**No.**

IN THE

# Supreme Court of the United States

KESHAUN EARLEY,
*Petitioner*,

v.

THE STATE OF NEW JERSEY,
*Respondent*.

**On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

In *Arizona v. Youngblood*, 488 U.S. 51 (1988), and *Illinois v. Fisher*, 540 U.S. 544 (2004), this Court held that the police violate a defendant's due process rights when they destroy potentially exculpatory evidence in bad faith. This Court, though, did not define what constitutes "bad faith" under this standard.

Since *Youngblood* and *Fisher*, state courts and federal circuit courts have divided on what a defendant must prove to satisfy the bad faith standard, with some requiring malicious intent, others requiring only knowledge of the evidence's potential exculpatory value, and still others requiring recklessness, gross negligence, or other severe misconduct.

The question presented is:

Whether the police acted in bad faith and thus violated Petitioner's due process rights where the trial court found that (1) the police knowingly destroyed potentially exculpatory evidence as part of a pattern of "cavalier" disregard for the State's obligation to preserve such evidence, and (2) the absence of the destroyed evidence was prejudicial to Petitioner's ability to present his alibi?

## PARTIES TO THE PROCEEDING

The Petitioner (appellant below) is Keshaun Earley. The respondent (appellee below) is the State of New Jersey.

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## OPINIONS BELOW

The Superior Court of New Jersey, Appellate Division's opinion is unreported. Pet. App. A. The Superior Court of New Jersey, Law Division's opinions are unreported. Pet. App. B and C. The July 10, 2017 order of the Supreme Court of New Jersey denying Petitioner's Petition for Certification is reported as *State v. Earley*, 230 N.J. 537 (2017). Pet. App. D. The September 11, 2017 order of the Supreme Court of New Jersey denying Petitioner's Motion for Reconsideration is not reported. Pet. App. E.

## JURISDICTION

The Superior Court of New Jersey, Appellate Division originally filed its opinion on March 17, 2017. Pet. App. A. The Supreme Court of New Jersey denied Petitioner's Petition for Certification on July 10, 2017. Pet. App. D. On September 11, 2017, the Supreme Court of New Jersey filed its order denying Petitioner's timely Motion for Reconsideration of the order denying the petition for certification. Pet. App. E. This Petition for a Writ of Certiorari is filed within ninety days of the Supreme Court of New Jersey's denial of the motion for rehearing. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, Section 1 of the United States Constitution:

> . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT

### I. STATEMENT OF THE CASE

In *Arizona v. Youngblood*, 488 U.S. 51 (1988), and *Illinois v. Fisher*, 540 U.S. 544 (2004), this Court held that a state violates a defendant's due process rights when the police destroy potentially exculpatory evidence and the defendant "can show bad faith on the part of the police." *Youngblood*, 488 U.S. at 58. This Court left open, however, exactly what a defendant must prove to establish "bad faith." State and federal courts since have divided over the question that *Youngblood* and *Fisher* left unanswered, and they have come to splintered and conflicting conclusions. Some courts rigidly require proof of actual malicious intent, as the New Jersey court did below. Other courts require only proof that the police knew of the potential exculpatory nature of the evidence. And still others apply more flexible, multi-factor approaches that encompass proof of the

police's recklessness, gross negligence, or other severe misconduct.

Petitioner was significantly affected by this conflict. In this case, the New Jersey appellate court concluded that *Youngblood* demanded proof that the police intentionally and maliciously destroyed potentially exculpatory evidence. The trial court found that the police acted with a pattern of "cavalierly" disregarding its evidence-preservation obligations and lacked a policy for the destruction of evidence. Indeed, the trial court found that the destruction was prejudicial to Petitioner's defense. Nonetheless, on appeal, the New Jersey appellate court held that the police had not acted with "official animus" or "conscious" intent to suppress evidence, and therefore the police's conduct could not constitute a due process violation under *Youngblood*.

As discussed below, the New Jersey appellate court's conclusion diverges from the interpretation of the *Youngblood* standard by numerous other state and federal courts, conflicts with this Court's standards for what constitutes "bad faith" in other criminal Constitutional contexts, and clashes with the principles that undergird *Youngblood*. This issue has broad implications not only to Petitioner in this case, but to numerous defendants nationwide. And, because the courts below made clear findings that cleanly and directly present the question, this case is the optimal vehicle for this Court to resolve the issue. Petitioner thus respectfully requests that this Court grant the Petition for a Writ of Certiorari.

## II. FACTUAL BACKGROUND

### A. Petitioner's Alibi Depended On The Contents Of Surveillance Tapes That The Police Destroyed

Mr. Earley was arrested for a murder that occurred on August 26, 2012, at 12:10 p.m. in Atlantic City, New Jersey. 10 T. 36, 185; 12 T. 183, 196–197.[1] Upon his arrest, Mr. Earley told the police that at the time of the incident he was at an apartment complex in Mays Landing, New Jersey, at least fifteen miles away. 5 T. 131; 14 T. 29–35.

Three days after the shooting, detectives from the Atlantic County Prosecutor's Office obtained surveillance footage from noon to midnight on the day of the crime from the eighteen cameras monitoring the apartment complex. 5 T. 42, 47–53, 120. These cameras commanded views of all entrances and exits to the apartment complex and, thus, could have supported Mr. Earley's alibi. 13 T. 67–69.

Over the course of many weeks, Sergeant Lynne Dougherty reviewed the 216 hours of surveillance video. 5 T. 114, 119. She took no notes when she watched the footage. 5 T. 118. The drive containing the video was kept in lockers used to store evidence temporarily, and Sergeant Dougherty

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[1] Citations to transcripts of the proceedings below not included in Petitioner's Appendix are referred to as "T," prefaced by the volume number and followed by the page number.

acknowledged treating the video as important evidence to the investigation. 5 T. 116–118.

New Jersey discovery rules required the prosecutor to turn the video over upon return of the indictment on March 20, 2013. N.J. Ct. R. 3:13-3(b). On July 3, 2013, defense counsel stated in court that he had still not received a copy of the surveillance footage and had called Sergeant Dougherty to obtain the video. 3 T. 6; 5 T. 138. Rather than turn the video over, Lieutenant Bruce DeShields instructed Sergeant Daugherty to extract the "relevant" portions of the video and to send only those portions to the defendant. 5 T. 145–148. On July 5, 2013, two days after defendant's request, Sergeant Dougherty asked Lieutenant Matthew Paley to extract two segments of video, knowing that the remainder of the footage would be deleted. 5 T. 138–139, 152.

The segments of the video sent to Petitioner showed a person resembling Mr. Earley walking into a residential cul-de-sac at the apartment complex at 12:25 p.m., just fifteen minutes after the murder occurred at least fifteen miles away. Although the State questioned the 12:25 p.m. identification, the State did not contest that the video segments also showed one of Mr. Earley's friends, April Tobias, drive her car into that cul-de-sac at 12:42 p.m., and then drive out two minutes later at 12:44 p.m. with Mr. Earley in the passenger seat. The video also showed Mr. Earley playing with his six-year-old daughter at a playground on the complex from 4:42 p.m. to 4:50 p.m., which confirmed Mr. Earley's statement and Ms. Tobias' testimony that they had

driven to pick up his daughter with whom he spent the remainder of the day. 11 T. 50, 55–60, 63–71; 14 T. 7.

The police destroyed the rest of the footage. Mr. Earley's alibi defense hinged on the information that the State unilaterally deemed irrelevant and deleted. The State's theory of the case was that Mr. Earley committed the shooting in Atlantic City at 12:10 p.m., and was then driven at least fifteen miles to Mays Landing with enough time to have been captured on the preserved video just fifteen minutes after the murder, at 12:25 p.m. or, at most, nineteen minutes after that when the video showed Mr. Earley driving out of the apartment complex at 12:44 p.m. The critical deleted minutes from noon to 12:44 p.m. thus were crucial to Mr. Earley's defense.

Because the surveillance cameras monitored the entrance to the complex and all roads within, they very likely would have captured whether any car drove Mr. Earley into the complex. Had the video shown Mr. Earley return to the complex before 12:25 p.m., it would have been highly relevant to Mr. Earley's innocence. It may have shown him at the time of the crime or, at least, would have reduced further the time between the crime and when Mr. Earley returned to the apartment. Such evidence would have supported that he could not have driven the fifteen miles from the crime scene in the available time. On the other hand, had the video shown no evidence that Mr. Earley returned to the complex after the murder and before Mr. Earley's appearances on the video at 12:25 p.m. and 12:44 p.m., this evidence too would have strongly

supported his alibi that he was at the complex the entire time, including when the murder occurred. Regardless of what was on the destroyed video, the evidence would have been highly material to Mr. Earley's defense.

### B. The Trial Court Rejected Mr. Earley's Due Process Claim, Even Though It Found That The Police Acted Cavalierly

Mr. Earley filed a pretrial motion to dismiss the indictment asserting that the destruction of the potentially exculpatory video footage denied him due process of law.

At the pretrial hearing, Sergeant Dougherty testified that she made the decision to keep only portions of the surveillance footage, but that she did so without any attorney input and without reference to any internal evidence destruction policy (which she believed did not exist). 5 T. 139, 148, 150–151. The trial court rejected the State's contention that the video was destroyed for "budgetary reasons" and as a matter of "economy" because the drive was needed for other cases. 5 T. 84, 192. The court voiced particular concern that the State lacked known policies governing the destruction of evidence and could not produce any such policy. Pet. App. B, 51–53; 5 T. 107–109.

The court described the police decision to extract only a few portions of the video, and to destroy the rest, as "cavalier." 5 T. 185. The trial court further "clearly" found that the 216 hours of destroyed video footage was material to the defense,

and that Mr. Earley was prejudiced by its destruction. Pet. App. B, 50, 55–56, 62.

Despite these findings, the court denied Mr. Earley's motion to dismiss the indictment. The court initially stated that a due process violation could occur based on "intentional [sic] inconsistent with fair play and therefore inconsistent with due process or an egregious carelessness or prosecutorial excess tantamount to suppression." Pet. App. B, 44. However, in denying Mr. Earley's motion, the court held that, to find a due process violation, it "would have to clearly find that there was bad faith or connivance on the part of the government." Pet. App. B, 54. Finding no "bad faith or connivance," and thus no state or federal due process violation, the court instead instructed the jury that it "may draw an inference unfavorable to the State which in itself may create a reasonable doubt as to defendant's guilt." 15 T. 138–39.

### C. Without The Destroyed Evidence, Mr. Earley Could Not Establish His Alibi And Was Convicted

At trial, the State based its case against Mr. Earley on three witnesses who identified him as the shooter. Pet. App. A, 6–8. Because the perpetrator of the crime held a towel over his face, all three witnesses identified Petitioner only from their observations made during a two-second window when the perpetrator's face covering briefly slipped. 10 T. 36, 66, 154; 13 T. 138–89.

Mr. Earley presented his alibi that he was in Mays Landing at the time of the crime. Mr. Earley supported his alibi with the portions of the surveillance video from the apartment complex that the police had not destroyed. He also presented other corroborating evidence, including witness testimony verifying his whereabouts shortly before and after noon that day, as well as cell tower records showing he was on a phone call in Mays Landing within minutes of the murder. 11 T. 53–71, 106–13, 118; 12 T. 156. In addition, he presented testimony demonstrating that it would have been almost impossible to travel at least fifteen miles from the crime scene to Atlantic City in the fifteen minutes between 12:10 p.m., when the shooting occurred, and 12:25 p.m., when preserved video showed a person believed to be Mr. Earley in Mays Landing. 14 T. 28–35.

Because the police had selectively destroyed the surveillance footage, Mr. Earley could not support his alibi with video evidence showing that he had not entered or exited the apartment complex before Ms. Tobias picked him up at approximately 12:42 p.m.

After deliberating for four days—at one time sending out a note that it could not reach a verdict despite several votes—the jury ultimately returned a guilty verdict. 17 T. 3; 18 T. 9–11.

### D. Mr. Earley Renewed His Due Process Motion, But The Trial Court Denied It Absent A Finding Of Malicious Intent

Prior to sentencing, Mr. Earley renewed his motion to dismiss the indictment, again asserting that the destruction of the video evidence denied him due process. 19 T. 3–12. Mr. Earley noted multiple additional facts regarding the scope of the evidence that the police had destroyed and other police misconduct that had been unknown before trial. *Id.*

The trial court characterized the State's conduct as a "continuing course of cavalierly treating evidence." 19 T. 22–23. The court noted "a long line of things" had "disturbed [the court] in this case since day one." 19 T. 14. The court expressed "concern[] about the processes and procedures of the office that brought this case to trial." 19 T. 21.

The trial court stated that "Mr. Earley was absolutely entitled to [the deleted video] as part of his due process rights under the United States Constitution" and "was deprived of that right." 19 T. 18. Despite that statement, and though noting again that a due process violation could be demonstrated by "an egregious carelessness or prosecutorial excess tantamount to suppression," the court nonetheless denied Mr. Earley's motion, finding no "bad faith, connivance or animus." Pet. App. C, 66, 72.

