19-6810

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DUANE GREGLEY,

Petitioner

v.

DOUGLAS FENDER, WARDEN,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI TO

DUANE GREGLEY #A358-808
Lake Erie Correctional Institution
P.O. Box 8000
Conneaut, OH 44030

In Propria Persona

QUESTIONS PRESENTED

I. WHETHER THERE IS PRETENSE THAT THE STATUTES AND LAWS OF THE STATE UNDER WHICH MR. GREGLEY IS CONVICTED OF, ARE REPUGNANT TO THE CONSTITUTION AND LAWS OF THE UNITED STATES?

A. Whether the failure to conduct a *de novo* sentencing hearing violated Mr. Gregley's right to due process?

B. Whether the resentencing of post release control resets the one-year statute of limitation to file a writ of habeas corpus under 28 U.S.C.§ 2241(d)(1)?

C. Whether Ohio's doctrine of *res judicata* which presupposes a valid final judgment is sufficient to bar a challenge to a conviction where the sentence was void?

D. Whether the Sixth Circuit erred by denying claims on grounds not presented by the Appellee?

E. Whether, in the interest of justice, the Sixth Circuit Court of Appeals should have granted a certificate of appealability where Mr. Gregley presented a substantial showing of a constitutional right, and jurists of reason could have debated the issues presented in a different manner?

F. . Whether Mr. Gregley's conviction is valid where the jury verdict of two counts of aggravated murder is contrary to law where the jury failed to find elements of the offense and the findings in the verdict form does not constitute the offense?

G. Whether Mr. Gregley's conviction is valid where the jury verdict of attempted aggravated murder is contrary to law; where the jury failed to find all essential elements of the offense; and where the findings in the verdict form does not constitute the offense?

H. Whether Mr. Gregley's conviction is valid where the trial court sentenced him to a three-year mandatory term for the firearm specification under Ohio Revised Code R.C. § 2941.145, where Mr. Gregley was indicted for a six-year firearm specification pursuant to R.C. § 29241. 44?

I. Whether Mr. Gregley was denied his right to effective assistance of counsel at trial when trial counsel failed to file a motion to suppress witness identification in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

The parties to this case are as follows:

DUANE GREGLEY #A358-808
Lake Erie Correctional Institution
P.O. Box 8000
Conneaut, Ohio 44030

Petitioner, *In Propria Persona*

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Columbus, Ohio 43215

Counsel for Respondent

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Petitioner respectfully prays that a writ of certiorari issues to review the opinions below.

A. Federal Courts

The Opinion of the United States Court of Appeal for the Sixth Circuit, denying Petitioner's Rehearing with suggestion of Rehearing *En Banc* appears at Appendixes A and B, and is unpublished.

The Opinion of the United States Court of Appeals for the Sixth Circuit, denying Petitioner's Application for Certificate of Appealability appears at Appendix C, and is unpublished.

The Opinion of the United States District Court for the Northern District of Ohio, denying Petitioner's Certificate of Appealability appears at Appendix D, and is unpublished.

The Opinion of the United States District Court for the Northern District of Ohio denying Petitioner's Motion for Reconsideration appears at Appendix E, and is unpublished.

The Opinion of the United States District Court for the Northern District of Ohio denying Petitioner's Motion to Reopen appears at Appendix F, and is unpublished.

The Opinion of the United States District Court for the Northern District of Ohio denying Petitioner's Writ of Habeas Corpus appears at Appendix G, and is unpublished.

B. State Courts

The Opinion of the Supreme Court of Ohio appears at Appendix H, and is unpublished.

The Opinion of the Ohio Court of Appeals for the Eighth Appellate District appears at Appendix I, and is unpublished.

The Judgment Entry of Resentencing of the Cuyahoga County Common Pleas Court appears at Appendix J, and is unpublished.

The Judgment Entry of conviction appears at Appendix K, and is unpublished.

JURISDICTION

A. Federal Courts

The date on which the United States Court of Appeals for the Sixth Circuit issued its judgment in this case August 14, 2019, and a copy of the order denying COA appears at Appendix C, and is unpublished.

A timely petition for rehearing *en banc* was denied by the United States Court of Appeals on October 17, 2019, and a copy of the order denying rehearing appears at Appendix A, and is unpublished.

A timely petition for rehearing was denied by the United States Court of Appeals on October 2, 2019, and a copy of the order denying rehearing appears at Appendix B, and is unpublished.

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

B. State Courts

The date on which the Supreme Court of Ohio decided my case was January 23, 2013, and a copy of that decision appears at Appendix H, and is unpublished.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provision

Article 6 § 2, U.S. Constitution
5th Amendment, U.S. Constitution
6th Amendment, U.S. Constitution
9th Amendment, U.S. Constitution
14th Amendment, U.S. Constitution

B. Statutes

18 U.S.C. § 510(b)
28 U.S.C. § 2253(c)
Ohio Revised Code 2923.02(A)
Ohio Revised Code 2941.144
Ohio Revised Code 2941.145

STATEMENT OF THE CASE

In June 1998, a jury convicted Mr. Duane Gregley of two counts of aggravated murder with mass murder specifications, and one count of carrying a concealed weapon. The court found Mr. Gregley guilty of having a weapon while under disability. When the jury deadlocked on the sentencing recommendation. The judge sentenced Mr. Gregley to three years on the firearm specification, life imprisonment without parole for each of the aggravated murder counts, nine years for the attempted aggravated murder charge, and one year as to each of the weapons charges. The judge further ordered that the sentence for the aggravated murder charges and the attempted aggravated murder charge were to be served consecutively, and the sentences for the weapons charges were to be served concurrent to each other and concurrent to the first aggravated murder charge, with all sentences consecutive to the three-year firearm specification. However, the judge failed to include post- release control statutorily required by law for the first degree felony charge of attempted aggravated murder or for the weapons charges.

