No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

MARK GERTH,
Petitioner,

v.

WARDEN, ALLEN OAKWOOD CORRECTIONAL INSTITUTION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner had a constitutional right to counsel, and thus the right to effective counsel, after the Court of Appeals for the First Appellate District of Ohio found he received ineffective assistance of appellate counsel in his direct appeal, granted his application to reopen his direct appeal, stated that the case shall now proceed as on an initial appeal, appointed Petitioner new appellate counsel, and reopened the appeal with the instruction that new appellate counsel present any other nonfrivolous arguments not previously considered.

LIST OF PARTIES

The Petitioner is Mark Gerth. The Respondent is the Warden of the Allen Oakwood Correctional Institution.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Mark Gerth, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit (hereafter "Sixth Circuit").

OPINIONS BELOW

The Sixth Circuit's opinion, *Gerth v. Warden*, 938 F.3d 821 (6th Cir. 2019) is reproduced as Appendix A. (Pet. App. 1a–15a) The Sixth Circuit's order denying rehearing en banc is reproduced as Appendix H. (Pet. App. 65a–66a) The Decision and Order, *Gerth v. Haviland*, No. 1:16-cv-598, 2017 WL 4468927 (S.D. Ohio Oct. 6, 2017), dismissing Gerth's habeas petition by the United States District Court for the Southern District of Ohio is reproduced as Appendix B. (Pet. App. 16a–20a) The Report and Recommendations, *Gerth v. Haviland*, No. 1:16-cv-598, 2017 WL 3387110 (S.D. Ohio Aug. 7, 2017), and the Supplemental Report and Recommendations, *Gerth v. Haviland*, No. 1:16-cv-598, 2017 WL 4076455 (S.D. Ohio Sept. 14, 2017), of the Magistrate Judge of the United States District Court for the Southern District of Ohio are reproduced as Appendix D (Pet. App. 33a–53a) and Appendix C (Pet. App. 21a–32a), respectively.

The Entry Granting Application to Reopen Direct Appeal of the Court of Appeals for the First Appellate District of Ohio (hereafter "First District") is reproduced as Appendix G. (Pet. App. 62a–64a) The First District's Opinion, *State v. Gerth*, 1st Dist. No. C-120392, 2014-Ohio-4569, 2014 WL 5306631 (Ohio 1st Dist. Oct. 17, 2014), is reproduced as Appendix F. (Pet. App. 56a–61a) The First District's Entry Denying Application for Reopening is reproduced as Appendix E. (Pet. App. 54a–55a)

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its opinion upholding the denial of Gerth's habeas petition on September 16, 2019, and denied rehearing en banc on October 24, 2019. Gerth now timely files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1) and § 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth and Fourteenth Amendments to the United States Constitution. The statutory provisions involved include Ohio App. R. 26. All constitutional and statutory provisions involved are set forth in Appendix I. (Pet. App. 67a–79a)

INTRODUCTION

The Sixth Circuit framed the primary issue as follows: "whether Gerth had a constitutional right to counsel after the Ohio Court of Appeals granted his 26(B) application, appointed Gerth counsel, and *reopened the appeal*." *Gerth v. Warden*, 938 F.3d 821, 830 (6th Cir. 2019) (emphasis in original). (Pet. App. 12a) The Sixth Circuit answered the question by holding, without citation to any authority, "that a reopened appeal under Rule 26(B) is also part of the collateral, postconviction process—and that Gerth therefore did not have a constitutional right to counsel at that stage of the proceeding." *Id.* at 831. (Pet. App. 12a) Because of this holding, the Sixth Circuit found Gerth procedurally defaulted his *Faretta*-based claim and did not consider the merits of it, despite the Magistrate Judge and District Court below considering the merits of this claim.

