No. 24-_____

In the

Supreme Court of the United States

Brandon Alexander,

Petitioner,

V.

The State of Ohio,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
OHIO SUPREME COURT

Petition for Writ of Certiorari

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QUESTION PRESENTED

When trial counsel objects to the erroneous admission of character evidence and preserves the evidentiary error, the prosecution in Ohio has the burden on direct appeal to show that the error was harmless beyond a reasonable doubt. *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153. Ohio also permits defendants to raise claims of ineffective assistance of counsel ("IAC") on direct appeal, including claims based on the failure to object to inadmissible evidence. So the question presented is:

> When a defendant asserts IAC on direct appeal in Ohio for failing to object to inadmissible evidence and is able to demonstrate deficient performance, does the Sixth Amendment require the State to meet the same burden to refute prejudice that would apply in the case of preserved error?

RELATED CASES

The Supreme Court of Ohio:

State v. Alexander, 173 Ohio St.3d 1404, 2024-Ohio-555, 227 N.E.3d 1265 (Feb. 20, 2024), *reconsideration denied on Apr. 30, 2024*, 173 Ohio St.3d 1478, 2024-Ohio-1577, 232 N.E.3d 829.

The Ohio Sixth District Court of Appeals:

State v. Alexander, 2023-Ohio-2708, 222 N.E.3d 812 (6th Dist. Aug. 4, 2023), *reconsideration denied on Oct. 27, 2023.*

The Common Pleas Court of Lucas County, Ohio:

State v. Alexander, Lucas C.P. No. CR-0202101678 (June 10, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Brandon Alexander respectfully petitions for a writ of certiorari to review the judgment of the Ohio Sixth District Court of Appeals.

OPINIONS BELOW

The opinion of the Ohio Court of Appeals for the Sixth Appellate District is published at 222 N.E.3d 812 (Ohio 2023) and 2023-Ohio-2708. The denial of petitioner's application for reconsideration in that court is unpublished. The denial of petitioner's appeal for review from the Supreme Court of Ohio is published at 173 Ohio St.3d 1404 (Ohio 2024), 227 N.E.3d 1265 (Ohio 2024), and 2024-Ohio-555. The denial of petitioner's motion for reconsideration at the Supreme Court of Ohio is published at 173 Ohio St.3d 1478 (Ohio 2024), 232 N.E.3d 1478 (Ohio 2024), and 2024-Ohio-1577.

JURISDICTION

On April 30, 2024, the Supreme Court of Ohio denied reconsideration of its order denying review of the opinion of the Ohio Sixth District Court of Appeals. This Court has jurisdiction over this timely petition under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides, in relevant part, "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

INTRODUCTION

A defendant is on trial in Ohio for rape and two counts of felonious assault against his former partner. He is tried twice. The first jury acquits him of rape and hangs on the felonious-assault charges. So Ohio tries him again.

This time, at the end of its case in chief, the State calls a witness it did not call the first time: the defendant's ex-wife (who is not the victim). The State elicits testimony about the defendant's aggressive and dishonest character, as exhibited during that earlier marriage. In Ohio, if defense counsel objects and preserves the error, the State has the burden on appeal to show that admitting the improper evidence was harmless beyond a reasonable doubt. *Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153.

The same standard should apply to IAC asserted on direct appeal when the failure to object was an obvious instance of deficient performance. But the Ohio appellate court flipped the burden and rejected Petitioner Brandon Alexander's IAC claim because (it held) he could not prove prejudice from the State's improper solicitation of inadmissible and highly inflammatory character testimony from his previous spouse.

The premise of a Sixth Amendment IAC analysis is that the defendant should suffer no adverse consequences because of counsel's ineffectiveness. After all, the right to counsel exists "to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984). But the Ohio appellate court left Mr. Alexander to claw back his right to a fair trial precisely because his counsel was

ineffective in not objecting, in effect watering down the defendant's Sixth Amendment right to competent counsel. The Court should grant certiorari, reverse the Sixth District's judgment, and restore equity to the process in Ohio for evaluating the prejudicial impact of wrongfully admitted evidence challenged on direct appeal.

STATEMENT OF THE CASE

I. THE STATE TRIED MR. ALEXANDER BASED ON AN UNCORROBORATED ACCUSATION THAT HIS EX-PARTNER FIRST RAISED IMMEDIATELY AFTER HE EVICTED HER.

After Mr. Alexander ended his live-in relationship with the victim, M.C., and asked her to leave his home, she reported to police that he had assaulted her twice before the relationship ended. The State indicted Mr. Alexander on one count of rape (Count 1) and two counts of felonious assault (Counts 2 and 3).

