CASE NO. 22-8015

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDREW J. JOHNSON,
Plaintiff-Appellant,

v.

CITY OF CHEYENNE, a municipal corporation; LANCE COOPER OVERSTREET, administrator of the estate Of George W. Stanford, deceased; ALAN W. SPENCER, an individual and Does 2 through 20, inclusive,
Defendants-Appellees.

On Appeal from the USDC District of Wyoming Case No. 1:17-CV-00074-SWS
The Honorable Scott W. Skavdahl, Presiding

RESPONSE BRIEF OF APPELLEES ALAN W. SPENCER AND THE ESTATE OF GEORGE STANFORD

ATTORNEYS FOR APPELLEES ALAN SPENCER
AND THE ESTATE OF GEORGE STANFORD

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ORAL ARGUMENT REQUESTED

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PRIOR OR RELATED APPEALS

This matter was before the Court in *Johnson v. Spencer*, *et al.,* Nos. 17-8089, Nos. 17-8090, Nos. 17-8091, 950 F.3d 680 (10th Cir. 2020).

ISSUES PRESENTED FOR REVIEW

I. Did the district court err when it granted Defendant Alan Spencer's motion to dismiss Plaintiff Andrew Johnson's claim related to fabrication of evidence?

II. Did the district court err when it granted summary judgment in favor of Spencer and the Estate of George Stanford on Johnson's *Brady/Trombetta/Youngblood* claims?

STATEMENT OF THE CASE

I. Procedural History

In 1989, a jury convicted Andrew Johnson of committing an aggravated burglary and a first degree sexual assault on Laurie Slagle at Slagle's apartment in Cheyenne, Wyoming. (App. Vol. I at 35).[1] The jury also found Johnson to be a habitual criminal. *Johnson v. State,* 806 P.2d 1282, 1283 (Wyo. 1991). In 2013, Johnson was exonerated based on an examination of DNA evidence. (App. Vol. I at 35). The DNA evidence was associated with Barney Haggberg, Slagle's boyfriend. (*Id*.).

In 2017, Johnson filed an action under 42 U.S.C. § 1983 against the City of Cheyenne and police officers Alan Spencer and the late George Stanford, who were involved in his criminal case.[2] (App. Vol. I at 34-70). Spencer and another police officer, Phillip Raybuck, were dispatched to the apartment within minutes of the assault. (*Id.*at 39-40). Spencer spoke to Slagle shortly after arriving and showed her Johnson's identification card, which he had found at the apartment. (*Id.* at 41-42). Slagle identified Johnson as her assailant. (*Id.* at 42). Meanwhile, Raybuck

[1] Johnson's appendix is separated by volumes that are not consecutively paginated. Accordingly, Appellees have cited to the volume number and page number assigned by Johnson.

[2] Stanford passed away in 2007. (App. Vol. I at 38). Johnson sued the administrator of Stanford's estate. (App. Vol. I at 34).

photographed the exterior of the apartment, and he later photographed Slagle at the hospital. (Aplt. Br. at 11-16) (reprinting photographs). The case was then assigned to Stanford, a detective. (App. Vol. I at 42).

In the complaint, Johnson accused Spencer of "fabricating evidence … or corruptly influencing" Slagle to implicate him. (App. Vol. I at 59-60). In that regard, Johnson criticized Spencer for showing Slagle his identification card at the scene of the assault. (*Id.*). Johnson also claimed that Spencer and Stanford withheld photographs of the interior of the apartment allegedly taken by Raybuck on June 11, 1989, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), *California v. Trombetta*, 467 U.S. 479 (1984), and *Arizona v. Youngblood*, 488 U.S. 51 (1988) (the "*Brady/Trombetta/Youngblood* claims"). (*Id.* at 56-59).

All defendants filed motions to dismiss the complaint arguing, in part, that Johnson's claims were barred by *res judicata*. (*Id.* at 76-97, 107-25; App. Vol. II at 48-71). The district court dismissed the case based on *res judicata*, without addressing the other grounds raised by defendants. (App. Vol. II at 82-103). This Court reversed. *Johnson v. Spencer*, 950 F.3d 680 (10th Cir. 2020).

Following remand, defendants renewed their motions to dismiss on the other grounds raised in their original motions. (App. Vol. III at 192-96, 220-45). The district court dismissed the fabrication of evidence claim against Spencer based on qualified immunity, ruling as follows:

> [T]his Court finds those factors of reliability present in this case outweigh any suggestive or corrupting effect of the challenged identification itself. Regardless, Plaintiff has failed to first show that Patrolman Spencer's actions – in asking Ms. Slagle within minutes of the assault if the perpetrator was the person depicted in the identification found at the scene – were impermissibly suggestive.

(App. Vol. IV at 150).

The district court denied the motion to dismiss on the *Brady/Trombetta/Youngblood* claims. (App. Vol. IV at 142-46). In denying the motion, the Court "[a]ccept[ed] Plaintiff's factual allegations regarding the material and exculpatory nature (and existence) of the photographic evidence as true – which the Court must at this stage of the proceedings [.]" (*Id.* at 146).

After Johnson had been allowed nearly a year to conduct discovery (App. Vol. VII at 228), Spencer and Stanford moved for summary judgment on the *Brady/Trombetta/Youngblood* claims. (*Id.* at 106-08). The district court granted the motion, ruling as follows:

> The Court simply cannot draw inference upon inference based largely on speculation and conjecture to ultimately find a *genuine* dispute of material fact. Even viewing the facts in a light most favorable to Plaintiff, he has failed to put forth evidence from which a reasonable jury could infer the allegedly missing photographs of the crime scene (specifically, photographs of the inside of Slagle's apartment on June 11, 1989) ever existed. Even so, because Plaintiff has failed to show the missing photos were material and apparently exculpatory, or destroyed in bad faith, Plaintiff has failed to make a showing sufficient to establish the elements of his *Brady/Trombetta/Youngblood* claims.

(*Id.* at 253-54) (emphasis in original). The district court also held that Spencer and Stanford were entitled to qualified immunity. (*Id.* at 251-53).

The district court entered judgment on March 30, 2022. (App. Vol. VII at 255). Johnson filed a timely notice of appeal on April 5, 2022.

