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STATE OF MICHIGAN

COURT OF APPEALS

In re PCG, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellant,

v

PCG,

Respondent-Appellee.

UNPUBLISHED
November 12, 2026
10:23 AM

No. 375738
Wayne Circuit Court
Family Division
LC No. 2024-001799-DL

Before: GADOLA, C.J., and O'BRIEN and MARIANI, JJ.

PER CURIAM.

The prosecution appeals by right the trial court's order granting respondent's motion to dismiss with prejudice his criminal charge of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) (sexual penetration of person under 13 years of age). We affirm.

I. BACKGROUND

This case arose from then-12-year-old GG's allegations that her fellow schoolmate, then-12-year-old respondent, sexually assaulted her in her home in August 2023. In early January 2024, GG disclosed the alleged assault to school employees. School administrators reported the disclosure to their school resource officer, who then immediately began investigating the matter. The officer's investigation included interviewing GG and her mother about the alleged assault immediately after the disclosure, conducting phone calls and follow-up interviews with GG's and respondent's respective parents, and scheduling (and thereafter reviewing) GG's forensic interview at a children's advocacy center. In the interim, GG obtained a personal protection order (PPO) against respondent. On February 27, 2024, the officer submitted the matter to the prosecutor's office for authorization of a CSC-I charge against respondent.

About a month later, a second school resource officer became involved in the investigation due to an allegation that respondent violated the PPO by messaging GG during his 13th birthday

party. Over the ensuing days, the officer contacted the parents of four children who had attended respondent's party and subsequently conducted in-person interviews of those children about the alleged PPO violation and the underlying CSC allegations. The officer used his body-worn camera (BWC) to record all of these phone and in-person contacts.

On May 21, 2024, the prosecutor's office informed the officers that it would not bring any charges against respondent at that time and that further investigation into the specifics of GG's allegations and her disclosures to others was required before a charge would be authorized. Pursuant to the prosecution's request for such further investigation, the second officer conducted several additional in-person and phone interviews between May 31 and June 20, 2024, regarding the alleged CSC. Specifically, the officer interviewed several people to whom GG may have previously disclosed the assault, including her older brother, her brother's girlfriend, the school social worker, and the school counselor. Again, the officer used his BWC to record these interviews. Following the interviews, the officers resubmitted the case for authorization, and the prosecution formally brought a CSC-I charge against respondent on September 5, 2024.

Early on in the discovery process, respondent submitted an evidentiary request for, among other things, copies of all audio and video recordings of phone and in-person interviews the officers conducted during their investigation, many of which had been referenced and briefly summarized in the police report. Over the ensuing months, respondent was only provided with four recordings:[1] (1) a January 10, 2024 phone conversation between the first officer and respondent's father regarding GG's allegations and the possibility of an interview with respondent; (2) a January 10, 2024 phone conversation between the first officer and GG's parents scheduling an interview with GG; (3) a January 11, 2024 phone conversation between the first officer and respondent's father attempting to schedule an in-person interview with respondent, which respondent's father declined; and (4) a March 20, 2024 phone conversation between the second officer and the mother of one of respondent's friends scheduling an in-person interview, which ultimately occurred two days later. After much back and forth between respondent and the prosecution, respondent moved to compel production of the missing recordings. This prompted the prosecution to follow up with the second officer, who was able to provide some additional documents but was unable to provide any of the missing recordings. According to the officer, the other recordings no longer existed because neither he nor the other officer notified the records bureau to retain them, and so they were automatically purged from the system after 90 days.

In April 2025, respondent moved to dismiss the charge against him. Respondent argued that the destruction of the missing recordings—namely, the interviews of respondent's four friends ("first set of recordings") and the interviews of GG's brother and his girlfriend, the school social worker, and the school counselor ("second set of recordings")—before completion of the legal proceedings against him violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215

[1] After obtaining a court order, respondent was also provided with a copy of GG's January 22, 2024 forensic interview. The substance of that interview was briefly summarized by the first officer in the police report.

