No. _____

_____

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
AND THE MONTGOMERY COUNTY, OHIO COURT OF APPEALS

APPENDIX

LAWRENCE EARL WILSON

INMATE NO. A349229

FRANKLIN MEDICAL CENTER

1990 HARMON AVENUE

COLUMBUS, OHIO 43223

APPENDICES

COURT OF COMMON PLEAS MONTGOMERY COUNTY, OHIO

CASE NO. 1996-CR-1019

Appx. A	INDICTMENT	Filed April 4, 1996
Appx. B	TERMINATION ENTRY	Filed July 30, 1997
Appx. C	TERMINATION ENTRY Amending Degree of Felony from F1 to AF1	Filed August 25, 1997
Appx. D	NUNC PRO TUNC TERMINATION ENTRY	Filed January 7, 2011

96-CRA-680A/First District Court

THE STATE OF OHIO, MONTGOMERY COUNTY

FILED
COURT OF COMMON PLEAS
95 APR -4 PM 3:41
CRAIG ZIMMERS
CLERK OF COURTS
MONTGOMERY CO., OHIO

96-CR-1019

THE COURT OF COMMON PLEAS

January Term in the year Nineteen Hundred and Ninety-Six

MONTGOMERY COUNTY, ss.

THE GRAND JURORS of the County of Montgomery, in the name, and the authority of the State of Ohio, on their oaths do present and find that LAWRENCE EARL WILSON,

on or about the **13th** *day of* **February** *in the year*
one thousand nine hundred and **ninety-six** *in the*
County of Montgomery, aforesaid, and State of Ohio, did engage in sexual conduct with another, to wit: S[redacted] E. E[redacted], not his spouse, less than thirteen (13) years of age, by **purposely compelling her to submit by force or threat of force,** whether or not the offender knew the age of such person; contrary to the form of the statute (in violation of Section 2907.02(A)(1)(b) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

SECOND COUNT:

AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that: LAWRENCE EARL WILSON, on or about the **13th** day of **February, 1996,** in the County of Montgomery, aforesaid, and State of Ohio, did have sexual contact with another, not his spouse, less than thirteen (13) years of age, to-wit: S[redacted] E. E[redacted], whether or not the offender knew the age of such person; contrary to the form of the statute (in violation of Section 2907.05(A)(4) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

Appendix A

Respectfully submitted,

MATHIAS H. HECK, JR.,
Prosecuting Attorney
Montgomery County, Ohio

By Nicholas Sylvain
Assistant Prosecuting Attorney
Supreme Court # 0062254

"NOTICE: AS A RESULT OF THIS INDICTMENT, THE DEFENDANT MAY NOT KNOWINGLY ACQUIRE, HAVE, CARRY OR USE ANY FIREARM OR DANGEROUS ORDNANCE. SEE SECTION 2923.13 OF THE OHIO REVISED CODE."

Redacted by Clerk of Court

7/25/97 JAIL

PRE SENTATE BILL 2 SENTENCE

FILED
COURT OF COMMON PLEAS 9
97 JUL 30 AM 11:55

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CRIMINAL DIVISION MONTGOMERY CO. OHIO

STATE OF OHIO	:	CASE NO. 96-CR-1019
		JUDGE SUNDERLAND
Plaintiff	:	
		TERMINATION ENTRY
vs.	:	
LAWRENCE EARL WILSON	:	
DOB: [redacted] **SSN:** [redacted]		
	:	
Defendant		

On **July 24, 1997**, the defendant herein having been convicted of the offense(s) of **RAPE (person under 13) (F1);**, was brought before the Court;

WHEREFORE, it is the JUDGMENT and SENTENCE of the Court that the defendant herein be delivered to **THE CORRECTIONS RECEPTION CENTER** there to be imprisoned and confined for a term **of not less than NINE (9) years nor more than TWENTY-FIVE (25) years;**

The Court finds defendant has been convicted of a sexually oriented offense(s) AND the Court finds defendant to be a sexually oriented offender by Ohio Revised Code 2950.01 (D) and;

The Court further finds that the defendant is not a Sexual Predator as defined by Ohio Revised Code 2950.01 (E);

The Court further finds that the defendant is not a Sexually Violent Predator as defined by Ohio Revised Code 2971.01 (H)(7);

The Court further finds that the defendant is not a Habitual Sex Offender as defined by Ohio Revised Code 2950.01 (B);

The Court advised the defendant of his/her requirement to register as a sex offender, as defined by Ohio Revised Code 2950.03 & 2950.04;

The defendant is to pay the costs of this prosecution taxed at $_____, upon which execution is hereby awarded through the Montgomery County Clerk's Office;

The defendant is to receive credit for _____ days spent in confinement;

Appendix B

If applicable in this, the defendant is hereby ORDERED to make complete restitution.

The Court did fully explain to defendant their appellate rights and the defendant informed the Court that said rights were understood.

The defendant is sentenced under Section **2907.02(A)(1)(b)** of the Ohio Revised Code. Bond is **RELEASED.**

JUDGE **DAVID G. SUNDERLAND**

Prepared by Montgomery County Prosecutor's Office/SDP
Assistant Prosecuting Attorney: **RAYMOND J. DUNDES/SHEILA G. LAFFERTY**
Defense Counsel: **JAMES ARMSTRONG, 1311 TALBOTT TOWER, DAYTON, OHIO 45402**
Montgomery County Sheriff's Office, Lt. Pierron, Civil Section (2 copies)

Redacted by Clerk of Court

8/19/97- JAIL

POST SENTATE BILL 2 SENTENCE

9

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO : CASE NO. 96-CR-1019
JUDGE SUNDERLAND
Plaintiff : AMENDED
TERMINATION ENTRY
vs. : (AMENDING DEGREE OF FELONY FROM F1 TO AF1)
LAWRENCE EARL WILSON :
DOB: [redacted] SSN: [redacted] :
Defendant :

On **July 24, 1997**, the defendant herein having been convicted of the offense(s) of **RAPE (person under 13) (AF-1)**, was brought before the Court;

WHEREFORE, it is the JUDGMENT and SENTENCE of the Court that the defendant herein be delivered to **THE CORRECTIONS RECEPTION CENTER** there to be imprisoned and confined for a term **of not less than NINE (9) years nor more than TWENTY-FIVE (25) years;**

The Court finds defendant has been convicted of a sexually oriented offense(s) AND the Court finds defendant to be a sexually oriented offender by Ohio Revised Code 2950.01 (D) and;

The Court further finds that the defendant is not a Sexual Predator as defined by Ohio Revised Code 2950.01 (E);

The Court further finds that the defendant is not a Sexually Violent Predator as defined by Ohio Revised Code 2971.01 (H)(7);

The Court further finds that the defendant is not a Habitual Sex Offender as defined by Ohio Revised Code 2950.01 (B);

The Court advised the defendant of his/her requirement to register as a sex offender, as defined by Ohio Revised Code 2950.03 & 2950.04 AND the Director or Chief Administrative Officer of the defendant's detention facility or correctional institution shall provide notice to the defendant at least ten (10) days before the defendant is released;

The defendant is to pay the costs of this prosecution taxed at $_____, upon which execution is hereby awarded through the Montgomery County Clerk's Office;

Appendix C

PAGE: 2
STATE VS. WILSON
CASE NO. 96-CR-1019

The defendant is to receive credit for _____ days spent in confinement;

If applicable in this, the defendant is hereby ORDERED to make complete restitution.

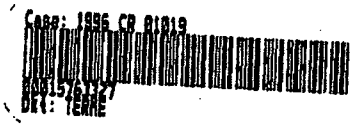
The Court did fully explain to defendant their appellate rights and the defendant informed the Court that said rights were understood.

The defendant is sentenced under Section **2907.02(A)(1)(b)** of the Ohio Revised Code. Bond is **RELEASED.**

JUDGE **DAVID G. SUNDERLAND**

Prepared by Montgomery County Prosecutor's Office/SDP
Assistant Prosecuting Attorney: **RAYMOND J. DUNDES and SHEILA G. LAFFERTY**
Defense Counsel: **JAMES ARMSTRONG, 1311 TALBOTT TOWER, DAYTON, OHIO 45402**
Montgomery County Sheriff's Office, Lt. Pierron, Civil Section (2 copies)

Redacted by Clerk of Court



FILED
COURT OF COMMON PLEAS
2011 JAN -7 PM 12: 02
GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
8

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO

Plaintiff

vs.

LAWRENCE EARL WILSON
DOB: 03/19/1953 SSN: [redacted]

Defendant

CASE NO. 1996 CR 01019
JUDGE FRANCE E. MCGEE

NUNC PRO TUNC 07-24-1997
TERMINATION ENTRY

The defendant herein having been found Guilty by a Jury Trial of the offense **RAPE (person under 13)** was on **July 24, 1997**, brought before the Court;

WHEREFORE, it is the JUDGMENT and SENTENCE of the Court that the defendant herein be delivered to **Correctional Reception Center**, there to be imprisoned and confined for a term of **not less than nine (9) years nor more than twenty-five (25) years;**

The Court finds defendant has been convicted of a sexually oriented offense AND the Court finds defendant to be a sexually oriented offender by Ohio Revised Code 2950.01 (D) and;

The Court further finds that the defendant is not a Sexual Predator as defined by Ohio Revised Code 2950.01 (E);

The Court further finds that the defendant is not a Sexually Violent Predator as defined by Ohio Revised Code 2971.01 (H)(7);

The Court further finds that the defendant is not a Habitual Sex Offender as defined by Ohio Revised Code 2950.01 (B);

The Court advised the defendant of his requirement to register as a sex offender, as defined by Ohio Revised Code 2950.03 & 2950.04;

Court costs to be paid in full in the amount determined by the Montgomery County Clerk of Courts.

The number of days for which the defendant should receive jail time credit is indicated in the entry and warrant to transport filed in this case. **If applicable in this case, the defendant is hereby ORDERED to make complete restitution.**

The Court did fully explain to the defendant his appellate rights and the defendant informed the Court that said rights were understood.

Bond is released.

Frances E. McGee
JUDGE FRANCES E. MCGEE

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: _____
JASON CAVINDER, #0081371
Assistant Prosecuting Attorney

Defense Counsel: Pro Se, Lawrence Earl Wilson, Pickaway Correctional Institution, Inmate #A349229, P.O. Box 209, Orient, Ohio 43146

12-28-10/skj

APPENDICES

COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT

CASE N0.s 16728 and 16752

Appx. E APPLICATION FOR REOPENING Filed August 19, 1998

Appx. F DECISION AND ENTRY Filed October 6, 1998
Application for Reconsideration Denied

Appx. G SUPREME COURT OF OHIO - CASE No. 98-2453
JURISDICTIONAL MEMORANDUM
Filed November 16, 1998

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO
SECOND APPELLATE JUDICIAL DISTRICT

STATE OF OHIO	**CASE NO. 16728 & 16752**
Plaintiff-Appellee	**TRIAL CT. 96-CR-1019**
-VS	
LAWRENCE E. WILSON	**APPLICATION FOR REOPENING**
Defendant-Appellant	

The appellant, Lawrence E. Wilson in PRO SE pursuant to App. R.26 (B) and STATE V MURNAHAN (1992) 63 Ohio St.3d 60,66 n.6 respectfully request this honorable court to reopen the above-captioned case affirming the court's decision and judgement in light of ineffective assistance of appellant counsel in violation of appellant's United States Sixth Amendment to the Constitution and for the reasons set forth in the attached brief in support of this motion.

