

**No. 22-5675  
Capital Case**

---

**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*

---

**RESPONDENT'S BRIEF IN OPPOSITION**

---

MATHIAS H. HECK, JR.  
Montgomery County Prosecuting Attorney

ANDREW T. FRENCH  
Assistant Prosecuting Attorney  
*Counsel of Record*

Montgomery County Prosecutor's Office  
301 West Third Street, Suite 500  
P.O. Box 972  
Dayton, OH 45422  
(937) 225-4117  
(937) 225-3470 (facsimile)  
[frencha@mcohio.org](mailto:frencha@mcohio.org)

*Counsel for Respondent, the State of Ohio*

**This is a Capital Case**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
STATE LAW PROVISION INVOLVED .....	1
RESTATEMENT OF THE CASE .....	2-7
REASONS FOR DENYING THE PETITION .....	8-18
CONCLUSION .....	19

## TABLE OF AUTHORITIES

### Cases

<i>D.A.'s Office v. Osborne</i> , 557 U.S. 52 (2009) .....	18
<i>Gapen v. Bobby</i> , N.D.Ohio No. 3:08-cv-280, 2017 U.S. Dist. LEXIS 130755, 2017 WL 3524688 (Aug. 14, 2017) .....	5
<i>Johnson v. United States</i> , 544 U.S. 295 (2005) .....	18
<i>State v. Gapen</i> , 819 N.E.2d 1047 (Ohio 2004) .....	2, 3
<i>State v. Gapen</i> , 822 N.E. 812 (Ohio 2005) .....	3, 4
<i>State v. Gapen</i> , 546 U.S. 846 (2005) .....	4
<i>State v. Gapen</i> , No. 21822, 2007 Ohio App. LEXIS 3873, 2007 WL 2405719, (Ohio Ct. App. Aug. 24, 2007) .....	4
<i>State v. Gapen</i> , 882 N.E.2d 444 (Ohio 2008) .....	4
<i>State v. Gapen</i> , 180 N.E.3d 1169 (Ohio 2022) .....	7

### Statutes

28 U.S.C. § 2254(e)(2)(A)(ii) .....	18
Ohio Revised Code § 2953.21 .....	4, 17
Ohio Revised Code § 2953.21(A)(1) .....	17

### Rules

Ohio Crim.R. 33 .....	1, 8
Ohio Crim.R. 33(A) .....	8
Ohio Crim.R. 33(B) .....	6, 8, 14

## STATE LAW PROVISION INVOLVED

This case involves the application of Sections A and B of Rule 33 of the Ohio Rules of Criminal procedure:

### **RULE 33. NEW TRIAL**

**(A) Grounds.** A new trial may be granted on motion of the defendant for any of the following causes affecting materially the defendant's substantial rights:

- (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;
- (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) That the verdict is contrary to law;
- (5) Error of law occurring at the trial;
- (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

**(B) Motion for new trial; form, time.** Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

## RESTATEMENT OF THE CASE

Petitioner Larry Gapen brutally murdered his ex-wife, Martha Madewell, Madewell's first husband (and current boyfriend), Nathan Marshall, and Martha's thirteen-year-old daughter, Jessica Young, by hacking them to death with a chopping maul. Martha's seventeen-year-old son, upon hearing the commotion, woke up to find Gapen in the house but, unaware at the time the Gapen had already killed his mother and sister, did as Gapen told him and went back to bed. Gapen then kidnapped Martha's seven-year-old son and eight-year-old daughter and fled Martha's home. Once arrested, Gapen confessed to police. DNA testing proved that the semen found on Martha's leg and abdomen belonged to Gapen. A full account of the evidence underlying Gapen's crimes is set out by the Supreme Court of Ohio in its decision affirming, in substantial part, Gapen's conviction and sentence on direct appeal. *See State v. Gapen*, 819 N.E.2d 1047 (Ohio 2004). The extensive post-conviction procedural history is set out in the decision of the Ohio Court of Appeals for the Second District, which affirmed the trial court's denial of Gapen's motion for leave to file a delayed motion for a new trial and which Gapen now seeks from this Court a writ of certiorari. *See* App. 5a-14a. The relevant portions for purpose of responding to Gapen's petition for writ of certiorari are the following:

### **A. Conviction, Appeal, and Post-Conviction Relief**

In 2000, the Montgomery County Ohio Grand Jury charged Larry Gapen in a sixteen-count indictment with escape, aggravated burglary, aggravated robbery, rape, and twelve counts of aggravated murder. *Gapen*, 819 N.E.2d at 1057. There

were four counts of aggravated murder for each of Gapen's three victims. Each count of aggravated murder also included five separate aggravating circumstances specifications, thus making Gapen eligible for the death penalty. *Id.*

On June 16, 2001, following a three-week jury trial, Gapen was found not guilty of rape, but guilty as charged on all remaining counts and specifications, including all twelve counts of aggravated murder and each of the five aggravating circumstances specifications attendant to those counts. *Id.* at 1057. Seven days later at the conclusion of the penalty-phase of the trial, the jury recommended that Gapen be sentenced to death for the aggravated murder of Jessica Young by prior calculation and design. *Id.* On all other counts of aggravated murder, the jury recommended a sentence of life imprisonment without the possibility of parole. *Id.* The trial court adopted the jury's recommendation and sentenced Gapen to death for the aggravated murder of Jessica and life without parole for the aggravated murders of Martha and Nathan. *Id.* For all remaining counts, Gapen received an aggregate sentence of twenty-five years in prison, to be served consecutively to his sentences for the aggravated murders. *Id.*

On direct appeal, the Ohio Supreme Court reversed Gapen's conviction for escape and the aggravating circumstances specifications alleging murder during the course of an escape, but affirmed his conviction and sentence on all remaining counts and specifications, including the sentence of death for the aggravated murder of Jessica. *Gapen*, 819 N.E.2d at 1053, 1077, *motion for reconsideration denied State v.*

*Gapen*, 822 N.E.2d 812 (Ohio 2005). This Court denied certiorari on October 3, 2005. *Gapen v. Ohio*, 546 U.S. 846 (2005).

On October 4, 2002, while his direct appeal was still pending, Gapen filed a petition for post-conviction relief with the trial court in accordance with Ohio Revised Code § 2953.21. App. 88a. His petition raised claims of juror misconduct and ineffective assistance of counsel for not presenting a psychological explanation for Jessica's aggravated murder and for not presenting Gapen's testimony during the trial's guilt phase. App. 91a, 94a. The trial court granted the State's motion for summary judgment and denied Gapen's petition without a hearing. App. 88a.

On appeal, the Ohio Second District Court of Appeals affirmed the trial court's summary denial of Gapen's claims of juror misconduct and ineffective assistance of counsel relating to Gapen's testimony during the trial's guilt phase, but reversed the trial court's summary denial of Gapen's claim of ineffective assistance of counsel for not presenting expert testimony in the sentencing phase of the trial to explain why Gapen killed Jessica. App. 93a, 96a, 104a-105a. Following an evidentiary hearing and briefing by the parties on remand, the trial court again overruled Gapen's post-conviction petition, which the court of appeals affirmed. *State v. Gapen*, No. 21822, 2007 Ohio App. LEXIS 3873, 2007 WL 2405719, \*2, \*8 (Ohio Ct. App. Aug. 24, 2007), *appeal not accepted*, *State v. Gapen*, 882 N.E.2d 444 (Ohio 2008).

## **B. Federal Court Proceedings**

On March 10, 2009, Gapen filed a Petition for Writ of Habeas Corpus with the United States District Court for the Southern District of Ohio, which he amended

several times over the next four years. *Gapen v. Bobby*, N.D.Ohio No. 3:08-cv-280, 2017 U.S. Dist. LEXIS 130755, 2017 WL 3524688 (Aug. 14, 2017). As part of his federal litigation, Gapen was granted leave to depose members of the jury, and the depositions occurred between January and May 2012. Gapen ultimately filed a motion with the district court, which the magistrate judge granted on November 12, 2013, asking that the habeas proceedings be stayed and held in abeyance pending the outcome of a motion for a new trial that he intended to file in state court. *Id.* at \*1.

