Supreme Court of Ohio Clerk of Court - Filed January 14, 2016 - Case No. 2014-1377

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2014-1377
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Portage County
v.	:	Court of Common Pleas
	:	**THIS IS A CAPITAL CASE**
TYRONE NOLING,	:	
	:	Case No. 1995-CR-220
Defendant-Appellant.	:	

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLEE STATE OF OHIO

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INTRODUCTION

Capital offenders are not the same as other offenders, so in many States their cases follow a different appellate track. This different treatment does not establish a constitutional violation of any kind, as this Court recognized in *State v. Smith*, 80 Ohio St. 3d 89 (1997), when it upheld Ohio's dual-track direct-appeal structure. Rather, it is a proper acknowledgement of their difference, based on sound policy bases. The same is true here for the parallel appellate structure under Ohio's post-conviction DNA testing statute.

Ohio law allows some convicted criminals to request post-conviction DNA testing from the State. R.C. 2953.71 *et seq*. Ohio allows testing even for decades-old convictions like this one, but not of biological material that "has become scientifically unsuitable for testing" over time. R.C. 2953.74(C)(2)(c). Noling, a capital offender convicted in two 1990 murders, has filed several applications for testing. The last time he was before this Court, he sought DNA testing of a cigarette butt found on the victim's driveway, which he asserted may have been smoked by another suspect. On remand, the Bureau of Criminal Investigation (BCI) tested that cigarette butt and determined it had no DNA from that other suspect. Noling now seeks DNA testing of bullet casings and ring boxes from 1990, but BCI found that those materials had become scientifically unsuitable for testing due to subsequent handling, marking, and contamination. Although Noling discusses this at length, he does not engage the statutory text that ties BCI's hands, and this issue is not before the Court.

Instead, this appeal challenges only the post-conviction DNA statute's appellate review provision under the Due Process Clause, Equal Protection Clause, and the Eighth Amendment. The statute provides capital offenders a discretionary appeal to this Court, R.C. 2953.72(A)(8); 2953.73(E), while giving other offenders an appeal as of right in the intermediate courts, R.C. 2953.72(A)(8); 2953.73(E). This parallels the track each set of offenders follows on direct

appeal—differential tracks this Court already upheld in *Smith* against the same challenges. The only difference is that the direct appeal to this Court is mandatory, while this post-conviction appeal is discretionary. That difference is justified by the post-conviction context, and does not distinguish this case from *Smith*. Indeed, in many ways it is easier because it only involves a successive post-conviction appeal—far removed from constitutional concerns.

The statute's appellate-review provision does not violate the Due Process Clause. As a matter of black-letter law, Noling has no fundamental right to DNA testing and no fundamental right to an appeal, let alone to an appeal from a post-conviction application like this one. Noling relies on the U.S. Supreme Court's access-to-review cases, which require equal access to the first appeal of right when state law provides an appeal. But the Supreme Court has never applied that precedent to the post-conviction appeals process. In this way this case is easier than *Smith*, because a post-conviction appeal under this statute does not in any way touch on whether Noling received a fair trial, and so is unlikely to implicate due-process rights. For that reason, if the Supreme Court's access-to-review cases apply here at all, they properly sound in equal protection, not due process.

The statute's appellate-review provision does not violate the Equal Protection Clause because it satisfies the rational-basis test. Rational-basis review applies to access-to-review cases that do not involve a fundamental right or a suspect class. The statute satisfies that test because capital offenders are not similarly situated to non-capital offenders. They are not similarly situated simply by nature of their sentence, as several courts have recognized. They have not been similarly situated at any time in the judicial process up to this point, including appellate rights on direct appeal. And they are not similarly situated under *this* statute, which gives capital offenders broader access to DNA testing. If anything, capital and noncapital

offenders are *less* similarly situated here than in *Smith*, because capital offenders have already been subject to different treatment on direct appeal, and so are certainly not similarly situated to other offenders now in successive post-conviction proceedings.

Even if they are similarly situated, the State has at least five rational bases for putting each group on distinct appellate tracks. *First*, because direct appeals in capital cases go directly to the Supreme Court, it makes sense for post-conviction appeals to mirror that structure. *Second*, the General Assembly may have even believed that appeals *had* to go to the Supreme Court to avoid a state constitutional challenge under the 1994 amendment language, which could be read to apply in post-conviction until this Court cleared it up in *State v. Davis*, 131 Ohio St. 3d 1 (2011). *Third*, distinct appellate tracks make sense as a practical matter. The DNA-testing statute gives capital offenders broader access to testing. This produces more appeals per case, so the statute simply makes the appeal discretionary. This Court is very capable of determining which appeals merit review. *Fourth*, as *Smith* explained, capital offenders are motivated to prolong the appellate process as long as possible, so the State has a rational interest in ensuring concise proceedings. 80 Ohio St. 3d at 100. *Fifth*, as *Smith* explained, funneling all appeals to the same court promotes consistency among death-penalty cases. *Id*. at 102. While the one-tier appellate procedure here is discretionary rather than mandatory as in *Smith*, that difference alone does not distinguish *Smith*'s reasoning on these points. Noling cannot satisfy his burden to rebut each of these bases for the statute's distinctions.

Finally, the statute's appellate-review provision does not violate the Eighth Amendment, which is concerned with *sentencing* procedures, not *post-conviction* procedures. As a matter of black-letter law, therefore, the Eighth Amendment has no application here.

STATEMENT OF AMICUS INTEREST

As Ohio's chief law officer, the Attorney General has a keen interest in the proper application of Ohio's laws. In particular, the Attorney General and the Bureau of Criminal Investigation play a key role under Ohio's post-conviction DNA testing statute. Given that role, the Attorney General has an interest in defending that statute against constitutional challenges like the one presented here, and ensuring that the Bureau's role in this case is not misconstrued.

PROCEDURAL HISTORY

A. A jury convicted Noling for killing the Hartigs and recommended the death penalty; courts have repeatedly upheld that sentence over twenty years as he exhausted his direct appeal, post-conviction petition, and federal habeas petition.

On April 7, 1990, Cora and Bearnhardt Hartig were found shot to death in their home in Atwater, Ohio. The jury found Noling guilty of aggravated murder on January 23, 1996, and recommended a death sentence, which the trial judge imposed. *State v. Noling*, 136 Ohio St. 3d 163, 2013-Ohio-1764 ¶ 3.

In a long and detailed procedural history, state and federal courts have repeatedly upheld the constitutional soundness of Noling's conviction. The Eleventh District denied his direct appeal. *State v. Noling*, 1999 WL 454476, *25 (11th Dist. Ct. App. 1999). And this Court affirmed the conviction and sentence, noting:

> [Two coconspirators] saw Noling and St. Clair . . . run from the Hartig home. Noling told both Wolcott and Dalesandro that he had shot the Hartigs and warned them not to tell the police. Noling also told St. Clair in front of the police to keep his mouth shut about the Atwater Township murders. Additionally, Noling admitted to fellow inmates Garner and Gantz that he shot the Hartigs and admitted to inmate Travise that he had robbed the Hartigs. Noling additionally admitted to police that he knew about the crime, although he tried to blame St. Clair. Finally, other evidence established that Noling had devised the plan to rob elderly individuals in their homes and that he had robbed two other couples within a day of shooting the Hartigs.