Ohio's Appellate Rule 26(B) contemplates a two-step process: (1) the application itself where the applicant must demonstrate a genuine issue as to deprivation of effective assistance of appellate counsel, and (2) the granting of the application and the applicant establishing that prejudicial errors were made in the trial court and that the ineffective assistance of appellate counsel in the prior appellate proceedings prevented these errors from being presented

effectively. *State v. Mockbee*, 4th Dist. Scioto No. 14CA3601, 2015-Ohio-3469, 2015 WL 5031768, ¶ 17-19. It is true that in *Lopez v. Wilson*, 426 F.3d 339, 351 (6th Cir. 2005) (en banc), the Sixth Circuit held that the **26(B) application itself**, i.e., the first step, is "part of the collateral, postconviction process rather than direct review."

However, the Sixth Circuit's holding in this case ignores the reality of the second step when the Ohio Court of Appeals grants a 26(B) application and reopens the appeal. Rule 26(B)(7) states: "If the application is granted, **the case shall proceed as on an initial appeal** in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered." (Pet. App. 72a) Pursuant to Rule 26(B)(6), the Ohio Court of Appeals must appoint counsel to represent indigent applicants. (*Id.*) Indeed, the Ohio Court of Appeals in this case reopened Gerth's appeal, appointed new appellate counsel, and ordered said counsel to present "**any other nonfrivolous assignment of error or argument not previously considered,"** and stated that the case would "proceed as on an **initial appeal**." (R.5, State Record, Exhibit 39, PageID#261–63 (emphasis added) (Pet. App. 64))

However, what good is providing appointed counsel if that counsel does not have a constitutional duty to be effective? This is precisely what happened to Gerth: his new appellate counsel, in the reopened appeal, failed to raise several nonfrivolous assignments of error not previously considered. *Gerth*, 938 F.3d at 829 ("But Gerth's second appellate counsel never raised the *Faretta* argument on the reopened appeal, and that decision precludes Gerth from raising the argument again in state court."). (Pet. App. 11a) The effect of the Sixth Circuit's holding is that Gerth has absolutely no recourse to address the errors of his appellate counsel in the reopened appeal. *Id.* at 829–31. (Pet. App. 9a–13a) How is due process satisfied if Gerth can point to errors that by law require a new trial, but because his ineffective appellate counsel

failed to raise them, Gerth has no right to a new trial? What is the point of Ohio having Rule 26(B) when the attorney appointed to do the reopened appeal has no duty of competence whatsoever? If the right to the effective assistance of appellate counsel has any meaning, the Sixth Circuit's decision cannot stand.

The Sixth Circuit's holding has enormous implications for defendants in Ohio. If not reversed, defendants in Ohio denied the effective assistance of appellate counsel in the first instance can again be denied the effective assistance of appellate counsel in a reopened appeal **with absolutely no recourse**. The Constitution forbids such a result.

STATEMENT OF THE CASE

I. CONVICTION AND ORIGINAL SENTENCE.

In April 2012, a Hamilton County jury found Gerth guilty of two counts of murder contrary to O.R.C. 2903.02(B), among other charges. (R.5, State Record, Exhibit 18, PageID#118–20) On April 26, 2012, the trial court sentenced Gerth to 48 ½ years to life in prison. (*Id.*)

II. DIRECT APPEAL.

On direct appeal, and despite a record replete with error, appellate counsel only raised one assignment of error regarding insufficiency of the evidence on Gerth's behalf. (R.5, State Record, Exhibit 21, PageID#126–35) On May 1, 2013, the Ohio Court of Appeals for the First Appellate District ("First District") found no merit in Gerth's assignment of error. *State v. Gerth*, No. C-120392, 2013-Ohio-1751, 2013 WL 1820817 (Ohio 1st Dist. May 1, 2013). (R.5, State Record, Exhibit 24, PageID#168-73)

III. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN DIRECT APPEAL.

On July 25, 2013, Gerth filed, pro se, an application to reopen his original direct appeal pursuant to Ohio App. R. 26(B). (R.5, State Record, Exhibit 37, PageID#241–53) Gerth argued that his first appellate counsel deficiently represented him by omitting assignments of error regarding (1) being denied his constitutional right to represent himself, (2) receiving the ineffective assistance of trial counsel, and (3) the trial court failing to merge offenses for purposes of sentencing.