(1963), as well as the police department's internal policies.[2] According to respondent, the destroyed recordings were necessary to prepare a complete defense because he denied committing the alleged assault, GG's allegations were the only evidence against him, and the recordings, as evidenced by their descriptions in the police report, contained material exculpatory impeachment evidence regarding GG's allegations.[3] Respondent further argued that even if the recordings were deemed only potentially exculpatory, dismissal was still warranted under *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988), because the officers' decision to selectively retain some recordings and not others from the same time period, contrary to their own department's policies, demonstrated bad faith.

In response to respondent's motion, the prosecution acknowledged that the missing recordings had been destroyed, but asserted that their destruction was simply due to a routine purging procedure by the police department. The prosecution argued that destruction of evidence pursuant to a routine purging procedure was insufficient to show bad faith, and that respondent had also not demonstrated that the destroyed recordings were material exculpatory evidence. Throughout its response, the prosecution primarily focused on the substance of the first set of recordings and the police department's retention policies for BWC recordings.

The trial court then held a hearing on the matter, at which the parties argued consistently with their briefs; respondent also stressed that the prosecution, in its response, had only discussed the first set of recordings but not the second, and had also failed to address the officers' selective retention of some recordings but not others. At the end of the hearing, the trial court granted

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[2] Respondent also argued, and the prosecution conceded, that the destruction of the recordings while the criminal investigation and legal proceedings were still ongoing amounted to a violation of MCL 780.316(2) of the Law Enforcement Body-Worn Camera Privacy Act, MCL 780.311 *et seq*. The police department's internal policies, which are discussed more thoroughly below, largely mirror the language contained in that act.

[3] In support, respondent identified in the police report various apparent inconsistencies in GG's disclosures over the course of the criminal investigation. For instance, according to the police report, GG told the school social worker that nobody was home during the alleged assault, but a few days prior to that disclosure, she told her brother's girlfriend that her mother was in the home with her when the alleged assault occurred. GG also told the social worker that the "exact date" of the assault was August 15, 2023, but less than two weeks later, she told the forensic interviewer she "was unsure of the date but believed it occurred in August," and then roughly three months after that, she provided the officers with photos "from the day of the assault" that she "did not know she had" until just then, which were dated August 17, 2023. Additionally, GG told the social worker that she had "spoke[n] with two friends and her older brother" about the alleged assault, but later told the forensic interviewer that she had "told her brother . . . and his girlfriend about [the alleged assault] with [respondent's] older sister"; GG's brother and his girlfriend, meanwhile, recounted GG telling them about the alleged assault, but neither mentioned respondent's older sister. GG also stated during her forensic interview that prior to the alleged assault, respondent had talked about sexually assaulting his girlfriend and another girl, and that during the assault, respondent had choked her "with both hands" and left "fingerprint abrasions that were visible days after the incident," but there was no mention of any of this in GG's other disclosures.

respondent's motion to dismiss his CSC-I charge with prejudice, and thereafter memorialized that ruling in a written order. The court concluded that, based on the record and arguments before it, (1) the destroyed recordings constituted "exculpatory evidence" for the reasons identified by respondent, and (2) as also argued by respondent, "[t]he apparent selective nature of [the] destruction" of the recordings "does not reflect human error or mere negligence, but bad faith." As to bad faith, the court explained that "it was clear" the recordings were destroyed while the criminal investigation "was ongoing," and destruction of the recordings despite that fact "was not consistent with the retention required" by the police department's policies. And had the destruction simply been a matter of a mistaken, routine application of those policies to the recordings, all of the recordings "within [the same] time period would have been destroyed"; instead, however, the officers retained a select few of the recordings but not the rest. The court concluded that, because the destroyed recordings were either materially exculpatory in nature or destroyed in bad faith, their destruction violated respondent's due-process rights and warranted dismissal of his CSC-I charge.

The prosecution now appeals, arguing that the trial court abused its discretion by granting respondent's motion to dismiss his CSC-I charge with prejudice.

