No. _____

In The

Supreme Court of the United States

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Anthony Olszewski, III,

petitioner

v.

Luis Spencer,
Superintendent, MCI - Norfolk

respondent

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Petition for Writ of Certiorari
to the United States Court of Appeals for the First Circuit

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Questions Presented

1. *Arizona v. Youngblood*, 488 U.S. 51 (1988), requires that a defendant claiming a due process violation from the destruction of evidence show only that the evidence was "potentially useful" and was destroyed "in bad faith". Olszewski made that showing. But the First Circuit required Olszewski to further show that the destroyed evidence, to which he never had access, was "material". The circuits are split regarding whether defendants must make such a showing. Do those circuits that require a showing of materiality contravene *Youngblood*?

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Petitioner Anthony Olszewski respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit**.**

Citations to the Opinions Below

The opinion of the Massachusetts Supreme Judicial Court ("SJC") reversing Olszewski's conviction is reported as *Commonwealth v. Olszewski*, 519 N.E.2d 587 (1988) ("Olszewski I"). The opinion of the Massachusetts Superior Court denying Olszewski's motion to dismiss is unpublished. The opinion of the SJC affirming Olszewski's conviction after a retrial is reported as *Commonwealth v. Olszewski*, 625 N.E.2d 529 (1993) ("Olszewski II"). The opinion of the United States District Court denying Olszewski's petition for a writ of habeas corpus is reported as *Olszewski v. Spencer*, 369 F. Supp. 2d 113 (D. Mass. 2005) ("Olszewski III"). The opinion of the United States Court of Appeals for the First Circuit affirming the denial of Olszewski's habeas corpus petition is reported as *Olszewski v. Spencer*, 466 F.3d 47 (2006) ("Olszewski IV"). Copies of the opinions below appear in the appendix to this petition at App. 1a-60a. (The Massachusetts Superior Court's opinion is one hundred twenty-four pages long. Olszewski has included only the relevant portions of that opinion in the appendix.)

Statement of Jurisdiction

The United States Court of Appeals for the First Circuit affirmed the denial of Olszewski's petition for a writ of habeas corpus on October 20, 2006. With the First Circuit's permission, Olszewski filed a petition for rehearing on November 9, 2006. That petition for rehearing was denied on November 21, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved In This Case

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Concise Statement of the Case

After extensive pre-trial hearings regarding the government's loss or destruction of at least ten pieces of evidence[1] and a fifteen day trial, Olszewski was convicted of the January 29, 1982 murder of his ex-girlfriend, Joanne Welch.[2] There were no witnesses to the crime and, in the words of the SJC, "there was no physical evidence connecting him to the crime."[3]

The government based its case on evidence that Olszewski had motive and opportunity, and had allegedly confessed to one Philip Strong. The defense was alibi. Olszewski's primary alibi witness was that same person: Philip Strong.

A. Olszewski's Alibi

On January 30, 1982, Olszewski told the police that he was in the company of Philip Strong at a Y.M.C.A. parking lot between seven and nine p.m. on January 29, the time the Commonwealth alleged that the murder was committed.[4] After meeting Strong

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[1] *Commonwealth v. Olszewski*, 519 N.E.2d 587, 589 (1988) ("*Olszewski I*").
[2] App. 36a.
[3] *Olszewski I*, 519 N.E.2d at 591.
[4] The transcript of the trial will be cited by volume and page as "(Tr. [volume]:[page])."; pre-trial transcripts will be cited as (Tr. [date]:[page number]); (Tr. 14: 165-169, 184-85); (Tr. 15:46, 192-193).

at the Y.M.C.A., Olszewski drove to a convenience store and was in the company of friends for the balance of the evening.[5]

B. Strong's statement supporting Olszewski's alibi

Sometime between January 31 and February 2, Strong gave the police a handwritten statement that exculpated Olszewski by corroborating his alibi.[6] The exact contents of Strong's handwritten statement are not known because it was deliberately destroyed at the behest of police officers.

The police never copied the statement.[7] They claimed that the statement was one paragraph long.[8] Strong testified that the entire content of the statement was: "I was with Tony Olszewski between seven and nine, we parked at the YMCA, we smoked a joint and talked for a while."[9]

But it took Strong between one and two hours to write out this statement.[10] Strong also testified that his original statement "described in detail" his meeting with Olszewski and might have included details of where he went after meeting Olszewski.[11] And both Strong and the police admitted that there were things in this first statement that neither of them could recall.[12]

At trial, the prosecutor used the destroyed evidence in his case-in-chief to argue for Olszewski's guilt. On direct examination of Strong, he elicited the supposed substance of

[5] (Tr. 14:166-169).
[6] (Tr. 9:172-177).
[7] (Tr. 16:85).
[8] App. 7a.
[9] (Tr.9:177).
[10] (Tr.9:177); (Tr. 10:48, 60-61).
[11] (Tr. 10:60, 63).
[12] (Tr. 16:54).

