ORIGINAL

19-7710

No.19-_____

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE R.YOUNG
Petitioner,

v/s

STATE OF OHIO
Respondent,

On Petition for a writ of Certiorari
to the United States Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

GEORGE R,YOUNG
WARREN CORR.INST.
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LEBANON,OHIO 45036

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QUESTIONS PRESENTED FOR REVIEW

On the record in this case,the District Court erred in denying a writ of habeas corpus without a plenary hearing.

When an application by a state prisoner to a Federal Court for a writ of habeas corpus alleges facts which,if proved, would entitle him to relief,the Federal Court to which the application is made has the power to receive evidence and try the facts anew. TOWNSEND V.SAIN,372 U.S.310-312-318.

Where the facts are in dispute,the Federal District Court must grant an evidentiary hearing if (1) the merits of the factual dispute were not resolved in the state hearing, either at the time of the trial or in a collateral proceeding;(2) the state factual determination is not fairly supported by the record as a whole;(3) the fact-finding procedure employed by the State Court was not adequate to afford a full and fair hearing;(4) there is a substantial allegation of newly discovered evidence;(5) the material facts were not adequately developed at the State Court hearing;or (6) for any reason it appears that the state trier of fact did not afford the applicant a full and fair fact hearing. ELLIS V.UNITED STATES,313 F.3d at 641.

In this case,the District Court erred in holding that petitioner does not identify any new,reliable evidence of his actual innocence;i.e.,exculpatory scientific evidence, trustworthy eyewitness accounts,or critical physical evidence that was not available to him at the time of his underlying criminal proceedings.

Petitioner presented the District Court with a Subpoena that was not available to him at the time of his underlying criminal proceeding in support of his actual innocence claim.(See Subpoena #875611;Doc#:15-1,at 287,290-292).

The District Court stated,a prisoner may pursue an untimely claim by passing through the "actual innocence"gateway,but it is a difficult standard to meet,applying only in "cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner]." Dretke v.Haley,541 U.S.386,124 S.Ct.1847,158 L.Ed.2d 659 (2004);McQuiggin v.Perkins,569 U.S.383,133 S.Ct. 1924,1928,185 L.Ed.2d 1019 (2013).

The question presented is;whether the District Court erred in denying petitioner's actual innocence claim.

QUESTIONS PRESENTED FOR REVIEW

(1) Does a defendant in a criminal proceeding have a constitutional right pursuant to Section 10,Article I,of the Ohio/United States Constitutions Sixth and Fourteenth Amendments to have adequate notice of the true nature and cause of the accusation against him as to afford him an opportunity to defend the allegations made against him in a criminal complaint pursuant to Crim.R.3,and Crim.R.5 (A)(1) at the initial stage of the proceeding.

Petitioner was not adequately notified of the true nature and cause of the accusation against him at the initial stage of the proceeding on August 30,2012, preventing him from having an opportunity to confront his accuser (s) face-to-face under the Sixth and Fourteenth Amendments to the United States Constitution. citing CRAWFORD V.WASHINGTON,541 U.S.36,124 S.Ct.1354,158 L.Ed.2d 177 (2004).See Transcript filed August 30,2013.

(2) After a defendant has been taken into custody,or deprived of his freedom of action in any significant way, does he have a constitutional right to be informed of his Fifth,Sixth and Fourteenth Amendment rights,privilege against self-incrimination and right to retained or appointed counsel in the face of interrogation. (Tr.585-588) See,e.g.[1964] Crim.L.Rev.,at 166-170. (Tr.594).

The United States Supreme Court reversed the judgment of three cases,and affirmed the fourth. When an individual was taken into custody and subjected to questioning,the U.S. Const.amend.V privilege against self-incrimination was jeopardized. As in this Case. (Tr.561,575-578).

The failure of defense counsel to object to the improper introduction at trial of an alleged statement obtained during a brief interview by Detective John K.Hudelson,does not preclude consideration of the issue by the Supreme Court of the United States,and does not constitute a waiver of the claim,where the trial was held prior to a decision of the Supreme Court establishing the pertinent rules for the first time. See (Doc#:15-1,at 414;Tr.585,591-594).

The lower court applied precedent to petitioner's claims denying him of a fair adjudication on the merits. All aspects of this case presents this court with both a substantial constitutional question and a matter of general and great public interset.

QUESTIONS PRESENTED FOR REVIEW

(3) Does a defendant in a criminal proceeding have a constitutional right to present a complete defense by presenting surrebuttal evidence.

The trial court allowed the State to put on rebuttal evidence. However,petitioner was not permitted to defend those additional assertions by Detective John K.Hudelson, the State's witness. Detective John K.Hudelson presented a false statement in a document filed on August 29,2012, in which he claimed he advised me of my constitutional rights. See (Doc#:15-1,at 414).

At trial Detective John K.Hudelson committed perjury under Oath claiming he advised petitioner of his rights. (Tr.585-594).

R.C.2921.11 Perjury.
(A) No person,in any official proceeding,shall knowingly make a false statement under oath or affirmation,or knowingly swear or affirm the truth of a false statement previously made,when either statement is material. (B).

R.C.2921.13 Falsification.
(A) No person shall knowingly make a false statement or knowingly swear of affirm the truth of a false statement previously made,when any of the following applies: (1)(2)(3)(7)(10).

Defense counsel then indicated that he wanted to have petitioner recalled as a surrebuttal witness. (Tr.599). The court indicated that it reviewed the case on the statutory law under R.C.2945.10,and the trial court indicated there is not an allowance for surrebuttal. (Tr.600-601). It is clear that a defendant has a "fundamental constitutional" right to have "a meaningful opportunity to present a complete defense.'"

The United States Supreme Court has held this bedrock procedural guarantee applies to both federal and State prosecutions. Under the Sixth Amendment's confrontation clause it provides, "In all criminal prosecutions,the accused shall enjoy the right * * * to be confronted with the witness (es) against him." CRAWFORD V.WASHINGTON,Supra, POINTER V.TEXAS (1965),380 U.S.400,406; ROCK V.ARKANSAS, 483 U.S.44,51-53,107 S.Ct.2704,97 L.Ed.2d 37 (1987); See CALIFORNIA V.TROMBETTA (1984),467 U.S.479,104 S.Ct.2528,81 L.Ed.2d 413.

PARTIES TO THE PROCEEDING

Petitioner George Young was a petitioner in the Sixth Circuit Court of Appeals. He seeks to appeal to this Court from the denial of his U.S.C.§2254. He applied for a Certificate of Appealability which was denied September 26, 2019,in Case No.19-3002. Respondent Dave Yost was the sole respondent in the court of appeals and he is the sole respondent in this court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases

Cases

Cases

Cases

Cases

APPENDEX

PETITION FOR WRIT OF CERTIORARI

Petitioner George Young respectfully petitions for a writ of Certiorari to review the Judgment of the united States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States District Court Northern District of Ohio Eastern Division Judgment entered in Case No.1:18cv00411 Young v.Harris,2018 U.S.Dist.LEXIS 185623 (N.D.Ohio,Oct.30,2018). Habeas Corpus Petition filed from State v.Young,2014-Ohio-1055,2014 Ohio LEXIS 965.

Reconsideration denied in Young v.Harris,2019 U.S.Dist. LEXIS 93278 (N.D.Ohio June 4,2019).

Judgment entered by Sixth Circuit Court of Appeals on September 26,2019,Case No.19-3002.

JURISDICTION

This Court has Jurisdiction to review the Sixth Circuit Court of Appeals Judgment denying Petitioner's Motion for Certificate of Appealability under 28 U.S.C.§1254(1) that was entered September 26,2019.

INTRODUCTION

This Court should grant review because,the district court improperly assessed petitioner's actual innocence claim for purposes of tolling the statute of limitations, the district court erroniously assumed that a petitioner with a credible claim of actual innocence had to additionally prove that he acted with reasonable diligence in pursuing his rights and "that some extraordinary circumstance stood in his way"of filing a timely petition.

A Certificate of Appealibility may issue where a habeas petitioner has made "a substantial showing of a denial of a Constitutional Right."28 U.S.C.§2253 (C)(2). To make a substantial showing of a denial of a constitutional right, a petitioner must show "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. This also,requires a petitioner to demonstrate that reasonable "jurists would find the district

Court's assessment of the claims debateable or wrong." SLACK V.McDANIEL,529 U.S.473,484,120 S.Ct.1597,1604,146 L.Ed.2d 542 (2002)(quoting BAREFOOT V.ESTELLE,463 U.S.880, 893,n.4 (1983).

Whether the District Court Abused its Discretion when it applied the law to petitioner's actual innocence claim without first reviewing the facts of the case. (citing MATTOX V.UNITED STATES,156 U.S.237,15 S.Ct.337,39 L.Ed.409 (1895);TIBBS V.FLORIDA,457 U.S.31,102 S.Ct.2211,72 L.Ed.2d 652 (1982).

Actual Innocence & Miscarriage of Justice,Proof of Innocence. The term "actual innocence"is somewhat of a misnomer as this inquiry focuses on legal proof. To have defaulted claims considered on the merits,petitioner's are not required to prove their factual innocence,but rather that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.

TESTIMONY OF STATE'S WITNESS NICHOLAS KARANICOLAS IS AS FOLLOWS:

"Q: Do you know who shot you? "A: Yeah. "Q: What is his name? "A: Barry --or Gary --. "Q: The person that shot you? "A: Huh? "Q: The person that shot you? "A: Yeah. "Q: What is his name? "A: Barry... "Q: Do you know a person by the name -- Mr.McDonnell: Objection. May we approach? See (Tr. 507-508). (Thereupon,proceedings were had off the record at side bar.) THE COURT: The objection is sustained. Mr.Cecez,would you be kind enough to ask your next question? MR.CECEZ: Thank you.

"Q: Do you recognize the person who shot you in the courtroom today? "A: Yes. "Q: Where is he sitting? "A: Nicholas never said anything,he dropped his head and pointed at me (indicating).

"Q: And who are you pointing at? "A: Randy. "Q: Randy? The question was asked and answered. Once a question is answered by a witness,counsel cannot repeat the question because he is dissatisfied with the answer. Nicholas was coerced to point at me.(Tr.509-510).

As stated in CHAMBERS V.FLORIDA,309 U.S.227,60 S.Ct.472, 84 L.Ed.716 (1940),this court has recognized that coercion can be mental as well as physical...

Defense Counsel [James J.McDonnell] was intentionally ineffective as he refused to cross-examine [Nicholas Karanicolas] as to who did he [testify] shot him? Counsel, James J.McDonnell claim that would be badgering the witness. DAVIS V.ALASKA,415 U.S.308,94 S.Ct.1105,39 L.Ed.2d 347(1974).

