NO. 102406-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDDIE HERSHELL WEST, JR. ,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

III. STATEMENT OF THE CASE 3

A. West Assaulted Multiple Law Enforcement Officers Attempting to Respond to a Bar Shooting 3

B. The Trial Court Denied West's Motion to Dismiss Because He Failed to Establish that the Officers Acted in Bad Faith 8

C. The Jury Convicted West as Charged and the Court of Appeals Affirmed on Direct Review 14

IV. ARGUMENT 15

A. Due Process Does Not Require Law Enforcement to Search for Exculpatory Evidence, Only to Preserve Evidence Already in its Possession. 16

B. Even if the State Had a Duty to Collect Here, West Fails to Establish that the Evidence was Materially Exculpatory or that the Police Acted in Bad Faith 21

1. The trial court correctly ruled that West failed to establish that the video footage was materially exculpatory..... 22

2. The trial court correctly ruled that even if the video had been potentially useful, West failed to meet his burden to show evidence of bad faith. 25

V. CONCLUSION..... 28

TABLE OF AUTHORITIES

State Cases

State v. Armstrong, 188 Wn.2d 333,
394 P.3d 373 (2017)..... 15, 16, 17, 20, 21, 22, 25, 26, 27, 28

State v. Jones, 26 Wn. App. 551,
614 P.2d 190 (1980)..... 15, 17

State v. Judge, 100 Wn.2d 706,
675 P.2d 219 (1984)..... 16, 17, 20, 21

State v. Koeller, 15 Wn. App. 2d 245,
477 P.3d 61 (2020)..... 25

State v. West, No. 56817-9-II, 2023 WL 5378052
(Wash. Ct. App. Aug. 22, 2023) (unpublished).. 14, 15, 18, 19

State v. Wittenbarger, 124 Wn.2d 467,
880 P.2d 517 (1994)..... 12, 16, 17, 18, 23, 28

Federal and Other Jurisdictions

Arizona v. Youngblood, 488 U.S. 51,
109 S. Ct. 333, 102 L.Ed.2d 281 (1988)..... 18, 23, 26, 27

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194,
10 L.Ed.2d 215 (1963)..... 13, 25

California v. Trombetta, 467 U.S. 479,
104 S. Ct. 2528, 81 L.Ed.2d 413 (1984)..... 27

Cunningham v. City of Wenatchee,
345 F.3d 802 (9th Cir.2003) 27

Constitutional Provisions

U.S. Const. amend. XIV 1, 16

Rules and Regulations

CrR 8.3(b) 13

RAP 13.4 2

I. INTRODUCTION

Under the Fourteenth Amendment's due process clause, law enforcement does not have a duty to search out potentially exculpatory evidence at a crime scene, nor do they have a duty to "preserve" evidence that they never possessed in the first place. The Court of Appeals straightforwardly applied this long-standing principle to correctly conclude that the trial court did not err in denying Eddie Hershell West's motion to dismiss for governmental misconduct where the State never possessed the video surveillance footage at issue here. Because this Court has spoken on this issue and the lower courts have consistently applied this Court's rule, there is no conflict of authority or other basis for review.

To overcome this consistent case law, West raises a new argument in this petition, namely that the State "possessed" the video surveillance simply because it could request the video from the third party possessing it. In addition to being incorrect and unsupported by the record, this argument does not meet the

criteria for review. Rather, it merely amounts to a disagreement with the application of long settled rules to the particular facts here, which in no way justifies review under RAP 13.4. There is no conflict of authority for this Court to review. Nor does this case involve an issue of substantial public interest. This case does not cry out for this Court's intervention in any way. The Court should deny review.

II. RESTATEMENT OF THE ISSUES

This case does not meet the criteria for review under RAP 13.4. If the Court were to accept the case, the issues on review would be:

A. Whether the Court of Appeals correctly applied firmly established precedent to hold that the State does not have a duty to search out potentially exculpatory evidence and does not have a duty to "preserve" evidence that it never possessed.

