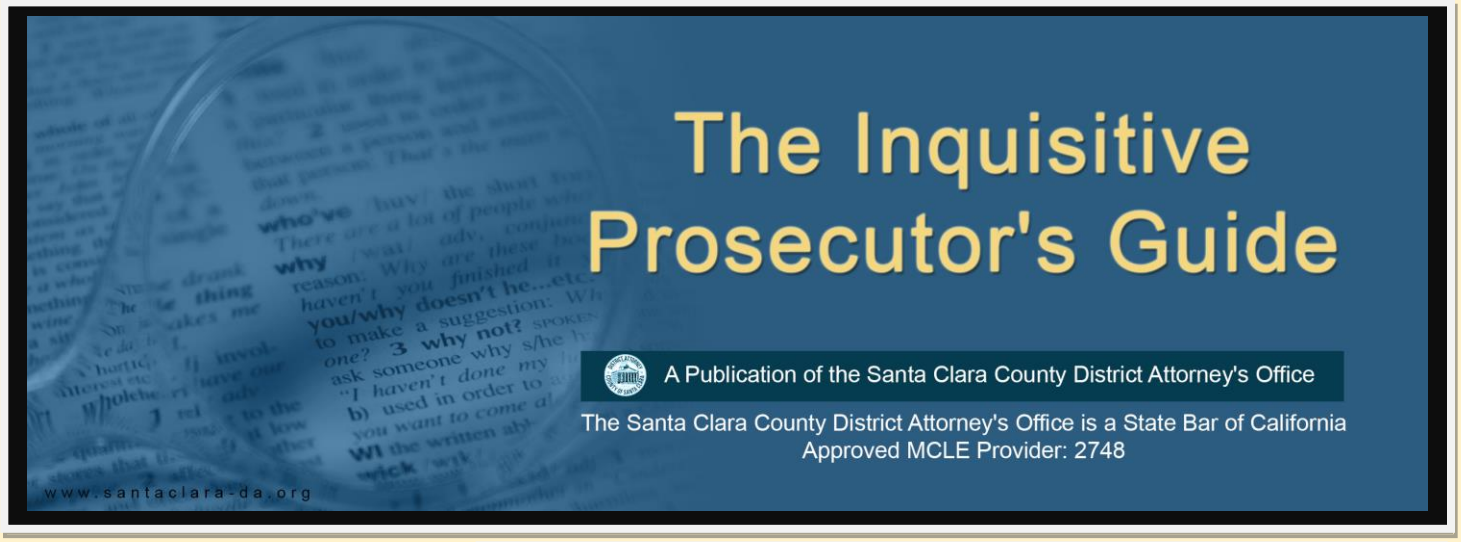

May 31, 2017

2017-IPG#30 (*TROMBETTA-YOUNGBLOOD* MOTIONS)

RESPONDING TO MOTIONS TO DISMISS BASED ON THE LOSS OR DESTRUCTION OF EVIDENCE AND RELATED TOPICS*

This May 31, 2017 edition of IPG covers five related topics. First, it discusses the principles governing motions to dismiss based on the loss or destruction of evidence (***Trombetta-Youngblood*** motions). Second, it discusses how hearings on these motions should be conducted. Third, it discusses what, if any, obligations exist on the part of law enforcement to *collect* evidence. Fourth, it discusses how prosecutors should respond to defense requests for examination and testing of evidence seized by law enforcement. Fifth, it discusses the ability of the prosecution to comment on the fact that evidence was released to the defense for testing. This IPG memo is accompanied by a 60-minute general MCLE credit approved podcast featuring San Francisco Assistant District Attorney Allison Macbeth, the co-author of this memo. **Click the following link to access it:** http://sccdaipg.podbean.com/

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I. DUTY TO PRESERVE EVIDENCE OBTAINED BY LAW ENFORCEMENT

A. Previous Law Governing Loss or Destruction of Evidence

In ***People* v. *Hitch*** (1974) 12 Cal.3d 641, the California Supreme Court held that there was a due process obligation to preserve evidence where there existed a "reasonable possibility" that the evidence would be favorable to the defendant on the issue of defendant's guilt or innocence. (***Id.*** at p. 652-653; **accord *People* v. *Nation*** (1980) 26 Cal.3d 169 [requiring preservation of a semen sample taken from a rape victim]; ***People* v. *Moore*** (1983) 34 Cal.3d 215 [requiring preservation of urine sample taken from a suspected narcotics user].) To redress such failure to preserve evidence, various sanctions such as exclusion or even dismissal could be imposed. (**See *People* v. *Moore*** (1983) 34 Cal.3d 215, 222-224.)

B. Current Law Governing Loss or Destruction of Evidence in General: *Trombetta-Youngblood-Fisher*

The rule of ***Hitch*** is no longer the governing law in California regarding the obligation to preserve evidence. Rather, motions based on failure to preserve evidence are now decided by reference to the United States Supreme Court decisions in ***California* v. *Trombetta*** (1984) 467 U.S. 479, ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51, and ***Illinois* v. *Fisher*** (2004) 540 U.S. 544, 549. These decisions are inconsistent with the standard laid out in ***Hitch***. And since ***Hitch*** was based on the state court's interpretation of the ***federal*** due process obligation, ***Hitch*** has been superseded. (**See *People* v. *Frye*** (1998) 18 Cal.4th 894, 942; ***People* v. *Zapien*** (1993) 4 Cal.4th 929, 964; ***People* v. *Hardy*** (1992) 2 Cal.4th 86, 165; ***People* v. *Cooper*** (1991) 53 Cal.3d 771, 810-811; ***People* v. *Johnson*** (1989) 47 Cal.3d 1194, 1233-1234.) Moreover, even if there existed an independent state constitutional due process standard different from the federal constitutional due process standard such that loss or destruction of evidence might run afoul of the state constitution, Proposition 8 would prevent such loss or destruction from resulting in the exclusion of any evidence. (**See *People* v. *Epps*** (1986) 182 Cal.App.3d 1102, 1113-1117; ***People* v. *Gonzales*** (1986) 179 Cal.App.3d 566, 576.)

So, what is a defendant required to show to establish a due process violation under the Fourteenth and Fifth Amendments of the federal Constitution when evidence obtained by the government is lost or destroyed? A review of the relevant cases highlights why challenges based on claimed violations of due process claims are notoriously free-floating and often simply come down to the same question when some person or piece of evidence does not get produced at trial: *did what occur cause an unfair trial*? Or, if the question arises before trial: *will what occurred so far cause an unfair trial?*

* **Editor's note:** Any right to the preservation of evidence or its production at trial stems from the individual's right to procedural due process as guaranteed by the Fifth and Fourteenth Amendments of the federal Constitution. (**See *California* v. *Trombetta*** (1984) 467 U.S. 479, 485 ["Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness."].) Procedural due process just means that if you are going to deprive someone of their life, liberty, or property, you have to do it in way that it is fair: "'No State shall ... deprive any person of life, liberty, or property, without due process of law.' U.S. Const., Amdt. 14, § 1; accord Amdt. 5. This Clause imposes procedural limitations on a State's power to take away protected entitlements." (***District Attorney's Office for Third Judicial Dist.* v. *Osborne*** (2009) 557 U.S. 52, 67; **see also *Hamdi* v. *Rumsfeld*** (2004) 542 U.S. 507, 530 ["Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"]; ***Daniels* v. *Williams*** (1986) 474 U.S. 327, 337 [The Due Process Clause of the Fourteenth Amendment contains "a guarantee of fair procedure, sometimes referred to as 'procedural due process': the State may not . imprison . a defendant without giving him a fair trial") (Stevens, J., concurring)].)

As will be seen, based on the cases from the High Court discussing "what might loosely be called the area of constitutionally guaranteed access to evidence" (***Arizona* v. *Youngblood*** (1988) 488 U.S. 51, 55; ***California* v. *Trombetta*** (1984) 467 U.S. 479, 485), the answer to that question rests upon principles derived from a hodge-podge of cases involving, inter alia, the failure to disclose evidence, the loss of witnesses, and speedy trial issues. As a result, while it is possible to ascertain *the minimum prerequisites* for showing a due process violation based on the loss or destruction of evidence, what showing a defendant must make to actually ***establish*** a due process violation is a little fuzzier.

1. *California* v. *Trombetta* (1984) 467 U.S. 479

In ***California* v. *Trombetta*** (1984) 467 U.S. 479, the defendant was arrested for driving under the influence. The State introduced test results indicating the concentration of alcohol in the blood of two motorists. The defendants asked the trial court to suppress those test results because the police failed to preserve "breath samples" of the air that the defendants had breathed into an intoxilyzer – claiming this failure was a violation of due process. (***Id***. at pp. 481-483.) The High Court rejected this argument for several reasons which are discussed below.

However, before the Court explained its rationale for rejecting the argument, it pointed out that the question before it was just the latest issue to arise in attempting to define the government's obligation to afford the defendants "a meaningful opportunity to present a complete defense" by guaranteeing that "it delivered exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." (**Id**. at p. 485.) The Court then identified various other decisions that also fell into "what might loosely be called the area of constitutionally guaranteed access to evidence." (**Ibid**.) Among them: ***Roviaro* v. *United States***

(1957) 353 U.S. 53 [addressing government obligation to disclose identity of undercover informants who possess evidence critical to the defense]; ***Napue* v. *Illinois*** (1959) 360 U.S. 264, 269–272 [addressing government's obligation to disclose when government witnesses lie under oath]; ***Killian* v. *United States*** (1961) 368 U.S. 231 [addressing whether good faith destruction of preliminary notes by FBI agents violated due process where information was incorporated into another document]; ***Brady* v. *Maryland*** (1963) 373 U.S. 83 [addressing government's obligation to disclose favorable evidence material to guilt or punishment of defendant upon request];]; ***Giglio* v. *United States*** (1972) 405 U.S. 150 [addressing government's obligation to correct false testimony regardless of whether trial prosecutor is aware when prior prosecutor was aware testimony was false]; ***United States* v. *Agur*s** (1976) 427 U.S. 97 [addressing government's obligation to disclose evidence without a request]; ***United States* v. *Valenzuela–Bernal*** (1982) 458 U.S. 858, 867 [addressing whether due process violated when the government deports witnesses before defendant has a chance to interview them]; ***United States* v. *Marion*** (1971) 404 U.S. 307, 324 [intimating a due process violation might occur if the Government delayed an indictment for so long that the defendant's ability to mount an effective defense was impaired]; ***United States* v. *Lovasco*** (1977) 431 U.S. 783, 795, n. 17 [same].) After reviewing these precedents, the High Court then explained its rationale for finding the failure to retain breath samples did not violate the Federal Constitution. (**Id**. at p. 488.)

First, the ***Trombetta*** court found it significant that the state "did not destroy respondents' breath samples in a calculated effort to circumvent the disclosure requirements established by ***Brady* v. *Maryland*** and its progeny." (***Trombetta*** at p. 488.) The Court observed that in "failing to preserve" the breath samples, the officers were acting "in good faith and in accord with their normal practice." (**Ibid**.) Moreover, the court observed that the record did not contain an "allegation of official animus towards respondents or of a conscious effort to suppress exculpatory evidence." (**Ibid**.)

Second, the Court thought it was even more important that the evidence lost was not the kind of evidence that "might be expected to play a significant role in the suspect's defense." (**Id**. at p. 488.) The ***Trombetta*** court believed that "[w]hatever duty the Constitution imposes on the States to preserve evidence," it did not extend to preserving evidence that did not meet this standard of materiality. (**Ibid**.) The ***Trombetta*** court held that to meet this "standard of constitutional materiality," the 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." (**Id**. at p. 489.) The ***Trombetta*** court likened this standard of materiality to the standard of materiality utilized in deciding whether due process is violated by failure *to disclose* evidence. (**Id**. at pp. 488-489 and fn. 8.)*

* **Editor's note:** For a further discussion of why ***the kind of*** evidence that must be *retained* for due process purposes and the kind of evidence that must be *disclosed* for due process purposes are similar, **see** this IPG, section I-E at p. 8.

Applying this standard of materiality, the Court did not find the breath samples were material. The Court held the evidence was not apparently exculpatory because the chances were "extremely low that preserved samples would have been exculpatory" considering the general accuracy of the Intoxilyzer machines that processed the breath results. The Court also held that even if it could be assumed that the Intoxilyzer results in this case were inaccurate and that breath samples might therefore have been exculpatory, the defendants were able to obtain comparable evidence by other reasonably available means, i.e., "alternative means of demonstrating their innocence." (***Id***. at pp. 489-490.) The Court pointed to the fact that there were "only a limited number of ways in which an Intoxilyzer might malfunction: faulty calibration, extraneous interference with machine measurements, and operator error" and the defendants "were perfectly capable of raising these issues without resort to preserved breath samples." (**Id**. at p. 490.)

* **Editor's note:** The ***Trombetta*** court identified the ways the defendants could raise the issues without resort to the breath samples. As to the potential issue of faulty calibration, the defendants could inspect the machines and had access to the "machine's weekly calibration results and the breath samples used in the calibrations." (***Id***. at p. 490.) Thus, they "could have utilized these data to impeach the machine's reliability. As to the potential issue of improper measurements due to extraneous interference, the defendants could highlight the two ways that interference could occur by showing "the defendant was dieting at the time of the test or that the test was conducted near a source of radio waves." (**Ibid**.) As to the issue of operator error, the defendant could "cross-examine the law enforcement officer who administered the Intoxilyzer test, and . . . attempt to raise doubts in the mind of the factfinder whether the test was properly administered." (**Ibid**.)

The ***Trombetta*** court also recognized that defendants would have been unable to show they lacked the ability to obtain comparable evidence by other reasonably available means *if* they had been made aware they could have submitted to urine or blood tests that would have been automatically preserved for retesting. (**Id**. at p. 490, fn. 11 [albeit noting that since the evidence did not show defendants were made aware of this alternative, it would be unfair to rely on this alternative to dismiss defendant's claims].)

2. *Arizona* v. *Youngblood* (1988) 488 U.S. 51

In ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51, the defendant was charged with child molestation. The police had seized clothing from the molested child but had failed to refrigerate it and had delayed examination of the sexual assault kit. The police inaction resulted in defendant's later inability to have the items tested. The defense was made aware of the evidence. The defendant argued that failure to refrigerate the clothing and the delay in examination of the swabs taken during the sexual assault exam resulted in the loss of evidence that could have exonerated him and thus denied him due process - regardless of whether the police acted in bad faith. (**Id**. at pp. 52-55.)

As in ***Trombetta***, the High Court characterized the issue before it one requiring consideration of "what might loosely be called the area of constitutionally guaranteed access to evidence." (**Id**. at p. 55 [and citing to many of the same cases it had cited to in ***Trombetta*** as falling within this area].) The Court observed that "the likelihood that the preserved materials would have enabled the defendant to exonerate himself appears *to be greater* than it was in ***Trombetta***," but nonetheless held "the possibility that the semen samples *could* have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality in ***Trombetta***." (**Id**. at p. 56, emphasis added by IPG.) Moreover, the Court thought it important that "unlike in ***Trombetta***, the State did not attempt to make any use of the materials in its own case in chief." (***Youngblood*** at p. 56.)

The Court then held that when the evidence lost is "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," (aka "potentially useful evidence") there is no denial of due process unless the defense can show "bad faith on the part of the police." (***Id***. at pp. 57-58.) The Court believed this rule would serve to "both limit the extent of the polices 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." (***Id***. at p. 68.)

The Court looked to decisions in related areas "when the claim is based on loss of evidence attributable to the Government" as support for its requirement the defendant show bad faith. (***Id***. at p. 57.) Significantly, the Court cited to ***United States* v. *Marion*** (1971) 404 U.S. 307 which rejected a due process challenge because there was "[n]o actual prejudice to the conduct of the defense . . . alleged or proved, and there [was] no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." (***Youngblood*** at p. 57.) The Court also noted that "[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." (***Id***. at p. 56, fn. *.)

Applying the principle adopted, the Court found that since the failure of the police to refrigerate the clothing and to timely perform tests on the semen samples could "at worst be described as negligent," there was no violation of due process in the case before it. (***Id***. at p. 58.)

Lastly, the Court rejected the notion that law enforcement had any constitutional duty to perform any particular tests on evidence retained or use any particular investigatory tool. (***Id***. at pp. 58-59.)

* **Editor's note:** Ironically, had the evidence been preserved in Youngblood it would have exonerated the defendant. In 2000, upon request from Youngblood's appellate attorneys, the police department tested the degraded evidence using new, sophisticated DNA technology. Those results exonerated Youngblood, and he was released from prison in August 2000. The district attorney's office dismissed the charges against Larry Youngblood that year. Shortly thereafter, the DNA profile from the evidence was entered into the national convicted offender databases. In early 2001, officials got a hit matching the profile of another individual, who was convicted of the crime and sentenced to twenty-four years in prison. (See www.innocenceproject.org)

3. *Illinois* v. *Fisher* (2004) 540 U.S. 544

In ***Illinois* v. *Fisher*** (2004) 540 U.S. 544, a defendant was arrested for possession of cocaine. Four tests conducted by crime labs confirmed the substance was cocaine. Defendant was charged with the crime and, eight days later, the defense filed a discovery motion requesting all evidence the prosecution intended to use at trial. The prosecution responded that all the evidence would be made available at a reasonable time and date upon request. About a year later, the defendant, who had been released on bail, failed to appear. Defendant remained a fugitive for over ten years until he was once again arrested. After charges were reinstated, the prosecution learned the police (acting in accordance with established procedures) had destroyed the plastic bag of cocaine shortly before defendant's re-arrest. The defendant argued due process was violated because once a discovery motion had been made, the prosecution is on notice they must preserve the evidence and because the evidence was defendant's "only hope for exoneration" and was "essential to and determinative of the outcome of the case." (**Id**. at pp. 547, 548.)

The ***Fisher*** Court disagreed. The Court reiterated the rule that failure to preserve "potentially useful evidence" does not violate due process "*unless a criminal defendant can show bad faith on the part of the police*." (***Id***. at p. 548, emphasis in original.) The Court then held that the existence of a pending discovery request did not eliminate the necessity of showing bad faith on the part of police. (**Ibid**.) The Court also rejected the notion that the rule adopted in ***Youngblood*** does not apply whenever the contested evidence provides a defendant's "only hope for exoneration" and is "'essential to and determinative of the outcome of the case.'" (***Fisher*** at p. 548.)

The Court concluded that the substance seized was plainly the sort of "potentially useful evidence" referred to in ***Youngblood*** in contrast to the "material exculpatory evidence addressed in ***Brady*** and ***Agurs***." (***Fisher*** at p. 548; **see also *Fisher*** at p. 549 ["the applicability of the bad-faith requirement in ***Youngblood*** depended not on the centrality of the contested evidence to the prosecution's case or the defendant's defense, but on the distinction between 'material exculpatory' evidence and 'potentially useful' evidence."].) And found that since the police acted in good faith (indeed, the tests done showed the destroyed evidence was inculpatory) and in accordance with their normal practice, there was no due process violation. (**Id**. at p. 548.)

C. What Can We Safely Say are the Current Rules Regarding What a Defendant Must Show to Establish a Due Process Violation Based on the Loss or Destruction of Evidence?

Under the current state of the law, it is safe to say the following:

There is a due process duty to preserve evidence in possession of the government. (**See *People* v. *Roybal*** (1998) 19 Cal.4th 481, 510.) This duty, however, is limited to evidence which is constitutionally material, i.e., "evidence that might be expected to play a significant role in the suspect's defense." (***People* v. *Beeler*** (1995) 9 Cal.4th 953, 976 citing to ***California* v. *Trombetta*** (1984) 467 U.S. 479, 488.) For evidence to be expected to play a significant role in the suspect's defense, it "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." (***California* v. *Trombetta*** (1984) 467 U.S. 479, 488-489; ***People* v. *Carter*** (2005) 36 Cal.4th 1215, 1246; ***People* v. *Johnson*** (1989) 47 Cal.3d 1194, 1233.)

If the missing evidence is not "apparently exculpatory," but simply "potentially useful" evidence, due process is not violated unless law enforcement acted in "bad faith" in destroying or losing it. (***People* v. *Beeler*** (1995) 9 Cal.4th 953, 976 citing to ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51, 58.)

D. What Issues are Not *Completely* Resolved Regarding What a Defendant Must Show to Establish a Due Process Violation Based on the Loss or Destruction of Evidence?

There are several questions involving the scope of the due process obligation to retain evidence that are not fully resolved – albeit we can take a pretty good guess at what the rule is on some of them:

First, is evidence that is constitutionally material under the failure to retain line of cases (***Trombetta-Youngblood-Fisher***) the equivalent of evidence that is constitutionally material under the failure to disclose line of cases (***Brady-Agurs-Bagley***-et al.)? (**See** this IPG, section I-E at p. 8)

Second, must a defendant show the police acted in bad faith to prove a due process violation when the evidence lost or destroyed could be expected to play a significant role in the suspect's defense? (**See** this IPG, section I-I at pp. 42-46.)

Third, if the evidence lost or destroyed was merely "potentially useful" evidence and the defense can show the police acted in bad faith, must the defendant *also* show the evidence could be expected to play a significant role in the suspect's defense? (**See** this IPG, section I-J at pp. 46-47.)

Fourth, if there is no due process violation, is a defendant ever entitled to a remedial instruction when the government loses or destroys evidence? (**See** this IPG, section I-Q-7 at pp. 62-64.)

E. Is "Constitutional Materiality" Under the Failure to *Retain* Line of Cases the Same as "Constitutional Materiality" Under the Failure to *Disclose* Line of Cases?

In ***California* v. *Trombetta*** (1984) 467 U.S. 479, the High Court indicated that only the destruction of evidence that is of constitutional materiality would violate due process: "Whatever 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***, see ***United States* v. *Agurs***, 427 U.S., at 109–110, 96 S.Ct., at 2400, 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." (***Trombetta*** at pp. 488–489, emphasis added; **see also *People* v. *Farnam*** (2002) 28 Cal.4th 107, 167.)

The ***Trombetta*** court did not draw much of a distinction between the kind of evidence that must be *retained* for due process purposes and the kind of evidence that must be *disclosed* for due process purposes. Indeed, the ***Trombetta*** court specifically stated: "In our prosecutorial ***disclosur****e* cases, we have imposed a ***similar*** requirement of materiality . . ." and then immediately cited to ***United States* v. *Agurs*** (1976) 427 U.S. 97. (***Trombetta*** at p. 488, fn. 8, emphasis added.)

Moreover, in referring to the kind of evidence that might be expected to play a significant role in the suspect's defense (i.e., evidence of constitutional materiality), the ***Trombetta*** court cited to ***Agurs*** at pp. 109-110. At that exact location, the ***Agurs*** court stated: "The mere possibility that an item of undisclosed information *might have helped the defense, or might have affected the outcome of the trial*, does *not* establish "materiality" in the constitutional sense." (***Id***. at pp. 109-110, emphasis added by IPG.) At another location in ***Agurs***, the High Court described what *would* establish "materiality" of the evidence in a constitutional sense: "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." (***Agurs*** at p. 108.)

It follows that ‘‘evidence that might be expected to play a significant role in the suspect's defense" is the *same kind* of evidence that would be described in the ***Brady-Agurs*** line of cases as evidence whose absence would deprive the defendant of a fair trial (***Agurs*** at p. 108), or, to put it another way, evidence that is "favorable to an accused . . . where the evidence is material either to guilt or to punishment". (***Agurs*** at p. 110, fn. 17, citing to ***Brady* v. *Maryland*** (1963) 373 U.S. 83, 87; **see also *United States* v. *Harry*** (D.N.M. 2013) 927 F.Supp.2d 1185, 1216 ["The Supreme Court applied ***United States* v. *Agurs***' standard of "constitutional materiality" in ***California* v. *Trombetta***, indicating that the ***United States* v. *Agurs***' standard of materiality is applicable when determining whether the

government's loss of evidence violates a defendant's due-process rights under ***California* v. *Trombetta***."].)

This interpretation is supported by language from ***Illinois* v. *Fisher*** (2004) 540 U.S. 544, where the High Court contrasted the sort of "potentially useful evidence" referred to in ***Youngblood*** with "the "material exculpatory evidence addressed in ***Brady*** and ***Agurs***." (***Fisher*** at p. 548; **see also *Fisher*** at p. 549 ["the applicability of the bad-faith requirement in ***Youngblood*** depended not on the centrality of the contested evidence to the prosecution's case or the defendant's defense, but on the distinction between 'material exculpatory' evidence and 'potentially useful' evidence."]; **see also *Olszewski* v. *Spencer*** (1st Cir. 2006) 466 F.3d 47, 56 [implicitly equating "apparently exculpatory" evidence with "material exculpatory evidence" under ***Brady*** based on language in ***Youngblood***].)

Why would the High Court, when talking about materiality in the context of discussing differences in the kinds of evidence that the government has *failed to retain*, draw a contrast between potentially useful evidence and "material exculpatory" evidence as addressed in ***Brady*** and ***Agurs*** if the latter standard was only pertinent to cases involving *failure to disclose* evidence?

The argument that there is no real difference between constitutional materiality under the failure to disclose line of cases and constitutional materiality under the failure to retain line of cases is *largely* but not fully supported by language in the California Supreme Court case of ***City of Los Angeles* v. *Superior Court (Brandon)*** (2002) 29 Cal.4th 1. In that case, the California Supreme Court recognized that materiality under ***Brady*** is closely related to materiality under ***Trombetta*** but described the prosecutor's obligation to retain property *as narrower* than the obligation to disclose: "Closely related to the ***Brady*** rule requiring the prosecution to disclose material evidence favorable to the defense is the prosecution's obligation to retain evidence. With respect to retention, however, the prosecution's obligation is narrower. Its failure to retain evidence violates due process only when that evidence 'might be expected to play a significant role in the suspect's defense, and has 'exculpatory value [that is] apparent before [it is] destroyed.' (***California* v. *Trombetta*** (1984) 467 U.S. 479, 488–489.)" (***Brandon*** at p. 8.)

* **Editor's note:** ***Brandon***'s discussion of standard laid out in ***Trombetta*** is somewhat of a misstatement since showing the evidence has exculpatory value that is apparent before it is destroyed is a ***prerequisite*** for showing the evidence might be expected to play a significant role in the suspect's defense, not something that must be shown ***in addition to*** showing that the evidence might be expected to play a significant role in the suspect's defense. (**See** this IPG at I-C at p. 7.)

Moreover, courts outside of California have equated the two standards and applied the ***Brady*** definition of materiality in context of determining whether destruction of evidence violated due process. (**See *State v. Ross*** (Ohio Ct. App. 2012) 980 N.E.2d 547, 549 [a "state's failure ***to preserve*** materially exculpatory evidence violates a defendant's due process rights under the Fourteenth Amendment to the

United States Constitution" and "Such evidence is deemed materially exculpatory if 'there is a 'reasonable probability' that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."]; ***State* v. *Durnwald*** (2005) 837 N.E.2d 1234, 1240 [same].)

On the other hand, some courts have stated: "[T]he Supreme Court's jurisprudence divides cases involving nondisclosure of evidence into two distinct universes. ***Brady*** and its progeny address exculpatory evidence that is still in the government's possession. ***Youngblood*** and ***Trombetta*** govern cases in which the government no longer possesses the disputed evidence." (***Smith* v. *Secretary of New Mexico Dept. of Corrections*** (10th Cir. 1995) 50 F.3d 801, 824, fn. 34; ***United States* v. *Femia*** (1st Cir. 1993) 9 F.3d 990, 993; ***Willoughby* v. *State*** (Wyo. 2011) 253 P.3d 157, 170.) And an argument can be constructed that the standards of materiality are distinct because a prerequisite to finding that evidence might be expected to play a significant role in the suspect's defense (the ***Trombetta*** standard) requires that the evidence be "apparently exculpatory" before it is destroyed. This means that the ***Trombetta*** standard often will *effectively* impose a requirement the defense show bad faith on the part of the police *even when* the evidence is not merely potentially useful. (**See *Arizona* v. *Youngblood*** (1988) 488 U.S. 51, 56, fn. *["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 the time it was lost or destroyed."].) According to the argument, this requirement of bad faith distinguishes the standard for determining materiality under ***Trombetta*** from the standard for determining materiality under ***Brady***, which does not require "bad faith."