In May 2022, the case went to trial the first time. There was no dispute that M.C. had been assaulted on two occasions; the question was who did it. There were no other eyewitnesses and no physical evidence identifying the assailant(s). So the State's case hinged on M.C.'s credibility in testifying that Mr. Alexander committed both assaults, as well as a rape.

But M.C.'s credibility was suspect. Her trial testimony differed from her prior explanations of how she incurred—and who inflicted—her injuries. M.C. had repeatedly told doctors that the assailant in the first assault was her ex-husband Eddie, a man who previously served a prison term for physically assaulting her in the past. *Alexander*, 2023-Ohio-2708, at ¶ 17, 19. M.C. had also reported that her injuries from the second assault were the result of a bar fight. *Id.* at ¶ 21–22. But after

Mr. Alexander ended their relationship, M.C. changed her story. *Id.* at ¶ 17. And at trial, she claimed that the assailant was Mr. Alexander both times and that her prior statements were lies. *Id.* at ¶ 22–23.

The first jury acquitted Mr. Alexander of rape and hung on the two felonious-assault charges, apparently unable to see past M.C.'s credibility issues. *Id.* at ¶ 5. The trial court declared a mistrial on those charges (Counts 2 and 3). *Ibid.*

II. In the Second Trial, the State Bolstered the Victim's Shaky Credibility with Inadmissible Character Evidence from a New Witness—Mr. Alexander's Ex-Wife—and His Counsel Failed to Object.

Eager on retrial to secure convictions it failed to obtain the first time, the State called a new witness at the end of its case-in-chief: Mr. Alexander's ex-wife, M.A. The State's ostensible purpose for calling M.A. was to establish that Mr. Alexander gave her a false explanation (a car accident) for his unavailability when M.A. was in the hospital, the falsity of which the State argued was suggestive of his consciousness of guilt. *See Alexander*, 2023-Ohio-2708, at ¶ 64.

But instead of confining M.A.'s testimony to that discrete issue, the State exploited the opportunity to malign Mr. Alexander's character through the testimony of the witness—his ex-wife—who the jury would presumably infer had the best insight into his character. The State developed M.A.'s testimony around her experience with Mr. Alexander's "angry and aggressive behavior." *Id.* at ¶ 67.

M.A.'s direct examination began with her describing her "overall" relationship with Mr. Alexander. (6/8/23 Trial Transcript, Vol. III, except attached at Appendix G ("Tr.") 538:23–24.) She called him "***aggressive***"—a word that the State immediately

seized on: "And you said ***aggressive.*** Brandon Alexander was aggressive?" (*Id.* at 538:25–539:5 (emphasis added).) M.A. also said, "He's angry, and that caused a lot of problems in our relationship." *(Id.* at 539:2–3.) She told the jury that "there [were] not always truths given" during their relationship. (*Id.* at 539:21–22.) And the State seized on the opportunity to undermine Mr. Alexander's credibility, playing up Mr. Alexander's supposed propensity to lie throughout M.A.'s testimony: "You're not buying what Brandon Alexander is selling, are you, [M.A.]?" (*Id.* at 549:6–7.) The State introduced all this testimony during its case in chief, ***before*** Mr. Alexander had made the decision whether to testify in his own defense.

During M.A.'s testimony, defense counsel ***stayed silent.*** She raised no objections to the inadmissible character evidence. And she conducted no cross-examination whatsoever. *Alexander*, 2023-Ohio-2708, at ¶ 37.

Throughout the trial, the State harkened back to M.A.'s improper and devasting testimony. It wove soundbites from M.A.'s testimony into its cross-examination of Mr. Alexander, making his anger a central theme and framing him as a liar:

- "You didn't argue with your ex-wife, . . .?" (Tr. 622:16.)
- "So you can argue with your ex-wife, but you are not an arguer . . .? " (*Id.* at 623:2–3.)
- "You sound like a really peaceful unargumentative guy." (*Id.* at 631:19–20.)

- "And it's interesting that you point the finger at [M.A.] and say how she wants to twist everything around. We have seen quite a bit of that from you this afternoon." (*Id.* at 620:24–621:2.)
- "You are putting your own twist on how you want us all to interpret those words, correct?" (*Id.* at 622:3–4.)[1]

In closing argument, the State again highlighted M.A.'s words, asking the jury to "remember" what [M.A.] said, Brandon's ex-wife, . . . he was the one lying in the first place. ***Sounds familiar, doesn't it?***" (6/9/22 Trial Transcript, Vol. IV at 758:11, 759:9–10 (emphasis added).) *See Alexander*, 2023-Ohio-2708, at ¶ 56 (quoting the same portion of closing argument but not including the emphasized text).

