

Case No.

IN THE
Supreme Court of the United States

FATHER,

Petitioner,

v.

MATERNAL GRANDPARENTS,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT**

PETITION FOR WRIT OF CERTIORARI

Allison L. Ehlert
Counsel of Record
Scotia J. Hicks
EHLERT HICKS LLP
2001 Addison Street, Suite 300
Berkeley, CA 94704
(415) 828-5350
aehlert@ehlerthicks.com

Counsel for Petitioner

QUESTION PRESENTED

Under Ohio law, incarcerated parents who have actively sought to maintain a connection with their children cannot lose their children to adoption without their consent. Where a parent satisfies this standard, may the State, consistent with the Fourteenth Amendment's Due Process Clause, entirely disregard his efforts to maintain his paternal ties and dispense with his statutory right to consent to the adoption of his children exclusively on the basis of the crime for which he was imprisoned, and in the absence of any statutory basis treating his crime as dispositive?

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF AUTHORITIES.....	iii
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION AND STATE STATUTE INVOLVED	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE PETITION	5
A. This Court Has Long Recognized That Parents' Relationships with Their Children Is Subject to the Protections of the Due Process Clause of the Fourteenth Amendment	5
B. This Court's Intervention Is Necessary to Clarify that Substantive Due Process Forbids State Courts from Severing the Parental Relationship Solely Because of Criminal Conduct in the Absence of Any Statutory Provision Making that Conduct Determinative	6
CONCLUSION	10
APPENDIX	
Entry in the Supreme Court of Ohio (May 9, 2018)	App. 1
Journal Entry and Opinion in the Court of Appeals of Ohio, Eighth Appellate District, County of Cuyahoga (December 21, 2017)	App. 2
Case Announcements in the Supreme Court of Ohio (July 11, 2018)	App. 21

TABLE OF AUTHORITIES

Cases

<i>In re Abdullah,</i> 85 Ill.2d 300 (Ill. 1981)	7
<i>In re Adoption of J,</i> 139 N.J. Super. 533 (NJ 1976)	7, 8
<i>In the Interest of A.R.M.,</i> 750 S.W.2d 86 (Mo. 1988)	7
<i>In the Interest of P.W.K.,</i> 815 S.W.2d 95 (Mo. 1991)	8
<i>In the Matter of Zisman,</i> 128 A.D.2d 789 (NY 1987)	7
<i>M.L.B. v. S.L.J.,</i> 519 U.S. 102 (1996)	5, 6, 9
<i>May v. Anderson,</i> 345 U.S. 528 (1953)	5
<i>Quilloin v. Walcott,</i> 434 U.S. 246 (1978)	5
<i>Santosky v. Kramer,</i> 455 U.S. 745 (1982)	5, 6
<i>Troxel v. Granville,</i> 530 U.S. 57 (2000)	5
<i>Turner v. Adoption of Madora,</i> 352 So.2d 957 (Fla. 1977)	8

Constitution and Statutes

U.S. Const. amend. XIV	<i>passim</i>
28 U.S.C. § 1257	1
In. Ann. Code § 31-19-9-9	7

O.R.C. § 3107.07	1
Wis. Ann. Stat. § 48.415	7

PETITION FOR A WRIT OF CERTIORARI

Father respectfully petitions for a writ of certiorari to review the judgment of the Ohio Court of Appeals, Eighth Appellate District.

OPINION BELOW

The opinion of the Ohio court of appeals (App. 2-19) is unreported.

JURISDICTION

The Ohio Court of Appeals issued its decision on December 21, 2017. The Ohio Supreme Court denied review on May 9, 2018, and denied reconsideration on July 11, 2018. On October 9, 2018, Justice Kagan granted Father's motion for a 60-day extension of time in which to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AND STATE STATUTE INVOLVED

The Due Process Clause of the Fourteenth Amendment provides:

No state shall “deprive any person of life, liberty, or property without due process of law.”

