No. 18-9468

In the Supreme Court of the United States

MELVIN BONNELL,

Petitioner,

v.

TIM SHOOP, Warden

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – EXECUTION SET FOR FEBRUARY 12, 2020

QUESTION PRESENTED

When the state trial court issued a *nunc pro tunc* entry correcting a clerical error in Melvin Bonnell's sentencing documents, did it enter a new "judgment" that allowed Bonnell to file a federal habeas petition that would otherwise be barred by the prohibition on second or successive petitions?

LIST OF PARTIES

The Petitioner is Melvin Bonnell, a capital inmate at the Chillicothe Correctional Institution. Bonnell is scheduled to be executed on February 12, 2020.

The Respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. State v. Bonnell, No. CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (judgment entered March 29, 1988) (conviction).

2. *State v. Bonnell*, No. 55927 (Ohio Court of Appeals, Eighth District) (judgment entered October 5, 1989) (direct appeal).

3. *State v. Bonnell*, No. 1989-2136 (Ohio Supreme Court) (judgment entered July 24, 1991; reconsideration denied September 18, 1991) (direct appeal).

4. *Bonnell v. Ohio*, No. 91-6740 (U.S. Supreme Court) (certiorari denied February 24, 1992) (direct appeal).

5. *State v. Bonnell*, No. 55927 (Ohio Court of Appeals, Eighth District) (judgment entered May 6, 1994; reconsideration denied February 1, 1995) (application for reconsideration).

6. *State v. Bonnell*, No. 1994-1343 (Ohio Supreme Court) (judgment entered December 20, 1994) (application for reconsideration).

7. *State v. Bonnell*, No. CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (judgment entered October 16, 1995; on remand for clarification, judgment entered August 13, 1997) (postconviction).

8. *State v. Bonnell*, Nos. 69835, 73177 (Ohio Court of Appeals, Eighth District) (judgment entered August 27, 1998) (postconviction).

9. *State v. Bonnell*, No. 1998-2113 (Ohio Supreme Court) (judgment entered January 20, 1999; reconsideration denied March 3, 1999) (postconviction).

10. *Bonnell v. Ohio*, No. 98-9618 (U.S. Supreme Court) (certiorari denied October 4, 1999) (postconviction).

11. *Bonnell v. Mitchell*, No. 00CV250 (U.S. District Court for the Northern District of Ohio) (judgment entered February 4, 2004) (first habeas petition).

12. *State v. Bonnell*, CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (first application for DNA testing denied October 21, 2005).

13. *State v. Bonnell*, No. 2005-2284 (Ohio Supreme Court) (appeal denied March 29, 2006) (first application for DNA testing).

14. *State v. Bonnell*, No. 87337 (Ohio Court of Appeals, Eighth District) (appeal dismissed August 3, 2006) (constitutionality of DNA testing statute).

15. *State v. Bonnell*, No. 2006-1739 (Ohio Supreme Court) (appeal denied December 27, 2006) (constitutionality of DNA testing statute).

16. *Bonnell v. Mitchell*, No. 04-3301 (U.S. Court of Appeals for the Sixth Circuit) (judgment entered January 8, 2007) (first habeas petition).

17. *Bonnell v. Ishee*, No. 07-6313 (U.S. Supreme Court) (certiorari denied December 3, 2007) (first habeas petition).

18. *Bonnell v. Mitchell*, No. 04-3301 (U.S. Court of Appeals for the Sixth Circuit) (motion to recall mandate denied November 20, 2009) (first habeas petition).

19. *Bonnell v. Bobby*, No. 09-9186 (U.S. Supreme Court) (certiorari denied June 1, 2010) (motion to recall mandate in first habeas petition).

20. *State v. Bonnell*, No. CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (judgment entered January 3, 2011) (motion for resentencing).

21. *State v. Bonnell*, No. 96368 (Ohio Court of Appeals, Eighth District) (judgment entered November 10, 2011) (motion for resentencing).

