

ORIGINAL

In the  
Supreme Court of Ohio

State of Ohio ex rel. REGINALD GIBSON,	:	S. Ct. Case No. 15-1381
	:	
Petitioner-Appellant,	:	
	:	On Appeal from the
v.	:	Ashtabula County Court of Appeals,
	:	Eleventh Appellate District
	:	
BRIGHAM SLOAN, Warden	:	C.A. Case No. 2014-CA-73
	:	
Respondent-Appellee.	:	

---

**MERIT BRIEF OF RESPONDENT-APPELLEE**

---

MICHAEL DEWINE  
Attorney General of Ohio

REGINALD GIBSON, #643-525  
Lake Erie Correctional Institution  
501 Thompson Road  
P.O. Box 8000  
Conneaut, Ohio 44030

JONATHAN R. KHOURI (0090733)  
Assistant Attorney General  
Criminal Justice Section  
150 E. Gay Street, 16th Floor  
Columbus, Ohio 43215  
(614) 644-7233  
(855) 542-2139 fax  
Jonathan.khour@ohioattorneygeneral.gov  
*Counsel for Respondent-Appellee*

*Pro se*

<b>FILED</b>
OCT 21 2015
CLERK OF COURT SUPREME COURT OF OHIO

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
STATEMENT OF CASE AND FACTS .....	1
LAW AND ARGUMENT .....	3
Appellee’s Proposition of Law No. 1:.....	5
<i>The appellate court’s dismissal of Gibson’s petition should be affirmed because Gibson failed to raise claims that are cognizable in habeas corpus.</i> .....	5
A. Gibson’s claims against the trial judge and the court are not cognizable in habeas corpus and otherwise meritless.....	6
B. Gibson’s ineffective assistance of counsel claims are not cognizable in habeas corpus and otherwise meritless.....	9
C. Gibson’s claims against the prosecution are not cognizable in habeas corpus and otherwise meritless.....	10
Appellee’s Proposition of Law No. 2:.....	11
<i>The extraordinary remedy of habeas is not available in light of the existence of alternative remedies, including direct review.</i> .....	11
Appellee’s Proposition of Law No. 3:.....	12
<i>Gibson is not entitled to immediate release because his sentence has not expired.</i> .....	12
CONCLUSION .....	13
CERTIFICATE OF SERVICE .....	13

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Adams v. Humphreys</i> , 27 Ohio St.3d 43, 500 N.E.2d 1373 (1986) .....	11
<i>Beard v. Williams Cty. Dept. of Social Services</i> , 12 Ohio St.3d 40, 465 N.E.2d 397 (1984) .....	11
<i>Bellman v. Jago</i> , 38 Ohio St.3d 55, 526 N.E.2d 308 (1988) .....	1, 4, 5
<i>Boszik v. Hudson</i> , 110 Ohio St.3d 245, 2006-Ohio-4356, 852 N.E.2d 1200 .....	9
<i>Brewer v. Dahlberg</i> , 942 F.2d 328 (6th Cir. 1991).....	4
<i>Caudill v. Brigano</i> , 100 Ohio St.3d 37, 2003-Ohio-4777, 795 N.E.2d 674 .....	6
<i>State ex rel. Collins v. Leonard</i> , 80 Ohio St.3d 477, 1997-Ohio-282, 687 N.E.2d 443 .....	7
<i>State ex rel. Earl v. Mitchell</i> , 87 Ohio St.3d 259, 1999-Ohio-54, 719 N.E.2d 545 .....	7
<i>Ellis v. McMacken</i> , 65 Ohio St.3d 161, 602 N.E.2d 611 (1992) .....	1, 5, 6, 9
<i>Frazier v. Stickrath</i> 42 Ohio App. 3d 114, 536 N.E.2d 1193 (1988).....	12
<i>Halleck v. Koloski</i> 4 Ohio St.2d 76, 212 N.E.2d 601 (1965) .....	4
<i>State ex rel. Harsh v. Sheets</i> , 132 Ohio St.3d 198, 2012-Ohio-2368, 970 N.E.2d 926 .....	7
<i>Heddleston v. Mack</i> , 84 Ohio St.3d 213, 1998-Ohio-320, 702 N.E.2d 1198 .....	1, 12
<i>Hoff v. Wilson</i> , 27 Ohio St.3d 22, 500 N.E.2d 1366 (1986) .....	12