Strong's destroyed first statement in order to establish Olszewski's alleged consciousness of guilt in procuring an allegedly false alibi.[13]

C. The destruction of Strong's first statement

After Strong gave his statement corroborating Olszewski's alibi, the police investigation stalled. Although the police suspected Olszewski since January 30, 1982,[14] they did not arrest Olszewski until February 15.[15]

On February 15, the police again brought Strong in for questioning.[16] It was then that Strong's first statement was destroyed. The trial judge made detailed findings of fact regarding the destruction of evidence which the SJC adopted.[17]

The police began their questioning by accusing Strong of being a liar[18] and yelled at him.[19] At first, Strong maintained that his original statement was true.[20] The trial judge inferred that the police made Strong aware that he could "be subject to possible prosecution as an accessory after the fact to murder" (a charge carrying a sentence of life in prison).[21] Strong started to cry[22] and he agreed to give a further statement.[23]

After reducing Strong to tears, the police left him alone in the interview room with the only existing copy of his statement.[24] The police

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[13] (Tr. 9:173, 177).
[14] App. 48a-49a.
[15] App. 55a.
[16] App. 51a.
[17] App. 38a.
[18] (Tr. 8/31/88:132, 134).
[19] (Tr. 9:187).
[20] (Tr. 9:187-190).
[21] App. 40a.
[22] (Tr. 15:203); (Tr. 16:9).
[23] (Tr. 10:73-74).
[24] App. 40a; (Tr. 8/30/1988 at 56).

> deliberately left the statement on the conference room table and left the room in the hope that Strong would destroy the statement and give a new one . . . The officers gave him an opportunity to undo what he had done and he took advantage of it.[25]

Strong then ripped up the statement and threw it in a trash can.[26] The police knew that Strong had ripped up the statement, intended that he do so, and never made any attempt to retrieve the statement from the trash can.[27]

As noted above, the trial judge found that the police specifically intended that Strong destroy his first statement. The trial judge also commented on the police's motivation for destroying the statement. The trial judge found that

> [w]hat Captain Sypek and Detective Zielinski did was incredibly foolish but I do not believe it was done maliciously. They both sincerely believed that the first statement was false and wanted very much to have it corrected. I do not believe it ever occurred to either one of them that the first statement should be preserved for the purpose of providing the defendant with an impeachment tool.[28]

Viewed in perspective, however, the trial judge's findings make clear that the police knew that the statement exculpated Olszewski at the time of the destruction. Although the police viewed the statement as false, the clearly exculpatory nature of the statement is what prompted them to seek its destruction.

Further, the judge repeatedly found that the police testified untruthfully regarding the destruction. The police testified that they did not want Strong to destroy the statement.[29] The judge found that this was not true:

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[25] App. 57a.
[26] (Tr. 10:96).
[27] App. 56a-57a.
[28] App. 40a, 57a.
[29] (Tr. 8/30/88 at 48-50).

> on the contrary, I strongly suspect that they deliberately left the statement on the conference room table and left the room in the hope that Strong would destroy the statement and give a new one.[30]

The police testified that they had no knowledge that the statement had been destroyed until it was too late to remove it from the trash can.[31] The trial judge and the SJC found that this was not true.[32] They testified that they looked for the statement once they learned that Strong destroyed it.[33] The judge found that this testimony was also not true: "[o]nce the first statement was destroyed[,] I do not believe they made any attempt to retrieve it."[34] (In direct violation of 28 U.S.C. § 2254(e)(1),[35] the First Circuit's opinion credits the police testimony on this point that was explicitly rejected by the trial judge and the SJC.[36])

D. Violation of normal procedures in the destruction of Strong's first statement

As further evidence of bad faith, the police violated their standard procedures in the destruction of Strong's statement. Indeed, the First Circuit found that

> the police violated their established procedures by failing to photocopy the first statement and leaving Strong alone in an interview room for some period of time with the only existing copy of the statement.[37]

Specifically, Officer Zielinski affirmed that it was the normal practice of the police that, if a witness makes a second statement, to retain a photocopy of the original statement "for a record".[38] Obviously, Strong's first statement was not retained.

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[30] App. 57a.
[31] (Tr. 7/28/1988 at 166); (Tr. 8/30/88 at 59-64).
[32] App. 40a, 57a.
[33] (Tr. 8/30/88 at 60).
[34] App. 57a.
[35] *See also Thompson v. Keohane*, 516 U.S. 99, 111 (1995).
[36] App. 2a, 4a.
[37] App. 4a.
[38] (Tr. 8/31/88:100-101).

Sergeant Whitehead maintained his own separate case file with photocopies of statements he thought were "important."[39] He thought Strong's statement was important, but he chose not to make a photocopy.[40] He admitted that he had "no reason" not to photocopy the statement.[41] Out of the dozens of statements that were taken during the investigation, Strong's exculpatory statement was the only witness statement never photocopied.[42]

The police knew that this was the only copy of Strong's statement when they left it in the room with Strong, hoping it would be destroyed.[43] But the normal police practice was never to leave a witness alone in an interview room with the case file.[44] Other than Philip Strong, no witness was ever left alone with his statement and the statements of others.[45]

In addition, the District Court found that "having the police physically write [Strong's] second statement[] was inconsistent with established police procedures." [46] Specifically, Sergeant Whitehead's normal practice was to have a witness write out his statement.[47] Indeed, Strong handwrote his own first – exculpatory - statement in accord with Whitehead's practice.[48] Strong's second – accusatory - statement was written out not by Strong by Sergeant Whitehead, supposedly according to Strong's dictation.[49] Thirteen of the sixteen witness statements taken by Sergeant Whitehead were written in the witness's own

