

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK R. RUSSELL--PETITIONER

VS.

MR. S. HARRIS, WARDEN __RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
FRANKLIN COUNTY, OHIO COURT OF APPEALS
TENTH APPELLATE DISTRICT.

PETITION FOR WRIT OF CERTIORARI

MARK R. RUSSELL, A449138

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QUESTIONS PRESENTED.

- 1). CAN THE OHIO LEGISLATOR'S ENACT STATUTES THAT DENY INDIGENT INCARCERATE PRO SE LITIGANTS A-RIGHT-OF-REMEDY TO PROVE BRADY VIOLATIONS AND OR INEFFECTIVE ASSISTANCE OF COUNSEL (TRIAL) CLAIMS THAT CAN ONLY BE PROVEN WITH EVIDENCE THAT'S OUTSIDE OF THE TRIAL RECORD? "WITHOUT VIOLATING THE 5TH, 6TH, AND 14TH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION."
- 2). CAN THE OHIO LEGISLATOR'S ENACT A STATUTE THAT DENIES EQUAL PROTECTION OF THE LAW? "WITHOUT VIOLATING THE 5TH, 6TH AND 14TH, AMENDMENT RIGHTS OF THE U.S. CONSTITUTION."
- 3). CAN OHIO'S CONTROLLING CASE STATE V. STEFFEN (1994), 639 N.E.2d 67, 76, WHICH WAS PREDICATE ON PENNSYLVANIA V. FINLEY (1987), 481 U.S. 1, 7, , STILL BE CONTROLLING IF FINLEY IS NO LONGER CONTROLLING?, UNDER MARTINEZ V. RYAN (2012) 132 S.Ct. 1309, TREVINO V. THALER (2013), 133 S.Ct. 1911, 1921, AND MONTGOMERY V. LOUISIANA (2016), 136 S.Ct. 718.?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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Those violation are argued throughout the entire petition, as well as the above mentioned constitutional amendments.

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix (A) to the petition and is

- ☐ reported at 16AP-542, 2017-ohio-2871; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the FRANKLIN COUTY COMMON PLEAS court appears at Appendix (B) to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was 9/27/17.
A copy of that decision appears at Appendix (C).

☒ A timely petition for rehearing was thereafter denied on the following date: 12/06/2017, and a copy of the order denying rehearing appears at Appendix (D).

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791]

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

AMENDMENT VI [1791]

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

AMENDMENT XIV [1868]

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

Ohio Crim.R. 5(B)(1)-(8), Ohio Crim.R.16, Ohio Crim.R.33

Ohio Revised Code 2953.21, 2953.22, 2953.23(A)(1)(a)(b), 2937.01-to-2937.21

Ohio Sen. Bill 139.

STATEMENT OF THE CASE.

Russell asserts as fact the recent U.S. Supreme Court cases discussed, *infra*, that were decided "after" his conviction became final as compared to his earlier collateral motions and petitions establishes he was, and is currently, being denied his substantive federal and state constitutional and statutory rights to effectively raise his ineffective assistance of counsel and due process prosecutorial misconduct claims concerning matters and evidence that occurred inside and outside of the trial record. The recently decided U.S. Supreme Court cases, discussed, *infra*, establish Ohio's application of res judicata to such collateral statutory procedures, such as motions for new trial and post-conviction petitions (ORC §§ 2953.21, 2953.22, 2953.23(A)(1)(a)&(b) Ohio Crim. R 33), are not only unconstitutionally extreme but apply jurisdictional barriers to collateral federal constitutional claims that are so limiting and arbitrary as to be tantamount to "no right of remedy" at all.

Thus, Ohio's arbitrary collateral rules of court and statutory post-conviction procedures render it impossible for an **indigent pro se litigant who cannot afford to retain counsel**, such as Russell being "similarly situated," to comply with such rules and procedures without meaningful outside assistance to investigate and discover exculpatory evidence that was either "withheld" and/or "trial counsel failed to investigate and obtain such before trial"

The factual problem that Russell faces with Ohio's constitutionally "defective" collateral procedures is that such does not contain, and outright denies Russell the ability to obtain post-conviction discovery as defined by Ohio Crim.R. 16 for a lack of such post-conviction discovery procedures. In turn, Russell is unable to "meaningfully" present his federal claims to the state Courts on collateral review in regards to his ineffective assistance of counsel and prosecutorial misconduct claims. That is because such collateral claims can only be proven with evidence "outside" the trial record. The evidence that was "withheld" before, during, and after trial by the prosecution; in conjunction with trial counsel's defective performance when not pursuing such through meaningful investigation of Russell's case. An example of

this, as Russell has tried time and time again to argue collaterally, is the fact that the prosecution "withheld" a States's witness, with whom they "allege" made a statement in regards to Russell "allegedly" confessing to him/her of killing Sartin. The proof that this witness's identity and statement were deliberately "withheld" from Russell can be reviewed from the Arraignment Hearing Transcript of October 23rd, 2001, Municipal Case No. 2001CRA-027092 (tr. p.3); and November 5th, 2001, Common Pleas Case No 01CR-6462(tr. p.5), affixed hereto, infra, at appendix "A" & "B" pp. 1a-2a, in relevant part as follows:

Municipal Case No. 2001CRA-027092 (tr.p.3,10/23/01):

MR. BOKELMAN: Mark Russell also confessed to an individual about killing the victim....

Common Pleas Case No.01CR-6462 (tr. p.5, 11/05/01):

MS. WORLEY: And it looks like CPD Detectives also interviewed an individual that Mark Russell confessed to about killing Ken Sartin (sic). In the Police summary....

Russell further argues that this "withheld" witness never appeared nor testified during the actual jury trial. Thus, depriving all of Russell's rights of confrontation, impeachment, and compulsory process. Yet, this "withheld" mystery witness and his/her "withheld" statement, simply by reference that such existed, was used against Russell by the prosecution to "somehow" support their burden of establishing "probable cause" for an arrest and indictment for murder. Thereby, depriving Russell of any and all substantive and procedural due process rights that were supposed to be protected by the U.S. Constitution as well as by Ohio Crim. R. 5(B)(1)-(8) and ORC §§ 2937.01 to 2937.21., Yet, all the state court required of the prosecution to meet their preliminary burden was to just say they had such without any burden of production whatsoever. Russell argues as fact that the foundation of his arrest by the Homicide Detectives William Gillette and Detective Seamans on 10/22/01 sum 14½ months after Russell was released from custody as not being the shooter, was based upon the alleged witness Russell allegedly confessed to. Detective Gillette's "Division of Police Progress of Investigation Report," Report No. 68352-2000, as affixed hereto at Appendix Exhibit "C" p.3a-4a, in relevant part:

"*** I also advised Mr. Russell that we (detectives) had uncover some new evidence...."

"*** At this point, Detective Seamans advised Mr. Russell the reason charges were filed on you tonight is because of some new evidence and this evidence nails you..."

This "so-called" new evidence the detectives were referencing in the attached report was in reference to the alleged mysterious witness whom they alleged provided them with a "phantom" statement that Russell confessed to murdering Sartin. Of course, Russell vehemently denied ever making such a statement to anyone. Russell was represented by a Ms. Hawkins from the Franklin County Ohio Public Defender's Office during his October 23rd, 2001 hearing, Ms. Hawkins was not provided with the identity nor was she given a copy of the statement of the prosecution's mysterious witness, Nor, after having knowledge of the alleged existence of such, did she in anyway move to have such witness/statement produced by the prosecution. Russell was then after represented by the late Attorney Robert Suhr during the November 5th, 2001 hearing, again, the prosecution makes reference to the mysterious "withheld witness and statement. Again, defense counsel was not provided with the identity nor given the statement of their mysterious witness, Attorney Suhr as well as attorney Hawkins neither one ever tried to move the prosecution to produce such witness and their statement. The prejudice suffered by the prosecution's withholding of their mysterious witness's identity and statement, concomitant with both defense counsel's failure to motion the court to compel the prosecution to produce such witness and statement pursuant to Ohio Crim.R. 16(A), (B)(1)-(7), (G), (I), and (M), denied Russell his substantive and procedural due process rights to move to dismiss his arrest and murder indictment due to false arrest and lack of probable cause. That is because the mysterious witness and his/her statement is the primary evidence used by the state to determine there was probable cause to arrest, indict, and to proceed with a jury trial. But, yet when such a trial began, this mysterious witness and his/her phantom statement is nowhere to be found. Russell was tested by CPD forensic unit for gunshot residue evidence right after being detained from the crime scene. The

was negative for gunshot residue, nor was there any blood evidence as a result of that, Russell was release as not being the shooter

Russell did testify at his trial. Russell's direct testimony at trial was that he had not killed the victim, whom he described as a friend, and had never told anyone that anyone other than Heltebrake was responsible. On cross-examination, the prosecution attempted to impeach Russell with Detective Gillette's accounts of his previous recorded interviews, in which Russell implicated Jesse Lanier and Marchello Cox. Appellant continued to assert that he had never told investigating detectives that anyone other than Heltebrake had committed the shooting. He stated that Detective Gillette was the one who kept bringing up other names in interviews and that he [Russell] had always denied that other persons were involved.