As in the first trial, the State had no physical evidence and no other witnesses to corroborate the victim's testimony. But unlike the first trial, the jury in the second trial also heard M.A.'s testimony, which the State prominently highlighted. M.A.'s testimony partially made the difference the State had hoped for: the second jury found Mr. Alexander not guilty of the first felonious-assault charge (Count 2) but guilty of the other (Count 3). *Id.* at ¶ 58.

III. WITHOUT ADDRESSING *MORRIS*, THE SIXTH DISTRICT FOUND THAT THE IMPROPER CHARACTER EVIDENCE CAUSED NO PREJUDICE.

On appeal, Mr. Alexander argued (among other things) that his counsel was ineffective for failing to object to the improper character evidence elicited during

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[1] The Ohio appellate court characterized these moments as times when the State "challenged" Mr. Alexander, *see Alexander* at ¶ 45–46. The actual language the State used is important to understand how heavily the State exploited the improper character testimony.

M.A.'s testimony (a commonly accepted procedure in Ohio if the record is developed enough to assess IAC on direct appeal). Mr. Alexander explained that the standard for assessing prejudice in this IAC context is the harmless-beyond-a-reasonable-doubt standard that the Ohio Supreme Court articulated in *Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153. In sum, unless the improper character evidence was harmless beyond a reasonable doubt, Mr. Alexander was entitled to a new trial. Other Ohio appellate courts had applied *Morris* precisely in the IAC context. *See State v. Stein*, 3d Dist. Logan No. 8-17-39, 2018-Ohio-2621; *State v. Marshall*, 8th Dist. Cuyahoga No. 109633, 2022-Ohio-2666; *State v. Bond*, 5th Dist. Richland, No. 2019CA0033, 2023-Ohio-2361.

The Ohio appellate court resolved Mr. Alexander's IAC argument without addressing whether counsel was ineffective; instead, it held that Mr. Alexander suffered no prejudice from the improper evidence, so counsel's ineffectiveness was moot. The court explained that "[t]he jury resolved the factual issues . . . considering credibility in the context of all the evidence" and Mr. Alexander's statement to M.A. about having been in a car accident. *Alexander*, 2023-Ohio-2708, at ¶ 74, 78. It also relied on the jury's split verdict as evidence showing "that [Mr. Alexander] was [not] actually prejudiced." *Id.* at ¶ 78.

By jumping to the prejudice analysis, the court elided over whether trial counsel was ineffective in failing to object.[2] It noted that counsel's failure to object

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[2] The Ohio appellate court nevertheless suggested that character traits of anger and aggression do not show an improper propensity to commit felonious assault. *See Alexander* at ¶ 66–67. That conclusion is detached from common sense and social

could be "deemed as [IAC] 'where resolutions of factual issues turn solely upon the credibility of those witnesses.'" *Id.* at ¶ 76 (quoting *State v. Nichols*, 116 Ohio App.3d 759, 765, 689 N.E.2d 98 (10th Dist. 1996)). The court acknowledged that most of M.A.'s testimony was problematic. *See Alexander* at ¶ 72. But the court nevertheless concluded that the jury resolved M.C.'s credibility issues "in the context of all the evidence" and that he therefore could not meet the prejudice prong of an IAC claim. *Id.* at ¶ 78.

In its initial decision, the court made no mention of one of Mr. Alexander's main points in his briefing and oral argument: that the *Morris* harmless-beyond-a-reasonable-doubt standard governed the IAC prejudice analysis when counsel's error led to the admission of otherwise-inadmissible character evidence.

IV. On Reconsideration, the Sixth District Held that the *Morris* Standard Plays No Role in IAC Cases.

Mr. Alexander moved for reconsideration, bringing to the Sixth District's attention that it had not addressed his argument under *Morris*—that the harmless-beyond-a-reasonable-doubt standard applied to the prejudice analysis.

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science. *See, e.g.*, Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 Wash.U.L.Rev. 343, 363 (2007) (explaining the "driving" stereotype that domestic-violence crimes are "motivated by anger"); Michael Buchhandler-Raphael, *Loss of Self-Control, Dual-Process Theories, and Provocation*, 88 Fordham L.Rev. 1815, 1836 (2020) (citing the "[a]mple psychological research" that supports "a strong connection between anger and reactive aggression"). And regardless of the application of the propensity rules, there simply was no basis for admitting this obviously prejudicial testimony under the apposite Ohio evidence rules, largely identical to their federal analogs. *See* Ohio R. Evid. 401, 403; Fed. R. Evid. 401, 403.

