

No. 21-6271

In the Supreme Court of the United States

AUSTIN MYERS,

Petitioner,

v.

OHIO,

Respondent.

*ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO*

**BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI**

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether this Court should grant a writ of certiorari to review the issue of whether the state intermediate court's application of the "good cause" standard in Ohio Rev. Code Ann. § 2953.21 to deny post-conviction discovery on some, but not all, of Petitioner's claims violated his rights to due process, access to the courts, and an adequate corrective process, where the court's determination is purely factual and does not conflict with a decision of this Court.
2. Whether this Court should grant a writ of certiorari to review the issue of whether imposition of the death penalty on an adult offender constitutes cruel and unusual punishment under the Eighth Amendment, where the state intermediate court's rejection of that constitutional claim to deny Petitioner an evidentiary hearing on his petition for post-conviction relief rests on adequate and independent state grounds, this Court already decided the issue in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), and the state court's decision does not conflict with a decision of this Court.

LIST OF PARTIES

The Petitioner is Austin Myers, an inmate at the Chillicothe Correctional Institution in North Chillicothe, Ohio.

The Respondent is the State of Ohio.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv-vii
CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE.....	viii
STATEMENT OF JURISDICTION.....	ix
STATEMENT OF STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE	x-xxiv
STATEMENT OF THE CASE.....	1-7
ARGUMENT	8-23
REASONS FOR DENYING THE WRIT	8-23
I. Myers' First Question Presented should be denied because the state intermediate court's denial of post-conviction discovery on some, but not all, of Myers' grounds for relief does not conflict with a decision from this Court. The court of appeals' decision resolved a purely factual issue.....	8-14
II. Myers' Second Question Presented should be denied because there are adequate and independent state court grounds supporting the decision of the state intermediate court, this Court decided this issue in <i>Roper v. Simmons</i> , 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), and the court of appeals' decision is consistent with this Court's Eighth Amendment jurisprudence.....	14-23
CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<i>Atkins v. Virginia</i> , 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).....	18
<i>Benton v. Kelley</i> , 2020 Ark. 237, 602 S.W.3d 96 (2020)	21
<i>Bracy v. Gramley</i> , 520 U.S. 899, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997).....	10, 11
<i>Caldwell v. Mississippi</i> , 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).....	14
<i>Doyle v. Stephens</i> , 535 F.App'x 391 (5 th Cir. 2013).....	21
<i>Foster v. State</i> , 258 So. 3d 1248 (Fla. 2018)	20
<i>Graham v. Florida</i> , 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).....	17, 18, 19
<i>Hairston v. State</i> , 167 Idaho 462, 472 P.3d 44 (2020).....	20
<i>Hurst v. Florida</i> , 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016).....	5
<i>In re Phillips</i> , No. 17-3729, 2017 WL 4541664 (6 th Cir. Jul. 20, 2017)	21
<i>Kennedy v. Louisiana</i> , 551 U.S. 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008).....	18
<i>Michigan v. Long</i> , 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983)	14
<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).....	19
<i>Moreland v. Bradshaw</i> , No. 3:05-CV-334, 2006 WL 1526884 (S.D. Ohio May 31, 2006)	11
<i>Murphy v. Bradshaw</i> , No. C-1-03-053, 2003 WL 23777736 (S.D. Ohio Sept. 13, 2003)	11
<i>Murray v. Giarratano</i> , 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989).....	12
<i>Myers v. Ohio</i> , 139 S. Ct. 822, 202 L. Ed. 2d 599 (2019)	5
<i>Nelson v. Minnesota</i> , 141 S. Ct. 2518, 2019 L. Ed. 2d 550 (2021)	22
<i>Nelson v. State</i> , 947 N.W.2d 31 (Minn. 2020).....	21
<i>Pennsylvania v. Finley</i> , 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987)	13
<i>People v. Gamache</i> , 48 Cal.4 th 347, 227 P.3d 342 (2010).....	20

<i>People v. Powell</i> , 6 Cal. 5 th 136, 425 P.3d 1006 (2018).....	20
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).....	14, 18, 19, 23
<i>Stanford v. Parker</i> , 266 F.3d 442 (6 th Cir. 2001).....	11
<i>State v. Berget</i> , 2013 S.D. 1, 826 N.W.2d 1 (2013).....	21
<i>State v. Graham</i> , 164 Ohio St. 3d 187, 2020-Ohio-6700, 172 N.E.3d 841	19, 20
<i>State v. Myers</i> , 164 Ohio St. 3d 1403, 2021-Ohio-2742, 172 N.E.3d 167	7
<i>State v. Myers</i> , 162 Ohio St. 3d 1424, 2021-Ohio-1262, 166 N.E.3d 8	7
<i>State v. Myers</i> , 154 Ohio St. 3d 1477, 2019-Ohio-173, 114 N.E.3d 1205	5
<i>State v. Myers</i> , 153 Ohio St. 3d 1451, 2018-Ohio-3025, 103 N.E.3d 830	5
<i>State v. Myers</i> , 154 Ohio St. 3d 405, 2018-Ohio-1903, 114 N.E.3d 405	1, 2, 3, 4, 20, 22
<i>State v. Myers</i> , 2021-Ohio-631 (Ohio Ct. App.).....	2, 3, 5, 6, 7, 8, 9, 10, 12, 14, 15, 16, 22
<i>State v. Nitsche</i> , 2016-Ohio-3170, 66 N.E.3d 135 (Ohio Ct. App.)	21
<i>State v. Perry</i> , 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967)	16, 17
<i>State v. Phipps</i> , No. 15AP-524, 2016-Ohio-663 (Ohio Ct. App.)	21
<i>State v. Tucker</i> , 2013-1631 (La. 9/1/15); 181 So. 3d 590 (La. 2015).....	21
<i>State v. Vinson</i> , 2016-Ohio-7604, 73 N.E.3d 1025 (Ohio Ct. App.)	22
<i>United States v. Dock</i> , 541 F.App'x 242 (4 th Cir. 2013).....	21
<i>United States v. Marshall</i> , 736 F.3d 492 (6 th Cir. 2013).....	21
<i>Williams v. Bagley</i> , 380 F.3d 932 (6 th Cir. 2004)	10, 11
<u>Statutes</u>	
Ohio Rev. Code Ann. § 2903.01(A)	2
Ohio Rev. Code Ann. § 2903.01(B)	2
Ohio Rev. Code Ann. § 2905.01(A)(2).....	2

Ohio Rev. Code Ann. § 2911.01(A)(3).....	2
Ohio Rev. Code Ann. § 2911.11(A)(1).....	2
Ohio Rev. Code Ann. § 2911.21(A)	2
Ohio Rev. Code Ann. § 2913.02(A)(1).....	2
Ohio Rev. Code Ann. § 2921.12(A)(1).....	2
Ohio Rev. Code Ann. § 2927.01(B)	2
Ohio Rev. Code Ann. § 2929.04(A)(7).....	2
Ohio Rev. Code Ann. § 2929.04(B)	19
Ohio Rev. Code Ann. § 2929.04(B)(6).....	4
Ohio Rev. Code Ann. § 2953.21.....	5, 6, 8, 9
Ohio Rev. Code Ann. § 2953.21(A)(1)(d)	9, 10
Ohio Rev. Code Ann. § 2953.21(A)(1)(d)(i)	9, 10
Ohio Rev. Code Ann. § 2953.21(A)(1)(d)(ii)	9
Ohio Rev. Code Ann. § 2953.21(A)(1)(f).....	10
Ohio Rev. Code Ann. § 2953.21(A)(1)(g)(i)	10
Ohio Rev. Code Ann. § 2953.21(A)(1)(g)(ii)	10
Ohio Rev. Code Ann. § 2953.21(A)(1)(g)(iii).....	10
Ohio Rev. Code Ann. § 2953.21(A)(1)(g)(iv)	10
Ohio Rev. Code Ann. § 2953.21(A)(1)(g)(v)	10
Ohio Rev. Code Ann. § 2953.21(A)(1)(g)(vi)	10
Ohio Rev. Code Ann. § 2953.21(A)(1)(g)(vii)	10
Ohio Rev. Code Ann. § 2953.21(A)(1)(i).....	10

