No. 21-6519

IN THE SUPREME COURT OF THE UNITED STATES

JESSE DRISKILL,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

BRIEF IN OPPOSITION

ERIC S. SCHMITT
Attorney General
EVAN J. BUCHHEIM
Chief Counsel, Criminal Unit

DANIEL N. McPHERSON
Assistant Attorney General
Counsel of Record

P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Dan.McPherson@ago.mo.gov

Attorneys for Respondent

CAPITAL CASE
QUESTIONS PRESENTED

1. Is the Missouri Supreme Court's doctrine of affirming a judgment that reaches the right result, regardless of the reasoning used by the lower court to reach that result, consistent with this Court's opinions stating that a court's adoption of a party's proposed findings will only warrant reversal where the findings are clearly erroneous.

2. Did the Missouri Supreme Court properly apply the facts of Petitioner's case to the standards set forth in *Giglio v. United States*, 405 U.S. 150 (1970), when it concluded that a tacit agreement did not exist between the State and a witness who testified for the State at trial.

3. Did the Missouri Supreme Court properly apply *California v. Trombetta*, 467 U.S. 479 (1984) in concluding that the Petitioner did not suffer a due process violation because evidence that was lost or misplaced did not have an exculpatory value that was apparent to law enforcement and the record did not show an official animus or a conscious effort to suppress that evidence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Court Rules

STATEMENT OF THE CASE

A. Facts of underlying crimes.[1]

In July 2010, Jesse Driskill and Jessica Wallace were at a river access where they did drugs and had sex. A police officer interrupted, and Driskill ran into the woods with a gun. Wallace returned home once she spoke to the police. At the same time, J.W. and C.W. (collectively, the "victims") were celebrating their 50th wedding anniversary at their home, which was roughly one-and-a-half miles from the river access.

Family members went to the house after becoming concerned about the victims' whereabouts. The victims' car was not there. The inside of the house was smoky and smelly. Family members saw C.W.'s feet under smoldering blankets and found J.W.'s body under a pile of blankets and chairs.

Blood had pooled around the victims' heads. The area near the victims smelled of accelerant. C.W. had burn marks on the top portion of her body and wadded paper towels had been burned in her groin area. A clear fluid and blood could be seen draining from her vaginal and anal areas. The skin beneath C.W.'s eyes was blackened, and she had a wound above her right eyebrow. Aside from his shoes, J.W. was naked. A plastic bag covered his head and a wound was visible on his face. C.W.'s purse had been dumped onto the floor. A can of gasoline was also located in the hallway.

---

[1] The factual summary is taken from the Missouri Supreme Court's opinion, which appears in Petitioner's Appendix at pages A2 to A5.

As police investigated the home, a burning vehicle was located near Conway, Missouri, and later determined to belong to the victims. Meanwhile, Driskill called Wallace twice, ultimately asking her to pick him up on Highway N in Conway. Wallace attempted to do so, but could not locate Driskill. Driskill later called Jessica Cummins from a hotel in Conway and she agreed to get him. Driskill mumbled during the drive, stating he had "messed up" and shot someone. Cummins dropped Driskill off at Codi Vause's apartment and left. Vause and Calvin Perry were in the apartment when Driskill arrived.

Driskill appeared exhausted and anxious. He stated he needed help and suggested he was being chased by the authorities. Driskill also said he needed new clothes and had killed a couple of people that day. Wallace – after Driskill contacted her and stated that he had perpetuated a home invasion, robbery, and double homicide – drove to Vause's apartment. Driskill explained to Wallace, Perry, and Vause that he was going through a shed or garage when an elderly couple found him. Driskill brandished his gun and ordered the couple to go inside. He then asked for money but was not satisfied with the amount. Driskill proceeded to shoot J.W. and rape C.W. Driskill initially shot C.W. in the head. She survived, and, when she tried to get away, he shot her two more times. Driskill further stated he put a plastic bag down C.W.'s throat and a pillow over her head. He explained he attempted to clean up the evidence by burning it and using bleach. He also stated he stole, and later burned, the victims' vehicle. Driskill said his shoes were filled with blood.

Wallace went to a store after hearing Driskill's story. A police officer at the store noticed she was upset and approached her. Wallace told the officer what Driskill had told her.

Cummins later returned to Vause's apartment and found Driskill washing his shoes in the kitchen sink. Driskill directed Vause to dispose of the clothes he had been wearing. After Driskill fell asleep on the couch, the other individuals relayed Driskill's story to Cummins and they called the police. Driskill resisted arrest and had to be tased.

