No. 20-6922

In the Supreme Court of the United States

MELVIN BONNELL,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

Where a defendant files a motion for leave to file a motion for new trial, and the state court finds the defendant failed to satisfy state law requirements for pursuing his claim, does the denial rest on adequate and independent state law grounds such that it is unnecessary to reach the substance of his claims?

May a petitioner raise subsequent claims concerning the state's failure to preserve evidence on specific items under *Arizona v. Youngblood,* 488 U.S. 51 (1988) that have already been previously decided and denied by reviewing courts?

Does the trial court's adoption of a parties' proposed findings of fact and conclusions of law violate a defendant's rights under the Eighth and Fourteenth Amendments of the United States Constitution?

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STATEMENT OF THE CASE

A. Relevant facts

On November 28, 1987, at approximately 3:00 a.m., Melvin Bonnell murdered 22-year-old Robert Bunner inside Bunner's apartment on the west side of Cleveland, Ohio. *State v. Bonnell*, 61 Ohio St.3d 179, 179 (1991). This is not, nor was it ever, a close case. In the years since, multiple reviewing courts have recognized that the evidence of Bonnell's guilt is overwhelming. *See, id.*, at 183 (finding that "the evidence of [Bonnell's] guilt to be overwhelming."); *Bonnell v. Mitchell*, 212 Fed.Appx. 517, 526, 528 (6th Cir.2007)(holding in 2007 that the evidence of Bonnell's guilt was "overwhelming" and "extremely strong.")

In the early morning hours of November 28, 1987, Shirley Hatch heard someone knock on the kitchen door of the apartment. Hatch asked who it was and Bonnell announced himself as "Charles." *Id.* When Robert Bunner opened the door, Bonnell entered the apartment, closed the door behind him, and pulled a gun from his pocket and uttered an expletive in Bunner's direction. Bonnell then fired two shots at Bunner at close range. *Id.* Bunner fell to the floor, and Hatch ran to a bedroom where Edward Birmingham was sleeping. Hatch heard two more gunshots, awoke Birmingham to tell him that Bunner had been shot, and then fled the apartment to call the paramedics. *Id.*

Birmingham went into the kitchen and observed Bonnell on top of Bunner, "pounding him in the face." *Id.* Birmingham also observed holes in Bunner's body, then proceeded to remove Bonnell from the apartment. *Id.*

Bonnell led police on a high-speed chase away from Bunner's apartment that ended when he crashed his car into a funeral home. *Id.,* at 180. Police retraced the chase scene and found the murder weapon on the street near where Bonnell crashed his car. *Id.*

Bonnell's case proceeded to a jury trial in 1988. The jury found Bonnell guilty of two counts of aggravated murder and aggravated burglary, as well as one capital specification of felony-murder under Ohio Revised Code 2929.04(A)(7) for killing Bunner during an aggravated burglary. Following the sentencing phase, the jury unanimously recommended the death penalty. The trial court agreed and sentenced Bonnell to death. *Id.*, at 180 – 181.

Two witnesses, Shirley Hatch, and Edward Birmingham, who were inside the apartment at the time of the murder, identified Bonnell at trial as the shooter. In his petition, Bonnell alleges that the state suppressed police reports indicating that these witnesses at first denied to police that they knew Bonnell. *See, Petiton* at pg. 4. However, at trial, Bonnell's defense counsel was aware of this fact and cross-examined both witnesses on this point:

Cross-examination of Edward Birmingham:

Q In the next sentence you say, "I never saw the guy before." Do you remember telling the police that?
A I seen the guy before last year. I didn't see him recently. Like I said, I seen the guy on occasions a couple times, that was it. I didn't recognize the guy at first. When I went to the hospital I knew that is that is the guy that did it, no question, I'll never forget his face.

(Trial Transcript, Tr. 949)

Cross-examination of Shirley Hatch:

> Q And did the police ask you if you knew who this was that did the shooting?
> A Yes, they did. I told him no, I did not. I was hysterical. It happened so fast I took off running.
>
> Q But when the police asked you at 10:00 o'clock in the morning down at the police headquarters, if you knew the person that did the shooting --
> A I told them, no.

(Trial Transcript, Tr. 978-979)

At trial, Bonnell and his attorneys were aware that Edward Birmingham and Shirley Hatch had initially told police that they had never seen the shooter before and did not know who the shooter was. They were cross examined on this point. Bonnell's implication that the state hid this information is belied by the record. This information has been known to Bonnell since trial.