[39] (Tr. 14:211-212); (Tr. 15:9).
[40] (Tr. 15:74-75).
[41] (Tr. 7/28/88:137); (Tr. 15:76).
[42] (Tr. 16:85); (Tr. 7/28/88:190); *see* (Tr.5:210) (statement of Welch's sister copied, Strong's statement not copied); (Tr. 6:56).
[43] (Tr. 16:85).
[44] (Tr. 5:216); (Tr. 6:50); (Tr. 7/28/88:169).
[45] (Tr. 15:205); (Tr. 16:203).
[46] App. 22a.
[47] (Tr. 7/28/88:250).
[48] (Tr. 7/28/88:250).
[49] (Tr. 15:87); (Tr. 7/28/88:193).

hand.[50] Of the three written by Whitehead rather than the witness, two were statements of Strong.[51] The third was the statement of Robert Shore corroborating Strong's second statement.[52]

E. Strong's second statement recounting Olszewski's supposed confession.

After destroying the first statement, Strong made a new statement alleging that Olszewski had confessed the crime to him in gruesome detail, including facts known only to the police (including the officer who wrote out Strong's second statement).[53]

At trial, the Commonwealth's case relied almost entirely upon Strong's new statement as the "linchpin" of its case.[54] The SJC found that, without Strong's testimony, no rational trier of fact could have found Olszewski guilty.[55]

According to Strong, Olszewski confessed to him that he argued with Welch over her new boyfriend and her threat to report him to the police, strangled her with his hands and belt, stomped on her neck, and ran over her several times with her car.[56] He then drove Welch's car from West Springfield to neighboring Westfield, where he disposed of her body and her car.[57] Strong further testified that, on January 30, Olszewski told him that the police were "stumped" and that he had used Strong as an alibi for the period from 7:00 to 9:00 p.m. on January 28.[58] While he initially claimed that Olszewski arranged this

[50] (Tr. 15:14).
[51] (Tr. 15:15).
[52] (Tr. 15:15).
[53] App. 44a.
[54] App. 44a.
[55] App. 40a. n.9.
[56] App. 37a.
[57] (Tr. 9:163, 168).
[58] (Tr. 9:172-73).

meeting on January 30 to discuss his alibi, Strong ultimately admitted that their only contact that day had been coincidental.[59]

F. Post-conviction proceedings.

On direct appeal, the SJC did not apply *Youngblood* to Olszewski's claims. Rather, it applied its own state-law test for destruction of evidence that "weighs" three factors: "the culpability of the Commonwealth and its agents, the materiality of the evidence, and the potential prejudice to the defendant."[60] It found that Olszewski had not met the state-law test and affirmed Olszewski's conviction.[61] This Court denied certiorari.[62] On January 11, 1995, the Massachusetts Superior Court denied Olszewski's motion for a new trial.[63] State post-conviction proceedings continued until 2001.[64] Olszewski then timely petitioned the District Court for a writ of habeas corpus on December 5, 2001.[65] The District Court denied the petition.[66] Olszewski appealed and the First Circuit affirmed that denial.[67]

G. The First Circuit's opinion.

The First Circuit rejected Olszewski's *Youngblood* claim. It held that Olszewski satisfied the "potentially useful" prong of the *Youngblood* claim by demonstrating that the police destroyed "apparently exculpatory evidence, rather than merely potentially

[59] (Tr. 9:173-173); (Tr. 10:102).
[60] App. 38a.
[61] App. 39a-40a.
[62] *Olszewski v. Massachusetts*, 513 U.S. 835 (1994).
[63] App. 16a.
[64] App. 16a.
[65] App. 16a.
[66] App. 13a.
[67] App. 12a.

useful evidence."[68] As to the "bad faith" prong, the First Circuit refused to decide whether Olszewski had demonstrated bad faith. However, it noted the Commonwealth's concession that "such a showing is not required because Strong's first statement was apparently exculpatory."[69]

Instead, the First Circuit denied the *Youngblood* claim solely because Olszewski had failed to demonstrate that the destroyed statement was "material" or "irreplaceable".[70] The court explicitly rejected Olszewski's argument that requiring him to demonstrate materiality contravened *Youngblood*.[71] It reasoned that

> [i]n all cases under *Brady*, the defendant must demonstrate that the evidence was material to establish a constitutional violation whether the prosecution acted in good faith or bad faith. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Kyles v. Whitley*, 514 U.S. 419, 434-35, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *United States v. Hansen*, 434 F.3d 92, 102 (1st Cir. 2006).[72]

Having determined that a materiality showing was required, the court went on to hold that Olszewski failed to demonstrate that the destroyed evidence (to which he never had access) was material. Although Strong and the police admitted that there were "other things" in the statement that they could not remember, they testified that they could recall the substance of the statement that they destroyed.[73] According to the First Circuit, that was good enough to satisfy the Due Process Clause.[74]

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[68] App. 6a.
[69] App. 6a.
[70] App. 6a-7a.
[71] App. 7a.
[72] App. 7a.
[73] App. 7a.
[74] App. 7a-8a.