An autopsy of the victims showed that C.W. was shot once near her jawline and once above her left eye. The latter shot was fatal. C.W. had a laceration from blunt trauma above her right eyebrow. She also had injuries consistent with sexual assault, such as tears at the entrance of her vagina and rectum. Vaginal swabs were collected from C.W. DNA testing eliminated J.W. as a contributor and revealed a mixture from C.W. and Driskill. J.W. was shot once near his right cheek. This wound was potentially fatal. Yet, the cause of death was listed as asphyxiation resulting from a wadded-up plastic bag that was found in J.W.'s throat.

B. Procedural history.

The jury convicted Driskill of two counts of first-degree murder, one count of first-degree burglary, one count of forcible rape, one count of forcible sodomy, and five counts of armed criminal action. (Pet. App. A1). Driskill was sentenced to death for each murder count. (Pet. App. A1) He also received a consecutive 15-year sentence for the burglary count and seven consecutive life sentences for all

remaining counts. (Pet. App. A1). The Missouri Supreme Court affirmed the judgment of convictions on direct appeal. (Pet. App. A5).

Driskill filed a motion for postconviction relief under Missouri Rule of Criminal Procedure 29.15. (Pet. App. A5). The motion was denied by the circuit court following an evidentiary hearing. (Pet. App. A5-6). The Missouri Supreme Court affirmed the circuit court's judgment. (Pet. App. A1, A55).

Driskill asks this Court to grant certiorari based on the Missouri court's resolution of two claims of error raised in his brief and of another issue discussed in his brief but not raised as a separate allegation of error. The Missouri court's disposition of those issues is set forth below.

C. Circuit court's adoption of State's proposed findings.

Driskill, in his brief in the Missouri Supreme Court, criticized the circuit court for adopting verbatim the proposed findings of fact and conclusions of law drafted by the State. Driskill did not raise that issue as a separate and independent claim of error. The Missouri Supreme Court addressed the criticism in a footnote wherein it noted that it had previously held that a court's adoption of a party's proposed findings of fact raises no constitutional problems so long as the court actually makes the findings proposed after independent review. (Pet. App. A15 n.6). The court also noted that the findings must also be supported by the evidence to be affirmed. (Pet. App. A15 n.6). The court went on to note that a trial court judgment will be affirmed if cognizable under any theory, and that the circuit court's

disposition of Driskill's claims was not clearly erroneous, so that the independent review issue need not be addressed. (Pet. App. A15 n.6).

D. Alleged *Brady* violation for not disclosing a witness agreement.

Driskill claimed in his postconviction motion, and raised a claim of error on appeal, that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose an alleged tacit, unwritten agreement with State's witness Calvin Perry. (Pet. App. A7-8). At the time of Driskill's trial, Perry was serving a prison sentence for possession of methamphetamine. (Pet. App. A8 n.4). The postconviction motion alleged that the state had agreed to reduce Perry's prison sentence in exchange for his trial testimony. (Pet. App. A8).

The case against Driskill was prosecuted by Assistant Attorney General Kevin Zoellner and Laclede County Prosecuting Attorney Jon Morris. (Pet. App. A8). Addressing a pretrial motion to disclose any witness agreements, Zoellner stated that no deals had been reached with any witnesses. (Pet. App. A8). But Zoellner also said that the defense might want to question Perry, as he had called Zoellner's office and said that he would not cooperate if he was not released in time to attend an upcoming family funeral. (Pet. App. A8).

During a deposition, Perry said that he was doing the "right thing," even though he was not receiving any favors or promises, and suggested that might impact his actions. (Pet. App. A8). Zoellner asked for Perry's trust and stated he would do whatever he could. (Pet. App. A8). Perry later said that he wanted a

portion of his sentence forgiven so that he could be released from prison sooner. (A8). Zoellner replied, "Yes." (Pet. App. A8).

Perry's trial testimony recounted Driskill's explanation of the crimes and suggested that Driskill enjoyed describing details that made others uncomfortable. (Pet. App. A8-9). Perry told the jury that he was asking the State for favors, namely being released from prison, but said he never "snitched" in exchange for favorable treatment. (Pet. App. A9).

