No. ______

In the Supreme Court of the United States

DELANO HALE,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

OFFICE OF THE
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CAPITAL CASE

QUESTIONS PRESENTED

Are a capital defendant's Due Process rights violated when he is allowed little substantive opportunity to satisfy the circular requirements of his state's post-conviction statute?

Is a capital defendant's Sixth Amendment right to effective counsel violated when his attorneys fail to investigate and present evidence supporting their own strategy?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceeding other than those listed in the caption.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Delano Hale respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

OPINIONS BELOW

The Cuyahoga Court of Common Pleas' Findings of Fact and Conclusions of Law, *State v. Hale*, Case No. CR-04-454857-A (2015) is attached hereto as Appendix A. The Ohio Eighth District Court of Appeals' Opinion on the post-conviction appeal, *State v. Hale,* 2016-Ohio-5837, (2016), is attached hereto as Appendix B. The Court's Entry denying reconsideration is attached hereto as Appendix C. The Ohio Supreme Court's denial of further jurisdiction, *State v. Hale,* 150 Ohio St.3d 1451, 2017-Ohio-8136, 83 N.E.3d 938 is attached hereto as Appendix D.

JURISDICTION

The Supreme Court of Ohio declined jurisdiction on October 11, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

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

A. Sixth Amendment, which provides in pertinent 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; 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.

B. Eighth Amendment, which provides in pertinent part:

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

C. Fourteenth Amendment, which provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 21, 2004, Douglas Green, a music producer, held a singing audition for Delano Hale in Hale's motel room. That audition turned into an unwelcomed sexual encounter that ended with Green's death and Hale's capital conviction.

The two men first met in May 2004, when Green encountered Hale who was singing while walking to the store. Green was in the music industry and offered to set Hale up in the recording business. Initially, Hale dismissed the idea, but Green gave him his cell phone number and insisted he consider the offer. Trial Ex. A; Tr. 2358-59. A few weeks later, Hale called Green to inquire about an audition. Green returned the call and learned that Hale was staying at the Lake Erie Lodge in Euclid, Ohio, where he had been staying since June 8, 2004. Tr. 2360. Green told Hale that the motel was the "perfect place to meet." Tr. 2359.

On June 21, 2004, Green met Hale at the Lake Erie Lodge, arriving at 6:32 p.m. Tr. 2528. Green was anxious to get to Hale's room, but Hale first wanted to buy beer. Tr. 2360. After purchasing malt liquor at a nearby Shell station, Hale and Green returned to the motel and went to Hale's room. *Id.*

In his motel room, Hale performed a couple of songs for Green before excusing himself to go to the bathroom. Tr. 2361. When Hale came out of the bathroom, he was confronted by a naked Green, lying provocatively on the bed with his legs spread. *Id.* Hale was "dumbfounded" and reminded of his previous experiences in prison where he had previously fought off unwanted advances. *Id.* Hale immediately rebuffed Green and told him to get out of his room, but Green was unrelenting in his sexual advances, telling Hale the "freaky" things he could do for him. *Id*. Hale again instructed Green to leave, but Green proceeded to grab Hale's wrists and thrust his head in Hale's crotch where he made "slurping" noises. Tr. 2362. Fearing further sexual assault, Hale managed to free his right arm from Green's grip and grabbed a gun. When Green refused to release him, Hale fired the gun, causing Green to fall back while still clutching Hale's wrist. Hale fired the gun a second time and then backed away. Still fearful, Hale reloaded the gun and fired twice more. *Id*.

