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# The Government's Use of Lost Evidence

Imagine an individual is accused of a horrific crime. The prosecution claims that it has a voluminous amount of evidence against the defendant. It parades experts before the jury to testify how this evidence links the defendant to the crime — and yet all of this evidence has been lost. Some of this lost evidence could possibly exonerate the accused. The defendant is not, however, given the opportunity to examine or test the volumes of evidence presented at trial that supposedly establish guilt beyond a reasonable doubt. Instead, the defendant is left to challenge this evidence through cross-examination and based on pictures of the real evidence. Surely this sort of scenario cannot satisfy the promise of due process of law contained in the U.S. Constitution. Yet astonishingly, according to some courts, it does.

An astounding example of the amount of loss and negligence some courts are willing to accept can be seen in *Georgia v. Davis*,[1] where the state of Georgia prosecuted Scott Davis for murder 10 years after the death of the victim. While the evidence law enforcement officers collected as part of the investigation was available to the state to build its case, by the time Davis was indicted over 70 pieces of evidence had been lost, including fingerprints and traceable pieces of evidence that could have exonerated him.[2] The state, however, was allowed to refer to much of this lost evidence at trial and connect some of it to Davis.[3] Although Davis challenged his conviction on appeal and in a state habeas proceeding, based in part on the loss and use of this evidence as violations of his right to due process, the courts in Georgia have so far found no constitutional violations.[4]

While the case involving Scott Davis provides an extreme example of the loss and destruction of evidence, he is not the only person who has been forced to stand trial without the benefit of examining the evidence the prosecution has allegedly accumulated. Is there ever a point that the negligence of the prosecuting entity in losing scores of evidence amounts to a *per se* constitutional violation? This article will examine the troubling problem with lost evidence, including the issues that contribute to the loss of evidence, the law as it relates to lost evidence, and what a practitioner can do to combat problems of lost evidence.

## Factors Contributing to the Loss of Evidence

The collection and preservation of evidence are undoubtedly the most important parts of any criminal investigation, as it is critical to piece together a theory regarding what happened and to demonstrate this theory to the jury.[5] Recognizing the importance of preserving evidence, most states have comprehensive training and standard operating procedures (SOPs) regarding the collection, storage, and preservation of evidence.[6] Additionally, law enforcement departments have rooms dedicated sole-

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ly to the storage of evidence in order to ensure that evidence is preserved and protected. In most of these rooms it is common for there to be a comprehensive storage system and procedures regarding the handling, disposition, and transfer of evidence.[7]

While standard operating procedures, training, and evidence room safeguards are common, they are only effective if the individuals who are entrusted with the evidence follow them. In many cases in which there is lost evidence, it can be directly linked to a violation of some procedure.[8] However, sometimes evidence is destroyed in accordance with standard operating procedures.[9] Whether the evidence is destroyed in accordance with, or in violation of, accepted standards and procedures, it seems apparent that when someone destroys critical evidence, there is a problem with the rules themselves.

In the *Davis* case, it was revealed at the habeas hearing that there were over 300 violations of SOPs. Further, an expert who had conducted numerous audits of evidence rooms around the country testified that the evidence room maintained by the Atlanta Police Department was a "mess[]" and that (1) there was insufficient documentation to maintain chain of custody, (2) the evidence was *maintained* in a manner that did not comport with commonly accepted professional law enforcement standards, (3) the *disposal* of evidence did not comport with commonly accepted professional law enforcement standards, (4) the *supervision* of the handling and disposition of the evidence did not comport with professional law enforcement standards, and (5) there was a *pattern* of practice by numerous law enforcement agencies and the District Attorney's Office of failing to properly respond to these deficiencies.[10]

All of the training, standard operating procedures, and evidence room procedures are useless in ensuring the preservation of evidence if law enforcement officers can ignore them without any repercussions. Further, the procedures themselves are useless if they do not lead to the preservation of critical evidence.

