NO. 20-5169

IN THE SUPREME COURT OF THE UNITED STATES

RANDY A. THOMAS

Petitioner

-vs-

THE STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Ohio places the burden of proof and persuasion in a self defense case on the person asserting self defense. A person's state of mind is relevant in a self defense case. A life long history of developmental delay issues, very low IQ scores and Social Security disability records are relevant to the state of mind issue.

1. Is counsel ineffective under the Sixth and Fourteenth Amendments of the federal Constitution when no investigation is conducted pre-trial concerning the client's developmental delay issues, very low IQ scores and history of Social Security benefits and post conviction investigation reveals such relevant information as to the client's state of mind in a self defense case?

2. Is counsel ineffective under the Sixth and Fourteenth Amendments of the federal Constitution when one counsel does not know what the average IQ score is and lead counsel testifies it is between 70-80 and counsel does not consult a mental health expert when the affirmative defense of self defense is presented and the client testifies with a recent IQ score in the low 50's?

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OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at *State v. Thomas*, Slip Opinion No. 2020-Ohio-648.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that:

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

The Fourteenth Amendment to the United States Constitution provides that:

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

STATEMENT OF THE CASE

Randy Thomas is not on death row.

Because he is not, his intelligence quotient was not material to his case.

What Thomas is really asking this Court to do is what neither Ohio's Ninth District Court of Appeals nor Ohio's Supreme Court would do: find that the Summit County, Ohio, Common Pleas Court abused its discretion when it found that Thomas' trial counsel were not constitutionally ineffective when they did not put Thomas' intellectual deficits before a jury that could not acquit him or reduce his punishment on that basis.

It is not this Court's duty to second-guess trial courts. It is also not this Court's duty to change a State's law for a party who will not benefit from such an action.

It is especially not this Court's duty to second-guess a trial court or change the law for the benefit of a single party where that party has misrepresented the facts of his case and the law in his State in his bid to have this Court hear his case.

Yet this is the situation in Randy Thomas' case.

The basic facts are that after Thomas agreed to engage in a fistfight with Anthony Smith in April 2013, he fired a revolver three times, killing Smith. When Thomas went to trial for aggravated murder, his two defense attorneys – each with more than 10 years of experience at that time – presented expert testimony from former Akron Police Chief Nice in addition to other evidence to show that Smith was such a dangerous drug gang member that any person living in Thomas'

neighborhood, regardless of their intelligence quotient or IQ, would have been afraid that Smith would kill them, even if Smith were unarmed.

Both lawyers were aware that Thomas was of below-average intelligence — one of them had represented Thomas in previous cases — but believed that IQ was not relevant to whether anyone would perceive Smith as a threat; in addition, based on their experience, they feared that stressing Thomas' intellectual deficiencies could "turn off" or anger jurors, causing the case to "go the other way." So, they asked Thomas' grandmother to testify about his IQ in order to put a "human face" on Thomas' case, and so she testified that Thomas was "slow."

Thomas' arguments to the lower courts, and again to this Court, focused on a single aspect of one element of Ohio's self-defense defense – the defendant's state of mind – in order to attempt to demonstrate a single aspect of the test for ineffective assistance of counsel.

However, Thomas did not demonstrate prejudice to the Summit County Common Pleas Court, which rejected his postconviction claim that his counsel was ineffective *per se*. He did not demonstrate prejudice to the Ninth District Court of Appeals, which similarly rejected his argument that his counsel was ineffective. See *State v. Thomas*, No. 29112, 2019-Ohio-4247, 2019 WL 5212575 (Ohio Ct.App. Oct. 16, 2019) (finding neither deficient performance nor prejudice). The Ohio Supreme Court, in turn, declined jurisdiction in Thomas' case in *State v. Thomas*, 2020-Ohio-648, 140 N.E.3d 736 (Table), thereby finding that his arguments did not present matters of constitutional importance or of public or great general interest.

Thomas' Petition to this Court relies upon several misrepresentations and omissions of law and/or fact. The misrepresentations of law begin with Thomas' paragraph introducing his Questions Presented, when he begins with the sentence stating, "Ohio places the burden of proof and persuasion in a self defense case on the person asserting self defense." See Petition at p. 2. This is no longer true; Ohio's General Assembly amended Ohio Rev. Code 2901.05 in March 2019 to place the burden of negating self-defense on the State.

