

**CAPITAL CASE
No. _____
October Term, 2022**

IN THE SUPREME COURT OF THE UNITED STATES

LARRY GAPEN,

Petitioner,

v.

STATE OF OHIO,

Respondent.

***ON PETITION FOR A WRIT OF CERTIORARI TO THE
SECOND DISTRICT COURT OF APPEALS OF OHIO***

PETITION FOR A WRIT OF CERTIORARI

September 20, 2022

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CAPITAL CASE – NO EXECUTION DATE

QUESTIONS PRESENTED

In this capital case, Petitioner Larry Gapen followed the rules and orders of the courts at every step. Yet even as his trial and sentencing proceedings were shot through with serious constitutional errors, the Ohio state courts repeatedly stymied his efforts to obtain, present, and litigate evidence of these improprieties. Indeed, Gapen ultimately unearthed an array of constitutional violations connected to juror misconduct and other errors, including evidence that extrinsic evidence was presented to the jury during deliberations, and that at least one juror had injected the extra-judicial code of law known as *lex talionis* into the jury's deliberations. Under that extrinsic law and evidence, the juror refused to give any consideration or effect to Gapen's mitigation evidence.

In addition, other highly inflammatory and prejudicial evidence, previously deemed inadmissible, was nevertheless sent to the jury during deliberations. Further, at least some jurors were implicitly or explicitly biased, but failed to honestly disclose their biases on their juror questionnaires and during voir dire. All of this extrinsic evidence and extraneous influence on the jury was presented against Gapen at a critical stage of trial but outside the presence of counsel and without the full panoply of other constitutional protections guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments. The trial court was informed about the evidentiary errors and juror misconduct by at least two jurors, but the court never notified Gapen's counsel.

It was not until Gapen was already in federal habeas corpus proceedings that he was able to obtain the formal court process necessary to uncover and litigate these constitutional violations. As this Court has directed, Gapen then returned to Ohio state court to present his evidence and claims. But the state courts slammed the door in his face, blaming him for the procedural roadblocks the courts themselves had previously erected, thereby multiplying the federal constitutional injury to Gapen. This Court's precedent, and decisions of the United States Court of Appeals for the Sixth Circuit, stand in tension with the Ohio state court's ruling preventing Gapen from presenting the merits of his federal constitutional claims.

The Questions Presented are as follows:

When state courts prevent a capital defendant from obtaining the formal process necessary to substantiate severe constitutional violations in his trial and sentencing proceedings, do the state courts run afoul of this Court's precedents when they subsequently decline to enforce federal constitutional rights by faulting the defendant for not obtaining the evidence earlier?

Whether state courts violate the federal constitution's right to due process by applying state procedural rules to prevent substantial claims of federal constitutional violations from being heard?

Whether state courts violate the federal constitution's right to due process by applying state procedure rules in a way that conflicts with precedent from this Court and the federal courts of appeals, where the state courts apply those rules to preclude protection of a defendant's federal constitutional rights?

PARTIES TO THE PROCEEDINGS

Petitioner, Larry Gapen, a death-sentenced Ohio prisoner, was the appellant in the Ohio Court of Appeals for the Second District.

Respondent, the State of Ohio, was the appellee in the Ohio Court of Appeals for the Second District.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	ii
PARTIES TO THE PROCEEDINGS	iv
TABLE OF CONTENTS.....	v
TABLE OF AUTHORITIES	vii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE PETITION.....	17
I. This Court should grant certiorari because the Ohio state court failed to protect Gapen's federal constitutional rights in a way that conflicts with this Court's relevant decisions.....	18
II. This Court should grant certiorari to clarify that the Ohio state court's use of state procedural rules to preclude meaningful review of Gapen's federal constitutional rights itself violates the federal constitution's guarantee of due process	26
III. This Court should grant certiorari because the Ohio state court of last resort decided an important federal question in a way that conflicts with decisions by the United States Court of Appeals for the Sixth Circuit holding that, under this Court's precedent, state procedural rules cannot be used to preclude protection of a defendant's federally protected constitutional rights.....	29
CONCLUSION.....	33

APPENDIX:

Appendix A: Opinion, Ohio Court of Appeals for the Second District, September 17, 2021	1a
Appendix B: Decision, Order, and Entry Overruling Motion For Leave to File Delayed Motion for New Trial, Court of Common Pleas, Montgomery County, April 29, 2020.....	31a

Appendix C: Judgment Entry, Supreme Court of Ohio, April 26, 2022	82a
Appendix D: Opinion, Ohio Court of Appeals for the Second District, January 31, 2005	83a
Appendix E: Decision, Order, and Entry Sustaining Plaintiffs' Motion for Summary Judgment, Court of Common Pleas, Montgomery County, March 11, 2004	110a
Appendix F: Petitioner Gapen's Motion for Discovery in Post-Conviction proceedings, Court of Common Pleas, Montgomery County, October 4, 2002	126a
Appendix G: Glen Weissenberger & A.J. Stephani, Ohio Evidence Courtroom Manual, § 606, Competency of Juror as Witness, 163–65 (2015 ed.)	136a
Appendix H: Ohio Rule of Evidence 606(B), as amended July 1, 2022	139a
Appendix I: Comparison between Ohio Rule of Evidence 606(B) as applicable in relevant part at the time of Petitioner Gapen's trial, and as amended in July 1, 2022, to eliminate the aliunde rule	143a

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abdul-Kabir v. Quarterman</i> , 550 U.S. 233 (2007).....	22
<i>Buchanan v. Angelone</i> , 522 U.S. 269 (1998)	23
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	18
<i>Cunningham v. Shoop</i> , 23 F.4th 636 (6th Cir. 2022)	18, 32
<i>DiCenzi v. Rose</i> , 452 F.3d 465 (6th Cir. 2006)	11
<i>Doan v. Brigano</i> , 237 F.3d 722 (6th Cir. 2001).....	9, 17, 30, 31
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982)	22
<i>Ewing v. Horton</i> , 914 F.3d 1027 (6th Cir. 2019).....	18, 22, 31
<i>Frazier v. United States</i> , 335 U.S. 497 (1948)	21
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977).....	20, 24
<i>Hitchcock v. Dugger</i> , 481 U.S. 393 (1987).....	22
<i>Holloway v. Arkansas</i> , 435 U.S. 475 (1978).....	19
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961)	20, 24
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	22
<i>Mattox v. United States</i> , 146 U.S. 140 (1892)	20
<i>McDonough Power Equip., Inc. v. Greenwood</i> , 464 U.S. 548 (1984).....	20
<i>Miller v. Webb</i> , 385 F.3d 666 (6th Cir. 2004)	21
<i>Morgan v. Illinois</i> , 504 U.S. 719 (1992)	23
<i>In re Murchison</i> , 349 U.S. 133 (1955)	24
<i>Never v. Killinger</i> , 169 F.3d 352 (6th Cir. 1999)	18, 31
<i>Nian v. Warden</i> , 994 F.3d 746 (6th Cir. 2021)..... <i>passim</i>	

