

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, :  
 :  
 vs. :  
 :  
 MICHAEL LUPARDUS, :  
 :  
 Defendant-Appellant. :

Case No. 08-2487  
On Appeal from the Washington  
County Court of Appeals  
Fourth Appellate District  
Case No. 08 CA 31

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF DEFENDANT-APPELLANT MICHAEL LUPARDUS**

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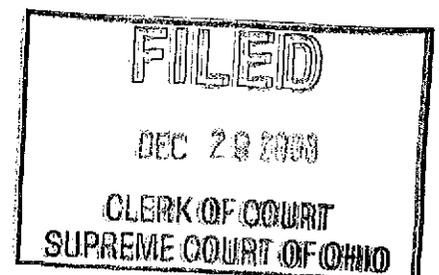
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## **EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case contains an issue of public and great general interest that warrants this Court's jurisdiction. The prosecutor in this case elicited testimony and made improper arguments to the jury that deprived Michael Lupardus of a fair trial. This Court should accept jurisdiction to vindicate those rights.

### **STATEMENT OF THE CASE AND FACTS**

Michael Lupardus was charged with operating a vehicle while intoxicated, a violation of R.C. 4511.19(A)(1)(a). At approximately 3:45 a.m., on June 25, 2006, Trooper Luke Forshey was traveling northbound on State Route 7. Trooper Forshey observed Michael Lupardus driving southbound on S.R. 7. Trooper Forshey pulled Mr. Lupardus over for traveling over the posted speed limit. When Trooper Forshey turned on his lights to pull over Mr. Lupardus, the in-car video camera automatically turned on and began taping. Trooper Forshey alleged that, while speaking with Mr. Lupardus, he noticed that his eyes were bloodshot and glassy and noticed an odor of alcohol. Therefore, he asked Mr. Lupardus to perform a series of field sobriety tests. He subsequently arrested Mr. Lupardus. Later that night, Trooper Forshey reviewed the video to prepare his report and statement.

Mr. Lupardus pleaded not guilty and demanded discovery on June 26, 2006. On July 25, 2006, the arresting officer, Trooper Forshey, attempted to make a copy of the videotape. Sergeant McDonald testified, "We just changed the equipment on DVD's to make it easier to make other copies, 'cause we were getting bombarded with copy requests. Trooper Smith had made one or two prior, he said he would take care of it . . . So I told Trooper Forshey to have Trooper Smith handle it for him." This was Trooper Forshey's first effort to copy a videotape onto DVD. According to Trooper Smith, "I explained it to them [sic] and thought he, you know,

he knew how to do it. So I left the room and he started making his tape from the - or his DVD from the cassette, and when I walked in the room, I think it was twenty-five, maybe thirty minutes later, I looked up on the screen and I didn't see the picture." Trooper Smith stopped Trooper Forshey's copying and learned that the officer reversed the procedure and copied over the evidentiary video tape. The final result is that the entire tape was destroyed.

The tape cannot be restored to its former condition. The State conceded "that the original tape correctly recorded everything." It was a unique piece of evidence not otherwise obtainable by other means. Counsel for Mr. Lupardus filed for discovery before the tape was destroyed. She notified the State that she wanted to see the tape, and asked for a continuance so that she could do that. Counsel for the State agreed to the continuance, but then the tape was destroyed. Mr. Lupardus filed a motion to dismiss and/or suppress because the State destroyed exculpatory evidence. A hearing was held on October 23, 2006, in which the court was to hear evidence on Mr. Lupardus' motion to dismiss/suppress. Counsel for Mr. Lupardus maintained that the burden was on the State to prove that the tape was not materially exculpatory. Over objection from defense counsel, the court continued the hearing for one week because the State's witness, Trooper Forshey, failed to appear at the hearing despite being under subpoena.

On November 9, 2006, an additional hearing was held. Mr. Lupardus disputed Trooper Forshey's testimony regarding the results of the walk-and-turn and one-leg-stand tests. Mr. Lupardus' fiancé, Patricia Frank, testified that Mr. Lupardus was not under the influence of alcohol, although she did not witness the field tests. Sgt. McDonald was also with Trooper Forshey when he pulled over Mr. Lupardus, but he did not witness the field tests and could not corroborate Trooper Forshey's testimony.

