No. 21-6637

IN THE

SUPREME COURT OF THE UNITED STATES

KENAN IVERY — PETITIONER, *pro se*

vs.

STATE OF OHIO — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

OHIO COURT OF APPEALS, NINTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

QUESTIONS PRESENTED

FIRST QUESTION PRESENTED FOR REVIEW:

IS A PETITIONER DENIED DUE PROCESS AND EQUAL PROTECTION OF LAW WHEN THE STATE COURT OF APPEALS PROCEDURALLY DISMISSES HIS OHIO APP.R. 26(B) APPLICATION FOR REOPENING ON THE BASIS OF IT BEING A SECOND (OR SUCCESSIVE) APPLICATION FOR REOPENING, WHERE PETITIONER WAS PREVIOUSLY GRANTED AN APPLICATION FOR REOPENING OF THE SAME DIRECT APPEAL?

SECOND QUESTION PRESENTED FOR REVIEW:

IS A PETITIONER DENIED A FAIR TRIAL AND DUE PROCESS OF LAW WHEN A TRIAL COURT ERROUNEOUSLY INSTRUCTS THE JURY TO FIND PETITIONER GUILTY EVEN IF THE STATE FAILED TO PROVE EVERY ESSENTIAL ELEMENT OF THE CHARGED OFFENSES?

THIRD QUESTION PRESENTED FOR REVIEW:

IS A PETITIONER DENIED DUE PROCESS OF LAW WHERE HE RECEIVES INEFFECTIVE ASSISTANCE OF BOTH TRIAL AND APPELLATE COUNSEL, BASED UPON THE FAILURE OF TRIAL COUNSEL TO OBJECT TO AN ERRONEOUS JURY INSTRUCTION THAT DENIED HIM A FAIR TRIAL, AND THE FAILURE OF APPELLATE COUNSEL TO RAISE THE ISSUE ON DIRECT APPEAL?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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

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TABLE OF AUTHORITIES CITED

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[ ] For cases from **federal courts:**

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

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[ ] is unpublished.

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

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[ ] is unpublished.

[X] For cases from **state courts:**

The opinions of the highest state court to review the merits appears at Appendix A, Appendix C, and Appendix D to the petition and is

[X] reported at (*State v. Ivery,* Case No. 28551, 2018-Ohio-2177); *(State v. Ivery,* Case No. 28551, 2020-Ohio-3349)_____ or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished (*State v. Ivery*, App. Case No. 28551, decided January 28, 2021).

The opinion of the Ohio Supreme Court appears at Appendix B to the petition and is

[X] reported at *State v. Ivery,* Case No. 2021-0307, 2021-Ohio-1721; or,
[ ] has been designated for publication but is not yet reported; or,

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States court of appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.
[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____ and a copy of the order denying rehearing appears in Appendix _____

[ ] An extension of time to file the petition for writ of certiorari was Granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[X] For cases from **state courts:**

The date on which the highest state court decided my case was May 25, 2021.
A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____ and a copy of the order denying rehearing appears at Appendix ___.
[ ] An extension of time to file the petition for writ of certiorari was Granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved herein are Amendments V, VI, and XIV to the United States Constitution:

Amendment V:

"No person shall be deprived of life, liberty, or property, without the due process of law..."

Amendment VI:

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

Amendment XIV:

