No. _____

In the Supreme Court of the United States

MELVIN BONNELL,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In 1988, before DNA was widely available as a forensic tool, Melvin Bonnell was convicted and sentenced to death. Trial testimony established that blood and other biological matter was spattered and pooled throughout the scene. Additionally, Bonnell's hands were bagged to preserve evidence, and swabs and/or slides were made from evidence collected from his hands; Bonnell's clothes were seized; his car was processed; and the victim's body and clothes contained biological evidence. Thus, the crime scene and Bonnell's person and clothes were evidentiary goldmines. Bonnell sought DNA testing of this evidence in the state courts. In response, the prosecuting attorney claimed that all the evidence had vanished or was destroyed. The trial court accepted, in total, the untested hearsay of the prosecuting attorney when it denied Bonnell's request.

Thus, Bonnell's case raises two critical concerns of national importance:

1. **Whether a trial court may deny a DNA application in a capital case based solely on the untested hearsay of the prosecuting attorney and in contravention to this Court's precedent.**

2. **Whether a trial court's decision to accept, in total, the untested hearsay of the prosecutor attorney when denying DNA testing in a capital case should be reviewable on appeal.**

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceeding other than those listed in the caption.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

TABLE OF CONTENTS

APPENDIX:

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

No. _____

In the Supreme Court of the United States

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Melvin Bonnell respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

OPINIONS BELOW

The Opinion of the Supreme Court of Ohio, *State of Ohio v. Melvin Bonnell*, Slip Opinion No. 2018-Ohio-4069, is attached hereto as Appendix A. The Cuyahoga County Court of Common Pleas Journal Entry, *State of Ohio v. Melvin Bonnell*, Case No. CR-87-223820-ZA, Cuyahoga County Common Pleas Court, Trial Court Journal Entry (August 14, 2017) [hereinafter J.E.], is attached hereto as Appendix B.

JURISDICTION

The Supreme Court of Ohio rendered its opinion on October 10, 2018. Bonnell timely filed a Motion for Reconsideration with the Supreme Court of Ohio on October 22, 2018. The Supreme Court of Ohio denied his motion on December 12, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

This case involves the following Amendments to the United States Constitution:

A. Sixth Amendment, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

B. Eighth Amendment, which provides in pertinent part:

> Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishment inflicted.

C. Fourteenth Amendment, which provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1988, Melvin Bonnell was convicted of one count of aggravated burglary with a firearm specification; one count of felony murder with a firearm and aggravated burglary specification; and one count of aggravated murder with a firearm and aggravated burglary specification. All counts arose from the homicide of a single victim, Robert Bunner. The jury recommended, and the trial court imposed, a sentence of death.

Bonnell's convictions and death sentence were affirmed on direct appeal, as was the denial of his petition for post-conviction relief. *State v. Bonnell,* 8th Dist. Cuyahoga No. 55927, 1989 Ohio App. LEXIS 4982 (Oct. 5, 1989) (denying relief on direct appeal); *State v. Bonnell*, 61 Ohio St.3d 179, 573 N.E.2d 1082 (1991) (affirming the denial of relief on direct appeal); *State v. Bonnell,* 8th Dist. Cuyahoga No. 69835/73177, 1998 Ohio App. LEXIS 3943 (Aug. 27, 1998)) (affirming the denial of post-conviction relief); and *State v. Bonnell*, 84 Ohio St.3d 1469, 704 N.E.2d 578 (1999) (no discretionary appeal allowed). Bonnell sought federal habeas relief after exhausting state remedies. *See Bonnell v. Mitchell*, 301 F.Supp.2d 698 (N.D. Ohio 2004) and *Bonnell v. Mitchell*, 212 F.App'x 517, 519 (6th Cir.2007).

On October 29, 2004, Bonnell applied for DNA testing pursuant to Senate Bill 11 (Ohio Revised Code 2953.71, *et seq*.), Ohio's original post-conviction DNA testing bill. He asserted that DNA testing would exclude him as the source of crime scene biological material and thus establish his actual innocence of the crimes for which he is convicted and sentenced to death. The prosecutor opposed Bonnell's Application for

DNA testing and alleged that testable evidence was either never collected or no longer existed. The prosecutor filed proposed Findings of Fact and Conclusion of Law on October 17, 2005, which the trial court adopted verbatim the following day. It is now clear that the trial court's Findings of Fact and Conclusions of Law were wrong because there was at least one piece of testable evidence that did exist, contrary to the prosecution's contention.

