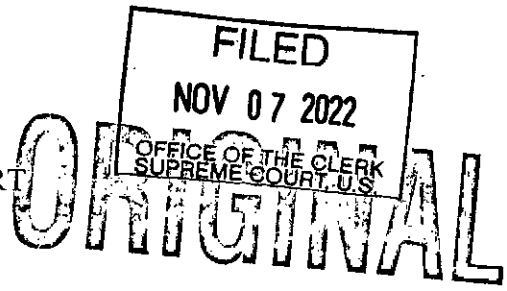
22-6181

CASE NO. _____



IN THE UNITED STATES SUPREME COURT

WILLIE SPEED

Petitioner-Appellant,

vs.

DOUGLAS FENDER, WARDEN

Respondent-Appellee.

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

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
CASE NO. 21-3931

WILLIE SPEED #A453-732
Lake Erie Correctional Institution
501 Thompson Road
P.O. Box 8000
Conneaut, OH 44030

PETITIONER-APPELLANT, *PRO SE*

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER AN ATTORNEY'S CONFLICT OF INTEREST DEPRIVED PETITIONER OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO EFFECTIVE ASSISTANCE AND DUE PROCESS

2. WHETHER PETITIONER'S RIGHT AGAINST EX POST FACTO WAS VIOLATED WHERE SUBSEQUENT ENACTMENT OF LAW INCREASED HIS TERM OF IMPRISONMENT.

TABLE OF CONTENTS

INDEX OF APPENDIX

TABLE OF AUTHORITIES

OPINIONS BELOW

A. Certificate of Appealability

1. United States Court of Appeals for the Sixth Circuit
Willie Speed v. Douglas Fender, Warden, 6th Cir. No. 2021-3931

a. Order, denying application for Certificate of Appealability and Motion to Proceed In Forma Pauperis (Date of Entry: April 27, 2022)

b. Order, denying request for en banc review (Date of Entry: July 27, 2022)

c. Order, denying request for rehearing en banc (Date of Entry: August 11, 2022)

B. Petition for Writ of Habeas Corpus

2. United States District Court for the Northern District of Ohio, Eastern Division
Willie Speed v. Douglas Fender, Warden, N.D.Ohio No. 1:18-CV-1296

a. Report and Recommendation, recommending dismissal of habeas corpus (ECF #: 16)
Date of Entry: July 20, 2021

b. Memorandum and Order, adopting Report and Recommendation (ECF #: 19)
Date of Entry: September 28, 2021

c. Judgment Entry, dismissing petition for writ of habeas corpus (ECF #: 20)
Date of Entry: September 28, 2021

C. Petitions for Post-Conviction Relief.

Cuyahoga County Court of Common Pleas
State of Ohio v. Willie Speed, Cuyahoga County No. CR-03-436669
Findings of Fact and Conclusions of Law denying Petitions for Post-Conviction Relief
Date of Entry of Judgment: December 7, 2015

D. Direct Appeal.

Ohio Court of Appeals for the Eighth Appellate District
State of Ohio v. Willie Speed, 8th Dist. Cuyahoga No. 83746
Convictions affirmed; sentence vacated; remanded for resentencing
Date of Entry of Judgment: September 30, 2004

STATEMENT OF THE BASIS FOR JURISDICTION

On April 27, 2022, the Sixth Circuit issued an Order denying Petitioner's Application for Certificate of Appealability ("COA"), and denied as moot Petitioner's Motion to Proceed In Forma Pauperis. **(See Exhibit A).** Pursuant to Rule 13 of the Rules of the Supreme Court of the United States the Court has jurisdiction to consider whether to grant certiorari to review the April 27, 2022 judgment of the Sixth Circuit.

In addition, the Court has jurisdiction to consider whether to grant certiorari to review the judgment of the Sixth Circuit denying Petitioner's Petition for En Banc Review of the Court's Order entered on July 27, 2022. **(See Exhibit B).**

Further, the Court has jurisdiction to consider whether to grant certiorari to review the judgment of the Sixth Circuit denying Petitioner's Petition for Rehearing En Banc entered on August 11, 2022. **(See Exhibit C).**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions

B. Statutory Provisions

STATEMENT OF THE CASE

A. Trial and Direct Appeal.

On April 22, 2003, the Cuyahoga County, Ohio Grand Jury indicted Petitioner in Cuyahoga Common Pleas No. CR-03-436669, on three counts of Rape, felonies of the first degree, in violation of Ohio Revised Code § 2907.02(A)(2) (hereinafter "R.C. § 2907.02(A)(2)"), each with specifications for Notice of Prior Conviction (R.C. § 2929.13(F)(6)) ("NPC"), Repeat Violent Offender (R.C. § 2941.149) ("RVO"), and Sexually Violent Predator (R.C. 2941.148) ("SVP") (Counts One, Two, Three); three counts of Kidnapping, felonies of the first degree, in violation of R.C. 2905.01(A)(1), each with specifications for NPC, RVO, and Sexual Motivation (R.C. § 2941.147) ("SMS") (Counts Four, Five, Six); one count of Aggravated Robbery, a felony of the first degree, in violation of R.C. 2911.01(A)(3), with specifications for NPC and RVO (Count Seven); four counts of Impersonating a Peace Officer, in violation of R.C. 2921.51(B) (fourth degree misdemeanor), (C) (first degree misdemeanor), (D) (fourth degree felony) and (E) (third degree felony) (Counts Eight, Nine, Ten, Eleven); one count of Intimidation, a felony of the fifth degree, in violation of R.C. § 2923.24(A) (Count Twelve); and one count of Possession of Criminal Tools, a felony of the fifth degree, in violation of R.C. 2923.24(A) (Count Thirteen).

Petitioner executed a Waiver of Jury Trial and elected to have his case tried to the bench.

