CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT A. GROUP, Petitioner,

vs.

STATE OF OHIO, Respondent.

On Petition for Writ of Certiorari to the Ohio
Court of Appeals for the Seventh Appellate District

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

Question Presented for Review

In Scott Group's trial, the State relied on DNA evidence to bolster the identification of the surviving victim, Sandra Lozier. Ms. Lozier's identification needed such bolstering due to its inherent unreliability on account of the fact that she survived a gunshot wound to her head. In various statements, Ms. Lozier described her assailant inconsistently with Mr. Group's size and appearance. In some statements, Ms. Lozier said she had lost consciousness after the assailant shot her. Yet, in other statements, Ms. Lozier said she did not lose consciousness. Trial counsel recognized that DNA evidence was important to Mr. Group's defense, and they retained a DNA expert from Lifecodes, Dr. Michael Baird. Trial counsel told the jury in opening statement that Mr. Group had a DNA expert who would testify about contaminates that would nullify the State's DNA evidence. Trial counsel breached that promise, however, and the jury heard no testimony from a DNA expert. The State exploited the lack of a defense DNA expert to great effect. The prosecutor misleadingly told the jury that law enforcement conclusively found Robert's DNA on Mr. Group's shoe, based only on the frequency that Robert's genetic profile appears in the data base once for every 220,000 Caucasians.

Mr. Group was stuck with an underdeveloped record in the state courts because his post-conviction counsel failed to investigate and present any issues off the record in support of the petition. It was not until Mr. Group's federal habeas

counsel investigated the case that he learned Dr. Baird was available to testify, and would have testified, but for his trial counsel's incompetent handling of this expert.

The lack of a DNA expert rendered Mr. Group's trial fundamentally unfair. Mr. Group's federal habeas counsel obtained a sworn declaration from a DNA scientist at Wright State University, Dr. Dan Crane. Dr. Krane's declaration establishes that the population frequency statistic offered at trial—that the genetic profile appears once for every 220,000 Caucasians—does not conclusively identify Robert Lozier as the source of the blood found on Mr. Group's shoe. The FBI threshold for using the random match statistic to identify a single contributing DNA source is "1 in 300 billion" and the random match statistic from Mr. Group's trial falls well short of that threshold. Dr. Krane's declaration further demonstrates the genuine possibility of another contributor of the DNA used to convict Mr. Group.

Mr. Group tried in vain to take this new evidence back to the trial court, but the United States District Court and the United States Court of Appeals for the Sixth Circuit denied him the authorization to do so. As an indigent death row prisoner, Mr. Group lacked the ability to litigate DNA issues in the trial court, pro se. It was not until Mr. Group's present, volunteer counsel entered the picture in February 2018, that Mr. Group was able to present his new evidence in the trial court. Yet, the trial court refused to consider the reasons that Mr. Group offered to justify his new trial request. This appeal involves the substantial question of whether the state court violated with basic principles of due process when it dismissed Mr. Group's request for a new trial without considering the reasons relevant to justify that request.

1. Does a state court deprive a capital defendant due process of law when it denies the defendant's request to present new evidence to challenge the capital conviction without considering the defendant's reasons for seeking delayed review of the new evidence?

List of Parties

The caption to this petition contains the only parties to this petition for writ of certiorari.

Corporate Disclosure

There are no corporate disclosures necessary for this case.

List of Proceedings

1. **Trial Court Proceedings:**
   a. *State of Ohio v. Scott A. Group*, Case No. 1997 CR 00066 (Mahoning County Court of Common Pleas).
   b. Charges filed:
      Ct. 1: Aggravated Murder, in violation of Ohio Rev. Code §2903.01(B)(C); Specifications: Ohio Rev. Code §§2929.04(A)(5), 2929.04(A)(7); Firearm Specification: Ohio Rev. Code §2941.145(A).
      Ct. 2: Attempted Aggravated Murder, in violation of Ohio Rev. Code §§ 2923.02(A)(3), 2903.02(B)(C); Firearm Specification: Ohio Rev. Code §2941.145(A).
      Ct. 3: Aggravated Robbery, in violation of Ohio Rev. Code §2911.01(A)(1); Firearm Specification: Ohio Rev. Code §2941.145(A).
      Ct. 4: Second Attempted Aggravated Murder, in violation of Ohio Rev. Code §§2923.02(A)(3), 2903.01(A)(D).
      Ct. 5: Intimidation, in violation of Ohio Rev. Code §2921.03(A)(B).
   c. Jury trial: March 16, 1999.
   d. Guilty verdict: April 14, 1999, on all charges.
   e. Mitigation phase: April 21 to April 23, 1999.
   f. Death sentence on aggravated murder and two specifications of aggravating circumstances (Ct. 1); 10 years' imprisonment for attempted aggravated murder (Ct. 2), aggravated robbery (Ct. 3), and attempted aggravated murder (Ct. 4); five years' imprisonment for intimidation (Ct. 5). Definite term of 3 years' incarceration served prior to and consecutive to the sentence in Count 1; firearm specifications in Counts 2 and 3 were merged with the firearm specification in Count 1.

2. **Direct Appeal:**
   a. *State of Ohio v. Scott A. Group*, Case No. 1999-1152 (Supreme Court of Ohio)
      i. Convictions and sentences affirmed December 30, 2002.
      ii. Case citation: *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, 781 N.E.2d 980.
      iii. Application For Reopening Under S.Ct.Prac. R. 11.06 filed June 3, 2015, denied June 15, 2016.
      iv. Case citation: *State v. Group*, 146 Ohio St. 3d 1413, 2016-Ohio-3390, 51 N.E.3d 658 (Table).

3. **Post Conviction:**
   a. Petition to Vacate or Set Aside Judgment and/or Sentence Pursuant to Ohio Revised Code 2953.23.
      i. Filed with Mahoning County Court of Common Pleas March 20, 2000.
      ii. Denied by the trial court December 31, 2009.

b. *State of Ohio v. Scott Group*, Case No. 2010 MA 00021 (Seventh Appellate District)
   i. Denial of post conviction relief affirmed December 8, 2011.
   ii. Case citation: *State v. Group*, 7th Dist. Mahoning No. 10 MA 21, 2011-Ohio-6422.
   iii. Ohio Supreme Court declined to accept jurisdiction May 8, 2013.
   iv. Case citation: *State v. Group*, 135 Ohio St.3d 1431, 2013-Ohio-1857, 986 N.E.2d 1021 (Table).

