No. _____

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

PETITION FOR WRIT OF CERTIORARI

OFFICE OF THE OHIO PUBLIC DEFENDER

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CAPITAL CASE

EXECUTION DATE: OCTOBER 18, 2023

QUESTIONS PRESENTED

This Court should accept this case to consider the following questions of great importance:

1. **When a capitally sentenced defendant credibly demonstrates that (1) state actors have continually exhibited bad faith throughout the history of a case, and (2) the vast majority of evidence (all of which could prove at least potentially exculpatory) from a capital case is lost, missing, or destroyed at the hand of state actors, did the lower court err in failing to find a violation pursuant to *Arizona v. Youngblood*, 488 U.S. 51 (1988)?**

In addition, there is a split among the Circuits and state courts as to what constitutes bad faith pursuant to this Court's decision in *Youngblood*. Some courts have settled on a lesser standard requiring only that state actors had "knowledge" that the evidence was exculpatory when they lost or destroyed the evidence in question. On the other hand, a number of courts require that state actors demonstrated actual "purpose" to deceive or "official animus," prior to granting relief on a *Youngblood* claim. Thus, this Court should accept this case to decide the following:

2. **Pursuant to this Court's decision in *Arizona v. Youngblood*, 488 U.S. 51 (1988), what is the required standard that a defendant must meet to prove that state actors acted in "bad faith?"**

This Court in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), as well as other state and federal courts, criticized the practice of a trial court's wholesale adoption of party-drafted Proposed Findings of Fact and Conclusions of Law, which

often leads to significant errors and, at best, creates the appearance of unfairness. Prosecutor-drafted Findings of Fact and Conclusions of Law, which absolve them of claimed misconduct, heightens the unfairness, and implicates the policies underlying *Tumey v. Ohio*, 273 U.S. 510 (1927). As such, this Court should further accept this case to decide the following:

3. **Is a capital defendant deprived of meaningful review, and are his Eighth and Fourteenth Amendment rights violated as described in *Anderson* and *Tumey*, when the trial court adopts verbatim the Prosecutor's flawed proposed Findings of Fact and Conclusions of Law to deny allegations of prosecutorial misconduct?**

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceeding other than those listed in the caption.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

RELATED PROCEEDINGS

All proceedings directly related to this petition include:

1. Cuyahoga Common Pleas Court Opinion Sentencing Bonnell to death: *State of Ohio v. Melvin Bonnell*, Case No. CR-87-223820-ZA, Journal Entry (May 25, 1988);

2. Intermediate Court of Appeals Opinion Affirming Conviction: *State of Ohio v. Melvin Bonnell*, 8th Dist. Cuyahoga No. 55927, 1989 WL 117828;

3. Ohio Supreme Court Direct Appeal Opinion: *State of Ohio v. Melvin Bonnell*, 61 Ohio St.3d 179, 573 N.E.2d 1082 (1991);

4. United States Supreme Court denial of certiorari: *State of Ohio v. Melvin Bonnell*, 502 U.S. 1107, 112 S. Ct. 1205, 117 L. Ed. 2d 444 (1992);

5. Cuyahoga Common Pleas Court Decision Denying Bonnell's Motion to Vacate or Set aside Judgement: *State of Ohio v. Melvin Bonnell*, Case No. CR-87-223820-ZA, Journal Entry (Oct. 16, 2995);

6. Intermediate Court of Appeals Opinion Affirming Denial of Bonnell's Motion to Vacate: *State of Ohio v. Bonnell*, 8th Dist. Cuyahoga No. 69835, 1998 WL 546589;

7. Ohio Supreme Court Decision Dismissing Appeal: *State of Ohio v. Melvin Bonnell*, 84 Ohio St.3d 1469, 704 N.E.2d 578;

8. District Court First Federal Habeas Decision: *Bonnell v. Mitchell*, Case No. 00CV250, 301 F.Supp.2d 698 (N.D.Ohio, Feb. 04, 2004);

9. Sixth Circuit Court of Appeals First Federal Habeas Decision: *Bonnell v. Mitchell*, 212 Fed.Appx. 517 (6th Cir. 2007);

10. Cuyahoga Common Pleas Court Finding of Facts and Conclusions of Law Denying Defendant's Application for DNA testing: *State of Ohio v. Melvin Bonnell*, Case No. CR-87-223820-ZA, Journal Entry (Oct. 21, 2005);

11. Cuyahoga Common Pleas Court Finding of Facts and Conclusions of Law Denying Defendant's Application for DNA testing: *State of Ohio v. Melvin Bonnell*, Case No. CR-87-223820-ZA, Journal Entry (Aug. 14, 2017);

12. Intermediate Court of Appeals Opinion Dismissing Bonnell's Appeal and Affirming the Denial of his DNA Application: *State of Ohio v. Melvin Bonnell*, 8th Dist. Cuyahoga No. 15-102630, 2015 WL 6797870;

13. Ohio Supreme Court Decision Affirming Denial of DNA Application: *State of Ohio v. Melvin Bonnell*, 155 Ohio St. 3d 176, 2018-Ohio-4069, 119 N.E.3d 1285.

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No. _____

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

Melvin Bonnell respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

OPINIONS BELOW

The Ohio Supreme Court's decision declining jurisdiction is attached hereto as Appendix A. *See* 06/17/2020 Case Announcements #2, 2020-Ohio-3276. The Ohio Supreme Court's decision denying Bonnell's Motion for Reconsideration is attached hereto as Appendix B. *See* 08/18/2020 Case Announcements, 2020-Ohio-4045. The Eighth District Court of Appeals Decision and Judgment affirming the lower court's decision and denying relief is attached hereto as Appendix C. *See State of Ohio v. Melvin Bonnell*, Case No. 108209, 2019-Ohio-5342 (Cuyahoga Ct. App. December 26, 2019). The Cuyahoga County Court of Common Pleas Journal Entry and Opinion are

attached hereto as Appendix D. *See State of Ohio v. Melvin Bonnell*, Case No. CR-87-223820-ZA, Cuyahoga County Common Pleas Court, Journal Entry (Jan. 25, 2019).

JURISDICTION

By 4-3 vote, the Supreme Court of Ohio rendered its decision denying jurisdiction on June 17, 2020. Bonnell timely filed a Motion for Reconsideration with the Supreme Court of Ohio on June 29, 2020. By 4-3 vote, the Supreme Court of Ohio denied his Motion for Reconsideration on August 18, 2020. Bonnell timely files this petition. *See* Order List: 589 U.S., March 19, 2020 (extending deadline to file any petition for writ of certiorari to 150 days from the date of the lower court judgment). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

This case involves the following Amendments to the United States Constitution:

A. Eighth Amendment, which provides in pertinent part:

> Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishment inflicted.

B. Fourteenth Amendment, which provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

A. The Offense and Trial.

More than thirty years ago, Robert Eugene Bunner ("Gene"), Shirley Hatch, and Ed Birmingham shared an apartment at 57th and Bridge Avenue, located in Cleveland, Ohio. The three began drinking around noon on November 27, 1987. Birmingham grew increasingly intoxicated and put himself to bed about at 8:30 pm. Meanwhile, Bunner and Hatch continued drinking throughout the night and into the early hours of the next morning. At around 3:00am, fifteen hours after they began drinking, someone knocked on their door. Hatch did not recognize the man who identified himself as "Charlie" and asked for Gene. But Bunner let the visitor in. *See* Police Reports, attached as Exhibits E-1 and E-2 in Appendix E.