State v. Noling, 98 Ohio St. 3d 44 (2002), *cert. denied*, *Noling v. Ohio*, 539 U.S. 907 (2003).

Noling then exhausted his first post-conviction petition. The trial court denied it, and the appeals court affirmed that denial on appeal. *State v. Noling*, No. 98-P-0049, 2003 WL 22171433 (Ohio Ct. App. Sept. 19, 2003), *appeal denied*, *State v. Noling*, 101 Ohio St. 3d 1424 (2004). Three years later, Noling filed a successive petition for post-conviction relief, a motion for a new trial, and motion for relief from judgment. The trial court denied these as well, and the appeals court affirmed the denials on appeal. *State v. Noling*, 2008 WL 2079466 (11th Dist. Ct. App. 2008), *appeal denied*, *State v. Noling*, 120 Ohio St. 3d 1453 (Dec. 31, 2008).

Noling has also exhausted his federal habeas corpus petition. The Northern District of Ohio dismissed it in 2008. *Noling v. Bradshaw*, 2008 WL 320531, *24 (N.D. Ohio, Jan. 31, 2008). The Sixth Circuit affirmed that dismissal. *In re Noling*, 651 F.3d 573 (6th Cir. 2011), *cert. denied*, *Noling v. Bobby*, 133 S.Ct. 1452 (2013).

On June 10, 2010, Noling filed another motion for a new trial based on allegedly newly discovered evidence under Crim. R. 33(A)(6). The trial court denied the motion for a new trial because the prosecution had an "open file" discovery policy. *State v. Noling*, 2014 WL 1348008, ¶ 14 (11th Dist. Ct. App. 2014). The court of appeals reversed and remanded the matter for an evidentiary hearing on narrow grounds. *Id.* ¶¶ 53, 62.

B. Ohio began permitting post-conviction DNA testing in 2003.

Ohio passed its first post-conviction DNA testing statute in 2003. An eligible offender may submit an application for DNA testing with the same trial court and the same trial judge (if available) that heard the case against him. R.C. 2953.72(A)-(B); 2953.73(A). As a preliminary requirement, an offender must be eligible under R.C. 2953.72(C).

1. The trial court can only grant the application if it meets certain mandatory criteria.

A trial court may only accept an application if it meets at least two sets of statutory criteria. *First*, the inmate must show that if the results establish a "DNA exclusion," the test results "would have been *outcome determinative* at the trial stage in that case." R.C. 2953.74(B)(1) (emphasis added). "Outcome determinative" means the "results of DNA testing of the subject offender . . . [establish] a strong probability that no reasonable factfinder would have found the offender guilty of that offense." R.C. 2953.71(L). In death-penalty cases, the offender may also obtain relief by showing a strong probability that no reasonable factfinder "would have found the offender guilty of the aggravating circumstance . . . [which formed] the basis of that sentence of death." *Id.*

Second, the trial court must determine whether a testing application meets *all* of the six criteria in R.C. 2953.74(C). Most important for this case is Section (C)(2), which requires the court to find (a) that the parent sample contains "scientifically sufficient material," (b) that it is not "so minute or fragile as to risk destruction of the parent sample" (although it may still be tested in some circumstances), and (c) that the parent sample "*has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing.*" *Id.* (emphasis added). To make these three determinations, the trial court "shall require the prosecuting attorney to consult with the testing authority and to prepare findings regarding the quantity and quality of the parent sample . . . collected from the crime scene or victim." R.C. 2953.76. The testing authority then prepares "a written document that contains its determination and the reasoning" for determining whether these factors have been met. R.C. 2953.76(B). The statute requires a favorable report from the testing authority before the trial court can grant an application for testing. R.C. 2953.74(C)(2)(a)-(c).

The remaining requirements are similar but still important. Section (C)(1) requires the trial court to find that "biological material was collected from the crime scene or victim," and a "parent sample" "still exists." Section (C)(3) requires the trial court to determine that during the trial, "the identity of the person who committed the offense was an issue." Section (C)(4) that at least one of the "defense theories asserted by the offender at the trial," makes a DNA "exclusion result" "outcome determinative." Section (C)(5) that "if DNA testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding the offender." And Section (C)(6) that, according to the "chain of custody of the parent sample . . . and of any test sample extracted," the "parent sample and extracted test sample are the same," and that they have not been "out of state custody or have been tampered with or contaminated since they were collected." *See* R.C. 2953.74(C).

If an offender's application does not satisfy all these requirements, the trial court's hands are tied: it cannot grant the application. R.C. 2953.74(A)-(C). Moreover, if the trial court rejects a DNA application because it fails to "satisfy the acceptance criteria," the trial court "will not accept or consider subsequent applications." R.C. 2953.72(A)(7).

2. The trial court alone picks the testing authority, and offenders cannot contest its choice.

If the application is accepted, "the court shall select a testing authority to be used for the testing." R.C. 2953.78(A). To be selected, the testing authority must be previously approved by the Attorney General and meet the requirements of R.C. 2953.80. *See* R.C. 2953.78(C). Once the trial court has selected a testing authority to perform the tests, if the offender objects, "the court shall rescind its prior acceptance of the application for DNA testing for the offender and deny the application." R.C. 2953.78(B). The statute "[does] not afford an offender any right to subsequently challenge the . . . selection, or use" of the "testing authority," and "an offender may

not appeal to any court the . . . selection, or use of a testing authority." R.C. 2953.78(D). If the court dismisses the application on this ground, the trial court may (in its discretion) allow the offender to file a subsequent application for DNA testing in the future. R.C. 2953.78(B).

3. In death penalty cases, the General Assembly chose to limit appeals to the Ohio Supreme Court.

An offender can appeal an order denying an application for post-conviction DNA testing. R.C. 2953.72(A)(8), 2953.73(E). In cases where the offender has been sentenced to death, the "offender may seek leave of the supreme court to appeal the rejection [of his application] to the supreme court." R.C. 2953.73(E)(1). In all other felony cases, an offender "may appeal [the denial] to the court of appeals." R.C. 2953.73(E)(2).

C. Noling has sought (and received) DNA testing through multiple applications.

Noling filed his first application for DNA testing in 2008, seeking testing of a cigarette butt found on the victim's driveway. *Noling*, 136 Ohio St. 3d 163 ¶ 4. The trial court rejected the application because it found earlier DNA testing was definitive. *Id*. In 2010, Noling filed a second application seeking testing of the same cigarette butt based on what he asserted was newly discovered evidence about other suspects. *Id*. ¶¶ 5-6. The trial court again denied his application. *Id*. ¶ 7. This Court accepted jurisdiction of Noling's appeal and held that the Ohio Constitution allows R.C. 2753.73(E) to confer appellate jurisdiction on this Court over a trial court's denial of a testing application, and that the testing statute does not bar subsequent applications for testing when a prior application was denied under a previous version of the statute. *Id*. ¶¶ 33-35. This Court remanded the case to "consider whether new DNA testing would be outcome-determinative." *Id*. at ¶ 44.

