

No. 23-7614

In the Supreme Court of the United States

MELVIN BONNELL,

Petitioner,

v.

BILL COOL, Warden

Respondent.

*ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

BRIEF IN OPPOSITION

DAVE YOST

Attorney General of Ohio

T. ELLIOT GAISER

Solicitor General

MICHAEL J. HENDERSHOT*

Chief Deputy Solicitor General

**Counsel of Record*

SAMUEL C. PETERSON

Deputy Solicitor General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614.466.8980

michael.hendershot@ohioago.gov

Counsel for Respondent

CAPITAL CASE – NO EXECUTION DATE SET

QUESTIONS PRESENTED

Did the Sixth Circuit correctly determine that Melvin Bonnell's third-in-time petition for a writ of habeas corpus was a second or successive petition that was barred by 28 U.S.C. §2244?

LIST OF PARTIES

The Petitioner is Melvin Bonnell, an inmate at the Ross Correctional Institution.

The Respondent is Bill Cool, the Warden of the Ross Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

The petition's list of directly related proceedings is incomplete. Among other things, Bonnell's list does not include citations to the Ohio court decisions that rejected the *Arizona v. Youngblood*, 488 U.S. 51 (1988) claim that Bonnell presents in his current Petition. Bonnell likewise does not cite this Court's decision denying Bonnell's petition for a writ of certiorari with respect to those decisions. A complete list of directly related proceedings follows.

1. *State v. Bonnell*, No. CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (judgment entered March 29, 1988) (conviction)
2. *State v. Bonnell*, No. 55927 (Ohio Court of Appeals, Eighth District) (judgment entered October 5, 1989) (direct appeal).
3. *State v. Bonnell*, No. 1989-2136 (Ohio Supreme Court) (judgment entered July 24, 1991; reconsideration denied September 18, 1991) (direct appeal).
4. *Bonnell v. Ohio*, No. 91-6740 (U.S. Supreme Court) (certiorari denied February 24, 1992) (direct appeal).
5. *State v. Bonnell*, No. 55927 (Ohio Court of Appeals, Eighth District) (judgment entered May 6, 1994; reconsideration denied February 1, 1995) (application for reconsideration).
6. *State v. Bonnell*, No. 1994-1343 (Ohio Supreme Court) (judgment entered December 20, 1994) (application for reconsideration).
7. *State v. Bonnell*, No. CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (judgment entered October 16, 1995; on remand for clarification, judgment entered August 13, 1997) (postconviction).
8. *State v. Bonnell*, Nos. 69835, 73177 (Ohio Court of Appeals, Eighth District) (judgment entered August 27, 1998) (postconviction).
9. *State v. Bonnell*, No. 1998-2113 (Ohio Supreme Court) (judgment entered January 20, 1999; reconsideration denied March 3, 1999) (postconviction).

10. *Bonnell v. Ohio*, No. 98-9618 (U.S. Supreme Court) (certiorari denied October 4, 1999) (postconviction).
11. *Bonnell v. Mitchell*, No. 00CV250 (U.S. District Court for the Northern District of Ohio) (judgment entered February 4, 2004) (first habeas petition).
12. *State v. Bonnell*, CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (first application for DNA testing denied October 21, 2005).
13. *State v. Bonnell*, No. 2005-2284 (Ohio Supreme Court) (appeal denied March 29, 2006) (first application for DNA testing).
14. *State v. Bonnell*, No. 87337 (Ohio Court of Appeals, Eighth District) (appeal dismissed August 3, 2006) (constitutionality of DNA testing statute).
15. *State v. Bonnell*, No. 2006-1739 (Ohio Supreme Court) (appeal denied December 27, 2006) (constitutionality of DNA testing statute).
16. *Bonnell v. Mitchell*, No. 04-3301 (U.S. Court of Appeals for the Sixth Circuit) (judgment entered January 8, 2007) (first habeas petition).
17. *Bonnell v. Ishee*, No. 07-6313 (U.S. Supreme Court) (certiorari denied December 3, 2007) (first habeas petition).
18. *Bonnell v. Mitchell*, No. 04-3301 (U.S. Court of Appeals for the Sixth Circuit) (motion to recall mandate denied November 20, 2009) (first habeas petition).
19. *Bonnell v. Bobby*, No. 09-9186 (U.S. Supreme Court) (certiorari denied June 1, 2010) (motion to recall mandate in first habeas petition).
20. *State v. Bonnell*, No. CR-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (judgment entered January 3, 2011) (motion for resentencing).
21. *State v. Bonnell*, No. 96368 (Ohio Court of Appeals, Eighth District) (judgment entered November 10, 2011) (motion for resentencing).
22. *State v. Bonnell*, No. 2011-2164 (Ohio Supreme Court) (appeal denied May 14, 2014; reconsideration denied September 24, 2014) (motion for resentencing).
23. *State v. Bonnell*, No. CR-87-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (nunc pro tunc entry January 20, 2015).

