Superior Court of New Jersey
APPELLATE DIVISION
DOCKET NO. A-1955-23T4

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	On Appeal from a Final Order in the Superior Court of New Jersey, Law Division, Bergen County.
v.	:	Sat Below:
LARRY M. NOEL	:	Hon. Christopher R. Kazlau, J.S.C.
Defendant-Respondent.	:	

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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May 7, 2024

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

OTHER AUTHORITIES

TABLE OF CITATIONS

Pa – State's appendix
1T – motion transcript dated December 11, 2023
2T – motion transcript dated January 22, 2024

TABLE OF JUDGMENTS, RULINGS, & ORDERS BEING APPEALED

INDEX OF APPENDIX

PRELIMINARY STATEMENT

The State intends to prove at trial that defendant arranged to meet with who he thought was a fourteen-year-old boy to have sex with him. The "boy" was actually an undercover detective from the Division of Criminal Justice, who he met online on Adam4Adam, an adults-only social-networking website for gay males. But because the detective inadvertently failed to preserve the profile used to chat with defendant, the trial judge found that defendant had proved the loss of the Adam4Adam profile had deprived him of his ability to receive a fair trial. And then he ruled that the only remedy available for this discovery violation was a dismissal of his indictment.

But the loss, misplacement, or destruction of evidence—even important evidence—does not inevitably and automatically create a discovery violation of a constitutional magnitude. Instead, to show a due process violation, a defendant must establish the State has acted in bad faith in destroying the evidence, the evidence was materially and facially exculpatory, or there were no other means of obtaining comparable evidence, thus irreparably prejudicing him.

In this case, defendant could not carry this burden to show his due process rights were violated by the State's inadvertent failure to preserve the undercover detective's Adam4Adam profile. First, defendant offered only speculation that the State was responsible for the deletion of the profile and could offer no proof

it had acted in bad faith. Second, he did not explain how the profile would have exculpated him, given his confession to arranging to have sex with a boy who told him he was fourteen years old and the chat logs confirming those messages. Third, he failed to show how he was irreparably prejudiced by the loss of the profile: the State had provided him with the age-regressed photograph that was used in the profile, he had the ability to recreate the remaining contents of the profile through other means, and the State had agreed that the judge should provide the jury with an adverse-inference charge, allowing the jury to infer the profile was destroyed by the State because it was favorable to defendant.

But dismissing an indictment is a drastic remedy our courts have warned should be used only as a last resort, only on the clearest and plainest of grounds, and only when there is no lesser remedy available. Procedurally dismissing a case without determining its merits deprives the State of its day in court, provides culpable defendants with unqualified immunity for their crimes, infringes on the rights of victims, and it impacts the safety of the community and the integrity of the criminal-justice system.

There were no grounds in this case warranting this extreme and draconian remedy, particularly since a lesser remedy was available and consented to by the State. Accordingly, the judge's decision was both a misapplication of the law and a clear abuse of discretion and this Court should reverse the ruling on appeal.

STATEMENT OF PROCEDURAL HISTORY

A State Grand Jury returned Indictment 19-10-0128-S charging defendant, Larry Noel, with second-degree Luring in violation of N.J.S.A. 2C:13-6(a) (count one); second-degree Attempted Sexual Assault in violation of N.J.S.A. 2C:5-1/2C:14-2(c) (count two); and third-degree Attempted Endangering the Welfare of a Child (Impairing/Debauching the Morals) in violation of N.J.S.A. 2C:5-1/2C:24-4(a)(1) (count three). (Pa1-5).

Defendant filed several motions, including a motion to dismiss his indictment on the grounds that the State had "affirmatively deleted" the Adam4Adam profile created by the undercover detective that led defendant to contact "Mark" on April 11, 2019. (1T6-12 to 16). The Honorable Christopher Kazlau, J.S.C., heard the motion on December 11, 2023. (1T). On January 22, 2024, Judge Kazlau granted defendant's motion, ruling that the State's failure to preserve the Adam4Adam profile was "either bad faith or connivance or an extremely egregious carelessness on the part of the detective[.]" (2T16-23 to 25). And even though the State had provided defendant with the picture used in "Mark's" profile, had assured the Court it would elicit during its case in chief that the profile listed Mark's age as at least eighteen, and had agreed the judge should provide the jury with an adverse-inference charge about the lost profile, Judge Kazlau ruled that the State's carelessness could not be cured. (1T18-8 to

21; 2T13-7 to 14-7; 2T16-23 to 25; Pa6-7). He determined defendant was unduly and irreparably prejudiced by the State's error and the only available remedy was to dismiss defendant's indictment. (2T17-2 to 5). He noted his dismissal was without prejudice, but that the State was only permitted to re-present the case to the grand jury if it located the missing profile. (2T17-2 to 5; Pa8).

The State timely filed a notice of appeal on March 4, 2024. (Pa9-12).

STATEMENT OF FACTS

Posing as a fourteen-year-old boy named Mark, undercover Bayonne Township Police Department detective Brian Borow created a profile on Adam4Adam, an adults-only social-networking website for gay males and used an age-regressed photo of himself as the profile picture. Around 9:00 p.m. on April 11, 2019, he received a message from user "morrisnoel," later determined to be defendant, that asked, "Hey are you looking for fun tonight?" "Mark" replied, "Sure." After some discussion about sexual positions, "Mark" asked defendant how old he was and defendant replied, "29 and you[?]" "Mark" replied that he was fourteen years old and would be fifteen in two weeks. Defendant replied, "Oh ok." After some more back-and-forth conversation, "Mark" messaged defendant, "I want [sic] sure if [you] were ok with my age with the oh ok answer." Defendant responded with, "Lol . . . when your [sic]

free[.]" After "Mark" said he was free that night, defendant agreed to drive to his house to meet him for sex, telling "Mark," "I would like to rim you, give you oral and sex and kissing if your [sic] into that" and that he would bring the lubrication. When defendant arrived at the pre-arranged location less than an hour later, he had the Adam4Adam application open on his phone on the passenger seat of his car and had the bottle of lubrication with him. (Pa14-15).

Defendant was subsequently arrested and brought to the Bergen County Prosecutor's Office for an interview. (Pa16-31). After being read his Miranda[1] rights, defendant acknowledged he was being interviewed because he "was an idiot" and had not made a good decision, but insisted he was "just being curious" and was not a "bad person[.]" (Pa19). He told investigators he contacted "Mark" after seeing his profile on Adam4Adam. (Pa19). He admitted "Mark" told him he was fourteen. (Pa20; Pa21). But he insisted "Mark's" profile said he was eighteen, so defendant continued to chat with him and they agreed to meet up for sex. (Pa20). Defendant told investigators that that night was the first time he had used the Adam4Adam application to meet up with anyone who was under eighteen years old. (Pa22).

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

LEGAL ARGUMENT

POINT I

DEFENDANT FAILED TO ESTABLISH THERE WAS ANY BASIS TO DISMISS HIS INDICTMENT. (2T3-14 to 18-4; Pa8)

Judge Kazlau erred in granting defendant's motion to dismiss his indictment, ruling that the loss of the Adam4Adam profile created by the undercover detective irreparably violated defendant's due process rights and deprived him of his ability to receive a fair trial. (2T). As this decision was based on an incorrect application of the law and was an abuse of discretion, it should be reversed on appeal.

Indictments should stand unless they are palpably defective. State v. Williams, 441 N.J. Super. 266, 272 (App. Div. 2015). New Jersey courts have long adhered to the principle that "a dismissal of an indictment is a draconian remedy [that] should not be exercised except on the clearest and plainest ground." State v. Peterkin, 226 N.J. Super. 25, 38 (App. Div.) certif. denied 114 N.J. 295 (1988) (citation and punctuation omitted). "Dismissal is the most severe sanction a court can impose; it is to be used with the greatest caution and deliberation." State v. Montijo, 320 N.J. Super. 483, 490 (Law. Div. 1998). "[D]ismissal is the last resort because the public interest, the rights of victims and the integrity of the criminal justice system are at stake." State v. Ruffin,

371 N.J. Super. 371, 384 (App. Div. 2004).

Justice is rarely served when criminal cases are dismissed on something other than their merits. Peterkin, 226 N.J. Super. at 38. "There is an overriding policy which is firmly imbedded in our law which disfavors the procedural dismissal of cases, except on the merits. Procedural dismissal is a choice of last resort not one of first instance." State in Interest of D.J.C., 257 N.J. Super. 118, 121 (App. Div. 1992). Indeed, choosing to dismiss an indictment "does not correct the error; it serves only to deprive the State of an opportunity to try the issues raised by the indictment. Dismissal does more than redress the wrong done to defendant; it effectively grants him immunity from prosecution." State v. Porro, 175 N.J. Super. 49, 52 (App. Div. 1980).

And because the dismissal of an indictment is such an extreme remedy, it is the defendant who bears the burden of establishing grounds exist to justify it. State v. Welek, 10 N.J. 355 (1952). Unless he can establish that his right to a fair trial has been irretrievably lost, the trial court should deny his motion to dismiss the indictment. State v. Abbati, 99 N.J. 418, 425 (1985); Peterkin, 226 N.J. Super. at 39.