Subsequently, the court found: (1) no motion to preserve the evidence had been filed but the court's ruling was not dependent on whether such a motion had been filed; (2) the State did

not act in bad faith when it destroyed the tape; and (3) defendant's assertions were insufficient to fulfill his burden of showing that the videotape contained apparent exculpatory evidence. The court further noted that "the Ohio Supreme Court on March 14, 2007 heard oral argument in *State v. Geeslin* decided by the 3<sup>rd</sup> Dist. No. 10-05-06, 2006-Ohio-1261. The Court follows *Geeslin* and as applied to the facts of this case DENIES the Motion."

Mr. Lupardus entered a no contest plea and the trial court convicted him. Mr. Lupardus appealed and the Fourth District dismissed his case because it found that the sentencing entry was not a final appealable order. Subsequently, the trial court entered a nunc pro tunc order clarifying in the original entry that Mr. Lupardus was entering a no contest plea to a violation of R.C. 4511.19(A)(1)(a). Mr. Lupardus appealed, and the Fourth District affirmed the trial court's decision. *State v. Michael Lupardus*, 4th Dist. No. 08CA31, 2008-Ohio-5960.

## FIRST PROPOSITION OF LAW

If the State destroys evidence after the defendant has made a discovery request, the burden of proof shifts to the State to prove the evidence was not materially exculpatory. If the State fails to meet its burden, the case must be dismissed. Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Sections 16 and 10, Article I of the Ohio Constitution.

The State violated Mr. Lupardus' due process right when it destroyed favorable evidence that was material to the issue of guilt and when the trial court denied Mr. Lupardus' motion to dismiss. A court of appeals reviews de novo a trial court's denial of a motion to dismiss based upon the state's failure to preserve materially exculpatory evidence. *State v. Benton* (2000), 136 Ohio App.3d 801, 805, 737 N.E.2d 1046; accord, *California v. Trombetta* (1984), 467 U.S. 479, 489, 104 S. Ct. 2528 (failure to preserve materially exculpatory evidence); *Arizona v. Youngblood* (1988), 488 U.S. 51, 58, 109 S. Ct. 333 (destruction in bad faith of potentially useful evidence). "Proving that lost or destroyed evidence is materially exculpatory is a daunting burden, one that has generally been placed with the defendant." *Benton*, at 805-07. In *Columbus v. Forest* (1987), 36 Ohio App. 3d 169, 173, 522 N.E.2d 52, the Tenth District shifted the burden away from the defendant in limited circumstances. *Forest*, 36 Ohio App.3d at 173 ("where a defendant moves to have evidence preserved and that evidence is nonetheless destroyed by the state in accordance with its normal procedures, the appropriate remedy is to shift the burden to the state to show that the evidence was not exculpatory").

Mr. Lupardus' case presents this Court with a situation in which the State *did* destroy evidence that Mr. Lupardus had previously requested. It was the State's malfeasance or misfeasance, as opposed to nonfeasance, that resulted in a constitutional violation which warrants reversal. See *State v. Williams*, 126 Ohio Misc.2d 47, 2003-Ohio-7294, 802 N.E.2d 195 at ¶20 "Malfeasance or misfeasance in this regard, (see *Benson* and *Benton*) as opposed to nonfeasance (see *Trombetta*, *Youngblood* and *Lewis*) undermines the fundamental fairness of the

proceedings in violation of due process of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and analogous Section 16, Article I of the Ohio Constitution.”).

**1. The trial court improperly placed the burden on Mr. Lupardus to prove that the destroyed evidence was materially exculpatory.**

The trial court held, “Defendant’s assertion concerning his performance of the field sobriety tests does no more than counter the officer’s testimony concerning those same tests. His mere assertion that he passed the tests is *insufficient to fulfill his burden of showing the videotape contained apparent exculpatory evidence.*” 7/26/07 Entry, 3. This conclusion is mistaken. On June 26, 2006, Mr. Lupardus requested discovery under Criminal Rule 16(B)(1)(a)(i), which requires the State to produce relevant recorded statements by the defendant. *Id.* Almost one month after that request, the investigating officer destroyed the videotape containing footage of Mr. Lupardus performing several field sobriety tests. Although another officer was ordered to copy the tape in response to Mr. Lupardus’s request, the arresting officer (who testified that Mr. Lupardus performed poorly on the field sobriety tests), and who was not trained in copying videotapes) erased the videotape. He alleged he accidentally pressed the wrong button. The machine did not malfunction; rather, the operator failed.

