No. _____

In the Supreme Court of the United States

DAWUD SPAULDING,
Petitioner,
v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. **Should courts presume defense counsel acted strategically, even when the evidence in the record demonstrates a lack of strategy in their actions?**

2. **Is a capital defendant's right to due process violated when he is allowed little substantive opportunity to satisfy the circular requirements of his state's post-conviction statute?**

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceeding other than those listed in the caption.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Dawud Spaulding respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

OPINIONS BELOW

The Summit County Court of Common Pleas' Judgement Entry, entered in *State v. Spaulding*, Case No. CR2012-05-1508, is attached hereto as Appendix D at A-5. The Ohio Ninth District Court of Appeals' Decision and Journal Entry on his post-conviction appeal, Case No. 28526 is attached as Appendix F and is attached hereto at A-31. The Supreme Court of Ohio's decision declining jurisdiction, *State v. Spaulding*, 2018-Ohio-1548 is attached as Appendix G and is attached hereto at A-85.

JURISDICTION

The Supreme Court of Ohio declined jurisdiction on May 15, 2019. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS

This case involves the following Amendments to the United States Constitution:

A. Fifth Amendment, which provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor be deprived of life, liberty, or property, without due process of law.

B. Sixth Amendment, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

C. Eighth Amendment, which provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

D. Fourteenth Amendment, which provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the early morning hours of December 15, 2011, at 1104 Grant Street in Akron, Ohio, Patrick Griffin was shot. Griffin, a known and convicted neighborhood drug dealer[1], was ultimately paralyzed from the neck down. Witnesses at the scene included Ernest Thomas, Erica Singleton, Anthony Shellman, and Tarheasia Norwood. Thomas and Singleton told police and others that "masked men" had entered through a side door as Griffin was leaving and fired multiple shots into the house. PC Ex. 1, 2. The police found a substantial amount of illegal drugs at the scene, but no one at the house was charged with possession of those drugs.

Information from numerous witnesses indicated a multiple shooter scenario. According to Shera Carter, following the shooting of Griffin, Thomas told her that "some masked men came into his house and he ran them out." PC Ex. 1. Also, "two black males were seen leaving the scene" who appeared to end up at Tarson Terrace. Tr. 2170. And, according to Keyona Bishop, Singleton also described the shooters as "masked men." PC Ex. 2.

Immediately after Griffin was shot, Singleton fled to her friend Cierra Harviley's house. PC Ex. 15. Shaunday Harviley was on the phone with Cierra Harviley when Singleton arrived at Cierra's house following the first shooting. PC Ex. 45. Singleton told Cierra that two men had come into the house shooting. *Id*.

[1] Since the shooting, Griffin has continued to his criminal activity on a nation-wide scale. *See* Stephanie Warsmith, *Quadriplegic Akron man gets 17 years in prison for running national drug ring*, AKRON BEACON. J. (JUNE 12, 2019, 12:03 AM), https://www.ohio.com/news/20190611/quadriplegic-akron-man-gets-17-years-in-prison-for-running-national-drug-ring.

Shaunday heard Singleton tell Cierra that, "these dudes came in my boyfriend's house trying to rob him." *Id.*

Ernest Thomas—Singleton's boyfriend—told Niechelle Bell he "thought they were being robbed but didn't know who would want to rob them." PC Ex 47. Thomas and Singleton also told Bell that they thought there was more than one shooter. *Id.*

Tarheasia Norwood was never interviewed by the police. Defense counsel ended up representing Norwood while simultaneously representing Spaulding. But they also failed to interview her. *See* PC Exs. 15, 49.

A few hours after Griffin was shot, at approximately 8:00 a.m., Thomas and Singleton returned to 1104 Grant Street to retrieve their vehicles. By all appearances, they were leaving town. Before they could leave, the two were shot and killed in the driveway.

