MR. ABT: Ten. Ten, 15.

THE COURT: Fifteen?

MR. ABT: Ten is fine.

THE COURT: You said you wanted a whole day, so you can have 15 if you want.

[Brief recess.]

* * *

CLOSING ARGUMENT BY MR. ABT

Well, the first thing I want to say is to thank the Court for its patience and allowing us to have the necessary time to present what is a pretty complicated habeas.

Your Honor, this case is about whether Scott Davis got a fair trial. Clearly, he did not. We are going to present to you a summary of the reasons why, and there's lots of great reasons to support that. And if he didn't get a fair trial, then he needs one. And that's what we're here to ask the Court.

It was -- despite the fact that there are very prominent attorneys that have represented Mr. Davis, both at trial and appeal -- Mr. Morris, Mr. Steel, and Mr. Samuel; these counsel were ineffective for a variety of reasons which we have to take notice of. We have presented a wide variety of explanations as to objections that should have been made and arguments that should have

been raised, both at trial and appeal. It is not simply enough for his counsel to have objected in summary to the fact that pieces of evidence were lost or destroyed. And that's what they did.

Instead, what they should have done and what would have made them effective, would have been to object to the individualized pieces of evidence in pretrial motions, at trial, and the motion for new trial, and on appeal. And they could have individualized those objections in a number of ways. Instead of just objecting and saying this violates the Sixth Amendment Confrontation Clause, they should have gone further. They should have raised issues regarding Fourteenth Amendment Due Process with respect to each piece of evidence, and they should have objected on the grounds of O.C.G.A. §16-10-94(a), O.C.G.A. §17-5-56 which are duties of law enforcement to preserve evidence, and they should have objected on the grounds of §17-16-4 allowing the Defense to inspect all the evidence prior to trial. These objections are simply not raised on an individualized basis on each piece of evidence through trial, and there's no standing objection for these various points of law with respect to what is tantamount to almost 70 items of evidence. And these are not unimportant items, and we'll get to that in a moment.

It's just not enough for them to say it's unfair for

witnesses to testify about lost evidence, they needed to have gone further. They needed to have highlighted the Standard Operating Procedures or SOPs that were violated and provide experts to show -- when I write IAC, ineffective assistance of counsel -- they needed to have, with respect to each piece of evidence, shown a Standard Operating Procedure that violated in losing or destroying that evidence, and then bringing to bear an expert at trial to say this piece of evidence had exculpatory value. If we could have tested it, here's what we could have tested it for. But they simply don't do that. They don't bring one expert to trial. Not one.

And so trial counsel didn't particularize these objections, and appellate counsel didn't investigate all the SOPs, and they didn't bring these experts. And when you have such a vast amount of evidence that's lost or destroyed, the totality of that, when you look at it as a whole -- and that's what the Court's already done, but we wanted to point out that these are individualized objections that should have been made: the Sixth Amendment, Fourteenth, and the O.C.G.A. statutes. There's three of them, in particular, that I can think of offhand, the ones that I've mentioned. These are the objections that should have been made, and this is what should have been presented as evidence in trial and appeal to prove

that it was not just harmless error to have lost such a tremendous volume of evidence. And the failure to investigate these issues, the failure to bring these experts, the failure to get those Standard Operating Procedures into evidence, made them ineffective.

And I want the Court to keep thinking about throughout when the Court is deciding this case, keep thinking about those photos of the Atlanta Police Department Evidence Room, how it looked like a garbage bin during the course of the Scott Davis case. And how later they cleaned it up, and now it looks like a real Evidence Room, how an Evidence Room should look.

Another example of this ineffectiveness is when we talk about the phone records. So I'm going to make this kind of Point 1. This is a good example of what could have been done or should have been done at trial. The Defense doesn't go out and obtain the phone records, which are now lost. We can't get them anymore. They've been purged. Mr. Morris testified about how the phone records are pursued but never pursued to the extent necessary to show that his theory of defense was that Ms. Bruton called the Jenacovas first, and then called Scott Davis. The Jenacovas at trial are the ones that supported the testimony that Ms. Bruton is the one that told them Mr. Coffin had been shot. And so that would have contradicted

the State's theory that Scott Davis is the first person to mention that Coffin has been shot. And it would have created a defense of showing that he only knew that from Ms. Bruton, because she speaks to the Jenacovas first, they testify that she mentions that to them, and then she calls Scott Davis. But the only way to prove that time line is through the phone records, and the phone records are not pursued.

