

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL STUMPH, PETITIONER

v.

THE STATE OF OHIO, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO COURT OF APPEALS, FIRST APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Ohio Revised Code § 2953.08(D)(3) is the only statute in the nation that expressly prohibits appellate review of non-death sentences for those convicted of aggravated murder and murder. Challenging the Eighth Amendment implications of this prohibition, Justice Sotomayor urged the state of Ohio to “be vigilant” in considering this “important question:”

[O]ur jurisprudence questions whether it is permissible that [the defendant] must now spend the rest of his days in prison without ever having had the opportunity to challenge why his trial judge chose the irrevocability of life without parole over the hope of freedom after 20, 25, or 30 years. The law, after all, granted the trial judge the discretion to impose these lower sentences. See § 2929.03(A)(1).

Campbell v. Ohio, -- U.S. --, 138 S.Ct. 1059, 200 L.Ed.2d 502 (2018) (Statement of Sotomayor, J.). The problem in *Campbell* was that the Ohio state courts had not been afforded an adequate opportunity to address the constitutional challenges to Ohio Revised Code § 2953.08(D)(3), rendering them out of this Court’s reach. Michael Stumph, on the other hand, explicitly preserved these constitutional issues before the Ohio state courts.

Despite the fact that Ohio Revised Code § 2953.08(D)(3) is constitutionally repugnant and can readily be severed from the state code, Ohio’s reviewing courts have declined to overturn the provision. The instant case presents this Court with the opportunity to cleave the obsolete law from Ohio’s statutory scheme to achieve jurisprudential equilibrium with the remainder of the nation. The questions presented are as follows:

Whether Ohio Revised Code § 2953.08(D)(3) violates the prohibition against cruel and unusual punishment under the Eighth Amendment to the United States Constitution?

Whether Ohio Revised Code § 2953.08(D)(3) violates the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution?

Whether Ohio Revised Code § 2953.08(D)(3) violates the substantive due process implications of the Due Process Clauses under the Fifth and Fourteenth Amendments to the United States Constitution?

Whether Ohio Revised Code § 2953.08(D)(3) violates the procedural due process safeguards of the Due Process Clauses under the Fifth and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

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

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

RELATED PROCEEDINGS

All proceedings directly related to this petition include:

1. Entry of the Supreme Court of Ohio declining jurisdiction dated July 6, 2021, *State v. Stumph*, No. 2021-0527.
2. Opinion and Judgment Entry of the Court of Appeals of Ohio, First Appellate District dated March 12, 2021, *State v. Stumph*, No. C-190318, 2021-Ohio-723, 2021 WL 942851.
3. Judgment Entry of the Court of Common Pleas for Hamilton County, Ohio dated May 6, 2019, *State v. Stumph*, No. B-1607280.

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PETITION FOR A WRIT OF CERTIORARI

Michael Stumph respectfully petitions for a writ of certiorari to review the judgment of the Ohio Court of Appeals, First Appellate District.

OPINIONS BELOW

The judgment entry of the Supreme Court of Ohio in docket number 2021-0527 was issued on July 6, 2021, and it is not published. Entry of the Supreme Court of Ohio declining jurisdiction dated July 6, 2021, *State v. Stumph*, No. 2021-0527. (App. A). The judgment entry and opinion of the Court of Appeals of Ohio for the First Appellate District in docket number C-190318 was issued on March 12, 2021, and it is not published. *State v. Stumph*, 2021-Ohio-723, 2021 WL 942851 (App. C). The judgment entry and decision of the Court of Common Pleas for Hamilton County, Ohio in docket number B-1607280 was issued on May 6, 2019, and it is not published. (App. D).

STATEMENT OF JURISDICTION

By order dated March 19, 2020, this Court extended the deadline for filing any petition for a writ of certiorari to 150 days from the date of the relevant lower court judgment or order. Thereafter, on July 19, 2021, this Court decreed that the deadline to file a petition for a writ of certiorari in any case in which the relevant lower court judgment or order was issued prior to July 19, 2021 remained 150 days from the date of the judgment or order.