<i>Parker v. Gladden</i> , 385 U.S. 363 (1966) (per curiam)	18, 20
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989).....	22
<i>Penson v. Ohio</i> , 488 U.S. 75 (1988)	19
<i>Remmer v. United States</i> , 347 U.S. 227 (1954).....	<i>passim</i>
<i>Sheppard v. Maxwell</i> , 384 U.S. 333 (1966).....	20, 24
<i>Skipper v. South Carolina</i> , 476 U.S. 1 (1986).....	22
<i>Smith v. Phillips</i> , 455 U.S. 209 (1982).....	<i>passim</i>
<i>State v. Bethel</i> , No. 2020-0648, 2022-Ohio-783, 2022 Ohio LEXIS 565 (Ohio 2022).....	12
<i>State v. Gopen</i> , 2d Dist. Montgomery No. 20454, 2005-Ohio-441, 2005 Ohio App. LEXIS 461 (Ohio Ct. App. 2d Dist. 2005)	2
<i>State v. Gopen</i> , 2d Dist. Montgomery No. 21822, 2007-Ohio-4333, 2007 Ohio App. LEXIS 3873 (Ohio Ct. App. 2d Dist. 2007)	2
<i>State v. Gopen</i> , 2d Dist. Montgomery No. 28808, 2021-Ohio-3252, 2021 Ohio App. LEXIS 3174 (Ohio Ct. App. 2d Dist. 2022)	1, 8, 12
<i>State v. Gopen</i> , No. 2001-1518, 2004-Ohio-6548, 819 N.E.2d 1047 (Ohio 2004).....	1
<i>State v. Gopen</i> , No. 2021-1336, 2022-Ohio-1328, 2022 Ohio LEXIS 827 (Ohio 2022).....	1, 3
<i>State v. Gopen</i> , No. 2021-1336, 2022-Ohio-397, 180 N.E.3d 1169 (Ohio 2022).....	2
<i>State v. Metcalf</i> , 2d Dist. Montgomery No. 26101, 2015-Ohio-3507 (Ohio Ct. App. 2d Dist. 2015)	11
<i>State v. Sutton</i> , 8th Dist. Cuyahoga Nos. 108748 and 108750, 2021- Ohio-854 (Ohio Ct. App. 8th Dist. 2021)	11
<i>State v. Walden</i> , 10th Dist. Franklin No. 84AP-31, 19 Ohio App. 3d 141, 483 N.E.2d 859 (Ohio Ct. App. 10th Dist. 1984)	11
<i>Turner v. Louisiana</i> , 379 U.S. 466 (1965).....	18, 20, 24
<i>United States v. Cronic</i> , 466 U.S. 648 (1984).....	19

<i>United States v. Herndon</i> , 156 F.3d 629 (6th Cir. 1998)	18, 32
<i>United States v. Lanier</i> , 988 F.3d 284 (6th Cir. 2021)	18, 32
<i>Williams v. Taylor</i> , 529 U.S. 420 (2000)	27, 28, 29, 33

Statutes

28 U.S.C. § 1257(a)	3
---------------------------	---

Rules

Fed. Evid. R. 606(B)	9
Ohio Crim. R. 33	10, 12, 17, 29
Ohio Crim. R. 33(A)	6, 10, 11
Ohio Crim. R. 33(B)	<i>passim</i>
Ohio Crim. R. 33(C)	6, 10
Ohio Evid. R. 606(B)	<i>passim</i>
S. Ct. R. 10(b)	17, 29
S. Ct. R. 10(c)	17, 18

Constitutional Provisions

U.S. Const. amend. V	<i>passim</i>
U.S. Const. amend. VI	<i>passim</i>
U.S. Const. amend. VIII	<i>passim</i>
U.S. Const. amend. XIV	<i>passim</i>

IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner Larry Gapen respectfully petitions for a writ of certiorari to review the judgment of the Ohio Court of Appeals for the Second District.

OPINIONS BELOW

The opinion of the state court of appeals, which was the highest state court to review the merits, was issued on September 17, 2021. It is reported at *State v. Gapen*, 2d Dist. Montgomery No. 28808, 2021-Ohio-3252, 2021 Ohio App. LEXIS 3174, 2021 WL 4241168 (Ohio Ct. App. 2d Dist.), and is reproduced in Appendix A.

The opinion of the trial court, issued April 29, 2020, is unreported, and is reproduced in Appendix B.

The decision of the Supreme Court of Ohio denying discretionary review and dismissing the matter was issued on April 26, 2022. It is reported at *State v. Gapen*, No. 2021-1336, 2022-Ohio-1328, 2022 Ohio LEXIS 827, 2022 WL 1216313 (Ohio), and is reproduced in Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including September 23, 2022, on June 7, 2022, in Application No. 21A787.

Additionally, the Ohio state courts had previously reviewed other aspects of Gapen's case, before the matters presented in this petition arose. The decision of the Supreme Court of Ohio on direct appeal issued on December 15, 2004, and is reported at *State v. Gapen*, No. 2001-1518, 104 Ohio St. 3d 358, 2004-Ohio-6548, 819 N.E.2d 1047 (Ohio). The first decision of the state court of appeals on Gapen's

post-conviction proceedings issued on January 31, 2005, and is reported at *State v. Gapen*, 2d Dist. Montgomery No. 20454, 2005-Ohio-441, 2005 Ohio App. LEXIS 461 (Ohio Ct. App. 2d Dist.). That decision contained the court's affirmation of the trial court's denial of Gapen's post-conviction discovery motion. It is reproduced here in Appendix D. The decision of the trial court underlying the Second District's January 31, 2005, opinion was issued on March 11, 2004. It is unreported, and reproduced here in Appendix E. The second decision of the state court of appeals on Gapen's post-conviction proceedings issued on August 24, 2007, and is reported at *State v. Gapen*, 2d Dist. Montgomery No. 21822, 2007-Ohio-4333, 2007 Ohio App. LEXIS 3873 (Ohio Ct. App. 2d Dist.).

Additionally, Gapen's motion for post-conviction discovery, filed on October 4, 2002, is reproduced in Appendix F. Materials setting out Ohio Rule of Evidence 606(B) as applicable in relevant part at the time of Gapen's trial, as amended on July 1, 2022, and a direct comparison of changes eliminating the *aliunde* rule in former Rule 606(B), are reproduced in Appendices G–I respectively.

JURISDICTION

The Ohio Second District Court of Appeals first issued an opinion in the present matter on September 17, 2021, with a Notice of Final Judgment Entry filed on September 20, 2021. The Supreme Court of Ohio initially accepted partial jurisdiction on February 15, 2022. *State v. Gapen*, No. 2021-1336, 2022-Ohio-397, 165 Ohio St. 3d 1540, 2022 Ohio LEXIS 330, 180 N.E.3d 1169 (Ohio). The Supreme Court of Ohio subsequently dismissed the matter on April 26, 2022, as having been

improvidently accepted. *State v. Gopen*, No. 2021-1336, 2022-Ohio-1328, 2022 Ohio LEXIS 827, 2022 WL 1216313 (Ohio).

This Court's jurisdiction is timely invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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

A. Fifth Amendment, which provides in relevant part:

“No person shall . . . be deprived of life, liberty, or property, without due process of law.”

B. Sixth Amendment, which provides in relevant part:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

C. Eighth Amendment, which provides:

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

D. Fourteenth Amendment, which provides in relevant part:

“No state shall . . . deprive any person of life, liberty, or property, without due process of law.”

