[CAPTION]

DEFENDANT'S MEMORANDUM ON SANCTIONS (DESTRUCTION OF EVIDENCE)

A. FACTS

[INSERT APPROPRIATE FACTS]

ISSUES

I. Whether this destruction of exculpatory evidence warrants sanctions against the State of Indiana because of prejudice to the Defendant in preparing his defense and denial of his due process rights?

II. Whether requiring bad faith in the destruction of exculpatory evidence is the appropriate standard to use when considering error under the Constitution of the State of Indiana?

III. Whether "bad faith" in destroying exculpatory evidence is not required under either the United States Constitution or the Indiana Constitution, when only pre-trial discovery sanctions are sought, as opposed to a reversal of a conviction on appeal from a negative judgment?

AUTHORITY AND ARGUMENT

I.

The destruction of exculpatory evidence in this case warrants sanctions against the State because of prejudice to the Defendant in preparing his defense and a denial of his due process rights.

It must always be remembered that this is a case in which the State of Indiana is seeking to have the ultimate sanction of death imposed on [DEFENDANT]. As was noted by the United States Supreme Court in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976):

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Id. at 96 S.Ct. 2991.

This qualitative difference where the death penalty is involved has also been implicitly recognized by the State of Indiana. In Cooper v. State, 540 N.E.2d 1216, 1218 (Ind. 1989), the Indiana Supreme Court stated that "this Court has regarded the duties placed upon it by the Code and the Constitution as requiring a more intensive level or scrutiny for sentences of death than for other criminal penalties," and in vacating another death sentence, the Court noted,

> [w]hile logic and common sense certainly support this Court's decision to overlook the technical deficiencies seen here, when reviewing a death sentence we prefer meticulous procedural obedience. Thompson v. State, 492 N.E.2d 264, 271 (Ind. 1986).

Other jurisdictions also recognize the role of this qualitative difference when the death penalty is involved. In reviewing death penalty cases, the Mississippi Supreme Court applies a standard of review it calls "heightened scrutiny," under which "all bona fide doubts are to be resolved in favor of the accused,

because `what may be harmless error in a case with less at stake becomes reversible error when the penalty-is death.'" Balfour v. State, 598 So.2d 731, 739 (Miss. 1992).

The United States Supreme Court reiterated the importance of evaluating error in capital cases when it considered the failure to disclose exculpatory evidence in Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). In reversing the Court of Appeals decision for failure to use the proper standard, the Court stated that its reason for granting certiorari was "[b]ecause `[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case,'..." Id. at 1560 (citing Burger v. Kemp, 483 U.S. 776, 785).

It therefore seems reasonable and appropriate that when the ultimate penalty at stake involves the possible taking of life, as opposed to merely property or temporary liberty, due process protections should be more strictly observed. In the instant case, unlike many capital cases, the guilt phase of the trial is being hotly contested, most particularly in the area of the identity of the perpetrator. Therefore, should a sentence of death ultimately be imposed, there is the possibility that the wrong person may be put to death, a sanction that can never be reversed.

There has been no positive identification of [DEFENDANT] as the perpetrator in this case. He has also filed a Notice of Alibi indicating that he was elsewhere at the time [VICTIM] was killed. According to the evidence presented at the hearing on this issue, the witness [WITNESS NAME], found images in those she was viewing of a person or persons whose features resembled the gunman. The evidence also showed, and the State stipulated, that [DEFENDANT]'s image could not have been one of those she saw.

These images have been lost forever, when they could have been easily preserved, and therefore [DEFENDANT] will be forever prevented from knowing who the witness saw. He is likewise forever deprived of evidence which could have contributed to his defense that he has been erroneously charged with an offense someone else committed. There is no other way for Mr. [DEFENDANT] to obtain this information, which could well be crucial to him. That this information could be of potential evidentiary value to the defense should have been readily apparent at the time it was destroyed. Surely due process and a defendant's right to present a defense are implicated in a scenario such as this.

The two United States Supreme Court decisions most often cited by the prosecution in the area of destruction of evidence are California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), and Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). While initially these decisions would appear to resolve the present issue against the defendant under the United States Constitution, a closer examination of these decisions reveal that they are not controlling, even as a matter of federal constitutional law.

