IN THE SUPREME COURT OF OHIO

SCT NO.

STATE OF OHIO	:	
Appellee	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of
vs.	:	Appeals CA: 109664
DAVID FIELDS	:	
Appellant		

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT DAVID FIELDS

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EXPLANATION OF WHY THIS CASE IS A FELONY CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

A criminal trial is not a game of telephone.[1] It is also not a theatrical performance where props stand in for the real thing. No, we require that evidence meet certain standards. The Rules of Evidence are our legal system's best answer to the question: How can we trust the outcome of a trial? But what becomes of that trust when defense counsel has allowed his client to be convicted almost exclusively on evidence that should have been found inadmissible?

Thirty-seven years ago the United States Supreme Court gave us the test to determine if a criminal defense attorney's performance was constitutionally deficient. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The test has two prongs: (1) deficient performance and (2) prejudice.

The prong of deficient performance – a mistake – is not all that difficult to detect. But often courts, as the Eighth District did here, refuse to recognize the mistakes by clinging to a presumption that attorneys are competent and are employing reasonable trial strategies. While it is true that, in 1976, this Court held that licensed attorneys in this state are presumed competent (*State v. Lytle,* 48 Ohio St.2d 391 at 397), that presumption has been badly abused. The instant case demonstrates why this Court must revisit the presumption and how lower courts are using it to avoid a meaningful analysis of an attorney's performance.

For the prejudice prong, the High Court settled on this standard to determine when a defendant has been prejudiced: "there is a *reasonable probability* that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. (Emphasis added.) Even if exactly what "probability" is defies a mathematically precise definition, the Court was clear as to what it is not. It

[1] "How to Play the Telephone Game." https://www.wikihow.com/Play-the-Telephone-Game.

is not an "outcome determinative standard." Indeed it is *not* even a preponderance of the evidence. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel *cannot* be shown by a preponderance of the evidence to have determined the outcome." *Id.* (Emphasis added.) In determining that Mr. Fields was not prejudiced by his counsel's performance, the Eighth District, like so many other state district courts of appeals, used exactly the wrong outcome determinative standard.

Here, the jury heard only weak circumstantial evidence against David Fields during his trial for being the get-away driver following the armed robbery of a jewelry store. Even the State's star witness – a highly interested witness – could not put Fields at the store during the robbery. Because the State's case was built on circumstantial evidence, anything that bolstered the State's version took on enhanced importance. The State presented a number of pieces of evidence that were inadmissible. Among other admissibility problems, there was hearsay, and unauthenticated records, and evidence presented against the best evidence rule. The record does not show any attempt by defense counsel to prevent his client from being attacked with evidence that should have never entered the record. As a result of this failure, the jury heard highly damaging but inadmissible testimony and received inadmissible evidence on points that the State absolutely had to prove in order to obtain a conviction.

Despite these errors, the Eighth District overruled Mr. Fields' ineffective assistance of counsel assignments of error. *State v. Fields*, 2021-Ohio-1880 at ¶12-24. To arrive at the conclusion, the court did little more than apply the presumption of competence. The presumption, Mr. Fields argues, must have its limit and that his counsel reached it. Secondly, the Court employed the incorrect outcome determinative standard to determine that Mr. Fields was not prejudiced.

With the decision, yet again, an Ohio district court of appeals has chipped away at the test for ineffective assistance of counsel set for us by the United States Supreme Court. The Eighth District's decision here, like many decisions of the district courts, drifts us farther away from the test that *Strickland* had set out nearly four decades ago and, should this decision stand. Nearly thirty

years ago, this Court recognized that Ohio courts cannot simply ignore what the United States Supreme Court says because they lead to unhappy results. See *State v. Storch*, 66 Ohio St.3d 280 (1993) (" We know that, as a lesser appellate court for purposes of federal questions, we ignore the words of the United States Supreme Court at our peril just as the "lesser" courts of Ohio ignore our words at their peril as to questions of state law." *Id.* at 291).

Accordingly, Mr. Fields argues that this Court should accept jurisdiction over this matter and adopt the proposed propositions of law.

Statement of the Facts and Case

On July 28, 2017, Demetrius Clardy robbed Gustav Julian Jeweler in Parma, Ohio for the money in the register – between $200 and $400. Between 30 minutes and an hour before the robbery, three people came into the store who the employees of the store found suspicious. Later, the three were identified as Kimberly Smith, Rodney Brewer, and Cleveland Gresham.

