

No. 21-6797

ORIGINAL

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

In re LAWRENCE EARL WILSON - PETITIONER

VS.

MALCOM HEARD, WARDEN - RESPONDENT

ON PETITION FOR A WRIT OF HABEAS CORPUS

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO
THE MONTGOMERY COUNTY, OHIO COURT OF APPEALS

PETITION FOR WRIT OF HABEAS CORPUS

LAWRENCE EARL WILSON

INMATE NO. A349229

FRANKLIN MEDICAL CENTER

1990 HARMON AVENUE

COLUMBUS, OHIO 43223

QUESTIONS PRESENTED

1. WHETHER, A PERSON WHO HAS BEEN DENIED THE ASSISTANCE OF COUNSEL AT A CRITICAL STAGE OF THE TRIAL PROCEEDINGS AND RECEIVED THE INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE FIRST APPEAL AS OF RIGHT HAS BEEN UNCONSTITUTIONALLY DEPRIVED OF HIS LIBERTY?
2. WHETHER, THIS CASE IS AN EXCEPTIONAL CASE WHERE THE EVIDENCE WEIGHS HEAVILY AGAINST THE CONVICTION?
3. WHETHER, THE PETITIONER IS ENTITLED TO EQUITABLE TOLLING?
4. DOES THE DOCTRINE OF RES JUDICATA APPLY IN THIS CASE?

LIST OF PARTIES

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

RELATED CASES

- *State v. Wilson*, No. 96-CR-1019, Court of Common Pleas, Montgomery County, Ohio. Jury Trial-Judgment entered July 24, 1997.
- *State v. Wilson*, C.A. Nos. 16728 & 16752, Court of Appeals, Montgomery County, Ohio, Appeal as of Right, Judgment entered August 12, 1998
- *State v. Wilson*, C.A. Nos. 16728 & 16752, Court of Appeals, Montgomery County, Ohio, Application for Reopening, Judgment entered October 6, 1998.
- *State v. Wilson*, No. 98-2453, Supreme Court of Ohio, Appeal, Judgment entered February 3, 1999.
- *State v. Wilson*, C.A. No. 17515, Court of Appeals, Montgomery County, Ohio, Appeal of Motion for New Trial, Judgment entered March 31, 1999.
- *State ex rel. Wilson v. Sunderland*, No. 99-1720, Supreme Court of Ohio, Writ of Mandamus for Trial Transcript, Judgment entered January 19, 2000.
- *Wilson v. Hurt*, No. C-3-99-128, U.S. District Court for the Southern District of Ohio, Petition for writ of habeas corpus, Report and Recommendation entered August 9, 1999. Judgment entered denying writ January 3, 2000.
- *Wilson v. Hurt*, No. 00-3165, U.S. Court of Appeals for the Sixth Circuit, Petition for writ of habeas corpus Affirmed, Judgment entered February 6, 2002.
- *In re Wilson*, Supreme Court of the United States, Petition for writ of certiorari, returned by Clerk due to missing Magistrate Report and Recommendation, given 60 days to correct and resubmit. Unable due to prison interference. May 1, 2002.
- *Wilson v. Southeastern Corr. Inst.* No. 2001-12088AD, Loss or Destruction of legal mail and materials. Judgment rendered for Plaintiff, July 1, 2003.
- *In re Wilson*, No. 02-4430, United States Court of Appeals for the Sixth Circuit, Petition for Second or Successive writ of habeas corpus. Denied May 14, 2003.

- *In re Wilson*, No. 06-3263, United States Court of Appeals for the Sixth Circuit, Petition for Second or Successive writ of habeas corpus. Denied October 4, 2006.
- *State v. Wilson*, No. 96-CR-1019, Court of Common Pleas, Montgomery County, Ohio. Post-conviction petition, Judgment entered January 13, 2005.
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- *State v. Wilson*, No. 2005-0908, Supreme Court of Ohio, Appeal not accepted for review. Judgment entered August 10, 2005.
- *Wilson v. Ohio*, No. 05-7374, Supreme Court of the United States, Petition for writ of certiorari, Denied, January 9, 2006.
- *State v. Wilson*, No. 96-CR-1019, Court of Common Pleas, Montgomery County, Ohio. Motion to vacate Judgment, Dismissed, entered July , 2006.
- *State v. Wilson*, C.A. No. 21738, Court of Appeals, Montgomery County, Ohio, Appeal of Motion to vacate, Judgment entered September 21, 2007.
- *State v. Wilson*, No. 2007-2037, Supreme Court of Ohio, Appeal not accepted for review. Judgment entered February 20, 2008.
- *State v. Wilson*, No. 96-CR-1019, Court of Common Pleas, Montgomery County, Ohio. Public Records Request, Denied. Judgment January 9, 2009.
- *State v. Wilson*, C.A. No. 23247, Court of Appeals, Montgomery County, Ohio, Appeal of Public Record Request, Judgment entered December 30, 2009.
- *State v. Wilson*, No. 2010-0163, Supreme Court of Ohio, Appeal Public Records Request not accepted for review. Judgment entered March 24, 2010.
- *State ex rel. Wilson v. McGee*, C.A. No. 23333, Court of Appeals, Montgomery County, Ohio, Writ of Mandamus to correct void sentence, Dismissed. Judgment entered May 27, 2009.
- *State ex rel. Wilson v. McGee*, No. 2009-1038, Supreme Court of Ohio, Appeal writ of mandamus, void sentence, Decided October 8, 2009.
- *State ex rel. Wilson v. McGee*, No. 2009-1038, Supreme Court of Ohio, Motion for relief from judgment. Decided January 27, 2010.

- *Wilson v. Hudson*, Case No. 10-CA-13 Court of Appeals, Pickaway County, State petition for writ of habeas corpus, Denied. May 28, 2010.
- *Wilson v. Hudson*, No. 2010-1054, Supreme Court of Ohio, Appeal, denial of writ, Affirmed. Judgment entered October 20, 2010.
- *Wilson v. Collins*, Case No. 09CVH11-16823, Court of Common Pleas, Franklin County, Ohio. Motion for Declaratory Judgment and Injunctive Relief. Summary Judgment granted for defendants.
- *Wilson v. Collins*, C.A. No. 10AP-511, Court of Appeals, Franklin County, Ohio, Appeal of Declaratory Judgment, Affirmed. December 30, 2010.
- *State v. Wilson*, No. 96-CR-1019, Court of Common Pleas, Montgomery County, Ohio. Motion to Correct Void Sentence. Judgment October 27, 2010.
- *State v. Wilson*, C.A. No. 24352, Court of Appeals, Montgomery County, Ohio, Appeal of Motion to Correct Void Sentence, Judgment November 18, 2011.
- *State v. Wilson*, C.A. No. 24462, Court of Appeals, Montgomery County, Ohio, Motion for Reconsideration, Judgment entered December 8, 2011.
- *State v. Wilson*, No. 2012-0091, Supreme Court of Ohio, Appeal from denial of Notice of Appeal of New Judgment. Not accepted for review. Judgment entered March 21, 2012.
- *Wilson v. Ohio*, No. 11-10959, Supreme Court of the United States, Petition for writ of certiorari, Denied. Decided October 12, 2012.
- *In re Wilson*, No. 13-3192, United States Court of Appeals for the Sixth Circuit, Petition for Second or Successive writ of habeas corpus. Denied August 13, 2013.
- *State v. Wilson*, C.A. Nos. 16728 & 16752 Court of Appeals, Montgomery County, Ohio, Motion for Relief from the Judgment and Application for delayed reconsideration for reopening the first appeal as of right. Overruled, Judgment entered June 3, 2014.
- *In re Wilson*, No. 13-10510, Supreme Court of the United States, Petition for writ of habeas corpus, Denied. Decided October 6, 2014.
- *State v. Wilson*, C.A. Nos. 16728 & 16752 Court of Appeals, Montgomery County, Ohio, Application for Reconsideration and En Banc Consideration. Overruled, Judgment entered May 6, 2015.