First, it should be noted that both cases involve scenarios factually different from that in the instant case. In Trombetta, the evidence destroyed consisted of breath samples in several drunken driving cases. The defense complained of their destruction because they were not able to perform their own testing on the samples in an effort to impeach the results submitted into evidence by the State. Two factors appeared to particularly influence the Court's decision that failure to preserve these samples did not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. First, the samples were more likely to be inculpatory than exculpatory. Id. at 104 S.Ct. 2534. Second, the defendants had alternative ways of establishing the inaccuracy of the test results and concomitantly, their innocence. Id. at 104 S.Ct. 2534-35. The Court also noted the use of procedures ensuring the reliability of breath test results, as opposed to the reliability of eyewitness testimony, which has often been seriously

questioned by the courts.[1]

The Trombetta Court also made two other observations that are of import in the instant case. In her concurrence, Justice O'Connor stated that "[r]ules concerning preservation of evidence are generally matters of state, not federal constitutional law." Id. at 104 S.Ct. at 2535. This preference for state law was also shown in footnote 12, where the Court noted that "[s]tate courts and legislatures, of course, remain free to adopt more rigorous safeguards governing the admissibility of scientific evidence... Id. See, section II, supra, dealing with state law.

In discussing the duty to preserve evidence imposed under the federal Constitution, the Trombetta Court also noted,

> [w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, 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. (Citations omitted) Id. at 104 S.Ct. 2534.

The Trombetta Court found these conditions had not been met in that case, but, in the instant case, they have been. There is certainly no other way for [DEFENDANT] to duplicate the evidence destroyed, or even to make the same point through other evidence. This evidence could have been used both to impeach any identification by the witness, and to pursue other leads for suspects. It simply cannot be replaced or duplicated by any other means. It seems equally clear that any defendant would be likely to make use of this evidence in his defense, and that its potential exculpatory nature would be readily apparent to a trained police officer.

The decision in Arizona v. Youngblood, supra, 109 S.Ct. 333, is most often cited for the proposition that bad faith is required to predicate error on the destruction of evidence. At issue in Youngblood, a case involving child molestation, were semen samples and additional test procedures which could have been performed on them. The defense in Youngblood also asserted that the wrong person was being prosecuted, but the victim had made a positive identification of the defendant as the perpetrator, unlike the instant case.

Although the stated holding in Youngblood was 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" Id. at 109 S.Ct. 337; there were a number of other factors that seemed to influence the Court's decision. One of these factors was that the State did not make any use of the contested material in its own case, in other words, there was no semen testing evidence used to inculpate the defendant.

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1 See, e.g., Stinson v. State, 262 Ind. 189, 191-92, 313 N.E.2d 699, 701 (1974), where the Court noted: "[p]ersonal identification evidence is doubtful at best and should be subject to close scrutiny. It would be naïve to say that any person could be absolutely certain of identification of another person whom they had never known previously and had observed only in a brief period of excitement and great tension." See also generally, Kerr, Criminal Procedure-Pretrial, Indiana Practice Series, Vol. 16 (1991), Sec. 6.1. In Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the Court further recognized that "the evolution over time of a given eyewitness's description can be fatal to its reliability." In the instant case, it has been over one year since [VICTIM] died, and any identification at this point would be suspect at best.

This situation is vastly different from that in the instant case, where it is certainly anticipated that the State will attempt to have the witness [WITNESS NAME] make an in-court identification of [DEFENDANT]. From a practical standpoint, it would seem that this factor would be critical to a harmless error analysis, even if not specified in the holding. The lack of prejudice to the defendant in Youngblood was specifically noted by Justice Stevens in his concurrence in the judgment, Id. at 109 S.Ct. 338. Justice Stevens did not join in the holding of the majority because he observed 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 109 S.Ct. 339.

If ever there were such a case, [DEFENDANT] would submit that this is it.

Another factor noted by the Court was that "[t]he court instructed the jury that if they found the State had destroyed or lost evidence, they might `infer that the true fact is against the State's interest.'" Id. at 109 S.Ct. 335. In the instant case this partial remedy would seem to be unavailing and inadequate if an in-court identification is made.

While the Court noted that the potential exculpatory nature of the evidence in Youngblood was probably greater than that involved in Trombetta, its exculpatory nature is still far less apparent than that in the instant case. As Justice Blackmun noted in his dissent to Youngblood.

> The Constitution requires that criminal defendants be provided with a fair trial, not merely a "good faith" try at a fair trial. Respondent here, by what may have been nothing more than police ineptitude, was denied the opportunity to present a full defense .... Regardless of intent or lack thereof, police action that results in a defendant's receiving an unfair trial constitutes a deprivation of due process. Id. at 109 S.Ct. 339.