On February 6, 2008, Bonnell applied for post-conviction testing once again under Ohio's improved and now permanent SB 262. Bonnell requested DNA testing of the following:

> Swabs and slides of blood recovered from the crime scene; swabs and slides of blood recovered from [Bonnell's] hands; jacket and other clothes; vomit found in kitchen; blood from [Bonnell's] vehicle; hair on green pillow; plastic bags for gunshot residue; 1 or 2 guns recovered by Cleveland police.

Inconsistent with his previous statement to the courts, the prosecutor did an about-face and revealed that one sole piece of evidence had been located—Bonnell's jacket.

The trial court accepted Bonnell's application and granted post-conviction DNA testing on that single item—Bonnell's jacket—that the prosecutor produced. In its order, the court acknowledged the State of Ohio's ongoing duty to account for the evidence. *See* Order for DNA Testing filed August 4, 2008, attached hereto as Appendix C.

After testing was conducted on Bonnell's jacket, the still pending DNA application sat for *nine years* until Bonnell asked again for an accounting of the evidence in this case. On June 15, 2017, the State finally filed its accounting of the

evidence, a Report pursuant to Ohio Revised Code 2953.75(B). This Report was in the form of a double and triple hearsay affidavit. On that same date, the State also filed its Brief in Opposition to Bonnell's Application for DNA Testing and the State's Proposed Findings of Facts and Conclusions of Law. Without affording Bonnell discovery, a hearing, or any adversarial testing of the prosecution's hearsay affidavit and the hearsay within the affidavit, on August 14, 2017, the trial court adopted the State's Proposed Findings of Fact and Conclusions of Law and filed its Journal Entry, denying Bonnell's Application for DNA Testing. *See* J.E., attached at Appendix B.

Bonnell filed his timely appeal of right in the Ohio Supreme Court. After briefing and oral argument, the Ohio Supreme Court affirmed the decision of the trial court on October 10, 2018. *State v. Bonnell*, Slip Opinion No. 2018-Ohio-4069, attached at Appendix A. In its decision, the Ohio Supreme Court limited its review solely to whether Bonnell demonstrated that DNA testing would prove outcome determinative. Bonnell filed a Motion for Reconsideration, which was denied on December 12, 2018. *See* Order, attached at Appendix F.

STATEMENT OF FACTS

Robert Eugene Bunner ("Gene"), Shirley Hatch, and Ed Birmingham shared an apartment at 57th and Bridge Avenue, in Cleveland, Ohio. The three began drinking around noon on November 27, 1987. Birmingham became very intoxicated and went to bed about 8:30 pm, but Bunner and Hatch continued drinking throughout the night and into the next morning. At around 3:00am, *fifteen hours* after they began drinking, someone knocked on their door. Hatch did not recognize the visitor who

identified himself as "Charlie" and asked for Gene. Bunner let the visitor in. *See* Police Reports, attached as Exhibits 2, 3 in Appendix D.

Hatch stated that the visitor shot Bunner twice. She ran to Birmingham's room to wake him, but it took several attempts because he was so intoxicated. Birmingham stated that he entered the kitchen and saw the shooter sitting on Bunner, beating him in the head. Birmingham claimed he pulled the armed assailant off Bunner and tossed him down the stairs. While Birmingham fought with the shooter, Hatch called the police and medical rescue. Hatch was the only witness to the shooting, and she and Birmingham were the only witnesses to see, ever so briefly, the shooter. *Id.*

Tina Norwood and Dorothy Ciesla shared an apartment directly below the Hatch/Birmingham/Bunner residence. Norwood and Ciesla testified that they heard a lot of noise the night of the murder. They heard loud noises and singing from the apartment above around 2:00 a.m., followed by "banging" and a "series of thumps" at 2:30 a.m. Norwood and Ciesla testified each heard Birmingham talking to Ray Campbell, another neighbor, immediately after the murder. Tr. 1359-60, 1339-40. Birmingham alerted Campbell that he set someone up for Bunner's murder and warned Campbell to keep quiet. *Id.*