"...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

On November 16, 2014, the Petitioner, Kenan Ivery, was involved in an altercation at Papa Don's Pub in Akron, Ohio, which resulted in the shooting death of Justin Winebrenner, and the injuring of four other individuals. As a result, Ivery was indicted on the following counts: Count 1, aggravated murder under R.C. 2903.01(A) of Justin Winebrenner, unclassified felony, with a death penalty specification under R.C. 2929.04(A)(5), a peace officer specification under R.C. 2941.1412, and a firearm specification under R.C. 2941.145; Count 2, murder under R.C. 2903.02(A) of Justin Winebrenner, unclassified felony, with a peace officer specification under R.C. 2941.1412, and a firearm specification under R.C. 2941.145; Count 3, murder under R.C. 2903.02(B) of Justin Winebrenner, unclassified felony, with a peace officer specification under R.C. 2941.1412, and a firearm specification under R.C. 2941.145; Count 4, felonious assault under R.C. 2903.11(A)(2) of Justin Winebrenner, first degree felony, with a peace officer specification under R.C. 2941.1412, and a firearm specification under R.C. 2941.145; Count 5, attempted murder under R.C. 2903.02(A)/2923.02 of David Wokaty, first degree felony, with a firearm specification under R.C. 2941.145; Count 6, attempted murder under R.C. 2903.02(A)/2923.02 of Jennifer Imhoff, first degree felony, with a firearm specification under R.C. 2941.145; Count 7, attempted murder under R.C. 2903.02(A)/2923.02 of Michael Capes, first degree felony, with a firearm specification under R.C. 2941.145; Count 8, attempted murder under R.C. 2903.02(A)/2923.02 of Thomas Russell, first degree felony, with a firearm specification under R.C. 2941.145; Count 9, attempted

murder under R.C. 2903.02(A)/2923.02 of David Eisele, first degree felony, with a firearm specification under R.C. 2941.145; Count 10, felonious assault under R.C. 2903.11(A)(2) of David Wokaty, second degree felony, with a firearm specification under R.C. 2941.145; Count 11, felonious assault under R.C. 2903.11(A)(2) of Jennifer Imhoff, second degree felony, with a firearm specification under R.C. 2941.145; Count 12, felonious assault under R.C. 2903.11(A)(2) of Michael Capes, second degree felony, with a firearm specification under R.C. 2941.145; Count 13, felonious assault under R.C. 2903.11(A)(2) of Thomas Russell, first degree felony, with a peace officer specification under R.C. 2941.1412, and a firearm specification under R.C. 2941.145; Count 14, felonious assault under R.C. 2903.11(A)(2) of David Eisele, second degree felony, with a firearm specification under R.C. 2941.145; Count 15, having weapons while under disability under R.C. 2923.13(A)(3), third degree felony; Count 16, carrying a concealed weapon under R.C. 2923.13(A)(2), fourth degree felony; Count 17, illegal possession of a firearm in a liquor premises under R.C. 2923.121, third degree felony; and Count 18, tampering with evidence under R.C. 2921.12(A)(1), third degree felony. Prior to trial, at the State's request, Counts 6, 7 and 8 were dismissed by the trial court, and Counts 9-18 were renumbered to Counts 6-15. (Tr. 3950-53)

Ivery pleaded not guilty to all charges and the case proceeded to a jury trial. Upon close of arguments by both parties, the jury was provided, in part, the following instruction by the trial court:

> "If you find that the State failed to prove beyond a reasonable doubt each and every essential element of the offenses in Counts 1 through 11, and that the defendant failed to prove by a preponderance of the evidence the defense of self-defense, then you must find the defendant guilty of those respective offenses." (TrT., Pg. 4010)

After deliberating, the jury found Ivery guilty of Counts 1-11, including the death penalty specification attached to Count 1. Upon further deliberation the jury recommended a sentence of life without parole. After merging some of the counts and specifications, the trial court sentenced Ivery to an additional prison term of sixty-five years, along with a mandatory five-year period of post-release control.

Ivery filed a timely notice of appeal and was appointed appellate counsel. His counsel raised four assignments of error which the Ohio Ninth District Court of Appeals either overruled or declined to address. See *State v. Ivery*, App. Case No. 28551, 2018-Ohio-2177 ("*Ivery I*"). On appeal of that decision the Ohio Supreme Court declined to accept jurisdiction for non-specific reasons under Ohio S.Ct.Prac.R. 7.08(B)(4).[1] See *State v. Ivery*, Case No. 2019-Ohio-173 ("*Ivery II*"). Ivery then filed a petition for writ of certiorari to this Court, which was denied on October, 7, 2019. See *Ivery v. Ohio*, 140 S.Ct. 84 (2019).

