ORIGINAL

No._____

In The
Supreme Court of the United States

TRAVIS COLBY CURRY ,

Petitioner,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS FOR THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI

Travis Colby Curry #20947700
Oregon State Correctional Institution
3405 Deer Park Drive, SE
Salem, Oregon 97301

Petitioner *pro se*

Question Presented

Whether the police act in bad faith in contravenes of the Due process Clause of the Fourteenth Amendment if they fail to collect and preserve surveillance video recordings that they knew likely captured some or all of a fight and its aftermath particularly when authorities knew the criminal defendant was claiming self-defense and lack of intent.

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PETITION FOR WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

Mr. Curry respectfully requests that a Writ of Certiorari issue to review the Oregon Court of Appeals decision to affirm his convictions without opinion over Mr. Curry's objection that Oregon failed to preserve exculpatory video recording that came into its possession during a criminal investigation.

PROCEDURAL HISTORY AND RELEVANT FACTS

1. Opinion Below

On November 1, 2017, the Oregon Court of Appeals for Oregon issued a judgment affirming Mr. Curry's convictions and sentences without opinion. (Appendix A). The Oregon Supreme Court denied to accept discretionary review. (Appendix B).

2. Jurisdictional Statement

This Court's jurisdiction is invoked under 28 USC §1254(1).

3. Constitutional Provisions

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

4. Statement of the Case[1]

Motion to Compel and Dismiss

Curt Martin closed the sale on the Peacock bar on December 11, 2014, two

[1] The Statement of the Case is taken largely from Mr. Curry's Opening Brief to the Oregon Court of Appeals.

days after the fight that resulted in the charges against Mr. Curry. (Tr 9). The bar had a surveillance system in it, "if you can call it that." (Tr 10). The camera outside "was total garbage and you couldn't see anything even during the day." (Tr 10). However, he is "not savvy about that stuff." (Tr 11). He explained:

> Well, because the camera outside did not work. *I mean, it worked, there was some sort of picture there* but you couldn't tell—*you call tell a figure* but that was about it. At night you couldn't see nothing.

(Tr 13)(emphasis added).

He did not know whether the video from the camera outside still existed. (Tr 11). At the time of the hearing, Sylvia Dixon was "in control of the building" because Martin had not completed "his part of the sale" and the building was "foreclosed." It "went back" to a trust fund consisting of several individuals. (Tr 12).

Martin received some calls asking him about the camera outside.[2] (Tr 9). He could not remember who called him. (Tr 10). At some point, he and at least one other person had "tried to erase them." (Tr 12)("[A]ll I know is we tried to erase them"). But he did not know, because he is "not a computer guy." (Tr 13). He did not remember when he tried to erase them either. (Tr 13).

Sean Patterson worked at the bar; he is also a good friend of Mr. Curry. (Tr

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[2] Mr. Curry's investigator, David Galvan, was one of those who contacted Martin. (Tr 47-50). Martin told Galvin that Mr. Curry would have to "subpoena him" to obtain any information about the video surveillance at the bar. (Tr 47-50). Galvan prepared the subpoena, but because the prosecutor directed the police to seize the video, Mr. Curry's attorney at the time, Rohrbough, told Galvan not to serve it. (Tr 48-50). Galvan was present at a meeting among Galvan, Rohrbough, and the prosecutor, and the prosecutor called Officer McCubbins during the meeting and told him to follow up on obtaining the video. (Tr 49). Rohrbough became ill, and Mr. Curry changed attorneys. (Tr 51). Mr. Curry's new attorney, Heslinga, asked Galvan to subpoena, Martin. (Tr 51). When Galvan eventually served Martin with a subpoena, Martin told Galvan that Galvan "needed to talk to" Sylvia Dixon, but he refused to give Galvan that Galvan Dixon's contact information. (Tr 51). Galvan nevertheless located Dixon and talked to her on the phone. (Tr 51). She allowed Galvan to enter the bar and take pictures, which showed an apparently functional surveillance system. (Tr 52-53). A camera was on a signpost outside the bar. (Tr 54).

14, 16). He did not see any video of the night of the fight. (Tr 14). But the "new owner," a woman, showed him some video of inside the bar, two days later, on December 11, 2014. (Tr 16). The video showed employees boxing items up. (Tr 16). Patterson had asked two other employees, Angela Miller and "Travis," to review some video where a friend of his was in an "altercation," and in response to the request, he "remember[s] hearing something about it wouldn't or didn't catch what happened from where the camera location was," (Tr 19).