Constitutional Provisions

U.S. Const. amend. VIII.....	3, 4, 5, 7, 14, 16, 17, 18, 19, 20, 22, 23
U.S. Const. amend. XIV	5

**CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS
OF THE OPINIONS AND ORDERS ENTERED IN THE CASE**

State v. Myers, 164 Ohio St. 3d 1403, 2021-Ohio-2742, 172 N.E.3d 167 (Aug. 17, 2021 Decision of the Supreme Court of Ohio not accepting discretionary appeal)

State v. Myers, No. CA2019-07-074, 2021-Ohio-631 (Ohio Ct. App. Mar. 8, 2021) (Opinion of the Twelfth District Court of Appeals of Ohio affirming in part and reversing in part trial court's dismissal of post-conviction petition/denial of post-conviction discovery)

State v. Myers, No. 14CR29826 (June 27, 2019) (Warren County Common Pleas Court Order Dismissing Defendant's Post-Conviction Petition; Findings of Fact and Conclusions of Law)

State v. Myers, 154 Ohio St. 3d 1477, 2019-Ohio-173, 114 N.E.3d 1205 (Jan. 23, 2019 Decision of the Supreme Court of Ohio denying application for reopening)

Myers v. Ohio, 139 S. Ct. 822, 202 L. Ed. 2d 599 (2019) (Jan. 7, 2019 Decision of the United States Supreme Court denying petition for a writ of certiorari)

State v. Myers, 153 Ohio St. 3d 1451, 2018-Ohio-3025, 103 N.E.3d 830 (Aug. 1, 2018 Decision of the Supreme Court of Ohio denying Motion for Reconsideration)

State v. Myers, 154 Ohio St. 3d 405, 2018-Ohio-1903, 114 N.E.3d 1138 (May 17, 2018 Opinion of the Supreme Court of Ohio affirming conviction and sentence on direct appeal)

State v. Myers, No. 14CR29826 (Oct. 16, 2014) (Warren County Common Pleas Court, Judgment Entry of Sentence on Aggravated Murder with Death Specifications Pursuant to R.C. §2929.03(F))

STATEMENT OF JURISDICTION

28 U.S.C. § 1257 sets forth this Court’s jurisdiction to review final judgments or decrees rendered by the highest court of a State. Section (a) of that provision states:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Respondent agrees that this statutory provision sets out the scope of this Court’s certiorari jurisdiction. It is Respondent’s position, however, that this case is inappropriate for the exercise of this Court’s discretionary jurisdiction. On the First Question Presented, the state intermediate court’s decision is based on the unique facts of this case, it is not repugnant to a provision of the United States Constitution, and it is not inconsistent with a decision of this Court. On the Second Question Presented, the state intermediate court’s decision is based on adequate and independent state grounds, it is not repugnant to a provision of the United States Constitution, and it is not inconsistent with a decision of this Court.

**STATEMENT OF STATUTES, RULES, AND CONSTITUTIONAL
PROVISIONS INVOLVED IN THE CASE**

STATUTES

28 U.S.C. § 1257 State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Ohio Rev. Code Ann. § 2929.04 (2014) Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to

have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

- (2) The offense was committed for hire.
- (3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.
- (4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:
 - (a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.
 - (b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.
- (5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, of the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.
- (6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the

offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

- (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.
- (8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.
- (9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.
- (10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been

eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

- (1) Whether the victim of the offense induced or facilitated it;
- (2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
- (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;
- (4) The youth of the offender;
- (5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;
- (6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;
- (7) Any other facts that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to

divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

Ohio Rev. Code Ann. § 2953.21 (2017) Petition for postconviction relief; discovery

(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, any person who has been convicted of a criminal offense and sentenced to death and who claims that there was a denial or infringement of the person's rights under either of those Constitutions that creates a reasonable probability of an altered verdict, and any person who has been convicted of a criminal offense that is a felony and who is an offender for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, “actual innocence” means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(c) As used in divisions (A)(1)(a) and (b) of this section, “former section 2953.82 of the Revised Code” means section 2953.82 of the Revised Code as it existed prior to July 6, 2010.

(d) At any time in conjunction with the filing of a petition for postconviction relief under division (A) of this section by a person who has been sentenced to death, or with the litigation of a petition so filed, the court, for good cause shown, may authorize the petitioner in seeking the postconviction relief and the prosecuting attorney of the county served by the court in defending the proceeding, to take depositions and to issue subpoenas and subpoenas duces tecum in accordance with divisions (A)(1)(d), (A)(1)(e), and (C) of this section, and to any other form of discovery as in a civil action that the court in its discretion permits. The court may limit the extent of discovery under this division. In addition to discovery that is relevant to the claim and was available under Criminal Rule 16 through conclusion of the original criminal trial, the court, for good cause shown, may authorize the petitioner or prosecuting attorney to take depositions and issue subpoenas and subpoenas duces tecum in either of the following circumstances:

(i) For any witness who testified at trial or who was disclosed by the state prior to trial, except as otherwise provided in this division, the petitioner or prosecuting attorney shows clear and convincing evidence that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict. This division does not apply if the witness was unavailable for trial or would not voluntarily be interviewed by the defendant or prosecuting attorney.

(ii) For any witness with respect to whom division (A)(1)(d)(i) of this section does not apply, the petitioner or prosecuting attorney shows good cause that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict.

(e) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1)(d) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, within ten days after the docketing of the request, or within any other time that the court sets for good cause shown, the prosecuting attorney shall respond by answer or motion to the petitioner's request or the petitioner shall respond by answer or motion to the prosecuting attorney's request, whichever is applicable.

(f) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1)(d) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, upon motion by the petitioner, the

prosecuting attorney, or the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from oppression or undue burden or expense, including but not limited to the orders described in divisions (A)(1)(g)(i) to (viii) of this section. The court also may make any such order if, in its discretion, it determines that the discovery sought would be irrelevant to the claims made in the petition; and if the court makes any such order on that basis, it shall explain in the order the reasons why the discovery would be irrelevant.

(g) If a petitioner, prosecuting attorney, or person from whom discovery is sought makes a motion for an order under division (A)(1)(f) of this section and the order is denied in whole or in part, the court, on terms and conditions as are just, may order that any party or person provide or permit discovery as described in division (A)(1)(d) of this section. The provisions of Civil Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion, except that in no case shall a court require a petitioner who is indigent to pay expenses under those provisions.

Before any person moves for an order under division (A)(1)(f) of this section, that person shall make a reasonable effort to resolve the matter through discussion with the petitioner or prosecuting attorney seeking discovery. A motion for an order under division (A)(1)(f) of this section shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph.