4. Federal Habeas Proceedings:

a. *Scott A. Group v. Norm Robinson, Warden*, Case No. 4:13CV01636, United States District Court, Northern District of Ohio.
   i. Habeas petition filed May 7, 2014.
   ii. Habeas petition denied without a certificate of appealability on any claim January 20, 2016.
   iii. Case citation: *Group v. Robinson*, 158 F.Supp.3d 632 (N.D. Ohio.2016).
   iii. Motion to Alter Or Amend The Judgment Under Federal R. Civ. P. 59(e) filed February 17, 2016.
   iv. Amendment to The Petition for Writ Of Habeas Corpus filed February 25, 2016.
   v. 59(e) Motion and Amendment to habeas petition denied May 27, 2016.
   vi. Case citation: *Group v. Robinson*, N.D. Ohio No. 4:13CV01636, 2016 WL 3033408 (May 27, 2016).

b. *Scott A. Group v. Norm Robinson, Warden*, Case No. 16-3726, Sixth Circuit Court of Appeals.
   i. Sixth Circuit denied Application for Certificate of Appealability May 25, 2017.
   ii. Case citation: *Group v. Robinson*, 6th Cir. No. 16-3726, 2017 WL 8315839 (May 25, 2017).
   iii. Petition for Rehearing filed June 8, 2017, denied December 21, 2017.

c. *Scott A. Group v. Norm Robinson, Warden*, Case No. 17-8188, Supreme Court of the United States
   i. Petition for Writ of Certiorari filed March 19, 2018, denied June 25, 2018.
   ii. Case citation: *Group v. Robinson*, 138 S. Ct. 2680 (2018).

5. Motion for New Trial in State Court:

a. Request for Leave to File a Motion for New Trial filed March 29, 2018, with the Mahoning County Court of Common Pleas.
b. Judgment Entry denying Request for Leave to File Motion for New Trial filed August 10, 2018.
c. Denial of Motion for Leave to File Motion for New Trial affirmed by the Seventh Appellate District Court September 18, 2019.
d. Case citation: *State v. Group*, 7th Dist. Mahoning No. 18 MA 0098, 2019-Ohio-3958.

d. Ohio Supreme Court declined to accept jurisdiction January 21, 2020.
e. Case citation: *State v. Group*, 157 Ohio St.3d 1538, 2020-Ohio-122, 137 N.E.3d 1196 (Table).

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CASES

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FEDERAL AND STATE STATUTES

RULES

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT A. GROUP, Petitioner,

vs.

STATE OF OHIO, Respondent.

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Court of Appeals for the Seventh Appellate District

Scott Group respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

Citations to Opinions Below

The Ohio Court of Appeals for the Seventh Appellate District, Mahoning County, Ohio, issued the opinion under review in this petition in *State v. Group,* 7th Dist. Mahoning No. 18 MA 0098, 2019-Ohio-3958, and that opinion is found in the Appendix at A-1.

The Mahoning County Court of Common Pleas denied Mr. Group's Motion for Leave to File Motion for New Trial in *State of Ohio v. Scott A. Group*, Case No. 1997 CR 00066, and that Judgment Entry is found in the Appendix at A-6.

Jurisdictional Statement

This Court has jurisdiction to review the state court judgment issued below under 28 U.S.C. §1257(a).

Constitution and Statutory Provisions

United States Constitution, Fourteenth Amendment, Section 1, 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

The State of Ohio indicted Scott A. Group in January 1997 in Mahoning County, Ohio, on charges of aggravated murder with death penalty specifications, attempted murder with a firearm specification, and aggravated robbery with a firearm specification. Mr. Group pled not guilty. The trial court appointed John F. Shultz and Gary L. Van Brocklin as Mr. Group's counsel. The Grand Jury returned a superseding indictment in June 1998, with the additional offenses of attempted aggravated murder and witness intimidation. In August 1998, Mr. Schultz and Mr. Van Brocklin were relieved as counsel, and the trial court appointed the Ohio Public Defender as defense counsel. Assistant State Public Defenders Andrew Love, Jerry McHenry, and Cynthia Yost appeared as counsel for Mr. Group.

A jury found Mr. Group guilty of aggravated murder with a firearm specification and capital specifications, attempted murder with a firearm specification, attempted murder, and witness intimidation. The jury recommended the death sentence for Mr. Group, and the trial court imposed the death penalty.

On direct appeal, this Court affirmed Mr. Group's convictions and his death sentence. *State v. Group*, 98 Ohio St. 3d 248, 2002-Ohio-7247, 781 N.E.2d 980.

Mr. Group filed an Application for Reopening, alleging ineffective assistance of appellate counsel, which this Court denied on June 15, 2016. *State v. Group,* 146 Ohio St. 3d 1413, 2016-Ohio-3390, 51 N.E.3d 658 (Table).

Mr. Group also filed a pro se Motion for Appointment of Counsel for post-conviction review in December 1999, but the trial court denied it. Represented by

Renee W. Green, Mr. Group filed a petition for post-conviction review in March 2000 in the trial court. With leave of the court, Ms. Green withdrew as post-conviction counsel, and the court appointed John Laczko and John Juhasz, both local counsel known by the trial court.

The trial court denied post-conviction relief. *State v. Group*, Mahoning C.P. No. 1997CR0066 (Dec. 31, 2009). The Ohio Court of Appeals affirmed. *State v. Group*, 7th Dist. No. 10 MA 21, 2011-Ohio-6422. The Ohio Supreme Court denied Mr. Group's jurisdictional appeal. *State v. Group,* 135 Ohio St. 3d 1431, 2013-Ohio-1857, 986 N.E.2d 1021 (Table).

Following post-conviction review, the United States District Court granted Mr. Group's request to appoint the Capital Habeas Unit of the Federal Public Defender for the Northern District of Ohio as counsel for habeas review. Mr. Group timely petitioned for a writ of habeas corpus in the United States District Court. That court denied Mr. Group's habeas petition. *Group v. Robinson*, 158 F. Supp. 3d 632 (N.D. Ohio 2016).