Because Mr. Lupardus previously requested the evidence, the burden shifted to the State to prove that the value of the evidence destroyed was “solely *inculpatory.*” *State v. Anderson*, 1st Dist. No. C-050382, 2006-Ohio-1568, at ¶18. Emphasis in original. However, the trial court erroneously placed the burden of proof on the defendant. Had the trial court applied the proper standard, the officer’s assertions could not have satisfied the State’s burden.

**2. The court below improperly applied *State v. Geeslin*.**

In *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, this Court noted that the evidence was only potentially useful, rather than materially exculpatory, because the portion of

the videotape that was destroyed “would not have been used for the purpose of establishing appellant’s guilt or innocence.” ( it only showed the driving that took place prior to the defendant being stopped). *Id.* at ¶12. There, evidence of Mr. Geeslin’s performance on the field sobriety tests was preserved and provided to the defense. *Id.* “This difference distinguishes this case from several decisions cited by the parties. In those cases, the defendants sought the missing or destroyed videotape evidence to challenge the *substance* of the allegations against them. See *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693; *State v. Durnwald*, 163 Ohio App.3d 361, 2005-Ohio-4867, 837 N.E.2d 1234.” *Id.* at ¶13 (emphasis in original).

On the other hand, in *Benson*, “the tape would have provided the only possible objective view of the events on the night [the defendant] was stopped.” *Benson* at ¶12. The footage that was erased in Mr. Lupardus’ case included his’ field sobriety tests. The officer even used that footage when preparing his report - the report that would also be used to prosecute Mr. Lupardus. Mr. Lupardus’ performance of the field sobriety tests goes directly to the issue of his impairment. Under these facts, according to this Court’s holding in *Geeslin*, this evidence was materially exculpatory as it went directly to the substance of the allegations.

**3. The court below violated Mr. Lupardus’ due process rights when it found the evidence was not materially exculpatory.**

To determine whether evidence is materially exculpatory, the court must analyze whether the evidence possesses an exculpatory value that was apparent before the evidence was destroyed and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means. *Benton* at 805, citing *Trombetta* at 489. The trial court correctly ascertained that the evidence was unique and that Mr. Lupardus was unable to obtain comparable evidence. However, the court erred determining that the evidence did not possess an exculpatory value. When the United States Supreme Court initially differentiated evidence that

was materially exculpatory and evidence that was only potentially useful for purposes of a due process violation, it was in reference to a breath sample that, in order to have any value, required additional testing, and, even then, had a very low likelihood of being exculpatory. *Trombetta* at 489. The breath samples at issue in *Trombetta* were only potentially useful, rather than materially exculpatory. *Id.*

Contrast that to Mr. Lupardus' case, in which the evidence at issue was an unaltered videotape that a juror could objectively view to determine whether Mr. Lupardus was impaired. It obviously had significant value, as Trooper Forshey (the arresting officer, who erased the tape) testified that he used it to help him prepare his report. If Trooper Forshey found it useful, certainly Mr. Lupardus would. Mr. Lupardus testified that he performed well on the field sobriety tests. Patricia Frank testified that Mr. Lupardus was not impaired. The only support for Trooper Forshey's testimony was the videotape that he erased.

**4. The court erred when it determined that the State did not act in bad faith when it destroyed the videotape.**

According to the Mercer County Court of Appeals' decision in *Geeslin*, the case Mr. Lupardus' trial court followed, "bad faith in this context is not a matter *how* the police destroyed evidence, it is only a question of *when*. . . . When determining who has the burden of proving whether evidence is materially exculpatory, the only way of proving bad faith is establishing that the evidence was destroyed after a specific request by the defendant to preserve the evidence in question." *State v. Geeslin*, 3rd Dist. No. 10-05-06, 2006-Ohio-1261, at ¶18, fn 2.

The timing here is clear. Mr. Lupardus requested the evidence on June 26, 2006. Almost an entire month went by before the State destroyed it on July 25, 2006. The State was aware that the defense wanted to view this specific evidence as it was the Law Director who requested the specific evidence from the State Highway Patrol and the defense had previously sought a

continuance in order to view the videotape. Sergeant McDonald ordered Trooper Smith (a more experienced officer), *not* Trooper Forshey, to copy the tape. Despite the order from his superior officer, Trooper Smith did not make the copy, Forshey did. Neither did Smith oversee Trooper Forshey's efforts; he left the room because he assumed Trooper Forshey knew what he was doing. Forshey, who had never attempted this procedure before, testified that he was "completely unsure on what to do . . ." and erased the crucial footage that he had previously viewed. Tr. 20. Forshey even testified that once the tape began recording, he realized the screen was blank; however, he continued to let it record over the footage. Tr. 20.