24. *State v. Bonnell*, No. 102630 (Ohio Court of Appeals, Eighth District) (judgment entered November 5, 2015) (appeal of nunc pro tunc entry).
25. *State v. Bonnell*, No. 2015-2047 (Ohio Supreme Court) (appeal denied March 15, 2017) (appeal of nunc pro tunc entry).
26. *State v. Bonnell*, No. 2017-0115 (Ohio Supreme Court) (appeal dismissed April 6, 2017) (second appeal of first application for DNA testing).
27. *State v. Bonnell*, No. 2005-2284 (Ohio Supreme Court) (application for reopening denied April 19, 2017) (first application for DNA testing).
28. *State v. Bonnell*, CR-87-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (second application for DNA testing denied August 14, 2017).
29. *Bonnell v. Jenkins*, No. 1:17-cv-787 (U.S. District Court for the Northern District of Ohio) (judgment entered August 25, 2017) (second habeas petition).
30. *State v. Bonnell*, No. 2017-1360 (Ohio Supreme Court) (judgment entered October 10, 2018) (second application for DNA testing).
31. *In re Bonnell*, No. 17-3886 (U.S. Court of Appeals for the Sixth Circuit) (judgment entered December 4, 2018) (second habeas petition).
32. *State v. Bonnell*, No. CR-87-223820 (Court of Common Pleas, Cuyahoga County, Ohio) (motion for leave to file a motion for a new trial denied January 24, 2019).
33. *Bonnell v. Ohio*, No. 18-8569 (U.S. Supreme Court) (certiorari denied May 28, 2019) (second application for DNA testing).
34. *Bonnell v. Shoop*, No. 18-9468 (U.S. Supreme Court) (certiorari denied October 7, 2019).
35. *State v. Bonnell*, No. 108209 (Ohio Court of Appeals, Eighth District) (judgment entered December 26, 2019) (motion for new trial).
36. *In re Bonnell*, No. 19-6863 (U.S. Supreme Court) (petition for an original writ of habeas corpus denied February 24, 2020; rehearing denied April 6, 2020)
37. *State v. Bonnell*, No. 2020-0210 (Ohio Supreme Court) (appeal denied June 17, 2020; reconsideration denied August 18, 2020)

38. *Bonnell v. Shoop*, No. 20-6922 (U.S. Supreme Court) (certiorari denied March 29, 2021)

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
LIST OF PARTIES	ii
LIST OF DIRECTLY RELATED PROCEEDINGS.....	iii
TABLE OF CONTENTS.....	vii
TABLE OF AUTHORITIES	viii
INTRODUCTION	1
JURISDICTION.....	3
STATEMENT.....	3
REASONS TO DENY THE WRIT	8
I. This case does not implicate the Questions Presented in Bonnell’s Petition.....	9
II. The Sixth Circuit’s decision is consistent with settled precedent and there is no circuit split.....	13
III. This case provides a poor vehicle to consider the Questions Presented....	14
CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Arizona v. Youngblood</i> , 488 U.S. 1 (1988)	1, 2, 6, 9, 10, 11, 12, 13, 14
<i>Blackman v. Davis</i> , 909 F.3d 772 (5th Cir. 2018)	13
<i>Bonnell v. Ishee</i> , 552 U.S. 1064 (2007)	7
<i>Bonnell v. Mitchell</i> , 212 F. App'x 517 (6th Cir. 2007)	7
<i>Bonnell v. Mitchell</i> , 301 F. Supp. 2d 698 (N.D. Ohio 2004)	1, 6, 7
<i>Bonnell v. Ohio</i> , 502 U.S. 1107 (1992)	6
<i>Bonnell v. Ohio</i> , 528 U.S. 842 (1999)	6
<i>Bonnell v. Shoop</i> , 140 S. Ct. 92 (2019)	7
<i>In re Bonnell</i> , 140 S. Ct. 2662 (2020)	7
<i>In re Bonnell</i> , No. 17-3886, 2018 WL 11298156 (6th Cir. Dec. 4, 2018)	7
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	2, 10, 13, 14
<i>Brown v. Muniz</i> , 889 F.3d 661 (9th Cir. 2018)	2, 13
<i>California v. Trombetta</i> , 467 U.S. 479 (1984)	9, 10
<i>Castro v. United States</i> , 540 U.S. 375 (2003)	3