Eleven years later, in 2009, Mr. Gregley filed a motion in the common pleas court for "Sentencing and Final Appealable Order." Ten days later, Judge Friedman denied Mr. Gregley's motion stating, "Defendant's motion (pro se) for sentencing etc. is overruled. Mr. Gregley was sentenced to two consecutive life terms without parole, and thus P.R.C does not apply." Mr. Gregley did not appeal this ruling; instead he commenced a writ of *procedendo* pursuant to the Ohio Supreme Court's decision in *State ex rel. Carnail v. McCormick* 125 Ohio St. 3d 124. Appellee moved for summary judgment and Mr. Gregley filed a brief in opposition. The court of appeals granted appellee's motion for summary judgment and dismissed Mr. Gregley's complaint. The court held that "Gregley had notice of post-release control issue when the trial judge added the language that 'Sentence includes any extensions provided by law.' *State ex rel Gregley v.*

Friedman, 8th Dist. No.96255, p.5. However, while awaiting decision from the appeal in the Ohio Supreme Court, the judge ordered Mr. Gregley return to court where the court imposed post-release control however the controlling law at the time Mr. Gregley filed his motion for sentencing entitled Mr. Gregley to a *de novo* sentencing hearing and as a result of the judge not following the law Mr. Gregley objected to the proceeding. The State of Ohio filed a motion for the Ohio supreme court to dismiss the appeal. Mr. Gregley filed an appeal along with a supplemental brief after the sentencing hearing held on October 7,2011 to the 8th Dist. Cuyahoga No.97469,2012-Ohio-3450. Mr. Gregley argued that his sentence for having a weapon while under disability had been served.

On August 2, 2012, the Ohio appellate court remanded the case to the trial court in order to correct the record as to post-release control by issuing another journal entry. (Ohio App. 8th Dist., Aug. 2, 2012). This entry mistakenly removed the post release control for the sentence of attempted aggravated murder that has not been served because the life without parole sentence is currently being served and the attempted aggravated murder sentence was ordered to be served consecutive to this sentence.

On August 13, 2012, Mr. Gregley filed a motion for reconsideration pursuant to Rule 26(A) Ohio Rules of Appellate Procedure in the appellate court because other claims which precede the post-release control statute were not ruled on the merits but denied *res judicata.* On August 24, 2012, the appellate court denied appellant's motion for reconsideration. On October 9, 2012, Mr. Gregley timely filed a notice of appeal to the Ohio Supreme court and in a one sentence, dismissed the appeal "the court declines to accept jurisdiction of the appeal pursuant to S.Ct. Pract.R7.08(B)(4) *State v. Gregley,* 134 Ohio St.3d 1421,2013-Ohio-158, 981 N.E.2d 886. 1-23-13. After properly exhausting the state court remedies, Mr. Gregley sought relief through Writ of Habeas Corpus on January 6, 2014. On April, 29, 2014, the Respondent filed a Return of Writ.

On May 5, 2014, Mr. Gregley through counsel Greg Robey, who was retained October 9, 2012 to file initial writ of habeas corpus, filed another federal habeas corpus petition in the district court which the clerk of courts filed under Case No. 1:14cv971. After Mr. Gregley had his added propositions of law properly before the court he terminated Mr. Robey as his attorney for not filing the initial writ of habeas corpus timely. On July 11, 2014, the Respondent filed a motion to dismiss and transfer Mr. Gregley's petition as a second or successive petition to the United States Court of Appeals, for the Sixth Circuit. Mr. Gregley failed to respond to the Respondent's motion.

On August 29, 2014, the United States Magistrate Judge Limbert issued a "Report and Recommendation" to have Mr. Gregley's habeas petition in Case No. 1:14cv50, dismissed as being time-barred under 28 U.S.C. 2244(d). On September 19, 2014, the United States District Court adopted the Magistrate Judge's R/R and dismissed Mr. Gregley's habeas petition as being time-barred. *Gregley v. Bradshaw,* 2014 U.S. Dist. LEXIS 132028 (N.D. Ohio, Sept. 19, 2014), adopting, *Gregley v. Bradshaw*, 2014 U.S. Dist. LEXIS 132180 (N.D. Ohio, Aug. 29, 2014).[1]

On February 19, 2015, the United States Magistrate Judge Limbert issued a Report and Recommendation to have Mr. Gregley's habeas petition in Case No. 1:14cv971, transferred to the United States Court of Appeals for the Sixth Circuit as a second or successive habeas petition under 28 U.S.C. 2244 (N.D. Ohio, Feb. 19, 2015).

