

MAY 16, 2022

OFFICE OF THE CLERK

No. 21-7976

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MARK A. HILL – PETITIONER

vs.

STATE OF OHIO – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TENTH DISTRICT COURT OF APPEALS OF OHIO

PETITION FOR WRIT OF CERTIORARI

Mark A. Hill A766-443
Pickaway Correctional Institution
11781 State Route 762
Orient, OH 43146

QUESTION(S) PRESENTED

1. Whether it is unconstitutional for a state court to make it mandatory that an indigent, pro se prisoner provide an attorney affidavit in order for claims of ineffective assistance of trial counsel raised in a post-conviction relief petition to be reviewed on its merits.
2. Whether newly court-appointed trial counsel is constitutionally ineffective when abandoning an established and agreed upon defense strategy days before the start of a jury trial without informing the criminal defendant.
3. Whether cumulative instances of ineffective assistance of trial counsel denied a criminal defendant a constitutionally and fundamentally fair trial.
4. Whether a prosecutor's knowing use of false testimony, and the trial court's use of the same false testimony for sentencing purposes, is a due process violation that makes a criminal trial proceeding constitutionally unfair.

LIST OF PARTIES

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

RELATED CASES

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, Indictment – filed October 18, 2018.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, ‘Defense’s Motion in Limine [] Pursuant to Evidence Rule 609(A)(2) to Exclude from Trial his Convictions for Felonious Assault and Harassment by an Inmate (2009)’ – filed April 8, 2019.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, ‘State’s Memorandum Contra Defendant’s Motion in Limine to Exclude from Trial his Convictions for Felonious Assault and Harassment by an Inmate Under Evidence Rule 609(A)(2) – filed April 23, 2019.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, Oral Arguments: Motion in Limine (no Judgment Entry filed) – conducted on August 19, 2019. See Offer Transcript.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, ‘Defendant’s Pro Se Criminal Rule 33 Motion for New Trial (Evidentiary Hearing Requested) – filed September 17, 2019.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, ‘Defendant’s Request for Leave to Proceed Pro Se and as Indigent – filed September 17, 2019.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, Sentencing Hearing (Defendant’s Motion for New Trial denied in open court based upon dual representation/no Judgment Entry filed) – September 19, 2019. See Sentencing Transcript, pp. 2-3.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, Copy of Indictment – filed October 17, 2019.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, Transcript (Offer/Jury Trial/Sentencing) – filed November 26, 2019.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, Brief of Appellant – filed January 17, 2020.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, Brief of Plaintiff-Appellee – February 3, 2020.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, ‘Defendant-Appellant’s Motion for Leave to File Supplemental Brief’ – filed April 9, 2020.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, Journal Entry (denying leave to file supplemental brief) – filed April 13, 2020.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, Notice (submission on briefs to panel without oral argument) – filed April 17, 2020.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, ‘Petition to Vacate or Set Aside Judgment of Conviction or Sentence (Evidentiary Hearing Requested)’ – filed May 19, 2020.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, ‘State’s Answer to Defendant’s Petition for Post-Conviction Relief’ – filed May 29, 2020.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, ‘Petitioner’s Civ.R. 12(F) Motion to Strike Respondent’s Answer to Petition for Post-Conviction Relief’ – filed July 9, 2020.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, ‘Petitioner’s Request for Leave to Amend Petition Pursuant to R.C. 2953.21(F)’ – filed July 14, 2020.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, Journal Entry (denying Motion to Strike Respondent’s Answer to Petition/Request for Leave to Amend Petition) – filed July 22, 2020.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, ‘Petitioner’s Request for Leave to File Summary Judgment and to Convert Motion to Strike to Summary Judgment Motion Pursuant to R.C. 2953.21 and Civil Rule 56’ – November 23, 2020.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, Journal Entry: Denying Post-Conviction Petition – filed December 17, 2020.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, Transcript of Proceedings: Amendment to Indictment (August 19, 2019) – filed December 17, 2020.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, Decision – filed January 21, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, Judgment Entry (overruling assignments of error/affirming judgment of Court of Common Pleas) – filed January 26, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 21AP-16, Brief of Petitioner-Appellant (Post-Conviction Relief) – filed February 23, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, ‘Appellant’s App.R. 26(A) Application for Reconsideration and/or En Banc Consideration’ – filed March 4, 2021.

State v. Hill, Supreme Court of Ohio, Case No. 21-0308, Notice of Appeal/Memorandum in Support of Jurisdiction (19AP-711) – filed March 10, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 21AP-16, Brief of Plaintiff-Appellee – filed March 11, 2021.

State v. Hill, Supreme Court of Ohio, Case No. 21-0308, State’s Waiver of Memorandum in Response – filed March 17, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 21AP-16, Petitioner-Appellant’s Reply Brief – filed March 29, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, ‘Defendant-Appellant’s App.R. 26(B) Application for Reopening of Direct Appeal’ – filed April 8, 2021.

State v. Hill, Supreme Court of Ohio, Case No. 21-0308, Entry (declining to accept jurisdiction of appeal – filed April 27, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, Memorandum Decision (denying Application for Reconsideration and/or En Banc Consideration) – filed May 13, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, ‘State’s Memorandum in Opposition to Defendant’s Application for Reopening’ – filed May 14, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, ‘Appellant’s Motion to Strike State’s Memorandum in Opposition to Defendant’s Application for Reopening’ – filed June 4, 2021.

State v. Hill, Supreme Court of Ohio, Case No. 21-0814, Notice of Appeal/Memorandum in Support of Jurisdiction (Reconsideration/En Banc Consideration) – filed June 28, 2021.

State v. Hill, Supreme Court of Ohio, Case No. 21-0814, State’s Waiver of Memorandum in Response – filed June 30, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 21AP-16, ‘Petitioner-Appellant’s Request for Oral Argument’ – filed July 13, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 21AP-16, Journal Entry (denying oral argument) – filed July 13, 2021.

Mark A. Hill v. Jennifer Pell, et al., United States District Court, Southern District of Ohio, Eastern Division, Case No. 2:21-cv-04142, Civil Rights Complaint Under 42 U.S.C. §§ 1985(2), 1985(3) and 1986 – filed August 10, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, Journal Entry (denying motion to strike) – filed August 12, 2021.

State v. Hill, Supreme Court of Ohio, Case No. 21-0814, Entry (declining jurisdiction of appeal (Reconsideration/En Banc Consideration)) – filed August 17, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 21AP-16, Notice (submission of briefs without oral argument) – filed August 17, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, Memorandum Decision (on Application for Reopening) – filed September 2, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 19AP-711, Journal Entry (denying Application for Reopening) – filed September 7, 2021.

State v. Hill, Supreme Court of Ohio, Case No. 21-1300, Notice of Appeal/Memorandum in Support of Jurisdiction (Application for Reopening) – filed October 20, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 21AP-16, Decision (Petition for Post-Conviction Relief) – filed November 2, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 21AP-16, Judgment Entry (affirming judgment of Franklin County Court of Common Pleas) – filed November 4, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 21AP-16, ‘Defendant-Appellant’s Appellate Rule 26(A) Application for Reconsideration (Post-Conviction Relief) – filed November 17, 2021.