Hatch stated that the man at the door shot Bunner twice. She ran to Birmingham's room to wake him, but it took several attempts because he was still heavily intoxicated. Birmingham stated that he entered the kitchen and saw the shooter sitting on Bunner, beating him in the head. Birmingham claimed he pulled the armed assailant off Bunner and tossed him down the stairs. While Birmingham fought with the man, Hatch called the police and medical rescue. Hatch was the only witness to the shooting, and she and Birmingham were the only witnesses to see, ever so briefly, the perpetrator. *Id.*

Tina Norwood and Dorothy Ciesla shared an apartment directly below the Hatch/Birmingham/Bunner residence. Norwood and Ciesla testified that they heard a lot of noise the night of the murder. They heard loud noises and singing from the

apartment above around 2:00 a.m., followed by "banging" and a "series of thumps" at 2:30 a.m. Norwood and Ciesla each testified that they heard Birmingham talking to Ray Campbell, another neighbor, immediately after the murder. Tr. 1359-60, 1339-40. Birmingham alerted Campbell that he set someone up for Bunner's murder and warned Campbell to keep quiet. *Id.*

Police dispatch announced a "male shot" at 3:51 a.m., one hour and 21 minutes after the "thumps" heard by Norwood and Ciesla. Officers Kukula and Stansic arrived at the scene at 3:53 a.m. Birmingham and Hatch both stated they did not know the shooter and described the suspect as "a man with long brown hair and a mustache." Ex. E-3. However, that description differs from the one Hatch gave the police dispatcher only mere moments earlier on the phone where she described the shooter as: "a man with blond hair and a maroon jacket." Ex. E-2. The officers attempted to resolve the discrepancy but were unable because Hatch and Birmingham were too intoxicated. Ex. E-4, p. 4. Although the shooter's description changed in a matter of minutes, what remained steadfast was that both Hatch and Birmingham emphatically denied knowing him.[1]

Melvin Bonnell and Joseph Egnor, a.k.a. Joey Popil, also spent the night of November 27, 1987, drinking. They visited several bars, then went to Marlene Roberts to borrow money. Roberts testified Bonnell arrived at her home about 2:00

[1] This exculpatory evidence was suppressed. Undersigned counsel has the hindsight advantage of reports that trial counsel did not. *See* affidavits of Richard F. Walsh and William T. McGinty (trial counsel for Melvin Bonnell), attached as Exhibits E-5 and E-6 in Appendix E.

a.m., and that she saw someone in a red jacket in the driver's seat of Bonnell's car. The person she saw was later identified as Joey Popil. Tr. 1286-87. Popil denied wearing a red jacket that evening. Tr. 1229. The red jacket is significant, not only because the shooter was identified as wearing a red jacket, but also because police reports describing it were suppressed. Popil relinquished his red jacket to the prosecutor one day before he testified at trial. Photographs taken of this jacket reveal what appear to be blood stains, but these pictures were never disclosed to trial counsel and were never presented as part of Bonnell's defense. *See* Ex. E-10[2]. These photos were only turned over later, during postconviction proceedings.

After Bonnell borrowed money from Roberts, he and Popil continued drinking at a local bar. By the time he attempted to drive home, Bonnell was highly intoxicated. His impaired driving attracted the attention of patrolling officers. When they signaled him to pull-over, Bonnell attempted to flee. A chase ensued but quickly ended when Bonnell wrecked into a building.

The timing and origin of the car chase is vital to the State's supposition that Bonnell was the shooter. However, when testimony about the chase is reviewed with the benefit of suppressed exculpatory evidence, this theory falls apart.

Police officers Montalyo and Jesionowski were partners who were working patrol on November 27, 1987. Both testified at Bonnell's trial. Officer Jesionowski's testimony contradicted Officer Montalyo's on critical points, and both officers'

[2] To this day, the State has produced only a single, color photo of the front of Popil's jacket. Undersigned counsel has never seen the back of the jacket in color.

testimony contradicted their written report.[3] *Compare* Tr. 1139, 1261, 1266, 1274; *with* E-4, p. 5. Montalyo testified he saw a car without its headlights on driving backward on Bridge Street at 3:40 a.m. and the officers began pursuit of the car *westward on Bridge*. Jesionowski testified that the chase began *southbound on 57th Street*. Their report says the officers observed a car driving *eastbound on Lorraine*, and the officers began pursuit *northbound on 58th Street*. The only conclusive detail was that the chase ended when Bonnell crashed and was transported to the hospital. Tr. 1251-53.

Officer Kukula knew of the car chase and subsequent wreck, and he was aware that Bonnell was taken to the hospital for medical treatment. Kukula somehow associated the perpetrator described by Hatch and Birmingham, the "man with long brown hair and a moustache" with the bloodied "man with blonde hair and a maroon jacket" pulled from the wreckage of the crash. Birmingham was brought to the hospital to see "if this [Bonnell] was the guy." Taken to see "the guy," Birmingham, who was roused from a drunken slumber to find his friend shot dead on his kitchen floor, glanced at Bonnell, bloody and battered from the car wreck with his face obscured by an oxygen mask, and proclaimed him the shooter. Tr. 925. He did not identify Bonnell by name, even though he had known Bonnell for at least 6 months. His identification was also contrary to his earlier statement to police that he did not know the shooter. Bonnell was charged with aggravated murder later that same day.

[3] The officers denied making a written report at trial. Tr. 1139, 1261. The State also suppressed the report, which was then only later discovered by postconviction counsel.

In early 1988, within mere months of his indictment, Melvin Bonnell was convicted of one count of aggravated burglary with a firearm specification, one count of felony murder with a firearm and aggravated burglary specification, and one count of aggravated murder with a firearm and aggravated burglary specification. For these crimes, Bonnell was handed the ultimate sentence: death. Before, during, and ever since his capital trial, Bonnell has maintained his innocence of this murder.

B. Direct Appeal, Postconviction, and First Habeas Petition.

Bonnell's convictions and death sentence were affirmed on direct appeal. *State v. Bonnell*, 8th Dist. Cuyahoga No. 55927, 1989 Ohio App. LEXIS 4982 (Oct. 5, 1989) (denying relief on direct appeal); *State v. Bonnell*, 61 Ohio 4 St.3d 179, 573 N.E.2d 1082 (1991) (affirming the denial of relief on direct appeal).

Beginning in 1995 with Appellant Bonnell's original postconviction proceedings, counsel demanded that the Prosecutor's Office account for the physical evidence, and any exculpatory evidence, in this capital case. Yet years passed with no accounting. Through various public records requests, postconviction counsel discovered a plethora of evidence that the prosecution suppressed, including the following:

- Hatch initially described the shooter to police dispatch as "a blonde man with a maroon jacket," but she told the scene officers—who responded within two minutes of dispatch—that he had "long brown hair and a moustache." *Compare* Ex. E-2 *and* Ex. E-3. Trial counsel was unaware of

Hatch's first description or that her description changed within a matter of minutes because this information was suppressed at trial.

- Hatch and Birmingham both repeatedly denied knowing the shooter and relayed as much to the officers at the scene, a position each maintained for weeks. Tr. 198, 225, 265-266; *see also* Exs. E-1 and E-2. This information was also suppressed at trial; the State only turned over to the defense the later statements in which they identified Bonnell by name.
- Birmingham testified at least four times that he was "stone cold sober," or "straight," the night of the shooting. Tr. 927, 941. Suppressed police reports noted both he and Hatch were severely intoxicated, and that officers had difficulty obtaining information due to their drunkenness. *See* Ex. E-4, p. 4.
- The time of the murder was estimated to be at 3:30 a.m., based upon a 3:46 a.m. EMS call. Suppressed statements from Hatch and Birmingham indicate discrepancies as to the time of the attack. The pair listed the attack as occurring at 2:30 a.m., 3:00 a.m., or between 3:35-3:45 a.m., depending on which report is read. Tr. 921, 956.
- Officer Jesionowski observed plastic bags on Bonnell's hands in the hospital. Tr. 1270. Hospital records confirm this. Generally, hands are bagged to preserve evidence, and, in this case, swabs were taken from Bonnell's hands. Tr. 905, 907, 912-13. The State has still not disclosed what evidence, if any, was collected from Bonnell's bagged hands or the bags themselves; has not disclosed what tests were performed; and has not

divulged the present location of the swabs and/or slides taken from his hands.

