IN THE CIRCUIT COURT OF LONOKE COUNTY, ARKANSAS
FIRST DIVISION

STATE OF ARKANSAS **PLAINTIFF**

VS. **CASE NO. 43CR-24-551**

AARON SPENCER **DEFENDANT**

BRIEF IN SUPPORT OF MOTION FOR ADVERSE INFERENCE JURY INSTRUCTIONAND HEARING ON SPOILATION/DESTRUCTION OF EVIDENCE

The Defendant Aaron Spencer, by and through his attorneys, requests an adverse-inference jury instruction to remedy spoliation and destruction of evidence resulting from the Lonoke County Sheriff's Office's loss of the memory card containing the dashboard-camera recordings from Michael Fosler's vehicle. Spencer also seeks an evidentiary hearing to show this loss violated his constitutional due process rights.

RELEVANT FACTS

Aaron Spencer intends to argue at trial that he killed 67-year-old Michael Fosler while defending his then-14-year-old daughter, whom Fosler had picked up from her home in the middle of the night. Mr. Spencer's daughter was the key witness against Fosler in a pending case involving forty-three felony counts— all stemming from Fosler's sexual exploitation of her— including internet stalking, sexual assault, and child pornography. Those offenses carried a potential life sentence and would be capital crimes if charged today.

And yet Fosler was free on bail on the night of October 8, 2024, when Mr. Spencer discovered his daughter's bed was empty. The Spencers called the police, and then he went to find his daughter. As Mr. Spencer drove around looking for his child, he crossed paths with Fosler's truck and saw her in the passenger seat. With Mr. Spencer behind him, Fosler fled

with Mr. Spencer's daughter. Mr. Spencer feared not only the repeated assaults on his child but also that Fosler would eliminate the only witness threatening to secure his life sentence.

To prevent further harm to his child, Mr. Spencer forced Fosler's truck to a stop. Fosler exited the vehicle and continued to pose an imminent threat to Mr. Spencer and his daughter. Mr. Spencer killed Fosler to protect himself and his child.

Mr. Spencer later learned that Fosler's vehicle contained a dash camera. The device would have captured the events of that evening, including the routes Fosler traveled before and after taking the minor into his custody, as well as his encounter with Mr. Spencer during and after the pursuit. That recording constituted critical evidence for the defense.

In July of 2025, defense was informed by Chief Deputy Prosecutor John Huggins that the memory card containing the footage had been "lost" after being taken into evidence by the Lonoke County Sheriff's Office and cannot be produced. (Ex. A). The Lonoke County Sheriff's Office did not secure the camera in a protective storage container, log the camera and its memory card as separate evidence items, or follow other standard procedures for preservation of physical evidence. Detective McCain allegedly removed the memory card from the camera, viewed the footage, and then sent both the camera and the card to the Attorney General's Office. *Id.* Only the camera arrived. The memory card "has since come up missing." *Id.* Defense counsel was further told that the Sheriff's Office is "pretty sure [the memory card] got knocked out of the camera in transit to the AG's office . . . no one knows for certain tho." (Ex. A).

Mr. Spencer therefore seeks an adverse-inference instruction and an evidentiary hearing under *California v. Trombetta* and its progeny.

ARGUMENT

I. Adverse-inference Jury Instruction Is Necessary.

Under Arkansas law, spoliation is defined as the intentional destruction or loss of evidence and when it is established, the fact finder may draw an inference that the evidence destroyed was unfavorable to the party responsible for its spoliation. *See Goff v. Harold Ives Trucking Co.*, 342 Ark. 143, 146 (Ark. 2000). The Arkansas Supreme Court approved a remedial jury instruction for spoliation in *Bunn Builders, Inc. v. Womack*, 2011 Ark. 231, 11–12 (Ark. 2011) ("AMI 106 correctly and adequately sets forth the law with respect to spoliation of evidence and the adverse inference to be drawn from it."). This instruction reads as follows:

> **AMI 106**
> **Effect of Intentional Destruction or Suppression of Evidence**
> If you find that a party intentionally *[destroyed] [or] [lost] [or] [suppressed]* (description of item) with knowledge that *[it][its contents]* may be material to a *[pending][potential]* claim, you may draw the inference that [the *(contents of the) (document) (writing) (photograph)* ((description of item))] *[an examination of it]* would have been unfavorable to that party's *[claim] [defense]*. When I use the term "material" I mean evidence that could be a substantial factor in evaluating the merit of a claim or defense in this case.

