YOUNGBLOOD IN PRACTICE: HOW THE BAD FAITH STANDARD PRESERVES WRONGFUL CONVICTIONS AND CREATES PERVERSE INCENTIVES

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What happens when evidence or documentation in a criminal investigation goes missing or is destroyed? Pursuant to the United States Supreme Court's decision in Arizona v. Youngblood, *the fact that such evidence is lost, missing, or destroyed does not violate the defendant's due process rights unless he or she can demonstrate that the evidence is missing as a result of bad faith. The opinion was harshly criticized at the time, and yet, even after Larry Youngblood himself was exonerated, the bad faith standard persisted.*

In the thirty-five years since the decision, the Youngblood *bad faith standard has proven nearly impossible to meet.* Youngblood *also created perverse incentives—endorsing lazy and sloppy policework and creating a legal landscape where government actors seeking to uphold a conviction are better served intentionally destroying exculpatory evidence in the hope that act will not be discovered, rather than run the risk that the exculpatory evidence is later uncovered to support a successful* Brady *claim.*

This Article, through the lens of two active post-conviction cases being litigated by the Duke University School of Law Wrongful Convictions Clinic, sheds light on the practical reality and challenges of litigating a due process claim based on missing evidence. And, with that unique insight, this Article proposes abolishing the current bad faith standard and replacing it with

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a burden-shifting framework that would eliminate any requirement to establish why the evidence is missing and would instead require the government to demonstrate—by clear and convincing evidence—that the missing evidence would not have had any exculpatory value.

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INTRODUCTION

This year marks the thirty-fifth anniversary of the United States Supreme Court's decision in *Arizona v. Youngblood*. In *Youngblood*, the Supreme Court created a rigid scheme requiring a defendant to demonstrate that missing, potentially exculpatory evidence once possessed by the government must have been lost as a result of "bad faith" in order to establish a due process violation. Time has proven that

standard virtually impossible to meet, with few successes out of thousands of cases.

The *Youngblood* framework also creates perverse incentives for law enforcement with regard to evidence collection and retention. For example, law enforcement may choose not to document—or to destroy or hide away— evidence, knowing that if never uncovered, the defendant cannot use the evidence to prove his or her innocence and will face the nearly impossible burden of establishing bad faith to prevail under *Youngblood*. Accordingly, in practice, *Youngblood* neuters the protections established by *Brady v. Maryland* and makes it more difficult to prove claims of innocence. This Article examines, through the lens of two ongoing post-conviction cases, the nearly insurmountable challenges presented by *Youngblood* and proposes an alternative burden-shifting standard to remedy *Youngblood*'s severe implications for the wrongfully convicted.

Part I of this Article reviews the Supreme Court's holding in *Youngblood*, the contemporaneous reaction to the decision, and how courts have applied the *Youngblood* bad faith standard in the thirty-five years since the decision.

Part II explores two wrongful conviction cases currently being litigated by the Duke Wrongful Convictions Clinic. In both cases, crucial, likely exculpatory evidence has either been misplaced or destroyed by state actors, but *Youngblood*'s bad faith requirement presents significant challenges in establishing due process claims to support an exoneration.

Part III, reflecting on *Youngblood's* practical realities, proposes a new burden-shifting standard under which the defendant need not demonstrate the government's "bad faith" regarding the missing evidence; instead, the defendant must demonstrate only that evidence that would normally exist and could plausibly have exculpatory or impeachment value is missing. If the defendant can make such a showing, then the burden would shift to the government to establish by clear and convincing evidence that such evidence would not be exculpatory (i.e., favorable to the defendant) or otherwise bear on a jury's determination of guilt or innocence. If the government fails to satisfy that burden, then the defendant would be deemed to have established a due process violation to support a claim of innocence.

I. THIRTY-FIVE YEARS OF *YOUNGBLOOD*

A. *The Precursor to* Youngblood*:* Brady *and its progeny.*

An examination of *Arizona v. Youngblood*[1] must necessarily begin with *Brady v. Maryland*,[2] which established the foundational doctrine upon which *Youngblood* rests. In *Brady*, the defendant, John Brady, was convicted of murder and sentenced to death.[3] Though Brady admitted he participated in the robbery, he claimed it was his co-defendant who shot the victim.[4] Brady's counsel conceded in closing argument that Brady was guilty of murder in the first degree, only requesting that the jurors return a verdict "without capital punishment."[5] Critically, however, prior to trial, Brady's defense counsel requested that the prosecution allow him to review Brady's co-defendant's statements.[6] Although the prosecution showed Brady's defense counsel several statements, the prosecution withheld the statement in which Brady's codefendant admitted that he, not Brady, had committed the homicide.[7]

Thus, in *Brady*, the United States Supreme Court grappled with whether the failure to disclose the co-defendant's inculpatory statement denied Brady of due process.[8] The Supreme Court held: "[T]he 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."[9] The Court offered the following rationale: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[10] Thus, *Brady* established that, regardless of bad faith, a defendant's due process rights are violated when prosecutors fail to disclose exculpatory evidence.[11]

In the subsequent years, *Brady*'s progeny examined the constitutional duty to preserve evidence.[12] Those state and federal courts established that the due process disclosure right established in *Brady*

1. 488 U.S. 51 (1988).
2. 373 U.S. 83 (1963).
3. *Id.* at 84–85.
4. *Id.* at 84.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 87.
9. *Id.*
10. *Id.*
11. *Id.* at 87–88.
12. *See* PAUL C. GIANNELLI ET AL., SCIENTIFIC EVIDENCE 203 (5th ed. 2012).

extended to evidence preservation, at least in certain circumstances.[13] The right to preservation of evidence was litigated throughout the 1970s and 1980s, with defendants prevailing in cases involving the failure to preserve, among other things, drugs, bullets, and blood results,[14] and physical evidence of arson, rape, and murder.[15] Despite those various rulings, the landscape remained unclear without direction from the Supreme Court. In *California v. Trombetta*, the Supreme Court considered whether a defendant's due process rights were violated when breathalyzer test ampoules were not preserved.[16] The Court ruled that due process did *not* require preservation of additional breath samples;[17] rather, the duty of preservation would be required only when the evidence: (1) "possess[es] an exculpatory value that was apparent before the evidence was destroyed" and (2) is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."[18] The Court found neither condition satisfied with respect to the additional breath samples at issue in *Trombetta*, and thus, found no due process violation.[19] With the

13. *Id.* The seminal case on this point is *United States v. Bryant*, in which the U.S. Court of Appeals for the District of Columbia Circuit held that the failure of narcotics agents to retain a conversation between an undercover agent and the defendants violated due process. 439 F.2d 642, 355–56 (D.C. Cir. 1971), *aff'd on remand*, 448 F.2d 1182 (1971). The D.C. Circuit held that it was "most consistent" with *Brady* "to hold that the duty of disclosure attaches in some form once the Government has first gathered and taken possession of the evidence in question." *Id.* at 651. In the eyes of the *Bryant* court, the failure to extend such protections could mean that "disclosure might be avoided by destroying vital evidence before prosecution begins or before defendants hear of its existence." *Id.*

14. *See, e.g.*, People v. Clements, 661 P.2d 267, 271 (Colo. 1983) (finding failure to preserve materials used to manufacture drugs violates due process rights); People v. Wagstaff, 484 N.Y.S.2d 264, 266 (N.Y. 1985) (asserting that destruction of marijuana violated due process); Johnson v. State, 249 So. 2d 470, 472 (Fla. Dist. Ct. App. 1971), *writ discharged*, 280 So. 2d 673 (Fla. 1973) (holding it is a reversible error to allow ballistics expert to testify about markings on bullet where the state could not produce the bullet for examination by the defendant's expert); People v. Garries, 645 P.2d 1306, 1308 (Colo. 1982) (affirming the suppression of blood test results when blood samples were completely destroyed through testing without photographs or another opportunity for defendant to examine the evidence).

15. *See, e.g.*, State v. Hannah, 583 P.2d 888, 889 (Ariz. 1978) (finding due process violation where arson evidence was inadvertently destroyed); Hillard v. Spalding, 719 F.2d 1443, 1447 (9th Cir. 1983) (holding failure to preserve sperm sample violated due process); Deberry v. State, 457 A.2d 744, 747 (Del. 1983) (establishing that failure to preserve the victim's clothing for laboratory analysis violates *Brady*); People v. Sheppard, 701 P.2d 49, 51 (Colo. 1985) (asserting that destroying of vehicle in vehicular homicide case violated defendant's due process right).

16. 467 U.S. 479, 481 (1984).

17. *Id.* at 488–90.

18. *Id.* at 488–89.

19. *Id.* at 489–90.

foundation laid out in *Trombetta*, as well as other post-*Brady* decisions,[20] the Supreme Court next confronted the issues raised in *Youngblood*.

B. The Arizona v. Youngblood *Decision*

Youngblood is a tragic case. On October 29, 1983, a ten-year-old boy was at a church carnival in Arizona when he was abducted by a middle-aged black man.[21] The assailant drove the boy to a secluded area, molested him, and then took him to a "sparsely furnished home . . . [and] sodomized him.[22] The attack lasted almost one-and-a-half hours.[23] The assailant sent the child to wash up in the bathroom before returning him to the carnival, but told him he would kill him if he told anyone about the attack.[24]

The boy was taken to the hospital where he was treated for rectal injuries, and a sexual assault kit was administered to collect evidence.[25] Specifically, the physician collected samples from the boy's mouth and rectum and also obtained samples of the boy's saliva, blood, and hair.[26] The physician did not examine the samples, which were placed in a secure refrigerator at the police station.[27] The police also collected the boy's underwear and t-shirt, but the clothing was never "refrigerated or frozen."[28]

Nine days later, the boy was asked to pick "his assailant from a photographic lineup" and selected Larry Youngblood's photograph.[29] The victim previously described the assailant with one unusual characteristic—a right eye that "was almost completely white";[30] yet, Youngblood had a bad left, not right, eye and several other descriptors that were materially different from the victim's original description.[31] The next day a police criminologist examined the sexual assault kit and,

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20. *See, e.g.*, United States v. Agurs, 427 U.S. 97, 111 (1976) (rejecting the proposition that a "prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel"); United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982) (addressing "what might loosely be called the area of constitutionally guaranteed access to evidence").