Elizabeth Swiger testified,petitioner always came to her house to see her and her brother,Nicky. (Tr.187). Elizabeth further testified petitioner never had problems with her or her brother Nicky,or Ashley. (Tr.226,233-235). Petitioner and Barry Fletcher are not acquainted. (Tr.564,at 2). Barry Fletcher testified he knows petitioner [as] Ashley's ex-boyfriend. (Tr.334,at 13-14,335,at 3-5). Detective John K.Hudelson testified he did not prepare any photo line-ups in this case pursuant to R.C.2933.83. (Tr.515),the State's identification procedure.See generally NEIL V.BIGGERS,409 U.S.188,34 L.Ed.2d 401,93 S.Ct.375 (1972);SIMMONS V. UNITED STATES,390 U.S.377,19 L.Ed.2d 1247,88 S.Ct.967 (1968).

Petitioner was the only person in the courtroom,so of course Barry was going to say he knows petitioner.

TESTIMONY OF STATE'S WITNESS ASHLEY SOWARDS IS AS FOLLOWS:

Ashley Sowards called 911 in this case.See State's Ex.56 (Tr.302). In the 911 call Ashley gave a brief explanation of happened,and she said that Nicholas and her mother were talking to SOMEONE,and she used those words. (Tr.308-310).

Ashley Sowards admitted she got upset with her mother because she was going with George (petitioner). (Tr.293-296 308-309,at 1-9)See (Tr.239-240).

Barry Fletcher was asked,was there anything ever said between you two,any sort of fighting or anything like that?

Barry responded,No! (Tr.336,at 1-5).

I did not shoot Elizabeth Swiger,Nicholas Karanicolas,or Barry Fletcher. I told the Court that it was my co-worker [Will Jones] who was driving my vehicle and discharged a firearm on August 24,2012,at Elizabeth Swiger (Betty) resident. I told Public Defender Linda Hricko and James J. McDonnell to subpoena him for trial. I never knew Public Defender Linda Hricko had subpoenaed him for trial as she withdrew from the case before trial which was scheduled for December 17,2012. (Tr.548,551,556,560,562,564,572-574).

The District Court moved to dismiss petitioner's habeas corpus petition as untimely,procedurally defaulted,and meritless. over petitioner's objection the district court dismissed the petition as untimely and declined to issue a certificate of appealability.

Petitioner request this court to recognize his pro se status. It is stated pro se petitions receive a comparatively lenient construction by the court. citing FRANKLIN V.ROSE, 765 F.2d 82,84-85 (6th Cir.1985)(noting that allegations of a pro se habeas petition,'though vague and conclusory, are entitled to a liberal construction'including "active interpretation"toward encompassing an allegation stating "federal relief;")

Petitioner is not an attorney. He has been presenting his legal issues to the best of his ability with the assistance of fellow inmates so as to show that he is actually innocent of the allegations and charges brought against him. The district court further explained that petitioner could not proceed through the "actual innocence"gateway.

Petitioner had received some incorrect legal advice from his fellow inmates regarding the filing of his habeas corpus yet he was still seeking the correct advice through the office of the Ohio Public Defender and the legal aid society. (Doc#:24-1,at 1644-1649,1650-1660).

The District Court claim petitioner has not been diligent. Petitioner's Case is very important to him as he is wrongly convicted through a malicious prosecution because of the cases he has been acquitted of, (Tr.714-716),and because he was having sex with his ex-girlfriend mom. (Tr.234,239-240, 293-295,308-310,312-313,320,324).

The District Court stated,a prisoner may pursue an otherwise untimely claim by passing through the "actual innocence"gateway,but it is a difficult standard to meet, applying in "cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted the prisoner.'" McQUIGGIN V.PERKINS,569 U.S.383, 395 (2013)(alteration in original)(quoting SCHULP V.DELO, 513 U.S.289,329 (1995).

The district court concluded that petitioner (Young) could not pass through the gateway because the evidence he provided was not "new,reliable evidence,such as exculpatory scientific evidence,trustworthy eyewitness accounts,or critical physical evidence,that was not presented at trial." DAVIS V.BRADSHAW,900 F.3d 315,326 (6th Cir.2018),cert.denied 139 S.Ct.1619 (2019).(Doc#:15-1,at 287,290-291).

The subpoena issued by Public Defender Linda Hricko is newly discovered evidence as it was not presented at trial. Petitioner testified he was not driving his vehicle on the night in question,that it was his co-worker [Will Jones] who was driving petitioner's vehicle and the person that discharged a firearm on August 24,2012,at Elizabeth Swiger resident. (Tr.523-524,547-556).

Will Jones was labeled as a witness (Doc#:24-1,at 1610), but he was not called for trial to testify as requested. An accused has a constitutional right to call witnesses whose testimony is "material and favorable"to his defense. WASHINGTON V.TEXAS,388 U.S.14,17-19 (1967)also UNITED STATES V.VALENZUELA-BERNAL,458 U.S.858,867 (1982).

The Fourteenth Amendment right to due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." citing In re Winship,397 u.s.358,90 S.Ct.1068,1073,25 L.Ed.2d 368 (1970).

The issue before this court is whether sufficient evidence was presented to the jury from which a reasonable fact-finder could find that the essential elements were proven beyond a reasonable doubt. SPALLA V.FOLTZ,615 F.Supp. 224,227 (E.D.Mich.1985)(citing BROWN V.DAVIS,752 F.2d 1142, 1145 (6th Cir.1985).

Thus,a §2254 petitioner "is entitled to habeas corpus relief if it is found that upon the record evidence adduced

at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." citing JACKSON V. VIRGINIA,443 U.S.307,99 S.Ct.2781,2791-92,61 L.Ed.2d 560 (1979).(Tr.226,233-235,309-310,336,507-508).

Courts analyze directed verdict/sufficiency of the evidence claims under the "unreasonable application" catagory of §2254 (d)(1). THOMPSON V.BOCK,215 F.App'x 431, 435-36 (6th Cir.2007). "[R]elief is only available when the decision results in an objectively unreasonable application of federal law." TINSLEY V.MILLION,399 F.3d 796,815 (6th Cir.2005). In short,a reviewing court must determine "whether the evidence was so overwhelmingly in favor of the defendant that it compelled a verdict in his favor." See THOMPSON,215 F.App'x at 436.

It is petitioner's contention that the trial court's guilty verdict was insufficient to support a conviction that petitioner was the person that caused serious physical harm to (1) Elizabeth Swiger,(2) Barry Fletcher,and (3) Nicholas Karanicolas. At best,all it proves is petitioner was present when the shooting occured and was in the vehicle when it left the scene. Petitioner had no knowledge that anyone was shot. (Tr.562,564,574).

One cannot be convicted on mere presence. STATE V.WERE, 2008-Ohio-2762,118 Ohio St.3d 448,471,890 N.E.2d 263.

Anthony Karanicols testified,the shots were not physically aimed at anyone. (Tr.408,418,423,428-429,562).

Therefore,the decision of the Eighth District Court of Appeals is 'diametrically different from the holdings in Jackson v.Virginia,and is therefore,contrary to clearly established federal law. See,e.g.ROMANEZ V.BERGUIS,490 F.3d 482,486 (6th Cir.2007)(citing DANDO V.YUKINS,461 F.3d 791, 796 (6th Cir.2006);See also BENGE V.JOHNSON,474 F.3d 236, 241 (6th Cir.2007).

"A State-Court decision is considered 'contrary to ... clearly established Federal Law 'if it is 'diametrically different,opposite in character or nature,or mutually opposed.'" quoting WILLIAMS V.TAYLOR,529 U.S.362,405,120 S.Ct.1495,146 L.Ed.2d 389 (2000)(quotation marks omitted).

According to FIORE V.WHITE,531 U.S.225,121 S.Ct.712,148 L.Ed.2d 629 (2001),the federal constitution's Due Process Clause "forbids a State to convict a person of a crime without proving the elements beyond a reasonable doubt." Id. at 228-29,121 S.Ct.712.

STATEMENT OF THE CASE

I. Legal Background

The City of Cleveland initially filed charges against petitioner on August 26,2012,but this case was improperly bound over to the Cuyahoga County Court of Common Pleas for further proceedings on August 30,2012.(See Cleveland Municipal Court Case Nos.2012-CRA-029673;2010-CRB-11430,see docket entries dated August 26,2012 and August 30,2012.)((Doc#:1-1,at 30-35;Doc#:18,at 1475²-1476).

The filing of a valid complaint invokes the jurisdiction of the municipal court. State v.Mbodji,120 Ohio St.3d 325, 2011-Ohio-2880,951 N.E.2d 1025,¶ 12;citing State v.Miller, 47 Ohio App.3d 113,114,547 N.Ed,2d 399 (1st Dist.1988).

Therefore,the question of whether a complaint is valid is a question of law,and this court's standard of review is de novo. Id. Newburgh Hts. v.Hood,8th Dist.Cuyahoga No. 84001,2004-Ohio-4236,¶ 5.

Petitioner argues that the complaint in this case is fatally defective and legally insufficient to charge 'felonious assault'because it does not include all of the essential elements of that offense,specifically,the culpable mental state of KNOWINGLY,THEREBY RENDERING THE COMPLAINT FATALLY DEFECTIVE AND WARRANTING DISMISSAL. It is fatally defective and fails to charge an offense divesting the municipal court of subject-matter jurisdiction or the authority to act. (Doc#:1,at 1,25; Doc#:1-1,at 31,35).

The complaint's in this case were withheld in 'Badfaith' thereby denying petitioner of the opportunity to know the 'real,true nature and cause of the accusation against him.

The United States Supreme Court has clearly established the rule that a defendant MUST receive REAL NOTICE of the TRUE NATURE of the charge against him,that is the first and most universally recognized requirement of Procedural Due Process. (citing Henderson v.Morgan,426 U.S.,at 645(quoting Smith v.O'Grady,312 U.S.329,334,61 S.Ct.512,85 L.Ed.859(1941 see also Bradshaw v.Stumpf,545 U.S.175,183,125 S.Ct.2398, 162 L.Ed.2d 143 (2005).(Doc#:1-1,at 30).

Petitioner contends he was neither informed of the true nature of the charge nor premitted to read the charging

instrument,in viloation of R.C.2937.02 (A)(1).
That subsection provides:

"When,after arrest,the accused is taken before a Court or magistrate,or when the accused appears pursuant to terms of summons or notice,the affidavit or complaint being first filed,the Court or magistrate shall,before proceeding further;SHALL: "(1) inform the accused of the nature of the charge and the identity of the complainant and permit the accused or counsel for the accused to see and read the affidavit or complaint or a copy of the affidavit or the complaint." THIS WAS NOT DONE IN THIS CASE.(Doc#:1-1,at 30).

Petitioner's probable cause determination was based on ill will.see Gerstein v.Pugh,420 U.S.103,95 S.Ct.854,43 L. Ed.2d 54,19 Fed.R.Serv.2d 1499 (1975). Petitioner was denied of the opportunity of facing his accuser(s) face to face August 30,2012,denying him of his Sixth and Fourteenth Amendments.(Doc#:1-1,at 32-34).