Mr. Group then moved to alter or amend the district court's judgment in February 2016, by relying on a report prepared by Christine Funk, Esq., an attorney expert on the defense of felony cases involving forensic DNA evidence. Mr. Group offered Ms. Funk's report to support his argument that trial counsel failed to defend against the State's DNA evidence. Mr. Group also requested a stay of the habeas case for him to exhaust his "new factual allegations . . . ." *Group v. Robinson*, N.D. Ohio

No. 4:13-CV-01636, Doc. 56, Petitioner's Motion To Alter Or Amend The Judgment Under Federal R. Civ. P. 59(e).

Eight days later, Mr. Group moved to amend his habeas petition with a ninth habeas ground, alleging ineffective counsel based on trial counsel's failure to contest meaningfully the State's DNA evidence. On April 13, 2016, Mr. Group filed a declaration with sworn testimony from a DNA scientist, Dr. Dan Krane, as additional supporting evidence for his ninth habeas ground.[1]

The federal district court issued a final order denying Mr. Group's motion to alter or amend the judgment and denying him leave to amend his habeas petition with the new, DNA-based ineffective trial counsel claim. *Group v. Robinson*, N.D. Ohio No. 4:13CV01636, 2016 WL 3033408 (May 27, 2016).

Mr. Group timely appealed to the United States Court of Appeals for the Sixth Circuit. In July 2016, Mr. Group moved the Sixth Circuit for an order to stay his habeas appeal and hold the appeal in abeyance so he could return to the state courts and exhaust his ninth habeas ground. The Sixth Circuit denied that request, and it ordered Mr. Group to request a Certificate of Appealability [COA] under 28 U.S.C. §2253(c). Mr. Group then moved for a COA in August 2016, but the Sixth Circuit

[1] Dr. Krane is a Professor of Biological Sciences at Wright State University. He has published more than twenty-five scholarly papers on DNA-related topics. He is the lead author of a widely used undergraduate textbook, Fundamental Concepts of Bioinformatics. He was a founding member of and gubernatorial appointee to the Common Wealth of Virginia's Advisory Committee, a twelve-member panel established to provide oversight and guidance to the Virginia Department of Forensic Sciences. Dr. Krane has testified on DNA evidence in more than one-hundred criminal cases. (T.d. 361, Proffered NTM Ex. I, Dan Krane's declaration).

denied Mr. Group's request. *Group v. Robinson*, 6th Cir. No. 16-3726, 2017 WL 8315839 (May 25, 2017).

Mr. Group unsuccessfully sought review in this Court with a petition for writ of certiorari. *Group v. Robinson*, 138 S. Ct. 2680 (2018).

Relying on new, unexhausted evidence, and new volunteer counsel, Mr. Group filed a threshold Motion for Leave to File New Trial Motion under Criminal Rule 33(B) in the Mahoning County Court of Common Pleas in March 2018. That court denied Mr. Group's threshold request, and Mr. Group timely appealed. The Seventh Appellate District affirmed the denial of Mr. Group's threshold Motion for Leave on September 18, 2019, *State v. Group,* 7th Dist. Mahoning No. 18 MA0098, 2019-Ohio-3958. The Seventh Appellate District was the last court to consider the merits of Mr. Group's claim. Mr. Group subsequently appealed to the Ohio Supreme Court, but it declined to accept jurisdiction. *State v. Group*, 157 Ohio St.3d 1538, 2020-Ohio-122, 137 N.E.3d 1196 (Table).

Factual Background

State's case at trial.

Sandra and Robert Lozier were the proprietors of the Downtown Bar in Youngstown, Ohio. On Saturday morning on January 18, 1997, they went to the bar at about 10:00 a.m. to count the previous night's receipts. (Tr. 2589). Shortly after they arrived, there was a knock on the door. Sandra testified that she looked through the peephole and saw the regular delivery man from the Ohio Wine Company. (Tr.

2592, 2632). Scott Group had previously delivered to the Downtown Bar for Ohio Wine ["Ohio Wine"]. (Tr. 2586).

Sandra further testified that the man asked to look through their invoices. (Tr. 2587-88). After a while, he asked to use, and went to use, the men's restroom. (Tr. 2595). When the man returned, he held a gun and he ordered the Loziers into the men's restroom. (*Id*.). The man said he was there due to the disappearance of young a woman, Charity Agee, last seen alive at the Downtown Bar, and he was not there for money. (Tr. 2596, 2598.) Robert told the man they were cooperating with the police regarding her disappearance. (Tr. 2599). However, the man shot Robert in the head, killing him. (Tr. 2599-2600). The man also shot Sandra in the head twice she sustained a defensive wound to her hand. (Tr. 2599and she -2600, 2608).

Sandra testified that she tried to write the words "Ohio Wine" in blood on the floor as a clue. (Tr. 2600-01). She crawled to prop open the door so first responders could gain access into the bar. (Tr. 2603-04). She also crawled to a phone and called 911, telling the operator they had been shot by the Ohio Wine delivery person. (Tr. 2603-04). The 911 call was recorded at 11:05 a.m. *Group*, 98 Ohio St. 3d 248, 2002-Ohio-7247, 781 N.E.2d 980, ¶12.

While hospitalized, Sandra told the police she was shot by the Ohio Wine deliveryman. (Tr. 2610). Also while hospitalized, she was shown a photograph of Mr. Group. (Tr. 2611-12). She further testified that after the man shot her, she noticed some bags of money were missing. (Tr. 2606-07). A box of invoices was missing, too. (Tr. 2614).

Later that day, Mr. Group voluntarily went to the police station after his mother told him the police were looking for him. (Tr. 3423-27). At the station, Detective Daryl Martin saw what appeared to him to be a small spot of blood on one Mr. Group's tennis shoes. (Tr. 3157). Officer Lou Ciavarella took the shoes from Scott. (*Id.*). The police submitted the shoes to the Ohio Bureau of Identification and Investigation (BCI) for forensic testing. (Tr. 2704).

