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18-8492

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

REGINALD GIBSON – PETITIONER

vs.

JAMES HAVILAND – RESPONDENT

ON PETITION FOR WRIT OF CERTIORI TO

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORIGINAL

**REGINALD GIBSON
2338 NORTH WEST STREET
LIMA, OHIO 45802**

QUESTIONS PRESENTED

1. Whether a criminal defendant is denied due process of law, if the state improperly invokes its res judicata rule for the sake of denying a post-conviction relief petition?
2. Did the Court of Appeals for the State of Ohio correctly conclude that the Petitioner filed a Motion for Leave to File a Delayed Appeal, after the trial court failed to render its Finding of Facts and Conclusion of Law as mandated by R.C. 2953.21(C) under the Ohio Constitution?
3. Whether reasonable jurists would debate if a District Court's determination that the Petitioner has defaulted all constitutional claims asserted in the post-conviction relief petition by failing to comply with the state procedural rule, and not show "cause" and "prejudice" to excuse this default?

LIST OF PARTIES

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

☐ All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is subject of this petition is as follows:

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

OPINIONS BELOW

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

☐ For cases from **federal courts**:

The opinion of the United States court of appeals 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☐ is unpublished.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 United States district 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☐ is unpublished.

☒ For cases from **state courts**:

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

☒ **reported at *State v. Gibson*, 147 Ohio St. 3d 1508:** or,

☒ **reported at *State v. Gibson*, 2014 Ohio LEXIS 2205:** or,

☐ has been designated for publication but is not yet reported; or

☐ is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and
is

☒ **reported at *Gibson v. Haviland*, 2017 U.S. Dist. LEXIS 216407:** or,

☐ has been designated for publication but is not yet reported; or

JURISDICTION

☐ For cases from the **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ 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: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for writ of certiorari was granted to and including _____ (date) on _____ (date) in the Application No. ____ A _____.

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

☒ For cases from the **state courts**:

The date on which the highest court decided my case was January 25, 2017 and September 3, 2014. A copy of that decision appears at Appendix A and B.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 27, 2018, and a copy of the order denying rehearing appears at Appendix _____.

☒ A timely petition for rehearing was, thereafter, denied on the following date: July 27, 2018, and a copy of the order denying rehearing appears at Appendix H.

☐ An extension of time to file the petition for writ of certiorari was granted to and including _____ (date) on _____ (date) in the Application No. ____ A _____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, 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.

FOURTEENTH AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE I, SECTION 16

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

R.C. 2953.21

(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, any person who has been convicted of a criminal offense and sentenced to death and who claims that there was a denial or infringement of the person's rights under either of those Constitutions that creates a reasonable probability of an altered verdict, and any person who has been convicted of a criminal offense that is a felony and who is an offender for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon

consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(H) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the denial of relief on the petition and of each claim it contains. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (F) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate.

App. R. 4(A)

Subject to the provisions of App.R. 4(A)(3), a party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry.

STATEMENT OF THE CASE

On February 26, 2013, the Stark County Grand Jury indicted appellant, Reginald Gibson, on one count of felonious assault in violation of R.C. 2903.11 and one count of abduction in violation of R.C. 2905.02. A jury trial commenced on July 30, 2013, wherein appellant represented himself with standby counsel present. The jury found appellant guilty as charged. By judgment entry filed August 12, 2013, the trial court sentenced appellant to eight years in prison. Petitioner filed an appeal asserting he did not properly waive his right to counsel, the trial court punished him for representing himself by sentencing him to the maximum, and his convictions were not supported by sufficient evidence. The Court of Appeals for the Fifth District of Ohio court affirmed his convictions and sentence.

On February 5, 2014, while his direct appeal was pending in the Court of Appeals, Petitioner timely filed a petition for postconviction relief in the trial court. He asserted several constitutional claims supported with affidavits, documentary evidence, files and records pertaining to the proceedings, including evidence outside of the trial court record. Thereafter, on May 23, 2014 the court granted the State's Motion to Dismiss and Motion for Summary Judgment" and dismissed the post-conviction relief petition on the basis of res judicata. However, the trial court neglected to render its finding of facts and conclusion of law as mandated by the procedural nature of R.C. 2953.21(C).

Thereafter, on June 19, 2014, Gibson, filed an "Appeal to Vacate or Set Aside Judgment of Conviction or Sentence" in the Court of Appeals. In the within "Appeal," Petitioner argued "[i]neffective assistance of counsel at the trial level based upon matters outside the record." Additionally, there were a number of affidavits describing matters outside the record. That court

affirmed Gibson's convictions on March 17, 2014. The Court of Appeals specified in the Opinion, "[W]e are... without jurisdiction to consider this "Appeal to Vacate or Set Aside Judgment of Conviction or Sentence" and the "appeal" is dismissed.

