IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESSEE VS. BRANDON VANDENBURG	)	NO. 2013-C-2199

DEFENDANT BRANDON VANDENBURG'S MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION TO DISMISS AND OR IN THE ALTERNATIVE SANCTIONS FOR PROSECUTORIAL DESTRUCTION OF EVIDENCE AND FAILURE TO PRESERVE EVIDENCE

Comes now, Defendant Brandon Vandenburg (VANDENBURG) and hereby brings this motion and its supporting points and authorities to dismiss the indictment against him and or in the alternative for sanctions against the Nashville's District Attorneys Office, DAO, DA Victor S. Johnson III (JOHNSON) and District Attorney General Tom Thurman, (THURMAN), for destruction of evidence and or failing to preserve evidence.

FACTS

VANDENBURG was charged in a presentment filed on August 9, 2013. The charging instrument purports to allege five (5) charges of aggravated rape, two (2) charges of aggravated assault, one (1) charge tampering with evidence and one (1) charge of unlawful photography. DAO and THURMAN have provided discovery in disk form and in a small amount of written documents to VANDE NBURG since the end of October 2013 and up to and including April 2014, even though VANDENBURG's defense team had repeatedly requested the discovery for months after he voluntarily

surrendered himself. See Exhibit "A" Motion for Discovery, which is incorporated by reference for this motion.

The disks were copied from the DAO by a professional copy service and provided to VANDENBURG, as well as other defendants indicted in this matter. From the start, the disks that were provided to the copy service by the DAO and THURMAN were installed on obsolete programs which made opening the disks very difficult, and various disks came with deleted content or with empty file folders with content that had been deleted. VANDENBURG was provided with disks from a professional copy service from Nashville, and was advised that the copy service company copied what they were given and gave them to VANDENBURG's counsel, regardless if it was blank, missing information and/or had deleted information.

The State claims to have provided open file discovery. However, it became obvious to VANDENBURG's defense team after reviewing **all** of the evidence provided, that crucial and material information to the defense of VANDENBURG was destroyed or not preserved.

Destroyed or not preserved evidence:

- Removed video footage from Surveillance CD/DVD disks, approximately 55% of the video surveillance provided has been destroyed.

- Deleted items from CD/DVD disks:
    - Disc 2 Folder 1 shows that Alleged Victim had 27,925 Messages stored on her iPhone as well as 220 Calls made, VANDENBERG only received a total of approximately 47 calls and or text messages
    - Disc 2 Folder 3 "iPhone device information" content deleted
    - Disc 2 Folder 6 "Vandenburg iPhone Text Messages wit[redacted]content deleted
    - Disc 2 Folder 7 "Vandenburg iPhone Text Messages with Batey" content deleted

- Disc 2 Folder 8 "Vandenburg iPhone Text Messages with Boyd" content deleted
- Disc 2 Folder 11 "Vandenburg iPhone Call Logs" content deleted

- Thumb Drive : Destroyed content: Pages 84-88, 131, 147-149, 152, 176, 190/191 (Page skipped), 192 (2 Page Skip), 354-355, 357, 530, 635, 653, 655, 657, 661, 837, 841, 959, 1076-1077, 1285, 1336-1337, 1346. This includes Search Warrant Documents, Hair Analysis testing, and Medical records

- Missing text messages:
  - Coach James Franklin
  - Coach Galt
  - Coach Kevin Colon
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - [redacted]
  - Alleged Vcitim
  - Austyn Carta Samuels
- Missing Social Media:
  - Dillon Van der Wal
  - [redacted]
  - [redacted]
  - Alleged Victim
- Missing phone records and call logs:
  - Coach Franklin
  - Coach Galt

- Coach Kevin Colon
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- Alleged Victim

- Missing Interview with [redacted]– he was the alleged victim's last alleged memory on 6/23/2013, he texted her during her medical exam on 6/27, and picked her up from the exam with [redacted]
- [redacted]s DNA test results- Alleged victim was wit[redacted] for approximately 3 ½ hours in the early morning hours of June 23, 2013
- Interview with [redacted] Austyn Carta Samuels girlfriend
- Interview with [redacted]- Chris Boyds's Girlfriend
- Hand written notes of all interviews by detectives as seen in interviews
- Additional interviews with Alleged Victim on 7/01/2013 and 8/8/2013 as referenced in reports
- Destroyed Medical Records

The alleged victim's medical records were subpoenaed by the DAO. It appears that a portion of such medical records were provided to VANDENBURG's defense team. Upon their review by VANDENBURG's defense team, it was noted in a letter from an attorney for Vanderbilt, who was providing these records to the DAO and the Metro Police Department (METRO) that based upon a conversation between JOHNSON of the

DAO and Vanderbilt's General Counsel, certain medical records would be removed and not provided in response to the judicial subpoena, thereby foreclosing disclosure to VANDENBURG's Counsel, see Exhibit "B" Attorney letter from Vanderbilt, which is incorporated by reference into this motion. This was done despite a court issued subpoena ordering **all** medical documents of the alleged victim. [Emphasis added} See Exhibit "C" Court issued Subpoena of All Medical Records, which is incorporated by reference into this motion. The DAO by this subterfuge intentionally concealed evidence from VANDENBURG'S Counsel[redacted]

Also provided to VANDENBURG'S Counsel, were surveillance video footage from 14 different cameras of the dorm parking lot, the dorm hallways and surrounding areas. The footage began June 23, 2013 at approximately 2:30 am and ended at noon the same day. SHREEVE'S report indicates that METRO received copies of surveillance video on 6/26/2013. See Exhibit "D" Metro received surveillance video copies on 6/26/2013, which is incorporated by reference into this motion. VANDENBURG'S

[1] The Supreme Court of Tennessee has opined that "a prosecutor should not intentionally avoid pursuit of evidence merely because the prosecutor believes it will damage the prosecutor's case or aid the accused." *State v. Culbreath*, 30 S.W.3d 309, 314 (Tenn. 2000).