22. *State v. Bonnell*, No. 2011-2164 (Ohio Supreme Court) (appeal denied May 14, 2014; reconsideration denied September 24, 2014) (motion for resentencing).

23. *State v. Bonnell*, No. CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (*nunc pro tunc* entry January 20, 2015).

24. *State v. Bonnell*, No. 102630 (Ohio Court of Appeals, Eighth District) (judgment entered November 5, 2015) (appeal of *nunc pro tunc* entry).

25. *State v. Bonnell*, No. 2015-2047 (Ohio Supreme Court) (appeal denied March 15, 2017) (appeal of *nunc pro tunc* entry).

26. *State v. Bonnell*, No. 2017-0115 (Ohio Supreme Court) (appeal dismissed April 6, 2017) (second appeal of first application for DNA testing).

27. *State v. Bonnell*, No. 2005-2284 (Ohio Supreme Court) (application for reopening denied April 19, 2017) (first application for DNA testing).

28. *State v. Bonnell*, CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (second application for DNA testing denied August 14, 2017).

29. *Bonnell v. Jenkins*, No. 1:17-cv-787 (U.S. District Court for the Northern District of Ohio) (judgment entered August 25, 2017) (second habeas petition).

30. *State v. Bonnell*, No. 2017-1360 (Ohio Supreme Court) (judgment entered October 10, 2018) (second application for DNA testing).

31. *In re Bonnell*, No. 17-3886 (U.S. Court of Appeals for the Sixth Circuit) (judgment entered December 4, 2018) (second habeas petition).

32. *State v. Bonnell*, No. CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (motion for new trial denied January 25, 2019).

33. *State v. Bonnell*, No. 108209 (Ohio Court of Appeals, Eighth District) (appeal docketed February 14, 2019; ongoing) (motion for new trial)

34. *Bonnell v. Ohio*, No. 18-8569 (U.S. Supreme Court) (certiorari denied May 28, 2019) (second application for DNA testing).

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INTRODUCTION

Three decades ago, Melvin Bonnell knocked on a Cleveland, Ohio apartment door at 3 a.m. When Robert Bunner opened the door, Bonnell entered uninvited, pulled out a gun, and shot Bunner in the chest and groin. Bonnell then sat on Bunner, repeatedly striking his face until one of Bunner's roommates was able to throw Bonnell out of the apartment. Bunner died from his injuries.

After an Ohio jury convicted Bonnell of aggravated murder and aggravated burglary, an Ohio trial court sentenced Bonnell to death for the aggravated murder and to ten-to-twenty-five-years' imprisonment for the aggravated burglary. Bonnell spent most of the next two decades unsuccessfully challenging his convictions and sentences on direct appeal, in state-postconviction proceedings, and in a federal habeas proceeding.

Then in 2010, Bonnell discovered a clerical error in the trial court's 1988 sentencing documents. The state courts agreed that there was a clerical error and, as Ohio law requires in such situations, entered a *nunc pro tunc* order to make the sentencing record reflect what actually happened in court.

Bonnell then returned to federal court, arguing that this *nunc pro tunc* order created a "new judgment" that, under *Magwood v. Patterson*, 561 U.S. 320 (2010), would allow him a fresh round of federal habeas review. But that is wrong. *Nunc pro tunc* orders correcting clerical errors are not "new judgment[s]" for *Magwood* purposes, as every circuit to have addressed the issue has recognized. This issue is splitless and Bonnell's underlying claims are meritless, so this Court should deny review.

JURISDICTION

The Sixth Circuit denied Bonnell's request to file his second habeas petition on December 4, 2018. Pet.App.2–5. The same court denied Bonnell's *en banc* petition on February 27, 2019. Pet.App.1. Bonnell timely filed his certiorari petition on May 23, 2019. The Court lacks jurisdiction to consider a writ of certiorari about a "denial of authorization by a court of appeals to file a second or successive application." 28 U.S.C. §2244(b)(3)(E). The Court does have jurisdiction to consider whether Bonnell's petition is in fact second or successive. *Castro v. United States*, 540 U.S. 375, 379–80 (2003).

