

ORIGINAL

IN THE SUPREME COURT OF OHIO

STEVEN CROTTS A430-972
STATE OF OHIO EX REL.
MANSFIELD CORRECTIONAL INSTITUTION
P.O. BOX 788
MANSFIELD, OHIO 44901-0788

CASE NO. 10-1685

Petitioner,

vs.

KEITH SMITH, WARDEN
MANSFIELD CORRECTIONAL INSTITUTION
1150 NORTH MAIN STREET
MANSFIELD, OHIO 44903

Respondent.

MOTION FOR RECONSIDERATION

STEVEN CROTTS A430-972
Mansfield Correctional Institution
P.O. Box 788
Mansfield, OH 44901-0788

PETITIONER, *PRO SE*

RICHARD CORDRAY
Ohio Attorney General
150 East Gay Street
Columbus, OH 43215

ATTORNEY FOR RESPONDENT

FILED
SEP 02 2010
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
SEP 02 2010
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STEVEN CROTTS A430-972 :
STATE OF OHIO EX REL. :
MANSFIELD CORRECTIONAL INSTITUTION :
P.O. BOX 788 :
MANSFIELD, OHIO 44901-0788 :

CASE NO. 10-1085

Petitioner, :

vs. :

KEITH SMITH, WARDEN :
MANSFIELD CORRECTIONAL INSTITUTION :
1150 NORTH MAIN STREET :
MANSFIELD, OHIO 44903 :

Respondent. :

MOTION FOR RECONSIDERATION

This case involves hundreds of Churches throughout Ohio. The reason this Court was deceived and ruled incorrectly about an Awana Church Youth Program was because of Ineffective Assistance of Defense Counsel, where the Petitioner was an Appellee before this Court.

This Petition was not presented after that decision because of the advise the same attorney gave the Petitioner on how to proceed. The new interpretation by the United States Supreme Court in Jose Padilla v. Kentucky, 2010 WL 1222274, has provided a new right. The right involves the duty of an attorney to provide the correct advise. It was only through negligence and incorrect advise that important issues of speedy trial and double jeopardy which involve the jurisdiction of the Court were not presented earlier.

The Court has also failed to recognize new federal law: 18 USCA Section 248, that mandates that State Courts can not admit evidence of religious affiliation. This new law when

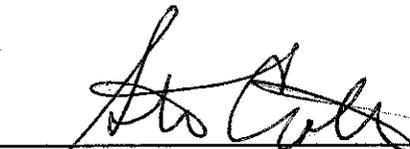
applied to this new civil case changes the way in which this court must consider the evidence within the case. By sua sponte dismissing this case, the Justices on the Court have not fulfilled their duty and obligation under the Ohio and Federal Constitution and have allowed this innocent applicant to be imprisoned without due process. This Court's opinion about a Church was a fixed, substantial, deliberate and settled impression regarding a false hypothesis and a lie. It has prevented this Court from exercising justice by blinding the Court to the concrete situation and its demands. Attached is a Memorandum in Support of these claims for your Reconsideration.



STEVEN CROTTS A430-972
Mansfield Correctional Institution
P.O. Box 788
Mansfield, OH 44901-0788

CERTIFICATE OF SERVICE

The undersigned Petitioner hereby certifies that he has sent a copy of the foregoing Motion for Reconsideration to RICHARD CORDRAY, Attorney General, by regular U.S. Mail on this 30 day of August, 2010.



Steven Crotts, Pro Se
Petitioner

TABLE OF CONTENTS

(Statement of Fact and Statement of Case are found in the original Memorandum in Support of the Habeas Corpus Petition. All exhibits are found in the Supplemental Appendix)

I	Factual Findings	Page 1
II	Habeas is Proper Remedy	Page 5
III	Res Judicate not applicable	Page 19
IV	No other Adequate Legal Remedy	Page 24
V	Procedural Defaults were for Good Cause	Page 25
VI	Defense Arguments not presented to Ohio Supreme Court	Page 28
VII	Grounds for relief are for good cause	Page 38
VIII	An Evidentiary Hearing is Required	Page 57
IX	Conclusions and Prayer for Relief	Page 58

MEMORANDUM IN SUPPORT

I. FACTUAL FINDINGS

In the case at bar, the Statement of Facts and the Statement of the case have been set forth in the Memorandum of Support for this Habeas Corpus Petition. The U.S. Supreme Court in *Watts v. State of Ind.*, 69 S.Ct. 1347 made it clear that Statements of fact that are “uncontroverted happenings” which effect the criteria for judgment and which are decisive of constitutional rights are proper issues for the court's adjudication. This is especially true under the Due Process Clause. The facts regarding the Church are uncontroverted. The Awana program was run by a Conservative Baptist Church. The alleged victim and his brother mislead the jury and the court by not being truthful about the Awana program. The Appeals Court recognized the fraud, prejudice and perjury the “mischaracterized” facts created. It was only through ineffective assistance of counsel that these facts were not presented as being “uncontroverted happenings” which were decisive in the violation of the Petitioner's rights to due process.

The Attorney General arguing for the Respondent in Habeas Proceedings has **always** argued that: “the Anti-Terrorism and Effective Death Penalty Act (AEDPA) USC 2244e requires as when adjudicating a petition for habeas corpus challenging the legality of a state court conviction to defer to a final decision on the merits of fact and law of the state court that first decided the claimed raised.” “These binding factual findings shall be presumed to be correct.” 28 USC 2254(e)(1), *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998), cert. Denied, 527 OTOMETOSOGISTU.S. more databases to search: 1040 (1999). In *Mitzel v. Tate*, 267 F.3d 524 (6th Cir. 2001) the court said “on habeas review, the state court of appeal's findings of fact must be presumed correct.” see: *Spisak*, 78 USLW 4031, *Clagg*, WL 148801 No. 1:09-CV-1323,

Pankey, 2010 WL 1254274, *Griffis*, 2010 WL 893567, *Konkel*, 2010 WL 1387209, *Bunch*, 2010 WL 750116, *Aruri*, 2010 WL more databases to search: 649740, *Phillips*, 2010 WL 680949, *Peterson*, 2010 WL 1433391, *Griffis*, 2010 WL 420006, *Nia*, 2010 WL 424983

In order to protect the Petitioner's 14 amendment rights to equality under the law, the Warden must apply the law equally. But he has not. He has not accepted as fact that the Appeals Court ruled:

“Finally the prosecution mischaracterized certain facts that increased the prejudicial effect of the erroneously admitted evidence. The prosecution implied that the Awana Group was some type of gay outreach program aimed at recruiting young boys for sex, although one of the police officers who testified on the State's behalf stated that the group is a legitimate Christian Boy's Club. The prosecution also implied that Crofts induced and orchestrated the photographs of P. and C. When P. testified that they requested the photo themselves.” (See Exhibit K).

Because of ineffective assistance of counsel the facts were not presented properly before the Ohio Supreme Court. The photos taken were again mischaracterized as being of young boys. But they were not. “C” was an adult male by the name of Clarence Cole. From the State's mischaracterization the court ruled that because the photos were of small boys they were allowed as evidence. The Church too was again mischaracterized before this Court. Making this Court's ruling appear foolish to those who know that the Awana Program is run by Conservative Baptist Christian Churches.

The U.S. Supreme Court in *Slagle v. Bagley*, 457 F.3d 501, CA 6 (Ohio) 2006 quoting *Berger*, 295 U.S. At 88, 55 S.Ct. 629, the justices ruled:

“It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one* Many of the prosecution's improper assaults and references were likely to mislead the jury or prejudice the defendant. The vouching statements and assertions of fact outside the record presented at least the impression that evidence not presented to the jury but known to the prosecutor, support the charges against the defendant and thus jeopardized the defendant's right to be heard solely on the basis of the evidence presented.”

AWANA stands for Approved Workman Are Not Ashamed. It comes from the bible text of II Timothy 2:15 that states: "Study to show thyself approved unto God, a Workman that needeth not be Ashamed, rightly dividing the word truth." This case at bar is about the truth. The Respondent would want this Court to believe that AWANA is a homosexual Church. Although the court ruled in their judgment that prejudice is subjective, the truth is not, the Petitioner asserts that AWANA is an International Youth group that is run by Conservative Baptist Christians.

The Warden/Respondent's case rest on lies, not on subjective fair prejudice. The alleged victim and his brother swore to testify to "nothing but the truth" But they lied. These lies were the basis for the conviction of the Petitioner where it was his word against one witness and were the basis for his appeal being granted. They were also the basis for the court being deceived. The Respondent seeks to continue this pattern of deception that placed Petitioner behind bars in violation of the value of the oath that Justice O'Connor made clear in her address before the Ceremony for the Admission to the Bar.

Furthermore, the Respondent may agree with the state in their assertions of fact outside the record that the prosecutor presented that were false and misleading in order to imply that there was other "cumulative evidence that was not presented." There was no "cumulative evidence" that the Petition was attracted to young boys. Even the Statement made regarding the case that was severed and later dismissed were false allegations as revealed by the Affidavit of Michael Brown. He stated, "Ronnie Justice told me that he made false allegations against Steve Crotts, Ronnie Justice did this in order to please his mother."

Additionally, it was only through ineffective assistance of counsel and fraud upon this court that this court was not shown the "uncontroverted happenings" regarding the charges being

dismissed. It was the clerk of Courts for Cuyahoga County who did not provide the whole record of the case and the ineffective assistance of counsel in not correcting this fraud that lead to an illegal conviction. In Exhibit C-8, the Deputy Clerk crosses off the word "journal" and writes in "docket" when certifying the Court Record. When asked for a Certified Copy of the Continuances or the Speedy Trial Computation from the Journal Entry the Court sent Exhibit C-9 which indicates the **record was modified** and not a Journal Entry. Also consider what the Court was not shown from the Record by the Deputy Clerk of Cuyahoga County. According to the Ohio Supreme Court records, there is no indication that the charges were filed in 1999 and then dismissed. The record fails to reflect that the indictment was not a "direct indictment" but stemmed from the complaint filed in 1999. Also consider what was missing from this court's file; the capias. Where the original warrant has been lost the judgment is void. *Lutheran v. Foreman*, 168 Ohio St. 186, 151 N.E.2d 905.

The Warden/Respondent may even agree with the prosecution's argument that claimed desensitization occurred by exposing the child to homosexuality. However, this crime was not a crime where the alleged victim claimed he was coerced.

In the case at bar, the court of appeals ruled:

"The evidence showed significant inconsistencies among the statements the victim initially made to police and medical personnel, the statement he later gave to defense investigator and his testimony at trial. His twin brother's statements to police and to the investigator also contained inconsistencies and there was no physical evidence to support the claim of sexual assault. The victim initially stated that Crotts assaulted him from behind, attempted to penetrate him annually, and that he used a ceremonial sword as a weapon or an accessory during the assault. The physical evidence however, failed to support these allegations, and one could argue that the victim's testimony was modified to accommodate the conflicts. Moreover there was other evidence in Crotts' favor including testimony from the victim's brother concerning his lack of credibility, and evidence that the victim's brother maintained their relationship with Crotts after the incident." (See Exhibit K).

The vouching statements and assertions of facts outside the record to the Ohio Supreme Court presented “the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and thus jeopardize the defendant's right to be heard solely on the basis of the evidence presented.” as in *Slagle v. Bagley, supra*.

Furthermore the second addition to the Habeas Corpus Petition provides objective proof that Petitioner's counsel was constitutionally ineffective. Through an affidavit that was filed within a motion to withdraw as counsel from the Ohio Supreme Court, Petitioner's counsel, David Doughten confesses:

“Supreme Court Rule VI section 6 provides this court with the discretion to dismiss an appellant's appeal for the failure to file timely. It is presumed that this would apply to the cross-appellant's **accepted** issues. Clearly, the failure of counsel to timely file the Merit brief is in contravention of his duties to his clients.” See second addition to the Habeas Petition.

