

No. 17-6232

In the Supreme Court of the United States

GLEN CAMPBELL,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

May a state limit the scope of sentencing review for non-capital homicide offenses without violating the due process and equal protection clauses of the United States Constitution?

LIST OF PARTIES

All parties appear in the caption of the cover page.

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JURISDICTION

Petitioner is seeking review from the Nov. 3, 2016 decision of the Ohio Court of Appeals, Eighth Appellate District affirming Petitioner's conviction. *State v. Campbell*, No. 103982, 2016-Ohio-7613, 2016 Ohio App. LEXIS 4471 (Nov. 3, 2016). Petitioner sought discretionary review to the Ohio Supreme Court pursuant to Ohio Sup. Ct. P. R. 7.01. The Ohio Supreme Court subsequently refused jurisdiction pursuant to Ohio Sup. Ct. P. R. 7.08. *State v. Campbell*, 149 Ohio St. 3d 1464, 2017-Ohio-5699, 77 N.E.3d 988 (2017).

For the reasons discussed in the argument section, this Honorable Court should not grant the writ and exercise jurisdictional discretion over this matter. The state court of last resort in Ohio or the Ohio Supreme Court has not decided an important federal question in a way that conflicts with the decision of another state court of last resort. Nor has a state court decided a federal question in a way that conflicts with relevant decisions of this Court. The factors favoring review under Rule 10 are not present in this matter and this case is not the appropriate vehicle to resolve the constitutional issues raised by Petitioner.

STATUTES OR OTHER PROVISIONS INVOLVED

Petitioner challenges the constitutionality of Ohio Rev. Code Ann. § 2953.08(D)(3). Ohio Rev. Code Ann. § 2953.08(D)(3) in its entirety states:

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

(1) The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 of the Revised Code, the maximum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

(a) The sentence was imposed for only one offense.

(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term and the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of section 2929.13 of the Revised Code for purposes of sentencing. If the court specifies that it found one or more of the factors in division (B)(1)(b) of section 2929.13 of the Revised Code to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of section 2971.03 of the Revised Code, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of section 2971.03 of the Revised Code is the longest term available for the offense from among the range of terms listed in section 2929.14 of the Revised Code. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in section 2971.01 of the Revised Code. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in section 2929.01 of the Revised Code, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (B)(2)(a) of section 2929.14 of the Revised Code.

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.

(2) The sentence is contrary to law.

(3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.

(C)

(1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (C)(3) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.

(2) A defendant may seek leave to appeal an additional sentence imposed upon the defendant pursuant to division (B)(2)(a) or (b) of section 2929.14 of the Revised Code if the additional sentence is for a definite prison term that is longer than five years.

(D)

(1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

(2) Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review under this section if the sentence is imposed pursuant to division (B)(2)(b) of section 2929.14 of the Revised Code. Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (B)(2)(c) of section 2929.14 of the Revised Code.

(3) 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.

(E) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in Rule 4(B) of the Rules of Appellate Procedure, provided that if the appeal is pursuant to division (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.

(F) On the appeal of a sentence under this section, the record to be reviewed shall include all of the following, as applicable:

(1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. An appellate court that reviews a presentence investigation report prepared pursuant to section 2947.06 or 2951.03 of the Revised Code or Criminal Rule 32.2 in connection with the appeal of a sentence under this section shall comply with division (D)(3) of section 2951.03 of the Revised Code when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of section 2951.03 of the Revised Code and does not cause that report to become a public record, as defined in section 149.43 of the Revised Code, following the appellate court's use of the report.

(2) The trial record in the case in which the sentence was imposed;

(3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;

(4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (I) of section 2929.20 of the Revised Code.

(G)

(1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13 or division (I) of section 2929.20 of the Revised Code, or to state the findings of the trier of fact required by division (B)(2)(e) of section 2929.14 of the Revised Code, relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.

(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

(H) A judgment or final order of a court of appeals under this section may be appealed, by leave of court, to the Supreme Court.

