No. 21-7132

In the Supreme Court of the United States

DOMINIQUE SWOPES,

Petitioner

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S QUESTION PRESENTED

When a trial court's discovery order regarding scientific testing of evidence will result in the total consumption of the evidence and thus preclude any testing by a defendant in a capital case, does Fourteenth Amendment due process guarantee a defendant the right to take an interlocutory appeal of that decision, particularly when there is a state-created right to take an interlocutory appeal from pretrial orders that finally determine a matter that is ancillary to the action on trial and from which there is no meaningful post-trial appeal?

LIST OF PARTIES

All parties appear in the caption of the cover page.

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JURISDICTION

The petitioner is seeking review, pursuant to 28 U.S.C. § 1257(a), of the Supreme Court of Ohio's decision not to accept an appeal from the decision of the intermediate court of appeals dismissing the petitioner's interlocutory appeal of a trial court discovery order for lack of a final appealable order. For reasons discussed in the argument section, this Honorable Court should not exercise discretion over this matter.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Ohio Constitution, Article IV, Section 3(B)(2), states:

> Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

The Ohio Constitution vests the Ohio's appellate courts with jurisdictions to "review and affirm, modify, or reverse judgments or final orders…" Whether an order is a final appealable order is determined by statute. Ohio Rev. Code §2505.02(B) states that "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

> **(1)** An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
>
> **(2)** An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

> **(3)** An order that vacates or sets aside a judgment or grants a new trial;
>
> **(4)** An order that grants or denies a provisional remedy and to which both of the following apply:
>
> > **(a)** The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
> >
> > **(b)** The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

Ohio R. Crim. P. 16(L) states, in relevant part:

> **Regulation of discovery.**
>
> (1) The trial court may make orders regulating discovery not inconsistent with this rule.

Other statutes, not relevant here, also provide sources of final appealable orders. See e.g., Ohio Rev Code §2945.67 and Ohio Rev Code §2953.08.

COUNTERSTATEMENT OF THE CASE AND RELEVANT FACTS

Dominque Swopes has been charged with, among other crimes, multiple counts of aggravated murder with capital specifications relating to the November 2018 homicide of R.P. and her young daughter. He is now awaiting trial. During the pretrial phase of litigation and as discovery was ongoing, the State of Ohio moved to consume DNA evidence. The motion concerned a portion of a DNA sample that the Ohio Bureau of Criminal Investigation ("BCI") had labeled the "defense portion," and specifically related to DNA swabs that had been taken from the victim's doorknob, labeled Item 9.1. Previous testing of the "State's portion" of the sample had drawn inconclusive results: Dominque Swopes could not be included or

excluded from the DNA sample because the sample was too degraded. But the State was informed by scientists that a larger sample could produce more accurate results. Even though the prosecution was not required by law or statute to do so, it requested that the trial court order the prosecution permission to test the remaining portion of the sample.

Although the State originally sought to have a different laboratory, Cybergenetics, test the DNA material, it ultimately notified the trial court that it would like to send the sample to Bode Technologies, an independent laboratory in Virginia, that routinely conducts testing for law enforcement, defense attorneys, and exoneration projects. The State also notified the Court that Bode was an attractive option because they seemed to allow for outside observation practices, meaning a defense expert could be present for the sought-after testing. After multiple hearings and extensive briefing, the trial court issued a 15-page order granting the State's motion to consume in December 2020.

Swopes then filed a notice of appeal in Ohio Court of Appeals, Eighth District, alleging an appeal of right under Ohio R. Crim. P. 42(E) and Ohio App. R. 11. On his notice of appeal, he claimed that the court's order granting the State's motion to consume constituted an order "regarding the appointment of experts" under Ohio R. Crim. P. 42(E)(4). And he believed the order to be a final appealable order under Ohio Rev. Code §2505.02(B). The State of Ohio moved to dismiss, arguing the order was an interlocutory discovery order not subject to appeal, and the Ohio Court of Appeals agreed, granting the State's motion. The Ohio Court of Appeals issued the

following one paragraph opinion in dismissing Swopes's appeal:

> Motion by appellee to dismiss appeal for lack of a final appealable order is granted. The trial court's pretrial discovery order allowing the State's consumption of the remaining DNA source does not constitute an order pursuant to Crim.R. 42(E), which allows for appeal of the trial court's refusal to appoint an expert in a capital case. Here, the trial court is permitting the appellant to have an expert observe the testing of the DNA. The order also does not constitute a provisional remedy. Should appellant be convicted, he will be afforded a meaningful and effective remedy upon review of his direct appeal. See *State v. Gaines*, 8th Dist. Cuyahoga No. 91179, 2009-Ohio-622; *State v. Abercrombie*, 8th Dist. Cuyahoga No. 88625, 2007-Ohio-5071, P 23-26; *State v. Warren*, 11th Dist. Trumbull No. 2010-T-027, 27-29. Appeal dismissed.

