19-8216

ORIGINAL

The Supreme Court
Of The United States Of America

Docket Number: _____

Scott Winfield Davis
Appellant,

versus

Eric Sellers, Warden
Appellee.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT RELATED TO AN APPEAL FROM A HABEAS CORPUS DECISION IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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FILED
MAR 3 1 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATEMENT OF THE QUESTIONS

This is the case for the Court to critically re-examine lost evidence and "bad faith" under *Arizona v. Youngblood*, 488 U.S. 51 (1988) because in application across the various jurisdictions, *Youngblood* is not being applied in clear or consistent ways. If Davis can present all of the evidence that at this point exists, does the "loss", destruction and alteration of over 72 pieces of critical evidence by six separate Georgia agencies (that often misled and obstructed Davis and the courts) with only circumstantial evidence of guilt qualify as "bad faith" for the purposes of a due process violation under *Youngblood* or under the 14th Amendment?

1. Whether the opinion of the U.S. Court of Appeals for the Eleventh Circuit is a precedent-setting error in interpreting the requirements for "bad faith" as a Due Process violation under the 14th Amendment concerning the destruction and loss of potentially exculpatory material evidence under *Arizona v. Youngblood,* 488 U.S. 51, 109 S. Ct. 333, 102 L.Ed.2d 281 (1988) that contributes to an existing and growing circuit split of exceptional importance?

-- Or --

2. If the opinion of the U.S. Court of Appeals for the Eleventh Circuit was not a precedent-setting error of exceptional importance in interpreting the requirements for "bad faith" concerning the destruction and loss of potentially exculpatory material evidence under *Arizona v. Youngblood,* 488 U.S. 51, 109 S. Ct. 333, 102 L.Ed.2d 281 (1988), should the requirements established by *Arizona v. Youngblood* be reexamined in light of the various issues of existing circuit splits of exceptional importance, doctrinal incoherence, new forensic science, legislative reform, and state judicial disapproval?

LIST OF PARTIES

All parties are in the caption of the case on the cover page.

RELATED CASES

Scott Winfield Davis v. Eric Sellers, Warden (28 USC § 2254 Appeal)
No. 17-14325, U.S. Court of Appeals for the Eleventh Circuit;
Reporter Citation: 940 F.3d 1175 (2019)
Decided 10/10/2019

Scott Winfield Davis v. Eric Sellers, Warden (28 USC § 2254 Petition for Rehearing)
Appeal Number: 17-14325-CC, U.S. Court of Appeals for the Eleventh Circuit
Decided 1/22/2020

Scott Winfield Davis v. Eric Sellers, Warden (28 USC § 2254 Petition)
1:13-CV-1434-AT, U.S. District Court for the Northern District of Georgia; Reporter Citation
Decided 3/30/17

State of Georgia v. Scott Winfield Davis (Initial Criminal Case)
Indictment Number 05SC37460, Fulton County Superior Court;
Decided 12/4/2006

Scott Winfield Davis v. State of Georgia (Direct Appeal)
Georgia Supreme Court; 676 S.E. 2d 215-16 (Ga. 2009).
Decided 4/28/2009

Scott Winfield Davis v. State of Georgia (Petition for Writ of Certiorari)
United States Supreme Court; 558 U.S. 879 (2009).
Decided 10/5/2009

Scott Winfield Davis v. Eric Sellers, Warden (State Habeas Corpus)
Gwinnett County Superior Court; Docket Number 10-A-07461-2
Decided 5/22/2012

Scott Winfield Davis v. Eric Sellers, Warden (State Habeas Corpus – Certificate of Probable Cause Application)
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Petition for Writ of Certiorari of the US Supreme Court; 558 U.S. 879 (2009).

The Georgia Direct Appeal is at 676 S.E. 2d 215-16 (Ga. 2009).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit related to an appeal from a habeas corpus decision in the United States District Court for the Northern District of Georgia pursuant to 28 USC § 2254. Jurisdiction of this Court is invoked under 28 USC § 1254(1)

The initial judgement of the Eleventh Circuit was entered on October 10th, 2019, Motion for Hearing en banc was considered and denied on January 22nd, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions:

Confrontation Clause of the Fifth Amendment
Due Process Clause of the Fourteenth Amendment

Statutes:

28 USC § 2254
O.C.G.A § 17-5-56

PRELIMINARY STATEMENT

"*Something is rotten in the state of Denmark*"[1] As the District Court noted in this case, "The number of errors in the prosecution of this case is troubling. Potentially useful evidence was lost, in baffling ways that sometimes sound as if they were lifted from a Hollywood thriller (or a podcast)."[2] "The record of pervasive Government "loss" of evidence is the most disturbing "[3] Yet somehow, Youngblood "bad faith" was not found.

This is the case for the Court to critically re-examine lost evidence and "bad faith" under *Arizona v. Youngblood*, 488 U.S. 51 (1988). The question of this case is that if Davis can present all of the evidence that at this point exists, does the "loss", destruction and alteration of over 72 pieces of critical evidence (including fingerprints, the alleged murder weapon, gas cans, a secret second audio tape of Davis' police interview, etc.) by six separate Georgia agencies (that often misled and obstructed Davis and the courts)[4] in a high profile murder and arson case with only circumstantial evidence of guilt qualify as "bad faith" for the purposes of a due process violation under *Youngblood* or under the 14th Amendment?

The claim of innocence and the inability to get a fair trial has been consistent by Davis for the many years this case has been litigated. Otherwise, this case continues to deliver more surprises and new evidence.

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[1] William Shakespeare, Hamlet, Act I, Scene 4, (Doc. 65 at 9.)

[2] Doc. 68 at 25.

[3] Id at 30

[4] Davis details the factual basis for these claims in Doc. 44 "Objections to Report and Recommendation", pp. 75-98

If Davis can present his evidence, the more difficult question is then, what actually constitutes "bad faith," and has Georgia and the Eleventh Circuit incorrectly interpreted the Supreme Court's definition of "bad faith", does it contribute to an existing split among jurisdictions and/or does the standard need to be re-examined based on the many problems and inconsistencies the standard presents?[5].