21. Arizona v. Youngblood, 488 U.S. 51, 52 (1988); State v. Youngblood, 734 P.2d 592, 592 (Ariz. Ct. App. 1986), *rev'd sub nom*, *Youngblood*, 488 U.S. at 51.

22. *Youngblood*, 488 U.S. at 52.

23. *Id.*

24. *Id.*

25. *Id.* at 52–53.

26. *Id.* at 53.

27. *Id.*

28. *Id.* at 52.

29. *Id.*

30. State v. Youngblood, 734 P.2d 592, 592 (Ariz. Ct. App. 1986).

31. *See id.*; *see also Youngblood*, 488 U.S. at 53.

in accordance with department procedure, concluded that sexual contact had occurred, without performing any additional tests.[32]

Youngblood was arrested and the State moved to compel him to provide blood and saliva for comparison with the biological material gathered with the sexual assault kit.[33] The trial court denied the motion because the State had not obtained enough of a semen sample to render a valid comparison, so the State requested that "the criminologist perform an ABO blood group test on the rectal swab sample" to try to ascertain the blood type of the assailant.[34] That test failed "to detect any blood group substances."[35]

Two years later, in 1985, the state criminologist examined the boy's clothing for the first time and "found one semen stain on the boy's underwear and another on . . . his t-shirt."[36] The criminologist tried to obtain blood group substances from both stains via "the ABO technique, but was unsuccessful."[37] A P-30 protein molecule test on the stains was similarly inconclusive.[38]

At trial, Youngblood's main defense was that the victim "erred in identifying him as [the assailant]."[39] In support of his defense, both the state's criminologist and Youngblood's own expert testified as to what may have been shown by laboratory testing if the tests were performed shortly after the rape kit evidence had been collected or by later tests if the victim's clothing had been properly preserved.[40] The trial court instructed the jury that if it found the State lost or destroyed evidence, they could "infer that the true fact is against the State's interest."[41]

The jury found Youngblood guilty,[42] but the Arizona Court of Appeals reversed, finding that "when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process."[43] The Arizona Court of Appeals reached its decision without imputing bad faith.[44] The Arizona Supreme Court denied the State's

32. *Youngblood*, 488 U.S. at 53.
33. *Id.*
34. *Id.* at 53–54.
35. *Id.* at 54.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. State v. Youngblood, 734 P.2d 592, 596 (Ariz. Ct. App. 1986).
44. *Id.*

petition for review and the United States Supreme Court granted certiorari.[45]

On certiorari, the Supreme Court reversed the Arizona Court of Appeals.[46] The Court acknowledged that, in the post-*Brady* world, *Youngblood* required it to consider "what might loosely be called the area of constitutionally guaranteed access to evidence."[47] The Court found that "[t]here is no question but that the State complied with *Brady* and *Agurs*," and thus, the question was whether there is "some constitutional duty over and above that imposed by cases such as *Brady* and *Agurs*."[48]

The Court explained that its recent decisions honed in on the significance of "good or bad faith on the part of the government when the claim is based on loss of evidence attributable to the government."[49] In *Brady*, the Court conceded that good or bad faith by the State is irrelevant as applied to the Due Process Clause of the Fourteenth Amendment.[50] Nonetheless, the *Youngblood* court concluded that "the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."[51]

The Court drew a line in the sand—requiring a showing of bad faith in cases of lost or missing evidence:

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve

45. Arizona v. Youngblood, 488 U.S. 51, 55 (1988).
46. *Id.* at 51.
47. *Id.* (quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)).
48. *Id.* at 55–56.
49. *Id.* at 57; *see* United States v. Marion, 404 U.S. 307, 325 (1971) ("No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them."); *see also* United States v. Lovasco, 431 U.S. 783 (1977); *Valenzuela-Bernal*, 458 U.S. at 872 (holding that prompt deportation was justified "upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution").
50. Brady v. Maryland, 373 U.S. 83, 87 (1963).
51. Arizona v. Youngblood, 488 U.S. 51, 57 (1988).

> potentially useful evidence does not constitute a denial of due process of law.[52]

It was clear that the six-three majority was concerned that requiring the State to retain and preserve all material evidence might be too great a burden.[53] For the majority, the distinction between *Youngblood* and *Brady* was that, in *Brady*, the evidence was known to be favorable to the accused, but, in *Youngblood*, it was unknown whether the clothing that was not refrigerated would ultimately prove to be exculpatory.[54] Importantly, the Court never defined what would constitute bad faith; it only held that, in this instance, "[t]he failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent."[55]

In his concurrence, Justice Stevens left open the possibility that "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."[56] Despite that acknowledgement, Justice Stevens evidently did not find Youngblood met that standard; rather, in Justice Stevens' view, Youngblood's guilt was so solidified that jurors would not be swayed by the exculpatory or inculpatory nature of the lost evidence.[57]

Justice Blackmun's dissent was more concerned with the implications of the majority's opinion. In his view, *Brady* and its progeny dictated that a due process violation could be found *without* bad faith.[58] Justice Blackmun also questioned whether the bad faith standard would "create more questions than it answers": "What constitutes bad faith for these purposes? . . . [T]he line between 'good faith' and 'bad faith' is anything but bright."[59] Justice Blackmun recognized the particular significance of the evidence in *Youngblood* and the fact that such evidence could completely exonerate the defendant.[60] Thus, because the destruction of the evidence here prevented a full defense, the dissent proposed a different standard:

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52. *Id.* at 58.
53. *Id.*
54. *Id.* at 57–58.
55. *Id.* at 58.
56. *Id.* at 61 (Stevens, J., concurring in judgment).
57. *Id.* at 60.
58. *Id.* at 66 (Blackmun, J., dissenting).
59. *Id.*
60. *Id.* at 69.

> [W]here no comparable evidence is likely to be available to the defendant, police must preserve physical evidence of a type that they reasonably know has the potential, if tested, to reveal immutable characteristics of the criminal, and hence to exculpate a defendant charged with the crime.[61]

Justice Blackmun elaborated that his proposed, alternate test requires two inquiries: (1) whether the evidence is the type that is "clearly relevant" and (2) whether the evidence that was obviously relevant "indicates an immutable characteristic of the actual assailant" or "is of a type likely to be independently exculpatory."[62] Recognizing the law enforcement burden, the dissent conceded that the defense should be informed of the existence of evidence and that, after a reasonable time, the burden of preservation might then shift to the defense.[63] Ultimately, the dissent concluded that the Arizona Court of Appeals was correct in reversing the conviction, finding that the lost evidence was significant and "this case was far from conclusive," and emphasizing that it "remains a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[64]

C. The Reaction to and Aftermath of Youngblood

The reaction to the *Youngblood* decision was immediate and scathing.[65] From the beginning, critics proclaimed that "[p]roving bad

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61. *Id.*

62. *Id.* at 70 (Blackmun, J., dissenting).

63. *Id.* at 71.

64. *Id.* at 73 (quoting *In re* Winship, 379 U.S. 358, 372 (1970) (concurring opinion)); *see* Henry James Zaccardi, *Constitutional Law–Limitations on Criminal Defendants' Rights to Preservation of Evidence by Police*, 23 SUFFOLK U. L. REV. 873, 880 (1989) ("The result of the *Youngblood* decision is that many criminal defendants will be left unprotected from loss or destruction of evidence when characterization of such evidence labels it only of 'potential' and not 'apparent' exculpatory value before the state loses it."); *see also* Sarah M. Bernstein, *Fourteenth Amendment–Police Failure to Preserve Evidence and Erosion of the Due Process Right to a Fair Trial*, 80 J. CRIM. L. & CRIMINOLOGY 1256, 1273–74 (1990) ("The majority decision is a massacre of precedent and constitutional protection of a fair trial. The Court's bad faith requirement inadequately protects criminal defendants' due process rights to present a complete defense and receive a fair trial.").

65. There were numerous, contemporaneous articles criticizing the *Youngblood* decision. *See, e.g.*, *Leading Cases*, 103 HARV. L. REV. 137, 157 (1989) ("The majority, by adopting a subjective 'bad faith' test and by placing the burden of proof on the defendant, needlessly weakened . . . constitutional assurances."); Trish Peyser Perlmutter, Arizona v. Youngblood, 24 HARV. C.R.-C.L. L. REV. 529, 529 (1989) (declaring the bad faith standard "both theoretically unsound and a serious erosion of protections for criminal defendants"); Matthew H. Lembke, *The Role of Police Culpability in* Leon *and* Youngblood, 76 VA. L. REV. 1213, 1215 (1990) (criticizing the "inherently flawed" *Youngblood* opinion because focusing

faith, as defined in *Youngblood*, is almost impossible."[66] Unfortunately, the impossibility became a near reality, with only *seven* successful *Youngblood* claims in the first nineteen years following the decision.[67] The successful cases do not appear to have any common theme or fact pattern meriting success; rather, a review of these cases reveals a fairly arbitrary and fortuitous explanation for the rare successful outcomes.[68] And while bad faith has proven more than sufficiently difficult to establish and amorphous to define,[69] some courts have further exacerbated these difficulties by interpreting the bad faith standard as only applying to "material exculpatory evidence."[70]

Many state courts have rejected the "bad faith" requirement via interpretation of their state constitutions and federalism interests.[71] For

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the analysis on the bad or good faith of the police rather than the materiality of the evidence "gives inadequate protection to the rights of the defendant to fundamental fairness").

