THIS IS A CAPITAL CASE

EXECUTION SET FOR November 26, 2026

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MELVIN BONNELL, Petitioner,

v.

BILL COOL,

Warden, Ross Correctional Institution, Respondent.

On Petition for Writ of Certiorari
to the Sixth Circuit Court of Appeals

APPENDIX

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No. 23-3235

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 7, 2023
DEBORAH S. HUNT, Clerk

In re: MELVIN BONNELL,) ORDER

Before SUTTON, Chief Judge; BATCHELDER and WHITE, Circuit Judges.

Melvin Bonnell, an Ohio prisoner under sentence of death, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in August 2021. The district court transferred the case to this court as a second or successive petition on March 21, 2023. *See* 28 U.S.C. § 1631; *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam). Bonnell now moves for leave to file a second or successive habeas corpus petition under 28 U.S.C. § 2244(b). His petition alleges that law enforcement, prosecutors, or both violated his right to due process, in violation of *Arizona v. Youngblood*, 488 U.S. 51 (1988), by hiding and/or discarding physical evidence from his case and deceiving him about it for years. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. Therefore, proof of bad faith is necessary; negligence is insufficient. *Id.*

Bonnell argues that § 2244(b)(1) does not bar his petition because he did not raise the current *Youngblood* claim in a prior petition, so the current petition is not second or successive and we should authorize the district court to consider his claim on the merits. In the alternative, he requests a briefing schedule and oral argument so that he can support a prima facie showing that his petition satisfies the exceptions in § 2244(b)(2). *See* § 2244(b)(3)(C).

Bonnell's current petition raises a broader *Youngblood* claim than the one he raised in his initial petition, but we must deny his motion to file the current petition because the facts underlying this claim were available at the time he filed his initial petition and he has not satisfied the prima facie showing required by § 2244(b)(2)(B)(ii).

Factual Background

Bonnell was convicted of aggravated burglary, aggravated (felony) murder, and aggravated murder for purposely, and with prior calculation and design, causing Robert Bunner's death. Bunner shared an apartment on Bridge Avenue in Cleveland with Shirley Hatch and Edward Birmingham. On November 28, 1987, at about 3:00 a.m., Hatch opened the door to Bonnell, who had identified himself as "Charlie." Hatch saw Bonnell shoot Bunner, and she ran to awaken Birmingham. Birmingham found Bonnell hitting Bunner in the face and threw Bonnell out of the apartment. About forty minutes later, two police officers saw a car being driven backwards with its headlights off on the same street where Bunner lived. They chased the vehicle until it crashed into a building. The officers identified the driver as Bonnell. Two other police officers arrived at the scene, saw Bonnell on the ground, and left to respond to the shooting at Bunner's apartment. They recognized that the witnesses' description of the assailant matched Bonnell. *State v. Bonnell*, 573 N.E.2d 1082, 1084 (Ohio 1991). The Ohio Court of Appeals noted that witnesses on Bonnell's behalf corroborated a statement he made to the police. Bonnell said that, on the day of the shooting, he had been out drinking with Joe Popil. He maintained that Popil owned the gun, drove the car, and took the gun with him when he alone entered the Bridge Avenue apartment. According to Bonnell, when Popil returned to the car he put the gun in the glove compartment. Bonnell said that he passed out and did not remember anything until he woke up in the hospital. Popil testified that he had been out with Bonnell but was driven home at 11:30 p.m. *State v. Bonnell*, No. 108209, 2019 WL 7190796, at *2 (Ohio Ct. App. Dec. 26, 2019).

Procedural History

The Ohio Court of Appeals affirmed Bonnell's convictions and death sentence in 1989. *State v. Bonnell*, No. 55927, 1989 WL 117828 (Ohio Ct. App. Oct. 5, 1989). The Ohio Supreme Court affirmed in 1991. *Bonnell*, 573 N.E.2d at 1089. After exhausting state post-conviction remedies, Bonnell filed a petition for a writ of habeas corpus in the district court in 2000. One of his claims was that the State failed to properly preserve potentially exculpatory evidence in violation of *Youngblood*. The evidence in question was vomit found near the victim's body, crime scene fingerprints, foreign substances on Bonnell's hands, the contents of Bonnell's car, and

substances on Bonnell's pants. *See Bonnell v. Mitchell*, 301 F. Supp. 2d 698, 729-30 (N.D. Ohio 2004). The district court denied Bonnell's *Youngblood* claim and denied his petition. We affirmed. *Bonnell v. Mitchell*, 212 F. App'x 517, 519 (6th Cir. 2007).