Russell did admit that, at one point, he had told the detective that the shooting was accidental, and that he had written a letter to the victim's mother indicating that the shooting was accidental. However, Russell later recanted that statement claiming that he was pressured by then-defense counsel, Robert Suhr, to write that letter. The reason Attorney Suhr advised Russell to write that letter was because CPD "alleged" Russell failed a polygraph examination. Attorney Suhr falsely lead mislead Russell to falsely condemn himself in that matter, being "an accident story," would "somehow" produce a more favorable outcome than continuing to assert that Heltebrake was the shooter. There was discussion between this Court and both counsels about admitting into evidence Russell's second letter that recanted his earlier "accident story" as "false." Russell still maintained his innocence.

June 19th, 2003, Russell, in spite of his protests of being innocent in face of weak circumstantial evidence, he was found guilty by the jury. Russell then after sentenced to an indefinite prison term of fifteen (15) years to life with an additional three (3) year consecutive sentence for the firearm specification on the same date.

While incarcerated at the Warren Correctional Institution (WCI), in the year of 2009, Russell became acquainted with another inmate whom stated to him that he "was the person that shot and killed Sartin" on the August 11th, 2000. His name is "Paul Kasperza."

Affixed hereto at Appendix Exhibit "D" p. 5a, is a personal "Affidavit" voluntarily given to Russell by Kasperza, notarized on November 2nd, 2009. As attested to in Kasperza's affidavit, two-years prior, that he contacted officials with the CPD Detectives' Bureau and told them that he was the one whom shot and killed Sartin on August 11th, 2000. Kasperza also attested that CPD detectives rejected his confession asserting to him that they "already got who they wanted."

Russell asserts that at the time his direct appeal was pending and after his conviction was affirmed on appeal, he was never informed nor given notice by defense nor appellate counsel that, pursuant to ORC § 2953.21(A)(2), that he only had six (6) months from the filing of the trial record in the Court of Appeals in which to invoke the jurisdiction of the trial court for post-conviction relief. This, in regards to seeking collateral relief as to the "withheld" witness and their alleged "withheld" statement – of what they said Russell allegedly said about killing Sartin. Even though the fact that this witness and statement existed from the face of the record, the identity of this witness and statement have been withheld "outside" the trial record to this date.

Russell, even when not being given proper notice of his deadline for filing post-conviction relief by appellate and defense counsel, did express to appellate counsel "John W. Keeling" his need to file for post-conviction relief asking him to help him. On July 2nd, 2003, Attorney Keeling did correspond to Russell asserting that "We might have other remedies available." See Appendix Exhibit "E" p. 6a.

Attorney Keeling represented Russell throughout his direct appeal process to the Supreme Court of Ohio. However, he never gave advanced notice to Russell, that beginning on August 11th, 2003 when the trial record was forwarded to the Court of Appeals, that he had no right to counsel on collateral review and had only a 6-month "deadline" from that aforementioned date to file such *pro se*, under ORC § 2953.21(A)(2), Attorney Keeling's representation ended when the Supreme Court of Ohio declined to review his case, when corresponding to Russell that he "no longer represented him." This, being "after" the expiration of the 6-month statute of limitations under ORC § 2953.21(A)(2).

Russell avers that Attorney Keeling did not provide him with a copy of his transcript of trial, as Russell earlier requested of him, until "after" the 6-month statute of limitations under ORC § 2953.21(A)(2) until June 7th, 2004. Yet, even when not being provided the constitutionally adequate notice of the 6-month statute of limitations under ORC § 2953.21(A)(2), Russell did diligently file a motion for new trial under Ohio Crim. R. 33 by then-defense counsel Myron Schwartz in July of 2003. Attorney Schwartz raised three grounds for a new trial in his motion: (1) improper impeachment of Russell with his prior inconsistent statements; (2) denial of his request to play audio and video tapes of his previous statements; and (3) exclusion of evidence.

Attorney Schwartz, in the Ohio Crim. R. 33 motion for new trial, did not raise the matter of the "withheld" identity and statement of the alleged witness that the prosecution earlier used to unconstitutionally usurp "probable cause" for Russell's arrest and subsequent indictment. Regardless of this fact, this Court still applied the doctrine of *res judicata* in an extreme manner to evade adjudicating the merits of Russell's first motion for new trial; which was later upheld on appeal.

Russell, realizing appellate counsel was not going to assist him in seeking collateral relief – as he falsely led Russell to believe was a possibility in his On July 2nd, 2003 correspondence at *Appendix Exhibit "E" p. 6a* – Russell filed his first petition for post-conviction relief under ORC § 2953.21 in this Court on November 2nd, 2004, around 34 days after the Supreme Court of Ohio declined review of his direct appeal on September 29th, 2004; being when Attorney Keeling terminated his representation. Russell's first petition stated the following grounds for relief: (1) prosecutorial misconduct; (2) trial counsel coercion; (3) ineffective assistance of trial counsel; and (4) improper admission of evidence.

On March 22nd, 2005, pursuant to ORC ORC § 2953.21(A)(1), this Court denied the first petition on jurisdictional grounds because it was filed later than 180 days after August 11th, 2003, the date which the trial transcript was filed in his direct appeal; to which expired on or around February 7, 2004. That decision was also affirmed on appeal.

On January 20th, 2005, Russell filed a motion to produce grand jury testimony in an attempt to discover the identity and nature of the statement and testimony of the "withheld and undisclosed" witness and his/her statement. The purpose for such was to obtain that withheld information in order to be able to file for "meaningful" post-conviction relief as required by ORC §§ 2953.21(C) and 2953.23(A)(1)(a)&(b). On November 21st, 2005, this Court denied that motion on the basis that Russell's motion failed to set forth a particularized need for the disclosure. That decision was also affirmed on appeal.

Without being able to obtain the identity and statement by the "withheld" witness the prosecution used to arbitrarily secure probable cause for Russell's arrest and indictment, being a frustrated claim the same, Russell again attempted to file for post-conviction relief with the benefits of any available post-conviction discovery procedures.

On December 12th, 2005, Russell filed a second motion for new trial. In the motion, appellant argued that the state had failed to disclose, prior to trial, the identity and statement of an individual to whom Russell had allegedly confessed to the crime. On December 30th, 2005, the state filed its response, asserting that appellant had already filed a similar motion that was denied by the trial court on September 29th, 2004.

By decision and entry filed May 3, 2006, this Court denied Russell's motion for new trial. This Court again concluded that Russell's claims were barred by the doctrine of *res judicata*, as the grounds for that motion were actually raised, or could have been raised, in this Court or on appeal from the judgment of conviction. However, this adjudication is objectively unreasonable resulting in a decision based on an unreasonable determination of the facts in light of the evidence presented. That is because Ohio's post-conviction statutes do not allow for post-conviction discovery procedures that would enable Russell to "present the withheld evidence." Therefore, Russell is being denied a "right to remedy" in such circumstances. That decision was also affirmed on appeal.

On February 26th, 2008, Russell filed a petition for a writ of habeas corpus pursuant to Title 28 U.S.C. § 2254 in the United States District Court for the Southern District of Ohio, Eastern Division raising the following grounds (only as relevant to this instant petition) [2009 U.S. Dist. LEXIS 45306 at [*26]-[*30]]:

3. Petitioner was denied his right to effective assistance of counsel when counsel failed to properly investigate and [conduct] pretrial discovery and failed to have scientific tests performed on the porcelain glass crack pipe in violation of his 6th Amendment [rights].

9. The trial court erred by denying petitioner's motion requesting the grand jury transcripts, a 14th Amendment violation.

10. The prosecution denied petitioner his constitutional rights by the non-disclosure of Crim.R. 16. The statements and identity of the person who petitioner supposedly confessed to, of the murder of Kenny Sartin (6th and 14th violation).

12. Petitioner's 4th and 14th Amendment rights of the United States Constitution were violated when a warrant for his arrest was issued without probable cause, nor was the probable cause shown.

12A. Petitioner's 4th and 14th Amendment rights of the United States Constitution were violated when the complaint filed by Detective Gillette to secure petitioner's arrest warrant was deficient, the complaint also violated Crim. R. 3.