Ivery also filed an Ohio App.R. 26(B) application for reopening, which was granted by the appellate court on June 13, 2019, and he was again appointed appellate counsel. Upon counsel's filing of a merit brief, but before the appellate court

[1] Under this rule, the Ohio Supreme Court may decline to accept jurisdiction for any of the following reasons: (a) The appeal does not involve a substantial constitutional question and should be dismissed; (b) The appeal does not involve a question of great general or public interest; (c) The appeal does not involve a felony; (d) The appeal does involve a felony, but leave to appeal is not warranted.

adjudicated the brief, Ivery filed a motion to have the brief and his court-appointed appellate counsel dismissed and to be allowed to proceed *pro se*, which was denied on December 26, 2019. The reopened appeal presented four assignments of error (differing from his original appeal), all of which were overruled by the appellate court. See *State v. Ivery*, App. Case No. 28551, 2020-Ohio-3349 ("*Ivery III*"). On appeal of that decision the Ohio Supreme Court again declined to accept jurisdiction. See *State v. Ivery*, Case No. 2021-0154, 2021-Ohio-1201 ("*Ivery IV*"). Ivery then filed a timely petition for writ of certiorari, which now pending before this Court.

Following the state appellate court's decision in *Ivery III* he filed another timely Ohio App.R. 26(B) application for reopening, which was procedurally dismissed by the court. *State v. Ivery*, Case No. 28551, decided January 28, 2021 (Unreported). He filed a timely appeal of that to the Ohio Supreme Court, which again declined to accept jurisdiction, although there was one dissenting opinion. *State v. Ivery*, App. Case No. 2021-0307, 2021-Ohio-1721 ("*Ivery V*"). Ivery now files this timely petition for writ of certiorari to this Court.

REASONS FOR GRANTING PETITION

Introduction – USCS Supreme Court Rule 10 provides that:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a

departure by a lower court, as to call for an exercise of this Court's supervisory power;
(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

I. THE COURT SHOULD GRANT THE PETITION BECAUSE PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION, WHERE THE OHIO NINTH DISCTRICT COURT OF APPEALS PROCEDURALLY DISMISSED HIS APP.R. 26(B) APPLICATION FOR REOPENING.

The State of Ohio has established an appellate rule where, following an adverse decision by the state appellate court, an appellant may seek to have the appeal reopened based upon a showing that he or she received constitutionally ineffective assistance of appellate counsel. That rule, App.R. 26(B), provides that:

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered...The parties

shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

As detailed in the above State of the Case, upon denial of his original direct appeal in *Ivery I*, Ivery filed a timely application for reopening, pursuant to Ohio App.R. 26(B). The application was granted by the Ohio Ninth District Court of Appeals and his appeal reopened, and he was appointed new appellate counsel.

In granting the first reopening, the Ninth District ordered that, "This case shall proceed as an initial appeal in accordance with the Ohio Rules of Appellate Procedure." (Ninth Dist. Journal Entry, 06/13/2019) This follows the language of App.R. 26(B)(7), as well as the Ohio Supreme Court's holding that, "If the [App.R. 26(B)] application is granted, * * * [t]he case is then treated as if it were an initial direct appeal, with briefs and oral argument." *State v. Simpson*, 2020-Ohio-6719 at ¶ 13. Consequently, if Ivery's reopened appeal was to proceed as an *initial appeal* in accordance with the Ohio Rules of Appellate Procedure, he should have been permitted to file an App.R. 26(B) application for reopening of the prior reopened appeal.