The Fourteenth Amendment's Due Process Clause is violated unless a criminal defendant FIRST receives'real notice of the true nature of the charge against him. cite Bousley v.United States,523 U.S.614,618,118 S.Ct.1604,104 L.Ed.2d 828 (1998).

"In the absence of a sufficient formal accusation,a court acquires no jurisdiction whatever,and if it assumes jurisdiction,a trial and conviction are a nullity." citing Stewart v.State (1932),41 Ohio App.351,at 353-354;see also Brookhart v.Janis (1966),384 U.S.1,4 [36 O.O.2d 141].

Section 10,Article I,of the Ohio Constitution guarantees every defendant the right to know the nature and cause of the accusation against him. State v.Burgun (1976),49 Ohio App.2d 112. Due Process requires that a criminal defendant be given fair notice of the charge(s) against him. cite as In re Oliver (1948),333 U.S.257,68 S.Ct.499,92 L.Ed.682.

A. DEFECTIVE INDICTMENT

On September 24,2012,petitioner was indicted by the Grand Jury of (1) three counts of felonious assault in violation of Ohio Rev.Code("O.R.C.")§2903.11(A)(2)(counts 1,2,3);(2) three counts of felonious assault in violation of O.R.C.§2903.11(A)(1)(counts 4,5,6);and(3) one count of improperly discharging a firearm at or into Habitation or School in violation of O.R.C.§2923.161(A)(1)(count seven)

a felony of the second degree. Each charge carried three firearm specifications,a one-year,three-year and a five-year firearm specification pursuant to R.C.2941.141, 2941.145,2941.146. (Doc#:15-1,Exh.1). At arraignment petitioner entered a plea of NOT GUILTY to all counts,and the Court assigned Public Defender Linda Hricko as counsel. (Doc#:15-1,Exh.3).

Trial was scheduled for December 17,2012,Trial was then converted to final pre-trial,and the Court assigned James J.McDonnell as counsel. (Doc#:15-1,at 457-458;Doc#:15-1,at 620). Public Defender Linda Hricko withdrew without notice pursuant to Court of Common Pleas Rule 10.0,notice of withdrawl.

The Case proceeded to a jury trial on March 11,2013,and on March 14,2013,the jury returned a verdict of guilty on all charges. (Doc#:15-2,Tr.4). Pursuant to Ohio Crim.R.29, petitioner moved for an aquittal at the close of the States Case,which the trial court denied. (Doc#:15-4,Tr.529-534, 580). Petitioner renewed his Ohio Crim.R.29 Motion for Acquittal after the defense rested and the state trial court denied the motion. (Id.,at 84).

The jury found petitioner guilty of felonious assault (Counts One through Six),and improperly discharging a firearm at or into habitation(Count Seven).(Doc#:15-1,at 4).

The trial court merged Counts One and Four,Counts Two and Five,and Counts Three and Six. (Doc#:15-1,Exh.5).

The trial court conducted a sentencing hearing on March 21,2013,petitioner was sentenced to a 32-year prison term.

B. DIRECT APPEAL

On April 9,2013,petitioner through counsel,Thomas A. Rein,filed a Notice of Appeal in the Eighth District Court of Appeals (state appellate court).(Doc#:15-1,Exh.6). In his appellate brief,counsel raised the following assignments of errors:

I. The trial court erred in denying Appellant's motion for acquittal as to the charges when the State failed to present sufficient evidence to sustain a conviction.

II. Appellant's convictions are against the manifest weight of the evidence.

III. The trial court denied Appellant of his right to a

fair trial when it erred by not allowing Appellant to present surrebuttal evidence and by not permitting him to completely testify in his defense.

IV. The trial court erred by giving a jury instruction on flight which denied Appellant's right to a fair trial.

V. Appellant was denied effective assistance of counsel as guaranteed by Section 10,Article I,of the Ohio Constitution and the Sixth and Fourteenth Amendments.

VI. The trial court erred by ordering Appellant to serve a consecutive sentence for the seperate firearm specifications.

VII. The trial court erred by ordering Appellant to serve a consecutive sentence without making the appropriate findings required by R.C.2929.14 and HB 86.

VIII. The trial court erred by ordering convictions and a consecutive sentence for seperate counts of felonious assault because the offenses are allied offenses pursuant to R.C.2941.25 and they are part of the same transaction under R.C.2929.14.

IX. The trial court erred by ordering Appellant to pay costs.

(Doc#:15-1,Exh.7). The State filed a brief in response. (Doc#:15-1,Exh.8).

C. POST-CONVICTION FILINGS

Petition to Vacate or Set Aside Judgment

On October 15,2013,petitioner filed a pro se pleading with the State trial court captioned "Defendant-petitioner, George Young's Petition to Vacate or Set Aside the Judgment or Sentence (Evidentiary Hearing Requested)."(Doc#:15-1,Exh. 10). This filing raised the following claim:

Petitioner's Constitutional right to effective assistance of counsel under the Sixth Amendment to the United States Constitution was violated by virtue of counsel's deficient performance which affected Petitioner's substantial rights to a fair trial.

The State filed a response in opposition. (Doc#:15,1,Exh.

11). On November 27,2013,the trial court denied petitioner motion without issuing findings of fact and conclusions of law. (Doc#:15-1,Exh.12).

On December 2,2013,petitioner filed a pro se pleading with the trial court captioned "Defendant-Petitioner's Reply to Plaintiff's Brief in Opposition to Defendant's Petition to Vacate or Set Aside Judgment or Sentence."(Doc#: 15-1,Exh.13).

On August 8,2014,Petitioner filed a third pro se pleading with the State trial court captioned "Defendant's Motion Requesting Court Pursuant to R.C.2953.21 (C)(G) and Crim.R. 35 (C) To make and file Findings of Fact and Conclusions of Law with Respect to Dismissal of Defendant's Petition to Vacate or Set Aside Judgment or Sentence."(Doc#:15-1,Exh.14)

Magistrate Judge Jonathan Greenberg stated in an order dated July 31,2018,at Doc#:19,1486,he stated the State did not file a response. On August 14,2014,the State mailed a copy of the foregoing State's Notice of Filing Proposed Findings of Fact and Conclusions of law to petitioner at Lake Erie Correctional Institution which was not time-stamped,dated or signed by Judge Steven E.Gall.(Doc#:15,1,at 461-462,464-467;Doc#:1-1,at 47-55).

After not receiving an answer to his request,Petitioner filed a pro se Petition for a Writ of Mandamus in the Eighth District Court of Appeals requesting the Court to compel the trial court to provide him with the findings of fact and conclusions of law. Subsequently,the Respondent filed a Motion for Summary Judgment to Petition for Writ of Mandamus on May 26,2015,which the Findings of Fact and Conclusions of Law was attached(dated August 18,2014)(Doc#: 24-1,at 1640)(see also Doc#:24-1,at 1644-1646).

The Court's Findings of Fact and Conclusions of Law further reflect the handwritten notations of "M-8-19-14" under petitioner's name and address and that of the assistant prosecutor's in the service endorsement,indicating that copies were mailed to bothparties on August 19,2014. (Doc#:15-1,Exh.15). In fact,the Clerk of Court's mailing to petitioner of the Eighth District's opinion was returned to the Clerk marked "Return to Sender not Deliverable as Addressed unable to Forward."(Doc#:1-1,at 61;Doc#:24-1,at 1636;Doc#:1-1,at 45;Doc#:24-1,at 1639).

The State's Findings of Fact and Conclusions of Law were

made under the penalty of perjury and with a reckless disregard for the truth or for the law,pursuant to R.C. 2921.13(A)(1)(7). (Doc#:15-1,Exh.15).

The State denied petitioner's Petition to Vacate or Set Aside Judgment or Conviction stating: "The Court concludes that Young failed to provide any credible supporting documentation to support his claim that counsel was ineffective. Contrary to Young's claim that counsel failed to Subpoena [Will Jones],the person who discharged a firearm on August 24,2012,and shot [Elizabeth Swiger,Barry Fletcher,Nicholas Karanicolas]. The State further claims Jones was subpoenaed by counsel for trial.(Tr.523-524)."

In support thereof,it attaches Defense Subpoena #875611 (Doc#:15-1,at 287). This argument fails for a couple of reasons: First of all,the Subpoena attached to the State's Opposition (Doc#:15-1,Exh.11,as Exhibit 1,was requested by Petitioner's first attorney[Public Defender Linda Hricko] who withdrew from the case without notice before trial which was scheduled for December 17,2012. Secondly,it ordered [Will Jones] to appear before the Court for the original trial date which was converted to final pretrial by the State December 17,2012. Third,Ms.Hricko was replaced with James J.McDonnell on December 17,2012,at the request of the State. (Doc#:15-1,at 457-458,620).

Petitioner did not request another attorney. Petitioner was not arguing the ineffectiveness of Public Defender Linda Hricko,but challenges the performance of James J. McDonnell,as he should have known about the subpoena,as he was requested to subpoena [Will Jones].(See Doc#:15-1,Exh. 10),Petitioner's Petition to Vacate or Set Aside Judgment or conviction.(See also Doc#:1-1,at 49,57;Doc#:24-1,at 1610)(citing TOWNS V.SMITH,395 F.3d 251,258 (6th Cir.2005) dispels any doubt that a lawyer's Strickland duty includes the obligation to investigate all witnesses who may have information concerning his/her client's guilt or innocence.

Where Petitioner presented sufficient evidence showing he was entitled to relief Judge Steven E.Gall had a duty to proceed to a prompt hearing on the issues presented in Petitioner's Petition to Vacate or Set Aside Judgment or conviction. His failure to do so deprived petitioner of a meaningful review,thus violating his Constitutional right to Due Process under the United States and Ohio Constitution,further,Judge Steven E.Gall knew Public Defender Linda Hricko did not represent petitioner at his trial March 11,2013.(Doc#:1-1,at 38)(Doc#:1-1,at 53).

Defendant's Rights,Right to Compulsory Process

At a minimum,criminal defendant's have the right to the governments assistance in compelling the attendance of all favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of his innocence or guilt. Federal Constitution's Sixth Amendment, to have compulsory process for obtaining witnesses in his/her favor. (Doc#:15-1,at 287).

The right of an accused under the Federal Constitution's Sixth Amendment,to have Compulsory Process for obtaining witnesses in his/her favor is applicable in State as well as Federal prosecution. Taylor v.Illinois,484 U.S.400,98 L.Ed.2d 798,108 S.Ct.646 (1988); United States v.Nixon,418 U.S.683,709 (1974). (See Doc#:24-1,at 1610).

D. DIRECT APPEAL DECISION

On March 20,2014,the Eighth District Court of Appeals subsequently affirmed petitioner's conviction and sentence. STATE V.YOUNG,8th Dist.No.99752,2014-Ohio-1055. (Doc#:15-1, Exh.9)(See also STATE V.YOUNG,2014 WL 1327660 (Ohio App.8th Dist.Mar.20,2014).