On May 29th, 2009, in Russell v. Jackson, 2:08-cv-171, 2009 U.S. Dist. LEXIS 45306, the Magistrate Judge submitted a Report and Recommendation that Russell's federal habeas petition be dismissed. However, the Magistrate did address Russell's arguments in support of finding "cause and prejudice" against procedurally defaulting his claims as follows:

As cause for his untimely post conviction petition, petitioner again asserts that he did not obtain a copy of his trial transcript in time to file a timely post conviction petition. Petitioner also argues that, because he was still represented by trial counsel (in proceedings on his first motion for a new trial), he did not want to raise an issue of ineffective assistance of trial counsel at the time his post conviction petition was due. *Petitioner also argues that his appellate attorney led him to believe that the attorney would file a post conviction petition on his behalf because counsel's July 2003 letter relating to petitioner's direct appeal also stated, "there are other remedies for wrongs that cannot be addressed by appeal, so please let me know if you have any concerns or comments regarding the fairness of the proceedings against you. We might have other remedies available."* * * * According to petitioner, he did not learn until early October 2004, i.e., after the time for filing a timely post conviction petition had expired, that appellate counsel would not be filing a post conviction petition on his behalf.... *Id.*, at 2009 U.S. Dist. LEXIS 45306 at [*67]-[*68].

Russell argues that the Magistrate Judge never adjudicated the fact that neither defense nor appellate counsel ever told him *he had no right to counsel for post-conviction relief*. This includes the fact that neither counsels ever told him *he had 180-days from the filing of the record in the Court of Appeals in his direct appeal in which to file his petition*. Additionally, the Magistrate Judge never adjudicated the fact that neither defense nor appellate counsel ever told Russell that there were "no" *post-conviction discovery procedures in order for him, in his indigent, pro se, and incarcerated state, to obtain the withheld witness's identity and statement, to include authenticating the same*.

The Magistrate Judge, when reviewing appellate counsel's July 2nd, 2003 letter (*Appendix Exhibit "E" p. 6a*), proves Russell was under the impression counsel would "investigate and procure" that withheld evidence, since there was no method available to obtain it himself. The Magistrate Judge never adjudicated as "cause and prejudice" that Russell was completely at the mercy of appellate counsel to do the investigative and evidence collective part of his collateral endeavors even though the Magistrate Judge did acknowledge these aforementioned facts in relevant part that:

Accordingly, petitioner has waived his right to present claims one, 1A, 1B, 1C, two, 2B, 2C, three, 3A, 4A, 5A, 5B, 5C, six, seven, eight, nine, ten, eleven, 11A, twelve and 12A, for federal habeas review. *He can still secure review of the merits of these claims if he demonstrates cause for his failure to follow the state procedural rules, as well as actual prejudice from the constitutional violations that he alleges. Id., 2009 U.S. Dist. LEXIS 45306, at [*53]-[*54].*

As cause for the procedural default of his *on-the-record claims* that he failed to raise on direct appeal, petitioner asserts the ineffective assistance of appellate counsel. * * * Petitioner complains that he had no input into the issues that appellate counsel raised on direct appeal. He states that the only contact he had with his appellate counsel consisted of one phone call and several letters. * * * Petitioner has attached, in support of this contention, a letter from his appellate attorney, John W. Keeling, dated July 2nd, 2003, which reads as follows: [*Id., 2009 U.S. Dist. LEXIS 45306, at [*53]-[*55].*]

I have been assigned to represent you on your appeal. An appeal is a review of your trial proceedings in order to ensure that they were conducted fairly. *It is not a new trial and we are not allowed to present new evidence or talk about anything that is not already part of the trial record*. I will have a transcript of all the trial testimony by the middle of August. I will send you a copy. After reviewing the transcript, I will file a brief setting forth our claim of errors. This brief will probably be filed by mid September, unless we need an additional extension of time. *Id., 2009 U.S. Dist. LEXIS 45306, at [*54]-[*55].*

Because I will have access to the entire record of your trial, I will have all the facts that I can use on appeal at my disposal. Because we cannot argue or allude to facts that are not in the record, there is little factual information that you can provide me for purposes of your appeal. *However, there are other remedies for wrongs that cannot be addressed by appeal, so please let me know if you have any concerns or comments regarding the fairness of the proceedings against you. We might have other remedies available.* You can call me collect. My office will accept the call if I am in. You are also free to write me or have anyone else contact me on your behalf. *Id.*, 2009 U.S. Dist. LEXIS 45306, at [*53]-[*55]. (Emphasis added).

Petitioner also notes that he was initially released from custody and was arrested only 14 months later. Finally, petitioner points out that, *although the prosecutor or police had represented during the early stages of the prosecution that a witness asserted that petitioner had confessed to the crimes charged, no such individual testified against him at trial or was disclosed in discovery.* *Id.*, 2009 U.S. Dist. LEXIS 45306, at [*72]-[*73] (footnotes omitted). (Emphasis added).

After the U.S. District Judge adopted the Report and Recommendation of the Magistrate Judge on August 11th, 2009, at 2009 U.S. Dist. LEXIS 70558, the United States Supreme Court announced three decisions on March 20th, 2012, May 28th, 2013, and January 25th, 2016. In those decision, the United States Supreme Court recognized new federal or state rights that affect a State's post-conviction procedures on substantive constitutional grounds that applies retroactively to persons in Russell's situation, and Russell's petition asserts claims based on those new substantive "collateral" rights.

Before those three recent U.S. Supreme Court decisions, the Court held that there were no constitutional rights involved with a State's post-conviction laws. However, as will be argued in detail in the jurisdictional statement of this delayed petition, the High Court, for the first time, determined that when a State's collateral proceedings *are the only vehicle and available means* in which the State Courts will entertain certain federal constitutional claims that are not permitted by State law to be raised on direct appeal; such as claims of prosecutorial misconduct and ineffective assistance of counsel that are supported only by evidence "outside" the trial record, that some "limited" substantive constitutional due process and equal protections rights must be applied in such instances. If not, as here, the petitioner is being foreclosed completely from being able to obtain redress for such claims.

REASON FOR GRANTING THE PETITION.

This case challenges/ and possibly will or should change the entire legal landscape pertaining to the Post-Conviction proceedings/procedures in the State of Ohio, because before the recent and retroactive U.S. Supreme Court decisions defendant's had no "Constitutional Rights" in post-conviction proceedings, In fact as a direct result of Pennsylvania v. Finley (1987), 481 U.S. 551 554-555, the Ohio Supreme Court held in State v. Steffen (1994), 70 Ohio St.3d 399, 410-411, 639 N.E.(2d) 67, 76, in relevant part: "A post conviction stay, unlike a direct appeal stay, is not a Constitutional Right. Indeed, post conviction state collateral review itself is not a constitutional right, even in capital cases. [Citing Murray and Finley, *supra*]. Also ruling that a post conviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment. See State v. Crowder (1991), 60 Ohio St.3d 151, 573 N.E.(2d) 652.

However, Russell, asserts that is no longer the case, because all defendants now have limited constitutional rights pertaining to post-conviction proceedings, because on March 20th, 2012, the U.S. Supreme Court (this court), reevaluated the question as to whether a State's collateral post-conviction remedies can involve federal substantive due process and equal protection rights when deciding the case of Martinez v. Ryan (2012), 132 S.Ct. 1309; modifying the previous "cause and prejudice" standard and application of procedural default doctrine in Coleman v. Thompson (1991), 501 U.S. 722. Martinez recognized that certain federal constitutional claims are "excluded" from being raised through the State's direct appeal process and must be raised under the state's collateral post-conviction laws and procedures when ruling in relevant part that:

"Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoners direct appeal as to the ineffective-assistance claim. This is because the state habeas court "looks to the merits of the claim" of ineffective assistance, no other court has addressed the claim, and "defendant's pursuing first-tier review...are generally ill equipped to represent themselves" because they do not have a brief from counsel or an opinion of the court addressing their claim of error. Halbert v. Michigan (2005) 545 U.S. 605-617, see Douglas v. California (1963), 372 U.S. 353, 357-358. Martinez, 132 S.Ct. at 1317. In Martinez, 132 S.Ct. at 1321-1322 (Scalia and Thomas, JJ. Dissenting), the Court also established that this new

perspective of limited substantive rights in State collateral relief also carries the same substantive constitutional weight, with equal force to prosecutorial misconduct due process claims brought under Brady v. Maryland (1963), 373 U.S. 83, the same as to collateral ineffective assistance of counsel claims and challenges. Although the pre-trial record in the case at bar shows that the prosecution vaguely referenced an unnamed witness provided a "statement" which has also been withheld along with their identity to this date-still qualifies as "evidence outside the trial record" for purposes of seeking relief exclusively under the State of Ohio's post-conviction procedures and excluding that claim from the direct appeal process.

On May 28th, 2013, the U.S. Supreme Court (this Court), "extended" Martinez in the case of Trevino v. Thaler (2013), 133 S.Ct. 1911, 1921, ruling in relevant part that:

"For these reasons, we conclude that where, as here, State procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in Martinez applies

[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. at ____, 132 S.Ct. 1309...