However, Ivery's second application for reopening – the first challenging ineffective assistance of counsel of his court-appointed appellate counsel in the reopened appeal – was procedurally denied by the Ninth District, strictly on the premise that Ivery "has no right to file successive applications for reopening, and such

applications are barred by res judicata." (Ninth District Journal Entry, 01/28/2021) The appellate court relied upon the precedent of the Ohio Supreme Court, who had earlier held that that "there is no right to file successive applications for reopening[.]" *State v. Williams*, 99 Ohio St. 3d 179 (2003) at ¶ 12. The Court further held that, "Neither App.R. 26(B) nor *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, provides a criminal defendant the right to file second or successive applications for reopening." *Id.* at ¶ 10. *Williams* was later followed by the Supreme Court in *State v. Twyford*, 106 Ohio St. 3d 176 (2005).

Williams is wholly distinguishable from the present case in that Williams had his first App.R. 26(B) application for reopening (which was filed as a delayed application) denied, and thus was attempting to file a second (or successive) application for his original direct appeal. Ivery, on the other hand, did have his first application for reopening granted, and his second application for reopening related to the newly appointed counsel in the reopened appeal, not the original appellate proceeding.

In *Twyford*, like Ivery, the appellant was also granted a reopening of his original direct appeal pursuant to App.R. 26(B), and then attempted to file a second (or successive) App.R. 26(B) application for reopening following a decision in the prior reopened appeal. The appellate court denied the application, "explaining that Twyford was not entitled to file a second application for reopening under App.R. 26(B)." *Twyford.* at ¶ 4. Relying on its earlier decision in *Williams*, the Ohio Supreme Court found that Twyford had no right to a successive application for reopening under

App.R. 26(B). *Id.* at ¶ 6. Significantly though, unlike Ivery, Twyford's second application was a delayed application for reopening and the Supreme Court found that Twyford "offer[ed] no sound reason why he could not comply with that fundamental aspect of the rule." *Id.* at ¶ 9.

Herein, Ivery challenges that in Ohio an appellant should be permitted to file an App.R. 26(B) application for reopening of a reopened appeal, so as to challenge that he or she received ineffective assistance of counsel in the reopened appeal. Ivery first notes that there is not anything in the language of App.R. 26(B) that prohibits a court from granting a second application. App.R. 26(B)(1) simply provides, in relevant part, that, "A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel."

In reviewing this issue, there should be a distinction made between cases where an appellant's first application for reopening was denied, and where an appellant's first application for reopening was granted and he or she is now attempting to reopen a decision from the subsequent reopened appeal. Thus, Ivery agrees with this Court's decisions in cases such as *Williams*, where Williams's first application was denied and the use there of res judicata does appear reasonable. The focus here is whether a second reopening should be permitted where the appellate court had already granted a prior reopening.

"The United States Supreme Court has recognized that res judicata is generally inapplicable 'where life or liberty is at stake.'" *State v. Stansell* (8th Dist.),

2021-Ohio-203 at ¶ 30, quoting *Sanders v. United States*, 373 U.S. 1, 8 (1963). The proposition here is that it is patently unfair and unjust to apply res judicata to Ivery's second application for reopening, where he has no other remedy of law to challenge that he received ineffective assistance of counsel in his reopened appeal.

It cannot be emphasized enough that Ivery attempted to have his court-appointed appellate counsel for the reopened appeal dismissed and moved the Ninth District for leave to proceed *pro se*. In a Motion to Strike Brief and Dismiss Counsel, Ivery detailed Attorney Eddie Sipplen's failure to cite any portion of the trial record in the first two assignments of error he raised – sufficiency of evidence and manifest weight of evidence, respectively – in contravention of Ohio App.R. 16(A)(7) and (D).

