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Here Today, Gone Tomorrow - Three Common Mistakes Courts Make When Police Lose or Destroy Evidence with Apparent Exculpatory

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HERE TODAY, GONE TOMORROW - THREE COMMON MISTAKES COURTS MAKE WHEN POLICE LOSE OR DESTROY EVIDENCE WITH APPARENT EXCULPATORY VALUE

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[1]Law Clerk, Honorable Wiley Y. Daniel, District of Colorado. Executive Editor, UCLA Law Review, Volume 47. J.D., UCLA School of Law, 2000; B.A. Philosophy, Wheaton College, 1997. Praise and thanks be to God, without whom neither my existence, nor my successes, would be possible or meaningful. If I have said anything correct, it is through His Grace alone, and if I have said anything incorrect, the error is only my own. For having introduced me to this issue and challenging me to pursue it, I owe my deepest gratitude to Justice Thomas E. Hollenhorst and his Chambers at the California Court of Appeal, Fourth Appellate District, Division Two. I thank Professor David Sklansky for his investment of time in me and tireless guidance on this Article. Thanks also to Professors Carolyn Kubota, David Dolinko, Devon Carbado, and Peter Aranella who read and commented on earlier drafts. Special thanks go to the folks at WLAB (Will, Di, Shar, et. al.) for their encouragement throughout the writing process and, most of all, to my role models in law and in life, Richard and Mary Bawden.

I. INTRODUCTION

Police Investigator Anthony DeLello was called to the scene of a burglary on May 22, 1997. He found tire tracks leading from the scene to Steve Samek's property. DeLello then obtained a warrant and searched Samek's home. As the police were preparing to leave Samek's house at the conclusion of the search, Samek arrived home in a van driven by his friend Douglas Jacobsen. Police arrested Samek when several of the items stolen in the burglary were found in the back of the van. Jacobsen was not arrested and later implicated Samek in the burglary. Two days later, Samek's wife gave police an audiotape (the "Tape") of a male voice confessing to the burglary. Based upon the contents of the Tape, DeLello formed the belief that the person speaking on the Tape was Jacobsen. DeLello then gave the Tape to prosecutor Edward Barce. DeLello told Barce his belief that the speaker was Jacobsen and played the Tape for Barce. Barce then instructed DeLello not to place the Tape into evidence. Barce did not tell DeLello to destroy the Tape. Neither Barce nor DeLello can remember whether DeLello took the Tape with him or left it with Barce. The Tape was never found after this meeting. Jacobsen cannot be located and is assumed to have fled.[2]

Samek filed a motion to dismiss the charges against him claiming that the State's failure to preserve exculpatory evidence in the form of the Tape violated his constitutional right to due process.[3] Samek's due process claim is governed by two Supreme Court cases, *California v. Trombetta*[4] and *Arizona v. Youngblood*,[5] which "set out the test . . . to determine when the government's failure to preserve evidence rises to the level of a due process violation."[6]

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[2]These facts are based upon Samek v. State, 688 N.E.2d 1286 (Ind. App. 1997), *reh'g denied* (Feb. 19, 1998).

[3]U.S. CONST. amend V. ("[N]or shall any person . . . be deprived of life, liberty or property, without due process of law . . . ."); U.S. CONST. amend XIV, 1 ("[N]or shall any State deprive any person of life, liberty or property without due process of law . . . .").

[4]467 U.S. 479 (1984) [hereinafter *Trombetta*].

[5]488 U.S. 51 (1988) [hereinafter *Youngblood*].

[6]United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993) [hereinafter *Cooper*].

Cases like defendant Samek's, which require due process analysis of the government's failure to preserve evidence, routinely arise.[7] It is well settled that *Trombetta* and *Youngblood* govern analysis of these cases.[8] Despite this agreement,

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[7]For example, some of the cases requiring *Trombetta* and *Youngblood* analysis that arose during 1998 include: United States v. Wilson, No. 97-1298, 1998 WL 538119 (2d Cir. Mar. 13, 1998); United States v. Sofidiya, No. 97-4681, 1998 WL 743597 (4th Cir. Oct. 23, 1998); Little v. Johnson, No. 98-40240, 1998 WL 853027 (5th Cir. Dec. 10, 1998); Irby v. DeTella, No. 97-1797, 1998 WL 796064 (7th Cir. Nov. 9, 1998); United States v. Garcia, No. 97-50576, 1998 WL 568052 (9th Cir. Aug. 26, 1998); United States v. Andreas, No. 96 CR 762, 1998 WL 214666 (N.D. Ill. Apr. 22, 1998); Otsuki v. Dubois, 994 F. Supp. 47 (D. Mass. Feb. 5, 1998); State v. Gaston, No. L-97-1170, 1998 WL 833556 (Ohio Ct. App. Dec. 4, 1998); State v. Leggett, No. WM-97-029, 1998 WL 614553 (Ohio Ct. App. Sept. 4, 1998); People v. Frye, 18 Cal. 4th 894 (Cal. 1998); Robinson v. State, No. 04-97-00392-CR, 1998 WL 236324 (Tex. Ct. App. May 13, 1998); State v. Hawkins, 958 P.2d 22 (Idaho Ct. App. 1998); Hawkins v. State, 964 S.W.2d 767 (Tex. App. Beaumont 1998).

[8]*Trombetta* and *Youngblood* govern all due process claims that arise under the federal constitution. *See generally Cooper*, 983 F.2d at 931. A majority of state courts also apply *Trombetta* and *Youngblood* to due process claims arising under their state constitutions (or they do not differentiate between the standards that apply to state and federal claims and apply *Trombetta* and *Youngblood* to both). *See* State v. Walden, 905 P.2d 974 (Ariz. 1995); Wenzel v. State, 815 S.W.2d 938 (Ark. 1991); State v. Walker, 914 P.2d 1320 (Ariz. Ct. App. 1995); People v. Beeler, 891 P.2d 153, 166 (Cal. 1995), *overruled in part by* Calderon v. United States, 163 F.3d 530 (1998) and EgoAguirre v. White, 1999 U.S. Dist. LEXIS 3162 (1999); People v. Smith, 926 P.2d 186 (Colo. Ct. App. 1996); State v. Bock, 659 So. 2d 1196 (Fla. Dist. Ct. App. 1995); Walker v. State, 449 S.E.2d 845 (Ga. 1994); Stuart v. State, 907 P.2d 783 (Idaho 1995); People v. Pecoraro, 677 N.E.2d 875 (Ill. 1997); Bivins v. State, 642 N.E.2d 928 (Ind. 1994); Taylor v. State, 834 P.2d 1325 (Kan. 1992) (*overruled on other grounds by* State v. Rice, 932 P.2d 981 (Kan. 1997); Collins v. Commonwealth, 951 S.W.2d 569 (Ky. 1997); State v. Schexnayder, 685 So. 2d 357 (La. Ct. App. 1996); State v. Berkley, 567 A.2d 915 (Me. 1989); People v. Huttenga, 493 N.W.2d 486 (Mich. Ct. App. 1992); Holland v. State, 587 So. 2d 848 (Miss. 1991); State v. Richard, 798 S.W.2d 468 (Mo. Ct. App. 1990); State v. Peterson, 494 N.W.2d 551 (Neb. 1993); People v. Scattareggia, 152 A.D.2d 679 (N.Y. App. Div. 1989); State v. Robinson, 488 S.E.2d 174 (N.C. 1997); State v. Estep, 598 N.E.2d 96 (Ohio Ct. App. 1991); Torres v. State, 962 P.2d 3 (Okla. Crim. App. 1998); State v. Hendershott, 887 P.2d 351 (Or. Ct. App. 1994); Commonwealth v. Moss, 689 A.2d 259 (Pa. 1997); State v. Garcia, 643 A.2d 180 (R.I. 1994); State v. Jackson, 396 S.E.2d 101 (S.C. 1990); State v. Arguello, 502 N.W.2d 548 (S.D. 1993); State v. Eldridge, 951 S.W.2d 775 (Tenn. Crim. App. 1997); State v. Rudd, 871 S.W.2d 530 (Tx. Ct. App. 1994); State v. Holden, 964 P.2d 318 (Utah Ct. App. 1998); Mullins v. Commonwealth, No. 1250-94-3, 1996 WL 343953 (Va. Ct. App. June 25, 1996); State v. Copeland, 922 P.2d 1304 (Wash. 1996); State v. Greenwold, 525 N.W.2d 294 (Wis. Ct. App. 1994); Gale v. State, 792 P.2d 570 (Wyo. 1990).