Counsel received copies of video surveillance on or about October 3, 2013, and after viewing each of the surveillance video footage of the 14 surveillance cameras, it became apparent that material video footage had been intentionally removed. The video footage has time counters so that the viewer can follow the footage by the second. However, crucial and material evidence has been removed so that the time counters are no longer in sequence. Approximately 55% of the surveillance footage has been removed. See Exhibit "E" Summary of Destroyed Video Footage, which is incorporated by reference into this motion. Additionally, we believe that there is evidence from the alleged victim's 6/26/13 interview from a female interviewer who says something to the effect that when the female interviewer spoke with the alleged victim before, she said she went to [redacted]'s room in the middle of the night. Much of the surveillance video from the middle of the night and early morning hours has been destroyed. Disk 2- at approximately the 23:00 mark 6/26/13 Interview.

Further, the alleged victim's text messages have been removed from the discovery provided. Evidence found by VANDENBURG's counsel states that the alleged victim had 27,925 text messages stored on her iPhone and 220 phone calls before, during and after the alleged incident, however, VANDENBURG'S Counsel received only 47 text messages and calls that were stored on the alleged victim's iPhone. Excluded were call logs and text messages, which were made during the alleged incident or around the time period as well as messages in the days following the alleged incident. See Exhibit "F" Alleged Victim's Apple Device Detail Log, which is incorporated by reference into this motion.

Further, in one video interview with the alleged victim, the alleged victim can be seen texting for approximately 5 to 10 minutes while she waits for the detectives to begin the 7/8/2013 interview. The alleged victim can also be seen taking a photo of herself, then sending it to some form of her social media. VANDENBURG has not been provided with this crucial and material information and may provide additional insight to important information related to this case. During this 7/8/13 interview, the alleged victim comments that she had received text messages and made phone calls regarding this alleged incident, and stated that she texted and called her ex boyfriend, [redacted] throughout the early morning hours of 6/23/2013. In this same interview, she stated that she was contacted by Coach Franklin and Coach Galt during her medical examination on 6/27/2013 and explained that they cared about her because she assisted them with recruiting and that Coach Franklin called her in for a private meeting and told her he wanted her to get fifteen pretty girls together and form a team to assist with the recruiting even though he knew it was against the rules. He added that all the other colleges did it. She also stated that she was in contact with [redacted], and [redacted] during her medical exam. She then shows detectives SHREEVE and MAYO her iPhone and they take notes. (Disk 8) In an interview with the alleged victim's friend, [redacted] on 7/18/13, disk 26, [redacted] states that the alleged victim texted her in the days following the alleged incident and gave her details via text. VANDENBURG has been deprived of this information and these valuable text messages and call logs.

It should also be noted that VANDENBURG has still not been provided with **all** of the alleged victim's interviews, the 7/1/13, the 8/8/13 and any additional interviews,

which may have taken place have not been provided. See Exhibit "G" She was interviewed and called upon many times, which is incorporated by reference into this motion. DAO and Roger Moore, (MOORE) recently provided an open file discovery visit for an attorney for VANDENBURG. See Exhibit "H", John Herbison declaration regarding Open File Discovery, which is incorporated by reference into this motion.

Also, the alleged victim's iPhone was initially taken from her by Metro Police detectives Mayo (MAYO) and Shreeve (SHREEVE) on 7/8/2013, after one of her many interviews and then was given back to her the same day without allowing the defense to have it examined. See Exhibit "I "Metro Electronic Report Re: Alleged Victim's iPhone returned the same day, which is incorporated by reference into this motion. During the 6/26/13 interview of the alleged victim, Detectives Shreeve and Mayo asked the alleged victim if they could see any text messages that had been sent surrounding the alleged incident and she said no, it is a privacy issue and she would be willing to read them a few messages, but would not let them go thru her phone. Many of these valuable conversations have been lost. The importance of this and other referenced calls and text messages is that VANDENBURG was not given all text messages or call logs or calls. It should be noted that soon after the alleged victim received her iPhone back, she tweeted it was dropped in a washing machine and was destroyed and later stated that "it was meant to be", See Exhibit "J" Document With Admission of Alleged Victim Phone Dropped in Washing Machine, which is incorporated by reference into this motion. The alleged victim is not being charged with a crime. The alleged victim also informs MAYO and SHREEVE that she destroyed pictures and text messages from her iPhone of this alleged incident and so did her roommate, [redacted]. See Exhibit "G" Report of

Alleged Victim and Roommate regarding destroying pictures and texts messages, which is incorporated by reference for this motion. These destroyed messages included text messages from the alleged victim to her roommate texting "I love you", around the time of the alleged incident as reported by [redacted] in her statement (Disk 18)

Detectives MAYO and SHREEVE received [redacted]'s phone log on 7/3/2013, See Exhibit "K" [redacted] Phone Log, which is incorporated by reference into this motion. The report suggests that [redacted] was interviewed at that same time, however VANDENBURG has not been supplied with interview notes from that 7/3/2013 meeting or any phone logs. Additionally, SHREEVE and MAYO ran an extraction report on [redacted]'s phone on 7/9/2013, 6 days after they received the phone log and they conducted an interview with [redacted] See exhibit "L", [redacted] 7/9/2013 Interview, which is incorporated by reference into this motion. The extraction report shows that over 90% of SMS text messages were deleted, 76% of MMS text messages were deleted, 50 % of phone calls were deleted, 100% of carved strings were deleted and 99% of Chats were deleted. See Exhibit "M", [redacted] Phone Extraction Report, which is incorporated by reference into this motion. The loss of data is not indicated on any police reports and [redacted] was not charged with a crime for deleting/destroying evidence from her phone. How does the DAO charge FINLEY and QUINZIO with crimes of destruction of alleged evidence and not [redacted] and the Alleged victim for destroying evidence? SHREEVE and MAYO did not preserve this valuable information. VANDENBURG was not able to view the contents of this phone, which could provide valuable information.