Arkansas courts have deferred to this instruction in evaluating the applicability of a spoliation instruction in criminal cases. *See, e.g.*, *Autrey v. State*, 90 Ark. App. 131, 204 S.W.3d 84 (Ark. App. 2005). Federal courts have held likewise. *See, e.g.*, *United States v. Laurent*, 607 F.3d 895, 902 (1st Cir. 2010) (discussing the applicability of a spoliation instruction in a criminal drug distribution case); *United States v. Clark*, No. 8:12CR342, 2014 U.S. Dist. LEXIS 56411, at *26-27 (D. Neb. Apr. 22, 2014) (indicating a criminal defendant would be entitled to spoliation

instruction); *United States v. Suarez*, No. 09-932, 2010 U.S. Dist. LEXIS 112097, at *22 (D.N.J. Oct. 21, 2010) (adopting civil standard on spoliation instruction in a criminal case). The Ninth Circuit has developed a Model Criminal Jury Instruction 4.19 to specifically address the government intentionally destroying or preserving the evidence. ("If you find that the government intentionally [destroyed] [failed to preserve] [*insert description of evidence*] that the government knew or should have known would be evidence in this case, you may infer, but are not required to infer, that this evidence was unfavorable to the government.").

Here, an adverse-inference jury instruction is necessary because the government lost a memory card containing video footage of the shooting and the events immediately preceding it despite knowing that footage was material to Mr. Spencer's defense. Discovery shows that the Lonoke County Sheriff's Office failed to follow its own procedures for documenting and preserving evidence. The dashboard camera was not placed in a protective container, such as an evidence bag, that would have prevented the memory card from being "knocked out" during transport. The memory card does not appear to have been logged into evidence at any point, even though an LCSO deputy has stated he removed it from the camera and viewed the footage.[1] Because of these failures by the Lonoke County Sheriff's Office, material evidence no longer exists. The State therefore breached its duty to maintain evidence necessary to ensure basic fairness in the litigation process. *Bunn Builders, Inc.*, 2011 Ark. 231.

The State's suggestion that the device contained no material footage does not withstand scrutiny. To begin, Det. McCain's assertion that all video files on the card were recorded "after the incident and just showed blue lights in the background" conflicts with the camera's

[1] Although LCSO did not inventory the contents of Fosler's truck until July 8, 2025—more than eight months after his death—its investigators removed the dash camera far earlier, shortly after the October 2024 shooting.

capabilities. Fosler's dash camera was equipped with two lenses—a wide-angle front camera and a rotatable interior cabin camera—capable of recording both the road and the vehicle's interior and behind the truck. In addition to blue lights in the background of the exterior recording, there also would have been footage from the opposite direction, including the interior. The interior footage would have captured the danger Spencer's child faced that night and the trauma she experienced.

Similarly, Det. McCain's belief that "the dashcam records on a continuous loop so it only shows what was on there until it was unplugged" reflects a misunderstanding of how dash cameras function. Turning off the vehicle ordinarily stops the recording; it does not overwrite existing files. There also should have been no need for any files to be overwritten. The camera is marked "HD 1080P," and a memory card of the type commonly used in such devices typically stores approximately sixteen to twenty hours of footage at that resolution. Overwriting the relevant video would have required the truck to idle for several hours with the camera actively recording. In addition, most dash cameras contain a gravity sensor that detects sudden impacts or

collisions, such as those that occurred during the events of October 8, 2024. When triggered, the sensor locks the file being recorded, preventing it from being deleted by loop recording.

For Det. McCain's statements—as relayed by Mr. Huggins in his email (Ex. A)—to be true, the interior camera and the gravity sensor both would have needed to fail, the memory card would have needed to be unusually small, and the truck would have needed to idle for hours until the camera recorded enough footage to overwrite all relevant files. Such a convergence of circumstances is unlikely. Finally, there was no need to remove the memory card at all because the camera had a built-in screen that allowed the videos to be viewed directly on the device.[2]

In sum, the Lonoke County Sheriff's Office's failure to secure, document, or preserve the memory card and needlessly removing it from the camera resulted in the loss of material evidence. This reckless mishandling amounts to losing or destroying this evidence intentionally.

The lost video footage would have shown how Fosler persuaded the child to leave the safety of her home, Fosler's behavior and manipulation, deception and/or threats, and the moments leading to and immediately preceding his death. This information is manifestly relevant to determining whether Spencer's defense was justified. Although some portions of the footage may be partially reconstructed through witness testimony, medical records, and crime scene

[2] Removing the memory card without adequate safeguards may itself constitute tampering with physical evidence, a felony. Under Arkansas law, a person commits that offense if he or she "alters, destroys, suppresses, removes, or conceals any record, document, or thing with the purpose of impairing its verity, legibility, or availability in any official proceeding or investigation." Ark. Code. Ann. § 5-53-111.

analysis, these sources are not a complete and fair substitute. The video would have provided a level of objective information that cannot be fully replicated through subjective recollection or written documentation.