In 2004, Bonnell moved for DNA testing in state court. The State responded that the evidence Bonnell wanted to test either had not been collected or no longer existed. The trial court denied the motion. Bonnell moved for DNA testing again in 2008 after Ohio's legislature enacted a new statute. The State said that it had located Bonnell's jacket, and the trial court ordered that it be tested. The tests found that the DNA on the jacket was consistent with the victim's. *State v. Bonnell*, 119 N.E.3d 1285, 1289 (Ohio 2018). Bonnell then moved to test the jacket for traces of the victim's blood, and the trial court denied the motion because the State's forensic witness had testified at trial that the victim's blood was not on Bonnell's jacket. *Id.* at 1291. In 2017, Bonnell requested an accounting of the evidence. The prosecutor indicated that the State had four boxes of documents but no physical evidence. The trial court denied further DNA testing. The Ohio Supreme Court affirmed in 2018. It held that Ohio's DNA-testing statute did not give the court jurisdiction to decide Bonnell's due-process challenge to the adequacy of the State's search for evidence and that Bonnell had failed to show that the evidence he sought to test could have been outcome-determinative. *Bonnell*, 119 N.E.3d at 1292 (citing Ohio Rev. Code § 2953.72(A)(8)).

Bonnell filed a second § 2254 habeas petition in 2017, raising claims unrelated to the current litigation. The district court found that Bonnell's petition was a second or successive petition under § 2244(b) and transferred the case to this court. We denied Bonnell permission to file a second or successive habeas petition. *In re Bonnell*, No. 17-3886, 2018 WL 11298156 (6th Cir. Dec. 4, 2018).

Bonnell moved for leave to file a motion for a new trial in 2018. He alleged that the State's 2017 accounting of the evidence showed a violation of *Youngblood* and that a 2017 affidavit from Hatch differed from her trial testimony. The trial court denied Bonnell's motion, and the Ohio Court of Appeals affirmed, both finding that Bonnell's motion was untimely because he had known since 1995 that the evidence he sought to have tested did not exist, and that Hatch's affidavit was

not newly discovered evidence because the State had found her years earlier. *Bonnell*, 2019 WL 7190796, at *6-7.

In January 2020, the prosecutor's office agreed to let Bonnell's counsel view its files. Bonnell's counsel examined the four boxes of files and discovered envelopes containing pellets and shell casings marked as exhibits for trial. Shortly thereafter, when the prosecution opposed Ohio Supreme Court review of Bonnell's motion for a new trial, it represented that Bonnell had known since 1995 that the evidence he sought had not been preserved for testing. Bonnell alleged that the prosecution had made false statements, and he moved to strike the prosecutor's pleading, to disqualify the Cuyahoga County Prosecutor's Office, to appoint the Office of Ohio Attorney General as Special Prosecutor, and for relief pursuant to Ohio Supreme Court Practice Rule 4.01. The prosecutor's office acknowledged that the pellets and shell casings were found in its files but argued that the evidence was not relevant to the issues in Bonnell's appeal. The Ohio Supreme Court denied Bonnell's motions, over a dissent. *State v. Bonnell*, 147 N.E.3d 647 (Ohio 2020). It denied his motion for reconsideration in August 2020. *State v. Bonnell*, 150 N.E.3d 965 (Ohio 2020).

Bonnell filed his current (third) habeas petition in August 2021, alleging that the State acted in bad faith and in violation of *Youngblood* when it lost or destroyed physical evidence that was exculpatory or potentially exculpatory and acted in bad faith when it failed to conduct a diligent search for the evidence and to accurately report whether any testable evidence remained. Bonnell referred to the following items of missing evidence: his pants and socks, evidence from his car, his jacket, any tests performed on his hands, two pellets, and a jacket belonging to Popil. At other points in his petition, he alleged that the State lost or destroyed the "vast majority of the evidence" and "nearly every piece of evidence." Bonnell alleged that his claims became ripe for federal habeas review when the Ohio Supreme Court denied his motion for reconsideration in August 2020. The State moved for Bonnell's petition to be transferred to this court as a second or successive petition.