In denying reconsideration, the Ohio appellate court set up the concrete legal question that Mr. Alexander now brings to this Court. It held that the *Morris* "harmless-beyond-a-reasonable-doubt standard concerns [only] error in the admission of evidence in cases in which that issue was preserved for appeal through timely objection," not error based on counsel's IAC in failing to object to improper character evidence. (*See* 10/27/23 Decision and Judgment Denying Application for Reconsideration, attached at Appendix B, at 6.)

That reconsideration decision exposed a conflict among Ohio appellate courts on the extent of a defendant's prejudice burden when raising IAC on direct appeal, so Mr. Alexander asked the Sixth District to certify that conflict to the Supreme Court of Ohio. The Sixth District denied that motion on January 2, 2024]. (1/2/24 Decision & Judgment Entry, attached at Appendix B.) The Supreme Court of Ohio denied discretionary review and reconsideration. (2/20/24 Entry, attached at Appendix D; 4/30/24 Reconsideration Entry, attached at Appendix E.)

REASONS FOR GRANTING THE WRIT

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to reasonably effective assistance of counsel. *Strickland*, 466 U.S. 668. It also guarantees criminal defendants the right to trial by an impartial jury.

As the Court is well aware, defendants claiming ineffective assistance of trial counsel must meet *Strickland*'s two prongs: that counsel's performance was deficient, and that the deficient performance caused them prejudice. *Id.* at 687–88, 694. In the

"ordinary" IAC case, prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Weaver v. Massachusetts*, 582 U.S. 286, 300 (2017) (quoting *Strickland*, 466 U.S. at 694).

But sometimes *Strickland*'s prejudice prong serves no useful purpose and creates unfair disparities in judicial administration. The *Strickland* Court itself "cautioned that the prejudice inquiry is not meant to be applied in a 'mechanical' fashion." *Ibid.* (quoting *Strickland*, 466 U.S. at 696). Here, for example, Ohio law would have relieved Mr. Alexander of a prejudice showing had counsel objected to the improper character evidence. *Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153. Why should the result ***on direct appeal*** be any different, especially when the record is sufficient to conclude that there was no strategic justification for counsel's failure to preserve the error?

Indeed, applying the same prejudice standard on direct appeal is consistent with *Strickland*'s purpose: "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder ***would have had a reasonable doubt*** respecting guilt." *Strickland*, 466 U.S. at 695 (emphasis added). The appellate court's decision below wrongly deprives defendants of the benefit of a prejudice presumption solely because of counsel's mistake. The Court should grant certiorari to clarify that in jurisdictions that permit IAC arguments on direct appeal, trial counsel's deficient performance in failing to object to improper evidence—when that deficiency is patent in the record—warrants the application of the same standard for assessing prejudice as applies for preserved

error. The Court should also remind appellate courts that the Sixth Amendment right to a jury trial necessarily limits an appellate court's ability to conclude summarily that the error was harmless to the convicted defendant. *See, e.g.*, *Bollenbach v. United States.*, 326 U.S. 607, 614 (1946) ("In view of the Government's insistence that there is abundant evidence to [convict the defendant], it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials . . . .").

These clarifications also harmonize perfectly with the Court's expressed concerns about "postconviction proceedings" that disturb finality and require new trials after significant time has elapsed. *See Weaver*, 582 U.S. at 302–03; *see also Brecht v. Abrahamson,* 507 U.S. 619, 622 (1993) (higher prejudice standard in habeas is "tailored to the nature and purpose of collateral review"). Unlike the federal system and most state jurisdictions,[3] Ohio permits IAC on direct review. So the "differences" that "justify a different standard" for IAC claims raised in "postconviction proceedings," *see Weaver*, 582 U.S. at 302–03, do not exist here.

I. The Decision Below Is Wrong.

The Court has long recognized that our Nation's legal system forbids convicting an accused by showing that they committed other crimes or is otherwise a bad person.

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[3] This Court and most jurisdictions recognize that IAC claims are best suited for collateral proceedings to give parties a chance to develop a record to address trial counsel's deficient performance and any resulting prejudice. *Massaro v. United States*, 538 U.S. 500 (2003).