Green's unwelcomed sexual advances stirred up memories from Hale's past. As a child, Hale and his younger sister were sexually assaulted by their cousin who forced them to fondle and perform oral sex on her. Tr. 3818, 3931. When Hale was thirteen, a male cousin tried to coerce Hale into oral sex. Tr. 3931-32. In addition to the sexual abuse, Hale came from a family wrought with substance abuse, volatility, and violence. Tr. 3722, 3729, 3771, 3777, 3789, 3814-18, 3821-23, 3835, 3841, 3930, 3933-34. Hale began using alcohol at the age of twelve and marijuana at thirteen. Tr. 3933. The only positive mentor Hale had, a priest from the local church, left town. After he left, Hale withdrew and became quick-tempered. Tr. 3847-48. Factors in Hale's life—family separation, parental substance abuse, family conflict, antisocial peers, and exposure to violence—put him at a heightened risk for perpetuating violence, and eventually landed him in prison. Tr. 3935-36. While incarcerated, Hale faced even more unwanted sexual advances—a factor which would later shape the way he reacted towards Green, an imposing man nearly twice his size. Tr. 305, 2597-98.

Following his arrest, Detective Baird interrogated Hale. Det. Baird reassured Hale, telling him that it would be understandable if he needed to protect himself from Green, who had a history of sexual assault.[1] Hale then began to cry and told Det. Baird what happened in his motel room. Tr. 308, 311.

At trial, Hale's attorneys argued that Hale acted in self-defense, but failed to present expert testimony, at either phase, that explained how Hale's background and history of sexual abuse and substance abuse would have elicited his reaction to Green on June 21, 2004. Instead, the only expert that the jury heard from during the penalty phase, psychologist Dr. John Fabian, gave inflammatory testimony by describing Hale as a violent and "aggressive, impulsive individual" with antisocial attitudes. Tr. 3935-36, 3963. Not only was Dr. Fabian's testimony not mitigating, it was both incorrect and affirmatively damaging in the sense that it was not an accurate portrayal of the sexual pressure and trauma that Hale experienced throughout his life. *See* PC Ex. 27.

On June 7, 2005, Delano Hale was convicted of the aggravated murder of Douglas Green. Additionally, Hale was convicted of aggravated robbery, tampering with evidence, felony murder specifications, and firearm specifications. Following Hale's minimal, and at times damaging, presentation of mitigating evidence, the jury recommended a sentence of death and the trial court agreed, imposing a death sentence on July 18, 2005.

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[1] In 1998, Green was accused of sexual assault while working at a Value City department store. Tr. 2364. Green was fitting a customer, Johnny Smith, for a suit when he began to perform oral sex on Smith. Tr. 3384, 3388. Green was charged with rape and pled to a misdemeanor assault in a deal worked out with the prosecutor's office. Tr. 3389-90.

On March 6, 2007, Hale filed a post-conviction petition. That same day, Hale also filed a motion for discovery; a motion for appropriation of funds for an attorney expert; a motion for appropriation of funds for a substance abuse expert, cultural expert, neurologist/ neuropsychiatrist, and an expert in grief/loss counseling; and, a motion for appropriation of funds for a positron emission tomography (PET) scan. On March 28, 2007, Hale filed a separate motion for appropriation of funds for a substance abuse expert. Eight years later, on September 24, 2015, the trial court issued its findings of fact and conclusions of law and denied all of Hale's claims for relief. S*tate v. Hale,* Case No. CR-04-454857-A, (Cuyahoga County C.P.), Findings of Fact and Conclusions of Law, Filed September 24, 2015, attached at A-1. The trial court failed to rule on, and thus effectively denied, Hale's motions, including his requests for discovery and expert funding.

Following state court post-conviction proceedings brought pursuant to Ohio statutory law, the Ohio Court of Appeals for the Eighth District in a 2-1 decision. It affirmed the lower court's dismissal, though on different grounds, and denied Hale further reconsideration. The Supreme Court of Ohio denied Hale's memorandum in support of jurisdiction by a decision entered on October 11, 2017. *See* Appendices A-D, attached. Hale now respectfully petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Ohio's collateral review proceedings are window dressing. Petitioners like Hale are virtually never provided with access to tools like discovery, and then their petitions are summarily dismissed without the opportunity for further factual development. As explained in Section I below, collateral review is a critical time to develop constitutional claims, but Ohio puts its petitioners in an impossible situation.