### E. The New Jersey Appellate Court Rejected Petitioner's Federal Due Process Claim, Holding That *Youngblood* Required Bad Intent

The Appellate Division affirmed the trial court's ruling denying Mr. Earley's motion to dismiss the indictment. Pet. App. A, 18–19. The court concluded that Mr. Earley had not proven that the police acted with "bad faith" under *Youngblood*, noting that "the routine destruction of video or other data does not establish bad faith," and that a discovery request made before the property's destruction does not compel such a finding. *Id* at 18. The court concluded that the *Youngblood* bad faith standard requires a finding of "'official animus toward [defendant] or [ ] a conscious effort to suppress exculpatory evidence.'" *Id.* at 19 (quoting *California v. Trombetta*, 467 U.S. 479, 488 (1984)). Because the court did not make such a finding, it affirmed the trial court's decision.

The Supreme Court of New Jersey denied Mr. Earley's Petition for Certification, as well as a motion for rehearing. Pet. App. D, E. This Petition follows.

## REASONS FOR GRANTING THE WRIT

This case presents a straightforward conflict among the state and federal courts over an important and frequently recurring question involving the extent to which the Due Process Clause protects criminal defendants from the

destruction by the state of potentially exonerating evidence.

In the decision below, the New Jersey appellate court held that this Court's decision in *Youngblood* required a criminal defendant to prove that the state acted with malicious intent to establish a due process violation. At least eighteen other states and seven federal circuits also have adopted this standard. These courts have construed the requisite intent differently and inconsistently. Meanwhile, at least fifteen other states and four federal circuits have not required bad intent but, instead, have required mere knowledge of the exculpatory nature of the destroyed evidence. One other federal circuit court, and multiple federal district courts, have applied multifactor tests to determine bad faith under *Youngblood*, but these courts have not agreed on what those factors must be. These multifactor tests encompass recklessness, gross negligence, or other serious police misconduct, even absent actual animus. Moreover, at least thirteen state courts have held that the *Youngblood* bad faith standard is more rigid and strict than their state due process clauses require, even where those clauses are virtually identical to the federal Due Process Clause.

This conflict among the state and federal courts necessitates this Court's review, and this case is the optimal vehicle in which to resolve it. The question presented is of substantial legal and practical importance. Its resolution will determine the balance between ensuring fair trials for numerous criminal defendants and the police

interest in appropriate limitations on the state's obligations to preserve evidence to reasonable bounds. This case cleanly and squarely presents the question, and the parties to the case will be acutely affected by the outcome. Absent review, Petitioner faces decades in prison.

Because the case readily satisfies the criteria for certiorari and is the optimal vehicle for this Court's review, the Petition should be granted.

## I. THE DECISION BELOW DEEPENS A CONFLICT AMONG STATE AND FEDERAL COURTS

Under the Due Process Clause of the Fourteenth Amendment, a state's "failure to preserve potentially useful evidence" constitutes a denial of due process if the "defendant can show bad faith on the part of the police." *Youngblood*, 488 U.S. at 58. This Court reaffirmed this principle in *Illinois v. Fisher*, 540 U.S. 544, 545 (2004). *Youngblood* and *Fisher*, however, left undecided the parameters of what constitutes "bad faith" under this standard.

In the absence of more direct guidance from this Court, "[i]ncoherence characterizes post-*Youngblood* case law decided in state and lower federal courts" with "significant disparities in the ways in which courts have interpreted fundamental aspects of *Youngblood*, including the meaning of 'bad faith.'" Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 Wash. U. L. Rev. 241, 247 (2008). Given the varying interpretations of "bad

faith," guidance is sorely needed from this Court to ensure that defendants are entitled to a uniform standard of due process under the federal constitution.

For instance, at least seven United States Courts of Appeals and eighteen state courts, like New Jersey, require proof of actual bad intent to establish a constitutional violation under the bad faith standard.[2] These courts, though, have diverged as to exactly what degree of intent suffices. Some have required "official animus."[3] Other courts

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[2] *See United States v. McNealy*, 625 F.3d 858, 870 (5th Cir. 2010); *United States v. Tyree*, 279 Fed. App'x 31, 33 (2d Cir. 2008); *United States v. Estrada*, 453 F.3d 1208, 1213 (9th Cir. 2006); *United States v. Revolorio-Ramo*, 468 F.3d 771, 775 (11th Cir. 2006); *Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 624 (7th Cir. 2000); *United States v. Jobson*, 102 F.3d 214, 218 (6th Cir. 1996); *Oliver v. State*, 498 S.W.3d 320, 325 (Ark. Ct. App. 2016); *People v. Abdu*, 215 P.3d 1265, 1270 (Colo. App. 2009); *Guzman v. State*, 868 So. 2d 498, 509 (Fla. 2003); *State v. Miller*, 699 S.E.2d 316, 319 (Ga. 2010); *People v. Gentry*, 815 N.E.2d 27, 33 (Ill. Ct. App. 2004); *Wade v. State*, 718 N.E.2d 1162, 1166 (Ind. Ct. App. 1999); *State v. Dulaney*, 493 N.W.2d 787, 791 (Iowa 1992); *Collins v. Commonwealth*, 951 S.W.2d 569, 573 (Ky. 1997); *State v. Lindsey*, 543 So. 2d 886, 891 (La. 1989); *Murray v. State*, 849 So. 2d 1281, 1286 (Miss. 2003); *Sheriff, Clark County v. Warner*, 926 P.2d 775, 778 (Nev. 1996); *State v. Hunt*, 483 S.E.2d 417, 421 (N.C. 1997); *State v. Steffes*, 500 N.W.2d 608, 613 (N.D. 1993); *State v. Durnwald*, 837 N.E.2d 1234, 1241 (Ohio Ct. App. 2005); *Commonwealth v. Free*, 902 A.2d 565, 572–73 (Pa. 2006); *State v. Bousum*, 663 N.W.2d 257, 263 (S.D. 2003); *State v. Wittenbarger*, 880 P.2d 517, 524 (Wash. 1994); *State v. Greenwold*, 525 N.W.2d 294, 298 (Wisc. Ct. App. 1994).

[3] *Tyree*, 279 Fed. App'x at 33; *Revolorio-Ramo*, 468 F.3d at 775; *Chaparro-Alcantara*, 226 F.3d at 624; *Jobson*, 102 F.3d at

demand "ill motive or intention."[4] Still other courts require a "dishonest purpose, moral obliquity, conscious wrongdoing, [or] breach of a known duty through some ulterior motive or ill will partaking the nature of fraud."[5] And others require a "deliberate decision to deprive defendant of evidence."[6]

Many other courts do not require bad intent to prove "bad faith." At least four federal Courts of Appeals and fifteen state courts construe "bad faith" to require proof that the police knew they were destroying potentially exculpatory evidence.[7] These

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218; *Gentry*, 815 N.E.2d at 33; *Lindsey*, 543 So. 2d at 891; *Greenwold*, 525 N.W.2d at 298.

[4] *Collins*, 951 S.W.2d at 573; *accord Estrada*, 453 F.3d at 1213; *Hunt*, 483 S.E.2d at 421.

[5] *See Durnwald*, 837 N.E.2d at 1241; *accord Miller*, 699 S.E.2d at 319; *Wade*, 718 N.E.2d at 1166; *Murray*, 849 So. 2d at 1286.

[6] *See Abdu*, 215 P.3d at 1270; *accord McNealy*, 625 F.3d at 870; *Jean*, 221 F.3d at 663; *Oliver*, 498 S.W.3d at 325; *Guzman*, 868 So. 2d at 509; *Dulaney*, 493 N.W.2d at 791; *Warner*, 926 P.2d at 778; *Steffes*, 500 N.W.2d at 613; *Free*, 902 A.2d at 572–73; *Bousum*, 663 N.W.2d at 263; *Wittenbarger*, 880 P.2d at 524.

[7] *United States v. Beckstead*, 500 F.3d 1154, 1159–1161 (10th Cir. 2007); *In re Sealed Case*, 99 F.3d 1175, 1178 (D.C. Cir. 1996); *United States v. Femia*, 9 F.3d 990, 996 (1st Cir. 1993); *United States v. Stevens*, 935 F.2d 1380, 1388 (3d Cir. 1991); *State v. Walker*, 914 P.2d 1320, 1330 (Ariz. Ct. App. 1996), *superseded on other grounds by statute as recognized by State v. Ofstedahl*, 93 P.3d 1122, 1123–24 (Ariz. Ct. App. 2004); *People v. Montes*, 320 P.3d 729, 758 (Cal. 2014), *as modified on denial of reh'g* (May 21, 2014); *Koonce v. District of Columbia*, 111 A.3d 1009, 1014 (D.C. 2015); *State v. Finley*, 42 P.3d 723, 727 (Kan. 2002); *Gimble v. State*, 18 A.3d 955, 961 (Md. Ct. Spec. App. 2011) (also finding that failure to follow police procedures is a factor in bad faith analysis); *People v. Love*,

courts have emphasized 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 or destroyed." *In re Sealed Case*, 99 F.3d 1175, 1178 (D.C. Cir. 1996). As one court explained, "in the context of a due process analysis, the Supreme Court has made clear that 'bad faith' has less to do with the actor's intent than with the actor's knowledge that the evidence was 'constitutionally material.'" *See*, *e.g.*, *State v. Walker*, 914 P.2d 1320, 1330 (Ariz. Ct. App. 1996), *superseded on other grounds by statute as recognized by State v. Ofstedahl*, 93 P.3d 1122, 1123–24 (Ariz. Ct. App. 2004).

The intent and knowledge tests, though similar, do not always lead to the same outcome. For example, "one may have wrongful intent without having knowledge that lost or destroyed evidence has exculpatory value. Conversely, one may have knowledge that evidence has exculpatory value without intending that it be destroyed." Bay, 86 Wash. U. L. Rev. at 291.

Complicating matters further, still other courts have adopted multifactor tests to determine

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2005 WL 1160653, at *2 (Mich. Ct. App. May 17, 2005); *State v. Heath*, 685 N.W.2d 48, 56 (Minn. Ct. App. 2004); *State v. Smith*, 157 S.W.3d 687, 691 (Mo. Ct. App. 2004); *State v. Castor*, 599 N.W.2d 201, 214 (Neb. 1999); *People v. Handy*, 988 N.E.2d 879, 882 (N.Y. 2013); *State v. Werner*, 851 A.2d 1093, 1106 (R.I. 2004); *State v. Jackson*, 396 S.E.2d 101, 102 (S.C. 1990); *State v. Morales*, 844 S.W.2d 885, 890 (Tex. Ct. App. 1993); *Park v. Commonwealth*, 528 S.E.2d 172, 179 (Va. Ct. App. 2000); *Grady v. State*, 197 P.3d 722, 732 (Wyo. 2008).

bad faith, considering intent and knowledge as important but not exclusive factors. For example, the Tenth Circuit Court of Appeals lists five factors courts should consider when determining bad faith: (1) whether the police were on notice that the defendant believed the evidence was exculpatory; (2) whether the defendant's belief that the evidence was exculpatory is corroborated by objective independent evidence; (3) whether the government was in control of the disposition of the evidence at the time they were provided notice of its exculpatory value; (4) whether the destroyed evidence was central to the case; and (5) whether the government offered an innocent explanation for the destruction of evidence. *Beckstead*, 500 F.3d at 1159–61.

Other courts have applied additional factors, such as the ease with which the evidence could have been saved, *United States v. Yevakpor*, 419 F. Supp. 2d 242, 247 (N.D.N.Y. 2006), whether the government delayed in responding to the defendant's requests to access the evidence, *United States v. Bohl*, 25 F.3d 904, 911–13 (10th Cir. 1994), whether the government disregarded established policies, *United States v. Elliott*, 83 F. Supp. 2d 637, 650 (E.D. Va. 1999), and whether the government selectively chose which portions of the evidence to keep and destroy, *Yevakpor*, 419 F. Supp. 2d at 251–52. Although some of these cases predated *Fisher*, this Court's *Fisher* opinion did not address their essential holding that malicious intent, or even actual knowledge, does not constitute a rigid requirement for establishing bad faith under *Youngblood*.

At least thirteen other state courts have construed *Youngblood* under the federal constitution, but have required a lesser showing under the due process clauses of their state constitutions.[8] Those holdings are despite the fact that many of the relevant state due process clauses are virtually identical to the federal Due Process Clause.[9]

Given the lack of uniformity nationwide, this Court should grant the Petition to settle the issue and ensure that defendants are afforded the same federal due process protections across jurisdictions.

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[8] *See Ex parte Gingo*, 605 So. 2d 1237, 1241 (Ala. 1992); *Thorne v. Dep't of Pub. Safety*, 774 P.2d 1326, 1330–31 (Alaska 1989); *State v. Morales*, 657 A.2d 585, 594–95 (Conn. 1995); *Hammond v. State*, 563 A.2d 81, 87 (Del. 1989); *State v. Matafeo*, 787 P.2d 671, 671 (Haw. 1990); *State v. Fain*, 774 P.2d 252, 265 (Idaho 1989), *overruled on other grounds by State v. Card*, 825 P.2d 1081 (Idaho 1991); *Commonwealth v. Henderson*, 582 N.E.2d 496, 496 (Mass. 1991); *State v. Smagula*, 578 A.2d 1215, 1217 (N.H. 1990); *State v. Riggs*, 838 P.2d 975, 977–78 (N.M 1992); *State v. Ferguson*, 2 S.W.3d 912, 914–917 (Tenn. 1999); *State v. Tiedmann*, 162 P.3d 1106, 1115 (Utah 2007); *State v. Delisle*, 648 A.2d 632, 642–43 (Vt. 1994); *State v. Osakalumi*, 461, S.E.2d 504, 512 (W. Va. 1995).