See Old Chief v. United States, 519 U.S. 172, 180–81 (1997) (condemning the practice of "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged"). That cardinal principle is embodied in both Fed. R. Evid. 404 and Ohio R. Evid. 404, precluding the introduction of any character or other-act evidence against a criminal defendant to demonstrate propensity, except in narrow circumstances not relevant here. It is likewise impermissible to attack a defendant's character for truthfulness unless and until he has elected to testify. *See* Fed. R. Evid. 608; Ohio R. Evid. 608.

The Supreme Court of Ohio has therefore developed a presumption that improper character evidence prejudices a defendant unless that State can prove that the error was harmless beyond a reasonable doubt. *Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153. Yet the appellate court below held that, when defense counsel's failure to object to the admission of improper character evidence amounts to IAC, defendants enjoy no presumption of prejudice and instead have to prove it—even on direct appeal. This rule creates an unfair disparity between two otherwise-identically situated defendants—one whose counsel was effective and preserved the error, and the other whose counsel was asleep at the switch and neglected to object.

In addressing the prejudice prong of Mr. Alexander's IAC argument, the appellate court should have applied the *Morris* test and excised M.A.'s improper testimony, and every reference to it thereafter, to determine if the State's remaining evidence "overwhelm[ingly] demonstrates guilt." *Morris*, 141 Ohio St.3d 399, 2014-

Ohio-5052, 24 N.E.3d 1153, at ¶ 32.[4] And here, the appellate court would have had no choice but to reverse under that standard, particularly given three considerations: (1) the victim's credibility issues; (2) the inability of the jury in the first trial—without M.A.'s improper character testimony—to reach a verdict on the felonious-assault charges; and (3) the State's emphasis and reliance on the testimony throughout the trial and during closing argument.

Applying the *Morris* harmless-beyond-a-reasonable-doubt standard in the IAC context would restore defendants like Mr. Alexander to the position they would have enjoyed but for their counsel's ineffectiveness in not objecting to clearly inadmissible evidence.[5] The prejudicial impact of improper character evidence is the same whether analyzed as preserved error or through the lens of IAC. The Court should grant certiorari and hold that whether trial counsel timely objects to improper character evidence should not change the prejudice analysis on appeal.

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[4] Unlike Ohio courts that use the *Morris* harmless-beyond-a-reasonable-doubt standard for evidentiary errors, federal courts use the analogous standard from *Chapman v. California*, 386 U.S. 18 (1967) only in the context of constitutional errors. *See Chapman* at 24. Mr. Alexander raises no argument about the federal standard and instead maintains only that Ohio should apply its *Morris* standard equitably.

[5] While the Ohio appellate court elided the ineffectiveness question by focusing on the prejudice prong of the IAC analysis, the Supreme Court of Ohio has suggested that a failure to object to improper character evidence is, by definition, ineffective in Ohio. *See State v. Grate*, 164 Ohio St.3d 9, 2020-Ohio-5584, 172 N.E.3d 8, ¶ 130, 133, 136 (counsel's performance is "deficient" if counsel fails to object to character or other-act evidence inadmissible under Ohio R. Evid. 404.

II. THIS IS AN IMPORTANT ISSUE, AND THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING IT.

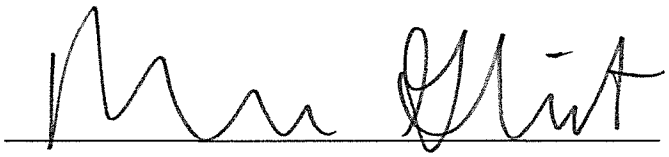
It is hard to overstate the importance of a criminal defendant's right to competent counsel. And to suffer conviction and incarceration on the strength of testimony that trial counsel should have intercepted is a legal travesty. The Court should accept this case to confirm that, when considering prejudice from improper character evidence in a direct-review criminal appeal, the standard is the same regardless of the pathway for reaching the prejudice question. In other words, whether arising directly from preserved error or from IAC, a defendant in Ohio is entitled to the same result. The Sixth Amendment requires no less.

This case is the perfect vehicle for clarifying this standard. Mr. Alexander fully briefed the issue in the appellate court, and it served as the basis for his memorandum in support of jurisdiction in the Supreme Court of Ohio. (*See* 4/5/23 Refiled Brief of Appellant Alexander; 8/14/23 Application for Reconsideration; 12/11/23 Memorandum in Support of Jurisdiction.) Moreover, if Mr. Alexander's counsel had objected to the improper character testimony, there is no serious question that he would have been entitled to a new trial. Instead, he sits in prison because his counsel failed to utter that one all-important word on the record. The Court is unlikely to find a better vehicle to shore up the Sixth Amendment right to competent counsel in the context of inadmissible character evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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