II. STANDARDS OF REVIEW

We review "a trial court's decision on a motion to dismiss charges against a [respondent] for an abuse of discretion." *People v Brown*, 330 Mich App 223, 229; 946 NW2d 852 (2019) (quotation marks and citation omitted). Such a ruling will not be disturbed unless the court's decision falls outside the range of principled outcomes, which necessarily occurs when the court makes an error of law. *Id*. at 229, 234. We review the trial court's underlying factual findings for clear error, which exists when, "after a review of the entire record, [we are] left with a definite and firm conviction that a mistake has been made." *Id*. at 234 (quotation marks and citations omitted). We review "due process claims, such as allegations of a *Brady* violation, de novo." *People v Dimambro*, 318 Mich App 204, 212; 897 NW2d 233 (2016) (quotation marks and citation omitted).

III. DISCUSSION

On appeal, the parties do not dispute that the challenged recordings were destroyed, but only whether the destroyed recordings were material exculpatory evidence or, if only potentially exculpatory, whether the police exhibited bad faith in their handling of that evidence. The prosecution argues, as it did below, that nothing in the record demonstrates that the recordings were even potentially exculpatory or that the police were acting in bad faith when the recordings were destroyed. In response, respondent argues, as he did below, that the police report's summaries of the destroyed recordings demonstrated their material, exculpatory nature and that the officers' selective retention of recordings contrary to their department's policies demonstrated bad faith. Like the trial court, we agree with respondent.

Under the Due Process Clause of the Fourteenth Amendment, US Const, Am XIV, criminal defendants must be afforded "a meaningful opportunity to present a complete defense." *California v Trombetta*, 467 US 479, 485; 104 S Ct 2528; 81 L Ed 2d 413 (1984). To protect this right, there "has developed what might loosely be called the area of constitutionally guaranteed access to

evidence." *Id*. (quotation marks and citation omitted). This constitutional protection extends to "evidence that might be expected to play a significant role in the suspect's defense." *Id*. at 488. Accordingly, "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 prosecution." *Brady*, 373 US at 87. To demonstrate such a due-process violation, a defendant must show that "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014). But there are also "due process constraints on the Government's failure to preserve potentially exculpatory evidence." *Trombetta*, 467 US at 487; see also *Youngblood*, 488 US at 57-58. In this context, to establish a due-process violation, a defendant must demonstrate that (1) "the missing evidence was exculpatory," or (2) "[w]hen the evidence is only potentially useful," that "law enforcement personnel acted in bad faith." *People v Dickinson*, 321 Mich App 1, 16; 909 NW2d 24 (2017) (quotation marks and citations omitted).

A. MATERIAL EXCULPATORY EVIDENCE

In arguing against dismissal of respondent's charge, the prosecution—both below and on appeal—maintains that respondent cannot demonstrate that the destroyed recordings were materially exculpatory, or even potentially so, because the recordings contained only minor impeachment evidence. We disagree.

To start, the record before us shows that there is no eyewitness testimony or physical evidence regarding respondent's alleged sexual assault of GG; only GG's allegations link respondent to the alleged offense. In other words, the prosecution's case hinges entirely on GG's statements and her credibility and reliability as a witness, and to prevail at trial, respondent would need to convince the factfinder that GG was not telling the truth. Evidence impeaching GG and her allegations is thus both central to respondent's defense in this case and well within the ambit of his constitutional challenge. See, e.g., *Chenault*, 495 Mich at 150 ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule of *Brady*.") (cleaned up); *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998) (recognizing that "[i]mpeachment evidence . . . falls within the *Brady* rule" and that, "[i]n general, impeachment evidence has been found to be material [under *Brady*] where the witness at issue supplied the only evidence linking the defendant to the crime"), overruled in part on other grounds by *Chenault*, 495 Mich at 151-152; see also *People v Christian*, 510 Mich 52, 56; 987 NW2d 29 (2022) (concluding that the prosecution violated *Brady* by "suppress[ing] the transcript of an interview with its most important witness" that "undermined [that] witness's testimony—testimony which [wa]s the thread that tie[d] together the rest of the evidence").

