IN THE SUPREME COURT OF OHIO
2022

STATE OF OHIO, Plaintiff-Appellee, -vs- MIGUEL L. MILLS, Defendant-Appellant.	Case No. 22-779 On Appeal from the Lucas County Court of Appeals, Sixth Appellate District Court of Appeals No. L-20-1084

BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO

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STATEMENT OF AMICUS INTEREST

Founded in 1937, the Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission is to assist county prosecuting attorneys to pursue truth and justice as well as promote public safety. OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and serve as legal counsel to county and township authorities. Further, OPAA sponsors continuing legal education programs and facilitates access to best practices in law enforcement and community safety.

In light of these considerations, OPAA urges this Court to affirm the judgment of the Sixth District. The duty of the trial court to sua sponte notice "sufficient indicia of incompetency" is one of those issues that might be called the "golden ticket" for defendants pursuing an appeal. Based on slight or vague indications of concerns in the record, the defense raises on appeal the issue of the court's duty to inquire into indicia of incompetency and to hold a hearing, and, with no hearing having yet been held, the defendant seeks the outright reversal of the conviction, with no possibility of a limited remand for a hearing to actually determine the competency issue. The draconian remedy of outright reversal is out of proportion to the problem, especially when, as here, the defense seeks to water-down the pertinent standard. and when there was no defense objection to the failure to hold a hearing and no objection about any incompetency concerns thereafter. A defense counsel hindered by the defendant's supposed incompetency would have been highlighting those concerns throughout the record and would have been able to provide concrete and detailed indications as to how the

supposed incompetency was affecting the defense. It is an objection that could have readily been made at the beginning of trial: "Your honor, we need to have a hearing on competency." "Your honor, I'm having real difficulty in receiving assistance from my client."

In the present case, the defense raised no objection to the failure to hold a hearing on the issue of the defendant's supposed incompetency. Perhaps the vague concerns mentioned in the November 19th defense motion had resolved so that the defendant was now fully cooperating with the defense counsel, thereby making it unnecessary to have a hearing. Perhaps the defendant's refusal to participate in the evaluation meant that the defense had no evidence that would actually support a finding by a preponderance that the defendant was incompetent to stand trial.

In any event, when the trial was about to begin on December 9th – nearly three weeks after the making of the motion – the defense registered no concern and raised no objection with proceeding to trial. When the court stated at the outset, "Mr. Crowther [defense counsel], my understanding – and you have been here all morning – Mr. Mills' case is proceeding to trial." (12-9-19 Tr. 2) Defense counsel responded, "It is, Your Honor." (Id.) It would have been easy enough to say, "we're not ready for trial because of the competency issue", but the defense was ready to proceed. This was also shown by the fact that the defense immediately entered into stipulations of evidence for the trial. (Id. 2-3) On this record, the logical conclusion is that there was no competency issue to be heard.

The defense decision to proceed with trial should be fatal to the issue being raised on appeal. "A party will not be permitted to take advantage of an error which he himself

invited or induced the trial court to make." *Lester v. Leuck*, 142 Ohio St. 91 (1943).

> The law imposes upon every litigant the duty of vigilance in the trial of a case, and even where the trial court commits an error to his prejudice, he is required then and there to challenge the attention of the court to that error, by excepting thereto, and upon failure of the court to correct the same to cause his exceptions to be noted.
>
> It follows therefore that, for much graver reasons, a litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible.

State v. Kollar, 93 Ohio St. 89, 91 (1915). "The legitimate state interest in orderly procedure through the judicial system is well recognized as founded on the desire to avoid unnecessary delay and to discourage defendants from making erroneous records which would allow them an option to take advantage of favorable verdicts or to avoid unfavorable ones." *State v. Awan*, 22 Ohio St.3d 120, 123 (1986).

Even "[c]onstitutional rights may be lost as finally as any others by a failure to assert them at the proper time." *State v. Childs*, 14 Ohio St.2d 56, 62 (1968). As this Court has reaffirmed, "[t]his contemporaneous-objection requirement imposes a duty on trial counsel to exercise diligence and to aid the court rather than by silence mislead the court into commission of error." *State v. Wintermeyer*, 158 Ohio St.3d 513, 2019-Ohio-5156, ¶ 10 (internal quote marks omitted).

Basic concepts of error preservation should be fully enforced in this context when the defendant is represented by counsel and such counsel is fully capable of raising any needed objection to the absence of a competency hearing.

Beyond the problems of error preservation, the record falls far short of warranting

an inquiry into competency. Although the defense counsel filed the motion for an evaluation, the allegations were vague. Being a difficult client is not an "indicia" of incompetence to stand trial. Instead, it would be par for the course for a defendant who has the remarkable criminal record of three juvenile felonies, eighteen juvenile misdemeanors, five adult felonies, and twenty-seven adult misdemeanors. (1-22-20 Tr. 6) Moreover, in his colloquies with the court and statements on the record, the defendant regularly revealed that he was able to understand what was going on, including confirming multiple times that he understood the possible complicated sentencing scenarios, even correcting the judge's recollection as to an earlier sentencing. (10-21-19 Tr. 4-11) During trial, the defendant said he understood his right to testify and that he was electing not to testify. (12-10-19 Tr. 293-94)

In the interest of aiding this Court's review herein, amicus curiae OPAA offers the present amicus brief in support of the State of Ohio and in support of affirmance.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history set forth in the State's brief.

