No. 18-8569

In the Supreme Court of the United States

MELVIN BONNELL,
Petitioner,

v.

STATE OF OHIO,
Respondent.

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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

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REPLY

Bonnell's reply will be limited to the Second Reason for Granting the Writ. In not replying to the First Reason for Granting the Writ, Bonnell is not conceding that his argument lacks merit; instead, Bonnell relies upon his initial Petition.

Second Reason for Granting the Writ: A trial court's decision to accept, in total, the untested hearsay of the prosecutor when denying DNA testing in a capital case should be reviewable on appeal.

As an initial matter, the State claims that "the offender simply cannot appeal the trial court's decision to rule on the application without first holding a hearing." State's Brief in Opposition at 11. This is not only an incorrect statement of Bonnell's argument, but it is also an incorrect statement of law. As Bonnell explained in his petition, the Ohio Supreme Court ruled that Ohio Revised Code 2953.72(A)(8), as written, constrained its appellate jurisdiction to ***solely*** the review of the ultimate determination as to whether DNA testing should be granted or denied. Specifically,

and relevant here, the Ohio Supreme Court construed the statute to constrain it from reviewing Bonnell's First Proposition of Law, which concerned the adequacy of the prosecution's search for evidence and/or the need for more evidence-development on that issue. What Bonnell raised—and what the Ohio Supreme Court failed to consider—is not just whether the trial court should have held a hearing before dismissing his application for DNA testing. That was merely one part of it. Bonnell also challenged the adequacy of the State's report and affidavit; he challenged the denial of his application without first ordering the prosecutor to turn over any Cleveland Police Department manuals or retention polices regarding the destruction and/or storage of evidence in place from 1987 through present day; and, he challenged the denial of his application without first ordering that Bonnell could conduct interrogatories or depositions of the actors identified in the State's report and affidavit.

The State next argues that "Bonnell does not identify any specific constitutional provision that he believes requires that states to provide unlimited appellate review of [the appeal of a DNA application]." State's Brief in Opposition at 8. This argument misses the mark. Bonnell is not claiming that the Ohio Supreme Court's review must be infinite. He is claiming, instead, that defendants must be afforded a way to appeal violations of their fundamental constitutional rights. If no way exists, then the right to appeal is illusory. This Court has repeatedly stressed that ***meaningful*** appellate review is essential to guaranteeing that the death penalty is not imposed arbitrarily, capriciously, or irrationally. *Parker v. Dugger*, 498

U.S. 308, 321 (1991) (emphasis added); *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990). Particularly in a death penalty case like this one, this Court should find that appellate review cannot be meaningful if Bonnell cannot challenge the adequacy of the sole "evidence" (the prosecutor's report and attached hearsay affidavit) that the trial court is relying upon to deny him relief.

The State next claims that Bonnell "did not challenge the constitutionality of these statutes in his appeal to the state supreme court." State's Brief in Opposition at 10. This is false. Bonnell could not raise a challenge to the constitutionality of these statutes in his initial appeal because he did not know that the Ohio Supreme Court would rule in such a way as to render his right to appeal meaningless. Once the Ohio Supreme Court issued its decision, in his Motion for Reconsideration, Bonnell raised two discreet issues for the Court's review:

I. The Court has jurisdiction to consider the adequacy of the state's search for evidence.

II. If this Court does not have jurisdiction to consider the adequacy of the state's search for evidence, then the statute, as written, is unconstitutional on its face.

In response, three Justices of the Court voted to grant reconsideration to "clarify the analysis in paragraph 26 of the court's opinion." *See* 12/12/2018 Case Announcements, 2018-Ohio-4962.[1] Paragraph 26 of the Ohio Supreme Court's opinion deals, in total, with Bonnell's First Proposition of Law and the state court's

[1] Case Announcements are found here: https://supremecourt.ohio.gov/rod/docs/pdf/0/2018/2018-ohio-4962.pdf.

limited jurisdiction. *State of Ohio v. Melvin Bonnell*, Slip Opinion No. 2018-Ohio-4069. Thus, Bonnell clearly raised this issue in the lower court.

The State then refers to "a parade of horribles" that Bonnell put forward in his Petition. State's Brief in Opposition at 10. The State asserts, "Bonnell is incorrect that Ohio law provides inmates with no protections against such things. A convicted offender may 'appeal the rejection' of an application for DNA testing." *Id.* Once again, this is incorrect. Bonnell's final example in his "parade of horribles" occurred in his own case. The prosecutor's report and affidavit demonstrated obvious bad faith and/or manipulation of all evidence in this capital case. Yet, in Bonnell's case, a simple "appeal of the rejection" of his application for DNA testing did not cure the problem, since the Ohio Supreme Court found that it could not consider this argument. This Court cannot allow this egregious injustice to prevail.

CONCLUSION

Particularly in a capital case, the state should not be able to hide behind its mistakes and missteps. This Court should grant the writ and remand this case back to the State Supreme Court for a merits determination on Bonnell's First Proposition of Law.

Respectfully submitted,

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