What constitutes "bad faith" within the context of a criminal prosecution? This case demonstrates that the current definition of "bad faith" is too subjective to be effective, and why at least ten State Supreme Courts have rejected the "bad faith" standards set forth in *Youngblood*[6]. Georgia on the other hand has taken the definition of "bad faith" to the other extreme and has made it apparently too difficult to meet without a police **admission before trial.** Collectively, disparities across jurisdictions undermine the legal framework established by *Youngblood* and result in a rule of law that defies consistent application across the United States. *Youngblood* is unworkable, is outdated and no longer deserves stare decisis[7]. The paramount concern of the Due Process Clause must be on

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[5] New forensic science, legislative reform, state judicial disapproval, and doctrinal incoherence, Norman C. Bay, "Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith", 86 Wash. U. L. Rev. 241, 278 (2008)

[6] Id, (See Ex Parte Gingo, 605 So.2d 1237, 1241 (Ala. 1992); Gurley v. State, 639 So.2d 557, 565– 68 (Ala. Crim. App. 1993); Thorne v. Dep't Pub. Safety, 774 P.2d 1326, 1330–32 (Alaska 1989); State v. Morales, 657 A.2d 585, 592–94 (Conn. 1995); Lolly v. State, 611 A.2d 956, 959–60 (Del. 1992); Hammond v. State, 569 A.2d 81, 85–89 (Del. 1989); State v. Okumura, 894 P.2d 80, 98–99 (Haw. 1995); Commonwealth v. Henderson, 582 N.E.2d 496, 496–97 (Mass. 1991); State v. Smagula, 578 A.2d 1215, 1217 (N.H. 1990); State v. Ferguson, 2 S.W.3d 912, 914–18 (Tenn. 1999); State v. Delisle, 648 A.2d 632, 642–43 (Vt. 1994); State v. Osakalumi, 461 S.E.2d 504, 507–14 (W. Va. 1995)).

[7] *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992)

ensuring fairness to the accused through reliable fact finding that protects the innocent from wrongful conviction. *Youngblood*, in many jurisdictions, focuses exclusively on an officer's unprovable subjective state of mind. Subjective unprovable bad faith is dispositive; prejudice to the accused is disregarded, even if the evidence could have led to his exoneration as eventually was the case for Larry Youngblood.

Over the 20+ years this case has been litigated, new documentation and evidence have consistently, but slowly, been discovered by Davis not for lack of due diligence. Some of the 72 missing items were known pretrial, and some were not disclosed or discovered until later. Sometimes, much later, almost 22 years after the crime. Davis has proven that this trickle of discoveries has been due to the deliberate deception and perjury of key state actors, but proving "bad faith" has been easier said than done.

STATEMENT OF THE CASE

David Coffin was murdered on December 10, 1996. The record shows that four days before Coffin's murder, Davis allegedly received Coffin's address in a phone call from a private investigator his lawyer had hired related to the divorce filed by his estranged wife, Megan.[8] Coffin's house was burglarized soon thereafter, and a phone call to Davis' home

[8] Davis has always denied the call with the investigator, and there was no phone call on Davis' phone records. The investigator Daws claimed attorney/client privilege when first subpoenaed to testify before the grand jury, but later changed his story, once offered a $300,000 reward by the Coffin family.

number was made from Coffin's house.[9] Coffin's Porsche, Beretta pistol, among other items were all reported missing.

On the morning of December 10th, a 911 call brought DeKalb Fire to a road in Dekalb County, where Coffin's stolen Porsche was discovered to be on fire while at the exact same time, Davis was in downtown Atlanta (Fulton County) many miles away at work in a meeting with three people.[10] That same evening, Davis called police to his home two different times, and the fire department was called to Coffin's house, where his badly burned body was subsequently discovered.

Detectives Rick Chambers and Marchel Walker responded to both the Coffin and Davis calls. Police took Davis to the homicide detective's office for an interview. Chambers subjected Davis to a "two-step" interview process. He conducted the first interview unrecorded and then after having Davis sign his initial statement, read Davis his *Miranda* rights and conducted a second interview that was recorded. During this interview, Davis mentioned that he had not "shot" the victim of which he stated his wife Megan had told him[11]. Police did not know the victim had been shot at this point because the body was burned. Davis was

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[9] Davis has argued that this call was from his wife, who was dating Coffin among others.
[10] Davis thus had an alibi for the Porsche fire, where the only crime scene fingerprints in the case were collected.
[11] Megan Davis denied telling Davis this that evening but subsequently changed her story repeatedly. Four other witnesses testified that Megan had in fact revealed to them and to Scott Davis that the victim had been "shot" or "shot in the head". ("TT") Trial Transcript (R:17 TT p.1976) (R:18 TT pp.3321-3355, 3356-3378, 3380-3382, 3383-3388). FCDA Paul Howard testified," I FOUND OUT THAT MEGAN DAVIS INDICATED THAT SHE MIGHT HAVE IN FACT MADE THAT STATEMENT TO SCOTT DAVIS." (Pretrial pp.137-138).

subsequently allowed to return home. The circumstances and content of this taped interview have been hotly disputed ever since.[12]

Davis was arrested three days later and charged with Coffin's murder. He was released from custody on bond, and the state dismissed the charges against him in mid-1998 for lack of evidence.

In early 2005, David Coffin's family offered a **$300,000 reward, to be paid only upon a conviction,** for information related to the murder[13]. Evidence started disappearing. Testimony changed[14]. Davis was re-arrested, and brought to trial for Coffin's murder. He has repeatedly denied murdering Coffin. Davis had an alibi for the Porsche fire[15] and 100% of the evidence provided by the state at trial was circumstantial. There were no eyewitnesses, and no physical evidence directly tying Davis to Coffin's murder. In fact, the only crime scene fingerprints collected (at the Porsche scene) were not Davis'[16]. Prior to trial, prosecutors disclosed that much of the key physical evidence collected was "missing." The State offered little justification or specific information on how or why all the potentially exculpatory evidence disappeared. It was just gone.

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[12] Among other things including threats by police, Davis has always said the tape was altered (R:18 TT p.3420).
[13] This was the largest reward in Georgia's history.
[14] This testimony that changed with the reward is often the same uncorroborated circumstantial testimony Davis challenged at trial but is oft repeated by subsequent courts (e.g., Panel Opinion at 31). Davis continues to argue this testimony was false and impeached (R:17 TT p.1571, R:19 TT pp.4214 -4125) (R:18 TT pp.3180-3181).
[15] Doc. 44 at 106
[16] Id at 105-117

When presented with the question of how every State agency involved with any facet of the investigation could have lost or destroyed the related evidence, the State's essential answer was, "Don't know, not my fault.[17]" Sadly, this "explanation" has been accepted by every court. While other states like Massachusetts and California investigate these types of **systemic** massive losses or abnormalities concerning evidence, Georgia has done nothing and not one single law enforcement officer has been held accountable.[18] In fact, the Fulton County DA would later appear on television stating that he has "to laugh" at the evidence loss and a false affidavit his team and other Georgia agencies were responsible for over this case.[19]

Prior to trial, Davis challenged the indictment and numerous pieces of material evidence under *Youngblood*.[20] This initial challenge was based on the incomplete or inaccurate evidence, testimony, and documentation provided by the State prior to trial. The trial judge denied the pretrial motion because at that time Davis could not prove "bad faith," but ruled that the now known to be incomplete list of lost and destroyed evidence was material[21].