Defendant would submit that in the instant case, the actions of the police illustrate the very concerns expressed by Justice Blackmun. Justice Blackmun also expressed concern over just what the "bad faith" standard entails. In noting that the majority left this issue for another day, he stated:

> Apart from the inherent difficulty a defendant would have in obtaining evidence to show a lack of good faith, the line between "good faith" and "bad faith" is anything but bright, and the majority's formulation may well create more questions than it answers. What constitutes bad faith for these purposes? Does a defendant have to show actual malice, or would recklessness, or the deliberate failure to establish standards maintaining and preserving evidence be sufficient? Does "good faith police work" require a certain minimum of diligence, or will a lazy officer, who does not walk the few extra steps to the evidence refrigerator, be considered to be acting in good faith? Id. at 109 S.Ct. 342.

In the instant case, while the defendant has not specifically alleged "bad faith" on the part of the investigating officer, the failure to perform a very simple operation which would generally be considered appropriate to any investigation has resulted in significant prejudice to the defendant. Given the Youngblood Court's lack of further instruction on the determination of bad faith; the facts of Mr. [DEFENDANT]'s case and the ultimate sanction requested by the State; and the points raised by Justice Blackmun, it is certainly appears that [DEFENDANT] has met the Supreme Court's standard for error in destruction of evidence. Again, as noted by Justice Blackmun, "[i]t still remains `a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" Id. at 109 S.Ct. 345 (citation omitted). Surely this precept has no greater impact than where an erroneous decision may result in the death of an innocent person.

It should also be noted that since the decision in Youngblood the Court has firmly reiterated its concerns about exculpatory evidence in the context of the duty to disclose such evidence. In expressing its concern over excusing a prosecutor from disclosing evidence in police custody of which the prosecutor is unaware, the Court in Kyles v. Whitley, 115 S.Ct. 1555 (1995) noted that such a principal "boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." *Id.* at 1568. This the Court was unwilling to do, as shown by its decision to reverse the defendant's conviction in that case. The Court in Kyles also noted its long term goal of "establishing `procedures under which criminal defendants are `acquitted or convicted on the basis of all the evidence which exposes the truth." Id. at 1569 (citation omitted).

Given the circumstances surrounding the destruction of the evidence in the instant case; the factual differences between it and those involved in Trombetta and Youngblood; the uncertainty as to what constitutes "bad faith;" and the significant factors relied upon by the Trombetta and Youngblood Courts, it appears that the actions of the police in Mr. [DEFENDANT]'s case rise to the level of reversible error under the due process clause and right to a fair trial in the federal Constitution. Even if this Court should determine that [DEFENDANT] is not entitled to relief under the United States Constitution, the issue is not closed, for relief may still lie under the Indiana Constitution.

II.

Bad faith in destroying exculpatory evidence is not required when considering error under the Indiana Constitution.

It is clear that the federal constitution is not the sole guarantor of the right to due process and other rights. Chief Justice Shepard made this abundantly clear in his law review article, *Second Wind for the Indiana Bill of Rights*, 22 Ind.L.Rev. 575 (1989), when he stated in conclusion that:

> Civil liberties protected only by a U.S. Supreme Court are only as secure as the Warren Court or the Rehnquist Court wishes to make them. The protection of Americans against tyranny requires that state supreme courts and state constitutions be strong centers of authority on the rights of the people. I am determined that the Indiana Constitution and the Indiana Supreme Court be strong protectors of those rights. Id. at 586.

The Chief Justice also stated that "Indiana was an early and noteworthy participant in using its bill of rights to defend personal liberty," and after citing to numerous early decisions, noted that "[t]hese were but a few in a fine line of cases in which the Indiana Supreme Court held that the Indiana Bill of Rights afforded Hoosiers rights which the federal Constitution did not." Id. at 576-77.2

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2 In the criminal law area, some cases discussed by the Chief Justice included Webb v. Baird, 6 Ind. 13 (1854) (granting the right to counsel at public expense long before the right was recognized under the U.S. Constitution); Miller v. State, 8 Ind. 325 (1856) (dealing with double jeopardy); Wilkins v. Malone, 14 Ind. 153 (1860), and Callender v. State, 193 Ind. 91, 138 N.E. 817 (1922) (dealing with the exclusionary rule); and Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920) (dealing with right to counsel). Shepard, Second Wind for the Indiana Bill of Rights, at 578-79. Chief Justice Shepard also noted the more recent cases where the Indiana Constitution was found to confer greater protection than the federal Constitution, including Taylor v. State, 511 N.E.2d 1036 (Ind. 1987) and Mills v. State, 512 N.E.2d 846 (Ind. 1987) (dealing with confrontation rights). Examples of similar decisions rendered since the Chief Justice's article include Price v. State, 622 N.E.2d 954 (Ind. 1993) (free speech); Brady v. State, 575 N.E.2d 981 (Ind. 1991) (face-to-face confrontation); Campbell v. State, 622 N.E.2d 495 (Ind. 1993) (defendant's right to be heard), *overruled on other grounds* by Richardson v. State, 717 N.E.2d 32 (Ind.