BCI analyst, Dale Laux, tested three spots on top of the left shoe and determined that two were human blood. (Tr. 3084-85). The test of the third spot was inconclusive. (Tr. 3087). Mr. Laux packaged samples drawn from Mr. Group, Sandra, and Robert and he sent them to Cellmark Forensics for DNA analysis. (Tr. 3089-90). Law enforcement found no other blood on Mr. Group's clothes or in his car.

At trial, the State presented testimony from a Cellmark scientist, Jennifer Reynolds. Dr. Reynolds did not do the lab work or co-sign the report. (Tr. 303-04). Rather, she did a "full technical review" of the work done by other analysts. (Tr. 3304). Cellmark did both the PCR and the RFLP types of DNA testing. (Tr. 3306). She noted that the PCR "technique is a very sensitive technique and extra precautions are necessary . . . ." (Tr. 3307). Dr. Reynolds explained the DNA database used "to help us establish how common or how rare it is to see certain genetic types in a person." (Tr. 3308-09).

While explaining the tests done, and the genetic profiles obtained for Mr. Group and the Loziers, Dr. Reynolds noted an asterisk correlating to "very faint results, and sometimes these faint results are so faint we don't know where they're

from. We don't know whether it's DNA from another person contributing and just there ever so slightly or whether it's a technical reason, and sometimes these tests, there are technical reasons why you might get very, very faint results." (Tr. 3318-19). She explained: "They're not interpretable. . . . So we put them there to be complete, and in our report it will say there were faint results present that might be due to DNA from another person or to technical artifacts. We can't determine which. It's too faint. But the important point is that it has no impact on the conclusions that we're drawing." (Tr. 3319).

Dr. Reynolds's lab did "additional testing with the two swabs [from Group's gym shoe] and the sample from Robert Lozier." (*Id.*) She said the testing excluded Mr. Group and Sandra as the source of DNA on those swabs. (Tr. 3320). The testing did not exclude Robert's DNA profile from those two swabs. (Tr. 3320-21). As Robert was Caucasian, his genetic profile would appear in the population at a frequency of one time per 220,000 Caucasians. (Tr.3321).

In addition to the crimes at the Downtown Bar, the state charged Mr. Group with an attempt to kill Sandra Lozier several months after the shootings, plus a charge of witness intimidation. Sandra testified that in June 1998 a young man appeared at her home and asked if someone lived there. (Tr. 2616-19). Detective Martin called Sandra and told her to leave her home because someone was hired to kill her. (*Id.*) Adam Perry testified he was the man that went to Sandra's house. (Tr. 2979-80). Mr. Perry also said Mr. Group solicited him to firebomb Sandra's house in exchange for $150,000. (Tr. 2984-85)

The Defense case at trial.

Scott Group filed a Notice of Alibi. His mother, Ruth Group, his grandmother, Naomi Socie, his sister, Terri Banyots, his sister, Danielle Group[2], and a family friend, Pancho Morales, all testified under oath that Mr. Group was at Ruth's house before 11:05 a.m., time of the 911 call. (Tr. 3592, 3680, 3744, 3765, 3889-90).

Besides those witness accounts, Mr. Group testified and denied committing the crimes. (Tr. 3433, 3443). He said that he took his adopted son, William Enyeart, to work early that Saturday morning and then went to Ruth's to get his clothes washed between 9:00 and 9:30 a.m. (Tr. 3404). He did not know when he left there. (Tr. 3410). He stopped at an Amoco gas station, he then stopped at the Diamond Bar, and finally at the VFW in Struthers, Ohio. (Tr. 3410-16).

Ruth informed Mr. Group that the police were looking for him so he went to the police station with Ruth and Mr. Group's sister, Terri, who was also Ruth's daughter. (Tr. 3422-25). Mr. Group testified that the police were interested in the bottom of his shoe because of a footprint found at the crime scene. (Tr. 3441). He also said he frequently cut his hand while working. (Tr. 3442). Mr. Group denied asking Mr. Perry to firebomb Sandra's house. (Tr. 3433). Mr. Group said he only wanted to have Mr. Perry fix a flat tire on Ruth's car and he told him to use a mixture of gasoline and dish soap to clean Ruth's driveway. (Tr. 3433-34).

[2] Danielle is actually the daughter of Mr. Group's sister, Denise Molina. Ruth Group adopted Danielle and, accordingly, the family regarded Danielle as Mr. Group's sibling.

Wayne Perry, a jail inmate, also testified that he heard Adam Perry say he would help himself at Mr. Group's expense. (Tr. 3848-49).

Jack Noble testified that Mr. Group was at the VFW on that Saturday afternoon. (Tr. 3698). Mr. Noble played pool with Mr. Group and he saw no blood stains on Mr. Group's shoes. (Tr. 3700-01). Mr. Group appeared to be calm and he seemed normal to Mr. Noble. (Tr. 3702).

George Harvischak also saw Mr. Group at the VFW around noon that Saturday. (Tr. 3716-17). He noticed nothing out of the ordinary about Mr. Group that day. (Tr. 3717).

Mr. Group also offered evidence to dispel any connection between him and the young woman, Charity Agee, who went missing from the bar. Charity's mother, Ann Marie Agee, testified that she was not aware of any connection between Mr. Group and Charity and she passed that information to Detective Martin. (Tr. 3872-73).

No DNA expert for Mr. Group's defense.

Mr. Group's first set of trial counsel moved the trial court for funds to retain a DNA expert. The trial court appointed Lifecodes. The State moved for a hearing on that appointment "to inquire of defense counsel, on the record, whether or not they are aware that the corporation selected by them [for DNA analysis] is the owner or parent corporation of Cellmark [the state's lab]. . . ." (T.d. 70, Motion for Hearing). At the hearing, trial counsel explained his belief that the companies were "separate," the work to be done by Lifecodes would not be problematic, and Lifecodes was one of only a few viable, and affordable, options for forensic DNA work. (Status Conference,

6/11/98, Tr. 45). The trial court authorized funds to pay Lifecodes as the defense expert.