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[17] Pretrial pp.131-134, Doc. 44

[18] https://www.wsj.com/articles/massachusetts-to-dismiss-some-20-000-drug-convictions-linked-to-tainted-crime-lab-1492556317 , and O.C. deputies' lapses prompt massive review of evidence handling and https://www.latimes.com/california/story/2020-02-04/o-c-deputies-lapses-prompt-massive-review-of-evidence-handling to-dismiss-some-20-000-drug-convictions-linked-to-tainted-crime-lab-1492556317

[19] Atlanta CBS 46 news segment https://www.youtube.com/watch?reload=9&v=biC5JGEgab8

[20] Twelve pieces of evidence were challenged in this proceeding.

[21] Order on Motions, July 13, 2006

During trial, Davis learned of more missing pieces of evidence, and more evidence of what Davis believed to be "bad faith." The list of new revelations by various State actors caused Davis to request and obtain continuing objections to **any and all missing or altered evidence** that he was aware of at that time.[22] These objections included items collected at Coffin's residence, the Porsche crime scene which included fingerprints, and the one then known audio tape of Davis' police interview. The stories the State weaved around this missing evidence formed a foundation for the unchallengeable testimony that Davis had no way to fight in order to "prove his innocence." These objections are of importance to this appeal because the Georgia Supreme Court ("GASC") missed or ignored them later in Davis' direct appeal.

State witnesses were questioned on the missing and destroyed evidence, but as would later be discovered during the state habeas proceedings, and much later in the federal habeas through the recordings and affidavit signed by APD Detective Walker, the state's witnesses were deceitful, committed perjury, and the information provided by the six Georgia agencies was inaccurate and incomplete.[23] The GASC denied Davis' direct appeal on this issue based on a finding that only the twelve pieces of evidence which had been challenged at pretrial were relevant to

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[22] (R: 17 TT pp. 2266, 2353, 2365, 2367, 2543, 2568; R:18 TT pp.2609, 2618, 2895). Davis' Attorney Steel "We are not objecting, contemporaneously with the state discussing some of the items that were found at the scene or when I say scene, 951 W. Conway" (victim's home)," or at the Porsche scene"...." I want to make sure we have a continuing objection to all this." The Court, "That's true."

[23] See footnote 29, infra, Detective Walker was one of the two detectives present during the taped interview of Davis.

the appeal[24], there was no bad faith, and that Davis had not challenged the additional missing pieces of evidence at trial. This was incorrect and one reason this decision deserves no deference.[25]

Davis filed a state habeas corpus petition, and presented numerous witnesses, evidence, and documents which only became available when the prosecution was required to open its file. Davis argued the State had withheld crucial information at trial concerning the missing evidence, committed misconduct through perjury and withheld material information concerning the missing and destroyed crime scene fingerprints, an altered interview tape, and other missing potentially exculpatory evidence that then totaled over 72 pieces. Over 300 hundred SOP violations committed by the six separate agencies were documented, and expert witness' testimony provided additional evidence of inaccurate and incomplete State witness testimony at trial, and incomplete Discovery provided by the six Georgia agencies concerning the missing evidence.[26] Among other things, a forensic audio expert witness testified that the Davis interview tape used at trial had been tampered with, the GBI Firearm examiner in the case had been fired for faking evidence, and the GBI Latent Print Examiner now

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[24] *Davis v State*, 676 S.E.2d 215,220 (2009) "However, by failing to contest the loss of those items **in the trial court,** Davis has waived any such challenges."

[25] See footnote 22, supra. Also, the state habeas court would later agree with Davis. (State Habeas Order, p.10-11). "Following the trial court's denial of the Petitioner's motion, counsel requested and was granted a continuing objection with regards to any references to the lost evidence made at trial." **The State of Georgia must have agreed because it wrote the Proposed Order that the habeas judge signed.** The State disingenuously changed their position during the Eleventh Circuit litigation.

[26] State Habeas "Supplement to Habeas Issue of Bad Faith" documented each of the 300 SOP violations and missing items

admitted he had an undisclosed **second** set of crime scene fingerprints that, contrary to SOP, he had also never backed up, never run thru AFIS and then intentionally destroyed in late 2005.

The state habeas court denied Davis' *Youngblood* claims incorrectly as solely Ineffective of Assistance of Counsel claims[27], but also unreasonably that there was no proof of "bad faith" in the record. Davis appealed to the GASC for a certificate of probable cause, but was denied.

Therefore, the decision of the State habeas court is the last court to have decided the merits of Davis' claims. Davis filed a federal 28 USC § 2254 petition in the U.S. District Court for the Northern District of Georgia.

Davis again raised claims concerning independent due process, and violations of *Youngblood* based on all of the evidence presented at trial and during the state habeas. After the Magistrate Judge entered his final report, Davis was provided with the first piece of direct evidence that the State had withheld a secret second tape of Davis' interview, and that Detective Chambers had perjured himself when he had testified under oath that there was only one interview tape. The direct evidence[28] provided by Jennifer Bland also established that the State knew that Chambers was committing perjury when he testified that only one tape existed of Davis'

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[27] The Eleventh Circuit determined the independent due process Youngblood claims were not defaulted

[28] The "Bland/Walker Evidence" was two phone call recordings

police interview. Not only were there two tape recorders used during the interview but also the two tapes and transcripts from both recorders were provided to Assistant DA Joe Burford by Detective Walker.[29] Davis filed Objections and submitted notice of new evidence to the district court, and requested that the court either conduct an evidentiary hearing to consider the "Bland/Walker evidence", or to stay the matter to permit him to return to the State courts with the newly obtained evidence.

The district court determined that it could not consider the Bland/Walker evidence because it had not been considered by the State courts. Based on this determination under *Cullen v. Pinholster*, 563 U.S. 170, the district court focused on the State habeas proceedings[30], and found that any claims based on the loss or destruction of evidence, untethered from the ineffective assistance of counsel claims, were procedurally defaulted. The district court was very troubled by the State's conduct[31] but Davis had failed to demonstrate "bad faith."

As for the Bland/Walker evidence, the district court ruled against Davis because Bland had asked Walker leading questions, there was no

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[29] Jennifer Bland is a criminal justice student who decided to investigate Davis' case as a project. She established contact with Detective Walker in 2016 and as calls continued, she started making recordings of their phone conversations. He admitted to Bland that there had been two recorders and tapes used during this interview, and that the tapes from both recorders had been provided to Assistant District Attorney Joe Burford. Davis was unaware of the second recorder during his interview and at trial because it was a hidden tape recorder and it was not disclosed in Discovery. This means that Det. Chambers committed perjury when he testified in Davis' state habeas corpus case that there was only one tape and cassette recorder (R:1 HT 849-850). It also means that the state knowingly permitted Chambers to offer knowingly false testimony on more than one occasion.