### **C. Motion for Leave to File Motion for New Trial**

A month earlier, on October 16, 2013, Gapen filed a Motion for Leave to File a Delayed Motion for a New Trial with the Montgomery County Ohio Common Pleas Court. Attached to his motion for leave was a proposed motion for a new trial, in which Gapen alleged five grounds for relief:

1. One of the jurors who was seated at his trial was biased against him and incapable of fairly deciding the case, because that juror failed to disclose information during voir dire about a crime that was committed against his neighbor.
2. The jury was in possession of prejudicial evidence during deliberations that had never been admitted or was specifically excluded at trial.
3. The trial judge failed to disclose evidence of constitutional violations that took place after the jury had retired to deliberate, namely that unadmitted evidence had made its way into the jury room, that the judge had an impermissible communication with a juror, that an extra-judicial source of law had been relied upon by at least one juror, and that a biased juror believed that death was the only appropriate sentence for murder.
4. One of the jurors who was seated at his trial was biased against him and incapable of fairly deciding an appropriate sentence because he would automatically vote for death as a punishment for murder.

5. The juror who would automatically vote for death as a punishment for murder adhered to the principle of *lex talionis*, the “law of retaliation,” and shared his beliefs with the other jurors.

Following the filing of the State’s memorandum in opposition to Gapen’s motion for leave and Gapen’s reply, the trial court set the matter for a hearing. Because Gapen was seeking to file a motion for a new trial under Rule 33 of the Ohio Rules of Criminal Procedure that was out of time by more than twelve years, the sole purpose of the hearing was to allow the trial court to determine whether Gapen could show, by clear and convincing proof, that he was unavoidably prevented from filing his motion for a new trial within the time provided by Ohio Crim.R. 33(B). The hearing took place over the course of four dates spanning nearly a year, during which the trial court heard from various attorneys and investigators who had worked on Gapen’s case in one capacity or another since his 2001 conviction. App. 11a-12a.

On April 29, 2020, the trial court issued a 49-page Decision, Order and Entry Overruling Gapen’s Motion for Leave to File Delayed Motion for New Trial. App. 31a. In its decision, the trial court found that “Gapen was not diligent in discovering or litigating his claims,” and that he “failed to prove by clear and convincing evidence that he and/or his counsel could not have learned of the grounds for relief in the exercise of due diligence and that Gapen failed to timely assert his claims herein.” App. 78a. Gapen appealed to Ohio’s Second District Court of Appeals and argued that the trial court abused its discretion in several respects. App. 1a.

On September 17, 2021, the court of appeals overruled each of Gapen's assignments of error and affirmed the trial court's denial of his motion for leave to file a motion for a new trial. App. 1a. In doing so, the court of appeals explained:

The trial court did not abuse its discretion when it found that Gapen failed to prove by clear and convincing evidence that he was unavoidably prevented from discovering the grounds for his claims. Likewise, the trial court did not abuse its discretion when it found Gapen had failed to demonstrate that he acted within a reasonable time or adequately explained the delay in filing his motion for leave to file a motion for a new trial. Finally, the trial court did not abuse its discretion when it did not rule on the merits of Gapen's claims.

App. 29a. The Ohio Supreme Court initially accepted jurisdiction over Gapen's appeal of the court of appeals' decision, *State v. Gapen*, 180 N.E.3d 1169 (Ohio 2022), but two months later dismissed the cause as having been improvidently accepted. App. 82a.

Gapen's petition for writ of certiorari is now before this Court for consideration.

## REASONS FOR DENYING THE PETITION

Larry Gapen seeks a writ of certiorari because he is dissatisfied with the state appellate court's application of the Ohio Rules of Criminal Procedure in affirming the denial of his untimely motion for leave to file a motion for a new trial. Gapen seems to suggest that by holding him to the requirements of well-settled Ohio law, his federal constitutional rights have been violated. He is wrong.