Next door neighbors, Dan and Pat Forney, were home at the time of the second shooting. PC Ex. 15. Dan Forney indicated that once he heard the shots, he looked out the door and saw a man outside while simultaneously hearing a second man inside, ransacking the house. *Id.* The Forneys knew the residence to be a drug house and were aware that there had recently been a drive-by shooting there. *Id.*

Singleton's mother showed up at the crime scene and told the police and others that she suspected Spaulding as the killer. Spaulding was Singleton's ex-boyfriend and father of their two children. Tr. 1069. She suspected him because of his domestic violence history with Singleton. The police acted on her suggestion right away.

On Dec. 20, 2011, while surviving victim Griffin was still in the hospital, the police showed Griffin a photo lineup containing Spaulding's photograph. At this point, Griffin had never given the police a description of his shooter, but the police provided him with photos only of men with braids – like Spaulding had. State's Ex. C. In fact, at the time they interviewed Griffin, *no* witness had described the shooter as a man with braids.

Griffin did not identify anyone out of the photo line-up initially. Tr. 1750. But then the officers informed Griffin for the first time that Singleton and Thomas had been shot and killed. *Id.* They administered the photo array containing Spaulding—Singleton's ex-boyfriend—a second time. *Id.* at 1751. It was then that Griffin chose a photo of Spaulding's face as that of his shooter.

From that point forward, except for a single open-ended question to Griffin during a deposition, no one mentioned reports that described the perpetrators were "masked men." Police wasted little time investigating before arresting Spaulding. He was arrested for the shooting of Griffin, even though neither Singleton nor Thomas ever indicated that Spaulding was the shooter. PC Ex. 45. Spaulding was then charged with killing Singleton and Thomas.

The trial phase

At trial, the State built a case against Spaulding based on evidence of prior bad acts, unreliable eyewitness testimony, and by overstating weak forensic evidence which they purported linked Spaulding to the crime scene. Critically, counsel failed to challenge the State's theory of the case or its experts in any meaningful way.

Additionally. Spaulding's attorneys failed to present the ample evidence available to demonstrate that police wrongly zeroed in on Spaulding at the exclusion of other, more plausible suspects.

The State used Spaulding's cell phone data to show that he was in the area of the crime scene at the time of the shootings. Tr. 1023. The court permitted testimony that misrepresented the precision of Spaulding's location and the forensic value of the technology. Defense counsel's failure to adequately correct the overstatements, either during cross or through an expert of their own, left the jury with an over-inflated impression of quality of the limited information provided by the cellular analysis.

The main evidence against Spaulding was the eyewitness identification from Griffin and from a man in a car nearby named Todd Wilbur.

Wilbur provided a cross-racial identification of Spaulding for the shooting of Thomas and Singleton. His initial description of the shooter did not contain the crucial detail of "braided hair" that his second description—given 9 months later—contained. Wilbur was a drug addict, though he testified that he was clean and no longer on drugs at the time he was an eyewitness to the shootings. Tr. 1547-48. Records, however, show that Wilbur was arrested for possession of marijuana right before the shootings, at a time Wilbur claimed to be clean. PC Ex. 17. Records also indicate Wilbur had brain damage, but the jury heard neither about brain damage nor the drugs with which the purportedly "clean" Wilbur was caught.

The State connected the shooting of Griffin with that of Thomas and Singleton by presenting testimony that all of the casings were from the same type of gun, and that it could establish that they actually came from the **same** gun. Tr. 2327. In reality, no one has located the murder weapon, and the evidence contradicted the State's claim—two different size shell casings were found at the scene. *See* tr. 1601 (.32 shells found in kitchen) and tr. 1140 (shooter in kitchen). *See also* tr. 2149-50 (9 mm casings). Defense counsel never challenged the State's scientific overstatement. PC Ex. 16; Tr. 1139-41.

There were multiple other, more plausible scenarios that fit the evidence surrounding the shootings at 1104 Grant Street that are inconsistent with a singular jealous ex-boyfriend. The facts and circumstances of shootings contradict the State's theory of domestic violence. Despite available evidence supporting alternative theories of what happened and the motive behind it, Spaulding's attorneys failed to present this evidence to the jury.

The jury did not hear the extent to which Thomas and Griffin were involved in illegal activities, that it was not the first time Griffin had been shot, nor was it the first shooting at 1104 Grant Street. PC Exs. 39-40. They did not hear that a drug dealer who went by the name of "Manny" seemingly took credit for the shootings because the victims had robbed him PC Ex. 3.