[30] "We now hold that review under § 2254(d)(1) **is limited to the record that was before the state court that adjudicated the claim on the merits**" *Pinholster* at 1398

[31] See footnotes 2-3, supra

information regarding the content of this second tape[32]and because Davis had failed to ask Walker any questions related to the second tape during the state habeas hearing when he had been on the witness stand.[33]

The district court granted a certificate of appeal on the issues, but during the litigation of that appeal, Walker provided Bland with an **affidavit**[34] admitting in no uncertain terms that he had recorded two **unique** tapes of Davis' interview and provided both along with transcripts to the Fulton County DA. This was direct evidence of "bad faith." A panel from the United States Court of Appeals for the Eleventh Circuit heard the case, again denying Davis' claims, finding they were either defaulted or had no merit focusing on the state GASC direct appeal decision. Importantly though it determined that Davis' *Youngblood* claim was NOT defaulted but the decisions of the GASC decision was entitled to deference. Davis' motion for *en banc* reconsideration was denied on January 22, 2020, and this Petition for Writ of Certiorari follows.

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[32] Walker has refused discussing any second tape content details with Davis' attorneys. This is exactly the reason an evidentiary hearing is needed. Davis has repeatedly argued he was threatened and other exculpatory details should be on the tape.

[33] Walker denied the existence of a second tape to Davis' State Habeas legal team (ECF No. 64-1, at 1) prior to the hearings, and Davis' State habeas attorney decided to not to ask questions to Walker as she believed it would hurt Davis' case. "the Court established that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Strickland v. Washington*, 104 S. Ct. 2052

[34] The Eleventh Circuit carried this affidavit with them (Appendix-G)

REASONS FOR GRANTING THE PETITION

Davis submits this case should be heard and that the Eleventh Circuit and Georgia ruled incorrectly because they:

1. interpreted the law concerning the *Youngblood* "bad faith" standard incorrectly in a way that discounts objective police knowledge while making subjective ill intent a requirement, and adds to the growing list of circuit splits in interpreting the standard.
2. unreasonably determined facts and law[35] while also giving undue deference under USC 42 § 2254(d)(1) while apparently focusing on the GASC direct appeal decision rather than the last court to decide the case on its merits which was the state habeas court.
3. did not allow Davis' Bland/Walker "bad faith" evidence into the record nor hold the case in abeyance giving the state courts the first opportunity to hold a hearing

This Court should grant review to prevent further inconsistent and incorrect application of the *Youngblood* "bad faith" standard across varying jurisdictions.

I. The Eleventh Circuit and Georgia interpret Youngblood "bad faith" incorrectly

[35] *Williams v. Taylor*, 529 U.S. 362 (2000)

The Eleventh Circuit has apparently never granted a *Youngblood* claim. Georgia has granted one[36] but has since strayed.[37] The Supreme Court articulated specific facts that contributed to its holding in *Youngblood*, so the facts in the Davis case are important[38]. Davis' case differs importantly in many ways from *Youngblood* and comparison shows how far the Eleventh Circuit and Georgia have strayed on "bad faith". In *Youngblood*, the Court dealt with the area of constitutionally guaranteed access to evidence in *Brady v. Maryland*.[39]

In *Youngblood*, there was no question as to whether or not the State complied with *Brady* and *Agurs*[40]. The State disclosed relevant police and lab reports to Youngblood and Youngblood's expert had access to material physical evidence.

Davis is distinguished from *Youngblood* because not only did the State not provide Davis with all of the various evidence documents[41], it also lost or destroyed virtually every piece of material physical evidence without Davis being able to subject any of them to independent testing or analysis. The essential argument from Georgia on all of the lost or destroyed evidence can be paraphrased as "Don't know. Not my fault. Trust me.[42]"

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[36] *The State v. Miller*, 298 Ga App 584(2009)
[37] *State v Mussman* 713 S.E.2d 822, 826 (2011)
[38] Doc. 44 details these facts
[39] 373 U. S. 8.
[40] *US v. Agurs*, 427 U. S. 97
[41] GBI Coffin Letter Submission document (MFNT pp.45-46), Atlanta Fire evidence UPS delivery receipt (Petitioner's Habeas Exhibit 27), Bernadette Davy Misconduct evidence (Doc. 44 at 70), etc.
[42] Pretrial pp.131-134, Doc. 44

In *Youngblood*, the Court concluded that Youngblood needed to show some constitutional duty more than *Brady* and *Agurs*. The Court cited *California v. Trombetta* for the proposition that as long as police were acting in "good faith" and following their normal practice, failure to preserve evidence would not rise to the level of a constitutional violation.[43] Again Davis is distinguished, none of the evidence was lost or destroyed following normal practices or SOP[44]. "Several instances might merely be sloppy but a wholesale failure to follow customary procedures equals bad faith", *United States v. Nebraska Beef*, 194 F. Supp. 2d 949, 958, Fn*12 (2002).

In *Youngblood*, the Court found that Youngblood might have had a greater chance of exoneration had the State preserved the evidence than Trombetta, but because the State had not attempted to make any use of any of the lost or destroyed evidence in its case in chief, there was no constitutional violation. Again, Davis' case is distinguished from *Youngblood*, because much[45] of the evidence introduced by the State in its case in chief was related to the lost or destroyed material physical evidence. Unlike *Youngblood* or *Trombetta*, Davis' case rested entirely on circumstantial evidence, including the State's characterizations of the one-sided tests ostensibly performed on the missing evidence. Also, unlike

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[43] 467 U. S. 479, 488 (1984).

[44] (R:1 State Habeas Supplement). **300 SOP violations** ("Supplemental Lost Evidence Summary Chart" lists specific SOP violations for the six latent print cards, the alleged murder weapon, 9mm magazine, the bullet that killed the victim (UID 96-2123 Bullet), the victim's blood with cocaine, Porsche gas can, "Olympic" bag, 3 bags of crime lab evidence from APD, Browning shotgun, swabbings, and 9mm cartridge cases). "

[45] Id

any of the cases cited by the Court in *Youngblood*, Davis had no viable "alternative means of demonstrating [his] innocence." Davis' best chance was to find an alternate suspect, and that was foreclosed by the State's loss and destruction of all the evidence that could have done this.[46]

The State took ten years to bring Davis to trial, and somehow, six separate Georgia agencies, lost or destroyed virtually all of the material physical evidence -over 72 pieces. These six agencies violated over 300 of their own SOPs along the way.[47] The standard set by *Trombetta* is that the police have to have followed their normal practice. Violating over 300 of their own SOPs cannot be considered "normal practice," and must violate *Trombetta* and *Youngblood.*

In a statement in *Youngblood* that has lent itself to grossly varying misapplication, the Court said bad faith is shown in:

> "those cases in which the police themselves, by their conduct, indicate that the evidence could form a basis for exonerating the defendant.

