No. _____

In The
Supreme Court of the United States

NOLAN MARCUS FORNESS, II,

***Petitioner*,**

v.

COMMONWEALTH OF VIRGINIA,

***Respondent*.**

Petition for Writ of Certiorari
to the Supreme Court of Virginia

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Questions Presented

Issue 1. Given the current extensive of use by law enforcement of modern technology such as automobile and body cameras, a defendant's right under the Compulsory Process and Confrontation Clauses of the Sixth Amendment and Due Process Clauses of both the Fifth and Fourteenth Amendments to access the resultant recordings and this Court should delineate the protections afforded to defendants and the procedures and standards courts must employ with regard to the loss and/or destruction of such evidence:

a) Regarding the admissibility of such evidence; and

b) Regarding the right of the trier of fact to hear and assess such evidence.

Parties

The parties to this case are petitioner Nolan Marcus Forness, II and the Commonwealth of Virginia.

Corporate Disclosure

There are no corporations involved in this case.

List of Proceedings

1. In the Arlington Circuit Court: *Commonwealth v. Nolan Marcus Forness, II*, No. CR200000452-00:

    a. Trial – June 14-15, 2021;

    b. Sentencing – September 22, 2021;

    c. Notice of Appeal to the Virginia Court of Appeals filed – September 23, 2021.

2. In the Virginia Court of Appeals: *Nolan Marcus Forness, II v. Commonwealth*, Record No. 1029-21-4:

    a. Petition for Appeal filed – 1 Judge review date – January 3, 2021 – converted to an appeal of right (new law);

    b. 3 judge panel affirmed – June 28, 2022;

c. Petition for rehearing *en banc* filed – July 12, 2022;

d. Petition for rehearing – denied – July 19, 2022;

e. Notice of Appeal to the Virginia Supreme Court filed – August 18, 2022.

3. In the Supreme Court of Virginia: *Nolan Marcus Forness, II v. Commonwealth*, SCV Record # 220514:

a. Petition filed – August 18, 2022;

b. Petition refused – January 4, 2023;

c. Petition for rehearing – January 18, 2023;

d. Petition for rehearing denied – March 20, 2023.

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In The
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Nolan Marcus Forness, II,
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v.

Commonwealth of Virginia
Respondent.

Petition for Writ of Certiorari
to the Supreme Court of Virginia

I. INTRODUCTION

On November 21, 2019, Petitioner Nolan Marcus Forness, II (Forness) was arrested by the Arlington County Police Department. Prior to said arrest, Forness was asleep in his car, which was parked in a private parking lot at McDonalds. The police surrounded and blocked the car. Officer Whitney Ruby (Ruby) testified that she approached the vehicle, turned off the ignition, took the keys and then aroused Forness. The Commonwealth identified three officers in addition to Officer Ruby who were at the scene initially and who surrounded and blocked Petitioner's vehicle. Although each of

the vehicles and officers had cameras (vehicle and/or body), no video was produced, which shows the initial encounter and no officer other than Ruby testified as to the initial procedures. The initial encounter is important because, in Virginia, if a person is asleep in a vehicle, the engine is off and the keys are not in the ignition, he is not driving or operating the vehicle and is not driving under the influence.

In the Circuit Court, Forness was charged with Driving Under the Influence, second within ten (10) years in violation of Code of Virginia, 1950, as amended, §§ 18.2-266, 18.2-270. Forness repeatedly asked for and the Circuit Court repeatedly ordered production of the videos from the four vehicles originally at the scene. The Commonwealth produced one video claiming that it was from Ruby and the Commonwealth, after significant insistence by the trial court, claimed that two of the officers made videos that were not saved, and it was waiting to hear from the other officer. The next day, Petitioner, because of these representation, moved to dismiss based on the destruction of evidence. Two days thereafter, the Commonwealth filed a supplemental discovery disclosure, wherein it admitted that the trial court had specifically ordered the production of videos. The Commonwealth never claimed that the representations in the motion were incorrectly stated. Rather, the Commonwealth claimed in the supplemental discovery disclosure that the Ruby video had been provided and that the other three officers made no recordings. At trial, Ruby testified that the video that the Commonwealth said was hers, was made by an officer, who the Commonwealth initially claimed was the officer from whom it was waiting to hear and then claimed did

not make a recording. Ruby further stated that she never made a video or audio recording.