<i>Illinois v. Fisher</i> , 540 U.S. 544 (2004)	13
<i>Killian v. United States</i> , 368 U.S. 231 (1961)	10
<i>Long v. Hooks</i> , 972 F.3d 442 (4th Cir. 2020)	13
<i>State v. Bonnell</i> , 155 Ohio St. 3d 176 (2018)	3, 15
<i>State v. Bonnell</i> , 2019-Ohio-5342 (Ohio Ct. App.)	7
<i>State v. Bonnell</i> , 61 Ohio St. 3d 179 (1991)	5, 6
<i>State v. Bonnell</i> , 71 Ohio St. 3d 223 (1994)	6
<i>State v. Bonnell</i> , 84 Ohio St. 3d 1469 (1999)	6
<i>State v. Bonnell</i> , No. 55927, 1989 Ohio App. LEXIS 4982 (Ohio Ct. App. Oct. 5, 1989)	3, 4, 5
<i>State v. Bonnell</i> , Nos. 69835 & 73177, 1998 Ohio App. LEXIS 3943 (Ohio Ct. App. Aug. 27, 1998)	5, 6
<i>State v. Bonnell</i> , Ohio Supreme Court Case No. 2020-0210	8
<i>State v. Conner</i> , 2014-Ohio-4669 (Ohio Ct. App.)	8
<i>Storey v. Lumpkin</i> , 142 S. Ct. 2576 (2022)	13
<i>Tompkins v. Sec’y, Dep’t of Corr.</i> , 557 F.3d 1257 (11th Cir. 2009)	13
<i>In re Wogenstahl</i> , 902 F.3d 621 (6th Cir. 2018)	13

Statutes

28 U.S.C. §1254.....	3
28 U.S.C. §2244.....	1, 2, 3, 7, 12, 13, 14
28 U.S.C. §2254.....	6

Other Authorities

<i>06/17/2020 Case Announcements #2, 2020-Ohio-3276</i>	8
---	---

INTRODUCTION

Melvin Bonnell murdered Robert Bunner in 1986 and was sentenced to death. Ohio courts have repeatedly affirmed his conviction and sentence. Federal courts have rejected Bonnell's challenges to his conviction and sentence as well. They have, among other things, denied Bonnell's first petition for a writ of habeas corpus, which he filed in 2000 and in which he raised an *Arizona v. Youngblood*, 488 U.S. 1 (1988) claim. *See Bonnell v. Mitchell*, 301 F. Supp. 2d 698, 718–19, 729–30 (N.D. Ohio 2004). Bonnell's challenges to his conviction did not stop after this Court affirmed the Sixth Circuit's denial of his first, properly filed, habeas petition. He has, since then, unsuccessfully challenged his conviction and sentence in a variety of ways.

Bonnell's petition for a writ of certiorari in this case is just the latest in a long line of meritless attacks on his conviction. In this Petition, Bonnell argues that he has a newly viable claim under *Youngblood* and that the Sixth Circuit was wrong when it denied him permission to file a second-or-successive petition raising that claim. Although Bonnell raised that claim in a third-in-time habeas petition, Bonnell argues that that petition was not a second or successive petition at all, and therefore did not need to comply with the requirements of 28 U.S.C. §2244. The Court should deny the Petition for at least three reasons.

First, this case does not present the questions that Bonnell has raised in his Questions Presented. Those questions ask how habeas courts should consider *Youngblood* claims that arise years after a defendant is convicted. But Bonnell does not present a *Youngblood* claim. A *Youngblood* claim requires that the defendant present evidence that the State acted in bad faith when it failed to preserve potentially useful

evidence. *See Youngblood*, 488 U.S. at 57–58. Bonnell has no such evidence. In arguing otherwise, Bonnell materially misrepresents what the courts below held. According to Bonnell, the district court and the Sixth Circuit both held that he had “satisfied the bad faith component of *Youngblood*.” Pet.4. They did not.