Officer Patrick O'Malley was investigating the fight. (Tr 22). He stayed at the bar "to preserve the scene inside the bar." (Tr 22-23). He also did three interviews. (Tr 23). He was aware that the bar had a video surveillance system. (Tr 22). Miller, the bar manager, allowed him to view video on a screen in the bar's office. (Tr 23). The monitor showed "several different separate screens." (Tr 23). "There were several black ones, none had captured the area of the incident occurred." (Tr 23, 84). Two or three of the screens were black. (Tr 85). He did not ask anyone for access to the video from the video system. (Tr 22-23). Detectives did however obtain video from the neighboring bank. (Tr 24).

Miller was a manager at the bar and is Mr. Curry's girlfriend. (Tr 36-38). The bar had surveillance video set up inside and outside. (Tr 38). Outside, a camera was placed on type of a signpost. (Tr 39). As far as she knew, all the cameras were working. (Tr 44). She showed Officer O'Malley the live-feed monitors inside the office. (Tr 40). She explained that the recorded footage was accessible by password and that "the owner" had the password. (Tr 40-41). O'Malley did not remember

Miller telling him anything about a password or remote access to the recorded video footage. (Tr 83-84). She may have said that though. (Tr 84).

Mr. Curry and other witnesses had told detectives that, immediately after the fight, Mr. Curry went inside the bar and grabbed a second knife and was disarmed inside the bar. (Tr 73-74). In the interview, Mr. Curry said that he was not the first aggressor and that he did not intend to stab anyone. (Tr 73-74).

When interrogating Mr. Curry, the detectives said that they had surveillance video from the bar, but that was a ruse. (Tr 66-67, 70). Detective McCubbins was told, either by Sergeant O'Malley or Detective Fountain, that no video was available. (Tr 67). Fountain testified that the "there was no operational camera outside the bar[.]" (Tr 72). He thinks it was O'Malley who told him that. (Tr 78). At the prosecutor's request (related to Fountain by McCubbins), Detective Steven Fountain contacted the "current owner" of the bar by phone, but he did not remember the name of the person he contacted. (Tr 74, 79-80). He wrote a report about that contact, but that report never reached the prosecutor or defense counsel.[3] (Tr 74, 79). He agreed, however, that the camera on the signpost was "in the vicinity of the fight." (Tr 73). And he was told "days after the incident . . . that there was supposedly a working camera that contradicted what we were told." (Tr 75).

Mr. Curry filed an omnibus motion, asking the court to, *inter alia*, dismiss the indictment. (Appendix C). The motion stated three grounds for dismissal:

1. The State failed to preserve exculpatory evidence.

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[3] As it turns out, Fountain lost that report and attempted to recreate it but was unsuccessful. Mr. Curry moved to compel discovery of Fountain's notes that he used to prepare the lost report, and the trial court denied that motion. That ruling was also briefed to the Oregon Court of Appeals.

2. The State failed to produce exculpatory evidence.

3. The State failed to preserve potentially useful evidence.

At the hearing, defendant argued:

> [DEFENSE COUNSEL]: Your Honor, the Defense needs to establish there could be exculpatory evidence on the video. In order to do that we've put on evidence that in the officers' interview of [defendant], [defendant] indicated that Mr. Dove laid hands on him first. And also the testimony of Ms. Miller, who confirmed that it was Mr. Dove who initiated the contact between the two of them. Ms. Miller also indicated that it was within the range of the camera located outside the bar. She also testified that the cameras were working as far as she knew. She also described sitting down with Sergeant O'Malley and explaining that anything that had been recorded would be not on the monitor screen, but would be contained in the computer somehow, accessed by a password that she didn't have. So there was a discussion about the need for the video, that it would augment and support the Defendant's version that he was attacked first.
>
> Additionally, there was a need to show that the cameras inside the bar, which nobody disputes were working, captures something of importance. And Detective Fountain was speaking about the case and said, "Well, there wasn't a new crime inside the bar, but the actions of the Defendant inside the bar might be indicative of his intent of what happened outside the bar. That he went in and retrieved another knife." How that happened and what his demeanor was would be important. That he never left the bar with the knife is clear, but how exactly that happened would be important and that would be shown on the video from inside the bar.
>
> As well as his level of intoxication, which although is not a defense, can be used to indicate whether somebody formed the requisite criminal intent. And the officer indicated that video is often used to determine whether or not someone is intoxicated or what level they're intoxicated. So those are very useful things for the defense.
>
> The indication was that the person who managed the bar and knew the system well believed it was to be working. An indication from the police was that they made an initial attempt to see if it was working by looking at the monitor, made no further attempt to get into the actual recording device, except now we learn that Officer Fountain, at some point, contacted the owner to see if he could get it and the owner told

> him no, there wasn't anything to get. The owner was here, Mr. Curt Martin, and he testified, and the Court can recall his testimony. He did not seem very interested in this process, didn't sound like a real effort was made to secure the video. [The prosecutor] went to the extra step when asked by [defense investigator] about the video to call up Officer McCubbins at home and say, "We need this video, go get it." So there was a direction to do it and there was a neglect to do so. That, we submit, would be sufficient to find that there was bad faith.