Police dispatch announced a "male shot" at 3:51 a.m., one hour and 21 minutes after the "thumps" heard by Norwood and Ciesla. Officers Kukula and Stansic arrived at the scene at 3:53 a.m. Birmingham and Hatch stated they did not know the shooter and described the suspect as "a man with long brown hair and a mustache." P.C. Exhibit NN. However, that description differs from the one Hatch gave the police

dispatcher only mere moments earlier: "a man with blond hair and a maroon jacket." Police Report, attached as Exhibit 3 in Appendix D. The officers attempted to resolve the discrepancy but were unable because Hatch and Birmingham were too intoxicated. Police Report at 4, attached as Exhibit 6 in Appendix D. Although the shooter's description changed in a matter of minutes, what remained steadfast was that both Hatch and Birmingham emphatically denied knowing him.[1]

Melvin Bonnell and Joseph Egnor, a.k.a. Joey Popil, also spent the night of November 27, 1987, drinking. They visited several bars, then went to Marlene Roberts to borrow money. Roberts testified Bonnell arrived at her home about 2:00 a.m., and that she saw someone in a red jacket in the driver's seat of Bonnell's car. That person she saw was later identified as Joey Popil. Tr. 1286, 1287. Popil denied wearing a red jacket that evening. Tr. 1229. The red jacket is significant, not only because the shooter was identified as wearing a red jacket, but also because police reports describing it were suppressed. Popil gave his red jacket to the prosecutor one day before he testified at trial. Pictures of this jacket depict what appear to be blood spots; these pictures were never disclosed to trial counsel but were only turned over post-trial during post-conviction proceedings.

After Bonnell borrowed money from Roberts, he and Popil continued to drink. By the time he attempted to drive home, Bonnell was intoxicated. His impaired

[1] This exculpatory evidence was suppressed. Undersigned counsel has the hindsight advantage of reports that trial counsel did not. *See* affidavits of Richard F. Walsh and William T. McGinty (trial counsel for Melvin Bonnell), attached as Exhibits 4, 5 in Appendix D.

driving attracted the attention of patrolling officers. When they signaled him to pull-over, Bonnell attempted to flee. A chase ensued but quickly ended when Bonnell wrecked into a building.

The timing and origin of the car chase is vital to the State's supposition that Bonnell was the shooter. However, when testimony about the chase is reviewed with the benefit of suppressed exculpatory evidence, the theory falls apart.

Police officers Montalyo and Jesionowski were partners who were working patrol on November 27, 1987. Both testified at Bonnell's trial. Officer Jesionowski's testimony contradicted Officer Montalyo's on critical points, and both officers' testimony contradicted their written report.[2] *Compare* Tr. 1139, 1261, 1266, 1274; *and* Police Report at 5, attached as Exhibit 6 in Appendix D. Montalyo testified he saw a car without its headlights on driving backward on Bridge Street at 3:40 a.m. and the officers began pursuit of the car *westward on Bridge*. Jesionowski testified that the chase began on *southbound on 57th Street*. Their report says the officers observed a car driving *eastbound on Lorraine*, and the officers began pursuit *northbound on 58th Street*. The chase ended when Bonnell crashed and was transported to the hospital. Tr. 1251-53.

Officer Kukula knew about the car chase and subsequent wreck, and that Bonnell was taken to the hospital. Officer Kukula somehow connected the man described by Hatch and Birmingham as "a man with long brown hair and a

[2] This report was also suppressed. It is another of the documents discovered later by appellate counsel.

moustache" -*and*- "a man with blonde hair and a maroon jacket" with the bloodied man pulled from the wreckage of the crash. Birmingham was brought to the hospital to see "if this [Bonnell] was the guy." Birmingham, who was roused from a drunken slumber to find his friend shot dead on his kitchen floor, glanced at Bonnell, bloody and battered from the car wreck with his face obscured by an oxygen mask, and proclaimed him the shooter. Tr. 925. He did not identify Bonnell by name, even though he had known Bonnell for at least 6 months. Bonnell was charged with aggravated murder later that day.

The State had *no* forensic evidence to support Bonnell as the shooter or place him at the scene. Nor did Bonnell confess. Bonnell was convicted solely by witness testimony, specifically that of Hatch,[3] Birmingham, and the police officers.[4] Trial counsel was unable to impeach these witnesses or undermine their credibility, because the State suppressed exculpatory evidence. Consider the following:

- Hatch initially described the shooter to police dispatch as "a blonde man with a maroon jacket," but she told the scene officers—who responded within two minutes of dispatch—that he had "long brown hair and a moustache." *Compare* State P.C. Exhibit NN *and* Police Report, attached

[3] Hatch had reason to lie: Hatch was on bond for felonious assault. On December 15, 1987, Hatch pled guilty to that charge, another was nolled, and she was released on recognizance despite a capias. Nine days later, Hatch identified Bonnell as the shooter. After Hatch testified and Bonnell was sentenced to death, Hatch received a suspended sentence.