Trooper Forshey destroyed the *only* objective evidence that could contradict his testimony. In a similar case relating to the destruction of a DUI videotape, an officer's "accidental erasure" was found to rise to the level of bad faith. *State v. Durnwald*, 163 Ohio App.3d 361, 2005-Ohio-4867, 837 N.E.2d 1234 ("Although the trooper's actions in this case may not have been totally intentional, the video tape erasure was not an accident related to machine malfunction. Rather, the erasure occurred due to the trooper's utter failure to safeguard evidence relevant to the crime and arrest."). Therefore, Trooper Forshey's conduct rose to the level of bad faith.

### **SECOND PROPOSITION OF LAW:**

An accused is denied the effective assistance of counsel when counsel fails to file a motion to preserve exculpatory evidence and the State subsequently destroys the evidence. Sixth and Fourteenth Amendments to the U.S. Constitution; Sections 10 and 16, Article I of the Ohio Constitution; and *Strickland v. Washington* (1984), 466 U.S. 668.

Mr. Lupardus' counsel was ineffective for failing to file a motion to preserve the videotape. When an accused is denied the effective assistance of counsel, the fairness and reliability of the trial are severely compromised. *United States v. Cronin* (1985), 466 U.S. 648, 754; *Strickland v. Washington* (1984), 466 U.S. 668, 686-87; *State v. Johnson* (1986), 24 Ohio St.3d 87, 494 N.E.2d 1061. To establish an ineffective-assistance-of-counsel claim, the accused

must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland* at 687. For the first prong, counsel's performance must fall below an objective standard of reasonableness to be deficient in terms of ineffective assistance of counsel. *Id.* To satisfy the second prong, the defendant must show that there exists a reasonable probability that counsel's errors are sufficient to undermine confidence in the outcome of the trial. *Id.*

Here, the trial court incorrectly placed the burden of proof on Mr. Lupardus. It would not have done so had his counsel moved to preserve the evidence. Some courts suggest that whether to shift the burden from the defendant to the state to prove the exculpatory value of the destroyed evidence turns on whether the defendant made a specific request for the state to preserve that evidence. See, e.g., *State v. Acosta*, 1st Dist. Nos. C-020767, C-020768, C-020769, C-020770, C-020771, 2003-Ohio-6503; *State v. Tarleton*, 7th Dist. No. 02-HA-541, 2003-Ohio-3492; *State v. Fuller*, 2nd Dist. No. 18994, 2002-Ohio-2055.

If the only reason that the burden was not shifted from Mr. Lupardus to the State was because trial counsel failed to file a specific request for the videotape, or a specific motion to preserve the evidence, then trial counsel was ineffective for failing to do so. There is a reasonable probability that the State would not have been able to meet its burden, as demonstrated above in the First Proposition of Law, above, and the charges would have been summarily dismissed based on the State's violation of Mr. Lupardus' due process rights. Therefore, Mr. Lupardus was deprived of his right to effective assistance of counsel.

**CONCLUSION**

This case involves substantial constitutional questions, as well as questions of public or great general interest. Mr. Lupardus respectfully requests this Court to grant jurisdiction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION has been sent by regular U.S. mail to Mark Sleeper, Assistant Law Director, 301 Putnam Street, Marietta, Ohio 45750, on this 29<sup>th</sup> day of December, 2008.