## Bad Faith Requirement in Lost Evidence Cases

The Supreme Court has long recognized the importance of preserving materially exculpatory evidence. Specifically, in *California v. Trombetta*,[11] the U.S. Supreme Court held that law enforcement owed criminal defendants a duty, under the Due Process Clause of the Fourteenth Amendment, to preserve material evidence. In so holding the Court reasoned that "criminal prosecutions must comport with prevailing notions of fundamental fairness."[12] A prosecution is fundamentally fair when a defendant is "afforded a meaningful opportunity to present a complete defense."[13] By this standard, the Court held that "whatever duty the Constitution poses on the state to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense."[14] Material evidence must "possess an exculpatory value that was apparent" before it was destroyed and the defendant must show that he was deprived of the ability to find comparable evidence elsewhere.[15] It is difficult to imagine how a defendant could find evidence comparable to things such as a murder weapon, fingerprints, or biological evidence.

In *Arizona v. Youngblood*,[16] the Supreme Court clarified that when the missing evidence is materially exculpatory, "the Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the state irrelevant. …" If, however, the evidence is only potentially exculpatory, then the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."[17] In *Youngblood*, the evidence at issue included swabs taken from the victim and the victim's clothing in a child sexual abuse case. These swabs had deteriorated over time. The Court found that "[t]he failure of the police to refrigerate the clothing and to perform tests on the semen samples [could] at worst be described as negligent."[18] Based on these facts, the Court found that there was no evidence of bad faith related to the missing evidence and, therefore, there was no due process violation.[19]

In *Illinois v. Fisher*,[20] the Supreme Court reiterated its holding in *Youngblood* and explained that "constitutionally material evidence 'must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.'" In finding that there was no bad faith in the destruction of evidence that at best was potentially exculpatory, the Court explained that "it is undisputed that police acted in 'good faith and in accord with their normal practice.'"[21]

Not surprisingly, when evidence is lost it is usually deemed potentially exculpatory because, as in *Youngblood*, it is hard to prove that the evidence could help exonerate the accused without possessing the evidence in order to test it. At least one court, however, has looked at how critical the evidence is in determining its materiality. Specifically, in *United States v. Belcher,* the Western District of Virginia applied the *Trombetta* materially exculpatory standard to destroyed marijuana plants because they were critical to the government's case and used in its case in chief.[22] But as the District of Kansas has recognized, the majority of courts have rejected this approach and would find such evidence only potentially exculpatory and thus subject to the *Youngblood* bad faith analysis.[23]

At best, as in *Youngblood*, in most instances one can usually only argue that the evidence has the potential to exonerate the accused if tested. Therefore, the analysis often focuses on the good or bad faith of the officer or agency. In evaluating whether an officer or agency acted in bad faith, courts have looked at factors such as requests for evidence, the importance of the evidence, whether the destruction of the evidence occurred in accordance with the SOPs of the agency, and whether those procedures were reasonable.[24] Likewise, if evidence is destroyed in contravention of an agency's policies, this can be evidence of bad faith.[25] Further, concealing the evidence that was destroyed is also evidence of bad faith.[26]

In *United States v. Beckstead*, the Tenth Circuit outlined five factors relevant to determining bad faith, including (1) notice that the defendant believed that the evidence was exculpatory; (2) whether the assertion that the evidence was potentially exculpatory was supported by objective independent evidence; (3) the timing of the destruction of the evidence; (4) the importance of the evidence to the government's case; and (5) whether an innocent explanation existed for failing to preserve the evidence.[27] While not all courts discuss these five factors, it appears that courts often look at similar issues in determining bad faith.

For example, in *United States v. Bohl,* the Tenth Circuit found bad faith in the destruction of radio towers because the defendant made repeated requests for the towers and the government had knowledge of independent evidence that its tests on the towers (which were crucial to the case) may have been flawed.[28] Also, in *United States v. Cooper,* the Ninth Circuit found bad faith where the govern-

ment, without any excuse, destroyed the lab, including equipment that had been requested, which was necessary to establish the defendant's defense — a defense of which the government was aware.[29]

