No. 18-8569

In the Supreme Court of the United States

MELVIN BONNELL,

Petitioner,

v.

STATE OF OHIO,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

Does the Sixth Amendment right to confront witnesses apply outside of trial in a state court postconviction proceeding regarding an application for DNA testing?

Does any provision of the United States Constitution require a state to allow a convicted offender to appeal a state court's decision to deny a postconviction application for DNA testing without first holding a hearing?

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STATEMENT OF THE CASE

On November 28, 1987, at approximately 3:00 a.m., Melvin Bonnell murdered 22-year-old Robert Bunner inside Bunner's apartment on the west side of Cleveland, Ohio. *See* Pet. App. A-2. Bunner knocked on the door to the apartment and announced himself as "Charles." *Id.* When Bunner's roommate opened the door, Bonnell pulled a gun from his pocket and shot Bunner in the chest and again in the groin at close range. *Id.* Two witnesses inside the apartment identified Bonnell at trial as the shooter. *See* Pet. App. A-21 – A-22. Bonnell then led police on a high-speed chase away from Bunner's apartment that ended when he crashed his car into a funeral home. *See* Pet. App. A-3. Police found the murder weapon on the street near where Bonnell crashed his car. *See* Pet. App. A-22.

Bonnell's case proceeded to a jury trial in 1988. The jury found Bonnell guilty of guilty of two counts of aggravated murder and aggravated burglary, as well as one capital specification of felony-murder under Ohio Revised Code 2929.04(A)(7) for killing Bunner during an aggravated burglary. *See* Pet. App. A-2-A-3. Following the sentencing phase, the jury unanimously recommended the death penalty. *Id.* The trial court agreed and sentenced Bonnell to death. *Id.*

Ohio state courts affirmed Bonnell's convictions on direct appeal and on postconviction review. *See State v. Bonnell*, 61 Ohio St.3d 179 (1991) (direct appeal); *State v. Bonnell*, 1998 Ohio App. LEXIS 3943 (1998) (postconviction). The state supreme court found that the evidence of Bonnell's guilt was "overwhelming." *State v. Bonnell*, 61 Ohio St.3d at 183. This Court denied certiorari over both Bonnell's

direct appeal and postconviction proceedings. *See Bonnell v. Ohio*, 502 U.S. 1107 (1992) (direct appeal); *Bonnell v. Ohio*, 528 U.S. 842 (1999) (postconviction).

Bonnell filed a petition for a writ of habeas corpus in United States District Court for the Northern District of Ohio in March of 2000. The district court denied Bonnell's petition. *See Bonnell v. Mitchell*, 301 F. Supp. 2d 698 (N.D.Ohio 2004). The Sixth Circuit unanimously affirmed. *Bonnell v. Mitchell*, 212 Fed.Appx. 517 (6th Cir.2007). The Sixth Circuit found that the evidence against Bonnell was "overwhelming" and "extremely strong." *Id.* at 528, 538. This Court denied Bonnell's petition for a writ of certiorari. *Bonnell v. Ishee*, 552 U.S. 1064 (2007).

In 2008, Bonnell requested DNA testing on a jacket recovered from his car after the crash. *See* Pet. App. A-7. The State agreed to DNA testing on the jacket. *Id.* In 2009, DNA test results shows that the victim's blood was on Bonnell's jacket in five different places, thus confirming Bonnell's identity as the killer. *Id.*

At that point, Bonnell took no further action in the case for more than seven years. *Id.* In 2017, Bonnell asked the State to account for the whereabouts of any other items of evidence in the case for potential additional DNA testing. *Id.* The State complied with that request and submitted a 24-page report documenting its efforts to search for any evidence remaining from Bonnell's trial in 1988. *See* Pet. App. A-46 – A-70. The report included a 15-page, 80-paragraph affidavit from the prosecution detailing its efforts to locate evidence from the trial. *See* Pet. App. A-72 – A-86. Although those efforts were extensive, the prosecutor was unable to verify that almost any of the other evidence from Bonnell's trial still existed for testing. *Id.*

The trial court thereafter denied Bonnell's application for DNA testing on two grounds. *See* Pet. App. A-13 – A-23. First, relying on the prosecutor's affidavit, the trial court found that no evidence still existed for DNA testing apart from the jacket, which had already been tested. *See* Pet. App. A-18 – A-21. Second, the court found that even if any evidence did exist, Bonnell could not show that any testing would be outcome-determinative in light of the overwhelming evidence of his guilt. *See* Pet. App. A-21 – A-23. The state supreme court unanimously affirmed. *See* Pet. App. A-1 – A-12. Bonnell now asks this Court to grant certiorari to review that decision.

