

**CAPITAL CASE
No. 22-5675
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***

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

November 22, 2022

DEBORAH L. WILLIAMS

Federal Public Defender
by:

ALLEN L. BOHNERT

(Supreme Court Bar No. 280600)

**Counsel of Record*

ADAM M. RUSNAK

(Supreme Court Bar No. 316391)

Assistant Federal Public Defenders
Office of the Federal Public Defender
for the Southern District of Ohio
Capital Habeas Unit

10 W. Broad Street, Suite 1020

Columbus, Ohio 43215

(614) 469-4116

(614) 469-2999 (Fax)

allen_bohnert@fd.org

adam_rusnak@fd.org

Counsel for Petitioner Larry Gopen

TABLE OF CONTENTS

| | Page |
|----------------------------|------|
| TABLE OF CONTENTS..... | ii |
| TABLE OF AUTHORITIES | iii |
| REPLY..... | 1 |
| CONCLUSION..... | 9 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|---------|
| Cases | |
| <i>Ewing v. Horton</i> , 914 F.3d 1027 (6th Cir. 2019)..... | 9 |
| <i>Morgan v. Illinois</i> , 504 U.S. 719 (1992) | 9 |
| <i>Remmer v. United States</i> , 347 U.S. 227 (1954)..... | 9 |
| <i>Smith v. Phillips</i> , 455 U.S. 209 (1982)..... | 9 |
| <i>State v. Bethel</i> , No. 2020-0648, 2022-Ohio-783, 167 Ohio St. 3d 362 (Ohio 2022)..... | 1, 2 |
| <i>Trevino v. Thaler</i> , 569 U.S. 413 (2013) | 10 |
| <i>United States v. Herndon</i> , 156 F.3d 629 (6th Cir. 1998)..... | 9 |
| <i>United States v. Lanier</i> , 988 F.3d 284 (6th Cir. 2021) | 9 |
| <i>Williams v. Taylor</i> , 529 U.S. 420 (2000) | 9 |
| Rules | |
| Ohio Crim.R. 33(A) | 1 |
| Ohio Crim.R. 33(B) | 1 |
| Ohio Crim.R. 33(C) | 1 |
| Ohio Evid. R. 606(B) | 3 |

REPLY

The State of Ohio does not dispute that egregious violations of Petitioner Larry Gapen’s federal constitutional rights occurred during the course of his capital trial. Under Ohio law, Gapen had only 14 days after his jury’s verdict to file a timely motion for new trial raising allegations of jury or court misconduct, or other allegations of “irregularities” in his trial. Ohio Crim.R. 33(A)–(B). Any such motion must be supported by sworn, competent evidence. Ohio Crim.R. 33(C). Respondent’s Brief In Opposition, like the lower court opinion subject to Gapen’s petition for certiorari, places a heavy emphasis on what Gapen’s counsel did (or did not do) in the years following Gapen’s trial. But Respondent misses the point: other than the first 14 days after the jury’s verdict, none of that matters.

That is, the only question is whether Gapen can show, by “clear and convincing proof,” that he was “unavoidably prevented” from discovering the grounds for his new-trial motion, and filing such a motion, within the 14-day window of time. If he was unavoidably prevented from discovering the information and filing during that 14-day period, then Gapen’s delayed motion for a new trial is proper. That would allow Gapen to obtain a meaningful review of the merits of his new-trial motion and the federal constitutional violations alleged therein. The Supreme Court of Ohio only recently clarified in *State v. Bethel*, No. 2020-0648, 2022-Ohio-783, ¶¶ 53–58, 167 Ohio St. 3d 362, 376–77 (Ohio 2022), that there is, simply, no other obligation on a criminal defendant seeking to file a delayed new trial motion. If Gapen was unavoidably prevented from discovering the information

and filing during that 14-day period, no further showing of entitlement is needed, and Gapen's delayed motion must be granted.

Respondent's brief in opposition ignores this critical, threshold timing issue. Instead, Respondent focuses on repeated accusations and insinuations that Gapen somehow chose to wait too long, after discovering information that supports a range of different grounds for relief, to file his motion for leave to file an untimely new-trial motion. Or, stated differently, Respondent criticizes Gapen for not filing his motion for leave within what Respondent deems a reasonable time after Gapen (through his counsel) discovered the information.