STATEMENT OF THE CASE

This case is about what happens when state courts use procedural rules to deny a criminal defendant numerous federal constitutional rights. First, the Ohio state courts used state procedural rules to deny Larry Gapen any chance to investigate, develop, and timely present competent, sworn evidence of a slew of constitutional errors. And then later, after Gapen was granted discovery process by a federal habeas court and was finally able to obtain the competent, sworn evidence to present to the state court, the state court instead blamed him for not doing so earlier and applied state procedural rules to refuse to let Gapen litigate the newly discovered claims. Because of that whipsaw use of Ohio's state procedural rules, Gapen's federal constitutional rights are indisputably trammelled by the state courts, but those same state courts leave him without recourse, inflicting additional federal constitutional injury instead.

The facts are troubling. A day or so after Gapen's capital trial concluded with a death sentence verdict, Juror Nedostup informed the trial court that Nedostup believed in—and applied in Gapen's case—the extrajudicial code of *lex talionis*, under which a death sentence is mandatory for a murder conviction, regardless of any mitigating evidence. Juror Nedostup also later admitted, while being deposed under oath, that he shared this extrajudicial code of law and its principles with other jurors during sentencing deliberations. Under this Court's precedents, that effectively made Juror Nedostup a witness against Gapen who introduced unadmitted evidence to the jury, outside the presence of counsel, and without being

subjected to confrontation and cross-examination. It also made Juror Nedostup an impermissible, biased juror who refused to give full, meaningful consideration and full, meaningful effect to Gapen's mitigation evidence. But Gapen's counsel were never informed, around the time of trial or soon thereafter, about these egregious violations of this Court's precedents and Gapen's federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendment. And, as it turns out, the myriad constitutional violations related to Juror Nedostup's belief in, application of, and discussion with other jurors about *lex talionis* was just the start. Gapen's counsel, once granted the necessary court process, eventually uncovered numerous other instances of juror, evidentiary, and judicial misconduct.

Unfortunately, the state court stymied Gapen's attempts to protect his federally guaranteed rights. Indeed, to the contrary: although Gapen followed the rules to litigate his case at every stage, the state court blocked Gapen's efforts to obtain competent evidence demonstrating trial- and sentencing-stage errors. Consequently, the state court prevented Gapen from being able to fully develop, present, and litigate, those constitutional violations.

First the state trial court, in the immediate wake of trial, prohibited Gapen from doing any juror investigation for an indeterminate period of time while some matters about the inconsistent verdicts were resolved, and reiterated that Ohio Rule of Evidence 606(B)'s *aliunde* rule would be enforced to preclude any evidence obtained from jurors. That court order prevented Gapen's trial counsel from investigating potential misconduct and obtaining the sworn affidavits that Ohio

Criminal Rule 33(B) requires to support a new-trial motion. But filing a new-trial motion without first obtaining sworn, competent evidence from jurors would have been an exercise in futility, to Gapen's detriment, because even filing a timely new-trial motion accompanied by a sworn juror affidavit was a venture doomed to fail under the *aliunde* rule. *See Nian v. Warden*, 994 F.3d 746, 754 (6th Cir. 2021) (“[N]either the Ohio Court of Appeals nor the trial court considered Nian’s Sixth Amendment claim because Ohio Rule of Evidence 606(B) required the juror’s testimony to be excluded since” it was insufficient evidence under the *aliunde* rule when Nian’s evidence was in the form of a juror’s affidavit). Similarly, filing a timely motion for new trial without supporting it with sworn affidavits from the jurors would have been fruitless under Rule 33(A)(6) and Rule 33(C). Thus, even if Gapen could have filed a new-trial motion within the 14-day or 120-day period that Rule 33(B) requires, it would have been a futile gesture without the accompanying evidence: evidence which the state court barred him from even seeking.

Then, in state post-conviction proceedings, Gapen was able to uncover a limited juror misconduct claim involving Juror Nedostup purportedly reading religious materials during court proceedings. But several jurors refused even to speak with Gapen’s counsel without a subpoena, and the jurors who were willing to speak were unwilling to sign sworn affidavits attesting to their disclosures. Gapen explained in his post-conviction discovery motion that he needed formal court process, including the power to issue subpoenas and take depositions, to properly investigate and litigate potential violations of his federal constitutional rights. But

the state court thwarted Gapen’s efforts on that front too, denying his discovery request without explanation. Then, having denied Gapen the chance to obtain the necessary sworn testimony, the court rejected his narrow, “reading religious materials” juror misconduct claim as unsupported by competent evidence. The state appellate court affirmed that denial of discovery and denial of the narrow claim.

Consequently, Gapen did not learn about or obtain competent, sworn evidence to support what was later revealed to be a broad range of egregious violations of his federal constitutional rights until federal habeas corpus proceedings. There, he obtained leave to take discovery on matters related to that previously asserted, narrower jury misconduct claim.

Federal habeas depositions unearthed that Gapen’s sentencing proceedings were shot through with numerous constitutional violations, including the first reveal of the many violations related to *lex talionis*. For example, in addition to learning about Juror Nedostup’s belief in, and application of, *lex talionis* principles, and obtaining documentary evidence of an email that Juror Nedostup sent to the trial court outlining his actions during deliberations, Gapen discovered that several pieces of highly inflammatory and prejudicial evidence, including gratuitous bloody photographs and an envelope in which the victim’s teeth could be heard rattling around, were sent to the jury for its sentencing deliberations, despite the trial court previously excluding those exhibits. Other unadmitted, excluded exhibits likewise went to the jury during deliberations, and jurors conceded at least some of those unadmitted-but-considered exhibits impacted their verdict. That federal habeas

discovery also revealed that a different juror, Juror Maguire, had subsequently informed the trial court about those evidentiary errors, but the trial court failed to notify any counsel or take any other remedial action after learning about those errors. The state appellate court even acknowledged that error, explaining that “we agree that the court should have notified counsel after learning about” the extrinsic evidence that went to the jury. *State v. Gopen*, 2d Dist. Montgomery No. 28808, 2021-Ohio-3252, 2021 Ohio App. LEXIS 3174, 2021 WL 4241168, ¶ 68 (Ohio Ct. App. 2d Dist.). But it is undisputed that the trial court never did so, let alone hold a hearing under *Remmer v. United States*, 347 U.S. 227, 229 (1954), thereby denying Gopen’s rights to a fair trial, due process, and fair and impartial jurors, as guaranteed by the federal Fifth, Sixth, Eighth, and Fourteenth Amendments.

Juror Maguire subsequently told Gopen’s federal habeas counsel that the unadmitted evidence in the jury room swayed his vote for death. Juror Maguire also divulged, for the first time during federal habeas discovery, that an attempted murder-suicide with facts similar to Gopen’s case had occurred in a duplex Maguire owned, while Juror Maguire was living in the other half of that structure—facts that Maguire had failed to disclose during voir dire and which undermined his ability to be fair and unbiased. Under this Court’s long-standing precedents, Gopen has federal constitutional rights to a fair trial which includes a right to a fair, impartial, and unbiased jury that considers his case solely on the evidence presented in open court subjected to the procedural protections that are constitutionally required, and a right to a jury that is free from extraneous

influences such as “private communication, contact, or tampering” in its deliberations. *Remmer*, 347 U.S. at 229. The newly discovered evidence amply demonstrates that each of those rights were violated during Gapen’s trial. Gapen also had federally protected rights to due process that required the trial court to inform his counsel once the court became aware of the extraneous evidence in the jury room during deliberations, and the other constitutional errors unknown to Gapen at that time.