It's also worth noting that Mr. Morris and Mr. Steel remain on for the appeal and the motion for new trial. And I think that's okay, but in a case with this many issues and this much going on, there is no mention in the motion for new trial or in the appeal about ineffective assistance of counsel. And that can't be just strategy, not when these tremendous amount of issues exist. It's ineffective for them to raise ineffective assistance of counsel, and they needed to have done that.

When you look at the totality of evidence in this case, almost 70 items, you can only come to the conclusion that bad faith exists because there is a pattern and practice by the State to have lost evidence. And again, we've gone through this, but I want to highlight some of these pieces of evidence:

You've got the gun, the 9mm Beretta; you've got the bullet; you've got the shell casings; you've got a shotgun

from the Porsche; a flashlight; a knife; the fingerprint cards; you've got the gas can that's used allegedly to cause the fire at the Coffin residence. And that's just to name a few of those items. Oh, two more of significance: the mace can that's recovered, the pepper spray; and the Olympic bag that's never recovered. And those become all these items of evidence which are not a automobile, and we'll talk about that comparison in Georgia Law later, but these are small enough and, you know, manageable enough to be kept in a box somewhere labeled "Scott Davis Case." It's bad faith not to have managed the evidence well in this case. It's the antithesis of good faith police work.

And when you look at it both from an individual item standpoint, which is what should have been argued at trial and what should have been argued in appeal, and then you look at it in the totality of it, the sheer volume of the evidence; the only conclusion that I think any reasonable person can come to is this is not acceptable police work. This is not how we want our trials to look.

Prosecution witnesses at trial are repeatedly allowed to testify about this evidence. And specifically, the most egregious example is Ms. Bruton and Detective Chambers who later essentially confirms Ms. Bruton's testimony. But what she is allowed to do and what Bruton

is later allowed to confirm is that the Olympic bag and the gas can looked like Scott Davis'. Well, that's a pretty incriminatory statement right there. How does the Defense get an opportunity to confirm that statement? They can't. They can't. This item and this item [indicating items written on board] are not available to be tested. And so what should the Defense have done at trial?

Well, they should have brought an expert like Mr. Dodd and Mr. Doran to come and say, you know, these items are traceable. We can test them for fingerprints to see who's touched them, if we have them. And we can test, if we have them, to see where they were purchased, on what day they were purchased, at what store, with whose credit card. There's a video tape, possibly, from the store to show who bought them. These are things that are exculpatory, but the Defense never gets to do that. And the prosecution witnesses are allowed to, without any retribution, violate Mr. Davis' Sixth Amendment rights to confront that evidence. You can't confront a witness under the Sixth Amendment if they're allowed to testify about something that -- poof -- doesn't exist.

And this issue about bringing experts in to show the prejudicial nature of the lost evidence, it's not raised at trial. It's not raised in the motion for new trial.

It's not raised at appeal. It's just not brought up.

The gas can is really an excellent example because, as I believe Mr. Doran testified, you know, you can trace it back, and that way you can -- it has -- it has exculpatory value. You can show who bought it. You can show where it was bought. You can show on what day it was bought.

There is a good case, Head vs. Thomason 276 Ga. 434, it's a 2003 case, which says, you know, it summarizes a lot of other cases which says basically, look, failing to call experts is a guaranteed way to get an ineffective assistance of counsel claim. You know, when you don't -- the two biggest ways to mess up a criminal trial are not investigating the facts and not calling experts. And despite the fact that he's got these great attorneys, attorneys that are the most well respected in the state, they don't do the things that are necessary in the face of knowing that all of these pieces of evidence are tested by the Prosecution, destroyed, and then the Prosecution is allowed to talk about them in trial, as if they're right there.

There is no objection at trial to Ms. Bruton's testimony that the bag and the gas can looked like Scott Davis'. There is no argument made that this violates his Sixth Amendment rights, his Fourteenth Amendment rights,

and all of these Georgia Code sections about preserving and maintaining evidence, about sharing evidence with the defense prior to trial.

[Off the record briefly.]