[4] Both of whom *did* lie. *See supra*, fn 2. Officers' Montalyo and Jesinowski testified no police reports were made about the car chase and crash. Tr. 1261, 1266, 1274. In fact, reports *were* made which directly contradict the Officers' testimony as to where the car chase originated. *See e.g.* Police Report at 5, attached as Exhibit 6 in Appendix D.

as Exhibit 3 in Appendix D. Trial counsel was unaware of Hatch's first description or that her description changed within a matter of minutes because this information was suppressed at trial.

- Hatch and Birmingham both repeatedly denied knowing the shooter and relayed as much to the officers at the scene, a position each maintained for weeks. Tr. 198, 225, 265-266; *see also* Police Reports, attached as Exhibits 2, 3 in Appendix D. This information was also suppressed at trial; the State only turned over to the defense the later statements in which they identified Bonnell by name.
- Birmingham testified at least four times that he was "stone cold sober," or "straight," the night of the shooting. Tr. 927, 941. Suppressed police reports noted both he and Hatch were severely intoxicated, and that officers had difficulty obtaining information due to their drunkenness. *See* attached Police Report at 4, attached as Exhibit 6 in Appendix D.
- The time of the murder was estimated to be at 3:30 a.m., based upon a 3:46 a.m. EMS call. Suppressed statements from Hatch and Birmingham indicate discrepancies as to the time of the attack. The pair listed the attack as occurring at 2:30 a.m., 3:00 a.m., or between 3:35-3:45 a.m., depending on which report is read. Tr. 921, 956.
- Officer Jesionowski observed plastic bags on Bonnell's hands in the hospital. Tr. 1270. Hospital records confirm this. Generally, hands are bagged to preserve evidence, and, in this case, swabs were taken from

Bonnell's hands. Tr. 905, 907, 912-913. The State has not disclosed what evidence, if any, was collected from Bonnell's bagged hands or the bags themselves; has not disclosed what tests were performed; and has not divulged the present location of the swabs and/or slides taken from his hands.

- The Trace Evidence Department of the Cuyahoga Coroner's Office conducted gun-powder residue tests on the jacket Bonnell wore the night of the crime. The results were negative. *See* Cuyahoga Co. Coroner's Laboratory Report, attached as Exhibit 7 in Appendix D. At trial, the prosecution suppressed the fact that testing was conducted as well as the results of the tests. To this day, the State has not disclosed what other tests were performed on evidence taken from Bonnell's hands, shirt, or pants, nor the results of those tests.
- The police processed Bonnell's car. *See* Police Report at 2, attached as Exhibit 6 in Appendix D. The technician removed evidence from the car and performed forensic tests on the car's interior. Photographs of the car being processed clearly show the car marked on the front and rear windows, to be processed for *fingerprints and blood*. These photographs were part of the record in the state courts. Over 30 years later, the State has not disclosed what evidence was collected, nor the results of any tests conducted on this evidence.

- Bonnell's jacket was seized and tested for blood. Witness testimony portrayed a bloody scene: blood was "all over the place", "it took a whole day to clean," Tr. 928, "blood gushed from victim's chest, the assailant was on top of the victim, punching him 20-30 times in the face, and chest with both hands." *Id*. at 921, 937, 943. At the time of this offense (1987), blood type comparison testing was available. Bonnell and the victim had different blood types. Tr. 903-04. The coroner's office visually inspected Bonnell's jacket before trial and identified blood stains. Serologist Linda Luke examined the blood stains on Bonnell's jacket – and her tests revealed the presence of only one person's blood – Bonnell's.
- In 2008, DNA testing of Bonnell's jacket showed that sometime *after* trial and before 2008, the victim's blood profile had appeared in small smears on the jacket. The sudden presence of the victim's blood along with the missing status of the other evidence in the case demonstrate the likelihood the jacket was subjected to improper storage between trial in 1988 and 2008, which resulted in contamination of the only evidence that still exists.
- The *white* pants Bonnell was wearing were also seized. If Bonnell was the shooter, who allegedly shot the victim at close range and then proceeded to sit on top of him punching him over and over (20 to 30 times with both hands (Tr. 937)), surely, his white pants, white socks, and boots would have all been bloodstained. The State has never turned over any results of the testing performed on the pants. Tr. 1208.