On March 5, 2015, Mr. Gregley also filed a "Motion to Vacate Judgment" pursuant to Fed. R. Civ, P., Rule 60(b), arguing that he never received copies of the Magistrate Judge's R/R, and the District Court's ruling in regards to Case No. 1:14CV50. Mr. Gregley requested the District Court to vacate the judgment so he could file timely objections and a notice of appeal. Mr. Gregley

[1] It's Mr. Gregley's contention that he never received copies of the orders in regards to the August 29, 2014, and September 19, 2014, rulings.

argued that he was never provided notice of these rulings and didn't know the Court had issued these rulings until February 24,2015. (See Mr. Gregley's Motion to Vacate Judgment, Fed. R. Civ. P., Rule 60(b); 3/5/2015).

On March 13, 2015, the Respondent filed an Opposition to Mr. Gregley's Rule 60(b) Motion to Vacate Judgment. On or about March 18, 2015 Mr. Gregley filed a response to the Respondent's Opposition.

On March 19, 2015, the District Court entered a ruling in regards to Mr. Gregley's objections to the Magistrate Judge's R/R, his pending Rule 60(b) Motion to Vacate Judgment. The District Court agreed with Mr. Gregley's objections that his numerically second habeas Petition should be construed as a motion to amend his pending first habeas petition. However, the District Court denied appellant's Rule 60(b) Motion to Vacate Judgment because the Court concluded that the clerk had mailed these documents to Mr. Gregley. The District Court also concluded that both of Mr. Gregley's habeas petitions were time-barred. *Gregley v. Bradshaw* 2015 U.S. Dist. LEXIS 34276 (N.D. Ohio, March 19, 2015). Mr. Gregley timely filed a Notice of Appeal in regards to the district courts March 19, 2015.

On April 14, 2015, Mr. Gregley filed a Motion for Pauper Status and an Application for Certificate of Appealability pursuant to Federal Rules of Appellate Procedure, Rule 22(b), and Title 28 U.S.C. 2253(c) Case Nos. 15-3363/3371.

On November 04, 2015, The Sixth Circuit Court filed its decision Pursuant to Rule 45(a), Rules of the Sixth Circuit denying Mr. Gregley's application ruling "reasonable jurists would not dispute the district court's assessment that Mr. Gregley's petition was filed after the limitations period had expired and that he is not entitled to any statutory or equitable tolling that might remedy his untimeliness." After diligent research Mr. Gregley found that the Sixth Circuit Court of

Appeals ruled that the imposition of post release control creates a new judgment that resets the clock for habeas statute of limitations see *Carnail v. Marquise* 2018 U S App LEXIS 9562 (6th Cir. 2018).

On February 14, 2019 Mr. Gregley filed a Motion to Reopen Judgment in the district courts due to the Sixth Circuit court's decision in establishing legal error in the District courts untimeliness holding. On February 15, 2015, the district court denied Mr. Gregley's Motion to Reopen Judgment. Mr. Gregley then filed a motion for reconsideration, an application for certificate of appealability and motion for pauper status with the District Court seeking habeas relief.

On August 14, 2019 the United States court of Appeals for the Sixth Circuit entered judgment denying Mr. Gregley's "COA" i.e. Certificate of Appealability. On August 28, Mr. Gregley filed a petition for rehearing with suggestion of rehearing *en banc* and the Panel denied Mr. Gregley's petition on October 17, 2019.

REASONS FOR GRANTING THE WRIT

Mr. Gregley respectfully contends that the Sixth Circuit Court of appeals entered a judgment denying his COA in conflict with other United States Courts of Appeals, as well as, its own precedent. Furthermore, the basis for the judgment is an important question that should be decided by this Court. As this Court has held, "[w]hen the validity of a statute of, or an authority exercised under, the United States is drawn into question, we have as yet not been obliged to determine." *In re Chapman*, 156 U.S. 211, 15 S.Ct. 331, 39 L.Ed. 401 (1895).

QUESTIONS PRESENTED:

I. WHETHER THERE IS PRETENSE THAT THE STATUTES AND LAWS OF THE STATE UNDER WHICH MR. GREGLEY IS CONVICTED OF, ARE REPUGNANT TO THE CONSTITUTION AND LAWS OF THE UNITED STATES?

Writ of Certiorari is the last judicial inquiry into the validity of a criminal conviction and sentence serves as "a bulwark against convictions that violate fundamental fairness" *Engle v. Issac*, 456 U.S. 107, 126, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). A judgment of a court without hearing the party or giving him an opportunity to be heard is not a judicial determination of his rights. *Sabariego v. Maverick*, 124 U.S. 261, 8 S.Ct. 461, 31 L.E d 430 (1888). It is a fundamental doctrine of law that a party to be affected by a personal judgment must have his day in court, and an opportunity to be heard. *Renaud v. Abbott*, 116 U.S. 277, 6 S.Ct. 194. 29 L Ed 629 (____).

Below, Mr. Gregley details numerous grounds for relief demonstrating that he remains incarcerated in violation of his Federal Constitutional Rights. Writ of Certiorari is warranted and relief should be granted.