Respectfully submitted,

LAWRENCE E. WILSON
#349229
P.O. Box 69
London, Ohio 43140-0069

---

1 **Appendix E**

MEMORANDUM IN SUPPORT

I. STATEMENT OF CASE

On 26 March, 1996 Defendant-Appellant, Lawrence E.Wilson (herinafter "Appellant) was charged and subsequently indicted on one count rape (under 13 W/force) in violation of section 2907.02 (A)(1) (B) and one count Gross sexual imposition 2907.05 (A) (4) of the Ohio revised Code. Following a jury trial on May 14-16,1997 appellant was found quilty of count one but without force or threat of force and not quilty of count two. On 24 July,1997 appellant was sentenced to a term of incarceration of 9-25 years and fined $10,000. The fine was suspended. A timely notice of appeal and motion for appointment of Appellant counsel was filed by appellant on 12 August,1997, and again by Appellants trial attorney on 21 August,1997, these matters (case no. 16728 & 16752) were consolidated for the sole purpose of this appeal. The judgement of the trial court was affirmed on 7 August,1998 in the court of appeals for Montgomery County, Ohio. It is from this judgement appellant seeks to reopen this Appeal based upon ineffective assistance of appellant counsel. James Eyler was court-appointed to represent appellant for this appeal 2 Sept.1997. Prejudicial errors were made in the trial court and the ineffective assistance of appellate counsel in the prior appellate proceedings prevented these errors from being presented effectively to the court of appeals. Defendant has a constitutional right to effective assistance of counsel on his first appeal as of right. **FREELS V. HILL** (1988)843 F.2d 958. A strong probability exist that without Appellant-Counsel's deficiencies the result of the appeal would have been different **STATE V. BRADLY** (1989) 42 Ohio St.3d 136. **EVITTS V LUCEY** (1985) 105 S.Ct 830

II. ISSUES NOT PRESENTED FOR REVIEW

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.**

Approximately thirty days before trial appellant requested in an inquiry that appointed counsel be replaced do to inadequate, ineffective representation and the existance of serious trust, communication and cooperation problems. The refusal of the court to appoint new counsel, or to provide meaningful appellate review when the inquiry was not placed on record constitites prejudicial error. **STATE V DEAL** (1969)17 Ohio St. 2d 17 **STATE V PRUITT** (1984) 18 Ohio App.3d 50 **STATE V BRONAUGH** (1982) 3 Ohio App.3d 307 **State V DUKES** (1986) 34 Ohio App.3d 263.

2) **The trial court erred to the prejudice of appellant in failing to perserve his constitutional right to effective assistance of counsel in intially permitting him to waiver 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.**

Appellant's trial proceeded without benefit of counsel after the following colloquy between the court and appellant; (Trial Record hereinafter "TR") TR 95,96,97 **STATE V DOANE** (1990) 69 Ohio App.3d 638 **EDENS V HANNIGAN** (1996) 87 F.3d 1109

3) **The appellant was denied his sixth amendment right to confront the chief witness testifying against him by the court's restrictiions which unreasonably limited examination of the accuracy, truthfulness and credibility or to elicit suppressed facts.**

The damaging and prejudicial testimony of the victim-witness TR at 59 is the key fact at issue. This testimony was left uncontradicted by trial counsel. When the appellant requested that he ask specific questions he refused TR at 89. The trial court restricted appellant's examination to re-direct TR at 101,102 which denied examination of testimony given by the victim-witness on direct examination, or to test the truthfulness, accuracy, credibility or to elicit suppressed facts. A full cross-examination of witness upon subject of his examination in chief is an absolute right, the denial of which is reversible error. **U.S. V MILLS** (1966) 366 F.2d 512 **FRANCIS V CLARK EQUIP CO** (1993) 993 F.2d 545

STATE V HANNAH(1978) 54 Ohio St.2d 84 **FED Rules of EVID R 611(b)**

If the conviction is to stand it must do so based soley on the validity and credibility of the testimony of the victim-witness as perceived by the jury. Bias, prejudice, interest or motive to misrepresent may be shown to impeach the witness either by examination of the witness or extrinsic evidence **EVID R 616** **STATE V WILLIAM** (1988) 61 Ohio App.3d 594 **WRIGHT V DALLMAN** (1993) 999 F.2d 174

4) **The trial court erred to the prejudice of appellant in failing to declare a mistrial based upon instances of prosecutorial misconduct.**

The prosecutor made false statements to the court at a trial continuance (pg 27) stating "she testified at the Grand Jury accompanied by her mother" when he knew it was the grandmother. He further misled the court by stating TR at 113 "there had been no coercion of the witness within the state's control including relatives", when he knew it was the grandmother a witness for the prosecution, who without legal custody took the victim-witness through every step of the proceedings (trial continuance pg 27) supervised the writing of state exhibits one and two TR at 30,126 and was given legal custody with his assistance prior to trial TR at 28 prosecutorial misconduct during trial include putting words into witness mouth, speaking as if from personal knowledge, bulling witness and assuming prejudicial facts not in evidence TR 57,58,59,60,86 87,233,234,235,237 and 238. Based upon the record it should be concluded that the misconduct prejudicially affected appellant's right. **STATE V SMIDI** (1993) 88 Ohio App.3d 177 **STATE V HART** (1994) 94 Ohio App.3d 665 **STATE V STEPHENS** (1970) "It is the close case that the prosecutor's conduct is srutinized more closely" **STATE V DRAUGHN** (1992) 76 Ohio App.3d 644.

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 constitutuon in failing to offer sufficient, competent, credible evidence to permit reasonable minds to find quilt beyond a reasonable doubt.**

The victim-witness testified that appellant performed a sexual act TR at 59. There was no mention of this act throughout interviews or in the statements presented as evidence, and stated she did not know if what was felt could have been the appellant's nose TR at 110,111. The testimony of the victim-witness is clearly shown to be perjured by the attached affidavit. **STOFFER V STATE** (1864) 15 Ohio St.47 **STATE V CLARK** (1995) 101 Ohio App.3d 389. Prior to and during his testimony Capt. Richard Wright reviewed has department supplemental report which is mis-stated and mutated and didnot constitute a "written recorded statement" TR atl18,119,120,130,131,132 appellant required the introduction of the tape recorded interview that Capt. Wright alleges didnot come out TR at 129 for the jury's ascertainment of the truth **EVID.R. 612** **STATE V WASHINGTON** (1978)56 Ohio App.2d 129 **CRIM.R.16(B)(a)(g)** After observing prononced signs of physical and emotional distress TR at 43,67,71,185,188,190,191,196 appellant conducted an examination due to a Bonafide Belief of Danger and Necessity during which appellant touched the tip of the tonque to a area between the vagina and anus in an attempt to identify a substance found to be dried blood. **STATE V METCALF**(1977) 60 Ohio App.2d 212, **DAYTON V GIGANDET** (1992)83 Ohio App.3d 886. Ohio Jury Instructions (1996-1) states that cunnilingus means a sexual act comitted with the mouth and the female sex organ, in the present case sexual activity required to prove the sexual conduct is vague or undefined. **STATE V GLOVER** (1984) 17 Ohio App.3d 256 **AKRON V RASDAN** (1995)105 ohio App.3d 164. In order to find that sexual conduct occured proof is required of the act proscribed. Conviction based on legally insufficient evidence constitutes denial of Due Process **TIBBS V FLORIDA** (1982) 457 U.S. 31,45 **STATE V THOMPKINS**(1997) 78 Ohio 3d 380. The vagina includes the canal that leads from the uterus of the female outward to and including its external orifice. The area

appellant testified to contacting is the "perineal body" an area between the the vagina and anus (see Gray's Anatomy of the human body copyright 1995) TR 223,238 and contact was made only to the substance (dried blood) A statute defining a crime or offense cannot be extended by construction to a person or thing not within its descriptive terms **STATE V HESS** (1948) 76 N.E.2d 300. The victim-witness was unsure of what was felt TR at 110,111. Due process requires that each element of crime be proved beyond reasonable doubt. **SPEIGNER V JAGO** (1978) 450 F.Supp.799. The erroneous jury instruction clearly confused the jury TR 256 causing confusion of the burden of proof necessary for appellant's conviction. **STATE V BROWN** (1982) 7 Ohio App.3d 113 , **U.S. V SALISBURY**(1993) 983 F.2d 1369 There is but one standard of proof in a criminal case, and that is quilt beyond a reasonable doubt. **STATE V JENKS** (1991) 61 Ohio St.3d 259. Appellant was convicted without sufficient, competent, credible evidence which created a manifest miscarriage of justice and the conviction must be reversed. **STATE V CLARK** (1995) 101 Ohio App.3d 389 **STATE V DELEON** (1991) 76 Ohio App.3d 68 **STATE V GARROW** (1995) 103 Ohio App.3d 368 **STATE V RICE** (1995) 103 Ohio App.3d 388 **STATE V ARRINGTON** (1990) 64 Ohio App.3d 654.

Appellant sought "Leave Of Court" by Motion For Leave Of Court to file supplemental Brief Out of Rule (INSTANTER) which was also filed in the Court of Appeals on 2 July, 1998 along with the pro se "Supplement to Brief for Appellant, a file stamped copy was returned to appellant in opposition to the statement on page 14 in **Conclusion** of the **Final Entry.** **WHEREFORE** Appellant request this honorable court to reopen this case for Appellate Review of these genuine issues.

Respectfully submitted

Lawrence E. Wilson

LAWRENCE E. WILSON
#349229
P.O. Box 69
London, Ohio 43140-0069

CERTIFICATE OF SERVICE

I herby certify that a copy of the foregoing Application for Reopening along with Affidavit from Sarah E. Washington was sent by certified mail to COURT OF APPEALS OF MONTGOMERY, COUNTY, OHIO 41 N.Perry St.,P.O. Box 972 Dayton, OH 45422-2170 on 14 August, 1998.

Lawrence E. Wilson

LAWRENCE E. WILSON

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO

STATE OF OHIO
Plaintiff-respondent

CASE NO.96-CR-1019
Court of Appeals CA-16752

VS

LAWRENCE E. WILSON
Defendant-Petitioner

AFFIDAVIT

I Sarah E. Washington admit of my own free will that parts of my testimony were not true during the trial of Lawrence E. Wilson on 15 May 1997. Let it also be known that I have not been forced or pressured to make this statement or sign this document.

Sarah E. Washington
SARAH E. WASHINGTON

Be it remembered that on this 24th day of February 1998 before me,a Notary Public, state of ohio, county of Montgomery personally appeared the above named Sarah E. Washington who acknowledged and did sign the foregoing instrument and that the same is her voluntary act and deed.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal, on the day and year last above mentioned.

Brenda R. Mutter
NOTARY PUBLIC
BRENDA R. MUTTER, Notary Public
In and for the State of Ohio
My Commission Expires April 1, 2002

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO — CASE NO. 16728 & 16752

Plaintiff-Appellee

-VS-

LAWRENCE E. WILSON — AFFIDAVIT

Defendant-Appellant

IN THE STATE OF OHIO,)
) SS:
COUNTY OF MADISON,)

Now comes Lawrence E. Wilson #349229 the Defendant-Appellant who being duly sworn, states as follows:

1) James T. Eyler (#0061244) Attorney for Defendant-Appellant failed to advocate Defendant-Appellant's cause or use the requisite level of skill necessary to insure integrity of the adversarial proceeding when he:

(a) Failed to raise or present for review five or more assignments of error or arguements in support of assignments of error that previously were not considered on the merits in this case by the appellant court as required under App.R.16(A). And;

(b) Failed to designate or order a transcript or other parts of the trial proceedings that the appellant intended to include in the record. And;

(c) Failed to provide a copy of the "Brief of Appellant" to the Defendant-Appellant or to keep him informed of important developments And;

(d) Failed to serve a copy of the Brief for Appellant" to the Appellate Division of the Montgomery County Prosecutor's Office.

2) All of which resulted in substantial prejudice to defendant-Appellant's right to a fair Appellant Review, wherein, counsel deprived Defendant-Apellant of the right to effective assistance by failing to render adequate legal assistance

Further affiant sayeth naught.

Lawrence E. Wilson

LAWRENCE E. WILSON
#349229

Sworn and subscribed to me this 14 day of August, 1998.

NOTARIAL SEAL

MARNIE K. HAZLETT
Notary Public, State of Ohio
My Commission Expires 10-2-2002

Marnie K. Hazlett

NOTARY PUBLIC

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 16728
16752

vs. :

LAWRENCE E. WILSON :

Defendant-Appellant :

. . . . . .

DECISION AND ENTRY

Rendered on the 6th day of October, 1998.

. . . . . .

PER CURIAM:

This matter is before the court on Defendant-Appellant's App.R. 26(B) application for reopening. As that rule contemplates, Defendant-Appellant claims that his appellate counsel was constitutionally ineffective for failing to raise certain errors on appeal.

As with claims of ineffective assistance of trial counsel, a defendant who claims ineffective assistance of appellate counsel must demonstrate two propositions. First, it must be shown that counsel's performance failed to satisfy prevailing professional norms in some respect.

Second, it must be shown that as a result of that defect the defendant was prejudiced to such an extent that, absent the defect, the result of the proceeding likely would have been different. Further, that prejudice must be affirmatively demonstrated. *Strickland v. Washington* (1984), 466 U.S. 668.

Defendant-Appellant Wilson presents five errors that his appellate counsel failed to present for merit review. They are discussed in order of their presentation.

First, Wilson argues that the trial court erred when it denied his request to appoint different counsel. However, Wilson does not explain how the court erred. Prejudice is not demonstrated affirmatively.