- *State v. Wilson*, No. 2015-0962, Supreme Court of Ohio, Appeal from denial of reconsideration and en banc consideration. Not accepted for review. Judgment entered August 26, 2015.
- *State ex rel. Wilson v. Robinson*, No. 2016-0409, Supreme Court of Ohio, Petition for writ of habeas corpus. Dismissed. Judgment July 27, 2016.
- *State ex rel. Wilson v. Robinson*, No. 2016-0409, Supreme Court of Ohio, Motion for reconsideration. Denied. Judgment entered October 5, 2016.
- *State v. Wilson*, No. 96-CR-1019, Court of Common Pleas, Montgomery County, Ohio. Motion to Vacate Judgment and Sentence. Denied. Judgment entered January 25 & 30, 2017.
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- *State ex rel. Wilson v. Mohr*, No. 2018-0804, Supreme Court of Ohio, Writ of mandamus (parole consideration) Dismissed. Judgment September 26, 2018.
- *Wilson v. Ohio*, No. 18-5466, Supreme Court of the United States, Petition for writ of certiorari, Denied. Decided October 1, 2018.
- *In re Wilson*, No. 19-3310, United States Court of Appeals for the Sixth Circuit, Petition for Second or Successive writ of habeas corpus. Denied as to first, second and fifth claims and Denied as unnecessary as to third and fourth claims. Judgment entered October 11, 2019.
- *Wilson v. Richards*, No. 3:19-cv-266, U.S. District Court for the Southern District of Ohio, Stay of Proceedings of petition for writ of habeas corpus U.S.C. § 2254, Decided August 30, 2019.
- *Wilson v. Richards*, No. 3:19-cv-266, U.S. District Court for the Southern District of Ohio, Stay of Proceedings vacated, Order to file amended petition. Decided, October 15, 2019.
- *Wilson v. Richards*, No. 3:19-cv-266, U.S. District Court for the Southern District of Ohio, Motion for release on bail. Denied. Judgment May 8, 2020.

- *Wilson v. Richards*, No.3:19-cv-266, U.S. District Court for the Southern District of Ohio, Motion for extension of time to appeal denial of motion for bail. Time extended. Decided July 18, 2020.
- *Wilson v. Richards*, No.3:19-cv-266, U.S. District Court for the Southern District of Ohio, Motion for expansion of the record. Denied. Decided August 19, 2020.
- *Wilson v. Richards*, No.3:19-cv-266, U.S. District Court for the Southern District of Ohio, Report and Recommendations. Decided September 16, 2020.
- *Wilson v. Richards*, No.3:19-cv-266, U.S. District Court for the Southern District of Ohio, Decision and Order. Decided October 30, 2020.
- *In re Wilson*, No. 19-3310, United States Court of Appeals for the Sixth Circuit, Motion for relief from the judgment. Received by the Clerk January 21, 2021 and returned to petitioner. Received February 19, 2021.
- *In re Wilson*, Supreme Court of the United States. Motion for leave to file petition for writ of habeas corpus; Brief in support of motion for leave to file petition for writ of habeas corpus; and Appendix, pursuant to Supreme Court Rule 20, received by the Clerk September 28, 2021, returned to petitioner contending failure to comply with Court Rules. October 5, 2021.
- *In re Wilson*, Supreme Court of the United States. Petition for writ of habeas corpus pursuant to *U.S.C.S. Supreme Court Rule 20* filed December , 2021.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF HABEAS CORPUS

Petitioner respectfully prays a writ of habeas corpus issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals is reported at *In re Wilson, 2019 U.S. App. LEXIS 30590*; and the opinion of the United States court of appeals is reported at *Wilson v. Hurt, 29 Fed. Appx. 324, 2002 U.S. App. LEXIS 2092*.

The opinion of the United States District Court appears at **Appendix I** to the petition and is unreported and; the opinion of the United States District Court is reported at *Wilson v. Richards, 2020 U.S. Dist. LEXIS 203384*

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at **Appendix F** to the petition and is unreported and; the opinion of the highest state court to review the merits appears at **Appendix J** to the petition and is unreported, and; the highest state court to review the merits appears at *State ex rel. Wilson v. Mohr, 2018 Ohio LEXIS 2291*.

I. JURISDICTION

The Supreme Court has jurisdiction to issue a writ of habeas corpus pursuant to: 28 U.S.C.S. § 1651(a); and 28 U.S.C.S. § 2241(c)(3), as Lawrence Earl Wilson, Petitioner, pro se, contends He is in custody in violation of the Constitution or laws or treaties of the United States; and 28 U.S.C.S. § 2242, whereas Wilson has twice moved the United States District Court for the Southern District of Ohio and repeatedly moved the United States Court of Appeals for the Sixth Circuit and now relies on U.S.C.S. Supreme Court Rule 20. The relief sought is from the judgment of a state court, the petition sets out specifically how and where Wilson has exhausted available remedies in the state courts and comes within the provisions of 28 U.S.C. § 2254(b). Exceptional circumstances warrant the exercise of this Court's discretionary powers, adequate relief cannot be obtained in any other form or from any other court. The premise underlying Wilson's argument challenges his conviction and right of appeal. It is beyond dispute that convictions must be obtained in a manner that comports with the Federal Constitution. Wilsons' constitutional right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1 Section 10 of the Ohio Constitution was denied. Wilson was entitled to effective assistance as defined in Strickland v. Washington, 466 U.S. at 687-88, which was violated at trial and on direct appeal, as set forth in Evitts v. Lucey, 469 U.S. at 396, and the judgments of the Ohio Appellate Court, Ohio Supreme Court and the United States Court of Appeals for the Sixth Circuit refusing to set aside his conviction and sentence "is

contrary to, and involves an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," within the meaning of 28 U.S.C. § 2254(d)(1) & (2).

II. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

USCS Const. Amend. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

USCS Const. Amend. 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

USCS Const. Amend. 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

USCS Const. Amend. 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III. STATEMENT OF THE CASE

A. Procedural Posture:

ADEQUATE RELIEF CANNOT BE OBTAINED IN ANY OTHER FORM OR FROM ANY OTHER COURT.