B. Even assuming the State had a duty to search for potentially exculpatory evidence at the crime scene, whether the trial court properly concluded that West failed to meet his burden of establishing that the missing evidence was either: materially exculpatory; or potentially exculpatory and that the police acted in bad faith in failing to obtain it.

III. STATEMENT OF THE CASE

A. West Assaulted Multiple Law Enforcement Officers Attempting to Respond to a Bar Shooting

In October 2020, Tacoma police responded to reports of a shooting at Latitude 84, a bar in Tacoma. 2RP[1] at 286. A large crowd gathered near the entrance to the bar, while other people left in their cars. *Id*. at 284, 291. The officers discovered the shooting victim near the entrance with shattered glass from a gunshot on the ground. *Id.* at 288. The scene was "hostile," "chaotic," and "emotionally charged," with members of the crowd yelling "[f]uck the police, Black Lives Matter, fuck you, defund the police." 3RP at 581.

Officer Logan Breskin observed a person, later identified as West, being "confrontational" and "aggressive" toward

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[1] For consistency, the State adopts West's citation system, as follows: January 26, 2021, May 21, 2021, December 3, 2021 (trial readiness); 1RP – March 7, 2022 (motion to dismiss, voir dire); 2RP – March 8, 2022 (jury trial); 3RP – March 9, 2022 (jury trial); 4RP – March 10, 2022 (jury trial); 5RP – March 25, 2022 (sentencing)

Officer Trent Dow, threatening to "beat his ass." 2RP at 293, 360. Breskin walked over to West, telling him to "stay out of the scene, to go away and just walk away." *Id.* at 297. Despite Breskin's attempts to get West to leave, West continued to be confrontational and threaten "to beat [the officers] up." *Id.* West eventually walked away for a few steps, stopped, and then started walking back towards the officers with his shoulders facing the officers in a threatening manner. *Id.* at 298-300.

In response to West's escalating behavior, Officer Breskin decided to use an "escort technique"—grabbing one hand above the elbow, another hand on the wrist, and turning the person's shoulders away—to push West away. 2RP at 300. West tensed up and tried to hit Breskin with a closed fist. *Id.* at 301-02. Officer Breskin took West down and while on the ground, West struck Breskin in the left jaw and left ear with a fist and struck another police officer, Brynn Cenicola. *Id.* at 302, 304, 306.

Officer Steven Miller arrived at Latitude 84 and initially worked to disperse the large crowd outside of the entrance. 2RP

at 380. West approached him in "an aggressive manner as if he was trying to pick a fight," stating that Miller was "a bitch ass cop" and "fuck your shield, fuck your badge." *Id.* Miller attempted to deescalate the situation by telling West to "have a good night, enjoy your evening," trying to get West to "move along." *Id.* at 381-82. West instead went up to another officer, Trent Miller, trying to pick a fight with him next. *Id.* at 382.

Shortly after, Miller observed Officers Cenicola and Breskin escorting West away from the vicinity of the shooting victim. 2RP at 383. Miller observed West push Cenicola and punch her in the face with a closed fist. *Id.* at 385. Miller ran towards West and assisted the other officers in "taking Mr. West to the ground" and while doing so, West punched Miller in the right side of his jaw. *Id.* at 387. While on the ground, West continued to swing and punch, hitting West in the head several times, and grabbed Miller's vest, dislodging two handgun magazines. *Id.* at 387-88. West stopped flailing his arms after Miller punched him in the face, at which point Miller was able to

handcuff West. *Id*. at 392, 401. While law enforcement escorted West to a police vehicle, West attempted to "mule kick[]" Officers Cenicola and Miller. *Id*. at 396.

