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# Criminal Law—Due Process—Police Need Not Preserve Potentially Exculpatory Evidence as Long as They Act in "Good Faith." Arizona v. Youngblood, 109 S. Ct. 333 (1988).

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CRIMINAL LAW—DUE PROCESS—POLICE NEED NOT PRESERVE POTENTIALLY EXCULPATORY EVIDENCE AS LONG AS THEY ACT IN "GOOD FAITH." *Arizona v. Youngblood*, 109 S. Ct. 333 (1988).

On October 29, 1983, David, aged 10, was abducted from a carnival near his church. The assailant took David to an unidentified house and sodomized him. The assailant then returned David to the carnival and threatened to kill him if he told anyone what had occurred.[1] When he got home, David told his mother what had happened and she took him to a hospital.

At the hospital a physician collected evidence of the attack using a "sexual assault kit."[2] The physician used cotton swabs from the kit to collect samples from David's rectum and mouth. He later prepared microscope slides from the small samples collected. The doctor also took samples of David's hair, blood, and saliva for comparison purposes. The police, on their arrival, took the kit and David's clothes as evidence. No one examined the evidence.[3] The police placed the assault kit in a secure refrigerator at the police station. However, David's clothes were not refrigerated.[4]

Nine days later, David identified Youngblood as his assailant in a photographic array.[5] The police arrested Youngblood about four weeks later. The day after David's identification, the police criminologist examined the contents of the assault kit for the first time to determine if sexual contact actually occurred. In accordance with standard departmental procedure, no tests were run to determine a blood type, nor were David's clothes examined.[6] The criminologist

1. Arizona v. Youngblood, 109 S. Ct. 333, 334 (1988).

2. *Id.* The Tuscon Police Department provided these kits to area hospitals. Each contained microscope slides, cotton swabs, tissue paper for saliva samples, tubes for blood samples, and a medical report form.

3. *Id.* at 334-35. Evidence introduced at trial indicated that immediate testing of the cotton swabs and the smears made from them could have revealed a blood type of the assailant if he had been a "secreter" (i.e., one whose blood type shows up in his semen). State v. Youngblood, 153 Ariz. 50, 54, 734 P.2d 592, 959 (1986), *rev'd*, 109 S. Ct. 333 (1988).

4. 109 S. Ct. at 335.

5. *Id.* At trial there was some question as to the accuracy of David's identification. David was not wearing his glasses the night of the attack or when he chose Youngblood's photo. He also later identified another man in the lineup as the assailant. *See* State v. Youngblood, 153 Ariz. 50, 52, 734 P.2d 592, 594 (1986). *See also* Arizona v. Youngblood, 109 S. Ct. at 344-45 (Blackmun, J., dissenting).

6. 109 S. Ct. at 335.

placed the kit, but not the clothes, back in the refrigerator after his examination.

Prior to trial, the state's criminologist conducted a blood group test on the semen sample in the assault kit. The test was inconclusive due to the small size of the sample.[7] The state's criminologist finally examined David's clothes for the first time some fifteen months after the attack. Semen stains were found on the clothes. However, because the clothing had not been refrigerated, conclusive testing of the semen samples was not possible.[8]

At trial, Youngblood denied the charges and claimed he was a victim of mistaken identification.[9] The defense presented testimony that proper refrigeration of the clothing could have preserved the semen samples for later conclusive testing.[10] The trial court instructed the jury that "[i]f you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest."[11] The jury convicted Youngblood of child molestation, sexual assault, and kidnapping.

The Arizona Court of Appeals reversed the conviction, stating, "[when] police permit the destruction of evidence that could [exculpate] a defendant . . . such loss is . . . a denial of due process."[12] The Supreme Court of Arizona denied review[13] and the United States Supreme Court granted certiorari.[14] In a six-to-three opinion the Court reversed, stating that "unless a . . . defendant can show bad faith on the part of the police, failure to *preserve* potentially useful evidence [is] not . . . a denial of due process."[15] *Arizona v. Youngblood*, 109 S. Ct. 333 (1988).

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7. State v. Youngblood, 153 Ariz. at 54, 734 P.2d at 596.

8. *Id.* The failure to "preserve" the semen stains was a direct result of the failure to "examine" the clothes and detect them in the first place. *See infra* notes 143-48 and accompanying text.

9. 109 S. Ct. at 335. Youngblood also used an alibi defense. State v. Youngblood, 153 Ariz. at 52, 734 P.2d at 594.

10. 109 S. Ct. at 335.

11. *Id.* at 338.

12. State v. Youngblood, 153 Ariz. at 54, 734 P.2d at 596 (quoting State v. Escalante, 153 Ariz. 55, 61, 734 P.2d 597, 603 (1986)). It is unclear from the Arizona Appeals Court's discussion whether the due process violation they found has its origins in the State or Federal Constitution. The court also discussed, but did not base its ruling on, the police seizure and destruction of a car allegedly belonging to the defendant. *Id.* at 55, 734 P.2d at 597. The defendant was never allowed to inspect the car and it did not match the victim's description of the car used by his assailant. *Id.* at 51, 734 P.2d at 593.