Chief Justice Shepard also made note of the fact that many provisions of the Indiana Bill of Rights have no counterpart in the United States Constitution, and observed that Article I, Section 12, was one of those provisions, Id. at 580-81. This provision, relating to due process, is at issue in the instant case.

The due process clause of the United States Constitution is found in Sec. 1 of the Fourteenth Amendment to the Constitution. That section states in relevant part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; .... (emphasis added).

The right to due process conferred under the Constitution of the State of Indiana is found in Article 1, Section 12, and contains significant language not found in the Constitution of the United States. The provision states:

> All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be *administered freely, and without purchase; completely, and without denial; speedily, and without delay*. (emphasis added)

While the defense is unaware of any Indiana case law specifically interpreting the emphasized portion of this constitutional provision, the provision itself was traced back to the Magna Charta in State ex rel. Board of County Comm'rs v. Laramore, 175 Ind. 478, 94 N.E. 761 (1911). The Laramore Court also acknowledged that although the provision was derived from the Magna Charta, it may be "a broader guaranty of free, unpurchased and impartial justice." Id. at Ind. 485, 94 N.E. at 763.

Three more contemporary decisions dealing with the issue of destruction of evidence are of particular import. First, it is clear from Chief Justice Shepard's concurrence in House v. State, 535 N.E.2d 103, 111 (Ind. 1989) that the issue of whether a lack of good faith on the part of the State was required for a defendant to obtain a remedy for the destruction of potentially exculpatory evidence under the Indiana constitution had not been decided adversely to the defendant, even after Youngblood.

The House decision actually dealt with the discovery of potentially exculpatory evidence, and the need for materiality of that evidence. Both Chief Justice Shepard and Justice DeBruler, however, discussed the related issue of destruction or loss of such evidence. In his concurrence and dissent, Justice DeBruler stated that,

> [w]hile I agree with the result reached by the majority opinion on this [discovery] issue, I point out that when the accused shows that material evidence was in the hands of the prosecution and lost, the question of whether the accused must then go ahead and show prejudice is open in Indiana. In my judgment, when the item is not available for scrutiny by the trial court, but is known to have been material, the risk of loss should be borne by the prosecution, not the defendant. The police and prosecutors are after all highly trained specialists in the gathering and retention of evidence and should be expected to carefully retain all material evidence in usable form. Id. at 111.

Chief Justice Shepard, in his concurrence, stated that, "I agree with Justice DeBruler that this case does not decide what standard Indiana should use for cases in which the prosecution has disposed of

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1999); and many decisions finding sentences not proportional to the crime, an analysis not pertinent under the U.S. Constitution.

arguably material evidence which might exculpate a defendant." Id. The instant case certainly appears to be the type envisioned by these comments. Two Indiana decisions have been found in which the issue of due process and the destruction of evidence was raised under both the federal and Indiana Constitutions. Hale v. State, 230 N.E.2d 432 (Ind. 1967); Douglas v. State, 464 N.E.2d 318 (Ind. 1984). Although both of these decisions were determined adversely to the defendants based on the facts of the cases, both also stated that *negligent* or intentional destruction of material evidence by the police or the prosecution may present grounds for reversal. Hale, 230 N.E.2d at 435; Douglas, 464 N.E.2d at 320. In each case, the defense alleged a violation of due process under both the federal and state Constitutions. While both decisions were rendered prior to the United States Supreme Court's decision in Youngblood, supra, the decision in House rendered after the Youngblood decision, makes it clear that the principle announced in Hale and Douglas may still be valid under the Indiana Constitution.

Furthermore, in Lee v. State, 545 N.E.2d 1085 (Ind. 1989), rendered after the decision in Youngblood, the Court stated that,

> [i]t is well established hat the negligent destruction or withholding of material evidence by police or prosecution may present grounds for reversal. The defendant must establish materiality as a condition precedent to claiming a denial of due process where evidence is negligently lost or withheld by the government except where the materiality is self evident or a showing of materiality is presented by the destruction of the evidence. Id. at 1089 (citations omitted).

This decision is particularly noteworthy for a number of reasons. First, it was decided almost a year after Youngblood, and over six months after Youngblood as discussed as the standard under the federal Constitution in House, supra. The decision makes no mention of Youngblood, even though the Court was aware of it as a source of the federal standard. It would appear therefore, that the Court in Lee was implicitly basing its statement on the Indiana Constitution and the long line of Indiana cases holding that mere negligent destruction of evidence can be sufficient to present reversible error.

