No. 22-5125

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 the 26(B) application for reopening proceeding was adequate and fundamentally fair in order to determine if appellate counsel was deficient and prejudicial to the petitioner.

2. Whether the 26(B) application for reopening demonstrated that there is a genuine issue as to whether the petitioner was deprived of the effective assistance of counsel on appeal.

3. Whether the petitioner's showing that appellate counsel's failure to request and include the transcript of the amendment to indictment presented a genuine issue of ineffective assistance.

4. Whether appellate counsel was unconstitutionally ineffective in failing to raise as plain error the trial court's failure to fully and completely give the jury all the relevant instructions as requested and agreed upon.

5. Whether appellate counsel was ineffective for failing to raise as plain error that defense counsel was ineffective for not requesting a limiting instruction to disregard highly inflammatory material.

6. Whether appellate counsel was unconstitutionally ineffective for failing to raise as error defense counsel's representing conflicting interests when stipulating to an element of the offense charged.

7. Whether counsel on appeal was ineffective for failing to raise as error that the trial court plainly erred by not instructing the jury on the lesser included offense.

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.

State v. Hill, Supreme Court of Ohio, Case No. 18CR-5181, 'Defendant Mark A. Hill's R.C. 2701.03(A) Affidavit of Disqualification of Franklin County Common Pleas Judge Richard A. Frye for Bias and Prejudice' – submitted March 23, 2022.

Supreme Court of the United States, Application No. 21A522, extension of time to file a petition for writ of certiorari (Application for Reopening) – granted March 22, 2022.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FORWRIT 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 application for reopening of direct appeal appears at Appendix B and is published at *State v. Hill*, 165 Ohio St. 3d 1480, 2021-Ohio-4289, 177 N.E.3d 1005. The Tenth District Court of Appeals of Ohio's memorandum decision denying the application for reopening of direct appeal appears at Appendix A and is unpublished.

JURISDICTION

The Tenth District Court of Appeals of Ohio rendered its memorandum decision on September 2, 2021, and Mark A. Hill filed a timely memorandum in support of jurisdiction requesting discretionary review of that decision in the Supreme Court of Ohio. A copy of that decision appears at Appendix A. That court denied discretionary review of the decision below on December 14, 2021. On March 22, 2022, Justice Kavanaugh extended the time to file this petition until and including April 30, 2022. 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. 2903.13(B): "No person shall recklessly cause serious physical harm to another or to another's unborn."

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. At the time, Hill and Brittany resided together with his two teen, and one pre-teen, children in a condominium community

located on the Southeast End of Columbus. It is a 16-mile drive in each direction and takes from 24 to 30 minutes to travel each way at that time of night.

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 requested for them to confront Jacobs.

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.

Hill knocked on the bedroom door, opened it into a dark room, turn on the light and approached Jacobs to confront him about punching Brittany. 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 him 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 the Franklin County Public Defender was appointed as defense counsel. On October 25, 2018, defense counsel filed a request for discovery and a Bill of Particulars.

On November 15, 2018, the prosecution filed a Bill of Particulars informing the defendant of the following particulars regarding the indictment, alleging that:

> "On or about August 25, 2018 at approximately 11:30 PM, in Franklin County, Ohio, the Defendant, Mark Anthony Hill, did, by force, stealth, or deception, trespass, as defined in section 2911.21(A)(1) of the Revised Code, in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, located at 1502 Norma Rd, Columbus, OH 43229, when Marty Jacobs, a person other than the accomplice, was present, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense the offender inflicted, or attempted or threatened to inflict physical harm on Marty Jacobs and/or the offender had a deadly

weapon or dangerous ordnance, to wit: a sledgehammer, on or about his person or under his control . . ."

and

"On or about August 25, 2018 at approximately 11:30 PM, in Franklin County, Ohio, the Defendant, Mark Anthony Hill, did knowingly cause serious physical harm to Marty Jacobs and/or did knowingly cause or attempt to cause physical harm to Marty Jacobs by means of a deadly weapon or dangerous ordnance, to wit: a sledgehammer . . ."