A. Whether the failure to conduct a *de novo* sentencing hearing violated Mr. Gregley's right to due process?

On December 8, 2009, Mr. Gregley sought correction of his sentence for failure to properly include post release control. At the time of his filing, the controlling case authority from the Ohio Supreme Court was *State v. Singleton*, 124 Ohio St. 3d 173, 2009 Ohio 6434, 920 N.E. 2d 958, which held: "[f]or criminal sentences imposed prior to July,11, 2006 in which a trial court failed to properly impose postrelease control, *trial courts shall conduct a de novo sentencing hearing* in accordance with decisions of the Supreme Court of Ohio." Id. at syllabus (emphasis added).

In addition, at the time of his filing, the controlling Ohio Supreme Court authority on the subject of final appealable orders was *State ex rel. Carnail v. Mcormick*, 126 Ohio St. 3d 124, 2010 Ohio 2671, 931 N.E. 2d 110, in which the Ohio Supreme Court stated: Ohio appellate courts have uniformly recognized that void judgments do not constitute final, appealable orders. Id. at ¶ 36. In making this statement, the *Carnail* Court cited numerous Ohio appellate court decisions to support their conclusion that "[t]he 1999 sentencing entry was not a final, appealable order, because it was void for failing to include the statutorily required mandatory term of postrelease control." Id. Significant to this case, the *Carnail* court went one step further and stated:

> "Carnail was entitled to the requested extraordinary relief in mandamus to compel the judge to issue a new sentencing entry to comply with R.C. 2967.28(B)(1) to obtain a final, appealable order."

Id., citing *State v. Culgan*, 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E. 2d 805, ¶ 8.

In this case, the Appellate Court relied on *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E. 2d 332, and declined to address any challenges to the validity of the conviction under the doctrine of *res judicata*. Notwithstanding, the changes concerning void sentences and

post release control, *Carnail* had not been abrogated by the Ohio Supreme Court's decision in *Fischer*, and was current law in regards to final appealable orders.

Two key terms that raise concerns here are "final judgment" and "direct appeal," and require further discussion.

The State court's application of the doctrine of *res judicata*, presupposes a final judgment of conviction upon which Mr. Gregley could challenge the validity of his criminal conviction on direct appeal. The facts of this case, however, do not support the proposition that there was a final appealable order issued until the trial court corrected the imposition of post release control. See *State ex rel. Carnail v. McCormick,* supra; see also, *State ex rel. Gooden v. Teodosio*, 128 Ohio St. 3d 538, 2011-Ohio-1915, 947 N.E. 2d 1206. In *Gooden*, the Ohio Supreme Court specifically relied on *Carnail,* stating:

> "Although Gooden's original sentence in 2007 may have been defective in the imposition of post release control, his 2009 sentence included the correct terms of post release control. The 2009 sentence thus constituted a final, appealable order."

Id.

Mr. Gregley requested a sentencing hearing for his void sentence in 2009 when *State v. Singleton, supra,* was controlling authority with respect to postrelease control. Moreover, *Carnail,* was, and still, remains controlling authority with respect to final appealable orders where post release control was improperly imposed. Nonetheless, the State court's reliance on *Fischer,* the appeal from Mr. Gregley's resentencing, raising challenges to the conviction, would not be subject to *res judicata* because this, in essence, was a "direct appeal of right" following the issuance of a "final appealable order," which was, in fact, the first final appealable order issued in this case.

1. Retroactive/*Ex Post Facto* Laws

The State court's reliance on *Fischer* also raised concerns involving United States Constitution's prohibition against *ex post facto* law, and Ohio's retroactive law. The Supreme

Court of the United States has denied retroactive application of many constitutional rules of criminal procedure, under the general principle that "the court may in the interest of justice make the rule prospective * * * where the exigencies of the situation require such an application* * *." *Johnson v. New Jersey,* 384 U.S. 719,726-727 (1966).

In *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1966), the Court set forth the following criteria guiding resolution of the question of whether a case, which overturns prior doctrines in the area of criminal law, should be applied only prospectively:

> "* * *
>
> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Id.

In this case, all three *Stovall* factors favor not allowing retroactive application of *Fischer* in this case. First, the facts of this case show that when Mr. Gregley filed to have his sentence corrected the Ohio Supreme Court authority demanded a *de novo* sentencing hearing. Moreover, that *de novo* sentencing allowed a direct appeal of right, in which all challenges to the criminal conviction were proper. Second, the Ohio Supreme Court created this procedural requirement through judicial decision making, disregarding prior case authority, as explained by Justice Lanzinger's dissenting opinion in *Fischer*. Third, without notice, the State applied this new standard and removed the "judicially created" direct appeal rights available prior to *Fischer*. Thus the State court erred in applying *res judicata* and not affording Mr. Gregley a *de novo* sentencing hearing. Writ of certiorari should be accepted and relief granted.

B. Whether the resentencing of post release control resets the one-year statute of limitation to file a writ of habeas corpus under 28 U.S.C.§ 2241(d)(1)?