Prior to trial, the State disclosed the exculpatory evidence that the Ohio Bureau of Criminal Investigation ("BCI") lab results concluded that Petitioner did not match the semen sample collected from the rape kit.

On August 26, 2003, a bench trial commenced. After the prosecution rested its case, the trial court granted Petitioner's Ohio Criminal Rule 29 motion for judgment of acquittal on the charge of aggravated robbery. The prosecution then amended the indictment and reduced the rape

charge under Count Three to Attempted Rape, a felony of the second degree, in violation of R.C. § 2923.02/R.C. § 2907.02.

The trial court found Petitioner guilty on August 28, 2003, of two counts of rape, one count of attempted rape, three counts of kidnapping, four counts of impersonating a police officer, and one count of possession of criminal tools. The trial court found Petitioner not guilty on the intimidation charge.

On October 2, 2003, a hearing on the sexually violent predator was had, and the trial court found Petitioner. Following the hearing, a sentencing hearing was held and the court sentenced Petitioner to 9 years for kidnapping, 9 years to life for rape, 7 years for attempted rape, 17 months for impersonating a police officer, and 11 months for possession of criminal tools. All sentences were ordered to run concurrently for a total prison term of 9 years to life. The court further ordered that Petitioner would be subject to the maximum amount of post-release control allowed by law.

Petitioner, through counsel, filed an appeal in the Ohio Court of Appeals for the Eighth Appellate District on November 6, 2003, and presented the following assignments of error:

> **Assignment of Error I:**
> The trial court incorrectly premised its verdicts upon information not in evidence, in violation of Mr. Speed's Fifth, Sixth, and Fourteenth Amendment rights to trial, confrontation and due process of law.
>
> **Assignment of Error II:**
> The verdicts were against the manifest weight of the evidence.
>
> **Assignment of Error III:**
> The state improperly admitted evidence of Mr. Speed's refusal to speak with police.
>
> **Assignment of Error IV:**
> The trial court erred when it entered convictions for the kidnapping charges in counts four through six after finding they were allied with the offenses alleged in counts one through three.

Assignment of Error V:
Mr. Speed received the ineffective assistance of counsel with respect to the hearing on whether there was evidence to sustain a finding that Mr. Speed is a sexually violent predator under R.C. 2971.01.

Assignment of Error VI:
The trial court erred when it sentenced Mr. Speed to seventeen months imprisonment for each of counts eight and nine.

Assignment of Error VII:
The trial court erred when it failed to advise Mr. Speed of the consequences attendant to the imposition of a term of post-release control.

The State filed its brief in opposition.[1]

On September 30, 2004, the Eighth District affirmed the judgment of the trial court, but found that the State conceded that the trial court did err on sentencing Petitioner to 17 months for each Impersonating a Peace Officer conviction. The Eighth District vacated those sentences and remanded the case to the trial court only for resentencing as to Counts Eight and Nine. See *State v. Speed*, 8th Dist. Cuyahoga No. 83746 2004-Ohio-52311 **(See Exhibit H).**

Petitioner, through counsel, filed a Notice of Appeal with the Supreme Court of Ohio on November 29 2004. In his Memorandum in Support of Jurisdiction, Petitioner presented the following propositions of law:

Proposition of Law I:
A criminal defendant is denied his right to trial and to due process when, in a bench trial, the trial court premises its verdict on its own beliefs about rape trauma in the absence of any evidence in this regard.

Proposition of Law II:
When the record is not clear as to whether the factfinders verdict was influenced by the use of post-arrest silence, the defendant's conviction violated the Fifth and Fourteenth Amendments to the United States Constitution.

[1] The Eighth District immediately remanded the case to the trial court because the repeat violent offender specifications had not been disposed of. On November 15, 2004, the trial court dismissed the repeat violent offender specifications at the prosecutor's request.

Proposition of Law III:
A trial court errs when it enters separate convictions for two offenses that the trial court has found to be allied to one another.

Proposition of Law IV:
Counsel is ineffective when counsel stipulates to evidence that is otherwise inadmissible.

Proposition of Law V:
Police incident reports are inadmissible at a hearing to determine whether a defendant is a sexually violent predator under R.C. 2791.01.

The State responded to Petitioner's memorandum in support of jurisdiction on December 16, 2004.

On March 2, 2005, the Supreme Court of Ohio denied Petitioner leave to appeal and dismissed the case as not involving any substantial constitutional question. See *State v. Speed*, 105 Ohio St.3d 1452, 2005-Ohio-763, 823 N.E.2d 457.

B. Resentencing on Remand.

A resentencing hearing was held on November 15, 2019, the trial court resentenced Petitioner to 9 years to life in prison for each rape conviction and to each kidnapping conviction, which were found to be allied offenses of similar import; 7 years in prison for attempted rape; 6 months in prison for each impersonating a peace officer under Counts 8-9; 17 months in prison for each impersonating a peace officer under Counts 10-11; and 11 months in prison for possessing criminal tools. All sentences were to be served concurrently, for the same sentence of 9 years to life in prison.

Petitioner did not seek an appeal of the resentencing.

C. Petitions for Post-Conviction Relief.

On June 14, 2004, Petitioner, through counsel, filed a Petition for Post-Conviction Relief in the trial court pursuant to R.C. § 2953.21, claiming his trial counsel provided ineffective assistance for failing to call known available witnesses. Petitioner's affidavit was attached.

Petitioner, *pro se*, filed a Petition to Vacate or Set Aside Conviction or Sentence in the trial court on June 15, 2004, claiming his trial counsel provided ineffective assistance for failing to call known available witnesses to support Petitioner's defense. Petitioner attached his Affidavit, a copy of pertinent police reports, and a flier advertising Petitioner's computer business.