<i>State ex rel. Jackson v. McFaul</i> , 73 Ohio St.3d 185, 1995-Ohio-228, 652 N.E.2d 746 .....	3, 11
<i>Jenkins v. Billy</i> , 43 Ohio St.3d 84, 538 N.E.2d 1045 (1989) .....	8
<i>Johnson v. Bobby</i> , 103 Ohio St.3d 96, 2004-Ohio-4438, 814 N.E.2d 61 .....	9
<i>Keith v. Bobby</i> , 117 Ohio St.3d 470, 2008-Ohio-1443, 884 N.E.2d 1067 (2008).....	10
<i>Leroy v. Marshall</i> , 757 F.2d 94 (6th Cir.), cert. denied, 474 U.S. 831 (1985).....	8
<i>Luchene v. Wagner</i> , 12 Ohio St.3d 37, 465 N.E.2d 395 (1984) .....	11
<i>Luna v. Russell</i> , 70 Ohio St.3d 561, 1994-Ohio-264, 639 N.E.2d 1168 .....	11
<i>Lynch v. Wilson</i> , 114 Ohio St.3d 118, 2007-Ohio-3254, 868 N.E.2d 982 .....	7
<i>State ex rel. Massie v. Rogers</i> , 77 Ohio St.3d 449, 1997-Ohio-258, 674 N.E.2d 1383 .....	10, 11
<i>Morgan v. Ohio Adult Parole Auth.</i> , 68 Ohio St. 3d 344, 1994-Ohio-380, 626 N.E.2d 939 .....	12
<i>Pratts v. Hurley</i> , 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992 .....	6, 7
<i>State ex rel. Rash v. Jackson</i> , 102 Ohio St.3d 145, 2004-Ohio-2053, 807 N.E.2d 344 .....	11
<i>Smith v. Smith</i> , 123 Ohio St.3d 145, 2009-Ohio-4691, 914 N.E.2d 1036 .....	7
<i>Stahl v. Shoemaker</i> , 50 Ohio St. 2d 351, 364 N.E.2d 286 (1977) .....	4, 5, 10
<i>State v. Cole</i> , 2 Ohio St.3d 112, 443 N.E.2d 169 (1982) .....	9
<i>State v. Gibson</i> , 11th Dist. No. 2014-A-0073, 2015-Ohio-3088.....	2, 3, 11

<i>State v. Gibson</i> , 140 Ohio St.3d 1418, 2014-Ohio-3785.....	2
<i>State v. Jenkins</i> , 15 Ohio St.3d 164, 473 N.E.2d 264 (1984) .....	7
<i>State v. Phillips</i> , 27 Ohio St.2d 294, 272 N.E.2d 347 (1971) .....	8, 9
<i>State v. Sanders</i> , 92 Ohio St.3d 245, 2001-Ohio-189, 750 N.E.2d 90 .....	9
<i>State v. Williams</i> , 51 Ohio St.2d 112, 364 N.E.2d 1364 (1977), <i>vacated on other grounds</i> , 438 U.S. 911 (1978).....	8
<i>Thomas v. Huffman</i> , 84 Ohio St.3d 266, 1998-Ohio-540, 703 N.E.2d 315 .....	6, 10
<i>Tucker v. Collins</i> , 64 Ohio St.3d 77, 591 N.E.2d 1241 (1992) .....	9
<i>Walker v. Maxwell</i> 1 Ohio St.2d 136, 205 N.E.2d 394 (1965) .....	1
<i>Wells v. Hudson</i> , 113 Ohio St.3d 308, 2007-Ohio-1955, 865 N.E.2d 46 .....	7
<i>Wilson v. Rogers</i> , 68 Ohio St.3d 130, 1993-Ohio-136, 623 N.E.2d 1210 .....	10
<b>Statutes</b>	
R.C. §2725.01 .....	2, 4
R.C. §2725.05 .....	4
R.C. 2945 .....	7
R.C. 2953.21 through 2953.23 .....	5

**Other Authorities**

App.R. 26(B)..... 2, 3  
Crim.R. 46(A)(2)..... 8  
Crim.R. 46(E)..... 8  
Ohio Const. art. IV, § 2(B)(2)..... 8

## INTRODUCTION

The decision of the appellate court dismissing Appellant Reginald Gibson's petition for writ of habeas corpus was correct and should be affirmed. The petition's claims are duplicative, unsupported and not cognizable for habeas relief.