Next, Thomas has consistently misrepresented Ohio law by either implying or outright asserting that the defense of self-defense in Ohio relies entirely on the defendant's state of mind. He does so again to this Court. It is not true. In Ohio, a defendant's state of mind is but one component of one element of self-defense, and if (under current law) the State disproves any one of those elements, the defense fails. See, e.g., *State v. Williamson*, 490 N.E.2d 893 (Ohio 1986); *State v. Thomas*, 673 N.E.2d 1339 (Ohio 1997).

Thomas' statement that his trial counsel believed his intellectual deficiencies were "baloney" is patently false, as the Court of Appeals pointed out in a footnote in its opinion. See *Thomas*, 2019 WL 5212575. Rather, one of the attorneys testified that he feared that if the defense highlighted Thomas' intellectual deficits, the jury would think it was mere "baloney."

Thomas further misrepresents his trial counsel's testimony, falsely claiming (as he has falsely claimed to the lower courts) that his trial counsel did not know that the average intelligence quotient or IQ is 100. The reality is that during the

evidentiary hearing, nobody asked Thomas' trial counsel for the average IQ score; instead, Thomas asked trial counsel for the IQ score Ohio required for a person to be considered mentally retarded or to be intellectually disabled.

Thomas represents to this Court that he has an IQ measured at 53. However, Thomas neglects to tell this Court that his expert, Dr. Thomas Webb, testified that that result — obtained when Thomas was applying for Supplemental Security Income (SSI) benefits as an adult — was an invalid anomaly. Thomas' previous IQ test scores had fallen between 72 and 80. Dr. Webb further testified that if Thomas actually had an IQ as low as 53, he would not have been capable of passing Ohio's high school graduation tests – "You can't do that with a 53 IQ." Yet, Thomas did pass Ohio's graduation tests. Also, one of Thomas' trial counsel testified that if Thomas had an IQ as low as 53, he might have been too incompetent to stand trial.

Thomas also neglects to tell this Court that he was a willing participant in arranging the fistfight with Smith, a fact that is fatal to any claim of self-defense in Ohio, regardless of who bears the burden of proof. Thomas testified during the trial that he had accepted Smith's challenge to fight, that Thomas could have declined, that Thomas took part in arranging where the fight would take place, and that once Thomas and Smith settled on a location, Thomas drove his van to that spot.

Thomas also neglects to tell this Court that he shot Smith not just once, but three times. The State argued at trial that Thomas brought the revolver with him, while Thomas told the jury Smith drew a gun, and Thomas knocked it from Smith's hand. Thomas testified that he was about eight feet from Smith when he fired the

first shot, and another witness testified there was a pause between the first and second shots — time enough, under Ohio law, to have required Thomas to retreat from the situation. Instead, Thomas filed not only a second but a third shot, and Smith died after he suffered four gunshot wounds from three bullets. The fact that Thomas did not stop firing is fatal to a claim of self-defense in Ohio, regardless of who bears the burden of proof.

Finally, Thomas neglects to tell this Court what else was in his school and his juvenile court records. This information would have been a motherlode of cross-examination gold for the prosecution, had Thomas' trial counsel tried to use the records at trial. Thomas' trial counsel testified later they would never have wanted the jury to see the records, because they showed:

- That Thomas had a prior juvenile record involving gun possession;
- That Thomas had prior anger management problems for which he sought counseling;
- That Thomas' teachers had reported at various points in his schooling that he was disruptive and provoked other students, sometimes on a daily basis;
- That Thomas' caregivers and examiners reported at various points in his life that he blamed other people for his mistakes or behaviors, and could not get along with others;
- That Thomas' sister had reported that he could be verbally aggressive;
- That Thomas had been suspended more than once in high school for fighting; and

- That when he was a teenager, Thomas had been fired from a job due to his anger.