The State filed a motion to dismiss the petitions on June 17, 2004 and June 21, 2004, on grounds that the claims presented therein were barred by the doctrine of res judicata.

On July 8, 2004, the trial court granted the State's motions by entry, and dismissed the petitions without a hearing.[2]

After receiving the Findings of Fact and Conclusions of Law, Petitioner, through counsel, filed an appeal in the Eighth District and presented the following assignments of error:

> **Assignment of Error No. I:**
> The trial court erred when it dismissed the petition for post-conviction relief on grounds that the allegations contained therein were barred by the doctrine of res judicata.
>
> **Assignment of Error No. II:**
> The trial court erred when it dismissed the petition as insufficient.

[2] Because the trial court did not issue findings of facts and conclusions of law with respect to denying Petitioner's petitions, Petitioner, *pro se*, filed a Request for Findings of Fact and Conclusions of Law in the trial court on July 28, 2004, which was denied by the court on August 31, 2004. Consequently, Petitioner, *pro se*, filed an original action in the Eighth District Court of Appeals to compel the trial court judge to issue findings of fact and conclusions of law. Subsequently, the trial court judge filed a motion for summary judgment, attaching its Findings of Fact and Conclusions of Law.

On April 21, 2005, Petitioner, pro se, filed a Motion For Leave to File Additional Exhibits to Support Assignments of Error, Instanter, to include the affidavit of Yolanda Humphrey-Monroe, an alibi witness. The court of appeals granted Petitioner leave on May 4, 2005.

On August 25, 2005, the Eighth District held the issues presented in the petitions were not barred by res judicata and that counsel provided ineffective assistance, and reversed the judgment of the trial court and remanded the case for a hearing on Petitioner's petitions. See *State v. Speed*, 8th Dist. Cuyahoga No. 85095, 2005-Ohio-4423 (Judge Corrigan dissent) (*Speed II*).

The State filed an appeal in the Supreme Court of Ohio on October 11, 2005, and presented the following propositions of law:

> **Proposition of Law No. I:**
> An appellate court it required to apply the abuse of discretion standard in reviewing a trial court's denial of a petition for post-conviction relief.
>
> **Proposition of Law No. II:**
> An appellate court, when reviewing a trial court's dismissal of a petition for post-conviction relief, may not consider an affidavit that was not filed with the trial court.

On January 25, 2006, the Supreme Court of Ohio denied the State's appeal and dismissed the same as not involving any substantial constitutional question. *State v. Speed*, 108 Ohio St.3d 1416, 2006-Ohio-179, 841 N.E.2d 320 (Slip Opinion).

1. Hearings on Petitions for Post-Conviction Relief.

A hearing on Petitioner's petitions for post-conviction relief was scheduled for May 1, 2006. However, the hearing was postponed until March 19, 2009. Just before the start of the hearing, however, Petitioner's counsel, John T. Martin, withdrew from the case after discovering he represented a material witness for Petitioner's defense. Instead, Attorney Patricia J. Smith was appointed to represent Petitioner at the hearing and the case was postponed until June 29, 2009.

On June 18, 2009, Ms. Smith requested the trial court to stay and hold the case in abeyance until the completion of Mr. Monroe's case, which was granted by the court on June 30, 2009.

The next hearing date was set for December 13, 2013.

On September 15, 2014, Petitioner, through counsel, filed an amended Petition for Post-Conviction Relief, presenting the following issues for review:

1. Mr. Speed was denied his rights to effective assistance of counsel guaranteed by Article I, Section 10 of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

2. Mr. Speed was denied due process of law because he is serving a sentence for being a sexually violent predator when, as a matter of law, he cannot be a sexually violent predator.

3. Mr. Speed was denied due process because he was not advised of his appellate rights at the time of his 2004 resentencing.

The State filed an opposition on September 23, 2014.

Nearly ten years after the Eight District's August 25, 2005 remand in *Speed II*, the trial court commenced the hearing on Petitioner's petitions, where Petitioner, represented by Attorneys Smith and Martin, presented two witnesses: Yolanda Humphrey-Monroe, and her husband, Darren Monroe. The State presented one witness—Petitioner's original trial counsel, Myron Watson. After hearing testimony, the hearing was continued for closing arguments and to hear arguments on the claims presented in Petitioner's amended petition.

Meanwhile, the State filed a supplemental brief in opposition to Petitioner's amended petition, to which Petitioner responded.

On June 17, 2015, the court heard closing arguments on the original petition, and arguments on Petitioner's amended petition.

The trial court issued Findings of Fact and Conclusions of Law on December 7, 2015, denying Petitioner's petitions for post-conviction relief and his amended post-conviction petition. **(See Exhibit G).**

2. Appeal of Post-Conviction Relief.

On December 24, 2014, Petitioner, *pro se*, filed a Notice of Appeal in the Eighth District Court of Appeals, and presented the following assignments of error in his appellate brief:

1. Appellant was deprived of his constitutional right to effective assistance of counsel at trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution

2. The trial court erred and abused its discretion by finding and concluding that appellant failed to demonstrate that he was improperly convicted of the sexually violent predator specification.

3. Appellant's rights under the due process clause were violated when the trial court failed to notify him after resentencing of his rights under Criminal Rule 32(B), and further abused its discretion by failing to reenter the judgment so that a timely appeal can be taken.

4. Appellant's right under the Sixth and Fourteenth Amendments were violated by virtue of counsel's failure to notify him of the right to appeal after the resentencing, resulting in the denial of the opportunity to appeal an adverse sentence.

The State filed a responsive brief on May 10, 2016.

Petitioner filed a handwritten reply on June 20 2016.