Sipplen also failed to include in the brief for Ivery's reopened appeal the following claims which formed part of the basis for his granted reopening: (1) the preponderance of evidence supports Ivery's affirmative defense that he was acting in self-defense; (2) there was insufficient evidence to support convictions for first degree felonious assault in Counts 4 and 10, and for the peace officer specifications in Counts 1-4 and 10; (3) the trial court failed to provide clarification to the jury on the definition of "spur of the moment"; and (4) Ivery received ineffective assistance of trial counsel based on counsel's failure to raise during trial Ivery's having been diagnosed with post-traumatic stress disorder (PTSD), counsel's failure to object to the repeated improper references made during trial of "Officer Winebrenner," and counsel's failure to object when the trial court provided the jury with erroneous instructions that

directed the jury to a verdict of guilty (as will be detailed in the second claim raised herein).

It is significant that in granting Ivery's first reopening the Ninth District did not bar him from raising any of these above claims. Had Ivery been permitted to submit a *pro se* brief it most assuredly would have included all of these meritorious claims. Ivery's motion was dismissed without explanation on December 26, 2019. The courts cannot have it both ways. They cannot force Ivery to retain Sipplen as appellate counsel, but then not allow him to challenge through an App.R. 26(B) application for reopening that he received ineffective assistance of counsel from Sipplen. Again, what other recourse does Ivery have?

In *Morgan v. Eads*, 104 Ohio St. 3d 142 (2004) at Syllabus, the Ohio Supreme Court concluded that, "Proceedings under App.R. 26(B) are collateral postconviction proceedings and not part of the direct-appeal process." But does this standard apply strictly to the application for reopening itself, or does it extend to a successfully reopened appeal? To classify a reopened appeal as a collateral post-conviction proceeding directly conflicts with the language of App.R. 26(B)(7), the Ohio Supreme Court's holding in *Simpson*, and the Ninth District Court's order that Ivery's reopened appeal should proceed as an *initial appeal* in accordance with the Ohio Rules of Appellate Procedure – which would include App.R. 26(B). An initial appeal is clearly *not* a post-conviction proceeding. Thus a reopened appeal itself is *not* a post-conviction proceeding.

Yet the Sixth Circuit has erroneously found that "a reopened appeal under Rule 26(B) is also part of the collateral, post-conviction process—and * * * Rule 26(B)'s text makes clear that a reopened appeal is not simply a do-over of the direct appeal." *Gerth v. Warden*, Allen Oakwood Corr. Inst., 938 F.3d 821 (2019). While the reopened appeal may not be a complete "do-over" of the original direct appeal, it must be deemed a continuation of that proceeding. Otherwise, why would App.R. 26(B)(7), and the Ohio Supreme Court in *Simpson*, refer to the reopened appeal as an *initial direct appeal*? The Sixth Circuit then relies on *Morgan* in offering that, "Our conclusion that a reopened appeal is a collateral proceeding matches the Ohio Supreme Court's precedents." *Id.* But again, it is unclear from *Morgan* whether the Supreme Court was only finding the App.R. 26(B) application for reopening itself to be a collateral proceeding, or whether that extended to the reopened appeal also. A more succinct opinion on the matter has come from the Ohio Eighth District Court of Appeal's conclusion that, "In addition to granting the application for reopening, we reinstate the appeal[.]" *State v. Douglas*, 2007-Ohio-5941 at ¶ 9. This could only be referring to the original direct appeal.

The Ohio Supreme Court has recognized the importance of providing appellants an opportunity to reopen their appeals: "App.R. 26(B) creates a special procedure for a thorough determination of a defendant's allegations of ineffective assistance of counsel. The rule creates a separate forum where persons with allegedly deficient appellate counsel can *vindicate their rights*. A substantive review of the claim is an *essential part* of a timely filed App.R. 26(B) application." (Emphasis

added.) *State v. Davis*, 119 Ohio St. 3d 422 (2008) at ¶ 26. How is justice served if Ivery is denied the opportunity to vindicate the ineffective assistance of counsel he alleges to have received from Attorney Sipplen? That Ivery was able to successfully challenge that his original appellate counsel was deficient should not procedurally bar him from now challenging that his counsel in the reopened appeal was not likewise deficient.