The jury did hear that just months prior to this incident, Griffin and Thomas had been witnesses to the shooting murder of David Clark just a few blocks away from the 1104 Grant Street house. PC Ex. 23. It did not, however, learn that both

Griffin and Thomas had been identified as State's witnesses regarding that murder but were killed before they could testify.

The State had a weak case against Spaulding, but defense counsel's performance was even weaker. Spaulding was wrongfully convicted and sentenced to death for the murders of Thomas and Singleton, and the attempted murder of Griffin.

The mitigation phase

Defense counsel's lack of preparation finally culminated in a mitigation phase. Counsel had prepared so little that, on the morning that the mitigation trial was to begin, the mitigation specialist had to write the opening statement for counsel. PC Ex. 4, p. 2. Counsel—unable to even follow the script—told the jury they would hear from a member of Spaulding's family who, in actuality, was deceased. Ex. 4, p. 2. *See also* tr. 2506. It took very little time for the jury to recommend a death sentence.

Postconviction proceedings and appeal

On December 23, 2013, Spaulding filed his postconviction petition. On July 31, 2015, Spaulding filed an amendment to his postconviction petition. Spaulding also moved the trial court for an order granting him leave to conduct discovery and for DNA testing. The State opposed the motions and requested the petition be dismissed. The trial court denied Spaulding's motions for discovery and DNA testing. *See* Appendices A-B. The trial court denied Spaulding's motion for reconsideration on his DNA Application. *See* Appendix C.

On January 10, 2017, the trial court dismissed Spaulding's postconviction petition. *See* Appendix D. Spaulding did not receive a hearing.

Spaulding filed a timely notice of appeal to the Ninth District Court of Appeals. He also requested an expansion of pages to file a longer brief, which the court denied. *See* Appendix E. On September 12, 2018, it denied his appeal and affirmed the trial court's entry. *See* Appendix F.

The Supreme Court of Ohio denied Spaulding's Memorandum in Support of Jurisdiction in a decision entered on May 15, 2019. *See* Appendix F. Spaulding now respectfully petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. When a lack of strategy is evident from evidence in the record, courts should not then act with the typical deference afforded to trial counsel.

The state courts deferred to nonexistent strategy decisions when they evaluated Spaulding's claims of ineffective assistance of counsel. Where counsel does not investigate a fruitful area, and therefore has no reason to believe the resulting information would not be valuable, counsel's inaction cannot be considered trial strategy.

Rarely, in a capital case, does trial counsel perform such an abysmal job that the entire defense team submits affidavits on appeal detailing counsel's failures. Spaulding's trial investigator—in the "first and only time [he had] ever criticized in this manner the attorneys [he] worked for"—described that he was "shocked by the lack of involvement and knowledge" by Spaulding's counsel. PC Ex. 15, p. 4. The mitigation psychologist explained how the attorney purportedly responsible for mitigation never once returned his calls. PC Ex. 5, p.1. The mitigation specialist

described how, on the day the mitigation phase was to begin, she realized counsel "knew very little, if anything, about the mitigation that had been collected on Mr. Spaulding's behalf," so in the minutes before beginning, she "handwrote an opening statement" for counsel to read. PC Ex. 4, p. 2. It did not help, because after reading aloud the first half of it, counsel decided to go off-the-cuff. Counsel was so uninformed that he "told the jurors that they would hear from a certain witness, but that particular witness was dead." *Id.*

Petitioners before this Court have litigated at length the validity of ineffective assistance claims where they are based in counsel's "strategic" failure to investigate or present evidence. Limiting investigation in this way usually rests on a tactical judgment not to present mitigating evidence and/or to pursue an alternative strategy. *Strickland v. Washington*, 466 U.S. 668 (1984); *See also Wiggins v. Smith*, 539 U.S. 510, 2530 (2003). However, "where counsel fails to investigate and interview promising witnesses, and therefore has no reason to believe they would not be valuable in securing defendant's release, counsel's inaction constitutes negligence, not trial strategy." *Stewart v. Wolfenbarger*, 468 F.3d 338, 356-57 (6th Cir. 2006) (internal citations omitted). *See also Blackburn v. Foltz*, 828 F.2d 1177, 1183 (6th Cir. 1987) ("Counsel did not make any attempt to investigate this known lead, nor did he even make a reasoned professional judgment that for some reason investigation was not necessary."). Spaulding was deprived of the effective assistance of counsel where his counsel neglected to investigate and present witnesses in the guilt phase of his

capital trial. The performance of Dawud Spaulding's trial counsel fell far short of what is constitutionally sufficient.