A minority of states have either rejected the *Trombetta/Youngblood* approach because of concerns that the bad faith requirement doesn't adequately guarantee due process, *see infra* note 70, and apply a balancing test approach to analysis of due process claims arising under their state constitutions, or, apply *Trombetta* and *Youngblood* along with additional criteria or factors. *See ex parte* Gingo, 605 So. 2d 1237 (Ala. 1992); Thorne v. Department of Public Safety, 774 P.3d 1326, 1330 n.9 (Alaska 1989); State v. Morales, 657 A.2d 585 (Conn. 1995); Brown v. United States, 1998 WL 422676 (D.C. 1998); Hammond v. State, 569 A.2d 81 (Del. 1989); State v. Matafeo, 787 P.2d 671 (Haw. 1990); State v. Hulbert, 481 N.W.2d 329 (Iowa 1992); State v. Schmid, 487 N.W.2d 539 (Minn. Ct. App. 1992); Commonwealth v. Henderson, 582 N.E.2d 496 (Mass. 1991); State v. Halter, 777 P.2d 1313 (Mont. 1989);

however, courts frequently botch their application of *Trombetta* and *Youngblood*. Hoping to prevent future blunders, this Article identifies three mistakes that courts commonly make when applying *Trombetta* and *Youngblood* and seeks to clarify *Trombetta* and *Youngblood's* proper application. As preparation for the discussion, this Article introduces the *Trombetta* and *Youngblood* cases. *Trombetta* and *Youngblood* are then applied to defendant Samek's situation in an attempt to discern whether he has a sound due process claim. The uncertainties that arise in this application justify examination of three specific questions. Part I of this Article examines the first question, what does it mean for evidence to have "apparent exculpatory value?" Part II of this Article answers the second question, when does *Youngblood's* bad faith requirement apply in failure to preserve evidence cases? Part III then seeks to determine the substance of *Youngblood*'s bad faith requirement and identify the best approach to defining it. Ultimately, this Article argues that there are three common mistakes that courts make when applying *Trombetta* and *Youngblood*. These mistakes are made because the answers to the three questions explored in Parts I through III are confused, ignored, or unclear. To avoid making these mistakes in the future, courts applying *Trombetta* and *Youngblood* must first correctly examine evidence to determine whether it has "apparent exculpatory value," focusing on whether any exculpatory value was apparent and recognizing that evidence does not need to exonerate a defendant to meet this standard. Second, courts must apply *Youngblood'*s bad faith requirement to all failure to preserve evidence cases. Finally, courts must adopt the rebuttable presumption approach as the best method for defining bad faith.

II. *CALIFORNIA V. TROMBETTA*

When stopped on suspicion of drunken driving on California highways, Trombetta submitted to an Intoxilyzer[9] test which revealed a blood alcohol concentration higher than the legal limit in California. Accordingly, Trombetta was charged with driving while intoxicated. Prior to Trial, Trombetta filed a motion to suppress the results of the Intoxilyzer test on the grounds that the police had failed to preserve the breath samples. Trombetta claimed that "had a breath sample been preserved, he would have been able to impeach the incriminating Intoxilyzer results."[10]

Rejecting Trombetta's motion, the Court found that a State only has a duty to preserve evidence that is constitutionally material. "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

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Keener v. State, 850 P.3d 311 (Nev. 1993); State v. Smagula, 578 A.2d 1215 (N.H. 1990); State v. Dreher, 695 A.2d 672 (N.J. Super. Ct. App. Div. 1997); State v. Barnett, 543 N.W.2d 774 (N.D. 1996); State v. Delisle, 648 A.2d 632 (Vt. 1994); State v. Osakalumi, 461 S.E.2d 504 (W. Va. 1995). Finally, I was unable to locate any Maryland cases that consider this issue post-*Youngblood*.

[9]"The Omicron Intoxilyzer . . . is a device used in California to measure the concentration of alcohol in the blood of motorists suspected of driving while under the influence of intoxicating liquor." *Trombetta,* 467 U.S. at 481.

[10]*Id.* at 483.

available means."[11] The Intoxilyzer evidence failed both prongs of the materiality test. It did not possess exculpatory value; "the chances [were] extremely low that preserved samples would have been exculpatory,"[12] and "were much more likely to provide inculpatory . . . evidence."[13] Trombetta also had "alternative means of demonstrating [his] innocence."[14]

The Court's articulation of the constitutional materiality test was preceded by a discussion of specific facts present in *Trombetta* which contributed to its determination that "the State's failure to retain breath samples . . . [does not constitute] a violation of the Federal Constitution."[15] First, "California authorities in this case did not destroy [the] breath samples in a calculated effort to circumvent the disclosure requirements established by *Brady v. Maryland* and its progeny."[16] Second, "the officers . . . were acting 'in good faith and in accord with their normal practice.'"[17] Third, there was no allegation of "official animus towards [Trombetta] or of a conscious effort to suppress exculpatory evidence."[18] Finally, "California's policy of not preserving breath samples [was] without constitutional defect."[19]

III. *ARIZONA V. YOUNGBLOOD*

A young boy was kidnapped, molested and sexually assaulted. The hospital which treated the boy following the ordeal used a "sexual assault kit" to collect evidence of the attack. The evidence was then turned over to the police who placed the kit in a secure refrigerator. The police also collected the boy's underwear and T-shirt but these items were not refrigerated. The police criminologist found semen

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[11] *Id.* at 489.

[12] *Id*.

[13] *Id*.

[14] *Trombetta*, 467 U.S. at 490. Trombetta could have challenged the reliability of the Intoxilyzer machine or cross-examined the police officer who administered the Intoxilyzer test. *Id.*

[15] *Id.* at 488.

[16] *Id*; *see also* Brady v. Maryland, 373 U.S. 83 (1963) [hereinafter *Brady*], held that upon the request of a criminal defendant, the State has a duty to disclose evidence material to guilt or punishment. If the State does not do this, due process is violated . . . ." The extent of the *Brady* guarantee was subsequently expanded by *United States v. Agurs*, 427 U.S. 97 (1976), which held that the State has an absolute duty to disclose to criminal defendants evidence material to their guilt or innocence even in the absence of a specific request.

[17] *Trombetta*, 467 U.S. at 488 (citing Killian v. United States, 368 U.S. 231 (1961)). In *Killian v. United States,* the Court held that destruction of a police officer's preliminary notes did not rise to the level of a constitutional violation. "If the agents' notes . . . were made only for the purpose of transferring the data thereon . . . , and if, having served that purpose, they were destroyed by the agents *in good faith and in accord with their normal practices*, it would be clear that their destruction did not constitute an impermissible destruction of evidence . . . ." *Id.* at 242 (emphasis added).

[18] *Trombetta*, 467 U.S. at 488.

[19] *Id.*

stains on the underwear and T-shirt but was unable to successfully test them because the stains had not been properly preserved.

Larry Youngblood was convicted by a jury of the kidnapping, child molestation and sexual assault. His principal defense was that the boy (victim) misidentified him as the perpetrator. Apparently, Youngblood claimed that had the semen stains on the boy's clothing been properly preserved, test results might have completely exonerated him. Rejecting this argument, the Court, after discussing *Trombetta*,[20] found 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."[21] While bad faith is not a consideration when the State fails to disclose material exculpatory evidence, "the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."[22]

The purpose of the bad faith requirement is to "limit[] the extent of the police's obligation to preserve evidence to reasonable bounds and confine[] it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." The Court did not explicitly define bad faith. Other than the purpose statement above, their main indication of the substance of bad faith comes in a footnote. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."[23]

Like the Court in *Trombetta*, the Court in *Youngblood* articulated specific facts which contributed to its holding. First, "[t]he failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent."[24] Second, the police's failure to refrigerate the sample and the sample's subsequent resistance to testing was not concealed from Youngblood. Finally, the Court relied on a lower court's note that factually, "there was no suggestion of bad faith on the part of the police."[25] Justice Stevens' concurring opinion in *Youngblood* also identified as critical the fact that "at the time the police failed to refrigerate the victim's clothing . . . they had at least as great an interest in preserving the evidence as did the person later accused of the crime."[26]

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[20]The *Youngblood* Court described the holding in *Trombetta* as based on three premises. First, that the officers were acting "in good faith and in accord with their normal practice;" second, that the chances that the preserved samples would have exculpated the defendants were slim, and third, that the defendants had "alternative means of demonstrating their innocence." *Youngblood*, 488 U.S. at 56.

[21]*Id.* at 58.

[22]*Id.* at 57.

[23]*Id.* at 56 n.*.

[24]*Id.* at 58.

[25]*Youngblood*, 488 U.S. at 51.