During the postconviction hearing, prosecutor Morris testified that, after Perry's testimony, he spoke to Perry while leaving the courthouse. (A9). Morris knew Perry and his family. (Pet. App. A9). Perry told Morris that he wanted credit for some of the time that he served, and Morris said he would look at the issue after trial. (Pet. App. A9). Morris did not make any specific promises to Perry. (Pet. App. A9). Morris reviewed the situation after trial, determined that Perry deserved the time credit, and took the request to a circuit judge in another county to ensure that the request was granted before Perry's sentence was concluded. (Pet. App. A9). Perry was deposed during the postconviction proceedings, but answered "no comment" to all questions besides stating his name. (A9).

The circuit court concluded that there was some evidence to support an inference that Perry had a subjective hope that his testimony might result in some benefit to his legal issues, but there was no credible evidence of an agreement between Perry and the prosecution prior to trial. (Pet. App. A9-10). The Missouri Supreme Court agreed with that finding and concluded that no *Brady* violation had

occurred. (Pet. App. A12). It also found that, without a deal, Appellant was not harmed as trial counsel and the jury knew Perry was asking for favors. (Pet. App. A12). The Missouri Supreme Court found that the circuit court did not clearly err in denying the claim. (Pet. App. A12).

E. Alleged intentional destruction of evidence.

Driskill claimed in his postconviction motion, and raised a claim of error on appeal, that the State destroyed allegedly exculpatory evidence – an orange fiber and hairs stuck between C.W.'s fingers – in bad faith. (Pet. App. A16). Driskill alleged that the materials were exculpatory because he had, at the time of his arrest, a shaved head and dark facial hair that did not match those materials. (Pet. App. A16-17).

The hair and fibers appeared in an autopsy photograph and were mentioned in the autopsy report, which said that the hairs appeared to be of pet origin. (Pet. App. A16). One of Driskill's trial counsels testified at the postconviction hearing that she had reviewed the autopsy photos, though she did not recall if she saw the fiber and hairs in that review. (Pet. App. A17). Counsel testified that she did not raise the issue at trial because she knew the victims had multiple cats. (Pet. App. A17).

The autopsy report indicated that the hairs and fiber were given to law enforcement officers, but were never sent to the crime laboratory for testing, and there was no record that law enforcement retained the materials. (Pet. App. A16). The Missouri Supreme Court found that the evidence demonstrated that the

materials were misplaced or lost. (Pet. App. A16). But the court concluded that Driskill had not proven a due process violation. (Pet. App. A19). The court relied on *Illinois v. Fisher*, 540 U.S. 544, 547-48 (2004), to state that "when evidence is only potentially useful, meaning, at most, it could have been tested and the results may have exonerated the defendant, due process is not violated, unless the defendant can show the State acted in bad faith." (Pet. App. A18).

The court concluded that the fiber and hairs were not materially exculpatory, as they did not possess exculpatory value that was apparent before destruction. (Pet. App. A18). The orange fiber appeared to be a carpet strand, and the hairs appeared to be of pet origin, which was consistent with the victims' ownership of cats. (Pet. App. A18). The court found those determinations to be reasonable, with both conclusions calling the exculpatory nature of the evidence into question. (Pet. App. A18). The court found that the fiber and hairs were only potentially useful because, at most, they could have been tested and may have been helpful to Driskill. (Pet. App. A18-19).

The court concluded that Driskill had not met his burden of showing that the fiber and hairs were destroyed in bad faith. (Pet. App. A19). The court found no evidence that the fiber and hairs were lost or destroyed because of animus towards Driskill or to hinder his defense. (Pet. App. A19). The presence of the fiber and hairs in the autopsy photograph and the mention of them in the autopsy report further undermined any contention that the state destroyed the evidence to prevent Driskill

from using it. (Pet. App. A19). The Missouri Supreme Court concluded that the circuit court did not clearly err in denying the claim. (Pet. App. A19).

REASONS FOR DENYING THE PETITION

1. The Missouri Supreme Court did not violate due process when it concluded that the lower court's judgment that adopted the proposed findings of fact that were prepared by the State was not clearly erroneous.

This Court has criticized the practice of a trial or motion court adopting wholesale a party's proposed findings of fact. *Jefferson v. Upton*, 560 U.S. 284, 293-94 (2010); *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985). But the Court has also found that, "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson*, 470 U.S. at 572, *see also*, *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964) ("Those findings, though not the product of the working of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence.").