13. 109 S. Ct. at 335.

14. Arizona v. Youngblood, 108 S. Ct. 1072 (1988).

15. 109 S. Ct. at 337 (emphasis added).

At common law, a criminal defendant had no right to receive disclosure of the prosecution's evidence against him.[16] This broad prohibition was somewhat abrogated in later cases that allowed discovery of documents that formed the basis of a criminal charge and of chattels that required expert examination in order to explain the facts to the jury.[17]

*United States v. Burr*[18] first recognized constitutional limits on the common law rule. In *Burr* a letter written by the government's chief witness formed the basis of the treason charge against Aaron Burr.[19] Chief Justice John Marshall found the letter to be material to the defense's case and issued a *subpoena duces tecum* ordering the President to turn the letter over to Burr.[20] The court noted that our system of jurisprudence provides for court-ordered disclosure of such evidence so that a criminal defendant may adequately prepare his defense.[21] Over a century passed before the courts announced any further decisions on the issue of discovery.[22]

In response to prosecutorial misconduct, the United States Supreme Court handed down a series of decisions in 1935 generally regarded as the source of "what might loosely be called the area of constitutionally guaranteed access to evidence"[23] for criminal defendants. *Mooney v. Holohan*,[24] the first of these decisions, involved a defendant convicted of murder for detonating a bomb in a parade crowd.[25] Later investigation revealed that all of the state's witnesses had lied with the encouragement of the district attorney.[26] The dis-

16. This broad rule was first espoused in Rex v. Holland, 4 T.R. 691, 100 Eng. Rep. 1248 (1792) where Chief Justice Lord Kenyon stated that to grant discovery in a criminal case would "subvert" the entire criminal justice system. *Id.* at 692, 100 Eng. Rep. at 1249. *See also* 2 M. RHODES, ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, 589-90 (2d ed. 1985). *See generally* Annotation, *Right of Accused to Inspection or Disclosure of Evidence in Possession of Prosecution*, 52 A.L.R. 207, 208-09 (1928).

17. *See* Rex v. Harrie, 6 Car. & P. 105, 172 Eng. Rep. 1165 (1833); Regina v. Spry & Dore, 3 Cox CC 221 (1848); Regina v. Colucci, 3 Fost & F. 103, 176 Eng. Rep. 46 (1861). *See also* 2 M. RHODES, *supra* note 16, at 589-90.

18. 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14, 692d). *See also* United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694). *See generally* 2 M. RHODES, *supra* note 16, at 591.

19. 25 Fed. Cas. at 36.

20. *Id.* at 37.

21. *Id.* at 32.

22. 2 M. RHODES, *supra* note 16, at 592.

23. United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). *See infra* text accompanying notes 78-81 for a discussion of this case.

24. 294 U.S. 103 (1935).

25. Mooney v. Holohan, 7 F. Supp. 385, 386 (1934).

26. The state's chief witness was over 90 miles away at the time of the explosion. *See* Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964) [hereinafter *Prosecutor's Duty*].

trict attorney suppressed evidence regarding the credibility of the state's witnesses and concealed a photograph showing Mooney on top of a distant building immediately before the explosion.[27]

The Supreme Court denied Mooney's petition for a writ of habeas corpus,[28] but stated that the use of perjured testimony by the prosecution was "inconsistent with the rudimentary demands of justice."[29] The Court also noted that the prosecutor's misconduct could constitute state action for purposes of the fourteenth amendment.[30]

Seven years later, the Court cited language from *Mooney* with approval in *Pyle v. Kansas*.[31] In *Pyle* the Supreme Court stated in dicta that deliberate use of perjured testimony and suppression of favorable evidence by the prosecution is "a deprivation of rights guaranteed by the Federal Constitution . . . ."[32] Proof of such activity should entitle a petitioner to release.[33]

In 1957 the Supreme Court again faced the issues of perjured testimony and suppressed evidence in *Alcorta v. Texas*.[34] The defendant claimed he killed his wife when he caught her kissing another man. This other man was the state's chief witness at trial. He denied

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27. *Id. See generally* R. FROST, THE MOONEY CASE (Stanford Press 1968) (describing in detail all aspects of the case and its political underpinnings).

28. Mooney v. Holohan, 294 U.S. 103, 115 (1935) (writ denied because Mooney failed to exhaust state remedies).

29. *Id.* at 112.

30. *Id.* at 113.

31. 317 U.S. 213 (1942).

32. *Id.* at 216.

33. *Id. See generally* Note, *Prosecutor's Duty*, *supra* note 26, at 137; Annotation, *Withholding or Suppression of Evidence by Prosecution in Criminal Case as Vitiating Conviction*, 34 A.L.R. 3d 16 (1970).