On September 4,2014,petitioner filed a Notice of Appeal with the Supreme Court of Ohio. (Doc#:15-1,Exh.18). That same day,petitioner filed a Motion for Leave to file a Delayed Appeal with the Supreme Court of Ohio with the help of a fellow inmate,because appellate counsel failed to keep petitioner informed of important decisions in the course of the prosecution. (Doc#:15-1,Exh.19).

On October 22,2014,the Supreme Court of Ohio denied petitioner's Motion for Leave to File Delayed Appeal and dismissed his case. (Doc#:15-1,Exh.20). The Clerks duties were not carried out proprely in this Case pursuant to App. R.30. App.R.30 Duties of Clerks (A) Notice of orders or judgments. Immediately upon the entry of an order or judgment,the clerk shall serve by mail a notice of entry upon each party to the proceeding and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel. STATE V.YOUNG,140 Ohio St. 3d 1465,2014-Ohio-4629,18 N.E.3d 445.

The Clerk of Court did serve appellate counsel with a copy of the judgment entry assuming. Appellate Counsel's failure to timely mail a copy of the Eighth District Court

of appeals decision is sufficient cause to excuse his procedural default. Appellant Counsel Thomas A.Rein's failure to mail petitioner a copy of the Appeal Courts decision amounts to a breach of duty of the first magnitude.

In short,Appellate Counsel Thomas A.Rein abandoned petitioner and left him to figure out the complex procedure for filing an appeal to the Supreme Court of Ohio. The Clerk noted in the appeal courts judgment entry "copies mailed to counsel for all parties."(Doc#:15-1,at 247). Yet, Counsel failed to mail petitioner a copy of the appeal court's decision.

The Supreme Court of Ohio stated in its order,upon the consideration of appellant's Motion for Delayed Appeal,it is ordered by this court that the motion is denied. See (Doc#:15-1,at 389,Ex.20).

CAUSE AND PREJUDICE

Under the cause and prejudice exception,it is required that a petitioner demonstrate cause for the default and actual prejudice as a result of the violation of federal law. Petitioner contends that ineffective assistance of his trial/appellate counsel supplies the cause needed to excuse his procedural default.(citing MOORE V.MITCHELL,708 F.3d 760,776 (6th Cir.2013);McFARLAND V.YUKINS,356 F.3d 688,699 (6th Cir.2004);also SMITH V.OHIO DEPARTMENT OF REHAB. AND CORR. 463 F.3d 426,432 (6th Cir.2006),and BERRY V.WARDEN,SOUTHERN CORRECTIONAL FACILITY,2016 WL 4177174 at * 3 (N.D.Ohio Aug.8,2016).

There can be a Constitutional claim of ineffective assistance of counsel only at a stage of the proceedings when there is a right to counsel under the Sixth Amenedment. (citing COLEMAN V.THOMPSON (2000),501 U.S.752. There is no doubt that there is a Constitutional right to effective assistance of counsel during a direct appeal as of right. See e.g.,SMITH V.ROBBINS (2000),528 U.S.259,275-76,and that appellate counsel's duties do not terminate the moment the Court of Appeals hands down its decision.(citing WHITE V. SCOTTEN,201 F.3d 743,752,753 (6th Cir.2005),overruled on other grounds by LOPEZ V.WILSON,426 F.3d 339,341 (6th Cir. 2005)(en banc).

Counsel failed to keep petitioner informed of important developments in the course of the prosecution. The Court's ultimate decision regarding a particular proceeding is part of that legal proceeding and appointed counsel's

duties in representing a client during that legal proceeding includes the duty of informing the defendant of the outcome of the proceedings.(citing PARIS V.TURNER, (6th Cir.No.97-4129,at *2-*3 (1999)(unpublished).

Appellate Counsel Thomas A.Rein failed to consult with petitioner on important decisions in the course of the prosecution. The Constitution require that Counsel make objectively reasonable choices and must do so not only during the legal proceeding for which counsel represents the client,but also after the judicial proceeding has concluded in determining whether an appeal should be filed. ROE V.FLORES-ORTEGA (2000),528 U.S.470,479.

Counsel's performance would be Constitutionally adequate if he consulted with petitioner about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the client's wishes. Id.

In this case,appellate counsel Thomas A.Rein never consulted with petitioner to find out whether he wanted to continue the appeal process to the Supreme Court. Further, appellate counsel Thomas A.Rein never advised petitioner that he had '45-days to file an appeal to the Supreme Court of Ohio after the Eighth District Court of Appeals decision was finalized.' He never advised petitioner what documents were necessary to perfect an appeal.

E. APPLICATION TO REOPEN APPEAL UNDER OHIO APP.R.26(B)

On April 13,2016,petitioner filed a pro se Application to Reopen Appeal Pursuant to Ohio App.R.26(B)(Doc#:15-1,Ex. 26). Petitioner's Application raised the following:

> Appellate Counsel's failure to raise a State claim is deficient. Counsel omitted significant and obvious issues. Mayo v.Henderson,13 F.3d 528,533 (2Cir,1994). Miranda Rights,Post-Arrest Silence. Brewer v.Williams, (1977),430 U.S.387,at 402-405.

(Id). The State filed a brief in opposition (Doc#:15-1,Ex. 27),to which petitioner replied. (Doc#:15-1,Ex.28).

On May 25,2016,the State appellate court denied the Application as untimely. (Doc#:15-1,Ex.29).

> APPELLATE COUNSEL WAS INEFFECTIVE FOR OMITTING A DEAD BANG WINNER,PREJUDICING PETITIONER FROM RECEIVING A FULL AND FAIR REVIEW ON DIRECT APPEAL AS OF RIGHT.

Petitioner had requested appellate counsel Thomas A.Rein to address the issues of his Miranda Rights and Post-Arrest Silence on direct appeal through a letter. Thomas A.Rein mails petitioner a letter April 22,2013,stating he can only set forth issues and arguments that were actually on the record;which is what the court reporter transcribed as to what happened in court or motions filed which are part of the record. (Doc#:24-1,at 1647). The issues relating to "Miranda Rights and Post-Arrest Silence are part of the record at: (Tr.561,565,575,585-589,593-594,599-600)."

A Criminal defendant is entitled to effective assistance of counsel on appeal as well as at trial. Counsel should act as an advocate rather than merely as a friend of the court. EVITTS V.LUCEY (1985),469 U.S.387,105 S.Ct.830,83 L.Ed.2d 821; PENSION V.OHIO (1988),488 U.S.75,109 S.Ct.346, 102 L.Ed.300.

The Strickland test applies to Appellate Counsel.citing SMITH V.ROBBINS (2000),528 U.S.259,285,120 S.CT.746,145 L. Ed.2d 756; BERGER V.KEMP (1987),483 U.S.776,107 S.Ct.3114, 97 L.Ed.2d 638. Although an attorney need not advance every argument urged by appellant,JONES V.BARNES (1983),463 U.S. 745,103 S.Ct.3308,77 L.Ed.2d 987. Counsel can be Constitutionally deficient for failing to raise a Dead-Bang Winner. MAPES V.COYLE (6th Cir.1999),45 F.3d 408,427-429, citing UNITED STATES V.COOK (10th Cir.1995),45 F.3d 388,395; PAGE V.UNITED STATES (7th Cir.1989),884 F.2d 300,302.

A dead-bang winner has been defined as "an issue which was obvious from the trial record. (Tr.511-513,561,565,575, 585-589,590-594,at 6-25,595-596,at 1-6,599-600,672,at 11-12, 675,at 14-14). COOK,Supra. To prevail on a claim of ineffective assistance of counsel,an appellant must show that appellate counsel ignored issues which were stronger than those presented. See SMITH V.ROBBINS,528 U.S.,at 288, 120 S.Ct.746;(quoting GRAY V.GREER (7th Cir.1986),800 F.2d 644,646.

To prove ineffective assistance of counsel,a defendant must show that "counsel's representation fell below an objective standard of reasonableness,"and that "the deficient performance prejudiced his defense." citing STRICKLAND V.WASHINGTON,466 U.S.668,687-88,104 S.Ct.2052, 80 L.Ed.2d 674 (1984). To prove deficient performance,a defendant must establish that counsel was not acting within the broad norms of professional competence. Id.,at 687-91. Furthermore,to prove prejudice,a defendant must establish that but for counsel's deficient performance,

there is a reasonable probability that the outcome would have been different. Id.,at 694. As shown,these issues were clear and obvious from the trial record,counsel's failure to raise these obvious issues certainly prejudiced petitioner from receiving a full and fair review on his direct appeal as of right. STRICKLAND,Supra.

Detective John K.Hudelson #839,committed perjury under oath pursuant to R.C.2921.11 (A)(B)(E)(F),when he testified he read petitioner his Miranda Rights. (Tr.585-588;589-593). Further,the record reveals the State failed to carry out its burden of proving warnings were given,as there was no evidence of any notes,video recordings, written statements,or any other corroborating evidence to support Detective Hudelson's allegation,specifically,at Detective Hudelson's own admission,he testified he did not have petitioner sign a waiver,as defense counsel James J. McDonnell referred to as a piece of paper,which rendered his performance deficient denying petitioner of a fair trial. (Tr.594,at 6-12,13-25).

Detective John K.Hudelson #839 further,did knowingly and intentionally with a reckless disregard for the truth or for the rights of petitioner or for the law made a false statement in a report typed by sdco dejesus,on 08/25/2012,claiming he advised petitioner of his Miranda Rights. (Doc#:15-1,at 413-414). Trial counsel failed to suppress this information denying petitioner of a fair trial.

A statement this court made in CARNLEY V.COCHRAN,369 U.S.506,516 (1962),is applicable here:

"Presuming wavier from a silent record is impermissable, the record must show,or there must be an allegation and evidence which show that an accused was offered counsel, but knowingly and intelligently rejected the offer. Anything less is not waiver."

This Court has always set high standards of proof for the waiver of Constitutional Rights. JOHNSON V.ZERBST,304 U.S.458 (1938),and it reasserts these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation,the burden rests on the shoulders of the State.

"[M]oreover,where incustody interrogation is invloved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to his invoking his right to remain silent when he is interrogated."

Judge Steven E.Gall,Assistant Prosecutor's Milko Cecez, Mollie Murphy were aware of Detective John K.Hudelson's perjured testimony. NAPUE V.ILLINOIS,360 U.S.264 (1959); MOONEY V.HOLOHAN,294 U.S.103 (1935); GIGLIO V.UNITED STATES, 405 U.S.150 (1972).