While any issues regarding delay between discovering new information and filing a motion for leave to file a delayed new-trial motion may have been applicable previously, that is no longer true. As the Supreme Court of Ohio explained in *Bethel*, there is no valid, textual command that a motion for leave to file a delayed motion for new trial must be filed within any period of time. 2022-Ohio-783, ¶¶ 53–58, 167 Ohio St. 3d 362, 376–77 (Ohio 2022). Curiously, Respondent's brief is silent on *Bethel*. Nevertheless, Respondent's brief is suffused with accusations about alleged unreasonable delay that have no relevance in the law. Indeed, that now-rescinded “reasonableness” requirement for filing a motion for leave to file a delayed new-trial motion within a reasonable time after discovering the underlying information lies at the very heart of the trial court's opinion, the Second District's opinion, and Respondent's brief in opposition. But *Bethel* struck down that non-textual requirement; all that matters under the law is whether Gapen could have

discovered, with “some effort,” the evidence in question within the time to file a motion for new trial, *i.e.*, no more than 14 days after the jury’s verdict. If he could not do so, then leave to file a delayed motion is appropriate and should be granted. This is so regardless of the length of time between when a defendant discovers the grounds for the new-trial motion, and when the defendant files his motion for leave to file the delayed new-trial motion. The State court’s refusal to permit such a delayed motion in Gapan’s case denied Gapan the opportunity to obtain a full, meaningful review of his federal constitutional claims and was, itself, a denial of Gapan’s fundamental constitutional rights.

Gapan explained in his Petition how the state courts prevented him from being able to discover information that would have supported a timely new-trial motion filed within 14 days of the jury’s verdict. First, the trial court forbade his trial counsel from interviewing any jurors following trial. That court also declared that any information obtained from a juror would be irrelevant anyway, because of the *aliunde* rule in Ohio Rule of Evidence 606(B). That rule prohibited any evidence regarding extrinsic evidence reaching the jury unless “some outside evidence of that act or event has been presented.” *See* App. I, 143a.¹ But only the jurors themselves had the information about constitutional errors that Gapan later discovered. Thus,

¹ Notably, the Supreme Court of Ohio amended Rule 606(B) as of July 1, 2022, specifically to eliminate the *aliunde* rule. The rule change was expressly made to address concerns that the *aliunde* rule violated a criminal defendant’s constitutional rights by denying a defendant—such as Gapan—the opportunity to demonstrate jury misconduct errors. (*See* Pet. for Cert., 9 n.1, 11; App. I, 143a.)

the trial court itself bore responsibility, in at least two ways, for preventing Gapen from obtaining the information necessary to support a timely motion for new trial.

These facts alone prove Gapen's entitlement to leave to file his delayed motion. But even if the post-14-day time period mattered for purposes of Gapen's motion for leave, he was still unavoidably prevented from discovering the evidence, because the post-conviction court denied Gapen any discovery for his post-conviction proceedings, after Gapen alleged some examples of juror misconduct that his new, post-conviction counsel had uncovered. As Gapen explained, he needed formal court process to obtain the sworn, competent evidence that Ohio law required him to provide with a motion for new trial, but the jurors with whom his post-conviction counsel were able to speak uniformly refused to provide any sworn affidavits, or refused entirely to speak with Gapen's counsel. So the *aliunde* rule and the trial court's refusal to grant discovery proved fatal to Gapen's ability to earlier file a motion for leave. The Second District and Respondent argue that there was no error in denying discovery to Gapen because there was no statutory entitlement to discovery in post-conviction proceedings. But the fundamental point still remains: Gapen needed discovery to obtain the sworn, competent evidence required to support his motion for new trial, and the *aliunde* rule, the jurors' refusal to provide any competent, sworn evidence in the absence of a court subpoena, and the state court's refusal to grant discovery, collectively and individually prevented Gapen from obtaining that evidence. Thus, whether it was the state court refusing to grant discovery, or the law of the State of Ohio under which a defendant is not entitled to

discovery as of right, or the jurors refusing to provide any sworn evidence absent a subpoena, Gapen was still prevented from being able to obtain the necessary information despite his best efforts.

But again, although Respondent spends much time and emphasis on what Gapen’s counsel knew in 2002 or thereafter, that part of the timeline simply does not matter. The relevant window of time was 14 days after the jury’s June 23, 2001, verdict—or until July 7, 2001. Whatever Gapen uncovered after July 7, 2001, whether in 2002 or beyond, has no bearing on whether he could have filed a timely motion for new trial within that 14-day window. Gapen explained in his Petition why he was unavoidably prevented from learning about the information alleged in his claims for relief during that 14-day window. Respondent’s Brief in Opposition ignores that point. In doing so, Respondent essentially asks this Court to give its stamp of approval to state court procedures that impermissibly tolerate numerous violations of Gapen’s constitutional rights.