Davis did not discover that some physical evidence had once existed and been collected by the State until he was litigating his state habeas corpus case. These revealing discoveries made during this initial collateral challenge provide much of the evidence of the state's "bad faith."

The most important and misapplied part of *Youngblood* is undoubtedly the following:

> "[488 U.S. 51, 58] We therefore hold that unless a criminal defendant can show bad faith on the part of the

[46] This is particularly true of the crime scene fingerprints that were not Davis'
[47] R:1 State Habeas "Supplement to Habeas Issue of "bad faith."

> police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. [Footnote *]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. Cf. *Napue v. Illinois,* 360 U.S. 264, 269 (1959).

There is a focus on "knowledge" and "conduct" in defining "bad faith" but no mention of a **requirement** for "official animus" or ill intent in *Youngblood*[48]. *Youngblood* discusses bad faith without using volitional words like "intent" and "purpose." Yet subjective ill intent is exactly what Georgia and the Eleventh Circuit require. Their **requirement**[49] for proven animus or ill intent is unreasonable because it is not the character of the prosecutor but the character of the evidence that matters most.[50] Clearly, bad faith is present when State agents lose or destroy evidence with "official animus" or "conscious effort to suppress," but bad faith is not necessarily absent when State agents lose or destroy evidence and independent proof of these specific motives is lacking. Ill intent may be one way to prove bad faith, but it is not the only way[51]. And this variance

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[48] As in *United States v. Elliott*, 83 F. Supp. 2d 637, 650, "Viewed as a whole, neither *Trombetta* nor *Youngblood* nor their progeny require a defendant to prove that the mental state of the police officer at the time of destruction was to foreclose a defense or to deliberately deny the defendant's due process rights.".

[49] The GASC discussing bad faith, "In other words, the police must show, by their conduct, **some intent to wrongfully withhold constitutionally material evidence from the defendant**" *The State v Mussman*, 713 S.E.2d 822, 826 (2011)

[50] *United States v Agurs*, 427 U. S. 110

[51] Courts often cite *Trombetta* as though this finding was essential to its holding and created an absolute requirement of these things in order to find bad faith. This representation is inaccurate. Elizabeth A. Bawden, *Here Today, Gone Tomorrow - Three Common Mistakes Courts Make When Police Lose or Destroy Evidence with Apparent Exculpatory*, 48 Clev. St. L. Rev. 335 (2000) at 355

concerning ill intent goes to the heart of the various jurisdictional splits on how Youngblood "bad faith" is interpreted.[52]

A. An Objective Evaluation of "Bad Faith" is Required

There is "ill intent" in the conduct of the Georgia agencies that lost and destroyed evidence in this case but this is not the only evidence of bad faith. When we no longer have the evidence that a defendant was not allowed to analyze, courts cannot just blindly trust the six separate law enforcement agencies in the Davis case that "lost" and destroyed evidence to give us their honest and subjective view of their "knowledge" or conduct when they are the ones that are at risk to be blamed. "Evidence of bad faith is likely to be within the peculiar control of the police, and an officer unprincipled enough to destroy evidence is unlikely to chronicle his actions."[53] "The defendant is ill-suited to inquire into subjective good faith or bad faith of the police. The most relevant evidence of police good or bad faith is apt to lie within the control of the police, and police officers are highly unlikely to cooperate voluntarily with defendants by accusing fellow officers of misconduct." [54]

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[52] Bay, supra, at 289. Compare *State v. O'Dell*, 46 P.3d 1074, 1078 (Ariz. Ct. App. 2002) ("[A] determination of bad faith 'must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.'") with *Guzman v. State,* 868 So.2d 498, 509 (Fla. 2003) ("[B]ad faith exists only when police intentionally destroy evidence they believe would exonerate a defendant."); compare *United States v. Day*, 697 A.2d 31, 36 (D.C. 1997) (dismissal the appropriate sanction under *Youngblood*), *with Stuart v. State,* 907 P.2d 783, 793 (Idaho 1995) ("In a criminal case, application of a favorable inference under the spoliation doctrine is the appropriate remedy for a *Youngblood* due process violation.").

[53] *The Supreme Court, 1988* Term, 103 HARV. L. REV. 40, 166 (1989).

[54] Id

Courts should instead use an objective evaluation that is at a minimum based on the "knowledge" a professionally trained officer/agent/expert should have and how he/she should have evaluated and preserved evidence that was at least initially viewed as worthy enough to collect (and worthy enough to convict), especially where clearly defined SOP is present.

Secondarily it is reasonable to infer some evidence of this "knowledge" based on the appropriate or inappropriate conduct of officers. As in this case, pervasive inappropriate conduct and SOP violations by trained and certified law enforcement is strong evidence of bad faith[55] because it is an objective way to show that the police had knowledge of the exculpatory value of the evidence.[56] Simply said, it should not be accepted by courts when an officers say, "We have clear SOP but it's OK if we ignored it."

The Eleventh Circuit ruled that,

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[55] "where there is no evidence of an established practice which was relied upon to effectuate the destruction, where the applicable documents teach that destruction should not have occurred, and where the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the *Trombetta/Youngblood* test. A contrary holding would permit law enforcement officials to ignore the clear text of the governing regulations on which they say their policy is predicated and to act inconsistently with it." *Elliott*, supra, at 647,648

[56] "Acting contrary to official instructions, which the [officer]thought to be in effect, is bad faith, whether measured objectively or subjectively.[..] it is not confined to the circumstance in which the [officer] deliberately says unto himself "I shall deprive the defendant of due process or hurt his case." If that were the test, there would be no check on the destruction of evidence because law enforcement agents would be able to defend the destruction of evidence by lying about subjective intent or by violating, with impunity, the rules they are obligated to follow. ", *Elliott*, supra, at 650.