At the heart of the matter is Rule 33 of the Ohio Rules of Criminal Procedure, which provides in relevant part that a trial court may grant a new trial "on motion of defendant for any of the following causes affecting materially his substantial rights: (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial; (2) Misconduct by the jury, prosecuting attorney, or the witnesses for the state \* \* \*." Ohio Crim.R. 33(A)(1)-(2). A motion for a new trial on grounds other than newly discovered evidence "shall be filed within fourteen days after the verdict is rendered." Ohio Crim.R. 33(B). But the trial court may entertain a defendant's motion for a new trial that is filed out of time if the defendant can show, "by clear and convincing proof that [he] was unavoidably prevented from filing his motion for a new trial" within fourteen days of the verdict. *Id.*

Here, the jury returned its verdict finding Gapen guilty in June 2001. He did not file his motion seeking a new trial until October 16, 2013—more than twelve years after the time limitations for filing such a motion had expired. For that reason, Gapen was required under Ohio Crim.R. 33(B) to demonstrate to the trial court, by clear and

convincing proof, that he was “unavoidably prevented” from filing him motion for a new trial within 14 days of the verdict. The trial court found that Gapen had not sufficiently shown that he was unavoidably prevented from timely filing his motion and the Second District Court of Appeals agreed. Both courts were correct.

**A. What Gapen and his attorneys knew and when they knew it.**

In overruling Gapen’s motion, the trial court acknowledged “the material difference between being unaware of the information and being unavoidably prevented from discovering that information in the exercise of due diligence,” and found that “Gapen was not unavoidably prevented from discovering the information in the exercise of due diligence. In fact, Gapen knew of the information upon which he predicates his motion [for a new trial] as early as the trial proceedings, but no later than 2002.” App. 78a. Based upon its review of the evidence presented during the hearing on Gapen’s motion and its assessment of the testimony presented by the team of lawyers who represented Gapen over the decade since his trial, the appellate court agreed with the trial court that years before he filed his motion for leave to file a motion for a new trial, Gapen either had actual knowledge of the information on which he based his allegations of error and misconduct, or could have learned of the information had he and his lawyers exercised reasonable diligence. App. 17a-22a. The reasoning of both courts below was legally sound and factually supported.

Gapen was represented by at least ten highly competent attorneys from the time of his trial until January 2012. App. 17a, 54a. He had two attorneys representing him at trial, three attorneys representing him in his direct appeal to the

Supreme Court of Ohio, two attorneys representing him in his 2002 post-conviction proceedings, and three attorneys representing him in his federal habeas corpus proceedings. Gapen’s attorneys were also not working alone; they had a “team” of individuals assisting them with their investigation. Many of the attorneys and investigators who investigated the various claims that later became Gapen’s grounds for relief testified at the evidentiary hearing on Gapen’s motion for leave. And based upon their testimony and the evidence produced at the hearing, it is clear that the trial court did not abuse its discretion in concluding that Gapen and his representatives knew of the facts underlying his claims, or should have known those facts through the exercise of due diligence, years before Gapen’s motion for leave to file a motion for a new trial was filed.

### **1. Trial Counsel**

At the hearing on Gapen’s motion for leave to file an untimely motion for a new trial, one of his trial attorneys testified that he was unaware of the allegations being lodged by Gapen in his claims for relief until he was told about the claims by Gapen’s federal habeas attorneys in September 2013. App. 45a. Concerning the claim that Juror Nedostup believed in the principle of *lex talionis*, trial counsel testified that he was unaware that the juror held that belief at the time of trial and that Nedostup gave no indication that, if one was convicted of murder, the only acceptable sentencing option was death.