SUMMARY OF THE ARGUMENT

The state court's decision in this case rests on an independent and adequate state law ground. Ohio law requires convicted offenders to satisfy six requirements to obtain postconviction DNA testing. The trial court found that Bonnell failed two of them. Bonnell appeals only one of them to this Court. This means that if the state court erred regarding the first reason, the second reason was still valid, and required the rejection of Bonnell's application under state law.

Even if this Court could reach the merits of this case, Bonnell's argument is essentially that this Court should extend the Confrontation Clause to apply to state court postconviction proceedings. This Court, however, has repeatedly held that the right to confront witnesses is a trial right that does not apply after a guilty verdict, even at sentencing in a capital case. Moreover, convicted offenders such as Bonnell have no constitutional right to state court postconviction review of their cases at all.

States are thus free to set reasonable restrictions on offenders attempting to return to state court for repeated rounds of postconviction review.

REASONS FOR DENYING THE WRIT

I. The state court's finding that any further DNA testing would not be outcome determinative provides an independent and adequate state law ground for the state court's decision.

This Court "has long held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989). The state supreme court's decision in this case rested upon an independent and adequate state law ground that rendered the federal constitutional question moot.

Ohio law provides a statutory right for convicted inmates to request DNA testing of items of evidence. *See generally* Ohio Revised Code 2953.71 - 2953.81. To obtain such testing, the inmate must satisfy six statutory criteria. *See* Ohio Revised Code 2953.74(C)(1)-(6). If any one of those six criteria are lacking, the Ohio court is precluded from authorizing the DNA testing. *State v. Emerick*, 170 Ohio App.3d 647, ¶ 16 (2007).

The trial court in this case found that Bonnell failed to meet two of those six criteria. First, the court found that Bonnell failed to demonstrate that any evidence was still available for DNA testing. *See* Pet. App. A-18 – A-21, citing Ohio Revised Code 2953.74(C)(1). Second, the court found that even if the evidence was still available, Bonnell could not show that any further testing would be "outcome

determinative" in light of the overwhelming evidence of his guilt. *See* Pet. App. A-21 – A-23, citing Ohio Revised Code 2953.74(C)(5).

In the state supreme court, Bonnell challenged both findings. In his first assignment of error, Bonnell "assert[ed] a due-process right to challenge in the trial court the adequacy of the state's search for evidence." *See* Pet. App. A-11. The state supreme court did not reach this issue because it held that Ohio's postconviction statutes did not allow Bonnell to appeal the trial court's decision as to whether to hold a hearing. *Id.* In his second assignment of error, Bonnell "contend[ed] that the trial court erred in its determination that he was not entitled to DNA testing (assuming any materials exist for testing) because the results would not be outcome determinative." *See* Pet. App. A-10. The state court rejected Bonnell's second argument on the merits. *See* Pet. App. A-10 – A-11.

In this Court, Bonnell challenges the state supreme court's resolution of only his first assignment of error. He raises no challenge to the state court's finding that "Bonnell has failed to demonstrate any of the evidence he sought to test could be outcome determinative[.]" *See* Pet. App. A-12. Indeed, he cannot, because there is no federal constitutional question at stake in whether further DNA testing of the evidence in question in Melvin Bonnell's case would be outcome determinative.

This ground is both independent and adequate. It is independent because it has nothing to do with Bonnell's Sixth Amendment challenge to the state court's reliance on the prosecution's affidavit regarding its efforts to search for the evidence. And it is adequate because Ohio's postconviction DNA testing statute requires the

defendant to satisfy all six requirements to obtain testing. *See* Ohio Revised Code 2953.74(C) ("the court may accept the application only if all of the following apply"); Pet. App. A-9 ("A court may accept an R.C. 2953.73 application for DNA testing only if it determines that six conditions apply").