Second, Wilson claims that his waiver of his right to the assistance of counsel at trial was not knowing, intelligent, and voluntary. The section of the trial transcript to which Wilson refers in support of this assignment demonstrates that Wilson withdrew his request to proceed without counsel upon inquiry by the court. The factual predicate for this claim is not exemplified.

Third, Wilson claims that his trial counsel refused to ask the victim certain questions that Wilson wished him to

ask, and that the court restricted his own recross examination of the victim. However, Wilson does not identify what areas of inquiry he was barred from pursuing or explain how he was prejudiced thereby. Again, prejudice is not demonstrated affirmatively.

Fourth, Wilson complains that the prosecuting attorney engaged in misconduct when he confused the victim's mother with her grandmother in asking questions of witnesses. Misstatements, standing alone, do not constitute misconduct. In any event, they are subject to correction or clarification in cross-examination of the witness. The alleged misstatements are insubstantial and fail to portray the measure of prejudice that an ineffective assistance of counsel claim requires.

Fifth, Wilson argues that the evidence was insufficient to demonstrate the violation of law alleged. This particular argument was rejected when we overruled the second assignment of error presented in the merit appeal

The Application for Reconsideration is Denied.

SO ORDERED.

JAMES A. BROGAN, JUDGE

WILLIAM H. WOLFF, JR., JUDGE

THOMAS J. GRADY, JUDGE

Copies mailed to:

Karyn J. Lynn
Asst. Pros. Attorney
P.O. Box 972
Dayton, Ohio 45422

James T. Eyler, Esq.
118 West First Street
Suite 517
Dayton, Ohio 45402

Lawrence E. Wilson
#349229
London Corr. Inst.
P.O. Box 69
London, Ohio 43140-0069

Hon. David G. Sunderland

Westlaw.

1998 WL 34276553 (Ohio)

For Opinion See 705 N.E.2d 365

Supreme Court of Ohio.
Lawrence E. WILSON, Appellant,
v.
State of Ohio, Appellees.
No. 98-2453.
November 16, 1998.

On Appeal from the Montgomery County Court of Appeals, Second Appellate District
Court of Appeals case No. 16728 16752

Memorandum in Support of Jurisdiction of Appellant Lawrence E. Wilson

Lawrence E. Wilson, #349229, P.O. Box 69, London, Ohio 43140-0069, (614) 852-2454, in Pro-Se.Karyn J. Lynn (0065573), Assistant Prosecuting Attorney, Montgomery County Courts Building, P.O. Box 972, 41 North Perry Street-Suite 315, Dayton, Ohio 45422, (937) 225-4117, Attorney for State of Ohio Pplaintiff.

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Note: Table of Contents page numbers missing in original document

*ii *TABLE OF CASES AND AUTHORITIES*

CASES

Appendix G

OHIO RULES OF CRIMINAL PROCEEDURE

Crim.R.44 ... 4,6,7,9

Crim.R.22 ... 7

*1 *WHY LEAVE TO APPEAL SHOULD BE GRANTED*

This cause presents two critical issues which apply to every criminal prosecution: (1) The necessity of the effective assistance of counsel on a first appeal as of right; and, (2) The Due Process Clause of the Fourteenth Amendment quarantees are violated by nominal attorney representation which does not suffice to render the proceedings constitutionally adequate. In *EVITTS V. LUCEY* (1985) 469 U.S.387,105 S.Ct.830,83 L.Ed. 821 the Supreme Court, Justice Brennan, held that: A criminal defendant is entitled to effective assistance of counsel on first appeal as of right. In bring an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction with its consequent drastic loss of liberty is unlawful. The facts in this case emphasize counsel's role, that of expert proffessional assistance necessary for examination into the record, research of the law, and marshalling arguments on client's behalf. In the present case the appellant allegese both incompetence and prejudice by the unreasonable representation of appellate-counsel under the prevailing norms in preparing and submitting his brief to the appellate court.

Under the Due Process Clause of the Sixth and Fourteenth Amendments a first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of attorney. Furthermore, a state may not extinquish appeal as of right from a criminal conviction because another right of appellant, right to effective assistance of counsel has been violated. In sum this case puts in issue the fairness of the criminal justice system in the State of Ohio. This court must grant jurisdiction to hear this case and review the erroneous, detached decision of the appellate court and determine whether appellant has had adequate opportunity to present his claims through the effective assistance of counsel on his first appeal as of right.

STATEMENT OF THE CASE AND FACTS

Appellant in this cause was arrested and charged with forcible rape of a person under the age of thirteen and gross sexual imposition. Following a jury trial on May 14-16,1997 appellant was convicted of the lesser included offense of rape and was aquitted of gross sexual imposition. On July 24, 1997 appellant was sentenced to a term of incarceration of 9-25 years and fined $10,000. The fine was suspended. A timely notice of appeal and motion for appointment of appellate counsel was filed by appellant on August 12, 1997 and again by appellant's trial counsel on August 21, 1997. These matters were consolidated for the sole purpose of appeal (case No. 16728 and 16752). The court-Appointed appellate counsel filed the Brief For Appellant December 5, 1997. The appellant filed a Motion For Leave To File Supplemental Brief For Appellant Out Of Rule (Instanter) To Brief For Appellant filed December 5, 1997 and Supplement To Brief For Appellant (Instanter) To Brief For Appellant filed December 5, 1997. Both of which were filed in the Court of Appeals July 2, 1998. The Court of Appeals rendered judgment affirming the trial court's decision on August 7, 1998 without considering the motion for the supplement or the Supplement filed by appellant. Appellant filed a timely Application For ~~Reopening~~ Reconsideration on August 19,1998 pursuant to App.R.26(B). Judgment was rendered denying the Application for Reopening on October 6, 1998. The Ohio Rules of Appellate Procedure App.R.12(A)(2) states: The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the eror on which the assignment of error is based or fails to argue the assignments of error separately in the brief, as required under App.R.16(A)., and App.R.12(B)(D) states: IN all other cases where the court of appeals finds error prejudicial to

the appellant, the judgment or final order of the trial court shall be reversed and the cause shall be remanded to the trial court for further proceedings. The only issue to be decided is whether the appellant has raised a "genuine issue" as to his claim that he was denied effective assistance of appellate counsel, according to the dictates of App.R.26(B)(5). The Supreme Court, Wright, J., held that: Two-prong Strickland analysis for claims of ineffective assistance of counsel is appropriate level of review to determine whether appellant has raised "genuine issue" as to ineffective assistance of appellate counsel in application for reopening of appeal.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

A FIRST APPEAL AS OF RIGHT IS NOT AJUDICATED IN ACCORD WITH DUE PROCESS OF LAW IF THE APPELLANT DOES NOT HAVE THE EFFECTIVE ASSISTANCE OF AN APPOINTED ATTORNEY.

The constitutional right under the Sixth Amendment of the United States constitution "to have the assistance of counsel for defense", which has been made obligatory upon the states by the Fourteenth Amendment implies adequate representation by efficient counsel and efficiency of counsel implies skill and preparation in endeavoring to produce the desired result; and where the trial record demonstrates that such legal representation was not provided to the defendant by the trial court, then such defendant has been deprived of his constitutional right to Due Process and of assistance of counsel as guaranteed to him by the Sixth and Fourteenth Amendments of the U.S. Constitution and the Ohio Constitution art.1§§10,16.*STATE V. CUTCHER* (1969) 17 Ohio App.2d 101. The constitution guarantees indigent defendant's competent cousel at trial and on direct appeal. The promise of *DOUGLAS V. CALIFORNIA* (1963) 372 U.S. 353, 83 S.Ct.814, 9 L.Ed.2d 811, that a criminal defendant has a right to counsel on his first appeal as of right - like the promise of *GIDEON V. WAINWRIGHT* (1963) 372 U.S. 335,83 S.Ct.792,9 L.Ed.2d 799,that a criminal defendant has a right to counsel at trial - would be a futile gesture unless it comprehended the right to effective assistance of counsel.

*4 In the present case the attorney for Defendant-Appellant presented for review and argued these three assignments of error:
A. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL
B. THE JURY INSTRUCTION REGUARDING THE ELEMENTS OF RAPE WAS ERRONEOUS AND PREJUDICIAL TO APPELLANT
C. STATEMENTS MADE TO POLICE BY APPELLANT WITHOUT BENEFIT OF COUNSEL AND WITHOUT HAVING BEEN ADVISED OF HIS MIRANDA RIGHTS SHOULD HAVE BEEN SUPPRESSED BY THE TRIAL COURT AS A VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

the appellant ascerts that the appointed appellate attorney failed to advocate his cause or use the requisite level of skill necessary to insure integrity of the adversarial proceedings when he failed to adequately argue the error's presented or to: designate or order transcripts or other parts of the proceedings in accordance with the Rules of Appellate Procedure App.R.9(B) or for correction or modification of the record pursuant to App.R.9(E) or to identify, present for review and argue error's of such constitutional magnitude that deficient performance is shown, which was prejudicial to the appellant as there was a reasonable probability of success if claims were asserted. The appellant upon recieving a copy of the Brief filed by appellate counsel, through a source other than counsel, found the brief seriously flawed whereby appellant attempted to file a supplemental brief in Pro Se raising these additional issues:
D. APPELLANT WAS DENIED HIS RIGHT TO ASSISTANCE OF COUNSEL BY THE TRIAL COURT.
E. WAIVER OF COUNSEL WAS NOT KNOWINGLY, INTELLIGENT AND VOLUNTARY, WAS

AGAINST THE MANDATE OF CRIMINAL RULE 44(C) AND WAS NOT IN WRITING.
F. APPELLANT WAS DENIED THE RIGHT TO CONFRONT THE WITNESS TESTIFYING AGAINST HIM BY THE TRIAL COURT'S RESTRICTIONS.
G. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN FAILING TO DECLARE A MISTRIAL BASED UPON INSTANCES OF PROSECUTORIAL MISCONDUCT.
*5 H. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW IN FAILING TO OFFER SUFFICIENT, COMPETENT, CREDIBLE EVIDENCE TO FIND QUILT BEYOND A REASONABLE DOUBT.

An additional issue not presented by Appellate-Counsel or Appellant which could show a violation of appellant's equal protection rights by the court (Tr.II) is:
I. A STATE DENIES A BLACK DEFENDANT EQUAL PROTECTION WHEN IT PUTS HIM ON TRIAL BEFORE A JURY FROM WHICH MEMBERS OF HIS RACE HAVE BEEN PURPOSELY EXCLUDED.

In STATE V. BRYANT (1995) 104 Ohio App.3d 512, 662 N.E.2d 846, it is a violation of defendant's equal protection rights to exclude members of his race from jury venire because of their race, or under false assumption that members of defendant's race are unqualified to serve as jurors. Id at 662 N.E.2d 848,849. Equal protection clause forbids prosecutor from challeging potential jurors soley on account of their race or an assumption that jurors of the same race as defendant would be unable to impartially consider state's case against defendant. It is irrelevant how many minority jurors remain on panel if even one is excluded on basis or race. Id at 850. In *STATE V. BROCK* (1996) 110 Ohio App.3d 656,675 N.E.2d 18, Criminal defendant can demonstrate violation of his equal protection rights under BATSON V. KENTUCKY (1986) 106 S.Ct.1712, by showing that prosecutor's use of peremptory challenges was used to purposely exclude members of defendant's race. see also *PURKETT V. ELEM* (1995) 115 S.Ct.1769 Modification of the Batson test. In holding with the Supreme Court decision of Wright, J. in *STATE V. REED* (1996) 660 N.E.2d 456,457 and the Two-prong Strickland analysis for claims of ineffective assistance of counsel for the appropriate level of review to determine whether appellant has raised "genuine issue" as to ineffective assistance of appellate counsel in application for reopening of appeal, appellant presents for review a single issue not identified in the record or raised, presented for review or argued in the merit brief by appellate counsel.

