STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal Number 2009 AP 001684-CR
Burnett County Circuit Court Case 08 CF 00052

STATE OF WISCONSIN,

Plaintiff – Appellant,

v.

KYLE LEE HUGGETT,

Defendant – Respondent.

ON APPEAL FROM A PRETRIAL ORDER
DISMISSING WITH PREJUDICE
A COMPLAINT AND AN INFORMATION
ENTERED IN BURNETT COUNTY CIRCUIT COURT,
THE HONORABLE JAMES D. BABBITT, PRESIDING.

BRIEF OF DEFENDANT-RESPONDENT

MASTANTUONO LAW OFFICE, S.C.
Attorney Craig Mastantuono
State Bar No. 1020125
Attorney Rebecca M. Coffee
State Bar No. 1041434

817 North Marshall Street
Milwaukee, Wisconsin 53202
(414) 276-8662

Attorneys for Defendant-Respondent

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ISSUE PRESENTED

Where the State failed to preserve "the most important pieces of exculpatory evidence" (R.36:13), did the Circuit Court err in dismissing the State's prosecution with prejudice?

The Circuit Court answered: No

STATEMENT OF FACTS

On January 20th, 2008, Kyle Huggett, Amy Kerbel and Kerbel's 5-year-old son Anthony were at Huggett's home in rural Danbury, WI. Kerbel was five months pregnant with Huggett's child at the time. (R.28:4; Ap.104.) At approximately 8:00 that evening, both Huggett and Kerbel began receiving threatening text messages and voicemail messages from John Peach, Kerbel's ex-boyfriend. (R.11:39,49,50.) Huggett responded to a couple of the text messages with sarcastic remarks. *Id.* Although neither Huggett nor Kerbel expected Peach to come to Huggett's home that night, they made a plan to call police if he did. (R.11:47, R.28:9,10; Ap.109-10.) At approximately 10:00 p.m. Peach and at least one other person showed up at Huggett's home. (R.28:13; Ap.113.) Immediately upon realizing Peach was outside, Huggett told Kerbel to take the phone in the back bedroom and call 911, which Kerbel did. (R.11:41-2,45-6.)

As Kerbel went into the bedroom to call 911, Peach and a friend were on Huggett's front porch, yelling and pounding on Huggett's front door. (R.11:51, R.28:14; Ap.114) Huggett grabbed and loaded a handgun he kept on top of a shelf in his basement. (R.28:11; Ap.111.) Peach kicked in Huggett's door and came screaming and charging into the house. (R.28:15-16; Ap.115-116.) Peach turned toward Huggett, Huggett screamed "stop"; Peach took a couple steps toward him, and Huggett shot twice. (R.28:16,18; Ap.116,118.) Peach ran out of the house before collapsing on the front lawn. (R.11:44.)

Officers from the Burnett County Sheriff's Department ("BCSD") arrived shortly thereafter in response to Kerbel's 911 call. Deputy Bartosh arrived first at the residence and spoke with Huggett, who stated: "I shot him, he broke into my house and I thought he was going to kill me." Deputy Bartosh placed Huggett under arrest and searched him, seizing, among other items, his cellular phone. (R.30:44-45.)

Deputy Bartosh then spoke with Kerbel, who, together with her 5-year-old son, resided with Huggett. Kerbel immediately told the Deputy about text and voicemail messages she had received from Peach earlier that night. (R.30:38,52.) Kerbel pulled the text messages up on her phone

and handed the phone to Deputy Bartosh, who began to write down some of the messages, one of which read: "FU bitch hes fucked 2 nite things will get real." (R.27:1.) Kerbel also pulled up her voicemail message from Peach and handed the phone to the Deputy to listen to it. After listening to it for just a few seconds, and recognizing the phone as containing important evidence, the Deputy seized Kerbel's phone and voicemail pass code. (R.30:53.)

After he was arrested, Huggett was taken to the Burnett County Sheriff's Department, where he gave a voluntary statement to BCSD Detective Finch. (R.28:1-34; Ap.101-134.) During that interview, Huggett told the Detective that he acted out of fear for what Peach would do to him, Kerbel, and her son. (R.28:18,24; Ap.118,124.) He told the Detective about both the text and voicemail messages from Peach on his phone and Kerbel's phone, and described them as threatening and screaming (R.28:6-8, 25,26, R.30:71-74; Ap.106-8, 125-6.) The Detective never listened to nor recorded the voicemail message on Huggett's phone, nor asked for his permission to do so. (R.30:78.) Following that interview, Huggett was held in custody until January 23rd, 2008, when he was released on cash bond. (R.1:1.)

Despite both Huggett and Kerbel alerting officers to the messages on their phones, which remained in BCSD custody, officers never recorded the voicemail messages from either phone, nor asked for permission from Huggett or Kerbel to do so.