Reasons for Granting the Petition

I. The government destroyed a statement supporting Olszewski's alibi, knowing that it was exculpatory. The First Circuit held that the statement was both potentially useful and apparently exculpatory. Under *Arizona v. Youngblood*, 488 U.S. 51 (1988), police destruction of evidence which they know to be exculpatory constitutes bad faith. Olszewski is therefore entitled to relief and need not show that the destroyed evidence was "material".

A. Olszewski's case is well-suited for certiorari review.

Legally and factually, this case presents concise issues. Factually, the trial judge distilled the extensive pre-trial hearings regarding destruction of evidence into findings, not contested by either party, covering a mere eight double-spaced pages.[75]

Legally, the question of whether a defendant must demonstrate materiality when making a claim under *Youngblood* is squarely at issue here. Under *Youngblood*, a criminal defendant claiming a due process violation due to the destruction of evidence must demonstrate: (1) that the destroyed evidence was potentially useful and (2) that the evidence was destroyed in bad faith.[76] The Commonwealth conceded below that Olszewski met each of these requirements (by demonstrating that the exculpatory value of the statement was apparent at the time it was destroyed).[77] Their contention, accepted by the First Circuit, was that his claim failed because he did not further demonstrate the materiality of the destroyed evidence.[78]

But in its 1988 *Youngblood* decision, this Court left no doubt about the test to be applied to destruction of evidence claims. Its holding was clear and succinct:

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[75] App. 48a-56a.
[76] *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *Illinois v. Fisher*, 540 U.S. 544, 548 (2004).
[77] App. 6a.
[78] App. 7a-8a.

> We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.[79]

The Court's 2004 per curiam decision in *Illinois v. Fisher* rebuked lower courts for deviating from the *Youngblood* standard and emphatically restated *Youngblood*'s holding:

> [T]he applicability of the bad-faith requirement in *Youngblood* depended not on the centrality of the contested evidence to the prosecution's case or the defendant's defense, but on the distinction between "material exculpatory" evidence and "potentially useful" evidence.[80]

Fisher draws this distinction three times.[81] *Fisher*, like *Youngblood*, makes no mention of a separate requirement of materiality in cases of destroyed evidence.[82]

This distinction between potentially useful evidence and material exculpatory evidence is dispositive in this case. Potentially useful evidence is evidence "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."[83] It is fairly easy for defendants to demonstrate that destroyed evidence was potentially useful. In *Fisher*, a drug possession case, this Court held that a substance that tested positive as cocaine four times before its destruction was nevertheless "potentially useful".[84]

On the other hand, it is nearly impossible for a criminal defendant to demonstrate that destroyed evidence was material. To demonstrate materiality, the defendant must demonstrate (1) that the exculpatory (not just useful) nature of the evidence was apparent (not just a potentiality) before its destruction, and (2) that the defendant cannot obtain

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[79] *Youngblood*, 488 U.S. at 57-58.
[80] *Fisher*, 540 U.S. at 549 (quoting *Youngblood*, 488 U.S., at 57-58).
[81] *Fisher*, 540 U.S. at 547, 548, 549.
[82] *Id.* at 548.
[83] *Youngblood*, 488 U.S. at 57.
[84] *Fisher*, 540 U.S. at 545, 548.

"comparable" evidence.[85] It is nearly impossible to satisfy this materiality standard because, as one commentator observed,

> when the prosecution has destroyed evidence, the defendant will never know whether the destroyed material was or was not exculpatory. Indeed, if the defendant does possess independent evidence that demonstrates the exculpatory value of the destroyed material . . . . then the defendant is able to obtain comparable evidence by other reasonably available means and hence is not entitled to relief.[86]

Here, the First Circuit held that cross-examination was "comparable" to the destroyed statement.[87]

But because the police ensured the destruction of the statement, Olszewski could never demonstrate that cross-examination was not comparable to the statement itself. By requiring Olszewski to demonstrate the materiality of evidence destroyed by the state, the First Circuit contravened both common sense and the plain language of *Youngblood*.

The issue is clearly defined. The facts are uncontroverted. The lower courts are split on the issue.[88] The Court should grant review.

B. A defendant who satisfies the "potentially exculpatory" and "bad faith" prongs of *Youngblood* is entitled to relief and need not also demonstrate that the destroyed evidence was material.

Olszewski satisfied both the "potential usefulness" prong of *Youngblood* and the "bad faith" prong of *Youngblood*. He demonstrated potential usefulness by showing that the destroyed statement exculpated him and provided a basis for cross-examining the government's main witness.[89] The Commonwealth conceded that he met the bad faith

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[85] App. 5a (*citing California v. Trombetta*, 467 U.S. 479, 488-89 (1984)).
[86] JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE, § 6.7 at 217 (1989) (footnotes and quotation marks omitted).
[87] App. 7a.
[88] § II, *infra*.
[89] App. 4a, 18a.

prong by demonstrating that the exculpatory character of Strong's statement was apparent to the police at the time that they engineered its destruction.[90]

That should have been the end of the inquiry. By requiring Olszewski to also demonstrate that the destroyed statement - which he never saw - was material, the First Circuit contravened both *Youngblood* and *Fisher*.