> "there is no evidence that departures from protocol were coordinated or designed to deprive Davis of evidence expected to play a significant role in his defense."[57]

This is not only a wildly inaccurate reading of the facts as contained within the record[58], but it also requires the notion of an official collusion and intent standard ("coordinated or designed") that is nowhere to be found in *Youngblood*. The facts show six separate Georgia agencies intentionally preventing Davis from testing or accessing evidence by destroying/withholding it (fingerprint cards, secret second interview tape, coercing a falsified affidavit from Linda Tolbert of Atlanta Fire, perjury, forensic reports from a fired and disgraced GBI expert, etc.) while committing over 300 SOP violations. This collective knowledge and conduct show the State knew of some exculpatory value of this evidence and was dishonest about it or why do things like coerce a false affidavit?[59]

Without any admission of intent from police - which didn't come for almost 20 years in this case, proof of bad faith can only come from an **objective evaluation** of the actions of trained, certified law enforcement. It was discovered during the state habeas proceeding that the FCDA **coerced** an Atlanta Fire employee, Linda Tolbert, to provide a false affidavit (concerning 35 pieces of material evidence that disappeared from Atlanta Fire that included the alleged murder weapon) intentionally

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[57] Panel Opinion p. 25.
[58] Doc. 44, pp. 75-98.
[59] Id

deceiving Davis' attorneys.[60] Evidence handling expert Capt. Robert Doran testified that there:

> "was a pattern and practice of police agency, fire department, GBI Laboratory, and prosecutor's office of failing to respond timely to deficiencies in the chain of custody, handling, retention, and disposal of physical evidence associated with this matter, and that pattern and practice did not comport with commonly accepted professional law enforcement standards."[61]

As if that were not bad enough, the State failed to disclose information to Davis about the lying, disgraced, and fired GBI Firearms Examiner Bernadette Davy, whose analysis and opinions had been used in Davis' case.[62] This failure, and Davy's criminal behavior in her official capacity, further impeached the state's purported "testing" of evidence and credibility in triple fashion.[63] This was not a mere mistake but direct "bad faith" conduct.[64]

Davis argues that as in Circuits other than the Eleventh, in a manner similar to *United States v. Elliott*, 83 F. Supp. 2d 637, and *United States v Estefani Zaragoza-Moreira*, 780 F.3d 971, 9th Circuit (2015), police's knowledge of the potential exculpatory value of the evidence at

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[60] The "Tolbert affidavit," R:1 Davis' State Habeas Exhibit 45.
[61] R:1 HT-p. 340.
[62] With Davy and the missing ballistic evidence, there is a multiplicative effect of bad faith and prejudice. The State lost all the ballistic evidence that was material to Petitioner's case. They deceived Petitioner's attorneys concerning what happened to the evidence with Tolbert's false affidavit. Then they withheld material impeachment evidence requested by Petitioner's attorneys. Davy was fired for falsifying ballistic reports and the errors showed up in 13% of the cases where retesting was available.
[63] Doc. 44, pp. 61-71.
[64] Doc. 44, pp. 71-75.

the time it was lost or destroyed must be **objectively** evaluated based on reasonable standards.

These objective standards should evaluate police knowledge based on the fact they are professionally trained law enforcement professionals certified in collection and preservation techniques and SOPs. They are not "civilians." Courts often give law enforcement personnel extra credibility because of this specialized professional knowledge. This "knowledge" should also be objectively evaluated as to the collective "system-at-large-knowledge" that the system itself should have had. In this case, **six separate agencies were involved in losing and destroying evidence**. Such systemic misconduct cannot reasonably be objectively evaluated as anything but proof of "bad faith."[65]

This was no "act of God" or single incident. The loss/destruction was perpetrated and allowed by dozens of officers/agents/experts in multiple locations. At least one of these State employees should have prevented it if they had exhibited any reasonably objective professional care in a wholly circumstantial case high profile murder case especially where Davis had repeatedly maintained his innocence. The failure of the State's prosecution team to act to protect the evidence from loss or destruction must also be evaluated based on the current forensic standards of that time. Most of the evidence apparently disappeared in 2005. Advanced forensic technologies including PCR DNA testing, touch DNA,

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[65] *United States v. Osbourn*, No. 05-M-9303-M-1, 2006 WL 707731, at *2 (D. Kan. Mar. 17, 2006)

millions of prints in the AFIS systems, and "CSI-style" technologies were common, unlike in 1988 when *Youngblood* was decided.[66] These known technologies provide higher possibilities of materiality because they can identify suspects in more ways and with greater certainty.

The unchallenged fact that six separate agencies lost and destroyed evidence is inculpating of the State on its own. It should be manifest that so many separate agencies could **not accidentally** lose/destroy so much evidence; or if they did, the entire system was constitutionally deficient in Georgia, and was so far beyond recklessly negligent that it qualifies as *de facto* proof of "bad faith."

One specific example of "bad faith" that deserves emphasis is the fact that the GBI and Fulton County Prosecutors lied and obstructed concerning the key crime scene fingerprints in the case (that were tested and not Davis')[67], and that there existed **two different sets (not one as claimed earlier) of the six fingerprint cards** that were both destroyed/lost independently with no digital backups - directly contrary to established SOP.[68] It is highly improbable that this destruction of evidence, which occurred right before Davis' indictment in October of 2005 - nine years after the crime - was coincidental. This is especially

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[66] Doc. 44, pp.71-94

[67] Davis argues these fingerprints should have "apparent Exculpatory value" under *Trombetta* as well because their value is "obvious, evident, or manifest." Therefore, bad faith is irrelevant.

[68] One set with the GBI was discovered in the Motion for New Trial hearing "MFNT" 1/11/2008 p.46), Another set in was discovered to be in Dekalb County. (R:1 HT pp. 440-442)

true since the FCDA was trying to match the prints to the victim (unsuccessfully) in January 2005. By the GBI's own SOP, the prints were AFIS quality fingerprints that prosecutors were so keen to try to use to convict Davis with in 1996, but yet were never run thru AFIS for over 9 years.[69] Again, the fingerprints in the case were Davis' **only** chance to identify another suspect.[70] This was also a violation of Georgia law.[71] (see O.C.G.A 17-5-56: "law enforcement agency or a prosecuting attorney, shall maintain any physical evidence that relates to the identity of the perpetrator of the crime"). It is also not reasonable to claim trained law enforcement did not have the knowledge to see the apparent value of crime scene fingerprints that were not Davis', as in *Zaragoza-Moreira,*[72] *U.S. v Bohl*[73] or *United States v. Cooper*[74] .

The opinion of the Eleventh Circuit, if it stands, as Glenn Cunningham once discussed in the *Baylor Law Review,* would "effectively provide(d) law enforcement officials with a blueprint to convict the innocent" because police now have little incentive to preserve potentially exculpatory material.[75] In fact, "police now have arguably been given a

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[69](R:1 HT pp. 440-442) Earlier courts have unreasonably been unconvinced the prints were of AFIS quality despite the admission that GBI SOP **requires** that prints that were not AFIS quality be marked on documents as such. Not a single one of these prints were marked non-AFIS.