However, the counterpoint to this argument is that the "apparently exculpatory" prerequisite to showing a due process violation under ***Trombetta*** is *also* implicit in the ***Brady*** standard. It is true that to establish a ***Brady*** violation, it is not necessary to show the *prosecutor* acted in bad faith. (**See *Brady* v. *Maryland*** (1963) 373 U.S. 83, 87 ["suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."], emphasis added.) But *somebody* on the prosecution team (e.g., whether that is a prosecutor or an officer) has to be aware the evidence is exculpatory. The High Court has never held that a violation of due process occurs where *nobody* on the prosecution team is or should be aware that the undisclosed evidence is exculpatory. (**See *Youngblood* v. *West Virginia*** (2006) 547 U.S. 867, 869–870 ["***Brady*** suppression occurs when the government fails to turn over even evidence that is "***known*** only to police investigators and not to the prosecutor," emphasis added by IPG]; ***Kyles* v. *Whitley*** (1995) 514 U.S. 419, 437 ["[T]he individual prosecutor has a duty to learn of any favorable evidence ***known*** to the others acting on the government's behalf in the case, including the police"].)

As pointed out by the California Supreme Court in ***In re Steele*** (2004) 32 Cal.4th 682: "Implicitly, ***Brady*** requires the prosecution to disclose only evidence that is favorable and material ***under the prosecution's evidence or theory of the case***." (**Id**. at p. 699, emphasis added.) "Otherwise, the

prosecution effectively would be required to do what ***Brady*** does not require, that is, to 'deliver [its] entire file to defense counsel' (***United States* v. *Bagley***, supra, 473 U.S. at p. 675, 105 S.Ct. 3375) in order to avoid withholding evidence that may, or may not, become favorable and material depending on whatever unknown and unknowable theory of the case that the defendant might choose to adopt." (***Steele*** at p. 699.)

A "prosecutor's duty to disclose under ***Brady*** is limited to evidence a reasonable prosecutor *would perceive at the time* as being material and favorable to the defense." (***Woods* v. *Sinclair*** (9th Cir. 2014) 764 F.3d 1109, 1127, emphasis added.) "As noted in ***United States* v. *Comosona*** (10th Cir.1988) 848 F.2d 1110, "[t]o hold otherwise would impose an insuperable burden on the Government to determine what facially non-exculpatory evidence might possibly be favorable to the accused by inferential reasoning. We are confident that the Supreme Court did not intend the ***Brady*** holding to sweep so broadly." (**Id.** at pp. 1115; **see also *Harris* v. *Kuba*** (7th Cir.2007) 486 F.3d 1010, 1016 ["***Brady*** does not require that police officers or prosecutors explore multiple potential inferences to discern whether evidence that is not favorable to a defendant could become favorable."]; **cf.**, ***Newsome* v. *McCabe*** (7th Cir. 2001) 260 F.3d 824, 824 ["police need not spontaneously reveal to prosecutors every tidbit that with the benefit of hindsight (and the context of other evidence) could be said to assist defendants."].)

This does not mean that a due process violation is avoided when nobody on the prosecution team is subjectively aware the evidence is exculpatory but objectively *should* know it is exculpatory. But that is really no different than requiring the evidence to be "apparently" exculpatory.

Thus, it is *likely* from a legal standpoint, and certainly from a practical standpoint, that there is little difference between undisclosed favorable material evidence that has been suppressed by a member of the prosecution team and not reasonably available to the defense (the *Brady* test for materiality) and apparently exculpatory evidence that is of a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means (the *Trombetta* test for materiality).

F. What Does It Mean for Evidence to Have an Apparent Exculpatory Value?

As noted earlier, in ***California* v. *Trombetta*** (1984) 467 U.S. 479, the Court held that for a due process violation to occur based on loss or destruction of evidence, the evidence must possess "***an exculpatory value*** that was apparent before the evidence was destroyed." (**Id.** at pp. 488-489; **see also *Arizona* v. *Youngblood*** (1988) 488 U.S. 51, 56, fn. 1 ["we made it clear in ***Trombetta*** that the exculpatory value of the evidence must be apparent 'before the evidence was destroyed'"].) So, what does it mean for evidence to have an exculpatory value that is apparent before its destruction?

1. Speculation is insufficient to establish that evidence is apparently exculpatory

A defendant cannot establish a violation of due process where there is no indication that there was anything exculpatory about destroyed evidence. (***People* v. *Stansbury*** (1993) 4 Cal.4th 1017, 1055; ***People* v. *Frye*** (1998) 18 Cal.4th 894, 943; ***United States* v. *Jobson*** (6th Cir. 1996) 102 F.3d 214, 219.) If the exculpatory value of the evidence can only be established through mere speculation, it is not "apparently exculpatory." (**See *People* v. *Alexander*** (2010) 49 Cal.4th 846, 877-879; ***People* v. *Cook*** (2007) 40 Cal.4th 1334, 1349, 1351; ***People* v. *Velasco*** (2011) 194 Cal.App.4th 1258, 1265-1266.)

2. Cases finding the evidence had no apparent exculpatory value are numerous

Most evidence seized by the police is taken because it is either incriminating on its face or has the potential to provide incriminating evidence. (**See *United States* v. *Ossai*** (1st Cir. 2007) 485 F.3d 25, 30 ["law enforcement officers do not normally collect evidence they deem immaterial to the offense under investigation"].) Obviously, the first type of evidence is not apparently exculpatory. Less obviously, the second type is also not considered apparently exculpatory. (**See *Arizona* v. *Youngblood*** (1988) 488 U.S. 51, 56, fn. 1 [noting that where police seize a sample of clothing or semen and they do not know to whom the sample belongs, it cannot be said that the exculpatory value of the evidence as to any particular suspect will be known in advance of its loss or destruction and, in such circumstances, the evidence is "simply an avenue of investigation that might have led in any number of direction"].)

Thus, it is not surprising that the vast majority of cases, especially in California, find the evidence law enforcement failed to retain to have no apparent exculpatory value. (**See *People* v. *Lucas*** (2014) 60 Cal.4th 153, 221 [no violation for failure to preserve partial fingerprint on insurance note]; ***People* v. *Duff*** (2014) 58 Cal.4th 527, 550 [no violation for failure to preserve vehicle where bodies of victims

found]; ***People* v. *Alexander*** (2010) 49 Cal.4th 846, 878-879 [no violation for failure to preserve audio of the attempted hypnosis session with a witness, original composite drawings by a police sketch artist and/or blood test swabs]; ***People* v. *DePriest*** (2007) 42 Cal.4th 1, 42 [no violation for failure to preserve car with three unidentified fingerprints where unknown who prints belonged to]; ***People* v. *Cook*** (2007) 40 Cal.4th 1334, 1348-1349 [no violation for failure to preserve trash bag (and garbage inside the bag) containing shoes with bloodstains matching murder victim's blood that was found inside defendant's garage]; ***People* v. *Schmeck*** (2005) 37 Cal.4th 240, 283-284 [no violation for failure to preserve defendant's jacket that was initially revealed to have bloodstains of victim even though it was possible additional, more refined, testing could have excluded the victim as the source of the bloodstain]; ***People* v. *Williams*** (1997) 16 Cal.4th 635, 662 [no violation for failure to preserve recorder used to make the original microcassette tape of defendant's confession]; ***People* v. *McPeters*** (1992) 2 Cal.4th 1148, 1179 [no violation for discarding envelope (but not cash inside envelope) found on defendant at booking where no evidence suggested officers knew or should have known at the time of its disposal that the manner in which defendant carried money on his person would be in issue or of value to the defense]; ***People* v. *Hardy*** (1992) 2 Cal.4th 86, 165-166 [no violation for failure to refrigerate shoe with bloodstain worn by defendant because, if anything, the stain would appear to police to provide evidence against defendant]; ***People* v. *Velasco*** (2011) 194 Cal.App.4th 1258, 1265-1266 [no exculpatory value in pair of prison inmate-manufactured pocket sewn in the front that allowed for easy access to shank recovered from inmate]; ***People* v. *Pastor Cruz*** (1993) 16 Cal.App.4th 322, 325-326 [no apparent exculpatory value in knife seized and lost by police although knife was allegedly used by defendant but differed in size from description given by victim and thus could potentially impeach victim]; ***People* v. *Lopez*** (1987) 197 Cal.App.3d 93, 96-98 [no apparent exculpatory value in liquid containing PCP which had been determined by chemist to weigh more than 14.25 grams even though defendant would not be subject to probation preclusion clause if he could show it weighed less than that]; ***People* v. *Gonzales*** (1986) 179 Cal.App.3d 566, 575 [no apparent exculpatory value in paper sheet upon which victim copied down words he saw tattooed on robbery suspect].)

3. Will illegal drugs ever be viewed as having an apparently exculpatory value?

Normally, unlawful drugs will not be deemed to have any apparent exculpatory value. (**See *Henry* v. *Page*** (7th Cir. 2000) 223 F.3d 477, 481 [no due process violation when custodian of evidence destroyed cannabis and cocaine seized from defendant's car because, inter alia, nothing in record suggested substances possessed exculpatory value prior to destruction]; ***United States* v. *Gomez*** (10th Cir. 1999) 191 F.3d 1214, 1218-1219 [no due process violation when government destroyed seized marijuana because defendant failed to show any apparent exculpatory value]; ***United States* v. *Rolande-Gabriel*** (11th Cir. 1991) 938 F.2d 1231, 1238 [no due process violation when government failed to preserve liquid in which cocaine was mixed; liquid had no exculpatory value because content

was not relevant to sentencing hearing and defendant had already pleaded guilty to importation]; **but see *United States* v. *Belcher*** (W.D.Va.1991) 762 F.Supp. 666, 672 [inexplicably finding marijuana plants which had been visually inspected but destroyed before testing were apparently exculpatory because the plants were "crucial evidence" and because "it is conceivable" that the opinion of the police that the plants were marijuana could be proven wrong by testing] and *compare* ***Crews* v. *Johnson*** (W.D.Va. 2010) 702 F.Supp.2d 618, 632 and fn. 11 [finding ***Belcher*** improperly defined what constituted "materially exculpatory" evidence]; ***United States* v. *Montgomery*** (D. Kan. 2009) 676 F.Supp.2d 1218, 1242 [finding ***Belcher***'s conclusion marijuana plants have apparently exculpatory value when crucial to a case is against weight of authority]; ***United States* v. *Rabinowitz*** (W.D.Va. 1998) 991 F.Supp. 760, 765 [destruction of marijuana plants did not violate due process where defense attorney was present at weighing and destruction of plants and had full opportunity to inspect them].)

4. Will items from which prints could potentially have been, but were not, lifted ever be viewed as apparently exculpatory evidence?

Usually, the failure to retain items from which prints could be lifted will not be a due process violation because until the prints are lifted and compared, it cannot be determined to whom any potential prints will belong. (**See *People* v. *Roybal*** (1998) 19 Cal.4th 481, 510; ***People* v. *Medina*** (1990) 51 Cal.3d 870, 893.)

For example, in ***People* v. *Carrasco*** (2014) 59 Cal.4th 924, defendant's fingerprint was lifted from a hairspray can located in the glove compartment of a car driven to the scene of a charged murder. The can was left in the car after it had been processed and the can was no longer available at trial because the car had been released to its owner. Defendant contended it was possible a second latent print of the same fingerprint introduced at trial could have been taken from the can and it may "have been possible for a defense expert to determine whether or not there was ever any print on the can to be lifted or if the print was lifted from somewhere else." In addition, defendant contended the can "could have been tested for accompanying fingerprints besides" defendant's, and that the "presence of other person's fingerprints could have created a reasonable doubt that [defendant] occupied the Honda at the time of the murder." (***Id***. at p. 960-962.) The California Supreme Court held the can was not apparently exculpatory but merely potentially useful evidence. (***Id***. at pp. 961-962; **but see *United States* v. *Elliott*** (E.D.Va. 1999) 83 F.Supp.2d 637, 643 [misapplying ***Youngblood*** in finding glassware from which prints could be lifted to be apparently exculpatory evidence even though prints could only *potentially* be exculpatory].)

G. What Does It Mean to Show Comparable Evidence Could Not Be Obtained by Other Reasonable Means?

As noted above, a defendant claiming a due process violation based on the failure to preserve evidence must show "that the defendant could not obtain comparable evidence by other reasonable means." (***People* v. *Frye*** (1998) 18 Cal.4th 894, 943, citing ***California* v. *Trombetta*** (1984) 467 U.S. 479, 489.) In ***California* v. *Trombetta*** (1984) 467 U.S. 479, the Court indicated that a defendant cannot make this showing where defendants have "alternative means of demonstrating their innocence." (**Id**. at p. 490; **accord *Arizona* v. *Youngblood*** (1988) 488 U.S. 51, 56.)

1. Does the requirement that the defendant show an inability to obtain comparable evidence by other reasonable means apply when the evidence is merely potentially useful but the government acts in bad faith?

To a certain extent, if the requirement that a defendant must show he or she could not obtain comparable evidence by other reasonable means is viewed as part and parcel (or the equivalent) of a showing of prejudice, then a reasonable argument can be made that the defendant must show a lack of comparable evidence in circumstances where the government acted in bad faith in destroying the evidence but the evidence is only potentially useful. There are not a lot of cases exploring the issue. On the one hand, when the evidence lost is merely "potentially useful," then the significance of the evidence cannot be known and thus it may be difficult to assess whether "comparable evidence" exists. This would militate in favor of a rule dispensing with the requirement the defendant show an absence of alternative evidence comparable to the "potentially useful" evidence in order to establish a due process violation when the potentially useful evidence is destroyed in bad faith.

On the other hand, if other evidence exists that establishes what the potentially useful evidence might show, *assuming the results would favor the defendant*, then it seems like due process would not be violated. For example, if one unknown print from a windowsill lifted during the investigation of a burglary was lost, but a second print from the same windowsill could be shown to have belonged to someone other than the defendant, it would be difficult to argue that defendant has been deprived of due process regardless of whether the police destroyed the first print in bad faith – especially if the jury was instructed to assume the missing print would have also have come back to someone other than the defendant.

Perhaps this is why the First Circuit has held the "no comparable evidence" requirement applies *regardless* of whether the evidence is apparently exculpatory or potentially exculpatory: "The defendant argues that ***Trombetta***'s irreplaceability requirement has been eliminated by ***Youngblood***. We

disagree. There is nothing in ***Youngblood*** to suggest elimination of the irreplaceability requirement. Also, while neither the Supreme Court nor this court has directly addressed the irreplaceability requirement in the context of apparently exculpatory evidence (as opposed to potentially exculpatory evidence), we conclude that proof of irreplaceability is required in ***both*** apparent and potential exculpatory evidence cases." (***Olszewski* v. *Spencer*** (1st Cir. 2006) 466 F.3d 47, 58, emphasis added by IPG.)

Indeed, several circuits have not only agreed with ***Olszewski***, but have indicated that the defendant must show no comparable evidence exists even when the police act in bad faith and the evidence *is apparently exculpatory*: "[U]nder the ***Youngblood*** standard, in cases "where the government fails to preserve evidence whose exculpatory value is indeterminate and only potentially useful," the defendant must demonstrate:(1) that the government acted in bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before its destruction; ***and*** (3) that the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other reasonably available means." (***United States* v. *Collins*** (6th Cir. 2015) 799 F.3d 554, 569; ***United States* v. *Jobson*** (6th Cir. 1996) 102 F.3d 214, 218, emphasis added by IPG.) "When the state fails 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,' a defendant must show: (1) that the government acted in bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before its destruction; ***and*** (3) that the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other means." (***Monzo* v. *Edwards*** (6th Cir. 2002) 281 F.3d 568, 580; ***United States* v. *Wright*** (6th Cir. 2001) 260 F.3d 568, 570, emphasis added by author; **accord *Tabb* v. *Christianson*** (7th Cir. 2017) 2017 WL 1532321, at *8; ***United States* v. *Bell*** (7th Cir. 2016) 819 F.3d 310, 318; ***United States*. v. *Fletcher*** (7th Cir. 2011) 634 F.3d 395, 407; ***United States* v. *Kimoto*** (7th Cir. 2009) 588 F.3d 464, 474–475; ***Hubanks* v. *Frank*** (7th Cir. 2004) 392 F.3d 926, 931 **see also *United States* v. *Ludwig*** (10th Cir. 2011) 641 F.3d 1243, 1254, fn. 8 [to prevail under ***Trombetta***, "[b]ad faith is a necessary but not sufficient element," the defendant must *also* and *separately* show the videotape in question was irreplaceable"]; ***United States* v. *Dougherty*** (W.D. Wis. 1989) 774 F.Supp. 1181, 1186 ["Apart from the bad faith requirement, it must ***also*** appear that the destroyed evidence would be of likely significance to the defendant's defense"], emphasis added by IPG; ***Samek* v. *State*** (1997) 688 N.E.2d 1286, 1289 same]; **but see *State* v. *Powers*** (1990) 555 So.2d 888, 890 [stating, albeit in dicta, that "where the destruction of evidence is a flagrant and deliberate act done in bad faith with the intention of prejudicing the defense, that alone would be sufficient to warrant a dismissal of the charges"].)

* **Editor's note:** See this IPG, section I-J at pp. 46-47 for a more in-depth discussion of these cases.

California cases, however, have not indicated that defendant would have to show a lack of comparable evidence when the evidence is potentially useful and bad faith has been shown.

2. Is the requirement that the defendant show an inability to obtain comparable evidence met if the defendant had a reasonable opportunity to obtain such evidence but did not act on the opportunity?

If the defendant had ***a reasonable opportunity*** to obtain comparable evidence, that fact can suffice to defeat a claim that comparable evidence was unavailable by other reasonable means - even if the defendant did not act on the reasonable opportunity. (**See *People* v. *Cook*** (2007) 40 Cal.4th 1334, 1349 [although "gel plates" used in testing blood sample from one stain on right tennis shoe destroyed, no violation of due process because, inter alia, defendant had the "ample means of independently testing the remaining stains on the right shoe as well as the remaining portion of the single stain on the left shoe"]; ***People* v. *Stansbury*** (1993) 4 Cal.4th 1017, 1056 [comparable evidence of lost gas receipt alleged to support alibi existed, inter alia, where defendant had two years to contact and make inquiry of witnesses at gas station to establish time of the sale]; ***Grisby* v. *Blodgett*** (9th Cir. 1997) 130 F.3d 365, 371 [defendant unable to show prejudice from destruction of carpet piece because defense was aware of carpet and had opportunity to test bloodstains on carpet but neglected to do so before destruction]; ***United States* v. *Hernandez*** (9th Cir. 1997) 109 F.3d 1450, 1455 [defendant was "able" to obtain comparable evidence by other reasonably available means because defense experts were "able to test (and did in fact test) the gun before it was inadvertently destroyed"]; **see also *People* v. *Gonzalez*** (1989) 209 Cal.App.3d 1228, 1234 [where investigation could have turned up identity of potential suspect whose name and employer were written down by, but destroyed and forgotten by, the police, comparable evidence was available - even though no such attempt to locate the potential suspect was made]; **cf.**, ***People* v. *Newsome*** (1982) 136 Cal.App.3d 992, 1008 [even under ***Hitch*** standard, if the prosecution made timely notification to defense of existence of evidence and defense failed in timely fashion to avail itself of evidence, subsequent deterioration of evidence attributable to passage of time was not attributable to prosecution].)

3. Is defendant considered to have a reasonable opportunity to obtain comparable evidence, where the opportunity was available to *the defendant* but not defense counsel?

It is possible that in, some circumstances, a court will find the "no comparable evidence" prong of the ***Trombetta*** test will not be met if the defendant himself had a reasonable opportunity to obtain the evidence but failed to do so. In the Mississippi case of ***Murray* v. *State*** (2003) 849 So.2d 1281, the defendant was charged with several counts of aggravated assault. Three projectiles were collected from the scene, two were tested and it was determined they could have been fired from the same gun but nothing more. One of the projectiles was lost. At best, if the missing projectile was tested, it might have

shown it was fired from the same gun as the other two and that it was not fired from defendant's gun. Defendant argued the loss of the projectile violated due process. However, there was evidence that defendant got rid of the gun he had in his possession that night. The court found defendant had an opportunity to present comparable evidence "which would have conclusively and forever proven his innocence" (i.e., "the gun" itself) but had divested himself of the means of doing so by his own acts. (**Id**. at pp. 1284-1286.)

4. Does comparable evidence mean *identical* evidence?

The inability to comparable evidence prong of the ***Trombetta*** test is not met just because a defendant cannot obtain identical evidence. In ***California* v. *Trombetta*** (1984) 467 U.S. 479, the Court held that it was not necessary for the police to preserve "breath samples" of the air that persons breathed into an intoxilyzer machine in order for the results of the breath test to be admitted into evidence. Although the breath sample could potentially provide absolute proof that a particular breath test was inaccurate, the ***Trombetta*** Court held that "comparable evidence" was available because the defense could bring out the fact that the intoxilyzer could malfunction in a variety of ways. (**Id**. at p. 490.) Thus, "comparable evidence" can be a far cry from "identical evidence." (**See *People* v. *Gonzales*** (1986) 179 Cal.App.3d 566, 575 [describing "comparable evidence" in ***Trombetta*** as a "compilation of speculation" and noting the ***Trombetta*** Court was willing to "settle for far less satisfactory secondary evidence" in place of potential absolute proof that a particular breath test was inaccurate]; ***Elmore* v. *Foltz*** (6th Cir. 1985) 768 F.2d 773, 778 [due process not violated by destruction of audio tapes of drug transaction despite the fact that "no better tool exists for impeaching" the adverse witness than the tapes]; ***In re Donovan B.*** [unreported] 2014 WL 6434247, at *3 ["***Trombetta*** does not require a defendant have access to evidence identical to what was lost or destroyed"].)

5. Comparable evidence can be the existence of alternative means of demonstrating the point the defense is seeking to make.

Under ***Trombetta***, what "matters is that some reasonable alternative means exists for attempting to do what one would have attempted to do with the destroyed evidence[.]" (***Elmore* v. *Foltz*** (6th Cir. 1985) 768 F.2d 773, 778.) This "alternative means" may simply be having the ability to cross-examine the witnesses who observed the condition of the missing evidence, even if those witnesses are government witnesses. (**See e.g.**, ***People* v. *Walker*** (1988) 47 Cal.3d 605, 638 [defendant could not make out due process violation based on police loss of tape recording of defendant's conversation where defendant failed to show why the opportunity to cross-examine the officer who directly monitored the taped conversation was not comparable evidence]; ***United States* v. *Bingham*** (9th Cir. 2011) 653 F.3d 983, 994 [loss of bloody pants found on inmate other than defendant after prison murder did not violate due

process where existence established by other witness and stipulation – even though pants could not be tested for additional DNA evidence that might have aided defense]; ***United States* v. *Revolorio-Ramo*** (11th Cir. 2006) 468 F.3d 771, 774-775 [where government destroyed boat that carried drugs and defense of lack of knowledge would be supported by showing boat was functional fishing vessel, the ability to cross-examine officers about their observations regarding the functionality of fishing equipment found on the boat sufficed, in conjunction with other factors, to defeat claim comparable evidence to destroyed boat was unavailable]; ***United States* v. *Bucci*** (D. Mass. 2006) 468 F.Supp.2d 251, 254 [where government destroyed most of marijuana and the issue of the weight of marijuana was significant, the fact the defense had the ability to challenge the accuracy of the DEA's testing equipment, to test the remaining representative samples, and to cross examine the individuals who weighed the marijuana provided comparable evidence to the destroyed marijuana]; ***United States* v. *Binker*** (5th Cir. 1986) 795 F.2d 1218, 1230 [opportunity to cross-examine all the witnesses who testified the evidence seized was marijuana, including the DEA chemist who testified about its chemical composition provided comparable evidence to destroyed marijuana].)

6. Can the ability to attack the reliability of the prosecution's evidence serve as comparable evidence?

In ***California* v. *Trombetta*** (1984) 467 U.S. 479, the Court specifically held that where the missing evidence could potentially undermine the validity of the prosecution's evidence, the existence of alternative methods of showing that the prosecution's evidence is unreliable can constitute "comparable evidence." (**Id**. at p. 490 [finding no due process violation because of defense's ability to attack reliability of test results through cross-examination of operator of intoxilyzer, testimony of defendant, or other methods, despite loss of breath samples]; **see also *People* v. *Chism*** (2014) 58 Cal.4th 1266, 1300 [ability to cross-examine recipient of defendant's letter comparable evidence]; ***People* v. *Richbourg*** (1986) 185 Cal.App.3d 1098, 1104 [no due process violation for release of car involved in vehicular homicide where defendant alleged car would show defective steering mechanism but defense could have presented own expert who, although deprived of the opportunity to actually examine the steering mechanism, could nevertheless offer an opinion concerning the alleged faulty steering mechanism, and could possibly challenge the findings of the prosecution expert, and defendant could testify himself about the steering mechanism or call the owner of the vehicle to testify about any "play," he had experienced in the steering mechanism when driving the car]; ***United States* v. *Donaldson*** (10th Cir.1990) 915 F.2d 612, 614 [where weight of seized marijuana was at issue, submitting affidavits and cross-examining government witnesses regarding weight was comparable evidence to weighing the marijuana itself]; ***United States* v. *Dela Espriella*** (9th Cir. 1986) 781 F.2d 1432, 1437-1438 [judge properly denied defendant's motion to suppress evidence that narcotics sniffing dog alerted on currency even though currency was lost because defense could challenge reliability of dog]; ***United States* v. *Boswell*** (8th Cir. 2001) 270 F.3d 1200, 1207 [no due process violation in failure to properly preserve

blood and serum samples where defendant had opportunity to impeach reliability of test results due to degradation of samples]; ***United States* v. *Sherrod*** (5th Cir. 1992) 964 F.2d 1501, 1507-1508 [no error when officers destroyed methamphetamine found in drug lab because defendant had ample opportunity to show government was wrong about amount of drug seized]; ***United States* v. *Boyd*** (3rd Cir. 1992) 961 F.2d 434, 437 [comparable evidence existed where defendant's urine sample destroyed because defendant could challenge reliability of positive result by bringing out fact test was inaccurate 4% of the time].)

7. Can a stipulation or adverse instruction suffice to provide comparable evidence?

In some cases, a prosecution stipulation as to the existence of the missing evidence can meet the comparable evidence prong. (**See e.g., *People* v. *Stansbury*** (1993) 4 Cal.4th 1017, 1056 [comparable evidence of lost gas receipt purportedly supporting defendant's alibi existed where, inter alia, prosecution stipulated to existence of receipt and date and place of gasoline sale]; ***United States v. Bingham*** (9th Cir. 2011) 653 F.3d 983, 994 [comparable evidence provided, in part, by stipulation that right after prison murder, an inmate other than defendant was wearing bloody pants]; ***State* v. *Morales*** (1992) 844 S.W.2d 885, 892 [failure by state to preserve taped interview of assault defendant was not violation of due process where, inter alia, state offered to stipulate as to what defendant claimed he said in taped interview].)

Alternatively, even absent a stipulation, a court could provide an adverse jury instruction that meets or exceeds the exculpatory value of the missing evidence. In ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51 (see this IPG, section I-B-2 at pp. 4-5), for example, the court gave an instruction telling 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 p. 54.) The majority opinion did not discuss the instruction further and made no mention of it in finding there was no due process violation. However, in his concurring opinion in ***Youngblood***, Justice Steven identified three factors "of critical importance" to his evaluation of this case. One of those factors was that that "the trial judge 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.' . . . As a result, the uncertainty as to what the evidence might have proved was turned to the defendant's advantage." (***Id***. at pp. 59-60.) Although Justice Stevens did not expressly state that the instruction served as "comparable evidence," he did view it as part of what a court could consider in determining whether the criminal trial was "fundamentally unfair." (***Id***. at p. 61 [and noting 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."].) Regardless, in terms of whether a defendant's due process rights have been violated, it does not make a difference whether the giving of an adverse jury

instruction is viewed as a means of providing comparable evidence or as a means of preventing an unfair trial in violation of due process: the result in the same. (**Cf.**, ***United States* v. *Cooper*** (9th Cir. 1993) 983 F.2d 928 (discussed more extensively below in this IPG, section I-G-13 at pp. 27-28) [court properly rejected prosecution offer to stipulate to jury instruction establishing some, but not all, of what defense wanted to show from missing evidence where impact of actual introduction of evidence significantly outweighed impact of stipulation].)

* **Editor's note:** A "jury instruction" that suffices to provide "comparable evidence" is different than a jury instruction that is given as a sanction once a court determines the due process rights of a defendant have been violated by loss of the evidence. (**See** this IPG, section I-Q-5-b at p. 60.) The former *precludes* a due process violation from being found in the first place; the latter assumes a due process violation *has occurred* – albeit one that does not require dismissal. Ultimately, the instructions serve the same purpose – avoiding a reversal.