Despite the clear language in *Youngblood* and the emphatic language in *Fisher*, the First Circuit relies on this Court's 1984 decision in *California v. Trombetta*[91] to justify their imposition of an additional materiality inquiry. In analyzing whether the state had violated the Due Process Clause by failing to retain breath samples taken from breathalyzers, the *Trombetta* Court stated that

> [w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, see *United States v. Agurs*, 427 U.S. [97, 109-110 (1976)], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.[92]

Some lower courts, including the First Circuit, have seized on this passage and have required defendants to meet both this test and the *Youngblood* test.[93] As a result, the First Circuit required Olszewski to demonstrate not only bad faith and potential usefulness, but also required him to demonstrate that the destroyed statement was material and "irreplaceable", i.e., that he could not obtain comparable evidence.

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[90] App. 6a.
[91] *California v. Trombetta*, 467 U.S. 479 (1984).
[92] *Id.* at 488-89 (footnote omitted).
[93] App. 7a; *see* § II, *infra*.

But Chief Justice Rehnquist's later opinion for the Court in *Youngblood* drew a controlling distinction between "potentially useful" evidence and "material" evidence. Again, potentially useful evidence is evidence "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."[94] The destroyed evidence in *Youngblood* was enough to be considered "potentially useful", but it would not have satisfied the *Trombetta* materiality standard.[95]

In light of the significant difference between the *Youngblood*'s new "potentially useful" standard and the prior *Trombetta* standard, the Court imposed a bad faith requirement as well. It reasoned

> that requiring a defendant to show bad faith on the part of the police . . . limits the extent of the police's obligation to preserve evidence to . . . 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 potentially useful evidence does not constitute a denial of due process of law.[96]

Therefore, the incorporation of bad faith essentially replaces *Trombetta*'s materiality inquiry because the police's bad faith "conduct indicate[s] that the evidence could form a basis for exonerating the defendant." That is, the destruction of evidence in bad faith is tantamount to a police admission that the evidence was material.[97] Justice Blackmun's dissent in *Youngblood*, although not controlling, also describes the majority opinion as eliminating *Trombetta*'s constitutional materiality inquiry; "the inquiry the majority eliminates in setting

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[94] *Youngblood*, 488 U.S. at 57 (emphasis added).
[95] *Id.* at 56 n.*.
[96] *Id.*, at 57-58.
[97] GORELICK ET AL., DESTRUCTION OF EVIDENCE §6.7 at 217.

up its 'bad faith' rule is whether the evidence in question here was 'constitutionally material'."[98]

Justice Blackmun was correct. The Court had good reasons for omitting materiality from *Youngblood*. As explained above, it is nearly impossible for defendant's to demonstrate that destroyed evidence is material. Recognizing that difficulty, *Youngblood* explains that part of the reason for the bad faith requirement was its desire to prevent courts from undertaking the "'treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.'"[99] The bad faith requirement properly obviates the need for such unreliable inquiries.

Therefore, the exclusive test for destruction of evidence is simply: (1) whether the destroyed evidence was potentially useful, and (2) whether police acted in bad faith. There is no materiality requirement.

C. The First Circuit's contravention of *Youngblood*

The First Circuit disagreed. It reasoned that,

> The requirement that the evidence be irreplaceable was directly addressed by the Supreme Court in *Trombetta* in connection with the second prong of the materiality requirement. The Supreme Court considered whether the defendants "were without alternate means of demonstrating their innocence." *Trombetta*, 467 U.S. at 490. . . .
>
> The defendant argues that *Trombetta*'s irreplaceability requirement has been eliminated by *Youngblood*. We disagree. There is nothing in *Youngblood* to suggest elimination of the irreplaceability requirement. Also, while neither the Supreme Court nor this court has directly addressed the irreplaceability requirement in the context of apparently exculpatory evidence (as opposed to potentially exculpatory evidence), we conclude that proof of irreplaceability is required in both apparent and

[98] *Youngblood*, 488 at 67 (Blackmun, J. dissenting).
[99] *Id.*, 488 U.S. at 58 (quoting *Trombetta*, 467 U.S. at 486).

> potential exculpatory evidence cases. In all cases under *Brady*, the defendant must demonstrate that the evidence was material to establish a constitutional violation whether the prosecution acted in good faith or bad faith. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Kyles v. Whitley*, 514 U.S. 419, 434-35, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *United States v. Hansen*, 434 F.3d 92, 102 (1st Cir. 2006). Irreplaceability is part of the materiality requirement in destroyed evidence cases, and it follows that the defendant in such a case bears the burden of showing that the evidence was irreplaceable. [**26] See *Trombetta*, 467 U.S. at 489; *Femia*, 9 F.3d at 993.[100]

The First Circuit and other circuits are flatly wrong on this point. *Youngblood* and *Fisher* explicitly reject the use of *Brady* and *Agurs* materiality analysis. In *Fisher*, this Court reiterated that analysis under the Due Process Clause requires a showing of "'"potentially useful evidence" referred to in *Youngblood*, not the material exculpatory evidence addressed in *Brady* and *Agurs*.'"[101]

Yet, this is exactly what the First Circuit did. Ignoring this Court's injunction against attempting to divine the contents of "unknown and, very often, disputed.'"[102] destroyed material, it held that cross-examination of the very actors who conspired to deliberately destroyed exculpatory evidence in a first-degree murder investigation was "comparable" to giving Olszewski access to the destroyed statement itself.[103] Because the police destroyed the statement, there is obviously no way to verify the assertion that cross-examination was comparable to the destroyed statement itself. Undaunted, the First Circuit felt that it could divine the import of the statement that it (and Olszewski) never saw.

