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FOR PUBLICATION

**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,**

Plaintiff,

v.

GEORGE AYUYU BARCINAS

Defendant.

) **CRIM. CASE NO. 15-0206**
)
) **ORDER DENYING DEFENDANT'S**
) **MOTION TO DISMISS FOR**
) **DESTRUCTION OF EVIDENCE AS**
) **DEFENDANT FAILED TO SHOW THAT**
) **THE EVIDENCE WAS DESTROYED IN**
) **BAD FAITH, THAT THE EVIDENCE**
) **POSSESSED AN APPARENT**
) **EXCULPATORY NATURE BEFORE IT**
) **WAS DESTROYED, AND THAT THE**
) **DEFENDANT WOULD BE UNABLE TO**
) **OBTAIN COMPARABLE EVIDENCE BY**
) **OTHER REASONABLY AVAILABLE**
) **MEANS**

I. INTRODUCTION

This matter came before the Court on June 20, 2016 at 9:00 a.m. on the Defendant's Motion to Dismiss for Destruction of Evidence. Defendant George Ayuyu Barcinas was present and represented by Assistant Public Defender Tillman Clark. The Commonwealth was represented by Assistant Attorney General Shannon Foley.

This case was initially scheduled for a bench trial in the Rota Courthouse on March 4, 2016. The day before the bench trial, counsel for both parties learned that a responding officer in this case deleted an audio recording of a statement made by the alleged victim. On March 4, 2016, before the scheduled bench trial could begin, the Defendant orally moved to dismiss the case due to destruction of evidence. The Defendant later filed his Motion to Dismiss for Destruction of Evidence on March 23, 2016. The Commonwealth filed its opposition on April 25, 2016. The Defendant did not file a reply.

1 The Defendant's Motion to Dismiss for Destruction of Evidence was initially scheduled for
2 a motion hearing on May 6, 2016. The motion hearing was continued due to discovery issues.
3 Testimony and arguments on the Defendant's motion were ultimately heard on June 20, 2016.

4 Based on a review of the filings, oral arguments, and applicable law, the Court **DENIES** the
5 Defendant's motion to dismiss.

6 II. BACKGROUND

7 On June 20, 2016, the Court heard testimony from Rota Department of Public Safety
8 ("DPS") Officer Joseph Quitugua Camacho, as well as from the alleged victim, Desiree
9 Pendergrass.¹ On June 5, 2015, Officer Camacho responded to an alleged incident of domestic
10 violence at the residence of the Defendant on the island of Rota. The Defendant works as a police
11 officer for DPS Rota. Officer Camacho testified that after he made contact with the Defendant, he
12 proceeded to another location to attempt to make contact with the alleged victim, Desiree
13 Pendergrass. At the time of the alleged incident, the Defendant and Desiree Pendergrass were
14 married.

15 Officer Camacho met with Desiree Pendergrass in the parking lot of the Rota Health Center.
16 When Officer Camacho found Desiree Pendergrass, she was with her mother and father. Officer
17 Camacho conducted an interview with Desiree Pendergrass inside his police vehicle. Desiree
18 Pendergrass's father, Bill Pendergrass, was also in the vehicle at the time of the interview.

19 Officer Camacho recorded his interview with Desiree Pendergrass with his mobile phone.
20 At the June 20, 2016 hearing, Officer Camacho testified that he had received training on handling
21 domestic violence cases, which instructed him to interview victims of domestic violence only once
22 to avoid re-traumatizing the victims. Thus, Officer Camacho asked Desiree Pendergrass if he could

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24 ¹ Ms. Pendergrass is also known as: "Desiree Barcinas," "Desiree Pendergrass," and "Daisy Pendergrass." These names all refer to the same person, the alleged victim in this case.

1 record the interview and she said yes. Officer Camacho recorded the interview so that he could
2 complete his report on the incident without having to re-interview Desiree Pendergrass. Without
3 any prompting from Desiree Pendergrass, Officer Camacho told Desiree Pendergrass that he would
4 delete the recording once he was finished with it.