B. Postconviction litigation

1. Direct Appeal

Ohio state courts affirmed Bonnell's convictions on direct appeal and on postconviction review. *See State v. Bonnell*, 61 Ohio St.3d 179 (1991) (direct appeal); *State v. Bonnell*, 1998 Ohio App. LEXIS 3943 (1998) (postconviction). The state supreme court found that the evidence of Bonnell's guilt was "overwhelming." *State v. Bonnell*, 61 Ohio St.3d at 183. This Court denied certiorari over both Bonnell's

direct appeal and postconviction proceedings. *See Bonnell v. Ohio*, 502 U.S. 1107 (1992) (direct appeal); *Bonnell v. Ohio*, 528 U.S. 842 (1999) (postconviction).

2. Postconviction Proceedings

In 1995, Bonnell filed a postconviction petition alleging that the state suppressed exculpatory evidence, either by failing to collect it from the crime scene or failing to preserve it. The state acknowledged that the sought-after evidence had not been preserved. The trial court found that Bonnell failed to establish a due process violation in the lack of preservation of evidence because he failed to show that the state acted in bad faith. The court of appeals affirmed. *State v. Bonnell,* 1998 Ohio App. LEXIS 3943.

3. Habeas Corpus

Bonnell filed a petition for a writ of habeas corpus in United States District Court for the Northern District of Ohio in March of 2000. The district court denied Bonnell's petition. *See Bonnell v. Mitchell*, 301 F. Supp. 2d 698 (N.D.Ohio 2004). The Sixth Circuit unanimously affirmed. *Bonnell v. Mitchell*, 212 Fed.Appx. 517 (6th Cir.2007). The Sixth Circuit found that the evidence against Bonnell was "overwhelming" and "extremely strong." *Id.* at 528, 538. This Court denied Bonnell's petition for a writ of certiorari. *Bonnell v. Ishee*, 552 U.S. 1064 (2007).

4. Applications for DNA testing

In 2004, Bonnell filed an application for DNA testing of the following items: vomit from the kitchen; blood from Bonnell's car; hairs on a green pillow; bags that were placed over his hands at the hospital; blood from the back stairs, stairwell, and

railing; and testing of any swabs or stains taken from Bonnell's hands. The trial court denied the application, finding that none of the materials he sought to have tested existed. *State v. Bonnell,* 2019-Ohio-5342, ¶¶ 23 – 24.

In 2008, Bonnell filed a second application for DNA testing, requesting DNA testing on a jacket recovered from his car after the crash. *State v. Bonnell,* 2018-Ohio-4069, 119 N.E.3d 1285, ¶ 11. The State agreed to DNA testing on the jacket. *Id.* In 2009, DNA test results shows that the victim's blood was on Bonnell's jacket in five different places, thus confirming Bonnell's identity as the killer. *Id.*, at ¶ 12.

5. Bonnell's 2017 Motion for Accounting of Physical Evidence

At that point, Bonnell took no further action in the case for more than seven years. *Id.*, at ¶ 13. In 2017, Bonnell asked the State to account for the whereabouts of any other items of evidence in the case for potential additional DNA testing. *Id.* The State complied with that request and submitted a report documenting its efforts to search for any evidence remaining from Bonnell's trial in 1988. *Id.* The Supreme Court of Ohio summarized those efforts:

> Those efforts included personally searching and/or arranging for searches of the prosecutor's property room, the office of the Cuyahoga County Clerk of Courts, the Cleveland Police department property room, the "dead files" section of the Eighth District Court of Appeals, the Bureau of Criminal Investigation, the Cuyahoga County Medical Examiner's Office, and the Western Reserve Historical Society (which sometimes receives items from old cases). Schroeder spoke with multiple former prosecutors, including the lead prosecutor at trial and a member of the appellate team, as well as investigating police officers and at least one assistant attorney general. He also tried to speak with the court reporter who had transcribed the trial, but she was deceased.

> Schroeder's investigation revealed that the Medical Examiner's Office still had possession of 7 autopsy microslides, 4 swabs from Bonnell's jacket, and 1 swab from an autopsy microslide, as well as the jacket itself. The lead prosecutor had signed out the murder weapon, pellets, and cartridge case on "February 18, 1987 [sic, 1988]" and never returned them. The .25-caliber shell casings had also been signed out, but the name was illegible. A second weapon seized during the investigation, but not connected to the crime, had been destroyed. Other items, including the pillow, had been sent from the police property room to the coroner in November 1987 but never returned.

Id., at ¶ 13 – 14.

The trial court thereafter denied Bonnell's application for DNA testing on two grounds. *Id.*, at ¶ 15. *First*, relying on the prosecutor's affidavit, the trial court found that no evidence still existed for DNA testing apart from the jacket, which had already been tested. *Id.* *Second*, the court found that even if any evidence did exist, Bonnell could not show that any testing would be outcome-determinative considering the overwhelming evidence of his guilt. *Id.*, at ¶ 16. The state Supreme Court unanimously affirmed. *Id.*, at ¶ 27.

