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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,  
YELLOWSTONE COUNTY

STATE OF MONTANA,

Cause No.: DC 09-18

Petitioner,

Judge Susan P. Watters

vs.

LINDA KATHERINE KAPSA,

**ORDER DENYING  
DEFENDANT'S FIRST MOTION TO  
DISMISS BASED ON DESTRUCTION  
OF EVIDENCE AND THE  
DEFENDANT'S ALTERNATIVE  
MOTION TO SUPPRESS**

Respondent.

**ORDER**

This matter comes before this Court on Defendant Linda Kapsa's First Motion to Dismiss based on Destruction of Evidence or in the alternative Motion to Suppress. The parties have provided briefs and a hearing was held on June 30, 2009. In consideration of the record and for good cause shown;

**IT IS HEREBY ORDERED** that the Defendant's First Motion to Dismiss based on Destruction of Evidence and Alternative Motion to Suppress is DENIED.

DATED this 2<sup>nd</sup> day of July 2009.

Dusan P. Wattie  
DISTRICT JUDGE

## **MEMORANDUM**

## Background

On January 13, 2009, the State charged Linda Kapsa with various felony and misdemeanor charges related to her care of the animals found on her property. *State's Resp. to Def.'s First Mot. to Dismiss based on Destr. of Evid. or in the Alt. Mot. to Supp. and Br. in Supp. 2* (June 19, 2009). According to the charging documents, on December 11, 2008, the State seized ten dogs, two cats and thirteen animal remains from Kapsa's ranch. *Def.'s First Mot. to Dismiss based on Destr. of Evid. or in the Alt. Mot. to Supp. and Br. in Supp. 2* (June 4, 2009). On December 30, 2008, the State seized 189 dogs, 27 chickens, 10 cockatiels, one cat and eleven animal remains. The live animals seized from Kapsa's ranch have been in the State's custody since the seizures. Several of the animals have since died while in the State's custody, including 35 dogs and several chickens. *Id.* The State has kept all of the animal remains, including those animals that have died since the seizures, in a freezer or freezers at the City of Billings Animal Shelter. *Id.*

1       Defense counsel retained Dr. Lisa Ritchie, a doctor of veterinary  
2 medicine, to view the animal remains to determine which remains to send to  
3 Dr. William Layton of the Montana Veterinary Diagnostic Laboratory in  
4 Bozeman, Montana. *Id.* The defense has retained Dr. Layton to conduct  
5 necropsies on the remains to determine the cause of death. *Id.*

6       On May 8, 2009, defense counsel, defense investigator, and Dr. Ritchie  
7 viewed the remains stored at the Billings Animal Shelter. *Id.* at 3. The  
8 remains from the second seizure (hereinafter “December 30 remains”) and the  
9 dogs that died while in the State’s custody were properly preserved and  
10 shipped to Dr. Layton. *Id.* Due to a freezer issue, however, the thirteen  
11 remains from the first seizure (hereinafter “December 11 remains”), were not  
12 properly preserved. *Id.* Dr. Ritchie determined that the December 11 remains  
13 were too decayed to have necropsies performed on them, and thus, none of  
14 the remains were shipped to Dr. Layton. *Id.*

15       Kapsa filed the instant motion to dismiss based on destruction of  
16 evidence or in the alternative motion to suppress on June 4, 2009. The State  
17 filed its response on June 19, 2009. Kapsa filed her reply on June 29, 2009.

18       **Discussion**

19       Kapsa argues that because of the State’s failure to properly preserve the  
20 evidence, defense experts will not be able to determine the cause of death on  
21 the December 11 remains and will therefore, be unable to present potentially  
22 exculpatory evidence on her behalf. *Id.* at 4. Kapsa argues the State’s failure  
23 to preserve the remains violates her fundamental right to due process and  
24

1 accordingly, Kapsa argues that her case should be dismissed with prejudice  
2 or in the alternative, any testimony or evidence regarding the December 11  
3 remains should be suppressed. *Id.* at 6. The State argues that Kapsa fails to  
4 prove that the December 11 remains are material to Kapsa's defense or tend  
5 to clear Kapsa of guilt in any way and therefore she fails to establish any due  
6 process violation. *State's Resp. to Def.'s First Mot. to Dismiss based on Destr.*  
7 *of Evid. or in the Alt. Mot. to Supp. and Br. in Supp.* at 2.  
8