Except in rare circumstances, the State's loss or even destruction of an important piece of evidence does not violate a defendant's rights. See State v. Marshall, 123 N.J. 1, 110 (1991), supplemented, 130 N.J. 109 (1992); State v.

Hollander, 201 N.J. Super. 453, 479 (App. Div.), certif. denied, 101 N.J. 335 (1985); State v. Mustaro, 411 N.J. Super. 91 (App. Div. 2009). To carry the heavy burden of establishing his rights were violated by the discovery violation, a defendant must show the government destroyed or failed to preserve the evidence in bad faith, that the evidence was sufficiently materially and facially exculpatory to the defense, or that he was irredeemably prejudiced by the loss or destruction of the evidence. Hollander, 201 N.J. Super. at 479. Simply pointing to a violation of a Court Rule or a similar misstep by the State does not satisfy this obligation.

Furthermore, the trial court's remedy for this discovery violation must be "just and reasonable under the circumstances." Aetna Life & Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 365 (App. Div. 1998). Even in cases where evidence has been lost or destroyed, the dismissal of a case with prejudice is the "ultimate sanction" and should not be ordered unless there is no other, lesser remedy available that would cure the prejudice created by the lack of discovery. Johnson v. Mountainside Hosp., Respiratory Disease Associates, 199 N.J. Super. 114, 199-20 (App. Div. 1985). "If a lesser sanction could erase the prejudice against the non-delinquent party, dismissal of the complaint with prejudice would not be appropriate and would therefore constitute an abuse of discretion." Id. at 120. Indeed, the "drastic remedy" of dismissing the

indictment "is inappropriate where other judicial action will protect a defendant's fair trial rights." State v. Clark, 347 N.J. Super. 497, 508 (App. Div. 2002); see State v. Franklin Sav. Account No. 2067, 389 N.J. Super. 272, 280 (App. Div. 2006) ("[T]he extreme sanction of dismissal is inappropriate where a less drastic remedy would rectify the harm.")

While the decision of whether to dismiss an indictment initially lies within the discretion of the trial court and is reviewed on appeal under an abuse of discretion standard, appellate courts need not give deference to a trial judge's factual rulings in cases where the court failed to give sufficient regard to all relevant information. State v. Twiggs, 233 N.J. 513, 532 (2018); State v. Ramirez, 252 N.J. 277, 298 (2022). And any purely legal determinations included in the decision to dismiss are reviewed de novo. Twiggs, 233 N.J. at 532; State v. Scherzer, 301 N.J. Super. 363, 424 (App. Div.), certif. denied, 151 N.J. 466 (1997).

In this case, without any evidence, Judge Kazlau found the loss of the Adam4Adam profile violated defendant's rights and that the only appropriate remedy was a dismissal of his indictment. This ruling ignored the other evidence of defendant's guilt, the other evidence available to replicate the contents of the missing profile, and the other less extreme remedies that could have been imposed to alleviate any remaining prejudice defendant suffered as a result of

the lost profile, namely an adverse-inference jury instruction. Judge Kazlau's legally and factually unsupported ruling thus should be reversed on appeal.

A. Defendant Offered No Proof the State Deleted the Adam4Adam Profile, Let Alone That It Did So in Bad Faith.

Defendant failed to present any evidence that the State deleted the Adam4Adam profile, let alone that it did so intentionally or maliciously. Thus, Judge Kazlau's opinion finding defendant had nonetheless proven the State destroyed the profile in bad faith was an abuse of discretion and an erroneous application of the law.

A defendant attempting to prove his rights were violated under the first Hollander factor must show the evidence was destroyed or lost in bad faith. 201 N.J. Super. at 479. "Bad faith is an essential element of a due process violation[.]" State v. Richardson, 452 N.J. Super. 124, 138 (App. Div. 2017). Caselaw is clear that a mere mistaken failure to preserve a piece of evidence is insufficient to satisfy this requirement. Peterkin, 226 N.J. Super. at 41-42 (stating that failure to preserve witness's photographic array "constituted the product of mere negligence, however gross it may have been[,]" but was not bad faith.); see Arizona v. Youngblood, 488 U.S. 51 (1988) (finding that although State had failed to preserve semen samples in sexual assault case that defendant claimed could have exonerated him, this was not denial of due process as

"[t]here was no indication that the police had acted in bad faith.").

Instead, this Court has held that the evidence must have been destroyed "in a calculated effort to circumvent the disclosure requirements;" with "an evil intent;" as part of a conscious effort to suppress evidence that would have exculpated the defendant; purposely or deliberately prevent the defendant from obtaining it; as part of a campaign of "official animus" towards the defendant; as the result of conspicuously bad, flagrant carelessness which speaks to deliberateness instead of negligence; or was destroyed with an "intention inconsistent with fair play." Clark, 347 N.J. Super. at 508-09; Peterkin, 226 N.J. Super. at 42; State v. Serret, 198 N.J. Super. 21, 26 (App.Div.1984), certif. denied, 101 N.J. 217 (1985); State v. Langanella, 144 N.J. Super. 268, 282-83 (App. Div.), appeal dismissed, 74 N.J. 256 (1976). Evident in these cases is the requirement that the State has acted with some nefarious or deliberate purpose in its attempt to keep the evidence out of the hands of the defendant.

Courts have thus been cautioned not to mechanically grant motions to dismiss based solely on the fact that important evidence was lost. See Williams, 441 N.J. Super. at 272 ("Even in a case in which we found an investigating officer's brazen misconduct to be wholly reprehensible, we reversed the dismissal of seventeen indictments[.]"); State v. Gunter, 231 N.J. Super. 34, 39 (App. Div.), certif. denied 117 N.J. 81 (1989) (maintaining that although

"photographic arrays are required to be preserved intact," failure to do so alone did not constitute grounds for reversal as "[n]o bad faith on the part of the State was shown.").

Defendant here failed to provide any evidence that the State was responsible for the deletion of the Adam4Adam profile and could not establish there was any malicious or deliberate intent behind the State's inadvertent failure to preserve it, and thus, could not establish bad faith. The only support defendant could offer for his claim that the State "intentionally deleted" the profile was an email sent by Adam4Adam's legal counsel, Michael Fattorosi, which counsel read into the record: "'After a complete search, my client could not find any information on their servers pertaining to the account . . . . Thank you for your patience.' And that was it." (1T32-7 to 12). Defendant thus argued,

> [The State is] calling it a failure to preserve this profile information. It's not a failure to preserve. This is not a situation where evidence was lost. It was intentionally deleted by the detective. Intentionally deleted. And we know that, Judge, because I subpoenaed the information from the website and was told by the attorney . . . that he could not produce the information because it was deleted. Affirmatively deleted.
>
> [(1T4-22 to 5-7).]

This representation was a significant exaggeration of the contents of the proffered email. The email does not state the profile was deleted, only that Adam4Adam could not find the information on their servers. And the email

does not implicate any action on the part of the State to effectuate this. In fact, the State had already confirmed on the record it did not delete or take any intentional or affirmative action to erase the profile. (1T13-16 to 18; 1T15-16 to 19).

Nonetheless, Judge Kazlau determined defendant has established "either bad faith or connivance or an extremely egregious carelessness on the part of the detective[.]" (2T16-13 to 25). The judge based this ruling solely on the State's inadvertent failure to preserve the profile, stating,

> Unfortunately for the State here, the egregious carelessness of the detective in this case in failing to preserve the profile information . . . which contains the -- again, essentially the bait with which Mr. Noel was lured, including the age of the person purportedly that the profile belonged to as well as the full, un-pixelated, uncropped photographs of this individual on the Adam4Adam website. All of that was preserved. But the profile was not preserved. There's simply no explanation for that.
>
> [(2T14-13 to 24).]

He pointed out that "Detective Borow went to great lengths to preserve all of the chats and text messages exchanged between Detective Borow and Mr. Noel" but then failed to preserve the profile itself. (2T14-7 to 10). "So this is a situation where this was either done purposely, or it is an absolutely egregious careless mistake on the part of the detective[.]" (2T16-13 to 16).

This ruling is erroneous for several reasons. First, Judge Kazlau

improperly determined the failure to preserve the Adam4Adam profile ipso facto justified a finding of bad faith. To the contrary, case law makes clear that the loss of evidence alone, even if negligent, is not an automatic constitutional violation.

Second, Judge Kazlau wrongly presumed the loss of the profile was attributable to the State, even though the State had confirmed it did not delete it. (1T13-16 to 18; 1T15-16 to 19). In fact, Adam4Adam was responsible for the deletion of the profile. As was learned after the motion, "Mark's" profile would have been deleted from the Adam4Adam servers in January 2020, as Adam4Adam permanently deletes all inactive profiles after 284 days. (Pa39).[2] Further, as the User Agreement, Privacy Policy, and Community Guidelines for Adam4Adam make clear, the administrators of the website may delete any profiles, information, or content at any time and in their discretion.[3] An administrator could have determined "Mark's" profile violated the Terms and Conditions for allegedly belonging to a fourteen-year-old boy and deleted it immediately. The profile was thus deleted without any intentional or even

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[2] The State is simultaneously filing a motion to expand the record to include this new information.