C. The instant petition.

In January 2018, Bonnell filed a motion for leave to file a motion for new trial. Bonnell's motion for leave essentially raised two claims. First, Bonnell argued that the State's 2017 report documenting its efforts to search for any additional items of evidence in this case gave rise to a renewed failure-to-preserve evidence claim under *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L.Ed.2d 281 (1988). Second, Bonnell attached a 2017 affidavit from State's witness Shirley Hatch. Although Hatch did not recant her identification of Bonnell as the shooter, Bonnell argued that the affidavit raised some other discrepancies that should cast doubt upon the jury's

verdict. The trial court denied Bonnell's motion for leave and issued findings of fact and conclusions of law in support of that decision. Bonnell appealed. *State v. Bonnell,* 2019-Ohio-5342, ¶ 29.

On appeal, Bonnell raised four assignments of error. He argued that, 1.) the trial court erred when it failed to invoke a due process analysis in denying his motion for leave; 2.) the trial court abused its discretion when it denied his motion for leave since the record demonstrated that he was unavoidably prevented from discovering new evidence; 3.) the trial court abused its discretion when it denied his motion for leave asserting that the newly discovered evidence establishes grounds for a new trial; and 4.) the trial court erred by adopting the state's findings of fact and conclusions of law. *Id.,* at ¶ 30.

The court of appeals did not address Bonnell's first and third assignments of error, finding that his second and fourth assignments were dispositive of this appeal. *Id.,* at ¶ 50. The court of appeals correctly recognized that the evidence Bonnell was relying on was not new, and therefore his motion was untimely. The court noted, "The extensive record in this case is replete with evidence that Bonnell had been aware well before the state's 2017 O.R.C. 2953.75(B) report of the state of the evidence. That is, that the items he sought testing on did not exist. The record demonstrates that this was evident since at least 1995." *Id.,* at ¶ 38. The court further criticized defense counsel for "misleading" the lower courts about the contents of Bonnell's applications for DNA testing in this case. Specifically, the court noted: "Further, any contention Bonnell has regarding the adequacy of the state's search for

the evidence he sought testing on vis-à-vis the testing on his jacket under his 2008 application for testing is *misleading*. Specifically, he had not previously requested testing on the jacket. When he did, the state searched for the jacket, found it, and agreed to testing, which revealed Bunner's blood in five different places." (Emphasis added).

The court of appeals also determined that Bonnell was not unavoidably prevented from discovering Shirly Hatch's 2017 affidavit, noting that "Bonnell [had] not set forth an adequate explanation as to why it took him 30 years to find Hatch. On this record, therefore, the trial court properly found that Bonnell failed to show that he was unavoidably prevented from discovering Hatch's affidavit." *Id.*, at ¶ 42. Furthermore, the court found that "both of Bonnell's grounds on which his request for leave were based — that "new evidence" showed that the state failed to preserve evidence and Hatch provided "new evidence" in her affidavit — have already been litigated and are, therefore, barred under the doctrine of res judicata." *Id.*, at ¶ 43.

Finally, the court also rejected Bonnell's contention that the trial court erred by adopting the state's proposed findings of fact and conclusions of law. The court of appeals found "no error in the trial court's adoption of the state's proposed findings of fact and conclusions of law. Bonnell has not demonstrated that the trial court failed to review the record and the documentation submitted in support of his motion for leave. Further, the trial court judge who considered his motion for leave was the same judge who considered his 1995 petition for postconviction relief and both of the

applications for DNA testing and, therefore, presumably was familiar with the case." *Id.*, at ¶ 48.

On February 10, 2020, Bonnell filed a Notice of Appeal and Memorandum in Support of Jurisdiction asking the Supreme Court of Ohio to grant jurisdiction over this case. He presented the following propositions of law:

> *APPELLANT'S PROPOSITION OF LAW I*: Pursuant to both the U.S. and Ohio Constitutions, a capital defendant's constitutional right to due process is violated when a trial court fails to engage in a due process analysis when the new evidence is raised in a Motion for New Trial was withheld by the prosecution in violation of *Brady v. Maryland,* 373 U.S. 83, 87 (1963)
>
> *APPELLANT'S PROPOSITION OF LAW II*: When a capital defendant establishes by clear and convincing evidence that he was unavoidably prevented from discovering the new evidence within 120 days of conviction, a trial court errs in overruling the Motion for Leave to File a Motion for New Trial on untimeliness grounds.
>
> *APPELLANT'S PROPOSITION OF LAW III*: When a capital defendant submits newly discovered evidence that establishes substantive constitutional violations of that defendant's rights, a trial court errs in failing to grant a new trial.
>
> *APPELLANT'S PROPOSITION OF LAW IV*: A capital defendant is deprived of meaningful review, and his Eighth and Fourteenth Amendment rights are violated when the trial court adopts, verbatim, the State's proposed Findings of Fact and Conclusions of Law.
>
> The Supreme Court of Ohio declined jurisdiction.