The Supreme Court of Ohio issued its entry declining to exercise discretionary jurisdiction over the instant case on July 6, 2021. Accordingly, the deadline to file this petition is 150 days from that date, or December 3, 2021. The instant petition is therefore timely. This Court's jurisdiction is drawn from 28 U.S.C. § 1257(a). Specifically, the case challenges the validity of Ohio Revised Code § 2953.08(D)(3) on the ground that the statute is repugnant to the United States Constitution.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment to the United States Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

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

On the date that Mr. Stumph was indicted thereunder, Ohio Revised Code § 2903.01 provided, and still provides, in pertinent part:

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape.

...

(G) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

On the date that Mr. Stumph was sentenced thereunder, Ohio Revised Code § 2929.02 stated, and still states, in pertinent part:

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022, 2929.03, and 2929.04 of the Revised Code[.]

On the date that Mr. Stumph was sentenced thereunder, Ohio Revised Code § 2929.03 stated, and still states, in pertinent part:

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in

division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) or (H) of this section, the trial court shall impose one of the following sentences on the offender:

(a) Life imprisonment without parole;

(b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment[.]

On the date that Mr. Stumph instituted his direct appeal in state court, Ohio Revised Code § 2953.08(D)(3) provided, and still provides: “A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section.”

STATEMENT OF THE CASE

The reality is that any innocent defendant is infinitely better off appealing a death sentence than a sentence of life imprisonment. . . . The capital convict will obtain endless legal assistance from the abolition lobby (and legal favoritism from abolitionist judges), while the lifer languishes unnoticed behind bars.

- Justice Antonin Scalia, *Glossip v. Gross*, 576 U.S. 863, 135 S.Ct. 2726, 2747, 192 L.Ed.2d 761 (2015) (Scalia, J., concurring).

Unchecked power in the hands of a single, fallible human being can be a dangerous thing. This case demonstrates how affording one judge unfettered discretion to impose a sentence of life without parole without any review whatsoever can beget a travesty of justice, and presents an ideal vehicle for closing this unconstitutional void in Ohio sentencing law.

This began as a capital case involving co-defendants Michael Stumph and Margaret Kinney. Though Ms. Kinney was the primary actor in the murder, both were sentenced to life without parole after receiving nearly identical plea deals. The primary mitigation evidence for Mr. Stumph was his wartime military service and subsequent diagnosis of post-traumatic stress disorder (PTSD). But the trial court's subjectivity-imbued statements at sentencing conveyed its indecorous treatment of these factors as aggravating rather than mitigating evidence.

The trial court declines to “slap ‘real heroes’ in the face.”

At sentencing, the judge relayed an admirable story about his “best friend,” Richard. Richard was a Vietnam War veteran and a “real hero” for whom the judge was endeavoring to get a medal. Richard saw all his friends killed in battle and

went on to become a paramedic, fireman, and family man. The judge further indicated he exercised with another veteran at the local YMCA who suffered from nightmares. That man had a successful career with Cincinnati Bell and a wife and children. Not even a traffic ticket marred his record.

Thereafter, the judge lamented for the second time in this case, “it’s difficult to get the death penalty from a jury.” He concluded that giving Mr. Stumph a break based upon his military service would demean the service of other veterans. To place Mr. Stumph on their level would be “a slap in their faces,” in the judge’s words. In this way, the court twisted the mitigating factors of Mr. Stumph’s military service and PTSD into aggravating factors to reach an unjust result.

Numerous considerations actually counseled against life without parole.

Notably, no one disputed that Margaret Kinney was the principal actor in the homicide of elderly victim Otto Stewart – not the police detectives, the prosecution, nor the trial court. Yet Ms. Kinney received the same plea deal on the aggravated murder charge, i.e., the dropping of the death specification. The fact that Mr. Stumph was not the principal offender should have mitigated to the dismissal of the death specification. Mr. Stumph’s military service and PTSD should have mitigated the sentence down even further.

Mr. Stumph led a law-abiding, productive life up until this incident. He served 12 months in Afghanistan and 15 months in Iraq as a member of the United States Army. Other than a felony nonsupport charge in Kentucky, he had no criminal record. Mr. Stumph suffered from PTSD, a disorder known to cripple some

men and women returning from war. At the time of sentencing, he was finally receiving proper treatment for the disorder. He had accepted responsibility for his role in the death of Mr. Stewart and expressed remorse for his actions.