8. Can uncontradicted testimony serve as comparable evidence?

Where an uncontradicted witness can provide the same information that was contained in the lost item, the comparable evidence prong may be met. (**See e.g., *People* v. *Sassounian*** (1986) 182 Cal.App.3d 361, 394-395 [comparable evidence existed where defense was able to present *uncontradicted* testimony of a deputy sheriff establishing existence and contents of lost jail logs].)

9. Can photos of the missing evidence serve as comparable evidence?

If the evidence has been photographed, the photograph can provide comparable evidence. (**See *People* v. *Cook*** (2007) 40 Cal.4th 1334, 1350 [finding no due process violation where book of photos in precise order shown to witness not available but xerox of book with only minor change to photo of defendant was]; ***People* v. *Carter*** (2005) 36 Cal.4th 1215, 1246-1247 [photograph of wood chips found on floor of murder victim's apartment provided comparable evidence to actual wood chips which had not been preserved]; ***United States* v. *Haywood*** (3rd Cir. 2004) 363 F.3d 200, 211 [photograph of lost clothing defendant was wearing in case where color and type of clothing worn was important to both defense and prosecution constituted comparable evidence]; ***Bell* v. *State*** (2007) 963 So.2d 1124, 1137 [photographs of broken side mirror provided comparable evidence to mirror itself, even though defense accident reconstruction expert testified it would have been important to have seen the mirror because it is hard to tell depth perception through the pictures, where expert acknowledged photographs as well as physical evidence are both reliable sources of information, and he had been trained to use both]; ***People* v. *Jordan*** (1984) 469 N.E.2d 569, 578-579 [photographs are comparable evidence under ***Trombetta*** when defendant is able to cross-examine prosecution witnesses and put on other evidence].)

This will not always be the case, though. (**See *Roberson* v. *State*** (2002) 766 N.E.2d 1185, 1188-1189 [blurry photograph of missing popsicle stick arguably fashioned into weapon in prison did not provide comparable evidence where crucial issue was nature of stick and photo did not sufficiently depict character or dangerousness of device, albeit noting a different result would be reached if item was knife or gun]; ***United States* v. *Cooper*** (9th Cir. 1993) 983 F.2d 928 (discussed more extensively in this IPG, section I-G-13 at pp. 27-28 [photographs of destroyed item did not provide comparable evidence]; ***People* v. *Enriquez*** (1988) 763 P.2d 1033, 1036 ["we cannot say as a matter of law that photographs are comparable to the evidence they depict for purposes of determining whether a due process violation has occurred under ***Trombetta***"]; **see also *United States* v. *Sivilla*** (9th Cir. 2013) 714 F.3d 1168, 1173-1174 [where appearance of hidden compartment in vehicle was significant to question of how difficult it would be to remove drugs from compartment, grainy and indecipherable photographs of vehicle could not minimize prejudice from loss of vehicle].)

10. If the evidence lost pertains to a record of a conversation, can the availability of the parties to the conversation provide comparable evidence?

When a report or notes relating to a conversation are lost, or a recording of a conversation is lost, the availability of the parties to the conversation can serve as comparable evidence to the missing report, notes, or recording. (**See *People* v. *Thomas*** (2012) 54 Cal.4th 908, 929; ***United States* v. *Ludwig*** (10th Cir. 2011) 641 F.3d 1243, 1254; ***United States* v. *Parker*** (10th Cir. 1995) 72 F.3d 1444, 1452; ***United States* v. *Rivera-Relle*** (9th Cir. 2003) 333 F.3d 914, 922; ***United States* v. *Fritzsching*** (D. Utah 2017) 2017 WL 389088, at *8; ***State* v. *McNeil*** (Ga. Ct. App. 2011) 708 S.E.2d 590, 595 **Cf**. ***Trombetta*** at p. 490 ["[T]he defendant retains the right to cross-examine the law enforcement officer who administered the [destroyed] test, and to attempt to raise doubts in the mind of the factfinder whether the test was properly administered.").

This is true even where the witnesses recounting the statement cannot recall it word for word. (**See *Olszewski* v. *Spencer*** (1st Cir. 2006) 466 F.3d 47, 58-59; **but see *Scott* v. *Meese*** (1985) 174 Cal.App.3d 249, 257 [where conflicting testimony from parties to tape, tape may not be comparable evidence].)

11. Can potential testimony of the defendant regarding the evidence qualify as comparable evidence?

In one California case, where a defendant was claiming he was deprived of exculpatory evidence that a steering wheel was faulty because police disposed of the vehicle he was driving during the commission of a vehicular homicide, the court suggested that comparable evidence to the missing car could be supplied,

in part, by the defendant's own testimony regarding the faulty steering mechanism. (**See *People* v. *Richbourg*** (1986) 185 Cal.App.3d 1098, 1104.) A recent California Supreme Court case similarly suggested that the Constitution does not forbid a defendant from choosing between his right to testify and his right to remain silent in this context, thereby suggesting that the defendant could supply comparable evidence. (***People* v. *Chism*** (2014) 58 Cal.4th 1266, 1300.)

In ***People* v. *Angeles*** (1985) 172 Cal.App.3d 1203, the court found defendant's own trial testimony provided, in part, comparable evidence to an officer's lost notes where defendant alleged the notes would support his claim of unfamiliarity with the English language. (**Id**. at p. 1215.) Cases from other jurisdictions have also found the ability of the defendant to testify can supply, in part, comparable evidence. (**See *United States* v. *Revolorio-Ramo*** (11th Cir. 2006) 468 F.3d 771, 774-775 [where existence of bona fide fishing equipment on boat carrying drugs would have supported defense claim of lack of knowledge of drugs, fact that defendant could testify to functionality of equipment helped provide comparable evidence to destroyed boat]; ***United States* v. *Brimage*** (1st Cir. 1997) 115 F.3d 73, 77 [finding no due process violation even when the "other evidence" available to the defense was the testimony of defendants who would have to waive their fifth amendment right not to testify]; ***United States* v. *Parker*** (10th Cir. 1995) 72 F.3d 1444, 1452 [defendant failed to show a missing videotape of defendant's conversation with officers was irreplaceable because the defendant could testify at the motion to suppress the missing tape].)

Expect the defense to argue that since the defendant has a right not to testify, it is wrong to assume he will supply comparable evidence and that requiring him to testify at a ***Trombetta*/*Youngblood*** hearing to show he cannot provide comparable evidence is essentially forcing the defendant to give up one constitutional right (i.e. the right against self-incrimination) in order to assert another constitutional right (i.e., the right to due process). For example, in ***United States* v. *Zaragoza-Moreira*** (9th Cir. 2015) 780 F.3d 971, involving a destroyed videotape of defendant's conduct at a port of entry, the Ninth Circuit rejected the argument that defendant's testimony at trial concerning her conduct would provide comparable evidence because this would run afoul of the defendant's "Fifth Amendment right against self-incrimination, by essentially forcing her to testify in her own defense." (***Id***. at p 981.) The Ninth Circuit then went on to say "[n]otwithstanding the obvious Fifth Amendment implications triggered by the government's argument, [defendant's] self-serving testimony, especially in light of her substantial cognitive disabilities, would not be comparable to video footage that recorded her actions while in the pedestrian line." (**Ibid**; **see also *United States v. Corsmeier*** (S.D. Ohio 2007) [unreported case] 2007 WL 4224366, *7 [agreeing with defendant that her own testimony about a conversation on a missing tape, if she could recall the content, would not be comparable evidence without specifying why].)

However, the California Supreme Court has taken a different approach and **rejected** the argument adopted by the Ninth Circuit. In ***People v. Chism*** (2014) 58 Cal.4th 1266, a case involving the loss or

a letter written by the defendant to a witness, the court observed that the absence of the letter "did not deny defendant all opportunity 'to obtain comparable evidence by other reasonably available means." This was because the "[d]efendant was able to cross-examine [the witness] on the issue and, had he chosen to do so, he could have testified to the nature of his letter to [the witness]." (***Id***. at p. 1300.) The court explained that "[t]here is no constitutional infirmity in the circumstance that if defendant had wanted to expand on the information presented by [the contents of [the witness'] letter,] and ... by testifying himself, he might have been put in the position of choosing between his right to testify at the trial and his right to remain silent. ""The criminal process ... is replete with situations requiring the "making of difficult judgments" as to which course to follow. [Citation.] Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."" (**Ibid**.)

The analysis by the California Supreme Court is spot on and is how the issue is viewed in analogous circumstances. (**See e.g., *People* v. *Humiston*** (1993) 20 Cal.App.4th 460, 474 [defendant seeking to suppress evidence is still subject to having his testimony at the hearing later used at trial to impeach him - albeit statement cannot be used in prosecution's case-in-chief]; ***People* v. *Drews*** (1989) 208 Cal.App.3d 1317, 1325-1326 [same]; ***People* v. *Macias*** (1997) 16 Cal.4th 739, 756 [defendant seeking to assert right to effective counsel at a motion for new trial claiming ineffectiveness of trial counsel is subject to having his statements at the motion being used to impeach at later trial if motion granted - albeit statements cannot be used as substantive evidence]; ***People* v. *Dennis*** (1986) 177 Cal.App.3d 863, 876 [same]; **see also *People* v. *Kowalski*** (1987) 196 Cal.App.3d 174, 179, 181 [defendant may be deemed to have waived right to a preliminary hearing within 10 court days by insisting on his constitutional right to counsel - which could not be complied with unless that right was deemed to prevail over the statutory time requirements for a preliminary hearing].)

12. Examples of common situations where courts have found comparable evidence to exist

a. Alibi documents

If the information on lost receipts or other documents can be recreated, this may suffice in providing comparable evidence. (**See e.g., *People* v. *Stansbury*** (1993) 4 Cal.4th 1017, 1056 [comparable evidence of lost gas receipt existed where police log had record of receipt, prosecutor stipulated to the existence of the receipt and the date and place of the gasoline sale, and defendant could have made inquiry of witnesses at gas station].)

b. Identity of Potential Suspect

Sometimes the police may contact a potential suspect whose name or identifying information is subsequently lost. If the defense has a means of obtaining the identity of the witness that will be deemed comparable evidence. For example, in ***People* v. *Gonzalez*** (1989) 209 Cal.App.3d 1228, an officer was driving around the neighborhood shortly after a burglary occurred in search of persons matching the description of the burglar provided by another officer who had seen the burglar. The officer located a landscape gardener who matched the description but when another officer (who had seen the burglar) arrived on the scene he stated the gardener was not the burglar. The officer took down the name and employer of the gardener but then destroyed his notes. The court found that comparable evidence was available because the identity of the gardener could have been obtained from an investigation of the identities of the gardeners who worked at the location where the gardener was detained and also because, at trial, evidence was presented that the searching officer had thought the gardener matched the description of the suspect. (**Id**. at pp. 1231-1234; **cf**., ***People* v. *Cook*** (2006) 39 Cal.4th 566 591-592 [loss of photographs of witnesses in house near murder victim who were interviewed some hours after a murder was not a due process violation because the prosecution provided the defense a list of the names of those witnesses].)

c. Photographs

In ***People* v. *Cook*** (2006) 39 Cal.4th 566, the court held there was no due process violation where police lost photographs of witnesses interviewed shortly after a murder occurred where the prosecution provided the defense a list of the names of those witnesses. (**Id**. at pp. 591-592.) In ***People* v. *Rodriguez*** (Colo.1996) 914 P.2d 230, the court held there was no due process violation where photographs were destroyed because videotape evidence of the same images was available. (***Id***. at pp. 270-271.) In ***State* v. *Gomez*** (2005) 915 So.2d 698, the court found comparable evidence was reasonably obtainable of a lost photograph of a defendant's bloody face (in a case where defendant was charged with battery on a peace officer and violently resisting arrest) from medical records establishing the suspect's injuries and a booking photo which also depicted defendant's injuries. (**Id**. at p. 791.)

d. Rape Kit or Sexual Assault Evidence

In ***United States* v. *Sherlock*** (9th Cir.1989) 962 F.2d 1349, the Ninth Circuit held there was no due process violation where a rape kit was lost but testimony of an examining physician that fluid samples from vaginal cavities of alleged victims showed no sperm served as an alternative, potentially exculpatory substitute for the lost rape kit. (Id. at p. 1355; **see also *United States* v. *Alderdyce*** (9th Cir. 1986) 787 F.2d 1365, 1370–1371 [holding that lack of vaginal swabs did not "completely deprive[ ] [rape defendant] of potentially exculpatory evidence" in violation of ***Trombetta***, because defendant had access to sperm samples found on victim's clothing, results of tests done on those samples, and results from pap smear indicating presence of sperm].)

e. Taped or Written Statements

Having the parties who were recorded on a missing tape available for cross-examination can provide "comparable evidence." (***United States* v. *Rivera-Relle*** (9th Cir. 2003) 333 F.3d 914, 922; **see also** ***United States* v. *Ludwig*** (10th Cir. 2011) 641 F.3d 1243, 1254 [videotape]; ***United States* v. *Parker*** (10th Cir. 1995) 72 F.3d 1444, 1452 [same]; ***People* v. *Thomas*** (2012) 54 Cal.4th 908, 929 [interview not recorded; no due process violation because officer taking interview was subject to cross-examination]; ***United States* v. *Fritzsching*** (D. Utah 2017) 2017 WL 389088, at *8 [defendant failed to show "no comparable evidence" existed where recording device did not record statement of defendant because parties to conversation available to testify to statement]; **but see *Scott* v. *Meese*** (1985) 174 Cal.App.3d 249, 257 [where conflicting testimony from parties to tape, tape may not be comparable evidence]; **see also** this IPG, section G-11 at pp. 23-24 [discussing issue when defendant is a party to the conversation].)

Similarly, comparable evidence of a destroyed *written* statement can be provided where the general content of statement is known and the police who took the statement can be cross-examined on its making and destruction. (**See *Olszewski* v. *Spencer*** (1st Cir. 2006) 466 F.3d 47, 58-59 [and finding this true even where the officers recounting the statement could not recall it word for word]; see also ***United States* v. *Bell*** (7th Cir. 2016) 819 F.3d 310, 315–19 [destruction of written statement by inmate was not violation of due process because inmate was available to testify to contents of statement].)

f. Videotape of Incident (e.g., Surveillance Videos, Body Camera, or Patrol Car Footage)

If there is a videotape of an incident (such as a police video of a stop), the fact the witnesses to the event are available to testify can provide comparable evidence. (**See *United States* v. *Ludwig*** (10th Cir. 2011) 641 F.3d 1243, 1254; ***United States* v. *Parker*** (10th Cir. 1995) 72 F.3d 1444, 1452.) This can be true even when what the witnesses saw is the videotape, rather than the incident videotaped. For example, in ***United States* v. *Drake*** (9th Cir. 2008) 543 F.3d 1080, police watched a videotape of the robbery shortly after it occurred. However, when they requested a copy of a store's surveillance videotape, they instead received a floppy disk containing fourteen still images from the surveillance camera (depicting the robbery in commission). The police never obtained the actual videotape and the original digital recording of the robbery was automatically deleted and permanently lost. Nevertheless, the court found comparable evidence of the videotape existed because and the officers were available to testify to the contents of the recording – albeit also because the still images of the robbery were preserved. (**Id**. at p. 1090.) Similarly, in ***People* v. *Braunthal*** (Colo. 2001) 31 P.3d 167, the court held photos lifted from the videotape provided comparable evidence to a lost videotape because the photos were available for the jury to consider and allowed for cross-examination of witnesses who viewed the tape. (***Id***. at pp. 174–175 [albeit noting there was no evidence offered to question the accuracy of videotape depicting same images as in photographs].)

13. Examples of rare cases where courts found a lack of comparable evidence

In ***United States* v. *Zaragoza-Moreira*** (9th Cir. 2015) 780 F.3d 971, the defendant was arrested and subsequently charged with drug offenses when she was found in possession of drugs at the border. After she had been directed to a secondary inspection, the defendant, in response to questioning, "blurted out" that she had packages on her. During a post-arrest interview, the defendant informed law enforcement agents that she had been pressured to carry the drugs into the United States and was trying to make her presence in line "obvious" so she would come to the attention of law enforcement. (***Id***. at pp. 976-978.) As part of a discovery request, defense counsel asked the government to preserve any and all videotapes which related to the defendant's arrest. The court also ordered the government to preserve video footage from the date of the defendant's arrest. However, the video was recorded over within a month after the defendant's arrest. (***Id***. at 976-977.) The Ninth Circuit held that comparable evidence was not available in the form of defendant's own testimony concerning her duress claim and the ability to cross-examine of the Customs and Border Patrol officers about defendant's demeanor and conduct. The Ninth Circuit believed it could not consider defendant's potential testimony because she had a right not to testify under the Fifth Amendment; and any self-serving testimony, "in light of her substantial cognitive disabilities, would not be comparable to video footage that recorded her actions while in the pedestrian line." (***Id***. at p. 981.) Moreover, the Ninth Circuit believed "cross examination of the border inspectors regarding [the defendant's] behavior in the pedestrian line would also be incomparable, because neither the primary nor secondary inspectors observed [the defendant] while she waited in line." (***Id***. at p. 982.)

In ***United States* v. *Cooper*** (9th Cir. 1993) 983 F.2d 928, two defendants were charged with various offenses related to the manufacture of methamphetamine. Before trial, the government destroyed all of the laboratory equipment it seized in connection with the prosecution (much of the equipment was assumed, but not shown, to be contaminated). The defendants contended they were lawfully manufacturing a fuel additive, dextran sulfate, and naval jelly; and that the government's destruction of the entire lab deprived them of the ability to establish their defense. (**Id**. at pp. 929-930.)

The defendants brought a motion seeking dismissal of the charges, claiming there was no comparable evidence that could be introduced (the government did not challenge the claim the exculpatory value of the evidence was apparent before destruction nor that the police acted in bad faith in allowing its destruction). At the hearing on the motion, one defendant testified that one piece of equipment (a vat that had been destroyed) was specially reconfigured for legitimate chemical processes and was constructed in a fashion that made it impossible to use in the manufacture of methamphetamine. A defense expert testified that if the defendant's description of the item was correct, the high temperatures required to make methamphetamine would destroy the vat, but that he could reach no firm conclusion

without examining the vat and other items whose properties the defendants claimed would support their innocence. The prosecution responded to the motion by pointing out that there was comparable evidence because the defense could question experts familiar with the properties of lab equipment (there were photos of the equipment) and could question the designer of the vat. ((**Id**. at pp. 930-932.)

The court rejected the prosecution's argument, finding testimony about the possible nature of the equipment would not be an adequate substitute for testimony informed by its examination and that expert opinion on how the vat might originally have been designed would not address the significance of any modifications made by the defendants. (**Id**. at p. 932.) The court also **rejected** the idea, proffered by the prosecution, that comparable evidence could be met by an instruction informing the jury that "they were to take as proven the defendant's claim that the laboratory was a legitimate laboratory set up to manufacture dextran sulfate." The court cited two reasons. First, the instruction paled in comparison with the potential value of the actual equipment; if the equipment was physically shown to be incapable of methamphetamine manufacture and specially configured for legitimate purposes, that would be powerful evidence - weightier than the instruction. Second, the only methamphetamine found at the lab was a trace amount in a container of sludge. The defendants had claimed the sludge was the result of cleaning out a second-hand pump (which was among the items destroyed) and not from manufacturing methamphetamine. The proffered instruction did not address this claim of the defendants. (**Id**. at p. 932.)

In ***United States* v. *Elliott*** (E.D.Va. 1999) 83 F.Supp.2d 637, police found glassware in defendant's car associated with the manufacture of methamphetamine. Some of the glassware had residue. The glassware was brought to the DEA Office where it was dusted for fingerprints; some fingerprints were lifted. None of the glassware on which the residue appeared was tested to ascertain the chemical composition of the residue. The glassware was then photographed and diagrams were made of the location from where prints were lifted (albeit no photos were taken of the residue or portions of the glassware from which the prints were lifted). A private company then disposed of the items. In what can only be called a gross misunderstanding of the relevant law, the court concluded the exculpatory value of the evidence was apparent and significant (even though it was only potentially exculpatory evidence) and that there was no comparable evidence because it was not possible to ascertain the chemical contents of the residue nor confirm whether the fingerprints of the defendant were located on glassware which contained a residue or on glassware which contained no residue. (**Id**. at pp. 640-644.)

In ***Roberson* v. *State*** (2002) 766 N.E.2d 1185, the court found no comparable evidence existed of a missing popsicle stick arguably fashioned into weapon in prison where the crucial issue was the nature of stick and a blurry photo of the item did not sufficiently depict the character or dangerousness of device. (**Id**. at pp. 1188-1189; **see also *United States* v. *Belcher*** (W.D.Va. 1991) 762 F.Supp. 666, 672 [no comparable evidence existed where the police destroyed marijuana plants without doing any testing of the plants].)

H. What Does It Mean to Show Bad Faith on the Part of the Police?

As noted above, in ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51, when the state fails 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 there is no violation of due process, ***unless a criminal defendant can show bad faith on the part of the police***." (**Id**. at 57-58; **accord *Illinois* v. *Fisher*** (2004) 540 U.S. 544, 548, emphasis added by IPG.) Thus, "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." (***Arizona* v. *Youngblood*** (1988) 488 U.S. 51, 58; **accord *Illinois* v. *Fisher*** (2004) 540 S.Ct. 544, 547-548.) So, what is bad faith?

* **Editor's note:** For a discussion of whether it is necessary for the defense to show law enforcement acted in bad faith in failing to preserve evidence when the evidence is apparently exculpatory and no comparable evidence is reasonably available (i.e., the ***Trombetta*** standard), **see** this IPG, section I-I at pp. 42-46.

1. How have the cases defined "bad faith?"

While the express requirement that the defendant show "bad faith" is only found in ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51, courts have also looked to ***California* v. *Trombetta*** (1984) 467 U.S. 479, which did not expressly require the defendant to show bad faith in order to prove a violation of due process, but which did state the following in describing why due process was not violated by the loss of evidence in that case:

> "To begin with, California authorities in this case did not destroy respondents' breath samples in a calculated effort to circumvent the disclosure requirements established by ***Brady* v. *Maryland*** and its progeny. In failing to preserve breath samples for respondents, the officers here were acting "in good faith and in accord with their normal practice." ***Killian* v. *United States***, supra, at 242, 82 S.Ct., at 308. The record contains no allegation of official animus towards respondents or of a conscious effort to suppress exculpatory evidence." (***Trombetta*** at p 488.)

Moreover, in ***Trombetta***, the Court required that the evidence "possess an exculpatory value that was apparent before the evidence was destroyed . . ." (***Id***. at p. 489.) This requirement was later referenced in ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51 when the Court stated: "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." (***Id***. at p. 56, fn. *.) The language in ***Trombetta*** and ***Youngblood*** have given the lower courts lots to work with in trying to come up with a comprehensive definition of "bad faith."

The California Supreme Court seems to require, at a minimum, a showing that it be apparent to law enforcement the evidence was exculpatory prior to the destruction. (***People* v. *Catlin*** (2001) 26 Cal.4th 81, 160; ***People* v. *DePriest*** (2007) 42 Cal.4th 1, 42; ***People* v. *Beeler*** (1995) 9 Cal.4th 953, 976; ***People* v. *Zapien*** (1993) 4 Cal.4th 929, 965-966.) In ***Zapien***, the California Supreme Court also indicated that there needs to be a showing of "official animus towards respondents or of a conscious effort to suppress exculpatory evidence" or phrased differently, an intent "to deprive defendant of exculpatory evidence or to otherwise harm defendant." (**Id**. at pp. 965, 966.)

a. "Official Animus" or "Conscious Effort to Suppress Exculpatory Evidence"

Several courts have held that "[t]o establish bad faith, then, a defendant must prove 'official animus' or a conscious effort to suppress exculpatory evidence.'" (***United States* v. *Jobson*** (6th Cir. 1996) 102 F.3d 214, 218 [citing to ***California* v. *Trombetta*** (1984) 467 U.S. 479, 488]; **accord *United States.* v. *Fletcher*** (7th Cir. 2011) 634 F.3d 395, 407; ***Jones* v. *McCaughtry*** (7th Cir. 1992) 965 F.2d 473, 477 [same]; **accord *People* v. *Angeles*** (1985) 172 Cal.App.3d 1203, 1214 [finding no bad faith in destruction of rough notes because no evidence of officer's "official animus toward defendant . . . or any conscious effort on his part to suppress exculpatory evidence"]; **see also *People* v. *Zapien*** (1993) 4 Cal.4th 929, 965.)

b. "Design to Deprive"

In ***Jean* v. *Collins*** (4th Cir. 2000) 221 F.3d 656, a case involving a civil suit against the police, the court stated that what was meant by "bad faith" in ***Youngblood*** is that it be shown "the officers have intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial." (**Id**. at p. 663; **accord *Griffin v. Spratt*** (3rd 1992) 969 F.2d 16, 21; ***Reid* v. *Simmons*** (D.N.H. 2001) 163 F.Supp.2d 81, 84; ***State* v. *Steffes*** (N.D. 1993) 500 N.W.2d 608, 613-614 [bad faith "means that the state deliberately destroyed the evidence with the intent to deprive the defense of information"]; **see also *People* v. *Garcia*** (1986) 183 Cal.App.3d 335, 349 [pre-***Youngblood*** case holding "good faith . . . is the absence of malice and absence of design to seek an unconscionable advantage over the defendant"]; ***People* v. *Coles*** (2005) 134 Cal.App.4th 1049, 1055 [same]; ***People* v. *Angeles*** (1985) 172 Cal.App.3d 1203, 1214 [same]; ***contra United States* v. *Elliott*** (E.D.Va. 1999) 83 F.Supp.2d 637, 647-648 ["neither ***Trombetta*** nor ***Youngblood*** nor their progeny require a defendant to prove that the mental state of the police officer at the time of destruction was to foreclose a defense or to deliberately deny the defendant's due process rights"].)

Bad faith has also been defined as "not simply bad judgment or negligence, but rather implies the conscious doing of wrong because of dishonest purpose or moral obliquity." (***Terry* v. *State*** (2006) 857 N.E.2d 396, 408; ***Blanchard* v. *State*** (2004) 802 N.E.2d 14, 27; ***Land* v. *State*** (2004) 802 N.E.2d 45, 51; ***Wade* v. *State*** (1999) 718 N.E.2d 1162, 1166.) "The term 'bad faith' generally implies

something more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of the fraud. It also embraces actual intent to mislead or deceive another." (***State* v. *Brown*** (2007) 866 N.E.2d 584, 586.)

c. Negligence (or Incompetence) Not Enough

Mere negligence does not constitute bad faith. (**See *People* v. *DePriest*** (2007) 42 Cal.4th 1, 42; ***People* v. *Medina*** (1990) 51 Cal.3d 870, 894; **see also *Richter v. Hickman*** (9th Cir. 2008) 521 F.3d 1222, 1235-1236.) Negligent, as opposed to bad faith, failure to preserve potentially useful evidence does not deny due process. (**See *People* v. *Ochoa*** (1998) 19 Cal.4th 353, 417; ***People* v. *Webb*** (1993) 6 Cal.4th 494, 530; ***People* v. *Alvarez*** (2014) 229 Cal.App.4th 761, 773 ***People* v. *Huston*** (1989) 210 Cal.App.3d 192, 213; ***United States* v. *Branch*** (6th Cir. 2008) 537 F.3d 582, 590; ***People* v. *Gentry*** (2004) 815 N.E.2d 27, 33.) Even ***gross*** negligence does not establish bad faith. (**See *United States* v. *Wright*** (6th Cir. 2001) 260 F.3d 568, 571; ***United States* v. *Jobson*** (6th Cir. 1996) 102 F.3d 214, 218; ***United States* v. *Femia*** (1st Cir. 1993) 9 F.3d 990, 993-994.)