As additional evidence of this intent, it is also noteworthy that in supporting the previously stated principal, the Lee court cited to the decision in Hale, supra, a decision where the provisions of the State Constitution had been raised. The court also made considerable mention of the decision in Birkla v. State, 263 Ind. 37, 323 N.E.2d 645 (1975).

At issue in Birkla was the negligent destruction of evidence prior to a request for its production by the defense. In rejecting the State's argument that "a mandatory retention rule `would require the police and prosecutors to become repositories of superfluous material, obligated to preserve the fruits of absolutely every inquiry made, however meritless or fallacious they were revealed to be..." The Court stated,

> [w]e cannot say the interest advanced by the state is not a legitimate one. However, it is not of the same magnitude as a defendant's right to a fair trial. We therefore hold that when the prosecution determines evidence to be nonmaterial, and further decide not to advise defense counsel of such evidence prior to its destruction, a heavy burden rests upon the prosecution to demonstrate that the destruction of such evidence did not prejudice the defendant. Id. at 648-49.

In providing guidance to the state concerning its determination of materiality, the Court listed the following factors: 1) the seriousness of the charge; 2) the relevance of the evidence to guilt or punishment; and 3) the potential usefulness of the evidence to the defendant. Id. at 649. In the instant case it seems clear that all of these factors would certainly be resolved in favor of retention of the evidence.

While other decisions have been rendered since Lee and the others cited infra, and have utilized the "bad faith" standard of Youngblood, an examination of those decisions reveals that they were predicated on the federal Constitution and did not address the impact of the destruction of potentially exculpatory evidence on the due process guarantees of the Indiana Constitution.

Even when applying the general rule enunciated in Youngblood with regard to evidence preservation issues under the Indiana Constitution, as in Stoker v. State, 692 N.E.2d 1386 (Ind.Ct.App. 1998), the Court of Appeals noted that, in some instances, the destruction or the failure to preserve evidence may be so prejudicial to the defendant as to warrant reversal even in the absence of "bad faith" by the police. Id. at 1390, fn 8.

This State should adopt a more flexible balancing test in which the good or bad faith of the State is only one of the factors to be considered by the Court in determining whether a defendant's right to due process has been violated by the loss of material and potentially exculpatory evidence. See also Note: Should Lost Evidence Mean a Lost Chance to Prosecute? State Rejections of the United States Supreme Court Decision in Arizona v. Youngblood, 27 Am. J. Crim. L. 329 (2000). Such a balancing test has been adopted by other state courts which have analyzed the issue under their respective state constitutions. In State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), the Tennessee Supreme Court held that proof that the State acted in bad faith in losing or destroying allegedly exculpatory evidence is not an absolute prerequisite to finding a violation of the Tennessee Constitution's due process clause, noting the extreme difficulty of proving bad faith on the part of the government and the fact that it allows no consideration of the materiality of the missing evidence. The accidental loss of the charred remains of a wallet violated the defendant's due process rights under the Alabama Constitution. Gurley v. State, 639 So.2d 557 (Ala.Crim.App. 1993); see also Thorne v. Dept. of Pub. Safety, 774 P.2d 1326 (Alaska 1989); State v. Morales, 232 Conn. 707, 657 A.2d 585 (1995); People v. Newberry, 166 Ill.2d 310, 209 Ill.Dec. 748, 652 N.E.2d 288 (1995); Commonwealth v. Henderson, 411 Mass. 309, 582 N.E.2d 496 (1991); Cook v. State, 114 Nev. 120, 953 P.2d 712 (1998); People v. Burch, 247 A.D.2d 546, 92 N.Y.2d 848 (1998); State v. Osakalumi, 461 S.E.2d 504 (W.Va. 1995).

In Osakalumi, the West Virginia Supreme Court summarizes multiple destruction of evidence cases. In Osakalumi, the police had destroyed a couch which was material to the case, thus preventing the defense from examining it, but at trial, testimony concerning the destroyed evidence was admitted. The Court relied on the West Virginia Constitution in finding that destruction of the evidence warranted a reversal of the defendant's conviction and a remand for a new trial where testimony about the evidence could not be admitted.

It is significant that in Osakalumi, the court reversed the conviction even though the trial court issued an instruction as follows:

> The Court instructs the jury that the State has introduced evidence gleaned from a couch which no longer exists. The reason this couch no longer exists is because the officers of the Bluefield City Police Department destroyed it after conferring with the Prosecuting Attorney's Office. In considering this evidence, you should scrutinize it with great care and caution. This destruction of evidence occurred before the defendant could examine it. This destruction of the couch may very well have deprived the defendant of evidence crucial to his defense and which may in fact have exculpated him.

