CASE NO. 19-8746

OCTOBER TERM, 2019

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

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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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?

This 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). In this case, 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). The prosecutor's misstatements about the DNA evidence likely had a profound impact on the jury's verdict given the weaknesses in Sandra Lozier's testimony identifying Mr. Group as the perpetrator.

Mr. Group's trial counsel performed well-below prevailing professional norms in death penalty cases when they failed to utilize an available DNA expert, Dr. Michael Baird, to correct the State's damaging misrepresentation about the DNA evidence. If presented to a jury, the additional DNA evidence could create reasonable doubt over Ms. Lozier's identification testimony. *See In re Winship*, 397 U.S. 358 (1970).

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.

I. Mr. Group could not have presented his new evidence any sooner.

The State argues that the Ohio Court of Appeals correctly denied Mr. Group's threshold motion for leave because Mr. Group failed to provide an explanation for his delay in filing his new evidence. State's Brief in Opposition at pp. 14-16. The State further relies on the Ohio Court of Appeals' finding that Mr. Group should have filed his new evidence sooner through a pro se pleading. *Id*. at p. 15.

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 provided for in Ohio Criminal Rule 33(B). Mr. Group's post-conviction counsel should have presented his new evidence, but through attorney error, he failed to develop this evidence. *See*

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). Mr. Group's first opportunity to present this new evidence came on federal habeas review, and required a return to the state courts. 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.

On this record, Mr. Group was unable to return to the trial court with his new evidence until present volunteer counsel came forward in February of 2018. Moreover, 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. The Ohio Court of Appeals was patently unreasonable to fault Mr. Group for not explaining why he was unavoidably prevented from raising his new evidence pro se. *State v. Group*, 7th Dist. Mahoning No. 18 MA0098, 2019-Ohio-3958, ¶26.

II. Mr. Group's new evidence would make a difference to a jury.

The State argues that Mr. Group's new evidence only "contradict[s] *parts* of the State's evidence regarding the DNA profile found on Defendant's shoe, [that does not] exonerate Defendant." State's Brief in Opposition at p. 18. The State endorses the Ohio Court of Appeals' reasoning that "none of [the new evidence] is likely to change the outcome of the trial." *Id*. at p. 19 (citing *Group*, 7th Dist. Mahoning No. 18

MA0098, 2019-Ohio-3958, ¶28). The State relies heavily on the testimony of the surviving victim, Sandra Lozier, to assert the State's proof of guilt was strong, and the new evidence would not matter to change the outcome of the trial. *Id*. at pp. 19-22.

Yet, Ms. Lozier sustained two gunshot wounds to her head, and her testimony was rife with inconsistencies as to her identification of the assailant. The State needed its over-exaggerated DNA evidence to bolster Ms. Lozier's identification of Mr. Group. Mr. Group's new evidence could create reasonable doubt in the minds of reasonable jurors as to whether Mr. Group was the assailant. *In re Winship*, 370 U.S. 358.

A. The new DNA evidence would matter to a jury.

Contrary to the State's assertion, Mr. Group's new DNA evidence does not challenge just parts of the State's forensic evidence. At the heart of this case lies the prosecutor's misrepresentation that a population frequency for a DNA profile of only one in 220,000 constitutes a conclusive identification or match between M. Lozier's DNA and the small blood spot on Mr. Group's gym shoe. Trial counsel ineffectively failed to correct the prosecutor's materially false DNA argument, and so the jury was able to find conclusive evidence of Mr. Group's guilt based on a flawed understanding of the State's DNA evidence.

Trial counsel failed to rebut the State's false assertion to the jury that the DNA evidence conclusively showed Robert Lozier's blood on Mr. Group's shoe. The State argued that the DNA evidence proved the victim's blood was on Mr. Group's shoe.

(Tr. 2515, 2521). That assertion went unchallenged by defense counsel. New evidence shows that the population frequency statistic offered at trial—a genetic profile appearing once for every 220,000 Caucasians—does not conclusively identify Robert Lozier as the source of the blood found on Mr. Group's shoe. (T.d. 361, Proffered NTM, Ex. I at ¶¶4-8).

It was "scientifically inappropriate to say that to 'a reasonable degree of scientific certainty' a specific person is the source to the exclusion of all others of an evidentiary DNA sample on the basis of a random match probability such as the 1 in 220,000 number that [the Cellmark analyst] attached to the results of Polymarker/DQ-alpha testing for this case." (*Id*. at ¶5). Cellmark's analyst did not "take into account the possibility of error (either in the collection of samples, testing or interpretation of test results). [The possibility of such error] is another reason to refrain from asserting that one particular individual is the source of the DNA found on an evidentiary sample to the exclusion of all others." (*Id*. at ¶6).