ARGUMENT

Amicus Proposition of Law: Error-preservation requirements apply to the question of the defendant's competency to stand trial when the defendant is represented by counsel. When the defense does not object to the absence of a hearing on the competency issue, and when the defense thereafter proceeds to trial without objection, the issue is forfeited, and the absence of the hearing will not justify appellate relief.

The record falls far short of showing sufficient indicia to warrant an inquiry into the defendant's competence to stand trial. Moreover, the record reflects that the defense dropped the issue and proceeded to trial without objection.

A.

The defendant became upset at the November 4, 2019, court hearing on continuing the trial date to December 9th. The defense twice had requested a trial at the at the earliest opportunity. (9-4-19 Tr. 2; 10-23-19 Tr. 2) At the October 23rd hearing, the defendant thanked the court for setting the trial for November 4th. (10-23-19 Tr. 3)

But now, on November 4th, the court was continuing the trial date until December 9th, and the defendant repeatedly complained about the delay and contended that his 90-day speedy-trial right was being violated. (11-4-19 Tr. 2-11) His rhetoric about "modern day slavery" and "guilty until proven innocent" was over the top, but, at bottom, he was raising a speedy-trial objection that signaled he was competent to understand the trial process; he even contended that he had "read" about his speedy-trial rights, (Id. at 8), which was yet another sign of his competence.

There had been numerous other indications of his competence so far. In the July 31st hearing, the defendant was being sentenced on another case and was being appointed counsel for the present case. While expressing some initial confusion about the case to

be sentenced, the court explained the status of the case, and the defendant's comments indicated that he understood now, and the court believed "we're on the same page". (7-31-19 Tr. 8) The defendant was adroit enough in understanding the involvement of counsel in his defense that he asked the court for the option to choose his counsel off the appointed-counsel list. (Id. 5, 13, 14) While this request was denied, the request itself demonstrated a familiarity with the court system, which is understandable given the defendant's long history of juvenile adjudications and adult convictions.

At the October 21st trial date, a plea offer was discussed on the record. (10-21-19 Tr. 3-11) The court explained the potential sentencing possibilities on the two pending counts and how that sentencing might affect his sentence on the earlier case. (Id.) The defendant repeatedly indicated that he understood the court's explanations as to possible sentencing, (id.) and the case was continued two days to allow the defendant to discuss the plea offer with his family. (Id. 10)

On October 23rd, the defense counsel indicated that he had talked with the defendant and that the defendant had rejected the plea offer. (10-23-19 Tr. 3) The court set the next trial date for November 4th, and the defendant thanked the court. (Id. 3) When the court reminded the defendant that he was to have no contact with the victim or witnesses in the case, the defendant said he understood. (Id. 4) As of this date, the record reveals that the defendant had consulted with counsel, entertained the plea offer, and had rejected the plea offer, and the defense counsel raised no concerns about any supposed lack of competency on the defendant's part.

But, again, on November 4th, the trial was being continued until December 9th, and the defendant expressed his frustration with the delay, while, at the same time,

reiterating that he was aware of his right to a speedy trial. Competent defendants can get frustrated, but incompetent defendants are unlikely to make lengthy speedy-trial objections as was done here.

To some degree, the defendant began taking his frustrations out on the defense counsel. On November 19th, counsel filed a "motion for compentency (sic) & general mental health assessment". The defense counsel made the following allegations:

> 1. Mr. Mills' mental stability since being in pre-trial detention on his charges has continued in a downward spiral. Where counsel was once able to have a "somewhat" reasonable conversation concerning the evidence against him that has completely evaporated.
>
> 2. Mr. Mills is unable to have a coherent conversation concerning the evidence against him, any type of trial tactic available or a calm reasoned discussion concerning the plea offer from the State and the risk of plea verses [sic] trial.
>
> 3. The last three visits with Mr. Mills have resulted in him becoming so verbally violent and physically telegraphing potential violence it has caused upwards to three or four Corrections Officers to respond to the meeting room.
>
> 4. This occurs with any comments by counsel that isn't in complete agreement with what his predetermined position is on even the smallest issues concerning the proceeding in court or his defense.

At best, these allegations are vague and do not bear up under the slightest parsing. They do not allege any actual mental illness, let alone any mental illness that would impact the defendant's competency to stand trial. The phrase "mental stability" masks a range of potential "mental" reactions in these meetings that do not signal an inability to understand proceedings or an inability to assist counsel. Moreover, the fourth allegation gives away the problem: counsel stated that "*this* occurs" because the defendant did not

wish to hear anything that conflicted with his "predetermined position" on the case. This allegation shows that the defendant understood the case and that he had determined his position on it, and the defendant was just refusing to entertain his counsel's advice. This does not reflect any *inability* to assist counsel or to understand the proceedings. The defendant knew what was going on and was able to assist counsel; he just did not want to do so in these particular meetings.