For example, Thomas' childhood SSI records indicate that when Thomas was eight years old and in the second grade, his grandmother reported that, "Sometimes Randy has a problem with bothering other children that is [sic] not messing with him." That year, Akron Public Schools' Child Study Department assessed Thomas' intelligence quotient or IQ at 80, with a confidence interval of anywhere from 76 to 86.

At a neurological evaluation that year, the examiner noted that Thomas acted before thinking, was easily angered, lost his temper easily, could not take teasing, was delighted when others failed or got into trouble, was stubborn, had an "I don't care" attitude, resisted being disciplined, and blamed others for his mistakes or behaviors. Later that year, Thomas' grandmother reported to evaluators that he could not get along with others and liked to push other children around.

In second grade, Thomas' teacher reported that he did not follow class rules, was disruptive, and had temper outbursts on a daily basis, and at least weekly was aggressive and fought or provoked his peers.

As part of an SSI evaluation when Thomas was 12 years old, his full-scale IQ was measured at 72 — and his sister reported that Thomas was not getting along with others, got into arguments and fights, and blamed others for the conflicts.

Five years later, when Thomas was 17 and in the 10th grade, he underwent

anger management counseling. His counseling records indicated he had been suspended once in the ninth grade and again in the 10th grade for fighting with a peer, and that he had been in juvenile detention twice that year. Thomas was then on juvenile probation for carrying a concealed weapon.

Four months after Thomas completed anger management treatment, Dr. Webb evaluated Thomas for the Juvenile Court's Probation Department. Dr. Webb noted that Thomas had considerable trouble controlling his anger, and that his mood sensitivity had caused him to imagine situations that did not exist. Dr. Webb did not assess Thomas' IQ or intellectual functioning in his report.

During Thomas' final year in school, his teacher reported that he was a "very bright [and] capable student, passed all of his OGTs [Ohio's graduation tests], [and he was] more advanced than peers and able to complete his assignments independently though he occasionally chooses not to."

These facts would have disastrously undermined Thomas' defense, and as the Court of Appeals noted, Thomas merely speculated that he could have excluded all of the damaging evidence in favor of admitting only the parts of the records that were favorable to him.

Therefore, even if this Court were inclined to address the topics Thomas raises in his Petition, Thomas' case is not an ideal vehicle through which to do so. Even if Thomas were to succeed before this Court, and his case were to be remanded back to Akron for a new trial, no amount of expert testimony about Thomas' intellectual deficits could allow a jury to acquit him of murder. Instead, just the fact

that he participated in creating the conflict between himself and Smith dooms his claim of self-defense under Ohio law.

ARGUMENT

This Court has repeatedly resisted invitations like Thomas' to create and enshrine bright-line standards for counsel's performance. Yet, in a nutshell, Thomas asks this Court to perform essentially the same function that Ohio's Ninth District Court of Appeals performed – which is to review the trial court's decision for an abuse of discretion – but to reach a different conclusion. That is not this Court's role.

I. Ineffective assistance of counsel

The Sixth Amendment guarantees several rights to a criminal defendant to ensure his right to a fair trial, and among them is the right to have the assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Because attorneys play such a necessary role in ensuring that a defendant's trial is fair, this Court has recognized that a defendant has not only a right to assistance, but to effective assistance by counsel. See *Strickland*, 466 U.S. at 686.

This Court has never tolerated mere second-guessing of a lawyer's performance by a disgruntled client, however. Instead, this Court has insisted that a defendant bear the burden to demonstrate two things: that his counsel's performance was deficient, meaning counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"[;] and then that counsel's performance prejudiced the defendant, meaning counsel's errors were so serious that they deprived the defendant of a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

To demonstrate Strickland's deficient performance prong, the defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The reasonableness of counsel's conduct must be judged as of the time it occurred, not in hindsight. See, e.g., *Maryland v. Kulbicki*, 136 S.Ct. 2, 4 (2015).

This Court has repeatedly refused to make bright-line rules dictating when counsel will be effective, starting with *Strickland*.

> The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. *** Prevailing norms of practice as reflective in American Bar Association standards and the like, *** are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-689.

Ohio follows the Strickland two-prong test when considering claims for postconviction relief, and Strickland's was the standard Ohio's courts applied in Thomas' case. See *State v. Gondor*, 860 N.E.3d 77 (Ohio 2006); *Thomas*, 2019-Ohio-4247. Thomas, however, asserted below and again here that his counsel's representation was per se ineffective under *United States v. Cronic*, 466 U.S. 648 (1984).