Second, there is no circuit split. The Sixth Circuit held that the facts underlying Bonnell’s *Youngblood* claim “were available at the time he filed his initial [habeas] petition,” Pet.App.1a, and that his current petition was a second or successive petition to which the gatekeeping requirements of 28 U.S.C. §2244(b)(2)(B) applied, Pet.App.6a–7a. Bonnell has not pointed to a single circuit that has treated *Youngblood* claims any differently. To be sure, it appears that the Sixth Circuit may be one of the only courts to have considered whether the gatekeeping provisions of §2244(b)(2) apply to *Youngblood* claims. But other courts have held that those provisions *do* apply to *Brady v. Maryland*, 373 U.S. 83 (1963) claims, *see Brown v. Muniz*, 889 F.3d 661, 668 (9th Cir. 2018), and *Brady* and *Youngblood* claims share a constitutional root, *Youngblood*, 488 U.S. at 55–58. The Sixth Circuit’s decision in this case is therefore entirely consistent with out-of-circuit precedent.

Third, this case provides a poor vehicle with which to address the Questions Presented. Even if Bonnell were permitted to file his third-in-time habeas petition, the outcome of this case would not change. Bonnell omits any discussion of the significant evidence that links him to the murder. For example, while Bonnell notes that testing at the time of trial indicated that the visible blood did not match the victim’s blood type, *see* Pet.10, he fails to mention that subsequent DNA testing of his jacket in 2009

identified blood in five additional places and that the newly identified blood was consistent with the blood of his victim, *State v. Bonnell*, 155 Ohio St. 3d 176, 180 (2018); *see also* Pet.App.9a (noting that “the only DNA evidence in the record is the DNA consistent with the victim’s on Bonnell’s jacket”); Affidavit of Christopher D. Schroeder at ¶28, Sixth Circuit Case No. 23-3235, Doc.12-2, Page#7.

JURISDICTION

The petition for a writ of habeas corpus that is at issue in this case is a second or successive petition under 28 U.S.C. §2244. The Sixth Circuit denied Bonnell’s request for permission to file his habeas petition and, under §2244(b)(3)(E), this Court lacks jurisdiction to consider a petition for a writ of certiorari challenging the Sixth Circuit’s decision. Bonnell, however, characterizes his Petition as challenging the Sixth Circuit’s determination that his habeas petition was second or successive, and therefore subject to §2244’s limitations. The Court has held that it may consider cert petitions that challenge the characterization of a habeas petition, despite §2244(b)(3)(E)’s bar. *See Castro v. United States*, 540 U.S. 375, 379–380 (2003). So construed, and under current precedent, the Court has jurisdiction under 28 U.S.C. §1254(1). *See id.*

STATEMENT

1. Robert Bunner and his roommates, Ed Birmingham and Shirley Hatch, spent much of November 27, 1986 partying in their Cleveland, Ohio apartment. *State v. Bonnell*, No. 55927, 1989 Ohio App. LEXIS 4982, at *2 (Ohio Ct. App. Oct. 5, 1989). Birmingham went to bed at 8:30 p.m., but the others stayed up.

At around 3:00 a.m., Hatch heard a knock on the back door. The knocker identified himself as “Charlie.” But Hatch could not see through the peephole who the person was, so she called Bunner over to the door. Bunner opened it and “Charlie” entered uninvited. Once inside, “Charlie” pulled out a gun, uttered an expletive, and shot Bunner twice at close range, striking him in his chest and groin. “Charlie” then turned towards Hatch, but she managed to escape to Birmingham’s bedroom. After Hatch woke up Birmingham, the pair left the bedroom and found “Charlie” sitting on top of Bunner, striking him repeatedly in the face. *Id.* at *2–3. Birmingham pulled “Charlie” off Bunner and threw him out the apartment door and down a flight of steps, while Hatch called the police and an ambulance. *Id.* at *3. Bunner later died from his injuries.

Around a half hour later, two Cleveland police officers spotted a car nearby, traveling backwards with its headlights off. They attempted to stop the car, but it turned and sped away. The police officers gave chase, and the fleeing car crashed into the side of a funeral home. *Id.* Emergency personnel took the driver, Melvin Bonnell, to the hospital. *Id.* at *4.