After the resentencing hearing on October 7, 2011, the Ohio Court of Appeals for the Eighth Appellate District remanded the case to the trial court on August 2, 2012 to correct the

record as to post-release control by issuing another journal entry. *State v. Gregley*, 8th Dist. No. 97469, 2012-Ohio-3450. This entry mistakenly removed the post release control for the sentence of attempted aggravated murder that has not been served as a result of the life without parole sentence currently being served. The attempted aggravated murder sentence was ordered to be served consecutive to the life without parole sentence. The Sixth Circuit holding that because the appellate court overturned the imposition of post release control that Mr. Gregley is not entitled to the reset of the habeas clock. Despite this ruling Mr. Gregley argues that a partial resentencing that resulted in the imposition of post release control is the type of change that creates a new judgment. *Carnail v. Marquis,* 2018 U.S. App LEXIS 9562 (6th Cir. 2018), and the resentencing itself resets the clock of the habeas time limitation for review, as it creates a new judgment. This is an important question that should be decided by this court.

C. Whether Ohio's doctrine of *res judicata* which presupposes a valid final judgment is sufficient to bar a challenge to a conviction where the sentence was void?

A judgment may be set aside by a court...where it was not entered in accordance with the practice of the court. *Baily v. Sloan* 65 Cal. 387 and "...can always be assailed in any proceeding." *Union Bank v. Crittenden* 2 Cranch C.C. 283 "Even where there is jurisdiction of the person and the subject- matter, if the court does not proceed according to established modes, or transcends the power granted to it by law that fact may be shown in a collateral proceeding, and, if shown, the judgment will be regarded as void" *Tenney v. Taylor* 1 App. D.C. 223, 227.

Mr. Gregley respectfully contends that because the jury did not establish that there was present in the mind a specific intention to purposely with prior calculation and design cause the death of another in their verdict, the court did in fact transcend the power granted to it by law imposing a judgment. (see Tr. P.1188,1236,1237)

In *Cooper v. Reynolds* 10 Wall 308, the court set forth the following standard: To render a judgment in *personam* void the court must (a) have been without jurisdiction of the subject matter of the action (b) without jurisdiction over the person of defendant or (c) the judgment must be in excess of jurisdiction.

In this case two factors favor for this court to render Mr. Gregley's judgment in *personam* void. As a result of the verdict omitting essential elements of the offense the court (a) was without jurisdiction of the subject matter of the action and (c) the judgment was in excess of jurisdiction.

The judgment is absolutely void and that it may be so declared in any proceeding to impeach it direct or collateral. "The so called verdict of the jury is spread upon the record and made part of the record and the judgment purports to be based on the verdict as rendered. The judgment therefore must be regarded as bearing evidence of its infirmity upon its face. It is a judgment which the court did not have jurisdiction to pronounce because the judgment roll itself shows that the contingency had not arisen under which it was competent for the court to render judgment. It is very clear that jurisdiction of the subject matter and jurisdiction of the person are not always sufficient to give validity to a judgment. The due process of law, guaranteed by the constitution and derived to us from the *Magna Charta*, requires even then that the judgment shall not be in excess of the jurisdiction." *Windson v. McVeigh* [12 App. D.C. 132] 93 U.S. 274; *Pennoyer v. Neff* 95 U.S. 714; *United States v. Walker* 109 U.S. 258; *Tenney v. Taylor supra.*

Mr. Gregley also contends that, because the statutorily required imposition of post release control was omitted from the journal entry in his case, the sentence is void *ab initio*. See *State ex rel. Carnail v. McCormick,* 126 Ohio St. 3d 124.

The state court, however, dismissed the issue based on the doctrine of *res judicata,* which states:

> "A final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment"

State v. Perry 10 Ohio St. 2d 175, 180 (1967) The operative phrase being "final."

"Final judgment in a criminal case means sentence." *Berman v. United* States, 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed.2d 204 (1937). "The sentence is the judgment." Id. Mr. Gregley contends that because his sentence is void his judgment of conviction is not final. See *State ex rel. Carnail v. McCormick,* 126 Ohio St. 3d 124.

"A void judgment is not entitled to the respect accorded a valid adjudication but may be entirely disregarded, or declared inoperative by any tribunal in which effect is sought to be given to it. It is attended by none of the consequences of a valid adjudication. It has no legal or binding force or efficacy for any purpose or at any place...It is not entitled to enforcement...All proceedings founded on the void judgment are themselves regarded as invalid." *30A Am Jur Judgments* 44, 45.

Because of the date of the offenses committed in this case, R.C. 2967.28(b)(1) was in effect at that time, and the statutes plain language expressly requires the inclusion of a mandatory post release control term of five years for each prison sentence for felonies of the first degree, and under R.C. 2967.28(f) the presence of an indefinite and a definite sentence does not eliminate the post release control requirement. *State v. Fry,* 125 Ohio St.3d 163, 2010- Ohio- 1017, 926 N.E. 2d 1239. Mr. Gregley has diligently addressed the unconstitutionality of the judgment entry and the judgment entry still remains invalid because the sentence for attempted aggravated murder has not been served and no change for the imposition of post release control has been made—save a separate judgment entry. Thus, the entry remains void. (See Appendix, at K).