The district court held that Bonnell's third petition asserted a claim not raised in his two previous petitions because it concerned all the State's physical evidence rather than just evidence

from the crime scene and Bonnell's hands, clothes, and possessions. It further found that Bonnell's petition relied on newly discovered evidence and previously unavailable facts—that the State possessed bullets and shell casings despite denying it had them. The district court found that Bonnell's claim was actionable when he filed his original petition because he knew physical evidence was missing from the State's files and he challenged the State's handling of evidence in that petition. It held that the previously unavailable evidence of the State's bad faith did not excuse him from § 2244(b)(2)(B)'s gatekeeping procedures but rather put his petition squarely within the provision's reach, citing *In re Wogenstahl*, 902 F.3d 621, 627-28 (6th Cir. 2018). The district court transferred Bonnell's petition to this court for authorization under § 2244(b)(3)(A).

Analysis

The Anti-Terrorism and Effective Death Penalty Act restricts a prisoner's ability to file a second or successive habeas petition to challenge a judgment of conviction and sentence. *See* § 2244(b). A proposed claim that was presented in a prior § 2254 petition and adjudicated on the merits "shall be dismissed." § 2244(b)(1); *see Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005); *In re Hanna*, 987 F.3d 605, 608 (6th Cir. 2021). "[A]ny claim that has *not* already been adjudicated must be dismissed unless it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence." *Gonzalez*, 545 U.S. at 530 (citing § 2244(b)(2)). Section 2244(b)(2) states:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

"[B]efore the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet § 2244(b)(2)'s new-rule or actual-innocence provisions." *Gonzalez*, 545 U.S. at 530 (citing § 2244(b)(3)). To satisfy the actual-innocence provision, the applicant must make a prima facie showing that the application satisfies both § 2244(b)(2)(B)(i) and § 2244(b)(2)(B)(ii). § 2244(b)(3)(C); *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010). A prima facie showing consists of sufficient allegations of fact and documentation that would justify fuller exploration in the district court. *In re Campbell*, 874 F.3d 454, 459 (6th Cir. 2017) (per curiam).

§ 2244(b)(1)

Although Bonnell's third petition raises a *Youngblood* claim that overlaps with a claim in his initial petition, the third petition is not barred by § 2244(b)(1). *See Gonzalez*, 545 U.S. at 530; *In re Hanna*, 987 F.3d at 608. The district court adjudicated the *Youngblood* claim in Bonnell's 2000 petition, which addressed the State's apparent failure to preserve several specific pieces of evidence. *Bonnell*, 301 F. Supp.2d at 729-30. On appeal, Bonnell argued "that the district court erred in denying him discovery and an evidentiary hearing on his allegations of suppression and destruction of such exculpatory evidence." *Bonnell*, 212 F. App'x at 519. We declined to review Bonnell's argument because it was not certified for appeal. *Id.* The *Youngblood* claim in Bonnell's current (numerically third) petition alleges that the State hid or discarded essentially all of the physical evidence—including items of evidence additional to and different from those involved in the *Youngblood* claim in his first petition—and lied about it. Therefore, this is a different, unadjudicated claim, and the petition is not barred by § 2244(b)(1). *See In re Wogenstahl*, 902 F.3d at 628 & n.2; *In re Keith*, No. 18-3544, 2018 WL 8807240, at *2 n.1 (6th Cir. Oct. 26, 2018).

§ 2244(b)(2)

But Bonnell's current petition is second or successive and must therefore meet the requirements of § 2244(b)(2). Bonnell has known since 1995 that the State claimed to have lost or destroyed nearly all the physical evidence. *Bonnell*, 2019 WL 7190796, at *6. His current petition alleges that the State acted in bad faith when it lost or destroyed evidence, failed to conduct a diligent search for the evidence, and failed to accurately report whether any testable evidence

remained. This claim is second or successive because it is based on facts available when he filed his initial petition, even though he was previously unaware of the evidence of the State's purported bad faith that he discovered in 2020. *See Magwood v. Patterson*, 561 U.S. 320, 335 (2010); *McCleskey v. Zant*, 499 U.S. 467, 489 (1991); *In re Wogenstahl*, 902 F.3d at 627-28.

§ 2244(b)(3)(C).