[9] *See, e.g.*, Conn. Const. art. I, § 8 ("No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law."); Tenn. Const. art. 1, § 8 ("That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land."); Mass. Const., Part I, art. XXIX ("It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice.").

## II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S APPLICATION OF "BAD FAITH" IN OTHER CRIMINAL CONSTITUTIONAL CONTEXTS AND THE PRINCIPLES ARTICULATED IN *YOUNGBLOOD*

Further review also is warranted because the decision below conflicts with this Court's application of "bad faith" in other criminal constitutional contexts and the principles that this Court articulated in *Youngblood*. The decision below also would create adverse incentives to the police and would render it impractical, if not nearly impossible, for defendants to establish a violation of due process even when the resulting prejudice deprives a person of the ability to present a defense.

Although this Court in *Youngblood* and *Fisher* did not define "bad faith," it has provided direction. In *Youngblood* itself, this Court emphasized that the bad faith requirement should apply based on whether "the police themselves *by their conduct* indicate that the [destroyed] evidence could form a basis for exonerating the defendant." *Youngblood*, 488 U.S. at 58 (emphasis added). Thus, *Youngblood* appears to contemplate that severe misconduct, even absent direct evidence of actual animus or malicious intent, may be enough. Similarly, in *Doggett v. United States*, this Court accepted that, in at least some contexts, protracted negligence could support a finding of bad faith. 505 U.S. 647, 657 (1992). As the Court explained, "our toleration of such negligence varies inversely with its protractedness, cf. *Arizona v. Youngblood*, 488 U.S. 51 (1988), and its

consequent threat to the fairness of the accused's trial." *Id.*

This Court also has provided guidance in other analogous criminal constitutional contexts. For example, in *United States v. Leon*, this Court established a good-faith exception to the exclusionary rule. 468 U.S. 897, 922 (1984). Yet, this Court explained that the good-faith exception would not apply when a warrant is based on a falsehood that the affiant "knew was false or would have known was false except for his reckless disregard of the truth." *Id.* at 923. This Court further stated that the good-faith inquiry is "confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization," and not on whether the officer had a subjective malicious intent. *Id.* at 922 n. 23.

This Court has even held that when considering damages intended to punish "outrageous" conduct, either evidence of subjective ill motive or recklessness can suffice as proof. *Smith v. Wade*, 461 U.S. 30, 56 (1983). As explained in *Smith*, though punitive damages for a violation of constitutional rights historically require proof of "malice," this mental state includes a "'reckless indifference to the rights of others which is equivalent to an intentional violation of them.'" *Id.* at 42 (quoting *Milwaukee & St. Paul Railway Co. v. Arms*, 91 U.S. 489, 493 (1875)). These damages punish "outrageous" conduct and "deter" the actor "and others like him from similar conduct in the

future." *Id.* at 54 (quoting RESTATEMENT (Second) of Torts § 908(1) (Am. Law Inst. 1977)). To accomplish this goal, the Court held that punitive damages may be awarded if the "defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Id.* at 56. Like with punitive damages, *Youngblood*'s bad faith requirement deters serious police misconduct where the police act in bad faith. A definition of bad faith that includes "reckless or callous indifference" to a defendant's due process rights would serve the same goal.

This Court long has articulated the principle that constitutional violations should not turn exclusively on a state actor's subjective intent. For example, this Court has "repeatedly rejected" a subjective approach in interpreting the actions of law enforcement. *See Brigham City v. Stuart*, 547 U.S. 398, 404 (2006). Instead, this Court "has long taken the view that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'" *Kentucky v. King*, 563 U.S. 452, 464 (2011) (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)).

Nothing in *Youngblood* or *Fisher* suggests a departure from this Court's previous direction. To the contrary, the principles that this Court articulated as the basis of its ruling in *Youngblood* would be furthered by recognizing that police may act in bad faith through recklessness, gross

negligence, or other significant misconduct. In *Youngblood*, this Court explained that, absent a bad faith requirement, the Due Process Clause would "impos[e] on the police an undifferentiated and absolute duty to retain and to preserve all materials that might be of conceivable evidentiary significance in a particular prosecution." *Youngblood*, 488 U.S. at 58. Thus, the "reason [this Court] adopted the bad-faith requirement" was "to 'limi[t] the extent of the police's obligation to preserve evidence to reasonable grounds and confin[e] it to that class of cases where the interests of justice most clearly require it.'" *Fisher*, 540 U.S. at 548 (quoting *Youngblood*, 488 U.S. at 58). This purpose would be met with a standard requiring a heightened showing of misconduct, even absent proof of actual malice or animus.

In contrast, a rigid standard that may be met only with direct proof of actual malicious intent would undercut this purpose because it would create the perverse incentive that police may destroy evidence without consequence if they also destroy the evidence of their bad intent. A rigid intent standard thus would create an almost impossible burden for defendants to meet. As explained by one United States District Court, if intent, or even actual knowledge, were the test, "there would be no check on the destruction of evidence because law enforcement agents would be able to defend the destruction of evidence by lying about subjective intent or by violating, with impunity, the rules they are obligated to follow." *United States v. Elliott*, 83 F. Supp. 2d 637, 650 (E.D. Va. 1999); *Cf. Lolly v. State*, 611 A.2d 956, 960 (Del. 1992) (departing from

the federal bad faith standard because actual animus is impossible to prove "[s]hort of an admission by the police").

This problem is "compound[ed]" by placing the burden of proof on the defendant, who is "ill-suited to inquire into subjective good faith or bad faith of the police." *Failure to Preserve Evidence*, 103 Harv. L. Rev. 157, 166 (1989). This is particularly true because "[t]he most relevant evidence of police good or bad faith is apt to lie within the control of the police, and police officers are highly unlikely to cooperate voluntarily with defendants by accusing fellow officers of misconduct." *Id.* Police officers who destroy evidence with an intent to deprive the defendant of exculpatory evidence would be even less likely to provide freely evidence of their own bad conduct. *Bay*, 86 Wash. U. L. Rev. at 292.

A 2007 survey of opinions citing *Youngblood* bears this out. Of 1,675 published opinions, only seven found bad faith. Teresa N. Chen, *The Youngblood Success Stories: Overcoming the "Bad Faith" Destruction of Evidence Standard*, 109 W. Va. L. Rev. 421, 422 (2007).

## III. THIS CASE CLEANLY AND SQUARELY PRESENTS THE QUESTION, AND THUS IS THE OPTIMAL VEHICLE FOR THIS COURT'S REVIEW

This case cleanly and squarely presents the question. In requiring a showing of official animus to make out a due process violation, the New Jersey appellate court relied on federal law and not on

adequate and independent state-law grounds. There are thus no impediments to the Court's resolution of the question presented in this case.[10]

Beyond that, this case presents the question in the context of trial court findings that spotlight the issue for decision. The trial court found that the destroyed evidence was potentially exculpatory and that its destruction was prejudicial to the defense. Pet. App. B, 62. The trial court held that the police had acted with a pattern of "cavalier" disregard for its evidence-preservation obligations. 5 T. 185; 19 T. 22–23. And, the appellate court held that there was no "official animus" or "a conscious effort to suppress exculpatory evidence." Pet. App. A, 19.

In addition, this case presents the issue in an increasingly significant context, the selective destruction of surveillance video. As one United States District Court explained, "a great danger to liberty would exist if Government could pick and choose segments of recordings for use in prosecution, destroy the remainder, and then argue that the defense must show that the destroyed evidence contained exculpatory or otherwise potentially useful and relevant information." *Yevakpor*, 419 F. Supp. 2d at 252 (finding bad faith).

In sum, the New Jersey court's decision deepens a widely recognized conflict on the question

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[10] That the New Jersey Supreme Court rejected certification should be of no substantive consequence here. After all, *Fisher* presented an identical procedural posture. *See Fisher*, 540 U.S. at 547 and n.*; *People v. Fisher*, 792 N.E.2d 310 (Ill. 2003).

of what a defendant must prove to establish the bad faith required to show a due process violation. That question is undeniably important and recurring, and this case is the optimal vehicle for considering it. This Court should grant the Petition for Certiorari and resolve a conflict among the state and federal courts that affects criminal defendants across the country.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

December 5, 2017

Respectfully submitted,

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# APPENDIX

APPENDIX A

**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION**



SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5051-13T1

STATE OF NEW JERSEY,

Plaintiff–Respondent,

v.

KESHAUN D. EARLEY, a/k/a
KESHAWN EARLEY, KESHAWN EARLY
and BUDDHA EARLEY,

Defendant-Appellant.

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Argued February 8, 2017 – Decided March 17, 2017

Before Judges Simonelli, Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment Nos. 11-04-0827, 11-09-2163 and 13-03-0858.

Elizabeth C. Jarit, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Jarit, of counsel and on the briefs).

John J. Santoliquido, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Diane Ruberton, Acting Atlantic County Prosecutor, attorney; Mr. Santoliquido, of counsel and on the brief).

PER CURIAM

On August 26, 2012, defendant Keshaun D. Earley was arrested and charged with the shooting death of James Jordan. An Atlantic County jury thereafter found defendant guilty of first-degree murder, N.J.S.A. 2C:11-3a(1) and (2) (Count One); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a (Count Two); and second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b (Count Three). Defendant filed post-trial motions to dismiss the indictment and for a new trial, which the court denied. On May 6, 2014, defendant was sentenced on the murder conviction to a forty-year prison term with an eighty-five-percent parole ineligibility period pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2(a). The court merged Count Two with the murder conviction, and imposed a concurrent seven-year prison term on Count Three.

In this appeal, defendant raises the following issues for our consideration:

POINT I

THE STATE'S DESTRUCTION OF OVER 200 HOURS OF POTENTIALLY EXCULPATORY SURVEILLANCE FOOTAGE RELATING TO EARLEY'S ALIBI REQUIRES REVERSAL OF EARLEY'S CONVICTIONS

A. Because Earley's due process rights were violated, the court erred in denying his motion to dismiss the indictment

1. Under the New Jersey Constitution, bad faith is not a prerequisite to finding that a defendant's right to due process has been violated

2. Alternatively, the trial court erred in its bad faith analysis and incorrectly focused on the nature of the charges in its decision to deny the defendant's motion

B. The doctrine of fundamental fairness independently requires dismissal of the indictment

C. The jury instruction provided by the court was insufficient to cure the discovery violation, requiring reversal and a remand for a new trial

POINT II

EARLEY'S RIGHTS TO EQUAL PROTECTION, DUE PROCESS, AND AN IMPARTIAL JURY WERE VIOLATED BY THE PROSECUTION'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES. (Raised by the judge)

POINT III

THE TRIAL COURT'S CONCLUSION THAT THE IDENTIFICATION PROCEDURES WERE NOT SUGGESTIVE, DESPITE THE FACT THAT THE POLICE VIOLATED NEARLY ALL OF THE ATTORNEY GENERAL GUIDELINES, WAS ERRONEOUS AND DENIED EARLEY DUE PROCESS AND A FAIR TRIAL

POINT IV

THE JURY INSTRUCTION ON IDENTIFICATION, WHICH OMITTED MOST OF THE SYSTEM VARIABLES, COULD NOT HAVE ADEQUATELY EXPLAINED THE RELEVANT FACTORS OF ASSESSING THE RELIABILITY OF THE OUT-OF-COURT IDENTIFICATIONS

POINT V

EARLEY'S RIGHT TO CONFRONTATION, AS WELL AS OUR HEARSAY RULES, WERE VIOLATED

BY THE ADMISSION OF STATEMENTS BY THE POLICE THAT THEY HAD ADDITIONAL WITNESSES AND EVIDENCE, NOT PRODUCED AT TRIAL, INCULPATING THE DEFENDANT. (Not raised below)

POINT VI

THE PROSECUTOR'S COMMENTS DURING SUMMATION ON THE DEFENDANT'S FAILURE TO PROVE HIS INNOCENCE AND ON HIS POST-ARREST SILENCE VIOLATED EARLEY'S STATE PRIVILEGE AGAINST SELF-INCRIMINATION AND DENIED HIM DUE PROCESS AND A FAIR TRIAL

POINT VII

THE CUMULATIVE IMPACT OF THE ERRORS DENIED EARLEY DUE PROCESS AND A FAIR TRIAL

POINT VIII

BECAUSE THE COURT ENGAGED IN IMPERMISSIBLE DOUBLE-COUNTING IN FINDING AGGRAVATING FACTORS ONE AND TWO, A REMAND IS REQUIRED FOR RESENTENCING

For the reasons that follow, we reject the arguments challenging defendant's conviction. We remand for the court to re-sentence defendant

without consideration of aggravating factors one and two, N.J.S.A. 2C:44-1(a)(1) and (2).

I.

Shortly before noon on August 26, 2012, Nicole Jones was preparing to cook breakfast for a group of relatives and friends in her Carver Hall apartment on Absecon Boulevard in Atlantic City. Jones sent Kevin Brown and an individual nicknamed "Meat" to buy food for the breakfast at the nearby High Gate apartment complex.