[70] Davis' alibi for the Porsche fire where the prints were discovered made the value of these prints even more obvious and the destruction of two sets even more egregious. eliminating **the potential to identify another suspect**

[71] Doc. 44, pp.22-27

[72] 780 F.3d 971, 982 (9th Cir. 2015)

[73] 25 F.3d 904, 913 (10th Cir.) "we note that the government here offers no reasonable rationale or good faith explanation for the destruction of the evidence."

[74] 983 F.2d 928 (9th Cir. 1993)

[75] *Arizona v Youngblood: A Blueprint to Convict the Innocent?,* Baylor Law Review, Vol41:775, 1989, p.791.

green light to destroy evidence without fear of having to suffer the consequences of their conduct."[76] It appears, police simply just need to obstruct at least until after trial and Georgia courts will allow it under any excuse. A collective "We don't know. We didn't do it." should not be good enough because they should have known and they shouldn't have allowed it.

As Justice Stevens stated in *Youngblood*, "there may well be cases in which the defendant is unable to prove that the state acted in bad faith, but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair."[77] How can at least 70 material items collectively NOT be "critical"? The prejudice of all the missing and destroyed items made Davis' trial fundamentally unfair.[78]

II. Youngblood is Due a Critical Reexamination

Three decades after *Youngblood* was decided, it is past time for a critical re-examination of its holding. *Youngblood* was built upon the conviction of an innocent man[79]. First, forensic science including DNA

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[76] Id.

[77] 488 U.S. 51, 61.

[78] *United States v. Bagley,* 105 S.Ct. 3375, 3381-82, (1985). *See Cooper,* 983 F.2d at 933

[79] Or, as Peter Neufeld of the Innocence Projects put it: "In law school, we have been taught that, absent bad faith, the destruction of critical evidence will not be deemed prejudicial. As a result, there has been no requirement that law enforcement agencies use due diligence to preserve evidence. This doctrine rested for more than a decade on the shoulders of an innocent man." Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 NEW ENG. L. REV. 639, 646 (2001).

was nascent in 1988. Since then, there have been remarkable advances in many areas [80]. Evidence that might have produced an ambiguous result in the 1980s can now be subjected to far more precise and sensitive testing that has the potential to inculpate or exculpate to a scientific certainty. Second, almost all states and the federal government have enacted innocence protection acts that provide convicted individuals with access to DNA testing. Many of these laws require the preservation of identifying or material evidence [81]. Regardless, imposing an affirmative statutory duty upon the state to preserve evidence is at odds with the limited protection afforded by *Youngblood*'s bad faith standard.

Third, a number of state courts have rejected *Youngblood*'s bad faith standard in interpreting due process under their constitutions. In the decade following *Youngblood*, ten states, either explicitly or implicitly, spurned *Youngblood*'s bad faith standard in interpreting due process under their own constitutions. States have rejected *Youngblood* as a matter of state constitutional law for a variety of reasons. First, some states have stressed adjudicative fairness, not instrumentalism, in interpreting due process. Several state courts have cited to Justice Stevens's concurrence with approval. Second, as a matter of policy, the bad faith rule of *Youngblood* **may encourage the destruction** of potentially exculpatory evidence. "[E]vidence destroyed becomes merely 'potentially useful' since

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[80] Terrence F. Kiely, Forensic Science: Science and the Criminal Law 427 (2d ed. 2006), Paul C. Gianelli & Edward J. Imwinkelreid, Scientific Evidence, 5th ed.
[81] Bay, supra, 283-287

its contents would be unprovable."[82] "a dishonest officer has a strong incentive to perjure himself if his subjective beliefs will control the admissibility of the evidence."[83] Also, negligently lost evidence might still "critically prejudice" a defendant. In some jurisdictions, the *Youngblood* test also puts the trial court to an "all-or-nothing" choice: either bad faith is found and the charges dismissed, or it is not found and the defendant is denied a favorable inference such as in Georgia where an adverse inference charge on lost evidence is not available in criminal cases.[84] In place of *Youngblood*'s bad faith standard, some states have turned to a multi-factor balancing test that resembles then-Judge Kennedy's approach in *Loud Hawk.*[85]

Finally, *Youngblood* draws a line that is blurry, not bright. Significant disparities characterize the way in which courts have interpreted it, and this has led to incoherence in the law. As the dissent in *Youngblood* forewarned, courts have differed on the definition of bad faith[86], the availability of a missing evidence instruction[87], the relationship

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[82] *Thorne, supra*, 1326, at 1330 n.9.
[83] *Lolly*, supra, at 960 (Del. 1992)
[84] Bay, supra, at 287-288
[85] *United States v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979)
[86] Bay, supra, at 289-290; "Central to Youngblood is the meaning of bad faith. Even on such a fundamental issue, jurisdictions have formulated an assortment of definitions. The two most common definitions equate bad faith with knowledge or wrongful intent.377 Some jurisdictions focus on the Court's statement that bad faith "must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."378 Other jurisdictions equate bad faith with wrongful intent or official animus.379 The federal courts of appeals are no more consistent than the states; they offer a mix of definitions as well.380"
[87] Bay, supra, at 293

between *Trombetta* and *Youngblood* [88] and whether the lost evidence must be potentially exculpatory or possess apparent exculpatory value, and the remedy for a due process violation[89]. The one constant, however, has been that bad faith is almost impossible to prove and law enforcement takes advantage of this. In combination, these developments undermine *Youngblood*'s bad faith standard as well as its conception of due process.

As the District Court noted in this case, "the problems with *Youngblood*'s doctrinal focus on bad faith as opposed to the potential value of the lost evidence - something commentators have been discussing for decades."[90]

III. The Bland/Walker New Evidence Should Have Been Afforded a Hearing or the Case Held in Abeyance

Davis' police interview, one altered version of which was extremely prejudicial and used against him repeatedly at trial, was challenged by Davis over and over because his rights were violated in numerous ways.[91] As two audio experts discovered in Davis' state habeas, the portion of the physical cassette tape that contained the portion of Davis' police interview contained deletions and was not authentic, and in fact they could both hear a second undisclosed tape recorder being

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[88] Bay, supra, at 294-295
[89] Bay, supra, at 289-296
[90] Document 68 at 25.
[91] Doc. 44, pp.27-61

operated in the room[92]. The Eleventh Circuit ruled that Davis defaulted his ***Brady*** claim because his state habeas attorney did not **clearly** claim an independent due process claim in his appeal briefs regarding *Brady* when she could have conceivably done so. It then went on to deny a stay and abeyance and discount the evidence based on alleged facts that were nowhere in the record while having no hearing[93].

