

[CAPTION]

**MOTION TO PRECLUDE STATE FROM INTRODUCING EVIDENCE,
TESTIMONY, AND TEST RESULTS RELATING TO ANY EVIDENCE
WHICH THE STATE DESTROYED OR COMPLETELY CONSUMED**

The Defendant, by counsel, respectfully requests this Court to prohibit the State from introducing any evidence, testimony or test results related to any matter and that has been destroyed or completely consumed by the State or its agents. In support of this Motion, the Defendant states the following:

1. [CHOOSE ONE: The State has readily admitted that materials have been used up and/or destroyed. *See attached letter from the State incorporated by reference as Exhibit A.* OR The State is unable to determine when these materials were destroyed].

2. Defense counsel requested the State to preserve all evidence in a prior motion. *See attached motion from defense counsel incorporated by reference as Exhibit B.* The defense was not notified before the materials were destroyed or used up by the State.

3. The State has a duty to preserve evidence that is exclusively within its control. Its failure to do so denies Defendant his Sixth, Eighth and Fourteenth Amendment rights under the U.S. Constitution and Article I §12 and § 13 under the Indiana Constitution to effective assistance of counsel, his right to present a defense and to due process.

4. Prior to any request for discovery by the Defendant, the negligent destruction or withholding of material evidence by the police or the prosecution may present grounds for reversal. Hale v. State, 248 Ind. 630, 230 N.E.2d 432 (1967).

6. The evidence destroyed or used up was material and exculpatory for the defense for the following reasons: [SET FORTH WHY THE EVIDENCE WAS MATERIAL AND EXCULPATORY].

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to prohibit the State from introducing into evidence any testimony, evidence or test results concerning the materials destroyed or completely consumed by the State, and for all other relief just and proper in the premises.

(Signature)

REFERENCES

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

T.R. 37(B), Indiana Rules of Procedure (failure to comply with discovery order).

I.C. 35-33-5-5 (law enforcement cannot destroy controlled substances or chemicals associated with the illegal manufacturing of drugs without first preserving a sufficient quantity of the chemicals or controlled substances to demonstrate their association with the unlawful activity).

NOTE

See also Motion to Dismiss based on Negligent Destruction in Motion to Dismiss 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, 102 L.Ed.2d 281 (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, 230 N.E.2d 432 (Ind. 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 Gaspar 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. State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999) (Tennessee Supreme Court rejects U.S. Supreme Court holding in Arizona v. Youngblood, 488 U.S. 51 (1988), 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

Lahrman v. State, 465 N.E.2d 1162 (1984) (if defendant cannot point to specific evidence actually destroyed or lost by police or prosecution, reversal is not required).

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (prosecution has a duty to

disclose material, exculpatory evidence that is in the possession or control of the prosecution).

Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (unless defendant can show bad faith, destruction of potentially exculpatory evidence is not denial of due process).

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).

California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) (the State has a duty to preserve evidence expected to play a significant role in the Defendant's defense).

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 the State's failure to preserve alleged dangerous device violated the Defendant's due process rights; the exculpatory value of the device should have been obvious to the State before its destruction despite subjective opinions of State's witnesses that the device was fashioned to be a weapon).

Birkla v. State, 263 Ind. 37, 323 N.E.2d 645 (1975) (in determining whether evidence is immaterial and thus may be destroyed by the prosecution, prosecution should consider the seriousness of the charge, whether evidence is relevant either to the Defendant's guilt or punishment and potential usefulness to the Defendant of evidence for rebuttal or impeachment of the State's case; after considering all these factors, if the prosecutor has any doubts concerning potential materiality of evidence, he must retain it).

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; held no violation of due process), *disapproved of on other grounds by* Abney v. State, 821 N.E.2d 375 (Ind. 2005).

State v. Durrett, 923 N.E.2d 449 (Ind.Ct.App. 2010) (in prosecution for failure to return to scene of accident resulting in SBI, State's failure to preserve van that struck victim did not violate due process because there was no evidence State acted in bad faith).

Holder v. State, 571 N.E.2d 1250 (Ind. 1991) (in order for the State to have a duty to preserve exculpatory evidence, the evidence must both possess exculpatory value that was apparent before the evidence was destroyed, and must be of such a nature that the Defendant would be unable to obtain comparable evidence by other reasonably available means).

Rita v. State, 663 N.E.2d 1201 (Ind.Ct.App. 1996) (the trial court did not err in denying the Defendant's motion to dismiss, and, alternatively, in refusing to exclude the State's evidence regarding a broken windshield and in refusing to give jury instruction; because there was no evidence that prosecution's decision to remove windshield was motivated by bad faith, the State's failure to preserve this evidence in the same condition as at the time of the accident did not constitute denial of due process), *vacated on other grounds by* 674 N.E.2d 968 (Ind. 1996).

Gasper v. State, 833 N.E.2d 1036 (Ind.Ct.App. 2005) (based on current case law and Stoker v. State, 692 N.E.2d 1386 (Ind.Ct.App. 1998), the Court again held that Article 1, Section 12 of Indiana Constitution does not require police officers to record custodial interrogations in places of detention; nevertheless, as in Stoker, the Court strongly encouraged law enforcement officers, as a matter of sound policy and fairness of proceedings, to record all custodial interrogations).

Seay v. State, 529 N.E.2d 106 (1988) (when only a small quantity of evidence is possessed by the State which will be destroyed by chemical analysis, the defense is allowed to use the State's testing reports and probe the veracity of those reports; narcotics defendant who was informed that drugs had been exhausted by State's testing procedures approximately three weeks before trial, but did not request that drugs be produced until first day of trial, and who cross-examined chemist who had analyzed substances in question about testing procedures used, failed to show he was unduly prejudiced by depletion of drugs during testing).

Nettles v. State, 565 N.E.2d 1064 (Ind. 1991) (the trial court did not err in denying the Defendant's motion to suppress blood and hair identification test results, samples of which were either destroyed in testing process or not preserved by State; intentional destruction was explained as necessary to conduct testing, and no bad faith was shown).

Hopkins v. State, 579 N.E.2d 1297 (Ind. 1991) (where other evidence of guilt at trial is so overwhelming, showing of arguably bad faith destruction, absent some material likelihood of exculpation, does not result in denial of due process).

Sewell v. State, 592 N.E.2d 705, 708 (Ind.Ct.App. 1992) (in conjunction with post-conviction relief proceedings, due process concerns entitled the Defendant to obtain the State's rape kit for laboratory examination and potential subsection to DNA testing in order to ascertain the truth; "Advances in technology may yield potential for exculpation where not previously existed. The primary goals of the court when confronted with a request for the use of a particular discovery device are the facilitation of the administration of justice and the promotion of the orderly ascertainment of the truth.").

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

Seal v. State, 38 N.E.3d 717 (Ind.Ct.App. 2015) (Defendant not denied due process rights by State's failure to preserve audio recordings of his daughters' interviews, where interviews were summarized, both daughters testified, and Defendant failed to explain how summaries were inadequate to assist him in cross-examining daughters).

Reid v. State, 984 N.E.2d 1264 (Ind.Ct.App. 2013) (Defendants did not have due process right to obtain post-conviction access to State's evidence for additional testing, and thus State did not violate due process by losing or destroying DNA evidence after Defendants were convicted of murder and attempted armed robbery).

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 were part of other crimes evidence constituted potentially useful evidence, as opposed to materially exculpatory, and therefore their destruction did not violate Defendant's due process rights absent a showing of bad faith on the part of the State, despite claim that loss of casings deprived Defendant of opportunity to test casings and contradict State's expert testimony that casings came from same firearm).