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6 **IN THE SUPERIOR COURT FOR THE**
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

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9 COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,

Case No. 17-05312-TR

10 Plaintiff,

11 v.

**ORDER DENYING DIXON KWON'S
MOTION TO DISMISS**

12 DIXON KWON,

13 Defendant.

14
15 **INTRODUCTION**

16 This matter comes before the Court on Dixon Kwon's ("Dixon") Motion to Dismiss.
17 On March 12, 2019, this Court ordered the Commonwealth to provide Dixon with any
18 favorable evidence derived from the Department of Public Safety's ("DPS") internal
19 investigation of police misconduct during Dixon's arrest. Specifically, the Court ordered
20 the Commonwealth to provide Dixon with the Internal Affairs Unit's reports/notes and
21 audio recordings from its investigation into police misconduct. Six days after the Court's
22 order, the Commonwealth informed the Court that DPS diligently searched for the
23 materials but did not find them because Officer Olympio Muna lost the notes/reports and
24 Officer Alexander Sakisat discarded the interview audio recordings. As a result, Dixon
25 now seeks to dismiss the charges against him.

26 On November 29, 2019, this Court conducted a hearing on Dixon's Motion to
27 Dismiss. Dixon was present with counsel Charity R. Hodson, and J. Robert Glass, Jr. was
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AG
C. Hodson

1 present representing the Commonwealth. Having carefully considered the parties' filings,
2 oral arguments, and applicable law, the Court denies Dixon's Motion to Dismiss.

3 DISCUSSION¹

4 Dixon asks the Court to dismiss this case because the Commonwealth failed to
5 produce the notes/reports and audio recordings from DPS's internal investigation, and
6 because this Court found in its previous Order that those notes/reports and recordings
7 favored Dixon.

8 When the government loses or destroys exculpatory evidence, a defendant's due
9 process rights may be implicated. *Arizona v. Youngblood*, 488 U.S. 51, 57–59 (1988). The
10 government must preserve evidence if: 1) the evidence is material and exculpatory in
11 nature; 2) the exculpatory value is apparent before the evidence is lost or destroyed; and 3)
12 the defendant is unable to obtain comparable evidence by other reasonably available
13 means. *California v. Trombetta*, 467 U.S. 479, 488–89 (1984). However, if the lost or
14 destroyed evidence is only "potentially useful evidence," failure to preserve it does not
15 violate due process "unless a criminal defendant can show bad faith on the part of the
16 police." *Youngblood*, 488 U.S. at 57–58.

17 Evidence is generally material and exculpatory if it clearly favors the defendant,
18 because it affects his guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). In
19 contrast, potentially useful evidence "could have been subjected to tests, the results of
20 which might have exonerated the defendant," such as Breathalyzer samples or seized
21 cocaine. *See Illinois v. Fisher*, 540 U.S. 544, 546 (2004); *see also Youngblood*, 488 U.S. at 57.

22 Here, DPS lost or destroyed potentially useful evidence, so Dixon must show that:
23 1) DPS acted in bad faith in failing to preserve the evidence; 2) the exculpatory value of the
24 evidence was apparent before its destruction; and 3) the nature of the evidence was such
25 that Dixon would be unable to obtain comparable evidence by other reasonably available
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28 ¹ The Court incorporates the facts recited in the "Background" section of its March 12, 2019 Order regarding
the *Brady/Giglio* material.

1 means. See *United States v. Jobson*, 102 F.3d 214, 218 (6th Cir. 1996) (citing *Youngblood*, 488
2 U.S. at 57–58; *Trombetta*, 467 U.S. at 488–89).

3 **1. Bad Faith Requirement**

4 Dixon argues that DPS acted in bad faith because Officer Muna lost the entire
5 internal investigation case file and because Officer Sakisat destroyed the only audio
6 recordings of the police officers' interviews. Failure to preserve potentially useful evidence
7 does not constitute a denial of due process unless a criminal defendant can show bad faith
8 on the part of the police. *Youngblood*, 488 U.S. at 58. A defendant may overcome the bad
9 faith requirement when the record shows an allegation of official animus toward him or of
10 the government's conscious effort to suppress exculpatory evidence. *Trombetta*, 467 U.S. at
11 488.

12 Here, it is unclear whether investigating Officer Muna lost the case file in bad faith.
13 Officer Muna testified that Internal Affairs Unit files are usually kept in a filing cabinet.
14 But he also testified that files often remain on his desk when he is working on a case and
15 when he is finished. Officer Muna appears to have acted similarly with Dixon's case:
16 Officer Muna testified that he left the case file on his desk after he finished; he then placed
17 the case file in a box when DPS relocated. After Dixon filed a motion to compel *Brady*
18 material, Officer Muna realized that he had misplaced the case file.

