NO. 19-6535

IN THE SUPREME COURT OF THE UNITED STATES

CLARENCE FRY

Petitioner

v.

THE STATE OF OHIO

Respondent

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

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

SHERRI BEVAN WALSH
Prosecuting Attorney
County of Summit, Ohio

JACQUENETTE S. CORGAN
Assistant Prosecuting Attorney
Counsel of Record
Appellate Division
Summit County Safety Building
53 University Avenue, 6th Floor
Akron, Ohio 44308
(330) 643-2800
jcorgan@prosecutor.summitoh.net

CAPITAL CASE

QUESTION PRESENTED

Is it unconstitutional for any Court to deny the Constitutional right to testify in one's own defense by placing the burden of making such desire known to the court on the criminal defendant when he is represented by counsel who knows that the defendant explicitly wants to testify?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iii
Opinion Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	3
Argument	11
Conclusion	14

TABLE OF AUTHORITIES

CASES: **PAGE**

Chatman v. Illinois,
549 U.S. 1211 (2007) 12

Chatman v. Illinois, 830 N.E.2d 21 (Ill. 2006), *petition for cert. filed*, 2006 WL 3825286 (U.S. Dec. 21, 2006) (No. 06-884) .. 12

Dep't of Revenue of Ky. v. Davis,
553 U.S. 328 (2008) 11

Frey v. Schuetzle,
151 F.3d 893 (8th Cir. 1998) 12

Goff v. Bagley,
601 F.3d 445 (10th Cir. 2010) 13

Guam v. Kitano,
2011 Guam 11 (Guam, 2011) 13

Illinois v. Smith,
680 N.E.2d 291 (Ill. 1997) 12

Iowa v. Reynolds,
670 N.W.2d 405 (Iowa 2003) 13

Johnson v. Texas,
169 S.W.3d 223 (Tex. 2005) 13

Louisiana v. Coleman,
188 So.3d 174 (La. 2016) 13

Ohio v. Bey,
709 N.E.2d 484 (Ohio 1999) 12

Ohio v. Fry,
Ohio Supreme Court No. 2019-0616, 2019-Ohio-3148 1

Ohio v. Fry,
9th Dist. Summit No. 26121, 2012-Ohio-2602 9

Ohio v. Fry,
125 Ohio St.3d 163, 926 N.E.2d 1239 (Ohio 2010) 9

Rhode Island v. Feole,
797 A.2d 1059 (R.I. 2002) 13

Riley v. Kentucky,
91 S.W.3d 650 (Ky. 2002) 13

Sprietsma v. Mercury Marine,
537 U.S. 51, 123 S.Ct. 518, 154 L.Ed.2d 466 (2008)............ 11

Underwood v. Clark,
939 F.3d 473 (7th Cir. 1991) 12

United States v. Edwards,
897 F.2d 445 (9th Cir. 1990) 12

United States v. Hung Thien Ly,
646 F.3d 1307 (11th Cir. 2011).................... 13

United States v. McMeans,
927 F.2d 162 (4th Cir. 1991) 12

United States v. Webber,
208 F.3d 545 (6th Cir. 2000) 9, 10

CONSTITUTIONAL PROVISIONS:

Sixth Amendment to the U.S. Constitution 2
Eighth Amendment to the U.S. Constitution.................... 2
Fourteenth Amendment to the U.S. Constitution 2

STATUTES:

28 U.S.C. Section 1257(a).................... 1

MISCELLANEOUS

Michele C. Kaminski, Annotation, *Requirement That Court Advise Accused of, and Make Inquiry with Respect to, Waiver of Right to Testify*, 72 A.L.R.5th 403 (1999)............ 13

NO. 19-6535

IN THE SUPREME COURT OF THE UNITED STATES

DEFENDANT'S NAME

Petitioner

v.

THE STATE OF OHIO

Respondent

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the Supreme Court of Ohio declining jurisdiction is reported at *State v. Clarence Fry*, 2019-Ohio-3148.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that:

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....