Based on the foregoing, the application of *res judicata,* as determined by *Perry,* is not applicable to Mr. Gregley's claims presented herein, and since he did not have a final judgment of conviction where his sentence is void, the State court's findings is contrary to clearly established law as determined by the U.S. Supreme court in *Berman.* Writ of certiorari relief should be granted and immediate release ordered.

D. Whether the Sixth Circuit erred by denying claims on grounds not presented by the Appellee?

"In a pleading to a proceeding, a party shall set forth affirmative...any other matter constituting an avoidance or affirmative defense." Federal R. Civ. P. 8 (c); *Haskell v. Washington Township*, 864 F.2d 1266, 1273 (6th Cir.1988). "Generally, a failure to plead an affirmative defense... results in the waiver of that defense and its exclusion from the case." *Phelps v. McCellan* 30 F.3d 658, 662 (6th Cir.1994).

Mr. Gregley respectfully contends that as a result of the affirmative defense used that deals with the appeal after the resentencing hearing that had not been asserted in the initial pleading resulted in the waiver and its exclusion from the case. This is an important question that this court should answer. Writ of certiorari relief should be granted.

E. Whether, in the interest of justice, the Sixth Circuit Court of Appeals should have granted a certificate of appealability where Mr. Gregley presented a substantial showing of a constitutional right, and jurists of reason could have debated the issues presented in a different manner?

A COA will issue only if the requirements of § 2253(c) have been satisfied. "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack v. McDaniel* 529 U.S. 473, 482, 120 S. Ct. 1595, 1602-1603, 146 L Ed. 2d 542 (2000); *Hohn v. United States*, 542 U.S. 236, 248, 118 S. Ct. 1969, 141 L Ed. 2d 242

(1998). § 2253(c) permits the issuance of a COA only where a petitioner has made a "substantial showing of the denial of a constitutional right." In *Slack*, supra at 483, 120 S. Ct. 1595, the Supreme Court recognized that congress codified the standard announced in *Barefoot v. Estelle*, 436 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983), for determining what constitutes the requisite showing.

Mr. Gregley contends that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack,* 529 U.S. at 484, 120 S. Ct. 1595 (quoting *Barefoot, supra* at 873, 103 S. Ct. 3383, n.4).

Mr. Gregley contends that the jury returned a verdict that did not constitute the offense he was charged. Mr. Gregley was also denied his right to the effective assistance of trial counsel. These acts clearly violate his rights to Due Process Clause of the 6th and 14th Amendment.

In determining whether COA should issue where the petition was dismissed on procedural grounds has components, one directed at the underlying constitutional claims and one directed at the district courts procedural holding. Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments. The recognition that the "court will pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of," *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), allows and encourages the courts to first resolve procedural issues. The *Ashwander* rule should inform the courts discretion in this regard.

In this case Mr. Gregley did make a showing of the denial of his constitutional rights, but the District Court and the Sixth Circuit Court of Appeals overlooked his constitutional violations regarding the issue of his COA.

Mr. Gregley "satisfies this standard by demonstrating that jurists of reason could disagree with the district court and the court of appeals resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller El v. Cockrell* 537 U.S 322, 327 (2003).

The Supreme Court is the final authority of the meaning and interpretation of the constitution and because the constitution is the supreme law of the land acts contrary to it must be addressed in the interest of justice. In *Marbury v. Madison,* 5 U.S. 174, 2. L.Ed. 60 (1803), the Supreme Court established the precedent for federal courts to rule on the actions of the government. These acts include, but are not limited to, the denial of constitutional rights, also the principal where a Supreme Court decision on the meaning of the Constitution has been changed. Safeguards were instituted where:

> "The parties to the compact of the United States Constitution further agreed that the enumeration in "The constitution of certain rights shall not be construed to deny or disparage others retained by the People, so that other constitutional concerns be not overlooked."

9th Amendment to the United States Constitution.

Article 6 of the Constitution of the United States binds all judicial officers, wherein it states:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made under the authority of the United States, shall be the Supreme Law of the Land, and the Judges of every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary, notwithstanding."

(Art. 6, Cl. 2, U.S. Constitution).

The denial of COA is a violation of Mr. Gregley's constitutionally secured rights to due process of law. "Where rights secured by the Constitution are involved, there can be no rule making or legislation, which would abrogate them" *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The Fifth Amendment require that all persons within the United States must be given due process of law and equal protection of the law. "Due process of law implies the right of the person affected thereby to... 'have the right of controverting', by proof, every material fact which bears on the question of right in the matter involved.", and "If any question of fact or liability be conclusively presumed against him this is not due process of law." See, e.g., *Zeigler v. Railroad Co.*, 58 Ala. 599.

For the reasons stated and the following issues presented, this Court should grant the petition and order immediate release.

F. Whether Mr. Gregley's conviction is valid where the jury verdict of two counts of aggravated murder is contrary to law; where the jury failed to find all essential elements of the offense; and where the findings in the verdict form does not constitute the offense?