(Tr 85-89). Defendant addressed the fact that he had not subpoenaed the recordings:

> [DEFENSE COUNSEL]: Well, there is a duty to preserve and that is stated in the [*Faunce*] case that I referenced regarding the black powder weapons. The problem is we did not receive . . . Mr. Fountain's report saying that the owner was saying there was nothing on the video. Had he received that he probably would have subpoenaed him at that point. And the second problem is when he went to subpoena him, he was relying on the State's assurance that he didn't need to do that because they would go and seize it. So there was a duty to preserve the evidence. There was neglect to do that. There has been as much of a showing as can be made without having the actual video that would be useful to the Defense. The statements of the witnesses, the locations of the cameras, the need to show the level of impairment of the Defendant at the time this happened and what exactly happened.

(Tr 95). The court ruled:

> THE COURT: If the police have reason to believe that there is evidence that is relevant to the case and they fail to preserve that evidence, that constitutes a violation. In this case the Court finds that there is not sufficient evidence to show that the police had any reason to believe, A, that there was any internal video recording that was relevant to the case, and B, that there was any external video at all. Three police officers testified independently to the same impression, that the external camera did not function or that there was no recording. We actually don't even know whether there was an external camera on the building at the time of the incident. We only know that there was an external camera on the building on May 15, 2015, when Mr. Galvan took the photographs. But assuming, if we were to, that the camera did exist on the day of the event, there is no evidence that it was functioning. In fact, there is evidence that it wasn't because Sergeant O'Malley looked at the screens and saw no actual external feed. There

> is also no evidence that there was a recording made of what occurred that day. So the motion is denied.

(Tr 94-95).

Defendant filed a motion to reconsider the court's ruling on the omnibus motion and alternative motion to compel discovery of Detective Fountain's notes. He noted that Detective Fountain had submitted a report[4] explaining that he had lost his report documenting his efforts to obtain the video surveillance recordings and was unsuccessful in duplicating his efforts:

> [DEFENSE COUNSEL]: Your Honor, we previously had a hearing, two hearings, on Defendant's motion to dismiss for failure to preserve exculpatory evidence or evidence that was potentially exculpatory that had not been provided, and in the latter instance the Defense would have to show bad faith. The State responded with an affidavit that listed the attempts the State's attorney had made to contact the police department and get a report to find out what happened to this video. There was no mention of Officer Fountain having a report or the report having been submitted or anybody other than Officer O'Malley and Officer McCubbins being involved with getting the video. We had a hearing and at the hearing Officer Fountain testified that he indeed was the one who had been tasked with going to obtain the video. He was unable to do so. He testified, and he wrote a report, he testified, which he then sent to the DA's office. This was his testimony at our last hearing, I believe it was May 20th.
>
> Following that testimony then I requested of [the prosecutor] to get that report and provide to me. That's something we have been looking for. [The prosecutor] requested it and the report I received is attached as Exhibit A, there's three pages, to my affidavit. And it basically says, "Well, I wrote a report and to put it in the computer but it didn't save for some reason. I cannot find it." And then he writes from his memory . . . of the interview of Mr. Martin and recited what he believed had happened back whenever it was that he talked to Mr. Martin. I am aware that computer systems have backup and that agencies such as the police department have IT people that can assist in recovering backup. I'm also aware that officers don't just generate reports initially on the computer, that the report is put aside till later when they have

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[4] Fountain's report was attached to Mr. Curry's motion to reconsider.

> some time and generally they're relying on some notes in a notepad that they've written down. And so I've requested the noted in a notepad that he'd written down. I'm trying to establish a record of the bad faith in not seizing this evidence, not only for this Court but if I need it in a future hearing.

(Tr 98-99). Defendant argued that the state failed to establish that the outdoor cameras were not functional: "[W]e did present evidence that there was a video available. So this is the issue for the Court on reconsideration. This report came in and it is now before the Court." (Tr 101).

