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 Supreme Court of Ohio

PETITIONER'S REPLY BRIEF

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REPLY

In failing to reply to any of Respondent's arguments, Bonnell is not conceding that his argument lacks merit; rather, Bonnell relies upon his initial Petition.

I. Respondent's Statement of the Case.

Before addressing Respondent's legal argument, Bonnell first needs to address certain critical misstatements presented in Respondent's Statement of the Case.

First, Respondent alleges that Bonnell was aware at trial of Hatch and Birmingham's initial statement denying that they knew Bonnell. Respondent's Brief at pp. 2-3. First, Hatch and Birmingham denied knowing the *perpetrator*. This statement is critical because both did, in fact, know Bonnell. Prior to trial, Bonnell's counsel were aware that Hatch and Birmingham initially stated that they had never seen the shooter before and did not know who he was, and they were able to narrowly cross-examine the witnesses on this single instance. But the Prosecution suppressed

additional police reports where, early on, Hatch and Birmingham consistently denied knowing the perpetrator. *See State of Ohio v. Melvin Bonnell,* Case No. CR-87-223820-ZA, Cuyahoga County Common Pleas Court, Petition to Vacate or Set Aside Judgment and/or Sentence Pursuant to Ohio Revised Code Ann. Section 2953.21 (filed March 16, 1995), hereinafter [PCP] at Exhibit K ("Shirley [Hatch] does not know the suspect and has never seen him before") and ("He [Ed Birmingham] has never seen the suspect before this incident"). *See also* Ex. E-8, p. 1 ("Asking this male [Ed Birmingham] if he ever saw the guy that killed Eugene, before that night. He said that he never seen this guy before."); Ex. E-4, p. 3 ("Hatch went on to say that she had never seen the suspect prior to tonight"); and E-2 ("I [Hatch] never say [sic] this man before that did the shooting."). The two are not mutually exclusive, as Respondent seems to suggest.

In addition, the Prosecution suppressed additional police reports containing contradictory descriptions by Hatch, Birmingham, and others, which were inconsistent with identifying Bonnell as the perpetrator. Exs. E-2 and E-3; *see also* PCP Exhibits B and H. As argued in Bonnell's initial petition, the Prosecution also withheld various other *Brady* evidence, including police reports that indicate that both Hatch and Birmingham were severely intoxicated, despite their claims otherwise (Ex. E-4, p. 4), the results of a negative gunshot residue test that was conducted on Bonnell's jacket (Ex. E-7), and police reports who Officers Montalyo and Jesionowski claimed at trial did not exist and which contradict where the "chase"

started. *Compare* Tr. 1139, 1261, 1266, 1274; *with* E-4, p. 5. None of these suppressed reports were uncovered by Bonnell and his counsel until post-conviction.

In making this claim, Respondent also disregards the pertinent caselaw. Respondent's Brief at pp. 1-3. Undeniably the "*Brady* duty extends to impeachment evidence as well as exculpatory evidence." *Youngblood v. West Virginia*, 547 U.S. 867, 869, (2006) (citing *United States v. Bagley*, 473 U.S. 667, 676, (1985)). This Court has "disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). Just because Bonnell's counsel was aware of a single incongruous statement, undermining the witnesses' identification, does not excuse the State from its obligation to disclose additional impeachment evidence. Moreover, "[t]he fact that some impeachment occurred at [] trial does not mean that the [additional] impeachment would have been immaterial or cumulative." *Blackston v. Rapelje*, 780 F.3d 340, 354 (6th Cir. 2015), citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("[W]e do not believe that the fact that the jury was apprised of other grounds for believing that the witness . . . may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one."). Thus, Respondent's argument that "Bonnell's implication that the state hid this information is belied by the record…[t]his information has been known to Bonnell since trial" is misinformed and is not true, as argued above.