- The victim's blood was found on a green pillow left on the back porch, as well as on the handrail on the back porch. Tr. 906. At trial, Linda Luke testified that the green pillow was stained with Bunner's blood, but also *incorrectly* testified that this pillow belonged to Bonnell. *Id*. at 903, 906. Because the pillow has disappeared, along with the rest of the evidence, there is no telling where or how this pillow was stored (i.e. with or without other evidence, such as Bonnell's jacket). Conveniently, both were checked out by Prosecutor Bombik at trial, yet only one has ever resurfaced.
- Credible evidence of alternative suspects was suppressed. Darryl Butcher was involved with the victim in a drug bust in October of 1987. Though Butcher was arrested, Bunner was not. Tr. 246-47. A witness who knew both Bunner and Butcher told police Butcher believed Bunner was a "narc" and wanted revenge. *Id*. Bunner went into hiding due to fear for his safety. *Id*. Furthermore, another suppressed police report confirmed Butcher's presence at the apartment on the night in question and noted that "talk on the street" was that Butcher killed Bunner. *Id*. at 265-66; *see* Police Report, attached as Exhibit 8 in Appendix D. Joey Popil was also peripherally involved with these same individuals and had similar reason to fear them. His uncle, with whom he lived, was a "narc," i.e. an officer with the Cleveland Police Department Narcotic Squad. Bonnell, on the other hand, knew some of the people involved but had nothing to do with this drug bust or any fall-out stemming from it.

Bonnell wished to test the only objective evidence in this case: the biological evidence. It is the only evidence not marred by suspicion and doubt. This was a very close case, and the jury struggled to reach a decision in both phases of the trial. They sent several notes to the judge. One note indicated the jury was troubled by how the testimony of Hatch, Birmingham, and Popil conflicted with that of Ciesla and Norwood (the jury asked for transcripts of this testimony). One juror emphatically stated the jury could not reach a decision and asked to be excused. At another time, the jury forewoman sent a note, which stated the jury was at an impasse, and which asked the court for guidance. Still another note asked if the jury could consider "doubt" and "not fully disclosed evidence" under mitigating factors. *See* juror notes, attached as Exhibit 9 in Appendix D.

The State has continuously deprived Bonnell, a death sentenced inmate, of evidence that he was entitled to before trial. Now, the State of Ohio posits that all this evidence is "lost." The trial court accepted the State's untested hearsay that the evidence is gone and denied Bonnell's request for testing without discovery or a hearing. The State Supreme Court then found that the trial court's decision, as to that issue, was not reviewable on appeal. This Court should grant the writ.

REASONS FOR GRANTING THE WRIT

A trial court may not deny a DNA application in a capital case based solely on the untested hearsay of the prosecuting attorney and in contravention to this Court's precedent.

Bonnell has a fundamental right to confront the evidence against him. *See Chambers v. Mississippi*, 410 U.S. 284 (1973). This Court firmly stated in *Crawford*

v. Washington, 541 U.S. 36 (2004), that a defendant must have the opportunity to cross-examine and test the evidence against him. U.S. Const. Amends. VI, XIV; *see also Id.* ("[W]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation."); *see also Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

Here, the state court—based on the untested hearsay statements of the prosecutor and without first ordering discovery or an evidentiary hearing—blindly accepted the "word" of the prosecuting attorney and concluded that no parent sample exists, i.e. that all the evidence that Bonnell wishes to have tested for DNA is gone—lost or destroyed, but either way, gone. After finding as such, the court denied Bonnell's application. This was error. Due process and Bonnell's fundamental right to confront the evidence against him required that before the trial court could deny relief, he should have had the opportunity to question the parties who obtained, maintained, and apparently ultimately lost, misplaced, or destroyed the evidence in his case. This Court should grant the writ.

A. Relevant Facts:

On June 15, 2017, the State of Ohio finally, after 9 years, provided both Bonnell and the trial court with an accounting of the evidence in this case. Therein, the prosecution devoted numerous pages to explaining one thing: the evidence that would establish Bonnell's innocence is unavailable. And, in every instance, the State and its agents were the last to have touched the evidence.