During a break in voir dire at 11:57 a.m. on August 19, 2019, day one of the jury trial an oral motion to amend the original indictment was raised by the prosecutor. The following proceeding occurred:

Prosecutor: "Your Honor, we've stated both of these offenses in the alternative. And just for simplicity's sake, I would move, pursuant to Criminal Rule 7(D), as to Count 1, in the last sentence of Count 1, "and/or the offender had a deadly weapon or dangerous ordinance, to wit: a sledgehammer, on or about his person or his control," we would move to delete that and just leave it the first way of committing aggravated burglary, which is the offender inflicted or attempted to inflict physical harm on Martie Jacobs. We would just have the one alternative."

Prosecutor: ". . . And then the same thing in Count 2. Once again, there's two ways of committing felonious assault. We've stated them both alternatively, which for simplicity's sake, we would move to amend the indictment to delete "and/or." Did knowingly cause or attempt to cause physical harm to Martie Jacobs by means of a deadly weapon or a dangerous ordinance, to wit: a sledgehammer.

"It should be noted, Your Honor, part of this is also because the defense previous has agreed to stipulate to the seriousness of harm in this case, and the medical records and the X rays and et cetera, correct?"

Defense Counsel: "Correct. So no objection to the deletion."

Prosecutor: ". . . If you present them with both alternatives in Count 2, for instance, you would have to voir dire them and say, "Well, which alternative did you all agree on?" Or would have to put an additional element there. It just makes it very convoluted."

(Amendment to Indictment Transcript)

On the morning of August 20, 2019, the prosecutor's opening statement offered to the jury, when discussing Jacobs as the alleged victim, that "[h]e's going to tell you, in his mind now, he

said, it was either a fist or a sledgehammer. He's going to testify. He's very sure this guy pulls out a little mini sledge concealed down in his shorts, and just whack, whack right in the face. And he said, and then the world just went away. That's what he remembers."

". . . You'll see what Mark Hill did with either this mini sledge hammer or his fist on August 25th." (Tr. Vol. 1, pp. 25-26)

Rita Hamm, Brittany's grandmother, was the first witness called by the prosecution. During Ms. Hamm's testimony, she 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 headlock 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 the clothing Hill was wearing 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 20, 2019, Detective Kathy Zimmer, from the Columbus Division of Police, testified for the prosecution and provided that Jacobs called on September 19, 2018 asking what was going on with his case. Zimmer and Detective Chapman went to 1502 Norma Rd. on September 19th and interviewed Jacobs and Ms. Hamm.

During this testimony, 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)

On cross-examination, Zimmer confirms that Hill voluntarily interviewed with her and provided her with the pictures of Brittany's eye date and time-stamped on August 25, 2018, along with screenshots of his call log that depicts the video calls from Brittany on that night. (Tr. Vol. 1, pp. 119-123)

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

Jacobs then claims that Brittany grabs a knife from the kitchen table and threatens 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 intervenes 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 testifies 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 for ten days then went to a Mount Carmel (part of Trinity Health) rehab hospital 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, the 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 answers 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 answers 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)

Hill testifies 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 hammer and states 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.

He and Brittany walked back to Jacobs' bedroom, Hill knocked on the door then opened it. 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. (Tr. Vol. 2, pp. 93, 95-96, 133)

On cross-examination, the prosecutor begins questioning Hill about his 2009 felonious assault conviction, focusing on the use of a weapon (a utility knife in that case) and emphasizing that it was one of his work tools.

Then he questions 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." (Tr. Vol. 2, pp. 109-110)

Hill testifies 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 questions Hill about his height, weight and build, then references him admitting to Detective Zimmer about being in fist fights before and being able to hit hard. Hill restates 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)

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.

Prior to closing arguments and outside the presence of the jury, defense counsel and the trial judge discuss an issue previously raised regarding jury instructions in the following manner:

Defense Counsel: ". . .I guess the only thing is, of course, I think with the jury instructions we talked about this, you indicated that you are going to instruct on deadly force, that it's a jury issue for them to consider?"

The Court: "Yes."

Defense Counsel: "At the time, I asked only for the instruction on non-deadly force. I would just note that I asked it to only be non-deadly force. You indicated you were going to instruct on both, so we worked from there."

The Court: "It seems like there is a dispute of fact about what four punches, which is the admitted nature of the force, what that could mean, so I think we have to send them both to the jury."