On February 13, 2014, the First District granted Gerth's application to reopen the direct appeal regarding the trial court's imposition of sentences on both of two counts of failure to stop after an accident. (R.5, State Record, Exhibit 39, PageID#261-63 (Pet. App. 62a–64a)) Accordingly, the First District reopened the appeal and appointed new appellate counsel. (*Id.* at PageID#263 (Pet. App. 64a)) Importantly, the First District **did not limit** new appellate counsel to raising the merger issue; instead, the court ordered "newly appointed counsel to present in the appellant's brief an assignment of error concerning the matter identified here as a ground for reopening, **along with any other nonfrivolous assignment of error or argument not previously considered**." (*Id.* (emphasis added) (Pet. App. 64a)) The First District also stated that "[i]n all other respects, **the case shall proceed as on an initial appeal**" in accordance with Ohio App. R. 26(B)(7). (*Id.* (emphasis added) (Pet. App. 64a)) In all other respects, "as on an initial appeal" certainly means the right to effective counsel.

Subsequently, new appellate counsel raised two sentencing issues and one confrontation issue in the reopened appeal. (R.5, State Record, Exhibit 40, PageID#264-86) Absent from the brief filed by newly appointed counsel was anything regarding (1) Gerth being denied his constitutional right to represent himself and the failure of the trial court to engage in a *Faretta*

inquiry, or (2) Gerth receiving the ineffective assistance of trial counsel. On October 17, 2014, the First District sustained the sentencing issues and overruled the confrontation issue. *State v. Gerth*, 1st Dist. No. C-120392, 2014-Ohio-4569, 2014 WL 5306631 (Ohio 1st Dist. Oct. 17, 2014). (Pet. App. 56a–61a) The First District vacated the sentence and remanded to the trial court for resentencing. Gerth subsequently received a prison sentence of 45 ½ years. (R.5, State Record, Exhibit 42, PageID#298–301)

IV. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN REOPENED DIRECT APPEAL.

On January 13, 2015, Gerth filed a timely application to reopen his direct appeal pursuant to Ohio App. R. 26(B). (R.5, State Record, Exhibit 47, PageID#323–82) Gerth contended that his appellate counsel on the reopened appeal provided deficient representation by failing to raise 6 nonfrivolous assignments of error which, pursuant to Ohio App. R. 26(B)(2)(c), "previously were not considered on the merits in the case by any appellate court." Among the 6 issues raised were the *Faretta* issue and the ineffective assistance of trial counsel issue.

The State filed an opposition on March 5, 2015, arguing that Ohio App. R. 26(B) made no provision for filing a successive application to reopen an appeal and cited *State v. Peeples*, 73 Ohio St.3d 149, 652 N.E.2d 717 (1995). (R.5, State Record, Exhibit 48, PageID #383) On March 13, 2015, Gerth filed a reply to the State's opposition. (R.5, State Record, Exhibit 49, PageID#387–89) In this filing, Gerth argued:

> [P]rocedurally, this case is different than the *Peeples* case. In *Peeples*, the appellant filed a delayed application to reopen, which was denied. *Peeples*, 73 Ohio St.3d at 149–150. When the appellant attempted to file a second application to reopen, the Ohio Supreme Court stated "that App.R. 26(B) makes no provision for filing successive applications to reopen." *Id.* at 150. Both applications to reopen in *Peeples* were delayed and neither were granted, so the direct appeal was **never reopened.**
>
> Here, however, this Court granted Gerth's first timely application to reopen, stated "the case shall proceed as on an initial appeal," and appointed new

> appellate counsel because there was at least one potentially meritorious issue that had been missed by the original appellate counsel. Under the State's theory, Gerth would have no ability to challenge the effectiveness of this new appellate counsel appointed by this Court. This would be untenable since, after all, App.R. 26(B) was created because claims of ineffective assistance of appellate counsel are not cognizable in post-conviction proceedings under R.C. 2953.21. *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), paragraph one of syllabus.
>
> Gerth has the right to effective assistance of appellate counsel on his first appeal as of right. *Douglas v. California*, 372 U.S. 353 (1963); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Under the State's theory, Gerth would have no remedy to enforce this right. It is well-settled that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). To deny Gerth's application under the State's theory would deny Gerth due process and the right to effective assistance of appellate counsel.