The orders that may be made under division (A)(1)(f) of this section include, but are not limited to, any of the following:

- (i) That the discovery not be had;
- (ii) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

- (iii) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (iv) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;
- (v) That discovery be conducted with no one present except persons designated by the court;
- (vi) That a deposition after being sealed be opened only by order of the court;
- (vii) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- (viii) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(h) Any postconviction discovery authorized under division (A)(1)(d) of this section shall be completed not later than eighteen months after the start of the discovery proceedings unless, for good cause shown, the court extends that period for completing the discovery.

(i) Nothing in division (A)(1)(d) of this section authorizes, or shall be construed as authorizing, the relitigation, or discovery in support of relitigation, of any matter barred by the doctrine of res judicata.

(j) Division (A)(1) of this section does not apply to any person who has been convicted of a criminal offense and sentenced to death and who has unsuccessfully raised the same claims in a petition for postconviction relief.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the

date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(6) Notwithstanding any law or court rule to the contrary, there is no limit on the number of pages in, or on the length of, a petition filed under division (A) of this section by a person who has been sentenced to death. If any court rule specifies a limit on the number of pages in, or on

the length of, a petition filed under division (A) of this section or on a prosecuting attorney's response to such a petition by answer or motion and a person who has been sentenced to death files a petition that exceeds the limit specified for the petition, the prosecuting attorney may respond by an answer or motion that exceeds the limit specified for the response.

(B) The clerk of the court in which the petition for postconviction relief and, if applicable, a request for postconviction discovery described in division (A)(1)(d) of this section is filed shall docket the petition and the request and bring them promptly to the attention of the court. The clerk of the court in which the petition for postconviction relief and, if applicable, a request for postconviction discovery described in division (A)(1)(d) of this section is filed immediately shall forward a copy of the petition and a copy of the request if filed by the petitioner to the prosecuting attorney of the county served by the court. If the request for postconviction discovery is filed by the prosecuting attorney, the clerk of the court immediately shall forward a copy of the request to the petitioner or the petitioner's counsel.

(C) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests a deposition or the prosecuting attorney in the case requests a deposition, and if the court grants the request under division (A)(1)(d) of this section, the court shall notify the petitioner or the petitioner's counsel and the prosecuting attorney. The deposition shall be conducted pursuant to divisions (B), (D), and (E) of Criminal Rule 15. Notwithstanding division (C) of Criminal Rule 15, the petitioner is not entitled to attend the deposition. The prosecuting attorney shall be permitted to attend and participate in any deposition.

(D) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed

under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the dismissal of the petition and of each claim it contains.

(E) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Division (A)(6) of this section applies with respect to the prosecuting attorney's response. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(F) 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. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(G) A petitioner who files a petition under division (A) of this section may amend the petition as follows:

(1) If the petition was filed by a person who has been sentenced to death, at any time that is not later than one hundred eighty days after the petition is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

(2) If division (G)(1) of this section does not apply, at any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

(3) The petitioner may amend the petition with leave of court at any time after the expiration of the applicable period specified in division (G)(1) or (2) of this section.

(H) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the denial of relief on the petition and of each claim it contains. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (F) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. If the petitioner has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the finding of grounds for granting the relief, with respect to each claim contained in the petition. The court also may make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (F) of this

section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(I) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(J)(1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (J)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (J)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (J) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (J)(2) of this section.

(K) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII

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

U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In January 2014, Defendant-Petitioner Austin Myers and his co-defendant, Timothy Mosley, both 19 years old, conspired to commit the aggravated murder of Myers' childhood friend, Justin Back. *State v. Myers*, 154 Ohio St. 3d 405, 2018-Ohio-1903, 114 N.E.3d 405, at ¶ 1-15. The idea was initiated by Myers. *Id.* at ¶ 2, 4. After planning the aggravated murder over several days, purchasing multiple items at various stores to commit and cover up the aggravated murder, and constructing a homemade garrote, or "choke wire," Myers and Mosley went to Back's home in Waynesville, Ohio, where Back resided with his mother and step-father, who were not at home at the time. *Id.* at ¶ 2-15. Back welcomed them inside and, in accordance with Myers' and Mosley's plan, Mosley assaulted Back by putting the garrote over Back's head in an attempt to strangle him, while Myers grabbed Back to restrain him. *Id.* at ¶ 16. Back resisted, and a struggle ensued on the floor. *Id.* at ¶ 17-19. As Back struggled for his life, he repeatedly asked "[W]hy[?]" and pleaded with Myers and Mosley to stop. *Id.* at ¶ 18. Myers told Back something "[along] the lines of 'it's all right, it's almost over.'" *Id.* Myers also alerted Mosley to the fact that Mosley had missed Back's throat, instead looping the garrote around his chin. *Id.* Mosley, in a panic, pulled out his pocket knife and stabbed Back in the back and chest, while Myers took hold of the garrote, maneuvered it around Back's neck, and pulled on it. *Id.* at ¶ 19. After killing Back, Myers and Mosley stole a safe, jewelry, a firearm, and other items from the home before dumping Back's dead body in a wooded area in Preble County, Ohio. *Id.* at ¶ 20-21, 24-25. Myers then shot two rounds into the body with the stolen firearm. *Id.* at ¶ 26. They then opened the stolen safe, burned bloody clothing and other evidence in Mosley's backyard, and disposed of the safe and other evidence. *Id.* at ¶ 27-29.

For his extensive role in the planning, execution, and attempt to conceal Back's murder and

other crimes, Myers was charged in a nine-count indictment with:

- aggravated murder (purposeful and with prior calculation and design), in violation of Ohio Rev. Code Ann. § 2903.01(A), with three death-penalty specifications (kidnapping, aggravated burglary, and aggravated robbery) under Ohio Rev. Code Ann. § 2929.04(A)(7);
- aggravated felony murder, in violation of Ohio Rev. Code Ann. § 2903.01(B), with three death-penalty specifications (kidnapping, aggravated burglary, and aggravated robbery) under Ohio Rev. Code Ann. § 2929.04(A)(7);
- kidnapping in violation of Ohio Rev. Code Ann. § 2905.01(A)(2);
- aggravated robbery in violation of Ohio Rev. Code Ann. § 2911.01(A)(3) with a one-year firearm specification;
- aggravated burglary in violation of Ohio Rev. Code Ann. § 2911.11(A)(1) with a one-year firearm specification;
- grand theft of a firearm in violation of Ohio Rev. Code Ann. § 2913.02(A)(1) with a one-year firearm specification;
- tampering with evidence in violation of Ohio Rev. Code Ann. § 2921.12(A)(1);
- safecracking in violation of Ohio Rev. Code Ann. § 2911.21(A); and
- abuse of a corpse in violation of Ohio Rev. Code Ann. § 2927.01(B) with a three-year firearm specification.

Myers, 154 Ohio St. 3d 405, at ¶ 36. Mosley was indicted with similar charges. *State v. Myers*, 2021-Ohio-631 (Ohio Ct. App.), at ¶ 7.