- The Trace Evidence Department of the Cuyahoga Coroner's Office performed gun-powder residue tests on the jacket Bonnell wore the night of the crime. The results were negative. *See* Cuyahoga Co. Coroner's Laboratory Report, attached as Ex. E-7. At trial, the prosecution suppressed the fact that this GSR testing was conducted as well as the negative result of the test. To this day, the State has not disclosed what other tests were performed on evidence taken from Bonnell's hands, shirt, or pants, nor the results of those tests.
- The police processed Bonnell's car. *See* Ex. E-4, p.2. The technician removed evidence from the car and seemingly performed forensic tests on the car's interior. Photographs of the car being processed discovered post-trial clearly show the car marked on the front and rear windows, to be processed for *fingerprints and blood*. These photographs were part of the record in the state courts. Over 30 years later, the State has not disclosed what evidence was collected, nor the results of any tests conducted on this evidence.
- Credible evidence of alternative suspects was also suppressed. Darryl Butcher was involved with the victim in a drug bust in October of 1987. Though Butcher was arrested, Bunner was not. Tr. 246-47. A witness who knew both Bunner and Butcher told police Butcher believed Bunner was a "narc" and wanted revenge. *Id*. Bunner went into hiding due to fear for his

safety. *Id*. Furthermore, another suppressed police report confirmed Butcher's presence at the apartment on the night in question and noted that "talk on the street" was that Butcher killed Bunner. *Id*. at 265-66; *see* Police Report, attached as Ex. E–8. Joey Popil was also peripherally involved with these same individuals and had similar reason to fear them. His uncle, with whom he lived, was a "narc," i.e. an officer with the Cleveland Police Department Narcotic Squad. Bonnell, on the other hand, knew some of the people involved but had nothing to do with this drug bust or any fall-out stemming from it.

Despite the discovery of this suppressed evidence, the trial court denied Bonnell's postconviction petition, and the Ohio Court of Appeals affirmed that denial. *State v. Bonnell*, 8th Dist. Cuyahoga No. 69835/73177, 1998 Ohio App. LEXIS 3943 (Aug. 27, 1998) (affirming the denial of postconviction relief); and *State v. Bonnell*, 84 Ohio St.3d 1469, 704 N.E.2d 578 (1999) (no discretionary appeal allowed). Bonnell sought federal habeas relief after exhausting state remedies. *See Bonnell v. Mitchell*, 301 F.Supp.2d 698 (N.D. Ohio 2004) and *Bonnell v. Mitchell*, 212 F.App'x 517 (6th Cir. 2007). These efforts were also unsuccessful.

In an attempt to prove his innocence, on October 29, 2004, Bonnell applied for DNA testing under Senate Bill 11, Ohio's original postconviction DNA testing bill. He asserted that DNA testing would exclude him as the source of crime scene biological material and thus establish his actual innocence of the crimes for which he is

convicted and sentenced to death. In the prayer for relief, Bonnell specifically requested that the trial court:

> A) Order the State, in accordance with R.C. 2953.75, to use reasonable diligence to locate ***any remaining biomaterial evidence from the case*** that could be suitable for DNA testing….

See State of Ohio v. Melvin Bonnell, Case No. CR-87-223820-ZA, Cuyahoga County Common Pleas Court, Memorandum in Support of Application for Post-Conviction DNA Testing, pp. 12-13 (Oct. 29, 2004) (emphasis added).

The Cuyahoga County Prosecutor's Office opposed Bonnell's Application for DNA testing and represented that all testable evidence was either never collected or no longer existed. Specifically, the State argued that "none of the evidence requested by Bonnell exists." *See State of Ohio v. Melvin Bonnell*, Case No. CR-87-223820-ZA, Cuyahoga County Common Pleas Court, Prosecuting Attorney's Brief in Opposition to Inmate's Application for DNA Testing, p.10 (Aug. 30, 2005).

The State then filed Proposed Findings of Fact and Conclusions of Law on October 17, 2005. The trial court wholesale adopted these Findings of Fact and Conclusions of Law the following day.

Senate Bill 262, codified in statute at R.C. 2953.71, *et seq*., replaced the outdated and flawed SB 11. Like many offenders, Bonnell sought an opportunity for DNA testing he was not granted under the flawed SB 11 and filed a new application for DNA testing on February 6, 2008. In his initial response, the then Assistant Prosecuting Attorney, Jon Oebker, explained that he had found Bonnell's jacket. In that same pleading, he then wrote, "The state is also continuing with its ongoing

obligation to establish the existence of ***any and all evidence*** in this trial." *See State of Ohio v. Melvin Bonnell*, Case No. CR-87-223820-ZA, Cuyahoga County Common Pleas Court, Initial Response to Second DNA Application, p.1-2 (April. 23, 2008). (emphasis added).

The trial court accepted Bonnell's application and granted postconviction DNA testing on that single item that the State produced: Bonnell's jacket. At trial, witness testimony described a graphic scene: blood was "all over the place", "it took a whole day to clean," Tr. 928, "blood gushed from victim's chest, the assailant was on top of the victim, punching him 20-30 times in the face, and chest with both hands." *Id*. at 921, 937, 943. Bonnell and the victim had different blood types. Tr. 903-04. Pre-trial, the coroner's office visually inspected Bonnell's jacket and identified blood stains. Serologist Linda Luke examined the blood stains on Bonnell's jacket, and her tests revealed the presence of only one person's blood: Bonnell's. But the DNA testing of Bonnell's jacket in 2009 showed that sometime *after* trial and before 2008, the victim's blood profile had appeared in small, but visible smears on the jacket. The sudden presence of the victim's blood along with the missing status of the other evidence in the case demonstrate the likelihood the jacket was subjected to improper storage between trial in 1988 and 2008, which resulted in contamination.[4]

[4] In advance of clemency, Bonnell's team consulted Marc Dupre, an expert in the field of forensic sciences, who offered the following: "In light of the fact that the homicide scene was very bloody, Mr. Bunner and the assailant had direct and substantial contact and there was heavy blood drops and transfer stains on the assailants exit path, I would expect this [Bonnell's] coat to have noticeable blood stains if worn by the assailant…I am highly skeptical of the validity of these [2008] results due to the cross-contamination conditions this coat was subjected to while displayed in trial."

After testing was conducted on Bonnell's jacket, the still pending DNA application sat for *nine years* until Bonnell asked again for an accounting of the evidence in this case. Bonnell had specifically argued that testing of several items, including the white pants he was wearing on the night of the offense, Joey Popil's "Devil's Den" jacket, and any items removed from the car when it was processed would exculpate him and prove outcome determinative. On June 15, 2017, the State finally filed its accounting of the evidence, including an affidavit by then Assistant Prosecutor Christopher Schroeder and an accompanying report pursuant to R.C. §2953.75(B). *See* Ex. 12, contemporaneously filed with Bonnell's Motion for Relief in the Supreme Court of Ohio, Case No. 2020-0210. Mr. Schroeder swore to the following in his affidavit:

> I informed [the defense investigator] that my office had four boxes of material related to the Melvin Bonnell case in our possession, but ***that those four boxes contained only paper documents.***

See June 15, 2017 affidavit of Christopher D. Schroeder, at p. 1, ¶5, (emphasis added).

> [The defense investigator] indicated that she was looking for physical exhibits. . . ***I stated that my office had no physical exhibits in our possession.***

Id. at pp. 1-2, ¶5 (emphasis added).

> On December 6, 2016, I asked two employees of my office's Case Management Unit if our office had any additional items in storage from Bonnell's case. I specified that I was looking "for physical exhibits - a handgun, two jackets, and a pillow." They later informed me that they had checked our office's file storage areas and that the only items we had related to Bonnell's case were the four boxes of paper documents I

See Ex. 26, p. 3, contemporaneously filed with Bonnell's Motion for Relief in the Supreme Court of Ohio, Case No. 2020-0210.

> had already ***both reviewed*** and informed [the defense investigator] about.

Id. at p. 2, ¶10 (emphasis added).

> I then emailed [the defense investigator] stating that I had confirmed ***there were no physical exhibits related to Bonnell's case in my office's possession***.

Id. at p. 3, ¶16 (emphasis added).

> ***I reiterated that my office had no evidence in its possession from Bonnell's case***.

Id. at p. 8, ¶43 (emphasis added).

On that same date, the State also filed its Brief in Opposition to Bonnell's Application for DNA Testing and the State's Proposed Findings of Facts and Conclusions of Law. Without affording Bonnell discovery, a hearing, or any adversarial testing of Assistant Prosecutor Schroeder's hearsay affidavit, on August 14, 2017, the trial court verbatim adopted the State's Proposed Findings of Fact and Conclusions of Law and filed its Journal Entry denying Bonnell's Application for DNA Testing. *See State of Ohio v. Melvin Bonnell*, Case No. CR-87-223820-ZA, Cuyahoga County Common Pleas Court, Journal Entry (Aug. 14, 2017).