The Missouri Supreme Court has adopted a similar standard in dealing with a court's adoption of a party's proposed findings. The court has found that no constitutional problem arises from the adoption of proposed findings of fact as long as the court actually makes the findings proposed after independent review and the proposed findings are supported by the evidence. *Skillicorn v. State*, 22 S.W.3d 678, 690-91 (Mo.), *cert. denied*, 531 U.S. 1039 (2000); *Hosier v. State*, 593 S.W.3d 75, 83 n.2 (Mo. 2019). The court reiterated that standard in Driskill's case. (Pet. App. A15 n.6). At the same time, the court noted its previously articulated principle that a trial court judgment will be affirmed if cognizable under any theory, regardless of

whether the reasons advanced by the trial court are wrong or are not sufficient. (Pet. App. A15 n.6).

A. *Driskill's criticism of the doctrine of affirming a judgment under any cognizable theory was not raised below.*

Driskill claims that the doctrine of affirming a judgment under any cognizable theory violates due process, at least in the context of findings that were prepared by a party and adopted by the trial court. (Pet. 7-8). But Driskill never raised that argument in the State court. In his brief before the Missouri Supreme Court, Driskill cited to *Hosier*, *supra*, as authority for his argument that the circuit court failed to independently review the State's proposed findings. (SC98259 App. Brf., p.36 n.25). But the same footnote in *Hosier* that discussed the propriety of a court adopting a party's proposed findings also set forth the principle that a trial court judgment will be affirmed under any cognizable theory, and applied that principle to the case at hand. *Hosier*, 593 S.W.3d at 83 n.2 (citing *Am. Eagle Waste Indus., LLC v. St. Louis Cnty*, 379 S.W.3d 813, 829 (Mo. 2012)). Driskill never argued in his brief, or in his post-opinion motion for rehearing, that the principle of affirming a judgment under any theory conflicted with this Court's opinions in *Jefferson*, *Anderson*, and *El Paso Natural Gas*.

B. *The doctrine of affirming a judgment under any cognizable theory is consistent with this Court's precedents.*

When it comes to a court adopting a party's proposed findings, this Court has stated that the findings may be reversed only if clearly erroneous. *Anderson*, 470

U.S. at 572. The principle of affirming a judgment if it is cognizable under any grounds is based on the idea that appellate courts are primarily concerned with the correctness of the trial court's result, not the route taken by the court to reach that result. *Rouner v. Wise*, 446 S.W.3d 242, 249 (Mo. 2014). That standard is consistent with the clearly erroneous standard articulated by this Court in *Anderson*, since findings that reach the right result will not be clearly erroneous.

C. *Certiorari is not appropriate due to factual distinctions between Driskill's case and the opinions of this Court on which he relies.*

In *Jefferson*, the Court considered a situation where the judge solicited proposed findings from one of the parties *ex parte* and did not provide the opposing party an opportunity to criticize the findings or to submit his own. *Jefferson*, 560 U.S. at 294. *El Paso Natural Gas* involved a situation where the judge announced from the bench at the conclusion of trial that the judgment would be for the appellee and that he would not write an opinion. *El Paso Natural Gas Co.*, 376 U.S. at 657. The judge then directed counsel for the appellee to prepare findings. *Id.* Counsel obeyed that directive, and the court adopted verbatim the findings drafted by counsel. *Id.*

The record filed in the Missouri Supreme Court in Driskill's case showed that the circuit court took the case under advisement at the conclusion of the postconviction evidentiary hearing and asked both parties to submit proposed findings and conclusions. (SC98259 Leg. File Doc. 1 p. 16; SC98259 Tr. p. 322). Driskill's counsel consented to that procedure and told the court that she preferred

submitting proposed findings to making a closing argument to the court. (SC98259 Tr. p. 322). The State filed its proposed findings on June 20, 2019, and Driskill filed his proposed findings on July 10, 2019. (SC98259 Leg. File Doc. 1, p. 16). Driskill did not raise before the circuit court, either in his proposed findings or in a separate pleading, any infirmities in the State's proposed findings. The procedure employed of soliciting proposed findings from both parties before rendering a decision avoids the concerns that the Court identified in *Jefferson* and *El Paso Nat. Gas*.