19 Dixon, however, does not find Officer Muna's explanation credible. Instead, Dixon
20 distinguishes this case with *CNMI v. Lemei*, Case No. 16-0062-CR (NMI Super. Ct. Jan. 10,
21 2017), emphasizing the quantity of evidence at issue here to show that Officer Muna's
22 conduct constitutes bad faith. In *Lemei*, the court determined that a DPS officer did not act
23 in bad faith when he failed to preserve a photo line-up he had shown to a witness. *Id.* at 5–
24 8. The court found it relevant that the officer produced only one photo line-up per case;
25 that the officer had already provided the defense with a copy of the photo he showed the
26 witness; that the potential exculpatory value was that the witness did not identify the
27 defendant in the photo; that the officer inadvertently failed to preserve the photo; and that
28 the record did not contain any evidence of official animus or of a conscious effort to

1 suppress evidence. *Id.* at 7. The court consequently denied the defendant's motion to
2 dismiss. *Id.* at 8.

3 Dixon argues that unlike the one photo line-up at issue in *Lemei*, the case file here
4 represents all the evidence from the internal investigation into police misconduct. As a
5 result, Dixon claims that Officer Muna's actions in losing the case file constitute bad faith.
6 But the quantity of evidence alone does not satisfy Dixon's burden of proving that Officer
7 Muna acted in bad faith. Like the record in *Lemei*, the record here does not show any
8 evidence of official animus or of a conscious effort to suppress evidence. *See Trombetta*, 467
9 U.S. at 488. Therefore, the Court must determine whether the case file's potential
10 exculpatory value was apparent at the time Officer Muna lost it. *See Youngblood*, 488 U.S.
11 at 56 n.* ("The presence or absence of bad faith by the police for purposes of the Due
12 Process Clause must necessarily turn on the police's knowledge of the exculpatory value of
13 the evidence at the time it was lost or destroyed.").

14 In contrast, Officer Sakisat's actions in discarding the audio recordings appear to
15 border on bad faith. Officer Sakisat recorded his interviews with five officers involved in
16 the investigation, and he kept the audio recording device in his person for several months
17 after conducting the interviews. When he tried to replay the recordings, Officer Sakisat
18 could not get the recorder to play the audio. Instead of attempting to retrieve the audio
19 from the recorder, Officer Sakisat tossed the recorder in the trash. In doing so, he failed to
20 transcribe the recordings even though it is DPS's standard procedure.

21 Dixon differentiates this case with *CNMI v. Barcinas*, Case No. 15-0206-CR (NMI
22 Super. Ct. Aug. 8, 2016). In *Barcinas*, a DPS officer deleted an audio recording from an
23 interview he conducted with a domestic violence victim. *Id.* at 9–10. The officer testified
24 that he did not know of any standard procedure for recording interviews with mobile
25 phones, and that there was no procedure for deleting audio recordings. *Id.* at 3–4. He also
26 stated that he did not recognize the recording's potential exculpatory value until he testified.
27 *Id.* at 10. The court found that the officer's conduct "skirt[ed] the line of bad faith," but it
28 nevertheless denied the defendant's motion to dismiss because the officer wrote the report

1 verbatim and did not act in contravention of any procedure. *Id.* at 10–12. Like the court in
2 *Lemei*, the court in *Barcinas* also found dismissal unwarranted because the record lacked any
3 allegation of official animus or of a conscious effort to suppress evidence. *Id.* at 9–10.

4 Dixon argues that unlike the officer in *Barcinas*, Officer Sakisat acted in bad faith
5 because he did not follow specific rules when he destroyed potentially useful evidence.
6 Specifically, Dixon reasons that Officer Sakisat's bad faith is apparent because he did not
7 transcribe the audio even though it is DPS's standard procedure.

8 By destroying the audio recordings, Officer Sakisat demonstrated either remarkable
9 ineptitude in performing his duties as an officer or a deliberate attempt to undermine the
10 Internal Affairs Unit's findings. Dixon wants the Court to find that Officer Sakisat acted in
11 bad faith principally because he discarded the recorder without transcribing the audio.
12 However, although Officer Sakisat did not follow DPS's standard procedure, the record
13 here, like the records in *Lemei* and *Barcinas*, is devoid of any allegation of official animus or
14 of a conscious effort to suppress evidence. As a result, the Court must look to whether the
15 audio recording's potential exculpatory value was apparent at the time Officer Sakisat
16 tossed it in the trash. *See Youngblood*, 488 U.S. at 56 n.*.

17 **2. Potential Exculpatory Value**

18 As indicated above, a defendant must also show that the government knew of the
19 evidence's exculpatory value at the time it was lost or destroyed. *Id.* at 57–58. The bad
20 faith requirement is interrelated with the requirement that the evidence possess an
21 exculpatory value apparent at the time of destruction. *Jobson*, 102 F.3d at 218 (citing
22 *Youngblood*, 488 U.S. at 56–57). Because "without knowledge of the potential usefulness of
23 the evidence, the evidence could not have been [lost or] destroyed in bad faith." *United*
24 *States v. Zaragoza-Moreira*, 780 F.3d 971, 977 (9th Cir. 2015).

25 First, the Court notes that Dixon relies on this Court's previous Order to support his
26 position that the evidence was exculpatory and that its value was apparent at the time it
27 was lost or destroyed. To clarify, the Court wrote in its March 12, 2019 Order that "[t]he
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1 Internal Affairs[] investigation findings were **generally favorable** to Dixon Kwon, as
2 Dixon [] was reinstated to regular police duty after a . . . three-day suspension."