When the relationship between Mr. Group and his first set of counsel soured, the trial court appointed the Ohio Public Defender to represent Mr. Group. Assistant State Public Defenders Andrew Love, Jerry McHenry, and Cynthia Yost appeared on Mr. Group's behalf. The record establishes that the second set of trial counsel knew of the importance of DNA evidence to the State's case and recognized the need for expert assistance because of that evidence.

At *voir dire*, Mr. Love admitted: "DNA is going to play a role in this case as well. And I would be—I wouldn't be truthful if I told you that I knew all about DNA. I could spell it. I could say it. But I'll be darned if I know how to pull it all together." (Tr. 1563).

In his opening statement, Mr. Love promised the jury it would hear significant DNA-related testimony from a defense expert. He said, "the defense, Scott Group, has a DNA expert as well." (Tr. 2533). He also said the defense expert had identified "artifacts … [which are] in all likelihood contaminates …." (*Id.*) He then claimed "these artifacts are contaminates . . . that render any DNA testing moot." (Tr. 2534). "It's what the evidence will show." (*Id.*)

Before Dr. Reynolds testified, however, Mr. Love told the court that their expert, Dr. Michael Baird, would not testify.[3] Mr. Love said that Dr. Baird initially

[3] Mr. Group complained to the trial court about the lack of a defense expert that prompted Mr. Love's statements to the court about Dr. Baird. (Tr. 3290-93).

had identified the artifacts caused by contamination, but Dr. Baird became "almost impossible to reach …." (Tr. 3295). Mr. Love complained that Dr. Baird still had not reviewed Cellmark's "protocol" and Mr. Love implied that was Dr. Baird's fault. (*Id.*)

Mr. Love said that Dr. Baird "was not going to challenge the DNA expert from Cellmark[,]" because "they are both in the same company . . . [and] he did not want to challenge a coworker . . . . Well, that left us in the lurch." (Tr. 3295-96). Mr. Love said, "it's not our fault. We had a promise, we had a contract, we had a plane ticket. The guy's not coming." (Tr. 3297).

Cross-examination of Dr. Reynolds by defense counsel.

Instead of hearing from a defense expert, the jury heard Ms. Yost's cross-examination of Dr. Reynolds only. Ms. Yost attempted to explore with Dr. Reynolds the issue of contamination and artifacts, but that attempt proved fruitless. She asked Dr. Reynolds how contamination affected the collection of DNA. But Dr. Reynolds said: "Um, I'm actually not familiar with collection techniques. I've never done it myself, so I—I wouldn't—hesitate to say whether it's prone to it or not prone to it." (Tr. 3330-31). Dr. Reynolds simply said "[s]ure" when asked if "contamination of evidence occurs?" (Tr. 3331).

Ms. Yost then asked about contamination versus degradation of DNA, and asked "would it be fairly easy for that to be contaminated either from the crime scene or from the investigator just from looking and handling something?" (Tr. 3332). But Dr. Reynolds could not follow the question: "And for this are you talking about—what kind of contamination are you asking me about?" (*Id.*) Ms. Yost's follow up question

to Dr. Reynolds about contamination was no clearer: "And again, is it contamination from another human is what you're asking me?" (Tr. 3333).

In another attempt to explore the "artifact" issue promised in Mr. Love's opening statement that went nowhere, Ms. Yost asked if Cellmark's report revealed "an artifact or something else that there that should not have been there?" (Tr. 3340). Dr. Reynolds answered: "No, no, it does not. Our conclusions will say the DNA from sample X contains DNA from more than one person. That is a statement of our conclusions. That is certainly not said in this report." (Tr. 3342).

New Evidence: Dr. Baird's affidavit.

Mr. Love's opening statement was made on March 29, 1999. Two days later, Dr. Baird sent a letter by facsimile to Ms. Yost in which he recognized that "Cellmark Diagnostics is a subsidiary of Lifecodes Corporation." (T.d. 361, Proffered New Trial Motion [hereafter, Proffered NTM], Ex. A, Michael Baird's letter of 3/31/99). Dr. Baird assured Ms. Yost he could testify for Mr. Group: "I am available to testify the week of April 12th." (*Id.*) He wrote that he had "not reviewed the data utilized by Cellmark . . ." (*Id.*)

Dr. Baird also wrote that he had not "reviewed the protocol utilized by Cellmark . . . ." (*Id.*). He prefaced this letter by stating: "I am providing this correspondence at the request of Kelvin Ford [trial counsel's investigator] to clarify what my testimony might entail if called for the above captioned trial." (*Id.*) Dr. Baird's availability to testify was clarified to counsel in that letter. (*Id.*) His letter

was faxed to trial counsel two days after Mr. Love's opening statement and five days before Mr. Love offered his "it's not our fault" excuse to the trial court.

Mr. Group's federal habeas counsel presented that letter to Dr. Baird in an email and asked him whether he had been willing to testify at the trial. (T.d. 361, Proffered NTM, Ex. B, Michael Baird's affidavit). Dr. Baird responded: "In regards to the above captioned case, if requested, someone from Lifecodes would have testified at trial regarding the testing performed and conclusions. The testing performed by Cellmark was prior to Lifecodes acquiring Cellmark." (*Id.*) Dr. Baird averred: "I affirm that my response to [habeas counsel] in the February 24, 2015 email is accurate." (*Id.*)

And, the trial court appointed Lifecodes as the defense expert when Mr. Group was represented by his first set of trial counsel. The order appointing Lifecodes continued after the trial court appointed Mr. Group's second set of counsel. The second set of counsel began their representation with Lifecodes already appointed as the defense expert. However, Ms. Yost's activities log from the trial shows that trial counsel did not contact Lifecodes or Dr. Baird until February 8, 1999, just a few weeks before the trial began. (T.d. 361, Proffered NTM Ex. C, Cynthia Yost's activities log).