Following indictment, Myers had two attorneys appointed to represent him, a mitigation specialist, and a psychologist. (Docket Entries 12, 131, 139 filed in Warren County Court of Common Pleas; 4/23/14 Entry and Order on Motions #3, 4, and 5; 5/19/14 Order Granting

Defendant's Motion #55; 5/12/14 Transcript of Proceedings, p. 7) The defense team gathered extensive information about Myers' history, character, and background, which included school records, mental health records, and a detailed family history from family members. (10/6/14 Transcript of Sentencing Phase)

Prior to trial, Myers did not claim that his age of 19 made him categorically ineligible for the death penalty under the Eighth Amendment. The case proceeded to a jury trial in September 2014. *Myers*, 154 Ohio St. 3d 405, at ¶ 37. A week before Myers' jury trial, Mosley entered a plea agreement with the State, in which he agreed to testify against Myers. *Myers*, 2021-Ohio-631, at ¶ 7. Mosley pled guilty to all charges in exchange for the dismissal of the death-penalty specifications. *Id.* He received a sentence of life in prison without the possibility of parole. *Id.* At trial, Myers' counsel conducted an extensive, vigorous cross-examination of Mosley. *Myers*, 154 Ohio St. 3d 405, at ¶ 186; *Myers*, 2021-Ohio-631, at ¶ 100. (9/22/14 Transcript of Trial, p. 1140-1225) Counsel's cross-examination of Mosley refuted Myers' later post-conviction claim that counsel did not adequately investigate Mosley's background. *Myers*, 2021-Ohio-631, at ¶ 100.

The jury found Myers guilty beyond a reasonable doubt of all counts and specifications. *Myers*, 154 Ohio St. 3d 405, at ¶ 37. After the trial court merged the aggravated murder counts and the specifications to those counts and the State elected to proceed on the death-penalty specification relating to aggravated robbery, the case proceeded to the sentencing phase of the trial before a jury. *Id.* The testimony presented in the sentencing phase included information that Myers suffered from childhood depression, had a history of self-mutilation, had some mental health issues, and came from a dysfunctional family. *Id.* at ¶ 209, 212-18. There was also testimony that emphasized his positive qualities, like his love for and support of his siblings and their love for him, his talent for music, and that he was classified as "gifted" in many academic areas. *Id.* at ¶ 121, 123, 212, 218.

The jury recommended a death sentence, and the trial court sentenced Myers to death. *Id.* at ¶ 37.

The court imposed prison sentences on the non-capital counts. *Id.*

Thereafter, Myers filed a direct appeal in the Supreme Court of Ohio, which affirmed his convictions and the imposition of the death penalty. *Id.* at ¶ 1, 231. The Supreme Court of Ohio rejected Myers' argument on appeal that the death sentence constituted cruel and unusual punishment under the Eighth Amendment because he was 19 years old when he committed the crimes and had had some mental health issues. *Id.* at ¶ 175-176. The Supreme Court of Ohio likewise rejected Myers' argument that Mosley was more culpable than him. *Id.* at ¶ 174. The Supreme Court of Ohio independently reviewed Myers' death sentence and found that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt. *Id.* at ¶ 204-226. In the court's weighing process, the court assigned weight to Myers' age of 19. *Id.* at ¶ 224. Regarding the Ohio Rev. Code Ann. § 2929.04(B)(6) mitigating factor, degree of participation, the court found that the factor was not entitled to significant weight due to Myers' role in the aggravated murder. *Myers*, 154 Ohio St. 3d 405, at ¶ 222. The court wrote:

Even though Myers did not inflict the fatal wounds, he had a large role in the offense. He came up with the idea of stealing the safe and of killing Back to get it. He chose that as an easy way to make some money over the alternative of robbing or burglarizing a drug dealer. He rejected Mosley's proposal to burglarize the Cateses' house on January 27, when they knew no one was home. He came up with the initial idea of killing Back, and he brainstormed with Mosley to arrive at the plan of making and using a garrote. He bought the materials to make the garrote.

Myers also extensively participated "in the acts that led to the death of the victim." He restrained Back while Mosley slipped the garrote over Back's head and continued to restrain him when Mosley, having failed in his attempt to strangle Back, pulled his knife and began stabbing him.

Id. at ¶ 222-223 (citation omitted). The Supreme Court of Ohio also found the death sentence to be proportionate to death sentences affirmed in similar cases. *Id.* at ¶ 227. The Supreme Court of Ohio denied Myers' subsequent motion to reconsider its decision and application to reopen his appeal.

State v. Myers, 154 Ohio St. 3d 1477, 2019-Ohio-173, 114 N.E.3d 1205; *State v. Myers*, 153 Ohio St. 3d 1451, 2018-Ohio-3025, 103 N.E.3d 830.

Myers filed a petition for a writ of certiorari, which this Court denied on January 7, 2019. *Myers v. Ohio*, 139 S. Ct. 822, 202 L. Ed. 2d 599 (2019). Although the Supreme Court of Ohio had rejected his claim that the death sentence constituted cruel and unusual punishment because he was 19 years old at the time he committed his crimes, Myers' petition for a writ of certiorari raised only the claim that his death sentence violated the Sixth Amendment under *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016). Myers did not present the question he raises in his current petition for a writ of certiorari, which challenges his death sentence as violating the Eighth and Fourteenth Amendments.

In 2016, Myers filed a Post-conviction Petition to Vacate or Set Aside Judgment and/or Sentence Pursuant to Ohio Rev. Code Ann. § 2953.21 (“PCR petition”), which raised sixty grounds for relief and included five volumes of exhibits. *State v. Myers*, 2021-Ohio-631 (Ohio Ct. App.), at ¶ 10. (Docket Entries 299, 301, 302, 303, 304, 305 filed in the Warren County Court of Common Pleas) After Ohio Rev. Code Ann. § 2953.21 was amended in 2017 to add discovery provisions for capital defendants, Myers filed a supplemental motion for discovery, which the trial court denied, finding that the amendments were not retroactive to petitions filed before the effective date and that Myers had not met the statute’s requirement of “good cause” for conducting discovery. *Myers*, 2021-Ohio-631, at ¶ 11-12, 33. The trial court ultimately dismissed Myers’ petition without a hearing. *Id.* at ¶ 13. Myers appealed the dismissal to the Twelfth District Court of Appeals of Ohio. *Id.* at ¶ 14.

On March 8, 2021, the court of appeals affirmed the dismissal in part and reversed it in part. *Id.* at ¶ 154. The court of appeals affirmed the trial court’s dismissal without a hearing on

most of Myers' grounds for relief because they were waived, barred by res judicata, moot, and/or Myers' petition and supporting documentation did not meet the statutory standard of presenting sufficient operative facts to establish substantive grounds for relief. *Id.* at ¶ 56-57, 63, 67, 74, 76, 78-80, 85-90, 96-114, 126, 130, 152. As to Myers' Twenty-First, Forty-Fourth, and Forty-Fifth Grounds for Relief, which argued ineffective assistance of counsel for failure to present expert testimony about Myers' mental health issues, his youth, and adolescent brain development in the penalty phase of Myers' trial, the court of appeals found that Myers had presented enough information to warrant an evidentiary hearing, reversed the trial court's dismissal on that issue, and remanded the case for a hearing. *Id.* at ¶ 140, 148, 153-154. The date of that hearing is still pending before the trial court because of Myers' intervening appeals to the Supreme Court of Ohio and this Court.

On the issue of discovery, the Twelfth District Court of Appeals of Ohio upheld the trial court's decision that the amendments to Ohio Rev. Code Ann. § 2953.21 were not retroactive. *Myers*, 2021-Ohio-631, ¶ 39. However, because Myers' PCR petition was pending on the effective date of the amendments, the court of appeals found that the amendments applied to his petition. *Id.* at ¶ 40. The court of appeals upheld the trial court's determination that Myers had not met the statutory requirement of "good cause" for discovery on most of his grounds for relief. *Id.* at ¶ 48, 49. However, the court of appeals reversed the trial court's "good cause" determination as to Myers' claim of ineffective assistance of counsel for failure to present expert testimony about Myers' mental health issues, his youth, and adolescent brain development in the penalty phase and remanded the case to the trial court for the exchange of discovery. *Id.* at ¶ 147.