During the investigation MAYO and SHREEVE had access to social media accounts of the defendants, witnesses and the alleged victim but failed to preserve any of the information obtained, including an admission the next day by the alleged victim that anything done with her was consensual. [redacted] The alleged victim also states in her 7/8/2013 (Disk 8) interview that she facebooked Dillon Van Der Wal regarding the alleged incident. VANDENBURG has not received any such reports on social media obtained by DAO, even though the alleged victim stated in interviews that she utilized social media regarding the alleged incident. The alleged victim utilized Twitter and Instagram on her cell phone, which is indicated in her iphone extraction report. See Exhibit "F" Alleged victim Apple Device Detail Log, which is incorporated by reference into this motion.

The iPhone, which contained this material evidence, was destroyed by the alleged victim in her washing machine, DAO did not preserve this critical evidence.

Throughout the discovery provided by DAO and THURMAN are references to "supplemental reports", those referenced supplemental reports have not been provided to VANDENBURG even though DAO and THURMAN have provided "open file discovery" on this matter and a review of the file turned up zero. See Exhibit "O" Tom Thurman Open File Discovery, which is incorporated by reference into this motion. See pages: 259, 260, 262, 263, 264, 265, 266, 267, 269, 270, 271, 274, 276, and 277 in Report by SHREEVE for reference to "see Supplemental Reports".

Additionally, VANDENBURG has not been provided with original hand written notes taken by detectives during the interviews provided. It can be seen during the interviews of all video interviews where the detectives are taking notes.

In addition to the above destroyed, deleted or not preserved evidence, interviews with the alleged victim's neighbor, Chris Boyd's girlfriend [redacted] and Austyn Carta Samuels girlfriend [redacted] have been omitted, even though they are referenced in the discovery. See Exhibit "P" Detectives Interviewed Neighbor, which is incorporated by reference into this motion. Please remember that DAO and THURMAN have insisted that all of the discovery has been provided and have objected to a continuance of a trial date for VANDENBURG and that the DAO has agreed to "open file discovery" See Exhibit "O" which is incorporated by reference into this motion. Also see Exhibit "T" identified below.

Numerous electronic file folders in discovery provided by DAO and THURMAN have been deleted: disk 2, files, 1, 3 ,6, 7, 8, and 11. As well as pages from thumb drive: 84-88, 131, 147-149, 152, 176, 190/191 (Page skipped), 192 (2 Page Skip), 354-355, 357, 530, 635, 653, 655, 657, 661, 837, 841, 959, 1076-1077, 1285, 1336-1337, 1346. This includes Search Warrant Documents, Hair Analysis testing, and Medical records. The copy service has been contacted and Mr. KC Freels, who owns the company and did the copying, has informed VANDENBURG'S defense team that he copied what he was given. See Exhibit "Q" Emails from KC Freels Re: Copy Service, which is incorporated by reference in this motion. Additionally, THURMAN distributed evidence to another defendant's defense attorney and did not send it to VANDENBURG. See Exhibit "R"

Email from Mark Scruggs indicating that he has evidence from THURMAN that was not sent to VANDENBURG, which incorporated by reference into this motion.

The above destroyed, deleted or not preserved evidence in this case has prevented VANDENBURG from preparing his case, receiving exculpatory evidence to show his innocence and denied him due process of law. VANDENBURG has not been provided all of the material and crucial items needed for VANDENBURG to defend himself because all those items listed in bullet points on pages 3 and 4 of this motion and all other items referenced throughout this motion have not been preserved or have been destroyed. See exhibit "S" Declaration of [redacted] which is incorporated by reference into this motion. It should be noted that DAO and THURMAN stated that they have given VANDENBURG "everything" with regard to evidence. See Exhibit "T", Thurman email confirming we have everything, which is incorporated by reference into this motion.

Further, to exemplify DAO and THURMAN'S bad faith and intentional misconduct, DAO and THURMAN have known about perjured testimony surrounding FINLEY and QUINZIO, the two California defendants and still submitted affidavits to this court containing these false statements in support of their motion to exclude Attorney Albert Perez Jr. (PEREZ) from representing VANDENBURG.

Information was obtained by SHREEVE on November 21, 2013 that FINLEY had not been truthful in his affidavit, regarding a female identified as [redacted] in his proffer. However, THURMAN still submitted two affidavits of his own on November 22, 2013 and November 25, 2013 for a hearing on November 26 2013 and one by FINLEY on March 27, 2014, that FINLEY was being truthful despite knowing Finley's

statements were false. See Exhibit "U" Report of [redacted], and email to SHREEVE which is incorporated by reference into this motion.

Additionally, THURMAN submitted an email with some new discovery in April 2014, stating that he just found this information out, tha[redacted] impeached FINLEY, even though the interview was done 5 months prior, despite the fact that METRO has stated that they are in contact with DAO on a daily basis, see below. Included, is an interview on CD with Vanderbilt Football Coach Bankins, which further impeaches the testimony of FINLEY. It is important to note that Detectives SHREEVE and MAYO have indicated the importance of theses statements and testimonies of the two Californian men and by stating in Disk 21 at 2:19 on Track 002 Detective Mayo:

"Obviously the DA in Nashville.... she wants to know everything that happens out here, I'm having to call her every night and let her know what's going on because they are very interested in this case to say the least. ".

We question the fact that something of this magnitude and importance and obvious impeachment of one of their witnesses, would take 4 to 5 months to reach the DAO and THURMAN. They intentionally hid this information so that they could impede the PRO HAC VICE motion of PEREZ, which would ultimately impede the process to begin defending VANDENBURG. It should be noted that VANDENBURG has testified that he wants PEREZ to defend him.