Simply put, Spencer has been obstructed from fully presenting his defense. To truly right the wrong the State has inflicted, Spencer is entitled to a curative instruction read to the jury at the conclusion of evidence:

> If you find that the State intentionally lost footage from Fosler's dashcam with the knowledge that it may be material in a potential case against Spencer, you may draw the inference that the dashcam footage would have been favorable to Spencer and unfavorable to the State. When I use the term "material" I mean evidence that could be a substantial factor in evaluating the merit of a claim or defense in this case.

This instruction preserves the State's right to produce other relevant evidence and does not preclude Spencer or his daughter from testifying as to their own actions or actions they observed, with the State investigative witnesses being subject to cross-examination regarding the loss of the dashcam footage.

II. Destruction of evidence warrants a hearing under *Brady v. Maryland* and *California v. Trombetta*.

For the reasons that follow, Spencer asks for an evidentiary hearing to establish grounds for dismissal under *California v. Trombetta* and its progeny. Specifically, Spencer argues that the charges against him should be dismissed as a result of the State's destruction of evidence in violation of the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution, Article 2 Section 8 of the Arkansas Constitution, and the principles set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) and *California v. Trombetta*, 467 U.S. 479 (1984), further developed by *Arizona v. Youngblood*, 488 U.S. 51 (1998).

"The interest of the Government in any criminal prosecution 'is not that it shall win a case but that justice shall be done.'" *United States v. Kelly,* 2008 U.S. Dist. Lexis 115723 (D.

Minn. Oct 28, 2008) (citing *Dye v. Snyder*, 208 F.3d 662, 665 (8th Cir. 2000)). In addition, "criminal prosecutions must comport with prevailing notions of fundamental fairness," requiring "that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984). As such, the U.S. Supreme Court developed "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). Accordingly, the Court requires that the prosecution disclose all evidence favorable to the accused that is material either to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Trombetta*, 467 U.S. at 485. *Brady* defines exculpatory evidence as "evidence favorable to the accused" and "material either to guilt or punishment." *Id.*

The Court has held that "the 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 State. *Id.* Further, "the duty to disclose such evidence is applicable even though there has been no request by the accused," *Strickler v. Green*, 527 U.S. 263, 280 (1999) (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)), and encompasses evidence known only to the police. *Id.* at 280–81 (citing *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)). "[T]o comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" *Id.* at 281 (citing *Kyles*, 514 U.S. at 437). Ultimately, "this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." *Trombetta*, 467 U.S. at 485.

When, as here, the State destroys or loses material exculpatory evidence—"evidence that might be expected to play a significant role in the suspect's defense"—it violates the Due Process Clause of the Fifth and Fourteenth Amendments and Article 2 Section 8 of the Arkansas Constitution. *See, e.g.*, *id.* at 489. In *Trombetta,* the Court addressed the prosecution's duty to preserve evidence on behalf of criminal defendants. "Under the two-prong *Trombetta* test, the government violates a defendant's right to due process when: (1) it destroys evidence whose exculpatory significance is 'apparent before' destruction; and (2) the defendant remains unable to 'obtain comparable evidence by other reasonably available means.'" *United States v. Bohl*, 25 F.3d 904, 909–10 (10th Cir. 1994) (citing *Trombetta,* 467 U.S. at 489). The Supreme Court and circuit courts have held that no showing of bad faith is necessary in this instance. *See, e.g.*, *United States v. Clark,* No.: 8: 12CR3422014, U.S. Dist. LEXIS 56411 (D. Neb. Apr. 22, 2014).

On the other hand, the Court in *Arizona v. Youngblood* developed the principles of *Trombetta* to clarify that when the evidence is only "potentially useful"—meaning, the exculpatory value of the evidence is unknown—the defendant required to show that the government acted in bad faith in destroying the evidence. *Arizona v. Youngblood*, 488 U.S. 51, 57–58 (1998). The Court in *Illinois v. Fisher* reiterated the holding in *Youngblood* that the necessity of showing bad faith depends on "the distinction between 'material exculpatory' evidence and 'potentially useful' evidence." 504 U.S. 544, 549 (2004). The Eighth Circuit followed suit:

> A due process violation arises from destruction of evidence when the evidence 'possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' A higher standard of proof applies, however, when the evidence is only potentially useful to the defendant. '[U]nless 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.'

United States v. Tyerman, 701 F.3d552 (8th Cir. 2012) (citing *Trombetta* and *Youngblood*).