> THE COURT: Okay. Well, first of all, I don't have any evidence before me of any bad faith. What I have, a couple things. First of all, the witness -- and I can't remember his name -- but the witness who testified at the original hearing, who was I guess what I would characterize as relatively belligerent, obviously did not want to testify, obviously did not want to cooperate and, frankly, I did not find his testimony very credible because he -- because of his attitude. So that's the first ingredient, I guess, in the problem. The second ingredient is, quite frankly, *the Lebanon Police Department did a sloppy job in this case of determining whether there was a video, documenting that carefully and conclusively.* And there was too much "I'm not sure" or "not to my knowledge" or other contradictions, I guess, between people about what video did and didn't exist. And it seems pretty obvious actually that the business owner, in whatever form that business owner is, whether it's the manager who testified who was belligerent or whether it's the current owner, we don't want to be bothered by this, they're not necessarily very interested in cooperating and they're not, etcetera. But none of that, notwithstanding that, none of that is attributable as bad faith to the State. None of that is -- constitutes evidence that there has been exculpatory evidence suppressed or anything of that nature.
>
> So, and there is no evidence to indicate that the missing report that somehow disappeared, contained information which has -- which is different from what the current reconstructed reported is. So based on all that, . . . Defendant's two motions are denied. *And again, I acknowledge the fact that there was some sloppiness in how this was done, and I would acknowledge that there's reason to be suspicious about the whole thing, I suppose, but that's not enough to constitute evidence to indicate either bad faith by the State or that there is*

> *something out there, some evidence out there that is exculpatory and is being hidden or is not being disclosed.*

(Tr 103-04)(emphasis added).

Trial

December 9, 2014, was the last call for the Peacock Bar; it's owner had sold it, and the new owners had different plans for the space. (Tr 293-94, 313, 316). Mr. Curry and Miller worked at the Peacock Bar, so December 9, 2014 was their last day on the job. (Tr 292, 349). Mr. Curry and Miller were in a relationship. (Tr 294, 355).

Ronald Dove is an Iraq-war veteran who had completed two tours of duty. (Tr 193). He weighs 285-pounds. (Tr 207).

On December 9, 2014, Dove went to the tattoo parlor that is in the same building as the Peacock Bar. (Tr 193). Dove left the parlor and walked down the street, passing a car in which a man and a woman were arguing. (Tr 196). He could hear the argument through the closed windows; the man (Mr. Curry, as it turns out) was the loudest. (Tr 197). Mr. Curry either jumped out of the car and smashed a cell phone against the building or he threw the phone out the window of the car. (Tr 197, 357). The woman, Miller, got out of the car and picked up the pieces of her phone. (Tr 358). She yelled that she wanted Mr. Curry to leave her alone and wanted to leave. (Tr 358). Mr. Curry yelled at her angrily. (Tr 358). Miller returned to the car with Mr. Curry behind her. (Tr 198, 359). She slipped while getting back into her car, and Mr. Curry helped her back up. (Tr 359).

Miller was sitting in her car saying that she wanted to leave. (Tr 198, 359).

Mr. Curry was standing in the driver's side doorway, holding the door open. (Tr 200). He reached over her to grab the keys. (Tr 200, 359). She was trying to pull away from him and was telling him to leave her alone. (Tr 200). He seemed angry and upset, and she seemed scared and upset. (Tr 198). He was "being real aggressive. He started leaning in and started grabbing her" and he hit her in the arm area; however, according to Miller, Mr. Curry never hit her. (Tr 201, 243, 360).

Dove decided to intervene at that point. (Tr 201). He walked up to the car and got between them. (Tr 202, 261). He told Mr. Curry that it was "not cool to do that," or, according to Miller, "Keep your fucking hands off her." (Tr 202, 361). Mr. Curry lunged for Miller "through" Dove. (Tr 204-05). Miller was still telling Mr. Curry to leave her alone. (Tr 207). Dove pushed Mr. Curry back; Dove's hands were against Mr. Curry's chest. (Tr 209). Dove turned around to ask Miller is she was okay and, at that moment, he saw Mr. Curry's forearm swing toward Dove's face. (Tr 209). Dove moved his head to avoid the blow, though the blow hit Dove in the face. (Tr 210). Mr. Curry swung again, and Dove blocked his arm. (Tr 210). A blow hit Dove in the ribs.[5] (Tr 211-12, 219). Dove grabbed Mr. Curry by the neck and started pushing. (Tr 213). They tripped and went down, but Mr. Curry got up again, and then tripped again. (Tr 213).

Dove saw that Mr. Curry had a knife with a black blade in his hand. (Tr 214, 261, 327). Dove had control of Mr. Curry's arm, but Mr. Curry was resisting. (Tr

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[5] It seems that this was when Mr. Curry stabbed Dove in the ribs, but it is unclear that Dove had seen the knife yet. (Tr 231)(Dove explaining that he put Mr. Curry "in a chokehold" after "he first initially stabbed me") Dove told the police that the fight started after Dove saw that Mr. Curry had a knife. (Tr 231).