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MICHAEL LUPARDUS

IN THE SUPREME COURT OF OHIO

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|                      | : | Case No. _____                |
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|                      | : | Fourth Appellate District     |
| MICHAEL LUPARDUS,    | : |                               |
|                      | : | Case No. 08 CA 31             |
| Defendant-Appellant. | : |                               |

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**APPENDIX TO MEMORANDUM IN SUPPORT OF JURISDICTION  
OF DEFENDANT-APPELLANT MICHAEL LUPARDUS**

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IN THE COURT OF APPEALS  
4<sup>TH</sup> APPELLATE DISTRICT  
205 PUTNAM STREET  
MARIETTA, OH 45750

OHIO STATE OF vs. MICHAEL LUPARDUS

TO : ATTY SARAH MARIE SCHREGARDUS  
8 E. LONG STREET, 11TH FLOOR  
COLUMBUS OH 43215

CASE NO. 08CA 31

PURSUANT TO APPELLATE RULE 22-B, YOU ARE  
HEREBY NOTIFIED THAT A DECISION AND  
JUDGMENT ENTRY, COPY HERETO ATTACHED,  
HAS BEEN FILED IN SAID COURT OF APPEALS IN  
THE ABOVE STYLED ACTION ON 11/13/08

NOTICE OF FILING

RULE 22-B

PAPERS ATTACHED:

DECISION AND JUDGMENT  
ENTRY DATED: 11/13/08

JUDY R. VAN DYK  
CLERK OF COURTS



DEPUTY

ORIGINAL NOTICE TO:

ATTY MARK C SLEEPER

DATED 11/14/08

CLERK OF COURTS  
200 NOV 13 01 2: 03  
COLUMBUS, OHIO

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
WASHINGTON COUNTY

State of Ohio,

Plaintiff-Appellee,

v.

Michael S. Lupardus,

Defendant-Appellant.

Case No. 08CA31

DECISION AND  
JUDGMENT ENTRY

APPEARANCES:

Timothy Young, Ohio Public Defender, and Sarah M. Schregardus, Assistant Ohio Public Defender, Columbus, Ohio, for appellant.

Roland W. Riggs III, Marietta Law Director, and Mark C. Sleeper, Assistant Marietta Law Director, Marietta, Ohio, for appellee.

Kline, J.:

{¶1} Michael S. Lupardus appeals from his operating a vehicle while under the influence ("OVI") conviction in the Marietta Municipal Court. On appeal, Lupardus contends that the trial court erred when it denied his motion to dismiss the charge against him because the State committed a *Brady* violation when it erased the dashboard videotape, which showed some or all of the field sobriety tests leading to his arrest. Because Lupardus failed to show that (1) the erased tape would have changed the outcome of the trial and/or (2) the State acted in bad faith, we disagree. Lupardus next contends that he was denied the effective assistance of counsel in the trial court because his counsel failed to move to preserve the evidence. Because Lupardus failed to show how this motion would have affected the outcome of the trial, we disagree.

Accordingly, we affirm the judgment of the trial court.

## I.

{¶2} A State Highway Trooper observed Lupardus driving above the speed limit on State Route 7. After his radar confirmed his observation, he then undertook a traffic stop of Lupardus. Upon approaching, the trooper noticed the smell of alcohol and that Lupardus' eyes were glassy and bloodshot. After questioning, Lupardus admitted to drinking eight beers two hours prior to the stop. The trooper conducted several field sobriety tests and administered a breath test, which read .114. The trooper then placed Lupardus under arrest and charged him with speeding and OVI.

{¶3} Lupardus entered a plea of not guilty and then filed a discovery request under Crim. R. 16. However, the State could not supply Lupardus with a copy of the dashboard videotape. The State indicated that the trooper tried to make a copy of the tape. However, the trooper accidentally destroyed the original by copying the blank DVD onto the tape.

{¶4} Lupardus then filed a motion to suppress and dismiss, based on the accidental destruction of the dashboard videotape, which showed some or all of the field sobriety tests. He argued that this amounted to a *Brady* violation. The trial court denied his motion, concluding that the video tape was in "no way exculpatory."

{¶5} Lupardus entered a no contest plea in exchange for the dismissal of the speeding offense. The court found him guilty of OVI in violation of R.C. 4511.19(A)(1)(a) and sentenced him accordingly.

{¶6} Lupardus appeals his OVI conviction and asserts the following two assignments of error: I. "The State violated Mr. Lupardus' due process rights when it

destroyed favorable evidence that was material to the issue of guilt.” And, II. “Mr. Lupardus was denied the effective assistance of counsel when counsel failed to file a motion to preserve evidence, and exculpatory evidence was subsequently destroyed.”

## II.

{¶7} Lupardus contends in his first assignment of error that the trial court erred when it denied his motion to dismiss the charge against him.<sup>1</sup> He asserts that the State violated his due process rights when it erased the dashboard videotape, which showed (with sound) some or all of the field sobriety tests. He claims that this amounted to a *Brady* violation.