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[100] App. 6a-7a.
[101] *Fisher*, 540 U.S. at 548 (emphasis added).
[102] *Youngblood*, 488 U.S. at 58 (quoting *Trombetta*, 467 U.S. at 486).
[103] App. 7a.

But the contents of Strong's first statement were, in the words of *Youngblood*, unknown and disputed. Trial counsel succinctly argued in closing that the police had to destroy Strong's alibi statement because it contained information that would have objectively verified the meeting between Strong and Olszewski at the time of the murder: "it carried its own indicators of reliability, and therefore, it could not survive."[104] Even if the first statement contained only bland details such as who Strong saw during, before, or after his encounter with Olszewski, or who he might have contemporaneously told about his meeting with Olszewski, those details would significantly strengthen Olszewski's defense if Olszewski could investigate and independently corroborate them.

Further, by the prosecutor's own account, Strong had "not the greatest memory."[105] Both Strong and Captain Sypek testified that there were things in this first statement that neither of them could recall.[106] The most that can be said about Strong's statement is that "the general contents of the destroyed statement were known."[107] But general testimony about destroyed evidence simply is not a constitutionally sufficient replacement for the specific potentially useful details that were destroyed by the government.[108]

Consistent with the constitution, Olszewski cannot be forced to rely on those who deliberately destroyed information they knew to be exculpatory to accurately recount all the details of that information.

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[104] (Tr. 17:70).
[105] (Tr. 17:99).
[106] (Tr. 16:54).
[107] App. 40a.
[108] *See, e.g.*, *United States v. Cooper*, 983 F.2d 928, 932-33 (10th Cir. 1993); *United States v. Bohl*, 25 F.3d 904, 912 (10th Cir. 1994).

II. This Court must step in and correct those lower courts, like the Massachusetts courts and the First Circuit, that have impermissibly deviated from this Court's perfectly clear *Youngblood* standard.

The Court should grant the writ of certiorari because the lower courts have frankly made a hash of *Youngblood*. As explained above, *Youngblood* clearly establishes a test with two prongs and two prongs only: potential usefulness and bad faith. This Court must step in because, although some courts have faithfully followed that standard, others have rejected it. Further, some state courts have developed state-law "balancing" tests that explicitly provide less protection than *Youngblood*.

The Fourth Circuit,[109] Tenth Circuit,[110] and twelve states[111] faithfully employ the *Youngblood* standard and do not require defendants to make a showing of materiality. But other circuits have been inconsistent or employed lax analysis. The Second, Fifth, Ninth and District of Columbia circuits have vacillated between adhering to the *Youngblood*

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[109] *Basden v. Lee*, 290 F.3d 602, 615 (4th Cir.), *cert. denied*, 537 U.S. 980 (2002); *United States v. Smith*, 451 F.3d 209, 221 (4th Cir.), *cert. denied*, 127 S. Ct. 197 (2006); *Lovitt v. True*, 403 F.3d 171, 186 (4th Cir.), *cert. denied*, 126 S. Ct. 400 (2005).

[110] *United States v. Sullivan*, 919 F.2d 1403, 1426 (10th Cir. 1990); *United States v. Richard*, 969 F.2d 849, 853 (10th Cir.), *cert. denied*, 506 U.S. 887 (1992); *Bohl*, 25 F.3d at 909-12; *United States v. Gomez*, 191 F.3d 1214, 1219 (10th Cir. 1999); *Bullock v. Carver*, 297 F.3d 1036, 1056 (10th Cir.), *cert. denied*, 537 U.S. 1093 (2002).

[111] *State v. Youngblood*, 844 P.2d 1152, 1157-58 (Ariz. 1993); *State v. Craig*, 490 N.W.2d 795, 796-797 (Iowa 1992); *State v. Finley*, 42 P.3d 723, 727 (Kan. 2002); *Collins v. Commonwealth*, 951 S.W.2d 569 (Ky. 1997); *People v. Leigh*, 451 N.W.2d 512, 513 (Mich. Ct. App. 1989); *State v. Benson*, 788 N.E.2d 693, 695 (Ohio Ct. App. 2003); *Torres v. State*, 962 P.2d 3, 13 (Okla. Crim. App. 1998), *cert. denied*, 525 U.S. 1082 (1999); *Commonwealth v. Small*, 741 A.2d 666, 676 (Pa. 1999), *cert. denied*, 531 U.S. 829 (2000).; *Commonwealth v. Deans*, 610 A.2d 32, 34 (Pa. 1992); *State v. Hales*, 2007 UT 14, 40 (Utah 2007); *State v. Gulbransen*, 106 P.3d 734, 742 (Utah 2005); *State v. Wittenbarger*, 880 P.2d 517, 522 (Wash. 1994); *State v. Greenwold*, 525 N.W.2d 294, 297 (Wis. Ct. App. 1994); *Whitney v. State*, 99 P.3d 457, 481 (Wyo. 2004), *cert. denied*, 544 U.S. 1001 (2005).