DAO and THURMAN have also represented that VANDENBURG destroyed or tampered with evidence even though DAO and THURMAN knew thru MAYO and SHREEVE that QUINZIO'S iPhone which is being alleged that VANDENBURG destroyed was recovered in QUINZIO'S vehicle on 7/25/2013.

Detective Mayo disk 21 @ 26:00 "(laughs) they found the iPhone 4 in his car" : @ 30:55 "Chad said he looked in it and everything has been deleted. He backed it up, he backed it to that one. Female: He transferred everything from the 4 to the 5. Mayo: I'm pretty much done with him. "

See Exhibit "V" Quinzio iPhone Found in His Vehicle, which is incorporated by reference into this motion. Also, that images that VANDENBURG allegedly told QUINZIO to erase from his MAC computer, were recovered from his MAC computer. Additionally, detectives noted that the alleged destruction of evidence for the two California men did not occur in Tennessee. See Exhibit "W", Destruction Did Not Occur in Tennessee, which is incorporated by reference into this motion.

This type of misconduct puts a chill on our justice system and exemplifies the bad and intentional misconduct of DAO and THURMAN.

LAW/ARGUMENT

"The search for truth is not served but hindered by the concealment of relevant and material evidence. Although our system of administering criminal justice is adversary in nature, a trial is not a game. Its ultimate goal is the ascertainment of truth, and where furtherance of the adversary system comes in conflict with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal. Implementation of this policy requires recognition of a duty on the part of the prosecution

to disclose evidence to the defense in appropriate cases." *In re Ferguson* (1971) 5 Cal.3d 525, 531.

In the case against VANDENBURG, an investigation of sorts has continued since June 26, 2013. Months later, VANDENBURG is faced with the task of discovering the relevant documents and audio interviews to prove his innocence. Again, VANDENBURG'S defense team notes the importance of these items for the defense of VANDENBURG. The prosecution knows the importance of these items because THURMAN is using the non destroyed evidence as his case in chief. The deleted, destroyed and or lost evidence are pieces of the puzzle needed for VANDENBURG'S defense and thus are material. (Including exculpatory evidence)

Courts have used different terminology to define "materiality," the U.S. Supreme Court has determined that evidence is material if there exists a "reasonable probability" that it's disclosure to the defense would have changed the result of the trial. *United States v. Bagley*, 473 U.S. 667, 681 (1985), *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). This standard does not require the Defendant to prove that it is more likely than not that disclosure of the evidence would result in an acquittal. *Kyles*, 514 U.S. 419, 434 at 1566. A reasonable probability of a changed result exists where the suppression of evidence "undermines confidence in the outcome of the trial." *Id.* (quoting *Bagley*, 473 U.S. at 678.).

Additionally, in *California v. Trombetta* 467 U.S. 479 (1984), the court noted decisions where the Federal Government might transgress constitutional limitations if it exercised its sovereign powers so as to hamper a criminal defendant's preparation for

trial. Particularly, the court states that 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. Marion*, 404 U.S. 307, 324 (1971), *United States v. Lovasco*, 431 U.S. 783, 795 (1977).

The court established the standard that the Constitution imposes a duty to preserve evidence that would be limited to evidence that might be expected to play a significant role in the suspect's defense. That court opined that to meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and to be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *United States v. Agurs*, 427 U.S. 97, 109-110 (1976). The court found neither of these conditions present in *Trombetta* citing that the preservation of breath samples might conceivably have contributed to the respondent's defense, but finding the chances were low that the evidence would be exculpatory considering the actual testing on the samples was completed and the accuracy of the testing having been certified by the California Department of Health. *California v. Trombetta*, 467 U.S. 479.under 18 U.S.C.S. § 1519, prohibiting the destruction of evidence. See *United States v. Kernell*, 667 F.3d 746 (6th Cir. 2012).

At the core of this argument is Defendant's inability to have a fair trial and put forth a defense. VANDENBURG is essentially put in the position of preparing, without the key pieces of evidence that are both exculpatory in nature and raise issues of credibility upon the prosecution's witnesses. DAO and THURMAN are aware of the importance of this evidence because they removed it, failed to preserve it and or

neglected to supply it to VANDENBURG. There is no other evidence comparable for VANDENBURG to obtain.

Fundamental error is shown when "the Government's evidentiary suppression 'undermines confidence in the outcome of the trial'." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (citing *U.S. v. Bagley*, 473 U.S. 667, 668 (1985)). It is well settled that the Government has the obligation to turn over evidence in its possession that is both favorable and not favorable to the accused and material to guilt or innocence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150, 153-154 (1972), the due process clause is implicated when the Government destroys evidence that might have proved favorable to a criminal defendant.

The courts have created two categories of evidence that require a different analysis. If the missing evidence is shown to be exculpatory, the Defendant's rights to fundamental fairness under the due process clause are violated, regardless of the good or bad faith of the state actors involved. *Brady v. Maryland*, 373 U.S. 83 (1963).

The U.S. Supreme Court has developed a two-pronged test that turns upon whether or not the good faith of the Government actors involved must be considered in determining whether failure to disclose evidence is a violation of the rights of due process or "what loosely can be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

In *U.S. v. Bohl*, the 10th Circuit was faced with a similar question of destroyed evidence. Bohl's conviction arose from his performance of a contract to build radar and radio transmission towers for the Federal Aviation Administration. Bohl's company had

agreed to construct the tower legs using a particular strength of steel in 1987 and 1988. The Federal Aviation Administration alleged Bohl used non-conforming steel in the fabrication of the towers. The criminal charges arose from the alleged inferior steel quality used in construction of the towers outside accepted norms and violative of the Government contract. See *U.S. v. Bohl*, 25 F.3d 904 (10th Cir. 1994).