No other contact with Lifecodes or Dr. Baird was noted in counsel's time records until March 9, 1999, only twenty days before Mr. Love's opening statement. On that date, counsel's time records reflect that Mr. Love, Mr. McHenry, and Ms. Yost had all participated in a conference call with Dr. Baird. (T.d. 361, Proffered NTM Ex. D, Andrew Love's billing statement; Ex. E, Jerry McHenry's billing statement;

and, Ex. C, Cynthia Yost's activities log). An email from Ms. Yost to Assistant State Public Defender Kort Gatterdam was sent on that date, discussing trial counsel's call with Dr. Baird. (T.d. 361, Proffered NTM Ex. F, Cynthia Yost's email of 3/9/99). Ms. Yost discussed some points made by Dr. Baird regarding Cellmark's analysis: "Dr. Baird has a lot of good points to make that will negate the State's DNA expert . . . [because] CellMark's examination shows signs of contamination that there is other evidence mixed in with that sample." (*Id*.)

The day after trial counsel's conference call with Dr. Baird, Mr. Love wrote to the prosecutor to request "a copy of the protocol used by CellMark's testing methods . . . ." (T.d. 361, Proffered NTM Ex. G, Andrew Love's letter of 3/10/99). That letter is on Mr. Love's billing record. (T.d. 361, Proffered NTM, Ex. D). There are no entries in any of trial counsel's time records reflecting their receipt of the Cellmark protocol from the prosecutor or in the forwarding of the Cellmark protocol to Dr. Baird. (*See* T.d. 361, Proffered NTM Exs. D, E, and C).

New Evidence: Attorney Funk's report.

Mr. Group obtained a report from forensic DNA attorney expert Christine Funk in February 2016. Ms. Funk identified red flags that point to trial counsel's woefully deficient performance in dealing with Dr. Baird. She reviewed documentary evidence, the state record, and concluded that Mr. Group was deprived of a defense of his trial counsel's ineffectiveness. (T.d. 361, Proffered NTM, Ex. H, Christine Funk's report, at pp. 11-15). Mr. Love's "it's not our fault" excuse was not "a fair or accurate assessment of Baird's representations." (*Id.* at p.13). During the March 9,

1999, phone call, Dr. Baird asked counsel to obtain additional information from Cellmark. Mr. Love wrote to the prosecutor with a "gibberish" request that reflected a lack of any understanding beyond some basic DNA words. (*Id*. at p. 7). There is no evidence indicating that trial counsel ever followed up on this matter, rendering trial counsel's preparation of Dr. Baird deficient. (*Id*. at p. 11-15).

Ms. Funk's report also addressed Mr. Love's false promise to the jury that a defense expert would testify. "Decisions about whether to call an expert witness, either to observe testimony of others, or to provide testimony, should be made well in advance of trial. Particularly when working with DNA evidence, a clear, understood and understandable theory of defense should be established and presented as a recurring theme in trial." (*Id*. at p. 6).

"By representing a defense expert would testify, and that the defense expert would establish the DNA evidence would be discredited, defense counsel created in the jurors an expectation that such testimony would actually be presented." (*Id*.) "The failure to then provide such testimony, as well as the failure of the attorneys to provide the expert with the documents he said he would need in order to render an opinion, fall short of reasonable expected practices in 1999." (*Id*.)

Trial counsel's first contact with Dr. Baird was March 9, 1999. (*Id*. at p. 5). At that time, Dr. Baird relayed to counsel he needed additional information about Cellmark's protocols. (*Id*.) After Mr. Love's opening statement on March 29, 1999, Dr. Baird wrote to trial counsel and said "he had not yet seen the protocols, and adding, '[p]lease contact me if you wish to have me testify at trial.'" (*Id*.)

Trial counsel made the decision of whether to call Dr. Baird as an expert well before the trial. "There does not have appeared to be any contact between defense counsel and the expert between March 9 and March 31. Nor does it appear there was any follow up with the state regarding the requested documents [from Cellmark]." (*Id*.) "However, it does appear that defense counsel decided not to call a defense expert long before the April 6 exchange [when Mr. Love offered his 'it's not our fault' excuse]." (*Id*. at pp. 5-6). As Ms. Funk explained, trial counsel was obviously inexperienced with DNA evidence and they clearly needed a defense expert's help to understand the scientific issues or to contest Dr. Reynolds's prosecution-slanted testimony. (*Id*. at p. 14).

"Perhaps the most critical error in failing to call a defense expert is related to the issue of whether there is the presence of more than one individual in the DNA sample." (*Id*. at p. 15). Dr. Reynolds said the apparent faint blue dots in the DNA test result did not affect the conclusions drawn by Cellmark, but those "conclusions include the statistical significance of the profile observed." (*Id*.) However, "[o]ne of the most important potential problems with the statistic used by the prosecution is that they may not adequately account for all of the factors that have gone into the declaration of a match." (*Id*., citation omitted).

Ms. Funk's report also addressed Ms. Yost's professionally inadequate confrontation of Dr. Reynolds, and the need to have an expert help Ms. Yost prepare for that cross-examination. Trial counsel missed a valuable opportunity to challenge the population frequency statistic of 1 in 220,000, as testified to by Dr. Reynolds,

because counsel did not use an expert to help them prepare for and confront the State's evidence. Had trial counsel done so, then counsel could have developed testimony to establish that the 1 in 220,000 figure is actually an "estimate [and] is considered to be within a range, plus or minus a factor of ten. …" (*Id.* at p. 8, citation omitted).

Ms. Yost also missed an important opportunity to question Dr. Reynolds about the potential of a mixed DNA sample (a sample with more than one contributor). Dr. Reynolds testified on direct examination that faint results in a test can appear, and those faint results can be DNA "from another person" or due to a "technical reason." (*Id.* at p. 10). The Cellmark analyst did not interpret the faint results, noted by an asterisk, because they were "that faint." (*Id.*) Dr. Reynolds told the jury, "the important point is that it has no impact on the conclusions that we are drawing." (*Id.*)

With that testimony, Ms. Funk reasoned that Dr. Reynolds was "ignoring data, declaring it not relevant." (*Id.*) "The test does not account for how many potential contributors are present at a given tested locus. If three people contribute in small amounts, or one person presents in a larger amount, the results could be the same." (*Id.*) "If the analyst didn't ignore the faint dots, and asked a different question, "[w]hat are the odds of seeing one of the potential profiles this mixed sample could contain?" the statistic would be very different. A defense expert could have explained that to the jury…." (*Id.*)

Indeed, "[c]ase notes identify a 1.1 at DQA1, a C at GC, a faint 9, 11 at CSF *in both samples* and a faint 7 *in both samples.* These may be artifacts." (*Id.*, emphasis

in original). "[F]or the same artifacts to appear in both samples leads one to question whether they are more likely an indication of DNA from another individual. An expert for the defense could have assisted in this portion of the cross examination." (*Id*. at pp. 10-11). Such an expert also could have "testified to the potential significance of the presence of these alleles." (*Id*. at p. 11.)