STATEMENT

1. Robert Bunner and his roommates, Ed Birmingham and Shirley Hatch, spent much of November 27, 1986 partying in their Cleveland, Ohio apartment. *State v. Bonnell*, No. 55927, 1989 Ohio App. LEXIS 4982, at *2 (Ohio Ct. App. Oct. 5, 1989). Birmingham went to bed at 8:30 p.m., but the others stayed up.

At around 3:00 a.m., Hatch heard a knock on the back door. The knocker identified himself as "Charlie." But Hatch could not see through the peephole who the person was, so she called Bunner over to the door. Bunner opened it and "Charlie" entered uninvited. Once inside, "Charlie" pulled out a gun, uttered an expletive, and shot Bunner twice at close range, striking him in his chest and groin. "Charlie" then turned towards Hatch, but she managed to escape to Birmingham's bedroom. After Hatch woke up Birmingham, the pair left the bedroom and found "Charlie" sitting on top of Bunner, striking him repeatedly in the face. *Id.* at *2–3. Birmingham pulled "Charlie" off Bunner, and threw him out the apartment door

and down a flight of steps, while Hatch called the police and an ambulance. *Id.* at *3. Bunner later died of his injuries.

Around a half hour later, two Cleveland police officers spotted a car nearby, traveling backwards with its headlights off. They attempted to stop the car, but it turned and sped away. The police officers gave chase, and the fleeing car crashed into the side of a funeral home. Emergency personnel took the driver, Melvin Bonnell, to the hospital. *Id.* at *4.

Police later realized that Bonnell matched Birmingham's and Hatch's descriptions of Bunner's murderer. *Id.* at *3–4. They brought Birmingham to the hospital, and he identified Bonnell as Bunner's murderer. *Id.* at *4. Police also found a .25-caliber automatic pistol at the funeral-home crash scene and were able to confirm that it was the same gun used to fire the bullets found in Bunner's body.

Bonnell later admitted that he had been at Bunner's apartment that morning, but said that he was there with his friend, Joe Popil, and had remained in the car while Popil went inside with a gun. Bonnell said Popil returned to the car with the gun, but that Bonnell had then passed out from alcohol and did not remember anything else until he awoke in the hospital. But he apparently had no explanation for why he was the only one in the car with the gun fleeing police shortly after Bunner's murder. (Popil confirmed he had been drinking with Bonnell earlier that night, but said he had gone home at 11:30 p.m., hours before the murder.)

An Ohio jury convicted Bonnell of aggravated murder and aggravated burglary. *Id.* at *1. Following the jury's recommendation, the trial court sentenced Bon-

nell to death for the aggravated murder. *Id.* at *1–2. And it later sentenced Bonnell to ten-to-twenty-five years' imprisonment for the aggravated burglary.

2. Bonnell appealed, raising thirty purported errors relating to his aggravated-murder and aggravated-burglary convictions. *See id.* at *43–51. Bonnell raised just one error related to his aggravated-burglary sentence: he argued that the trial court erred by sentencing him for the aggravated burglary when he was not present. *See id.* at *19–20. The Ohio Court of Appeals largely rejected Bonnell's assignments of error, but remanded to the trial court to resentence Bonnell for the aggravated burglary in his presence. *Id.* at *20, *42. The trial court did so later that month.

Bonnell appealed to the Ohio Supreme Court, this time raising twenty-nine purported errors. *See State v. Bonnell*, 61 Ohio St. 3d 179, 189–92 (1991). Although he argued that the trial court's sentencing documents did not comply with Ohio law "in several respects," he never pointed out that the trial court had failed to memorialize his ten-to-twenty-five-year aggravated-burglary sentence in the sentencing documents. *See id.* at 185. Nor did he argue that trial court *erred* in failing to memorialize that sentence. Instead, Bonnell challenged several other aspects of his aggravated-burglary conviction. *See id.* at 182–83, 190. The Ohio Supreme Court rejected Bonnell's arguments, upheld his convictions, and affirmed his death sentence. *Id.* at 181. This Court denied certiorari. *Bonnell v. Ohio*, 502 U.S. 1107 (1992).