Davis argues that was an incorrect determination because the claim was clear enough especially when you view the claims presented in oral argument, and the evidence presented[94]. But regardless, the court did not default Davis' *Youngblood* claim and therefore the new evidence would not violate Georgia's successive petition rule. The Bland/Walker evidence is clearly "bad faith" conduct evidence with which the District Court was so troubled[95]. It is material because it serves to impeach the State's lead Detective Chambers and expose his repeated perjury, impeaching the prejudicial tape used at trial and prove "bad faith" conduct beyond any doubt, even showing the ill intent Georgia requires. Any lingering doubt would be removed by consideration of the Walker affidavit. Because Chambers was the lead detective and the only law enforcement witness

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[92] (R:1 HT p.835-845).

[93] Panel Opinion p.26-32

[94] In the state habeas closing arguments, Davis' attorney made clear claims as such "When the State fails to disclose evidence or tampers with evidence, it automatically violates due process and the confrontation clause of the Sixth and the Fourteenth Amendment. "(R:1 HT pp.872-873, 879). This is clearly an independent due process violation claim.

[95] Document 68 at 28, "The second tape genuinely raises the troubling constitutional prospect that the prosecution failed to turn over a second audio tape to Petitioner's counsel that might potentially have been exculpatory and in any event, clearly had been requested by Defense counsel."

involved in the case for its entirety, his impeachment would have "impugned not only (his) veracity but the character of the entire investigation". More to the point, it would have been proof positive of "bad faith" conduct[96] Beyond any *Brady* claim, Davis' central argument has consistently been throughout state court a due process violation concerning Youngblood "bad faith" and this new evidence supports those claims.

Therefore, either the federal district court should have held a hearing or Davis should have been able to use the *Rhines*[97] stay-and-abeyance procedure or one similar[98] as the Bland/Walker bad faith evidence was not available to Davis until he was litigating his federal habeas and it directly proves the merits of Davis' *Youngblood* claims. Davis did his due diligence in multiple state courts but the State dishonestly never turned over the second tape, Walker initially denied the existence of two tapes[99] and Chambers clearly testified there was only one tape.[100] The Court has held that a petitioner has not "failed to develop" the

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[96] *Guzman v. Secretary, Department of Corrections*, 663 F. 3d at 1353, 1354.
[97] *Rhines v. Weber*, 544 U.S. 269, (2005)
[98] *Gonzalez v Wong*, 667 F.3d 965, 972 9th Circuit (2011), "We remand that portion of the case[2] to district court with instructions to stay the proceeding in order to give Gonzales an opportunity to return to state court and present his claim with the benefit of the materials that were not available and not part of the record at the time of the California Supreme Court decision. By that process, we seek to satisfy the intent of AEDPA, as discussed in *Pinholster,* 131 S.Ct. at 1398, that habeas claims of state prisoners be channeled in the first instance to state court."

[99] ECF No. 64-1, at 1.
[100] (R:1 HT 849-850)

factual basis of a claim when the petitioner was "not at fault" for the failure. *See Holland v. Jackson,* 542 U.S. 649, 652-53, (2004).

The Eleventh Circuit then goes on to discount the materiality of the Bland/Walker evidence completely ignoring any impeachment value. Supposedly in the context of the entire record, it cites uncorroborated circumstantial evidence against Davis that he has challenged as false and cites no direct evidence Davis actually committed any crime[101]. Yet it leaves out Davis' evidence of innocence such as his alibi for the Porsche fire[102] and any State misconduct. It then makes claims that are utterly not supported by the record at any time, ruling the secret second tape of Davis' taped interview "fails to demonstrate that this ill-defined claim is potentially meritorious primarily because,

> "Davis suggests that he uttered the (shot) statement only because Chambers threatened him with the death penalty 'off tape'." (Panel Opinion, at 31-32.)

and that "Davis can only speculate that Chambers' alleged threat was recorded on a second tape".

This is utterly false and the record clearly shows that Davis has **never** suggested anywhere - at any time - in any venue - that Chambers' threats caused him to utter the "shot" statement, and this finding is **contrary to all of the facts in the record.**

Davis stated in in his police interview and has argued in every venue in detail **that it was his wife Megan that gave him this**

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[101] Panel Opinion at 31.

[102] Doc. 44, pp. 75-98

inculpatory information. Multiple witnesses confirmed Davis' claim[103]. The Eleventh Circuit substituted its preferred "fact" in place of the actual facts in the actual record which is ironic considering its emphasis on *Pinholster*.

Finally, Davis knows what happened in his police interview but can only speculate about the contents of a second tape for two reasons. First, the State withheld and lied about the second tape and it is now gone. Walker's admissions however now prove it existed. This is precisely why it is *Youngblood* evidence. If the contents were exactly known, it wouldn't be by definition. Second, Walker has refused to speak to Davis' legal team concerning the content of the second tape. As well, the question should be asked, why lie, alter and withhold if the State had nothing damaging to hide? These reasons are precisely why a stay and abeyance should be ordered.

CONCLUSION

Something is rotten in the State of Georgia.

No criminal case in State/Federal jurisprudence has been found that compares to the "losses" in this case. The cumulative nature of the actions and inactions of State actors related to the material evidence lost, mishandled, destroyed or concealed over this case, even without considering the Bland/Walker evidence, qualifies as "bad faith" and knowledge for *Youngblood* purposes under the totality of circumstances

[103] (R:17 TT p.1976) (R:18 TT pp.3321-3355, 3356-3378, 3380-3382, 3383-3388).

standard. Evidence of State's "bad faith" for *Youngblood* purposes is overwhelming when the Bland/Walker evidence is considered.

If a reasonable jurist actually looks at the facts in the record pointed out in the Objections[104] in this case rather make excuses for every State transgression while repeating the incorrect factual claims often used by the State not supported by the record, the bad faith and misconduct should scream Due Process violation. Because the State courts' determinations of fact and law were objectively unreasonable, they should not be entitled to deference by the federal courts[105].

If the denial of Davis' *Youngblood* claims stands in this circumstantial case where there is significant evidence Davis is actually innocent[106], it would set an impossible burden to meet for any defendant, and would allow the State to destroy and "lose" evidence at will with no consequences while violating the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Youngblood should be critically reexamined. When it comes to the constitutional right of access to evidence, it is time to end *Youngblood*'s myopic focus on bad faith and instrumentalism, to the detriment of an alternative vision of due process that promotes adjudicative fairness. In this case, as the district court noted, **"a reasonable jurist might conclude**

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[104] Doc. 44

[105] *Williams v. Taylor*, 529 U.S. 362, 413

[106] Doc. 44, pp. 106-117

that the cumulative pattern here indicates that Petitioner was denied a fair trial."[107]

Davis prays this Court issue Writ of Certiorari to examine the questions posed, and grant such relief as warranted.

Respectfully submitted, this 28 day of March, 2020.

Scott Winfield Davis

Scott Winfield Davis

[107] Doc. 68 at 24