No. ______

In the Supreme Court of the United States

CHARLES MAXWELL,
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 — NO EXECUTION DATE SET

QUESTIONS PRESENTED

This Court has extended constitutional protections to the indigent on the first appeal of right, "[f]or there can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has." *Douglas v. California*, 372 U.S. 353, 355 (1963) (internal quotation omitted). Those same constitutional guarantees are not available to the indigent when mounting collateral attacks upon their convictions. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Because Ohio prohibits the filing of certain constitutional claims on direct review, the discrimination recognized in *Douglas* effectively still exists for Ohio indigent defendants with regard to many of their constitutional claims.

A law nondiscriminatory on its face may be grossly discriminatory in its operation. On direct review, the Supreme Court of Ohio would not consider Maxwell's ineffective assistance of counsel claim. On collateral review of that claim, the Ohio courts failed to provide Maxwell with the process prescribed by Ohio's own postconviction statute. Ohio's indigent prisoners are without the process they should be due, simply because of the procedural pleading requirements in Ohio.

Should the constitutional guarantees afforded to prisoners be tied to the constitutional violations raised, instead of to the manner in which a state defines its pleading requirements and procedures?

When state courts do not fulfill their responsibility to provide adequate collateral review, acting contra to their own state statutes, do they violate the due process rights of prisoners?

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.

RELATED PROCEEDINGS

All proceedings directly related to this petition include:

1. Ohio Supreme Court Direct Appeal Opinion: *State v.* Maxwell, 139 Ohio St.3d 12 (2014);

2. Supreme Court of the United States denial of certiorari: *Maxwell v. Ohio*, 135 S.Ct. 1400, No. 14-6882;

3. Trial Court Postconviction Opinion: *State v. Maxwell*, Case No. CR-05-475400-A;

4. Court of Appeals Postconviction Opinion: *State v. Maxwell*, 8th Dist. C.A. 107758, 2020-Ohio-3027;

5. Ohio Supreme Court denial of jurisdiction: *State v. Maxwell*, Entry, Ohio Supreme Court Case No. 2020-0810.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT ii

RELATED PROCEEDINGS iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

I. There is no justifiable rationale for treating constitutional claims differently if they are raised in collateral review as opposed to direct review. 9

II. When a state's collateral proceeding is the equivalent to the prisoner's first designated proceeding for raising a constitutional challenge, the state should be required to provide the process necessary to fully review that claim 14

CONCLUSION 23

APPENDIX:

Appendix A: *State of Ohio v. Charles Maxwell*, Case No. 2020-0810, Ohio Supreme Cout, Entry (Oct. 27, 2020) A-1

Appendix B*:* *State of Ohio v. Charles Maxwell*, Case No. 107758, Cuyahoga County Court of Appeals, Journal Entry and Opinioin (May 21, 2020) A-2

Appendix C*:* *State of Ohio v. Charles Maxwell*, Case No. CR-05-475400-A, Cuyahoga County Common Pleas Court, Journal Entry (Sept. 8, 2016) A-49

Appendix D*:* *State of Ohio v. Charles Maxwell*, Case No.CR-05-475400-A, Cuyahoga County Common Pleas Court, Journal Entry and Findings of Fact and Conclusions of Law (Sept. 4, 2018) A-50

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia, 536 U.S. 304 (2002) 12

Brady v. Maryland, 373 U.S. 83 (1963) 10, 11, 22

Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981) 10, 20

Cullen v. Pinholster, 563 U.S. 170 (2011) 21, 22

D'Ambrosio v. Bagley, 527 F.3d 489 (6th Cir. 2008) 22

Dist. Atty.'s Office for Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009) 9, 10, 19, 20