That direct appeal was just the beginning of Bonnell's many challenges to his convictions and sentences. An abbreviated summary follows: After this Court de-

nied certiorari in 1992, Bonnell sought delayed reconsideration in the state courts. He raised fifty-five purported errors, including ineffective-assistance-of-counsel claims against both his trial counsel and his appellate counsel. The Ohio Court of Appeals denied reconsideration, and the Ohio Supreme Court affirmed. *See State v. Bonnell*, 71 Ohio St. 3d 223 (1994).

At that point, Bonnell filed a state-postconviction petition, raising fifty-three claims for relief. After the trial court summarily dismissed the petition, Bonnell appealed. *State v. Bonnell*, Nos. 69835 & 73177, 1998 Ohio App. LEXIS 3943 (Ohio Ct. App. Aug. 27, 1998). The Ohio Court of Appeals affirmed, *id.*, and the Ohio Supreme Court dismissed Bonnell's attempted appeal because it raised "no substantial constitutional question," *State v. Bonnell*, 84 Ohio St. 3d 1469 (1999). This Court again denied certiorari. *Bonnell v. Ohio*, 528 U.S. 842 (1999).

3. Bonnell then turned to the federal courts, seeking habeas relief under 28 U.S.C. §2254. He alleged "twenty general areas of alleged constitutional violation." *See Bonnell v. Mitchell*, 301 F. Supp. 2d 698, 718 (N.D. Ohio 2004). These purported errors included (in the District Court's words) a variety of forms of "prosecutorial misconduct," *id.* at 724–33, "judicial misconduct," *id.* at 733–37, "instructional error," *id.* at 737–56, "voir dire" errors, *id.* at 755–56, "ineffective assistance of counsel," *id.* at 756–62, "appeal" errors, *id.* at 762–63, and two challenges to the "constitutionality of Ohio['s] death penalty statute," *id.* at 763. The District Court denied Bonnell's habeas petition but, influenced by Bonnell's claims of prosecutorial error, granted a certificate of appealability on Bonnell's sufficiency-of-the-evidence claims.

Id. at 765. The Sixth Circuit unanimously affirmed, *see Bonnell v. Mitchell*, 212 F. App'x 517 (6th Cir. 2007), and this Court denied certiorari, *see Bonnell v. Ishee*, 552 U.S. 1064 (2007).

4. Bonnell returned to the state courts in May 2010, twenty-two years after his conviction and sentencing, pointing out for the first time that the trial court's 1988 sentencing documents failed to record his aggravated-burglary conviction. Pet.App.21–24. The Ohio Court of Appeals agreed that the trial court's sentencing documents, by omitting this information, "failed to technically comply with" Ohio Rule of Criminal Procedure 32(C). Pet.App.22. Following Ohio Supreme Court precedent, the courts remanded Bonnell's case to the trial court to issue a *nunc pro tunc* entry correcting the documents to include the aggravated-burglary conviction. Pet.App.22–24. The Ohio Court of Appeals also instructed Bonnell that, under Ohio law, the issuance of this *nunc pro tunc* entry would not create "a new final order from which an appeal may be taken." Pet.App.24. The Ohio Supreme Court declined review. *State v. Bonnell*, 138 Ohio St. 3d 1493 (2014).

After the trial court entered the *nunc pro tunc* entry on remand, Bonnell attempted to appeal it. Pet.App.28–32. The Ohio Court of Appeals held that the *nunc pro tunc* entry had been the appropriate vehicle to cure the technical error in this case, and that the *nunc pro tunc* entry in fact had cured the 1988 error. Pet.App.31. It therefore dismissed Bonnell's appeal. Pet.App.32. The Ohio Supreme Court again declined review. Pet.App.33.

