No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

LAWRENCE EARL WILSON - PETITIONER

VS.

STATE OF OHIO - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

LAWRENCE EARL WILSON

INMATE NO. A349229

FRANKLIN MEDICAL CENTER

1800 HARMON AVENUE

COLUMBUS, OHIO 43223

(614) 441-0679

QUESTIONS PRESENTED

1. WHETHER A TRIAL COURT'S FAILURE TO COMPLY WITH STATUTORY REQUIREMENTS WHEN IMPOSING A SENTENCE RENDERS THE ATTEMPTED SENTENCE VOID.?

2. WHETHER THE TRIAL COURT'S USE OF NUNC PRO TUNC ORDERS IS LIMITED TO MEMORIALIZING WHAT THE COURT ACTUALLY DID AT AN EARLIER POINT IN TIME?

3. WHETHER, WHEN A SENTENCE PRONOUNCED IN OPEN COURT IS MODIFIED AND THE JUDGMENT ENTRY REFLECTS THE MODIFICATION, MUST THE MODIFICATION HAVE BEEN MADE IN OPEN COURT IN THE DEFENDANT'S PRESENCE?

4. WHETHER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10, OF THE OHIO CONSTITUTION GUARANTEE CRIMINAL DEFENDANT'S THE RIGHT TO COUNSEL AT ALL "CRITICAL STAGES" OF THE CRIMINAL PROCESS?

5. WHETHER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 9, ARITCLE I OF THE OHIO CONSTITUTION FORBID EXTREME SENTENCES THAT ARE GROSSLY DISPROPORTIONATE TO THE CRIMES?

LIST OF PARTIES

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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

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 State v. Wilson, 2017-Ohio-8498, 2017 Ohio App. LEXIS 4887, 2017 WL 5192392.

The opinion of the Montgomery County, Ohio Court of Common Pleas appears at **Appendix B** of the petition and is unpublished.

The decision, Without Published Opinion, of the Ohio Supreme Court denying review appears at **Appendix C** to the petition and is reported at State v. Wilson, 2018 Ohio 1600, 2018 Ohio LEXIS 958.

JURISDICTION

The date on which the highest state court decided my case was April 25th 2018. A copy of that decision appears at Appendix C.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

USCS Const. Amend. 6

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

USCS Const. Amend. 8

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

USCS Const. Amend. 14, USCS Const. Amend. 14, § 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.

Oh. Const. Art. I, § 10, Part 1 of 3

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the

accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

Oh. Const. Art. I, § 9

All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

This case is the result of "Petitioner" Lawrence Earl Wilson's attempt, in loco parentis, to ensure the health, safety, and welfare of his fiancées ten year old daughter after she alleged being repeatedly sexually abused by relatives while at her grandmothers home. The events giving rise to this prosecution occurred in February 1996, and arises from an indictment filed April 4th 1996 in the Court of Common Pleas of Montgomery County, Ohio that proceeded under the law as it existed prior to July 1st 1996. The barebones and duplicitous, two count indictment, charged that Petitioner engaged in sexual conduct, with his fiancée's daughter, by force or threat of force, in violation of the Ohio Revised Code ("R.C.") *2907.02(A)(1)(b)*, in count one, and in the second count, that Petitioner did have sexual contact with her in violation of *R.C. 2907.05(A)(4)*. The indictment omitted any name or identity, classification or degree of the offense's, and did not set forth any specific act constituting the charges. Petitioner requested, but did not receive a Bill-of-Particulars, or discovery. This case proceeded to jury trial on May 14th thru 16th 1997, in which Petitioner's court-appointed attorney was dismissed by the court, mid-trial, without a valid waiver of counsel, and counsel was not re-appointed for sentencing. Petitioner was convicted of rape, acquitted of the force or threat of force specification, and acquitted of gross sexual imposition. On July 24th 1997 following a sexual offender classification determination, the sentencing hearing was held in which the judgment and sentence of the court was that the petitioner be imprisoned

for a "*definite*" period of not less than nine, nor more than twenty-five years. On July 30th 1997, the court filed a "Termination Entry" of the above-stated sentence as a *first degree felony*. **(Appx.-D)** The imposition of a definite term of imprisonment as a first degree felony was not authorized by law and the trial court abused its discretion in so sentencing the Petitioner. Petitioner was delivered into the custody of the Ohio Department of Rehabilitation Correction ("ODRC") on August 6th 1997. On August 25th 1997, after Petitioner had began serving his sentence and his direct appeal had been perfected, the trial court filed an "Amended Termination Entry" which changed the sentence from a first degree felony to an aggravated first degree felony. **(Appx.-E)** Petitioner did not receive a copy of the Amended Termination Entry from the Court Clerk. On January 7th 2011 the trial court filed a "*nunc pro tunc* 07-24-1997 Termination Entry" **(Appx.-F)** by a successor judge, adding the requirements of the Ohio Rules of Criminal Procedure "*Crim.R."32(B)*[1], removed all mention of the degree of felony, and classification of the offense, and deleted the section of the revised code under which the sentence was made, and modified the language of the requirement to pay court cost. Petitioner's timely filed Notice of Appeal from that Termination Entry was denied for lack of a final appealable order. This case has a long and complicated history of litigation from the conviction to date. Petitioner contends that the trial court violated his Equal Protection and Due Process rights as well as *Crim.R. 36, and Crim.R. 43*, by issuing the amended