Although the basis for the application of res judicata to the application for reopening in *Davis* was different than in the present case, the following conclusion of the Court is just as appropriate to Ivery: "That result would run counter to our recognition of effective appellate counsel as a constitutional right guaranteed to *all* defendants." (Emphasis added.) *Davis* at ¶ 27. *All* defendants would include Ivery and any other defendant/appellant filing a second App.R. 26(B) application for reopening after having successfully won a prior application for reopening. Thus, to deny Ivery that opportunity must surely be a violation of his constitutional right to equal protection of the law, on top of the due process violation.

"The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)." *Wolff v. McDonnell*, 418 U.S. 539 (1974). See also *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) ("liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State"). Here again, it must be reminded that nothing in the language of App.R. 26(B) prohibits the filing of a second or successive application for reopening. Instead, the courts of Ohio have arbitrarily decided sua

sponte that no appellant should ever be allowed to reopen their direct appeal for a second time.

This Court has long recognized that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. [Citation omitted.] But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants[.]" *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The Court concluded that where a state provides for appellate review of criminal convictions, "at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons * * * from invidious discriminations." *Id.* Applied to the issue at hand, the appellant in a reopened appeal should have the same constitutional right to effective assistance of counsel as any other appellant; and an appellant should not be discriminated against just for having successfully reopened his or her original direct appeal by being barred from attempting to have the reopened appeal itself reopened.

There is a clear and obvious danger to denying an appellant, such as Ivery, from being able to challenge that he or she received ineffective assistance of counsel in a reopened appeal. Put to the extreme, Ivery's counsel in the reopened appeal could have filed a brief on his behalf that raised only one assignment of error, which itself was only one paragraph long, devoid of any supporting authority or reasoning, and with every word misspelled and written in crayon; but because the Ohio courts say he cannot file a second application for reopening, Ivery would be unable to challenge the obvious ineffectiveness of the counsel in such a reopened appeal. Ivery's

reopened appeal should be subject to the same standards of due process and equal protection as his original direct appeal – that would include the right to effective assistance of appellate counsel.

Here, it must be found that the decision of the Ohio Ninth District Court of Appeals, procedurally denying the App.R. 26(B) application for reopening Ivery filed on September 17 2020, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. The Ninth District's decision should be overturned and the matter remanded back to the court with an order that it adjudicate Ivery's application for reopening on its merits.

II. THE COURT SHOULD GRANT THE PETITION BECAUSE PETITIONER WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW WHEN THE TRIAL COURT ERROUNEOUSLY INSTRUCTED THE JURY TO FIND PETITIONER GUILTY OF COUNTS 1-11 EVEN IF THE STATE FAILED TO PROVE EVERY ESSENTIAL ELEMENT OF THE CHARGED OFFENSES.

This Court has long held that "the Due Process Clause [of the 5th and 14th Amendments to the U.S. Constitution] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358 (1970). Thus the Due Process Clause "forbids a state to convict a person of crime without proving the elements of the crime beyond a reasonable doubt." *Fiore v. White*, 531 U.S. 225 (2001). The standard is clear: unless the prosecution has proven all of the essential elements of a charged offense beyond a reasonable doubt, the jury must acquit the defendant of that offense.

But what if a trial court instructs a jury to find a defendant guilty *even if* the prosecution has *failed* to prove every essential element of the offense? "Jury instructions that effectively relieve the state of its burden of persuasion violate a defendant's due process rights. *Sandstrom v. Montana* (1979), 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39; *Rose v. Clark* (1986), 478 U.S. 570, 580, 106 S. Ct. 3101, 92 L. Ed. 2d 460." *State v. Adams*, 103 Ohio St. 3d 508 (2004) at ¶ 97. See also *Francis v. Franklin*, 471 U.S. 307, 326 (1985), citing *Sandstrom* ("the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in *Winship*"). Such is the case here.