Gibson claims his incarceration is unlawful for multiple violations of his constitutional rights committed by the trial judge, his counsel, and the prosecution. The alleged violations are related to his waiver of counsel, as well as various aspects of his proceedings, including the prosecution's alleged failure to turn over evidence and his counsel's perceived errors leading up to trial (when Gibson decided to proceed *pro se*). Gibson does not challenge the jurisdiction of the sentencing court and fails to raise any claims appropriate for habeas review.

Significantly, the extraordinary remedy of habeas corpus may not be used as a substitute for other forms of action, such as direct appeal, post-conviction relief or mandamus. *Ellis v. McMacken*, 65 Ohio St.3d 161 (1992); *Walker v. Maxwell* 1 Ohio St.2d 136 (1965). Constitutional issues of right to counsel, prosecutorial misconduct, denial of due process, and effective assistance of counsel are properly raised by appeal or postconviction relief, not by habeas corpus. *Bellman v. Jago*, 38 Ohio St.3d 55, 526 N.E.2d 308 (1988). Moreover, Gibson's 2013 sentence of eight (8) years has not expired; he is not entitled to release. *Heddleston v. Mack*, 84 Ohio St.3d 213, 214, 1998-Ohio-320. As such, the Eleventh District Court of Appeals decision dismissing the petition must be affirmed.

## STATEMENT OF THE CASE & FACTS

Appellant Reginald Gibson is inmate #624-776 at the Lake Erie Correctional Institution in Conneaut, Ohio. Brigham Sloan, as the Warden of that Institution, is the custodian of Gibson and is the correct Respondent to this action. Gibson is currently serving a sentence of eight (8)

years as a result of his 2013 convictions of felonious assault and abduction in the Stark County Court of Common Pleas, which was affirmed in the Fifth District Court of Appeals. *State v. Gibson*, 5th Dist. Stark No. 2013CA00175, 2014-Ohio-1169, ¶¶1, 12, 14. The Supreme Court of Ohio declined a discretionary appeal. *State v. Gibson*, 11th Dist. No. 2014-A-0073, 2015-Ohio-3088, ¶ 2, citing *State v. Gibson*, 140 Ohio St.3d 1418, 2014-Ohio-3785.

In February 2014, Gibson petitioned the trial court for post-conviction relief, which the court denied on the basis that all claims were barred by *res judicata*, since they could have been raised on direct appeal. *State v. Gibson*, 5th Dist. Stark No. 2015CA00039, 2015-Ohio-2055, ¶ 6. Gibson's application to the Fifth District to reopen his appeal pursuant to App.R. 26(B) was denied. *Id.* at ¶ 7. In June 2014, Gibson filed a second petition for post-conviction relief with the Fifth District, to which the state responded. *Id.* at ¶ 8. The Fifth District dismissed for lack of jurisdiction; and the trial court also dismissed the petition, finding that Gibson failed to meet the prerequisites for filing a successive petition for post-conviction relief, and that his claims were barred by *res judicata*. *Id.* Gibson appealed and the Fifth District affirmed the trial court's dismissal. *Id.* at ¶ 45.

On December 2, 2014, Gibson filed the R.C. §2725.01 petition for a writ of habeas corpus that underlies this appeal in the Eleventh District Court of Appeals. Gibson presented nineteen (19) duplicative grounds that contend he is illegally confined. Gibson made the following claims against the trial judge, trial court, his counsel, and the prosecution: (1) the trial judge improperly increased Gibson's bail without an adequate hearing, "functionally denied" Gibson counsel by requiring him to choose between his pretrial lawyer or appearing *pro se* and failed to ensure Gibson's waiver of counsel and assertion of right to proceed *pro se* was knowing, intelligent, and voluntary; (2) the trial court allegedly lacked jurisdiction when the

verdict forms failed to include the charging statute and when the court failed to excuse a juror; (3) counsel was ineffective for failing to interview certain witnesses, file a notice of alibi defense and motion to suppress, preserve the record, obtain Gibson's toxicology report, and challenge certain physical evidence from the prosecution; (4) the prosecution relied on deceptive photographs, and withheld documents and information that could have impeached the state's witnesses. Gibson asserts that these cumulative errors violated his constitutional rights to counsel, due process, equal protection, and fair trial. Respondent was never served with the petition, or a summons.

