No. 20-6959

IN THE SUPREME COURT OF THE UNITED STATES

MASON SOMERS,

Petitioner

v.

JAY FORSHEY,

Respondent

PETITION FOR WRIT OF CERTIORARI

Based upon the procedural rules provided in Ohio Appellate Rules of Practice and Procedure, App.R. 26(B); Ohio Revised Code Sections 2953.21; And the Courts holdings in Strickland v. Washington, (1984) 466 U.S. 668 (effective representation of counsel), Petitioner Mason Somers respectfully asks that a writ of certiorari issue to review the denial of his Certificate of Appealability in the Sixth Circuit Court of Appeals and remand to the Southern District of Ohio, Eastern Division for an evidentiary hearing and granting of a writ of habeas corpus.

OPINIONS BELOW

At issue in this petition is the Sixth Circuit Court of Appeals denial of Mr. Somers Certificate of Appealability, Somers v. Forshey, 2020 U.S. App. LEXIS 31367 (6th Cir. Oct. 1, 2020) and attached as Appendix A. The Ohio Fifth Appellate District Court of Appeals summarily denied Petitioner's Ohio Appellate Practice and Procedure Rule, App.R. 26(B) on March 6, 2019, State v. Somers, No. CT2018-0013 (5th Dist. Court of Appeals, Mar. 6, 2019) and attached as Appendix

B. The Ohio Supreme Court's entry declining to exercise its discretionary jurisdiction to hear Petitioner's appeal from the March 6, 2019 decision. State v. Somers, 156 Ohio St.3d 1464, 2019-Ohio-2892, 2019 LEXIS 1472, 126 N.E.3d 1169 (July 23, 2019) is attached as Appendix C. The Muskingum County Common Pleas Court of Ohio denied Petitioner Post-Conviction Relief Petition pursuant to Ohio Revised Code Section 2953.21 on March 8, 2019, State v. Somers, No. CR2017-0424 (Muskingum Co. Common Pleas Court Mar.8, 2019) and is attached as Appendix D. The Ohio Fifth Appellate District Court of Appeals affirmed the state trial court's denial of Petitioner's post-conviction relief petition on August 5, 2019, State v. Somers, 2019-Ohio-3157, 2019 Ohio App. LEXIS 3243 (Ohio Ct. App., Muskingum County, Aug. 5, 2019) and attached as Appendix E. The Supreme Court of Ohio's entry declining to exercise its discretionary jurisdiction to hear Petitioner's appeal from the August 5, 2019 decision, State v. Somers, 157 Ohio St.3d 1496, 2019-Ohio-4840, 2019 Ohio LEXIS 2424, 134 N.E. 2d 1217 (Nov. 26, 2019) and attached as Appendix F. The United States District Court for the Southern District of Ohio, Eastern Divison denied Habeas Corpus Relief on March 10, 2020, Somers v. Warden, Noble Corr. Inst., 2020 U.S. Dist. LEXIS 41126 (S.D. Ohio, Mar. 10, 2020) and attached as Appendix G. The United States District Court for the Southern District of Ohio, Eastern Division, District Judge overruled Petitioner's Objection, affirmed the March 10, 2020 Magistrates Report and Recommendation and declined to issue a Certificate of Appealability on June 23, 2020, Somers v. Warden, Noble Corr. Inst., 2020 U.S. Disit. LEXIS 110075 (S.D. Ohio June 23, 2020) and attaached as Appendix H.

JURISDICTION

On October 1, 2020, the Sixth Circuit Court of Appeals for the United States declined to issue a Cerificate of Appealability and writ of Habeas Corpus pursuant to 28 U.S.C.S. 2254. This Court has Jurisdiction under 28 U.S.C.S. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 5 of the United States Constitution provides, in pertinent part: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

Amendment 6 of the United States Constitution provides, in pertinent part: ". . . ., and to have the Assistance of Counsel for his defense."

Amendment 14 of the United States Constitution provides, in pertinent part: "No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Ohio statutory provisions that are relevant to this petition, Ohio Revised Code Sections 2941.25 and 2953.21 are reprinted in Appendix I and J.

QUESTION(S) PRESENTED

1. Once trial counsel learns facts of a criminal case prior to receiving discovery from the government, provides that discoverable information to his client and the client is heard on a jail house phone call repeating those facts, is trial counsel ineffective when the government uses those recordings and state to the jury that "defendant must have committed the offense because he is heard talking about facts of the case before he should have known them" with-

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out any attempt from trial counsel to recuse himself, request for appointment of co-counsel, or objection?

2. Has Petitioner procedural defaulted his Habeas Corpus claim when he brought a Ineffective Assistance of Appellate Counsel claim pursuant to Ohio Appellate Practice and Procedure, App.R. 26(B) for his failure to raise as an assignment of error that Petitioner's trial counsel was ineffective for not raising a merger, allied offense claim under R.C. 2945.21 and Double Jeopardy claim at sentencing?

STATEMENT OF THE CASE

At the time of Petitioner's closure of his direct appeal, the Ohio Appellate Practice and Procedures allowed for reopening of a direct appeal pursuant to Ohio App.R. 26(B) in criminal cases based upon a claim of ineffective assistance of appellate counsel. In Petitioner's timely application to reopen his direct appeal pursuant to App.R. 26(B), as an assignment of error, he asserted that Appellate Counsel failed to raised the merger claim, however, in the body of that argument Petitioner arged that his trial counsel was deficient in failing to raise the issue of merger, allied offenses and the double jeopardy claim and appellate counsel was deficient for not raising the claim of ineffective assistance of trial counsel for not raising the sentencing error at sentencing.

Ohio Revised Code Section 2953.21(A)(1)(a) provides that any person who has been convicted of a criminal offense who claims that there was such a denial of infringement of his constitutional rights as to render the judgment void or voidable under the Ohio and U.S. Constiutions may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief.

On November 11, 2017, Petitioner met with Attorney Keith Edwards and Mr. Edwards explained to the Petitioner he had been appointed to represent him. During this conversation, Mr. Edwards, whom is a fixture in Muskingum County, the prosecutor's office, the Court of Common Pleas, and Muskingum County Sheriff's and Police Departments and have many resourceful individuals whom share information with him regarding criminal cases, especially cases he is involved with, told Petitioner that day that the state was in possession of a key chain flashlight found in the yard of the residence he was being accused of committing a home invasion, that a firearm was used, and that no one was shot. He further stated to Petitioner that nothing was taken from the victim or the victims residence. Trial counsel presented an aerial view along with the name and address of the residence to Petitioner.

During the arraignment hearing, the governments assistant prosecuting attorney, when arguing the denial of bond, stated that Petitioner "he breaks in. He's assaulting this individual. He--while leaving--he has a firearm with him. While leaving he drops a flashlight that has he DNA on it."

On a November 22, 2017 jail house phone call, Petitioner is recorded repeated everything he learned from trial counsel and the assistant prosecuting attorney on November 11, 2017. Petitioner is again record repeating that same information on November 26, 2017 with the mother of his child during s jail house visit.

The government gives Attorney Keith Edwards discovery on December 6, 2017 and the jail house recordings were not included.

During opening statements at the January 23, 2018 jury trial, the government, without objection from trial counsel or motion to recuse himself or request for co-counsel, to the jury that Petitioner was recorded talking about the facts of the case before Petitioner was

given discovery by the government and insinuated that since Petitioner knew facts about the case before he should have known them, Petitioner is the offender whom committed the crime.

The government solicited testimony from Detective Brad Shawger whom testified that all calls are monitored, that discovery was not handed over to defense counsel until December 6, 2017.

During closing arguments, trial counsel attempted to inform the jury that he was the one whom told Petitioner about the facts of the case prior to receiving the governments discovery, however, that was met with an objection by the government and the trial court sustained that objection.

Petitioner filed a Post-Conviction Relief Petition pursuant to Ohio Revised Code Section 2953.21 arguing that the prosecutor committed prosecutorial misconduct and Petitioner was denied the effective assistance of trial counsel when trial counsel failed to move to recuse himself, move to appointment of co-counsel because he was a witness in Petitioner case and failing to object to the recordings. In support of Petitioner's claims, he presented the November 11, 2017 arraignment hearing transcript, and his own affidavit of the conversation he had with trial counsel Keith Edwards prior to the arraignment hearing. Attorney Keith Edwards has not and apparently will not return any correspondence Petitioner had sent to him.

THE INITIAL TRIAL AND DIRECT APPEAL

The Muskingum County Grand Jury indicted Mason Somers for the offenses of: Aggravated Burglary in violation of Ohio Rev. Code Ann. § 2911.11(A)(2); Aggravated Robbery in violation of Ohio Rev. Code Ann. § 2911.01(A)(1); Kidnapping in violation of Ohio Rev. Code Ann.

§ 2905.01(A)(1); and Felonious Assault in violation of Ohio Rev. Code Ann § 2903.11(A)(2). All counts involved the same victim, Ernest Dilley.

The jury found Mason Somers guilty of all the counts and firearm specifications contained in the indictment.

On Janaury 29, 2018, the trial court imposed a 25-years prison term. The court merged the kidnapping and aggravated robbery charges. The court sentenced Petitioner to eleven (11) years in prison on the aggravated robbery and burglary charges, with an additional three (3) years upon the firearm specification and ordered those prison terms concurrently to each other. The court imposed an eight (8) year prison term on the felonious assault with an additional three (3) year upon the firearm specification. The court ordered Petitioner to serve the eleven (11) year prison term consecutive to the fourteen (14) year prison term.

Petitioner timely appealed to the Fifth Appellate District Court of Appeals for Muskingum County, Ohio which affirmed his convictions and sentence. State v. Somers, 2018-Ohio-4625, 2018 Ohio App.LEXIS 4942 (Ohio Ct. App. Muskingum County, Nov. 15, 2018). Petitioner did not pursue a discretionary appeal to the Supreme Court of Ohio.

Petitioner filed a Ohio App.R. 26(B) with the Fifth Appellate District Court of Appeals for Muskingum County, Ohio seeking to reopen his direct appeal for reason he was denied the effective assistance of appellate counsel on direct appeal when appellate counsel failed to raise on direct appeal the issue of merger, allied offenses, and double jeopardy claim and denied of effective assistance ot trial counsel in not raising these claims at sentencing.

The Fifth Appellate District Court of Appeals for Muskingum County,

Ohio summarily denied Petitioner's application on March 6, 2019. State v. Somers, No. CT2018-0013, (5th Dist. Court of Appeals, Mar. 6, 2019).