The Assistant Prosecutor Milko Cecez's use of Petitioner post-arrest silence suggested he was guilty is a clear violation of his Constitutional Right Fifth and Fourteenth Amendments privilege against self-incrimination. (Tr.561,at 2-10,672,at 11-12,675,at 14-15). Petitioner contends that the prosecutor's question in this regard made it appear as though he had something to hide and therefore needed an attorney.

At trial the following exchange took place between petitioner and assistant prosecutor Milko Cecez as follows:

"Q: Did you ever tell the Detective about Will Jones?

"A: No Sir,I did not.

"Q: Okay,why did you not tell the Detective about Will Jones?

"A: Because I told Detective Hudelson once he came to interview me,that I had spoken to an attorney,and he told me not to talk to him until he came.

"Q: Well,you didn't do anything wrong,why would you speak to an attorney? (Tr.561,at 2-10,564-565,575,at 2-12, 576-578).

Assistant Prosecutor Milko Cecez,in closing mentioned twice that petitioner never mentions a "Will Jones"when he talks to the Detective back in August. (Tr.672,at 11-12, 675,at 14-15). GRAVELY V.MILLS,87 F.3d 779 (6th Cir.1996); NOLAN V.DIXON,808 F.Supp.485 (W.D.N.C.1992).

"In DOYLE V.OHIO (1976),426 U.S.610,held that the use of post-arrest silence is unconstitutional,the Court stated that " * * * [W]hile * * * Miranda warnings contain no express assurance that silence will carry no penalty,such

assurance is implicit to any person who receives the warnings." In this case,petitioner was not provided any warnings. (Tr.594,at 6-12,13-25;599-600). ESCOBEDO V. ILLINOIS,378 U.S.478 (1964). In such circumstances,it would be fundamentally unfair and a deprivation of 'Due Process'to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." See (Tr.561,at 2-10).

In this Case,although references were made to the effect that petitioner had not mentioned the name of [Will Jones] to Detective Hudelson,the rational of DOYLE,Supra, is applicable since petitioner did not waive his Miranda Rights. Defense counsel's failure to object to the improper admission of this questioning was prejudicial error and rendered the trial as a whole fundamentally unfair as to require a reversal. STATE V.SABBAH (1982),13 Ohio App.3d 124,13 OBR 155,468 N.E.2d 718. (Tr.561,672,at 11-12,675,at 14-15).

Petitioner is demonstrating that his trial was fundamentally unfair and the results are unreliable as a result of trial counsel's deficient performance.

Appellate Counsel raised ineffective assistance of counsel as an appellate issue,but did so in a relatively weak fashion. Appellate Counsel did not raise many of the specific instances of trial counsel's ineffectiveness that are mentioned,they are obvious when reviewing the record and he did not present what is noted as potentially meritorious ineffective assistance of counsel issues.

'[E]rrors by a State Court in the admission of evidence are not cognizable in habeas corpus proceedings unless they so perniciously affect the prosecution of a criminal Case as to deny the defendant the fundamental right to a fair trial.'" KELLY V.WITHROW,25 F.3d 363,370 (6th Cir.1994).

The District Court's decision rendered in opinion and order June 4,2019,was clear error. (Doc#:29). Magistrate Judge Johnathan D.Greenberg hereby determined in the order on July 31,2018,that based on its initial review of petitioner's petition,Return of Writ and Traverse,the Court does not anticipate discovery and/or an evidentiary hearing will be necessary and is confident the issues raised in the petition can be resolved based on the State Court record, the district court further stated,

At this time,and upon careful review of the pleadings,

the court does not anticipate that an evidentiary hearing will be warrented in this matter,as all of Young's habeas claims appear to involve legal issues which can be independently resolved without additional factual inquiry. (Doc#:18,at 1479³).

The State Court decision was a final adjudication that:

(1) resulted in a decision that was contrary to,or involved an unreasonable application of,clearly established Federal Law,as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceedings. (Doc#:19;Doc#:19,at 1510).

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner's Constitutional right to Procedural Due Process,Compulsory Process was violated at the initial stage of the proceeding pursuant to Crim.R.3;Crim.R.4(1)(C)(D)(3)(E)(2);Crim.R.5(A)(1)(2)(3)(4)(5)(B)(1)(2)(3)(4)(5)(6).cite LOCHNER V.NEWYORK,198 U.S.45,25 S.Ct.539,49 L.Ed.937 (1905).

A. On August 23,2012,petitioner spent the night with(Betty) Elizabeth Swiger. Her brother Nicholas and her neice Heather and her boyfriend James were there. (Tr.187,225-226,234-235, 239-242,543).

On August 24,2012,Friday morning I went to work from (Betty) Elizabeth's house at approximately 6:30. I never told Ashley I was having sex with her mother. Elizabeth and I had sex 'twice'. Elizabeth had called my phone before I left work and asked me if I was going to stop by her house. I told her I would while I was out and about,that I would stop over. Elizabeth knew I was dating other females and her daughter Ashley.

On August 24,2012,my co-worker [Will Jones] and my two nephews had stopped over my house after work.(Tr.547,559). [Will Jones]leaves his car parked in my driveway. He wants to hang out for his birthday,so I let him drive my vehicle because he wants to impress the girls.(Tr.548). While we are out ,we were going over to East 63rd in Union,Union crosses over East 55th street. Being that we were on Fleet Ave. East 59th goes to East 55th street.

As we are going that way I ask [WILL Jones] to back into

Elizabeth's driveway as there were other vehicles there and in case anyone wanted to get out. I texted Elizabeth's cell phone to let her know I was outside. (Tr.551-553).

Elizabeth and Nicholas came to the vehicle together.They came to the driver's side because they knew it was my vehicle. (Tr.186,191,193,295-296,312-313,315,339,407). The windows on the vehicle were tinted and you cannot see inside the vehicle in the dark. (Tr.427,441,480,484,488,493,495-499 State's Ex.27-28).

I introduced my co-worker to Elizabeth and Nicholas as [Lil Will]. (Tr.547). Elizabeth and Nicholas were already intoxicated when they came to the vehicle. Elizabeth testified she was not intoxicated,her daughter Ashley Sowards testified her mom and her uncle were intoxicated. (Tr.195-196,198,240,333,370-372,431-432). The four of us were chilling minding our own business and smoking a blunt. (Tr.191,at 24,236-238,293-296,316,338-341,366,407,418,553).

While we were sitting there,Elizabeth told me the kids were there (Skylar and Morgan). I gave her two milkshakes that we had bought at Wendy's and I told her to give them to the kids. (Tr.553,556-557). Elizabeth walked off towards the backyard,that's when the loud talking started in the backyard. id.553,thats when dude came to the vehicle and started threatening my co-worker.id.553-558).

Barry Fletcher testified he came to the vehicle running his mouth. (Tr.341-345,364,370,554-564). Will Jones pulled a pistol out of his waistband and started shooting,I thought he was shooting in the air,I never knew that he had shot anyone. (Tr.555-558,562,564,572-574).

On August 26,2012,according to (Doc#:1-1,at 35),reveals the City of Clevelad initially filed charges against me with a Complaint initiated by Detective John K.Hudelson for Felonious Assault O.R.C.2903.11 F-2. See also (Doc#:18,at 1475-1476).

CASE INFORMATION FORM PRINTED 08/29/12 Time:12:32:18 CIF#:324AI ITN#:211460CC Originating Complaint No.20120027-7215 CPD#017025 Booking Time:15:35--- This document reveals petitioner was charged with:

1 ORC 2903.11A-Felonious Assault-CHGB-08/29/12-CT Case No. 2012-CRA-29673

2 MC 600-Contempt of Court-CHGB-08/29/12-CT Case No.2010-CRB-11430 (Doc#:1-1,at 32).

B.Procedural History

Monday,August 27,2012,I went to work as usual at 16800 South Waterloo Rd,EastSideMetals. (Tr.557). That day my co-worker [Will Jones] does not report to work. That same morning Detective John K.Hudelson calls my place of employment instead of my personal cell phone.(Tr.522,558, 583). Ashley and Elizabeth had my cell phone number. (Tr. 233,235,544).

I spoke with Detective Hudelson Monday August 27,2012, and in that conversation he states he has issued a warrant for my arrest without an explanation. (Tr.584). Detective Hudelson asked me if I could come to the district nearest me and speak to him after work. I told Detective Hudelson that I did not have a problem speaking with him. I never said anything about turning myself in,as I was not hiding. Id.at 583.

The weekend of the 24th of August,I was home. The police never came to my house. (Tr.391,522). Officer Vicky Przybylski testified they had a couple of officers go to specific addresses,but she did not look for petitioner.also Detective John K.Hudelson was asked,did he attempt to go over to the house based on the information he had,he stated 'No!

Monday after work,at the advise of my supervisor I contacted an attorney being that Detective Hudelson stated he had issued a warrant for my arrest. (Tr.561,565,575-578). I contacted Attorney Jaye Schlachet and he advised me not to speak to Detective Hudelson until he spoke to me at his office. We made an appointment for 5:30pm Tuesday August 28, 2012. citing WATTS V.INDIANA,338 U.S.49,59 (1964). "Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances." See ENKER & ELSEN,Counsel for the suspect, 49 Minn.L.Rev.47,66-68 (1964).

On Tuesday,August 28,2012,I reported to work as usual, 7:00am,and again [Will Jones] does not report to work. At approximately 9:00am my supervisor 'Mike Falachinski'came to my work station and informed me that the police were up front wanting to speak with me. As I approached the officer I was told to put my hands behind my back,the officer merely stated,You know what this is about!

The officer's [Cruz 0214 D6 Plat and other unknown] never apprised me of my Miranda Rights. The cuffs were

placed on me,and I was lead out of the building and placed in a police cruiser and transported downtown to the City Jail where I was booked,fingerprinted and detained.

I was arrested without a summons,warrant or an explanation. (Tr.512-515,522-523,583-584). See (Doc#:1-1,at 32).

"[T]he Fourth Amendment applies to all seizures of the person including seizures that involve only a brief detention short of a traditional arrest." citing DAVIS V.MISSISSIPPI, 394 U.S.721 (1969);TERRY V.OHIO,392 U.S.1,16-19 (1968).

[W]henever a police accosts an individual and restrains his freedom to walk away,he has'seized'that person.Id.at 16 and the Fourth Amendment requires the seizure to reasonable. citing UNITED STATES V.BRIGNONI-PONCE,422 U.S.873,878 (1975).

"[T]he government may not 'authorize police conduct which trenches upon Fourth Amendment rights,regardless of labels it attaches to such conduct." citing SIBRON V.NEWYORK,392 U.S.40,61 (1968). compare DUNWAY V.NEWYORK,442 U.S.at 212-216(seizure of suspect without probable cause and custodial interrogation in police station violates Fourth Amendment),and DAVIS V.MISSISSIPPI,394 U.S.721,727-728 (1996)(suspect may not be summarily detained and taken to police station for fingerprinting,but may be ordered to appear at a specific time). (Tr.584-585).