Unhappy with that result, Swopes sought review in the Supreme Court of Ohio. There, Swopes argued that "a trial court's decision in a capital case that appoints an expert to conduct scientific testing which will completely consume evidence, and thus preclude the defendant from testing the same evidence, is a final appealable order under R.C. 2505.02(B)(4)." Swopes told the Ohio court it was "important to note that the proposition of law in this case is ***limited solely to the issue of appellate jurisdiction***."[1] The Supreme Court of Ohio declined to hear the case.

It is from that decision that Swopes asks the Court to grant certiorari, asserting that he has a Fourteenth Amendment due process right to an interlocutory appeal of a pretrial discovery order.

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[1] Swopes's "Amended memorandum in support of jurisdiction," along with the other filings in the Supreme Court of Ohio, can be found at https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2021/0394 (last access March 18, 2022). Emphasis Added.

REASONS FOR DENYING THE WRIT

Swopes seeks review by this Court merely as a delay tactic in his case. He asks this Court to review a matter of state law: the jurisdiction of Ohio's appellate courts. Swopes fails in his attempt to provide a federal nexus to this state issue, just as he failed to properly preserve a federal question below. He does not allege that there is any conflict of law among federal courts of appeals or state courts of last resort. The state respectfully submits that the petition does not present a significant constitutional question, nor does it implicate federal law. This Court should decline to grant certiorari as doing so here would serve no useful purpose.

A. Swopes's right to an interlocutory appeal is governed by state law

Swopes has not asserted that his case implicates federal law or a significant constitutional question. He only claims that Fourteenth Amendment due process mandates that he be allowed an interlocutory appeal of a pretrial discovery order. His request implicates the Fourteenth Amendment Due Process Clause no more than any other criminal case before this Court. And, like other criminal defendants in Ohio, Swopes has appellate and postconviction remedies at his disposal should he be convicted in this case.

This Court has stated that "it is well settled that there is no constitutional right to an appeal." *Abney v. United States,* 431 U.S. 651, 656 (1977). The State of Ohio has created a right to direct appeal in criminal cases through Ohio Rev. Code § 2953.02. When a state "has created appellate courts as 'an integral part of the . . . system for adjudicating the guilt or innocence of a defendant,' the procedures used

in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (citing *Griffin v. Illinois,* 351 U.S. 12 (1956)).

The Ohio Constitution grants the courts of appeals "such jurisdiction as may be provided by law" to review "judgments or final orders." Ohio Constitution, Article IV, Section 3(B)(2). The "provided by law" part of the constitutional grant is effectuated through the definition of a "final order" contained in Ohio Rev. Code §2505.02(B). In Swopes's case, the provision of Ohio Rev. Code §2505.02(B) that might apply is Ohio Rev. Code §2505.02(B)(4), which states that "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is…

> **(4)** An order that grants or denies a provisional remedy and to which both of the following apply:
>
> > **(a)** The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
> >
> > **(b)** The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

Ohio Rev. Code §2505.02(B)(4) has transformed in some cases orders that would ordinarily be interlocutory into final appealable orders. The Supreme Court of Ohio established a framework for determining whether an order qualifies as a final order under the provisional remedy rule in *State v. Muncie,* 746 N.E.2d 1092 (Ohio 2001) when the Supreme Court of Ohio determined that an order forcibly medicating an incompetent defendant with psychotropic drugs to restore that defendant to

competency is a final appealable order in a criminal case. The *Muncie* framework was applied in other contexts. See e.g., *State v. Glenn,* 179 N.E.3d 1205 (Ohio 2021) (holding discovery order requiring defense counsel to disclose written summaries of conversations with witnesses was not a final order), *State v. Anderson,* 35 N.E.3d 512 (Ohio 2015) (holding that denial of pretrial motion to dismiss on double jeopardy grounds was immediately appealable), *State v. Chambliss,* 947 N.E.2d 651 (Ohio 2008) (holding that a pretrial ruling removing a criminal defendant's retained counsel is a final appealable order subject to immediate appeal), *State v. Upshaw,* 852 N.E.2d 711 (Ohio 2006) (holding that a pretrial ruling finding a criminal defendant incompetent to stand trial and committing the defendant for restoration is a final order). The Supreme Court of Ohio's decision in *Glenn* is significant because it confirms that not all pretrial discovery orders are immediately appealable.