Foust v. Houk, 655 F.3d 524 (6th Cir. 2011) 22

Frazier v. Huffman, 343 F.3d 780 (6th Cir. 2003) 17

Freeman v. Florida, Case No. 20-6879 12

Goodwin v. Johnson, 632 F.3d 301 (6th Cir. 2011) 22

Greenholtz v. Inmates of Nebraska Penal and Corr. Complex, 442 U.S. 1 (1979) 10

Griffin v. Illinois, 351 U.S. 12 (1956) 13

Harrington v. Richter, 562 U.S. 86 (2011) 21

Jamison v. Collins, 291 F.3d 380 (6th Cir. 2002) 22

Martinez v. Ryan, 566 U.S. 1 (2012) 11, 15

McGrath, Case No. 17-6483 .... 12, 13

Medina v. California, 505 U.S. 437 (1992) 9

Pennsylvania v. Finley, 481 U.S. 551 (1987) 9, 13, 14

Powell v. Collins; 332 F.3d 376 (6th Cir. 2003) 22

Robinson v. Massachusetts, Case No. 17-6483 12

Saunders v. Warden, Case No. 20-5802 12

Sears *v. Upton*, 561 U.S. 945 (2010) 18

Shelton v. Hard, 696 F.2d 1127 (5th Cir. 1983) 23

Stallings v. Bagley, 561 F.Supp.2d 821 (N.D. Ohio 2008) 23

State v. Keith, 79 Ohio St. 3d 514 (1997) 10

State v. Madrigal, 87 Ohio St.3d 378 (2000) 15

State v. Maxwell, 139 Ohio St.3d 12 (2014) 4, 5, 6, 11

State v. Scott, 63 Ohio App.3d 304 (8th Dist. Ct. App. 1989) 11
Strickland v. Washington, 466 U.S. 668 (1984) 10
Witherspoon v. Illinois, 391 U.S. 510 (1968) 11
Woodford v. Visciotti, 537 U.S. 19 (2002) 21
Workman v. Tate, 957 F.2d 1339 (6th Cir. 1992) 20, 21, 22, 23

CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1257 2
U.S. Const. amend VI... 2
U.S. Const. amend XIV 2

STATUTES

O.R.C. § 2953.21 .... 18, 19

PETITION FOR A WRIT OF CERTIORARI

The Office of the Ohio Public Defender, on behalf of Petitioner Charles Maxwell, respectfully petitions for a writ of certiorari to review the judgment of Ohio's Eighth District Court of Appeals.

OPINIONS BELOW

The Journal Entry of the Supreme Court of Ohio denying jurisdiction, *State v. Maxwell*, Entry, Ohio Supreme Court Case No. 2020-0810 (Oct. 27, 2020), is attached hereto as Appendix A. The decision of Ohio's Eighth District Court of Appeals, *State v. Maxwell*, 8th Dist. Cuyahoga Cty. No. 107758 (May 21, 2020), is attached hereto as Appendix B.

Two journal entries from the Cuyahoga County Court of Common Pleas are attached. The court's initial journal entry denying relief, *State v. Maxwell*, Journal Entry, Cuyahoga Cty Common Pleas Ct. Case No. 05-475400-A (Sep. 8, 2016), is attached as Appendix C. The court's subsequent journal entry, drafted by the State as proposed findings of fact and conclusions of law, *State v. Maxwell*, Journal Entry, Cuyahoga Cty Common Pleas Ct. Case No. 05-475400-A (Aug. 31, 2018), is attached as Appendix D.

JURISDICTIONAL STATEMENT

The Eighth District Court of Appeals issued its opinion on the merits on May 11, 2020. App. B. A Memorandum in Support of Jurisdiction was timely filed with the Supreme Court of Ohio on July 2, 2020. That court denied jurisdiction on October 27, 2020. App. A. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

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

A. The Sixth Amendment, which provides in pertinent part:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

B. The Fourteenth Amendment, which provides in pertinent part:

> No State shall . . . 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

Charles Maxwell, a man with "significant brain impairment," was sentenced to death in Ohio. PC Ex. 3, p. 2. Even though two psychologists recommended neurological testing, trial counsel failed to obtain a neurological evaluation or request the court a neurological evaluation for purposes of mitigation. When Maxwell raised this issue in his postconviction petition, the trial court summarily dismissed his claims without discovery or a hearing, and without the statutorily required findings of fact and conclusions of law. After the court dismissed the petition, the State asked to draft findings of fact and conclusions of law. The court permitted this post hoc drafting by the State and eventually "granted" the State's filing, essentially adopting the State's reasoning as its own. Thus, Maxwell was denied meaningful process in his postconviction proceedings.

I. Competency and Trial Proceedings

In 2006, Maxwell was charged with a capital crime: the aggravated murder of his romantic partner Nichole McCorkle. Early on, counsel questioned Maxwell's competence to stand trial. Although two out of three psychologists who evaluated Maxwell were unable to form an opinion as to his competence, counsel never requested funding for a neurological evaluation to assist in the guilt or sentencing phases of trial.

First, Dr. Michael Aronoff from the Court Psychiatric Center interviewed Maxwell and administered several tests. Tr. 15, 134-35. He noted that Maxwell had been in a motorcycle accident after which he fell unconscious. Tr. 128-29. Dr. Aronoff

was unable to render a definitive conclusion regarding competency because he was uncertain whether Maxwell was malingering delusional symptoms. Tr. 14, 140-41. The court referred Maxwell for a 20-day inpatient evaluation at North Coast Behavioral Health Care System. Tr. 14-18.