3 But even though the Court concluded that the findings were generally favorable to
4 Dixon, the Court could not determine whether the findings were exculpatory because the
5 materiality standard expressed in *Brady* can be determined only in a post-trial setting. *See*
6 *United States v. Neal*, 27 F.3d 1035, 1050 (5th Cir. 1994) (finding that without the benefit of
7 a trial record, a court cannot determine whether a defendant's right to due process has been,
8 would, or even could be violated); *see also Commonwealth v. Campbell*, 4 NMI 11, 4 (1993)
9 ("[A] defendant must be tried and convicted before any due process violation becomes of
10 consequence."). So "[w]hether evidence is 'useful,' 'favorable,' or 'tends to negate the guilt
11 or mitigate the offense' are semantic distinctions without difference in a pretrial context."
12 *United States v. Acosta*, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005). Therefore—at the pre-
13 trial stage—*Brady* requires disclosure of "evidence that may reasonably be considered
14 favorable to a defendant's case and that would likely lead to admissible evidence." *See*
15 *United States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009); *United States v. Sudikoff*, 36 F.
16 Supp. 2d 1196, 1201 (C.D. Cal. 1999).

17 The Court accordingly ordered the Commonwealth to provide Dixon with the case
18 file and audio recordings. In doing so, the Court did not conclude that the findings were
19 material and exculpatory; instead, the Court found that the evidence may reasonably be
20 considered favorable to Dixon and that it could likely lead to admissible evidence. Dixon
21 apparently understands this distinction, having applied the *Youngblood* standard for
22 potentially useful evidence, even though he asserts the Court found the evidence to be
23 exculpatory *Brady* material. With this in mind, the Court now turns to whether Officers
24 Muna and Sakisat knew the case file and audio recordings were potentially exculpatory
25 when they lost or destroyed them.

26 Dixon contends that the notes/reports and the audio recordings are indisputably
27 exculpatory evidence. The Court agrees to the extent that Dixon could use the
28 notes/reports and the audio recordings to impeach the interviewed officers or to question

1 the Breathalyzer test's results. It is unclear at the pre-trial stage, however, whether the
2 Commonwealth will rely on the interviewed officers, the Breathalyzer test, or any
3 statements Dixon made without being properly Mirandized. Nevertheless, the standard for
4 potentially useful evidence is whether it could be subjected to tests, the results of which
5 might exonerate the defendant. *Youngblood*, 488 U.S. at 57. Officers Muna and Sakisat
6 testified that the findings were favorable to Dixon although they could not remember any
7 specifics from the investigation they conducted. The Court therefore finds that the
8 evidence's potential exculpatory value was apparent at the time it was lost or destroyed.
9 Accordingly, the Court also finds that Officers Muna and Sakisat acted in bad faith.

10 **3. Reasonably Available Means to Obtain Comparable Evidence**

11 Lastly, to warrant dismissal, lost or destroyed evidence "must be of such a nature
12 that the defendant would be unable to obtain comparable evidence by other reasonably
13 available means." *Trombetta*, 467 U.S. at 489. Dixon argues he would be unable to obtain
14 comparable evidence because everything from the investigation is lost or destroyed, and a
15 cross-examination of the officers would not recreate the Internal Affairs Unit's investigation
16 or the favorable findings. This Court disagrees.

17 The *Youngblood* test only looks to whether the defendant can obtain **comparable**
18 evidence. 488 U.S. at 57. Dixon declares but does not explain how a cross-examination
19 could not produce favorable findings. As this Court explained above, Dixon could use the
20 internal investigation's findings to impeach the officers, to question the Breathalyzer results,
21 and to suppress any statements from Dixon. Officer Muna testified that he discovered
22 inconsistent information regarding whether Officer Melvin Cadigan properly Mirandized
23 Dixon. And Officer Sakisat testified that Officer Peter Aldan declared that Dixon signed a
24 form refusing to acknowledge his constitutional rights, even though Dixon had not signed
25 the form. Nothing prevents Dixon from cross-examining Officers Muna, Sakisat, Aldan,
26 and Cadigan about these inconsistencies. Furthermore, any statements in violation of a
27 defendant's *Miranda* rights can be suppressed. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).
28 The Court therefore finds that even though Dixon may be unable to recreate the internal

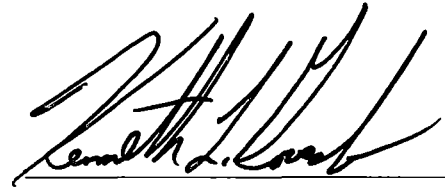
1 investigation, he can obtain comparable evidence through other reasonably available
2 means.

3 **CONCLUSION**

4 DPS acted in bad faith when Officer Muna lost the internal investigation case file
5 and Officer Sakisat discarded the audio recordings, because the finding's potential
6 exculpatory value was apparent at the time they were lost or destroyed. However, Dixon
7 can obtain comparable evidence by other reasonably available means. Accordingly, the
8 Court denies Dixon's Motion to Dismiss.

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10 Ordered this 8th day of January 2020.



11 KENNETH L. GOVENDO
12 Associate Judge
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