Because of Doughten's failure to file briefs on time, Petitioner was prejudiced by not being able to file a Cross-appeal which was accepted.

Furthermore, there is objective proof that new counsel, Paul Mancino Jr. was also constitutionally ineffective in failing to research the facts of the case. David Doughten did not provide his replacement, Paul Mancino Jr. with a copy of the transcripts. See exhibit H-29. The Merit brief was filed on May 19, 2004. Doughten wrote his letter to Petitioner on May 2, 2004 indicating that the only copy of the transcripts were in the possession of the court. Exhibit H-1 states that the transcripts were in the Ohio Supreme Court in Columbus. Mancino was from Cleveland. Therefore, without the transcripts Paul Mancino Jr. could not research the facts and because of counsel's negligence in researching the facts within the record the issues of fact and law as presented to the court of appeals were not the same as what was presented in the Ohio Supreme Court .

In *Hard V. U.S.* 84 S. Ct. 424 the court held :

We conclude that counsel's duty can not be discharged unless he has a transcript of the testimony and evidence presented by defendant and also the court's charge to the jury, as well as the testimony and evidence presented by prosecution."

Thus, there is objective proof that counsel was ineffective and the following argument explains how that ineffectiveness prejudiced the petitioner.

II. Habeas corpus is the proper remedy

A. Habeas Corpus is the proper remedy when there is no adequate legal remedy.

In *Pirman v. Money*, 635 N.E.2d 26 (1994); the Ohio Supreme Court held that habeas will lie for non-jurisdictional deprivation of liberty if there is no adequate legal remedy. O Const. Art IV, Section II, requires the Supreme Court of Ohio to exercise its original jurisdiction in habeas corpus. In such a case the court cannot refuse to exercise that original jurisdiction under the *Doctrine of Forum Non Convenience*. "Jurisdiction is conferred by allegation of unconstitutional restraint and is not defeated by anything that may occur in state proceedings and the state procedural rules must yield to Federal Policy" (Constitutional law as defined by the U.S. Supreme court). Only deliberate bypassing of state procedure is grounds for which relief may be denied." *Jackson v. Denno*, 84 S.Ct. 1774

Although the Respondent may contend that habeas corpus petitions are different in the State as opposed to the federal courts, the United States Constitution makes no such distinction, but sets forth the same guiding principles for all "constitutional" courts. The Ohio Supreme Court is a constitutional court established by the U.S. Constitution and the State of Ohio Constitution.

Petitioner brings this cause of action in strict accordance with R.C. 2725, where a petition is filed which states a proper cause of action for a Writ of Habeas Corpus and there is **no plain**

and adequate remedy in the ordinary course of law. Ohio Revised Code 2725.05 states “If the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment or order”. However Revised Code 2725.05 does not control the exercise of original jurisdiction in habeas corpus actions in the Ohio Supreme Court **when constitutional rights are involved, as in the case at bar**. To bar this court through legislative act from hearing cases where the Constitutional rights of citizens have been violated would violate Article III of the US Constitution and Article III of the Ohio Constitution, as the United States Supreme Court ruled in *Marbury v. Madison*, 1 Cranch 137, 177, Led. 60 (1803).

An accused who is deprived of his or her liberty by an Ohio Court without Due Process of Law is entitled to a writ of habeas corpus for the purpose of inquiring into the matter if there is **no adequate legal remedy**. *Sharp v. State of Ohio*, 314 F.2d 799, 24 Ohio Op.2d 93 (6th Cir. 1963), *In re Beard*, 164 Ohio St. 488, 58 Op 328, 132 N.E.2d 96 (1956); *Watkins v. Collins*, 111 Ohio St. 3d 425, 2006-Ohio-5082, 857 N.E.2d 78 (2006); *Hernandez v. Kelly*, 108 Ohio St. 395, 2006-Ohio-126, 844 N.E.2d 301 (2006); *Drake v. Tyson-Parker*, 101 Ohio St.3d 210 210, 2004-Ohio-711, 803 N.E.2d 811 (2004). Furthermore, where there is a showing of Due Process violation the petitioner will be discharged. *In re Fisher*, 39 Ohio St.2d 71, 68 Ohio Op.2d 43, 313 N.E.2d 851 (1974), *Douglas v. Maxwell*, 174 Ohio St. 92, 21 Ohio Op.2d 345, 186 N.E.2d 723 (1962).

B. Habeas corpus is proper remedy if Constitutional rights to effective counsel is violated when the defendant is the appellee before this court.

Even though the State of Ohio has provided for Ineffective Assistance of Counsel before the Appellate Court, it has **no adequate legal remedy** before the Ohio Supreme Court. Such a provision is not necessary in most cases because appeals before the Ohio Supreme Court are

discretionary. In the Petitioner's case, he was the Appellee/Defendant before the Ohio Supreme Court. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right..... to have the Assistance of Counsel for his defense (emphasis added).” In *State ex rel.*

Habeas Corpus is appropriate for ineffective assistance of defense/appellee counsel. “If it rises to the level of a state or federal constitutional violation, ineffective assistance of appellate counsel, can serve as cause to excuse the procedural default of claims brought in a habeas corpus proceeding.” *Buell v. Mitchell*, 274 F.3d 377, 351-352 (6th Cir. 2001) (“[Petitioner's] ineffective assistance of appellate counsel claims can serve as cause for the procedural default of his other claims only if [the petitioner] can demonstrate that his appellate counsel was constitutionally ineffective. To do so, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense.”)

The Petition is brought before this honorable Court directly because this Court is the court which has jurisdiction over its own rules and rulings. When reviewing the decision of the 8th District Court of Appeals, which was favorable to the Petitioner, the Court reviewed a correct judgment. The Appeals Court ruled;

“Finally the prosecution mischaracterized certain facts that increased the prejudicial effect of the erroneously admitted evidence. The prosecution implied that the AWANA Group was some type of gay outreach program aimed at recruiting young boys for sex although one of the police officers who testified on the State's behalf stated that the group is a legitimate Christian boy's club.” Exhibit G.

The reason why this evidence should not be allowed is based on R.C. 2945.59, and the fact that mischaracterized facts created an impartial jury. The Appeals Court recognized the fact the AWANA Group is a legitimate Christian Boys Club, from testimony the State presented and the name of the Baptist Church which was in the transcripts. Federal law , 18 USCA section 249

mandates that state courts are **prohibited from admitting** “evidence of speech, beliefs, association, group membership or expressive conduct **unless that evidence** is relevant and admissible under Federal Rules of Evidence”. The defence attorney for Petitioner failed to see the obvious violation of E.V.R. 610 and the violation of the Petitioner's First and Fourteenth Amendment rights, which prohibits one's belief or association with a church to be used to prove credibility or criminal intent and which would prevent the court from discrimination based on religion. Because of the negligence of the Petitioner's defence counsel, the proper issues of fact and law were not presented to this Honorable Court. Despite the fact the AWANA Church was a conservative, right wing fundamental, Bible believing, Baptists Church, this Court incorrectly ruled;

“Testimony that Crotts took children to allegedly homosexual churches (AWANA) does not lead so inexorably to the conclusion that he is homosexual that admission of such testimony was an abuse of discretion. Theoretically, testimony that a heterosexual male took children to a homosexual church would be more supportive of the State's theory that it was done for the purpose of desensitizing Justin [to pedophilia] because a straight male would have less reason to attend a gay church, and his motive for taking a child there would be that much more suspicious” Exhibit L.

Thus anyone taking a child to homosexual church is suspicious and can be convicted of sexual assault based on this information.

The Ohio Supreme Court made this ruling without the proper facts and in violation of the U.S. Supreme Courts interpretation of Constitutional religious rights that mandate that State courts can not prefer one religious group over another *Wallace v. Jeffree* 105 S. Ct. 2479.

C. The third reason why this habeas corpus action is the proper remedy is that the results of the Ohio Supreme Court's decision resulted in an illegal conviction as in *State ex. rel. Bailey v. Henderson*, 63 N.E.2d 830 (1945).

In Bailey the conviction was overturned because the evidence [Bailey signing his own

name on a check] did not constitute the crime of forgery. In the Petitioner's case kidnapping and sexual imposition were "proven" by taking a child to a certain kind of church. In *Bailey (supra)* the Court ruled that a wrongful conviction occurred through "inadvertence of the trial court whose attention presumably was not directed to the facts." In Petitioner's case there was also an "inadvertence of the court whose attention was not directed to the facts." "One can not be convicted or imprisoned for an offense, which is not made subject of a statute or ordinance" *In re Moreno*, 82 N.E.2d 325, *Davis v. U.S.*, 94 S.Ct. 2298. The Court has no jurisdiction to hear a case where the kind of church one attends is the basis for the conviction. The privileges and immunities clause of the 14th Amendment prevents proving guilt or intent through discriminating against a law abiding church within a evidentiary hearing. See also Ohio Constitution, Article I, Section 7. The U.S. Supreme Court in *Watson v. Jones*, 80 U.S. 679 has defined the law stating where subject matter is in dispute "a matter over which courts have no jurisdiction, a matter which concerns theological controversy, church discipline....., conformity to standards of morals, becomes the subject of the actions. It may be said here that no jurisdiction has been conferred on the tribunal to try the particular case before it." See also, *Oregon v. Smith*, 110 S.Ct. 1595, *Church of Lukumi Babalu Aye v. City of Hialeah*, 113 S.Ct. 2227.

In order to establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way in the strength and subject matter from the evidence actually presented. *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005). The Petitioner asserts that the AWANA-Church is a youth program within a fundamentalist, right wing, conservative, Bible believing, Baptist Church that opposes homosexuality. This was the same conclusion of the Eighth District Court of Appeals. In not providing the Petitioner equal protection under the law,

in violation of Ohio Const. Art. I, Section 2 and 7, and the USCA 14 , this court inadvertently referred to a right wing, fundamental, Bible believing Baptist Church as a “suspicious” homosexual church which was not true.

E. Habeas Corpus is the proper remedy when the court lacks jurisdiction.

Besides asserting the ineffective assistance of counsel that resulted in an illegal conviction, this petition set forth the fact that the court lacked subject matter jurisdiction because of violation of statutes governing Double Jeopardy as in *Davis v. Wolf*, 2001, 92 Ohio St.3d 549, 552, 751 N.E.2d 1051. In *State ex. rel. Bailey v. Henderson*, besides the “inadvertence of the court whose attention was not directed to the facts”, the court stated; “the rules of court were not followed that may have interfered with a fair hearing.” “When the state undertakes to deprive an individual of life or liberty, it must conform to the rules of procedure which it has established” *State v. Cocco* (1943), 73 Ohio App. 182, 28 O.O. 283, 55 N.E.2d 430. By not applying the law equally the court also violated the Ohio Constitution and the U.S. 14th Amendment of U.S. Constitution.

In *Davis v. Wolf*, the Court ruled that because of time constraints the court lacked subject matter jurisdiction. The issue of whether the time was tolled because of an agreement did not “preclude him from asserting the court lacked jurisdiction to do so.” “When a court lacked subject matter jurisdiction, habeas corpus is generally an appropriate remedy **despite the availability of an appeal**,” “Issue of subject matter jurisdiction cannot be waived and can be raised at any time.”

Statutory violations: The first rule (LAW) the State broke made the facts unclear and witnesses unavailable, and if followed would have barred further proceedings.