Even further, the Petitioner filed a Petition for Writ of Mandamus in the Court of Common Appeals seeking an order requiring Respondent to issue findings of fact and conclusions of law in support of the denial of his motion for post-conviction relief. That court in its opinion stated at [¶P4] "[I]f the entry [denying a motion for post-conviction relief] of the trial court **sufficiently apprises** the petitioner of the reasons for the judgment and permits meaningful appellate review, a writ of mandamus will not be issued to compel findings of fact and conclusions of law. *State ex rel. Carrion v. Harris* (1988), 40 Ohio St.3d 19, 19-20, 530 N.E.2d 1330, 1330-1331. [¶5] "Respondent issued a ruling on the motion for post-conviction relief on May 23, 2014. The entry contained sufficient findings of fact and conclusions of law to apprise Relator of the reasons for denial of the motion." Because Respondent ruled on the motion in question with sufficient findings of fact and conclusions of law, we find Relator has failed to demonstrate his entitlement to the writ as Respondent has fulfilled her legal duty. For this reason, the motion to dismiss is granted, and the instant petition is dismissed. Id at [¶6].

Petitioner asserts, the principal factual issue is there has been denial due process because of the trial court failed to render a factual findings and conclusion of law as mandated by R.C. 2953.21. In this matter, the trial court's May 23, 2014 judgment entry is questionable, and by contrast, the due process nature embedded in R.C. 2953.21(C) was totally ignored. There are significant questions that remain unresolved; (1) is Petitioner's postconviction relief petition still pending in the trial court? (2) Have he been deprived due course of law? (3) Did the trial court

provide an orderly method to ensure the Court of Appeals was allowed a meaningful hearing on the matter? (4) Did the May 23, 2014 judgment entry dismissing his petition contain a judgment **part and parcel** of the entry dismissing the petition as mandated in the Ohio Supreme Court precedent case, *Mapson*, in that finding of fact and conclusions of law **are part and parcel** of a judgment denying post-conviction relief because it fosters the orderliness of this process? *State v. Mapson*, 41 Ohio App. 3d 390.

There is no question to the fact, there is a serious undercurrent existing in postconviction relief cases in the state court. The criminal defendant constitutional rights are being violated because the state court improperly invoking its res judicata rule as a basis to dismiss the petition. However, the truth of the matter is, constitutional violations are committed regularly, while going unchecked. There have are countless state prisoners, such as Gibson, whose postconviction relief petition is dismissed without the proper findings. In spite of this, these defendants are left without any adequate remedy at law to correct the courts dereliction of their duty. This decision is arbitrary and unconstitutionally predetermined in violation of the Fourteenth's Amendment Due Process Clause. With Fourteenth Amendment rights hanging in the balance, such unscrupulous practice absolutely contribute to the fraying of the fabric of our democracy.

In sum, majority of the criminal defendants in postconviction proceedings in Ohio's state courts, are regularly deprived of a protected liberty interest when there was a substantial denial of their rights under the Constitution of the United States or the State of Ohio or both.

SUMMARY OF ARGUMENT

Petitioner seeks a writ of certiorari to review a decision of the state court which denied him due process of law as guaranteed under the Fourteenth Amendment during his postconviction proceedings. This is a prima facie case of due violations to invoke the corrective process of the federal court. The state courts regularly dismiss petition for postconviction relief without ever deciding the federal questions involved. Not only does due process require that criminal defendants convicted in a state court to unequivocally have the availability to remedy constitutional violations occurring during state court proceedings, but to have an adequate remedy at law, via a state corrective process. In the examinations of postconviction petitions, Ohio state courts have inconsistently dismiss postconviction relief petitions pursuant to the due process nature embedded in R.C. 2953.21. Many state courts dismiss these petitions without ever filing the statutorily mandated finding of facts and conclusions of law, while others simply use one judgment entry without sufficient findings to apprise the petitioner of the basis of his claims. Even further, a majority of criminal defendant's postconviction relief petitions are denied without the courts ever giving any reasons for the denial.

In other cases, the petitions are dismissed because the the court "lacked jurisdiction" due to there being no final appealable order. The state court fails to understand that findings of fact and conclusions of law are part and parcel of a judgment denying post-conviction relief because it fosters the orderliness of this process. Moreover, the part and parcel of a judgment entry when denying post-conviction relief is not discretionary, but is mandated pursuant to statute. This protected liberty interest is guaranteed under Article I, Section 16 of the Ohio Constitution.

Conversely, the procedure has been explained in Ohio's Supreme Court precedent case, *Mapson*. *State v. Mapson*, 41 Ohio App. 3d 390.

There are numerous cases of this type, whereby, the postconviction relief petitions are simply denied without further proceedings. Ultimately, when the petitioner files their §2254 habeas petition to the United States district court, the record, thus, shows that he failed to seek the proper remedy or follow the state procedure under Ohio law. Additionally, the state court record will reflect the grounds raised in the habeas petition has been forfeited, which is an adequate and independent state ground on which the State can rely to foreclose review of a federal constitutional claim. Thereafter, the district court concludes that the petitioner did not follow the procedural rule. Frankly, this failure to set forth the Maupin factors explicitly, thereby, rendering the defaulted status of the petitioner's claim or claims debatable among jurists of reason.

The judgments this Court are asked to review rest on an adequate federal ground. The denials of petitioner's applications for habeas corpus present a federal question merely because the decision below requires only that the trial court unequivocally follow the holdings of the Ohio Supreme Court case precedent case *Mapson*, supra. Petitioner argues that, that facts as stated above, leaves him without any remedy in the state courts.