On January 25th, 2008, the State issued a subpoena to All-Tel, the cellular phone provider for both Huggett and Kerbel, ordering All-Tel to produce the following information for the cell phone numbers assigned to Huggett and Kerbel: "[B]illing statements, account records, internet usage, T-Zone usage, IM usage, text messages, or any other records in any form." (R.24:1.) The subpoena did not demand voicemail messages from either phone. (R.24:1,2.) On February 1st, All-Tel responded to the BCSD that "[T]here is no text message data available for the time period requested. All other information has been provided." (R.24:5.) Over one month later, on March 11th, the State issued a search warrant for the three phones, which were then still in the BCSD's custody.

(R.15:1-4.) Pursuant to that warrant, BCSD Detective Mead photographed the text messages that remained on the three phones. (R.30:100.) By that time, the voicemail messages on both Huggett's phone (R.32:2)[1] and Kerbel's phone (R.30:103) had been lost, having been automatically deleted on or about January 27th, 2008. (R.36:5.)

Though he was arrested on January 20th, 2008, the State did not initiate formal prosecution against Huggett until May 13th, 2008. (R.4:1-4.) On June 3rd, shortly after being retained, counsel for the defense sent the District Attorney via email and mail a request to preserve any and all recordings, transcripts or records of voicemail messages on Huggett's phone and Peach's phone. (R.30:10, R.29:4.) Following the preliminary hearing on July 16th, the defense filed a formal discovery demand, which included, among other things, all voicemail recordings and text messages. (R.9:1-3.)

On February 24th, 2009, the BCSD advised the defense that officers could no longer access any voicemail messages from the phones. On February 25th, 2009, Huggett filed a Motion to Dismiss Prosecution. (R.29:1-7.) The Circuit Court held an evidentiary hearing the following day, at the conclusion of which, the Court ordered briefing by the parties on the issue of what duty, if any, Huggett had to remotely access the voicemail message on his phone, and whether Huggett could be compelled to provide his voicemail pass code to police. (R.30:137,142.) The Circuit Court also ordered that all three cellular phones be sent to the Wisconsin State Crime Lab for analysis to determine whether any information could be retrieved. (R.30:135.) On March 3rd, having been requested to do so for the first time, Huggett voluntarily provided his voicemail pass code to BCSD officers. (R.31:2.) On March 25th, 2009, a letter from All-Tel confirmed that the message on Huggett's phone was gone. (R.32:1,2.) On May 29th, 2009, the Circuit Court issued a decision granting Huggett's motion to dismiss prosecution with prejudice. (R.36:1-14.)

[1] All-Tel provided this information on March 25th, 2009, pursuant to a subpoena sent by Huggett's Counsel on March 19th, 2009.

STANDARD OF REVIEW

This case presents a mixed question of law and fact. The factual portion concerns the police officers' acts and omissions, whether the State possessed the voicemail messages at issue, and whether the facts meet the legal standard established by *California v. Trombetta,* 467 U.S. 479 (1984). An Appellate Court will uphold a Circuit Court's findings of fact unless they are clearly erroneous. *Noll v. Dimiceli's, Inc.,* 115 Wis. 2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). If the Appellate court accepts the Circuit Court's findings of fact, it reviews de novo the application of the legal standard to those facts. *See State v. Hahn*, 132 Wis. 2d 351, 356-7, 392 N.W.2d 464 (Ct. App. 1986).

A Circuit Court's dismissal of prosecution with prejudice is subject to an abuse of discretion review. "To find an abuse of discretion an appellate court must find either that discretion was not exercised or that there was no reasonable basis for the trial court's decision." *Hahn*, 132 Wis. 2d 351, 361 (quoting *Wisconsin Pub. Serv. Corp. v. Krist*, 104 Wis. 2d 381, 395, 311 N.W.2d 624 (1981)).

ARGUMENT

I. As the State correctly notes, this Court is without jurisdiction to overrule or modify *State v. Greenwold*, and, in any event, this argument was waived.

As its primary argument, the State seeks to have *State v. Greenwold,* 189 Wis. 2d 59, 525 N.W.2d 294 (Ct. App. 1994) overruled. The State correctly recognizes that this Court is without jurisdiction to overrule or modify *Greenwold*. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (the court of appeals may not overrule, modify or withdraw language from a previously published decision). As a separate matter, the State waived this argument. It not only failed to raise it in the Circuit Court, its arguments below relied

exclusively on *Greenwold* rather than challenging it.[2] "It is a fundamental principle of appellate review that issues must be preserved at the circuit court." *State v. Huebner,* 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727; *see also State v. Hahn,* 132 Wis. 2d at 361 ("[w]e will not address issues raised for the first time on appeal.").

II. The correct analysis of the State's failure to preserve evidence in a criminal case distinguishes between potentially useful and apparently exculpatory evidence, as this Court recognized in *Greenwold* following the *Trombetta*/*Youngblood* decisions.

During pre-trial litigation on Huggett's motion to dismiss in the present case, both parties and the Circuit Court adopted the same legal framework for evaluating whether the State's actions violated Huggett's right to due process of law. That framework is outlined in *State v. Greenwold*, which sets forth the Wisconsin Court's interpretation and adoption of the United States Supreme Court decisions in *California v. Trombetta*, 467 U.S. 479 (1984) and *Arizona v. Youngblood*, 488 U.S. 51 (1988).

