

OBJECTIONS TO THE **MAGISTRATES REPORT AND RECOMMENDATION**

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TABLE OF EXHIBITS

1. **Exhibit A-1** Tolbert affidavit; State habeas exhibit P-45.
2. **Exhibit A-2** Firearms expert Davy misconduct; State habeas exhibit P-74
3. **Exhibit A-3** "Tape #2" transcript portion; State Habeas exhibit P-79 contains whole transcript.
4. **Exhibit A-4** Order from court related to tape expert , expert findings; State Habeas exhibit P-83. The habeas exhibit also has tape expert Griffins resume.
5. **Exhibit B-1** Supplemental Lost Evidence Summary Chart.

These exhibits have been excised from the state habeas petition to accommodate the court in relation to the serious issues related to them. The entire exhibit file should be considered when evaluating this brief and memorandum.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SCOTT WINFIELD DAVIS	:	
PRISON NO. 1234213	:	
	:	
DEFENDANT/PETITIONER,	:	CIVIL NO.
	:	1:13-CV-1434-AT-RGV
VS.	:	
	:	
ERIC SELLERS, WARDEN	:	HABEAS CORPUS
OF PHILLIPS STATE PRISON,	:	28 U.S.C. § 2254
BUFORD, GEORGIA; AND	:	
GEORGIA ATTORNEY GENERAL	:	
	:	
RESPONDENT(S) .	:	

OBJECTIONS TO THE MAGISTRATES REPORT AND RECOMMENDATION

COMES NOW, SCOTT WINFIELD DAVIS, by and through undersigned counsel, and respectfully submits the following objections to the Magistrates R&R pursuant to 28 U.S.C. § 2254 and Federal Rules of Civil Procedure FCRP 72.

As a note for referencing the record, "HT" stands for the Petitioner's state habeas transcript Volumes 1-5, "HT2" stands for the Petitioner's state habeas transcript for Dec 2, 2011, "TT" stands for the Petitioner's trial transcript, "PT1" stands for Petitioner's pretrial transcript for the first day of hearings in April 2006, "PT2" stands for Petitioner's pretrial transcript for the second day of hearings in May 2006, and "MFNT" stand for the transcript of Petitioner's Motion for New Trial hearings.

The R&R erroneously validates the rulings of the state habeas court based on many of the same false assertions of incorrect or immaterial facts not supported by the record as well as by unreasonably and subjectively ignoring material facts which support Petitioner's claims of due process violations related to misconduct by the State in violation of the principles held in *California v. Trombetta*, 467 U.S. 479, 488, 104 S. Ct. 2528, 2534, 81 L. Ed. 2d 413 (1984) and *Arizona v. Youngblood*, 488 U.S. 51 (1988) concerning lost evidence and the bad faith of the State, *Giglio v. United States*, 405 U.S. 150 (1972) concerning the use of false evidence, and *Brady v. Maryland*, 373 U.S. 83 (1963) concerning the withholding of exculpatory evidence. As well, Petitioner's trial and appellate counsel were also ineffective as per *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The state court and the Magistrate's Report and Recommendation unreasonably apply the law to the facts presented by the Petitioner.

Petitioner objects to the magistrate not granting a hearing (R:38 p. 15) as there was and is significant evidence that needs to be addressed that was provided in the habeas hearing particularly the tape of Petitioner's first interview. The Court needs to hear the tape for itself in recognizing the expert's analysis that the tape was not authentic or continuous was not

only correct and scientific but the flaws relevant to this finding can be heard by a layperson. (See State Trial Exhibit 251 - Tape, Side B at approximately 17:21). It is critical for the court to listen to this tape, as this was newly discovered evidence of a second tape recorder and tape (See Section D, the altered and second Tape, *infra*).

A. All Substantive Due Process Grounds were properly raised and are not new.

1. In the R & R. pp. 10-12 including footnotes and other comments within the R&R, the Magistrate states that the Petitioner only raised two substantive due process grounds and that some grounds included in the federal habeas petition are new and procedurally defaulted under O.C.G.A § 9-14-51. The R&R also claims that Petitioner failed to raise these substantive due process claims in his state habeas corpus petition. Petitioner objects to these claims and denies that any of the due process claims raised in his federal petition are new, successive or were not explicitly or implicitly raised, presented, argued or did in fact conform to evidence presented in his state habeas petition and proceedings.

The State did not claim that issue number 2 in the 2254 was new or defaulted, which clearly represented the due process violations. Further the standard representation of issues in 2254 Petitions were correctly articulated in conformity to other

successful 2254 petitions when discussing the due process errors made by the state courts habeas decision which included due process in addition to ineffective assistance of counsel. (See 2254 issues in general and specifically issues 2, 3, 4, 5, 7, 8, 9, and 10 which all mention the due process questions addressed by the state courts decision in addition to ineffective assistance claims. (The R&R (R:38) itself notes that due process is applicable, see footnote 4 and 13). Therefore any due process analysis is valid and any complaint that due process was not raised is moot or without evidentiary support. Regardless the R&R is wrong in that due process was repeatedly raised in all the pleadings during the litigation process with the state.

2. The new evidence revealed at the state habeas hearing included the deliberate and continuous appalling state of the APD evidence room; an affidavit from a state employee who admitted her affidavit concerning what happened to missing evidence was a lie; the taped interview of the Petitioner was proven not to be authentic or continuous and a second tape existed; critical crime scene fingerprints were intentionally destroyed by the GBI, and the GBI Firearm Examiner in the case was fired along with impeachment evidence withheld among other newly discovered information. Such circumstances are a part of the State Habeas record and issues per Georgia law. On at least two occasions the pleadings were properly supplemented without

objection. See (R:1-43 "CPC", Certificate of Probable Cause to the Georgia Supreme Court (GASC) issues I, II, and V). The discussion of the law in the supplement to the state habeas also addressed the affect the lost evidence and bad faith had on Petitioners due process rights. (See R:1 entire State Habeas Supplement discussion on bad faith as tied to due process violations). (R:1 State Habeas Supplement). No court has addressed the substance or law in the State Habeas Supplement. (Petitioner's due process claims were a part of his CPC (R:1-43). to the Georgia Supreme Court and were properly presented for discretionary review. As long as state Supreme Court review of a prisoner's claims is part of a state's ordinary appellate review procedure, prisoners of that state must present their claims to the state supreme court to preserve those claims for federal review, **even if review by that court is discretionary** (emphasis added). See *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, at 1734, (1999).

3. The state habeas court ordered each party to submit a proposed order. In the 108-page proposed order provided to the court by Petitioner, each issue was identified from the habeas and that which was discovered and argued orally during the habeas hearing, clearly articulating the due process issues presented then and now. (See Petitioners proposed order in general and R:1 Petitioner's Proposed Order pp.32-26, 42, 45-48,

63-64, 70-74, 77 and 79-et. seq. specifically). Although ineffective assistance of counsel is a significant component of Petitioner's pleadings, all due process questions are and were properly before the state court and this honorable court.

4. Pursuant to O.C.G.A. § 9-11-15 Amended and supplemental pleadings: allows; (a) A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order; (b) **Amendments to conform to the evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings (During the habeas hearing the state did not object to any of the new evidence revealed as a violation of Petitioner's due process rights). Such amendment of the pleadings as may be necessary to cause them *to conform to the evidence* and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. Pleadings are not an end in themselves, but only a means to the proper presentation of a case, and that at all times they are to assist, not deter, disposition of litigation on the merits. *McDonough Constr. Co. v. McLendon Elec. Co.*, 242 Ga. 510, 250 S.E.2d 424 (1978) (see O.C.G.A. 9-11-15). "In Georgia, a party's right to amend a complaint pursuant to O.C.G.A. 9-11-15(a) was very liberal."

Nationwide Mut. Fire Ins. Co. v. Kim, 294 Ga. App. 548, 669 S.E.2d 517 (2008). See O.C.G.A. 9-11-15, "requires that decisions be **made on the merits**, not upon the niceties of pleadings." See, *Owens v. Cobb County*, 230 Ga. 707, 198 S.E.2d 846 (1973). Pleadings may in effect be amended by **evidence** adduced upon trial. *Juneau v. Juneau*, 98 Ga. App. 330, 105 S.E.2d 913 (1958). Parties may, by **express consent** or by introduction of evidence without objection, amend pleadings at will. *McDonough Constr. Co, supra*; *Carreras v. Austell Box Bd. Corp.*, 154 Ga. App. 135, 267 S.E.2d 792 (1980); **Evidence received without objection amends pleadings by operation of law.** *McLendon Elec. Co, supra*; *Sambo's of Ga., Inc. v. First Am. Nat'l Bank*, 152 Ga. App. 899, 264 S.E.2d 330 (1980). The various documents and pleadings filed in this case clearly addressed multiple due process violations under the 5th, 6th and 14th Amendments to the United States Constitution, including evidence uncovered for the first time at the habeas hearing itself. There were no objections to the supplement to the state habeas (R:1 Supplement to Habeas) which has not been mentioned related to the due process arguments in the state habeas order or the R&R. The order filed on Petitioner's behalf specifically discussed and raised the due process claims and new evidence findings and even though the state court decided to sign, in less than 24 hours, the State's proposed order without any changes, the

information submitted in Petitioner's order is relevant to what the court was aware of as it relates to due process and ineffective assistance claims which included the new information presented and discovered at the habeas hearing itself. In addition to the many claims of due process violations that occurred in this case, a fundamental miscarriage of justice has occurred to such a degree as to require review of all claims and to remand this case for a new trial. 28 USC 2254(c) requires only that state prisoners give state courts a fair opportunity to act on their claims. See *Castille v. Peoples*, 489 U.S. 241 (1986); *Picard v Connor*, 404 U.S. 270, 275-276 (1971).

5. Pursuant to O.C.G.A § 9-11-15, Petitioner clearly amended his state petition through oral argument and by the new evidence uncovered and introduced in the state habeas hearings, briefs and orders all raised in state court proceedings and state Certificate of Probable Cause (CPC) to the GASC, and now alleged in his federal 2254 petition. In Petitioner's closing oral arguments during the hearings in State court Petitioner's attorney stated that, "When the State fails to disclose evidence or tampers with evidence, it automatically violates due process and the confrontation clause of the Sixth and the Fourteenth Amendment. You don't even have to address all these issues. When they mess with the evidence or they don't disclose it, you get in trouble." (R:1 HT pp.872-873). In the CPC (R:1-43 p.11),

Issue I clearly delineates separate due process violations for all of the new evidence of misconduct discovered in the state habeas proceedings. In the CPC (R:1-43 p.35), it clearly states that "This is not only ineffective assistance of counsel but a due process violation based on misconduct alone." All of these documents and pleadings are clear due process claims articulated throughout the case and are not "some makeshift needles in the haystack of the state court record", as stated in the R&R. These due process claims clearly cover all the misconduct, the tampered tape and missing 2nd tape, the false and perjured affidavit attested to by Atlanta Fire Department employee Linda Tolbert concerning what happened to 35 pieces of the most critical and material evidence in the case (including the alleged murder weapon, bullet projectiles, other weapons, gas can and more) (R:1 Petitioner's State Habeas Exhibits 21, 25, 27, 45) and the state of the evidence room showing intentional acts of continued violations of procedure (which are addressed *infra* in Sections C-G).

6. None of the claims made in Petitioner's federal habeas petition are new and therefore the state court had the opportunity to rule on these claims as required by law. If anything, these claims were missed and not ruled on by the state court simply because the court took only 24 hours to sign the State's Proposed Order, never reviewing the voluminous pleadings

and over 7000 pages of habeas record. Therefore these claims need be given no deference by the federal courts and should be reviewed and evaluated *de novo* without deference to any state ruling. Otherwise, the claims should be determined to be unexhausted because the state court did not rule on them and should be referred back to the state habeas court to hold an evidentiary hearing without prejudice to Petitioner and Petitioner should be allowed to refile his federal habeas (stay-and-abeyance procedure) after the completion those proceedings should it be necessary.

B. Trial and Appellate Counsel were Ineffective in handling the lost evidence.

1. Petitioner's trial counsel was misled by State deception and obstructive behavior as discussed in Sections B-G, *infra*, but counsel was also ineffective as per *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984). The R&R, R:38 p.17, attempts to validate trial counsel Morris attempts at dealing with the lost evidence. Petitioner objects to imputing such validation where no record exists that Morris has such standing when he admitted he did not think experts or other means of addressing the lost evidence was necessary. This statement does not alleviate any attorney's obligation to properly investigate the case or if a mistake is made based on such conduct not be held to the proper ineffective

assistance standard. Morris statements that he "pursued every legal standard" and "raised all issues" is not enough to exonerate 6th Amendment protections and is not true. This obviously did not occur in light of the discoveries related to the lost evidence and misconduct revealed at the habeas hearing. (The Supreme Court of Georgia noted that the attorneys did not address significant "other" lost evidence).

2. Petitioner objects to the R&R (R:38 p.19) regarding the handling of the lost evidence being supported by "some evidence" and cites what Petitioner argues was instead only an ineffective "attempt" and was not therefore effective assistance of counsel. Petitioner's attorneys put on no evidence of "bad faith" that was at the time available and/or was intentionally hidden by the State's misconduct (which will be addressed as the substantive due process violations, *infra* in Sections C-G). As discussed in the controlling U.S. Supreme Court case *Arizona v. Youngblood*, 488 U.S. 51 (1988), proving bad faith was essential to winning any argument in Petitioner's **pretrial** Motion to Dismiss Due to Destruction of Evidence due process violation motion concerning potentially exculpatory evidence. See *Youngblood*, 488 U.S. at 58 ("We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law). This is especially true because the lost

evidence due process issue and the admissibility of the lost and destroyed evidence was decided before the trial judge in the pretrial motions hearings. The trial judge did in fact rule that "Having carefully considered the nature and quantity of the missing items, this court concludes that the missing evidence is **material**" (emphasis added) (Order on Motions, July 13, 2006). However the judge ruled that "without showing bad faith", there is no due process violation. Therefore counsel was required to put on any evidence of bad faith in these hearings and not later at trial. This alone is ineffective assistance supported by the very trial record used to address these matters in the habeas.

3. Petitioner objects to the R&R (R:38 p.22) regarding the use of one fire expert and one blood chemistry expert as being deemed effective as related to other expert opinions on matters not related to the fire or blood. Clearly talking to one expert on one dimension of this case is not a sufficient use of the experts needed based on all of the evidence lost that was shown to be necessary by the opinion of the Georgia Supreme Court (GASC). The GASC specifically pointed out that trial counsel for Petitioner only addressed a few pieces of the missing evidence, see *Davis v. The State*, 676 S.E.2d 215. Additionally experts on the items presented at the habeas hearing were necessary to prove the misconduct of the State's witnesses and the effect of

the lost evidence on the trial. This had nothing to do with counsel's effective assistance in contacting a fire and blood expert. Speaking with these two experts cannot exonerate counsel in utterly failing to contact experts in the area of the gun, lost evidence, the tape interview, gas can, evidence room misconduct and witnesses who falsified reports and affidavits. Counsel believing the misconduct was "obvious" is not a legal strategy for failing to investigate the case properly or call necessary experts to prove bad faith. The Georgia Supreme Court alluded to this error in their opinion.

4. Petitioner objects to the R&R (R:38 p.24) wherein the court relied solely on Attorney Morris's statement that he "had the investigator look into it" related to the lost evidence and spoke to individuals who had a hand in it. Those individuals identified are not the persons who had a hand in the lost evidence. Consulting with the **property** room (rather than the Evidence Room) in the City of Atlanta police Department (APD) is irrelevant, as Morris clearly put nothing in the record even similar to what Petitioner's state habeas attorneys did. Morris never went to see any evidence room, never spoke to any experts on the lost evidence and never spoke to any person running the evidence rooms or discussed their conditions, which had a direct affect on what was later discovered. Morris never investigated the chain of custody of the evidence. He was deceived about

where some of the evidence might be based on Tolbert's false affidavit and other deceptions (discussed infra in Sections C-G), but he never spoke to the persons who were responsible for the preservation of the evidence. Chain of custody receipts, delivery receipts and other documentation were readily available and significant to proving the bad faith conduct in losing the evidence just before the trial. Most of this evidence could have provided vital DNA to prove Petitioner's innocence. There is no substitute for this evidence.

5. Petitioner objects to the R&R (R:38 pp. 24-25) regarding the cross examination of witnesses as enough to establish the fact that counsel did his duty when examining the lost evidence issue. The cross examination of these witnesses could only be effective if counsel could catch them in a lie or show that the testimony given was false or misleading. To do this the attorney would have to locate the evidence and experts to show that these witnesses were in fact not telling the truth. (See for example *Rogers v. Israel*, 746 F.2d 1288 (7th Cir. 1984). (Counsel was ineffective for failing to call a physician as an expert witness to contradict the testimony of the prosecutions expert witness).

6. Petitioner does claim that his trial attorneys were ineffective for essentially doing nothing to prove the "bad faith" as required by *Youngblood*, *supra*. The trial attorneys were ineffective for claiming "gross negligence" was bad faith

in his pretrial Motion to Dismiss Due to Destruction of Evidence when that is clearly an incorrect legal claim as defined by law and therefore not based on proper legal strategy. "When the government is negligent, or even grossly negligent, in failing to preserve potentially exculpatory evidence, bad faith is not established." *Monzo v. Edwards*, 281 F.3d 568, 580 (6th Cir. 2002). They were also ineffective for putting on no witnesses who handled the evidence besides Det. Chambers who was not responsible for the custody and care elements of the evidence. Counsel failed to present evidence of the hundreds of intentionally violated SOP's as proven in Petitioner's state habeas hearings to prove bad faith. Putting on one SOP that was violated is not enough to show the massive amount of violations that occurred (See Petitioner's "Supplemental Lost Evidence Summary Chart" Exhibit B which can and did establish bad faith. This chart was submitted as a supplement to the State habeas). To prove bad faith without examining witnesses about the many violations is ineffective assistance.