Police later realized that Bonnell matched Birmingham’s and Hatch’s descriptions of Bunner’s murderer. *Id.* at *3–4. They brought Birmingham to the hospital, and he identified Bonnell as Bunner’s murderer. *Id.* at *4. Police also found a .25-caliber pistol at the funeral-home crash scene and were able to confirm that it was the same gun used to fire the bullets found in Bunner’s body. *Id.*

Bonnell later admitted that he had been at Bunner's apartment that morning, but said that he was there with his friend, Joe Popil, and had remained in the car while Popil went inside with a gun. Bonnell said Popil returned to the car with the gun, but that Bonnell had then passed out from alcohol and did not remember anything else until he awoke in the hospital. But he apparently had no explanation for why he was the only one in the car with the gun fleeing police shortly after Bunner's murder. *Id.* (Popil confirmed he had been drinking with Bonnell earlier that night, but said he had gone home at 11:30 p.m., hours before the murder.) *Id.*

An Ohio jury convicted Bonnell of aggravated murder and aggravated burglary. *Id.* at *1. Following the jury's recommendation, the trial court sentenced Bonnell to death for the aggravated murder. *Id.* at *1–2. And it later sentenced Bonnell to ten-to-twenty-five-years' imprisonment for the aggravated burglary. *Id.* at *20.

2. Bonnell appealed, raising thirty purported errors relating to his aggravated-murder and aggravated-burglary convictions. *See id.* at *43–51. The Ohio Court of Appeals largely rejected Bonnell's assignments of error but remanded to the trial court to resentence Bonnell for the aggravated burglary. *Id.* at *20, *42. The trial court did so later that month. *See State v. Bonnell*, Nos. 69835 & 73177, 1998 Ohio App. LEXIS 3943, *6 (Ohio Ct. App. Aug. 27, 1998).

Bonnell then appealed to the Ohio Supreme Court, this time raising twenty-nine purported errors. *See State v. Bonnell*, 61 Ohio St. 3d 179 (1991). The Ohio Supreme Court rejected them all. And, as required by state law, it “independently review[ed] the death sentence for appropriateness and proportionality.” *Id.* at 186. The Court

upheld the sentence. *Id.* at 186–87. Bonnell petitioned this Court for *certiorari*, but it denied his request. *Bonnell v. Ohio*, 502 U.S. 1107 (1992).

That direct appeal was just the beginning of Bonnell’s many challenges to his convictions and sentences. An abbreviated summary follows: After this Court denied *certiorari* in 1992, Bonnell sought delayed reconsideration in the state courts. He raised fifty-five purported errors. The Ohio Court of Appeals denied reconsideration, and the Ohio Supreme Court affirmed. *See State v. Bonnell*, 71 Ohio St. 3d 223 (1994). At that point, Bonnell filed a state-postconviction petition, raising fifty-three claims for relief. After the trial court summarily dismissed the petition, Bonnell appealed. *State v. Bonnell*, Nos. 69835 & 73177, 1998 Ohio App. LEXIS 3943 (Ohio Ct. App. Aug. 27, 1998). The Ohio Court of Appeals affirmed, *id.*, and the Ohio Supreme Court dismissed Bonnell’s attempted appeal because it raised “no substantial constitutional question,” *State v. Bonnell*, 84 Ohio St. 3d 1469 (1999). This Court again denied *certiorari*. *Bonnell v. Ohio*, 528 U.S. 842 (1999).

Bonnell then turned to the federal courts, seeking habeas relief under 28 U.S.C. §2254. He alleged “twenty general areas of alleged constitutional violation.” *See Mitchell*, 301 F. Supp. 2d at 718. These purported errors included (in the district court’s words) a variety of forms of “prosecutorial misconduct,” *id.* at 724–33, “judicial misconduct,” *id.* at 733–37, “instructional error,” *id.* at 737–55, “voir dire” errors, *id.* at 755–56, “ineffective assistance of counsel,” *id.* at 756–62, “appeal” errors, *id.* at 762–63, and two challenges to the “constitutionality of Ohio[s] death penalty statute,” *id.* at 763. As is most relevant here, Bonnell alleged a *Youngblood* violation on

the basis of the State's failure to preserve certain evidence from the crime scene. *Id.* at 729–30. The district court denied Bonnell's habeas petition. The Sixth Circuit unanimously affirmed, *see Bonnell v. Mitchell*, 212 F. App'x 517 (6th Cir. 2007), and this Court denied *certiorari*, *see Bonnell v. Ishee*, 552 U.S. 1064 (2007).