[3] User Agreement – Adam4Adam, available at https: / / adam4adam .zendesk.com/hc/en-us/articles/115001825345-User-Agreement (last accessed March 19, 2024).

careless action on the part of the State, and defendant was unable to prove otherwise.

Third, Judge Kazlau abused his discretion in basing his ruling on unwarranted credibility findings based on nothing more than assumptions. The State had informed the court that Detective Borow had used a non-work email address to create the Adam4Adam profile in 2019 and had since forgotten his password for the site. (1T12-25 to 13-19). Judge Kazlau found this lapse in memory was further proof of the State's bad faith:

> [T]he State concedes, or at least the State asserts that Detective Borow simply forgot the login information that he used to create the profile. Whether that information is credible or not, and -- and one might infer, as the defense does, perhaps, that that is -- that there is connivance on the part of the detective in this situation or not, whether it is or it isn't, again, it is such an egregious mis -- egregious carelessness.
>
> And not only that. Even if not deliberate, certainly that information, that assertion that he simply forgot the login information, it's simply not reliable. I don't find it to be reliable. And why is that? Because the cell phone extraction of Detective Borow, the phone with which Detective Borow maintains that he used to create the profile, none of the information used to create the profile, including the email address purportedly used, was recovered from the phone.
>
> [2T14-24 to 15-17].

He continued, "[I]t's extremely troubling to this Court that while all of the significant incriminatory information regarding the texts and the online exchanges between [defendant] and Detective Borow were preserved, the bait,

the . . . online profile, was not, with seemingly no explanation other than he forgot the login information." (2T16-6 to 12).

Detective Borow's failure to remember a password that he created for a work project several years earlier is not proof of connivance or carelessness. And the fact that none of the information Detective Borow used to create the Adam4Adam profile was contained in the extraction report from his phone is accurate, but also not proof of any wrongdoing. A decision was made to extract from Detective Borow's phone only the chat messages between him and defendant on April 11, 2019. (Pa32-38). This decision was not made by Detective Borow. (1T22-18 to 20). It was also not unreasonable: a full extraction likely would have produced millions of pieces of data on dozens of unrelated and pending investigations that then would had to have been painstakingly and meticulously redacted out before the report could be provided to counsel. (1T22-18 to 20).

Consequently, Judge Kazlau abused his discretion in finding the State intentionally or maliciously failed to preserve the Adam4Adam profile and misapplied the law to determine this alone established bad faith. Although the State should have preserved the Adam4Adam profile right away, defendant offered absolutely no proof the State acted in bad faith in failing to do so. Judge Kazlau's factually and legally unsupported ruling must be reversed on appeal.

B. As Judge Kazlau Recognized, the Profile was Not Facially Exculpatory, Thus Failing to Satisfy the Second Hollander Factor.

Because defendant could not establish that the State deleted the profile in bad faith, he needed to show the lost evidence was materially and facially exculpatory. He could not do so.

Materially exculpatory evidence has "an apparent exculpatory value and is of such a nature that comparable evidence could not be obtained by other means." Serret, 198 N.J. Super. at 26. This threshold "is a high one" as the evidence must negate defendant's guilt or directly call a witness's credibility into doubt. Montijo, 320 N.J. Super. at 490; State v. Russo, 333 N.J. Super. 119, 134 (App. Div. 2000). Evidence that is only potentially exculpatory does not satisfy this requirement. Hollander, 201 N.J. Super. at 479. "Exculpatory evidence is treated differently from merely potentially useful evidence." State v. Robertson, 438 N.J. Super. 47, 67 (App. Div. 2014), opinion after grant of certification on other grounds, 228 N.J. 138, (2017).

Just because evidence is important, or even central, to a case does mean it is exculpatory. State v. Casele, 198 N.J. Super. 462, 469-71 (App. Div. 1985) (noting there was no indication that failure to preserve blood samples in vehicular homicide involving alcohol "would have been material to the defense" because it may not have called original blood results into question as claimed.).

See Marshall, 123 N.J. at 110 (holding that evidence that may have supported defendant's explanation for stopping at murder location "would not have been wholly exculpatory" because jury would still need to weigh explanation in context of remaining evidence); Gunter, 231 N.J. Super. at 39 ("[T]he loss of the missing 15-photograph array from which a tentative identification was made was neither so material nor so prejudicial to defendant as to warrant dismissal of the indictment.").

A defendant's bald claim that the profile "may have" exculpated him does not establish that it was actually exculpatory. In Serret, this Court considered whether the State's destruction of a bottle containing suspected gasoline and a wick placed on a windowsill and allegedly set on fire by the defendant violated his due process rights in an attempted arson case. 198 N.J. Super. at 28. The bottle had not been tested for fingerprints and although the chromatograph results concluded the liquid in the bottle was gasoline, there was no testimony as to the reliability of the chromatograph used. Id. at 25. The defendant filed a motion to dismiss his indictment alleging the destruction of the bottle prevented him from affirmatively using the evidence that may have exculpated him and from "meaningfully confronting and examining the chemist who testified to results of the analyses of the contents of the bottle." Ibid.

The trial court rejected Serret's argument and this Court affirmed that

decision. Id. at 28. This Court ruled, "[I]t was not apparent before its destruction that the evidence had any exculpatory value and, while the physical properties were not available after destruction, the methods used in the analyses of the liquid content and the results obtained were subject to examination." Id. at 27-28. Thus, it ruled, that key evidence was not exculpatory.

Similarly, a defendant's unsubstantiated claim that evidence would have called a witness's credibility into question does not make evidence exculpatory. In State v. Washington, 165 N.J. Super. 149, 155 (App. Div. 1979), the defendant was charged with possession of drugs after being observed throwing a purse containing heroin out of the window while police were executing a warrant. Before her trial, the purse and the heroin were mistakenly destroyed by a police officer. Id. at 153. The defendant asserted the purse was the link between her and the drugs, and since it was unavailable, she had lost her ability to use the evidence to cross-examine the witness on the details of the purse. Ibid. The defendant asserted she had satisfied the materially exculpatory factor "even though the evidence would do no more than affect the credibility of a witness whose testimony prejudiced defendant's case." Id. at 155.

This Court rejected her argument, noting that to be sufficiently exculpatory, the evidence needed "to discredit a witness to the point of probably or possibly affecting the result of the trial." Ibid. It was not enough that the

evidence may have provided an avenue to potentially discredit the witnesses. Id. at 157.

Here, the Adam4Adam profile was not materially exculpatory. Judge Kazlau specifically acknowledged this, saying, "It's certainly potentially exculpatory. It's certainly potentially inculpatory. But we don't know that." (2T10-19 to 21). Once he determined the evidence lacked an apparent exculpatory nature, Judge Kazlau should have ended his inquiry on this prong.

He did not, however, and then went on to apply an incorrect legal standard. He said, "Really, the . . . evidence that we're dealing with here certainly is relevant and probative with respect to proving or disproving facts in the case." (2T10-16 to 19). While acknowledging that the profile may not actually exculpate defendant, he noted that nonetheless, "it is significant and material to the defendant's defense, and critical to the defense -- to the defendant's right to confront the witnesses against him." (2T10-16 to 24). He elaborated, "And this Court agrees with the defense in this case that the Adam4Adam profile information is crucial to the defense in this case. This is essentially the bait with which the undercover detective lured and ultimately captured and charged [defendant] with." (2T12-21 to 13-1).

While the profile is certainly important, the law requires defendant show the evidence was materially exculpatory. Defendant's unsupported theory that

there may have been information in the profile that would support his entrapment defense and prove "Mark" appeared to be an adult did not meet this standard. Although he speculated that "Mark's" profile may have contained statements like, "I'm 29 years old, but I like to pretend I'm 14. If you're into this thing, too, let's connect[,]" (1T6-16 to 21), there is no proof of that—or anything remotely similar to that—in the record. Defendant failed to certify or testify to that and did not make such a claim in his statement to police on the night of the offense, despite his personal familiarity with "Mark's" profile. Speculating that the evidence would have been exculpatory, without presenting any evidence in support of that claim, is insufficient.

This is especially true when compared to the other evidence in the case. "Mark" definitively told defendant during their chat that he was fourteen and defendant responded with, "Oh, ok." (Pa14). Later, "Mark" asked defendant if he was ok with his age, and defendant replied, "Lol" and asked when "Mark" was free. (Pa14). Defendant also provided a statement to police where he conceded "Mark" told him he was fourteen years old and that he nonetheless agreed to meet up with "Mark" because he was an "idiot" and he was "curious." (Pa18; Pa19; Pa21). He also acknowledged that this was "the first time" he met up with anyone from the website who was under eighteen. (Pa22).

And as outlined in Subpoint C below, defendant is still able to effectively

cross-examine Detective Borow about the contents of the profile and call his credibility into question, even without the profile. Although his cross-examination would likely "be more difficult," without it, this does not mean the evidence was exculpatory.

Ultimately, all defendant could offer was speculation and possibilities as to what he may have been able to use the profile to prove. Consequently, although Judge Kazlau should have ended his analysis once he recognized the evidence may have actually inculpated defendant, he erred even further in failing to outline any legal basis for his opinion that the evidence was exculpatory. This Court should reverse.