Hale was deprived the opportunity to develop his collateral review claims, most notably the ineffective assistance of counsel during mitigation. Even without the benefit of discovery, one of the three judges reviewing his post-conviction appeal found that he presented substantive grounds for relief:

> [Hale's attached] evidence is outside the record and sets forth substantive grounds for relief. Moreover, given the eight and one-half years of delay between when Hale filed his petition, the state responded, and when the court issued its ruling, and the fact that Hale presented evidence outside the record, I would find that the failure to conduct a hearing under these circumstances was unreasonable and arbitrary.

State v. Hale, 2016-Ohio-5837, ¶ 67 (Ct. App.) (Mary Eileen Kilbane, P.J., dissenting). As demonstrated in Section II below, Hale was denied the effective assistance of counsel when his attorneys failed to investigate and present evidence in line with their own strategy.

I. Initial review collateral proceedings are often crucial to developing meritorious claims for relief, but Ohio allows little substantive opportunity to uncover and develop claims that meet Ohio's collateral review requirements.

Capital defendants such as Hale face a serious dilemma under Ohio's post-conviction scheme. The text of the statute provides that a petitioner must include affidavits or other evidence *dehors* the record in support of his claims. O.R.C. § 2953.21(A). It is from the face of the petition that a trial court must determine if a hearing is required. To survive a motion to dismiss, post-conviction petitioners must develop sufficient evidence *dehors* the record to support constitutional claims without any benefit of the discovery processes available to every other civil litigant. Without access to traditional civil tools of discovery, Ohio's post-conviction process imposes an impossible pleading standard on petitioners that renders it meaningless as an effective vehicle to remedy serious constitutional violations.

At a criminal trial, it is the prosecution's burden to prove the elements of the crime beyond a reasonable doubt. The prosecution's ability to meet that burden would be severely diminished if it did not have resources available by which it could obtain search warrants, compel DNA samples, subpoena witnesses, and otherwise gather evidence needed to prove its case. So why is it acceptable to deny a capital petitioner the basic resources required in order to provide him with a real opportunity to meet his burden to prove that a constitutional violation occurred at his trial?

This Court has recognized that important claims can come from initial review collateral proceedings—claims that "often turn[] on evidence outside the trial record"—and that there is a "key difference between initial-review collateral proceedings and other kinds of collateral proceedings." *Martinez v. Ryan,* 566 U.S. 1, 10, 12 (2012). It has recognized the potential for injustice that could occur when a prisoner is denied the effective assistance of counsel in initial review collateral proceedings, because "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." *Id.* The same injustice occurs when it is the denial of resources that forces the attorney to err.

At no time during his post-conviction proceedings was Hale afforded the right to discovery or to any evidentiary hearing. Post-conviction petitioners, like Hale, must rely on evidence outside the record of trial to establish the constitutional violation warranting post-conviction relief, but the post-conviction petitioner cannot meet his burden without the necessary discovery and/or evidentiary hearings. Thus, Ohio's post-conviction system deprives petitioners of the tools necessary to develop the factual basis for their constitutional claims, and then allows the trial court to dismiss the petition summarily on the combined bases of the doctrine of res judicata and the lack of factual development. That is precisely what happened in Hale's case, ultimately depriving him the due process to which he is entitled.

When a state adopts a procedure or rule to vindicate the constitutional rights of a litigant, it must provide any litigant a fair and reasonable opportunity to identify all relevant claims and to have those claims heard and decided. *See Michel v. Louisiana*, 350 U.S. 91, 93 (1955); *Parker v. Illinois*, 333 U.S. 571, 574 (1948). The right to object to a federal constitutional violation presupposes a reasonable opportunity to exercise that right. *Reece v. Georgia*, 350 U.S. 85, 89 (1955). In *Case v. Nebraska*, 381 U.S. 336 (1965), Justice Brennan outlined that a state's post-conviction system should operate as "swift and simple and easily invoked," should be "sufficiently comprehensive to embrace all federal constitutional claims," and must "provide for full fact hearings to resolve disputed factual issues." *Id*. at 346-347. Ohio lacks these base criteria in its post-conviction processes.