This analysis has consistently adhered to the presumption that good faith is irrelevant when the State fails to either disclose or preserve evidence that is apparently exculpatory to the defendant in a criminal case. When such evidence - significant in its obvious exculpatory nature - fails to transfer from state control to the defendant, fundamental fairness and due process violations result, regardless of the good or bad faith of the state actors involved. The State's invitation to change that premise by erroneously interpreting the *Trombetta/Youngblood* cases and overturning the *Greenwold* decision would not only support a flawed result in the present case, but would significantly depart from binding precedent in this area of law. The Circuit Court's ruling should

[2] "In the trial court, *neither party* raised the question of whether the court of appeals' decision in *State v. Greenwold*, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994), is correct in interpreting *California v. Trombetta*, 467 U.S. 479 (1984), and *Arizona v. Youngblood,* 488 U.S. 51 (1988), as articulating two alternative due process tests instead of a single test for loss-of-evidence cases." State's Br. at 2 (emphasis added).

be affirmed because where "the most important pieces of exculpatory evidence" (R.36:13) are lost, a fair trial is simply not possible.

A. The *Trombetta/Youngblood* framework.

The legal issue in *California v. Trombetta* involved whether the State is required to preserve potentially exculpatory evidence on behalf of defendants in criminal cases. *Trombetta,* 467 U.S. at 481. The evidence in question in that case was breath samples from suspects arrested for suspected drunk driving. The defendants challenged the admissibility of breath analysis test results in criminal prosecutions because law enforcement agencies failed to preserve the breath samples for subsequent testing. *Id.*

The starting point for the *Trombetta* analysis was the recognition that "[t]he due process clause of the Fourteenth Amendment requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment." *Id.* at 480-81 (citing *United States v. Agers*, 427 U.S. 97 (1976) and *Brady v. Maryland*, 373 U.S. 83 (1963)). From there, the *Trombetta* Court referenced a body of cases ensuring that criminal prosecutions comport with notions of fundamental fairness by affording criminal defendants access to evidence. *Id.* at 485.

Never squarely addressed, the *Trombetta* Court noted, was "the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants." *Id.* at 486. While reaffirming a court's ability to bar further prosecution when evidence is destroyed in violation of the constitution, *id.* at 487, the *Trombetta* Court ruled that there was little chance that the breath samples, having already been tested through generally accepted means, would have been exculpatory. *Id.* at 489. This finding was the key to the Court's ruling that California's policy of not preserving the breath samples was without constitutional defect. "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, *see United States v. Agurs*, 427 U.S. at 109-110, evidence must both possess an

exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 488-89. The *Trombetta* decision limited findings of constitutional violation to cases involving state loss or destruction of evidence that is apparently exculpatory, which the already-tested breath samples in that case were not.

The legal issue in the *Arizona v. Youngblood* decision also involved the extent to which the Due Process Clause of the Federal Constitution requires states to preserve "evidentiary material that might be useful to a criminal defendant," or potentially exculpatory evidence. 488 U.S. at 53. The evidence in question in that case was semen samples and clothing collected from a victim during a sexual assault investigation. While in the State's possession, the evidence was not properly stored for subsequent testing. A defense expert testified at Youngblood's criminal trial that timely performance of tests with properly preserved samples, which had not been conducted in that case, could have produced results exonerating the defendant. *Id.* at 54.

In addressing whether the State's failure to preserve the items for subsequent tests caused a constitutional violation, the *Youngblood* Court discussed the issue of good faith on the part of the government in cases where the claims are based upon loss of evidence attributable to the government. *Id.* at 57. The Court stated:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the result of which might have exonerated the defendant.

Id. at 58. The Court carefully separated out potentially useful evidence, holding that a bad faith finding is *required* before the Court would deem government loss or destruction of this potentially exculpatory evidence to rise to a constitutional

violation. *Id. Youngblood* clearly declined to extend that requirement to cases involving evidence with exculpatory value apparent to the police before the evidence is destroyed. *Id.* at 56.[3]

In the present case, the State erroneously argues that the crucial distinction in the above quote from the *Youngblood* decision is the distinction between *disclosure* of evidence and *preservation* of evidence. That argument fails to recognize that the crucial distinction in *Youngblood*, as in *Trombetta,* was between evidence that is obvious in its exculpatory nature and evidence that is only potentially exculpatory. It also places an illogical focus upon disclosure of evidence versus preservation of evidence, one that presumably would hold law enforcement to a strict, *Brady*-type standard for turning over clearly exculpatory evidence upon a defendant's request, but to a lesser, negligence-is-excusable standard for preserving same and preventing its loss. This distinction is meaningful only in the abstract and cannot be applied concretely. As discussed further below, the State's argument is inconsistent with this Court's own precedent, which follows the Wisconsin Court's and United States Supreme Court's distinction between preservation of clearly exculpatory versus potentially useful evidence. [4]

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[3] Following the U.S. Supreme Court's decision in *Youngblood*, Larry Youngblood returned to prison in 1993, when the Arizona Supreme Court reinstated his conviction. In 2000, Youngblood's attorneys requested that police test the degraded evidence using new DNA technology. Those results exonerated Youngblood, and he was released from prison. Subsequently, entry of the DNA profile from the evidence to the national convicted offender database produced a match with Walter Cruise, then a Texas inmate, who was ultimately convicted of the crime and sentenced to twenty-four years in prison. Innocence Project, Profile of Larry Youngblood, www.innocenceproject.org/Content/303.php (last visited Oct. 2, 2009); *see also* Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 Wash. U. L. Rev. 241, 243 n.6 (2008).