As detailed in the Prosecutor's Report, Prosecutor Richard Bombik tried Bonnell's case to a jury in 1988. The trial lasted from February 22, 1988, until March 24, 1988. On February 18, 1988, four days before the trial began, Prosecutor Bombik signed out several pieces of evidence in Bonnell's case: the gun purported to be the murder weapon, pellets, a cartridge case, and casings. *See* Schroeder aft. ¶76, Exhibit 1 of Prosecuting Attorney's Report, attached as Appendix E. On February 23, 1988, additional casings were signed out by another individual whose name is illegible on the evidence log. *Id.* On February 25, 1988, the coroner's office noted that it released a jacket and a pillow to Prosecutor Bombik. *Id.*

On February 9, 1990, two years after trial, Prosecutor Bombik retrieved from his own closet the jacket that Bonnell was purportedly wearing on the night in question. Ex. 2 to Prosecuting Attorney's Report, attached as Appendix E. After the jacket was pulled from the Prosecutor Bombik's closet, it would not be tested for DNA until almost 20 years later in 2009. In fact, it went missing again for several years. In 2004, the prosecution filed a report indicating that no evidence could be located whatsoever. In 2008, the jacket reappeared for the second time; this time it was found in an open box as part of the file kept in the Eighth District Court of Appeals and was finally tested. Its whereabouts during this time-frame remain unknown, or at least undisclosed. Interestingly, when it resurfaced in 2008, blood that could potentially have belonged to the victim was located. Yet, the presence of this blood is perplexing. Prior to trial, the jacket was tested using blood typing technology. Serologist Linda Luke testified that the victim's blood was *nowhere to be found on the jacket* in 1988.

Tr. 905-07. Only Bonnell's blood type was present. *Id.* It was not until after the jacket was taken by the prosecutor at trial, improperly stored in his closet, and then hidden away somewhere before finally being relocated and tested, that it had these new, additional blood stains on it, consistent with the victim's blood.

Prosecutor Bombik was not only the last person to have possession of the jacket before its mysterious reappearance, he was also the last individual to sign out the gun described as the murder weapon at trial, the green pillow collected from the crime scene, and the firearms evidence. In the current prosecutor's search for the evidence, the coroner's office informed him that not a single piece of evidence was returned to its secure location in the Cleveland Police property room after trial. Schroeder aft. ¶55, 69 74, 76, Exhibit 1 to Prosecuting Attorney's Report, attached as Appendix E. Each one of these items has been missing since they were in Bombik's possession at trial.

Evidence from both the crime scene as well as from Bonnell's person were collected by law enforcement. *See* Ex. 14, 15 to Prosecuting Attorney's Report, attached as Appendix E; Tr. 1215, 1219. Law enforcement also collected Bonnell's clothing, including his white pants and white socks, boots, and keys. *Id.* On December 4, 1987, these items were signed out to Officer Reed. Ex. 2 to Prosecuting Attorney's Report, attached as Appendix E. There is no indication in the record or in the prosecutor's 2017 report where these items were located after December 1987, two months before Bonnell's capital trial.

On December 8, 1987, the SIU laboratory received two pellets from law enforcement. Ex. 3 to Prosecuting Attorney's Report, attached as Appendix E. Items were documented as checked in or out by a card catalogue system in 1987. Interestingly, the card in the catalogue pertaining to the pieces of evidence in Bonnell's case is missing. In its place is a blank card acting as a placeholder. *See* Schroeder Aft. ¶72-73, Exhibit 1 to Prosecuting Attorney's Report, attached as Appendix E. This indicates that someone "checked out" the evidence in Bonnell's case, presumably to conduct testing or for use at trial, but never returned it to its secured location.

Not only were law enforcement or the prosecution the last to lay hands on the potentially exculpatory evidence in Bonnell's case, the State, or its agents, were also responsible for and admitted to the destruction of evidence. At trial, Officers Montalyo and Jesinowski testified that they located the gun purported to be the murder weapon on the side of a street. Tr. 1112, 1117, 1257-58. Marlene Roberts testified for the defense that she had found a gun in her couch that was similar to the gun found by officers. Roberts believed the gun she found belonged to Bonnell. Tr. 1285, 1298. If this were the case, then the fact that others had seen Bonnell with a gun like the one used in the murder would hold less weight; the gun could not have been in two places at once. However, according to Cleveland Police Department's property room records, the gun found by Roberts was destroyed on February 1, 1992. Ex. 5 to Prosecuting Attorney's Report, attached as Appendix E. The murder weapon,

however, was never documented as "destroyed." It, along with the rest of the evidence in Bonnell's case, has simply vanished.