Thus, we may authorize Bonnell's current petition only if it satisfies either the new-rule provision or the actual-innocence provision of § 2244(b)(2)(B). *See* § 2244(b)(3)(C). Bonnell does not rely on a new rule of constitutional law, so his claim is based on the actual-innocence provision and the questions are whether he has made a prima facie showing of due diligence, and whether the facts underlying his claim could show by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty. *See* §§ 2244(b)(2)(B)(i) & (ii); *In re Jones*, 652 F.3d at 605. We find that Bonnell has made a prima facie showing of diligence. *See* § 2244(b)(2)(B)(i); *In re Wogenstahl*, 902 F.3d at 629. He repeatedly sought access to the evidence in his state-court actions before and after he filed his first habeas petition. It was not until his counsel discovered the bullets and shell casings in 2020 that Bonnell could show that the State had inaccurately denied having such evidence.

But we cannot conclude that, in light of the evidence as a whole, the evidence underlying his claim amounts to "new facts showing a high probability of actual innocence." *Gonzalez*, 545 U.S. at 530; § 2244(b)(2)(B)(ii). The evidence at trial was that Hatch and Birmingham saw a man shoot and beat the victim. Police officers recognized that Hatch's and Birmingham's description of the killer matched Bonnell, who had wrecked his car down the street from the victim's apartment after leading the police on a chase. Bonnell was alone in the car, police found the murder weapon along the route of the chase, and the gun was Bonnell's. *See Bonnell*, 573 N.E.2d at 1084-86. Birmingham had confronted the killer, testified that the killer was Bonnell, and said that he would never forget his face. *Bonnell*, 301 F. Supp. 2d at 761. Both Birmingham and Hatch were acquainted with Bonnell and recognized him as the murderer. *Id.* The State's apparent mishandling of the bullets and casings does not cast doubt on Bonnell's guilt.

Bonnell does not argue that the bullets and shell casings themselves are exonerating or potentially useful. *See Youngblood*, 488 U.S. at 58. Instead, he maintains that the facts underlying his claim, taken with the evidence as a whole, show that he is actually innocent. He maintains that, if the State had preserved the evidence, he could have tested Popil's jacket for evidence linking it to the victim, he could have questioned Hatch about Popil's jacket, he could have shown that, had he been the killer, his clothing would have been covered in blood, and he could have matched the vomit, blood, and other biological material from the crime scene to the real killer. Bonnell also argues that the physical evidence the State does possess has no inculpatory value. He states that the shell casings and pellets cannot be connected to his guilt because the murder weapon was destroyed. Bonnell asserts that his jacket cannot be linked to Hatch's testimony because of her 2017 affidavit. Hatch testified at trial that the killer wore a gray and maroon jacket. Another witness said that Popil wore a red jacket, and a police report indicated that the witness saw Bonnell and Popil together the night of the crime. In her affidavit, Hatch said that the killer wore a red shiny jacket with writing on it, like photos of Popil's jacket. She also cast doubt on her and Birmingham's identification of Bonnell as the killer. The prosecution introduced Bonnell's jacket into evidence. Bonnell describes it as maroon and tan, corduroy, and without writing. He argues that the writing on Popil's jacket and the apparent blood stains on it make it materially exculpatory without testing.

Bonnell's arguments rely on speculation, are not new, and do not refute his guilt. He can speculate that the missing evidence is exonerating precisely because it is missing. Unfortunately, the impact of that evidence cannot be known. Bonnell has long challenged the eyewitnesses' identification of him as the murderer and sought to blame Popil. In his prior appeal to this court, he argued that Birmingham's and Hatch's description of the murderer also fit Popil and that Popil was seen after the shooting in a jacket that appeared to be blood-stained. We found that Bonnell's trial counsel had an opportunity to cross-examine Popil and Hatch. *Bonnell*, 212 F. App'x at 523-24. Courts view recanting affidavits by trial witnesses with extreme suspicion. *See Brooks v. Tennessee*, 626 F.3d 878, 897 (6th Cir. 2010); *Carter v. Mitchell*, 443 F.3d 517, 539 (6th Cir. 2006). Hatch's doubts 30 years after the trial are not enough to support a claim that Bonnell is

actually innocent. *See Keith v. Bobby*, 551 F.3d 555, 559 (6th Cir. 2009); *cf. In re McDonald*, 514 F.3d 539, 547 (6th Cir. 2008). In addition, the only DNA evidence in the record is the DNA consistent with the victim's on Bonnell's jacket. *Bonnell*, 119 N.E.3d at 1289. Even if we consider Hatch's affidavit, Popil's jacket, and other missing evidence, Bonnell has not made a prima facie showing under § 2244(b)(2)(B)(ii). *See* § 2244(b)(3)(C); *In re Jones*, 652 F.3d at 605.