The United States Supreme Court has held "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct.525, 92 L.Ed. 746 (1948), and "[w]here a jury's...verdict findings negate an essential element of the offense the defendant must be acquitted and cannot be retried on that offense. *United States v. Lucarelli,* 476 F. Supp.2d 163 (D. Conn.2007).

Here, Mr. Gregley contends that the trial judge instructed the jury as follows:

> "Before you can find the defendant guilty you must find beyond reasonable doubt that defendant purposely 'with prior calculation and design' caused the death of

> another, to wit: Jermaine Davis. It must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to purposely 'with prior calculation and design' cause the death of another."

(Tr.p. 1188, L. 4-10, 17-22).

However, the jury's verdict reads:

> "We the jury in this case, being duly impaneled and sworn, do find the Defendant Duane Gregley, guilty of the aggravated murder of Jermaine Davis. . . We further find and specify the Defendant Duane Gregley did kill Jermaine Davis and purposely killed Donald Whitt."

(Tr.p. 1236, L. 20-25; Tr.p. 1237, L1-16).

Here, the judge gave specific instructions for the jury to follow if the jury were to find Mr. Gregley guilty of the criminal offense. However, because the elements to the offense are omitted from the jury's verdict, the verdict violates Mr. Gregley's rights as guaranteed by the Due Process Clause of the Fourteenth Amendment.

The Supreme Court states, "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all of the elements of the crime in which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511,115 S.Ct. 2310, L.Ed.2d 444 (1995).

A verdict is void if its import is (by necessity) in doubt or if it is unresponsive to the issues submitted to the jury. *State v. Reed*, 23 Ohio App.3d 119, 491 N.E.2d 723 (Ohio Ct. Hamiliton.1985). "A statutory interpretation compels justification why the state's judgment has a contrary adverse effect with apparent unfairness in its due process the way it is construed." 18 U.S.C. § 510(b); *Blockburgr v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). This violation of due process sets forth clearly established law from which relief should be granted according to the United States Supreme Court.

Mr. Gregley respectfully requests, in the interest of justice, that this Petition be granted and immediate release ordered.

G. Whether Mr. Gregley's conviction is valid where the jury verdict of attempted aggravated murder is contrary to law; where the jury failed to find all essential elements of the offense; and where the findings in the verdict form does not constitute the offense?

The Supreme Court states, "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all of the elements of the crime in which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511,115 S.Ct. 2310, L.Ed.2d 444 (1995).

The verdict and the verdict form in this case, as read into the record, for count three, attempted aggravated murder, merely reads as follows:

> "[C]ount three, attempted aggravated murder, guilty on count three. Did have a firearm."

(Tr.p.1237).

To find Mr. Gregley guilty of attempted aggravated murder, the jury must make a unanimous verdict as to each element of the offense. The statute provides, in pertinent part:

> "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

Ohio Revised Code 2923.02(A).

The jury verdict read into the record only recite the name of the statute and does not state that the jury found Mr. Gregley guilty of the essential elements of attempted aggravated murder. (R.C.2923.02). This violation of due process sets forth clearly established law from which relief should be granted as determined by the United States Supreme Court.

Accordingly, Mr. Gregley respectfully requests, in the interest of justice, that this Petition be granted and immediate release ordered.

H. Whether the conviction is valid where the trial court sentenced Mr. Gregley to a three-year mandatory term for the firearm specification pursuant to R.C. 2941.145, where he was indicted for a six-year firearm specification pursuant to R.C 29241. 44?

A judgment may not be rendered in violation of constitutional protections. "The limitations inherent in the requirements of due process and equal protection of the law extend to judicial as well as political branches of government, so that a judgment may not be rendered in violation of those constitutional limitations and guarantees." *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

Mr. Gregley maintains that the trial court erred in sentencing him to a mandatory term of three years on the firearm specifications pursuant to R.C. 2941.145, where he was indicted under R.C. 2941.144, which requires a six- year term of incarceration.

Specifically, Count One, Count Two, Count Three, and Count Five all included a firearm specification pursuant to R.C. 2941.44, which provides:

> "The Grand Juror further find and specify that the offender had a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offenders control while committing the offense."

As indicted, the specifications carried a penalty of a mandatory six-year incarceration. R.C. 2941.144. However, with respect to the firearm specifications, the trial court instructed the jury as follows:

> "Now, count one also contains what we refer to as a firearm specification. If your verdict is guilty you will separately decide whether the defendant had a firearm on about his person or under his control while committing the offense of aggravated murder, and displayed the firearm, brandished the firearm, indicated that he possessed the firearm or used it to facilitate the offense of aggravated murder as charged in count one of the indictment.

(Tr.p.1196 L. 20-25; 1197 L. 1-6).

The trial court gave this same instruction for all firearm specifications in the indictment. (See jury instructions: Tr.pp.1196-1218).

The trial court gave instruction to firearm specifications that were not included in the indictment. R.C. 2941.145, which provides:

> (A) Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense [a]nd displayed the firearm, or used it to facilitate the offense***.

The indictment in the instant case did not specify a three-year firearm specification. The indictment did not specify a one-year firearm specification. The indictment in the instant case specified a six-year firearm specification pursuant to R.C. 2941.144, which contain completely distinct elements from the three-year and one-year firearm specification.