Petitioner's challenges this statute under the Due Process and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner raised four assignments of error to the Ohio Court of Appeals, Eighth District. The first assigned error challenged his sentence under Ohio's repeat violent offender statute, which is not subject to this petition. The second assigned error challenged the imposition of consecutive sentences. The third assigned error challenged his sentence as violating the aggravating factors and mitigating circumstances contained in Ohio Rev. Code Ann. § 2929.12(C) and (E). It is from this assigned error that Petitioner forms the basis of his constitutional challenge as the Ohio Court of Appeals, Eighth District rejected this assignment of error pursuant to Ohio Rev. Code Ann. § 2953.08(D)(3). The Ohio Court of Appeals, Eighth District did not address or analyze the issue of whether Ohio Revised Code Ann. § 2953.08(D)(3) violated the Equal Protection Clause or Due Process Clause of the Fourteenth Amendment of the United States Constitution. A fourth assigned error challenged the effectiveness of Petitioner's trial counsel for the same issues Petitioner raised in his other assigned errors. A subsequent supplemental assignment of error was filed challenging the repeat offender sentence but that too was rejected and is not the basis for this writ.

For the first time, Petitioner explicitly raised to the Ohio Supreme Court the issue of whether Ohio Rev. Code Ann. § 2953.08(D)(3) violated the Equal Protection Clause and Due Process Clause of the United States. The State of Ohio timely opposed jurisdiction. The Ohio Supreme Court declined jurisdiction without

explanation which is consistent with its practice when refusing to grant discretionary review.

REASONS FOR DENYING THE WRIT

I. Federal question has not been drawn into question by Respondent and it should be presumed from the Ohio Supreme Court's silence that the claimed federal issue was not properly presented.

Despite having a procedural mechanism to do so, the Petitioner did not directly challenge the contention that Ohio Rev. Code Ann. § 2953.08(D)(3) violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

When the state appellate court declined to consider Petitioner's challenge to his aggravated murder sentence, pursuant to Ohio Revised Code Ann. § 2953.08(D)(3), Petitioner did not make any timely request for reconsideration, which under state procedural rules would have allowed him to address any issue that he believed was an "obvious error" or one that was not "considered or fully considered" when it should have been. Thus, Petitioner never formally argued that Ohio Rev. Code Ann. § 2953.08(D)(3) violated the Due Process and Equal Protection Clause of the United States Constitution, until he sought discretionary review with the Ohio Supreme Court.

It is settled practice of this Court, that in the exercise of its §1257(a) certiorari jurisdiction over state court judgments, that it will not consider federal questions not pressed or passed upon in the state courts. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). Furthermore, where the federal question

is initially raised in the petition filed in the highest state court, which refuses to consider any issue not presented to the trial court, the jurisdiction of the Supreme Court cannot attach. *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945). It can be said here that the federal question has not been adequately and sufficiently presented in the state court to warrant certiorari review in this case. The Equal Protection and Due Process argument, framed by Petitioner, was not adequately raised by Petitioner as evidenced by the opinion of the Ohio Court of Appeals, Eighth District which described the issues raised by Petitioner and as evidence in the lack of any constitutional analysis of Ohio Rev. Code Ann. § 2953.08(D)(3). Petitioner did not seek any rehearing under Ohio R. App. P. 26(A), a procedural rule which permits a litigant to call to the attention of the intermediate appellate court “an obvious error in its decision or permits a litigant to raise an issue for the court’s consideration that was either not considered at all or was not fully considered by the court when it should have been.” *State v. Wong*, 97 Ohio App.3d 244, 246 (1994).

Other appellate courts in Ohio have had the opportunity to expressly reject the claim that Ohio Revised Code Ann. § 2953.08(D)(3) violates the Equal Protection Clause of the United States Constitution. For instance, the Ohio Court of Appeals, Second District engaged in an Equal Protection analysis and rejected the defendant’s Equal Protection argument in a detailed opinion. *State v. Burke*, 69 N.E.3d 774, 782 (Ohio Ct. App. 2d 2016). Although a detailed opinion was not provided, the Ohio Court of Appeals, Fifth District noted the equal protection claim as being raised in a

defendant's reply brief but also rejected the claim. *State v. Weaver*, 5th App. Dist. Muskingum No. CT2016-0033, 2017-Ohio-4374.

Given the failure of Petitioner to appropriately raise the issue he now complains of in the state court, jurisdiction is not appropriate in this case and the writ of certiorari should be denied.

Even if the issues had been appropriately raised, Petitioner's Equal Protection and Due Process arguments would fail for the reasons discussed below.