[1] At the time of sentencing Crim.R. 32(B) was applicable, which is now Crim.R. 32(C) (eff.7-1-1998).

and the *nunc pro tunc* judgment entry's rather than conduct a second sentencing hearing to correct the extraneous sentence in the original entry, which was outside the permissible statutory range, contrary to law and *void*. Petitioner contends that, in the instant proceedings, the sentence is still void, and that *res judicata* does not apply to a void sentence. Petitioner has always, and continues to assert, actual-factual innocence to the offense of conviction. Petitioner request this Honorable Court to summarily reverse the State Court decisions that have so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisor power.

REASONS FOR GRANTING THE PETITION

1. WHETHER, A TRIAL COURT'S FAILURE TO COMPLY WITH STATUTORY REQUIREMENTS WHEN IMPOSING A SENTENCE RENDERS THE ATTEMPTED SENTENCE VOID?

In Ohio a court speaks through its journal. This principle has been repeatedly and consistently followed. *State ex rel. Indus.Comm. v. Day (1940) 136 Ohio St. @ 479*. Accordingly, it is imperative that the court's journal reflect the truth. *State ex rel. Worcester v. Donnellon, 49 Ohio St.3d @118*. At the time of Petitioner's sentencing *Crim.R. 32(B)*, required a judgment of conviction to include the plea, the verdict or findings, and that the sentence be signed by the judge and entered by the clerk to constitute a final appealable order. *State ex rel. White v. Junkin,(1997) 80 Ohio St.3d@ 337* . The Ohio Supreme Court has held that Appellate Courts are required to raise jurisdictional issues involving final

appealable orders *sua sponte*. *In re Murray (1990) 52 Ohio St.3d 159, fn.2*. An Ohio court of appeals has no jurisdiction over orders that are not final and appealable. *Ohio Const. Art. IV, § 3(B)(2)*. The definition of final order is contained in *R.C. 2505.02*; *State v. Baker, 119 Ohio St. 3d @ 198*, Syllabus of the Court. Because the judgment entry's of conviction did not reflect the jury's verdict and the trial court's finding of guilt, in Petitioner's First Appeal As Of Right, they were not final appealable orders and the court of appeals was without jurisdiction to consider the trial court's Judgment entry's filed July 30th 1997 or August 25th 1997. Petitioner did not waive or consent to the appellate courts jurisdiction when he appealed his initial, noncompliant sentencing entry. The trial court's failure to issue a judgment of conviction that complied with *Crim.R. 32(B)* rendered Petitioner's conviction void. Ohio court's have consistently found that the failure of the trial court to comply with *Crim.R. 32(B)* was a jurisdictional bar and non-appealable. *State v. Taylor, 1995 Ohio App. LEXIS 2305*. This jurisdictional issue was not fully addressed until years later in the Ohio Supreme Court holdings of *State v. Baker, 119 Ohio St.3d 197*; *State ex rel. DeWine v. Burge, 128 Ohio St.3d1230*, and *State v. Lester, 130 Ohio St.3d 303*, Syllabus of the Court 1 & 2. Further, the court held "only one document can constitute a final appealable order under *R.C. 2505.02*," *Baker, supra @ ¶17*, and that "journalization of the judgment of conviction pursuant to *Crim.R. 32(C)* starts the 30-day clock ticking." *Baker, supra @ ¶10 &¶19*. The judgment entries in this case make no mention of the charge or specification to which Petitioner was