Critically, all of these violations of Gapen’s constitutional rights, and more, were not sufficiently uncovered until federal habeas discovery proceedings, rather than state post-conviction or shortly after trial, precisely because Gapen followed the rules at every step along the way: immediately after trial, the court forbade Gapen’s trial counsel from doing any juror investigation, even as Ohio’s *aliunde* rule, as it then existed, prohibited any evidence from a juror regarding extraneous prejudicial information, or about any outside influence, unless some “outside evidence of that act or event has been presented.”¹ But that effectively precluded

¹ See Glen Weissenberger & A.J. Stephani, Ohio Evidence Courtroom Manual, § 606, Competency of Juror as Witness, 163–65 (2015 ed.), reproduced here in Appendix G. Two decisions from the United States Court of Appeals for the Sixth Circuit concluded the *aliunde* rule violated the federal constitution. *Nian v. Warden*, 994 F.3d 746, 756 (6th Cir. 2021); *Doan v. Brigano*, 237 F.3d 722, 733 & n.7 (6th Cir. 2001), overruled on other grounds by *Wiggins v. Smith*, 539 U.S. 510 (2003). Thus, Ohio amended Rule 606(B) in July of 2022, to “more closely mirror Fed. Evid. R. 606(B), and is intended to address constitutional challenges to the former rule as being violative of a criminal defendant’s constitutional rights because it infringed upon the defendant’s fair trial rights.” See Ohio Evid. R. 606(B) (amended July 1, 2022) and Staff Notes to July 1, 2022 Amendment, reproduced here in Appendix H, and available at

<https://www.supremecourt.ohio.gov/LegalResources/Rules/evidence/evidence.pdf>. A

Gapen from earlier raising his claims with a timely Ohio Criminal Rule 33 motion for new trial, because the jurors themselves were the source of Gapen's information about the misconduct and evidentiary errors. And even if he could have filed a timely Rule 33 motion for a new trial, it would have been dismissed as unsupported, because the Rule requires that any such motion be supported by sworn affidavits. Ohio Crim. R. 33(C), R. 33(A)(6).

Then, in state post-conviction proceedings, Gapen raised his suspicions of the limited misconduct and evidentiary claims he knew about after informal interviews with a few jurors. Gapen explained that even the jurors who were willing to speak informally to his post-conviction counsel were unwilling to sign a sworn affidavit, and thus he needed formal court process to fully investigate the misconduct. But the state courts denied this request too.

Not until federal habeas corpus proceedings was Gapen able to obtain sworn, competent evidence to support his claims. After Gapen uncovered the wide range of misconduct in federal habeas proceedings, and once it became clear the State of Ohio would not waive exhaustion, he did what this Court has instructed—he promptly returned to state court to give that court the opportunity to consider his newly discovered claims.

Ohio Criminal Rule 33 requires a criminal defendant to file a motion for new trial based on newly discovered evidence within 14 days or 120 days of a verdict,

direct comparison of the changes in Rule 606(B) as of July 1, 2022, which eliminated the *aliunde* rule, can be found in Appendix I.

depending on certain considerations not relevant here. The distinction is irrelevant because Gapen did not discover the new evidence until after that 120-day mark, nor could he have learned about the misconduct in time to file a timely motion—to say nothing about obtaining competent evidence to support such a motion—after the trial court prohibited his counsel from doing any post-trial juror investigation and invoked Ohio’s *aliunde* rule, and again when it denied his request for discovery in post-conviction. Thus, once Gapen obtained—in federal habeas proceedings several years later—the court process necessary to collect the sworn, competent evidence required to support a Rule 33(B) motion, Gapen filed a motion seeking leave to file a delayed Rule 33(B) motion for new trial based on the newly discovered evidence. To obtain court leave, Rule 33(B) requires the defendant to show that he was “unavoidably prevented” from filing a timely new trial motion. That, in turn, has been defined under Ohio law to mean the defendant had no knowledge of the ground supporting the new-trial motion, and could not have timely learned of the existence of that information with the exercise of reasonable diligence, which requires “some effort,” *State v. Metcalf*, 2d Dist. Montgomery No. 26101, 2015-Ohio-3507, ¶ 11 (Ohio Ct. App. 2d Dist.), or “reasonable diligence,” Crim. R. 33(A)(6); *State v. Sutton*, 8th Dist. Cuyahoga Nos. 108748 and 108750, 2021-Ohio-854, ¶ 156 (Ohio Ct. App. 8th Dist.) (applying “reasonable diligence” standard); *State v. Walden*, 10th Dist. Franklin No. 84AP-31, 19 Ohio App. 3d 141, 146, 483 N.E.2d 859 (Ohio Ct. App. 10th Dist. 1984) (same); *see also DiCenzi v. Rose*, 452 F.3d 465, 470 (6th Cir. 2006).

But having thwarted Gapen’s earlier efforts to uncover and litigate these irregularities, the Ohio court now obstructed Gapen once more, refusing to grant him leave after unfairly blaming him for not acting earlier and demanding not “some effort” or “reasonable diligence,” but rather maximum, extraordinary, and productive—albeit futile—effort from Gapen, while standing directly in the way of those efforts. Instead, the state court unreasonably concluded that since the errors occurred at the time of Gapen’s trial, Gapen knew or should have known about the entire range of errors at that time, and thus Gapen was not “unavoidably prevented” from filing a timely motion within either 14 days or 120 days following the jury’s verdict.² The court posited that Ohio’s post-conviction statute does not grant a petitioner the right to conduct discovery, and that Gapen didn’t need a subpoena to talk to jurors anyway. But that reasoning fails to address the heart of the matter: the trial court prevented Gapen from obtaining the sworn evidence necessary to support a motion for new trial, whether timely or delayed. Instead, it ordered Gapen’s trial counsel to refrain from interviewing jurors, and then refused to give him the formal court process he needed.

² The court also affirmed denial on the basis of a second consideration, a non-textual “reasonableness” timing requirement under Ohio Crim. R. 33(B). *See Gapen*, 2021-Ohio-3252, ¶¶ 64, 68, 70–82. But the Supreme Court of Ohio subsequently held that the text of Rule 33 does not contain such a reasonableness requirement, and that the Ohio courts may not apply that non-textual requirement to Rule 33 motions. *State v. Bethel*, No. 2020-0648, 2022-Ohio-783, 2022 Ohio LEXIS 565, 2022 WL 838337, ¶¶ 51–58 (Ohio 2022).

Consequently, the state court unfairly and unreasonably applied state procedural rules to perpetuate, rather than review and remedy, the numerous violations of Gapen's federal constitutional rights. That, in turn, creates additional federal constitutional violations. Specifically, the Ohio court's application of state procedural rules—at least one of which has since been amended to cure the very type of error raised here—to bar any consideration of the federal constitutional violations Gapen raised in his motion for leave inflicts specific, additional violations of Gapen's rights to due process and a fair trial, because it denied him any chance to protect those other federal rights.