The procedural history of this case in both state and federal courts is long and complicated, but integral to an understanding of the clear violations of Due Process and Equal Protection of the laws and the denial of basic constitutional rights that have taken place in this case. Lawrence Earl Wilson, Petitioner, *pro se*, (hereinafter “Wilson”) incarcerated in the Ohio Department of Rehabilitation and Corrections (“ODRC”) has for nearly two and one half decades unsuccessfully pursued every avenue open to him through state and federal actions to prove that his conviction is unlawful and his imprisonment illegal. Wilson charges that the State holds him in confinement without Due Process of law in violation of the Sixth and Fourteenth Amendments of the Constitution of the United States and Article I, Section 10 of the Constitution of Ohio, and contends that the State has deprived him of his liberty without Due Process of law and failed to provide a proper corrective judicial process by which a conviction so obtained may be set aside. In support of these charges Wilson submits a chronological history of the trial, appeals and other judicial proceedings connected with his conviction. The controlling constitutional issue the Courts were required to reach is whether Wilson received the Ineffective Assistance of Appellate Counsel (“IAAC”) in violation of the *Due Process Clause* on his first appeal as of right as set forth by this Court in Evitts v. Lucey, 469 U.S. 387, 396, after being denied the Sixth Amendment right to the effective assistance of

trial counsel as set forth in *Farella v. Cal.*, 422 U.S. 806, 835. These issues were pursued in the state and federal courts at the proper times and in the appropriate courts. Each Court has “unreasonably” viewed the facts and the law, allowing an extreme malfunction in the Ohio criminal justice system to continue. Exceptional circumstances warrant the exercise of this Court’s discretionary powers. Adequate relief cannot be obtained in any other form or from any other Court. Wilson insist that he is innocent of the offense of conviction and is in custody pursuant to the judgment of a state court in violation of the constitution or laws or treaties of the United States and that the adjudication of the claim of IAAC in both state and federal courts has (1) resulted in a decision that is contrary to, and involves an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; and (2) resulted in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the state and federal proceedings. In this case, the United States Court of Appeals for the Sixth Circuit and the Ohio Second District Court of Appeals have entered decisions which conflict with their own decisions and the decisions of other State and Federal Court’s on the same matter and have decided the federal questions in a way that conflicts with the decisions of state courts of last resort, and have so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by lower courts as to call for an exercise of this Court’s supervisory power. Wilson contends that he was denied the Federal Constitution’s *Sixth Amendment* right to the effective assistance of counsel constitutionally required for

trial and appeal, and that attorney error is the objective external factor providing cause for excusing procedural default. *Coleman v. Thompson*, 501 U.S. 722, 750. Constitutionally IAAC is imputed to the State. Wilson contends this rule of law was clearly established at the time his state-court conviction became final and the merits of his claims are squarely governed by the Courts holdings in *Strickland v. Washington*, 466 U.S. 668; *United States v. Cronic*, 466 U.S. 648; *Faretta v. Cali.*, 422 U.S. 806; and *Evitts v. Lucey*, 469 U.S. 387. This case demonstrates that the IAAC renders a first appeal as of right no more than a meaningless ritual.

B. Trial: On April 4th 1996 Wilson was charged with one count of engaging in sexual conduct with a person less than thirteen years of age, by force or threat of force, in violation of Ohio Revised Code (“R.C.”) § 2907.02(A)(1)(b) & (B) and one count of having sexual contact in violation of R.C. § 2907.05(A)(4) in Montgomery County, Ohio. (**Appendix “Appx.”A**) A jury found Wilson guilty of rape, without force or threat of force, and not guilty of gross sexual imposition. Wilson was subsequently sentenced to serve not less than nine (9) nor more than twenty-five (25) years in prison. (**Appx. B,C,D**).

C. Direct Appeal: Wilson, with new court-appointed-appellant-counsel appealed his conviction and sentence, raising three assignments of error, which were overruled. In addition to the merit brief his attorney filed, Wilson filed a *pro se* “Supplement to Brief for Appellant” presenting additional assignments of error, which were stricken from the record of the proceeding and not considered in the judgment from which Wilson's appeal was taken. The court held “If Wilson believes

that his appellate counsel was ineffective for failing to raise the issues that he has attempted to present, Wilson may file an App.R. 26(B) application for reopening."

State v. Wilson, 1998 Ohio App. LEXIS 4433. Affirmed. Wilson contends that he was denied due process and equal protection when his supplemental appellant brief was stricken from the record of his first appeal as of right. Appeal to the Ohio Supreme Court was dismissed by the Clerk as having been filed one day late.

D. Motion for New Trial: On March 5, 1998, while his direct appeal was pending in the appellate court Wilson filed a Motion for New Trial, along with an Application for Order Allowing Delayed Motion for New Trial based on newly discovered evidence, irregularity in the proceedings, and misconduct of the prosecuting attorney and witnesses for the state. In support of his delayed motion for new trial, Wilson attached affidavits of the child victim, and her mother, dated January 26, 1998 and February 24, 1998. The child stated in her affidavit that "parts of my testimony were not true." The mother stated in her affidavit that "I now know that my daughter was coached in her testimony and did not tell the truth while testifying" and her affidavit supported fraud upon the court by the lead police officer who destroyed material evidence of recorded testimony, and misconduct of the prosecuting attorney by intimidation and threats against her in the courthouse during the trial. On October 22, 1998, the trial court denied Wilson's motions, the court asserted Wilson failed to comply with Crim.R. 33(B) by not filing his motion for new trial in a timely manner and by not presenting evidence to show that he was unavoidably prevented from filing the motion in time. The court of appeals

Affirmed. *State v. Wilson, 1999 Ohio App. LEXIS 1372*. Wilson contends that both courts abused their discretion and he was denied Due Process and Equal Protection by the courts. Neither court held an evidentiary hearing to determine if he was prevented from timely filing the motions based on the affidavits, *State v. Wright (1990) 67 Ohio App.3d 827, 828*, and the courts did not address the motions in the required two-step procedure. *State v. Dawson (2000) 89 Ohio St.3d 1208*.

E. Application for Reopening: Wilson filed a timely application to reopen his appeal under *App.R. 26(B)*. Wilson argued his appellate counsel failed to obtain necessary transcripts to review potential errors and raised errors that were meritless when he should have raised errors that had merit. Wilson raised the following issues for review in his application for reopening:

- (1) Appellant was denied his right to the assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when the trial court failed to appoint different counsel for appellant's defense upon his timely request after inquiry into the allegations of inadequate and ineffective representation made at pretrial or to provide meaningful appellate review;
- (2) The trial court erred to the prejudice of appellant in failing to preserve his constitutional right to effective assistance of counsel in initially permitting him to waive counsel without properly ascertaining that such waiver was knowingly, intelligent and voluntary and with understanding of the disadvantages, perils and possible sentences involved and without complying with the mandate of Crim.R.44(C) that a record be made of the advice of the court and not complying with the further mandate that the waiver of counsel be in writing;
- (3) The appellant was denied his Sixth Amendment right to confront the chief witness testifying against him by the court's restrictions which unreasonably limited examination of the accuracy, truthfulness and credibility or to elicit suppressed facts;
- (4) The trial court erred to the prejudice of appellant in failing to declare a mistrial based upon instances of prosecutorial misconduct;
- (5) The trial court committed prejudicial error and deprived appellant of due process of law as guaranteed by the fourteenth Amendment to the U.S.

constitution and the Ohio constitution in failing to offer sufficient, competent, credible evidence to permit reasonable minds to find guilt beyond a reasonable doubt. (Appx. E)

The state did not file any opposing memorandum. The court of appeals summarily dismissed the five claims in a Decision and Entry on October 6, 1998. (Appx. F)

The only issue to be decided at that stage of the case was whether Wilson had raised a “genuine issue” as to his claim of IAAC, according to the dictates of App.R.26(B)(5) as required by State v. Reed, 74 Ohio St.3d 534, 535. Wilson contends that his App.R.26(B) application for reopening established genuine issues and colorable claims requiring his application to be granted and proceed to the second step. The court of appeals erred in determining that a genuine issue did not exist by deciding the IAAC based solely on the application for reopening filed by him rather than ordering briefing on the issues as required by App.R. 26(B) (6-9).