On March 26, 2015, Gibson moved for judgment on the pleadings. Upon review, the Eleventh District Court of Appeals *sua sponte* dismissed his petition and found his claims were substantially the same as those raised in his second petition for post-conviction relief. *State v. Gibson*, 11th Dist. No. 2014-A-0073, 2015-Ohio-3088, ¶ 5, citing *State v. Gibson*, 5th Dist. Stark No. 2015CA00039, 2015-Ohio-2055. Moreover, the appellate court found that all of Gibson's claims could have been raised on direct appeal, or by way of application pursuant to App.R. 26(B). *Id.* Thus, Gibson failed to establish that he had no adequate remedy at law. Finally, the appellate court agreed that his claims were barred by *res judicata*. *Id.*, citing *State v. Gibson*, 5th Dist. Stark No. 2015CA00039, 2015-Ohio-2055, ¶ 8. The case is before this Court pursuant to Gibson's appeal from the Eleventh District Court of Appeals August 3, 2015 judgment dismissing the petition in *State ex rel. Gibson v. Sloan*, 2015-Ohio-3088.

### **LAW & ARGUMENT**

A writ of habeas corpus is an extraordinary remedy and is appropriate only when the petitioner is entitled to immediate release from confinement. *See State ex rel. Jackson v. McFaul*, 73 Ohio St.3d 185, 188, 652 N.E.2d 746 (1995). The burden of proof is on the

Petitioner to show that he is illegally detained and, therefore, entitled to immediate release. *See Halleck v. Koloski* 4 Ohio St.2d 76, 77, 212 N.E.2d 601 (1965). Respondent submits Gibson has not shown that he is entitled to release and the appellate court's dismissal of his petition must be affirmed.

Ohio Revised Code Section 2725.01 sets forth who is entitled to a writ of habeas corpus:

Whoever is unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint, or deprivation.

However, under Ohio Revised Code Section 2725.05, a writ of habeas corpus may *not* issue when:

If it appears that a person in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ of habeas corpus shall not be allowed. 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. Thus, habeas corpus normally may be used only to challenge the jurisdiction of the sentencing court.

*Stahl v. Shoemaker*, 50 Ohio St. 2d 351, 364 N.E.2d 286 (1977)(holding that when a petitioner does not attack the jurisdiction of the court, habeas corpus does not lie); *See Brewer v. Dahlberg*, 942 F.2d 328 (6th Cir. 1991) (holding that a writ of habeas corpus will not be allowed in Ohio unless a petitioner alleges that he is being restrained by a court who lacked jurisdiction over him); *See Bellman v. Jago*, 38 Ohio St.3d 55, 526 N.E.2d 308 (1988) (holding that constitutional issues of right to counsel, prosecutorial misconduct, denial of due process, and effective assistance of counsel were properly raised by appeal or through postconviction relief proceedings, not by habeas corpus)

**Appellee's Proposition of Law No. 1:**

*The appellate court's dismissal of Gibson's petition should be affirmed because Gibson failed to raise claims that are cognizable in habeas corpus.*