C. Privilege Against Self-Incrimination

On Wednesday,August 29,2012,Detective John K.Hudelson was acting as an agent of law enforcement when he briefly interviewed petitioner at the City Jail. (Tr.585-588). When Detective Hudelson first came to interview me,he took me into a side room at the City Jail he asked me why didn't I come see him Monday after work? (Tr.578). I explained to him that I had spoke with an attorney and he told me not to speak to you. (Tr.561,565,575-577). I gave Detective John K. Hudelson Jaye Schlachet name and number,he looks at the card and states,'Is he who you call all the time?(Doc#:19,at 1492).

Detective Hudelson was asked,are you positive that you had Mr.Young -- that you advised him of his rights? he responded,absolutely. "Q: Don't you usually have him sign something,a piece of paper? "A: No. (Tr.594-596).

"[T]he decision in ESCOBEDO V.ILLINOIS,378 U.S.478 (1964) stressed the need for protective devices to make the process of police interrogation conform to the dictates of the

privilege against self-incrimination." At the outset,if a person in custody is subjected to interrogation he must first be informed in clear and unequivocal terms that he has the right to remain silent,he has the right to an attorney, if he can't afford one,one will be appointed for him. If the individual indicates in any manner,at any stage ,that he has an attorney,the interrogation must cease.

"[I]f the interrogation continues without the presence of an attorney,and a statement is taken,a heavy burden rests on the State to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed Counsel. ESCOBEDO V.ILLINOIS,378 U.S.478,490,n.14.

Detective John K.Hudelson testified and filed in a report on 8-25-2012 (Doc#:15-1,at 413-414),stated I told him I was at my girlfriends house and that I didn't know anything about it. (Tr.585-588,589-593). Furthermore,there was no evidence of any notes,video recordings,written statements, or any other corroborating evidence to support Detective Hudelson testimony. (Tr.589-597).

"Pursuant to Miranda v.Arizona,384 U.S.436,86 S.Ct.1602, 16 L.Ed.2d 694 (1966),held that statements stemming from custodial interrogation of the defendant must be suppressed, unless the defendant had been informed of his Fifth and Sixth Amendments rights before being questioned.Id. Miranda defines "custodial interrogation" as "any questioning' initiated by law enforcement officers AFTER a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."Id.at 444. (Tr. 582-588,589-595,599-600).

As stated,Detective John K.Hudelson was acting as an agent of law enforcement when he briefly interviewed me at the City Jail on August 29,2012. STATE V.BOLAN,27 Ohio St. 15,271 N.E.2d 839 (1971).(Tr.585).

"The prosecution may not use statements,whether exculpatory or inculpatory,stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment privilege against self-incrimination." (Tr.585-594). The District Court claim the failure to give Miranda warnings was harmless error. The same was said for the denial of Surrebuttal Testimony. See (Doc#:15,at 137-138).

On Thursday,August 30,2012,petitioner was taken before the municipal court for bond hearing where he was given a high bond of 500.000$dollars. The prosecutor read what he referred to as a synopsis. (Doc#:24-1,at 1611). Petitioner was not provided with an actual copy of the synopsis.

The synopsis read before the court contained the same language that assistant prosecutor Milko Cecez presented to the court in his opening statement that read as follows:

"Long story short,here is that this defendant,George Young showed up to a birthday party that he was not invited to,he was asked to leave,he showed up in his car. The synopsis contained the statement that two family members asked him to leave,he reached in the center console,took out a gun and started shooting,three people were struck by these rounds. This information provided to Judge Moore was inconsistent with the trial testimony." (Tr.170-175).

At trial Elizabeth Swiger claimed she asked us to leave that way there wouldn't cause no argument,no fight,whatever. (Tr.186). Elizabeth never asked us to leave,the four of us were smoking a blunt minding our own business.

Ashley Sowards testified she saw my vehicle backing in the driveway,so she went to tell her mother that it would be best if she goes and tell him to leave. (Tr.294-296,308-309;312-313,315).

Barry Fletcher testified he was in the house when he saw my vehicle backing into the driveway. He further testified he was thinking about telling Elizabeth to tell him to leave. (Tr.338). He further testifies he was not aware if anyone asked him to leave. He further testifies he was very impatient that day,and he started talking loud. (Tr.339-345)

Petitioner contends he was neither informed of the true nature of the charge nor permitted to read the charging instrument,in violation of R.C.2937.02 (A)(1). That subsection provides:

"When,after arrest,the accused is taken before a Court or magistrate,or when the accused appears pursuant to terms of summons or notice,the affidavit or complaint being first filed,the Court or magistrate shall,before proceeding further:"(1) inform the accused of the nature of the charge and identify the complainant and permit the accused or counsel for the accused to see and read the affidavit or complaint or a copy of the affidavit or complaint."

Petitioner contends the synopsis read by the prosecutor before the municipal court August 30,2012,did not confer jurisdiction on the municipal court as it cannot be deemed a valid charging instrument pursuant to Crim.R.3. Petitioner further argues that his constitutional due process rights were violated when the reading of the synopsis did not apprise him of what occurances formed the basis of the charge (s) he faced,inorder to protect him from double jeopardy. VALENTINE V.KONTEH (6th Cir.2005),395 F.3d 626.

There is no doubt the proper procedure under R.C.2935.09, R.C.2935.10,was not followed in this case. Furthermore, when a defendant challenges the fact that the complaint was not reviewed by a reviewing official before filing,he is challenging a procedural defect in the prosecution of the case.

The General Assembly amended R.C.2935.09,effective June 30,2006,Am.H.B.No.214,151 Ohio laws,part III,5973. The current version of the statutes states in partinent part:

"(A) As used in this section,'viewing official'means a judge of a Court of record,the prosecuting attorney or attorney charged by law with the prosecution of offenses in a Court or before a magistrate,or a magistrate." In this case,Judge Moore acted in the clear absence of all jurisdiction as there was no valid charging instrument before the municipal court on August 30,2012,pursuant to Crim.R.3. See (Doc#:1-1, at 31,33,35).

The filing of a valid complaint is a necessary prerequisite to a court obtaining subject matter jurisdiction. STATE V.KOZLOWSKI (Apr.18,1996),Cuyahoga App.No.69138,citing STATE V.BISHOP (Dec.3,1993),Clark App.No.3070. Therefore,the question of whether the complaint is valid is a question of law,and this court's standard of review is de novo.Id.

Criminal Rule 3 provides:

"The complaint is a written statement of the essential facts constituting the offense charged. It shall also state the numerical designation of the applicable statute or ordinance. It shall be made upon oath before any person authorized by law to administer oaths."

"The formal criminal charge whether by an indictment,an information,or complaint under criminal Rule 3,must contain the constituent elements of a criminal offense. while all the specific facts relied upon to sustain the charge need not be recited,the material elements of the crime must be

stated." STATE V.BURGUN (1976),49 Ohio App.2d 112,at parag. one of the syllabus, See also HARRIS V.STATE (1932),125 Ohio St.257,181 N.E.104; STATE V.OLIVER (1972),32 Ohio St.2d 109; STATE V.CIMPRITZ (1932),158 Ohio St.490.

Furthermore,the fact that the complaint contains the numerical designation of the applicable statute or ordinance violated cannot cure the failure of the complaint to charge all of the essential elements of the offense. See CENTERVILLE V.CORBITT (October 22,1980), Montgomery App.No. 6856; FOUTS V.STATE (1857),8 Ohio St.98.(Doc#:1-1,at 31).

Although the complaint could have been amended to include the required culpable mental state,STATE V.O'BRIEN (1987),30 Ohio St.3d 122,the state never requested that the complaint be amended and the trial court did not amend the complaint.

The complaint and the municipal court documents were withheld in "bad Faith" to deny petitioner the equal protection of the laws. (Doc#:1-1,at 30-35). I was not given a copy of the complaint or any of the municipal court documents on August 30,2012,when I was before the municipal Court. HICKS V.FRANKLIN,546 F.3d 1279 (10th Cir.2008).

"In the absence of a sufficient formal accusation,a court acquires no jurisdiction whatever,and if it assumes jurisdiction,a trial and conviction are a nullity." cite STATE V.BROWN (1981),2 Ohio App.3d 400,2 OBR 475,442 N.E.2d 475. The first essential for the attachment of jeopardy is that the court seeking to act in the matter be of competent jurisdiction." The complaint is the jurisdictional instrument of the municipal court.Id. (Doc#:16 at 4-9).

In the case sub judice,the municipal court was not a court of competent jurisdiction as there was no valid charging instrument before that court. Because the Municipal Court was without jurisdiction,any proceedings before that court are void. (Doc#:1-1,at 31).

SUBJECT MATTER JURISDICTION,

On August 30,2012,petitioner was improperly bound over to the Cuyahoga County Court of Common Pleas. Boundover CIF# CI123254AI. Transcript Filed,Cash/Sur/Prop/10% Bond Set, Amount $500.000.00/No contact with victim.

D. Defective Indictment

On September 24,2012,an indictment was returned by the

Grand Jury with Six counts of felonious assault and one count of improperly discharging a firearm at or into a habitation or school. The complaint that was withheld shows a charge of one count of felonious assault. (Doc#:1-1,at 31, 35;Doc#:15-1,Ex.3).

The court in UNITED STATES V.ESTEPA,471 F.2d 1132 (2d Cir. 1972),determined that a prosecutor may not mislead a grand jury into thinking that it is hearing eyewitness testimony when it is actually hearing an account whose hearsay nature is concealed. The court dismissed an indictment because of improper use of hearsay evidence before the grandjury. This is a case where the grand jury was deceived into believing that hearsay evidence was direct testimony.

The court further stated,'we have previously condemed the casual attitude with respect to the presentation of evidence to a grand jury manifested by the decision * * * to rely on testimony of the law enforcement officer who knew least.'

The State's (5) five witnesses that consisted of the (3) three victims (1) Elizabeth Swiger, (2) Barry Fletcher, (3) Nicholas Karanicolas presented inconsistent testimony at trial. There is a grave risk in this case that petitioner was convicted on evidence that was not presented to the grand jury. (Tr.507,at 21-25;508,at 1-6).

Defenses and motions pursuant to Crim.R.12. Defects in Indictments,Information,or Complaint,Crim.R.12 (B)(2). Failure to raise Defenses or Objections,Crim.R.12 (G),and Mandatory Pre-Trial Motions Crim.R.12 (B)(2)(3),SHALL be noted by the Court at any time.

At arraignment,the court assigned Public Defender Linda Hricko as counsel. (Doc#:15-1,at 163,Ex.3). Public Defender Linda Hricko was ineffective for failing to Object/file a pre-trial motion pursuant to Crim.R.12 (C)(2)(F),to challenge/dismiss the defective complaint (Doc#:1-1,at 31), or to file any other pre-trial motions under the Rules of criminal procedure,thereby violating petitioner's Sixth and Fourteenth Amendments.