Officer Cenicola observed West threaten Officer Dow, stating that he was "going to fuck [him] up … I'm going to hit [him] in the face." 2RP at 435. A man who identified himself as security escorted West away, but West came back a few minutes later and continued to threaten Dow. *Id*. at 437, 443-47. West stepped back, approached the officers again, and Officers Breskin and Cenicola grabbed West to move him away. *Id*. at 450. West pulled his arms free and punched Cenicola in the face with a closed fist. *Id*. at 450-53. In response, Officers Breskin, Cenicola, and Miller took West to the ground and from there, West hit Breskin in the face with a closed fist and flailed his arms. *Id*. at 455-56. After the officers handcuffed West, he started to kick backwards towards Cenicola while she searched him. *Id*. at 458. Cenicola suffered severe bruising across the top

of her nose and under her eyes and had bruising on the side of her leg where West kicked her. *Id.* at 462.

According to West, while at Latitude 84, he heard gunshots from outside the building, saw people running from the bar, and decided to stay inside the bar because he did not want to get shot. 3RP at 508-09. After some time passed, West went outside, and a police officer told him to move because he was in a crime scene. *Id.* at 511-12. West told an officer that he was not from Washington and did not the know the area. *Id.* at 514. Another officer told him that he was "obstructing the crime scene" and that he needed to "get your ass and keep moving." *Id.* at 515.

West reached into his pocket to turn off music that he was listening to, and an officer grabbed his wrist and pushed him to the ground. 3RP at 519. While on the ground, officers punched and hit him, and West wondered if he would die. *Id.* at 518, 548. He denied hitting or striking any officer; instead, he claimed to fall backwards and reached out to try to avoid falling onto his

back or head. *Id.* at 545-46. He stated that he lost consciousness after falling. *Id.* at 546-47. West was fearful for his life and thought he might die when the officers were on top of him. *Id.* at 548-52.

B. The Trial Court Denied West's Motion to Dismiss Because He Failed to Establish that the Officers Acted in Bad Faith

The State charged West with three counts of third-degree assault. CP 3-5. Prior to trial, West filed a motion to dismiss "based on the State's failure to preserve, and/or produce, potentially exculpatory video surveillance evidence of which was in the [S]tate's control." CP 21. Specifically, West argued that the incident was captured on Latitude 84's surveillance cameras, law enforcement obtained only the portions of the surveillance video capturing the unrelated shooting incident, and that law enforcement's failure to obtain and preserve the portions of the surveillance video capturing West's incident with law enforcement denied him his right to due process. *Id.* at 21-29.

The superior court held a hearing on West's motion where Tacoma Police Officer Ryan Warner testified that he responded to reports of a shooting incident at Latitude 84 and went inside to determine if anybody had a gun. 1RP at 10-13. While inside, a male, later identified as West, began verbally confronting Warner, and had to be restrained by another man. *Id.* at 14. Warner met with the bar manager and viewed footage from the bar's security camera system with the objective of obtaining surveillance footage related to the shooting incident. *Id.* at 13-15. He observed video footage of three males, one of whom had a gun, and observed the individual with the gun outside of the bar on foot firing a gun back into a crowd that had gathered outside. *Id.* at 16.

As Warner was observing the surveillance, he heard people talking outside of the room and "it sounded like maybe there was an issue outside." 1RP at 17-18. He observed a "pile" of officers in the corner of the live camera feed, but "couldn't see what had happened" so he "dropped what [he] was doing" and

ran out. *Id.* at 18. When he arrived, officers had a person in custody and Warner asked if they needed any assistance, to which the other officers replied they did not. *Id.* Warner then resumed his investigation of the shooting incident. *Id.* at 18-19. As his primary objective was to identify the shooter and identify his location, he was concerned about the "fleeing" shooting suspect and focused his efforts to locating the individual. *Id.* at 44.