Next, Respondent omits certain aspects of Bonnell's procedural history. *See* Respondent's Brief at pp. 3-11. With regards to Bonnell's 1995 postconviction proceedings, in addition to filing a postconviction petition alleging that the state

suppressed exculpatory evidence, Bonnell also sought discovery of the State's exhibits from trial, which included the morgue pellets and shell casings. *See Bonnell,* CR-87-223820-ZA, Brief in Opposition to Defendant's Motions for Discovery (filed May 2, 1995); and Entry Denying Petitioner's Motion for an Order to Compel the Cuyahoga County Prosecutor's Office to Preserve and Allow Inspection of Potential Exculpatory Evidence (October 16, 1995). The Prosecutor's Office opposed Bonnell's request, and the trial court denied it. *See Id*.

Respondent's account also omits certain aspects of Bonnell's DNA litigation. Respondent's Brief at pp. 4-5. Notably, in his 2004 Application for DNA testing, Bonnell explicitly sought DNA testing of several specifically identified items. In the prayer for relief, he further 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 Bonnell, CR-87-223820-ZA, Memorandum in Support of Application for Post-Conviction DNA Testing, 12-13 (Oct. 29, 2004) (emphasis added). Thus, although he may not have delineated every piece of evidence from the case, it was Bonnell's intent that the Prosecutor's Office search for any remaining biomaterial[1] evidence, not just that which he explicitly requested.

When Bonnell filed his DNA Application, it triggered the Prosecutor's duty to conduct a reasonably diligent search for evidence. *See* R.C. 2953.75. A diligent search

[1] The terms "biomaterial evidence" and "biological material" refer to items of evidence that might contain DNA and would include Bonnell's jacket, shell casings, and morgue pellets.

would have obviously included the file maintained at the Prosecutor's Office where the morgue pellets and shell casings were housed and also the Clerk of the Eighth District Court of Appeals where the jacket was found in 2006.[2]

Following Bonnell's First DNA Application, the jacket was located and Bonnell filed a Second Application for DNA testing. In the State's Initial Response to Bonnell's Second DNA Application, the Assistant Prosecutor at the time, Jon Oebker, not only explained that he found Bonnell's jacket and was amenable to DNA testing of it, but also wrote, "The state is also continuing with its ongoing obligation to establish the existence of any and all evidence in this trial." *See Bonnell*, CR-87-223820-ZA, Cuyahoga County Common Pleas Court, Initial Response to Second DNA Application, 1-2, (April 23, 2008). Thus, as early as 2008, the Prosecutor's Office acknowledged an affirmative duty to look for *any and all* evidence from this case. Bonnell waited several years for the Prosecution to follow through before asking again, in 2017, for an accounting of the evidence in his case.

Concerning the discovery of the morgue pellet and shell casings, Bonnell disputes that there was any "long-standing invitation" to inspect the Prosecutor's file as Respondent submits.[3] Respondent's Brief at p. 10. In fact, there is evidence to the

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[2] The Clerk of the Eighth District Court of Appeals was included among "All other reasonable sources" in Mr. Schroeder's 2017 Report Pursuant to R.C. 2953.75 (B), *see* Affidavit of Christopher Schroeder, Prosecuting Attorney's Report, filed June 15, 2017.

[3] In support of this supposed "open" invitation, the State cites paragraph 76 of Prosecutor Schroeder's 2017 affidavit, which reads:
"On June 14, 2017, I spoke to Tina Stewart, a Scientific Examiner with the Cleveland Division of Police, detailed to the Medical Examiner's Office. Ms. Stewart provided me with copies of the Forensic Laboratory Report cards for the .25 Tanfoglio pistol

contrary. Not only did the Prosecutor's Office oppose Bonnell's formal requests for discovery in postconviction, the very same document that Respondent relies on in an attempt to make this point is, in fact, internally inconsistent on this issue. Former Prosecutor Schroeder's 2017 affidavit demonstrate it also was not an "open" invitation, as Respondent now suggests. *See*, Affidavit of Christopher Schroeder, Prosecuting Attorney's Report, filed June 15, 2017.