As a result, even if the state court's resolution of Bonnell's first assignment of error regarding his right to an evidentiary hearing was wrong, it would not have mattered. The state court found that Bonnell failed to show that any additional DNA testing would be outcome determinative. That finding, without more, required the state court to reject his application for DNA testing under state law. This is an independent and adequate state law ground on which this Court should decline to hear this case.

II. The Sixth Amendment right to confront witnesses does not apply in postconviction proceedings.

The Sixth Amendment right to confront witnesses is "basically a trial right." *Barber v. Page*, 390 U.S. 719, 725 (1968). "[I]t is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause[.]" *California v. Green*, 399 U.S. 149, 157 (1970). *See also Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) ("The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination") (emphasis in original).

The Confrontation Clause is not "universally applicable to all hearings." *Wolff v. McDonnell*, 418 U.S. 539, 567 (1974). For example, in *Williams v. New York*, 337

U.S. 241, 250-251 (1949), this Court held that the right to confrontation does not apply at sentencing, even in capital cases. In *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972), this Court recognized that the Sixth Amendment right to confrontation did not apply at parole revocation proceedings because such proceedings were not a stage of a criminal prosecution.

This Court has never applied the Confrontation Clause outside of a trial setting. There is "no Supreme Court precedent – or, for that matter, precedent from any other federal court – suggesting that the right to be present enshrined in the Confrontation Clause extends to a post-conviction, post-sentence" context. *Brown v. Warden, Mansfield Corr. Inst.*, 492 Fed. Appx 533, 539 (6th Cir.2012). To the contrary, appellate courts have uniformly held that the right to confront witnesses does not apply to postconviction proceedings. *See Oken v. Warden, MSP*, 233 F.3d 86, 92-93 (1st Cir.2000); *United States v. Martinez*, 413 F.3d 239, 242-244 (2d Cir.2005); *United States v. Fernandez*, 526 Fed. Appx. 270, 284 n. 13 (4th Cir.2013); *United States v. Kirby*, 418 F.3d 621, 627-628 (6th Cir.2005); *Castillo-Hernandez v. Holder*, 596 Fed. Appx. 645, 651 (10th Cir.2014); *United States v. Boyd*, 131 F.3d 951, 954 (11th Cir.1997).

This Court held in *Crawford v. Washington*, 541 U.S. 36 (2004), that the admission of certain testimonial hearsay at trial would violate the Confrontation Clause absent an opportunity for cross-examination and the unavailability of the declarant. This Court also held, however, that a violation of the defendant's Sixth Amendment right to confront witnesses only occurs if the prosecution introduces

those statements *at trial*. *See Bullcoming v. New Mexico*, 564 U.S. 647, 657 (2011) ("As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness").

Bonnell cites no authority in his petition that supports extending, for the first time, the Sixth Amendment right of confrontation to postconviction proceedings. Nor does he provide this Court with warranted reasons as to why this should now be the case. To extend the right of confrontation in this way would effectively convert all state court postconviction proceedings into miniature trials, enforcing sharp federal constitutional limits on the types of postconviction review states must provide. This Court's precedents do not support such a drastic change. This Court should deny the petition as to Bonnell's first question.

III. States are free to adopt reasonable limitations on postconviction review of a convicted offender's request for DNA testing.

In his second question presented, Bonnell argues that the Ohio statute limiting what convicted offenders may or may not appeal regarding a postconviction application for DNA testing should be unconstitutional. Bonnell does not identify any specific constitutional provision that he believes requires the states to provide unlimited appellate review of such a request. And this Court has consistently rejected attempts to micromanage postconviction review in state courts.

A convicted inmate has no constitutional right to postconviction review. "Postconviction relief * * * is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction."

Pennsylvania v. Finley, 481 U.S. 551, 557 (1987). "States have no obligation to provide this avenue of relief." *Id.*, citing *United States v. MacCollum*, 426 U.S. 317, 323 (1976) ("[t]he Due Process Clause of the Fifth Amendment * * * certainly does not establish any right to collaterally attack a final judgment of conviction").