66. Karen Carlson Paul, *Destruction of Exculpatory Evidence: Bad Faith Standard Erodes Due Process Rights*, 21 ARIZ. ST. L.J. 1181, 1195 (1989).

67. *See* Teresa N. Chen, *The* Youngblood *Success Stories: Overcoming the Bad Faith Destruction of Evidence Standard*, 109 W. VA. L. REV. 421, 422 (2007) (explaining that of the 1,675 published cases citing *Youngblood* just seven were successful, without any common thread explaining the successes).

68. *See id.*

69. *See, e.g.*, Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988) (showing that the Supreme Court did not even attempt to define "bad faith" or the relevant conduct, only suggesting that "[t]he 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 of destroyed").

70. *See* State v. Wittenbarger, 880 P.2d 517, 522 (Wash. 1994) (en banc) (concluding that maintenance and repair records of BAC Verifier Data Master "did not rise to the level of 'material exculpatory evidence' and are, at best, only potentially useful to the defense"); *see also* Cooper v. Calderon, 255 F.3d 1104, 1113 (9th Cir. 2001) ("The duty to preserve evidence is limited to material evidence, *i.e.*, evidence whose exculpatory value was apparent before its destruction and that is of such nature that the defendant cannot obtain comparable evidence from other sources.").

71. *See, e.g.*, State v. Morales, 657 A.2d 585, 594 (Conn. 1995) ("Like our sister states, we conclude that the good or bad faith of the police in failing to preserve potentially useful evidence cannot be dispositive of whether a criminal defendant has been deprived of due process . . . which the United States Supreme Court adopted under the federal constitution in *Youngblood*."); Commonwealth v. Henderson, 582 N.E.2d 496, 497 (Mass. 1991) ("The rule under the due process provisions of the Massachusetts Constitution is stricter than that stated in the *Youngblood* opinion."); State v. Tiedemann, 162 P.3d 1106, 1115 (Utah 2007) ("[T]he culpability or bad faith of the state should be only one consideration, not a bright line test, as a matter of due process under article 1, section 7 of the Utah Constitution."); State v. Delisle, 648 A.2d 632, 643 (Vt. 1994) (explaining that the *Youngblood* decision is "too narrow because it limits due process violations to only those cases in which a defendant can demonstrate bad faith, even though the negligent loss of evidence may critically prejudice a defendant"); State v. Osakalumi, 461 S.E.2d 504, 512 (W. Va. 1995) ("As a matter of state constitutional law, we find that fundamental fairness

example, in *Thorne v. Department of Public Safety*, just six months after the *Youngblood* decision, Alaska became the first state to reject *Youngblood*'s bad faith standard.[72] The Alaska Supreme Court agreed with the defendant's argument that the destruction of a videotape showing the defendant performing a sobriety test violated his constitutional right to due process: "We have construed the Alaska Constitution's Due Process Clause to not require a showing of bad faith."[73] Similarly, the very next year, in *State v. Matafeo*, the Hawaii Supreme Court rejected the bad faith test as too restrictive for defendants.[74]

Later, echoing Justice Stevens' concurrence in *Youngblood*, the Alabama Supreme Court recognized an exception to the *Youngblood* bad faith test where "the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair."[75] The Illinois Supreme Court recognized that even good-faith destruction of evidence could violate due process if the state had notice of the defendant's discovery request.[76] And the Delaware Supreme Court rejected *Youngblood*'s bad faith test in favor of a three-pronged analysis—

> (1) the degree of negligence or bad faith involved,
>
> (2) the importance of the missing evidence, considering the probative value and reliability of secondary or substitute evidence that remains available, and

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requires this Court to evaluate the State's failure to preserve potentially exculpatory evidence in the context of the entire record.").

72. Thorne v. Dep't of Pub. Safety, 774 P.2d 1326, 1331 (Alaska 1989).

73. *Id.* at 1327–28, 1330 n.9; *see also* Gundersen v. Anchorage, 792 P.2d 673, 676 (Alaska 1990) ("Since a defendant must provide the state with potentially incriminating evidence at the risk of criminal penalties, we hold that due process requires that the defendant be given an opportunity to challenge the reliability of that evidence in the simplest and most effective way possible, that is, an independent test.").

74. State v. Matafeo, 787 P.2d 671, 673 (Haw. 1990) (rejecting the bad faith test because that standard prevents courts "in cases where no bad faith is shown, from inquiring into the favorableness of the evidence or the prejudice suffered by the defendant as a result of its loss").

75. *Ex parte* Gingo, 605 So. 2d 1237, 1241 (Ala. 1992).

76. *See* People v. Newberry, 652 N.E.2d 288, 292 (Ill. 1995) ("Where evidence is requested by the defense in a discovery motion, the State is on notice that the evidence must be preserved, and the defense is not required to make an independent showing that the evidence has exculpatory value in order to establish a due process violation . . . . If the State proceeds to destroy the evidence, appropriate sanctions may be imposed even if the destruction is inadvertent.").

(3) the sufficiency of the other evidence used at trial to sustain conviction.[77]

Of the alternatives to the *Youngblood* bad faith test, the Delaware analysis has been the most commonly adopted to date.[78] For example, in *State v. Ferguson*, the Tennessee Supreme Court rejected the *Youngblood* test, recognizing that "as the final arbiter of the Tennessee Constitution, [the Supreme Court of Tennessee] is always free to expand the minimum level of protection mandated by the federal constitution," and adopting and applying the Delaware analysis.[79]

The final shoe dropped when Larry Youngblood was exonerated in 2000, and Justice Blackmun's fear of convicting an innocent man was realized.[80] In 2000, after Youngblood was arrested on other charges, his attorneys requested that the police department test the degraded DNA evidence originally collected from the victim, this time using more advanced DNA technology that was not previously available.[81] The DNA results exonerated Youngblood.[82] Thus, in the ultimate irony, the case in which the Supreme Court established its draconian doctrine around missing evidence—overruling a previously vacated conviction—resulted in an exoneration.[83] Yet, despite the ultimate outcome of Youngblood's

77. Hammond v. State, 569 A.2d 81, 86–87 (Del. 1989) (citations omitted) ("We remain convinced that fundamental fairness, as an element of due process, requires the State's failure to preserve evidence that could be favorable to the defendant '[t]o be evaluated in the context of the entire record.' . . . When evidence has not been preserved, the conduct of the State's agents is a relevant consideration, but it is not determinative." (quoting *United States v. Agurs*, 427 U.S. 97, 97 (1976)).

78. *See, e.g.*, State v. Ferguson, 2 S.W.3d 912, 917 (Tenn. 1999); State v. Osakalumi, 461 S.E.2d 504, 512 (W. Va. 1995); Gurley v. State, 639 So. 2d 557, 566–68 (Ala. Crim. App. 1993); Com. v. Henderson, 582 N.E.2d 496, 496 (Mass. 1991).

79. *Ferguson*, 2 S.W.3d at 916, 918.

80. Innocence Project, *Larry Youngblood*, NAT'L REGISTRY OF EXONERATIONS (Jun. 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3774.

81. *Id.*

82. *Id.* In 2001, using the DNA profile detected via the new technology, officials got a hit to another man, Walter Cruise—a man who was blind in his left eye, just as the victim had described. Marc Bookman, *Does an Innocent Man Have the Right to be Exonerated?*, ATLANTIC (Dec. 4, 2014), https://www.theatlantic.com/national/archive/2014/12/does-an-innocent-man-have-the-right-to-be-exonerated/383343/. Cruise, who was incarcerated for a drug conviction, had two prior convictions for child sexual abuse in Houston, Texas and a similar arrest for similar conduct in Tucson, Arizona. *Id.* Cruise was convicted in 2002 and sentenced to twenty-four years in prison. *Id.*

83. As Peter Neufeld, co-founder of the Innocence Project, wrote:

> In law school, we have been taught that, absent bad faith, the destruction of crucial evidence will not be deemed prejudicial. As a result, there has been no requirement

case, the Supreme Court has still cited its *Youngblood* opinion favorably.[84]

Today, *Youngblood*'s impact has stretched beyond the court system, by contributing to the erosion of evidence collection and retention practices in police departments across the country.[85] Dr. Edward Blake, a DNA scientist may have stated the post-*Youngblood* reality best—

> We now have before us a flawed legal precedent that stands on the shoulders of an innocent man. . . . For those organizations that are poorly run or mismanaged or don't give a damn, . . . the Youngblood case was a license to let down their guard and be lazy. The effect that had was generally to lower the standards of evidence collection.[86]

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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).

84. First, in *Illinois v. Fisher*, all of the justices affirmed *Youngblood* and law enforcement's right to destroy cocaine evidence that had been tested four times, confirmed to be real, and destroyed without ever testing the cocaine for DNA evidence. 540 U.S. 544, 544–58 (2004). Second, in *District Attorney's Office of the Third Judicial District v. Osborne*, the Court determined that the defendant, serving time for kidnapping and sexual assault, did not have a constitutional right to post-conviction DNA testing—even if such testing would be performed at his own expense. 557 U.S. 52, 60–62 (2009). The majority, citing *Youngblood*, explained—"We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. . . . If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when?" *Id.* at 74. And third, in *Connick v. Thompson* the Court reversed a $14 million damage award against the New Orleans District Attorney's office after the defendant spent fourteen years on death row after the state failed to turn over test results of blood evidence that later acquitted him. 563 U.S. 51, 54 (2011). In a concurrence, Justice Scalia cited to *Youngblood* in support of his conclusion that the state had no obligation to disclose the evidence to defense counsel in the first place. *Id.* at 77 (Scalia, J., concurring in judgment).