Second, Dr. Alice Cook evaluated Maxwell during his inpatient stay at North Coast. Dr. Cook did not perform any additional tests. Tr. 75. She concluded that Maxwell was competent to stand trial based on her interview of Maxwell, Dr. Aronoff's report, psychiatric records from North Coast, and consultations with treatment staff at North Coast. Tr. 71-72, 79.

Third, Dr. John Fabian conducted an independent evaluation of Maxwell. Dr. Fabian recommended that neurological testing be conducted to fully ascertain Defendant's condition. PC Ex. 1; Tr. 45-49. At that point, the defense filed a motion for neurological testing. PC Ex. 1. Counsel explained that Dr. Fabian had not submitted a psychological report because of his belief that a neurological examination was required to properly assess Maxwell's competence. Tr. 46. The court denied the motion and, following a competency hearing, ruled that Maxwell was competent to stand trial. Tr. 152.

Despite Dr. Aronoff's inability to render a conclusion as to Maxwell's competence and Dr. Fabian's suggestion that neurological testing take place so that he could complete his assessment, trial counsel did not renew their motion in anticipation of trial. Nor did they ever file a motion for neurological testing for the purpose of mitigation. *See State v. Maxwell*, 139 Ohio St.3d 12, 57-58 (2014).

Subsequently, the case went to trial and the jury found Maxwell guilty of aggravated murder.

II. Mitigation

In preparation for the sentencing phase, trial counsel hired mitigation specialist and psychologist Dr. Sandra McPherson. Dr. McPherson saw several indicators of brain dysfunction in Maxwell, including limited coping abilities, testing distortions, memory deficits, a significant point discrepancy between his verbal and performance IQs, and a reported history of head injuries. PC Ex. 4, ¶ 3. Like Dr. Fabian, Dr. McPherson advised defense counsel to get Maxwell a neurological or neuropsychological evaluation. *Id.* ¶ 4. They did not, nor did they even raise the issue with the court.

Dr. McPherson is not a neuropsychologist and could not perform neuropsychological tests herself. *Id.* However, she testified at the sentencing phase of trial as to some signs of brain abnormality. *Maxwell*, 139 Ohio St.3d at 60; Tr. 2166-67. Further, her report described a history of head injury, including an incident in 1985 in which Maxwell got into a fight and hit his head on a rock, and Maxwell's more recent motorcycle accident. PC Ex. 5, p. 4; *see also* Tr. 2167-68. Following the mitigation phase, the jury recommended, and the court imposed, a sentence of death.

III. Direct Appeal

On direct appeal to the Supreme Court of Ohio, Maxwell argued in part that the trial court abused its discretion in denying Maxwell's request for a neurological evaluation and that Maxwell's counsel was ineffective for failing to request a

neurological evaluation for mitigation purposes. The Supreme Court of Ohio rejected both arguments. It concluded that the trial court did not err in failing to order a neurological evaluation for mitigation purposes because "the trial court never entertained a defense motion for a neurologist for mitigation purposes," but only in the context of his competency evaluation. *Maxwell*, 139 Ohio St.3d at 58. It rejected the ineffective assistance claim because nothing in the trial record was "conclusive as to brain damage" and there was no evidence of prejudice at the time. *Id.* at 60.

IV. Postconviction Proceedings

On August 11, 2008, Maxwell filed a postconviction petition in which he alleged ineffective assistance of counsel for failure to obtain and present evidence of his organic brain impairment in mitigation. In support of his argument, Maxwell submitted the evaluation of Dr. Barry Layton, a clinical neuropsychologist. Dr. Layton concluded that Maxwell has "significant brain dysfunction, and it impacts him every single day of his life." PC Ex. 3, p. 12.

The extensive testing done by Dr. Layton showed impairments in executive functioning, judgment, memory, and attention—in particular, Maxwell performed below the 1st percentile for his age and education on two tests of problem solving and memory. *Id.* at 8, 10. Dr. Layton concluded that Maxwell was neurologically impaired based on testing alone, and he stressed that his opinion did not rely on any particular incident of head trauma from Maxwell's past. He wrote, "In and of itself, my examination demonstrates neurological dysfunction unequivocally." *Id.* at 12 (emphasis omitted).

Maxwell submitted several other exhibits in support of his ineffective assistance claim. Two of those exhibits corroborated his head injury in 1986: an affidavit from his cousin Rodney Maxwell describing the incident, PC Ex. 2, and a fax from Howard Memorial Hospital in Arkansas stating that he was a patient there for two days in 1986, PC Ex. 6. He also submitted an affidavit by Dr. McPherson, who described, among other things, advising counsel to get Maxwell a neurological or neuropsychological evaluation. PC Ex. 4, ¶¶ 4, 7. Finally, he submitted an affidavit from a juror stating that evidence of Maxwell's brain damage may have made a difference in the case. PC Ex. 15, ¶ 5.