Moreover, despite omitting anything suggesting an open invitation in his initial affidavit, former Prosecuting Attorney Schroeder then added certain language to his newly updated April 1, 2020 affidavit. This affidavit, which was only filed in the trial court after Bonnell's March 30, 2020 pleadings were filed in the Ohio Supreme Court, is the first place where Prosecutor Schroeder claimed to have made this "open offer" to Bonnell's then investigator. *Compare* Affidavit of Christopher Schroeder, Prosecuting Attorney's Report, filed June 15, 2017, at ¶ 5 *with* Affidavit of Christopher Schroeder, filed April 1, 2020, at ¶ 9. In addition to not appearing in his first affidavit, the purported openness of any invitation was also undercut by his preceding statements in the updated 2020 affidavit where he indicated that he

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(Lab #244381), the morgue pellets (Lab #244492), the .25 cartridge case (Lab #244815), and two .25 caliber shell casings (Lab #245065). These accounted for the remaining four items received by SIU (the fifth item, the .25 caliber Titan handgun, having been destroyed in 1992). The cards for the .25 Tanfoglio pistol, the morgue pellets, and the .25 cartridge case all contained handwriting showing that they had been signed out to trial prosecutor Rick Bombik on February 18, 1987 (which I believe to be a typo intended to reflect 1988). The card for the two .25 caliber shell casings showed that it was signed out to another individual, whose name was illegible to me, on February 18, 1988. There was no further indication of what happened to any of the items." This paragraph merely documents that several pieces of evidence, last in the possession of the State, were lost, destroyed, or otherwise unaccounted for.

informed the same investigator that "the Office would not allow a defense investigator unrestricted access to [the] file…" and that they "could not agree to such a broad request." *See id*. at ¶¶4-5. Thus, to the extent that any invitation was ever extended, it was rescinded and withdrawn until Ms. Rigby requested such access, and Prosecutor Schroeder agreed to it, in late 2019.

Finally, Bonnell disputes Respondent's position that the State never hid this evidence from Bonnell, and that Schroeder was "open to any additional avenues to search for biological material in the Melvin Bonnell case." Prosecutor Schroeder did indicate a willingness to search "additional avenues," and Bonnell concedes that he did not offer up any. However, that is not the point. Respondent's Brief at p. 10. It was not up to Bonnell to ask that Prosecutor Schroeder search his own file again, particularly when the Prosecutor represented in his 2017 affidavit that he diligently searched the four boxes in possession of the Prosecutor's Office and then affirmed that "those four boxes contained only paper documents." *See* Affidavit of Christopher Schroeder, Prosecuting Attorney's Report, filed June 15, 2017 at ¶ 5 ("I informed her 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 also Id*. at ¶ 10 ("the only items we [the Prosecutor's Office] had related to Bonnell's case were the four boxes of paper documents I had already both reviewed and informed Investigator Quattrochi about."); and ¶ 16 ("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.").

Respondent faults Bonnell for failing to suggest "any areas in which he felt the State's search was deficient." Respondent's Brief at p.10. But Bonnell was entitled to rely on the Prosecutor's representation that he was diligent in his search—particularly of his own file.

II. First Reason for Granting the Writ.

Respondent first argues that since Bonnell's claims are very fact-specific and were never addressed by the lower courts, that his case is not a good vehicle for answering the constitutional questions posed here. That is not the case. For all the reasons previously submitted in Bonnell's Second Reason for Granting the Writ, the Court should accept this case and provide guidance to the lower courts.

Respondent's reliance on *State v. Williams,* and *City of Toledo v. Reasonover,* is unpersuasive. *See* Respondent's Brief at p. 13. First, Bonnell's case is distinguishable from both of these cases, as Bonnell consistently raised and argued his *Youngblood* claims at every opportunity in the lower court. *See City of Toledo v. Reasonover,* 5 Ohio St.2d 22 (1965); (where the defendant raised a new argument, for the first time before the Ohio Supreme Court, seven days before the case was set for oral argument on the merits); *see also State v. Williams*, 51 Ohio St.2d 112 (1977), *vacated in part*, 438 U.S. 911, 98 S. Ct. 3137 (1978) (where the defendant, after failing to object at trial or raise it in the intermediary court of appeals, raised a failure to object to jury instruction for the first time in the Ohio Supreme Court).