[26]*Id.* at 59 (Stevens, J., concurring). Justice Stevens identified two other factors which, post-trial, are helpful to analysis of a *Youngblood* claim. First, Justice Stevens found it "unlikely that the defendant was prejudiced by the State's omission." *Id.* This was because

IV. APPLICATION OF *TROMBETTA*

Applying *Trombetta's* constitutional materiality test to Samek, the critical inquiry is into the exculpatory value of the lost Tape. There are two tenable responses to this inquiry. On one hand, it seems clear that the lost Tape had apparent exculpatory value. Both DeLello and Barce had the opportunity to hear the Tape prior to its loss. They were aware that the Tape contained a confession to the burglary for which Samek had been arrested. They believed that the confessor was Jacobsen. If Jacobsen committed the burglary, this would tend to clear Samek from fault. On the other hand, it is possible to conclude that the Tape was not exculpatory evidence, but rather, was merely "potentially useful evidence."[27] The mere fact that a person other than Samek confessed to the burglary does not necessarily tend to clear him from guilt. First, the confessor merely said that he, himself, committed the burglary. The confessor did not say that Samek did not commit the burglary.[28] This is particularly significant given the possibility that Samek and Jacobsen committed the crime together; they were together when the police arrested Samek and they were both in the van carrying the burgled items. Second, the confessor on the Tape did not identify himself.[29] Though DeLello believed that the confessor was Jacobsen, this belief was mere speculation at the time the Tape was lost. Next, the circumstances surrounding the making of the Tape were unknown.[30] Samek's wife delivered the Tape. She did not explain how or why she was in possession of the Tape. She made no statement as to her belief in the authenticity of the Tape. At the time of its loss, DeLello's belief in the Tape's authenticity was not grounded in objective fact.[31]

Unfortunately, the Court in *Trombetta* offers little guidance as to the definition of "exculpatory" as used in its rule or the distinction (if any[32]) between exculpatory and potentially exculpatory evidence. As a result, it is necessary to address the issue of what constitutes exculpatory evidence under *Trombetta*.

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the trial court instructed the jury: "If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest." *Id.* Second, Stevens concluded that "the fact that no juror chose to draw the permissive inference that proper preservation of the evidence would have demonstrated that the defendant was not the assailant suggest(s) that the lost evidence was immaterial. *Id.* at 60. These two factors are not helpful to a pre-trial analysis of a *Youngblood* claim.

[27]This was the conclusion of the Indiana Court of Appeals in *Samek v. State*, 688 N.E.2d 1286, 1289 (Ind. Appeals 1997). *See infra* note 52 for further discussion.

[28]*Id*.

[29]*Id*.

[30]*Id*.

[31]This Article proceeds on the assumption that the Tape would be admissible at trial. It is important to note, however, that there is a potential hearsay problem with the Tape. *See* Indiana Rules of Evidence, Article VIII. Hearsay; *see also Samek*, 688 N.E.2d at 1287 (noting that the trial court granted a motion stating that the Tape was inadmissible hearsay).

[32]In many instances it is unclear whether courts use and/or quote "potentially exculpatory evidence" in an effort to distinguish it from the sort of exculpatory value required by *Trombetta* or whether it is a term is sufficient to satisfy *Trombetta's* materiality requirement. *See infra* Part I.

V. APPLICATION OF *YOUNGBLOOD*

Seeking to determine whether *Samek* represents one of those cases where "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant,"[33] the critical inquiry is whether DeLello and/or Barce acted in bad faith in failing to preserve the lost Tape. There are several tenable responses to this inquiry.

Youngblood emphasizes the connection between the presence of bad faith and "the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."[34] Apparently, if police know that evidence has exculpatory value and that evidence is subsequently lost then this is prima facie evidence[35] of bad faith. One response to the bad faith inquiry then, is that because Barce and DeLello knew that the Tape had either exculpatory value or at least potential exculpatory value[36] prior to the loss of the Tape, *Youngblood* requires a conclusive finding that bad faith was present.[37] Another response is that Barce and DeLello's loss of evidence which they knew had exculpatory value creates a rebuttable presumption that they acted in bad faith.[38] A final response is that bad faith is simply not present;[39] Samek offered no independent facts or evidence sufficient to allow the Court to find that Barce or DeLello acted in bad faith.

The factors discussed by the *Youngblood* majority are not particularly helpful to an assessment of which of the above responses is most consistent with the Court's intent. A main reason for this is the fact that, at the time of loss, both DeLello and Barce had listened to the Tape and knew that it contained a confession to the burglary and had reason to think that the confessor was not the defendant. By contrast, the police in *Youngblood* did not know that there were semen stains on the boy's underwear or T-Shirt when they collected them and they further did not know the significance of those stains (i.e. whether, once tested, they would tend to inculpate or exculpate defendant). Barce and DeLello's awareness of the content and potential value of the Tape magnifies the significance of footnote * and its conclusion that "the presence . . . of bad faith . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence."

Looking specifically at the factors that the *Youngblood* Court considered, Barce and DeLello's awareness of the value of the Tape further makes a conclusion that its loss was the result of "mere negligence" more difficult than was the same determination in *Youngblood*. This awareness also precludes a finding that at the time the Tape was lost the police "had at least as great an interest in preserving the

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[33] *Youngblood*, 488 U.S. at 58.

[34] *Id.* at 56 n.*.

[35] Prima facie evidence is "[e]vidence good and sufficient on its face. Such evidence . . . is sufficient to establish a given fact, . . . which if not rebutted or contradicted, will remain sufficient." BLACK'S LAW DICTIONARY 1190 (6th ed. 1990).

[36] *See infra Part* I applying *Trombetta* to *Samek* and discussing whether the lost Tape had exculpatory value or potential exculpatory value.

[37] *See infra* Part III.A.

[38] *See infra* Part III.B.

[39] *See infra* Part III.C.

evidence" as did Samek. Barce and DeLello presumably had sufficient evidence to support, at minimum, Samek's arrest for the burglary. If the Tape had turned out to be insignificant (i.e. it was later determined to be a fabrication or to have no evidentiary value) their case would be in the same position as it was before the Tape appeared. On the other hand, if the Tape were admitted into evidence at trial, it could significantly weaken their case.

VI. WHAT CONSTITUTES APPARENT EXCULPATORY VALUE?

Exculpatory evidence "tends to justify, excuse or clear the defendant from alleged fault or guilt."[40] Therefore, any evidence that "tends to justify, excuse or clear the defendant from alleged fault or guilt" has exculpatory value. Exculpatory value is apparent when this value is "obvious, evident, or manifest."[41] Though these definitions may appear straightforward,[42] courts mistakenly apply the concept of "apparent exculpatory value" on a regular basis. Many of these mistakes stem from an undefined distinction between evidence with "apparent exculpatory value" and evidence with "potential exculpatory value."[43] This unclear distinction is further confused by the fact that courts each seem to define "apparent exculpatory value" and "potential exculpatory value" differently. By in large, courts have failed to clarify their use of these terms. As a result, different courts dealing with the same piece of evidence apply different labels to it and arrive at different conclusions as to whether it satisfies *Trombetta*'s "apparent exculpatory value" requirement. To resolve the confusion, I rely on the black letter definitions provided above and then look to various discussions and determinations of "apparent exculpatory value."

A. Evidence Which Has Been Tested and Appears to be Inculpatory

Evidence which has been examined or tested by government agents and appears to be inculpatory evidence does not have apparent exculpatory value.[44] Such evidence is "not expected to play a significant role in the suspect's defense" as "the chances are extremely low that [the] preserved [evidence] would have been exculpatory."[45]

The breath samples in *Trombetta* provide an example of evidence that has been tested and appears to have only inculpatory value. The Intoxilyzer twice analyzed samples of Trombetta's breath. Trombetta registered a blood-alcohol concentration higher than the legal limit. Given the reading of the Intoxilyzer there was nothing that would have suggested to the police officer who performed the tests that the

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[40]BLACK'S LAW DICTIONARY 566 (6th ed. 1990).

[41]*Id.* at 96.

[42]The *Trombetta* and *Youngblood* courts seem to have understood what they meant when they used these term "apparent exculpatory value." Had they been confused or anticipated that the term would cause confusion, it seems likely that they would have provided some explicit definition beyond the standard and commonly used definition.

[43]*See infra* Part I.E.

[44]*See generally Trombetta*, 467 U.S. at 489-90.

[45]*Id.* at 489.

breath samples might in any way exculpate Trombetta. The breath samples therefore did not have apparent exculpatory value.

The breath samples in *Trombetta* were tested and appeared inculpatory. By contrast, the Tape lost by Barce and DeLello was examined and was not inculpatory. Instead, it appeared to be exculpatory in nature. As a result, the reasoning applied to the destroyed breath samples in *Trombetta* does not apply to the lost Tape in *Samek*.