5 After Officer Camacho finished interviewing Desiree Pendergrass, he proceeded to DPS
6 Rota Central and wrote his report. He put earphones on so that nobody could hear what he was
7 listening to, and he wrote his report immediately following the interview. Officer Camacho listened
8 to the recording twice—once while he was typing, and a second time to make sure that his report
9 was accurate. On June 20, 2016, Officer Camacho testified that he accurately typed all of the
10 information from Desiree Pendergrass’s interview into his written report and did not omit any
11 information.

12 Officer Camacho testified that his written report did not include Desiree Pendergrass’s tone
13 of voice, demeanor, whether she was crying, nor the questions he asked her. Officer Camacho
14 testified that Desiree Pendergrass appeared shaken during the interview. Desiree Pendergrass also
15 testified that she was shaken during the interview. Desiree Pendergrass’s demeanor was not noted
16 in Officer Camacho’s written report.

17 After Officer Camacho finished writing his report, he deleted the audio recording of his
18 interview with Desiree Pendergrass. He was not asked by anyone in DPS Rota, nor by Desiree
19 Pendergrass, to delete the recording. Rather, Officer Camacho testified that he deleted the recording
20 to fulfill his promise to Desiree Pendergrass—that he would delete the recording once he was
21 finished with his report.

22 On June 20, 2016, Officer Camacho testified that he had been trained to take notes using a
23 note pad and pen during the police academy. Officer Camacho also testified that he did not know if
24 there was any standard procedure for recording interviews with mobile phones. Officer Camacho

1 testified that it was his own decision to delete the audio recording and that there is no procedure in
2 place regarding deleting audio recordings. At the time that he deleted the audio recording, Officer
3 Camacho did not realize that the contents of a recording of an alleged victim's statement made
4 shortly after an incident could be useful to a defense attorney.

5 According to Officer Camacho, the contents of the interview are accurately reflected in his
6 written report. Desiree Pendergrass also testified that she had the opportunity to review Officer
7 Camacho's written report, and that it was word-for-word what she told Officer Camacho on the
8 night of the incident.

9 III. DISCUSSION

10 The Defendant argues that Officer Camacho's destruction of the audio recording of the
11 interview with the alleged victim is a violation of his due process rights under the Due Process
12 Clause of the Fourteenth Amendment of the United States Constitution. Under *Brady v. Maryland*,
13 "the suppression by the prosecution of evidence favorable to the accused upon request violates due
14 process where the evidence is material either to guilt or to punishment, irrespective of the good
15 faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). "The Supreme Court's jurisprudence
16 divides cases involving nondisclosure of evidence into two distinct universes. *Brady* and its
17 progeny address exculpatory evidence still in the government's possession.
18 *Youngblood* and *Trombetta* govern cases in which the government no longer possesses the disputed
19 evidence." *United States v. Femia*, 9 F.3d 990, 993 (1st Cir. 1993).

20 In cases involving missing evidence or the destruction of evidence, Federal courts apply the
21 standard outlined by the United States Supreme Court in *Youngblood* and *Trombetta*. *Arizona v.*
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1 *Youngblood*, 488 U.S. 51, 58 (1988); *California v. Trombetta*, 467 U.S. 479, 479 (1984).² In
2 *Youngblood*, a sexual assault victim was swabbed for semen, and his clothes were collected but not
3 refrigerated. 488 U.S. at 53-54. Although the swab was examined to determine that sexual contact
4 had occurred, the victim’s clothing was not tested. *Id.* Semen was later found on the victim’s
5 clothing, but since the clothing had not been properly stored, tests on the semen were inconclusive
6 as to the assailant’s identity. *Id.* The defendant in *Youngblood* argued that, since he could have been
7 exonerated by properly preserved and tested semen samples, his due process rights were violated.
8 *Id.* at 51-55.

9 The United States Supreme Court in *Youngblood* discussed *Brady*, but found that the
10 standard under the Due Process Clause is different when the government fails to preserve evidence.
11 *Youngblood*, 488 U.S. at 57-58. Under *Youngblood*, “the Due Process Clause requires a different
12 result [from *Brady*] when we deal with the failure of the State to preserve evidentiary material of
13 which no more can be said than it could have been subjected to tests, the results of which might
14 have exonerated the defendant.” *Id.* Thus, “unless a criminal defendant can show bad faith on the
15 part of the police, failure to preserve potentially useful evidence does not constitute a denial of due
16 process of law.” *Id.* at 58.