Respondent next cites caselaw that it is generally the practice of the Ohio Supreme Court to "ordinarily" decline to decide a claim. Respondent's Brief at p. 13.

But Respondent cites no authority that declares that the state court could not exercise its discretion to do so, nor does Respondent cite any authority suggesting that this Court has previously followed, or is bound in any way, by this practice.

III. Second Reason for Granting the Writ.

Respondent argues that the evidence Bonnell seeks is only "potentially useful," but that is not the case. Respondent's Brief at pp. 15-17. At a minimum, Respondent fails to address any of the clothing that Bonnell was wearing on the night of the murder, all of which would have apparent exculpatory value.

The clothing Bonnell was wearing on the night of the crime, including his white pants, white socks, and boots, possessed an apparent exculpatory value. When his clothing was collected, there were no records that noted stains on the clothing. But this is inconsistent with the gore present at the crime scene. 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. Tr. 897, 921, 937, 943.

Thus, if Bonnell were the shooter, Bonnell's white pants, white socks, and boots would have been blood-spattered and damningly inculpatory. But the Prosecution did not present any evidence of this at trial, so the logical inference is that these items were not useful to the State's case, were not covered in blood, and were, thus, exculpatory. The State drew the same logical inference and previously conceded that some of the missing evidence in question was exculpatory in nature. *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 ("Our position is that the jury 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.). Bonnell's clothes, in particular, were not merely potentially useful, but, instead, would have had immediately apparent exculpatory value at the time of the loss or destruction.

Next, Respondent argues that Bonnell cannot establish bad faith. Respondent's Brief at pp. 18-19. In advancing this argument, Respondent underscores the precise reason that Court intervention is necessary. Respondent's response ignores the split among the Circuits and state courts as to what constitutes bad faith and just assumes that the higher, "official animus" standard must be met in order to establish bad faith. *Id*. at p. 18. But as detailed in Bonnell's Petition, 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. This case presents this Court with the opportunity to resolve this Circuit and state court split and to establish a consistent and clear definition of what "bad faith" means for use by the lower courts.

Respondent next alleges that "The state's diligent and thorough efforts in that regards shows significant *good* faith on the part of the State." Respondent's Brief at p. 20 (emphasis in original). Respondent seemingly ignores the fact that this search failed to yield some of the very evidence Bonnell was seeking: the ballistics evidence.

See Bonnell, CR-87-223820-ZA, Melvin Bonnell's Motion to Compel Discovery (filed March 16, 1995). A thorough search would necessarily have included checking in the files maintained at the Prosecutor's Office. And any search of that file should have revealed the pellets and casings. But Prosecutor Schroeder maintained that no such evidence existed. Affidavit of Christopher Schroeder, Prosecuting Attorney's Report, filed June 15, 2017, ¶¶ 5, 10, 16. So, either the State's search was not diligent and thorough, as Respondent suggests, or Prosecutor Schroeder knowingly made misstatements in his affidavit to conceal the evidence.[4] Critically, none of these scenarios demonstrate, as Respondent suggests, good faith on the part of the State.

Respondent again argues that the State did not attempt to hide the evidence and invited defense counsel to review the files, but also claims "it was the state, not Bonnell, that has filed a Notice of available evidence in the trial court." Respondent's Brief, at pp. 20-21. Bonnell previously addressed Respondent's argument pertaining to the purported "open" invitation. *Supra*, Section I.. Further, Respondent fails to appreciate that the State only filed the notice in the trial court after it had pled in the Ohio Supreme Court, following the discovery of the ballistic evidence, the following:

> 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***

[4] One final, unlikely option also exists: another state actor somehow removed the evidence from the file prior to Prosecutor Schroeder's review of the file, only to later return it, despite it being housed in off-site storage.

> ***evidence was not preserved. This has never been a secret.*** The State never hid it from Bonnell.