When the two men returned, they were approached outside Carver Hall by Jordan, who was Jones's nephew. As Brown spoke with Jordan, "[defendant] . . . came from around the corner" with "a shirt tied around his face," which prompted Brown to ask Jordan "who was that[?]" When Jordan "blew [] off" his question, Brown "started backing off" because he thought he was being set up. The white tee shirt initially prevented Brown from recognizing the gunman. Brown then saw the man fire one shot, striking Jordan. As Brown was still backpedaling, he saw the suspect's face after he dropped the gun, reached down for it, and the tee shirt fell from his face.

Brown ran into a nearby building, where he met Jones "a couple minutes after everything happened." Brown told Jones "it was Buddah"[1] who shot Jordan. Brown testified he knew defendant prior to the shooting because they had been

[1] Defendant's nickname, Buddah, alternately appears as Buddha in various portions of the record.

"incarcerated a couple of times" together, and he had "seen him [on] the streets a couple of times," even though defendant "[didn't] hang out in that area."

When the shooting occurred, Jones was talking to her other guests in front of a window in the living room of her apartment. Jones testified that, after hearing the shot, she looked out the window and saw: "Budd[ah] dropped the gun, and when he went down to pick it up, he had a towel or like a shirt over his head that fell." She described the shooter, who she identified as Buddah, as "ha[ving] brown skin, kind of tall, skinny," and wearing "a white short-sleeve shirt [], some blue jeans," with something white hanging from his head. At the same time, Jones's friend, Ny-Taijah Ceasar, also yelled "that's Budd[ah], that's Budd[ah]." Jones testified she recognized the suspect as Buddah before Ceasar began shouting.

Before Jones went to the police station, she made phone calls in an attempt to ascertain Buddah's true identity. Jones testified she knew Buddah because "I seen him around a few times," and "[h]e came to my house like two times." She later testified she was not acquainted with defendant but had seen him at Carver Hall about three times in the two or three months before the shooting. According to Jones, Buddah "put the towel on his head" after it fell off before retrieving the black handgun. Jones saw Brown and Jordan, who she did not know had been shot, run from the scene. She also saw Buddah run behind the building and out of her view before reappearing and running

across Absecon Boulevard and the Brigantine connector road to a field on the other side.

Ceasar testified that she had been friends with defendant for several years at the time the shooting occurred. On that day, he was wearing "shorts, army fatigue material with a white shirt and a white shirt over his face." Ceasar stated she was looking out the window before the shooting and saw Buddah approach Brown and Jordan and then shoot Jordan. She observed: defendant had the gun in his hand as he approached; he shot the victim once; his shirt fell off his face for less than ten seconds; he picked the shirt and gun up; and ran across the highway. As this occurred, she yelled out the window, "oh my God, that's Budd[ah]."

Nina Brooks also heard the gunshot and called 911. She reported that the suspect ran across the street after the shooting. Ceasar described the shooter as a tall, African-American male who was wearing a white tee shirt, a white towel on his head, and grey shorts. She also reported hearing a female resident from the second floor run out yelling "it's Buddah."

The shooting was captured on a Carter Hall surveillance camera and the video was retrieved by police. Neither the gun nor any ballistics evidence was recovered. The State's forensic pathologist conducted an autopsy and testified that Jordan died from a gunshot wound to his chest.

Jones, Ceasar, and Brown all informed the police that defendant shot Jordan. Subsequently,

police presented them with a photograph of defendant, and each positively identified him as the shooter.

Sergeant Kevin Ruga of the Atlantic County Prosecutor's Office (ACPO) testified that on the day of the shooting, he was part of a surveillance team stationed at Oakcrest Estates in Mays Landing to locate defendant. Defendant did not stop when instructed to by the officers. Instead, he ran through the woods and into an apartment where his girlfriend resided. The officers discovered defendant "lying in the bed [on] the third floor with the covers pulled up to his head," while "wearing a white tee shirt and some sweatpants."

After his arrest, defendant waived his Miranda[2] rights and agreed to speak with the investigating officers. Initially he insisted, "I was in Mays Landing all day. You look at them cameras [and] you'll see me out there all day . . . . I was never in Atlantic City today." He also stated, "if you talking about what happened today my aunt called me and told me that the boy got killed around Carver Hall." Later in the questioning, defendant admitted he left Mays Landing with April Tobias in Tobias' Jaguar and traveled to Pleasantville to pick up his daughter around 2:00 p.m. Ultimately, defendant admitted he went to Atlantic City after 2:00 p.m. to pick up his daughter, and then immediately left and went to Pleasantville.

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

ACPO investigators also recovered surveillance video footage from Oakcrest Estates. Sergeant Richard Johannessen of the ACPO's Computer Crimes Unit explained that he utilized an external hard drive to store recorded footage from eighteen cameras at Oakcrest Estates between noon and midnight on August 26, 2012. Johannessen transferred this footage onto a hard drive on August 29, 2012, and provided the hard drive to the lead case detective, Sergeant Lynne Dougherty, the next day. Dougherty testified she reviewed the Oakcrest Estates surveillance video footage. In doing so, she focused on the period from noon "until we see [] defendant leaving the car, which is about 12:43ish." She explained that defendant claimed to have been at Oakcrest Estates at the time of the homicide, and she therefore specifically looked for defendant within that timeframe.

In response to a July 3, 2013 defense request to view the video discovery, Dougherty instructed Sergeant Matthew Paley of the Computer Crimes Unit to extract two portions totaling thirty minutes out of the total 215.5 hours of video footage from the eighteen cameras. She testified: "[o]ne camera was 12:20 to 12:40 [p.m.] that was camera [six], and then camera [twenty one] was 4:40 to 4:50 [p.m.], so [twenty] minutes and [ten] minutes." The first extracted portion captured an individual appearing to be defendant in a store, and the second extracted portion captured an individual appearing to be defendant on the playground with his daughter. The remaining Oakcrest Estates video footage that Dougherty did not direct Paley to extract was destroyed. Johannessen explained that once

everything evidential is extracted, the remaining video is deleted and the hard drive "gets put back in service" for use in future cases.

Defendant did not testify but his recorded statement was played at trial. He also relied on the testimony of several of the State's witnesses and cell phone records to corroborate his alibi defense that he was in Mays Landing rather than Atlantic City at the time of the shooting, along with evidence regarding the time and distance between the two locales. The jury ultimately convicted defendant of all charges. This appeal followed.

## II.

We first address defendant's contention that the trial court erred in denying his pre-trial and post-trial motions to dismiss the indictment based on the State's destruction of the bulk of the Oakcrest Estates surveillance footage. Specifically, defendant argues that: the New Jersey Constitution does not require a showing of bad faith with respect to the destruction of evidence; the trial court erred in not finding the State acted in bad faith; and the permissive adverse inference instruction the court gave the jury was insufficient to cure the harm caused by the destruction of the surveillance video.

### A.

The trial court conducted an evidentiary hearing on defendant's pre-trial motion to dismiss the indictment. In ruling on the motion, the court analyzed the three factors bearing upon whether the

destruction of physical evidence amounts to a due process violation, as identified in State v. Hollander, 201 N.J. Super. 453, 479 (App. Div.), certif. denied, 101 N.J. 335 (1985).

> With respect to the first factor, the court:
>
> > found it disappointing and unacceptable that nobody seems to know what the policy is for discovering evidence from the [ACPO][,] . . . or even where it would be other than on a vast database somewhere . . . . Why was that an important thing for me to understand? Because, if I had determined that there was such a policy and it had been violated, then . . . it would be [] easier to find bad faith or connivance which was a very material thing for me to try to find in undertaking this Hollander analysis.

The court continued, "[t]here is no standard operating procedure that was known to anybody who was involved in this case on the prosecutor's side" "regarding maintenance of evidence and turning over evidence to the defense in a murder trial, . . . the most serious of cases that could be brought in Superior Court of New Jersey." "So a decision was made by the line detective, who . . . testified honestly that she reviewed [the video] and she made the call. I don't think she should have made the call."

Despite recognizing the improper destruction of the video evidence, the trial court found Dougherty was a "well-meaning detective," and

ultimately concluded the destruction was not done in bad faith:

> [A]t the very least, [] there should be some involvement by an attorney who understands . . . the legal responsibilities, not the crime-fighting responsibilities. . . . [Dougherty] indicated herself she did what she was told, and her superior told her pull out what's relevant and repurpose the hard drive. [] [I]n this case, repurposing means destroy[.] . . . The evidence in this case was destroyed. [] I cannot find, however, based upon the testimony . . . and [after] thinking about it for a long time, [that there was] bad faith or connivance on the part of the State . . . , but I'm not satisfied with what happened, and I am going to balance the scales of justice.

With respect to the second factor, the court found "the evidence that was in this case destroyed was sufficiently material to the defense as the second Hollander criteria. It should have been turned over to the defense. I find it difficult to believe that it was not turned over to the defense." The court noted "[t]his is not a minor issue, this is a major issue, and in this case [the ACPO] failed to fulfill their responsibility."

Turning to the third prong of the Hollander test, the court determined that defendant was prejudiced by the State's destruction of the video evidence:

> Dougherty testified she didn't [see all 215-and-a-half hours of tape], and . . . if she did, . . . it would [have] taken her [twenty-seven] eight-hour[] days to review all that material. She explained [that] . . . she could review multiple cameras with . . . one video screen [but] . . . if you have five or [ten] [] cameras going at a time, how much are you able to concentrate on any one object? . . . [U]nfortunately we'll never know. We will never know what was on those tapes other than the [thirty] or [forty] minutes that [were] produced by the State [to] [defense counsel] []. He's not satisfied with it. I'm certainly not satisfied with it either.

After concluding that the destroyed evidence was material, and that its destruction prejudiced defendant, the trial court next considered the appropriate remedy:

> I don't think it's appropriate for me to dismiss a murder indictment. There are demands of justice on the other side, too . . . [T]here's been a murder[,] which is the most grievous crime [] anyone [] could [] commit[] against the people of the State of New Jersey[.] . . . [Defendant] was indicted for that murder, [so] he's going to stand trial for that murder.

The court continued, "given the discovery violation that I find as a matter of fact has been committed by

the [ACPO] in this case, I think I have to right the scales of justice, and I think that" the "extreme remedy" of an adverse inference charge "gives me a [] way to do it." "It's an extreme remedy that is below the remedy of [dismissal], . . . but it is a remedy that's a very potent remedy for the defense. An adverse inference charge is a remedy to balance the scales of justice, even outside the realm of a discovery violation."

Consequently, the court granted defendant's alternative motion for an adverse inference instruction. In its final charge, the court instructed the jury as follows:

> You have heard testimony that the [ACPO] destroyed and failed to preserve video surveillance footage from Oakcrest Estates consisting of [twelve] hours each for [sixteen] cameras as well as approximately [twenty-three] hours, [thirty] minutes from another two cameras, spanning the approximate hours of [twelve] noon to [twelve] midnight on August 26, 2012. Under our court rules, the prosecutor has a duty to produce to the defense evidence in its possession following the return of the indictment. If you find that the State has destroyed and failed to preserve evidence in its possession following the return of the indictment, then you may draw an inference unfavorable to the State which in itself may create a reasonable doubt as to [] defendant's guilt. In deciding

> whether to draw this inference, you may consider all the evidence in the case, including any explanation given as to the circumstances under which the evidence was destroyed. In the end, however, the weight to be given to the destruction of the evidence is for you and you alone to decide.

The court also gave the jury a similar instruction during the testimonial phase of the case.

The court also denied defendant's post-trial motion to dismiss the indictment. The court again concluded: "I do not find evidence of bad faith, such as would enable me [to] . . . overturn" "a unanimous verdict by a duly constituted and selected jury of people from Atlantic County, after two adverse inference charges found [defendant] guilty of first-degree murder."

B.

The State is obliged by due process to disclose exculpatory evidence. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963). A Brady violation occurs when the prosecution suppresses evidence that is both material and favorable to the defense. State v. Martini, 160 N.J. 248, 268 (1999). "Evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" State v. Robertson, 438 N.J. Super. 47, 67 (App. Div. 2014), certif. granted, 221 N.J. 287 (2015) (quoting

State v. Knight, 145 N.J. 233, 246 (1996)). "When the evidence withheld is no longer available, to establish a due process violation a defendant may show that the evidence had 'an exculpatory value that was apparent before [it] was destroyed' and that 'the defendant would be unable to obtain comparable evidence by other reasonably available means.'" State v. Mustaro, 411 N.J. Super. 91, 102 (App. Div. 2009) (quoting California v. Trombetta, 467 U.S. 479, 489, 104 S. Ct. 2528, 2534, 81 L. Ed. 2d 413, 422 (1984)). Suppression of exculpatory evidence violates due process regardless of whether the prosecutor acted in bad faith. Knight, supra, 145 N.J. at 245.

However, a different standard applies to evidence that is only potentially useful. "Without bad faith on the part of the State, 'failure to preserve potentially useful evidence does not constitute a denial of due process of law.'" George v. City of Newark, 384 N.J. Super. 232, 243 (App. Div. 2006) (quoting Arizona v. Youngblood, 488 U.S. 51, 57, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988)); see also State v. Marshall, 123 N.J. 1, 109 (1991) (applying Youngblood bad faith standard); Mustaro, supra, 411 N.J. Super. at 103. Where evidence has been destroyed, the court must focus on "(1) whether there was bad faith or connivance on the part of the government, (2) whether the evidence . . . was sufficiently material to the defense, [and] (3) whether [the] defendant was prejudiced by the loss or destruction of the evidence." Hollander, supra, 201 N.J. Super. at 479 (internal citations omitted).