Ohio's jurisprudence is rich in cases that have interpreted Ohio Rev. Code §2505.02(B)(4). For reasons emphasized below, the trial court's pretrial discovery order allowing the prosecution to test its own evidence using an independent laboratory and allowing for the defense expert to be present and observe the testing does not constitute a final appealable order. And that conclusion is governed by the Ohio Constitution and relevant statutes.

B. This Court has already squarely decided the underlying issue at hand

At the root of Swopes's interlocutory appeal is the state's ability to consume one DNA sample taken from the doorknob of the victims' home. The State originally set aside half of the DNA sample to preserve for defense testing, if necessary.

However, upon completing testing of the "State's portion" of the sample, the reports came back as inconclusive. Swopes could not be excluded, or included, to a reasonable degree of scientific certainty, from the doorknob. However, scientists testified that if given a larger sample to work with, they may be able to reach more conclusive results. Therefore, in an abundance of caution for Swopes's due process rights, the prosecution moved the trial court for an order permitting the State to consume the entire DNA sample, which the trial court granted. The whole basis of Swope's objection, and the reason for his interlocutory appeal, is that he, and he alone, should be given the opportunity to conduct scientific testing on the second half of the DNA sample.

This Court has already spoken on that issue in *Arizona v. Youngblood*, 488 U.S. 51 (1988). *Youngblood* holds that unless a criminal defendant can show bad faith, the State's failure to preserve potentially useful evidence—of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant—does not violate the due process clause of the United States Constitution's Fourteenth Amendment. There is also a clear difference between *consumption* and *destruction* of evidence. Here, the prosecution is consuming the DNA sample to conduct further testing. Should the testing result in exculpatory evidence, the State's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), would apply, and Swopes would be given access to those test results. And, under Ohio law, Swopes is entitled to the results and reports regardless of the outcome of the test.

C. Swopes has an alternative adequate remedy upon review of his direct appeal

While Swopes's question presented involves the ability to challenge the interlocutory order of the trial court, the chances of success of such an appeal should also be considered. The law is settled that such success would require a showing of bad faith on behalf of the State. And that claim can be made on direct appeal, should Swopes be convicted. Doing so will afford him a meaningful and adequate remedy upon appeal of final judgment.

The Ohio Court of Appeals, Eighth District correctly determined that the trial court's pretrial discovery order did not constitute a provisional remedy, nor did it deny Swopes a meaningful or effective remedy by an appeal following final judgment. It relied on Ohio case law that squarely addressed the issue of Swopes's appeal. The Ohio Court of Appeals had previously overruled the argument that the failure to retain a portion of a DNA sample for a defendant's independent testing violates the defendant's due process rights. *State v. Gaines,* No. 91179, 2009 Ohio App. LEXIS 540, 2009 WL 344990 (Ohio Ct. App. Feb. 12, 2009). The court held that a defendant's ability to retain an expert to review the findings of the State's testing who could arrive at independent conclusions and be available for testimony and cross-examination adequately meets a defendant's due process rights. *Gaines,* ¶ 52-54. And in Swopes's instance, the trial court's order exceeds *Gaines*, allowing Swopes to have a DNA analyst present for the DNA testing. Further, the DNA testing is being conducted by an independent laboratory, Bode Technologies, who has no affiliation with the State of Ohio and routinely performs work in conjunction

with criminal defendants as well as state agencies. Swopes's due process rights have been diligently looked after in this matter.

The Ohio Court of Appeals, Eighth District had also previously looked to the Due Process Clause of the Fourteenth Amendment and found that it "does not require the prosecution to preserve samples for independent analysis unless the sample possesses an exculpatory value that is apparent before the sample is destroyed, and the defendant is unable to obtain comparable evidence by other reasonably available means." *State v. Abercrombie*, No. 88625, 2007 Ohio App. LEXIS 4488 (Ohio Ct. App. Sept. 27, 2007), quoting *State v. Estep*, 598 N.E.2d 96 (Ohio Ct. App. 1991). This type of claim can be reviewed on direct appeal. Total consumption of a DNA sample does not violate due process. And a criminal defendant's inability to challenge the total consumption of a DNA sample via an interlocutory appeal also does not violate due process. Swopes's appeal to the Ohio Court of Appeals was improper and lacked merit. The Supreme Court of Ohio recognized the meritless nature of his appeal and properly declined jurisdiction. The State of Ohio asks this Court to do the same.

For all these reasons, this case does not provide a good vehicle to decide the question Swopes has presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Daniel T. Van, counsel of record for Respondent and a member of the Bar of this Court, hereby certify that on March 18, 2022 he served a copy of the Brief in Opposition to Petition for Writ of Certiorari to Erika Cunliffe, Assistant Public Defender, 310 Lakeside Ave., Suite 200, Cleveland, Ohio 44113 and via electronic mail.

Respectfully submitted,

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