*6 *INVALID WAIVER OF COUNSEL*

The trial court erred to the prejudice of the appellant in failing to preserve his constitutional right to effective assistance of counsel in initially permitting him to proceed through trial without ascertaining that waiver of counsel was knowing, intelligent and voluntary and without an understanding of the disadvantages, perils and possible sentences involved, and without complying with the mandate of *Criminal Rule 44(C)* that a record be made of the advise of the court and not complying with the further mandate that the waiver of counsel be in writing. Failure of Appellate-Counsel to raise this issue of constitutional magnitude, where it is clearly shown in the trial record (Tr.95-104) constitutes deficient performance, and, asserted error was prejudicial as appellant had a reasonable probability of success if claim was presented. In *STATE V. DYER* (1996) 117 Ohio App. 3d 92,689 N.E.2d 1034 Requirements of rules outlining how waiver of counsel is to affirmatively appear in the record are mandatory, and failure to comply with these proceedures constitutes error. see also *STATE V. BAYER* (1995) 102 Ohio App.3d 172,656 N.E.2d 1314. In *STATE V. EBERSOLE* (1995) 107 Ohio App.3d 288, 668 N.E.2d 934 Before right to counsel can be waived court must be satisfied that defendant made intelligent and voluntary waiver of right with knowledge that he would have to represent himself, and defendant should be informed of inherent dangers in self-representation. To make proper determination as to whether defendant waived right to counsel

not only must defendant's actions be examined, but also trial court's explanation of consequences of defendant's actions. *U.S. V. McDOWELL* (1987) 814 F.2d 245 is the leading case in this circuit regarding waiver of right to counsel, in McDowell it is stated "[t]he legal standard is well settled that an accused's waiver of his right to counsel must be knowingly and intelligently made." Id at 248. McDowell sets forth the standard inquiry *7 for district courts to follow and requires the use of the "Model Inquiry" set forth as an appendix to the McDowell opinion (see Id at 251-252) or one covering the same substantive points along with an express finding that the accused has made a knowing and voluntary waiver of counsel. In *U.S. V. MILLER* (1990) 910 F.2d 1321,1324 ("[T]he rule today, based upon our supervisory powers, requires substantial compliance and not literal adherence to the guidelines in the Bench Book".) In *STATE V. DOANE* (1990) 69 Ohio App.3d 638 646-647,591 N.E. 2d 735,741 The Supreme Court articulated that a knowing and intelligent waiver can only be valid when the defendant is "[M]ade aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with his eyes open' ". The Supreme Court set forth a "general standard" stating: a waiver can only be valid when a defendant has knowledge of the following: " *** 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". in addition a majority of the circuit courts have also held that the trial court must also inform the defendant that he will be required to follow the same rules of procedure and evidence which normally governs the conduct of a trial. In this case, the ~~district~~ trial court made no inquiry which comports upon any of the relevant considerations addressed by the Federal Courts model inquiry or the Supreme Courts general standards, nor were the mandatory provisions of *Crim.R. 44(C),Crim.R.22* complied with. Moreover, In *WESTBROOK V. ARIZONA* (1966) 384 U.S.150,86 S.Ct.1320 the "constitutional right of an accused to be represented by counsel invokes of itself, the protection of the trial court in which the accused, whose life or liberty is at stake is without Counsel, and this protecting duty imposes serious and weighty responsibility upon the trial judge of determining whether there is an *8 intelligent and competent waiver of counsel of the accused. In *STATE V. TRAPP* (1977) 52 Ohio App.2d 189,368 N.E.2d 1278 a "defendant has a ... constitutional right to defend himself if his waiver of right to counsel is knowing, intelligent and voluntary; but in addition to claiming that right he must be competent to conduct his own defense. A defendant must be competent to waive counsel, moreover the degree of competency required to waive counsel is "vaguely higer" than the standard for standing trial, discussed supra Mcdowell, 814 F.2d at 250. In *LAGWAY V. DALLMAN* (1992) 806 F. Supp. 1322,1332-33 Ohio courts do so under the standard enunciated by the Supreme Court in *DUSKEY V. U.S.* (1960) 362 U.S.402, 80 S.Ct.788 it is not enough for the district judge to find that the defendant [is] oriented to time and place [has] some recollection of events; but the test must be whether he has sufficient present ability to consult with his lawyer wtih a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him. Competency is an underlying predicate to Due Process. A duty devolves upon the trial court to investigate a defendant's competence whether or not either party makes a motion raising the issue. A judge with a "bona fide" doubt about a defendant's competency must, sua sponte hold a competency hearing to investigate the defendant's "rational understanding". *PATE V. ROBINSON* (1966) 383 U.S.375,86 S.Ct.836 15 L.Ed.2d815 The defendant's trial is constitutionally tainted because the trial judge failed to secure a knowing intelligent and voluntary waiver of defendant's right to counsel. see also *MORAN V. GODINEZ* (1994) 40 F.3d 1567,1571; *U.S. V. LEWIS* (1993) 991 F.2d 527. The right to proceed pro-se is not absolute, a judge may terminate self-representation if the defendant is not able or willing to abide by the rules of procedure or courtroom protocol. The trial record is replete with these actions begining with counsel's remarks at (Tr.92) "But he also expressed some --- some disillusion with the entire process". The appellant's *9 inability to correctly formulate questions (Tr.105,106,112 and throughout examinations). The failed Plea Agreement (Tr.145-167), when questioned about its voluntaryness the appellant laughed (Tr.147). Appellant said that he un-

derstood the nature of the charges (Tr.148-149) however severe confusion is portrayed at (Tr.155) "accepting as true, whether I belive its true or not". (Tr.158-159) discussion of what actually constitutes the act, and finally the court would not allow the appellant to enter the plea agreement even over the appellant's admission of quilt (Tr.161). A reasonable jurist should have entertained a good faith doubt as to appelllant's competence during change-of-plea hearing so that failure to hold competency hearing was a violation of due process. Clearly from the trial record in the case sub judice the trial court erred to the prejudice of the 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 or that he was competent to do so, and without an 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 be in writing. Appellant counsel was deficient and ineffective by failing to argue that the trial ~~that the trial court~~ had violated the defendant's constitutional rights by an invalid waiver of counsel which is a "genuine issue" as to his claim that he was denied effective assistance of appellate counsel, according to the dictates of App.R.26(B)(5).

The court is bound to extend to the appellant due process, and the process that is due includes a fair proceeding where the adjudicatory process follows historical practice and procedure, including compliance ***10** with the other provisions of criminal and appellate rules and statutes. Accordingly appellant submits that both the trial court and the appellate court erred when they failed to defend appellant's constitutional right of due process, and it is for this reason the appellant ask this court to invoke its jurisdiction.

CONCLUSION

For the reasons stated in the foregoing memorandum, appellant prays this court accept jurisdiction in this case.

Appendix not available.

Lawrence E. WILSON, Appellant, v. State of Ohio, Appellees.
1998 WL 34276553 (Ohio) (Appellate Petition, Motion and Filing)

END OF DOCUMENT

APPENDICES

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

CASE NO. C-3-99-128 (C:3-99-128)

Appx. H	REPORT AND RECOMMENDATIONS Writ of habeas corpus under 28 U.S.C. 2254	Filed August 9, 1998
Appx. I	Decision and Entry Adopting Report And Recommendations	Filed January 3, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

LAWRENCE E. WILSON,

Petitioner,

- vs -

ROBERT L. HURT,
Warden,

Respondent.

Case No. C-3-99-128

Chief Judge Walter Herbert Rice
Magistrate Judge Michael R. Merz

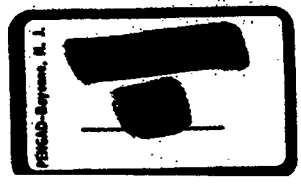
REPORT AND RECOMMENDATIONS

This is an action for writ of habeas corpus, brought *pro se* by Petitioner Lawrence e. Wilson under 28 U.S.C. §2254. Mr. Wilson is serving a sentence of nine to twenty-five years in Respondent's custody upon conviction of rape.

Mr. Wilson raises the following claims for habeas corpus relief:

Ground One: Denial of Effective Assistance of Counsel

Supporting Facts: Ineffective assistance of appointed trial counsel when he failed to (1) obtain proper or timely discovery, (2) interview, call, or subpoena an important witness, (3) investigate or present any expert testimony pertaining to child victims regarding there [sic] abuse, (4) thoroughly cross-examine the child witness or introduce evidence in his possession which showed the victims motive to misrepresent the accused, (5) investigate defendant's background to obtain mitigating evidence or exhibits, present witnesses, objet to or file motions to errors which occurred in the proceedings during and following trial or to prepare for the sentencing stage of the proceedings. Ineffective assistance of counsel is cause for procedural default. Further, petitioner was denied effective assistance of counsel by the trial court's failure to honor his timely good faith request for substitution of counsel where trust, communication and cooperation



Appendix H

had so deteriorated as to obviate any attorney-client relationship. Finally, counsel's performance on appeal was so deficient as to again render ineffective assistance on petitioner's appeal as of right. Due process requires that a defendant charged with having committed a felony be represented by counsel, and such representation includes thoroughgoing investigation and preparation pursuant to the Sixth Amendment to the United States Constitution.

Ground Two: Invalid Waiver of Counsel

Supporting Facts: Appointed counsel was "dismissed" during trial without any judicial inquiry concerning the importance of legal representation that must precede any knowing and intelligent waiver of counsel, nor was petitioner made aware of the dangers and disadvantages of self-representation, nor did the waiver comply with the Ohio or Federal Rules of Criminal Procedure. Petitioner did not knowingly and voluntarily waive his Sixth Amendment right to counsel.

Ground Three: Denial of Right of Confrontation

Supporting Facts: Petitioner was denied his Sixth and Fourteenth Amendment rights to confront and cross-examine the chief witness testifying against him by the trial court's restrictions which unreasonably limited examination of the accuracy, truthfulness, bias, credibility or to elicit suppressed facts.

Ground Four: Misconduct of the Prosecuting Attorney and Witnesses for the State Deprived Petitioner of Due Process and a Fair Trial.

Supporting Facts: The prosecutor knowingly employed false testimony, withheld exculpatory evidence, communicated to the jury by innuendo, insinuations and assertations [sic] and conducted himself in an improper manner, and defense witnesses perpetrated falsehoods upon the court at trial.

Ground Five: Erroneous jury instructions violated Petitioner's right to due process of law.

Supporting Facts: Instructions given to the jury were twice incorrect, remained incomplete and were misleading and confusing.

Ground Six: The State denied Defendant equal protection.

Supporting Facts: Defendant was tried by a jury which was not a fair cross-section of the community, and members of defendant's race were purposely excluded through prosecutor's challenge to potential juror.

Ground Seven: Constitutional violations resulted in the conviction of one who is actually innocent.

Supporting Facts: The constitutional violations asserted in this habeas corpus petition resulted in the conviction of an innocent man, resulting in a fundamentally unjust incarceration and a miscarriage of justice.

Petition, Doc. #2, pp. 5-6a.

Upon initial Report and Recommendations, the Magistrate Judge concluded that Ground One (at least as to ineffective assistance of trial counsel) and Ground Five were unexhausted and recommended dismissal because the Petition was a mixed petition of exhausted and unexhausted claims. In response, Mr. Wilson has dismissed the unexhausted claims (Doc. #15). The case is therefore before the Court only on the ineffective assistance of appellate counsel portion of Grounds1, and Grounds 2, 3, 4, 6, and 7.

STATE COURT PROCEEDINGS

Mr. Wilson was indicted on one count of forcible rape of a person under thirteen and one count of gross sexual imposition on the same victim. He was found guilty at trial of rape without the use of force and not guilty of gross sexual imposition. On direct appeal to the Ohio Court of Appeals, he raised three assignments of error: ineffective assistance of trial counsel, erroneous jury instructions, and violation of Miranda with respect to statements he made to the police. The Court of Appeals affirmed the conviction and no further appeal has yet been taken to

the Ohio Supreme Court.

Within the time allowed by Ohio R. App. P. 26(B), Mr. Wilson filed a motion to reopen his appeal, alleging he had received ineffective assistance of appellate counsel. To the extent relevant here, Mr. Wilson alleged that his appellate counsel, who was different from trial counsel, failed to assign the following errors:

1. That he was denied his Sixth and Fourteenth Amendment rights to the effective assistance of trial counsel when the trial court failed to appoint different counsel for his defense upon his timely request after inquiry into the allegations of inadequate and ineffective representation made at pretrial.

2. That the trial court further denied his right to effective assistance of counsel in "initially permitting him to waiver counsel without properly ascertaining that such waiver was knowingly [sic] intelligent and voluntary and with understanding of the disadvantages, perils and possible sentences involved and without complying with the mandates 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. That the trial court 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. That "the trial court erred to the prejudice of appellant in failing to declare a mistrial based upon instances of prosecutorial misconduct."

Application for Reopening, Return of Writ, Doc. #10, Ex. 22. The Court of Appeals denied reopening (Id., Ex. 23). Mr. Wilson then appealed to the Ohio Supreme Court, which declined to hear the case (Id., Ex. 27).