Defendant urges us to dispense with the bad faith requirement, citing the view of some other

states and a minority on the United States Supreme Court. However, our Supreme Court follows the bad faith requirement set forth in Youngblood. See Marshall, supra, 123 N.J. at 109; Mustaro, supra, 411 N.J. Super. at 103 n.4 (declining to follow, based on New Jersey Supreme Court precedent, other jurisdictions that have determined that proof of bad faith is not required by the State constitutions). We are bound by the decision of our Supreme Court.

Applying these principles, we discern no due process violation. First, defendant has not demonstrated that the erased portion of the video had exculpatory value that was apparent before it was destroyed. Nor has defendant met his burden to establish bad faith. Youngblood, supra, 488 U.S. at 58, 109 S. Ct. at 337, 102 L. Ed. 2d at 289. Our courts have held that the routine destruction of video or other data does not establish bad faith. See State v. Reynolds, 124 N.J. 559, 569 (1991) (no bad faith where police destroyed tapes of police radio broadcast to arresting officer); Robertson, supra, 438 N.J. Super. at 72 (no bad faith where data routinely erased due to "firmware bug"); Mustaro, supra, 411 N.J. Super. at 104 (reuse of video in accord with departmental procedures ninety days after arrest did not indicate bad faith); see also Trombetta, supra, 467 U.S. at 488, 104 S. Ct. at 2533, 81 L. Ed. 2d at 421-22 (finding no due process violation where California authorities routinely failed to preserve breath samples but did so in "good faith and in accord with their normal practice").

Moreover, the fact that a discovery request was made prior to the routine destruction of

evidence does not compel a finding of bad faith. See Illinois v. Fisher, 540 U.S. 544, 548, 124 S. Ct. 1200, 1202, 157 L. Ed. 2d 1060, 1066 (2004) ("We have never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of the police.") (citation omitted). There is no evidence of "official animus toward [defendant] or [] a conscious effort to suppress exculpatory evidence." Trombetta, supra, 467 U.S. at 488, 104 S. Ct. at 2534, 81 L. Ed. 2d at 422. We therefore conclude that defendant has failed to demonstrate a due process violation.

This, however, does not end our analysis. In addition to the dictates of due process, our discovery rules impose obligations upon the State to preserve and produce evidence to a defendant. See R. 3:13-3. Particularly in view of the State's awareness of the defense request and the potential relevance of the video footage, the State was required to preserve the evidence at least until its decision not to disclose the remaining footage was adjudicated. The State is generally not free to destroy discoverable evidence post-complaint. See State v. Dabas, 215 N.J. 114, 138 (2013) (holding that post-indictment destruction of an officer's interview notes violated Rule 3:13-3); see also State v. Hunt, 184 N.J. Super. 304, 306 (Law Div. 1981).

Having concluded that the State was not at liberty to destroy the video, we turn to the question of remedy. The court may order a party that has failed to comply with Rule 3:13-3 "to permit the discovery of materials not previously disclosed, grant a continuance or delay during trial, or prohibit the

party from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate." R. 3:13-3(f). The court has broad discretion to determine the appropriate sanction. Marshall, supra, 123 N.J. at 134.

Dismissal of an indictment is a harsh remedy that should be sparingly employed. See State v. Murphy, 110 N.J. 20, 35 (1988). In lieu of dismissal, a court may provide the jury with an adverse-inference charge. See Dabas, supra, 215 N.J. at 140–41. We conclude the trial court properly imposed that remedy here.

Defendant contends that, due to the egregiousness of the police conduct, the court should have issued a stronger instruction directing the jurors to draw a negative inference against the State, rather than merely permitting them to do so. However, we discern no abuse of discretion in the court's permissive inference charge. See Dabas, supra, 213 N.J. at 140 n.12 (holding that permissive inference should be given when police destroy their notes); see also Model Jury Charge (Criminal), Statements of Defendant (When Court Finds Police Inexcusably Failed To Electronically Record Statement) (instructing that "the absence of an electronic recording permits but does not compel [the jury] to conclude that the State has failed to prove that a statement was in fact given and if so, was accurately reported by State's witnesses.").

III.

Defendant next argues that the prosecutor used racially and religiously discriminatory peremptory challenges to strike three African-Americans from the panel during jury selection. Defendant further contends that the trial court failed to engage in the three-step analysis required by State v. Osorio, 199 N.J. 486, 504 (2009), to assess whether a constitutional violation resulted. We find no merit in these contentions.

The United States and New Jersey Constitutions both prohibit the prosecution and defense counsel from exercising peremptory challenges of jurors in a way that discriminates on the basis of race or religion. Batson v. Kentucky, 476 U.S. 79, 96, 106 S. Ct. 1712, 1723, 90 L. Ed. 2d 69, 87-88 (1986); State v. Gilmore, 103 N.J. 508, 522-23 (1986); State v. Fuller, 182 N.J. 174, 197 (2004). Where a defendant establishes a prima facie showing that the challenges are being exercised on constitutionally impermissible grounds, Gilmore, supra, 103 N.J. at 517, 535-36, the burden then shifts to the State to demonstrate "evidence that the peremptory challenges under review are justifiable on the basis of concerns about situation-specific bias[,]" id. at 537, that is, something "'reasonably relevant to the particular case on trial or its parties or witnesses[.]'" Id. at 538 (quoting People v. Wheeler, 583 P.2d 748, 765 (Cal. 1978)).

Assuming the State advances such non-discriminatory reasons, as a third step of the analysis, the court must then "determine whether the defendant has carried the ultimate burden of proving, by a preponderance of the evidence, that the

prosecution exercised its peremptory challenges on constitutionally-impermissible grounds of presumed group bias." Id. at 539. Accord Osorio, supra, 199 N.J. at 505-06; State v. Pruitt, 430 N.J. Super. 261, 269-71 (App. Div. 2013) (quoting Gilmore, supra, 103 N.J. at 539). Among other things, the court must assess whether the State has applied the proffered reasons "even-handedly to all prospective jurors"; the "overall pattern" of the use of peremptory challenges; and "the composition of the jury ultimately selected to try the case." Osorio, supra, 199 N.J. at 506 (quoting State v. Clark, 316 N.J. Super. 462, 473-74 (App. Div. 1998), appeal after remand, 324 N.J. Super. 558 (App. Div. 1999), certif. denied, 163 N.J. 10 (2000)).

In the present case, during jury selection, the trial court sua sponte asked the prosecutor to explain his decision to excuse another African-American juror. The record reflects that the first challenged juror "was a social worker." The second such juror was friendly with members of defendant's family, including the mother of defendant's daughter, and was "a case worker at the Atlantic County Welfare Office." Finally, the third juror struck by the prosecutor stated during voir dire that "her daughter's father is in prison for the rest of his life," her niece was on probation, and that she worked as a property manager and also served as a minister at her church. Apparently satisfied with the prosecutor's explanation, the judge inquired of defense counsel, "is there anything you want to ask?" Defense counsel responded, "Not at this time, Judge."

We conclude from our review of the record that defendant failed to fulfill his step one obligation to make "a prima facie showing that the peremptory challenges [were] exercised on the basis of race[.]" Osorio, supra, 199 N.J. at 492. Even if defendant did so, the prosecutor proffered sufficient non-discriminatory reasons for the challenges, and defendant posed no objection nor sought further explanation. Accordingly, the court was not required to proceed to the third stage of the Osorio analysis. Moreover, with respect to the third juror, whose position as a minister underlies defendant's religious discrimination claim, her relatives' experiences with the criminal justice system might well lead a reasonable prosecutor to believe the juror "would be disposed to favor the defense." See Fuller, supra, 182 N.J. at 202. Accordingly, we discern no constitutional violation.

IV.

Defendant next argues that the identification procedure employed by the State was impermissibly suggestive and that the resulting witness identifications should have been excluded. Specifically, defendant contends that: (1) by simply showing Jones, Ceasar, and Brown a single photograph of defendant, the State failed to adhere to the Attorney General Guidelines;[3] and (2) the court erred in prematurely concluding the pretrial hearing on the admissibility of the eyewitness

[3] Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (April 18, 2001), http://www.state.nj.us/lps/dcj/agguide/photoid.pdf.

identifications without testimony from those witnesses regarding the estimator variables.

Alternatively, defendant argues the trial court erred in failing to provide the jury with an instruction on identification that explained all relevant system and estimator variables.

When reviewing an order denying a motion to bar an out-of-court identification, our standard of review "is no different from our review of a trial court's findings in any non-jury case." State v. Wright, 444 N.J. Super. 347, 356 (App. Div.) (citing State v. Johnson, 42 N.J. 146, 161 (1964)), certif. denied, ___ N.J. ___ (2016). We accept those findings of the trial court that are "supported by sufficient credible evidence in the record." State v. Gamble, 218 N.J. 412, 424 (2014) (citing State v. Elders, 192 N.J. 224, 243 (2007)). Deference should be afforded to a trial judge's findings when they are "substantially influenced by his [or her] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Johnson, supra, 42 N.J. at 161. However, "[a] trial court's interpretation of the law . . . and the consequences that flow from established facts are not entitled to any special deference." Gamble, supra, 218 N.J. at 425 (citing State v. Gandhi, 201 N.J. 161, 176 (2010); Manalapan Realty v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Consistent with State v. Henderson, 208 N.J. 208, 289 (2011), a court should suppress identification evidence only if it finds "from the totality of the circumstances that defendant has

demonstrated a very substantial likelihood of irreparable misidentification[.]" The Court in Henderson cautioned that, though it had revised the framework for analyzing the reliability of out-of-court identifications, it fully expected that, "in the vast majority of cases, identification evidence will likely be presented to the jury. The threshold for suppression remains high." Id. at 303. The Court also pointed out that this analysis it was endorsing "avoids bright-line rules that would lead to suppression of reliable evidence any time a law enforcement officer makes a mistake." Ibid.

Under prior law, there was a two-step test for determining the admissibility of identification evidence; it required the court to decide whether the identification procedure in question was impermissibly suggestive and, if so, whether the objectionable procedure resulted in a "very substantial likelihood of irreparable misidentification." State v. Madison, 109 N.J. 223, 232 (1988) (quoting Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247, 1253 (1968)). To assess reliability, the Court considered five factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the time of the confrontation; and (5) the time between the crime and confrontation. Id. at 239-40. These reliability factors were then balanced against the "corrupting effect" of the suggestive identification. Henderson, supra, 208 N.J. at 238 (quoting Manson v.

Braithwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977)).

In Henderson, the Court relied upon current social science research and studies to expand the number of factors informing the reliability of identification evidence and to provide trial courts guidance and explanation as to how to analyze those factors. Specifically, the court identified eight "system variables," defined as characteristics of the identification procedure over which law enforcement has control. Id. at 248-61. These variables are: (1) whether a "blind" or "double-blind" administrator is used; (2) whether pre-identification instructions are given; (3) whether the lineup is constructed of a sufficient number of fillers that look like the suspect; (4) whether the witness is given feedback during or after the procedure; (5) whether the witness is exposed to multiple viewings of the suspect; (6) whether the lineup is presented sequentially versus simultaneously; (7) whether a composite is used; and (8) whether the procedure is a "showup." Ibid.

The Court also identified ten "estimator variables," defined as factors beyond the control of law enforcement which relate to the incident, the witness, or the perpetrator. Id. at 261. These variables are: (1) the stress level of the witness when making the identification; (2) whether a visible weapon was used during the crime; (3) the amount of time the witness viewed the suspect; (4) the lighting and the witness's distance from the perpetrator; (5) the witness's age; (6) whether the perpetrator wore a hat or disguise; (7) the amount of time that passed between the event and the identification; (8) whether

the witness and perpetrator were different races; (9) whether the witness was exposed to co-witness feedback; and (10) the speed with which the witness makes the identification. Id. at 261-72.

Henderson prescribed a four-step procedure for determining admissibility of identification evidence. Id. at 288-89. First, to obtain a hearing, defendant has the burden of producing some evidence of suggestiveness, tied to a system rather than estimator variable, that could lead to a mistaken identification. Ibid. Second, the State must offer proof the identification is reliable, "accounting for system and estimator variables[.]" Id. at 289. Third, the burden remains on the defendant "to prove a very substantial likelihood of irreparable misidentification." Ibid. And, fourth, if defendant sustains his burden, the identification evidence should be suppressed; if defendant does not sustain his burden, the evidence should be admitted with "appropriate, tailored jury instructions[.]" Ibid.

In the present case, the trial court granted a hearing based on the fact the eyewitnesses were shown only a single photograph of defendant. Dougherty testified at the hearing that the three witnesses named defendant as the shooter before being shown his photo, and all knew him prior to the shooting. After hearing Dougherty's testimony and viewing recordings of the identifications, the court found "defendant's allegation of improper suggestiveness . . . groundless." The court concluded that "defendant has not demonstrated any likelihood whatsoever of irreparable misidentification[.]"

The record here contains compelling facts that defeat defendant's claim that the out-of-court show-up of defendant's photo resulted in a very substantial likelihood of irreparable misidentification. Brown knew defendant "for awhile" and the two had been incarcerated together. Like Brown, Ceasar knew defendant for "several years." Jones was also acquainted with defendant and had seen him at the Carver Hall Apartments on multiple occasions in the two or three months prior to the shooting. When shown defendant's photograph, all three witnesses identified defendant almost immediately and were confident in their identifications.