II. Fabrication of Evidence Claim

Johnson alleged in the complaint that, on the night of June 10, 1989, he ran into Slagle at a bar in Cheyenne, Wyoming. (App. Vol. I at 47). Johnson and Slagle had previously socialized together. (*Id.* at 47-48). After meeting at the bar, Johnson and Slagle eventually went to Slagle's apartment. (*Id.* at 42-43, 48). While at Slagle's apartment, Johnson alleged that he used a plastic sleeve containing his identification card to separate marijuana before rolling two joints. (*Id.* at 42). The pair then smoked the marijuana and drank wine in the apartment's living room. (*Id.* at 42-43). They then left the apartment to go to additional bars in downtown Cheyenne. (*Id.* at 43). Johnson alleged that he left the plastic sleeve containing his identification near the remaining marijuana debris in a box top on the coffee table in Slagle's living room. (*Id.*).

After Johnson and Slagle left the apartment they went to two bars. (App. Vol. I at 49-50, 52). Slagle left Johnson at the second bar and drove home. (*Id.* at 50-52). Slagle fell asleep, but she was awakened by someone pounding on her apartment door. (*Id.* at 51). The intruder eventually broke a window on the door and

unlocked it and proceeded up a flight of stairs into the apartment. (*Id.*). The intruder sexually assaulted Slagle. (*Id.*).

At about 3:20 a.m., shortly after the sexual assault, Spencer and Raybuck were dispatched to the apartment in response to a 9-1-1 call from Slagle's downstairs neighbor. (App. Vol. I at 40). The neighbor reported that she had heard banging, glass being broken, and a woman screaming. (*Id.* at 39-40). When Spencer and Raybuck arrived, they found the broken door and entered the apartment. (*Id.* at 40-41). When they initially entered the apartment, Spencer and Raybuck could hear Slagle's muffled yells and hysterics from the apartment's bathroom. (*Id.*). Spencer eventually heard Slagle repeat, "Is he still here?" (*Id.* at 41). In response, Spencer and Raybuck searched the apartment for a suspect.

When Spencer returned to the bathroom to speak with Slagle, she stated "He had hurt me. He hurt me." (App. Vol. I at 41). Spencer testified at trial that he asked Slagle who had hurt her and she responded "A.J." (*Id.* at 42). Spencer testified that he asked Slagle for A.J.'s last name, which she did not know. (*Id.*). Johnson denies that Slagle actually identified her assailant as "A.J." (*Id.* at 59).

Spencer testified that he glanced down at the floor of the bathroom doorway and noticed a plastic sleeve containing Johnson's identification cards. (App. Vol. I at 42). Johnson alleges Spencer actually found the sleeve containing identification cards on a coffee table in the living room. (*Id.* at 42-43, 59). Spencer testified that

he picked up the sleeve from the floor by the bathroom and, showing it to Slagle, asked if Johnson was the "A.J." to whom she was referring. (*Id.*). She initially did not say anything and became hysterical. (*Id.*). When Spencer asked Slagle again, she shook her head and then stated, "Yes, that's A.J." (*Id.*).

Two days after the assault, Slagle allegedly found a pair of eyeglasses in her bedroom. (App. Vol. I at 54). Slagle immediately told Stanford and gave him the glasses. (*Id.*). Stanford subsequently confirmed that the glasses belonged to Johnson. *See Johnson*, 806 P.2d at 1286. Johnson alleges in the complaint that an unknown person planted his glasses in the bedroom after-the-fact. (App. Vol. I at 55).

Johnson was charged with, tried for, and convicted of, aggravated burglary and sexual assault. (App. Vol. I at 35, 40-44, 48-51). Slagle testified at trial that Johnson broke into the apartment and raped her. (*Id.* at 51). Spencer also testified at trial. (*Id.* at 48-51). Johnson's conviction was affirmed on direct appeal. *Johnson v. State,* 806 P.2d 1282, 1283 (Wyo. 1991). Johnson was subsequently exonerated based on a DNA examination. (App. Vol. I at 35).

In his complaint in this case, Johnson alleged that "when endeavoring to learn the identity of the intruder and before Ms. Slagle in any way generally or specifically identified the man who 'hurt' her … Patrolman Spencer showed Ms. Slagle Mr. Johnson's I.D. or driver's license[.]" (App. Vol. I at 59). Johnson claimed that by these actions Spencer unlawfully prompted Slagle to identify Johnson as the

perpetrator. (*Id.*). In his response to Spencer's renewed motion to dismiss this claim, Johnson alleged Spencer set up a "contrived one-person photo array [that] constituted a fabrication of evidence that unreasonably influenced the alleged 'victim' and created unreliable evidence[.]" (App. Vol. IV at 26).

The district court dismissed Johnson's fabrication of evidence claim, ruling that Spencer was entitled to qualified immunity. (App. Vol. IV at 151, 158). The court held that Johnson had "not alleged sufficient facts that show Defendant Spencer plausibly violated [Johnson's] constitutional rights[.]" (App. Vol. IV at 147). The court rejected Johnson's argument that two pre-1989 cases, *Manson v. Brathwaite,* 432 U.S. 98 (1977) and *Johnston v. Makowski,* 823 F.2d 387 (10th Cir. 1987), established that the identification procedure used by Spencer violated due process. (*Id.* at 147-50). The district court ruled that those cases established just the opposite – that showing Slagle, within minutes of the assault, the identification card Spencer found at the scene did not violate due process. (*Id.* at 148-50).

In reaching this conclusion, the district court noted that the constitutionality of an allegedly suggestive photo array is determined by assessing certain factors including "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [her] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time

between the crime and confrontation." (App. Vol. IV at 148 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)).

Applying those factors, the district court ruled that Slagle's prior relationship with Johnson, Johnson's admission that he was in the apartment earlier in the evening and left his identification, and Slagle's certainty in identifying him minutes after the crime outweighed any allegedly suggestive effect of Spencer's use of the identification. (*Id.* at 148). The court concluded that where the identification was found and when Slagle stated "A.J." had hurt her were immaterial and that Spencer's action in asking if the identification showed the perpetrator could not "be fairly characterized as 'crafting false evidence' or fabricating evidence." (*Id.* at 149).