Ohio Revised Code 2945.73(D) states:

(D) “when a charge of felony is dismissed pursuant to division (B) 'upon motion made at or prior to the commencement of trial, a person charged with an offense

shall be discharged if he is not brought to trial within the time required' (D) such discharge is bar to any further criminal proceedings against him based on the same conduct." (EMPHASIS ADDED)

In the case at bar, the transcripts show that the conduct that was the basis for the charges being dismissed in 1999 was the same conduct that was the basis for the criminal proceeds against the Petitioner in 2002. The judge also recognized that the case began in 1999 by giving Petitioner credit for jail time for time served in 1999 and the State did not object. See Exhibit B-5. No new complaint was filed. Compare Exhibit A-1, Complaint, with Exhibit A-5, Transcripts. The charges were dismissed in 1999 and the petitioner was discharged. In *Ex parte McGehan*, 22 Ohio St. 422 the court ruled "that the discharge of the prisoner provided for by the statute was to be regarded not as a mere temporary release from imprisonment, but as a discharge from prosecution for the crime or offense and as, in effect, an acquittal the order granting it being a Final Judgment in the cause and putting an end to all proceedings therein." In *State v. Adams*, 664 N.E.2d 588 (1995) the court stated:

"The double jeopardy clauses of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution protect an accused from multiple punishments for the same offense, *North Carolina v. Pearce* (1969), 395 U.S. 711 89 S.Ct. 2072, 23 L.Ed.2d 656; *State v. Thomas* (1980), 61 Ohio St.2d 254, 15 O.o.3d 262, 400 N.E.2d 897. The purpose of the Double Jeopardy Clause is to prohibit the State from seeking, in two or more separate proceedings, to impose punishment for a single offense. *U.S. v. \$405,089.23 US Currency* (C.A. 9, 1994) 33 F.3d 1210, 1215. Moreover, these prosecutions apply with equal force whether the first prosecution results in a conviction or acquittal, *Burk v. U.S.* (1978), 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1. The Ohio General Assembly has dealt with the impact of the statutory speedy trial requirement on the Double Jeopardy prohibition in R.C. 2945.73(D)..... Hence, the dismissal of a criminal complaint for speedy trial violations amounts to a dismissal with prejudice or an acquittal and bars any further punitive action, *State v. England* (1982), 456 N.E.2d 544; *State v. Eberhardt*, 381 N.E.2d 1356."

1. **Lacked jurisdiction because of Res Judicata**

In the case at bar the charges were dismissed because of the violation of Ohio Supreme

Court Superintendence Rule 39(B)(2). The rule states:

“Grand Jury proceedings when an accused has been bound over to a grand jury and no final action is taken by the grand jury within sixty (60) days the date of the bind over, the court or the administrative judge of the court shall dismiss the charge unless for good cause shown the prosecuting attorney is granted a continuance for a definite period of time.”

In the view of Ohio Rule of Civil Procedure, Rule 41(B)(3) governing dismissals which expressly provides that, an involuntary dismissal operates as an adjudication upon the merits unless the Court in its Order for dismissal otherwise specifies; the Petitioner's Motion to Dismiss barred further proceedings under the rule and thus the Court lacked jurisdiction. The Respondent may cite the doctrine of Res judicata for the basis for the dismissal of this Habeas Petition but the same measure of justice he wishes to apply should be applied here. The investigation ended in 1999 and no new evidence was discovered. If the State choose not to bring the claim or hid the claim, the alleged new charges are barred by Ohio law of claim preclusion *General Medicine P.C. v. Morning View Care Centers* 477 F.Supp. 2Nd 858 (S.D.Ohio 2006). To rule otherwise would violate the 14th Amendment giving the State greater power than other Plaintiffs before the Court and would diminish this Court's power to protect the substantive rights of citizens against the ever increasing power of the State. (The Ohio Supreme Court's power to create rules that protect a substantive right can not be diminished by any appellate ruling or legislative statue. Article III of the Ohio Constitution.)

2. Lacked jurisdiciton because statutory time to bring the case to trial expired.

In the commentary notes of January 1, 1997, the Ohio Revised Code states that “Although R.C. 2945.71 does not mandate a time limit for completion of the grand jury process, the statutory time limit runs from the date of arrest including time taken in grand jury process.” In the instant case, Crotts was arrested in January 1999 and bound over from Maple Height

Municipal to the Cuyahoga County jurisdictional custody, for grand jury proceedings. A nolle prosequi was not entered by the prosecution as required by R.C. 2941.33. Any extensions of time (found in R.C. 2945.72) is governed by Civ.R. 6(B) where a court may within its discretion, grant or deny an extension "where the failure to act was the result of excusable neglect...." an extension may be granted. It is further governed by Ohio Revised Code 2945.02 which states: "Whenever any continuance is granted the court shall enter on the journal the reason for the same." Continuances are also controlled by Cuyahoga County Rule 3, Section B, that require all continuances be made by way of written motion.

Criminal Rule 1 states: "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure a fair, impartial, speedy and sure administration of justice simplicity in procedure and the elimination of unjustifiable expense and delay."

Therefore, the Petitioner's release from custody did not nolle or toll the time. The United States Supreme Court has ruled on this issue in *Klopfer v. State of North Carolina*, 87 S.Ct. 988; stating:

"North Carolina Supreme Court's conclusion – that the right to a speedy trial does not afford affirmative protection against an unjustified postponement of trial for an accused discharged from custody – has been explicitly rejected by every other state court which considered the question."

"The Petitioner is not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him to go whithersoever he will. The pendency of the indictment may subject him to public scorn and deprive him of employment and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the anxiety and concern accompanying public accusation."

According to the law as interpreted by the U.S. Supreme Court, without any continuances the statutory time to proceed to trial expired in 1999 even though the Petitioner was released from custody, and thus the Court lacked jurisdiction because of the violation of the statute that

protects Petitioner's Constitutional Right. This interpretation is support by the Supreme Court of Ohio in *State v. Meeker* (1971), 268 N.E.2d 589; *State v. Selvage*, 687 N.E.2d 433; *State v. Doksa*, 680 N.E.2d 1043.

3. Lacked jurisdiction because the capias was not served with due diligence.

Because of public scorn Petitioner was compelled to sell his well established school picture business and concentrate his energy on his concession business. Petitioner was available at his home in September of 1999 in order for the State to get unnecessary DNA samples. He remained in Cleveland until the investigation ended and his computers were returned. Through the Petitioner's cooperation all slanderous allegation were proven false through the examination of the physical evidence. Thereafter, he moved to Florida and could be contacted through his attorney of record or the Cleveland company he sold, Digital Photo Images. See Exhibit C

In July and August of 2000 and 2001 the Petitioner returned to Ohio contracting with the state as a vendor at the Ohio State Fair and was unaware that a capias was issued in May of 2001. He even rented a camping site from the State and lived for a month on State property which was patrolled by the State police. Both of those years he also returned to Cleveland in September to help those who purchased Digital Photo Images.

The summons and capias were never served on Petitioner or his attorney as required by R.C. 2941.49. In *State v. Reimer*, 2001 WL 1034636 the court stated that the prosecution must exercise due diligence according to R.C. 2941.72(A) and that "It is well-settled that the mailing of a summons and a capias to a defendant's last known address does not comport with requirements of "reasonable diligence." Accordingly, the court began time computations at the time of the indictment. It is well established that constitutional guarantees of a speedy trial are applicable to unjustifiable delays in commencing prosecution as well as unjustifiable delays after

indictment. See *Meeker, supra* and *Oregon V. Kohne*, 690 N.E.2d 66.

Over 6 months after the *capias* was issued the Petitioner was brought back to Cleveland, Ohio, not knowing the reason. Because the *capias* was based on an indictment that had as its foundation a complaint that was dismissed and statutory time to bring to trial expired, its function as the legal means to detain a citizen of another state was invalid. But even if the case was not previously dismissed, the statutory time to bring the case to trial would have started at the point of the indictment because the county was not reasonably diligent in serving the warrant on the Petitioner or his counsel. And, because the speedy trial time would expire within 6 months, here again, the *capias* was not legally binding and the court did not have jurisdiction. The Ohio Supreme Courts records also indicate that the *capias* was missing when the case was before this court. So this court had not only a case with no judgment but also a case with no *capias*.

In the case at bar, no new evidence was discovered. The delay was unreasonable because the witnesses that both investigated the crime scene and the Pastor of the Church were no longer available to testify. Everyone's memory as to what happened was not clear. The jury and the court were left to speculate on every piece of physical evidence including an alleged homosexual church. Even the victim could not identify his own shorts. The police who testified were not the ones who collected the evidence and were also speculating regarding the physical evidence.

When the Petitioner made a motion prior to trial in both 1999 and 2002 it evoked the statute and barred the court to proceed with charges "based on the same conduct." Petitioner's constitutional rights to due process were violated by not following this provision in the Ohio Revised Code that enforces the statutory time to bring a case to trial and the principles of collateral estoppel, *res judicata* and claim preclusion that prevent double jeopardy.

When a Court's judgment is void because the Court lacked subject matter jurisdiction, habeas corpus is generally an appropriate remedy despite the availability of appeal. *Davis v. Wolfe*, 906 N.E. 2d 422, *State v. Doksa*, 630 N.E.2d 1043; *Styer v. Brichta*, 69 Ohio App.3d 738, 591 N.E.2d 1255 (1990); *State v. Stephens*, 370 N.E.2d 756 (1977); *State v. Stamps*, 712 N.E.2d 762; *State v. Justice*, 358 N.E.2d 1382; *State v. Echols*, 765 N.E.2d 37.

E. Habeas Corpus is the proper remedy when violations involve illegal indictments.

Statutory Violation: The rules regarding indictments were not followed, which created structural errors from beginning to end as in *State v. Perry*, 802 N.E.2d 643 at 17.

From the time the charges were reintroduced the State sought to conceal the basis for the charges. In the case at bar the Court also did not follow the law regarding indictments. Because indictment counts 3 and 4 were identical they were "multiplicitious". An indictment is multiplicitious if it charges a single offense in multiple counts, *United States v. Christner*, 66 F.3d 922, 927 (8th Cir. 1995). In *United States v. Panzavechchia*, 421 F.2d 440 (5th Cir. 1970) the Court said "three counts of an indictment contain verbatim language [,]... their fusion into one and the same thing renders them inseverable as identifiable entries of separate and distinct criminal charges." *Id* at 440. The Petitioner could not defend himself not knowing the difference between counts 3 and 4. Ohio Revised Code prohibits conviction "where crimes are motivated by a single purpose and where both convictions rely upon identical conduct and the same evidence, R.C. 2941.25(A). Under Crim.R. 24(B) Petitioner is allowed to assert the claim. This type of indictment also violated O Const. I, Section 10 where the accused is guaranteed to know the nature and cause of the allegations against him. Also, the same was true of count 5 of the indictment. The prosecutor even asked the jury to decide which way the kidnapping occurred. This was the basis for the Cross-Appeal before the Ohio Supreme Court that was not heard because of negligence of counsel in filing briefs on time.

In the present case, the two (2) incidents of force, which the court and the prosecutor believed may have formed the basis of two separate kidnapping charges, may have occurred hours apart, and on different dates. This would impermissibly permit a conviction where unanimity does not exist as to the presence of the restraint of liberty element. *Schad v. Arizona*, 501 U.S. At 632-633 (plurality opinion). This Court has addressed this issue. In *State v. Johnson* (1989), 46 Ohio St.3d 96, the Court held:

.... if a single count can be divided into two or more “distinct, conceptual groupings,” the jury must be instructed specifically that it must unanimously conclude that the defendant committed acts falling within such grouping in order to reach a guilty verdict. *Johnson* at 104.

Because the jury was not instructed that it must unanimously conclude which act of the Petitioner formed the basis of the element of “restraint of liberty,” the conviction of kidnapping must fall. Furthermore without knowing the mens re one can not determine if crimes are allied. The judge sentenced the Petitioner and therein determined that the crime of kidnapping was not allied to sexual imposition. The court made this ruling without knowing how the jury determined the animus and the jury must find all facts essential to punishment. *Apprendi v. New Jersey* 120 S. Ct. 2351

The theory regarding the church that was the basis for the prosecution was not revealed before trial. Petitioner was allowed to be tried based on these erroneous charges in the dark, in violation of well established rules of court and the Ohio Constitution Article I Section 10, see also *Dillingham v. State of Ohio*, 5 Ohio St. 280 (1855), *Harris*, supra at 125 Ohio St. 257 (1937), *Stirouc v. U.S.* 1960, 361 U.S. 212, 218, 80 S.Ct. 270.