A cursory review of the Henderson estimator variables reveals that most address identification of a perpetrator who is a stranger to the witness, based on the witness's observation of the perpetrator during the often-brief criminal event. Id. at 261-72. The majority of the estimator variables have little or no application when the witness knows the suspect from previous dealings and can identify the person based upon those prior contacts. Under these circumstances, where the three eyewitnesses were well familiar with defendant, we conclude the identification procedure used did not result in a "very substantial likelihood of irreparable misidentification." Id. at 289. See, e.g., State v. Herrera, 187 N.J. 493, 507, 509 (2006) (finding "significant, if not controlling" in admissibility of identification evidence derived from suggestive showup procedure, the fact the witness "had seen defendant on a daily basis in the month prior to the incident").

Contrary to defendant's argument, the trial court reasonably exercised its discretion to terminate the hearing after it heard Dougherty's testimony and viewed the recorded identifications. "[T]he court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless." Henderson, supra, 208 N.J. at 289. We likewise discern no error in the court's jury instruction on identification, which was "appropriate[ly] tailored" to reflect the circumstances of the identifications. Ibid.

V.

Having reviewed the record, we conclude the arguments raised in Points V, VI, and VII of defendant's brief lack sufficient merit to warrant extended discussion. R. 2:11-3(e)(2). We add only the following limited comments.

For the first time on appeal, defendant argues in Point V that his confrontation rights and the hearsay rules were violated by the admission of statements made by police during their questioning of defendant that other persons, who were not produced at trial, identified defendant as the shooter. Although under the plain error rule we will consider allegations of error not brought to the trial court's attention that have a clear capacity to produce an unjust result, see Rule 2:10-2; State v. Macon, 57 N.J. 325, 337-39 (1971), we otherwise generally decline to consider issues that were not presented at trial. State v. Robinson, 200 N.J. 1, 19 (2009); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

As noted, defendant's present argument regarding statements made by police during his questioning was not raised before the trial court and accordingly we need not review it. Nevertheless, addressing the merits of the argument, we conclude defendant has not met his burden of showing that the admission of the challenged remarks produced an unjust result. The statements of the investigators who interviewed defendant were not offered or admitted for the purpose of proving that others inculpated defendant. Rather, as defendant acknowledges, the officers' statements were part of a "proper interrogation technique" aimed at securing his confession.

In Point VI of his brief, defendant argues that the prosecutor committed misconduct during his closing argument by commenting on defendant's post-arrest silence and "failure" to present evidence proving his innocence. The State responds that the prosecutor simply commented on the pledge made during defense counsel's opening statement that he would prove defendant's innocence. The State further maintains that the prosecutor's remaining comments were not directed to defendant's silence but rather to his lack of credibility in responding to the investigators' inquiries.

To warrant reversal, prosecutorial misconduct during summation must be "so egregious that it deprived defendant of a fair trial." State v. Swint, 328 N.J. Super. 236, 261 (App. Div.) (citing State v. Feaster, 156 N.J. 1, 59 (1998)), certif. denied, 165 N.J. 492 (2000). A reviewing court should not hesitate to reverse a conviction where "the

prosecutor in his [or her] summation over-stepped the bounds of propriety and created a real danger of prejudice to the accused." State v. Smith, 167 N.J. 158, 178 (2001) (quoting State v. Johnson, 31 N.J. 489, 511 (1960)). However, a prosecutor's comments during summation should not be reviewed in a vacuum, rather, they must be considered "in the context of the trial as a whole [.]" Swint, supra, 328 N.J. Super. at 261.

A prosecutor is entitled to significant latitude in the content of his or her closing arguments. State v. Frost, 158 N.J. 76, 82 (1999). The prosecutor may "be forceful and graphic" in the arguments presented to the jury. State v. DiPaglia, 64 N.J. 288, 305 (1974). Likewise, the prosecutor "may suggest legitimate inferences to be drawn from the record, but [he] commits misconduct when [he] goes beyond the facts before the jury." State v. Harris, 156 N.J. 122, 194 (1998).

Here, in his opening statement, defense counsel stated to the jury:

> I'll tell you this: The defense will prove that [defendant] is innocent. We don't have to, we shouldn't have to, but here we are today and he's on trial for a murder he didn't commit. We don't have to prove it, but we will. And, you know, I don't say that lightly. That's a big promise I'm making to you, and I got to hope I fulfill it for my client's sake, for a man who's on trial for a murder he did not commit.

In his summation, the prosecutor responded:

> Now, [defense counsel] is absolutely right. He does not have to prove a single thing to you, but he said he would. He said in the beginning he was going to prove his client was innocent, his client was not in Atlantic City on that day. So what does he do? Well, he takes out a lot of cell phone records, and [defense counsel] is very technologically savvy. He knows all the terms for the cell phone records, he knows all the terms for the text messages, and he says, [] look at these texts, look at these cell phone records, but he doesn't prove a thing. He doesn't have to, but he didn't. Absolutely no evidence was put forward in this case to prove that [defendant] was anywhere but Atlantic City murdering James Jordan.

Viewed as a whole, the prosecutor's comments did not impermissibly shift the burden of proof to defendant to prove his alibi. Rather, the comments represented a direct response to the promise defense counsel made in his opening statement that defendant would prove his innocence. See e.g., State v. Smith, 212 N.J. 365, 404 (2012), cert. denied, ___ U.S. ___, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013) ("an appellate court will consider whether the offending remarks were prompted by comments in the summation of defense counsel"). Further, "[a] prosecutor's otherwise prejudicial arguments may be deemed harmless if made in response to defense

arguments." State v. McGuire, 419 N.J. Super. 88, 145 (App. Div.), certif. denied, 208 N.J. 335 (2011).

Moreover, "prompt[] and effective[]" instructions have the ability to neutralize prejudice engendered by an inappropriate comment or piece of testimony. State v Wakefield, 190 N.J. 397, 440 (2007), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008). In its final charge, the judge instructed the jury that defendant had no obligation to prove his alibi:

> [D]efendant, as part of his denial of guilt, contends that he was not present at the time and place that the crime was allegedly committed, but was somewhere else and therefore could not possibly have committed or participated in the crime. Where a person must be present at the scene of the crime to commit it, the burden of proving [] defendant's presence beyond a reasonable doubt is upon the State. [] [D]efendant has neither the burden nor the duty to show that he was somewhere else at the time and so could not have committed the offense. You must determine, therefore, whether the State has proved each and every element of the offense charged, including that of [] defendant's presence at the scene of the crime and his participation in it.

"We presume that the jury faithfully follow[s] [the court's] instruction[s.]" State v. Miller, 205 N.J. 109, 126 (2011).

We likewise reject defendant's contention that the prosecutor improperly commented on his post-arrest silence. Rather, taken in context, the prosecutor's comments focused on defendant's vague and inconsistent responses to various questions posed during his questioning, which, the State argued, reflected his lack of credibility.

In his final argument challenging his conviction, defendant asserts that the cumulative effect of the errors denied him due process and a fair trial. However, we are satisfied that none of the errors alleged by defendant, individually or cumulatively, warrant reversal of his conviction or the granting of a new trial. State v. Orecchio, 16 N.J. 125, 129 (1954).

VI.

Defendant also challenges his sentence. He argues that, in imposing sentence, the court improperly double-counted the victim's death in finding aggravating factors one and two. The State agrees that those aggravating factors are not supported by the record, but nonetheless urges us to affirm defendant's sentence.

At defendant's sentencing hearing, the court found aggravating factors one, the nature and circumstances of the offense (N.J.S.A. 2C:44-1(a)(1)); two, the gravity of harm to the victim (N.J.S.A. 2C:44-1(a)(2)); three, the risk defendant will commit another offense (N.J.S.A. 2C:44-1(a)(3)); six, defendant's prior record (N.J.S.A. 2C:44-1(a)(6)); and nine, the need for deterrence (N.J.S.A. 2C:44-

1(a)(9)). The court found no mitigating factors. Pertinent to this appeal, the court made the following findings regarding aggravating factors one and two:

> First, the [c]ourt [] finds that there was aggravating factor one and that this is the single most important factor. While ordinarily the death of the victim cannot be used as an aggravating factor, the [c]ourt can, however, consider that . . . there was a weapon used in this offense. Therefore, the fact that [] defendant shot and killed [the victim] in cold blood is . . . an appropriate aggravating factor.
>
> Second, the [c]ourt finds also aggravating factor two. [] [D]efendant's actions led to the death of the victim. Here, defendant fired a single shot into [the victim]'s body. The bullet traveled through his arm into his chest and into his lungs, ultimately ending his life.

We review sentencing determinations for abuse of discretion. State v. Robinson, 217 N.J. 594, 603 (2014) (citing State v. Roth, 95 N.J. 334, 364-65 (1984)). For each degree of crime, N.J.S.A. 2C:43-6(a) sets forth "sentences within the maximum and minimum range." Roth, supra, 95 N.J. at 359. The sentencing court must "undertake[] an examination and weighing of the aggravating and mitigating factors listed in [N.J.S.A.] 2C:44-1(a) and (b)." Ibid.; State v. Kruse, 105 N.J. 354, 359 (1987). "'[W]hen the mitigating factors preponderate, sentences will

tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range.'" State v. Fuentes, 217 N.J. 57, 73 (2014) (quoting State v. Natale, 184 N.J. 458, 488 (2005)). Furthermore, "[e]ach factor found by the trial court to be relevant must be supported by 'competent, reasonably credible evidence'" in the record. Id. at 72 (quoting Roth, supra, 95 N.J. at 363).

We accord deference to the sentencing court's determination. Fuentes, supra, 217 N.J. at 70 (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)). We must affirm defendant's sentence unless

> (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [Ibid. (quoting Roth, supra, 95 N.J. at 364-65).]

We will remand for resentencing if the sentencing court fails to provide a qualitative analysis of the relevant sentencing factors, ibid. (citing Kruse, supra, 105 N.J. at 363), or if it considers an inappropriate aggravating factor. Ibid. (citing State v. Pineda, 119 N.J. 621, 628 (1990)).

Aggravating factor one requires consideration of "[t]he nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner[.]" N.J.S.A. 2C:44-1(a)(1). When assessing whether this factor applies, "the sentencing court reviews the severity of the defendant's crime, 'the single most important factor in the sentencing process,' assessing the degree to which defendant's conduct has threatened the safety of its direct victims and the public." State v. Lawless, 214 N.J. 594, 609 (2013) (quoting State v. Hodge, 95 N.J. 369, 378-79 (1984)). The court may also consider "'aggravating facts showing that [a] defendant's behavior extended to the extreme reaches of the prohibited behavior.'" Fuentes, supra, 217 N.J. at 75 (quoting State v. Henry, 418 N.J. Super. 481, 493 (Law Div. 2010)). In determining whether a defendant's conduct was "'especially heinous, cruel, or depraved,' a sentencing court must scrupulously avoid 'double-counting' facts that establish the elements of the relevant offense." Id. at 74-75; see also State v. Yarbough, 100 N.J. 627, 645 (1985).

Defendant correctly asserts that the trial court engaged in impermissible double-counting. Defendant's act of firing a single shot did not "extend[] to the extreme reaches of the prohibited behavior." Fuentes, supra, 217 N.J. at 75 (quoting Henry, supra, 418 N.J. Super. at 493). Likewise, the gravity of harm to the victim, i.e., death, is itself an element of first-degree murder. Since the court erred in finding aggravating factors one and two, we remand for reconsideration of defendant"s sentence in the absence of those aggravating factors.

Defendant"s conviction is affirmed. We remand for the court to resentence defendant without consideration of aggravating factors one and two.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

APPENDIX B

THE COURT: Okay. We have a number of things to do. The first one is I'm going to rule on the motion to dismiss that was brought by Mr. Shenkus yesterday.

I'm going to start with a brief background of what the law is on the matter regarding destruction of physical evidence in a criminal trial. State v.

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Mustaro, 411 N.J. Super. 91, from the Appellate Division of 2009, states, Generally, when there has been a loss or destruction of physical evidence in a criminal trial, the court must determine whether the defendant has thereby been denied due process and a fair trial, and that really undercuts everything that I'm about to say in this case because the foremost responsibility of not only the judge but of the prosecutor and the defense attorney is to assure the defendant of due process and a fair trial.

I liken and will paraphrase the comment made in Brady v. Maryland which is the most

important United States Supreme Court case on this issue. The United States, in that case the federal system, but in this case the state system, wins when justice is done. There's no win or loss in the ultimate finding by the jury. There's a finding by the jury, but as long as justice has been done, then the justice system wins. The prosecutors have a duty to preserve potentially exculpatory evidence on behalf of criminal defendants. California v. Trombetta, 467 U.S. 479. Even under the less broad yet constitutionally engaged federal standard, a state's duty to preserve evidence includes evidence, quote, that might be expected to play a significant role in the suspect's defense. Evidence

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must 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 in Arizona v. Youngblood, another one of the progeny of Brady, 488 U.S. 51, 1988. The Supreme Court expressly limited the extent of the police's obligation to preserve evidence to reasonable bounds to confine it to cases in which the police

themselves by their conduct indicated that the evidence could form a basis for exonerating the defendant.