B. Evidence Which Could Have Been Subjected to Tests Which Might Have Exonerated Defendant

Evidence that has not been examined or tested by government agents provides a prime example of evidence that does not have apparent exculpatory value.[46] "*Trombetta* speaks of evidence whose exculpatory value is 'apparent.' . . . . The possibility that . . . samples could have exculpated [defendant] if preserved or tested is not enough to satisfy the standard."[47]

The stains on the boy's clothing in *Youngblood* are an example of the sort of evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."[48] Because the stains were not tested prior to their degradation, there was no way of knowing whether the stains tended to implicate or exculpate defendant Youngblood.[49]

The lost Tape in *Samek* is not like the lost stains in *Youngblood.* While government agents in *Youngblood* had no awareness at all of any sort of exculpatory value in stains on the boy's clothing, Barce and DeLello knew the contents of the Tape and were fully aware that it had value to Samek.

C. Evidence Whose Possible Exculpatory Value is Apparent Prior to its Loss or Destruction

Evidence whose exculpatory value is suggested to or recognized by government agents may qualify under *Trombetta* as having apparent exculpatory value. In *United States v. Cooper*[50] government agents seized laboratory equipment from Cooper, a suspected methamphetamine manufacturer. Cooper immediately told government agents that the equipment was used in his legitimate chemical manufacturing business and was neither capable of nor configured to produce methamphetamine. Government agents knew that Cooper did have a legitimate chemical manufacturing business. Independent experts later testified that were the equipment configured as Cooper said, it would not have been capable of producing methamphetamine. Before the equipment was examined it was destroyed as part of routine procedure. The Court concluded that the equipment's exculpatory value was

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[46]*See generally Youngblood*, 488 U.S. at 51.

[47]*Id.* at 56 n.*.

[48]*Youngblood*, 488 U.S. at 57.

[49]*Id.* at 54-55.

[50]983 F.2d 928 (9th Cir. 1993). It is useful to note that *Cooper* is one of the few (if not the only) published case where the court successfully concluded that the lost evidence had exculpatory value. Interestingly, this conclusion came after the government failed to challenge the district court's same determination about the value of the evidence.

apparent before destruction.[51] Following *Cooper*, evidence need not be "certain" to exonerate a defendant to qualify as having "exculpatory value" under *Trombetta*. This conclusion is affirmed by the Court's explicit reference to the destroyed lab equipment's value as "potentially exculpatory evidence."[52]

The facts in *Samek* are somewhat similar to those in *Cooper*. In the same way that the government agents in *Cooper* knew about the value of the equipment to Cooper, it is clear that Barce and DeLello, having heard the burglary confession on the Tape, knew of its value to Samek. Though it is not certain that the Tape would have exonerated Samek–the facts may have born out that Samek and Jacobsen committed the crime together–there is little argument that the Tape would have tended to cast some doubt on Samek's guilt. As a result, the Tape had apparent exculpatory value.[53]

D. Evidence that will Certainly Exonerate a Defendant

Evidence that will certainly exonerate a defendant necessarily qualifies as having exculpatory value. It is this sort of evidence that most clearly satisfies *Trombetta's* requirement. There are, however, no discoverable cases where the exculpatory value of lost or destroyed evidence has been this clear.[54] Ultimately, it must be admitted that once evidence is lost, its exculpatory value can rarely, if ever, be conclusively

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[51] *Id.* at 931.

[52] *Id.*

[53] Despite my conclusion that the Tape does have exculpatory value, I would be remiss if I did not note that the Indiana Court of Appeals held otherwise in *Samek v. State*, 688 N.E.2d 1286, 1289 (Ind. Ct. App. 1997). As explained in my analysis, I disagree with their conclusion. One of the few cases that contains an investigation of the meaning of "exculpatory value," the Court in *Samek* first looked to Black's Law dictionary defining evidence with exculpatory value as evidence that "tends to justify, excuse or clear the defendant from alleged fault or guilt." *Supra* note 39. Working from this definition, I find it difficult to believe that an objective court would conclude that a taped confession of a man other than the defendant would not "tend to clear the defendant from alleged fault or guilt." If evidence like the lost Tape does not meet this requirement, I find it difficult to imagine lost or destroyed evidence that would ever meet this requirement.

After defining exculpatory value, the Court then distinguished an Indiana Supreme Court case, *Bivins v. State*, 642 N.E.2d 928 (Ind. 1994) (holding that a tape recording of a defendant's preliminary advisements was material evidence where the tape would have supported defendant's assertion that he was under duress at the time he gave his statement), which ostensibly would have required a finding that the Tape lost by Barce and DeLello was of "apparent exculpatory value." The Court reasoned "We think that . . . the [Supreme Court in Bivins] was using 'material' in the traditional sense rather than as a term of art as employed by the Court in *Youngblood*." *Id.* at 1288. They proceeded to announce a distinction between "potentially useful evidence" and "materially exculpatory evidence" without fleshing out the distinction. With no analysis other than that recounted *infra* at Part VII.B. (discussion of Trombetta application to Samek), the Court concluded that the lost Tape fell into the category of "potentially useful evidence" and did not satisfy *Trombetta's* "apparent exculpatory value" requirement. *Id.* at 1289.

[54] I have found no reported cases in which the exculpatory value of evidence was this clear.

established.[55] As a result, it is a rare, if non-existent, situation where lost or destroyed evidence is deemed clearly exculpatory by a fact finding court.

E. Framework for Understanding "Exculpatory Value"

The key to a proper understanding of exculpatory value is not so much the distinctions between different levels of exculpatory value (i.e. potential v. certain), but the requirement that such value be "apparent" prior to loss or destruction of the evidence.[56] The mere failure to preserve evidence which could have been subjected to tests which might have exonerated the defendant will not constitute a due process violation because the evidence had no exculpatory value that was *apparent* before its loss. In the same way, there is no apparent exculpatory value to evidence that has been tested and is apparently inculpatory. However, when the government fails to preserve evidence that has apparent potential to "cast doubt on the guilt of defendant," such evidence has exculpatory value within the meaning of *Trombetta*. So long as its exculpatory value is apparent, this qualification as having exculpatory value applies regardless of the degree with which it is certain that the evidence will exculpate a defendant (i.e. certain or potential).

VII. WHEN DOES *YOUNGBLOOD'S* BAD FAITH REQUIREMENT APPLY TO FAILURE TO PRESERVE EVIDENCE CASES?

Having concluded that the Tape lost by Barce and DeLello satisfies *Trombetta's* exculpatory value requirement, it is necessary to determine whether satisfaction of *Trombetta's* materiality test[57] alone constitutes a violation of Samek's right to due process or whether Samek must also prove bad faith under *Youngblood* to show a due process violation. There are two tenable responses to this inquiry.

A. Approach #1 Bad Faith is a Required Element of All Failure to Preserve Evidence Claims

One response is that Samek must prove the presence of bad faith under *Youngblood.* The First Circuit in *United States v. Femia*[58] explained" [i]n *Youngblood, the Court . . .* added a third element" to *Trombetta's* two pronged materiality test. Following *Youngblood*,

> [any] defendant who seeks to suppress evidence formerly in the government's possession therefore must show that the government, in failing to preserve the evidence, (1) acted in bad faith when it destroyed evidence, which (2) possessed an apparent exculpatory value and, which (3) is to some extent irreplaceable. Thus in missing evidence cases, the

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[55] *See* State v. Okumura, 894 P.2d 80, 99 (Haw. 1995).

[56] *Youngblood* "reemphasized *Trombetta's* focus on whether the exculpatory value of the evidence was *apparent* before its destruction." State v. Leroux, 557 A.2d 1271, 1273 (Conn. App. Ct. 1989) (emphasis added).

[57] This Article proceeds on the assumption that the evidence lost by Barce and DeLello is unobtainable from other sources.

[58] 9 F.3d 990 (1st Cir. 1993).

> presence or absence of good or bad faith by the government will be dispositive.[59]

There are two major implications of this approach. First, as noted by *Femia*, good or bad faith becomes relevant, if not dispositive, to the analysis of each and every case where the government fails to preserve evidence that has apparent exculpatory value. Second, any determination that evidence lacks apparent exculpatory value[60] becomes dispositive.[61] Whenever the government fails to preserve evidence that has no apparent exculpatory value, the good or bad faith of police is not a consideration.

B. Approach #2 Bad Faith is Only Required When Evidence is Not Material Under Trombetta

A different response is that Samek is not required to prove bad faith because the lost Tape had apparent exculpatory value. Bad faith is only required when government agents fail to preserve evidence whose exculpatory value is indeterminate. The Tenth Circuit demonstrated this approach in *United States v. Bohl.*[62]

> We first must determine whether *Trombetta* or *Youngblood* governs our analysis of [the defendants'] due process challenge. This inquiry turns on

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[59] *Id.* at 993-94. *See, e.g.,* United States v. Rastelli, 870 F.2d 822, 833 (2d Cir. 1989); Jones v. McCaughtry, 965 F.2d 473, 477 (7th Cir. 1992); United States v. Malbrough, 922 F.2d 458, 463 (8th Cir. 1990); People v. Muna, 1992 WL 245624, *3 (D. Guam App. Div. 1992); Maravilla v. United States, 901 F. Supp. 62, 68 (D.P.R. 1995).