85. *See* Bookman, *supra* note 82. Specifically, the New York, Houston, and New Orleans police departments purged significant evidence from their evidence rooms and warehouses. *Id.* And, even more concerning than destroying evidence due to storage capacity issues is that each of the purges in New York and Houston were closely linked in time to DNA exonerations, creating the insinuation that such evidence was destroyed, in mass, to avoid additional exonerations. *Id.*

86. Barbara Whiteaker, *DNA Frees Inmate Years After Justices Rejected Plea*, N.Y. TIMES, Aug. 11, 2000, at A12; *see also A Mishandling of Justice*, ST. PETERSBURG TIMES, Aug. 12, 2000, at 16A ("Youngblood's story is as old as the common law itself: Bad facts make bad law. In 1988 six justices dispensed with principle in order to keep a man they thought had committed a depraved act behind bars. Instead, their ends-justifies-the-means

II. DUKE WRONGFUL CONVICTION CLINIC CASE STUDY

The Duke Wrongful Convictions Clinic[87] (the "Clinic") is currently litigating two cases involving missing evidence that illustrate the nearly insurmountable challenges in advancing and succeeding on a *Youngblood* claim.

A. Derrick McRae

On October 14, 1995, Jeremy Lee Rankin was found shot to death on the front porch of a house in Rockingham, North Carolina.[88] More than four months later, on February 29, 1996, Derrick McRae, at the age of sixteen, was arrested and charged with first-degree murder of Rankin.[89]

1. The State's Case at Trial

The State's case against McRae was remarkably weak. With no physical evidence tying him to the murder, the State relied principally on two statements from non-eyewitnesses[90] (1) Edward Tender and (2) Thurman Nelson:

- Tender, a forty-four-year-old alcoholic with an extensive criminal record, was at the Richmond County Jail "awaiting [his own trial] for nineteen felonies and three misdemeanors" when McRae arrived at the jail.[91] Facing about twenty years in prison, Tender agreed to implicate McRae in order to reduce his own charges and signed a statement which said that

justice landed an innocent man in prison for years and gave police the green light to mishandle key evidence without consequence.").

87. The Duke Wrongful Convictions Clinic is one of Duke University School of Law's student clinics. The Clinic represents individuals incarcerated in North Carolina with claims of innocence in both state and federal court. To date, the Clinic has exonerated ten clients who collectively served more than 214 years in prison. *See Wrongful Convictions Clinic*, DUKE UNIV. SCH. OF L., https://law.duke.edu/wrongfulconvictions/ [https://perma.cc/95VS-77PQ] (last visited Oct. 19, 2023).

88. *See* Petition for Writ of Habeas Corpus at 6, McRae v. Hooks, No. 1:21-cv-00577-LCB-JLW (M.D.N.C. July 13, 2021), ECF No. 1.

89. *Id.* at 8.

90. The State originally planned on calling an alleged eyewitness to the murder, but the eyewitness later recanted and was incarcerated for a capital murder conviction at the time of McRae's trial. *See id.* at 16 n.20, 25 n.35, 26 n.36.

91. *Id.* at 11.

McRae told Tender that he killed Rankin.[92] Just two days after Tender provided his statement to the Rockingham Police Department (the "RPD"), twenty of his twenty-two charges were reduced to misdemeanors, dismissed, or otherwise favorably resolved, with the final two resolved after Tender testified and McRae was convicted.[93]

- Nelson was another young man arrested and charged with Rankin's murder the day after McRae was arrested for the same crime.[94] At McRae's trial, while Nelson was still charged with Rankin's murder himself, Nelson implicated McRae but testified to his own complete innocence and lack of involvement in the crime.[95] Nelson denied having an agreement with the State in exchange for his testimony, but his pending charges, including for Rankin's murder, were dropped or favorably resolved shortly after McRae's conviction.[96]

McRae's core defense was his alibi: on the evening of the murder McRae got so intoxicated at a neighborhood party that he had to be carried home, was vomiting, and had to be put to bed at 8:30 p.m. by his brother.[97] Multiple witnesses, including his codefendant, Nelson, testified that McRae was "passed out in his bed between 10:00 PM and 2:00 AM" the night of the murder.[98] McRae's mother confirmed that she was up "taking care of her sick mother" that night and McRae never emerged from his room or left the house.[99]

With that evidence, McRae's first trial resulted in a hung jury, with jurors voting eight to four in favor of acquittal.[100] Undeterred, the State retried McRae just ten days later, presenting a nearly identical case, with the only difference being the "rapid deterioration of McRae's mental

92. *Id.* at 12. Tender testified that McRae killed Rankin because he was white and he "wanted to kill all white people," claiming that McRae, a mentally-challenged sixteen-year-old, was a well-read man who spoke "like a Malcolm X or Stokely Carmichael." *Id.* at 13.
93. *Id.* at 12.
94. *Id.* at 8.
95. *Id.* at 15–18.
96. *Id.* at 16–17.
97. *Id.* at 20.
98. *Id.* at 20.
99. *Id.* at 20.
100. *Id.* at 21.

health" and resulting change in demeanor.[101] The jury at the second trial returned a guilty verdict, and McRae was sentenced to life imprisonment without the possibility of parole, a decision affirmed by the North Carolina Supreme Court.[102]

2. Post-Conviction Discovery

During the course of the Clinic's representation, and post-conviction litigation, significant evidence was uncovered that was not presented or otherwise known to defense counsel at McRae's trial including: (1) multiple suppressed witness statements; (2) Tender's recantation; and (3) Rankin's criminal records.

- *Suppressed statements*. At trial, the only statements provided to McRae and his counsel were statements from Tender, Nelson, and Allen Davis (the man who found Rankin's body), and a one-page document containing a single unbroken paragraph, without identifying information, of statements McRae allegedly made to potential State trial witnesses.[103] During post-conviction litigation, the Richmond County District Attorney Office's (the "DAO") file was provided under North Carolina's post-conviction discovery laws, which revealed, among other things, nine previously undisclosed purported witness statements.[104] The statements were all taken by the investigating police officers "over a ten-day period more than four months after Rankin's murder," and have striking material differences that cannot be reconciled with one another and the case the State presented at trial.[105]
- *Tender's recantation*. Beginning in 2009, Tender repeatedly recanted his trial testimony to different individuals on different occasions.[106] Tender explained that he testified

101. *Id.* at 10; *see also id.* at 10 n.13 (discussing McRae's "slack face" and apparent "disinterest"). McRae's mental health spiraled while he was imprisoned in the county jail awaiting trial. He was ultimately diagnosed with schizophrenia, but, without his medication, his mental state and outward appearance waned. *Id.* at 9 n.7.

102. *See* State v. McRae, 594 S.E.2d 71, 80 (N.C. Ct. App. 2004); State v. McRae, 599 S.E.2d 911 (N.C. 2004) (mem.). McRae was eventually resentenced to life with the possibility of parole in light of *Miller v. Alabama*, 567 U.S. 460 (2012). *See* Petition for Writ of Habeas Corpus, *supra* note 88, at 5.

103. *See* Petition for Writ of Habeas Corpus, *supra* note 88, at 22.

104. *See id.* at 7 n.4.

105. *See id.* at 7.

106. *Id.* at 22.

falsely at trial because the prosecutor offered him a "lenient sentence, which [he] ended up getting."[107]

- *Rankin's criminal record.* During post-conviction litigation, the Clinic also obtained police records from a neighboring police department which reveal that Rankin, the victim, had engaged in a crime spree in the week leading up to his death.[108] The records suggest that others may have had a motive to harm Rankin, including the man that Rankin told his mother shortly before his death "was going to beat the ass out of him."[109]

3. Missing Documents

The most notable aspect of post-conviction discovery in this case is not what evidence was discovered in post-conviction, but what was found to be *missing* from the official files, namely the police files. From October 14, 1995, to February 21, 1996—the critical months immediately following the murder—both the RPD and DAO case files contain just *two* documents.[110] Both files are otherwise devoid of any other documentation from this time period.[111] When questioned about the gap in the files at a 2014 state court evidentiary hearing, the lead investigator (and subsequently the RPD Chief), testified that the first months of an investigative record would contain crucial documents, including witness statements and possible suspects.[112] The now disgraced former Chief[113]

107. *See* State v. McRae, No. 96 CRS 1576, 2015 N.C. Super. LEXIS 486, at *14 (Super. Ct. N.C. Feb. 18, 2013). When the Clinic first met Tender, he did not know what case the Clinic wanted to discuss, yet, unprompted, he described a case in which the State set up a young man. He later identified McRae as that young man, admitted his own involvement in the setup, and wished that the Clinic could help McRae. At the evidentiary hearing Tender's memory appeared faded, but he did *not* affirm his trial testimony. *See* Petition for Writ of Habeas Corpus, *supra* note 88, at 26–27.

108. *See* Petition for Writ of Habeas Corpus, *supra* note 88, at 28.

109. *Id.* at 28–29.

110. *See* Exhibit 17 to Petition for Writ of Habeas Corpus at 2 n.3, McRae v. Hooks, No. 1:21-cv-00577-LCB-JLW (M.D.N.C. July 13, 2021), ECF No. 1-17 (explaining the only two documents from this time period are a criminal history of the victim and a property sheet).

111. *See* Supplemental Memorandum re: Petition for Writ of Habeas Corpus at 5, McRae v. Hooks, No. 1:21-cv-00577-LCB-JLW (M.D.N.C. Jan. 24, 2023), ECF No. 41.

112. *See* Exhibit 16 to Response to Petition for Writ of Habeas Corpus at 144:3-10, 141:9-14, McRae v. Hooks, No. 1:21-cv-00577-LCB-JLW (M.D.N.C. Dec. 15, 2021), ECF No. 10-16; Exhibit 17 to Response to Petition for Writ of Habeas Corpus at 157:24–158:14, McRae v. Hooks, No. 1:21-cv-00577-LCB-JLW (M.D.N.C. Dec. 15, 2021), ECF No. 10-17.