(R.5, State Record, Exhibit 49, PageID #388–89 (emphasis in original))

On April 13, 2015, the First District denied the application. (R.5, State Record, Exhibit 50, PageID#393–94 (Pet. App. 54a–55a)) The First District concluded that Ohio App. R. 26(B) made no provision for a successive application, and res judicata prohibited Gerth from presenting his challenges. Gerth timely sought discretionary review in the Supreme Court of Ohio, which the court declined on August 26, 2015. *See State v. Gerth*, 143 Ohio St.3d 1443, 2015-Ohio-3427, 36 N.E.3d 190.

V. HABEAS CORPUS – DISTRICT COURT.

On May 31, 2016, Gerth filed a habeas corpus petition. (R.1, Habeas Petition, PageID#1-37) On August 7, 2017, the Magistrate Judge concluded that although Gerth had preserved the *Faretta* argument for review, the petition should be dismissed with prejudice with no certificate of appealability. (R.14, Report and Recommendations, PageID#1173-93 (Pet. App. 33a–53a)) After Gerth submitted objections, on September 14, 2017, the Magistrate Judge again recommended that the petition be dismissed with prejudice, but this time with a certificate of

appealability as to the *Faretta* claim. (R.19, Supplemental Report and Recommendations, PageID#1219-29 (Pet. App. 21a–32a))

On October 6, 2017, the District Court overruled all objections, dismissed the petition with prejudice, but granted Gerth a certificate of appealability as to the *Faretta* claim. (R.23, Decision and Order, PageID#1263-67; R.24, Judgment, PageID#1268 (Pet. App. 16a–20a)) On October 16, 2017, Gerth timely filed a notice of appeal. (R.25, Notice of Appeal, PageID#1269-70)

VI. HABEAS CORPUS – APPEAL.

On September 16, 2019, the Sixth Circuit held Gerth procedurally defaulted his *Faretta* claim. *Gerth v. Warden*, 938 F.3d 821 (6th Cir. 2019). The Sixth Circuit first determined that the District Court erred in concluding that the First District silently rejected the *Faretta* argument. *Id.* at 828. (Pet. App. 9a) The Sixth Circuit then considered whether Ohio's res judicata doctrine acted as a procedural bar to reviewing Gerth's *Faretta* claim, which depended on whether Gerth could show cause and prejudice to excuse the purported default. *Id.* at 829. (Pet. App. 10a) The Sixth Circuit determined that this question turned "on whether Gerth had a constitutional right to counsel on the reopened appeal." *Id.* at 830. (Pet. App. 11a) The Sixth Circuit answered the question by holding "that a reopened appeal under Rule 26(B) is also part of the collateral, postconviction process—and that Gerth therefore did not have a constitutional right to counsel at that stage of the proceeding." *Id.* at 831. (Pet. App. 12a) According to the Sixth Circuit, because Gerth had no constitutional right to counsel on the reopened appeal, the attorney's performance could not excuse the procedural default of the *Faretta* argument. *Id.* at 832. (Pet. App. 15a)

On September 30, 2019, Gerth timely filed a Petition for Rehearing En Banc. On October 24, 2019, the Sixth Circuit denied the Petition. (Pet. App. 65a–66a)

STATEMENT OF FACTS

On March 16, 2011, at approximately 12:30 to 12:45 A.M., Cincinnati police officer Mark McChristian was patrolling Over-the-Rhine in Cincinnati, Ohio.)Transcript Pages 292-93, R.5-9, PageID#632-33; hereafter T.p. __, R.__, PageID#__) He spotted a red SUV in the middle of the intersection of Lang Street and East Clifton Avenue. A person on foot was interacting with someone in the vehicle making McChristian think a drug transaction was occurring. The pedestrian walked away, and the SUV proceeded driving west. (T.p. 294, R.5-9, PageID#634) McChristian claimed he was able to see the driver, but he could not tell if there was a passenger on board. (T.p. 295, R.5-9, PageID#635)