Despite the giving of this extremely defense-oriented instruction, the Court found that it was not sufficient to protect the defendant's right to due process under the West Virginia Constitution.

The Osakalumi decision contains both analysis and citation to other authority which is instructional in the instant case. While decisions from other jurisdictions are not binding on the courts of this State, given the remarks of Chief Justice Shepard concerning reliance on state constitutional grounds; similar comments of Justice O'Conner in Youngblood; the unique language of the due process clause of the Indiana Constitution; the seriousness of the sanction sought by the State in this case; and the lack of other evidence of guilt of [DEFENDANT], the reasoning of the West Virginia Supreme Court should be very persuasive.

If the language of Article I, Section 12 of the Indiana Constitution, "Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay…" is to have any meaning at all, it certainly seems to support a more stringent enforcement of due process rights than required under the federal Constitution. Given the facts of the instant case, the penalty involved, and the long history of concern about preservation of evidence in Indiana case law, [DEFENDANT] should not be deprived of a remedy for the egregious loss of evidence occasioned by the actions of law enforcement in his case, especially in light of the ease with which the evidence could have been preserved. As discussed in the following section, even if the Court should find the situation here does not rise to constitutional error under the Indiana Constitution, it is certainly a situation appropriate for the Court's exercise of its discretion to impose sanctions.

III

"Bad faith" in destroying potentially exculpatory evidence is not required under either the United States Constitution or the Indiana Constitution, when only pre-trial discovery sanctions are sought, as opposed to a reversal of a conviction on appeal from a negative judgment.

In the instant case, [DEFENDANT] is seeking to prevent a miscarriage of justice due to impingement of his right to due process, and is not appealing from a negative judgment against him. Even if this court should find that due process concerns under either the federal or state Constitution would not elevate the destruction of evidence in this case to the level of constitutional error, it does not follow that the defendant is not entitled to relief.

It is well settled under Indiana law that a trial court has considerable discretion in matters of discovery and in deciding whether remedial measures are warranted. Mahrdt v. State, 629 N.E.2d 244 (Ind.Ct.App. 1994). The Mahrdt Court noted:

> A serious breach of duty occurs when the prosecution willfully or intentionally, when unjustified by a public policy, obstructs the access of the defense to material evidence in its possession. *It is likewise a serious breach when through lack of vigilance the negligent destruction or withholding of material evidence by law enforcement officers or the prosecutor occurs*. In such instances grounds for reversal may exist. Turnpaugh v. State, 521 N.E.2d 690, 692-93 (Ind. 1988) (internal citations omitted). *Since such misconduct may justify the reversal of a conviction, the significance of such misconduct in the posture of an interlocutory appeal is as great; exclusion of the evidence should be forth right upon a showing of prejudice from the state's violation of discovery orders.* Id. at 248. (emphasis added).

The Mahrdt decision, which dealt with the State's obstruction of access to breath testing equipment by the defense after a court order provided for the same, is significant for the proposition that exclusion of evidence may be a proper sanction where the defendant has been prejudiced in evaluating this evidence. Such is surely the case here, where the destruction of the images at issue has forever prevented the defendant from determining whose images corresponded to the features of the gunman.

The potential for prejudice is also increased exponentially because of the tenuous nature of the other evidence of guilt, and because of the death penalty sought by the State.

That sanctions may be appropriate even if a reversal of a conviction may not be mandated, is also apparent from the decision in Nettles v. State, 565 N.E.2d 1064 (Ind. 1991). Nettles involved a situation where the State did not adequately preserve blood samples, and when the defense eventually requested them for independent testing, they had deteriorated too much for testing due to lack of refrigeration. While finding that this particular failure to preserve, which appears much less egregious than the destruction of evidence in the instant case, was not sufficient to warrant reversal, the Court observed that sanctions against the State might have been appropriate. Id. at 1067.

These two decisions alone, both rendered after the decision in Youngblood, supra, make it clear that the Court has discretion to impose appropriate sanctions for negligent destruction of evidence, even if such sanctions are not mandated as a matter of constitutional proportions. While [DEFENDANT] maintains that due process requires the imposition of sanctions, he would also submit that such sanctions are certainly appropriate and proper as matters of the Court's discretion.

It should not be forgotten that when a defendant has been convicted and appeals his conviction, he is appealing from a negative judgment against him. When such an appeal is based on a discretionary act by the trial court, the appellant must show an abuse of that discretion. Such is not the posture of [DEFENDANT].