Cronic did not hold what Thomas believes it held. *Cronic* did not enunciate a different standard or overturn Strickland. In *Cronic*, the trial court appointed replacement counsel for a defendant in a $9.4 million check kiting scheme that had

taken the Government more than four years to investigate, and allowed the new lawyer only 25 days to prepare for trial. See *Cronic*, 466 U.S. at 649. The Tenth Circuit had found that these circumstances mandated an inference that counsel was unable to effectively represent Cronic. See *Cronic*, 466 U.S. at 658.

This Court disagreed, and remanded Cronic's case back to the Tenth Circuit. See *Cronic* at 666. In doing so, this Court noted that "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic* at 658.

The only time a defendant would be absolved of the obligation to demonstrate prejudice, this Court stated, would be in circumstances such as where the defendant is completely denied counsel at a critical stage of the proceedings, or where the circumstances make it highly unlikely that a competent lawyer could provide effective assistance, or where the trial court denied the defendant effective cross-examination. See *Cronic* at 659-660, citing *Davis v. Alaska*, 415 U.S. 308 (1974) (court barred cross-examination of certain prosecution witnesses). "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. See *Strickland*[.]" *Cronic*, 466 U.S. at 659, fn 26.

This case does not present a circumstance of that magnitude.

In addition, *Cronic* reinforces, rather than undermines, Ohio's requirement that a defendant overcome a strong presumption that the attorney's challenged

action might be considered to be a sound trial strategy under the circumstances. See *Cronic* at 658; see also *State v. Mohamad*, 88 N.E.3d 935 (Ohio 2017), ¶18. Simply because another lawyer may believe there was another, better strategy available does not mean counsel's representation was ineffective. See *Mohamad*, ¶19; see also *Strickland*, 466 U.S. at 689. Furthermore, courts are to assess an attorney's conduct from counsel's perspective at the time, not through the lens of hindsight. See *Strickland*, 466 U.S. at 689; *Burger v. Kemp*, 483 U.S. 776, 789 (1987).

Instead, this Court has presumed prejudice to a defendant only where impairments to the defendant's Sixth Amendment rights are easy to identify and prejudice is so likely that a case-by-case inquiry is not worth the cost, such as when counsel has been compromised or denied at a critical stage during trial or on appeal, or counsel completely fails to counter the prosecution's case. See *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. 648; *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (actual conflict of interest); *Garza v. Idaho*, 139 S.Ct. 738, 743-744 (2019).

In this case, Thomas had not made that showing to the trial court, to the Court of Appeals, or to the Ohio Supreme Court.

II. Self-Defense in Ohio

A. Elements of the defense

Self-defense is statutorily considered an affirmative defense in Ohio, but the common law considered it a justification for the defendant's admitted conduct, rather than a condition that negates an element of the offense. See *State v. Jones*,

No. C-170647, 2020-Ohio-281, 2020 WL 507637 (Ohio Ct.App. Jan. 31, 2020), ¶40.

An assailant acts in self-defense where 1) the defendant did not participate in or was not at fault in creating the violent situation or affray; 2) the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm, or that his only means of escape was the use of force; and 3) that the defendant did not violate a duty to retreat or avoid the danger. See *Thomas*, 673 N.E.2d at 1342, citing *State v. Williford*, 551 N.E.2d 1279, 1281 (Ohio 1990); *State v. Goff*, 942 N.E.2d 1075 (Ohio 2010), ¶36; Ohio Rev. Code 2901.05(B)(1) (shifting the burden of proof to the State).

These elements are cumulative; the absence of one will negate the defense. See, e.g. *State v. Williamson*, 490 N.E.2d 893, 896-897 (Ohio 1986).

1. Causing the affray

No jurisdiction permits a defendant to ambush a victim and claim that he acted in self-defense. See, e.g., *State v. Reed*, 200 So.3d 291, 304 (La. 2014); *Williamson v. State*, 422 P.3d 752, 760 (Okla. 2018); *People v. Sparks*, 73 N.E.3d 354, 355 (N.Y. 2017); *State ex rel. Kitchen v. Painter*, 700 S.E.2d 489, 498 (W.Va. 2010).