5. Bonnell returned to federal court again, seeking habeas relief for a second time. This time, he raised two claims for relief. *First*, he argued that Ohio's death-penalty scheme, at least as applied in his case, violates the Sixth Amendment rule announced in *Hurst v. Florida*, 136 S. Ct. 616 (2016). *Second*, he argued that the state trial court violated his due-process and equal-protection rights by failing to specifically mention his aggravated-burglary conviction in its 1988 sentencing documents. He claimed that the court's failure deprived him, as a matter of Ohio law, of a final appealable order and thereby deprived all of the appellate courts in his case of jurisdiction. *See* Pet.App.2–3.

The District Court held that Bonnell's second habeas petition was second or successive. Therefore, the court concluded, it could not entertain his petition, since 28 U.S.C. §2244(b)(2), with exceptions not met here, says that "second or successive habeas corpus" petitions that raise issues "not presented in a prior application shall be dismissed." The Sixth Circuit agreed with the District Court that Bonnell's petition was second or successive because both claims could have been raised in his first habeas petition. Pet.App.3–4. The Sixth Circuit recognized that, when a state courts enters a new "judgment" after an initial round of habeas proceedings, a petition challenging that judgment is neither second nor successive under *Magwood v. Patterson*, 561 U.S. 320 (2010). But it rejected Bonnell's argument that the state trial court's *nunc pro tunc* entry correcting the clerical error in its 1988 sentencing documents created a new "judgment" in the relevant sense. Pet.App.4. The Sixth

Circuit denied *en banc* review, Pet.App.1, and Bonnell timely filed a petition for certiorari.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for certiorari. Bonnell concedes that petitioners are generally prohibited from filing second or successive petitions. He makes just one argument for why *his* petition is neither second nor successive: he says the state court's *nunc pro tunc* entry created a new "judgment" and that the second-or-successive rules thus do not apply to his first petition challenging the new judgment. *See Magwood v. Patterson*, 561 U.S. 320 (2010). This argument does not directly implicate any circuit split. Indeed, the circuits unanimously agree that *nunc pro tunc* entries correcting earlier clerical errors and causing the record to reflect what actually happened in court do not create new "judgment[s]." Because there is no split on that issue, Bonnell's question presented is not worth this Court's time. But even if there were a split, Bonnell's underlying claims are meritless, making this a bad vehicle for the Court to review the question presented.

I. This Court should deny certiorari because this case does not directly implicate a circuit split or otherwise present an issue of exceptional importance.

Federal habeas review of state convictions "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority," "frustrat[ing] both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (citations omitted); *see Calderon v. Thompson*, 523 U.S. 538, 554–56 (1998). That is

why AEDPA tightly circumscribes the availability of federal habeas relief to state prisoners. *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

Relevant here, AEDPA "does not take kindly to repeat requests for habeas relief." *King v. Morgan*, 807 F.3d 154, 155 (6th Cir. 2015) (Sutton, J.). A state prisoner may not raise a claim on a second habeas petition that he could have raised in his first habeas petition unless he can satisfy one of 28 U.S.C. §2244(b)(2)'s two "gatekeeping provisions." *Panetti v. Quarterman*, 551 U.S. 930, 942 (2007); *cf. Tyler v. Cain*, 533 U.S. 656, 661 (2001). But because those two gatekeeping provisions contain "stringent requirements," *King*, 807 F.3d at 155, state prisoners have every incentive to try to avoid them.

One way a state prisoner filing a second habeas petition may avoid these stringent gatekeeping requirements is if he is attacking a new state-court "judgment." *See Magwood*, 561 U.S. at 332–34. This is so, this Court explained, because "the phrase 'second or successive' must be interpreted with respect to the judgment challenged." *Id.* at 332–33. So if a prisoner obtains from the state courts "a new judgment (through a new trial or new sentencing proceeding)," *id.* at 332 (emphasis omitted), his first habeas petition filed *after* that new "judgment" is not "second or successive" for purposes of §2244(b), *see id.* at 342; *accord King*, 807 F.3d at 156.

This case presents the question whether the Ohio trial court's *nunc pro tunc* entry was a new "judgment." That question implicates no circuit split, and the Sixth Circuit properly ruled for the State.