(Tr. Vol. 2, p. 148)

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)

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)

Defense counsel then offers "[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 begins his rebuttal argument by stating: "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 [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)

While instructing the jury, the trial court states: "If you find the defendant committed a felonious assault, you must next consider whether Mr. Hill acted in self-defense." (Tr. Vol. 2, p. 199)

The jury is next instructed that: "If you find that evidence was presented tending to support a finding that the defendant used deadly or non-deadly force in self-defense, the state must prove beyond a reasonable doubt that the defendant did not act properly in self-defense." (Tr. Vol. 2, p. 200)

The trial judge then goes on to fully define self-defense "in which the use of deadly force occurred," as found in Ohio Jury Instructions – CR 421.21, including the definitions for each separate element of 'deadly force.' (Tr. Vol 2, pp. 200-202). In the midst of fully defining self-defense of person against danger of death or great bodily harm – use of deadly force, the trial judge briefly instructs the jury on self-defense in which non-deadly force was used as follows:

> "A person has a duty to retreat if you find that he used deadly force. If you find the defendant did not use deadly force, he had no duty to retreat. If the defendant did not use deadly force, he had only to reasonably believe that some force was necessary to defend himself against the imminent use of unlawful force."

(Tr. Vol. 2, p. 201, lines 2-8)

The brief mention of "non-deadly force" does not fully define self-defense against danger of harm to person – use of non-deadly force as found in Ohio Jury Instructions – CR 421.19. (See Appendix C).

When concluding the instructions to the jury, the trial judge states:

> "There is no separate verdict form for self-defense, but as I've tried to explain, based upon the very complicated law our legislature has given us, with the help of the lawyers, the self-defense issue is wrapped in around whether or not Mr. Hill is guilty or not guilty of that second charge. But there's no separate question that you have to answer about that."

(Tr. Vol. 2, p. 206)

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 Count 1 in the indictment, aggravated burglary, and guilty of Count 2 in the indictment, felonious assault. The trial judge found Hill guilty of the repeat violent offender specification charged in the indictment and revoked his bond.

On September 19, 2019, a sentencing hearing was held. 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 states to Hill: "Once you've been to prison for a felonious assault, it behooves someone to be really careful about hitting anybody else, particularly with your fists at short range and, particularly, in the face. 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. And on October 17, 2019 appellate counsel timely filed a notice of appeal and ordered the transcript of proceedings.

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 was filed.

On December 8, 2019, Hill forwarded a letter to court-appointed appellate counsel outlining numerous concerns of constitutional, procedural and statutory errors that occurred during the criminal trial proceedings in this case. Within the letter, Hill informed appellate counsel that the indictment had been amended.

In a letter dated December 22, 2019, appellate counsel acknowledged receipt of Hill's December 8th letter and provided him with a copy of the transcripts filed on November 26th. Hill realized that the transcripts depicting the amendment to indictment proceedings held during a break in voir dire on August 19, 2019 were not included.

On March 18, 2020, appellate counsel forwarded a copy of the appeal brief filed on January 17, 2020, and brief of the appellee filed on February 3, 2020. (See Appendix C)

The January 17th brief filed by appellate counsel raised just three (3) assignments of error: 1. The trial court erred when it denied defendant-appellant's R. 29 Motion for Acquittal (Vol. 2, P. 139, 149) (sufficiency of the evidence); 2. The verdict of felonious assault was against the manifest weight of the evidence; and 3. The trial court abused its discretion in allowing the State to present evidence of other acts/crimes/convictions.

The 15-page brief (including cover page, table of contents, table of authorities and statement of assignments of error) was presented in a typeface of 16 points, double-spaced, and consisted of a total of seven (7) pages of the three assignments of error arguments including the two sentence conclusion. Tenth Appellate District, *Loc. App. R. 8(B)*, provides that in "a matter assigned to the Regular Calendar, a principal brief shall not exceed 60 pages."

As a result, on April 9, 2020 Hill filed a motion in the appeals court requesting leave to file a supplemental brief in order to present arguments of constitutional error not presented by court-appointed appellate counsel and to address the absence of the transcript of the amendment to indictment proceeding. On April 13, 2020, the appeals court denied Hill leave to supplement the brief on direct appeal.

Although *Loc. App. R. 11(A)* sets forth that: "Oral arguments shall be scheduled without request or motion in all appeals other than in which a party is both incarcerated and self-

represented," as a result of the Covid-19 pandemic an emergency notice was issued on April 17, 2020 scheduling the appeal to be presented to a reviewing panel on the briefs without oral argument.