To the extent "incompetent" actions can be distinguished from "negligent" behavior, such incompetency also does not constitute bad faith. (***People* v. *Cook*** (2007) 40 Cal.4th 1334, 1351-1352 [incompetent changing of photographs in photo lineup did not constitute bad faith].)

d. Recklessness Not Enough

Bad faith requires more than recklessness. (**See *United States* v. *Flyer*** (9th Cir. 2011) 633 F.3d 911, 916; ***United States* v. *Webster*** (8th Cir. 2010) 625 F.3d 439, 447; **see also *United States* v. *Vera*** (D. Or. 2001) 231 F.Supp.2d 997, 1001; ***State* v. *Steffes*** (N.D. 1993) 500 N.W.2d 608, 613-614; ***State* v. *Baldwin*** (Conn. 1993) 618 A.2d 513, 522; **but see *United States* v. *Elliott*** (E.D.Va. 1999) 83 F.Supp.2d 637, 647-648 ["bad faith exists when conduct is knowingly engaged in or where it is reckless"].)*

> * **Editor's note:** "[T]o the extent that ***Elliott*** stands for the proposition that a mens rea of no greater magnitude than recklessness is required to demonstrate bad faith, it stands alone." (***United States* v. *Kendrick*** (W.D.N.Y. 2015) 2015 WL 2129573, at *7.

e. Accidental Versus Intentional Destruction

Do not confuse "intentional" conduct with an intent to suppress evidence. The fact that evidence was destroyed as a result of an officer's conscious and deliberate decision (as opposed to accidental destruction) is not enough to show bad faith. Neither ***Youngblood***, nor its organizing principle, suggest that the act by which the potentially exculpatory evidence is destroyed need be inadvertent. (***United States* v. *Garza*** (1st Cir. 2006) 435 F.3d 73, 75; ***United States* v. *Gallant*** (1st Cir. 1994) 25 F.3d 36, 39, fn. 2.)

f. Destruction Pursuant to Standardized Procedures

The fact evidence is destroyed pursuant to a routine or standardized procedure is a factor that supports an inference that the evidence was destroyed in good faith. (**See e.g., *Illinois* v. *Fisher*** (2004) 540 U.S. 544, 548-549 [finding no due process violation for destruction of drugs because, inter alia, destruction was done pursuant to standardized procedures]; ***People* v. *Duff*** (2014) 58 Cal.4th 527, 550 ["[a] showing that evidence was disposed of in accordance with standard procedures in the ordinary course of business suggests police acted in good faith"]; ***People* v. *Tafoya*** (2007) 42 Cal.4th 147, 187 [records destroyed in normal course of business]; ***City of Los Angeles* v. *Superior Court*** (2002) 29 Cal.4th 1, 12 [no bad faith in routine destruction of citizen complaints after five years]; ***People* v. *Memro*** (1995) 11 Cal.4th 786, 831 [no bad faith in destruction of police personnel records kept by the police three years beyond the time period for recordkeeping under Gov. Code, § 34090 even though records destroyed while case on appeal and issue on appeal was whether denial of motion for those records was proper]; ***United States* v. *Garza*** (1st Cir. 2006) 435 F.3d 73 , 76 ["that the evidence was destroyed in the course of implementing routine procedures militates against a finding of bad faith"]; ***Villasana* v. *Wilhoit*** (8th Cir. 2004) 368 F.3d 976, 980 ["acting in accordance with agency policy tends to show good faith rather than bad, whether or not the policy is sound"]; ***United States* v. *Hernandez*** (9th Cir. 1997) 109 F.3d 1450, 1455 [destruction of gun pursuant to standard department procedures supports finding of good faith]; ***United States* v. *Rivera-Relle*** (9th Cir. 2003) 333 F.3d 914, 922 [destruction of dispatch tapes (recounting conversation of two agents relating to locating suspect) pursuant to routine destruction procedures no violation of due process]; **see also *United States* v. *Deaner*** (3rd Cir. 1993) 1 F.3d 192, 202 ["destruction of evidence in accordance with an established procedure ***precludes*** a finding of bad faith absent other compelling evidence"]; ***United States* v. *Gomez*** (10th Cir. 1999) 191 F.3d 1214, 1219 [same].)

However, the ***failure*** to follow standardized procedures does not necessarily allow for an inference of bad faith. (**See *Com.* v. *Snyder*** (Conn. 2009) 963 A.2d 396, 406; ***United States* v. *Vera*** (D. Or. 2001) 231 F.Supp.2d 997, 1001; **see also *People* v. *Garcia*** (2000) 84 Cal.App.4th 316, 331 [rejecting defendant's argument that destruction of officer's rough investigatory notes was contrary to official policy and therefore it can be inferred that he destroyed the notes in a deliberate attempt to frustrate their discovery by the defense]; **but see *United States* v. *Elliott*** (E.D.Va. 1999) 83 F.Supp.2d 637, 647 [stating that while failure to follow standard procedure does not, ipso facto, establish bad faith, it "is probative evidence of bad faith, particularly when the procedures are clear and unambiguous"]; ***People* v. *Walker*** (1993) 628 N.E.2d 971, 974 [finding premature destruction of evidence within 6 weeks of arrest that was not done in accordance with police procedures helped showed lack of good faith].)

g. Destruction of Evidence by Custodian Under Mistaken Belief Case Closed

One of the most common situations involving the destruction of evidence is when a custodian destroys the evidence under a mistaken belief that the case is over. Destruction in such circumstances does not demonstrate bad faith. (**See e.g., *United States* v. *Webster*** (8th Cir. 2010) 625 F.3d 439, 446 [no bad faith where evidence necessary in federal prosecution being held by local police destroyed because local case agent's mistakenly believed case closed and overlooked transfer of state case to federal court]; ***Henry* v. *Page*** (7th Cir. 2000) 223 F.3d 477, 481 [no bad faith where custodian mistakenly destroyed the drugs after receiving the civil forfeiture order under incorrect belief criminal case had been completed and evidence was no longer needed]; ***State* v. *Steffes*** (N.D. 1993) 500 N.W.2d 608, 614 [no bad faith where tape erased under belief that the case had been dealt with and that the tape would not be further needed].)

h. Destruction Pursuant to Court Order or Statute

Destruction of evidence pursuant to a court order or a state statute should defeat any finding of bad faith destruction. (***United States* v. *Scoggins*** (8th Cir. 1993) 992 F.2d 164, 167; ***United States* v. *Malbrough*** (8th Cir. 1990) 922 F.2d 458, 463.)

2. How significant is the fact the defendant made a general request for discovery in assessing whether bad faith exists?

The existence of a general discovery request does not eliminate the necessity for the defense to show bad faith on the part of the police in order to establish a due process violation. (***Illinois* v. *Fisher*** (2004) 540 U.S. 544, 548-549.) In ***Fisher***, a defendant was arrested for possession of cocaine. Four tests conducted by crime labs confirmed the substance was cocaine. Defendant was charged with the crime and, eight days later, the defense filed a discovery motion requesting all evidence the prosecution intended to use at trial. The prosecution responded that all the evidence would be made available at a reasonable time and date upon request. About a year later, the defendant, who had been released on bail, failed to appear. Defendant remained a fugitive for over ten years until he was once again arrested. After charges were reinstated, the prosecution learned the police (acting in accordance with established procedures) had destroyed the plastic bag of cocaine shortly before defendant's re-arrest. The defendant argued due process was violated because once a discovery motion had been made, the prosecution is on notice they must preserve the evidence and because the evidence was defendant's "only hope for exoneration" and was "essential to and determinative of the outcome of the case." (**Id**. at pp. 547, 548.) The Supreme Court concluded that the existence of a discovery request did not eliminate the necessity of the defense showing bad faith on the part of the police in order to establish a due process violation and since the police acted in good faith (indeed, the tests done showed the destroyed evidence was

inculpatory) and in accord with their normal practice, there was no due process violation. (**Id**. at p. 548; **see also *United States* v. *Rivera-Relle*** (9th Cir. 2003) 333 F.3d 914, 922 [despite the fact the defense filed a discovery request for a dispatch tape within 30 days after tape was made, tape's destruction before discovery did not create a due process violation where tape was re-used pursuant to standardized procedures]; ***United States* v. *Jobson*** (6th Cir. 1996) 102 F.3d 214, 218 [same except dispatch tape destroyed within 90 days].)

3. How significant is the fact the defendant made a specific request for discovery or gave notice requesting the evidence be preserved in assessing whether bad faith exists?

If the defense requests a specifically identifiable item of evidence that is later destroyed, or if the defense has *specifically* informed the government that it wants the item preserved *because* of its exculpatory value, this can certainly be a factor in deciding both whether the exculpatory nature of the value of the evidence was apparent before its destruction and whether the government acted in good faith. (**See *United States* v. *Cooper*** (9th Cir. 1993) 983 F.2d 928, 932; ***United States* v. *Beckstead*** (10th Cir. 2007) 500 F.3d 1154, 1160 [identifying whether notice provided by defense of need to preserve as one of five factors in assessing if destruction was done in bad faith].)

In ***People* v. *Alvarez*** (2014) 229 Cal.App.4th 761, notice played a significant role. In ***Alvarez***, three defendants were captured shortly after they robbed the victim of a gold chain in a parking lot at 1:30 in the morning. A detective came out to the scene and spoke with one of the defendants (Cisneros). Cisneros denied any involvement in the incident, and pleaded with the detective to get the videos (apparently referring to video from surrounding cameras). The detective responded, "if I had video cameras of what took place, that's part of my job. My job is not to arrest people that aren't guilty of something." (***Id***. at pp. 768-769.) The officer's personal recording device captured the co-defendant's request to check the cameras. (**Ibid.**)

At the preliminary examination, the prosecutor also assured the court and counsel that no footage would be destroyed – albeit it was not entirely clear if the prosecutor's reference was to footage from the police cameras or private cameras nearby. (***Id***. at pp. 769, 777.) As it turned out, neither the prosecutor nor the investigating officers reviewed or preserved any camera data. (***Id***. at p. 767.) And by the time the defense made a direct requested to the police department for the surveillance footage, the footage was destroyed. The police department did supply the defense, however, with some video footage demonstrating the general coverage of the cameras, two of which included coverage of the parking lot where the robbery had occurred. (***Id***. at p. 768.)

The defendant made a motion to dismiss for failure to preserve the footage (which presumably was only directed toward the footage within the possession of the law enforcement agency). At the hearing on the

motion, a detective with the unit that oversaw the cameras, testified that one camera was placed in the parking lot where the robbery occurred, but that it would not necessarily have been pointed at the specific location of the robbery. (**Ibid**.) That detective said an officer could request to view any such footage via e-mail or phone, but the department only retained their footage for two and one-half weeks. (***Id***. at p. 768.) Moreover, officers were typically aware that the footage was only available for a short time. (**Ibid**.) One of the officers on the scene who was familiar with the video surveillance system and was aware of the cameras in the vicinity of the incident, did not recall defendant Cisneros asking him to review video of the robbery, and he was not sure if he had requested video of the incident, although he thought he had. He did not reference any such request in his report, which is something he would typically do. (**Id**. at p. 768.)

Based on these facts, the defense asked for a dismissal. The prosecution objected, arguing that the defendant had not shown any of the cameras had video of the relevant area or that evidence had been lost or destroyed in bad faith. The prosecution asserted it was unaware that any videos had ever existed, or if they did exist, whether they had been destroyed. Moreover, the prosecution stated, at most failure to retain the videos was negligence and that did not require dismissal. (***Id***. at p. 767.) The trial court granted the dismissal, which was upheld by the appellate court. (**Id**. at p. 764.)

While the ***Alvarez*** court was unable to conclude that the video possessed exculpatory value that was apparent before the evidence was destroyed, the court did conclude that the video was "potentially useful" to the defendants. (**Id**. at p. 776.) So, the ***Alvarez*** court assessed whether the government acted in bad faith. (**Id**.)

Although the People argued that the police department and the prosecution were negligent, the appellate court found otherwise. Based on the evidence produced at the hearing in the trial court, the appellate court held it was reasonable to conclude that the police would point the cameras in the direction where they would be most useful and at least one of the cameras captured the incident. (**Id**. at p. 775.) Moreover, the appellate court believed that the prosecution was on clear notice that the video from the parking lot was important to the defense, based upon the co-defendant's prompt request at the scene for the video footage and the prosecutor's later representation in court, the footage would be obtained. (**Id**. at p. 777.)

In ***United States* v. *Zaragoza-Moreira*** (9th Cir. 2015) 780 F.3d 971, the defendant was charged with importing heroin and methamphetamine into the United States. (***Id***. at p. 976.) During her interview with Customs and Border Patrol, the defendant stated that she had been forced to do so by a drug cartel so that her mother and daughter would not be hurt. (***Id***. at pp. 975-976.) The defendant also stated during the interview that she tried to draw attention to herself–by throwing her passport on the ground and loosening the packages attached to her body–so that she would get caught. (***Id***.) After the complaint was filed, defense counsel sent a letter to preserve evidence, including videotapes leading up

to and including the defendant's arrest. (***Id***. at p. 976.) Two months later, a trial court ordered the government preserve the video. (***Id***. at pp. 976-977.) The video, however, had been destroyed a month after the defense attorney had initially requested it. (***Id***.) The Ninth Circuit concluded that the video was potentially useful evidence to support defendant's claim of duress. (**Id**. at p. 978.) The Ninth Circuit found the agent had made a "conscious effort to suppress exculpatory evidence," (i.e., acted in bad faith) because the agent made "no attempt" to preserve or even view the port of entry video before it was destroyed, despite knowing about the defendant's claims regarding her conduct in the entry line and despite knowing that the port of entry was "under constant video surveillance and that [the agent] had the ability to review and preserve the video recordings." (***Id***. at p. 980 [and noting as well that three out of four of the agent's reports in connection with the case omitted any reference to the defendant's claims of duress].) The Ninth Circuit found it "particularly disturbing" that the government failed to act in response to defense counsel's letter. (***Id***. at p. 981.)

However, the simple fact that a request for preservation of the evidence has been made is not ***dispositive*** on the issue of good faith. For example, in the case of ***United States* v. *Bucci*** (D. Mass. 2006) 468 F.Supp.2d 251, after the DEA sent a notice to the prosecuting attorney's office of intent to destroy all but a representative sample of 453 pounds of marijuana it had seized within 60 days absent written notice from the U.S. Attorney's office, the defense filed a motion to preserve the evidence which the U.S. Attorney's office opposed on technical grounds. A couple of months later all but a small sample of the marijuana was destroyed. Two years later, the defense asked to have the marijuana re-weighed and then made a motion asking for dismissal upon learning of its destruction. Despite the fact the government was on notice that the defense wanted the evidence preserved and nevertheless let the DEA destroy the majority of the marijuana, the court held this was not sufficient to establish bad faith on the part of the government. (**Id**. at p. 254 [albeit noting the DEA preserved representative samples and documented the process in photographs and videotapes and there was no indication that the evidence was destroyed out of animus or an effort to conceal exculpatory information].)

4. Does the defendant have to show law enforcement itself destroyed the evidence in order to show bad faith?

The case law does not require defendants to show that law enforcement officers actually destroyed the evidence. It is sufficient if law enforcement *directed* a third party to destroy the evidence (**see *United States* v. *Beckstead*** (10th Cir. 2007) 500 F.3d 1154, 1158) or *permitted* a third party to destroy the evidence under their control (**see *United States* v. *Cooper*** (9th Cir. 1993) 983 F.2d 928, 932 [finding due process violated where a waste disposal company, hired by the DEA to remove and store methamphetamine labs destroyed items pursuant to company policy–not DEA direction]).

5. Does the seriousness of the offense bear on whether the destruction will be viewed as being done in bad faith?

In assessing whether law enforcement acted in bad faith in destroying evidence, the potential sentence might receive is irrelevant. (***United States* v. *Webster*** (8th Cir. 2010) 625 F.3d 439, 448.)

6. Does the bad faith requirement still apply if the evidence destroyed or lost was "crucial to the case-in-chief?"

Some cases in other jurisdictions ***had*** held ***Youngblood's*** requirement that the defense make a showing of bad faith did not apply if the evidence lost was evidence the prosecution "had to use" in order to convict the defendant as opposed to evidence which was not used in prosecution's case-in-chief. (**See *United States* v. *Belcher*** (W.D.Va.1991) 762 F.Supp. 666, 672 [no showing of bad faith necessary where "state officials intentionally destroy evidence that is absolutely crucial and determinative to a prosecution's outcome" and drawing a distinction between evidence the prosecution "must use" in order to convict and evidence not used in prosecution's case-in-chief]; ***Roberson* v. *State*** (2002) 766 N.E.2d 1185, 1188, fn. 4 [drawing same distinction as in ***Belcher***]; ***People* v. *Walker*** (1993) 628 N.E.2d 971, 974 [same]; ***Commonwealth* v. *Deans*** (1992) 610 A.2d 32, 34 [same].)

This interpretation of ***Youngblood*** was never adopted in California or by the Ninth Circuit. (**See also *United States* v. *Hood*** (10th Cir. 2010) 615 F.3d 1293, 1299-1300 [declining to follow, and noting no justice joined, J. Stevens' concurring opinion in ***Youngblood*** indicating that loss or destruction of evidence could be so critical that it renders a trial unfair in violation of due process even absent bad faith].) More importantly, the validity of this limitation on the scope of ***Youngblood*** was completely undermined by the decision in ***Illinois* v. *Fisher*** (2004) 540 U.S. 544, where the Supreme Court held the applicability of the bad-faith requirement in ***Youngblood*** did ***not*** depend "on the centrality of the contested evidence to the prosecution's case or the defendant's defense[.]" (**Id.** at p. 549; **see also** this IPG, section I-B-3 at p. 6.) ***Fisher's*** quashing of the idea that ***Youngblood*** does not apply to evidence the prosecution "had to use" is recognized even in jurisdictions that had previously sought to limit the scope of ***Youngblood***. (**See e.g.**, ***Com.* v. *Snyder*** (Conn. 2009) 963 A.2d 396, 404.)

7. Is whether officers acted in bad faith a subjective or objective test?

It is an open question whether the test for determining bad faith (as described in ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51) is an objective or subjective standard. (**See *United States* v. *Westerdahl*** (9th Cir. 1991) 945 F.2d 1083, 1087 ["We need not determine here whether the

appropriate standard under ***Youngblood*** is objective or subjective . . ."]; ***United States v. Vera*** (D. Or. 2001) 231 F.Supp.2d 997, 1000, fn. 2 ["Whether bad faith is assessed against an objective or subjective standard remains an open question."].)

In the unpublished California case of ***People* v. *Gonzalez*** 2002 WL 819857, the court rejected defendant's argument that an objective standard of bad faith would better comport with the principles of due process defined in ***Youngblood*** than a subjective standard. The ***Gonzalez*** court found the argument was "inconsistent with the California Supreme Court's interpretation of ***Youngblood*** in ***People v. Webb*** (1993) 6 Cal.4th 494[.]" (***Gonzalez*** at p. *4.) The ***Gonzalez*** court pointed to the following language in ***Webb*** at pp. 519-520 as reflecting a "subjective standard" should be used: "The due process principles invoked by defendant are primarily intended to deter the police from purposefully denying an accused the benefit of evidence that is in their possession and known to be exculpatory. (***Arizona* v. *Youngblood***, *supra*, 488 U.S. 51, 58 [].) Here, however, police conduct in leaving the revolver in Sharon's apartment can 'at worst be described as negligent.'" (***Gonzalez*** at p. *4.)

Considering the definitions of "bad faith" used in ***Trombetta*** and ***Youngblood*** (**see** this IPG, section H-1 at pp. 30-33) – all of which require intentional conduct on the part of law enforcement - it is difficult to view the test of "bad faith" as anything but subjective. This does not mean that objective circumstances may not be considered, however, in assessing the credibility of law enforcement when law enforcement claims there was no bad intent. For example, the fact that evidence was or was not destroyed pursuant to standardized procedures (an objective fact) is a common consideration in deciding whether the evidence was destroyed in bad faith. (**See** this IPG section I-H-3-f at pp. 32-33.) However, the fact courts can take into the consideration objective circumstances in assessing bad faith does not convert the test of whether the destruction was done in good or bad faith from a subjective one into an objective one. (**See *FEI Enterprises, Inc. v. Kee Man Yoon*** (2011) 194 Cal.App.4th 790, 798 ["if good faith is to be measured by a subjective standard, . . . determining its existence is a factual question requiring the examination of objective circumstantial evidence that would permit an inference as to a subjective state of mind"].)

And the High Court ***has not yet created*** an exception to the test that would allow a defendant to prevail on a due process claim for destruction of evidence that is only potentially exculpatory in *objectively* egregious circumstances. (**Cf.**, ***United States* v. *Leon*** (1984) 468 U.S. 897, 923 [although suppression is not required when officers act in good faith reliance on search warrant, this rule does not apply when, inter alia, the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" or the warrant is "so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid"].)

8. What kind of objective factors can a court consider in deciding whether law enforcement subjectively destroyed evidence in bad faith?

IPG has already discussed some of the factors that a court can consider in deciding whether law enforcement subjectively destroyed evidence in bad faith, including: (i) whether it was done pursuant to standardized procedures (**see** this IPG, section I-H-1-f at pp. 32-33); (ii) whether destruction occurred pursuant to a court order (**see** this IPG, section I-H-1-h at p. 33); (iii) whether a request was made for disclosure of the specific evidence or that the specific evidence not be destroyed (**see** this IPG, section I-H-3 at pp. 34-36).

However, some courts have come up with additional factors. For example, the Tenth Circuit has identified five factors that bear on the inquiry into bad faith: "(1) whether the government had explicit notice that [the defendant] believed the [evidence] was exculpatory; (2) whether the claim that the evidence is potentially exculpatory is conclusory, or instead "backed up with objective, independent evidence ..."; (3) whether the government could control the disposition of the evidence once [the defendant] indicated that it might be exculpatory; (4) whether the evidence was central to the case; and (5) whether the government offers any innocent explanation for its disposal of the evidence." (***United States* v. *Simpson*** (10th Cir. 2017) 845 F.3d 1039, 1059; ***United States* v. *Smith*** (10th Cir. 2008) 534 F.3d 1211, 1224–1235; **accord *United States* v. *Beckstead*** (10th Cir. 2007) 500 F.3d 1154, 1160.)

* **Editor's note:** It is questionable whether the fourth factor is still a valid consideration in light of ***Illinois* v. *Fisher*** (2004) 540 U.S. 544, where the Supreme Court held the applicability of the bad faith requirement in ***Youngblood*** did not depend "on the centrality of the contested evidence to the prosecution's case or the defendant's defense[.]" (***Id***. at p. 549; **see also** this IPG, section I-H-6 at pp. 37-38.) The Tenth Circuit's five-factor test derives from the case of ***United States* v. *Bohl*** (10th Cir.1994) 25 F.3d 904, 910–911, which was decided long before ***Fisher***.

9. What is the significance of the fact that the evidence destroyed is "apparently exculpatory" to the question of whether law enforcement acted in good faith?

Although arguments can be made about ***how*** apparent or ***how*** favorable the evidence must be to the defense in order for it to be considered "apparently exculpatory" under the ***California* v. *Trombetta*** (1984) 467 U.S. 479 analysis, once the evidence is deemed "apparently exculpatory" it is not subject to the test identified in ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51. This is because the test adopted in ***Youngblood only*** applies when the evidence is "potentially useful evidence" – "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[.]" (***Id***. at pp. 57-58.) And ***that is why*** the ***Youngblood*** court stated: "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." (***Id***. at p. 56, fn. *; **see also *Moldowan* v. *City of Warren*** (6th Cir. 2009) 578 F.3d 351, 385 ["***Separate*** tests are applied to determine whether the government's failure to preserve evidence rises to the level of a due process violation in cases where material exculpatory evidence is not accessible versus cases where 'potentially useful' evidence is not accessible."]; ***United States* v. *Wright*** (6th Cir. 2001) 260 F.3d 568, 570 [same], emphasis added by IPG].)

* **Editor's note:** Some courts do not believe that the requirement of "bad faith" identified in ***Youngblood*** is confined to evidence that is *not* apparently exculpatory and have crafted tests that require a defendant to show bad faith even when the evidence lost *is* apparently exculpatory. (**See** this IPG, section I-I at pp. 43-44.)

10. What are some example of cases where bad faith was found to exist?

In contrast to the numerous cases in which good faith on the part of the police has been established, cases finding bad faith on the part of the government are few and far between. (**See *Pena* v. *State*** (Tex. 2005) 166 S.W.3d 274, 281 [noting scholars researching federal law have located few post-***Youngblood*** cases finding bad faith]; ***State* v. *Weissinger*** (Wis. Ct. App. 2014) 355 Wis.2d 546, 566 (conc. opn.) [citing several law review articles, one of which noted "the bad faith standard imposes an almost insurmountable burden upon the accused" and that in "two decades, only a handful of courts have found due process violations"; and another which observed that "what was initially hailed as an almost 'impossible' standard by critics has almost proven to be just that," and which found "in 2007 that in more than 1500 published cases citing ***Youngblood***, only seven found bad faith"].)

* **Editor's note:** Although it might come as a surprise to some academics, another possible explanation for the paucity of cases in which bad faith destruction of evidence was found is that most officers generally try to avoid committing crimes. (**See** Pen. Code, § 135 [making it a misdemeanor to knowingly destroy any matter or thing to prevent it from being introduced into evidence in a trial].)

In addition to ***People* v. *Alvarez*** (2014) 229 Cal.App.4th 761 and ***United States* v. *Zaragoza-Moreira*** (9th Cir. 2015) 780 F.3d 971 [discussed in this IPG, section I-H-3 at pp. 35-36], there are two other commonly cited cases where the court made a finding bad faith:

In ***United States* v. *Cooper*** (9th Cir. 1993) 983 F.2d 928 [discussed more extensively in this IPG, section I-G-13 at pp. 27-28], the prosecution conceded bad faith on appeal where the DEA allowed

various pieces of equipment seized from an alleged methamphetamine manufacturing lab to be destroyed even though the agents were repeatedly informed of the equipment's value as potentially exculpatory evidence (i.e., they were told by several persons the equipment was being used for legitimate chemical manufacturing purposes) and the agents told the defense the equipment was being retained in response to requests for its return -even after it had been destroyed. (**Id**. at p. 932.)

In ***United States* v. *Bohl*** (10th Cir. 1994) 25 F.3d 904, the court held due process was violated where defendants were charged with defrauding the government by providing substandard steel radio tower legs and the government destroyed those legs even though defendants repeatedly notified the government before destruction that the steel was possibly exculpatory, there existed substantial independent evidence that government tests (forming the basis for the indictment) may have been flawed, the key issue in the case was whether the towers conformed to contract specifications, and the government offered no innocent explanation for destruction. (**Id.** at p. 911-915;

There are several other less commonly referenced cases. (**See *United States* v. *Elliott*** (E.D.Va. 1999) 83 F.Supp.2d 637, 644-647 [discussed more extensively in this IPG, section I-G-13 at p. 28], mixing up the ***Trombetta*** standard with the ***Youngblood*** standard and holding there was bad faith destruction of chemical glassware, which had untested residue and from which prints were lifted, where the officers did not comply with government regulations concerning destruction]; ***United States* v. *Montgomery*** (D. Kan. 2009) 676 F.Supp.2d 1218, 1242-1246 [finding bad faith destruction and/or failure to preserve or photograph marijuana plants where evidence regarding the number of plants and their root formation was critical evidence since charge required a specific number of plants and agency offered disingenuous testimony regarding whether it followed government protocol in destroying plants before accurately photographing them]; ***State* v. *Miller*** (Ga.App. 2009) 680 S.E.2d 627, 632 [bad faith found where cell phone was erroneously seized, notice that cell phone could be retrieved was sent to an incorrect address while defendant was still in custody, cell phone was destroyed based on false statements in police affidavit, and arresting officer did not testify at hearing on defendant's motion to dismiss; **but see** dis.opn.]; ***State* v. *McGrone*** (2001) 798 So.2d 519, 523 [finding bad faith destruction of defendant's pants seized by officers because officers refused to show up when subpoenaed by defense to testify at hearing on loss of pants]; ***Yarris* v. *County of Delaware*** (3rd. Cir. 2006) 465 F.3d 129, 142-143 [bad faith shown on part of detectives where, post-conviction, defense turned up DNA sample slides and prosecutor sent two detectives to retrieve the samples for transport to the coroner and then to the laboratory but, detectives never delivered the slides to the coroner, instead, keeping slides in a paper bag under a detective's desk where they eventually rotted and were rendered useless for DNA testing].)

I. Must a Defendant Show the Police Acted in Bad Faith (as Described in *Youngblood*) to Prove a Due Process Violation When the Evidence Lost or Destroyed Could Be Expected to Play a Significant Role in the Suspect's Defense (as Described in *Trombetta*)?

Since the decision in ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51, which held that a defendant must show bad faith to make out a due process violation based on the loss or destruction of "potentially useful" evidence, California courts have generally (and properly) recognized there is a distinction between the test adopted in ***Trombetta*** and the test adopted in ***Youngblood*** and find that only under the latter test is there a requirement the defendant show bad faith. (**See e.g.**, ***People* v. *Alvarez*** (2014) 229 Cal.App.4th 761, 773 ["there is a distinction between ***Trombetta***'s 'exculpatory value that was apparent' criteria and the standard set forth in ***Youngblood*** for 'potentially useful' evidence. If the higher standard of apparent exculpatory value is met, the motion is granted in the defendant's favor. But if the best that can be said of the evidence is that it was 'potentially useful," the defendant must ***also*** establish bad faith on the part of the police or prosecution"]; ***People* v. *Roybal*** (1998) 19 Cal.4th 481, 510 [laying out test under ***Trombetta*** and then recognizing that the state responsibility to preserve evidence is "***further*** limited" under the ***Youngblood*** test]; ***People* v. *Frye*** (1998) 18 Cal.4th 894, 943 [laying out test under ***Trombetta*** and then stating the "defendant must ***also*** show bad faith on the part of the police in failing to preserve ***potentially useful*** evidence"]; ***People* v. *Valencia*** (1990) 218 Cal.App.3d 808, 824 [noting ***Youngblood*** seems to deal solely with evidence that is "potentially useful"].) (Emphasis added throughout by IPG.)