In the instant case, the Defendant's request for sanctions is simply an effort to prevent the State from using evidence against him that he cannot effectively attack because of the destruction of crucial evidence to rebut it. The tremendous impact of the in-court identification of a defendant cannot be seriously questioned. The evidence at issue was not merely lost or unprocured, it was available at one time and was deliberately destroyed. Excluding the in-court identification of [DEFENDANT] by [WITNESS NAME], or a similar sanction, would merely place Mr. [DEFENDANT] in the same position as the defendant in Youngblood (where the evidence at issue was not used in any way by the state).

IV

Conclusion

Based on the authority and argument set forth in the preceding sections, [DEFENDANT] would submit the following conclusions.

1. Given the facts of this case, due process and the Defendant's right to a fair trial mandate that the destruction of potentially exculpatory evidence presented here entitle him to relief, even as a matter of federal constitutional law.
2. Even if the Court should determine, however, that the Defendant's constitutional rights have not been violated under the United States Constitution, the more protective provisions of the Indiana Constitution have been violated and he is entitled to relief under Indiana law.
3. Even if the destruction of evidence here is not found by the Court to violate [DEFENDANT]'s constitutional right to due process and a fair trial, it is certainly egregious enough to warrant the exercise of the Court's discretionary power to impose appropriate sanctions to protect his right to a fair trial, especially in light of the penalty sought by the State and the lack of other overwhelming evidence of guilt

For all of the foregoing reasons, [DEFENDANT] prays this Court to grant his Motion for Sanctions, and for all other relief just and proper in the premises.

(Signature)

REFERENCES **CASEBANK B.10.m; M.7.a; N.1.f**

T.R. 37(B), Indiana Rules of Procedure (failure to comply with order)

I.C. 35-33-5-5 (law enforcement cannot destroy controlled substances or chemicals associated with the illegal manufacturing of drugs without first preserving a sufficient quantity of the chemicals or controlled substances to demonstrates their association with the unlawful activity).

CASE LAW

Lahrman v. State, 465 N.E.2d 1162 (Ind.Ct.App. 1984) (if defendant cannot point to specific evidence actually destroyed or lost by police or prosecution, reversal is not required).

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (prosecution has a duty to disclose material, exculpatory evidence that is in the possession or control of the prosecution).

Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (unless defendant can show bad faith, destruction of potentially exculpatory evidence is not denial of due process).

Illinois v. Fisher, 540 U.S. 544, 124 S. Ct. 1200; 157 L. Ed. 2d 1060 (2004) (although the destruction of "material exculpatory evidence" violates federal due process regardless of the good or bad faith of the State, the failure to preserve "potentially useful evidence" does not violate federal due process unless the Defendant can prove bad faith by the State; the existence of a pending discovery request did not eliminate the need for a showing of bad faith by the police in this case).

California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) (the State has a duty to preserve evidence expected to play a significant role in the Defendant's defense).

Roberson v. State, 766 N.E.2d 1185 (Ind.Ct.App. 2002) (the trial court erred in denying the Defendant's motion to dismiss charge of possessing material capable of causing bodily injury by inmate because the State's failure to preserve alleged dangerous device violated the Defendant's due process rights; the exculpatory value of the device should have been obvious to the State before its destruction despite subjective opinions of State's witnesses that the device was fashioned to be a weapon).

Birkla v. State, 263 Ind. 37, 323 N.E.2d 645 (1975) (in determining whether evidence is immaterial and thus may be destroyed by the prosecution, prosecution should consider the seriousness of the charge, whether evidence is relevant either to the Defendant's guilt or punishment and potential usefulness to the Defendant of evidence for rebuttal or impeachment of the State's case; after considering all these factors, if the prosecutor has any doubts concerning potential materiality of evidence, he must retain it).

Glasscock v. State, 576 N.E.2d 600, 603 (Ind.Ct.App. 1991) (blood samples for BAC test destroyed per hospital procedure; police and prosecution never possessed samples; held no violation of due process), *disapproved of on other grounds by* Abney v. State, 821 N.E.2d 375 (Ind. 2005).

Holder v. State, 571 N.E.2d 1250 (Ind. 1991) (in order for the State to have a duty to preserve exculpatory evidence, the evidence must both possess exculpatory value that was apparent before the evidence was destroyed, and must be of such a nature that the Defendant would be unable to obtain comparable evidence by other reasonably available means).

