franklin aforesaid, in violation of section 2907.02 of the Ohio Revised Code, did engage in sexual conduct, to wit: fellatio; with Luz Marina Melean, and the said Javier Armengau having purposely compelled Luz Marina Melean to submit by force or threat of force, SPECIFICATION ONE TO THE THIRTEENTH COUNT, in accordance with section 2941.148 of the Ohio Revised Code, the Grand Jurors further find and specify that said Javier Armengau is a sexually violent predator,

Count 12

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Javier Armengau late of said County, from on or about Janaruy 1, 2002 to December 31, 2008, within the County of Franklin aforesaid, in violation of section 2907.02 of the Ohio Revised Code, did engage in sexual conduct, to wit: vaginal intercourse with Luz Marina Melean, not his spouse, and the said Javier Armengau having purposely compelled Luz Marina Melean to submit by force or threat of force, SPECIFICATION ONE TO THE FOURTEENTH COUNT, in accordance with section 2941.148 of the Ohio Revised Code, the Grand Jurors further find and specify that said Javier Armengau is a sexually violent predator,

Count 13

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed

within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Javier Armengau late of said County, from on or about January 1, 2002 to December 31, 2008, within the County of Franklin aforesaid, in violation of section 2907.02 of the Ohio Revised Code, did engage in sexual conduct, to wit: vaginal intercourse, with Luz Marina Melean, not his spouse, and the said Javier Armengau having purposely compelled Luz Marina Melean to submit by force or threat of force, SPECIFICATION ONE TO THE FIFTEENTH COUNT, in accordance with section 2941.148 of the Ohio Revised Code, the Grand Jurors further find and specify that said Javier Armengau is a sexually violent predator,

Count 14

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Javier Armengau late of said County, from on or about January 1, 2002 to December 31, 2008, within the County of Franklin aforesaid, in violation of section 2905.01 of the Ohio Revised Code, did, by force, threat, or deception, restrain another, to wit: Luz Marina Melean, of her liberty, with the purpose to engage in sexual activity as defined in section 2907.01 of the Ohio Revised Code, with the said Luz Marina Melean, against her will,

Count 15

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Javier Armengau late of said County, from on or about January 1, 2002 to December 31, 2008, within the County of Franklin aforesaid, in violation of section 2907.03 of the Ohio Revised Code, did engage in sexual conduct, to wit: vaginal intercouse, with another, to wit: Luz Marina Melean, not his spouse, when the said Javier Armengau knowingly coerced the

said Luz Marina Melean to submit by means that would prevent resistance by a person of ordinary resolution,

Count 16

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Javier Armengau late of said County, from on or about January 1, 2002 to December 31, 2008, within the County of Franklin aforesaid, in violation of section 2907.03 of the Ohio Revised Code, did engage in sexual conduct, to wit: fellatio with another, to wit: Luz Marina Melean, not his spouse, when the said Javier Armengau knowingly coerced the said Luz Marina Melean to submit by means that would prevent resistance by a person of ordinary resolution,

Count 17

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Javier Armengau late of said County, from on or about January 1, 2002 to December 31, 2008, within the County of Franklin aforesaid, in violation of section 2907.03 of the Ohio Revised Code, did engage in sexual conduct, to wit: fellatio, with another, to wit: Luz Marina Melean, not his spouse, when the said Javier Armengau knowingly coerced the said Luz Marina Melean to submit by means that would prevent resistance by a person of ordinary resolution,

Count 18

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Javier Armengau late of said County, from on or about January 1, 2002 to December 31, 2008, within the County of Franklin aforesaid, in violation of section 2907.03 of the Ohio Revised Code, did engage

in sexual conduct, to wit: vaginal intercourse, with another, to wit: Luz Marina Melean, not his spouse, when the said Javier Arzhengau knowingly coerced the said Luz Marina Melean to submit by means that would prevent resistance by a person of ordinary resolution, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio.

RON O'BRIEN
Prosecuting Attorney
Franklin County, Ohio

A TRUE BILL

Assistant Prosecuting Attorney

Foreperson, Grand Jury

The following is Information for the Clerk of Courts Only.