The FAA tested the legs and found the steel to be inferior. The Government gave to Bohl the remainder of the tower legs from which the sample was taken. Bohl repeatedly asked that the towers be preserved for testing, however, they were not. A criminal investigation ensued in 1989 by a special agent in the United States Department of Transportation Inspector General's Office. The agent was in contact with the FAA regarding the importance of the towers for the purposes of developing its chemical tests as evidence against Bohl. *U.S. v. Bohl*, 25 F. 3d 904 (1994). The evidence was not preserved and thus a due process violation.

To determine a Brady violation, the court must first determine that a due process violation has occurred by the destruction of evidence that is exculpatory to the Defendant. The evidence must also be material. 18 U.S.C.S. § 1519, prohibits the destruction of evidence. See *United States v. Kernell*, 667 F.3d 746 (6th Cir, 2012)

Under decisional law interpreting the United States Constitution, 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 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988); *State v. Ferguson*, 2 S.W.3d 912, 914 n.1 (Tenn.

1999). The Supreme Court of Tennessee in *Ferguson* rejected the more stringent *Youngblood* standard in regard to the Constitution of Tennessee:

> According to *Youngblood,* 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. In this regard, proving bad faith on the part of the police would be, in the least, extremely difficult. In addition, the *Youngblood* analysis apparently permits no consideration of the materiality of the missing evidence or its effect on the defendant's case. The conclusion is that this analysis substantially increases the defendant's burden while reducing the prosecution's burden at the expense of the defendant's fundamental right to a fair trial.

2 S.W.3d at 916-17.

The Court of Criminal Appeals in *Ferguson* affirmed the trial court's finding that the State's failure to preserve the video of the defendant's arrest violated the defendant's right to a fundamentally fair trial under *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). However, in reviewing the trial court's application of *Ferguson's* balancing test, the Court of Criminal Appeals erred by applying an incorrect standard of review.

In *Ferguson,* the Court addressed the question of what consequences flow from the State's loss or destruction of evidence in a criminal case, stressing that the central objective is to protect the defendant's right to a fair trial. The Court observed that, while "[g]enerally speaking, the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law..., 'that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense.'" *Ferguson,* 2 S.W.3d at 917 (quoting *California v. Trombetta,* 467 U.S. 479, 488-89 (1984)). If the judge determines that a trial without the missing evidence would be fundamentally unfair, the defendant is entitled to some remedy. Dismissal is one

option, but it is not the only option. *Id.* at 917. "The trial judge may craft such orders as may be appropriate to protect the defendant's fair trial rights. As an example, the trial judge may determine, under the facts and circumstances of the case, that the defendant's rights would best be protected by a jury instruction." *Id.* at 917 (footnote omitted).

Therefore, under *Ferguson,* two questions arise, each employing a different standard of review. The first is a determination of whether a constitutional violation has occurred, and the second, if necessary, is a determination of the appropriate remedy. Ferguson's balancing test - determining whether the defendant's right to a fundamentally fair trial has been violated - is a mixed question of law and fact. On the other hand, the determination of the particular remedy for the constitutional violation is a matter committed to the trial court's sound discretion. Where, as in this case, the trial court finds a constitutional violation and orders the dismissal of the indictment, the appellate court should employ a plenary or de novo standard of review to the trial court's constitutional determination, but an abuse of discretion standard to review the trial court's selection of a remedy. *See State v. Barnes,* 127 Conn. App. 24, 15 A.3d 170, 175 (Conn. App. Ct. 2011). Thus, while the Court of Criminal Appeals correctly determined that the appropriate standard of review for the trial court's remedy was an abuse of discretion, it erred in applying the same standard to the trial court's determination of whether a constitutional violation occurred.

The Court of Criminal Appeals affirmed the trial court's determination that the State violated the defendant's right to a fundamentally fair trial by not preserving a video of the defendant's arrest. The trial court, however, made this finding after failing to perform properly the test set out by this Court in *Ferguson.*

The Due Process Clause of the Fourteenth Amendment to the *United States Constitution* and Article I, Section 8, of the *Tennessee Constitution* afford every criminal defendant the right to a fair trial. *See Johnson v. State,* 38 S.W.3d 52, 55 (Tenn. 2001). Accordingly, the State has a constitutional duty to furnish a defendant with exculpatory evidence pertaining to the defendant's guilt or innocence or to the potential punishment faced by a defendant. *See Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97 (1963).

Likewise, the State "has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law." *Ferguson,* 2 S.W.3d at 917. Nevertheless, 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, 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. (quoting *Trombetta,* 467 U.S. at 488-89). If the proof demonstrates that the State had a duty to preserve evidence and failed to do so, the court must turn to a balancing analysis and weigh the following factors: "I. The degree of negligence involved; 2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and 3. The sufficiency of the other evidence used at trial to support the conviction." Id. (footnote omitted).

More recently, in *State vs. Merriman,*410 S.W.3d 779 (2013) the court opined that the trial court should analyze Brady violations with a three part test, 1. The degree of

negligence by the government in failing to preserve or the destruction of evidence 2. The significance of the destroyed or lost evidence and 3. The sufficiency of other evidence. If the government is found in violation, the appropriate remedy is a dismissal of charges, *Merriman*, 410 S. W. 3d 774.

CONCLUSION

This is a motion that brings with it a heavy heart because we all want to believe that the prosecution seeks justice. Not only to prosecute those fairly, but to exonerate those who have come into the criminal system by error. However, in this case, the justice system, thru the prosecutor's office and its prosecutors and detectives, has tainted that fairness and due process standard. One should not be so zealous to find someone guilty, so as to forget the Constitution, it's safe guards and the presumption of innocence. But apparently THURMAN and DAO did. Based on the overwhelming evidence that VANDENBURG has shown and the serious and intentional misconduct, the court should use its discretion to dismiss this case. (*Merriman*)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a correct and complete copy of the foregoing has been hand-delivered or mailed, first class postage prepaid, to the office of the District Attorney General, 222 Second Avenue North, Suite 500, Nashville, Tennessee 37201, this XX day of April, 2014.

