No. 18-9579

In the Supreme Court of the United States

JAMES TENCH,
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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REPLY

Petitioner James Tench hereby incorporates into this Reply all the facts alleged, and arguments made, in his Petition for Writ of Certiorari. In any instance where Tench does not specifically respond to an argument or allegation, he is not conceding that his argument lacks merit, express or implied. Rather, Tench relies upon his initial Petition.

First Reason for Granting the Writ: The admission of improper and prejudicial evidence violated Tench's right to due process where the record indicated that the jury relied upon that evidence in rendering its guilty verdict and in recommending a sentence of death.

The State argues, and the lower court found, that the error in admitting the improper "other acts" evidence against Tench was harmless because there remained "overwhelming evidence of [his] guilt". State's Brief in Opposition at 7; *Tench*, 2018-

Ohio-5205, ¶138. This was in error. Both the State and the Ohio Supreme Court afforded too much weight to flimsy and circumstantial evidence.

The State first notes that Tench's boots were stained with his mother's blood and cites to the testimony that the boots must have been present at a spatter-producing event. State's Brief in Opposition at 10. First, ownership of the boots was not clearly established, nor was there any way to date the blood on the boots. Vol. XXI, Tr. 3689. Tench himself explained that the boots had belonged to his deceased father and both he and his mother would slip them on for outdoor chores and errands like walking the dogs. Vol. XXIX, Tr 4997. On one such occasion, in February of 2013, Mary slipped and fell in the driveway while retrieving the mail and injured her nose. Vol. XXIX, Tr. 5054. Ever since, she was susceptible to nosebleeds. *Id*. Mary's fall in February of 2013 is consistent with a "spatter-producing event" where the source of the blood is above the boots or above the spatter. Vol. XXI, Tr. 3664. In addition, the actual presence of blood was so slight that in two of the three tested sources of blood there was no usable DNA profile detected. Vol. XXII, Tr.3912-13. Thus, the presence of trace amounts of Mary's blood on the boots is not as incriminating as the State argues.

The State next cites to the presence of footprints in the snow leading from the SUV to the "area of the Tench house" in support of its position. State's Brief in Opposition at 10. Evidence technicians did observe and document a set of footprints at the crime scene "going from the vehicle in a North direction… towards the development away from Total Marketing". Vol. XVI Tr. 2925. The Tench residence is

one of at least 40-50 homes within that development. Vol. XVI, Tr. 2929. Further, the evidentiary value of these footprints is uncertain where the scene had not been secured until after people had walked around it. Vol. XVI, Tr. 2925. Prior to the footprints being documented, at least four individuals from law enforcement had walked around the car, as well as an unknown number of Carquest employees. Vol. XVI, Tr. 2929. When law enforcement officers attempted to trace the path back through the development, "nothing of evidentiary value was found." *Id*. "I didn't see any footprints in the yards, someone cutting through a yard… If I saw any footprints, they were just normal traffic on a sidewalk." Vol XVI, Tr. 3018; *see also* Tr. 3041. Thus, while there were some tracks leading to the general vicinity of the Tench residence, this is not "overwhelming" evidence of Tench's guilt as the State argues.

The State's Brief in Opposition also affords weight to the Kyker family witnesses who stated that Tench did not act like himself on the night of November 11, 2013 and that he left their home earlier than usual. At the time, Tench drove both a black Ford F-150 truck and a light grey Toyota Hyundai. Vol. XIIX, Tr. 3230; Vol. XXIX, Tr. 5055. The State's selective reliance on their testimony ignores that multiple members of the Kyker family noted that they were expecting bad weather that evening: "It was supposed to get bad. I think it was, you know; supposed to storm or something, snowstorm." Vol. XVI, Tr. 2965. Irene Kyker even recalled that it was snowing at the time that Tench left. "The snow, there was a lot of snow." Vol. XVI, Tr. 2982. It was not until the police had arrested Tench that the Kyker family, in hindsight, had any reason to note his behavior as "unusual."

The State next cites Tench's purchases two days before his mother's disappearance as additional evidence of his guilt. State's Brief in Opposition at 10. Tench does not deny that he purchased both duct tape and a tarp, as well as other project-specific items, from Home Depot. Tench was using these items as part of a home-improvement project that he was due to complete before Thanksgiving. Vol. XXIX, Tr. 4990, 5021. As Tench explained, "It's a pain to do any kind of staining of any kind of baseboards or paint when it's cold out, especially in the garage, so I was going to set up some sawhorses and tarp in the basement and I was going to stain the baseboards down there." Vol. XXIX, Tr. 4990-91. Further, the tarp was tested in the field and was negative for blood. Vol. XXI, Tr. 3679. The State cites to the trial court's characterization of the tarp as "wet" as evidence inculpating Tench. State's Brief in Opposition at 10. As argued above, there was snow on the ground and this tarp was found in the garage. Thus, it is not "suspicious" to find the tarp wet. In addition to being wet, the tarp was also described as being "dirty," yet it yielded no fingerprints, and no other biological evidence. Vol. XXI, Tr. 3688. Again, this is not evidence weighty enough to overcome the prejudice Tench suffered due to the improper admission of "other acts" evidence.