State of Ohio v. Javier Armengau
Address: 4891 Rays Circle, Dublin, Ohio 43016
DOB: 4-14-1962
Sex/Race: Male/Unknown
Date of Arrest: 4-10-2013
SS[redacted]
Police Agency: Columbus Police Department
Municipal Reference: 8213-13
ITN #: 169056 DA

Count 1: Kidnapping
2905.01 F-2

Count 2: Public Indecency
2907.09 M-4

Count 3: Gross Sexual Imposition
2907.05 F-4

Count 4: Rape
2907.02 F-1 with Specification 20

Count 5: Kidnapping
2905.01 F-2

Count 6: Sexual Battery
2907.03 F-3

Count 7: Gross Sexual Imposition
2907.05 F-4

Count 8: Gross Sexual Imposition
2907.05 F-4

Count 9: Rape
2907.02 F-1 with Specification 20

Count 10: Rape
2907.02 F-1 with Specification 20

Count 11: Rape
2907.02 F-1 with Specification 20

Count 12: Rape
2907.02 F-1 with Specification 20

Count 13: Rape
2907.02 F-1 with Specification 20

Count 14: Kidnapping
2905.01 F-2

Count 15: Sexual Battery
2907.03 F-3

Count 16: Sexual Battery
2907.03 F-3

Count 17: Sexual Battery
2907.03 F-3

Count 18: Sexual Battery
2907.03 F-3

Case No. 13 CR 2217

APPENDIX

F

Comparative Indictment in Case No. 2014 CR 02 0300, State of Ohio v. Eric M. Stenson, Jr.

Counts 1, 2, 4 and 5 (Hamilton County)

Counts 3, 6 and 7 (Butler County)

Each count identifies the element required by the Ohio Supreme Court

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STATE OF OHIO	FILED	**CASE NO. CR2014-02-0300**
Plaintiff	2014 MAR 26 AM 9:03	
vs.	MARY L. SWAIN BUTLER COUNTY CLERK OF COURTS	**INDICTMENT**
ERIC M. STENSON JR.		**PAGE 1 OF 2**
Defendant		

STATE OF OHIO,
COUNTY OF BUTLER, SS:

In the Year 2014

THE JURORS OF THE GRAND JURY OF THE STATE OF OHIO, *within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that:*

COUNT ONE
ROBBERY

On or about December 02, 2013, at Hamilton County, Ohio, and being an ongoing and continuing course of criminal conduct, Eric M. Stenson Jr. did in attempting or committing a theft offense, as defined in R.C. section 2913.01, or in fleeing immediately after the attempt or offense, inflict, attempt to inflict, or threaten to inflict physical harm on another, which constitutes the offense of ROBBERY, a Second Degree Felony, in violation of R.C. §2911.02(A)(2), and against the peace and dignity of the State Of Ohio.

COUNT TWO
ROBBERY

On or about December 13, 2013, at Hamilton County, Ohio, and being an ongoing and continuing course of criminal conduct, Eric M. Stenson Jr. did in attempting or committing a theft offense, as defined in R.C. section 2913.01, or in fleeing immediately after the attempt or offense, inflict, attempt to inflict, or threaten to inflict physical harm on another, which constitutes the offense of ROBBERY, a Second Degree Felony, in violation of R.C. §2911.02(A)(2), and against the peace and dignity of the State Of Ohio.

COUNT THREE
ROBBERY

On or about December 19, 2013, at Butler County, Ohio, and being an ongoing and continuing course of criminal conduct, Eric M. Stenson Jr. did in attempting or committing a theft offense, as defined in R.C. section 2913.01, or in fleeing immediately after the attempt or offense, inflict, attempt to inflict, or threaten to inflict physical harm on another, which constitutes the offense of ROBBERY, a Second Degree Felony, in violation of R.C. §2911.02(A)(2), and against the peace and dignity of the State Of Ohio.

COUNT FOUR
ROBBERY

On or about December 30, 2013, at Hamilton County, Ohio, and being an ongoing and continuing course of criminal conduct, Eric M. Stenson Jr. did in attempting or committing a theft offense, as defined in R.C. section 2913.01, or in fleeing immediately after the attempt or offense, inflict, attempt to inflict, or threaten to inflict physical harm on another, which constitutes the offense of ROBBERY, a Second Degree Felony, in violation of R.C. §2911.02(A)(2), and against the peace and dignity of the State Of Ohio.

COUNT FIVE
ROBBERY

On or about December 31, 2013, at Hamilton County, Ohio, and being an ongoing and continuing course of criminal conduct, Eric M. Stenson Jr. did in attempting or committing a theft offense, as defined in R.C. section 2913.01, or in fleeing immediately after the attempt or offense, inflict, attempt to inflict, or threaten to inflict physical harm on another, which constitutes the offense of ROBBERY, a Second Degree Felony, in violation of R.C. §2911.02(A)(2), and against the peace and dignity of the State Of Ohio.

COUNT SIX
ROBBERY

On or about December 31, 2013, at Butler County, Ohio, and being an ongoing and continuing course of criminal conduct, Eric M. Stenson Jr. did in attempting or committing a theft offense, as defined in R.C. section 2913.01, or in fleeing immediately after the attempt or offense, inflict, attempt to inflict, or threaten to inflict physical harm on another, which constitutes the offense of ROBBERY, a Second Degree Felony, in violation of R.C. §2911.02(A)(2), and against the peace and dignity of the State Of Ohio.

