In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2019-1769
	:	
Appellee,	:	On Appeal from the
	:	Butler County
v.	:	Court of Appeals,
	:	Twelfth Appellate District
ROGER SIMPSON,	:	
	:	Court of Appeals
Appellant.	:	Case No. 2018-06-121

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

CHRISTOPHER PAGAN (0062751)
1501 First Avenue
Middletown, OH 45044
(t) 513-424-1823
(f) 513-424-3135
cpagan@repperpagan.com

Counsel for Appellant
Roger Simpson

MICHAEL T. GMOSER (0002132)
Butler County Prosecuting Attorney

JOHN C. HEINKEL (0023157)
Chief, Appellate Division
315 High Street, 11th Floor
Hamilton, Ohio 45011
(t) 513-785-5216
(f) 513-785-5206
heinkeljc@butlercountyohio.org

Counsel for Appellee
State of Ohio

DAVE YOST (0056290)
Attorney General of Ohio

BENJAMIN M. FLOWERS* (0095284)
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor General
SHAMS H. HIRJI (0099227)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
benjamin.flowers@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

INTRODUCTION

In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court announced a two-prong test for assessing ineffective-assistance-of-counsel claims. To prevail, an aggrieved defendant must show that "counsel's representation fell below an objective standard of reasonableness," and that there is a reasonable probability the case would have come out differently but for counsel's errors. *Id.* at 688, 694. For decades, Ohio courts have applied the same standard when determining whether to reopen an appeal, under Rule 26(B) of the Rules of Appellate Procedure, based on the alleged ineffectiveness of *appellate* counsel. This case presents the question whether the Court should replace this tried-and-true test with an eleven-factor checklist-style test that the appellant, Roger Simpson, divined from a misreading of a Sixth Circuit decision. The answer to that question is "no." And because Simpson failed to justify reopening his appeal when his claims are viewed through the *Strickland* lens, this Court should affirm the Twelfth District's decision denying Simpson's Rule 26(B) motion.

STATEMENT OF *AMICUS* INTEREST

As Ohio's chief law officer, the Attorney General has an interest in ensuring that Ohio's criminal justice system functions fairly and effectively. That includes striking the right balance between review of criminal judgments and finality of those judgments. The appellate decision below preserved the balance long struck in Ohio between these interests. This Court should affirm.

STATEMENT OF THE CASE AND FACTS

Roger Simpson is a rapist. Simpson is in prison because he and two co-defendants, Rodney Gibson and Elijah Mincy, brutally raped a woman "multiple times and in multiple ways." *State v. Simpson*, 2019-Ohio-1493 ¶2 (12th Dist.). Gibson and the victim had both been guests at the same party but left for an apartment after the victim became sick. *Id*. Once at the apartment, and while the victim was resting on a bed, Gibson made sexual advances toward her, but she declined. *Id*. Simpson "then entered the room, got into bed with [the victim], and raped her multiple times." *Id*. Simpson refused to let the victim leave. *Id.* ¶3. And when he finished raping her, he "held the victim down so that Elijah could orally rape and digitally penetrate the victim." *Id*.

The victim eventually left the apartment and went to the hospital. *Id*. ¶4. There, she "was diagnosed with abrasions, scratches, five labial tears, and two tears to her anus, all of which represented repetitive and forceful trauma to the areas." *Id*. Authorities charged Simpson with twenty-three counts related to the crime. *Id*. ¶5. He initially denied engaging in any sexual activity with the victim when questioned. *Id.* He pleaded not guilty. *Id.* A jury convicted him on all charges, after a three-day trial. *Id*.

Simpson then appealed to the Twelfth District, raising two assignments of error: one related to his sentencing, and one claiming that he received ineffective assistance of

trial counsel. *Id*. ¶¶8, 20. Neither argument prevailed, and the Twelfth District affirmed the trial court's judgment. *Id*. ¶32.