Dr. Krane's declaration.

On April 12, 2016, Mr. Group obtained a sworn declaration from Dr. Dan Krane, a professor with the Department of Biological Sciences at Wright State University. (T.d. 361, Proffered NTM Ex. I, Dan Krane's declaration). Dr. Krane was "asked … to comment on the appropriateness of asserting that a DNA profile observed on an evidence sample (A8-1; a stain found on the shoe of Scott Group) is from one particular individual (here, a victim, Robert Lozier) to the exclusion of all others and on the reliability of a statistical weight attached to that sample." (*Id*. at p.1.)

Dr. Krane's declaration demonstrates that the population frequency statistic offered at trial—that the genetic profile appears once for every 220,000 Caucasians—does not conclusively identify Robert Lozier as the source of the blood found on Mr. Group's shoe. The FBI threshold for using the random match statistic as a way to identify a single contributing DNA source is "1 in 300 billion" and the random match statistic from Mr. Group's trial "falls very short of that threshold." (*Id*. at pp. 2-3.) Dr. Krane's declaration further demonstrates the genuine possibility of another contributor to the DNA used to convict Mr. Group. "The presence of an additional allele, [identified by Dr. Krane in Cellmark's testing results], even at intensity below

that of the control dot, would be consistent with the proposition that the results obtained from sample A8-1 are from a mixture of two or more individuals." (*Id*. at p. 3.

Reasons for Granting the Writ

The prosecutor argued to the jury, misleadingly, that Robert Lozier's genetic profile appeared on Mr. Group's gym shoe. Although inaccurate, this was "powerful" DNA evidence to support a capital conviction. *District Attorney's Office for the Third Judicial District, et al. v. Osborne*, 557 U.S. 52, 62 (2009). Trial counsel failed in their representation of Mr. Group by neglecting to adequately challenge the prosecutor's misleading assertion about the DNA evidence. Mr. Group could not contest that misrepresented evidence on the merits until his present successor counsel sought leave from the trial court to file a new trial motion.

Through a bifurcated screening process, the trial court dismissed Mr. Group's new evidence after finding Mr. Group's return to state court was dilatory. The trial court refused to consider the reasons Mr. Group offered to justify the delay in presenting his new evidence. The trial court's refusal to consider those reasons for delay violated Mr. Group's right to due process of law. The trial court acted arbitrarily and unreasonably because it ignored the only supporting document offered with Mr. Group's threshold motion for leave. *See Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."). *Cf. Williams v. Taylor*, 529 U.S. 362, 416 (2000) (Granting relief on merits of ineffective counsel claim on habeas

review and finding state court's adjudication unreasonable where: "The Virginia Supreme Court's decision reveals an obvious failure to consider the totality of the omitted mitigation evidence.")

Under Ohio's procedure, a Motion for Leave involves a bifurcated review in which the trial court first conducts a threshold determination of whether circumstances prevented a defendant from discovering his new evidence within one hundred twenty days of the trial verdict. Ohio R. Crim. P. 33(B); *State v. Davis*, 131 Ohio St.3d 58, 2011-Ohio-5028, 959 N.E.2d 516, ¶1, n. 1; *State v. Trimble*, 11th Dist. Portage No. 2013-P-0088, 2015-Ohio-942, ¶¶ 18-19, 26. Mr. Group proffered his substantive new trial motion with his threshold motion for leave. He supported his substantive new trial motion with the affidavit of Dr. Baird, the sworn declaration of Dr. Krane, and Ms. Funk's report. (T.d. 361, Proffered NTM Exs. B, I, and H.). Mr. Group offered those documents to support his substantive claim alleging ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984).

Conversely, Mr. Group supported his threshold Motion for Leave with one document, an affidavit from his federally appointed counsel, Alan Rossman. (T.d. 360, Motion for Leave [hereafter MFL], Ex. A, Affidavit of Alan C. Rossman). Mr. Rossman's affidavit laid out the circumstances by which Mr. Group identified and developed his new *Strickland* claims in order to establish that Mr. Group simply could not present his new claims within one hundred twenty days of the verdict. (*Id.*)

The Court of Appeals found that the trial court did consider Mr. Rossman's affidavit, albeit, without any reference to it in its opinion. *Group*, 7th Dist. Mahoning

No. 18 MA0098, 2019-Ohio-3958, ¶¶24-25. Under a plain reading of the record, however, the trial court confined its review of Mr. Group's threshold motion to just the three documents proffered with the substantive motion: Dr. Baird's affidavit, Dr. Krane's declaration, and Ms. Funk's report. (T.d. 367, Judgment Entry at p. 3). Without regard for due process, the trial court failed to consider Mr. Rossman's affidavit and it denied Mr. Group's motion for leave because he supplied no affidavit to explain why he failed to comply with Ohio's procedural rule:

> Upon review of the affidavits and arguments, Defendant has failed to establish that he was unavoidably prevented from discovering the alleged new evidence-i.e., Dr. Baird's affidavit, Dr. Dan Krane's statement, and Christine Funk's Report. Ohio courts have held that affidavits filed outside the 120-day limit of Crim.R.33 that fail to offer a sufficient explanation as to why evidence could not have been obtained sooner are inadequate to show that the movant was unavoidably prevented from obtaining the evidence within the prescribed time. The affidavits submitted in support of [Mr. Group's] Motion for leave fail to offer such an explanation.

(T.d. 367, Judgment Entry at p.3, Emphasis in original.)