McChristian ran the license plate number of the SUV and continued to follow it. McChristian later learned that the SUV had been reported stolen in Newport, Kentucky. (T.p. 295-96, R.5-9, PageID#635-36)

McChristian did not testify to seeing any unlawful turns or traffic violations before the SUV pulled to a curb at Vine and Thill Streets. (T.p. 296-97, R.5-9, PageID#636-37) McChristian pulled up behind the SUV, still without the cruiser's lights activated, but then the SUV took off and turned right onto Thill. (T.p. 297-99, R.5-9, PageID#637-39) McChristian and Officer Tim Lanter, who was in a secondary unit, turned on the cruiser lights and began a pursuit. (T.p. 299-300, 378–81, R.5-9, PageID#639-40, 718-21)

The officers chased the SUV through Mt. Auburn and Corryville, and then back through Mt. Auburn and down Sycamore Street into downtown Cincinnati. (T.p. 301-02, 382, R.5-9, PageID#641-42) McChristian testified that the suspect vehicle could not stop, and instead crashed at Eighth and Sycamore Streets downtown, sheering off the front of a car heading west on Sycamore and colliding with a taxicab also going west, running the cab into a parked meter.

(T.p. 303, 317-21, 326-29, R.5-9, PageID#643, 657-61, 666-69) The purported driver of the SUV ran through the parking lots along Seventh and Eighth Street. (T.p. 305, 321, R.5-9, PageID#645, 661) McChristian stopped and pursued him on foot, while Lanter drove ahead and ended up assisting McChristian in making an arrest. (T.p. 305, 321, 385-86, R.5-9, PageID#645, 661, 725-26) At trial, McChristian identified the suspect as Gerth. (T.p. 306, R.5-9, PageID#646) However, Lanter could not place Gerth as the driver, could not smell any alcohol on Gerth that night, and said that Gerth's speech was more excited and fast talking as opposed to slurred. (T.p. 394, R.5-9, PageID#734) Further, the actual apprehension was not recorded on police video camera. (T.p. 314, R.5-9, PageID#654)

The driver of the taxicab was found dead at the wheel, and the woman passenger was found dead under the taxi. (T.p. 310, 321, 430-31, R.5-9, PageID#650, 661, R.5-10, PageID#770-71) The SUV caught on fire. (T.p. 310, 321, R.5-9, PageID#650, 661) A passenger was in the front seat of the SUV who was taken to the hospital and survived. (T.p. 310, 365-67, 372, R.5-9, PageID#650, 705-07, 712)

Four eyewitnesses described Gerth, who is white, to police as a black man. (T.p. 325, 338, 347, 354, R.5-9, PageID#665, 678, 687, 694)

Officer Michael Flamm of the Cincinnati Police Traffic Unit was the lead investigator and accident reconstructionist. (T.p. 438-39, R.5-10, PageID#778-79) He responded originally to University Hospital to see all of the parties in the accident who were taken there. (T.p. 450, R.5-10, PageID#790) Tonya Hairston, the taxi passenger, was deceased before he arrived. (*Id.*) The SUV passenger, Donald Evans, was hospitalized with injuries. (T.p. 466, R.5-10, PageID#806)

Flamm took a recorded statement from Gerth. (T.p. 453, R.5-10, PageID#793) Gerth was incoherent, sleepy, and had a slight odor of alcohol. (T.p. 455-56, R.5-10, PageID#795-96) The nurse treating Gerth later testified that she did not know if he was given pain medication. (T.p. 495-96, R.5-10, PageID#835-36) At Flamm's request, the nurse drew a blood sample from Gerth. (T.p. 489-90, 493, R.5-10, PageID#829-30, 833) The hospital treated Gerth and released him to Flamm for arrest at approximately 8:00 A.M. (T.p. 458-59, R.5-10, PageID#798-99)

All vehicles involved had been towed to the police impound lot for inspection. (T.p. 467, R.5-10, PageID#807) The SUV's windshield showed head strikes. (T.p. 469, R.5-10, PageID#809) Hair fibers and skin were found in the driver's part of the windshield. (T.p. 471, R.5-10, PageID#811)