A. The circuits agree that state courts' *nunc pro tunc* entries correcting earlier clerical errors do not create new "judgments" that state prisoners can use to circumvent §2244(b).

1. "While *Magwood* establishes that a habeas application challenging a 'new judgment' is not second or successive, it does not define the term 'new judgment.'" *United States v. Jones*, 796 F.3d 483, 485 (5th Cir. 2015). In some circumstances, the question whether a revised judgment is "new" is easy enough. For example, a sentence imposed by a state trial court after a "full resentencing" results in a "new judgment." *King*, 807 F.3d at 156. But what if a state trial court modifies its judgment through something less than a "full resentencing"? More relevant here, does a *nunc pro tunc* entry that corrects an earlier clerical error create a "new judgment"?

The Sixth Circuit has held that state courts need not conduct a full resentencing for there to be a new "judgment" that resets the second-or-successive count. *See In re Stansell*, 828 F.3d 412, 416–17 (6th Cir. 2016) (Sutton, J.). Rather, the relevant question is whether the state court later imposes a "*worse-than-before*" custodial sentence, whether through an order styled as a *nunc pro tunc* entry, *see Crangle v. Kelly*, 838 F.3d 673, 678 (6th Cir. 2016) (emphasis added), or through a limited resentencing, *In re Stansell*, 828 F.3d at 416–17. A new, worse-than-before custodial sentence thus results in a "new judgment" that resets the second-or-successive count, even if it is imposed in a *nunc pro tunc* entry. *See Crangle*, 838 F.3d at 678.

But it is a different situation when a *nunc pro tunc* entry merely "correct[s] clerical errors that result in a discrepancy between the court's oral pronouncements

and its paper records." *In re Stansell*, 828 F.3d at 420. *These* entries are *not* "new judgments for purposes of the second or successive requirements." *Id.* After all, "[t]o hold otherwise would turn those requirements into a game of "I Spy," where the petitioner best able to catch the court's technical errors will earn himself a free pass (maybe many free passes) into federal court." *Id.*

Other circuits have addressed the issue, both in cases arising under §2254 (which applies to petitioners in *state* custody) and in cases arising 28 U.S.C. §2255 (which applies to petitioners in *federal* custody). They all agree that an order correcting an earlier clerical error does not create a "new judgment" for *Magwood* purposes. *See Marmolejos v. United States*, 789 F.3d 66, 71 (2d Cir. 2015) (§2255); *United States v. Ledesma-Cuesta*, 476 F. App'x 412, 412 n.2 (3d Cir. 2012) (§2255) (dicta); *In re Parker*, 575 F. App'x 415, 418–19 (5th Cir. 2014) (§2255); *United States v. Brown*, 915 F.3d 1200, 1202 (8th Cir. 2019) (§2255); *Gonzalez v. Sherman*, 873 F.3d 763, 772 (9th Cir. 2017) (§2254) (as a matter of California law); *May v. Kansas*, 562 F. App'x 644, 645–46 (10th Cir. 2014) (§2254); *Wells v. Sec'y, Dep't of Corr.*, 769 F. App'x 885, 887 (11th Cir. 2019) (§2254); *see also In re Lampton*, 667 F.3d 585, 588 & n.6 (5th Cir. 2012) ("second or successive" means the same thing in the §2254 and §2255 contexts) (collecting cases).

Bonnell does not cite a single contrary case. That is, he has not found a single case holding that a state (or federal) court's *nunc pro tunc* entry correcting an earlier clerical error creates a "new judgment" that allows a state (or federal) prisoner to file an otherwise second or successive petition. Without any split among

the circuits on this question, there is no compelling reason for this Court to hear this case. *See* S. Ct. Rule 10.

2. Although Bonnell does not identify any circuit split implicated by his question presented, there is some disagreement among the circuits about whether (in the §2254 context) the question of what constitutes a new "judgment" that resets the second-or-successive count is a question of federal or state law.