Petitioner appealed the decision of the Fifth Appellate District. On July 23, 2019, the Supreme Court of Ohio declined to exercise its discretionary jurisdiction to hear his appeal. State v. Somers, 156 Ohio St.3d 1464, 2019-Ohio-2892, 2019 LEXIS 1472, 126 N.E.3d 1169 (July 23, 2019).

PETITIONER MASON SOMERS POST-CONVICTION RELIEF PETITION

On February 25, 2019, Petitioner filed his Post-Conviction Relief Petition in the sentencing court. He attached the November 11, 2017 Arraignment Hearing Transcript and his own Affidavit of the prior conversation he had with trial counsel before the November 11, 2017 Arraignment Hearing. The Petition was premised on this Court's decision in Strickland v. Washington, (1984) 466 U.S. 668.

On March 8, 2019, the sentencing court filed its judgment entry denying Petitioner post-conviction relief petition.

Petitioner appealed to the Fifth Appellate District, Muskingum County Court of Appeals. On August 5, 2019, the court of appeals affirmed the judgment of the sentencing court. State v. Somers, 2019-Ohio-3157, 2019 Ohio App. LEXIS 3243 (Ohio Ct. App., Muskingum County, Aug. 5, 2019).

Petitioner appealed the decision of the Fifth Appellate District. On November 26, 2019, the Supreme Court of Ohio declined to exercise its discretionary jurisdiction to hear his appeal. State v. Somers, 2019-Ohio-4840, 2019 Ohio LEXIS 2424 (Ohio, Nov. 26, 2019).

Petitioner filed a Petition For Writ of Habeas Court pursuant to

28 U.S.C.S. 2254 in the United States District Court for the Southern District of Ohio, Eastern Division. On June 23, 2020, the District Judge affirmed the Magistrates Report and Recommendation over Petitioner's Objection to dismiss the petition, and declined to issue a Certificate of Appealability. Somers v. Warden, Noble Corr. Inst., 2020 U.S. Dist. LEXIS 110075 (S.D. Ohio June 23, 2020).

Petitioner appealed the decision of the District Court for the Southern District of Ohio. On October 1, 2020, the Sixth Circuit Court of Appeals for Ohio, declined to issue a Certificate of Appealability. Somers v. Forshey, 2020 U.S. App. LEXIS 31367 (6th Cir. 2020).

REASON FOR GRANTING THE WRIT

I. The Sixth Circuit Court of Appeals reliance on Wogenstahl v. Mitchell, 668 F.3d 307, 338 (6th Cir. 2012) is not applicable to the instant case, thus a remedy is required.

Pursuant to Ohio App.R. 26(B), a defendant in a criminal case may apply for reopening of the appeal from the judgment of conviciton and sentence based on a claim of ineffective assistance of counsel. App.R. 26(B)(1). The defendant must set forth one or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits or that were considered on an incomplete record due to appellate counsel's deficient performance. App.R. 26(B)(2)(c).

On relying on Wogenstahl v. Mitchell, 668 F.3d 307, 338, the Sixth Circuit in denying a Certificate of Appealability, held:

> "Somers never presented his first claim--that the trial court's failure to merge some of his convictions at sentencing violated his double-jeopardy rights--to the state courts. "Under Ohio law, the failure to raise on

> appeal a claim that appears on the face of the record constitutes a procedural default under the State's doctrine of res judicata." Wong v. Money, 142 F.3d 313, 322 (6th Cir. 1998)(citing State v. Perry, 226 N.E.2d 104 (Ohio 1967)). Because this claim concerns an alleged error in the trial court proceedings, it could have been raised on direct appeal. Ohio's doctrine of res judicata therefore bars Somers from returning to state court to exhaust this claim in a post-conviction petition. See Seymour v. Walker, 224 F.3d 542, 555 (6th Cir. 2000). The fact that Somers argued in his Rule 26(B) application that appellate counsel should have raised this claim on direct appeal is immaterial because a Rule 26(B) application preserves only ineffective-assistance-of-appellate-counsel claims, not the underlying substantive claims. See Wogenstahl v. Mitchell, 668 F.3d 307, 338 (6th Cir. 2012).

The Sixth Circuit seems to have alternative facts that have not been shared with Petitioner. First, the Sixth Circuit is mistaken when it alleges that Petitioner had "never presented his first claim--that the trial court's failure to merge some of this convictions at sentencing violated his double-jeopardy rights--to the state courts." The court is right that the issue was not prsented on direct appeal. However, that is because appellate counsel did not raise that issue on direct appeal. As Petitioner has pointed out, Ohio has a procedure in place, Ohio App.R. 26(B) for when appellate counsel fails to present claims that have merit on direct appeal. An Ohio App.R. 26(B) can not be filed in a trial court, the proper filing requirements is before the state appellate court. Petitioner alleged in his Ohio App.R. 26(B) application that he was denied the effective assistance of appellate counsel when appellate failed to raise on direct appeal that the trial court erred when it imposed consecutive prison terms for the Aggravated Burglary and Felonious Assault conviction rather than merge them for sentencing purposes because the offenses were allied offenses of similar import under Ohio's multi-count statute, Ohio Rev. Code Ann. Section 2941.25, State v. Lacavera, 8th Dist. Cuyahoga No. 96242,

2012-Ohio-800, which controls the inquiry whether the state legislature intended cumulative punishments for the two offenses. Petitioner also argued that the asserted error violated the Double Jeopardy Clause of the Fifth Amendment, which prohibits the imposition of cumulative punishments.

Secondly, the state court did not apply the procedural res judicata bar to Petitioner's Ohio App.R. 26(B) application. Res Judicata does not even fit within the context of this Ohio App.R. 26(B) proceeding. The fact that there is a procedure in place in Ohio to raise a ineffective assistance of appellate counsel claim, App.R. 26(B), and that Petitioner complied with that procedure in its entirety, res judicata does not apply here.

Thirdly and finally, a person does not have to be a law professor to understand the plain reading of Ohio App.R. 26(B). Ohio App.R. 26(B) is designed to give a defendant a procedure to challenge appellate counsel's representation during a direct appeal proceeding. If appellate counsel raised weak issue on appeal when there are clearly stronger ones available, a defendant can challenge appellate counsels deficient preformance when he raised those weak issue on direct appeal. Another issue, as in the instant, when appellate counsel fails to present an assignment of error that could possibly have a different result on direct appeal had appellate counsel present it. App.R. 26(B)(2)(c).

Petitioner asserts that his ineffective assistance of appellate counsel claim is not barred by the doctrine of res judicata, is not procedural defaulted, thus the Sixth Circuit is applying erroneous case law in denying a Certificate of Appealability, thus because Petitioner's sentence violates the Fifth and Fourteenth Amendments, he request the granting of his Writ.

II. When trial counsel representation conflicts with his duties to represent his cliet vigorously, trial counsel has a duty to move for co-counsel, or recuse himself, thus the client is denied the effective assistance of trial counsel and prejudiced thereform when trial counsel fails to do so.

The issue presented herein is unique. There is no case law or authority by this Court on the issue herein.

Ohio post-conviction remedies, Ohio Rev. Code. Ann. Section 2953.21 requires a Petitioner to file his petition within 365 days of the date the trial transcripts were filed with the court of appeals or from the trial courts judgment of sentencing. Claims appearing on the face of the trial courts record must be raised on direct appeal, or they will be waived under Ohio's of res judicata. State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). Issues which must be raised in a post-conviction action pursuant to Ohio Rev. Code Ann. Section 2953.21 include claims which do not appear on the face of the trial courts record and claims of ineffective assistance of trial counsel. State v. Cole, 2 Ohio St.3d 112, 443 N.E.2d 169. There is an exception to Ohio's res judicata doctrine where a petitioner presentes evidence dehors, or outside, the trial courts record to support a claim on post-conviction. State v. Smith, 17 Ohio St.3d 98, 101 n. 1, 17 Ohio B. 219, 477 N.E.2d 1128 (Ohio 1985). This exception applies where the defendant "had no means of asserting the constitutional claim there asserted until his discovery, after the judgment of conviction, of the factual basis for asserting that claim," so the claim "was not one that could have been raised. . .before the judgment of conviction, and hence could not reasonably be said to have been...waived." Perry, 10 Ohio St. 2d at 179. Thus, "[g]enerally, the introduction in a [post-conviction] petition of evidence dehors the record of ineffective assistance of

counsel is sufficient, if not to mandate a hearing, at least to avoid dismissal on the basis of res judicata." State v. Cole, 2 Ohio St.3d 112, 114, 2 Ohio B. 661, 443 N.E.2d 169 (Ohio 1982). The dehors evidence must "demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original record. State v. Lawson, 103 Ohio App.3d 307, 315, 659 N.E.2d 362 (Ohio Ct. App. 1995).

Petitioner asserts that the Ohio trial court, state appeals court, habeas court, and Sixth Circuit Court of Appeals incorrectly applied the res judicata bar to preclude review of Petitioner's ineffective assistance of trial counsel claim.

During these proceedings, Petitioner dismissed the prosecutorial misconduct claim because it seems to delude the ineffective assistance of trial counsel claim.

In the case in chief, Petitioner first met Attorney Keith Edwards on November 11, 2017 while in the Muskingum County Courthouse. Petitioner had just been transported from the county jail. Upon induction, Attorney Keith Edwards informed Petitioner that he had been appointed by the court to represent him. Mr. Edwards goes into telling Petitioner what he had learned about the case, that being that the victims name is Ernest Dilley, that someone committed a home invasion and robbed him, that nothing was taken from the residence or from the victim, that a firearm was used in the home invasion, however, no one was shot or hurt, and that the prosecutor is in possession of a key chain flashlight found in the victim yard with Petitioner's DNA on it. This conversation occurred outside the presence of the trial court and prosecutor between Petitioner and Attorney Keith Edwards. During this conversation Attorney Keith Edwards producted an aerial view of the residence and

street the residence was located on along with the charging complaint.

On November 22 and 26, 2017, during a jail house phone call and jail house visit, Petitioner is recorded talking about the facts of the case as relayed to him by Attorney Keith Edwards.

On December 6, 2017, the Muskingum County Prosecutor's Office gave Attorney Keith Edwards discovery.