After allowing Maxwell's postconviction petition to languish for eight years, the trial court summarily denied his petition on September 2, 2016. The court also denied Maxwell's motion to conduct discovery, and it denied a hearing on Maxwell's claims. Despite Ohio's statutory requirement that a court provide a death-sentenced individual with its reasoning, it issued a one-line journal entry stating: "Defendant's motion for post-conviction relief is denied." App. C. Subsequently, Maxwell filed a motion for the court to issue findings of fact and conclusions of law, as required by statute. The court denied this motion. Dkt. Entry, Cuyahoga Cty Common Pleas Ct. Case No. 05-475400-A (Sep. 16, 2016). The State then filed a motion to allow them additional time to submit proposed findings of fact and conclusions of law, which the court immediately granted. State's Mot. For Time Within Which Proposed Findings of Fact and Conclusions of Law May Be Filed, Sep. 29, 2016.

The State filed its proposed findings of fact and conclusions of law on October 31, 2016. Maxwell filed an objection to the Court's reliance on the State's reasoning, stating, "This Court denied the post-conviction petition on September 2, so it must have already determined its reasons for rejecting Maxwell's claims for relief. It casts doubt on this Court's conclusions if the Court's reasons for denying Maxwell's claims are drafted by the prosecutor, after the fact." Pet'r's Mot. to Disregard and Objection to Court Reliance on Prosecutor's Proposed Findings of Fact and Conclusions of Law, Oct. 31, 2016.

On August 31, 2018, almost two years after its one-line denial and a decade after Maxwell filed his petition, the Court signed and filed its findings of fact and conclusions of law, which were identical to the State's proposed findings down to the typographical errors and errors of law. *Compare* State's Proposed Findings of Fact and Conclusions of Law, Oct. 31, 2016, ¶ 13 with App. D., ¶ 13; *see also* App. B., ¶ 20. They were prefaced by a journal entry stating, "State's findings of fact and conclusions of law is granted." App. D. The entry found that Maxwell's ineffective assistance claims were barred by res judicata and rejected them on the merits. Reviewing under an abuse of discretion standard, the Eighth District Court of Appeals affirmed the trial court's findings. App. B., ¶ 67. The Supreme Court of Ohio declined to accept jurisdiction of Maxwell's appeal. App. A.

REASONS FOR GRANTING THE WRIT

I. There is no justifiable rationale for treating constitutional claims differently if they are raised in collateral review as opposed to direct review.

This Court tolerates denials of process in collateral proceedings that it would never tolerate in trial or direct appellate proceedings. *See, e.g., Dist. Atty.'s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009) (holding that the Due Process Clause does not "require[] that certain familiar preconviction trial rights be extended to protect Osborne's postconviction liberty interest"); *Finley*, 481 U.S. at 552 ("States have no obligation to provide postconviction relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well."). To establish a due process violation in collateral proceedings, a petitioner must show that the procedure "transgresses any recognized principle of fundamental fairness in operation." *Osborne*, 557 U.S. at 69 (quoting *Medina v. California*, 505 U.S. 437, 448 (1992)). Such a transgression occurred in this case. Yet, this Court should reconsider whether that sky-high standard for postconviction due process claims is appropriate, particularly for claims that cannot be raised on direct appeal.

The heightened standard for due process claims on collateral review is premised on the idea that direct appeal and collateral proceedings are "fundamentally different." *Finley*, 481 U.S. at 552. This Court has stated, "Given a valid conviction, the criminal defendant has been constitutionally deprived of his

liberty." *Osborne*, 557 U.S. at 69 (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)).

This reasoning does not apply in Maxwell's situation, for two reasons. First, although courts must *presume* that Maxwell was "constitutionally deprived of his liberty," Maxwell has presented uncontroverted evidence in this case that his death sentence was in fact *unconstitutional*, because he was denied the effective assistance of counsel. Collateral review was Maxwell's primary opportunity to present these claims to a court and prove that he was in fact deprived of liberty without due process of law. This is different from a situation—as in *Dumschat*—where a validly convicted inmate seeks to vindicate a liberty interest such as early release on parole. *Dumschat*, 452 U.S. at 464 (citing *Greenholtz v. Inmates of Nebraska Penal and Corr. Complex*, 442 U.S. 1, 7 (1979)).