First and foremost, Gibson is not challenging the jurisdiction of the sentencing court, and when the appellant does not attack the jurisdiction of the court, habeas corpus does not lie. *Stahl v. Shoemaker*, 50 Ohio St.2d 351, 364 N.E.2d 286 (1977). Moreover, Ohio jurisprudence definitively states that nonjurisdictional issues pertaining to evidence either used at trial, or not used at trial, or allegedly fraudulently used at trial were required to be raised by appeal, not by habeas corpus. *Ellis v. McMackin*, 65 Ohio St.3d 161, 162, 602 N.E.2d 611 (1992). Nonjurisdictional claims of ineffectiveness of counsel must also be raised by appeal, rather than habeas corpus. *Id.* In Gibson's petition, he asserts that the trial judge did not appropriately handle his waiver of counsel and decision to proceed *pro se*, allegedly failing to apprise Gibson of the risks. Further, Gibson implicates both the prosecution and the court for using and accepting allegedly deceptive evidence during the case. Finally, despite deciding to proceed *pro se*, Gibson claims that counsel was ineffective for failing to obtain certain evidence, not performing thorough pretrial investigation, and failing to exploit discrepancies in the prosecution's evidence. Habeas corpus is not the proper remedy for any of Gibson's claims.

This Court has recognized that “[h]abeas corpus ‘is not and never was a postconviction remedy for the review of errors or irregularities of an accused’s conviction or for a retrial of the guilt or innocence of an accused.’” *Bellman v. Jago*, 38 Ohio St. 3d 55, 56, 526 N.E.2d 308 (1988) citing *Walker v. Maxwell*, 1 Ohio St. 2d 136, 137, 205 N.E.2d 394 (1965). Specifically, constitutional issues raising right to counsel, prosecutorial misconduct, denial of due process, and effective assistance of counsel are appropriately raised by appeal or through post-conviction relief proceedings under R.C. 2953.21 through 2953.23, but not by petition for habeas corpus. *Id.*

at 55. Further, a prisoner's claims that his conviction and sentence were erroneous because of ineffective assistance of counsel, improper argument by the prosecution, and a violation of his right to equal protection are not cognizable in habeas corpus. *Thomas v. Huffman*, 84 Ohio St.3d 266, 267, 1998-Ohio-540, 703 N.E.2d 315.

**A. Gibson's claims against the trial judge and the court are not cognizable in habeas corpus and otherwise meritless.**

Significantly, habeas corpus is not the proper remedy for reviewing errors by a court that properly had subject-matter jurisdiction, *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11, citing *Blackburn v. Jago*, 39 Ohio St.3d 139 (1988), and Gibson did not challenge the trial court's jurisdiction. Specifically, Gibson asserted that the trial judge violated his constitutional right to representation by accepting his waiver to proceed *pro se* and by allowing Gibson to choose between representing himself or moving forward with the lawyer that had represented him leading up to trial. This claim is not proper in habeas, but is also meritless. The trial court engaged Gibson in a lengthy colloquy discussing his reasons for representing himself and explaining the implications of doing so. *State v. Gibson*, 5th Dist. Stark No. 2013CA00175, 2014-Ohio-1169, ¶13. The trial court also appointed standby counsel. *Id.* Following a hearing on his second attorney's motion to withdraw and appellant's decision to proceed with trial *pro se*, Gibson knowingly, intelligently, and voluntarily waived his right to counsel on July 23, 2013, one week before trial. *Id.*

Gibson also contends that the evidence was insufficient to convict him – such a claim is not cognizable in habeas corpus. This Court has held that habeas corpus will not issue to raise insufficiency of evidence claims, *Caudill v. Brigano*, 100 Ohio St.3d 37, 2003-Ohio-4777, 795 N.E.2d 674, which should have been raised in direct appeal. *Ellis*, 65 Ohio St.3d at 162 (1992). Habeas corpus is not available to challenge the sufficiency of evidence for a conviction, even if

direct appeal or postconviction relief is no longer available. *Lynch v. Wilson*, 114 Ohio St.3d 118, 2007-Ohio-3254, 868 N.E.2d 982, ¶ 5.

Additionally, Gibson alleges multiple violations of R.C. 2945, stating that the trial court failed to comply with statutory requirements and committed structural error. It is well-settled that alleged violations of R.C. 2945 are not the proper subject for habeas corpus relief and may be remedied only in direct appeal from a criminal conviction. *State ex rel. Collins v. Leonard*, 80 Ohio St.3d 477, 478, 1997-Ohio-282, 687 N.E.2d 443; *Pratts v. Hurley*, 102 Ohio St.3d 81, 88, 2004-Ohio-1980, 806 N.E.2d 992; *State ex rel. Earl v. Mitchell*, 87 Ohio St.3d 259, 1999-Ohio-54, 719 N.E.2d 545.