1. BCI tested the cigarette butt in 2014 and found that it did not match alternative suspect Danny Wilson.

On remand, Portage County simply agreed to test "the cigarette butt at BCI and run the results against [the National DNA database]." R. 415. The tests showed that neither Danny Wilson's DNA—the alternative suspect advanced by Noling's legal team—nor anyone in the FBI's national database, matched the profile found on the cigarette butt collected from the Hartig's driveway. R. 436.

2. Noling requested DNA testing of recovered shell casings and ring boxes, and the trial court sent the application to BCI to determine whether these could be tested.

On remand, Noling amended his application also to ask for testing of shell casings collected from the Hartig home and empty ring boxes recovered from the bedroom. R. 377. Although the State opposed, the trial court granted Noling's motion to amend. R. 391. The spent shell casings were recovered from on and around the kitchen floor, surrounding the bodies of the Hartigs. State's Ex. 2-9, 78-85; Tr. 726-730. The empty ring boxes were collected from the Hartig's bedroom from a "chest of drawers." State's Ex. 16; Tr. 749-752.

Following the statutory scheme, the trial court asked BCI to issue a report regarding the "quantity and quality of the parent sample . . . [and] determine whether the parent sample has degraded or been contaminated to the extent that it has become scientifically unsuitable for testing." R. 416; *see* R.C. 2753.76(C)(2)(a)-(c). In reaction to the orders, Noling moved the trial court to designate Orchid Cellmark as the testing authority. R. 423. Pointing to R.C. 2753.78(B), the State responded that Noling had no authority to challenge the trial court's selection of BCI as the testing authority. R. 435. To preserve the record, the court conducted a hearing, and Noling called a Dr. Straub to testify about the viability of DNA testing on the evidence collected and to give his opinion about the appropriate testing lab. Evid. Hrg. Tr. 31-

123. Shortly after the hearing and following R.C. 2953.76(C)(2)(a)-(c), the trial court issued a new order again asking BCI to submit findings regarding the suitability of the parent samples for testing. R. 442.

3. BCI found that any trace DNA on the shell casings and ring boxes had been contaminated.

After visually inspecting the evidence, BCI filed a report concluding the ring boxes and shell casings "are contaminated to the extent they have become scientifically unsuitable for testing." R. 450. Testing objects that simply may have been touched in passing decades ago is much harder than testing material recently collected pursuant to up-to-date DNA protocols. Given that these casings and boxes were collected before DNA testing became prevalent, BCI noted, among other defects, that the shell casing had been written on, which is incompatible with current DNA procedures. *Id*. Likewise, the ring boxes had been packaged together, and dusted for prints, in a manner inconsistent with current DNA collection practices. *Id*. Overall, BCI's DNA technical leader, Dr. Lewis Maddox, explained that far too many people and objects may have touched the casings and boxes. R. 385 at 25, Maddox Aff. (Nov. 1, 2013) at ¶ 2-5. In 1990, when the shell casings and ring boxes were collected from the Hartig's home, and later examined at BCI, police officers and lab workers may not have known that they could transfer their DNA onto these items by simply touching them, breathing near them, or even talking over them. *See District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 82 (2009) (J. Alito, concurring); R. 393, Maddox Aff. (Nov. 27, 2013) at ¶¶ 9, 11. Citing R.C. 2953.74(C)(2)(c), BCI opined that the shell casings and ring boxes were "scientifically unsuitable for testing" due to contamination, R. 450, and the trial court dismissed the application, R. 451.

BCI is the leading forensics laboratory in Ohio and is routinely relied upon by law-enforcement agencies and courts around the State. Last year alone, BCI DNA tested roughly eight thousand DNA samples for judicial proceedings throughout Ohio. BCI has collected, and uploaded, more than 13,000 of Ohio's 46,000 crime scene DNA profiles into the FBI's national DNA database. FBI, CODIS—NDIS Statistics (2015), *available at* https://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics/#Ohio.

To do that, BCI must be nationally accredited. *See* 42 U.S.C. §§ 14132, 14133, 14135. "To participate in CODIS [the National DNA database], a local laboratory must sign a memorandum of understanding agreeing to adhere to quality standards and submit to audits to evaluate compliance with the federal standards for scientifically rigorous DNA testing." *Maryland v. King*, __ U.S. __, 133 S.Ct. 1958 (2013); *see* FBI Quality Assurance Standards for DNA Databasing Laboratories, *available at* https://www.fbi.gov/about-us/lab/biometric-analysis/codis/qas-standards-for-dna-databasing-laboratories-effective-9-1-2011 (last accessed Jan. 14, 2016). As required by law, BCI is in full compliance with the "nationally accepted quality assurance standards for forensic DNA testing [and] advanced DNA testing," and has met "internal [and] external audit(s) for quality assurance," in accordance with the FBI guidelines. R.C. 2953.80(A)(1).

BCI also employs the most advanced DNA testing technology, although that is not really the point here (and not in the record and so harder to explain). The testing "kit" a lab uses can be more or less sensitive, but the basic technology has not changed much in the past decades. R. 393, Maddox Aff. (Nov. 27, 2013) at ¶ 6. Three such kits are mentioned in the briefing, each issued by the same company and each approved by the FBI. FBI Laboratory, National DNA Index System (NDIS) Operational Procedures Manual (Jan. 1, 2015) at § 4.2.3 and App'x E

(listing all three among accepted DNA kits), *available at* https://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-procedures-manual. The Identifiler Kit is widely used and overwhelmingly accepted in the scientific community. *See, e.g.*, *United States v. McClusky*, 954 F. Supp. 2d 1224, 1260 (D.N.M. 2013) (noting wide use of Identifiler Kit); *People v. Jackson*, 77 Cal. Rptr. 3d 474, 481-82 (Cal. Ct. App. 2008) (same). Noling goes to great lengths attempting to demonstrate that BCI's use of the Identifiler Kit is outdated and that the Identifiler Plus Kit (utilized by the third-party lab Orchid Cellmark) is more reliable. Noling Br. at 15. All three kits are perfectly reliable, though. R. 393, Maddox Aff. (Nov. 27, 2013) ¶ 6. And while this is not in the record given its limited relevance, BCI purchased and implemented the most sensitive one—the Globalfiler Kit—about a year ago. *See* Life Technologies, "Development of a 'Global STR Multiplex for Human Identification Analysis" (2012) at 4, 10, & 21, *available at* https://tools.thermofisher.com/downloads/ISHI_2012_GlobalFiler_Final.pdf (comparing Identifiler Plus Kit to Globalfiler Kit).