The Eighth Amendment to the United States Constitution provides that:

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

The Fourteenth Amendment to the United States Constitution provides, in relevant part that:

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

STATEMENT OF THE CASE

Clarence Fry admitted to having stabbed Tamela Hardison four times—including once in the back—in front of her grandchild. He even laughed about it.

Just days before the slaying, Fry was arrested for domestic violence after Hardison's neighbors called 911 to report that Fry was throttling Hardison in her Akron, Ohio, apartment, yelling "Bitch, you are going to die. *** Bitch, you gonna die. You gonna die tonight."

Hardison was still screaming when Akron police arrived.

During the short time he was in the Summit County Jail before being released on bond for this offense, Fry called Hardison, saying he wanted her to drop the charges, and telling her that he had a violent history that included "two toe tags" — indicating he had already killed two people.

Fearing Fry, Hardison moved out of her apartment and stayed with friends or with her daughter, and she planned to leave town. On July 31, 2005, Hardison stayed at her daughter's publicly subsidized apartment—from which Fry was banned based on his past violent conduct—and was going to watch her three grandchildren while her daughter was at work.

That afternoon, then-5-year-old J.B., Hardison's grandson, was playing outside with other children when he saw Fry go into his house, carrying a bowl and a knife. J.B. told Fry not to go inside. Fry ignored him. The child went in after Fry, saw Fry confront Hardison and ask her where she'd put Fry's clothes, and then saw Fry stab Hardison.

The boy testified that Hardison did not hit Fry; she was just sitting on the couch when Fry stabbed her. In perhaps her last act, Hardison told J.B. to call the police, so the boy went to a neighbor who called police.

Police and paramedics arrived minutes later, but it was too late. Hardison had been stabbed four times, and one stab wound in her upper back severed both her aorta and pulmonary arteries, causing her to bleed to death internally.

Fry fled to Charleston, West Virginia, where he was arrested four days later. There were no injuries on Fry's body. Fry told the arresting officer, "Remorse, I don't have any remorse for that woman. I didn't shoot her."

Fry told his mother while in the West Virginia jail that he killed Hardison after she hit him with an ashtray. He repeated the same thing to Akron Detective Michael Shaeffer, saying, "I stabbed her. Yeah she was trying to kill me."

Fry was indicted on multiple charges, some of which were dismissed before trial. Though Fry's record was replete with numerous prior domestic violence convictions, the trial court ordered that the only evidence of those convictions that the State could proffer regarded the previous offenses Fry had committed against Hardison.

What apparently was not permitted at trial were transcripts of calls Fry made to his mother while jailed in West Virginia, in which he likened himself to the Archangel Michael and alleged that God intended for him to kill Hardison. Also excluded was the testimony of Tara Thomas, one of Fry's previous domestic violence

victims, and Debra Fleming, who would have testified that Fry burned down her house.

The court appointed lawyers Lawrence Whitney and Kerry O'Brien to represent Fry during trial. Whitney testified that Fry was a difficult client but not extraordinarily difficult from the start, but he became more difficult as the trial progressed, and became "very, very disinterested after the jury was picked."

At an evidentiary hearing, Fry testified that he believed he was the only person who could explain to the jury what he had told Akron police: that he confronted Hardison because he accused her of stealing his belongings, including his clothing, while he was jailed on the domestic violence charge, and that when he stabbed her four times it was because she had struck him with an ashtray. "See, when I went to jail, I told them not to give me my house keys so she couldn't have access to my house, but while I'm in jail I released my keys to her and I trusted her, but then she treated me like a stranger and stole my property, and I just needed witnesses to corroborate that. That's all," Fry testified.

Fry testified that he believed that his story would have supported, rather than negated, the "sudden fit of passion or rage" element of the manslaughter lesser included offense that his counsel asked the jury to consider.

Fry further stated that when it came to whether he would testify, "it was always said, like, not that I want to testify, it was when. It was never an issue of how, it was always when because for me it was always: When I tell these people what happened, they would understand."

Fry accused Whitney of racism, saying that Whitney told Fry that if he needed to know where to find a crack house and to conduct himself there, he would contact Fry, but when it came to a court of law, Fry was out of his league.