Unknown to Petitioner, the Eighth District, on July 5, 2016, ordered Petitioner's original brief stricken as it failed to comply with Eighth District Court of Appeals Local Appellate Rule 13.2(B)(1)(d) (hereinafter, "Loc.App.R. 13.2(B)(1)(d)") in that it identified the victim of a sexual offense. The Eighth District granted Petitioner leave to file a complying brief on or before July 29, 2016, and warned Petitioner that his failure to do so may result in the dismissal of the appeal. See *State v. Speed*, 8th Dist. Cuyahoga No. 103953, Motion No. 497902.

The State moved to dismiss the appeal on August 8, 2016, because the time had passed for Petitioner to file a conforming brief. The Eighth District granted the State's motion and dismissed the appeal on August 11, 2016.

On August 19, 2016, Petitioner moved the court for leave to file the brief, *instanter*, claiming he did not receive a copy of the Eighth District's July 5, 2016 entry ordering him to file a complying brief by July 29, 2016. Petitioner submitted a conforming brief with his motion. The State opposed the motion.

On September 2, 2016, Petitioner filed an Application for Reconsideration pursuant to Rule 26(A) of the Ohio Rules of Appellate Procedure (hereinafter, "App.R. 26(A)"), requesting the court to reconsider its August 11, 2016 dismissal of his appeal. The State opposed the motion, and on September 19, 2016, the Eighth District denied Petitioner leave to file his brief, *instanter*, and denied Petitioner's motion to reconsider the dismissal of the appeal. See *State v. Speed*, 8th Dist. Cuyahoga No. 103953, Motion No. 499729 (Sep. 26, 2016).

Petitioner, *pro se*, filed a Notice of Appeal with the Supreme Court of Ohio on October 28, 2016, under Case No. 2016-1590. In his memorandum in support of jurisdiction, Petitioner raised the following propositions of law:

> **Proposition of Law I:**
> When a criminal defendant is incarcerated and proceeding on appeal without the assistance of an attorney and has demonstrated the importance of the appeal by timely filing all documents, does the Court of Appeals err by *sua sponte* dismissing the appeal without taking into consideration the cause and prejudice for Appellant's failure to comply with the Court's order?
>
> **Proposition of Law II:**
> Where the Appellant was not served with a copy of the Court of Appeals judgment entry, Appellant's right to due process of law was violated.

The State moved to dismiss and also opposed jurisdiction.

On May 31, 2017, the Supreme Court of Ohio declined to accept jurisdiction of the appeal. *State v. Speed*, 147 Ohio St.3d 1481, 2017-Ohio-10, 66 N.E.3d 767.

D. Motion for Relief from Judgment.

On December 7, 2016, Petitioner, through counsel, filed in the trial court, a Motion for Relief from Judgment under Ohio Rules of Civil Procedure, Rule 60(B) (hereinafter, "Civ.R. 60(B)"), claiming Petitioner had been denied the right to appeal from his resentencing of November 15, 2004. The State opposed the motion, and on February 9, 2017, the trial court denied Petitioner's motion.

Through counsel, Petitioner filed an appeal in the Eighth District and presented the following assignment of error:

Assignment of Error I:
The trial court erred when it denied the motion for relief from judgment.

The State filed a brief in opposition on August 7, 2017.

On January 25, 2018, the Eighth District held the issue presented by Petitioner was barred by the doctrine of res judicata and affirmed the judgment of the trial court. See *State v. Speed* 8th Dist. Cuyahoga No. 105543, 2018-Ohio-277.

Counsel filed an Application for Reconsideration on February 5, 2018, to which the State filed an opposition on February 12, 2018.

On February 26, 2018, the Eighth District denied the application. State v. Speed, 8th Dist. Cuyahoga No. 105543, Motion No. 51488.

Petitioner, through counsel, filed a Notice of Appeal in the Supreme Court of Ohio on April 12, 2018, and presented the following propositions of law in his memorandum in support of jurisdiction:

Proposition of Law I:
When it appears that a criminal defendant may be serving a sentence in excess of the statutory maximum for that offense, and where that sentence has never been reviewed on appeal, res judicata will not bar delayed consideration of the sentence by an appellate court.

Proposition of Law II:
In an appeal from a resentencing where the original sentence was vacated and a sentencing *de novo* has been conducted, issues relating to the second sentencing may be raised even if similar issues arose and were not raised at the original hearing.

Proposition of Law III:
A trial court errs when it denies a motion for relief from judgment premised upon an obvious error made by the trial court.

The State responded, and on July 5, 2018, the Supreme Court of Ohio declined to accept jurisdiction of the appeal. *State v. Speed*, 153 Ohio St.3d 1432, 2018-Ohio-2639, 101 N.E.3d 464.

F. Federal Habeas Corpus.

1. Petition for Writ of Habeas Corpus.

On May 30, 2018, Petitioner, *pro se*, filed in the United States District Court for the Northern District of Ohio, Eastern Division, a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, and presented the following grounds for relief:

Ground For Relief No. I:
Petitioner was deprived of his constitutional right to effective assistance of counsel at trial under the Sixth and Fourteenth Amendments.

1. Mr. Watson's reason for not calling Ms. Humphrey-Monroe, based on the belief that the alibi was mistaken or false, is contradicted by Mr. Watson's own conduct and the record.

2. Counsel's reasons for not calling the witness, based on an alleged conversation with the Petitioner, must be rejected as frivolous and false when compared to the alleged circumstances and events surrounding the alleged incident.

3. Counsel's reason for not calling the witness created a conflict of interest. Prejudice is presumed.

a. Counsel actively represented conflicting interests.
b. An actual conflict of interest adversely affected counsel's performance.

4. Counsel's reason for not calling the witness, based on trial strategy, fell outside the wide range of professionally competent assistance.

5. Counsel's performance fell below an objective standard of reasonableness by virtue of his failure to investigate other material witnesses.

Ground For Relief No. II:
Petitioner's conviction of the sexually violent predator specification is not supported by sufficient evidence, and, therefore, violates the Due Process Clause of the Fourteenth Amendment.