During a hearing on pretrial motions, the trial court stated that it would not hear the motion to dismiss at that time and that a separate pretrial hearing was required for the motion to dismiss. However, after the aforementioned pretrial hearing, the trial court denied the motion to dismiss without evidence and without a hearing.

Petitioner sought to raise the video issue and the lack of supporting evidence regarding Ruby's assertion that the vehicle was on and that she removed the keys from the ignition. The trial court prevented Petitioner from presenting this evidence to the jury and from allowing the jury to be instructed that if the vehicle is off and the keys are not in the ignition, Forness could not be convicted of driving under the influence.

After a two-day jury trial, Forness was found guilty and the jury recommended a sentence of eight (8) months and a fine of $1,500.00. On September 3, 2021, the trial court imposed a sentence of 240 days with 120 days suspended and a fine of $1,500.00, which has been stayed.

The Court of Appeals avoided the forgoing issues by stating "nothing in the record suggests the video material [appellant] refers to still exists or ever existed."

With the increasing use of automobile and body cameras, the issues in this case: 1) regarding the rights of an accused to such evidence; 2) the obligations of the prosecuting authorities to secure and preserve said evidence; 3) the standards and procedures the courts must employ regarding the possible loss and/or destruction of such evidence; and, 4) the right of an accused to present evidence of

such loss and/or destruction to the trier of fact; are important and are recurring with greater frequency. Because of the Constitutional importance of these issues, all courts, all prosecuting authorities, and all citizens would benefit from this Court's guidance.

II. OPINIONS BELOW

The opinion of a panel of the Virginia Court of Appeals affirming the decision of the trial court is attached hereto as Exhibit A. The denial of the petition for rehearing *en banc* is attached hereto as Exhibit B. The refusal of the Petition for Appeal by the Supreme Court of Virginia is attached hereto as Exhibit C. The denial of the petition for rehearing by the Supreme Court of Virginia is attached hereto as Exhibit D.

III. STATUTORY JURISDICTION

This Court has jurisdiction to review this matter on a writ of certiorari pursuant to 28 U.S.C. § 1257, which provides in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari … where any title, right, privilege or immunity is specifically set up or claimed under the Constitution or the treaties or the statutes of, or any commission held or authority exercised under, the United States.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions
United States Constitution –

5th Amendment

… nor shall any person … be deprived of life, liberty, or property, without due process of law; …

6th Amendment

In all criminal prosecutions, the accused shall enjoy the right to a … trial, by an impartial jury …; 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.

14th Amendment

nor shall any State deprive any person of life, liberty, or property, without due process of law …

Virginia Statute

§ 18.2-266. Driving motor vehicle, engine, etc., while intoxicated, etc.
It shall be unlawful for any person to drive or operate any motor vehicle, engine or train (i) while such person has a blood alcohol concentration of 0.08 percent or more by weight by volume or 0.08 grams or more per 210 liters of breath as indicated by a chemical test administered as provided in this

article, (ii) while such person is under the influence of alcohol …

IV. STATEMENT

A. Facts

On November 21, 2019, Petitioner Nolan Marcus Forness, II (Forness) was arrested by the Arlington County Police Department (R-64, 66). Prior to said arrest, Forness was asleep in his car, which was parked in a private parking lot at McDonalds (R-307-310). The police surrounded and blocked the car (R-310). Officer Whitney Ruby (Ruby) testified that she approached the vehicle, turned off the ignition, took the keys and then aroused Forness (R-310-311). The Commonwealth identified three officers in addition to Officer Ruby who were at the scene initially and who surrounded and blocked Petitioner's vehicle. Although each of the vehicles and officers had cameras (vehicle and/or body), no video was produced, which shows the initial encounter and no officer other than Ruby testified as to the initial encounter (R-340-344, 430-431). The initial encounter is important because, in Virginia, if a person is asleep in a vehicle, the engine is off and the keys are not in the ignition, he is not driving or operating the vehicle and is not driving under the influence. The video provided (R-943) does not show Ruby's actions until she is walking with Forness. There is no audio at that time. It cannot be determined from a body camera or a vehicle camera if the car was on or off; and, it cannot be determined if Ruby took the key out of the ignition.