GROUND ONE: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A criminal defendant is entitled to effective assistance of counsel on appeal as well as at trial, counsel who acts as an advocate rather than merely as a friend of the court. *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Penson v. Ohio*, 488 U.S. 75, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988). Counsel must be appointed on appeal of right for indigent criminal defendants. *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963); *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967); *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The right to counsel is limited to the first appeal as of right. *Ross v. Moffitt*, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974). The attorney need not advance every argument, regardless of merit, urged by the appellant. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." 463 U.S. 751-52). Effective appellate advocacy is rarely characterized by presenting every non-frivolous argument which can be made. *See Smith v. Murray*, 477 U.S. 527 (1986). See Annotation, Adequacy of Counsel -- Appellate Remedies, 15 ALR 4th 519 (1980).

The governing standard for effective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the

> deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687.

With respect to the first prong of the *Strickland* test, the Supreme Court has commanded:

> Judicial scrutiny of counsel's performance must be highly deferential. ... Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within a 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."

466 U.S. at 689.

As to the second prong, the Supreme Court held:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to overcome confidence in the outcome.

466 U.S. at 694. *See also Darden v. Wainright*, 477 U.S. 168, 106 S. Ct 2464, 91 L. Ed. 2d 144 (1986); *Blackburn v. Foltz*, 828 F. 2d 1177 (6th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988). *See generally* Annotation, 26 ALR Fed 218. Trial counsel's tactical decisions are particularly difficult to attack. *O'Hara v. Wigginton*, 24 F. 3d 823, 828 (6th Cir. 1994). As to the prejudice prong, the test is whether counsel's errors have likely undermined the reliability of, or confidence in, the result. *West v. Seabold*, 73 F. 3d 81, 84 (6th Cir. 1996), citing *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). "Counsel is constitutionally ineffective only if [his or her] performance below professional standards caused the defendant to lose what he otherwise probably

would have won." *United States v. Morrow*, 977 F. 2d 222 (6th Cir. 1992), *cert. denied*, 508 U.S. 975, 113 S. Ct. 2969, 125 L.Ed.2d 66 (1993).

Mr. Wilson has not told this Court in his Petition what aspects of his appellate counsel's performance he believes were ineffective. Construing his *pro se* Petition liberally, the Court reads it as raising every claim of ineffective assistance of appellate counsel made in the Application for Reopening as set forth above.

In finding that appellate counsel was not ineffective, the Ohio Court of Appeals made the following express rulings:

> First, Wilson argues that the trial court erred when it denied his request to appoint different counsel. However, Wilson does not explain how the court erred. Prejudice is not demonstrated affirmatively.
>
> Second, Wilson claims that his waiver of his right to the assistance of counsel at trial was not knowing, intelligent, and voluntary. The section of the trial transcript to which Wilson refers in support of this assignment demonstrates that Wilson withdrew his request to proceed without counsel upon inquiry by the court. The factual predicate for this claim is not exemplified.
>
> Third, Wilson claims that his trial counsel refused to ask the victim certain questions that Wilson wished him to ask, and that the court restricted his own recross examination of the victim. However, Wilson does not identify what areas of inquiry he was barred from pursuing or explain how he was prejudiced thereby. Again, prejudice is not demonstrated affirmatively.
>
> Fourth, Wilson complains that the prosecuting attorney engaged in misconduct when he confused the victim's mother with her grandmother in asking questions of witnesses. Misstatements, standing alone, do not constitute misconduct. In any event, they are subject to correction or clarification in cross-examination of the witness. The alleged misstatements are insubstantial and fail to portray the measure of prejudice that an ineffective assistance of counsel claim requires.
>
> Fifth, Wilson argues that the evidence was insufficient to

> . demonstrated the violations of law alleged. This particular argument was rejected when we overruled the second assignment of error presented in the merit appeal.

Opinion, Return of Writ (Doc. #10), pp. 1-2.

The only thing Mr. Wilson says about the merits of his claim of ineffective assistance of counsel appears at p. 3 of his Traverse (Doc. #18):

> Appellate counsel's failure to raise these well-established, straightforward and obvious constitutional violations standing alone establish deficient performance. There is more than a reasonable probability that but for appellate counsel's unprofessional errors, the results of the appeal proceedings would have been different.

This language is merely conclusory and does not pay attention to what the Court of Appeals did on the Application for Reopening: it actually considered the merits of the various assignments of error which Mr. Wilson said should have been raised and found they were without merit. Although technically the Court of Appeals did not reopen the appeal, it essentially gave merit consideration to Mr. Wilson's proposed assignments of error and found they were without merit. In doing so, the Court of Appeals expressly applied the Strickland v. Washington standard.

Mr. Wilson has done nothing in the papers he has filed in this Court to persuade the Court that the result of the appeal would have been different if any of these assignments of error had been raised since he has not demonstrated any of them have merit.

As to the first claim, he has submitted as an attachment to his Traverse a transcript of the proceeding in which he asked Judge Sunderland to appoint new counsel, but the transcript demonstrates nothing more than that Mr. Wilson wanted someone else; it does not show any good reason for that request, despite repeated questioning by Judge Sunderland on the point.

With respect to the second claim, Mr. Wilson cites a great deal of law on the point that a waiver of counsel must be knowing, intelligent, and voluntary. What he does not deal with

is the finding of the appellate court that he did not persist in his request to proceed without counsel and in fact never actually did so proceed.

Mr. Wilson fails utterly to demonstrated why the prosecutor's mistake in referring to the victim's mother as her grandmother constituted misconduct (as opposed to mistake, which is what the Court of Appeals found), or how it prejudiced him.

With respect to the fifth claim, the Court of Appeals found there was sufficient evidence to convict in the victim's testimony of cunnilingus and Mr. Wilson fails to argue why the Court of Appeals was in error.

Mr. Wilson's claim that he received ineffective assistance of appellate counsel is without merit.

GROUND TWO: INVALID WAIVER OF COUNSEL

In Ground Two, Mr. Wilson claims his waiver of counsel was not knowing, intelligent, and voluntary. As the Ohio Court of Appeals found, no such waiver actually happened. While Mr. Wilson may have started in that direction, he backed away from it before he actually proceeded without counsel. Ground Two is without merit[1].

GROUND THREE: DENIAL OF RIGHT OF CONFRONTATION

[1]Respondent argues this Court should not reach the merits of Ground Two because it was procedurally defaulted in the state courts. Although the Court of Appeals did not formally reopen the appeal, it did essentially give Mr. Wilson merit review of this claim by deciding he suffered no prejudice from failure to raise it by appointed appellate counsel. There is therefore no need for this Court to decide if the Ohio Court of Appeals actually enforced a procedural bar.

In Ground Three, Mr. Wilson asserts he was denied his right to confront the principal witness against him because he was not permitted sufficient cross examination. Without doubt, the constitutional right to confront the witnesses against one in a criminal case includes the right to cross examine them. *Douglas v. Alabama,* 380 U.S. 415 (1965); *Pointer v. Texas,* 380 U.S. 400 (1965); *Barber v. Page,* 390 U.S. 719 (1968); *California v. Green,* 399 U.S. 149 (1970). However, all Mr. Wilson has done in his Traverse is cite various cases for this proposition. He has not told this Court any more than he told the Court of Appeals about what questions he believes should have been asked and how he was prejudiced by their being omitted. Ground Three is without merit[2].

GROUND FOUR: PROSECUTORIAL MISCONDUCT

In his statement of Ground Four, Mr. Wilson claims the state and defense witnesses were guilty of misconduct, as well as the prosecuting attorney. However, it is only the prosecutor's conduct to which he calls attention and only that conduct will be analyzed here. A habeas corpus court is not required to guess at what a petitioner is complaining about.

On habeas corpus review, the standard to be applied to claims of prosecutorial misconduct is whether the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process, *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S. Ct. 1868, 1871, 40 L. Ed. 2d 431 (1974); *Darden v. Wainright,* 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) or whether it was "so egregious as to render the entire trial fundamentally unfair." *Cook v. Bordenkircher,* 602 F. 2d 117 (6th Cir.), *cert. denied,* 444 U.S. 936 (1979); accord *Summitt v.*

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[2]Respondent claims Ground Three is procedurally defaulted on the same basis as Ground Two. The Court reaches the merits for the same reason as it did with Ground Two.

Bordenkircher, 608 F.2d 247 (6th Cir. 1979), *aff'd sub nom*, *Watkins v. Sowders*, 449 U.S. 341 (1981); *Stumbo v. Seabold*, 704 F.2d 910 (6th Cir. 1983). The court must decide whether the prosecutor's statement likely had a bearing on the outcome of the trial in light of the strength of the competent proof of guilt. *Angel v. Overberg*, 682 F. 2d 605, 608 (6th Cir. 1982). The court must examine the fairness of the trial, not the culpability of the prosecutor. *Serra v. Michigan Department of Corrections*, 4 F. 3d 1348, 1355 (6th Cir. 1993)(quoting *Smith v. Phillips*, 445 U.S. 209, 219 (1982)), *cert. denied*, 501 U.S. 1201 (1994). In Serra, the Sixth Circuit identified factors to be weighed in considering prosecutorial misconduct:

> In every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they are isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proof to establish the guilt of the accused.

Id., at 1355-56 (quoting *Angel*, 682 F. 2d at 608). The misconduct must be so gross as probably to prejudice the defendant. *Prichett v. Pitcher*, 117 F. 3d 959, 964 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 572 (1997); *United States v. Ashworth*, 836 F. 2d 260, 267 (6th Cir. 1988).

Mr. Wilson complains about a bench conference that is recorded in the transcript at pp. 80-82. The record specifically reflects that this was a bench conference. The purpose of a bench conference is to hold a discussion out of the hearing of the jury. Mr. Wilson argues this conference occurred in the hearing of the jury, but he offers no evidence to that effect. In the absence of any proof to the contrary, regularity of trial court proceedings is presumed. *Walker v. Johnston*, 312 U.S. 275 (1941). In any event, there is nothing prejudicial about the comments Mr. Dundes made during the bench conference even if they were heard by the jury. The matter he brought up at the bench was immediately thereafter explored on the record with the victim-witness without objection.

Mr. Wilson also complains about Mr. Dundes' cross-examination which is transcribed

at pp. 226-240. The Court had read that portion of the transcript and finds no prosecutorial misconduct. Every question Mr. Dundes asked had a foundation in Mr. Wilson's own prior testimony or related to testimony Mr. Wilson had heard in open court. All of it was fair cross examination and did not suggest any matter for which there was not some basis in the evidence. As Mr. Wilson acknowledges by his own Ground Three, cross examination is expected to be vigorous and nothing here exceeded the bounds of proper cross examination. Ground Four is without merit.

GROUND SIX: DENIAL OF EQUAL PROTECTION

In his sixth ground for relief, Mr. Wilson alleges members of his race were purposely excluded from the jury.

The first time this claim was made was in Mr. Wilson's Motion for New Trial which he sought leave to file on March 5, 1998, while the case was on direct appeal and more than seven months after the verdict was returned. Judge Sunderland refused to consider the motion on the merits because it had been filed far too late (Decision, Order and Entry, Ex. 15 to Return of Writ, Doc. #10). The Ohio Court of Appeals affirmed on the same basis (Opinion of March 31, 1999, Ex. 20 to Return of Writ, Doc. #10). Mr. Wilson apparently took no appeal from this decision to the Ohio Supreme Court. He had, however, previously attempted to raise this claim in the Ohio Supreme Court on appeal from the denial of his Application for Reopening.

A petitioner may not raise on federal habeas a federal constitutional right he could not raise in state court because of procedural default. *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). If, because of a procedural default, a habeas corpus petitioner can no longer present one or

more of his claims to the state courts, he has waived those claims for purposes of federal habeas corpus review unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error. *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). *Wainright* replaced the "deliberate bypass" standard of *Fay v. Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

Failure to raise a constitutional issue at all on direct appeal is subject to the cause and prejudice standard of *Wainwright v. Sykes*, 433 U. S. 72 (1977). *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Leroy v. Marshall*, 757 F.2d 94 (6th Cir.), *cert. denied*, 474 U.S. 831 (1985).

The Sixth Circuit Court of Appeals requires a four-part analysis when the State alleges a habeas claim is precluded by procedural default. *Maupin v. Smith*, 785 F. 2d 135, 138 (1986).

> First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
>
> (* * *)
>
> Second, the court must decide whether the state courts actually enforced the state procedural sanction.
>
> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim.
>
> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Id.

Mr. Wilson's sixth ground for relief is clearly procedurally defaulted. He presented it for the first time in his motion for new trial which the Court of Common Pleas refused to consider because it was untimely. The Court of Appeals affirmed. Thus there is no doubt that the timeliness rule was enforced against him. Requiring claims to be timely filed protects the valid state interest in finality of criminal convictions, and this rule is clearly independent of any federal consideration.