In the case at bar Russell, was and remains incarcerated and had/has "no" procedural means to investigate and procure the withheld evidence himself. Since, within the definition of Trevino, 133 S.Ct. at 1917-1918, the State of Ohio's post-conviction rules and procedures are unconstitutional because according to the U.S. Supreme Court the Ohio post-conviction proceedings are the initial review proceedings for Brady violations involving withheld evidence "outside the trial record". Ohio's post-conviction rules/procedures are unconstitutional upon their face and as applied as violative of substantive and procedural due process and equal protection of laws, because those statutes/procedures deny an indigent incarcerated pro se litigant post conviction discovery procedures-rendering it impossible to obtain an initial review collateral right-of-remedy for such violations because the State of Ohio has shielded itself from having to release such wit

withheld Brady Evidence. Evidence which is tangibly needed to prove the violation on collateral review itself. In the State of Ohio when raising a Brady claim or a ineffective assistance claim the pro se indigent litigant must possesse and attach the withheld evidence to his/her post-conviction relief petition in order to receive an hearing on his/her claims. Therefore, unless that poor indigent individual can somehow afford to retain post conviction counsel and investigator etc.. A luxury Russell does not have, he has no right-of-remedy at all., due to him, not being able to afford justice which in the State of Ohio comes with a price. In State v. Taylor, 8th Dist. Appeal Case No. 102020, 2015-Ohio-1314, 2015 Ohio App. LEXIS 1271, rendered 04/02/15, at ¶ 11 the Eight District recognized that Trevino "extended" Martinez. However, Taylor appeared to argue that Trevino and Martinez announced a "new" right of counsel for collateral actions; to which is separate and distinct from Russell's argument herein. Taylor, 2015-Ohio-1314, at ¶'s 11-15; citing Gunner v. Welch (6th Cir. 2014 749 F.3d 511, while acknowledging that Gunner was predicated on Martinez and Trevino, then after concluded in an objectively unreasonable manner that:

*** [E]ven if we were to read Gunner's interpretation of an Ohio appellate attorney's duties as extending beyond federal habeas proceedings we find its application to the present case to be incompatible with established Ohio law. Decisions of the Ohio Supreme Court are binding upon this court, whereas, decisions of the sixth circuit court of appeals serve as persuasive authority.

State v. Johnson, 8th Dist Appeal Case No. 42846, 1981 Ohio App. LEXIS 10913 rendered 07/16/81. As addressed above, the Ohio Supreme Court has held that ineffective assistance of appellate counsel arguments are to be raised in accordance with App.R. 26(b) rather than in post conviction proceedings and that an indigent petitioner has neither a State nor Federal Constitutional Right to be represented by an attorney in a post conviction proceeding. Because we find Gunner to be in conflict with these established legal principles we decline to apply it to create an exception to the statutory and jurisdictional time restraints imposed by R.C. 2953.21 (A)(2).

Taylor, while indirectly acknowledging the Supremacy Clause of Article VI, C1.2 of the U.S. Constitution, see State ex rel, Painter v. Brunner (2011), 128 Ohio St.3d 17, 31, wherein Travino and Martinez are controlling, unreasonably rejected their application by asserting that Ohio Supreme Court decision are binding over U.S. Supreme Court cases as far as Ohio's post-conviction

relief statutes are concerned. Taylor's rational that State law is the only controlling law in a State's post-conviction relief statutes and procedures was rejected by the U.S. Supreme Court (this Court), on January 25th, 2016, in Montgomery v. Louisiana (2016), 136 S.Ct. 718, 731-732, wherein it is held in relevant part: "If a State may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own postconviction proceeding. Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the constitution. If a State collateral proceeding is open to a claim controlled by federal law, the state court "has a duty to grant the relief that federal law requires." [Yates v. Aiken (1988) 484 U.S. 211, 218]. Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement states cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge. See also Young v. Ragen (1948), 337 U.S. 235, Brewer v. Dahlberg (6TH Cir. 1991), 942 F.(2) 328, 339, Kruse v. Lack (M.D. Tenn. 1985), 634 F.Supp. 50.

Since Taylor, acknowledged that Gunner was predicated on Martinez as extended by Travino. Taylor unreasonably applied Martinez and excluded Travino when not finding Gunner controlling, being contrary to and unreasonable as applied to Montgomery. Since Gunner is predicated on Martinez and Travino the Supremacy Clause under Montgomery mandates Gunner's application have equal force, Regardless of the fact that decision of the Ohio Supreme Court are also binding. None of the Ohio Court's have addressed the abrogating affect on Finley and Giaratano, supra, Martinez 132 S.Ct at 1326 (Justice Scalia, Justice Thomas, dissenting) questioning whether Steffen 70 Ohio St.3d at 410-411 is still controlling under Martinez, Travino and Montgomery 136 S.Ct at 746-750 (Justice Scalia with whom Justice Thomas and Justice Alito join, dissenting).

Russell ,believes that this Honorable High Court must grant jurisdiction to hear this case and review the erroneous and unconstitutional decisions of the Ohio State Court.

Shortly after Russell filed his petition, the Ohio General Assembly enacted Senate Bill 139, which now allows discovery procedure in post conviction proceedings, but one must be convicted and sentenced to death, Senate Bill 139 is as unconstitutional as the previous post conviction statutes and procedures. Which Russell's Constitutional ground for relief number two fully explains.

CONSTITUTIONAL GROUND FOR RELIEF NO:1

ORC §§ 2953.21, 2953.22, AND 2953.23(A)(1)(a)&(b) ARE UNCONSTITUTIONAL UPON THEIR FACE AND AS APPLIED IN VIOLATION OF THE SUPREMACY, DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION PURSUANT TO THE RECENT AND RETROACTIVE DECISIONS IN MARTINEZ, TRAVINO, AND MONTGOMERY, BECAUSE SUCH DENIES INDIGENT PRISONERS POST CONVICTION DISCOVERY PROCEDURES THAT FORECLOSES THEIR RIGHT-OF-REMEDY TO PROVE BRADY VIOLATIONS.

In Brady v. Maryland (1963), 373 U.S. 83, 87, the U.S. Supreme Court held in relevant part that:

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

In the case at hand, the prosecution "suppressed" the identity of an alleged witness and statement that was material to the defense and just by the mentioning of its existence during the pre-trial procedures, whether such a person and statement truly exist, without producing it, the prosecution was allowed to escape their burden of establishing probable cause for Russell's arrest and subsequent indictment. This prejudiced and foreclosed Russell's ability to have the matter dismissed under ORC § 2937.12 and Ohio Crim.R.ules 5(B)(2)-(3)(a)-(d) and 12(E), as well as the 4TH Amendment. A Brady violation occurs when the following three(3)

components are present: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene (1999), 527 U.S. 263, 281-282. It must then be determined whether the favorable evidence was improperly suppressed, meaning that the evidence was material and likely to produce a different result: "in determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." State v. Johnston (1988), 39 Ohio St.3d 48, 60-61. See also the recent decision rendered by the U.S. Supreme Court in Wearry v. Cain (2016) 136 S.Ct. 1002,

The Court stated in relevant part: "Wearry need not show that he more likely than not would have been acquitted had the new evidence been admitted, Smith v. Cain 565 U.S. 73, He must show only that the new evidence is sufficient to undermine confidence in the verdict."

In the case at hand, Russell has already proven that a Brady violation was committed by the State of Ohio, Russell has also established that Ohio's post-conviction statutes do not allow for

post-conviction discovery procedures, nor do they allow appointment of counsel or a private investigator to obtain the suppressed/withheld Brady material for a indigent, incarcerated petitioner acting in pro se. Gordon, 2009-Ohio-1330, at ¶12. Nor can Russell avail himself the same through ORC §§ 149.43 and 2731. et seq. Broom 123 Ohio St.3d at 115, State ex rel. Love, 87 Ohio St. 3d at 158. Russell has already established that Ohio's post-conviction statutes require that even an indigent, incarcerated petitioner proceeding pro se; being similarly situated and without the right to counsel and an investigator, must also still provide and exhibit with the petition the "Suppressed/withheld Brady" material-outside the pre-trial/trial record before they can avail themselves pursuant to ORC §§ 2953.21(C), 2953.22, and 2953.23(A)(1)(a)&(b). Additionally that a petitioner's own self-serving affidavit alleging a Brady violation will "not" compel a hearing. Young, 2006-Ohio-1165, at ¶'s 8-13; Kapper, 5 Ohio St.3d at 37-38 citing State v. Jackson(1980) 64 Ohio St.2d 107; see also State v. Calhoun(1999) 86 Ohio St.3d 279,283. State v. Howard 2016 Ohio App. LEXIS 427 rendered 02/11/16, at ¶20.