standard[112] and requiring a showing of materiality.[113] On the other hand, the Sixth[114] and Eighth[115] circuits recognize that the defendant need not demonstrate the materiality of the destroyed evidence but nevertheless require that defendants meet the *Trombetta* standard in addition to the *Youngblood*. They do this despite Chief Justice Rehnquist's explanation that the *Youngblood* standard is distinct from *Trombetta*, not just an addendum to it.[116]

Like the First Circuit, the Third[117] and Seventh circuits[118] have consistently required that defendants demonstrate the materiality of the destroyed evidence. (While the Eleventh Circuit has not frequently addressed the issue, it has also required a showing of materiality.[119]) Twenty-two states similarly require a showing of materiality.[120]

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[112] *United States v. Pirre*, 927 F.2d 694, 697 (2nd Cir. 1991); *Hernandez v. Burge*, 137 Fed. Appx. 411, 414 (2d Cir. 2005); *United States v. Moore*, 452 F.3d 382, 388 (5th Cir.), *cert. denied*, 127 S. Ct. 423 (2006); *United States v. Rambo*, 74 F.3d 948, 954 (9th Cir. 1995), *cert. denied*, 519 U.S. 819 (1996); *In re Sealed Case*, 99 F.3d 1175, 1178 (D.C. Cir. 1996); *United States v. Estrada*, 453 F.3d 1208, 1212-13 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 990 (2007).

[113] *United States v. Nichols*, 912 F.2d 598, 603 (2nd Cir. 1990); *United States v. Rastelli*, 870 F.2d 822, 833 (2d Cir. 1989); *United States v. Thompson*, 130 F.3d 676, 686 (5th Cir. 1997), *cert. denied*, 524 U.S. 920 (1998); *Grisby v. Blodgett*, 130 F.3d 365, 371 (9th Cir. 1997); *United States v. McKie*, 951 F.2d 399, 403 (D.C. Cir. 1991) (Ginsburg, J.).

[114] *United States v. Jobson*, 102 F.3d 214, 218 (6th Cir. 1996); *United States v. Wright*, 260 F.3d 568, 571 (6th Cir. 2001).

[115] *United States v. Chase Alone Iron Eyes*, 367 F.3d 781, 786 (8th Cir. 2004); *United States v. Malbrough*, 922 F.2d 458, 463 (8th Cir. 1990), *cert. denied*, 501 U.S. 1258 (1991).

[116] *Youngblood*, 488 U.S. at 57-58.

[117] *United States v. Ramos*, 27 F.3d 65, 71 (3rd Cir. 1994); *United States v. Jackman*, 72 Fed. Appx. 862, 867 (3d Cir. 2003).

[118] *Hubanks v. Frank*, 392 F.3d 926, 931 (7th Cir. 2004), *cert. denied*, 544 U.S. 1025 (2005).

[119] *United States v. Brown*, 9 F.3d 907, 910 (11th Cir. 1993), *cert. denied*, 513 U.S. 852 (1994).

[120] *Wenzel v. State*, 815 S.W.2d 938, 940-41 (Ark. 1991); *People v. Frye*, 959 P.2d 183, 205 (Cal. 1998), *cert. denied*, 526 U.S. 1023 (1999); *People v. Wyman*, 788 P.2d 1278, 1279-1280 (Colo. 1990); *Guzman v. State*, 868 So. 2d 498, 509 (Fla. 2003); *Walker v. State*, 264 Ga. 676, 680 (Ga. 1994); *Holder v. State*, 571 N.E.2d 1250, 1255 (Ind. 1991); *State v. Lindsey*, 543 So. 2d 886, 892 (La. 1989), *cert. denied*, 494 U.S. 1074 (1990);

Massachusetts, thirteen other states, and the District of Columbia have formulated their own "balancing" or "weighing" tests,[121] the application of which can actually result in less protection for a defendant than that provided by the United States Constitution. In Olszewski's case, the SJC stated Massachusetts test as follows:

> For each piece of missing evidence shown to be potentially exculpatory, the judge must weigh the culpability of the Commonwealth and its agents, the materiality of the evidence, and the potential prejudice to the defendant.[122]

It has further explained that

State v. Schexnayder, 685 So. 2d 357, 366 (La. Ct. App. 1996), *cert. denied*, 522 U.S. 839 (1997); *State v. Berkley*, 567 A.2d 915, 917-918 (Me. 1989); *Tolen v. State*, 477 A.2d 797, 804 (Md. Ct. Spec. App.), *rev. denied*, 484 A.2d 274 (Md. 1984); *State v. Larivee*, 656 N.W.2d 226, 231 (Minn.), *cert. denied*, 540 U.S. 812 (2003); *Murray v. State*, 849 So.2d 1281 (Miss. 2003); *State v. Burns*, 112 S.W.3d 451, 454-455 (Mo. Ct. App. 2003); *State v. Gollehon*, 864 P.2d 1257, 1264-1265 (Mont. 1993); *State v. Castor*, 257 Neb. 572, 590 (Neb. 1999); *State v. Robinson*, 488 S.E.2d 174 (N.C. 1997); *State v. Hunt*, 483 S.E.2d 417, 420 (N.C. 1997); *State v. Hernandez*, 707 N.W.2d 449, 460 (N.D. 2005); *In re Huskey*, 882 P.2d 1127, 1130 (Or. Ct. App. 1994), *rev. denied*, 889 P.2d 1299 (Or. 1995); *State v. Werner*, 851 A.2d 1093, 1105 (R.I. 2004); *State v. Cheeseboro*, 552 S.E.2d 300, 307 (S.C. 2001), *cert. denied*, 535 U.S. 933 (2002); *State v. Lyerla*, 424 N.W.2d 908, 911 (S.D. 1988), 488 U.S. 999 (1989); *San Miguel v. State*, 864 S.W.2d 493, 495 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 1215 (1994); *Lovitt v. Warden*, 585 S.E.2d 801, 815 (Va. 2003), *cert. denied*, 541 U.S. 1006 (2004).