COUNT SEVEN
ROBBERY

On or about January 03, 2014, at Butler County, Ohio, and being an ongoing and continuing course of criminal conduct, Eric M. Stenson Jr. did in attempting or committing a theft offense, as defined in R.C. section 2913.01, or in fleeing immediately after the attempt or offense, inflict, attempt to inflict, or threaten to inflict physical harm on another, which constitutes the offense of ROBBERY, a Second Degree Felony, in violation of R.C. §2911.02(A)(2), and against the peace and dignity of the State Of Ohio.

Filed _____

Defendant arraigned, and pleads:

_____Guilty to this indictment

By_____
MARY L. SWAIN
CLERK OF COURTS

By_____
Deputy

/vw

MICHAEL T. GMOSER (0002132)
PROSECUTING ATTORNEY

BY _____
DAVID L. KASH (0024200)
ASSISTANT PROSECUTING ATTORNEY

A TRUE BILL

_____
FOREPERSON, GRAND JURY

APPENDIX

G

Comparative Indictment in Case No. 11 CR 551, State of Ohio v. Stacey L. Miller.

Supplemental Indictment adding Count 7:

Count 7 (Marion County)

Counts 8, 9, 10 and 13 (Crawford County)

Count 11 (Wyandot County)

Count 12 (Delaware County)

Counts 14 and 15 (Marion County)

Each count identifies the element required by the Ohio Supreme Court

WF

COMMON PLEAS COURT
MARION CO. OHIO

IN THE COURT OF COMMON PLEAS OF MARION COUNTY, OHIO

2012 APR 24 PM 3:03

JULIE M. KAGEL
CLERK OF COURTS

THE STATE OF OHIO, :

-v- : Case No. 11-CR-0551

STACEY L. MILLER :
476 Decatur Street
Marion, Ohio 43302
(DOB: 11/20/69; SS# XXX-XX-6552) :

SUPPLEMENTAL INDICTMENT

Defendant. :

The Jurors of the Grand Jury of Marion County, Ohio, on their oaths, do find and present that:

COUNT 7 - Receiving Stolen Property [R. C. 2913.51(A)], F5

STACEY L. MILLER, at Marion County, Ohio, on or about October 7, 2011, did receive, retain, or dispose of property of another, to-wit: license place, knowing, or having reasonable cause to believe, that said property had been obtained through commission of a theft offense. The property stolen is listed in R. C. 2913.71.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Brent W. Yager, Prosecuting Attorney

By: Brent W. Yager (#0033906)
Prosecuting Attorney

This Bill of Indictment found upon testimony sworn and sent before the Grand Jury at the request of the Prosecuting Attorney.

A True Bill

Thomas B. Hamilton
Foreman of the Grand Jury

by042312j1.wpd

Appendix G

MF

IN THE COURT OF COMMON PLEAS OF MARION COUNTY, OHIO

THE STATE OF OHIO,	:	
-v-	:	Case No. 11-CR-0551
STACEY L. MILLER 476 Decatur Street Marion, Ohio 43302 (DOB: 11/20/69; SS# XXX-XX-6552)	:	**SUPPLEMENTAL INDICTMENT**
Defendant.	:	

The Jurors of the Grand Jury of Marion County, Ohio, on their oaths, do find and present that:

COUNT 8 - Aggravated Robbery [R. C. 2911.01(A)(1)], F1

STACEY L. MILLER, as part of a course of criminal conduct, in Crawford County, did on or about September 30, 2011, did, in attempting or committing a theft offense, as defined in R.C. 2913.01, or in fleeing immediately after the attempt or offense, have a deadly weapon on or about his person or under his control and either display the weapon, brandish it, indicate the Defendant possessed it, or use it.

COUNT 9 - Theft [R. C. 2913.02(A)(1)], F5

STACEY L. MILLER, as part of a course of criminal conduct, in Crawford County, Ohio did, on or about September 30, 2011, did, with purpose to deprive the owner of property or services, to-wit: license plate ERL5156, knowingly obtain or exert control over said property or services without the consent of the owner or person authorized to give consent. The property stolen is listed in R. C. 2913.71.

COUNT 10 - Tampering with Evidence [R. C. 2921.12(A)(1)], F3

STACEY L. MILLER, as part of a course of criminal conduct, in Crawford County, Ohio did, on or about September 30, 2011, did, knowing that an official proceeding or investigation was in progress, or was about to be or likely to be instituted, alter, destroy, conceal, or remove a record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation.

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COUNT 11 -Theft [R. C. 2913.02(A)(1)], F5

STACEY L. MILLER, as part of a course of criminal conduct, in Wyandot County, Ohio did, on or about October 3, 2011, did, with purpose to deprive the owner of property or services, to-wit: license plate AS97XD, knowingly obtain or exert control over said property or services without the consent of the owner or person authorized to give consent. The property stolen is listed in R. C. 2913.71.