Moreover, this Court has declined to recognize "a freestanding right to access DNA evidence for testing[.]" *DA's Office v. Osborne*, 557 U.S. 52, 73 (2009). Because a convicted inmate has no constitutional right to any postconviction review, including postconviction DNA testing, the inmate's "right to file a postconviction petition is a statutory right, not a constitutional right." *State v. Broom*, 146 Ohio St.3d 60, ¶ 28 (2016). The petitioner receives no more rights than those the state statute provides.

Ohio has chosen, in its discretion, to provide convicted offenders with a statutory right to postconviction DNA testing. At the same time, Ohio limits the scope of an inmate's right to appeal to the trial court's ultimate decision to accept or reject the request for DNA. Ohio law expressly provides that "no determination otherwise made by the court of common pleas in the exercise of its discretion regarding the eligibility of an offender or regarding postconviction DNA testing under these provisions is reviewable by or appealable to any court." Ohio Revised Code 2953.72(A)(8). This includes the trial court's discretionary decision as to whether to hold a hearing on the application. Under Ohio Revised Code 2953.73(D): "The court is not required to conduct an evidentiary hearing in conducting its review of, and in making its determination as to whether to accept or reject, the application."

Bonnell did not challenge the constitutionality of these statutes in his appeal to the state supreme court. This Court ordinarily "will not consider a claim that was not presented to the courts below." *Jenkins v. Anderson*, 447 U.S. 231, 234 n. 1 (1980). Even if Bonnell had preserved this claim in state court, there is no constitutional right to postconviction review at all – including a right to postconviction DNA testing. Ohio is thus "free to impose proper procedural bars to restrict repeated returns to state court for postconviction proceedings." *Slack v. McDaniel*, 529 U.S. 473, 489 (2000). Ohio has done so by limiting the scope of the issues a convicted offender may appeal regarding postconviction DNA testing. These types of state court procedural rules implicate no federal constitutional rights.

IV. Ohio law adequately protects inmates by allowing the offender to appeal the rejection of the application.

In support of his position, Bonnell presents this Court with a parade of horribles that he believes Ohio trial courts might rely on to deny applications for DNA testing absent sufficient appellate review, including racism, sexism, religious bigotry, and ex parte conversations with prosecutors. *See* Petition, p. 23-24. None of this is at issue in this case because Bonnell does not claim the trial court relied on any of these reasons to deny his application.

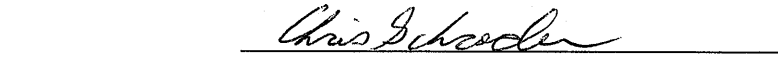
Moreover, Bonnell is incorrect that Ohio law provides inmates with no protections against such things. A convicted offender may "appeal the rejection" of an application for DNA testing. Ohio Revised Code 2953.72(A)(8). If the trial court's reason for rejecting the application is unsound – for example, if the trial court relies on reasons that are racist, sexist, or otherwise improper – the state court can review

and reverse that reasoning. The offender simply cannot appeal the trial court's decision to rule on the application without first holding a hearing. That is all the state supreme court held in this case. This Court should deny the petition as to Bonnell's second question.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,



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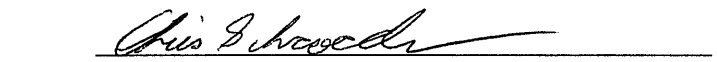
PROOF OF SERVICE

Pursuant to Rules 29.3 and 29.5(b) of the Rules of the Supreme Court of the United States, Christopher D. Schroeder, counsel of record for Respondent and a member of the Bar of this Court, hereby certifies that on April 23, 2019, he served Kimberly Rigby, counsel of record for Petitioner Melvin Bonnell, and co-counsel Erika LaHote, by placing in the United States Mail, postage pre-paid, properly addressed to Attorneys Rigby and LaHote at the Officer of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, a copy of the Brief in Opposition to Petition for Writ of Certiorari.

All parties required to be served in this case have been served.

Respectfully submitted,



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