On Myers' Eighth Amendment claim that the death penalty was unconstitutional because he was 19 years old when he committed the offenses, the Twelfth District Court of Appeals of Ohio affirmed the trial court's determination that the argument was barred by res judicata because Myers had raised the same claim in his direct appeal. *Id.* at ¶ 56. The court of appeals also affirmed the trial court's determination that Myers had failed to set forth sufficient operative facts to establish substantive grounds for relief to warrant an evidentiary hearing on that issue "given the election of the United States Supreme Court and Ohio Supreme Court not to extend the ban on the death penalty to individuals who are over the age of 18 at the time of the crime." *Id.* at ¶ 57.

Myers appealed to the Supreme Court of Ohio the portion of the court of appeals' opinion affirming the trial court's dismissal of his PCR petition. *State v. Myers*, 164 Ohio St. 3d 1403, 2021-Ohio-2742, 172 N.E.3d 167. The Supreme Court of Ohio stayed the proceedings related to the issues that the court of appeals remanded to the trial court. *State v. Myers*, 162 Ohio St. 3d 1424, 2021-Ohio-1262, 166 N.E.3d 8. On August 17, 2021, the Supreme Court of Ohio declined to accept Myers' appeal for review. *State v. Myers*, 164 Ohio St. 3d 1403, 2021-Ohio-2742, 172 N.E.3d 167.

From the Supreme Court of Ohio's August 17, 2021 decision, Myers filed a petition for a writ of certiorari and a motion for leave to proceed *in forma pauperis* in this Court on November 15, 2021. The State of Ohio hereby responds.

ARGUMENT

Reasons for Denying the Writ

I. Myers' First Question Presented should be denied because the state intermediate court's denial of post-conviction discovery on some, but not all, of Myers' grounds for relief does not conflict with a decision from this Court. The court of appeals' decision resolved a purely factual issue.

Myers' First Question Presented challenges the state intermediate court's application of Ohio's statutory standard for post-conviction discovery. The Twelfth District Court of Appeals' denial of post-conviction discovery on some, but not all, of Myers' grounds for relief is a purely factual issue. The court of appeals' resolution of a purely factual issue does not conflict with a decision of this Court. Nor does Myers establish that the court of appeals' denial of discovery amounts to constitutional error.

The trial court denied Myers' motions for discovery under the amendments to Ohio Rev. Code Ann. § 2953.21 that took effect on April 6, 2017. (7/3/18 Entry and Order Denying Petitioner's Supplemental Motion for Discovery, filed in Warren County Court of Common Pleas) The trial court first found that the discovery amendments were not retroactive to Myers' PCR petition, since the petition was filed before the amendments took effect. (*Id.* at p. 4) The trial court also determined that Myers' motions did not satisfy the threshold showing of "good cause" for entitlement to discovery under the statute. (*Id.* at p. 5-10)

On appeal, the Twelfth District Court of Appeals Ohio agreed with the trial court that the amendments did not apply retroactively. *State v. Myers*, 2021-Ohio-631 (Ohio Ct. App.), at ¶ 39. However, the court of appeals found that the amendments applied prospectively to PCR petitions pending on the effective date of the amendments, like Myers' PCR petition. *Id.* at ¶ 40. The court of appeals next analyzed Myers' discovery requests and determined that he had shown "good cause" to conduct discovery under the statute regarding his Twenty-First, Forty-Fourth,

and Forty-Fifth Grounds for Relief, which argued ineffective assistance of counsel for failure to present expert testimony about Myers' mental health issues, his age, and adolescent brain development in the penalty phase of Myers' trial. *Id.* at ¶ 147. However, as to all other grounds for relief, the court of appeals held that the trial court properly denied Myers' requests for discovery because Myers did not meet the statutory requirement of establishing "good cause" for the discovery. *Id.* at ¶ 48-49.

Myers does not establish that the court of appeals' application of the state post-conviction statute's standard governing discovery conflicts with a decision of this Court or that it violated his right to due process, access to the courts, or an adequate corrective process. Under Ohio's statutory framework for post-conviction relief, a PCR petitioner is not entitled to automatic discovery. The 2017 amendments to Ohio Rev. Code Ann. § 2953.21 authorize the court to order discovery, specifically, the taking of depositions, the issuance of subpoenas and subpoenas duces tecum, and any other form of discovery as in a civil action that the court in its discretion permits. Ohio Rev. Code Ann. § 2953.21(A)(1)(d). However, before the court may order discovery, the moving party has the burden of establishing good cause for his request. *Id.* When the party requests to take depositions of and issue subpoenas and subpoenas duces tecum to a witness, the party must establish good cause that the witness is material and that a deposition or subpoena is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict. Ohio Rev. Code Ann. § 2953.21(A)(1)(d)(ii). When the party requests to take depositions of and issue subpoenas and subpoenas duces tecum to a witness who testified at trial or who was disclosed by the State prior to trial, the party is held to a higher standard. Ohio Rev. Code Ann. § 2953.21(A)(1)(d)(i). In those circumstances, the party must establish clear and convincing evidence that the witness is material and that a deposition or

subpoena is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict. *Id.* The court may also find that the discovery sought would be irrelevant to the claims made in the petition and order that the discovery not be had or make any other order, including those set forth in Ohio Rev. Code Ann. § 2953.21(A)(1)(g)(i) to (vii). Ohio Rev. Code Ann. § 2953.21(A)(1)(f). Finally, Ohio Rev. Code Ann. § 2953.21(A)(1)(i) states that “[n]othing in division (A)(1)(d) of this section authorizes, or shall be construed as authorizing, the relitigation, or discovery in support of relitigation, of any matter barred by the doctrine of res judicata.”

The Twelfth District Court of Appeals correctly applied the statutory discovery provisions to deny Myers post-conviction discovery on all but Myers' Twenty-First, Forty-Fourth, and Forty-Fifth Grounds for Relief. As an initial matter, pursuant to Ohio Rev. Code Ann. § 2953.21(A)(1)(i), the trial court was not authorized to grant Myers discovery on claims that were barred by res judicata. The court of appeals found that many of Myers' grounds for relief were barred by res judicata, as they could have been raised on direct appeal. *State v. Myers*, 2021-Ohio-631 (Ohio Ct. App.), at ¶ 48-49, 56, 63, 76, 80, 86, 88, 89, 90, 108, 113, 114.

Even assuming, *arguendo*, that Myers' claims were not barred by res judicata, Myers was not entitled to discovery because he failed to meet another requirement of Ohio Rev. Code Ann. § 2953.21(A)(1)(d), that being the requirement of showing good cause for the discovery. Good cause for discovery is present “where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is … entitled to relief.” *Bracy v. Gramley*, 520 U.S. 899, 908-09, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997); *Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004). “Conversely, where a petitioner would not be entitled to relief on a particular claim, regardless of what facts he developed, he cannot show good

cause for discovery on that claim.” *Murphy v. Bradshaw*, No. C-1-03-053, 2003 WL 23777736, at *1 (S.D. Ohio Sept. 13, 2003).

Before determining whether a petitioner is entitled to discovery, the court must identify the “essential elements” of the claim. *Bracy*, at 904. The burden of demonstrating the materiality of the information requested is on the petitioner. *Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001). “Conclusory allegations are not enough to warrant discovery.” *Williams*, at 974. The party seeking discovery is not entitled to engage in a fishing expedition based on bald assertions and conclusory allegations. *Williams*, at 974; *Moreland v. Bradshaw*, No. 3:05-CV-334, 2006 WL 1526884, at *1 (S.D. Ohio May 31, 2006). Rather, the moving party must “set forth specific allegations of *fact*.” (Emphasis added.) *Williams*, at 974.

