

No. 23A\_\_\_\_\_

**CAPITAL CASE**

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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MELVIN BONNELL, *Petitioner*,

v.

TIM SHOOP, *Respondent*

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**APPLICATION FOR A SIXTY (60) DAY EXTENSION OF TIME  
IN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI**

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**APPENDIX TO APPLICATION FOR A SIXTY (60) DAY EXTENSION OF TIME  
IN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI**

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COUNSEL FOR PETITIONER

**APPENDIX**

1. Order Filed Denying Petition for en banc Rehearing..... 1a
2. Order Filed Denying Movant’s Motion to Grant Second Successive Motion.. 3a

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.

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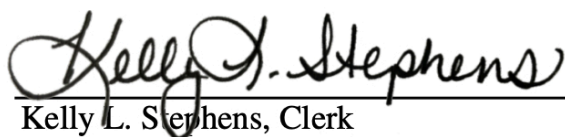
ORDER

**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

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\* Judge Murphy recused himself from participation in this ruling.

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

Kelly L. Stephens  
Clerk

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Filed: January 03, 2024

Mr. Laurence E. Komp  
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Kansas City, MO 64106

Re: Case No. 23-3235, *In re: Melvin Bonnell*  
Originating Case No.: 1:21-cv-01604

Dear Mr. Komp,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris  
En Banc Coordinator  
Direct Dial No. 513-564-7077

cc: Mr. Alan C. Rossman  
Mr. Charles L. Wille

Enclosure



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**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

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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

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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



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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.

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“[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

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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.

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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

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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



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Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

Deborah S. Hunt  
Clerk

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Filed: August 07, 2023

Mr. Laurence E. Komp

Mr. Alan C. Rossman

Mr. Charles L. Wille

Re: Case No. 23-3235, *In re: Melvin Bonnell*  
Originating Case No. 1:21-cv-01604

Dear Counsel:

The Court issued the enclosed Order today in this case. Judgment to follow.

Sincerely yours,

s/Patricia J. Elder  
Senior Case Manager  
Direct Dial No. 513-564-7034

cc: Ms. Sandy Opacich

Enclosure

No mandate to issue