The police report reflects—and the prosecution does not particularly dispute—that at least some of the destroyed recordings contained impeachment evidence favorable to respondent. According to the prosecution, however, any impeachment evidence in the recordings was immaterial because it, "at best," could only be used "to impeach minor inconsistencies in [GG's] statements." Of course, the full extent of the impeachment value of the recordings cannot be known for certain, given their destruction. But based on what is known of their content from the

police report, the second set of recordings[4] exclusively pertained to GG's allegations of sexual assault and contained substantial impeachment evidence that cast doubt on the veracity and reliability of those allegations. As previously noted, and as respondent has detailed both below and on appeal, the report reflects a variety of inconsistencies in GG's allegations over the course of her disclosures, including those related to when the assault occurred, who was present in the home at the time, to whom she disclosed the assault, and what respondent said and did before and during the assault. Evidence of just one of these inconsistencies, alone, might not be enough to "result[] ultimately in [respondent's] acquittal," but that is not the relevant inquiry. *Chenault*, 495 Mich at 150 (cleaned up). Instead, the question is whether, in the absence of the destroyed evidence, respondent would "receive[] a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*. at 151 (quotation marks and citation omitted). And in answering that question, the destroyed evidence must be considered "collectively, rather than piecemeal." *Id*.

Here, as discussed, the destroyed evidence comprised multiple recorded interviews with numerous individuals to whom GG had reportedly disclosed the alleged assault, and even just the limited record we have about the recordings' content betrays a notable degree of inconsistency in GG's allegations. Considering the sum total of this destroyed evidence and its apparent impeachment value, as well as the centrality of GG's credibility and reliability to this case, we see a reasonable probability that this impeachment evidence would make a difference in the determination of respondent's guilt or innocence at trial, such that its absence would undermine confidence in the verdict. See *id*. at 150 (explaining that, "[t]o establish materiality, a defendant must show that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"—with "[a] 'reasonable probability' [meaning] a probability sufficient to undermine confidence in the outcome") (quotation marks and citation omitted); *id*. at 150-151 (describing the relevant inquiry as "whether, in the absence of the suppressed evidence, the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence") (quotation marks and citation omitted).

Relatedly, the prosecution argues that respondent does not need the recordings to prepare a complete defense because "[a]ll the interviews were reduced to writing and turned over to respondent," and respondent could simply use those writings, along with testimony from the interview subjects, for impeachment purposes at trial. But the police report—the only "writing" of the interviews' content that the defense was provided—does not purport to transcribe or

[4] While it seems, from the record before us, that the first set of recordings may have included content that could potentially be used to generally impeach GG's credibility, the degree of its materiality for *Brady* purposes is not readily apparent. In any event, we need not analyze that point further given our conclusion that the second set of recordings amounted to material exculpatory evidence in themselves. We note also that, both below and on appeal, respondent has maintained that there are certain interviews which, based on the present record, appear to have been conducted and should have been recorded, but "for which the police were silent as to whether they were [actually] recorded[.]" On appeal, however, respondent has expressly declined to rely on that category of interviews to support affirmance of the trial court's ruling, given that his request for dismissal below focused "only on specific BWC recordings known to exist at one point but [were] destroyed." Accordingly, we too will not address that topic further.

otherwise capture the full content of the interviews, but instead contains only the interviewing officer's own summary of them for purposes of the report.[5] Cf. *Christian*, 510 Mich at 62-63 (explaining how "a police-created 'summary' of [an] interview" with a key witness proved to be an insufficient substitute for the suppressed transcript of that interview). And although respondent may be able to use the police report's summaries to highlight some of the inconsistencies in GG's statements through witness testimony at trial, that "does not make *more* evidence" of those inconsistencies "immaterial." *Id*. at 85-86. "To the contrary, it makes the possibility that the result of the trial would [be] different *more* likely" with the benefit of that "additional impeachment evidence." *Id*. at 86. Indeed, the materiality of such additional evidence is all the more apparent in a case such as this, which rests entirely on the reliability and credibility of a single witness whose statements are the only evidence tying the accused to the alleged offense—and where, correspondingly, the ability to show the full extent of how that witness's allegations have changed over the course of the criminal investigation is fundamental to the accused's defense. See *id*. at 56; *Chenault*, 495 Mich at 150; *Lester*, 232 Mich App at 282.