This is what I would call a pattern of misconduct. When you have 70 pieces of evidence that go missing or are destroyed. It is not simply an isolated incident anymore. You cannot say that it is an accident. And I contest that at what point do we as a judicial system say harmless error, it's okay to lose one or two pieces of evidence or a piece of evidence that doesn't matter; at what point, when you lose this many items of evidence, including the murder weapon and key pieces of evidence like a can that's allegedly used to start the fire, fingerprint evidence; at what point does the totality of circumstances -- where is the threshold? Because if it's not 70 pieces of evidence that constitute the murder weapon and all the other key pieces associated with the conclusion of the Prosecution that Mr. Davis committed this horrific act; if it's not there, I don't know where the threshold is that it becomes harmful error, it becomes reversible error.

When you look at the totality of circumstances in this case, and you look at the individualized pieces of evidence, and you look at how much is lost and how little is done to maintain it; then to me that raises to the

level of bad faith. That screams bad faith. It can't be good faith.

You have these agencies: the GBI, the Atlanta Police Department, the Atlanta Fire Department, and then some DeKalb agencies as well. And we have counted over 300 violations of Standard Operating Procedure. Three hundred with respect to these 70 pieces of evidence. How many does it take? How much disregard for the law and snubbing or disregarding it does it take to say, hmm, we can't have a fair judicial system if you're throwing evidence in a room in garbage bags and hoping that's some sort of orderly way of maintaining it.

Again, I really want to focus on the photos from the Evidence Room. I want the Court to remember that. Melvin Denson came in here -- I hope I'm spelling his name right, I believe it has two n's [sic] -- Melvin Denson came to court and showed you those photos of what the Evidence Room looked like. And, by the way, those were never presented or disclosed at trial. Those were never investigated by the Defense. That's something new. And we'll get to new versus old, I want to talk about that later on. But I want the Court to remember and think about how the APD Evidence Room was run. It looked like a trash dump to me, not an Evidence Room. And after the Davis case they change everything, because they know that

it's bad faith. They know there's a pattern and a practice of losing and abusing and mistreating the way evidence should be treated at trial. This is per se bad faith because it is the supervisors who are ignoring and disregarding any careful attention to what Georgia Law requires, those Georgia statutes requiring how evidence needs to be handled.

And then you have the photos from Cecil Mann, and those were great photos, too, because you have the before and the after photos. You have this trash dump and then you have these photos of, wow, you know, boxes on shelves, nicely labeled. Hmm, that looks like an Evidence Room to me. That's a good faith attempt to keep an Evidence Room. Well, what's the opposite of good faith? It can't be said that it's anything other than bad faith to treat evidence like trash. There's no way that that can be fair. It's not fair to the Prosecution. It's not fair to the Defense. And it's certainly not fair to our system of justice.

We brought forth another expert, Mr. Doran, who was an expert on the issues of chain of custody, evidence handling, police procedures. And Mr. Doran is a fantastic type of witness. That's the type of expert that should have been brought at trial to explain to the Court and explain to the jury how evidence should be handled, how

evidence should be presented, and why it is bad faith on the part of the police not to statutorily preserve the evidence under O.C.G.A. §17-5-56, under §16-10-94.

Doran tells us that the SOPs were violated, the chain of custody was violated, the physical evidence was improperly destroyed in violation of Georgia Law, there was a lack of supervision of the evidence. And it's the supervision that is so key because that's what constitutes a pattern and practice that is tantamount to bad faith. It's the supervision that becomes so important because it's no longer just one person at a low level making a careless error, it is a pattern and practice of bad conduct. And it is pervasive in these agencies. This is not an isolated incident. This doesn't happen once or twice in this case, it happens almost 70 times.

By the way, the -- a good example of this is the fingerprint evidence, another important piece of evidence that's lost or destroyed. So if the lawyers had run the fingerprints through AFIS, the national system, then that could have exculpated Scott Davis, and that's not done. The fingerprints aren't lost until 2004 had gone. So the Prosecution has them from '96 to '04. The Defense doesn't make sure they're run through AFIS, which means they're ineffective for not doing so, but the bad faith is proven by the fact that during this time period, from '96 when

the murder happens to '04, they do go to great lengths to test the fingerprints, to determine whether they're Davis' or Coffin's. And, you know, they figure out they're neither. Well, if they'd been Davis', boy, they would have jumped all up and down about that. And the fingerprints aren't Coffin's, and that could have only, if they had been, only helped the Prosecution. But so the Prosecution stops there. They don't run it through the national database.