Similarly, in *United States v. Elliott*, the Eastern District of Virginia found bad faith on the government's part in destroying glassware in a methamphetamine case. In finding that the evidence had apparent potential exculpatory value, the court explained that the evidence could have easily provided evidence to exculpate or incriminate the defendant (such as fingerprints and residue that could have proven to be a legal substance). The court continued, stating that "[o]n this record then, it is beyond serious question that a reasonable law enforcement agent would recognize, before the glassware was destroyed, that it was of potentially exculpatory value. And, without question, the exculpatory value of the destroyed evidence was significant."[30] The court also found that there was no other comparable evidence, finding the testimony of a co-defendant "an inadequate substitute for a chemical analysis."[31]

In response to the government's argument that it acted in good faith, the Eastern District of Virginia rejected the argument that the government followed established policies:

> Where, as here, there is no evidence of an established practice which was relied upon to effectuate the destruction, where the applicable documents teach that destruction should not have occurred, and where the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the *Trombetta/ Youngblood* test.[32]

In *Mussman v. Georgia*,[33] the Georgia Supreme Court reversed the grant of relief to a defendant who was charged with vehicular homicide. In that case, the defendant claimed that he was the passenger in the car. The car, however, had been destroyed in accordance with policy.[34] The Georgia Supreme Court focused on the fact that the car was just a container for the biological evidence and that it would be impractical for the police to be required to maintain things as large as a car in all cases.[35] The Georgia court rejected the implication of bad faith in simply following a policy, explaining that a finding of bad faith has to look at the actions of the individuals involved.[36]

In *Story v. Martel*, the Northern District of California refused to imply a finding of bad faith despite the fact that physical evidence was destroyed in contravention of agency policies.[37] While the Northern District "agree[d] that whether destruction of evidence occurred in accordance with established policy may be relevant in determining whether evidence was destroyed in bad faith[,]" it refused to find that this automatically amounted to bad faith because "it is difficult to imagine a negligent loss of evidence that occurs in compliance with department policy, and in *Youngblood* the Supreme Court found that the negligent loss of potentially exculpatory evidence by the police did not violate due process."[38] Instead, the court posited that "bad faith in the context of lost or destroyed evidence requires some intent to withhold evidence that may have value to the defense and does not turn on police compliance with evidence destruction policies."[39]

While "bad faith" is the requirement as set forth by the Supreme Court, as the Court of Criminal Appeals in Alabama recognized in *Scott v. Alabama*, "some commentators and a growing minority of appellate courts have proposed that trial judges dealing with lost or destroyed evidence focus not only on the culpability of the police but also on 'the materiality of the [lost] evidence … the type of evidence and the impact it could have had at trial.'"[40] As the Delaware Supreme Court explained, the materiality of the lost evidence is important because "fundamental fairness, as an element of due process, requires the state's failure to preserve evidence that could be favorable to the defendant '[t]o be evaluated in the context of the entire record.'"[41] Therefore, these courts take part in a three-part test, examining "(1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence, considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence used at trial to sustain conviction."[42] It is important to note, however, that these courts base this three-part test on state constitutional requirements, not on Supreme Court precedent.[43]

Notably, when courts examine the good and bad faith of the officer or agency, they are usually only dealing with one, or at most a few, types of destroyed evidence and the value of this evidence is examined in light of the other evidence.[44] This is most likely because it is rare that more than one piece or type of evidence will go missing in any given case if the officers and agencies are acting in good faith and in compliance with any written process. While this may seem like the logical conclusion, a few courts dealing with a more widespread loss, including the courts in the *Davis* case, have refused to impute bad faith based on the volume of the loss or for that matter even when 300 standard operating procedures were violated.[45]

For example, in *Martel*, the Northern District of California refused to find bad faith despite the loss of *all* of the physical evidence in violation of department policies.[46] While the court found that the loss of all of the physical evidence was "both perplexing and disturbing," it refused to impute a finding of bad faith and instead affirmed the trial court's finding "that the evidence was likely lost due to police negligence, possibly at the time that the department moved from one location to another."[47] Policy violations should not be classified as negligence. In doing so, police are given carte blanche to violate procedures at the expense of due process.