214). Dove pushed Mr. Curry and tripped over the curb. (Tr 214). Mr. Curry got "up on top of" Dove. (Tr 214). Dove used a maneuver he had learned in the military to "flip Mr. Curry back over." (Tr 216). Dove was on top of Mr. Curry at that point. (Tr 216). Dove had control of Mr. Curry's hand that had the knife in it. (Tr 216). He might have grabbed the knife. (Tr 220, 236). He used his forearm to apply pressure to Mr. Curry's face and neck area; he called it a "choke slam." (Tr 216, 219, 262, 270). That type of maneuver can cause death. (Tr 574-77). A bystander, Randy Holden, called the police. (Tr 261).

Meantime, Miller went back inside the bar and said that Mr. Curry needed help. (Tr 294, 303, 306, 316, 324, 332). Sean Patterson, who was tending the bar, went outside. (Tr 294). Christian Poston-Harwood, Patterson, Lance Parrish and Cody Patterson went outside too. (Tr 296, 303, 306, 316-17). Dove was on top of Mr. Curry pummeling him. (Tr 303, 328). Parrish pulled Dove off Mr. Curry. (Tr 217, 296, 382). Parrish had to dig his knee into the ground and use it for leverage to pry Dove off. (Tr 325). Parrish let go when Dove said that he had been stabbed. (Tr 325).

Poston-Harwood removed Mr. Curry. (Tr 317). As they separated, Dove had his hand on Mr. Curry's wrist and Mr. Curry was moving his arm around a lot. (Tr 217). The knife sliced Dove's hand.[6] (Tr 217, 306). Parrish got the knife from Mr. Curry or Preston-Harwood and threw it into the street. (Tr 325-26). Mr. Curry said, "I'm gonna kill you." (Tr 217, 239). He repeated that three times. (Tr 220). Dove started walking toward Miller as if to check on her and Parrish got between them. (Tr 326, 389). People continued pushing Dove away. (Tr 217). Dove was bleeding a

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6 Authorities never recovered the knife.

lot. (Tr 219, 307). Dove said, "A bunch of Iraguis couldn't kill me. I don't think your little punk ass could too." (Tr 221).

Mr. Curry went inside the bar and grabbed the knife kept behind the bar used for cutting lemons. (Tr 298, 309, 334). Mr. Curry said, "I'm gonna kill him." (Tr 300). Mr. Curry did not resist when Christian took the knife from him. (Tr 299-300, 303, 312).

Dove walked to the corner. (Tr 222). Some people on the corner offered to help Dove, and he "passed out." (Tr 223). He quickly regained consciousness. (Tr 223). An ambulance took him to the hospital. (Tr 224).

A short time later, Ryan Penner saw Mr. Curry and Miller arguing loudly in the Walmart parking lot. (Tr 275, 370). Mr. Curry called her profane names. (Tr 277). She was very quiet. (Tr 278). They were walking toward the store but then Miller turned and walked back toward her car. (Tr 281, 371). Mr. Curry ran up to Miller and shoved her with both hands in her chest. (Tr 282). She stepped back, and it appeared to Penner that Mr. Curry struck her in the face, but he could not tell because he was behind them. (Tr 282-83). Penner yelled, "Hey. You cannot hit a woman. You can't do this. I'm calling the police." (Tr 283). Penner moved toward Mr. Curry. (Tr 283). Miller said, "He's actually treating me nice." (Tr 284, 373). Mr. Curry said, "You see what she said you fucking punk; I'm treating her well." (Tr 284). Mr. Curry and Miller got in the car' Mr. Curry continued yelling at her. (Tr 284). They left; Miller was driving. (Tr 285).

Officer James Glover stopped the car. (Tr 422). Glover noted that Mr. Curry

matched the description of the person who fought with Dove, but did not mention that fact, and they discussed the disturbance at Walmart. (Tr 427). Mr. Curry had speckles of red on his face and his shirt. (Tr 424). Glover detained Mr. Curry in handcuffs. (Tr 425). Detectives took him to the police department and seized his clothes. (Tr 426, 445). Mr. Curry had a red mark on his neck and a scratch on his back. (Tr 447-50). In an interview with the detectives, denied that he hit Miller. (Tr 460). He said that he got the knife out after Dove overpowered him and that he swung the knife while wrestling but not intending to stab Dove. (Tr 467-69, 540).