State v. Hill, Supreme Court of the United States, ‘Application to Justice Sonia Sotomayor for an Extension of Time to File a Petition for Writ of Certiorari – submitted November 18, 2021 (Returned December 2, 2021).

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 21AP-16, ‘State’s Memorandum Contra Defendant’s Untimely Application for Reconsideration’ (Post-Conviction Relief) – filed December 1, 2021.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 21AP-16, ‘Appellant’s App.R. 26(A)(1)(b) Reply to Appellee’s Contra Memorandum – filed December 9, 2021.

State v. Hill, Supreme Court of Ohio, Case No. 21-1300, Entry (declining jurisdiction of appeal, Application for Reopening of Direct Appeal) – filed December 14, 2021.

State v. Hill, Supreme Court of Ohio, Case No. 21-1557, Notice of Appeal/Memorandum in Support of Jurisdiction (Post-Conviction Relief) – filed December 20, 2021.

State v. Hill, Supreme Court of Ohio, Case No. 21-1557, State's Waiver of Memorandum in Response (Post-Conviction Relief) – filed December 27, 2021.

State v. Hill, Supreme Court of Ohio, Case No. 21-1557, Entry (declining jurisdiction of appeal, Post-Conviction Relief) – filed February 15, 2022.

State v. Hill, Tenth District Court of Appeals of Ohio, Case No. 21AP-16, Memorandum Decision (on Application for Reconsideration/Post-Conviction Relief) – filed February 17, 2022.

State v. Hill, Tenth District Court of Appeals, Case No. 21AP-16, Journal Entry (denying Application for Reconsideration/Post-Conviction Relief) – filed February 17, 2022.

State v. Hill, Supreme Court of the United States, 'Application to Justice Sonia Sotomayor for an Extension of Time to File a Petition for Writ of Certiorari (Application for Reopening) – submitted March 9, 2022.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, 'Defendant's Motion for Leave to File a Criminal Rule 33 Motion for New Trial' – filed March 11, 2022.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, 'Defendant's Criminal Rule 33(A)(2) & (6) Motion for New Trial Based Upon Newly Discovered Brady Material Evidence – filed March 11, 2022.

State v. Hill, Franklin County Court of Common Pleas, Case No. 18CR-5181, 'Defendant's R.C. 149.43(B)(8) Request for an Order Granting Access to Obtain Public Records from the Columbus Division of Police and Franklin County Prosecuting Attorney' – submitted March 18, 2022.

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Mark A. Hill v. State of Ohio, Supreme Court of the United States, Petition for Writ of Certiorari to Tenth District Court of Appeals of Ohio – filed April 28, 2022.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The Supreme Court of Ohio's Entry denying discretionary review of petitioner's appeal from the denial of the post-conviction relief petition appears at Appendix C and is published at *State v. Hill*, 165 Ohio St.3d 1542, 2022-Ohio-397, 180 N.E.3d 1177. The Tenth District Court of Appeals of Ohio's memorandum decision overruling the assignments of error and affirming the trial court's judgment denying the post-conviction relief petition appears at Appendix A and is published at *State v. Hill*, 2021-Ohio-3899. The Franklin County Court of Common Pleas Journal Entry denying the post-conviction petition appears at Appendix B and is unpublished.

JURISDICTION

The Tenth District Court of Appeals of Ohio rendered its memorandum decision on November 2, 2021, and Mark A. Hill filed a timely notice of appeal and memorandum in support of jurisdiction requesting discretionary review of that decision in the Ohio Supreme Court. That court denied discretionary review of the decision below on February 15, 2022. A copy of that decision appears at Appendix C. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . ; nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . . , and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "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."

O.R.C. 2901.05(B)(1): "A person is allowed to act in self-defense, defense of another, or defense of that person's residence. If, at the trial of a person who is accused of an offense that involved the person's use of force against another, there is evidence presented that tends to support that the accused person used the force in self-defense, defense of another, or defense of that person's residence, the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense, defense of another, or defense of that person's residence, as the case may be."

O.R.C. 2903.11(A): "No person shall knowingly do either of the following:

- "(1) Cause serious physical harm to another or to another's unborn;
- "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

O.R.C. 2911.11(A): "No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

- "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
- "(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control."

STATEMENT OF THE CASE

In late Spring of 2017, petitioner Mark A. Hill (a Black man) began a mixed-race relationship with Brittany Hamm. Brittany was one of the many persons in Columbus, Ohio inflicted with an opioid (heroin) addiction. Hill was drug-free but aware of her addiction.

Just after 10pm on August 25, 2018, Brittany called Hill and asked him to pick her up from her grandmother's home located on the North End of Columbus. While driving, Brittany made several Messenger video calls to Hill wherein she was hysterical and crying and displaying a swelling right eye. She told him that she was in the garage smoking a cigarette when her 'uncle', Martie Jacobs, approached and offered her \$25 to perform oral sex on him and when she told him "no" he punched her in the face.

When Hill arrived, Brittany was sitting in front of the open overhead garage door still crying. He walked up the driveway to her, examined her eye, and they entered Brittany's grandmother's home through the garage door into the kitchen, walked past Rita Hamm sitting on her living room couch, back to the bedroom where Jacobs was occupying as a rent-free border. A physical altercation between Hill and Jacobs occurred.

After the altercation, Hill and Brittany left the bedroom and exited Ms. Hamm's home, got into his truck and drove away to a hotel parking lot approximately two miles away. While in the hotel parking lot, he took five photos of Brittany's reddened and swollen eye with his cell phone.

On September 27, 2018, the police filed a criminal complaint and arrest warrant against Hill charging him with felonious assault, in violation of *R.C. 2903.11(A)(2)*, alleging that he caused Jacobs "physical harm with a deadly weapon or dangerous ordnance, to wit: a sledgehammer."

After 11pm on October 9, 2018, a SWAT Team entered Hill's condo and arrested him on the complaint and warrant. During the early hours of October 10, 2018, he voluntarily interviewed with detectives relating that when he confronted Jacobs about sexually propositioning and then punching Brittany in the face he was forced to dodge a punch swung at his face by Jacobs and responded in self-defense with four quick punches to Jacobs' face who then fell back onto his bed.

During the interview, Hill also provided the detectives with date and time stamped photos of Brittany's swollen and discolored eye taken on August 25, 2018 at 11:12pm, along with the call log depicting Brittany's Messenger video calls.

The lead detective informed Hill that Jacobs accused him of hitting him twice in the face with a 2½-lb. sledgehammer, and that she did not believe Hill used only his fists. Petitioner was then taken to the county jail and charged with a felony.

On October 18, 2018, a prosecutor obtained an indictment charging Hill with Count 1, Aggravated Burglary, a first-degree felony in a violation of *R.C. 2911.11(A)(1) & (2)* with a Repeat Violent Offender Specification under *R.C. 2941.149*, and Count 2, Felonious Assault, a second-degree felony in a violation of *R.C. 2903.11(A)(1) & (2)* with a Repeat Violent Offender Specification under *R.C. 2941.149*.