John E. Herbison

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE
DIVISION V AT NASHVILLE

2014 APR 29 PM 2:30

STATE OF TENNESSEE	)	
	)	
vs.	)	No. 2013-C-2199
	)	
BRANDON E. BANKS,	)	
CORY LAMONT BATEY,	)	
JABORIAN DASHON McKENZIE	)	
and BRANDON ROBERT VANDENBURG	)	

DEFENDANT BRANDENBURG'S RESPONSE TO STATE'S MOTION TO STRIKE DEFENDANT'S MOTION TO DISMISS

When Yogi Berra famously said, "It's déjà vu all over again," he was speaking of repeatedly watching Roger Maris and Mickey Mantle hitting back-to-back home runs during the early 1960s. That witticism can apply equally as well to the State of Tennessee's unflagging, *seriatim* efforts to preclude any witness taking the stand for any pretrial hearing in this lawsuit.

In a remarkable display of *chutzpah,* counsel for the State assert that the Defendant's 14-page motion to dismiss (supported by an 18-page memorandum of law) suffers from insufficient particularity. That, the undersigned counsel submit, is disingenuous.

The Rules of Criminal Procedure "are intended to provide for the just determination of every criminal proceeding." Tenn.R.Crim.P. 2. Such rules promote the determination, not the avoidance, of pretrial issues raised in defense. Rule 12(b)(1)

provides that "A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." Rule 12(e) states:

> The court shall decide each pretrial motion before trial unless it finds good cause to defer a ruling until trial or after a verdict. . . . When factual issues are involved in deciding a motion, the court shall state its essential findings on the record.

Criminal defendants have a constitutional right, implicit in the Sixth Amendment, to present a defense, and this right is "a fundamental element of due process of law." *State v. Rice,* 184 S.W.3d 646, 671 (Tenn. 2006), quoting *State v. Brown,* 29 S.W.3d 427, 432 (Tenn. 2000), and *Washington v. Texas,* 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *see also, Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). Procedural and evidentiary rules should be construed in light of this Due Process right, and such rules "may not be mechanistically applied to defeat the ends of justice." *Brown,* at 432, quoting *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973).

Rule 47(c) provides that a motion shall state: (1) with particularity the grounds on which it is made; and (2) the relief or order sought. The Advisory Commission Comment to the rule describes this requirement as being "essentially the requirement of motions in civil practice. *See* Rule 7.02(1), Tenn.R.Civ.P." In light of this essential equivalence, authorities interpreting Civil Rule 7.02 (which contains a similar particularity requirement) are instructive as to Rule 47(c)(1).

The particularity requirement in Tenn.R.Civ.P. 7.02(1) "obliges parties to inform the court what relief they want and to give the court enough information to process the motion correctly." *Jennings v. Sewell-Allen Piggly Wiggly,* 173 S.W.3d 710, 711 (Tenn. 2005), quoting *Davis v. Tennessee Department of Employment Security,* 23 S.W.3d 304, 315 (Tenn.App. 2000). The rule does not require any particular form for motions. *Davis,* at 315.

The undersigned defense counsel doubt seriously that this Court will be hampered by any failure of particularity in the defense motion to dismiss the presentment or, in the alternative, to disqualify the District Attorney General. We note that counsel for the State do not appear to have been unable to prepare and file their motion to strike in response thereto, which includes denials of some of the Defendant's factual allegations.

The State would have the Court elevate form over substance. However, as Judge David Farmer has written for the Court of Appeals of Tennessee, Western Section:

> . . . The general purpose of T.R.C.P. 7.02 is to "give a simple and elastic procedure without too much emphasis on form." *Raughley v. Pennsylvania Railroad Co.*, 230 F.2d 387, 391 (3rd Cir. Pa. 1956). The "particularity" requirements [sic] set forth in T.R.C.P. 7.02 is intended to be flexible and motions that do not set forth with specificity the grounds they are based upon will be elaborated when it is evident from the record that "the opposing party knew of or had notice of the particular grounds being relied upon." 2A Moore's Federal Practice § 7.05 (1990), *citing Wallace v. American Telephone and Telegraph Co.*, 460 F.Supp. 755 (E.D.N.Y. 1978); *See Smith v. Danyo,* 585 F.2d 83 (3rd Cir. Pa. 1978).

Patty v. Perry, 1991 Tenn.App. LEXIS 380, **13-14 (May 22, 1991) (copy attached).

If the Court believes that it lacks sufficient facts and information from the Defendant's detailed and unambiguous motion to process the motion correctly or to discern what relief Mr. Brandenburg seeks, defense counsel will be pleased to supplement the motion if so requested by the Court. That determination, however, is for the Court to make; it is not for adversary counsel to decide unilaterally.

That having been said, there is filed contemporaneously with this response a motion to dismiss or for other relief based upon loss or destruction of discoverable evidence. In the interest of providing additional particularization of the previously filed motion to dismiss or disqualify, the Defendant would here incorporate by reference the allegations of that motion. (We would respectfully remind counsel for the State of the proverb about being careful what one asks for.[1])

The State's motion to strike appears to overlook (or ignore) the requirements of Tenn.R.Crim.P. 12(b), which states in relevant part:

(2) Motions That Must Be Made Before Trial

The following must be raised before trial:

(A) a motion alleging a defect in the institution of the prosecution;

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[1] *See, e.g.,* "Be careful what you wish for in this world, for if you wish hard enough, you are sure to get it." "A Native of Winby," Sarah Orne Jewett, *The Atlantic Monthly,* Vol. 67 (1891). http://www.oldberwick.org/index.php?option=com_content&view=article&id=358:a-native-of-winby&catid=51:writings&Itemid=122

> (B) a motion alleging a defect in the indictment, presentment, or information -- but at any time while the case is pending, the court may hear a claim that the indictment, presentment, or information fails to show jurisdiction in the court or to charge an offense[.]