D. Discovery of morgue pellets and shell casings.

While this case was pending before the Supreme Court of Ohio, Bonnell's counsel accepted the state's long-standing invitation to Bonnell to inspect the state's file. While reviewing the file, morgue pellets and shell casings were located within. At no point did the state attempt to hide the presence of these items from defense

counsel. Rather, the prosecutor present permitted defense counsel to document and take photographs of the items. And, as the history of this case shows, the state informed the Court and Bonnell that the Prosecutor's office was the last known entity in possession of the morgue pellets and casings. Affidavit of Christopher Schroeder, Prosecuting Attorney's Report, filed June 15, 2017, ¶ 76. Assistant Prosecutor Schroeder even previously informed the Supreme Court of Ohio that, while he believed the items may have been destroyed, he was not sure because he could not find documentation reflecting the destruction. *State v. Melvin Bonnell,* 2017-1360, Oral Argument at the 20:20 mark, https://www.ohiochannel.org/video/supreme-court-of-ohio-case-no-2017-1360-state-v-bonnell (website last access on February 24, 2021).

The state never hid this evidence from Bonnell. Rather, there is a written record of the state's open-door policy in this case. In his original affidavit filed June 15, 2017, APA Schroeder wrote that he was "open to any additional avenues to search for biological material in the Melvin Bonnell case[,]" and that he would "supplement this affidavit and my report pursuant to R.C. 2953.75 with any additional information that I may learn in the future." Affidavit of Christopher Schroeder, Prosecuting Attorney's Report, filed June 15, 2017, ¶ 33. In the Brief of Appellee filed in the court of appeals in the instant appeal, the State "invited Bonnell to suggest any areas in which he felt the State's search was deficient." There were no provisos. The State maintained this open-door policy for 2 1/2 years, receiving only silence in response.

It was not until December 2019, at the prompting of the State, that defense counsel expressed any interest in viewing any evidence in the State's possession at

all. The state thus knew at the time that Bonnell could not show the "good cause" necessary to obtain postconviction discovery through legal process. Yet despite knowing this, the State voluntarily offered defense counsel access to the Prosecutor's Office file. It was through this open-door policy by which the morgue pellets and shell casings were located.

In its response to Bonnell's memorandum in support of jurisdiction filed in the Supreme Court of Ohio, the prosecution limited itself to the record. The dispositive issue in the lower courts was whether the Prosecuting Attorney's report constituted "newly discovered" evidence. It does not. And, relevant to the Court's decision here, this "new evidence" was never part of the appeal to the state courts. Instead, it is anticipated that further testing is may occur in this case.

SUMMARY OF THE ARGUMENT

Bonnell asks this court to address a constitutional claim that was never addressed by the state courts. Bonnell's motion for leave to file a motion for new trial was never granted because he failed to demonstrate that he was unavoidably prevented from discovering the evidence on which he now relies. As such, the court of appeals did not address the merits of his *Arizona v. Youngblood* claim, and the Supreme Court of Ohio properly refused to consider it. Since Bonnell's *Youngblood* claim was never addressed below, it is not the proper vehicle for this Court to address these claims in the first instance.

Even if the lower courts had considered Bonnell's *Youngblood* failure-to-preserve-evidence claims, these claims fall well short of establishing grounds for a

new trial. With respect to the newly located morgue pellets and shell casings that were located during the pendency of this litigation, *Youngblood* does not apply, since *Youngblood* only applies to evidence that has not been preserved. The morgue pellets and shell casings have been preserved. A notice of this available evidence was filed with the trial court 11 months ago. The proper avenue to address the morgue pellets and shell casing lies with the state courts where the items can be subject to additional testing.

The state court's decision denying Bonnell's motion to leave to file a motion for new trial rests-in part-on independent and adequate state law ground. Pursuant to Ohio Rules of Criminal Procedure, an inmate may request leave to file a motion for a new trial based on newly discovered evidence if they can demonstrate that they were unavoidably prevented from discovering the new evidence within 120 days of the verdict. The state courts also found Bonnell's claim was barred as res judicata.

Finally, Bonnell's third argument that certiorari should be granted is unavailing. Despite Bonnell's attempt to frame the trial court's adoption of the state's proposed findings of fact and conclusions of law as a constitutional issue, this Court has not held that the practice is constitutionally prohibited. The prosecutor's proposed findings were publicly filed and available to Bonnell. Bonnell was not prevented from filing his own proposed findings of fact and conclusions of law, he just chose not to do so. And, Bonnell did not file any objection when the prosecutor filed proposed findings of fact and conclusions of law.

There is no reason for the Court to grant certiorari. Bonnell "reasons" include facts that were not properly before the state courts or this Court. The Supreme Court of Ohio did not find it necessary to review Bonnell's claims, nor should this Court.