After another round of state-court proceedings, Bonnell returned to federal court, where he again sought habeas relief. The district court determined that Bonnell's second-in-time petition was a second or successive petition that 28 U.S.C. §2244(b)(2) prevented it from considering. It therefore transferred the case to the Sixth Circuit. *See In re Bonnell*, No. 17-3886, 2018 WL 11298156, *1 (6th Cir. Dec. 4, 2018). The Sixth Circuit agreed that Bonnell's petition was a second or successive petition and denied Bonnell permission to file that petition. *Id.* at *2. Bonnell filed a petition for *certiorari*, seeking review of the Sixth Circuit's judgment. The Court denied Bonnell's petition. *See Bonnell v. Shoop*, 140 S. Ct. 92 (2019). Bonnell then filed a petition with this Court seeking an original writ of habeas corpus. The Court denied that petition as well. *In re Bonnell*, 140 S. Ct. 2662 (2020).

3. While his federal challenges were still pending, Bonnell sought a new trial in state court. The basis for his new-trial request was again that the State failed to preserve certain evidence. *See State v. Bonnell*, 2019-Ohio-5342, ¶¶29, 33 (Ohio Ct. App.). The trial court denied his request, and a state appellate court affirmed. *Id.* While his appeal of that decision was pending in state court, the prosecutor's office gave Bonnell's counsel permission to view its files. *See Pet.App.4a.* Although the State had long maintained that most of the trial evidence had been lost, Bonnell's

counsel discovered in those files several shell casings and morgue pellets, a term that some Ohio courts use to refer to a fired bullet, *see, e.g., State v. Conner*, 2014-Ohio-4669, ¶7 (Ohio Ct. App.), that had been marked as trial exhibits, Pet.App.4a.

Bonnell had, in the meantime, appealed to the Ohio Supreme Court and challenged the appellate court decision that affirmed the denial of his motion for a new trial. *See State v. Bonnell*, Ohio Supreme Court Case No. 2020-0210. After the State again noted that the evidence from Bonnell's trial had been lost, Bonnell filed a motion to disqualify the Cuyahoga County Prosecutor's Office and to strike the prosecutor's pleading. *See id.*, Motion to Strike. The basis for his motion was the discrepancy between what the State had said (that all the physical evidence had been lost or destroyed) and the reality (that at least some physical evidence had been preserved but misplaced). *Id.* Bonnell did not argue in that motion (and has not argued at any time since then) that the newly discovered evidence was itself relevant or that it called his conviction into question in any way. *See id.*, *see also* Pet.App.8a. The Ohio Supreme Court denied his motion and declined to accept his appeal. *06/17/2020 Case Announcements #2*, 2020-Ohio-3276.

REASONS TO DENY THE WRIT

The Court should deny the petition for a writ of certiorari for at least three reasons. *First*, this case does not implicate the Questions Presented in Bonnell's petition. *Second*, there is no circuit split and the Sixth Circuit's decision is consistent with the settled law that other circuits apply in similar situations. *Third*, this case provides a poor vehicle to consider the Questions Presented. Bonnell's claims would fail

regardless of the answer to the Questions Presented because DNA testing links him to the murder for which he was convicted.

I. This case does not implicate the Questions Presented in Bonnell's Petition.

Both of Bonnell's Questions Presented are premised on the existence of a valid *Youngblood* claim. But Bonnell does not have a valid *Youngblood* claim. *Youngblood* requires the bad-faith destruction of evidence by the State. *See* 488 U.S. at 58. The ultimate basis for Bonnell's *new* arguments (that is, those that he did not raise in his first habeas petition) is not that evidence was destroyed or lost. It is that evidence has recently been found. And even then, Bonnell does not allege that the newly discovered evidence is relevant to his guilt or innocence; he alleges only that the new evidence shows that the State acted in bad faith when it failed to preserve most of the trial evidence. The evidence Bonnell points to does nothing of the sort. Not only does the evidence fail to establish bad faith for purposes of a *Youngblood* claim, it fails to establish bad faith for *any* purpose.