Ground For Relief No. III:
Petitioner's rights under the Sixth and Fourteenth Amendments were violated by virtue of counsel's failure to notify him of his right to appeal after resentencing, resulting in the denial of the opportunity to appeal an adverse sentence.

(ECF #:1-1, at PageID #55-68).

2. Respondent's Answer/Return of Writ.

The Respondent filed its Answer/Return of Writ on November 1, 2018, denying each of the grounds for relief presented by Petitioner, and moved the Court to deny the petition without a hearing (ECF #: 9).

3. Petitioner's Traverse.

On January 29, 2019, Petitioner, pro se, filed a Traverse to Respondent's Return of Writ requesting the Court to reject Respondent's arguments and grant habeas relief. (ECF #:13).

3. Magistrate Judge's Report and Recommendation.

On July 20, 2021, Magistrate Judge William H. Baughman, Jr. issued a Report and Recommendation ("R&R"), recommending dismissal of Petitioner's petition in its entirety and his case be dismissed. (ECF #: 16) **(See Exhibit F).**

4. Petitioner's Objections.

On September 10, 2021, Petitioner filed an Objection to the Magistrate Judge's recommendation of the dismissal of his petition. (ECF #: 18).

5. Memorandum Opinion and Order.

On September 28, 2021, the Court issued a Memorandum Opinion and Order finding that the state courts' decision was neither contrary to nor involved an unreasonable application of federal law, and that reasonable jurists would not debate that conclusion because counsel's decision not to call Petitioner's alibi witness to testify or to interview other witnesses was a reasonable strategic decision that merits deference. Moreover, the Court found Petitioner's challenge to his sexual violent predator specification conviction was procedurally defaulted and that reasonable jurists would not debate that conclusion. Consequently, the Court overruled Petitioner's objections. It then accepted and adopted the portions of the Magistrate Judge's R&R to which Petitioner did not object to, and accepted and adopted the Magistrate Judge's recommendation that Petitioner's petition be denied for the reasons stated in the report and recommendation and for additional reasons stated in its Opinion. Accordingly, the Court denied and dismissed Petitioner's petition. Further, the Court certified that an appeal from its decision could not be taken in good faith and that there is no basis upon which to issue a certificate of appealability. (ECF #: 19) **(See Exhibits D & E).**

6. Application for Certificate of Appealability.

Contending the District Court erred by denying his petition for writ of habeas corpus and further erred by finding there was no basis upon which to issue a certificate of appealability, Petitioner, *pro se*, on October 12, 2021, filed a Notice of Appeal and Motion to Proceed In Forma Pauperis in the United States Court of Appeals for the Sixth Circuit. The Court construed the notice of appeal as Petitioner's request for a certificate of appealability ("COA").

a. Order denying Certificate of Appealability.

On April 27, 2022, the Sixth Circuit issued an Order essentially agreeing with the findings of the District Court that reasonable jurists would not debate the grounds presented by Petitioner, and denied Petitioner's COA and his motion to proceed in forma pauperis as moot. *Speed v. Fender*, 6th Cir. No. 21-3931, 2022 U.S. App. LEXIS 11450 (6th Cir.2022) **(See Exhibit A).**

b. Petition for Rehearing En Banc.

On June 1, 2022, Petitioner, *pro se*, filed a Petition for Rehearing En Banc of the Court's Order entered on April 27, 2022, denying his application for a certificate of appealability.

c. Orders denying En Banc Review.

On July 27, 2022, a panel of the Sixth Circuit issued an Order denying Petitioner's application for COA, and subsequently referred the matter to all active members of the Court for further proceedings on the suggestion for an en banc rehearing. *Speed v. Fender*, 6th Cir. No. 21-3931 (6th Cir. July 27, 2022). **(See Exhibit B).**

The petition was then circulated to all active members of the court,[3] none of whom requested a vote on the suggestion for an en banc rehearing. Consequently, the panel denied the petition for rehearing en banc. *Speed v. Fender*, 6th Cir. No. 21-3931, 2022 U.S. App. LEXIS 22429 (6th Cir. August 11, 2022). **(See Exhibit C).**

After nearly twenty-years of litigating, Petitioner is now before the highest Court in the land respectfully requesting the Court to grant certiorari on the Questions presented.

[3] Judge Murphy recused himself from participation.

ARGUMENT IN SUPPORT OF REASONS FOR GRANTING THE WRIT

It is indisputable that a criminal defendant has the right to effective assistance of counsel. In early 20th-century jurisprudence, this Court addressed the importance of counsel in criminal cases, holding, in part:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

Powell v. Alabama., 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

In defining the Sixth Amendment intent for effective assistance, decades later the Court announced a list of duties as a *guide* to determine whether counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, stating:

> "Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See *Cuyler v. Sullivan*, [446 U.S. 335], 346[, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)]. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."

Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting *Powell v. Alabama*, 287 U.S., at 68-69 (emphasis added).

Here, Petitioner contends that, because counsel omitted or ignored several of his basic duties, counsel's performance fell below an objective standard of reasonableness—prejudicing Petitioner's fundamental right to a fair trial under the Due Process Clause. It is for these reasons Petitioner is now before the highest Court requesting it to grant certiorari.

REASONS FOR GRANTING THE WRIT

QUESTION NO. I
WHETHER AN ATTORNEY'S CONFLICT OF INTEREST DEPRIVED PETITIONER OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO EFFECTIVE ASSISTANCE AND DUE PROCESS.