Warner planned with the bar to obtain the video of the shooting incident from multiple camera angles, testifying that it was the bar's practice to burn a CD and for law enforcement to retrieve it later. 1RP at 20. Although Warner did not request the video footage related to West's assault of the police officers, he did not instruct or ask the bar manager to not record or save the video of West's assault against law enforcement officers. *Id.* at 22, 44. He also had no reason to believe that the video footage would contain any "exculpatory evidence." *Id.* at 23. Although the cameras were pointed in the general direction of where the

incident took place, the cameras would not necessarily have captured all of West's incident with law enforcement because "the crowd" or "[o]fficers could have blocked it" and the pillars in the room made it "very frustrating" to capture everything. *Id.* at 42.

West argued that law enforcement collected eight minutes of video and failed to obtain an additional two minutes of footage and those additional two minutes would likely have included footage regarding West's incident with law enforcement. 1RP at 93-94. He further argued that Warner knew of assault allegations against law enforcement and observed West being arrested but failed to secure the video. *Id.* at 94.

The State argued that West failed to demonstrate either that the surveillance footage was materially exculpatory or that law enforcement failed to preserve the evidence in bad faith. 1RP at 99. Specifically, the State argued that "a showing that the

evidence *might* have exonerated the defendant is not enough"[2] and that West failed to meet his burden of showing that "there was any exculpatory value whatsoever in the video." *Id*. at 100 (emphasis added). The State further asserted that law enforcement's decision to not preserve the video did not arise to bad faith, "even if it is something that … in hindsight, the officers and the State and defense and Your Honor might have wished to have seen." *Id*. at 105.

The trial court found that law enforcement was aware that "there was video that would have shown the incident that occurred between Mr. West and the law enforcement officers" and that the officers "were aware that the video could be accessed and preserved." 1RP at 109. The court also noted the officers had "ample opportunity" to preserve the evidence and that their decision not to do so was "negligent in that they did not collect the evidence knowing that it was there and it could have been

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[2] Quoting *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994) (emphasis added).

inculpatory or exculpatory." *Id*. at 110 (emphasis added). "They were highly negligent in not collecting evidence against an individual that they were charging with an assault." *Id*. at 110-11.

The court noted that a showing of bad faith "requires essentially defense counsel to show that the officers intentionally didn't collect the video." 1RP at 111. While the court had "great reservations" about why the officers did not collect the video footage, it found that West "cannot make a showing of bad faith. And without the showing of bad faith or knowing what is on the video and that it was, in fact, exculpatory, [the court] cannot find that under 8.3,[3] this was a Brady[4] violation." 1RP at 111 (footnotes not in original). The court denied West's motion to dismiss. *Id*.

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[3] CrR 8.3(b).

[4] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

West asked for clarification of the court's ruling. 1RP at 140. The court stated that although the missing video footage was "potentially exculpatory," it could not find that the evidence was "material" and "I don't believe that its potential exculpatory nature is enough. I think that it has to be … exculpatory." *Id.* The court continued that "the issue really turned upon the issue of bad faith … [a]nd that bad faith … was not present." *Id.* Later, the court entered written findings of fact and conclusions of law denying West's motion. CP 103-07.

C. The Jury Convicted West as Charged and the Court of Appeals Affirmed on Direct Review

The jury found West guilty beyond a reasonable doubt as charged. 4RP at 683; CP 100-02. The superior court sentenced West as a First-Time Offender, imposing 30 days of jail converted to 240 hours of community service and six months of community custody. 5RP at 10; CP 123.

On direct review, the Court of Appeals affirmed in an unpublished opinion. *State v. West*, No. 56817-9-II, 2023 WL 5378052 (Wash. Ct. App. Aug. 22, 2023) (unpublished).

Pertinent here,[5] the court held that the trial court did not err in denying West's motion to dismiss for governmental misconduct. *West*, 2023 WL 5378052, at *4. The court noted that "West attempts to frame his argument as a preservation issue; however, such an argument fails because the State does not have a duty to collect evidence nor can it preserve evidence it never possessed." *Id*. (citing *State v. Armstrong*, 188 Wn.2d 333, 345, 394 P.3d 373 (2017)). The court reasoned that "caselaw establishes that officers have no duty to search for exculpatory evidence or pursue every angle on a case. Furthermore, where the State never had possession of the evidence, it follows that there is no duty to preserve the evidence." *West*, 2023 WL 5378052, at *4 (citing *Armstrong*, 188 Wn.2d at 345 and *State v. Jones*, 26 Wn. App. 551, 554, 614 P.2d 190 (1980)).