Therefore, if the petitioner cannot afford to hire counsel and an investigator or the public defender appointed to represent the indigent person on direct appeal refuses or neglects to follow through with collateral relief-such as Russell, they are completely deprive of the ability to file a meaningful post-conviction petition, tantamount to being outright denied the right-of-remedy because the post-conviction statutes prevents such solely on the basis of their indigence. This is the very definition of an "invidious discrimination" as announced in Griffin v. Illinois(1956) 351 U.S. 12,18-19. Especially when the direct appeal process is "not" available to raise such Brady styled collateral challenges, See Travino,133 S.Ct. at 1052-1053: "Where the State consequently channels initial review of this constitutional claim to collateral proceedings, a lawyers failure to raise[a Brady] claim during initial-review collateral proceedings, could deprive a defendant of any review of that claim at all."

To the best of Russell's knowledge, Taylor,2015-Ohio-1314, at ¶'s 10-11, is currently the only Ohio Appellate Court to acknowledge Martinez; as extended in Travino, has impacted federal law regard-

ing a State's post-conviction relief procedures [that] has developed significantly in the last three-plus years. Taylor did not address that abrogating affect on Finley and Giarrratano, supra, Martinez, 132 S.Ct. at 1326 (Justice Scalia, Justice Thomas, dissenting); questioning whether Steffen, 70 Ohio St.3d at 410-411 is still controlling under Martinez, Travino, Montgomery, 136 S.Ct. at 746-750 (Justice Scalia with whom Justice Thomas and Justice Alito join, dissenting).

Russell, believes due to the argument raised, an evidentiary hearing should be ordered requiring the prosecution produce the suppressed/withheld evidence discussed herein and in support of granting this petition in order to protect Russell's substantive constitutional rights for the reasons asserted herein.

CONSTITUTION GROUD FOR RELIEF NO:2

ORC §§ 2953.21, 2953.22, AND 2953.23(A)(1)(a)&(b) ARE UNCONSTITUTIONAL UPON THEIR FACE AND AS APPLIED IN VIOLATION OF THE SUPREMACY, DUE PROCESS, AND EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION PURSUANT TO THE RECENT AND RETROACTIVE DECISION IN MARTINEZ, TRAVINO, AND MONTGOMERY, BECAUSE SUCH DENIES INDIGENT PRISONERS POST CONVICTION DISCOVERY PROCEDURES THAT FORECLOSES THEIR RIGHT-OF-REMEDY TO PROVE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS WITH EVIDENCE OUTSIDE OF THE TRIAL REORD.

Russell is well aware of the fact that in order to prevail on a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate (1) That his counsel's performance fell below an objective standard of reasonableness, and (2) That counsel's deficient performance prejudiced him Strickland v. Washington (1984), 466 U.S. 668, 694. To establish prejudice, petitioner must demonstrate that counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial could not have reliably produced a just result." State v. Anderson, 1st Dist Appeal Case No. C-040541, 2005 Ohio App. LEXIS 3913, rendered 08/19/05, at ¶8; citing State v. Powell (1993), 629 N.E.(2d) 13. Counsel for a criminal accused has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." In reviewing a challenge to counsel's effectiveness, a court must assess "a particular decision not to investigate*** for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

In evaluating the performance of counsel, strategic choices made

after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Anderson, 2005-Ohio-4301, at ¶10; citing Strickland, 466 U.S. at 690-691. In the case at hand, Defense counsel, once becoming aware of the fact that the prosecution did not provide in discovery neither the identity nor statement of their primary witness they were using to obtain probable cause for Russell's arrest and subsequent indictment-should have compelled such production pursuant to the procedures set forth in Ohio Crim.R.16(M) in order to subject the prosecutions case to meaningful adversarial testing during both the pretrial and trial proceedings. And in order protect Russell's substantive constitutional confrontation and impeachment rights under the procedures set forth in ORC §2937.12; including, Ohio Crim. Rules 5(B)(2)-(3)(a)-(d), 12(E), and 16(G)-(H)(1)-(4) and (I). This prejudice is compounded when defense counsel, during the pretrial and trial proceedings, did not subject the prosecutions case to meaningful adversarial testing in regards to the lack of gun powder residue and blood splatter evidence; including finger print evidence taken from the murder weapon. Instead of further investigating these complex forensic scientific matters by consulting with neutral and detached forensic experts in order to determine the accuracy of the prosecution's expert witnesses findings in regard to this evidence or lack thereof-in an effort to find additional exculpatory evidence in relation thereto-counsel left those experts free from meaningful confrontation and impeachment representing a complete breakdown of the adversarial process. The prejudice behind this is that counsel allowed the prosecution to **place insufficient evidentiary value** on the fact that those experts findings were that the finger prints found on the murder weapon "did not match Russell's". See **Appendix Exhibit "G"** p.12a (being a portion of the transcript from the November 5th, 2001 arraignment hearing at pg.3). Only to then after, during the trial itself, allowed the expert to testify that "the five prints lifted from the revolver were of no value"

See Appendix Exhibit "G" p.12a (being a portion of the trial transcript on June 17th, 2003, at pg.168).

Of course, Russell maintains his case should not have even went that far when the alleged witness the prosecution referenced in support of finding probable cause for arrest and indictment is probably fictitious and doesn't exist; meaning this should have been dismissed during the preliminary phases, Especially when this "so-called" witness never testified at the trial itself. Regardless of these facts, the same post-conviction rules apply to ineffective assistance of trial counsel claims. That is, the same as with proving Brady violations, Russell must still obtain and provide the suppressed/withheld discovery that counsel failed to investigate and compel in order to support and prove this claim. See State v. Ramos, 11th Dist. Appeal Case No. 2007-G-2794, 2008-Ohio-3738, 2008-Ohio App. LEXIS 3166, rendered 07/25/08, at ¶'s 25-29, citing State v. Pierce (1998), 127 Ohio App.3d 578, 586, 713 N.E.(2d) 498, in relevant part;

"For purposes of determining whether there are substantive grounds for post conviction relief that would warrant a hearing, it is generally accepted that affidavits presented in support of the petition should be accepted as true. ***However, conclusory or self-serving affidavits presented by the petitioner in support of his claims, without more, will not satisfy the petitioner's evidentiary burden."

Russell, asserts, because Ohio's post-conviction statutes do not allow for post-conviction discovery procedures to obtain and produce the evidence counsel failed to secure that is outside the record in support thereof; and in order to meet the petitioner's burden the same as with a Brady violation, Martinez, Travino, and Montgomery are equally applicable here requiring full retroactive application in order to protect and enforce Russell's substantive constitutional rights.

Several months after Russell filed his Application for post conviction relief, pursuant to the recent decisions rendered by the U.S. Supreme Court in Martinez, Trevino, and Montgomery, and this Court's decision in Gunner, the Ohio General Assembly enacted a New post conviction statute Senate Bill 139. The new statute now allows Post Conviction Discovery Rights, but those rights only apply to those sentenced to death, see Appendix Exhibit "H" (being a letter from Mr. Sietz and a copy of the enacted Bill 139)

Russell asserts that the Newly enacted post conviction statute is even more or just as unconstitutional as the previous statute, because the new statute "Senate Bill 139" allows discovery in post conviction proceedings, but it is restricted to only those convicted of Agg. Murder and sentenced to death..

Senate Bill 139, birthed a new, and well overdue right to access the prosecutor's complete case file for potentially exculpatory evidence, and or "previously withheld evidence". Russell asserts that the Equal Protection Clause, prohibits this remedy from being restricted only to those sentenced to death for the following reasons:

- 1). A person sentenced to Death must have every reasonable opportunity to discovery of exculpatory evidence because of the magnitude of their punishment(sentence) consists of them never being returned to society and being put to death in prison,
- 2). However, a person not sentenced to death, but instead sentenced for example to 18-years-to-life, also faces the ultimate hope-killer, and magnitude of punishment (sentence), consisting of the reality that they too will never be returned to society and will die in prison. The person sentenced to death once their sentence is confirmed and executed, that person dies quickly, but the person sentenced with a life-tail, who may never be returned to society dies slowly, but the outcome is the same they both died in prison.

Russell, asserts that any conviction obtained through impermissible suppression of exculpatory evidence, or any other undisclosed evidence which could have led to the discovery of exculpatory evidence is a direct violation of Due-Process and compromises the integrity of the entire judicial system, therefore, full discovery in post conviction proceedings must not be foreclosed to those of us not sentenced to death. The equal protection clause limits the power of a legislator to target a particular individual, organization, or group by requiring that the legislator confer benefits or impose cost on a larger, neutrally defined group; it cannot pick on just the most vulnerable. Therefore, Senate Bill 139, is unconstitutional, like the old-saying goes "whats good for the goose is good for the gander".. I do sympathize for those on death-row, but I truly believe I deserve the same protection of the law. I too, should be afforded discovery in post conviction proceedings, a person on death-row should not be afforded more rights than a person sentenced to life in prison.