Flamm and criminalist Barbara Mirlenbrink obtained a search warrant for the windshield. They took blood and fiber samples from it for DNA analysis. They also did the same for the blood on the driver's seat of the SUV. (T.p. 472-73, R.5-10, PageID#812-13) However, Flamm testified that the police did not dust for fingerprints, and noted that no clothing fibers were found on the driver's seat. (T.p. 478-79, R.5-10, PageID#818-19)

William Harry, a serologist and DNA analyst for the Hamilton County Coroner's Crime Laboratory, took the known samples of Gerth and Evans' blood and compared them to the tissue samples from the windshield and the two blood swabs from the SUV. (T.p. 501-02, 505-06, R.5-10, PageID#841-42, 845-46) The DNA from the tissue matched Gerth, and the DNA from the swabs matched Evans. (T.p. 508-09, R.5-10, PageID#848-49)

Robert G. Topmiller, the coroner's chief toxicologist, screened Gerth's blood for drugs and alcohol and determined that marijuana, cocaine, and a small amount of alcohol had been in Gerth's system. (T.p. 561-62, 566, 568, 573, 575, R.5-11, PageID#901-02, 906, 908, 913, 915)

Topmiller did establish that Gerth's particular cocaine ingestion would have impaired his driving. (T.p. 578-79, R.5-11, PageID#918-19) However, he did not know if Gerth's age, weight, size, and general physical condition would have affected his tolerance, and did not know about Gerth's possible food consumption. (T.p. 581, R.5-11, PageID#921) Topmiller did acknowledge that marijuana could lessen the effect of alcohol and cocaine. (T.p. 582, R.5-11, PageID#922)

Dr. Karen Looman, a Hamilton County deputy coroner and forensic pathologist, performed the autopsies. (T.p. 512-13, 515, R.5-10, PageID#852-53, 855) She ruled that both the taxi driver and the passenger died from blunt force trauma due to an accident. (T.p. 529, 540-41, R.5-10, PageID#869, 880-81)

As for the origin of the SUV, Flamm obtained the owner's name from some empty checkbooks in the back seat. (T.p. 475, R.5-10, PageID#815) He confirmed that the SUV had been reported stolen in Kentucky. (T.p. 475-76, R.5-10, PageID#815-16) Mary Gail Hoffman of Newport, Kentucky, testified that the car disappeared from the street in front of her house. (T.p. 558-59, R.5-11, PageID#898-99)

According to Flamm's investigation, Gerth's license was suspended at the time, and he had no driving privileges. (T.p. 476-77, R.5-10, PageID#816-17)

Regarding the *Faretta* claim at issue, numerous times and long before trial, Gerth advised the trial court he was dissatisfied with counsel. (R.5, State Record, Exhibit 15, PageID#104-07; R.5, State Record, Exhibit 16, PageID#108-14; T.p. 23-24, R.5-4, PageID#479-80; T.p. 37-41, R.5-5, PageID#490-91; T.p. 86-89, R.5-6, PageID#540-43; T.p 96-103, R.5-7, PageID#550-57) Gerth consistently let the trial court know, both in writing and orally in court, the reasons for his dissatisfaction. Since Gerth had requested the removal of his first attorney (though he attempted

to withdraw his motion on September 13, 2011), the trial court was unwilling to remove his second attorney, Norm Aubin.

As a result, Gerth requested to represent himself at trial. (T.p 101-03, R.5-7, PageID#555-57; T.p. 108-25, R.5-8, PageID#562-79; R.5, State Record, Exhibit 17, PageID#115-17) The trial court denied Gerth's requests. In so doing, the trial court cited the court clinic psychiatric report, Gerth's mental health history, and alleged that Gerth's motion was not timely. (T.p. 127-32, R.5-8, PageID#581-86) The trial court never inquired of Gerth if he understood the risks of self-representation, of following courtroom procedure, and whether he was knowingly, voluntarily, and intelligently waiving his constitutional right to counsel. Gerth asked whether he had the right to represent himself, and the trial court simply told him to keep quiet. (T.p. 135, R.5-8, PageID#589) The trial court was without authority to deny his request without conducting the inquiry.