The only aspect of Respondent’s Brief in Opposition that is even potentially responsive to Gapen’s arguments is its discussion of what Gapen’s trial counsel knew and when they knew it. But even then, Respondent’s analysis misses the mark. As Gapen’s trial counsel explained, they believed the jury had “gone astray” because they believed there were inconsistent verdicts that resulted from an impermissible compromise verdict. (This allegation was ultimately proven correct, but not until Gapen finally obtained compulsory court process in federal habeas corpus proceedings and used it to obtain an email sent from Juror Nedostup to the

trial court expressly admitting what the jury had done.) That is simply a different matter entirely from whether the jury considered extrinsic evidence, or whether unadmitted, highly prejudicial evidence that the trial court had excluded went to the jury for deliberations anyway, or whether the trial court had notice of significant irregularities with the trial but failed to alert Gapen’s counsel, or any of the other constitutional claims Gapen seeks to raise now. Stated differently, Gapen’s trial counsel did what they reasonably could, with their suspicions of a certain type of jury misconduct. But even those efforts were stymied by the trial court’s order prohibiting trial counsel from interviewing any jurors in the immediate wake of trial. Respondent declares “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.” Br. in Opp. 11. But that is precisely what the trial court precluded with its order to refrain from speaking to the jury members and its preemptive invocation of the *aliunde* rule.

Thus, when Respondent faults Gapen’s trial counsel for “not attempt[ing] to interview any of the jurors to find out what had happened,” *id.* at 12, Respondent seeks to blame Gapen for obeying the court’s direct order. This Court should not bless such lawlessness. Moreover, this Court should especially refuse to countenance Respondent’s argument, and the Second District Court of Appeals’ decision, when it directly leads to egregious violations of Gapen’s federal constitutional rights.

Additionally, Respondent follows the lower court's mischaracterization of Juror Nedostup's jury questionnaire statements about the death penalty to suggest that Nedostup's pro-death penalty answers somehow equate to notice that Nedostup was an "automatic death penalty" juror who subscribed to, and applied, the extra-judicial code of *lex talionis*. But simply stating that a juror supports the death penalty and might find it appropriate in most or even every murder case—which is what Nedostup stated on his questionnaire—is not the same as saying that the juror believes the death penalty must be mandatory following an aggravated murder conviction. Indeed, Nedostup clarified that distinction later, in his email to the trial court discussing his *lex talionis* beliefs and that he discussed and applied them during deliberations, and again during his sworn deposition after Gopen obtained discovery process. Nor does the knowledge that a juror supports the death penalty as a policy matter equate to knowledge that the juror would inject discussions of *lex talionis* principles into the jury's sentencing deliberations, as the Second District concluded and as Respondent now argues here. Accordingly, Respondent's argument that Gopen knew enough, at the time of trial, to file a timely new-trial motion about Nedostup's *lex talionis* beliefs/automatic death penalty position is misplaced.

Respondent also attempts to frame matters here as if Gopen is alleging that Ohio's Rule of Criminal Procedure are facially unconstitutional. Not so. Rather, Gopen argues that his federal constitutional rights were violated when the jury considered extrinsic evidence; considered an extrinsic, extra-judicial code of law

under which the death penalty was mandatory following conviction for aggravated murder; when the jury refused to meaningfully consider, or give full, meaningful effect to any mitigation evidence; when the trial court was notified not once but at least twice that unadmitted—indeed, excluded, highly prejudicial—evidence and an extra-judicial code of law had been injected into the jury’s deliberations, but the court failed to notify Gapen’s counsel about those errors; and the additional constitutional violations alleged here. As Gapen noted in his Petition, some of those errors are structural in nature, including the complete denial of counsel at critical stages of trial when unadmitted, excluded, highly prejudicial evidence was introduced to the jury for deliberations, and a jury that included Nedostup, an “automatic death penalty” juror who was actually biased, who was untruthful in his voir dire answers, and who later admitted—first in improper, *ex parte* email correspondence with the trial judge and then when deposed under oath—that he was unwilling, unable, and refused to consider any mitigation evidence. Gapen also argues that Ohio’s procedural rules further violate his federal constitutional rights when a state procedural rule unfairly penalizes him for following the rules and, consequently, he is unable to obtain any meaningful review of egregious constitutional errors that occurred during his trial. Respondent flagrantly mischaracterizes Gapen’s arguments.