113. The former chief, Robert Voorhees, perjured himself. *See* Supplemental Memorandum, *supra* note 111, at 12–14. He was indicted for embezzling seized drug money. Kathryn Burcham, *Former Police Chief Indicted on Charges of Embezzling*, WSOC-TV

confirmed that the RPD created a "master investigation file" for every case and that "[a]ll work product of the investigation" would be included in the file.[114] He explained that everything "that could have been documented should have been documented" and everything would be turned over to the district attorney's office.[115]

Yet, for the Rankin murder investigation, the former Chief confirmed that although the file had an index for additional materials–including "crime scene, evidence statement, witness statements, suspect info, autopsy report, report synopsis . . . when you turn to the tab there is nothing there," even though something clearly *should* be behind those tabs, or otherwise be in the file.[116] The fact that the RPD and DAO are missing the *exact* same documents in their files only raises further suspicions. Thus, there are seemingly only two plausible explanations for the missing material: (1) the RPD never provided the materials to the DAO, in contravention of RPD policy, and the materials were subsequently removed from the RPD file; or (2) miraculously, the exact same set of records were somehow removed or lost from both the RPD and DAO files.[117]

With that, McRae is left with a difficult challenge. Although it is clear that documents *should* exist from the first four and a half months following Rankin's murder, they are not in the files and McRae can only speculate as to what those documents could have revealed—and why they are missing. To seek answers, McRae filed a motion for leave to conduct discovery in connection with his pending petition for habeas corpus in the United States District Court for the Middle District of North Carolina.[118] The court granted the motion, permitting McRae to: (1) seek production of the RPD files relating to the Rankin murder from October 14, 1995, to March 1, 1996; and (2) if the files are not located or produced, depose relevant members of the RPD and DAO regarding the contents of the missing files.[119]

(Nov. 13, 2012), https://www.wsoctv.com/news/local/former-police-chief-indicted-charges-embezzling/223155653/.

114. *See* Exhibit 16 to Response to Petition for Writ of Habeas Corpus, *supra* note 112, at 130:16–131:2.

115. *See* Exhibit 17 to Response to Petition for Writ of Habeas Corpus, *supra* note 112, at 222:18–223:2, 245:13–19, 272:19–275:7 (explaining that testimony of former ADA Michael Parker confirming that the DAO would receive a copy of the full file from the RPD).

116. *See* Exhibit 16 to Response to Petition for Writ of Habeas Corpus, *supra* note 112, at 141:8–17.

117. *See* Supplemental Memorandum, *supra* note 111, at 12.

118. *See* Order on Motion for Discovery, McRae v. Hooks, 1:21-cv-00577-LCB-JLW (M.D.N.C. Aug 29, 2022), ECF No. 18.

119. *Id.* at 3.

Unfortunately, but unsurprisingly, the discovery requests yielded no additional records.[120] Neither the RPD nor DAO produced any additional files from the relevant time period.[121] Thus, McRae proceeded to depose seven individuals from the RPD and DAO regarding the Rankin investigation and file.[122] The deponents were clear and in agreement that the RPD would immediately begin investigating a crime and indicated that materials placed in the file would include: handwritten officer notes, interview notes, the investigation and notes on alternate suspects, notes and statements from a neighborhood canvas, and notes about efforts to locate and secure the murder weapon.[123] But *none* of those materials are present in the Rankin murder files.[124] Despite the deponents' certainty regarding the investigative steps typically undertaken after a homicide, no RPD officer or DAO prosecutor could recall specific investigative steps taken almost twenty years ago in connection with the Rankin investigation—even though one former RPD officer all but established that work had been done in the first few months on the case, exclaiming: "[y]ou're not just going to sit there for four months and not do anything."[125]

Now, like other post-*Youngblood* defendants, McRae is left speculating: What happened to the documents? What information did those documents contain? Did those documents identify other suspects and/or the true perpetrator of the crime? McRae is an outsider; he is not privy to "insider" information about what the RPD or DAO may have done with the documents, and, to date, no witness or document has explained what happened. McRae can only point to the perjury and other misconduct of important state actors.[126] But those accusations do not necessarily satisfy the *Youngblood* bad faith standard.[127] McRae's case is a perfect example of *Youngblood*'s consequences and the perverse incentives flowing from the bad faith standard.

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120. *See* Supplemental Memorandum, *supra* note 111, at 2.
121. *Id.*
122. *See id.* at 7 n.13 (listing deponents).
123. *See id.* at 7 (citations omitted).
124. *See id.* at 9.
125. *See id.* at 9–12.
126. *See id.* at 12–16.
127. Although, as detailed above, McRae would likely have a cognizable *Youngblood* claim the Clinic originally pursued a claim relating to the missing documents under *Brady v. Maryland*, hoping and expecting that the missing materials would be located by the relevant state entities. As such, at this time, McRae's MAR does not contain a *Youngblood* claim. Thus, McRae is left trying to meet the *Schlup* actual innocence gateway; an exacting standard that requires a showing that new evidence not presented at trial makes it "more likely than not that no reasonable juror would have found [the habeas] petitioner guilty beyond a reasonable doubt." Schlup v. Delo, 513 U.S. 298, 327 (1995).

B. Ruben Wright

James Taulbee was murdered on January 5, 2004.[128] Officers responded to a 9-1-1 call at the Taulbee residence and found Taulbee in bed, shot twice in the face.[129] Taulbee was a retired marine whose wife, Zenaida Taulbee ("Zenaida") was having an affair with Ruben Wright, an African-American marine stationed at Camp Lejeune in Jacksonville, North Carolina.[130]

1. Evidence at Trial

No physical evidence connected Wright to the crime; rather, all of the physical evidence pointed to Randy Linniman, a Caucasian marine who was found in possession of the components of the murder weapon and admitted to making and attempting to dispose of the weapon.[131] Yet, the Onslow County Sherriff's Office ("OCSO") honed in on Wright, based largely on the testimony of Zenaida and an undocumented purported confession made by Wright.[132]

The State's theory of the crime, adopted largely from Linniman's statements, was that Wright departed Camp Lejeune on the morning of January 5, 2004, in a white Honda Accord driven by Linniman.[133] Linniman's tale of the night changed, but his final story was that he drove Wright off the base to the Taulbee home and drove him back to Camp Lejeune thirty minutes later.[134] Linniman claimed that he did not know why Wright wanted to go to the Taulbee home, but when they returned to the base Wright threatened Linniman's family if he told anyone about their trip. Linniman was charged as an accessory after the fact and did not testify at Wright's trial.[135]

Zenaida was the State's principal witness. She testified that Wright told her that Linniman was making a "silencer gun" to be used to kill her

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128. State v. Wright, 646 S.E.2d 625, 626–27 (N.C. Ct. App. 2007).

129. *Id.*

130. *See id.* at 627.

131. *See generally* Indictment, United States v. Linniman, 2007 WL 7695074 (E.D.N.C. Mar. 28, 2007) (No. 7:07cr37-D3); Memorandum of Plea Agreement, United States v. Linniman, 2007 WL 7695073 (E.D.N.C. July 16, 2007) (No. 7:07cr37-D3).

132. *Wright*, 646 S.E.2d at 627–28. *See generally* Transcript of Trial, State v. Wright, 2006 WL 6630246 (N.C. Super. Jan. 9, 2006) (No. 04CRS50533).

133. *See* Brief for the State at 7, North Carolina v. Wright, 2007 WL 5596382 (N.C. App. Feb. 16, 2007) (No. COA06-1435); Transcript of Trial, *supra* note 132, at 941:12–20.

134. Transcript of Trial, *supra* note 132, at 941:7–20.

135. *See* Memorandum from Mario A. Palomino, Inspector General, Naval Crim. Investigative Serv., to Director, Naval Crim. Investigative Serv. 5 (Oct. 22, 2018) [hereinafter NCIS Report] (on file with author).

husband.[136] According to Zenaida, Wright told her that he had retrieved the gun Linniman "made for him" and that he and Linniman would be at her house on Monday.[137] Zenaida testified that her husband remained in bed when she left the house at 4:20 a.m.[138] She further testified that as she was getting in her vehicle, she saw Linniman's car approach and turned around and waited by her house, where she observed a white arm protruding from the driver's side window of Linniman's car.[139] Then, as she was driving off, she saw Wright, dressed in all black, exit Linniman's car and walk towards her house.[140]

Zenaida further testified that she arrived at the gym at 4:30 a.m. and saw Wright's car in the parking lot, but she did not see him at the gym until sometime after 5:00 a.m.[141] She alleged that she asked Wright if he was at her home that morning and he said, "don't worry about it," and later said that it was going to be a "good year" for them.[142] Zenaida testified that she tried to call her husband several times that day, but he did not answer.[143] When Zenaida returned home she discovered the doors open and her deceased husband upstairs.[144]

Contrary to Zenaida's testimony about her whereabouts the morning of the crime, two OCSD officers testified that Wright confessed to them that he was present when Zenaida shot her husband and reloaded the gun for her, but that he was not the shooter.[145] The officers' testimony could not be corroborated because the interview was not recorded and Wright denies that he confessed.[146]

2. Inconsistent Witness Statements

The two witnesses on whom the State based its case—Zenaida and Linniman—both provided inconsistent and untruthful statements to OCSD officers during the investigation and/or at trial:

- *Zenaida.* Zenaida was interviewed on January 5, January 7, January 9, January 13, January 21, and January 22 of 2004

136. *Wright*, 646 S.E.2d at 627.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 627–28.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 627.
146. Transcript of Trial, *supra* note 132, at 303–04, 319, 331, 333.

and her story materially changed with each interview.[147] Zenaida initially told OCSD that the person she suspected killed her husband was a man named Ronnie Hancock, with whom she admitted to having an affair.[148] Then, during the January 13 interview, she admitted to also having an affair with Wright and that she believed he may have killed Taulbee out of jealousy.[149] On January 21, Zenaida, for the first time, said that she saw Linniman's car in the cul-de-sac and saw Wright get out of the car wearing all black.[150] Despite Zenaida's numerous inconsistencies and changing story, the State relied on Zenaida's testimony.