Instead, Ohio law has always held that a defendant who has participated in creating the violent incident has not acted in self-defense. See, e.g., *State v. Inman*, No. 03CA0099-M, 2004-Ohio-1420, 2004 WL 573850 (Ohio Ct.App. March 24, 2004), ¶12 (defendant began affray by grabbing victim's arm); *State v. Robinson*, No. 67363, 1995 WL 329004 (Ohio Ct.App. June 1, 1995), *4. Ohio's case law has not

indicated in any way that this element depends upon the defendant's state of mind; rather, the determination rests strictly with the objective facts of the case. See *Inman*, ¶¶12-13 (reciting facts of incident).

Even a defendant who has been assaulted by the victim does not have a self-defense claim where, once the victim ends the assault of the defendant, the defendant then uses deadly force against the victim. See *Sparks*, 73 N.E.3d at 355. In one case, for example, a vanload of belligerents drove to the defendant's home, where they engaged in a racially-motivated physical assault on the defendant in his front yard. When the victims returned to their van, the defendant returned to his house, retrieved a pistol, walked up to the van, and fired all of his bullets into the van — and then, after the driver lost consciousness, the defendant returned to his house, reloaded, came back outside, and fired another clip of ammunition into the van, wounding three occupants and killing two. See *State v. Hamad*, No. 2017-T-0108, 2019-Ohio-2664, 2019 WL 2746736 (Ohio Ct.App. June 28, 2019), *passim*.

2. Bona fide belief

This element of self-defense does not turn exclusively upon a defendant's subjective beliefs — in other words, the defendant's beliefs by themselves are not dispositive. Instead, it is well-established that the "bona fide belief" element is a combined subjective and objective test. See *Thomas*, 673 N.E.2d at 1345; *City of Parma v. Treanor*, 117 N.E.3d 970, 976 (Ohio Ct.App. 2018).

First, the jury must consider the defendant's situation objectively, "that is, whether, considering all of the defendant's particular characteristics, knowledge, or

lack of knowledge, circumstances, history, and conditions at the time of the attack, [he did not] reasonably believe[] [he] was in imminent danger." *Thomas,* 673 N.E.2d at 1345. Then, the jury must determine whether the defendant did not honestly believe he was in imminent danger. See *Thomas*, id.

For example, in a non-deadly force case, an Ohio court affirmed that a man who "got nervous," and therefore repeatedly punched a former high school classmate in his yard when the classmate approached him, did not have honest and reasonable grounds to believe that he had to assault his classmate in order to defend himself against the imminent use of unlawful force. See *State v. Gatt*, No. 10CA0108-M, 2011-Ohio-5221, 2011 WL 4789580 (Ohio Ct.App. Oct. 11, 2011), ¶11.

The question is not whether the use of deadly force would be reasonable to the particular defendant because of his particular mindset; as one Ohio court held, "that would make the question whether use of deadly force is reasonable a subjective analysis when it should be objective. A person who erroneously believes everyone he encounters who is left handed is going to kill him may have a subjective belief he must defend himself but because his belief is not reasonable he cannot avail himself of the self defense justification." *State v. Stargell*, 70 N.E.3d 1126, 1139 (Ohio Ct.App. 2016).

3. Duty to retreat

Ohio is not a "stand your ground" state. Rather, "[I]n most cases, 'a person may not kill in self-defense if he has available a reasonable means of retreat from the confrontation.'" *Thomas*, 673 N.E.2d at 1342, quoting *State v. Williford*, 551

N.E.2d 1279, 1281 (Ohio 1990).

The duty to retreat does not end once the shooting starts; a defendant who shot his alleged assailant not once, but twice, did not establish that he had no duty to retreat after he fired the first of the two shots. See *State v. Palmer*, 687 N.E.2d 685, 703 (Ohio 1997).

B. Burden of Proof

As noted earlier, Ohio has sometimes imposed the burden of persuasion upon the State and sometimes upon the defendant in the last century. See former Ohio Rev. Code 2901.05(A).