Simpson then applied to reopen his appeal under Appellate Rule of Procedure 26(B). That rule gives defendants "in a criminal case" the ability to "apply for reopening of the appeal … based on a claim of ineffective assistance of appellate counsel." App.R.26(B)(1). Simpson alleged that his counsel provided ineffective assistance by failing to raise three arguments. *See generally* Application to Reopen (Applic.). The Twelfth District denied Simpson's application. *See* Entry Denying Application to Reopen Appeal (Nov. 5, 2019) ("Applic.Op.") (attached as Ex. 2 to Simpson Apt. Br.). It reasoned that, because the arguments were meritless, counsel performed reasonably by failing to raise them. *Id.* at 2–3. Further, Simpson could not have been prejudiced by the failure to raise meritless arguments.

Simpson petitioned this Court for review, and the Court agreed to hear his case. *See 3/11/20 Case Announcements*, 2020-Ohio-748.

ARGUMENT

Amicus Curiae Ohio Attorney General Dave Yost's Proposition of Law:

> *To prove ineffective assistance of appellate counsel for purposes of Rule 26(B), a criminal defendant must prove: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.*

I. *Strickland v. Washington* governs Appellate Rule 26(B) applications.

A. Rule 26(B) creates a two-stage postconviction process in the courts of appeals for examining appellate-ineffectiveness claims.

1. In *State v. Murnahan*, 63 Ohio St. 3d 60 (1992), the Court held that "[c]laims of ineffective assistance of appellate counsel" were "not cognizable" through the typical post-conviction proceedings that occur under R.C. 2953.21. *Id.* syl. ¶1. Those proceedings occur in trial courts. As the Court explained, "*appellate* judges are in the best position to recognize" whether a criminal defendant has received, or been prejudiced by, ineffective *appellate* counsel. *Id.* at 65 (emphasis added). Allowing ineffective-appellate-counsel claims to be raised in Ohio trial courts "could in effect permit trial courts to second-guess superior appellate courts." *Id.* At the time of *Murnahan*, however, Ohio "ha[d] no statutory authority or court rules dedicated to the procedure to be followed by defendants who allege ineffective assistance of appellate counsel." *Id.* at 66 n.6. While such claims could be raised in direct appeals to this Court or in applications for reconsideration in the courts of appeals, neither procedure was designed to handle such claims. *See id.* at 65–66. The Court thus called upon the Rules

Advisory Committee to review whether to amend an existing rule, or adopt a new one, "to better serve claimants in this position." *Id.* at 66 n.6.

About a year later, the Court adopted Appellate Rule 26(B) to fill this void. Rule 26(B) creates "a specialized type of postconviction process" in the courts of appeals. *Morgan v. Eads*, 104 Ohio St. 3d 142, 2004-Ohio-6110, ¶8. Its procedures do not "constitute part of the original appeal." *Id.* ¶9. Rather, the "rule was designed to offer defendants a separate collateral opportunity to raise ineffective-appellate-counsel claims beyond the opportunities that exist through traditional motions for reconsideration and discretionary appeals." *Id.* ¶8.

Rule 26(B) establishes a two-stage procedure. In the first stage, a defendant must "apply" to "reopen[]" his appeal. App.R.26(B)(1). A defendant must make a threshold showing in the application before he is entitled to have his appeal reopened. In particular, a defendant must demonstrate the existence of "a genuine issue as to whether" he was "deprived of the effective assistance of counsel on appeal." App.R.26(B)(5). An application must include "[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 any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R.26(B)(2)(c).

As part of an application, a defendant must include "[a] sworn statement" that explains "the basis for the claim" that appellate counsel "was deficient with respect to

the assignments of error or arguments." App.R.26(B)(2)(d). That statement "may include citations to applicable authorities and references to the record," though it cannot exceed ten pages. App.R.26(B)(2)(d), (B)(4). Moreover, an applicant must append "any parts of the record" and "supplemental affidavits" he relies on that are available to him, App.R.26(B)(2)(e), but those documents do not count toward the page limit, App.R.26(B)(4). In response, the attorney for the prosecution "may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application." App.R.26(B)(3). The same page limit applies to the prosecution's response as applies to the defendant's application. App.R.26(B)(4). The court may request to hear argument for any application if it so chooses. *Id*.