[4] The State's argument that the proper test is a three-part conjunctive test requiring a showing of bad faith in all government loss of evidence cases, whether that evidence is apparently exculpatory or only potentially exculpatory, would be an improper extension of State government authority beyond the minimum restriction delineated by the U.S. Supreme Court in *Youngblood*. It is worth noting that twelve states have moved away from the *Youngblood* decision in a direction opposite than that urged by the State in this case. These states have ruled that defendants need not

B. The Circuit Court properly applied *Greenwold*.

This Court's decision in *State v. Greenwold* directly addressed the court's application of a constitutional standard to the conduct of police officers preserving evidence. 189 Wis. 2d at 66. The evidence not preserved in that case was an impounded automobile and blood samples that were improperly stored after a suspected drunk driving related car accident, which resulted in a death. *Id.* at 64. After being charged with homicide by intoxicated use of a motor vehicle, Greenwold moved to dismiss the charge, asserting that the State failed to preserve relevant and exculpatory evidence, resulting in a Constitutional due process violation. *Id.* at 65. At a hearing before the Circuit Court, the defense stipulated to a lack of bad faith by the officers in causing the destruction of evidence. *Id.* at 66. The Circuit Court dismissed the criminal case, finding that the officers negligently breached their duty to investigate, constituting bad faith. *Id.*

On appeal, this Court addressed the good faith/bad faith analysis and the *Trombetta* and *Youngblood* decisions in reaching the conclusion that "[i]n *Youngblood*, the Court distinguished 'potentially useful evidence' from 'exculpatory evidence.'" *Id.* at 67 (citing *Trombetta,* 467 U.S. at 485 and *Youngblood*, 488 U.S. at 57-58). The *Greenwold* Court correctly found that the *Youngblood* Court "reasoned that the State's bad faith is irrelevant when it fails to disclose exculpatory evidence." *Id.* The *Greenwold* Court recognized that *Youngblood's*

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demonstrate bad faith on the part of law enforcement in government loss of evidence cases in order to avail themselves of due process protection under state constitutions. *See* Alabama, *Ex parte Gingo*, 605 So. 2d 1237(Ala. 1992); Alaska, *Thorne v. Department of Public Safety*, 744 P.2d 1326 (Alaska 1989); Connecticut, *State v. Morales*, 657 A.2d 585 (Conn. 1995); Delaware, *Hammond v. State*, 569 A.2d 81 (Del. 1989); Hawaii, *State v. Okumaura*, 894 P.2d 80 (Haw. 1995); Idaho, *State v. Fain*, 774 P.2d 252 (Idaho 1989); Massachusetts, *Commonwealth v. Henderson*, 582 N.E.2d 496 (Mass. 1991); New Hampshire, *State v. Smagula,* 578 A.2d 1215 (N.H. 1990); New Mexico, *State v. Riggs*, 838 P.2d 975 (N.M. 1992); Tennessee, *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999); Vermont, *State v. Delisle*, 648 A.2d 632 (1994); and West Virginia, *State v. Osakalumi*, 461 S.E.2d 504 (W.Va. 1995).

> [A]nalysis suggests that if the materiality of the evidence rises above being potentially useful to clearly exculpatory, a bad faith analysis need not be evoked; the defendant's due process rights are violated because of the apparently exculpatory nature of the evidence not preserved.

Id. at 68.

> Thus, the due process analysis is two-pronged. A defendant's due process rights are violated if the police: (1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory.

Id. at 67-68 (citing *Youngblood*, 488 U.S. at 57-58).

> Under prong two, the bad faith analysis, the investigator's knowledge of the potentially useful or potentially exculpatory nature of the evidence is also relevant. However, if the State fails to disclose *or preserve* materially exculpatory evidence, the defendant's due process rights are violated under the first prong of the test.

Id. at 68 (emphasis added) (citing *Youngblood*, 488 U.S. at 57-55).

The *Greenwold* Court concluded that the evidence in question in that case, the impounded auto and blood samples, whose evidentiary value was not clear but could have been subjected to further testing had it been preserved properly, was not apparently exculpatory. *Id.* at 68 (citing *State v. Greenwold, ("Greenwold I")* 181 Wis. 2d 881, 885-86, 512 N.W.2d 237 (Ct. App. 1994)). Having reached that conclusion, the Court concluded that a bad faith showing was required to demonstrate a due process violation, and that Greenwold failed to meet that burden. *Id.* at 69.[5]

The evidence in the present case, recorded threats from the decedent to the suspect in a homicide investigation, were "the most important pieces of exculpatory evidence" (R.36:13)

[5] Greenwold stipulated that the officers did not act in bad faith in failing to preserve evidence in that case. Just as significant, the Court found that trial testimony indicated that the officers were not aware of the potentially exculpatory value of the evidence when they collected it. *Id.* at 69-70.

and were immediately apparent as such, as discussed further below, and Huggett was entitled to have law enforcement officers preserve and disclose it once they collected it. Given the high degree of materiality of this evidence, a bad faith analysis is not implicated.