Among the issues raised by the defense motion to dismiss/disqualify are that the presentment is multiplicitous and that counsel for the State have improperly abused the charging process so as to offend constitutional Due Process guaranties. Misconduct in relation to prosecutors' seeking a presentment is obviously a defect in institution of the prosecution.[2] Objections based on defects in the charging instrument, specifically including allegations of multiplicity, must be raised prior to trial or they are waived according to Tenn.R.Crim.P. 12(b)(2). *See, Teague v. State,* C.C.A. NO. 03C01-9604-CC-00153, 1996 Tenn.Crim.App. LEXIS 743, **4** (November 27, 1996) (copy attached).

The State cavils that the issues raised by the defense motion seeking a judicial remedy for prosecutorial overreaching are intertwined with the ultimate

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[2] Rules of statutory construction are applicable in construing rules governing practice and procedure of the court. *See, State v. Peele,* 58 S.W.3d 701, 704 (Tenn. 2001). When a statute (or procedural rule) is clear, courts apply the plain meaning without complicating the task. The Court's obligation is simply to enforce the written language. *Lind v. Beaman Dodge, Inc.,* 356 S.W.3d 889, 895 (Tenn. 2011).

There is nothing ambiguous or unclear about the command of Tenn.R.Crim.P. 12(b)(2)(A) that a motion alleging a defect in institution of the prosecution must be raised prior to trial. If holding a pretrial hearing on the defense motion to dismiss/disqualify harelips the Devil, then may the Devil wear that harelip proudly.

issue of guilt. That is not so. If the State's glib contention as to "intertwining" is correct, then the scope of pretrial evidentiary hearings under Rule 12(b) would be severely limited. That would be wholly inconsistent with the mandate of Rule 12(e): "The court shall decide each pretrial motion before trial unless it finds good cause to defer a ruling until trial or after a verdict."[3]

Prosecutors can overreach as to a guilty person;[4] they can also overreach as to an innocent person. A pretrial determination that prosecutors have overreached in this case as to this Defendant would not have preclusive effect as to guilt or the absence of guilt, in that the issues are distinctly different.[5] In order to even determine whether to defer a ruling until trial or after a verdict, however, the Court would need to receive and consider evidence.

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[3] "It is academic that the use of the word 'shall' in a statute [or procedural rule] is indicative of a mandatory legislative intent." *State v. Lowe,* 811 S.W.2d 526, 527 (Tenn. 1991); *State v. Graves,* 126 S.W.3d 873, 877 (Tenn.Crim.App. 2003).

[4] Or more precisely, prosecutors may overreach as to a presumptively innocent person. The law of course presumes that the defendant is innocent of the charges against him. *See, e.g., State v. Bolin,* 684 S.W.2d 40, 44 (Tenn. 1984).

[5] By way of comparison, a finding of lack of probable cause in support of an arrest warrant at a preliminary hearing does not preclude later prosecution of the matter, by either a new warrant or by an indictment. D. Raybin, *Tennessee Criminal Practice and Procedure,* § 7.30, 224 (1984). (That, however, is not this case, which was initiated by direct presentment without a preliminary hearing.)

Under the plain language of Rule 12(b) and (e), once a pretrial motion is made, a trial court must decide the motion before trial if it is "capable of determination without the trial of the general issue." *State v. Goodman,* 90 S.W.3d 557, 561 (Tenn. 2002). This Court is surely able to determine the overreaching issue(s) and any remedy therefor, based on evidence, without necessarily determining the existence or absence of a reasonable doubt as to whether Brandon Vandenburg committed every element of the offense(s) of which the grand jury has accused him. That the State would conflate these distinct issues is at best puzzling.

One issue raised in the instant defense motion is whether several counts of the presentment[6] were charged without probable cause at the time of presentation to the grand jury. The trial courts of this State frequently make findings of fact and legal determinations prior to trial as to whether probable cause existed or did not exist at an earlier stage of proceedings regarding the Defendant.

For example, where an accused's statement to police is the fruit of an arrest or detention without probable cause, that statement may be subject to exclusion from evidence. *See, e.g., Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). *See also, State v. Chandler,* 547 S.W.2d 918 (Tenn. 1977);

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[6] Under Tennessee law, each count in a multiple count indictment is, in legal contemplation, a separate indictment; each count must accordingly be a complete indictment in itself. *State v. Russell,* 800 S.W.2d 179, 172 (Tenn. 1990). It follows that each count of the instant presentment is subject to a distinct inquiry as to whether prosecutors were without probable cause therefor on August 9, 2013 when the presentment was found.

Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). The same is true of items of physical evidence gathered from a full-scale arrest without probable cause. *State v. Berrios,* 235 S.W.3d 39 (Tenn. 2007).

The probable cause inquiry in that pretrial motion context[7] is distinct from whether the accused did or did not commit the offense for which he is accused. Indeed, in the instant case, defense counsel contemplate filing a motion pursuant to *Dunaway, supra,* (among other grounds) to suppress a statement made by Mr. Vandenburg at the Vanderbilt University police station on or about June 25, 2013. One of the issues to be raised therein is whether police then had probable cause to detain Mr. Vandenburg. Will the State object to holding an evidentiary hearing as to the facts surrounding that interrogation?