CONSTITUTIONAL GROUND FOR RELIEF NO:3

PETITIONER'S 5TH, 6TH, AND 14TH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION WERE VIOLATED WHEN THE TRIAL COURT ABUSED ITS DISCRETION DENYING PETITIONER'S DELAYED POST CONVICTION PETITION, KNOWING THE STATE DOES NOT PROVIDE AN ADEQUATE REMEDY TO HAVE SAID FEDERAL CLAIMS ADJUDICATED ON THEIR MERITS.

Petitioner, Mark R. Russell, (hereinafter Russell), asserts that the trial court failed to exercise sound, reasonable, and legal decision making when it denied Russell's Delayed Post Conviction Petition. The trial court ruled that Russell's delayed post-conviction petition was untimely and barred by res judicata. Russell is asking this Honorable Court to explain to him, how is it possible for his delayed post-conviction petition to be deemed untimely, when said petition was filed pursuant to the rules that govern delayed post-conviction proceedings. Russell is also asking that this honorable Court explain to him, how does res judicata apply to his case, when the claims raised by him could not have been raised in his direct appeal, because his claims can only be proven with evidence that is outside of the trial record. Russell is also asking this Honorable Court to explain to him, how can the State of Ohio procedurally default a Federal Constitution Claim/Claims "When" the State of Ohio has failed to provide an adequate remedy to have said claim/claims adjudicated on their merits. As this Court well-knows, the statutes that govern post-conviction proceedings does not provide a remedy for indigent pro se litigants to use to prove "Brady" or "Ineffective Assistance of Trial Counsel Claims" that can only be proven with evidences that is outside of the trial record, In fact the statute demands that the indigent, pro se petitioner attach the "withheld" evidence (statements etc) to the actual petition when raising a Brady claim, like-wise, the same holds true when a indigent pro se litigant raises a "Ineffective Assistance" claim arguing counsel's failure to consult or retain expert assistance/testimony, counsel failure to investigate and obtain the withheld evidence, according to the statute that indigent pro se petitioner without any outside assistance Must provide some sort of documentation of what the expert would have testified to at trial, "how" is it at all possible for that indigent petitioner to get his/her hands on such evidence, that same indigent petitioner must also have the withheld evidence his/her counsel failed to obtain. The way the statute is design it forecloses the poor from raising claims that can only be proven with evidences that's outside of the record,

Russell has been diligent for the past 12-plus years attempting to have his federal claims adjudicated on their merits in the Ohio State Courts but, those courts just continued to **"Unconstitutionally"** use their procedural default doctrine, Russell even attempted to raise these same claims in his federal writ of habeas corpus, see **Russell v. Jackson**, 2009 U.S. Dist LEXIS 45306, at [*72]-[*73](footnotes omitted)(Emphasis added), Where the court stated;

"Petitioner also notes that he was initially released from custody and was arrested only 14 months later, Finally, petitioner points out that, although the prosecutor or police had represented during the early stages of the prosecution that a witness asserted that petitioner had confessed to the crimes charged, no such individual testified against him at trial or was disclosed in discovery."

However, Russell asserts that the federal courts hands were tied so-to-speak, due to the state Court procedural default doctrine which was totally unconstitutional, but nonetheless, On 08/11/09 at 2009 U.S. Dist LEXIS 70558, The U.S. District Judge adopted Report and Recommendation of the Mag.Judge.

But, several years after Russell's writ of habeas corpus was denied, the U.S. Supreme Court announced three decisions, **March 20th, 2012, May 28th, 2013, and January 25th, 2016**. In those decisions the U.S. Supreme Court recognized **"New Federal and State rights that affect a State's post-conviction procedures on substantive constitutional grounds that applies retroactively to persons in Russell's situation, and Russell's petition(post-conviction) asserted claims based on those new substantive "collateral" rights** Russell is well aware of the fact that before those three(3) recent U.S. Supreme Court decisions, the Court previously held that there were no Constitutional Rights involved with a State's post-conviction laws. **However**, as Russell argued in detail, the Nations High Court for the first-time, determined that when a State's collateral proceedings are the only vehicle and available means in which the State Court will entertain federal constitutional claims that are not permitted by state law to be raised on direct appeal, such as claims of prosecutorial misconduct and ineffective assistance of counsel that are supported only by evidence **"outside"** the trial record, that some **"limited"** substantive constitutional due process and equal protection rights must be applied in such instances. If not, as here, the petitioner is being foreclosed completely from being able to obtain redress for such

claims. As a direct result of the previous U.S. Supreme Court decisions in Pennsylvania v. Finley(1987), 481 U.S. 551, 554-555, and Murray v. Giaratano(1989), 492 U.S. 1, 7, the Ohio Supreme Court held in State v. Steffen(1994), 639 N.E.2d 67,76 in relevant part that;

"A post-conviction stay, unlike a direct appeal stay, is not a constitutional right."

But, on March 20th, 2012, the U.S. Supreme Court reevaluated the question as to whether a state's collateral post-conviction remedies can involve federal substantive due process and equal protection rights when deciding the case of Martinez v. Ryan(2012), 132 S.Ct. 1309, modifying the previous "cause and prejudice" standard and application of the procedural default doctrine in Coleman v. Thompson(1991), 501 U.S. 722, Martinez recognized that certain federal constitutional claims are excluded from being raised through the state's direct appeal process and must be raised under the State's collateral post-conviction laws and procedures when ruling in relevant part that "Where, as here, the initial review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective-assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoners direct appeal as to the ineffective-assistance claim. This is because the state habeas court "looks to the merit of the claim" of ineffective assistance, no other court has addressed the claim, and "defendants pursuing first-tier review... are generally ill equipped to represent themselves" because they do not have a brief from counsel or an opinion of the court addressing their claim of error. Halbert v. Michigan(2005) 545 U.S. 605,617, see Douglas v. California(1963) 372 U.S. 353,357-358. Martinez, 132 S.Ct.at 1317.

In Martinez, 132 S.Ct. at 1321-1322(Scalia and Thomas,JJ Dissenting) the court also established that this new perspective of limited substantive rights in State collateral relief also carries the same substantive constitutional weight, with equal force, to prosecutorial misconduct due process claims brought under Brady v Maryland(1963),373 U.S. 83, the same as to collateral ineffective assistance of counsel claims and challenges. Although the pre-trial record in Russell's case, shows the prosecution vaguely referenced an unnamed witness that provided a "statement" which has also been withheld along with their identity to this-date still qualifies as "evidence" outside of the trial record" for purposes of seeking relief exclusively under ORC §§ 2953.21 and 2953.23(A) (1)(a)&(b), and excluding those claims from the direct appeal process. State v. Lester(1975),322 N.E.2d 656, State v. Perry(1967) 226 N.E.2d 104.,

"Evidence **presented** outside the record must meet some threshold standard of cogency[.] "Lawson, 103 Ohip App.3d at 315." ***Evidence **offered** dehors the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original record. "State v. Cole (1982), 2 Ohio St.3d 112, 114, 443 N.E. (2d) 169; State v. Combs (1994), 100 Ohio App.3d 90, 97 652 N.E. (2d) 205 (Emphasis added)

On May 28th, 2013, the U.S. Supreme Court "extended" Martinez in the case of Travino v. Thaler (2013) 133 S.Ct. 1911, 1921, ruling in relevant part that;

For these reasons, we conclude that where, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in Martinez applies;

"[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 132 S.Ct. 1309.

In the case at bar, Russell was and remains incarcerated and had/has "no" procedural means to investigate and procure the withheld evidence himself. See State v. Gordan, 10th Dist. Appeal Case No. 08-AP-791, 2009 Ohio App. LEXIS 1119, rendered 03/24/09, at ¶12 ("Similarly, appellant is not entitled to be appointed a private investigator, as R.C. 2953.21 does not provide for discovery."), State v. Young, 10th Dist. Appeal Case No. 05AP-641, 2006 Ohio App. LEXIS 972 rendered 03/09/06, at ¶8 ("Another type of evidence outside the record that is insufficient to support a post conviction petition is evidence that fails to meet a minimum level of cogency. (Internal citations omitted). Likewise, evidence outside the record in the form of petitioner's own self-serving affidavit alleging constitutional deprivation will not compel a hearing. State v. Kapper (1983), 448 N.E. (2d) 823.") Young also holds that, "There are no substantive grounds for post conviction relief under Brady where a defendant fails to present evidence that the State actually failed to provide reports." Id, 2006-Ohio-1165, at ¶13. Since, within the

definition of Travino, 133 S.Ct. at 1917-1918, ORC §§ 2953.21 and 2953.23(A)(1)(a)&(b), are the "initial review" proceedings for Brady violations involving withheld evidence "outside the record" then ORC §§ 2953.21 and 2953.23(A)(1)(a)&(b) are unconstitutional upon their face and as applied as violative of substantive and procedural due process and equal protection of laws, That is because those statutes deny an indigent incarcerated pro se litigant post conviction discovery procedures-rendering it impossible to obtain an initial review collateral right-of-remedy for such violations because the government/state has shielded itself from having to release such withheld Brady evidence. Evidence which is tangibly needed to prove the violation on collateral review itself. That is, unless that similarly situated petitioner can economically afford to retain post-conviction counsel and investigators, etc .. A luxury Russell does not have.