The Ninth Circuit appears to treat this question as one of state law. *See Gonzales*, 873 F.3d at 769 ("We look to state law to determine whether the state court action constitutes a new, intervening judgment."); *Clayton v. Biter*, 868 F.3d 840, 844 (9th Cir. 2016) (citing *Hill v. Alaska*, 297 F.3d 895, 897–99 (9th Cir. 2002)); *but see Posey v. Nevan*, No. 2:15-cv-01482, 2019 U.S. Dist. LEXIS 45837, at *7 & n.4 (D. Nev. Mar. 20, 2019) (arguing that the Ninth Circuit's recent reliance on state-law analyses is undesirable and suggesting that it also deviates from earlier Ninth Circuit decisions and from *Magwood*). But no other circuit shares this view. Rather, other circuits approach the question whether a state-court action creates a new judgment as one of federal law. *See, e.g.*, *In re Stansell*, 828 F.3d at 415–17 (relying only on federal law in determining whether a partial resentencing creates a new "judgment"); *id.* at 417–18 (looking at state law only to determine whether an Ohio court's later imposition of post-release control "alter[ed] the substance" of the sentence and made it worse than before).

Whatever circuit split might exist on this point is immaterial for Ohio prisoners. Under Ohio law, as in federal law, a *nunc pro tunc* entry correcting an earlier

clerical error to make the sentencing record reflect what actually happened in court does not create a "new judgment." *See* Pet.App.22–24; Pet.App.29–32. So for Ohio prisoners, it does not matter whether the Sixth Circuit applies federal law (as it does now) or state law (as the Ninth Circuit does)—either way, a *nunc pro tunc* entry correcting an earlier clerical error to make the sentencing record reflect what actually happened in court does not create a "new judgment."

3. In sum, this case does not give the Court a chance to resolve a circuit split. Instead, Bonnell seeks factbound error correction. And as the following section illustrates, the Sixth Circuit did not err in finding his petition second or successive.

B. The Sixth Circuit correctly denied Bonnell permission to file a successive habeas petition.

The Sixth Circuit correctly held that Bonnell's current habeas petition was not challenging a "new judgment." *See* Pet.App.4. There is no dispute that the state trial court actually sentenced Bonnell in court to ten-to-twenty-five years' imprisonment for the aggravated burglary. *See* Pet.App.22, Pet.App.28. But the court failed to memorialize that sentence in its sentencing documents. *See* Pet.App.22, Pet.App.29. Its later *nunc pro tunc* entry memorializing that sentence thus corrected a clerical error that resulted "in a discrepancy between the court's oral pronouncements and its paper records." *In re Stansell*, 828 F.3d at 420; *accord* Pet.App.23–24, Pet.App.31. Because such an entry is not a "new judgment," the Sixth Circuit correctly treated Bonnell's petition as a successive petition. *See* Pet.App.4. And the Sixth Circuit correctly determined that Bonnell's claims did not satisfy §2244(b)(2)'s gatekeeping requirements, *see* Pet.App.3–4. In fact, Bonnell

does not even challenge that part of the Sixth Circuit's ruling. The Sixth Circuit thus correctly denied Bonnell permission to file this petition.

II. Bonnell's underlying claims are meritless, making this case a bad vehicle to review his question presented.

Even if Bonnell's question presented were worth this Court's time, there would be no need to address it in this case. Bonnell's petition for habeas relief is doomed on the merits, making any decision on the second-or-successive issue irrelevant.

A. Ohio's death-penalty scheme is consistent with *Hurst*.

Bonnell's first underlying claim is that "he is entitled to habeas relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016)." Pet.App.2.

1. Ohio's capital-sentencing system comports with *Hurst*. In *Hurst*, the Court invalidated Florida's capital-sentencing system because it allowed a judge to increase the maximum punishment—from life imprisonment to a death sentence—"based on her own factfinding." 136 S. Ct. at 620–22. That, the Court held, violated the Sixth Amendment right to a jury trial, under which "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Id.* at 621 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)).