Hill was determined to be indigent and, on October 22, 2018, Don Shartzner of the Franklin County Public Defender's Office was appointed as defense counsel. On October 25, 2018, Shartzner filed a request for discovery and a Bill of Particulars.

On November 15, 2018, the prosecution filed a Bill of Particulars alleging that on August 25, 2018 Hill trespassed in a separately occupied portion of an occupied structure with the purpose to commit any criminal offense and that he inflicted physical harm on Jacobs and/or had a deadly weapon or dangerous ordnance, to wit: a sledgehammer on his person or under his control.

And that Hill knowingly caused Jacobs serious physical harm and/or knowingly caused physical harm to Jacobs by using a deadly weapon or dangerous ordnance, to wit: a sledgehammer.

Shartzner utilized Amy Slaven, Investigator for the Franklin County Public Defender, to investigate the allegations against Hill. Shartzner also demonstrated the required particularized need to the trial judge and was granted expert witness funding in March 2019.

Shartzner retained the expert medical services of Dr. Adam Kennah, a wound specialist, to review the medical records that Jacobs provided to investigating officers of the Columbus Police on September 19, 2018, in order to obtain an opinion of whether Jacobs was hit with a 2½-lb. sledgehammer or not. Dr. Kennah was also asked to provide an expert opinion on the extent of any injury to Jacobs.

In one of the five or six occurrences, Shartzer met with Hill at the Franklin County Corrections Center II (FCCC II) in March 2019 and informed him of Dr. Kennah's findings that Jacobs was not hit with a sledgehammer and the localized extent of his injury from being punched in the face by Hill. Hill and Shartzer agreed upon the strategy of calling Dr. Kennah, Amy Slaven and Brittany as witnesses for the defense.

On March 28, 2019, Ohio's Legislature changed the burden of proof required in *R.C. 2901.05(B)(1)* from Hill's preponderance of the evidence showing that he acted in self-defense to the prosecutor showing beyond a reasonable doubt that Hill did not act in self-defense.

Shartzer then informed Hill that he had to withdraw as defense counsel to have hip-replacement surgery. On April 12, 2019, Robert Barnhart of the Franklin County Public Defender's was appointed to represent Hill and inherited an already established and agreed upon defense strategy, to which Barnhart acknowledged in his first meeting with Hill at FCCC II, on or about April 13, 2019. On April 16, 2019, Hill posted bail and was released from FCCC II.

On April 21, 2019, Dr. Kennah issued a report after reviewing Jacobs' medical records and revealed that Jacobs was taken to Riverside Hospital, arriving with an alcohol level of 0.205, and had multiple bilateral facial bone fractures requiring operative repair. The report also revealed that once the facial bones are fractured, the structure of the face begins to lose its integrity, and that the diffuse, bilateral nature of injuries would be more indicative of repeated lower force impacts than of one or two higher force impacts. That the injury pattern trended against a single high force impact.

On April 26, 2019, Barnhart provided the prosecutor with a copy of Dr. Kennah's report as reciprocal discovery pursuant to *Crim. R. 16(H)*.

Barnhart obtained two (2) continuances and a jury trial date was set for August 19, 2019. While out on bail, Hill had two phone conversations with Barnhart in addition to the brief personal contacts in the courtroom to request continuances.

On August 8, 2019, Hill and Brittany met with Barnhart in his office for pretrial preparation. Barnhart confirmed to Hill and Brittany that the defense prepared with Shartz, involving Dr. Kennah, Amy Slaven and Brittany being called as witnesses, would be presented at trial in eleven days.

During a break in *voir dire* on August 19, 2019, an oral motion to an obvious previously arranged amendment to the indictment was raised by the prosecutor, after urging from Barnhart, wherein it was requested that “and/or the offender had a deadly weapon or dangerous ordnance, to wit: a sledgehammer” be deleted from the aggravated burglary offense, And that “and/or did knowingly cause or attempt to cause physical harm . . . by means of a deadly weapon or a dangerous ordnance, to wit: a sledgehammer” be also deleted from the felonious assault offense.

Additionally, Barnhart acknowledged a prior agreement to stipulate to the “serious physical harm” element of the felonious assault offense, the medical records and x-rays, in exchange for the amendment. (Amendment to Indictment Transcript)

Despite requesting the amendment to delete the alternative means of committing the charged offenses, the prosecutor aggressively presented an alternative means argument to the jury, beginning with his opening statement, offering that Jacobs would testify that Hill hit him with his fist or a mini sledgehammer, without objection from Barnhart. (Tr. Vol. 1, pp. 25-26)

On August 20, 2019, as the prosecution’s first witness, Rita Hamm, Brittany’s grandmother, testified that she believed her granddaughter about Jacobs sexually propositioning and then punching her in the face in the garage. (Tr. Vol. 1, p. 53)

Ms. Hamm also revealed that after hearing Brittany yell that Jacobs had punched her in the garage, she was still crying when she entered the kitchen through the garage door while "Martie was in the living room and all of a sudden her and Martie got into a fight." That Jacobs had Brittany in a chokehold and Ms. Hamm had to intervene to get him off of her granddaughter. (Tr. Vol. 1, pp. 46-49)

Ms. Hamm, in response to the prosecutor's question, described that Hill was wearing shorts and a t-shirt and that he did not have a sledgehammer in his hands or concealed in his shorts when he walked past her twice on August 25, 2018. (Tr. Vol. 1, pp. 61-63)

During an exchange between the trial judge and Ms. Hamm, it was revealed that within a few minutes after Hill and Brittany left, Jacobs 'walked normally' from his bedroom to the bathroom. And that Jacobs was in the bathroom for five to ten minutes before yelling for Ms. Hamm. (Tr. Vol. 1, pp. 94, 96-97)

On August 21, 2019, Jacobs testified that he spent the day at the neighbors' house across the street getting drunk. He claimed to be unaware of Brittany being at the house until he entered it after leaving the neighbors. That after entering the house and seeing Brittany he confronted her about allegedly bringing men into the house to have sex for money or drugs.

Jacobs then claims that Brittany grabbed a knife from the kitchen table and threatened to stab him with it. She goes around the kitchen table away from him, Jacobs goes the opposite direction, grabs her and takes the knife and throws it. He then grabs Brittany and throws her on the living room floor and gets on top of her. After Ms. Hamm intervened to get Jacobs off of her granddaughter, he gets off of her and goes to bed. (Tr. Vol. 2, pp. 23-26, 46-48)

Jacobs testified that he was in bed asleep when the bedroom door opens, he rolls over and sees Hill standing in the doorway and "seen him pull a sledgehammer out of his pants" and he

“tried to get up” and had “just got [his] feet on the floor” and “[he] got hit” on the side of his face. That he fell to the floor onto his knees and “got hit again” on the other side of his face. (Tr. Vol. 2, pp. 29-30, 51)

While giving testimony to having suffered many life-threatening injuries, Jacobs states that he was at Riverside Hospital (part of Ohio Health) for ten days then went to a Mount Carmel rehab hospital (part of Trinity Health) for an additional seven days. (Tr. Vol. 2, pp. 31-32)

The prosecutor asks Jacobs whether he remembers telling him it was either a hammer or a fist and Jacobs answers “no” and that in his mind he was hit with a hammer. (Tr. Vol. 2, pp. 36-37)

On about six instances, the prosecutor asked Jacobs whether he hit Brittany, besides the confrontation and wrestling match in the living room, and gave her a black eye in the garage after asking her to suck his dick for \$25 and she told him “no.”