Russell asserts as fact the recent U.S. Supreme Court cases discussed, infra, that were decided "after" his conviction became final as compared to his earlier collateral motions and petitions established he was, and is currently, being denied his substantive federal and state constitutional and statutory rights to effectively raise his ineffective assistance of counsel and due process prosecutorial misconduct claims concerning matters and evidence that occurred inside and outside of the trial record. The recently decided U.S. Supreme Court cases, discussed, infra, establish Ohio's application of res judicata to such collateral statutory procedures, such as motions for new trial and post conviction petitions (ORC §§ 2953.21, 2953.22, 2953.23(A)(1)(a)&(b); Ohio Crim.R 33) are not only unconstitutionally extreme but apply jurisdictional barriers to collateral federal constitutional claims that are so limiting and arbitrary as to be tantamount to "no-right of remedy" at all. Thus, Ohio's arbitrary collateral rules of court and statutory post conviction procedures render it impossible for an indigent pro se litigant who cannot afford to retain counsel, such as Russell being "similarly situated" to comply with such rules and procedures without meaningful outside assistance to investigate and discover exculpatory evidence that was either "withheld" and/or "trial counsel failed to investigate and obtain such before trial. The factual problem that Russell faces with

Ohio's constitutionally "defective" collateral procedures is that such does not contain, and outright denies Russell the ability to obtain post conviction discovery as defined by Ohio Crim.R.16 for a lack of such post conviction discovery procedures. In turn Russell was/is unable to "meaningfully" present his federal claims to the State Courts on collateral review in regards to his ineffective assistance of counsel and prosecutorial misconduct claims. That is because such collateral claims can only be proven with evidence "outside" the trial record. The evidence that was "withheld" before, during, and after trial by the prosecution, in conjunction with trial counsel's defective performance when not pursuing such through meaningful investigation of Russell's case. An example of this, as Russell has tried time and time again to argue collaterally, is the fact that the prosecution withheld a State's witness with whom they "allege" made a statement in regards to Russell "allegedly" confessing to him/her of killing Sartin. The proof that this witness's identity and statement were "deliberately withheld" from Russell can be reviewed from the Arraignment Hearing transcripts of October 23rd, 2001, Municipal Case No. 2001 CRA-027092 (pg. 3) and November 5th, 2001, Common Pleas Case No. 01CR-6462 (pg. 5) affixed hereto, infra, at Appendix Exhibit "A" & "B" pp. 1a-2a, in relevant part as follows:

Municipal Case No. 2001 CRA-027092 (tr. pg. 3, 10/23/01)

MR. BOKELMAN: Mark Russell also confessed to an individual about killing the victim...

Common Pleas Case No. 01CR-6462 (tr. pg. 5, 11/05/01)

MS. WORLEY: And it looks like CPD Detectives also interviewed an individual that Mark Russell confessed to about killing Ken Sartin (sic). In Police Summary...

Russell further argued that this "withheld" witness never appeared nor testified during the actual jury trial. Thus, depriving all of Russell's rights of confrontation, impeachment, and compulsory process. Yet, this "withheld" witness and his/her "withheld" statement, simply by reference that such existed, was used against Russell by the prosecution to "somehow" support their burden of establishing "probable cause" for for an arrest and indictment for felony murder, thereby, depriving Russell of any and all substantive and procedural due process rights that were supposed to

be protected by Ohio Crim.R.5(B)(1)-(8)and ORC §§ 2937.01 to 2937.21.Yet,all the Court required of the prosecution to meet their preliminary burden was to just simply say they had such without any burden of production whatsoever.

Russell argued as fact that the foundation of his arrest by the Homocide Detectives of the Columbus Police Dept,(CPD),Detectives William Gillette and Detective Seamans,on October 22nd,2001,was based on the Detective Gillette's "Division of Police Prograss of Investigation Report"Report No.68352-2000,as affixed hereto at **Appendix Exhibit"C" p.3a-4a**,in relevant part;

"*** I also advised Mr.Russell that we(detectives)had uncovered some new evidence..."

"*** At this point,Detective Seamans advised Mr.Russell the rea-son charges were filed on you tonight is because of some new evi-dence and this evidence nails you.."

This "so-called" new evidence the detectives were referencing in the attached report was in reference to the alleged mysterious witness whom they alleged provided them with a "phantom"statement that Russell confessed to killing Sartin.Of course,Russell vehe-mently denies ever making such a statement to anyone.That is be-cause Russell always maintained that he did not murder or cause the death of Kenny Sartin.period.Russell was represented by a Ms. Hawkins from the Franklin County,Ohio Public Defender's Office during his October 23rd,2001 probable cause hearing.Ms.Hawkins to the best of Russell's knowledge was not provided with the identity nor statement of the prosecutions mysterious witness by the prosecution.Nor,after having knowledge of the alleged exist-ence of such,did she in anyway move to have such produced by the prosecution.Russell was then after represented by the late Robert Suhr during the November 5th,2001 pretrial and probable cause hearing that occurred in the Common Pleas Court,Again,the pro-secution makes reference to the mysterious "withheld" witness and statement.And again,defense counsel was not provided with the identity nor statement of the prosecution's mysterious witness by the prosecution.Nor did Attorney Suhr,the same as Attorney Hawkin after having knowledge of the alleged existance of such,did he in anyway move to have such produced by the prosecution.The preju-dice suffered by the prosecution's withholding of this mysterious

witness's identity and statement, concomitant with both defense counsel's failure to motion the state court to "compel" the prosecution to produce such pursuant to Ohio Crim.R.16(A), (B)(1)-(7) (G), (I), and (M), denied Russell his substantive and procedural due process rights to move to dismiss the felony murder indictment and charges due to false arrest and lack of probable cause. That is because the mysterious witness and his/her phantom statement is the primary evidence used by the State of Ohio to determine there was probable cause to arrest, indict, and proceed with a jury trial on the felony murder charge. Yet, when the actual jury trial is commenced, this mysterious witness and his/her phantom statement is nowhere to be found.

Russell was tested by CPD forensic unit for gunshot residue evidence right after being detained from the crime scene. The test was "negative" for gunshot residue. CPD forensic officials also saw no visual signs of blood evidence. As a result of that, CPD released Russell as "not" being the shooter. Russell now re-asserts the following,

- 1). The State Court failed to exercise sound, reasonable, and legal decision making when it denied his Delayed Post Conviction Petition, ruling that it was untimely and barred res judicata,
- 2). The State of Ohio does not provide an adequate remedy for indigent pro se litigants to use to have claims adjudicated on their merits when those claims can only be proven with evidence that is outside of the trial record, therefore procedurally defaulting such claims is unconstitutional,
- 3). The way the statute is design it forecloses the poor from receiving justice. When it comes to federal claims that can only be proven with evidence that is outside of the trial record.

Russell believes that an evidentiary hearing should be ordered requiring the prosecution produce the suppressed/withheld evidence.

CONSTITUTIONAL GROUND FOR RELIEF NO:4

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO PROVIDE PROPER NOTICE OF POST CONVICTION PROCEEDINGS/PROCEDURES, TIME RESTRAINTS ETC. IN VIOLATION OF PETITIONER'S 6TH AND 14TH AMENDMENT RIGHTS OF THE U.S CONSTITUTION.

In the first week of July 2003, Russell received a letter dated July 2nd, 2003, from Attorney John Keeling of the Franklin County, Ohio Public Defenders Office. Mr. Keeling was appointed to represent Russell on his direct appeal, see Appendix Exhibit "E" p. 6a.

That letter reads as follows;

"Dear Mr. Russell,

I have been assigned to represent you on your appeal. An appeal is a review of your trial proceedings in order to ensure that they were conducted fairly. It is not a new trial and we are not allowed to present new evidence or talk about anything that is not already part of the trial record. I will have a transcript of all the trial testimony by the middle of August. I will send you a copy. After reviewing the transcript, I will file a brief setting forth our claim of errors. This brief will probably be filed by mid-September unless we need an additional extension of time.

Because I will have access to the entire record of your trial, I will have all the facts that I can use on appeal at my disposal. Because we cannot argue or allude to facts that are not in the record, there is little factual information that you can provide me for purposes of your appeal. However, there are other remedies for wrongs that cannot be addressed by appeal, so please let me know if you have any concerns or comments regarding the fairness of the proceedings against you. We might have other remedies available. You can call me collect. My office will accept the call if I am in. You are also free to write me or have anyone else contact me on your behalf."