[60] *See infra* Part I.

[61] This stands in contrast to Approach #2 which allows for the possibility that the failure to preserve evidence without apparent exculpatory value might rise to the level of a due process violation *if* bad faith is present. *See supra* discussion of Approach #2.

[62] 25 F.3d 904 (10th Cir. 1994); *see also* United States v. Jobson, 102 F.3d 214, 218 (6th Cir. 1996). It is necessary to note that while *Bohl* correctly articulated this approach, it did not correctly apply the approach. In *Bohl*, government agents failed to preserve steel tower legs whose chemical composition was central to the case against defendants Bell and Bohl. The tower legs were destroyed after the government was explicitly and repeatedly placed on notice that Bell and Bohl wanted the legs preserved and believed they were exculpatory, and after the government was presented with objective, independent evidence which gave them reason to believe that further tests on the tower legs might lead to exculpatory evidence. *Bohl*, 25 F.3d at 911. The exculpatory value of the tower legs was apparent before their destruction. More could be said than that "[the evidence] could have been subjected to tests the results of which might have exonerated the defendant." *Youngblood*, 488 U.S. at 57. As a result, the tower legs should have been recognized as having "apparent exculpatory value," *see infra* Part VI (discussion of this value), and bad faith should not have been required to prove a due process violation.

The Court in *Bohl* recognized the factual similarities between their case and *United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993), (this recognition came during the discussion of bad faith), yet failed to follow *Cooper's* analysis, *see infra* Part I.C., which would have lead to the conclusion that the tower legs did have apparent exculpatory value. Following the approach they articulate, had the *Bohl* Court reached this conclusion, they would have found a due process violation without requiring a finding of bad faith.

> the import of the destroyed materials. To invoke *Trombetta*, a defendant must demonstrate that the government destroyed evidence possessing an 'apparent' exculpatory value. However, to trigger the *Youngblood* test, all that need be shown is that the government destroyed "potentially useful evidence." The Court in *Youngblood* defined "potentially useful evidence" as evidence of which "no more can be said than that it could have been subjected to tests the results of which might have exonerated the defendant." Because our review of the record concludes that the [lost evidence] offered only potentially useful evidence for [defendants'] defense, we apply the rule of *Youngblood* rather than *Trombetta*.[63]

Applying *Bohl's* approach to Samek, because the Tape had apparent exculpatory value[64] *Youngblood* is not triggered and bad faith is not relevant to a determination of whether Samek's due process rights were violated.

There are two major implications of this approach. First, a due process violation may be shown even where the police acted in good faith so long as the evidence has apparent exculpatory value. Second, a due process violation may be shown even where the exculpatory value of the evidence was not apparent at the time the evidence was lost or destroyed.

C. Approach #1 Correctly Applies Trombetta *and* Youngblood

The implications of Approach #2 are not consistent with *Trombetta* and *Youngblood*. First, it is not correct that a due process violation may be shown even where the police acted in good faith. *Trombetta* itself indicated that good faith was a separate and distinct reason for finding no due process violation. Moreover, *Youngblood* read *Trombetta* this way. If a due process violation cannot occur when government agents act in good faith, then bad faith must necessarily be a part of any due process violation. Consequently, Approach #1's inclusion of *Youngblood*'s bad faith requirement in every assessment of a failure to preserve evidence case is proper. Second, and also weighing against Approach #2, a due process violation may not be shown where the exculpatory value of the evidence was not apparent at the time it was lost or destroyed. *Youngblood* indicated that its bad faith requirement extended, rather than replaced, *Trombetta*'s requirement that the evidence have apparent exculpatory value. *Youngblood* explained, "we made clear in *Trombetta* that the exculpatory value of the evidence must be apparent 'before the evidence [is] destroyed.'" By contrast, Youngblood was not able to show "that the police knew the semen samples would have exculpated him when they failed to [preserve it]."[65] Moreover, *Youngblood* declared, "The presence or absence of bad faith . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed," and justified the bad faith requirement on the ground that it "limits the extent of the police's obligation to preserve evidence . . . to those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant."[66] Police conduct would

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[63]United States v. Bohl, 25 F.3d at 910 (citations omitted).

[64]*See infra* Part I.C.

[65]*Youngblood*, 488 U.S. at 56 n.* (citations omitted).

[66]*Id.* at 56 n.* & 58.

not indicate an awareness that the evidence could form a basis for exonerating the defendant if they themselves were not aware that the evidence had apparent exculpatory value. Approach #1 does not forget *Trombetta*'s materiality requirement, but combines it with the bad faith requirement. This is workable and consistent with both *Trombetta* and *Youngblood.*

Approach #1 correctly applies *Trombetta* and *Youngblood*. Accordingly, to prove a due process violation, Samek must show that Barce and DeLello acted in bad faith when they lost the Tape.

VIII. WHAT IS THE SUBSTANCE OF BAD FAITH?[67]

To prove a due process violation, Samek must prove that Barce and DeLello acted in bad faith. However, to properly assess evidence offered to prove the presence of bad faith a court must first determine what is necessary to establish bad faith. Though the question, "What constitutes bad faith . . . ?"[68] was first posed over a decade ago by Justice Blackmun in his *Youngblood* dissent, there is still no clear answer to the question.[69]

One reason such an answer has not been reached is that discussion of the substance of the bad faith requirement has been overshadowed by concern over whether *Youngblood* adequately preserves a defendant's constitutional right to due process. Justice Stevens, in his concurring opinion to *Youngblood,* recognized, "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 unfair."[70] Justice Steven's due process concern gave rise to a lengthy dialogue among legal scholars, the majority of whom conclude that *Youngblood's* bad faith requirement falls short of guaranteeing due process to criminal defendants.[71]

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[67]All of the discussion in Part III is predicated on the assumption that the elements of *Trombetta*'s two prong materiality test, that the evidence have apparent exculpatory value and be unobtainable from other sources, have already been proven.

[68]*Id.* at 66 (Blackmun, J., dissenting) ("I also doubt that the 'bad faith' standard creates the bright-line rule sought by the majority. . . . 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?").

[69]Currently, courts continue to struggle with the definition of bad faith. In June 1998 the Court in Rodriguez v. State, No. 03-97-00180-CR, 1998 WL 303873, at *4 (Tex. Ct. App. June 11, 1998), reaffirmed that "[w]hat constitutes "bad faith" is not altogether clear from the case law."

[70]*Id*. at 61 (Stevens, J., concurring).

[71]*See generally* Sarah M. Bernstein, Note, *Fourteenth Amendment-Police Failure to Preserve Evidence and Erosion of the Due Process Right to a Fair Trial*, 80 J. CRIM. L. & CRIMINOLOGY 1256 (1990); Albert M. T. Finch, III, Note, *"Oops! We Forgot to Put it in the Refrigerator": DNA Identification and the State's Duty to Preserve Evidence*, 25 J. MARSHALL L. REV. 809 (1992); B. W. Gordon, Jr., Note, *Constitutional Law-Due Process-Failure of Police to Preserve Evidence Held Not to Be a Denial of Due Process of Law Absent Defendant's Showing Bad Faith on Part of Police: Arizona v. Youngblood, 109 S. Ct. 333 (1988),* 20 CUMB. L. REV. 211 (1989); Linda Gensler Kaufmann, *Arizona v. Youngblood, State Advantage in Criminal Proceedings: the Ghost Is Real and the Haunting Continues*, 14 OKLA. CITY U. L. REV. 665 (1989); Matthew H. Lembke, Note, *The Role of Police Culpability in*

While the due process problem identified by Justice Stevens is important, the substance of the bad faith requirement is a more immediate concern. Despite the criticism of courts and academics, a majority of the Supreme Court in *Youngblood* necessarily found that the bad faith requirement affords criminal defendants due process. More importantly, in the decade following *Youngblood*, the Court has offered no indication that it plans to reconsider or alter the bad faith requirement. Admitting that the requirement is here to stay, an understanding of its substance is crucial to its proper application. This Article, therefore, focuses on the substance of the bad faith requirement, assuming that at a base level, the requirement does provide due process.

Another reason there has been no answer to the question "what constitutes bad faith?" is that the majority of *Trombetta/Youngblood* cases involve evidence which had no apparent exculpatory value.[72] Once this determination is reached, the presence or absence of bad faith becomes moot, because without apparent exculpatory value there can be no due process violation.[73] Moreover, those courts that try to explore bad faith are fundamentally handicapped in their attempts because bad faith and exculpatory value are so intertwined;[74] when there is no exculpatory value bad faith cannot be fully explored. Next, there is no clear definition of bad faith because those courts who have had occasion to consider the requirement have adopted different approaches to its application.[75] Finally, there are a very limited number of cases where courts have found the presence of bad faith.[76] As a result, there is little opportunity to observe the affirmative character of bad faith.