The trial court's final disposition on Petitioner's postconviction relief petition in the state court proceeding is totally inconsistent with due process clause, which is embedded in Ohio's statute R.C. 2953.21, Article I, Section 16 of the Ohio Constitution, and the Fourteenth Amendment to the United States Constitution. Clearly, Petitioner had a legal right as to the trial court's reasons for its dismissal of his petition. The Ohio Supreme Court majority's concluded in

Mapson was, that a denial of a postconviction relief petition may be appealed within 30 days of the findings of fact and conclusions of law filed pursuant to R.C. 2953.21(E).

In *Piesciuk v. Warden, Mansfield Corr. Inst.*, the habeas corpus case had been pending in that Court for nearly five years. *Piesciuk v. Warden, Mansfield Corr. Inst.*, 2012 U.S. Dist. LEXIS 102483, (2012). On November 21, 2011, the Court entered its Substituted Decision and Order on petitioner's Motion to Stay and Hold in Abeyance. In that Order, this case was ordered "stayed pending the outcome of Petitioner's currently pending mandamus proceedings. The Butler County Court of Appeals has granted him the mandamus relief he sought. *Piesciuk v. Nastoff*, Case No. CA2011-07-137 (Ohio App. 12th Dist. May 25, 2012). In reaching its conclusion, the court of appeals made a critical ancillary finding, to wit, "that relator's postconviction relief petition was timely filed within 180 days of the time that the entire trial transcript. Petitioner sought precisely that finding when he filed a Motion for an Order to Show Cause asking the United States District Court to require Respondent to admit that Petitioner had a properly filed post conviction petition which remained undecided in the state courts. Now the finding was in place from the court where it mattered.

Petitioner argue in August, 2011, that the finding would "require the District Court to dismiss the case at bar without prejudice" because his Grounds for Relief 22, 23, 24, and 25 "remain unexhausted." The Twelfth District Court of Appeals has accepted that position and inferentially recognized the authority cited by Petitioner, *State ex rel. Ferrell v. Clark*, 13 Ohio St. 3d 3, 13 Ohio B. 378, 469 N.E.2d 843 (1984), for the proposition [¶3] that there is no final trial court judgment in a postconviction proceeding until findings and fact and conclusions of law are entered. In his Motion, Petitioner recognized that the one-year statute of limitations time with

the AEDPA is tolled if the collateral proceeding was properly filed. The Twelfth District Court of Appeals held that the March, 2005, post-conviction petition was properly filed, which meant that the statute of limitations remained tolled as of the date of the timely filed postconviction relief petition, and that date remained tolled until state court process was completed on the March, 2005, postconviction petition. It followed that the Petition was a "mixed petition" containing four Grounds for Relief which were unexhausted.

In *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982), the Supreme Court held that a "mixed" habeas petition containing both exhausted and unexhausted claims must be dismissed; accord, *Pillette v. Foltz*, 824 F.2d 494 (6th Cir. 1987). This mixed Petition in this case was accordingly dismissed without prejudice to Mr. Piesciuk's filing a complete Petition once exhaustion had occurred. It was therefore, respectfully recommended that the Petition be dismissed without prejudice.

In the instant case, the Court of Appeals dismissed Appellant's appeal because it lacked jurisdiction, presumably on the basis that it had not been properly appealed, and not filed within 30 days of the judgment entry initially denying the petition. A holding to the contrary, not only defeats the purposes of R.C. 2953.21, but judicial lackadaisicalness is fostered by a holding to the contrary, for such a holding would have the effect of justifying a trial court's negligence in failing to follow the relatively simple statutorily prescribed procedures of R.C. 2953.21.

ARGUMENT

A. Whether a criminal defendant is denied due process of law, if the state improperly invokes its res judicata rule for the sake of denying a post-conviction relief petition?

The Court of Appeals for the State of Ohio held that “the trial court issued a ruling on the motion for post-conviction relief filed on May 23, 2014. The entry contained sufficient findings of fact and conclusions of law to apprise Petitioner of the reasons for denial of the motion.”

(quoting *State ex rel. Gibson v. Heath*, 2016-Ohio-1449 (2016). The present writ of certiorari is before this court because a state court has ever denied the reasonableness of filing a separate finding of facts and conclusion of law which is mandatory by

statute. R.C. 2953.21(H) states “If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition.”

Though, the issue as framed by the Petition for Writ of Certiorari goes to the due process aspect of the cases involving a person who has been convicted of a criminal offense who claims that there was such a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, that files a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The State has not cited a single case contrary to the holdings in *Mapson*. *State v. Mapson*, 41 Ohio App. 3d 390.

Moreover, the Sixth Circuit in stated *Richey v. Bradshaw*:

“We have declined to observe Ohio's procedural bar and instead have proceeded to the merits of an ineffective-assistance claim when we have concluded that Ohio improperly invoked its res judicata rule.” 498 F.3d 344 at 1445. The Ohio procedural rule that the state post-conviction court relied upon in dismissing Richey’s ineffective-assistance claim provides that the claim must be raised on direct appeal where it does not depend on evidence outside the record. *State v. Cole*, 2 Ohio St. 3d 112, 2 Ohio B. 661, 443 N.E.2d 169, 171 (Ohio 1982). If the requirements of this res judicata rule are met, an ineffective-assistance claim asserted in a post-conviction petition must be dismissed. On the other hand, “allegations of ineffectiveness [**42] based on facts not appearing in the record should be reviewed through the postconviction remedies of [O.]R.C. 2953.21.” *State v. Coleman*, 85 Ohio St. 3d 129, 1999 Ohio 258, 707 N.E.2d 476, 483 (1999); accord *Byrd v. Collins*, 209 F.3d 486, 521 (6th Cir. 2000) (stating that Ohio's res judicata rule “has been consistently interpreted to stand for the proposition that a claim of ineffective assistance of trial counsel, which is dependent upon evidence outside the record, is to be raised in a post-conviction proceeding rather than on direct appeal”).