III. *Brady/Trombetta/Youngblood* Claims

In his *Brady/Trombetta/Youngblood* claims, Johnson alleged that Raybuck took materially exculpatory photographs of the interior of the apartment on June 11, 1989. (App. Vol. I at 45, 56-59). Johnson alleged the photographs were not disclosed to his lawyer in the criminal case. (*Id.* at 47). Johnson alleged the photographs were missing. (*Id.* at 36). Johnson claimed some of the missing photographs would have been exculpatory, in that (1) they would have shown the marijuana or wine bottles on the coffee table; (2) would have shown the sleeve containing the identification cards on the coffee table, and thus been useful to impeach Spencer's testimony as to

where he found it; and (3) would have been useful to impeach Slagle's testimony about where she found Johnson's glasses. (App. Vol. I at 56).

Spencer and Stanford moved for summary judgment on Johnson's *Brady/Trombetta/Youngblood* claims after discovery was complete. (App. Vol. V at 106-08). They argued that (1) there was no evidence Raybuck took photographs of the interior of the apartment, (2) there was no evidence as to what such photographs showed, *i.e.,* that they were exculpatory and material to the outcome of the trial, and (3) there was no evidence Spencer or Stanford suppressed or failed to preserve any photographs. (App. Vol. V at 119-25). Spencer and Stanford also argued that they were entitled to qualified immunity. (*Id.* at 123-25).

In opposing summary judgment, Johnson argued a jury could infer from the evidence that Raybuck photographed the interior of Slagle's apartment. (App. Vol. V at 257-59). Johnson pointed to the absence of a photograph referenced in Raybuck's report – a photograph of Slagle's inner thigh that he took at the hospital (*Id.* at 257). Johnson also alleged there was a missing photograph of a flash card or identifying card customarily taken by Raybuck before photographing a crime scene. (*Id.* at 257). Johnson also relied on certain expert opinions to allegedly raise a genuine issue of fact. (*Id.* at 258).

In its order on summary judgment, the district court set forth the following undisputed material facts (none of which Johnson specifically disputes on appeal):

- On June 11, 1989, Defendant Alan W. Spencer, a Cheyenne police officer, responded to a dispatch to 513 E. 18th St. in Cheyenne, Wyoming [the address where the assault occurred]. (Spencer Aff. ¶¶ 2-3, ECF No. 194-3.) [App. Vol. V at 135].
- Spencer did not do any further investigating of the Johnson matter after arriving home from the call on the morning of June 11, 1989. (Spencer Dep. at 150, ECF No. 194-5.) [App. Vol. V at 147].
- Spencer did not withhold any evidence from the prosecutor or defense counsel in the Johnson case. (Spencer Aff. ¶ 8.) [App. Vol. V at 135].
- On June 11, 1989, Philip E. Raybuck, Sr., a Cheyenne police officer, responded to a dispatch to 513 E. 18th St. in Cheyenne, Wyoming. (Raybuck Aff. ¶ 3.) [App. Vol. V at 142].
- Raybuck does not recall taking photographs on June 11, 1989. (*Id*. ¶ 6.) [App. Vol. V at 143]. Raybuck does not recall taking photographs of flashcards on June 11, 1989. (*Id*. ¶ 9.) [App. Vol. V at 143].
- In June of 1989 Raybuck's standard practice was to photograph a "flash card" at the beginning and end of a series of crime scene photographs identifying himself as the officer taking the pictures.

(Raybuck Dep. at 30, 51.) [App. Vol. V at 177, 198]. There is no such identifying card in the series of photos taken by Raybuck and currently maintained by the CPD related to Johnson's criminal case. (*Id*.) [App. Vol. V at 177, 198].

- Based solely on his contemporaneous report in the Johnson case, Raybuck believes he took the photographs reflected in the top strip of negatives (Strip 1) shown on Exhibit "A-1" to the Affidavit of Jennell Webster, including the photographs of the broken glass and floor by the apartment door. (*Id*. ¶ 7.) [App. Vol. 5 at 143]. Strip 1 coincides with the apartment photographs listed in his report. (*See* Raybuck Report; Webster Aff. Ex. A-1; Photograph Prints, Defs.' Ex. J.) [App. Vol. V at 144; 134; 240-43]. None of Raybuck's produced negatives and photos show the interior of Slagle's apartment.

- After taking the photographs, Raybuck left the apartment and went to the hospital. (Raybuck Dep. at 7-8.) [App. Vol. V at 154-55]. Raybuck did not go back to the apartment. (*Id*. at 8-9.) [App. Vol. V at 155-56].

- Based on the absence of any references to such photographs in his report, Raybuck has no reason to believe he took any photographs

of the interior of Slagle's attic apartment at any time. (Raybuck Aff. ¶ 8.) [App. Vol. V at 143].

- Raybuck's report indicates he took photos at the hospital of Slagle's arms and inner thigh. (Raybuck Report, Defs.' Ex. C-1.) [App. Vol. V at 144]. Strip 1 of the negatives maintained by the CPD related to Johnson's criminal case includes two pictures of Slagle's arms but does not include a picture of Slagle's inner thigh. (Raybuck Dep. at 52-53.) [App. Vol. V at 199-200].
- The photographs reflected in the negatives shown on Exhibit A-1 to the Webster Affidavit were provided to the prosecutor in the Johnson criminal case, including Strip 1. (*See* Compl. ¶ 32.) [App. Vol. I at 46].
- Neither [Maury] Kahn [,Plaintiff's film expert,] nor Plaintiff's law enforcement expert, Christopher Bertram, know what was shown by the additional photographs Raybuck allegedly took of the interior of Slagle's apartment on June 11, 1989. (Bertram Dep. at 59-60, ECF No. 194-7; Kahn Dep. at 24-25.) [App. Vol. V at 213-14; 228-29]. Plaintiff's experts concede there is no way to know. (*Id.*) [App. Vol. V at 213-14; 228-29].
- [George] Stanford was assigned as the detective in the Johnson

case. Detective Stanford's contemporaneous report does not mention photographs. (*See* Stanford Report; Bertram Dep. at 128.) [App. Vol. V at 244-47; 217].