III. The State violated Huggett's right to due process when it failed to preserve apparently exculpatory evidence.

As discussed above, the controlling standard in this case has two requirements. First, the evidence must possess an exculpatory value that was apparent before it was destroyed, and second, the evidence must be of such a nature that the defendant is unable to obtain comparable evidence by other reasonably available means. *See Trombetta,* 467 U.S. at 489; *Greenwold*, 189 Wis. 2d at 67. The evidence at issue in the present case, the voicemail messages left by Peach on the phones belonging to Kerbel and Huggett, satisfies both of these requirements.

A. The exculpatory nature of the voicemail messages was apparent prior to their destruction.

The State conceded at the circuit court level that the voicemail messages from Peach were apparently exculpatory. At the evidentiary hearing on Huggett's motion to dismiss prosecution, the State's concession was explicit:

> I would just in way of response and perhaps we will have more argument later, I will tell you what is not going to be a point of contention. I'm not going to sit here as an officer of the court, as district attorney, and an advocate for justice and tell the court that this evidence is not exculpatory or apparently exculpatory. Of course what that does in the [*Youngblood* line] of cases is render the issue of good faith irrelevant here, at least to that extent.

(R.30:12; A-Ap.126.) It was from this premise, accepted by both parties and the Circuit Court, that the evidence in question was unquestionably apparently exculpatory, that the Circuit Court analyzed and ruled on Huggett's motion to dismiss.

The significant and exculpatory nature of these voicemail messages was immediately made apparent to the Sheriff's Department Officers investigating the incident that evening. Deputy Bartosh was the first to arrive at Huggett's home in response to the 911 call. When the Deputy approached Huggett in the front yard, Huggett stated ". . . I shot him. He broke into my house. I thought he was going to kill me." (R.30:45.) The Deputy placed Huggett under arrest, taking his cell phone. *Id.* Deputy Bartosh then went into the home and began speaking with Amy Kerbel. Within just a matter of minutes, Kerbel told Deputy Bartosh about Peach's threats, retrieved both the text and voicemail messages from Peach, gave the Deputy her cell phone, and provided her voicemail pass code. (R.30:37-39.) One of the text messages that Deputy Bartosh viewed and copied down said: "I will be there when the game's over. I'm in crazy mode now. Fuck you. It's going down, Bitch." (R.30:48, R.27:1.) Deputy Bartosh only listened to a few seconds of Peach's voicemail message on Kerbel's phone. (R.30:53.)

Deputy Bartosh testified at the motion hearing that she immediately recognized the text and voicemail messages on Kerbel's phone as significant evidence, knew at that point that Huggett was claiming self-defense, and therefore took the phone and the voicemail pass code as evidence in the ongoing investigation. (R.30:53.) The immediately apparent exculpatory nature of this evidence is further demonstrated by the following colloquy between the Circuit Court and Deputy Bartosh at the motion hearing:

> Court: Okay. And at the time you reviewed the texts and listened to the voice mail, you had already placed the defendant Kyle Huggett under arrest and knew that, in essence, he was claiming self defense?
> Deputy: Yes.
> Court: He said the guy - - I was afraid he was going to kill me so I shot him, basically?
> Deputy: Yes.
> Court: And even thought you don't recall the tone and tenor of the voice mail, is it a fair assumption to say that in your 11 years of experience as a law enforcement officer, whatever you heard on that voice mail you knew this is evidence and I better have it?
> Deputy: Yes.

> . . . .
> Court: And it's a long time ago, I understand, Deputy, but can you give us an estimation as to timewise how long you listened to that message?
> Deputy: I believe it would have been a very short time, a second or two. It - - I believe after I had seen the text messages I had informed her that the phone was going to be placed into evidence. And I - - I recall her stating that she wanted to make a phone call to her mother and in that - - I believe that's when she started to show me more on the phone and then it was enough, the phone needs to be seized before we lose anything off the phone.
> Court: Okay. I'm not trying to put words in your mouth but let me go through it. You arrive on the scene where there's a person who's probably dying in the front yard, true?
> Deputy: Correct.
> Court: And you arrest Mr. Huggett and he makes a statement about shooting the guy on the front lawn, true?
> Deputy: Yes.
> Court: You're awaiting backup, you have numerous things you want to be doing at that time, you started listening - -or looking at the texts because Ms. Kerbel suggested you should, true?
> Deputy: Yes.
> Court: And then some - - some comment was made by her about a voice mail, you listened long enough to that to confirm that, in your 11 years experience, this is important stuff and that's when you said I'm going to seize the phone and then you got on with whatever else you needed to do?
> Deputy: Yes.