III. RES JUDICATA IS NOT APPLICABLE

In determining if a plaintiff has alleged cause of action sufficient to withstand Motion to Dismiss for lack of Subject Matter Jurisdiction, a Court is not confined to the allegations of the

complaint, and it may consider evidentiary material pertinent to such inquiry. *Southgate Development Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St.2d 211, 358 N.E.2d 526 Ohio 1976. Evidence may be received dehors the record for a full adjudication of the claim. *In re Martin*, 76 Ohio L.Albs 219, 140 N.E.2d 623 (ct App. 8th Dist., Cuyahoga County) 1957. Petitioner asserts that this petition is not barred by res judicata because evidence dehors is necessary for a full adjudication of this claim. This petition is brought to this court so that it may consider “the totality of the evidence both that which was adduced at trial and the evidence adduced in habeas proceeding” as outline by *Parish Towns v. Smith*, 395 F.3d 251 (6th Cir. 2005), *Wiggins v. Smith*, 539 U.S. 510, 536 (2003) quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) and *Clinkscale v. Carter*, 375 F.3d 430, 436. Evidence outside the record is essential in this petition to correct false statements of fact previously presented to this Court as true, to wit:

A. AWANA is a Church of Homosexuals.

B. Photo used was allowed because it was alleged to be of a young boy but in fact it was an adult by the name of Clarence(Chris) Cole.

C. The negligence of preparation by trial Counsel in investigating and presenting the evidence and total neglect of Appellee Counsel before this Court previously distorted the facts due to the delay in prosecution.

In addition, the following issues of Law and Fact demonstrate Res Judicata is not applicable.

A. The issue of law regarding using an association with a Church to prove intent, motive, plan or credibility is forbidden by 18 USCA section 249, Evid.R. 610, Ohio Constitution 1 section 7 , USCA1, 14 and the Civil Rights act of 1964.

B. The court lacked jurisdiction because of violation of rules and statutes regarding Double Jeopardy and Speedy Trial. **Petitioner was denied a fair hearing because of the violation of Court Rules.**

In particular, Petitioner requested that the Court consider the argument regarding the evidence dehors necessary for a full analysis of this issue regarding the failure of Counsel to

present the evidence dehors and the implementation of Ohio Supreme Court Rule 6, Section 7 that allowed erroneous "Statement of Fact" to be presented as true when they were not. This misrepresentation of untruths as "facts" led to this Court's erroneous ruling that a fundamental Baptist church promotes pedophilia when the Court overturned the Eighth District Court of Appeals. This ruling was made unfairly without Petitioner having his Constitutional Entitlement to present the correct findings of fact and issues of law. This Petitioner presents the "identity of fact" essential for a correct decision and res judicata does not apply to a case where the "identity of fact" essential for a correct decision differ in a substantial way. *State v. Hay*, 861 N.E.2d 893.

Petitions with evidence dehors the record of ineffective assistance of defense counsel is sufficient, if not to mandate a hearing at least to avoid dismissed on the basis of res judicata. *State v. Cole (1982)*, 2 Ohio St.3d 112, 113, 114, 443 N.E.2d 169.

Under the doctrine of res judicata a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating the same issue in any proceeding except an appeal from that judgment. *State v. Perry*, 10 Ohio St.2d 175 (1917), 226 N.E.2d at 106. When the verdict was overturned by the Court of Appeals, the case was remanded back to the Trial Court. There was no judgment upon which to appeal as stated in Rule 12(B) of the Appellate Court which states:

"When the Court of Appeals determines that the Trial Court committed error prejudicial to the Appellant and that Appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the Court of Appeals shall reverse the judgment or final order that the Trial Court should have rendered or remand the cause to the court with the instruction to render such judgment or final order."

Even though there was as yet no judgment, the Ohio Supreme Court allowed the State to appeal in contravention of Rule 12(B). Since the action the State took was a new action, Res Judicata does not apply. Furthermore, this new action against the Petitioner was in opposition to

the State's own interpretation of the AEDPA. "When a judgment has been vacated, reverse or set aside on appeal it is thereby deprived of all conclusive effect both as res judicata and collateral estoppel." *State v. Baron*, 805 N.E.2d 173. Res Judicata does not apply to this application which intends to correct the constitutional violations due to Ineffective Assistance of Appellee/Defense Counsel regarding collateral attack against a reverse and remand order.

Res Judicata also does not apply to matters regarding the jurisdiction of the court that cannot be waived and can be raised at any time as in *Davis v. Wolf*, 751 N.E.2d 1051. The State may argue that the issue of Double Jeopardy was already raised due to the fact Petitioner claimed in his App.R. 26(B) Application for Re-Opening of Appeal, he was denied Due Process when the Court failed to dismiss the indictment after his right to Speedy Trial was violated. However, the Petitioner's claim is based on the fact the Court lacked jurisdiction to make such a ruling. This is a case of Subject Matter Jurisdiction that can be raised at **any** time and can not be waived as in *Davis v. Wolf*, *Id.* The US Supreme Court has held that so long as the Court's jurisdictional issue remains unfairly or not fully litigated, the Court lacks jurisdiction. *Marshall v. Marshall*, 126 S.Ct. 1735. And the Doctrine of Res Judicata is inapplicable on a Final Judgment rendered by State Court lacking Subject Matter Jurisdiction. *Grimes v. Grimes*, 879 N.E.2d 247.

Also, res judicata does not apply to Plain Error. Under Ohio's Criminal Rule 52(B), a Plain Error committed by a Court is an obvious error which is prejudicial to an accused, although neither objected to nor affirmatively waived, which if allowed to stand, would have a substantial impact on the integrity of and public confidence in judicial proceedings. *State v. Stover*, 456 N.E.2d 833 (1982).

Res judicata was also not applied to habeas petitions as in *State ex rel. Bailey v. Henderson*, 63 N.E.2d 830 (1945) the court ruled that a wrongful conviction occurred through

“inadvertence of the trial court whose attention presumably was not directed to the facts.” In *Bailey*, the Court ruled that the evidence presented was impermissible in proving the crime. In the Ohio Supreme Court, the State attention was not directed to the fact that AWANA was not an all gay church but Fundamental Baptist Youth Program. This fraudulent deception can not prove criminal intent.

The Court has held in *Bailey*; that the facts were so misrepresented that the Court did not have jurisdiction. In the case at bar, the mis-statements of fact led the Court to make a ruling abridging religious rights of Petitioner. The ruling in the case at bar has set forth an unreasonable precedent that the State has approval from the Court to prove anyone who takes a child to the AWANA Group a sexual predator. Intent is proven from the fact this court ruled it a suspicious place, because it exposes children to homosexuality.

IV. PROCEDURAL DEFAULTS WERE FOR GOOD CAUSE

“Where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of cause for the procedural default.” *Murray v. Carrier*, 106 S.Ct. 2639, 2640. The Ohio Supreme Court is generally barred from considering a decision if the case is procedurally defective. If the court determines that a Petitioner did not comply with a State Procedural Rule, and that the rule was an adequate and independent state ground, then a Petitioner must show that there was “good cause” for him not to follow the procedural rule and that the constitutional error he claims prejudiced his case. *Clinkscale v. Carter*, 375 F.3d 430, 440 (6th Cir. 2004).

The Sixth Circuit and the Ohio Supreme Court has held that constitutionally ineffective assistance of counsel can constitute “good cause” for procedural default, *State v. Reed* 660 N.E. 2 d 456 at 458 , *Rust v. Zent*, 17 F.3d 155 (6th Cir. 1994) to establish “good cause” under

ineffective assistance of counsel, a petitioner must satisfy the two (2) prongs under *Strickland v. Washington*, 466 U.S. 688 (1984). The Defendant must show that the attorney failed to maintain an objective standard of reasonableness in performing his or her professional responsibility. The Defendant must then show that he was prejudiced by this failure. A court must consider “the totality of the evidence – both that adduced at trial and the evidence adduced in habeas proceeding.” *Parish Towns v. Smith*, 395 F.3d 251 (6th Cir. 2005), *Wiggins v. Smith*, 539 U.S. 510, 536 (2003) (quoting; *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000), *Clinkscale v. Carter*, 375 F.3d 430, 436 (6th Cir. 2004).

The Sixth Circuit has recently ruled that a number of recent cases have emphasized that the defense attorneys have a constitutional duty to conduct adequate factual investigations, see e.g. *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510, 536 (2003), *Joseph v. Coyle*, 469 F.3d 441, 460 (2006); “the relevant question is not whether counsel’s choices were strategic but whether they were reasonable” *Roc v. Flores-Ortega*, 528 U.S. 470 481 (2000) accord *Clinkscale* at 443. *The Parish Towns Court* at 258, began with a review of cases where it had not “hesitated to find ineffective assistance in violation of the 6th Amendment when counsel fails to conduct a reasonable investigation into one or more aspects of the case and when that failure prejudice[d] his or her client.”

In *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1985), the Court found that counsel had a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary. There, counsel neither investigated nor made a reasonable decision to investigate the State’s case through discovery. Such a complete lack of pre-trial preparation puts at risk the defendant’s right to an “ample opportunity to meet the case of the prosecution.... and the reliability of the adversarial testing process” *Strickland* at 685, 688 quoting *Adams v. United*

States, 317 U.S. 269, 275 (1942).

In *Parrish Towns*, the Court affirmed the granting of a habeas petition because it was demonstrated that the counsel failed to fulfill his obligation to investigate evidence that would have undermined the prosecution's theory. Reviewing *ms*, 970 F.2d at 1580-81. Ultimately, it is the failure to investigate and thoroughly prepare for trial that renders counsel's performance ineffective. Thus any decision based upon failure is per se below the standard of reasonableness necessary to overcome the first prong of *Strickland*.

The second prong of the *Strickland* test for ineffective assistance of counsel, establishing prejudice, is proven when a defendant demonstrates a "reasonable probability" that the result of his trial would have been different but for the attorney's mistakes. *Strickland* at 694; *Gillard*, 445 F.3d at 896; *Harris v. Bell*, 417 F.3d 631, 639 (6th Cir. 2005). A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome," but something less than a showing that the outcome more likely than not would have been different. *Id* at 693-94. The focus should be on whether the result of the trial was "fundamentally unfair or unreliable" and does not turn on whether or not Petitioner conclusively demonstrated his "actual innocence"... *Lockart v. Fretwell*, 506 U.S. 364, 369 (1993).

In *Parrish Towns*, the Sixth Circuit found that the Petitioner's petition was supported by the weakness in the prosecution's case. The Court pointed out that the "Supreme Court has explained that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support" *Parrish Towns* at 265 quoting *Strickland* at 696.

Like Petitioner, *Parrish* had only one eyewitness testimony of a crime. The court reminded that it has repeatedly expressed "grave reservations concerning the reliability of

eyewitness testimony....” *Parish Towns* at 260 (quoting *Clinkscale* at 455). The Court found that in the light of the “relatively scant evidence of Parrish's guilt, his counsel's ineffectiveness must be deemed especially prejudicial.” *Parrish Towns* at 260-61.

V. DEFENSE ARGUMENTS NOT PRESENTED TO THE OHIO SUPREME

To be entitled to habeas relief a Petitioner must identify “exculpatory evidence or additional defensive theories that would have been discovered or developed had his counsel investigated the case more thoroughly.” *Flores v. Johnson*, 957 F.Supp 893, 913 (WD Text 1997). Here both exculpatory and additional defensive theories were available, but for the failure of the Petitioner's attorneys to meet an objective standard of reasonableness in performing their duties and petitioner was prejudiced by that failure.