Leon and Youngblood, 76 VA. L. REV. 1213 (1990); Willis C. Moore, Note, *Arizona v. Youngblood: Does the Criminal Defendant Lose His Right to Due Process When the State Loses Exculpatory Evidence*?, 5 TOURO L. REV. 309 (1989, 90); Karen Carlson Paul, Note, *Destruction of Exculpatory Evidence: Bad Faith Standard Erodes Due Process Rights, Arizona v. Youngblood, 109 S. Ct. 333 (1988)*, 21 ARIZ. ST. L.J. 1181 (1989); Trish Peyser Perlmutter, *Arizona v. Youngblood, 109 S.Ct. 333 (1988)*, 24 Harv. C.R.-C.L. L. Rev. 529 (1989). *But see* Gavin Frost, *Arizona v. Youngblood Adherence to a Bad Faith Threshold Test Before Recognizing a Deprivation of Due Process*, 34 S.D. L. REV. 303 at 407 (1989) (praising *Youngblood* as effectively securing due process for criminal defendants).

[72]*See generally,* People v. Hines, 938 P.2d 388, 419-20 (Cal. 1997); People v. Beeler, 891 P.2d 153, 165-67 (Cal. 1995); People v. Freeman, 8 Cal. 4th 450, 456 (1994); People v. Hardy, 825 P.2d 781, 827 (Cal. 1992); People v. Zapien, 846 P.2d 704, 722-23 (Cal. 1993).

[73]*See supra* Part II.C. for discussion of apparent exculpatory value.

[74]*See Youngblood*, 488 U.S. at 56 n.* ("The presence or absence of bad faith . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence . . . .").

[75]*See supra* Part III.A - C.

[76]I have found only three post-*Youngblood* cases where bad faith was present. *See* United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993) (finding bad faith because the government "[left] unchallenged the district court's conclusion that the police acted in bad faith by allowing the [evidence] to be destroyed while assuring [the defendant] and his attorney that it was being held as evidence"); United States v. Bohl, 25 F.3d 904, 911-13 (10th Cir. 1994) (finding bad faith because the facts and evidence in the case, "in the absence of any innocent explanation offered by the government, [gave] rise to a logical conclusion of bad faith"); Stuart v. State, 907 P.3d 783, 793 (Idaho 1995) ("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.*").

There are three main approaches to defining bad faith. The labels attached to each approach are my own creation and are not used by any court. I believe, however, that the labels effectively represent the approaches to defining bad faith as revealed by different courts' analyses of the problem.

A. Conclusive Presumption Approach

The conclusive presumption approach, while recognizing that bad faith is a required element of Samek's due process claim, would find that Samek has already met his burden of proof to establish a due process violation. This is because "[t]he presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."[77] When the exculpatory value of the evidence is clear, then subsequent loss or destruction of the evidence conclusively indicates the presence of bad faith. The implication, applied to *Samek*, is that Barce and DeLello realized that the Tape could help Samek and then "lost" it to prevent Samek from benefitting from that help. In other words, Barce and DeLello indicated by their conduct "that the evidence could form a basis for exonerating the defendant."[78] Once a conclusive presumption of bad faith arises, the State has no opportunity to demonstrate the absence of bad faith and a defendant need not prove anything further. Since Barce and DeLello were aware of the exculpatory value of the Tape when they lost it, bad faith is conclusively presumed.

This approach to bad faith is simply an alternate formulation of Approach #2 discussed *supra* in Part II.B. Rather than concluding that *Youngblood's* bad faith requirement simply doesn't apply when evidence has apparent exculpatory value, courts adopting this approach conclusively presume that bad faith is present in any situation where evidence with apparent exculpatory value is lost or destroyed. The arguments made against Approach #2, *supra* in Part II.C., apply here as well.

This approach was rejected in *United States v. Lov-It Creamery, Inc.*[79] The Court "[did] not read [*Youngblood's*] footnote as creating a rule that if evidence has apparent exculpatory value at the time it is lost or destroyed, then an inference of bad faith arises."[80] The Court argued that such a reading placed undue emphasis on the footnote which was meant "to emphasize that the measure of the exculpatory value of the evidence must be made with reference to the time it is destroyed, not, for example, after other evidence is uncovered that may change the exculpatory nature

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[77] *Youngblood*, 488 U.S. at 56 n.*.

[78] *Id.* at 58.

[79] 704 F. Supp. 1532 (E.D. Wis. 1989), *modified by* United States v. Lov-It Creamery, Inc., 895 F.2d 410 (7th Cir. 1990).

[80] *Id.* at 1548. Note: the word "inference" as used by the Court in *Lov-It Creamery, Inc*., has the same meaning as the term "conclusive presumption" that I use in my analysis. An inference is "a truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted. A logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts." BLACK'S LAW DICTIONARY 778 (6th ed. 1990).

of already-destroyed evidence."[81] The *Lov-It Creamery* Court rightly concluded that while a government agent's awareness of the exculpatory value of the evidence is "certainly relevant to whether there was bad faith," it cannot be the *only* measure.[82]

B. Rebuttable Presumption Approach

Because an inquiry into bad faith "must necessarily turn on the [government's] knowledge of the exculpatory value at the time it was lost or destroyed,"[83] and because the Tape Barce and DeLello lost was apparently exculpatory, this approach to bad faith establishes a rebuttable presumption of bad faith in Samek's favor.[84] This presumption can be overturned upon the showing of sufficient proof by Barce and DeLello that bad faith was not a factor behind the loss or destruction of the Tape.

United States v. Bohl[85] demonstrates the rebuttable presumption approach. After concluding that the lost evidence had potential exculpatory value,[86] the Court effectively established a rebuttable presumption of bad faith. They proceeded to analyze the evidence for an "innocent explanation" of the destruction which could rebut the presumption. They concluded that the evidence on record, "in the absence of any innocent explanation offered by the government, [gave] rise to a logical conclusion of bad faith."[87]

In its discussion, the Court in *Bohl* analyzed prior caselaw to identify what sorts of evidence might sufficiently rebut a presumption of bad faith. First, negligent loss or destruction has been sufficient to rebut bad faith.[88] In *Youngblood*, the failure of

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[81]*Lov-It Creamery*, 704 F. Supp. at 1548.

[82]*Id.*

[83]*Youngblood*, 488 U.S. at 56 n.*.

[84]The rebuttable presumption approach, while placing heavy emphasis on *Youngblood*'s footnote * avoids *Lov-It Creamery's* criticism of the conclusive presumption approach's complete reliance on the footnote, *see supra* Part III.A., because it doesn't use the footnote as the "only" measure of bad faith.

[85]25 F.3d 904 (10th Cir. 1994). The facts of *United States v. Bohl* are recounted *supra* note 61.

[86]It is necessary to remember that although the *Bohl* Court says that they are using the term "potential exculpatory value" to refer to evidence of which "no more can be said than that it could be subjected to tests the results of which might have exonerated the defendant," the destroyed evidence in *Bohl* does meet the standard of "apparent exculpatory value" that I discussed *supra* at Part I. Both the *Bohl* Court and I believe that bad faith is a required element given our determinations of exculpatory value. As a result, even though the *Bohl* court mistakenly applies *Trombetta* and *Youngblood* in their analysis of the case, their use of the rebuttable presumption approach appropriately demonstrates how the approach would operate within the correct *Trombetta/Youngblood* framework discussed *supra* at Part II.

[87]*Id.* at 913.

[88]To demonstrate "negligent loss or destruction" that is sufficient to rebut bad faith, the State must be able to demonstrate the method or manner in which the evidence was lost or destroyed. For example, in *United States v. Femia*, 9 F.3d 990 (1st Cir. 1993), the State demonstrated that evidence was destroyed because "Agent Lively incorrectly failed to heed [a] cross-referencing notation linking the Perea file [which contained evidence relating to Femia's case] to Femia's file, which should have alerted him that the Tape recordings in Perea's file were to be preserved pending the disposition of Femia's case." *Id.* at 991-92. Such a showing

police to preserve evidence was "at worst . . . described as negligent,"[89] and no bad faith was found. Subsequent cases have consistently affirmed negligence as rebutting a finding of bad faith.[90] Though unclear, it also appears as though gross negligence is sufficient to rebut bad faith.[91] Second, a showing that the evidence was destroyed "pursuant to standard procedure" is the most common way that bad faith is rebutted. "[C]ourts have held that the government does not necessarily engage in bad faith conduct when the destruction of evidence results from a standard procedure employed by the governmental department or agency regarding the disposal of the evidence at least when there is adequate documentation of the destroyed evidence."[92]

Following its examination, the Court concluded,

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of negligence is sufficient to rebut the presumption of bad faith. It is not, however, enough simply to say, "we don't know what happened to the evidence and so it must have been negligently lost."