And by the time we get to 2004, we have Alfreddie Pryor coming to court and testifying that he thinks maybe he has the fingerprint cards. So he goes back and comes back the next day -- he checks at home, "No, no, I don't have them. They were too old. They were destroyed." Well, if the man is potentially keeping fingerprint cards in his house, doesn't that demonstrate again to the Court this tremendous pattern of mishandling evidence, of lack of police procedures being followed? This is evidence that the Prosecution was allowed to test, that the Defense never got to confront or test on its own, and has that apparent exculpatory value because who do those fingerprints belong to? We will never know. They never get tested, the Defense never gets to run them through AFIS. And yet the Prosecution goes to great lengths to prove what they want to prove. They get to prove what

they want, but the Defense doesn't get its Sixth Amendment right. It doesn't get to confront the evidence.

Torn clothing, another great example. There is torn clothing found at Scott Davis' house. And you know Mr. Doran testified that things like that, fibers, can be tested for DNA, they can be traced to determine where they're bought from, where they're purchased, point of purchase. But they're lost, and never -- there's never a chance to test them. And it's ineffective assistance of counsel for them not to have investigated this and tested it. And then it's ineffective assistance of counsel for them not to have highlighted at trial, well, since the Prosecution lost it, here's the procedure that was violated, members of the jury, and here's an expert to testify about what we could have done with that evidence if we had had that.

Same thing, fire timeline. Fire experts. And this is a -- this is sort of really interesting because it's the same issue, but Bruce Morris retains a man named Lentini, who is a nationally recognized fire recreation expert. And in his report Lentini says, well, fire timelines are too tenuous to establish. And so he doesn't bring in Lentini to testify at trial. That's exactly the testimony that should have been brought out in front of the jury. And that's exactly the testimony that Mr. Dodd

and Jim Tolbert, who got up here on the stand, testified about. That fire timelines and fire recreations are imperfect to the point where they're not scientifically acceptable, they shouldn't have been admitted at trial, they should have been contested at trial, but nobody's brought to bear on that issue until now. They never bring in to trial their own expert, or on appeal, to show that the fire timeline that the State creates and the fire re-creation that the State creates is hocus-pocus.

Also Mr. Dodd testifies about something really interesting that we'll bring up again later, but he testifies about the 9mm Beretta. Because one of the things he says is, you know, you can take -- even Ms. Davy at the original trial says you can't test the gun; it's burnt; it's too burnt to perform tests on. Mr. Dodd says you can take the action bolt off that gun, put it on another gun, and perform tests on them. And there's a lack of investigation, there's a lack of bringing experts to trial to talk about these things. That's something that could have determined the cause of death in this case. But because Ms. Davy's allowed to testify without any controversion of her testimony, without any contrary expert testimony about what the cause of death is -- and Dodd says, no, you know, you could have performed other tests on that gun. We're going to come back talking about

both the gun and Ms. Davy, but it's -- I think that's an important point to note.

Dodd testifies that the evidence at the fire scene is not properly handled, that the evidence was not properly preserved, that it was contaminated, and that violated all kinds of Standard Operating Procedures, both for national and local standards of handling evidence in fire scenes. The Defense doesn't bring anyone to trial, and the issue isn't raised on appeal about these fire issues. And again, that's of great importance in deciding all of this totality of the 70 items of lost evidence.

I think it's important to look at some of the case law with respect to all this evidence that's not properly litigated. And there's some big cases I'm sure the Court is aware of. The first if Trombetta from 1984. And the Court looks -- the Supreme Court looks at due process and says when you're unable to -- the first step is if you can't recreate the evidence or test it in another way -- you know, if you can, then there's no -- there's no harmful error -- but if you can't recreate it, that's step one. And then the second step, the most important step, is it having an apparently exculpatory value? Due process demands simply that where evidence is collected by the State, law enforcement agencies must establish and follow rigorous and systematic procedures to preserve the

captured evidence or its equivalent for the use of the defendant. That's not done here. They violate everything Trombetta stands for. Can we really say that law enforcement agencies here handled the evidence using systematic and rigorous procedures when you see the photos of that Evidence Room from APD?

In Trombetta the Court does not suppress the lost breath samples from a DUI in their case because law enforcement was acting in good faith in accordance with, quote, their normal practice. Well, when normal practice is to treat an Evidence Room like a garbage dump, then I don't think those are the procedures, rigorous procedures, that the Trombetta court was looking for. I don't think it is normal for an Evidence Room to look like a garbage dump or of, you know, someone's garage.

