NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EDDIE GILMER,
Petitioner

V.

STATE OF MISSISSIPPI,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE MAJORITY OPINION OF THE MISSISSIPPI SUPREME COURT VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS BY MAKING IT A FELONY TO VIDEOTAPE A PERSON IN HER HOME EVEN THOUGH THAT PERSON CAN BE VIEWED BY THE PUBLIC THROUGH AN OPEN DOOR.

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On August 20, 2004, Eddie Gilmer was convicted by a jury in the Circuit Court of Madison County, Mississippi of five counts of video voyeurism and was sentenced to a term of five years consecutively on each count, with ten years suspended and fifteen to serve. Gilmer appealed his convictions to the Mississippi Supreme Court. That Court affirmed Gilmer's conviction. *State v. Gilmer,* 955 So.2d 829 (Miss. 2007). Appendix A.

JURISDICTION

This Court has jurisdiction under Title 28 *U.S.C.* §1257, which provides that this Court may grant a petition for writ of certiorari by any party where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amendment XIV (in part):

> [N]or shall any State deprive any person of

> life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Miss. Code Ann. §97-29-63 (Rev. 2006):

> Any person who with lewd, licentious or indecent intent secretly photographs, films, videotapes, records or otherwise reproduces the image of another person without the permission of such person when such a person is located in a place where a person would intend to be in a state of undress and have a reasonable expectation of privacy, including, but not limited to, private dwellings or any facility, public or private, used as a restroom, bathroom, shower room, tanning booth, locker room, fitting room, dressing room or bedroom shall be guilty of a felony and upon conviction shall be punished by a fine of Five Thousand Dollars ($5,000.00) or by imprisonment of not more than

STATEMENT OF THE CASE

(a) Course of the Proceedings and Disposition in the Courts Below:

On August 20, 2004, Eddie Gilmer was convicted by a jury in the Circuit Court of Madison County, Mississippi of five counts of video voyeurism and was sentenced to a term of five years consecutively on each count, with ten years suspended and fifteen to serve. Gilmer appealed his convictions to the Mississippi Supreme Court. That Court affirmed Gilmer's conviction. *State v. Gilmer,* 955 So.2d 829 (Miss. 2007). Appendix A. He did not file a motion for rehearing in state court. A copy of the state court judgment is

attached as Appendix B.

(b) Statement of Facts:

Eddie Gilmer was an elected constable in Madison County at the time of his alleged criminal behavior. He served warrants in Madison County, including at the Pear Orchard Apartments in Ridgeland, Mississippi, where Debra Clayton occupied a second-floor apartment. In March 2003, Clayton noticed that Gilmer would arrive at the Pear Orchard Apartments in his official vehicle marked "Madison County Constable, District Number 3, Eddie Gilmer" around 9:00 p.m. and park his car in a space in the apartment complex parking lot with his vehicle facing Clayton's apartment about 87 feet from her balcony. Gilmer would stay in his parked car for an hour or an hour and a half before driving away.

Clayton contacted the police about Gilmer's suspicious behavior. Consequently, police officers conducted five separate surveillance operations. Officers captured Gilmer on tape, recording Clayton with a hand-held video camera while she was sitting inside her apartment in front of her balcony door, which was open about eighteen inches. The evidence demonstrated that, while filming, Gilmer often zoomed in on Clayton's chest and crotch area.

Gilmer was indicted on May 23, 2003, charged with ten counts of photographing a person in privacy without permission. A jury trial culminated in a conviction on counts five through ten (the counts where Gilmer was under video surveillance by the police), but was acquitted on the first five counts occurring before Clayton notified the police.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE MAJORITY OPINION OF THE MISSISSIPPI SUPREME COURT VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS BY

MAKING IT A FELONY TO VIDEOTAPE A PERSON IN HER HOME EVEN THOUGH THAT PERSON CAN BE SEEN BY THE PUBLIC THROUGH AN OPEN DOOR.[1]

As the Mississippi Supreme Court recently noted, "[i]t is bedrock law in Mississippi that criminal statutes are to be strictly construed against the State and liberally in favor of the accused." *Coleman v. State*, 947 So. 2d 878, 881 (Miss. 2006) (citing *McLamb v. State*, 456 So.2d 743, 745 (Miss. 1984)). Not only is this principle firmly embedded in Mississippi law, Chief Justice John Marshall wrote that this ancient rule of statutory interpretation "is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *U.S. v. Wiltberger*, 18 U.S. 76, 95, 5 L. Ed. 37, 42, 5 Wheat. 76 (1820).

Judicial constructions not construing statutes in favor of the offender violate fundamental principles of due process. *Duke v. U. of Tex.*, 663 F.2d 522, 526 (5th Cir. 1981), 527 (citing *Dunn v. U.S.*, 442 U.S. 100, 112, 99 S. Ct. 2190, 2197, 60 L. Ed. 2d 743 (1979); *Marks v. U.S.*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977); *Rabe v. Washington*, 405 U.S. 313, 92 S. Ct. 993, 31 L. Ed. 2d 258 (1972); *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964)).

In construing statutes in favor of the offender, any "[a]mbiguities concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* (citing *Busic v. U.S.*, 446 U.S. 398, 406, 100 S. Ct. 1747, 1753, 64 L. Ed. 2d 381 (1980); *Dunn*, 442 U.S. at 112; *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 375, 93 S. Ct. 1652, 1663, 36 L. Ed. 2d 318 (1973); *U.S. v. Campos-Serrano*, 404 U.S. 293, 297, 92 S. Ct. 471, 474, 30 L. Ed. 2d 457 (1971);

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[1] Gilmer's arguments track those of the dissents of Justices Diaz and Dickerson of the Mississippi Supreme Court.