- *Linniman.* Linniman did not testify at trial, despite being charged as an accessory after the fact and found with the murder weapon components.[151] Like Zenaida, Linniman materially changed his story during the course of OCSD's investigation.[152] On January 14, during Linniman's first interview with OCSD, he claimed that Wright rented a U-Haul and that he picked Wright up at a local, off-base U-Haul Center at around 4:30 or 4:45 a.m., drove him back to the base, and dropped him off at the gym around 5:00 a.m.[153] OCSD investigated Linniman's tale and discovered it was false—Wright had neither rented nor returned a vehicle at the two local U-Haul Centers.[154] Linniman was interviewed again on January 20, 2004. After the OSCD could not locate any U-Haul location that rented a truck to Wright, thereby disproving his original tale, Linniman changed his story.[155] Linniman now claimed that he picked up Wright on the base in his white Honda Accord and drove him off base to the

147. *Id.* at 809:1–5, 874:24–875:23.
148. *Id.* at 881:23–882:7.
149. *See id.* at 879:15–880:12, 1009–10.
150. *Id.* at 932:25–933:13.
151. *See* Memorandum of Plea Agreement, *supra* note 131. *See generally* Transcript of Trial, *supra* note 132.
152. Linniman was also charged with Taulbee's murder and with being an accessory after the fact. He was acquitted of both charges but subsequently convicted of related gun charges in federal court. *See* United States v. Linniman, No. 7:07-CV-00037, 2012 WL 405355, at *1 (E.D.N.C. Mar. 28, 2007).
153. NCIS Report, *supra* note 135, at 4.
154. *See id.*
155. *See id.*

> Taulbee residence.[156] Linniman claims that he waited outside the Taulbee home, Wright returned a few minutes later, and they drove back to the base, where Linniman disposed of the murder weapon.[157] Despite the inconsistencies and incredible story, the State presented Linniman's story at trial, without having him testify to his own purported account of the events.[158]

3. Missing Surveillance Footage

The Clinic sought to obtain the surveillance footage of Linniman's vehicle leaving and returning to Camp Lejeune to establish whether Wright was in the car. Although never introduced at trial, it is uncontested that surveillance technology existed at the gate checkpoints at Camp Lejeune.[159] It is clear that the surveillance footage from the morning of Taulbee's murder was reviewed during the course of the police investigation.[160] For example, early in the investigation, Naval Criminal Investigative Service ("NCIS") produced a photograph of Linniman's car after it passed through the Camp Lejeune Main Gate at 04:06:05 on the morning of January 5, but NCIS did not—and has not—produced or accounted for the original video from which the image was extracted.[161] It is not possible to determine who is in the car from the lone still photograph.[162] The Clinic has tried, unsuccessfully, to have NCIS turn over or otherwise explain the missing surveillance footage recorded at the Main Gate.[163]

The sparse information the Clinic has been able to uncover about the video heightens suspicion that the video exculpates Wright. During pre-trial investigation, an NCIS special agent reviewed the surveillance video and reported to OCSD that Wright was in Linniman's car when it left *and* returned to Camp Lejeune.[164] Yet, at trial, that NCIS agent testified that "[i]t was too dark and there wasn't enough light off the gate camera

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156. *See id.*
157. *See id.*
158. *See* Transcript of Trial, *supra* note 132, at 1039:4–5.
159. *See* Transcript of Trial, *supra* note 132, at 940:6–15.
160. *See, e.g.*, *id.*
161. *See generally* NCIS Report, *supra* note 135. The Clinic has come to understand that the Camp Lejeune checkpoints had video, not photographic technology.
162. *Id.* at 5; Transcript of Trial, *supra* note 132, at 941:21–25, 942:11–16.
163. *See generally* NCIS Report, *supra* note 135. It is unanimously agreed upon that Linniman's car left through the Main Gate and returned through the Piney Green Gate at Camp Lejeune. *See id.* at 13; Transcript of Trial, *supra* note 132, at 941:1–15.
164. *See* NCIS Report, *supra* note 135, at 5.

to identify anyone in the vehicle."[165] Upon review of the video, the Clinic is certain that Wright was *not* in the vehicle when it retuned to Camp Lejeune the morning of January 5; rather, the surveillance footage reveals Linniman was alone in his car when it returned to the base.[166]

With that revelation, the key question became whether Wright was in the car when it *left* the base.[167] The Clinic obtained some evidence from OCSD, including surveillance footage, but the Clinic has been unable to obtain the missing video surveillance footage showing the car leaving the Camp Lejeune Main Gate the morning of the crime. The Clinic *knows* that such footage exists—or existed at one point—because there are still photographs from that surveillance camera.[168] Specifically, OCSD maintained images of multiple white cars leaving the Main Gate at Camp Lejeune on the morning of January 5, 2004, but there is only one image of Linniman's car leaving the base.[169] The aforementioned NCIS agent testified that he screened the video footage for white cars exiting the base the morning of the murder and that the screenshot at 04:06:05 a.m. captured Linniman's car leaving through the Main Gate.[170] Notably, while there are multiple images of the *other* white cars the *only* image of Linniman's car is when the car is already far enough from the Main Gate outpost such that it is essentially impossible to determine who is in the vehicle.[171]

Wright's case is another example of the practical challenges of pursuing a *Youngblood* claim. It is clear that video surveillance footage

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165. Transcript of Trial, *supra* note 132, at 944:7–9. Notably, the surveillance video was *not* introduced as evidence at trial. *See generally* Transcript of Trial, *supra* note 132.

166. United States v. Linniman, No. 7:07-CV-00037, 2012 WL 405355, at *1 (E.D.N.C. Mar. 28, 2007). The Onslow County District Attorney and principal deputy agreed that Linniman was alone in the car.

167. The State's theory of the crime requires that Wright leave the secure based on the morning of January 5, 2004, to murder Taulbee. The surveillance footage confirms that Wright was not in Linniman's car when he returned to the base. Thus, if it could be confirmed that he was also not in the car when it left the base, then the State would not have plausible explanation for how Wright left the base and committed the murder. As it stands, the State cannot explain how Wright returned to the base and why Linniman had the murder weapon on the base after the murder.

168. *See* NCIS Report, *supra* note 135, at 6. Given the technology available the Camp Lejeune Main Gate, there are only two possible explanations for the creation of the still images: (1) the video footage was comprised of clip-by-clip still images or (2) someone reviewed the footage and created or exported still images from the video footage. Both explanations require affirmative human action after reviewing the surveillance video.

169. *See* Transcript of Trial, *supra* note 132, at 941:1-15.

170. *See, e.g.*, Transcript of Trial, *supra* note 132, at 941:7–15.

171. *Id.* at 942:11–16. The other images the Clinic received show several images of the other white cars; images that provide much greater visibility of the other cars and their passengers.

existed and that NCIS personnel ignored the Navy's procedures for handling the video surveillance footage. If Wright had the video surveillance footage from the Camp Lejeune Main Gate, he could establish that he was neither in Linniman's car when it left the base nor when it returned, and thus, leave the State with no theory of how Wright could have traveled to and from the crime scene. But the footage is no longer available, and, to date, no evidence or witness confirms intentional misconduct with respect to the missing evidence. Wright's case demonstrates that the failure to preserve evidence can have significant and lasting consequences for the accused and convicted and that *Youngblood* provides no incentive for law enforcement to preserve potentially exculpatory evidence.[172]

III. THE *YOUNGBLOOD* SOLUTION: A BURDEN-SHIFTING FRAMEWORK

While the swift repudiation from the legal community coupled with the exoneration of Youngblood himself should have been enough to revisit and rewrite the standard for lost, missing, or destroyed evidence, the devastating effect on numerous other cases, including the two Clinic cases detailed here, should finally prove the need for change. For thirty-five years, *Youngblood* has created unreasonable obstacles for defendants; denying constitutional rights and helping to ensure and preserve wrongful convictions. The following discussion proposes a new, burden-shifting framework that allows for a more equitable evaluation of constitutional claims based on missing, lost, or destroyed evidence.

A. Burden-Shifting is Not Unique and is Already Used in Comparable Contexts.

"Shifting the burden of proof is very useful in areas where fault or evidence is difficult to pin-down but society has a large interest in protecting plaintiffs."[173] There are many examples of burden-shifting frameworks in varied areas of the law, but, for purposes of this Article, the author will focus on a select few.

First, the burden-shifting framework in a strict products-liability action. In a strict products-liability case, the plaintiff must show that his

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172. On this point, that the State makes much to do about the fact that the video surveillance was never introduced at trial, and thus, would not have made a difference in the outcome of Wright's trial. However, the inverse is arguably more likely—if the video was inculpatory, the State surely would have made it a centerpiece of their case, and thus, by not showing it, there is reason to believe the video was exculpatory.

173. *Shifting the Burden of Proof,* LEGAL INFO. INST. (July 2021), https://www.law.cornell.edu/wex/shifting_the_burden_of_proof.

or her injury was caused by the product's design or manufacturing defect, at which point the burden shifts to the defendant to show that the product is not defective or that the design benefits outweigh the risks.[174] In asserting a prima facie case, the plaintiff "may rely upon the circumstances of the accident and proof that the product did not perform as intended."[175] The rationale for the requisite initial proof and burden-shifting framework was well articulated by the California Court of Appeal:

> [T]he burden of proof on the issue of causation may be shifted to the defendant where demanded by public policy considerations. . . . The shift in the burden of proof . . . may be said to rest on a policy judgment that when there is a substantial probability that a defendant's negligence was a cause of an accident, and when the defendant's negligence makes it impossible, as a practical matter, for plaintiff to prove proximate causation" conclusively, it is more appropriate to hold the defendant liable than to deny an innocent plaintiff recovery, unless the defendant can prove that his negligence was *not* a cause of the injury.[176]

Second, the *McDonnell Douglas* burden-shifting framework in employment discrimination cases.[177] Title VII makes it unlawful for an employer to "fail or refuse to hire . . . any individual, or otherwise to discriminate against any individual with respect to his compensation,

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174. *See, e.g.*, McGee v. Cessna Aircraft Co., 188 Cal. Rptr. 542, 547–49 (Cal. Dist. Ct. App. 1983); *see also* Minda v. Biomet, Inc., No. 98-9533, 1999 U.S. App. LEXIS 23605, at *1 (2d Cir. July 7, 1999).