Any time “potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.” *California v. Trombetta*, 467 U.S. 479, 486 (1984). The Court, however, has refused to impose on the police “an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.” *Youngblood*, 488 U.S. at 58. It has instead held that “unless 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.*

It is not enough under *Youngblood* to simply assert that the police acted in bad faith generally. A defendant has a valid *Youngblood* claim only if he can show that the police acted in bad faith *when they failed to preserve evidence*. For example, in *Trombetta* (on which *Youngblood* relied) the Court held that there was no due process violation when the police in a drunk driving case destroyed breath samples but did not do so in bad faith. Key to its decision was the fact that California “did not destroy respondents’ breath samples in a calculated effort to circumvent the disclosure requirements established by *Brady v. Maryland* and its progeny.” *Trombetta*, 467 U.S. at 488. The same was true in *Killian v. United States*, 368 U.S. 231 (1961). The Court in that case discussed whether the federal government had violated the Due Process Clause by destroying notes that FBI agents had made. *See id.* at 242. It ruled that there was no constitutional problem so long as the agents destroyed the notes “in good faith and in accord with their normal practice.” *Id.* The Court observed that “almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed.” *Id.*

Bonnell, in this case, has failed to make the showing of bad faith that is necessary to establish a *Youngblood* claim. Although he alleges that he has newly discovered evidence of bad faith on the part of the State, he has not pointed to any evidence—new or otherwise—that suggests the State acted in bad faith when it *failed to preserve*

evidence. The evidence of (alleged) bad faith on which Bonnell relies involves events that occurred years after the evidence at issue was lost.

Bonnell also fails to establish a *Youngblood* claim for a second, equally important, reason: He cannot show that the State acted in bad faith at all, even years after the trial evidence at issue in this case was lost. Bonnell materially misrepresents the lower courts' decisions when he claims that they held otherwise.

As evidence of the State's alleged bad faith, Bonnell points to the fact that several shell casings and morgue pellets were recently discovered in envelopes that were in the prosecutor's files. *See* Pet.13–24. He never connects the recently discovered evidence to the evidence that was lost or destroyed. Instead, he claims that the recently discovered evidence contradicts the State's repeated assertions that much of the trial evidence in this case was lost years ago. *See* Pet.12–15.

There are at least two problems with Bonnell's argument. *First*, because it does not involve the failure to preserve evidence, it is not a *Youngblood* claim. *Second*, the recent discovery of these pieces of physical evidence does not show that the State made its earlier statements in bad faith. The rest of the record in this case shows just the opposite. It shows that the State engaged in a diligent search for the misplaced trial evidence. *See* Affidavit of Christopher D. Schroeder at ¶28, Doc.12-2, Page#7.

Bonnell challenges the thoroughness of the State's search and argues that the State either lied about the existence of the shell casings, or that the casings were reinserted in the prosecutor's file after the State had searched it. *See* Pet.32–33. He

ignores the more reasonable (and more likely) explanation, which is that, despite the State's best efforts, it did not find the shell casings and morgue pellets when it originally searched a box that it believed contained only documents. *See* Affidavit of Charles D. Schroeder at ¶¶6–9, Doc.12-2, Page#2–3. That conclusion is made even more likely by the fact that the shell casings that were ultimately found in the box were not on the list of specific evidence that Bonnell told the State he was looking for. *See id.* at ¶9, Doc.12-2, Page#2–3.

Bonnell nevertheless claims that the district court and the Sixth Circuit both held that he had “satisfied the bad faith component of *Youngblood*.” Pet.4; *see also* Pet.15, 33–34. He misrepresents the lower courts' decisions. The Sixth Circuit did not hold that the State had acted in bad faith. It in fact described the evidence on which Bonnell now relies as “evidence of the State's *purported* bad faith.” Pet.App.7a (emphasis added). And while it is true that the district court used the phrase “evidence of the State's bad faith,” *see* Pet.App.18a, it is clear from context that the language in question was not the court's holding but was instead merely a convenient short-hand description of the evidence on which Bonnell relied. *See* Pet.App.17a–18a; *see also* Pet.App.7a (Sixth Circuit discussing the district court's decision).

Because Bonnell does not have a valid *Youngblood* claim, this case does not implicate the Questions Presented. Both of his Questions focus on the intersection of *Youngblood* and the requirements of §2244(b)(2). *See* Pet.i. But without a valid *Youngblood* claim there is no intersection and no question for the Court to answer.