Appellate counsel's performance was objectively unreasonable, and there was a reasonable probability that the result of the appeal would have been different but for counsel's errors under the standard adopted for evaluating IAAC under Strickland, 466 U.S. 668, 687; State v. Bradley, 42 Ohio St.3d 136, 142, syllabus paragraph 3. See also Smith v. Robbins, 528 U.S. 259, 285). Wilson fairly presented his federal claims to the Ohio Supreme Court making clear that IAAC denied him due process of law guaranteed by the *Sixth* and *Fourteenth Amendments*. (Appx. G)

Wilson asserts that the appellate court's denial of his application for reopening was a denial of substantive and procedural due process. Appeal to the Ohio Supreme Court was dismissed, as not involving a substantial constitutional question. State v. Wilson, 84 Ohio St.3d 1485 (table).

F. Writ of Habeas Corpus: Wilson filed a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Ohio Case No. C-3-99-128. The constitutional issue presented to the Federal Court's was the right to the effective assistance of appellate counsel on a first appeal as of right citing Evitts v. Lucey, 469 U.S. 387. The Magistrate Judge held that Wilson's petition was a mixed petition. Wilson dismissed the unexhausted claims, no evidentiary hearing was conducted, the Court did not make factual findings, but deferred to the state court findings and recommended the petition be denied.

(Appx. H) Wilson filed Objections to the Report and Recommendations ("R&R").

The District Judge adopted the Magistrate's R&R and his Decision and Entry Denied the petition for writ of habeas corpus, the anticipated motion for leave to appeal *in forma pauperis*, and request for a certificate of appealability ("COA").

(Appx. I). Wilson petitioned the United States Court of Appeals for the Sixth Circuit, a COA was granted on two issues: (1) that he was denied his Sixth Amendment right to the assistance of trial counsel and (2) IAAC for failure to raise invalid waiver of counsel on appeal. Wilson v. Hurt (6th Cir. 2002) 29 Fed. Appx. 327, Affirmed. Wilson has filed numerous motions following the denial of the original writ of habeas corpus and persistently returned to the state and federal courts seeking relief. Relevant is an Application for Reconsideration and En Banc consideration of the decision issued by the state court of appeals on October 6, 1998, pursuant to App.R. 26(A), which provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an

obvious error or renders an unsupportable decision under the law. State v. Gillispie, 2012 Ohio 2942, ¶9. The application demonstrated obvious errors and pointed out issues that were not adequately addressed or considered at all. The App.R.26(A) application was Overruled May 6, 2015, the court asserted untimeliness, res judicata, and the Sixth Circuit ruling in Wilson v. Hurt, at 331. (Appx. J) Appeal not accepted for review. State v. Wilson, 2015 Ohio LEXIS 2206. A Motion to Vacate Judgment and Sentence filed in the trial court December 6, 2016, denied and appealed, State v. Wilson, 2017 Ohio App. LEXIS 4887. Appeal to the Ohio Supreme Court not accepted for review, State v. Wilson, 2018 Ohio LEXIS 958. Wilson has repeatedly moved the Court of Appeals for the Sixth Circuit for permission to file a Second or Successive writ of habeas corpus: Case No. 02-4430 denied May 14, 2003; Case No. 06-3263 denied October 4, 2006; Case No. 13-3192 denied August 13, 2013, In re Wilson, 2013 U.S. App. LEXIS 26609 and Case No. 19-3310 denied October 11, 2019, In re Wilson, 2019 U.S. App. LEXIS 30590, the Court found that Wilson was allowed to proceed on grounds concerning the denial of parole. (Appx. K) Wilson v. Richards, 2019 U.S. Dist. LEXIS 177938. Following the Decision and Order overruling Wilson's objections to the Magistrates R&R in Wilson v. Richards, 2020 U.S. LEXIS 203384, Wilson again moved the Court of Appeals for the Sixth Circuit in a Motion for Relief from the Judgment in Case No. 19-3310, returned, not filed by the Court Clerk. (Appx. L) Wilson has attempted to move this Court for relief beginning May 1, 2002 in a Writ of Certiorari, from the denial of Wilson v. Hurt which was returned by the Clerk to append the R&R of the Magistrate. (Appx. M)

Wilson was unable to obtain and refile within the time allotted due to interference by that Institutions mailroom staff which equated to denial of access to the courts.

See Wilson v. Southeastern Correctional Institution, Case No. 2001-12088-AD; 2003 Ohio 3741. (Appx. N) The following petitions for extraordinary writs to this Court have been denied: Petition for writ of certiorari, Wilson v. Ohio, 2006 U.S. LEXIS 636; Wilson v. Ohio, 2012 U.S. LEXIS 6806; petition for writ of habeas corpus, In re Wilson, 2014 U.S. LEXIS 6384; petition for writ of certiorari, Wilson v. Ohio, 2018 U.S. LEXIS 4982.

G. Denial of Meaningful Consideration for Parole: The Sixth Circuit in In re Wilson, 2019 U.S. App. LEXIS 30590, held:

“[w]ith respect to Wilson’s proposed third and fourth grounds for relief, no authorization for a second or successive petition is necessary. Wilson’s arguments in support of these grounds concern the denial of parole in 2017 and therefore ‘assert [] claims whose predicates arose after the filing of the original petition.’ In re Jones, 652 F.3d 603, 605-06.

The claims were: (3) [Wilson] was denied meaningful consideration for parole; and (4) the denial of parole rendered his sentence “grossly disproportionate” in violation of the Eighth Amendment. Wilson contends these claims relate directly to the IAAC which rendered his conviction and sentence invalid. State ex rel. Miller v. Leonard, 2000 Ohio LEXIS 329; Greenholtz v. Inmates of Neb., Penal & Corr. Complex, 442 U.S. 1, 7. The Fourteenth Amendment prohibits any State from depriving a person of life, liberty, or property without due process of law. Wilson contends his conviction has always been invalid and imprisonment illegal. Wilson has appeared before the APA five times all after filing his first habeas corpus petition. The APA

modified his sentence from a category 9 to a category 10 which denied meaningful consideration from the first parole hearing because the APA's guideline range failed to give Wilson the possibility for parole as of the date of his initial eligibility because the lowest possible guideline range was beyond the date of his initial parole eligibility. *State v. Hall*, 2004 Ohio App. LEXIS 5892, ¶42-43. The APA's “[d]enial of meaningful consideration had the effect of rendering the trial court's sentence meaningless.” *Ankrom v. Hageman*, 2005 Ohio App. LEXIS 1480, ¶34. Wilson contends that all subsequent parole board hearings have been based upon misstated, fraudulent reports, erroneous assertions and statements and vindictive, legally defective information which is demonstrated by trial transcripts, court records and APA documents. Wilson asserts that the records of his entire, more than twenty-four years of incarceration clearly support that the APA's assertions are blatantly false and seriously affect the basic fairness, integrity, and public reputation of the entire parole process as well as Due Process and Equal Protection of the law. Wilson exhausted the parole claims in a writ of mandamus action. *State ex rel. Wilson v. Mohr*, 2018 Ohio LEXIS 2291. Wilson's final parole board hearing was held October 5, 2020 during the habeas proceedings, wherein the APA added even more false assertions relevant to the offense and offender.

