In the Supreme Court of Ohio

STATE OF OHIO,	}	
	}	CASE NO. 2022-1482
Plaintiff-Appellee,	}	
	}	ON APPEAL FROM THE CLARK COUNTY
v.	}	COURT OF APPEALS
	}	SECOND APPELLATE DISTRICT
TYLER WILSON,	}	
	}	COURT OF APPEALS CASE NO. 2021-CA-
Defendant-Appellant.	}	68

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice; and to advocate, in the courts and legislature of Ohio, for the rights secured by law to persons accused of the commission of a criminal offense

STATEMENT OF THE CASE AND THE FACTS

Amicus concurs in the Statement of the Case and the Facts presented in the Merit Brief of Appellee.

LAW AND ARGUMENT

Overview and Summary of Argument. This case presents two issues. The first is whether the firing of a warning shot against an aggressor constitutes a use of force sufficient to necessitate an instruction on self-defense. The second is whether counsel performs ineffectively, to the prejudice of his client, for conceding that no instruction on self-defense is warranted.

Amicus argues first that a warning shot is sufficient to constitute the use of force, and thus to justify instructing the jury on the defendant's right to self-defense. The decisions of the courts below were based on a misreading of cases which have held that self-defense is not available when the defendant claims accident or mistake. Besides being based on a misunderstanding of the law, those decisions create the paradoxical result of promoting a policy which encourages people to actually shoot each other, rather than to attempt to dissuade them from further aggression.

Counsel's failure to request an instruction on self-defense meets both of the prongs of *Strickland v. Washington* for ineffective assistance of counsel. It unquestionably prejudiced the defendant; without a self-defense instruction, he was left in a position where he unquestionably shot at someone, without having any justification for doing so. It is no little irony that he was convicted for using force while being denied an instruction on self-defense because, according to the courts, the prosecutor, and his own lawyer, he did not use force.

Counsel's failure to request the instruction was also deficient performance. There was no tactical or strategic reason for foregoing such an instruction, and counsel's decision was based on the same misunderstanding of the law that the courts engaged in.

AMICUS' PROPOSITION OF LAW NO 1: An accused is entitled to a self-defense instruction for firing a warning shot at an armed aggressor, and defense counsel renders ineffective assistance for not requesting an instruction on self-defense under such circumstances.

1. Wilson was entitled to an instruction on self-defense. The court below had a simple rationale for denying Wilson a jury instruction on self-defense. The statute under which Wilson was convicted, felonious assault pursuant to R.C. §2903.11, prohibits causing or attempting to cause physical harm to another by means of a deadly weapon. The court then launched into an extended and abstract discussion of how self-defense cannot negate any elements of the offense, but must admit it and prove a further justification for the defendant's actions. In the view of the court, by claiming he only fired a warning shot, Wilson was not attempting to cause harm, thereby negating an element of the offense and disqualifying himself for a self-defense instruction.

There are three problems with the court's analysis. The cases it cites in support of its conclusion don't support that conclusion. It ignores the true rationale of self-defense and the concept of force. And it leads to a result that, from a public policy perspective, is simply disastrous.

A. The cases cited by the court do not support its decision. The appellate court begins its analysis by citing *State v. Poole*, 33 Ohio St.2d 18, 294 N.E.2d 888 (1973), but even cursory scrutiny shows the case to be irrelevant to the issue here. *Poole* involved a defense of accident, not self-defense. The courts have consistently held that one cannot claim both accident and self-defense. *State v. Dixon*, 8th Dist. Cuyahoga No. 110972, 2022-Ohio-2582; *State v. Rigdon*, 12th Dist. Warren No. CA2006-05-064, 2007-Ohio-2843.

Those rulings make sense. As this Court put it in *State v. Champion*, 109 Ohio St. 281,

286-87, 142 N.E. 141 (1924), "Self-defense presumes intentional, willful *use of force to repel force or escape force.* Accidental force * * * is exactly the contrary, wholly unintentional and unwilful." (Emphasis added.) One cannot claim he used force in self-defense when he denies using force at all.