In capital proceedings, such as this one, fact-finding procedures should be required to meet a heightened standard of reliability. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("Because of that qualitative difference [in punishment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). In capital trials, states are required to provide, at a minimum, the following to the accused: 1) the opportunity to present evidence; 2) the opportunity to challenge or impeach the state's evidence; and 3) a decision-maker who is neutral, detached and not a member of the executive branch of government. *Ford v. Wainwright*, 477 U.S. 399, 412-417 (1986). It is axiomatic that at least some of that need for reliability and requirement for fair process carries past trial to the capital post-conviction proceedings.

Ohio's post-conviction statutes, like many other state collateral review laws, were passed in response to the United States Supreme Court decision in *Case v. Nebraska*, 381 U.S. 336 (1965). In 1965, the State of Ohio had no "adequate corrective process." *Id.* The only collateral remedy, state habeas corpus, was extremely limited, and was available for the assertion of certain constitutional rights. *See Knox v. Maxwell*, 277 F. Supp. 593, 596-597 (N.D. Ohio 1967). Given the *Case* holding, Ohio's lawmakers passed the Ohio Post-Conviction Act in 1965. As passed, O.R.C. § 2953.21 (1965) allowed a prisoner to file a post-conviction petition in the trial court claiming "a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States..." The trial court was obligated to grant an evidentiary hearing on the post-conviction claims unless the record of the case and the petition demonstrated that there was no right to relief. O.R.C. § 2953.21(E).

The Ohio Post-Conviction Act opened the door to state collateral review. This statute, as written, did not erect procedural bars to post-conviction actions. Ohio trial judges recognized that a petitioner could present in state post-conviction proceedings any claims that could not have been previously raised and decided. *See, e.g.*, *Laugesen v. State*, 11 Ohio Misc. 10, 13, 227 N.E.2d 663 (C.P 1967). But only two years after passage of the Post-Conviction Act, the Ohio Supreme Court announced a drastically restricted interpretation of the new post-conviction law, in *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). The Court therein determined that the doctrine of res judicata was applicable to post-conviction actions. With little or no analysis, the Court severely limited the opportunity to raise claims that had not previously been raised. The *Perry* court held that no claim could be brought in a post-conviction action if it *could* have been raised at trial or on direct appeal. *Id.* at ¶9 of the syllabus (emphasis added).

The Ohio Supreme Court's already restrictive interpretation of the post-conviction remedy was further restricted in subsequent years. In *State v. Nichols*, 11 Ohio St.3d 40, 463 N.E.2d 375 (1984), the Court held that Ohio's delayed appeal procedures were not applicable to post-conviction appeals. In so holding, the Court responded to critics of the limitations placed upon Ohio post-conviction processes:

> We are mindful that commentators have viewed the evolution of post-conviction relief in Ohio as having created a virtually futile review process. (Citations omitted.) To the extent we would encourage the expeditious disposition of frivolous and interminable appeals from prisoners who have their freedom to gain and comparatively little to lose, we would not deny such assertions.

Id. at 43. Thus, the Ohio Supreme Court admitted that judicial convenience governed as the primary reason for the recent judicially created restrictions read into Ohio's post-conviction law and processes.