Assuming that the Supreme Court will uphold determinations such as in *Martel* and *Davis* despite the loss of huge amounts of evidence, one question still remains: What use can be made of the lost evidence? In *Davis*, the prosecution was allowed to present expert and lay testimony linking Davis to the lost evidence.[48] Conversely, in *Illinois v. Kladis*, the Supreme Court of Illinois upheld a discovery sanction prohibiting the prosecution from using a destroyed tape in a DUI prosecution. In upholding this sanction, the court noted that there was other evidence available to the prosecution and that the sanction was reasonably and narrowly tailored.[49]

While it certainly is an appropriate, and desired, discovery sanction to have the lost evidence excluded in its entirety, exclusion is not automatic given the Supreme Court's decision in *Fisher,* finding no bad faith and not finding any other due process violation despite the fact that the evidence was clearly used at trial.[50] It is, however, worth filing motions in limine or requests to exclude lost evidence at trial.

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## Preserving a Client's Due Process Rights in the Face of Lost Evidence

Like most complicated issues, a practitioner involved in a case in which evidence has been lost or destroyed must be prepared to attack the prosecution's case on several fronts. The first prong of attack, if possible, should be to try to explain why the evidence is materially exculpatory. If one can convince a court to classify the evidence as materially exculpatory, then a due process violation has been established and the court need not even inquire into the good or bad faith on the part of the officer or agency in destroying the evidence.[51]

What is potentially exculpatory versus materially exculpatory evidence is a more slippery slope than it should be. If lost evidence is going to be used at trial, tested only by the government experts and presented as connected to the accused, the only logical conclusion is that such evidence can be nothing but material regardless of how it was lost.[52] The key is to show the exculpatory nature of the lost evidence.

If the court finds, however, that the evidence only has a potentially exculpatory value, then a practitioner must be prepared to demonstrate bad faith on the part of the government.[53] Establishing bad faith is always an uphill battle. It is important to remember that a finding of "[b]ad faith is reserved for 'those cases in which the police themselves *by their conduct* indicate that the evidence could form a basis for exonerating the defendant.'"[54] That is, the inquiry focuses on the subjective intent of the party losing the evidence.[55] Relevant factors in determining bad faith include whether the police were on notice that the defendant thought the evidence was exculpatory, whether this belief was supported by objective evidence, the timing and reason for the loss or destruction, and the importance of the evidence in the case.[56] Therefore, the defense should ask for the evidence early, clearly, and often. As in most parts of practicing law, there is no substitute for lawyers doing their homework. If defense counsel can show that the defense's requests have been ignored, a finding of bad faith may not be far behind. It is important to remember that the concern with lost evidence is a possible due process violation. Thus, if defense counsel establishes bad faith in destroying potentially exculpatory evidence, then the inquiry is over.[57]

To establish bad faith, one cannot rely solely on the amount of lost evidence[58] or the fact that the evidence was destroyed as a result of negligence[59] or in violation of standard operating procedures.[60] While each of these alone may not be enough, each is relevant and taken together just may be enough. It is important to demonstrate to the court that if SOPs are not followed, the necessity of not allowing that lost evidence into the trial is enhanced.[61] Without this safeguard, law enforcement officers can cherry pick what evidence to lose without consequence as long as they are not obvious about it.[62]

In establishing a violation of standard operating procedures, it is important to look to every possible agency that might have made a mistake. The defense attorney should subpoena or file Freedom of Information Act requests for the procedures from each of those agencies. In addition, the defense should subpoena the appropriate persons to discuss these procedures and the violations that occurred in the defendant's case. It is important for the defense to hire appropriate experts to examine and discuss the violations that occurred. In essence, a practitioner must conduct a thorough investigation to uncover all of the mistakes law enforcement officials made that led to the loss of evidence.

Although bad faith is the law of the land, if the defense does not have evidence of bad faith, the defense can argue that in the circumstances involved in the defendant's case, requiring a showing of bad faith will dilute the client's due process rights.[63] Being convicted in a case clouded by lost evidence violates the fundamental notion that all individuals are innocent until proven guilty beyond a reasonable doubt.

Even if the lost evidence does not amount to a due process violation that requires the charges to be dismissed, defense counsel must remember to argue for the exclusion of the evidence. Exclusion of the evidence may be appropriate as a sanction.[64] Alternatively, if a government expert testifies regarding the lost evidence, the defense may attempt to get the evidence excluded under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[65] arguing that the expert testimony cannot be deemed reliable without the actual evidence available to be examined.[66] If they examined the evidence before it was lost by the state, the defense attorney should argue for exclusion.[67] This argument may also encompass a confrontation issue.