II. Ohio Revised Code. 2953.08(D)(3) does not violate the Due Process Clause where other remedies exist to address the hypothetical concerns raised by Petitioner.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” The purpose of the due process clause has long been recognized to “secure [an] individual from the arbitrary exercise of the powers of government[.]” *Daniels v. Williams*, 474 U.S. 327, 331 (1986) quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884). The clause works to promote fairness, and requires that the government follow appropriate procedures prior to depriving any person of their life, liberty, or property. Thereby preventing “governmental power from being ‘used for purposes of oppression[.]’” *Daniels, supra*, at 331-32, quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856)(discussing the Due Process Clause of the Fifth Amendment).

Petitioner alleges that Ohio Rev. Code Ann. § 2953.08(D)(3) works to arbitrarily preclude defendants from challenging the imposition of a sentence for

Aggravated Murder on perceived disparities in sentencing based on race or gender. He is incorrect. While Ohio Rev. Code Ann. § 2953.08(D)(3) does preclude direct appellate review concerning the imposition of a sentences for Aggravated Murder, Ohio law does provide a defendant an avenue to challenge their Aggravated Murder sentence by way of a petition of postconviction relief, pursuant to Ohio Rev. Code Ann. § 2953.21.

In Ohio, it has long been recognized that “a reviewing court may not rely upon matters outside the record in deciding an appeal.” *Derolph v. State*, 78 Ohio St.3d 193, 205 fn. 7 (1996), citing *State v. Ishmail*, 54 Ohio St.2d 402 (1978). In order to demonstrate that a particular sentencing judge has a history of imposing certain sentences based on race or gender, an offender must rely on evidence outside the record. This type of evidence would be unreviewable by courts of appeals regardless of the limitations set forth in Ohio Rev. Code Ann. § 2953.08(D)(3). Recognizing this, the Ohio General Assembly has provided an avenue for all offenders, including those sentenced for Murder and Aggravated Murder, to challenge their sentences based on such evidence outside the record.

Ohio Rev. Code Ann. § 2953.21 governs petitions for post-conviction relief and provides a procedure for a person convicted of a criminal offense to claim that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio or United States Constitutions. A petition for post-conviction relief is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues are not contained in the record

of the petitioner's criminal conviction. *State v. Holt*, 2006-Ohio-3327 (Ohio Ct. App. 2006), ¶ 16. Such petitions are statutory vehicles designed to correct a violation of a defendant's constitutional rights. *Id.* Ohio Rev. Code Ann. § 2953.21(A)(5) particularly addresses sentences imposed based on alleged disparity in sentencing. Ohio Rev. Code Ann. § 2953.21(A)(5) provides:

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, *the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion.* If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons. (Emphasis added)

Contrary to what Petitioner asserts in his petition, defendants sentenced for Murder and Aggravated Murder in Ohio may raise a claim the has been denied equal protection if the sentence imposed upon him was part of a consistent pattern of disparity in sentencing by the trial judge who imposed the sentence. Ohio's postconviction relief statute exists to provide convicted defendants avenues to seek relief on certain issues that would not normally be heard on direct appeal. The fact that on offender may not raise this issue on appeal in Ohio does not preclude him from raising said issue in a more appropriate forum, such as in a petition for postconviction relief.

If an offender is sentenced for Aggravated Murder or Murder, a sentencing judge is not free to arbitrarily choose which sentence to impose. And if a sentencing judge does appear to be engaging in a pattern of disparity in regards to race, gender, ethnic background, or religion, Ohio's postconviction relief statute gives the offender an adequate avenue for review. Ohio postconviction relief statute ensures that an offender's due process rights are not violated.

III. Ohio Revised Code Ann. § 2953.08(D)(3) does not violate the Equal Protection Clause of the United States Constitution

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." "In considering whether state legislation violates Equal Protection . . . [courts] apply different levels of scrutiny to different types of classifications." *Clark v. Jeter*, 486 U.S. 456, 461. This Court has stated that it "will not overturn a statute that does not burden a suspect class or a fundamental interest unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Pennell v. San Jose*, 485 U.S. 1, 14 (1988) quoting *Vance v. Bradley*, 440 U.S. 93 (1979). In other words, "a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Frontiero v. Richardson*, 411 U.S. 677, 683.