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[5] West seeks review only of the governmental misconduct issue here and does not seek review of the other issues he raised in the Court of Appeals.

IV. ARGUMENT

A. Due Process Does Not Require Law Enforcement to Search for Exculpatory Evidence, Only to Preserve Evidence Already in its Possession.

Reviewed is wholly unwarranted here where it is well established that due process requires law enforcement to only preserve potentially exculpatory evidence already in their possession. *E.g.*, *Armstrong*, 188 Wn.2d 333. Law enforcement does not have a duty to search out exculpatory evidence or expand the scope of their investigation. *State v. Judge*, 100 Wn.2d 706, 717-18, 675 P.2d 219 (1984). The Court of Appeals tightly adhered to these principles to reach the correct result. There is no statutory or constitutional basis for revisiting this long-settled point.

Washington's due process clause "affords the same protection regarding a criminal defendant's right to discover potentially exculpatory evidence as does its federal counterpart." *Wittenbarger*, 124 Wn.2d at 474. Under the Fourteenth Amendment, the accused must be afforded "a meaningful

opportunity to present a complete defense." *Id*. Accordingly, the State has a duty to disclose and preserve material exculpatory evidence in its possession. *Id*. at 475.

While the State is required to "preserve all potentially material and favorable evidence, this rule does not require police to *search* for exculpatory evidence." *Armstrong*, 188 Wn.2d at 345 (citing *Judge*, 100 Wn.2d at 717) (emphasis added). It follows that the State has no duty to *collect* exculpatory evidence. *See Armstrong*, 188 Wn.2d at 345; *see also Judge*, 100 Wn.2d at 717-18. "Investigating officers have no duty to investigate potentially exculpatory evidence at a crime site." *Judge*, 100 Wn.2d at 717-18. Due process does not "require police or other investigators to search for exculpatory evidence, conduct tests, or exhaustively pursue every angle on a case." *Id*. at 716 (citations omitted in original); *see also Jones*, 26 Wn. App. at 554. As stated by the United States Supreme Court, law enforcement does not have ""an undifferentiated and absolute duty to retain and to preserve all material that might be of

conceivable evidentiary significance in a particular prosecution.'" *Wittenbarger*, 124 Wn.2d at 475 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L.Ed.2d 281 (1988)).

Applying these well-established principles here, the Court of Appeals properly concluded that "the State does not have a duty to collect evidence nor can it preserve evidence it never possessed." *West*, 2023 WL 5378052, at *4. As noted by the court, "where the State never had possession of the evidence, it follows that there is no duty to preserve the evidence. The surveillance footage was in the possession of a third party, and was never collected by the officers." *Id.* (internal citations omitted).

To overcome this consistent case law, West changes horses midstream. In the Court of Appeals below, he argued that law enforcement deprived West of his due process rights by failing to *preserve* the video. *See* Br. of Appellant at 23-35, *State v. West*, No. 54817-9-II (Wash. Ct. App. Oct. 31, 2022); *see also*

West, 2023 WL 5378052, at *4 ("West attempts to frame his argument as a preservation issue.") In this petition, West now attempts to argue that video surveillance was in the "possession" of law enforcement because "the portion of the video in question was literally at Officer Warner's fingertips." Pet. at 14-15. West's contention is belied by the record. At the motion hearing, Officer Warner testified that it was the bar's practice to burn a CD with the requested footage and provide it to the police later. 1RP at 19-20; *see also West*, 2023 WL 5378052, at *2, n.5. Accordingly, where the bar never burned a CD containing the pertinent portions of the surveillance video and this nonexistent CD was never collected by the police, law enforcement never had possession of the surveillance video.