Whitney testified he would have said,

> for instance, when he wanted to tell me what to do in a courtroom, I would say, "Clarence, you put me out on the street to sell crack cocaine, how would I do?" And he would say, "Not very well." And I would say, "Well, how can you expect me to do — how can you expect you to do any better than me in a courtroom?" That's the way I would put that. I said that same thing in many ways for 40 years to clients who think that they know how to conduct themselves in a courtroom when they don't. And I try to explain it to them that way. I am not a good crack dealer. I'm not a good bus driver. I can't drive a truck. But put me in that situation I'm not very good. But put me in a courtroom, I've been doing this for a long time, I know what's good. So I would have said something in that regard, yes, in that way. But I don't remember specifically that, but I've said that a hundred times. In fact, I just said it yesterday to a client, frankly.

Both Whitney and O'Brien testified that Fry had told them at various stages of the proceedings that he wanted to testify in his defense, but that because Fry's testimony would open the door to cross-examination on and introduction of all of Fry's prior convictions and inflammatory and inculpatory statements he had made, their advice was that Fry should not testify.

As Fry's lawyers put it, he would have been "eaten alive" by the prosecution. O'Brien testified that the State would have explored not only every detail of Hardison's stabbing death, but also Fry's behavior in the courtroom during trial (which included laughing during J.B.'s testimony), his gloating that Hardison could not steal more of Fry's clothes because of her death, and the jail calls in which Fry declared that "The bitch got what she deserved."

By the end of the State's case, both Whitney and O'Brien believed Fry had decided not to testify, and they told the trial court that during a recorded sidebar.

The last attorney to discuss the matter with Fry was O'Brien, who wrote, "June 11, final argument prep. Clarence wants to testify. Reasons given for not testifying." in his notes. "I believe what happened was that after—if I wrote down he wants to testify, then I gave him reasons for not testifying, then he would have told me, 'Okay, I don't want to testify,' and then I would have reported that the next morning," O'Brien testified; "My position would have been when I left the jail, I was certain that Clarence did not want to testify." O'Brien further testified that when he left the jail, there was no question in his mind that Fry did not want to testify.

The trial court indicated at that time that had Fry vacillated, the court would have inquired of Fry on the record.

Both attorneys testified that had they believed Fry adamantly wanted to testify, they would have prepared him to testify and called him in his defense. "What I do with every case is, I present options to my client. I discuss the pros and cons of each option, and then I say, 'What do you want to do?' The decision is the client's, not mine," O'Brien testified.

"There's two decisions I can't make," Whitney testified. "One is whether to have a jury trial or he has -- or he testifies. I can make just about any other decision in a trial. But he was unequivocal that for those -- from Friday, Saturday, Sunday, whatever day of the week this was, that he did not want to testify, and that's what I told the Court. *** I can only tell you what Clarence told Kerry and I from Friday,

Saturday and Sunday. *** My advice is my advice. I mean, he lives with the case. I move on. And it's his decision, and he makes the decision and I give him my advice, and if he doesn't want to listen to my advice then we move on."

At no point after the State rested its case did Fry say in open court that he wanted to testify, and O'Brien testified that he believed that with Fry's strong personality, if he had wished to testify, he would not have felt shy about saying it. Fry testified by the end of the guilt phase of the trial, he had "shut down" and had "nothing to discuss" with his counsel, but that when he failed to speak up and assert his right to testify, he "messed up. I should have known," and that he "choked."

Fry told his sister and brother that he intended to testify in his defense. Fry's sister, Sharon Brandon, testified that she did not specifically tell either of Fry's counsel that he affirmatively wanted to testify; rather she asked them when he might testify or "I thought Clarence wanted to testify," but relied upon her demeanor and her question as sufficient to have conveyed Fry's intentions to them. Fry's brother, Lawrence Fry, Sr., testified that Whitney told him that Whitney didn't believe it would be a good idea for Fry to testify, "but we'll see how it goes," but did not hear from Fry himself that he had changed his mind and decided not to testify.

The jury convicted Fry on all counts, including aggravated murder with death penalty specifications, and after Fry affirmatively declined to present mitigating evidence, the jury recommended that he be sentenced to death. The trial court concurred with the jury's recommendation and sentenced Fry to death.