On December 17, 2020, the trial court filed the transcript of the amendment to indictment proceeding in conjunction with the entry denying Hill's timely filed post-conviction relief petition. The amendment transcript was not transmitted to the appellate court as part of the record on appeal.

On January 21, 2021, the appellate court rendered its decision overruling all three assignments of error filed by appellate counsel and affirmed the conviction and sentence of the trial court, without having the amendment to indictment transcript as part of the record.

On April 8, 2021, Hill timely filed an App. R. 26(B) Application for Reopening of Direct Appeal based upon ineffective assistance of appellate counsel for failing to raise four (4) assignments of error that are in the record, in addition to not requesting the transcript of the amendment to indictment proceeding. Hill briefly presented the four arguments and supporting legal authorities within the page limit set forth in procedural rule.

The first assignment of error argued that defense counsel provided ineffective assistance for not objecting to the trial court's failure to provide a limiting instruction with respect to testimony allowed regarding use of a sledgehammer in commission of the felonious assault offense, specifically that the jury were not to consider use of a sledgehammer, nor any other weapon, in order to reach a verdict on the offense charged. Hill based this argument on the fact that the felonious assault offense charged in the indictment was amended to delete the "deadly weapon or dangerous ordnance, to wit: a sledgehammer" and the trial court would instruct the jury only on the first way of committing the offense as defined in R.C. 2903.11(A)(1).

The second assignment of error argued that the trial court plainly erred, to the prejudice of Hill, by failing to instruct on the lesser included offense of reckless assault. That in viewing the facts and evidence in the light most favorable to him, under existing Ohio law, the jury should have been given the option to determine whether Hill acted "recklessly" or "knowingly" in committing felonious assault as they are defined by the Ohio Revised Code. Hill argued, therefore, that because it was obvious in the record the trial court committed plain error for failing to give the lesser included offense instruction without request or objection from defense counsel.

The third assignment of error argued that defense counsel provided ineffective assistance of counsel by representing conflicting interests when stipulating to the serious physical harm element of felonious assault defined in R.C. 2903.11(A)(1).

Hill argued that the prosecution had to prove beyond a reasonable doubt that he violated the two elements set forth in R.C. 2903.11(A)(1), element one being he "knowingly" and element two "caused serious physical harm." That the stipulation gave the prosecution a prejudicial advantage by leaving it only having to prove the "knowingly" element of the statute and, thus, granted Jacobs and the prosecution unbridled freedom to exaggerate the seriousness of any injury he may have sustained and claim numerous other injuries uncorroborated by the medical records.

Hill argued that defense counsel's stipulation to the serious physical harm element breached his duty of loyalty to him and amounted to an active representation of conflicting interests, and a failed duty to expose the prosecution's case to reliable adversarial testing.

The fourth assignment of error argued that the trial court plainly erred and prejudiced Hill by failing to provide the jury with the legal definition of "non-deadly force" self-defense. That it is obvious on the record, palpable, and so fundamental such that it should have been apparent to the trial court without objection.

Despite defense counsel's request that an instruction only for "non-deadly force" be given and his objection to a "deadly force" instruction, the trial court stated it would instruct on both. Hill demonstrated that the trial court gave the complete "deadly force" instruction to the jury and did not give the complete "non-deadly force" instruction.

Hill also argues that in addition to the trial court's failure to give the requested instruction in full, it nullified the jury's duty to properly deliberate the claim of self-defense after it determined whether or not Hill was guilty of felonious assault by instructing the jury that there's no separate question they had to answer about that.

The application was supported by the required sworn statement, a copy of Hill's December 8, 2019 letter to appellate counsel, appeal counsel's December 22, 2019 letter to Hill, a full copy of the missing transcript of the amendment to indictment proceeding occurring on August 19, 2019, a copy of the transcript pages depicting the trial court's self-defense jury instructions, and the complete Ohio Jury Instructions – CR 421.19 and CR 421.21. (See Appendix C)

On May 14, 2021, the prosecutor's Memorandum in Opposition to Hill's App. R. 26(B) application was filed.

On June 4, 2021, Hill filed a Motion to Strike the prosecutor's opposing memorandum arguing that it presented unsupported arguments contrary to App. R. 26(B)(3), fraudulently misrepresents each of Hill's arguments presented in support of the four (4) assignments of error raised, and raises argument(s) that were not presented in the trial proceeding and not part of the record. On August 12, 2021, the appeals court denied Hill's motion to strike.