On direct appeal, Mr. Curry argued to the Oregon Court of Appeals that due process as interpreted by this Court required the state to preserve potentially exculpatory material that comes into its possession during an investigation and that a defendant can established a claim of denial of due process if the state acted in bad faith in failing to preserve any potentially exculpatory evidence.

Mr. Curry presented evidence that a video surveillance system could have captures the crucial interactions between the victim and him and the immediate aftermath of those interactions. The recordings could have shown Mr. Curry acting in self-defense as he claimed or that he lacked intent. Thus, the recordings were potentially exculpatory.

In addition, investigating officers knew that Mr. Curry was claiming that he acted in self-defense or without intending to harm the victim, because Mr. Curry sat for an interrogation and made those claims. Mr. Curry further presented evidence that the police officer never established whether the relevant cameras were

functional, whether they captured the actions or whether the recordings could be retrieved. Mr. Curry attempted to learn information about the existence and quality of the recordings, but he was stymied by the passage of time and the police failure to turn over relevant reports. The trial court ultimately found the police work related to the video surveillance recordings to be "sloppy." And the prosecutor refused to turn over police officer notes regarding their efforts to obtain the recordings, even after the officer lost his formal report summarizing those actions. Mr. Curry argued the sloppiness amounted to bad faith under all of those circumstances.

Mr. Curry Appealed to the Oregon Court of Appeals Arguing, among other issues, that the trial court erred in concluding that the State did not gather exculpating video evidence, and in that failed process, violates his due process rights of the Fourteenth Amendment of the United States Constitution as interpreted by this Court.

On November 1, 2017, the Oregon Court of Appeals affirmed Mr. Curry's convictions without opinion and issued a judgment, (Appendix A). The Oregon Supreme Court declined to accept Mr. Curry's Petition for discretionary review. (Appendix B).

5. Reasons for Granting the Writ

In *Arizona v. Youngblood* 488 US 51 (1988), this Court held that unless a criminal defendant can show bad faith on the part of the police, their failure to preserve potentially useful evidence does not constitute a violation of the due process clause of the Federal Constitution's Fourteenth Amendment. *See also*

Illinois v. Fisher, 540 US 544, 548 (2004).

As this Court held in *Fisher, supra*, at 548, the substance destroyed was, at best, "potentially useful" evidence, and therefore *Youngblood*'s bad-faith requirement applies. Here, the surveillance videos both inside and outside of the bar were at minimum "potentially useful" and the State exhibited bad faith in failing to secure the video evidence.

a. The state violated Mr. Curry's due process rights by failing to take adequate steps to determine the existence and quality of video surveillance recordings of the fight between Dove and Mr. Curry (outside the bar) and of its immediate aftermath (inside the bar).

"Whether rooted directly in the Due process Clause of the Fourteenth Amendment,[7] or in the Compulsory Process or Confrontation clauses of the Sixth Amendment,[8] the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 467 US 683, 690 (1986) (quoting *California v. Trombetta*, 467 US 479, 485 (1984)) (citations omitted). In discussing the Compulsory Process Clause, this Court has held that "our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendant of favorable witnesses at trial and the right to put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 US 39, 56 (1987)(footnote omitted). "The

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[7] The Fourteenth Amendment to the United States Constitution provides in part: "No State shall . . . 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."

[8] The Sixth Amendment to the United States Constitution reads in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right 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 defence."

defendant's right to compulsory process is itself designed to vindicate the principle that the 'ends of criminal justice would be defeated if judgments were to be found on a partial or speculative presentation of the facts.'" *Taylor v. Illinois*, 484 US 400, 411 (1988) (quoting *United States v. Nixon*, 418 US 683, 709 (1974)). To be certain the Due Process Clause of the Fourteenth Amendment guarantees a criminal Mr. Curry's access to evidence in the state's possession that "is material either to guilt or to punishment . . . " *Brady v. Maryland*, 373 US 83, 87 (1963).[9]

To support a claim of denial of due process on the ground that constitutionally material evidence was lost or destroyed, a defendant must show that (1) the evidence possessed "an exculpatory value that was apparent before the evidence was destroyed" and "that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Trombetta*, 467 US at 489 or (2) the state acted in bad faith in failing to preserve any "potentially exculpatory" evidence. *Youngblood*, 488 US at 58.

b. The video surveillance recordings were potentially exculpatory because they could have shown Mr. Curry acting in self-defense or could have provided an inference that Mr. Curry did not act intentionally.