Bonnell timely filed his appeal of right in the Ohio Supreme Court. While that appeal was still pending, on January 11, 2018, in the trial court, Bonnell also filed a Motion for Leave to File a Motion for a New Trial under Crim.R. 33(B).

Bonnell's motion for a new trial relied on the newly discovered report and affidavit provided by Assistant Prosecutor Schroeder, as well as new statements made by Shirley Hatch, which materially differ from her trial testimony and support

an alternate theory of the case. At trial, Hatch described the shooter as wearing a maroon jacket. Tr. 964. The jacket identified as Bonnell's was reddish-maroon and tan in color and was made of corduroy fabric. There was no writing anywhere on the jacket. However, Hatch's new statement indicated that the killer was wearing a "reddish shiny jacket with writing on the back. It was made of satiny material, a windbreaker type with lining." *See* Ex. E-9. From the photograph, it is obvious that Popil's jacket is a satiny material, unlike Bonnell's jacket. *Id.*; Tr. 904. The writing on the back of Popil's jacket as well as what appears to be blood stains on the front of the jacket (both clearly visible in the photograph of the jacket) makes the jacket materially exculpatory without further testing. The presence of writing on the jacket supports Hatch's account and the theory that the shooter was Joey Popil, not Melvin Bonnell.

On July 19, 2018, the State filed its Brief in Opposition. The trial court stayed any ruling on Bonnell's motion for new trial while the case was pending before the Ohio Supreme Court.

After briefing and oral argument, on October 10, 2018, the Ohio Supreme Court affirmed the decision of the trial court. *State v. Bonnell*, Slip Opinion No. 2018-Ohio-4069. In its decision, the Ohio Supreme Court limited its review solely to whether Bonnell demonstrated that DNA testing would prove outcome determinative. Bonnell filed a timely Motion for Reconsideration, which was denied on December 12, 2018.

Following the denial of reconsideration in the DNA appeal, on January 3, 2019, the State filed Proposed Findings of Fact and Conclusions of Law in the trial court. On January 25, 2019, still without affording Bonnell discovery or a hearing, the trial court once again wholesale adopted the State's Proposed Findings of Fact and Conclusions of Law and filed its Journal Entry, denying Bonnell's Motion for Leave to File a Motion for a New Trial. *See State of Ohio v. Melvin Bonnell*, Case No. CR-87-223820-ZA, Cuyahoga County Common Pleas Court, Journal Entry and attached Findings of Facts and Conclusions of Law (Jan. 25, 2019), attached as Appendix D.

Undersigned counsel then met with Assistant Prosecutor Schroeder at his office in Cleveland, Ohio. This meeting was in anticipation of, and concerned, Bonnell's upcoming clemency proceedings, since Bonnell had an active execution of February 12, 2020.[5]

Following the trial court's denial, Bonnell appealed to the Eighth District Court of Appeals. That appeal was denied on December 26, 2019. *See State v. Bonnell*, No. 108209, 2019-Ohio-5342 (Cuyahoga Ct. App. December 26, 2019), attached as Appendix C.

Following that denial, on January 15, 2020, undersigned counsel once again met with Assistant Prosecutor Schroeder in Cleveland, Ohio. At that meeting, Ms. Rigby "asked Mr. Schroeder if we [Ms. Rigby and Ms. LaHote] could view the file at the Prosecutor's Office. Mr. Schroeder agreed, but said that it would take some time

[5] Governor DeWine reprieved Bonnell's execution date on December 20, 2019 to March 18, 2021. He subsequently reprieved Bonnell's execution date again on September 3, 2020 to October 18, 2023.

to call up the old files." *See* Ex. 1, p. 1, ¶3, contemporaneously filed with Bonnell's Motion for Relief in the Supreme Court of Ohio, Case No. 2020-0210. In the interim, while the files were being called up, Mr. Schroeder left the Cuyahoga County Prosecutor's Office. Mr. Frank Zeleznikar replaced Mr. Schroeder on Bonnell's case.

On February 10, 2020, Bonnell filed a Notice of Appeal and Memorandum in Support of Jurisdiction [hereinafter MISJ] in the Ohio Supreme Court. *See State of Ohio v. Melvin Bonnell,* Case No. 2020-0210, Supreme Court of Ohio, Memorandum in Support of Jurisdiction (Feb. 10, 2020*).*

Following the filing of his MISJ, Mr. Zeleznikar allowed Ms. Rigby and Ms. LaHote to view the file on February 26, 2020. The file consisted of four boxes, labeled 614 – 617. Ms. LaHote and Ms. Rigby methodically reviewed the contents of those boxes and, while reviewing box 615, made a startling discovery: the morgue pellets and shell casings that the prosecutors had repeatedly said were "lost" or "destroyed." Ms. Rigby described that discovery in detail in her affidavit (*see generally* Ex.1, pp. 2-5, ¶¶13-21, contemporaneously filed with Bonnell's Motion for Relief in the Supreme Court of Ohio, Case No. 2020-0210[6]):

> Box 615 contained the trial transcripts and trial exhibits. Each transcript volume was bound separately. The trial exhibits were all bound separately in numerical order in a single binder.
>
> The trial exhibits binder contained mostly photographs. These included mostly 8x10 color photos of the autopsy, the crime scene, the car that Bonnell was driving, and the Funeral Home that Bonnell crashed into. There were also some smaller polaroid photographs of Bonnell at

[6] All Exhibits referenced within the following quotation were also filed contemporaneously with Bonnell's Motion for Relief in the Supreme Court of Ohio, Case No. 2020-0210.

booking and of the victim and various people. Also in this binder were three manilla envelopes. I would guess that they were about 5 by 7 inches in size. The first was labeled "State's Exhibits Nos. 1 and 2 Pellets." Another was labeled "State's Exhibit 38." The envelope noted "HOLD AS EVIDENCE => FORWARD TO S.I.U. FOR POSSIBLE THUMB PRINTS … NEG FOR PRINTS." The description of property inside the envelope was "2 spent shell casings .25 auto." The last was labeled "State's Exhibit 53." The description of property inside the envelope was ".25 Cal. Casing." The envelope also noted "Compare with .25 Cal Auto M44846." I took pictures of each of these envelopes. *See* Exhibits 3-5.

Inside the envelope marked State's Exhibit 1 and 2 was another smaller manilla envelope. I would guess that this envelope was about 2 by 4 inches. The front of the envelope had various writing including describing the specimen: "small caliber force" and by "RC Challener." It was dated "11/28/87 11:45AM." I took a photograph of the front of this envelope. *See* Exhibit [22]. The back of the envelope was marked "State's Exhibit 2: and also dated "12/8/87 1400." Also written is "Scott to [illegible]." I also took a photograph of the back of this envelope. *See* Exhibit 7.

Inside the envelope marked State's Exhibit 38 was another smaller envelope that I would estimate was about 2 by 4 inches. This envelope contained no writing. I took photographs of this envelope, front and back. *See* Exhibits 8-9.

Inside the envelope marked State's Exhibit 53 was a small canvas baggie and an attached card. I took photographs of both. *See* Exhibits 10-11. The card again noted that the baggie contained ".25 Cal. Casing." It again noted "Compare with .25 Cal Auto M44846." Also check-marked is a box marked "Evidence." I could see a very small envelope inside the baggie. Exhibit 11.

I felt the outside of each of the envelopes described above and shown in Exhibits 6-11. I could tell that the described items were inside each of the envelopes. The envelopes had small hard cylindrical items inside.

Because it was not sealed and had no writing on the outside of it, I looked inside the smaller envelope (Exhibit 8-9) found inside of the Envelope marked State's Exhibit 38 (Exhibit 4). To look inside, I grabbed the edges of the envelope and squeezed them together to view what was contained in the bottom of the envelope. I clearly saw 2 shell casings. I was careful not to touch anything inside the envelope, as I was not

> provided gloves and did not have gloves. Both my co-counsel, Ms. LaHote, and Mr. Zeleznikar were present for this.
>
> Upon my request, Mr. Zeleznikar also opened the envelope marked State's Exhibits 1 and 2 (*see* Exhibit 3). He opened both the outer envelope as well as the smaller interior one. Neither were sealed. The smaller interior envelope shown in Exhibits 6-7 was labeled as detailed above. Mr. Zeleznikar confirmed the pellets were indeed inside the envelope.
>
> I did not open the small envelope that I could see was inside of the canvas baggie, which is shown in Exhibits 10 and 11. However, again, I could feel that there was something small and hard inside. It felt like a shell casing, as was described to be inside. Both my co-counsel, Ms. LaHote, and Mr. Zeleznikar were present for this.