REASONS FOR DENYING THE WRIT

I. Since Bonnell's *Arizona v. Youngblood* claims were never addressed in the lower courts, and are highly fact-specific, this case is not a good vehicle to address Bonnell's claims.

Bonnell asks this Court to address a constitutional claim that was never addressed by the trial court, the court of appeals, or the Supreme Court of Ohio. Bonnell's motion for leave to file a motion for new trial was never granted because he failed to demonstrate that he was unavoidably prevented from discovering the evidence on which he now relies.[1] As such, the court of appeals did not address the substance of his motion for new trial, and the Supreme Court of Ohio properly refused to consider it.

"It is an established rule of long-standing in [Ohio] that a criminal constitutional question can not be raised in the [Supreme Court of Ohio] unless it is presented and urged in the court below." *State v. Williams*, 51 Ohio St.2d 112, 117, 364 N.E.2d 1364 (1977). *See also City of Toledo v. Reasonover*, 5 Ohio St.2d 22, 213 N.E.2d 179 (1965), paragraph two of the syllabus (this Court "will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court").

[1] The shell casings and morgue bullets that were located during the pendency of this litigation were not part of the record before the Supreme Court of Ohio.

As Bonnell's motion for leave to file a motion for new trial was not granted, neither the trial court, the court of appeals, nor the Supreme Court of Ohio addressed his *Youngblood* claims. The Court should decline certiorari on an issue that was not decided below.

II. Bonnell's *Youngblood* claims are without merit.

Even if the lower courts had considered Bonnell's *Youngblood* claims, they fall well short of establishing grounds for a new trial. *Youngblood* does not impose on the police an "undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Arizona v. Youngblood*, 488 U.S. at 58, 109 S. Ct. 333, 102 L.Ed.2d 281. The State's duty to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

To determine if the State's failure to preserve evidence violates a defendant's right to due process, courts divide evidence into two categories: (1) evidence that is "materially exculpatory," and (2) evidence that is "potentially useful." *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, ¶ 10. For evidence to be considered "materially exculpatory," it "must possess an exculpatory value that was apparent before the evidence was destroyed[.]" *Trombetta* at 489. If the evidence is merely "potentially useful," however, its consumption does not constitute a denial of due process "unless a criminal defendant can show bad faith on the part of the police[.]" *Youngblood* at 57. Absent such a showing of bad faith, the consumption or

failure to preserve evidence that is only "potentially useful" does not constitute a denial of due process. *Id.*

a. The additional items were merely "potentially useful."

Under the *Trombetta/Youngblood* standard, Bonnell could not show that any evidence in this case was "materially exculpatory." The evidence was simply that which Bonnell hoped to test for DNA on the off chance that a surprising result might turn up. This was the very definition of "potentially useful" evidence. The Court in *Youngblood* defined "potentially useful" evidence as "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Youngblood* at 57.

For example, in *Youngblood*, the police did not preserve semen samples that could have eliminated the defendant as the perpetrator. The Court held that the evidence was "potentially useful," and not "materially exculpatory," because "[t]he possibility that the semen samples could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality." *Id.*

Here, the federal district court held in 2004 that "Bonnell has failed to establish that the unpreserved or untested evidence is exculpatory." *Bonnell v. Mitchell*, 301 F.Supp.2d at 729-730. The Supreme Court of Ohio held in 2018 that none of the evidence Bonnell sought for testing would be outcome-determinative. *State v. Bonnell*, 155 Ohio St.3d 176, 2018-Ohio-4069, 119 N.E.3d 1285, ¶¶ 21-25. Those holdings are now res judicata. They establish that the evidence in question is not exculpatory and is at most only "potentially useful."

Even the way that Bonnell explains his argument here demonstrates that the evidence is only "potentially useful." For example, Bonnell writes: "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." *See, Petition* at p. 27; "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." *See, Petition* at p. 28. Bonnell's petition is replete with these types of if/then conditionals. It is equally likely (and given the amount of other evidence against Bonnell, quite probable) that additional testing "might have proved Bonnell's presence at the apartment and involvement in the murder." *Bonnell v. Mitchell*, 301 F.Supp.2d at 730. The value of any of these items, as Bonnell acknowledges, depends upon additional hypothetical testing. Quite literally every item of evidence in every case would be "materially exculpatory" under Bonnell's use of the term. Applying *Youngblood,* all the evidence in this case fell into that "potentially useful" category.