In addition, Mr. Stumph had embraced religion while incarcerated and was baptized into the Catholic Church. Chaplain Jack Kennevan addressed the sentencing court on Mr. Stumph's behalf. He noted that Mr. Stumph's baptism was only the second he had performed in his 13-year career at the jail. Defense counsel implored the court to afford Mr. Stumph a light at the end of the tunnel in the form of parole eligibility, however remote. Counsel's plea fell on ears clogged with autobiographical anecdotes.

Mr. Stumph respectfully beseeches this Court to question the wisdom in affording one individual so much discretion in imposing a sentence of life without parole, insulated from all appellate review.

The proceedings culminating in this travesty of justice are as follows:

1. In January 2017, the Hamilton County Grand Jury returned an indictment charging Michael Stumph with one count of capital murder, one count of murder, and two counts of aggravated robbery. Mr. Stumph pled guilty to aggravated murder in exchange for dismissal of the death specification and remaining counts. Co-defendant Margaret Kinney, the primary actor in the homicide of the elderly victim, received the same plea bargain on the murder charges.

2. Defense counsel presented extensive mitigation evidence to the trial

court in advance of sentencing pertaining to Mr. Stumph's wartime military service and PTSD diagnosis. The trial court sentenced Mr. Stumph to life without the possibility of parole. Ms. Kinney received the same sentence on her murder charges.

3. Mr. Stumph timely appealed to the Ohio Court of Appeals for the First Appellate District. The Court of Appeals declined to address whether the trial court failed to afford due consideration to Mr. Stumph's military service and whether the court improperly treated the mitigating evidence presented by the defense as aggravating evidence, finding such challenges were precluded by Ohio Revised Code § 2953.08(D)(3). The Court of Appeals pointedly elected to avoid addressing the constitutionality of the statute. *State v. Stumph*, 1st Dist. Hamilton No. C-190318, 2021-Ohio-723, 2021 WL 942851.

4. Mr. Stumph sought discretionary review in the Ohio Supreme Court, quoting Justice Sotomayor's concerns with Ohio Revised Code § 2953.08(D)(3) as expressed in *State v. Campbell v. Ohio*, -- U.S. --, 138 S.Ct. 1059, 200 L.Ed.2d 502 (2018) (Statement of Sotomayor, J.). Rather than heed Justice Sotomayor's invitation to weigh in on the constitutional implications of this anomalous Ohio statutory provision, Ohio's highest state court declined review. *State v. Stumph*, 163 Ohio St.3d 1495, 2021-Ohio-2270, 169 N.E.3d 1287 (Table). Two of the seven justices dissented and would have accepted the case.

Ohio Revised Code § 2953.08(D)(3) has long outlived its viability. Its continued tenure in the annals of the Ohio Revised Code rends an unconstitutional void in Ohio's criminal appellate scheme. For the reasons detailed more fully below,

this Court should issue a writ of certiorari to the Ohio Court of Appeals for the First Appellate District to abrogate this unconstitutional statute.

REASONS FOR GRANTING THE PETITION

Petitioner Stumph now seeks further review in this Court and offers the following reasons why a writ of certiorari is warranted.

- I. Ohio Revised Code § 2953.08(D)(3) violates the prohibition against cruel and unusual punishment under the Eighth Amendment to the United States Constitution.**
 - A. The absence of any opportunity for release catalyzes Eighth Amendment scrutiny of a sentence of life without the possibility of parole, likening the sentence to death over all others and thereby warranting heightened Eighth Amendment scrutiny.**

The importance of the appellate process in American criminal jurisprudence cannot be overstated. As one commentator penned, a “robust” appellate system serves a number of functions, including “correcting legal and factual errors; encouraging the development and refinement of legal principles; increasing uniformity and standardization in the application of legal rules; and promoting respect for the rule of law.” Robertson, *The Right to Appeal*, 91 N.C.L.Rev. 1219, 1224-25 (2013).