In sum, the record reflects that the second set of recordings contained substantial impeachment evidence that went to the heart of the prosecution's case and respondent's ability to mount a complete defense and receive a fair trial. See *Trombetta*, 467 US at 485; *Chenault*, 495 Mich at 150-151. Accordingly, we see no error in the trial court's determination that respondent demonstrated the recordings were material exculpatory evidence, such that their destruction amounted to a violation of due process.

B. BAD FAITH IN DESTRUCTION OF RECORDINGS

We also see no error in the trial court's conclusion that, even if the destroyed recordings can only be said to have been " 'potentially useful,' " respondent has demonstrated a due-process violation by showing the police acted in bad faith in destroying them. *Dickinson*, 321 Mich App at 16, quoting *Youngblood*, 488 US at 58. According to the prosecution, respondent did not, and cannot, demonstrate bad faith because the recordings "were not marked for retention" and were thus subsequently destroyed simply "as part of the routine police retention process"—a circumstance which, "without more, is mere negligence." In making this argument, the

[5] For instance, the police report's summary of the officer's interview with the school social worker goes into detail regarding what GG disclosed about the alleged assault. Such detail is wholly absent, however, from the summary of the interview with the school counselor, even though the counselor was present with the social worker for at least part of that same disclosure and the report states (in the social-worker summary) that when the counselor arrived, GG "provided [the counselor] additional information" regarding the alleged assault. The reason for this apparent disparity in detail between the respective summaries, including the extent to which it might correspond to the content of the actual interviews themselves, is unclear from the report. In a related vein, the report also notes that respondent's older sister was never interviewed regarding GG's allegations, even though GG said in her forensic interview that she had told the older sister about the alleged assault and the "older sister [had] talked with [respondent] about it and was upset with him." According to respondent, however, subsequent discovery showed that the older sister had been interviewed and had denied what GG had said about her involvement.

prosecution, as it did below, primarily relies on the fact that all the interviews occurred months before the prosecutor's office authorized the CSC-I charge against respondent; thus, there were no criminal charges—and, correspondingly, no reason to mark the recordings for retention—at the time of those interviews. But, consistent with the trial court's findings below, the police department's retention policy provides that "[a]ll recordings that are subject of ongoing criminal . . . *investigations* or legal proceedings shall be retained until the completion of the *investigation* or proceeding . . . ." (Emphasis added.) Accordingly, the fact that the prosecutor's office had not yet authorized a criminal charge against respondent by the time that the recordings were created or destroyed did not, in itself, relieve the officers of their obligation to retain the recordings. And the record before us demonstrates that (1) the officers were well aware of—and actively participated in—an ongoing criminal investigation into the alleged CSC that required them to retain any recordings affiliated with it, and (2) the destroyed recordings were all part of this ongoing CSC investigation.

Per the police report, the first officer immediately began investigating a possible CSC the day that GG disclosed the alleged assault to school employees. This included interviewing GG immediately after her initial disclosures and, over the ensuing month, conducting follow-up calls and interviews with GG's and respondent's respective parents, scheduling GG's forensic interview, and reviewing and summarizing that forensic interview. While the first officer's request for authorization of a charge was still pending, the second officer conducted recorded, in-person interviews of respondent's four friends. By the prosecution's own admission, the officer interviewed the four friends to investigate both a potential violation of the PPO (whose issuance arose out of the alleged CSC) and the underlying facts of "the *pending* CSC matter." (Emphasis added.) Correspondingly, the police report indicates that these interviews pertained to both a potential "PPO violation . . . and a CSC," and were to determine whether any of the interview subjects "had additional information on *either incident*." (Emphasis added.) Relatedly, the first officer, who was only involved in the investigation of the CSC and not of the PPO violation, specifically noted in the report, "Please see [the second officer's] supplemental report with interviews of . . . students who may have heard information about this incident." In April 2024, the first officer also received additional information and photos from GG regarding the alleged CSC and, correspondingly, continued to supplement the police report with these things. The report also indicated that the first officer continued to communicate with the prosecutor's office to "updat[e the office] on the new information."