Moreover, Bonnell's specific examples here are claims he has already litigated unsuccessfully. Bonnell argues that the State suppressed evidence regarding witness Joey Popil. *See, Petition* at pgs. 26 – 28. The Sixth Circuit Court of Appeals rejected these claims:

> "Similarly, Bonnell's assertion of a Brady violation in the non-disclosure of certain police reports discussing Popil is flawed because of the petitioner's failure to establish that any material evidence was suppressed. Bonnell argues before this court that the descriptions of the murderer given by Birmingham and Hatch also fit Popil, that Popil was observed shortly after the shooting wearing a jacket stained with a substance that appeared to be blood, and that Popil was familiar with the idiosyncrasies of the murder weapon. Popil himself testified at trial,

> however, and defense counsel was given a full opportunity to cross-examine the witness about any alleged involvement in the murder of Eugene Bunner. Because Bonnell knew of Popil's existence and was able to elicit whatever information he wished from the witness at trial, the petitioner was in no way harmed by any suppressed reports that might have described facts about which Popil was eventually cross-examined."

Bonnell v. Mitchell, 212 Fed. Appx at 523-24.

Bonnell argues that the testing of his clothing might prove exculpatory if it revealed the absence of the victim's blood. *See Petition* at pgs. 27 – 28. The Supreme Court of Ohio rejected this claim:

> It stands to reason that the assailant would have Bunner's blood on his clothing. Therefore, Bonnell suggests, DNA testing of his clothes that failed to detect the victim's blood would make it obvious that he could not have committed the crime. But the state's forensic witness testified at trial that Bunner's blood was not on the jacket, so Bonnell already had the opportunity to argue his innocence based on the absence of blood evidence. Despite this evidence, the jury convicted him. A new test would not strengthen his innocence claim.

State v. Bonnell, 2018-Ohio-4069, 119 N.E.3d 1285, ¶ 21.

Bonnell argues that vomit found at the crime scene might prove exculpatory. *See, Petition* at pg. 29. The Supreme Court of Ohio also rejected this claim: "Bonnell's claim that vomit may be outcome determinative is not well taken. There is no evidence in the record to suggest that the vomit was ever collected or stored, and therefore, it cannot be outcome determinative." *State v. Bonnell,* 2018-Ohio-4069, ¶ 24.

The decades of precedent and litigation in this case show that Bonnell's claims are meritless and procedurally barred.

b. Bonnell cannot infer bad faith from the mere failure to preserve items of potential evidentiary value.

Because Bonnell can, at most, say that the items are "potentially useful," he is required to show bad faith.

> "The term 'bad faith' generally implies something more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive, or ill will partaking of the nature of the fraud. It also embraces actual intent to mislead or deceive another."

State v. Powell, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 81. The "inquiry into bad faith 'must necessarily turn on the [government's] knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.'" *United States v. Bohl*, 25 F.3d 904, 911 (10th Cir.1994), quoting *Youngblood*.

Youngblood's is a very high standard. "Negligence, even gross negligence, on the part of the government does not constitute bad faith." *United States v. Spalding*, 438 Fed.Appx.464, 466 (6th Cir.2011). *See Youngblood* at 58 (where the failure of police to preserve evidence could "at worst be described as negligent.... there was no violation of the Due Process Clause"). Rather, bad faith requires a defendant to prove an "official animus" or "a conscious effort to suppress exculpatory evidence." *United States v. Wright*, 260 F.3d 568, 571 (6th Cir.2001).

Bonnell offers no evidence of bad faith. His analysis here consists of rehashing the various items that he has known since at least 1995 were not preserved. He then asks this Court to infer from nothing that those items cannot be located because the state must have systematically destroyed them in deliberate bad faith attempt to prevent Bonnell from proving his alleged innocence. Other than the fact that the items cannot be located, however, there is no evidence of bad faith anywhere in Bonnell's motion.

A court "cannot infer bad faith from the mere act of its destruction." *D'Ambrosio v. Bagley*, N.D. Ohio No. 1:00 CV 2521, 2006 U.S. Dist. LEXIS 12794, *162 (Mar. 24, 2006). *See also United States v. Taylor*, D.D.C. No. 17-129, 2018 U.S. Dist. LEXIS 97845, *12 (June 12, 2018) ("bad faith cannot be inferred from the mere act of nonpreservation itself"); *Magraw v. Roden*, 743 F.3d 1, 8-9 (1st Cir.2014) ("It will often be the case that evidence no longer available might have been inculpatory, exculpatory, or simply inconclusive. If the state's failure to preserve such evidence could give rise to an inference that the evidence was exculpatory, there would be little need from the *Trombetta-Youngblood* dichotomy"); *United States v. Cody*, E.D. Tenn. No. 2:04-CR-14, 2006 U.S. Dist. LEXIS 16275, *2 (Apr. 4, 2006) ("The mere fact that the government disposed of the tapes in some manner does not by itself establish bad faith or provide any sort of inference that government officials acted in bad faith").