(R.30:52-54.)

Deputy Bartosh turned over the cell phone and her notes to BCSD Detective Mead, who then interviewed Kerbel. (R.30:50-51.) Kerbel alerted the Detective to the voicemail and text messages on her phone, told her they were threatening toward Huggett, and were available on Kerbel's phone, which was lying on the table in front of them during the interview. (R.30:99,107,112.) Detective Mead never listened to the voicemail message. (*Id.)*

Huggett also alerted officers to the voicemail messages on both his and Kerbel's phones during his voluntary interview with BCSD Detective Finch in the early morning

hours following his arrest.[6] Detective Finch described Huggett as being cooperative overall and answering all of her questions. (R.30:68,69.) He advised Detective Finch that he had acted in self-defense and that he pulled the trigger out of "fear." (R.30:69, R.28:18; Ap.118.) When asked what he feared from Peach, Huggett responded: "I - - I feared all of a sudden there he gets in the house - - he takes me out, he's got control, and his son who he - - he rarely sees and my girlfriend pregnant with my child are completely defenseless - - you know. Trapped in a room that - - that I told her to go into." (R.28:24; Ap.124.) Huggett further advised the Detective about both the text and voicemail messages from Peach, referred to them as threatening and screaming, and asked the Detective whether she had heard them yet. (R.28:25,26. R.30:70,71,74; Ap.125-26.) Detective Finch never asked for Huggett's consent to search his phone. (R.30:78.) The voicemail messages' significant exculpatory nature was apparent to police involved in this incident.

The Officers' actions of taking both phones as evidence, and writing down the pass code for Kerbel's phone, demonstrate that investigators immediately recognized the importance of this evidence. *See Hahn,* 132 Wis. 2d at 360 (finding that the State's act of impounding the vehicle, the lost exculpatory evidence at issue in that case, just after the accident demonstrated that the State immediately recognized the apparently exculpatory nature of the vehicle); *see also Greenwold*, 189 Wis. 2d at 69,70 (the Court based its conclusion that the officers were not aware of the potentially exculpatory nature of the lost evidence, a vehicle, on the officer's hearing testimony that he saw nothing of interest in the car when it was impounded, that the investigation was focused in a different direction, and that he had no reason to suspect that the evidence would have been helpful to the defendant).

Despite its concession to the Circuit Court that the voicemail messages were apparently exculpatory, the State

[6] At the motion hearing, there was conflicting testimony regarding whether Huggett listened to the message on Kerbel's phone. Kerbel did not think that he did; Huggett testified that he had. The Circuit Court found that Huggett was more credible on this point, and found as fact that Huggett listened to both voicemail messages. (R.36:6,7.)

argues for the first time on appeal that Huggett failed to meet the first requirement of the *Trombetta/Greenwold* standard because the messages were not *totally* (rather than *apparently*) exculpatory. (State's Br. at 17, 18.) The State's reference to a *totally* exculpatory standard is unsupported by the established case law on this issue, and the State cites no authority referencing a *totally* exculpatory test. Although the State does not define *totally* exculpatory, it argues that the voicemails do not meet this standard because, standing alone, they only support Huggett's claim that he *subjectively* believed that Peach intended to kill him or cause great bodily harm, as opposed to the prosecution's position that Huggett's actions were objectively unreasonable. This argument fails for the obvious reason that, by the State's analysis, no evidence whose significance is contested in the adversarial process could be characterized as apparently exculpatory, or inculpatory, for that matter. The reasonableness of Huggett's beliefs and actions during this incident are ultimately an issue of fact for the jury to determine at a trial. *See generally State v. Head*, 2002 WI 99, ¶ 115-16, 255 Wis. 2d 194, 648 N.W.2d 413. The voicemail messages are a vital piece of exculpatory evidence in this analysis. The messages were singularly exculpatory in nature; their interaction with other pieces of evidence in determining the existence of perfect self-defense is not the proper inquiry for deciding whether the evidence should have been preserved.

B. The screaming/threatening voicemail messages from Peach are of such a nature that Huggett is unable to obtain comparable evidence by any other reasonably available means.

In its decision granting Huggett's motion to dismiss, the Circuit Court identified the voicemail messages as "the most important pieces of exculpatory evidence." (R.36:13.) The Court further characterized this evidence as follows:

> It is hard to imagine any evidence more compelling than threats from the decedent that the defendant heard approximately two hours before the decedent is breaking into the defendant's residence. Because of law enforcement's failure to retain either voice mail, the jury -- through the State's inaction - - cannot avail themselves

> of this critical and necessary evidence. These voice mail messages are literally the last contact Peach had with Kerbel and Huggett prior to breaking into their residence. The messages represent the culmination of a week long exchange of heated and threatening text messages. . . . This Court believes that any trier of fact, in order to comport with the due process clause, would need to listen to at least one, and, even better, both voice mail messages in order to determine whether or not Huggett's actions were reasonable or an unreasonable exercise of the privilege of self-defense.

(R.36:10-11.)