found not guilty rendering the journal entries "interlocutory." *State v. Brown (1989), 59 Ohio App.3d 1*, Syllabus. Petitioner has persistently pursued litigation in numerous attempts to have the void sentence set aside, including Writ of Mandamus to correct a void sentence, *State ex rel. Wilson v. McGee, 123 Ohio St.3d 341*; *State ex rel. Wilson v. McGee, 124 Ohio St.3d 1439*; and Writ of Habeas Corpus, *Wilson v. Hudson, 127 Ohio St.3d 31*; and by Declaratory Judgment, *Wilson v. Collins, 2010-Ohio-6538*, and again by Notice of Appeal following the filing of the January 7th 2011 *nunc pro tunc* judgment entry. *State v. Wilson, 2011-Ohio-5990*; Appealed to Ohio Supreme Court *State v. Wilson, Case No. 2012-0091, 2012 Ohio LEXIS 822*; certiorari denied *Wilson v. Ohio, 2012 U.S. LEXIS 8606*. Petitioner contends that this issue has never been properly adjudicated and that this issue is much more in-depth than its superficial appearance. The transcript of the sentencing hearing clearly reflects that the trial court repeatedly imposed a "*definite*" sentence. This constituted structural error. The court imposed a sentence that was statutorily incorrect, which also demonstrates the courts failure to consider the statutory sentencing factors provided by the Ohio General Assembly, pursuant to *R.C. 2929.12 (A)(B)(C)&(D)*. "A trial court's failure to comply with statutory requirements when imposing a sentence renders the attempted sentence void. The Ohio Supreme Court in *Colegrove v. Burns (1964), 175 Ohio St. @,438*, described the role of a trial judge in sentencing a convicted criminal stating:

> "[C]rimes are statutory, as are the penalties therefor, and the only Sentence which a trial judge may impose is that provided for by statute.

A court has no power to substitute a different sentence for that provided for by law."

See also State v. Beasley (1984), 14 Ohio St.3d @ 75. "The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity." Romito v. Maxwell (1967), 10 Ohio St.2d @ 267; (Tari v. State, 117 Ohio St. @ 498), When imposing Petitioners sentence, the trial judge disregarded the statutory mandates existing prior to July 1st 1996, i.e., R.C. 2929.11(A), R.C. 2929.12(A)(B)(C)&(D), & R.C.2967.13(A), which require that a person convicted of a felony, without exception, shall be imprisoned for an *"indefinite" term*. The transcripts of the sentencing hearing clearly show that the court imposed a *"definite"* sentence, **(Appx.- G-Tr. 303, 304).** In State v. Wilson, 2011 Ohio 5990,@ ¶19, the State simply changed the context of this error, and then brushed it aside as *res judicata*. Nevertheless, Petitioner has consistently asserted that he was improperly sentenced to a *definite term* under the law as it existed prior to July 1st 1996 as clearly shown in the sentencing transcript, which made the trial court's pronouncement of the sentence illegal and void. The July 30th 1997 Termination Entry reflected the sentence as a first degree felony, which was only available for a definite sentence. This error combined with the degree of felony placed the sentence under R.C. 2929.11(B)(4), as a felony of the first degree, in which the minimum term could only be four, five, six, or seven years, rendering it statutorily incorrect to the nine year sentence under R.C. 2929.11(B)(1)(a)) as an *aggravated felony of the first degree*. Further, Petitioners indictment did not include the name,

degree, or classification of the offense, the indictment failed to reasonably inform Petitioner of the charge, as such, the indictment failed to charge an offense. **(Appx.-H)** "A judgment of conviction based on an indictment which does not charge an offense is void for lack of jurisdiction of the subject matter." *State v. Cimpritz, 158 Ohio St. 490,* syllabus, paragraph six. The trial court amended its August 25th 1997 termination entry to reflect the degree of felony as an aggravated first degree felony, effectively changing the sentence pronounced in open court. Petitioner asserts that his sentence is contrary to law because the sentence announced by the trial court at the hearing differed from the sentencing entry, and the difference in the sentence as memorialized in the sentencing entry is material. In *Yonkings v. Wilkinson (1999), 86 Ohio st.3d @ 227,* the Ohio Supreme Court examined various statutory provisions in *R.C. 2967,* the chapter regarding parole includes the statutory provision at issue. The Ohio Supreme Court concluded the term "minimum" as used in the statutory provision *R.C. 2967.13(A),* was meant to apply only to an indefinite term of imprisonment. The court also held such statutory provisions do not apply to a "definite" sentence. *Pollock v. Ohio Adult Parole Auth., 2002 Ohio 1319,¶11.* Further, the sentence demonstrates that the trial court did not follow the dictates of *R.C. 2929.12,* that section states the general factors which must be considered by the trial court in determining the sentence to be imposed for felony, and gives detailed criteria which do not control the court's discretion but which must be considered for or against severity or leniency in a given case. The statute states