REASONS FOR GRANTING THE WRIT

PETITIONER'S *FARETTA* CLAIM IS NOT PROCEDURALLY DEFAULTED.

In seeking a writ of habeas corpus, a petitioner must meet certain procedural requirements to permit federal review, most notably by first exhausting "the remedies available in state court by fairly presenting his federal claims to the state courts; unexhausted claims will not be reviewed by a federal court." *Wilson v. Mitchell*, 498 F.3d 491, 498 (6th Cir. 2007). Federal courts will not review claims not entertained by state courts due to a petitioner's failure to "(1) raise those claims in the state courts while state remedies were available, or (2) comply with a state procedural rule that prevented the state courts from reaching the merits of the claims." *Id.* at 498-98.

The Sixth Circuit considered whether Ohio's res judicata doctrine acted as a procedural bar to reviewing Gerth's federal claim. To answer this question, the Panel applied the four-part test set forth in *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). The claim may not be reviewed if (1) Gerth failed to comply with Ohio's res judicata doctrine; (2) Ohio courts enforce that doctrine; (3) res judicata is an adequate and independent state ground for denying review of a constitutional claim; and (4) Gerth cannot show cause and prejudice excusing the default.

Here, the Sixth Circuit stated the analysis turned on "whether Gerth had a constitutional right to counsel after the Ohio Court of Appeals granted his 26(B) application, appointed Gerth counsel, and *reopened the appeal*." *Gerth*, 938 F.3d at 830 (emphasis in original). (Pet. App. __a) The Sixth Circuit answered the question by holding "that a reopened appeal under Rule 26(B) is also part of the collateral, postconviction process—and that Gerth therefore did not have a constitutional right to counsel at that stage of the proceeding." *Id.* at 831. (Pet. App. __a) The Sixth Circuit erred in reaching this holding.

In Ohio, because claims of ineffective assistance of appellate counsel are not cognizable in post-conviction proceedings under O.R.C. 2953.21. Ohio App. R. 26(B) was created as a mechanism for criminal defendants to raise claims of ineffective assistance of appellate counsel. *See State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), paragraph one of syllabus.

Rule 26(B) contemplates a two-step process: (1) the application itself where the applicant must demonstrate a genuine issue as to deprivation of the effective assistance of appellate counsel, and (2) the Ohio Court of Appeals granting the application and the applicant establishing that prejudicial errors were made in the trial court and that the ineffective assistance of appellate counsel in the prior appellate proceedings prevented these errors from being

presented effectively. *State v. Mockbee*, 4th Dist. Scioto No. 14CA3601, 2015-Ohio-3469, 2015 WL 5031768, ¶ 17-19.

Gerth, in his pro se application for reopening his direct appeal, presented 3 meritorious issues including that the trial court erred in refusing to permit him to represent himself and in failing to conduct any inquiry as required under *Faretta*. (R.5, State Record, Exhibit 37, PageID#242-48) The First District granted the application based on a different issue Gerth presented (i.e., a merger of counts issue under O.R.C. 2941.25) without addressing the *Faretta* claim, and ordered new appellate counsel, in the reopened appeal, to present "**any other nonfrivolous assignment of error or argument not previously considered,"** and stated that the case would "proceed as on an **initial appeal**." (R.5, State Record, Exhibit 39, PageID#261-63 (emphasis added) (Pet. App. 64a))

Contrary to the Sixth Circuit, if a case is proceeding as if on an initial appeal, a defendant clearly has a constitutional right to effective appellate counsel on an initial appeal. The First District believed there was at least one potentially meritorious issue that no appellate court had considered on the merits due to original appellate counsel's ineffectiveness. The court appointed and ordered new appellate counsel to present those issues. Gerth's situation is no different **once** the First District reopened the appeal.