Under Ohio's bifurcated proceeding, the documents supplied by Dr. Krane and Ms. Funk were not offered to demonstrate unavoidable delay in presenting Mr. Group's new DNA-based, *Strickland* claim. *See Trimble*, 11th Dist. Portage No. 2013-P-0088, 2015-Ohio-942, ¶¶ 18-19, 26. Rather, Mr. Group offered the affidavit of Alan Rossman, the supervising attorney of the Federal Public Defender's Capital Habeas Unit, as support for his Motion for Leave. (T.d. 360, Motion for Leave, Ex. A.) The trial court failed to consider Mr. Rossman's affidavit, which was the sole evidence Mr. Group relied on to meet his threshold burden under Ohio's rule. *See Goldberg v. Kelly,* 397 U.S. at 267 (citation omitted). Mr. Rossman's sworn affidavit was cogent as to the

reasons Mr. Group could not develop and present his new *Strickland* claims under Ohio's timeframe of one hundred twenty days after the verdict. The trial court violated due process when it outright ignored Mr. Group's reasons for unavoidable delay.

The Court of Appeals also found that Mr. Rossman's affidavit failed to set forth grounds to explain why Mr. Group could not present his new evidence sooner. *Group*, 7th Dist. Mahoning No. 18 MA0098, 2019-Ohio-3958, ¶27. This fails to recognize and appreciate the significance and point of the document. Mr. Rossman's affidavit, when considered in the context of the record it referenced, explains why circumstances required Mr. Group to present his new evidence outside of the one hundred twenty-day window in the Ohio rule.

Mr. Group's new evidence fell outside the boundaries of the trial record. Necessarily, he could not raise his new *Strickland* claims on direct appeal. *See State v. Ishmail*. 67 Ohio St. 2d 16, 18, 423 N.E.2d 1068, 1070 (1981). Although a defendant can raise such new claims on post-conviction review, Mr. Group's appointed post-conviction counsel neglected to present any cogent evidence *de hors* the record to support his post-conviction petition. Offering no supporting evidence, his post-conviction counsel performed unreasonably because they failed to plead *any* substantive grounds for relief. *See* Ohio Rev. Code. §2953.21(C); *State v. Calhoun*, 86 Ohio St. 3d 279, 283, 714 N.E.2d 905, 910 (1999); *Martinez v. Ryan*, 566 U.S. 1, 14 (2012) (recognizing ineffective post-conviction counsel as a means for habeas petitioner to show cause and prejudice to excuse procedural default).

On federal habeas review, Mr. Group diligently sought to return to state court to present his new evidence, but his requests were denied by the federal courts—and the Federal Defender was not granted authorization to litigate Mr. Group's new evidence in the state trial court. (T.d. 360, Affidavit of Alan Rossman, Motion for leave, Exhibit A); *Group v. Robinson*, N.D. Ohio No. 4:13CV01636, 2016 WL 3033408 (May 27, 2016); *Group v. Robinson*, 6th Cir. No. 16-3726, 2017 WL 8315839 (May 25, 2017). Regarding the Federal Defender's ability to file Mr. Group's Motion for Leave, Mr. Rossman averred that the Federal Defender, as habeas counsel, identified "new and unexhausted claims" and moved to return to the state courts to litigate matters ancillary to the habeas case. (T.d. 360, Affidavit of Alan Rossman, Exhibit A, Motion for Leave, ¶¶ 4-5.).

Per Mr. Rossman's affidavit, the Federal Defender was not able to represent Mr. Group in this matter without the proper authorization by a federal court. Thus, it was "not feasible for Mr. Group's federal counsel to move for appointment in the Mahoning Court of Common Pleas as it is not one of the judicial bodies in which [18 U.S.C. §3006 A] vests appointment authority." *Id*. at ¶ 12. Because of this record, Mr. Group was simply unable to return to the trial court with his new evidence until present volunteer counsel came forward in February of 2018.

The Court of Appeals also faulted Mr. Group for not explaining why he was unavoidably prevented from raising his new evidence pro se. *Group*, 7th Dist. Mahoning No. 18 MA0098, 2019-Ohio-3958, ¶26. Yet the answer should be evident.

As an indigent, death row prisoner, Mr. Group lacked the means to develop evidence from paid experts such as Dr. Krane or Ms. Funk about DNA evidence.

Mr. Group's first opportunity to develop off-the-record evidence from paid experts was during federal habeas review, after the appointment of federal habeas counsel. After federal habeas counsel developed this evidence, Mr. Group promptly and diligently tried to return to the State courts to present it there but the United States District Court denied his request. (T.d. 360, MFL, Ex. A at ¶ 5). He then moved the United States Court of Appeals for the Sixth Circuit to remand his case to the State courts so he could present his new evidence. That court also denied his request. (*See id*. at ¶ 7.)

Throughout federal habeas review, the Warden, as the representative of the State on habeas review, opposed Mr. Group's requests to return to the state courts to exhaust his new evidence. Without authorization from a federal judge, Mr. Group's federal defenders could not litigate anything new in the state courts. (*Id*. at ¶ ¶ 8-12). Mr. Group had to wait to move for leave until his present counsel undertook the return to state court—after a brief time for present counsel to become sufficiently familiar with the file.

Mr. Rossman's affidavit explains the circumstances that prevented Mr. Group from filing his new evidence until he obtained volunteer counsel in 2018. *See State v. Warren*, 2017-Ohio-853, 86 N.E.3d 728, ¶ 51 (2d Dist.). The trial court violated basic due process principles when it ignored Mr. Rossman's affidavit. (T.d. 367, Judgment Entry at p. 3.) *See Goldberg*, 397 U.S. at 267 (Citation omitted). The trial court failed

to consider the very reasons that Mr. Group offered to meet his burden under Criminal Rule 33(B). Mr. Group offered cogent reasons as to why he could not develop and present his new *Strickland* claims within one hundred and twenty days of the trial verdict.

Conclusion

The Court has "recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensic experts." *Hinton v. Alabama*, 571 U.S. 263, 276 (2014). The Court also has acknowledged that cross-examination of experts is critical to a fair trial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319-20 (2009). The Ohio courts' refusal to allow Mr. Group the opportunity to litigate this critical issue denied his constitutional right to due process. Basic notions of due process require a fair opportunity to have a party's evidence heard. Because the procedure followed below offends basic notions of due process, the writ of certiorari should issue.

Respectfully submitted,

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