In pretrial, counsel put on no witnesses from APD, AFD, Dekalb or the GBI that actually were responsible for the custody of the evidence. The Supreme Court of Georgia ruled in *Davis, supra*, that Petitioner's pretrial counsel only challenged during the **crucial** pretrial hearings 12 of the over 70 actual pieces of evidence that were lost by the state in the case. This

established the basis for the habeas petition and the IAC complaints along with the due process violations. If the Supreme Court of Georgia felt the attorneys did not do enough and did not challenge specific pieces or all of the missing evidence then Petitioners claims and evidence now support their ineffective assistance in this regard. The Georgia Supreme Court ruled that trial counsel waived challenges to the other items. This is exactly why this information had to be raised as both IAC and due process at the state habeas hearing. Petitioner argues that Petitioner's attorneys did object (using continuing objections) to all the missing evidence during trial (R: 17 TT pp.2266, 2335, 2353,2365, 2367, 2543, 2568; R:18 TT pp.2609, 2618, 2895) but did not do so in the pretrial motions where admissibility and due process violations were decided. This difference is crucial to Petitioner's claims here and was noted by the Georgia Supreme Court as a specific counsel deficiency. At trial the objections rang hollow as no additional evidence could be presented.

Almost all the lost items were in testable condition, (R:1 HT p.722), but counsel had to challenge the evidence in the pretrial motion but unexplainably did not do so. Counsel was ineffective during the crucial pretrial motion hearings in April and May of 2006 where the trial attorneys put on no substantive and specific evidence of bad faith as required to prove a due

process violation in accord with *Youngblood, supra*. The pretrial motions hearing on the lost and destroyed evidence was when the missing evidence issue was decided. In pretrial, counsel only questioned three people concerning the missing evidence none of whom actually was physically responsible for testing or for physically preserving the evidence itself. The first was Detective Chambers who, although somewhat responsible as lead Homicide detective, did not handle any evidence once it was submitted to the various agencies (PT1 pp.28-107). Although Det. Chambers admits that some unspecified SOP was violated, counsel (although they allegedly investigated all avenues and spoke to unnamed state officials) does not actually put into evidence a single SOP nor do they identify one of the more than 300 serious SOP violations later discovered by state habeas counsel. Trial counsel did not put on any witness from the Atlanta Fire Dept, Dekalb Police or the GBI that was responsible for virtually all the material lost evidence as detailed in Petitioner's §2254 and other filings. To prove bad faith without examining witnesses on their conduct and showing the violations from their actions and violation of SOP's is ineffective no matter counsel's hollow words. The remaining two witnesses examined in pretrial, Fulton County DA Paul Howard and Fulton County ADA Joe Burford, had responsibility as prosecutors but did not handle or have anything to do with the evidence once submitted to the various

agencies. These witnesses denied responsibility simply because they were not responsible for the physical evidence itself (PT1 pp.28-217). Counsel was clearly ineffective for not addressing the relevant witnesses who were responsible for the actual physical evidence most of whom were available in 2006 as was done by Petitioner's state habeas attorneys.

In pretrial, Petitioner's counsel specifically did not submit any standard operating procedures (SOP's), chain of custody documents (COC's) nor did they produce any evidence of what actually happened to the evidence (R:1 HT p.652-656). Counsel did not know how many SOP's were violated (R:1 HT p.673) and never considered investigating or arguing SOP violations (R:1 HT p.692). He did not subpoena SOP's because he believed it was "self-evident" the state did not handle the evidence properly and he thought that it "did not require proof" (R:1 HT p.721). Counsel admitted not putting on witnesses from APD, AFD, the GBI or Dekalb that actually processed evidence or was responsible for its chain of custody (R:1 HT p.672, also see Pretrial transcripts). Counsel did not put on or even consider an expert witness in the area of evidence handling (R:1 HT pp.648, 658). Instead of actually putting on evidence of prejudice, counsel instead believed prejudice was "obvious" (R:1 HT p.660). Counsel knew it was possible to trace gas cans' serial numbers to purchasers but did not consider an expert to

do so because again he thought the prejudice was "obvious" (R:1 HT p.693). This issue alone became significant since witness Bruton was allowed to testify that the gasoline can recovered from the victim's burned Porsche looked like the one Petitioner had. Petitioner could not refute this directly inculcating statement without being able to look at the gas can, or have it traced. Trial counsel did not attempt to put into the record any substantive evidence of bad faith or "official animus" on the part of the persons or agencies that actually were responsible for the physical loss (PT1 and PT2). Trial counsel instead wrongly depended on their claim that "gross negligence" should equal bad faith (R:1 HT p.644) when established case law clearly says it does not, see *Monzo v. Edwards, supra*.

Appellate counsel was no better in proving the key issue of bad faith. Petitioner did not change counsel from trial and therefore could not claim ineffective assistance counsel (R:1 HT p.778). Although appellate counsel testified that they subpoenaed SOP's and other evidence documents as well as spoke with witnesses, they only submitted one SOP from Dekalb County (R:1 HT pp.385-390). They did not prove or articulate even one actual specific SOP violation and even more importantly how and why this single SOP was violated. As state habeas counsel discovered later, GBI Latent Print Examiner Alfreddie Pryor gave new and materially different evidence at the State habeas

hearing that the latent print cards were actually still in existence in 2005, which was completely different from the state's claim they were lost or destroyed in the late 1990's. This again shows how the state was intentionally willing to mislead and misdirect Petitioner's trial counsel on the apparently exculpatory latent print evidence. Appellate counsel did not consider nor put on any evidence-handling expert (R:1 HT pp.392, 399). Appellate counsel did not delve into SOP violations, chain of custody violations nor did they even provide evidence as to what should have happened with the evidence through property receipts or chain of custody documents. Counsel even admitted that he does not recall considering any conversations concerned with getting SOP's to investigate what the proper procedures were or if the state had violated them (R:1 HT p.674). As was testified to in the Habeas hearings, Petitioner's counsel again just assumed that bad faith was obvious and therefore decided no proof was needed. This is a clearly erroneous legal argument and representation standard. Beliefs not based on fact is ineffective, *Shorter v. Waters*, 278 Ga. 558, 560 (2004). No attorney's conduct is above a reasonableness inquiry. *Chandler v. United States*, 218 F.3d 1305, 1310. See also, *Etheridge v. United States*, 287 Fed.Appx 806 (11th Cir. 2008).

Despite Petitioner's trial and appellate counsel's apparent assumptions, courts are clear that the Petitioner cannot just say something is "self-evident." Counsel has to prove how the evidence was handled improperly and prove the bad faith as required in *Youngblood*, *supra*, and counsel needed to do it in the pretrial hearings where this issued was argued. Despite trial counsel's opinion and claim that they "investigated all avenues", it is clear they did not. The amount of work the attorneys did on incorrect legal assumptions is far from adequate and certainly not "all avenues". Counsel may not have to investigate "all avenues" to be effective; however if they allege they did so and the proof shows otherwise then ineffective assistance can be assumed. Even that is not necessary here as the attorneys were operating on a misguided legal theory. The R&R relies heavily on statements but subjectively ignores the material evidence to the contrary to these statements. Had trial and post conviction counsel been effective regarding the efforts they claim, most of the evidence, not hidden by state misconduct, should have been used in pretrial. Therefore, Petitioner's trial and appellate counsel were ineffective and Petitioner's 5th and 6th Amendment constitutional rights were violated which had a substantial and injurious effect in determining the jury's verdict as well as the judge's determination of Petitioner's pretrial motions.

C. Apparent Exculpatory Latent Prints

1. Petitioner objects to Magistrate's findings concerning the lost fingerprint cards, (R:38 p.21) and that there was no evidence the prints were of AFIS quality. The SOP manuals in effect during the time frame that the prints were kept (from at least 1998 to 2005) noted that crime prints were to be preserved due to their significance to criminal cases (R:1 Petitioner's State Habeas Exhibit #29-30, 51-61). The SOP notes specifically that, "Latent prints are the most dynamic physical evidence available to law enforcement agencies. The preservation, analysis, and documentation of latent fingerprints provide invaluable support to criminal investigations" (R:1 HT pp. 446-447) (R:1 Petitioner's State Habeas Exhibit #53). O.C.G.A. 17-5-56 also applies to Petitioner and states that:

(a) Except as otherwise provided in Code Section 17-5-55, **on or after May 27, 2003**, governmental entities in possession of any physical evidence in a criminal case, including, but not limited to, a law enforcement agency or a prosecuting attorney, shall maintain any physical evidence collected at the time of the crime that contains biological material, including, **but not limited to**, stains, fluids, or hair samples **that relate to the identity of the perpetrator of the crime** as provided in this Code section (emphasis added)

This would include fingerprints as both biological material ("Touch DNA") and of course being related to the identity of a perpetrator that the State had until 2005, two years after the enactment of this statute. The R&R states, that the Petitioner

presented no evidence that the missing fingerprints were of AFIS quality. Testimony and facts prove this is clearly incorrect as by GBI SOP in force in 1999 when the GBI still had the prints, **latent prints that were not of AFIS quality had to be identified in the Official GBI reports as such** (R:1 HT pp. 440-442). This non-AFIS quality designation was not given to the prints and GBI Latent Print Examiner Al Pryor admitted this in the habeas hearings (R:1 HT pp.220, 437, 467) (R:1 Petitioner's State Habeas Exhibits 37, 39, 51). So this is clear and convincing evidence the prints were of AFIS quality and were not run in violation of numerous SOPs concerning AFIS searches (R:1 HT pp. 204, 439-464). All unidentified AFIS quality prints go to the Unsolved Latent Print File and were to be run on a regular basis (R:1 HT p. 452). As ex-GBI certified print expert Adrian McCravy also testified in the habeas hearings, prints were automatically sent to be run through AFIS (R:1 HT pp.179-180). New evidence in the state habeas hearings and in the Motion for New Trial (MFNT pp.45-46) hearings clearly showed that the state had the prints into 2005. Over the nine years the state had the prints, GBI SOP clearly designates that the prints should have been scanned and backed up (R:1 HT p.213), (R:1 Petitioner's State Habeas Exhibit 39), but they were not, as admitted to by the GBI's Pryor. Since, as above, the prints were of AFIS quality, they should have been regularly and repeatedly run thru AFIS in the unsolved

print file as per SOP (R:1 HT p.452). It was also first learned in the MFNT, that in early 2005, Atlanta Police Investigator Carter Jackson was trying to compare the crime scene latent prints against the victim's that he had hoped to obtain from a letter the victim had written (MFNT pp.45-46) Jackson was unsuccessful but admits they had the prints when he did this. Logic dictates the only reason Jackson would have had to try and match the latent prints to the victim nine years after the crime would have been to obtain proof that the prints were not valuable to the Petitioner because if they were the victim's, they could not have been another suspect's or the real killer's. This attempt to do so by law enforcement shows that the police were aware of the apparent exculpatory value to the Petitioner and then later intentionally destroyed the prints against SOPs. This shows "official animus" and intent, which is also bad faith. This is clearly a due process violation under the *Youngblood, supra*, or *Trombetta, supra*, standards, further discussed in Section G., *infra*. Since the prints had an apparent exculpatory value, Petitioner does not need to prove bad faith; but he has met his burden anyway with the intentionally destruction by the GBI. All the evidence presented in the state habeas, *supra*, is clear and convincing testimony that the prints were of AFIS quality.

2. Petitioner objects to the determinations in the R&R (R:38 p.21) concerning the prints in general because the determinations ignore material issues concerning the bad faith of the State. The prints were of AFIS quality but even if they were not, no rules or regulations as understood by any GBI official with the extensive experience such as Alfreddie Pryor would allow that person to destroy the prints no matter the AFIS quality designation. The prints were still materially valuable to the Petitioner if another suspect was identified or even if new technology became viable. What happened here is quite simple; the officials admittedly recognized the inculpatory evidentiary value of the evidence. If the crime scene prints matched the Petitioner, they had very strong proof of guilt because the Petitioner would have had no innocent explanation for his prints being on the victim's Porsche. When the prints did not match the Petitioner, they became a liability. This became even truer when in 2005, right before the Petitioner was indicted, they could not be matched to the victim. The only value left in this case was exculpatory. The false and misleading testimony of GBI Latent Print Examiner Alfreddie Pryor at trial (R:17 TT p.2410) and the Fulton County ADA as to what happened to the missing crime scene latent prints alleging that they just disappeared sometime in the late 1990's (R:1 Petitioner's State Habeas Exhibit #80) when in fact the State

had them at least until 2005 was bad faith. Pryor later admitted in the state habeas that he **intentionally** destroyed what were AFIS quality prints stored in the Latent Print Case File allegedly due to age which is directly against SOP (and common sense) in an open homicide (R:1 HT pp.488-471). The record establishes that he knew their apparent exculpatory value and then intentionally destroyed them when the regulations, which he knew governed his conduct, prohibited that. Under any view of the law, that is bad faith. "[T]here is no evidence of an established practice which was relied upon to effectuate the destruction, where the applicable documents teach that destruction should not have occurred, and where the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both." *United States v. Elliott*, 83 F. Supp. 2d 637, 647-48 (E.D. Va. 1999). The deception of the State concerning what prosecutors told the Petitioner's trial attorneys and what actually happened to the prints along with Pryor's misleading testimony is bad faith. It also would be additional impeachment information the jury and trial judge should have known and could have collectively assessed together with the rest of the bad faith and impeachment evidence

discussed, *infra* and *supra*. Petitioner was prejudiced because he could not use the prints to identify the killer or other suspects and had his attorneys known of this false testimony, it would have further impugned the entire investigation in the eyes of the jury (as in *Guzman v. Sec DOC*, 663 F.3d 1336, at 1351 (citing *Giglio*)). It likely would have affected the judge's determination of bad faith in considering Petitioner's pretrial motion concerning the lost evidence.

D. The Altered Tape and Missing Second Tape

1. Petitioner objects to the R&R, (R:38 pp. 26-37) related to the findings regarding the tape recordings of Petitioner during his police interview because the determinations of the state habeas court and the Magistrate are based on false assertions of fact and subjectively ignore material facts and law. Therefore, these courts' determinations deserve no deference and this court should review the facts, evidence and law *de novo*. Petitioner argues based on his various statements and requests to his attorneys to have the tape analyzed that their not doing so was ineffective assistance of counsel. Petitioner also raised and argued that the misconduct concerning the tape was also a substantive due process violation not dependent on any ineffective assistance of counsel claim. Petitioner's attorney made this claim in his summary statement

during Petitioner's state habeas proceedings. "When the State fails to disclose evidence or tampers with evidence, it automatically violates due process and the confrontation clause of the Sixth and the Fourteenth Amendment. You don't even have to address all these issues" (R:1 HT pp. 872, 873). Therefore, Petitioner's state habeas counsel did claim a separate substantive due process violation concerning the tape. The due process claims related to the tape along with IAC were also two separate issues raised in the supplement to the state habeas (R:1 Supplement to the State Habeas), the Petitioner's proposed state habeas order (R:1 Proposed Order) and the CPC. (R:1-43 pp.11,35)

2. This claim is not dependent on ineffective assistance of counsel because the State acted intentionally in that the State violated *Giglio, supra* and *Brady, supra*, when the various state actors hid the evidence of the tampered tape, hid the still missing 2nd tape, and altered the tape transcript and other evidence. In Petitioner's pretrial motions "MOTION FOR DISCOVERY AND INSPECTION AND TO DISCLOSE EVIDENCE OR INFORMATION FAVORABLE TO DEFENDANT" and "SECOND MOTION FOR DISCOVERY AND INSPECTION AND TO DISCLOSE EVIDENCE OR INFORMATION FAVORABLE TO DEFENDANT", Petitioner requested "1. Any and all statements, confessions, or admissions made by the Defendant, whether written or oral, subsequently reduced to writing, or summarized in officers'

reports or copies thereof, including the rough notes of such officers." Also requested was "4. Any statement by the Defendant which was tape-recorded. Also requested are exact copies of such tape-recordings, documents authorizing the interception of said conversation, and the date the recording was made, and the identity of all persons whose voices were recorded." (See pre trial discovery motions). Petitioner's attorneys clearly asked for all audio recordings and statements of Petitioner. The State intentionally did not comply. Petitioners' attorneys repeatedly questioned APD Homicide detective Rick Chambers as to whether the tape was altered. Detective Chambers denied the tape was altered. When questioned by the assistant district attorney, "Has it been altered in any way Chambers responded, "No." (PT1 p.55). He also denied the tape was unauthentic when questioned by Petitioner's attorney (PT2 p.40). Simply put, Chambers lied. As Petitioner's audio expert proved through undisputed science and testimony, *infra*, the tape used at trial against the Petitioner was altered, not continuous and unauthentic. (See for example *Hall v DOC*, 343 F.3d 976, 9th Cir Court of Appeals, (2003) ("false and material evidence was admitted at Hall's trial in violation of his due process rights"); Habeas granted through the use of scientific expert testimony of erasures and alterations in critical documents related to petitioner's alleged incriminating statements). Chambers had motive to lie

about the tape thus requiring an expert to prove his deception, which Petitioner has done, *infra*. The State had an opportunity to put on their own tape expert but chose not to do so and made no objection to this expert testimony and evidence.