Bonnell's new *Youngblood* claim does not justify fuller exploration in the district court. *See In re Campbell*, 874 F.3d at 459. For the foregoing reasons, we **DENY** Bonnell's motion to file a second or successive habeas corpus petition. We also **DENY** his request for a briefing schedule and oral argument.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 23-3235

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 3, 2024
KELLY L. STEPHENS, Clerk

IN RE: MELVIN BONNELL,

Movant.

ORDER

BEFORE: SUTTON, Chief Judge; BATCHELDER and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

*Judge Murphy recused himself from participation in this ruling.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Melvin Bonnell, Petitioner, v. Chris McBee, Warden, Respondent.	)	CASE NO. 1:21 CV 1604 JUDGE JEFFREY J. HELMICK **MEMORANDUM OF OPINION AND ORDER**

Before me is Respondent Warden Chris McBee's motion to transfer to the Sixth Circuit Court of Appeals Petitioner Melvin Bonnell's third petition for writ of habeas corpus pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254 (Doc. 1). (Doc. 6.) Respondent seeks the transfer for a determination of whether Bonnell's petition is barred as "second or successive" under 28 U.S.C. § 2244(b). Bonnell opposes the motion. (Doc. 8.) For the following reasons, Respondent's motion to transfer is granted.[1]

RELEVANT BACKGROUND

Bonnell was convicted in an Ohio state court and sentenced to death in 1988 for the aggravated murder of Eugene Bunner. *See State v. Bonnell*, 61 Ohio St. 3d 179, 180 (Ohio 1991). Ohio courts affirmed his convictions and sentences on direct appeal and post-conviction review. *See id.* at 181 (direct appeal); *State v. Bonnell*, 71 Ohio St. 3d 1459 (Ohio 1994) (application to reopen direct appeal); *State v. Bonnell*, 84 Ohio St. 3d 1469 (Ohio 1999) (post-conviction review).

[1] Bonnell filed a motion for leave to conduct discovery (Doc. 9) at the same time as his brief opposing Respondent's motion to transfer. Because the Court grants Respondent's motion to transfer, Bonnell's discovery request is denied as moot.

Bonnell first sought federal habeas corpus relief in this Court in 2000, raising twenty claims. *See Bonnell v. Mitchell*, 301 F. Supp. 2d 698, 718-20 (N.D. Ohio 2004). He asserted, among other things, several claims of prosecutorial misconduct. In one of those claims, he alleged that the State improperly failed to preserve potentially exculpatory evidence from the crime scene, including blood droppings, vomit, and fingerprints, and from Bonnell's hands, car, and pants under *Arizona v. Youngblood*, 488 U.S. 51 (1988). *See Bonnell v. Mitchel[l]*, 301 F. Supp. 2d 698, 729-30 (N.D. Ohio 2004) (Katz, J.). In *Youngblood*, the Supreme Court held that the failure to preserve potentially material, exculpatory information violates constitutional due process where that failure resulted from bad faith. *Youngblood*, 488 U.S. at 57-58.

Another judge in this Court denied Bonnell's petition on February 4, 2004. *Id.* at 703. The Sixth Circuit affirmed that decision on January 8, 2007. *Bonnell v. Mitchell*, 212 Fed. Appx. 517 (6th Cir. 2007). The Supreme Court declined review of the case on December 3, 2007. *Bonnell v. Ishee*, 552 U.S. 1064 (2007).

Bonnell filed a second habeas petition before a different judge in this Court on April 12, 2017. (Case No. 1:17 cv 787, Doc. 1.) In his petition, he asserted two claims: (1) that Ohio's statutory death-penalty scheme was unconstitutional under a recent Supreme Court decision that held that Florida's capital sentencing scheme was unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death"; and (2) that his federal equal protection and due process rights were violated when the state trial court failed to render a final appealable order. (Case No. 1:17 cv 787, Doc. 1.) The respondent filed a motion to transfer the petition to the Sixth Circuit for a determination of whether the petition was barred as a "second or successive" petition under AEDPA's § 2244(b). (Case No. 1:17 cv 787, Doc. 5.) The Court granted the motion (Case No. 1:17 cv 787, Doc. 16 (Lioi, J.)), and the Sixth Circuit ultimately found the petition barred (*see* Case No. 1:17 cv 787, Doc. 17).