[89]*Youngblood*, 488 U.S. at 58.

[90]*See, e.g.*, United States v. Bohl, 25 F.3d 904, 912 (10th Cir.1994); Holdren v. Legursky, 16 F.3d 57, 60 (4th Cir.1994) (police investigators' negligence does not indicate bad faith); Montgomery v. Greer, 956 F.2d 677, 680-81 (7th Cir. 1992) (finding that due process was not violated when police's loss of evidence was both "unprofessional" and "slip-shod" because "mere negligence, without more, does not amount to a constitutional violation"); Collins v. Commonwealth, 951 S.W.2d 569, 573 (Ky. 1997) ("[M]ere negligence simply does not rise to the level of bad faith required by *Youngblood.*") (citation omitted). *But see Youngblood*, 488 U.S. at 66 (Blackmun, J., dissenting) (criticizing a rule that allows negligence to rebut bad faith Justice Blackmun asked, "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?").

[91]*See* Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 987 n.120 (1993) ("The Court has left open the possibility that 'something less than intentional conduct, such as recklessness or 'gross negligence' is enough to trigger the protections of the Due Process Clause.")(citation omitted). *See, e.g.,* United States v. Femia, 9 F.3d 990, 992 (1st Cir. 1993) (gross negligence in handing evidence did not constitute violation of due process); United States v. Jobson, 102 F.3d 214, 218 (6th Cir. 1996) (finding no bad faith when the loss of evidence was attributable to negligence, possibly even gross negligence); Perlmutter*, supra* note 71, at 529 ("By establishing a bad faith test for lost evidence, the Court concluded that even gross negligence on the part of the police should go unsanctioned."). *But see* People v. Baca, 562 P.2d 411, 414 n.5 (Colo. 1977), (holding that under some circumstances gross negligence may be tantamount to bad faith); People v. Newberry, 638 N.E.2d 1196, 1203 (Ill. App. Ct. 1994) ("[I]t would appear to be a reasonable assumption that conduct amounting to 'gross negligence,' . . . be deemed to be tantamount to bad faith on the part of the State.").

[92]United States v. Bohl, 25 F.3d 904, 912-13 (10th Cir. 1994) (citing United States v. Gibson, 963 F.2d 708, 711 (5th Cir. 1992) (United States Border Patrol agents "routinely" destroy seized controlled substances sixty days after informing the United States Attorney about the seizure, pursuant to agency procedure)); United States v. Belden, 957 F.2d 671, 673-74 (9th Cir. 1992) (holding that cutting of marijuana plants pursuant to routine practice due to lack of storage capacity does not rise to the level of bad faith), *cert. denied*, 506 U.S. 882 (1992)). *But see* Gordon, *supra* note 71, at 223 (expressing fear that this rule gives the police free reign "to establish arbitrary guidelines requiring all evidence, including that which might be useful to the defense, to be destroyed routinely in order to preclude its disclosure").

> What this authority teaches is that even if the government destroys or facilitates the disposition of evidence knowing of its potentially exculpatory value, there might exist innocent explanations for the government's conduct that are reasonable under the circumstances to negate any [presumption] of bad faith. Although the defendant has the burden of proving the bad faith of the government in destroying the evidence . . . we note that the government here offers no reasonable rational or good faith explanation for the destruction of the evidence.[93]

Based on the *Bohl* analysis and the facts originally provided in *Samek*, Barce and DeLello will be unable to rebut a presumption of bad faith. Because they do not know how they lost the Tape (they do not even know who lost the Tape), they cannot claim that the loss was the result of "mere negligence."[94] Moreover, they have no argument that the Tape was destroyed according to standard police procedure. This is especially true given that Barce and DeLello did not work through normal channels by placing the Tape into evidence.

Aside from the two categories defined in *Bohl*, it is unclear what else might sufficiently rebut bad faith. One possibility is that a state actor's declaration that he did not act intentionally, or in bad faith, might rebut a presumption of bad faith. Though this possibility has not been explicitly addressed by any court, courts do seem to take into account whether or not a state actor does make such a declaration when performing their bad faith analysis. The *Samek* Court placed great weight on a government agent's testimony that "the [evidence] was simply misplaced, not purposefully destroyed" and then used this statement to effectually equate the loss with negligence.[95] Allowing this sort of testimony to rebut bad faith would move the rebuttable presumption approach closer toward the no presumption approach discussed *infra* Part III.C.[96]

In the event that State actors are able to rebut a presumption of bad faith, the burden shifts back to the defendant who must make an affirmative showing of bad faith to prove a due process violation.[97]

C. No Presumption Approach

The no presumption approach requires Samek to affirmatively prove that Barce and DeLello acted with "official animus" or a "conscious effort to suppress

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[93]*Bohl*, 25 F.3d at 913.

[94]As discussed *infra* at note 93, the *Samek* Court did ultimately conclude that the loss was the result of negligence. This was not because the method of loss revealed negligence. Instead, the conclusion was based on DeLello's testimony that he "misplaced" the tape and did not "destroy" it. *See* Samek v. State, 688 N.E.2d 1286, 1289 (Ind. Ct. App. 1997).

[95]*Id*.

[96]Commentators have expressed concern about the possibility that a State actor's statement could be enough to rebut bad faith, "[a]nother danger . . . is the likelihood that the court will without question accept an agent's statement that he destroyed the evidence in good faith." Kaufmann*, supra* note 71, at 687-88.

[97]Presumably, this independent showing of bad faith would resemble the sort of bad faith showing required by the no presumption approach discussed *infra* in Part III.C.

exculpatory evidence" when they lost the Tape.[98] If they did not intend to deprive Samek of exculpatory evidence or otherwise harm him, bad faith is not established and there is no due process violation.

This approach to bad faith was first articulated by *United States v. Zambrana*[99] prior to the Court's explicit articulation of the bad faith requirement in *Youngblood*. It is based upon a factor considered by the Court in *Trombetta*. Holding that there was no due process violation, the Court noted, "[t]he record contains no allegation of official animus towards [defendants] or of a conscious effort to suppress exculpatory evidence."[100] Courts like *Zambrana* cite *Trombetta* as though this finding was essential to its holding[101] and created an absolute requirement of these things in order to find bad faith. This representation is inaccurate. The absence of these motives was simply one factor which the Court examined to determine that bad faith was not present. Clearly, bad faith is present when State agents lose or destroy evidence with "official animus" or "conscious effort to suppress," but bad faith is not necessarily absent when State agents lose or destroy evidence and independent proof of these specific motives is lacking.

The no presumption approach is troubling for several other reasons. First, it has not be re-evaluated in light of *Youngblood*.[102] Given that *Youngblood* is the seminal case on the issue of bad faith, it seems odd that there is no discussion of how the reasoning in *Youngblood* might impact the reasoning of the no presumption approach. An obvious point for discussion might be that *Youngblood* doesn't cite or articulate the *Trombetta* factor that the no presumption approach is based upon. It seems that the *Youngblood* Court would have highlighted it had their intention been to create an absolute rule from that factor. Moreover, Justice Blackmun, who sat on the panel that decided *Youngblood*, wasn't himself clear that bad faith required such intentional conduct. He asked, "Does a defendant have to show actual malice. . . ?"[103]

The *Youngblood* decision is not entirely void of support for the no presumption approach. The Court does make a single reference to acts of "intention" citing *United States v. Marion*[104] in its discussion of "the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based

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[98]*See* United States v. Jobson, 102 F.3d 214, 218 (6th Cir. 1996) (citing *Trombetta*, 467 U.S. at 488).

[99]841 F.2d 1320, 1341-42 (7th Cir. March 7, 1988) ("[T]he loss or destruction of evidence does not implicate the Due Process Clause of the Fourteenth Amendment absent 'official animus' or a 'conscious effort to suppress exculpatory evidence.'").

[100]*Trombetta*, 467 U.S. at 488.

[101]*Zambrana*, 841 F.2d at 1341-42 (holding that "the loss or destruction of evidence does not implicate the Due Process Clause of the Fourteenth Amendment absent 'official animus' or a 'conscious effort to suppress exculpatory evidence'").

[102]*Zambrana*, 841 F.2d at 1320, outlined the no presumption bad faith formulation in March of 1988 while *Youngblood* was not decided until November 29, 1988.

[103]*Youngblood*, 488 U.S. at 66 (Blackmun, J., dissenting).