At bottom, the Ohio courts have prevented Gapen from being able to protect his federal constitutional rights. First, the trial court prohibited Gapen from doing what was necessary to investigate, support with sworn evidence, and litigate, in a timely manner under Rule 33(B), potential jury misconduct. Then, in post-conviction, the state courts refused to grant the formal court process that Gapen required to adequately investigate, develop, support, and litigate federal constitutional violations inflicted by a narrow jury misconduct claim and potentially other constitutional violations. And now, with Gapen having lifted the veil on numerous federal constitutional violations arising from jury misconduct and evidentiary errors, the state trial and appellate courts inflict added insult: rather than permitting Gapen to protect his constitutional rights identified here, the state court blames Gapen for not doing earlier that which the courts refused to permit

him to do, and then uses Gapen's state-imposed impediments to justify refusing to even consider the broad range of newly uncovered constitutional violations.

The state courts used state procedural rules to preclude consideration of Gapen's federal constitutional violations, thereby denying Gapen any chance to protect a vast swath of his federal constitutional rights, including the rights to: due process; a fair trial; a fair, impartial, and unbiased jury that considers the case solely on the evidence presented in open court, subject to the procedural protections that are constitutionally required; a jury that is free from extraneous influences during its deliberations; the presence at critical stages of effective assistance of counsel; confront and cross-examine the evidence and witnesses presented against him; have his jury decide the case solely on the information presented and admitted in open court; have his capital sentencing jury be willing and able to give full, meaningful consideration to his mitigation evidence; have his capital sentencing jury be willing and able to give full, meaningful effect to his mitigating evidence; have his verdicts and sentence based solely on the evidence presented at trial and the court's instructions as to the applicable law; have a jury free from the presence of a juror who would automatically vote for the death penalty in every case because such a juror would fail in good faith to consider the evidence of aggravating and mitigating evidence as the instructions require him to do; have a trial by an impartial jury free from outside influences, with a verdict based on evidence received in open court, not from outside sources; and to have a trial court that becomes aware a defendant's constitutional rights have been violated to disclose

that information to the defense. These rights are protected under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Gapen raised these violations of his federal constitutional rights in his motion for leave to file a delayed new-trial motion, but the trial court rejected his arguments. *See Appendix B.* He again asserted these violations of his federal constitutional rights in his appeal to the Ohio Court of Appeals for the Second District, but that court likewise rejected his appeal. *See Appendix A.* He also raised in his appellate briefing the additional violations of his federal constitutional rights wrought by the state trial court’s decision, and the appellate court rejected those claims too. *See id.* And he raised these violations of his constitutional rights in his motion urging the Supreme Court of Ohio to accept jurisdiction over his discretionary appeal, but that court, too, declined to address his claimed constitutional violations. *See Appendix C.*

The state court’s denial of Gapen’s motion for leave to file a delayed motion for new trial cemented the application of Ohio’s unconstitutional *aliunde* rule against Gapen, which blocked him from investigating, identifying, and litigating his claims earlier. The court’s denial on the basis of Gapen’s failure to satisfy the “unavoidable prevention” requirement in Rule 33(B) further insulates from remedial review, on the basis of state procedural rules, numerous violations of Gapen’s federal constitutional rights. And, in so doing, the state court inflicts new, additional constitutional injury: that is, using state procedural rules to preclude consideration of federal constitutional violations itself independently violated

Gapen’s federally protected rights to due process and a fair trial, in conflict with decisions by the United States Court of Appeals for the Sixth Circuit and this Court’s relevant decisions.

Notably, the State has not disputed that the alleged misconduct and trial errors occurred. Nor does the State contest that the alleged conduct violated an array of Gapen’s federal constitutional rights. The federal district court has already concluded that Gapen was sufficiently diligent in his investigation. *See Decision and Entry, Gapen v. Bobby*, No. 3:08-cv-00280, ECF No. 122, at PageID 3052–56 (S.D. Ohio Mar. 6, 2012); *Decision and Order, Gapen v. Bobby*, No. 3:08-cv-00280, ECF No. 169, at PageID 4676–78 (S.D. Ohio Dec. 7, 2012). And the record evidence establishes that some of the errors involving the jury’s composition and absence of counsel were structural, while the other constitutional errors had a prejudicial effect on Gapen’s trial outcome because the jurors have admitted as much. Thus, there is a reasonable probability of a different outcome at trial but for those errors. Yet the state court has refused to remedy those federal constitutional violations, in violation of this Court’s well-settled precedents. Under this Court’s holding in *Trevino v. Thaler*, a state court must afford a “meaningful review” of a prisoner’s constitutional claims. 569 U.S. 413, 428 (2013). But here, the state court refused to do that. This Court should intervene.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Ohio state court failed to protect a broad array of Gapen's federal constitutional rights in a way that conflicts with this Court's relevant decisions. S. Ct. R. 10(c).

The Court should also grant review because this case provides the Court a timely opportunity to consider important questions of federal law that have not been, but should be, settled by this Court. *Id.* Specifically, this Court should grant certiorari to clarify that the Ohio state court's use of state procedural rules—specifically the state court's prohibition on trial counsel investigating jurors and its invocation of the *aliunde* rule in Ohio Rule of Evidence 606(B), and the timing and substantive requirements under Ohio Crim. Rule 33 as applied in Gapen's case—to preclude meaningful review of Gapen's federal constitutional rights itself violates the federal constitution.

Relatedly, this Court should grant certiorari because the Ohio state court of last resort has decided an important federal question in a way that conflicts with several decisions by the United States Court of Appeals for the Sixth Circuit holding that, under this Court's precedent, state procedural rules cannot be used to preclude protection of a defendant's federally protected constitutional rights. *See Nian v. Warden*, 994 F.3d 746, 756 (6th Cir. 2021); *Doan v. Brigano*, 237 F.3d 722, 733 & n.7 (6th Cir. 2001). The Ohio state court of last resort also decided an important federal question in a way that conflicts with decisions by the Sixth Circuit holding that well founded allegations of jury misconduct, jury bias,

and extrinsic evidence invading the jury’s deliberations require, as a matter of due process, the trial court to conduct an investigation that includes an evidentiary hearing under *Remmer v. United States*, 347 U.S. 227 (1954), and *Smith v. Phillips*, 455 U.S. 209, 217–18 (1982). *See Cunningham v. Shoop*, 23 F.4th 636, 662 (6th Cir. 2022), *petition for cert. filed*, (U.S. June 16, 2022) (21-1587); *United States v. Lanier*, 988 F.3d 284, 295 (6th Cir. 2021); *Ewing v. Horton*, 914 F.3d 1027, 1030 (6th Cir. 2019); *Nevers v. Killinger*, 169 F.3d 352, 373 (6th Cir. 1999), *abrogated on other grounds by Harris v. Stovall*, 212 F.3d 940 (6th Cir. 2000); *United States v. Herndon*, 156 F.3d 629, 637 (6th Cir. 1998).

I. This Court should grant certiorari because the Ohio state court failed to protect Gapen’s federal constitutional rights in a way that conflicts with this Court’s relevant decisions.