Ohio Revised Code section 3107.07 provides:

Consent to adoption is not required of any of the following:

(A) A parent of a minor, when it is alleged in the adoption petition and the court, after proper service of notice and hearing, finds by clear and convincing evidence that the parent has failed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner.

STATEMENT OF THE CASE

Petitioner Father pleaded guilty to killing his wife in 2006, and has been imprisoned in Ohio since then, serving a sentence of 23 years to life. At the time of his crime, Father and his wife had two young children, A.K. and C.K. Maternal Grandparents were granted permanent custody of both children in 2007, and have taken care of them ever since.

On June 8, 2015, Maternal Grandparents filed a petition to adopt the children. Adoption would have far-reaching consequences in that it would effectively terminate Father's paternal rights and also cut off the rights of Father's family members (particularly the paternal grandmother) to maintain a relationship with the children.

Like virtually all other states, Ohio prescribes by statute that a biological parent's consent is required before his or her children may be adopted, but it also enumerates very limited circumstances in which that right to consent may be lost. Here, Maternal Grandparents bore the burden of proving that Father had failed to have more than "de minimis contact" with his children or had failed to support them for a year preceding the filing of the adoption petition, and that Father lacked "justifiable cause" for these failures.

A magistrate held a two-day trial as to whether Father's right to consent to his children's adoption had been vitiated. Several witnesses testified, including Father and his mother and brother. The evidence showed that Father feels a strong connection to his children, is deeply interested in them and their welfare, and does

not wish to have his paternal bond with them legally severed. The only reason Father has not directly communicated with his children is because he has complied with a no-contact order entered in 2006. Father has nonetheless done what he can to maintain his paternal ties. He has sent the children Christmas gifts anonymously; learned how to knit in jail to make them things; and learned sign language when he heard that they were learning it (both children have special needs). Father encourages his family members to visit the children. Although there is tension between Father's family and that of his deceased spouse, Father's mother visits the children approximately four times each year. She brings gifts for them and leaves Maternal Grandparents with a check for \$400. Father's mother keeps him informed about how the children are doing and she gives him pictures of them. Father has given his mother numerous letters and cards for the children that he hopes they will one day receive.

After the trial, the magistrate judge held that Maternal Grandparents had failed to establish that Father lacked justifiable cause for not communicating with his children. It reasoned that the no-contact order prevented Father from doing so and that but for it, Father would be in regular touch with them. The magistrate likewise held that Father lacked the resources to financially support the children while he was incarcerated and that this constituted justifiable cause as to the second prong of the consent provision. Accordingly, it held that Maternal Grandparents could not adopt the children without Father's consent.

Maternal Grandparents filed objections to the magistrate's ruling and the trial judge reversed. He concluded that it was Father's own criminal conduct that had made him subject to a lengthy prison sentence and the no-contact order. App. 12. The trial judge also concluded that the nature of Father's crime was reason enough to dispense with his consent to the adoption. According to the trial judge:

But for [Father's] heinous actions, the children's mother would still be alive, the [Father] would not be in prison, and the children would not now be subject to these Adoption proceedings. He should not be allowed to reap any legal benefit from the consequences of his crime.

App. 12.

The Ohio Court of Appeals (Eight District) issued a split decision affirming the trial judge. The majority found the trial judge's reasoning persuasive, stating that, "We wholly agree with the trial court's conclusion that 'public policy dictates that the very unique circumstances of this case not be disregarded.'" App. 13. The court of appeals further agreed with the trial court's determination that "unlike individuals who are in prison for crimes unrelated to their children, it would be entirely unjust to allow [Father] to use his imprisonment to justify the failure to contact and support where [Father's] own actions necessitated his prison sentence in the first place." App. 13. The court of appeals' decision rested on the lack of justifiable cause for Father's failure to contact his children, and did not reach the question of financial support. App. 14.

The dissenting judge concluded that there was ample evidence to support the magistrate's order and "scant support" for the trial judge's reversal of that order.