Contamination, though, has little to do with the sensitivity of the DNA testing kit. When an unknown number of people, objects, and contaminates may have touched an object (at the crime scene, at the lab, discovery, trial, or post-trial), testing can produce "false results." R. 393, Maddox Aff. (Nov. 27, 2013) at ¶ 8. A more sensitive system, in fact, may just pick up more contamination. *Osborne*, 557 U.S. at 82 (J. Alito, concurring) ("Any test that is sensitive enough to pick up such trace amounts of DNA will be able to detect even the slightest unintentional mishandling of evidence.").

For that reason, Ohio's DNA post-conviction statute requires BCI to determine whether a sample is contaminated *prior* to testing. The testing authority must "prepare findings regarding the quantity and quality of the parent sample," and determine "whether the parent sample has

degraded or been contaminated to the extent that it has become scientifically unsuitable for testing," and then prepare a report for the court. R.C. 2953.76(B). Per the General Assembly, if the trial court finds the items contaminated, it cannot order testing. R.C. 2953.74(C)(2)(a)-(b). Here, BCI examined the casings and boxes, determined that they were contaminated and scientifically unsuitable for testing, and conveyed that to the trial court, which denied the testing application. Noling filed a notice of appeal and a memorandum in support of jurisdiction with this Court. R. 469. This Court granted discretionary review only on the issue of whether R.C. 2953.73(E)(1) and (2) violates Due Process, Equal Protection, and the Eighth Amendment.

LAW AND ARGUMENT

Amicus Curiae's Proposition of Law:

> *Ohio's post-conviction appellate-review provision placing capital and noncapital offenders on different tracks (1) does not violate due process, as defendants have no constitutional right to DNA testing or post-conviction appeals and the statute does not create one; (2) does not violate equal protection, as capital offenders are not similarly situated to noncapital offenders and the State's distinctions have rational bases; and (3) does not violate the Eight Amendment, which does not require any post-conviction proceedings at all.*

Ohio's post-conviction DNA testing statute allows capital offenders like Noling to file a discretionary appeal in the Ohio Supreme Court if the trial court denies their testing application, while all other offenders file an appeal in the intermediate court. This structure is uncontroversial, and does not violate the Eighth or Fourteenth Amendment or the parallel provisions of the Ohio Constitution.

A. Due Process: The appellate-review provision for post-conviction DNA testing applications provides *more* process than constitutionally required, and so does not burden any constitutional right.

Ohio's post-conviction DNA testing statute goes far beyond the constitutional requirements of the Fourteenth Amendment. Due process protections are designed to ensure that a defendant's conviction occurred after a fair and constitutionally-sound trial. After that has

been determined, a defendant like Noling "does not have the same liberty interests as a free man." *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). Indeed, that is what a "valid conviction" means—"'the criminal defendant has been constitutionally deprived of his liberty.'" *Id.* at 69 (citation omitted). Accordingly, "[w]hen a State chooses to offer help to those seeking relief from convictions," as Ohio does here, "due process does not dictate the exact form such assistance must assume." *Id*. (citations and quotation marks omitted).

To begin with, Noling's latest challenge does not "implicate[] a fundamental right," contrary to his assertions. Noling Br. at 35-36, n. 50. The U.S. Supreme Court has expressly held that there is no fundamental right to DNA testing and no fundamental right to an appeal, let alone a right to a mandatory appeal in post-conviction proceedings.

1. Noling has no constitutional right to DNA testing.

The Supreme Court has made clear that there is no "freestanding right to DNA evidence." *Osborne*, 557 U.S. at 72; *see also In re Smith*, 349 F. App'x 12, 15 (6th Cir. 2009) ("[T]he Supreme Court held in *Osborne* that there is no freestanding substantive due process right to DNA testing."). *Osborne* explained there is "no long history of such a right," and observed that it would be unwise to create one. 557 U.S. at 73. Doing so would improperly "'place the matter outside the arena . . . of legislative action,'" *id*. (citation omitted), and "force [the Court] to act as policymakers," *id*. If it did so, the Court would have to issue opinions not just concerning "access" to DNA testing, "but a myriad of other issues" best left to the legislative branch. *Id*. at 74. Nor is DNA testing tied to a liberty interest at the post-conviction stage, when an offender "has already been found guilty at a fair trial" and so has "only . . . a limited interest in post-conviction relief." *Id*. at 69. At that point, a court should not "upset a State's post-conviction

relief procedures [unless] they are fundamentally inadequate to vindicate the substantive rights provided." *Id*. at 69. That is not the case here, so no due process violation has occurred.

2. Noling has no constitutional right to an appeal, let alone to an appeal from successive post-conviction proceedings.

Equally well settled precedent says that the U.S. Constitution does not mandate a right to appeal, let alone the availability of successive post-conviction appellate review, contrary to the "fundamental right to appeal" Noling asserts. Noling Br. at 35-36 & n. 50. There is no constitutional right to a *direct* appeal or to post-conviction proceedings at all, let alone an appeal from successive post-conviction proceedings.

This Court has already rejected that possibility. "[T]here is no constitutional right to an appellate review of a criminal sentence." *State v. Smith*, 80 Ohio St. 3d 89, 97 (1997). It has long been the law that "the right to appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." *State ex rel. Bryant v. Akron Metro. Park Dist.*, 281 US. 74, 80 (1930). It "is clear that the State need not provide any appeal at all." *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974) (declining to extend Due Process and Equal Protection rights to discretionary appeals which immediately follow the first appeal of right). Noling does not assert that his trial deprived him of due process; indeed, state and federal courts have already ruled that he was not. *See supra* at 4-5. So he has no right to an appeal.

This case is far easier than *Smith*, which rejected a Due Process right to a *direct* appeal, because Noling asserts a substantive right to a *post-conviction* appeal. The federal constitution does not mandate the availability of any kind of post-conviction relief. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Likewise, this Court has recognized that "postconviction state collateral review itself is not a constitutional right, even in capital cases." *State v. Steffen*, 70 Ohio St. 3d 399, 410 (1994). So in the post-conviction

context, "a petitioner receives no more rights than those granted by the statute." *State v. Calhoun*, 86 Ohio St. 3d 279, 281 (1999).

The statute itself offers Noling no help here—it expressly states that the statute does not "give any offender any additional constitutional right" and that "the court has no duty or obligation to provide postconviction DNA testing to offenders." R.C. 2953.72(A)(8). If *Smith* found no due-process right to appellate review in the first instance, then Noling certainly has no due-process right to appellate review in post-conviction. The entire post-conviction procedure set up by the statute is constitutionally optional. Noling's ability to appeal such an application is even more removed from any due process concerns.

3. The *Griffin – Douglas* "unreasoned distinctions" test should not apply to a post-conviction appellate-review provision, which is far removed from Due Process fair-trial concerns.

In the alternative, Noling cites a series of cases holding that although Due Process and Equal Protection do not afford a right to appellate review, once a State affords that right, it must "be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Noling Br. at 34; *see Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). Supreme Court cases suggest that this argument runs into the same problem: although the *Douglas-Griffin* line of cases can extend due process concerns to the first appeal as of right, it certainly should not extend to post-conviction appeals. If that line of cases has any application here, the analysis is only justified by equal protection, not due process.