The Ohio Supreme Court affirmed that decision. See *Ohio v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239 (Ohio 2010).

While the Ohio Supreme Court appeal was pending, Fry filed a petition for post-conviction relief; the trial court denied it without conducting an evidentiary hearing. Ohio's Ninth District Court of Appeals reversed and remanded for an evidentiary hearing concerning Fry's twelfth ground for relief, regarding whether Fry's sentence was void or voidable "because he was not allowed to testify at trial, and because the trial court failed to obtain a knowing, intelligent waiver of his right to testify." See *Ohio v. Fry*, 9th Dist. Summit No. 26121, 2012-Ohio-2602, ¶38.

After two separate days of evidentiary hearings, the trial court denied Fry's petition, mostly because the trial court found Fry to completely lack credibility. In analyzing the issues, the trial court quoted extensively from the Sixth Circuit Court of Appeals' decision in *United States v. Webber*, 208 F.3d 545, 550 (6th Cir. 2000) to hold that because Fry did nothing to alert the court of his claimed desire to testify, the court correctly presumed that Fry had waived his right to testify.

Fry did not cite to or discuss *Webber* when he appealed the trial court's decision to Ohio's Ninth District Court of Appeals, arguing instead that the trial court had abused its discretion when it found that Fry's attorneys were credible and he was not. Fry only discussed *Webber* in his reply brief to that court, and only to attempt to distinguish *Webber* from his case — not to argue that *Webber's* holding contradicted the Constitution.

After the Court of Appeals affirmed, Fry sought review at the Ohio Supreme Court. In asking that Court to accept jurisdiction, Fry discussed *Webber* — but only to distinguish that case. Now that the Ohio Supreme Court declined Fry's invitation to act as an intermediate court of appeals and declare that the trial court abused its discretion, Fry extends essentially the same invitation to this Court.

WHY CERTIORARI SHOULD NOT BE GRANTED

Fry portrays his counsel as having engaged in outrageously unprofessional conduct that would have surely resulted in a new trial — if the conduct had occurred.

It did not.

Yet, Fry resorts to defaming his counsel, and, in turn, Ohio's courts, to tempt this Court into granting review of an argument that he did not attempt to make below.

This Court routinely declines to consider arguments that the parties did not press in the lower courts. See, e.g., *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 332, n.2 (2008); *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56, n4, 123 S.Ct. 518, 154 L.Ed.2d 466 (2008).

Since Fry did not press his argument below, his case is not an "ideal vehicle" for this Court's consideration. This Court should therefore devote its limited resources elsewhere, and deny certiorari to Fry.

In addition, Fry's Petition merely repeats the same factual arguments (though in more inflammatory terms) that he made unsuccessfully to the Court of Appeals and the Ohio Supreme Court. He does not attempt to vindicate the procedure he asks this Court to establish as a Constitutional mandate.

This Court, however, declined to do so more than 12 years ago when it denied certiorari in *Chatman v. Illinois*, 549 U.S. 1211 (2007). The question in *Chatman* asked:

> Whether defendant, a 16 year old, was denied his constitutional right to testify at his murder trial where at trial defendant did not testify and the trial court did not obtain from defendant prior to his not testifying a knowing and voluntary waiver of his right to testify. At a post-conviction hearing, defendant asserted he told his counsel he desired to testify, but his counsel did not call him and he did not know he had a constitutional right to testify if he chose. The Appellate Court of Illinois abided by the holding of *People v. Smith*, 176 Ill.2d 217 (1997), Illinois Supreme Court, that where defendants argued on appeal that they were precluded from testifying at trial, their convictions will not be reversed unless they contemporaneously assert the right to testify by informing the trial court of their desire to do so. Whether certiorari should be granted to resolve a conflict on an important constitutional issue where the law in the State of Illinois *** is in direct conflict with the law in the State of Hawaii ***.

Chatman v. Illinois, 830 N.E.2d 21 (Ill. 2006), *petition for cert. filed,* 2006 WL 3825286 (U.S. Dec. 21, 2006) (No. 06-884).