In its criminal complaint, the State charged Huggett with one count of second degree intentional homicide in the shooting death of Peach, alleging that under all of the circumstances at the time of the shooting, Huggett acted with an actual but unreasonable belief that he or another was in imminent danger of death or great bodily harm, and an actual but unreasonable belief that the amount of force he used was necessary to defend himself or another. (R.4:1-4.) The Wisconsin Pattern Jury Instruction for second-degree intentional homicide requires the jury to put themselves in the defendant's position when determining whether he acted reasonably. *"The reasonableness of the defendant's belief must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now."* Wis. Pattern JI 1052 (2006) (emphasis added). The State thus put squarely at issue the reasonableness of Huggett's beliefs and actions during this incident, under all of the circumstances facing him at the time.

The destroyed evidence at issue here is irreplaceable in providing the jury with a complete view of the situation facing Huggett during the moments of the incident, and is crucial in determining the reasonableness of Huggett's beliefs and actions. Peach's voicemails to Huggett and Kerbel are the *only* pieces of evidence that reveal the decedent's own voice, tone, and actual words, screaming, threatening and directed at Huggett just hours before Peach and his friends came to Huggett's home in rural Danbury, kicked down the front door and charged into Huggett's home. (R.28:14-16.) The messages are described by Kerbel and Huggett as "angry and yelling" (R.30:22), "a lot of yelling, and screaming, and very

threatening tone" (R.30:126), and the gist of them as being threats to "kick Kyle's ass." (R.30:25.) Kerbel testified that these messages were part of her consideration when deciding to call 911 when she realized Peach was outside the home that night. (R.30:27.)

Although Kerbel and Huggett were able to describe the tone of voice and gist of the messages when they testified at the motion hearing, neither was able to recall the exact words Peach used. Huggett was able to recall only some of the words in the messages, specifically, "I'm John Peach mother fucker" and "he was going to send me to the hospital in pieces" but he did not remember any of the other words. (R.30:126.) Kerbel was unable to recall any of the words used in either message, and did not listen to the entire message on left on Huggett's phone. (R.30:19,20,22,23.)[7] Deputy Bartosh only listened to the message on Kerbel's phone, and only for a few seconds. She can recall only that she came away with the perception that the message should be preserved. (R.30:52-54.) This important and clearly exculpatory evidence cannot be duplicated nor adequately described by either a witness or an instruction to the jury.

C. The State took and maintained exclusive control over the voicemail messages on Kerbel's and Huggett's cellular phones when they took the phones the night of the incident as evidence in the case, and kept them in their possession.

The State argues that it did not have exclusive control over the voicemail messages because Huggett and Kerbel could have remotely accessed their messages even while the police kept their phones as evidence in an ongoing homicide investigation. (State's Br. at 19.) The Circuit Court rejected this argument for two reasons. First, Huggett never had access to Kerbel's voicemail pass code, and therefore would not have access to her message. And, second,

[7] That no one other than Huggett is able to recall even some of the words Peach used is significant when considering the potential remedy for this lost evidence, as Huggett has a Constitutional protection against self-incrimination at trial.

> [A]s for Huggett's voice mail message, it is law enforcement officers who are trained in the seizure and preservation and handling of evidence. The officers failed to take the necessary steps to preserve the evidence. *Can law enforcement be held to a lower standard of evidence preservation than a person who is not yet charged with any offense? The fault lies here with law enforcement, not with an uncharged suspect, for not preserving this crucial evidence.* This Court is satisfied that Huggett did what he reasonably should have done to have the evidence preserved; namely, he told Detective Finch precisely where the voice mail was located, he summarized it to her immediately after the incident as best he could, and he even went so far as to suggest she listen to it.

(R.36:11,12 (Emphasis added).)

Additionally, at a follow up interview three days after the incident, BCSD Detective Finch told Kerbel that they were planning to get a warrant for Kerbel's phone so they could access her text and voicemail messages. Kerbel's response to Detective Finch was essentially you have my phone, "you can have at it." (R.30:31, R.36:5.) Additionally, There is nothing in the record to explain the State's decision to forego asking Huggett for his consent to search his phone that night, and recording the voicemail message. He had, after all, alerted officers to the importance of the voicemail messages. In fact, this is what Bartosh started to do when she took Kerbel's phone, wrote down her voicemail pass code as part of her report, and turned over both the phone and pass code to Detective Mead.

In *State v. Hahn*, the Court of Appeals rejected a similar argument by the State, i.e. that it did not have exclusive possession and control of Hahn's truck, the destroyed evidence in that case, and therefore had no duty to preserve it. 132 Wis. 2d at 357. In *Hahn*, the State impounded Hahn's truck during an investigation and prosecution for homicide by intoxicated use of a motor vehicle, and had it towed to a private garage. *Id.* at 354. While the truck was at the garage, Hahn signed over his vehicle title to his insurance company, which in turn set in motion the truck's release to a scrap yard, where the truck was partially dismantled, causing to be inadequate for testing by a defense expert for vehicular defect, an issue relevant to a statutory defense to that charge. *Id.* at 354, 358-59.