Now, we have to fairly recognize what the context of this particular case was. There was 216 or so hours of videotape that was recorded from these various cameras, 18 cameras I believe, that were in the Oakcrest Estates in Mays Landing, New Jersey. The defendant in a statement indicated that that's where he was at the time of the murder in this case, so the prosecutor -- prosecution was tipped off within hours of the incident of the killing in this case that Mr. Earley was presenting an alibi defense, or certainly that could be reasonably inferred from his statement, and therefore what they did or did not find at the apartment complex was of evidential value.

Witness the fact that within a very short





time, they went out, they captured it on hard drive. This was a hard drive and it was, as I recall, 300 megs of hard drive space on 18 cameras. It was

probably a lot of video, but given what's happening in our marketplace, to store 300 megs of hard drive, it's a lot, they can't fit it on a CD, but you can fit it on a hard drive which the State says in their -- what they use because they used a mini-hard drive because what's contained in their computers is contained in -- but you can buy it ancillary space, I used the word Sam's Wholesale Club, not that I'm giving Walmart any advertisement here, but it's relatively cheap. You can buy that or probably more for $60, so it's not a tremendously expensive piece of crime-fighting equipment, it seems to me, compared to the other stuff.

The seminal case in this area as to what does a court do in situations like this is State v. Hollander, 201 N.J. Super. 453, Appellate Division cert. denied by the New Jersey Supreme Court 101 N.J. 235, 1985. The Appellate Division in Hollander sets forth the three factors on which a court should focus to determine whether a due process violation. Now, remember we're talking about a due process violation. In the law, they say, you know, a Supreme Court justice or a judge is liberal or conservative and there are

differences between that, but here we're talking about due process of law. Due process of law is something that's been at issue in the American republic since way before people were liberals and conservatives. This is the type of stuff that Thomas Jefferson and James Madison and other lenient intellectuals and founding fathers were concerned about because of the lack of due process in the countries that many of us came from. America was established, the United States Constitution was established to give due process to everybody that came before the bar of justice, and realizing the overwhelming importance of due process of law, it's not really a party kind of a thing and it's not really a Republican or Conservative or a Liberal and Democratic concern, it's a concern. I would readily concede that the law has not been in stasis in terms of what is due process since 1789, but certainly since the case of Brady v. Maryland, there's been a broad constitutional consensus and mandate that due process requires discovery to be supplied by the State, reciprocal discovery, frankly, by the State and by the defense, and I've heard likened to an open book exam, there are no surprises generally in a criminal case because discovery has been completed. Why is that? Is that because we don't like, you know, the trials we often

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see on TV? No. Because we felt that that is integral to the process, to due process for every defendant that appears in this court. I am here to assure that due process occurs in this court. I'm not a partisan for either party that appears before me.

These three factors which were established by Hollander are: 1) whether there was bad faith or connivance on the part of the government; 2) whether the evidence suppressed, lost or destroyed, was sufficiently material to the defense; and third, whether the defendant was prejudiced by the loss or destruction of the evidence.

The key here is, number 1, which is bad faith or connivance. To establish bad faith, there must be a finding of intentional inconsistent with fair play and therefore inconsistent with due process or an egregious carelessness or prosecutorial excess tantamount to suppression. In the absence of these conditions, the right of the public to its day in court in the prosecution of properly found indictment should be forfeited only if, otherwise, it would be

manifest and harmful prejudice to the defendant. And that's State v. Clark, 347 N.J. 497.

And there they're considering -- the remedy, and I'm sure everybody is aware of this, the remedy

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[Colloquy] [9]

that Mr. Shenkus has requested in this case, and it's one that has, frankly, caused me a sleepless night and wondering what is the right thing for me to do, is the dismissal of an indictment, and particularly a dismissal of an indictment in a charge of first-degree murder. That is a tremendously potent remedy, and one, and there's been various courts that have opined that ] this should be the last resort of a court to dismiss an indictment, and I think that that, although I guess theoretically there's no difference between a shoplifting and fourth-degree shoplifting and first-degree murder indictment, at least considering the right of due process for either the defendants, I think that the scale is a sliding scale and I think that the dismissal of a murder indictment would be an extreme remedy and one that would only be justifiable by this court, a clear

and convincing finding of certainly all the three Hollander factors.

We had some conversations yesterday with -- in the closing of this case, Mr. Levy indicated that, Judge, where is it required that we have to keep videos? Mr. Shenkus responded that -- and I quickly and offhand and I interrupted Mr. Levy, and I apologize for that, but my first comment was Brady, and I interrupted him in the middle of his closing on this



[Colloquy] [10]

issue, and I apologize for that, but Brady is certainly but Mr. Shenkus reminded us that the answer is closer to home, the New Jersey court rules. Rule 3:13-3(b) post-indictment discovery states in pertinent part: Discovery shall include exculpatory information or material. It shall also include but is not limited to the following relevant material so not necessarily exculpatory, it says it shall also include other than exculpatory material. Exculpatory information and material is easy, that's, you know, that is the essence of Brady v. Maryland,

exculpatory material, but it says it shall also include, the way I read the court rule, it shall include other than material which is exculpatory in nature, and I'm going to subparagraph E, books, papers, documents, or copies thereof, or tangible objects, buildings or places, which are in the possession or custody of control of the prosecutor including but not limited to writings, drawings, graphs, charts, photographs, video, sound recordings, images, electronically stored information, any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form. It seems to me that the authors of the rules of evidence, and these are all proved by the New Jersey Supreme Court, are

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[Colloquy] [11]

making an effort in that paragraph to be inclusive rather than exclusive, and therefore I would hesitate to find something to find that these videotapes were not within the discovery requirements of the Atlantic County Prosecutor's Office. I think, clearly, they were. New Jersey Court Rule 3:13-3(f) failure to

comply states in pertinent part: If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, it may order such party to permit the discovery materials not previously disclosed, grant a continuance or delay during trial or prohibit the party from introducing into evidence the material not disclosed, or may enter such an order as it deems appropriate. I think it can be fairly inferred from that rule of court that the court -- that this court, the trial court, is invested with a fair amount of discretion in instances where it finds, as I find, that materials which should have been handed over to the State were not handed, excuse me, handed over to the defendant, were not handed over to the defendant.

The New Jersey State Supreme Court in a very recent case, State v. Dabas, D-a-b-a-s, 215 N.J. 114, 2013 addresses available sanctions for discovery

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violations.

Now, Mr. Levy in his closing tried to limit the scope of Dabas to only failure to disclose notes, and it is true that the facts of Dabas were notes taken by police, and I agree, I have read it again last night and I agree with Mr. Levy, they basically said we told you once we were going to do something and we told you again we're going to do something, now we're going to do something, in terms of an adverse inference charge, but the comment by the Dabas, I think, goes further than Mr. Levy was willing to maintain yesterday. Dabas states once an indictment is issued, a defendant has a right to automatic and broad discovery of the evidence the State has gathered in support of its charges. Also, Dabas also states it's the prosecutor's obligation to abide by Rule 3:13-3(b) as in the post-indictment setting which includes the prediction -- which includes the production of interview notes, and that's what this Dabas was all about, but it is not dicta, in other words, this is the rule, this is the law of the State of New Jersey. Dabas states that an adverse inference charge is one permissible remedy for discovery violation such as the destruction of the interrogation notes. The charge is a remedy to balance the scales of justice, even outside

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the realm of a discovery violation. The Dabas court indicates that in the case of a discovery violation by the State, the scales of justice have to be balanced. I think Mr. Shenkus was eloquent yesterday talking about the scales of justice -- justice being blind, and justice is blind to who -- to what violations, and if Mr. Shenkus were in violation of his discovery obligation, I would be looking to balance the scales of justice in a way he may not like, but it would be necessary, because the bottom line here is due process of law which is a very weighty and extremely important concept.

Insofar as this matter is concerned, I clearly find that the evidence that was in this case destroyed was sufficiently material to the defense as the second Hollander criteria. It should have been turned over to the defense. I find it difficult to believe that it was not turned over to the defense, and given some of the testimony I heard from the Atlantic County Prosecutor's Office, and I don't mean any of this personally against any people, but we had four representatives of the Atlantic County Prosecutor's Office from all levels. We had the Captain of county detectives here. He did not know what the criteria was [25] for maintaining evidence and/or discovering evidence,

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that is, turning it over to the defendant, and all the way down the rank and we finally got to the line officer who was handling this case, Miss Lynne Dougherty, and she did not know what the criteria was, whether there was a standard operating procedure in the Atlantic County Prosecutor's Office.

Mr. Shenkus, I think, I was wondering where he was going to when he was trying to introduce the certification which was obtained by the Atlantic County Prosecutor's Office as an official law enforcement office by the New Jersey Association of Police Chiefs, but and they apparently were certified which is good, but I found out in testimony taken in this court that if there are a set of standard operating procedures, they're not in a book that's on anybody's desk. They are contained in various places on some kind of a huge database, and it seemed to me that the Captain of county detectives was not exactly sure what they say on this issue which is an extremely key issue in terms of what the responsibility of the Atlantic County Prosecutor's

Office is: It is to obey the law and to try cases, and integral to trying cases is seeing that the defense has received the discovery that it is required by the United States Constitution to receive. This is not a minor issue, this is a major issue, and

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in this case they failed to fulfill their responsibility. And what I found somewhat surprising, and I'm going to go more than surprising, I found it disappointing and unacceptable, that nobody seems to know what the policy is for discovering evidence from the Atlantic County Prosecutor's Office. Nobody seemed to know what that policy is, or even where it would be other than on a vast database somewhere. Nobody was able to produce a criteria. Why was that an important thing for me to understand? Because, if I had determined that there was such a policy and it had been violated, then I could find it would be certainly easier to find bad faith or connivance which was a very material thing for me to try to find in undertaking this Hollander analysis. But as there appears to be no recognizable or readily available or understandable or extant policy regarding

maintenance of evidence and turning over evidence to the defense in a murder trial, this is a homicide, this is the most serious of cases that could be brought in Superior Court of New Jersey. There is no standard operating procedure that was known to anybody who was involved in this case on the prosecutor's side of the ledger who was aware of any criteria. So a decision was made by the line detective, who I said yesterday and I will resay, state





it again, I didn't find her testimony not to be credible. I think she testified honestly that she reviewed it and she made the call. I don't think she should have made the call, and I will say that I think that a prosecutor, assistant prosecutor, someone with a legal background, should be made to -- should be involved in the destruction of any physical evidence, and in this case apparently they were not. I think Captain Barnett shared my confusion because I think he thought it was required at one point in time and then his testimony did change later that he was not -- he wasn't sure, but I think that, at the very least, that there should be some

involvement by an attorney who understands the responsibilities, the legal responsibilities, not the crime-fighting responsibilities. I'm sure Miss Dougherty is a crime- fighter of the first degree, but she's not a lawyer, she doesn't understand the discovery responsibilities. She indicated herself she did what she was told, and her superior told her pull out what's relevant and repurpose the hard drive. Well, in this case, repurposing means destroy, so I don't want to mince words about repurposing and destroyed. The evidence in this case was destroyed. The -- I cannot find, however, based upon the testimony that there was bad

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[Colloquy] [17]

faith or connivance on the part of the government in this destruction. And I think in order to achieve the most extreme remedy, that is, the remedy proposed by Mr. Shenkus, I would have to clearly find that there was bad faith or connivance on the part of the government, and if I were to find that, then I don't think I would have much of a choice under our system of law, under my responsibilities to assure due process of law to everybody who is a defendant

in this court, other than to dismiss the indictment. In this case, I could not, I cannot find, and in thinking about it for a long time, I can't find bad faith or connivance on the part of the State in this case, but I'm not satisfied with what happened, and I am going to balance the scales of justice.

The third Hollander factor, whether the defendant was prejudiced by the loss or destruction of the evidence, there has been a lot of argument by Mr. Levy that the defendant was not prejudiced because there was nothing on the remaining 215-and-a-half hours of tape that were destroyed in this case. Well, you know, I don't think Mr. Levy saw them all, 215-and-a-half hours, I know I didn't see any of them. Now, Miss Dougherty testified she didn't, and I think she testified honestly that if she did, it would have

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[Colloquy] [18]

taken her a heck of a long time to do it. It would, I figured out, if she spent eight-hours days, it would taken her 27 eight-hours days to review all that material. She explained she didn't necessarily -- she

could review multiple cameras with one, with one, you know, one video screen, and that's probably true. Mr. Shenkus brought up a point which I think is also true, if you have five or 10 there cameras going at a time, how much are you able to concentrate on any one object? These are all true and they're at debatable points, and unfortunately we'll never know. We will never know what was on those tapes other than the 30 or 40 minutes that was produced by the State Mr. Shenkus has. He's not satisfied with it. I'm certainly not satisfied with it either.

So the question is what is the remedy. I'm not -- I don't think it's appropriate for me to dismiss a murder indictment. There are demands of justice on the other side, too, which is there's been a murder which is the most grievous crime that anyone that could be committed against the people of the State of New Jersey against the person. Mr. Earley was indicted for that murder, he's going to stand trial for that murder. He's presumed to be innocent at this point in time. The jury will have to make a decision as to it, but I

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think that there is, given the discovery violation that I find as a matter of fact has been committed by the Atlantic County Prosecutor's Office in this case, I think I have to right the scales of justice, and I think that Dabas gives me a clear way to do it. Dabas talks about what's called an adverse inference charge as one permissible remedy for a discovery violation, and it is an extreme remedy. It's an extreme remedy that is below the remedy of, that is less intrusive, I think, by the Court on the achievement of justice for a death that occurred in this case, but it is a remedy that's a very potent remedy for the defense. An adverse inference charge is a remedy to balance the scales of justice, even outside the realm of a discovery violation.