Myers fell well short of that “good cause” standard in his request for discovery. His supplemental motion for discovery relied on nothing more than conclusory allegations. Specifically, he asserted in his supplemental motion that:

- “[t]here is good cause for discovery;”
- he has made “specific allegations” “such that there is ‘reason to believe that the petitioner may, if the facts are more fully developed, be able to demonstrate that he is ...entitled to relief;’”
- “[h]is allegations are neither patently frivolous nor palpably incredible, and, indeed, are supported with at least some evidence;”
- “[t]he discovery he requests * * * is specific, limited, and reasonably calculated to lead to evidence in support of these claims of” ineffective assistance of counsel, constitutionality of the death sentence, and prosecutorial misconduct;
- “[d]iscovery will enable Petitioner to more fully establish that his trial counsel were

deficient, in the above respects, under the relevant performance standards;”

- “[d]iscovery would also enable Petitioner to establish that trial counsel’s deficiencies in these respects were not the result of trial strategy or tactics, and that Petitioner was ‘prejudiced’ by the deficient performance in that, but for counsel’s unprofessional errors, the result of the proceeding (as to either guilt or sentencing) would have been different;” and
- the witnesses he seeks to depose “are necessary, and their testimony would be material.”

(3/1/18 Petitioner’s Supplemental Motion for Leave to Conduct Discovery, filed in Warren County Court of Common Pleas) These are all statements that, in conclusory fashion, merely repeat various legal standards. If that were a sufficient basis to entitle a party to discovery, then the legislature would not have required a *showing* of “good cause.” The *showing* of “good cause” is a requirement, and it was not met when Myers did not provide specific factual or evidentiary support for his request and, instead, relied solely on conclusory allegations. Moreover, as the Twelfth District Court of Appeals of Ohio found, Myers’ requests for discovery were either an attempt by him to engage in a fishing expedition, or he was not entitled to relief, regardless of what facts he developed. *State v. Myers*, 2021-Ohio-631 (Ohio Ct. App.), at ¶ 48-49.

As to his Twenty-First, Forty-Fourth, and Forty-Fifth Grounds for Relief, which argued ineffective assistance of counsel for failure to present expert testimony about Myers’ mental health issues, his age, and adolescent brain development in the penalty phase of trial, the court of appeals found that Myers had established “good cause” for the discovery. *Id.* at ¶ 147. The court of appeals found those claims to be “neither patently frivolous nor palpably incredible” and that the discovery he requested was “limited and reasonably calculated to lead to evidence in support of his claim.” *Id.*

The court of appeals’ allowance of discovery on some, but not all, of Myers’ grounds for relief shows that its application of the “good cause” requirement was based entirely on the specific

facts. Myers does not argue that the court of appeals erred in its application of the standard when it granted him discovery. He only takes issue with the court's identical application of the standard to deny him discovery. His argument shows merely his disagreement with the outcome of a purely factual issue. The court of appeals' resolution of a purely factual issue does not conflict with a decision of this Court.

Nor does the court of appeals' decision on the specific facts of this case rise to the level of a constitutional violation. State post-conviction review is not a part of either the criminal proceedings or the appeal from the criminal proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 556-57, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). "It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction." *Id.* at 557. "States have no obligation to provide this avenue of relief." *Id.* State post-conviction procedures are constitutional if they "compor[t] with fundamental fairness." *Id.* at 556.

Fundamental fairness does not require the State to provide a lawyer to a defendant in post-conviction proceedings, *see Finley*, at 555-57, even to capital defendants. *See Murray v. Giarratano*, 492 U.S. 1, 11, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989). Myers was not deprived of fundamental fairness by the court of appeals' application of the state statutory standard for allowing or denying post-conviction discovery.

Ohio's post-conviction statute permits capital defendants to conduct discovery in certain circumstances. The statute provides threshold requirements that defendants must meet before they will be entitled to discovery. A state court's application of those threshold requirements to disallow post-conviction discovery on some, but not all, of a defendant's grounds for relief does not violate principles of fundamental fairness. It is a decision based purely on the facts of the case.

There is no basis for certiorari review of the Twelfth District Court of Appeals' denial of

post-conviction discovery. The State asks this Court to deny Myers' petition for a writ of certiorari on the First Question Presented.

II. Myers' Second Question Presented should be denied because there are adequate and independent state court grounds supporting the state intermediate court's decision, this Court decided this issue in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), and the court of appeals' decision is consistent with this Court's Eighth Amendment jurisprudence.

In his Forty-Eighth Ground for Relief in his petition for post-conviction relief, Myers argued that the death penalty is per se unconstitutional for young adults 18 years of age or older. *State v. Myers*, 2021-Ohio-631 (Ohio Ct. App.), ¶ 54. He asks this Court for a writ of certiorari to review that question after that claim was dismissed on post-conviction review. Respondent State of Ohio asks this Court to deny his petition on that issue because (1) there is an adequate and independent state ground supporting the Twelfth District Court of Appeals' decision affirming the dismissal of Myers' Eighth Amendment claim, (2) this Court already decided the Eighth Amendment issue in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), and (3) the court of appeals' decision is consistent with this Court's Eighth Amendment jurisprudence.

The Twelfth District Court of Appeals of Ohio's rejection of Myers' Eighth Amendment argument rests on an adequate and independent state ground. A state court's actual reliance on a procedural bar as an independent basis for its disposition of the case deprives this Court of jurisdiction to consider an issue of federal law. *Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.*, quoting *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).

The Twelfth District Court of Appeals of Ohio actually relied on a procedural bar as an independent basis to affirm the trial court's dismissal of Myers' PCR petition. The issue before the court of appeals was whether the trial court abused its discretion in dismissing Myers' PCR petition without an evidentiary hearing. In determining that issue, the court of appeals first discussed the trial court's decision:

The trial court further dismissed Grounds 5 and 46 through 48 as follows:

The Ohio Supreme Court has already addressed whether the sentence of death for Myers based on his age is a violation of the Eighth Amendment and found that it is not a violation of his constitutional rights. Therefore, *this argument is barred by res judicata*.

Further, the Supreme Court of the United States has addressed the age of youthful offenders in a number of contexts and has not chosen to extend the ban on the death penalty to individuals who are over the age of eighteen at the time of the crime. [Myers] has submitted evidence related to the development in brain science, however, the Ohio Supreme Court and the United States Supreme Court have considered these new developments and similar arguments to the ones set forth by [Myers]. The United States Supreme Court acknowledged that individuals over eighteen may still exhibit signs of a juvenile but also found that since eighteen is the line society draws for many purposes between childhood and adulthood, that was the age that the line for death penalty ought to rest. *Roper v. Simmons*, 543 U.S. 551, 574, 125 S.Ct. 1183, 1197-98, 161 L.Ed.2d 1 (2005).

State v. Myers, 2021-Ohio-631 (Ohio Ct. App.), at ¶ 55 (emphasis added). The court of appeals next explained its reasons for affirming the trial court's decision:

We find that *the trial court properly dismissed Grounds 5, 8, 9, and 46 through 48*. On direct appeal to the supreme court, Myers argued that the death sentence violated the Eighth Amendment proscription of cruel and unusual punishment, given recent decisions of the United States Supreme Court and a growing body of new developments in brain science indicating that age 18 is not the proper cut-off point for the death penalty. Myers further argued that his death sentence was comparatively disproportionate to the life sentence Mosley received and that he should not have been sentenced to death because he was a 19-year-old immature adolescent with mental and youth-related behavioral issues when he committed his crimes. The supreme court addressed and rejected these claims. [State v.] *Myers*, 2018-Ohio-1903 at ¶ 173-176, 154 Ohio St.3d 405, 114 N.E.3d 1138. *They are therefore barred by res judicata*.