On November 30, 1987, just days after Bonnell's arrest, the Scientific Investigation Unit processed his car. Ex. 17 to Prosecuting Attorney's Report, attached as Appendix E. There is photographic and other evidence of an officer collecting and processing evidence from the car. *See* Police Report at 2, attached as Exhibit 6 in Appendix D. However, any evidence collected from his car, swabs taken from in or on the car, as well as results of any testing conducted have met the same fate as all the other evidence in this case: it has gone missing.

In this case, every single piece of evidence has gone missing along the way. Taken together, the Prosecutor's Report and affidavit make clear that evidence went missing at the hands of law enforcement before Bonnell's trial, and at the hands of the prosecutor himself after Bonnell's trial. The last individual to touch all the evidence in Bonnell's case has been either a police officer or a prosecutor. There is no one to lay the blame on but the State itself. The details surrounding the missing evidence reasonably point only in one direction: back at the State.

B. Argument and Analysis:

Particularly in a case where the prosecution conceded that it was the last party to control the evidence that Bonnell is seeking to test, Bonnell should have had a clear right to confront the individuals who provided the information contained in the Prosecutor's Report and affidavit before the trial court ruled on the Application for DNA Testing. *See generally Crawford v. Washington*, 541 U.S. 36 (2004). Yet, the trial

court denied Bonnell's Application for DNA Testing without first affording Bonnell discovery or a hearing. The trial court blindly accepted the prosecution's supposition that the evidence Bonnell sought to test "no longer existed." J.E. at ¶12, attached as Appendix B. The trial court accepted that the prosecutor's report "satisfied" the relevant Ohio statute and that Bonnell could not "show that a parent sample of any biological material exists at this point in time." *Id*. at ¶23.

The trial court's reliance on the untested hearsay of the prosecutor was error where the prosecution relied, in large part, on the very individuals last responsible for that evidence and where that same office had previously claimed—in Bonnell's first Application for DNA testing—that no evidence existed when at least one piece of evidence—the jacket that surfaced in 2009—clearly survived. The only reason the jacket was found in 2009 was because Bonnell filed a Second Application for DNA Testing in 2008. Otherwise, the record of this case would hold that no evidence exists in this case, and that is just factually wrong. Without a vetting of the prosecution's report and affidavit, the trial court could have no certainty that the prosecution got it right this time.

Bonnell had a fundamental right to confront the evidence against him. *See Chambers v. Mississippi*, 410 U.S. 284 (1973); *Bullcoming v. New Mexico*, 564 U.S. 647, syl (2011) (If an out-of-court statement is testimonial, it may not be introduced against the accused unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness). Even though the procedural posture of this case is admittedly not at trial and, as the State points out,

the right to confront and cross-examine is not absolute, the State's actions in this case call into question "the integrity of the fact-finding process," which "require[d] that the competing interest be closely examined." *See Berger v. California*, 393 U.S. 314 (1969). Here, the State's interest is expeditious enforcement of final judgments. But, "the finality of the sentence-imposed [death] warrants protections that may or may not be required in other cases." *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring). Generic expeditious enforcement of a final judgment cannot overcome Bonnell's life interest and his right to confront the evidence against him. Bonnell should have had the opportunity to question the parties who obtained, maintained, and apparently ultimately lost, misplaced, or destroyed the evidence in his case.

In addition, this Court has stated repeatedly that a state statute must comport with due process. Ohio created a statutory process to allow for post-conviction DNA testing, and, thus, Bonnell has a clear statutory right to his requested DNA testing. *State v. Noling*, 149 Ohio St.3d 327, 2016-Ohio-8252 (2016) (finding "capital offenders have a state-created liberty interest in postconviction DNA testing."). In a case like this—where justice demands it—he similarly has a due process right to that testing. *See Evitts v. Lucey*, 469 U.S. 387 (1985). "[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Id.* at 401.

Here, Ohio enacted a DNA testing statute; now it must comport with due process in deciding how to enforce that statute. In this case, with these facts, due

process and Bonnell's right to confront the witnesses against him demanded that Bonnell receive a hearing where he could question the prosecution and its agents concerning the whereabouts of the evidence that was collected during the investigation of this capital case. The Court should grant the writ.