C. Defendant Has Ample Comparable Evidence Available to Him and Will Receive the Benefit of an Adverse-Inference Charge.

Defendant has the ability to recreate the profile during his trial and any harm remaining from the loss of it would be eliminated by providing the jury with an adverse-inference charge. Judge Kazlau nevertheless determined defendant was irreparably prejudiced and the only possible remedy was a dismissal of his indictment.

Where a defendant cannot prove either bad faith on the part of the State or the obvious exculpatory nature of the lost evidence, he is not entitled to relief unless he can make a "showing of manifest prejudice or harm arising from the

failure to preserve evidence" as required under the third Hollander factor. Hollander, 201 N.J. Super. at 479; State v. M.B., 471 N.J. Super. 376, 383 (App. Div. 2022). This standard requires the defendant prove that he has been deprived of the ability "to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 480 (1984); Serret, 198 N.J. Super. at 26. If the defendant is able to recreate the missing evidence, however, he will not be able to establish he has been materially and permanently prejudiced. Serret, 198 N.J. Super. at 27.

Cross-examining the State's witnesses about the lost evidence is the best way to replicate it. Ibid. Subjecting a witness "to the rigors of cross-examination" is the "greatest legal engine ever invented for the discovery of truth." State v. Cope, 224 N.J. 530, 555 (2016) (quoting California v. Green, 399 U.S. 149, 158 (1970)). In Serret, this Court determined a defendant was not prejudiced by the State's destruction of important evidence because the "defendant's opportunity to discredit the testimony of the State's expert with respect to his procedures through the testimony of his own expert was not impaired by the inability to inspect the bottle and its contents. Thus, defendant was capable of questioning the test results without resort to the destroyed evidence." 198 N.J. Super. at 27.

[T]he absence of the bottle and its contents did not prevent a more

> searching examination of inadequacies in the procedures utilized by the expert, the reliability of the testing equipment, the acceptability of the test results and the proficiency of the expert in conducting the test. Also, defendant's opportunity to discredit the testimony of the State's expert with respect to his procedures through the testimony of his own expert was not impaired by the inability to inspect the bottle and its contents."
>
> Ibid.

Indeed, "[a]lthough the absence of the evidence may have made his cross-examination of the witness more difficult," this alone did not amount to manifest prejudice requiring or warranting dismissal of the defendant's case. Ibid.

This Court held similarly in Casele. In that case, the defendant in an alcohol-involved vehicular-homicide case claimed the destruction of his blood sample prohibited him from obtaining independent test results that may have exculpated him and denied him the "ability to cross-examine expert witnesses[.]" Id. at 469. This Court rejected Casele's argument, stating it did not believe "that the defendant was prejudiced by the destruction of this evidence. Defendant had every opportunity to question the test results without resort to the evidence itself both by cross-examination of the State's witnesses and through his own expert's testimony." Id. at 470. See Washington, 165 N.J. at 157 (noting that destruction of physical evidence "may at times make cross-examination more difficult," but finding that defendant still can still elicit information needed for defense during cross-examination, even without it).

Thus, where there are other avenues of recreating the missing evidence, rarely will a defendant's claim of manifest prejudice be substantiated.

What is more, providing the jury with an adverse-inference charge alleviates the prejudice created by the loss of the evidence. State v. Dabas, 215 N.J. 114, 140 (2013). The adverse-inference charge, akin to the spoliation charge in civil cases, permits a jury to presume that the evidence a party destroyed would have been damaging or unfavorable to them. Dabas, 215 N.J. at 140 n.12. "The adverse-inference charge is a remedy to balance the scales of justice" and "a means to even the playing field between the litigants." Id. at 140; State, New Jersey Dep't of Envtl. Prot. v. Cullen, 424 N.J. Super. 566, 588 (App. Div. 2012), certif. denied 213 N.J. 397 (2013). Using such a charge can be "a complete substantive remedy[.]" Tartaglia v. UBS PaineWebber Inc., 197 N.J. 81, 120 (2008). Indeed, these adverse-inference charges "can have a decisive impact upon a jury's determination." Washington v. Perez, 219 N.J. 338, 357 (2014).

As our courts and courts across the country have recognized, adverse-inference instructions are the appropriate remedy in the majority of missing-evidence cases. See Kounelis v. Sherrer, 529 F. Supp. 2d 503, 520 (D.N.J. 2008) ("[T]he spoliation inference serves the remedial function of leveling the playing field after a party has destroyed or withheld relevant evidence."); United States

v. Ellis, 57 M.J. 375, 380 (C.A.A.F. 2002) ("An adverse inference instruction is an appropriate curative measure for improper destruction of evidence."); Fletcher v. Municipality of Anchorage, 650 P.2d 417, 418 (Alaska Ct. App. 1982) (citations omitted) ("There are many sanctions other than dismissal for a violation by the government of its duty to preserve evidence" such as "instruct[ing] the jury to assume that the video tape evidence would be favorable to the defendant."); Hammond v. State, 569 A.2d 81, 90 (Del. 1989) (finding no due process violation where state failed to preserve vehicle in vehicular-homicide prosecution, but noting defendant was entitled to jury instruction that it could infer that crash vehicle, if available, would have exculpated him); Cost v. State, 10 A.3d 184, 197 (Md. 2010) ("The application of the 'missing evidence' inference against the State in this case, as promulgated through a jury instruction, will help ensure that the interests of justice are protected."); see State v. Zenquis, 251 N.J. Super. 358, 370 (App. Div. 1991), aff'd, 131 N.J. 84 (1993) (finding court's charge that jury could infer destroyed notes contained information inconsistent with witness's trial testimony "obviated any potential for prejudice."); People v. Handy, 988 N.E.2d 879, 879 (N.Y. 2013) ("An adverse inference charge mitigates the harm done to the defendant, resulting from the risk that the State has lost exculpatory evidence, without terminating the prosecution.").

In this case, Judge Kazlau improperly ruled defendant was materially and irreparably prejudiced by the loss of the Adam4Adam profile. He determined that the loss of the profile created "extreme prejudice" for defendant because he would have to go to trial "without the benefit of having the full profile information that was . . . created by the undercover detective in this case." (2T13-13 to 18; 2T15-19). "There would be a manifest and harmful prejudice to Mr. Noel to go to trial without the benefit of these -- this profile information." (2T16-1 to 4). And, he ruled, this prejudice "simply cannot be cured." (2T14-3 to 7).

To the contrary, defendant will suffer little, if any, prejudice from the loss of the profile for several reasons. First, there is sufficient comparable evidence available to him to replicate the profile. The State has already provided defendant with the most important piece of the profile, namely, the picture that was used in "Mark's" Adam4Adam profile. (Pa6-7). Judge Kazlau acknowledged the State had provided the photo, (1T19-1 to 3; 1T20-7 to 9), but then, during his ruling, determined the State had <u>not</u> provided it:

> The State sent a letter to defense counsel <u>enclosing an enlarged image of the undercover's profile picture.</u> A smaller image is displayed in the Adam4Adam chats. So just to be clear, the original photo from the profile, it's undisputed between the parties that <u>the original photo that Mr. Noel presumably observed when searching through the site was not provided to the defense.</u> Certainly, relevant material and probative as to Mr. Noel's intent here and with respect

> to the age of the person in the profile, whether they were 18 or older or under the age of 18.
>
> [(2T9-4 to 15) (emphasis added).]

So, he ruled, the State was obligated to provide a "full, un-pixelated, uncropped" profile photograph. (2T14-19 to 20).

The picture the State provided is the profile picture that was displayed on the Adam4Adam site and it is large enough and clear enough to be used at trial. Judge Kazlau's "presumption" that defendant observed a different photo on the Adam4Adam site, that a larger version was available on Adam4Adam, or that the photograph the State provided was somehow "cropped" was an unfounded abuse of discretion.

The State has also agreed to provide defendant with the second-most important piece of the profile, proof of Mark's age. The State informed the judge it intended to introduce in its case-in-chief that Adam4Adam is an adults-only website and that "Mark's" profile said he was at least eighteen. (1T18-17 to 20). The Deputy Attorney General said, "He presented himself as an adult[]" and "[t]he profile gave an adult age." (1T18-23 to 24; 1T24-20). "And that information is going to come up on the State's direct, or in the . . . State's case in chief. So it's not like that's going to be hidden." (1T18-17 to 20). Consequently, the two pieces of the profile which both defendant and the judge

referenced as being crucial to his defense have already been or will be provided.

And defendant will be able to recreate the remaining contents of the Adam4Adam profile during the cross-examination of Detective Borow—the investigator who created the profile—or the other detectives involved in the investigation. Asking such questions as, "What information was in the profile" would provide defendant with the information he asserts he needs to properly defend himself.[4] While more tedious to obtain this evidence this way, it nonetheless protects defendant's right to due process and a fair trial.