Gibson's claim that the jury verdict forms did not list essential elements of the criminal offense is not cognizable in habeas corpus. *State ex rel. Harsh v. Sheets*, 132 Ohio St.3d 198, 2012-Ohio-2368, 970 N.E.2d 926, ¶ 3; *Wells v. Hudson*, 113 Ohio St.3d 308, 2007-Ohio-1955, 865 N.E.2d 46, ¶ 8. *See Smith v. Smith*, 123 Ohio St.3d 145, 2009-Ohio-4691, 914 N.E.2d 1036, ¶ 1. He had an adequate remedy by way of appeal to raise this claim. *Id.* Gibson also asserts that the jury may have included a convicted felon, and he contends that the juror should have been questioned further. Generally, the scope of examination of prospective jurors is within the discretion of the trial court and the judgment will only be reversed upon a showing that the trial court abused its discretion in restricting the scope of voir dire. *State v. Jenkins*, 15 Ohio St.3d 164, 186, 473 N.E.2d 264 (1984), citing *Pavilonis v. Valentine*, 120 Ohio St. 154, 157, 165 N.E. 730 (1929). Gibson has not even attempted to allege how the inclusion of this juror resulted in any abuse of discretion or reversible error by the court.

Gibson contends that the trial court set bail unreasonably high in violation of his due process rights. Despite Gibson's attempt to use his petition and merit brief to re-argue his reasons

for a lower bail, his claim is without merit. Gibson had been charged with a violent crime that warranted a high bail, regardless of other factors. Crim.R. 46(A)(2) permits a court to impose a bail bond secured by the deposit of ten percent of the amount of the bond in cash, as the court did in Gibson's case. Also, a court, at any time, may order additional or different types, amounts, or conditions of bail. Crim.R. 46(E). Moreover, the amount of bail is largely within the sound discretion of the court. *Jenkins v. Billy*, 43 Ohio St.3d 84, 538 N.E.2d 1045 (1989), citing *Bland v. Holden*, 21 Ohio St.2d 238, 239, 257 N.E.2d 397 (1970). Gibson has failed to allege the factual or legal predicate necessary to prove that the trial court abused its discretion in setting bail.

Finally, Gibson's merit brief to this Court raises the following two (2) propositions of law for the first time, which may not be considered:

**PROPOSITION OF LAW NO.6: Whether the trial court dismissal of the appellant's Postconviction Relief Petition without issuing its findings of facts and conclusions of law as mandated by §2953.21(C), was an abuse of discretion and violates the Equal Protection Clause and due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution, thereby depriving him of his protected liberty interest to appeal the claims of denial of his federal rights.**

**PROPOSITION OF LAW NO.7: Whether a bias judge, as such in appellant's case, is structural error? Does it deprive the trial court of jurisdiction? Does it violate the Equal Protection and Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution?**

The Ohio Supreme Court lacks jurisdiction to consider constitutional issues not raised or considered in the case below. *See* Ohio Const. art. IV, § 2(B)(2); *Leroy v. Marshall*, 757 F.2d 94, 97, 99-100 (6th Cir.), *cert. denied*, 474 U.S. 831 (1985); *State v. Williams*, 51 Ohio St.2d 112, 364 N.E.2d 1364, 1367 (1977) (and cases cited therein), *vacated on other grounds*, 438 U.S. 911 (1978); *State v. Phillips*, 27 Ohio St.2d 294, 272 N.E.2d 347, 352 (1971). It is an established,

long-standing rule in Ohio that a criminal constitutional question cannot be raised in the Supreme Court unless it was presented and argued in the court below. *State v. Phillips*, 27 Ohio St.2d 294, 272 N.E.2d 347 (1971). Where an appeal is taken to the Ohio Supreme Court, the Court will not consider or determine claimed errors which were not raised and preserved in the court of appeals. *Id.*, citing *State ex rel. Babcock v. Perkins*, 165 Ohio St. 185, 134 N.E.2d 839 (1956); see also *State v. Sanders*, 92 Ohio St.3d 245, 2001-Ohio-189, 750 N.E.2d 90; *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982). Gibson's sixth and seventh propositions of law against the trial judge and court were not previously raised and cannot be considered here on appeal.