One week after the discovery of the shell casings and morgue pellets, on March 4, 2020, Mr. Zeleznikar filed his Memorandum in Opposition to Jurisdiction [hereinafter MOJ] in the Ohio Supreme Court. *See State of Ohio v. Melvin Bonnell,* Case No. 2020-0210, Supreme Court of Ohio, Memorandum in Opposition to Jurisdiction (Mar. 4, 2020*)*. Mr. Zeleznikar stated the following as to the state of the evidence in Bonnell's case:

> It cannot be disputed that ***Bonnell has been aware since at least 1995 that the items in question were not preserved for testing***. The extensive record documenting Bonnell's knowledge of that fact is recounted at length in the statement of facts below. He's known this evidence was lost or destroyed because ***the State continuously, at every point in the last 24 years, has acknowledged that the evidence was not preserved. This has never been a secret.*** The State never hid it from Bonnell. For Bonnell to now claim that this information is new to him ignores the last 24 years of litigation, all [of] which is preserved in writing on the court's docket.

Id. at p. 1. *See also id*. at pp. 23, 33, and-34.

On March 30, 2020, counsel for Bonnell filed several motions in the Ohio Supreme Court in direct response to the inaccurate statements made in the State's

MOJ. *See* Ohio Supreme Court Case No. 2020-0210, Motion for Relief Pursuant to S.Ct.Prac.R. 4.01 and Motion to Strike Memorandum in Response, Motion to Disqualify the Cuyahoga County Prosecutor's Office, Motion to Appoint the Ohio Attorney General as Special Prosecutor, filed March 30, 2020. On April 1, 2020, the State, specifically Mr. Zeleznikar, filed a Brief in Opposition. In that pleading, Mr. Zeleznikar indicated that "that State does not dispute that on February 26, 2020 morgue pellets and shell casings were located in the prosecutor's files." *See State of Ohio v. Melvin Bonnell,* Case No. 2020-0210, The Supreme Court of Ohio, State of Ohio's Brief in Opposition, p. 2 (Apr. 1, 2020*).* Prosecutor Zeleznikar additionally indicated that he "recognize[d] that a limited reference to the February 26, 2020 meeting in his memorandum in response would have clarified confusion." *Id*. at p. 3, fn.1.

On that same date, a different assistant prosecuting attorney, Ms. Katherine E. Mullin, filed a pleading on behalf of the State in the trial court that was entitled "State's Notice of Available Evidence." *See State of Ohio v. Melvin Bonnell*, Case No. CR-87-223820-ZA, Cuyahoga County Common Pleas Court, State's Notice of Available Evidence (Apr. 1, 2020). *See also* Ex. A, contemporaneously filed with Bonnell's Motion to Expand the Record and Strike Appellee's Opposition in the Supreme Court of Ohio, Case No. 2020-0210. This Notice included two new affidavits: one updated affidavit signed by former prosecuting attorney Christopher D. Schroeder and a new affidavit by Frank R. Zeleznikar. Prosecutor Zeleznikar's affidavit indicated the following: "On March 4, 2020, I [Mr. Zeleznikar] filed a

Memorandum in Response to Jurisdiction in *State v. Bonnell*, Case No. 2020-0210. The morgue pellets and shell casings are not relevant to the issues Bonnell raised in his appeal." *Id.* at Affidavit of Frank Romeo Zeleznikar, p. 2.

On June 17, 2020, over three dissents, the Ohio Supreme Court declined to accept jurisdiction of Mr. Bonnell's appeal and denied all attendant motions. *See* 6/17/20 Case Announcements #2, 2020-Ohio-3276, attached at Appendix A. Justice Donnelly dissented with an opinion that included the following:

> Of all the shortcomings or deficiencies that one might identify in the postconviction review process of death-penalty cases, there are two that have been identified as "particularly problematic: the reluctance of state trial courts to conduct evidentiary hearings to resolve contested factual issues, and the wholesale adoption of proposed state fact-finding instead of independent state court decision-making." Steiker, Marcus & Posel, *The Problem of "Rubber-Stamping" in State Capital Habeas Proceedings: A Harris County Case Study*, 55 Hous.L.Rev. 889, 893 (2018). Those are precisely the two problems involved in this case and presented to this court in this appeal.
>
> Despite appellant [] Bonnell's repeated, ardent claims of his actual innocence, his colorable claims of the state's mishandling of the evidence in his case, and evidence showing a conflicting description of the assailant through a recent sworn statement by one of the witnesses to the 1987 offense who testified at trial, the Cuyahoga County Court of Common Pleas denied Bonnell's motion for leave to file a delayed motion for new trial without holding a hearing. Moreover, the trial court's decision on the motion was a verbatim repetition of the findings of fact and conclusions of law that were proposed by the state. The trial court similarly adopted, verbatim, the state's proposed findings of fact and conclusions of law in overruling Bonnell's postconviction motions in 2005 and 2017.

Id.

Bonnell filed a Motion for Reconsideration on June 29, 2020. On July 7, 2020, the State filed its opposition. The Ohio Supreme Court, again over three dissents,

denied the Motion for Reconsideration on August 18, 2020. *See* 08/18/2020 Case Announcements, 2020-Ohio-4045, attached as Appendix B.

REASONS FOR GRANTING THE WRIT

The incontrovertible truth is that nearly all of the evidence from Bonnell's capital case is gone at the hands of the State. Some of that evidence would have had apparent exculpatory value, and the rest would have had at least potential exculpatory value, at the time of its loss and/or destruction. Bonnell's conviction was predicated on two extremely questionable eyewitnesses, who were never challenged at trial against the exculpatory evidence the State withheld. Bonnell has repeatedly been denied the opportunity to meaningfully challenge the State's case, both at trial and throughout his postconviction litigation. Due process requires that criminal defendants be afforded a meaningful opportunity to present a complete defense, which necessarily requires the disclosure and preservation of exculpatory evidence. Here, the numerous instances where the State has suppressed, lost, or otherwise mishandled exculpatory evidence suggests that this is not by accident, but by design. Thus, by virtue of the State's repeated and continued mishandling and misrepresentation of the status of the evidence in his case, Bonnell can prove bad faith on the part of the State.

The State first acted in bad faith when it withheld exculpatory evidence at Bonnell's capital trial; it then again acted in bad faith when, despite requests for discovery and access to much of the evidence, state actors lost, mishandled, and/or destroyed nearly every piece of evidence in this capital case. Finally, the State acted

in bad faith when members of the Cuyahoga County Prosecutor's Office, despite a constitutional and Ohio statutory duty to do so, failed to conduct a diligent search for, and accurately report to the court concerning, any remaining testable evidence from this case. Bonnell has proven a violation of this Court's decision in *Arizona v. Youngblood*, 488 U.S. 51 (1988). This Court should grant the writ.

In addition, this Court should grant the writ to finally decide what exactly a petitioner is required to prove to meet the standard of "bad faith," as discussed in *Youngblood*, and to clarify whether a cumulative analysis of police/prosecutor's actions throughout the history of a case may be used to prove "bad faith." There is, indeed, a circuit split on this question. A clear answer to this question would provide guidance to lower courts, which currently only find bad faith in approximately 0.4% of *Youngblood* cases, and help to achieve a more consistent and robust standard. *See* Teresa N. Chen, *The Youngblood Success Stories: Overcoming the "Bad Faith" Destruction of Evidence Standard*, 109 W. Va. L. Rev. 421, 422 (2007).