If the court determines that the defendant has made the requisite showing for reopening his appeal, the second stage of the 26(B) process begins. In stage two, the case "proceed[s] as on an initial appeal in accordance with" the rest of Ohio's rules of appellate procedure. App.R.26(B)(7). That means the case is, once again, expected to be fully briefed and argued, with some modifications: The "court may limit its review to those assignments of error and arguments not previously considered." *Id.* The parties must also "address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency." *Id.* "If the court … determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate." App.R.26(B)(8).

And finally, "[i]f the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment." App.R.26(B)(9).

2. As explained above, both the first stage and the second stage of Rule 26 proceedings require the defendant to make some showing of appellate counsel's ineffectiveness. To be sure, the defendant's burden is different at each stage. The defendant must actually establish deficiency and prejudice in the second stage. App.R.26(B)(9). In the first stage, by contrast, the defendant need only raise a "genuine issue" or, as this Court has put it, a "colorable claim," as to deficiency and prejudice. *See* App.R.26(B)(5); *State v. Tenace*, 109 Ohio St. 3d 451, 2006-Ohio-2987, ¶6. But regardless of the burden, the *test* for determining ineffective assistance of appellate counsel is the same at each stage. It is the familiar, two-prong test laid down decades ago in *Strickland v. Washington*, 466 U.S. 668 (1984), and which this Court adopted for Rule 26(B) applications in *State v. Reed*, 74 Ohio St. 3d 534, 535 (1996). To establish counsel's ineffectiveness under that test, a defendant must establish*: first*, that counsel's performance fell below an objective standard of reasonableness; and *second*, that there is a reasonable probability the result of the proceeding would have been different but for counsel's errors. *See Strickland*, 466 U.S. at 688, 694; *Reed*, 74 Ohio St. 3d at 535; *see also State v. Tenace*, 109 Ohio St. 3d 451, 2006-Ohio-2987, ¶5; *State v. Spivey*, 84 Ohio St. 3d 24, 25 (1998); *State v. Bradley*, 42 Ohio St. 3d 136, 142 (1989).

Under this test, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 446 U.S. at 689. This Court takes the lesson of *Strickland* as directing courts to apply "a heavy measure of deference to counsel's judgments," so that they "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Tenace*, 109 Ohio St. 3d 451, ¶7 (internal quotation omitted). And, in the appellate context, this means recognizing that "counsel need not raise every possible issue to render constitutionally effective assistance." *Id.* (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983) and *State v. Sanders*, 94 Ohio St. 3d 150, 151–52 (2002)).

B. The Twelfth District faithfully followed *Strickland* in rejecting Simpson's Rule 26(B) application here.

The Twelfth District properly applied the foregoing standards in denying Simpson's application to reopen his appeal. In his application, Simpson claimed he was denied effective assistance of appellate counsel because his counsel did not raise three arguments on appeal. Applic.6, 7. But none of these arguments had merit, and so counsel neither performed deficiently nor prejudiced Simpson by failing to raise them.

1. The first involved the trial court's admission of out-of-court statements. *Id.* at 8-9. Each of the statements came in through the victim's testimony. For example, she testified that co-defendant Gibson said the victim "was unconscious," and that the men "should stop" the assault. *Id.* at 8. She also testified as to Gibson's statement that the

victim "would alert the police." According to Simpson, these statements were inadmissible hearsay. *Id*.

The Twelfth District correctly recognized that Simpson would not have won reversal based on these hearsay arguments. First, there was "no indication that the out-of-court statements made during the victim's testimony would have been excluded as hearsay," as they were "not offered for their truth … but rather for their effect on the listener." Applic.Op.2. Second, the Twelfth District found that, because Simpson did not object to the statements at trial, the "court would have applied a plain error standard." *Id.* at 2–3. Under plain-error review, Simpson would have had to show that the admission of this evidence was "plain or obvious error," that "the outcome of the proceeding would have been otherwise," and that reversal was "necessary to correct a manifest miscarriage of justice." *State v. Quarterman*, 140 Ohio St. 3d 464, 2014-Ohio-4034, ¶16. The Twelfth District correctly recognized that Simpson "could not [have] overcome" this standard and prevailed even if the hearsay arguments had been raised on appeal. Applic.Op.2–3. And even if the statements were inadmissible hearsay and Simpson objected, as he argues, any error was "harmless beyond a reasonable doubt" given the other "overwhelming" evidence supporting his guilt. *State v. Hood*, 135 Ohio St. 3d 137, 2012-Ohio-6208, ¶43 (2012) (internal quotations omitted).