**B. Gibson's ineffective assistance of counsel claims are not cognizable in habeas corpus and otherwise meritless.**

Claims involving ineffective assistance of counsel or the alleged denial of the right to counsel are not cognizable in habeas corpus. *Boszik v. Hudson*, 110 Ohio St.3d 245, 246, 2006-Ohio-4356; See, e.g., *Johnson v. Bobby*, 103 Ohio St.3d 96, 2004-Ohio-4438, 814 N.E.2d 61 ¶5. In fact, this Court stated in *Tucker v. Collins*, 64 Ohio St.3d 77, 591 N.E.2d 1241 (1992), "even if appellant's claim of invalid waiver of counsel at trial were sustained, it would not be grounds for issuance of a writ of habeas corpus because the error did not deprive the trial court of jurisdiction over his case." Nonjurisdictional claims of ineffectiveness of counsel must be raised by appeal, rather than habeas corpus. *Ellis v. McMackin*, 65 Ohio St.3d 161, 162, 602 N.E.2d 611 (1992) citing *Rodriguez v. Sacks*, 173 Ohio St. 456, 457, 184 N.E.2d 93 (1962). Since habeas corpus cannot substitute for a direct appeal, *Id.*, citing *Walker v. Maxwell* 1 Ohio St.2d 136, 205 N.E.2d 394 (1965), Gibson's ineffective assistance of counsel claims are not cognizable.

**C. Gibson's claims against the prosecution are not cognizable in habeas corpus and otherwise meritless.**

This Court has affirmed the dismissal of a petition involving claims of improper argument by the prosecuting attorney as not cognizable in habeas corpus, *Thomas v. Huffman*, 84 Ohio St.3d 266, 267, 1998-Ohio-540, 703 N.E.2d 315, citing *Mattox v. Sacks*, 172 Ohio St. 385, 176 N.E.2d 221 (1961), since petitioner had adequate legal remedies by an appeal or postconviction relief to raise his claimed errors. See *State ex rel. Massie v. Rogers*, 77 Ohio St.3d 449, 450, 674 N.E.2d 1383 (1997). The same is true in the instant case. In fact, Gibson only actually asserts one claim against the prosecution – failure to disclose evidence – while his other claims insist that the court accepted deceptive evidence from the prosecution that was highly prejudicial and potentially fraudulent. Gibson's petition also contends that certain evidence required additional explanation at trial. Again, these are not claims raised in habeas corpus.

Habeas corpus is unsuitable to review allegations of prosecutorial misconduct and credibility of evidence used at trial. *Wilson v. Rogers*, 68 Ohio St.3d 130, 131, 1993-Ohio-136, 623 N.E.2d 1210. Moreover, claims of perjured testimony and fraud upon the court are not cognizable in habeas corpus. *Keith v. Bobby*, 117 Ohio St.3d 470, 472, 2008-Ohio-1443, 884 N.E.2d 1067, citing *Williamson v. Williams*, 103 Ohio St.3d 25, 2004-Ohio-4111, 812 N.E.2d 1283 ¶ 3. Gibson does not provide a credible factual predicate to substantiate his broad, duplicative allegations, but even if he did, he has not challenged the jurisdiction of the sentencing court – the only basis for which a writ of habeas corpus could issue. *Stahl, supra*, at 354. Thus, Gibson's petition fails to state a viable habeas corpus claim and must be dismissed.

**Appellee's Proposition of Law No. 2:**

*The extraordinary remedy of habeas is not available in light of the existence of alternative remedies, including direct review.*

The extraordinary remedy of habeas corpus is not available when petitioner had other adequate legal remedies. *State ex rel. Jackson v. McFaul*, 73 Ohio St.3d 185, 1995-Ohio-228, 652 N.E.2d 746; *State ex rel. Massie v. Rogers*, 77 Ohio St.3d 449, 1997-Ohio-258, 674 N.E.2d 1383; *Luchene v. Wagner*, 12 Ohio St.3d 37, 39, 465 N.E.2d 395 (1984). In other words, habeas corpus may not be used as a substitute for other forms of action, such as direct appeal, post-conviction relief or mandamus. *Adams v. Humphreys*, 27 Ohio St.3d 43, 500 N.E.2d 1373 (1986); *Beard v. Williams Cty. Dept. of Social Services*, 12 Ohio St.3d 40, 465 N.E.2d 397 (1984). The existence of an alternative remedy is enough to remove a petitioner's allegations from habeas consideration, whether the alternative remedy opportunity still exists or not, as long as the petitioner *could have* taken advantage of it previously. *Luna v. Russell*, 70 Ohio St.3d 561, 562 (1994).