Smith testified against Fields as part of her plea deal with the State of Ohio. She explained that she and Brewer were in a relationship at the time and that they had driven to Parma together that day. Smith intended to go to a Giant Eagle in the Parma area. However, according to Smith, during the drive to Parma, Brewer was communicating with David Fields. Smith and Brewer stopped at the CVS at the corner of State Road and Seven Hills Boulevard to wait for Fields to join them. The CVS was across the street from the jewelry store. Smith testified that Fields arrived at the CVS parking lot in a Ford Taurus.

Smith claimed that, in order to pass the time while Brewer and Fields talked, Smith went into the CVS and then across the street to the jewelry store. The surveillance footage shows that Smith, Brewer, and Cleveland Gresham all entered the store around the same time. But Smith testified that she was there for her own purpose – to look at rings – and they did not come in together. She also testified that she did not know Gresham's name and that he did not arrive at that location with her and Brewer.

After leaving the jewelry store, Smith left Brewer in Parma. She was not present for the robbery

of the jewelry store.

The employees of the jewelry store, Julie Washington and Roberta Askett, testified that 30 minutes to an hour after Smith, Brewer, and Gresham left the store another man, later known to be Demetrius Clardy, came in wearing ill-fitting gloves, a surgical mask, and wig. He had a gun and demanded the cash in the register. Both Washington and Askett hit an alarm button which sent an alert to ADT, the store's security service. Washington complied with Clardy's demands and pulled out the cash register drawer. After Clardy left, Askett called the police.

From the surveillance footage of nearby businesses, a Ford Taurus is seen leaving the scene of the robbery. Neither the driver nor the license plate are visible in the footage.

On October 18, 2017, Mr. Fields was indicted in connection with the robbery of Gustav Julian Jeweler along with Demetrius Clardy and Cleveland Gresham as co-defendants. Kimberly Smith and Rodney Brewer were indicted separately. Mr. Fields was named in six of the nine counts of the indictment: two counts of aggravated robbery with firearm specifications; two counts of kidnapping with firearm specification; and two counts of having weapons under a disability.

In order to link Mr. Fields to this crime the following evidence was presented in court this way:[2]

- Kimberly Smith gave information to the police and they were able to trace the car back to the lot where it had been purchased. There they were told that the car was purchased by a woman by the name of Alberta Darden. No one from the car dealership testified.
- The police testified that Ms. Darden told them that she purchased the car for Crystal Williams and that Williams was Fields' girlfriend. Ms. Darden did not testify.
- A detective testified to what the Bureau of Motor Vehicle records contained in regard to

[2] In a lengthy portion of his brief to the Eighth District, Mr. Field's argued that the State relied heavily on inadmissible evidence in an attempt to link Fields to the Ford Taurus and a "burner phone" and that none of it should be considered to support his conviction. The fact that his counsel failed to object or challenge any of this supposed evidence was the basis for one of his assignments of error to the Eighth District Court of Appeals and is the issue taken up in this memorandum.

Fields' last known address on Linn Drive. The BMV records were not admitted.

- There was testimony that Mr. Fields was connected with a "burner phone." The phone had no subscriber information attached to it but "data" from the phone was presented. It suggested that the phone, which may have been near the robbery, was later at the location of 55th and Superior and had "pinged" near Linn Drive. Video surveillance footage from the 55th location, where the phone "pinged," showed the suspect vehicle – the Ford Taurus – pull in. Again, the driver cannot be identified. The phone records were not authenticated and no custodian of records testified.

A jury convicted Mr. Fields on all six counts.

Mr. Fields appealed to the Eighth District Court of Appeals raising four assignments of error, one of which is relevant here:

> Assignment of Error II: Mr. Fields received ineffective assistance of counsel when counsel failed to object to multiple pieces of inadmissible evidence.

The Eighth District overruled all of Mr. Fields' assignments of error, including these, and affirmed his conviction. His timely Memorandum in Support of Jurisdiction now follows.

PROPOSITION OF LAW I: For purposes of a claim of ineffective assistance of counsel, the presumption of reasonable trial strategy can be rebutted when trial counsel repeatedly fails to challenge the admissibility of highly damaging, inadmissible evidence presented by the State.

In order for the State of Ohio to convict Mr. Fields, it needed to prove that he was the driver of the get-away car following the robbery of jewelry store. There was no hard evidence of that – no eye witness to that conduct, no video, no photographs, and no physical evidence. So it was crucial, at a minimum, that the State prove a connection between Fields and the get-away car and be able to place him at the scene. In order to do so, the State presented these supposed facts to the jury:

(1) The purchaser of the car was a woman named Alberta Darden;

(2) Darden told the police that she bought it at the behest of Crystal Williams, who is Fields' girlfriend;

(3) GPS installed on the car shows that the car was frequently at an address on Linn Drive;

(4) The Linn Drive address was connected to David Fields; and

(5) That a "burner phone" that was near the robbery has also "pinged" from Linn Drive.