In *Byrd*, the Sixth Circuit analyzed Ohio's res judicata rule and its application by Ohio courts and held that it is an adequate and independent state procedural rule. 209 F.3d at 521. The inquiry did not end there, however, that Court have declined to observe Ohio's procedural bar and instead have proceeded to the merits of an ineffective-assistance claim when it concluded [**43] that *Ohio improperly invoked* its res judicata rule.

In his federal habeas petition, Gibson argued ineffectiveness assistance of counsel in his state post-conviction petition. Additionally, this assertion was supported by material documents and

evidence outside of the record. The legal basis for his claim remained constant, and had the facts developed in the district court, it would have merely substantiated his assertions. It can not be said, that his ineffective assistance of counsel claim was procedurally defaulted in the state court as to preclude the district court's review. If in fact, had his ineffective assistance of counsel been procedurally defaulted, the district court should have taken a step further in determining whether the petitioner had truly established "*cause and prejudice*" to excuse the default.

The district court could have established, Gibson's trial counsel was in fact ineffective because he withdrew from his case just one week prior to trial, due to the fact he refused to accept a guilty plea? The petitioner was given a Hopson's choice. He had to waive his right to a jury trial or represent himself. His trial counsel behavior was repugnant, thereby, violating the notion for what the Sixth Amendment stands for in criminal trials. In certain Sixth Amendment contexts, prejudice is presumed. "[A]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Mapson*, is precedent in Ohio postconviction proceedings. Clearly, precedent is not just a legal document, but has been adopted in our both, the United States Constitution and Ohio Constitution.

Based upon the facts, this court must now determine whether the petitioner has been denied due process of law, and if the State improperly invoked its res judicata rule for the sake of denying his post-conviction relief petition. The same policy considerations that underlie *Mapson* apply in this case. Until a trial court files its findings of fact and conclusions of law, an appellant has no opportunity to determine the basis for an appeal. Even further, his postconviction petition is still tolling. There are compelling reasons for adopting the rule set

forth in *Mapson*. When a timely request for findings of fact and conclusions of law has been filed in accordance with the rules of criminal procedure, the time period for filing a notice of appeal does not commence to run until the trial court files its findings of fact and conclusions of law.

For the foregoing reasons, the judgment of the district court must be reversed, and this cause remanded to that court for further proceedings.

B. Did the Court of Appeals for the State of Ohio correctly conclude that the Petitioner filed a Motion for Leave to File a Delayed Appeal, after the trial court failed to render its Finding of Facts and Conclusion of Law as mandated by R.C. 2953.21(C) under the Ohio Constitution?

In *State v. Mapson*, the Appellant contended that an appeal from a denial of a post-conviction relief petition was timely if it had been filed within 30 days of the filing of the statutorily required findings of fact and conclusions of law. The State asserted essentially that such an appeal must be filed within 30 days of the date the judgment denying the petition is entered, regardless of whether findings accompanied the entry. *State v. Mapson*, 1 Ohio St. 3d 217 (1982).

After carefully reviewing the applicable statutes and the policies underlying the statutes, the Supreme Court of Ohio held that R.C. 2953.21 mandates that a judgment denying post-conviction relief include findings of fact and conclusions of law, and that [***4] a [912] judgment entry filed without such findings is incomplete and it thus does not commence the running of the time period for filing an appeal therefrom. R.C. 2953.21, the Ohio statute for post-conviction determination of constitutional rights, provides, in pertinent part, that " * * [i]f the court dismisses the petition [to vacate or set aside the sentence] it shall make and file findings of fact and conclusions of law with respect to such dismissal." With the enactment of this provision

in 1967, the General Assembly unequivocally mandated that findings of fact and conclusions of law must be made by a trial judge even where a post-conviction petition is summarily denied. [***5] That court, in *State v. Lester* (1975), 41 Ohio St. 2d 51 [70 O.O.2d 150], considered this provision and held in paragraph two of the syllabus that:

“ R.C. 2953.21 requires the trial court to consider the allegations of the petition for postconviction relief and the particular facts upon which the petitioner bases his claim; if, upon such consideration, the trial court finds no grounds for a hearing, the court is required to make and file findings of fact and conclusions of law as to the reasons for dismissal and as to the grounds for relief relied upon in the petition.”

Recognizing the mandatory nature of findings, the court in *Lester, supra*, at page 56, remanded the cause to the trial court because the judge had failed to “* * * make and file findings of fact and conclusions of laws with regard to * * * [its] holding.” Thus, in *Lester*, as well as in *State v. Hester* (1976), 45 Ohio St. id 71 [74 O.O.2d 156], the Supreme Court of Ohio implicitly agreed with the holding in *State v. Brown* (1974), 41 Ohio App. 2d 181, 185 [70 O.O.2d 349], that the failure of a trial judge to make the required findings is prejudicial error.