- Bertram knows of no one who says Spencer or Stanford destroyed or misplaced negatives or photographs. (Bertram Dep. at 8-10, 125-26.) [App. Vol. V at 208-10, 215-16]. Likewise, Bertram knows of no one who says that Spencer or Stanford withheld photographs or negatives from the prosecution. (*Id*. at 126.) [App. Vol. V at 216]. Bertram also knows of no one who says Spencer or Stanford withheld evidence from the defense in the Johnson case. (*Id*. at 134-35.) [App. Vol. V at 220-21]. Bertram knows of no one who says Stanford saw any photographs or negatives. (*Id*. at 145.) [App. Vol. V at 223].

(App. Vol. VII at 233-38).

Based on the undisputed material facts, the district court granted summary judgment to Spencer and Stanford. (App. Vol. VII at 254). The court ruled, initially, that there was no evidence Raybuck took any pictures of the apartment other than the four exterior photographs maintained and produced by the Cheyenne Police Department. (*Id.* at 244). It also ruled that any inference to that effect would be speculative. (*Id.* at 244-246, 253-54). For example, the court stated that "[e]ven *if*

the existence of additional Raybuck photos could be reasonably inferred from the absence of identifying cards in the produced negatives, Kahn's opinion that such photos depicted the apartment's interior is pure conjecture." (*Id.* at 245) (emphasis in original). Christopher Bertram's purported opinion to that effect was determined to be deficient for the same reason (among others). (*Id.* at 245-26).

Further, the district court ruled that there was no evidence the alleged photographs of the interior of the apartment were exculpatory and material. (App. Vol. VII at 246-50). As to their alleged exculpatory value, Johnson contended "the 'missing' photographs 'would have been relevant and perhaps determinative' of the issues relating to where Johnson's identification cards were located and whether his eyeglasses were in the bedroom at the time." (*Id.* at 247). However, as the court stated "there is no evidence whatsoever that Raybuck took photographs of the dining room table, the floor outside the bathroom door, and the floor of the bedroom (which happened to show his identifications [sic] cards on the dining room table and not on the floor by the bathroom, happened to show marijuana or a wine bottle in the apartment, and happened to show the exact location in the bedroom where Slagle said she found his glasses two days later and show the glasses were not there)." *Id.*

As to materiality, the district court ruled that Johnson failed to show a reasonable probability that, had the allegedly exculpatory photographs existed and been disclosed, the result at trial would have been different. (*Id.* at 247). The court

also observed that Johnson "'had a readily available source to replace the missing [photos] – [the victim's and officers'] testimony and [his] own testimony of the events.'" (*Id.* at 249) (quoting *United States v. Parker,* 72 F.3d 1444, 1452 (10th Cir. 1995)). In that regard, Johnson could have testified as to where his identification cards were located and how Slagle came into possession of his glasses. (*Id.*). Johnson also could have cross-examined the officers on those matters and the existence of additional photographs. (*Id.*).

In addition to ruling that there was no evidence the alleged missing photographs ever existed or were exculpatory and material, the district court ruled that there was no evidence Spencer and Stanford had acted in bad faith. (App. Vol. VII at 250-51). In that regard, the court observed, "inquiry into bad faith 'must necessarily turn on the [government's] knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.'" (*Id.* at 251). Johnson had never explained how either Spencer or Stanford would or should have known that photographs of the interior of the apartment were exculpatory. (*Id.*). While the absence of an innocent explanation for loss or destruction could point to bad faith, this did not help Johnson because "the record here is devoid of any evidence as to the how, when, or why the photos were lost or destroyed or who was responsible." (*Id.*).

Finally, the district court ruled that qualified immunity barred Johnson's claims. (App. Vol. VII at 251-53). The court stated that "there is no evidence [Spencer and Stanford] participated in any violation of Johnson's constitutional rights, let alone did so knowingly or recklessly." (*Id.* at 252). Neither officer's report refers to photographs, and "Spencer affirmatively testified that he did not tamper with or dispose of any film negatives or photographs, view any negatives, request any negatives or photographs or withhold any evidence from the prosecutor in the Johnson case." (*Id.* at 252-53).

The district court also noted that Bertram admittedly did not know of anyone who said Spencer or Stanford destroyed, misplaced, or withheld negatives or photographs from the prosecution or defense. (App. Vol. VII at 253). His opinion that "somebody" had recklessly or intentionally removed the alleged pictures did not establish that Spencer or Stanford did so. (*Id.*) Their access to the negatives did "not bridge the gap from conjecture to reasonable inference." (*Id.*). The court concluded that "[b]ased on the facts in the record, Plaintiff cannot show [Spencer or Stanford] knowingly or recklessly caused a *Brady/Trombetta/Youngblood* violation in his criminal case." (*Id.*).

SUMMARY OF THE ARGUMENT

I. Dismissal of Fabrication of Evidence Claim

Spencer is entitled to qualified immunity on Johnson's fabrication of evidence claim. The identification procedure at issue, by itself, does not intrude on any constitutionally protected right. The constitutional right in question is the right to a fair trial – and Johnson cannot show that he was denied a fair trial due to the identification procedure followed by Spencer.

Spencer also did not act improperly by showing Slagle an identification card he found at the crime scene shortly after the crime was committed. Doing so was not impermissibly suggestive, and Slagle's identification of Johnson was reliable under the totality of the circumstances. Finally, Spencer does not allege a violation of clearly established law. The district court should be affirmed.

II. Grant of Summary Judgment on *Brady/Trombetta/Youngblood* Claims

Johnson has not raised a genuine dispute of material fact on his *Brady/Trombetta/Youngblood* claims. As a prerequisite, those claims require evidence that Raybuck actually photographed the interior of Slagle's apartment. Johnson adduced no evidence that Raybuck did so. There is also no evidence from which a jury could infer Raybuck did so.

Further, Johnson's theory that the alleged missing photographs were exculpatory requires evidence that Raybuck photographed specific areas of the

apartment that showed or failed to show specific items. Johnson submitted no evidence that Raybuck photographed those areas and no evidence as to what those photographs showed. Johnson also did not raise a genuine issue as to whether the alleged missing photographs were material in the constitutional sense. Finally, to pursue his claim under *Youngblood*, Johnson had to submit evidence that Spencer and Stanford acted in bad faith. Johnson did not do so.

Qualified immunity also bars the *Brady/Trombetta/Youngblood* claims. To surmount qualified immunity, Johnson had to show Spencer or Stanford personally participated in any destruction or failure to preserve evidence, and did so knowingly or recklessly. Johnson did not come forward with any evidence on this point. Summary judgment on the *Brady/Trombetta/Youngblood* claims should be affirmed.