Mr. Wilson does not suggest any cause for his delay in filing the motion for new trial. At least as to his claim that black males were systematically excluded from his jury[3], that fact would have been apparent to him at the time of trial.

Even if this Court were to reach the merits of this claim, Mr. Wilson has presented no evidence in support of it. All he says by way of facts is that he hasn't been given the voir dire transcripts. He doesn't even make any specific allegations about particular black males in the venire who were excluded, nor did he make any such allegation in the motion for new trial before Judge Sunderland.

In sum, Ground Six is both procedurally defaulted and without merit.

GROUND SEVEN: ACTUAL INNOCENCE

In his seventh ground for relief, Mr. Wilson asserts that he is actually innocent. A claim of actual innocence **alone** is insufficient to warrant habeas relief. *Herrera v. Collins*, 506 U.S.

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[3]It is unclear from the motion papers whether Mr. Wilson is claiming black males were purposely excluded from the pool from which the venire was drawn or that the prosecutor intentionally used his peremptory challenges in a racially exclusionary manner.

390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). Rather, actual innocence may be pled as a grounds of avoiding the requirement to show cause and prejudice on a claim which has been procedurally defaulted in the state courts.

In *Murray v. Carrier,* 477 U.S. 478 (1986), the Supreme Court recognized an exception to the cause and prejudice requirement for a petitioner who could demonstrate actual innocence. However, actual innocence means factual innocence as compared with legal innocence. *Kuhlmann v. Wilson,* 477 U.S. 436, 454, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). "A prototypical example of actual innocence in a colloquial sense is the case where the State has convicted the wrong person of the crime." *Sawyer v. Whitley,* 505 U.S. 333, 112 S. Ct. 2514, 120 L.Ed. 2d 269 (1992). To come within the actual innocence exception to the required showing of cause and prejudice with respect to an abuse of the writ, a habeas petitioner or §2255 movant must show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. That is, the petitioner must show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt in the light of the new evidence he or she is tendering.

It is not strictly necessary to reach the actual innocence question because the Court has analyzed each of the claims on the merits, although it found procedural default in the alternative on ground six. But for the sake of completeness, the Court notes that Mr. Wilson has not offered any new evidence that he is innocent. The case from the beginning has been about whether the jury would believe the victim witness or Mr. Wilson. Mr. Wilson, a forty-two year old male at the time of the incident, admitted to having the victim (daughter of his girlfriend and later wife) undress. He then kissed her on the breast and later admittedly touched his tongue to her perineal area, all allegedly as a part of an "investigation" about whether she had been sexually abused by someone else. The victim's testimony was that, in addition to this, he inserted his tongue into her. Mr.

Wilson offers no reason why this Court should believe him and substitute its belief for that of the jury, which heard the live witnesses subject to cross examination.

Ground Seven does not constitute a separate ground for habeas corpus relief and should be denied on that basis.

CONCLUSION

In accordance with the foregoing analysis, the Petition for Writ of Habeas Corpus should be DENIED.

August 9, 1999.

Michael R. Merz
United States Magistrate Judge

NOTICE

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within ten days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is automatically extended to thirteen days (excluding intervening Saturdays, Sundays, and legal holidays) because this Report is being served by mail and may be extended further by the Court on timely motion for an extension. 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. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within ten days after being served with a copy thereof.

Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See, United States v. Walters*, 638 F. 2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

LAWRENCE E. WILSON,	:	
Petitioner,	:	
vs.	:	Case No. C-3-99-128
ROBERT L. HURT, Warden,	:	CHIEF JUDGE WALTER HERBERT RICE
Respondent.	:	

DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE (DOC. #19); PETITIONER'S OBJECTIONS TO SAID JUDICIAL FILING (DOC. #20) OVERRULED; PETITION FOR WRIT OF HABEAS CORPUS, AS AMENDED, DENIED; JUDGMENT TO ENTER IN FAVOR OF RESPONDENT AND AGAINST PETITIONER; ENTRY DENYING MOTION FOR LEAVE TO APPEAL *IN FORMA PAUPERIS* AND FOR CERTIFICATE OF APPEALABILITY; TERMINATION ENTRY

Based upon the reasoning and citations of authority set forth in the Report and Recommendations of the United States Magistrate Judge, filed August 9, 1999 (Doc. #19), as well as upon a thorough *de novo* review of this Court's file and the applicable law, this Court adopts said Report and Recommendations in their entirety. The Petitioner's Objections to said judicial filing (Doc. #20) are overruled. The Petition for Writ of Habeas Corpus, as amended, is denied upon its merits.

In ruling as aforesaid, this Court makes the following non-exclusive, observations:

Appendix I

1. Given that the Petitioner has dismissed his unexhausted claims (Ground 1, as to ineffective assistance of trial counsel, and Ground 5), the Petition is before this Court only on the ineffective assistance of appellate counsel portion of Ground 1, and Grounds 2, 3, 4, 6 and 7.

2. Petitioner's objections cover only the Magistrate Judge's conclusions as to Ground 1 (ineffective assistance of appellate counsel) and Ground 2 (invalid waiver of counsel). The crux of his objections is that appellate counsel did not appeal from the invalid waiver of trial counsel. The state Court of Appeals, in considering this claim, found that Petitioner did not actually waive his right to counsel. The actual record is somewhat more complex. In a review of the trial transcript, pages 88-104, it shows that after some hesitation, he did take over from his trial counsel, insofar as the re-cross examination of the victim witness and the entire cross examination of police officer Wright are concerned. Once officer Wright's testimony was concluded, the state rested and trial counsel again became involved as counsel (he had remained as Petitioner's legal advisor for the brief time that Petitioner was asking questions) and presented the trial judge with a plea agreement. When the plea agreement fell apart and the trial proceeded, the Petitioner again conducted his own defense, but with trial counsel remaining as an advisor. The Petitioner put his wife (mother of the victim) and himself on the stand. At some point after the jury retired to begin deliberations, trial counsel is

again acting as counsel in helping the Court respond to juror questions.

While the trial judge admittedly did not go through the extensive questions that are recommended in the District Judge's Bench Book for someone who wishes to proceed without counsel, neither did he leave Petitioner without the assistance of counsel. Never during the trial did Petitioner ask that his trial counsel leave the courtroom or not act as standby counsel or as his legal advisor. Petitioner had the assistance of legal counsel throughout the trial, except for that portion of the trial where he exercised his right under *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975), to conduct a portion of the examination himself. Of equal importance, Petitioner has shown no prejudice, nothing which would have been done differently by counsel during that portion in which he was proceeding on his own. *Faretta* expressly recognizes the practice of appointing standby counsel (footnote 46 at 422 U.S. 834). When standby counsel is appointed without objection, and serves in that capacity, likewise without objection, with counsel going back and forth between conducting the case and advising, a defendant has not been deprived of counsel.

WHEREFORE, based upon the aforesaid, this Court adopts the Report and Recommendations of the United States Magistrate Judge (Doc. #19), and overrules the Petitioner's Objections thereto (Doc. #20). Judgment will be ordered entered in favor of Respondent and against Petitioner herein on the merits of the Petition for Writ of Habeas Corpus, as amended.

Given that the issues raised in the within Petition and in the Court's discussion herein are not matters about which reasonable jurists could disagree, the anticipated request for a Certificate of Appealability and for Leave to Appeal *In Forma Pauperis* is denied.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

December 30, 1999

WALTER HERBERT RICE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Copies mailed to:

Lawrence E. Wilson, *Pro Se*
Katherine E. Pridemore, Esq.

WHR/djv

APPENDICES

COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT

CASE NO.s 16728 and 16752

Appx. J	Application for Reconsideration And for En banc Consideration Decision and Entry – Overruled	Filed May 6, 2015
Appx. K	United States Court of Appeals Application for Second or Successive Petition for habeas corpus relief Under 28 U.S.C. 2254	Filed October 11, 2019
Appx. L	United States Court of Appeals For the Sixth Circuit- Motion for Relief From the Judgment – not filed by the Clerk, General Docket – Case No. 19-3310	Filed February 11, 2021
Appx. M	Supreme Court of the United States Office of the Clerk – requiring corrections	Dated May 1, 2002
Appx. N	Court of Claims of Ohio Lost or destroyed legal materials Case No. 2001-12088-AD	Decided July 1, 2003

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO *Plaintiff-Appellee* v. LAWRENCE EARL WILSON *Defendant-Appellant*	Appellate Case Nos. 16728 and 16752 Trial Court Case No. 1996-CR-1019

DECISION AND ENTRY

May 6th, 2015

PER CURIAM:

On March 16, 2015, Appellant, Lawrence Earl Wilson, filed an application for reconsideration and for en banc consideration with respect to a decision we issued on October 6, 1998. The State of Ohio has responded to the application, and this matter is ripe for disposition.

In May 1997, Wilson was found guilty of one count of rape of a person under the age of thirteen, and was sentenced to not less than nine and no more than 25 years in prison. We affirmed Wilson's conviction and sentence in August 1998. *See State v. Wilson*, 2d Dist. Montgomery Nos. 16728, 16752, 1998 WL 639100 (Aug. 7, 1998) (*Wilson I*).

Appendix J

Wilson then filed a pro se application to reopen his appeal based on alleged ineffective assistance of appellate counsel. We denied the application on October 6, 1998. *See State v. Wilson*, 2d Dist. Montgomery Nos. 16728, 16752 (Oct. 6, 1998) (*Wilson II*). Among the matters raised in the application was that Wilson's waiver of his right to the assistance of counsel at trial was not knowing, intelligent, and voluntary. *Id.* at p. 2. We rejected Wilson's claim that appellate counsel had rendered ineffective assistance by failing to include this issue on direct appeal. *Id.* The record indicates that copies of our decision were mailed to Wilson. Wilson's appeal from our decision on the application to reopen was dismissed by the Supreme Court of Ohio on February 3, 1999. *See State v. Wilson*, 84 Ohio St.3d 1485, 705 N.E.2d 365 (1999).

Subsequently, Wilson filed numerous motions with the federal and state courts, challenging various aspects of his conviction. For example, in March 1998, while his direct appeal was pending, Wilson filed a motion with the trial court, seeking a new trial, as well as an application for an order permitting a delayed motion for new trial. After the trial court rejected Wilson's request, Wilson appealed to our court. We affirmed the trial court's judgment on March 31, 1999. *See State v. Wilson*, 2d Dist. Montgomery No. 17515, 1999 WL 173551, *2 (Mar. 31, 1999) (*Wilson III*).

After failing to obtain relief in state court, Wilson filed a petition for a writ of habeas corpus in federal district court. After the petition was denied, Wilson appealed to the Sixth Circuit Court of Appeals. See *Wilson v. Hurt*, 29 Fed.Appx. 324, 325 (6th Cir.2002) (*Wilson IV*).[1] In the federal case, the Sixth Circuit Court of Appeals granted Wilson a certificate of appealability on the following issues:

[1] This case was not selected for publication in the Federal Reporter.

> First, Wilson argues that he proceeded pro se in the middle of the trial and did not validly waive his right to counsel. Thus, he argues that he was denied his Sixth Amendment right to the assistance of trial counsel. Second and closely related, Wilson argues that the assistance of his appellate counsel was ineffective because counsel did not raise his first argument on direct appeal.

Id. at 327.

Initially, the Sixth Circuit Court of Appeals concluded that Wilson had knowingly and voluntarily waived his right to counsel. In this regard, the court stated that:

> Even if we were not limited in our review by 28 U.S.C. § 2254(d)(1), we would not hold the defendant's waiver insufficient under the precedents of this court. This court has never required the formality of searching inquiry into the defendant's knowledge of the perils accompanying *pro se* or hybrid litigation for a valid waiver. *See United States v. McDowell*, 814 F.2d 245, 248-49 (6th Cir.1987). The continuing presence of advisory counsel also increases the evidence that a decision to proceed *pro se* was voluntarily made. *See United States v. Wright*, 791 F.2d 936 (table), 1986 WL 16915, *3 (6th Cir.1986); *Maynard v. Meachum*, 545 F.2d 273, 279 (1st Cir.1976). Moreover, much thinner warnings by the trial court, in one case consisting only of a requirement that the defendant consult with his appointed advisory counsel, have been deemed by this court sufficient for a knowing and voluntary waiver. *See McDowell*, 814 F.2d at 247. Here, where the court had advisory counsel discuss with Wilson the implications

> of undertaking himself the examination of witnesses, required that advisory counsel sit with Wilson for the remainder of the proceedings, advised Wilson on the record of all of his responsibilities if he decided to proceed on his own, and informed Wilson that his questioning would also be bound by the rules of evidence, we hold that the court's development of the record was more than adequate to insure that Wilson's waiver was knowing and voluntary as required by *Faretta* [*v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)].