Second, Maxwell's position is not "fundamentally different" from a defendant on direct appeal, because he could not raise his claims of ineffective assistance of counsel on direct appeal. In Ohio, defendants cannot raise on direct review the types of constitutional claims that require evidence outside the record in order to demonstrate the violation. Claims under *Brady v. Maryland,* 373 U.S. 83 (1963) and *Strickland v. Washington*, 466 U.S. 668 (1984), with outside evidence demonstrating prejudice, will not sound on direct appeal. *See, e.g.*, *State v. Keith*, 79 Ohio St. 3d 514, 536 (1997) ("Establishing that would require proof outside the record, such as affidavits demonstrating a lack of effort to contact witnesses or the availability of additional mitigating evidence. Such a claim is not appropriately considered on a

direct appeal."); *State v. Scott*, 63 Ohio App.3d 304, 308 (8th Dist. Ct. App. 1989) (a claim of failure to present mitigating evidence is properly considered in a postconviction proceeding because evidence in support of that claim could not be presented on direct appeal). In fact, Maxwell attempted to raise his ineffective assistance claims on direct review, and his arguments were rejected because he could not prove a constitutional violation without evidence outside the record. *Maxwell*, 139 Ohio St.3d at 60 ("We cannot infer a defense failure to investigate from a silent record . . . ."). Only claims that are apparent from the record—such as issues with jury instructions or voir dire challenges—can be raised on direct review.

States have varying rules concerning what claims can be raised in which proceeding, and those rules effectively determine which claims receive due process. If a state's direct review permitted all constitutional claims to be raised in that proceeding, then perhaps there would be some justification for the refusal to extend constitutional guarantees to collateral review. But when they do not, that justification disappears. *See Martinez v. Ryan*, 566 U.S. 1, 11 (2012) (noting that where an ineffective assistance claim cannot be raised on direct appeal, "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim."). In such states, in effect, the right to be free from constitutional infringement is tied to the manner in which that state fashions its criminal appellate rules and statutes. A *Brady* violation is no less a constitutional violation than a *Witherspoon* error, but the former is unlikely to ever be discovered without the assistance of collateral review.

The lack of process afforded to prisoners in state collateral review is by no means limited to Ohio. This issue is a recurring problem throughout the states, as evidenced by some of the petitions that have come before this Court.

Timothy Wade Saunders recently alerted this Court to the issue in *Saunders v. Warden*, Case No. 20-5802. As Saunders explained, petitioners in Alabama are forced to file petitions with ill-trained volunteer counsel, who are typically civil attorneys unfamiliar with Alabama's arcane postconviction pleading requirements, effectively rendering the filing of these petitions an exercise in futility. *See* Petition for Certiorari at 8, *Saunders v. Warden*, Case No. 20-5802.

John Freeman raised a similar issue in *Freeman v. Florida,* Case No. 20-6879. In Florida, *Atkins* petitioners were given a mere 60 days in which to bring their claims, which in turn were extremely limited by arbitrary rules enforced by the Florida courts, effectively denying petitioners the ability to bring such claims unless they had the foresight to predict this Court's decision in *Atkins* decades before it was issued. *See* Petition for Certiorari at 15-18, *Freeman*, Case No. 20-6879.

George McGrath and Paul G. Robinson notified this Court of such problems with Massachusetts' collateral review process. *McGrath v. Massachusetts*, Case No. 17-6483. Massachusetts requires first-degree murder defendants to appeal a denial of a postconviction motion to a single justice of the Supreme Judicial Court, who will deny appellate review unless the petitioner establishes that their case is different from all others previously filed. Yet Massachusetts does not publish, index, or otherwise make available the single justice decisions denying appellate review,

therefore making it essentially impossible for a petitioner to distinguish their case. *See* Petition for Certiorari at 11-12, *McGrath*, Case No. 17-6483.

These are just a few examples of the myriad ways in which states across this country have been denying process to petitioners—particularly capital petitioners, those with the most to lose when due process is denied. Claims raised in collateral review are just as significant, yet not even a right to counsel is guaranteed.

In *Griffin v. Illinois,* 351 U.S. 12 (1956), this Court held that a state may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their ability to pay costs. Then, in *Douglas v. California*, 372 U.S. 353 (1963), this Court held that the right to counsel extended to the first appeal as of right. "For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'" *Id.* at 355 (quoting *Griffin,* 351 U.S. at 19). Those same constitutional guarantees have not been extended to collateral review.

There is unconstitutional discrimination against the poor when counsel is denied in the first appeal, yet somehow there is no such unconstitutional discrimination when indigents are denied counsel in collateral review. *Finley*, 481 U.S. at 554. Because states prohibit the filing of certain constitutional claims on direct review, that discrimination effectively still exists for indigent defendants with regard to many of their constitutional claims. This discrepancy leads to many valid and serious constitutional violations going without remedy.

The pleading requirements by states concerning what claims get raised where should not be the determining factor in whether an indigent prisoner gets the relief they are due on their constitutional claims. The time has come for this Court to recognize that constitutional guarantees should be tied to the constitutional violations raised by prisoners.

