

[CAPTION]

**MOTION TO DISMISS (DESTRUCTION OF EVIDENCE)**

The Defendant, by counsel, respectfully requests this Court, pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 1, §12 of the Indiana Constitution, to dismiss the [indictment/information] in this cause because of the State's [intentional/negligent] destruction of material evidence. In support of this Motion, the Defendant states the following:

1. The State has [intentionally/negligently] destroyed the following evidence: [specify evidence, e.g., blood stains, clothing, fingerprints, footprint(s), witness' memory or testimony by use of hypnosis]
2. This evidence is material for the following reason(s): [specify reasons]
3. The burden is on the State to demonstrate that this evidence was not material and its destruction did not prejudice the Defendant. Cox v. State, 422 N.E.2d 357 (Ind. 1981).
4. Even if this Court were to find that the evidence is only potentially useful to the Defendant, the State acted with bad faith when destroying the evidence.
5. Pursuant to Criminal Rule 3, a memorandum stating specifically the grounds for dismissal is filed herewith and incorporated by reference as Exhibit A.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to set this matter for hearing if the allegations set forth in this Motion are denied by the State. If the allegation(s) are admitted or shown at the hearing on this Motion to be correct, the Defendant requests this Court to dismiss the [indictment/information].

(Signature)

## REFERENCES

## CASEBANK B.10.m; M.7.a; N.1.f

Ind. Code 35-34-1-8 (motion to dismiss by Defendant; requisites; affidavits; documentary evidence; disposition; procedures)

U.S. Constitution, 14th Amendment (Due Process Clause)

Indiana Constitution, Article 1 §12

Indiana Rules of Criminal Procedure, Rule 3 (memorandum to be filed with motion to dismiss)

## NOTE

*See also Motion to Suppress Results based on Destruction of Evidence in Suppression Motion Chapter.*

Argue that Article I, Section 12 of the Indiana Constitution does not strictly require a finding of bad faith on the part of the State. Generally, State's failure to preserve potentially useful evidence does not constitute denial of due process where there was no showing of bad faith on part of police. However, Indiana case law, prior to Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988) says the *negligent* or intentional destruction of evidence by the police can provide grounds for dismissal. See Birkla v. State, 263 Ind. 37, 323 N.E.2d 645 (1975); Hale v. State, 248 Ind. 630, 230 N.E.2d 432 (1967).

Moreover, the Indiana Court of Appeals has suggested that the Indiana Constitution may, in some circumstances, provide greater protection against destroyed evidence.

Stoker v. State, 692 N.E.2d 1386 (Ind.Ct.App. 1998) (although the court held that the Indiana constitutional analysis is analogous to the U.S. Constitutional analysis, in some instances, destruction or failure to preserve evidence may be so prejudicial to the Defendant as to warrant reversal even absent bad faith; although sound policy, neither constitution requires taping of interrogations in all situations). See also Gasper v. State, 833 N.E.2d 1036 (Ind.Ct.App. 2005).

Rita v. State, 663 N.E.2d 1201 (Ind.Ct.App. 1986) (where no evidence that destruction was motivated by bad faith, there was no due process violation; Sullivan, J., concurring in result, disagreed with implication that prior case law creates absolute "bad faith" proof requirement with respect to withheld or destroyed evidence), *aff'd in relevant part, vacated in part*, 674 N.E.2d 968 (Ind. 1996).

Lee v. State, 545 N.E.2d 1085 (Ind. 1989) (with no mention of Youngblood, the Court found that negligent destruction or withholding of material evidence by police or prosecution may present grounds for reversal where the Defendant establishes materiality of lost evidence or where materiality is self-evident).

Other States have found a broader due process protection against the destruction of evidence than found in the U.S. Constitution. See, e.g., State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999) (Tennessee Supreme Court rejects U.S. Supreme Court holding in Youngblood, and holds that proof that state acted in bad faith in losing or destroying allegedly exculpatory evidence is not an absolute prerequisite to finding violation of Tennessee constitution's due process clause).

## CASE LAW

Illinois v. Fisher, 540 U.S. 544, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004) (although the destruction of “material exculpatory evidence” violates federal due process regardless of the good or bad faith of the State, the failure to preserve “potentially useful evidence” does not violate federal due process unless the Defendant can prove bad faith by the State; the existence of a pending discovery request did not eliminate the need for a showing of bad faith by the police in this case).

Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (unless the Defendant demonstrates that police acted in bad faith, destruction of potentially exculpatory evidence is not denial of due process; failure of police to refrigerate clothing and test semen samples did not constitute bad faith.).