175. *Minda*, 1999 U.S. App. LEXIS 23605, at *1.

176. Thomas v. Lusk, 34 Cal. Rptr. 2d 265, 269 (Cal. Dist. Ct. App. 1994) (citations omitted). *See also* Blysma v. R.C. Willey, 416 P.3d 595, 607–08 (Utah 2017).

> Accordingly, our strict products liability doctrine allows "strict liability against 'downstream' parties (without proof of fault) in order to allow them to act as a conduit to pass liability 'upstream' to the manufacturer." And this "'upstream' indemnification fosters the policy behind strict products liability by placing final responsibility for injuries caused by a defective product upon the entity initially responsible for placing that product into the stream of commerce." Indeed, our doctrine has embraced the notion that "in the absence of imposition of liability on the 'upstream' manufacturer, the manufacturer would have little economic incentive to remove a defective product from the market." Thus, whereas the purpose of products liability generally is to shift the burden of loss from an injured party to the sellers of a defective product as a collective whole, the purpose of implied indemnity is to shift the burden from an individual passive retailer—who bears no fault in the usual sense of the word—onto the party responsible for the defect, the manufacturer.
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> *Blysma,* 416 P.3d at 607–08.

177. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin."[178] When an individual asserts a claim of employment discrimination without direct evidence of such discrimination, the courts use the *McDonnell Douglas* burden-shifting framework to analyze the claim.[179] Under the framework, the plaintiff bears the initial burden of making a prima facie case of discrimination.[180] If the plaintiff can make such a showing, "the burden shifts to the employer to identify the legitimate, non-discriminatory or non-retaliatory reason on which it relied in taking the complained-of action."[181] If the employer meets its burden, then the burden shifts back to the plaintiff "for a chance to show that the employer's stated reason for its actions was a pretext for unlawful discrimination."[182]

Third, the burden-shifting framework under *Batson v. Kentucky* for challenges to juror striking.[183] In *Batson*, the Court held that preemptory juror challenges on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment.[184] The Supreme Court outlined a three-step procedure courts must follow to assess whether a preemptory challenge was discriminatory: (1) the defendant must make a prima facie case that the prosecutor struck a juror based on an impermissible basis, such as race;[185] (2) if the defendant satisfies his initial burden, the burden shifts to the prosecutor to provide a race-neutral explanation for striking the at-issue juror as it relates to the case; and (3) if the prosecutor provides a race-neutral explanation, then the court determines whether the defendant proved the prosecutor's improper motive for striking the juror or whether a credible race-neutral explanation exists.[186]

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178. 42 U.S.C. § 2000e-2(a)(1).

179. Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006).

180. Chappell-Johnson v. Powell, 440 F.3d 484, 487 (D.C. Cir. 2006). "To state a prima facie case of discrimination, a plaintiff must allege she is part of a protected class under Title VII, she suffered a cognizable adverse employment action, and the action gives rise to an inference of discrimination." Walker v. Johnson, 798 F.3d 1085, 1091 (D.C. Cir. 2015).

181. *Walker*, 798 F.3d at 1091.

182. Gulley v. District of Columbia, 474 F. Supp. 3d 154, 162 (D.D.C. 2020) (citing *Walker*, 798 F.3d at 1091).

183. *Batson v. Kentucky*, 476 U.S. 79 (1986).

184. *Id.* at 89.

185. To make a prima facie showing, the defendant must establish that: "(1) the prospective juror is a member of a cognizable racial group, (2) the prosecutor used a preemptory strike to remove the juror, and (3) the totality of the circumstances raises an inference that the strike was motivated by race." United States v. Collins, 551 F.3d 914, 919 (9th Cir. 2009) (quoting Boyd v. Newland, 467 F.3d 1139, 1143 (9th Cir. 2006)).

186. *Batson*, 467 U.S. at 96–98.

And, finally, in the criminal or post-conviction context, the burden-shift that occurs once a petitioner makes a showing that an eyewitness identification was suggestive.[187] Specifically, the defendant or petitioner bears the initial burden of establishing, by a preponderance of the evidence, that the identification procedure was impermissibly suggestive.[188] If the defendant makes that showing, then "the burden shifts to the government to prove that the identification was reliable independent of the suggestive procedure."[189] The government must meet its burden by clear and convincing evidence.[190] In many instances, this inquiry may "come down to the assignment of burdens—a type of judicial tiebreaker" where the government must be able to show that the identification was sufficiently reliable.[191]

B. A Burden-Shifting Framework Will Force Government Actors to Explain Their Conduct and Account for Missing Evidence.

The current *Youngblood* bad faith standard has proven unworkable, and borderline impossible, for defendants. Bad faith is a notoriously imprecise, amorphous standard.[192] Notably, even in the *Youngblood*

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187. *See, e.g.*, Perry v. New Hampshire, 556 U.S. 228, 248 (2012) (explaining that a two-prong test determines whether an allegedly unreliable eyewitness identification requires suppression).

188. *See* English v. Cody, 241 F.3d 1279, 1282–83 (10th Cir. 2001) (citations omitted); *see also* United States v. Wade, 388 U.S. 218, 240 n.31 (1967); *Perry*, 556 U.S. at 238–39.

189. *English*, 241 F.3d at 1283; *see* United States v. Sanchez, 24 F.3d 1259, 1261–62 (10th Cir. 1994) (explaining that if the lineup is impermissibly suggestive, "then the court must decide whether the identifications were nevertheless reliable in view of the totality of the circumstances").

190. *English*, 241 F.3d at 1283; *see also Wade*, 388 U.S. at 240 (providing the clear and convincing standard).

191. *See, e.g.*, United States v. Warford, No. 20-cr-1208 JCH, 2022 WL 17620770, at *22 (D.N.M. Dec. 13, 2022). In *Warford*, the court concluded that the burden shifted to the United States, but that the "the United States failed to show by clear and convincing evidence, or even by a preponderance of the evidence, that the victims' prior identifications were reliable," and thus, "[t]he tiebreak favor[ed] Mr. Warford." *Id.* at *23 (citations omitted).

192. *See* Napper v. Thaler, No. CIV. A. H-10-3550, 2012 WL 1965679, at *28 (S.D. Tex. May 31, 2012) ("A review of federal circuit courts and state courts of last resort in other jurisdictions reveals that they . . . expressly adopted the *Trombetta* formulation as the definitive test of bad faith [while] . . . [o]ther courts have focused on one or both of the *Trombetta* situations, characterizing bad faith as involving improper motivation or malice, or defining bad faith as an intent to deprive the defendant of access to (exculpatory or potentially exculpatory) evidence. Various jurisdictions have also indicated that bad faith is not established by a mere showing that the government agent was grossly negligent, engaged in intentional conduct, did not follow proper procedures, exercised poor judgment, or performed sloppy work."); *see also* Jean v. Collins, 221 F.3d 656, 663 (4th Cir. 2000)

opinion, the majority never defined what behavior would constitute bad faith,[193] and declined to find bad faith in Youngblood's case—a case in which the police appeared to diverge from standard police practice when it destroyed two key pieces of evidence.[194] Defendants suffer from an inherent information disadvantage—it will always be challenging for a defendant to uncover the requisite direct evidence about what happened to the missing evidence to establish that the evidence was lost or destroyed in bad faith.[195] Thus, as a matter of public policy, it makes logical sense to require the government to explain away any missing evidence when defendants, as outsiders, must rely on circumstantial evidence to prove their claim.[196] With that premise, the author proposes a new burden-shifting framework for lost, missing, or destroyed evidence.

C. Defendant Makes a Prima Facie Showing.

First, like in the *McDonnel Douglas* and *Batson* frameworks,[197] the defendant would first have to make a prima facie case establishing that: (1) normally available evidence is missing and (2) such evidence could *plausibly* have exculpatory or impeachment value. This showing provides the right balance: the bar is not too low so as to guarantee that every defendant can make a prima facie showing, but its requirements are feasible enough for defendants to meet, even if only via circumstantial evidence.

As to the first prong, "normally available evidence" should be construed as evidence that is expected or would typically exist, depending on the specific crime. For example, in every case there should exist initial reports from the crime scene, witness statements, and some investigative materials concerning potential suspects, leads, and/or other relevant evidence before a suspect is identified and arrested. But, "normally available evidence" can also be a more nuanced, case-specific inquiry. For example, if the defendant knows an interrogation was recorded, a defendant can assert that the full recording, and not just a snippet, would normally be available and maintained.

As to the plausible exculpatory value prong, this prong should mirror what courts have long considered to be *Brady* material—*i.e.* exculpatory

("[Bad faith requires] that the officer have intentionally withheld the evidence for the purpose of depriving [petitioner] of the use of that evidence during his criminal trial.").

193. Arizona v. Youngblood, 488 U.S. 51, 66–67 (1988) (Blackmun, J., dissenting).

194. *Id.* at 67–69 (Blackmun, J., dissenting).

195. *See, e.g.*, *id.* at 69.

196. *See* Thomas v. Lusk, 34 Cal. Rptr. 2d 265, 269 (Cal. Dist. Ct. App. 1994).