no less than four (4) times the "[t]erm of imprisonment for a felony for which an indefinite term of imprisonment is imposed." A trial court abuses its discretion when it imposes a sentence that is statutorily incorrect or when it fails to consider the statutory sentencing factors provided by the General Assembly. *State v. Yontz, 33 Ohio App.3d 342*, Syllabus; *State v. Perkins, 93 Ohio App.3d @ 684*. *R.C. 2929.12*, makes no provision for a definite sentence. Further, *R.C. 2967.13(A)* is the basis for parole eligibility "for a felony for which an indefinite term of imprisonment is imposed." The Ohio Supreme Court, and this Court, has consistently held: "[T]here is no constitutional or inherent right to be released before the expiration of a valid sentence." *State ex rel. Miller v. Leonard (2000) 88 Ohio St.3d @ 47*; *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex (1979) 442 U.S.@ 7*. Petitioner contends that his sentence is invalid, and that he is being deprived of protected liberty interests, and due process rights based on his illegal sentence. Neither the "Amended" nor the "Nunc Pro Tunc" Termination entries reflect what the trial court actually decided, and they do not show what sentence the trial court should have statutorily imposed in compliance with the sentencing factors. Further, the failure of the trial judge to address the Petitioner personally in violation of the appropriate statutory and criminal rules also requires remand for resentencing. The trial court sentenced Petitioner without allowing him an opportunity to speak in accordance with *Crim.R. 32(A)(1)* and *R.C. 2947.05*. The language of these two provisions clearly mandate that a court, before imposing sentence shall afford counsel an

opportunity to speak on behalf of the defendant and "shall address the defendant personally (unambiguously) and ask if he wishes to *make a statement in his own behalf or present any information in mitigation of punishment.*" (Emphasis added.) This right is both absolute and not subject to waiver due to a defendant's failure to object. Silsby v. State, 119 Ohio St. 314, syllabus1&2. In the case *sub judice*, a review of the record shows that the court stated: *"[d]o you have anything to say before I impose sentence?"* **(Appx.-G-Tr. 303)**. Petitioner contends that he did not know what allocution was nor did his attorney or the judge even mentioned it. The trial court did not ask Petitioner if he wished to make a statement or present further information in mitigation of punishment or ask why judgment should not be pronounced against him. The omission clearly violated the requirements of Crim.R. 32(A)(1) and R.C. 2947.05. Since the Ohio Criminal Rules and the Statutory Provisions impose a mandatory duty on the trial court to specifically inquire, failure of the trial court to do so is reversible error. The issue is not whether Petitioner was prejudiced, but whether the trial court complied with the law. The purpose of allocution is to allow the defendant an opportunity to state any information which the judge may take into consideration when determining the sentence to be imposed. The United States Supreme Court has specifically cautioned federal judges under comparable Federal Rules. Green v. United States, 365 U.S. @ 305. The Ohio Supreme Court has followed this same reasoning. State v. Green, 90 Ohio St.3d 358-360. In this case, the Petitioner's right of allocution was violated, thereby

undercutting the constitutional reliability of his sentence, requiring remand for resentencing.

2. WHETHER, THE TRIAL COURT'S USE OF A NUNC PRO TUNC ORDER IS LIMITED TO MEMORIALIZING WHAT THE COURT ACTUALLY DID AT AN EARLIER POINT IN TIME?

What the trial court decided in this case, "its true action," is not a clerical mistake, arising from oversight or omission as contemplated by Crim.R. 36. A *nunc pro tunc judgment* is to be employed to correct clerical errors only. The function of *nunc pro* tunc is not to change, modify, or correct erroneous judgments but merely to have the record speak the truth. Through a *nunc pro tunc* order, the trial court may make a prior entry reflect its true judgment as long as the amendment does not alter the substance of the previous decision. A *nunc pro tunc* entry that seeks to make a substantive correction to a previous journal entry is void. Barille v. O'Toole, 2003 Ohio 4343, ¶50. *Nunc pro tunc* entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided or what the court intended to decide. State ex rel. Fogle v. Steiner (1995) 74 Ohio St.3d @ 164. A "clerical mistake" correctable under Crim.R. 36 refers to a mistake or omission mechanical in nature and apparent on the record, which does not involve a legal decision or judgment." State ex rel. Cruzado v. Zaleski, 2006 Ohio 5795 ¶19. In the present case, a *nunc pro tunc* entry was not the appropriate remedy to correct the trial court's errors of the initial sentencing hearing. The trial court originally sentenced Petitioner on July 24th 1997, but several errors in

