
CASE NO. 2018-1509

**In the
Supreme Court of Ohio
Columbus, Ohio**

STATE of OHIO,

Plaintiff-Appellee,

vs.

MATHEW NICOLAS MIKU,

Defendant-Appellant.

**JURISDICTIONAL APPEAL FROM
THE OHIO COURT OF APPEALS FOR STARK COUNTY,
FIFTH APPELLATE DISTRICT,
CASE NO. 2016-CA-00057
[APP. R. 26(B) APPLICATION TO REOPEN]**

**MEMORANDUM IN RESPONSE
OF PLAINTIFF-APPELLEE, THE STATE OF OHIO**

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TABLE OF CONTENTS

	<u>Page</u>
WHY THE CASE SHOULD NOT BE ACCEPTED FOR REVIEW	1
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	
<u>PROPOSITION OF LAW</u>	
APPELLATE COUNSEL IS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM ON APPEAL THAT IS WITHOUT MERIT AND CONTRARY TO LAW.	7
PROOF OF SERVICE	10

WHY THIS CASE SHOULD NOT BE ACCEPTED FOR REVIEW

The Supreme Court of Ohio should not accept this case for review because it does not involve a substantial constitutional question, and is not of public or great general interest. In this appeal from a denial of a App. R. 26(B) application to reopen, the defendant has alleged that appellate counsel was ineffective for failing to challenge the validity of the indictment on grounds that it was defective for failing to include the *mens rea* element for the offense of child endangering. In making this argument, the defendant relied upon this Court's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, (hereinafter “*Colon I*”), *narrowed upon reconsideration*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 (hereinafter “*Colon II*”). Unfortunately for defendant’s case, this Court explicitly overruled *Colon* in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, paragraph one of the syllabus. Therefore, the ineffectiveness claim is wholly without merit, and was properly rejected by the court of appeals in dismissing the application to reopen. Similarly, this Court should reject this discretionary appeal.

STATEMENT OF THE CASE AND FACTS

In 2016, the Stark County Grand Jury returned an indictment that charged Mathew Nicolas Miku with one count of murder – for knowingly causing the death of another as a proximate result of committing the second-degree felony of child endangering, R.C. 2903.02(B) – and one count of child endangering – for recklessly abusing a child that resulted in serious physical harm to the child, R.C. 2919.22(B)(1) and (E)(2)(c), or for recklessly torturing or cruelly abusing the child that resulted in serious physical harm to the child, R.C. 2919.22(B)(2) and (E)(3). The victim for both charges was Miku’s three-year-old daughter Hailey, whom Miku beat over a three-month period causing

serious injuries to the girl. Miku then failed to seek medical attention for her injuries, which resulted in senselessly causing her death. After a jury trial, Miku was founded guilty of the charged offenses, and the trial court sentenced him to an aggregate prison term of 23 years to life imprisonment – 15 year to life for the murder conviction, and a consecutive eight-year prison term for the child endangering conviction.

Miku appealed his convictions and sentences to the Court of Appeals for Stark County (Fifth Appellate District), and raised seven assignments of error:

I. THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION TO SUPPRESS.

II. APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

III. THE TRIAL COURT ERRED IN ADMITTING PHOTOS WHICH WERE INFLAMMATORY AND HIGHLY PREJUDICIAL.

IV. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY OF PRIOR BAD ACTS.

V. THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY ON INVOLUNTARY MANSLAUGHTER.

VI. APPELLANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND OF ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

VII. THE TRIAL COURT ERRED WHEN IT FAILED TO MERGE APPELLANT'S CONVICTIONS AS ALLIED OFFENSES.

The court of appeals overruled these assignments of error, and affirmed Miku's criminal convictions and sentences. *State v. Miku*, 5th Dist. Stark No. 2017-CA-00057, 2018-Ohio-1584

(2018 WL 1906095).

Miku then filed an application to reopen this direct appeal, arguing that his appellate counsel was ineffective for failing to challenge an allegedly defective indictment. According to Miku, the indictment was defective because the child endangering charge did not specify the *mens rea* element for that offense (recklessness). The court of appeals denied the application, finding that Miku had not raised a colorable claim that his appellate counsel was ineffective since the indictment was not defective. Miku now files the instant appeal to challenge this ruling of the court of appeals.

(Miku has also filed a petition for post-conviction relief [R.C. 2953.21] earlier this year, arguing that his trial counsel was ineffective for failing to investigate a possible insanity defense. The trial court dismissed the petition, and the court of appeals has affirmed. *State v. Miku*, 5th Dist. Stark No. 2018-CA-00094, 2018-Ohio-4404 (2018 WL 5733725).