Now, Bonnell has filed a third habeas petition attacking his 1988 state-court judgment. (Doc. 1.) In it, he asserts yet another claim under *Youngblood*, alleging that his due process rights were violated when the police or prosecutors, or both, acting in bad faith, lost or destroyed nearly all of the physical evidence in his case, "[s]ome of [which] held apparent exculpatory value, and the rest [of which] held at least potential exculpatory value, at the time of its loss and/or destruction." (*Id.* at 23.)[2]

According to Bonnell, he has sought access to the State's trial exhibits and other physical evidence in his case in various state post-conviction proceedings since 1995, whether to support *Brady* claims alleging the State's suppression of exculpatory evidence, *Youngblood* claims alleging the State's failure to preserve evidence, or requests for DNA testing. (*Id.* at 11-22.)[3] But the State consistently has represented to Bonnell's counsel and the courts that the physical evidence in the case was not preserved, with one exception: his jacket was located in 2008. (*Id.* at 11-15.)

Then, in February 2020, while working on the appeal to the Ohio Supreme Court of the appellate court's decision affirming the trial court's denial of a post-conviction petition, Bonnell's state post-conviction counsel discovered in the prosecutor's file trial exhibits consisting of bullets from the victim's body and shell casings. (*Id.* at 17-20.) Nevertheless, in March 2020, in its memorandum in opposition to jurisdiction filed in the Ohio Supreme Court, the State again represented that all physical evidence in the case except the jacket was lost or destroyed. (*Id.* at 20-21.) In response, Bonnell's counsel filed several motions in Ohio's high court alleging prosecutorial

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[2] All references to page numbers of documents in the Court's electronic court filing system ("ECF") are to the page numbers assigned by ECF, not to the original documents' page numbers or ECF "PageID" numbers.

[3] S*ee also State v. Bonnell*, 2019 WL 7190796, at *2-5 (Ohio Ct. App. Dec. 26, 2019) (recounting procedural history of Bonnell's litigation relating to missing evidence).

misconduct given their recent discovery of the morgue bullets and shell casings. (*Id.* at 21-22.) The State replied to the motions by acknowledging the recently discovered evidence, but arguing the evidence was irrelevant to the issues Bonnell raised in his post-conviction appeal. (*Id.* at 21.) The court denied review of Bonnell's allegations of misconduct. (*Id.* at 22.)

Bonnell then filed this third-in-time habeas petition on August 17, 2021, raising a new, broader *Youngblood* claim encompassing all of the physical evidence in the case now lost or destroyed and supported by his discovery of the bullets and casings in the prosecution files. (Doc. 1 at 23-36.) And on April 22, 2022, Respondent filed the motion now before the Court, requesting that Bonnell's petition be transferred to the Sixth Circuit as a "second or successive" petition requiring authorization under 28 U.S.C. § 2244(b)(3). (Doc. 6.) Bonnell counters that his new petition is not successive under § 2244(b) because his new *Youngblood* claim only became ripe when his counsel discovered the bullets and casings and could prove the State's bad faith. (*Id.* at 2.)

ANALYSIS

A. "Second or Successive" Habeas Petitions under AEDPA

Under the gatekeeping provisions of AEPDA's § 2244(b), claims presented in a "second or successive" habeas petition that a petitioner previously presented in a federal habeas petition must be dismissed. 28 U.S.C. § 2244(b)(1). Claims in a "second or successive" petition that a petitioner did not previously raise also are subject to dismissal, unless the petitioner can make a *prima facie* showing that they rely either on a new and retroactive rule of constitutional law, or on new facts that could not have been discovered previously through the exercise of due diligence *and* show a high probability of actual innocence. 28 U.S.C. § 2244(b)(2), (b)(3)(C); *Magwood v. Patterson*, 561 U.S. 320, 330 (2010).

AEDPA requires state prisoners to obtain authorization from the appropriate federal court of appeals before filing a "second or successive" habeas petition in federal district court. 28 U.S.C. §

2244(b)(3). Without such authorization, the district court lacks jurisdiction to review the petition. 28 U.S.C. § 2244(b)(3)(A).