Finally, this Court has "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." *Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985). Federal and state appellate courts have likewise "repeatedly condemned the ghostwriting of judicial orders." *See e.g.*, *In re Colony Square Co.*, 819 F.2d 272, 275 (11th Cir. 1987). Despite the condemnation of this verbatim adoption by trial courts, as evidenced in the instant case, this remains standard practice in Ohio capital postconviction cases. Moreover, the Prosecutor's

Office, in its Proposed Findings of Fact and Conclusions of Law, had a direct and personal interest and absolved itself of misconduct; therefore, these prosecutor-drafted findings run afoul of *Tumey v. Ohio*, 273 U.S. 510 (1927). The trial court's wholesale adoption of these findings deprived Bonnell of due process. *See Id.* at 523. This Court should use this case as a vehicle to make it clear to the lower courts that the wholesale adoption of party-written Findings of Fact and Conclusions of Law is highly discouraged in any case and inappropriate in a capital case, such as this one.

First Reason for Granting the Writ

When a capitally sentenced defendant credibly demonstrates that (1) state actors have continually exhibited bad faith throughout the history of a case, and (2) the vast majority of evidence (all of which could prove at least potentially exculpatory) from a capital case is lost, missing, or destroyed at the hand of state actors, the lower court errs in failing to find a violation pursuant to *Arizona v. Youngblood*, 488 U.S. 51 (1988)

A. Controlling and Persuasive Authority.

This Court has determined there is a due process duty to preserve evidence in the government's possession. *California v. Trombetta*, 467 U.S. 479, 488 (1984). This duty, however, extends only to evidence that is constitutionally material, i.e., "evidence that might be expected to play a significant role in the suspect's defense." *Id.* For evidence to be presumed to play a significant role in the suspect's defense, it "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id*. at 488-89.

Where the missing evidence is not "apparently exculpatory," but simply "potentially useful" evidence, due process is not violated unless law enforcement acted in "bad faith" in destroying or losing it. *Youngblood*, 488 U.S. at 58. What constitutes "bad faith" varies by jurisdiction; however, "bad faith" seems to indicate more than mere negligence. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id*. at 56

To determine whether the exculpatory nature of the value of the evidence was apparent before its destruction and whether the government acted in good faith, certain factors can be edifying. For instance, whether the defense requests a specifically identifiable item of evidence that is later destroyed, and/or whether the defense has specifically informed the government that it wants the item preserved because of its exculpatory value, can both be significant factors to consider. *See United States v. Cooper,* 983 F.2d 928, 932 (9th Cir. 1993*)*; *United States v. Beckstead,* 500 F.3d 1154, 1160 (10th Cir. 2007). As the First Circuit Court of Appeals held in 2014: "It is common ground that, upon request, a criminal defendant has a due process right to review all evidence in the government's possession that is material to his guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct, 1194, 10L.Ed.2d 215 (1963). But this right would be empty if the government could trump it by the simple expedient of destroying evidence harmful to its theory of the case." *Magraw v. Roden*, 743 F.3d 1, 7 (1st Cir. 2014) (internal citation omitted). Requiring the government to safeguard exculpatory evidence preserves due process, protects the

innocent from erroneous conviction and ensures the integrity of our criminal justice system. Anything less should not be tolerated.

B. Argument and Analysis.

Bonnell has shown that he meets this Court's test as laid-out in *Youngblood*. First, he has demonstrated that state actors lost or destroyed almost every piece of evidence from his capital case. Second, he has demonstrated that, at the time of the loss or destruction, the evidence would have had apparent exculpatory value, or, in the alternative, would have been at least potentially useful. Third, he has shown that there is no other reasonably available evidence. And finally, under either interpretation, he can prove "bad faith" on the part of the state actors.

1. Bonnell has shown that the evidence that was lost or destroyed has no comparable replacement and it either had apparent exculpatory value or was at least potentially useful.

As explained above, evidence is material if its exculpatory value was "apparent before the evidence was destroyed" and the defense would be "unable to obtain comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 489. If evidence is merely potentially useful, Bonnell must also prove that the state actors acted in "bad faith." *See* Section 2, *infra*. Bonnell proved in the state courts that all of the evidence that was lost or destroyed was either "apparently exculpatory" or at least "potentially useful."

As detailed above, Shirley Hatch has now provided a statement indicating that the killer was wearing a "reddish shiny jacket with writing on the back. It was made of satiny material, a windbreaker type with lining." *See* Ex. E-9. From the photo in

the file, it is evident that Popil's jacket is a satiny material, unlike Bonnell's corduroy jacket. Tr. 904. The writing on the back of Popil's jacket (clearly visible in the photograph of the jacket, *see* Ex. E-10) makes the jacket materially exculpatory without further testing. The presence of writing supports Hatch's account and the theory that the shooter was Joey Popil, and not Melvin Bonnell.

Popil's jacket was not only apparently exculpatory given the newly discovered evidence, but also would have been at least potentially useful at the time of Bonnell's trial. Photographs of the jacket show that it is stained in areas with a reddish-brown substance. This should have been tested and could have been used to establish whether the stain was biological. Assuming the stains were confirmed to be blood, they then should have been compared to the victim's blood, much like Bonnell's jacket was. If Popil's jacket came back with the victim's blood type on it, whereas Bonnell's did not, this would have been essential to challenging the State's theory of the case. Yet the State collected and then, without explanation, lost Popil's jacket. Bonnell had no available alternative that would substitute for Popil's missing jacket and despite requesting an accounting of the evidence, has been offered no explanation for its whereabouts.

The clothing Bonnell was wearing on the night of the crime, including his white pants, white socks, and boots also possessed an apparent exculpatory value. When his clothing was collected, there were no records that noted stains on the clothing. But this is inconsistent because the crime scene was described as terribly gory. Eyewitnesses claimed that there was blood all over the kitchen, the bathroom, and

the back porch. The blood had "gushed from the victim's chest" (Tr. 921) and took "a whole day to clean." Tr. 928. Aside from the crime scene itself, the murder as detailed by State's witnesses would have left the shooter covered in the victim's blood. The shooter not only shot the victim at close range, but then sat on top of the victim punching him repeatedly (20-30 times) in the face and chest with both hands. Tr. 921, 937, 943. The victim suffered abrasions, suggesting that he had been dragged across the floor. Tr. 897. Thus, if Bonnell were the shooter, Bonnell's white pants would have shown even a slight bloodstain, let alone the great deal of blood that would have splattered on to them. Likewise, Bonnell's white socks and boots should have shown blood given the description of the scene.

If Bonnell's clothes were covered in blood when the police collected them, it would have been immediately apparent to police that they were material to the case. If the blood on the clothes belonged to the victim, the State could have displayed the blood-soaked pants to the jury to show that Bonnell shot and beat the victim to death.

If, on the other hand, Bonnell's clothes were not soaked in blood, the exculpatory nature of the items would be immediately apparent. Police would have known that Bonnell could show the clothing to the jury to support his defense that he was not the person who killed the victim. But Bonnell has never been provided with so much as a photograph of these items.

Law enforcement collected Bonnell's clothing while he was restrained in a hospital bed in the intensive care unit. Once the items were in the possession of law enforcement, Bonnell had no access to them other than to submit to the State a

request to inspect them. Bonnell had absolutely no reasonably available means to view or analyze these items other than through the State. Bonnell could not muster up any other evidence that would have told the same story as the clothes he was wearing when police pulled him from the wrecked car on the night of the crime, i.e. there is no comparable evidence.

Besides the above evidence—which all would have had immediately apparent exculpatory value—there was other evidence at the scene that could also prove potentially useful to Bonnell's case. Yet it too is also all missing at the hands of the State. Blood, vomit, and other biological material at the crime scene, in Bonnell's car, and on his hands, if tested, could further produce an exculpatory result. If the blood strewn across the kitchen, the bathroom, and the back porch at the crime scene belongs to someone other than Bonnell or the victim, it is exculpatory. If the vomit on the kitchen floor near the body came from anyone other than Bonnell—such as the shooter overwhelmed by killing Brunner—it is exculpatory. If Bonnell's hands were bagged and swabbed for gunshot residue but produced a negative result, indicating that he had not held a firearm before he ended up in a hospital bed on the night of the crime, it is exculpatory.[7]

[7] The Trace Evidence Department of the Cuyahoga Coroner's Office performed gun-powder residue tests on the jacket Bonnell wore the night of the crime. The results were negative. *See* Cuyahoga Co. Coroner's Laboratory Report, attached as Ex. E-7. At trial, the prosecution suppressed the fact that GSR testing was conducted as well as the negative result of the test. To this day, the State has not disclosed what other tests were performed on evidence taken from Bonnell's hands, shirt, or pants, nor the results of those tests.