In this regard, California is consistent with many other courts that "have considered the relationship between ***Trombetta*** and ***Youngblood*** and have concluded that (1) the destruction of 'apparently exculpatory' evidence does not require a showing of bad faith but that (2) if the evidence is only 'potentially useful,' a bad-faith showing is required." (***Olszewski* v. *Spencer*** (1st Cir. 2006) 466 F.3d 47, 56 [making observation and noting that ***Fisher*** suggests bad-faith requirement does not apply to material exculpatory evidence, but declining to decide issue in case before it]; **see also *United States* v. *Moore*** (5th Cir.2006) 452 F.3d 382, 388 ["impermissibly withheld evidence must be *either* (1) material and exculpatory or (2) only potentially useful, in combination with a showing of bad faith on the part of the government"], emphasis added; ***United States* v. *Estrada*** 453 F.3d 1208, 1212–1213 [only requiring a showing of bad faith when the evidence is "potentially exculpatory, as opposed to apparently exculpatory"]; ***Moldowan* v. *City of Warren*** (6th Cir. 2009) 578 F.3d 351, 384-386, 392 and fn. 11 [firmly concluding bad faith showing not required when evidence lost or destroyed is material exculpatory evidence and listing numerous cases holding ***Youngblood's*** requirement of showing bad faith is limited to situations when the evidence destroyed is only "potentially useful"]; ***Bullock* v. *Carver*** (10th Cir.2002) 297 F.3d 1036, 1056 ["A defendant can obtain relief under the Due Process

Clause when he can show that a police department destroyed evidence with 'an exculpatory value that was apparent before [it] was destroyed.' ... Where, however, the police only failed to preserve 'potentially useful' evidence that might have been exculpatory, a defendant must prove that the police acted in bad faith by destroying the evidence." (internal citations omitted)]; ***United States* v. *Wright*** (6th Cir.2001) 260 F.3d 568, 571 ["The destruction of material exculpatory evidence violates due process regardless of whether the government acted in bad faith."]; ***State* v. *Fellows*** (Tex. App. 2015) 471 S.W.3d 555, 563 ["if the State fails to preserve evidence that is exculpatory and material, then a due process violation has occurred regardless of the good or bad faith on the part of the State in failing to preserve that evidence"]; ***State* v. *Blackwell*** (Georgia 2000) 537 S.E.2d 457, 462 [noting "numerous courts from other jurisdictions have concluded that ***Youngblood***'s bad faith requirement does not apply where-as here-the exculpatory value of the evidence was apparent before its destruction, and there is no reasonably available comparable evidence"]; ***People* v. *Newberry*** (Ill. 1995) 652 N.E.2d 288, 292 [no bad faith showing required where destroyed evidence "is more than just 'potentially useful'"]; ***State* v. *Greenwold*** (Wis. Ct. App. 1994) 525 N.W.2d 294, 297 ["defendant's due process rights are violated if the police: (1) failed to preserve the evidence that is apparently exculpatory; ***or*** (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory.", emphasis added by IPG]; ***People* v. *Eagen*** (Colo.App.1994) 892 P.2d 426, 428 [***Youngblood*** applies only when "the exculpatory value of the evidence does not satisfy the ***Trombetta*** standard")

However, not all courts agree and have either conflated the tests or failed to draw a distinction between them. For example, after noting "courts have fashioned different interpretations of the collective meaning of ***Trombetta*** and ***Youngblood***," the Seventh Circuit in ***McCarthy* v. *Pollard*** (7th Cir. 2011) 656 F.3d 478 stated "***Trombetta*** and ***Youngblood*** do ***not*** create two separate rules, with the former governing "apparently" exculpatory evidence and the latter governing "potentially" exculpatory evidence. We instead read both cases to stand for the same proposition: the destruction of potentially exculpatory evidence violates the defendant's right to due process if (1) the State acted in bad faith; (2) the exculpatory value of the evidence was apparent before it was destroyed; ***and*** (3) the evidence was of such a nature that the petitioner was unable to obtain comparable evidence by other reasonably available means. (***Id***. at p. 485, emphasis added by IPG]; **accord *United States* v. *Kimoto*** (7th Cir.2009) 588 F.3d 464, 475 [observing that three-part test derives from both ***Trombetta*** and ***Youngblood***]; ***Hubanks* v. *Frank*** (7th Cir. 2004) 392 F.3d 926, 931 [stating that our three-part test also derives from ***Youngblood***]; ***United States* v. *Folami*** (7th Cir.2001) 236 F.3d 860, 864 [stating that our three-part test derives from ***Trombetta***]; **see also *United States* v. *Bell*** (7th Cir. 2016) 819 F.3d 310, 315–19 [stating that "Only if bad faith is shown does the court consider the constitutional materiality of the evidence in question, to evaluate whether the defendant ultimately was deprived of due process."]; ***Henry* v. *Page*** (7th Cir.2000) 223 F.3d 477, 481 [explaining that ***Youngblood*** used the word "potentially" to illustrate that the defendant failed the second prong—which requires the evidence's exculpatory value to be apparent—of ***Trombetta***'s test]; ***United States* v. *Lanzon*** (11th Cir. 2011)

639 F.3d 1293, 1300 [incorrectly characterizing ***United States* v. *Revolorio–Ramo*** (11th Cir.2006) 468 F.3d 771, 774 as standing for the proposition that a defendant claiming a due process violation for loss of evidence must show 'the evidence was likely to significantly contribute to his defense" and "also show that the loss of evidence was a result of bad faith on the part of the government or police"].)

At least part of the reason for the differing interpretations stems from language used in ***California* v. *Trombetta*** (1984) 467 U.S. 479 and in ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51, 56, fn. * that suggests that the good or bad faith of the officer is relevant in deciding whether evidence is apparently exculpatory. However, taken in context, the language does no more than indicate that evidence of an officer's good faith or bad faith can help determine whether the items destroyed were apparently exculpatory – not that a showing of bad faith *is required* in order to prove a due process violation once the item is determined to be apparently exculpatory and there is a finding no comparable evidence is reasonably available to defendant.

In finding that the failure to preserve breath samples did not violate due process, the High Court in ***Trombetta*** (1984) 467 U.S. 479 made note of the fact that the state "did not destroy respondents' breath samples in a calculated effort to circumvent the disclosure requirements established by ***Brady* v. *Maryland*** and its progeny." (***Trombetta*** at p. 488.) The Court also observed that in "failing to preserve" the breath samples, the officers were acting "in good faith and in accord with their normal practice." (**Ibid**.) And the court further observed that the record did not contain an "allegation of official animus towards respondents or of a conscious effort to suppress exculpatory evidence." (**Ibid**.)

However, the majority in ***Trombetta*** did **not** state that a defendant would have to show bad faith on the part of the police in order for a due process violation to occur. Rather, right after noting evidence the officers acted in good faith, the Court stated: "More importantly, California's policy of not preserving breath samples *is without constitutional defect. Whatever 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*." (***Id*** at p. 488, emphasis added by IPG.) The ***Trombetta*** court then went on to defined what it would take for the evidence to meet this standard of constitutional materiality: it "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." (***Id***. at p. 489.)

In ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51, the Court recognized that its "decisions in related areas have stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government." (***Id***. at p. 57.) And, in a footnote, the Court stated: "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." (***Id***. at p. 56, fn. *.)

However, as pointed out in this IPG, section I-E at pp. 8-11, the ***Youngblood*** court indicated "apparently exculpatory" evidence is akin to the type of "material exculpatory" evidence described in ***Brady* v. *Maryland*** (1963) 373 U.S. 83 and noted "The Due Process Clause of the Fourteenth Amendment, as interpreted in ***Brady,*** makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence." (***Youngblood*** at p. 57.)

Moreover, while "[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", this just means that if the police do not know the evidence is exculpatory, it will prove difficult, if not impossible, to show bad faith in its destruction. (**See *People v. Montes*** (2014) 58 Cal.4th 809, 838 ["Defendant's failure to show the apparent exculpatory value of a blood sample at the time of his arrest also bears on the issue of whether the police acted in bad faith."].)

Finally, it must be kept in mind that the Court developed the test in ***Youngblood*** to confine law enforcement's duty to maintain evidence: "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." (***Id***. at p. 58.) If ***Trombetta*** already required a showing of bad faith on the part of the police, it is doubtful that it would have been necessary for the High Court to even decide ***Youngblood.***

The conclusion that a defendant does **not** have to show bad faith when the evidence destroyed is not potentially exculpatory but is materially exculpatory evidence is supported by the High Court's most recent decision in the area. In ***Illinois* v. *Fisher*** (2004) 540 U.S. 544, the court stated: "the applicability of the bad-faith requirement in ***Youngblood*** depended not on the centrality of the contested evidence to the prosecution's case or the defendant's defense, but on the distinction between 'material exculpatory' evidence and 'potentially useful' evidence. As we have held . . . the substance destroyed here was, at best, 'potentially useful' evidence, *and therefore* ***Youngblood's*** *bad-faith requirement applies."* (**Id**. at p. 549, emphasis added by IPG.) If ***Trombetta*** also had a "bad faith" requirement, why would the High Court refer solely to "***Youngblood***'s bad faith requirement"?

J. If the Evidence Destroyed Was Merely Potentially Useful Evidence and It is Shown It Was Destroyed by Law Enforcement Acting in Bad Faith (as Described in *Youngblood*), Must the Defense *Also* Show the Exculpatory Value of the Evidence was Apparent Before Its Destruction and That the Nature of the Evidence Was Such that the Defendant Would be Unable to Obtain Comparable Evidence by Other Means (as Described in *Trombetta*)?

Several federal cases have stated: "When the state fails 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,' a defendant must show: (1) that the government acted in bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before its destruction; ***and*** (3) that the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other means." (**See *Monzo* v. *Edwards*** (6th Cir. 2002) 281 F.3d 568, 580; ***United States* v. *Wright*** (6th Cir. 2001) 260 F.3d 568, 570; ***United States* v. *Jobson*** (6th Cir. 1996) 102 F.3d 214, 218 (emphasis added by author); **accord *Tabb* v. *Christianson*** (7th Cir. 2017) 2017 WL 1532321, at *8; ***United States* v. *Bell*** (7th Cir. 2016) 819 F.3d 310, 318; ***United States.* v. *Fletcher*** (7th Cir. 2011) 634 F.3d 395, 407; ***United States* v. *Kimoto*** (7th Cir. 2009) 588 F.3d 464, 474–475; ***Hubanks* v. *Frank*** (7th Cir. 2004) 392 F.3d 926, 931 **see also *United States* v. *Ludwig*** (10th Cir. 2011) 641 F.3d 1243, 1254, fn. 8 [to prevail under ***Trombetta***, "[b]ad faith is a necessary but not sufficient element," the defendant must *also* and *separately* show the videotape in question was irreplaceable"]; ***United States* v. *Dougherty*** (W.D. Wis. 1989) 774 F.Supp. 1181, 1186 ["Apart from the bad faith requirement, it must ***also*** appear that the destroyed evidence would be of likely significance to the defendant's defense"], emphasis added by author; ***Olszewski* v. *Spencer*** (1st Cir. 2006) 466 F.3d 47, 58 [even if police acted in bad faith in destroying potentially useful evidence, the defendant is **still** required to show the absence of comparable evidence in order to make out a due process violation]; ***Samek* v. *State*** (1997) 688 N.E.2d 1286, 1289 [same].) Under these cases, simply showing the police acted in bad faith is ***not enough***, by itself, to make out a due process violation. It must **also** be shown the evidence is (i) apparently exculpatory and (ii) the kind of evidence for which there exists no comparable evidence.

* **Editor's note:** It is *possible* that when these courts are talking about the apparent exculpatory value of the evidence, they are using the term in a slightly different way than the term was used in ***Trombetta***. Under ***Trombetta***, apparently exculpatory means the evidence would have to, at least, be favorable (and potentially material as well) and its exculpatory value would have to be apparent. (**See** this IPG, section I-B-1 at pp. 2-3.) However, some (or all) of the above-mentioned cases may be thinking simply that "apparently exculpatory" means that law enforcement would have to recognize that the evidence could, in some fashion, *turn out to be* favorable or material.

The High Court decision in ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51, which stated "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 p. 58) *seems* to imply that if officers act in bad faith in destroying potentially useful evidence, a due process violation occurs *regardless* of whether the evidence apparently exculpatory or whether comparable evidence is available. However, even the California Supreme Court has indicated this might not be the case as evidenced by the language used in ***People* v. *DePriest*** (2007) 42 Cal.4th 1 right before it cited the above quote from ***Youngblood***:

> "Law enforcement agencies must preserve evidence ***only*** if it possesses exculpatory value 'apparent before [it] was destroyed,' and not obtainable "by other reasonably available means." (***California v. Trombetta*** (1984) 467 U.S. 479, 489 [alternate citation omitted] cf. ***Brady* v. *Maryland*** (1963) 373 U.S. 83, 87 [alternate citation omitted] [prosecutorial duty to disclose evidence that is both "favorable" and "material" to the defense].) The state's responsibility is ***further limited*** when the defendant challenges the failure to preserve evidence 'of which no more can be said than that it could have been subjected to tests' that might have helped the defense." (***DePriest*** at pp. 41-42.)

K. Will Destruction of an Officer's Rough Notes Which Are Incorporated Into a Formal Report Violate Due Process or Any Statutory Discovery Obligation?

1. No Due Process duty to preserve

There is no duty to preserve the rough notes of a police interview where the notes were accurately incorporated into a formal report and the notes were not destroyed in bad faith. Even under the old "***Hitch"*** standard, there was no violation of the Constitution just because the officer destroyed the rough notes of an interview. (**See *People* v. *Seaton*** (1983) 146 Cal.App.3d 67, 75-76 [finding no violation even though not every detail incorporated into formal report]; ***In re Jesse L.*** (1982) 131 Cal.App.3d 202, 211 ["neither ***Hitch*** nor the Constitution require police officers to act like pack rats, saving every scrap of paper generated in an investigation"]; ***People* v. *Savage*** (1982) 129 Cal.App.3d 1, 3; ***In re Gary G.*** (1981) 115 Cal.App.3d 629, 640; **but see *People* v. *Jones*** (1983) 145 Cal.App.3d 751, 756-760 [finding duty to preserve rough notes of a confession, albeit limiting rule to that situation].)

Under the current standard, establishing a due process violation for destruction of rough notes is even more difficult. (**See *People* v. *Garcia*** (2000) 84 Cal.App.4th 316, 331 [no due process violation for destruction of investigatory notes incorporated into final report]; ***People* v. *Garcia*** (1986) 183 Cal.App.3d 335, 347-350 [under ***Trombetta*** standard, no due process violation for destruction of notes, and noting ***Jones*** decision effectively overruled] ***People* v. *Angeles*** (1985) 172 Cal.App.3d 1203, 1211-1216 [same]; ***People* v. *Tierce*** (1985) 165 Cal.App.3d 256, 261-265 [same and noting that, in addition to meeting the ***Trombetta*** standard, a defendant, pursuant to ***Killian* v. *United States***

(1961) 368 U.S. 231 must necessarily show the *absence* of one of the following factors: the notes were made for the purpose of transferring the data, the agent acted in good faith in destroying the notes, and the agent acted in accordance with the normal procedure of the governmental unit in so destroying the notes]; **see also *People* v. *Coles*** (2005) 134 Cal.App.4th 1049,1054.)

2. Destruction of notes and Proposition 115 (Pen. Code, § 1054.1)

Penal Code section 1054.1(f), which requires the prosecution to disclose "relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial ...." does not require law enforcement officers to retain all investigatory notes. (***People* v. *Coles*** (2005) 134 Cal.App.4th 1049,1054; **accord**, 81 Ops.Cal.Atty.Gen. 397, (1998).)

However, if the officer's notes *still exist* at the time of a discovery request, it may be problematic if the officer destroys them. (**Cf.**, ***People* v. *Verdugo*** (2010) 50 Cal.4th 263, 281-282 [if a prosecutor has taken notes, providing an oral summary of the interview, in lieu of the notes, will not suffice- notes must also be provided].)

L. Can Loss or Destruction of Evidence Due to Testing Violate Due Process?

1. Consumption by law Enforcement

There is **no** due process violation when law enforcement or the prosecution asks for some item of evidence to be scientifically tested and the testing results in the consumption of the evidence. (**See *People* v. *Griffin*** (1988) 46 Cal.3d 1011, 1021 [noting the prosecution must be allowed to investigate and prosecute crime and due process does not require that it forego investigation in order to avoid destroying potentially exculpatory evidence-even under more rigid rule of ***Hitch***]; **accord *People* v. *Varghese*** (2008) 162 Cal.App.4th 1084, 1093; ***People* v. *Houston*** (2005) 130 Cal.App.4th 279, 302 [same but post-***Trombetta***]; ***People* v. *Axell*** (1991) 235 Cal.App.3d 836, 868 [same but post-***Trombetta***]; **accord *Leavitt* v. *Arave*** (9th Cir. 2004) 383 F.3d 809, 831 [okay to use up sample where no bad faith involved].)

In ***Griffin***, the court did, however, take note of cases from other jurisdictions holding that performing a scientific test that destroys all the evidence cannot be condoned when it is unnecessary. (**Id.** at pp. 1021-1022.)

Moreover, the fact that testing resulted in the consumption of evidence does not change the standard for determining whether the loss of the evidence constituted a due process violation. (**See *People* v. *Beeler*** (1995) 9 Cal.4th 953, 977-978 [no due process violation even assuming test-firing rifle would prevent further testing]; ***People* v. *Houston*** (2005) 130 Cal.App.4th 279, 303 [no due process

violation in "digesting" all DNA material off bullet where, inter alia, no bad faith shown]; ***United States v. Stevens*** (3rd Cir. 1991) 935 F.2d 1380, 1388 [no constitutional violation in using up sample because defense did not show bad faith on part of FBI].)

2. Notification to the defense

Although the California Supreme Court in ***People* v. *Griffin*** (1988) 46 Cal.3d 1011 found no due process violation where the prosecution conducted tests consuming all the evidence, it noted that "[t]he trial court in this case wisely urged the prosecution to consider giving notice to the defense and allowing defense experts to be present when tests will make use of the evidence. This is the better practice, but it has not been established as a constitutional requirement." (**Id**. at p. 1022, fn. 2; **accord *People* v. *Varghese*** (2008) 162 Cal.App.4th 1084, 1093 [noting no constitutional requirement to notify defense but agreeing better practice is to offer the defense the ability to be present at the testing]; **see also *People* v. *Epps*** (1986) 182 Cal.App.3d 1102, 1110-1111 [noting prosecution could have avoided problem of consumption of evidence if it had informed defense counsel and sought either a mutually agreed upon independent laboratory, an alternate and scientifically sound procedure for testing two smaller-than-usual samples, or the guidance of the superior court in fashioning a discovery order]; ***People* v. *Bolden*** (2002) 29 Cal.4th 515, 548-553 [observing where prosecution expert realized evidence would be consumed, she and prosecution arranged for defense expert to be present to observe tests]; ***United States* v. *Kenney*** (D. Me. 2008) 550 F.Supp.2d 118, 121-123, discussed in greater depth in this IPG, section II-B at p. 77 [allowing prosecution to *retest* sample that would be consumed during retesting but under proviso defense expert be present during retesting].)

3. Potential upside of having defense expert present at testing

In ***People* v. *Bolden*** (2002) 29 Cal.4th 515, the court upheld (i) the prosecution calling of a defense expert (who was present, at prosecution invitation, during testing of evidence which was consumed) to testify at pre-trial ***Kelly*** hearing, (ii) the prosecution eliciting at trial the fact the defense expert had been present, and (iii) the prosecution commenting in closing argument on defense failure to call the expert. (**Id**. at pp. 548-553; **accord *People* v. *Varghese*** (2008) 162 Cal.App.4th 1084, 1094; **cf**., this IPG, section III-B at pp. 76-77 [discussing propriety of commenting on fact defense was provided evidence for testing but introduced no evidence in this regard].)

4. Potential downside of having defense expert present at testing

Many crime labs will object to the defense expert being present during the testing as the presence of an outsider can be very disruptive both from a time and manpower standpoint. The lab may need to have additional personnel present to ensure the defense expert does not inadvertently contaminate any

evidence. Moreover, attempting to accommodate the schedule of the defense expert can be disruptive of the lab's own scheduling, not to mention the prosecution's time table for testing. At a minimum, before offering the defense the opportunity to be present during testing, it behooves the prosecutor to clear it with the criminalist who will be conducting the testing.

M. Does the Analysis of Whether Due Process is Violated Based on the Loss or Destruction of Evidence Change if the Loss or Destruction is Caused by the Prosecutor (as Opposed to the Police)?

The ***Trombetta/Youngblood*** standard applies regardless of whether the destruction or loss is attributed to the police or the prosecution. (***United States* v. *Garza*** (1st Cir. 2006) 435 F.3d 73, 76.)

In ***People* v. *Zapien*** (1993) 4 Cal.4th 929, a prosecutor and his investigator, while traveling in a county pool car, located an envelope containing a tape recording. The envelope bore the name of the public defender who was handling defendant's case. Although the investigator suggested he prepare a "found property" report, the prosecutor (who was not the prosecutor handling defendant's case) opined that the tape might relate to defendant's case and asked the investigator to listen to it and "report to him what was on the tape." The investigator testified that instead of listening to the tape recording, he threw the sealed envelope into a trash dumpster approximately 15 minutes after the envelope was discovered. As it turned out, the tape was simply a dictated cassette of the public defender's thoughts on the case. The tape had been transcribed and a sealed copy of the transcription was later introduced by defense counsel at a hearing on the destruction of the tape and was reviewed by the trial court in camera. (**Id**. at pp. 961-966.) The trial court refused to impose sanctions against the prosecution. The California Supreme Court upheld this refusal because the evidence did not bear on defendant's guilt or innocence and its exculpatory value was not apparent before its destruction. (**Id**. at pp. 965-966.) Nevertheless, the court held "it was highly improper for the [officer] to discard the envelope [containing the tape]" (**id**. at p. 964), and had the evidence otherwise been materially exculpatory, it is likely a sanction would have been imposed.

Subsequently, the Ninth Circuit held that there was no authority for the proposition that a due process violation can be premised on the destruction of information already known to the defense. (***Zapien v. Martel*** (9th Cir. 2015) 805 F.3d 862, 867.)

1. Do prosecutors have immunity from suit for constitutional violations based on deliberate destruction of evidence?

There is a split in the case law as to whether prosecutors are entitled to absolute immunity from suit for constitutional violations caused by their alleged deliberate destruction of exculpatory evidence. (**See**

e.g., *Yarris* v. *County of Delaware* (3rd. Cir. 2006) 465 F.3d 129, 137 [no]; ***Khanna v. State Bar of Cal.*** (N.D.Cal. 2007) 505 F.Supp.2d 633, 646 [no]; ***Wilkinson* v. *Ellis*** (E.D. 1980) 484 F.Supp 1072, 1083-1084 [no] ***Armstrong* v. *Daily*** (7th Cir. 2015) 786 F.3d 529, 550 [no] *with* ***Heidelberg* v. *Hammer*** (7th Cir. 1978) 577 F.2d 429, 432 [yes]; ***Nylon* v. *Wellston*** (ED. Mo 1981) 512 F.Supp 560, 562 [yes]; ***Gutierrez* v. *Vergari*** (D.C.N.Y., 1980) 499 F.Supp. 1040, 1051-1052 [yes]; **cf.**, ***Imbler* v. *Pachtman*** (1976) 424 U.S. 409, 431 n. 34 [prosecutor's "deliberate *withholding* of exculpatory information" shielded by absolute immunity].)

N. If the Loss or Destruction of the Evidence is Caused by the Defendant or a Third Party, Can Due Process Still be Violated?

The loss or destruction of evidence caused by defendant's own efforts does not constitute a violation of due process - even if defendant was placed in a better position to destroy the evidence as a result of police negligence. (**See *People* v. *Webb*** (1993) 6 Cal.4th 494, 519-520 [no due process violation where officers collected firearm as evidence but inadvertently left it at scene and defendant then convinced owner of residence where it was left to dispose of it]; **see also *People* v. *Huston*** (1989) 210 Cal.App.3d 192, 215 [defendant's contributory negligence leading to destruction of evidence weighed against imposition of sanctions against prosecution]; **cf**., ***In re Michael L.*** (1985) 39 Cal.3d 81, 84, 86-87 [neither dismissal nor other sanction warranted when police left store surveillance videotape in possession of store owner, and owner inadvertently erased it.)

Similarly, if a third party destroys the evidence on his or her own initiative, there is no due process violation. Generally, concerns of due process apply **only** to actions by the state, not by private citizens. (**See e.g., *Colorado* v. *Connelly*** (1986) 479 U.S. 157.) Thus, before a defendant may prevail on a due process claim for loss of exculpatory evidence, the record must first show that evidence has been lost and that this loss is "chargeable to the State." (***United States* v. *Rahman*** (2d Cir. 1999) 189 F.3d 88, 139 [destruction of tapes by FBI informant]; **accord *United States* v. *Sepulveda*** (1st Cir. 1993) 15 F.3d 1161, 1195 [no due process violation where government inspected phone records but returned the records to defendant's housemate, who then discarded records]; ***State* v. *Nelsen*** (Ore. 2008) 183 P.3d 219, 225 [no due process violation where police requested laundromat video surveillance tape but it was automatically recorded over before laundromat owner ever provided it].)

Moreover, if the evidence destroyed never made it into the possession of the government, its loss or destruction cannot be a violation of due process. (**See *Grega* v. *Pettengill*** (D. Vt. 2015) 123 F.Supp.3d 517, 537 ["the State is not required to preserve and disclose exculpatory evidence it never possessed"]; ***United States* v. *Thomas*** (D.N.M. 2014) 61 F.Supp.3d 1221, 1224 ["research has not revealed any case in which a court held that the government owed a duty to preserve evidence that it had never possessed."].)

O. Can There Be a Violation of Due Process If the Loss or Destruction of the Evidence Takes Place After It Was Introduced at Trial?

Usually, evidence that is destroyed ***after*** it has been introduced into evidence (either pre- or post-verdict) by a court clerk will not be found to violate due process, largely because it is difficult to show bad faith and/or because the destruction of the evidence is not attributed to the State. (**See e.g., *Lovitt* v. *True*** (4th Cir. 2005) 403 F.3d 171, 186-187 [no due process violation because no bad faith shown where court clerk destroyed evidence after trial while petition for cert still pending]; ***People* v. *Blaylock*** (2000) 723 N.E.2d 1233, 1237 [no due process violation because no bad faith shown where clerk's office lost box of exhibits introduced at trial]; ***Brown* v. *United States*** (1998) 718 A.2d 95, 105-106 [no due process violation after photos sent to jury room were lost mid-deliberations because, inter alia, no showing of bad faith and because court responsible for custody of photos]; ***Fields* v. *United States*** (1997) 698 A.2d 485, 489 [no due process violation after clerk's office lost exhibits during jury deliberations because no showing of bad faith or fault on the part of the prosecution was made]; ***State* v. *Jefferson*** (1996) 938 S.W.2d 1, 15-17 [no due process violation after clerk purged exhibits before defendant's retrial because, inter alia, the lost items were not in the State's possession]; ***State* v. *Lindsey*** (1989) 543 So.2d 886, 890-891 [upholding denial of defendant's motion to quash indictment after clerk's office lost photographs because photos deemed to be in court's possession and no showing of bad faith by the State was made and reaching same result regarding clothing introduced at trial and destroyed by court clerk 2 years later]; ***State* v. *Vickers*** (1994) 885 P.2d 1086, 1093 [no due process violation found where court clerk authorized destruction of evidence 18 months after conviction].)