New appellate counsel, however, did not raise the *Faretta* issue. (R.5, State Record, Exhibit 40, PageID#264-86) Because the *Faretta* issue was nonfrivolous and was not previously considered by the First District, new appellate counsel provided ineffective assistance by not presenting the issue in the reopened appeal. Accordingly, Gerth complied with Ohio App. R. 26(B) by timely filing an application to reopen on January 13, 2015. (R.5, State Record, Exhibit 47, PageID#323-82) Once that application to reopen was denied, Gerth appealed to the Supreme

Court of Ohio and raised the *Faretta* issue. (R.5, State Record, Exhibit 51, PageID#395-96; R.5, State Record, Exhibit 52, PageID#405-07) Thus, Gerth complied with the applicable state procedural rule (i.e., Ohio App. R. 26(B)). The Sixth Circuit never stated what remedy or what other rule Gerth should have pursued instead to raise the ineffective assistance of his new appellate counsel in the reopened appeal.

Additionally, the actual text of Ohio App. R. 26(B) does not bar the filing of an application to reopen based on a claim of ineffective assistance of new appellate counsel in a previously reopened appeal. Section (B)(1) of Ohio App. R. 26 states that an application for reopening can be filed based on a claim of ineffective assistance of appellate counsel. (Pet. App. 71a) Gerth argued he received the ineffective assistance of his new appellate counsel in the proceedings the First District described as the "initial appeal," and accordingly asked to reopen the appeal from his judgment of conviction and sentence. Therefore, and again, for purposes of the *Maupin* test, Gerth complied with the applicable state procedural rule by timely filing an application to reopen his direct appeal, and the state courts erred in imposing a procedural sanction when the rule itself did not expressly prohibit his filing.

To further support Gerth's position, he asks this Court to consider the following hypothetical. In this case, after the First District reopened the appeal and ordered new appellate counsel to raise the merger issue pursuant to O.R.C. 2941.25, assume new appellate counsel did not raise the issue as ordered in the reopened appeal. What would happen then? What remedy would Gerth have after his appellate counsel erred? Gerth could not file a post-conviction petition under O.R.C. 2953.21, and according to the First District and the Sixth Circuit, he could not file an application to reopen under Ohio App. R. 26(B) to allege ineffectiveness of new appellate counsel for failing to raise the merger issue. Gerth would be left with a claim the First

District found to be a "genuine issue" that was not raised before due to appellate counsel ineffectiveness, but he would have no mechanism for obtaining relief in the Ohio or federal courts because his new appellate counsel still failed to raise the claim. To state this proposition is to recognize its absurdity.

The Sixth Circuit's opinion says that even if Gerth's second appellate counsel failed to raise meritorious issues, that does not matter, the issue is res judicata because the issues could have been raised on direct appeal. *Gerth*, 938 F.3d at 829-30. (Pet. App. 10a-11a) The Sixth Circuit's reasoning is circular. The issues were not raised on direct appeal because appellate counsel was ineffective. His ineffectiveness was raised and the appeal was reopened, presumably to make sure that any issues satisfying the *Strickland v. Washington*, 466 U.S. 668 (1984) standard were raised. If that was not the intent of the court that reopened the appeal, then what was the point of reopening the appeal?

So when new counsel proceeding as if on an initial appeal does not perform as the Constitution requires, why is the State permitted to hide behind res judicata? Gerth had two ineffective attorneys. After raising the first attorney's ineffectiveness, he was then at the mercy of the second appointed attorney who utterly failed to raise issues constituting reversible error.

The Sixth Circuit's opinion eviscerates a criminal defendant's last chance to obtain a new trial. The holding allows clearly reversible errors to stand all because counsel in a reopened appeal has no obligation to do his job. Gerth implores this Court to reverse the holding in this case.

Finally, federal courts may still address the merits in a habeas case to avoid a miscarriage of justice. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). The Sixth Circuit did not address this **at all**. As the procedural history of this case demonstrates, Gerth received ineffective

assistance at the trial and appellate levels, and Gerth did all he could to preserve those issues and vindicate his rights. To avoid a miscarriage of justice, the merits of his *Faretta* claim should be reviewed.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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November 25, 2019