During opening and closing arguments of trial, the prosecutor made the following remarks without an object or motion being made by trial counsel Keith Edwards:

> "You have two separate--one visit and one jail call where he knows facts about the case before he has any reason to know about the facts * * * again, we have him knowing facts of the case in his view long before he has any way of actually knowing what those facts are. And we have him expressing the facts of the case that a person who is innocent does not express. Expressing the view I want a sweet deal and I want to beat my case, not I want the truth to come out and I'm innocent, get me out of here * * * and then Mr. Somers who matches the physical description and has the same tattoos, knows the, more or less, street description of the facts before he has any opportunity to actually know those, unless of course he was actually at the scene and knew, well, nothing got taken, nobody gave him money * * * Its November before he gets access to anything in the state's file except for that he's linked to this case by a flashlight that has his DNA on it. He knows the victims wasn't shot so it's not felonious assault * * * He knows it's a key chain flashlight. He knows there's not force entry * * * He knows nothing was taken * * * But here's the thing. If you're charged out the blue with crimes that you don't know anything about, you don't know anything about it, you don't know it's a key chain flashlight, there's no forced entry, the victim wasn't shot, and anything got taken. You don't know these things. You have no clue. Your like, what am I doing here, get me out of here * * * Again, he did do it, so he knows what the facts are."

These statements by the prosecutor is what convinced the jury to find Petitioner guilty of the charges contained in the indictment. Contrary to the prosecutor's statement that "Mr. Somers who matches the description and has the same tattoos" is not an accurate statement of the facts. There was no eyewitness testimony that Petitoner committed the

offenses. No one testified, nor a statement presented that identified Petitioner as the perpetrator. The victim, Mr. Dilley testified he could not see or tell if the person was in the court room who robbed him. He also testified that the perpetrator's height and tattoos on his arms and hands were consistent with that of Petitioner's height and tattoos but could not say whether the tattoos were the same.

Furthermore, Bureau of Criminal Investigation Forensic Scientist Michael Monfredi testified that he had a mixture of DNA on the key chain flashlight and Petitioner's was included. And that DNA can stay on an item for decades, and does not know how the DNA end up on the flashlight or how the flashlight ended up in the victims yard.

There was no evidence that Petitioner committed these offenses. There was nothing linking Petitioner to the residence of the victim but a key chain flashlight found in the victims yard. This is clearly a case where there is NOT overwhelming evidence for the conviction.

The entirely of the governments case relied upon the jail house phone call and visit recordings. Without those recordings, there is no conviction. Trial Attorney Keith Edwards possessed personal knowledge before the November 11, 2017 Arraignment Hearing, before the December 6, 2017 discovery date, and before the January 23, 2018 trial of facts concerning Petitioner's case that he shared with Petitioner at which Petitioner repeated on a jail house phone call and jail house visit. Trial counsel had a duty, at the very least, once the prosecutor in his opening statement insinuated that Petitioner committed the crimes because he was recorded talking about facts of the case before he was given discovery, to object, to seek to withdraw and for appointment of co-counsel for reason the government had made him a witness as to how Petitioner learned the facts he was recorded talking about.

Petitioner submitted in support of his post-conviction relief petition his own affidavit of the conversation he had with Attorney Keith Edwards as stated previously, not part of the trial courts record which is considered evidence dehor the record. Attorney Keith Edwards, after trial, refused to communicate with Petitioner and his family. So no affidavit from Attorney Keith Edwards was supplied to Petitioner, however, Petitioner still supplied operative facts to warrant a evidentiary hearing to learn from Attorney Keith Edwards where he learned the facts of the case before the December 6, 2017 discovery date and why he failed to speak up and instead choose to allow the government to insinuate that Petitioner is guilty of committing the crimes because Petitioner is recorded talking about facts of the case he shouldnot know at the time.

Petitioner did comply with the two part pong established in Strickland v. Washington, 466 U.S. 668. Clearly, Trial counsel not coming forward prior to trial, or at the time the government was giving its opening statement, to notify the trial court of his conflict of interest, was deficient. Because trial cousnel failed in his obligation of representation to Petitioner, Petitioner was prejudiced by an ill concieved conviction. Had trial counsel moved to recuse himself, request an assistance of co-counsel, the trial court would have granted such motions, thus promising a different result.

The Sixth Circuit and the line of court's, have incorrectly applied the doctrine of res judicata in this case. There is no way Petitioner could have challenged his trial counsel ineffectiveness on direct appeal because there is no evidence of that in the trial courts record. Thus the proper remedy was through post-conviction relief.

CONCLUSION

For the foregoing reasons, Petitioner Mason Somers respectfully request this Court grant this petition for certiorari.

RESPECTFULLY SUBMITTED,

Mason Somers#A741-605
Noble Corr. Inst., Pro Se
15708 McConnelsville Road
Caldwell, Ohio 43724

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for a Writ of Certiorari was sent by U.S. Mail to Counsel of Record for Respondent Warden, Attn: Maura O'Neill Jaite, Criminal Justice Section, Office of the Ohio Attorney General's Office, 150 East Gay Street, 16th Floor, Columbus, Ohio 43215 on this 28 day of December, 2020.

Mason Somers

There are approximately 3700 words within this petition.

APPENDIX PAGE

No. 20-3690

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 01, 2020
DEBORAH S. HUNT, Clerk

MASON SOMERS,

Petitioner-Appellant,

v.

JAY FORSHEY, Warden,

Respondent-Appellee.

ORDER

Before: McKEAGUE, Circuit Judge.

Mason Somers, an Ohio prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. This court construes Somers's notice of appeal as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1). Somers has filed two motions to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a). The warden has filed a response to these motions that opposes the grant of a certificate of appealability.

In January 2018, an Ohio jury convicted Somers of one count of aggravated burglary, in violation of Ohio Revised Code § 2911.11(A)(2); one count of aggravated robbery, in violation of Ohio Revised Code § 2911.01(A)(1); one count of kidnapping, in violation of Ohio Revised Code § 2905.01(A)(1); and one count of felonious assault, in violation of Ohio Revised Code § 2903.11(A)(2). Each conviction also carried an attendant firearm specification. *See* Ohio Rev. Code § 2941.145. At the sentencing hearing, the trial court merged Somers's kidnapping and aggravated-robbery convictions, and the State elected to have Somers sentenced on the aggravated-

robbery conviction. The trial court sentenced Somers to an aggregate term of twenty-five years' imprisonment.

On direct appeal, Somers argued that: (1) his convictions were supported by insufficient evidence; (2) his convictions were against the manifest weight of the evidence; (3) the trial court unlawfully imposed consecutive sentences; and (4) trial counsel had rendered ineffective assistance by not: (a) objecting to the prosecution playing for the jury his statements that the State had better offer him a "sweet deal," (b) objecting to the prosecution playing for the jury the recorded conversation in which he discussed criminal offenses committed by others and the "deals" they had received, and (c) requesting a waiver of court costs. The Ohio Court of Appeals affirmed Somers's convictions and sentence, *State v. Somers*, No. CT2018-0013, 2018 WL 6015942, at *6 (Ohio Ct. App. Nov. 15, 2018), and Somers did not seek review from the Ohio Supreme Court.

In January 2019, Somers filed an application to reopen his direct appeal under Rule 26(B) of the Ohio Rules of Appellate Procedure, in which he argued that appellate counsel had rendered ineffective assistance by failing to: (1) argue that his aggravated-burglary and felonious-assault convictions should have merged at sentencing; and (2) make a better argument that his felonious-assault conviction was supported by insufficient evidence. The Ohio Court of Appeals denied the Rule 26(B) application and the Ohio Supreme Court declined to accept jurisdiction over Somers's appeal. *State v. Somers*, 126 N.E.3d 1169 (Ohio 2019) (table).

In February 2019, Somers filed a state petition for post-conviction relief, in which he argued that the prosecutor committed misconduct by improperly arguing to the jury that Somers must have been the perpetrator because he knew the facts of the case before he received the State's discovery response. Relatedly, Somers argued that trial counsel rendered ineffective assistance by not recusing himself and testifying that he had told Somers the facts of the case prior to receiving the State's discovery response. Somers also argued that trial counsel rendered ineffective assistance by advising him not to testify at trial. The trial court denied the petition, concluding that Somers's claims were barred by the doctrine of res judicata because he could have raised them

on direct appeal, but failed to do so. The Ohio Court of Appeals affirmed. *State v. Somers*. No. CT2019-0020, 2019 WL 3559421, at *6 (Ohio Ct. App. Aug. 5, 2019*), perm. app. denied*, 134 N.E.3d 1217 (Ohio 2019).

In December 2019, Somers filed a § 2254 petition, in which he argued that: (1) the trial court violated his protection against double jeopardy by not merging his aggravated-burglary and felonious-assault convictions; (2) the prosecutor committed misconduct by improperly arguing that he must have been the perpetrator because he knew the facts of the case before he received discovery, and trial counsel was ineffective for not challenging the prosecutor's argument; and (3) trial counsel was ineffective for coercing him into not testifying. The magistrate judge recommended dismissing Somers's habeas petition after concluding that his first and second claims were procedurally defaulted and that this third claim was meritless. Over Somers's objections, the district court adopted the magistrate judge's report and recommendation, dismissed the habeas petition with prejudice, and declined to issue a COA. This appeal followed.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). In order to be entitled to a COA, the movant must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. When the district court denies a habeas petition on procedural grounds, a COA should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Procedurally Defaulted Claims

The district court determined that Somers procedurally defaulted his first and second claims. In analyzing whether a petitioner procedurally defaulted a federal claim in state court, a federal court must consider whether: "(1) the petitioner failed to comply with a state procedural

rule; (2) the state courts enforced the rule; [and] (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim." *Jalowiec v. Bradshaw*, 657 F.3d 293, 302 (6th Cir. 2011). A procedural default can also result from a petitioner's failure to exhaust his federal claims in state court. The exhaustion requirement is deemed "satisfied when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). Generally, a petitioner must present his claims to both the state court of appeals and the state supreme court for the claim to be considered exhausted. *Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009). When a petitioner failed to fairly present his claims to the state courts and no remedy remains, his claims are procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996).

Somers never presented his first claim—that the trial court's failure to merge some of his convictions at sentencing violated his double-jeopardy rights—to the state courts. "Under Ohio law, the failure to raise on appeal a claim that appears on the face of the record constitutes a procedural default under the State's doctrine of res judicata." *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998) (citing *State v. Perry*, 226 N.E.2d 104 (Ohio 1967)). Because this claim concerns an alleged error in the trial court proceedings, it could have been raised on direct appeal. Ohio's doctrine of res judicata therefore bars Somers from returning to state court to exhaust this claim in a post-conviction petition. *See Seymour v. Walker*, 224 F.3d 542, 555 (6th Cir. 2000). The fact that Somers argued in his Rule 26(B) application that appellate counsel should have raised this claim on direct appeal is immaterial because a Rule 26(B) application preserves only ineffective-assistance-of-appellate-counsel claims, not the underlying substantive claims. *See Wogenstahl v. Mitchell*, 668 F.3d 307, 338 (6th Cir. 2012).