Insofar as this line of cases invokes due process, direct appeal stands on a much different constitutional footing than post-conviction. The Supreme Court has never extended the *Griffin – Douglas* line of cases to the post-conviction appeal process. *Griffin* requires States to furnish transcripts for indigent defendants seeking a first appeal of right. 351 U.S. at 24. Two early cases seem to extend that principle to a few proceedings outside of the first appeal of right.

Smith v. Bennett, 365 U.S. 708, 709 (1961) (filing fees could not prevent indigent defendants from filing habeas corpus petitions); *Lane v. Brown*, 372 U.S. 477, 484-85 (1963) (trial transcripts must be afforded to indigent offenders in writ of error *coram nobis* appeals). But neither case extends it to the post-conviction appellate process, as Noling's argument must.

Besides, the Supreme Court subsequently has limited the *Douglas – Griffin* line of cases to the first direct appeal of right. Those access-to-review cases involving state-provided counsel best illustrate this. Although an offender has no right to an appeal, the Supreme Court has recognized that when state law provides that appeal, due process and equal protection require the state to provide counsel to indigent defendants on their "first appeal . . . of right . . . from a criminal conviction." *Douglas*, 372 U.S. at 356. But *Douglas* did not mean the State had to provide indigent defendants with counsel "at every stage." *Ross*, 417 U.S. at 611. Rather, *Douglas* has been limited to the first direct appeal of right. *Id.*; *Halbert v. Michigan*, 545 U.S. 605, 611 (2005) ("first-tier review differs from subsequent appellate stages"). The first direct appeal of right is enough to ensure that defendants are not "denied meaningful access to the appellate system." *Ross*, 417 U.S. at 611, 616. In this way, the "function and significance of a first appeal of right" is wholly different than later proceedings: "[r]elated decisions . . . make clear that there is no continuum requiring varying levels of process at every conceivable phase of the criminal system." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 284 (1998).

If *Ross* refused to apply *Douglas* after the first direct appeal of right, *Douglas* certainly does not extend to collateral post-conviction actions. The Supreme Court held as much in *Finley*, 481 U.S. at 555. *Finley* explained that the Constitution does not guarantee post-conviction review, so prisoners have no right to assistance of counsel when mounting collateral attacks. *Id*. at 555. Compared to *Ross*, "[p]ostconviction review is even further removed from

the criminal trial." *Id*. at 556. Indeed, post-conviction "is not part of the criminal proceeding itself, and is in fact considered to be civil in nature." *Id*. at 557; *see also Calhoun*, 86 Ohio St. 3d at 281 ("[A] postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment."). Accordingly, "meaningful access" to the appellate system has already been provided on direct appeal, *Finley*, 481 U.S. at 557; the "[s]tates have no obligation to provide this avenue of relief" at all, *id*.; and the "[s]tates have substantial discretion to develop and implement" procedures for post-conviction review, *id*. at 559. Contrary to Noling's assertions, the Supreme Court has refused to recognize that additional constitutional protections are necessary for capital cases during post-conviction review: "*Finley* should apply no differently in capital cases than in non-capital cases." *Giarratano*, 492 U.S. at 10.

The *only* case Noling cites that applies the *Griffin – Douglas* cases to post-conviction appellate review is *Dickerson v. Latessa*, 872 F.2d 1116 (1st Cir. 1989), and it supports the State. Noling Br. at 36-37. That case only involved an equal-protection challenge. *Dickerson*, 872 F.2d at 1117. In *Dickerson*, Massachusetts law only allowed post-conviction appellate review in capital cases to the Supreme Judicial Court if a single justice found that a claim "presents a new and substantial question which ought to be determined by the full court." *Id*. at 1118. Non-capital defendants could seek a regular post-conviction appeal to the intermediary appellate court on all claims. *Id*. The court began by explaining that due process was not at issue: a post-conviction appeal implicates no "fundamental right." States are "not constitutionally obliged to provide even a direct appeal for a criminal defendant," so there can "hardly be" any such right in post-conviction. *Id*. at 1119 (citing *Finley*, 481 U.S. 551 (no constitutional right to post-conviction review); *United States v. MacCollom*, 426 U.S. 317 (1976) (no absolute right to a free transcript in post-conviction appeal)). Accordingly, only rational basis review under the Equal

Protection Clause was "appropriate." *Id*. The First Circuit held that the State acted well within the Constitution's parameters when it set up a different appeal procedure for post-conviction review in capital cases than in non-capital cases. *Id*. at 1120.

As *Dickerson* suggests, if the *Griffin – Douglas* line of cases applies at all, it applies only under the Equal Protection Clause, and only requires rational-basis review. "[A]s a practical matter," that rational-basis analysis applies to both claims in access-to-review cases like this one—"the two Clauses [Due Process and Equal Protection] largely converge." *Smith v. Robbins*, 528 U.S. 259, 276 (2000); *see also Smith v. Mitchell*, 567 F.3d 246, 262 (6th Cir. 2009) (noting in Smith's habeas case that his "due-process argument is essentially the same as his equal-protection argument: . . . [that] capital defendants should be provided more process than noncapital defendants"). Noling seems to agree; he categorized the *Griffin – Douglas* cases under Equal Protection, not Due Process, Noling Br. at 34-37, and recognized that *Dickerson* applied only rational basis review, *id.* at 37.

4. Noling's remaining arguments do not affect this analysis.

Noling's Due Process analysis is largely repetitive of that Equal Protection claim. He begins by suggesting that due process requires "'laws operating on all alike,'" Noling Br. at 37, before seeming to take a different position on the next page, where he asserts that "more process is due in death penalty cases" than in other cases, *id*. at 38. As to his argument that the statute should "operat[e] on all alike," that kind of argument properly sounds in Equal Protection, as explained above. As to his argument that capital offenders should receive "more process," Ohio's testing statute goes above and beyond the requirement of due process in any case, capital or otherwise.

Finally, Ohio's statute stacks up favorably compared to other states, contrary to Noling's assertions, Noling Br. at 39-46. Such a comparison, of course, has nothing to do with due

process. But Noling's survey looks at only a narrow sliver of the bigger picture. Nineteen of the States Noling lists do not have the death penalty at all, and so could not have separate post-conviction tracks for capital offenders. Many of those that do have the death penalty also limit post-conviction DNA testing in those cases. Seven States only allow post-conviction DNA testing for a limited time window, and so might not have allowed Noling's application at all. *See* Nat'l Conference of State Legislatures, "Post Conviction DNA Testing" (2013). Noling's own chart shows that some States expressly do not allow for *any* appellate review of post-conviction DNA testing applications, like California, Maine, West Virginia, and Wyoming. Noling Br. at 39-46. Other States do not explain whether such applications are reviewable. *Id*. (Noling lists 28 states in this category). Among those states that do allow appeals, a few only provide for a discretionary appeal, much like Ohio allowed Noling here. *Id*. (Michigan, Mississippi). Compared to these other States, Ohio allows for at least as many post-conviction testing applications and at least as much appellate review of those applications in capital cases.