This Court has long recognized appellate review as an essential procedural safeguard against the arbitrary and capricious imposition of the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 166-68, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The

absence of such review would render a sentence of death “cruel and unusual in the same way that being struck by lightning is cruel and unusual.” *Furman v. Georgia*, 408 U.S. 238, 309, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring).

A sentence of life without the possibility of parole “share[s] some characteristics with death sentences that are shared by no other sentences.” *Graham v. Florida*, 560 U.S. 48, 69, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). Verily, death is different. *Harmelin v. Michigan*, 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). But the two are sufficiently similar to render a sentence of life without parole deserving of heightened Eighth Amendment scrutiny. Berry, *More Different than Life, Less Different than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After Graham v. Florida*, 71 Ohio St.L.J. 1109 (2010).

Due to the parallels between life without parole and death, this Court “has drawn on certain Eighth Amendment requirements developed in the capital sentencing context to inform the life-without-parole sentencing context.” *Campbell v. Ohio*, __ U.S. __, 138 S.Ct. 1059, 200 L.Ed.2d 502 (2018) (Statement of Sotomayor, J.). For example, this Court imposed a categorical ban upon sentences of life without parole for youths who committed offenses other than homicide in *Graham v. Florida*, 560 U.S. 48, 82, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). Thereafter, in *Miller v. Alabama*, 567 U.S. 460, 475-77, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), this Court grafted the Eighth Amendment requirement of individualized sentencing for the death penalty onto the juvenile context, holding that a similar

requirement should apply to a sentence of life without parole.

This “correspondence” between sentences of life without parole and death counsels in favor of revisiting sentencing practices concerning the former. *Miller*, 567 U.S. at 475. Of note, meaningful appellate review of all sentences – including life without parole – guards against the arbitrary or irrational imposition thereof. *See Eddings v. Oklahoma*, 455 U.S. 104, 111, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Clemons v. Mississippi*, 494 U.S. 738, 749, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); *Parker v. Dugger*, 498 U.S. 308, 321, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991); *Gregg v. Georgia*, 428 U.S. at 195 (noting, “the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner”).

These principles insistently beg the question – does Ohio Revised Code § 2953.08(D)(3) really “mean[] what it says,” as opined by the Supreme Court of Ohio? *See State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 17. In other words, if a judge arbitrarily imposes life without parole because he did not like the look of a defendant, is that sentence truly meant to be shielded from all meaningful appellate review? To the contrary, as observed by Justice Sotomayor:

Our Eighth Amendment jurisprudence developed in the capital context calls into question whether a defendant should be condemned to die in prison without an appellate court having passed on whether that determination properly took account of his circumstances, was imposed as a result of bias, or was otherwise imposed in a “freakish manner.” And our jurisprudence questions whether it is permissible that [the accused] must now spend the rest of his days in prison without ever having had the opportunity to challenge why his trial judge chose

the irrevocability of life without parole over the hope of freedom after 20, 25, or 30 years. The law, after all, granted the trial judge the discretion to impose these lower sentences. See § 2929.03(A)(1).

It is essential that meaningful appellate review be safeguarded for all noncapital aggravated murder or murder convicts in the state of Ohio to avoid the arbitrary or “freakish” imposition of a functional death sentence inside prison walls.

B. Ohio Revised Code § 2953.08(D)(3) inhibits the ability of Ohio reviewing courts to correct arbitrary and capricious action by Ohio sentencing courts.

The Supreme Court of Ohio tried to “split the baby” when recently confronted with this issue in *State v. Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952. *See also State v. Kinney*, 163 Ohio St.3d 537, 2020-Ohio-6822, 171 N.E.3d 318. Rather than excise the problematic statute from Ohio’s code, however, the *Patrick* court engaged in a bit of analytical gymnastics to hold that the statute did not prohibit consideration of *constitutional* arguments pertaining to noncapital aggravated murder and murder sentences. *Patrick* at ¶¶ 19-22.