the court's sentencing entry led to the issuance of an amended entry on August 25th 1997 and a *nunc pro tunc* entry on January 7th 2011. When the court issued its amended Termination Entry on August 25th 1997 it did not label the entry as a nunc pro tunc entry. There is nothing in the August 1997 entry which would indicate that it was intended as a nunc pro tunc entry, nor is there any indication that the trial court believed it was correcting a void sentence. A trial court lacks authority to reconsider their own valid final judgments in criminal cases. *Cruzado supra @ ¶18-19*. The corrected entries had the effect of creating an additional burden to the Petitioner's liberty interest that was not present in his original sentence. Petitioner's current Motion to Vacate the Judgment and Sentence has been construed as an untimely motion for post conviction relief under *R.C. 2953.21(A)*. Petitioner asserts that he was unavoidably prevented from discovery of the facts upon which his claim for relief relies because he did not receive a copy of the Amended Termination Entry filed August 25th 1997 and the *nunc pro tunc* 07-24-1997 Termination Entry filed January 7th 2011 was filed more than thirteen (13) years after the judgment and sentence, and the court denied his timely Notice of Appeal filed from that judgment. The Supreme Court of Ohio held "where a criminal defendant, subsequent to his direct appeal, files a motion seeking vacation or correction of his sentence on the basis that his constitutional rights have been violated, such a motion is a petition for post conviction relief as defined in *R.C. 2953.21(A)(1)*; *State v. Reynolds, 79 Ohio St.3d @ 160*. However, one of the exceptions under which a court may hear an

untimely or successive petition is when the petitioner shows that he was prevented from discovery of the facts upon which he must rely to present the claim for relief. R.C. 2953.23(A)(1)(a). In this case, the Petitioner had no way of contesting an action the trial court had not yet taken. The Amended Termination Entry was not received from the Court Clerk, and the *nunc pro tunc* Termination Entry filed January 7th 2011 Petitioner filed a timely Notice of Appeal. It was an abuse of discretion for the Court of Appeals to deny Petitioner's timely appeal, as "a trial court retains jurisdiction to correct its void judgments." State v. Dixon, 2016 Ohio 955 ¶16-18. (Citations omitted) "A sentence imposed by a judge other than the one before whom a defendant was tried and found guilty, except when performed under the circumstances described in Crim.R. 25(B), is void." Beatty v. Alston,40 Ohio App.2d 545, *Syllabus.* Petitioner contends that he has a "due process right to have his sentence based on accurate information, and that where the sentencing judge, who was different from the trial judge, imposed the Nunc pro Tunc Termination Entry of January 7th 2011 without properly familiarizing herself with the record, or the degree of familiarity necessary to the nature of the case, or the credibility, of the witnesses, again disregarding statutory mandates, acquiescing to the trial judges view of the case, constituted plain error and rendered that judgment also void. State v. B.J.T. 2017-Ohi0 8797 ¶39-41, (Citations omitted). The sentencing entries in this case, have never met the requirements of Section 3(B)(2), Article IV, of the Ohio Constitution or R.C. 2505.02, and are not final or appealable. Because the

sentencing entries do not constitute a final appealable order, the appellate court lacked jurisdiction to address the merits of Petitioners appeal, which renders the Petitioners First Appeal as of Right also void.

3. WHETHER, WHEN A SENTENCE PRONOUNCED IN OPEN COURT IS MODIFIED AND THE JUDGMENT ENTRY REFLECTS THE MODIFICATION; MUST THE MODIFICATION HAVE BEEN MADE IN OPEN COURT IN THE DEFENDANT'S PRESENCE?

The trial court erred by not holding a resentencing hearing before filing the corrected sentencing entry on August 25th 1997 and on January 7th 2011. The Petitioner also seeks relief under *Crim.R. 43(A)*. Petitioner was not physically present when the trial court imposed the prison sentence reflected in the court's judgment entry. It is axiomatic that a criminal defendant has a fundamental right to be present at all critical stages of his criminal trial, including the imposition of sentence. *Crim.R. 43(A)*; *Section 10, Article I of the Ohio Constitution* and the Due Process Clause of the *Fourteenth Amendment*. The United States Supreme Court has stated that an accused is guaranteed the right to be present at all stages of a criminal proceeding that is critical to its outcome when his or her absence may frustrate the fairness of the proceedings. *Kentucky v. Stincer (1987), 482 U.S.@ 745*. Because Petitioner was not physically present when the trial court modified its judgment he was denied the Due Process right to a fair and just hearing. *Snyder v. Massachusetts (1934), 291U.S. @107-08*. Failure to comply with *Crim.R. 43(A)* results in reversible error whether the sentence is increased or not, *State v. Brackette, 2010 Ohio 3068*; *State v. Carpenter, 1996 Ohio App.LEXIS 4434*. This is true for any modification of a

sentence. *State v. Davis, 116 Ohio St.3d 404 ¶90* . Petitioner contends that the *Crim.R. 43(A)* violation in this case was not harmless, but raises to *Structural Error* where as in this case, Petitioners absence necessarily resulted in prejudicial and constitutional error for the following reasons: Petitioner was denied the Constitutionally protected right to the effective assistance of counsel for trial, sentencing and the appellate proceedings; the sentence is contrary to law and excessive; and the sentence is void.