For the record, the jury verdict read into the record, if considered valid, only warrants a one-year firearm specification. Specifically, the jury verdict is set forth below verbatim:

> "Firearm specification. We further find and specify the defendant, Duane Gregley, did have a firearm on or about his person..."

Mr. Gregley was not charged with a one-year firearm specification nor was he charged with a three-year firearm specification, and, therefore, it was plain error for the trial court to impose a sentence for the three-year firearm specifications when the indictment did not include such specifications. The judgment of conviction is void. This violation of due process sets forth clearly established law from which relief should be granted as determined by the United States Supreme Court.

Mr. Gregley, therefore, respectfully requests, in the interest of justice, that this petition be granted and immediate release ordered.

I. Whether Mr. Gregley was denied his right to effective assistance of counsel at trial when trial counsel failed to file a motion to suppress witness identification in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

The familiar standard for evaluating ineffective assistance of counsel is set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the 6th Amendment." Id. Second, the petitioner must show that he or she was prejudiced by counsel's errors. The *Strickland* court held that "[t]his requires showing that counsel's errors were so serious as to deprive the defendant a fair trial, a trial whose result is reliable." Id. In *Skaggs v. Parker*,235 F.3d 261, 271 (6th Cir. 2000), the court noted that "a petitioner need not prove by a preponderance of the evidence that the result would have been different, but merely that there is a reasonable probability that the result would have been different." (citation omitted)

To assert a successful ineffective assistance of counsel claim, a petitioner must point to specific errors in counsel's performance. *United States v. Cronic* 466 U.S.648, 666, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Thereafter, the *Strickland* court held, a reviewing court must consider "[w]hether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

In making this determination as to prejudice, this court examines the combined effect or all acts of counsel found to be constitutionally deficient, in light of the totality of the evidence in the case. *Strickland*, 466 U.S. at 695 (In determining whether prejudice has resulted from counsel's errors, a court "must consider the totality of the evidence before the jury...[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with the overwhelming record support"); *United States v. Cronic*, 466 U.S. 648, 695 (1984)

(Noting that in considering whether counsels conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result, the court "must [base this determination] on a consideration of the "totality of the evidence before the judge or jury."); see also *Blackburn v. Foltz* 828 F.2d 1177, 1186 (6th Cir. 1987).

In *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, T.D. 1964 (1914), the court held that "evidence seized as a result of an unconstitutional seizure is the fruit of the poisonous tree and may not be used as proof." Thus, "[t]he failure to file a motion to suppress in certain instances may support a claim of ineffective assistance of counsel." *Kemmelman v. Morrison,* 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

In the case at bar, Detective Michael C. Perry testified that he used a photo line-up of six photos, in which Mr. Gregley's photo was included (T.1032 L 4-6). Detective Perry also testified that he interviewed Willie Whatley, Carol Geter, and Louise Washington, and without hesitation each witness picked Mr. Gregley's photo (T. 1032 L 22, T. 1033 L 1-11, T. 1033 L 16-24). However, the testimony of witness Antonio Grayson involving the detective's investigation, calls into question what actually took place because Mr. Grayson testified that when he was called to the police station, instead of being questioned that "Detective Johnson was telling him information that he had gathered" (T. 991 L 21-25), and each witness testified contrary to that of Detective Perry. On direct examination when questioned about being shown a photo array the witness Ms. Washington testified "they only showed me one picture that was a photo of Duane Gregley (T.677 L 4-13).

Mr. Whatley testified that when he was called into the police station the detective told him to identify Mr. Gregley and when asked the question "[d]id they tell you what picture to pick?" he replied "Yeah, number 6" (T.576 L 18-24).

When asked to identify Mr. Gregley at trial, Ms. Carol Geter's stated: "It looks like him." (T.704 L 17-20). Ms. Geter was further questioned for purposes of identification, as State's Exhibit No. 44. Specifically, Ms. Geter was asked: "Do you recognize that?" to which she answered: "That's my signature." When asked to make another recognition she replied that the second signature was also hers. However, when asked did she know what State's Exhibit No. 44 was she replied, "No, not really." (T. 729 L 3-23).

Based on the foregoing, counsel's failure to file a motion to suppress witnesses' identification was so objectively unreasonable that the adversarial balance of the prosecution was rendered suspect, and Mr. Gregley was prejudiced thereby. *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L Ed. 2d 305 (1986).

For the above stated reasons the Supreme Court for the United States should grant this writ of certiorari and order immediate release.

CONCLUSION

Although the United States Supreme Court emphasized the special responsibility and status of the government's attorney by holding that a state's duty to prosecute fairly "is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal prosecution is not that it shall win a case but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 55 S. Ct.629 (1935), the Respondent would deny Mr. Gregley any relief, even though Mr. Gregley properly analyzed Ohio's statute as unconstitutional and properly and timely presented it to the state arguing precisely the reasons decided by the United States Supreme Court. Since the respondent has failed to conform to the standard set forth by this Court, in the interest of justice, the instant writ of certiorari should be granted and Mr. Gregley immediately released.

Dated: November 2, 2019

Respectfully submitted,

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In Propria Persona