The period between the appointment of counsel and the start of trial is a "critical stage of the proceeding" for the Sixth Amendment purposes. MITCHELL V.MASON,257 F.3d 554, 556 (6th Cir.2001); MORAN V.BURBINE,475 U.S.412,432 (1986).

Trial was scheduled for December 17,2012. On December 17,

2012,trial was converted to final pre-trial. Public Defender Linda Hricko withdrew without notice pursuant to Court of Common Pleas rule 10.0. the appearance docket does not reflect an entry of withdrawl for Public Defender Linda Hricko. (Doc#:15-1,at 620).

On December 17,2012,the record reveals the court assigns James J.McDonnell as counsel. (Doc#:15-1,at 457-458,620). I did not request another attorney. I received a letter from James J.McDonnell on December 18,2012,stating he was appointed as counsel. (Doc#:1-1,at 37).

I had given Public Defender Linda Hricko my co-worker [Will Jones] name and number on the day we were listening to the 911 call in preparation for trial. The call came to the part where Ashley was saying her mom and uncle were talking to SOMEBODY,Linda asked me who did I have with me I told her my co-worker [Will Jones] was driving my vehicle. See (Doc#:15-1,at 287;Doc#:24-1,at 1610). [Will Jones] is listed as a witness in Response to Request For Discovery dated December 4,2012.(Tr.302,309-311,313;State's Ex.56).

After meeting with James J.McDonnell before trial I told him to subpoena [Will Jones] and my two nephews who knew my co-worker had left his vehicle in my driveway and drove my vehicle on August 24,2012. I also told James J.McDonnell to subpoena my time card record and my co-worker's time card record to show he did not report to work on Monday, August 27,and Tuesday,August 28,2012. James J.McDonnell merely stated, 'What do we need them for?'

James J.McDonnell called my nephew Dwight Smith's cell phone and asked him an immaterial question,asking him if he knew about a shooting. James J.McDonnell was told to ask my nephew was my co-worker driving my vehicle and where did he leave his vehicle parked at? My nephew left a message on James J,McDonnell's cell phone stating he did not know anything about a shooting which he did not. He was not with my co-worker [Will Jones] and I at Elizabeth's resident on August 24,2012. (Doc#:1-1,at 49,57-59).

James J.McDonnell's failure to call my witnesses for trial allowed the prosecution to coerce Elizabeth,Barry and Anthony to say I was driving my vehicle. Assistant prosecutor Milko Cecez telling the jury I swithced places with the driver. (Tr.573). ROMANEZ V.BERGUIS,Supra.

E. Prosecutorial Misconduct In Opening Statement and In Closing Argument

Petitioner argues that the assistant prosecutor's opening statement and closing arguments were "saturated with emotion and served to inflame the jury."

UNFAIR PREJUDICE

The issue presented in this case is whether the prosecutor's remarks in opening and closing argument constituted prejudicial conduct sufficient to require a reversal of petitioner's conviction. The statements by the prosecution went beyond the record,were not substantiated by the evidence and characterized the defense in derogatory terms clearly designed to sway the jury. This misconduct substantially prejudiced petitioner (Young's) rights and warrants reversal.(Tr.170-175;637-647;658-680).

The prosecution is normally entitled to a certain degree of latitude in its concluding remarks. A prosecutor is at liberty to prosecute with earnestness and vigor,striking hard blows,but may not strike foul ones. BERGER V.UNITED STATES,295 U.S.78,88,55 S.Ct.79 L.Ed.1314 (1935). The prosecutor is a servant of the law whose interest in a prosecution is not merely to emerge victorious but to see that justice is done. It is a prosecutor's duty in opening and closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury. UNITED STATES V.DORR (C.A.5,1981),636 F.2d 117. See also JOHNSON V.BELL,525 F.3d 466,484 (6th Cir.2008).

The test regarding prosecutorial misconduct in opening and closing arguments is whether the remarks were improper and,if so,whether they prejudicially affected substantial rights of the defendant. UNITED STATES V.DORR,Supra,at 120. To begin with,the prosecution must avoid insinuations and assertions which are calculated to mislead the jury. BERGER V.UNITED STATES,Supra,at 88. It is improper for an attorney to express his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused.

In the present case,assistant prosecutor Milko Cecez expressing his personal beliefs and vouching for the credibility of the witnesses in opening statement and in closing argument. Defense counsel James J.McDonnell did not object to the improper admission of such flagrant misconduct "calculated to incite the passion and prejudice of the jury."KIMMELMAN V.MORRISON,477 U.S.365 (1986).

The record reveals assistant prosecutor Milko Cecez

commented at length on inferences to be drawn from facts which were not in evidence,characterized the defendant in terms designed to inflame the jury,and expressed personal opinions as to the credibility of a witness and the guilt of the accused. Assistant prosecutor Milko Cecez telling the jury when you hear this evidence,you consider all the testimony,you consider that everyone knows who he is,he's an ex-boyfriend who showed up uninvited to a party and was asked to leave,perhaps jealous that he's not invited there he's no longer with her,he decides to take his anger out at the three victims who are still suffering as of today. See (Tr.170-175). It is also clear that this misconduct prejudicially affected substantial rights of petitioner.

To begin with,in cases of such flagrant misconduct on the part of the prosecution as was present here,the general instruction that arguments of counsel are not to be considered as evidence was insufficient to correct the error. There was no more specific instruction from the court. In view of the fact that improper insinuations and assertions of personal knowledge by the prosecution are apt to carry great weight against the accused when they should properly carry none. BERGER V.UNITED STATES,Supra, at 88,some more definite guidance from the court was required. (Tr,636,at 18-19).

Closing argument of assistant prosecutors Mollie Murphy and Milko Cecez expressing their personal opinions as to credibility of the witnesses and the guilt of the accused. (Tr.637-647;658-680). UNITED STATES V.WHITE,58 F.App'x 610, 617-18 (6th Cir.2003); UNITED STATES V.MODENA,302 F.3d 626, 634 (6th Cir.2002);also UNITED STATES V.YOUNG,470 U.S.1,9-10,105 S.Ct.1038,84 L.Ed.2d 1 (1985).

Assistant prosecutor Milko Cecez telling the jury to consider his made-up bogus story. Stating,does anyone really expect to believe that? That these victims would just make this whole thing up and have that much time to just come up with a story and all decide that Mr.Young is the person? (Tr.674). He further states,Every single person was brutally honest with you about this whole thing. (Tr.661). BRECHT V.ABRAHAMSON,507 U.S.619,113 S.Ct.1710.

Defense counsel failed to object to the improper admission of officer Vicky Przybylski's testimony,claiming the baby, Skylar said 'George did this.'(Tr.389-390,397-398). Elizabeth testified noone calls me George. (Tr.189). Ashley Sowards is the only person who knows me as George. (Tr.309,569). GIGLIO V.UNITED STATES,Supra.

Federal Courts will not consider the merits of procedurally defaulted claims,unless the petitioner demonstrates cause for the default and prejudice resulting therefrom,or where failure to review the claim would result in a fundamental miscarriage of justice. See LUNDGREN V. MITCHELL,440 F.3d 754,763 (6th Cir.2006)(citing WAINWRIGHT V.SYKES,433 U.S.72,87,97 S.Ct.2497,53 L.Ed.2d 594 (1977).

A petitioner's procedural default,however,may be excused upon a showing of "cause" for the procedural default and "actual prejudice" from the alleged error. See MAUPIN V. SMITH,785 F.2d at 138-39 (6th Cir.1986). "Demonstrating cause requires showing that an 'objective factor external to the defense impeded counsel's efforts to comply' with the state procedural rule." FRANKLIN V.ANDERSON,434 F.3d 412,417 (6th Cir.2006)(quoting MURRAY V.CARRIER,477 U.S.478, 488 (1986).

Meanwhile, "[d]emonstrating prejudice requires showing that the trial was infected with constitutional error." Id. Prejudice does not occur unless petitioner demonstrates "a reasonable probability" that the outcome of the trial would have been different. See MASON V.MITCHELL,320 F.3d 604,629 (6th Cir.2003)(citing STRICKLER V.GREENE,527 U.s. 263,289,119 S.Ct.1936,144 L.Ed.2d 286 (1999).

Finally,a petitioner's procedural default may also be excused where a petitioner is actually innocent in order to prevent a "manifest injustice." See COLEMAN V.THOMPSON,501 U.S.722,749-50,111 S.Ct.2546,115 L.Ed.2d 640 (1991).

Conclusory statements are not enough-a petitioner must "support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence,trustworthy eyewitness accounts,or critical physical evidence-that was not presented at trial." See SCHLUP V.DELO,513 U.S.298,324,115 S.Ct.851,130 L.Ed.2d 808 (1995). See also JONES V.BRADSHAW,489 F.Supp.2d 786,807 (N.D.Ohio 2007); ALLEN V.HARRY,2012 WL 3711552 at * 7 (6th Cir.Aug.29,2012).

Officer Vicky Przybylski testified she along with her partner,Officer Steven Schmitz were first on scene (Tr.375-379). Officer przybylski further testified when they first arrived,they observed a large crowd of people (Tr.380),she further testified the first thing they do is try to keep everybody that was on scene when the crime happened there, and she ask other officer's to assist her in getting

everybody's information in regards to them being witnesses or them being victims. (Tr.387). Officer Przybylski further testifies she spoke to Elizabeth. (Tr.388). Elizabeth knew I was not driving my vehicle as she was flirting with my co-worker when he told her it was his birthday.

Officer Przybylski testified she spoke to the children, Skylar and Morgan,a six-year old and a five-year old. (Tr. 397). Elizabeth and Ashley testified there were eight (8) or nine (9) adults at this alleged party. (Tr.235,295,311, 331). Barry Fletcher was asked,how many people were at this party? He stated, I know me,Nicky was there,Elizabeth and Anthony was there,his daughter,friend of his daughter was there.

Elizabeth mentioned Heather and James,but there is no mention of officer przybylski speaking to them. Elizabeth testified James is the one who put the white t-shirt around Nicky's neck to slow the bleeding down. (Tr.241-242). None of the eight or nine adults are listed as witnesses in the original narrative field report that was not presented at trial. (Doc#:15-1,at 419-420).

Only the three babies are listed as witnesses,a six-year old,a five -year old,and a six-month old. (Doc#:1,at 2,6,10, 12). Officer Vicky Przybylski was asked,did you make notes at the scene? She testified she threw them away. She was asked,and in that report did you mention that you had a conversation with Skylar? She committed perjury and said she did not. (Tr.398;See Doc#:15-1,at 419-420).

Officer Vicky Przybylski was asked,how many people did she speak to? She testified,besides other officers,four. (Tr.399).

In petitioner's 28 U.S.C.§2254 proceeding,the court should have assessed the prejudicial impact of Constitutional error in State Court Criminal trial under Substantial and injurious effect standard for plain error. The prosecutorial misconduct had "a substantial and injurious effect"on the jury verdict. BRECHT V.ABRAHAMSON, Supra,at 637.