Counts 1-11 of Ivery's indictment charged him with aggravated murder, murder, attempted murder, and felonious assault, relating to five victims of a shooting in Papa Don's Pub on November 16, 2014. Ivery's trial counsel presented an affirmative defense of self-defense – that he feared for his life after being verbally and physically accosted by three large white men, which resulted in him drawing his handgun and wildly firing four random shots.

Upon conclusion of both the State of Ohio and Ivery's defense in presenting their cases, the trial court proceeded to provide the jury with instruction for its deliberations for finding Ivery guilty or not guilty. In providing instructions specifically to Ivery's affirmative defense of self-defense, the court instructed the jury as follows:

> "If you find that the State failed to prove beyond a reasonable doubt each and every essential element of the offenses in Counts 1 through 11, and that the defendant failed to prove by a preponderance of the evidence the defense of self-defense, then you must find the defendant guilty of those respective offenses." (TrT., Pg. 4010)

Thus, the jury was instructed to find Ivery guilty of the charged offenses in Counts 1-11 even if the State *failed* to prove its case beyond a reasonable doubt. And the jury did indeed find Ivery guilty on all of those counts. However, because of the court's erroneous instruction there is no way of knowing whether the jury actually found that the State of Ohio had proved beyond a reasonable doubt every essential element of the offenses charged in Counts 1-11, or was merely following the court's erroneous instruction.

"It is the duty of the court to instruct the jury as to the law and it is the duty of the jury to follow the law as it is laid down by the court." *Sparf v. United States*, 156 U.S. 51 (1895). "A presumption exists that the jury followed the instructions given to it by the trial court." *State v. Murphy*, 65 Ohio St. 3d 554 (1992). Here, there is a very real possibility that the jury did not find that the State had proved beyond a reasonable doubt each and every essential element of some or all of the offenses charged in Counts 1-11, but were compelled by the erroneous jury instruction to still find Ivery guilty.

Ivery's sole defense theory was self-defense, and out of all the jury instructions that were given, there were only two jury instructions that were *specifically* given for only counts 1-11 and for Ivery's affirmative defense of self-defense. The first instruction, which was erroneous, instructed the jury as follows:

> "If you find that *the State failed to prove beyond a reasonable doubt each and every essential element of the offenses* in Counts 1 through 11, and that the defendant failed to prove by a preponderance of the evidence the defense of self-defense, *then you must find the defendant guilty of those respective offenses.*" (TrT., Pg. 4010 – emphasis added.)

The second jury instruction that was specifically given for only counts 1-11 and for Ivery's affirmative defense of self-defense, which was proper, instructed the jury as follows:

> "If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of any of the offenses in Counts 1 through 11, or if you find that the defendant proved by a preponderance of the evidence the defense of self-defense, then you must find the defendant not guilty as to those respective offenses." (TrT., Pg. 4010-4011)

But even though the second instruction was presented correctly, that on its own does not cure the erroneous instruction first provided by the court to the jury. Significantly, the court *never* corrected the erroneous instruction and *never* told the jury to disregard the erroneous instruction. "Language that merely contradicts and does not explain a constitutionally infirm [jury] instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Francis* at 322.

Indeed, there is no way of knowing if the highly prejudicial, erroneous instruction given for Ivery's affirmative defense for the charges for Counts 1-11 was followed by the jury. Consequently, no confidence can be given to the verdicts reached by the jury for Counts 1-11, and the convictions for those counts must be vacated.

As the erroneous jury instruction was not objected to at trial, Ivery respectfully asks this Court to review this claim under the plain error standard. Pursuant to USCS Fed.R.Crim.P. 52(b), "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." See also Ohio Crim.R. 52(B). Under the federal rule, before an appellate court can correct an error not raised at trial, there must exist: (1) an error; (2) the error is plain (clear or obvious); and (3) the error must affect substantial rights. *Johnson v. United States*, 520 U.S. 461, 466 (1997), citing *United States v. Olano*, 507 U.S. 725, 732 (1993). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson* at 467 (internal quotation marks omitted).