II. The Sixth Circuit’s decision is consistent with settled precedent and there is no circuit split.

Bonnell has not identified a single decision from another circuit court with which the Sixth Circuit’s decision conflicts. That is perhaps because, at least as far as the Warden has been able to tell, no other circuit has considered the Questions Presented in this case. Courts have held, however, that “*Brady* claims are subject to [28 U.S.C. §2244’s] second or successive gatekeeping requirements.” *Brown v. Muniz*, 889 F.3d 661, 668 (9th Cir. 2018); *see also Tompkins v. Sec’y, Dep’t of Corr.*, 557 F.3d 1257, 1260 (11th Cir. 2009); *Blackman v. Davis*, 909 F.3d 772, 778–79 (5th Cir. 2018); *In re Wogenstahl*, 902 F.3d 621, 627–28 (6th Cir. 2018); *Long v. Hooks*, 972 F.3d 442, 456 (4th Cir. 2020). This Court has declined to review that issue. *See Storey v. Lumpkin*, 142 S. Ct. 2576 (2022).

The Court should decline to consider the Questions Presented in this case as well. The same logic that circuit courts have applied to *Brady* claims applies with equal force to *Youngblood* claims. *Youngblood* and *Brady* share a common root. *See Youngblood*, 488 U.S. at 55–58. A successful *Youngblood* claim however, requires a showing “over and above” the constitutional requirements of *Brady*. *Id.* at 56. A successful *Brady* claim requires a defendant to show that the State suppressed favorable evidence and that the evidence was material to either guilt or punishment, *Brady*, 373 U.S. at 87. The good faith or bad faith of the prosecution does not matter. *Id.* A defendant who alleges a *Youngblood* claim, by comparison, must show that the police destroyed potentially exculpatory evidence in bad faith. *Youngblood*, 488 U.S. at 58; *see also Illinois v. Fisher*, 540 U.S. 544, 548 (2004) (discussing the difference

between *Brady* and *Youngblood* evidence). It is more difficult, in other words, for a defendant to establish a *Youngblood* claim than it is for a defendant to establish a *Brady* claim. And if criminal defendants face a *higher* burden when attempting to establish a *Youngblood* claim in state court, it would make little sense if habeas petitioners faced a *lower* burden when filing a second or successive habeas petition that raises a *Youngblood* claim.

Bonnell's petition addresses none of this. He does not acknowledge that courts have consistently held that *Brady* claims must satisfy §2244(b)(2)(B)'s demanding standard. Nor does he make any argument about why *Youngblood* claims should be treated differently than *Brady* claims. He has failed to present any compelling reason why the Court should grant his petition in this case, let alone why the Court should use this case to upend settled circuit precedent.

III. This case provides a poor vehicle to consider the Questions Presented.

Bonnell spends considerable time in his petition discussing the potential value of the misplaced trial evidence and explaining how, he believes, that evidence could help him now. *See* Pet.7–11. He argues that it is unfair to require a habeas petitioner to demonstrate his actual innocence under §2244(b)(2)(B)(ii) because the very nature of a *Youngblood* claim means that the petitioner does not have access to the lost evidence. Pet.28.

This case provides a poor vehicle to address that question. Even if some future case might raise questions about how a petitioner can satisfy §2244(b)(2)(B)(ii) with respect to a *Youngblood* claim, this one does not. With or without the lost evidence, Bonnell could not show that “no reasonable factfinder” would have found him guilty

of Brunner's murder. DNA testing performed after trial determined that Bonnell's jacket had traces of blood in five places and that that blood was consistent with the victim's DNA. *Bonnell*, 155 Ohio St. 3d at 180; *see also* Pet.App. 9a; Affidavit of Christopher D. Schroeder at ¶28, Case No. 23-3235, Doc.12-2, Page#7. Bonnell focuses instead on testing that was done at trial. That testing showed only that the *visible* blood on Bonnell's jacket matched Bonnell's blood type, not Brunner's. *See* Pet.7, 10. Perhaps because it directly contradicts his arguments, Bonnell never mentions the later, more accurate, evidence that directly implicates him in Brunner's murder.

CONCLUSION

This Court should deny Bonnell's petition for a writ of certiorari.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s/ Michael J. Hendershot
T. ELLIOT GAISER
Solicitor General
MICHAEL J. HENDERSHOT*
Chief Deputy Solicitor General
**Counsel of Record*
SAMUEL C. PETERSON
Deputy Solicitor General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614.466.8980
michael.hendershot@ohioago.gov

Counsel for Respondent