A. Defense theories in facts and law argued from U.S. Constitution, 14.th Amendment.

Evidentiary rulings rise to the level of due process violations when they offend some principle of justice so rooted in the traditions and conscience of the American People as to be ranked fundamental. *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). Here the principle of religious liberty has been violated. The Appellate Court recognized the violation of the Petitioner's Constitutional Rights,

“Where the error affects constitutional rights, it must be harmless beyond a reasonable doubt, while non-constitutional error can be found harmless if substantial other evidence supports the conviction. While the transcript here presents a compelling case for determining that the cumulative errors denied Crotts' constitutional rights to a fair trial we need not make such a determination because the evidence here does not support a finding of harmlessness under either standard.” (See Court of Appeal's Opinion, Exhibit K)

Because the error affected the religious constitutional rights , the Appeals court understood that the evidence must be harmless beyond a reasonable doubt. They in tern stated “mischarcterized statemOTOMETOSOGISTents regarding the Awana program does not support

a finding of harmlessness under either standard.

Theoretically if the Ohio Supreme Court would have reasoned that taking children to church is not suspicious and does not create prejudice, such reasoning would demonstrate a non-discriminatory belief and would demonstrate how the jury could reason without prejudice.

By believing a lie this Court went beyond the trial court which simply allowed the evidence. The Supreme Court in confirmation of the state's position stated those who take children to certain kinds of churches (Churches which *gay people attend*) are suspicious and this evidence is "fair prejudice". If the jury reasoned as the Ohio Supreme Court, the untruths submitted concerning the church created more than just harmless error. It created a ruling based on religious belief or affiliation. This ruling, as the unconstitutional law in *Romer v. Evans*, 517 U.S. 620, 162, page 1624-1627, has first the peculiar property of imposing a disability on a single named group, namely (in this case), those who attend churches with gay people. Second in the light of the fact that Awana Church is not a homosexual church the State's reason for pursuing its argument seems inexplicable by anything but animus toward the group the argument effects. "Evidence is unfairly prejudicial where it impairs credibility by revealing opinions likely to offend the religious beliefs of a jury of conventional believers." *U.S. v. Kalydjan*, C.A. 2D, 1986, 784 F.2d 53, 56; *U.S. v. Sampol*, C.A.D.C. 1980, 636 F.2d 621, 666. The lies told about the Church were so offensive to this court that if the Justices themselves as heterosexuals took children to the alleged church which gay people attended they would be under more suspicion.

Therefore, besides the violation of the Due Process and Equal Protections Clauses of the Fourteenth Amendment to the U.S. Constitution, the Court also violated the "Privileges-Immunities Clause" which states "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." The Petitioner is immune from

prosecutions regarding evidentiary rulings that are based on proving criminal intent based on his religious association with a “legitimate Christian youth group” by supporting a lie about a church. *Dartmouth College v. Woodward*, 17 U.S. 518, 1819 WL 2201 (U.S.N.H.), 4 L.Ed. 629, 4 Wheat. 518

B. FACTS AND LAW ARGUED FROM OHIO CONSTITUTION.

The Ohio Constitution goes further than the Fourteenth Amendment's guarantees in protecting those who educate children religiously. It states:

Ohio Constitution, Article I, Section 7; “religion, morality, and knowledge, however, being essential for good government, it shall be the duty of the General Assembly to pass laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.”

The Petitioner took children to an Awana Program at a Fundamental Baptist Church. The children within the program were taught to memorize Bible verses and were taught moral lessons from the Bible. Within this Church, the children would have been taught that homosexuality is an “abomination.”

The alleged victim within his testimony stated that the Church he attended he thought was a Roman Catholic Church in Maple Heights. His twin brother said Awana was a gay church. These statements like most of the testimony are in the record to create fear and prejudice the jury. If the attorney would have researched the issues, he would have known that no Roman Catholic Churches has an Awana Program. But even if the twins were taken to a Roman Catholic Youth Group, should this court consider this a suspicious act? Some could argue that the track record of the Roman Catholic Church covering up sexual misconduct would support such a claim. However, the Roman Catholic Religion is the religion of 6 of the Chief Justices of the United States Supreme Court. Even the Roman Catholic faith is protected under the Ohio Constitution.

Also within the transcripts the United Church of Christ is mentioned. This was the Church the Petitioner attended with the alleged victim's older brother. It is the oldest denomination in this country. Our representative form of government is based on this Church's government. The denomination was known as "Congregationalist." They were the church that founded Harvard and Yale Universities. They are the Church that produced the greatest of all the revivalists of the Second Great Awakening, an Ohioan by the name of Charles Finney. They were the first to educate blacks and women at Oberlin in Ohio. They produced the leaders in the underground railroad and the women's suffrage movement.

In Justice's Scalia's dissenting opinion in *Romer v. Evans*, 116 S.Ct. 1620, he states that those rights that deserve protection were those rooted in the values of our forefathers. Historically people came to this country to be protected from religious persecution. The first Congregationalist, the Pilgrims were one such group. Today, in the same spirit that produced the first Thanksgiving, the people of the Church have allowed gay people to become members. The United Church of Christ has been the backbone of the moral reformations that has brought us, freedom of religion, the end of slavery, great universities, and empowered women in Church and government. It has always been condemned by those who were afraid of moral reformation. But the church's power to effect such change is what the founders of our State had in mind when they wrote in the Ohio Constitution: "Every Religious Denomination" is protected, even churches that allowed gay people to become members.

Even though the AWANA Program was not the United Church of Christ, to single one type of Church out for suspicion and prosecute someone for taking a child to the church violates the Ohio Constitution. Therefore, he can not be found guilty based on exposing children to gay people at any church. It is forbidden by the Ohio Constitution. And churches that accept

homosexuals have never been caught up in public controversies involving pedophilia.

C. ARGUMENT OF FACTS AND LAW ACCORDING TO FEDERAL LAW

The Civil Rights act of 1964 prevents discrimination based on religion it states: According to USCA 42, Section 2000a-1; all persons shall be entitled **to be free**, at any establishment or place, **from discrimination** or segregation of any kind **on the ground of** race, color, **religion**, or national origin, if such discrimination or segregation is or purports to be required by any law statute, ordinance, regulation, **rule or order of a State** or any agency or political subdivision thereof.

USCA 42, Section 2000a-2; No person shall (a) withhold, deny or attempt to withhold or deny or deprive or **attempt to deprive any person of any right or privilege secured by Section 2000a or 2000a-1** of this Title or (b) **intimidate, threaten, or coerce** any person with the purpose of interfering with any right or privilege secure by Section 2000a, 2000a-1 of this Title. **No person shall (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by Section 2000a, 2000a-1.**

The premise of the State's argument disregards the facts stated in the evidentiary ruling of the Court of Appeals and is motivated by religious discrimination. According to the State's argument, if a person takes a child to a Church which gay people attend this can prove criminal intent. The State argues that those who do so do not have the same protection as those who take children to Churches that do not accept homosexuals. Considering the fact the State's argument is based on a lie and the total disregarding of the Appellate Court's findings of fact, and Considering the fact that the State's own literature reveals that heterosexuals are 98% more likely to sexually assault boys (See exhibit J) Such arguments that the State makes must be based on religious bias and prejudice against Churches that accept gay people. The argument is in opposition to the U.S. Supreme Court's ruling in *Christian Law Society v. Martinez*, 130 S. Ct. 795, which upheld that principals of non-discriminatory practices regarding religious groups that accepts gay people. The State's discrimination is proof that the evidence should never have been allowed and why the judgment should be void.

Federal law, 18 USCA section 248 , mandates that the courts can not “admit evidence of Speech, beliefs, association group membership or expressive conduct unless that evidence is relevant and admissible under Federal Rules of Evidence.” And the evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced. Evid. Rule 610 is in opposition to the Ohio Supreme Court's Statement. “It [other act evidence regarding the church] is always material because it tends to show why one version of events should be believed over another.”

The reasoning behind Rule 610 in State and Federal Evidentiary Rules, according to **Wright and Gold's *Federal Practice and Procedure***, “that many people presume a strong connection between religious belief and moral character; evidence of religious beliefs or lack thereof may be highly prejudicial. This may occur in 4 different ways:

1. Jury may over weigh evidence of truthfulness or untruthfulness (this is evident in the radically different descriptions of the church by the Court of Appeals and the Ohio Supreme Court).
2. Such evidence may distract. This is evident throughout the transcripts. For instance, the 15 year old was questioned 4 months prior to the trial by a private investigator he stated the Petitioner never had an erection. At trial he states the Petitioner did have an erection. When it is evident that he has been caught in this lies the State asks abruptly “what kind of church was it.” (Tr. 145). This question was out of place and meant to distract.
3. The third reason for applying Rule 610 is that it prevents the prejudice of a jury using religious beliefs to draw incorrect inferences. This was done by the Ohio Supreme Court in its ruling. It was ruled; “Theoretically, testimony that a heterosexual male took children to a homosexual church would be more supportive of the State's theory that it was done for the purpose of desensitizing, because a straight male would have less reason to attend, a gay church and his motive for taking a child there would be that much more suspicious.” The statements made about the church make the following false assumptions.
 - a. That the Awana Church was a homosexual church. It was a Fundamental Baptist Church that opposed homosexuals.
 - b. Churches that some would say are homosexual because they have members or clergy that are homosexual desensitize children to pedophilia. Included are a few denominations, none of which have been linked to pedophilia but all accept homosexuals; Anglican, United Church of Christ, Unitarian and American Baptist.

c. Straight males are more suspicious for taking children to this kind of church. According to the Ohio Supreme, people like Barack Obama and Bill Moyer who have attended the United Church of Christ would be even more suspicious for taking children to a gay friendly church.

d. Homosexuals are likely to desensitize a child to pedophilia. The state's own publications that clearly state: "98% of males who molest boys are heterosexuals" See Exhibit J.

4. The final reason why Evidence Rule 610 was created and why in this case not using it created prejudice is that the jury ignored the issues and based their verdict on beliefs. At the time the allegations were made, Roman Catholics were under great suspicion. So the alleged victim lies and states the Awana Church was a Roman Catholic Church. His twin brother goes further calling it a homosexual church. The American Psychiatric Association scientific position is that homosexuality is a normal human condition. Yet many people still assume this condition is brought about by coercive behavior of adults. They further believe religious groups that believe as the American Psychiatric Association and allow homosexuals to participate in community activities of the church desensitize and corrupt their children. Historically, homosexuality and rape were associated through the story of Sodom in the Bible. Up until 2003 one could be imprisoned for homosexual relationships. Fundamentalist Churches like the twins attended believe this view. Yet, ironically through the deception regarding the church this court based its decision on the same erroneous beliefs regarding the Awana Church desensitizing children.

Other Federal Laws that apply are the Northwest Ordinance, Freedom of Religion and Conscience Act and The Religious freedom restoration act of 1996

D. FACTS AND LAW ARGUED FROM THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

The previous ruling of the court of Appeals and the Ohio Supreme Court set the precedent that a person's sexual orientation can not be used against them to prove guilt through other act evidence. The liberty that does away with prosecutions based on sexual orientation is not sufficient if the court rules some one can be imprisoned for taking a child to a church that openly accepts homosexuals. In giving the Petitioner one right, you have stripped him of the right to worship God and to share his faith with others. The Petitioner saw juvenile delinquents, as God's children needing religious and moral instruction. He wanted not to expose them to

homosexuality but to the faith of his father, an evangelical Baptist Minister.