It is not surprising in a 30-year-old case which predated DNA testing, that many items collected from the crime scene would not still be available. This is especially true where virtually none of the items Bonnell discusses were introduced as exhibits at trial, with the exceptions of (1) Bonnell's jacket and (2) the murder weapon. Bonnell never requested that the State preserve any evidence prior to 1995. The record reveals no evidence of a "calculated effort to circumvent [*Brady's*] disclosure requirements[,]" "official animus[,]" or a "conscious effort to suppress exculpatory evidence." *Trombetta* at 488.

When it denied Bonnell's postconviction petition in 1995, the trial court found that bad faith did not exist in this case: "A review of the facts fails to show that the

State acted in bad faith in preserving the evidence in this case. Accordingly, Petitioner's third Claim for Relief lacks merit." The federal district court agreed. *See Bonnell v. Mitchell*, 301 F.Supp.2d at 729-730. The only thing that has changed between then and now is that the state conducted an exhaustive search for any evidence in this case in 2017, and submitted a comprehensive report and affidavit documenting those efforts. The state's diligent and thorough efforts in that regard shows significant *good* faith on the part of the State.

Finally, Bonnell attempts to utilize the morgue pellets and shell casings that were located during the litigation of this action as evidence of bad faith. His argument fails for two reasons.

First, the location of the morgue bullets and shell casings undermines his own *Youngblood* claim, since *Youngblood* only applies to evidence that was not preserved and no longer exists. Since these morgue pellets were located, no *Youngblood* claim can lie since this evidence has been preserved.

Second, at no point did the state attempt to hide the presence of these items from defense counsel. The state *invited* defense counsel to review the files for evidence. Affidavit of Christopher Schroeder, Prosecuting Attorney's Report, filed June 15, 2017, ¶ 76. In responding to Bonnell's memorandum in support of jurisdiction, the state limited itself to the record before the Supreme Court of Ohio. The newly located casings and pellets were not a part of that record. The dispositive issue in the lower court was whether the Prosecuting Attorney's report constituted "newly discovered" evidence. It did not. Bonnell knows that the state's position has

been that the items requested and listed in the report were not preserved or could not be found for testing. While additional evidence has recently been located, that does not change whether the Supreme Court of Ohio should have granted jurisdiction, or whether the Court should grant the writ. To the contrary, it can be safely assumed that the evidence may lead to additional requests for testing or other motions, but those are appropriately raised at the trial court. The location of the morgue pellets and shell casings did not transform the Prosecuting Attorney's report into something it clearly is not.

In declining jurisdiction, the Supreme Court of Ohio did not decide matters related to the morgue bullets or shell casings. The Supreme Court of Ohio has long held that "a reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Hunter,* 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 46 (*quoting State v. Ishmail,* 54 Ohio St.2d 402, 377 N.E.2d 500, paragraph one of the syllabus). The morgue pellets and shell casings were not before the lower courts and are not properly before the Court. The state of the record remained unchanged.

The Court should decline to issue the writ because it is likely that there will be additional litigation in the state courts. In fact, it was the state, not Bonnell, that has filed a Notice of Available Evidence with the trial court, indicating the state's willingness to have the new evidence tested if applicable. The proper place to raise the issue of the morgue pellets and casings are in the trial court.

c. Bonnell cannot show prejudice from the non-preservation of any additional items.

The trial court found that Bonnell could not establish prejudice under *Youngblood* for two reasons.

First, the Supreme Court of Ohio held in Bonnell's 2018 appeal that additional DNA testing on the items in question "would not have changed the outcome of the trial." *State v. Bonnell*, 155 Ohio St.3d 176, 2018-Ohio-4069, 119 N.E.3d 1285, ¶ 21. The Supreme Court of Ohio found that the trial court properly denied Bonnell's application for DNA testing because Bonnell failed "to show that DNA testing, if performed, would yield a result that would be outcome determinative." *Id.*, ¶25. If testing of these items would not change the outcome, Bonnell cannot show prejudice. *See* Findings of Fact and Conclusions of Law, filed Jan. 25, 2019, ¶ 41.

Second, Ohio's postconviction DNA testing statute generally prohibits the trial from considering any additional requests for DNA testing in this case.[2] Ohio Revised Code § 2953.72(A)(7) provides that "if the court rejects an eligible offender's application for DNA testing because the offender does not satisfy the acceptance criteria described in division (A)(4) of this section, the court will not accept or consider subsequent applications[.]" The trial court rejected Bonnell's application for DNA testing in 2017. The Supreme Court affirmed that decision. As a result, the trial court has no jurisdiction to consider any additional, successive applications for DNA testing. *See* Findings of Fact and Conclusions of Law, filed Jan. 25, 2019, ¶ 42.

[2] Nonetheless, as discussed above, the state has filed a Notice of Available Evidence with the trial court, indicating the state's willingness to have the new evidence tested if applicable.