The process followed in this case also permitted a finding that the circuit court conducted an independent review and reached its own conclusions before issuing its findings. *Anderson*, 470 U.S. at 573; *Hosier*, 593 S.W.3d at 83 n.2. The Missouri Supreme Court has ruled that a finding of independent refection by a circuit court can be shown by the fact that the court had several months to review the evidence in the case. *Lyons v. State*, 39 S.W.3d 32, 43 (Mo.), *cert. denied*, 534 U.S. 976 (2001). The evidentiary hearing in this case concluded on May 10, 2019. (SC98259 Leg. File Doc. 1, p. 16). Both parties had submitted their proposed findings to the court by July 10, 2019. (SC98259 Leg. File Doc. 1, p. 16). The court issued its Findings of Fact and Conclusions of Law on October 17, 2019. (SC98259 Leg. File Doc. 1, p. 16). The court had ample time to review the evidence and the proposed findings of both parties.

Driskill has not shown that the circuit court's adoption of the State's proposed findings resulted in a due process violation in this case. He has also not shown that the Missouri Supreme Court resolved the issue in a manner inconsistent

with this Court's precedents. Driskill has not presented an issue worthy of this Court's consideration, and certiorari should be denied.

II. Driskill's claim regarding the alleged existence of a deal between the State and a witness asks this Court to draw inferences from the evidence that are contrary to those drawn by the fact-finding court.

Driskill's second question presented presumes the existence of a tacit agreement between the prosecution and State's witness Calvin Perry. But the Missouri circuit court made a factual finding that no tacit agreement existed, and the Missouri Supreme Court determined that the circuit court's finding was not clearly erroneous. (Pet. App. A9-A12). Driskill acknowledges that finding in his argument. (Pet. 10). He then goes on to criticize that finding, citing to cases where a tacit agreement was found to exist, and argues that the Missouri Supreme Court articulated a standard that places too high a burden on defendants to prove the existence of a tacit agreement. (Pet. 13). Driskill fails, however, to develop any cogent argument showing how the Missouri Supreme Court supposedly deviated from the legal standards set forth by this Court in *Giglio v. United States*, 405 U.S. 150 (1970).

Driskill goes so far as to claim that the Missouri Supreme Court would not have found a tacit agreement under the facts of *Giglio*. That argument does not withstand scrutiny. The evidence in *Giglio* included an affidavit filed by an Assistant United States Attorney, who stated that he promised the defendant's co-conspirator that he would not be indicted if he testified before the grand jury in the defendant's case as a government witness and that he would not be prosecuted if he eventually testified as a government witness at the defendant's trial. *Id.* at 152. No

such direct evidence of an agreement is present in this case. Instead, Driskill complains that the circuit court drew the wrong factual inferences from the evidence presented at the State postconviction hearing in his case, and that the Missouri Supreme Court erred in upholding the lower court's findings.

While Driskill tries to frame this issue as a question of law he is, in reality, presenting a fact-bound claim of lower court error that is not appropriate for this Court's consideration. Sup. Ct. R. 10. Indeed, the existence or non-existence of a tacit agreement is one that necessarily turns on the facts and circumstances of the particular case and on credibility determinations that are properly within the province of the state court that presided over the trial and the post-conviction evidentiary hearing. *Patton v. Yount*, 467 U.S. 1025, 1038 (1984). One of the cases relied on by Driskill demonstrates this, as a sharply-divided Hawaii Supreme Court disagreed on whether the facts before it established the existence of an undisclosed, off-the-record agreement between a witness and the prosecution. *Birano v. State*, 426 P.3d 387 (Haw. 2018). A three-judge majority of the court found that the factual record did establish the existence of such an agreement. *Id.* at 409. Two dissenting judges found that those same facts did not establish an agreement. *Id.* at 417 (Nakayama, J., dissenting).

Driskill has failed to show a need to revisit the principles utilized in determining whether a *Brady*/*Giglio* violation has occurred. Those standards provide a sufficient framework for courts to use in applying the facts of the case

before it to resolve the legal issue. Driskill has not presented an issue worthy of this Court's consideration, and certiorari should be denied.

III. Driskill's claim regarding lost evidence asks this Court to draw inferences from the evidence that are contrary to those drawn by the fact-finding court.