[121] *Ex parte Gingo*, 605 So. 2d 1237, 1241 (Ala. 1992); *Grimsley v. State*, 678 So. 2d 1197, 1203-04 (Ala. Crim. App. 1996); *State v. Ward*, 17 P.3d 87, 90 (Alaska Ct. App. 2001); *Thorne v. Dep't of Public Safety*, 774 P.2d 1326, 1331 (Alaska 1989); *State v. Estrella*, 893 A.2d 348, 363 (Conn. 2006); *State v. Morales*, 657 A.2d 585, 591-592 (Conn. 1995); *Hammond v. State*, 569 A.2d 81, 86 (Del. 1989); *Lolly v. State*, 611 A.2d 956, 960 (Del. 1992); *Williams v. United States*, 881 A.2d 557, 565 (D.C. 2005), *cert. denied*, 126 S. Ct. 1132 (2006); *State v. Porter*, 948 P.2d 127, 136 (Idaho 1997), *cert. denied*, 523 U.S. 1126 (1998); *People v. Newberry*, 652 N.E.2d 288 (Ill. 1995), overruled, *Fisher*, 540 U.S. at 548; *Olszewski I*, 519 N.E.2d at 590; App. 38a-40a (*Olszewski II)*; *State v. Dreher*, 695 A.2d 672, 709 (N.J. App. Div. 1997), *cert. denied*, 524 U.S. 943 (1998); *Scoggins v. State*, 111 N.M. 122, 124 (N.M. 1990); *People v. Conway*, 297 A.D.2d 398, 400 (N.Y. App. Div. 2002), , *rev. denied*, 785 N.E.2d 738 (N.Y. 2003); *State v. Ferguson*, 2 S.W.3d 912, 917 (Tenn. 1999); *State v. Gibney*, 825 A.2d 32, 42-43 (Vt. 2003); *State v. Osakalumi*, 194 W. Va. 758, 766 (W. Va. 1995).

[122] App. 38a.

> [t]he Commonwealth's conduct is merely a factor to be weighed in determining its culpability. That culpability, if any, is then weighed along with the other two factors, materiality and prejudice, in determining whether, and to what extent, any remedy will be employed.[123]

This test and (other state-law weighing tests) are contrary to *Youngblood* by their very terms. Under such weighing tests, bad faith by the police – no matter how egregious - is merely a "factor" and not dispositive of the issue.[124] But bad faith is the dispositive inquiry under *Youngblood*.[125]

For the same reason, the Massachusetts courts' consideration of prejudice is contrary to *Youngblood*. If bad faith is found in the destruction of potentially useful evidence, then the *Youngblood* inquiry is at an end.[126] But the SJC required Olszewski to establish *both* bad faith and prejudice.[127] (The SJC also contravened *Youngblood* by requiring a showing that the destroyed evidence was "potentially exculpatory" rather than "potentially useful".[128])

The impermissible nature of such weighing tests is exemplified by the Delaware Supreme Court's description of its own test. It observed that its

> "totality of the circumstances" approach might actually preserve convictions for the State where the evidence of bad faith presents a close question and the trial judge would have otherwise dismissed the charge.[129]

But states are not entitled to employ a standard that "preserves" convictions where the federal constitution requires that the defendant be afforded relief.

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[123] *Commonwealth v. Willie*, 510 N.E.2d 258, 261-62 (1987) (citations and footnote omitted).
[124] *See, e.g., Willie*, 510 N.E.2d at 261-62.
[125] *Youngblood*, 488 U.S. at 57.
[126] *Id.* at 58; *Doggett v. United States*, 505 U.S. 647 (1992).
[127] App. 40a.
[128] App. 40a.
[129] *Lolly*, 611 A.2d at 960.

Only Hawaii, Nevada, and New Hampshire have developed state-law tests that do not afford less protection to criminal defendants than the protection afforded by *Youngblood*. Hawaii and Nevada acknowledge the *Youngblood* standard but also afford the defendant relief if he demonstrates prejudice from the destruction regardless of the good or bad faith of the government.[130] New Hampshire places the burden on the state to prove good faith.[131] If the state carries its burden, only then is the defendant required to demonstrate the materiality of the destroyed evidence.[132]

Conclusion

The First Circuit and too many other courts ignore the clear dictates of *Youngblood.* In doing so, they reduce *Youngblood*'s promise of due process protection against government destruction of evidence to a false hope. This Court should grant the defendant's petition for a writ of certiorari.

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[130] *State v. Matafeo*, 787 P.2d 671, 673 (Haw. 1990); *Leonard v. State*, 17 P.3d 397, 407 (Nev. 2001).
[131] *State v. Smagula*, 578 A.2d 1215, 1217 (N.H. 1990).
[132] *Id.*