This Court's decision in *State v. Ricks*, 136 Ohio St. 3d 356, 2013-Ohio-3712, is not to the contrary. True, *Ricks* noted that out-of-court statements should "*generally* be

excluded" "when the statements connect the accused with the crime charged." *Id.* ¶24 (emphasis added and internal quotation omitted). But *Ricks* did not establish anything close to a bright-line rule. Rather, *Ricks* was a highly factbound decision that held the statements at issue should have been excluded as inadmissible only in light of all of the relevant facts. *Id.* ¶¶28–48. Indeed, *Ricks* expressly limited its holding to "the particular facts of [that] case." *Id*. ¶1. So there is no good argument that the factbound decision in *Ricks* so clearly established the inadmissibility of this evidence that Simpson would have prevailed under the applicable plain-error standard.

2. The second of the unraised arguments pertained to the disparity between Simpson's sentence (51 years' imprisonment) and his co-defendants' sentences (5 and 8 years). Applic.9. Simpson argued that this discrepancy was unsupported by the record, demonstrated that his sentence was "disproportionate," and proved that "the trial court vindictively sentenced [him] for exercising his jury-trial right." *Id.* at 10.

Appellate counsel did not perform deficiently or prejudice Simpson by failing to raise this argument, because it was doomed to fail. Every "defendant is different and nothing prohibits a trial court from imposing two different sentences upon individuals convicted of similar crimes." *State v. Schaper*, 2019-Ohio-749, ¶17 (12th Dist.); *accord State v. Berlingeri*, 2011-Ohio-2528, ¶12 (8th Dist.); *State v. Tewolde*, 2007-Ohio-2218, ¶13 (10th Dist.). What is more, there were key differences in the facts and charges in Simpson's case and his co-defendants' cases. Application Opposition Br.7. What is

more, *both* of the co-defendants pleaded guilty, *see* Simpson Br.5, which would have been relevant at sentencing. Especially given the enormous discretion accorded sentencing courts, it would have been a reasonable strategy not to raise this argument, and instead to focus on arguments with a non-zero chance of success. Nor was Simpson prejudiced by the failure to make the argument.

3. The third and final argument that Simpson says his appellate counsel should have made is this: It was unconstitutional for the trial court to (1) conduct its rape-shield hearing without recording it, and (2) not file Simpson's preferred exhibit containing the rape-shield evidence. Applic.10; Simpson Br.13. This argument, like the other two omitted arguments, is meritless. The *only* authority Simpson cites for this proposition is *State v. Clinkscale*, 122 Ohio St. 3d 351, 2009-Ohio-2746, ¶¶12–20. *See* Simpson Br.13–14. But that case is inapposite. In *Clinkscale*, the Court vacated a jury's verdict and remanded the defendant's case for a new trial "because a deliberating juror was replaced with an alternate juror in violation of former Crim.R.24(G)(2) and because the trial court failed to make a record of the proceedings that resulted in the deliberating juror's dismissal and replacement." *Id.* ¶1. The factual context was therefore entirely different. Moreover, the Court went out of its way to say that its "analysis of [the] case [was] *guided by the fact that Clinckscale was charged with a capital offense under R.C. 2901.02(B).*" *Id.* ¶11 (emphasis added). That, of course, was not true of Simpson's case. Finally, Simpson made no attempt below (or in this Court) to show

that "the evidence proffered would have been admissible under Ohio's rape shield law." Applic.Op. 3. He therefore could not show "that his appellate counsel was ineffective for" failing to raise this issue. *Id.*

* * *

Because Simpson's arguments had little to no merit, Simpson did not have a "colorable" claim that his appellate counsel performed objectively unreasonably by failing to raise them. *Tenace*, 109 Ohio St. 3d 451, ¶¶6. Nor did Simpson have a colorable claim that he was prejudiced by counsel's failure to make those meritless arguments. As such, the Twelfth District properly concluded that Simpson failed to raise a "genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal." Applic.Op.3.