II. When a state's collateral proceeding is the equivalent to the prisoner's first designated proceeding for raising a constitutional challenge, the state should be required to provide the process necessary to fully review that claim.

This Court has previously determined that the constitutional guarantees afforded to the indigent on direct review are not available to them when mounting collateral attacks upon their convictions. *See Finley*, 481 U.S. at 555. Specifically, in *Finley*, the Court found that "respondent has no underlying constitutional right to appointed counsel in state postconviction proceedings, [and thus] she has no constitutional right to insist on the *Anders* procedures which were designed solely to protect that underlying constitutional right." *Id.* at 557. The Court also stated, "Since respondent has received exactly that which she is entitled to receive under state law . . . she cannot claim any deprivation without due process." *Id.* at 558. The question that remains is whether the converse is true: if the respondent in *Finley* had *not* received her entitlements under state law, would the Due Process Clause have protected her?

Unlike the petitioner in *Finley*, Maxwell did not "receive[] exactly that which []he is entitled to receive under state law." *Id*. This failure of process is systemic in

Ohio and states other than Ohio. Adequate review means state courts must follow their own laws and consider the constitutional violations before them.

In Ohio, the initial-review collateral proceeding is the first, and often only, opportunity for a prisoner to raise constitutional violations with evidence outside the record. *State v. Madrigal*, 87 Ohio St.3d 378, 391 (2000) ("Establishing that would require proof outside the record . . . . Such a claim is not appropriately considered on direct appeal."). *See also Martinez,* 566 U.S. at 11 ("Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim."). Although some record-based claims of ineffective assistance at trial are raised in direct review, Ohio courts routinely reject them due to the inability to discern prejudice without outside evidence. *See Madrigal*, 87 Ohio St.3d at 391 (collecting cases). Thus, Ohio's postconviction process is the vehicle through which petitioners can support their claims by providing evidence outside the record.

But that vehicle has had its engine removed. Ohio has not provided such petitioners that to which they are entitled under state law, and the postconviction process has been rendered meaningless. Petitioners are deprived the opportunity to have meaningful consideration of their claims in state court, violating their right to due process.

A. The Ohio courts denied Maxwell the postconviction processes that he was due.

The trial court denied Maxwell's postconviction petition without a hearing and without stating its rationale, in violation of statutory requirements. The court then allowed the State to draft proposed findings of fact and conclusions of law *after* the court had issued its judgment—and it then adopted that draft verbatim. Maxwell's case was reduced to nothing more than a "meaningless ritual." *Douglas*, 372 U.S. at 358.

A central question in Maxwell's state postconviction petition was whether trial counsel's failure to secure a neurological evaluation of Maxwell amounted to ineffective assistance of counsel. In support of his claim, Maxwell presented the evaluation of neuropsychologist Barry Layton, who examined Maxwell for purposes of postconviction and determined that Maxwell suffered from organic brain damage. Dr. Layton rendered his diagnosis based on the battery of neuropsychological testing he conducted on Maxwell. *See* PC Ex. 3, pp. 6-12. Dr. Layton specified that "*[i]n and of itself, my examination demonstrates neurological dysfunction unequivocally*." *Id.* at 12 (emphasis in original).

Maxwell included in his postconviction petition evidence of a prior head injury, which Dr. Layton also reviewed in his examination. But Dr. Layton was clear that "the examination *alone* definitively demonstrates brain impairment, particularly in the anterior of the brain (the frontal cerebrum)." *Id.* at 2 (emphasis in original). On tests of executive function and memory, Maxwell scored in the 1st percentile on two different tests. *Id.* at 8, 10. As a result of these neurological impairments, Maxwell

"is locked into his initial conception [of a situation], whether or not it reflects objective reality." *Id.* at 9.

Even though two psychologists told trial counsel that Maxwell needed to be examined by a neurologist, trial counsel never hired a neurologist or neuropsychologist. They never asked the court to order a neurological examination for the purposes of mitigation. And the unequivocal evidence of Maxwell's brain damage was never presented in mitigation.

The State presented no expert evidence refuting Maxwell's postconviction claim. Rather, it argued that the evidence of Maxwell's brain damage would have run counter to the *trial* defense of reasonable doubt (which was not an issue in mitigation). Brief in Opposition to Petition for Postconviction Relief, p. 33. Maxwell demonstrated that residual doubt was not his mitigation strategy, nor was it a viable strategy in Ohio, and thus did not conflict with presenting Maxwell's brain damage. Maxwell's Reply to the State's Resp. in Opp'n to Pet. For Post-Conviction Relief, Nov. 10, 2008, p. 7 (hereinafter Reply). *Cf. Frazier v. Huffman*, 343 F.3d 780, 794 (6th Cir. 2003) (stating that where counsel was aware of defendant's brain impairment, "[w]e can conceive of no rational trial strategy that would justify the failure of [defendant's] counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on the hope that the jury would spare his life due to any 'residual doubt' about his guilt.").