Somers also failed to raise his second claim—that the prosecutor committed misconduct by making an improper argument and counsel was ineffective for not challenging that argument—on direct appeal, but instead raised this claim for the first time in his petition for post-conviction relief. The Ohio Court of Appeals affirmed the trial court's conclusion that res judicata barred

review of this claim because the prosecutor's allegedly improper remarks and counsel's alleged ineffectiveness appeared on the face of the trial record and therefore could have been raised on direct appeal. *See Somers*, 2019 WL 3559421, at *3-4. The state court's enforcement of Ohio's doctrine of res judicata constitutes an adequate and independent state ground for barring habeas relief. *See Hanna v. Ishee*, 694 F.3d 596, 614 (6th Cir. 2012).

Considering the foregoing, reasonable jurists could not debate the district court's determination that Somers procedurally defaulted his first and second claims. In order for procedurally defaulted claims to be examined in a federal habeas proceeding, the petitioner must either establish cause and prejudice or show that a miscarriage of justice would result if the claim is not addressed. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). A fundamental miscarriage of justice requires a showing of actual innocence. *See Dretke v. Haley*, 541 U.S. 386, 393 (2004). Somers presented no arguments that would establish cause for the defaults or resulting prejudice, nor did he make a colorable showing of actual innocence.

Remaining Claim

Finally, Somers argued that trial counsel psychologically "coerced" him into not testifying by telling him that he was "going home today" and that, if he testified, the jury would surely convict him. To establish a claim of ineffective assistance of counsel, the defendant must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688.

Although the ultimate decision whether to testify rests with the defendant, when counsel makes a tactical decision not to have his or her client testify, the defendant's consent is presumed. *Gonzales v. Elo*, 233 F.3d 348, 356 (6th Cir. 2000). A defendant who insists on testifying against

his attorney's desires must, at a minimum, alert the trial court that he wishes to do so or that there is a disagreement with his attorney. *Id.* at 357. In affirming the trial court's denial of Somers's post-conviction petition, the state appellate court determined that "[n]othing in the record suggests [Somers's] decision to not testify was the result of coercion. [Somers] has not shown that his decision to not testify was not of his own free will, and he therefore cannot challenge his decision to not testify as ineffective assistance of counsel." *Somers*, 2019 WL 3559421, at *5. The district court agreed that Somers failed to show that counsel coerced him into not testifying.

Moreover, the state appellate court concluded that counsel's advice that Somers not testify was sound trial strategy because it allowed the defense "to attack the evidence without putting [Somers] on the witness stand and exposing [him] to cross examination" on a number of issues, including his prior conviction for drug possession. *Id.* The district court concurred with the state appellate court's reasoning, adding only that Somers's decision to not testify prevented the prosecutor from questioning him about how he knew the facts of the case before he received discovery. Considering the foregoing, reasonable jurists would not find that the district court's resolution of this claim is debatable. *See Strickland*, 466 U.S. at 689.

Somers has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Accordingly, Somers's COA application is **DENIED** and his motions for pauper status are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff - Appellee

-vs-

MASON P. SOMERS

Defendant - Appellant

JUDGMENT ENTRY

(26/45-48)

CASE NO. CT 2018-0013

This matter came before the Court on Appellant Mason Somer's Application to Reopen Direct Appeal, filed January 10, 2019, and the State's Opposition to Appellant's Application for Reopening, filed January 15, 2019.

Appellate Rule 26(B)(1) provides:

"A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

This Court's opinion and entry affirming Appellant's conviction and sentence were filed on November 15, 2018. We therefore find such Application to be timely filed.

In his Application to Re-open his appeal, Appellant argues that he was denied effective assistance of appellate counsel.

The standard when reviewing an ineffective assistance of counsel claim is well-established. Pursuant to *Strickland v. Washington* (1984) 466 U.S. 668, 687, 104 S.Ct.

Appendix B

2052, 2064, 80 L.Ed.2d 674, in order to prevail on such a claim, the appellant must demonstrate both (1) deficient performance, and (2) resulting prejudice, *i.e.,* errors on the part of counsel of a nature so serious that there exists a reasonable probability that, in the absence of those errors, the result of the trial court would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. Id. at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. Id.

The Supreme Court of Ohio, in *State v. Smith*, 95 Ohio St.3d 127, 766 N.E.2d 588, 2002-Ohio-1753, has once again examined the standards that must be applied to an application for reopening as brought pursuant to App.R. 26(B). In *Smith*, the Supreme Court of Ohio specifically held that:

"Moreover, to justify reopening his appeal, [Appellant] 'bears the burden of establishing that there was a "genuine issue" as to whether he has a "colorable claim" of ineffective assistance of counsel on appeal.' *State v. Spivey,* 84 Ohio St.3d at 25, 701, 706 N.E.2d 323, N .E.2d 696.

"*Strickland* charges us to 'appl[y] a heavy measure of deference to counsel's judgments,' 466 U.S. at 691, 104 S.Ct. 2052, 80 L.Ed.2d 674, and to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' Id. at 689, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Moreover, we must

bear in mind that appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. See *Jones v. Barnes* (1983), 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987; *State v. Sanders* (2002), 94 Ohio St.3d 150, 761 N.E.2d 18." *State v. Smith,* 95 Ohio St.3d 127, 766 N.E.2d 588, *2002-Ohio-1753,* at 7.

Appellant herein argues that his Appellate counsel was ineffective for failing to assign as error the issue of merger of the aggravated burglary and felonious assault charges and for failing to make a better argument regarding the sufficiency of the evidence on the felonious assault charge.

Upon review, we find no merit in the argument concerning merger due to the fact that a firearm was used in the aggravated burglary, therein preventing merger with the felonious assault charge. We further find no merit in his argument that his counsel should have made a better argument or different argument challenging the sufficiency of the evidence. Finally, we find Appellant has failed to demonstrate that his counsel was incompetent or that he suffered prejudice as a result of his counsel's decisions. We further do not find that Appellant has established that the result of the proceeding have been different.

We find Appellant's arguments unpersuasive and thus find that no genuine issue exists as to whether Appellant was denied the effective assistance of counsel on appeal.

We therefore find Appellant's Application for Reopening not well-taken and hereby deny same.

HON. JOHN W. WISE

HON. W. SCOTT GWIN

HON. PATRICIA A. DELANEY

The Supreme Court of Ohio

State of Ohio

v.

Mason P. Somers

Case No. 2019-0451

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Muskingum County Court of Appeals; No. CT 2018-0013)

Maureen O'Connor
Chief Justice

Appendix C

IN THE COMMON PLEAS COURT OF MUSKINGUM COUNTY, OHIO

State of Ohio,

Plaintiff

-vs-

Mason Somers,

Defendant

Case No. CR2017-0424

Judge Mark C. Fleegle

480/1037

ENTRY

The Defendant filed a Petition for Post-Conviction Relief on February 25. 2019. The State filed a response on March 7, 2019. After review of the petition, the Court finds that the Defendant failed to raise these claims in his direct appeal.

Furthermore, the Court finds that the Defendant fails to present any meritorious claims and the Defendant is barred by the doctrine of *res judicata.*

THEREFORE, the Defendant's petition is **Denied**.

IT IS SO ORDERED.

Judge Mark C. Fleegle

D. Michael Haddox
Attorney for State

Michael A. Cox
Defendant, *pro se*

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Entry has been served upon all parties this March 8, 2019.

Assignment Commissioner

Appendix D

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COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff - Appellee -vs- MASON SOMERS Defendant - Appellant	:	JUDGES: Hon. W. Scott Gwin, P.J. Hon. John W. Wise, J. Hon. Craig R. Baldwin, J. Case No. CT2019-0020 OPINION (26/625-637)
CHARACTER OF PROCEEDING:		Appeal from the Muskingum County Court of Common Pleas, Case No. CR2017-0424
JUDGMENT:		Affirmed
DATE OF JUDGMENT:		

APPEARANCES:

For Plaintiff-Appellee

D. MICHAEL HADDOX
Prosecuting Attorney
Muskingum County, Ohio

By: TAYLOR P. BENNINGTON
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For Defendant-Appellant

MASON SOMERS
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Appendix E

Baldwin, J.

{¶1} Mason Somers appeals the decision of the Muskingum County Court of Common Pleas denying his motion for post-conviction relief based upon the doctrine of res judicata, failure to address issues on direct appeal and lack of meritorious claims.

STATEMENT OF FACTS AND THE CASE

{¶2} Ernest Dilley was sitting in his home when there was a knock at his front door. Mr. Dilley opened the door believing it to be his daughter returning home from work, but instead it was a man holding a gun, with a bandana covering part of his face. Mr. Dilley noticed the man was around six feet tall and had tattoos on his arms and on the hand holding the gun. The man charged into the house and pushed Mr. Dilley through the threshold area of the home, into the living room, until Mr. Dilley was on his couch. The man pointed the gun at Mr. Dilley and demanded all of Mr. Dilley's money. Mr. Dilley told the intruder his money was at the bank. The intruder then picked up a lid from a glass candy jar and struck Mr. Dilley in the face. The intruder grabbed Mr. Dilley's cell phone off the coffee table and ran out of the house. Mr. Dilley followed the intruder to the front porch area. Once outside, Mr. Dilley noticed the glass candy dish lid had been dropped in his yard. On top of the broken glass lid was a flashlight.

{¶3} Mr. Dilley ran to the neighbor's house and asked him to call the police. When the police arrived, they searched the area and found Dilley's cell phone in the middle of his yard and returned it to him. The police also found the flashlight and a pistol bullet cartridge that had not been fired and both were submitted for DNA testing. The DNA discovered on the flashlight came back as a one in one trillion match to Appellant Mason Somers. The test of the bullet was inconclusive.

{¶4} Appellant was indicted on one count of Aggravated Burglary, a felony of the first degree, in violation of R.C. 2911.11 1(A)(2), one count of Aggravated Robbery, a felony of the first degree, in violation of R.C. 2911.01(A)(1), one count of Kidnapping with a gun specification, a felony of the first degree, in violation of R.C. 2905.01(A)(1), and one count of Felonious Assault, a felony of the second degree, in violation of R.C. 2903.11(A)(2).

{¶5} At trial, the jury heard testimony from Ernest Dilley, Deputy Andrew Murphy, Detective Amy Thompson, BCI forensic scientist Michael Monfredi, and Detective Brad Shawger.

{¶6} Mr. Dilley testified as to the events that took place on August 23, 2017, as set forth above. He further testified that the perpetrator's height and tattoos on his hands and arms were consistent with that of Appellant's height and tattoos on his hands and arms. Mr. Dilley also testified that the flashlight found in the yard had not been there previously because if it had been, he would have picked it up.