With regard to the computers in the Tench house, the State noted that the phrase "kill someone without getting caught" was typed as a Google query on the Dell computer in the basement. State's Brief in Opposition at 10. What was not established, however, was when the search was created, and whether the search was a "search query" or "original search query," the former being auto populated by

Google's search predictor. Vol. XXIV, Tr. 4247. The username associated with the Dell computer was "Jimmy and Aubrey," indicating that Tench was not the exclusive user of this machine. Vol XXIV, Tr. 4244. Further, the Dell in the basement had not been accessed since April 11, 2013, months before Mary went missing. Vol. XXIV, Tr. 4247.

The other computer, the HP desktop upstairs in Mary's room, supposedly accessed Google images of the exact location where Mary's body was found. State's Brief in Opposition at 10. Not only does this exaggerate the precision of the location, but it misstates the forensic value of these images. Most critically, the date and time information for the recovered Google map tiles and corresponding images relates to the internet history cache, not when the images were actually created. Thus, this is not "overwhelming" evidence of Tench's guilt as the State argues.

With regards to Tench's laundry, the State notes that police found blood on a bleach bottle, on the washing machine, on a sponge in the kitchen trash, and in the kitchen sink. State's Brief in Opposition at 11. All of these items tested presumptive for blood, but only two were submitted for additional confirmation testing. Confirmation testing assures that the presumptive testing that was conducted did not yield a false positive. Even the State's witness, BCI Agent Staley, conceded that there is a degree of fallibility to field testing: "There is a possibility of having false positives depending on what detergents are used or what chemicals the clothing comes in to contact with." Vol. XXI, Tr. 3667-68 BCI.

Even assuming that blood was actually present in all of these places, this is not overwhelming evidence of Tench's guilt. Rather, Mary, who suffered recurrent

nose bleeds following her February 2013 fall, suffered one earlier in the day on the eleventh as a consequence of the changing weather. Vol. XXIX, Tr. 4998. Of the two collected samples that were subjected to additional testing, the amounts were so trace that there was no usable DNA standard from the source on the washing machine, and the source in the sink was a mixed profile of Mary and another individual.

The State next notes that Tench walked over the footprints in his back yard. State's Brief in Opposition at 11. The State's argument that his behavior "appeared to detectives to be a deliberate attempt to obscure them" is nothing more than speculation. Tench's cooperation with the police was nothing more than that. He walked the detectives through both his house and backyard and answered their questions. Vol. XXIX, Tr. 5043. They repaid his courtesy by returning and drawing their weapons on Tench. *Id*.

The State also cites to an envelope found in Tench's bedroom as "strong evidence of Tench's motive." State's Brief in Opposition at 11. Tench again does not deny his possession of the note, nor does he dispute that he knew about his mother's notation. Prior to her disappearance, Tench and Mary reached an agreement and entered into a payment plan where Tench was to pay Mary back. As Tench explained, "[My mother] gave me the envelope on the 8th when we signed a promissory note stating I would pay her a minimum of $50 every single paycheck starting on the 15th of November… On the envelope it said, 'Leave, tell police'". Vol. XXIX, Tr. 4985. This mutual understanding between Tench and his mother belies the State's argument that Tench had ill feelings toward his mother. *See* State's Brief in Opposition at 12.

Thus, the other evidence admitted against Tench is not, in fact, overwhelming, as the State claims. The jurors were focused, as evidenced by their questions to the witnesses, on evidence that was already found to be inadmissible against Tench. The admission of other acts evidence in this case "predispose[d] the mind of the juror[s] to believe that [Tench was] guilty, and thus effectually [] strip[ped] him of the presumption of innocence" and, thus, prejudiced Tench. *See Breakiron v. Horn*, 642 F.3d 126, 144 (3d Cir. 2011), [citing *Commonwealth v. Harkins*, 459 Pa. 196, 328 A.2d 156, 157-58 (1974). This Court should grant the writ.

Second Reason for Granting the Writ: The Ohio Supreme Court violated Tench's right to a jury determination of whether death is appropriate in violation of this Court's decision in *Hurst* and the Sixth Amendment to the U.S. Constitution.

The State cites to the recent Ohio Supreme Court decision in *State v. Mason*, 2018-Ohio-1462 as conclusive authority that the Ohio death penalty scheme does not violate a defendant's Sixth Amendment right.. State's Brief in Opposition at 14. The State ignores that it is this Court, not the Ohio Supreme Court, that will have that final say as to whether Ohio's statute is permissible in light of *Hurst*. In addition, the State ignores that Tench's argument is an as applied challenge to Ohio's capital sentencing scheme, as opposed to a facial challenge.

Just was the case in Florida pre-*Hurst*, the jury determination in Ohio is necessary, but not sufficient, for a defendant to receive a death sentence. R.C. § 2929.03 (D)(3). Judicial fact-finding is required before a sentence of death can be imposed. The only difference between the regime in *Hurst* and in Ohio is that the judge in Ohio

does not find aggravating facts, but instead weighs those facts. This is a difference without distinction under the Sixth Amendment.

Compounding the error here is the fact the Ohio Supreme Court independently nullified the jury's finding and substituted its own when it found that one aggravator—aggravated robbery—was not proven, and, thus, reduced the number of aggravating circumstances from three to two. *Tench*, 2018-Ohio-5205, ¶1. The Ohio Supreme Court's use of appellate reweighing to correct this error was unconstitutional under this Court's decision in *Hurst*. This Court should grant the writ.

CONCLUSION

Particularly in a capital case, the State should not be allowed to improperly admit other acts evidence so as to undermine the integrity and fairness of a capital trial. Doing so was a violation of Tench's constitutional right to due process.

Respectfully submitted,

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