The procedural nature of R.C. [***6] 2953.21(C) cannot be ignored. This section, along with the other sections dealing with post-conviction relief, provide a [*219] procedure “* * * to make available 'the best method of protecting constitutional rights of individuals, and, at the same time, provid[ing] a more orderly method of hearing such matters.” “*Kott v. Maxwell* (1965), 3 Ohio App. 2d 337, 338 [32 O.O.2d 457]. **The Supreme Court holding that findings of fact and conclusions of law are part and parcel of a judgment denying post-conviction relief fosters the orderliness of this process.**

That court went on to say, "Important policy considerations also underlie this decision. The obvious reasons for requiring findings are * * * to apprise petitioner of the grounds for the judgment of the trial court and to enable the appellate courts to properly determine appeals in such a cause." *Jones v. State* (1966), 8 Ohio St. 2d 21, 22 [37 O.O.2d 357]. The existence of findings and conclusions are essential in order to prosecute an appeal. Without them, a petitioner knows no more than he lost and hence is effectively precluded from making a reasoned appeal. In addition, the failure of a trial judge to make the requisite findings [***7] prevents any meaningful judicial review, for it is the findings and the conclusions which an appellate court reviews for error. Even further, the court noted in *Lester*, at page 56, that "the general purpose of R.C. 2953.21 is to provide [**913] judicial review of the allegations raised in a prisoner's petition, in order to provide a remedy for violation of constitutional rights." In order for this purpose to remain meaningful and viable, findings must be held to be [***8] a necessary and essential part of a judgment denying post-conviction relief.

A holding to the contrary would not only defeat the purposes of R.C. 2953.21, it would also serve to increase the workload of the already over-burdened and overcrowded courts of appeal and further tax the already scarce state resources. Requiring a petitioner to perfect an appeal without having findings before him would deter judicial economy, for it would guarantee two trips to the appellate court -- one to force the findings and another to review the decision on the merits. This court has previously recognized the potential for judicial inefficiency which results when a trial court neglects to make the requisite findings. As this court noted in *Lester*, at page 56, that "* * * unless the trial court makes and files findings on all issues presented, appeals

may well be piecemeal; the reversal of any dismissal could require the cause to be remanded to decide issues not considered by the trial court, while the reversal of the granting of relief upon one ground might be mooted by a later appeal upon some valid ground. A time-consuming series of appeals could well result * * *." [*220] Judicial [***9] lackadaisicalness would also be fostered by a holding to the contrary, for such a holding would have the effect of justifying a trial court's negligence in failing to follow the relatively simple statutorily prescribed procedures of R.C. 2953.21.

In *Mapson*, the Court of Appeals dismissed appellant's appeal as untimely, presumably on the basis that it had not been filed within 30 days of the judgment entry initially denying post-conviction relief. That entry, however, was not accompanied by the requisite findings of fact and conclusions of law. The Court of Appeals apparently reasoned that such findings were not essential to a judgment denying post-conviction relief. For the reasons stated above, this was error, and concluded:

For the stated reasons, the judgment of the Court of Appeals was reversed and the cause remanded for further proceedings not inconsistent with that opinion.

C. Whether reasonable jurists would debate if a District Court's determination that the Petitioner has defaulted all constitutional claims asserted in the post-conviction relief petition by failing to comply with the state procedural rule, and not show "cause" and "prejudice" to excuse this default?

In the instant matter, the Sixth Circuit Court of Appeals declined to grant a certificate of appealability, because reasonable jurists would not find the Court's assessment of Petitioner's claims unreasonable. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), but he disagrees with this contention. The Petitioner attacks the Sixth Circuit Court of Appeals certificate of appealability decision on the basis *Young v. Ragen*, 337 U.S. 235 and *Richey v. Bradshaw*, 498 F.3d 344. The jurisdiction of a circuit court over an appeal of a habeas decision adverse to the petitioner depends on there being a certificate of appealability. The jurisdiction in habeas is original and depends on such facts as whether the petitioner is in custody and where, whether the custody is state or federal, and so forth. See 28 U.S.C. § 2241.

The *Perry* res judicata rule has been repeatedly upheld in the Sixth Circuit as an adequate and independent state rule. *State v. Perry*, 2010-Ohio-2956, (2010). The Ohio procedural rule that the state post-conviction court relied upon in dismissing Gibson's ineffective-assistance claim provides that the claim must be raised on direct appeal where it does not depend on evidence outside the record. If the requirements of this res judicata rule are met, an ineffective-assistance claim asserted in a post-conviction petition must be dismissed. On the other hand, "allegations of ineffectiveness based on facts not appearing in the record should be reviewed through the postconviction remedies of O.R.C. 2953.21; accord *Byrd v. Collins*, 209 F.3d 486, 521 (6th Cir. 2000) (stating that Ohio's res judicata rule "has been consistently interpreted to stand for the proposition that a claim of ineffective assistance of trial counsel, which is dependent upon evidence outside the record, is to be raised in a post-conviction proceeding rather than on direct appeal").