(1). Denial of the Right of Allocution: Wilson's right of allocution was violated, undercutting the constitutional reliability of his sentence. *R.C. 2947.05* and *Crim.R. 32(A)(1)* demand allocution. “The purpose of allocution is to permit the defendant to speak on his own behalf or present any information in mitigation of

punishment. Although not considered a constitutional right, the right of allocution is firmly rooted in the common-law tradition. This right is both absolute and not subject to waiver due to a defendant's failure to object." *State v. Goff, 2012 Ohio App. LEXIS 992, ¶16*. (citations and quotation marks omitted.) The remedy for failure to grant allocution is a remand for resentencing. *Silsby v. State, 119 Ohio St. 314*, syllabus paragraph one & two; *State v. Campbell, 90 Ohio St.3d 320*, syllabus one, two & three; *Goff v. Bagley, 601 F.3d 445, 464-465*. The trial court did not comply with the law; this cause was required to be remanded to the trial court with instructions to resentence Wilson after directly asking him "if he wishes to make a statement in his own behalf or present any information in mitigation of punishment." *Crim.R. 32(A)(1)*.

(2). The Sentence Constitutes Cruel and Unusual Punishment: Wilson contends that his Disproportionate Sentence claim was raised as a parole-related claim and has likewise been exhausted. *State v. Wilson, 2017 Ohio App. LEXIS 4887; State v. Wilson, 2018 Ohio App. LEXIS 958*. The *Eighth Amendment*, applicable to the states by the *Fourteenth Amendment* bars punishments that are excessive in relation to the crime committed. *Coker v. Georgia, 433 U.S. 584, 592; Kennedy v. Louisiana, 554 U.S. 407, 419*. It forbids only extreme sentences that are grossly disproportionate to the crime. *Harmelin v. Mich., 501 U.S. at 997, 1000-1001*. "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is

not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.” *Graham v. Florida*, 560 U.S. 48, 58. (citations and internal quotation marks omitted.) The Ohio General Assembly modified the classifications of criminal offenses and corresponding sentences before Wilson was convicted and sentenced. Under Senate Bill 2, (“SB2”) the maximum sentence for the offense at the time of Wilson’s conviction was ten (10) years. *State v. Rush*, 83 Ohio St.3d 53. The General Assembly again enacted substantial changes to Ohio’s sentencing scheme with House Bill 86 (“H.B.86”), effective September 30, 2011, enacted to reduce the state’s prison population and save the associated costs of incarceration by diverting certain offenders from prison and by shortening the terms of offenders sentenced to prison. *State v. Thomas*, 148 Ohio St.3d at 251-252. Wilson argues that he has been denied Equal Protection of the laws and received disproportionate punishment because people convicted of the same offense before and after SB2 and H.B.86 can only be sentenced to a maximum of eleven (11) years while Wilson is required to serve twenty-five (25) years by the APA. The APA was required to consider “the equivalent sentence range under SB2 for the same offense of conviction when making parole suitability determinations. *O.A.C. § 5120-1-1-07*. Wilson’s right to freedom from invidious discrimination under the *Due Process Clause of the Fourteenth Amendment* has been clearly established. The legal principle emerges under *28 U.S.C. § 2254(d)(1)*, The “gross disproportionality principle is applicable to sentences for terms of years.” *Lockyer v. Andrade*, 538 U.S.

63, 72-73. Due Process serves the goal of preventing “governmental power from being used for purposes of oppression” regardless of the fairness of the procedures used. *Daniels v. Williams*, 474 U.S. 327, 331.

IV. REASONS FOR GRANTING THE PETITION:

- 1. WHETHER A PERSON WHO HAS BEEN DENIED THE ASSISTANCE OF COUNSEL AT A CRITICAL STAGE OF THE TRIAL PROCEEDINGS AND RECEIVED THE INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE FIRST APPEAL AS OF RIGHT HAS BEEN UNCONSTITUTIONALLY DEPRIVED OF HIS LIBERTY?**

(a). Ohio Mandatory Requirements for Waiver of Counsel:

In Ohio, a defendant in a criminal trial has an independent constitutional right to self-representation and may proceed that way *only* when he knowingly, intelligently, and voluntarily elects to do so. The rights are independent of each other and may not be asserted simultaneously. The records of this case show that the trial court erred by dismissing Wilson’s counsel. There were inadequate warnings as to the perils of self-representation, such that there was no compliance with *Crim.R. 44(A)*. Further, Wilson never waived his right to counsel. Rather, he indicated that he did not wish to proceed pro se, but instead, to just question the states chief witness. The United States Supreme Court has not prescribed a specific formula or script for waiving counsel, however, the Supreme Court of Ohio has. The requirements of the *Ohio Rules of Criminal Procedure*, *Crim.R. 44(A) & (C)*, are mandatory, and the failure to comply with its procedures constitutes reversible error. *State v. Gibson*, 45 Ohio St.2d 366, syllabus one and two; *State v. Martin*, 103 Ohio St.3d 385, syllabus one and two. The Court has consistently held:

“[T]o be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.” *Id. at 393, ¶40.* (citations omitted).

In this case, the trial court failed to comply with Crim.R. 44(A) and (C), the judge allowed a request by Wilson to question the state’s key witness during her trial testimony by dismissing trial counsel in the process. The state court did not satisfy its duty to make Wilson aware of the dangers and disadvantages of self-representation. The record clearly demonstrates that Wilson’s attorney was dismissed mid-trial by the trial court, without a valid waiver of counsel. *Fowler v. Collins*, 253 F.3d 244, 249; *James v. Brigano*, 470 F.3d 636, 644. The appellate court held in response to the App.R. 26(B) application for reopening, “*The factual predicate for this claim is not exemplified.*” This is an unreasonable application of clearly established state and federal law, and an unreasonable determination of the facts in light of the evidence presented in the state court. The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on the first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387. In Ohio a claim of Ineffective Assistance of Appellate Counsel (“IAAC”) must be brought in an application under App.R. 26(B). *State v. Davis*, 2008 Ohio LEXIS 2538; *Morgan v. Eads*, 2004 Ohio LEXIS 2719. Wilson filed an App.R. 26(B) application to reopen his first appeal as of right in the Second District Court of Appeals, which was denied. The standard of review requires an application to reopen the appeal of a conviction to be granted if there is a genuine issue as to whether the applicant was denied

effective assistance of appellate counsel. To succeed on an *App.R. 26(B)* application, a petitioner must establish that counsel's performance fell below an objective standard of reasonable representation *and* that he was prejudiced by the deficient performance. The Ohio Supreme court and the United States Supreme Court have recognized that the *Strickland* standard applies to claims asserting IAAC, reaffirmed in *State v. Simpson*, 2020 Ohio LEXIS 2806, ¶19. The waiver of counsel during trial, standing alone, required reopening of Wilson's appeal.

(b). Invalid Waiver of Counsel:

The *Sixth Amendment to the United States Constitution* provides: "In all criminal prosecutions, the accused shall have the Assistance of Counsel for his defence." The Ohio Constitution provides: "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel." *Section 10, Article I, Ohio Constitution*. The Ohio Supreme Court reaffirmed that in Ohio "[a] criminal defendant has the right to representation by counsel or proceed pro se with the assistance of standby counsel. However, these two rights are independent of each other and may not be asserted simultaneously." *State v. Martin*, 103 Ohio St.3d 385, 391 and, "[i]n the case of a serious offense as defined by *Crim.R. 2(C)*, when a criminal defendant elects to proceed pro se, the trial court must demonstrate substantial compliance with *Crim.R. 44(A)* by making a sufficient inquiry to determine whether the defendant fully understood and intelligently relinquished his or her right to counsel." *Id at 392*. *State v. Gibson*, 45 Ohio St.2d 366, paragraph one and two of the syllabus. Citing *Faretta*, 422 U.S. at 835. "[T]o be

valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.”