A. Merits Review

Under the first ground for relief, Petitioner presented the District Court with the following issue for review:

> PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

In recommending denying this ground, the Magistrate Judge stated:

> The more significant roadblock for Speed on Ground One is federal law and the absence of any constitutional violation—in other words, the merits of his claim under Ground One. His petition discusses how he disagreed with his lawyer, and further describes the selection of witnesses, alibi defenses, and trial strategies his lawyer did or did not implement. Beyond disagreements with his trial lawyer and the fact that he lost his case, Speed never explains how he was deprived of his Sixth Amendment or Fourteenth Amendment rights.
>
> * * *
>
> It bears repeating: the petition's deficiency as to Ground One is that Speed has not demonstrated that his trial attorney's performance was unconstitutionally deficient. Nor has he ever demonstrated that there is a reasonable probability that the result of his trial would have been different had he received what he believes to be proper representation.
>
> * * *

> After reviewing the record including the transcripts of the post-conviction hearing that dealt with Ground One of Speed's petition, I find no basis for calling into question, let alone reversing, the decision of the trial court judge on Ground One. The trial judge's findings of fact and conclusions of law are lengthy and well-thought out, incorporate the facts as presented at the hearing, set forth the applicable Supreme Court law governing ineffective assistance of counsel, and reasonably apply the facts as presented to her to the law. For these reasons, I recommend that Speed's petition for post-conviction relief based on Ground One be denied.

Speed v. Fender, 2021 U.S. Dist. LEXIS 187345 (N.D. Ohio July 20, 2021) (ECF #: 16, PageID ##: 1443; 1447; 1448). (Exhibit D).

In adopting the Magistrate Judge's recommendations, the Court concluded the following:

> The Court agrees with the recommendation of the magistrate judge that in adjudicating Speed's ineffective assistance of counsel claim, the trial court applied the correct federal law and adduced facts at the hearing which supported her decision that Speed was not deprived of his Sixth Amendment right to effective assistance of counsel because trial counsel did not call an alibi witness. See *McRae v. Jackson-Mitchell*, No. 3:20-cv-168, 2020 U.S. Dist. LEXIS 181318, 2020 WL 5815893, at *6 (S.D. Ohio Sept. 30, 2020) ("[T]he Third District [Court of Appeal] quite reasonably decided that failure to call the alibi witnesses was within reasonable performance parameters of defense counsel. Even if McRae had four witnesses who were prepared to testify he was elsewhere when the victim was murdered, defense counsel might well have believed, based on the evidence of presence that the Third District cited, that the alibis would have been perjurious and of course an attorney has an ethical obligation not to present such testimony.");4 see also *Hamilton v. Brunsman*, No. 1:09-cv-295, 2010 U.S. Dist. LEXIS 142947, 2010 WL 6618545, at *3 (S.D. Ohio June 10, 2010) ("An attorney's oath binds him to be an officer of the court, not a 'mouthpiece' for whatever his client wants to convey. A lawyer has an ethical/legal obligation not to present false testimony to a court."), report and recommendation adopted sub nom. *Hamilton v. Warden, Lebanon Corr. Inst.*, No. 1:09-cv-00295, 2011 U.S. Dist. LEXIS 50236, 2011 WL 1791683 (S.D. Ohio May 11, 2011).

Speed v. Fender, 2021 U.S. Dist. LEXIS 184999, 2021 WL 4437056 (N.D. Ohio September 28, 2021) (ECF #: 19, PageID #: 1506). (Exhibit C).

In denying Petitioner's request for a certificate of appealability, the Sixth Circuit held:

> On post-conviction review, the state trial court concluded, after a hearing, that trial counsel was not ineffective for failing to call Humphrey-Monroe to testify as an alibi witness. The trial court found Humphrey-Monroe's testimony that Speed was at her home when the crimes occurred unreliable due to several inconsistencies

> between her testimony and affidavit. The trial court also found Humphrey-Monroe's and Monroe's testimony inconsistent with counsel's testimony that Speed admitted that he had sex with the victim during the time when they stated that he was at their home. The trial court credited counsel's testimony that he believed Humphrey-Monroe's and Monroe's alibi information to be untruthful given Speed's admission, and that he could not ethically present their testimony at trial. The trial court also found that counsel's decision not to call Humphrey-Monroe or interview Monroe in support of an alibi defense and to instead rely on certain weaknesses in the State's case, was a reasonable strategy because the victim was reluctant to testify, and the State lacked DNA evidence.
>
> The district court concluded that the state trial court's decision was neither contrary to nor an unreasonable application of federal law. See § 2254(d)(1). Reasonable jurists would not debate that conclusion because counsel's decision not to call Humphrey-Monroe to testify or to interview Monroe was a reasonable strategic decision that merits deference. See *Strickland*, 466 U.S. at 690; *Millender v. Adams*, 376 F.3d 520, 527 (6th Cir. 2004). Moreover, counsel is not ineffective for failing to assist a defendant in presenting perjured testimony. *Nix v. Whiteside*, 475 U.S. 157, 166-67, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986). The record reveals that counsel reasonably believed that Humphrey-Monroe's alibi testimony was unnecessary due to deficiencies in the State's case and that neither Humphrey-Monroe's alibi testimony nor Monroe's potential alibi information was truthful based on Speed's admission to counsel.

Speed v. Fender, 2022 U.S. App. LEXIS 11450, *4-6 (6th Cir. April 27, 2022). (Exhibit A).

Based on the foregoing, the Magistrate Judge, District Court, Sixth Circuit and State court only adjudicated Petitioner ineffective assistance of counsel claim involving counsel's failure to call the alibi witness, or interview other witnesses. However, even though Petitioner's submitted other subclaims involving counsel's ineffectiveness, no court, either State or Federal, has ever addressed them.

In his Petition for Writ of Habeas Corpus Petitioner raised the following subclaims under Ground One:

1. [Counsel]'s reason for not calling Ms. Humphrey-Monroe, based on the belief that the alibi was mistaken or false, is contradicted by [counsel]'s own conduct and the record.