II. Simpson does not offer a sound reason for overturning the Twelfth District's judgment.

Simpson asks this Court to overturn the Twelfth District's decision. He effectively argues that the Court should ditch the *Strickland* test and replace it with an eleven-factor checklist derived from *Mapes v. Tate*, 388 F.3d 187, 191 (6th Cir. 2004) (*Mapes II*). Simpson would not prevail even under the *Mapes* test. But the Attorney General will not delve into that here. It suffices to say that the Court should not adopt Simpson's proposed test. And as explained above, Simpson loses under the law as it exists today.

A. The Court should not adopt the *Mapes* factors.

Simpson urges the court to adopt the *Mapes* factors for assessing appellate counsel's performance. Simpson Br.8–10. A panel of the Sixth Circuit originally formulated the factors in *Mapes v. Coyle*, 171 F.3d 408 (6th Cir. 1999) (*Mapes I*), as "considerations that ought to be taken into account in determining whether an attorney on direct appeal performed reasonably competently." *Id.* at 427–28. These considerations take the form of eleven questions pertaining to the decision not to argue a point on appeal:

(1) Were the omitted issues "significant and obvious"?

(2) Was there arguably contrary authority on the omitted issues?

(3) Were the omitted issues clearly stronger than those presented?

(4) Were the omitted issues objected to at trial?

(5) Were the trial court's rulings subject to deference on appeal?

(6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?

(7) What was appellate counsel's level of experience and expertise?

(8) Did the petitioner and appellate counsel meet and go over possible issues?

(9) Is there evidence that counsel reviewed all the facts?

(10) Were the omitted issues dealt with in other assignments of error?

(11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Id.

Simpson argues that adopting these factors "would make the law predictable, uniform, and stable." Simpson Br.9. According to Simpson, it also "would make for more accurate constitutional decisions because the factors are comprehensive and flexible enough to account for varied [] fact-patterns." *Id.* Simpson further argues that adopting the factors "would harmonize federal and Ohio law." *Id.*

The suggestion that an eleven-factor test will provide anything approaching clarity is close to self-refuting. Multi-factor tests rarely bring clarity to anything. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2447–48 (2019) (Gorsuch, J., concurring in the judgment). But even putting that aside, Simpson's argument fails. One glaring problem with Simpson's argument is that he never makes clear what he means when he argues that the Court should adopt the *Mapes* factors. If he means that judges should always consider these factors in analyzing any appellate-counsel-ineffectiveness claim, that is a bad idea, and no court—not even the Sixth Circuit—does that. *See, e.g., Moody v. United States*, 2020 U.S. App. LEXIS 14463, *13 (6th Cir.) (rejecting claim without explicitly citing any *Mapes* factors); *Tackett v. Trierweiler*, 956 F.3d 358, 376–377 (6th Cir. 2020) (same); *Harper v. United States*, 792 F. App'x 385, 391 (6th Cir. 2019) (considering just one *Mapes* factor in rejecting claim). It is not difficult to see why. For one thing, courts can consider only the issues that parties bring to them, and rarely will litigants brief all eleven of these questions. Indeed, even Simpson's brief to this Court does not tick off all eleven factors in arguing that he meets the test. Simpson Br.10–14. Nor will the

record necessarily even contain all the information relevant to each factor. What is more, these questions apply only to claims of ineffectiveness based on the failure to raise an argument—not to other defective aspects of counsel's performance.