9 The Montana Supreme Court has found that a criminal defendant has a  
10 constitutional right to obtain exculpatory evidence and denial of this right is a  
11 violation of due process. *State v. Sadowski* (1991), 247 Mont. 63, 79, 805  
12 P.2d 537, 546. The Court also found that this right is only a personal right,  
13 and, therefore, police officers are not required to take initiative or even assist  
14 the defendant with procuring evidence on his own behalf. *Id.* at 79, 805 P.2d  
15 at 546. The police may not, however, frustrate or hamper an accused's right  
16 to obtain exculpatory evidence. *State v. Heth* (1988), 230 Mont. 268, 272, 750  
17 P.2d 103, 105.  
18

19 If the State deliberately or intentionally suppresses or destroys  
20 evidence, a *per se* violation of due process occurs. *State v. Herman*, 2009 MT  
21 101, ¶ 31, 350 Mont. 109, 204 P.3d 1254. If the State loses evidence due to  
22 negligence or lack of due diligence, the defense must show the evidence was  
23 material, of substantial use, and exculpatory in order to have the case  
24 dismissed. *Id.* In other words, the defendant must show the lost evidence  
25 "[w]ould have tended to clear the accused of guilt, to vitiate a conviction." *Id.*

1 (quoting *State v. Patterson*, (1983) 203 Mont. 509, 512-13, 662 P.2d 291, 293  
2 (citing *Brady v. Maryland*, (1963) 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d  
3 215)). Finally, the defendant must show he could not obtain comparable  
4 evidence by other reasonable means and the exculpatory value was apparent  
5 before the evidence was lost. *Herman*, ¶ 31.

6 Kapsa argues that the December 11, 2008 remains would have played a  
7 significant role in her defense because Dr. Ritchie could have sent the  
8 remains to Dr. Layton if the remains had not been decomposed and the cause  
9 of death of the thirteen animals could have been established. *Def.'s First Mot.*  
10 *to Dismiss based on Destr. Of Evid. or in the Alt. Mot. to Supp. and Br. in Supp.*  
11 at 6. Kapsa asserts the exculpatory value of the remains was apparent before  
12 their destruction because the State seized them and attempted to preserve  
13 them. *Id.* at 5. Finally, Kapsa contends that the remains cannot be replaced  
14 with any other evidence. *Id.* at 6.

16 First, Kapsa's argument is premised on the fact that the remains could  
17 have potentially revealed exculpatory information for the defense. In order to  
18 assert this argument however, Kapsa must show bad faith on the part of the  
19 State to establish a due process violation. See *State v. Giddings*, 2009 MT 61,  
20 ¶ 49, 349 Mont. 347 (stating "where the lost evidence is only potentially  
21 exculpatory, rather than apparently exculpatory, the defendant must show  
22 bad faith by the State in order to establish a due process violation.") This  
23 Court finds that there was absolutely no evidence presented at the hearing of  
24 bad faith on the part of the State in the way they attempted to preserve the  
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1 December 11 remains. Therefore, Kapsa has failed to establish bad faith on  
2 the part of the State.

3 Second, assuming all of Kapsa's assertions are true, this Court fails to  
4 see the materiality, the substantial use or the exculpatory value of the  
5 December 11 remains. Even if Kapsa had been absolved of all responsibility  
6 for the death of the thirteen dogs at issue in the December 11 remains  
7 through Dr. Layton's cause of death determinations, such an outcome is of no  
8 consequence in light of the substantial amount of remaining evidence against  
9 her. Eleven remains exist from the December 30 seizure with a cause of  
10 death yet to be determined and over 200 living dogs have been documented as  
11 evidence of Kapsa's alleged conduct in the State's case. Due to the remaining  
12 evidence against Kapsa – all relevant to the same charge – this Court finds  
13 there was no expectation that the lost evidence would play a significant role in  
14 the defense of the defendant. *Heth*, 230 Mont. at 272, 750 P.2d at 105; *see also* *United States v. Agurs* (1976), 427 U.S. 97, 96 S.Ct. 2392 (stating that  
15 the mere possibility that an item of undisclosed information might help the  
16 defense or affect the outcome of the trial does not establish "materiality" in  
17 the constitutional sense). Put simply, Kapsa cannot show the lost evidence  
18 "[w]ould have tended to clear [her] of guilt" or "vitiate[d] a conviction."  
19 *Herman*, ¶ 31.