Jacobs answered that “he didn’t know she was there till [he] went in the house,” “no” and that he “had never done that before,” that he “didn’t believe so” and he “didn’t remember hitting her.” (Tr. Vol. 2, pp. 39-40, 45, 60, 62)

On cross-examination, Jacobs answered that he is certain that he got hit with a sledgehammer and that he “told the police it was a two-and-a-half-pound sledge.” (Tr. Vol. 2, pp. 73-74). The prosecution rests its case following a redirect-examination.

Barnhart then informs Hill that he did not subpoena Dr. Kennah or Amy Slaven to appear as expert witnesses for the defense.

Hill testified that on August 25, 2018, he was wearing “blue basketball-like gym shorts, a black t-shirt, what they call a wife-beater, and black Nikes.” He also denies having a

sledgehammer and stated that there was no where he could have hidden a hammer in those clothes.

(Tr. Vol. 2, p. 90)

Hill tells the jury that he pulled up, parked on the street, walked up the driveway to where Brittany was sitting in front of the garage smoking and still crying.

They walked back to Jacobs' bedroom together, Hill knocked and then opened the door. Jacobs was sitting on the side of the bed in the dark, fully dressed, and Hill turned on the light and confronted Jacobs about him punching Brittany in the eye because she refused his sexual proposition.

Then Jacobs jumped up and swung a punch at Hill's face. He dodged the punch and reacted with about four quick punches to Jacobs' face in self-defense. (Tr. Vol. 2, pp. 93, 95-96, 133)

On cross-examination, the prosecutor questioned Hill about his profession doing home renovations as a carpenter and his knowledge of tools, specifically his familiarity "with a two-and-a-half-pound sledge or other type of hammer." Hill provided that he doesn't own sledgehammers because he does not do demolition but finish carpentry. (Tr. Vol. 2, pp. 109-110)

Hill also testified that he was "just now hearing all about this whole headlock thing" and that no one "has ever said anything to [him] about it", regarding Jacobs' second physical assault on Brittany in the kitchen and living room. (Tr. Vol. 2, p. 118)

The prosecutor questioned Hill about his height, weight and build, attempting to make an exaggerated physical comparison that Hill is a foot taller than Jacobs, which Hill refuted. Hill stated that at the time of the altercation he was 6 foot 4, and weighed 217 pounds. (Tr. Vol. 2, pp. 122-123; 125-126)

Then he references Hill allegedly admitting to Detective Zimmer about being in fist fights before and being able to hit hard and restating that he hit Jacobs with his fist after Zimmer states

“[t]his looks like a hammer to me. I can’t see someone’s fist doing this to someone.” (Tr. Vol. 2, pp. 122-124). The interview was not played for the jury, nor entered as evidence.

Although Brittany was served by defense counsel with a subpoena to appear and testify about what happened on August 25, 2018, she failed to appear. Hill was the only defense witness.

The prosecutor’s closing argument begins by referencing Hill’s size and history of fist fights, that he hit Jacobs four times in the face, and that he could hurt him really bad. (Tr. Vol. 2, pp. 157, 159)

And continuing the alternative means argument, that “[a]ccording to Martie, it was a straight-up sucker punch to the face with either a hammer or his fist.”

“And even if everything Brittany Hamm said about [Jacobs] sexually propositioning her and striking her in the eye is true, it does not matter. * * *. It matters morally. * * *. It does not matter legally for your determination.” (Tr. Vol. 2, p. 165, 166)

Defense counsel begins his closing argument by emphasizing that “Rita Hamm says, Martie walked to the bathroom. * * *. He didn’t say anything to her. You’ve seen the pictures of the house. It’s a small house. * * *. She could see Martie Jacobs when he walked into the bathroom.” (Tr. Vol. 2, pp. 169-170)

And that “[a]nother thing Rita Hamm said: I never saw Mark with a hammer. I saw him come in, no hammer. And we’re talking about what Mr. Jacobs describes as a sledgehammer that he’s getting hit with. Rita never sees that.” (Tr. Vol. 2, p. 170)

Counsel for the defense then references that the medical records are stipulated to and that the jury will see a cover letter from Ohio Health, demonstrating that the records only cover the ten-day period between August 25-September 5, 2018. (Tr. Vol. 2, pp. 174-175)

The prosecutor's rebuttal argument begins with: "this 6 foot 4, 230 pound, lean, muscular man confronted [Jacobs] about sexually propositioning and then assaulting his girlfriend."

He continues by arguing that "Rita doesn't see a hammer. Remember [Jacobs] said [Hill] had it concealed in his pants. It was a small hammer. [Hill] says [he] owns hammers. [He] is a finish carpenter. [He] owns other types of hammers, but [he] don't own a two-and-a-half-pound sledgehammer. This is a man that works with tools for a living. Isn't it reasonable to presume that he would have that type of tool handy and ready? And how hard would that be to tuck that into your shorts and hold it there as you walk back?

"So the evidence that there is no hammer comes from Rita, who didn't see it, not because [Hill] didn't have it concealed." (Tr. Vol. 2, p. 185)

And [Hill's] credibility should be taken in light of everything you know about him. [Jacobs] is so drunk. Remember this guy is so drunk, how can you believe anything he says? He's so drunk. Look at the medical records.

And continuing the alternative means argument, he argues [Jacobs] is able to relate to police officers it was either his fist or a hammer. So he's with it enough to tell them what happened to him consistently from the very first time he talked to law enforcement. He's not that drunk. (Tr. Vol. 2, pp. 186-187)

The prosecutor continues his rebuttal argument by offering: "[a]nd that's if you believe [Hill]. And I would argue to you what you know about his credibility belies his believability. What you know about [Hill] belies what he says up there.

"If you believe Martie and the hammer – and that's why they are so desperate to get away from the hammer. This couldn't have been a hammer, because no one goes back with a hammer and does this and argues self-defense.

“Why is Martie even saying it was either a hammer or this? I would argue to you it’s because he is being truthful about what he remembers happened.” (Tr. Vol. 2, p. 189)

The trial judge fully instructs the jury for considering “self-defense with the use of deadly force” and – in a single paragraph – briefly gives the instruction on “self-defense with the use of non-deadly force.” (Tr. Vol. 2, pp. 200-202)

And for the jury to deliberate whether or not Hill committed the offenses defined in *R.C. 2911.11(A)(1)* and *R.C. 2903.11(A)(1)* beyond a reasonable doubt. The trial judge also told the jury that there weren’t separate verdict forms for self-defense.

On August 21, 2019, at 3:41 p.m., the jury commenced deliberations. At 5:41 p.m., the jury returned with a verdict. The jury found Hill not guilty of aggravated burglary but guilty of felonious assault. The trial judge found Hill guilty of the repeat violent offender specification charged in the indictment and revoked his bond.