The police report further demonstrates that less than two weeks after the officers were informed that the prosecution declined to authorize the charge, the second officer interviewed GG's brother and his girlfriend, the school social worker, and the school counselor about GG's disclosures to them. Per the report, this was done specifically to gather the prosecution's "requested additional information" for "authorization on this case." Once those interviews were completed, the officers promptly "[r]e-submitted to [the] Prosecutor for review," and the "[d]isposition" of the case remained "[o]pen" during that time.

Thus, the record makes clear that all of the destroyed recordings were related to an ongoing criminal investigation, meaning they should have been retained by the officers until the completion of the criminal investigation and proceedings; as such, they were not destroyed pursuant to the controlling retention policy, but instead in violation of it. And while the prosecution maintains, as it did below, that any such violation was at most negligent, it has not substantively addressed,

below or on appeal, the fact that some of the investigation-related recordings from the same time period were retained—despite that fact featuring prominently in both respondent's argument as to bad faith and the trial court's finding to that effect.

Per the police department's policy, and as the second officer explained during discovery, to retain a recording so that it does not get destroyed through the department's automatic purging cycle, an officer must mark the recording for retention, which notifies the records bureau to retain it. Thus, if a criminal investigation is ongoing but its related recordings are not affirmatively flagged for retention, they will be destroyed as part of the automatic purging cycle. The record shows that the officers were aware of this procedure and did, in fact, adhere to it in connection with the instant CSC investigation—but only as to four particular recordings. Of these four recordings, two were of phone calls between respondent's father and the first officer regarding GG's allegations and the possibility of a police interview of respondent, with respondent's father ultimately declining that interview. The other two recordings documented certain steps the officers took to investigate GG's allegations, but not the ultimate substance of those investigatory efforts. For instance, the first officer provided recordings of his call scheduling an interview with GG on January 10, 2024, but he did not provide a recording of his interview of GG that occurred later that day. Similarly, the second officer retained a recording of his March 20, 2024 call to the mother of one of respondent's four friends scheduling an in-person interview, but he did not retain a recording of the in-person interview that then occurred two days later. Nor did he retain recordings of the other three minors' in-person interviews that occurred on March 20 and March 21—the same day as and the day after, respectively, the date of the March 20 call that was retained.

Accordingly, the record shows the officers affirmatively retained a handful of recordings regarding the process of their investigation, including the refusal of their request to interview respondent, but they did not retain recordings of any of the interviews they conducted with GG and other potential witnesses—let alone any such interviews that, on the present record, appear to be at least " 'potentially useful' " to respondent. *Dickinson*, 321 Mich App at 16, quoting *Youngblood*, 488 US at 58. As the trial court recognized, such selective retention of recordings related to an ongoing criminal investigation lends only further support to respondent's position that the destruction of the recordings at issue was not simply a matter of negligence, but instead reflected the officers' failure to "act[] in good faith and in accord with their normal practice." *Trombetta*, 467 US at 488 (quotation marks and citation omitted); see also *Youngblood*, 488 US at 56. And again, the prosecution has not attempted to address this aspect of the record or the trial court's assessment of it, despite its import to the court's finding of bad faith.

In sum, we see no error in the trial court's determination that respondent's due-process rights were violated, see *Dimambro*, 318 Mich App at 212, or in the court's determinations that the recordings at issue constituted material exculpatory evidence and that the police acted in bad faith in destroying them, see *Brown*, 330 Mich App at 234. We thus conclude the trial court did not abuse its discretion by granting respondent's motion to dismiss his CSC-I charge with prejudice. *Id*. at 229, 234.

Affirmed.

/s/ Michael F. Gadola
/s/ Philip P. Mariani

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Before: GADOLA, C.J., and O'BRIEN and MARIANI, JJ.

O'BRIEN, J. (*dissenting*).