4. WHETHER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10, OF THE OHIO CONSTITUTION GUARANTEE CRIMINAL DEFENDANT'S THE RIGHT TO COUNSEL AT ALL "CRITICAL STAGES" OF THE CRIMINAL PROCESS?

First, it must be noted that Petitioner questioned the effectiveness and adequacy of assigned counsel, in a pre-trial hearing request for substitute counsel on April 11th 1997 in which the trial judge denied the request and required the trial to proceed with assigned counsel. **(Appx.- I)** Petitioner asserts that a conflict of interest, a breakdown of communication, and irreconcilable conflicts existed before trial and the failure of the trial court to honor Petitioner's timely request for different counsel was arbitrary, amounted to a denial of effective assistance of counsel, and was in violation of the *Sixth and Fourteenth Amendments*. This hearing was not placed in the record for appeal as required due to error by the Official Court Reporter. *State v. Deal 17 Ohio St.2d 17*, Syllabus. Appointed counsel did not file a motion for discovery or demand a bill of particulars prior to trial. This

resulted in the Petitioner being required to proceed to trial without knowing what he had to defend against. During trial, counsel's performance was deficient, and counsel's deficiencies caused a complete breakdown of communication, which resulted in counsel's dismissal. *State v. Newland, 2003 Ohio 3230,¶30*. In this case, Petitioner's trial attorney was dismissed by the court, mid-trial, without a valid waiver of counsel in violation of both Federal and State rights. *Faretta v. California, 422 U.S. 806*, Syllabus; *State v. Gibson, 45 Ohio St.2d 366*, Syllabus 1&2. The Sixth Amendment guarantees the right to assistance of counsel in all criminal prosecutions that result in jail sentences. *State v. Wellman, 37 Ohio St.2d @171*, citing *Argersinger v. Hamlin, 407 U.S. @ 37*, which is made obligatory on the State by the Fourteenth Amendment. *Gideon v. Wainwright, 372 U.S. 335*. The constitutionally protected right to the assistance of counsel is absolute and absent a knowing intelligent waiver, no person may be imprisoned for any offense unless he was represented by counsel at his trial. *State v. Tymcio, 42 Ohio St.2d @ 43*. In Ohio, "[t]o be valid, a waiver of the right to counsel must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. *State v. Martin, 103 Ohio St.3d 385,¶40*, citing *Von Moltke v. Gillies, 332 U.S. @ 723*. In this case, the transcript of the trial **(Appx.- G-Tr. 88-105)**, demonstrates that Petitioner did not make a knowing, voluntary, or intelligent

waiver of the right to counsel, and that the waiver was not in open court, and was not in writing. See *State v. Youngblood, 2006 Ohio 3853, ¶13; State v. Engle, 2009 Ohio 1944,¶63*. Petitioners court-appointed attorney was dismissed by the trial court, thus, his conviction must be reversed and remanded. This issue was not raised on appeal due to the ineffective assistance of appellate counsel as dictated by *Evitts v. Lucey, 469 U.S.@ 396*. Petitioner was required to, and did raise this issue in an Application for Reopening pursuant to the Ohio Rules of Appellate Procedure, *App.R. 26(B)*, raising a claim of ineffective assistance of appellate counsel, which was litigated throughout the State courts to the United States Court of Appeals for the Sixth Circuit in a petition for writ of habeas corpus. In *Wilson v. Hurt, 29 Fed. Appx.@ 330*, the Court held that:

> "[T]here is one matter that our holding on the federal constitutional element of Wilson's claim regarding the validity of his waiver of trial counsel does not resolve. Wilson suggests in one sentence that his waiver of counsel was invalid under the decisions of the Ohio courts. If his state claims had sufficient merit such that there is a reasonable probability that, if raised, the result on appeal would have been different, then, as a federal constitutional matter, the assistance of Wilson's appellate counsel could have been ineffective. However, we doubt that his state constitutional claims are sufficiently meritorious. First, these claims were raised before the Ohio Court of Appeals during his ineffective assistance claim. The Ohio Court of Appeals did not find these claims worthy of mention separate from its discussion of the federal issue. Second, as far as we can determine, the decisions of Ohio courts require no more than an inquiry into the defendant's understanding of the "ramifications of proceeding without an attorney."