It is important to attack the loss of evidence on state and federal grounds if the proceedings are taking place in one of the minority jurisdictions where a court has found that its state constitution requires it to look at the importance the lost of evidence could have had at trial and have found that negligence in losing important evidence may be a state constitutional violation.[68] In these circumstances, a practitioner's argument should focus on state constitutional law and violations, as the Supreme Court precedent has clearly stated that bad faith is required under the federal constitution to result in a federal due process violation.[69] The decisions in these jurisdictions are also valuable as sources for language regarding the fundamental unfairness of using this evidence at trial or proceeding to trial in the first place.

The odds may not be in the favor of a practitioner who raises a due process violation based on loss of evidence. Nevertheless, it is important to keep pushing the envelope to make courts realize that if they do not penalize the government for losing evidence, important evidence will continue to be lost and a loss of faith in the accuracy of the judicial system will result. Scott Davis remains hopeful that a federal court will look at his case and finally say enough is enough and find that a conviction where the state lost over 70 pieces of evidence and violated over 300 of its own procedures does not satisfy the Constitution's promise of due process. This case gives the government and law enforcement the opportunity to cherry pick what evidence to keep and what to lose without anyone holding them to the rigors of standard operating procedures. Why have procedures if they do not have to be followed? This is not what the framers of the Constitution envisioned would satisfy due process.

## Notes

1. *Georgia v. Davis*, Indictment No. 05SC37460, Fulton County.

2. *Davis v. State*, 285 Ga. 343, 349 (2009) (acknowledging the loss of evidence, but deeming issue waived because not raised at trial); *Davis v. Howerton, Superior Court of Gwinnett County*, No. 10A074612.

3. *Id.*

4. *Id.*

5. *See, e.g.*, Charles Montaldo, The Trial Stage of a Criminal Case: Stages of the Criminal Justice System ("Witnesses are used to lay a foundation for the admitting of evidence.") *available at* http://crime.about.com/od/Crime_101/a/The-Trial-Stage-Of-A-Criminal-Case.htm (last visited Feb. 17, 2013); Renee Booker, How to Collect Evidence at a Crime Scene ("Using the proper techniques to collect the evidence

left at a crime scene is critically important. Without use of proper techniques, evidence can be lost, overlooked or contaminated.") *available at* http://www.ehow.com/how_4907745_collect-evidence-crime-scene.html (last visited Feb. 17, 2013).

6. *See* Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. UNIV. L. REV. 284-85 (2008) ("17 states with innocence protection acts, along with the District of Columbia and the federal government, impose a 'blanket' duty to preserve [biological] evidence") *available at* http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=1118&context=lawreview (last visited Feb. 17, 2013). *See also e.g.,* National Institute of Justice and National Forensic Technology Center Crime Scene Procedures III (both discussing the collection and preservation of evidence) *available at* http://projects.nfstc.org/property_crimes/module03/pro_m03.htm (last visited Feb. 17, 2013); Georgia Bureau of Investigation Division of Forensic Sciences Operations Manuals (1999) ("[a]ll worked evidence with the exception of biological evidence submitted by GBI will be subject to be returned to the submitting agency 30 days after completion of analysis"); Georgia Bureau of Investigation Division of Forensic Sciences Operations Manual, 9-2, 9-4 (an Evidence Return/Transfer Receipt must be generated when evidence is returned/transferred to an agency); Atlanta Fire Department Standard Operating Procedures, at 8 ("[a]ll evidence must be properly packaged and labeled and placed in the section's vault. Property may also be turned in at the police property," and "[a] chain of evidence must be maintained."); Atlanta Police Department Standard Operating Procedure from 1989 to present, 3.1 and 8.2.3(1)(b) (the department should "securely store all evidence … coming into its custody; maintain the chain of evidence; … and promptly dispose of items in accordance with the law[]" and items may be released if "[t]he reporting officer, or the officer's immediate supervisor, signs the property card authorizing the release" or "[a] court of competent jurisdiction authorizes the release by court order.").