ARGUMENT

I. The district court correctly dismissed Johnson's alleged fabrication of evidence claim against Spencer.

A. Standard of Review

"[This Court] review[s] Rule 12(b)(6) dismissals and qualified-immunity rulings de novo." *Frey v. Town of Jackson, Wyo.,* 41 F.4th 1223, 1232 (10th Cir. 2022) (alterations added). "When a defendant raises qualified immunity in his motion to dismiss, we engage in a two-part analysis. We must decide (1) whether the plaintiff plausibly alleged a violation of a constitutional right, and (2) if

so, whether that right was clearly established at the time of the alleged violation." *Id.* (internal citation, citation, and internal quotation marks omitted).

"The [qualified immunity] test imposes a heavy two-part burden." *Grissom v. Roberts*, 902 F.3d 1162, 1167 (10th Cir. 2018) (alteration added) (citation and internal quotation marks omitted). "Under this test, immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id.* (internal quotation omitted). "[A] defendant's assertion of qualified immunity from suit under 42 U.S.C. § 1983 results in a presumption of immunity." *Est. of Taylor v. Salt Lake City,* 16 F.4th 744, 757 (10th Cir. 2021) (citation omitted).

B. Johnson failed to plausibly allege a constitutional violation by Spencer.

Due process is implicated when identification testimony at trial is preceded by pre-trial photographic identification. *Perry v. New Hampshire,* 565 U.S. 228, 232 (2012). "If there is a very substantial likelihood of irreparable misidentification, the judge must disallow presentation of the evidence at trial." *Perry,* 565 U.S. at 232 (internal quotation marks and citation omitted). "But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." *Id.*

As the foregoing shows, "the constitutional interest implicated in challenges to police identification procedures is *evidentiary* in nature." *Alexander v. City of S.*

Bend, 433 F.3d 550, 555 (7th Cir. 2006) (emphasis in original) (citing *Manson,* 432 U.S. at 113 n. 14). "[A] suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest." *Manson,* 432 U.S. 98 at 113 n. 13. Instead, the "rule regarding unduly suggestive identification procedures 'is a prophylactic rule designed to protect a core right, that is the right to a fair trial, and it is only the violation of that core right and not the prophylactic rule that should be actionable under § 1983.'" *Id.* (quoting *Hensley v. Carey,* 818 F.2d 646, 649 (7th Cir. 1987)); *accord Wray v. City of New York,* 490 F.3d 189, 193 (2d Cir. 2007) (constitutional violation is denial of fair trial, not the suggestive identification procedure itself); *Pace v. City of Des Moines,* 201 F.3d 1050, 1055 (8th Cir. 2000) ("In the context of unduly suggestive lineups, only a violation of the core right—the right to a fair trial—is actionable under § 1983."); *cf. Vega v. Tekoh*, 142 S. Ct. 2095, 2101–02 (2022) (violation of the prophylactic *Miranda* rule does not give rise to a claim under 42 U.S.C. § 1983).

Johnson did not allege that Spencer's use of the identification card caused him to be denied a fair trial. Nor can he. According to Johnson, Slagle's testimony against him was not the product of "irreparable misidentification;" Slagle simply lied. (Apl't Br. at 45). "The allegation here is that *Ms. Slagle did not mistake or confuse Mr. Johnson* – who was an acquaintance (App. Vol. I at 47) – for Mr. Haggberg, Ms.

Slagle's boyfriend or fiancée (App. Vol. I at 35); rather, she lied." (Apl't Br. at 46) (emphasis added).

Spencer's action in using the identification card was not prohibited in any event. As this Court has held:

> "The inquiry required by the due process clause when an identification procedure is challenged is two pronged: first, it must be determined whether the identification procedure was impermissibly suggestive; and, second, if it is found to have been so, whether the identification nevertheless was reliable in view of the totality of the circumstances.

Johnston v. Makowski, 823 F.2d 387, 391 (10th Cir. 1987); *accord United States v. Worku,* 800 F.3d 1195, 1203 (10th Cir. 2015).

Based on the allegations of the complaint, the "identification procedure" in this case was not impermissibly suggestive. Spencer showed Slagle an identification card he had just found at the crime scene and asked if the person depicted on the card was her assailant. (App. Vol. I at 42). Slagle said it was. (*Id.*). The identification of Johnson was not an identification under "police-arranged suggestive circumstances." *Perry,* 565 U.S. at 232.

Slagle's identification of Johnson was also reliable under the totality of the circumstances. Slagle and Johnson were not "total strangers." *See Manson*, 432 U.S. at 112 (explaining that "usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness' recollection of the stranger can be distorted easily by the circumstances or

by later actions of the police."). Johnson admittedly knew Slagle, had socialized with her previously and had been with her that night. (App. Vol. I at 47-48). Slagle also identified Johnson as her attacker within minutes of the assault. (*Id.* at 42).

As the district court ruled, "[t]hese indicators of the reliability of Ms. Slagle's identification are hardly outweighed by any suggestive effect of the challenged identification itself." (App. Vol. IV at 148). And Johnson alleged no facts suggesting that Spencer should have known Slagle was lying. (*Id.* at 150). The district court properly dismissed the fabrication of evidence claim.

C. Johnson did not allege a violation of clearly established law by Spencer.

To defeat qualified immunity Johnson must allege a violation of clearly established law. *Frey,* 41 F.4th at 1232. "For the law to be clearly established, there ordinarily must be a Supreme Court or Tenth Circuit opinion on point, or the clearly established weight of authority from other circuits must point in one direction." *Pompeo v. Bd. of Regents of the Univ. of New Mexico,* 852 F.3d 973, 981 (10th Cir. 2017) (internal quotation marks omitted).

"The Supreme Court has 'repeatedly stressed that courts must *not* define clearly established law at a high level of generality, since doing so avoids the crucial question [of] whether the official acted reasonably in the particular circumstances that he or she faced.'" *Frasier v. Evans,* 992 F.3d 1003, 1021 (10th Cir.) (quoting *District of Columbia v. Wesby,* 138 S. Ct. 577, 590 (2018)) (alteration and emphasis

in *Wesby*) (additional internal quotation marks omitted). A court "must ask whether the violative nature of *particular* conduct is clearly established." *Pompeo,* 852 F.3d at 981-82 (internal quotation and citation omitted) (emphasis in original). "With the right at issue so formulated, existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 982 (internal quotation and citation omitted).