The next important case I want the Court to be reminded of is Youngblood, Arizona vs. Youngblood. I apologize to the Court that I have probably not the greatest penmanship, but I think you get it. Youngblood is a 1988 case. And the important thing I want the Court to recognize about this case is in the decision the Supreme Court rules that bad faith is irrelevant. You don't even have to get to the issue of bad faith. 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.

By the way, what's interesting, I think, about the Youngblood case is again they rule for the Prosecution. It's a child molestation case. And it's basically they allegedly lost forensic evidence. But two years after the Supreme Court rules for the State, the attorneys for Mr. Youngblood, despite the fact that the case is ready to be ruled on by the highest court in the land, they ask for the DNA evidence to be retested and, lo and behold, Youngblood wasn't the perpetrator. And two years after the case is decided, after 1982 -- 2000, they test the DNA and Youngblood walks free. And that's important because you don't have to show that they -- you don't have to show all these procedures were violated, you don't have to show all these experts, you find that the State didn't disclose evidence or they altered evidence, tampered with evidence. That case doesn't even -- it's not even important.

And now the most important case, Mussman. We're very confident that this Court has what I think is some pretty good insight into the Mussman decision, having litigated the case. 289 Ga. 586. Mussman is Georgia's law when it comes to the issue of lost or destroyed evidence. So

there's a few things that are important about the Supreme Court's ruling in Mussman. I'll make a whole new page, if possible.

The first is in Mussman it isn't the State that destroys the evidence, it's a third party wrecking service that destroys a car. So can you really distinguish that? I think you can, when it's not the State's fault that the evidence gets destroyed, you can't really hold them responsible. And I think that's an important distinction. We had 70 items of evidence that are lost or destroyed, and there is no third party handling it. It's not a wrecking service, it's not some contractor for the State, it's the GBI and the APD and the AFD.

The second really important distinction, and this is huge, in Mussman, the defendant consents to the evidence being destroyed. There's a car, and I think the wrecking service calls Mussman's parents and says, hey, you know, do you want this? No. Nah, total it out. Our insurance will pay for it. Well, you can't consent to the evidence being destroyed and then later claim that it's prejudicial to you. And there's nothing like that here. We don't have a situation where, you know, Sheila Ross or Detective Chambers called up Bruce Morris and say, hey, you know, we're thinking about throwing away the gun. Is there anything you want to test it for? Uh-uh, that doesn't

happen here.

And the third -- and the thing that the Court really makes an important issue of -- is the size of the evidence. You're dealing with a whole car in Mussman. Okay. That's a pretty big piece of evidence. And the Court goes to great lengths to explain why you can't store a car in an Evidence Room. And they even give other examples. They say that, you know, if there is DNA on a mattress, you can't expect the State to keep the entire mattress, maybe they should keep a portion of it. Or a recliner, you know, if there's some fluid, bodily fluid on a button of a recliner, you keep the button, not the whole recliner. And that makes good sense. The Court gets it right.

And this is the opposite of Mussman. We don't have a car we're asking them to hold on to. We have a gun, a bullet. How much space does a bullet take up, a shell casing, magazine for the bullets, a flashlight, fingerprint card? These are small pieces of evidence that are easily stored, readily stored. And instead of taking up too much space, they're destroyed altogether due to the incompetence and bad faith of the State, not some third party, not the Defense consenting to it, but the State.

And in Mussman the Court concludes, and I'll quote, "Here the trial court correctly found there is simply no

evidence in the record that the police were acting in bad faith when they followed the standard policy of releasing evidence of vehicular homicide cases that they considered to be solved. This is not to say that following a standard policy may never amount to evidence of bad faith. However, the question of whether bad faith would exist under such circumstances would depend on the conduct of the actors in relation to the policy, not whether the policy itself constituted evidence of bad faith."

In that last sentence of the Mussman court, they instruct to look at the conduct of the actors. Does their conduct create an issue of violating procedure and policy? Does it raise to a level of being -- acting in bad faith?

And so now we get to what I consider the most important issues in this. Because even if the Court wants to look and interpret Mussman and Youngblood and Trombetta and say -- because they're going to get up and say these issues have been litigated. That's what they said in opening, I'm sure they're going to say it again. All this stuff's been litigated. And so even if the Court wants to follow that line of thinking and say, well, you know, 70 items of evidence -- I don't think it's bad faith because -- for whatever reason. If the Court wants to take that position, we want the Court to be reminded of Arizona vs. Youngblood and issues which have not been litigated.