Id. at 377, quoting *Von Moltke v. Gillies* (1948), 332 U.S. at 723-724. *Crim.R. 44(A)* and *(C)* are mandatory and the failure to comply with its procedures constitutes *structural error*. *Martin, supra, at 397*. The trial record demonstrates (Tr. 88-104) that the trial judge did not comply with *Gibson*, *Martin*, *Fareta*, or *Crim.R. 44(A)* or *(C)* and that Wilson did not knowingly, intelligently, or voluntarily waive the benefits of counsel. Moreover, there is no signed waiver of counsel, and the waiver was not made in open court. The *Sixth Amendment* is a jurisdictional bar to a valid conviction and sentence. *Gibson*, 45 Ohio St.2d at 376. A state court’s interpretation of state law, binds a federal court sitting in habeas corpus. The trial court failed to follow the mandatory requirements of *Crim.R. 44*. The question to the federal courts was not whether the trial court conducted an adequate *Fareta* proceeding, the question was whether an appellate victory on the issue of waiver of counsel was so likely that the failure to include it constituted IAAC. It is well settled that the deprivation of the right to the effective assistance of counsel recognized in *Strickland* is an error that undermines confidence in the fundamental fairness of the state adjudication to justify the issuance of the federal writ. *Williams v. Taylor*, 529 U.S. 362, 375-376. The Sixth Circuit held:

“[T]here is one matter that our holding on the federal constitutional element of Wilson’s claim regarding the validity of his waiver of trial counsel does not

resolve. Wilson suggests in one sentence that his waiver of counsel was invalid under the decisions of the Ohio courts. If his state claims had sufficient merit such that there is a reasonable probability that, if raised, the result on appeal would have been different, then, as a federal constitutional matter, the assistance of Wilson's appellate counsel could have been ineffective. However, we doubt that his state constitutional claims are sufficiently meritorious. First, these claims were raised before the Ohio Court of Appeals during his ineffective assistance claim. The Ohio Court of Appeals did not find these claims worthy of mention separate from its discussion of the federal issue. Second, as far as we can determine, the decisions of Ohio courts require no more than an inquiry into the defendant's understanding of the "ramifications of proceeding without an attorney." *See State v. Glasure*, 724 N.E.2d 1165, 1172 (Ohio Ct. App. 1999). Again, we cannot find that the court's discussion with Wilson did not inquire into his understanding of the "ramifications" of personally assuming some of the functions of counsel. We find that Ohio state standards are not relevantly more demanding, so that their inclusion in Wilson's direct appeal would have increased the probability of a different result above the consideration of only the federal claim. *Wilson v. Hurt*, 29 Fed. Appx. at 330.

The Court of Appeals for the Sixth Circuit holding is erroneous. The trial court did not conduct the colloquy, admonishments, or findings required by Ohio or Federal Courts and IAAC is demonstrated by counsel's failure to raise the invalid waiver of counsel on appeal, his performance was objectively unreasonable, and prejudicial.

(c). Denial of Counsel at a Critical Stage of the Trial:

It is beyond dispute that "[t]he *Sixth Amendment* safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 80-81; *See United States v. Cronic*, 466 U.S. 648, 653-654; *Gideon v. Wainwright*, 372 U.S. 335, 344. Wilson was denied the assistance of counsel at trial during the critical stage of testifying. The waiver of counsel claim is intertwined with the right to testify with counsel. This claim was unaddressed due to the IAAC and the summary dismissal of the application for reopening in the

court of appeals. The records of this case show that this component of the federal claim was inadvertently overlooked in the state and federal courts. This Court has held: “[W]hen the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, §2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge.” Johnson v. Williams, 568 U.S. 289, 303. When there is no reasoned state-court decision on the merits, the court’s must determine what arguments or theories could have supported the state court’s decision and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the Supreme Court. Harrington v. Richter, 562 U.S. 86, 102. Wilson’s decision to forgo his right to counsel was not a “free choice.” Wilson represented himself because his attorney’s questioning of the states chief witness was *ineffective and inefficient* and the attorney admittedly would not or could not promote further questions amounting to “no choice.” James v. Brigano, 470 F.3d 636, 644. The state court of appeals held that there was no waiver of counsel. That was an unreasonable application of *Faretta* and Crim.R. 44(A) as the trial court dismissed Wilson’s attorney in the middle of the trial and Wilson took over the functions of his attorney through the remainder of the trial. The trial record shows Wilson did not want to dismiss his attorney, Wilson was told: “[i]f he decides that he wants to testify, he would do it in narrative form and counsel as a *legal advisor* would be able to sit there and help him for purposes of objecting to any impropriety in the state’s questioning or things of that nature.” (Tr. pgs. 209-210)

“[I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.” *United States v. Wade*, 388 U.S. 218, 227. Wilson's waiver of counsel was constitutionally invalid, he was required to give his testimony and answers to cross-examination in a narrative form, without any assistance of counsel. Counsel was totally prevented from assisting Wilson during this critical stage of his trial and he suffered constitutional error that required no corresponding show of prejudice. *United States v. Cronic*, 466 U.S. at 659. The right of a defendant to testify at trial is a constitutional right of fundamental dimension and is subject only to a knowing and voluntary waiver by the defendant. *Rock v. Arkansas*, 483 U.S. 44, 51-53. The trial court denied Wilson's right to have his testimony elicited through direct examination with counsel in contravention to the *Fifth*, *Sixth*, and *Fourteenth Amendments of the United States Constitution* and *Article I, Section 10 of the Ohio Constitution* and *Crim.R. 44(A)*. The question of a waiver of a federally guaranteed constitutional right is, a federal question controlled by federal law. *Brookhart v. Janis*, 384 U.S. 1, 4. There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was “an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464. Violation of the right to counsel at a critical stage of the trial in this case is *structural error*. See *Ariz. v. Fulminante*, 499 U.S. 279, 309-310. “Absent a knowing and intelligent waiver, no person may be

imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.” State v. Wellman, 37 Ohio St.2d 162, syllabus, paragraph one, citing, Argersinger v. Hamlin, 407 U.S. 25, 37. Wilson contends that his conviction and sentence has always been invalid and his imprisonment illegal pursuant to Faretta, Cronic, Wellman, and Argersinger. In this case, the IAAC demonstrated is shown to be constitutionally ineffective.