Driskill's third question presented also presumes the existence of factual findings that are contrary to those made by the circuit court and affirmed by the Missouri Supreme Court. Driskill claims that the carpet fiber and hair found in the hand of victim C.W. had an exculpatory value that was apparent to law enforcement before that evidence was lost or misplaced. But the Missouri Supreme Court concluded that the evidence did not possess an exculpatory value that was apparent before destruction. (Pet. App. A18). The Missouri Supreme Court agreed with the circuit court's determination that the orange fiber appeared to be carpet strand while the hair appeared to be of pet origin, consistent with the victims' ownership of cats. (Pet. App. A18). The court concluded that both determinations were reasonable and called the exculpatory nature of the evidence into question. (Pet. App. A18). One of Driskill's trial counsels testified that she did not raise the issue at trial because she knew the victims had multiple cats. (Pet. App. A17). The court concluded that the fiber and hairs were only potentially useful because, at most, they could have been tested and may have been helpful. (Pet. App. A18-A19). Accordingly, under this Court's precedents, Driskill had to show that the evidence was destroyed in bad faith to establish a due process violation. (Pet. App. A19). *Fisher*, 540 U.S. at 547-48.

A. *The Missouri Supreme Court followed the standards set by this Court.*

Driskill complains that the Missouri Supreme Court went beyond this Court's precedents when it required him to show official animus or a conscious effort to suppress exculpatory evidence. That argument is incorrect in two respects. First, the Missouri court did not did not state that a showing of official animus or a conscious effort to suppress was an absolute requirement to showing bad faith on the part of the State. It instead noted that the absence of those factors can impact the bad faith analysis. (Pet. App. A19).

That leads to the second flaw in Driskill's argument, in which he claims that the Missouri court's analysis was contrary to this Court's precedents. But the language concerning official animus or a conscious effort to suppress came from this Court's opinion in *California v. Trombetta*, as cited by the Missouri Supreme Court in its opinion. (Pet. App. A19). In finding no constitutional violation from California's failure to retain breath samples in a driving while intoxicated case, this Court stated the following:

> To begin with, California authorities in this case did not destroy respondents' breath samples in a calculated effort to circumvent the disclosure requirements established by Brady v. Maryland and its progeny. In failing to preserve breath samples for respondents, the officers here were acting "in good faith and in accord with their normal practice." *The record contains no allegation of official animus towards respondents or of a conscious effort to suppress exculpatory evidence.*

California v. Trombetta, 467 U.S. 479, 488 (1984) (internal citation omitted) (emphasis added). In fact, one of the cases that Driskill relies on likewise stated that, "Bad faith can be shown by proof of an official animus or a conscious effort to

suppress exculpatory evidence." *Jimerson v. Payne*, 957 F.3d 916, 926 (8th Cir. 2020). The Eighth Circuit in that case found that the facts before it evidenced a conscious effort to suppress evidence. *Id.* The Missouri Supreme Court properly applied this Court's precedents in determining that the lack of evidence of official animus or of a conscious effort to suppress exculpatory evidence was a factor that supported the circuit court's denial of Driskill's postconviction claim.

B. *Driskill has not shown a conflict with other courts.*

The other two cases cited by Driskill do not aid his argument. The Fourth Circuit in *United States v. Johnson* did not make a finding that the defendant's due process rights had been violated. It instead found that the record before it was insufficient to resolve the issue and remanded the case to the district court so it could reassess the claim with an expanded evidentiary record. *United States v. Johnson*, 996 F.3d 200, 216 (4th Cir. 2021). Furthermore, Driskill incorrectly characterizes the court's ruling as to the defendant's entitlement to an adverse inference instruction on remand. The court did not, as Driskill suggests, rule that the defendant was entitled to such an instruction. The court explicitly declined to rule on that issue. *Id.* at 216. It did observe, however, that if the district court rejected the defendant's due process claim on remand and conducted a retrial, it should assess anew whether the defendant would be entitled to such an instruction at the retrial. *Id.* at 216-17.

The Ninth Circuit's opinion in *United States v. Zaragoz-Moreira* turned on its factual findings that the exculpatory value of the destroyed evidence was known to

law enforcement and that the evidence was thus destroyed in bad faith. *United States v. Zaragoza-Moreira*, 780 F.3d 971, 982 (9th Cir. 2015). No conflict exists between that opinion and the Missouri Supreme Court's opinion in the present case. It is simply a matter of the application of differing facts to the relevant legal principles leading to a different result.

Driskill's complaint boils down to a contention that the circuit court and the Missouri Supreme Court erroneously applied the facts of his case to the governing legal principles. That contention does not warrant this Court's grant of certiorari. Sup. Ct. R. 10.

CONCLUSION

In view of the foregoing, the respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

_____

DANIEL N. McPHERSON
Assistant Attorney General
Counsel of Record

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321

ATTORNEYS FOR RESPONDENT