The State argued that there was no credible evidence demonstrating that Maxwell had ever had a head injury, and thus the expert could not have found brain

damage. Brief in Opposition to Petition for Postconviction Relief, p. 33-36. Maxwell reiterated that Dr. Layton made his conclusions from the battery of testing; he did not need to rely on evidence of specific head injuries. Reply, p. 5-6. The State submitted no evidence questioning Dr. Layton's methods or credentials. *Cf. Sears v. Upton*, 561 U.S. 945, 949 (2010) (stating that concerns about experts' reference to informal personal accounts cannot undermine an unequivocal, well-credentialed assessment of a petitioner's cognitive functioning).

The State also claimed that the court should disregard Dr. Layton's opinion because Maxwell appeared and behaved in court as if he could communicate and monitor his behavior. Brief in Opposition to Petition for Postconviction Relief, p. 33-36. It also made the unsupported argument that Dr. Layton had previously made unconvincing claims regarding organic brain injuries on behalf of litigants in criminal and civil cases. Maxwell disputed the State's claim that it could tell brain damage from watching Maxwell. Reply, p. 7. Maxwell refuted the State's criticism of Dr. Layton simply by distinguishing the very cases cited by the State. Reply, p. 6.

At that point, the trial court was required to give Maxwell a hearing unless the petition and case record demonstrated that he was not entitled to relief. *See* Ohio Rev. Code § 2953.21(E) ("Unless the petition and the files and records of the case show the petitioner is *not* entitled to relief, the court *shall* proceed to a prompt hearing on the issues even if a direct appeal of the case is pending." (emphasis added)). The statute also required the court to state its reasons, after considering the petition, in findings of fact and conclusions of law. *See* Ohio Rev. Code § 2953.21(C) ("If the court dismisses

the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal."). The court did neither of these things.

Maxwell's meritorious claim of ineffective assistance of counsel was summarily denied without the benefit of a hearing, despite the clear language of the statute. The court's only action after an eight-year delay was to issue a statutorily defective one-line order denying Maxwell's petition. When Maxwell filed a motion for findings of fact and conclusions of law, the court denied the motion. When the State offered to submit proposed findings to the court, the court granted that post hoc motion. Maxwell opposed the court's reliance on the State's draft on the basis that the court had already denied the petition and presumably knew its own reasons for doing so.

The State submitted its findings of fact and conclusions of law, repeating the faulty arguments outlined above, and the trial court granted them without a single change, over Maxwell's written objections. The court did not correct misstatements of fact and law, did not alter the format of the document, did not correct typos, and did not add or delete a single sentence. The court merely signed the order and published it. That judgment, drafted by the State *after* the court had denied Maxwell's claims, received a deferential standard of review from the appellate court.

Maxwell has a liberty interest in demonstrating that his initial trial violated his constitutional rights. *Osborne*, 557 U.S. at 68 (concluding that postconviction petitioner had liberty interest in demonstrating innocence with new evidence). Ohio grants criminal offenders a statutory right to postconviction relief proceedings. Ohio Rev. Code §§ 2953.21(A)(1)(a), (H). Where a state has created such a statutory right,

that right can "beget yet other rights to procedures essential to the realization of the parent right." *Osborne*, 557 U.S. at 68 (quoting *Dumschat*, 452 U.S. at 463). And while states are free to provide fewer protections to postconviction petitioners than are constitutionally required at trial, states are not free to engage in a process that is "fundamentally inadequate to vindicate the substantive rights provided." *Id.* at 69.

Maxwell was denied a procedure that was essential to realizing his constitutional claims. The trial court violated its clear statutory directive, and in doing so, it also violated the most basic of due process principles: the meaningful determination of Maxwell's claims by an independent court. It reduced Maxwell's postconviction proceedings to a "meaningless ritual" and delegated its duty to the prosecution. *Douglas*, 372 U.S. at 358 (concluding that equal protection required appointment of counsel to indigent defendant on appeal as of right).