B. Equal Protection: the appellate-review provision should not trigger the *Griffin - Douglas* "unreasoned distinctions" test, but even if it does, the provision easily satisfies rational-basis review by paralleling the Ohio Constitution's structure for direct appeals.

The statute's appellate-review provision also satisfies the Equal Protection Clause. As a matter of settled precedent, this statute does not burden a fundamental right or target a suspect class, so only rational basis review applies and the statute easily satisfies that standard.

This Court begins that review with a "strong presumption of validity," *Heller v. Doe*, 509 U.S. 312, 319 (1993), placing the burden "on the one attacking the legislative arrangement to negative every conceivable basis which might support it," *id*. at 320 (citation omitted). This is because courts refuse to "'sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed

along suspect lines.'" *Id*. at 319 (citation omitted). As this Court explained in *Smith*, "'it must appear beyond a reasonable doubt that the legislation'" is "'clearly incompatible'" with the Constitution, and "'doubts regarding the validity of the legislative enactment are to be resolved in favor of the statute.'" 80 Ohio St. 3d at 99-100 (citations omitted).

Ohio's post-conviction DNA testing statute satisfies that liberal standard for two reasons. First, capital offenders are not similarly situated to non-capital offenders. Second, even if they are similarly situated, the State has several rational bases for placing each group on distinct appellate tracks.

1. Rational-basis review applies.

General Fourteenth Amendment principles, as well as this Court's prior access-to-review cases, show that rational-basis review applies to equal-protection challenges like this one. "The Equal Protection Clause prevents states from making distinctions that (1) burden a fundamental right; (2) target a suspect class; or (3) intentionally treat one individual differently from others similarly situated without any rational basis." *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010); *see also Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546 ¶ 82. The same analysis applies under the Ohio Constitution's Equal Protection Clause. *Ohio Apt. Ass'n. v. Levin*, 127 Ohio St. 3d 76, 2010-Ohio-4414 ¶ 33 ("'The limitations placed upon governmental action by the federal and state Equal Protection Clauses are essentially the same.'") (citation omitted).

The rational-basis test applies because Noling's challenge implicates no fundamental right (as established above), and capital offenders are not a suspect class. Courts around the country resoundingly agree that capital offenders are not a suspect class. *Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1193 (6th Cir. 1997) ("capital inmates are not a suspect class"), *reversed on other grounds*, *Woodard*, 523 U.S. 272; *State v. Melhado*, No. 02AP-458 Franklin

Cnty., 2003 WL 22077869, 2003-Ohio-4763 ¶ 27 ("Capital murder defendants for whom a jury recommends a life sentence are not members of a suspect class."); *see also Green v. Johnson*, 160 F.3d 1029, 1044 (5th Cir. 1998); *Hatch v. Oklahoma*, 58 F.3d 1447, 1455 (10th Cir. 1995), *overruled on other grounds*, *Daniels v. United States*, 254 F.3d 1180 (10th Cir. 2001); *Blair v. Armontrout*, 916 F.2d 1310, 1328 (8th Cir. 1990); *Evans v. Thompson*, 881 F.2d 117, 121 (4th Cir. 1989); *Dickerson*, 872 F.2d at 1119. Noling does not suggest otherwise. *Smith*'s similar challenge to the similar appellate scheme on direct review shows this as well—this Court applied rational basis review not heightened review. *Smith*, 80 Ohio St. 3d at 99-100.

Prior *Griffin – Douglas* access-to-review cases confirm that the rational-basis test is the appropriate standard. This Court, like the U.S. Supreme Court, has explained that direct appellate review, "once . . . established," simply "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Smith*, 80 Ohio St. 3d at 98 (quoting *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969)). As explained above, this standard, at best, applies here. Noling relies on it as well. Noling Br. at 34.

This "unreasoned distinctions" standard is only a rephrasing of rational-basis review. As the U.S. Supreme Court explained, "this Court in dealing with equal protection challenges to state regulation of the right of appeal in criminal cases ha[s] applied the traditional rational-basis test." *Estelle v. Dorrough*, 420 U.S. 534, 538 (1975). When this Court analyzed a similar challenge to the similar appellate scheme on direct review, it began with *Estelle* and quoted the U.S. Supreme Court's "unreasoned distinctions" standard. *Smith*, 80 Ohio St. 3d at 98. It then seemed to apply rational-basis review. It began with a similarly situated analysis. *Id*. at 100 (suggesting "capital and noncapital defendants" are not similarly situated). And it continued by examining the State's rational bases for any distinctions. *Id*. at 100 (noting that "Ohio voters had

a rational basis to" institute a single-tier appellate procedure in capital cases). On habeas review, the federal courts applied the same standard. *Smith v. Mitchell*, 567 F.3d 246, 262 (6th Cir. 2009) ("The Ohio Supreme Court correctly applied rational-basis review to Smith's claim, following the standard in *Estelle*."). The Sixth Circuit regularly applies rational-basis review in access-to-review cases. *See Johnson*, 624 F.3d at 760 (citing *Griffin v. Illinois*, 351 U.S. 12 (1956); *Williams v. Illinois*, 399 U.S. 235 (1970)); *see also Smith v. Robbins*, 528 U.S. at 276 (citing cases applying rational basis review). And the First Circuit did the same in *Dickerson*. 872 F.2d at 1119.

2. Capital offenders are not similarly situated to non-capital offenders, and suggesting otherwise is problematic because of a whole host of differences.

Noling's challenge must fail under the rational-basis test. The Equal Protection Clause applies only to "persons similarly situated," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), a principle Noling recognizes, Noling Br. at 22. It does not address persons *differently* situated. Capital offenders are not similarly situated to non-capital offenders.

Most fundamentally, capital offenders and non-capital offenders are not similarly situated simply by nature of their sentences. That alone should end the analysis: "[C]ourts have generally rejected equal protection challenges to statutes which vary a criminal defendant's appellate rights depending upon the crime for which he was convicted." *Smith v. Mitchell*, No. C-1-99-832, 2003 WL 24136073, *27 (S.D. Ohio Sept. 30, 2003) (citing cases). As the Ninth Circuit explained in an access-to-appeal case, a capital offender and non-capital offender simply "are not similarly situated. The relevant comparison for equal protection purposes is between two defendants, *both of whom* are sentenced to death." *Massie v. Hennessey*, 875 F.2d 1386, 1389 (9th Cir. 1989).

Finding that capital and non-capital offenders are similarly situated would diverge from the U.S. Supreme Court's death penalty jurisprudence mantra that "death is different." The Supreme Court has long recognized "'[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind.'" *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (citation omitted). Noling even suggests, albeit wrongly, that this doctrine applies here. Noling Br. at 34 n.48. If death penalty cases are categorically "*different*" for other constitutional provisions, then they are not categorically "*similar*" for Equal Protection purposes. Otherwise, each constitutionally-required procedural protection in capital cases—a bifurcated trial, individualized sentencing, etc.—would invoke Equal Protection challenges in noncapital cases demanding equal treatment.