Since Miku has asserted alleged facts that point to his alleged innocence, a succinct statement of facts is necessary. Miku was convicted of cruelly abusing and torturing his three-year-old daughter over a period of three months, which resulted in her senseless and cruel death. Hailey Miku was found dead in her bedroom late one morning when medical assistance was first called by Miku and his live-in girlfriend, Jessica Bender. Hailey had been found unresponsive by Miku, with foam coming out of her mouth. The girl's body was transported from the house, and Miku and Bender were taken to the Canton Police Department for questioning.

The subsequent autopsy, performed by Dr. Renee Robinson, a forensic pathologist with the Stark County Coroner's Office, revealed the cause of Hailey's death. There were no contents inside Hailey's stomach, and a toxicological screen of her blood and liver did not show the presence of Tylenol or Ibuprofen. Hailey weighed less than 28 pounds, which placed her in the lower 5

percentile for children her age. There were obvious abrasions to the girl's face, indicating recent blunt trauma, and her one eye was swollen. Dr. Robinson also noted a deep cut behind her one ear, which also included a significant amount of dead skin on that part of the scalp (from lack of blood supply). Hailey's hair was missing from his area, and her hair easily came out during the autopsy. There was also some scabbing on her scalp, and skin had been taken off the little girl's face. Dr. Robinson concluded that none of these injuries were caused by a fall, but were instead the result of blunt trauma. T.(II) 520-528.

Dr. Robinson also noted green discoloration around Hailey's abdomen, and a bulba (a collection of fluid) on her hip bone. This indicated to Dr. Robinson that something was not right with Hailey's body chemistry since these are signs usually seen when someone is dead and decomposing. Hailey's torso had perimortem abrasions, which indicated that the injuries were caused while she was dying. There was also an abrasion to the girl's labia. Turning Hailey over, Dr. Robinson noted bruising all along the girl's back area. Besides bruising, scabbing, and healing lesions on her buttocks, there were bruises all up and down the girl's spine, corresponding with the protruding bones of Hailey's spine. According to Dr. Robinson, such injuries are usually seen on elderly patients who have been bed ridden for some time, producing what are commonly known as bed sores. In Hailey's case, they also could have been caused by standing against a wall for a long time. Despite her young age, Hailey was also missing teeth and some of her teeth were merely sitting in their sockets and easily came out during the autopsy. Most children do not lose their teeth until the age of six as a result of the permanent teeth coming in. Dr. Robinson also noted bruising and contusions on the girl's legs. None of the bruising and contusions, according to Dr. Robinson, were the results of a fall, but were instead the result of blunt trauma. T.(II) 534-546.

Dr. Robinson also testified about the significance of the foam found from Hailey's mouth at the time of death. This foam would indicate a slow death. Blood and other bodily fluids were leaking inside Hailey's body, making its way to her lungs, where they would have collected and have been expelled through her mouth. An examination of Hailey's internal organs showed the presence of bacterial overgrowth as a result of bacteria in the girl's blood stream. This bacterial overgrowth was present in her heart, her brain, the eyes, and the kidneys. As a result, these organs showed chronic, or longstanding, inflammation. In addition, the small intestine showed evidence of bleeding, which results when the body's clotting agents are consumed in dealing with bleeding and inflammation in other parts of the body. Dr. Robinson also observed bone marrow emboli in Hailey's lungs, which indicated that the girl's bones had suffered trauma. Dr. Robinson finally noted that rigor mortis had set in when the girl's body was found around 11:30 a.m.; this rigor would have indicated that the girl had been dead approximately two hours. T.(II) 546-557.

Dr. Robinson's conclusion was that Hailey's death was a homicide.

Sure. My final anatomic diagnosis reads that she sustained inflicted trauma of varying ages of her head, face and scalp, of her torso, which is your trunk, and the extremities. There was evidence of neglect, both of general care and of medical care. There was sequelae of trauma and neglect which is things that can happen as a result of the trauma and neglect, and everything I talked about, the chronic inflammation and the things that I found in the organs are sequelae of that.

With the final diagnosis coming under the heading of all these things, being the result of combined effects of acute and chronic inflicted trauma and neglect. Acute means short-term, chronic means long-term.

. . . And that is my cause of death.

T.(II) 558-559.