Johnson argues that Spencer was constitutionally-required to obtain a description of Slagle's assailant from Slagle before showing her Johnson's identification card. (Apl't Br. at 55). However, Johnson proffers no decision from this or any court – issued before or after the events in question – that imposes the constitutional requirement he urges.[3] Johnson instead falls back on a defendant's generalized "right to be free from reckless falsification of identification evidence[.]" (*Id.* at 57).

Johnson cites *Pierce v. Gilchrist,* 359 F.3d 1279 (10th Cir. 2014) in support of his argument, but *Pierce* is nothing like this case. In that case, a police chemist was alleged to have falsely reported to the prosecution that a suspect's hair was microscopically consistent with hair found at the scene of the crime. *Pierce,* 359

[3] Johnson asserts that common sense and proper police technique required Spencer to obtain a physical description from Slagle before showing her the identification card. (Apl't Brief at 56). However, clearly established law is derived from decisions issued by courts, not dubious propositions put forth by parties.

F.3d at 1282-83. In this case, Johnson does not allege Spencer falsely reported that Slagle identified him as her attacker. He admits that Slagle *did* identify him. (Apl't Br. at 50).

A "right to be free from reckless identification evidence" is also far too general to form the basis for clearly established law. *See Frasier,* 992 F.3d at 1021 (recognizing that courts must not define clearly established law at a high level of generality). A recent identification decision of the Seventh Circuit Court of Appeals illustrates the correct analysis. *Holloway v. City of Milwaukee,* No. 21-3007, 2022 WL 3152594 (7th Cir. Aug. 8, 2022). In that case, Plaintiff Holloway was exonerated by DNA evidence after serving twenty-four years in prison. Holloway subsequently filed a § 1983 action, claiming police officers had used an unconstitutional identification procedure. The victim tentatively identified the suspect in a photo array and then identified him with certainty from a lineup thirty-two hours later. *Id*. at *2.

On appeal from a summary judgment for defendants, the Seventh Circuit Court ruled that there was a genuine dispute of material fact as to whether the identification procedure was unconstitutionally suggestive. *Holloway,* 2022 WL 3152594 at *4. The court nonetheless affirmed summary judgment based on qualified immunity. *Id.* The court ruled that, "[b]ecause Holloway can point to no controlling or persuasive authority that clearly established that it was impermissible

for the police to use a photo array only a day or so before the physical lineup, defendants are entitled to qualified immunity as a matter of law." *Id.*

Spencer is likewise entitled to qualified immunity in this case. Johnson alleges that Spencer recklessly failed to obtain a physical description of the assailant before showing Slagle his identification card. (Apl't Br. at 53-58). However, Johnson has not identified a pre-existing (or subsequent) case requiring Spencer to obtain a physical description before showing her identification. Johnson has thus failed to satisfy the second prong of qualified immunity test as a matter of law. The district court should be affirmed.

II. The district court correctly entered summary judgment on Johnson's *Brady/Trombetta/Youngblood* claims.

A. Standard of Review

"[This Court] review[s] a grant of summary judgment de novo and appl[ies] the same legal standard used by the district court." *Hooks v. Atoki*, 983 F.3d 1193, 1205 (10th Cir. 2020) (citation omitted) (alterations added).

Under Rule 56(a), Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

With respect to summary judgment:

> The party moving for summary judgment bears the initial burden of showing an absence of any issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

> Where, as here, the burden of persuasion at trial would be on the nonmoving party, the movant may carry its initial burden by providing "affirmative evidence that negates an essential element of the nonmoving party's claim" or by "demonstrat[ing] to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Id.* at 331, 106 S.Ct. 2548.
>
> If the movant makes this showing, the burden then shifts to the nonmovant to "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505 91 L.Ed.2d 202 (1986). If the nonmovant "fails to make a showing sufficient to establish the existence of an element," the Federal Rules of Civil Procedure "mandate[ ] the entry of summary judgment." *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548.

Tesone v. Empire Mktg. Strategies, 942 F.3d 979, 994 (10th Cir. 2019) (alteration in original).

As this Court has further explained:

> No genuine issue of material fact exists unless the evidence, construed in the light most favorable to the non-moving party, is such that a reasonable jury could return a verdict for the non-moving party. Unsubstantiated allegations carry no probative weight in summary judgment proceedings. Rather, to defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise.

Hasan v. AIG Prop. Cas. Co., 935 F.3d 1092, 1098 (10th Cir. 2019) (internal citations and quotation marks omitted).

"[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphases in original). Thus, "[w]hen the

moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts[.]" *Scott v. Harris,* 550 U.S. 372, 380 (2007) (citation and internal quotation marks omitted) (alterations added).

B. Johnson did not raise a genuine dispute as to the taking and content of photographs of the interior of the apartment where the assault took place.

Johnson alleges that Raybuck took pictures of the inside of the apartment where the assault occurred. Johnson claims the photographs were exculpatory in some way and, in violation of *Brady, Trombetta* and *Youngblood*, Spencer and Stanford allegedly destroyed or failed to preserve the photographs.

A brief discussion of those cases is thus in order. In *Brady v. Maryland*, 373 U.S. 83 (1963), defendant (Brady) and another (Boblit) were separately tried for first degree murder arising from the same incident. Brady conceded that he had been involved in the incident, but claimed that Boblit had done the actual killing. Prior to trial, Brady's counsel asked the prosecution for all of Boblit's statements. The prosecution provided some statements, but withheld Boblit's confession to actually committing the murder. *Brady,* 373 U.S. at 84.

Against that background, the *Brady* court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Goode v. Carpenter,*

922 F.3d 1136, 1149 (10th Cir. 2019) (quoting *Brady*, 373 U.S. at 87). "To prevail on a *Brady* claim, the proponent must show that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defendant, and (3) the evidence was material." *Id.* (citation and internal quotation marks omitted). "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Id.* (citation and internal quotation marks omitted).