Wilson IV at 329.

In addition, the Sixth Circuit Court of Appeals concluded that Wilson's appellate counsel did not render ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In this regard, the court of appeals observed that:

> The only question with regard to the performance of Wilson's appellate counsel before this court is his omission of Wilson's claims regarding the invalid waiver of his right to trial counsel. Assuming, arguendo, that the omission was outside the wide range of reasonable professional judgment required for effective counsel under *Strickland*, we cannot find that Wilson was prejudiced by the omission. Although the *Strickland* prejudice standard does not require that we find that the result "more likely than not" would have been different on appeal, our determination that Wilson's argument regarding the validity of his waiver of trial counsel is without merit is not sufficiently close that we could find a

> "reasonable probability" that the Ohio Court of Appeals would have decided the question differently and overturned Wilson's conviction.

Wilson IV, 29 Fed.Appx. at 330.

A few years after the decision of the Sixth Circuit Court of Appeals, we rejected a pro se motion that Wilson had filed with our court in July 2004. *See State v. Wilson*, 2d Dist. Montgomery Nos. 16728, 16752 (August 5, 2004) (*Wilson V*). In the motion, Wilson asked us to "revisit our prior rejection of his App.R. 26(B) application and [invited] us to certify a conflict to the Supreme Court of Ohio for its resolution * * *." *Id.* at p. 1. We rejected both requests.

We first noted that Wilson failed to file the motion to certify within the time period set forth in App.R. 26(A), which was not subject to enlargement under App.R. 14(B). *Id.* at p. 2. With respect to the application for reconsideration, we noted that this motion was untimely, and we saw "no reason to waive the time requirement under the authority conferred on us by App.R. 14(B) at this late date." *Id.* Our decision noted that copies of the decision were sent to Wilson.

In November 2011, we issued yet another decision discussing Wilson's waiver of his right to counsel. *See State v. Wilson*, 2d Dist. Montgomery No. 24352, 2011-Ohio-5990 (*Wilson VI*). In that case, Wilson had filed a motion in January 2009, asking the trial court to correct a "void" sentence. The trial court overruled the motion. *Id.* at ¶ 2.

One of the clams involved Wilson's sentence, which he alleged was void. In discussing this issue, we made the following observations:

> Finally, Wilson contends that his trial attorney was dismissed, mid-trial, without a "valid waiver of [his right to] counsel for trial or sentencing."

> He claims that, as a result, both his original sentence and his amended sentence were void. On direct appeal, we noted that, "[p]art-way through his trial, Wilson insisted on taking over his own defense from his counsel, and did so." *State v. Wilson* (Aug. 7, 1998), Montgomery App. No. 16728 and 16752. We also rejected numerous arguments claiming that Wilson's trial attorney had been ineffective prior to the point when Wilson took over his own defense, as well as Wilson's claims that "his counsel's 'lack of preparedness and unfamiliarity with the intricacies of trial procedure caused [Wilson] * * * to elect to proceed pro se.' " Because we rejected Wilson's claim on direct appeal that he was denied his right to counsel, the trial court did not err in finding that this claim was barred by res judicata.

Wilson VI at ¶ 23.

Subsequently, on January 30, 2014, Wilson filed a pro se motion for relief from judgment and an application for delayed reconsideration for reopening of the first appeal as of right. In the motion, Wilson contended that we had originally applied the wrong standard in assessing his motion to reopen his appeal. Specifically, he claimed that he was only required to demonstrate a colorable claim of ineffective assistance of counsel. Among the grounds asserted in the motion was Wilson's allegedly invalid waiver of counsel in the trial court. See January 1, 2014 Motion for Relief from the Judgment and Application for Delayed Reconsideration for Reopening of the First Appeal as of Right, pp. 6-7.

We overruled Wilson's motion and application on June 3, 2014. See *State v. Wilson,* 2d Dist. Montgomery Nos. 16738 and 16752 (June 3, 2014) (*Wilson VII*). We

gave the following reasons for our decision: (1) we saw no basis for reconsidering our prior decision; (2) a defendant has no right to file a second or successive application for reopening; and (3) Wilson failed to establish good cause for the more than fifteen-year delay since we decided his prior application to reopen. *Id.* at p. 2. The decision also indicates that a copy was sent to Wilson.

Apparently undeterred, Wilson filed the current application for reconsideration on March 16, 2014, again raising the argument that he did not knowingly, intelligently, and voluntarily waive his right to counsel and that appellate counsel was ineffective for failing to include this issue on appeal. This time, Wilson also included a motion for en banc consideration. After consideration of the application, we conclude that it is untimely and must be overruled.

Regarding reconsideration, App.R 26(A)(1) provides that:

> Application for reconsideration of any cause or motion submitted on appeal shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by App. R. 30(A).

Wilson's current application for reconsideration was filed more than 16 years after our October 6, 1998 decision rejecting his motion to reopen his appeal, and it is clearly untimely. Wilson contends, however, that the time for applying for reconsideration has never expired because the clerk failed to make a note in the docket of mailing, as required by App.R. 30. We disagree, because the Supreme Court of Ohio stated in *Martin v. Roeder*, 75 Ohio St.3d 603, 604, 665 N.E.2d 196 (1996), that "under the Appellate Rules, application for reconsideration of any judgment submitted on

appeal must be filed within ten days after filing of the judgment or announcement of the court's decision, whichever is later." Under this standard, the application is clearly untimely.

We also consider Wilson's argument disingenuous, since he appealed in November 1998 to the Supreme Court of Ohio from our decision in *Wilson II*, which rejected his motion to reopen his appeal. As was noted, the Supreme Court of Ohio dismissed the appeal in 1999. *Wilson*, 84 Ohio St.3d at 1485, 705 N.E.2d 365.

Furthermore, as we noted nearly a year ago in *Wilson VII*, the Supreme Court of Ohio has stressed that "that " '[n]either App.R. 26(B) nor *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, provides a criminal defendant the right to file second or successive applications for reopening." *State v. Cooey*, 99 Ohio St.3d 345, 2003-Ohio-3914, 792 N.E.2d 720, ¶ 5, quoting *State v. Williams*, 99 Ohio St.3d 179, 2003-Ohio-3079, 790 N.E.2d 299, ¶ 10. (Other citations omitted.). *See, also*, *Wilson VII*, 2d Dist. Montgomery No. 16738 and 16752, at p.3 (June 3, 2014). Although Wilson has styled the current motion as one for reconsideration, in reality, he is attempting to reopen his appeal.

To avoid untimeliness, Wilson argues that his time for filing a motion for reconsideration should be enlarged under App.R. 14(B). This rule states, in pertinent part, that:

> For good cause shown, the court, upon motion, may enlarge or reduce the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of the prescribed time. The court may not enlarge or reduce the time for filing a notice of appeal

> or a motion to certify pursuant to App. R. 25. Enlargement of time to file an application for reconsideration or for en banc consideration pursuant to App. R. 26(A) shall not be granted except on a showing of extraordinary circumstances.

According to Wilson, extraordinary circumstances exist in the case before us because the issue raised in his motion – the right to counsel – is of sufficient importance to warrant disregard of the time limit in App.R. 26(A)(1). We disagree. Although the right to counsel is important, Wilson presented his arguments to our court sixteen years ago, and we rejected them. We also rejected his requests to reconsider our position in both 2004 and 2014. *See Wilson V*, 2d Dist. Montgomery Nos. 16728, 16752, at p. 1 (August 5, 2004), and *Wilson VII*, 2d Dist. Montgomery Nos. 16738 and 16752, at p. 2 (June 3, 2014). Under the circumstances, no extraordinary circumstances warranting enlargement of time exist.

Concerning the request for en banc consideration, App.R. 26(A)(2)(b) allows a party to make an application for en banc consideration. The rule further provides that "[a]n application for en banc consideration must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions." *Id.* In addition, App.R. 26(A)(2)(c) states that "[t]he rules applicable to applications for reconsideration set forth in division (A)(1) of this rule, including the timing requirements, govern applications for en banc consideration."

Applying the timeliness rules in App.R. 26(A)(1), as required, the application for en banc consideration is untimely in view of the previous discussion. It is also not

permitted under the provision in App.R. 14(B) allowing for enlargement of time. Accordingly, the application for reconsideration and for en banc consideration is overruled.

SO ORDERED.

JEFFREY E. FROELICH, Presiding Judge

MIKE FAIN, Judge

MARY E. DONOVAN, Judge

MICHAEL T. HALL, Judge

JEFFREY M. WELBAUM, Judge

Copies to:

Michele D. Phipps
Attorney for Appellee
301 W. Third Street, 5th Floor
Dayton, Ohio 45422

Lawrence Earl Wilson
Defendant-Appellant, pro se
#A349229
Franklin Medical Center – Zone B
1800 Harmon Avenue
Columbus, Ohio 43223

Hon. Richard Skelton
Montgomery County Common Pleas Court
41 N. Perry Street
Dayton, Ohio 45422

//AF

No. 19-3310

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: LAWRENCE E. WILSON,

Movant.

ORDER

Before: CLAY, DONALD, and LARSEN, Circuit Judges.

Lawrence Wilson, an Ohio prisoner proceeding pro se, moves this court for an order authorizing the district court to consider a second or successive petition for habeas corpus relief under 28 U.S.C. § 2254. The State has filed a response opposing the motion.

In 1997, a jury convicted Wilson of one count of raping a child less than thirteen years of age. The trial court sentenced Wilson to serve nine to twenty-five years' imprisonment. An Ohio Court of Appeals affirmed his conviction and affirmed the trial court's denial of Wilson's motion for a new trial. *State v. Wilson*, Nos. 16728/16752, 1998 WL 639100 (Ohio Ct. App. Aug. 7, 1998); *State v. Wilson*, No. 17515, 1999 WL 173551 (Ohio Ct. App. Mar. 31, 1999). Wilson did not appeal to the Ohio Supreme Court.

Wilson filed his initial federal habeas corpus petition in 1999, which the district court denied on the merits. In that petition, Wilson raised the following grounds for relief: (1) trial counsel provided ineffective assistance; (2) he did not enter a knowing and voluntary waiver of the right to counsel before appointed counsel was dismissed during trial; (3) he was denied his right to confront and cross-examine the chief witness against him; (4) the prosecutor engaged in misconduct; (5) the trial court gave erroneous instructions to the jury; (6) the jury did not represent a fair cross-section of the community, and members of his race were purposely excluded by the prosecutor; and (7) he was actually innocent. We affirmed the district court's judgment. *Wilson v. Hurt*, 29 F. App'x 324 (6th Cir. 2002) (per curiam). Since that time, Wilson has filed numerous

petitions for post-conviction relief in both federal and state courts. In 2002, 2006, and 2013, Wilson filed motions seeking authorization to file a second or successive petition, which were denied for failing to satisfy either criterion in 28 U.S.C. § 2244(b). *See In re Wilson*, No. 13-3192 (6th Cir. Aug. 13, 2013); *In re Wilson*, No. 06-3263 (6th Cir. Oct. 4, 2006); *In re Wilson*, No. 02-4430 (6th Cir. May 14, 2003).

In his current motion, Wilson proposes to raise the following claims in a new petition: (1) "[t]here was no[] constitutionally permissible waiver of the right to counsel"; (2) the final judgment is void; (3) he was denied meaningful consideration for parole; (4) the denial of parole rendered his sentence "grossly disproportionate" in violation of the Eighth Amendment; and (5) "the State has intentionally treated him differently from others similarly situated" in violation of his rights to due process and equal protection.

We "may authorize the filing of a second or successive" habeas corpus petition only if the petitioner "makes a prima facie showing" that it contains a claim premised on (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"; or (2) new facts that "could not have been discovered previously through the exercise of due diligence" and that, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2), (b)(3)(C). Claims raised in a prior § 2254 petition must be dismissed. 28 U.S.C. § 2244(b)(1).