When paramedics and police arrived at the Miku's residence, they noticed Hailey's body on

a mattress in the livingroom. Massive trauma and injuries were evident on the girl's face and body. Miku told these people that Hailey had fallen down the stairs, and this had caused her death. T.(II) 451-452.

Detective Joseph Mongold first interviewed Bender for several hours. He then proceeded to interview Miku, who first repeated the same story about Hailey falling down the stairs. Detective Mongold eventually confronted Miku with the fact that the evidence – the injuries on Hailey's body – could not have been caused by a simple fall down thickly padded stairs. Miku then conceded that he had not been truthful. He offered that some of Hailey's injuries might have been caused by an allergic reaction to Tylenol or Ibuprofen that he had given her. He also continued with the story that she had fallen down the stairs, coupled with a fall off a standard toilet in the bathroom. As the interview continued, Miku admitted more and more. Yes, he had anger issues that he took out on Hailey, and that once he started with violence, he couldn't stop. He struck his daughter on the side of the face with an open hand, causing her ear to bleed. Miku also used a curtain rod to beat his daughter, using 60%-70% of his strength in beating her this way. Miku admitted to Mongold that he had gone too far and had killed Hailey. When asked about Bender's role in the abuse of his daughter, Miku responded that Bender doesn't have a hard bone in her body and wouldn't hurt a fly. Miku conceded that he was going to jail, and wanted Mongold to tell his neighbors that he had killed his daughter. T.(II) 451-468.

ARGUMENT

PROPOSITION OF LAW

APPELLATE COUNSEL IS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM ON APPEAL THAT IS WITHOUT MERIT AND CONTRARY TO LAW.

Miku argues that he should have prevailed on his App. R. 26(B) application to reopen the direct appeal on his single issue – that his appellate counsel was ineffective for failing to raise on direct appeal that the indictment was defective for failing to specify the *mens rea* element for the offense of child endangering. Miku’s argument primarily relied upon this Court’s ruling in its first *Colon* ruling., and ignores the Court’s subsequent reconsideration ruling in *Colon*, as well as this Court’s controlling *Horner* decision. As a result, the court of appeals properly denied his application to reopen, rejecting his ineffective assistance of counsel (“IAC”) claim.

IAC claims are governed by the *Strickland-Bradley* standard. Under this two-prong standard, a criminal defendant must show that counsel’s performance fell below an objective standard of reasonable representation that led to prejudice. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus, *cert. denied*, 497 U.S. 1050, 111 S.Ct. 16, 111 L.Ed.2d 830 (1990) (following *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Prejudice, in the *Strickland-Bradley* context, is “a reasonable probability that, were it not for counsel’s errors, the result of the trial would have been different.” *Bradley, supra*, at paragraph three of the syllabus. *See, also, Strickland*, 466 U.S. at 687-688 (When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.”), and at 694 (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the

result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

This Court held in *Colon I* held that when an indictment fails to charge a *mens rea* element of a crime, the error is structural in nature. *Colon I*, however, had been narrowed in *Colon II*, and that structural error occurs not simply from the defective indictment alone, but from a trial in which the error of this defect permeates the entire trial, from beginning to end. *See State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶¶ 20-21 (holding that an indictment that fails to charge the mens rea element of a crime is structural error). This Court, however, expressly overruled *Colon I in toto*, and *Colon II* in part, in its *Horner* decision. In *Horner*, the Court held that “[a]n indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state.” *Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, at paragraph one of the syllabus. Thus, the indictment in this case was not defective for failing to include the *mens rea* element of recklessness expressly, especially since the statute doesn’t expressly provide it.

The court of appeals properly rejected Miku’s IAC claim, therefore, since the law on his claim is definite and unsupportive. It in fact contradicts his legal assertions. The court of appeals did not err or abuse its discretion in denying the App. R. 26(B) application.

Furthermore, Miku ignores the *Horner* decision in his memorandum, perhaps because it removes any grounds for his IAC claim. He further does not offer this Court with any argument why it should revisit *Horner*, overrule it, and return to the *Colon I* model for assessing the validity of indictments and whether the omission of the *mens rea* element (because the criminal statute omits it) is structural error. Providing no grounds and no argument, this Court deny the discretionary

appeal.

Accordingly, the sole proposition of law should be rejected.

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PROOF OF SERVICE

A copy of the foregoing MEMORANDUM IN RESPONSE was sent by ordinary U.S. mail this 21st day of November, 2018, to MATHEW NICOLAS MIKU, defendant-appellant *pro se*, at Inmate No. A693-135, Belmont Correctional Institution, P.O. Box 540, St. Clairsville, Ohio 43950-0540.

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