20 Third, this Court rejects Kapsa's argument that she cannot obtain  
21 comparable evidence by other reasonable means. As noted above, eleven  
22 other remains that were similarly seized from Kapsa's property exist for Dr.

1 Layton to conduct necropsies on. Although this Court is aware that the  
2 individual dogs may differ, any defense that Kapsa intended to rely upon  
3 using the December 11 remains can presumably be relied upon using the  
4 December 30 remains, although reliance on any exculpatory evidence  
5 provided by the December 30 remains would not, in and of itself, be sufficient  
6 to defeat the State's charges against Kapsa given the other alleged evidence  
7 against her, some of which was presented at the hearing. As such, the  
8 December 30 evidence is comparable evidence that Kapsa has obtained.  
9

10 Finally, Kapsa fails to point to any evidence that the State intentionally  
11 failed to preserve the remains and no such evidence was presented at the  
12 hearing; therefore, this Court finds that the State's conduct was not  
13 prejudicial *per se*.

14 This Court finds Kapsa has failed to establish the unpreserved  
15 December 11 remains were vital to her defense and were of material and  
16 substantial use. Accordingly, this Court finds Kapsa has not established that  
17 the State violated her due process rights by intentionally or negligently  
18 suppressing exculpatory evidence.  
19

20 In her reply brief, Kapsa raises for the first time the issue of the State's  
21 failure to attach evidence tags to the December 11 remains and failure to  
22 follow standard operating procedure for chain of custody of evidence arguing  
23 that, at best, the State's failure to follow standard operating procedure caused  
24 the destruction of the evidence or, at worst, the State intentionally destroyed  
25 the evidence.

1       First of all, it is improper to raise new arguments in support of a motion  
2 in a reply brief. Pursuant to Uniform District Court Rule 2, the reply brief is  
3 the final brief to be filed before a motion is ripe for ruling on by the Court.  
4 When new arguments are raised in a reply brief, the opposing party is  
5 precluded from responding to them. Consequently, it is improper to raise new  
6 arguments in a reply brief.  
7

8       The Court finds that there is no evidence that the State's failure to  
9 attach evidence tags to the December 11 remains caused the destruction of  
10 the evidence. ACO Fleming and Lt. Schieno testified to the alternative method  
11 the officers used to identify the remains and why they did not feel the  
12 standard practice of attaching evidence tags to evidence would work for the  
13 December 11 remains (or the December 30 remains, for that matter, and  
14 Kapsa has not raised this issue with regard to the December 30 remains).  
15 The Court further finds that none of the procedural issues raised by Kapsa in  
16 her reply brief, or the evidence presented at the hearing with regard to these  
17 procedural issues, support her argument that the State's failure to follow  
18 standard operating procedure caused the destruction of the evidence or that  
19 the State intentionally destroyed the evidence.  
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21       With regard to suppressing the evidence of the December 11 remains,  
22 the State did not conduct any necropsies on the December 11 remains either.  
23 Consequently, the State may not present testimony on the cause of death of  
24 the December 11 remains. The State may, however, present evidence of the  
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1 seizure of the December 11 remains, the circumstances of where they were  
2 located on Kapsa's property, etc.

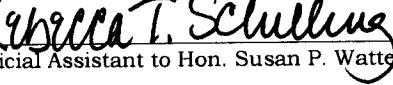
3 **Conclusion**

4 Based upon the foregoing, Defendant's First Motion to Dismiss based on  
5 Destruction of Evidence or in the Alternative Motion to Suppress is DENIED.  
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cc: Yellowstone County Attorney's Office  
State Public Defender's Office

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail/hand  
upon the parties and their attorneys of record at their last known  
addresses this 2nd day of July 2009.

BY   
Rebecca T. Schilling  
Judicial Assistant to Hon. Susan P. Watters