On September 1, 2019, Hill submitted a handwritten Criminal Rule 33 Motion for New Trial and Motion to Proceed as Indigent and Pro Se, arguing that he was prejudiced by Barnhart’s complete abandonment of his defense by failing to call Dr. Kennah and Investigator Slaven as expert witnesses without discussing the defense change with him, agreeing to the amendment to indictment without consulting it with Hill, and that the prosecutor knew that Jacobs’ testimony was false and perjured.

On September 19, 2019, a sentencing hearing was held. As a preliminary matter, the trial judge denied Hill’s motion for new trial determining it as ‘hybrid representation.’ (Sentencing Tr., p. 3)

The prosecution acknowledged that Hill did have some provocation based on what Brittany told him, but not to the level of reducing what would otherwise be a felonious assault to an

aggravated assault. And that it is something that is fair to take into account as a mitigating factor in the sentence in this case. (Sentencing Tr., pp. 10-11)

The trial judge acknowledges that Hill used his fists and punched Jacobs in the face. Then states: "If he swung on you, you could have given him a shove. If he swung on you, you could have slapped him. But you didn't. And you damn near killed him with your blows with your fist. You're a big, strong guy. You know it; I know it; everybody knows it. And you used it. And you treated him in a sub-human way." (Sentencing Tr., pp. 12-13)

The judge then imposes an eight-year, mandatory prison term for the felonious assault, the maximum sentence allowed for a second degree felony. (Sentencing Tr., p. 14)

The trial judge then further finds that a sentence of only eight years demeans the seriousness of the offense and that Hill did not act under strong provocation. That Jacobs did not induce the offense in any way and it was a "disproportionate beating that nearly killed the man" and characterized the sexual and physical assaults committed against Brittany by Jacobs as "a perceived emotional slight."

Then an additional four-year prison term was imposed on the repeat violent offender specification consecutive to the eight years, for a total sentence of twelve years. (Sentencing Tr., pp. 14-15)

On September 20, 2019, new counsel was court-appointed to represent Hill on direct of appeal. On November 26, 2019, the transcripts depicting the offer, testimonies given in the jury trial proceedings held in this case from August 19 – 21, 2019, and sentencing hearing proceedings held on September 19, 2019 were filed.

In a letter dated October 7, 2019, Barnhart detailed that he was providing Hill the entire record with witness statements and all material not marked "counsel-only", including the report

from Dr. Kennah.

On May 19, 2020, Hill timely filed a post-conviction relief petition raising six (6) grounds for relief. The petition was accompanied with documentary evidence marked as exhibits A-V, which included: the October 7th letter from Barnhart; Dr. Kennah's report; Hill's request for an affidavit from Dr. Kennah; a request for an affidavit from Barnhart and his refusal; a request for an affidavit from Amy Slaven and her response revealing that Barnhart told her that she couldn't; an affidavit from Brittany; Hill's affidavit; an affidavit from David Castlin (a former associate of Hill) who spoke with Shartzner and Barnhart about the abandoned defense; and even a police preliminary investigative report showing that Jacobs arrived at Riverside in stable condition.

Three of the grounds raised claims of ineffective assistance of trial counsel: 1. Failure to call Dr. Kennah as an expert witness; 2. Failure to call Amy Slaven as an expert witness; and, 3. Conflict of interest for agreeing to amend the indictment.

An additional ground argued the prosecutor's knowing use of Jacobs' false and perjured testimony. Another ground raised the claim that the sentencing court relied upon Jacobs' false and perjured testimony when imposing the sentence. And the final ground raised that cumulative constitutional errors deprived Hill of a fair trial.

On May 29, 2020, the State filed its Answer to Hill's post-conviction relief petition, raising one affirmative defense of *res judicata* to the ground for relief regarding the sentencing judge's reliance on Jacobs' false testimony and misleading statements by the prosecution, and general defenses to the remaining five grounds for relief. In arguing against the credibility of Brittany's affidavit, the State revealed that Jacobs had previously sustained facial fractures from a crash while drag racing, corroborating an averment in Brittany's affidavit.

On July 9, 2020, Hill filed and served a ‘Motion to Strike’ the State’s answer for failing to comply with Rules 8 and 10 of the Ohio Rules of Civil Procedure, and that it presented insufficient, immaterial, impertinent and/or scandalous matter(s). The State did not file an opposing or responsive memorandum.

On July 14, 2020, Hill filed and served a ‘Request for Leave to Amend Petition’ to supplement the exhibits with a copy of a Franklin County Municipal Court Case Docket opened May 15, 2020 on Jacobs, which provided his height and weight (6 feet tall, and 210 pounds), in order to negate the prosecutor and sentencing judge’s false physical comparisons made between Hill and Jacobs. (Tr. Vol. 2, pp. 122-125; Sentencing Tr., pp. 12-13)

On July 22, 2020, the trial court denied the motion to strike and leave to amend the petition, referencing Jacobs’ testimony and the jury’s ability “to see both [Hill] and Mr. Jacobs face-to-face in open court,” concluding that “[t]he new 2020 material about Jacobs is therefore of no value.”

On November 23, 2020, Hill filed and served a ‘Request for Leave to File Summary Judgment and to Convert the Motion to Strike to Summary Judgment,’ accompanied with an ‘Affidavit of Summary Judgment’ pursuant to Civ. R. 56(E). The State did not file an opposing summary judgment motion or affidavit.

In a Journal Entry filed on December 17, 2020, the trial court granted Hill’s request to convert the motion to strike to summary judgment and denied the post-conviction relief petition. The trial court determined that all of the grounds for relief raised by Hill, besides the three ineffective assistance of counsel claims, should have been addressed on direct appeal because they did not require consideration of anything except the trial court record, citing the procedural bar of *res judicata*.

The trial court's Entry noted that the trial transcript prepared in this case for direct appeal did not include the amendment to indictment on August 19, 2019 and had now been filed by the court reporter.

The trial court's near verbatim adoption of the State's arguments presented in its answer concluded that Hill's trial counsel was not ineffective, first, because Barnhart's agreement to amend the indictment minimized references to a sledgehammer and helped the defense focus the jury upon whether hitting someone with fists was really done knowingly under the circumstances, and more importantly on Hill's claim of self-defense.

That Barnhart's failure to call Dr. Kennah as an expert witness was prudent. It would have been clearly quite risky to Hill's self-defense position because once the State's reliance on Jacobs' sledgehammer testimony was reduced in importance by the amendment to indictment, a reasonable defense lawyer would conclude the medical testimony about injury a 2½ pound sledgehammer might have caused was marginally relevant, and would not have affected the outcome of the case.

And that Barnhart's failure to call Amy Slaven to provided impeaching testimony was not reasonably supported, and that counsels' decision falls within the rubric of trial strategy.
(Appendix B)

Hill timely appealed, arguing that the trial court abused its discretion when denying his post-conviction petition and six grounds for relief without an evidentiary hearing, contrary to clearly established constitutional law in violation of the 5th, 6th and 14th Amendments to the United States Constitution and Sections 10 and 16, Article 1 of the Ohio Constitution.