The *Patrick* court began its analysis by reasoning that the plain language of Ohio Revised Code § 2953.08(D)(3) merely precluded review of sentences for murder and aggravated murder under that particular section. *Patrick* at ¶17. The court observed that Ohio Revised Code § 2953.02 provided a “right to appeal a judgment or final order to the court of appeals ‘[i]n a capital case in which a sentence of death is imposed for an offense committed before January 1, 1995, and in any other criminal case. . . .’” (Emphasis sic.) *Id.* at ¶16, quoting Ohio Revised Code § 2953.02. Moreover, Ohio Revised Code § 2953.02 permitted an appeal from a

judgment or final order “involving a question arising under the Constitution of the United States or of this state.” *Patrick* at ¶16.

The *Patrick* court went on to note that the term “final judgment” in Ohio Revised Code § 2953.02 referred to sentence. *Id.* Reasoning that “the preclusive language in [Ohio Revised Code §] 2953.08(D)(3) demonstrates that its scope is limited to the bases of appeal described in [Ohio Revised Code §] 2953.08,” the court concluded that *constitutional* challenges to sentences imposed for aggravated murder were not precluded by Ohio Revised Code § 2953.08(D)(3). *Patrick* at ¶¶ 17, 22.

Mr. Stumph’s arguments that the trial court failed to properly consider his military service and improperly treated the mitigating evidence presented by the defense team as aggravating evidence would not fall within the ambit of permissible constitutional review under *Patrick*. Indeed, the Court of Appeals of Ohio for the First Appellate District ruled that arguments in this vein were precluded by Ohio Revised Code § 2953.08(D)(3). Thereafter, the Ohio Supreme Court’s silence in declining jurisdiction over Mr. Stumph’s appeal effectively sanctioned the Ohio Court of Appeals’ inapt conclusion.

The differences between death and life without parole in Ohio inform why appellate review is so important. Despite their similarities, the two punishments are imposed and reviewed vis-à-vis exceptionally different means. Death sentences are imposed by way of a balanced discretionary process involving the weighing of aggravating and mitigating factors by a three-judge panel, or by a single judge only

after a unanimous jury recommendation. Ohio Revised Code §§ 2929.02; 2929.03; 2929.04. *See State v. Mason*, 153 Ohio St.3d 476, 2018-Ohio-1462, 108 N.E.3d 56, ¶¶ 6-12. The propriety and proportionality of death sentences are subject to mandatory, independent review by the Supreme Court of Ohio. Ohio Revised Code § 2929.05(A). *See State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 232.

By contrast, noncapital sentences of life without the possibility of parole are imposed in the sole discretion of a single judge, ostensibly without any appellate review whatsoever save constitutional challenges in the wake of *Patrick*. Arguably, even where one is indicted for capital murder and pleads to a noncapital version of the offense, the full panoply of statutory protections assigned to capital defendants should apply in view of the fact that the individual still stands *charged with* an offense punishable by death. *See State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833, 769 N.E.2d 846, ¶ 117 (holding that, even if the state agrees not to pursue the death penalty, one who pleads guilty to aggravated murder with a death penalty specification is entitled to have his case decided by a three-judge panel). This includes mandatory appellate review of his or her sentence. *See id. See also* Ohio Revised Code § 2929.05(A).

Regardless, by allowing Ohio Revised Code § 2953.08(D)(3) to endure, Ohio punishes Mr. Stumph and other aggravated murder and murder offenders by withholding the right to appeal conferred on all other felony offenders, including those sentenced to death. This arbitrary and discriminatory treatment violates the

prohibition against cruel and unusual punishment. *Furman v. Georgia*, 408 U.S. 238 at 249 (Douglas, J., concurring), citing Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 Harv.L.Rev. 1773, 1790 (1970).

The Eighth Amendment's prohibition against cruel and unusual punishment does not tolerate denying Mr. Stumph and those like him the opportunity to challenge why the trial judge selected the irrevocability of life without parole over the hope of freedom after a term of years. Accordingly, this Court should grant certiorari in the instant case and hold that Ohio Revised Code § 2953.08(D)(3) violates the Eighth Amendment to the United States Constitution.

II. Ohio Revised Code § 2953.08(D)(3) violates the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution.

A. Where a state elects to provide a statutory right of appeal, said right must be applied evenhandedly to avoid running afoul of constitutional equal protection guarantees.