This Court should grant certiorari in this case because the state court decision inflicts significant injury to Gapen’s federal constitutional rights, in conflict with this Court’s precedents. S. Ct. R. 10(c). This Court has held that “the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant’s right of confrontation, of cross-examination, and of counsel.” *Parker v. Gladden*, 385 U.S. 363, 364–65 (1966) (per curiam) (internal quotation marks omitted); *see also Crawford v. Washington*, 541 U.S. 36, 68 (2004) (“Where testimonial evidence is at issue, [] the Sixth Amendment demands . . . a prior opportunity for cross-examination.”); *Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965). Furthermore, a defendant such as Gapen has a right to the presence of counsel during critical

stages of trial, including the jury's receipt of evidence. *See, e.g., United States v. Cronic*, 466 U.S. 648, 659–60 & nn. 25–26 (1984); *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978); *Penson v. Ohio*, 488 U.S. 75, 88–89 (1988).

In Gapen's case, it is uncontested that the jury received and considered during its deliberations evidence that was unadmitted, not submitted by a witness in a public courtroom, and instead submitted without any judicial protection of Gapen's right of confrontation, of cross-examination, or presence of counsel. For instance, Juror Nedostup's introduction of the extra-legal code of *lex talionis* into the jury's deliberations amounted to him becoming a witness against Gapen, without Gapen being afforded the opportunity to confront him, nor to cross-examine him, as guaranteed by the Sixth Amendment. And, during that critical stage of Nedostup introducing the jury to (impermissible, extra-judicial code of law) evidence against Gapen, Gapen had no counsel present to protect his rights, in violation of his Sixth Amendment right to the presence and assistance of effective counsel under *Cronic*. The same applies to other unadmitted evidence that the state trial court nevertheless sent to the jury for its consideration during deliberations, including highly inflammatory bloody photographs, the envelope containing the victim's loose teeth, and documents that jurors used to speculate about Gapen's actions and his motives. Each such exhibit was an extraneous influence, extrinsic evidence not received in open court, presented to the jury outside the presence of Gapen's counsel, not from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of

counsel, but rather in secret, all in violation of black letter law protecting Gapen's federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In addition, this Court has long held that the rights to a fair trial and due process require that verdicts and sentences must be based solely on the evidence presented at trial and the court's instructions as to the applicable law. *Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965); *Sheppard v. Maxwell*, 384 U.S. 333, 351, 362 (1966) (“Due process requires that the accused receive a trial by an impartial jury free from outside influences”; the jury’s verdict must be based on “evidence received in open court, not from outside sources”); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (stating that a juror’s verdict “must be based upon the evidence developed at the trial”). And, a criminal defendant’s rights to a fair trial and due process require, among other things, a jury that is fair, impartial, and unbiased, and a jury which will consider the case solely on the evidence presented in open court, subject to the procedural protections that are constitutionally required; furthermore, a jury must be free from extraneous influences such as “private communication, contact, or tampering” in its deliberations to protect a defendant’s constitutional right to a fair trial. *Remmer v. United States*, 347 U.S. 227, 229 (1954); *Turner*, 379 U.S. at 472–73; *Irvin*, 366 U.S. at 721–22; *Mattox v. United States*, 146 U.S. 140, 149 (1892); *Parker*, 385 U.S. at 364; *see also Gardner v. Florida*, 430 U.S. 349, 362 (1977); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984); *Smith v. Phillips*, 455 U.S. 209, 215 (1982); *id.* at 222 (O’Connor, J., concurring). Each of

these rights was violated in Gapen’s trial. The state court’s decision, insulating from meaningful review each of these violations of Gapen’s federal constitutional rights, cannot be squared with this Court’s long-standing precedent.

Additionally, a non-zero number of Gapen’s jurors were unable to be fair, impartial, and unbiased based on their own personal experiences or personal belief systems that they applied during deliberations. Juror Maguire and Juror Nedostup did not answer honestly their jury questionnaires or questions put to them during voir dire. Had those two jurors been honest in their answers, counsel and the trial court each would have had obligations to dismiss Maguire and Nedostup for cause.

Frazier v. United States, 335 U.S. 497, 511 (1948); *Miller v. Webb*, 385 F.3d 666, 675 (6th Cir. 2004) (“When a trial court is confronted with a biased juror, as in this case, the judge must, either *sua sponte* or upon a motion, dismiss the prospective juror for cause.”). At least three jurors admitted—some under oath—that they considered impermissible extraneous evidence or otherwise applied an extra-judicial code of law in reaching their verdict. In short, Gapen did not receive the fair trial and due process he was guaranteed as a matter of federal constitutional right, and each of the constitutional rights identified herein were violated during his trial.

Furthermore, Jurors Maguire and Nedostup each admitted that he had communicated to the trial court in the immediate aftermath of trial to disclose some of the troubling matters recounted herein. The trial judge had a constitutional obligation to tell Gapen’s attorneys about the extraneous evidence that had been in the jury room during deliberations, and the other potential constitutional errors

related to the jury's deliberations. If a court is aware that a defendant's constitutional rights have been violated, due process requires the court to disclose that information to the defense. *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (explaining that “[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen”); *see also id.* (making clear that “the trial court has a duty to take steps to ensure that the jury votes solely on the basis of the evidence presented at trial”). But it is undisputed that the trial judge never informed Gapen’s counsel about those critical disclosures, let alone held a *Remmer* hearing, likewise depriving Gapen of a fair trial and due process guaranteed by the federal Fifth, Sixth, Eighth, and Fourteenth Amendments. *Ewing v. Horton*, 914 F.3d 1027, 1033 (6th Cir. 2019) (holding that defendant had shown “a due process violation . . . for denial of an opportunity to prove prejudice” from jury’s exposure to extrinsic evidence).

Moreover, in capital cases, like Gapen’s, additional constitutional rights are implicated by the newly discovered evidence. This Court has repeatedly emphasized that the Eighth and Fourteenth Amendments require that capital juries must be able and willing to give full, meaningful consideration, and full, meaningful effect, to all relevant mitigating evidence. *See, e.g., Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007); *Penry v. Lynaugh*, 492 U.S. 302, 321 (1989) (“*Penry I*”); *Hitchcock v. Dugger*, 481 U.S. 393, 398–99 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586,

604 (1978). A capital juror “may not refuse to consider[] any constitutionally relevant mitigating evidence.” *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998). To empanel such a juror violates Gapen’s constitutional rights under the Eighth Amendment as announced in this Court’s decision cited above, and also under the Due Process Clause of the Fourteenth Amendment, *see Morgan v. Illinois*, 504 U.S. 719, 729 (1992). Yet at least one juror, Juror Nedostup, personally contacted the trial court to advise the court that he did *not*—indeed, *would never*—consider Gapen’s mitigating evidence, and that he did not and would not give any effect to any mitigating evidence. Nedostup effectively admitted in his communication to the trial court that he refused to consider any of Gapen’s relevant mitigating evidence. Juror Nedostup admitted the same when Gapen finally had the court-authorized process to put him under oath.

Other jurors, too, revealed that they voted for death based on extrinsic, extraneous evidence or their own (mis)application of the evidence and the law, which further violated Gapen’s federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. But once again, the state court failed completely to protect these core federal constitutional rights when it refused to consider Gapen’s claims and, instead, blamed him for failing to do that which the state court itself had prevented Gapen from doing.