{¶7} The state presented two audio recordings of Appellant from a phone call and a visit. In the recordings, Appellant comments on the facts of the case and concludes that he should get a "sweet deal" as a result of the lack of any egregious actions during the offense. Appellee argued the statements were made prior to the state responding to Appellant's discovery requests, suggesting that Appellant had knowledge of the facts that only the perpetrator would know. Appellee's trial counsel cross-examined the officer who introduced the tapes, suggesting during those questions and in his closing argument that there were alternative sources for the information the Appellant described, such as the complaint, trial counsel, or other individuals. Appellant's trial counsel chose not to have his client testify and avoided subjecting him to cross examination, which, according to

Appellant's brief, would disclose a prior drug offense and, based upon the record, may have been of little material assistance.

{¶8} The jury found Appellant guilty of all counts and firearm specifications and the trial court sentenced Appellant to serve 25 years in prison and pay court costs.

{¶9} Appellant, through appointed counsel, filed a timely appeal assigning as error that the conviction was based upon insufficient evidence and against the manifest weight of the evidence, that consecutive sentences were unconstitutional and that he received ineffective assistance of counsel. This court rejected his assignments of error and affirmed the decision of the trial court on November 18, 2018.

{¶10} Appellant filed a petition for postconviction relief on February 25, 2019, asking that the trial court grant a hearing on the petition and, ultimately, a new trial. Appellant alleged that his constitutional rights were violated as a result of prosecutorial misconduct and ineffective assistance of trial counsel. In support of his motion, Appellant supplied multiple references to transcripts of hearings before the trial court as well as his affidavit recounting his conversations with trial counsel before and during the hearings.

{¶11} On March 8, 2019, the trial court denied Appellant's petition finding that the Defendant failed to raise these claims in his direct appeal, that he failed to present any meritorious claims and that his motion was barred by the doctrine of res judicata. On March 25, 2019 Appellant filed a timely notice of appeal, listing three assignments of error:

{¶12} "I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S POST-CONVICTION RELIEF PETITION WHEN APPELLANT HAD SHOWN ESSENTIAL OPERATIVE FACTS IN(SIC) SUPPORTING EVIDENTIAY(SIC) QUALITY MATERIALS DEHORS THE RECORD IN VIOLATION OF THE OHIO AND U.S. CONSTITUTIONS."

{¶13} "II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S POST-CONVICTION PETITION WITHOUT A HEARING WHEN THE COURT FILES, RECORD, AND DOCUMENTATION SUPPORTED SUCH A HEARING."

{¶14} "III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FAILED TO ISSUE FACTS AND CONCLUSIONS OF LAW AS REQUIRED BY R.C. 2953.21."

STANDARD OF REVIEW

{¶15} The appropriate standard for reviewing a trial court's decision to dismiss a petition for post-conviction relief, without an evidentiary hearing, involves a mixed question of law and fact. *State v. Durr,* 5th Dist. Richland No. 18CA78, 2019-Ohio-807. This court must apply a manifest weight standard in reviewing a trial court's findings on factual issues underlying the substantive grounds for relief, but we must review the trial court's legal conclusions de novo. *Id.*

{¶16} With regard to Appellant's assertion he was entitled to a hearing, the Supreme Court of Ohio held that "[i]n post-conviction cases, a trial court has a gatekeeping role as to whether a defendant will even receive a hearing." *State v. Gondor,* 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77. A petition for post-conviction relief does not provide a petitioner a second opportunity to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing on the petition. *State v. Wilhelm,* 5th Dist. Knox No. 05-CA-31, 2006-Ohio-2450, citing *State v. Jackson*, 64 Ohio St.2d 107, 413 N.E.2d 819 (1980). Pursuant to R.C. 2953.21(C), a defendant's petition may be denied without a hearing when the petition, supporting affidavits, documentary evidence, files, and records do not demonstrate that the petitioner set forth sufficient

operative facts to establish substantive grounds for relief." *State v. Adams*, 11th Dist. No.2003–T–0064, 2005–Ohio–348, ¶ 36 quoting *State v. Calhoun,* 86 Ohio St.3d 279, 282, 714 N.E.2d 905 (1999).

{¶17} We also note that the trial court's entry referred to the lack of "meritorious" claims, when R.C. 2953.21 obligates the trial court to review the petition for "substantive grounds for relief." R.C. 2953.21(D). In the context of this case, we accept the trial court's cite to "meritorious claims" as referencing "substantive grounds for relief."

I.

{¶18} Appellant contends that prosecutorial misconduct and ineffective assistance of counsel supports his first assignment of error in which he argues the trial court abused its discretion by denying the petition. He concludes his argument by characterizing the facts he describes as "outside the trial court's record" but the record requires the opposite conclusion. The facts Appellant relies upon were clearly part of the record and thus available for presentation and argument at trial and at a direct appeal of any alleged error.

{¶19} Appellant first contends that the prosecutor acted inappropriately by arguing that Appellant knew the facts of the case before Appellant received the state's discovery response and that guilt could be implied from that fact. Appellant refers to the Arraignment Hearing Transcript, the prosecutor's opening statement and recordings of Appellant's telephone conversations while Appellant was in custody. Appellant contends the prosecutor's comments on the evidence were improper because he knew or should have known that Appellant was informed of the facts prior to and during the November 11, 2017 arraignment hearing. He states in his petition that "The prosecutor in this case knew that he was not going to get a conviction based upon the testimony of the victim and BCI

forensic scientist, thus choose to result(sic) to conduct clearly prohibited by the professional rules of conduct by telling the jury that defendant committed the crimes because he had information about the crimes before defendant should have known it, resulting in prosecutorial misconduct." (Defendant Mason Somers Timely Motion for Postconviction Relief Pursuant To Ohio Revised Code Section 2953.21, February 25, 2019, Docket # 47).

{¶20} The alleged prosecutorial conduct was part of the record in this case. The prosecutor referenced Appellant's foreknowledge in his opening and closing statements, contending that Appellant had information about the crime long before the state responded to Appellant's discovery request. The state presented two recorded conversations of Appellant in support of its contention that the Appellant had committed the crimes described in the complaint because appellant had knowledge of the facts. Appellant's trial counsel addressed this issue in cross examination and closing, arguing that Appellant could have received the same information from other sources and the state had failed to rule out those alternatives.

{¶21} Appellant had the opportunity to raise the claim of prosecutorial misconduct that he now sets forth in the instant appeal at trial and in a direct appeal. Such claims, therefore, are barred under the doctrine of res judicata. *State v. Perry,* 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967). The Perry court explained the doctrine as follows: "Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment." *Id.* at paragraph 8 of the syllabus. A defendant who was represented

by counsel is barred from raising an issue in a petition for post-conviction relief if the defendant raised or could have raised the issue at trial or on direct appeal. *State v. Szefcyk*, 77 Ohio St.3d 93, 96, 671 N.E.2d 233 (1996).

{¶22} Appellant had the opportunity to raise the issue of the prosecutor's conduct at trial and a direct appeal thereafter, but failed to do so. This portion of the first assignment of error is overruled.

{¶23} Appellant argues his trial counsel was ineffective for failing to withdraw and request appointment of new counsel in the second part of his first assignment of error.

> Where ineffective assistance of counsel is alleged in a petition for postconviction relief, the defendant, in order to secure a hearing on his petition, must proffer evidence which, if believed, would establish not only that his trial counsel had substantially violated at least one of a defense attorney's essential duties to his client but also that said violation was prejudicial to the defendant.

State v. Cole, 2 Ohio St.3d 112, 114, 443 N.E.2d 169 (1982).

{¶24} Appellant's argument is based upon a contention that his trial counsel had the obligation to withdraw from the case so he could be called as a witness and testify as to his conversations with his client regarding the facts of the case, in an effort to rebut the prosecutor's contention that Appellant had foreknowledge of the facts. In support of his argument, Appellant offers his own affidavit describing his conversations with counsel regarding the facts of the case and references to the record of the case.

{¶25} The decision whether to call any witness falls within the purview of trial tactics. *State v. Adkins,* 144 Ohio App.3d 633, 646, 761 N.E.2d 94 (12th Dist.2001); *Lakewood v. Town*, 106 Ohio App.3d 521, 527, 666 N.E.2d 599 (8th Dist.1995). Had

Appellant's counsel testified, it is likely that he would have waived attorney client privilege and subjected himself to prejudicial cross examination by the state. Appellant discloses an example of the potential prejudicial information in his petition when he admits his trial counsel warned him that his prior conviction of possession of drugs, if disclosed to the jury, would have a negative effect.

{¶26} Appellant's trial counsel addressed the state's allegation regarding Appellant's knowledge of facts by cross examination of the officer that identified the recordings and by suggesting to the jury the existence of alternative sources for the information in his closing argument. Trial counsel's failure to withdraw and act as a witness in this case is not evidence of ineffective assistance, but part of a prudent trial strategy and "[w]e will not second-guess the strategic decisions counsel made at trial even though appellate counsel now argue that they would have defended differently." *State v. Post,* 32 Ohio St.3d 380, 388, 513 N.E.2d 754 (1987) as cited in *State v. Mason,* 82 Ohio St.3d 144, 169, 1998-Ohio-370, 694 N.E.2d 932. Consequently, even if the trial court believed Appellant's allegations, he has not provided evidence of a substantial violation of trial counsel's duties.

{¶27} We hold that the trial court did not abuse its discretion by finding that the Appellant's allegations were barred by res judicata or did not provide substantive grounds for relief. The first assignment of error is denied.

II.

{¶28} Appellant revisits his allegation of ineffective assistance of counsel in his second assignment of error, arguing his trial counsel violated an essential duty by

advising him not to testify. "The advice provided by counsel to his or her client regarding the decision to testify is "a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance." *State v. Winchester*, 8th Dist. Cuyahoga No. 79739, 2002–Ohio–2130, ¶ 12, quoting *Hutchins v. Garrison*, 724 F.2d 1425, 1436 (C.A.4, 1983), cert. denied, 464 U.S. 1065, 104 S.Ct. 750, 79 L.Ed.2d 207 (1984). See also, *Jones v. Murray* (C.A.4, 1991), 947 F.2d 1106, 1116, fn. 6. Nonetheless, a claim for ineffective assistance of counsel may be successful if the record demonstrates the defendant's decision whether or not to testify was the result of coercion. *Id,* citing *Lema v. United States*, 987 F.2d 48, 52–53 (1st Cir.1993).

{¶29} Nothing in the record suggests Appellant's decision to not testify was the result of coercion. Appellant has not shown that his decision to not testify was not of his own free will, and he therefore cannot challenge his decision to not testify as ineffective assistance of counsel.