Rita v. State, 663 N.E.2d 1201 (Ind.Ct.App. 1996) (the trial court did not err in denying the Defendant's motion to dismiss, and, alternatively, in refusing to exclude the State's evidence regarding a broken

windshield and in refusing to give jury instruction; because there was no evidence that prosecution's decision to remove windshield was motivated by bad faith, the State's failure to preserve this evidence in the same condition as at the time of the accident did not constitute denial of due process; Sullivan, J., concurring in result, disagreed with implication that prior case law creates absolute "bad faith" proof requirement with respect to the withheld or destroyed evidence), *vacated on other grounds by* 674 N.E.2d 968 (Ind. 1996).

Stoker v. State, 692 N.E.2d 1386 (Ind.Ct.App. 1998) (in some instances, destruction or failure to preserve evidence may be so prejudicial to the Defendant as to warrant reversal even absent bad faith).

Gasper v. State, 833 N.E.2d 1036 (Ind.Ct.App. 2005) (based on current case law and Stoker v. State, 692 N.E.2d 1386 (Ind.Ct.App. 1998), the Court again held that Article 1, Section 12 of Indiana Constitution does not require police officers to record custodial interrogations in places of detention; nevertheless, as in Stoker, the Court strongly encouraged law enforcement officers, as a matter of sound policy and fairness of proceedings, to record all custodial interrogations).

Seay v. State, 529 N.E.2d 106 (1988) (when only a small quantity of evidence is possessed by the State which will be destroyed by chemical analysis, the defense is allowed to use the State's testing reports and probe the veracity of those reports; narcotics defendant who was informed that drugs had been exhausted by State's testing procedures approximately three weeks before trial, but did not request that drugs be produced until first day of trial, and who cross-examined chemist who had analyzed substances in question about testing procedures used, failed to show he was unduly prejudiced by depletion of drugs during testing).

Lee v. State, 545 N.E.2d 1085 (Ind. 1989) (with no mention of Youngblood, the Court found that negligent destruction or withholding of material evidence by police or prosecution may present grounds for reversal where the Defendant establishes materiality of lost evidence or where materiality is self-evident).

Nettles v. State, 565 N.E.2d 1064 (Ind. 1991) (the trial court did not err in denying the Defendant's motion to suppress blood and hair identification test results, samples of which were either destroyed in testing process or not preserved by State; intentional destruction was explained as necessary to conduct testing, and no bad faith was shown).

Hopkins v. State, 579 N.E.2d 1297 (Ind. 1991) (where other evidence of guilt at trial is so overwhelming, showing of arguably bad faith destruction, absent some material likelihood of exculpation, does not result in denial of due process).

State v. Durrett, 923 N.E.2d 449 (Ind.Ct.App. 2010) (in prosecution for failure to return to scene of accident resulting in SBI, State's failure to preserve van that struck victim did not violate due process because there was no evidence State acted in bad faith).

Sewell v. State, 592 N.E.2d 705 (Ind.Ct.App. 1992) (in conjunction with post-conviction relief proceedings, due process concerns entitled the Defendant to obtain the State's rape kit for laboratory examination and potential subjection to DNA testing in order to ascertain the truth; "Advances in technology may yield potential for exculpation where not previously existed; the primary goals of the court when confronted with a request for the use of a particular discovery device are the facilitation of the administration of justice and the promotion of the orderly ascertainment of the truth.").

Mahrdt v. State, 629 N.E.2d 244 (Ind.Ct.App. 1994) (the Defendant had a right to inspect the breathalyzer machine, and the State's refusal to all the Defendant to do so before re-certifying the machine, despite the

Court's Order, required suppression of BAC results).

Seal v. State, 38 N.E.3d 717 (Ind.Ct.App. 2015) (Defendant not denied due process rights by State's failure to preserve audio recordings of his daughters' interviews, where interviews were summarized, both daughters testified, and Defendant failed to explain how summaries were inadequate to assist him in cross-examining daughters).

Reid v. State, 984 N.E.2d 1264 (Ind.Ct.App. 2013) (Defendants did not have due process right to obtain post-conviction access to State's evidence for additional testing, and thus State did not violate due process by losing or destroying DNA evidence after Defendants were convicted of murder and attempted armed robbery).

Bishop v. State, 40 N.E.3d 935 (Ind.Ct.App. 2015) (destroyed shell casings from another shooting that occurred within hours of victim's murder and that were part of other crimes evidence constituted potentially useful evidence, as opposed to materially exculpatory, and therefore their destruction did not violate Defendant's due process rights absent a showing of bad faith on the part of the State, despite claim that loss of casings deprived Defendant of opportunity to test casings and contradict State's expert testimony that casings came from same firearm).