2. Counsel's reasons for not calling the witness, based on an alleged conversation with the Petitioner, must be rejected as frivolous and false when compared to the alleged circumstances and events surrounding the alleged incident.

3. Counsel's reason for not calling the witness created a conflict of interest. Prejudice is presumed.

a. Counsel actively represented conflicting interests.
b. An actual conflict of interest adversely affected counsel's performance.

4. Counsel's reason for not calling the witness, based on trial strategy, fell outside the wide range of professionally competent assistance.

5. Counsel's performance fell below an objective standard of reasonableness by virtue of his failure to investigate other material witnesses.

ECF #: 1-1, PageID #: 62-64.

Under subclaim 3, Petitioner contends that counsel's reason for not calling Petitioner's witnesses created a conflict of interest. When an ineffective-assistance claim involves an alleged conflict of interest, prejudice will be presumed if a defendant establishes an "actual conflict of interest" provided that it "adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) (footnote omitted). In essence, an actual conflict of interest which causes deficient performance results in the prejudice prong of ineffective assistance being satisfied.

In *Strickland,* this Court addressed this issue as follows:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States v. Cronic*, 466 U.S. [648], at 659, and n. 25, 104 S.Ct., at 2046-2047, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. 466 U.S., at 658, 104 S.Ct., at 2046. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

> One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, 446 U.S., at 345-350, 100 S.Ct., at 1716-1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed.Rule Crim.Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan, supra*, 446 U.S., at 350, 348, 100 S.Ct., at 1719, 1718 (footnote omitted).

Id. at 691-92. (Emphasis added.)

1. Counsel actively represented conflicting interests.

To demonstrate an actual conflict of interest, Petitioner must be able to point to specific instances in the record to suggest an actual conflict or impairment of his interests. *Cuyler, supra.*

It is indisputable that Petitioner's interest was the alibi testimony of Mrs. Humphrey-Monroe. When counsel discovered Petitioner was excluded as the source of the DNA recovered from the victim during the hospital examination, counsel dismissed the alibi witness without consulting with Petitioner on this important development.

At the hearing on Petitioner's petitions for post-conviction relief, counsel testified, stating, he believed the alibi to be mistaken or false, based on a conversation he had with Petitioner early on in his representation and, therefore, calling the witness would have been against the canons of ethics for attorneys. (See Doc. No. 9-5, PageID #: 1347-1349). In fact, counsel stated that he never intended on calling the witness from the beginning. (Id. at 1347).

It is worth noting that counsel subpoenaed and/or instructed Mrs. Humphrey-Monroe to appear in court on four separate occasions. Further, he led the prosecuting attorney to believe, up to the start of trial, literally, that he would be calling the witness. In other words, Petitioner and the prosecuting attorney believed that counsel would be calling the witness.

Based on the foregoing, there can be no doubt that counsel actively represented conflicting interests, i.e., his duties under the canons of ethics versus the interests of Petitioner.

a. An actual conflict of interest adversely affected counsel's performance.

As a result of the apparent conflict in this case, counsel dismissed the only defense witness without so much as even hinting to the Petitioner that a conflict existed. As counsel stated at the hearing on Petitioner's post-conviction relief:

> "Particularly, I didn't indicate to him that it would be an ethical violation. Maybe I should have told him from the beginning, but I did not tell him."

(Doc. No. 9-5, PageID #: 1348).

Counsel's failure to consult with Petitioner on this important development deprived Petitioner from obtaining other legitimate alternative options that were available to him, such as:

1. Petitioner counsel brought the conflict to the attention of the court and requested that other counsel be appointed, instead.

2. Petitioner could have accepted the State's plea offer of ten (10) years (excluding the sexually violent predator specification).

3 Petitioner could have opted to waive his constitutional right to counsel, altogether, and represented himself and present the alibi witness himself.

4. Petitioner could have testified in his own defense and present the alleged consensual sexual defense that counsel claimed Petitioner told him. After all, counsel had prevailed upon the Petitioner to waive his right to a jury trial and have the case tried to the bench, which would have been an ideal opportunity since it is ordinarily presumed that in a bench trial in a criminal case the court considers only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary. See, e.g., *State v. Eley*, 77 Ohio St.3d 174, 181, 1996-Ohio-323, 672 N.E.2d 640.

But to do nothing, as counsel in this case did, and given the severity of the potential sentence, and the ultimate results of the trial, it cannot be argued that the conflict adversely affected counsel's performance. Here, counsel put on no defense whatsoever—none at all. See *State v. Speed*, 8th Dist. Cuyahoga No. 85095, 2005-Ohio-4423, ¶ 16. Under these circumstances prejudice is presumed.

Petitioner respectfully requests the Court to grant certiorari on this question.

QUESTION NO. II

WHETHER PETITIONER'S RIGHT AGAINST EX POST FACTO WAS VIOLATED WHERE SUBSEQUENT ENACTMENT OF LAW INCREASED HIS TERM OF IMPRISONMENT.

A. Merits Review.

Petitioner was indicted in 2003, on three counts of rape each with a specification for Sexually Violent Predator (R.C. 2941.148) ("SVP"). He was subsequently convicted, among other things, of two counts of rape and attempted rape and the SVP. Petitioner was sentenced to a concurrent 9 years for the underlying rape counts, and sentenced to a life prison term for the SVP; for a total prison term of 9 years to life.

It is the Petitioner's argument that his conviction and sentence for the SVP violates the Ex Post Facto Clause under Article I, § 10, of the United States Constitution.