In *California v. Trombetta*, 467 U.S. 479 (1984), a drunk driving case, a breath sample used for a breathalyzer test was discarded. The California Court of Appeals held that the destruction of the breath sample violated due process, requiring suppression of the breathalyzer test result. The United States Supreme Court reversed. *California v. Trombetta,* 467 U.S. 488, 491 (1984). In so doing, the Court held as follows:

> California's policy of not preserving breath samples is 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, **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 488-49 (footnote and internal citation omitted) (emphasis added).

In *Arizona v. Youngblood*, 488 U.S. 51 (1988), a sexual assault case, police obtained a victim's underwear and t-shirt following the assault. The clothing was not refrigerated or frozen. Shortly after the assault, a police criminologist tested other items, but not the clothing. Over a year later, a criminologist examined the clothing. The criminologist found a semen stain on both the t-shirt and underwear. Tests of the stains were either unsuccessful or inconclusive. Defendant alleged that prompt testing or refrigeration of the clothing could have exonerated him. The Arizona Court of Appeals found a violation of due process and reversed defendant's conviction. *See Youngblood,* 488 U.S. at 55. The court did not find that the State had acted in bad faith. *Id.*

The United States Supreme Court reversed. *Youngblood,* 488 U.S. at 59. The Court held that unless a criminal defendant can show bad faith on the part of the police, a failure to preserve potentially useful evidence does not constitute a denial of due process of law. *Id.* The Court noted that "[t]he presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at 56 n. *. Negligence on the part of the police is not sufficient to show bad faith. *Id.* at 58.

Combining *Trombetta* and *Youngblood,* this Court has distilled the following standard:

> To the extent the Constitution's due process guarantees impose a duty upon the government to preserve evidence, the Supreme Court has told us that the "duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *California v. Trombetta,* 467 U.S. 479, 488–89, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). To qualify as constitutionally material in this sense, the evidence must: (1) "possess an exculpatory value that was apparent [to the police] before the evidence was destroyed," and (2) "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489, 104 S.Ct. 2528. In addition, "if the exculpatory value of the evidence is indeterminate and all that can be confirmed is that the evidence was 'potentially useful' for the defense," then the defendant must also show (3) "that the government acted in bad faith in destroying the evidence." *United States v. Bohl,* 25 F.3d 904, 910 (10th Cir.1994) (quoting *Arizona v. Youngblood,* 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)).

United States v. Ludwig, 641 F.3d 1243, 1253-54 (10th Cir. 2011).

Based on the foregoing, as the district court observed, *Brady/Trombetta/Youngblood* claims presuppose the existence in fact of a thing in the hands of the State – a confession, a breath sample, a piece of clothing – that is suppressed, destroyed, or rendered useless to the defense. (App. Vol. VII at 243).

Indeed, this Court has held that "[a] *Brady* claim fails if the existence of favorable evidence is merely suspected. **That the evidence exists must be established by the defendant**." *United States v. Erickson,* 561 F.3d 1150, 1163 (10th Cir. 2009) (emphasis added).

This obvious principle dooms Johnson's claims in this case. Johnson theorizes that the prosecutor and his defense lawyer were not given photographs of the inside

of the apartment taken by Raybuck on June 11, 1989. (App. IV at 45-46, 56). However, Johnson does not have any of the alleged photographs. He does not even claim the photographs exist. Johnson does not know what happened to them. (*Id.* at 36). And his experts concede there is no way to know what the alleged photographs show. (App. Vol. V at 213-14, 228-29).

Spencer and Stanford established below that there is no evidence any photographs of the interior of the apartment ever existed. Raybuck's contemporaneous report only references four photographs of the apartment (the exterior photographs reprinted in Johnson's appellate brief). (App. Vol. V at 144; Apl't Br. at 13-16) (reprinting photographs). No document references additional apartment photographs by Raybuck. (App. Vol. V at 224-25). Stanford's report does not mention photographs at all. (App. Vol. V at 244-47). As the district court observed, "Bertram [Johnson's expert] admittedly has no information about apartment photographs taken by Raybuck other than what is stated in Raybuck's report." (App. Vol. VII at 245 (citing App. Vol. V at 222)).

Given the passage of time, Raybuck does not recall taking any photographs on the date of the incident. (App. Vol. V at 143). Specifically, Raybuck does not recall photographing a flash card at the crime scene.[4] (*Id.*). Based on the absence of

[4] In his brief, citing a page from Raybuck's deposition, Johnson suggests Raybuck testified that in fact he photographed a flash card on the occasion in question. (Apl't Brief at 37). Raybuck testified to no such thing. (App. Vol. V at 177).

any reference in his report to photographs of the interior of Slagle's apartment, Raybuck has no reason to believe he took any such photographs at any time. (*Id.*).

Johnson nonetheless argues that "the material facts and reasonable inferences to be drawn therefrom" show that Raybuck did take photographs of the interior of the apartment. (Apl't Br. at 21). Johnson relies on two facts in this regard: (1) Raybuck customarily took pictures of flash cards at the beginning and the end of crime scene photographs and none exist in this case; and (2) Raybuck's report refers to a photograph of Slagle's inner thigh and no such photograph exists.[5] (*Id.* at 17).

From these facts, Johnson claims it can be inferred that (1) Raybuck took photographs not referenced in his report; (2) those photographs included photographs of the interior of the apartment; (3) the photographs of the interior of the apartment included photographs of the bedroom, bathroom doorway and living room table; and (4) the photographs showed the absence or presence of various things and were thus somehow exculpatory. (Apl't Br. at 37-41).

This is not inference. This is invention. "An inference is a logical conclusion drawn from the facts." *Adams v. Kinder-Morgan, Inc.,* 340 F.3d 1083, 1105 (10th

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[5] In his brief, citing another portion of Raybuck's deposition, Johnson falsely asserts that "there are photographs that Officer Raybuck recalls to have taken of Ms. Slagle that are also missing from the negatives produced by the CPD." (Apl't Brief at 38) (emphasis added). The cited deposition testimony does not support this assertion. (App. Vol. V at 164-65, 174, 200).

Cir. 2003), *as amended on denial of reh'g* (Aug. 29, 2003). None of the foregoing matters logically flow from the facts identified by Johnson. For example, Johnson presented no evidence Raybuck ever omitted a reference to a photograph from a report. A jury would have no basis to conclude that he did so as to any photographs in this instance.