App. 15, 17. The dissent explained that the evidence established that the no-contact order was an insuperable barrier to Father's communication with his children and that if he had sought to lift that order, Maternal Grandparents would have retaliated by preventing Father's family from visiting the children. App. 17. The dissent also rejected the narrow focus on the Father's criminal behavior stating that, "I further find error in the trial court's overriding rationale that [Father's] own actions, which resulted in his incarceration and the issuance of the no-contact order, disqualifies him from establishing justifiable cause." App. 18.

Father sought review in the Ohio Supreme Court but his petition was denied, as was his motion for reconsideration of the denial.

REASONS FOR GRANTING THE PETITION

A. This Court Has Long Recognized That Parents' Relationships with Their Children Is Subject to the Protections of the Due Process Clause of the Fourteenth Amendment.

This Court has long regarded the interest of parents in their children as a fundamental liberty interest protected by the substantive component of the Fourteenth Amendment's Due Process Clause. *Troxel v. Granville*, 530 U.S. 57, 65-67 (2000); *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). Parental rights have been deemed "rights far more precious . . . than property rights." *May v. Anderson*, 345 U.S. 528, 533 (1953). This Court has characterized the termination of parental rights as "severe," "irreversible," and as among the most "grave" consequences of "judicial action." *M.L.B.*, 519 U.S. at 118-19 (quoting *Santosky*, 455 U.S. at 759,

787). “Termination denies the natural parents physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child.” *Santosky*, 455 U.S. at 749. Because the termination of parental rights signifies “the severance of natural family ties,” the Court has stated that this form of state action “demands the close consideration the Court has long required when a family association so undeniably important is at stake.” *M.L.B.*, 519 U.S. at 116-19.

B. This Court’s Intervention Is Necessary to Clarify that Substantive Due Process Forbids State Courts from Severing the Parental Relationship Solely Because of Criminal Conduct in the Absence of Any Statutory Provision Making that Conduct Determinative.

The court of appeals’ decision raises serious due process concerns worthy of this Court’s intervention. Ohio’s adoption statute does not enumerate the homicide of one parent by the other as among the few exceptions for permitting an adoption to occur without the living parent’s consent. That Father killed mother was not what Maternal Grandparents had to establish to abrogate Father’s consent to the adoption. Instead, Maternal Grandparents bore the burden of proving by clear and convincing evidence that Father lacked justifiable cause for not communicating with the children or lacked justifiable cause for not financially supporting them.

The magistrate judge who actually observed the witnesses and heard their testimony concluded that Maternal Grandparents failed to carry their burden. The record was replete with evidence—from the numerous letters and cards addressed to the children that Father has given to his mother over the years, to his anonymous gift giving, and eagerness for news of how his children are faring—that but for the no-contact order, Father would be in regular touch with the children.

The court of appeals, however, ignored all of this evidence and reduced the “justifiable cause” inquiry mandated by the statute to a single fact: Father had been convicted of killing his children’s mother. That by itself was dispositive, according to the court of appeals, such that the evidence concerning Father’s desire to maintain his parental ties and all the actions he took to do so were rendered irrelevant.

The vast majority of the states spell out in statute those extremely limited situations in which a biological parent’s consent to adoption may be dispensed with. Only two states—Indiana and Wisconsin—have made the homicide of one parent by the other a *per se* basis upon which to vitiate the living parent’s right to consent. In. Ann. Code § 31-19-9-9; Wis. Ann. Stat. § 48.415. Case law shows that the remaining states—i.e., those that do not statutorily make the homicide of a co-parent a basis for eliminating the right to consent—are divided on how to deal with this difficult question.

Some states have held, as the court of appeals here did, that such crimes are dispositive of the consent question and have not undertaken any further inquiry.

See e.g., In the Interest of A.R.M., 750 S.W.2d 86 (Mo. 1988); *In the Matter of Zisman*, 128 A.D.2d 789 (NY 1987); *In re Abdullah*, 85 Ill.2d 300 (Ill. 1981); *In re Adoption of J*, 139 N.J. Super. 533 (NJ 1976).