Mr. Stumph mounts facial and as applied attacks against Ohio Revised Code § 2953.08(D)(3). In order to survive an equal protection challenge where a law implicates something other than a fundamental right or a suspect class, disparate treatment must be rationally related to a legitimate governmental purpose. *Clements v. Fashing*, 457 U.S. 957, 963, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). This Court typically applies rational basis scrutiny to equal protection challenges of state appellate procedure. *Estelle v. Dorrough*, 420 U.S. 534, 538, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975).

It is well established that there exists no constitutional right to appellate review of criminal sentences. *See Lindsey v. Normet*, 405 U.S. 56, 77, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (citing cases). Nonetheless, Ohio and most if not all other states have elected to implement a direct appeal of right via statute. *See Ohio Revised Code Chapter 2953. See also Davidow & Wright, Virginia's Discriminatory Treatment of Criminal Appeals: Some Constitutional and Policy Considerations*, 6 Geo. Mason U.Civ.Rts. L.J. 1, 28 (1996). Where a state affirmatively establishes the right to appeal, that right “must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.” *Williams v. Oklahoma City*, 395 U.S. 458, 459, 89 S.Ct. 1818, 23 L.Ed.2d 440 (1969). *See also Lindsey* at 77 (citing cases and stating, “[w]hen an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause”).

To this end, the legislation governing appeals must bear a rational relationship to an independent and legitimate legislative purpose to ensure that any disparate treatment is not intended merely to burden a particular group’s access to the courts. *See Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980) (Stevens, J., concurring) (noting, “[i]f the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect”). In contravention of these principles, Ohio Revised Code § 2953.08(D)(3) denies access to appellate review only over sentences for those convicted of

noncapital aggravated murder or murder. In this way, the statute denies the affected individuals equal protection under the law.

B. Ohio's disparate application of appellate review for sentencing challenges brought by noncapital aggravated murder and murder convicts versus all others violates federal equal protection.

Aggravated murder and murder are among the most serious offenses in every state. Indeed, the Ohio General Assembly enacted a statutory scheme governing sentences for murder and aggravated murder that differs from that applied to Ohio's classified felonies. *Compare* Ohio Revised Code §§ 2929.02 through 2929.07 (penalties for murder, an unclassified felony) with Ohio Revised Code §§ 2929.11 through 2929.201 (penalties for felonies of the first through fifth degree). *See also State v. Hollingsworth*, 143 Ohio App.3d 562, 566-69, 758 N.E.2d 713 (8th Dist.2001) (providing an overview of the differences in the two sentencing schemes implemented by Ohio's Senate Bill 2). This disparate treatment prompted one Ohio Court of Appeals to conclude that, "through the enactment of a separate statutory scheme regarding sentencing for aggravated murder, the legislature clearly intended said offenses to be treated differently because of their severity." *State v. Burke*, 2016-Ohio-8185, 69 N.E.3d 774, ¶ 26 (2d Dist.).

The problem is, the same considerations that support punishing aggravated murder and murder more severely than lesser offenses do not support foreclosing these more serious sentences from appellate review. Indeed, they demand it. Despite the legislative distinctions in the two schemes, there is simply no rational

basis for a two-track process that affords appellate review to all felony sentences save attacks on those for aggravated murder and murder. Nor can any legitimate state interest be advanced for denying appellate review over these particular sentences while affording review to all others.

The offensiveness of this disparate treatment bears a resemblance to cases where this Court struck down state legislation impeding access to courts attendant to a criminal defendant's indigent status (hereinafter, "the *Griffin* line of cases"). *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *Smith v. Bennett*, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Rinaldi v. Yeager*, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966); *Entsminger v. Iowa*, 386 U.S. 748, 87 S.Ct. 1402, 18 L.Ed.2d 501 (1967); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Similarly, the prohibition against appellate review of aggravated murder and murder sentences imposed by Ohio Revised Code § 2953.08(D)(3) constitutes inherently "invidious" discrimination which erects a barrier to "adequate and effective appellate review" as between similarly situated individuals. *See Griffin* at 20.