Capital and noncapital defendants are also not similarly situated because their rights and privileges have been different up to this point. As this Court explained in *Smith*, "the reality is that capital and noncapital defendants were not treated similarly" at any time. 80 Ohio St. 3d at 100. That is all the more true by the time an offender's case reaches post-conviction proceedings. In some ways, capital offenders have *more* rights and privileges than non-capital offenders. State rules guarantee capital defendants more qualified appointed counsel. App't Council R. 4.01-.07 (Feb. 1, 2015). The same rules appoint indigent capital defendants at least two attorneys, *id.* R. 5.03(A), and appoint co-counsel for capital defendants who can afford only a single attorney, *id.* R. 5.04. Capital defendants are not subject to joinder with co-defendants. R.C. 2945.20. State law grants capital defendants a bifurcated trial. R.C. 2929.022. And a right to individualized sentencing. R.C. 2929.04(B). In other ways, capital offenders have fewer rights and privileges than non-capital offenders, such as having no right to bail. R.C. 2953.09(B). If capital and noncapital defendants have been treated differently thus far, there is

no basis for finding that they are now similarly situated. If that was true in *Smith*, it is certainly true here.

Indeed, capital offenders under this statute are even *less* similarly situated to other offenders than they were in *Smith*, because they have already been subject to different treatment on direct appeal. Nowhere is their prior different treatment plainer than in the direct appellate review process. As *Smith* explained, about twenty-nine states at the time had a two-tier appellate court system for noncapital defendants, but about twenty-five of those had only a single-tier system in capital cases. 80 Ohio St. 3d at 98-99. Ohio grants a capital defendant only "one right to appeal of all issues," which occurs in this Court. *Id*. at 100. Ohio's noncapital defendants also have "a *right* to only one appeal of all issues," but that occurs in the intermediate courts and they may follow that with a discretionary appeal to this Court. *Id*. If capital and noncapital defendants are not similarly situated on direct appeal, then there certainly is no basis for treating them as similarly situated now.

Nor are capital and noncapital offenders similarly situated under this particular statute. Capital offenders have *broader* access to post-conviction DNA testing. R.C. 2953.71(L), R.C. 2953.74(C)(5). Noncapital offenders convicted of a felony can seek post-conviction DNA testing if the results could show he was not "guilty of that offense." *Id*. Capital offenders can seek post-conviction DNA testing either on that ground or because the results could show he was not guilty of "*the aggravating circumstance or circumstances*" that led to the capital sentence. *Id*. Broader statutory access to testing in the statute's substantive provisions means they are not similarly situated for purposes of the statute's procedural provisions governing appellate review.

One more thing. This case is not like most of the Supreme Court's access-to-review cases cited by Noling, Br. at 34-37, which turned on a distinction between indigent and more

affluent appellants. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Griffin v. Illinois*, 351 U.S. 12. Those cases dealt with statutes that made access to review contingent on the ability to pay certain costs. Because indigent and affluent appellants were subject to the same statutory language governing a particular appeal, they were similarly situated under those statutes. *Smith v. Robbins*, 528 U.S. at 276-77 (explaining that this line of cases is about protecting indigent defendants when an appellate review statute "'discriminates between rich and poor'") (quoting *Douglas*, 372 U.S. at 357). This statute does not distinguish among appellants based on wealth, so the standard from those cases does not automatically apply until Noling establishes a similarly situated comparator. As explained above, this Court recognized in *Smith* that this was a necessary first step, and it is not satisfied here.

3. Even if similarly situated, the State has many rational bases for the statute's distinction.

The General Assembly had a number of rational bases for treating capital defendants differently than noncapital defendants, sending capital appeals to this Court on a discretionary basis, and noncapital appeals to the intermediate court.

Paralleling Direct Appeal. Again, the Ohio Constitution requires capital cases to go directly from the court of common pleas to this Court on direct appeal. Ohio Const., Art. IV, §§ 2(B)(2) & 3(B)(2). This statute's appellate process for post-conviction DNA testing parallels this one-tier appellate system. R.C. 2953.72(A)(8). This makes sense, as those courts that considered a case on direct appeal will already be familiar with it. In particular, if the inmate is diligent in seeking DNA testing, the Supreme Court will likely already have an intimate familiarity with the facts of the case. Just as the offender submits a DNA testing application to "the court of common pleas that sentenced the offender," R.C. 2953.73(A), and it is then assigned to the judge "who was the trial judge" for the original trial, *id*. at (B)(2), so the statute

also requires offenders to file an appeal with the same court that considered the direct appeal, R.C. 2953.72(A)(8). As the First Circuit reasoned in *Dickerson*: it is reasonable to channel "the most serious" offenses to the State's "highest court," and "[a]s [that Court] will have already become familiar with the record, it is also reasonable to channel to it . . . the post-conviction motions of capital defendants." 872 F.2d at 1120.

That the post-conviction appeal is discretionary instead of mandatory simply reflects this Court's limited resources. As *Dickerson* explained: "when viewed in the context of the whole [State] appeals process," the distinction between capital and noncapital offenders "is rationally related to the twin legislative objectives of assuring . . . thorough[] review . . . on a direct appeal, and at the same time, of relieving [the Supreme Court] from the burden of subsequently entertaining . . . frivolous claims." *Id*. Paralleling the appellate process from the direct appeal is a rational basis for this statute's appellate review provision as well.

Ambiguous Constitutional Text. The Ohio Constitution requires one-tier appellate review vested in the Supreme Court "in cases in which the death penalty has been imposed." Art. IV, § 2(B)(2)(c). This language is broad enough that it could apply to all matters in a death penalty case, not just direct appeals. So the General Assembly may have designed this statute to send appeals like this one directly to the Ohio Supreme Court in order to ensure that it complied with the Ohio Constitution. Indeed, the Ohio Legislative Commission analysis of this statute dropped a comment explaining the jurisdiction of the Supreme Court and court of appeals and reproduced this constitutional provision. OH B. An., 2003 S.B. 11 (Comment). Although the scope of the constitutional provision was limited to direct appeal in *State v. Davis*, 131 Ohio St. 3d 1, 2011-Ohio-5028 ¶ 22, the General Assembly did not know *Davis*'s outcome when it passed this statute

in 2003. Protecting the statute against a similar constitutional challenge was a rational basis for the statute's distinctions.

Broader Access to Testing. As explained already, Ohio's post-conviction DNA testing statute gives capital offenders broader access to testing than non-capital offenders. R.C. 2953.71(L), R.C. 2953.74(C)(5). Capital offenders can seek post-conviction DNA testing related to the offense itself *or* to aggravating circumstances supporting the capital sentence, while noncapital offenders are limited to the former. *Id*. As argued above, this is one more reason capital and non-capital offenders are not similarly situated. Even if the Court disagrees on that point, this difference at least provides a rational basis for providing distinct paths for review. A capital offender's broader access to testing logically results in more appeals in each case, and so justifies discretionary appellate review.