It must be stressed that Maxwell is not alone; this is not the problem of one lone petitioner complaining about the lack of process provided to him. This is a systemic problem in Ohio, and those who have received more than the summary treatment given to Maxwell are the exception, not the rule. Nor is it a recent problem that this Court can count on the Ohio courts to fix. For instance, in *Workman v. Tate*, 957 F.2d 1339, 1342 (6th Cir. 1992), the Sixth Circuit granted habeas relief to an Ohio petitioner where "[t]he [trial] court dismissed [Workman's petition for postconviction relief] in a one-sentence order, without conducting a hearing and without making findings of fact or conclusions of law." The court also observed that Workman's postconviction petition "languished in the state courts for more than three years

without the Court of Common Pleas making the required findings of fact and conclusions of law." *Id.* at 1344.

B. Due to the limitations of federal courts in their habeas jurisdiction, the lack of process in state courts means that many state prisoners are forever denied meaningful review of their constitutional claims.

Relief in federal habeas has been restricted even more in recent years, and the lack of state processes provided in Ohio and other states has thus been amplified. *See Cullen v. Pinholster*, 563 U.S. 170 (2011)*; Harrington v. Richter*, 562 U.S. 86 (2011). This Court has been very clear that "Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter,* 562 U.S. at 103. "The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable." *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002). Thus, the significance of state court decisions on petitioners' constitutional claims cannot be overstated. Once defendants exhaust their state court appeals and enter federal court, those state court decisions are presumed correct. But the reality is that the state courts are not treating these cases in a manner equal to their significance.

When state courts fail to live up to their responsibility, state prisoners are often forever denied relief. Historically, when Ohio prisoners have obtained relief from their convictions or sentences, it is on the basis of claims presented in state postconviction proceedings. But it has not been the state courts that have granted

that relief. Rather, it is only in federal habeas that a court finally gives due consideration to claims that had been filed in state court years earlier. *See, e.g., Workman,* 957 F.2d at 1346 (relief granted on Workman's claim that he had been deprived the right to the effective assistance of counsel at trial, which had been initially raised in state postconviction); *Foust v. Houk*, 655 F.3d 524, 539-546 (6th Cir. 2011) (relief granted on Foust's claim that he had been deprived the right to the effective assistance of counsel at mitigation, which had been initially raised in state postconviction); *Powell v. Collins*; 332 F.3d 376, 398-401 (6th Cir. 2003) (relief granted on Powell's claim that he had been deprived the right to the effective assistance of counsel at mitigation, which had been initially raised in state postconviction).

In addition, prior to *Pinholster*, many death-sentenced Ohio prisoners were able to avail themselves of discovery and/or an evidentiary hearing in federal habeas, which ultimately led to relief. *See e.g. Goodwin v. Johnson,* 632 F.3d 301, 319, 331 (6th Cir. 2011) (after permitting discovery and an evidentiary hearing, the district court granted, and the Sixth Circuit upheld, relief on Goodwin's claim that he had been deprived the right to the effective assistance of counsel at mitigation); *Jamison v. Collins*, 291 F.3d 380, 384, 391 (6th Cir. 2002) (after permitting discovery, the district court granted, and the Sixth Circuit upheld, relief on Jamison's *Brady* claim); *D'Ambrosio v. Bagley*, 527 F.3d 489, 494, 499-500 (6th Cir. 2008) (after permitting discovery and an evidentiary hearing, the district court granted, and the Sixth Circuit upheld, relief on D'Ambrosio's *Brady* claim); *Stallings v. Bagley*, 561 F.Supp.2d 821,

873-77 (N.D. Ohio 2008) (after permitting discovery and an evidentiary hearing, the district court granted Stallings' claim that he had been deprived the right to the effective assistance of counsel at mitigation, and that decision was not appealed). While their claims were meritorious, the state courts provided these prisoners with no such process.

In previous decades, federal courts recognized that "[t]he forbearance required of the federal courts is 'based on the assumption that the state remedies available to petitioner are adequate and effective to vindicate federal constitutional rights.'" *Workman*, 957 F.2d at 1344 (quoting *Shelton v. Hard*, 696 F.2d 1127, 1128 (5th Cir. 1983)). This assumption concerning adequate state remedies is still applied, but the ability for federal courts to recognize the impact of inadequate state remedies has diminished under the increasingly restricted application of AEDPA. And despite this Court's and Congress's intention to leave to the states the ability to right their own wrongs, the absence of federal habeas relief has not prompted the states to conduct the review required.

CONCLUSION

State courts are not doing their jobs, and while Ohio is a prime example of that, it is far from the only state facing such indifference to due process. Because the states need this Court's intervention to effect meaningful review, this Court should hold that constitutional guarantees are tied to the constitutional violations raised by prisoners. And moreover, that state courts violate the due process rights of prisoners when they do not fulfill their responsibility to provide adequate collateral review,

acting contra to their own state statutes. Maxwell's case provides the perfect vehicle for such a holding.

For the foregoing reasons, this Court should grant the writ.

Respectfully submitted,

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