The Supreme Court has made clear, however, that not every second or later-filed petition is "second or successive" for purposes of § 2244(b). *See, e.g., Magwood*, 561 U.S. at 335 n.11. District courts have jurisdiction, therefore, to make a preliminary determination as to whether a petition filed after an initial or earlier petition is "second or successive," and therefore subject to § 2244(b)'s gatekeeping requirements, or non-successive, in which case the court may consider it without the circuit court's authorization. *In re Smith*, 690 F.3d 809, 809-10 (6th Cir. 2012) (holding that a district court has jurisdiction to determine "in the first instance" whether a habeas petitioner's second petition is "second or successive" within the meaning of § 2244(b)).

The term "second or successive" is not defined in § 2244(b). Instead, the Supreme Court considers the phrase a "term of art given substance" by the Court's habeas cases. *Slack v. McDaniel*, 529 U.S. 473, 486 (2000). For instance, the Court "has confirmed that a numerically second petition is not properly termed 'second or successive' to the extent it asserts claims whose predicates arose after the filing of the original petition." *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010). In *Stewart v. Martinez-Villareal* 523 U.S. 637, 644 (1998), and later in *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007), the Court held that the statutory bar on "second or successive" applications does not apply to claims raised under *Ford v. Wainwright*, 477 U.S. 399 (1986), prohibiting the execution of insane prisoners, where the petition was filed after the state obtained an execution warrant. *Martinez-Villareal*, 523 U.S. at 640 (as to an identical, previously filed *Ford* claim); *Panetti*, 551 U.S. at 947 (as to a *Ford* claim that had not been presented in an earlier petition). This exception is based on the ripeness doctrine, permitting a petitioner to file what is functionally a first petition as to a previously unripe claim that becomes ripe only when execution is imminent, as an individual's competency to be executed cannot properly be assessed until that time. *See Martinez-Villareal*, 523 U.S. at 645

("Respondent brought his claim in a timely fashion, and it has not been ripe for resolution until now."); *Panetti*, 551 U.S. at 945 ("We conclude, in accord with this precedent, that Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe.").

B. Bonnell's Third Petition

Bonnell relies on *Panetti* and *Martinez-Villareal*'s ripeness theory here in arguing that his third-in-time habeas petition is not successive and therefore not subject to § 2244(b)'s gatekeeping requirements. He contends, without supporting authority, that the claim he now asserts relies on evidence of the prosecutor's bad faith, and "[b]ad faith is an element that is *not* ripe at the time of trial but is accumulated over a significant period of time as reflected in [the] unique procedural history" of this case. (Doc. 8 at 4-5.) Bonnell maintains that this claim ripened when his post-conviction counsel discovered in 2020 the morgue pellets and shell casings in the prosecutor's file, which the prosecutors had repeatedly claimed over many years were lost or destroyed. (*Id.* at 7.) Respondent counters that Bonnell's new petition "on its face is successive" and therefore must be transferred to the Sixth Circuit for authorization. (Doc. 6 at 3.) I agree.

Courts have applied the *Panetti* / *Martinez-Villareal* ripeness exception to the statutory bar on successive petitions outside the context of *Ford* claims. In *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010), for example, the Sixth Circuit found an *ex post facto* claim asserted in a later habeas petition non-successive, because it challenged the cumulative effect of amendments to Michigan's parole system, the last of which took effect two years after the petitioner filed his original habeas petition. The court explained that "[l]ike the *Ford* claims at issue in *Panetti* and *Martinez–Villareal*, Jones's *ex post facto* claim was unripe when his initial petition was filed – the events giving rise to the claim had not yet occurred." *Id.* *See also Garcia v. Quarterman*, 573 F.3d 214, 221 (5th Cir. 2009) ("[L]ater

habeas petitions attacking distinct judgments, administration of an inmate's sentence, defective habeas proceeding itself, or some other species of legal error – when the error arises after the underlying conviction – tend to be deemed non-successive.") (citing cases)).

But the Supreme Court explicitly has refused to apply the *Panetti* / *Martinez-Villareal* exception to later petitions asserting claims based on newly discovered facts – even where the facts were previously unavailable to the petitioner. In *Magwood v. Patterson, supra*, the Court rejected an interpretation of § 2244(b)(2)(B) in which the second-or-successive rule would "*not* apply to a claim that the petitioner did *not* have a full and fair opportunity to raise previously." *Magwood*, 561 U.S. at 335 (emphasis in original). It reasoned that if a petitioner's claim falls directly within the scenario described in § 2244(b)(2)(B) to allow the petitioner to bypass the authorization procedure "would considerably undermine – if not render superfluous – the exceptions to dismissal set forth in § 2244(b)(2)." *Id.; see also In re Coley*, 871 F.3d 455, 457-58 (6th Cir. 2017) (rejecting similar argument in interpreting § 2244(b)(2)(A)). In other words, because § 2244(b)(2)(B) permits circuit courts to authorize claims presented in "second or successive" petitions that are predicated on newly discovered evidence to proceed in some circumstances, the provision clearly contemplates that such claims, while previously unavailable to the petitioner, are nonetheless successive.