In addition, a fundamentally fair trial is also guaranteed as a matter of basic due process, separate and distinct from the other rights outlined above. *Morgan*, 504 U.S. at 727 (“[D]ue process alone has long demanded that, if a jury is to be

provided the defendant . . . the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment.”); *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (“Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.”); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (finding a due process violation when a “death sentence was imposed, at least in part, on the basis of information which [a defendant] had no opportunity to deny or explain.”); *Sheppard*, 384 U.S. at 351; *Turner*, 379 U.S. at 472 (“The requirement that a jury’s verdict ‘must be based upon the evidence developed at the trial’ goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.”); *Irvin*, 366 U.S. at 721–22; *In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”) Gapen’s right to due process as articulated in this Court’s decisions was egregiously violated, but now the state court refuses to protect those rights, in defiance of this Court’s long-standing precedent.

Each of the above-listed rights were violated when the unadmitted evidence was sent back to Gapen’s jury for its consideration during deliberations at the trial phase and then at the sentencing phase of Gapen’s capital trial, and when the trial court, having learned of those errors, did nothing to protect Gapen’s rights as the constitution and this Court’s precedents require. All of this unadmitted evidence, including the bloody photographs, the victim’s teeth, the paper documents that Juror Maguire considered to concoct his own theories about Gapen’s activities, and

the extra-judicial code of law that Juror Nedostup subscribed to and injected into deliberations, constituted extraneous prejudicial information that contained the court's imprimatur and that the jurors considered at Gapen's trial. The jury considered the extrinsic evidence during a critical stage of a criminal proceeding, and the jury received that evidence with a complete absence of Gapen's counsel and without Gapen having an opportunity for cross-examination or confrontation of the witnesses and evidence offered against him. The scope and nature of the unadmitted evidence was such that it meant the jury was unable—indeed, unwilling—to give full, meaningful consideration and effect to all of Gapen's relevant mitigating evidence. The jury's receipt and consideration of the unadmitted evidence, as well as the trial court's failure to protect Gapen's rights when it learned of those violations, denied Gapen's rights to due process, a fair trial, and the host of other rights discussed herein that are guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

In the face of these undisputed improprieties, the state courts nevertheless deigned to do nothing. This matter comes to this Court on an appeal from a state court decision, not as part of federal habeas corpus review. Gapen has done that which this Court has instructed state prisoners to do: take his claimed constitutional violations to the state courts for a merits decision first. But the state court failed to protect Gapen's federal constitutional rights, and now only this Court can rectify those violations and vindicate Gapen's rights fully and completely. These

violations cry out for this Court’s intervention: this Court should grant certiorari and reverse.

II. This Court should grant certiorari to clarify that the Ohio state court’s use of state procedural rules to preclude meaningful review of Gapen’s federal constitutional rights itself violates the federal constitution’s guarantee of due process.

The Ohio state court of last resort here is the Ohio Court of Appeals for the Second District. That court affirmed denial of Gapen’s motion for leave to file a delayed motion for new trial because, it concluded, Gapen could not demonstrate that he was unavoidably prevented from discovering the grounds for that motion within the time to file a timely new-trial motion.

But Gapen followed the rules in state court. Yet he is now being penalized for that compliance by the Ohio court’s application of state procedural rules to preclude meaningful review of Gapen’s federal constitutional claims. That denial based on state procedural rules, itself, violates the federal constitution by insulating other violations from any meaningful review. Particularly as it relates to the extrinsic evidence claims and the biased juror claims, those violations are considered presumptively prejudicial under this Court’s precedents. *Remmer*, 347 U.S. at 229. A defendant in such a situation is entitled to a meaningful opportunity to demonstrate the communications, the “circumstances, their impact[,]” and “whether or not [the contacts were] prejudicial, in a hearing with all interested parties permitted to participate.” *Id.* at 229–30. But the Ohio state court denied Gapen this critical avenue of protecting his core federal constitutional rights, thereby inflicting new constitutional injury on Gapen as well.

Specifically, three aspects of the proceedings below demonstrate the unfairness of the state court’s application of procedural rules to discard Gapen’s claims without regard for his federal constitutional rights. First, the trial court expressly ordered Gapen’s trial counsel to not investigate jurors after counsel had suggested that the verdict was an improperly reached compromise. And the trial court also invoked the *aliunde* rule in Ohio Rule of Evidence 606(B), to tell trial counsel that any evidence about misconduct obtained from juror investigations would not be admitted anyway. In doing so, the trial court defied this Court’s precedents from *Remmer*, *Smith*, and others in that line of cases that require the trial judge to investigate allegations of juror bias and misconduct, including with an evidentiary hearing. *Remmer*, 347 U.S. 229–30; *Smith v. Phillips*, 455 U.S. 209, 217–18 (1982); *Williams v. Taylor*, 529 U.S. 420, 442 (2000).

Second, the trial court denied Gapen in post-conviction proceedings that which he needed to fully investigate, present, and litigate his constitutional claims with competent, sworn evidence as Ohio law required: court-authorized process in the form of discovery, including sworn depositions. The court denied that request without explanation, and then the appellate court upheld that denial based on the irrelevant and circular reasoning that Gapen could not obtain discovery because there was no statutory right to discovery. That is a different question than whether Gapen *tried* to obtain the evidence—he did—or whether he was able to successfully obtain the required sworn evidence without court process—he was not, because jurors refused to speak to his counsel or otherwise refused to provide any sworn

affidavits in the absence of a court-issued subpoena. That state court denial, too, was a violation of Gapen's due process rights under *Remmer*, *Smith*, and *Williams*, *supra*, in addition to a violation of the other numerous federal constitutional rights discussed herein.

And third, the trial court compounded that unfairness when it rejected Gapen's motion for leave to file a delayed new-trial motion, blaming Gapen for allegedly knowing or having reason to know about the misconduct evidence and not investigating further in the wake of his trial. That the court came to this conclusion, even after Gapen made clear that he could only obtain the required, sworn evidence with court process, and even where Gapen did not obtain discovery powers until federal habeas corpus proceedings several years later, is a further violation of his federal constitutional rights. That decision inflicted further due process injury to Gapen by denying him the opportunity to present evidence at a *Remmer* hearing, and further cemented the violations of Gapen's federal constitutional rights discussed herein.

At bottom, the state court prevented Gapen from obtaining the evidence required to substantiate his claims, and then blamed Gapen for not earlier investigating, obtaining, and presenting that evidence. The state court refused to protect Gapen's federal constitutional rights because, it concluded, Ohio procedural rules required Gapen to do more to protect his rights—even when the primary impediment to Gapen protecting his rights was the state court itself. That, too, violates Gapen's right to due process, above and beyond the numerous federal

constitutional violations set out above. *See Remmer*, 347 U.S. at 229–30; *Smith*, 455 U.S. at 217; *Williams*, 529 U.S. at 442. Consequently, this Court should grant certiorari to clarify that Ohio state courts may not use Ohio’s state procedural rules, including Ohio Criminal Rule 33, to deny a criminal defendant any chance to protect his federal constitutional rights, particularly when the state courts had previously denied him the ability to vindicate those rights in earlier proceedings.

III. This Court should grant certiorari because the Ohio state court of last resort decided an important federal question in a way that conflicts with decisions by the United States Court of Appeals for the Sixth Circuit holding that, under this Court’s precedent, state procedural rules cannot be used to preclude protection of a defendant’s federally protected constitutional rights.