On September 2, 2021, the appellate court rendered a decision fully adopting the prosecutor's opposing arguments and determining that Hill failed to demonstrate a genuine issue that he has a colorable claim that his appellate counsel's performance was deficient and that he

was prejudiced by the performance, without appointing new appellate counsel and permitting Hill to adequately brief the assignments of error raised in the App.R. 26(B) application for reopening.

On October 20, 2021, Hill timely filed a notice of appeal and memorandum in support of jurisdiction to the Supreme Court of Ohio.

The Supreme Court of Ohio declined to accept jurisdiction of the appeal on December 14, 2021.

REASONS FOR GRANTING THE PETITION

I. THE PETITION SHOULD BE GRANTED TO RESOLVE WHETHER THE 26(B) APPLICATION FOR REOPENING DIRECT APPEAL PROCEEDING FAIRLY PROVIDED PETITIONER WITH THE OPPORTUNITY TO DEMONSTRATE A GENUINE ISSUE OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

This case presents the Court with the chance to implement a constitutional procedure for guaranteeing that indigent prisoners are given a fair opportunity to have a *Sixth Amendment* claim of ineffective assistance of appellate counsel raised in a state court – when unrepresented – briefed and argued fully in order to determine whether a criminal defendant was actually prejudiced by court-appointed counsel's deficiencies on direct appeal of his conviction and sentence.

On the first appeal of right, a defendant is entitled to effective assistance of appellate counsel. *Mahdi v. Bagley*, 522 F.3d 631, 636 (6th Cir. 2008).

This Court determined that where a state provides a process of appellate review, the procedures used must comply with the constitutional dictates of due process and equal protection. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). See, also, *Evitts v. Lucey*, 469 U.S. 387, 393 (1985).

Ohio *Appellate Rule 26(B)* provides 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." *Davie v. Mitchell*, 547 F.3d 297, 311-12 (6th Cir. 2008).

An application for reopening must set forth "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by an appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." *App.R. 26(B)(2)(c)*.

The court must grant an application for reopening if the appellant demonstrates that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." *App.R. 26(B)(5)*. To determine whether the applicant has raised a genuine issue of ineffective assistance, Ohio courts employ the two-pronged analysis of *Strickland v. Washington*, 466 U.S. 668 (1984). See *Smith v. Robbins*, 528 U.S. 259, 285-286 (2000).

Under Strickland, a defendant must demonstrate the following: (1) counsel was deficient in failing to raise the issue[s] defendant now presents; and (2) defendant had a reasonable probability of success if the issue had been presented on appeal. *State v. Lee*, 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶12, citing *State v. Timmons*, 10th Dist. No. 04AP-840, 2005-Ohio-3991.

But the *Strickland* Court cautioned that the prejudice inquiry is not meant to be applied in a "mechanical" fashion. *Henness v. Bagley*, 644 F.3d 308, 317 (6th Cir. 2011); 466 U.S. at 696. For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on "the fundamental fairness of the proceeding." *Ibid. Weaver v. Massachusettes*, 137 S. Ct. 1899, 1911 (2017).

Despite the application's 20-page limit, Hill met the argument requirements prescribed in App.R. 26(B)(1) through (4), supported with the letters exchanges with counsel, the complete amendment to indictment transcript, and transcript pages of the self-defense instructions to the jury. (See Appendix C).

Upon the first opportunity, Hill presented the issue of "fundamental fairness" of his 26(B) proceeding to the Ohio Supreme Court, and fairness never being more imperative than when constitutional claims are presented for review by an indigent, pro se criminal defendant.

On February 8, 2022, the Supreme Court of Ohio rendered a decision, in *State v. Leyh*, 2022-Ohio-292, regarding the structural and textual interpretation and application of App.R. 26(B).

The Court provides that *App.R. 26(B)* establishes a two-step procedure to adjudicate claims of ineffective assistance of appellate counsel. * * *. At that first stage, the applicant must apply to have his appeal reopened following the procedure set out in App.R. 26(B)(1) through (4). *State v. Simpson*, 164 Ohio St.3d 102, 2020-Ohio-6719, 172 N.E.3d 97, ¶12. And that the burden is on the applicant to demonstrate a "genuine issue" as to whether there is a "colorable claim" of ineffective assistance of appellate counsel. *Leyh* at P19-P21.