To the extent any inferences are indulged in this case, they would be unreasonable. *See GeoMetWatch Corp. v. Behunin,* 38 F.4th 1183, 1200 (10th Cir. 2022) ("an inference is unreasonable if it requires a degree of *speculation* and conjecture that renders [the factfinder's] findings *a guess or mere possibility*." (emphases in original) (alteration in original) (citation and internal quotation marks omitted). At best, all a jury could do in this case is guess that the alleged missing photographs were taken and guess what they showed.

What's more, contrary to Johnson's claim, he is not rescued by Bertram's opinion about what a professional photographic examination of a crime scene would include. (Apl't Br. at 38). All that Bertram's opinion tells us is what photographs, in his view, should have been taken; it tells us nothing about what photographs were in fact taken. (App. Vol. VII at 245-46).

Johnson also is not rescued by *United States v. Bohl,* 25 F.3d 904 (10th Cir. 1994), which involved evidence that indisputably existed and was destroyed. (Apl't Br. at 39). In *Bohl*, defendants built steel towers for the Federal Aviation

Administration. *Bohl,* 25 F.3d at 906-07. The parties' contract included specifications with respect to the metallic content of the steel. *Id.* at 907. The government alleged the steel used did not conform to those specifications, and defendants were indicted for fraud. *Id.* at 907-08. Despite defendants' numerous requests to inspect the towers, the government destroyed them. *Id.* at 908-09. All that remained was an eighteen-inch portion of one tower leg and shavings from legs on two other towers. *Id.* at 908. Government testing of those small samples, the legitimacy of which was in question, revealed some nonconforming steel. *Id.* at 907. Defendants were convicted of fraud. *Id.* at 909.

On appeal, defendants challenged their convictions pursuant to *Youngblood*, which required them to show the government had destroyed potentially useful evidence in bad faith. *See Bohl,* 25 F.3d at 910. This Court held that the discarded towers constituted potentially useful evidence, reasoning as follows:

> Given the substantial dispute over testing methodologies to determine the chemical composition of the steel tower legs, doubts about the accuracy of the government's tests, and [defendants'] additional independent evidence of the possibility that the steel met the Contract specifications, defendants have established that the actual steel used in the towers was potentially useful for their defense because their own tests of the steel might have exonerated them.

Id. at 911.

Johnson claims that *Bohl* requires this Court to assume that Raybuck might have photographed the living room table in the apartment and the photograph might

have shown Johnson's identification card on the table. (Apl't Br. at 40-41). The claim should be rejected. There is no evidence any pictures of the interior of the apartment – unlike the towers in *Bohl* – ever existed. There is no dispute over the examination of the photographs that did exist. There is no evidence (let alone "independent evidence") that the postulated photographs might have been exculpatory. *See Bohl,* 25 F.3d at 911. And there is no evidence Spencer and Stanford destroyed any photographs. *Bohl* is irrelevant to this case.

In short, Johnson failed to raise a genuine issue as to the taking and content of the "missing photographs" upon which his *Brady/Trombetta/Youngblood* claims are based. Summary judgment should therefore be affirmed.

C. Johnson did not raise a genuine issue on other elements of his *Brady/Trombetta/Youngblood* claims.

To prevail on *Brady/Trombetta/Youngblood* claims, a criminal defendant must show the undisclosed evidence was material in a constitutional sense. *See Goode,* 922 F.3d at 1149 (*Brady*); *Ludwig,* 641 F.3d at 1253 (*Trombetta/Youngblood*). To satisfy the materiality element of a *Brady* claim, a defendant must show "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Goode,* 922 F.3d at 1149 (citation and internal quotation marks omitted). To satisfy the materiality element of *Trombetta/Youngblood* claims, a defendant must show the undisclosed evidence "(1) possess[ed] an exculpatory value that was apparent [to the police]

before the evidence was destroyed, and (2) [was] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Ludwig,* 641 F.3d at 1253 (citation and internal quotation marks omitted) (alterations added). When a *Youngblood* claim is made, a defendant must additionally show that "the government acted in bad faith in destroying the evidence*."* *Ludwig,* 641 F.3d at 1253-54 (citation omitted).

As the district court ruled, Johnson did not raise a genuine issue on any of the foregoing elements of his claims. (App. Vol. VII at 247-51). As to *Brady*, the criminal trial evidence placed Johnson and Slagle together the night of the assault, not only at the bar but also at the apartment; Johnson's identification cards were admittedly found in the apartment; Slagle identified Johnson as the perpetrator shortly after the assault; Slagle testified at length that Johnson raped her; and both Slagle and Haggberg testified that Haggberg was out-of-town at the time of the assault. (App. Vol. I at 42-43, 47-51).

In the face of that evidence, there is no reason to think Johnson would have been acquitted if only he had had pictures of the marijuana, wine, sleeve containing the identification cards, and the location where the glasses were found. What Johnson and Slagle did at the apartment earlier on the night of June 10-11, 1989 was irrelevant; whether Spencer found the identification cards on a coffee table or on the

floor by the bathroom was of no consequence; and whether Slagle found Johnson's glasses in her bedroom was insignificant.

Johnson does not even argue on appeal that the result of his trial might have been different if the alleged missing photographs had been disclosed. Instead, Johnson baselessly argues that he need not make such a showing in this case. (Apl't Br. at 41). *Brady* requires such a showing. *See Goode*, 922 F.3d at 1149. He also complains, to no effect, that the order on summary judgment refers to statements by the Wyoming Supreme Court in its opinion on Johnson's direct appeal. (*Id.* at 41-42; App. Vol. VII at 7). Johnson did not meet the materiality element of a *Brady* claim in this case.

Likewise, Johnson does not argue that he met the materiality element of his *Trombetta/Youngblood* claim. Johnson does not mention that element at all. Johnson presented no evidence the alleged exculpatory value of the "missing" photographs was apparent to anyone on the Cheyenne police force, let alone to Spencer or Stanford. (App. Vol. VII at 248-49). Johnson also had "other reasonably available means" to impeach and present evidence on the subjects in question, through his own testimony and cross-examination of Slagle and the officers. (*Id.* at 249-50).

Finally, Johnson did not present any evidence of bad faith on the part of Spencer and Stanford. (App. Vol. VII at 250-51). Relying on *Bohl*, Johnson argues he did not have to because there was no "innocent explanation" for the alleged