And Affirmed the district court's denial of the petition for habeas corpus. The Courts decision was contrary to, and involved an unreasonable application of,

the federal standard and it rested on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding pursuant to 28 U.S.C.S. § 2254(d). It is indisputable that "A defendant is prejudiced by his counsel's deficient performance if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington, 466 U.S.@ 694*. Waiver of counsel in Ohio, pursuant to *Crim.R. 44(C)* and *Crim.R. 22*, outline how the waiver of counsel is to affirmatively appear in the record, and provides that the "waiver of counsel *shall* be in open court and the advice and waiver *shall* be recorded as provided in Rule 22." In Addition, in serious offense cases the waiver shall be in writing. (Emphasis added.) *State v. Dyer, 117 Ohio App.3d @ 95*. The Court's of Appeals for Ohio have consistently held that when there is no written signed waiver in the record of the case, and the waiver was not made in open court these fundamental errors required the conviction to be reversed and the sentence vacated. *State v. Ware, 1999 Ohio App. LEXIS 6350, [*4]*; *State v. Mathers, 2002 Ohio 4117, ¶5-6*; *State v. Cline, 2003 Ohio 4712, ¶11*. *State v. Maurer, 2018 Ohio1546, ¶7*. In the case sub judice, the waiver of counsel was not in open court and not in writing. The United States Supreme Court has also held that "sentencing is a critical stage of the criminal proceeding at which a defendant is entitled to the effective assistance of counsel. *Gardner v. Florida, 430 U.S. @ 358*. Petitioner's trial attorney was not reappointed for the sentencing proceedings, but represented Petitioner anyway. Even though the Petitioner

had no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. After trial on May 16th 1997, Petitioner was unable to see or speak to his dismissed trial attorney, even though he made numerous attempts, until at the sentencing proceedings on July 24th 1997. As a result, Petitioner was unable to present witnesses, or to present documents in mitigation of a lower sentence, thus, Petitioner was also denied the effective assistance of counsel at sentencing.

5. WHETHER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 9, ARITCLE I OF THE OHIO CONSTITUTION FORBID EXTREME SENTENCES THAT ARE GROSSLY DISPROPORTIONATE TO THE CRIMES?

The Eighth Amendment to the United States Constitution states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. *Solem v. Helm, 103 S.Ct. @ 3006*. Section 9, Article I of the Ohio Constitution is couched in identical language. The Supreme Court concluded proportionality analysis should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Id. @ 292. In *Harmelin v. Michigan, 111 S.Ct. @ 2707*, the Supreme Court focused the proportionality requirement set forth in *Solem* and eliminated the need for comparative proportionality analysis in every

case. The proper role for comparative analysis of sentences is to validate an initial judgment that a sentence is grossly disproportionate to a crime. Ohio courts have held a sentence does not violate the constitutional prohibition against cruel and unusual punishment if it is not so greatly disproportionate to the offense as to "shock the sense of justice of the community." *State v. Chaffin, 30 Ohio St.2d @ 17*. The Due Process Clause of the Fourteenth Amendment "protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *In re Winship, 397, U.S. @ 364*. The issue that must first be addressed is not whether the incriminating fact of the crime has been proved, but rather the indeterminacy of precisely what that fact is. "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standard less that it authorizes or encourages seriously discriminatory enforcement. *Hill v. Colorado, 530 U.S. @ 732*. Petitioner was indicted for "engaging in sexual conduct." Petitioner was found guilty of rape, in violation of *R.C. 2907.02(A)(1)(b)*, which provides that "[N]o person shall engage in sexual conduct with another who is not the spouse of the offender *** when any of the following applies ***. The other person is less than thirteen years of age, ***." Attempted rape and gross sexual imposition are lesser-included offenses of rape. *State v. Williams 74 Ohio St.3d @ 578*. The pertinent difference between rape, or attempted rape, and gross sexual imposition are the acts that

constitute "sexual conduct" versus the acts that constitute "sexual contact."

R.C. 2907.01, defines:

> "Sexual Conduct" as: (A) "[v]aginal intercourse between a male and a female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse. "Sexual Contact" as: (B) "[a]ny touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person, and "Sexual activity" as: (C) "[s]exual conduct or sexual contact, or both."

To be guilty of sexual battery, R.C. 2907.03, which is also defined as Sexual Conduct, the offender must be the natural or adoptive parent, stepparent, guardian or custodian of, or in loco parentis with, the victim, the offense of rape has no such requirement. Pursuant to R.C. 2945.74 and Crim.R. 31(C), three groups of lesser offenses are considered to be included in the indictment for a charged offense: "(1) attempts to commit the crime charged, if such an attempt is an offense at law; (2) inferior degrees of the indicted offense; or (3) lesser included offenses." State v. Deem, 40 Ohio St.3d 205, paragraph one of the syllabus. The *Deem* Standard provides that:

> "[a]n offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense." *Id.@ 210.*