P. Is Failure to Disclose the Fact that Evidence Has Been Lost or Destroyed a Potential *Brady* Violation?

It is an open question whether failure to disclose the fact that evidence has been lost or destroyed (as opposed to failure to disclose the evidence itself) constitutes a ***Brady*** violation. (**See *United States* v. *Laurent*** (1st Cir. 2010) 607 F.3d 895, 900 ["***Brady*** . . . requires the prosecutor to produce exculpatory evidence to the defense and this could conceivably include information that someone-even a private citizen-had destroyed exculpatory evidence" albeit finding evidence destroyed in case before it not exculpatory]; ***United States* v. *Martinez-Montilla*** (2003) 82 Fed.Appx. 53, 55 [assuming without deciding that government's obligation under ***Brady*** required pre-trial disclosure of fact it had erased a tape recording of the defendant's voice]; ***State* v. *Brown*** (Ohio 2007) 866 N.E.2d 584, 586 ["Ironically, the most significant exculpatory feature of the destroyed evidence is the very fact of its destruction."].)

At least two opinions have held that failure to disclose the fact evidence was destroyed is not a ***Brady*** violation where the fact the evidence was destroyed would not entitle the defense to a dismissal under a ***Trombetta-Youngblood*** analysis. The courts found this conclusion flowed from the fact that a ***Brady*** violation requires the undisclosed evidence be favorable to the defense, and when the evidence that is destroyed is not itself favorable to the defense, there can be no ***Brady*** violation. (***Guzman* v. *State*** (Fla. 2003) 868 So.2d 498, 510; **accord *Guzman* v. *Secretary, Dept. of Corrections*** (M.D.Fla. 2010) 698 F.Supp.2d 1317, 1338-1339.)

Two other decisions suggest failure to disclose the loss of evidence might not be a ***Brady*** violation either: ***Com.* v. *Friedenberger*** (Pa. Super. Ct) [unreported] 2014 WL 10920398 and ***People* v. *Jones*** (N.Y. 1978) 375 N.E.2d 41.

In the unreported case of ***Com.* v. *Friedenberger*** (Pa. Super. Ct) 2014 WL 10920398, the prosecutor did not disclose the death of three critical witnesses that occurred between the defendant's original trial and his subsequent plea of guilty. (**Id**. at p. *2.) The defendant sought to withdraw his plea when he learned of the witnesses' deaths, claiming the plea could not "be considered knowing, intelligent and voluntary because he was not informed of the fact that the Commonwealth could not even prosecute him[.]" (**Id**. at p. *2.) The Commonwealth responded that while three witnesses had died, prosecution was not impossible, just more difficult. (**Ibid**.) After observing that "no case or rule exists in Pennsylvania mandating a prosecutor to disclose to the defense that witnesses are no longer available" and that the defendant has supplied any case law from other jurisdictions, the majority of the court declined to find, "[b]ased on the sparse and undeveloped argument advanced herein" that the defendant entered an unknowing, unintelligent, and involuntary plea. (**Id**. at p. *4.) The majority received "excoriation" from the dissent for not adequately discussing or examining ***Brady***, but pointed out it did not do so since nowhere in the defendant's brief did he cite ***Brady*** or suggest "the death of a witness constitutes exculpatory evidence or that ***Brady***-type considerations should control." (**Ibid**.) The majority also pointed out the while defendant raised a claimed violation of the ethical rule that requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense" (Pa.R.P.C. 3.8(d), it was not raised on appeal. (**Id**. at p. *4, *17.) Moreover, it stated "[t]he fact that witnesses have died is not evidence that [the defendant] did or did not commit the crime in question. (**Id**. at p. *6.) The majority rejected the claim that the prosecutor willfully misrepresented any facts by certifying that it was ready to try the case. (**Id**. at p. *4.) The majority did, however, note that "[c]ritically, unlike [in ***People* v. *Jones*** (N.Y. 1978) 375 N.E.2d 41], this matter involved numerous additional witnesses." (**Id**. at p. *6.)
In ***People* v. *Jones*** (N.Y. 1978) 375 N.E.2d 41, the court held that failure to disclose the fact that the prosecution's primary eyewitness against the defendant had died several days earlier before entry of guilty plea did not constitute ***Brady*** evidence since "[t]he circumstance that the testimony of the complaining witness was no longer available to the prosecution was not evidence at all." (**Id**. at p. 43

[and finding no ethical duty to disclose either]; **accord *People* v. *Roldan*** (N.Y. 1984) 476 N.Y.S.2d 447, 449; **cf.**, ***Matter of Wayne M.*** (1983) 467 N.Y.S.2d 798, 800, fn. 1 [finding there would be an ***ethical*** violation in failing to disclose fact there was no possibility the witness would be available to testify but seeming to accept that ***Brady*** not implicated].) By way of analogy, it can be argued that if failure to disclose the fact a material witness is no longer available does not constitute a ***Brady*** violation, then failure to disclose the fact material evidence is no longer available should not be deemed a ***Brady*** violation either, albeit it might be an ethical violation.

The fact evidence was ordered destroyed by a prosecutor instead of police officer does not convert the destruction into a ***Brady***, as opposed to a ***Trombetta -Youngblood*** violation. (**See *United States* v. *Garza*** (1st Cir. 2006) 435 F.3d 73, 76.)

However, even if disclosure was not required under ***Brady***, it is possible that failure to disclose the loss or destruction of evidence violates the statutory obligation to disclose "exculpatory evidence" under section 1054.1(e). (**Cf.**, ***United States* v. *Laurent*** (1st Cir. 2010) 607 F.3d 895, 900 [noting district court found prosecution was required, under Federal Rule of Criminal Procedure 16, which governs pre-trial disclosure by federal prosecutors in criminal cases, to disclose fact evidence was destroyed].)

Moreover, it is unlikely a court will look favorably upon a prosecutor who fails to disclose that evidence is no longer available. And a prosecutor undoubtedly is ethically barred from suggesting or implying evidence that is no longer available remains available.

Q. Hearings on Motions to Dismiss Based on Allegations of Improper Loss or Destruction of Evidence

1. An evidentiary hearing is contemplated

Assuming there are disputed issues of fact, some sort of evidentiary hearing is contemplated when the defendant makes a claim that the prosecution or law enforcement has destroyed or lost evidence in violation of due process. Not many cases have discussed precisely how the hearing proceeds, albeit in ***People* v. *Roybal*** (1998) 19 Cal.4th 481, the court described the procedure used in the trial court: "At the hearing, the superior court determined that, to 'streamline' the procedure, defendant would first be required to make an offer of proof, which the court would take 'at face value' subject to further examination; the prosecution would then be permitted to rebut the offer of proof through the testimony of witnesses, who would also be available for cross-examination by defendant." (**Id.** at p. 508.)

2. Who bears the burden at the hearing?

The defendant bears the burden of establishing both the loss or destruction of property and that the loss or destruction violated due process. (**See *People* v. *Alexander*** (2010) 49 Cal.4th 846, 879 [defendant has threshold burden of establishing lost evidence is apparently exculpatory]; ***United States* v. *Femia*** (1st Cir. 1993) 9 F.3d 990, 993; ***City of Columbus* v. *Forest*** (1987) 522 N.E.2d 52, 57; **see also *United States* v. *Ossai*** (1st Cir. 2007) 485 F.3d 25, 30 [defendant has burden to show evidence exculpatory and that its exculpatory value was apparent].) And this burden includes showing the destruction was in bad faith. (**See *Arizona* v. *Youngblood*** (1988) 488 U.S. 51, 58; ***People* v. *Memro*** (1995) 11 Cal.4th 786, 831; ***United States* v. *Webster*** (8th Cir. 2010) 625 F.3d 439, 447; ***United States* v. *Bohl*** (10th Cir. 1994) 25 F.3d 904, 911-912.) Thus, the burden would be on the defense to call witnesses (unless the prosecution was willing to stipulate to the existence of certain facts). Nevertheless, a trial court may, within its discretion, allow the prosecution to put on its witnesses first, so long as the defense is, at some point, allowed to present its own witnesses. (**See *People* v. *Roybal*** (1998) 19 Cal.4th 481, 510-511.)

* **Editor's note:** In two Ninth Circuit decisions (***United States* v. *Flyer*** (9th Cir. 2011) 633 F.3d 911 and ***United States* v. *Sivilla*** (9th Cir. 2013) 714 F.3d 1168), the Ninth Circuit, quoted language from a concurring opinion in a pre-***Trombetta*** case (***United States* v. *Loud Hawk*** (9th Cir. 1979) 628 F.2d 1139, 1152) that "[t]he Government bears the burden of justifying its conduct and the defendant bears the burden of demonstrating prejudice." (***Flyer*** at 915; ***Sivilla*** at p 1173.) This language cropped up in ***Loud Hawk*** in the context of the courts' discussion of when it is appropriate to give an instruction where no due process violation has been found. ***Loud Hawk*** was decided before ***Trombetta*** and ***Youngblood*** issued and its assumption that remedial instruction can be given even when there has been no due process violation may be erroneous. Regardless, to the extent the language regarding burdens may be considered at all, it only reflects the burdens in the context of deciding whether to give a remedial instruction when no due process violation has occurred.

3. Does the defense have a right to an in camera hearing on whether the defense has been prejudiced by the loss or destruction of evidence?

In attempting to show that there has been prejudice from the loss or destruction of evidence, is the defendant entitled to make the showing in camera so as not to reveal their trial strategy? The answer may depend on how the motion is characterized.

In ***People* v. *Huston*** (1989) 210 Cal.App.3d 192, the defendant, charged with 10 counts of robbery, claimed that he kept a series of receipts and other documents which would help establish his alibi in his

jail cell. The defendant hid these documents in a Playboy magazine that, in turn, was kept in a box marked legal files. The magazine was located by deputies during a "shakedown" search of defendant's cell and seized. The defendant complained about the seizure, arguing the magazine was necessary to his defense but refused to explain what was in the magazine that was needed, asserting the information was confidential. The deputies assumed the defendant was referring to an article in the magazine. The magazine (which was only temporarily confiscated while defendant was in a "punishment" cell) was stored and eventually returned to the defendant. The defendant claimed that numerous documents were missing when the magazine was returned. (**Id**. at pp. 202-204.) The defendant brought a nonstatutory motion to dismiss (and, in the alternative, a motion for curative jury instructions) on the ground the missing documents were critical to his defense. Defendant asked the court to hear all the testimony concerning the contents of the missing documents in camera because otherwise the description of the lost documents would give the prosecution premature notice of major portions of the defendant's defense. The trial judge denied the request, stating the prosecution's right to full cross-examination outweighed defendant's right to delay disclosure of his defense, given that defendant was the one bringing the motion and was seeking the extraordinary remedy of dismissal. At the hearing, the defendant's witnesses testified to the contents of the lost documents and the judge ordered the prosecution not to use "this testimony" in its case-in-chief. The judge denied the motion to dismiss based on the fact the deputies did not maliciously or intentionally lose or destroy the documents and made a series of factual findings that (i) certain alleged missing receipts never existed; (ii) certain missing receipts existed but bore dates different than those claimed by the defendant; (iii) some of the missing receipts contained information that could be adequately proven in alternative ways. (**Id**. at pp. 204-205.) The judge refused to give any curative instructions that went beyond his factual findings (and even suggested those findings would not be binding on the jury). The only remedy the court considered appropriate was severing the counts for which alibi documents had been lost from the other counts. (**Id**. at p. 206.) The appellate court approved the trial judge's determination to hold an open hearing, and held that defendant's rights were adequately protected by the court's order that testimony concerning the alibi documents could not be used in the prosecution's case-in-chief. (**Id**. at p. 212.) The court also noted "the existence of some limited statutory schemes for in camera hearings under dissimilar circumstances [does not] render an in camera hearing appropriate, let alone mandatory, on a motion for dismissal or other sanctions for loss of evidence." (**Id**. at p. 212, fn. 3; **cf**., ***Kling* v. *Superior Court*** (2010) 50 Cal.4th 1068, 1079 [recognizing defense may be able to go in camera at hearing on whether to release subpoenaed records but noting a trial court "'is not 'bound by defendant's naked claim of confidentiality"' but should, in light of all the facts and circumstances, make such orders as are appropriate to ensure that the maximum amount of information, consistent with protection of the defendant's constitutional rights, is made available to the party opposing the motion for discovery."]; ***City of Alhambra* v. *Superior Court*** (1988) 205 Cal.App.3d 1118, 1130 [permitting defense in camera hearing in attempts to obtain discovery from police department but providing same caveat as in ***Kling***]; **accord *Garcia v. Superior Court*** (2007) 42 Cal.4th 63, 72-76 [citing to ***Alhambra*** with

approval in context of request for confidentiality in making showing necessary for *Pitchess* records but finding that in light of the enactment of Proposition 115 and its implementation of reciprocal discovery, a court deciding whether to hold an in camera hearing may no longer weigh the need for confidentiality as heavily as the court did in ***City of Alhambra***].)

On the other hand, in ***People* v. *Caldwell*** (1991) 230 Cal.App.3d Supp. 1, the court held an in camera hearing was appropriate in a different context, albeit one that had some overlap with the failure to preserve evidence. In ***Caldwell***, the prosecution very belatedly disclosed two police reports regarding the charged crime and also told the defense that a supplemental report on the incident was permanently lost. The defense claimed prejudice because witnesses listed in the reports were no longer available to testify. The court treated the issue as a question of what was the appropriate sanction for violating a discovery order (as opposed to an issue of what sanction should be imposed for loss of evidence). In that context, the court approved the trial judge's decision to allow counsel to file a sealed declaration establishing that the testimony of the missing witnesses was material. (**Id**. at pp. Supp. 4-7.)

4. If the defense meets their burden of showing a due process violation, must the case be dismissed?

In ***McCarty* v. *Gilchrist*** (10th Cir. 2011) 646 F.3d 1281, the court listed several decisions the court claimed had held "the only remedy for the bad faith destruction of potentially exculpatory evidence under ***Youngblood*** is the dismissal of all charges." (**Id**. at p. 1288 [albeit also noting other courts have held alternative remedies may be appropriate].) A review of these cases cited, however, does not support the conclusion that these cases stand for that proposition.

There are a number of California cases indicating "courts enjoy a large measure of discretion in determining the appropriate sanction that should be imposed because of the destruction of discoverable records and evidence." (***People* v. *Yeoman*** (2003) 31 Cal.4th 93, 126; **accord *People* v. *Memro*** (1995) 11 Cal.4th 786, 831; ***People* v. *Sixto*** (1993) 17 Cal.App.4th 374, 399, citing ***People* v. *Zamora*** (1980) 28 Cal.3d 88, 99; ***People* v. *Alvarez*** (2014) 229 Cal.App.4th 761, 778-779.) Moreover, in ***People* v. *Lucas*** (2014) 60 Cal.4th 153, a case in which the issue was whether lost evidence met the "constitutional materiality" standard outlined in ***Trombetta***, the California Supreme Court stated: "Although a jury instruction *may be a viable response to a due process violation*, the trial court is under no obligation to so instruct the jury when there is no violation." (***Id***. at p. 222, emphasis added.)

Nevertheless, with the exception of ***Alvarez***, which stated "courts have a large measure of discretion in determining the appropriate sanction for failure to preserve ***material*** evidence" (*id*. at p. 778) while upholding the sanction of dismissal, in none of the decisions mentioned above did the court expressly find there had been a due process violation as described in ***Trombetta*** or ***Youngblood***. (**But see *People* v. *Delrio*** (unreported) 2010 WL 2109827, at *9 ["If the defendant demonstrates that

significant exculpatory evidence was lost, or establishes bad faith in connection with the loss of potentially useful evidence, the trial court has discretion to impose appropriate sanctions.", emphasis added by IPG])

The California Supreme Court has stated in cases involving the destruction of discoverable evidence, "the remedies to be applied need be only those required to assure the defendant a fair trial." (***People* v. *Yeoman*** (2003) 31 Cal.4th 93, 126; ***People* v. *Zamora*** (1980) 28 Cal.3d 88, 99.) This can be taken two ways. Since a finding the defendant has been deprived of due process by the loss of the evidence is tantamount to a finding the defendant will be deprived of a fair trial absent the evidence (**see *People* v. *Sixto*** (1993) 17 Cal.App.4th 374, 398; **see also *People* v. *Marshall*** (1990) 50 Cal.3d 907, 925 ["due process demands whatever is necessary for fundamental fairness."]), this language could be relied on to suggest that once the finding is made that a due process violation has occurred, dismissal is the only remedy. On the other hand, most courts appear to interpret this language as simply demanding that any remedy for the loss or destruction of evidence ensure a fair trial; and recognize that remedies short of dismissal may be adequate if the prosecution can show no irremediable prejudice - *without* suggesting that when the evidence lost or destroyed could be expected to play a significant role in the suspect's defense (as necessary to find a due process violation under ***Trombetta***), the remedy is limited to dismissal. (***People* v. *Alvarez*** (2014) 229 Cal.App.4th 761, 778–79; ***People* v. *Ervine*** (2009) 47 Cal.4th 745, 768, fn. 11; ***People* v. *Posey*** (2004) 32 Cal.4th 193, 212; ***People* v. *Zapien*** (1993) 4 Cal.4th 929, 967.) Regardless, assuming dismissal is not the only remedy even when the evidence lost is constitutionally material, two principles are fairly clear:

First, if there is governmental destruction of evidence that violates due process, the burden of explaining why the sanction of dismissal should not be imposed shifts to the prosecution. To "avoid dismissal of a criminal action because of prosecutorial destruction of evidence, the People must prove facts, by a preponderance of the evidence, establishing that the destruction of the evidence did not prejudice the defendant." (***People* v. *Ervine*** (2009) 47 Cal.4th 745, 768, fn. 11; ***People* v. *Posey*** (2004) 32 Cal.4th 193, 212; ***People* v. *Zapien*** (1993) 4 Cal.4th 929, 967.)

Second, dismissal for a due process violation is, at least, *a permissible remedy* if less drastic alternatives are unavailable. (***People* v. *Alvarez*** (2014) 229 Cal.App.4th 761, 778-779 [with no obvious alternative and the People's failure to suggest one, there was not abuse of discretion in dismissing the case]; ***United States* v. *Cooper*** (9th Cir. 1993) 983 F.2d 928, 933 [rejecting sanction of simply suppressing evidence where prejudice to defendants from loss of evidence could not be remedied even by stipulating to certain facts favoring the defendants; ***United States* v. *Bohl*** (10th Cir.1994) 25 F.3d 904, 914 [bad faith destruction of evidence required dismissal because the effect of destruction and dearth of adequate secondary evidence violated the defendants' due process rights]; **see also *People* v. *Gonzalez*** (1989) 209 Cal.App.3d 1228, 1233 [judge gave instruction to jury that, *if* they found officer had destroyed or failed to preserve the name of a potential witness as part of a "deliberate design to falsely convict this

defendant" they had "a duty to acquit the defendant of the charge" -although the appellate court seriously questioned whether the giving of the instruction was proper].)

That being said, there are plenty of decisions indicating that other options must be explored before imposing the remedy of dismissal. "[T]he dismissal of a charge is the most severe sanction a court can impose for the destruction of evidence; it is to be used with the greatest caution and deliberation." (***State* v. *Thomas*** (2002) 826 So.2d 1048, 1049; ***State* v. *Westerman*** (1997) 688 So.2d 979, 980. "[T]he drastic remedy of dismissal should not be invoked where less severe measures can rectify the harm done by the loss of evidence[.]" (***People* v. *Haupt*** (1987) 128 A.D.2d 172, 175; **accord *People* v. *Christopher*** (1995) 634 N.Y.S.2d 948, 952.) Indeed, even in ***People* v. *Alvarez*** (2014) 229 Cal.App.4th 761, the court acknowledged that "[a] dismissal on due process grounds may be improper if a less drastic alternative is available that still protects the defendant's right to due process." (Id. at p. 778 citing to ***United States* v. *Kearns*** (9th Cir.1993) 5 F.3d 1251, 1254.)

Even under the old ***Hitch*** standard, courts had a strong tendency "to fashion sanctions less drastic than dismissal" for the loss or destruction of evidence. (***People* v. *Mayorga*** (1985) 171 Cal.App.3d 929, 937; **see also *In re Michael L.*** (1985) 39 Cal.3d 81, 87 [finding, even pre-***Trombetta***, sanctions imposed should not be out of proportion to alleged police failing].) And dismissal of charges for destruction of or failure to preserve evidence remains a rare occurrence. (**See *United States* v. *Solis*** (D.Kan. 1999) 55 F.Supp.2d 1182, 1187; ***United States* v. *Headdress*** (D.Utah 1996) 953 F.Supp. 1272, 1288.)

5. What sanctions, other than dismissal, are available when evidence is destroyed or lost?

Assuming that sanctions short of dismissal may be imposed (regardless of whether the evidence lost or destroyed could be expected to play a significant role in the suspect's defense, as necessary to find a due process violation under ***Trombetta*** or was destroyed in bad faith, as necessary to find a due process violation under Youngblood), courts have discussed several alternative sanctions when evidence is lost or destroyed.

a. Exclusion

The sanction for loss or destruction of evidence may be the exclusion of the evidence or suppression of a witness' testimony. (**See *People* v. *Goss*** (1980) 109 Cal.App.3d 443, 456; ***United States* v. *Elliott*** (E.D.Va. 1999) 83 F.Supp.2d 637, 649; **see also *Deutsch* v. *Masonic Homes of California, Inc.*** (2008) 164 Cal.App.4th 748, 764, fn. 7 [stating ***Trombetta*** decision did not undermine the holding in ***Brown* v. *Municipal Court*** (1978) 86 Cal.App.3d 357 that "a proper remedy for the intentional suppression of possibly exculpatory evidence is exclusion of the evidence that the defendant was unable

to rebut"].) An instruction telling the jury to disregard a certain portion of a witness's testimony is another possible sanction. (**See *People* v. *Bailes*** (1982) 129 Cal.App.3d 265, 273-274.)

However, Proposition 8 would preclude the using the sanction of exclusion for the loss or destruction of evidence unless there has been a violation of federal due process as described in ***Trombetta*** or ***Youngblood.*** (**See *People* v. *Epps*** (1986) 182 Cal.App.3d 1102, 1113-1117; ***People* v. *Gonzales*** (1986) 179 Cal.App.3d 566, 576; ***People* v. *Superior Court (Calamaras)*** (1986) 181 Cal.App.3d 901, 906.)

b. Instruction

The sanction for loss or destruction of evidence may be an adverse or curative jury instruction. (**See *People* v. *Cooper*** (1991) 53 Cal.3d 771, 811; ***People* v. *Medina*** (1990) 51 Cal.3d 870, 894; ***People* v. *Zamora*** (1980) 28 Cal.3d 88, 99-103; ***People* v. *Sixto*** (1993) 17 Cal.App.4th 374, 398; ***People* v. *Huston*** (1989) 210 Cal.App.3d 192, 215.) However, there is no ***sua sponte*** duty on the trial court to fashion a cautionary instruction. (***People* v. *Medina*** (1990) 51 Cal.3d 870, 894.)

An adverse jury instruction may require the jury to find certain facts before permitting the jury to draw any adverse inferences. (**See e.g., *People* v. *Sassounian*** (1986) 182 Cal.App.3d 361, 394-395 [where the court instructed the jury that ***if*** it found that the sheriff had willfully "lost" or destroyed the jail record it could presume that such record was unfavorable to the People's case]; **see also *People* v. *Gonzalez*** (1989) 209 Cal.App.3d 1228, 1233 [judge gave instruction to jury that, *if* they found officer had destroyed or failed to preserve the name of a potential witness as part of a "deliberate design to falsely convict this defendant" they had "a duty to acquit the defendant of the charge" -although the appellate court seriously questioned whether the giving of the instruction was proper].)

However, there is no duty to give an instruction pursuant to Evidence Code section 412, which provides that "if weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust," when the prosecution has lost the evidence because if the evidence is lost it is not within the power of the prosecution to present it. (***People* v. *Von Villas*** (1992) 10 Cal.App.4th 201, 245; **see also *People* v. *Marshall*** (1996) 13 Cal.4th 799, 836, fn. 5; ***People* v. *Taylor*** (1977) 67 Cal.App.3d 403, 412.)

c. Limitation on Argument

The sanction for loss or destruction of evidence could be prohibiting the prosecution from making a particular argument. In ***People* v. *Yeoman*** (2003) 31 Cal.4th 93, the prosecution lost the original copies of the photographs used in a photo line-up and only a black and white photocopy was available. A witness had failed to identify the defendant from the original set of photos. The trial judge's remedial ruling was to bar the People from arguing that the witness had failed to identify defendant from the lost

photograph because it was a poor likeness, and instructed the jury that it would be unfair to draw any such conclusion. (**Id**. at p. 126.)

d. Severance

The sanction for loss or destruction of evidence could be severance of some counts from other counts. (**See *People* v. *Huston*** (1989) 210 Cal.App.3d 192, 206 [discussed in this IPG, section I-Q-3 at pp. 55-56 and noting, but neither approving nor disapproving trial judge's suggested use of this remedy].)

e. Stipulation

Another potential sanction for the loss or destruction of evidence could be forcing the prosecution to accept a stipulation establishing a particular defense point that cannot be established as a result of the destruction or loss of the evidence. (**See e.g.**, ***People* v. *Enriquez*** (Colo. 1988) 763 P.2d 1033, 1035, fn. 13 [People argued appropriate sanction for failure to preserve hood of car driven by defendant involved in collision with a boy on moped would be to order the parties to stipulate to speed of moped at time of the collision].)

6. What factors should be considered in deciding what sanction to impose?

In ***People* v. *Zamora*** (1980) 28 Cal.3d 88, the California Supreme Court set forth factors to be considered in determining what sanction should be imposed for the loss or destruction of evidence. (**Id**. at pp. 100-101.)

"First, 'the imposition and mode of sanctions depends upon the particular circumstances attending such loss or destruction.'" (***Id***. at p. 100 citing to ***People* v. *Hitch*** (1974) 12 Cal.3d 641, 650.) "Thus lawful and proper destruction requires no sanction [citations omitted]; illegal and malicious suppression of evidence may result in dismissal [citations omitted]." (***Zamora*** at p. 100.)

"Second, the sanction depends on the materiality of the evidence suppressed. In ***Hitch***, for example, we noted that bad faith destruction of evidence which might conclusively demonstrate innocence could require dismissal. (12 Cal.3d 641, 653, fn. 7.) Suppression of evidence which might impeach a witness for bias, however, may result in a new trial instead of a dismissal (***Giglio* v. *United States***, supra, 405 U.S. 150); suppression of evidence immaterial to the charge invokes no sanction (**see *Dell M. v. Superior Court***, *supra*, 70 Cal.App.3d 782, 788)." (***Zamora*** at p. 100.)

"Finally, the courts must consider the impact of the sanction upon future cases and future police conduct. If a sanction is to deter suppression of records and evidence, it must contain a punitive element; it must outweigh the benefit that the prosecution gains from the suppression. At the same time

the court must bear in mind the public interest in law enforcement, and the harm which may be inflicted by a sanction which prevents the trial and conviction of possibly guilty future defendants." (**Ibid.**) However, ***Zamora*** was decided before the ***Trombetta-Youngblood*** standards superseded ***Hitch*** and thus those factors need to be reevaluated in light of the current law. Among the ***Zamora*** factors that likely remain relevant under the current law: the circumstances of the loss or destruction of the evidence and the materiality of the evidence suppressed. (**See *People* v. *Sixto*** (1993) 17 Cal.App.4th 374, 399 [a post-***Trombetta/Youngblood*** case citing to ***People* v. *Zamora*** (1980) 28 Cal.3d 88, 100.) The ***Zamora*** court also suggested considering the impact of the sanction upon future police conduct, but continued use of this factor is highly suspect in light of the statement in ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51 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." (**Id**. at p. 58.)

* **Editor's note:** For a discussion of some of the factors courts consider in deciding whether to give an ameliorating instruction, **see** this IPG, section I-Q-8 at p. 64.)

7. If the defense does *not* meet their burden of showing a due process violation under *Trombetta* or *Youngblood*, can any form of sanction (i.e., a remedial instruction) be imposed for the loss or destruction of evidence?