17 In its analysis in *Youngblood*, the United States Supreme Court drew upon its earlier
18 analysis in *Trombetta*. 488 U.S. at 58. In *Trombetta*, police failed to preserve a defendant’s breath
19 sample. 467 U.S. at 482-483. “Although preservation of breath samples is technically feasible,
20 California law enforcement officers do not ordinarily preserve breath samples, and made no effort
21 to do so in these cases.” *Id.* In *Trombetta*, the police “did not destroy respondents’ breath samples in
22 a calculated effort” to evade *Brady*. *Id.* at 488. Rather, the officers were “acting in good faith and in
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24 ² The Defendant argued that the Court should follow a range of state court tests related to missing evidence in lieu of the Federal standard.

1 accord with their normal practice.” *Id.* (quoting *Killian v. United States*, 368 U.S. 231, 242 (1961))
2 (internal quotation marks omitted). The *Trombetta* court noted that the “record contain[ed] no
3 allegation of official animus towards respondents or of a conscious effort to suppress exculpatory
4 evidence.” *Id.*

5 *Trombetta* also noted that “[w]hatever duty the Constitution imposes on the States to
6 preserve evidence, that duty must be limited to evidence that might be expected to play a significant
7 role in the suspect’s defense.” 467 U.S. at 488. The evidence must be constitutionally material,
8 meaning that “evidence must both possess an exculpatory value that was apparent before the
9 evidence was destroyed, and be of such a nature that the defendant would be unable to obtain
10 comparable evidence by other reasonably available means.” *Id.* at 489.

11 Together, *Trombetta* and *Youngblood* form the Federal standard related to the failure to
12 preserve potentially useful evidence. The defendant must show “(1) that the government acted in
13 bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was
14 apparent before its destruction; and (3) that the nature of the evidence was such that the defendant
15 would be unable to obtain comparable evidence by other reasonably available means.” *United*
16 *States v. Jobson*, 102 F.3d 214, 218 (6th Cir. 1996) (citing *Youngblood*, 488 U.S. 57-58; *Trombetta*,
17 467 U.S. 488-89).

18 “Where potentially useful evidence is not preserved, bad faith alone will not violate a
19 criminal defendant’s due process right to access exculpatory evidence.” *United States v. Wright*,
20 260 F.3d 568, 571 (6th Cir. 2001) (citing *United States v. Jobson*, 102 F.3d 214, 218 (6th Cir.
21 1996)). Rather, a defendant must also show “that the exculpatory value of the evidence was
22 apparent before its destruction...[and] he or she must also demonstrate an inability to obtain
23 comparable evidence by other reasonably available means.” *Id.*

1 **A. Officer Camacho Acted with Gross Negligence, Not Bad Faith, in Destroying the**
2 **Evidence**

3 First, the Court will turn to whether Officer Camacho acted in bad faith in deleting the audio
4 recording of his interview with Desiree Pendergrass. “Unless a criminal defendant can show bad
5 faith on the part of the police, failure to preserve potentially useful evidence does not constitute a
6 denial of due process of law.” *Youngblood*, 488 U.S. at 58. *Youngblood* requires that a defendant
7 “show bad faith on the part of the police.” 488 U.S. at 58. This requirement:

8 [B]oth limits the extent of the police’s obligation to preserve evidence to reasonable bounds
9 and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*,
 those cases in which the police themselves by their conduct indicate that the evidence could
 form a basis for exonerating the defendant.

10 *Id.*

11 The bad faith requirement is interrelated with the requirement that the evidence possess an
12 exculpatory value apparent at the time of destruction. *United States v. Jobson*, 102 F.3d 214, 218
13 (citing *Youngblood*, 488 U.S. at 56-57). “The presence or absence of bad faith by the police for
14 purposes of the Due Process Clause must necessarily turn on the police’s knowledge of the
15 exculpatory value of the evidence at the time it was lost or destroyed.” *Youngblood*, 488 U.S. at 56
16 n*. In essence, “without knowledge of the potential usefulness of the evidence, the evidence could
17 not have been destroyed in bad faith.” *United States v. Zaragoza-Moreira*, 780 F.3d 971, 977 (9th
18 Cir. 2015). In determining bad faith, the record must show “an allegation of official animus towards
19 [the Defendant] or of a conscious effort to suppress exculpatory evidence.” *Trombetta*, 467 U.S. at
20 488.