The Supreme Court of Ohio has previously determined that both sexual battery and gross sexual imposition, as statutorily defined, are lesser included offense of rape. State v. Johnson, 36 Ohio St.3d 224, paragraph one of the syllabus. Such

offenses need not be separately charged, because they are "necessarily and simultaneously" charged as part of the indicted offense. *State v. Lytle, 49 Ohio St.3d @ 157*. "Once a court has concluded that an offense may be a lesser included offense the court must determine whether the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Collins, 2008 Ohio 2590, [*P77]*. "Where the evidence supports the giving of the lesser included offense charge the failure to give the instruction constitutes prejudicial error." *Id. @ [*P78]*. "There is no question but that the included offense charge should be given where the trial focuses on a dispute as to whether the sexual activity was essentially conduct or contact." *Id. @ [*P80]*. Petitioner contends that the trial court erred by not instructing the jury on the lesser included offense of gross sexual imposition. In *Johnson, supra, 36 Ohio St.3d 224*, the defendant denied being involved in the rapes, claiming that the victims' stories were wholly fabricated. *Id. @ 227*. No physical evidence existed as in the case sub judice. The Supreme Court stated:

> "A criminal defendant is not entitled to a jury instruction on gross sexual imposition as a lesser included offense of rape where the defendant has denied participation in the alleged offense, and the jury, considering such defense, could not reasonably disbelieve the victim's testimony as to 'sexual conduct' R.C. 2907.01(A), and at the same time, consistently and reasonably believe her testimony on the contrary theory of mere 'sexual contact,' R.C. 2907.01(B)." *paragraph two of the syllabus.*

In Petitioners' case, the state chose to narrowly focus its prosecution on the rape charge, and the entire case depended upon the credibility of the victim's

testimony as to the act of cunnilingus. At trial the child testified that Petitioner "licked and stuck his tongue in her private." Petitioner testified that he "touched his tongue to a substance on the child's perineum in his attempt to identify it." The General Assembly has already made provision for an instance where an offender makes contact with the genitals or pubic region defining it as gross sexual imposition "sexual contact" in violation of R.C. 2907.05. The court of appeals in the Second Assignment of Error in *State v. Wilson, 1998 Ohio App. LEXIS 4433, [*11]* determined that the evidence, if believed was sufficient to prove "sexual contact." Indisputably, "sexual contact" is insufficient for a conviction of the "sexual conduct" of rape. Further, the rule of lenity codified in R.C. 2901.04(A), states that "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." Where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant. *State v. Young, 62 Ohio St.2d @374*; *United States v. Lanier, 520 U.S. @ 266*. To allow the sexual conduct of cunnilingus as defined by the jury instructions given in this case "a sexual act committed with the mouth and the female sex organ," to include any touching of an erogenous zone subjects an offender committing only one criminal act to prosecution under two different criminal provisions, in this case one an aggravated felony of the first degree, R.C. 2907.02(B), and the other a third-degree felony R.C. 2907.05(B). Likewise Sexual battery, R.C. 2907.03(B), a third-degree felony in which sexual conduct of the statute prohibits identical activity, requires identical

proof, and yet imposes vastly different penalties, demonstrates that Petitioners conviction is grossly out of proportion to the severity of the crime as to shock the sense of justice and sentencing a person under the statute with the higher penalty violates the Equal Protection Clause. Moreover, R.C. 1.58(B), Provides:

> "[I]f the penalty, forfeiture, or punishment for any offense is reduced By a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended."

By its own terms, R.C. 1.58(B), is applicable in this instance because Petitioner's sentence is void, and any sentence now imposed will be after the effective date of H.B. 86. "[T]he uncodified law of H.B. 86 specifies that its sentencing provisions apply to any unsentenced offender whose potential sentence would be reduced under H.B. 86, regardless of when the offense was committed." State v. Thomas, 2016 Ohio 5567, ¶16-17. Addressing the contention of *res judicata* in this case, If **a Judgment is void, the doctrine of res judicata has no application.** Res judicata should not bar consideration of the issues, as the Ohio Supreme Court explained in State v. Simpkins, 2008- Ohio-1197, ¶25-27:

> "[R]es judicata is a rule of fundamental and substantial justice, that is to be applied in particular situations as fairness and justice require, and that is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice. We would achieve neither fairness nor justice by permitting a void sentence to stand. Although res judicata is an important doctrine, it is not so vital that it can override society's interest in enforcing the law, and in meting out punishment the legislature has deemed just. Every judge has a duty to impose lawful sentences. Confidence in and respect for the criminal justice system flow from a belief that courts and officers of the courts perform their duties pursuant to established law. The interests that underlie res judicata, although critically important, do not override our duty to sentence defendants as required by law." (Citations omitted.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Lawrence Earl Wilson
LAWRENCE EARL WILSON

Date: July 20th 2018

I declare that these documents were deposited in the institution's internal mail system on the above-show date.

Lawrence Earl Wilson