Second, the State agreed that Judge Kazlau should provide the jury with an adverse-inference charge, which would sufficiently cure any prejudice remaining from the loss of the profile. The adverse-inference charge would allow the jury to infer the State destroyed the profile because it would have benefitted defendant, even though the profile itself may not have done so if still available. This instruction would balance the scales of justice and likely decisively impact the jury's verdict in defendant's favor. Not only would it

[4] If Detective Borow is unable to recall all of the details from his profile, defendant will be able to use that to call his credibility into question. Detective Borow's credibility would then later be called into question by the court's reading of the adverse-inference charge, further cementing his unreliability in defendant's favor. But defendant would know what questions to ask of the witnesses, and would know with certainty what information "Mark's" profile contained, because he has or had an Adam4Adam profile himself and viewed "Mark's" profile before contacting him.

balance the scales, it would likely be "a complete substantive remedy." See Tartaglia, 197 N.J. at 120.

Indeed, defendant has conceded the appropriateness of adverse-inference charges in missing-evidence situations. During the motion hearing, defendant asserted that adverse-inference charges were suitable for cases "where there's some other evidence perhaps to corroborate" the missing evidence or there were "ways to try to construct these things back together." (1T10-8 to 17). But he insisted such a charge could not be used in his case because there was "literally no other mechanism" available to "obtain any of this evidence. None." (1T10-8 to 17). In fact, because defendant has the ability to recreate the entirety of the Adam4Adam profile, an adverse-inference charge was likely a boon for his case.

Consequently, dismissing defendant's indictment was too extreme of a remedy for the State's inadvertent failure to preserve the Adam4Adam profile.[5] And this remedy did far more than right the unintentional discovery violation; it effectively granted defendant immunity from being prosecuted for attempting to meet up with an underage boy for sex. All of Judge Kazlau's findings were thus

[5] We also now know that Adam4Adam has permanently deleted "Mark's" profile from their server and the State has no ability to retrieve it. (Pa39). Defendant's case has, in effect, been dismissed with prejudice. Cf. State v. Zadroga, 255 N.J. 114, 140-41 (2023) (recognizing in double jeopardy context that "denying courts power" to try a defendant for a crime frustrates "the purpose of law to protect society from those guilty of crimes").

a misapplication of applicable law and a clear abuse of discretion and should be reversed on appeal.

CONCLUSION

For the foregoing reasons, the State urges this Court to reverse the motion court's granting of defendant's motion to dismiss his indictment.

Respectfully submitted,

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APPELLATE BUREAU

OF COUNSEL AND ON THE BRIEF

DATED: May 7, 2024

	SUPERIOR COURT OF NJ APPELLATE DIVISION DOCKET NO. A-1955-23
STATE OF NEW JERSEY, Plaintiff/Appellant, v. LARRY NOEL, Defendant/Respondent.	SUPERIOR COURT OF NJ LAW DIVISION-CRIMINAL PART BERGEN COUNTY Indictment No. 19-10-00128-S CRIMINAL ACTION SAT BELOW: HON. CHRISTOPHER KAZLAU, J.S.C.

DEFENDANT/RESPONDENT'S BRIEF AND APPENDIX

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TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Cases **Pages**

TABLE OF AUTHORITIES

Cases **Pages**

TABLE OF AUTHORITIES

TABLE OF CITATIONS

Ma – State's attachments on its Motion to Supplement the Record

Pa – State's Appendix on its Brief

Pb – State's Brief on Appeal

Da – Defendant's Appendix on Appeal

1T – Motion transcript dated December 11, 2023

2T – Motion to Dismiss the Indictment transcript, dated January 22, 2024

INDEX TO APPENDIX

PRELIMINARY STATEMENT

The United States Supreme Court has held that the withholding of material evidence favorable to a defendant constitutes a denial of due process and the right to a fair trial. When there is evidence of bad faith on the part of the prosecution and a resulting prejudice to a defendant, the appropriate sanction is a dismissal with prejudice.

In this matter, critical evidence was destroyed / lost by the State, making discovery thereof impossible. The circumstances at issue undoubtedly constituted a due process violation. Coupled with the evidence of bad faith on the part of the prosecution (by way of the complaining witness, Bayonne Police Department Detective Brian Borow) and the resulting prejudice to Defendant, the appropriate remedy was a dismissal of the Indictment. The Trial Court's ruling was proper and should be upheld.

PROCEDURAL HISTORY

On October 22, 2019, a Grand Jury Indictment was returned against Defendant which charged him with the following: Luring, in violation of N.J.S.A. 2C:13-6(a), a crime of the Second Degree; Attempted Sexual Assault, in violation of N.J.S.A. 2C:14-2(c)(4)/2C:5-1(a), a crime of the Second Degree; and Attempted Endangering the Welfare of a Child, in violation of N.J.S.A. 2C:24-4(a)/2C:5-1(a), a crime of the Third Degree. (Pa2-Pa5).

Defense Counsel appeared with Defendant for an Arraignment on December 2, 2019, and for conferences on February 10, 2020, and March 2, 2020. At the March 2, 2020 conference, Defense Counsel advised the Court and the State of an intent to file a Motion to Dismiss the Indictment in this matter; a briefing scheduled was set.

On April 8, 2020, Defense Counsel filed a Notice of Intent to Rely Upon the Statutory and Due Process Defenses of Entrapment.

On April 11, 2020, Defense Counsel filed a Notice of Motion to Dismiss the Indictment on the grounds of: (1) due process entrapment, (2) the presentation of inappropriate, inflammatory, and prejudicial information to the Grand Jury, and (3) failure to present exculpatory evidence. On May 4, 2020, the State responded to the motion by way of a letter brief.

Due to the COVID-19 pandemic, the parties were unable to appear to argue the motion until October 28, 2020. Following oral argument, the Motion to Dismiss the Indictment was denied.

Thereafter, on October 28, 2020, Defense Counsel propounded a formal request for supplemental discovery upon the State. (Da1).

On November 17, 2020, the State provided Defense Counsel with a transcript of Defendant's statement to law enforcement at the time of his arrest. (Pa16-Pa31). However, the supplemental discovery requested in Defense Counsel's October 28,

2020 letter remained outstanding. The State was advised via email accordingly. (Da2). The supplemental discovery was never provided.

On March 31, 2021, Defense Counsel filed a Notice of Motion to Compel Discovery. (Da3). In particular, Defense Counsel sought the production of:

> All details associated with the "Adam4Adam" profile utilized by Bayonne Police Department Detective Brian Borow to communicate with Defendant on the date of the incident (to wit: "Mark"), including but not limited to a full color photograph of Mark's profile picture and all details provided by Detective Borow to generate Mark's profile (such as Mark's age, height, weight, etc.).

In response to Defense Counsel's filing, the State indicated that the "Adam4Adam" profile utilized by Bayonne Police Department Detective Brian Borow to communicate with Defendant did not appear to have been preserved. While the State sought to confirm same, the Trial Court encouraged Defense Counsel to seek to obtain the requested information directly from "Adam4Adam."

In July 2021, Defense Counsel successfully made contact with the attorney for "Adam4Adam." Defense Counsel advised the State that contact had been initiated. Thereafter, in August 2021, Defense Counsel was advised by the attorney for "Adam4Adam" that the profile utilized by Bayonne Police Department Detective Brian Borow to communicate with Defendant could not be located on the "Adam4Adam" server. Defense Counsel advised the State accordingly. It is clear from the materials submitted by the State that the State never sought to communicate

directly with the attorney for "Adam4Adam" at any point during the pendency of Defendant's matter before the Trial Court.

On September 5, 2023, the State again confirmed via email to Defense Counsel that the profile information utilized by Bayonne Police Department Detective Brian Borow was not available. Accordingly, on September 29, 2023, Defense Counsel filed a Motion to Dismiss the Indictment. On November 3, 2023, the State responded to the motion by way of a letter brief. The motion was the subject of a hearing before The Honorable Christopher Kazlau, J.S.C. on December 11, 2023. Following the hearing, on January 22, 2024, Judge Kazlau granted the motion and dismissed the Indictment without prejudice.[1]

On May 7, 2024, the State filed a Motion to Supplement the Record with material they obtained in March 2024 related to the loss of the "Adam4Adam" profile. On May 24, 2024, this Court granted that Motion.

STATEMENT OF FACTS

Adam4Adam

"Adam4Adam" is a dating website is designed for men to meet other men. It is a site readily available to all adults that have internet access.

> Adam4Adam uses the new "Restricted To Adults" label in the metatags of its pages . . . .

---

[1] The "without prejudice" designation was clearly limited to the following circumstance: "So should -- should the State recover that evidence, you're free to go back to the grand jury if you want." (2T17:2-4). That circumstance did not occur.

> Gay & Lesbian News reports that Adam4Adam and similar sites may soon come under an expanded interpretation of [18 U.S.C.A. 2257], the Child Protection and Obscenity Enforcement Act . . . . [This] would mean that Adam4Adam and similar companies would have to keep records proving that individuals appearing in photographs or videos are over the age of 18.
> (https://en.wikipedia.org/wiki/Adam4Adam)

Simply put, "Adam4Adam" is not for use by anyone under the age of eighteen (18). To ensure that its users are of legal age, the site requires registration and the obtaining of a passcode. The main (welcome) page of the site requires the user to acknowledge the following at every log in:

> By signing up you agree with the Terms and Conditions and testify that you ***are 18 years or older***[.] [(Emphasis added).]