But as both the trial court and court of appeals explained, while Nedostup may not have referred specifically to his belief in *lex talionis*, his jury questionnaire clearly

revealed his position that the death penalty was “[a]ppropriate in every case where someone has been murdered” and his strong agreement with the statement, “The death penalty should **always** be used as the punishment for every murder.” (Emphasis *sic.*) App. 18a-19a, 41a-43a, 73a-74a. Consequently, trial counsel *was* aware at the time of voir dire and trial that Nedostup held the belief that “if somebody is killed, somebody who did it has to be killed in return”; in other words, *lex talionis*.

Additionally, at the time of the sentencing verdict on June 23, 2001, Gapen’s trial counsel believed that the jury had committed misconduct. After the jury’s sentencing recommendation was announced, trial counsel objected to the jury’s recommendation of a sentence of death on only one count of aggravated murder because he believed “the verdicts are inconsistent. It’s the same weight of the mitigating factors and aggravated circumstances in all counts, and Count Thirteen is no different from anything else in that way.” App. 46a. He filed a motion four days after the sentencing verdict was rendered further explaining his argument. App. 46a. Gapen’s trial counsel later testified during the hearings held in the post-conviction proceedings and offered his suspicion that “[t]he jury in my mind violated its oath in this case, and I think that was clear from without any juror affidavits.” App. 24a. He further explained his belief that, at the time the verdict was read, the jury had gone astray and that it had decided for the death penalty on a non-statutory ground. App. 76a. Thus, the fact that trial counsel believed, at the time of trial, that the jury had committed misconduct should have triggered an immediate investigation into the matter to determine what exactly happened. But despite trial counsel’s knowledge

of what he believed was very “clear” juror misconduct occurring in the case, he did not attempt to interview any of the jurors to find out what had happened. Had he done so, it is possible that trial counsel would have discovered within fourteen days of the verdict the very same information that Gapen’s federal habeas counsel claim they discovered in December 2011 or January 2012.

## **2. Post-Conviction Counsel**

Two attorneys from the Ohio Public Defender’s Office represented Gapen during his state post-conviction proceedings, and they were assisted in their investigation of possible post-conviction claims by two investigators. When post-conviction counsel began representing Gapen in 2001 immediately after the trial had concluded, one of the first things they did was meet with Gapen’s trial counsel, talk to him about the case, and obtain his case file. By the time the post-conviction petition was filed on October 4, 2002, post-conviction counsel was at least aware of the juror misconduct issue that trial counsel suspected.

Post-conviction counsel knew much more than that, however, because in September of 2002 they interviewed several of the jurors from Gapen’s trial. App. 5a, 63a. One of Gapen’s post-conviction attorneys testified in 2013 that she could not recall the substance of the interview she had with Juror Maguire in 2002, yet her affidavit of Maguire’s statements during that interview revealed that “Juror Maguire confirmed that while the trial was proceeding, Juror David Nedostup conducted independent research into the biblical meaning of the death penalty. Mr. Nedostup shared his views with the other jurors. He also read religious texts during side bars

when the jury was waiting in another room for the trial to resume.” App. 6a-7a, 39a-40a. Also in 2002, post-conviction counsel interviewed Juror Senter, who stated that “fellow juror Nedostup conducted his own outside research on the death penalty and the law, and that Juror Nedostup told the other jurors about his research during deliberations.” App. 6a, 39a.

Finally, in September or October 2002, another of Gapen’s post-conviction attorneys and an investigator interviewed Juror Nedostup himself. App. 5a, 36a. At the hearing held in the trial court, neither the attorney nor the investigator recalled whether Nedostup used the term *lex talionis* during the interview. However, in an affidavit the investigator filed with the trial court, he revealed that Nedostup stated during the 2002 interview that “[o]ne of [the] moral absolutes that infirm [sic.] his ‘world view’ is that if one is guilty of murder, death is the only appropriate sanction. Mitigating factors would be such factors as did the murder occur during a war, was it the result of self-defense, was there compelling, credible evidence that the person did not commit the murder. But once it is proved that the person committed the murder, death must be the sanction. He never believed that any other penalty was acceptable.” App. 10a, 35a-37a. Nedostup was talking about *lex talionis*, although he did not use that specific term. App. 18a-19a. Based on that conversation, Gapen’s team knew in 2002 that Nedostup held that belief at the time of trial. Why he waited until 2013 to bring this fact to the trial court’s attention is a mystery.