Defense counsel would have had the ability to gather actual, specific information about "incompetency" if it truly existed. The defendant had just recently been through multiple hearings demonstrating his ability to understand legal concepts. He had pleaded guilty in the prior case, and prior counsel would have been a possible resource to develop any possible information about mental-health or incompetency issues. Family members were also available to develop what the defendant's history with any mental-health issues had been. And, even more importantly, the defendant had been through the juvenile-justice and adult-criminal-justice system numerous times, and counsel could have sought to obtain any prior report(s) that might have been generated in those earlier cases and that might have touched on any incompetency issues (if they existed). Defense counsel did not allege any such history and instead resorted to vague phrasing instead.

The lack of any true substance to the motion was borne out by subsequent events. While the defendant refused to participate in an evaluation, even competent defendants can be leery of submitting to an evaluation that could potentially veer into areas that are privileged under the Fifth Amendment right against self-incrimination. The defense in many cases *opposes* mental-health examinations of the defendant by third-party independent examiners. See, e.g., *State v. Whitaker*, ___ Ohio St.3d ___, 2022-Ohio-

2840, ¶ 113 ("defense counsel objected to Whitaker's being examined by the state's expert"). Moreover, the choice to waive the Fifth Amendment privilege is the defendant's choice, not counsel's. *State v. Leigh*, 6th Dist. No. OT-16-028, 2017-Ohio-7105, ¶ 16 ("defendant's right to testify or not testify on his own behalf is a personal right that only the defendant can waive."), citing *State v. Bey*, 85 Ohio St.3d 487, 499 (1999); *United States v. Rodriguez-Aparicio*, 888 F.3d 189, 193 (5th Cir.2018) ("This right is personal to the defendant: only he, not counsel, may make the choice."). The defendant's refusal to cooperate with the evaluation is wholly consistent with the choice that a competent defendant can make when such an evaluation could very well explore the defendant's understanding of the events that would be tried and when the end result of the evaluation would be to disclose those matters to the court and prosecution. The refusal to submit also effectively negated and forfeited the defense counsel's motion for such evaluation and should preclude any appellate relief in that regard.

Per the December 3rd letter from psychologist White at the Court Diagnostic & Treatment Center, the defendant had refused to be transported on that date and refused to participate in the evaluation process. The December 3rd letter added:

> According to jail personnel, Mr. Mills has been housed on the sixth floor since August 2019 and has not had any issues except to regularly request that his counselor speak with his attorney. Per CDTC staff, Mr. Mills' attorney, Jeff Crowther, Esq., called this agency to inform our personnel of Mr. Mills' hostile and uncooperative nature. This same sentiment was reiterated by jail transportation personnel the day of the attempted evaluation.

Notably, "hostile and uncooperative" is how counsel described the defendant's attitude, *not* any actual inability to understand legal concepts or any actual inability to assist

counsel. The CDTC letter also reveals another possible source of information about the defendant, i.e., the jail counselor who defendant asked to speak with his counsel.

After the December 3rd refusal, the defense dropped the issue. In the original motion, the defense had not asked for a hearing, and it did not ask for such a hearing now. The defense raised no objection to the absence of a hearing. The defense did not seek to call any family members or the counselor to develop any supposed information on the record about the defendant's mental status; these sources would not have been dependent on the defendant's cooperation with the CDTC evaluation.

The defense would have had the burden of production to rebut the presumption of competence, see *State v. Williams*, 23 Ohio St.3d 16, 19 (1986), and the burden of persuading the judge of the defendant's incompetence by a preponderance. R.C. 2945.37(G). But the defense did not bother to seek to introduce any such evidence and, instead, the defense counsel signaled he was ready for trial and proceeded with the trial.

During trial, the defendant further demonstrated his competence. When the defense counsel raised a *Batson* objection during jury selection as to the State's peremptory challenge to the lone black juror, (12-9-19 Tr. 115-19), the defendant understood the ramifications of the objection, saying "this is racist" after the court overruled the objection. (Id. 119) The defendant thus understood the race-based nature of the objection that the defense counsel had just argued.

During trial, the defendant also expressed his understanding of his right to testify and not testify in a colloquy with the court. (12-10-19 Tr. 293-94)

At sentencing, defense counsel again remained vague. Counsel said that he found the defendant "to be an intelligent man, a very passionate man, and I also found him to be

someone who could be at times explosive and somewhat irrational." (1-22-20 Tr. 2-3) Counsel also discussed the defendant's "long criminal history", saying that there is "a significant mental health component that overlies his behavior." (Id. 3) But, again, there is no indication of any inability to understand the proceedings and to assist counsel, and the "mental health component" and "somewhat irrational" references were vague and indefinite. Counsel had indicated that he was ready to proceed with sentencing, (id. 2), and counsel raised no objection as to competency at the sentencing hearing, which, again, signaled the absence of any competency issue hindering the defendant, who was characterized as "intelligent".