GG accused respondent of sexually assaulting her. As part of the investigation into this accusation, officers interviewed a variety of individuals. Those interviews were recorded and summarized in a police report. Unfortunately, the recordings of the interviews were not marked for retention, so they were destroyed as part of a routine purging by the department. The majority holds that petitioner's inability to produce the destroyed recordings of the interviews constitutes a *Brady* violation because the interviewees made material and exculpatory statements in their interviews. But the majority can only say that the interviewees made material and exculpatory statements in their interviews because the police report summarizing those interviews states as much. Respondent has that police report, so he too knows of the material and exculpatory statements made by the interviewees in their interviews. Given this, respondent cannot establish that any material evidence was suppressed. To the extent the majority bases its findings of a *Brady* violation on the possibility that more exculpatory statements may have been made during the interviews that we do not know about because the recordings of the interviews were destroyed, that reasoning conflates respondent's *Brady* claim with his *Youngblood* claim. As for respondent's *Youngblood* claim, I would conclude that respondent has not met his burden of proving that the recordings were destroyed in bad faith, at least not as a matter of law.

Starting with respondent's *Brady* claim, to establish a *Brady* violation, respondent must show that (1) the state suppressed evidence; (2) that evidence was exculpatory; and (3) that

exculpatory evidence was material. *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014). Respondent contends that the destroyed recordings were exculpatory because the interviewees said that GG made statements that were inconsistent with statements that GG herself made to authorities. And respondent bases this contention on the police report's summary of the interviews—the report states that the interviewees made the exculpatory statements identified by respondent.

The majority recounts that "the report reflects a variety of inconsistencies in GG's allegations over the course of her disclosures, including those related to when the assault occurred, who was present in the home at the time, to whom she disclosed the assault, and what respondent said and did before and during the assault." *Ante* at 10. More precisely, the report reflects that certain interviewees said that GG told them things that were inconsistent with what GG told authorities. And those inconsistencies as identified by the majority related to (1) whether GG was sexually assaulted on August 15 or August 17; (2) whether GG's mother was home when GG was sexually assaulted; (3) whether GG disclosed the sexual assault to her brother, her brother's girlfriend, and respondent's sister, or just to her brother and her brother's girlfriend; and (4) the fact that GG mentioned in only her forensic interview that respondent talked about sexually assaulting other girls and choked GG while assaulting her. See *ante* pp 4-5 n 3. These minor inconsistencies in what other people remembered about the details that GG shared with them regarding the sexual assault fall far short of *Brady*'s materiality requirement.[1]

That aside, respondent is fully aware of the inconsistencies in GG's allegations as identified by the majority. Despite not having access to the recordings of the interviews, respondent knows about the interviewee's exculpatory statements because those statements were recorded in the police report. If this case proceeded to trial, respondent could readily take advantage of that evidence. Given this, I cannot agree with the majority that the destroyed recordings of the interviews were material for purposes of a *Brady* violation. Respondent is fully aware of the inconsistencies in GG's allegations as identified by the majority, and respondent can bring those inconsistencies to the factfinder's attention at a potential trial.

The majority rejects this reasoning because the police report "does not purport to transcribe or otherwise capture the full content of the interviews, but instead contains only the interviewing officer's own summary of them for purposes of the report." *Ante* at 11. And the majority reasons that more exculpatory statements were likely made during the interviews that we do not know about because the recordings were destroyed, which provides further support for finding a *Brady* violation. See *ante* at 11-12. This reasoning, however, conflates respondent's *Brady* claim with his *Youngblood* claim.

We do not know—and cannot know—whether the interviewees made exculpatory statements other than those identified in the police report because the recordings of the interviews

[1] The only alleged inconsistency that relates to the sexual assault itself is that GG mentioned something in her forensic interview that she did not mention in other disclosures. But forensic interviewers are professionally trained to interview minor victims of sexual assault. That GG gave the most detailed account of the assault when interviewed by such a professional is hardly surprising.

were destroyed. "Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." *California v Trombetta*, 467 US 479, 486; 104 S Ct 2528; 81 L Ed 2d 413 (1984). So, rather than asking judges to determine whether a due-process violation occurred by divining what lost evidence would have shown, the United States Supreme Court adopted a test that considers the government's role in losing the potentially useful evidence—"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*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988).[2]

The majority agrees with the trial court that respondent established, as a matter of law, that the government acted in bad faith when it destroyed the recordings of the interviews in this case because (1) the failure of the officers to mark the recordings for retention (which led to the recordings being destroyed) violated department policy and (2) other recordings besides the pertinent interviews were marked for retention and thus preserved.