In Ohio, the General Assembly has provided appellate courts the authority to review criminal sentences pursuant to Ohio Rev. Code Ann. § 2953.08. This statute

authorizes appellate courts to review felony sentences on a limited number of bases set forth in the statute, e.g. the sentence was contrary to law, or if the record clearly and convincingly does not support the sentence imposed. *See, e.g. State v. Marcum*, 146 Ohio St. 516, 2016-Ohio-1002, 59 N.E.3d 1251. Nonetheless, Ohio Rev. Code Ann. § 2953.08(A)(3) precludes appellate review of sentences imposed for Aggravated Murder and Murder. The question thus becomes, does this violate Equal Protection. It does not.

Petitioner recognizes and concedes that those who have been convicted of Aggravated Murder do not fall into a suspect class, nor do they have a fundamental right to any particular sentence. Therefore, the question is whether Ohio Rev. Code Ann. § 2953.08(A)(3) bears a rational relationship to a legitimate government interest. It does.

The state of Ohio's "practice of treating sentencing for Aggravated Murder and Murder convictions differently from other felonies is longstanding." *State v. Hollingsworth*, 258 N.E.2d 713, 718 (Ohio Ct. App. 8th 2001) The general felony sentencing statutes in Ohio apply to lesser felony offenses classified as first through fifth degree felonies. *See*, Ohio Rev. Code Ann. § 2929.14(A). These statutes exclude sentencing for Murder and Aggravated Murder as to the term of imprisonment to be imposed. Rather, sentencing for Murder and Aggravated Murder falls under a special, comprehensive statutory scheme which differs from that applied to other felonies. *State v. Burke*, 69 N.E.3d 774, 782 (Ohio Ct. App. 2d 2016). By enacting this separate statutory scheme, "the legislature clearly intended [Murder and

Aggravated Murder] to be treated differently because of their severity.” *Burke, supra*, at 782.

Ohio appellate courts that have reviewed this separate statutory scheme treating Murder and Aggravated Murder differently from other felonies have come to the same conclusion: it does not violate equal protection. *See, Burke, supra; State v. Weaver*, 2017-Ohio-4374 (Ohio Ct. App. 5th 2016). In doing so, the courts have recognized that the Generally Assembly may differentiate offenders based on the seriousness of their offenses. *Burke, supra*, at ¶ 27, citing *State v. Skapik*, 2015-Ohio-4404 (Ohio Ct. App. 2d 2015). This court has recognized the same principle, that legislature’s may treat offenses differently based on the seriousness of the offense. *Johnson v. Louisiana*, 406 U.S. 356, 364 (1972)(holding that a state's constitutional and statutory provisions authorizing a verdict by nine of twelve jurors in criminal cases in which the punishment is necessarily at hard labor, whereas unanimity is required in capital cases and in five-man jury cases in which punishment may be at hard labor, do not violate the equal protection clause of the Fourteenth Amendment.) As such, there is “nothing irrational or arbitrary in the legislature’s decision to view aggravated murder or murder as a more serious offense such that it warrants a separate statutory scheme from classified felonies.” *Burke, supra*, at ¶ 27. Such provision work to “facilitate, expedite, and reduce expense in the administration of criminal justice.” *Johnson, supra*, at 365.

There is nothing irrational or arbitrary about the Ohio General Assembly’s decision to establish a special, separate, comprehensive statutory scheme for the

offenses of Murder and Aggravated Murder. This scheme applies, not only in the trial courts, but pursuant to Ohio Rev. Code Ann. § 2953.08(D)(3), it applies to Ohio appellate courts as well. Based on the forgoing, Ohio Rev. Code Ann. § 2953.08(D)(3), which treats appellate review for Murder and Aggravated Murder sentences differently than sentences imposed on lower level felonies, does not violation the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,



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PROOF OF SERVICE

Pursuant to Rules 29.3 and 29.5(b) of the Rules of the Supreme Court of the United States, Daniel T. Van, counsel of record for Respondent and a member of the Bar of this Court, hereby certifies that on January 2, 2017, he served Jeffrey M. Gamso, counsel of record for Petitioner Glen Campbell, by placing in the United States Mail, postage pre-paid, properly addressed to Attorney Gamso at the Cuyahoga County Public Defender's Office, 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113, a copy of the Brief in Opposition to Petition for Writ of Certiorari.

All parties required to be served in this case have been served.

Respectfully submitted,



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