7. *See, e.g.,* Interpol Standard 4.12 ("Having and maintaining systems of revenue collection, money and property handling and for the control and preservation of evidence that ensure that those collecting or handling public money, dealing with evidence or handling property are accountable and that the systems are such as to deter corruption."); http://publicsafety.spacesaver.com/Public-Safety-Storage-Solutions/Public-Safety-Storage-Case-Studies/Evidence-Storage-McKinney-Police-Department.htm (discussing the new state of the art storage system in McKinney, Texas, and that "For the McKinney Police Department, there can be no room for error in the evidence handling process and zero doubt about the integrity of confiscated evidence.") (last visited Feb. 17, 2013).

8. *See, e.g.*, *United States v. Elliott*, 83 F. Supp. 2d 637, 647 (E.D. Va. 1999); *Story v. Martel*, No. 10-CV-00566-LHK, 2011 WL 90112 (N.D. Cal. Jan. 10, 2011).

9. *State v. Mussman,* 289 Ga. 586, 591 (2011); *United States v. Moore*, 452 F.3d 382, 389 (5th Cir. 2006); *United States v. Roberson*, 195 Fed. Appx. 902, 904 (11th Cir. 2006); *United States v. Boyd*, 961 F.2d 434, 437 (3d Cir. 1992).

10. *Davis v. Howerton*, *Superior Court of Gwinnett County*, No. 10A074612.

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

12. *Id.* at 485.

13. *Id*.

14. *Id.*

15. *Id.*

16. 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

17. *Id.*

18. *Id*.

19. *Id.* at 58-59.

20. 540 U.S. 544, 547, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (2004).

21. *Id.* at 548, *citing Youngblood*, 488 U.S. at 56.

22. 762 F. Supp. 666, 672 (W.D. Va. 1991).

23. *United States v. Montgomery*, 676 F. Supp. 2d 1218, 1242 (D. Kansas 2009) ("The weight of authority, however, goes the other way. The court agrees with the majority of courts and finds that before they were destroyed, the marijuana plants constituted potentially useful evidence but did not have apparent exculpatory significance. Accordingly, to prevail on his destruction of evidence claim, defendant must show that the government acted in bad faith in destroying the marijuana plants.").

24. *Mussman,* 289 Ga. at 591 (followed SOP); *Moore*, 452 F.3d at 389 (followed policy); *Roberson*, 195 Fed. Appx. at 904 ("Overall, the record demonstrates that the government complied with accepted standard procedures in storing the evidence and, thus, did not act in bad faith. "); *Boyd*, 961 F.2d at 437 (followed SOP). *Montgomery*, 676 F. Supp. 2d at 1245 ("courts have generally found no bad faith when the destruction of evidence results from standard procedure, at least when it retains adequate documentation of the destroyed evidence") citing *United States v. Bohl,* 25 F.3d 904, 911 (10th Cir.1994); *United States v. Vera*, 231 F. Supp. 2d 997, 1000 (D. Or. 2001) ("Compliance with departmental policy concerning the destruction of evidence is evidence of good faith.").

25. *See, e.g.*, *Elliott*, 83 F. Supp. 2d at 647 ("the failure to follow established procedures is probative evidence of bad faith, particularly when the procedures are clear and unambiguous as are the regulations upon which the government relies here"). *But see Martel*, 2011 WL 90112 (finding no bad faith despite destruction of all of the physical evidence in contravention of agency policies).

26. *Cf. e.g.*, *Stuart v. Idaho*, 127 Idaho 806, 816 (1996) ("We believe that the failure to provide discovery regarding the taped phone call is a sufficiently proximate cause of the destruction of the phone log evidence so as to rise to the level of bad faith under *Youngblood."*).

27. 500 F.3d 1154, 1159-61 (10th Cir. 2007). *See also Bohl,* 25 F.3d at 911 (applying the five factors and finding a due process violation); *Montgomery*, 676 F. Supp. 2d at 1243-45 (same).

28. 25 F.3d 904 (10th Cir. 1994).

29. 983 F.2d 928, 931 (9th Cir.1993).