2. A trial court's decision to accept, in total, the untested hearsay of the prosecutor when denying DNA testing in a capital case should be reviewable on appeal.

The Ohio Supreme Court ruled in that Ohio Revised Code 2953.72(A)(8), as written, constrained its appellate jurisdiction to merely the review of the ultimate determination as to whether DNA testing should be granted or denied. Specifically, and relevant here, the Ohio Supreme Court construed the statute to constrain it from reviewing Bonnell's First Proposition of Law, which concerned the adequacy of the prosecution's search for evidence and/or the need for more evidence-development on that issue. Because the statute at play curtailed the lower court's appellate review so much as to render it meaningless, Ohio Revised Code 2953.72(A)(8), as written, is unconstitutional on its face.

This Court has repeatedly stressed that ***meaningful*** appellate review is essential to guaranteeing that the death penalty is not imposed arbitrarily, capriciously, or irrationally. *Parker v. Dugger*, 498 U.S. 308, 321 (1991) (emphasis added); *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990). An integral part of any analysis in determining the constitutionality of a capital statute is whether the state has provided an adequate review of the case on appeal after the death sentence is imposed. *Gregg v. Georgia*, 428 U.S. 153 (1976). Here, the statute at play curtailed the

Ohio Supreme Court's review (the sole court to review the denial of DNA testing in a capital case) so much as to render it meaningless. *See Douglas v. California*, 372 U.S. 353**,** 358 (1963) (The state may not extend to those indigent defendants merely a "meaningless ritual."); *M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996) citing *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) ("[I]t is now fundamental that, once established, these avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.").

As interpreted by the lower court, Section (A)(8) of Ohio's DNA statute will lead to absurd results. For instance, a trial court could deny a DNA application for wholly improper reasons—with no recourse for the defendant. As one example, a trial court could accept the ex parte "word" of the prosecutor that he/she searched for evidence (when he/she did not), yet the defendant could not challenge this "process" or lack of process on appeal. Where else, but in this statute, is it completely acceptable for the hearsay "word" of the prosecuting attorney to meet a legal requirement that inures exclusively to the benefit of the state? *See State v. Hill*, 104 N.E.3d 794, 805, 2018-Ohio-67, ¶ 24 ("[H]earsay is generally not admissible.") *See also* Reason for granting the Writ No. 1.

In a second example, a prosecutor could forcefully oppose a DNA application due to the race, religion, or sex of the defendant and/or victim. A trial court could deny the defendant's application on the same bases. Even assuming the defendant has absolute proof of the motives of both the prosecution and the trial court, if the appellate court's—Ohio Supreme Court's—ultimate decision is that DNA testing is

not warranted, the defendant would have absolutely no recourse against this egregious injustice.

A final example, pertinent here, was obvious bad faith and/or manipulation of evidence. Bonnell's case presented a documented history of prosecutorial misconduct. Indisputably, the state had sole possession of crucial evidence and allowed that evidence to just vanish. Due process demanded that the state account for its mishandling of evidence and/or that Bonnell have an opportunity to develop the record on that issue.

This Court cannot allow this egregious injustice to prevail, or similar circumstances to unfold in the future. Particularly in a capital case, the state should not be able to hide behind its mistakes and missteps. A man's life is on the line. This Court should grant the writ and remand this case back to the State Supreme Court for a merits determination on Bonnell's First Proposition of Law.

CONCLUSION

A prosecutor's sworn duty is not to win convictions but to seek justice. Justice is not served by a prosecutor's indiscriminate opposition to every DNA application. Nor is justice served by a trial court's indiscriminate denial of every DNA application. DNA test results are not partial or biased, but a factual reporting of scientific truth.

Bonnell sought DNA testing of the evidence in his case. However, due to the State's egregious missteps, it seems that the evidence is now gone or missing, and with it, Bonnell's chance to establish his innocence. In denying Bonnell's Application for DNA Testing, the trial court relied on unverified hearsay to conclude that no

evidence exists to test. At the very least, Bonnell should have had the opportunity to challenge the unverified hearsay upon which the trial court concluded that no evidence exists that Bonnell could subject to DNA testing. On appeal, the Ohio Supreme Court then found that it did not have jurisdiction to review that conclusion. Where a man's life is on the line, more process is due. For the foregoing reasons, this Court should grant the writ.

Respectfully submitted,

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