See State of Ohio v. Melvin Bonnell, Case No. 2020-0210, Supreme Court of Ohio, Memorandum in Opposition to Jurisdiction (Mar. 4, 2020*)* (emphasis added). It was not until undersigned counsel filed a Motion to Strike the State's filing in the Ohio Supreme Court based on the misrepresented status of the evidence that the State was prompted to notify the lower court about the existence of the evidence.

Respondent also claims that Bonnell cannot succeed on his *Youngblood* claim because he "cannot show prejudice." Respondent's Brief at p. 22. First, a showing of "prejudice" is unnecessary pursuant to *Arizona v. Youngblood*, 488 U.S. 51 (1988). Even assuming that the Court does not believe that the evidence that Bonnell complains of did not have immediate exculpatory value, and was merely potentially useful, Bonnell has established bad faith on the part of the State. Thus, he has proven a violation of *Youngblood*. He need not prove anything more. *Id.* 488 U. S. at 58.

Finally, Respondent alleges that the fact that Ohio's postconviction DNA statute generally does not allow for successive request for DNA testing is fatal to Bonnell's *Youngblood* claim. Respondent's Brief at p. 22. This argument is inapposite, as one has nothing to do with the other. Bonnell is arguing to this Court that he deserves relief pursuant to a Motion for New Trial that he filed in the trial based, in part, on *Youngblood*. This is not the appeal of, nor a successor request for, DNA testing.

IV. Third Reason for Granting the Writ.

Respondent argues that because Ohio courts have decided that 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," that the Court should agree with the same and allow this practice to continue. Respondent's Brief at pp. 24. However, instead of being a reason to deny review of this case, that is a reason that this Court should accept review here. Bonnell's case offers a vehicle for the Court to finally decide what it has hinted at previously when it "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 City, N.C.,* 470 U.S. 564, 572 (1985)

In addition, Respondent's argument that this Court should decline to grant certiorari in this case as to the First Reason for Granting the Writ underscores this very issue. Respondent argues that "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." *See* Respondent's Brief at pp. 13. But any deficiencies in the trial court's finding of facts and conclusions of law are more accurately attributable to the State, who authored the findings in the first place. This is precisely the policy reason this Court reached its decision in *Anderson*. Justice Donnelly of the Ohio Supreme Court echoed that analysis in his dissent. *See* 6/17/20 Case Announcements #2, 2020-Ohio-3276, previously attached at Appendix A ("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.'").

Further, the Prosecutor's Office possessed a direct and personal interest in preparing 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 similarly implicated when the findings are used to deny Petitioner further review—as Respondent attempts here. *See* Respondent's Brief at pp. 13.

Bonnell would also note that Respondent's characterization of the December 2019 "offer" "at the prompting of the state" to the review the Prosecutor's file is untrue. Respondent's Brief at p. 25. It was undersigned counsel who requested access to the file; Prosecutor Schroeder then agreed. *See* Affidavit of Christopher Schroeder, filed April 1, 2020, at ¶ 38; Affidavit of Attorney Kimberly Rigby, filed March 23, 2020, at ¶ 3.

Finally, Respondent's position that it is "rife with speculation" that had the trial court held a hearing on this motion, Bonnell may have discovered the morgue pellets and shell casings sooner, is misplaced. Respondent's Brief at pp. 25-26. This is not mere speculation. Had Bonnell been able to test the State's case and Prosecutor's claims as to the state of the evidence, it is highly likely that these would

have been discovered sooner. And it is equally likely (based on the history of this case) that additional evidence would come to light as well. For instance, there is no evidence that Bonnell's clothes, or the murder weapon, have been destroyed. Without that chain of custody, should it be assumed that these items may still exist—thrown in some unmarked box, hidden in another closet, or locked away in storage? Without this Court's review and discovery and an evidentiary hearing in the trial court where Bonnell can question those who could hold the answers to those questions, we may never know. Is that acceptable in a capital case?

CONCLUSION

For the foregoing reasons argued in Bonnell's initial petition and contained herein, this Court should grant the writ.

Respectfully submitted,

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