3. In the R&R (R:38 pp. 30, 33), the Magistrate quotes again the state habeas court's decision and repeats that, "Petitioner never informed counsel of an additional recording device in the interview room or of the existence of a second audio recording." This is not material and Petitioner objects to such a claim. **There is no evidence that Petitioner knew there was a second recorder or tape being used.**

It is material to note that the tape used at trial was a "microcassette" despite the fact Det. Chambers testified in the habeas hearings that the tape recorder used to record Petitioner's interview was "just a basic cassette recorder" (R:1 HT p.848). Therefore it can be reasonably inferred that the second recorder could have been easily hidden from Petitioner including hidden on the detective's person. Further evidence shows that Bruce Morris was never notified about or given a second tape (R:1 HT2 p.5). Counsel did request all statements of the Petitioner and any audio recordings and were told they turned over to defense counsel (R:1 HT2 p.6). Also when analyzed objectively and reasonably, the fact the Petitioner never mentioned a 2nd tape recorder or tape is supportive of and

consistent with Petitioner's claims that the detectives were committing misconduct including *Brady* and *Giglio* violations regarding the alteration of the tape and the undisclosed 2nd tape discussed, *infra*. The second recorder was obviously hidden and not seeing the second tape recorder is not relevant to the evidence showing a second tape existed and was not continuous. The issue is the lack of an authentic continuous tape and the existence of a second tape not disclosed to counsel.

4. The R&R (R:38 p.31) simply repeats the state habeas court's order by also suggesting that it was material that "Griffin did not examine the actual tape recorder that was used to make the recording." Petitioner objects to any conclusions made from this because there is no evidence that this is materially relevant to a scientific forensic audio analysis and the recorder was never provided by the State (R:1 HT p.840). Petitioner also objects to the R&R suggesting that somehow this affected the evaluation. It should be noted that a court order was obtained to get the exact tape from the government that was used at trial. The tape was given to Griffin from the District Attorney's office as an original tape to analyze specifically per request and for the state habeas hearing. Petitioner's state habeas exhibits 62 and 63 (R:1 Petitioner's State Habeas Exhibits 62, 63) reflect that the tape forensically analyzed was the original tape used against the Petitioner at trial. No one

for the State at the habeas hearing testified that the tape was not subject to proper analysis by the expert. The State offered no counter expert to suggest any of Griffin's findings were incorrect or that in tape analysis that the expert must see the recording device to analyze the authenticity of the tape. The R&R is conjecture and Petitioner objects to the suggestion that a tape cannot be analyzed without seeing the actual recording device as no evidence supports such a conclusion. This process is done every day in trials on phone taps and interviews with police and suspects. The tape is the issue not the recorder. The testimony of Griffin was not speculative as suggested by the state court and adopted in the R&R. Griffin's testimony was specific and supported by peer-reviewed methods used to analyze the tape. The issue is that the tape was altered, thus making the tape not authentic and not continuous by law in violation of *Giglio, supra*, and that a second recorder was in the room recording for which the 2nd tape is still missing in violation of *Brady, supra*.

5. The R&R also makes reference to the believability of Detective Chambers over the forensic expert Griffin. (R:38 pp. 33, 34). Petitioner objects to this determination as it is not reasonable based on the facts in evidence. Petitioner has repeatedly challenged Det. Chambers' truthfulness and

credibility in each hearing Chambers has testified. Concerning Petitioner's police interview, Chambers' testimony has repeatedly and materially changed each time he has been confronted with new impeaching evidence in each of his five separate testimonies over the course of Petitioner's case. Simply because Chambers was law enforcement does not make his testimony unassailable, nor does it excuse untruthfulness. On example of many would be simply reviewing Chambers' pretrial testimony (PT1 pp. 28-105, PT2 pp.18-46) concerning Petitioner's police interview versus later testimony in the Motion for New Trial hearings (MFNT pp.46-67) on the question of the Miranda warning allegedly given. The Miranda was challenged in Petitioner's Jackson-Denno hearing. It is instructive in assessing Chambers' overall credibility. Petitioner's trial attorney challenged the legality of Petitioner's police interviews (a written statement, a pre-tape interview and a taped interview) in one respect because Petitioner has repeatedly argued he was not given a Miranda warning until after he as a suspect had lengthily been interviewed (pre-tape) in a custodial setting by detectives. He was then re-interviewed on tape post-Miranda (in what has now been shown to be an altered tape and a 2nd missing tape, *infra*). In pretrial and a trial, Chambers denied this two-stage illegal interview. He originally stated that Miranda was given in writing prior to the pre-tape

interview of the Petitioner as a suspect and that the Miranda was written because that was the practice in an **"office setting"** which is where Petitioner was in APD's Homicide office (R:17 TT p. 2544). In the MFNT), Petitioner's attorney confronted Chambers with the fact Petitioner's signed Miranda warning at 5:00 a.m. was an hour and a half after Petitioner's signed statement at 3:32 a.m. Therefore, the entire pre-tape interview was pre-Miranda and a violation of Petitioner's rights as well as proof of Chambers' deceit. When confronted with the significance of this, Chambers then completely changed his testimony and stated that a never before mentioned or documented oral Miranda warning was given (MFNT pp.62-64). This was in direct contradiction to Chambers' own words that a written warning was given in office settings and his pretrial and trial testimony concerning the timing and form of the Miranda warning (R:17 TT pp. 2540-2555). In the end of the MFNT Chambers changed his testimony yet again. Chambers testified that the Miranda was actually given before the "taped segment" which made the whole un-taped interview segment pre-Miranda (MFNT pp.65). Chambers testimony concerning Petitioner's interviews is so untrustworthy it does not deserve deference.

Chambers is certainly not an expert on forensic tape analysis. His false statement that the tape was not altered and that there was no second tape has nothing to do with science,

and was self-serving and false. This falsity is something the jury should have heard. The science is unassailable and does not require a credibility finding as to Chambers denials, which are not unexpected. Either the forensic determinations are true or not but only another forensic expert could make that determination, certainly not Chambers. The State did not offer their own expert to refute the scientific findings of Griffin. The jury is responsible for such findings and because the tape was used throughout the trial Petitioner had a right to have his expert discredit the testimony of Chambers in pretrial proceedings or trial. The tape's alterations and the State's deception are due process violations while the lack of expert analysis of the tape by counsel is ineffective assistance.

6. Griffin's testimony was not mere speculation and Petitioner objects to such comments in the R&R (R:38 p. 35). (See for example *Hall v DOC, supra* ("false and material evidence was admitted at Hall's trial in violation of his due process rights"). (The Petitioner requests that this honorable court listen to the original tape on a high fidelity audio system as even a layperson can hear the second tape being turned over in the room at beginning approximately at 17:20 into Side B).

7. In the R&R (R:38 pp. 32-33) the court repeats the state court's determination that there was no IAC in regards to analyzing the altered tape. The Respondent has repeatedly argued

that Petitioner's attorney, Bruce Morris, in conflicting testimony (now withdrawn by affidavit) stated that it was Petitioner's decision not to analyze the tape. (The R&R does not mention Mr. Morris' affidavit regarding Petitioner's request to have the tape analyzed). Therefore the State argues the Petitioner waived his right to claim this due process violation based on ineffective assistance of counsel, and therefore the claim fails. First, testimony from Petitioner's two other attorneys and a letter from the Petitioner to his trial attorneys clearly shows he asked to have the tape analyzed (R:1 Petitioner's State Habeas Exhibit #50). As Petitioner's habeas attorney states in summary argument, "And I want to point back to Don Samuel's testimony because Don not only is brave enough to get up on the stand and say, you know, I screwed up. Scott Davis did ask me to have the tape analyzed and I just didn't do it. But he also says something that is really, really important, which is -- and I want to quote him -- that if the tape had been altered, it would be, quote, the very definition of bad faith. I like that. It is not acceptable for the police to erase parts of the evidence and say here's an authentic copy" (R:1 HT p.885). Attorney Samuel did not even listen to the tape (R:1 HT p.410). Second, in Morris' earlier testimony he stated analyzing the tape was **never discussed** (R:1 HT p.732). Morris now admits

Petitioner did ask to have the tape analyzed and that Morris did not do so.

8. Petitioner objects to the R&R (R:38 p.30) where the court states that, "Despite multiple conversations with counsel concerning the audio tape, Petitioner never informed counsel that he believed the audiotape was manipulated or inaccurately reflected certain portions of the interview." This is not a reasonable or objective interpretation and Petitioner objects to this inaccurate statement of the facts. Petitioner claimed "adamantly" that the tape had been stopped at least once if not more, not including the turnover stop. Petitioner claimed that detectives illegally threatened him when it was stopped and thus by definition the tape used at trial did not reflect the interview. The threats and whatever else happened while the recorder was stopped, over-recorded, or erased was not on the audio so therefore the tape did not represent accurately the interview. However the analysis does not end with what was said when the tape was off. The issue and analysis is related to whether the tape was continuous, not altered and not stopped in addition to evidence of the existence of a second tape. The law does not allow such a tape to be used against a person regardless of any allegations of what was said to Petitioner when the tape was turned off and the state court never addressed this legal issue. This denied State misconduct was discovered

only after the tape was analyzed by an expert something Petitioner's trial and appellate attorneys were asked to do repeatedly but failed to do. Any allegation of strategy in not doing so is flawed, as the law does not allow a tape that has been altered to be used regardless of what was said or not when the tape was off. This would have been a significant determination in any argument that the tape should be suppressed. The attorneys never argued the law on such an altered tape resulting in ineffective assistance of counsel for failing to get an expert to analyze the tape, a common practice in every attorney's investigation process. (*Steidl v. Walls*, 267 F.Supp 2d 919 (C.D. Ill 2003)). Steidl's attorney did not use an expert to impeach critical evidence. "This court concludes that there is a reasonable probability that scientific refutation of one of the key aspects of Rienbolt's testimony would have resulted in a different outcome at trial. This probability is sufficient to undermine confidence in the outcome. The appellate court's finding to the contrary constituted an unreasonable determination of the facts and an unreasonable application of the Strickland standard."

In the state habeas hearing the facts revealed Bruce Morris testified that Petitioner consistently, repeatedly and emphatically stated as far back as 1996 that the tape had been stopped and that Det. Chambers had threatened him (R:1 HT

p.683). Morris could not remember how many times Petitioner claimed the tape was stopped by Chambers (R:1 HT p.685). Petitioner's trial counsel Brian Steel testified as follows at (R:1 HT 775):

Habeas Counsel: "Did it come to your attention that -- from Mr. Davis that he was concerned that there were times in the tape, multiple times in the tape, where the tape was stopped and started, and that during those stops the police were threatening Mr. Davis? "

Mr. Steel: "I don't know if I remember multiple, but it definitely was said. My memory is that Mr. Davis told Mr. Morris and myself that Detective Chambers, I believe Detective Walker, and I believe a third detective or officer was in a room with Mr. Davis. I think Mr. Davis told me that Detective Chambers shut the tape off in Mr. Davis' presence - Detective Chambers shut off the tape in Mr. Davis' presence, put a finger in Mr. Davis' face, and told him that he would die in the Georgia electric chair, he would see to it that he would die, he would get the death penalty, and then Mr. Chambers calmed down and turned back on the tape. That's my memory."

Habeas Counsel: "Okay. So this was not -- was not your understanding that this was an issue about turning the tape over, that Mr. Chambers stopped the tape to then threaten Mr. Davis."

Mr. Steel: "I feel very comfortable testifying that's what Mr. Davis had told me."

Post trial counsel Don Samuel also testified that the Petitioner claimed that Detective Chambers turned the tape recorder on and off to threaten him and that the transcript and tape were not indicative of the interview (R:1 HT p.401). Specifically:

Habeas Counsel: "What did Mr. Davis tell you about the -- what you have already mentioned as a stopping and starting of the audiotape?"

Counsel Samuel: "I cannot remember details other than that subject matter was discussed with some -- I don't want -- I don't want to say with some frequency, **but he was adamant that the tape was started and stopped, and perhaps that the transcript did not accurately reflect what was actually said.** And I don't mean that the transcript and tape aren't identical, but there were issues, I guess is the best way I can describe it."

Habeas Counsel: "Did you go then and listen to the tape?"

Counsel Samuel: "I don't think I ever listened to the tape."

Further testimony from Don Samuel (R:1 HT p.429) noted:

Habeas Counsel; "What was it clear to you the reason--why was the reason that Scott Davis wanted you to have the tape analyzed?"

Counsel Samuel: "**Because it was either altered or repeatedly started and stopped--stopped and started.** "

Two of Petitioners three attorneys admitted Petitioner made these statements and wanted the tape analyzed. Morris despite his inconsistent testimony has now agreed this was the case. Other witnesses at trial testified that the Petitioner also told them that Chambers stopped the tape to threaten him. In addition, the Petitioner's father testified also that the police and specifically Det. Chambers, "Had yelled and screamed at him and gotten in his face, that they had tape recorded him, but they would turn the tape on and off" (R:18 TT p.3420). This is

further corroborating evidence that the Petitioner stated consistently that the detectives threatened him, that the tape was stopped multiple times but most importantly that the tape did not represent fairly the interview. The R&R (R:38 pp.30-31) continues with the state habeas court's ruling that Petitioner decided not to have the tape analyzed on the advice of his attorneys. Although Morris does once state the above, he is inconsistent and contradictory. In addition, his habeas testimony is completely inconsistent with the two other attorneys' testimony, *supra*, that represented Petitioner. Since the habeas, Morris has corrected his testimony with an affidavit correctly stating the Petitioner did ask to have the tape analyzed but that Morris did not do so. Regardless of the affidavit and its admissibility now, Petitioner objects to the court's reliance solely on Morris testimony when deciding this issue. In objecting to the R&R related to this issue it should be noted that Morris first stated analyzing the tape was never even discussed with the Petitioner (R:1 HT p.732). The R&R also subjectively ignores other evidence such as the letter written to Petitioner's attorneys asking for the tape to be analyzed (R:1 Petitioner's State Habeas Exhibit #50).

10. In the R&R (R:38 p.31,33), the Magistrate credits as reasonable the state habeas courts factual analysis that Morris' belief analyzing the tape would not strengthen the argument that

the tape was stopped or that threats were made against Petitioner during those stops. Petitioner objects to these factual conclusions as well as concluding Morris was effective for this unsupported legal opinion and advice to Petitioner. Despite counsel's claim and the state habeas court's ruling, proving the content of the interview when the tape was turned off was not the only legal issue. Admissibility was the issue as per *Ellis v. The State*, 279 Ga.App. 902; and *United States v. McMillan*, 508 F.2d 101 (8th Cir.), cert. denied, 421 U.S. 916, {746 F.2d 441} 43 L. Ed. 2d 782, 95 S. Ct. 1577 (1975). Both trial (R:1 HT p.688) and appellate counsel (R:1 HT pp 408, 778) admitted that they have challenged tapes before and used experts to do so. In fact in Petitioner's Second Discovery Motion before trial, counsel specifically requested in point #3:

"The Defendant also requests the opportunity to examine all physical evidence and photographs and to subject all original audio and video recordings to examination by an expert of the Defendant's choosing."

When Counsel was questioned about what Petitioner said concerning how many times Detective Chambers stopped the tape, counsel testified as follows:

Mr. Morris: "Mr. Davis was emphatic, I don't remember how many times, Mr. Davis was emphatic that Detective Chambers stopped the tape and threatened him while the tape was not on."

Habeas Counsel: "And Mr. Davis told you that prior to the trial?"

Mr. Morris: "Absolutely."

Habeas Counsel: "He told you that back in 1996; correct?"

Mr. Morris: "Yes."

Habeas Counsel: "So if Mr. Davis was correct, that would have been a pretty crucial thing to prove; correct? Is that right?"

Mr. Morris: "Yes. I think we did prove it."

However, the record shows that Morris was completely wrong by any objective and reasonable standard. He never proved the lack of continuity of the tape because he never had a forensic expert analyze the tape. What Mr. Morris was referring to is unknown but if it is because he asked the Detective alone if the tape was stopped and started that was insufficient. Chambers was not going to tell Morris he stopped or started the tape or had another recorder. Analyzing the tape would be the best way to prove that the threats were possible and that the tape was unauthentic. There was no valid strategic reason not to do so. This could only be proven due to the stops and starts of the recorder or any other physical and digital anomalies determined by an expert through the use of scientific tools such as a microscope and forensic audio software as was done by Petitioner in the state habeas hearings, as discussed *infra*. The science was clearly impeachment of such testimony and the very fiber of due process every defendant is entitled to. Failing to present

impeachment evidence is ineffective assistance of counsel. See *Nixon V. Newsome*, 888 F.2d 112 (11th Cir. 1989).

11. Petitioner objects to the R&R (R:38 p.31) as to the court's findings regarding Petitioner's tape expert. Petitioner objects to the conclusions concerning forensic expert Griffin because the courts findings are not objective, are incomplete and fail to mention material facts a reasonable fact finder would include. The State habeas testimony shows that Griffin had nineteen years of experience as an audio engineer and expert (R:1 HT p.818). He testified to his lengthy related professional education and background and the fact that he had testified for both the government and defense in approximately 30 cases to analyze and authenticate audio recordings. (R:1 HT pp.819-822). Griffin testified that he used both a physical microscope to look at a tape and used peer accepted expert audio software to analyze the digital copy of any tape he made. Griffin testified specifically that areas of the tape "will be looked at on the computer wave form as well as magnetically developed and viewed through the microscope where necessary to identify those areas of interest." Griffin was admitted as a "tape expert in the area of forensic audio analysis" without objection (R:1 HT p.824). Speaking to any of the detectives who interviewed Petitioner during the taping of his statement is not relevant to a forensic analysis of the tape itself. Petitioner's attorneys or

detectives are not qualified to scientifically analyze a tape recording. The purpose of using forensic experts in the first place is to determine the authenticity and accuracy of a recording made by the police. The detective had already denied in pretrial, falsely, that the tape was not stopped except to turn it over and that there was no second tape. This is false as both the forensic expert and even the State's tape transcript prove otherwise. (The tape transcript also refers to the tape used against the Petitioner at trial as "Tape 2" (R:1 Petitioner's State Habeas Exhibit # 79)).