{¶30} Appellant has admitted that at least one reason for counsel's advice was his prior conviction for drug possession. As noted in our review of the first assignment of error, trial counsel employed a strategy that allowed him to attack the evidence without putting his client on the witness stand and exposing to cross examination.

{¶31} Even if the trial court accepted the assertions in Appellant's affidavit as true, the trial court would not have abused its discretion by finding that the allegations did not state substantive grounds for relief as the facts as stated by Appellant do not support a claims of ineffective assistance of counsel.

{¶32} Appellant's second assignment of error is overruled.

III.

{¶33} In his third assignment of error, Appellant claims the trial court failed to include findings of fact and conclusions of law in its entry denying the petition. Findings of fact and conclusions of law are mandatory if the trial court dismissed the petition without hearing as they are necessary "to apprise petitioner of the grounds for the judgment of the trial court and to enable the appellate **1331 courts to properly determine appeals in such a cause.' *Jones v. State*, 8 Ohio St.2d 21, 22, 222 N.E.2d 313 (1966)

> The exercise of findings and conclusions are essential in order to prosecute an appeal. Without them, a petitioner knows no more than he lost and hence is effectively precluded from making a reasoned appeal. In addition, the failure of a trial judge to make the requisite findings prevents any meaningful judicial review, for it is the findings and the conclusions which an appellate court reviews for error.

State v. Mapson, 1 Ohio St.3d 217, 219, 438 N.E.2d 910 (1982).

{¶34} We hold that the journal entry in this case satisfies the policy considerations announced by the Supreme Court of Ohio in *Mapson*, *supra.* The trial court did not label its entry as findings of fact and conclusions of law, but that is what its words import. *State ex rel. Carrion v. Harris*, 40 Ohio St.3d 19, 20, 530 N.E.2d 1330 (1988). We have previously held that "As long as the basis for the court's ruling can be gleamed from the entry, R.C. 2953.21 has been complied with." *State v. Wells*, 5th Dist. Licking No. 94 CA 113, 1995 WL 495308, *1. In *State v. Rouse,* 5th Dist. Muskingum No. CT2013-0043, 2014-Ohio-483, ¶ 20, we found that an entry stating that the court found that the claims

were barred by res judicata was sufficient. The entry in the case sub judice contains that reference as well as a reference to the absence of "meritorious claims" and failure to address the arguments during the direct appeal. Appellant does not claim any prejudice from the alleged failure to provide findings of fact or conclusions of law and it is clear that Appellant was aware of the trial court's rational as he presented argument, on pages 18 and 19 of his brief, that "res judicata is inapplicable here" and that "there are enough facts provided to verify Appellants (sic) claims and to grant relief."

{¶35} Appellant's third assignment of error is denied.

{¶36} The decision of the Muskingum County Court of Common Pleas is affirmed.

By: Baldwin, J.

Gwin, P.J. and

Wise, John, J. concur.

HON. CRAIG R. BALDWIN

HON. W. SCOTT GWIN

HON. JOHN W. WISE

CRB/dw

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff - Appellee

-vs-

MASON SOMERS

Defendant - Appellant

JUDGMENT ENTRY

CASE NO. CT2019-0020

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio is affirmed. Costs are assessed to appellant.

HON. CRAIG R. BALDWIN

HON. W. SCOTT GWIN

HON. JOHN W. WISE

The Supreme Court of Ohio

State of Ohio

v.

Mason Somers

Case No. 2019-1246

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Muskingum County Court of Appeals; No. CT2019-0020)

Maureen O'Connor
Chief Justice

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

MASON SOMERS,

Petitioner, : Case No. 2:19-cv-5633

- vs - Chief Judge Algenon L. Marbley
Magistrate Judge Michael R. Merz

WARDEN,
Noble Correctional Institution,

:

Respondent.

REPORT AND RECOMMENDATIONS

This is a habeas corpus case brought *pro se* by Petitioner Mason Somers to obtain relief from his convictions and sentences in the Common Pleas Court of Muskingum County, Ohio. It is ripe for decision on the merits on the Petition (ECF No. 1), the State Court Record (ECF No. 4), the Warden's Return of Writ (ECF No. 5), and Petitioner's reply (ECF No. 6).

The Magistrate Judge reference in the case was recently transferred to the undersigned to help balance the Magistrate Judge workload in the District (ECF No. 7).

Litigation History

On November 15, 2017, a Muskingum County, Ohio, grand jury indicted Petitioner on one count each of aggravated burglary, aggravated robbery, kidnapping, and felonious assault, each with a firearm specification. After a trial jury found Petitioner guilty on all counts and

Appendix G

specifications, the trial judge merged the aggravated robbery and kidnapping counts and sentenced Somers to a twenty-five year term of imprisonment. With new counsel, Somers appealed to the Ohio Fifth District Court of Appeals, which affirmed his convictions and sentence. *State v. Somers*, No. CT2018-0013, 2018-Ohio-4625 (Ohio App. 5th Dist. Nov. 15, 2018; copy at State Court Record, ECF No. 4, Ex. 16, PageID 114, et seq.). Somers took no appeal to the Supreme Court of Ohio. However, he later filed an application to reopen the direct appeal, asserting ineffective assistance of appellate counsel in the omission of two assignments of error (State Court Record, ECF No. 4, PageID 130-37). The appellate court denied reopening and Somers unsuccessfully sought review in the Supreme Court of Ohio. 156 Ohio St. 3d 1464, 2019-Ohio-2892.

Somers also filed a timely *pro se* petition for post-conviction relief under Ohio Revised Code § 2953.21. After the trial court denied relief, he appealed, again *pro se*, to the Fifth District, which affirmed. *State v. Somers*, No. CT2019-0020, 2019-Ohio-3157 (Ohio App. 5th Dist., Aug. 5, 2019; copy at State Court Record, ECF No. 4, PageID 385, et seq.), appellate jurisdiction declined, 157 Ohio St. 3d 1496, 2019).

On December 20, 2019, Somers filed his Petition in this Court pleading the following grounds for relief:

> **Ground One**: Petitioner's conviction for Aggravated Burglary and Felonious Assault should merge into one sentence. The United States Constitution.
>
> **Supporting Facts:** Petitioner allegedly pointed a firearm at the victim as he directed the victim across the threshold into the victim's home, which is the subject of the Aggravated Burglary and Felonious Assault sentencings. Ohio Law provides for merger of Sentencing when a defendant commits one act that constitute (*sic*) more than one offense. This is for reason that a sentence must comport with the Double Jeopardy Clause of the United States Constitution, however, Petitioner's sentence in this case, did not

merge, ran consecutively, thus he was punished for two acts when his animus and conduct support only one conclusion.

Ground Two: Prejudicial Prosecutor misconduct occurred at Petitioner's trial and Defense Counsel rendered deficient performance in failing to object, recuse himself, and request appointment of co-counsel.

Supporting Facts: Prosecutor acted inappropriately by arguing that Petitioner knew the facts of the case before Petitioner received the state's discovery response and that guilt could be implied from that fact. Prosecutor's comments on the evidence were improper because he knew or should have known that Appellant was informed of the facts prior to and during the November 11, 2017 arraignment hearing.

And, trial counsel, whom (*sic*) also represented Petitioner at the arraignment hearing, had the obligation to object to the prosecutor's false misleading insinuations, to inform that trial court that he was the person to inform Petitioner prior to and during the November 11, 2017 Arraignment Hearing of the facts of the case the prosecutor eludes [sic] to, to request to withdraw from the case and request appointment of co-counsel so he could be called as a witness and testify as to his conversations with his client regarding the facts of the case, in an effort to rebut the prosecutor's contention that Petition had foreknowledge of the facts.

Ground Three: Petitioner was denied the effective assistance of trial counsel when Counsel coerced him not to testify.

Supporting Facts: The prosecutor made false misleading insinuations about Petitioner knowing the facts of the case prior to receiving the December 2017 discovery and since Petitioner did have that knowledge, was the one who committed the offenses. Defense Counsel was the individual who informed Petitioner of the facts of the case prior to receiving the discovery, this it was prudent upon counsel to let the jury know that the prosecutor was not being honest with his evidence with testimony from the Petitioner. Defense Counsel told Petitioner not to testify because the prosecutor had not proven its case, that Petitioner was going home and if he testified the prosecutor would bring up his prior criminal record and Petitioner would be convicted. Coercion at its finest.

(Petition, ECF No. 1, PageID 7-13.)

Analysis

Ground One: Double Jeopardy: Failure to Merge Aggravated Burglary and Felonious Assault

In his First Ground for Relief, Somers alleges that punishing him separately for aggravated burglary and felonious assault violates his rights under the Double Jeopardy Clause of the Fifth Amendment. He claims that his conviction for felonious assault is for pointing a gun at the victim as he "directed the victim across the threshold into the victim's home." Since, he says, this was only one act, he can only be punished once for it, instead of the consecutive sentencing he received.

On direct appeal, the Fifth District recited the following facts which it found from the trial transcript:

> On August 23, 2017, at approximately 10:30 p.m., Ernest Dilley was sitting in his home when there was a knock at his front door. Mr. Dilley opened the door believing it to be his daughter returning home from work, but instead it was a man holding a gun, with a bandana covering part of his face. (T. at 165). Mr. Dilley noticed the man was around six feet tall and had tattoos on his arms and on the hand holding the gun. *Id.* The man charged into the house and pushed Mr. Dilley through the threshold area of the home, into the living room, until Mr. Dilley was on his couch. Id. The man pointed the gun at Mr. Dilley and demanded all of Mr. Dilley's money. *Id.* Mr. Dilley told the intruder his money was at the bank. The intruder then picked up a lid from a glass candy jar and struck Mr. Dilley in the face. (T. at 167). The intruder grabbed Mr. Dilley's cell phone off the coffee table and ran out of the house. Mr. Dilley followed the intruder to the front porch area. Once outside, Mr. Dilley noticed the glass candy dish lid had been dropped in his yard. On top of the broken glass lid was a flashlight.

Somers, 2018-Ohio-4625, at ¶ 14. -4625; copy at State Court Record, ECF No. 4, PageID 115.

Respondent asserts this Ground for Relief is procedurally defaulted in a number of ways:

by failure to contemporaneously object in the trial court, by failure to raise a double jeopardy claim on direct appeal, and by failure to appeal to the Supreme Court of Ohio (Return of Writ, ECF No. 5, PageID 841, *et seq.*).