There is little doubt that a criminal defendant's due process rights include the right to review all evidence the government possesses that "is material either to

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[9] The "*Brady* principle" obligates the state to preserve potentially exculpatory material that came into its possession during an investigation. *Arizona v. Youngblood*, 488 US 51 (1988); *California v. Trombetta*, 467 US 479, 489 (1984); *United States v. Valenzuela-Bernal*, 458 US 858, 867 (1982)(noting that the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence").

guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). It is equally clear that "this right would be empty if the government could trump it by the simple expedient of destroying evidence harmful to its theory of the case." *Magraw v. Roden*, 743 F3d 1, 7 (1st Cir 2014).

In defining the parameters of the government's due process obligation to preserve material evidence, this Court has distinguished situations where (1) the exculpatory value of the evidence was apparent to law enforcement before the evidence was destroyed and (2) situations where the evidentiary value of destroyed or missing evidence was not known and can be described only as potentially exculpatory. In the first instance, where the materiality of the evidence was apparent to the police at the time the evidence was destroyed, "good or bad faith of the prosecution is irrelevant." *Illinois v. Fisher*, 540 US 544, 547 (2004); *see California v. Trombetta*, 467 US 479, 485 (1984). However, where the evidence at issue can only be described as "potentially useful," the defendant must demonstrate the police acted in bad faith in order to prove a due process violation. *Illinois v. Fisher*, 540 US at 548 (quoting *Arizona v. Youngblood*, 488 US 51, 58 (1988)). *See generally Olszewski v. Spencer*, 466 F3d 47, 56 (1st Cir 2006)(under *Youngblood*, defendants must meet bad faith standard where the evidence at issue is not "apparently exculpatory" but only "potentially useful" to the defense).

Based on federal cases decided subsequent to *Youngblood*, there is little dispute that the evidentiary burden placed on the defendant is uncompromising and difficult to meet absent direct proof of intentional conduct by law enforcement.

Indeed, as this Court noted in *Youngblood*: "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." 488 US at 56 n*. Some courts have described the defense burden as demonstrating law enforcement animus or a deliberate and conscious effort to suppress exculpatory evidence. *See United States v. Jobson*, 102 F3d 214, 218 (6th Cir 1996)("To establish bad faith, then, a defendant must prove 'official animus' or a 'conscious effort to suppress exculpatory evidence'")(citation omitted); *Ewing v. Zavislak*, No 97-2021, 1998 US App. LEXIS 33137, 1998 WL 964238, at *1 (6th Cir Dec. 30, 1998)(stating that "[b]ad faith cannot be established unless the plaintiff proves a 'conscious effort to suppress exculpatory evidence' on the part of the police")(citations omitted); *Woodson v. Sec'y, Dep't of Corrections*, No. 6:10-cv-649-Orl-36KRS, 2012 US Dist LEXIS 151359, 2012 WL 5199614, at *7 (MD Fla Oct. 22, 2012)("Petitioner must show more than intentional destruction of potentially exculpatory evidence; Petitioner must demonstrate that the State was aware of the exculpatory value of the evidence and made a conscious effort to prevent the defense from securing the evidence") *United States v. Sanders*, 207 F App'x 651, 653 (7th Cir 2006)("[B]ad faith means a conscious effort to suppress exculpatory evidence")(quotation marks and citations omitted). Moreover, courts applying *Youngblood* have held that negligent or even grossly negligent conduct by the police in failing to preserve potentially exculpatory evidence does not qualify as bad faith. *See e.g., United States v. Branch*, 537 F3d 582, 590 (6th Cir 2008)(although failure to

preserve videotape "may have been negligent, or even grossly negligent, as the district court found, it was not in bad faith"); *Monzo v. Edwards*, 281 F3d 568, 580 (6th Cir 2002)("When the government is negligent, or even grossly negligent, in failing to preserve potentially exculpatory evidence, bad faith is not established"); *Boykin v. Leapley*, 28 F3d 788, 793 (8th Cir 1994)("It is clear that although the state did act negligently [in failing to preserve blood samples], it did not act in bad faith"); *United States v. Fairchild*, 24 F3d 250 (9th Cir 1994)(police incompetence is not bad faith); *United States v. Eldridge*, No. 09-CR-329-A, 2014 US Dist LEXIS 139784, 2014 WL 4829146, at *6 (WD NY Sept 29, 2014)(government's conduct in releasing potentially exculpatory evidence did not constitute "negligence of gross magnitude necessary for a finding of bad faith"). With all of these less than exacting standard in mind, guidance is needed from this Court.

In this case, Mr. Curry presented evidence that a video camera was situated on top of a sign post outside the Peacock Bar, which could have captured the crucial interactions between Dove and Mr. Curry. The recording could have shown the Mr. Curry acting in self-defense or that Mr. Curry lacked the requisite mental state.