Given this history, little actual opportunity existed for Hale for any further factual development in the post-conviction process in Ohio. An individual seeking post-conviction relief is *not* entitled to an evidentiary hearing until he or she produces sufficient documentation, in the form of evidence outside the record, to demonstrate an entitlement to relief. *State v. Kapper*, 5 Ohio St.3d 36, 38, 448 N.E. 2d 823 (1983); *State v. Cole*, 2 Ohio St.3d 112, 114, 443 N.E. 2d 169 (1982); *State v. Jackson*, 64 Ohio St.2d 107, 110-112, 413 N.E.2d 819 (1980). Further, Ohio's post-conviction petition claims are limited to three pages per claim by Ohio Rule of Criminal Procedure 35, thus limiting the arguments that can be presented in support of any post-conviction claim.

Hale was denied his due process rights to a fair and reasonable opportunity to support and present post-conviction claims. His post-conviction petition, filed in 2007, came before Ohio amended its post-conviction statute to allow for the possibility of discovery. Hale was further hindered because his trial, which occurred in 2005, came years before Ohio amended its criminal discovery rules for trials, denying him access to even simple items like witness statements. Thus, he was a petitioner who faced the conundrum of the classic "Catch 22" situation – one cannot obtain a hearing until they demonstrate adequate proof of a constitutional violation, but one cannot utilize the means to gather that level of proof (discovery) until the court is satisfied that it sees sufficient proof of the alleged constitutional violations. The ultimate result of this circular reasoning is frequently the summary dismissal of the post-conviction petition, often on the purported basis of res judicata.

Hale presented evidence *dehors* the record that could not have been considered on direct appeal. Nevertheless, this evidence was rejected, based upon the assertion that it had been heard, or could have been heard, at the trial. Under Ohio law, however, res judicata does *not* apply if a post-conviction claim is supported by evidence outside the record, as well as by evidence appearing in the record. *State v. Smith*, 17 Ohio St. 3d 98, 101 n.1, 506 N.E.2d 1205 (1985); *State v. Milanovich*, 42 Ohio St.2d 46, 325 N.E.2d 540 (1975); *State v. Cooperrider*, 4 Ohio St.3d 226, 448 N.E.2d 452 (1983). When evidence is outside the record, counsel on direct appeal could not have raised claims relying on that evidence. *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978) (a reviewing court cannot add matter to record before it, which was not a part of trial court's proceedings).

Further complicating Ohio's post-conviction process is the failure of Ohio courts to respect the wording of the statute itself. Ohio's post-conviction statute directs that a hearing shall be held "[u]nless the petition and the files and records of the case show the petitioner is not entitled to relief." O.R.C. § 2953.21 (E). Thus, the evidentiary hearing should allow an Ohio petitioner to prove claims of constitutional violations, with corresponding prejudice that merits judicial relief. The petitioner is not required to *prove* his claims and prejudice based *solely* upon the words that appear on the face of the petition. Adopting such a position effectively reads the evidentiary hearing provision out of the statute. The statutory language favors a lower standard of proof and the granting of a hearing over summary dismissal of all claims.

Ohio's process for determining post-conviction relief claims fails to satisfy minimal standards of due process. *See Case*, 381 U.S. 336. Because Ohio has chosen to establish a post-conviction procedure to effectuate constitutional rights for those defendants sentenced to death, that procedure must comport with fundamental due process. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *see also Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 282-83 (1998) (appellant's life interest protected by due process clause); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (death is different and so requires heightened due process).

II. Available, compelling evidence supported trial counsel's strategy in their case to save Hale's life, but they inexplicably failed to obtain and present it.

Criminal defense counsel must provide their clients with objectively reasonable representation under the prevailing professional standards. *Strickland v. Washington,* 466 U.S. 668, 694 (1984). Hale's counsel employed the strategy of arguing that Hale acted in self-defense to keep from being raped by Green and introducing Hale's written statement to police, in which Hale had explained the effect on him of years in prison fighting off "unwanted advances." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864. Trial counsel told the jury to "think about…whether the victim facilitated, induced, or facilitated the offense, and whether the defendant acted under duress or coercion or strong provocation," referencing Ohio's statutory mitigating factors under Ohio Rev. Code § 2929.04(B)(1) and (B)(2). Despite their own strategy, counsel never investigated and presented the evidence available to support it.