B. Ms. Lozier's identification testimony has serious flaws in it.

The State anchored its case in Ms. Lozier's testimony. The State suggests her testimony against Mr. Group was airtight, *see* State's Brief in Opposition at pp. 19-22, but her identification testimony was seriously flawed. The new evidence matters because the State relied on its DNA evidence to bolster Ms. Lozier's purported identification of Mr. Group.

This Court has determined that eyewitness identifications are "peculiarly riddled with innumerable dangers and variable factors which might seriously, even

crucially, derogate from a fair trial." *United States v. Wade*, 388 U.S. 218, 228 (1967); *see id* at 235 (noting "dangers inherent with eyewitness identifications[]"). Following the Supreme Court's guidance, *see id*., the United States Court of Appeals for the Sixth Circuit has also explained "eyewitness misidentification accounts for more false convictions in the United States than any other factor." *Ferensic v. Birkett*, 501 F.3d 469, 478 (6th Cir. 2007); *see id*. at 482 (quoting *Watkins v. Sowders*, 449 U.S. 341, 352 (1981). The inherent dangers of eyewitness testimony are present in Ms. Lozier's purported identification of Mr. Group.

Ms. Lozier testified the assailant was about the same height as her husband, Robert, but thinner. The coroner's examination done on January 19, 1997, put Robert Lozier at 72 inches tall with an estimated weight of 175 pounds. (T.d. 361, Proffered NTM, Ex. J). The hand-written police report and typed police report note she described her assailant as thin with blond wavy hair. (T.d. 361, Proffered NTM, Ex. K). A police report prepared in January 1997 put Mr. Group's height as 6 foot one inch and his weight at 190 pounds. (T.d. 361, Proffered NTM, Ex. M).

An earlier police report from when Mr. Group was age eighteen states that he was 6 feet tall, 185 pounds, had a "stocky" build, and had red hair. (T.d. 361, Proffered NTM, Ex. N). At 190 pounds, Mr. Group was not thinner than Robert, estimated to weigh 175 pounds. At 190 pounds, Mr. Group was not even thin. Mr. Group had a stocky build according to a 1983 police record. (T.d. 361, Proffered NTM, Ex. N). And, in 1997, Mr. Group was heavier than he was in 1983. (*See* T.d. 361, Proffered NTM,

Ex. M). Further, unlike the assailant, Mr. Group did not have blond wavy hair because his hair was red. (T.d. 361, Proffered NTM, Ex. N).

Ms. Lozier also testified that the assailant's height was similar to Robert's (taller than average at 6 feet). Trial counsel asked her if she recalled telling the detective that her assailant was 5 feet 9 inches (average height). She did not recall saying that, and trial counsel just let that answer stand without any challenge. An available police report, in which she said that her assailant was 5'9" to 5'10", impeaches her testimony. (T.d. 361, Proffered NTM, Ex. K).

Ms. Lozier further testified that she lost consciousness after sustaining two gunshot wounds to her head. (Tr. 2600). Yet, the medical records state she did not lose consciousness. (T.d. 361, Proffered NTM, Ex. O).

III. Conclusion.

The surviving witness to the crimes sustained two gunshot wounds to her head, and her identification testimony differs materially from other statements that she made. The State needed to present DNA evidence to support the surviving witness' shaky testimony—and DNA evidence was material to the State's case against Mr. Group. However, the prosecutor misled the jury with false arguments about the DNA evidence. On this record, Mr. Group's new evidence would matter to a jury as it would create reasonable doubts over Ms. Lozier's crucial identification testimony, but the state courts denied him a fair review of his new evidence.

The failure of the trial court to consider Mr. Rossman's affidavit renders the proceedings below fundamentally unfair in violation of Mr. Group's right to due

process under the Fourteenth Amendment. *See Burger v. Kemp*, 483 U.S. 776, 785 (1987) ("Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."). In view of the record, Mr. Rossman's affidavit explains why Mr. Group was unable to present his new evidence sooner. And, it was unreasonable to find that Mr. Group, an indigent death row prisoner, could have litigated a DNA issue pro se.

This Court should accept this case for a merits review.

Respectfully submitted,

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