SUPREME COURT OF THE UNITED STATES

ILLINOIS *v.* GREGORY FISHER

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 03–374. Decided February 23, 2004

JUSTICE STEVENS, concurring in the judgment.

While I did not join the three Justices who dissented in *Arizona* v. *Youngblood*, 488 U. S. 51 (1988), I also declined to join the majority opinion because I was convinced then, and remain convinced today, 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 61 (STEVENS, J., concurring in judgment).* This, like *Young-*

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* *Youngblood*'s focus on the subjective motivation of the police represents a break with our usual understanding that the presence or absence of constitutional error in suppression of evidence cases depends on the character of the evidence, not the character of the person who withholds it. *United States* v. *Agurs,* 427 U. S. 97, 110 (1976). Since *Youngblood* was decided, a number of state courts have held as a matter of state constitutional law that the loss or destruction of evidence critical to the defense does violate due process, even in the absence of bad faith. As the Connecticut Supreme Court has explained, "[f]airness dictates that when a person's liberty is at stake, the sole fact of whether the police or another state official acted in good or bad faith in failing to preserve evidence cannot be determinative of whether the criminal defendant received due process of law." *State* v. *Morales,* 232 Conn. 707, 723, 657 A. 2d 585, 593 (1995). See also *State* v. *Ferguson,* 2 S. W. 3d 912, 916–917 (Tenn. 1999); *State* v. *Osakalumi,* 194 W. Va. 758, 765–767, 461 S. E.2d 504, 511–512 (1995); *State* v. *Delisle,* 162 Vt. 293, 309, 648 A. 2d 632, 642 (1994); *Ex parte Gingo,* 605 So. 2d 1237, 1241 (Ala. 1992); *Commonwealth* v. *Henderson,* 411 Mass. 309, 310–311, 582 N. E. 2d 496, 497 (1991); *State* v. *Matafeo,* 71 Haw. 183, 186–187, 787 P. 2d 671, 673 (1990); *Hammond* v. *State,* 569 A. 2d 81, 87 (Del. 1989); *Thorne* v. *Department of Public Safety,* 774 P. 2d 1326,

blood, is not such a case.

Neither is it a case that merited review in this Court, however. The judgment of the Illinois Appellate Court has limited precedential value, and may well be reinstated on remand because the result is supported by the state-law holding in *People* v. *Newberry,* 166 Ill. 2d 310, 652 N. E. 2d 288 (1995). See *ante,* at 3, n. 1. In my judgment the State's petition for a writ of certiorari should have been denied.

1330, n. 9 (Alaska 1989).