(d). Denial of Substitute Counsel:

The first claim of IAAC to the state court in the App.R. 26(B) application for reopening was the denial of the Sixth and Fourteenth Amendment right to the assistance of counsel based upon Wilson’s request for substitute counsel prior to trial, due to serious conflict between attorney and client so great that it resulted in a complete break-down in the attorney-client relationship which prevented an adequate defense during trial. The failure of the trial court to substitute counsel is a factor relevant to the waiver of counsel. State v. Pruitt, 18 Ohio App.3d 50, 57. “The Supreme Court requires a knowing and intelligent waiver, and it is a reasonable application of the seminal Supreme Court decision regarding waiver of counsel found in Faretta and Von Moltke v. Gillies to look at the whole record, not just the colloquy immediately before the waiver to determine if it was voluntary, knowing, and intelligently entered.” King v. Bobby, 433 F.3d 483, 492. Wilson’s court-appointed trial attorney failed to investigate the case, did not move the state for discovery or a bill-of-particulars, did not confront the fatally defective indictment which did not inform Wilson of the nature or cause of the charges or the requisite

conduct constituting the offenses or any essential facts to differentiate between the charges, did not subpoena a key witness that Wilson wished to testify, all demonstrating *good cause* and “*justifiable dissatisfaction*” warranting substitution of counsel. The appellate court denial of this issue in the application for reopening held: “[W]ilson does not explain how the court erred. Prejudice is not demonstrated affirmatively.” The transcript of Wilson’s pre-trial request for substitute counsel was not in the record considered by the state court of appeals, due to error by the Official Court Reporter and the IAAC, its absence from the record was the basis for overruling this issue in the application for reopening. The court did not conduct an evidentiary hearing or adjudication-on-the-merits of this claim. This issue clearly presents a denial of the right to the assistance of counsel as guaranteed by the *Sixth and Fourteenth Amendment* to the United States Constitution.

(e). Incomplete Record:

The right of appeal includes the right to an accurate record on appeal and the failure to provide a full complete record violates the substantial right to appellate review. *Britt v. North Carolina, 404 U.S. at 227; Evitts v. Lucey, 469 U.S. at 393.* No Court has had a complete trial transcript upon which to review the merits of this case. Transcripts of a pre-trial hearing of Wilson’s request for different counsel and closing arguments of the prosecutor, which also demonstrate prosecutorial misconduct, were not included in the record for appeal to the state courts. Wilson requested that appellate counsel obtain and include these transcripts for appeal however, he did not do so demonstrating IAAC. *State v. Carpenter, 2002 Ohio App.*

LEXIS 4877, ¶6. The Official Court Reporter failed to include this transcript in the record because she misplaced it. Ohio courts have held omissions in records constitute an “extraordinary circumstance” warranting delayed reconsideration.

Deutsch Bank Nat'l Trust Co. v. Knox, 2011 Ohio 421, ¶9. Wilson moved the U.S. District Court and the U.S. Court of Appeals for expansion of the record in the original habeas petition, neither Court responded to the motions. Wilson again sought to expand the record in the U.S. District Court in Wilson v. Richards, 2020 U.S. Dist. LEXIS 150069, denied. A District Court must review the trial transcript in habeas cases, and where substantial portions of that transcript were omitted before the District Court, a habeas case should be remanded to the District Court for consideration in light of the full record. Adams v. Holland, 330 F.3d at 406, citing Townsend v. Sain, 372 U.S. at 319, and App.R. 26(B) allows an applicant to submit additional matter not in the record of the trial to support claims of IAAC. Morgan v. Eads, 104 Ohio St.3d at 144.

(f). Merits Not Adjudicated in the State Courts:

“[T]he Antiterrorism and Effective Death Penalty Act (AEDPA) provides a federal habeas court may not grant relief to a state prisoner whose claim has been “adjudicated on the merits in state court,” 28 U.S.C. § 2254(d), unless that claim’s adjudication resulted in a decision that was “contrary to, or involved an unreasonable application of clearly established federal law, as determined by [this] Court,” §2254(d)(1) or “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,” §2254(d)(2). Johnson v. Williams, 568 U.S. 289, Syllabus.

“A judgment is normally said to have been rendered on the merits only if it was delivered after the court . . . heard and *evaluated* the evidence and the parties’ substantive arguments.” *Id. at 302*. The state did not reach the merits of the claims

in Wilson's application for reopening, it summarily dismissed the application and did not reach "stage two". Pursuant to the App.R. 26(B) rules, if an application is granted, "[T]he parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency." App.R. 26(B)(7); Morgan v. Eads, 104 Ohio St.3d at ¶19; State v. Davis, 119 Ohio St.3d 422, ¶17. This case arises under App.R. 26(B), not Murnahan. Id. at ¶13. Wilson filed his application for reopening within twelve days of journalization of the appellate judgment, so he was not required to show "good cause for filing at a later time." Unlike the defendant in Murnahan his was not a delayed appeal. The appellate court had no discretion as to whether it should consider the application. Wilson followed the rules. State v. Davis, *supra*, at ¶16-17; State v. Murnahan, 63 Ohio St.3d 60, 66. The state court denied Wilson's App.R. 26(B) application without an adjudication-on-the merits, without a complete record or an evidentiary hearing and without a determination of whether a genuine issue of IAAC existed. The federal claims at issue here as set forth by Strickland, 466 U.S. at 687 and Evitts v. Lucey, 469 U.S. at 397, cannot be presumed to have been adjudicated on the merits by the Ohio courts, resulting in an *extreme malfunction* in the state criminal justice system. Jackson v. Virginia, 443 U.S. 307, 332, n.5. Because a claim of IAAC arises in the appellate court, and because the court's foreclosing a substantive App.R. 26(B) review – an appellant like Wilson never had an opportunity to fully present his case to *any* court. The result runs counter to the constitutional right guaranteed to all defendants to effective appellate counsel. State v. Davis, *supra*, at ¶27.

Habeas corpus remains available to a prisoner who was deprived of liberty pursuant to conviction infected with constitutional error, including IAAC. *Evitts. v. Lucey*.

2. WHETHER, THIS CASE IS AN EXCEPTIONAL CASE WHERE THE EVIDENCE WEIGHS HEAVILY AGAINST THE CONVICTION?

(g). Manifest Miscarriage of Justice:

This case is based upon legally insufficient evidence which is a denial of due process. Wilson alleges the evidence could not be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt, stating a constitutional claim cognizable in a federal habeas proceeding. *Jackson v. Virginia*, 443 U.S. 307, 316-319; *Tibbs v. Fla.*, 457 U.S. 31, 37-38, n.11. Pursuant to Ohio law the essential elements of rape require proof of “sexual conduct” of the type alleged in the indictment. *State v. Lucas*, 2001 Ohio App. LEXIS 4227, /*6. The indictment in this case did not allege any of the four specific types of sexual conduct set forth by statute and was fatally defective. R.C. 2907.01 provides in part:

“(A) ‘Sexual conduct’ means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.”

“(B) ‘Sexual contact’ means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.”