Here, Bonnell's petition presents the exact scenario described in § 2244(b)(2)(B). It attacks the same state-court judgment as his previous two petitions. It asserts a claim he did not raise in his prior petitions; Bonnell concedes his new *Youngblood* claim, which concerns all of the State's physical evidence in the case, is "similar, but not identical" to the one he raised in his original petition, which focused only on evidence from the crime scene and his hands, clothes and possessions at the time of his arrest. (Doc. 1 at 2.) And the new *Youngblood* claim is predicated on newly discovered and previously unavailable facts – namely, that the morgue bullets and shell casings were in the State's possession despite its repeated representations to the contrary.

Furthermore, this claim was not unripe when Bonnell filed his original habeas petition. By his own account, Bonnell has long been aware that physical evidence in his case was missing, and for more than two decades he has challenged the State's handling of the evidence in both state and federal courts, including in his initial petition. The fact that Bonnell only now has found this additional, previously unavailable evidence of the State's bad faith – which he contends strengthens and broadens his new *Youngblood* claim – does not relieve him of § 2244(b)(2)(B)'s gatekeeping procedures; rather, it plants his petition squarely within the provision's reach. *See In re Wogenstahl*, 902 F.3d 621, 627-28 (6th Cir. 2018) (finding second-in-time petition "second or successive" under § 2244(b)(2)(B) where the factual predicates of his *Brady* and ineffective-assistance claims "had already occurred when he filed his petition, although Wogenstahl was unaware of these facts.").

Accordingly, Bonnell's third-in-time petition is "second or successive" under AEDPA's § 2244(b)(2)(B) and must be transferred to the Sixth Circuit for authorization pursuant to the Act's § 2244(b)(3)(A).

CONCLUSION

For the reasons stated above, the Court finds Petitioner Bonnell's petition for writ of habeas corpus (Doc. 1) is "second or successive" within the meaning of 28 U.S.C. § 2244(b), and therefore grants Respondent's motion to transfer the petition to the Sixth Circuit Court of Appeals for a determination of whether the case may proceed (Doc. 6). It hereby orders the Clerk to transfer the case to the Sixth Circuit pursuant to 28 U.S.C. § 1631 for such authorization.

IT IS SO ORDERED.

Dated: March 21, 2023

s/ Jeffrey J. Helmick
JEFFREY J. HELMICK
UNITED STATES DISTRICT JUDGE

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

March 20, 2024

Mr. Laurence Edward Komp
1000 Walnut, Suite 600
Kansas City, MO 64106

Re: Melvin Bonnell
v. Chris McBee, Warden
Application No. 23A852

Dear Mr. Komp:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kavanaugh, who on March 20, 2024, extended the time to and including June 1, 2024.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Sara Simmons
Case Analyst

Whereabouts of Physical Evidence in Bonnell's Case

Lost, Mishandled, or Destroyed Evidence	Approximate time of loss	Existing Evidence	Approximate time of recovery (if applicable)
Popil's stained jacket	Lost after trial – never furnished to Bonnell for testing		
Bonnell's white pants	Lost before trial		
Bonnell's white socks	Lost before trial		
Bonnell's jacket	Lost after trial		
		Bonnell's jacket	2 years after trial – in Prosecutor Bombik's closet
Bonnell's jacket	Lost again, some time after initial recovery		
		Bonnell's jacket	2008
Vomit at the apartment	Lost before trial		
Other biological material at the apartment	Lost before trial		
Biological evidence recovered from Bonnell's car	Lost before trial		
Murder Weapon	Destroyed after trial		
Green Pillow	Lost after trial – never furnished to Bonnell for testing		
Gunshot residue test of Bonnell's hands	Lost before trial		
Shell casings	Lost after trial		
		Shell casings	2020 – found in prosecution's file
Morgue pellets	Lost after trial		
		Morgue Pellets	2020 – found in prosecution's file