{¶8} “We review de novo a trial court’s decision involving a motion to dismiss on the ground that the state failed to preserve exculpatory evidence.” (Cites omitted.) *State v. Sneed*, Lawrence App. No. 06CA18, 2007-Ohio-853, ¶19.

{¶9} The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no State shall “deprive any person of life, liberty, or property, without due process of law[.]” To determine if a defendant’s alleged due process rights are violated, courts characterize lost or destroyed evidence as (1) “materially exculpatory” or (2) “potentially useful.” See, *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239. “The Due Process Clause protects a defendant from being convicted of a crime where the state has failed to preserve materially exculpatory evidence or has destroyed, in bad faith, potentially useful evidence.” (Cite omitted.) *Sneed* at ¶20.

### A. “Materially Exculpatory” Analysis

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<sup>1</sup> Lupardus does not argue that the trial court erred when it denied his alternative motion to suppress.

{¶10} "The suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *State v. Johnston* (1988), 39 Ohio St.3d 48, paragraph four of the syllabus, following *Brady v. Maryland* (1963), 373 U.S. 83. The defendant has the burden of proving a *Brady* violation involving a denial of due process. *State v. Jackson* (1991), 57 Ohio St.3d 29, 33.

{¶11} "In determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. This standard of materiality applies regardless of whether the evidence is specifically, generally or not at all requested by the defense." *Johnston*, supra, paragraph five of the syllabus, following *United States v. Bagley* (1985), 473 U.S. 667.

{¶12} Here, we cannot find that "the result of the proceeding would have been different." Even if the court had excluded the videotape evidence where Lupardus allegedly (1) performed poorly on the walk and turn and the one leg stand and (2) admitted that he earlier had eight beers to drink, the record still shows combined factors that supported finding him guilty of violating R.C. 4511.19(A)(1)(a). That is, Lupardus (1) was speeding; (2) had glassy and bloodshot eyes; (3) had a strong odor of alcohol coming from his mouth when he talked; (4) scored six out of six clues on the Horizontal

Gaze Nystagmus ("HGN") test; and (5) recorded .114 on the portable breath test and a .100 on the BAC.

{¶13} Therefore, we find that the erased tape was not "material either to guilt or to punishment."<sup>2</sup>

B. "Potentially Useful" Analysis

{¶14} "Unless a defendant can show that the state acted in bad faith, the state's failure to preserve potentially useful evidence does not violate a defendant's due process rights." *Geeslin*, supra, syllabus, following *Arizona v. Youngblood* (1988), 488 U.S. 51.

{¶15} Lupardus contends the State acted in bad faith and cites to cases showing that bad faith includes "gross negligence."

{¶16} Here, the trial court found that the State did not act in bad faith when it erased the videotape. Competent, credible evidence supports the trial court's finding. After Lupardus filed a discovery request, the trooper testified that he tried to copy the videotape onto a blank DVD by using new equipment for that very purpose. However, he stated that he accidentally destroyed the original videotape by reversing the process, i.e., he copied the blank DVD onto the videotape. Stated differently, the trooper pushed the wrong button.

{¶17} In addition, Lupardus (through his counsel) did not make a single argument at the motion hearing regarding the "bad faith" of the State. In fact, he made it clear to the trial court at that hearing that he was not contending that the State acted in bad faith.

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<sup>2</sup> Lupardus does not argue that he would have received a lesser sentence based on the evidence contained in the videotape.

As such, Lupardus invited the court to find that the State did not act in bad faith. "A party will not be permitted to take advantage of an error which he himself invited or induced." *State v. Bey* (1999), 85 Ohio St.3d 487, 493, citing *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, paragraph one of the syllabus; *State v. Seiber* (1990), 56 Ohio St.3d 4, 17. This rule is generally referred to as the "invited error doctrine." *State v. Ellis*, Scioto App. No. 06CA3071, 2007-Ohio-2177, ¶ 27. Therefore, we find that Lupardus invited any alleged error of the court in concluding that the State did not act in bad faith when it erased the videotape.

{¶18} In addition, we note that the record does not show any evidence of this type of problem in the past. The trooper was new and never did this procedure before. He asked for help and another experienced trooper gave him directions on how to copy the videotape. He simply pushed the wrong button. We find that these actions do not reach "gross negligence" or "bad faith."