To that end, there is no mechanism through which a user can create a profile that indicates that s/he is under the age of eighteen (18).

Underlying Facts

On April 11, 2019, using the mobile application "Adam4Adam," Defendant engaged in a text message chat with an undercover police officer ("UC") who was posing as an underage male. (Pa14). The parties never spoke. (Pa14). During the text message exchange, the following questions were asked and answered before Defendant agreed to meet the UC:

> LN: cool are you a top or bottom
> UC: like both, but bottom more
> LN: cool. I can travel to you
> UC: nice. how old r u

LN: 29 and you
UC: 14 gonna be 15 in 2 weeks
LN: oh ok
LN: ?
(Pa14).

When Defendant arrived at the agreed upon location, he was arrested by the Bayonne Police Department.

Immediately following his arrest on April 11, 2019, Defendant was interviewed at the Bergen County Prosecutor's Office by Detective Brian Borow and Detective Jennifer Appelmann of the Burlington County Prosecutor's Office. After being read his Miranda rights, Defendant agreed to speak with the detectives. In response to a question from law enforcement as to why he was arrested, Defendant said it was because he was "an idiot." Defendant explained:

> Well, I was just being curious. I'm not bad person. I don't have a (IA) or anything. It just…I kind figured something was wrong with the age and then the auntie's house. That's why I didn't give my real age or car I was driving because I was like (IA) kind of weird. (Pa19).

Defendant explained that he saw a picture that the UC used, that the user did not look young, and his profile indicated he was at least eighteen (18) years old. (Pa20; Pa7). When the UC texted that he was fourteen (14) years old, Defendant questioned this by texting a question mark back to the UC. (Pa20). Defendant never indicated to officers that he believed he was communicating with someone who was actually fourteen (14) years old.

Notably, Defendant also lied about his age during the text chat, telling the UC that he was twenty-nine (29) when in fact he was forty-three (43). (Pa14). Defendant further lied about the make and model of the car he would be driving to the encounter. (Pa15; Pa26). Defendant told the detectives that although he used the "Adam4Adam" application for several years, he had never met anyone through the application who was under the age of eighteen (18) years before. (Pa26). Defendant told the detectives that users of the application frequently lied about their ages. (Pa22). For example, Defendant conveyed to the detectives that he previously met a user who said he was twenty-nine (29) years old but was actually fifty (50) years old. (Pa22).

During his interview, Defendant granted the detectives permission to search his mobile phone and vehicle. (Pa23; Pa26). Nothing illegal was found on or in either.

LEGAL ARGUMENT

POINT I

THE DISCOVERY AT ISSUE HAD A TENDENCY IN REASON TO PROVE A MATERIAL FACT AND SHOULD HAVE BEEN PRESERVED BY THE STATE AND PRODUCED TO THE DEFENSE.

The Court Rules provide that a defendant is entitled to all relevant discovery. R. 3:13-3b, et seq. Relevance in this context may not be assessed solely from the perspective of the State. State v. Ford, 240 N.J. Super. 44, 52 (App. Div. 1990). So long as the discovery at issue is not beyond the scope of discovery as defined in Ford, i.e., "evidence having any tendency in reason to prove any material fact," it must be provided. Id. at 48.

Stated differently, a discovery demand must be honored if the information sought "(1) concerns an issue involved in the prosecution and (2) tends, reasonably, to prove a fact material to such an issue." State v. Tull, 234 N.J. Super. 486, 499 (Law Div. 1989); see also United States v. Bagley, 473 U.S. 667, 682 (1985) (holding that the State must provide discovery to the defendant which might be used to impeach the State's witness(es)).

In this matter, the discovery relative to the "Adam4Adam" account that was used by Detective Brian Borow to communicate with Defendant on the date of his arrest is clearly relevant and certainly had (at an absolute minimum) a tendency to

prove a material fact at issue. Accordingly, it should have been preserved by the State and produced to the defense. In particular, Detective Brian Borow's "Adam4Adam" profile information, which included at least one (1) photograph and his age, was critical to a primary issue in the prosecution of this case, to wit: whether Defendant knew that he was communicating with a minor. This should have been apparent to the State during the investigation.

Yet, that discovery was not preserved and was never provided to the defense. Rather, it was lost/destroyed by Detective Borow. Notably, it is well-established that, for Brady purposes, the knowledge of police officers is imputed to the prosecutor. See State v. Russo, 333 N.J. Super. 119, 133-35 (App. Div. 2000); State v. Mustaro, 411 N.J. Super. 91, 102 (App. Div. 2009); State v. Robinson, 229 N.J. 44 (2017) (holding that discovery in the possession of police are deemed to be in the possession of the prosecutor). The State's failure in this regard is fatal to its case.

POINT II

THE STATE'S LOSS / DESTRUCTION OF THE DISCOVERY AT ISSUE CONSTITUTED A VIOLATION OF DEFENDANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL, WHICH REQUIRED THE TRIAL COURT TO DISMISS THE INDICTMENT.

More than seventy years ago, the Supreme Court stated that the role of the prosecution in the criminal justice system:

> is not that it shall win a case, but that justice shall be done. . . . [W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger v. United States, 295 U.S. 78, 88 (1935).

This case violated those most basic principles.

A defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. State v. Hollander, 201 N.J. Super. 453, 478 (App. Div. 1985), (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)). The purpose of the Brady rule is to ensure that the defendant receives a fair trial in which all relevant evidence of guilt and innocence is presented to enable the fact-finder to reach a fair and just verdict. Brady, 373 U.S. at 87-88.

The Brady doctrine imposes an affirmative duty on the trial prosecutor to investigate, preserve, and disclose favorable information located in the prosecutor's files, as well as information in the possession of any member of the prosecution team, including but not limited to its law enforcement officers. Kyles v. Whitley, 514 U.S. 419, 436-38 (1995). To that end, it is well-settled that a defendant is entitled to evidence in possession of the State that is exculpatory in nature. Brady, 373 U.S. at 87. Exculpatory evidence includes not only materials that are directly exculpatory of the defendant, but also evidence that may impeach the credibility of

a State's witness. State v. Spano, 69 N.J. 231, 235 (1976). The suppression by the State of evidence favorable to the accused violates due process where the evidence is material, irrespective of the good faith or bad faith of the prosecution. State v. Marshall, 123 N.J. 1, 107 (1991) (citing Brady, 373 U.S. at 87).

The issue in the instant matter concerns: (1) the State's failure (by way of its complaining witness/investigating officer) to preserve critical evidence; and (2) the subsequent loss or destruction of evidence by the State's complaining witness. On this score, New Jersey follows Arizona v. Youngblood, 488 U.S. 51 (1988), which imposes a bad faith standard for establishing a due process violation with regard to potentially exculpatory destroyed evidence. See State v. Marshall, 123 N.J. at 109-110; State v. Dreher, 302 N.J. Super. 408, 482-483 (App. Div. 1997); State v. Hollander, 201 N.J. Super. at 479. In particular, Courts must consider: (1) the bad faith or connivance by the government; (2) whether the evidence was sufficiently material to the defense; and (3) whether the defendant was prejudiced. Dreher, 302 N.J. Super. at 483; Hollander, 201 N.J. Super. at 479.

A. There Clearly Existed Bad Faith by the State.

The State's conduct in the instant matter was more than an oversight or a mistake. Detective Brian Borow was quite conscientious in preserving the messages alleged to have been sent in the chat between he and Defendant. Nevertheless, he failed to preserve the pieces of evidence most favorable to the defense, to wit: his

fake "Adam4Adam" profile and the picture(s) of the adult he was portraying himself to be. The fake profile and any picture(s) associated with it are material, favorable to the defense, and exculpatory. This should have been apparent to the State during the investigation.

In State v. Laganella, 144 N.J. Super. 268 (App. Div. 1976), app. dism. 74 N.J. 256 (1977), the court set forth the standard for dealing with instances of evidence lost or destroyed:

> Before a dismissal of an indictment is warranted in such circumstances, we believe there must be a finding of intention inconsistent with fair play and therefore inconsistent with due process, or an egregious carelessness or prosecutorial excess tantamount to suppression. Id. at 282.

This matter implicates a lack of fair play by the State.

As Defense Counsel argued before the Trial Court, bad faith clearly existed here. It was only due to the unilateral conduct of Detective Brian Borow that the information relative to his "Adam4Adam" profile was destroyed. From this, one can absolutely infer that the destruction of the evidence at issue was not inadvertent, but rather, was a conscious act on the part of Detective Brian Borow to avoid the preservation of evidence which may not support the testimony that would have been elicited from him at trial.

The Trial Court agreed with Defense Counsel:

... what we have here, this Court finds, is an egregious carelessness

on the part of Detective Borow that simply cannot be cured.

And let's be clear about this. Detective Borow went to great lengths to preserve all of the chats and text messages exchanged between Detective Borow and Mr. Noel. Now, look. There's no question here that Ms. Counts for the State, or Mr. Forte, have not conducted themselves in anything but an honest manner, with integrity. Unfortunately for the State here, the egregious carelessness of the detective in this case failing to preserve the profile information which con -- which contains the -- again, essentially the bait with which Mr. Noel was lured, including the age of the person purportedly that the profile belonged to as well as the full, un-pixelated, uncropped photographs of this individual on the Adam4Adam website.