12. The R&R (R:38 pp. 31-32) summarizes the state habeas court's analysis that the tape had been recorded on a device similar to a dictation device and that it could miss small portions due to automatic starts and stops. Petitioner objects to any conclusions made from this because material facts are omitted, for example, the R&R findings that the "automatic pauses" were different than the "stops", erasures, and over-recordings found during the Scott Davis portion of the interview identified by the forensic tape expert Griffin. Griffin defined the difference as stated in the R&R findings versus what actually happened as follows; "A stop, on the other hand, is when the actual physical button is pushed on the tape recorder which activates it and makes it stop, and then at some point later the recording is resumed when the record button is again

pushed" (R:1 HT p.835). Griffin articulated the difference between automatic stops (such as voice activation stops) and physical stops. Erasures are different from the automated pauses. Griffin testified, "the erasures are also manually done when someone pushes the button" (R:1 HT p.845). So the stops, erasures and deletions were all manually done by the detectives, creating false evidence in violation of *Giglio*.

13. The R&R (R:38 p.32) summarizes the state habeas court's incorrect analysis that Det. Chambers testified that the detectives had "deliberately taped over another interview to record Petitioner's interview." Petitioner objects because this is false, incomplete, speculative and misleading. Detective Chambers only testified to the following when asked about the tape, "It was Detective Walker's tape, and I believe he had another interview on there that we taped over" (R:1 HT p.850). The state court's factual conclusion is incorrect because the tape was not Det. Chambers' tape and he only "believe(d)" Walker had another interview on the tape that was taped over. There is no claim by Chambers that specifically the Scott Davis portion of the interview over recorded any prior interview and Det. Walker did not testify to this either. Finally, forensic expert Griffin stated unequivocally that he did **not** hear any over-recorded conversation from another case on the Scott Davis portion of the interview audiotape (R:1 HT p.845). It is also

important to note concerning the admissibility of the tape that it was in fact Walker's and not Chambers' tape. This is important because Chambers with that testimony admits he could not have known of the "the manner of preservation" or even the security and control of the tape as required for admissibility by *Ellis, supra*. Further, Det. Chambers admitted he was "in and out" of the interrogation room during the interview with the Petitioner (R: 18 TT p. 2584). So even if Chambers was not being untruthful in his shifting testimony, he cannot testify as to whether Detective Walker erased or deleted portions of the tape while he was out of the room as was proven by the clear scientific forensic evidence from the expert Griffin. Walker did testify briefly in the state habeas hearings and did not use his testimony in any way to verify the authenticity of the tape. Collectively this is clear and convincing evidence that the stops, erasures and over recordings Griffin found on the audiotape were deliberate making the tape unauthentic and not continuous as required by Georgia law. The importance of this is significant since this altered and highly prejudicial audiotape was used as a significant portion of the State's case as testified to by Chambers. All of the tape misconduct would have been powerful impeachment evidence in the pretrial and trial process. This is also a separate due process violation in addition to counsel failing to have the audiotape forensically

analyzed as was Petitioner's request during pretrial motions for discovery, suppression and post trial proceedings of Petitioner which have been proven to be true.

14. The R&R (R:38 p.32) summarizes the State habeas court's analysis of Griffin's forensic findings. Petitioner objects to these factual findings concerning Griffin's testimony and any legal conclusions made from them, as the findings are materially incomplete and subjectively ignore material facts. Chambers' testimony that there was only one tape and that it was not altered, not stopped and started other than to turn it over is self serving and not forensically accurate and sole reliance on Chambers is not objective.

15. The R&R (R:38 p.32) begins a summary of the ineffective assistance of counsel analysis of the state habeas court. As already addressed *supra*, Petitioner objects to the R&R factual determinations and legal conclusions that counsel's performance was not ineffective. Petitioner states that there were other substantive due process violations concerning the altered audiotape and a 2nd undisclosed audiotape that would have been discovered if counsel had followed through on analyzing the tape. Petitioner objects to the state habeas court's and the R&R's determination (R:38 p.32) that the Petitioner failed to establish prejudice concerning the altered audio tape and the undisclosed 2nd audio tape. (Prejudice will be discussed in

detail, *infra*). Petitioner also objects to any factual finding or legal conclusion that Griffin's testimony was the only evidence to support Petitioner's claim the tape was unauthentic and that therefore any so called "beliefs" by Griffin are purely speculation. There was nothing speculative about the uncontroverted scientific expert testimony of Griffin. Any judicial inferences to the alternative are without legal or factual support. (See for example *Hall v DOC*, *supra*).

16. Petitioner objects to the R&R (R:38 pp.33,34) wherein the court gives a brief but also incomplete analysis of Petitioner's claims concerning the due process violations related to the unauthentic and altered audiotape and the undisclosed 2nd tape. Petitioner objects to the Magistrate's factual and legal conclusions that Petitioner failed to conclusively establish that the State altered the audiotape or failed to disclose a second recording because the findings are not reasonably or objectively supported when an objective fact finder analyzes all the evidence presented by Petitioner. How else would they be persuaded other than through the expert? This is clear and convincing evidence that the Petitioner's audiotape was unauthentic and that there was an undisclosed 2nd tape of the interview. The evidence presented conclusively established the alteration, erasures, stops and starts and the existence of a 2nd tape. This can be done by reading the admitted without objection

forensic audio expert Griffin's testimony in its entirety (R:1 HT pp.808-845). **(Petitioner respectfully requests that the district court listen, on high fidelity audio equipment to the actual tape of Petitioner's interview (State's Trial Exhibit 4 and 251) or otherwise the digital copy of the Scott Davis portion of the interview tape, (Petitioner's State Habeas Exhibit 63, which is a physical exhibit))**. It is also respectfully requested that the district court review the official transcript prepared by the State of the Scott Davis interview portion of the tape for the reference to "Tape 2" (R:1 Petitioner's Habeas Exhibit 79) which further supports the existence of two tapes. This transcript evidence supports that there were two tapes and the one used at trial was not continuous and was unauthentic. Because Det. Chambers admitted he was "in and out" of the interrogation room during the interview with the Petitioner (R:18 TT p.2584), Chambers by his own admission was not present in the room the entire time. Therefore depending on Chambers testimony, even if it was true, concerning the alleged integrity of the tape is not determinative because he cannot testify as to whether Det. Walker erased or deleted portions of the tape while Chambers was out of the room, as was proven by the clear scientific forensic evidence from the expert Griffin. Finally, it is important to note that a 2nd audio expert witness admitted on a limited basis

(R:1 HT p.495), Henry Howard, also analyzed the Scott Davis portion of the tape and determined that he heard noises consistent with a 2nd tape recorder and tape (R:1 HT p.509). He testified, "The interview would be going along, they would say, "I'm going to stop the tape now," either to take a break, or at one point they stopped the tape to turn it over, and you actually hear the button pushed to stop the other recording, you heard the tape removed, turned over, inserted, and then that recorder put back into the record mode." He could not have heard this without there being two recorders and tapes - one recording and another one being turned over. It is possible that the state judge simply did not understand the significance of this. Howard was not allowed to give a separate expert conclusion but his experienced opinion is consistent with Griffin's expert conclusion there were two tapes.

As testified to by the expert Griffin, the tape was "altered" because it had at a minimum two stops (not including the flipping over the tape) and that there were **two deletions (erase-overs)** during Petitioner's interview but not on other parts of the tape not related to Petitioner's interview (R:1 HT pp.818-846, Petitioner's Habeas Exhibit 83). Based on the stops, erasures and deletions, Petitioners expert explained that the tape could not be considered "authentic" (R:1 HT pp.837, Petitioner's Habeas Exhibit 83) and therefore should have been

inadmissible at trial, see *Ellis v. State*, *supra*. Griffin's testimony at best shows unequivocally thru his expert scientific analysis that the tape is unauthentic and that there were two recorders operating in the room (R:1 HT p.837) :

Habeas Attorney: "What did you discover at 17:21 (On side B of the tape)?"

Audio Expert Griffin: "At 17:21 I discovered a stop, and immediately after the tape was resumed, the detective in the room said," "Turn the tape over."

Habeas Attorney: "What did that mean to you?"

Audio Expert Griffin: "It suggested that there was another tape recorder being used. And I would following the detective's words "Turn the tape over," there was some fumbling, handling, mechanical noise which was consistent the operation of the tape recorder.

Habeas Attorney: "What does the term "authenticity" mean?"

Audio Expert Griffin: "A tape is authentic if it is shown to be original, continuous, and unaltered.

Habeas Attorney: "Is this tape authentic?"

Audio Expert Griffin: "No."

Habeas Attorney: "Is it continuous?"

Audio Expert Griffin: "No."

Habeas Attorney: "Has the tape been altered?"

Audio Expert Griffin: "Yes, it has."

Further, it is objective and reasonable to conclude that after the detective says "turn the tape over" and noises a

forensic audio expert concludes are consistent with tape handling and recorder operation are heard, these noises are clear evidence of a second recorder in the room. Logically if the tape admitted at trial was being turned over, it could not be recording. Noises consistent with the operation of a recorder and the handling of a tape on the tape admitted at trial, which are clear even to a layperson, could only be heard on the tape admitted at Petitioner's trial if there were in fact two recorders and two tapes. One recorder and tape were recording (This is trial Exhibit 251 played at trial) while the second recorder and tape (still missing) was being stopped, turned over and started again. This is clear and convincing evidence the tape was altered, there is a still missing 2nd tape and Det. Chambers committed repeated perjury in violation of *Giglio, supra*.

17. Based on all the above evidence, Petitioner objects to the state habeas court's and the R&R conclusions that the audiotape played at trial was not proven to be unauthentic, was altered or that two recorders and tapes were operating during Petitioner's interview with police. Petitioner argues that any objective and reasonable fact finder would, if they considered all the above clear and convincing evidence admitted in Petitioner's hearings, agree that the tape was unauthentic, altered and therefore inadmissible despite the non scientific

false testimony of Det. Chambers. Petitioner objects and argues that any objective and reasonable fact finder would also, if they considered all the above clear and convincing evidence admitted in Petitioner's hearings, find that a second tape of the Petitioner's interview was not disclosed to Petitioner in violation of *Brady*. This is a separate due process violation. Clearly based on the forensic physical analysis that there were deletions, over-recordings, intentional stops and starts, the tape admitted at trial (State's Exhibit 251) should not have been admissible. These alterations and misconduct meet the definition of Felony Tampering with Evidence OCGA § 16-10-94, which is surely bad faith.

18. Petitioner objects to the R&R (R:38 p.36) determinations that no bad faith was established by the tape misconduct. Altering the tape with deletions and over-recordings is "official animus" and bad faith. The non-disclosure of the 2nd tape as per *Brady*, does not require bad faith. In *Brady* suppression of evidence favorable to the defendant is addressed. In *Brady*, the court holds, "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution (emphasis added)". Also when the reliability of a given witness may well be determinative of

guilt or innocence, nondisclosure of evidence affecting credibility falls within the general rules applied in *Giglio*, *supra*. (See *Guzman*, 533 F.3d at 1347, 11th Cir. 2011). As in *Guzman* "counsel was never given the opportunity to impeach the detective concerning false testimony" and altered evidence in front of the fact finder. For *Giglio* violations, the defendant is entitled to a new trial "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury" *United States v. Agurs*, 427 US 97 at 103, 49 L Ed 2d 342, 96 S Ct 2392 at 2397 (1976). "The could have standard requires a new trial unless the prosecution persuades the court that the false testimony was harmless beyond a reasonable doubt." *Smith v Sec'y Department of Corrections*, 572 F.3d 1327 at 1333-34 (11th Cir. 2009). *Giglio's* materiality standard is "more defense friendly" than *Brady's*. *Hammond v. Hall*, 586 F.3d 1289, 1306 .4 (11th Cir. 2009).

19. Petitioner objects to the state habeas court's and the R&R's determination that Petitioner's due process rights were not violated because of what is an ongoing and repeated subjective analysis that completely ignores a main legal issue with the tape (R:38 p.36,37). Proving the content of the interview when the tape was turned off is not the legal issue here. Petitioner agrees that it would be impossible to prove the content of the interview when the tape was off without something

such as a second tape or the very unlikely admission of misconduct by the detectives. However, the missing content is not the question addressed when the tape was analyzed and more importantly that missing content is not what is relevant when determining the admissibility of the tape by law at trial. **The legal issue is whether the tape is authentic and meets all the legal requirements for admissibility under State law which it does not.** It seems that both the state habeas court and the R&R completely ignore this in their determinations and wrongly focus only on what could or could not be proven that happened when the tape was turned off. The admissibility of the tape is determined in Georgia by law. In *Ellis, supra*, in order to establish the foundation for an audiotape statement's admissibility the State "must prove: 1) The mechanical device was capable of recording a statement; 2) the operator was competent; 3) **the recording is authentic and correct;** 4) **no changes, additions, or deletions were made;** 5) the manner of preservation; 6) the identity of the speakers; and 7) the statement was not elicited through duress"(emphasis added). Petitioner argues since the tape was not authentic and that there were deletions and over-recordings proven by scientific evidence, that the tape was proven inadmissible by clear and convincing evidence.

20. The Petitioner objects to the state habeas court's determination and the R&R that there was no prejudice associated

with the tape (R:38 p.37). Because there seems to be no substantive analysis done by either court concerning the prejudice of the tape, Petitioner cannot object to any specific factual findings of the courts. However, the prejudice associated with the tape to Petitioner was tremendous because it should not have been admitted at trial and the taped statement was very damaging to Petitioner. The state repeatedly played the taped statements of Petitioner who unknown to the jury had been threatened during his interview as testified to in the habeas hearings and discussed *supra*. The state then claimed repeatedly that the Petitioner was deceitful. The taped statement was repeatedly testified to and highlighted during Detective Chamber's testimony (R:17 TT p.2568). The taped statement was quoted or played during the State's closing **over thirty times** and was the repeated centerpiece of convicting the Petitioner (R:19 TT pp.4111-4185). Some examples of the State's specific claims of lies after playing the tape or citing the Petitioner's statements from the tape are (R:19 TT p.4121, "Well, ladies and gentlemen, that is what we call a lie, a lie"); (R:19 TT p.4122, "The defense is sticking to the theory that the best lie, ladies and gentlemen, is the closest to the truth"); (R:19 TT p.4143, "That, again, is an example of the best lie is the one closest to the truth"); (R:19 TT p.4144, "But under these circumstances when he is lying to Detective Chambers, he is doing it to cover

up guilt, because he is guilty of murder"); (R:19 TT p.4148, "He lies about his whereabouts to the police Monday, the 9th, and, ladies and gentlemen, again, he wouldn't lie if he didn't kill the victim, because this what he lies about" and quotes the audio). There are more examples of quoting the audio and prejudice (specifically at R:19 TT pp.4150, 4159, 4165, 4167, 4168, 4169, 4170, 4171, 4173, 4175 cites audio about the Petitioner knowing Coffin was "shot", R:19 pp. 4176, 4274 cites audio identifying the gas can as the Petitioner's, etc.). The State often calls the Petitioner's words "lies" and bases these claims on an altered tape that does not fairly or accurately represent the interview due to alterations and deletions, the threats against the Petitioner or Det. Chambers' perjured testimony. It is especially egregious for the State to claim the Petitioner "lied by omission" when the tape was altered with deletions. The audiotaped statement properly objected to by Petitioner's counsel that should have been inadmissible was the foundation of the State's prejudicial closing argument and the conviction of the Petitioner.

As well, it is very probable that had the jury known of the misconduct, deception and perjury concerning the taped statement exposed by Petitioner's audio expert, the entirety of Detective Chambers' testimony would have been impeached or seen as highly questionable. Chambers' testimony in pre-trial was essential to

denying Petitioners' pre-trial motions to exclude Petitioner's statement and dismiss the indictment due to the lost evidence based on bad faith (PT1 28-107, PT2 18-54). Chambers' false testimony in front of the jury (R: 18 TT pp.2517-2758) as the lead investigator was prejudicial, paramount and crucial to convicting Petitioner, as in *Guzman*, 663 F.3d at 1351. We must also consider the cumulative effect of the false evidence for the purposes of materiality, See *Kyles v. Whitley*, 514 U.S. 419, 437-439 (115 S. Ct. 1555, 131 L. Ed. 2d 490) (1995) at 1567 n.10. The tape misconduct and prejudice was especially impactful because it is Detective Chambers, the lead homicide detective from the first night of the investigation that altered evidence, hid a 2nd tape and later repeatedly committed perjury concerning it. Had this evidence of misconduct concerning Chambers (and Det. Walker) and the *Brady* and *Giglio* evidence of the altered and missing 2nd tape been disclosed, Detective Chambers and his extremely prejudicial pretrial and trial testimony would have been completely impeached, see *Guzman* at 1353, 1354.