### C. Burden of Proof

{¶19} Lupardus further contends that the trial court erred when it placed the burden of proof on him at the motion hearing. He asserts in his merit brief that *State v. Anderson*, Hamilton App. No. C-050382, 2006-Ohio-1568, places the burden on the State.

{¶20} Because Lupardus invited the court to find that the State did not act in bad faith when it erased the tape, we will only address this issue as it relates to our "materially exculpatory" analysis.

{¶21} As we stated earlier, the defendant bears the burden of proving that the lost or destroyed evidence was materially exculpatory. *Jackson*, supra, at 33. "However, some courts shift the burden of proof regarding the exculpatory value of the evidence where the defendant moves to have the evidence preserved and the state destroys the evidence." *Sneed*, supra, at ¶20, citing *State v. Benton* (2000), 136 Ohio App.3d 801, 805-806. See, also *State v. Benson*, 154 Ohio App.3d 495, 2003-Ohio-1944, ¶11; *Columbus v. Forest* (1987), 36 Ohio App.3d 169, 173.

{¶22} In *Anderson*, supra, the court distinguished its prior holding in *State v. Acosta*, Hamilton App. No. C-020767-71, 2003-Ohio-6503. In *Acosta*, the court held that a general motion for discovery does not change the burden of proof. That is, it remains with the defendant. However, in *Anderson*, the defendant made a general discovery request, and "he also filed a separate motion to preserve 'any video or audio recordings at the station.'" The court held that "[t]his was a specific request for preservation of the evidence[.]" The *Anderson* court stated that its facts were similar to the facts in *Benson*.

{¶23} Here, we find that Lupardus' "REQUEST FOR DISCOVERY" was a general request. It stated, "Now comes \* \* \* counsel of record, and respectfully requests discovery in the above captioned case pursuant to Criminal Rule 16." As such, the facts of this case are similar to *Acosta*, instead of *Anderson*, *Benton* ("specifically requested discovery of the tape"), *Benson* ("motion to preserve any audio-or videotape of the stop"), or *Forest* (motion to preserve "broadcast tapes"). Consequently, the trial court did not err when it placed the burden of proof on Lupardus.

#### D. Conclusion

{¶24} Therefore, for the above stated reasons, we find that the trial court did not err when it overruled Lupardus' motion to dismiss.

{¶25} Accordingly, we overrule Lupardus' first assignment of error.

### III.

{¶26} Lupardus contends in his second assignment of error that he was denied his right to the effective assistance of counsel in the trial court. Specifically, he asserts that his counsel failed to file a motion to preserve evidence and exculpatory evidence was subsequently destroyed.

{¶27} "In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness." *State v. Wright*, Washington App. No. 00CA39, 2001-Ohio-2473, citing *State v. Hamblin* (1988), 37 Ohio St.3d 153, cert. den. (1988), 488 U.S. 975; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient\* \* \*" which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[;]" and (2) "that the deficient performance prejudiced the defense\* \* \*[,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Absent both showings, "it cannot be said that the conviction \* \* \* resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

{¶28} This court “when addressing an ineffective assistance of counsel claim, should not consider what, in hindsight, may have been a more appropriate course of action.” *Id.*, citing *State v. Phillips* (1995), 74 Ohio St.3d 72. Instead, this court “must be highly deferential.” *Id.*, citing *Strickland* at 689. Further, “a reviewing court: ‘must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.*, citing *Strickland* at 689.

{¶29} Here, Lupardus bases his ineffective assistance of counsel claim on the arguments he made in his first assignment of error. However, we found that he failed to show that (1) the outcome of the trial would have been different with the evidence (erased videotape) and/or (2) the State acted in bad faith. Further, even if the State had the burden of proof, our findings would not change. Therefore, under the second prong of the *Strickland* test, we find that Lupardus’ trial counsel’s performance did not affect the outcome of the trial. Consequently, Lupardus did not show that he had the ineffective assistance of counsel in the trial court.

{¶30} Accordingly, we overrule Lupardus’ second assignment of error and affirm the judgment of the trial court.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and Appellant pay the costs herein taxed.

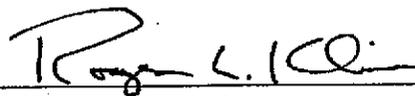
The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Marietta Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, P.J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY:   
Roger L. Kline, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**