As Ohio law stands at present, an individual sentenced to life without parole for rape of a child under the age of ten may appeal the sentence. *See, e.g., State v. Koon*, 9th Dist. Lorain No. 16CA011050, 2018-Ohio-2090, ¶ 4. On the other end of the spectrum, an individual sentenced to prison for fifth-degree felony theft can challenge the trial court's imposition of a six- to twelve-month term of incarceration

rather than community control. *See, e.g., State v. Goldsmith*, 6th Dist. Lucas No. L-16-1126, 2017-Ohio-484, ¶ 8. Yet an individual sentenced to anything but death for aggravated murder or murder is foreclosed from challenging his sentence whatsoever under Ohio Revised Code § 2953.08(D)(3).

To be sure, those convicted of aggravated murder or murder do not typically inspire much sympathy in the rest of humanity. A moral impetus to treat these individuals more gravely as a result by denying appellate review, however, does not pass constitutional muster. For, as this Court has consistently held, objectives such as “a bare . . . desire to harm a politically unpopular group” do not amount to legitimate state interests. *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). *See also Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-47, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Romer v. Evans*, 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1995).

Of note, the concurring opinion in the Ohio Supreme Court *Patrick* case cautioned against construing the prohibition in Ohio Revised Code § 2953.08(D)(3) at face value given the legislative history surrounding the statute. *See Patrick*, 2020-Ohio-6803 at ¶¶ 53-56 (Donnelly, J., concurring) (observing that, because life with the possibility of parole after 20 years was the only possible sentence for noncapital aggravated murder under the former statute, barring appellate review under the old scheme made sense). With the advent of judicial discretion in aggravated murder and murder sentences due to different sentencing options, the failure to amend the prohibition in Ohio Revised Code § 2953.08(D)(3) may best be

viewed as an oversight. *Id.* at ¶¶ 57-59.

In sum, the omission of appellate review for this class of individuals cannot be said to reasonably relate to public health, safety, morals, or general welfare. Nor is there any rational relationship between Ohio Revised Code § 2953.08(D)(3) and any purpose ostensibly fitting within one of these sanctioned interests. Accordingly, this Court should grant certiorari and hold that Ohio Revised Code § 2953.08(D)(3) violates the Equal Protection Clause of the United States Constitution.

III. Ohio Revised Code § 2953.08(D)(3) violates the substantive due process implications of the Due Process Clauses under the Fifth and Fourteenth Amendments to the United States Constitution.

A. Where a state elects to provide a statutory right of appeal, said right must be applied fairly in order to comport with substantive due process.

A state may not detain someone when doing so does not comport with due process of law. Fifth and Fourteenth Amendments to the U.S. Constitution. Central to substantive due process protections is the requirement of fundamental fairness. *Lassiter v. Durham Cty. Dept. of Social Servs.*, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

Much of the aforementioned equal protection analysis can inform the substantive due process analysis. Harkening back to the *Griffin* line of cases, this Court noted that, as a practical matter, the equal protection and due process clauses of the Fourteenth Amendment “largely converge to require that a State’s procedure ‘afford[d] adequate and effective appellate review to indigent

defendants[.]” *Smith v. Robbins*, 528 U.S. 259, 276-77, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000), quoting *Griffin*, 351 U.S. at 20. Nonetheless, the inquiries triggered by the two clauses do slightly differ:

“Due Process” emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. “Equal Protection,” on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.

Evitts, 469 U.S. at 405.

One way that substantive due process serves to prevent oppressive governmental overreach is by operating as a check on legislative enactments believed to infringe upon fundamental rights otherwise not explicitly protected by the Bill of Rights. *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir.1996). In this vein, a state appellate scheme touted as fair must necessarily “offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal.” This is precisely where Ohio Revised Code § 2953.08(D)(3) fails.

B. Ohio’s denial of appellate review for sentencing challenges brought by noncapital aggravated murder and murder convicts offends the affected individuals’ substantive due process rights.

Although Ohio has established a system of appeal of right, it does not offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. By foreclosing appellate review, Ohio Revised Code § 2953.08(D)(3) essentially sanctions arbitrary and capricious sentencing for those convicted of

noncapital aggravated murder and murder. As touched upon above, a trial judge may bluntly base a sentence for these offenses on the defendant's character, perceived moral ineptitude, or even his haircut. Without appellate review, said inequities would be allowed to stand.