Because the reliability of a particular witness may be determinative of guilt or innocence, impeachment evidence also falls within the *Brady* rule. It is irrelevant that a police agency may have possessed the favorable evidence without the knowledge of the prosecutor; the law places the responsibility and ultimate burden on the prosecutor for the failure to provide

the favorable evidence to the defendant if any part of the prosecution team possessed and suppressed the favorable evidence. See *Kyles, supra.*; *Scofield v Palmer*, 279 Ga. 848; 621 S.E.2d 726 (2005). In determining the impact of the State's action in suppressing favorable evidence, courts should consider how the defense's knowledge of the withheld information would have impacted not just the evidence presented at trial, but also the strategies, tactics, and defenses that the defense could have developed and presented to the trier of fact. Because Detective Chambers was the lead detective and the only law enforcement witness involved in the case for its entirety, his impeachment would have "impugned not only (his) veracity but the character of the entire investigation" as in *Guzman*, 663 F. 3d at 1353, 1354. This is especially true since Chambers testimony was so prejudicial to Petitioners case. Chambers' testimony and credibility were crucial to the State's circumstantial case. (TT-2524, 2525, 2543, 2550, 2551, 2553, 2568, 2584, 2585, 2589, 2602, 2603, 2609, 2617, 2623, 2627, 2629, 2639, 2658, 2660, 2666, 2658, 2709, 2722, 2725, 2747, 2748, 2750, 2752, 2754, 2755, 2756, 2757).

Because of this and because the Detective falsely denied the altered evidence in pretrial, trial and all of the post-trial hearings, Petitioner's council was unable to impeach him in front of the jury and judge. As well, Petitioner's complete

trial strategy and tactics would have been different if they could have suppressed the audiotape and/or impeached the state's most important witness, Chambers, with the evidence of the stops and starts on the tape, erase-overs and the 2nd tape noted in the State's tape transcript. It would have been material in proving bad faith with the lost evidence. As a result based on both the *Giglio* and *Brady* standards, the Court should find that an objective fact finder would have determined Petitioner's due process rights were violated and granted his habeas petition, *Guzman*, 663 F. 3d at 1353, 1354. "Considering the undisclosed evidence cumulatively means adding up the force of it all and weighing it against the totality of the evidence that was introduced at the trial." See *Kyles*, 514 U.S. at 436-7 n.10. The evidence against the Petitioner was weak and circumstantial (See Section I. for more detail) and therefore the prejudice of the false and missing evidence was material and Petitioner's habeas should be granted.

E. GBI Firearm Examiner Misconduct

1. Petitioner objects to the R&R concerning the disgraced former GBI firearm analyst Bernadette Davy (R&R pp.19-21, 37-43). Petitioner could not prove a negative to show that Davy lied concerning her analysis or lack thereof of the alleged murder weapon and other ballistic evidence because the evidence

was never available to the petitioner in pretrial, trial or his MFNT. (Due to the Tolbert false affidavit and the law enforcement's wholesale violation of SOPs). Petitioner notes that since deviations were found in 13% of Davy's audited cases as far back as at least 2000, no reasonable fact finder who knew of such a high rate of unacceptable error would believe Davy's conclusions in any case thus requiring retesting in all of her cases. If this were not true, Davy would have not been forced to resign her position at the GBI. However in Petitioner's case, the firearm was allegedly lost just before trial and the State's firearms expert committed fraud in her department among other suspect behavior problems that directly affect her credibility at trial. Petitioner could not retest the firearm and contrary to the R&R her testimony was prejudicial to Petitioner. The State's case was weak and therefore any impeaching information was relevant to Petitioners due process rights including her behavior while working for the GBI. Any information tending to cause doubt on a witness's credibility (impeachment evidence) is a typical category of exculpatory material. *United States v. Abel*, 469 U.S. 45 (1984). Such evidence may include information concerning prior bad acts of the witness that go to the witnesses' credibility. See for example *United States v. Kelly*, 35 F.3d 929, 937 (4th Cir. 1994) (requiring new trial where prosecution failed to produced both affidavit used to support

application for warrant to search witness's home, as well as letter found during search written by witness and explaining how she lied to her employer). Davy's employment record should have been provided to counsel as was requested in discovery. Even if the information regarding her falsification of forensic firearm reports was discovered post trial, it is relevant now to whether Petitioner received a fair trial in light of this discovery which prohibited Petitioner from obtaining significant impeachment evidence.

2. Petitioner objects to the R&R (R:38 pp.20-21) regarding the State's firearm expert. The court suggested that Petitioner could not prove by clear and convincing evidence that the firearm could have been tested further or that the State's expert had falsified her testimony. The Petitioner's expert at the habeas hearing was qualified to testify about fire damage and to make an educated finding as to what could have been done with the firearm had it not been deliberately lost. The court fails to even address the misconduct of the State's firearm expert in falsifying 13% of her reports. Petitioner would need the firearm in order to disprove the negative the court suggests should be applied here. The firearm and all the ballistic evidence disappeared and what happened to it all was deliberately obscured due to the deliberate falsification of an

affidavit over its receipt (See Section F., *infra*). Also Ms. Davy's employment records should have been revealed to Petitioner before trial and was only discovered as a result of the habeas investigation by counsel. Davy was impeachable if the firearm had been available or from this important misconduct, information that the State should have revealed as trial counsel specifically requested all impeachment information of government witnesses in pretrial discovery motions. See "MOTION FOR DISCOVERY AND INSPECTION AND TO DISCLOSE EVIDENCE OR INFORMATION FAVORABLE TO THE DEFENDANT", (R:1 HT p.682). Fulton County withheld specifically in point 12 of the motion, " Any and all evidence or information which may be used to impeach any State witness or which may lead to evidence which might be used to impeach any State witness." This was extremely prejudicial to Petitioner because there was significant impeachment evidence in the records available before trial concerning Davy that was revealed in the Habeas hearings (R:1 HT pp.606-629) (R:1 Petitioner's State Habeas Exhibits 73-78). Fulton County has still never disclosed the information to the Petitioner (R:1 HT p.682). This is either a due process violation or IAC for failing to investigate the State's expert, a basic requirement in any trial preparation related to cross-examining state witnesses. Counsel must ordinarily "investigate possible methods

for impeaching prosecution witnesses", *Hoots v. Allsbrook*, 785 F.2d 1214, 1221 (4th Cir. 1986).

3. Petitioner objects to the R&R (R:38 p.41) regarding the State's firearm expert and that the Petitioner has not shown that Davy testified falsely in his case. Petitioner cannot prove she testified falsely because the firearm that was alleged to be the murder weapon along with other ballistic evidence were deliberately lost and the events of the loss were intentionally hidden in bad faith due to the false Tolbert affidavit (See Section F., *infra*). Again the court wants Petitioner to prove a negative in a "catch 22" position. On the one hand the Petitioner was able to prove that Davy was disciplined for repeated misconduct, falsified official reports and that her testimony could be challenged in court but could not prove on the other hand she did so on his report because the ballistic evidence and gun went missing through intentional acts of deception and bad faith. Ms. Davy had motive to lose the gun and bullets to avoid detection about falsifying reports including Petitioner's. The jury should have heard this evidence. (It should be noted that all the evidence at issue here was preserved from 1996 until 2005 just prior to the Petitioner's indictment. The massive amount of evidence lost occurred conveniently just before trial allowing the prosecution to use

the evidence tested but unavailable to Petitioner during the pretrial and trial process).

4. Petitioner objects to the R&R (R:38 p.41) in that the R&R suggests that the deviations in Davy's false reports were immaterial. The cases with deviations were found at least as far back as 2000, which was six years before petitioners' trial (R:1 HT p.608). In the habeas hearing, Ms. Davy's peers testified regarding her conduct and behavior. GBI Firearm Section Manager George Stanley sent a letter to Ms. Davy's peers regarding his concern that there was a **pattern of falsification** of reports; see (R:1 Petitioner's State Habeas Exhibit 74). Also (R:1 Petitioner's State Habeas Exhibits 75-78) revealed the concerns of the GBI lab personnel over Ms. Davy's misconduct and behavior. The deviations in her false reports were not minor and Petitioner objects to the R&R so concluding, as this is not the state of the evidence admitted at the state habeas hearing. Some of these deviations were serious as noted in (R:1 Petitioner's State Habeas Exhibit 74) which is an internal GBI email. In this email from Stanley, he noted that the mistakes Davy made included identifying the wrong rifling for a weapon, listing a safety on the weapon as OK when the safety and retainer spring were **completely missing**, listing the magazine capacity incorrectly, and listing incorrect cartridge case types. He called her errors "at the very least...concerning." The R&R seems

to imply that these deviations were after Petitioner's trial and were therefore immaterial. This is false. As noted, these problems existed as far back as at least 2000.

5. In the R&R (R:38 p.41) the court stated that Petitioner has not demonstrated that the prosecutor had any knowledge of Davy's improprieties and failure to follow the rules. Petitioner objects because this is immaterial since knowledge is imputed to the prosecution, as Davy was a part of the prosecution's team of law enforcement and investigation personnel. See *Kyles v. Whitley*, 514 U.S. 419, 437-38, 115 S. Ct. 1555, 1567-68 (1995). The prosecution team includes the police. See *Smith v Florida*, 410 F.2d 1349 (5th Cir. 1969). The police knew a state witness testified falsely concerning whether he had been offered a deal. The prosecutor was unaware of the deal and the falsity of the witnesses' testimony. *Id.* at 1349. The Fifth Circuit Court held:

"The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to the guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. The cruelest lies are often told in silence. If the police silence as to the existence of the reports resulted from negligence rather than guile, the deception is no less damaging. The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused."

(This finding by the court of appeals is equally applicable at the very least to the lost fingerprints that were AFIS quality, the second tape, the alleged murder weapon and ballistic evidence, the gas can and other evidence through the false affidavit of Tolbert and the ongoing misconduct of the GBI firearms analyst Ms. Davy). See also *Brown V. Wainwright*, 785 F.2d 1457 (11th Cir. 1986). (A defendant is entitled to a new trial if the false or misleading testimony could in any reasonable likelihood have affected the judgment of the trier of fact).

6. In the R&R (R:38 p.41) the court states that Petitioner did not show that Davy's serious GBI infractions such as giving out passwords, threatening to kill her supervisor and other misconduct were prior to his trial. This is false and Petitioner objects to this conclusion as the Director of the Office of Professional Standards for the GBI Fred Mays, started with the GBI internal affairs group in 2001 (R:1 HT p.620). Mays testified that Davy's violations regarding her password, carrying an unauthorized firearm to work and numerous other misconduct was prior to his employment in 2001, well before Petitioner's trial (R:1 HT 621). See *McMillian v. Johnson*, 88 F.3d 1554, 1569 (11th Cir.1996) ("Our case law clearly established [as of 1987 and 1988] that an accused's due process rights are violated when the police conceal exculpatory or

impeachment evidence"). A defendant establishes a *Brady* violation in the criminal or habeas context whenever he can show that favorable evidence material to his case was not disclosed to the defense, "*irrespective of the good faith or bad faith of the prosecution.*" *Brady*, 373 U.S. at 87, 83 S.Ct. at 1197 (emphasis added); see *Strickler v. Greene*, 527 U.S. 263, 288, 119 S.Ct. 1936, 1952, 144 L.Ed.2d 286 (1999) ("[U]nder *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment"); *Agurs*, 427 U.S. at 110, 96 S.Ct. at 2401 ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor"). The *Brady* rule thus imposes a no-fault standard of care on the prosecutor. If favorable, material evidence exclusively in the hands of the prosecution team fails to reach the defense—for whatever reason—and the defendant is subsequently convicted, the prosecution is charged with a *Brady* violation, and the defendant is entitled to a new trial.

7. Davy's testimony was prejudicial and objects to Magistrate's claim it was not (R:38 p.42). Although Davy stated she could not state the Beretta lost was the murder weapon, she states that the projectile that killed the victim could have come from a Beretta providing the only forensic evidence linking the victim's death with the lost weapon (R:18 TT p.3032). Det.

Chambers used this forensic claim by Davy now in question to call the lost Beretta the murder weapon (R:18 TT p.2725). As well the State cites Davy in their closing argument as evidence the Beretta was the murder weapon (R:18 TT p.4136). Since the prosecution put Davy on to discuss her forensics on the projectile and Beretta, the State believed it important to convict Petitioner as they emphasize in their closing causing prejudice to Petitioner.

With Davy and the missing ballistic evidence, there is a multiplicative effect of bad faith and prejudice. The State lost all the ballistic evidence that was material to Petitioner's case. They misled Petitioner's attorneys concerning what happened to the evidence with Tolbert's false affidavit. They withheld material impeachment evidence requested by Petitioner's attorneys. Davy was fired for falsifying ballistic reports and the errors showed up in 13% of the cases where retesting was available. No objective or reasonable jurist would agree with the determination that there was no bad faith or due process violations that prejudiced Petitioner's rights to present all the evidence to the jury and defend himself due to Davy's misconduct and the State's misrepresentations of where the lost ballistic and other evidence was. Tolbert's false affidavit is directly tied to this evidence. If the evidence were available, would it show that Davy lied about testing it properly? No juror

knowing all of the misconduct could have confidence in Davy's testimony at trial or the State's reliance on it.

9. Petitioner objects to the R&R (R:38 p.42) stating there is no impact on Petitioner's case based on Davy's misconduct. The R&R notes that the Georgia Supreme Court (GASC) ruling and the importance it makes of the Petitioner's statement to police that he knew the victim had been shot, when "at the time, the police did not know the victim had been shot due to the charred condition of the body." *Davis*, 676 S.E.2d at 216-17, The R&R also notes that the GASC does not mention Davy. Davy's testimony was used repeatedly by the State to connect the lost Beretta and the victim's death. The State claimed that the Beretta was in fact the murder weapon. The State felt that Davy was important to their case. Without Davy's now impeached testimony, there was no forensic evidence that the Beretta was the murder weapon. In fact without Davy, it was just one of many unloaded weapons in the victim's residence.

F. The Tolbert False Affidavit

1. Petitioner objects to the R&R (R:38 pp.66-67) that Issue V (five) was procedurally defaulted. The law in Georgia is clear that any habeas petition can be modified up to and including the hearing to comport to the evidence, (See Section A., *supra*, and O.C.G.A § 9-11-15). The **(Tolbert false affidavit was not** discovered until she testified at the habeas hearing

that it was false. Her falsity was intentionally hidden from the Petitioner by the State until the state habeas hearing. She was subpoenaed originally for the habeas hearing to discuss her affidavit and any details she could provide on the lost evidence. Instead, she finally told the truth and testified during direct examination that the affidavit was false. Petitioner could not know Ms. Tolbert would testify that she created the false affidavit until under oath she admitted such conduct occurred. Nothing can be procedurally defaulted if it was not known until the habeas hearing. It was properly addressed in the habeas hearing once it was discovered through argument by counsel, in the proposed order of Petitioner's, the CPC and in the 2254. There can be no procedural default if it was raised when discovered. (See Section A., *supra*, and O.C.G.A. 9-11-15)

It was discovered only at the habeas hearing that Atlanta Fire Department (AFD) employee Linda Tolbert lied on an affidavit the State provided to Petitioner's trial attorneys concealing what happened to 35 pieces of evidence including the alleged murder weapon, bullets, gas can, weapons, the victim's cocaine tainted blood and other crucial ballistic evidence (see list of all items on R: 1 Petitioner's Habeas Exhibit #24). Fulton County Investigator Chris Harvey asked her to produce the affidavit. This was not a mistake but an intentional act of

obstruction that affected Petitioner's attorneys conduct and is conduct in bad faith. "The fact that the government seeks in bad faith to suppress certain evidence indicates that such evidence may indeed be material. We are doubtful that any prosecutor would in bad faith act to suppress evidence unless he or she believed it could affect the outcome of the trial", *US v. George Jackson*, 780 F.2d 1305, (7th Cir. Ct. of App. 1986). The deceit was especially prejudicial as the Petitioner's experts at the habeas hearing testified that the gun was relevant to determining if the GBI firearms expert had lied on her report and the gas can was relevant potential exculpatory evidence because had petitioner had the gas can he could have traced it. Megan Bruton at trial testified that the gas can found in the victim's burnt Porsche looked like Petitioner's, something Petitioner could not rebut without the gas can itself. These were just two of 35 pieces of evidence that had potential exculpatory value and were lied about to misdirect Petitioner's efforts to locate them.

2. The Tolbert affidavit, (R:1 Petitioner's State Habeas Exhibit 45), is not a mere mistake and objects to the R&R (R:38 p.67) so suggesting. The affidavit **adamantly** states that the receipt for the package containing the gun and other evidence was forged. The affidavit states that Ms. Tolbert did not receive the package containing these lost items and that if she

had she would have had to inform "immediately" (underlined in the affidavit), OIC of the Arson Unit or OIC of OPS for the department. She even calls for a "more thorough" investigation into what happened. If one reads this affidavit, it is clear Ms. Tolbert knew exactly what she was doing. This was not a simple mistake. It was a lie, false and bad faith. The lie she perpetrated in the affidavit was the mistake she was referring to in her habeas testimony and nothing else. This affidavit is unequivocal in its intent to mislead anyone looking for the evidence that was sent to AFD. Because she lied she was able to avoid reporting this to OIC of the Arson Unit or OPS of the AFD further obstructing the investigation into the lost evidence. The lies mislead Petitioner's attorneys and denied Petitioner the opportunity to retrieve and locate critical evidence in his case. Intentional lies cannot be excused as a mistake years later after trial and after the prejudice was incurred by the Petitioner. This repeated bad faith, misconduct and misdirection on the part of law enforcement is a repeating pattern when analyzed in totality and when analyzed objectively. Petitioner's habeas attorney claimed in the state habeas proceedings, "So now we have evidence that a prosecution witness provided false testimony. Again, I would argue, that alone would be grounds for a new trial" (R:1 HT p.881). This is on its face is a due process claim and violation. Pleadings are not an end in

themselves, but only a means to the proper presentation of a case, and that at all times they are to assist, **not deter**, disposition of litigation on the merits. *McDonough Constr. Co. v. McLendon Elec. Co.*, supra (see O.C.G.A. 9-11-15).