B.

The defendant is not entitled to a "rapport" or a "meaningful relationship" with counsel. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶ 101; *State v. Henness*, 79 Ohio St.3d 53, 65 (1997); *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983). An indigent defendant is not entitled to choose his appointed counsel. *Thurston v. Maxwell*, 3 Ohio St.2d 92, 93 (1965).

Nor can the defendant insist that his counsel only give advice that aligns with the defendant's "predetermined" view of the case. Counsel is expected to render honest advice to his client, even if the client does not want to hear it; there is no duty to be optimistic when the facts do not warrant optimism. *State v. Cowans*, 87 Ohio St.3d 68, 73 (1999). Disagreements on the merits of a plea offer or on trial tactics are to be expected in the attorney-client relationship and do not demonstrate any basis for relief. See *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, ¶ 71; *Ketterer*, ¶¶ 150-51. A client's frustration with his counsel's advice represents a mine-run problem within the criminal-

justice system and provides no basis to think that the defendant is incompetent.

Revised Code 2945.37(G) provides that a defendant "is presumed to be competent to stand trial." That same statute also provides that a person shall not be found incompetent merely because he has received treatment as a voluntarily- or involuntarily-committed mentally ill or mentally retarded person or because he is receiving psychotropic medication. R.C. 2945.37(F). Incompetence is shown only if the evidence shows by a preponderance that "the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense * * *." R.C. 2945.37(G).

The constitutional test for competency is whether the defendant has a sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding and whether he has a rational and factual understanding of the proceedings against him. *Godinez v. Moran*, 509 U.S. 389, 396 (1993). "Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." Id. at 402. "Incompetency must not be equated with mere mental or emotional instability or even with outright insanity. A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel." *State v. Bock*, 28 Ohio St.3d 108, 110 (1986). "[M]ental illness is not necessarily legal incompetency." *State v. Hessler*, 90 Ohio St.3d 108, 125 (2000). "The term 'mental illness' does not necessarily equate with the definition of legal incompetency." *State v. Berry*, 72 Ohio St.3d 354 (1995), syllabus. "The test for competency focuses entirely on the defendant's ability to understand the meaning of the proceedings against him or her and the

defendant's ability to assist in his or her own defense, which can be satisfied regardless of the defendant's mental health." *State v. D-Bey*, 8th Dist. No. 109000, 2021-Ohio-60, ¶ 41

A defendant need not have a lawyer-like acumen to be competent to stand trial. The test is whether defendant has sufficient capability to consult with a lawyer, not whether he would be a good lawyer himself. *Godinez*, 509 U.S. at 399-400.

Courts reject the notion that frustration with counsel would provide "indicia" of lack of competence. A defendant's "failure to cooperate with counsel does not indicate that [the defendant] was incapable of assisting in his defense." *Berry*, 72 Ohio St.3d at 361. "Nor is the fact that [the defendant] was uncooperative with defense counsel at various times an indicator that he lacked competence to stand trial." *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, ¶ 30; *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, ¶ 49.

Frustration is simply not an "indicia". *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶¶ 161, 169 ("Johnson's anger regarding the newspaper articles, his refusal to heed his counsel's advice, and his abandoned request to fire his counsel did not indicate that he was unable to understand the nature of the charges and proceedings or the gravity of the situation or that he could not assist in his defense."; issues of anger, suspiciousness, distress, and agitation "fail to address Johnson's *competency*"; emphasis sic); *State v. Basile*, 11th Dist. No. 2021-L-080, 2022-Ohio-3372, ¶ 45 ("appellant's outbursts are not indicia of incompetency, but an inappropriate expression of his anger regarding the matter of bond, remaining incarcerated pending adjudication, and the length of his sentence."). If anything, the defendant's frustration on this record indicates

a ready understanding of what is happening in the proceedings and reflects the defendant having arrived at his own conclusions as to how the case should progress and his disappointment or anger with results so far.

The absence of any specific information as to incompetency is also significant. Despite the defendant's frequent encounters with the justice system, no information indicating incompetence was forthcoming, and the defense counsel's motion was entirely vague. Despite the availability of family members and a jail counselor, no information was forthcoming. By all indications, after the defendant refused to participate in the evaluation, the defense dropped the issue. It never objected to the failure to have a hearing and never indicated the defense was not ready for trial.

C.

Of course, the defense now points to the making of the motion on November 19th as raising the issue and as triggering a hearing. But the fact that counsel raised the competency issue does not compel a hearing. *Bock*, 28 Ohio St.3d at 110. The court's appointing of an expert to evaluate the defendant does not compel a hearing either. Id. "Defense counsel, after the original motion for a hearing, failed ever again to mention the defendant's competency until the time for appeal." Id. at 111. In *Bock*, this Court rejected the appellate court's conclusion that the failure to hold a hearing was automatic reversible error.