And we're going to start with Ms. Davy. Bernadette Davy. She is the State's firearm expert at trial. And Ms. Davy testifies about a variety of tests that she performs and, of course, she performs those tests on pieces of evidence that are then lost or destroyed. And, importantly, she is the person who testifies about the cause of death. She is, of course, terminated from the GBI for falsifying tests and lying in other trials, which comes out after the Davis appeal has been denied.

George Herrin, Jr., who is the deputy director of the GBI Crime Lab, you heard his testimony. And he testifies that him and -- he and Amanda Lokar -- he is the deputy director, Ms. Lokar's title was the technical leader for GBI firearms. And they both really testified about prior disciplinary issues with Ms. Davy. She had given out passwords she wasn't supposed to, she had threatened a supervisor, and these are important points because these prior disciplinary issues are things that the Defense, Mr. Morris and Mr. Steel, could have investigated. How about when you know an expert's going to come to trial to testify, subpoenaing their personnel file and records -- we do it all the time in every DUI case, we go and get the P.O.S.T. records of every officer who's going to testify. That's not that hard to do. They could have gone and found out, hey, she's got a bunch of disciplinary issues.

Maybe we should cross-examine her about those. But they don't do that. That's a failure to investigate and it's another reason why there's ineffective counsel.

But the new issue, the key issue, is that issue they couldn't have known about. The issue that doesn't rely on something that's already been litigated, is that it turns out she is a big, fat liar. She lies in trials, she lies about tests she performed. And Fred Mays, who also testified from the GBI, he is from the Office of Professional Standards, he is the one who says, well, she ultimately admitted to falsifying tests, lying about it, and not just falsifying tests from 20 or 25 trials that actually took place, but when they confronted her about it, she tried to cover her own tracks and lied about it then in the audit that was done. This alone could grant us a new trial. Her conduct is not just reprehensible, it's prejudicial. There is no way for us to go back now and determine if Ms. Davy fabricated or falsified or tampered with the tests in the Davis case. The evidence is gone. But we don't -- that's not an issue that's been mitigated because Ms. Davy's misconduct comes forward after the fact. And it is, on its face, prejudicial to us.

What are the pieces of evidence she handled? The 9mm Beretta, the magazine, the shell casings, and the bullet

that caused Mr. Coffin's death. All this evidence is lost after she handles it. I don't know if she lost it, I don't know who lost it. And that's not the issue. The issue is she is wholly discredited and her testimony is used to convict Mr. Davis.

What's even more complicated and distressing about Ms. Davy and her situation is when the GBI finds out about it and does their investigation and forces her to -- or asks her to resign -- that's a nice way of doing it -- who do they notify? They send a letter to every D.A. in the State. Wow, that's great. That's just fantastic. Let's just notify one side of the coin. We don't need to actually put on notice any defense lawyers who have been involved in her trials, we'll just notify every D.A.'s office. I mean, why not at least send the same letter to every public defender in the state? At least that way every county or every circuit is -- both sides are on notice. No, no, they don't do that.

But they do send the same letter to Paul Howard. And what does he do with that letter? I don't know, I guess he puts it in a file somewhere. He certainly doesn't share it with Scott Davis' lawyers, and that's a Brady violation because there are cases like Penn vs. Richey with the U.S. Supreme cite in 1987 that says, ah, you know, Brady doesn't just extend the evidence you have

prior to the date of trial. If new things come up, even after appeal, you have to -- have to -- share them with the Defense. To this day, as I stand here before Your Honor, no one from the Fulton County's D.A.'s Office or anyone from the State has ever notified anyone on his team, not Bruce Morris, not Brian Steel, not Don Samuel, not Ms. Shein, Mr. Cohen, or myself, or any of our investigators. I mean, he's got enough lawyers. All you'd have to do is notify one of them. They never mentioned the word Davy and termination. They've never shared the letter with us.

He gets a new trial just on that ground. It violates his due process that she was allowed to testify about the cause of death, testify about the firearms, testify about key pieces of evidence, when she very well may have been lying through her teeth.

All right. Well, that's not an issue that depends on something that's already been litigated, so that's one.