Even the State has recognized and previously conceded that the evidence in question was exculpatory in nature. During oral argument before the Sixth Circuit Court of Appeals, the State argued that there was not a *Brady* problem in this case, not because it disputed the exculpatory value of the missing evidence, but because the jurors should have inferred the exculpatory nature when it was not presented at trial.

> Q: So, your point is don't worry about this evidence because you should just assume that the tests were done, you should assume the tests were negative, and that would be exculpatory, which is a *Brady* problem, but it couldn't have been prejudicial given the arguments that were made?
>
> Charles Willie: Exactly. Our position is that the jury concluded that had to have concluded that obviously there was no evidence developed that tied, no physical evidence that tied [Bonnell] in the form of residue, et cetera blood evidence et cetera.

See Oral Argument given by Charles Willie on behalf of Betty Mitchell, *Bonnell v. Mitchell*, 212 F. App'x 517 (6th Cir. 2007), held on November 11, 2006.

Thus, Bonnell made the requisite showing in the state courts, as required by this Court in *Trombetta* and *Youngblood*.

2. Bonnell has demonstrated "bad faith" on the part of state actors.

Under either standard as described *infra* in the Second Reason to Grant the Writ, Bonnell has made the requisite showing of bad faith.

Before his trial, evidence went missing at the hands of law enforcement. Law enforcement checked items into evidence and then checked them out, never to be seen again. The State never provided Bonnell with evidence of any analysis of the items that were collected from Bonnell's car or any analysis of any evidence found on

Bonnell's hands. Two months before his capital trial, someone—either law enforcement or the prosecution—removed firearms evidence from the scientific investigation unit's laboratory and never returned it to its secured place in the lab. *See* Ex. 1, ¶ 73, contemporaneously filed with Bonnell's Motion for Relief in the Supreme Court of Ohio, Case No. 2020-0210.

Then, around the time of Bonnell's trial, trial prosecutor Bombik "checked out" the murder weapon, Bonnell's jacket, firearms evidence, and a pillow from the crime scene. *See* Ex. 18 to Ex. 12, contemporaneously filed with Bonnell's Motion for Relief in the Supreme Court of Ohio, Case No. 2020-0210. None of these items were returned to the secured storage facility in the lab. *Id.* At some time after trial, the prosecutor put at least one of these items – Bonnell's jacket – in his own closet. It was not retrieved from the prosecutor's closet until two years later. Ex. 2 to Ex. 12, contemporaneously filed with Bonnell's Motion for Relief in the Supreme Court of Ohio, Case No. 2020-0210. This jacket did not have any of the victim's blood on it when tested pre-trial in 1987, (Tr. 907) yet when it was finally tested again in 2009, it suddenly had new blood on it that could potentially belong to the victim.

The murder weapon has been missing since the prosecutor checked it out during Bonnell's trial. The State asserted at trial that the gun found by law enforcement after the crime belonged to Bonnell. Joseph Egnor testified that he had seen Bonnell with a gun of the same caliber. Tr. 1223-31. Marlene Roberts testified that she had found another similar gun in her couch and turned it over to police. She believed that the gun she found in her couch belonged to Bonnell. Tr. 1298. However,

the gun Roberts turned over was destroyed in 1992. See Ex. 5 to Ex. 12, contemporaneously filed with Bonnell's Motion for Relief in the Supreme Court of Ohio, Case No. 2020-0210. Interestingly, there is no documentation that the murder weapon was likewise destroyed. All that can be determined concerning the murder weapon is that Prosecutor Bombik checked it out just before Bonnell's trial and never returned it. Ex. 18 to Ex. 12, contemporaneously filed with Bonnell's Motion for Relief in the Supreme Court of Ohio, Case No. 2020-0210. Even so, the State now assumes that the police destroyed the murder weapon just because a similar weapon was, in fact, destroyed.

This evidence, taken together, demonstrated that law enforcement, or the prosecutors themselves, acted in bad faith in their handling of the evidence in Bonnell's case. Instead of methodically preserving evidence in a capital case, the State and its agents did the opposite: they lost, destroyed, or mishandled almost every piece of evidence that Bonnell asserts could prove his innocence. Specific to at least Popil's jacket and Bonnell's white clothes, it was clear that this evidence would have had apparent exculpatory value when Prosecutor Bombik, or another state actor, lost or destroyed these items, proving "bad faith." And as to the shell casings and morgue pellets, which will be discussed further below, it seems that state actors purposefully deceived Bonnell and the courts as to the state of that evidence. This is unacceptable. Bonnell's constitutional right to due process cannot be negated by the State's actions.

In finding that Bonnell failed to establish bad faith by the State, the Ohio state courts adopted the State's self-serving proposed findings, which stated "there is no

evidence that anything that occurred in this case was done contrary to the Cleveland Police Department's normal practice at the time." *See State of Ohio v. Melvin Bonnell*, Case No. CR-87-223820-ZA, Cuyahoga County Common Pleas Court, Findings of Fact and Conclusions of Law, ¶ 39 (Apr. 1, 2020). But what was the Cleveland Police Department's "normal practice at the time?" Bonnell does not know because, despite multiple requests for such information, the State will not provide any manuals or retention policies so that Bonnell can compare the Prosecutor's Affidavit to said policies. At a minimum, the state courts should have ordered an evidentiary hearing before making this finding.

In addition, following the filing of the underlying litigation, additional evidence of bad faith on the part of the Cuyahoga County Prosecutor's Office was uncovered. It was previously assumed, based upon the sworn protestations of Assistant Prosecutor Schroeder in his June 2017 affidavit, that the firearms evidence, including the shell casings and morgue pellets, were missing, i.e. apparently lost, or destroyed. It was not until February 2020 when undersigned counsel discovered this evidence in plain sight in the file maintained by the Prosecutor's Office that the State's assertion was proven incorrect. This discovery was made while Bonnell's underlying case was already in the Ohio Supreme Court on appeal; thus, this fact had not been alleged in the lower courts.

As described above in the Statement of Case and Facts, Prosecutor Zeleznikar and Prosecutor Schroeder (if not the prosecutors that preceded them in this matter) had actual, or at least imputed, knowledge that physical evidence remained in their

file, yet they repeatedly stated the exact opposite to the courts. Assistant Prosecutor Schroeder stated in his report, his affidavit, and to the courts in various pleadings,[8] that no evidence remained at his office. Mr. Schroeder's statements are undeniably false according to a review of the actual file. Further, Prosecutor Zeleznikar both saw and handled the trial evidence in the prosecutor's file just one week before filing his MOJ where he perpetuated these misstatements.

Because this is a death penalty case, the Prosecutor's actions are particularly egregious. The State was prepared to execute Bonnell on February 12, 2020.[9] If not for Governor DeWine's reprieve on December 20, 2019, the State may have succeeded. This was all the while perpetuating the falsehood that no evidence existed in this case to prove Bonnell's innocence.

This Court cannot excuse the Prosecutor's conduct as mere incompetence or "negligence." Indeed, awareness of the inaccuracy as to the state of the evidence demanded corrective action—not doubling down on that inaccuracy. Assistant Prosecutor Zeleznikar's misstatements—made directly to Ohio's highest court—prove prosecutorial bad faith, by demonstrating purpose or official animus. Assuming arguendo that Bonnell had not proven bad faith on the part of the state actors prior

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[8] For a full history of the claim made by the Prosecutor's Office, *see State of Ohio v. Melvin Bonnell,* Case No. 2020-0210, The Supreme Court of Ohio, Bonnell's Motion for Relief and Associated Exhibits (March 30, 2020*)*.

[9] Notably, the February 12, 2020 execution date was not the first execution date requested by the State. By Motion in the Ohio Supreme Court, on May 14, 2010, the State requested that the court set Bonnell's execution date. That Motion was granted, and his original execution date was set for October 18, 2017. Since that time, Bonnell has been litigating under warrant. Governor DeWine subsequently reprieved that date until April 11, 2018, and then again until February 12, 2020.

to this discovery, finding this remaining evidence in the prosecutor's own file, particularly in context of the prosecutor's actions and misstatements to the courts and Bonnell over the last 12-30 plus years, indeed proves "bad faith." *See also* pp. 6-10, *supra* (detailing the suppressed *Brady* material uncovered in postconviction litigation). This Court must find a violation of *Arizona v. Youngblood*, 488 U.S. 51 (1988).