California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) (the State has duty to preserve evidence expected to play significant role in the Defendant's defense). See also U.S. v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 841 (1985).

Roberson v. State, 766 N.E.2d 1185 (Ind.Ct.App. 2002) (the trial court erred in denying the Defendant's motion to dismiss charge of possessing material capable of causing bodily injury by inmate because State's failure to preserve alleged dangerous device violated the Defendant's due process rights; because the condition of device was critical to both sides in this case and was the Defendant's sole basis of defense, the court concluded that device was materially exculpatory evidence and that the Defendant could not secure comparable evidence by other reasonably available means).

Hopkins v. State, 579 N.E.2d 1297 (Ind. 1999) (a showing of bad faith destruction of evidence by State, absent material likelihood that evidence would have exculpated the Defendant, does not result in denial of due process).

Johnson v. State, 507 N.E.2d 980 (Ind. 1987) (Defendant should not be required to conclusively prove that the destroyed evidence was exculpatory, but the court will not assume the destroyed evidence contained exculpatory material when the record is devoid of such indication).

Mahrtdt v. State, 629 N.E.2d 244 (Ind.Ct.App. 1994) (Defendant had right to inspect breathalyzer machine, and State's refusal to allow Defendant to do so before re-certifying machine, despite Court order, required suppression of BAC results).

Cases in which the courts have found that the Defendant did not prove the State acted with bad faith. Nettles v. State, 565 N.E.2d 1064, 1067 (Ind. 1991) (blood samples in murder trial destroyed; intentional destruction was explained as necessary to conduct testing); Glasscock v. State, 576 N.E.2d 600, 603 (Ind.Ct.App. 1991) (blood samples for BAC test destroyed per hospital procedure; police and prosecution never possessed samples); State v. Durrett, 923 N.E.2d 449 (Ind.Ct.App. 2010) (van that struck victim was photographed, released, unclaimed, and eventually sold for scrap parts).

Cases in which the courts have found evidence to be only “potentially useful evidence.” Bishop v. State, 40 N.E.3d 935 (Ind.Ct.App. 2015) (destroyed shell casings from another shooting that occurred within hours of victim's murder and that was part of other crimes evidence constituted potentially useful evidence and therefore destruction did not violate Defendant's due process rights absent a showing of bad faith; casings did not have exculpatory value that was apparent before the evidence was destroyed); Blanchard v. State, 802 N.E.2d 14 (Ind.Ct.App. 2004) (twenty-seven lost photographs showing twins as

happy and healthy infants were potentially useful evidence at best and did not rise to level of materially exculpatory evidence because baby was chronically malnourished and anemic at time of the Defendant's arrest; no bad faith shown); Albrecht v. State, 737 N.E.2d 719 (Ind. 2000) (at most, FBI agent's interview notes which were destroyed before trial may have been potentially helpful to the Defendant's case as additional evidence); Wade v. State, 718 N.E.2d 1162 (Ind.Ct.App. 1999) (the Defendant's due process rights were not violated by the State's failure to preserve his vehicle as evidence; at best this evidence was "potentially useful evidence" that would only discredit witness' description, but it would not clear the Defendant from guilt); Chissell v. State, 705 N.E.2d 501 (Ind.Ct.App. 1999) (the State's failure to preserve police videotapes of the Defendant performing sobriety tests both at the scene and at the jail did not impair the Defendant's rights to fair trial and due process).

Hood v. G.D.H. by Elliott, 599 N.E.2d 237, 241 (Ind.Ct.App. 1992) (T.R. 37 provides that when a party fails to comply with a discovery order, the trial court may issue an order "dismissing the action or proceeding or any part thereof"; "Indiana does not require trial courts to impose lesser sanctions before applying the ultimate sanction of . . . dismissal").

Matter of Hudson, 105 N.E.3d 1085, (Ind. 2018) Per Curiam. Court suspended a former Porter County deputy prosecutor from the practice of law for 18 months without automatic reinstatement for failing to disclose exculpatory evidence and by prosecuting a charge she knew was not supported by probable cause. D was fired for withholding from the defense evidence that an alleged victim (A.V.) said he had been coached to lie and had recanted allegations of child molestation. Respondent did not immediately disclose to trial court that she had known about A.V.'s recantation, and after learning of Respondent failure to disclose the false testimony, the judge acquitted D as to all four counts of child molesting and referred the matter to the Disciplinary Commission.