In violation of the first amendment this Court supports a religious view because of fear caused by a lie about an Awana Church Youth Group. The U.S. Supreme Court has ruled in *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 113 S.Ct. 2227, that [case law] law is not neutral if its purpose is the "suppression of religion or religious conduct" even if it does so indirectly. In not applying the law equally by protecting the religious rights of those who attend churches with gay people the State is given power to impose coercive control over religious groups. The U.S. Supreme Courts interpretation of Constitutional religious rights that mandate that State courts can not prefer one religious group over another. *Wallace v. Jeffree* 105 S. Ct. 2479. The teachings of religious beliefs to children or adults in attendance has always been protect by the Courts no matter how ridiculous the beliefs may be. *Resources of Oregon v. Smith*, 110 S.Ct. 1595 (1990). Historically the Courts have refused to permit evidence to convict someone based on an association with a particular creed, sect or faith. *Commonwealth v. Buzzel*, (1834), 33 Mass 153, *Commonwealth v. Burke*, (1860), 82 Mass 33.

VI. Grounds for Relief are for Good Cause.

Delay in retention of counsel raises constitutional issues if such denial results in **fundamental unfairness**. *States ex rel. Reid v. Richmond* (2nd Cir.), 295 F.2d 83, 89-90. Constitutional Guarantee of Counsel under the Sixth Amendment include the right to preparation period sufficient to ensure minimal level of quality of counsel. *U.S. v. McCutcheon*, 86 F.3d 187. Because of Doughten's admitted negligence, his replacement had less than one week to prepare, and New Counsel could not, nor did he request a continuance to adequately investigate. (See Second Addition to Habeas filing - Doughte's Affidavit). Mancino's Notice of Appearance was made the same day he filed his Merit Brief. Mancino never requested to see the transcripts.

Counsels' failure to meet an objective standard in performing their professional responsibilities caused the violation of Constitutional Law in allowing an association with a church to be used as a basis for criminal intent.

Good Cause # 1

First the trial and Appellee Counsel(s) **neglected** to meet with the Petitioner to discuss the "other act evidence." An attorney's duty to adequately meet with his client is usually a factor to investigate when determining ineffective assistance. *Rompilla v. Beard*, 545 U.S. 375 (2005). In *Wood v. Mitchell*, 2005 U.S. Dist. LEXIS 22109 (N.D. Ohio 2005), the court explicitly discussed the amount of times the attorney met with the defendant and his family..... There the court noted that a cursory investigation made the strategy counsel developed pursuant that to be an uninformed one Id at *37. Accordingly, the court found counsel's conduct unreasonable Id. Mancino never had time to meet with Petitioner and did not know the facts regarding "other act evidence". Not one defendant's attorneys met to discuss the evidence regarding the church prior to trial. The total negligence of preparation led to the incorrect issues of law being presented and the violation of the Petitioner's Constitutional rights. It was because the Appellee's Counsel did not meet with the Petitioner that the Ohio Supreme Court was not presented the correct facts.

Petitioner learned Warren lost all of the information that Petitioner had advised him to keep regarding the conflict between Petitioner and his employee, Paris Brewer. In particular Warren, lost Paris' journal which would have cast substantial doubt on the credibility of Justin and which supported the Petitioner. Warren also admitted that he had never taken a case to trial and was unqualified if the case should proceed to trial.

For the above reasons, Petitioner interviewed other lawyers. On November 23, 2001 he hired Leonard Yelsky's law firm to represent him. However, instead of the firm sending the

younger son, they sent the eighty-two (82) year old Senior member who fell asleep during the pre-trials. Warren who was also present, reported this to Petitioner. Because Petitioner was not allowed to be present at the pre-trials after returning from Florida for each one, he was not aware that the state was basing its case against Petitioner on the false belief that the Baptist Church Youth Group to which Petitioner took the alleged victim was a recruiting instrument for pedophiles and was going to be used to prove guilt, by association. None of Petitioner's attorneys challenged or protested this clearly fraudulent misrepresentation.

Exhibit H shows that trial counsel "were not helpful. In fact were almost adversarial" to the Petitioner. See **Exhibit H-1**. The Petitioner expressed to Appellate Counsel "that trial counsel had been ineffective." Appellate Counsel also knew that trial counsel was asleep during the trial stating, "Mr. Yelsky arguable performed beneath the professional norm by falling asleep." Trial Counsel only met briefly with the Petitioner because Ms. Johnson's Motion to Dismiss based on Speedy Trial was suppose to prevent any trial from occurring.

Doughten the first Appellate Counsel only met with the Petitioner for a few minutes and Paul Mancino never met with the Petitioner before his appearance in the Ohio Supreme Court. The record also shows from Mancino's correspondence with Petitioner, (see Exhibit H-38), that Mancino did not even read letter sent to him. Petitioner responds to a letter from Mancino stating "it is disturbing for you to write me November 16, 2005 asking for an Affidavit when I had already sent you one." Even family members could not get in touch with Appellate Counsel, see Exhibit H. But beyond just meeting with the Petitioner both Trial and Appellate Counsels threatened the Petitioner. In Exhibit H-5, while avoiding telephone calls by Petitioner's family, Doughten threatens **"the next time I will make up some bullshit and keep your money."** He did just that when he misled the Petitioner to believe he filed a

Cross-Appeal, see Exhibit H-31. He also misled Petitioner to believe he would file a Post Conviction and later claimed he never received \$4,000.00 the Petitioner paid him for the Post Conviction. Appellate Counsel lied about hiring Alan Rossman as replacement counsel when he suddenly abandoned the Petitioner before the Ohio Supreme Court he even left town. See **Exhibit H-6**.

The Court appointed Attorney, Edward Graham, would not meet or even speak with the Petitioner. See Exhibit H-22, H-26-28. New Appellate Counsel Mancino did not meet with Petitioner and does not correct the facts in his motion for reconsideration in the Ohio Supreme Court even though Petitioner makes him aware of the issues of fact that were incorrect. See Exhibit H-37. Petitioner also contacted this Court directly trying to get the Court to deal with the unethical and ineffective counsel. See **Exhibits H-22, H-25, H-27**.

This deception perpetrated by the State used the stereotypes and fears regarding the “homosexual” church to deceive this Court. Certainly if Paul Mancino would have had time to meet with the Petitioner, such basic knowledge gained from Petitioner would have empowered Mancino to prevent the State's malicious deception. Petitioner's counsel should have argued: it is “**fundamentally unfair**” to assume that AWANA Church is a homosexual church in the light of the State's own witnesses, one of whom testified on the State's behalf “that the group is a legitimate Christian boy's club” and the fact the name of the Church was Suburban Heights Baptist Church. (Appellate Court's decision, **Exhibit G**).

Because of the failure to meet and communicate with the Petitioner, Mancino was not prepared to address the proper issues of law and fact as outlined in the “V – Argument of Facts and Law.” Paul Mancino was not even aware of the age of the adult male in the photo that the prosecutor characterized as a young boy or that the record itself indicated the church in question

was a conservative Baptist Church. See **Exhibit H 39** and **Third Addition to Habeas Petition.**

CAUSE #2

The second ground for this Petition is that counsel neglected to follow Court Rules and statutes governing Res Judicata, Double Jeopardy after the statutory time to bring the case to trial expired. In the case at bar Petitioner is asserting that the State violated and abridged Petitioner's substantive rights; and that the violations are an independent cause for this Habeas Petition. His counsel failed to meet an objective standard of reasonableness in performing his professional responsibility by failing to follow the rules of court and Petitioner was prejudiced by that failure. Ohio Constitution, Article IV, Section 5:

B “The Supreme Court of Ohio shall prescribe rules governing practice and procedure in all courts of the state which rules shall not abridge, enlarge or modify any substantive right.” “All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”

An appeal to substantive rights before this court can not be barred by statutes governing discretionary appeals that would limit this court's power over the enforcement of their own rules. *Hiatt v. S. Health Facilities, Inc. (1994)*, 68 Ohio St.3d 236 and *State ex rel Bohlman v. O'Donnell (1994)*, 68 Ohio St.3d 496. Any law that would conflict or limit the implementation of the rules “shall be of no further force or effect.” Ohio Constitution, Article IV, Section 5. This provision in the Ohio Constitution also protects the Petitioner's “substantive right[s]” against any rule that would “abridge, enlarge or modify the Petitioner's rights.” No rule can bar this court from hearing cases regarding constitutional violations that were caused by the rules of court being broken to do so would be to create rules and laws that could “abridge or modify a substantive right.”

The courts have upheld this principal in *State v. Cocco (1943)*, 73 Ohio App. 182, 28 O.O. 283, 55 N.E.2d 430 where the court ruled “when the state undertakes to deprive an

individual of life or liberty; it must conform to the rules of procedure which it has established.”

In *State v. Westbrook*, 353 N.E.2d 637, the Court ruled that the State had an obligation in bringing the case to trial within 6 months of arrest regardless whether statutory limits had expired. Despite the fact Petitioner was discharged in 1999, the time to bring the case to trial began when he was first arraigned and the city of Maple Heights bond him over to the county for grand jury proceedings. No new evidence was discovered. Society's interest could no longer be protected because witnesses were unavailable and the account of what happened was not clear, as evident by this court believing the AWANA was an “all gay” church. In *Klopper v. State of North Carolina*, the United States Supreme Court stated that time does not nolle when a prisoner is discharged. The time to bring this case to trial expired in 1999 and the dismissal of the charges barred a second proceeding because of time limitations imposed by the Statutes. Yet, Petitioner's counsel was negligent in protecting the 5th and 6th Amendment Rights of the Petitioner.

Counsel was asleep during pre-trials. The evidence from reading the docket also demonstrates how the principles of double jeopardy as this court set forth in *State v. Adams*, 644 N.E.2d 588 (1995) were not followed. The record shows two (2) cases, No. CR-99-39-1336-ZA and CR-01-406396-ZA. The docket also shows Petitioner was sentenced twice, once on March 29, 1999 and then again on May 21, 2002. Petitioner was also said to “leave jail” to serve his sentence in 1999 on May 30, 2002. However, the same date was given for “leaving jail” in 2002 after being sentenced.

The Court recognized that the charges made in 1999 were the basis for the conviction in 2002 by giving Petitioner 40 days of jail time credit that he served in 1999. And, the State did not object. The transcripts also reveal that the same conduct which was the basis for the charges

in 1999 were the same conduct that was the basis for the proceedings in 2002. See Exhibit A. The investigation ended in 1999 and no new evidence was discovered. If the State choose not to bring the claim or hid the claim, the alleged new charges are barred by Ohio law of claim preclusion *General Medicine P.C. v. Morning View Care Centers* 477 F.Supp. 2Nd 858 (S.D.Ohio 2006). Petitioner's Attorneys were not vigilant in order to discover the fact it was the same case. In fact, the State deceptively sought to portray the case as being new. The State gave it a new Case No. and attached indictments the that were latter dismissed. The State even changed the charges from attempted rape to sexual imposition while at the same time in their opening statements stated "the defendant was attempting to penetrate him anally" see Exhibit A.

Even the name of the alleged victim was not stated on the indictment and was not revealed to the Petitioner until the second pre-trial. Only when charges were severed was it then clear that this was just the exact same case as in 1999. Attorneys for Petitioner were negligent in their duty to investigate this fact and to research the statutes that protect Petitioner's 5th Amendment Rights. Furthermore, the Certified Record from the Ohio Supreme Court that the *capias* was missing from the files.

Attorneys for the Petitioner: Warren, Yelsky, and Johnson, all told the Petitioner they did not request any continuances, that the case would not go forward because they would make a motion to dismiss based on speedy trial. However, the record shows that attorneys did request a continuance. They not only requested the continuance but both the State and Defense Counsel violated the rules of Cuyahoga County Court (Rule 3, Section B). The rule requires all continuances to be made by way of written motion. (See Cuyahoga County Common Pleas Rule 3, Section B states:

"No case in which a date certain had been fixed for pre-trial/case management conference, trial, or hearing shall be passed without the

authorization of the assigned Judge for good cause shown a case awaiting trial may be continued provided a written motion is submitted to the Judge.” “The Motion shall state specifically the reason(s) for the continuances granted and at whose request. If the reason for the continuance is due to a conflict of trial assignment dates, the attorney must attach a copy of the conflicting assignment thereto. The Motion shall also contain the Written endorsement of the Moving Party as well as the Moving Party's Attorney, represented.....”