The first error raised is that the trial court abused its discretion and prejudiced Hill by applying an unreasonable determination of the facts and evidence, when denying his claim of ineffective assistance of trial counsel due to Barnhart's failure to call Dr. Kennah as an expert

witness and completely abandoning the defense that Hill depended on, without an evidentiary hearing. That the trial court should have conducted an evidentiary hearing to determine more fully the nature of Dr. Kennah's testimony as well as any strategical reason Barnhart chose not to call Kennah to contradict Jacobs' sledgehammer testimony and that Hill provided evidentiary documents containing sufficient operative facts to establish that Barnhart substantially violated his duty to Hill.

The second error argued that the trial court abused its discretion by applying the *res judicata* bar to Hill's claim that the prosecutor knowingly used Jacobs' false and perjured testimony, finding the "alleged inconsistencies in the testimony of [Jacobs]" as an issue that should have been addressed on appeal because it did "not require consideration of anything except the trial record." (Appendix B, p. 2). Hill argued that Dr. Kennah's report and three police reports presented as documentary evidence constituted evidence outside the record for proof of the claim requiring an evidentiary hearing be conducted.

The third error raised a due process claim resulting from the trial court's reliance on Jacobs' false injury testimonies and misleading and unreliable information from the prosecutor when imposing the sentence in this case, and that the trial court abused its discretion and prejudiced Hill by applying the *res judicata* bar to deny relief without an evidentiary hearing, despite the competent, relevant, and material evidence outside of the trial court record presented in support of the claim.

The fourth error raised that Barnhart's representation fell below an objective standard of reasonableness prejudicial to Hill by failing to call defense investigator, Amy Slaven, as an expert witness for purposes of impeaching Jacobs' credibility – as the State's main witness – based upon the several interactions she had with Jacobs specifically about his alleged consensual sexual

encounters with Brittany, supported by several documents and affidavits. And that the trial court abused its discretion when determining that with nothing more descriptive of the testimony that Slaven might have presented, the argument was not reasonably supported so as to require an evidentiary hearing.

The fifth error argued that the trial court abused its discretion and misapplied *Strickland* to deny Hill's claim of Barnhart's prejudicial representation resulting from his actual conflict of interest and breach of his loyalty duty when agreeing to the amendment to indictment without consulting with Hill, eliminating the prepared defense against the State's accusations. That the trial court erred by not holding an evidentiary hearing, instead determining that amending the indictment, eliminating the reference to a sledgehammer, was focused and simplified the case for both sides, and although the trial included some references to a sledgehammer the jury charge didn't include a deadly weapon or dangerous ordnance, yet, minimizing references to a sledgehammer helped the defense so that it could focus the jury upon whether Hill hitting Jacobs with fists was really done knowingly, thereby, neither prong of the *Strickland* analysis was met.

Hill's arguments demonstrate how trial counsel's deficient performances contributed to the prosecutor's ability to solicit Jacobs' uncorroborated and entirely false testimony regarding his alleged injuries, and how the testimony had an inflammatory and prejudicial effect on the jury's decision specific to the "serious physical harm" element of the felonious assault offense, and the trial court's consideration when imposing its sentence.

For instance, during the testimony of Detective Zimmer on August 20, 2019, a stipulation was placed on the record regarding the fairness and accuracy of the disc containing a copy of Jacobs' medical records that he personally provided to Zimmer on September 19, 2018. (Tr. Vol. 2, p. 117)

Following the stipulation, the trial judge asks Zimmer whether the medical records are all from one hospital to which she answers that she did not go through them in detail but believes that they are from one hospital.

During the exchange between the trial judge and Zimmer, it is detailed by the Court for the record that the medical records are accompanied by an affidavit from Ohio Health and that they “all appear to be from Ohio Health, particularly Riverside.” (Tr. Vol. 1, p. 118)

Yet, despite the stipulation, the following day the prosecutor solicited testimony from Jacobs that he spent ten days in Riverside Hospital and seven days at a Mount Carmel Rehab Hospital, where he “was learning how to eat again . . . had a tracheotomy in [his] throat, had to learn to swallow, walk, and tried to restore [his] balance.” (Tr. Vol. 2, pp. 31-34, 64)

Despite the trial court’s exchange with Ms. Hamm revealing that she witnessed Jacobs “walk normally” immediately after the altercation with Hill, (Tr. Vol. 1, pp. 94, 96-97), Jacobs testified that, although he was unable to walk and had a trachea in his throat, he called Ms. Hamm to pick him up and take him to the rehab hospital. (Tr. Vol. 2, p. 31-33)

Ms. Hamm was 78-years old at the time and only stands five-one and weighs 97 pounds, but is supposed to have assisted a 6 foot, 210 pound grown man that is unable to walk to a rehab hospital. (Tr. Vol. 1, pp. 32-33; 50-51)

Jacobs testified that he was unable to talk because both of his jaws were broken. (Tr. Vol. 2, p. 30, 53.) But he made two (2) calls to 911 and is able to be understood and give the address. (Tr. Vol. 2, pp. 54-56.) He is able to yell “Rita” over the television from the bathroom to the living room. (Tr. Vol. 1, p. 65, 97; Vol. 2, p. 30.) According to the medical records Jacobs was able to talk the entire time and be understood. (Tr. Vol. 2, pp. 174-176.) And the prosecutor even

acknowledged his ability to talk to police and give multiple inconsistent statements. (Tr. Vol. 2, p. 187)

Jacobs testified that his “brain stem got knocked loose.” (Tr. Vol. 2, pp. 30-31.) Yet he is transported to the hospital in stable condition. (Exhibit D, Petition.) And the medical records Jacobs provided do not demonstrate his condition as life-threatening. (Tr. Vol. 2, p. 175)

These exaggerated, life-threatening injuries claims were known by the prosecutor, Barnhart, and even the trial court, to be false but allowed without objection. Even though the trial court granted Shartzer expert witness funding and Dr. Kennah’s report refutes Jacobs’ sledgehammer and numerous false injury claims being provided to the prosecutor.

The sixth error argued that Hill was denied a fair trial due to the cumulative effect of the numerous constitutional errors presented above.

The State began its contention by accurately presenting that Hill’s arguments in this appeal, as in his petition, are primarily focused on debating Jacobs’ credibility and the seriousness of his injury.

The State references Hill’s admission to hitting Jacobs in self-defense and that he stipulated to the serious physical harm (although the stipulation was not available to either party to present to the trial court as an issue) and that the jury evaluated the credibility of both and rejected Hill’s version of events. And that Hill was attempting to re-litigate the underlying facts.

In counter-arguing Hill’s three ineffective assistance of trial counsel claims, the State argued that because Hill was pursuing a theory of self-defense and stipulated that Jacobs suffered serious physical harm, the amendment simplified the case and that the issue before the jury was whether he knowingly caused serious physical harm to Jacobs. And that Hill did not present any

valid reason to explain why counsel should have opposed the amendment because he had the benefit of arguing that his fists could not have caused that extensive damage.

That Hill did not overcome the presumption that Barnhart's decision not to call Dr. Kennah and Amy Slaven was reasonable trial strategy. And that he was unable to prove that their testimony would have significantly assisted Hill's defense, questioning the credibility and reliability of Kennah's report and the other documentary evidence presented to support Slaven's ability to impeach Jacobs' credibility.