In the Circuit Court, Forness was charged with Driving Under the Influence, second within ten

(10) years in violation of Code of Virginia, 1950, as amended, §§ 18.2-266, 18.2-270. Forness repeatedly asked for the videos of his encounter with the police in both the General District Court and the Circuit Court repeatedly ordered production of the videos including videos from the four vehicles originally at the scene R-130-138, 139-141, 300-303, 430-344). The Commonwealth produced one video claiming that it was from Ruby (R-130-138). On November 24, 2020, the Commonwealth Attorney's Office advised counsel for Petitioner by email that Officer Cara Mason, Corporal Christopher Miller, Officer Ruby, Officer Christopher Mulrain, and Officer Elena Robertson were originally present on the scene and that Officer Lipschutz arrived later. The Commonwealth prior to that date provided videos it claimed were from Ruby and Lipschultz. The Commonwealth email stated that it did not know if Miller and Robertson had videos, but it did know the Mason and Mulrain videos had been destroyed (R-130-138);

The next day, November 25, 2020, Petitioner, as a result of these representation, moved to dismiss based on the destruction of evidence (R130-138). Two days thereafter, the Commonwealth filed a supplemental discovery disclosure, wherein it admitted that the trial court had specifically ordered the production of videos; and stated: that Robertson was not at the scene; that the Ruby video had been provided; and, that Miller, Mulrain and Mason made no recordings. The Commonwealth never claimed that the representations in the motion were incorrectly stated (R-139-141).

At trial, the situation became even more confusing because Ruby testified that the video that the Commonwealth said was hers, was made by

Miller, who the Commonwealth had claimed did not make a recording. Ruby further stated that she never made a video or audio recording (R421-427). The following chart sets forth the Commonwealth's various positions regarding this evidence:

Video	Email/motion	Sup. Discovery	Trial
Ruby	provided	provided	never made
Miller	no response yet	never made	CW Exh # 1
Mason	not saved/destroyed	never made	
Mulrain	not saved/destroyed	never made	

During a hearing on pretrial motions, the trial court stated that it would not hear the motion to dismiss based on destruction of evidence at that time and that a separate pretrial hearing was required on the motion to dismiss. However, after that pretrial hearing, the trial court denied the motion to dismiss without evidence and without a hearing (R-142-142).

At trial, Forness sought to raise the video issue and the lack of supporting evidence regarding Ruby's assertions that the vehicle was on and that she removed the keys from the ignition (R-619-621, 628-631). The trial court prevented Forness from presenting this evidence to the jury and from allowing the jury to be instructed that if the vehicle is off and the keys are not in the ignition, Forness could not be convicted of driving under the influence (619-621, 628-631, 765-767).

After a two-day jury trial, Forness was found guilty and the jury recommended a sentence of eight (8) months and a fine of $1,500.00. On September 3, 2021, the trial court imposed a sentence of 240 days with 120 days suspended and a fine of $1,500.00, which has been stayed. Notice of Appeal was timely

filed. The "Petition for Appeal" was converted to an appeal of right, which was denied on June 28, 2022. The Court of Appeals avoided the foregoing issues by stating "nothing in the record suggests the video material [Forness] refers to still exists or ever existed." Clearly, this statement ignores the trial court's refusal to have a hearing on the matter pretrial, refusal to allow the evidence at trial, as well as the pleadings filed in the case.

A petition for rehearing and rehearing *en banc* was filed on July 12, 2022 and denied on July 19, 2022. Notice of appeal and this petition are timely filed. On January 4, 2023, the Supreme Court of Virginia denied Petitioner's Petition for Appeal and on March 20, 2023, that Court denied Petitioner's petition for rehearing.

B. Issues Raised in State Court

The issues which are the subject of this Petition were raised in the Arlington County Circuit Court in a "Motion to Dismiss – Destruction of Evidence" and a memorandum in support thereof (R-130-138). A hearing on various defense motion was held on November 30, 2020. Although the issue was discussed, the trial court ruled that a separate hearing was required for those issues (R-300-303, 340-344, 430-431). That hearing was not held and the court denied the motion without a hearing and without evidence. (R-142-142).