Gibson had other adequate legal remedies and availed himself of them. As the appellate court recognized in dismissing Gibson's petition, the claims raised are "substantially the same as those raised in his second petition for post-conviction relief." *State v. Gibson*, 11th Dist. No. 2014-A-0073, 2015-Ohio-3088, ¶ 5, citing *State v. Gibson*, 5th Dist. Stark No. 2015CA00039, 2015-Ohio-2055, ¶ 10-42. This Court has recognized that a petitioner may not use habeas corpus to gain successive appellate reviews of the same issue. *State ex rel. Rash v. Jackson*, 102 Ohio St.3d 145, 2004-Ohio-2053, ¶ 12, citing *Agee v. Russell*, 92 Ohio St.3d 540, 548, 751 N.E.2d 1043 (2001). In this case, Gibson unsuccessfully pursued virtually identical claims via direct appeal and an application to reopen, and is now improperly attempting to use habeas corpus to have these claims heard again. Gibson is not challenging the jurisdiction of the sentencing court

and thus, habeas corpus may only lie if there is no other adequate legal remedy. *Luna v. Russell*, 70 Ohio St.3d 561 (1994). Gibson had and pursued the legal remedies available to him; his petition for writ of habeas corpus must be dismissed.

**Appellee's Proposition of Law No. 3:**

*Gibson is not entitled to immediate release because his sentence has not expired.*

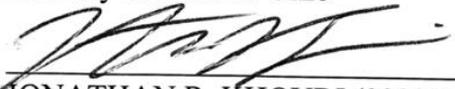
An inmate is not entitled to release after serving his minimum sentence, but an inmate may petition for a writ of habeas corpus only if his maximum sentence has expired and that individual is being held unlawfully. *Heddleston v. Mack*, 84 Ohio St. 3d 213, 214; 1998-Ohio-320; *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St. 3d 344, 346, 1994-Ohio-380; *Hoff v. Wilson*, 27 Ohio St.3d 22 (1986); *Frazier v. Stickrath* 42 Ohio App. 3d 114, 115-116 (1988). In Gibson's case, he received a lawful sentence of eight (8) years for his conviction of felonious assault and abduction. *State v. Gibson*, 5th Dist. Stark No. 2013CA00175, 2014-Ohio-1169, ¶12, 14. In that his maximum sentence will not expire until the year 2021, Gibson is not entitled to a writ of habeas corpus.

**CONCLUSION**

For the above reasons, the decision of the Court of Appeals dismissing Gibson's habeas petition should be affirmed.

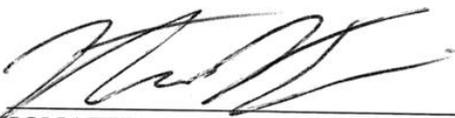
Respectfully submitted,

MICHAEL DEWINE  
Attorney General of Ohio

  
\_\_\_\_\_  
JONATHAN R. KHOURI (0090733)  
Assistant Attorney General  
Criminal Justice Section  
150 E. Gay Street, 16th Floor  
Columbus, Ohio 43215  
(614) 644-7233  
(855) 542-2139 fax  
Jonathan.khouri@ohioattorneygeneral.gov  
*Counsel for Respondent-Appellee*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee has been forwarded to Appellant Petitioner, Reginald Gibson, #643-525 at the Lake Erie Correctional Institution, 501 Thompson Road, P.O. Box 8000, Conneaut, Ohio, 43302 via U.S. mail, postage prepaid, this 21st day of October, 2015.

  
\_\_\_\_\_  
JONATHAN R. KHOURI (0090733)  
Assistant Attorney General