The State argues that *res judicata* bars Hill's claims of the prosecutor's knowing use of Jacobs' false and perjured testimony and the trial court's reliance upon such when imposing the sentence. And, finally, that no cumulative error occurred. (Brief of Plaintiff-Appellee)

The court of appeals grouped together Hill's three ineffective assistance of trial counsel errors for its review. Regarding Hill's claims of Barnhart's failure to call Dr. Kennah and Amy Slaven as expert witnesses, the appellate court concluded that because Hill did not present an affidavit from Dr. Kennah and Ms. Slaven, nor from Barnhart to corroborate the claims, nor provide an affidavit from Barnhart or any non-interested party with personal knowledge of the steps trial counsel took in preparing Hill's case for trial, the lack of this affidavit testimony is significant because there is no evidence indicating why Barnhart chose not to secure Dr. Kennah and Amy Slaven's testimonies.

Also that Hill could have raised trial counsel's alleged ineffectiveness for failing to secure Kennah and Slaven's appearances at trial in the direct appeal because them not being called was known at the time, thus, *res judicata* bars the claims.

The appeals court further determined that Barnhart's decision not to call Dr. Kennah and

Amy Slaven as witnesses is a matter of trial strategy and that Hill has failed to prove that their testimonies would have affected the outcome of the case.

The appellate court then determined that Barnhart was not ineffective for agreeing to the amendment to indictment because it did not change the name or identity of the crime charged, and that minimizing references to the sledgehammer helped the defense by permitting Barnhart to focus the jury on whether Hill hitting Jacobs with his fists was done knowingly, and that it could have been raised in direct appeal and is barred by *res judicata*. (Appendix A, ¶¶ 17-37)

The appellate court overruled Hill's error claiming that the prosecutor knowingly used Jacobs' false or perjured testimony by referencing its determination that Dr. Kennah's report does not definitively establish that Jacobs lied about being hit with a sledgehammer, and that Hill failed to obtain an affidavit from the prosecution or any non-interested party with knowledge of the steps the prosecution took in preparing the case against him, including discussions with Jacobs. (Appendix A, ¶¶ 39-43)

The appeals court determined that Hill's claim that the trial court violated his rights by relying on Jacobs' materially false testimony and misleading statements by the prosecutor when imposing its sentence is barred by *res judicata* because it's based upon matters contained in the record. Additionally, the court determined that Hill failed to demonstrate that Jacobs' testimony was false or that the trial court relied on the testimony at sentencing, referencing Hill's alleged testimony about the damage his fists could inflict and the trial court observing first-hand the alleged size disparity between Hill and Jacobs. (Appendix A, ¶¶ 44-51)

The appellate court then concluded that Hill failed to set forth operative facts demonstrating constitutional error on any of the grounds for relief he asserted. (Appendix A, ¶¶ 52-53)

Hill timely sought discretionary review of his from the Supreme Court of Ohio. On February 15, 2022, the Ohio Supreme Court declined to accept jurisdiction of the appeal.

REASONS FOR GRANTING THE PETITION

I. THE PETITION SHOULD BE GRANTED TO DETERMINE WHETHER STATE COURTS IN OHIO UNCONSTITUTIONALLY DEPRIVE INDIGENT CRIMINAL DEFENDANTS OF A FAIR OPPORTUNITY TO RAISE CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND THE KNOWING USE OF FALSE TESTIMONY IN POSTCONVICTION RELIEF PROCEEDINGS.

This case presents the Court with the opportunity to resolve the conflict and confusion created in the decisions rendered by Ohio state courts pertaining to claims of deficient performance by trial counsel and a prosecutor's knowing use of false testimony raised in a post-conviction relief petition.

Specifically, how the courts below consistently and routinely require criminal defendants to obtain affidavit testimony from trial counsel and/or the prosecutor in order for these federal constitutional claims to be granted an evidentiary hearing.

Also, how Ohio courts consistently apply the *res judicata* bar to these kinds of claims presented in post-conviction relief by asserting that the issues should have been raised in direct appeal, although the trial court record is silent on the federal constitutional violations.

“In a petition for post-conviction relief, which asserts ineffective assistance of counsel, the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel’s ineffectiveness.” *State v. Pankey* (1981), 68 Ohio St.2d 58; *State v. Jackson* (1980), 64 Ohio St.2d 107.

The Supreme Court of Ohio has held that a petition for post-conviction relief alleging ineffective assistance of trial counsel may be dismissed without a hearing based on *res judicata*

where the petitioner had new counsel on direct appeal and the claim of ineffective assistance of counsel could have been raised on direct appeal without resorting to evidence outside the record. See *State v. Lentz* (1994), 70 Ohio St.3d 527, 530, citing *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169, at syllabus.

Ohio App.R. 9(A), composition of the record on appeal, sets forth: “(1) The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal.”

On direct appeal, Ohio law limits the reviewing court “to the record of the proceedings at trial.” *McGuire v. Warden*, *Chillicothe Corr. Inst.*, 738 F.3d 741, 751 (6th Cir. 2013) (quoting *Morgan v. Eads*, 104 Ohio St.3d 142, 818 N.E.2d 1157, 1159 (2004)). In *Trevino v. Thaler*, 569 U.S. 413, 428 (2013), the Supreme Court recognized that “the need to expand the trial court record” is critical to ensuring meaningful review. Ohio courts, too, have recognized this necessity and have refused to adjudicate ineffective-assistance claims on direct appeal because of the need for additional evidence. See, e.g., *State v. Smith*, 477 N.E.2d 1128, 1131 n. 1 (1985); *State v. Copperrider*, 448 N.E.2d 452, 454 (1983) (holding that when “it is impossible to determine whether the attorney was ineffective in his representation of [petitioner] where the allegations of ineffectiveness are based on facts not appearing in the record,” defendant’s should avail themselves of post-conviction evidentiary procedures). In these instances, Ohio effectively requires defendants to raise ineffective-assistance claims in post-conviction petitions. *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270, 277 (6th Cir. 2019).

In this case, the appellate court decided this federal constitutional issue by ignoring all of the exhibits filed with his petition and finding that Hill offered no evidence other than the

arguments and his own self-serving affidavit, relying upon its own holdings that Hill's lack of affidavit testimony from trial counsel and the prosecutor is significant because there is no evidence indicating why Barnhart chose not to call Dr. Kennah and Amy Slaven, nor the steps the prosecutor took in preparing the case, such that the claims are unsupported and incapable of proving ineffective assistance of trial counsel. See, *State v. Ibrahim*, 10th Dist. No. 14AP-355, 2014-Ohio-5307; *State v. Silverman*, 10th Dist. No. 06AP-1278, 2007-Ohio-6498.

Nor the prosecutor's knowing use of Jacobs' false and perjured testimony, citing: "Evidence of perjury, without proof of knowledge on the part of the prosecution, does not implicate constitutional rights and thus does not support a petition for postconviction relief." *State v. Boddie*, 10th Dist. No. 12AP-811, 2013_Ohio-3925, ¶13, citing *State v. Jones*, 10th Dist. No. 06AP-62, 2006-Ohio-953, ¶25.