Regardless of who bore the burden of persuasion, Ohio has always considered the self-defense justification to exist only if all of its components are present, and has never permitted it to be presumed upon the failure of the State to disprove one or more of its components. See *State v. Melchior*, 381 N.E.2d 196 (Ohio 1978).

So, even when the State has borne the burden to prove the defendant did not act in self-defense, a showing by the State that the defendant participated in creating the affray, or did not have an objectively reasonable belief that he was in imminent danger of great bodily harm, or did not take advantage of some means to escape the danger, will satisfy the State's burden of persuasion.

III. Proof of Thomas' intellectual deficits would not have acquitted him

As noted above, Thomas has consistently focused only on a single element of self-defense in Ohio, and of that, only its subjective component.

Yet, regardless of who bore the burden of proof in this case, if Thomas had

introduced evidence of his intellectual deficits at trial, it would not have resulted in his acquittal — and it would not acquit him even if he were retried. At the time of his trial, however, Thomas bore the burden to demonstrate that he was not at fault in creating the affray with Smith; that he had a subjective and objectively bona fide belief that he was in imminent danger of death or great bodily harm, and that his only means of escape was through the use of deadly force; and that he did not violate any duty of retreat to avoid being killed by Smith. Two of these elements — the "not at fault" element and the "duty to retreat" element do not rely in any way upon the mindset of the defendant, and the "bona fide belief" element contains both an objective as well as a subjective component.

It was impossible for Thomas to have demonstrated the "not at fault" and the "duty to retreat" elements, regardless of whether his trial attorneys obtained and used every record showing Thomas' intellectual difficulties or hired an expert witness. Thomas participated in arranging the affray with Smith on a public street. He could have driven away, rather than driving to the site. Thomas testified that he disarmed Smith; at that point, when he was about eight feet from Smith, he could have walked away. Instead, he fired three times, striking Smith three times — and there was testimony in the trial record that there was a gap of time between the first and second shots, meaning that Thomas could have stopped shooting and walked away after the first shot. At each point, Thomas could have walked away, and did not. On this evidence, there was no reasonable probability that any jury could have acquitted Thomas of murder.

Furthermore, one of Thomas' persistent arguments has been that an expert witness could have explained to the jury that Thomas' lower-than-average IQ reduced his credibility, and caused him to misperceive situations in which he found himself. While this argument has not been squarely addressed below, it is improper and counterintuitive at the same time. It improperly assumes that any expert may testify for the purpose of bolstering or vouching for the truthfulness of a witness. It is counterintuitive because it tacitly admits that Thomas' IQ might cause his perceptions of events to be inherently unreasonable — thus negating any notion that his fear of Smith was *objectively reasonable.*

Neither of his attorneys' performance was deficient, as the trial court and the Court of Appeals correctly concluded. Both attorneys testified they were aware that Thomas was intellectually deficient to some degree. When their client was facing an aggravated murder charge, neither lawyer wanted to make Thomas' IQ a main point in his defense, because in their experience, such a strategy could backfire and generate animosity on the jurors' part toward Thomas, rather than understanding. Instead, their strategy was to have Thomas' grandmother "put a human face" on his case by testifying that Thomas was simply "slow." Instead, they took the extraordinary step of calling Akron's former Chief of Police as well as another gang expert to the stand, in an effort to focus the jury's visceral and retributive attention on how dangerous Smith was as a member of one of Akron's violent street gangs.

To a degree, that strategy worked. Thomas was on trial for *aggravated* murder under Ohio Rev. Code 2903.01(A), and if convicted, he would have been

sentenced to life in prison without any possibility of parole. Instead, the jury convicted Thomas of the lesser-included offense of murder with a firearm specification, for which he is serving a life term with the possibility of parole after 19 years.

Therefore, Thomas failed to demonstrate to the trial court or to the Court of Appeals that his counsel's performance was prejudicially deficient under *Strickland* — and there is no probability that if this Court were to order him to be retried, he would be acquitted. Even if Thomas has presented questions that merited certiorari, then, his case is not the appropriate vehicle through which to answer them.

CONCLUSION

For the above-stated reasons, the State of Ohio respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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