Because of Ms. Tolbert's false affidavit, trial counsel could not track down what happened to all the evidence lost by AFD. Had she just told the truth when Petitioner's attorneys were preparing for trial, Petitioner's investigation and strategy would have been different. This is not a mere mistake and to classify it as such in a murder case is unprecedented. Reasonable and objective jurists would clearly believe such conduct in the intentional preparation of a false affidavit either for Tolbert or for Fulton County Investigator Harvey is bad faith and a violation of due process as well as obstruction of justice. Trying to impute some other identity to this false affidavit is unsupported by the evidence.

G. Lost Evidence and Bad Faith

In the R&R (R:38 p.59), the Magistrate begins the analysis of Petitioner's due process claims for the loss of the material evidence in the case. Petitioner objects to any determination that the Petitioner has not claimed separate substantive due process violations concerning the loss of evidence. Again, Petitioner argues his trial and appellate attorneys were

ineffective in their handling of the lost evidence (See Section B, *supra*). However, the separate due process violations in regards to the lost evidence and bad faith of the State stand on their own. (See Section A., *supra*)

1. The *Trombetta* and *Youngblood* Dichotomy

In the R&R (R:38 pp.59-60), Petitioner agrees that the two controlling cases concerning the lost and destroyed evidence are *Trombetta* for "apparently exculpatory evidence" and *Youngblood* for "potentially exculpatory evidence". In *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528 (1984), the Supreme Court first set forth the framework for assessing whether the destruction of evidence deprived the defendant of due process of law. Destroying evidence does not automatically deprive the defendant of their constitutional rights of due process. "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, ..evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means", *Id.* at 488-89 (citation and footnote omitted). In *Trombetta*, destroying breath samples did not violate the defendant's rights. The Supreme

Court gave three reasons for reaching that conclusion. First, the evidence was not destroyed by the government "in a calculated effort to circumvent the disclosure requirements established by *Brady v. Maryland* and its progeny;" rather, the law enforcement officers acted "in good faith and in accord with their normal practice", *Id.* at 488. The evidence was not constitutionally material. Materiality, according to the Court, meant evidence which possessed "an exculpatory value that was apparent before the evidence was destroyed" and which was of "such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489. Finally, the likelihood that the evidence would have been exculpatory had it been preserved was small. *Id.*

Four years later, in *Arizona v. Youngblood*, the Supreme Court refined the test articulated in *Trombetta*, holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. (emphasis added). Justice Stevens concurred in the Court's judgment, but did not join its opinion because, in his view, it announced a proposition of law broader than necessary to decide the case. Justice Stevens left open the possibility that "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of

evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair.” *Id.* at 60 (Stevens, J., concurring in the judgment). In so holding, the Court further explained that the mere possibility that evidence could exculpate a defendant, had it been preserved, would not be sufficient to satisfy the constitutional materiality standard set out in *Trombetta*. Instead, the potential exculpatory value of the evidence must be evident, and this must be judged based on the facts, experience, circumstances and knowledge available to law enforcement before the evidence is destroyed. Therefore, “the presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police’s knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. *Id.* at 56 fn* (emphasis added).

The bad faith aspect of *Youngblood* is an integral part of the application of the test announced in *Trombetta* requiring that the exculpatory value of the evidence be apparent before it is destroyed or lost. Whether the exculpatory value is “apparent” for *Trombetta* or “potential” for *Youngblood* determines which case to apply. Fairly read, *Trombetta* and *Youngblood* frame a dichotomy between evidence that is apparently exculpatory and evidence that is no more than potentially useful, *Magraw v Roden*, 743 F3d 1 (1st Cir 2014); See *Illinois*

v. Fisher, 540 U.S. 544, 547-48, 124 S. Ct. 1200, (2004); *Olszewski v. Spencer*, 466 F.3d 47, 56-57 (1st Cir. 2006).

2. Youngblood and the Bad Faith Standard

Next brings the inquiry to the bad faith component of the *Youngblood* test. Proving "bad faith" can be done through a number of ways. Black's Law Dictionary (Ninth Edition) defines "Bad Faith" as "dishonesty of belief or purpose" and continues with "A complete catalogue of types of bad faith is impossible, but the following are among those that have recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, ...". One way to prove bad faith is, "Bad faith is present if the officer [lost or] destroyed the evidence 'in a calculated effort to circumvent the disclosure requirements established by *Brady v. Maryland*. See, *United States v. Cruz*, 508 F. App'x 890, 901 (11th Cir. 2013) (per curiam) (quoting *Trombetta*, 467 U.S. at 488). Bad faith can also be proven through 'official animus' or a 'conscious effort to suppress exculpatory evidence.'" *Jones v. McCaughtry*, 965 F.2d 473, 477 (7th Cir. 1992). Black's Law Dictionary defines 'animus' as "Ill will; animosity" and continues with "intention." Logically, it follows that 'official animus' means ill will, animosity or intention by the State officials in regards to the loss or destruction of the evidence.

Establishing bad faith is a fact specific inquiry. In the past, in evaluating whether an officer or agency acted in bad faith, courts have looked at a number of factors. One such factor is whether the destruction of the evidence occurred in accordance with the standard operating procedures of the agency and whether those procedures were reasonable, *United States v. Moore*, 452 F.3d 382, 388, 389 (5th Cir. 2006) ("In sum, impermissibly withheld evidence must be either (1) material and exculpatory or (2) only potentially useful, in combination with a showing of bad faith on the part of the government." (tapes were destroyed as part of the agency's policies and so there was no showing of bad faith). If evidence is destroyed in contravention of an agency's policies this can be evidence of bad faith. See e.g., *United States v. Elliott*, 83 F. Supp. 2d 637, 647 (E.D. Va.1999) ("... the failure to follow established procedures is probative evidence of bad faith, particularly when the procedures are clear and unambiguous as are the regulations upon which the Government relies here."). See *United States v. Nebraska Beef*, 194 F. Supp. 2d 949, 958, Fn*12 (2002). ("Several instances might merely be sloppy but a wholesale failure to follow customary procedures equals bad faith.").

3. Bad Faith in Petitioner's Case

In the R&R (R:38 pp.61-62), the Magistrate begins a discussion on the determination of the "apparent exculpatory"

versus the "potential exculpatory" value of the evidence lost in Petitioner's case. Petitioner objects to any determination that the latent print cards were not of apparent exculpatory value. The crime scene fingerprints found on the stolen Porsche were not the Petitioner's. Therefore by definition, they were exculpatory. This was blatantly apparent before the GBI's Alfreddie Pryor destroyed the prints in 2005 without authorization and against SOP. As the Petitioner has always maintained his innocence, it was critical having those prints to identify any suspects. The prints should fall under the *Trombetta* analysis. (See Section C. for a detailed discussion, *supra*).

The rest of the over 70 pieces of missing evidence ruled material in pretrial would be "potentially exculpatory" evidence as admitted to in the R&R (R:38 pp.62, FN 12). The R&R seems to inconsistently then state that, "petitioner's claims regarding the potential exculpatory value of this evidence amount to 'mere speculation,' which is insufficient to support a due process claim, citing *United States v. Jobson*, 102 F.3d 214, 219." *Jobson* is not on point however. The issue in *Jobson* was a dispatch tape that was erased as per an established SOP, despite a discovery motion by the defendant to preserve the tape that was unfortunately unknown to the officer who erased the tapes. Importantly, no one ever listened to the tapes so there was no

knowledge of any potential exculpatory value for the tape. This is completely different than Petitioner's circumstances. As in *United State v. Elliott, supra*, it is beyond serious question that a reasonable law enforcement agent would recognize, before the evidence in the Petitioner's case was lost or destroyed, that it was of potentially exculpatory value. Validating this, the potential exculpatory value of the destroyed evidence was significant as all the evidence was ruled material by the trial judge (Order on Motions, July 13, 2006). Additionally, the State evaluated at some point all of the evidence. The State cannot be heard to contend that law enforcement officers did not recognize or understand the obvious. That certainly is true here because there is no testimony any official that was charged with preserving evidence suggesting that they did not recognize the obvious potential for exculpation in the destroyed or missing evidence. Nor should courts sanction arguments that excuse law enforcement officers from having to make an assessment of the potential utility of evidence that they potentially could destroy or lose. That is especially true where, as here, all the evidence was material. If evidence is material and could be inculpatory or exculpatory, it has evidentiary utility. Under those circumstances, the plea that a law enforcement officer does not recognize the potentially exculpatory value of destroyed or missing evidence is tantamount to permitting the

officer to plead ignorance when the controlling protocol requires that he act with knowledge. In sum, an officer who sticks his head in the sand cannot be heard to claim that the rather obvious exculpatory nature of evidence is not apparent to him. Thus, the first facet of the *Trombetta/Youngblood* analysis is satisfied. This evidence therefore would fall under the *Youngblood* analysis and would require bad faith.

4. The second component of *Trombetta/Youngblood*

Could comparable evidence be obtained by other reasonably available means? Unlike *Elliott* where there was just one item of destroyed material evidence (glassware), there were over 70 pieces of material evidence destroyed or lost by five separate law enforcement agencies in the case. Petitioner argues that the quantity of destroyed and lost evidence alone makes finding comparable evidence impossible. However it is also important to point out a few specific instances. The destroyed apparently exculpatory latent prints from the Porsche were not the Petitioner's and therefore like *Elliott*, the prints could have been determinative by specifically identifying the perpetrator (see O.C.G.A 17-5-56; a law enforcement agency or a prosecuting attorney, shall maintain any physical evidence ... that relate to the identity of the perpetrator of the crime) in the murder or at least provided other suspects to investigate. The prints were irreplaceable.

The destroyed gas cans and the not even collected and so-called "Olympic" bag from the Porsche that the Petitioner's wife identified as being like the Petitioner's were also irreplaceable. All could have been traced and the bag could have at least been fingerprinted. Partial view photos are not substitutes. The "torn clothing" on the Petitioner's fence was the best evidence that could have proven the attacks on the Petitioner that the State claims were false. Yet without explanation, the clothing simply vanished without a trace or was destroyed. The clothing likely and logically contained some type of DNA or "Touch DNA" and could have identified the attacker or even could have been identifying in its uniqueness. The clothing was irreplaceable. The missing Beretta and bullet that killed the victim and other unique ballistic evidence were unique and irreplaceable. This is especially true due to the misconduct of the GBI's Davy. The cocaine tainted blood of the victim had a unique mix of cocaine metabolites that if available to be tested by Petitioner's expert could have helped Petitioner prove the victim's exact time of death and strengthened his alibis further. The blood was irreplaceable. The same goes for the various pieces of fire debris. Only it could be tested for accelerants. All of this and more were irreplaceable to the Petitioner. Only the physical items of evidence themselves would enable the defendant to use any actual exculpatory potential of

the destroyed evidence. Therefore, the second component of the *Trombetta/Youngblood* calculus is also met.

That brings the inquiry to the bad faith component of the *Trombetta/Youngblood* test. Petitioner objects to the R&R (R:38 pp.63-66) where the Magistrate determines there was no bad faith and therefore no due process violations for the loss and destruction of evidence. Petitioner objects to any determination that the State's wholesale violation of hundreds of SOPs, violation of clear evidence preservations statutes, alteration of evidence, production of false affidavits concerning evidence, withholding of evidence, producing false testimony by law enforcement officials singularly and collectively is not bad faith. The R&R then cites *United States v. Vera*, 231 F. Supp 2d 997 (D. Or 2001), "although numerous cases permit an inference of good faith from evidence of compliance with departmental policies, no authority has been offered to support [petitioner's] assertion that the negative inference holds true; i.e., that failing to adhere to departmental policies constitutes evidence of bad faith." This is simply not correct. In the footnote #16, the Magistrate dismisses the *Elliott* case with, "Petitioner's reliance on *United States v. Elliott*, 83 F. Supp. 2d 637, 647 (E.D. Va. 1999), is unpersuasive because that case involved the intentional destruction of evidence contrary to policy, not lost or misplaced evidence." This is incorrect

and Petitioner objects as much of the evidence in Petitioner's case was destroyed contrary to policy (latent prints, gas can, shotgun and all the Dekalb evidence), and all of the remaining evidence was at a minimum lost contrary to policy and common sense, and at worst was intentionally hidden and destroyed. All of this was clearly stated or proven

Elliott, supra, at 647 states that "the destruction of evidence in accord with some established procedure or regulation forecloses a finding of bad faith unless there is other clear evidence to the contrary", See e.g., *Trombetta*, 467 U.S. at 488; *United States v. Deaner*, 1 F.3d 192, 200 (3rd. Cir. 1993). Nor does a showing that the Government failed to follow standard procedure *ipso facto* establish bad faith, *Deaner*, 1 F.3d at 200. *Elliott* in no way precludes bad faith when policies are not followed as it continues with, "However, **the failure to follow established procedures is probative evidence of bad faith**, particularly when the procedures are clear and unambiguous as are the regulations in the instant case" (emphasis added). As in *Elliott, supra*, the record is devoid of evidence that the State acted pursuant to any applicable controlling procedure in Petitioner's case when it destroyed or lost evidence. Instead, the SOP documents which on their face, given their plain meaning and without the need for any legal interpretation simply do not permit the destruction of what was destroyed in the case or what

simply vanished under dishonest circumstances such as the false Tolbert affidavit or the Davy GBI lab misconduct. To the contrary, those documents and the relevant evidence preservation statutes if given reasonable scrutiny by trained law enforcement officials, teach that evidence of the type here at issue ought not be destroyed in an open homicide case or lost because of its evidentiary value and because of principles of due process of law.

As in *Elliott, supra*, at 647-648, here "there is no evidence of an established practice which was relied upon to effectuate the destruction, where the applicable documents teach that destruction should not have occurred, and where the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the *Trombetta/Youngblood* test. A contrary holding would permit law enforcement officials to ignore the clear text of the governing regulations on which they say their policy is predicated and to act inconsistently with it". The over 300 violations of SOP's were a wholesale failure to follow required procedures by five separate agencies (See Petitioner's "Supplemental Lost Evidence

Summary Chart" that lists in detail all of the specific SOP violations for the six latent print cards, the alleged murder weapon, 9mm magazine, the bullet that killed the victim (UID 96-2123 Bullet), the victim's blood with cocaine, Porsche gas can, "Olympic" bag, 3 bags of crime lab evidence from APD, Browning shotgun, swabbings, and 9mm cartridge cases). "Several instances might merely be sloppy but a wholesale failure to follow customary procedures equals bad faith", *United States v. Nebraska Beef*, 194 F. Supp. 2d 949, 958, Fn*12 (2002).

5. Egregious, continuous combination of bad faith

In the R&R (R:38 p.65), the Magistrate essentially determines all of the bad faith and misconduct proven by Petitioner was instead all due to negligence, gross negligence, or good faith mistakes and therefore not bad faith, citing *US v Farmer*, 289 Fed Appx 81 (6th Cir 2008). *Farmer* was about one item (radio communications) that the defendant wanted preserved as per a court order. "Both police units erased their radio communications under routine department policy, and all officers involved consistently testified that they did not know about the preservation order", *Farmer* at 86. As the Magistrate notes, "such a breach can stem from a good-faith mistake as well as something more sinister." It appeared to be a good faith mistake in *Farmer* because the tapes were erased **as per SOP**. This is nothing like Petitioner's case where hundreds of SOP's were

violated in the loss of 70+ items and intentional law enforcement deception, perjury and obstruction were involved. For example, failing to follow SOPs for years in the maintenance of the evidence room is not gross negligence and is bad faith. The testimony of the former APD evidence room custodian Cecil Mann, brought in specifically to address the deplorable conditions of the evidence room established that SOPs were repeatedly violated and staff knew it, yet did nothing. Mann testified in the state habeas hearings that there was a culture of wholesale SOP violations and no accountability at the APD Evidence Room and that evidence went missing on a regular basis (R: 1 HT pp.62, 71, 133). The photos he provided of the APD Evidence Room (R:1 Petitioner's State Habeas Exhibits 11-20) prior to his work (and after his reengineering) there shows evidence was handled completely against SOP and looked like a trash dump. Weapons can be seen stored on shelves unsecured against SOP. He admitted these violations existed when Petitioner's evidence was stored at APD. In addition to this testimony, Petitioner brought in an evidence room expert to audit and identify if the conditions of the APD evidence room were merely "gross negligence" as the R&R suggests.

Robert Doran, admitted (without objection) as an expert in evidence management systems, testified at the habeas hearing that after reviewing various SOPs and other documents in this

case, including the photographs of the APD evidence room during the pendency of this case, it clearly does not appear that the SOPs were followed at all. (R:1 HT pp.301-303, 311). This witness highlighted some of the dangers of failing to follow SOPs, especially in homicide cases, including the loss, destruction or contamination of evidence (R:1 HT pp.306-311). This expert described the state of the APD evidence room in 2005 and years prior, the time Petitioner's evidence was being allegedly maintained, as "one of the worst messes I have ever seen." (R:1 HT p.310). Some of the deficiencies the expert found in this case were: insufficient documentation to maintain chain of custody, that the evidence was *maintained* in a manner that did not comport with commonly accepted professional law enforcement standards, that the *disposal* of evidence did not comport with commonly accepted professional law enforcement standards, that the *supervision* of the handling and disposition of the evidence did not comport with professional law enforcement standards, and that there was a *pattern* of practice by the APD, GBI, DFD, AFD, and Fulton County District Attorneys' Office, of failing to follow professional law enforcement standards. Again this is not evidence of gross negligence but instead is clear and convincing evidence of bad faith through what was **an intentional culture of SOP violations.**

When an agency in charge of the collection and preservation of evidence does not follow its own procedures enacted to protect an individual's Constitutional right to due process and as a result takes from a defendant the opportunity to challenge a criminal accusation or confront the evidence he is deprived of his Constitutional right to due process. *Shorts v. Bartholomew*, 255 Fed.Appx. 46, 49, 60 (6th Cir. 2007) (implicitly recognizing the need for procedures that are followed to protect due process rights in a §1983 claim alleging, among other things, that the Sheriff failed to "prevent the harm-by breaching the duty to implement a requisite policy or process" and denying summary judgment because "the County did not produce or identify any evidence to demonstrate the existence of *any procedure at all*, let alone a procedure that would ensure due process."); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (implicitly recognizing that procedures may be necessary to protect due process and explaining that "resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected ... More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an

erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."). The amount of destruction or misplacement of evidence in Petitioners case was in violation of multiple and years of APD, AFD, DFD, DPD, and GBI SOPs. Petitioner objects to any determination otherwise, as collectively all of the law enforcement SOP violations and misconduct is not negligence and is instead bad faith as proven by clear and convincing evidence.