There is no need for an evidentiary hearing when the defense is dropping the issue. "A hearing is not required in all situations, only those where the competency issue is raised and maintained." *State v. Harris*, 8th Dist. No. 110635, 2022-Ohio-933, ¶ 8 (quoting another case); *State v. Kidd*, 1st Dist. No. C-200356, 2021 Ohio App. LEXIS

3803, at *19. It makes perfect sense that a hearing would only be needed when the defense would actually be seeking to rebut the presumption of competence. *Harris*, ¶ 8 ("hearing is only needed to introduce evidence rebutting the presumption of competency"). Moreover, the issue will be considered abandoned when the defense does not press it further. See *State v. Harris*, 142 Ohio St.3d 211, 2015-Ohio-166, ¶ 30 (issue abandoned when defense did not request a competency hearing or challenge court's finding that he was competent).

While it might appeal to some to engage in the formalism of the defense verbally withdrawing the motion on the record, this Court has recognized that formalisms like this should not control. For example, a NGRI plea can be formally withdrawn, but it can be abandoned in other ways simply by failing to pursue it further or by taking actions that are inconsistent with the NGRI plea, including the failure to present evidence in support of the defense. *Harris*, 142 Ohio St.3d 211, ¶ 18 ("Precedent demonstrates that a defendant can withdraw the defense formally, by entering a guilty or no-contest plea, by failing to pursue the defense, or by pursuing a new defense at trial."), citing *State v. Monford*, 190 Ohio App.3d 35, 2010-Ohio-4732, ¶¶ 74-76 (10th Dist.). Counsel would be strongly presumed to be acting reasonably in not proceeding with the NGRI issue at trial. *Monford*, ¶ 78. By parity of reasoning, counsel's act of proceeding with the trial without the formalism of a hearing on competency indicates the absence of enough information to proceed with such a hearing.

While the statute is mandatory in providing that the court shall have a hearing, the predicate for that duty presupposes a party or the court *raising* the issue. If no party or the court raises the issue, there is no mandatory duty. But "raising" the issue at a certain

point does not necessarily mean that the issue *continues* to be raised at later times.

Even in cases involving a confirmed diagnosis of mental illness, the possible existence of symptomatic mental illness at one point in time will not necessarily indicate that the defendant is laboring under such limitations at other times. "Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Indiana v. Edwards*, 554 U.S. 164, 175 (2008). Even if the motion on November 19th sufficiently "raised" the issue of incompetency at that time, the trial did not occur until nearly three weeks later, and it would be possible for the defense to drop the issue as no longer existing in the days leading up to trial. There would be no presumption that the defendant's "hostile and uncooperative nature" in earlier meetings would carry over into the trial he desired (even if that attitude were attributable to some inability to assist counsel).

When the defense proceeds to trial without objection, the appellate court would need no further indication that the issue is no longer being "raised" at that point. Again, if the defense were actually pursuing the competency issue, the defense would be requesting a hearing on that issue before trial and would be highlighting the hindrance(s) at the start of trial and during trial. Compare *State v. Were*, 94 Ohio St.3d 173, 175-76 (2002) (counsel raising issue before and during trial; "Counsel consistently claimed that appellant's failure to cooperate seriously hampered their ability to present a defense.").

D.

The defense's failure to object as the case moved into trial raises another important point as to lack of error preservation. As this Court has continued to emphasize in recent years, mandatory statutory provisions can still be subject to notions

of express waiver, forfeiture through failure to object, plain-error review, and the bar against the reversal for invited errors. See, e.g., *In re K.K.*, ___ Ohio St.3d ___, 2022-Ohio-3888, ¶ 54 (statute's mandatory "shall not" provision is not jurisdictional; merely voidable error, not "void"); *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, ¶¶ 23-26; *State v. Morgan*, 153 Ohio St.3d 196, 2017-Ohio-7565, ¶¶ 49-51.

Some might argue that it is the trial court's statutory duty to conduct the hearing and therefore that applying the plain-error standard would discount the court's duty to act according to statute. But, as the United States Supreme Court has recognized, "Rhetoric aside, that is always the point of the plain-error rule: the value of finality requires defense counsel to be on his toes, not just the judge * * *." *United States v. Vonn*, 535 U.S. 55, 73 (2002). Counsel is obliged to understand legal requirements, and it is fair to burden the defendant with his lawyer's obligation to do what is reasonably necessary to render the proceedings effectual "and to refrain from trifling with the court." Id. at 73 n. 10. As this Court has also stated: "We believe that our holdings should foster rather than thwart judicial economy by providing incentives (and not disincentives) for the defendant to raise all errors in the trial court – where, in many cases, such errors can be easily corrected." *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶ 23. "This contemporaneous-objection requirement imposes a duty on trial counsel to exercise diligence and to aid the court rather than by silence mislead the court into commission of error." *Wintermeyer*, ¶ 10 (internal quote marks omitted).