Myers, 2021-Ohio-631, at ¶ 56 (emphasis added). The court of appeals continued:

Myers' other claims were properly dismissed by the trial court as failing to set forth sufficient operative facts to establish substantive grounds for relief, given the election of the United States Supreme Court and Ohio Supreme Court not to extend the ban on the death penalty to individuals who are over the age of 18 at the time of the crime. Myers notes that while his direct appeal made a brief reference to the newer brain science, it did not make the constitutional claim for a *Roper*-extension that his P[CR] petition makes. *See Myers* at ¶ 176 ("Although Myers argues that new developments in brain science indicate that age 18 is not the 'proper cut off point for the death penalty,' he does not propose that the categorical exclusion for those under 18 be extended to 19-year-olds.") However, such constitutional argument was recently addressed and rejected by the Ohio Supreme Court in *State v. Graham*, Slip Opinion No. 2020-Ohio-6700.

Graham, who turned 19 years old the month before he committed his crimes and who was sentenced to death, argued that imposing a death sentence on a capital defendant who was under the age of 21 at the time of the crime violated the Eighth Amendment. Extrapolating from the United States Supreme Court's *Roper* decision, Graham argued that it was possible the Supreme Court could extend *Roper* to find that a defendant who turned 19 the month before committing the offense is constitutionally barred from receiving a death sentence. The Ohio Supreme Court squarely rejected the argument: "[B]ecause the United States Supreme Court has drawn the line at 18 for Eighth Amendment purposes, state courts are not free to invoke the Eighth Amendment as authority for drawing it at a higher age. * * * *Roper* is controlling, and we must follow it." *Graham*, at ¶ 182, citing *In re Phillips*, 6th Cir. No. 17-3729, 2017 U.S. App. LEXIS 17766 (July 20, 2017) (no authority exists at the present time to support the argument that a defendant who was 19 years old at the time of the offense is ineligible to receive a death sentence).

Myers, 2021-Ohio-631, at ¶ 57-58.

Concerning Myers' Forty-Eighth Ground for Relief, which argued that his death sentence was categorically prohibited under the Eighth Amendment due to his age of 19 at the time of the crimes, the court of appeals set forth two separate and independent grounds for finding that the trial court had properly dismissed the petition. The first was res judicata. In affirming the trial court's dismissal of Myers' PCR petition, the court of appeals actually and clearly relied on res judicata as a procedural bar to Myers' Forty-Eighth Ground for Relief. Res judicata is a proper basis for dismissal of a petition for post-conviction relief. *State v. Perry*, 10 Ohio St. 2d 175,

226 N.E.2d 104 (1967), at paragraph nine of the syllabus. “Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.” *Id.* This procedural bar is an adequate and independent state ground which deprives this Court of jurisdiction over Myers’ Eighth Amendment claim.

Even assuming, *arguendo*, that there is not adequate and independent state grounds supporting the court of appeals’ decision, jurisdiction is not appropriate. This Court has already decided the Eighth Amendment issue that Myers raises in his petition, and the Twelfth District Court of Appeals of Ohio’s decision is consistent with that decision and this Court’s Eighth Amendment jurisprudence.

The Cruel and Unusual Punishment Clause of the Eighth Amendment prohibits the imposition of “inherently barbaric” punishments. *Graham v. Florida*, 560 U.S. 48, 59, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). For the most part, this Court’s precedents consider punishments that are challenged, not as inherently barbaric, but as being disproportionate to the crime. *Id.* This Court’s cases addressing the proportionality of sentences fall within two general classifications: (1) those which involve challenges to the length of term-of-years sentences; and (2) those which “implement[] the proportionality standard by certain categorical restrictions on the death penalty.” *Id.*

The proper analysis to determine proportionality for a capital offense is to “consider the nature of the offense” and the “characteristics of the offender.” *Id.* at 61. When considering the nature of the offense, this Court has determined that capital punishment is impermissible for non-

homicide crimes against individuals. *Kennedy v. Louisiana*, 551 U.S. 407, 437-38, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008). To determine the characteristics of the offender, this Court has adopted categorical rules prohibiting the death penalty for offenders who committed the crime prior to age 18, *see Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), or offenders whose intellectual functioning is in a low range, *see Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). In cases involving the categorical approach, this Court first “considers ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice’ to determine whether there is a national consensus against the sentencing practice at issue.” *Graham*, at 61, quoting *Roper*, at 572. Second, “guided by ‘the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,’ the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.” (Internal citation omitted.) *Graham*, at 61.

Myers argues that, due to his age of 19 at the time he committed the offenses, the death penalty is unconstitutional. However, this Court has not set aside a category of “youthful offender” and furthermore, has already addressed this issue in *Roper*. *Roper* prevents juveniles, those who commit the offense under the age of 18, from being sentenced to death. *Roper*, at 574. *Roper* does not expand to age 18 and beyond, but rather sets a bright line by stating that the age of 18 is “the age at which the line for death [penalty] eligibility ought to rest.” *Id.*

Myers was not a juvenile under 18 years of age. “The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.” *Roper*, at 574. At 19 years old, Myers was an adult with all of the privileges and responsibilities of an adult. He was able to vote, serve on a jury, and get married. In accordance with *Roper*, in order for the

death penalty to be imposed in Ohio, the defendant must be “found at trial to have been eighteen years of age or older at the time of the commission of the offense.” Ohio Rev. Code Ann. § 2929.04(B). At age 19 at the time of the offense, Myers was eligible to receive the death penalty due to his planning and participation in the aggravated murder of Justin Back.

Myers argues that, because he was not a “fully-formed adult” at the age of 19, he should therefore not be liable for his actions. He cites to scientific studies that show that adults under the age of 21 are immature and irresponsible, vulnerable or susceptible to negative influences and peer pressure, and their personality traits are not fixed. He asserts that these characteristics of youth continue into one’s early twenties. Significantly, however, this Court considered that very fact when it decided *Roper*. This Court expressly acknowledged in *Roper* that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach.” *Id.* at 574. Notwithstanding that recognition, a line had to be drawn, and this Court drew that line at age 18. *Id.* (“The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.”)

Since *Roper*, this Court has continued to identify 18 years as the critical age for purposes of Eighth Amendment jurisprudence. *See Miller v. Alabama*, 567 U.S. 460, 465, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (prohibiting mandatory sentences of life without parole for homicide offenders who committed their crimes before the age of 18). *See also Graham v. Florida*, 560 U.S. 48, 74-75, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (prohibiting sentences of life without parole for nonhomicide offenders who committed their crimes before the age of 18).

The Supreme Court of Ohio also considered and rejected the argument for extending the categorical ban to young adults aged 18 and older. Just last year, in *State v. Graham*, 164 Ohio

St. 3d 187, 2020-Ohio-6700, 172 N.E.3d 841 (reversing sentence on other grounds), Ohio's high court recognized the controlling authority of *Roper* and declined to extend that case to a 19-year-old defendant. *State v. Graham*, 164 Ohio St. 3d 187, at ¶ 182-183. In Myers' direct appeal, the Supreme Court of Ohio determined that Myers' age of 19 did not render his death sentence unconstitutional under the Eighth Amendment. *State v. Myers*, 154 Ohio St. 3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, at ¶ 173, 175-176. Myers did not seek a writ of certiorari from this Court on that issue.