The Ohio court’s refusal to protect Gapen’s constitutional rights, and that court’s improper placing of blame on Gapen for failing to do that which the courts themselves prevented him from doing, demands this Court’s intervention for a further reason. Not only does such a denial constitute an independent federal constitutional violation that defies this Court’s precedents, as described above, but also it conflicts with well-established precedent of the United States Court of Appeals for the Sixth Circuit. *See S. Ct. R.* 10(b).

Gapen was prevented by the trial court from obtaining the information he’s now blamed for not earlier uncovering and presenting, due to the trial court’s application of Ohio Rule of Evidence 606(B) and the *aliunde* rule, as well as the trial court’s denial of discovery in post-conviction proceedings. Notably, however, the Sixth Circuit has held that application of the *aliunde* rule—and, by extension, other related state procedural rules—to preclude a defendant from demonstrating

constitutional violations in his criminal trial is impermissible under the federal constitution. First, in *Doan v. Brigano*, 237 F.3d 722, 736 (6th Cir. 2001), *abrogated on other grounds by Wiggins v. Smith*, 539 U.S. 510 (2003), the Sixth Circuit held with respect to Ohio Rule of Evidence 606(B):

[T]he Ohio courts' application of Ohio Evid. R. 606(B) effectively denied Doan the opportunity to show a violation of his Sixth and Fourteenth Amendment rights to confront the evidence and the witnesses presented against him, as well as his right to a jury that considers only the evidence presented at trial. Furthermore, the Ohio courts applied Ohio Rule 606(B) while ignoring Doan's constitutional claim, thereby violating clearly established Supreme Court precedent recognizing the fundamental importance of Doan's constitutional right to a fair trial.

Nian v. Warden, 994 F.3d 746, 754 (6th Cir. 2021) (quoting *Doan*, 237 F.3d at 736).

And second, like in *Doan*, the Sixth Circuit in *Nian* reached a similar holding. The *Nian* court considered a case in which the defendant alleged constitutional violations based on extrinsic evidence submitted to the jury, but the state courts rejected that claim based on state procedural rules, *i.e.*, the *aliunde* rule in Ohio Rule of Evidence 606(B). The court in *Nian*, like the court in *Doan*, ultimately held that it was inappropriate for a state procedural rule to be applied in way that would bar consideration of proof of improper extrinsic evidence and jury misconduct. *Nian*, 994 F.3d at 756. Doing so, the court concluded, prevented a criminal defendant from demonstrating violations of the defendant's rights under the Sixth and Fourteenth Amendments to confront the evidence and witnesses against him, and his right to a jury that considers only the evidence presented at trial. *Id.* Accordingly, the *Nian* court held that this application of state procedural rules "fail[ed] to protect

adequately [the defendant's] constitutional right to a fair trial," which was itself a violation of the defendant's federal constitutional rights. *Id.*

Gapen's case presents essentially the same scenario. The trial court forbade his trial counsel from investigating any jurors, and stated that the *aliunde* rule would preclude any evidence regarding jurors. Then the same trial court, in post-conviction, denied Gapen any discovery necessary to obtain the required sworn evidence to support his post-conviction claims. And the trial court again denied Gapen any chance to obtain a *Remmer* hearing or to otherwise vindicate his federal constitutional rights by blaming Gapen for not doing earlier what he was earlier prohibited from doing by that same court—a ruling the Ohio court of last resort affirmed. Accordingly, the Ohio appellate court's decision, affirming that state procedural rules can preclude protection of Gapen's federal constitutional rights long recognized by this Court, stands in direct conflict with decisions from the United States Court of Appeals for the Sixth Circuit in *Doan* and *Nian*. Certiorari should be granted.

Relatedly, the Sixth Circuit has also made clear that "[w]hen a trial court is presented with evidence that an extrinsic influence has reached the jury which has a reasonable potential for tainting that jury, due process requires that the trial court take steps to determine what the effect of such extraneous information actually was on that jury." *Ewing v. Horton*, 914 F.3d 1027, 1030 (6th Cir. 2019); *see also Nevers v. Killinger*, 169 F.3d 352, 373 (6th Cir. 1999) (citing *Smith v. Phillips*, 455 U.S. 209, 217–18 (1982)), abrogated on other grounds by *Harris v. Stovall*, 212

F.3d 940 (6th Cir. 2000); *Cunningham v. Shoop*, 23 F.4th 636, 662 (6th Cir. 2022), *petition for cert. filed*, (U.S. June 16, 2022) (21-1587); *United States v. Lanier*, 988 F.3d 284, 295 (6th Cir. 2021); *United States v. Herndon*, 156 F.3d 629, 637 (6th Cir. 1998). That is, the Sixth Circuit has held that criminal defendants like Gapen who plausibly allege jury bias or misconduct must be afforded “a meaningful opportunity to demonstrate jury bias,” and failure to do so constitutes a due process violation. *Lanier*, 988 F.3d at 295; *see also Herndon*, 156 F.3d at 637. Due process requires that such a defendant is “entitled to a ‘constitutionally meaningful *Remmer* hearing.’” *Lanier*, 988 F.3d at 295 (quoting *Ewing*, 914 F.3d at 295). The Sixth Circuit in *Lanier* provided extensive discussion to explain what the trial court’s “constitutional obligations” are when it learns of jury bias or misconduct involving extrinsic evidence. *Id.* at 295–98.

Due process, the Sixth Circuit concluded, requires permitting all interested parties to participate in a hearing, at which defense counsel must be permitted to question the jury. That further requires allowing a meaningful investigation into the circumstances of the external communications, the impact of the communications on the jury, and whether the communications were prejudicial. *Id.* at 295–96 (citations omitted). And where, as here, there were allegations of impermissible outside research or evidence reaching the jury, the trial court “must seek at minimum to preserve the relevant data and notify the defendants. Anything less flunks the Supreme Court’s guarantee” of constitutional protections. *Id.* at 296 (citing *Remmer*, 347 U.S. at 230). Here, the trial court never ordered the jurors to

preserve their information regarding the extrinsic evidence, and never notified Gapen's counsel, despite being put on notice by at least two jurors themselves that extrinsic evidence had infected the jury's deliberations. At no point did the trial court ever hold a *Remmer* hearing or otherwise conduct the investigation that are required under the constitution, principles of due process, the Fifth, Sixth, Eighth, and Fourteenth Amendments, *Remmer*, *Smith*, *Williams*, and the line of Sixth Circuit cases discussed above. The Ohio appellate court's decision therefore conflicts with the decisions of not just this Court but those of the Sixth Circuit as well. Certiorari should be granted accordingly.

CONCLUSION

Severe and pervasive juror, evidentiary, and judicial misconduct infected Larry Gapen's capital trial and sentencing verdicts, in violation of numerous constitutional rights. The State of Ohio does not contest that the misconduct occurred. Gapen tried, at each step, to obtain the sworn evidence that Ohio law required him to present to vindicate his constitutional rights. But the state courts blocked him at each point in the process. Now the same courts that prevented Gapen from earlier obtaining and presenting the evidence of those constitutional violations blames Gapen for not doing that which they precluded Gapen from doing, thereby cementing those federal constitutional violations and inflicting further constitutional injury. This Court should grant Gapen's petition and reverse, to ensure that state procedural rules may not be applied in a way that conflicts with

this Court's holdings and those of the federal courts applying those holdings, in violation of Gapen's constitutional rights.

Respectfully submitted this 20th day of September, 2022,

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by:

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