The duty to object is important for other reasons. First, it prevents the defense from "gaming" the system. *Puckett v. United States*, 556 U.S. 129, 140 (2009). Second, the objection allows the court to decide any and all legal aspects of the issue(s) involved.

Id. at 140 (court "if apprised of the claim will be in a position to adjudicate the matter in the first instance, creating a factual record and facilitating appellate review."). The objection affords the court the opportunity to resolve whether the statute actually addresses an unusual situation, such as when the defendant refuses to participate in the evaluation, the defense has no other evidence to present on the issue, and there are repeated indications of competence in the record. The law does not require the doing of a futile act. *State v. Madison*, 64 Ohio St.2d 322, 327 (1980). "Notwithstanding the mandatory character of a statute, it can not command the doing of a vain thing." *State ex rel. Stauss v. Cuyahoga County*, 130 Ohio St. 64 (1935), paragraph five of the syllabus; *Fortelka v. Meifert*, 176 Ohio St. 476, 480 (1964) ("the law does not require a claimant or litigant to do a vain thing * * *"). Nor is the defense counsel required to make a futile objection. *State v. McGuire*, 80 Ohio St.3d 390, 401 (1997) ("no need to preserve these futile claims"); *State v. Grate*, 164 Ohio St.3d 9, 2020-Ohio-5584, ¶ 146 ("not ineffective assistance when such a motion would have been futile."). In the absence of the defense being willing to go forward on proving incompetence, there would be no basis to proceed with a hearing, and the court could conclude that the statutory provision was inapplicable because the defense was no longer "raising" the issue.

If the defense nevertheless wishes to insist on a futile hearing, it must object when it becomes apparent that the trial court will not be conducting one. In the absence of an objection, the defense at the very least should be held to have forfeited all but plain error regarding the court's failure to hold whatever hearing was required by statute.

This Court has applied plain-error review to aspects of defendant-competency issues before, including whether there was sufficient inquiry by the court into the

defendant's competency. *State v. Spivey*, 81 Ohio St.3d 405, 410 (1998) ("appellant never specifically requested a hearing on the issue of competency"); *Neyland*, ¶ 52; *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, ¶ 29. "[W]e must apply plain error when a defendant did not raise competency issues while represented by counsel." *United States v. Ziegler*, 1 F.4th 219, 228 (4th Cir. 2021). The defense "failed to request a competency hearing below. Therefore, to the extent that this issue is considered at all, it shall be addressed under a plain error standard of review." *United States v. Carpenter*, 25 Fed. Appx. 337, 344 (6th Cir.2001). "The failure to sua sponte hold a competency hearing will always be reviewed for plain error." *United States v. Garza*, 751 F.3d 1130, 1134 n. 3 (9th Cir. 2014).

The contemporaneous-objection principle "is of long standing, and it goes to the heart of an adversary system of justice." *State v. Murphy*, 91 Ohio St.3d 516, 532 (2001). This longstanding principle is "strict." *State v. Long*, 53 Ohio St.2d 91, 96 (1978).

Enforcing the contemporaneous-objection principle against the defense does not require a personal "waiver" by the defendant. While "waiver" and "forfeiture" are often used interchangeably in regard to the defense failure to object, forfeiture of an objection through enforcement of the contemporaneous-objection principle does not require a personal, knowing, and intelligent decision on the part of the defendant. *United States v. Olano*, 507 U.S. 725, 733 (1993); *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, ¶ 21; *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, ¶ 15. Forfeiture grows out of the basic principle that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to

the trial court's attention at a time when such error could have been avoided or corrected by the trial court. *Rogers*, ¶ 21.

"In Ohio, Crim.R. 52 gives appellate courts narrow power to correct errors that occurred during the trial court proceedings." *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, ¶ 19; *Perry*, ¶ 9. Although an issue is forfeited through lack of objection, Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). Ohio did not allow any appellate review of a forfeited claim of error before Crim.R. 52(B), but now plain-error review provides for the review of such forfeited claims. *Morgan*, ¶¶ 34-36. Even so, "[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long*, paragraph three of the syllabus.

"The power afforded to notice plain error, whether on a court's own motion or at the request of counsel, is one which courts exercise only in exceptional circumstances, and exercise cautiously even then." Id. at 94. As stated in *State v. Campbell*, 69 Ohio St.3d 38, 41 n. 2 (1994), "[o]ur cases make clear that we will not *overturn* a conviction for alleged error not raised below, unless it amounts to plain error." (Emphasis sic). "[T]he lack of a 'plain' error within the meaning of Crim.R. 52(B) ends the inquiry and *prevents recognition of the defect*." *State v. Barnes*, 94 Ohio St.3d 21, 28 (2002) (emphasis added).

In *Barnes*, this Court stated that the plain-error analysis begins with three criteria: (1) there must be "a deviation from a legal rule"; (2) the defect must be "'obvious'"; and (3) the error "must have affected the outcome of the trial." To be "obvious", the error must have been "'plain' at the time that the trial court committed it." *Barnes*, 94 Ohio St.3d at

28; *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, ¶ 112.