21 The Defendant argues that Officer Camacho deleted the recording in bad faith because he
22 deleted an audio recording of the alleged victim “pursuant to personal considerations designed to
23 protect the alleged victim and not under his duty to preserve relevant and material evidence related
24 to a criminal investigation.” Def.’s Mot. at 16.

1 The Commonwealth directed the Court's attention to *Killian v. United States*. In *Killian*, an
2 F.B.I. agent destroyed notes related to oral reports. 368 U.S. 231, 242 (1961). The *Killian* court
3 found that:

4 If the agents' notes...were made only for the purpose of transferring the data thereon...and
5 if, having served that purpose, they were destroyed by the agents in good faith and in accord
6 with their normal practice, it would be clear that their destruction did not constitute an
impermissible destruction of evidence nor deprive the petitioner of any right.

7 *Id.*

8 The Court notes that the situation in *Killian* is different from the present case. In *Killian*, the
9 United States Supreme Court looked to whether the notes were destroyed "in good faith and in
10 accord with their normal practice." 368 U.S. at 242. Officer Camacho testified that there are no
11 protocols or procedures in place related to recording statements on a mobile phone, nor are there
12 any procedures in place for the destruction of those audio recordings. Although Officer Camacho
13 documented the contents of the audio recording, his actions were entirely outside any kind of
14 protocol or procedures governing the preservation or destruction of notes or audio recordings at the
15 Department of Public Safety.

16 If the government agent is "negligent, even grossly negligent, in failing to preserve potential
17 exculpatory evidence, the bad faith requirement is not satisfied." *United States v. Wright*, 260 F.3d
18 568, 571 (6th Cir. 2001) (citing *United States v. Jobson*, 102 F.3d 214, 218 (6th Cir. 1996)). In
19 *Jobson*, a dispatch tape was "erased not as a result of malice, but routine police department policy."
20 102 F.3d at 218. Although the police in *Jobson* were "negligent, perhaps even grossly negligent, in
21 failing to preserve the tape, there is no evidence that [the police] acted in bad faith." *Id.*

22 Similarly, in *United States v. Branch*, an officer failed to preserve a video "because it lacked
23 an audio track and was therefore 'flawed,' and that he 'recirculated it intentionally.'" 537 F.3d 582,
24 590 (6th Cir. 2008). In hindsight, the officer in *Branch* stated that it was "probably a bad decision

1 on my part,” but that he thought the tape had “no evidentiary value.” *Id.* The Sixth Circuit upheld
2 the lower court’s finding that, although the officer’s actions “may have been negligent, or even
3 grossly negligent...it was not in bad faith.” *Id.*

4 In *United States v. Femia*, recordings were mistakenly destroyed due to a D.E.A. officer’s
5 failure to notice a note cross-referencing separate files, which indicated that the recordings in one
6 file were to be preserved for another case. 9 F.3d at 991-992. In *Femia*, the failure to preserve the
7 tapes was the result of gross negligence, rather than bad faith. *Id.* at 995.

8 Based on Officer Camacho’s testimony, his motivation in recording and subsequently
9 deleting the audio recording was to avoid having to interview Desiree Pendergrass more than once.
10 He promised Desiree Pendergrass that he would delete the audio recording, without any prompting
11 from her. Officer Camacho’s misplaced loyalties led him to deviate from his duty to collect and
12 preserve evidence. Rather than focusing on the case, Officer Camacho made promises to the alleged
13 victim and improperly deleted the audio recording, deviating from his duty to collect and preserve
14 evidence. Officer Camacho intentionally deleted the audio recording to keep a promise made to the
15 alleged victim.

16 Despite this, the Court cannot find bad faith on behalf of Officer Camacho when he deleted
17 the audio recording. Based on the testimony presented to the Court at the evidentiary hearing,
18 Officer Camacho did not realize that the recording could be useful to the Defendant, although he
19 did realize this in hindsight. “Without knowledge of the potential usefulness of the evidence, the
20 evidence could not have been destroyed in bad faith.” *United States v. Zaragoza-Moreira*, 780 F.3d
21 971, 977 (9th Cir. 2015).