The State argued that Hahn actively contributed to the vehicle's destruction when he gave the truck's title to his insurance company. *Id.* at 360. The Court rejected this argument, stating that

> [W]hen the sheriff's department told defendant that his truck had been impounded, he had no reason to believe that any action he might take regarding the vehicle . . . would affect the impoundment. While defendant's act of signing the truck's title may have initiated a chain of events which resulted in the destruction of his truck, defendant's action has no relationship to the state's duty to preserve evidence.

Id.

The voicemail messages, like the truck in *Hahn*, were in the State's exclusive control from the moment officers took the phones that night. Huggett, like the defendant in *Hahn*, had no reason to believe that once the phones were taken into police custody as evidence, and he alerted officers to the voice and text messages, that the State would lose this evidence. Further, Huggett was not yet even charged with an offense until five months after the incident and investigation. Huggett's actions or inactions have no relationship to the State's duty to preserve exculpatory evidence.

IV. Dismissal with prejudice was the only meaningful remedy.

In ordering Huggett's case dismissed with prejudice, the Circuit Court acknowledged that it was imposing the most serious remedy. (R.36:9.) Nonetheless, that Court found that:

> Because what may well be characterized as the most important pieces of exculpatory evidence were not preserved by law enforcement officers, Mr. Huggett's due process rights have been denied. This evidence simply cannot be adequately reconstructed by any other means, and the only sanction left to this Court is dismissal of the criminal case with prejudice.

(R.36:13.)

The State in the present case argues that dismissal with prejudice is an unfairly harsh sanction against the State, and should not be an "automatic remedy" in cases of no bad faith like the present case. (State's Br. at 26, 27.) The State also argues that Huggett has other means of establishing the voicemail's contents and tenor. However, the State's argument fails for three reasons; first, as explained above, the State has already agreed that a bad faith analysis is irrelevant in this case because of the apparently exculpatory nature of the evidence. (R.30:12.) Second, Huggett does not have other means of establishing the words Peach used or duplicating the tenor, demeanor, or tone of Peach's voice to the jury. Only Huggett recalls a few of the words Peach used, and Huggett and Kerbel could only describe them as threatening and yelling – a wholly inadequate substitute for the jury hearing the decedent's actual voice, just as Huggett heard it hours before Peach broke down his front door.

Third, it is clear from the Circuit Court's written decision granting Huggett's motion that dismissal with prejudice was not an "automatic remedy," but viewed and treated as the most serious sanction available to that Court. The Circuit Court carefully deliberated this issue and did not abuse its discretion in reaching what it recognized as the "most draconian sanction" available. (R.30:135,140-41.) "An appellate court does not find an abuse of discretion merely because it would have decided the question differently. 'To find an abuse of discretion an appellate court must find either that discretion was not exercised or that there was no reasonable basis for the trial court's decision.'" *Hahn*, 132 Wis. 2d at 361. Huggett respectfully suggests that this Court find that the Circuit Court reasonably exercised its discretion in granting Huggett's motion to dismiss prosecution with prejudice.

Finally, the *Hahn* Court rejected the State's argument that dismissal with prejudice was too severe because the ultimate effect of the evidence's destruction could not be known. *Hahn*, 132 Wis. 2d at 362. In that case, the State argued that a special instruction to the jury, or stipulation between the parties could have been given instead. *Id.* However, the Court of Appeals noted that the trial court's conclusion that the vehicle's destruction would have made an

adequate defense impossible because no other evidence would have been comparable was not unreasonable, and the Court did not abuse its discretion. *Hahn*, 132 Wis. 2d at 362, 363.

CONCLUSION

For the foregoing reasons, Huggett respectfully requests that this Court uphold the Circuit Court's ruling dismissing the State's prosecution against him with prejudice.

Respectfully submitted this 5th day of October, 2009.

MASTANTUONO LAW OFFICE, S.C.
Attorney Craig Mastantuono
State Bar No. 1020125
Attorney Rebecca M. Coffee
State Bar No. 1041434
817 North Marshall Street
Milwaukee, Wisconsin 53202
(414) 276-8662

By: _____
Rebecca M. Coffee
Counsel for Kyle Huggett

ELECTRONIC BRIEF CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wisconsin Statute section 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

_____
Rebecca M. Coffee
State Bar No. 1041434

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wisconsin Statute section 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 7,167 words.

_____
Rebecca M. Coffee
State Bar No. 1041434

CERTIFICATION OF MAILING

I hereby certify that on this 5th day of October, 2009, pursuant to Wisconsin Statute section 809.80(3)(b) and (4), the original and nine copies of the Brief of Defendant-Respondent were served upon the Wisconsin Court of Appeals via United States first-class mail in properly addressed, postage paid envelopes. Three copies of the same were served upon counsel of record for Plaintiff-Appellant via United States first-class mail in properly addressed, postage paid envelopes.

_____
Rebecca M. Coffee
State Bar No. 1041434

APPENDIX

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as separate document or as a part of this brief, is an appendix that complies with Wisconsin Statute section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Rebecca M. Coffee
State Bar No. 1041434