Even if the error satisfies the first three prongs, there is still discretion for the appellate court to decline to afford relief.

> Even if a forfeited error satisfies these three prongs, however, Crim.R. 52(B) does not demand that an appellate court correct it. Crim.R. 52(B) states only that a reviewing court "may" notice plain forfeited errors; a court is not obliged to correct them. We have acknowledged the discretionary aspect of Crim.R. 52(B) by admonishing courts to notice plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."

Barnes, 94 Ohio St.3d at 27-28 (citations omitted).

The defendant cannot obtain plain-error reversal under these standards. In the absence of sufficient indicia of incompetence, the defendant cannot show error and certainly cannot show that any such error was so obvious at the time as to amount to plain error. Also, given the absence of indicia that the defendant was incompetent to stand trial, the end result of plain-error review would be to reject the claim of error, as the record fails to demonstrate a reasonable probability of a different outcome if a hearing had been held. *State v. Bond*, ___ Ohio St.3d ___, 2022-Ohio-4144, ¶ 22 ("reasonable probability that the error resulted in prejudice"); but see *Whitaker*, ¶ 39 (applying clear-outcome-determination standard to plain-error review).

As also indicated earlier in this brief, the defense did more than just fail to object to the lack of a hearing on competency before the trial. The defense affirmatively signaled that it was ready to proceed to trial. This implicates the invited-error doctrine and completely bars appellate review.

E.

At this point, amicus OPAA wishes to address another aspect of the issue of appellate review regarding the supposed error of the trial judge in failing to hold a hearing. When the appellate court determines that a hearing should have been held, the usual remedy would be to remand for that hearing. If the defendant would lose the hearing, then the trial court could re-enter the judgment of conviction. If the defendant would prevail in the hearing and the legal issue prejudiced the defendant at trial, then the trial court would treat the trial-based convictions as vacated, and the case would move forward from there.

This "limited remand" approach arises out of basic common sense. Even for constitutional rights, "the general rule [is] that remedies should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interests." *Rushen v. Spain*, 464 U.S. 114, 117-118 (1983) (quoting another case). When the injury is a failure to afford a hearing, the appellate remedy would be to afford a hearing.

Examples of these kinds of "limited remand" situations include: *Batson* challenges; suppression-hearing issues; *Deal* inquiry issues; and conflict-of-interest inquiry issues.

In *State v. Tuck*, 80 Ohio App.3d 721 (10th Dist.1992), the Tenth District held that the trial court had erred in not asking the prosecution to come forward with a race-neutral explanation for a peremptory strike under *Batson v. Kentucky*, 476 U.S. 79 (1986). But instead of merely vacating the conviction and ordering a new trial, the Tenth District remanded with special instructions that if the trial court on remand accepted the prosecution's race-neutral explanation, "then defendant's conviction will stand, subject to

any appeal." *Tuck*, 80 Ohio App.3d at 725. If the prosecution failed to provide a sufficient explanation, then the defendant was entitled to a new trial. Id.; see, also, *State v. Russell*, 2nd Dist. No. 23454, 2010-Ohio-4765, ¶ 65 ("If the trial court finds no *Batson* violation, it may reinstate Russell's convictions and sentence * * *. If the trial court finds that a *Batson* violation exists, then Russell will be entitled to a new trial"). See, generally, *State v. Powers*, 92 Ohio App.3d 400 (10th Dist.1993) (limited-remand approach used).

The same limited-remand approach can apply to suppression-issue remands. When the error is limited to an aspect of the suppression hearing or suppression ruling, the remand is limited to fixing the error and then determining whether suppression would have been granted. If suppression is still denied after fixing the error on remand, the conviction is reinstated. "A limited remand without retrial is permissible, and oftentimes necessary, when dispositive issues are unaddressed by the trial court." *State v. Hogan*, 10th Dist. No. 11AP-644, 2012-Ohio-1421, ¶ 14; see, e.g., *State v. Brown*, 2nd Dist. No. 24297, 2012-Ohio-195, ¶ 12 ("Brown's sole assignment of error having been sustained, his conviction is reversed, and the case is remanded to the trial court to make findings of fact and conclusions of law based on the evidence adduced at the suppression hearing. In the event the court again denies the motion to suppress, the court may reinstate the judgment entry of conviction."); *State v. Hogan*, 10th Dist. No. 09AP-1182, 2010-Ohio-3385, ¶ 29 ("If such an independently reliable basis is proven, then the initial jury verdicts and judgment of guilt can be reinstated."); *State v. Keith*, 10th Dist. No. 08AP-28, 2008-Ohio-6122, ¶ 40 ("We remand the matter for the trial court to address the merits of appellant's motion to suppress and to proceed accordingly. In the event the trial court denies the motion to suppress on remand, it can reinstate the verdict. If the trial court

grants the motion, a re-trial would be required on the possession of cocaine charge."); *State v. Shover*, 2014-Ohio-373, 8 N.E.3d 358, ¶ 19 (9th Dist.) ("similar to *Hogan* and *Keith*, we conclude that the trial court properly reinstated Mr. Shover's conviction for improperly handling firearms in a motor vehicle after following this Court's instructions on remand").