Number two, Linda Tolbert. Linda Tolbert is an interesting witness. She provided the Fulton County D.A.'s Office, at their request and at their drafting, she signs an affidavit. And that affidavit -- and she signs the affidavit prior to trial, it's already in discovery. And that affidavit says really two things. One, her signature on the Evidence Room sheets is forged, and two,

she never received the 9mm Beretta. Maybe she thought it was, at the time, under Ms. Davy's mattress at home. But she signs this affidavit that says two things. Her signature on the evidence -- evidence logs is not right, and she doesn't get the gun.

And so after seeing that affidavit, Scott Davis' defense team says, well, no reason to call her. I mean, you know, we're going to investigate and look at her in such a way that, you know, we can't prove that the D.A.'s Office ever got the gun, that she ever got the gun. Well, then she comes here and says, you know, they kind of made me lie in that affidavit. It's false. The affidavit's false. It is my signature and I probably did get the gun. So, I mean, I hate to use the word "perjury," but at the very least she's supplying false testimony. And that changes the way that a defense attorney operates and strategizes and deals with a witness. Because you have this belief that these things are going on when, in fact, they're not. And Bruce Morris could have called her to the stand and said, you got the gun, it comes back to you, and then presto-chango, puff, it disappears.

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. Remember, this is no small piece of evidence she's testifying about. It's

the 9mm Beretta. It's the murder weapon that she loses. It's not a flashlight. I can't think of a more important piece of evidence in this case, physical evidence. And she got up on the stand here and admitted to providing false testimony. What's interesting is she's asked to provide that affidavit by Chris Harvey, who's the investigator in the D.A.'s Office. I don't want to point the finger too hard at Paul Howard's Office, but boy, that to me is reprehensible. It's unacceptable. It is not worthy of the system of justice and trials that we have in this country where fairness and truth should prevail.

All right. And then we have the crown jewel. The most important piece of evidence is the tape, the audio tape of Scott Davis' interview. Scott Davis tells his lawyers: Please get this analyzed. But they don't. It's ineffective for them not to. I hope that would be grounds for a new trial alone, in and of itself. But we go a lot further than that.

Mr. Griffin testified today that you have the tape being turned over once when you get from Side A to Side B. Okay. There's no real technical issue with respect to that. Then you have two starts and stops. And then you have two deletions or what he calls them "erasures." They're for small amounts of time, but they're erasures nevertheless. You know, the interesting issue about the

tape is not all this technical stuff he testifies to. The interesting issue for me, from my perspective, is something we don't even need an expert for. He just hits play and you hear -- it's either Chambers or Walker telling one or the other, hey, turn the tape over. And then you hear them turning the tape over. Well, how is that possible? Let's think about that for a minute. If you hear them turning the tape over, that means there's another tape. It means there's two tapes. You can hear the tape being turned over. How does that tape record? There's a second tape and it's never disclosed. It's not turned over ever. To this day Detective Chambers gets up here and says, you know, there's no second tape. There's no second tape. Okay, really? I don't even think you need an expert to figure that one out.

But Griffin does point out something important. There are these erasures. I call that tampering or altering. He says the tapes not altered. Okay. You know, we've all seen somebody come in and they fail a drug test for a probation violation: I swear, I didn't use any drugs. I mean, that's what I felt like when he was testifying. The uncontroverted expert testimony is that there are alterations and deletions to the tape. He wants to swear that the sky is blue, and if the sky's not blue, that it's purple, fine. He can do that all day long. But

the science shows that the tape is altered.

So we're no longer dealing with harmless error after harmless error, and oh, it's okay for the State to kind of mess things up. It's too much. It gets to a point where after -- if you don't want to look at the 70 pieces of evidence and you don't want to look at Davy and you don't want to look at Tolbert and you don't want to look at the tape, at what point does it become an unfair trial? I can't think -- maybe I have a limited imagination, but I can't think of a more egregious set of examples, which in their totality point to the fact that this man didn't get a fair trial.

And it's also prejudicial because the tape, by the way, is used as the key, the crown jewel, in closing argument at trial by Sheila Ross, who's the ADA. I mean, she hammers on that issue at trial. Listen to his tape. That's what's used to convict him, and it's a tampered with piece of evidence. So I'm not afraid to call Detective Chambers a liar. I mean, I know there was a second tape in my heart and I know that somewhere it still could exist and that we'll never see it.