Most of the other cases cited by the court are equally unavailing. The defendant in *State v. Martin,* 21 Ohio St.3d 91, 488 N.E.2d 166 (1986), argued that the State must disprove self-defense beyond a reasonable doubt, a position the Ohio legislature finally adopted in 2019, but which has nothing to do with the situation here. *State v. Armstrong-Carter,* 2nd Dist. Montgomery No. 28571, 2021-Ohio1110, involved whether excessive force should be considered as an affirmative defense, or under the "lawful arrest" element of resisting arrest. *See also State v. Ellis,* 2nd Dist. Montgomery No. 24003, 2011-Ohio-2967 (same). The court rejected the claim of self-defense in *State v. Henderson,* 2nd Dist. Montgomery No. 28975, 2021-Ohio-3943 because there was no evidence the defendant was threatened with harm or was in any danger. The same claim was rejected in *State v. Petway,* 11th Dist. No. 2019-L-124, 2020-Ohio 3848, because the defendant was at fault in creating the affray. And self-defense is not available where the defendant never claims to have used any force, but instead insists that he was not involved in the altercation. *State v. Grant,* 2nd Dist. Darke No. 2019-CA-13, 2020-Ohio-3055.

The one case that supports the appellate court's opinion here is *State v. Hubbard,* 10th Dist. Franklin No. 11AP-945, 2013-Ohio-2735, which presents a similar fact situation. But *Hubbard* suffers the same analytical flaw as does the court's opinion in this case: *Hubbard* is largely premised on *State v. Johnson,* 10th Dist. Franklin No. 06 AP-878, 2007-Ohio-2792, which was an accidental discharge case.

The bigger problem with *Hubbard* and the decision below is that they exalt form over substance, and ignore the realities of force and self-defense.

B. The essence of self-defense is the defendant's intent to use force. Imagine two scenarios. In the first, a homeowner is approached by an angry mob. He fires a warning shot into the ground, and the mob disperses.

In the second, a homeowner is approached by an angry mob. He fires a shot into the crowd, killing someone.

No reasonable person – or at least, no reasonable *layman* – would view those situations differently, and conclude that the defendant acted in self-defense in the second but not in the first. In both cases, the defendant was attempting to thwart an aggressor. In both cases, the defendant used force – firing a gun – to do so. It makes little sense to hold that since he didn't actually try to kill or harm someone, he was not entitled to argue that he was defending himself and his property. In both cases, it is clear that the homeowner discharged the gun to protect himself and his property. It is equally clear that Wilson fired the shot to protect himself.

In fact, the requirement in *Hubbard* and this case that a defendant cannot claim self-defense unless he intends to harm an aggressor finds little support in cases throughout the country. In *Alexander v. State*, 121 So.3d 1185 (Fl. Ct.App. 2013), the court reversed a conviction of a defendant who'd fired a warning shot, concluding that the trial court had erred in giving a jury instruction that required the defendant to have injured someone. The court in *State v. Hill*, 315 S.C. 260, 433 S.E.2d 848 (1993) similarly concluded that a defendant could fire a warning shot in order to prevent an altercation from escalating further. In *State v. Dahrens*, 192 Or.App. 283, 84 P.3d 1122 (2004), the court held that "the defense of self-defense is available where an act is done with the knowledge or intent that it will thwart another's application of

unlawful force" and that a defendant need not "intend to assault another in order to claim self-defense."

C. It should not be the public policy of Ohio to encourage people to use more force in self-defense than necessary. Return to the scenarios presented above, and add another fact to the first one: the bullet ricochets off the ground, and strikes a member of the mob. Following the analysis employed by the court below, despite the identical results, the first homeowner cannot claim self-defense, and would be held culpable for felonious assault, while the second would be exonerated. Ironically, the first homeowner would be penalized for not shooting to maim or kill someone. As the court noted in *People v. Baar*, 2019 Il.App. (1st) 171267-U, ¶65, 2019 Ill.App.Unpub. LEXIS 2426, such a holding "could perversely punish the victims of violence for using less, rather than more, force to repel their attackers."