Counsel failed to use a prison expert to explain how Hale's time in prison shaped his interaction with Douglas Green. They further failed to investigate and present available mitigating evidence supporting a more comprehensive portrayal of

Hale. *See also* Hale's seventh, fifteenth, sixteenth, and seventeenth grounds for post-conviction relief.

Ohio law regarding provocation is that, "[i]n determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time." *State v. Lawrence*, 44 Ohio St.3d 24, 26 541, N.E.2d 451 (1989), citing *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988). When it comes to provocation as a mitigating factor, "the issue is not whether the provocation was sufficiently serious to legally justify or excuse the use of deadly force, but whether the provocation was serious enough to qualify as a mitigating fact for the purposes of O.R.C. § 2929.04(B)(2)." *State v. Lawrence*, 44 Ohio St.3d at 32.

A prison expert such as Dr. Clemens Bartollas should have been used to explain Hale's time in prison, and explain the "fear for his survival that constituted trauma in his life that extended over to his post-institutional adjustment." PC Ex. 27. Dr. Bartollas would have testified about the evidence of "potential sexual assault or at least extremely traumatic incidents with Hale in prison." PC Ex. 27 at p. 6. Hale had in fact been "attacked on several occasions but was able to fight off his aggressors." PC Ex. 27 at p. 1. In fact, on at least one occasion, Hale's cellmate, who would masturbate in front of him, attacked Hale in the middle of the night. *Id*. at p. 7. In addition to facing sexual pressure, Hale had been housed in a dormitory where "it was not unusual to see inmates raped." *Id*. In fact, Hale told Dr. Bartollas that "guys were constantly getting raped" and "rapes were an ongoing occurrence in the shower areas that were inadequately supervised." *Id*. Moreover, Hale fits the profile of a sexual victim: "Mr. Hale is a small man, was not affiliated with a gang that could have protected him, did not have a type of offense record that would have earned him respect, and does not appear to have a demeanor that would have received respect from other inmates." *Id*. at p. 8.

Dr. Bartollas could have told the jury that Hale's "continued potential of sexual victimization, as well as his strong sense that 'someone would take him out,' made him feel like a victim for most of the nearly fifteen years he spent in prison settings." *Id*. He could have explained how that trauma related to sexual pressure and physical survival in prison would have affected Hale's mental state at the time of the offense. Due to his experiences in prison, further compounded by his childhood history of sexual abuse, Hale was primed to be hypervigilant to the threat of sexual assault, precipitating the reaction that resulted in the death of Mr. Green.

Without hearing the testimony of Dr. Bartollas, the lower court majority erroneously concluded that the testimony of Dr. Fabian – the psychologist presented by trial counsel – essentially foreclosed the need for a prison expert like Dr. Bartollas. Contrary to the Court's opinion, however, Dr. Bartollas could have provided the jury with information that was directly relevant to Hale and contrary to, not cumulative of, Dr. Fabian's testimony.

Dr. Fabian did not do an adequate job in accurately conveying to the jury how Hale's experiences in prison affected his state of mind at the time of Green's death.

He testified that he was "not certain whether this [crime] mirrors being victimized sexually in other times of [Hale's] life," and that "in prison, one is confronted with a lot of stresses," but Hale had no "formal records of violence in prison." Tr. 3943, 3994. Dr. Fabian actually contradicted Hale's statement of the instant offense in which he references his frame of mind to prison and having to have fought off sexual incidents while in prison. Dr. Fabian's testimony was problematic on two fronts: it was not mitigating, and it was an inaccurate depiction of the sexual pressure and trauma that Hale did face while in prison.