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. And, in fact, the case law supports that as well. There's a lot of cases but the one I'll point the Court to is Brown vs. State which says that "In order to authenticate and introduce an audiotape at trial," Brown vs. State is 274 Ga.App. 302, it's a 2005 case, "the audiotape cannot have any --" oh, what is the word they use -- "if the recording is authentic and correct, then there can be no changes, additions, or deletions." You can't have any deletions. Well, there's two erasures in this tape. And it's not like the A.G.'s Office brought an expert and has to analyze the tape and said, oh, no it's continuous. There's no erasures. This is uncontroverted.

I expect the State's response to all of this is to say two things: one, all these issues have been litigated, and two, there's overwhelming evidence of Mr. Davis' guilt. Well, guess what? That overwhelming evidence of his guilt is based on things like the tape and Ms. Davy's testimony and Ms. Tolbert's affidavit, which have been altered and tampered with and which is what the Court in

Youngblood said you don't even need bad faith. When they do that, when the State starts messing with the evidence and they don't disclose stuff and Paul Howard doesn't even tell you about the fact that Davy's been fired, then you get a new trial.

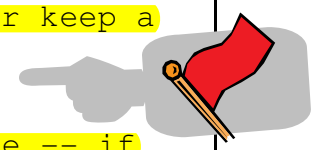
If we ignore this new evidence, things like Tolbert, Davy, the Evidence Room photos, and the tape issues -- the two tape issues, because there's one issue with the erasures, the second issue -- the fact that there's a second tape out there somewhere. If we ignore that, what message does it send? We are inviting disaster in our judicial system because we are telling police it's okay to lie a little, it's okay to fake it, it's okay to fudge the evidence, as long as you think you're right. That's not the legal system that any of us signed up for. And I simply can't sit here and stand by and think that this is harmless.

What is left with the greatest justice system in the world if the police are allowed to erase portions of an interview of a defendant and a suspect? How many times do we have to say things like this is harmless error? What is the threshold -- again, I point to the Court -- when you have -- what is the threshold when you have 70 items of evidence that are lost, the failure to show Standard Operating Procedures have been violated, the failure to

call the experts to show that the evidence was important, and then the photos from the Evidence Room? Tolbert lying, Davy lying, tape deletions, and a second tape out there somewhere. Because, again, you know, I think a lay person can figure that out, but we have the expert testimony that there's a second tape. Uncontroverted. Unless, of course, you believe Detective Chambers and want to ignore basic common sense, because you can hear the tape being turned over.

So how many times do we have to say that all of this is harmless? When we look at the totality of the circumstances in this case, it raises to a level, to me, that is obnoxious the way the police and the Fulton County District Attorney's Office handled the evidence and handled the witnesses, and conducted this case.

Do we want to send a message to police that it's okay to cherry pick pieces of evidence? Here's the stuff that helps you out, we'll just admit that at trial. And, you know, this may not help us at trial, let's toss it. Or let's test it and see if it helps us use those tests and then toss it. And it's okay to fake the tests you do, if you need to. And it's okay to edit the tapes or keep a second secret tape if you need to.



You know, maybe we start swearing in police -- if this is all acceptable, maybe what we need to do is swear

in police witnesses: Do you swear to tell some of the truth or distort the truth if you think it's necessary to prove your case? Maybe that's the oath they should take if all of this becomes acceptable in court. I can't endorse that. I can't endorse treating an Evidence Room like a garbage pit or falsifying affidavits or falsifying firearms tests or deleting portions of tapes or hiding tapes or hiding the fact that the firearms expert has been discredited and terminated. I think it's simply intolerable. It violates every principle we have as a society that relies on fair and honest police work and a fair system of justice.

So I implore Your Honor, if nothing else persuades you in this case, Scott Davis must have a new trial on these issues here.

I thank Your Honor for her time and patience in hearing this case.

MR. MALCOLM: Your Honor, our argument will be reflected in our brief. We don't intend to present an oral closing argument today.

THE COURT: All right. Then I guess we're done for the day. I will plan to see everybody on December 2nd?

MS. SHEIN: Yes, ma'am.

THE COURT: Okay, at 1:30. And I'm thinking it's going to be the same courtroom, but we'll get a notice out

to everybody to let you know. We change courtrooms so often, I couldn't really say.

[Off the record comments.]

[Proceedings adjourned; to reconvene on December 2, 2011.]