Wilson's motion fails to meet these statutory requirements. First, Wilson's proposed first claim concerning the waiver of his right to counsel was raised in his initial § 2254 petition and is therefore subject to dismissal. *Id.*

Second, his proposed second and fifth claims do not rely on a retroactively applicable new rule of constitutional law or new facts that could not have been discovered previously through the exercise of due diligence. Wilson's proposed second ground for relief concerns the trial court's entry of an amended termination entry in August 1997 and a nunc pro tunc judgment in 2011. The

trial court amended the termination entry in 1997 to correct the initial termination entry's identification of the offense as a first-degree felony rather than an aggravated first-degree felony, and the 2011 nunc pro tunc judgment was entered only to add wording that identified the manner of Wilson's conviction, "by jury trial," in accordance with Ohio Criminal Rule 32(C). *See State v. Wilson*, No. 24352, 2011 WL 5826043, at *1-2 (Ohio Ct. App. Nov. 18, 2011). Indeed, the Ohio Court of Appeals found that the failure to state the manner of conviction was merely a clerical error and that the correction of the misidentification of the offense as a first-degree felony did not alter Wilson's sentence and thus held that Wilson's judgment was never void. *See id.*; *see also State ex rel. Wilson v. McGee*, 916 N.E.2d 480 (Ohio 2009) (per curiam). There was no re-sentencing hearing in either instance and Wilson's sentence remained unaffected. To the extent Wilson argues that the 2011 nunc pro tunc judgment was a new judgment that reset the second or successive count, *see King v. Morgan*, 807 F.3d 154, 156 (6th Cir. 2015), we already considered and rejected that argument when we denied Wilson's 2013 motion for authorization to file a second or successive petition. *See In re Wilson*, No. 13-3192 (6th Cir. Aug. 13, 2013). Moreover, the nunc pro tunc judgment is neither a new fact that could not have been discovered previously nor a fact that bears on his guilt or innocence. *See* § 2244(b)(2)(B).

In his proposed fifth ground for relief, Wilson argues that the State has violated his rights to due process and equal protection by treating him differently from others similarly situated. Wilson provides no factual support for this proposed claim and does not cite any new rule of constitutional law on which his claim is based. He therefore fails to satisfy the statutory requirements for raising such a claim in a second or successive petition.

With 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 (6th Cir. 2010).

Accordingly, Wilson's motion for an order authorizing the district court to consider a second or successive § 2254 petition is **DENIED** as to his proposed first, second, and fifth claims and **DENIED** as unnecessary as to his proposed third and fourth claims.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Received
February 19, 2021
YEW

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: January 26, 2021

Mr. Lawrence E. Wilson
Franklin Medical Center
P.O. Box 23658
Columbus, OH 43223

Re: Case No. 19-3310, *In re: Lawrence Wilson*
Originating Case No. : 3:99-cv-00128

Dear Mr. Wilson:

Enclosed please find, unfiled, your motion for relief from judgment. Please be advised that this court denied your 28 U.S.C. § 2244 application by order filed October 11, 2019. The order was self-executing the day it was filed and this court cannot entertain any further filings in this case.

If there is anything new to which you want to bring the court's attention, you will need to file a new § 2244 application.

Sincerely yours,

s/Patricia J. Elder
Senior Case Manager

cc: Ms. Mary Anne Reese

Enclosure

Appendix L

Received February 16, 2021 JEW

General Docket

United States Court of Appeals for the Sixth Circuit

Court of Appeals Docket #: 19-3310 **Docketed:** 04/09/2019
In re: Lawrence Wilson **Termed:** 10/11/2019
Appeal From: Southern District of Ohio at Dayton
Fee Status: not applicable

Case Type Information:
1) Original Proceeding
2) Successive Habeas Corpus
3) null

Originating Court Information:
District: 0648-3 : 3:99-cv-00128
Trial Judge: Walter H. Rice, U.S. District Judge

Prior Cases:

00-3165 **Date Filed:** 02/08/2000 **Date Disposed:** 02/06/2002 **Disposition:** Oral Argument

02-4430 **Date Filed:** 12/19/2002 **Date Disposed:** 05/14/2003 **Disposition:** Motions Panel, Other

06-3263 **Date Filed:** 02/22/2006 **Date Disposed:** 10/04/2006 **Disposition:** Motions Panel, Other

13-3192 **Date Filed:** 02/21/2013 **Date Disposed:** 08/13/2013 **Disposition:** Motions Panel, Other

Current Cases:
None

In re: LAWRENCE E. WILSON (State Prisoner: #349229) Movant	Lawrence E. Wilson [NTC Pro Se] Franklin Medical Center P.O. Box 23658 Columbus, OH 43223

RHONDA RICHARD Respondent	Mary Anne Reese Direct: 513-852-1525 [COR LD NTC Retained] Office of the Attorney General of Ohio 441 Vine Street Suite 1600 Cincinnati, OH 45202

M. Scott Criss, Assistant Attorney General
Terminated: 04/17/2019
[NTC Retained]
Office of the Attorney General
of Ohio
150 E. Gay Street
16th Floor
Columbus, OH 43215

In re: LAWRENCE E. WILSON

Movant

04/09/2019	1	Second Successive Motion Docketed. Notice filed by Movant Lawrence E. Wilson. 2nd/Successive Motion Received in 6CA: 04/08/2019. (MMD) [Entered: 04/09/2019 01:24 PM]
04/09/2019	2	The case manager for this case is: Michelle Davis (MMD) [Entered: 04/09/2019 04:51 PM]
04/17/2019	3	APPEARANCE filed for Respondent Rhonda Richard by Mary Anne Reese. Certificate of Service: 04/17/2019. [19-3310] (MAR) [Entered: 04/17/2019 11:31 AM]
04/19/2019	4	RESPONSE in opposition filed regarding a motion second successive case, [1]; previously filed by Lawrence E. Wilson. Response from Attorney Ms. Mary Anne Reese for Respondent Rhonda Richard Certificate of Service:04/19/2019. [19-3310] (MAR) [Entered: 04/19/2019 11:19 AM]
06/13/2019	5	LETTER SENT to Lawrence E. Wilson, in response to letter of 6/12/19. (MMD) [Entered: 06/13/2019 08:16 AM]
10/11/2019	6	ORDER filed: Accordingly, Wilson's motion for an order authorizing the district court to consider a second or successive § 2254 petition is DENIED as to his proposed first, second, and fifth claims and DENIED as unnecessary as to his proposed third and fourth claims. [1]. Eric L. Clay, Bernice Bouie Donald and Joan L. Larsen, Circuit Judges. (PJE) [Entered: 10/11/2019 12:53 PM]
01/25/2021	7	LETTER SENT to Lawrence E. Wilson, returning unfiled motion for relief from judgment. (PJE) [Entered: 01/26/2021 11:02 AM]

Received
February 16, 2021
YEW

Received
10 MAY 2002

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

VILLIAM K. SUTER
CLERK OF THE COURT

May 1, 2002

AREA CODE 202
479-3011

Lawrence E. Wilson
#349229
5900 B.I.S. Road
Lancaster, OH 43130

RE: Lawrence E. Wilson v. Robert L. Hurt, Warden

Dear Mr. Wilson:

The above-entitled petition for writ of certiorari was postmarked April 21, 2002 and received April 30, 2002. The papers are returned for the following reason(s):

The appendix to the petition does not contain the following documents required by Rule 14.1(i):

The report and recommendation of the magistrate must be appended.

Please correct and resubmit as soon as possible. Unless the petition is received by this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

When making the required corrections to a petition, no change to the substance of the petition may be made.

Sincerely,
William K. Suter, Clerk
By:

Jeffrey Atkins
(202) 479-3263

Enclosures

cc: Katherine E. Pridemore

Appendix M

2003 WL 21652699

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Claims of Ohio.

Lawrence E. WILSON, Plaintiff,

v.

SOUTHEASTERN CORRECTIONAL INSTITUTION, Defendant.

No. 2001-12088-AD.

Decided July 1, 2003.

Prisoner brought action against correctional institution, seeking to recover value of materials delivered by him to institution personnel for mailing and subsequently lost or destroyed. The Court of Claims, No. 2001-12088-AD, held that: (1) evidence supported finding that prisoner's parcel containing legal material was negligently lost or destroyed while under care of correctional institution personnel, and (2) correctional institution was liable to prisoner in total amount of $225.00.

Judgment rendered.

Attorneys and Law Firms

Lawrence E. Wilson, # 349-229, 5900 B.I.S. Road, Lancaster, Ohio 43130, Plaintiff, Pro se.

Gregory C. Trout, Chief Counsel, Department of Rehabilitation and Correction, 1050 Freeway Drive North, Columbus, Ohio 43229, For Defendant.

MEMORANDUM DECISION

FINDINGS OF FACT

*1 {¶ 1} 1) At sometime between June through August, 2000, plaintiff, Lawrence E. Wilson, an inmate incarcerated at defendant, Southeastern Correctional Institution (SCI), delivered a box containing numerous legal materials to SCI personnel for mailing to a designated address. According to plaintiff, the box he delivered was packed with legal materials and other property including but not limited to pleadings, motions, orders, judgments, trial transcripts, memoranda, briefs, affidavits, research materials, correspondence, grievances, and other personal property.

{¶ 2} 2) Plaintiff asserted he authorized the mailing of the parcel containing his legal materials by having an inmate account withdrawal slip completed. Although the parcel was delivered to SCI mailroom staff and a mailing was authorized, the parcel was never mailed. Plaintiff contended the parcel was lost or destroyed while under the custody and care of SCI personnel. Plaintiff first complained about the loss of the box containing legal materials in either May or June of 2001. Plaintiff subsequently filed this complaint seeking to recover $2,500.00, the estimated value of the property contained in the box plaintiff delivered to defendant at sometime between June-August 2000.

{¶ 3} 3) Plaintiff submitted an affidavit from defendant's employee, Sgt. Karl Flugharty, who packed the box containing plaintiff's legal material. Sgt. Flugharty stated he packed a box with plaintiff's legal material and delivered the packed sealed parcel to the SCI mailroom for mailing. The packed box measured approximately "18-inches in length, 12-inches in width, and 10-inches in depth." Sgt. Flugharty recollected the box was "full of legal papers and documents." Additionally, Flugharty stated, the necessary authorization for paying postage on the parcel was completed. Defendant's mailroom has no record of ever receiving the parcel.

{¶ 4} 4) Defendant denied, for lack of knowledge, any liability in this matter. Defendant did not provide a mailroom log for the time period in question to establish if the plaintiff's parcel had been mailed. Defendant did not provide any evidence regarding withdrawals from plaintiff's inmate account for postage costs. Defendant ultimately did not provide any evidence to show the parcel was mailed after it was delivered into the hands of SCI mailroom staff.

{¶ 5} 5) The trier of fact finds evidence establishes plaintiff's parcel containing legal material was lost or destroyed while under the care of SCI personnel. This action involves a case of simple negligence.

Appendix N

{¶ 6} 6) Defendant contended plaintiff has failed to provide substantial proof of damages. Damages in this claim are confined to the reasonable value of the personal property contained in the unmailed parcel. Plaintiff has not submitted sufficient evidence to establish his damage claim.

CONCLUSIONS OF LAW

[1] {¶ 7} 1) Although not strictly responsible for a prisoner's property, defendant had at least the duty of using the same degree of care as it would use with its own property. *Henderson v. Southern Ohio Correctional Facility* (1979), 76 0356 AD.

*2 **[2]** {¶ 8} 2) Plaintiff has the burden of proving, by a preponderance of the evidence, that he suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University* (1977), 76-0368-AD.

{¶ 9} 3) This court in *Mullett v. Department of Correction* (1976), 76-0292-AD, held that defendant does not have the liability of an insurer (i.e., is not liable without fault) with respect to inmate property, but that it does have the duty to make "reasonable attempts to protect, or recover" such property.

[3] {¶ 10} 4) Negligence on the part of defendant has been shown in respect to the loss of the delivered parcel. *Baisden v. Southern Ohio Correctional Facility* (1977), 76-0617-AD.

{¶ 11} 5) The assessment of damages is a matter within the province of the trier of fact. *Litchfield v. Morris* (1985), 25 Ohio App.3d 42, 495 N.E.2d 462.

{¶ 12} 6) Where the existence of damage is established, the evidence need only tend to show the basis for the computation of damages to a fair degree of probability. *Brewer v. Brothers* (1992), 82 Ohio App.3d 148, 611 N.E.2d 492. Only reasonable certainty as to the amount of damages is required, which is that degree of certainty of which the nature of the case admits. *Bemmes v. Pub. Emp. Retirement Sys. Of Ohio* (1995), 102 Ohio App.3d 782, 658 N.E.2d 31.

[4] {¶ 13} 7) The court finds defendant liable to plaintiff in the amount of $200.00, plus the $25.00 filing fee, which may be reimbursed as compensable damages pursuant to the holding in *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc.2d 19, 587 N.E.2d 990.

{¶ 14} Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount of $225.00, which includes the filing fee. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

All Citations

Not Reported in N.E.2d, 2003 WL 21652699, 2003 -Ohio- 3741

End of Document