All of that was preserved. But the profile was not preserved. There's simply no explanation for that. Not only that, the State concedes, or at least the State asserts that Detective Borow simply forgot the login information that he used to create the profile. Whether that information is credible or not, and -- one might infer, as the defense does, perhaps, that this is -- that there is connivance on the part of the detective in this situation or not, whether it is or it isn't again, **it is such an egregious mis -- egregious carelessness**.

And not only that. **Even if not deliberate, certainly that information, that assertion that he simply forgot the login information, it's simply not reliable.** I don't find it to be reliable. And why is that? Because the cell phone extraction of Detective Borow, the phone with which Detective Borow maintains that he used to create the profile, none of the information used to create the profile, including the email address purportedly used, was recovered from the phone. That illustrates and demonstrates the significance of this evidence, and the significant extreme prejudice to Mr. Noel to go to trial without having the benefit of this profile information to cross-examine Detective Borow. (2T14:7-15:21) (emphasis added).

... Again, I've repeatedly said, this was the bait. This was the lure utilized to hook Mr. Noel and ultimately apprehend and charge Mr. Noel and it's extremely troubling to this Court that while all of the

> significant incriminatory information regarding the texts and the online exchanges between Mr. Noel and Detective Borow were preserved, the bait, the online -- online profile, was not, with seemingly no explanation other than he forgot the login information.
>
> **So this is a situation where this was either done purposely, or it is an absolutely egregious careless mistake** on the part of the detective. (2T16:4-15) (emphasis added).

The State's contention that there was no evidence to support the Trial Court's finding that there was bad faith is directly refuted by the record below. The Trial Court's ruling that bad faith existed was proper and should be upheld.

Notably, the existence of any internal policy at "Adam4Adam" regarding the deletion of inactive accounts does not negate Defense Counsel's underlying claim that Detective Brian Borow acted in bad faith by failing to preserve his "Adam4Adam" profile following Defendant's arrest, which resulted in extreme prejudice to Defendant. Even in the light most favorable to the State, it is extremely unlikely that the existence of this policy would have changed the outcome of the motion hearing and should, likewise, have no bearing upon this Court's decision as to whether to uphold the Trial Court's ruling.

B. The "Adam4Adam" Profile Information Was Crucial to the Defense.

To be material, the evidence must possess exculpatory value and be of a nature that the defendant cannot obtain comparable evidence. Dreher, 302 N.J. Super. at 483, (California v. Trombetta, 467 U.S. 479, 489 (1984)). The defendant does not have to prove that he will be acquitted if the Brady evidence was produced, but must

merely show that, in the absence of the evidence, he would not receive a fair trial. Kyles, 514 U.S. at 434.

There is no dispute that the discovery at issue was crucial to the defense. There is also no dispute that there was no comparable evidence.

"A picture is worth a thousand words." The defense, and ultimately, the petit jury (if this matter were to proceed to trial) should have had the benefit of the **entire** picture that Detective Brian Borow displayed on his "Adam4Adam" profile (not a pixelated, cropped version). However, because of his deliberate, bad faith actions, the profile picture utilized by Detective Brian Borow no longer exists.

Likewise, the defense, and ultimately, the petit jury, should have had the benefit of the information that Detective Brian Borow displayed on his "Adam4Adam" profile, including, most importantly, information about his age. Again, however, because of Detective Brian Borow's deliberate, bad faith actions, the profile information no longer exists. Without this discovery, Mr. Noel was deprived of the "best evidence" available to accurately determine the facts necessary for a petit jury to decide the case. Again, there was no comparable evidence.[2]

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[2] The State flippantly argues that Defendant "has the ability to recreate the profile during his trial." See Pb22. This argument is absurd. There are absolutely no means through which Defendant can recreate the fake "Adam4Adam" profile utilized by Detective Brian Borow.

Not only was this information critically important to defend against the allegations brought by the State, but it was also relevant to the defense's anticipated reliance on the statutory and due process defenses of entrapment.

Again, the Trial Court agreed:

> And this Court agrees with the defense in this case that the Adam4Adam profile information is **crucial to the defense** in this case. This is essentially the bait with which the undercover detective lured and ultimately captured and charged Mr. Noel with.
>
> Not only is this information important to mount a defense and defend against the allegations brought by the State, it's also relevant to the defense's reliance on statutory and due process defenses of entrapment. (2T12:21-13:6) (emphasis added).
>
> ... That illustrates and demonstrates the significance of this evidence, and the significant extreme prejudice to Mr. Noel to go to trial without having the benefit of this profile information to cross-examine Detective Borow. (2T15:17-21).
>
> ... it's just **simply fundamentally unfair**. There would be a manifest and harmful prejudice to Mr. Noel to go to trial without the benefit of these -- this profile information. (2T15:25-16:4) (emphasis added).

As set forth above, to satisfy the second Hollander factor, a defendant must merely show that, in the absence of the evidence at issue, he would not receive a fair trial. Kyles, 514 U.S. at 434. The State's contention that "the law requires defendant show the evidence was materially exculpatory" is patently untrue. See Pb20. The Trial Court properly ruled, under the circumstances present, that the evidence at issue was crucial to the defense and to force Defendant to proceed to trial without it

would have been fundamentally unfair. This ruling satisfied the second Hollander factor and should, therefore, be upheld.

C. Defendant Was Undoubtedly Prejudiced by the State's Conduct.

There is no question that Defendant was prejudiced by the State's loss / destruction of the evidence at issue – and the prejudice was so severe that no remedy other than a dismissal of the Indictment was appropriate.

At the very least, the material evidence at issue was critical for cross-examination purposes. Impeachment evidence encompasses a broad range of information that would expose weaknesses in the State's case or cast doubt on the credibility of the State's witness. The Supreme Court has observed that the factfinder's "estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959). Impeachment evidence is especially valuable in a case when it may impugn the testimony of a witness who is critical to the prosecution's case. State v. Landano, 271 N.J. Super. 1 (App. Div. 1994). As the State's sole witness, Detective Brian Borow was central to the prosecution of this case. Had the "Adam4Adam" profile information been made available, his testimony would have been subject to heightened scrutiny and might even have been directly refuted.

At most, the evidence at issue was exculpatory in nature and would have resulted in an acquittal should this matter have proceeded to trial.

Yet again, the Trial Court agreed with Defense Counsel:

> **There is no question here that Mr. Noel has been prejudiced by the State's conduct. Even the State concedes[3] that Mr. Noel has been prejudiced by the State's conduct,** although the State maintains that there is some alternative remedy here that the Court can employ in the form of an adverse inference charge to a jury. **This Court is not convinced that an adverse inference charge would cure the prejudice** that would result in Mr. Noel to go to trial without the benefit of having the full profile information that was -- full profile that was created by the undercover detective in this case.
>
> The evidence here, this profile information is certainly material and relevant for cross examination purposes. (2T13:7-21) (emphasis added).

The Trial Court properly found that Defendant was prejudiced by the State's loss / destruction of the material discovery that was crucial to his case. Ultimately, the Trial Court held:

> So in light of that, given the extreme prejudice to Mr. Noel, given the significant materiality of that evidence, and given evidence here of either bad faith or connivance or an extremely egregious carelessness on the part of the detective, this Court grants the defendant's Motion to Dismiss the Indictment . . . . (2T16:21-17:2).

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[3] Interestingly, the State previously *conceded* the prejudice to Defendant, but now seeks to assert that "defendant will suffer little, if any, prejudice from the loss of the profile." Under the circumstances, this position is nonsensical. See Pb27.

As the ruling was soundly based on the facts and circumstances present and satisfied the Hollander factors, the Trial Court's decision should be upheld.

POINT III

THE STATE'S LOSS / DESTRUCTION OF THE DISCOVERY AT ISSUE VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE, WHICH REQUIRED THE TRIAL COURT TO DISMISS THE INDICTMENT.

Defendant has a constitutional right to present a defense. The United States Supreme Court has long recognized that criminal courts cannot deny defendants the opportunity to adduce relevant evidence to either establish their innocence or challenge the government's case. Taylor v. Illinois, 484 U.S. 400, 423 (1988). The constitutional right to present a defense is grounded in the Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment. Ibid. The right has been described as "the right to present the defendant's version of the facts." Ibid. (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)). This includes the defendant's basic right to "have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" Crane v. Kentucky, 476 U.S. 683, 690-91 (1986) (citations omitted).

Here, the loss or destruction of Detective Brian Borow's "Adam4Adam" profile information deprived Defendant of the ability to present the best evidence at trial. It deprived him of material evidence that could have been used to cross-

examine the State's key witness. Most importantly, it deprived him of evidence material to his defenses of entrapment. Simply put, the State's loss / destruction of the evidence at issue unilaterally robbed Defendant of a defense in this case.