6. Mental state of officials not relevant.

In the R&R (R:38 p.65), the Petitioner objects to what the Magistrate cites as case law examples that the Petitioner must prove 'official animus' or a 'conscious effort to suppress exculpatory evidence' and that Petitioner has not done so. These are possible ways to prove bad faith but the Petitioner does not have to prove the subjective intent of an official that lost or destroyed evidence or that they had a specific intent to harm the defendant when they destroyed or "lost" material evidence. Viewed as a whole, neither *Trombetta* nor *Youngblood* nor their progeny require a defendant to prove that the mental state of an

official at the time of destruction was to foreclose a defense or to deliberately deny the defendant's due process rights, *Elliott*, 83 F. Supp. 2d at 650. Here the evidence obviously had at least potentially exculpatory value and the evidence was destroyed in the wholesale violation of the very clear SOP regulations and statutes documented by the Petitioner. Tolbert's false affidavit and the wholesale violation of official policy by five separate agencies (AFD, APD, Dekalb Co., GBI and FCDA), which the officials knew to be in effect, is bad faith, whether measured objectively or subjectively (Tolbert's false affidavit alone is official animus though that is not the legal standard of proof. Contrary to the argument of the State, bad faith "is not confined to the circumstance in which the official deliberately says unto himself "I shall deprive the defendant of due process or hurt his case." If that were the test, there would be no check on the destruction of evidence because law enforcement agents would be able to defend the destruction of evidence by lying about subjective intent or by violating, with impunity, the rules they are obligated to follow. If that is to be the rule, it must be established by some court other than this one", *Elliott*, at 650. In any event, bad faith exists when conduct is knowingly engaged in or where it is reckless. See *State v. Leon*, 468 U.S. 897, 922-26, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (establishing the good faith exception to Fourth

Amendment prohibitions but approving suppression as an appropriate remedy if the warrant was issued based on information that the "affiant knew was false or would have known was false except for his reckless disregard of the truth.") By any standard, a majority of the conduct associated with destroying and losing the evidence in the instant case was at best intentionally reckless bad faith and at worst pure deception, official animus and obstruction of justice.

The R&R (R:38 p.65) continues that, there is no indication in the record that the evidence was "deliberately [lost] to deprive petitioner of access to relevant evidence." Citing *Featherstone v. Estelle*, 948 F.2d 1497, 1505 (9th Cir. 1991). Again, this case is not on point. *Featherstone* was about a destroyed photo used in a lineup. "The police officer who destroyed the photo did not preserve the photo because he mistakenly believed it was not useful identification evidence. More importantly, the photo lacked any apparent exculpatory value before its destruction, and the defense not only could, but indeed did obtain comparable evidence...Furthermore, the court properly instructed the jury that it could draw adverse inferences from the destruction of the photo", *Featherstone* at 1505. So the material circumstances are not comparable, and as in *Youngblood*, *Featherstone* got an adverse inference jury charge

unlike Petitioner. The Magistrate then continues with citing *United States v. Christian*, 302 F. App'x 85, 87 (3rd Cir. 2008) (defendant failed to demonstrate bad faith where there was "no suggestion in the evidence that the police believed the missing latent print cards would have exculpated [defendant]; the loss of the print cards appears to have been nothing more than an unfortunate but innocent mistake."). *Christian* is also not on point. The case is similar to Petitioner's in that it concerns the loss of latent print cards, although this is all that was lost rather than 70+ pieces of evidence. Otherwise, the case is not comparable. In *Christian*, prints from a magazine on a weapon were lost. An internal government investigation revealed that a fingerprint technician, Thomas Jackson, had collected prints from the magazine of the gun, attached the latent print cards to his report, and submitted both the report and the print cards to a supervisor, Jonathan Hitesman. Hitesman said that the report lacked information required by department regulations and sent it back to Jackson to be corrected. Hitesman later stated that he examined the fingerprints and believed that they contained no suitable ridges for comparison. He also said Jackson resubmitted the report, but without the latent print cards, which were never found. This is materially different from Petitioner's case. When just looking at the prints alone in Petitioner's case, they were of AFIS quality, were exculpatory and they were intentionally

destroyed by the GBI after violating dozens of SOPs as discussed, in Section C., *supra*.

7. Violation of SOPs is not the only evidence of bad faith.

As discussed in Sections C-F, *supra*, there were numerous *Trombetta*, *Giglio* and *Brady* violations with the altered tape and missing 2nd tape, perjury by Detective Chambers, the misconduct of the GBI's Davy and the false Tolbert affidavit and other evidence of State deception. Beyond those constitutional violations, all of the **collective** official animus, deception, and bad faith detailed in those sections also apply to the bad faith analysis of the missing evidence as well. Even if an individual act of bad faith does not meet the *Youngblood* threshold, collectively they do as the bad faith has infected the entire investigation and the destruction and loss of evidence. The false affidavit and cover-up as to what happened to the crucial 35 material items including the alleged murder weapon lost by AFD that intentionally misled Petitioner's attorneys shows intent. Further, concealing what happened to the evidence that was destroyed or lost, as was done by Tolbert's false affidavit concerning her receipt of all the 35 material items of evidence that disappeared at AFD, is also evidence of bad faith. *Cf. e.g., Stuart v. Idaho*, 907 P.2d 783, 793 (Idaho 1996) ("We believe that the failure to provide discovery

regarding the taped phone call is a sufficiently proximate cause of the destruction of the phone log evidence so as to rise to the level of bad faith under *Youngblood*."). The withholding of the requested in discovery impeachment evidence and misconduct of GBI Firearm examiner Bernadette Davy misled Petitioner's attorneys and the jury. The false and misleading testimony of GBI Latent Print Examiner Alfreddie Pryor (R:17 TT p.2410) and the Fulton County ADA as to what happened to the missing crime scene latent prints alleging that they just disappeared sometime in the late 1990's (R:1 Petitioner's State Habeas Exhibit #80) when in fact the State had them at least until 2005 was bad faith and mislead Petitioner's attorneys. Pryor admitted in the state habeas that he **intentionally** destroyed what were AFIS quality prints stored in the Latent Print Case File allegedly due to age which is directly against SOP (and common sense) in an open homicide (R:1 HT pp.488-471) and without authorization. Importantly in the Petitioner's case, the jury never knew of all this material bad faith and misconduct and did not receive an adverse instruction jury charge concerning the lost evidence. Had the jury known of all this collective bad faith, the entire investigation would have been impugned and the testimony of the various law enforcement officials impeached. (See *Guzman, supra*, at 1353, 1354.)

It is noteworthy that both *Youngblood*, *Trombetta* and almost all lost evidence cases have dealt with one piece of lost or destroyed evidence. It was a breath sample in *Trombetta* and swabs taken from the victim's clothing in a child sexual abuse case in *Youngblood*. In the instant case we have over 70 pieces of evidence ruled material lost and destroyed due to misconduct and reckless bad faith. Petitioner's case differs from *Youngblood* in other ways as well. In the end, the court ruled that no due process violation occurred in *Youngblood*, since (a) the failure of the police to refrigerate the boy's clothing and to perform tests on the semen samples could at worst be described as negligent, (b) none of this information was concealed from the defendant at trial, and (c) the evidence—such as it was, had been made available to the defendant's expert, who declined to perform any tests on the samples. In Petitioner's case, law enforcement was not negligent as discussed, *supra*. Information and evidence was concealed from Petitioner. *Youngblood* had an opportunity to examine the evidence before it was not preserved properly, but chose not to, *Youngblood* at 58, while Petitioner wanted to examine and test all the evidence but could not. Also, the trial judge instructed the jury that it could draw an adverse inference from the fact that evidence had been lost, *Id* at 59. "As a result, the uncertainty as to what the evidence might have proved was turned

to the defendant's advantage." *Id* at 60. Petitioner got no such adverse charge.

H. Reasonable Jurist Would Disagree

1. Courts and reasonable jurists disagree on how to prove bad faith but following the standards set out by some courts offers an additional analysis as to why Petitioner's case and evidence proves bad faith and that he is entitled to a new trial.

United States v. Beckstead, 500 F.3d 1154 (10th Cir. 2007) expanded on the limitations of *Trombetta* and *Youngblood* setting out five factors relevant to determining bad faith:

1. The defendant believed that the evidence was exculpatory:

In this case, that belief is supported by experts and facts. The fingerprints were exculpatory. All of the evidence was believed to be exculpatory by the Petitioner as he repeatedly and adamantly maintained his innocence. Of note, he also adamantly requested his statutory right to inspect and test the evidence.

2. Whether the assertion that the evidence was potentially exculpatory was supported by objective independent evidence:

In this case the experts that appeared at and testified during the state habeas hearing clearly identified the potential exculpatory value of the lost

evidence, including but not limited to the above specific pieces. The trial judge ruled the evidence material.

3. The timing of the destruction of the evidence: In Petitioner's case the evidence was kept for 9 years and just disappeared right before trial. (The case went cold in 1997 and the trial was held in 2006. Most of the evidence disappeared in 2005).

4. The importance of the evidence to the government's case: Clearly if the State used the evidence at trial, they deemed it essential in the case against the Petitioner and that is why they used it in their case in chief. This would include the alleged murder weapon and ballistic evidence, the gas cans, "Olympic bag", other weapons of the victim, "fuzzy ball", fire debris, caller-id box, blood, fibers and all of the other evidence listed in detail in Petitioner's State Habeas Supplement on bad faith (See R:1 State Habeas Supplement).

5. Whether an innocent explanation existed for failing to preserve the evidence: Based on all the evidence introduced in Petitioner's state habeas hearings discussed *supra*, there is no innocent explanation. Lies and deceptions were perpetrated based on Tolbert's false affidavit and no explanation was given for what happened to those 35 pieces of evidence she lied about receiving.

The GBI's Pryor lied about what happened to the prints at trial and then admitted he destroyed the prints against SOP and logic and that they were of AFIS quality. The 300+ SOP violations and state of the APD evidence room has no excuse. Altering the tape and still withholding a 2nd tape is a crime.

2. *Scott v Alabama*, CR-08-1747, 2012 WL 4757901 (Ala. Crim. App. Oct. 5, 2012), noted the role of police culpability in *Leon* and *Youngblood*, 76 Va. L. Rev. 1213, 1242 (1990). The Alabama court discussed their concern for the limitations of the Supreme Court's interpretation of bad faith and apparent versus potentially exculpatory evidence conflict. The Delaware Supreme Court explained materiality of the lost evidence as being important to "fundamental fairness and discussed a three part test to be evaluated in the context of the entire record. *Hammond v. Delaware*, 569 A.2d 81, 87 (Del. 1989) quoting *Agurs*, *supra*.

1. **(The degree of negligence or bad faith involved)** (Over 300 violations of SOP's, a false affidavit and an evidence room intentionally left in disarray for years, etc.; See Sections B-H, *supra*).
2. **The importance of the missing evidence, considering the probative value and reliability of secondary or**

substitute evidence that remains available: (All of the evidence used in the State's case in chief as was significant and prejudicial, as discussed *supra*. It is also important to note the double standard of care for evidence that the State deemed inculpatory. Evidence like the "gas blower", the Petitioner's letters and voice messages were all preserved while exculpatory evidence like the fingerprints and "torn clothing" were destroyed or vanished).

3. **The sufficiency of the evidence used at trial to sustain the conviction:** The case against the Petitioner was circumstantial. The trial was a very close case as the jury took four days to come to a final verdict (See Section I., *infra*).

The misconduct and bad faith of the State Detectives Chambers and Walker interview tape, AFD employee Linda Tolbert, GBI employees Bernadette Davy and Alfreddie Pryor, impeached the entire investigation of the State. Had the jurors known this evidence at trial, the integrity and fairness of the entire ten-year-old prosecution would have been tainted in front of any fair-minded person. The loss of all the ballistic evidence in light of Tolbert's false affidavit and Bernadette Davy's falsifying official test reports completely prevents any conclusions or claims on the alleged murder weapon and bullet

that killed the victim. With the destruction of the latent prints and ignoring of SOP on running the fingerprints thru AFIS, the State eliminated the Petitioner's best chance to identify another suspect. The disappearance of the torn clothing on Petitioner's fence also eliminated another avenue to use DNA to potentially identify the Petitioner's assailant(s). The altered tape and State's emphasis on it in their closing misled the jury. The Petitioner did not receive a jury instruction permitting the jurors to draw an adverse inference against the prosecution for lost evidence or misconduct that surely would be given in the face of this new evidence. "Even where individual judicial errors or prosecutorial misconduct may not be sufficient to warrant reversal alone, we may consider the cumulative effects of errors to determine if the defendant has been denied a fair trial." *United States v. Lopez*, 590 F.3d 1238, 1258 (11th Cir. 2009) (citation omitted); see also *United States v. Thomas*, 62 F.3d 1332, 1343 (11th Cir. 1995) ("[T]he cumulative effect of multiple errors may so prejudice a defendant's right to a fair trial that a new trial is required, even if the errors considered individually are non-reversible."). "In addressing a claim of cumulative error, we must examine the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial." *United States v. Calderon*, 127 F.3d 1314, 1333 (11th Cir. 1997). "The

harmlessness of cumulative error is determined by conducting the same inquiry as for individual error - courts look to see whether the defendant's substantial rights were affected." *United States v. Baker*, 432 F.3d 1189, 1223 (11th Cir. 2005) (citation omitted). All of the prejudice, as discussed *supra* and in Section I., *infra*, of this misconduct has been proven. Though there is enough cumulative error and misconduct here to warrant a new trial it may be as simple as the false affidavit by Tolbert in an attempt to obstruct justice that prevails as was the incident in *Guzman v. DOC*, *supra*. The facts of the case are also potentially important in further defining law related to lost evidence and *Youngblood* due to doctrinal incoherence across the different federal circuits, new science and the significant problems of the unclear "bad faith" test (See 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, (2008)). Reasonable jurists could certainly disagree based on the unclear and inconsistent definition of bad faith alone.

I. Prejudice in the circumstantial case

A review of the trial evidence is important in showing that as a result of the misconduct noted here a different result was probable and that there can be no confidence in the outcome of the trial. Petitioner is entitled to a fair trial without a court now trying to nitpick away the pervasive misconduct that

appears in this case. In doing an analysis of the impact of new evidence and the lost evidence prejudice, the misconduct prejudice and the *Brady* and *Giglio* violations prejudice in the case, it is important to note that the case against the Petitioner was circumstantial. There was no forensic evidence that implicated the Petitioner or any eyewitness that implicated the Petitioner for any crime. It is therefore important to review the overall evidence again especially in light of the new evidence of misconduct, perjury and bad faith on the part of the State discovered post trial and after the decision of the Georgia Supreme Court. It is important to evaluate uncorroborated testimony in the light of the extremely high **\$300,000 reward** paid only after a conviction in the case (TT 916). "Bias is always relevant in assessing a witness's credibility", *Schledwitz v. United States*, 169 F.3d 1003, 1015 (6th Cir. 1999); *United States v. Lynn*, 856 F.2d 430, 432 n.3 (1st Cir. 1988); *Villaroman v. United States*, 87 U.S. App. D.C. 240, 184 F.2d 261, 262 (D.C. Cir. 1950). The Supreme Court has defined bias as "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." *United States v. Abel*, 469 U.S. 45, 52, 83 L. Ed. 2d 450, 105 S. Ct. 465 (1984). "Within limits of discretion, the district court may evaluate witness credibility and draw some inferences against

the government in deciding whether a new trial is warranted", See *United States v Autuori*, 212 F.3d 105, at 120 (2nd Cir, 2002). Regardless, the trial was a very close case that took the jury four days to come to a final verdict.

2. There is also significant and material evidence to support that Petitioner is not guilty. The Petitioner had an unassailable alibi for the Dekalb County burning of the victim's stolen Porsche. The Porsche was found burning in Dekalb County and reported by Ms. Betty Reynolds at 11:26 am on Tuesday, 12/10/1996. She did not see the Petitioner present (R:17 TT p.2259). The Petitioner's former Andersen Consulting co-worker Lee Spitalnick testified that he, along with one other person, met with the Petitioner that same morning in the Georgia-Pacific building in downtown Atlanta at 10:00 am for about 15-30 minutes to discuss a work assignment. The Petitioner's demeanor was normal (R:17 TT p.2243). Subsequently, Spitalnick and the other consultant met again with the Petitioner "a little after 11:00 am" for about 10-15 minutes to discuss a further project details. The Petitioner did not smell of smoke or gas (R:17 TT pp.2245, 2251). Private Investigator Buddy Jones testified that the timeframe it would take to travel directly between the Georgia Pacific building, in downtown Atlanta (Fulton County) where the Petitioner worked and the location of the burned Porsche many miles away in Dekalb County made it impossible for

the Petitioner to have had enough time to burn the Porsche. The round trip between the Georgia Pacific building and the location of the Porsche burning was at least one hour and six minutes (R:18 TT pp.3648-3651). The timing along with the complicated logistics of getting the car to Dekalb, burning it and leaving the scene and so on make it impossible for the Petitioner to have burned the car. So the question is, who did? The only answer has to be, someone else. Had the GBI and the State followed SOP with AFIS and/or not destroyed the latent prints from the Porsche, this might be known.