[104]404 U.S. 307 (1971).

on loss of evidence attributable to the Government."[105] This sole reference to intention, however, seems insufficient to support a definition of "bad faith" that requires an intentional act done with "official animus" or "conscious effort." This is especially true given that *Marion* is cited to support a general bad faith standard but is not applied in the Court's analysis of the *Youngblood* case. In contrast to *Marion*, *Youngblood* discusses bad faith without using volitional words like "intent" and "purpose." The Court said that bad faith occurs where "the police themselves by very conduct indicate that the evidence could form a basis for exonerating defendant."[106] This statement opens up the possibility that in some instances conduct, rather than the sort of mindset or intent required by the no presumption approach, can indicate bad faith. For example, the Arizona Court of Appeals cited *Trombetta* and *Youngblood* to support the proposition that "in the context of a due process analysis, the Supreme Court has made clear that 'bad faith' has less to do with the actor's intent than with the actor's knowledge that the evidence was 'constitutionally material.'"[107]

Samek offers no direct evidence that Barce or DeLello were motivated by "official animus" or "conscious effort to suppress exculpatory evidence."[108] There is some circumstantial evidence that might support such a motivation. Samek could argue that Barce's instruction to DeLello not to place the Tape into evidence demonstrates bad faith, but it seems unlikely that this conduct, in the absence of additional motive proving evidence, would be sufficient to demonstrate the required mindset. This was the finding of the Indiana Court of Appeals. They indicated that circumstantial evidence in the form of Barce's instruction not to place the Tape into evidence was not sufficient to support a finding of bad faith because it was not conclusive of Barce's mindset. The Court suggested that absent direct evidence of bad faith, the only sort of circumstantial evidence that might rise to the level of bad faith would have been an affirmative instruction to destroy the Tape. The Court concluded, "[t]he record reveals that though Barce told DeLello not to place the Tape in evidence, he did not tell DeLello to destroy the tape. DeLello testified that the tape was simply misplaced, not purposefully destroyed. This evidence does not prove 'conscious doing of wrong' . . . ."[109] Theoretically, Samek has the opportunity to discover this additional motive proving evidence (if it exists). Practically, however, even if the evidence exists, the opportunity is non-existent. "The defendant is ill-suited to inquire into subjective good faith or bad faith of the police. The most relevant evidence of police good or bad faith is apt to lie within the control of the police, and police officers are highly unlikely to cooperate voluntarily with defendants by accusing fellow officers of misconduct."[110] "As Justice Blackmun suggested in dissent, the 'inherent difficulty a defendant would have in obtaining

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[105] *Youngblood,* 488 U.S. at 57.

[106] *Id.* at 58.

[107] State v. Walker, 914 P.2d 1320, 1330 (Ariz. Ct. App. 1996).

[108] Direct evidence might include things such as an admission by either Barce or DeLello that one or both of these motives were present.

[109] *Samek*, 688 N.E.2d at 1289.

[110] *The Supreme Court, 1988* Term, 103 HARV. L. REV. 40, 166 (1989).

evidence to show a lack of good faith' makes [such a] test unworkable and unprincipled."[111]

D. Bad Faith is Best Defined by the Rebuttable Presumption Approach

The rebuttable presumption approach represents the best way to define bad faith. The approach is consistent with *Youngblood* because it acknowledges footnote *, that bad faith "must necessarily turn on the [government's] knowledge of the exculpatory value of the evidence at the time it was lost or destroyed"[112] without placing undue emphasis on it.[113] The approach provides a workable definition of bad faith for both defendants and government agents. Unlike the no presumption approach, the rebuttable presumption approach does not place an impossible burden on a defendant by requiring him to prove the subjective mindset of government agents.[114] The rebuttable presumption approach does what the conclusive presumption does not. It allows the government an opportunity to demonstrate that bad faith was not a part of the loss or destruction of evidence.[115] This opportunity is consistent with *Youngblood's* goal of limiting the extent of the government's obligation to preserve evidence.[116] At the same time, the rebuttable presumption approach fulfills *Youngblood's* goal of protecting a defendant when a government agent's conduct affirmatively demonstrates that the evidence could form a basis for exonerating the defendant but evidence conclusive of that agent's subjective mindset is unavailable.[117]

IX. CONCLUSION

The Indiana Court of Appeals made three common mistakes when it applied *Trombetta* and *Youngblood* in *Samek v. State*.[118] The first mistake they made was to conclude that lost evidence does not have "apparent exculpatory value" unless it is certain to cast doubt on the guilt of the defendant. This mistake led the Court to conclude that the Tape lost by Barce and DeLello did not have apparent exculpatory value because it did not "*prove* that Jacobsen committed the burglary instead of Samek."[119] This mistake could have been avoided if the Court had properly focused

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[111] *Id.* (quoting *Youngblood,* 488 U.S. at 66-67 (Blackmun, J., dissenting)).

[112] *Youngblood*, 488 U.S. at 56 n.*.

[113] *See* analysis of conclusive presumption approach *supra* Part III.A.

[114] *See supra* Part III.C.

[115] *See supra* Part III.A & B.

[116] *See Youngblood*, 488 U.S. at 58. "We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.").

[117] *Id*.

[118] 688 N.E.2d 1286 (Ind. Ct. App. 1997).

[119] *Id.* at 1289. ("We hold this tape to be potentially useful evidence, not material exculpatory evidence. Without the identification of the speaker and evidence as to the circumstances surrounding the making of the tape, the tape does not prove that Jacobsen

on whether the exculpatory value of the lost evidence was *apparent* prior to its loss rather than on the degree of certainty with which the evidence would exculpate the defendant. So long as its exculpatory value is apparent to government agents, any evidence that tends to cast doubt on the guilt of the defendant has apparent exculpatory value.

One reason that courts continually botch their analysis of "apparent exculpatory value" is that they use the label "potentially exculpatory" in different ways. Some use the label to refer to the sort of evidence lost in *Youngblood* of which "no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."[120] This sort of evidence does not meet the "apparent exculpatory value" standard because the people who lose this evidence are not *aware* of any exculpatory value before they lose it. By contrast, a number of courts (*i.e.* the 9th Circuit in *Cooper*) use the label "potentially exculpatory" to refer evidence that has exculpatory value, but whose exculpatory potential is less than certain (*i.e.* the evidence may cast doubt on guilt but is not certain to prove innocence). So long as the exculpatory value of this sort of evidence is apparent before the evidence is lost or destroyed, the materiality standard of "apparent exculpatory value" is met.

The Indiana Court of Appeals made a second common mistake by requiring proof of bad faith only when the lost or destroyed evidence does not have apparent exculpatory value. The Court required Samek to prove bad faith because of their conclusion that the Tape did not have apparent exculpatory value.[121] Had they realized that the Tape did have apparent exculpatory value, they presumably would have found a due process violation without requiring bad faith. This result would not have been proper or consistent with *Youngblood*. This second mistake could have been avoided if the Court had recognized that *Youngblood*'s bad faith requirement applies to all failure to preserve evidence cases.

The Indiana Court of Appeals made its third and final mistake because it did not know the substance of *Youngblood*'s bad faith requirement. Believing that the requirement could only be met by an independent demonstration that government agents consciously intended to suppress exculpatory evidence or acted with official animus toward the defendant the Court determined that Samek failed to prove bad faith because he could not show that Barce and DeLello purposefully destroyed the Tape.[122] This mistaken conclusion could have been avoided if the Court had applied

committed the burglary instead of Samek . . . The tape would be potentially useful because with proper identification, verification, and supporting evidence the tape might have helped to exonerate Samek.")

[120]*Youngblood*, 488 U.S. at 57.

[121]*Id.* ("[W]hen the evidence at issue falls within the definition of material exculpatory evidence, the defendant need not establish bad faith in order to prove a due process violation. Bad faith is relevant only when the evidence merely meets the definition of potentially useful evidence.").

[122]*Samek*, 688 N.E.2d 1286. ("The record reveals that though Barce told DeLello not to place the Tape in evidence, he did not tell DeLello to destroy the Tape. DeLello testified that the Tape was simply misplaced, not purposefully destroyed. This evidence does not prove 'conscious doing of wrong,' . . . . We, therefore, hold that Samek has failed to show that the State's failure to preserve the Tape was done in bad faith.").

the rebuttable presumption approach to bad faith.[123] Whenever apparently exculpatory evidence is lost or destroyed the rebuttable presumption approach shifts the burden of showing an innocent explanation for the loss or destruction to the government. Bad faith is commonly rebutted where the evidence is lost or destroyed as a result of mere negligence or where the evidence was destroyed pursuant to standard procedure.

To avoid making any of the three mistakes made by the Indiana Court of Appeals and countless other courts like them, a court applying *Trombetta* and *Youngblood* must know three things. First, they must understand what it means for evidence to have "apparent exculpatory value." Specifically, they must focus their attention on whether any exculpatory value is *apparent* while at the same time recognizing that evidence with such value need not go so far as to conclusively "prove" a defendant's innocence. Second, they must apply *Youngblood*'s bad faith requirement to all cases where the government has failed to preserve evidence. Finally, a court should apply the rebuttable presumption approach as the most effective method of determining whether bad faith is present.

[123]The rebuttable presumption approach is discussed *supra* at Part III.B & D.