I take no issue with the notion that the government's failure to follow standard protocol for preserving evidence can be evidence that the government acted in bad faith, but I would hold that such evidence alone is not enough to establish bad faith. See, e.g, *United States v Deaner*, 1 F3d 192, 200 (CA 3, 1993) ("While a showing that the government did not follow standard procedure could provide some evidence of bad faith, we have not held that an improper procedure in and of itself implies bad faith. While it may permit such an inference, it does not syllogistically imply the presence of bad faith as a matter of deductive logic."); *United States v Garza*, 435 F3d 73, 76 (CA 1, 2006) ("While Garza argues that it was not 'normal' procedure to destroy evidence in cases that were still open, there is no evidence that Quinn was motivated by malice or bad faith in authorizing the destruction."); *United States v Christian*, 302 Fed Appx 85, 87 (CA 3, 2008) ("Absent some proof of ill-will, a failure to follow procedure is insufficient to support a finding of government bad faith.").

And I disagree with the majority that some recordings being preserved while others being destroyed establishes, as a matter of law, that the government's failure to preserve all of the recordings was the result of bad faith. The majority concludes that the "selective retention of recordings" is evidence that "the destruction of the recordings at issue was not simply a matter of

[2] Respondent did not advance a *Trombetta* claim, which considers not whether the government acted in bad faith when it destroyed evidence but whether the evidence that was destroyed "meet[s] the standard of constitutional materiality." *Trombetta*, 467 US at 489. This standard is satisfied if the evidence "both possess[es] an exculpatory value that was apparent before the evidence was destroyed" and was "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id*. It is unclear why respondent chose to advance a *Brady* claim instead of a *Trombetta* claim because a *Trombetta* claim is considered one of the "two tests" that the United States Supreme Court "has established . . . to determine whether a government's failure to preserve evidence amounts to a due process violation." *United States v Collins*, 799 F3d 554, 569 (CA 6, 2015).

negligence," *ante* at 16-17, but that is clearly a factual finding, not a legal conclusion.[3] Indeed, I fail to see why the retention of some recordings but not others affirmatively disproves, *as a matter of law*, petitioner's claim that the destruction of the recordings was the result of negligence. The majority seems to reason that the "selective retention of recordings" is affirmative evidence of the government's bad faith because petitioner does not explain why some recordings were retained while others were not. See *ante* 15, 17. But this reasoning flips the burden of proof on its head—it is respondent's burden to prove his *Youngblood* claim. See *People v Dickinson*, 321 Mich App 1, 16; 909 NW2d 24 (2017) (explaining that the defendant bears the burden of showing that the failure to preserve the evidence was done in bad faith). That petitioner does not explain why some recordings were preserved while others were destroyed does nothing to assist respondent in carrying that burden.

This is not to say that the inference that the trial court and the majority draw from petitioner's lack of an explanation for why some recordings were retained while others destroyed is necessarily impermissible. I simply believe that the inference requires fact-finding—the unexplained retention of some recordings and the destruction of others does not rebut the prosecution's assertion that the recordings were destroyed by accident, nor does it conclusively establish that the officers acted in bad faith when they failed to preserve the recordings. Unfortunately, the trial court made this factual finding without the benefit of an evidentiary hearing. I would hold that this was error, the remedy for which is a remand of respondent's *Youngblood* claim for an evidentiary hearing. At that hearing, the trial court can hear from the officers involved in this case and determine, as a factual matter, whether their failure to retain the evidence was the result of bad faith. But on the record as it now stands, I would not conclude that respondent has established, as a matter of law, that the government's failure to retain the recordings was done in bad faith.

For these reasons, I respectfully dissent.

/s/ Colleen A. O'Brien

[3] The language used by the trial court when rendering its decision reflects that it, too, understood itself to be making a factual finding in this respect. The court made credibility determinations about "the information presented" and concluded that there was "sufficient evidence" to find bad faith.