McBoyle v. U.S., 283 U.S. 25, 27, 51 S. Ct. 340, 341, 75 L. Ed. 816 (1931); *U.S. v. Scrimgeour*, 636 F.2d 1019, 1022 (5th Cir. 1981); *Tenneco Oil Co. v. Padre Drilling Co.*, 453 S.W.2d 814 (Tex.1970)).

Accordingly, due process requires the State to prove the following elements in this case: (1) "lewd, record[ing] or otherwise reproduc[ing] the image of another person;" (3) without their permission; (4) when the other person "is located in a place *where a person would intend to be in a state of undress*;" and (5) *where that person would "have a reasonable expectation of privacy*." Miss Code Ann. §97-29-63 (Rev. 2006) (emphasis supplied). However, under the majority's interpretation, the State is able to meet the fourth and fifth elements merely by proving the person was located in a private dwelling. This is a clear violation of the rules of statutory construction, and results in a violation of due process. *Duke v. U. of Tex.*, 663 F.2d at 526.

The majority opinion neither addresses the age-old rule of construction regarding criminal statutes nor does it explain how its interpretation of the statute does not violate due process. Instead, the opinion relies on *Davis v. Miller*, 202 Miss. 880, 890, 32 So.2d 871, 873 (Miss. 1947) in support of its liberal interpretation in favor of the state. *Davis* held that courts may not construe a statute so that a portion of it becomes meaningless. *Id.* (citing 50 Am. Jur., Statutes, Sec. 358, 361-64). This proposition, however, actually undermines the majority's conclusion, for under its interpretation, the statute's requirements of undress and reasonable expectation of privacy become meaningless. *Id.*

The State presented no evidence that Clayton was "located in a place where a person would intend to be in a state of undress." This element cannot be met by the mere fact that she was inside her apartment. At all times, Clayton was fully clothed, seated in front of an open door and facing a public parking lot. Consistent with her testimony, no

reasonable person would have a reasonable expectation of privacy or intend to be in a state of undress while sitting in front of an open door. Clayton repeatedly testified that she never intended to be undressed with the blinds or door open:

> Q: At anytime when the defendant was present, were you disrobed?
>
> Q: Were there occasions, however, in your home when you were disrobed? A: As long as my window was shut and my blinds were pulled. . .
>
> Q: Would it be fair to say that you generally don't intend to be in a state of undress in your living room or den in front of a plate glass window with it open, do you? A: Not open. Q: Or with the blinds open. Would you agree with that? A: Yes, I would.

Not only does the majority's broad interpretation of the crime violate due process concerns regarding the rules of statutory construction and due process, it has alarming First Amendment ramifications because of its chilling effect on anyone legitimately using a video camera or any other recording device. This law was passed to protect persons from intrusive and invasive private recording—a "Peeping Tom" law for this ever-more digital world.

Yet under the majority's interpretation of the statute, virtually any use of a recording device could prove to be a felony. A statute is overbroad when it in sweeps within its ambit expression which in ordinary circumstances would constitute an exercise of freedom of speech or the press or where it lends itself to harsh and discriminatory enforcement. *Thornhill v. Alabama,* 310 U.S. 88 (1940). As the minority opinion in *Gilmer's case* points out, under the majority's rationale, many persons who utilize recording devices in otherwise legal employment could be prosecuted as felons. For example, a television reporter who covers a sporting match and conducts interviews in the team's locker room might be said to have "lewd intent" if his camera accidentally zooms in or records a sensitive area of a

person's body. Beware also to the private investigator who is paid by a spouse to record the night-time activities of a straying mate. *Gilmer,* 855 So2d at 842 (Diaz, J., dissenting). Is someone whose camera through an open window or door unexpectedly witnesses an adult sexually abusing a child and films it for later evidentiary use guilty of a criminal act?

The majority's elimination of two critical elements from the crime of video voyeurism distorts legislative intent and violates First Amendments doctrines against overbreadth constructions of criminal laws and centuries-old, fundamental principles of due process. Because the state has failed to prove two essential elements of the offense and has violated both the First and Fourteenth Amendments, the Court should grant certiorari.

To be clear, Gilmer did not video someone who believed she was enjoying a moment of privacy where she could not be seen or filmed. Gilmer is charged with video taping Clayton at a time when she was fully clothed and sitting in a place where she freely admits that people outside in the parking lot could see her. Voyeurism is not taking pictures of a person who is aware that the public may be looking. It is nonsensical for the law to allow one to stand and look with impunity at a person who knows they are being looked at, but the moment a picture is taken or a video is made, the looker becomes a voyeur who is guilty of a felony.

Debra Clayton freely admits she was aware that anyone in the parking lot of her apartment complex could easily see her while she was sitting in front of her balcony door. Thus, under the majority view, Gilmer could not take a picture of Clayton without becoming a felon even though Clayton knew that he or anyone else could see her from the parking lot and might be filming her.[2] Under its plain terms,

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[2] On the five counts where Gilmer was convicted, Clayton in fact knew she was being filmed and consented to having the police film Gilmer

the statute is violated only when the person photographed is in a place where that person would expect to be undressed and would have a reasonable expectation of privacy. Clayton had no reasonable expectation of privacy to that which she knowingly exposed to the public. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

CONCLUSION

Because the ruling of the Mississippi Supreme Court violates due process and has a chilling effect on legitimate First Amendment expression, this Court should grant certiorari.

Respectfully submitted,
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