"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." *Youngblood,* 488 U.S. at 57, n.* (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). For example, in *Ohio v. Durnwald*, 163 Ohio App. 3d 361, 371, 837 N.E.2d 1234, 1242 (Ohio App. 2005), the court found bad faith when an officer watched but then failed to preserve the video of traffic stop and DUI arrest by "accidentally" taping over it. The court reasoned, "[t]he tape may have supported appellant's version of his actions during the stop, and is, therefore, potentially useful." 837 N.E.2d at 1241. Accordingly, to show defendant's "due process rights were violated, he must demonstrate that the trooper's actions amounted to 'bad faith.'" *Id.* Given the obvious evidentiary value of the recording, the court found assertions that overwriting the tape was a mere accident not credible:

> Since it is likely that a defendant may ask for the video tape, and it has obvious evidentiary value and importance to substantiate a trooper's version of the events leading up to an arrest, this court finds it incredible that such 'accidental' erasures continue to occur. Once made, the video tape must be preserved, just as any other evidence regarding an alleged crime or arrest would be preserved.

Id. The Court found that such "cavalier attitude toward the preservation of DUI video tape evidence rises to the level of bad faith" where erasure was not product of machine malfunction but instead due to "complete and utter failure to safeguard evidence relevant to a crime and arrest." *Id.*

Here, too, the destruction of evidence appears to stem from a complete failure by the Lonoke County Sheriff's Office to safeguard material evidence related to a death investigation

and accompanying arrest. The video footage of the moments leading up to the shooting had obvious evidentiary value, and it was highly likely that a defendant charged with second-degree murder would ask for the recording of the encounter to substantiate his defense. And yet the Lonoke County Sheriff's Office—after reviewing the video and determining its exculpatory value—failed to take even the minimal steps necessary to preserve it, such as securing the camera and its memory card in an evidence bag. The Office then lost track of the memory card entirely. Such cavalier attitude toward the preservation of video evidence in a homicide case supports a finding of bad faith.

For these reasons, Spencer requests an evidentiary hearing to explore the loss or destruction of the memory card by the Lonoke County Sheriff's Office and its failure to preserve this evidence. Spencer expects to show that this reckless mishandling warrants relief, including potential dismissal of charges, under *California v. Trombetta* and its progeny.

CONCLUSION

Mr. Spencer respectfully asks that this Court grant his motion for an adverse-inference jury instruction on spoliation. Mr. Spencer also asks that the Court hold a hearing to establish the memory card's exculpatory value and to show that the loss of this evidence was due to utter failure of Lonoke County Sheriff's Office to follow its own evidence-preservation procedures. This failure warrants relief, including potential dismissal of charges against Mr. Spencer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was delivered on November 24, 2025, to all attorneys of record via e-Filing.

/s/ Erin Cassinelli

EXHIBIT A

Gmail Erin Cassinelli <erin@lasscass.com>

Spencer - a few warrant-related questions

jhuggins@lonokepa.com <jhuggins@lonokepa.com> Thu, Jul 3, 2025 at 1:39 PM
To: Erin Cassinelli <erin@lasscass.com>
Cc: Michael Kaiser <michael@lasscass.com>, Chrissy <chendrickson@lonokepa.com>, Jay Shue <jshue@lonokepa.com>

Erin,

I wanted to let you know about a dashcam that was apparently in Fosler's truck that was taken into evidence by LCSO after the incident. Det. McCain took the micro SD card out and reviewed the video files on it but all the files showed to be after the incident and just showed blue lights in the background and no other exculpatory/inculpatory evidence. He believes the dashcam records on a continuous loop so it only shows what was on there until it was unplugged. Det. McCain sent the dashcam unit along with the SD card to the AG's office for Amber Kalmer to do a forensic exam of it. It has since come up missing. They have been combing their desks in CID for months trying to find it without any luck. At this point, I'm not sure it will be found but I will let you know if/when that happens.

John

From: rmccain@lonokeso.com <rmccain@lonokeso.com>
Sent: Thursday, July 3, 2025 1:24 PM
To: jhuggins@lonokepa.com
Subject: RE: Spencer - a few warrant-related questions

No… pretty sure it got knocked out of the camera in transit to the AG office… no one knows for certain tho.

Det. R. McCain

Lonoke County Sheriff's Office

Office (501) 676-3001

Cell (501)743-9709

From: jhuggins@lonokepa.com <jhuggins@lonokepa.com>
Sent: Thursday, July 3, 2025 1:23 PM
To: rmccain@lonokeso.com
Subject: RE: Spencer - a few warrant-related questions

Oh yeah that's right. Sorry been a bit. Any luck finding the sd card?

From: rmccain@lonokeso.com <rmccain@lonokeso.com>
Sent: Thursday, July 3, 2025 11:17 AM
To: jhuggins@lonokepa.com
Subject: RE: Spencer - a few warrant-related questions

In regards to the dashcam.. I talked to Amber and she confirmed that the camera had no internal storage.

Det. R. McCain

Lonoke County Sheriff's Office

Office (501) 676-3001

Cell (501)743-9709