Ohio's approach is much different than Florida's. For a defendant to be death-penalty eligible under Ohio law, the State must charge and prove an aggravating circumstance at the guilt phase and the jury must find an aggravating circumstance beyond a reasonable doubt. *See* Ohio Rev. Code §2929.03 (addressing

sentencing for aggravated murder); Ohio Rev. Code §2929.04(A) (listing aggravating circumstances). Then, at the mitigation phase, the jury must determine beyond a reasonable doubt that the aggravating circumstances outweigh any mitigating factors. Ohio Rev. Code §2929.03(D)(1). Only then, if the jury recommends death, does a court independently weigh mitigating factors against whatever aggravating circumstance the jury found. Ohio Rev. Code §2929.03(D)(3); *see also* Ohio Rev. Code §2929.05(A) (mandating, upon appeal, that the Ohio Supreme Court independently consider "whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case"). As a result, the court cannot impose a death sentence unless the jury first decides that a death sentence would be appropriate.

Ohio's scheme does not violate *Hurst*. It tasks juries with finding every fact necessary to support a death sentence. In other words, it is impossible for a judge to increase a sentence based on judge-found facts. A judge's only options are to (1) impose the jury's recommended sentence or (2) impose a *lesser* sentence. *See* Ohio Rev. Code §2929.03(D)(1)–(3). The Ohio Supreme Court has already held, on multiple occasions, that Ohio's capital-sentencing system complies with *Hurst*. *State v. Goff*, 154 Ohio St. 3d 218, 224–26 (2018); *State v. Mason*, 153 Ohio St. 3d 476 (2018); *State v. Belton*, 149 Ohio St. 3d 165, 176 (2016). This Court has denied review of the issue, also on multiple occasions. *Goff v. Ohio*, No. 18-8016, 2019 U.S. LEXIS 4043 (U.S.) (cert. denied June 17, 2019); *Mason v. Ohio*, 139 S. Ct. 456 (2018); *Belton v. Ohio*, 137 S. Ct. 2296 (2017).

2. In any event, "*Hurst* does not apply retroactively to cases on collateral review." *Ybarra v. Filson*, 869 F.3d 1016, 1032 (9th Cir. 2017). Usually, this Court's constitutional holdings do not apply retroactively to cases on collateral review. There are only two exceptions to this rule. The first applies to rules that "place[] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v. Lane*, 489 U.S. 288, 311 (1989). The second applies to "watershed rules of criminal procedure." *Id*. The *Hurst* rule is neither. Indeed, it is materially identical to the rule announced in *Ring v. Arizona*, which held that capital defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. 584, 589 (2002). This Court held that *Ring* was *not* retroactively applicable on collateral review, *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), and there is no reason to treat *Hurst* any differently.

This Court decided Hurst in 2016, decades after Bonnell's sentencing, and years after the state court issued the *nunc pro tunc* order. Thus, *Hurst*'s non-retroactivity prevents Bonnell from relying upon it.

B. Federal habeas relief is unavailable for errors of state law.

Bonnell's second underlying claim is that "his rights to equal protection and due process were violated when the state trial court did not issue a final appealable order in the judgment of conviction, which resulted in a jurisdictional defect." Pet.App.2–3. In other words, Bonnell thinks the Ohio courts erred as a matter of state law in one of two ways: (1) by neglecting to include his aggravated-burglary

conviction in the trial court's sentencing documents; or (2) by denying him a second round of appeals after the *nunc pro tunc* entry corrected that initial clerical error.

Both theories fail. This Court has "stated many times that 'federal habeas corpus relief does not lie for errors of state law.'" *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (citation omitted); *accord Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam). "[I]t is only noncompliance with *federal* law that renders a State's criminal judgments susceptible to collateral attack in the federal courts." *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam). Bonnell's attempt to dress up his fundamentally state-law claim in federal-sounding language, *see* Pet.7 (claiming a "federal constitutional right to equal protection of state supreme court precedent"), is not enough to transform it into a claim that he "is in custody in violation of the Constitution or laws or treaties of the United States," *see* §2254(a).

CONCLUSION

The Court should deny Bonnell's petition for a writ of certiorari.

Respectfully submitted,

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