Here, it was an obvious error for the trial court to instruct the jury *to find Ivery guilty even if the State failed to prove each and every essential element of the offenses* charged in Counts 1-11, thus meeting the first prong of *Johnson*. The error is clear and obvious from the record, meeting the second prong. The error affected Ivery's right to a due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution, meeting the third prong. Concerning the fourth prong, the error in the jury instruction clearly affected the fairness and integrity of Ivery's trial, and has caused a black eye to the judicial proceedings. For this cause, this Court should take judicial notice of the challenged error.

III. THE COURT SHOULD GRANT THE PETITION BECAUSE PETITIONER WAS DENIED DUE PROCESS WHERE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF BOTH TRIAL AND APPELLATE COUNSEL.

As presented in the previous ground for why this petition should be granted, the trial court erroneously provided a jury instruction whereby Petitioner would be found guilty even if the State did *not* prove beyond a reasonable doubt each and every essential element of the offenses in Counts 1-11.

Petitioner's trial counsel failed to object to, and so let stand, the erroneous instruction. This failure on counsel's part deprived Petitioner of his constitutional right to effective assistance of counsel. This Court has determined that:

> "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. * * * In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. * * * Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."
>
> *Strickland v. Washington*, 466 U.S. 668 (1984).

The second prong of an ineffective assistance of counsel claim requires that an individual show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at

694. Again, as presented in the previous ground, there is a reasonable probability that, had the jury not been provided with the erroneous instruction to find Petitioner guilty even if the State did not prove its case, he would have been found not guilty of all or some of the offenses charged in Counts 1-11. Thus, had counsel objected to the erroneous instruction and caused the trial court to correct and/or clarify the instruction, there is most certainly a reasonable probability that the outcome of the jury's verdicts would have been different.

As it relates to an ineffective assistance of appellate counsel claim, this Court has held that "[a] first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). As provided in the first ground presented in support of this petition, in granting a reopening of Petitioner's direct appeal, the Ninth District ordered that, "This case shall proceed as an *initial appeal* in accordance with the Ohio Rules of Appellate Procedure." (Ninth Dist. Journal Entry, 06/13/2019, emphasis added.) Thus, Petitioner's reopened appeal was in essence his *first appeal*, and subject to the same right to effective assistance of counsel.

This Court has further held that "if the attorney appointed by the State to pursue the appeal is ineffective, the prisoner has been denied fair process and an opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims. [Internal citations omitted.] Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-

assistance-of-trial-counsel claim." *Martinez v. Ryan*, 566 U.S. 1, 11 (2012). In the present case, Petitioner's court-appointed counsel in his reopened appeal failed to raise as a claim in the brief submitted on Petitioner's behalf that he had received ineffective assistance of trial counsel, where counsel failed to object to the erroneous jury instruction detailed herein.

Furthermore, since under current Ohio law – as addressed in the first ground herein – Petitioner would be precluded from filing an Ohio App.R. 26(B) application for reopening (in which he could have raised the issue of the erroneous jury instruction) of his reopened appeal (which still constituted his *initial appeal*), his appellate counsel's failure to raise the claim in the reopened appeal prevented Petitioner from being able to have the claim adjudicated on its merits.

For this cause, Petitioner's convictions in Counts 1-11 should be vacated and the matter remanded for a new trial.

CONCLUSION

The Petition for Writ of Certiorari should be granted review due to the grounds presented herein, which demonstrate clear due process and equal protection violations relating to the arbitrary denial of Petitioner's Ohio App.R. 26(B) application for reopening, and to the erroneous jury instruction provided by the trial court and his trial counsel's failure to object to it.

Wherefore, the Petitioner, Kenan Ivery, humbly prays this Honorable Court will grant his petition and allow further review of the issues raised herein.

Respectfully submitted,

Date: November 18th, 2021

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