COUNT 12 - Theft [R. C. 2913.02(A)(1)], F5

STACEY L. MILLER, as part of a course of criminal conduct, in Delaware County, Ohio did, on or about October 7, 2011, with purpose to deprive the owner of property or services, to-wit: license plate CSN6343, knowingly obtain or exert control over said property or services without the consent of the owner or person authorized to give consent. The property stolen is listed in R. C. 2913.71.

COUNT 13 - Theft [R. C. 2913.02(A)(1)], F5

STACEY L. MILLER, as part of a course of criminal conduct, in Crawford County, Ohio on or about October 8, 2011 to October 9, 2011, did, with purpose to deprive the owner of property or services, to-wit: license plate AM56BY, knowingly obtain or exert control over said property or services without the consent of the owner or person authorized to give consent. The property stolen is listed in R. C. 2913.71.

COUNT 14 - Tampering with Evidence [R. C. 2921.12(A)(1)], F3

STACEY L. MILLER, at Marion County, Ohio, on or about October 7, 2011, did, knowing that an official proceeding or investigation was in progress, or was about to be or likely to be instituted, alter, destroy, conceal, or remove a record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation.

COUNT 15 - Possession of Criminal Tools [R. C. 2923.24(A)], F5

STACEY L. MILLER, at Marion County, Ohio, on or about October 8, 2011, did purposely possess, or have under his control, a substance, device, instrument, or article, with purpose to use it criminally. The circumstances indicate that the substance, device, instrument, or article involved in the offense was intended for use in the commission of a felony.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Brent W. Yager, Prosecuting Attorney

By: Brent W. Yager (#0033906)
Prosecuting Attorney

This Bill of Indictment found upon testimony sworn and sent before the Grand Jury at the request of the Prosecuting Attorney.

A True Bill

Linda L Hendman
Foreman of the Grand Jury

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APPENDIX

H

Comparative Indictment, State of Ohio v. Gerry L. Moore, 2017 CR 0347

Count 1 (Erie County)

Count 2 (Marion County)

Count 3 (Marion County)

Each count identifies the element required by the Ohio Supreme Court

IN THE COURT OF COMMON PLEAS, ERIE COUNTY, OHIO

The State of Ohio,
Erie County } **SS.**

Grand Jury Term
August Session

INDICTMENT

Case Number
2017 CR 0347

THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present:

Defendant	Gerry L. Moore, AKA Gerry L. Moore, Sr.
Count One	**Retaliation - F3** ORC §2921.05(B), 2921.05(C)
Date of Offense	On or about 4/21/2017 through 7/6/2017

That Gerry L. Moore, on or about 4/21/2017 through 7/6/2017, at Erie County, Ohio, did, purposely and by force or by unlawful threat of harm to any person or retaliate against the victim of a crime because the victim filed or prosecuted criminal charges.

In violation of the Ohio Revised Code Section 2921.05(B), 2921.05(C) and against the peace and dignity of the State of Ohio.

Defendant	Gerry L. Moore, AKA Gerry L. Moore, Sr.
Count Two	**Attempted Aggravated Murder - F1** ORC §2923.02 / 2903.01(A), 2903.01(F), 2929.02(A)
Date of Offense	On or about 4/21/2017 through 7/6/2017

That Gerry L. Moore, on or about 4/21/2017 through 7/6/2017, at Marion County, Ohio, did attempt to purposely, and with prior calculation and design, cause the death of Diane J. Moore.

In violation of the Ohio Revised Code Section 2903.01(A), 2903.01(F), 2929.02(A) and against the peace and dignity of the State of Ohio.

SUMMARY OF INDICTMENT

Case No. 2017 CR 0 347 August 2017 Term

Gerry L. Moore, AKA Gerry L. Moore, Sr.
Richland Correctional Institution
1001 Olivesburg Road
Mansfield, OH 44905

DOB: 9/11/1954
SSN: XXX-XX-3119

Indictment for:

Count 1: Retaliation, ORC §2921.05(B), 2921.05(C), F3
Count 2: Attempted Aggravated Murder, ORC §2903.01(A), 2903.01(F), 2929.02(A), F1
Count 3: Conspiracy, ORC §2923.01(A)(1), 2923.01(J)(2), F2

A TRUE BILL:

Foreperson of the Grand Jury

Ashley Thomas
Assistant Prosecutor

The State of Ohio, Erie County.

I, the undersigned, Clerk of the Court of Common Pleas in and for said County, do hereby certify that the foregoing is a full, true and correct copy of the original indictment, with the endorsements thereon, now on file in my office.

WITNESS my hand and the seal of said Court at Sandusky, Ohio

this _____ day of _____, _____.

Luvada Wilson
Clerk of Courts

by
Deputy