CONCLUSION

Respondent's Brief in Opposition is notable as much for what it doesn't say as for what it does say, and what it does say is largely irrelevant or inaccurate. Respondent does not contest that the alleged actions occurred during Gapen's trial. Nor does Respondent contest that the alleged actions violated several of Gapen's federal constitutional rights. Respondent fails to engage with Gapen's evidence that the trial court prevented Gapen's trial counsel from speaking with any of the jurors following trial, which precluded Gapen from being able to file a timely new-trial motion within 14 days after the jury's verdict. The State likewise fails to wrestle with Gapen's point that Ohio law, in the form of the *aliunde* rule in conjunction with the trial court's orders, left Gapen unavoidably prevented from discovering the information necessary to file such a properly supported timely motion.

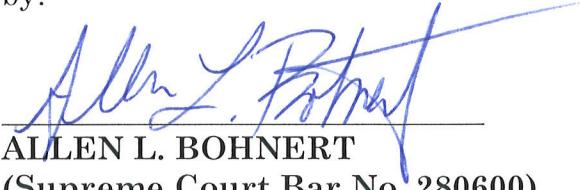
Instead, Respondent maintains that much of the newly discovered information was available to Gapen as of 2002. But that emphasis concedes that the grounds for a new trial were not reasonably discoverable until long after July 7, 2001, the deadline for Gapen to file a motion. Similarly, Respondent mischaracterizes Gapen's arguments about Ohio's procedural rules. Gapen argues that his federal constitutional rights were violated by the actions of the jury and the trial court, and that the state courts' application of a state procedural rule to bar any consideration of Gapen's alleged federal constitutional violations creates additional constitutional violations that this Court must not abide. Respondent fails entirely to address Gapen's arguments demonstrating why the Second District's

decision stands in conflict with this Court’s binding precedent on that point. *See Pet.*, 17–18; 18–26; 26–29; 30–33, and cases cited therein; *see also*, e.g., *Williams v. Taylor*, 529 U.S. 420, 442 (2000); *Morgan v. Illinois*, 504 U.S. 719, 727–29 (1992); *Smith v. Phillips*, 455 U.S. 209, 217–18 (1982); *Remmer v. United States*, 347 U.S. 227, 229–30 (1954); *United States v. Lanier*, 988 F.3d 284, 295 (6th Cir. 2021); *Ewing v. Horton*, 914 F.3d 1027, 1030 (6th Cir. 2019); *United States v. Herndon*, 156 F.3d 629, 637 (6th Cir. 1998). And finally, none of Respondent’s complaints about the actions of Gapen’s later counsel have any bearing on whether Gapen could have filed a motion for new trial within 14 days after the jury’s verdict: none of those counsel represented Gapen during the applicable period.

This Court must not countenance the Ohio state courts’ refusal to provide any meaningful opportunity for review of Gapen’s alleged federal constitutional violations. Gapen followed the rules at every step, and now the state courts fault him for that to bar any consideration of his claims. Accordingly, this Court should grant Gapen’s petition, vacate the lower court ruling, and remand the case for further proceedings with the direction that Gapen be permitted to file his motion for new trial and the Ohio state courts must afford Gapen the full, meaningful consideration this Court’s jurisprudence requires. *See Trevino v. Thaler*, 569 U.S. 413, 425, 428–29 (2013) (emphasizing that state courts may not use state procedural rules to deny a “meaningful opportunity” for “meaningful review” of claimed constitutional violations).

Respectfully submitted this 22nd day of November, 2022,

DEBORAH L. WILLIAMS
Federal Public Defender,
by:


AILEEN L. BOHNERT
(Supreme Court Bar No. 280600)

**Counsel of Record*


ADAM M. RUSNAK
(Supreme Court Bar No. 316391)

Co-Counsel

Assistant Federal Public Defenders
Office of the Federal Public Defender
for the Southern District of Ohio
Capital Habeas Unit
10 W. Broad Street, Suite 1020
Columbus, Ohio 43215
(614) 469-4116
(614) 469-2999 (Fax)
allen_bohnert@fd.org
adam_rusnak@fd.org
Counsel for Petitioner Larry Gopen