Illinois, Ohio, and the Sixth Ciruit adhere to the majority position among the states and the Federal Circuit Courts of Appeal that hold where a defendant is represented by counsel and fails to indicate to the trial court that he wishes to testify, the trial court may presume that the defendant has waived the right to testify, and the trial court may so presume without conducting an on-the-record colloquy with the defendant. See, e.g., *Illinois v. Smith*, 680 N.E.2d 291 (Ill. 1997); *Ohio v. Bey*, 709 N.E.2d 484 (Ohio 1999); *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991); *Underwood v. Clark*, 939 F.3d 473, 476 (7th Cir. 1991); *Frey v. Schuetzle*, 151 F.3d 893, 898 (8th Cir. 1998); *United States v. Edwards*, 897 F.2d

445, 446 (9th Cir. 1990); *Goff v. Bagley*, 601 F.3d 445, 471 (10th Cir. 2010); *United States v. Hung Thien Ly*, 646 F.3d 1307, 1315 (11th Cir. 2011); *Guam v. Kitano*, 2011 Guam 11 (Guam, 2011); *Iowa v. Reynolds*, 670 N.W.2d 405 (Iowa 2003); *Riley v. Kentucky*, 91 S.W.3d 650, 562-63 (Ky. 2002); *Louisiana v. Coleman*, 188 So.3d 174, 222 (La. 2016); *Rhode Island v. Feole*, 797 A.2d 1059, 1064 (R.I. 2002); see also Michele C. Kaminski, Annotation, *Requirement That Court Advise Accused of, and Make Inquiry with Respect to, Waiver of Right to Testify*, 72 A.L.R.5th 403 (1999) (collecting cases).

Furthermore, the majority position is that a trial court does not have a duty to ensure that a defendant understands his right to testify. See, e.g., *Johnson v. Texas*, 169 S.W.3d 223, 234 (Tex. 2005). There are a number of good reasons underpinning that position.

> Many courts have pointed out that the right to testify is counterpoised by the right not to testify and have held that a trial court admonishment about the former unduly risks interference with the latter—and that the right not to testify is the more fragile right, needing greater protection. In this vein, some courts fear that a trial court admonishment would interfere with the attorney-client relationship and disrupt legitimate trial strategy. In addition, many courts hold that advising the defendant of his right to testify is simply not the trial court's responsibility, but is the responsibility of defense counsel, and the trial court should be able to presume (absence evidence to the contrary) that counsel carried out that responsibility. Some courts analogize the "right to testify" to the right of an accused to represent himself—a right the trial court is not ordinarily required to admonish a defendant about. And some courts point out that the trial judge is not required to admonish a testifying defendant about the right not to testify, and therefore, should not be expected to admonish a non-testifying defendant about the converse right.

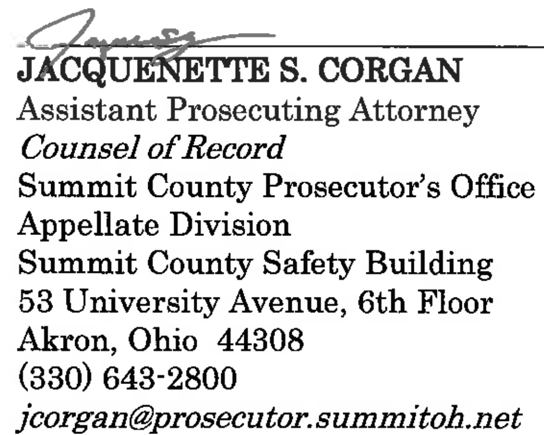
Johnson, 169 S.W.3d at 234-235, citations in footnotes omitted.

CONCLUSION

For the above-stated reasons, the State of Ohio respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney
County of Summit, Ohio



JACQUENETTE S. CORGAN
Assistant Prosecuting Attorney
Counsel of Record
Summit County Prosecutor's Office
Appellate Division
Summit County Safety Building
53 University Avenue, 6th Floor
Akron, Ohio 44308
(330) 643-2800
jcorgan@prosecutor.summitoh.net