After receiving Mr. Keeling's letter, Russell contacted him, and asked that he use any and all other remedies available. Russell was under the impression that Mr. Keeling was going to represent him in his (Russell's) collateral actions. Attorney Keeling represented Russell throughout his direct appeal process to the Ohio Supreme Court. However, Attorney Keeling never gave advance notice to Russell, that beginning on August 11th, 2003, when the trial record was forwarded to the Court of Appeals, that Russell had no right to counsel on collateral review and had only a six (6) month "deadline" from that aforementioned date to file such pro se, under ORC § 2953.21(A)(2), in which to invoke the jurisdiction of the trial court for post conviction relief, this in regards to seeking collateral relief as to the "withheld" witness and their alleged "withheld" statement of what they said Russell allegedly said about killing Kenny Sartin. Even though the fact that this witness and statement existed from the face of the record, the identity of this witness and statement have been "withheld" outside the trial record to this date. In October 2004, Russell received a letter from Attorney Keeling dated 10-1-04, see **Appendix Exhibit "E" p. 6b,**

That letter reads as follows;

Dear Mr. Russell,

Enclosed is the entry from the Ohio Supreme Court dismissing your appeal. I have exhausted your state remedies on the appeal of your murder conviction and I am now withdrawing as your attorney. I no longer represent you in any capacity. If you wish to seek any additional remedies, you will have to make arrangements for appointed counsel or retain your own."

Russell received the above mentioned letter from attorney Keeling well after the six(6)month limitation to file an post conviction relief petition had long expired. After receiving attorney Keeling October 1st, 2004 letter, Russell finally realized he had to proceed pro se, Russell has filed numerous post trial motion, and petitions arguing that the State withheld evidence. The state just continued to unconstitutionally employ their procedural default doctrine. If attorney Keeling would have given Russell his advance notice of the post conviction procedures time limits etc, Russell would have filed a timely application for post conviction relief. Russell now states a new constitutional claim regarding appellate counsel's failure to advise and give notice to Russell that he had no right to counsel in post conviction concomitant with his failure to notify Russell of the then six(6)month statute of limitation under ORC §2953.21(A)(2) if he(Russell)decided to proceed pro se.

Sum ten plus years after Russell's conviction became final the Sixth Circuit Court of Appeals rendered their decision in Gunner v. Welch(6th Cir. 2014) 749 F.3d 511. The Sixth Circuit Court ruled that petitioner Gunner had received ineffective assistance of appellate counsel due to counsel's failure to inform Gunner of the post conviction requirements, the Court determined that Gunner's appeal attorney had an obligation to provide Gunner with those requirements.

A year or so after the Sixth Circuit rendered its decision in Gunner, the 3th Appellate Dist. rendered its decision in State v. Taylor, 8th Dist. Appeal Case No. 102020, 2015-Ohio-1314, 2015 Ohio App. LEXIS 1271, rendered 04/02/15, at ¶ 11, the 8th Dist., recognized that Trevino"extended" Martinez, However, Taylor appeared to argue that Trevino and Martinez announced a "new" right of counsel for collateral actions; to which is separated and distinct from Russell's argument herein. Taylor, 2015-Ohio-1314, at ¶'s 11-15;

citing Gunner v. Welch (6th Cir. 2014) 749 F.3d 511, while acknowledging that Gunner was predicated on the U.S. Supreme Court cases of Martinez and Travino, then after concluded in an objectively unreasonable manner that:

***[E]ven if we were to read Gunner's interpretation of an Ohio appellate attorney's duties as extending beyond federal habeas proceedings we find its application to the present case to be incompatible with established Ohio law. Decisions of the Ohio Supreme Court are binding upon this Court; whereas, decisions of the Sixth Circuit Court of Appeals serve as persuasive authority. State v. Johnson, 8th Dist. Appeal Case No. 42846, 1981 Ohio App. LEXIS 10913, rendered 07/16/81. As addressed above, the Ohio Supreme Court has held that ineffective assistance of appellate counsel arguments are to be raised in accordance with App.R.26(B) rather than in post conviction proceedings and that an indigent petitioner has neither a State nor Federal Constitutional Right to be represented by an attorney in a post conviction proceedings. Because we find Gunner to be in conflict with these established legal principles we decline to apply it to create an exception to the statutory and jurisdictional time restraints imposed by R.C.2953.21(A)(2).

Taylor, 2015-Ohio-1314, at ¶'s 11-15 while indirectly acknowledging the Supremacy Clause of Article VI, Cl.2 of the U.S. Constitution, see State ex rel. Painter v. Brunner (2011), 128 Ohio St.3d 17, 31, 941 N.E.(2d) 782; wherein Travino and Martinez are controlling, unreasonably rejected their application by asserting that Ohio Supreme Court decisions are binding over U.S. Supreme Court cases as far as Ohio's post conviction relief statutes are concerned. Taylor's rationale that State Law is the only controlling law in a State's post-conviction relief statutes and procedures was rejected by the U.S. Supreme Court on January 25th, 2016, in Montgomery v. Louisiana (2016) 136 S.Ct. 718, 731-732, wherein it is held in relevant part "If a State may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own postconviction proceedings. Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution. If a state collateral proceeding is open to a claim controlled by federal law, the state court "has a duty to grant the relief that federal law requires." [Yates v. Aiken (1938), 484 U.S. 211, 218] Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge. See also Young v. Ragen (1948) 337 U.S. 235; Brewer v. Dahlberg (6th Cir. 1991) 942 F.(2d) 328, 339; Kruse v. Lack (M.D. Tenn. 1985) 634 F.Supp. 50.

Russell is unsure if the Gunner's Court Decision, has anything to do with the procedures of the Ohio Public Defender's Office, but, that office notifies their clients of the post conviction requirements, see Appendix Exhibit "E" p.6c, That letter is dated January 26, 2017 its addressed to Mr. Amos K. Johnson it's from Ms. Nikki Trautman Baszynski, Mr. Johnson's court appointed appeal attorney, it reads in relevant part;

"As a reminder, the filing of the transcripts also triggers your postconviction-relief deadline. The transcripts were filed on January 23, 2017, so your postconviction petition is due on JANUARY 23, 2018."

The letter Russell received from his court appointed appeal attorney gives no notice of the postconviction requirements. Russell now, reasserts, since Gunner is predicated on Martinez and Travino, the Supremacy Clause under Montgomery mandates Gunner's application have equal force, Regardless of the fact that decisions of the Ohio Supreme Court are also binding Taylor, 2015-Ohio-1314 at ¶ 15, Cf., State v. Dye, 10th Dist. Appeal Case No. 13AP-420, denying an Ohio App. R. 26(B) application, rendered 11/20/14, at ¶6 footnote 1 (to the extent appellant relies on the Sixth Circuit decision in [Gunner] in support of his "good cause" argument, we note that Gunner sets out the duty owing to an appellant during a direct appeal to the Supreme Court of Ohio and only in regard to a contemplated application for post-conviction relief...) (Emphasis added) See Appendix Exhibit "F" p7a-11a.

Russell is claiming a "new" federal and state right that applies retroactively to Russell's case and situation on collateral review as announced by Martinez and Travino, and as enforced through the Supremacy Clause by Montgomery, in the context of a State's collateral procedures as it pertains to Russell's appeal attorney failure to give the constitutionally required notice of postconviction procedures coupled with the fact that attorney Keeling made Russell believe he would seek collateral review on Russell's behalf. The fact still remains that the State of Ohio "withheld" evidence that was used by the state to usurp probable cause for Russell's arrest and indictment.

An evidentiary hearing should be ordered requiring the prosecution to produce the suppressed/withheld evidence.

CONCLUSION.

Russell has brought some pretty strong arguments to this Court's attention, concerning the Post-Conviction Procedures here in the State Of Ohio, those procedures foreclose the poor/indigent incarcerated litigant from being able to raise federal claims that can only be proven with evidence that's outside of the trial record, Russell has also shown this Court, how the Ohio State Court of Appeals for Franklin County, Ohio rendered/set-forth inaccurate/untruthful, and misleading factual findings in Russell's case, that court put words in witness Tyrone Woods mouth that he did not say there's no excuse for that. Russell believes based upon the decision rendered by this Court (U.S. Supreme Court) in Martinez, Trevino, and Montgomery, this court should grant Russell's writ of certiorari, so that his federal claims can finally be adjudicated on their merits, Russell is also requesting that this Court order the prosecution to provide the withheld evidence, statement and identity of their alleged witness who Russell allegedly confess too. That witness was used by the prosecution to usurp probable cause for Russell's arrest and indictment.

/s/ Mark R. Russell

PROOF OF SERVICE.

I, Mark R. Russell, do swear or declare that on this date Feb 5th 2018, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI to the Ohio Attorney General's Office at 150 East Gay Street, 16th Floor Columbus, Ohio 43215

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this the 5th day of Feb 2018.

/s/ Mark R. Russell