Hill contends that the state appellate court's position that a defendant must present his counsel's testimony to establish that his counsel's performance was deficient is unreasonable and at odds with *Strickland v. Washington*, 466 U.S. 668 (1984).

There can be no dispute that the imposition of a categorical rule that counsel must testify in order for a petitioner to succeed on a federal constitutional ineffective-assistance-of-counsel claim contravenes with United States Supreme Court decisions requiring an objective inquiry into the adequacy and reasonableness of counsel's performance based on the full record before the court.

Strickland established the legal principles governing ineffective-assistance-of-counsel claims. Namely, a defendant must show deficient performance and prejudice. *Id.*, at 687. It is the first prong of the *Strickland* test that is at issue here. In assessing deficiency, a court presumes that counsel "rendered adequate assistance and made all significant decisions in the exercise of

reasonable professional judgment.” *Id.*, at 690. The burden to rebut that strong presumption rests with the defendant, *id.*, at 687, who must present evidence of what his counsel did or did not do, see *Burt v. Titlow*, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013).

The Supreme Court has never, however, required that a defendant present evidence of his counsel’s actions or reasoning in the form of testimony from counsel, nor has it ever rejected an ineffective assistance claim solely because the record did not include such testimony.

The imposition of a *per se* rule requiring testimonial evidence from counsel [is] inconsistent with Supreme Court precedent. See, *Reeves v. Alabama*, 138 S.Ct. 22, 199 L.Ed.2d 341, *22-*27 (Justice Sotomayor, with whom Justice Ginsburg and Justice Kagan join, dissenting from the denial of certiorari). See, also, *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

Accordingly, *State v. Smoot*, 2d Dist. Montgomery No. 96-CA-107, 1997 Ohio App. LEXIS 3426, *10-11; *State v. Singerman*, 1996 Ohio App. LEXIS 4582, Montgomery App. No. 15692, *9, unreported; and *State v. Workman*, 1989 Ohio App. LEXIS 4967, 8th Dist. Cuyahoga No. 55746, *9-10, unreported, each decided that the post-conviction relief petitioner’s own affidavit was sufficient enough to support an evidentiary hearing on a claim of ineffective assistance of counsel.

Actually, the Ohio Supreme Court has established a standard for addressing this very issue. On post-conviction petitions, *** the trial judge holds a hearing and receives testimony on the very issue of ineffective assistance. The trial judge can delve into the motivation or reasoning of trial counsel through trial counsel’s testimony. The court can hear the testimony of witnesses that were never called to testify as well as the witnesses’ credibility. The trial judge can ask what the counsel knew, when he knew it, and whether a mistake was not strategic, but was instead careless. ***, a judge can hear testimony about what evidence was made available to trial counsel and when

it was made available. *State v. Prater*, 10th Dist. No. 18AP-818, 2019-Ohio-2535, P30, quoting *State v. Gondor*, 112 Ohio St.3d 377, 389, P54-P55 (2006).

Nothing in the record indicates what kind of testimony Dr. Kennah and Ms. Slaven could have provided because it would require proof outside the record. *State v. Harman*, 93 Ohio St.3d 274, 299, (2001).

As a result, the trial court should have conducted an evidentiary hearing to determine more fully the nature of Kennah and Slaven's testimony as well as any strategical reason trial counsel chose not to call an expert witness to contradict Jacobs' testimony. The trial court erred in failing to conduct an evidentiary hearing on Hill's petition to determine whether trial counsel was ineffective. See *State v. Aeh*, 1997 Ohio App. LEXIS 5600, *10 (10th Dist.).

Thus, the remaining genuine question is when may an indigent criminal defendant have claims of unconstitutional ineffective trial counsel and prosecutor's knowing use of false testimony raised in post-conviction relief petitions be considered properly presented.

II. THE DECISIONS BELOW UNCONSTITUTIONALLY ESTABLISH THAT THE SIXTH AMENDMENT FORBIDS CRIMINAL DEFENDANTS FROM DEVELOPING A DEFENSE STRATEGY WHEN REPRESENTED BY COURT-APPOINTED COUNSEL.

Another reason for granting the petition is for this Court to clarify whether or not there is a limit or prohibition placed upon a criminal defendant's constitutional right to develop the strategy for defending against the state's charges when he or she is deemed indigent and trial counsel is court-appointed to assist in the defense.

Especially in this case, whether a criminal defendant is denied the constitutional right to a fair trial and effective assistance of trial counsel when he agreed to and relied upon defense strategy is completely abandoned by court-appointed trial counsel just before the start of the jury

trial proceedings without informing the defendant, and trial counsel does not present an equally sufficient defense in its place.

The *Sixth Amendment* does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. * * *. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. *Faretta v. California*, 422 U.S. 806, 818-820 (1975).

It is clearly established that “[a]n attorney undoubtedly has a duty to consult with the client regarding ‘important decisions,’ including questions of overarching defense strategy.” *Harris v. Konteh*, 198 Fed. Appx. 448, 457 (6th Cir. 2006), quoting *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (citing *Strickland*, 466 U.S. at 688).

An error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant’s right to conduct his own defense, which, when exercised, “usually increases the likelihood of a trial outcome unfavorable to the defendant.” *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8 (1984). That right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. See *Faretta v. California*, 422 U.S. 806, 834 (1975). Because harm is irrelevant to the basis underlying the right, the Court had deemed a violation of that right structural error. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n. 4 (2006). *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017).

In contention, the Ohio courts routinely apply that it is well-settled that “[c]ounsel’s decision to call a witness is a matter of trial strategy * * * [and] [s]uch decisions will generally not

be second-guessed by a reviewing court.” *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶113; *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶42.

That “[a] lawyer must have ‘full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval.’” *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, quoting *Taylor v. Illinois*, 484 U.S. 400, 418 (1988).

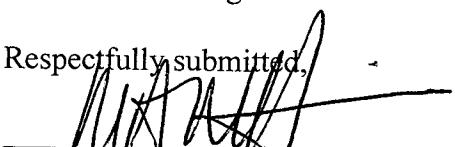
And that “the end result of tactical decisions need not be positive in order for counsel to be considered ‘effective.’” *State v. Awkal*, 76 Ohio St.3d 324, 337 (1996).

The question remaining is, in this case, would it be considered reasonably professional assistance when a criminal client charged with a violent crime was granted expert witness funding, expert assistance was obtained, additional expert assistance from an investigator was utilized, but then trial counsel chooses not to call the expert witnesses and even stipulates to one of the two elements in the charged offense that the prosecution is required to prove beyond a reasonable doubt, without discussing the change with the defendant?

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



MARK A. HILL A766-443
Pickaway Correctional Institution
11781 State Route 762
Orient, Ohio 43146

Petitioner, *pro se*

CERTIFICATE OF COMPLIANCE

No.

MARK A. HILL,

Petitioner,

vs.

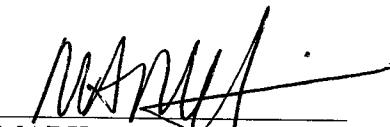
STATE OF OHIO,

Respondent(s).

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 8,997 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 13, 2022



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