Less Susceptible to Delay. It also makes sense as a matter of incentives. As this Court explained in *Smith*, capital offenders have every reason to "seek to prolong the appeal process as long as possible, using every conceivable avenue of attack," 80 Ohio St. 3d at 100, while all other offenders "have a great interest in expediting their appeals," *id*.; *see also Rhines v. Weber*, 544 U.S. 269, 277 (2005) ("[C]apital petitioners might deliberately engage in dilatory tactics"); *In re Reno*, 283 P.3d 1181, 1246 (Cal. S. Ct. 2012) ("'[D]eath row inmates have an incentive to delay . . . that is not shared by other prisoners.'") (citation omitted). Because of this, capital offenders are more likely to file multiple applications for DNA testing. This case bears that out. *Smith* explained that combatting these "length delays" is a "rational basis" for limited judicial review. 80 Ohio St. 3d at 100; *see also id.* at 101 ("the state has a direct, legitimate, and compelling interest in ensuring that the final judgments of its courts are expeditiously enforced."). The same is true here. Ohio has a strong interest in ensuring that it can enforce

state court judgments, including those that impose capital sentences, in a timely fashion. *Hill v. McDonough*, 547 U.S. 573, 583–584 (2006) ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence."). Requiring repeated review of multiple DNA testing applications would only encourage such dilatory tactics and potentially overrun this Court's docket, while allowing discretionary review ensures that this Court can look at cases worthy of review.

Promotes Consistency. A single-tier system of review also "reduce[s] the arbitrariness of the application of the death penalty." *Smith v. Mitchell*, 2003 WL 24136073 at *27; *c.f. Smith*, 80 Ohio St. 3d at 102 ("this court can more readily judge both the appropriateness and proportionality of death sentences on a statewide basis"). Sending all death penalty cases to the same appellate court "ensure[s] that similar results are reached in similar cases" across the state, which, in turn, makes it less likely that the death penalty will be imposed in an arbitrary and capricious manner. *Proffitt v. Florida*, 428 U.S. 242, 258-59 (1976). The Arizona Supreme Court has said the same, relying on *Proffitt* to uphold that state's single-tier review statute because it "promoted consistency in death sentencing." *Arizona v. Ramirez*, 871 P.2d 237, 243 (Ariz. 1994) (in banc). If Ohio's direct-appeal structure promotes proportional application of the death sentence, then Ohio can also follow the same structure in this post-conviction statute. And while post-conviction does not affect the constitutional doctrine of proportionality, Ohio's post-conviction DNA statute still serves the broader goal of promoting consistency. That this review is not automatic does not undermine this reasoning. This Court has the discretion to exercise its authority as much as necessary to fill its role.

Each of these five reasons provides a rational basis for providing different appellate tracks to capital and noncapital defendants under the post-conviction DNA statute. Even if those

groups of defendants were similarly situated, the State need only point to one rational basis to justify any distinction. Noling, however, as "the one attacking the legislative arrangement," has the burden to "negative every conceivable basis which might support it." *Heller*, 509 U.S. at 320.

4. Noling's remaining arguments do not affect this analysis.

Noling's contrary arguments are unconvincing. He begins with a series of tables that, he suggests, show that appellate review of post-conviction DNA applications is "critical," and that a discretionary appeal is not enough. Noling Br. at 23-31. Even if these tables supported his conclusions, they have little to do with the proper Due Process and Equal Protection analysis—they are policy arguments, not constitutional arguments. But the tables do not support his conclusions. The tables show that intermediate appellate courts affirm the denial of about two-thirds of non-capital DNA testing applications that are appealed. *Id*. Add the eight cases that appellate courts simply sent back to the trial court for clarification of the grounds for the denial, and that number shoots up closer to 75%. *Id*. This high rate suggests the trial court usually gets it right. More broadly, it makes sense for noncapital cases to produce more appeals and reversals simply because there are *more* of them. Any ambiguities in the statute which might warrant appellate review are more likely to come up in noncapital cases first. In addition, capital cases are litigated with more scrutiny, so fact-bound error is less likely.

Noling also offers no reason to doubt the Attorney General's rational basis analysis. Noling makes no attempt to explain why capital and noncapital offenders are similarly situated, but he does assert that their different treatment is "arbitrary" for two reasons: some noncapital offenders are indicted with death-penalty specifications, and some are convicted of aggravated murder. Noling Br. at 35-36. Neither point goes to either capital or noncapital offenders as a class. The vast majority of noncapital offenders are not indicted with death-penalty

specifications, and are not convicted of aggravated murder. And neither makes the different treatment "arbitrary." As explained above, the two groups are differently situated by nature of their sentence and past treatment, not the specific indictment or crime. Similarly, their different appellate tracks are justified on grounds also related to their sentence and past treatment.

C. Eighth Amendment: the Eighth Amendment governs sentencing, not post-conviction appellate proceedings, so it does not apply here.

Finally, Ohio's post-conviction DNA testing statute does not violate the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972), and its progeny apply an anti-arbitrariness rule to individualized *sentencing* during the penalty phase of a capital trial—not post-conviction appeals. As the U.S. Supreme Court explained, *Furman* requires that a State "(1) rationally narrow[s] the class of death-eligible defendants; and (2) permit[s] a jury to render a reasoned, individualized sentencing determination." *Kansas v. Marsh*, 548 U.S. 163, 174 (2006). Nothing more is required. *Id*. (beyond this, "a State enjoys a range of discretion in imposing the death penalty"); *id.* at 175 (a statute "satisfies the constitutional mandates of *Furman* and its progeny" if it meets these two requirements). This Court should reject Noling attempt to catapult the anti-arbitrariness rule of *Furman* well beyond the sentencing phase into the arena of post-conviction appellate review. Noling Br. at 48. Ohio's statute, of course, easily satisfies that rule, for the same reasons it satisfies rational-basis review. But there is no reason to even go that far. As the Ninth Circuit recently noted "we know of no other case in the four decades since *Furman* was decided that has invalidated a state's post-sentencing procedure as impermissibly arbitrary under the Eighth Amendment[.]" *Jones v. Davis*, 806 F.3d 538, 551 (9th Cir. 2015).

For the same reasons, the Supreme Court's Eighth Amendment *death is different* jurisprudence, which Noling touches on, Noling Br. at 34 n.48, does not apply. *Giarratano*, 492

U.S. at 10. As explained in the above discussion of due process, the "heightened requirements on capital trials and sentencing proceedings do not apply in the postconviction context." *Woodard*, 523 U.S. at 282 (citation omitted); *Rouse v. Lee*, 339 F.3d 238, 254 (4th Cir. 2003) ("While it is undeniable that the Supreme Court has treated death differently, any distinctions between procedures required in capital and noncapital cases 'are primarily relevant to trial.'" "[T]he Supreme Court has repeatedly declined to treat death differently in the post-conviction context.").

CONCLUSION

For the foregoing reasons, this Court should affirm the lower court's judgment.

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