3. There is no evidence throughout the entire trial that ever places the Petitioner at any of the four crime scenes. There is no witness or any forensic evidence that shows the Petitioner was actually ever present at one of the crime locations. First for the initial burglary of the victim's house and stealing of the victim's Porsche, the State cannot actually even prove when the burglary occurred. The times are disputed but the crime could have allegedly occurred anywhere from 7:00 pm on 12/7/1996 to noon on 12/8/1996, as the victim was allegedly not present at his home during this window. The State argued that because there was a call from the victim's residence to the Petitioner's home at 7:20 pm on 12/7/1996 that this was the Petitioner calling his own home or an alleged accomplice committing the burglary at this time. This is mere speculation.

The Petitioner was at his parents' home that evening during the timeframe of this call from approximately 6:30 pm to 7:45 pm (R:18 TT p.3415). As well, the Petitioner has always argued this was the Petitioner's ex-wife calling his house to leave a message concerning conflicting holiday party issues (R:19 TT p. 4244). There is also the problem of needing multiple people to get to the victim's house, steal a number of large items and drive the Porsche off. The State proved nothing beyond pure speculation how Petitioner supposedly did this, that there was any "accomplice" or who this alleged "accomplice" might have been. As well had the State truly believed in an accomplice, it seems they would have tried to run the latent prints found on the Porsche thru AFIS. They did not.

4. Second, the State did not prove exactly when the murder of the victim occurred. They speculated that it could have happened on Monday evening 12/9/1996 but there is no proof of this. The last telephone call known from the victim was at 6:00 pm that Monday evening but the body was not found until approximately midnight Tuesday 12/10/1996. The autopsy of the victim showed a blood alcohol content of .22, which is extremely high, and the blood was positive for cocaine. The Petitioner argued that evidence showed that the murder at least did not occur until later on Tuesday 12/10/1996 when it would have been impossible for him to be responsible. The evidence of the

forensic chemical expert Dr. James Woodford concerning the victim's blood alcohol content supports this contention (R: 18 TT pp.3312-3314). Regardless, there is no evidence the Petitioner was ever at the victim's residence. Third discussed, *supra*, the Petitioner was at work in downtown Atlanta when the Porsche was burned and was never placed in Dekalb County. Fourth and finally for the fire at the victim's house on 12/10/1996, the Petitioner also presented evidence that it would have been very difficult if not impossible for him to have started the fire based on his known whereabouts, the alleged fire analysis by the State and the analysis of the victim's burned watch (R:19 TT p.4211). There is no evidence to prove the Petitioner was ever even in the vicinity of the victim's house at any time much less when a crime allegedly occurred. It is important also to note that for the **one crime** when the actual exact time of the crime occurred is definitively known (the burned Porsche), the Petitioner has an unassailable alibi.

5. There was extensive evidence presented at trial that the Petitioner's knowledge the victim had been "shot" in fact came from his now ex-wife Megan Bruton. This fact that the Petitioner repeated Bruton's words was cited by the GASC as supposedly very incriminating evidence against the Petitioner. In note of all the new evidence of law enforcement misconduct discussed *supra*, the evidence in support of the Petitioner's consistent claim his

ex-wife told him the victim had been "shot" and that he just repeated this information must be noted in a different light. Evidence showed that Bruton made a call at 12:18 am to the Petitioner's house from the victim's next-door neighbor's house before the Petitioner's interview with police. In this call the victim's close friend, Craig Foster, testified that he heard Bruton tell the Petitioner the victim had been "shot." Craig Foster testified that he told Fulton County Investigator Bernadette Hernandez that Megan Bruton told the Petitioner and her friend Jennifer Jenacova that the victim had been shot (R:17 TT pp.2090-2092). He also in fact testified that he told Det. Chambers, at the APD Homicide office that first night of the case, that Bruton made this statement earlier that night of the fire and discovery of the victim's body (PT2 p.62), (R:17 TT p.2201). Jennifer Jenacova (Bruton's close longtime childhood friend), her husband Michael Jenacova, and Mr. Jenacova's mother Jane Jenacova testified that Bruton called them from the victim's neighbor's house at 12:08 am on the night of the victim's house fire and told her that the victim "had been shot in the head", an added specific detail the Petitioner was never even alleged by police to have said. This call also occurred ten minutes before Bruton called the Petitioner at 12:18 a.m. (R:17 TT p.1976). Jane Jenacova took a contemporaneous note of the Jenacova couple's recollection of this call from Bruton as the

Jenacova couple was troubled with Bruton's knowledge of these facts about how the victim was "shot in the head" (R:18 TT pp.3321-3355, 3356-3378, 3380-3382, 3383-3388). All of this evidence contradicts Bruton's already questionable, uncorroborated and changing testimony that the Petitioner told her the victim had been shot. As well, no one ever heard the Petitioner tell Bruton that the victim had been "shot in the head" despite numerous witnesses being right next to the Petitioner on the phone. The State's claim that the Jenacovas somehow made up this evidence or altered it because of some bias against Bruton does not ring true. The Jenacovas could not have known what was really going on that first night and had no way of knowing that night that the time of the 12:08 am call by Bruton was so material to the case because it was ten minutes before the call Bruton made to the Petitioner. To claim that they started some conspiracy including Mr. Jenacova's mother in real time that evening to make Bruton look guilty is beyond believability. This is especially true since Mrs. Jenacova was one of Bruton's closest friends from childhood and bridesmaid in her wedding.

Fulton County DA Paul Howard admitted in pretrial testimony that the theory Scott Davis knowledge the victim was "shot" and therefore he was the killer was not strong. He testified, "I found out that Megan (Bruton) indicated that she might have in

fact made that statement to Scott Davis, and so, therefore, I concluded that that was not the pillow of evidence that it might at one time have been thought to be" and continued with "I believed it to the extent it certainly would eliminate this theory that the only way he could have repeated that is by being a participant in the killing", (PT1 pp.137-138). He found this out from his own assistant district attorney Joe Burford. The Petitioner told the APD detectives that Bruton told him that the victim had been shot. Since that first night in 1996, Bruton's story has repeatedly changed concerning her knowledge that the victim had been "shot in the head." Initially she told detectives that she did not know how the victim had died (PT1 p.53). However as the consistent and compelling evidence came out that Bruton was in fact the source of this knowledge as told to the Petitioner and Mrs. Jenacova as heard by Craig Foster, *supra*, along with the \$300,000 reward as well, Bruton changed her story. This evidence shows Bruton was the first to disclose that the victim was shot even admittedly before the police knew. The question remains unanswered today, how did Bruton know this information? Det. Chambers ignored this and focused only on the Petitioner.

There is also strong evidence from the Motion for New Trial that Bruton was deceitful, biased and therefore her harmful testimony against the Petitioner could have been seriously

impeached in front of the factfinder. First at trial, Bruton's overall testimony and honesty was at least significantly impeached by a taped conversation (Petitioner's Trial Exhibit 7) the Petitioner's father and mother had with Bruton back in December of 1996 right after the arrest of the Petitioner. This tape and Bruton's own words directly contradicted some of Bruton's damaging testimony against the Petitioner. After the tape was played, Bruton was forced to admit that some of her earlier damaging testimony was incorrect and that she told both the Petitioner's parents and the police in 1996 that the Petitioner was neither jealous nor violent. She also had to change her testimony and admit that the Petitioner did not inappropriately show up at her work or residence (R:17 TT pp.1261-1268). She then also admitted that back in 1996 and early 1997 when the events had just happened, she told no one that the Petitioner had allegedly said to her the victim had been shot in the head. This includes the Petitioner's attorneys in a formal interview (R:17 TT pp.1287-1288). Importantly, new evidence from the Motion for New Trial hearings materially further impeached Bruton. During the hearings, copies of blog posts Bruton made during trial using seven different false identities along with a number of her personal emails were admitted into evidence (Defendant's MFNT Exhibit 11). These documents showed a very biased and deceitful Bruton. One year

prior to trial, Bruton by email contacted the blogger Steve Huff to discuss the Petitioner's case and her biased opinions against the Petitioner almost immediately after the Petitioner was indicted in November of 2005 (MFNT p.1363). During trial, emails showed that Bruton was in constant contact with the blogger (even against the direct order from the trial judge not to discuss her testimony in between days on the stand), (R:17 TT p.1107, MFNT pp.1344-1348) and was later constantly posting to the public blog under the seven assumed identities. Interestingly, Bruton's posts discussed (in the 3rd person) her experiences during the events at the victim's house the night of the fire, but these descriptions differed importantly from her testimony. In one long blog post made on December 3rd, 2006 during trial, Bruton writes the following about herself, "Megan already knew from the fire chief that David had been murdered. I know when I hear the word 'murdered' I usually think 'shot'. So, I don't believe that hearing that David had been shot was a huge shock to her" (MFNT p.1339). This is different than her trial testimony that the fire chief only said the victim did not die from the fire (R:17 TT p.1093). Her words that she assumed "shot" is also completely different than her dubious claim that the Petitioner told her this. This difference that the jury never knew at a minimum throws further doubt on Bruton's changing story and is impeachment evidence for the jury.

Bruton's blog posts show clearly her bias against the Petitioner (MFNT pp.1323-1337). After the verdict, Bruton admits her blog posts to the blog in an email to the blogger Steve Huff (MFNT p.1354). Finally in another email to the blogger on July 17th, 2007, prior to the Motion for New Trial hearings and after receiving a subpoena, Bruton pressures Mr. Huff not to cooperate with the defense on the Petitioner's appeal (MFNT pp.1365-1366). This bias from Bruton would have further impeached her and her highly prejudicial testimony in front of the jury and should further show the case against the Petitioner is extremely weak. "Bias is always relevant in assessing a witness's credibility", *Schledwitz* at 1015. Bruton was crucial to convicting the Petitioner at trial.

6. Much of the most damaging circumstantial evidence against the Petitioner in his trial was uncorroborated testimony by witnesses about statements the Petitioner allegedly made. It is important to analyze uncorroborated testimony in the light of the \$300,000 reward paid only after a conviction in the case (R:17 TT p.916). Some of this testimony was cited by the GASC in its ruling affirming the Petitioner's convictions, see *Davis*, *supra*. Based on all the misconduct and bad faith along with the impeachment of Det. Chambers, Bernadette Davy and others, this testimony must be reviewed in light of this new evidence. The testimony of the Petitioner's former work friend Erik Voss is

one that was emphasized in *Davis*. This claim that the Petitioner allegedly "threatened to kill anyone who had a sexual relationship with his wife" appears very damaging in isolation. Voss' testimony is suspect and particularly uncorroborated as the Petitioner argued (R:17 TT p.1571, R:19 TT pp.4214 -4125). Voss never told anyone of the alleged threat or his alleged personal fear and in fact remained friends with the Petitioner, attended parties with the Petitioner at the Petitioner's residence and in fact sought to set up the Petitioner on a date with his female friend (R:17 TT p.1595). In fact, Voss' uncorroborated testimony concerning the Petitioner's alleged statements and behavior was impeached by another state witness Tom Elias (R:18 TT pp.3180-3181).

7. Testimony from the Petitioner's former private detective James Daws should also be viewed as uncorroborated and suspect. Mr. Daws was hired by the Petitioner's divorce attorney to investigate certain aspects of the Petitioner's divorce proceedings including potential infidelity of Petitioner's wife. Daws testified that he investigated potential men that Petitioner's wife had dated and tried to obtain their phone numbers and addresses prior to the victim's involvement with Bruton. He also conducted very limited surveillance over the course of a few months on Bruton. Daws testified that Petitioner called him to obtain the victim's phone number and address. Daws

testified that on 12/6/1996, he called Petitioner and gave him this information. Daws then claimed that Petitioner stated he might do "drive bys" of the victim's house and might call Daws to assist if needed. This testimony was damaging because victim's house was burglarized on 12/7 or 12/8 and the victim was killed a few days later. The most damaging aspects of the testimony of Daws were completely uncorroborated though. (Also the fact that Daws' comes forward only the day after he hears of the huge \$300,000 reward should be considered). No independent evidence supports Daws alleged claims. The phone records show no call to the Petitioner allegedly providing the victim's address prior to the victim's burglary was made as claimed by Daws on 12/6/1996 (R:17 TT p.1823). In addition, none of Daws' paperwork supported that he provided the Petitioner with the victim's phone number or address prior to the burglary at the victim's house or the victim's murder. Finally, Jonathan Levine, the Petitioner's divorce attorney and officer of the court testified that he and Daws had a December 11th, 1996 meeting that included Petitioner's criminal attorney, Mark Kadish. They discussed in detail the alleged crimes concerning the victim. Levine reviewed his contemporaneous notes from the meeting as well. Levine testified that Daws did not claim that he had provided the Petitioner with the victim's address or phone number prior to the crimes or that the Petitioner said he would conduct "drive-

bys" of the victim's house (R:18 TT pp.3241-3243; R:19 TT pp.4196-4197, 4218-4219).

J. Summary

The weight of the evidence of bad faith and misconduct cannot continue to be blindly excused. The petitioner did not have a fair trial. Continuing to ignore the facts and evidence from the habeas and the exhibits submitted, make excuses for bad faith proof, support obstruction of justice and ignore the documents supporting Petitioners constitutional rights violations is beyond belief. Many of the comments made by the state are factually wrong, out of context and appear to be followed blindly. This case just as in *Guzman* and *Elliott* supports a new trial.

At trial before the misconduct of the State was discovered, the evidence against Petitioner was circumstantial. Now considering the new clear and convincing evidence of misconduct and bad faith, it is highly likely a jury would have acquitted the Petitioner. Therefore, Petitioner's habeas should be granted. A conviction obtained through use of false evidence falls under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. "The state appellate court's decision was an unreasonable determination of the facts, given that the state trial court specifically found that the

informant's notes were false; scientific evidence supported the informant's testimony that the notes contained erasures. The false evidence was material, and therefore the inmate's due process rights were violated, because there was no physical evidence connecting the inmate to the murder and his confession contained multiple discrepancies." *Hall v. DOC, supra*. The Petitioner is therefore entitled to a new trial for the perjury concerning the altered interview audiotape and withheld 2nd tape, the false affidavit concerning the missing 35 items of evidence at the AFD and for the withheld impeachment evidence and misconduct of GBI Firearm examiner Bernadette Davy. In *Chapman v. California*, 386 U.S 18 (1967) the cumulative effect of the error was weighed together. Thus, "the state prosecutor's argument and the trial judge's instruction to the jury continuously and repeatedly impressed the jury that from the failure of petitioner to testify, to all intents and purposes, the inferences from the facts in evidence had to be drawn in favor of the State -- in short, that by their silence petitioners had served as irrefutable witnesses against themselves. And though the case in which this occurred presented a reasonably strong "circumstantial web of evidence" against petitioners, it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these

circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions. Such a machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession". *Chapman*, 386 U.S. at 25-26 (internal citations omitted). It is also true that in *Brecht v. Abrahamson*, 507 U.S. 619 (1993) the United States Supreme Court did not preclude the possibility that "in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Brecht*, 507 U.S. at 638 n.9. But the essence of *Chapman* is that a prosecutor's misconduct is not harmless when it renders the defendant's "evidence worthless." *Chapman*, 386 U.S. at 26. Looking at this criterion it is easy to see that Petitioner has met his burden.

The R&R tries to take each complaint and minimize or excuse the actions of law enforcement or provide a new interpretation of what actually happened. The collective effect of the facts

surrounding the misconduct and intentional acts is for the jury to consider in a trial to be held without the government being able to use evidence that Petitioner could not independently test or pursue which deprived him of the opportunity to accurately confront or cross examine witnesses on their character and conduct. (See *Crawford v. Washington*, 541 US 36, 124 S Ct 1354, (2004))

Keeping Petitioner from material evidence by means of misconduct, obstructive behavior and repeated and intentional violations of procedural requirements in the handling of evidence undermines justice and produces a lack of confidence in the outcome of the trial. It is also important to compare Petitioner's case to *Guzman v. Sec DOC*, 663 F.3d 1336 (11th Cir. 2011), *supra*, where Guzman's habeas was granted because of an undisclosed \$500 payment to a witness who was a prostitute and the multiplicative effect of perjury concerning it by the lead detective in the case. The multiplicative effect of the prejudice due to State misconduct, perjury and obstruction in Petitioner's case was far worse. Unlike in the Petitioner, there was also some direct evidence of Guzman's guilt along with Guzman's prior history of criminal behavior and involvement in illegal drugs yet Guzman's federal habeas was granted and this was affirmed by the 11th Circuit. Petitioner is entitled to a fair trial with the jury fully informed of all the impeachment

evidence against the crucial State witnesses, without the State being able to use evidence lost or destroyed in bad faith and with the jury being instructed that it could draw an adverse inference from the fact that evidence had been lost. Petitioner's habeas should be granted.

Respectfully submitted,

This 22nd day of September, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Response has been electronically filed via the CM/ECF system, which will electronically serve a copy of this Notice to Assistant United States Attorney, Clint C. Malcolm, Email: cmalcolm@law.ga.gov.

Respectfully submitted,

This 22nd day of September, 2014.

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