22 Although the Court cannot find bad faith in this particular instance, the Court cautions law
23 enforcement officers against letting personal considerations interfere with police investigations. The
24 record does not show “allegations of official animus towards [the Defendant] or of a conscious

1 effort to suppress exculpatory evidence.” *Trombetta*, 467 U.S. at 488. Officer Camacho’s actions
2 skirt the line of bad faith; however, Officer Camacho’s actions are more correctly viewed as gross
3 negligence rather than outright bad faith.

4 **B. The Evidence Did Not Possess an Apparent Exculpatory Value Before the Evidence**
5 **was Destroyed**

6 Next, the evidence must “possess an exculpatory value that was apparent before the
7 evidence was destroyed.” *Trombetta*, 467 U.S. at 489. “Where potentially useful evidence is not
8 preserved, bad faith alone will not violate a criminal defendant’s due process right to access
9 exculpatory evidence.” *United States v. Wright*, 260 F.3d 568, 571 (6th Cir. 2001) (citing *United*
10 *States v. Jobson*, 102 F.3d 214, 218 (6th Cir. 1996)). Rather, a defendant must also show “that the
11 exculpatory value of the evidence was apparent before its destruction.” *Id.*

12 Based on the testimony of Officer Camacho and Desiree Pendergrass, the audio recording
13 did not seem to possess any exculpatory value. Officer Camacho admitted that, in hindsight, he
14 realizes that the Defendant might find the audio recording useful. However, there was nothing on
15 the court record to indicate that anything exculpatory was said during the interview. Desiree
16 Pendergrass testified that Officer Camacho’s written report was a word for word account of her
17 statement. Officer Camacho likewise testified that the written report was a transcription of Desiree
18 Pendergrass’s interview. No testimony or evidence was presented to the Court indicating that either
19 witness was lying or concealing a portion of Desiree Pendergrass’s statement. Thus, there is nothing
20 on the court record indicating that the audio recording had an exculpatory nature apparent at the
21 time it was destroyed.

22 **C. The Defendant is Able to Obtain Comparable Evidence by Other Reasonably**
23 **Available Means**

24 Finally, the evidence “must be of such a nature that the defendant would be unable to obtain
comparable evidence by other reasonably available means.” *Trombetta*, 467 U.S. at 489. Based on

1 the testimony of Officer Camacho and Desiree Pendergrass, Officer Camacho's written report
2 contained an accurate transcription of Desiree's statements. Missing from the written report is
3 information as to Desiree Pendergrass's demeanor, tone, or emotional state. Despite this, both
4 Officer Camacho and Desiree Pendergrass herself were able to testify as to her emotional state
5 during the interview. This information is available to the Defendant through direct and cross
6 examination of these witnesses, as well as by interviewing them as part of his defense counsel's
7 trial preparation.

8 Officer Camacho's written report also omits his own questions to Desiree Pendergrass,
9 instead transcribing her answers. This information, again, can be obtained through Officer Camacho
10 and Desiree Pendergrass. Further, a third party was in the vehicle at the time—Bill Pendergrass,
11 Desiree Pendergrass's father. Bill Pendergrass is also subject to pre-trial interviews by the defense
12 counsel or his investigator, as well as direct and cross examination at trial.

13 Based on the testimony at the evidentiary hearing, it is clear that any missing information
14 from the audio recording can be provided through one of the three individuals present in the vehicle
15 at the time of the interview. Desiree Pendergrass testified that the report was an accurate
16 transcription of her interview with Officer Camacho. Both Desiree Pendergrass and Officer
17 Camacho testified that there was no exculpatory information omitted from the written report, and
18 their testimony at the motion hearing appeared credible to the Court. It is worth emphasizing that
19 the alleged victim reviewed the report and stated that it accurately reflects what she told Officer
20 Camacho during the interview.

21 Accordingly, since Officer Camacho did not delete the audio recording in bad faith but
22 rather as a result of gross negligence; the audio recording was not apparently exculpatory at the
23 time it was deleted; and, since the Defendant has other reasonably available means to obtain the
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information, the Court finds that there has been no due process violation because of a police officer's failure to preserve the audio recording of his interview with the alleged victim.

V. CONCLUSION

Accordingly, the Defendant's motion to dismiss is **DENIED**.

IT IS SO ORDERED this 9th day of August, 2016.



JOSEPH N. CAMACHO
Associate Judge