Moreover, Mr. Curry presented evidence that several cameras were situated inside the Peacock Bar and that most of those were functional. Any of those recordings could have shown the Mr. Curry being disarmed quickly, which the jury could perceive as a lack of aggression, thus supporting his self-defense claim. Those recordings also could have shown the Mr. Curry's high level of intoxication, which in turn, could negate a finding that Mr. Curry acted intentionally. Thus, the

recordings were potentially exculpatory.

c. The police acted in bad faith in failing to preserve the video surveillance recordings, because their investigation was more than negligent; it was "sloppy."

In *United States v. Zaragoza-Moreira*, 780 F3d 971, 980-81 (9th Cir 2015), the Ninth Circuit held that border officers acted in bad faith by failing to preserve potentially exculpatory video surveillance recordings. The defendant was convicted of drug offenses after she was found in possession of drugs at the border. After she was directed to a secondary inspection, the defendant, in response to questioning, blurted out that she had packages on her. She told the officers that she tried to make her presence in line obvious and that she was pressured to carry the drugs into the United States. *Id.* at 975-76. As part of a discovery request, defense counsel asked the government to preserve video recordings that related to the defendant's arrest. The district court also ordered the government to preserve video footage from the date of the defendant's arrest. However, the video was recorded over within a month after the defendant's arrest. *Id.* at 976-77. The defendant moved to dismiss the indictment, and although the district court found that the evidence was "potentially useful," to a defense of duress, it determined the government had not acted in bad faith. *Id.* at 978.

The Ninth Circuit reversed. It reasoned that the defendant had "repeatedly alerted [the officers] to her duress claim" and that the officer's questions to the defendant demonstrated that she "appreciated the significance" of the defendant's claims. *Id.* The officer also testified that she understood her professional obligation to collect and preserve evidence, was aware that duress was a defense to a crime,

and knew that the area was under surveillance. The Ninth Circuit found that those facts, combined with the fact that the officer failed to include any of the defendant's statements regarding coercion in her reports or in her affidavit to support the criminal complaint, demonstrated that she acted in bad faith rather than negligently. *Id.* at 980.

Here too, the officers were aware that Mr. Curry was claiming that he acted in self-defense or without intending to harm Dove, because Mr. Curry sat for an interrogation and made those claims. The officers were also aware that the Peacock Bar had a surveillance system in place that potentially could have captured the relevant action.[10] Mr. Curry further presented evidence that the police officers never established whether the outdoor camera was functional or whether the recording could be retrieved. And the police officers never established whether the indoor cameras captured the Mr. Curry retrieving the lemon knife and being disarmed of it. Mr. Curry attempted to learn information about the existence and quality of the recordings, but he was stymied by the passage of time and the police failure to turn over the relevant reports. The court ultimately found the police work related to the video surveillance recordings to be "sloppy." As in *Zaragoza-Moreira*,

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[10] In its initial ruling on Mr. Curry's motion to dismiss, the trial court found that Officer O'Malley determined that the outdoor camera was not functional, but the record does not support that finding. Officer O'Malley testified that some of the camera were dark, but he could not remember which ones; and Martin testified that the cameras were functional but did not capture much at night. (Tr 13, 22-23, 84-85). Miller testified that the cameras were working. (Tr 44). Owners could access recorded footage, and the officers did not ask Martin who had the password-access to the recorded footage. (Tr 36-40). It could be that the recordings would be too low-quality to be of assistance to the defense, but Officer O'Malley did not determine whether that was the case.

Regardless, the trial court backed off that finding in its ruling on Mr. Curry's motion for reconsideration. At that time, the court acknowledged that police sloppiness prevented the court from saying that the police had determined that the outdoor camera was not functioning. (Tr 103-04).

the sloppiness amounted to bad faith, because the police officers knew that the recordings could have had exculpatory value.

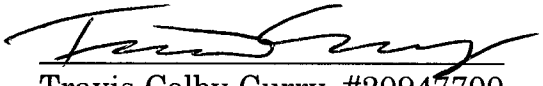
Under those circumstances, the trial court should have granted Mr. Curry's motion to dismiss. Instead, the trial court erroneously concluded that the detective's did not act in bad faith and Mr. Curry's due process rights were not violated.

Further instruction from this Court is needed to offer inferior courts a brighter-line guidance on the affirmative duty of the criminal prosecution to preserve apparent and potentially exculpatory evidence.

CONCLUSION

For those reasons, this Court should issue its writ.

DATED this 2nd day of August, 2018.



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