In Byrd, that analyzed Ohio's res judicata rule... but its inquiry does not end there. That Court declined to observe Ohio's procedural bar and instead have proceeded to the merits of an ineffective-assistance claim when we have concluded [**43] that Ohio improperly invoked its res judicata rule. In *Hill v. Mitchell*, 400 F.3d 308, 314 (6th Cir. 2005), the habeas petitioner argued that his trial counsel was ineffective for failing to hire a psychologist to testify at his mitigation hearing until a day before the hearing. The petitioner had raised this same claim in his post-conviction petition in the Ohio state court, but that court dismissed the claim on the grounds that it should have been raised on direct appeal and therefore was barred by Ohio's res judicata rule. We agreed with the district court that we could consider the merits of the claim, despite the state court's res judicata ruling, because the claim depended on evidence outside the trial record and therefore could not have been raised on direct appeal. *Id.*; accord *Greer v. Mitchell*, 264 F.3d 663, 675 (6th Cir. 2001) (where an Ohio post-conviction court dismissed the petitioner's ineffective-assistance claim on the basis of Ohio's res judicata rule, we stated that "when the record reveals that the state court's reliance upon its own rule of procedural default is misplaced, we are reluctant to conclude categorically that federal habeas review of the purportedly defaulted [**44] claim is precluded"); *White v. Mitchell*, 431 F.3d 517, 526-27 (6th Cir. 2005) (reviewing an ineffective-assistance-of-counsel claim on the merits even though the Ohio courts deemed it procedurally defaulted under Ohio's res judicata rule); [*360] *Linscott v. Rose*, 436 F.3d 587, 592 (6th Cir. 2006) (stating that, "[w]e find it difficult, based on the limited record before us, to effectively evaluate whether the Ohio court properly concluded, if it concluded at all, that Linscott procedurally defaulted his psychiatric evaluation claim").

Just as in *Hill* and *Greer*, Gibson's ineffective-assistance claim depended on evidence outside the trial record. It is well-established in Ohio law that where an ineffective assistance of counsel claim cannot be supported solely on the trial court record, it should not be brought on direct appeal. In Petitioner's case, his trial counsel had given him two options with just one week before trial. In going to the specifics, his counsel refused to represent him at trial. The options petitioner was given were; (1) plea guilty; or (2) plea guilty and if you refuse to plead guilty, quote, "[I] would withdraw from your case and you will have to represent yourself."

In his postconviction relief petition, Gibson presented documentary evidence outside the trial court record to support this assertion. Gibson refused to plead guilty, thereafter, his trial counsel withdrew from his case, and he represented himself. This abhorrent, despicable, and unethical conduct violates the guarantee of our Sixth Amendment to have the effective assistance of counsel. The Sixth Amendment's guarantee of the right to counsel "is the right to the effective assistance of counsel." *McMann v. Richardson* (1970), 397 U.S. 759, 771, fn. 14. In order to see the error in the present case, it is necessary to look in detail at the facts. An adequate picture cannot be gleaned from the summaries offered in the majority's opinion.

The U.S. Court of Appeals for the Sixth Circuit has previously stated that Ohio state courts improperly invoke its res judicata rule in postconviction relief proceedings, and thereafter, proceeded to rule on the merits of the claim. For these reasons, reasonable jurists would find the district court's assessment of his constitutional claims debatable or wrong warrants encouragement to proceed further.

REASON FOR GRANTING THE WRIT

The crux of this case is, this Court held that prisoners convicted in state courts must be afforded a mechanism by which they can assert claims of federal constitutional rights violations. Ohio's Postconviction Remedy Act of 1965 provides prisoners this mechanism. R.C. 2953.21 embraces all claims of violations of federal constitutional rights. It provides for full hearings when necessary. R.C. 2953.21 requires a trial court to consider not only the petition and its supporting affidavits, but the entire record of the proceedings against a petitioner. The trial court is required to set forth in a judgment entry the *findings of fact and conclusions of law* supporting its decision, whether the trial court dismisses a petition with or without a hearing. The test of their adequacy is whether they are sufficiently comprehensive and pertinent to the issue to form a basis for the decision.

In the instant matter, Petitioner was denied a writ of habeas corpus. The state contended that the denial of the writ should be based upon state procedural grounds. Petitioner's asserts his claims were not procedurally barred under the Maupin analysis. Although, the state court failed to fulfill the requirements of R.C. 2953.21, yet it enforced the procedural sanction of *res judicata* regarding Petitioner's claims. Gibson meets the requirements of the Maupin factors. Therefore, the grounds on which the district court relied upon to foreclose on his federal review was not an appropriate remedy for the relief of denials of due process. However, the petitioner asserted substantial questions under the Due Process Clause of the Fourteenth Amendment in his postconviction relief proceedings. Petitioner's state court remedies were not deemed to have been exhausted under 28 U.S.C.S. § 2254 because he had the right to habeas corpus relief in a state court.

28 U.S.C.S. § 2254 provides that an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. An applicant shall not be deemed to have exhausted the remedies available in the courts of the state within the meaning of this section if he has the right under the law of the state to raise, by any available procedure, the question presented. Countless persons in custody under judgments of Ohio courts petitioned in the courts of that state for relief on the ground of infringement of Federal rights. These petitions are denied as “insufficient in law and substance.” Now this court is faced with the problem of determining what, if any, is the appropriate post-trial procedure in Ohio by which claims of infringement of federal rights may be raised. See *Woods v. Nierstheimer*, 328 U.S.211; [*237] *Marino v. Ragen*, 332 U.S. 561; *Loftus v. Illinois*, 334 U.S. 804.