Then, if the court grants the application, the matter proceeds to the second stage of the procedure, which "involves filing appellate briefs and supporting materials with the assistance of counsel, in order to establish that prejudicial errors were made in the trial court and that ineffective assistance of appellate counsel in the prior appellate proceedings prevented these errors from being presented effectively to the court of appeals." *1993 Staff Notes to App.R. 26(B).* See *Simpson* at ¶13 (when an application is granted, the case proceeds to the second stage and is treated as if it were an initial direct appeal with briefing and oral argument). *Leyh* at P22. See *App.R. 26(B)(6) through (9).*

The Ohio Supreme Court accepted Leyh's discretionary appeal – a case involving a missing transcript – on September 1, 2020, and was pending at the time Hill filed discretionary appeal on October 20, 2021 arguing the fundamental unfairness of his 26(B) proceeding – involving a

missing transcript – which was not accepted. Also, Leyh was represented by new counsel on 26(B) while Hill filed as an indigent, pro se prisoner litigant.

In each case, the court of appeals denied the App.R. 26(B) applications based on their determination that both failed to establish the prejudice prong of the *Strickland* analysis, i.e., that there was "a reasonable probability of success" that the result of the appeal would have been different, collapsing the second-stage ineffective-assistance-of-counsel determination under App.R. 26(B)(9) into App.R. 26(B)(5)'s first-stage threshold determination whether there is a genuine issue the applicant was deprived of the effective assistance of counsel on appeal. See *Leyh* at P34; Appendix C, at ¶27.

The Leyh Court reversed and remanded the appellate court's judgment for further proceedings pursuant to App.R. 26(B)(6) through (9), concluding that under 26(B), the deficient and prejudice determination is to be made after the appeal has been reopened and the parties are afforded the opportunity to have counsel appointed, transmit the necessary record, and substantively brief the issues. Hill was not equally afforded this consideration.

The remaining genuine question is what establishes a fundamentally fair process for determining unconstitutionally deficient and prejudicial assistance of appellate counsel and whether it equally applies to the indigent prisoner as well as the financially able.

II. THE DECISION BELOW IS AN UNREASONABLE DETERMINATION OF THE RECORD FACTS AND EVIDENCE CONTRARY TO STATE AND FEDERAL LAWS.

The decision below also warrants review for other reasons. Ohio's Tenth Appellate District Court began if fact-finding merit process for determining whether appellate counsel was ineffective in this case by acknowledging the prejudicial effect the omitted amendment to

indictment transcript had on its direct appeal review, a consideration performed on an incomplete record. See *App.R. 26(B)(2)(c)*.

The Court stated: "In affirming the judgment of the trial court during Hill's direct appeal, we determined that the evidence "was sufficient to allow the jury to infer that appellant knowingly caused physical harm to [the victim] and/or that appellant knowingly caused or attempted to cause serious physical harm to the victim by means of a deadly weapon as required by *R.C. 2903.11(A)(1)* and *(2)*."" (Appendix A, ¶3).

The statement first misquotes R.C. 2903.11(A)(1) and (2). Regardless, the amendment to indictment deleted "and/or by means of a deadly weapon or dangerous ordnance, to wit: a sledgehammer" from the charged offenses. The trial court instructed the jury on R.C. 2903.11(A)(1) only. Thus, the jury being allowed to consider both ways of committing felonious assault created confusion form the injection of the inflammatory material.

First, that because the amendment to indictment was so obvious on the record and fundamental that it should have been apparent to the trial court it was necessary to give a limiting instruction to the jury not to consider use of a weapon when deliberating on R.C. 2903.11(A)(1), and failure to do so amounted to plain error based upon trial counsel's failure to request the trial court to give a limiting instruction. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16; *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-200, 661 N.E.2d 1043.

The gist of the argument is there's a definite possibility of jury confusion in light of the allegations made regarding the sledgehammer and the statute charged. *State v. Johnson* (1989), 46 Ohio St.3d 96, 105, citing *United States v. Beros*, 833 F.2d 455, 461 (3d Cir. 1987).