The attorneys' behavior was unreasonable, unethical , illegal, **fundamentally unfair** and totally contrary to any legal representation envisioned by the Ohio and United States Constitutions respectively. Even the Appellate Counsel recognized Trial Counsels' adversarial behaviors. Appellate Counsel stated; “I did interview the attorneys. They were not helpful. In fact they were almost adversarial.”

The judge also granted the continuances in violation of the Court Rules. It is the Constitutional duty of this Court to have superintendence over all Courts and their rules. And, “the rules it establishes must not abridge, enlarge or modify any substantial right” of the Petitioner. O Const. 4, Section 5(A)and (B). In this case it is clear that by blatantly ignoring the rules, the Trial Court has violated the Petitioners Constitutional rights and has set itself up in opposition to this court's authority given to it by the Ohio Constitution.

As noted in the facts, the Petitioner lived and worked in Florida and spent substantial funds to appear for pre-trials. He would not nor did he request any continuances. The following was the incorrect chronology for computing Speedy Trial Time as set forth in Petitioner's Motion before the trial on April 10, 2002. This chronology was based on the false premise that the original charges were nolle and not in fact dismissed and a clear demonstration how the proper issues of fact and law were not presented:

January 16, 1999 – Defendant is arrested	
February 5, 1999 – Defendant was released on bond	Totaling = 63 days
March 29, 1999 – Charges are dismissed (adding another 51 days totaling)	= 114 days

October 26, 2001 – Arrested in Florida
October 31, 2001 – Defendant in custody of Cuyahoga County, Ohio
November 1, 2001 – Released on bond (adding another 3 days totaling) = 117 days
November 2, 2001 through April 3, 200 (adding another 153 days totaling = 270)

GRAND TOTAL OF DAYS = 270

Revised code 2945.73 allow for only 270 days. The trial was held after this time expired.

And R.C. 2945.73(D) does not allow new charges based on the same conduct to be made after a dismissal and the statutory time has expired. The court lacked jurisdiction to hear the case as in Davis v. Wolfe.

The above chronology does not include the time Crofts was detained in September of 1999. The judge denied Petitioner's motion to dismiss based on speedy trial stating; "Defendant together with the State on or about February 1, 2002 prepared a speedy trial computation which indicated that Defendant's speedy trial rights would not expire until July 2002." However, no such document is in the record, nor were any Written Motions made for any continuances by the Petitioner. The Docket which was certified by the Clerk of Courts states; "that the foregoing is taken from the Docket CR-406396." The Clerk crosses out the word Journal and puts in the word Docket. Included in the "foregoing" are what appear to be the Journal Entries of continuances, but are in fact not Journal Entries, but Entries "taken from the Docket." This Court should not rely on Journal Entries that were modified or the Docket that has been fraudulently modified. It should have been clear that the erroneous speedy trial computation was made on indictments 1 and 2 because the Petitioner never made a motion to dismiss these baseless indictments prior to trial.

Furthermore, Defense Counsel, Almeda Johnson told the Petitioner that Yelsky (who was sleeping during trial proceedings) forged her name on what the judge called a "speedy trial computation." The failure of the attorneys and the court regarding speedy trial leads to

confusion; so that lead counsel Johnson was unprepared to go to trial because she thought the charges would be dismissed. The failure to not follow rules and not file the appropriate Motions and Objections clearly prejudiced the petitioner.

The “substantive right” regarding Double Jeopardy must be protected by this court asserting its power to enforce its rules. In order to protect the Petitioner's rights, the Ohio Constitution gives the Court ultimate power so nothing can keep this court from the enforcement of its own rules. To do so would be to create statutes or laws that would “abridge or modify a substantial right.” The Ohio constitution mandates that it is the rights of the individual which the Courts must protect from the powers of the State. Justice Cupp in his address before the Admission to the Bar in May 2010, admonished all new attorneys that it was the duty of the court to protect the rights of individuals.

In this case not only did Petitioner's attorneys fraudulently lead him to believe that the case would be dismissed because of speedy trial violations but the record shows both prosecution and defense counsel broke court rules by asking for continuances without the Petitioner's consent and not by way of written motion. This clearly demonstrates not just **fundamental unfairness** to Petitioner, but an illegal action when the defense and prosecution attorneys both colluded against Petitioner. The illegal continuances became the basis for the Court denying the Motion to Dismiss and led to the violation of the Double Jeopardy Clause in both Ohio and U.S. Constitutions.

CAUSE # 3

The final ground for relief is that both trial and Appellee Counsel did not do their job by investigating the facts of the case and filing appropriate briefs, motions and objections regarding proving the Petitioner not guilty by an association with a recognized church entity. High Courts

have held that the failure to file Briefs constitutes a failing to meet an objective standard of reasonableness. *U.S. ex rel. Thomas v. O'Leary*, 856 F.2d 1011. *Roe v. Flores – Ortega* 129 S.Ct. 1029

Attorneys should have recognized the well established law that an unjustifiable delay between commission of an offense and indictment for it resulting in actual prejudice to the defendant violates due process rights under O Const. Art I, § 10,16: see also *State v. Glazer*, 11 Ohio App.3d 769, 677 N.E.2d 368 (1996), U.S. Const. Amend. 5, 14, *State v. Luck*, 15 Ohio St.3d 150, 15 Ohio B296. The record shows that the original complaint of attempted rape was dismissed. The county prosecutor had no valid complaint or affidavit to bring before the grand jury R.C. 2945.73(D) barred any further prosecution. The indictment was based on “other acts” and the same contradictory account by one witness, as the facts have shown in the statements made both to the doctor and the police and in fact is the actual basis for Petitioner's appeal being granted.

The delay was **fundamental unfair**, it prevented Counsel for the Petitioner from locating Pastor Fink of Suburban Heights Baptist Church who would have testified that the Church's AWANA Program opposes homosexuality. Petitioner's attorney should have recognized the clear prejudice created by the lack of this important witness and file the appropriate motion to dismiss.

Counsel for the Petitioner had to file a bill of particulars because the original indictment was not legally sufficient yet the prosecutor's response to the bill of particulars reiterated the general provision of the statute and stated acts in pretrial that were different than those used at trial. Counts three (3) and four (4) of the indictment were identical and the language used “rendered them inseverable as identifiable charges.” *United States v. Christner*, 66 F.3d 922, 927 (8th Cir. 1995) ,*United States v. Panzavechchia*, 421 F.2d 440 (5th Cir. 1970) This type of

indictment clearly violated the Petitioner's right to due process because it was **unreasonable** and illegal. Also, the same was true of count 5 of the indictment. The prosecutor even asked the jury to decide which way the kidnapping occurred. The court could not be unanimous when given a choice to the mens rea with two (2) different choices happening hours apart. *State v. Johnson* (1989), 46 Ohio St.3d 96, *Schad v. Arizona*, 501 U.S. at 632-633. Because trial counsel failed to request an in camera inspection of the grand jury minutes, Petitioner/Defendant could not state for sure what were the "other acts evidence" that constituted the mens rea element for the crime. **The indictments created structural errors from beginning to end as in *State v. Perry*, 802 N.E.2d 643 at 17.** Ohio Revised Code prohibits conviction "where crimes are motivated by a single purpose and where both convictions rely upon identical conduct and the same evidence, R.C. 2941.25(A). Under Crim.R. 24(B) Petitioner is allowed to assert the claim. The U.S. Supreme Court has ruled the failure to object to indictments prejudices the defendant and is cause for ineffective assistance of counsel *Joseph v. Coyle* 469 F3d 44. Such judgments based on these types of conviction are void.

It was **Fundamentally Unfair** for the Petitioner to be unaware that a Church Youth Group called AWANA was going to be used to prove him guilty. This again was against the provision in the Ohio Constitution that allowed him to know "the nature and cause of the accusation against him." Petitioner was allowed to be tried based criminal intent through what was falsely said to be a homosexual church in the dark, in violation of the rules of court and the Ohio Constitution Article I Section 10, see also *Dillingham v. State of Ohio*, 5 Ohio St. 280 (1855), *Harris*, supra at 125 Ohio St. 257 (1937), *Stirouc v. U.S.* 1960, 361 U.S. 212, 218, 80 S.Ct. 270.

The indictments were fundamentally unfair because without the essential elements

being revealed, there was no guarantee that the jury's findings were unanimous concerning the essential element of mens rea, nor could the judge determine whether the charges were allied. Was the Petitioner found guilty of kidnapping with sexual motivation because he took the alleged victim to a "homosexual church" or was he found guilty based on photos he took as a professional photographer of an unrelated adult? Or was the the Petitioner found guilty based on the stories told by the alleged victim? Was the victim restrained or was he moved from one location to another? Because of the ineffective assistance of Counsel in asking for an in camera inspection of the grand jury minutes or asking for a more definitive bill of particulars, the Petitioner was forced to defend himself from a continuous onslaught of "other acts evidence" that merely created prejudice.

By not applying this law Petitioner's rights under US Const. Amend 14 and Ohio Const. Art. I, Sec. 10 were violated. The results was a jury that was not impartial, violating the Fifth Amendment Rights of Petitioner. The Appellate Court recognized the violation of the Petitioner's Constitutional Rights, Because the error affected the religious constitutional rights , the Appeals court understood that the evidence must be harmless beyond a reasonable doubt. They in tern stated "mischaracterized statements regarding the Awana program does not support a finding of harmlessness under either standard." However, when the prosecutor appealed the decision, the Appellate Attorney, David Doughten, failed to file the Merit Brief on time and suddenly withdrew as counsel and would not provide a replacement or cooperate with new counsel, he even left town. *U.S. v. Myers*, 892 F.2d 642 (7th Cir. 1990) the court ruled Counsel's failure to cooperate or provide replacement counsel with pertinent information, may constitute cause to grant a Writ of Habeas Petition.

U.S. ex rel Thomas v. O'Leary, 856 F.2d 1011 (7th Cir. 1988) the court ruled that the

failure to file briefs led to prejudice and the granting of a writ. The following is a summary of those failures by the Petitioner's original Appellate/Appellee Counsel, David Doughten (See Exhibit N) that ultimately led to the violation of the Petitioner's Constitutional Rights.

A. Counsel Doughten failed to file Post-Conviction Petition and did not return the Petitioner's payment of fee. **Revised Code 2913.02 Sate v. Brown 671 NE 2nd 280 Rule Violation:** DR6-101(3) and DR2-110(2)(3). **Prejudice created:** 1) Violation of Speedy Trial Right was not brought to Court's attention, 2) Trial Attorney Yelsky's falling asleep was not brought before the Court's attention, 3) Trial Attorney's threatening Petitioner not brought before the Court's attention, and 4) Trial Attorney Yelsky forging name of lead counsel, Almeda Johnson, was not brought to the Court's attention. New Counsel that (Petitioner was forced to hire) was not prepared, in the end he could not correct the mistakes of Doughten.

B. Doughten failed to file Merit Briefs on time. **Rule Violation:** DR6-101(3). **Prejudice created:** The implementation of Supreme Court Rule VI, Section 7.

C. Doughten failed to file Notice of Cross-Appeal. **Rule Violation:** DR6-101(3). **Prejudice created:** Barred by statute of limitations.

D. Doughten withdrew suddenly as Petitioner's counsel without filing the Merit Brief mentioned in Section B, and not returning Petitioner's payment of the fee; and failing to pay for a substitute as was promised. **Rule Violation:** DR7-101(2). **Prejudice created:** Court appointed an attorney who admitted to the Petitioner that he was not qualified. New Counsel Petitioner was forced to hire was not prepared.