On February 26, 2013, the Stark County Grand Jury indicted petitioner, Reginald Gibson, on one count of felonious assault in violation of R.C. 2903.11 and one count of abduction in violation of R.C. 2905.02. He later filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio containing allegations which, if true, raise substantial questions under the due process clause of the Fourteenth Amendment. The Attorney General of Ohio concedes that petitioner is not entitled to relief because of an “adequate and independent” state ground to bar review of his federal claims. Of course federal do not review state decisions which rest upon adequate state procedural grounds. But it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right is based upon the state improperly invoking its res judicata rule. The

Ohio Attorney General suggests Ohio's post-trial remedy is appropriate. In actuality, Ohio offers no post-trial where the petitioner a clear and orderly method by which he may raise claims of denial of his federal rights. In that regard, there is no post-trial procedure by which federal rights may be vindicated in Ohio.

This petition for certiorari raise substantial questions under the due-process clause of the Fourteenth Amendment, which is now before this Court following denials of relief by Ohio courts or the Criminal Court of Stark County. In a majority of these cases, there was never a hearing held or the petitioner permitted to submit proof of the truth of his allegations. Even further, the state appellate courts decisions are in conflict with other districts. Additionally, the state courts rulings are inconsistent on a regular basis on postconviction relief petitions. Moreover, the postconviction relief procedure is extremely confusing. There is an absence of available State corrective process and the existence of circumstances rendering such process ineffective to protect the rights of the prisoners. Therefore, it shall not be deemed that they have exhausted their remedies available in the courts of the State, within the meaning of 28 U. S. C. § 2254, he has been deprived the right under the law of the State to raise, by any available procedure, the question presented. See *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986).

1. In *Price v. Jones* (1983), 9 Ohio App. 3d 64, 9 OBR 83, 458 N.E. 2d 413, the appellant filed a timely motion for separate findings of fact and conclusions of law after the trial court had filed its judgment entry. The appellant filed his notice of appeal within thirty days of the filing of the court's findings of fact and conclusions of law, but more than thirty days after the court filed its judgment entry. The court of appeals dismissed the appeal on the ground that the notice of appeal was not timely filed as required under App. R. 4(A).

2. In *Reineck*, the Court of Appeals for Sandusky County considered the same issue, but declined to rule as did the court in *Price*. The court in *Reineck*, applied the reasoning in *State v. Mapson* (1982), 1 Ohio St. 3d 217, 1 OBR 240, 438 N.E. 2d 910. On May 17, 1983, appellant, Jerry Dale Ferrell, filed a petition for post-conviction relief in the Court of Common Pleas of Fairfield County. The petition was heard by appellee, Judge Joseph T. Clark, who denied the petition on June 15, 1983. The entry contained no findings of fact or conclusions of law. *State ex rel. Ferrell v. Clark*, 13 Ohio St. 3d 3, (1984). On October 26, 1983 appellant brought this action in mandamus in the Court of Appeals for Fairfield County seeking the issuance of a writ to compel Judge Clark to prepare and file findings of fact and conclusions of law relative to appellant's petition. The court of appeals denied the writ and the cause is proceeded before the Supreme Court of Ohio upon an appeal as of right. That court stated in its Opinion:

[**844] *Per Curiam*. The court of appeals denied the writ, stating, "[a]n adequate remedy at law exists [***2] by way of appeal," without further explanation. A

Mandamus was granted to compel a court to proceed to final judgment in an action for post-conviction relief. *State, ex rel. Turpin, v. Court of Common Pleas* (1966), 8 Ohio St. 2d 1 [37 O.O.2d 40]. The judgment of the court of appeals was reversed and writ was allowed.

3. Appellate court declined to address defendant's appeal concerning his PCR petition because trial court did not issue findings of fact and conclusions of law when it denied defendant's timely PCR petition, R.C. 2953.21(C), and, as such, there was no final, appealable order; defendant's PCR petition was timely under the former and current statute. *State v. Thomas*, 2016-Ohio-3327.
4. Appeal was dismissed because the appellate court lacked jurisdiction as there was no final judgment in that the appellate court was unable to discern any findings of fact or conclusions of law in the trial court's judgment entry, pursuant to R.C. 2953.21, relative

to the claims which defendant advanced in her petition for post-conviction relief. *State v. Stull*, 2013-Ohio-2521, (2013).

5. The common please court erred in declining to entertain a postconviction petition that was filed in conjunction with a reopened appeal under App.R. 26(B): R.C.

2953.21 permits a petition to be filed within 180 days of the filing of the trial transcript in the "direct appeal"; and because an appeal reopened under App.R. 26(B) is a "direct appeal," the filing of the petition 39 days after the trial transcript had been filed in the reopened appeal clearly gave the trial court jurisdiction to entertain the petition. There is no jurisdiction to review an appeal from the appeal from the judgment denying a postconviction petition, when the trial court fails to make and file findings of fact and conclusions of law and or to otherwise provide a basis for meaningful appellate review, and when, as a consequence of that failure, there is no final appealable order. *State v. Fuller*, 171 Ohio App. 3d 260, (2007).

6. Defendant-appellant Robert Horton, Sr. appealed the March 16, 2017 Judgment Entry entered by the Muskingum County Court of Common Pleas denying his petition for post-conviction relief filed pursuant to R.C. 2953.21.