30. *Elliott*, 83 F. Supp. 2d at 643.

31. *Id.* at 643-44.

32. *Id.* at 647-48. *But see Vera*, 231 F. Supp. 2d at 1001 (disapproving of *Elliott*'s use of recklessness to find bad faith).

33. *Mussman,* 289 Ga. at 586.

34. While it is unclear, despite stating that it was assuming that the evidence was constitutionally material, the Georgia court must have assumed that the evidence in *Mussman* was potentially exculpatory, but not apparently exculpatory because in the latter situation no good faith/bad faith analysis is necessary. As the U.S. Supreme Court explained in *Fisher*, *supra*, there is a difference between potentially and apparently exculpatory evidence, with only the destruction of the former having to rise to the level of bad faith before there is a due process violation. 540 U.S. at 547-48, 124 S. Ct. 1200, 157 L. Ed. 2d 1060.

35. *Id.* at 589-90.

36. *Id.*

37. *Martel*, 2011 WL 90112.

38. *Id.* at *12.

39. *Id. See also United States v. Webster*, 625 F.3d 439, 447 (8th Cir. 2010) (Following the destruction of the evidence in the case, the Eighth Circuit explained that "[u]nder *Youngblood,* we agree with the district court there is no evidence of bad faith on the part of the individuals involved which would constitute a due process violation. At most, the record shows Walters acted negligently in failing to notify Evans of the federal indictment, which is not enough for [the defendant] to demonstrate a due process violation.").

40. CR–08–1747, 2012 WL 4757901 (Ala. Crim. App. Oct. 5, 2012) *citing* Note, *The Role of Police Culpability in Leon and Youngblood,* 76 VA. L. REV. 1213, 1242 (1990).

41. *Hammond v. Delaware,* 569 A.2d 81, 87 (Del. 1989) quoting *United States v. Agurs,* 427 U.S. 97, 112, 96 S. Ct. 2392, 2402, 49 L. Ed. 2d 342 (1976).

42. *Id.*

43. *Id. See also North Dakota v. Steffes,* 500 N.W.2d 608, 611-12 n.3 (N.D. 1993) ("Relying upon state constitutional law, some states hold that even in situations where defendants cannot show bad faith on the part of the state in failing to preserve material evidence, defendants may nonetheless be entitled to an adverse-inference instruction, dismissal, or new trial if they can make a sufficient showing of substantial prejudice[]" but finding that the defendant did not raise state constitutional grounds); *Davis,* 2012 WL 4757901, at *43-45.

44. *Fisher*, 540 U.S. at 547, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (destruction of drugs); *Youngblood*, 488 U.S. at 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (two pieces of missing evidence); *Moore*, 452 F.3d at 387 (failure to preserve tape recordings); *Boyd*, 961 F.2d at 437 (destruction of one urine sample); *Elliott*, 83 F. Supp. 2d. at 637 (glassware that was seized from one container was missing), *Mussman,* 289 Ga. at 586 (one piece of missing evidence).

45. *Davis v. Howerton, Superior Court of Gwinnett County*, No. 10A074612; *Martel*, 2011 WL 90112.

46. *Id.* at *11.

47. *Id.*

48. *Davis v. Howerton, Superior Court of Gwinnett County*, No. 10A074612.

49. 2011 IL 110920, 960 N.E.2d 1104, 1113 (Ill. 2011).

50. *Fisher*, 540 U.S. at 547 (while not explicitly discussing the use of the lost evidence at trial, the Court implicitly recognized that the prosecution introduced evidence of the four tests it conducted on the lost substance and the Supreme Court explained that the potential exculpatory value came from the fact that "an additional test might have provided the defendant with an opportunity to show that the police tests were mistaken"). *See also Trombetta*, 467 U.S. at 491, 104 S. Ct. 2528, 81 L. Ed. 2d 413 ("The Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-analysis tests at trial.").

51. *Trombetta*, *supra* note 11.