1. Sexually Violent Predator (R.C. 2971.01(H)(1)).

The version of R.C. 2971.01(H)(1) in effect when Petitioner was indicted defined "sexually violent predator" as "a person who has been convicted of or pleaded guilty to committing, on or after the effective date of this section, a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses." (Emphasis added.) Am.Sub.H.B. No. 180, 146 Ohio Laws, Part II, 2560, 2652. The effective date of that version was January 1, 1997. Id. at 2560-

2561, 2668. In *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, at ¶ 18, the Supreme Court of Ohio stated that the words of R.C. 2971.01(H)(1) "clearly indicate" that a defendant cannot be charged as a sexually violent predator unless the defendant has "already been convicted of a sexually violent offense." The Court therefore concluded, "Conviction of a sexually violent offense cannot support the specification that the offender is a sexually violent predator as defined in R.C. 2971.01(H)(1) if the conduct leading to the conviction and the sexually violent predator specification are charged in the same indictment." *Smith* at syllabus.

Shortly thereafter, the General Assembly amended R.C. 2971.01(H)(1), effective April 29, 2005. Am.Sub.H.B. No. 473, 150 Ohio Laws, Part IV, 5707, 5817, 5832. R.C. 2971.01(H)(1) now defines "sexually violent predator" as "a person who, on or after January 1, 1997, commits a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses." The state characterizes this amendment as a clarification and not a change in the law, asserting that it represented what the General Assembly had always intended and in any event created no new penalty.

a. Applying R.C. 2971.01 to Petitioner's crimes.

The crimes Petitioner was charged with occurred before April 29, 2005. Accordingly, any application of the amended statute to Petitioner is patently retroactive—because the statutory change occurred after the offenses were committed. See *Weaver v. Graham*, 450 U.S. 24, 30, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

Of central concern in an Ex Post Facto Clause analysis is whether the defendant had "fair warning" and therefore notice of the change in the law. *Weaver* at 28. The Ex Post Facto Clause requires the government to "'abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.'" *Peugh v. United States*, 569 U.S.

530, 544, 133 S.Ct. 2072, 186 L.Ed.2d 84 (2013), quoting *Carmell v. Texas*, 529 U.S.513, 533, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000).

Changes in sentencing laws implicate the Ex Post Facto Clause. In analyzing a change in federal sentencing guidelines, the Supreme Court of the United States concluded, "A retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an ex post facto violation." Id. This Court has invalidated on ex post facto grounds a sentencing scheme that might have caused a defendant to receive a sentence greater than the sentence he would have received under the sentencing scheme in place when he committed his crimes. *Miller v. Florida*, 482 U.S. 423, 435-436, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).

In this case, the statutory change created more than "a sufficient risk of a higher sentence" by actually imposing a sexually-violent-predator specification on Petitioner that had not applied when he committed his crimes. *Peugh* at 544. The amendments to R.C. 2971.01(H)(1) resulted in a new definition of "sexually violent predator" that allowed, for the first time, the underlying conduct in an indictment to satisfy the specification without a prior conviction. Without the sexually-violent-predator specification, Petitioner would have faced a definite term of three to 10 years for the first-degree felony offenses he was charged with and subsequently convicted of.

Based on the amendment to R.C. 2971.01(H)(1), which became effective on April 29, 2005, Petitioner was improperly indicted as a sexually violent predator. The portion of the indictment alleging him to be a sexually violent predator for acts committed when the initial version of R.C. 2971.01(H)(1) was effective is, therefore, unconstitutional. *Weaver*, 450 U.S. at 30, 101 S.Ct. 960, 67 L.Ed.2d 17; *Miller* at 435-436.

At the time of Petitioner's conviction and sentencing, and prior to the *Smith* decision, Ohio courts had not uniformly interpreted Ohio Rev. Code § 2971.01(H)(1) to require a prior conviction

in order to satisfy the specification. In fact, several Ohio courts of appeal had read the language of the statute to permit the specification to be satisfied by a contemporaneous conviction. See, e.g., *State v. Haven*, 9th Dist. Wayne No. 02CA0069, 2004 Ohio 2512, 2004 WL 1103957; *State v. McDonald*, 5th Dist. Stark No. 1999CA00019, 2000 Ohio App. LEXIS 530, 2000 WL 222132; *State v. Oldham*, 8th Dist. Cuyahoga No. 73644, 1999 Ohio App. LEXIS 2152, 1999 WL 304314; cf. *State v. Reigle*, 2000 Ohio 1786, 2000 WL 1682520, at *7 (interpreted Section 2971.01(H) to mean that "the accused must have been convicted of a sexually violent offense prior to conviction of the offense charged in the indictment. This is the interpretation adopted by the Supreme Court of Ohio four years later in *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283.).

Petitioner, however, contends that Ohio's incorrect interpretation of R.C. § 2971.01(H)(1) does not justify or excuse violation of ex post facto. The law is the law, and through Art. I, § 10, of the Constitution of the United States, States must not enact laws which imposes punishment for act which was not punishable at time it was committed, or punishment in addition to that then prescribed. *Burgess v. Salmon*, 97 U.S. 381, 24 L.Ed. 1104, 1878 U.S. LEXIS 1464 (1878).

Petitioner respectfully requests the Court to grant certiorari on this question.

CONCLUSION

For the above-stated reasons, Petitioner respectfully requests the Court to grant certiorari to review the judgment of the Sixth Circuit Court of Appeals, Northern District of Ohio, and Ohio state courts.

Respectfully submitted,

Willie Speed #A453-732
Lake Erie Correctional Institution
P.O. Box 8000
Conneaut, OH 44030

Petitioner-Appellant, *pro se*

DECLARATION UNDER 28 U.S.C. § 1746

I, Willie Speed, declare under penalty of perjury that the foregoing *Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit* and *Motion to Proceed In Forma Pauperis* was delivered to prison officials on the 21st day of November, 2022, to be mailed by U.S. Mail, first-class postage prepaid, to the Office of the Clerk of the United States Supreme Court for filing.

Dated: November 21, 2022

Willie Speed
Petitioner-Appellant, *pro se*