It is also a mystery why Gapen waited more than a decade to raise his claim of alleged judicial misconduct. During his 2002 interview with Gapen’s post-conviction

counsel, Juror Nedostup mentioned that he had tried to contact the trial judge and may even have specified how he contacted the judge. App. 22a, 53a, 71a, 73a. The same is true for Gapen's allegation that unadmitted exhibits were in the jury room during deliberations. Notes taken by a member of Gapen's post-conviction team during their 2002 interview with Juror Maguire revealed that Maguire talked in detail about unadmitted evidence allegedly being in the jury room during deliberations, as well as the jurors' alleged meeting with the trial judge to discuss the evidence. App. 16a-18a, 67a-70a.

In short, given all the information Gapen's post-conviction attorneys and investigators had gathered in 2002 to support Gapen's claims of alleged juror and judicial misconduct, why Gapen waited another eleven years before raising these allegations and seeking a new trial has never been sufficiently explained. And its Gapen's lack of a sufficient explanation for why he was "unavoidably prevented from discovering the information in the exercise of due diligence," Ohio Crim.R. 33(B), that both the trial court and district appellate court relied on in denying Gapen leave to file a motion for a new trial that was more than a decade out of time.

### **3. Federal Habeas Counsel**

Additional counsel were appointed to represent Gapen in August 2008 as part of his pursuit of federal habeas relief. Federal habeas counsel asserted in filings with the trial court that they first learned in 2011 of the information from Juror Maguire about a murder-suicide that occurred at the apartment unit adjoining his. App. 8a, 47a-49a, 62a. They claimed that in May 2012 they first became aware of the

allegation that unadmitted evidence was in the jury room during deliberations. App. 8a, 49a-50a. They alleged that they learned in December 2011 that the trial judge was aware of unadmitted evidence being in the jury room during deliberations and that, in January 2012, they learned that Juror Nedostup contacted the trial judge. App. 22a, 49a-50a. And they asserted that Nedostup first disclosed his belief in the principle *lex talionis* during his deposition in January 2012. App. 72a.

But what counsel asserts in a motion or memorandum is not evidence. Affidavits from habeas counsel were not presented to the trial court, and habeas counsel did not testify as to when they first became aware of the grounds for Gapen's claims. Therefore, there was no evidence in the record to show what federal habeas counsel knew and when they knew it, nor was any direct evidence presented as to what habeas counsel did to investigate Gapen's case once they were appointed in 2008. This, too, explains why both the trial court and appellate court found that Gapen failed to convincingly show that he, in the exercise of due diligence, was unavoidably prevented from discovering the information upon which his request for a new trial was based.

Gapen had to prove by clear and convincing evidence that he *and his counsel* had no knowledge of the existence of the grounds supporting his motion for new trial and that, even with the exercise of due diligence, could not have discovered the grounds in time to properly seek a new trial. Gapen was represented by ten attorneys from his trial, through his direct appeal, through post-conviction proceedings, and into federal habeas corpus proceedings. Yet Gapen only called one of his trial

attorneys, one of his post-conviction attorneys, and none of his federal habeas attorneys at the hearing on his motion for leave to file an untimely motion. The witnesses that he did call failed to demonstrate that he did not know of the basis for his claims and could not have reasonably discovered the basis for his claims through due diligence. Applying the Ohio Rules of Criminal Procedure in denying Gapen leave to file a motion for a new trial out of time—by more than a decade—did not infringe upon Gapen’s federal constitutional rights.