Petitioner attempted to present the destruction of the videos, the lack of support for Ruby's claims that the vehicle was off and that she removed the keys from the ignition to the jury, but was prevented from doing so by the trial court (R-619-621, 628-631, 765-767)

Petitioner raised these issues in his Petition for Appeal and in his Opening Brief in the Virginia Court of Appeals. As noted previously, the Virginia Court of Appeals noted the issues, but avoided the foregoing issues by stating "nothing in the record suggests the video material [Forness] refers to still exists or ever existed" (Opinion-14-17), even though the Commonwealth discovery responses showed to the contrary. The issues were raised again before the Court of Appeals in the petition for rehearing *en banc*.

Before the Virginia Supreme Court, the issues were raised in the Petition for Appeal and in the Petition for Rehearing.

V. REASONS FOR GRANTING THE WRIT

A. THERE ARE AND INCREASINGLY WILL CONTINUE TO BE IMPORTANT RECURRING ISSUES REGARDING THE USE AND PRESERVATION OF VIDEO AND AUDIO RECORDINGS MADE BY POLICE USING BODY AND VEHICLE CAMERAS IN CRIMINAL CASES, AND THE GUIDANCE OF THIS COURT IS REQUIRED.

> Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings—erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testify. But, when critical

> documents go missing, judges and litigants alike descend into a world of *ad hocery* and half measures—and our civil justice system suffers.
>
> *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257, 259 (Fed. Cl. 2007)

Due to concerns regarding highly publicized police killings and official justifications for those killings, a demand arose for vehicle and body cameras to record the conduct. The use of this equipment proved worthwhile in almost all areas of law enforcement. Intrinsically, the population understood excessive police conduct, which Justice Jackson gently described as the "often competitive enterprise of ferreting out crime" *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948), and an accused's motivation to escape responsibility. Cameras have significantly modulated misrepresentation and hyperbole on both sides and made the search for the truth more obtainable.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court established the requirement that exculpatory evidence must be provided to the defense.

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

In *United States v. Agurs*, 427 U.S. 97 (1976), the Court required that such exculpatory evidence had to be provided even though no requests for it had been made.

In *Kyles v. Whitley*, 514 U.S. 419, 434-436, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), this Court specifically dealt with the withholding of evidence favorable to the accused in the context of a habeas corpus situation. In that case, this Court explained the decision in *United States v. Bagley*, 473 U.S. 667, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985), regarding how courts should view the materiality of evidence that had not been disclosed. There are four factors that should be considered.

1) The failure to disclose the evidence created a reasonable probability of a different outcome meaning that the failure undermines confidence in the outcome;
2) This is not a sufficiency of the evidence test. Inculpatory evidence need not be negated. Rather, the favorable evidence puts the whole case in such a different light as to undermine confidence in the result;
3) Harmless error analysis does not apply; and
4) If there are multiple items of non-disclosed evidence, these should be considered collectively, not item by item.

In explaining the first factor, the Court specifically stated that a Petitioner does not have to prove, even by a preponderance of the evidence, that disclosure would have resulted in an acquittal, the Court stated:

> Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a

> showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). … *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial." *Bagley,* 473 U.S., at 678, 105 S.Ct., at 3381.
>
> 514 U.S. at 434

In discussing the second factor, the Court emphasized that materiality is not a sufficiency of the evidence test. The accused does not have to negate the inculpatory evidence.

> The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not

> have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.
>
> 514 U.S. 434-435

In *California v. Trombetta*, 467 U.S. 479, 485 (1984), this Court explained that in order to meet Due Process standards, "criminal prosecutions must comport with prevailing notions of fundamental fairness." Such fairness included the requirement "that criminal defendants be afforded a meaningful opportunity to present a complete defense." That requirement is safeguarded by "what might loosely be called the area of constitutionally guaranteed access to evidence. *United States v. Valenzuela-Bernal*, 458 U. S. 858, 867 (1982)."