Perhaps Simpson means to argue that a Rule 26(B) court should analyze each *Mapes* factor that a defendant properly raises or that is fairly encompassed by the defendant's claims. Even then, the Court should reject Simpson's argument. For one thing, Ohio courts already *do* incorporate many of the *Mapes* factors in analyzing ineffective-appellate-counsel claims under the two-prong *Strickland* test. The Twelfth District's entry denying Simpson's own application is a case in point. In concluding that none of the omitted arguments had any merit, the Court implicitly concluded that the omitted issues were not "significant and obvious" (factor 1); the omitted issues were not "clearly stronger than those presented" (factor 2); and the decision to omit the issues was not "one which only an incompetent attorney would adopt" (factor 11). Applic.Op.2–3; *see Mapes*, 171 F.3d at 427–28. The court also *explicitly* concluded that Simpson's out-of-court-statements argument was doomed by the fact that "there was no objection to the statements at trial." Applic.Op.2. Thus, on appeal, the Twelfth District "would have applied a plain error standard that Simpson could not overcome." Applic.Op.3. This analysis touched on two more *Mapes* factors in addition to the three mentioned above: factor 4, which asks whether the omitted issues were "objected to at trial," and factor 5, which asks whether "the trial court's rulings" would have been

"subject to deference on appeal." *Mapes*, 171 F.3d at 427. In total, the Twelfth District either explicitly or implicitly analyzed at least five of the same considerations that the *Mapes* factors address.

The Twelfth District's analysis is par for the course when it comes to Ohio's courts of appeals. Those courts routinely address the same types of considerations that the *Mapes* factors address in evaluating ineffective-appellate-counsel claims. *See, e.g.*, *State v. Payne*, 2020-Ohio-1599, ¶¶8–9, 16 (8th Dist.) (rejecting claim and noting contrary authority on the omitted issues).

Simpson might ask: If Ohio courts are already addressing many of the same considerations, why not require courts to explicitly consider each relevant *Mapes* factor, at least when properly raised? Because that would fly in the face of *Mapes* itself, which exhorted that its list of factors was "not exhaustive," nor was it meant to "produce a correct 'score'." *Mapes I*, 171 F.3d at 428; *accord Mapes II*, 388 F.3d at 191. In other words, *Mapes* counseled against a mechanical application of its own factors. Accordingly, the Sixth Circuit does not mechanically apply the factors (if it applies them at all).

Rightly so. The point of the *Mapes* factors is to *assist* the ultimate determination of whether counsel performed objectively unreasonably as contemplated by *Strickland*. And *Strickland* itself noted that "[m]ore specific guidelines" were "not appropriate." *Strickland*, 466 U.S. at 688. This is because the Sixth Amendment and the Ohio

Constitution's guarantee of counsel, both of which Rule 26(B) was designed to effectuate, refer "simply to 'counsel.'" *Id.* They do not "specify[] particular requirements of effective assistance." *Id.* They rely "instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process" that the United States and Ohio Constitutions "envision[]." *Id.* And "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id*. The application of those norms requires considering the totality of circumstances, not eleven arbitrary questions.

Of course, the representation "of a criminal defendant entails certain basic duties," such as "a duty of loyalty, a duty to avoid conflicts of interest," and a "duty to advocate the defendant's cause." *Id.* But "[t]hese basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance." *Id*. Ultimately, "[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688–89. Indeed, "[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* at 689. And it "could distract counsel from the

overriding mission of vigorous advocacy of the defendant's cause." *Id.* "Moreover, the purpose of the effective assistance guarantee of" both the Sixth Amendment and the Ohio Constitution is "not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system." Instead, "[t]he purpose is simply to ensure that criminal defendants receive a fair trial" or appeal. *Id.*

In light of these principles, this Court should not require the courts of appeals to consider any particular set of factors when assessing *Strickland* deficiency under Rule 26(B). It should let the courts do what they have been doing: courts should continue to evaluate whether "counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. To the extent that any of the *Mapes* factors are helpful in making that determination, the courts of appeals are free to incorporate them into their analyses. Requiring anything more would risk creating the sort of checklist of attorney performance that neither Rule 26(B), nor the Sixth Amendment, nor the Ohio Constitution, envision.