Other state courts that have dispensed with the biological parent’s right to consent have not premised their decisions *exclusively* on the parent’s criminal act of killing a co-parent, but have also relied on additional circumstances that established the living parent’s lack of interest or effort in maintaining a kinship

connection with their children. In *Turner v. Adoption of Madora*, 352 So.2d 957 (Fla. 1977), the court held that the father had lost his right to consent but it did not treat his killing of the child's mother as dispositive. It also found that he had not attempted to communicate with his child in any way, and that he had "never sent her a card, written her a letter, sent her a gift, called her on the telephone, made requests to see the child, or made requests to have the child brought to prison to see him." *Id.* at 959. Likewise, in *In the Interest of P.W.K.*, 815 S.W.2d 95 (Mo. 1991), the court held that the nature of the mother's crime (killing her husband) was "a relevant factor," but it did not rest its decision on that single criterion. *Id.* at 96. The court went on to consider the incarcerated mother's relationship with her son, which the court concluded did not "indicate a willingness to assume parental responsibilities" because she never inquired about her son from his grandparents, and did not attempt to repair the damage her crime had caused her son, but instead portrayed herself as the victim. *Id.* at 97.

Furthermore, dissenting judges in these cases have sometimes explicitly objected to treating the homicide of a co-parent as the *exclusive* factor for determining the consent issue. In *In re Adoption of J.*, for instance, the dissenting judge explained that even though such a crime is "heinous" and destroys the family unit, "it does not follow, in my view, that it constitutes a failure to perform parental obligations, after the criminal act, willfully and continuously as the statute requires, so as to allow the irrerevocable cessation of all parental rights." 354 A.2d at 547.

The Ohio court of appeals entirely disregarded the abundant evidence of Father's ongoing efforts to maintain a bond with his children even in the face of a no-contact order. By its lights, that evidence was immaterial because Father had killed his children's mother, and nothing Father did in the way of nurturing his bond with his children or expressing his care and affection for them could ever overcome that fact.

The court of appeals' decision infringes Father's substantive due process rights by clearing the way for his children's adoption without his consent based on a single factor—the nature of his crime—that is nowhere enumerated in Ohio's adoption statute. Father never had notice that this one consideration could spell the end of his parental relationship with his children. And in exercising the "severe" power to terminate Father's parental rights, *M.L.B.*, 519 U.S. at 118-19, the court of appeal disregarded significant and undisputed evidence of Father's concrete efforts to maintain his parental bond with his children, even in the extraordinary situation of being incarcerated and hamstrung by a no-contact order.

If substantive due process has any teeth, it must mean that under such circumstances—where there has been no legislative judgment making the parent's right of consent turn solely and exclusively on his particular crime, and where he has shown an undisputed interest in maintaining his parental rights—the state courts may not give dispositive weight to the nature of the parent's crime and ignore all the evidence in his favor. This Court's intervention is thus necessary to

clarify the substantive due process protections the Fourteenth Amendment confers on parents in Father's shoes.

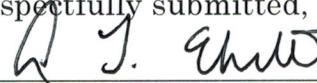
C. This Case Is an Ideal Vehicle in Which to Answer the Substantive Due Process Question Presented.

The issue in this case is substantial and sure to recur. The state courts consider thousands of adoption petitions each year and some of these invariably concern parents convicted of grave crimes, as Father here was. This case presents a clean and straightforward vehicle for answering the question presented and there are no ancillary or unique facts or considerations that would prevent his Court from issuing a decision of general applicability.

CONCLUSION

For all the reasons described above, Petitioner Father respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,



Allison L. Ehlert
Counsel of Record
Scotia J. Hicks
EHLERT HICKS LLP
2001 Addison Street, Suite 300
Berkeley, CA 94704
(415) 828-5350
aehlert@ehlerthicks.com

Counsel for Petitioner