A. Available, compelling evidence could have supported Spaulding's defense, but defense counsel inexplicably failed to obtain and present it.

Spaulding's counsel had within their reach multiple bases on which a "two-shooter" theory, challenging the State's case, could have been galvanized. Many of these implicated persons with greater motive than Spaulding's purported domestic violence as the State's theory alleged. To compound matters, the evidence against Spaulding is sparse, and the defense he could have established is strong. Spaulding provided extensive evidence detailing this in his postconviction petition. The courts deferred to presumed "strategy" and "trial tactics." *See generally State v. Spaulding*, 2018-Ohio-3663 (Ct. App.).

1104 Grant Street was a known drug house, and it makes no sense that Spaulding would choose a house full of drug dealers with guns as the location in which to attack Singleton. Moreover, neither Singleton nor Thomas identified Spaulding as the shooter, and Singleton had no difficulty in the past with telling people what Spaulding did to her. She reported to the police on multiple occasions. *See, e.g.,* State's Exs. 167, 168. But, despite having the opportunity after the first shooting, at no point did Singleton tell anyone that the shooter was Spaulding. Singleton would not have left the house on Grant and gone to her apartment—the scene of an earlier assault by Spaulding—if she knew that Spaulding was the shooter who had yet to be caught.

Instead, it is far more likely that the shootings were related to the activities of Griffin and/or Thomas, who lived at the house. There was documented evidence that Griffin and Thomas were going to be State's witnesses in an upcoming trial concerning the murder of David "Frog" Clark. *See* PC Exs. 21, 25-33. Griffin and Thomas were named in the police report as State's witnesses, and the day after the murder trial dates were set, Griffin and Thomas were gunned down. Thomas and Griffin could have been shot in retaliation for turning State's evidence, or to prevent their testimony.

Spaulding's counsel never investigated that and never obtained the documentation demonstrating it. Nor did they obtain and present additional evidence showed that Clark's associates likely believed Thomas was involved in Clark's death and that Griffin was found hiding with Clark's shooter. Thomas and Griffin could have been shot in retaliation for their involvement in Clark's killing. *See* PC Exs. 21-24.

Defense counsel failed to investigate eyewitness Todd Wilbur. Wilbur testified that he was in drug treatment in November 2011—before the date of the shooting and the purported eyewitness encounter on December 15—and thus not using drugs after that time. Tr. 1548. Counsel failed to investigate and thus failed to impeach him with reports showing that he was caught with drugs on December 5, 2011. *See* PC Exs. 17 and 18.

Similarly, counsel never investigated and learned that Wilbur is so brain-damaged he was released from a criminal sentence early. According to a court entry

in a criminal case against Wilbur, he was released early from community control because of the brain damage he suffered. PC Ex. 19. The State and the jury relied on this man's memory in deciding whether the convict and send Spaulding to death row.

Defense counsel failed to present available expert testimony undermining the out-of-court testimony of the other eyewitness, surviving victim Griffin. Griffin's identification was suspect for numerous reasons. First, he was taken by surprise by the shooter and shot in the dark driveway. Further, Griffin only identified Spaulding after he was informed by the police that Singleton and Thomas had been shot and killed. And. Griffin's hospital records show that he had been on a Propofol drip for five days and was also taking morphine and a benzodiazepine. An expert would have demonstrated that Griffin would not yet have been able to perform cognitive functions and access memories at the time the police took a statement from him. PC Ex. 12.