197. *See* Chappell-Johnson v. Powell, 440 F.3d 484, 487 (D.C. Cir. 2006); *see also* Batson v. Kentucky, 476 U.S. 79, 89 (1986).

evidence going to a defendant's guilt or innocence and impeachment evidence affecting a juror's assessment of a witness.[198] A defendant need not affirmatively establish that the evidence is in fact exculpatory or impeachment evidence; he or she need only allege that the missing evidence could *plausibly* be exculpatory or impeachment evidence.[199] In *Trombetta*, the Supreme Court defined exculpatory evidence as evidence that "possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."[200] Although *Trombetta* did not require bad faith, the author believes the *Trombetta* standard is nonetheless too burdensome for the proposed burden-shifting framework here.[201] The defendant should not need to establish that he or she "would be unable to obtain comparable evidence by other reasonably available means;" rather, asserting that the missing evidentiary material had exculpatory value should be sufficient.[202] This position is consistent with *Kyles*, in which the Supreme Court held that the government's disclosure obligation "turns on the *cumulative* effect of all suppressed evidence . . . not on the evidence considered item by item."[203] Under this proposed framework, whether there is only comparable evidence should be irrelevant because the evidence must be viewed cumulatively and an additional piece of evidence—even if comparable to other retained and maintained evidence—can have added exculpatory value.

Impeachment evidence should also be construed broadly. Any document or statement that could be used to discredit a witness is "classic impeachment evidence."[204] But impeachment evidence also encompasses less direct material, such as material—or lack thereof—that can be used to discredit the quality of a police investigation.[205] Any material that can

198. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); Giglio v. United States, 405 U.S. 150, 154–55 (1972). Of course, there is no "artificial bright-line between impeachment and exculpatory evidence," and such a distinction is irrelevant in assessing whether a defendant has satisfied his or her burden under the author's proposed burden-shifting framework. United States v. Beckford, 962 F. Supp. 780, 788 (E.D. Va. 1997) (citations omitted).

199. *Beckford*, 962 F. Supp. at 786–88.

200. California v. Trombetta, 467 U.S. 479, 489 (1984).

201. *See id.*

202. *See id.*

203. Kyles v. Whitley, 514 U.S. 419, 421 (1995) (emphasis added).

204. *See, e.g.*, Juniper v. Hamilton, 529 F. Supp. 3d 466, 510 n.84 (E.D. Va. 2021) (finding evidence contradicting what an officer said "is classic impeachment evidence"); Browning v. Trammell, 717 F.3d 1092, 1105 (10th Cir. 2013) (asserting evidence showing memory deficits "is classic impeachment evidence").

205. Fontenot v. Crow, 4 F.4th 982, 1056 (10th Cir. 2021) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the

be used to raise "questions about the manner, quality, and thoroughness of the investigation" should meet the requirements of the plausible exculpatory value prong.[206] For example, in the McRae case, the fact that there are almost no documents from the first fourth months of the investigation—even if assumed to be true—would be perfect fodder for defense counsel to impeach the relevant government actors about the quality of the murder investigation.[207] Likewise, the fact that law enforcement in the Wright case did not preserve key surveillance video of the suspect's car leaving the military base, when video exists of other similar cars that same morning, raises questions about the thoroughness of that investigation.[208]

D. The Burden Then Shifts to the Government to Rebut the Defendant's Prima Facie Showing.

Second, if the defendant makes out a prima facie case, the burden shifts to the government to establish by clear and convincing evidence that the lost, missing, or destroyed evidence would *not* be of exculpatory or impeachment value (i.e., favorable to the defendant) or otherwise bear on a jury's determination of guilt or innocence. Clear and convincing evidence is evidence "so clear, direct and weighty and convincing as to enable the [fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."[209] It is the "middle level burden of proof that strikes a fair balance between the rights of the individual and the legitimate concerns of the [government]."[210] The clear-and-convincing evidence standard is a common evidentiary standard that petitioners are held to in post-conviction litigation.[211] Thus, it is reasonable to hold the government to the same standard of proof when

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defendant, and we may consider such use in assessing a possible *Brady* violation." (quoting Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir. 1986))).

206. *Id.* (quoting *Bowen*, 799 F.2d at 613).

207. *See supra* Section II.A.

208. Importantly, in post-conviction cases, whether such evidence was used at trial is irrelevant. For example, the fact that law enforcement did not introduce any surveillance footage at Wright's trial is immaterial to whether surveillance material, if properly preserved and maintained, would constitute exculpatory or impeachment evidence. *See supra* Section II.B.

209. U.S. Fire Ins. Co. v. Royal Ins. Co., 759 F.2d 306, 309 (3d Cir. 1985).

210. Addington v. Texas, 441 U.S. 418, 431 (1979); *see* United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir. 1985) ("[C]lear and convincing evidence . . . means something more than 'preponderance of the evidence,' and something less than 'beyond a reasonable doubt.'").

211. *See, e.g.*, 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The application shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

dealing with crucial, plausibly exculpatory evidence that could exonerate a defendant.

To satisfy the clear-and-convincing burden of proof, the government would need "to prove that a factual contention is highly probable."[212] For this framework, that would require the government establish that it is highly probable that the lost, missing, or destroyed evidence would not have been exculpatory or have impeachment value.

If the government fails to meet this exacting standard, then the defendant would be deemed to have established a due process violation to support a claim of innocence. In other words, this finding should be treated akin to a *Brady* violation—a due process violation warranting vacating the conviction and awarding a new trial in which the defendant may use the lost, missing, or destroyed evidence as exculpatory and/or impeachment evidence.[213] However, if the court deems the lost, missing, or destroyed evidence as retaining "lingering prejudice" such that it "has removed all possibility that the defendant could receive a new trial that is fair" then the court could dismiss the indictment.[214]

If the government is able to meet its burden of presenting clear and convincing evidence that the missing evidence is neither exculpatory nor impactful on a juror's determination, then the court can weigh the evidence and determine whether the defendant established that the lost, destroyed, or missing evidence would in fact have exculpatory or impeachment value at trial.[215]

Critically, unlike the current *Youngblood* bad faith standard, the author's proposed burden-shifting framework renders the reason *why* the evidence was lost, missing, or destroyed irrelevant. Treating lost, missing, or destroyed evidence the same as a *Brady* violation for due process concerns will hopefully re-incentivize government actors to engage in the highest standards of evidence collection and retention.[216]

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212. Blandon v. Barr, 434 F.Supp.3d 30, 38 (W.D.N.Y. 2020) (citations omitted); *see* Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (explaining that the clear-and-convincing evidence standard requires presenting evidence showing "the truth of its factual contentions are 'highly probable'").

213. *See, e.g.*, Poventud v. City of New York, 750 F.3d 121, 133 (2d Cir. 2014) ("[T]he remedy for a *Brady* violation is *vacatur* of the judgment of conviction and a new trial in which the defendant now has the *Brady* material available to her.").

214. United States v. Pasha, 797 F.3d 1122, 1139 (D.C. Cir. 2015). Although it may only be a remedy of last resort, dismissal of the indictment should be considered as a potential remedy for egregious evidence spoliation. *See* Gov't of V.I. v. Fahie, 419 F.3d 249, 254 (3d Cir. 2005) (joining the Ninth and Tenth Circuits in concluding that dismissal may be an appropriate remedy for a *Brady* violation).

215. Batson v. Kentucky, 476 U.S. 79, 96–98 (1986) (explaining the *Batson* burden-shifting framework).

216. *See* Whiteaker, *supra* note 86.

E. New Framework, New Incentives.

As described above, the current *Youngblood* standard creates perverse incentives for government actors. Given the near impossibility that a defendant could prove bad faith, government actors can safely assume that any lost, destroyed, or missing evidence will have no impact on the government's ability to convict the defendant, or for the conviction to be upheld in post-conviction litigation. But what is the difference between a government actor who buries a file in a drawer (implicating *Brady*) and one who shreds or throws a file in the trash (implicating *Youngblood*)?[217] None. As explained by some commenters, *Youngblood* was part of an emerging trend by courts to "leave police unfettered."[218] That freedom has directly caused an unknown number of individuals to be deprived of their constitutional rights and wrongfully imprisoned.

It has been thirty-five years since the *Youngblood* decision changed the law of lost, missing, or destroyed evidence. The *Youngblood* bad faith standard has given government actors carte blanche to engage in substandard evidence collection and retention practices.[219] The burden-shifting framework would return things to the pre-*Youngblood* era before the Supreme Court departed from its precedent and inserted the bad faith requirement.[220] The time has come to end the bad faith standard to ensure that the evidence is properly collected and maintained and ensure that criminal defendants' constitutional due process rights are not infringed.

CONCLUSION

The *Youngblood* decision was "a massacre of precedent and constitutional protection of a fair trial."[221] *Brady* established a fundamental doctrine that required disclosure of exculpatory evidence and helped ensure fair criminal trials.[222] "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the

217. *See* Brady v. Maryland, 373 U.S. 83, 84 (1963); Arizona v. Youngblood, 488 U.S. 51, 67–69 (1988) (Blackmun, J., dissenting).

218. Al Kamen, *Police Not Bound to Save Evidence, High Court Says*, WASH. POST (Nov. 30, 1988), https://www.washingtonpost.com/archive/politics/1988/11/30/police-not-bound-to-save-evidence-high-court-says/44dbdc3d-321f-4687-b713-e7e9c3805a05/.

219. *See* Whiteaker, *supra* note 86.

220. *See* Willis C. Moore, Arizona v. Youngblood: *Does the Criminal Defendant Lose His Right to Due Process When the State Loses Exculpatory Evidence?*, 5 TOURO L. REV. 309, 319–21 (1990).

221. *See* Bernstein, *supra* note 64, at 1273.

222. *Brady*, 373 U.S. at 87.

administration of justice suffers when any accused is treated unfairly."[223] It is not an exaggeration to say that the *Youngblood* decision made criminal trials fundamentally less fair. The difficulty in establishing bad faith has permitted government actors to engage in harmful, violative police practices. The author believes that a burden-shifting framework will encourage better practices by requiring the government to explain away lost, missing, or destroyed evidence. Transferring the burden of persuasion from the defendant to the government will help to hold the government accountable and ensure defendants' due process rights are protected.

223. *Id.*