Here, the trial court overtly and explicitly premised its decision to sentence Mr. Stumph to death within prison walls on considerations entirely personal and subjective in nature. True, a judge does not decide matters in a vacuum. But some level of neutrality must inform his or her decisions, and it is imperative that the law remain the primary steward. The trial court's twisting of Mr. Stump's military service and PTSD into aggravating factors was improper. *See Harwell*, 6th District Lucas No. L-00-1356, 2002-Ohio-4349 at ¶¶ 18-27 (in choosing among the life sentences for noncapital aggravated murder, a judge must engage in the same weighing of aggravating circumstances against mitigating factors as he or she does in deciding whether death is the proper sentence). Without any appellate review of these issues whatsoever, the resultant inequity will be permitted to stand in perpetuity, untested and unchecked.

Because Ohio Revised Code § 2953.08(D)(3) renders Ohio's statutory appellate scheme so fundamentally unfair as to deprive Mr. Stumph and those similarly situated of due process, this Court should grant certiorari in the instant case and hold that the law contravenes the substantive due process implications of the Due Process Clauses of the United States Constitution.

IV. Ohio Revised Code § 2953.08(D)(3) violates the procedural due process safeguards of the Due Process Clauses under the Fifth and Fourteenth Amendments to the United States Constitution.

A. Where a state elects to provide a statutory right of appeal, said process must contemplate notice and a meaningful opportunity to be heard in order to comport with procedural due process.

Even if governmental action withstands substantive due process scrutiny, procedural due process requires that any action that deprives a person of life, liberty, or property be implemented by the government in a fair manner. *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). The core components of procedural due process are notice and the opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Not just any hearing will do; rather, the accused must be afforded a “meaningful” and “appropriate” hearing:

The hearing required by the Due Process Clause must be ‘meaningful,’ and ‘appropriate to the nature of the case.’ It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision * * * does not meet this standard.

(Citations omitted.) *Bell v. Burson*, 402 U.S. 535, 541-42, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

The American Bar Association observed that appellate review is a “fundamental element of procedural fairness.” Robertson, *The Right to Appeal*, 91 N.C. L. Rev. at 1245, quoting 3 Am. Bar Ass’n, Judicial Admin. Div., Standards Relating to Appellate Courts §3.10, at 18 (1994). The State of Ohio created a liberty interest in appellate review when it enacted Ohio Revised Code Chapter 2953.

Compare Norris v. Schotten, 146 F.3d 314, 329 (6th Cir.1998) (acknowledging that “the Ohio legislature created a liberty interest in requiring that appellant be tried within ninety days of his arrest”). What is more, “any arbitrary denial of a state-created right for which there is no state remedy is [] a violation of procedural due process[.]” *Id.*

Not only is there no meaningful review for noncapital aggravated murder and murder sentences in Ohio – there is absolutely no review. The complete absence of a forum in which to challenge one’s sentence for these offenses renders Ohio Revised Code § 2953.08(D)(3) violative of the basic tenets of procedural due process.

B. Ohio’s denial of appellate review for sentencing challenges brought by noncapital aggravated murder and murder convicts offends the affected individuals’ procedural due process rights.

The goals of procedural due process are “to minimize the risk of substantive error, to assure fairness in the decision-making process, and to assure that the individual affected has a participatory role in the process.” *Howard*, 82 F.3d at 1349. That Ohio deprives noncapital murder and murder felons appellate review over their sentences removes the very mechanism designed to correct any potentially devastating anomalies in the imposition of sentence. *Compare Cobble v. Smith*, 154 F. App’x 447, 454 (6th Cir.2005), quoting *Norris*, 146 F.3d at 329 (holding that any arbitrariness in trial court’s summary denial of petitioner’s motion for new trial was cured through appellate review). This failure to provide

any appellate review whatsoever for this narrow group of individuals constitutes an arbitrary and unfair use of official power. *See Howard* at 1350.

Due to this complete deprivation of appellate process, this Court should grant certiorari in the instant case and hold that Ohio Revised Code § 2953.08(D)(3) deprives individuals convicted of noncapital aggravated murder and murder of liberty without meaningful process in violation of the Due Process Clauses of the United States Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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