To its credit, the Ohio Public Defender counsels against "creating a new standard by which to judge appellate counsel's effectiveness" using the *Mapes* factors. Ohio Public Defender Br.15–16. In so doing, the Public Defender confirms that adopting *Mapes* as anything more than perhaps "a useful heuristic" is not just unnecessary but would likely *hurt* criminal defendants over the long haul. *Id.* That is right. Employing this unwieldy test will likely focus trial courts' attention on superficially analyzing a set

of factors and shift attention away from the proper inquiry for measuring attorney performance under *Strickland*: "whether counsel's assistance was reasonable considering all the circumstances." 466 U.S. at 688. That is exactly why *Strickland* warned courts against creating "a *checklist* for judicial evaluation of attorney performance." *Id.* (emphasis added). It is also why the Public Defender argues against "creating a new standard" for measuring counsel's performance that results in a "mechanical[] evaluat[ion]" of the *Mapes* factors. Ohio Public Defender Br.15. And because the Sixth Circuit itself does not mechanically apply the *Mapes* factors, if it applies them at all, adopting the *Mapes* factors will not harmonize Ohio law with Sixth Circuit law on this issue. (Also, it is unclear why the State should feel any pressure to "harmonize" these bodies of law—Ohio can and does apply its own independent law, and may do so whenever it does not violate the federal constitution or validly enacted federal law.)

B. The Court should reject Simpson's (and the Ohio Public Defender's) argument for a lighter burden at the application stage.

Simpson and the Public Defender do unite on one point: they both say that Rule 26(B)'s application stage requires "something less than a merits showing." Simpson Br.14; *see also* Ohio Public Defender Br.4 The Ohio Public Defender goes further and faults Ohio's courts of appeals for requiring defendants to *establish* deficiency and prejudice at the application stage (step one of two under the Rule). Ohio Public Defender Br.4–6. This, the Public Defender says, makes Rule 26(B)(5)'s "genuine issue"

language surplusage. *Id.* at 6. What is more, the Public Defender says this heightened standard is impossible to overcome given the page and time limits at the application stage. *Id.* at 7–8. Thus, the Public Defender contends, Rule 26(B) should require only a "fair probability or likelihood, but not a certitude, of success on the merits" at the application stage. *Id.* at 6.

The argument is a strawman. Rule 26(B) *does not* require defendants to establish deficiency and prejudice with "certitude" at the application stage. Rather, it requires defendants to show that their claims are colorable. No doubt, that inquiry requires considering the merits. As this Court has recognized, "[a] *substantive* review of the claim is *an essential part* of a timely filed App.R.26(B) application." *State v. Davis*, 119 Ohio St. 3d 422, 2008-Ohio-4608, ¶26 (emphases added); *see also State v. Snyder*, 2009-Ohio-2473, ¶14 (5th Dist.); *State v. Ross*, 2008-Ohio-5578, ¶13 (5th Dist.). But the fact that courts look to the merits does not mean they are doing so to assess *actual* success rather than *possible* success. To the extent some courts might apply a too-high standard, Ohio Public Defender Br.8–14, the problem lies in their application of the rule, not the rule itself.

Finally, the Public Defender also takes issue with the page and time limits in the Rule. Ohio Public Defender Br.7–8. The Rule imposes a ten-page limit and a ninety-day deadline. But those defaults may be modified when the case justifies more space or time. Simpson's case proves the point. The Twelfth District granted the State's motion

to exceed the page limit, and there is no reason to think that the court would not have done the same for Simpson had he asked. The Twelfth District also granted the State's motion for more time to respond. Simpson too could have sought additional time if needed. *See* App.R.26(B)(1). Anyway, expanding page limits and deadlines is a matter to be considered in the rulemaking process, not in Simpson's case. In that process, the rulemakers can adequately study the costs and benefits of longer deadlines and page limits.

CONCLUSION

The Court should affirm the Twelfth District's judgment.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s Benjamin M. Flowers
BENJAMIN M. FLOWERS * (0095284)
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor General
SHAMS H. HIRJI (0099227)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
benjamin.flowers@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee State of Ohio was served this 17th day of June, 2020, by e-mail on the following:

Christopher Pagan
1501 First Avenue
Middletown, OH 45044
cpagan@repperpagan.com

John C. Heinkel
315 High Street, 11th Floor
Hamilton, Ohio 45011
heinkeljc@butlercountyohio.org

/s Benjamin M. Flowers
Benjamin M. Flowers
Solicitor General