Additionally, numerous factors in Hale's life implicate brain damage, including his involvement in physical altercations, the abuse he suffered, his history of blackouts, and his father's Alzheimer's diagnosis. There was no testimony from a neuropsychological standpoint to explain how any impairment would impede Hale's functioning and mental processes. Though Dr. Fabian testified that Hale began to abuse both drugs and alcohol at the age of 12, Dr. Fabian failed to address what implications early substance abuse has for adolescent development or the pervasive effects that can further impair adult functioning. Tr. 3933-34, 3936, 3943, 3972.

While other experts could provide specific insights into those mitigating factors, everything is further compounded by Hale having being raised in an impoverished community with certain cultural ethos, instilled from an early age, warranting further explanation and testimony from a cultural expert. A cultural expert could have provided insights into why Hale was reluctant to admit to his sexual abuse by another male, why he was mistrustful of the police and did not call them after his encounter with Green, and perhaps why he feared showing any mental disorder.

It was not just evidence about Hale that counsel failed to investigate and present. As this Court recognized in *Lockett v. Ohio*, the "consideration of the character and record of the individual offender and the circumstances of the particular offense [are] a constitutionally indispensable part of the process of inflicting the penalty of death in order to ensure the reliability, under Eighth Amendment standards of the determination that death is the appropriate punishment in a specific case." 438 U.S. 586, 589 (1978). Counsel also failed to investigate and present mitigating evidence though the testimony of Corporal Steven Key, a Corrections Officer who could have bolstered Hale's statements regarding Green's provocation.

As he did with Hale, Mr. Green approached Corporal Steven Key about coming to the recording studio despite the fact that Corporal Key "couldn't sing a lick." PC Ex. 35. Also analogous to Hale, Key felt that Green was hitting on him and described him as being very aggressive. *Id.* Green approached Key so often that Key deliberately "tried to avoid him." *Id.* In the Eight District Court of Appeals, the majority agreed with the trial court's denial of this claim because "Hale's contention that the victim provoked the murder was refuted by the physical evidence" and, "the jury was already aware that the victim had raped another man by forcefully performing oral sex on him. Thus, the fact [Green] 'hit on Key' would not have added to [Hale's] defense." *State v. Hale,* 2016-Ohio-5837 at ¶24.

In Ohio, when it comes to provocation as a mitigating factor, "the issue is not whether the provocation was sufficiently serious to legally justify or excuse the use of deadly force, but whether the provocation was serious enough to qualify as a mitigating fact for the purposes of O.R.C. § 2929.04(B)(2)." *State v. Lawrence*, 44 Ohio St. 3d 24, 32, 541, N.E.2d 451 (1989). Thus, while Hale believes that Corporal Key could have testified during the trial phase to, at the very least, rebut the testimony regarding Green's business practices, it is undisputed that Key could have testified during mitigation and would have provided valuable insights into Hale's mindset at the time of the offense. *Id.*

Green's killing did not occur in a vacuum, and the jury should have had the relevant information before making its determination. Hale stood before the jury as a "member[] of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death," because trial counsel failed to do their job. *Woodson v. North Carolina*, 428 U.S. 280, 282 (1976).

The majority of the Ohio Court of Appeals gave little actual consideration to the evidence Hale presented. It dismissed much of it by pointing to Dr. Fabian, finding that he had testified "at length," and that any expert opinion would have been cumulative to his testimony. *State v. Hale*, 2016-Ohio-5837, ¶18 (Ct. App.). It made these determinations without Hale ever getting the opportunity to present the testimony.

CONCLUSION

Ohio courts are not providing capital post-conviction petitioners with the necessary tools to prosecute their post-conviction litigation. Hale was denied the ability to use any tools of discovery, and then his petition and appeal were dismissed without a hearing. The mitigating evidence that Hale's counsel failed to present would have been critical for a jury to hear. This Court should grant Hale's petition to require Ohio make capital post-conviction proceedings meaningful for all capital petitioners.

Respectfully submitted,

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