Courts should not presume a strategy on behalf of defense counsel when all the evidence indicates they were not acting strategically. Ineffective assistance cases turn on their individual facts. *Sanders v. Trickey*, 875 F.2d 205 (8th Cir. 1989). Spaulding's counsel were negligent in virtually every way.

B. Failure to use expert testimony does not necessarily equate to a "strategic choice" by counsel to rely on cross-examination.

The idea of cross-examination as an adequate substitute for calling an independent expert witness is premised upon the assumption that trial counsel perform adequately. Especially when the State's theory is predicated on faulty, unreliable investigative techniques, trial counsel cannot sit on their hands and hope the jury figures out the truth.

Adequate cross-examination has a threshold, beyond which it is no longer sufficient to rely on contradictory questioning. If the technical premise on which a conviction is based may be called into question (or negated entirely) by an alternate, equally reliable theory, it should not go unanswered. Spaulding was not provided with counsel who thoughtfully and diligently considered the evidence against their client and made decisions to opt for cross-examination over experts. Their decision cannot be strategic when they failed to investigate or attempt to understand this investigative area.

To Spaulding's prejudice, the State grossly misrepresented the results of their investigation. For example, the State's witnesses testified as if they were able to pin-point Spaulding's location based on tracking his cell phone. But cell-site tracking has been rapidly losing its evidentiary value and joining the ranks of investigative techniques dismissed as "junk science." *See, e.g., United States v. Hill*, 818 F.3d 289, 297-99 (7th Cir. 2016) (The Seventh Circuit cautions the government not to present historical cell-site evidence without clearly indicating the level of precision – or imprecision – with which the particular evidence pin-points a person's location at a given time.) *See also United States v. Reynolds*, 626 Fed.Appx. 610 (6th Cir. 2015) (The Sixth Circuit gave the technique an unfavorable appraisal). A 2013 article in the American Bar Association's, "ABA Journal," discusses at length the pitfalls and lack of probative value derived from cell-site tracking, citing multiple sources that caution

against their use at all.[2] Other experts have also described the significant limitations and subsequent lack of probative value of cell-site tracking.[3]

Spaulding's counsel neither challenged those results through cross-examination nor through an expert of their own. The end result is that the jury overestimated the quality of the limited information provided by the cell-site analysis.

The state courts presumed that counsel made a specific strategic choice to forgo the use of an expert. The trial court found that they "chose to cross-examine Detective Moledor instead of presenting an independent witness, which is a matter of trial strategy," and the appellate court agreed. *State v. Spaulding*, 2018-Ohio-3663, 119 N.E.3d 859, 875. But the evidence in the record does not support the picture of counsel who weighed the option and came up with a strategy. Instead, the entire defense team submitted affidavits detailing counsel's failures.

This Court should grant certiorari in Spaulding's case to define the boundaries of "strategy" to which the courts must defer. When the only evidence in the record indicates the lack of a thorough investigation, instead of presuming a strategic choice, a postconviction court should err on the side of holding a hearing so "[t]he trial judge can ask what the counsel knew, when he knew it, and whether a mistake was not

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[2] Mark Hansen, *Hard Cell*: *Prosecutors' use of mobile phone tracking to spot a defendant is 'junk science,' critics say*, ABA J., June 2013, at 15-16, 19, 66, http://www.abajournal.com/magazine/article/prosecutors_use_of mobile_phone_tracking_is_junk_science_critics_say.

[3] Aaron Blank, *The Limitations and Admissibility of Using Historical Cellular Site Data to Track the Location of a Cellular Phone,* 18 RICH. J. L. & TECH. 3 (2011), https://jolt.richmond.edu/jolt-archive/v18i1/article3.pdf.

strategic, but was instead careless." *State v. Gondor*, 2006-Ohio-6679, ¶ 54, 112 Ohio St. 3d 377, 389.

II. Initial review collateral proceedings are often crucial to developing meritorious claims for relief, but Ohio allows little substantive opportunity to uncover and develop claims that meet Ohio's collateral review requirements.