West's argument threatens to turn long standing case law on its head and create a new rule with potentially absurd consequences. If law enforcement were in "possession" of everything at their "fingertips," ***all*** physical and tangible evidence at a crime scene—regardless of whether it was actually

collected by the police or not—would be in the State's "possession." Such a rule would require law enforcement to collect virtually all physical evidence at a crime scene, because it is not difficult to speculate on some conceivable exculpatory value the evidence may have. But such a conclusion flies in the face of firmly established case law holding that the police do not have a duty to expand the scope of their investigation, nor do they have a duty to search out potentially exculpatory evidence at the scene of the crime. *Armstrong*, 188 Wn.2d at 345; *Judge*, 100 Wn.2d at 717-18.

Moreover, even if this Court were interested in exploring such a new rule, this case is a poor vehicle to do so. As Officer Warner testified, although the bar's surveillance cameras were pointed in the general direction of the incident, the cameras would not necessarily have captured all of West's incident with law enforcement because "the crowd" or "[o]fficers could have blocked it" and the pillars in the room made it "very frustrating" to capture everything. 1RP at 42. According to this unrefuted

testimony, it is entirely speculative whether the cameras would have even captured the incident. And West's speculation that the video evidence *might* have exonerated him does not establish that the video footage would have done so. Accordingly, this case is a poor vehicle to revisit *Armstrong*'s rule that the police are not required to "search for exculpatory evidence" where it is entirely speculative whether the evidence would even have been of any use to West. *Armstrong*, 188 Wn.2d at 345 (citing *Judge*, 100 Wn.2d at 717).

In sum, the Court of Appeals properly dispensed with West's claim of governmental misconduct under long standing precedent. West does not present any arguments demonstrating that this rule should be revisited. This Court should decline review.

B. Even if the State Had a Duty to Collect Here, West Fails to Establish that the Evidence was Materially Exculpatory or that the Police Acted in Bad Faith

Review is further unwarranted here because even assuming the State had a duty to collect the surveillance

footage—and it did not—the trial correctly concluded that the video in question was not materially exculpatory and that the State did not act in bad faith. Due process requires dismissal of a case only if (1) the State does not preserve "material exculpatory evidence" or (2) the State does not preserve "potentially useful evidence," *and* the defendant establishes that the State acted in bad faith. *Armstrong*, 188 Wn.2d at 344. Applying this test, the trial court properly concluded that dismissal for governmental misconduct was unwarranted under long standing case law.

1. The trial court correctly ruled that West failed to establish that the video footage was materially exculpatory.

Even if the State had a duty to collect the evidence, West failed to establish that it was materially exculpatory. To meet this standard, "the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Armstrong*, 188 Wn.2d at 345 (internal quotation omitted). In contrast, merely

"potentially useful" evidence is evidence that "could have been subjected to tests, the results of which might have exonerated the defendant." *Youngblood*, 488 U.S. at 57.

West's speculation that the surveillance footage might have supported his self-serving version of events falls far short of meeting the definition of "materially exculpatory" evidence. "A showing that the evidence *might* have exonerated the defendant is not enough." *E.g.*, *Wittenbarger*, 124 Wn.2d at 475 (emphasis added). Indeed, at most, West can only show that the surveillance footage might have supported his self-serving testimony at trial. Without explaining how or why, he makes the conclusory assertion that the "video evidence had an obvious exculpatory value." Pet. at 18. This amounts to nothing more than pure conjecture.

Rather, as the trial court astutely noted, the missing video evidence "could have been *inculpatory or exculpatory*," 1RP at 110 (emphasis added), and it was at most "potentially exculpatory." 1RP at 140. The court specifically stated that it

could not find that the evidence was "material" and "it's potential exculpatory nature" was not enough. *Id.* And to paraphrase the prosecutor, "even if [the video surveillance] is something that … in hindsight, the officers and the State and defense and [the court] might have wished to have seen," *id* at 105, the simple fact is that nobody knows what the video would have shown.