A decent argument can be made that absent a violation of due process, there is **no** basis for giving any remedial instruction when evidence is lost or destroyed. In ***People* v. *DePriest*** (2007) 42 Cal.4th 1, the police released a homicide victim's car after subjecting it to forensic testing. The defense did not have any chance to conduct its own review of the car and requested an adverse instruction be given. The California Supreme Court held that, "[e]ven assuming negligence on the prosecution's part, no more can be said than that the car could have been subjected to further testing by the defense. Accordingly, no due process violation occurred, and *no basis for giving defense instructions on the issue arose at trial*." (***Id***. at pp. 41-42; **see also *People* v. *Martinez*** (1989) 207 Cal.App.3d 1204, 1218 ["By deciding that appellant did not show the materiality of the evidence under ***Trombetta***, and finding no evidence of bad faith under ***Youngblood***, we have no need to discuss the propriety of an instruction under ***Zamora***"]; ***People* v. *Ortega*** (unreported) 2012 WL 1621564, at *13 [rejected defendant's claim he was "necessarily entitled to an adverse inference instruction, even in the absence of a due process violation" considering that "[r]eviewing courts have uniformly rejected claims of error grounded on the failure to give similar instructions when police negligently failed to preserve evidence whose exculpatory value was unapparent"]; **cf**., ***People* v. *Lucas*** (2014) 60 Cal.4th 153, 222 ["Although a jury instruction

may be a viable response to a due process violation, the trial court *is under no obligation* to so instruct the jury when there is no violation."], emphasis added by IPG; ***People* v. *Cooper*** (1991) 53 Cal.3d 771, 811 [trial court *not required* to give jury instructions as sanction when there is no ***Trombetta/Youngblood*** violation]; ***People* v. *Huston*** (1989) 210 Cal.App.3d 192, 215 [trial court *does not commit error when it fails to give* cautionary instruction in absence of ***Trombetta*** violation].)

On the other hand, the Ninth Circuit has held that, under certain circumstances, a defendant may be entitled to a remedial instruction when the government has failed to preserve evidence even though the failure to preserve evidence does not rise to the level of a due process violation as described in ***Trombetta*** or ***Youngblood***. For example, in ***United States* v. *Sivilla*** (9th Cir. 2013) 714 F.3d 1168, the defendant was charged after cocaine was found in the jeep he was driving. Prior to trial, the district court ordered the government to preserve the vehicle as evidence. Despite the order, the vehicle was auctioned and "stripped for parts." (***Id***. at pp. 1170-1171.) The defendant had "sought to use his inspection of the Jeep to rebut the prosecution's argument that he must have known that the drugs were in the Jeep because of how long and involved a process it was to remove them from the car...." (***Id***. at 1174.) The ***Sivilla*** court did not find the exculpatory value of the vehicle was apparent nor that the government's destruction of the vehicle was done in bad faith. Rather, it was merely negligent. (***Id***. at p. 1172.) Nevertheless, relying on the concurring opinion in the pre-***Trombetta*** Ninth Circuit case of ***United States* v. *Loud Hawk*** (9th Cir. 1979) 628 F.2d 1139, the ***Sivilla*** court held the defendant was entitled to a remedial jury instruction and reversed the case. (***Id***. at p. 1174.) The ***Sivilla*** court held "[b]ad faith is the wrong legal standard for a remedial jury instruction...." and found, instead, "[c]ourts must balance the quality of the Government's conduct against the degree of prejudice to the accused, where the government bears the burden of justifying its conduct and the accused of demonstrating prejudice." (***Id***. at p. 1173.)

* **Editor's note:** For a more extended discussion of the balancing test utilized in ***Sivilla*** in determining whether to give a remedial instruction, **see** this IPG, section I-Q-8 at p. 64.)

In ***United States* v. *Flyer*** (9th Cir. 2011) 633 F.3d 911, the Ninth Circuit stated, in dicta, that "[i]f the government destroys evidence under circumstances that do not violate a defendant's constitutional rights, the court may still impose sanctions including suppression of secondary evidence." (***Id***. at p. 916 [citing to ***United States* v. *Loud Hawk*** (9th Cir. 1979) 628 F.2d 1139].)

However, ***Sivilla*** appears to be inconsistent with other Ninth Circuit authority, which at least requires criminal defendant to "establish (1) that the evidence was destroyed in bad faith, and (2) that he was prejudiced by its destruction" before allowing remedial instructions based on destruction of property to be given. (***United States* v. *Romo-Chavez*** (9th Cir. 2012) 681 F.3d 955, 961 citing to ***United States* v. *Artero*** (9th Cir.1997); 121 F.3d 1256, 1259; ***United States* v. *Jennell*** (9th Cir.1984) 749 F.2d 1302, 1308–1308; and finding this rule to be in accord with ***Arizona* v. *Youngblood*** (1988) 488

U.S. 51, 58 and ***United States* v. *Laurent*** (1st Cir.2010) 607 F.3d 895, 902 [stating that an adverse inference "instruction usually makes sense only where the evidence permits a finding of bad faith destruction; ordinarily, negligent destruction would not support the logical inference that the evidence was favorable to the defendant"].) And in ***United States* v. *Fries*** (9th Cir. 2015) 781 F.3d 1137, the Ninth Circuit noted the government's suggestion that ***Romo–Chavez*** and ***Sivilla*** are in tension with respect to application of the bad faith standard but declined to resolve the tension since the defendant's challenge failed under either standard. (***Fries*** at p. 1153; **see also *People* v. *Morales*** (unreported) 2013 WL 5636959, at *4 [observing ***Sivilla*** is not binding on California courts but characterizing it as simply holding "there may be circumstances where some type of remedial jury instruction (other than one that sanctions the prosecution) is necessary to protect a defendant's right to a fair trial" and indicating that when so characterized it is not inconsistent with California law].)

8. If a remedial jury instruction can be given as a sanction where there has been no showing of a process violation under *Trombetta* or *Youngblood*, what factors should a court consider in deciding whether to give such an instruction?

If the trial court believes sanctions *can* be imposed for the loss or destruction of evidence that does not concurrently violate due process, then courts could be guided by the factors laid out in ***People* v. *Zamora*** (1980) 28 Cal.3d 88, 96-103 [see this IPG, section I-Q-6 at pp. 61-62] and the concurring opinion in the pre-***Trombetta*** case of ***United States* v. *Loud Hawk*** (9th Cir. 1979) 628 F.2d 1139, 1151-1156 as recounted in ***United States* v. *Sivilla*** (9th Cir. 2013) 714 F.3d 1168.)

In ***United States* v. *Sivilla*** (9th Cir. 2013) 714 F.3d 1168 the Ninth Circuit concluded that a showing of bad faith is not required to receive a jury instruction and then outlined the test to be used in assessing whether a curative instruction is appropriate. It stated the court must balance the quality of the government's conduct against the prejudice to the accused. (**Id**. at p. 1173.)

The ***Sivilla*** court held that to assess the quality of the government's conduct, the court should determine whether: 1) the evidence was the government's custody at the time of the loss; 2) the government acted in disregard of the accused's interests; 3) the government negligently failed to follow established procedures; and 4) the government acted in good faith, if the destruction had been deliberate. (**Id**. at p. 1173.) And that in assessing prejudice, "the court must consider a wide number of factors including, without limitation, the centrality of the evidence to the case and its importance in establishing the elements of the crime or the motive or intent of the defendant; the probative value and reliability of the secondary or substitute evidence; the nature and probable weight of factual inferences or other demonstrations and kinds of proof allegedly lost to the accused; the probable effect on the jury from absence of the evidence, including dangers of unfounded speculation and bias that might result to

the defendant if adequate presentation of the case requires explanation about the missing evidence. (***Id***. at pp. 1173-1174.)

Applying that test, the ***Sivilla*** court found that the loss of a vehicle which contained a hidden compartment merited a remedial instruction because the configuration and ease of access to the compartment was important in allowing the defense to help show the defendant was a "blind mule" and that the grainy, indecipherable photographs proffered as a substitute were inadequate to remedy the loss. were no substitute for the vehicle itself, the Ninth Circuit concluded that prejudice to the defendant was significant and a remedial instruction was warranted. (**Id**. at p. 1174.)

* **Editor's note:** For a more extended discussion of the facts in ***Sivilla***, **see** this IPG, section I-Q-7 at p. 63.)

R. Aside from the Due Process Clause, Do Any Other Constitutional or Statutory Provisions Impose a Duty Upon the Government to Preserve Evidence?

1. Any Sixth Amendment right to preservation of evidence?

A defendant had no separate Sixth Amendment right, greater than his due process right to the preservation of evidence. (**See *People* v. *Arias*** (1996) 13 Cal.4th 92, 165 [specifically involving right to preservation of official records].)

2. Any statutory rights to preservation of evidence?

a. Health and Safety Code Section 11479 (Retention of Controlled Substances)

In ***People* v. *Superior Court (Calamaras)*** (1986) 181 Cal.App.3d 901, the court assumed (for purposes of deciding the issue before it) that officers who seized marijuana failed to comply with the mandate of Health and Safety Code section 11479 which authorized destruction of seized controlled substances in excess of 10 pounds in gross weight without a court order, but only if certain requirements were met, including that "[a]t least five random and representative samples have been taken, for evidentiary purposes, from the total amount of suspected controlled substances to be destroyed." Nevertheless, the court stated the remedy of suppression of the evidence was not available unless the destruction of the evidence violated due process per ***Trombetta***. (**Id**. at pp. 905-907; **compare *People* v. *Wilson*** (1987) 191 Cal.App.3d 161, 167-168[recognizing ***Trombetta*** standard and finding no due process violation but also stating only strict compliance with § 11479 will satisfy due process]; **cf**., ***People* v. *Eckstrom*** (1986) 187 Cal.App.3d 323, 335 [no suppression of evidence for violation of § 11479 where "substantial compliance" with statute].)

b. Penal Code Section 1536 (Retention of Evidence Taken Pursuant to Warrant)

In ***People* v. *Von Villas*** (1992) 10 Cal.App.4th 201, the court held that Penal Code section 1536 (which, among other things, states the police *must* retain any property taken pursuant to a search warrant) does not provide any special basis for sanctions (independent of the sanctions available for a due process violation) where an officer, in possession of property seized pursuant to a search warrant, loses or destroys the seized property. (***Id***. at p. 238-240.)

c. Penal Code Section 1417.9 (Retention of Biological Evidence)

Penal Code section 1417.9 requires "the appropriate governmental entity" to "retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case[.]" (Pen. Code, § 1419.7(a).) The duty to retain the property is subject to exception if certain conditions are met. (Pen. Code, § 1419.7(a).) However, the section does not set out what, if any sanctions, are available if the evidence is destroyed.

S. Can the Destruction of Evidence After Trial is Over Be a Due Process Violation?

The Ninth Circuit has held that cases assessing pre-conviction access to evidence under ***Trombetta*** and ***Youngblood*** do **not** apply when a defendant is denied access after conviction. (***Andrews v. Davis*** (9th Cir. 2015) 798 F.3d 759, 794-795.) The other circuits appear to be split. There are cases holding due process (as identified in the ***Trombetta/Youngblood*** line of cases) does **not** apply to post-trial destruction or loss of evidence. (***Tyler* v. *Purkett*** (8th Cir. 2005) 413 F.3d 696, 703; ***Ferguson* v. *Roper*** (8th Cir. 2005) 400 F.3d 635, 638; **see also *Terry* v. *State*** (2006) 857 N.E.2d 396, 407 [noting no Indiana or federal cases so holding and that it would be a significant extension of the law to so hold]; ***Lovitt* v. *True*** (4th Cir. 2005) 403 F.3d 171, 187 [it would be significant extension to apply ***Trombetta/Youngblood*** line of cases post-conviction]; ***Cress* v. *Palmer*** (6th Cir. 2007) 484 F.3d 844, 853 [Supreme Court has not held that post-conviction destruction is a due process violation].) However, there is at least one case finding due process (as identified in the ***Trombetta/Youngblood*** line of cases) *does* apply to postconviction destruction of evidence. (**See *Yarris* v. *Cnty. of Del.*** (3d Cir. 2006) 465 F.3d 129, 142 [holding although ***Youngblood*** addressed preconviction government conduct, its analysis of the defendant's due process right to access evidence applied to postconviction government conduct); **see also *McCarty* v. *Gilchrist*** (10th Cir. 2011) 646 F.3d 1281, 1288 fn. 3 [assuming (because the parties agreed) that the ***Youngblood*** decision, which addressed a defendant's due process rights in the preconviction context, applies equally to a defendant's due process rights in the postconviction context].)

* **Editor's note:** It is likely that, when ultimately faced with the question, the High Court will find due process is not violated by post-conviction loss or destruction of evidence for similar reasons it found due process was not violated by pre-conviction loss or destruction. (**Cf.**, ***Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*** (2009) 557 U.S. 52, , 2319 [in context of post-verdict ***Brady*** claim, finding the court of appeals went "too far" in "concluding that the Due Process Clause requires that certain familiar preconviction trial rights be extended to protect Osborne's postconviction liberty interest"].)

T. Does a Defendant Waive the Right to Complain About the Loss or Destruction of Evidence by Pleading Guilty?

When a defendant pleads guilty, defendant waives his right to complain about a due process violation based on the prosecution's loss or destruction of evidence. (**See *People* v. *Avalos*** (1996) 47 Cal.App.4th 1569, 1576; ***People* v. *Wakefield*** (1987) 194 Cal.App.3d 67, 70; ***People* v. *Halstead*** (1985) 175 Cal.App.3d 772, 778- 782; ***People* v. *Bonwit*** (1985) 173 Cal.App.3d 828, 831- 832; ***People* v. *Galan*** (1985) 163 Cal.App.3d 786, 796; ***People* v. *Ahern*** (1984) 157 Cal.App.3d 27, 32; **contra**, ***People* v. *Aguilar*** (1985) 165 Cal.App.3d 221, 224.)

U. When Must a *Trombetta-Youngblood* Motion Be Raised in Order to Preserve the Issue for Appeal?

There are three methods by which a motion to dismiss based on the loss or destruction of evidence may be brought (and preserved for appeal): "(i)--the most preferable method--by motion before trial; (ii) by objection to the admission of evidence at trial; and (iii)--the least preferred method--by motion to strike testimony." (***People* v. *Gallego*** (1990) 52 Cal.3d 115, 179-180, citing to ***People* v. *Mayorga*** (1985) 171 Cal.App.3d 929.)

If evidence has already been introduced that would otherwise have been suppressed as a sanction for the loss or destruction of evidence, it is too late and any due process claim is waived. (**See *People* v. *Gallego*** (1990) 52 Cal.3d 115, 179-180; ***People* v. *Taylor*** (1977) 67 Cal.App.3d 403, 410.)

Moreover, the defense may not use a new trial motion to raise a motion to dismiss for loss or destruction of evidence for the first time. (***People* v. *Gallego*** (1990) 52 Cal.3d 115, 179; ***People* v. *Mayorga*** (1985) 171 Cal.App.3d 929, 939-941.)

V. Is a Dismissal of Charges Based on the Destruction of Evidence a Final Judgment on the Merits Having Collateral Estoppel Effect?

A dismissal of charges for a due process violation based on the destruction of evidence is not considered a "final judgment on the merits" having binding collateral estoppel effect. Findings made on a ***Trombetta/Youngblood*** motion are not binding on a court considering dismissal of different charges based on different crimes. (**See *People* v. *Huston*** (1989) 210 Cal.App.3d 192, 225.)

W. What is the Standard of Review When Defendants Claim a Violation of Due Process Based on the Loss or Destruction of Evidence?

On review, the appellate court must determine "whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to support" the trial court's ruling there was no violation of due process notwithstanding the loss or destruction of evidence. (***People* v. *Roybal*** (1998) 19 Cal.4th 481, 510; ***People* v. *Griffin*** (1988) 46 Cal.3d 1011, 1022.) " A trial court's ruling on a ***Trombetta*** motion is upheld on appeal if a reviewing court finds substantial evidence supporting the ruling. (***People* v. *Montes*** (2014) 58 Cal.4th 809, 837.)

II. DUTY TO COLLECT EVIDENCE

A. No General Duty to Collect Evidence

In ***People* v. *Frye*** (1998) 18 Cal.4th 894, the California Supreme Court stated: "It is not entirely clear that the failure to obtain evidence falls within 'what might loosely be called the area of constitutionally guaranteed access to evidence.'" (**Id**. at p. 943.) But then went on to say: "Although this court has suggested that there might be cases in which the failure to collect or obtain evidence would justify sanctions against the prosecution at trial, we have continued to recognize that, ***as a general matter, due process does not require the police to collect particular items of evidence***." (**Ibid**; **accord *People* v. *Montes*** (2014) 58 Cal.4th 809, 837 ["Generally, due process does not require the police to collect particular items of evidence."]; ***People* v. *Littlefield*** (1993) 5 Cal.4th 122, 134 ["the prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense"]; ***People* v. *Farmer*** (1989) 47 Cal.3d 888, 911 [police cannot be expected to "gather up everything which might eventually prove useful to the defense"]; ***People* v. *Hogan*** (1982) 31 Cal.3d 815, 851 [duty to preserve material evidence already obtained does not include duty to obtain evidence or to conduct certain tests on it]; ***People* v. *Nation*** (1980) 26 Cal.3d 169, 175 ["the Constitution does

not require the prosecution to make a complete and detailed accounting to the defendant of all police investigatory work on a case"]; ***In re Koehne*** (1960) 54 Cal.2d 757, 759 ["the law does not impose upon law enforcement agencies the requirement that they take the initiative, or even any affirmative action, in procuring the evidence deemed necessary to the defense of an accused"].) Lower appellate courts have been more definitive in finding no duty to collect. (**See *People* v. *Velasco*** (2011) 194 Cal.App.4th 1258, 1265 [officers have no due process requirement "to keep investigating a crime once they have established probable cause"]; ***People* v. *Wimberly*** (1992) 5 Cal.App.4th 773, 791 ["police have no obligation to collect evidence for the defense; their duty is to preserve existing material evidence"]; ***People* v. *Kelley*** (1984) 158 Cal.App.3d 1085, 1101-1102 [same]; ***People* v. *Kane*** (1985) 165 Cal.App.3d 480, 485 ["prosecution is not required to engage in foresight and gather up everything which might eventually prove useful to the defense"]; ***People* v. *Ventura*** (1985) 174 Cal.App.3d 784, 794 [no duty to gather, collect, or seize evidence for defendant's use]; ***People* v. *Bradley*** (1984) 159 Cal.App.3d 399, 405 [same]; ***People* v. *McNeill*** (1980) 112 Cal.App.3d 330, 338 [no duty to gather and collect everything which, with fortuitous foresight, might prove useful to the defense]; ***People* v. *Watson*** (1977) 75 Cal.App.3d 384, 400 [same].)

"The police cannot be expected to 'gather up everything which might eventually prove useful to the defense.'" (***People* v. *Montes*** (2014) 58 Cal.4th 809, 837; ***People* v. *Hogan*** (1982) 31 Cal.3d 815, 851.)

B. Any Duty to Collect Evidence is Less Than the Duty to Preserve It

Even assuming a duty to collect evidence, the "duty to obtain exculpatory evidence is not as strong as its duty to preserve evidence already obtained." (***People* v. *Daniels*** (1991) 52 Cal.3d 815, 855; **accord *People* v. *Webb*** (1993) 6 Cal.4th 494, 519, fn. 18; ***People* v. *Hogan*** (1982) 31 Cal.3d 815, 851.) Thus, if failure to preserve the evidence would not violate due process, failure to collect it in the first place would not violate due process either. (**See *Miller* v. *Vasquez*** (9th Cir. 1988) 868 F.3d 1116, 1121 ["since, in the absence of bad faith, the police's failure to preserve evidence that is only potentially exculpatory does not violate due process, then a fortiori neither does the good faith failure to collect such evidence violate due process"]; **see also *People* v. *Daniels*** (1991) 52 Cal.3d 815, 855 [assuming, arguendo, due process duty to collect evidence, but finding no violation in case before it because no showing evidence had exculpatory value per ***Trombetta***]; **see also *People* v. *Cooper*** (1991) 53 Cal.3d 771, 810-811 [applying ***Trombetta-Youngblood*** test to failure to collect evidence].)

C. No Duty to Collect Crime Scene Evidence

Failure to collect crime scene evidence will not violate due process. (**See *People* v. *Daniels*** (1991) 52 Cal.3d 815, 855 [no duty to test hands of another possible suspect for gunshot residue]; ***People* v.**

Velasco (2011) 194 Cal.App.4th 1258, 1265 [no duty to collect shorts modified to allow a prisoner to carry a shank, and rejecting argument that because defendant was a prisoner the state is a de facto custodian of the shorts even if prison guards never obtained them]; ***People* v. *Kane*** (1985) 165 Cal.App.3d 480, 485 [no duty to impound or preserve car with indentation (or tell victim not to repair car) in case where defendant had allegedly shot at car]; ***People* v. *Bradley*** (1984) 159 Cal.App.3d 399, 405-408 [no duty to collect bloodstained articles found at scene of the crime]; ***People* v. *Maese*** (1980) 105 Cal.App.3d 710, 719-720 [no duty to obtain fingerprints from articles found at crime scene].)

D. No Duty to Evidence from Defendant at the Time of Arrest

There is no duty to collect evidence from defendant at the time of arrest. For example, there is no to obtain a urine sample from a defendant arrested for possession of methamphetamine - at least where police do not know evidence would be exculpatory. (***People* v. *Clark*** (1996) 45 Cal.App.4th 1147, 1157.) Moreover, "[l]aw enforcement agencies are not required to take a blood sample from a defendant on their own initiative in order to determine whether he is under the influence of alcohol or drugs." (***People* v. *Watson*** (1977) 75 Cal.App.3d 384, 399; **see also *People v. Montes*** (2014) 58 Cal.4th 809, 837-838 [officers had no duty to collect blood sample from defendant].)

In ***In re Newbern*** (1961) 55 Cal.2d 508, the court stated that it would be a denial of due process for law enforcement authorities to frustrate the reasonable efforts of a person accused of intoxication to obtain a timely sample of his blood, and that the remedy therefor would be **discharge**. (**Id**. at p. 513; **accord *Webb* v. *Miller*** (1986) 187 Cal.App.3d 619, 629; ***Brown* v. *Municipal Court*** (1978) 86 Cal.App.3d 357, 361.) Motions based on this claim were commonly referred to as ***Newbern*** motions.

The impact of ***Newbern*** has been significantly diminished by more recent developments in the case law and Proposition 8. First, the California Supreme Court in ***People* v. *Hitch*** (1974) 12 Cal.3d 641 overruled ***Newbern*** in holding due process is satisfied by exclusion of the results of the chemical test, rather than dismissal as mandated in ***Newbern***. (**See *People* v. *Superior Court (Maria)*** (1992) 11 Cal.App.4th 134, 141.) Second, as pointed out in ***People* v. *Superior Court (Maria)*** (1992) 11 Cal.App.4th 134, when it comes to motions involving a claim the police prevented the defendant from obtaining evidence, the applicable law is now found in ***Trombetta*** and ***Youngblood.*** (**Id**. at p. 142.) Thus, even assuming there remains an obligation on the part of law enforcement to allow the defendant a reasonable opportunity to obtain a timely sample of his blood or urine, the defendant would have to show that such a test would be material (i.e., that its exculpatory nature would be apparent and the defendant would be unable to obtain comparable evidence by other reasonably available means) or the officers acted in bad faith in preventing him from obtaining the test. (**See *People* v. *Superior Court (Maria)*** (1992) 11 Cal.App.4th 134, 140-144.)

E. No Duty to Evidence to Perform Particular Tests

"[T]he police do not have a constitutional duty to perform any particular tests." (***People* v. *Seaton*** (2001) 26 Cal.4th 598, 657, citing to ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51, 59; **see also *Jimenez* v. *County of Los Angeles*** (2005) 130 Cal.App.4th 133, 143 [defendant has no right to have police conduct testing of DNA evidence, let alone right to speedy testing]; ***People* v. *Ventura*** (1985) 174 Cal.App.3d 784, 794 [no duty "to test the evidence in the absence of a defense request"]; ***People* v. *Newsome*** (1982) 136 Cal.App.3d 992, 1006 [same].)

F. Any Constitutional Duty to Record a Defendant's Statements to Law Enforcement?

Police do not have a duty to tape record statements of a defendant and failure to tape-record a statement does not violate due process or require exclusion of the statement. (***People* v. *Holt*** (1997) 15 Cal.4th 619, 664-665; ***People* v. *Marshall*** (1990) 50 Cal.3d 907, 924-925.)

Police may even deliberately choose to discontinue tape-recording an interrogation during the period in which they "confront" the suspect without such discontinuation being a violation of due process. (**See *People* v. *Wimberly*** (1992) 5 Cal.App.4th 773, 791; **cf.**, ***United States* v. *Marashi*** (9th Cir. 1990) 913 F.2d 724, 734 [no ***Brady*** obligation to tape-record statements of witnesses]; ***United States* v. *Bernard*** (9th Cir. 1980) 625 F.2d 854, 860 [criticizing agent's practice of deliberately deciding not to take notes to avoid leaving a paper trail of inconsistent factual remarks but finding failure to record government interviews did not constitute ***Brady*** error].)

1. Any statutory duty to record a defendant's statements to law enforcement?

Pursuant to Penal Code section 859.5, law enforcement has a statutory duty, subject to certain exceptions to electronically record a custodial interrogation of any person, including an adult or a minor, who is in a fixed place of detention, and suspected of committing murder, as listed in Section 187 or 189 of this code, or paragraph (1) of subdivision (b) of Section 707 of the Welfare and Institutions Code . . ." (Pen. Code, § 859.5(a).) If the suspect is a juvenile, the interrogation must be videotaped. If the suspect is an adult, the interrogation may be either videotaped or audiotaped. (**See** Pen. Code, § 859.5(g)(2)(A) & (B).

G. Any Constitutional Duty to Record Conversations?

Police may selectively tape some telephone and body wire conversations involving the defendant and not others. In ***People* v. *Harris*** (1985) 165 Cal.App.3d 324, 328, the court rejected the defense claim

sanctions were proper because "the investigating officers were selective in tape recording only the most incriminating telephone calls and ... had mysteriously failed to tape record the actual [criminal] transactions." (**Id**. at pp. 328-329; **accord *People* v. *Wimberly*** (1992) 5 Cal.App.4th 773, 791.)

H. Any Duty to Preserve the Body of a Victim?

Even under the old ***Hitch*** standard, it was not a violation of due process to release a homicide victim's body to the victim's family. In ***People* v. *McNeill*** (1980) 112 Cal.App.3d 330, the court rejected defendant's argument that releasing the victim's body to the victim's family immediately after the autopsy and without instructions that the body not be cremated violated due process. The court observed that prosecutorial agencies have no right to custody of the remains of a deceased. Health and Safety Code section 7102 provides a right of custody in homicide cases to the coroner and not to any other person or official. Pursuant to Health & Safety Code section 7100, after the coroner completes an autopsy or investigation, the right to control disposition of the remains of a deceased and the duty of interment devolve on the family of the deceased. "[T]herefore no duty of preservation arises." (**Id**. at pp. 337-338 [and noting "society extends more respect to a dead body than to other physical evidence"]; **accord *People v. Hogan*** (1982) 31 Cal.3d 815, 851, fn. 18; ***Walsh* v. *Caidin*** (1991) 232 Cal.App.3d 159, 163-164; ***People* v. *Vick*** (1970) 11 Cal.App.3d 1058, 1064-1065; **but see *People* v. *Roehler*** (1985) 167 Cal.App.3d 353, 384 [finding no due process violation in failure to preserve victim's body after second autopsy but disagreeing with the premise in ***McNeill*** and ***Vick*** that a human body differs so greatly from other kinds of material evidence that special rules attach to its disposition].)

The ***McNeill*** court recognize that a "trial court has the discretion to allow discovery by a criminal defendant including the examination of a body in some circumstances," but ultimately ruled a court will not judicially legislate to require "a coroner retain possession of a body until a defendant requests permission to conduct his own autopsy examination. Due process does not compel such a ruling." (**Id**. at p. 338; ***People* v. *Vick*** (1970) 11 Cal.App.3d 1058, 1064-1065.)

I. Any Duty to Determine a Witnesses' Identity?

The prosecution does not have an obligation to ascertain the identity of an informant. (**See *People* v. *Callen*** (1987) 194 Cal.App.3d 558, 561-564 [where informant anonymously volunteers information on hotline, police have no duty to identify the source as a condition of acting upon information]; **cf.**, ***Eleazer* v. *Superior Court*** (1970) 1 Cal.3d 847, 852-853 [police have duty to keep tabs on confidential informant used by police].)