#### **B. Gapen’s Explanation for Seeking a New Trial Eleven Years Too Late**

Throughout his Petition to this Court, Gapen repeatedly blames the trial court for his failure to file his motion for a new trial in a timely manner. He asserts, for example, that the trial court “blocked [his] efforts to obtain competent evidence” proving his constitutional claims, Cert. Petition at p. 5; that the trial court “thwarted [his] efforts” to obtain the supporting evidence he needed by “denying his discovery requests without explanation, Cert. Petition at p. 7; that the state courts “denied [his] request” for “formal court process” to compel the jurors from his trial to speak to his counsel or sign affidavits, Cert. Petition at p. 10; and that “the trial court prevented [him] from obtaining the sworn evidence necessary to support a motion for a new trial, whether timely or delayed,” Cert. Petition at p. 12. But when Gapen argued on appeal below that the trial court was to blame for interfering in his ability to obtain the facts and evidence needed to file a motion for a new trial within the time limitations under Ohio law, the District Court of Appeals concluded that there were “at least two problems with his claim.” App. 17a.

The first problem, said the appellate court, was that Ohio's post-conviction relief statute, Ohio Revised Code § 2953.21, does not grant a petitioner the right to conduct discovery, and the trial court, therefore, cannot be blamed for following the law. App. 17a.<sup>1</sup> Second, the trial court's denial of Gapen's request for compulsory discovery did not prevent Gapen and his team of attorneys and investigators from speaking to jurors or witnesses, or from conducting whatever investigation they wished to conduct—as evidenced by the fact that several of the jurors were, in fact, interviewed as early as 2002. App. 17a-18a. Moreover, “[b]eing told that you cannot subpoena is not the same as being told you cannot interview.” App. 18a. The appellate court acknowledged that in 2002 Gapen's team had already interviewed several jurors and had obtained information supporting Gapen's claims of alleged juror and judicial misconduct, and that, despite the trial court's refusal to compel the jurors to provide Gapen's lawyers more of what they wanted, nothing stood in their way of continuing to conduct their investigation—other than perhaps their own lack of effort. App. 18a. As the appellate court explained, “[t]he inquiry is not just whether Gapen had knowledge of all the alleged improper evidence [because he likely did not] but rather if he could have learned of it. We agree with the trial court that he could have.” App. 18a.

### **C. Ohio's Rules of Criminal Procedure are not unconstitutional.**

Gapen tries to counter the trial court's and appellate court's application of Rule 33 of the Ohio Rules of Criminal Procedure by arguing that Ohio's rules violate his

---

<sup>1</sup> Ohio Revised Code § 2953.21(A)(1) was amended in 2017 to now allow for post-conviction discovery by defendants sentenced to death.

federal constitutional rights. But imposing a due-diligence requirement on postconviction petitioners is not unreasonable. *See Johnson v. United States*, 544 U.S. 295, 316 (2005) (Kennedy, J., dissenting) (“States can, and do, impose diligence by limiting the time for requesting a vacatur of a prior state conviction.”); 28 U.S.C. § 2254(e)(2)(A)(ii) (under the AEDPA, a petitioner must show due diligence in developing a factual predicate when seeking an evidentiary hearing on a petition for writ of habeas corpus). This Court has also been mindful of the fact that “[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man,” and that a “state accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief.” *D.A.’s Office v. Osborne*, 557 U.S. 52, 68-69 (2009). For that reason, federal courts “may upset a State’s postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided,” which the defendant has the burden of demonstrating. *Id.* at 69, 71.

Here, Gapan has failed to demonstrate the inadequacy of Ohio’s post-conviction procedures regarding the filing and consideration of a defendant’s motion for a new trial, whether filed timely or untimely. Further review by this Court is not warranted.

## CONCLUSION

In view of the foregoing law and argument, Larry Gapen's petition for writ of certiorari should be denied.

Respectfully submitted,

MATHIAS H. HECK, JR.  
Montgomery County Prosecuting Attorney

/s/ Andrew T. French  
ANDREW T. FRENCH  
Assistant Prosecuting Attorney  
Counsel of Record  
Montgomery County Prosecutor's Office  
301 West Third Street, Suite 500  
P.O. Box 972  
Dayton, OH 45422  
(937) 225-4117  
[frencha@mcohio.org](mailto:frencha@mcohio.org)

*Counsel for Respondent, the State of Ohio*