Defense Counsel argued that such conduct warranted dismissal of the Indictment. The Trial Court agreed:

> And this Court agrees with the defense in this case that the Adam4Adam profile information is crucial to the defense in this case. This is essentially the bait with which the undercover detective lured and ultimately captured and charged Mr. Noel with.
>
> Not only is this information important to mount a defense and defend against the allegations brought by the State, it's also relevant to the defense's reliance on statutory and due process defenses of entrapment. (2T12:21-13:6).

The Trial Court's ruling should be upheld.

POINT IV

THE CORRECTNESS OF THE TRIAL COURT'S RULING IS NOT IMPACTED BY THE STATE'S SUPPLEMENTED MATERIALS ON APPEAL.

The Grand Jury in this matter issued an Indictment on October 22, 2019. ***That*** Indictment was dismissed by Judge Kazlau on January 22, 2024. The State did not request or obtain a Stay of the dismissal. Accordingly, as of January 23, 2024, the Defendant's Indictment did not exist[4] – and, certainly, the 2019 Grand

[4] It is clear that the "without prejudice" designation of the dismissal was limited to a circumstance in which the State was able to recover the lost / destroyed evidence and not a hearsay email confirming that the evidence was lost / destroyed.

Jury that issued the 2019 Indictment was no longer sitting.

Notwithstanding that the 2019 Indictment had been dismissed and that, clearly, as of March 2024 a new Grand Jury was sitting, on March 21, ***2024***, the State, the State propounded a Grand Jury subpoena upon "Adam4Adam."[5] In response to the Grand Jury subpoena, the State received the March 25, 2024 email that has been supplemented into this record. The State's Grand Jury subpoena was improperly issued.

Traditionally viewed as a shield between an individual and his sovereign, the grand jury is a judicial, investigative body with "broad investigative authority . . . to determine whether a crime has been committed and whether criminal investigations should be instituted against any person." State v. Francis, 191 N.J. 571, 585-86 (2007). To carry out its investigatory role, the grand jury is entrusted with expansive powers. Ibid. at 586 (Branzburg v. Hayes, 408 U.S. 665, 688 (1972)).

When dealing with claims of grand jury abuse after an indictment has been returned, the Supreme Court has adopted the "unbroken line of authority" which holds that:

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[5] A copy of the Grand Jury subpoena was not provided by the State. However, the transmission email references "NJSP Case: H310-2022-00087." (Ma7.) Clearly, a Grand Jury that was empaneled in 2022 is not still sitting in 2024. ("Ma" refers to the State's attachments on its Motion to Supplement the Record.)

> [S]uch use of the grand jury is permitted *unless the dominant purpose of that use was to buttress an indictment already returned by the grand jury*. Post-indictment, the State may continue to use the grand jury to investigate ***additional or new charges*** against a defendant. However, once an indictment is returned, ***the State may not use the grand jury to gather evidence solely in respect of the charges already filed***. Ibid. at 591-92 (emphasis added).

The remedy for instances where the State has improperly used the grand jury process in gathering proofs it seeks to use is "suppression of the improperly garnered proofs." Ibid. at 594.

In this matter, the State's conduct is more egregious than what was contemplated by the Supreme Court in Francis. Not only was Defendant's matter *clearly* at the post-indictment stage, but at the time of the issuance of the Grand Jury subpoena, the Indictment against Defendant had been dismissed by Judge Kazlau. Yet, the State still sought to utilize a Grand Jury subpoena to gather evidence relative to the dismissed charges. This conduct is a direct and flagrant contravention of the Grand Jury process.

Accordingly, the evidence obtained by the State and supplemented into this record does not change the merits of the Trial Court's decision nor should it have any bearing on this Court's decision.

CONCLUSION

For all the foregoing reasons, as well as any reasons to be set forth during

oral argument, the Trial Court's decision to grant Defendant's Motion to Dismiss the Indictment should be upheld. It is respectfully requested that this Court enter an Order denying the State's appeal.

Respectfully submitted,

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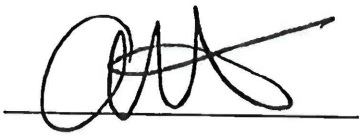
Respondent, Larry Noel



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LETTER IN LIEU OF REPLY BRIEF
ON BEHALF OF THE STATE OF NEW JERSEY

The Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: STATE OF NEW JERSEY (Plaintiff-Appellant) v.
LARRY M. NOEL (Defendant-Respondent)
Docket No. A-1955-23

Criminal Action: On Appeal from a Final Order in the
Superior Court of New Jersey, Law Division, Bergen County

Sat Below: Hon. Christopher Kazlau, J.S.C.

Honorable Judges:

Please accept this letter brief in lieu of a formal reply brief on behalf of the State of New Jersey. See R. 2:6-2(b).

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

Pb – State's merits brief
Pa – State's appendix
Mb – State's brief in support of its motion to expand the record
Ma – State's appendix in support of its motion to expand the record
Db – Defendant's brief
1T – motion transcript dated December 11, 2023
2T – motion transcript dated January 22, 2024

STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

The State relies on the Statement of Procedural History and Statement of Facts set forth in the State's brief on the merits (Pb-5), and its brief in support of its motion to expand the record, (Mb1-2).

LEGAL ARGUMENT

POINT I

THE STATE LEGALLY SENT ITS MARCH 21, 2024, GRAND JURY SUBPOENA TO ADAM4ADAM.

Contrary to defendant's assertion that the State's issuance of its March 21, 2024, grand jury subpoena on Adam4Adam was a "flagrant contravention of the Grand Jury process[,]" (Db22), in fact, the State was permitted to issue the subpoena for two reasons: first, because defendant had successfully moved to have his indictment dismissed, and second, because even if the indictment had not been dismissed, the State was allowed to follow up on information proffered by defense counsel during the motion to dismiss.

First, the State could properly serve the March 21, 2024, grand jury subpoena on Adam4Adam because, as defendant concedes, "at the time of the issuance of the Grand Jury subpoena, the Indictment against Defendant had been

[1] For the Court's convenience and to avoid repetition, the State has combined the Statement of Procedural History and the Statement of Facts.

dismissed by Judge Kazlau." (Db22). The dismissal of a defendant's indictment dismisses the pending criminal case against him. State v. Campione, 462 N.J. Super. 466, 506 (App. Div. 2020) ("As a result of the dismissal of the indictment in its entirety, the criminal action was no longer pending[.]") Consequently, the case returns to square one and the State may continue to investigate the allegations against the defendant the same way it did before the defendant was indicted. State v. Reid, 194 N.J. 386, 407 (2008). As our Supreme Court has noted, this means the State may send out new grand jury subpoenas and compile additional evidence in anticipation of presenting the case to a new grand jury. Ibid. (noting that where indictment is dismissed, State may "re-serve a proper grand jury subpoena . . . and seek a new indictment.").

Here, Judge Kazlau terminated the pending criminal matter against defendant when he granted defendant's motion to dismiss his indictment. (Pa8). The State was therefore permitted to investigate the matter anew and send a subpoena to Adam4Adam in anticipation of re-presenting defendant's case to a state grand jury. (Ma7). As Judge Kazlau himself noted as part of his decision, the State was "free to go back to the grand jury" if the profile was located. (2T17-2 to 5). The State was therefore within its legal right to send Adam4Adam a grand jury subpoena on March 21, 2024.

Second, the State would have been permitted to send the grand jury

subpoena even if defendant's indictment had not been dismissed. After a defendant is indicted, the grand jury may still investigate the matter. State v. Francis, 191 N.J. 571, 590–91 (2007). "The investigative power of a grand jury does not necessarily end with the return of an indictment. Rather, a grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined." Id. at 590 (quoting United States v. Furrow, 125 F.Supp.2d 1170, 1172–73 (D.Cal.2000)).

After a defendant has been indicted, prosecutors may not use the grand jury's investigative powers for the "sole or dominant purpose" of obtaining additional evidence to prove the charges against the defendant. Id. at 590-91. But prosecutors may use the grand jury for other purposes, such as identifying the defendant's potential co-defendants, testing the legitimacy of the defendant's possible affirmative defenses, and investigating additional charges against the defendant. Id. at 592. The return of an indictment thus does not sever the State's ability to use the grand jury's investigative powers.

Here, the State was permitted to send Adam4Adam the grand jury subpoena in an effort to follow up on the information defense counsel proffered—but did not provide—during the motion to dismiss hearing. (1T31-3 to 4; Ma2). Defense counsel represented to the court that the subpoena response from Adam4Adam read: "'After a complete search, my client could

not find any information on their servers pertaining to the account . . . . Thank you for your patience.' And that was it." (1T32-7 to 12). She insisted this email proved bad faith on the part of the State, (1T31-1 to 5), which became an underpinning of Judge Kazlau's ruling. As the State was not served with a copy of this email, it was permitted to send its own subpoena to confirm this information. And since the purpose in sending the subpoena was not to secure additional evidence to use against defendant at trial, but to counter claims of intentional bad faith, the State was legally permitted to send it at any time, even if the indictment and case against defendant had not already been dismissed.

CONCLUSION

For the foregoing reasons, as well as those set forth in the State's opening brief, the State urges this Court to reverse the motion court's granting of defendant's motion to dismiss his indictment.

Respectfully submitted,

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