52. *Cf.* Note, *The Role of Police Culpability in Leon and Youngblood,* 76 VA. L. REV. 1213, 1237-38 (1990) (recognizing that a defendant's due process rights will be diluted by the use of lost evidence). *But see e.g.*, *Fisher*, 540 U.S. at 547 (the discussion established that the prosecution introduced lost evidence at trial); *Davis*, 285 Ga. at 349 (2009) (deeming issue of lost evidence waived even though used at trial); *Davis v. Howerton*, *Superior Court of Gwinnett County*, No. 10A074612 (denying habeas relief despite the use of lost evidence at trial); *United States v. Turner*, 287 Fed. Appx. 426, 433-34 (6th Cir. 2008) (refusing to exclude photographic evidence of boot print that was destroyed and permitting expert testimony regarding this print).

53. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), *Illinois v. Fisher*, 540 U.S. 544, 547, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (2004).

54. *Mussman*, 289 Ga. at 591 citing *Youngblood,* 488 U.S. at 58, 109 S. Ct. 333.

55. *See, e.g., id.*

56. *See* note 27, *supra*.

57. *See* Note, *The Role of Police Culpability in Leon and Youngblood,* note 52, *supra*, at 1237-38 (recognizing lost evidence cases are concerned with preserving due process rights). *See also Fisher*, 540 U.S. at 547-48, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 ("the failure to preserve this 'potentially useful evidence' does not violate due process '*unless a criminal defendant can show bad faith on the part of the police*'").

58. *See* note 45, *supra*.

59. *See* notes 37-39, *supra*.

60. *See* note 8, *supra*.

61. *See also* note 24, *supra,* for a discussion of following standard operating procedures as evidence of good faith; note 25, *supra*, for examples of when the failure to follow procedures have been found to be evidence of bad faith and when courts have refused to make such a finding.

62. *Cf. e.g.,* Note, *The Role of Police Culpability in Leon and Youngblood,* note 52, *supra,* at 1235 (discussing the bad faith requirement in *United States v. Leon,* 468 U.S. 897 (1984), relating to search warrants and explaining that "[e]ven though police good faith is the appropriate general standard to carry into effect the deterrent purpose of the exclusionary rule, how well the standard works will depend upon how strict the courts are in their definition of what constitutes good faith. The real danger of the *Leon* standard is that it might cause police officers to dispense with some of the internal checks that they usually follow to ensure that their warrant applications are well supported, particularly in cases where the impetus for police action is an anonymous tip."); *See, e.g.*, note 25, *supra*, for an example of the government suffering the consequences of losing evidence and an example of no such consequences despite the loss of all of the evidence.

63. Note, *The Role of Police Culpability in Leon and Youngblood,* note 52, *supra*, at 1237-38 ("Given that the actual concern in exclusion of evidence cases is with fundamental fairness and not deterrence, requiring proof of ill motives on the part of police can only result in the dilution of a defendant's due process rights. … The chief reason for this inevitable dilution of a defendant's due process rights under the *Youngblood* standard is that innocent defendants are likely to be convicted as a result of unfair trials which are allowed to stand on the basis of the bad faith requirement.").

64. *See* notes 48-49, *supra*.

65. 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

66. *But see Turner*, 287 Fed. Appx. at 433-34 (refusing to exclude photographic evidence of boot print that was destroyed and permitting expert testimony regarding this print because, in part "[b]oth the government expert, Smith, and the defense expert, Koverman, testified that photographic analysis was recognized as a valid method of shoe-print analysis within the scientific community"); *McMickens v. Volkswagen of America, Inc.*, Civil Action No. 00–0088–CB–S, 2003 WL 25682172, at *4 (S.D. Ala. Feb. 21, 2003) (rejecting "plaintiff['s] claims that since the air bag is lost it is impossible to test the reliability of [the expert's] testimony[]" because "even in the absence of the examination of the air bag under special lighting conditions, [the expert's] testimony is based upon sufficient facts and data to support the reliability of his conclusions").

67. *See* notes 48-50, *supra*.

68. *See* notes 40-43, *supra*.

69. *See* note 53, *supra*.

## About the Author

Marcia G. Shein, who served as president of the Georgia Association of Criminal Defense Lawyers in 2013, is a life member of NACDL. She is a recognized federal attorney in pretrial, sentencing, appeals, and postconviction relief.

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