Many other courts have also declined to extend that bright line to 18 years old and beyond. In September 2020, the Supreme Court of Idaho rejected the claim of a 19½-year-old defendant that the constitutional prohibition against executing juveniles should be extended to defendants under the age of 21. *Hairston v. State*, 167 Idaho 462, 468-69, 472 P.3d 44 (2020). The defendant's Eighth Amendment claim relied on an affidavit from Laurence Steinberg, Ph.D. and the ABA House of Delegates' Resolution 111, just as Myers does in his petition for a writ of certiorari. *Id.* at 465, 467. In September 2018, the Supreme Court of California upheld the imposition of the death penalty against an 18-year-old offender. *People v. Powell*, 6 Cal. 5th 136, 191-92, 425 P.3d 1006 (2018), *cert. denied*, 140 S. Ct. 55, 205 L. Ed. 2d 51 (2019). It rejected the argument that evolving standards of decency require the abolition of the death penalty against young adults. *Id.* See also *People v. Gamache*, 48 Cal.4th 347, 404-05, 227 P.3d 342 (2010), *cert. denied*, 562 U.S. 1083, 131 S. Ct. 591, 178 L. Ed. 2d 514 (2010) (18-year-old). In December 2018, the Florida Supreme Court likewise declined to expand *Roper* to offenders who are 18 years old or older. *Foster v. State*, 258 So. 3d 1248, 1253-54 (Fla. 2018), *cert. denied*, 140 S. Ct. 152, 205 L. Ed. 2d 67 (2019). The defendant in that case relied on the same studies and purported trends as Myers does. *Id.* In 2013, the Supreme Court of South Dakota held that "evolving standards of decency" do not prohibit

capital punishment against adults. *State v. Berget*, 2013 S.D. 1, ¶ 90, 826 N.W.2d 1, 28 (2013), *cert. denied*, 574 U.S. 1197, 135 S. Ct. 1505, 191 L. Ed. 2d 442 (2015). *Accord State v. Tucker*, 2013-1631, p. 51-52 (La. 9/1/15); 181 So. 3d 590, 627 (La. 2015), *cert. denied*, 578 U.S. 1018, 136 S. Ct. 1801, 195 L. Ed. 2d 774 (2016), *rehearing denied*, 137 S. Ct. 16, 195 L. Ed. 2d 888 (2016) (no “objective indicia of consensus” “exists against executing adult offenders”). *See also Doyle v. Stephens*, 535 F.App’x 391, 395 (5th Cir. 2013), *cert. denied*, 571 U.S. 1209, 134 S. Ct. 1294, 188 L. Ed. 2d 320 (2014) (“Doyle was over eighteen, so he cannot use [*Roper v. Simmons* as a shield.”); *In re Phillips*, No. 17-3729, 2017 WL 4541664 (6th Cir. Jul. 20, 2017), at *3 (“While Phillips relies on *Roper, Hall [v. Florida*, 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014)], and related legal authority, none of those cases provide that he is ineligible for a death sentence because he was 19 at the time of his offense.”); *State v. Nitsche*, 2016-Ohio-3170, 66 N.E.3d 135 (Ohio Ct. App.), at ¶57-63, appeal not allowed, 147 Ohio St.3d 1437, 2016-Ohio-7677, 63 N.E.3d 156; *State v. Phipps*, No. 15AP-524, 2016-Ohio-663 (Ohio Ct. App.), at ¶37, 39.

Courts continue to adhere to the bright line of 18 years of age when addressing sentences less than death. *See United States v. Dock*, 541 F.App’x 242, 245 (4th Cir. 2013) (because the defendant was older than 18 at the relevant time, “*Miller* is of no help to [him]” in challenging his prison sentence); *United States v. Marshall*, 736 F.3d 492, 500 (6th Cir. 2013), *cert. denied*, 573 U.S. 922, 134 S. Ct. 2832, 189 L. Ed. 2d 795 (2014) (rejecting claim that defendant’s immaturity rendered his mandatory sentence of five years unconstitutional); *Benton v. Kelley*, 2020 Ark. 237, at 3-4, 602 S.W.3d 96, 98-99 (2020) (upholding as constitutional sentence of life without parole of 21-year-old capital murder defendant); *Nelson v. State*, 947 N.W.2d 31, 37-40 (Minn. 2020), *cert. denied*, 141 S. Ct. 2518, 209 L. Ed. 2d 550 (2021) (rule rendering sentence of life without parole unconstitutional for juvenile offenders did not apply to defendant who was 18 years and 7 days old

when he committed murder); *State v. Vinson*, 2016-Ohio-7604, 73 N.E.3d 1025 (Ohio Ct. App.), at ¶53, *appeal not allowed*, 150 Ohio St.3d 1408, 2017-Ohio-6964, 78 N.E.3d 909. In *Nelson, supra*, this Court denied Nelson a writ of certiorari to consider the question presented of whether the Eighth Amendment required a hearing at which the defendant could present evidence to show that he was materially indistinguishable from a juvenile. *Nelson v. Minnesota*, 141 S. Ct. 2518, 2019 L. Ed. 2d 550 (2021). All of the above cases rebut that there is a national consensus regarding adults who are 18 and older.

Myers received an individualized sentencing determination that took account of his age of 19. Myers presented his age as a mitigating factor during the sentencing phase of his trial. (10/6/14 Transcript of Sentencing Phase; 10/16/14 Judgment Entry of Sentence on Aggravated Murder with Death Specifications Pursuant to R.C. §2929.03(F), filed in Warren County Court of Common Pleas, p. 3) The trial court, as well as the Supreme Court of Ohio in its independent review of Myers' sentence, considered and gave weight to Myers' age as a mitigating factor. (10/16/14 Judgment Entry of Sentence on Aggravated Murder with Death Specifications Pursuant to R.C. §2929.03(F), filed in Warren County Court of Common Pleas, p. 3; *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, at ¶207, 224) The trial court assigned substantial weight to Myers' youth. (10/16/14 Judgment Entry of Sentence on Aggravated Murder with Death Specifications Pursuant to R.C. §2929.03(F), filed in Warren County Court of Common Pleas, p. 3) The Twelfth District Court of Appeals of Ohio has remanded to the trial court, for discovery and an evidentiary hearing, the issue of whether Myers' trial counsel were ineffective for not presenting expert testimony regarding Myers' mental health issues, his age, and adolescent brain development in the penalty phase of Myers' trial. *State v. Myers*, 2021-Ohio-631 (Ohio Ct. App.), at ¶ 147-148. Proceedings on that issue have been stayed during Myers' appeals to the Supreme Court of Ohio

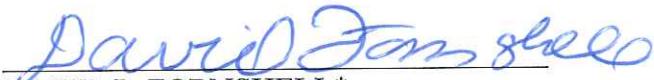
and this Court.

Respondent State of Ohio asks this Court to deny Myers' petition for a writ of certiorari on the Second Question Presented. Initially, there is an adequate and independent state ground supporting the Twelfth District Court of Appeals' decision affirming the dismissal of Myers' Eighth Amendment claim. Furthermore, this Court already decided the Eighth Amendment issue in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), and the court of appeals' decision is consistent with that decision and this Court's Eighth Amendment jurisprudence.

CONCLUSION

For the reasons set forth in the above argument, Respondent asks this Court to deny Myers' petition for a writ of certiorari.

Respectfully Submitted,


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