Capital defendants such as Spaulding face a serious dilemma under Ohio's post-conviction scheme. The text of the statute provides that a petitioner must include affidavits or other evidence *dehors* the record in support of his claims. R.C. § 2953.21(A). It is from the face of the petition that a trial court must determine if a hearing is required. To survive a motion to dismiss, post-conviction petitioners must develop sufficient evidence *dehors* the record to support his constitutional claims without any benefit of the discovery processes available to every other civil litigant. Without access to traditional civil tools of discovery, Ohio's post-conviction process imposes an impossible pleading standard on petitioners that renders it meaningless as an effective vehicle to remedy serious constitutional violations.

This Court has recognized that important claims can come from initial review collateral proceedings—claims that "often turn[] on evidence outside the trial record"—and that there is a "key difference between initial-review collateral proceedings and other kinds of collateral proceedings." *Martinez v. Ryan,* 566 U.S. 1, 10, 12 (2012). It has recognized the potential for injustice that could occur when a prisoner is denied the effective assistance of counsel in initial review collateral proceedings, because "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court

at any level will hear the prisoner's claim." *Id.* The same injustice occurs when it is the denial of resources that forces the attorney to err.

The post-conviction trial court never afforded Spaulding the right to discovery, to DNA testing, or to an evidentiary hearing. Ohio's post-conviction system deprives petitioners of the tools necessary to develop the factual basis for their constitutional claims, and then allows the trial court to dismiss the petition summarily on the combined bases of the doctrine of res judicata and the lack of factual development. That is precisely what happened in Spaulding's case, ultimately depriving him the due process to which he is entitled.

When a state adopts a procedure or rule to vindicate the constitutional rights of a litigant, it must provide any litigant a fair and reasonable opportunity to identify all relevant claims and to have those claims heard and decided. *See Michel v. Louisiana*, 350 U.S. 91, 93 (1955); *Parker v. Illinois*, 333 U.S. 571, 574 (1948). The right to object to a federal constitutional violation presupposes a reasonable opportunity to exercise that right. *Reece v. Georgia*, 350 U.S. 85, 89 (1955). In *Case v. Nebraska*, 381 U.S. 336 (1965), Justice Brennan outlined that a state's post-conviction system should operate as "swift and simple and easily invoked," should be "sufficiently comprehensive to embrace all federal constitutional claims," and must "provide for full fact hearings to resolve disputed factual issues." *Id.* at 346-347. Ohio lacks these base criteria in its post-conviction processes.

In capital proceedings, such as this one, fact-finding procedures should be required to meet a heightened standard of reliability. *Woodson v. North Carolina*, 428

U.S. 280, 305 (1976) (plurality opinion) ("Because of that qualitative difference [in punishment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). In capital trials, states are required to provide, at a minimum, the following to the accused: 1) the opportunity to present evidence; 2) the opportunity to challenge or impeach the state's evidence; and 3) a decision-maker who is neutral, detached and not a member of the executive branch of government. *Ford v. Wainwright*, 477 U.S. 399, 412-417 (1986). It is axiomatic that at least some of that need for reliability and requirement for fair process carries past trial to the capital post-conviction proceedings.

Ohio's process for determining post-conviction relief claims fails to satisfy minimal standards of due process. *Case v. Nebraska*, 381 U.S. 336 (1965). Because Ohio has chosen to establish a post-conviction procedure to effectuate constitutional rights for those defendants sentenced to death, that procedure must comport with fundamental due process. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *see also Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 282-83 (1998) (appellant's life interest protected by due process clause); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (death is different and so requires heightened due process).

CONCLUSION

This Court should grant Spaulding's petition to define the boundaries of "strategy" to which the courts must defer. Despite the lack of investigation by Spaulding's trial counsel, the lower courts excused their deficient performance by

labeling it 'strategy.' It should be an obvious legal conclusion that strategy cannot be assumed when counsel never gathered the information necessary to strategize.

Additionally, Ohio courts are not providing capital post-conviction petitioners with the necessary tools to prosecute their post-conviction litigation. Spaulding was denied the ability to use any tools of discovery, and then his petition and appeal were dismissed without a hearing. This Court should grant Spaulding's petition to require Ohio make capital post-conviction proceedings meaningful for all capital petitioners.

Respectfully submitted,

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