C. Conclusion to the First Reason for Granting the Writ.

Most of the physical evidence remains missing at the hands of the State. Regardless of whether Bonnell has proven that the evidence had apparent exculpatory value or merely potential exculpatory value before it went missing, it no longer matters. Bonnell has proven bad faith on the part of the State. This Court should grant the writ.

Second Reason for Granting the Writ

This Court should accept this case to define for the lower courts what constitutes "bad faith" in the context of this Court's decision in *Arizona v. Youngblood*, 488 U.S. 51 (1988).

When this Court originally decided *Youngblood*, it was mostly silent as to what it believed constituted bad faith on the part of the State. There is a sole footnote that attempts to provide any guidance on this required standard: "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood*, 488 U.S. 51, 56 n.* (1988). Because of this

ambiguous standard, Circuit Courts and state courts alike have interpreted the bad faith requirement in disparate ways.

The First Circuit, the Tenth Circuit, and the DC Circuit, have interpreted this requirement to mean that state agents act in bad faith whenever they fail to preserve evidence they know to be exculpatory. *See United States v. Femia*, 9 F.3d 990, 996 (1st Cir. 1993); *In re Sealed Case*, 99 F.3d 1175, 1178 (D.C. Cir. 1996); *United States v. Bohl*, 25 F.3d 904, 911 (10th Cir. 1994). The Seventh Circuit and the Ninth Circuit, however, will not find bad faith unless the State acted purposefully, as opposed to only knowingly. *See United States v. Chaparro-Alcantara*, 226 F.3d 616 (7th Cir. 2000) (explaining that "the defendant must prove 'official animus' or a 'conscious effort to suppress exculpatory evidence'" to demonstrate bad faith) (citation omitted); *United States v. Estrada*, 453 F.3d 1208, 1213 (9th Cir. 2006) (requiring "malicious intent"). State courts have generally differed along the same fault lines. *See* Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U.L. REV. 241, 290 (2008).

This case presents this Court with the opportunity to resolve this split and to establish a consistent definition of bad faith for use by the lower courts. This Court should also clarify whether a cumulative analysis of police/prosecutor's actions throughout the history of a case may be used to prove bad faith.

This Court could adopt the *knowingly* standard. In adopting this standard, the Court could use this case, and specifically Bonnell's white clothes, as an example of evidence that would have had apparent exculpatory value when collected and at the

time of the loss/destruction, as it would have been apparent if these clothes were (or, more to the point, were not) saturated in blood. In the alternative, this Court could adopt the *purposefully* standard. This Court could again use this case, and the years of deceit by the Cuyahoga County Prosecutor's Office, to exemplify evidence of "purpose" or "official animus" on the part of state actors. In either scenario, Bonnell's case, and the state actors' actions within it, could prove a vehicle to grant this needed guidance to the lower courts.

Third Reason for Granting the Writ

A capital defendant is deprived of due process and meaningful review pursuant to the Eighth and Fourteenth Amendments, when the trial court adopts verbatim, the State's flawed Proposed Findings of Fact and Conclusions of Law that absolve the State of misconduct.

This Court has "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." *Anderson v. City of Bessemer,* 470 U.S. 564, 572 (1985). Federal and state appellate courts have also "repeatedly condemned the ghostwriting of judicial orders." *See e.g.*, *In re Colony Square Co.*, 819 F.2d 272, 275 (11th Cir. 1987). As the Eleventh Circuit noted, the "quality of judicial decisionmaking suffers." *Id*. Further, adopting prosecutor-drafted Findings of Fact and Conclusions of Law leads to the "utter lack of an appearance of impartiality." *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 n.46 (11th Cir. 1997).

Justice Donnelly noted the same in the Ohio Supreme Court, when he stated the following in dissent in this case: "Of all the shortcomings or deficiencies that one might identify in the postconviction review process of death-penalty cases, there are two that have been identified as 'particularly problematic: the reluctance of state trial courts to conduct evidentiary hearings to resolve contested factual issues, and the wholesale adoption of proposed state fact-finding instead of independent state court decision-making.' Steiker, Marcus & Posel, *The Problem of "Rubber-Stamping" in State Capital Habeas Proceedings: A Harris County Case Study*, 55 Hous.L.Rev. 889, 893 (2018)." *See* 6/17/20 Case Announcements #2, 2020-Ohio-3276, attached at Appendix A.

Yet, despite these warnings and protestations that caution against the wholesale adoption of party-written Findings of Fact and Conclusions of Law, this is precisely what happened in this case. *Compare* State's Proposed Findings of Facts and Conclusions of Law, (Jan. 3, 2019), *with* Appendix D; both filed in Cuyahoga County Common Pleas Court, Case No. CR-87-223820-ZA. Unfortunately, this is not an outlier event. Rather, this is standard practice in Ohio trial courts and in Ohio capital postconviction proceedings. And, as Justice Donnelly noted, this was also not the first occasion that this verbatim adoption of prosecutor-drafted findings occurred specific to this case. The trial court had previously verbatim adopted the Prosecutor's Findings of Fact and Conclusions of Law in Bonnell's DNA litigation in 2005 and 2017. *See generally, State of Ohio v. Melvin Bonnell*, Cuyahoga County Common Pleas Court, Docket, Case No. CR-87-223820-ZA.

In the instant case, the trial court's wholesale adoption of these findings deprived Bonnell of due process, since these adopted findings included relying on the State's assertions that there remained no testable evidence. *See State of Ohio v. Melvin Bonnell*, Case No. CR-87-223820-ZA, Cuyahoga County Common Pleas Court, Journal Entry and attached Findings of Facts and Conclusions of Law (Jan. 25, 2019), attached as Appendix D. As undersigned counsel discovered in February 2020, that is incorrect. The shell casings and morgue pellets do, indeed, remain, and could be tested for DNA. *See* Ex. 26, p. 3, contemporaneously filed with Bonnell's Motion for Relief in the Supreme Court of Ohio, Case No. 2020-0210 ("Lastly, it is common practice today to perform Touch DNA testing on discharged cartridge cases collected at homicide crime scenes to establish who may have loaded them into the firearm. Due to the constantly changing eyewitness statements regarding the assailant, I recommend this test be conducted on the three cartridge cases found at the homicide scene.")

Had the trial court not wholesale adopted the Prosecutor's Proposed Findings of Fact and Conclusions of Law, and instead, held an evidentiary hearing where Bonnell could have adequately challenged the self-serving and untested statements made in Assistant Prosecutor Schroeder's June 2017 affidavit, this evidence would have been discovered sooner. Further, this begs the question: what other evidence from this case could still remain somewhere hidden? This is unacceptable, particularly when a man's life is on the line. The wholesale adoption of prosecutor-drafted Findings of Fact and Conclusions of Law further denied any sort of

meaningful review of that decision because the State controlled any and all factual and legal "determinations" made by the trial court.

Moreover, the Prosecutor's Office possessed a direct and personal interest in findings of fact and conclusions of law of a certain nature to absolve itself of misconduct. Thus, the principles underlying this Court's decision in *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), are implicated.

This Court should grant the writ to make it clear to the lower courts that a trial court's wholesale adoption of party-written Proposed Findings of Fact and Conclusions of Law is highly discouraged in all cases, and unacceptable practice in a capital case. This Court's guidance would protect against violations of due process, and support independent judgment and impartial analysis by trial courts throughout the United States.

CONCLUSION

The case presents this Court with several opportunities. Not only is this case an egregious example of the misapplication of this Court's precedent; this case further presents this Court with the chance to finally—and definitively—define what constitutes "bad faith" in the *Youngblood* context. Finally, this case presents this Court with an opportunity to make clear that the wholesale adoption by trial courts of party-written Proposed Findings of Fact and Conclusions of Law is highly discouraged in all cases, and unacceptable in a capital case.

For the foregoing reasons, this Court should grant the writ.

Respectfully submitted,

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