That the sledgehammer testimony was highly inflammatory and erroneous material violating Hill's right to a fair trial under the *Due Process Clause of the Fourteenth Amendment to*

the United States Constitution. See, *State v. Green* (10th Dist.), 1999 Ohio App. LEXIS 1134, *18, citing *State v. Davis* (1975), 44 Ohio App.2d 335, 345, 349, citing *Bruton v. United States* (1968), 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476. See, also, *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S. Ct. 1730, 52 L.Ed.2d 203 (1977); *Estelle v. McGuire*, 502 U.S. 62, 73 (1991); *Coleman v. Mitchell*, 244 F.3d 533, 542 (6th Cir. 2001).

And that trial counsel's failure to object to the sledgehammer testimony and the prosecutor's alternative means presentation, and to request a limiting instruction considering the amendment to indictment, was not a strategic and tactical decision of counsel and but for the unprofessional errors, there is a reasonable probability the result of the proceeding would have been different. *State v. Hester* (10th Dist.), 2002-Ohio-6966, P15; *State v. Hughes*, 10th Dist. No. 14AP-360, 2015-Ohio-151, ¶69; *Strickland* at 694.

In deciding this first assignment of error, without presenting a single legal authority to support its decision and completely ignoring the federal constitutional violation presented by Hill.

The appeals court acknowledges that the "indictment was amended to eliminate the specific reference to the use of a sledgehammer, and the jury charge included no reference to a dangerous weapon or ordnance." And because Hill's primary defense was premised on a claim of self-defense, removing the reference to the sledgehammer from the indictment and removing the alternative means for the state to prove guilt also helped the defense as it permitted counsel to have the jury hone in on whether striking the victim with fists was done knowingly under the circumstances. (Appendix A, ¶12).

The appeals court determined the argument regarding the failure of a limiting instruction being provided as meritless by concluding that whether Hill used a sledgehammer or his fists, the jury was free to reject Hill's claim of self-defense and his continued complaints that the jury chose

to believe the victim rather than him is simply a rehashing of the argument made on direct appeal, and that appellate counsel was not ineffective for failing to bring the argument. (Appendix A, ¶13).

Hill argued that the trial court plainly erred when failing to instruct the jury to consider "reckless assault," under R.C. 2903.13(B), as a lesser-included offense of "felonious assault," under R.C. 2903.11(A)(1). This based upon the conflicting accounts of the altercation presented by trial testimony, Jacobs' claim of being hit with a sledgehammer, Rita Hamm providing that Hill dis not have a hammer, Hill's testimony that he punched Jacobs in self-defense, and the trial court's statements at sentencing regarding punches causing injury to Jacobs.

The Tenth Appellate District has found that in deciding whether to provide a lesser-included offense instruction, the trial court must consider both the state's evidence and the defense's evidence, and it must view the evidence in the light most favorable to the defendant. *State v. Anderson*, 10th Dist. No. 06AP-174, 2006-Ohio-6152, ¶39; *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶37, 827 N.E.2d 285. *State v. Rutledge* (10th Dist.), 2019-Ohio-3460, P24-P25.

The Tenth Appellate District has also found that a felonious assault can actually be a simple assault if the person throwing the punch did not know he was causing serious physical harm but only knew he was causing physical harm. A felonious assault likewise becomes a simple assault if the person throwing the punch caused serious physical harm recklessly. *State v. Eisenman* (10th Dist.), 2018-Ohio-934, P4.

In deciding the second assignment of error, again without a single reference to any legal authority to support its conclusion, the appeals court determined that Hill's claim that the jury should have been given the option to consider "reckless assault" as a lesser included offense of felonious assault is "utterly without merit," and based upon its prior decision resolving the direct

appeal, an instruction on reckless assault would not only be unsupported but would be entirely inconsistent with Hill's claim of self-defense. Thus, appellate counsel was not ineffective for failing to argue "a non-existent error." (Appendix A, ¶¶15-17).

The court of appeals' "non-existent error" determination is wholly contrary to clearly established Ohio law that specifically has addressed an instruction on a lesser-included offense being given where self-defense is claimed.

The responsibility of the trial court with respect to lesser included offenses where self-defense is claimed was set forth in *State v. Nolton* (1969), 19 Ohio St.2d 133, 135.

