

STATE OF INDIANA)
) SS:
COUNTY OF CARROLL)

IN THE CARROLL CIRCUIT COURT

CAUSE NUMBER: 08C01-2210-MR-00001

STATE OF INDIANA)
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RICHARD M. ALLEN)

**STATE’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS FOR DESTROYING
EXCULPATORY EVIDENCE**

Now comes the State of Indiana, by Prosecuting Attorney, Nicholas C. McLeland, and respectfully objects to the Defendant’s Motion to Dismiss for Destroying Exculpatory Evidence. The evidence in question is not exculpatory evidence nor is it potentially useful evidence. The interviews of Patrick Westfall and Brad Holder are not evidence at all related to this case. They are simply interviews that the Defense wish to use to support a wild theory of this case that has no evidentiary support whatsoever. However, even though the interviews were not evidence, they were not destroyed by the state purposefully or in bad faith. For those reasons, the State would ask the Court to deny the motion and in support thereof, states the following:

1. That on August 10th, 2017, Carroll County Prosecutor’s Office Investigator Steve Mullin discovered that the DVR at the Delphi Police Department for the interview room had been recording continuously for an unknown number of days. Mullin determined that the data storage on the 6 tera byte drive had been consumed, causing the equipment to record over previous recordings, resulting in lost data. Investigator Mullins called the company who installed the DVR immediately in an attempt to recover the information. The representative advised that all recordings prior to February 20th, 2017 were lost.

2. That on February 17th, 2017, investigators interviewed Brad Holder at the Delphi Police Department. This recorded interview was lost due to the DVR recording over as described in paragraph 1. The narrative summary prepared by investigators from that interview has been provided to the defense.
3. That on February 19th, 2017, investigators interviewed Patrick Westfall at his home and a narrative report has been provided to the defense. The report does not indicate that the interview was recorded and no recording has been located in the State's possession.
4. That the Defense suggest that the State destroyed these recordings, which they believe to be evidence that is exculpatory in nature, further claiming that the loss of the recordings was negligent or purposeful on the part of the State.
 - a. That the interviews of Brad Holder and Patrick Westfall are neither exculpatory, nor are they potentially useful evidence.
 - b. That the State did not destroy any recordings maliciously or in bad faith.
5. The Due Process Clause does not impose on the State an undifferentiated and absolute duty to retain and preserve all material that might be of conceivable evidentiary significance in a particular prosecution. *Arizona v. Youngblood*, 488 U.S. 51 (1988).
6. The State only has a constitutional duty to preserve materially exculpatory evidence and evidence that is potentially useful to the Defense. That is evidence that might be expected to play a significant role in the suspects defense. *California v. Trombetta*, 467 U.S. 479 (1984).
7. The mere possibility that a defense may have been created in the future by a piece of destroyed evidence does not mean that there was apparent exculpatory value at the time police acquired the item. The fact that evidence had an outsized significance for the

defense is not enough to show a deprivation of the Defendant's due process rights.

Illinois v. Fisher, 540 U.S. 544 (2004).

8. That the Defense is merely speculating that the interviews that were recorded over will aid the defense. Mere speculation is not enough. *Blanchard v. State*, 802 N.E.2d 14 (Ind. Ct. App. 2004).
9. The loss of the recordings does not justify application of the two-part test to see if the loss warrants dismissal.
10. The two-part test consists of determining what kind of evidence is at issue and then determining if the evidence was destroyed in bad faith.
 - a. That step one is to determine what evidence is at issue. Is it evidence that is materially exculpatory or potentially useful. *Land v. State*, 802 N.E.2d 45 (Ind. Ct. App. 2004).
 - b. Evidence is materially exculpatory if it possesses an 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. *Chissell v. State*, 705 N.E.2d 501 (Ind. Ct. App. 1999).
 - c. Exculpatory evidence is a very narrow class of evidence uncovered during an investigation into a crime that tends to establish a criminal Defendant's innocence. *State v. Durrett*, 923 N.E.2d 449 (Ind. Ct. App. 2010). That means that it must possess an exculpatory value that was apparent before the evidence was destroyed and is a such a nature that the Defendant' would be unable to obtain comparable evidence by other reasonably available means. *Terry v. State*, 857 N.E.2d 396 (Ind. Ct. App. 2006).

- d. That exculpatory is defined as clearing or tending to clear from alleged fault or guilty, excusing. *Land v. State*, 802 N.E.2d 45 (Ind. Ct. App. 2004).
- e. The State must preserve materially exculpatory evidence and the failure to do so deprives a Defendant of due process regardless of whether the State acted in good faith or not. *State v. Durrett*, 923 N.E.2d 449 (Ind. Ct. App. 2010).
- f. In contrast, evidence is merely potentially useful if no more can be said than that it could have been subjected to tests, the results of which might have exonerated the Defendant. *Chissell v. State*, 705 N.E.2d 501 (Ind. Ct. App. 1999).
- g. If the State fails to preserve potentially useful evidence it does not constitute a denial of due process unless the Defendant can show that the State acted in bad faith. *Terry v. State*, 857 N.E.2d 396 (Ind. Ct. App. 2006).
- h. The destruction of potentially useful evidence is constitutionally unproblematic absent a showing that the State acted in bad faith. *Land V. State*, 802 N.E.2d 45 (Ind. Ct. App. 2004).
- i. That step two is if the evidence is considered potentially useful, determining if the State destroyed the evidence in bad faith.
- j. That in order to show bad faith, the Defendant must show that the State failed to preserve the evidence pursuant to a conscious doing of wrong because of dishonest purpose or moral obliquity. *Terry v. State*, 857 N.E.2d 396 (Ind. Ct. App. 2006)
- k. Bad faith requires a showing beyond simple bad judgement or negligence. It exists only if the Defendant can show the State's failure to preserve the evidence

was the conscious doing of wrong because of dishonest purpose or moral obliquity. *Terry v. State*, 857 N.E.2d 396 (Ind. Ct. App. 2006)

11. The lost recording of Brad Holder was clearly not materially exculpatory. Even if it could be described as potentially useful, it certainly was not destroyed intentionally or in bad faith.
12. That the lack of a recording for an interview with Patrick Westfall is clearly not materially exculpatory. Even if it could be described as potentially useful, the absence of a recording was not done in bad faith on the part of law enforcement.
13. Further, both Holder and Westfall are still available to be interviewed and/or deposed by the Defense.
14. The interviews of Patrick Westfall and Brad Holder are not evidence at all related to this case against Richard Allen. These interviews are part of an expansive 7-year investigation following thousands of leads, selected by the Defense to support a wild theory of this case that lacks a sufficient evidentiary foundation.

WHEREFORE, the State objects to the Defendant's Motion to Dismiss for Destruction of Exculpatory Evidence and would ask the Court to deny the same. Respectfully submitted.



Nicholas C. McLeland
Attorney #28300-08
Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon his attorney of record, through personally delivery, ordinary mail with proper postage affixed or by service through the e filing system and filed with Carroll County Circuit Court, this _22nd_ day of February, 2024.



Nicholas C. McLeland
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Prosecuting Attorney