F. Actual Innocence

Reason For Granting The Writ

Although the United States Supreme Court has not so far explicitly held that actual innocence can constitute

equitable tolling,the Sixth Circuit has held that the statute of limitations may be tolled for a showing of actual innocence. SOUTER V.JONES,395 F.3d 577,589-90 (6th Cir.2005). The Sixth Circuit applies the standard taken from SCHLUP V.DELO,513 U.S.298,316 (1995). Succinctly stated,the standard as follows:

The United States Supreme Court has held that if a habeas petitioner "presents evidence of innocence so strong, that a Court cannot have confidence in the outcome of the trial unless the Court is also satisfied that the trial was free of nonharmless constitutional error,the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claim." SCHLUP,513 U.S.at 316.

Thus,the threshold inquiry is whether "new facts raise[] sufficient doubt about [the petitioner's] guilt to undermine the confidence in the result of the trial."Id.at 317. To establish actual innocence, "a petitioner must show that it is more likely than not no reasonable juror would have found petitioner guilty beyond a reasonable doubt."Id.at 337. This Court has noted that "actual innocence means factual innocence,not mere legal insufficiency." BOUSLEY V.UNITED STATES,523 U.S.614,623, 140 L.Ed.2d 828,118 S.Ct.1604 (1998).

"To be credible,such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence,trustworthy eyewitness accounts,or critical physical evidence -- that was not presented at trial." See SCHLUP,513 U.S. at 324. The Court counseled however,that the actual innocence exception should "remain rare" and "only in the "extraordinary Case." Id.at 321. See SOUTER V.JONES,395 F.3d at 590.

My co-worker [Will Jones] was subpoenaed for trial by Public Defender Linda Hricko on December 5,2012,the docket reveals the subpoena was returned. See (Doc#:15-1,at 287), subpoena #875611 was not issued. My witnesses were not called for trial as requested. See (Doc#:24-1,at 1610).

I contend that I was denied of effective assistance of counsel as required of the Sixth and Fourteenth Amendment, right to conflict free counsel as required by STRICKLAND V. WASHINGTON,466 U.S.668,687-88,104 S.Ct.2052,80 L.Ed.2d 646 (1984).FOSTER V.WOLFENBARGER,687 F.3d 702 (6th Cir.2012). Defense counsel refused to investigate the case,failed to raise alibi defense.

Defense counsel James J.McDonnell failed to address the issues of the State's witnesses inconsistent testimony and lack of evidence when presenting the Rule 29 Motion. (Tr. 529). Defense counsel further failed to object to assistant prosecutor Milko Cecez's statement when he renewed the Rule 29 Motion claiming,we've already had testimony from (five different people putting him as the driver of the car, deceiving the jury. Assistant prosecutor Milko Cecez also expressing his personal opinion tampering with the jury stating, 'the defendant at this time puts himself there, tries to switch the roles between himself and the passenger. (Tr.580).

I never said I wasn't at (Betty),Elizabeth's resident. (Tr.599-600). The court reporter misquoted what was said. Only Elizabeth,Ashley,Barry and Anthony testified and said I was driving my vehicle. Elizabeth claimed she asked us to leave. (Tr.186). Elizabeth was asked, 'Was anyone else in the car with him?' She responded, Yes,sir. Elizabeth was asked, 'Do you know who this other person was?" She replied No,sir. (Tr.190). Defense counsel did not object to the leading question,by prosecutor Milko Cecez asking, 'Now, who was driving the car? (Tr.191).

Defense counsel asked Elizabeth, 'Now,you also said that there was someone else in the car,is that correct? Elizabeth asked, At the time of the shooting? (Tr.250). Elizabeth was asked,can you describe that young gentleman? She responded,No. Not really. All I know is a black gentleman. (Tr.251,399,523-525).

Petitioner further argues that defense counsel James J. McDonnell was ineffective when he failed to file a Motion to Suppress or object to the testimony that petitioner had a gun by, 'Elizabeth Swiger,Ashley Sowards,Barry Fletcher, and Anthony Karanicolas (the state witnesses),and even the prosecutor's Milko Cecez,Mollie Murphy constituted prejudicial error,and rendered the trial as a whole fundamentally unfair. JAMISON V.KERESTES,U.S.LEXIS 74918.

Detective Frank Costanzo was asked, 'Do you recall finding a gun or anything of that sort in the vehicle? He responded, No,I do not. (Tr.461-462).

Petitioner further argues that defense counsel James J. McDonnell was ineffective in that he did not file a motion to suppress the testimony of Detective John K.Hudelson in regards to petitioner making a statement. (Doc#:15-1,at 414;Tr.585-588,589-593).

The mere fact that an individual held for interrogation by a law enforcement officer may have answered some brief questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further questions until he has consulted with an attorney and thereafter consents to be questioned. (Tr.561,565,575-578).

In this case,defense counsel,James J.McDonnell's absolute failure to investigate [Will Jones],or call alibi witnesses,obtain or present any evidence[time card records] let alone the record reveals that defense counsel did not give an opening statement in this case,he should have,and he could have,especially after assistant prosecutor Milko Cecez deceived the jury with his personal opinions and his own personal beliefs in his opening statement. See (Tr.170-175).FOSTER V.WOLFENBARGER,Supra,687 F.3d 702 (6th Cir.2012

Rather,defense counsel addressed the court: Your Honor, may it please the court,at this time we would reserve the right to make an opening statement at another time. (Tr.176 Defense counsel's failure to give an opening statement prevented the jurors from hearing anything at all about the defendant before them. Jurors and human psychology is that people remeber what they hear[first and last],along the lines of primacy and recency. Later,defense counsel could have made an opening statement pursuant to O.R.C.2945.10 (B). The court may deviate from the order of proceedings listed in this section. Effective date:10-01-1953.

As in ELLIOTT V.WILLIAMS,248 F.3d 1205 (10th Cir.2001), attorney who failed to put on a defense or make an opening statement was deemed prejudicial. Counsel's ineffectiveness in fact precipitated a "breakdown in the adversarial process." Counsel's failure to make an opening statement prejudiced petitioner and affected the outcome of the trial.

What is relevant is that counsel's deficient performance prejudiced petitioner's rights to effective and competent representation as provided by the U.S.Constitution and Ohio Constitution. These actions and omissions cannot be viewed as strategy and falls below the acceptable standards of professional conduct. It deprived petitioner of a fair trial.

With no witnesses in my defense,I was compelled to testify in my own defense. BRAM V.UNITED STATES,168 U.S.532, 542 (1897) held that no person 'shall be compelled to be a witness against himself.

On January 3,2013,defense counsel James J.McDonnell mailed me a letter stating: I spoke with your mother and she informed me that Michael Young is homeless and she cannot locate him. Also,she does not have Dwight Smith's address nor his phone number. See letter attached.

Defense Counsel James J.McDonnell,instead of him investigating [Will Jones] he questions Detective Hudelson as follows:

"Q: Is there any reason that you did not arrest his co-worker whose name is Mr.Will --

MR.CECEZ: objection.

THE COURT: Why don't you rephrase the question.

"Q: Do you know a Mr. Jones who works with my client?

"A: A Mr. Jones?

"Q: Yes.

"A: No.

"Q: Was his name ever given to you by anybody?

"A: No.

"Q: Did you investigate a Mr.Jones as it relates to this incident?

"A: I wasn't given any information about a Mr.Jones so no.

"Q: During the course of your investigation,were you ever told how many people were in the car where the gunshots came from?

"A: No.

"Q: Did you ever ask?

"A: No. All the information that I had is that George Young was the operator,and that was the information I was given, and I wasn't given any information about other people in the vehicle.

"Q: So during the course of your investigation you were never told that there was anyone else in the car,correct?

"A: To my knowledge,no.

"Q: And you reviewed your notes and everything before you testified here today?

"A: Correct.

"Q: So we can be pretty sure that nobody ever told you that there was someone else besides Mr.Young in the car?

"A: I wasn't given any information about another male in the vehicle. (Tr.523-524). See State's Exhibit 56-911 call and the original narrative field report written by officer Vicky Przybylski #66 on August 24,2012. (Doc#:15-1,at 419-420).

At trial,Elizabeth Swiger,Ashley Sowards,Barry Fletcher, and Anthony Karanicolas testified there was someone in the vehicle with me,but they claim he was the passanger. They were coached to say I was the driver. I had introduced my co-worker to Elizabeth and Nicky when we arrived as [Lil Will]. (Tr.547;(Tr.186,190,250-251,314-315,320-321,337,343, 369-370,411,418,424,433-434).

Elizabeth and Nicky were intoxicated,it is believed they forgot my co-worker's name. (Tr.195-196,236-238,311-313, 339-340,366,370-371,407-408,418,431-432,507-508).

Reasonable minds would believe prosecutor Milko Cecez coached them on what to say. At sentencing Judge Steven E. Gall expressing his bias personal opinion as to the credibility of the witnesses and the guilt of the accused stating:

"[T]his mystry person,this co-worker,just is not credible at all. There wasn't any motive for any of these folks to come up and lie on you,say you were the one who did the shooting." (Tr.720;See also Doc#:15-1,at 287-Subpoena for [Will Jones][Doc#:24-1,at 1610-witness list]. This judicial misconduct resulted in an unreasonable determination of facts by the State Court.'"

"A decision is 'contrary to 'clearly established federal law when' the State Court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or decides a case differently than the Supreme Court on a set of materially indistinguishable facts.'" OTTE V.HOUK, 654 F.3d 594,599 (6th Cir.2011)(quoting WILLIAMS V.TAYLOR, 529 U.S.362,412-13 (2000)).

"A State Court's adjudication only results in an unreasonable application'of clearly established federal law when 'the State Court identifies the correct governing legal principle from the Supreme Court's decisions,but unreasonably applies that principle to the facts of the prisoner's case.'" Id.,at 599-600.(quoting WILLIAMS,529 U.S.,at 413).

The unreasonable application 'clause requires the State Court decision to be more than incorrect or erroneous. See LOCKYER V.ANDRADE,538 U.S.63,75 (2003). The State Court's application of clearly established law must be objectively unresaonable. Id.

In order to obtain federal habeas corpus relief,a petitioner must establish that the State Court's decision 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. BOBBY V.DIXON, 132 S.Ct.26,27 (2011)(quoting HARRINGTON V.RICHTER,131 S. Ct.770,786-87 (2011).

CONCLUSION

Considering the foregoing,petitioner concludes that he has shown that the Ohio Court of Appeals determination was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. HARRINGTON,562 U.S.,at 103.

Pursuant to the preceeding issues presented for this court's review,petitioner respectfully request this Court grant his Petition for Writ of Certiorari.

Respectfully Submitted,

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Petitioner Pro Se

December 14,2019