Most relevant here are the "duty of inquiry" cases, in which the trial court had a duty to inquire into a particular issue and failed to do so. In notable instances, this Court has approved the limited-remand approach.

When the defendant makes a specific complaint about the effectiveness of trial counsel, the trial court has a duty to inquire into the complaint and to address it under *State v. Deal*, 17 Ohio St.2d 17 (1969). When the error claimed on appeal is that the trial court engaged in no inquiry at all when it should have done so, or that the court engaged in an insufficient inquiry, the appellate court might find error in those regards. But the remedy would be a remand for the court to conduct the inquiry it should have conducted. *Deal*, 17 Ohio St.2d at 20. The appellate court would not outright order a new trial. If, after the needed inquiry, the trial court would determine that the specific complaint is unfounded, it would re-enter the conviction. Id.; *State v. Corder*, 2017-Ohio-7039, 95 N.E.3d 756, ¶ 21 (10th Dist.); *State v. Harrison*, 8th Dist. No. 95666, 2011-Ohio-3258, ¶ 15-17. If the complaint were determined to be well-founded, the trial court would order a new trial.

Another duty of inquiry can arise in relation to the defense attorney having a potential conflict of interest (usually when representing co-defendants). As this Court held in *State v. Williams*, 166 Ohio St.3d 159, 2021-Ohio-3152, the trial court will have

an "affirmative duty to inquire into multiple representation of codefendants * * * when the trial court knows or has reason to know that a possible conflict of interest exists or when a defendant objects to the multiple representation." Id. ¶ 6.

When the defense successfully claims on appeal that the trial court failed to engage in the needed inquiry, the appellate court should order a limited remand so that the trial court can conduct the needed inquiry. "If the trial court's affirmative duty arose but it did not inquire, the case must be remanded to the trial court with instructions to conduct a hearing to determine whether an actual conflict of interest existed." *Williams*, ¶ 7; see, also, *State v. Johnson*, 185 Ohio App.3d 654, 2010-Ohio-315, 925 N.E.2d 199, ¶ 8 (3d Dist.) (following limited-remand approach).

These "duty of inquiry" cases support a limited-remand approach on the competency issue when the error found on appeal is the failure to hold a hearing. The claimed error under the statute is a failure to engage in a duty of inquiry by holding a hearing on the issue of competency. As the Tenth District has recognized:

> Although in some cases a new trial must be granted because due process rights were violated in failing to conduct a competency hearing, we find no such necessity in this case. Just as the Supreme Court of Ohio in *Bock* held that the erroneous failure to conduct a competency hearing can constitute harmless error, and the Supreme Court in *Pate* held that sometimes the error cannot be cured even by a remand or a competency hearing, there necessarily must be the middle ground wherein a remand for a competency hearing is sufficient to meet the constitutional due process requirements. Accordingly, the appropriate order is to vacate the judgment of the common pleas court, remand the cause for a competency hearing, with instructions that the trial court grant a new trial if it be determined that defendant were, in fact, not competent to stand trial or if it be determined that the issue of defendant's competency to stand trial cannot now be the

> subject of credible pyschiatric or psychological expert opinion. On the other hand, if defendant be found to have been competent to stand trial, the judgment of conviction should be reinstated. * * *

State v. Archie, 10th Dist. No. 89AP-804, 1990 Ohio App. LEXIS 4275, at *15-16; see, also, *Goad v. State*, 2021 Nev. App. LEXIS 1, *31, 488 P.3d 646, 662 (2021) ("an appellate court may remedy the failure by remanding the case to the trial court to hold a retrospective hearing to determine whether the defendant was incompetent during trial, provided the trial court first determines on remand that it is feasible to retrospectively determine the defendant's competence."); *Walker v. AG*, 167 F.3d 1339, 1347 n. 4 (10th Cir. 1999) (collecting cases allowing retrospective hearing); *Were*, 94 Ohio St.3d at 180-81 (Cook, J., dissenting – collecting cases).

Concerns about an inability to replicate a full hearing on the defendant's mental competency from an earlier time appear overblown. Criminal defendants are allowed to submit evidence of retrospective mental-status evaluations relevant to the criminal act long after the time of that act, and there is no bar on the admission of such evidence. The ability to retrospectively assess the mental status of competency as of the time of an earlier trial would be no different.

The limited-remand approach is especially appropriate given that the lack of a record is owing to the failure of the defense to preserve the issue. In a case in which the defense raises the issue, but then drops it, and then proceeds to trial without any objection, an appellate court should be disinclined to excuse the forfeiture under plain-error and invited-error review. But, even if so inclined, the limited-remand approach should apply to temper the harshness of any automatic-reversal principle that would

otherwise be applicable.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA urges that this Court affirm the judgment of the Sixth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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