With regard to destroyed evidence, this Court explained:

> evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.
>
> 467 U.S. at 489

In *Trombetta*, Petitioner had been charged with driving under the influence and had submitted

to an Omicron Intoxilyzer breath test. Petitioner contended that the state should have preserved a sample of his breath by using a device called Intoximeter Field Crimper-Indium Tube Encapsulation Kit (Indium tube). As the Court described the problem,

> Less clear from our access-to-evidence cases is the extent to which the Due Process Clause imposes on the government the additional responsibility of guaranteeing criminal defendants access to exculpatory evidence beyond the government's possession.
> 467 U.S. at 486

The Court ruled that requiring the use of the Indium tube was not necessary. In this case, the audio and video recordings existed as the Commonwealth's discovery responses established. Some were destroyed. The preservation and availability of this vital evidence is the issue in this case. The Court's guidance will benefit both the defense and the prosecution. Additionally, it will instruct the courts.

In *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988), this Court explained how potentially exculpatory evidence must not be destroyed in bad faith. Of significance in that case was the fact that the defense had been offered the opportunity to test the panties that were destroyed and the prosecution did not use that evidence. See also, *Illinois v. Fisher*, 540 U.S. 544, 545, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004).

With regard to law enforcement video and audio recordings, especially in cases such as driving under the influence, where such video and audio

recordings demonstrate the actual offense, the conduct of the officers, the conduct of the accused, and the accused's condition, Petitioner would urge the Court to find that destruction of such evidence is a denial of Due Process of Law. As noted *supra*, "the defendant would be unable to obtain comparable evidence by other reasonably available means." Also, the destruction of said evidence "undermines the confidence" of any verdict obtained after the destruction of said evidence.

Additionally, "whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." *Trombetta*, 467 U.S. at 486; *Youngblood*, 488 U.S. at 57-58, 109 S. Ct. at 337. There is no need for the Courts to undertake a "treacherous task" in such cases. The police have the videos and the audios. Preserving the material is simple and easy. It can be preserved on the equipment itself; it can be transferred to a disc; it can be transferred to a thumb drive; it can be transferred to other computers; and, it can be stored on the cloud. In fact, it can be transferred to the police officer's or anyone else's cell phone, which this Court, in *Riley v. California*, 134 S.Ct. 2473, 2484, 189 L.Ed.2d 430 (2014) explained were ubiquitous. In fact, any of these transfers and methods of preservation can be done in minutes, even seconds. Destroying or losing this evidence is inexcusable. If the consequences are clear and unequivocal, the destruction will cease, an accused right to Due Process of Law will be strengthened and the public's confidence in American Jurisprudence will increase.

B. HEARINGS ARE REQUIRED TO ENSURE THAT RECORDINGS HAVE NOT BEEN DESTROYED.

This Court has repeatedly mandated that trial court's have the initial obligation to determine if an accused's rights have been violated and to enforce those rights. In Fourth Amendment, search and seizure cases, *Weeks v. United States*, 232 U.S. 383, 393-394, 34 S.Ct. 341, 58 L.Ed. 652 (1914) established the right to a pretrial judicial hearing and to suppression of illegally obtained evidence. In *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), these rights were extended through the Fourteenth Amendment to the states.

In cases involving statements, a defendant's statements were protected against involuntariness in violation of the Fifth Amendment in *Bram v. United States*, 168 U.S. 532, 542, 18 S.Ct. 183, 187, 42 L.Ed. 568 (1897). In *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), this Court not only established the prophylactic warnings designed to protect an accused's Fifth Amendment right to remain silent and Sixth Amendment right to counsel, but also established the procedures and requirements necessary to enforce those rights.384 U.S. at 473-479.

Similar procedures have been established for identification evidence: "This was not an issue at trial, although there is some evidence relevant to a determination. That inquiry is most properly made in the District Court." *United States v. Wade*, 388 U.S. 218, 242, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); see also, *Gilbert v. State of California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967).

With regard to scientific evidence, the same procedure has been established. *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). Although in those cases, Rules of Evidence 104 and 702 establish the procedures and requirements, those procedures are the same as those used in determining the Constitutional admissibility of certain evidence.