Cunnilingus is not defined by statute. Ohio holds, “Cunnilingus” is defined as “a sexual act committed with the mouth and the female sexual organ.” *State v. Ramirez*, 98 Ohio App.3d 388, 393. The court affirmed the conviction contending:

“[W]ilson testified that he touched his tongue to the area between his victim's vagina and anus. If this was all the evidence before the jury, then we might question whether the State had proved the required contact with the female

sexual organ. However, S. testified that Wilson put his tongue in my private, and that her private meant her vagina. (T. 59). That evidence, if believed, was sufficient to prove **sexual contact.**” *State v. Wilson, 1998 Ohio App. LEXIS 4433, ¶11.*

Following trial, the states witness swore by affidavit that she did not tell all the truth while testifying. *State v. Wilson, 1999 Ohio App. LEXIS 1372, ¶2.* Ohio law for rape requires proof of “sexual conduct” not “sexual contact.” The Ohio General Assembly has made provision for instances where an offender makes sexual contact with the genitals or pubic region, *R.C. 2907.01(B)*, defining it as gross sexual imposition, a third degree felony. *R.C. 2901.04(A)*, requires that ‘[s]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.” *State v. Wells, 91 Ohio St.3d 32, 34-35.* To sustain Wilson’s conviction, the evidence must preponderate, beyond a reasonable doubt, a “sexual act” of “sexual conduct” took place with the “female sex organ.” The evidence in this case does not rise to that level. Further, pursuant to *R.C. 2945.74* and *Crim. R. 31(C)*, a criminal defendant is entitled to an instruction on a lesser included offense whenever the trial court: (1) determines that the offense on which the instruction is requested is necessarily lesser than and included within the charged offense, under the statutory elements test; and (2) after examining the facts of the case, ascertains that the jury could reasonably conclude that the evidence supports a conviction for the lesser offense and not the greater. When the defendant is thus entitled to the instruction, the refusal of the court to charge upon the lesser included offense constitutes prejudicial error. *State v. Johnson, 36 Ohio St.3d 224, 225-226*, (citations omitted.) There is no question that

a lesser included offense was warranted in this case. This case is not a case of two completely divergent stories presented to the jury. Wilson contends that he attempted to ensure the health, safety and welfare of his fiancée's child, *in loco parentis*, after being told that the child had been repeatedly sexually abused. Wilson asserts that after gathering the facts, and with the mother's permission, he checked the child and her urogenital area for signs of injury, infection, disease and sexual activity, he testified that he touched his tongue to a substance on the child's perineum in attempts to identify that substance, found to be dried blood and learned it was from her recent menses. "It is the *exclusive province* of the jury to pass upon and determine which, if any, of the particular crimes has been committed *and which degree of the crime charged the accused is guilty.*" State v. Collins, 1995 Ohio App. LEXIS 4409, [*8]. The right to have the jury instructed on a lesser included offense is fundamental to providing a fair trial. State v. Thomas, 40 Ohio St.3d 213, 219, n.7. The failure to give the instruction in this case constituted prejudicial error. The offense in this case, i.e., cunnilingus, does not require proof of "sexual conduct" as an essential element, rather, it only requires "sexual contact", accordingly, viewing the evidence as strictly construed against the state, and liberally construed in favor of Wilson, pursuant to R.C. 2901.04(A), it is clear that a rational jury could conclude that all of the elements of the crime of rape have not been proven beyond a reasonable doubt. Based on the evidence adduced at trial, it can be said that the jury lost its way and that a manifest miscarriage of justice has occurred requiring a new trial. Wilson raised the issue of prejudicial error, due

process of law and sufficient, competent, credible evidence to find guilt beyond a reasonable doubt as the fifth claim in his application for reopening. The appellate court held “[T]his particular argument was rejected when we overruled the second assignment of error presented in the merit appeal,” and did not further address the issue. In this case the evidence was legally insufficient to support the conviction. Whether the evidence is legally sufficient to sustain a verdict is a question of law.

State v. Robinson, 162 Ohio St. 486. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. Tibbs v. Fla., 457 U.S. at 45, citing Jackson v. Virginia, 443 U.S. at 321. “[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364. The indeterminacy of precisely what that fact is in this case, renders the statute unconstitutionally vague and a denial of due process. United States v. Williams, 553 U.S. 285, 306. This case is an “exceptional case in which the evidence weighs heavily against the conviction.”

3. WHETHER, THE PETITIONER IS ENTITLED TO EQUITABLE TOLLING?

(h). Equitable Tolling:

A petitioner seeking a writ of habeas corpus must comply with two procedural requirements, both grounded in the interests of comity and federalism, before a federal court may review the petitioner’s claim. First, the petitioner must exhaust all available opportunities to pursue his claim in state court before he may litigate that claim in federal court. 28 U.S.C. § 2254(b)(1)(A). A petitioner is entitled

imprisonment. Wilson has not proved he is entitled to equitable tolling of the statute of limitations. His objection in that regard is OVERRULED.”

However, Wilson presented documented proof of constitutional rights violations of the denial of access to the courts through exhaustion of the “Inmate Grievance Procedure” set in O.A.C. 5120-9-31; Howard v. Mgmt. & Training Corp. 2019 Ohio App. LEXIS 44; See also Howard v. Mgmt. & Training Corp., 2018 U.S. Dist. LEXIS 190632, [*6]. In response to Wilson’s Informal Complaint the Library Supervisor stated that “the problem had been occurring for several months.” The District Court assertions are in error. Access to the court is a right protected by the United States Constitution. Graham v. Nat'l Collegiate Athletic Ass'n., 804 F.2d 953, 959. This constitutional right is required to be “adequate, effective, and meaningful.” Lewis v. Casey, 518 U.S. 343, 351. Wilson has demonstrated actual injury caused by the shortcomings of the library. Harbin-Bey v. Rutter, 420 F.3d 571, 578. The inmate grievance procedure constitutes an adequate legal remedy which must be exhausted prior to instituting a mandamus regarding complaints and problems of inmates relating to conditions of their incarceration. State ex rel. Humphrey v. Jago, 74 Ohio St.3d 675, 676. “[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.” Harris v. Nelson, 394 U.S. 286, 300. Wilson was entitled to equitable tolling.

4. DOES THE DOCTRINE OF RES JUDICATA APPLY IN THIS CASE?

The Ohio Supreme Court has observed the doctrine of res judicata should only be “applied as fairness and justice require” and not “so rigidly as to defeat the ends of justice.” *Davis v. Wal-Mart Stores Inc.*, 93 Ohio St.3d 488, 491. The Ohio Supreme Court stated that res judicata does not apply when a sentence is void. Since Wilson's sentence is void, res judicata is inapplicable. *State v. Lucas*, 2008 Ohio 4584 ¶24; *State v. Simpkins*, 117 Ohio St.3d 420, ¶30. This Court has held “When application of a state law bar depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and the U.S. Supreme Court's jurisdiction is not precluded.” *Foster v. Chatman*, 136 S.Ct. 1737, 1746. Under the Antiterrorism and Effective Death Penalty Act of 1996, federal habeas relief cannot be awarded on a claim that a state court decided on the merits unless the state court's decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U. S. C. §2254(d)(1). It requires habeas petitioners to “show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.” *Harrington v. Richter*, 562 U. S. 86, 103. “[w]hen reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong.” *Woods v. Donald*, 575 U. S. 312, 315-316 (per curiam). The state and federal court decisions affirming Wilson's conviction and sentence is contrary to, and involves an

unreasonable application of clearly established Federal law under 28 U.S.C.S. § 2254(d)(1) and (d)(2).

V. CONCLUSION:

This petition for writ of habeas corpus should be granted.

Respectfully submitted,



LAWRENCE EARL WILSON

Inmate No. A349229

Franklin Medical Center

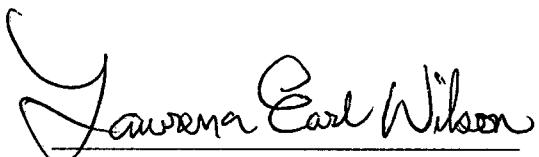
1990 Harmon Avenue

Columbus, Ohio 43223

Petitioner, *pro se*

Date: December 13th, 2021

Pursuant to 28 U.S.C.S. § 1746, I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on the 13th day of December, 2021.



LAWRENCE EARL WILSON

Inmate No. A349229

Petitioner, *pro se*