It may well be that a jury would have rejected Wilson's claim of self-defense. It could have concluded that his testimony about seeing Reffet with a gun was untrue, and that Wilson was not in fact in fear of death or great bodily harm, either subjectively or objectively. It could have concluded that Wilson was the aggressor, and thus not entitled to claim self-defense. It could have found that Wilson used excessive force.

It did not do any of those things, because it was never given the opportunity to properly adjudicate Wilson's guilt or innocence. Self-defense was Wilson's only viable argument, and a court intent on sifting through the entrails of abstract legal principles, rather than examining the situation from a common-sense and practical aspect, deprived him of the opportunity to make that argument.

2. Wilson's counsel rendered ineffective assistance. The standard for claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct.

2052, 80 L.Ed.2d 674 (1984). It contains both a performance prong and a prejudice prong: the defendant must show that counsel's performance was deficient, and that the defendant was prejudiced by it.

A. Counsel's performance was deficient. *Strickland* held that the proper standard for evaluating attorney performance is that of reasonably effective assistance; to demonstrate a deficiency, the defendant must show that counsel's performance fell below the range of competence demanded of attorneys in criminal cases. *Strickland* at 687. "[S]crutiny of counsel's performance must be highly deferential," and the "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689. For example, decisions about whether to ask for instructions on lesser-included offenses or go for an "all or nothing" verdict is generally regarded as a classic example of a strategic decision by counsel, and virtually immune from judicial second-guessing. *State v. Perez*, 8th Dist. Cuyahoga No. 108245, 2020-Ohio-100; *State v. Zhu,* 10th Dist. Franklin No. 21AP-10, 2021-Ohio-4577. This is understandable. For a trial lawyer, the decision to pursue an outright acquittal, or seek conviction of a lesser offenses, requires a risk/reward analysis. The risk of a chargedown is a compromise verdict: the jury might not believe that the state proved its case, but that the defendant did *something*, and so will convict him of the lesser offense, when otherwise he would have been acquitted. The potential reward is that the defendant will be convicted of a much lesser offense than he otherwise would be. The evaluation of the risks and rewards should be entrusted to counsel, in consultation with his client.

But "trial strategy" is not a rubric which immunizes from scrutiny every decision made by an attorney; *Strickland* holds that the decision must be objectively reasonable. As the Supreme Court explained in *Roe v. Flores-Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145

L.Ed.2d 985 (2009), "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." There was no similar risk/reward analysis in this case: there was absolutely no downside to requesting a self-defense instruction, and it offered Wilson the only realistic pathway to acquittal.

Moreover, despite the trial court's reason for refusing to give a self-defense instruction, requesting one was hardly an exercise in futility, since it would at least have preserved the issue for appellate review. As has been seen, the precedent relied upon by both the trial and appellate courts was substantially less that iron-clad; this Court has never ruled on whether a warning shot can be argued as self-defense, and most of the cases cited by the lower courts involved accidental shootings, which clearly do not fall within the ambit of self-defense. Counsel has a duty to make reasonable investigation into the case, *Strickland* at 690-691, and that duty "extends to the law as well as the facts." *Heard v. Addison*, 728 F.3d 1170, 1179 (10th Cir. 2013) (finding counsel ineffective for advising defendant to plead guilty to lewd molestation charges without informing him that he could assert that his conduct was not criminal under the statute). "[C]ounsel is obligated to research relevant law to make an informed decision whether certain avenues will prove fruitful." *United States v. Demeree*, 108 F. App'x 602, 605 (10th Cir. 2004). Here, counsel meekly acquiesced to a ruling which had little basis in law and which robbed his client of the only possibility of acquittal. There was no reasonable strategy in failing to request an instruction on self-defense.

B. Wilson was prejudiced by counsel's failure. *Strickland's* second prong requires the defendant to show that counsel's deficient performance resulted in prejudice to him. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland* at 691.

A defendant need not demonstrate that counsel's deficient conduct more likely than not altered the outcome of the case.

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 693, 694.

That standard is easily met here. One can have no confidence in the outcome of a trial in which the defendant is deprived of his only real defense.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully prays the Court to reverse the decision of the Clark County Court of Appeals, and to remand the case for a new trial.

Respectfully submitted,

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SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Association of Criminal Defense Lawyers was sent by email to counsel for all parties.

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