It should be noted that, with regard to the constitutional questions and scientific questions, except in cases involving a search warrant, the burden is on the prosecution. Searches and seizures – *Coolidge v. New Hampshire*, 403 U.S. 443, 455-456 (1971); Statements – *Miranda*, 384 U.S. at 475; Identification – *Wade*, 388 U.S. at 250-251; Scientific questions – *Daubert*, 509 U.S. at 596.

Similarly, the burden should be on the prosecution to establish that no video or audio material has been lost or destroyed. Not only is this consistent with the procedures and requirements in the other areas, but, as a practical matter, the videos and audios are in the control of the prosecution, not the defense. This case demonstrates the importance of placing the burden on the prosecution and the importance of an evidentiary hearing. At the trial in the General District Court, the Commonwealth presented a video, which it described as being Ruby's video. After Forness appealed to the Circuit Court, which by law results in a trial *de novo*, the Commonwealth, after repeated orders by that Court, wrote that the Ruby video had been provided, that Miller had not yet responded, and that videos by Mason and Mulrain had not been saved. When faced with a motion to dismiss, the Commonwealth

claimed that the Ruby video had been provided, but Miller, Mason and Mulrain made neither vehicle nor body recordings. At trial, Ruby claimed she made no videos and the video provided was made by Miller. No evidence was allowed to be taken either pretrial or at trial with regard to what videos and other recordings were made, by whom they were made, if they were not made, why not, and when and why they were destroyed. No explanation was given as to why the Commonwealth produced multiple and variant inaccurate stories about the videos. Did the attorney for the Commonwealth make them up? Was he given false information by the police? Did the police realize that the videos demonstrated that the vehicle was not on and the keys were not in the ignition, and based on that realization did not provide that evidence or destroyed it. More importantly, Forness was prevented from exploring any of this both pretrial and at trial. This is inconsistent with the responsibility of the Courts to protect rights particularly his rights under the 6th Amendment to Confrontation and Compulsory Process. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313-314, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

C. If the Evidence is Admitted, the Trier of Fact is Required to Determine the Issue of Spoliation.

At trial, before the jury, Forness tried to demonstrate that evidence, which may have shown that Forness was innocent had been mishandled and/or destroyed. During cross examination, the following question was asked of Ruby:

Q All right let me ask you this: If the car was

> not on and the keys were not in the ignition you wouldn't have a DUI, would you? (R-619)

The trial court sustained the Commonwealth's objection and a bench conference ensued wherein counsel stated:

> There's missing evidence here and this goes to the motive for why the evidence is missing. In this case, what I am trying to show is they had videos and audios that would have shown when the car was on and the car was off. And this is an important question in this case because as you know and I know, if the car was off, he's not guilty of anything. (R-619-620)

The video provided does not show Ruby's actions until she is walking with Forness after he is out of the car. There is no audio until sometime after that. It cannot be determined from the video provided if the car was on or off when the police arrived. It cannot be determined if Ruby took the keys from the ignition. Not insignificantly, no audio or video was provided despite at least four (4) officers and four (4) vehicles, all with cameras, being at the scene. The Legislature did not appropriate money to equip each of the officers and each of the vehicles with cameras and recording equipment, so they would not be employed and so the evidence produced would not be used at trial.

A defendant is entitled to challenge conflicting statements made by the Commonwealth about videos, especially when the critical questions of "was the car on?" and "were the keys in the ignition?" could have been definitively answered by either

audio or video. The Commonwealth subsequently attempted to claim essentially that only one recording was made, but Forness was entitled to challenge that, especially in light of the Commonwealth's other statements and in light of commonsense. Additionally, the jury was entitled to review the matter in reaching its decision. Interestingly, not a single officer other than Ruby testified that the car was on and the keys were in the ignition. Forness was entitled to make that challenge, but the trial court cut it off. Clear rules of discovery and preservation would avoid this problem.

Unquestionably, the issue of spoliation is far more developed in civil law than in criminal law. See, for example, Rule 37 (e) of the Federal Rules of Civil Procedure. This is surprising in light of the Sixth Amendment.