On February 16, 2016, Appellant filed a handwritten "Motion to Vacate Sentence" with the trial court. The state filed a memorandum in opposition on February 23, 2016. It does not appear that the trial court ruled upon this pro se motion. [***3] In its memorandum, the state conceded that the trial court was required to make findings of fact and conclusions of law.

[*P9] On June 20, 2016, Appellant filed pro se a typewritten "Motion for Reconsideration to Vacate Sentence" with the trial court. The state filed its opposition to the motion on June 20, 2016. It does not appear in the record that the trial court ruled upon this motion.

[*P10] On August 17, 2016, Appellant filed a "Petition to Vacate or Set Aside Judgment of Conviction and Sentencing (Evidentiary Hearing Requested) with the trial court. The

state filed its opposition on August 31, 2016. Appellant filed a Response on September 8, 2016. On October 14, 2016, Appellant filed a "Motion for Summary Judgment" with the trial court. On March 6, 2017, Appellant filed a "Motion for Ruling" with the trial court. By Judgment Entry filed March 16, 2017, the trial court summarily denied Appellant's petition to vacate or set aside and his motion for summary judgment.

[*P18] The judgment in the case at bar is insufficient to comply with the requirement of R.C. 2953.21(G) that the court issue findings of fact and conclusions of law when denying a petition for post-conviction relief without a hearing. [*P20] The judgment of the Muskingum County Common Pleas Court is reversed and this cause is remanded to that court with instructions to make findings of fact and conclusions of law. *See, State v. Poulton*, 5th Dist. Muskingum No. CT2015-0041, 2016 Ohio-901; *State v. Ashraf*, 5th Dist. Muskingum No. CT2015-0052, 2015-Ohio-5323. *State v. Horton*, 2017-Ohio-7052, (2017).

In the case at bar, petitioner filed a Petition for Writ of Mandamus against Respondent, Judge Taryn Heath of the Stark County Court of Common Pleas. He sought an order requiring Respondent to issue findings of fact and conclusions of law in support of the trial court's denial of his motion for post-conviction relief. Respondent filed a motion to dismiss arguing Respondent had already issued the findings of fact and conclusions of law. Further, Respondent argued petitioner has or had an adequate remedy at law by way of appeal. [*P4] If the entry [denying a motion for post-conviction relief] of the trial court *sufficiently apprises* the petitioner of the reasons for the judgment and permits meaningful appellate review, a writ of mandamus will not be issued to compel findings of fact and conclusions of law. *State ex rel. Carrion v. Harris* (1988), 40 Ohio St.3d 19, 19-20, 530 N.E.2d 1330, 1330-1331. [*P5] Respondent issued a ruling on the motion for post-conviction relief on May 23, 2014. The entry contained sufficient findings of fact and conclusions of law to apprise Relator of the reasons for denial of the motion.

[*P6] For this reason, the motion to dismiss is granted, and the instant petition is dismissed. (See Appendix I)

The egregious rationale Ohio courts has adopted in its disposal of the postconviction relief petitions, without the necessary *finding of fact and conclusion of law*, is happening at a dizzying pace. Their failure to comply with the due process nature of R.C. 2953.21 is problematic requiring a structural change. There is an ever increasingly need to protect the rule of law, precedent decisions, and criminal defendants protected liberty interest under due process clause of, both, the United States Constitution and Ohio's Constitution in a state postconviction proceeding.

CONCLUSION

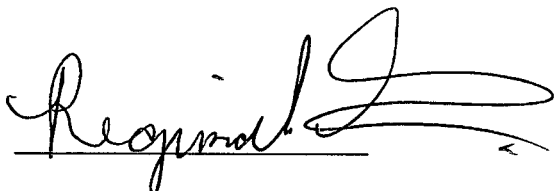
In short, Section 2953.21, Revised Code, reads in part as follows:

"Unless the petition and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the Prosecuting Attorney, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto." Under the provisions of this section, it is the mandatory duty of the trial court to make findings of fact and conclusions of law if a petitioner raises an issue properly cognizable under the Postconviction Remedy Act, the resolution of which requires the determination of facts. If such facts may not be determined from an examination of the court records, it is the duty of the court, by deposition or otherwise, to conduct a hearing to obtain the necessary information to make the required findings of fact and conclusions of law. Such findings are necessary to apprise the petitioner of the grounds for the

judgment of the trial court and to enable the appellate courts to properly determine appeals in such a cause.

The procedural nature of R.C. 2953.21(C) cannot be ignored. The Ohio Supreme Court court's holding in, *Mapson*, that findings of fact and conclusions of law are part and parcel of a judgment denying post-conviction relief fosters the orderliness of this process. Important policy considerations also underlie this decision. Without them, a petitioner knows no more than he lost and hence is effectively precluded from making a reasoned appeal. In addition, the failure of a trial judge to make the requisite findings prevents any meaningful judicial review, for it is the findings and the conclusions which an appellate court reviews for error.

In this case, the state court failed its mandatory duty. Frankly, the State of Ohio think it is an island unto itself. Certiorari must be granted.

A handwritten signature in dark ink, appearing to read "Reginald J. [unclear]", with a horizontal line underneath the name.

Respectfully submitted,

Date: October 26, 2018