In a lengthy and detailed section of his brief to the court of appeals, Mr. Fields argued that, as it was presented in this trial, none of this evidence was admissible. Each piece of evidence violated one or more of the following rules:

Evid. R. 802 and 803, hearsay;

Evid. R. 602, personal knowledge;

Evid. R. 1001, best evidence rule;

Evid. R. 803, business records; and

Evid. R. 901, authentication.

Crucially, all of this inadmissible evidence was highly prejudicial to Mr. Fields and defense counsel failed to object to any of it.

Mr. Fields was denied the effective assistance of counsel as guaranteed him under by Article I, Sec. 10 of the Ohio Constitution and Sixth and Fourteenth Amendments of the United States Constitution. To establish a claim for ineffective assistance of counsel, the defendant has the burden of demonstrating: 1) that the performance of defense counsel was seriously flawed and deficient; and 2) that there is a reasonable probability that the result of the defendant's trial or legal proceeding would have been different had defense counsel provided proper representation. *State v. LeGrant*, 2014-Ohio-5803 (2nd Dist.), ¶ 26, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Here, the Eighth District refused to find that Mr. Fields' counsel rendered deficient performance when he failed to object to numerous pieces of inadmissible evidence. Rather, the court simply found that a "decision to object or not to object at trial ordinarily constitutes a question of trial strategy" and that the "'failure to make objections is not alone enough to sustain a claim of ineffective assistance of

counsel.'" *Fields* at ¶20 (Citations omitted). By determining that the failure to object to this evidence was a "trial strategy" the Eighth District was also, in essence, relying on the presumption of competence granted to licensed Ohio attorneys. *State v. Lytle*, 48 Ohio St.2d 391 at 397.

The problem with the court's approach to the first prong of *Strickland* is two-fold.

First, the Eighth District did not pass judgment on the admissibility of the evidence cited by Mr. Fields. So, while the court made a wholesale ruling in two paragraphs (Fields at ¶20-1) that he did not satisfy his burden to show ineffective assistance of counsel, it did not explain *why or how* Fields' arguments over the admissibility of specific evidence would have failed. In order to find that there was a reasonable trial strategy in not challenging this evidence, the court necessarily needed to analyze the merits of the evidentiary arguments that Mr. Fields was making. But it did not.

Second, by ruling that a strategy could be found here, the court cloaked trial counsel in, effectively, an irrebuttable presumption of competence. But the presumption of competence is not a license for incompetence. It must have its limits if it is to have any meaning. If the presumption of competence and reasonable trial strategy can be rebutted, it is rebutted by the record in this case.

Fields' trial counsel repeatedly failed to challenge inadmissible evidence. The objections were missed in four areas, without which the State did not have a case: (1) the ownership of the car; (2) reason for the car purchase; (3) the car's association with an address; (4) Fields' last known address; and (5) "burner phone" records. In short, the evidence regarding the ownership of the car was classic hearsay; the evidence of the car's association with an address and Mr. Fields' last known address was hearsay, given without personal knowledge, and against the best evidence rule; and the "burner phone" records were not offered as business records and were never properly authenticated.

Merriam-Webster defines "strategy" as the art of devising or employing plans or stratagems toward a goal. The goal for Mr. Fields' defense counsel was an acquittal. As this evidence was coming in, defense counsel missed, not one, not two, but potentially dozens of objections – with no discernable upside. If the State was properly kept from using this inadmissible (and

unreliable) evidence, the likelihood of a conviction here was slim to none. No strategy can be found in this approach. A strategy would suggest that some plan would be apparent from the record – not objecting here for the sake of an advantage there. That cannot be found. The record shows no rational trade-off aimed at gaining some other advantage in exchange.

Even if, for whatever reason, choosing to not object in open court constitutes a strategy, that does not settle the question. For example, the record does not show requests for sidebar discussions. Even based on pre-trial discovery, the problems with this evidence should have been apparent to defense counsel. And counsel could have attempted to prevent the State's use of inadmissible evidence through motions. Counsel did none of these things. Rather, as the State mounted damning, inadmissible evidence against his client, counsel made no attempt to stop it.

In considering his claim of ineffective assistance of counsel, we cannot escape the fact that Mr. Fields was convicted on inadmissible evidence. This was as a result of the fundamental flaw in how counsel performed. Here, Mr. Fields argues that the presumption of competence and reasonable trial strategy is effectively rebutted when counsel repeatedly fails to hold the State to the rules of evidence when it comes to highly damaging, inadmissible evidence. As such, the Eighth District erred in finding that Mr. Fields' argument did not clear *Strickland*'s first hurdle of deficient performance based on the use of presumptions.