In *Battocchi* v. *Washington Hosp.* Center, 581 A.2d 759, 765 (DC, 1990), the Court stated:

> The doctrine of what has been termed spoliation of evidence includes two sub-categories of behavior: the deliberate destruction of evidence and the simple failure to preserve evidence. It is well settled that a party's bad faith destruction of a document relevant to proof of an issue at trial gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction.

Citing: *Brown & Williamson Tobacco Corp. v. Jacobson,* 827 F.2d 1119, 1134 (7th Cir.1987); *Vick v. Texas Employment Comm'n,* 514 F.2d 734, 737 (5th Cir. 1975); *Friends for All Children, Inc. v. Lockheed*

Aircraft Corp., 587 F.Supp. 180, 190 (D.D.C.), modified, 593 F.Supp. 388, affd, 241 U.S.App.D.C. 83, 746 F.2d 816 (1984).

The Court in *Battocchi* also addressed the failure to preserve issue by explaining in terms consistent with the criminal concept of confidence in the outcome of the trial, why failure to preserve evidence is important:

> When the loss or destruction of evidence is not intentional or reckless, by contrast, the issue is not strictly "spoliation" but rather a failure to preserve evidence. The rule that a fact-finder may draw an inference adverse to a party who fails to preserve relevant evidence within his exclusive control is well established in this jurisdiction. [cites below] **Like the spoliation rule, it derives from the common sense notion that if the evidence was favorable to the non-producing party's case, it would have taken pains to preserve and come forward with it.** 581 A.2d at 766 (Emphasis added) citing: *Aetna Casualty & Sur. Co. v. Smith, supra,* 127 A.2d at 559; *Hartman v. Lubar,* 49 A.2d 553, 556 (D.C.1946); *Tendler v. Jaffe, supra,* 92 U.S.App.D.C. at 7, 203 F.2d at 19; *Washington Gas Light Co. v. Biancaniello,* 87 U.S.App.D.C. 164, 167, 183 F.2d 982, 985 (1950); *Fidelity & Deposit Co. v. Helvering,* 72 App.D.C. 120, 126, 112 F.2d 205, 211 (1940) in the first section and *International*

> *Union (UAW) v. NLRB,* 148 U.S.App.D.C. 305, 311-12, 314, 459 F.2d 1329, 1335-36, 1338 (1972); *Washington Gas Light Co. v. Biancaniello, supra,* 87 U.S.App.D.C. at 167, 183 F.2d at 985, in the second section.

In *United States v. Bryant*, 439 F.2d 642 (D. C. Cir., 1971), the government had made tape recordings with the defendant that were lost or destroyed. The Court explained the problem:

> But in these cases we are entirely in the dark. We have no idea what may have been on the tape. For all we know, the tape would have corroborated Agent Pope's story perfectly; or, for all we know, it might have completely undercut the Government's case. There is not simply "substantial room for doubt," but room for nothing except doubt as to the effect of disclosure.

See also, *United States v. Belcher*, 762 F.Supp. 666 (W.D. Va., 1991)

Although in the areas of constitutional rights and scientific procedures the Courts must make the initial determination as to any violation, the jury is given the final say regarding said evidence, if it is admitted. Increasingly, that is true with regard to spoliation in the criminal law. The Ninth Circuit has developed Model Criminal Jury Instruction 4.19 entitled "Lost or Destroyed Evidence" which provides:

> If you find that the government intentionally [destroyed][failed to

> preserve] [*insert description of evidence*] that the government knew or should have known would be evidence in this case, you may infer, but are not required to infer, that this evidence was unfavorable to the government.

Petitioner, for the reasons stated*a*, believes that Instruction 4.19 is not strong enough for video and audio recordings, especially video and audio recordings pertaining to driving under the influence. The police know the recordings exist and can be easily preserved. The defendant is constitutionally entitled to this evidence. Because of these facts, the jury instruction should be mandatory, not optional.

VI. CONCLUSION

For the foregoing reasons, this Court should weigh in on and give guidance to the criminal law system on the question of the preservation and production of police body camera and vehicle camera videos. Additionally, the use of this evidence in criminal cases both in pretrial proceedings and at trial would benefit from the Court hearing this case.

Respectfully Submitted

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