For example, regarding Count 8 of the presentment, the probable cause issue turns on a single fact. The language of Count 8 constitutes a positive averment that Mr. Vandenburg, on June 22 or 23, 2013, knew "that an investigation or official proceeding was pending, or in progress" with regard to evidence that he allegedly altered, concealed or destroyed.

The State cavils (motion to strike, p. 3) that the date of the offense here is not material and that it may be cured by amendment upon motion. *Au contraire!* One of the cases there cited by the State is *State v. Kennedy,* 10 S.W.3d 280 (Tenn.Crim. App. 1985). The Court of Criminal Appeals there opined, citing *State v. Unsworth,*

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[7] Tenn.R.Crim.P. 12(b)(2)(C) requires that a motion to suppress evidence be raised prior to trial.

85 N.J.L. 237, 88 A. 1097, 1099 (N.J. 1913), that whether an amendment changing the date upon which an offense is alleged to have occurred is "legally permissible depends on whether the date is material, for the court cannot by amendment make the indictment charge a crime when none is presented, or a crime different than that presented, by the grand jury." 10 S.W.3d 285. The court stated that time is material when "an act may be innocent at one time and criminal at another," but not in instances when the date is merely imperfectly stated. *Id.*

If a person altered, concealed or destroyed an item, that may otherwise have had future evidentiary value, before an investigation or official proceeding began, or after the same began but before that person knew of the investigation or official proceeding, there can be no probable cause to believe that that person committed the offense charged here in Count 8. That, the undersigned counsel submit, is a sterling example of "an act [that] may be innocent at one time and criminal at another[.]"

It is a simple matter to determine when, in this case, an investigation or official proceeding began. If there is no probable cause to believe that any such investigation or proceeding was underway not later than June 23, 2013, then it is unethical for prosecutors to proceed further on the grand jury's allegations in Count 8. Rule 8 of the Supreme Court of Tennessee, RPC 3.8(a) requires that the prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. *See also,* Local Rules of Practice § 5.04:

"I will voluntarily withdraw claims or defenses when it becomes apparent that they do not have merit[.]"

The mere fact that resolution of a pretrial motion to dismiss will likely require presentation of evidence related to the ultimate issue of whether guilt will or will not be proven at trial is no impediment to holding a hearing upon such motion. A good example of this principle is where evidence potentially favorable to the accused has been lost or destroyed while under control of the State.

The analysis which the Supreme Court adopted in *State v. Ferguson,* 2 S.W.3d 912 (Tenn. 1999), regarding a defendant's claim that potentially favorable evidence has been lost or destroyed is as follows, as summarized by the Supreme Court in *State v. Merriman,* 410 S.W.3d 779 (Tenn. 2013):

> *Ferguson* requires a trial court to determine "whether a trial, conducted without the lost or destroyed evidence, would be fundamentally fair." *Ferguson,* 2 S.W.3d at 914. When this claim is raised by a defendant, *Ferguson* first requires the trial court to determine whether the State had a duty to preserve the evidence. In *Ferguson,* we acknowledged the State's general duty to preserve all evidence subject to discovery and inspection under Rule 16 of the Tennessee Rules of Criminal Procedure and other applicable law, including *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Ferguson,* 2 S.W.3d at 917. We recognized, however, the difficulty in defining the boundaries of the State's duty to preserve evidence when its true nature, whether exculpatory, inculpatory, or neutral, can never be determined. *Ferguson,* 2 S.W.3d at 915, 917.
>
> Although difficult to define, the State's duty to preserve evidence is limited to constitutionally material evidence described as 'evidence that might be expected to play a significant role in the suspect's defense." *Ferguson,* 2 S.W.3d at 917 (quoting *California v. Trombetta,* 467 U.S. 479, 488, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). To meet this materiality standard, we held that the evidence must potentially possess exculpatory value and be of such a nature that the defendant would be unable to obtain

comparable evidence by other reasonably available means. *Ferguson*, 2 S.W.3d at 915, 918. If the trial court determines that the State had a duty to preserve the evidence, the court must determine if the State failed in its duty. *Ferguson,* 2 S.W.3d at 917.

If the trial court finds that the State failed in its duty to preserve the evidence, the trial court must consider the following factors to determine the consequences of that failure:

(1) the degree of negligence involved;

(2) the significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and

(3) the sufficiency of the other evidence used at trial to support the conviction.

Ferguson, 2 S.W.3d at 917 (footnote omitted). The trial court must balance these factors to determine whether a trial conducted without the missing or destroyed evidence would be fundamentally fair. *Id.* If the trial court concludes that a trial would be fundamentally unfair without the missing evidence, the trial court may then impose an appropriate remedy to protect the defendant's right to a fair trial, including, but not limited to, dismissing the charges or providing a jury instruction. *Id.*

Merriman, 410 S.W.3d at 784-86 [footnote omitted]. That analysis presupposes receipt of evidence at a hearing concerning whether the missing evidence would have been favorable, (that is, evidence probative of innocence,) as well as evidence concerning what remaining materials are available to the parties notwithstanding the loss, destruction or failure to preserve the missing evidence (that is, evidence which may be probative of guilt). The question there, however, is not guilt or innocence, but the availability *vel non* of a fundamentally fair trial for the accused.

The late former Governor and House Speaker Ned McWherter was reportedly fond of admonishing legislators who were reluctant to tackle difficult issues, "If you didn't want to work, you shouldn't have hired out." Here, if counsel for the State didn't want to defend against pretrial motions, they shouldn't have overcharged an innocent young man.

THE FOREGOING PREMISES CONSIDERED, the Defendant Brandon Robert Vandenburg respectfully entreats the Court to deny the State's motion to strike.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a correct and complete copy of the foregoing has been hand-delivered or mailed, first class postage prepaid, to the office of the District Attorney General, 222 Second Avenue North, Suite 500, Nashville, Tennessee 37201, this 29TH day of April, 2014.

John E. Herbison