West's contention that the video would have exonerated him or corroborated his self-serving trial testimony amounts to nothing more than speculation and a conclusory allegation devoid of any factual support. Moreover, Officer Warner expressly testified that he had no reason to believe that the missing video footage would contain any "exculpatory evidence" whatsoever. 1RP at 23. Although the cameras were pointed in the general direction of where the incident took place, the cameras would not have even necessarily captured the incident because of the large number of people in the bar or the pillars in the camera's view could have obstructed the incident. *Id.* at 42. Thus, it cannot be the case that the evidence possessed "an exculpatory

value that was apparent before it was destroyed" and therefore was not "material exculpatory evidence." *Armstrong*, 188 Wn.2d at 345 (emphasis added); *see also State v. Koeller*, 15 Wn. App. 2d 245, 253, 477 P.3d 61 (2020).

The trial court's conclusion that West failed to establish that the evidence was materially exculpatory was supported by the record and based on firmly established case law. There is no basis for this Court's intervention here.

2. The trial court correctly ruled that even if the video had been potentially useful, West failed to meet his burden to show evidence of bad faith.

The trial court correctly denied the request for dismissal, because if the video was merely "potentially useful" to the defense, the defendant must face the burden of establishing that the State acted in bad faith. The presence of bad faith is irrelevant to the due process analysis when the State fails to disclose material exculpatory evidence. *See Brady*, 373 U.S. at 87. But "the Due Process Clause requires a different result" when addressing a failure "to preserve evidentiary material of which

no more can be said then that it could have been subjected to tests, the results of which might have exonerated the defendant." *Youngblood*, 488 U.S. at 57. When the evidence is "potentially useful," destruction of evidence "is not a denial of due process unless the suspect can show bad faith by the State." *Armstrong*, 188 Wn.2d at 345.

Evidence of bad faith "turns on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Armstrong*, 188 Wn.2d at 345. Here, the police investigation indicated that they had no reason to believe that the video footage would contain any "exculpatory evidence." 1RP at 23. Indeed, the police were not even sure if the cameras would have even captured the event given the large crowd in the bar and the presence of pillars in the room partially obstructing the camera's view, which made it "very frustrating" to capture everything. *Id.* at 42.

To show bad faith, West "must 'put forward specific, nonconclusory factual allegations that establish improper

motive.'" *Armstrong*, 188 Wn.2d at 345 (quoting *Cunningham v. City of Wenatchee*, 345 F.3d 802, 812 (9th Cir.2003)). Negligent failure to preserve potentially useful evidence is insufficient to establish "bad faith." *Youngblood*, 488 U.S. at 58 (holding due process was not violated by failure to preserve potentially useful evidence including a semen sample and the victim's clothing, because the defendant did not show bad faith). West failed to show any indication of bad faith, such as "official animus towards [him] or … a conscious effort to suppress … evidence." *California v. Trombetta*, 467 U.S. 479, 488, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984).

Indeed, the trial court specifically found that the police were merely "negligent" in failing to obtain the video and expressly stated that it could not make a finding of bad faith. 1RP at 111. And it is well-established that negligent failure to preserve potentially useful evidence is insufficient to establish "bad faith." *Youngblood*, 488 U.S. at 58.

As in *Armstrong*, the trial court correctly ruled that West failed to meet his burden to "put forth specific, nonconclusory factual allegations that establish improper motive." *Armstrong*, 188 Wn.2d at 345; *see also Wittenbarger*, 124 Wn.2d at 478. The trial court correctly applied long standing principles in reaching its conclusions. This Court should decline to revisit these well settled constitutional principles.

V. CONCLUSION

For the foregoing reasons, the State respectfully asks the Court to deny West's petition for review.

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RESPECTFULLY SUBMITTED this 17th day of October, 2023.

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PIERCE COUNTY PROSECUTING ATTORNEY

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