Bonnell does not address either of these findings in his brief, and they are both fatal to his *Youngblood* claim.

III. The trial court's adoption of a party's findings of fact and conclusions of law with respect to a ruling on a Motion for Leave to File a Motion for New Trial, pursuant Ohio's Rules of Criminal Procedure, is not properly before this court.

In January 2018, Bonnell filed a motion for leave to file a motion for new trial, pursuant to Ohio Rules of Criminal Procedure Rule 33(B). In denying Bonnell's motion for leave, the trial court adopted the state's proposed findings of fact and conclusions of law. Bonnell challenges the trial court's adoption of the proposed findings.

The Court "has long held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989). The decision in this case rested upon an independent and adequate state law ground that rendered any federal constitutional question moot.

The Ohio Rules of Criminal Procedure (Ohio Crim.R.) provide an avenue for convicted inmates to move the trial court for a new trial. Ohio Crim.R. 33 provides the framework for which a defendant may be granted a new trial. One of the grounds that a new trial may be granted is if there is "new evidence material to the defense [that] is discovered which the defendant could not with reasonable diligence have discovered and produced at trial." Ohio Crim.R. 33(A)(6). Ohio Crim.R. 33(B) states that an application for a new trial must be made within fourteen (14) days after the

verdict has been rendered. If the motion for a new trial is made upon the grounds of newly discovered evidence, the motion for a new trial must be made within one hundred and twenty (120) days after the day upon which the verdict was rendered.

In the case at bar, the verdict was rendered decades before the instant motion was filed. As such, Bonnell's motion had been filed well outside the deadlines set forth in Crim.R. 33. Nonetheless, a defendant may avoid these deadlines if he can prove by clear and convincing evidence that he was unavoidably prevented from the discovery of the evidence upon which he is relying. Ohio Crim.R. 33(B). In response to Bonnell's motion, the state submitted proposed findings of fact and conclusions of law. The court adopted these findings. Bonnell did not file his own findings of fact and conclusions of law; nor did he respond or object to the state's proposed findings after the state filed them.

In Ohio, it is well-recognized that, "[i]n the absence of demonstrated prejudice, it is not erroneous for the trial court to adopt, in verbatim form, findings of fact and conclusions of law which are submitted by the state." *State v. Thomas*, 2006-Ohio-6588, ¶ 15, citing *State v. Powell*, 90 Ohio App.3d 260, 263, 629 N.E.2d 13 (1993). "A trial court may adopt verbatim a party's proposed findings of fact and conclusions of law as its own if it has thoroughly read the document to ensure that it is completely accurate in fact and law." *Id.*, citing *State v. Jester*, 2004-Ohio-3611, ¶ 16.

Nothing in this case indicates that the trial court failed to review the record and the materials submitted before ruling. The trial court judge was the same one who adjudicated Bonnell's 1995 postconviction petition and both of his applications

for DNA testing, and so was very familiar with the prior postconviction proceedings in the case. Additionally, no prejudice exists where, as here, "the State applied the appropriate legal analysis to the facts presented." *State v. Williams*, 2013-Ohio-2706, ¶ 26.

Bonnell asserts that if the trial court did not adopt the state's proposed findings of fact and conclusions of law and instead held a hearing, the recently located morgue pellets and shell casings would have located sooner. This position is rife with speculation. It also ignores the fact that it was not until December 2019, at the prompting of the state, that defense counsel expressed any interest in viewing any evidence in the state's possession at all. The state knew at the time that Bonnell could not show the "good cause" necessary to obtain postconviction discovery through the legal process, therefore a hearing would not have led to any additional discovery. Yet despite knowing it had no legal obligation to do so, the state voluntarily offered defense counsel access to the Prosecutor's Office file. Rather, it was the prosecutor's longstanding good faith open-door policy and invitation to Bonnell to review its files which resulted in the location of this evidence. It is unclear how a hearing on Bonnell's untimely motion for leave to file a motion for new trial would've expedited the matter.

Bonnell has failed to identify any legal deficiencies or prejudice suffered by the trial court's adoption of the state's proposed findings. Instead, he focuses on the state's own good faith invitation to Bonnell in allowing him to inspect its files as evidence that the trial court erred in adopting the state's proposed findings. It is

unlikely that a hearing on Bonnell's motion would have led to the location of the morgue pellets and shell casings given the focus of Bonnell's motion. A hearing would not have changed this.

The trial court's decision to adopt the state's proposed findings of fact and conclusions of law has no impact on Bonnell's rights under the United States Constitution. Bonnell disagrees with the conclusions that were reached, but that doesn't amount to a valid constitutional claim. Bonnell's motion for leave to file a motion for new trial was denied on adequate and independent state grounds, and the Court should not grant the writ to review claims that do not involve Bonnell's rights under the United States Constitution.

CONCLUSION

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

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