E. Counsel, David Doughten, failed to complete the Appellate process in the Eighth District Court of Appeals and failed to return the fee paid for service. **Rule Violation:** DR 7-101(2). **Prejudice Created:** New attorney was unfamiliar withdrawing the case and could not correct mistakes of Doughten.

F. Counsel, Doughten failed to inform the Petitioner of the negligence in a timely manner. **Rule violation:** EC7-7, DR 2-110(B). **Prejudice Created:** The Petitioner was barred from filing a cross-appeal by the statute of limitations. And new counsel was not briefed on facts of case to order to be properly prepared.

G. Counsel, Doughten failed to transfer research information to new counsel and was uncooperative with both Petitioner and new counsel. **Rule Violation:** DR-2-110(2)(3). **Prejudice Created:** New Counsel could not prepare for Ohio Supreme Court.

It is well established law that Appellate Counsel's failure to raise clearly meritorious issues on direct appeal constitutes Ineffective Assistance. *Banks v. Reynolds*, 54 F.3d 1508,

1515-16 (10th Cir. 1995), *Gray v. Greer*, 778 F.2d 350 (7th Cir. 1985), *Robinson v. Maynard*, 826 F.2d 1501 (10th Cir. 1987), *Evitts v. Lucey*, 105 S.Ct 830 (1985). It was only through the negligence of Doughten that obvious “Dead Bang Winners” were not presented in the Court of Appeals as in the double jeopardy issue. *U.S. v. Cook*, 45 F.3d 388 (10th Cir. 1995) the Court ruled that failure of counsel to raise “Dead Bang Winners” constitutes Ineffective Assistance and establishes “cause” for ineffective assistance but Doughten went beyond simple neglect when he followed through with his threat stating in Exhibit H-2; **“the next time I will make up some bullshit and keep your money.”** His malicious behavior is outlined in Exhibit H.

The result of Doughten's malicious negligence left the Petitioner without counsel before the Ohio Supreme Court. The New Counsel, Paul Mancino neither met with the Petitioner, nor did he receive the transcripts. The New Counsel did not even correspond with the Petitioner regarding the facts of the case. The Petitioner was virtually without an informed advocate before this Honorable Court.

The U.S. Supreme Court has set forth in *U.S. v. Cronin*, 104 S.Ct. 2039 that not only is the *Strickland* test applicable in testing the effectiveness of Counsel. But, that “surrounding circumstances” may prevent an attorney from being effective. In the case at bar, Doughten's malicious negligence prevented Paul Mancino from having any access to transcripts that would have shown the age of Clarence Cole, and would have revealed that the AWANA Group was falsely said to be both a “Catholic Church” and an “All Gay Church.” The transcripts would have also revealed the Churches name, Suburban Heights Baptist Church, and the fact it ran a legitimate Christian youth program. They would have also revealed from the first day of trial transcripts that the age of adult, Clarence Cole was mentioned. It is an objective fact that there was only one (1) transcript made the summer of 2004, and the Ohio Supreme Court had

possession thereof. Appellee Counsel, Paul Mancino could have never researched the record/transcripts because he never had a copy of the transcripts. See Exhibit H-29. The Ohio Supreme Court's docket shows that Mancino gave his "notice of appearance" the same day he filed the merit brief. See Exhibit H-1

In *Hard V. U.S.* 84 S. Ct. 424 the court held :

We conclude that counsel's duty can not be discharged unless he has a transcript of the testimony and evidence presented by defendant and also the court's charge to the jury, as well as the testimony and evidence presented by prosecution."

Mancino was not just given less than a week to prepare the merit brief, but because of Doughten's failure to file on time, the Ohio Supreme Court's Rule VI, Section 7 was used which prevented any meaningful adversarial testing of the facts. In *Cronic*, the Court stated; that when circumstances prevented an attorney from being effective, Due Process Rights have been violated. This created a ruling that was not just incorrect, **fundamentally unfair** and erroneous, but, it was unreasonable because the AWANA Group was run by Baptist Evangelicals that are hostile to homosexuals. And, the premise of the State's argument was that desensitization to pedophilia occurs by exposing a victim to homosexuals at Church.

When the Prosecutor presented the "facts" of the case, somehow they were viewed as correct, despite the overwhelming evidence that the story did not match the original account or the factual findings of the Court of Appeals. Furthermore, the facts which were the basis for the judgment of Court were totally false according to the official certified court docket. For instance, it was **fundamentally unfair** for this court to rule that the case was severed from another involving the twin brother of the alleged victim. The case that was severed was the case involving the two indictments regarding Ronnie Justice that were dismissed for good cause. Enclosed is an Affidavit from Michael Brown who was a supervisor of a Counseling Center that

Ronnie's mother took him to. He states; "Ronnie Justice told me that he made false allegations against Steve Crotts." "Mr. Crotts became a scapegoat so that Ronnie Justice could please his mother and get the attention and love he so craved." (See Exhibit B).

The facts regarding the photos of the allegedly "young boys" were used in a **fundamentally unfair** manner. The Picture taken of the "young boy" that was said to be risqué was in fact of a man named Clarence(Chris) Cole. At the time Petitioner was a professional photographer and took tens of thousand of portraits every year. A part of his home was his studio and thus a public place of business. The Petitioner took school pictures and never photographed anyone nude, including Clarence Cole who had on a pair of short underneath a tunic. The alleged victim was there only because their brother worked for the Petitioner and rented a room from the Petitioner. Only upon terminating the brother's employment and evicting him were allegations made against the Petitioner. In retrospect he recognizes that it was reckless for him to allow the older brother to rent a room and have his brothers spend the night. He deeply regrets the decision. But there is no mistake that the child exploited the fears of the jury and the police, and the child succeeded in his theft of the petty cash the Petitioner used to run his business by making up lies in order to get Petitioner out of the way after he had fired the older brother. After police received a search warrant they could not find the money and the older brothers clothes were packed to move out the morning the allegation were made. The Police found the statements regarding pornography on the computers to be false and the computers were returned. It was **fundamentally unfair** to use any allegation of pornography on the computer in light of the police investigation. Outrageous statements about being cut with a sword were proven false by the doctor's examination. Most important of all were the facts concerning the Church. These alleged "facts" were actual lies and perjuries.

Counsel furthermore did not provide the proper advise after they recognized they failed to raise the proper and issues of fact and law. As recently as April of 2010 the U.S. Supreme Court has ruled that the Sixth Amendment guarantee of effective counsel includes advise given to their client on how to proceed. *Jose Padilla v. Kentucky*, 2010 WL 1222274. In the case at bar, after the information was not presented properly and the Petitioner suggested a civil proceeding in order to correct the mistakes of fact, Mancino, failed to inform Petitioner that a State Habeas Corpus could correct these terrible misconceptions regarding AWANA. Mancino incorrectly advised him that if he would give him an additional \$5,000, the Federal Courts would correct the misstatements of fact. But when the Federal Court heard the issue they stated the issue was not presented in State Court, so it was not exhausted. The Petitioner asserts and has proven by the evidence dehors that the allegations are unfounded in both fact and law. AWANA-Church is not a homosexual Church but a Fundamentalist Baptist Conservative Anti-Homosexual Church. 18 U.S.C.A. 249, as well as the Ohio and United States Constitution, and Evidence Rules 610 respectively, forbids the association with a church to be used to mislead any jury and/or any court.

And finally we ask this court to consider the fraudulent statements made about the AWANA program. After hearing the truth, this Court can not allow false statements made in reckless disregard of whether they were false or not to stand. There is clear and convincing proof that these children were not being truthful. Actual malice would be proven if the State allows this erroneous ruling to stand, and if the State did not accept the fact these children were maliciously lying. See definition of malice; *New York Times Co. v. Sullivan, syllabus*. The conservative Baptist community would be outraged by this court's support of a lie about their church youth group in this way. This Court will lose the respect of all citizens who know that an

AWANA Program is not a gay church. Even within this Court's broad discretion, at the very least it must reverse its decision based on ineffective assistance of counsel, but the Petitioner asks this court to go further and set the precedent that the subject matter (a conservative Christian youth group called AWANA) is not allowed to be used to prove criminal intent and the Rules of Court must be followed regarding bringing a case to trial within the statutory guidelines, thus protecting a citizen's substantive rights under the constitution. As a consequent, the **judgment must be void**. (See Exhibit G). The Petitioner must be released.

VII. An Evidentiary Hearing is required by *Townsend v. Sain*.

In order to clarify any questions the Court may have, Petitioner has retained Keith Yeazel to represent him if an evidentiary hearing would be helpful. This Court, should determine whether an evidentiary hearing is required as set forth by the principals of *Townsend v. Sain*, 372 U.S. 293 (1963), modified by *Kenney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Singh v. Woodford*, 2005 U.S. Dist LEXIS 4126, *24 (D.Cal. 2005); *Edwards v. Murphy*, 96 F.Supp.2d 31, 49 (D.Mass 2000).

In *Townsend*, the court ruled that “habeas corpus” must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a State court..... In the case at hand:

1. the merits of the factual dispute (church) were not resolved in the State hearing.
2. The State factual determinations were not fairly supported by the record as a whole.
3. the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing.
4. there was a substantial allegation of newly discovered evidence.
 1. The material facts were not adequately developed at any State Court hearing; or
 2. for any reason it appears that the State trier of facts did not afford the habeas applicant a full and fair hearing.

Material fact, i.e. those facts essential to a fair, rounded consideration of a petitioner's claim, have not been adequately developed where the Petitioner alleges undeveloped evidence

sufficient to call into question the 'reliability' of the court's determination of the petitioner's claims. *Street v. Lynaugh*, 812 F.2d 950 958 (5th Cir. 1987). Even if the Ohio Supreme Court holds that an evidentiary hearing is not mandatory, it should still grant an evidentiary hearing within its broad discretionary power. The United States Supreme Court noted that "the too limited use of such hearings would allow many grave constitutional errors to go forever uncorrected." *Townsend v. Sain*, 372 U.S. 293, 319 (1963).

VII. CONCLUSION AND PRAYER FOR RELIEF

Every slanderous allegation launched against the Petitioner was proven false by the police investigation; otherwise, the charges would never have been dismissed. Petitioner is innocent of the heinous crimes alleged against him, and convicted illegally through false statements made about the AWANA-Church Youth Group, and the violation of Court Rules that revoked substantive rights (Constitutional Rights) due to ineffective assistance of counsel.

The false statements made by the victim and the twin regarding the church did not "leave the mind open to the fact these children were not being truthful." It was done deliberately in order to create a strong and deep impression which closed the mind of both the jury and this Honorable Court.

It was clear that the Ohio Supreme Court's opinion about the Church was a fixed, substantial, deliberate and settled impression regarding a false hypothesis and a lie, and it closed the court's mind to the truth which the Court of Appeals made clear by stating "The Prosecution mischaracterized the facts regarding the AWANA group." It has prevented the court from exercising justice by blinding the court to a concrete situation and its demands. Historically, the court have always ruled that "[e]very appeal by the trial court to the jury's passions or prejudices should be promptly rebuked and reviewing court must take care that wrong is not done in that

was." *Reynolds v. U.S.*, 98 U.S. 145. And in *Armistead v. Com.*, 1841 WL 2323, the Court ruled even "an opinion founded on rumor was a hypothesis and ground for reversal."

This habeas petition represents Petitioner's last attempt to correct the record and vindicate himself by correcting the erroneous precedent this court's ruling set. Conservative Christians who take their children to this AWANA Program do not want anyone to think that by taking a child to an AWANA-Church youth group, they would be criminally liable. Citizens will lose confidence in this court and in the entire justice system if citizens are found guilty and punished for taking children to what police officers say is a "legitimate Christian youth group" **at any church**. The stench of the cumulative evidence of injustice and fundamental unfairness demand this court to take immediate action, granting Petitioner an order to compel his immediate release.