Nolton and its progeny, *State v. Fox* (1972), 31 Ohio St.2d 58, 63; *State v. Long* (1978), 53 Ohio St.2d 91, 99; *State v. Jenkins* (1976), 48 Ohio App.2d 99, 104; and *State v. Osburn* (1976), 52 Ohio App.2d 146, 148, require that where the defendant is charge with a homicidal or physical assault-type crime and defends on a claim of self-defense, a charge on a lesser-included offense is both warranted and required, not only for the benefit of the state, but for the benefit of the accused if the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which, by themselves, would sustain a conviction on a lesser included offense. *State v. Parra*, 61 Ohio St.2d 236, 239-240, 400 N.E.2d 885.

See, also, *State v. Bogle*, 2d Dist. Montgomery, 1996 Ohio App. LEXIS 1932, *16; *State v. Locklear* (10th Dist. Franklin), 1986 Ohio App. LEXIS 8788.

To find Hill guilty of violating R.C. 2903.11(A)(1), the prosecution had to prove, beyond a reasonable doubt, both the "knowingly" and "caused serious physical harm" elements, each individually defined by the Ohio Legislature.

This Court has established that "the *Due Process Clause* 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." *Sandstrom v. Montana*, 422 U.S. 510, 520 (1979); *Middleton v. McNeil*, 541 U.S. 433, 437.

Hill argued that trial counsel was ineffective when violating his duty to advocate Hill's cause by stipulating to the "serious physical harm" element, representing conflicting interests, giving the prosecution a prejudicial advantage to obtain a conviction on R.C. 2903.11(A)(1). See, *Powell v. Alabama*, 287 U.S., at 68-69; *Strickland* at 688, 692; *Florida v. Nixon*, 543 U.S. 175, 178 (2004); *Cuyler v. Sullivan*, 446 U.S. 335, 345-350.

The appeals court determination of this third assignment of error speculated that because trial counsel pursued a strategy of self-defense, the stipulation to serious physical harm and medical records prevented the state from presenting a medical expert or experts whose testimony would have provided detailed explanations and analyses of the injuries and potential causes. That such expert medical testimony would only draw more attention to Jacobs' alleged serious injuries and added weight to Jacobs' version of how the alleged injuries were specifically caused.

In that, Hill failed to demonstrate that actions of trial counsel were not part of a sound trial strategy and that the outcome of the trial would have been different otherwise, under the presumption set forth in *Strickland v. Washington*, 466 U.S. 668, 689 (1984), quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955).

The appellate court concluded that there was no reasonable probability of success so appellate counsel was not deficient for failing to raise the issue. (Appendix A, ¶¶19-22).

It is overwhelmingly obvious in the record that trial counsel objected to a "deadly force" instruction and requested only a "non-deadly force" self-defense instruction. The trial court stated it would give both and provided its reasoning as Hill's punching Jacobs.

Simply, the trial court committed plain error when it detailed the "self-defense by use of deadly force" instruction set forth in Ohio Jury Instruction – CR 421.21 and *did not* give the full and detailed "self-defense by use of non-deadly force" instruction set forth in Ohio Jury Instruction – CR 421.19. Then the trial court nullified the manner in which the jury was to consider self-defense.

The trial court's plain error "misled the jury in a matter materially affecting [Hill's] substantial rights." See, *State v. Dean* (2015), 146 Ohio St.3d 106, ¶135, quoting *Kokitka v. Ford Motor Co.* (1995), 73 Ohio St.3d 89, 93.

In deciding this fourth assignment of error, the appeals court plainly misrepresents and misstates Hill's argument when stating that he asserts "appellate counsel was ineffective for failing to argue that the trial court committed plain error by providing a jury instruction on both deadly and non-deadly force and for failing to argue that trial counsel was ineffective for failing to object to the instruction on deadly force." (Appendix A, ¶23).

See, *Wiggins v. Smith*, 123 S. Ct. 2527, 2538-39 (2003); *Miller-El v. Cockrell*, 537 U.S. 322, 346-347 (2003); *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004).

The appellate court does properly quote that "[t]he court must give all instructions that are relevant and necessary for the jury to weigh the evidence and discharge its duty as the factfinder." *State v. Mankin*, 10th Dist. No. 19AP-650, 2020-Ohio-5317, ¶34.

And then, in further misstating the actual argument presented, concludes that because Hill failed to demonstrate that the outcome of the trial would have been different had the instruction on

non-deadly force solely been given, appellate counsel was not ineffective for failing to raise this argument. (Appendix A, ¶¶25-26).

CONCLUSION

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

Respectfully submitted,

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