For example, a defendant may be entitled to such a charge if the State fails to present a witness who is within its control and available to the defense and likely to give favorable testimony to the defendant. The failure, and this would be called a Clawans charge, the failure to present the witness might raise a natural inference that the State fears exposure to those facts would be unfavorable to it. The same logic applies, perhaps, with the greater force to the destruction of interrogation notes which would

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be the Dabas case exactly, or to our case which is the destruction of a vast trove of tapes which were taken at the Oakcrest Estates.

Therefore, the defendant has argued that, as the defendant has argued, that due process rights were prejudiced due to the discovery violation that occurred when the State knowingly destroyed the Oakcrest Estates surveillance tapes. In the alternative, this court is going to allow an adverse inference charge which I am going to read once during the trial after the presentation of witnesses regarding the destruction of these tapes which I'm sure we're going to hear during the trial of this matter, and then I'm going to read it again along with my instructions to the jury, and the following will be my adverse inference charge which I'm going to read to the jury twice in this case, and it's going to be as follows: Quote, you have heard testimony that the Atlantic County Prosecutor's Office destroyed and failed to preserve a video surveillance footage from Oakcrest Estates consisting of 12 hours each for 16 cameras as well as 11 hours, 50 minutes for another camera, and 11 hours, 40 minutes for yet another camera spanning the approximate 12 noon

to 12 midnight on August 26, 2012. Under our court rules, the prosecutor has a duty to produce to the defense

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evidence in its possession following the return of the indictment. If you find that the State has destroyed and failed to preserve evidence in its possession following the return of the indictment, then you may draw an inference unfavorable to the State which in itself may create a reasonable doubt as to the defendant's guilt. In deciding whether to draw this inference, you may consider all the evidence in the case, including any explanation given as to the circumstances under which the evidence was destroyed. In the end, however, the weight to be given to the destruction of evidence is for you and for you alone to decide.

I thought long and hard about the remedy. I think that I'm doing the right thing here and that's why I'm doing it. There's a strong case I think Mr. Shenkus put on for the dismissal of this indictment. I think, because the dismissal of the indictment is

such an extreme remedy, it is not called for in this case, it would not be called for in any opinion. I've read numerous cases where this has been considered among which is State v. Gentilello which is a recent case coming out of the Docket Number A-0419-10-T3. I don't have the official citation for it. Also State v. Peterkin, also, this is reported at 226 N.J. Super. 25.

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[Colloquy] [22]

I did review, Mr. Levy, just for your -- and I also reviewed a case which was as to materiality which assisted in my determination that this fulfilled the second Hollander factor, and that case is State v. Serret, 198 N.J. 21, it's a 1984 case, and I did, Mr. Levy, read both the cases cited by you, meaning, State v. Greeley, 198 N.J. 38 which was the Appellate Division reversal, actually, of the underlying State v. Greeley.

I think the facts in State v. Greeley are different than the facts we have here, and that case really concerned the right of a defendant after being arrested for a drunk-driving case to be able to have

an independent blood test taken thereby circumventing the requirement that most police officers have to not allow somebody to leave their custody until someone who's not drunk comes to pick them up. And the court, Supreme Court in that case says because we find that neither the policy at issue here nor its administration in circumstances of this case impermissibly encroached on that statutory right, and because the policy, that's the policy not to allow people who are intoxicated to drive protects the safety of both defendants and the public to reverse the decision of the Appellate Division and reinstate the defendant's conviction. So

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[Colloquy] [23]

at the end of the day, I think that case is not directly applicable to the facts of this case.

Therefore, my order in this case is in light of a discovery violation in this case, I am going to order the adverse inference charge that I just cited, and I just want to make it clear that in terms of a finding on State v. Hollander, I'm making a positive finding as to two, factor number 2, that the evidence lost --

that the evidence in this case, it was wasn't lost or suppressed, lost or destroyed, in this case, it was destroyed, it was material to the defense. And I'm also finding that the defendant was prejudiced by the loss or destruction of this evidence. It's one thing for Miss Lynne Dougherty who's, you know, I think a well-meaning detective working for the Atlantic County Prosecutor's Office to determine that it was not exculpatory, the rest of the 115-and-a-half hours were not exculpatory. It would have been, I think, appropriate for her to turn over this evidence to Mr. Shenkus and let him make the same determination which he may have made, but as I said yesterday, we will never know what's on that tape. Mr. Shenkus will never know what's on that tape. Mr. Earley will never know what's on that tape, and the jury will never know what's on that tape so the actual destruction of the

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tape is actually an event which I think the jury should know about because there is prejudice attached to it.

That's my ruling on this issue. Thank you.

APPENDIX C

THE COURT: Thank you. All right. As both counsel know, I have thought long and hard about these issues. I thought about them before the trial and I have had to think about them again in rev -- and remember, the question that's now asked is, Judge, will you dismiss a first-degree murder indictment based upon the finding of guilty, a unanimous finding of guilty by a jury after I gave them two, if you recall, two adverse inference charges saying that the jury could disbelieve all the testimony if they found that the

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[Colloquy] [27]

State's failure to deliver the missing videos was of such a nature as would warrant that finding.

The jury -- the jury did come back with the unanimous finding of guilty of first-degree murder. So now it's my question to me is whether I'm going to -- I'm going to upset that jury verdict.

In State v. Hollander, the Appellate Division set forth three factors on which a court should focus in a determination where there is a due process violation. Remember, we're talking about due process here. I don't know where it is in the United States Constitution, but it's somewhere near the -- it's somewhere near the top. Okay. "Due process of law occurred when either there's been a suppression, loss or destruction of physical evidence in a criminal trial."

Three requirements: one, "Whether the evidence suppressed, lost or destroyed was sufficiently material to the defense." Clearly it is sufficiently mat -- it is sufficiently material to be constituted and called Grady material or material that's required to be produced. Two, "Whether the defendant was prejudiced by the loss or destruction of the evidence." I can't help but say the defendant was prejudiced by the loss or destruction of the evidence because we

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don't know what was on the other 250 hours.

We saw half an -- two half-hour snippets and -- of that, but we didn't see 250 hours. There may have been materials on there that were helpful to the defendant. There may not have been. I don't know. Nobody knows. We will never know, I imagine, at this point in time.

So clearly it's Brady material. It's the material that has to be supplied. It's part of our basic core -- it's our basic core values of justice, due process, which has been around. It's not a new concept. It's been around since 1789 when the United States Constitution was finally ratified.

But the third question is whether there was bad faith or connivance on behalf of the government. To establish bad faith, according to State v. Hollander and State v. Clark, "There must be a finding of intention inconsistent with fair play and, therefore, inconsistent with due process or an egregious carelessness or prosecutorial excess tantamount to suppression. In the absence of these conditions, the right of the public to its day in court in the prosecution of properly found indictments should be forfeited only if there would be a manifest and harmful prejudice to the defendant."

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It's an extremely high bar. It was an extremely high bar before this trial. It's even a more extremely high bar after there's been a jury verdict.

"Previous courts have found bad faith in rare circumstances, including situations where the destruction or loss of evidence was found to be 'a calculated effort' to circumvent the disclosure requirements." And that is, in fact, Brady v. Maryland. 373 U.S. 83, 1963. "Or where there was an allegation of official animus toward the defendant or a conscious effort to suppress exculpatory evidence." State v. Surret, quoting California v. Trumbetta.

Defendant argues that there was a continued demonstration of bad faith, connivance and animus by the State in many ways, including the State never acknowledged the Atlantic County Prosecutor's Office knew which hard drive was used to capture their surveillance footage and then erroneously testified that the hard drive had been overwritten by zeros.

Two, the State's failure to comply with the court order requiring a fully functioning copy of defendant's confession or, in the alternative, a reason as to why the copy is not possible. And, three, Sergeant Doughery -- Dougherty's contradictory testimony at the pretrial hearing compared with the





testimony at trial.

Here, allegations made by the defendant of the actions by the Atlantic County Prosecutor's Office I find do not rise to a due process violation warranting the extreme sanction of dismissal of the indictment. I am -- I am going to rule against your motion. I don't know and no doubt the Appellate Division's going to take a look at that and they may agree with me and they may not agree with me.

Defendant bears the burden of establishing bad faith. While this Court may find bad faith through circumstantial evidence, it is a high standard to meet and I don't think it has been met in this case.

First, Lieutenant Furman's report, which indicate -- which indicated that two portions of the Oak Crest Estates surveillance video remained on a hard drive is not a Brady violation warranting the dismissal of an invite -- indictment. He testified at the pretrial hearing regarding the destruction of the Oak Crest sur -- Estates surveillance video. Sergeant Dougherty testified that she had reviewed it, all of the Oak Crest Estates surveillance video and determined that the two portions she had saved and subsequently turned over to defendant were the only relevant portions to the investigation.



[Colloquy] [31]

As this Court found during the pretrial motion to dismiss indictment, there was no vad -- bad faith on the --on the part of the Atlantic County Prosecutor's Office and, therefore, I denied the defendant's motion.

Instead, what I tried to do was to balance the equities. The balance --we made --we made a -- I made, I guess, a point of saying that I wanted to balance the scale and I attempted to do that by

giving two adverse inference charges, one during the case at the time Mr. Shenkus selected and once at the final instructions to the jury. And the jury was given these adverse interest -- inference charges.

At this juncture, we're -- while no transcripts of the pretrial motion have been submitted, it is the Court's belief that Sergeant Johannesen had testified that he did not remember whether the Oak Crest Estates video hard drive had been retasked, but testified as to the procedures by which a hard drive could be put back into use, including the additional step of writing zeros to the drive.

Lieutenant Furman's report merely confirmed that the only portions of the hard drive, which have all -- what -- that they had had already been discovered by defendant. There was no new additional

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[Colloquy] [32]

evidence found or any new evidence -- new evidence destroyed. As a result, there was no prejudice to

defendant because the report had confirmed what was already known.

Second, the Atlantic County Prosecutor's Office did comply with the Court's order of February 12, 2014. The Court ordered the State to produce a fully functioning disk of defendant's recorded statement or, in the alternative, to submit an affidavit as to the reason why the State could not provide it.

At that time, the State was unable to provide a fully functioning disk after consulting with the company who created the recording system and as a result, submitted the company's emailed response as to why the company was not able to do so with a written certification indicating the email was authentic.

Of importance, it is noted that the original copy that defendant discovered of defendant's statement was entirely complete and the defendant never argued otherwise. The disk merely did not have the ability to use commands such as fast-forward.

Third, while there was not exactly clear -- it -- while it is not exactly clear what specific part defendant is alleging that Sergeant Dougherty gave

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contradictory statements—and this is referring to Mr. Shenkus' brief—when comparing the pretrial hearing and trial testimony, it appears the assertions are a general reference to Sergeant Dougherty's review of the video evidence. This allegation does not form a basis nor support any argument that the State has continued to destrict -- to demonstrate bad faith, connivance or animus towards the defendant.

Instead, Sergeant Dougherty was extensively cross-examined at trial and at most, any contradiction establishes that Sergeant Dougherty reviewed her notes after the pretrial hearing, but before the trial was -- the trial to prepare her up -- for her upcoming testimony.

As a result, I find -- and this is not -- I would like to say as I would usually say, there -- you know, there -- this is -- you know, this was something that could I wake up in the morning and came to this. This was after a great deal of thought. And a great deal of thought to the consequences of a guilty -- a

unanimous guilty verdict by a duly constituted and selected jury of people from Atlantic County, a jury of his -- a jury of Mr. Earley's peers, after two adverse inference charges found him guilty of first-degree murder. I do not find evidence of bad faith,

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[Colloquy] [34]

such as would enable me, trying to adhere to and follow my oath, overturn the actions of that jury. And, therefore, I am going to -- I am going to deny the defendant's motion to dismiss the indictment. Okay, that's that issue.

APPENDIX D

**FILED**, Clerk of the Supreme Court, 10 Jul 2017,
**079207**

SUPREME COURT OF NEW JERSEY
C-979 September Term 2016
079207

ON PETITION FOR CERTIFICATION

STATE OF NEW JERSEY,

PLAINTIFF–RESPONDENT,

V.

KESHAUN D. EARLEY, A/K/A
KESHAWN EARLEY, KESHAWN
EARLY AND BUDDHA EARLEY,

DEFENDANT–PETITIONER.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-005051-13 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 5th day of July, 2017.

CLERK OF THE SUPREME COURT

APPENDIX E

**FILED**, Clerk of the Supreme Court, 11 Sep 2017,
**079207**

SUPREME COURT OF NEW JERSEY
M-11 September Term 2017
079207

STATE OF NEW JERSEY,

PLAINTIFF,

V.

ORDER

KESHAUN D. EARLEY, A/K/A KESHAWN EARLEY, KESHAWN EARLY AND BUDDHA EARLEY,

DEFENDANT-MOVANT.

It is ORDERED that the motion for reconsideration of the order denying the petition for certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 6th day of September, 2017.

CLERK OF THE SUPREME COURT

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