In his Reply, Somers states he raised this claim in his Application for Reopening under Ohio R.App.P. 26(B) and then argues the merits of the claim (ECF No. 6, PageID 884-88). The purpose of a proceeding under App. R. 26(B) is to raise claims of ineffective assistance of appellate counsel, and that is what Somers claimed he was doing in that proceeding (Application, State Court Record ECF No. 4, PageID 130). One of the assignments of error he asserted should have been raised was the failure to the trial court to merge his convictions for aggravated burglary and felonious assault, the same claim made in the First Ground for Relief. *Id.* at PageID 133. Applying the correct federal standard under *Strickland v. Washington,* 466 U.S. 668 (1984), the Fifth District concluded it was not ineffective assistance of appellate counsel to fail to raise this assignment of error because there would have been no merit in it "due to the fact that a firearm was used in the aggravated burglary, therein [sic] preventing merger with the felonious assault charge." *Somers*, 2019-Ohio-

Presentation of a claim as an omitted assignment of error in a Rule 26(B) Application does not preserve that claim for merits review in federal habeas corpus. An Ohio App. Rule 26(B) application preserves for habeas review only the ineffective assistance of appellate counsel arguments, not the underlying substantive arguments. *Wogenstahl v. Mitchell*, 668 F.3d 307, 338 (6th Cir. 2012), citing *Lott v. Coyle*, 261 F.3d 594, 612 (6th Cir. 2001).

> The *Lott* court explained that permitting an Ohio prisoner to raise a substantive claim in a Rule 26(B) motion "would eviscerate the continued vitality of the procedural default rule; every procedural default could be avoided, and federal court merits review guaranteed, by claims that every act giving rise to every procedural default was the result of constitutionally ineffective counsel."

Id., quoting *Lott*, 261 F.3d at 612

Because an allied offenses claim under Ohio Revised Code § 2941.25 and an associated double jeopardy claim should have been raised at the time of sentencing, Somers procedurally defaulted this claim when he made no objection at sentencing. Because the claim could have been litigated on the fact of the appellate record, Somers again procedurally defaulted by not presenting this claim on direct appeal. Because he never appealed from the Fifth District's direct appeal decision to the Supreme Court of Ohio, his failure constitutes another unexcused procedural default. Therefore, Somers' First Ground for Relief should be dismissed as procedurally defaulted.

Moreover, the claim is without merit as a double jeopardy claim.[1] The test for whether two offenses constitute the same offense for Double Jeopardy purposes is "whether each offense contains an element not contained in the other." *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("*Blockburger* test"). As Petitioner's quotations of the statute show, a person can commit aggravated burglary in Ohio by trespassing in an occupied structure with the purpose of committing an offense if the offender either inflicts or threatens to inflict physical harm or the offender has a firearm. Here the facts as found by court of appeals are that Somers actually inflicted physical harm on the victim by striking him in the fact with the glass candy jar lid. The state thus did not have to prove the presence of a firearm to show aggravated burglary. Somers' First Ground for Relief is therefore without merit.

Ground Two: Prosecutorial Misconduct and Ineffective Assistance of Trial Counsel

[1] Whether Ohio Revised Code § 2941.25 provides more protection against multiple convictions or punishments than the Double Jeopardy Clause, and therefore might provide protection here, is a question of Ohio state law only, on which this Court is bound by the conclusions of the Fifth District. *Bradshaw v. Richey*, 546 U.S. 74 (2005).

In his Second Ground for Relief, Somers argues the prosecutor committed misconduct by arguing to the jury that Somers knew many of the facts of the crime before he received discovery and therefore must have been the perpetrator. He further accuses his trial attorney of ineffective assistance for not recusing himself and testifying as to how Somers knew those facts.

Although the prosecutor's allegedly improper comments were part of the trial transcript, Somers did not raise this claim on direct appeal. When he later presented it in post-conviction, the Fifth District held that it was barred by the Ohio criminal doctrine of *res judicata* which requires that issues must be raised and litigated on direct appeal if they can be shown from the face of the record.

> {¶ 20} The alleged prosecutorial conduct was part of the record in this case. The prosecutor referenced Appellant's foreknowledge in his opening and closing statements, contending that Appellant had information about the crime long before the state responded to Appellant's discovery request. The state presented two recorded conversations of Appellant in support of its contention that the Appellant had committed the crimes described in the complaint because appellant had knowledge of the facts. Appellant's trial counsel addressed this issue in cross examination and closing, arguing that Appellant could have received the same information from other sources and the state had failed to rule out those alternatives.
>
> {¶ 21} Appellant had the opportunity to raise the claim of prosecutorial misconduct that he now sets forth in the instant appeal at trial and in a direct appeal. Such claims, therefore, are barred under the doctrine of res judicata. *State v. Perry,* 10 Ohio St.2d 175, 180, 226 N.E.2d 104 (1967). The *Perry* court explained the doctrine as follows: "Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment." *Id.* at paragraph 8 of the syllabus. A defendant who was represented by counsel is barred from raising an issue in a petition for post-conviction relief if the defendant raised or could have raised the

> issue at trial or on direct appeal. *State v. Szefcyk,* 77 Ohio St. 3d 93, 96, 1996-Ohio-337, 671 N.E.2d 233 (1996).
>
> {¶ 22} Appellant had the opportunity to raise the issue of the prosecutor's conduct at trial and a direct appeal thereafter, but failed to do so. This portion of the first assignment of error is overruled.

Somers, 2019-Ohio-3157.

Ohio's doctrine of *res judicata* in criminal cases, enunciated in *Perry,* 10 Ohio St. 2d 175 (1967), is an adequate and independent state ground of decision. *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007). The Ohio courts have consistently enforced the rule. *State v. Cole*, 2 Ohio St. 3d 112, 113-14 (1982); *State v. Ishmail*, 67 Ohio St. 2d 16, 18 (1981).

However, an incorrect application of a state *res judicata* rule does not constitute reliance on an adequate and independent state ground. *Wogenstahl v. Mitchell*, 668 F.3d 307, 341 (6th Cir. 2012), citing *Richey v. Bradshaw*, 498 F.3d 344, 359 (6th Cir. 2007); *Durr v. Mitchell*, 487 F.3d 423, 434-35 (6th Cir. 2007). Moreover, "presentation of competent, relevant, and material evidence *dehors* the record may defeat the application of *res judicata*." *State v. Lawson*, 103 Ohio App. 3d 307, 315 (12th Dist. 1995), citing *State v. Smith*, 17 Ohio St. 3d 98, 101 n.1 (1985).

Somers attempts to defeat the application of *res judicata* here by claiming that he did rely on evidence outside the appellate record to prove this claim in post-conviction, to wit, a transcript of the November 11, 2017, arraignment hearing which he claims he had to purchase separately. (Reply, ECF No. 6, PageID 898.) This argument misunderstands what it means to be "outside the record." The transcript of the arraignment is attached to Somers' Petition for Post-Conviction Relief (State Court Record, ECF No. 4, PageID 216, *et seq.*_ and certified by the court reporter who recorded the proceedings when they occurred.[2] If Somers had raised this claim on direct

[2] The copy in the State Court Record as furnished to this Court does not have Ms. Tahyi's signature (State Court Record, ECF No. 4, PageID 221). The Magistrate Judge assumes the regularity of the transcript because the state

appeal and had needed this portion of the record transcribed to prove the relevant assignment of error, it would have been available to him and his appellate counsel. In other words, the arraignment happened "on the record" in the Court of Common Pleas, but that portion of the record was not transcribed for the direct appeal because it was not needed in support of any assigned error.

Somers also filed his own Affidavit in support of his post-conviction petition (Somers Affidavit of February 11, 2019, State Court Record, ECF No. 4, PageID 212-15). In it he attempts to explain how he knew the facts of the crime when he made statements referred to in the Affidavit:

> ¶ 16 Prosecutor Litle solicited testimony from Detective Brad Shawger that I made a phone call on November 22, 2017 and had a visit on November 26, 2017 at which times I made comments about the case before receiving discovery, thus having knowledge about the case before I should have;
>
> ¶ 19 After the Prosecutor rested its case, I told Attorney Keith Edwards that I wanted to testify because it needed to be cleared up as to how I knew about the case prior to November 22, 2017;
>
> ¶ 25 Just based upon the November 11, 2017 Arraignment Hearing Transcript, Prosecutor Litle knew or should have known that I was given some of the facts of the case by Assistant Prosecutor Gerald Anderson and based upon that knowledge knew his statements to the jury were untrue, false and misleading[.]

Id. at PageID 213, 214. Thus the prosecutor's comments that Somers regards as misconduct happened on the record at trial.

Assistant County Prosecutor Anderson, in opposing Mr. Edwards' motion for bond reduction pointed out that Somers had prior felony drug convictions. He continued:

> The facts of this case, it's a -- he breaks in. He's assaulting this individual. He -- while leaving -- he has a firearm with him. While leaving, he drops a-flashlight that has his DNA on it. The evidence is very strong that this is the individual. It's a very serious crime.

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courts did not question it.

> For those reasons, the State would believe that bond should be continued as previously set.

(Arraignment Tr., State Court Record, ECF No. 4, PageID 220).

> The state presented two audio recordings of Appellant from a phone call and a visit. In the recordings, Appellant comments on the facts of the case and concludes that he should get a "sweet deal" as a result of the lack of any egregious actions during the offense. Appellee argued the statements were made prior to the state responding to Appellant's discovery requests, suggesting that Appellant had knowledge of the facts that only the perpetrator would know. Appellee's trial counsel cross-examined the officer who introduced the tapes, suggesting during those questions and in his closing argument that there were alternative sources for the information the Appellant described, such as the complaint, trial counsel, or other individuals. Appellant's trial counsel chose not to have his client testify and avoided subjecting him to cross examination, which, according to Appellant's brief, would disclose a prior drug offense and, based upon the record, may have been of little material assistance.

Somers, 2019-Ohio-3157, at ¶ 7. On his direct appeal, he argued these recordings should have been excluded because they were hearsay and trial counsel was ineffective for failing to object to them, but the Fifth District held they were admissible under Ohio R.Evid. 801(D)(2) as admissions of a party opponent. *Somers*, 2018-Ohio-4625, at ¶¶ 48-49.

At trial, upon direct examination of Detective Brad Shawger, the State was able to establish that the discovery letter conveying Shawger's file to defense had gone out on December 6, 2017 (Tr., State Court Record, ECF No. 4-1, PageID 693). Shawger reviewed a recording of a telephone conversation between Somers and his brother that occurred November 22, 2017, in which Somers discussed his prior possession of a "little key chain flashlight." *Id.* at 694-95. Then on November 26, 2017, Somers was visited by Autumn, "the mother of Somers' children." *Id.* at PageID 695. During that conversation. Somers told Autumn "they better offer me a sweet deal. . . [because] there was no forced entry, the victim wasn't shot . . . [and n]othing was taken." *Id.* at PageID 696.