J. Bad Faith Failure to Collect Potentially Exonerating Evidence

In ***Miller* v. *Vasquez*** (9th Cir. 1989) 868 F.2d 1116, the Ninth Circuit recognized that "***Trombetta*** did not impose a duty to obtain evidence" and that they could not find any cases "holding due process clause is violated when the police fail to gather potentially exculpatory evidence." (**Id**. at pp. 1119-1120.) Nevertheless, the ***Miller*** court specifically held that "a ***bad faith*** failure to collect potentially exculpatory evidence would violate the due process clause." (***Miller* v. *Vasquez*** (9th Cir. 1989) 868 F.2d 1116, 1120-1121 (emphasis added) [finding such failure where trial judge found officer investigating rape within 24 hours after it occurred purposefully failed to collect a bloodstained jacket the victim was wearing during the attack and then lied repeatedly about why he failed to do so]; **accord *United States* v. *Martinez-Martinez*** (9th Cir. 2004) 369 F.3d 1076, 1086; ***Gausvick* v. *Perez*** (9th Cir. 2003) 345 F.3d 813, 818;

In ***People* v. *Velasco*** (2011) 194 Cal.App.4th 1258, the court characterized the true rule of ***Miller*** as simply requiring law enforcement "to gather and to collect evidence in those cases in which the police themselves *by their conduct indicate that the evidence could form a basis for exonerating the defendant*." (**Id**. at p. 1264; **see also *Northern Mariana Islands* v. *Bowie*** (9th Cir. 2001) 243 F.3d 1109, 1117.)

However, even in ***Miller***, the Ninth Circuit recognized that there is no due process duty to collect potentially exculpatory evidence if the failure to collect is not the result of bad faith. (***Miller* v. *Vasquez*** (9th Cir. 1989) 868 F.2d 1116, 1120-1121; **accord *Cunningham* v. *City of Wenatchee*** (9th Cir. 2003) 345 F.3d 802, 812.) Moreover, ***Miller*** is inapposite when the evidence the police allegedly purposely failed to collect was not yet in existence, i.e., failure to create evidence, such as a statement, is different than failure to collect evidence, such as an item of clothing. (**See *People* v. *Von Villas*** (1992) 10 Cal.App.4th 201, 248.)

And, finally, at least one court has condemned the holding in ***Miller*** as aberrant, noting it is limited to the Ninth Circuit. (**See *White* v. *Tamlyn*** (E.D.Mich. 1997) 961 F.Supp. 1047, 1062; ***People v. Wade*** (unreported) 2007 WL 701578, *3.) In ***People* v. *Velasco*** (2011) 194 Cal.App.4th 1258, the court noted the criticism, but suggested it might be misplaced as ***Miller*** is limited to situations in which "police see that evidence is likely to be exculpatory but avoid collecting it because of that perception" – a circumstance which the ***Velasco*** court stated (in dicta) seemed to flow logically from ***Youngblood***. (***Velasco***, at p. 1265.) However, the ***Velasco*** court went on to criticize ***Miller*** on a different ground, noting that ***Miller*** seemed to overlook the threshold question whether the items (i.e., a bloodstained jacket) "could be anything but inculpatory." (***Velasco***, at p. 1265.)

K. Penal Code Section 13823.5 Does Not Require Sanctions for Failure to Collect Evidence

Penal Code section 13823.5 requires, among other things, that there should be a protocol for the examination and treatment of victims of sexual assault which shall include recommended methods regarding the collection and preservation of evidence. Penal Code section 13823.11 lays out the minimum standards for the collection and preservation of evidence.

However, Penal Code section 13823.12 states: "Failure to comply fully with Section 13823.11 or with the protocol or guidelines, or to utilize the form established by the Office of Emergency Services or the standardized sexual assault forensic medical evidence kit described in Section 13823.14, shall not constitute grounds to exclude evidence, nor shall the court instruct or comment to the trier of fact in any case that less weight may be given to the evidence based on the failure to comply."

III. THE DEFENSE RIGHT TO CONDUCT TESTS ON EVIDENCE

In ***People* v. *Backus*** (1979) 23 Cal.3d 360, the court stated that "[d]ue process requires that criminal defendants have an opportunity to examine, and in appropriate cases have chemical tests performed on, evidence to be offered against them." (**Id**. 384, citing to the case of ***In re Newbern*** (1959) 175 Cal.App.2d 862.) In light of more recent case law (**see e.g.**, ***Arizona* v. *Youngblood*** (1988) 488 U.S. 51; ***California* v. *Trombetta*** (1984) 467 U.S. 479), the statement can no longer be construed to mean that due process is violated just because evidence is lost or destroyed before the defense has an opportunity to examine and test evidence.

However, the Due Process Clause of the Fourteenth Amendment requires "that criminal defendants be afforded a meaningful opportunity to present a complete defense." (***California* v. *Trombetta*** (1984) 467 U.S. 479, 485.) And, thus, if evidence still exists, a defendant should have a right to examine and test that evidence - otherwise the rationale for requiring its preservation (to allow the defendant to present and prepare a defense) would be undermined. (**See *People* v. *Backus*** (1979) 23 Cal.3d 360, 384; ***Keenan* v. *Superior Court*** (1981) 126 Cal.App.3d 576, 585 [no dispute regarding right of defense to test evidence]; **but see *People v. Griffith*** [*unreported*] 2010 WL 2060314, *25 [noting the United States Supreme Court "has never concluded that due process requires a prosecutor to make potentially useful physical evidence available to the defense for purposes of forensic examination or testing"]; ***District Attorney's Office for the Third Judicial Dist*. v. *Osborne*** (2009) 557 U.S. 52, 68-69, 73-74 [finding there is no freestanding due process right to conduct testing of DNA evidence *after* a verdict, but also noting due process rights after trial do not parallel trial rights].)

At a minimum, a court has discretion to allow such examination. (**See *Prince* v. *Superior Court*** (1992) 8 Cal.App.4th 1176, 1180-1181.)

Moreover, *if* it not necessary for the prosecution to maintain the integrity of the evidence, the defense is entitled to conduct **independent** testing on the evidence. In ***Prince* v. *Superior Court*** (1992) 8 Cal.App.4th 1176, there was DNA evidence in a vaginal swab that was large enough to allow each party to conduct five DNA tests. The trial court divided the sample between the parties but ordered that each party be allowed to observe a test conducted by the other and each be provided a report of the results. The defendant challenged this order on several bases, arguing that the prosecution should not be allowed to observe its testing and was not entitled to a report of its results. (**Id**. at pp. 1178-1179.) The appellate court found that the order did *not* violate defendant's Fifth Amendment right against self-incrimination, since that right only protects against forcible disclosure of testimonial communications and the testing is not testimonial communication. (**Id.** at p. 1179.) However, the court did find the order unnecessarily interfered with defendant's right to effective assistance of counsel, specifically counsel's right to communicate in confidence with experts in the preparation of the defense case. (**Id**. at p. 1180 [albeit declining to address whether the order violated due process or defendant's statutory work product claim].) Accordingly, the ***Prince*** court ordered the trial judge to modify its order to permit the defense to conduct an independent analysis of its half of the sample and keep the results confidential *if* they were not going to be used at trial by the defense. (**Id**. at pp. 1180-1181; **see also *Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1046 [citing ***Prince*** with approval]; ***People* v. *Varghese*** (2008) 162 Cal.App.4th 1084, 1094 [noting California Supreme Court approval of ***Prince*** in ***Alford***].)

A. The Defense Right to Conduct Tests on Evidence Is Subject to Reasonable Limitations

The defense does **not** have a right to conduct tests on evidence (whether or not it will be consumed) in a manner that will prevent the prosecution from maintaining the integrity of the evidence. In ***Keenan* v. *Superior Court*** (1981) 126 Cal.App.3d 576, the court found a trial judge's order allowing defense criminalists to inspect, test and examine physical evidence in police custody, but preventing removal of the evidence from custody and requiring monitoring of any inspection, testing or examination by law enforcement, was proper where the monitoring was limited to the taking of reasonable precautions to prevent loss or destruction of the evidence, and encouraged the defense to seek further assistance if necessary to ensure testing was done in reasonable privacy. (**Id**. at p. 585-586; **see also *People* v. *De La Plane*** (1979) 88 Cal.App.3d 223, 238 [trial court's denial of defense request to have ski mask containing strands of hair tested by independent laboratory in Oakland was not a violation of due process where the trial court indicated defendant would be permitted to find a local Los Angeles expert to make such examination and analysis and no prejudice established from this limitation]; ***People* v. *Millwee*** (1998) 18 Cal.4th 96, 136 [in discovery process, it is reasonable for prosecution to take efforts

to ensure that original, irreplaceable items are not lost or destroyed]; ***Walters* v. *Superior Court*** (2000) 80 Cal.App.4th 1074, 1077 [noting the prosecutor's obligation to protect the integrity of the evidence, the inculpatory on behalf of the People, the exculpatory on behalf of the defense, cannot be reconciled with defense ex parte access to it]; **see also *People* v. *Richardson*** (2008) 43 Cal.4th 959, 1003 [burden is on proponent to establish evidence was not altered]; ***People* v. *Baldine*** (2001) 94 Cal.App.4th 773, 779 ["Chain-of-custody issues are present whenever physical evidence capable of submission to the jury is introduced at trial"].)

B. No Defense Right to Conduct *Confidential* Testing of Evidence if Evidence Will Be Consumed

Sometimes the defense will want to conduct an independent test on evidence that will result in the evidence being consumed. In such a situation, the defense is **not** entitled to consume or alter the evidence without disclosing the results to the prosecution. If the defense is unwilling to share testing results as a condition of conducting independent tests, a trial court may deny the defendant the right to conduct those tests. (**See *People* v. *Cooper*** (1991) 53 Cal.3d 771, 814-816 [upholding order of trial court requiring testing of samples (which would be consumed in process) be conducted in presence of both defense and prosecution expert]; ***People* v. *Varghese*** (2008) 162 Cal.App.4th 1084, 1093 [where sample would be consumed, the "defense has no right to test the sample independently"]; ***Walters* v. *Superior Court*** (2000) 80 Cal.App.4th 1074, 1078-1079 [requiring noticed motion and hearing before defense may test evidence in prosecution's possession and noting that trial judge's order in ***Prince*** (**see below**) that nondivisible evidence must be tested in presence of both defense and prosecution expert was not challenged by defense]; **cf**., ***Prince* v. *Superior Court*** (1992) 8 Cal.App.4th 1176, 1179-1181 [where there would be evidence left over for further testing, defense is entitled to do independent testing without revealing results to prosecution unless results will be introduced into evidence].)

In ***People* v. *Varghese*** (2008) 162 Cal.App.4th 1084, the court held that when evidence is going to be consumed during defense testing, it is appropriate for a trial court to order release of the results to the prosecution - even in some circumstances where the prosecution has already tested the evidence! (**Id**. at p. 1095.) In ***Varghese***, the prosecution tested a sample of a small bloodstain for DNA and testing showed the DNA belonged to the defendant. The defense asked to do independent testing of the remaining sample without having to reveal the results, notwithstanding the fact the remaining sample would be consumed. The prosecutor opposed the motion, stating that given the importance of the sample, it wished to *corroborate* the DNA results obtained during the original testing with a second test. Ultimately, the trial court told the defendant he could have a test done by an independent expert or an expert of defendant's choice but that the defense would be required to provide those results of those tests to the prosecution. The trial court followed the prosecution's suggestion and the defense declined the offer to do the testing if it was subject to the requirement that the results be disclosed, albeit not the

reports or the observations of the expert. (**Id**. at pp. 1090-1092.) On appeal, the ***Varghese*** court upheld the trial court's order, finding that the order was a proper exercise of the trial court's discretion that protected the interests of both parties and advanced the interest of determining the truth. (**Id**. at p. 1095.)

The ***Varghese*** court, however, made it a point to observe that the order was not the only acceptable compromise that could have been reached in the circumstances. (**Id**. at p. 1095.) And it probably would have been equally acceptable to have the testing done by the prosecution in the presence of a defense expert as occurred in ***United States* v. *Kenney*** (D. Me. 2008) 550 F.Supp.2d 118.

In ***Kenney***, a defendant was charged with providing her brother with methadone that caused his death. The government obtained a blood sample from the state medical examiner's office, had some of the sample tested, and shared some of the sample with defendant. However, the government then discovered that their laboratory failed to follow standard laboratory procedure during the original testing. The government requested the sample be returned. The district court held that since there was an insufficient quantity of blood remaining for both defendant and government to conduct separate testing, the sample was critical piece of evidence for government's allegation against defendant, and there was no basis to conclude that if properly tested the result would be different whether done by government or defendant, the district court ordered the sample returned with the proviso that the defendant's expert be permitted to attend the testing. (**Id**. at pp. 121-123.)

* **Editor's note:** Sometimes the defense will seek to conduct tests on evidence that has been seized as part of an investigation in a case that has not yet been charged but which the defense wants to test for purposes of establishing a third-party culpability defense in a different charged case. No California case holds the defense can conduct tests on evidence and destroy it even if the evidence may be needed by the defense in another prosecution.

C. The Defense Has No Constitutional Right to Post-Conviction Testing of DNA, But There is a Statutory Right

In ***District Attorney's Office for the Third Judicial Dist*. v. *Osborne*** (2009) 557 U.S. 52, the High Court held that there was no freestanding due process right to conduct testing of DNA evidence after a verdict. (***Id***. at p. 73-74.) Part of the rationale given for declining to do so was that if such right was found, the court would have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested – a question the court was not inclined to address. (***Id***. at p. 73-74.)

However, there is a statute in California providing for such testing but only when certain enumerated circumstances exist. (**See** Pen. Code, § 1405 [requiring state to allow defendant to have DNA evidence where, inter alia, identity was an issue in the case and evidence is in condition to be retested].)

IV. PROSECUTORIAL COMMENT UPON THE FACT EVIDENCE HAS BEEN PROVIDED TO THE DEFENSE

Whether it is permissible for the prosecution to elicit and/or comment upon the fact that evidence is available for testing by the defense and/or on the fact evidence was provided to defense for testing but the defense did not introduce the results of any testing, is largely resolved in California. (**See *People* v. *Gray*** (2005) 37 Cal.4th 168, 207-209; **see also *People* v. *Foster*** (2010) 50 Cal.4th 1301, 1356-1357.)

There are several arguments defendants make as to why such elicitation or comment is improper: (i) it violates the work-product privilege; (ii) it violates the attorney-client privilege; (iii) it violates the federal and state constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and corollary state provisions by interfering with the attorney-client relationship; (iv) it violates the federal constitutional right to due process under the Fifth and Fourteenth Amendments by interfering with the ability to prepare and present a defense; (v) it violates the rule against commenting upon defendant's failure to testify as outlined in ***Griffin* v. *California*** (1965) 380 U.S. 609; and (vi) it shifts the burden of proof onto the defendant. (**See *People* v. *Foster*** (2010) 50 Cal.4th 1301 , 1356-1357; ***People* v. *Gray*** (2005) 37 Cal.4th 168, 207-209; ***People* v. *Zamudio*** (2008) 43 Cal.4th 327, 353-355; ***People* v. *Bennett*** (2009) 45 Cal.4th 577, 595-596.) Below we explain how courts have addressed each of those arguments.

(i) The Work Product Privilege Claim

In ***People* v. *Scott*** (2011) 52 Cal.4th 452, the prosecution asked whether a bullet (which purportedly had been fired by the defendant during an attempted murder and which was matched to a pistol belonging to the defendant) had been in the possession of a defense expert. The defendant claimed this line of inquiry violated the attorney work product privilege. The California Supreme Court held the "fact that the bullet had been in the possession of a defense expert did not implicate the attorney work product privilege." (***Id***. at p. 489.) "The mere fact that a piece of evidence was given to the defense says nothing about what the defense team did or did not do with the evidence." (**Ibid**.)

In ***People* v. *Zamudio*** (2008) 43 Cal.4th 327, a case in which a criminalist testified she provided a blood sample to the defense for testing, the California Supreme Court made it clear that, at a minimum, elicitation of such evidence would not violate the work-product privilege. The court reasoned that section 1054.6 limits what is considered work product to the definition provided in Code of Civil Procedure section 2018.030(a). That section defines work product as a "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." Since evidence of the fact that an item was sent by the lab to the defense for testing did not qualify as a "writing," it was not "work-product" and thus not protected by the work product privilege. (**Id**. at p. 355; **accord *People* v. *Bennett*** (2009) 45 Cal.4th 577, 595 [finding questions by the prosecutor of forensic experts as to

whether evidence was available for retesting did not violate work-product privilege under same theory]; **see also *People* v. *Gray*** (2005) 37 Cal.4th 168, 207-209 [Evidence Code § 913 only prohibits comment upon and drawing of inferences from exercise of privilege and fact forensic evidence was made available to the defense does not constitute comment on the "exercise of" the work product privilege].)

The ***Zamudio*** court distinguished the case of ***People* v. *Coddington*** (2000) 23 Cal.4th 529, which had found a violation of the work product privilege where the prosecution asked defense experts whether they were aware that three other *non*testifying experts (whose names the prosecution had learned from defendant's jail visitor records) had also evaluated the defendant, on the ground that the ***Coddington*** court was interpreting the work-product privilege as it existed *before* the passage of Proposition 115].)

These aforementioned cases establish that eliciting or commenting upon the fact evidence was provided to the defense for testing does not violate the attorney-client privilege.

(ii) The Attorney-Client Privilege Claim

The attorney-client privilege is "a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." (Evid. Code, § 954.) "That privilege encompasses confidential communications between a client and experts retained by the defense." (***People* v. *Coddington*** (2000) 23 Cal.4th 529, 605, citing to Evid. Code, § 952.)

In ***People* v. *Bennett*** (2009) 45 Cal.4th 577, the prosecution asked several questions of its forensic experts regarding whether there was evidence available for retesting by the defense and whether the defense had asked for any samples for retesting. (**Id**. at pp. 593-595.) The defense argued that asking these questions violated the attorney-client privilege (Evid. Code, § 954). (**Id**. at p. 596.) The ***Bennett*** Court held that "[a]sking whether there was evidence available for retesting, and even whether the defense sought a split of the sample, did not violate the privilege." (**Id**. at p. 596.)

The ***Bennett*** Court was not confronted with the issue of whether *comment* upon the defense failure to retest would violate the attorney-client privilege. However, in support of its holding, the ***Bennett*** court cited to ***People* v. *Coddington*** (2000) 23 Cal.4th 529, a case involving both questioning *and* comment on the failure of the defense to call expert witnesses. In ***Coddington***, the prosecutor elicited evidence (*and commented upon the fact*) that the defendant had been examined by experts other than those who testified. The defendant argued that doing so violated the attorney-client privilege. The ***Coddington*** Court held "[n]either evidence that [defendant] had been examined by experts other than those who testified nor evidence that the testifying experts were aware or not aware of the opinions of the nontestifying experts disclosed a confidential communication between defense counsel and [defendant] or [defendant] and any psychiatrist. Therefore, the decision of the defense to call only three of the experts who had examined [defendant] did not constitute the exercise of the attorney-client privilege and comment was not precluded by Evidence Code section 913." (**Id**. at p. 605.)

Under ***Bennett*** and ***Coddington***, eliciting and/or commenting upon the fact that samples were available or provided to the defense for testing does not violate the *attorney-client* privilege.

(iii) The Claim of Interference with the Attorney-Client Relationship (i.e., the Right to Effective Assistance of Counsel Claim)

In ***People* v. *Scott*** (2011) 52 Cal.4th 452, the prosecution asked whether a bullet (which purportedly had been fired by the defendant during an attempted murder and which was matched to a pistol belonging to the defendant) had been in the possession of a defense expert. The defendant claimed this line of inquiry violated, inter alia, his right to the assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. (***Id***. at p. 489.) Although the ***Scott*** case focused on rejecting defendant's claims that the question violated the work-product privilege (see this IPG, section IV at p. 79, it also stated the "rejection of defendant's work product claim on the merits necessarily leads to rejection of his *constitutional* claims." (**Ibid**., emphasis added by IPG.)

In ***People* v. *Gray*** (2005) 37 Cal.4th 168, the defendant claimed his trial attorney should have argued that his federal and state constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and corollary state provisions were violated when the prosecution elicited and commented upon the availability of, or provision to the defense of, forensic evidence that was not later presented by the defense. However, the California Supreme Court did not address the issue on the merits, but simply found there was no prejudice from the failure to raise the issue. (**Id**. at p. 209; **see also *People* v. *Zamudio*** (2008) 43 Cal.4th 327, 353 [issue raised but held forfeited for failure to raise it in trial court].)

The issue was more directly confronted in the unreported decision of ***People* v. *Wilson*** 2012 WL 5928727. In ***Wilson***, the trial court ordered the police department to release the biological evidence gathered for the case to the defense, and also authorized the collection of DNA samples of the defendant for comparison purposes. (***Id***. at p. *3.) During argument, the prosecutor commended the defense counsel on conceding that the "chemistry" of the police lab testing was correct "because of course his own retesting undoubtedly proved that fact to be true. I mean, *we know he had the evidence retested*." (Italics in opinion.) Shortly thereafter, the prosecutor stated, "*I guarantee that the DNA was retested at 15 loci*." Later, the prosecutor told the jury that it had no evidence of retesting, "but the judge has already made a ruling that I get to comment on the fact of the retest and any inferences that you can draw from that.... What that means is that *you get to know that [defense counsel] sent the DNA to be retested at a lab*." Defense counsel objected on grounds of speculation and after a sidebar conference, the prosecutor reminded the jury that there was DNA available to retesting to defense labs and then stated, "So again, I told you before, I told you the first time, the defense is not obligated to present anything to you, but you can *draw reasonable inferences about why they produced no evidence to contradict the match and [defense counsel] is conceding that the chemistry was correct*." (***Id***. at p. *5.)

The appellate court rejected defendant's claim that allowing the comment violated his right to effective assistance of counsel as a well as his claim that it violated his privilege against self-incrimination. (***Id***. at pp. *5-*7.) The case is not citeable, but, fortunately, defendant filed a habeas petition in federal court and so we now have published federal district court decision finding the California court of appeal was not contrary to or an unreasonable application of clearly established federal law. (***Wilson* v. *Knipp*** (N.D. Cal. 2015) 85 F.Supp.3d 1165, 1170 [and noting, at p. 1171, in support of its conclusion, "under Federal law, prosecutors are permitted to call attention to the defendant's failure to present exculpatory evidence."].)

(iv) The Claim of Interference with the Ability to Prepare and Present a Defense (i.e., Due Process)

In ***People* v. *Scott*** (2011) 52 Cal.4th 452, the prosecution asked whether a bullet (which purportedly had been fired by the defendant during an attempted murder and which was matched to a pistol belonging to the defendant) had been in the possession of a defense expert. The defendant claimed this line of inquiry violated, inter alia, his right to a fair trial. (***Id***. at p. 489.) Although the ***Scott*** case focused on rejecting defendant's claims that the question violated the work-product privilege (**see** this IPG, section IV at p. 79, it also stated the "rejection of defendant's work product claim on the merits necessarily leads to rejection of his *constitutional* claims." (**Ibid**., emphasis added by IPG.)

In ***People* v. *Gray*** (2005) 37 Cal.4th 168, the defendant claimed his trial attorney should have argued that his federal and state constitutional right to the effective assistance of counsel under the Fifth and Fourteenth Amendments to the United States Constitution were violated when the prosecution elicited and commented upon the availability of, or provision to the defense of, forensic evidence that was not later presented by the defense because it interfered with his ability to prepare and present a defense. However, the California Supreme Court did not address the issue on the merits, but simply found there was no prejudice from the failure to raise the issue. (**Id**. at p. 209; **see also *People* v. *Zamudio*** (2008) 43 Cal.4th 327, 353 [issue raised but held forfeited for failure to raise it in trial court].)

Whether the defense argument has any legs will likely depend on whether the rationale of the holding in ***Prince* v. *Superior Court*** (1992) 8 Cal.App.4th 1176 (i.e., that if evidence is available for retesting without the evidence being consumed, the defense is entitled to do independent testing without revealing results to prosecution unless the results will be introduced into evidence) can be stretched to prevent the prosecution from even pointing out that such evidence was available and provided to the defense for testing. At least in the unpublished opinion ***People* v. *Wilson*** (unreported) 2012 WL 5928727 [discussed in greater detail in this IPG, section IV at pp. 80-81], the court rejected such an attempt to stretch ***Prince*** to cover comment upon the fact the defense got evidence for testing and did not produce any results. (***Wilson*** at p. *6.) Obviously, the reason for pointing out the defense had the evidence for testing but did not produce any test results is to create the inference that the defense has not been able to come up with any evidence to refute the prosecution's test results. However, the

inference to be drawn is no different than the inference that is generally drawn when it is brought out and commented upon that the defense failed to call witnesses who were available and known to the defense and who would logically be called if they had said anything to support the defense. (**See *People* v. *Mitcham*** (1991) 1 Cal.4th 1027, 1051-1052.) Thus, if commenting upon the fact that the defense has obtained evidence for testing and failed to introduce evidence of it violates due process by interfering with the defendant's ability to present and prepare a defense, then the long line of cases finding it appropriate to comment upon the failure to call logical witnesses (**see *People v. Brown*** (2003) 31 Cal.4th 518, 554; ***People* v. *Morris*** (1988) 46 Cal.3d 1, 35; ***People* v. *Szeto*** (1981) 29 Cal.3d 20, 34) must also be suspect. (Cf., ***People v. Bolden*** (2002) 29 Cal.4th 515, 549-550 [rejecting Sixth Amendment challenge to comment of prosecutor asking jury to consider the failure to call the defense expert who had been present during the police lab testing of the evidence and been hired to collaborate in the testing].)

(v) The Claim of *Griffin* Error

In ***Griffin* v. *California*** (1965) 380 U.S. 609, the high court held the prosecution may not comment on a defendant's failure to testify. (**Id**. at p. 615.) However, the holding in ***Griffin*** does not normally prevent comment on the failure of the defense to introduce material evidence or call logical witnesses, excepting the defendant. (***People v. Stevens*** (2007) 41 Cal.4th 182, 210; ***People* v. *Hughes*** (2002) 27 Cal.4th 287, 372.)

In ***People* v. *Bennett*** (2009) 45 Cal.4th 577, the California Supreme Court summarily **rejected** the argument that it was ***Griffin*** error for the prosecution to question its experts regarding whether (i) the defense could have retested forensic evidence and (ii) the defense sought to have retested forensic evidence. (**Id**. at p. 596.)

(vi) The Claim of Burden Shifting

A prosecutor may not suggest that "a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (***People* v. *Bradford*** (1997) 15 Cal.4th 1229, 1340; ***People* v. *Woods*** (2006) 146 Cal.App.4th 106, 112.) However, "[p]ointing out that contested physical evidence could be retested did not shift the burden of proof." (***People* v. *Cook*** (2006) 39 Cal.4th 566, 607.)

In ***People* v. *Bennett*** (2009) 45 Cal.4th 577, the California Supreme Court summarily **rejected** the argument that the prosecution somehow shifted the burden of proof onto the defense by questioning its experts regarding (i) whether the defense could have retested forensic evidence and (ii) whether the defense sought to have the forensic evidence retested. (**Id**. at p. 596.) The ***Bennett*** court observed that "[t]he prosecutor did not state or imply that defendant had a duty to produce evidence" and that "[t]he complained-of questions merely asked whether there was evidence for retesting." (**Ibid** [and noting, as well, that the jury was instructed that the prosecution bears the burden of proof and it is presumed the

jury followed those instructions]; **accord *People* v. *Foster*** (2010) 50 Cal.4th 1301, 1356-1357 [no shifting of burden of proof where prosecutor's questioning revealed evidence released to defense but was not tested]; ***People* v. *Cook*** (2006) 39 Cal.4th 566, 607 [permissible for prosecutor to ask government expert "whether the defense could have subjected the autopsy bullets to its own testing by an independent laboratory" and no burden shifting occurred because "the prosecutor did not ask whether the defense had a duty to do independent testing, merely whether the defense had an opportunity to do so."].)

Neither ***Bennett*** nor ***Foster*** involved a situation where the prosecutor commented upon the failure of the defense to introduce evidence of testing contradicting the prosecution test results. However, "[a] distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (***People* v. *Bradford*** (1997) 15 Cal.4th 1229, 1340.) Thus, so long as the prosecutor makes it clear that he or she is not arguing the defense has the burden of producing evidence or proving innocence, the rule against burden-shifting should not be implicated by commenting on failure of the defense to introduce evidence of test results from forensic evidence obtained by the defense. (**See *People* v. *Bradford*** (1997) 15 Cal.4th 1229, 1339-1340 [not burden shifting for prosecutor to note "the defense did not call an expert witness to testify contrary to the conclusions reached by the coroner with regard to the time frame of [the victim's] death, although defendant 'certainly is free to call his own witness to testify to those facts.'"].)

-END-

NEXT EDITION: WE KNOW. WE KNOW. *THIS* EDITION WAS SUPPOSED TO BE ABOUT PROP 64 AND ISSUES ARISING FROM ITS IMPLEMENTATION. GOD WILLING, THE NEXT ONE WILL BE.

Suggestions for future topics to be covered by the Inquisitive Prosecutor's Guide, as well as any other comments or criticisms, should be directed to Jeff Rubin at (408) 792-1065.