Mr. Fields urges this Court to accept jurisdiction over this case and adopt this proposition of law in order to provide guidance to the lower courts on the limitations of the presumption of competence and reasonable trial strategy.

Proposition of Law II: In determining whether a criminal defendant's counsel provided representation so deficient that the defendant's Sixth Amendment right to the effective assistance of counsel was violated, a court of appeals may not ask whether counsel's deficiencies are outcome determinative but must, rather, apply the measure set forth by the United State Supreme Court which finds prejudice "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." (*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2025, 80 L.Ed.2d 674 (1984), applied).

Mr. Fields maintains that he was denied the effective assistance of counsel as guaranteed him under by Article I, Sec. 10 of the Ohio Constitution and Sixth and Fourteenth Amendments of the United States Constitution, when counsel failed repeatedly to object to inadmissible evidence. To establish a claim for ineffective assistance of counsel, Mr. Fields has the burden of demonstrating that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) there is a *reasonable probability* that the result of his trial or legal proceeding would have been different had defense counsel provided proper representation. *State v. LeGrant*, 2014-Ohio-5803 (2nd Dist.), ¶ 26, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). (Emphasis added.)

In overruling his ineffective assistance of counsel assignments of error, the Eighth District Court of Appeals said, "Fields has failed to satisfy his burden to demonstrate *that the results of the proceedings would have been different* in that the exhibits or testimony would have been in excluded had counsel objected." *Fields* at ¶21. The Eighth District got the standard exactly wrong. While it properly quoted *Strickland* earlier in its decision (*Fields* at ¶13), the Court did not apply the "reasonable probability" standard in its analysis or conclusion and thereby converted the standard to an outcome determinative one.

Notably, this is not the only time an Ohio district court of appeal got the standard wrong. Indeed, the error is virtually commonplace. See, *e.g. State v. Springer*, 8th Dist. Cuyahoga No. 104649, 2017-Ohio-8861, ¶19, jurisdiction denied 2018-Ohio-1795; *State v. Drummond*, 2nd Dist. Mahoning No. 05 MA 197, 2006-Ohio-7078, ¶15 (improperly citing *Strickland* for "defendant must show that counsel's errors were so serious that the outcome would have been different."); *State v. Hardley*, 8th Dist. Cuyahoga Nos. 88456 & 88457, 2007-Ohio-3530, ¶20 (improperly citing *Strickland* for "result of appellant's trial or legal proceeding would have different); *State v. Dover*, 2nd Dist. Clark No. 2013-CA-

58, 2015-Ohio-4785 (insisting on the standard of "substantial likelihood" of a "different outcome" and not being "persuaded that the evidence was overwhelmingly in favor of an acquittal").[3]

The High Court went to great lengths to explain what "reasonable probability" is and is not. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel *cannot* be shown by a preponderance of the evidence to have determined the outcome." *Strickland* at 694. (Emphasis added.) Over and over Ohio courts of appeals, employing the wrong standard, fail to find that an attorney's deficient trial performance clears that hurdle. Effectively, these courts have impermissibly moved the goalpost put in place by the United States Supreme Court. As this Court recognized, "as a lesser appellate court for the purposes of federal questions we ignore the words of the United State Supreme Court at our peril." *State v. Storch*, 66 Ohio St. 3d 280, 612 N.E.2d 305 (1993). It is clear from many cases – and this is case is just another example – that these lower courts need this Court's guidance on when and how to find prejudice for ineffective assistance of counsel claims.

The Eighth District Court of Appeals is wrong. This Court should accept jurisdiction over this matter so that it can adopt the proposition of law and remand the case the trial court.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction over this case and order briefing on the merits on the two propositions of law set forth and explained above.

Respectfully submitted,

s/ Noelle A. Powell

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Assistant Public Defender Counsel for Appellant

[3] Among literally dozens of cases making the same mistake, see *e.g. State v. Lewis*, 4th Dist. Ross, No. 14CA3467, 2015-Ohio-4303, ¶24; *In re C.W.*, 3rd Dist. Wyandot No. 16-09-26, 2010-Ohio-2157, ¶29; *State v. Adams*, 11th Dist. Trumbull No. 2004-T-0053, 2005-Ohio-4332, ¶51; *State v. Davis*, 5th Dist. Licking No. 2007-CA-00104, 2008-Ohio-2418, ¶74; *State v. Vore*, 12th Dist. Warren Nos. CA2012-06-049 & CA2012-10-106, 2013-Ohio-1490, ¶19.

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was hand delivered upon Michael O'Malley, Cuyahoga County Prosecutor, and or a member of his staff, The Justice Center 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this July 19, 2021.

s/ Noelle A. Powell

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