These recorded statements of Petitioner evince a much more detailed knowledge of the offense than was conveyed by Assistant Prosecutor Anderson at the arraignment. He mentions a dropped flashlight with Somers' DNA on it, but he gives no further description of the flashlight, while Somers' description is much more complete – it's a key chain flashlight that Somers used to have. Anderson mentions the assault, but he doesn't say the victim wasn't shot. He doesn't say there was no forced entry. And he doesn't say nothing was taken. All of those are true facts about the crime which would have been known by the perpetrator. Somers has offered no proof that his attorney would have known those facts before discovery was provided December 6, 2017.

Because Somers was recorded describing facts about the crime that he had no way of knowing except by being the perpetrator, the prosecutor's comments to that effect were not false or misleading to the jury. Somers' claim of prosecutorial misconduct in Ground Two is completely without merit.

Because the claim is without merit, it was not ineffective assistance of trial counsel to fail to object to the prosecutor's comments. Instead, defense counsel cross-examined the detective and suggested in argument other sources from which Somers might have obtained this information, The jury did not accept the argument, but determination of what witnesses to believe was their province.

Somers' claim that his trial attorney was the source of these details about the crime before discovery was provided is completely unsubstantiated. He provided no affidavit from Mr. Edwards to that effect in support of his post-conviction relief petition. In fact, in his own Affidavit he never details what facts his lawyer gave him off the record about the crime.

Ground for Relief Two should be dismissed.

Ground Three: Ineffective Assistance of Trial Counsel

In his Third Ground for Relief, Somers asserts he received ineffective assistance of trial counsel when his attorney "coerced" him not to testify. The alleged coercion consisted in advising Petitioner not to testify because he was "going home today" "and if you testify, the prior possession charges will surely convict you." (Reply, ECF No. 6, PageID 904-05). Somers asserts this constituted "psychological" or "mental coercion." *Id.* at PageID 905.

The record shows that when the trial judge called for defendant to call his first witness, the defense rested without calling any witnesses (Tr., ECF No. 4-1, PageID 710). Somers did nothing to make the trial judge aware that he wanted to testify, which was of course his right.

The record does not demonstrate any coercion on counsel's part. Given the evidence, counsel's prediction of acquittal was sanguine, but the advice to a convicted felon not to testify in his own behalf is extremely common advice under these circumstances. Somers opines that would not have mattered, that the convictions were unrelated, but the vigor with which defense counsel regularly fight admission of prior convictions seriously undercuts that claim. Any defense attorney who advised a previously-convicted defendant to take the stand would probably have to defend against an ineffective assistance of trial counsel claim. And if Somers had insisted on testifying, Edwards would almost certainly have insisted on putting on the record his advice that Somers should not. Of course, any witness is subject to cross-examination about prior felony convictions, so they certainly would have come up.

Ground Three should therefore be dismissed.

Conclusion

Based on the foregoing analysis, it is respectfully recommended that the Petition herein be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Petitioner be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

March 10, 2020.

s/ *Michael R. Merz*
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal.

**AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

JUDGMENT IN CIVIL CASE

MASON SOMERS,

Petitioner,

Case No. 2:19-cv-5633

- vs -

Chief Judge Algenon L. Marbley
Magistrate Judge Michael R. Merz

WARDEN,
Noble Correctional Institution,

Respondent.

[] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] **Decision by Court.** This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the June 23, 2020 Order, the Court **ADOPTED** the Report and Recommendation; finding the Objections not well-taken; DISMISSING WITH PREJUDICE the Petition.

Date: June 23, 2020

Richard W. Nagel, Clerk

s/Betty L. Clark
Betty L. Clark/Deputy Clerk

Appendix H

2941.25 Allied offenses of similar import - multiple counts.

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

Effective Date: 01-01-1974.

2953.21 Post convicti relief petition.

(A)

(1)

(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, any person who has been convicted of a criminal offense and sentenced to death and who claims that there was a denial or infringement of the person's rights under either of those Constitutions that creates a reasonable probability of an altered verdict, and any person who has been convicted of a criminal offense that is a felony and who is an offender for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(c) As used in divisions (A)(1)(a) and (b) of this section, "former section 2953.82 of the Revised Code" means section 2953.82 of the Revised Code as it existed prior to July 6, 2010.

(d) At any time in conjunction with the filing of a petition for postconviction relief under division (A) of this section by a person who has been sentenced to death, or with the litigation of a petition so filed, the court, for good cause shown, may authorize the petitioner in seeking the postconviction relief and the prosecuting attorney of the county served by the court in defending the proceeding, to take depositions and to issue subpoenas and subpoenas duces tecum in accordance with divisions (A)(1)(d), (A)(1)(e), and (C) of this section, and to any other form of discovery as in a civil action that the court in its discretion permits. The court may limit the extent of discovery under this division. In addition to discovery that is relevant to the claim and was available under Criminal Rule 16 through conclusion of the original criminal trial, the court, for good cause shown, may authorize the petitioner or prosecuting attorney to take depositions and issue subpoenas and subpoenas duces tecum in either of the following circumstances:

(i) For any witness who testified at trial or who was disclosed by the state prior to trial, except as otherwise provided in this division, the petitioner or prosecuting attorney shows clear and convincing evidence that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict. This division does not apply if the witness was unavailable for trial or would not voluntarily be interviewed by the defendant or prosecuting attorney.

(ii) For any witness with respect to whom division (A)(1)(d)(i) of this section does not apply, the petitioner or prosecuting attorney shows good cause that the witness is material and that a deposition of the witness or the

issuing of a subpoena or subpoen ces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable pr bility of an altered verdict.

(e) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1)(d) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, within ten days after the docketing of the request, or within any other time that the court sets for good cause shown, the prosecuting attorney shall respond by answer or motion to the petitioner's request or the petitioner shall respond by answer or motion to the prosecuting attorney's request, whichever is applicable.

(f) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1)(d) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, upon motion by the petitioner, the prosecuting attorney, or the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from oppression or undue burden or expense, including but not limited to the orders described in divisions (A)(1)(g)(i) to (viii) of this section. The court also may make any such order if, in its discretion, it determines that the discovery sought would be irrelevant to the claims made in the petition; and if the court makes any such order on that basis, it shall explain in the order the reasons why the discovery would be irrelevant.

(g) If a petitioner, prosecuting attorney, or person from whom discovery is sought makes a motion for an order under division (A)(1)(f) of this section and the order is denied in whole or in part, the court, on terms and conditions as are just, may order that any party or person provide or permit discovery as described in division (A)(1)(d) of this section. The provisions of Civil Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion, except that in no case shall a court require a petitioner who is indigent to pay expenses under those provisions.

Before any person moves for an order under division (A)(1)(f) of this section, that person shall make a reasonable effort to resolve the matter through discussion with the petitioner or prosecuting attorney seeking discovery. A motion for an order under division (A)(1)(f) of this section shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph.

The orders that may be made under division (A)(1)(f) of this section include, but are not limited to, any of the following:

(i) That the discovery not be had;

(ii) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(iii) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(iv) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;

(v) That discovery be conducted with no one present except persons designated by the court;

(vi) That a deposition after being sealed be opened only by order of the court;

(vii) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(viii) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(h) Any postconviction discovery authorized under division (A)(1)(d) of this section shall be completed not later than eighteen months after the start of the discovery proceedings unless, for good cause shown, the court

extends that period for completing the discovery.

(i) Nothing in division (A)(1)(d) of this section authorizes, or shall be construed as authorizing, the relitigation, or discovery in support of relitigation, of any matter barred by the doctrine of res judicata.

(j) Division (A)(1) of this section does not apply to any person who has been convicted of a criminal offense and sentenced to death and who has unsuccessfully raised the same claims in a petition for postconviction relief.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(6) Notwithstanding any law or court rule to the contrary, there is no limit on the number of pages in, or on the length of, a petition filed under division (A) of this section by a person who has been sentenced to death. If any court rule specifies a limit on the number of pages in, or on the length of, a petition filed under division (A) of this section or on a prosecuting attorney's response to such a petition by answer or motion and a person who has been sentenced to death files a petition that exceeds the limit specified for the petition, the prosecuting attorney may respond by an answer or motion that exceeds the limit specified for the response.

(B) The clerk of the court in which the petition for postconviction relief and, if applicable, a request for postconviction discovery described in division (A)(1)(d) of this section is filed shall docket the petition and the request and bring them promptly to the attention of the court. The clerk of the court in which the petition for postconviction relief and, if applicable, a request for postconviction discovery described in division (A)(1)(d) of this section is filed immediately shall forward a copy of the petition and a copy of the request if filed by the petitioner to the prosecuting attorney of the county served by the court. If the request for postconviction discovery is filed by the prosecuting attorney, the clerk of the court immediately shall forward a copy of the request to the petitioner or the petitioner's counsel.

(C) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests a deposition or the prosecuting attorney in the case requests a deposition, and if the court grants the request under division (A)(1)(d) of this section, the court shall notify the petitioner or the petitioner's counsel and the prosecuting attorney. The deposition shall be conducted pursuant to divisions (B), (D), and (E) of Criminal Rule 15. Notwithstanding division (C) of Criminal Rule 15, the petitioner is not entitled to attend the deposition. The prosecuting attorney shall be permitted to attend and participate in any deposition.

(D) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the dismissal of the petition and of each claim it contains.

(E) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Division (A)(6) of this section applies with respect to the prosecuting attorney's response. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(F) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(G) A petitioner who files a petition under division (A) of this section may amend the petition as follows:

(1) If the petition was filed by a person who has been sentenced to death, at any time that is not later than one hundred eighty days after the petition is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

(2) If division (G)(1) of this section does not apply, at any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

(3) The petitioner may amend the petition with leave of court at any time after the expiration of the applicable period specified in division (G)(1) or (2) of this section.

(H) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the denial of relief on the petition and of each claim it contains. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (F) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. If the petitioner has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the finding of grounds for granting the relief, with respect to each claim contained in the petition. The court also may make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (F) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(I) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(J)

(1) If a person sentenced to death intends to file a petition under this section the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (J)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (J)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (J) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (J)(2) of this section.

(K) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

Amended by 131st General Assembly File No. TBD, SB 139, §1, eff. 4/6/2017.

Amended by 130th General Assembly File No. TBD, HB 663, §1, eff. 3/23/2015.

Amended by 128th General AssemblyFile No.30, SB 77, §1, eff. 7/6/2010.

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