34. 355 U.S. 28 (1957). In the years between *Pyle* and *Alcorta*, the Supreme Court enacted Federal Rule of Criminal Procedure 16. Federal Rules of Criminal Procedure, 327 U.S. 821 (1946) (enacted pursuant to authority granted by 18 U.S.C. § 688 (1933)). This rule provides for discovery in criminal cases and states in pertinent part, "[u]pon request of the defendant the government shall permit the defendant to inspect . . . tangible objects . . . which are within the possession, custody or control of the government, and which are material to the preparation of his defense . . . ." FED. R. CRIM. P. 16(C). In addition, the lower courts decided several cases involving the issues raised by *Pyle*. *See, e.g.*, United States *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3rd Cir. 1952) (defendant's murder conviction overturned on due process grounds when the prosecution suppressed the fact the victim was killed by a bullet that did not come from the defendant's gun); United States *ex rel.* Montgomery v. Ragen, 86 F. Supp. 382 (N.D. Ill. 1949) (defendant's trial characterized as a "sham" and a "fraud" because the prosecutor suppressed a hospital's written report that no rape had occurred). *See generally* 2 M. RHODES, *supra* note 16, at 566-678 (discussing FED. R. CRIM. P. 16); R. BERGER & A. KRASH, *Government Immunity From Discovery*, 59 YALE L.J. 1451 (1950); Comment, *Discovery of Government Documents under the Federal Rules*, 18 U. CHI. L. REV. 122 (1950); Note, *Prosecutor's Duty*, *supra* note 26; Annotation, *supra* note 33.

any romantic involvement with the defendant's wife.[35] He was actually having an affair with the victim, but the prosecutor told him not to admit it.[36] The Supreme Court found that the prosecutor's actions violated the defendant's due process rights.[37]

Similarly, in *Napue v. Illinois*[38] the Court reversed a conviction because the prosecution knowingly allowed a witness's lie to go uncorrected.[39] The Court held that the rule against prosecutorial use of perjured testimony applied although the false evidence only affected the witness's credibility,[40] and was not direct evidence of the defendant's guilt or innocence.

In the *Brady v. Maryland*[41] decision in 1963, the Court shifted its focus from the prosecution's misconduct in concealing evidence to the prejudice such concealment caused the defendant.[42] The *Brady* Court held that fundamental fairness requires that a criminal defendant be afforded access to material evidence upon specific request.[43] In *Brady* the defendant, who was charged with murder, asked to see copies of his accomplice's extrajudicial statements to the prosecution.[44] The prosecution, however, concealed a statement in which the accomplice admitted doing the actual killing.[45] Announcing "a basic constitutional principle for required disclosures to defendants,"[46] the Supreme Court stated that suppression of evidence "favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[47] Withholding evidence tending to excul-

35. 355 U.S. at 30.

36. *Id.* at 31.

37. *Id.*

38. 360 U.S. 264 (1959).

39. *Id.* at 272. The Court stated that "a conviction obtained through use of false evidence, known to be such by the representatives of the State, must fall under the Fourteenth Amendment . . . . The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 269.

40. *Id.* The lie concerned only the fact that the witness received concessions for his testimony from the prosecuting attorney. The Court failed to explain how the defendant was prejudiced by this other than to discuss the possible effect on the jury's perception of the witness's credibility. *Id.* at 270.

41. 373 U.S. 83 (1963).

42. *See* Note, *Prosecutor's Duty*, *supra* note 26, at 138-42 (discussing why the Court shifted its focus).

43. 373 U.S. at 87. *See generally* Note, *The Duty of the Prosecutor to Disclose Exculpatory Evidence*, 60 COLUM. L. REV. 858 (1960). Although written three years before the decision in *Brady*, this note discusses the issues resolved in *Brady*.

44. 373 U.S. at 84.

45. *Id.*

46. A. CHUTE, *Due Process and Unavailable Evidence*, 118 MIL. L. REV. 93, 96 (1987).

47. 373 U.S. at 87.

pate a defendant is unjust, even when the prosecution's "action is not the result of guile . . . ."[48]

The *Brady* rule was criticized by some for not being "self-implementing."[49] The defendant faces great difficulty in determining whether all the material evidence has in fact been disclosed.[50] Most courts and commentators, however, agree with the basic safeguards of fairness which *Brady* constitutionalizes and extends to state proceedings.[51] The task for lower courts in the wake of *Brady* was to determine what is "material" and "exculpatory" evidence for purposes of the *Brady* rule.[52]

Some confusion over the scope of *Brady* was cleared up in *United States v. Agurs*,[53] where *Brady* was read to mean only that the prosecution may not withhold material exculpatory evidence when the defendant specifically requests it.[54] Like *Brady*, *Agurs* involved concealed evidence[55] which was still intact and available for the defendant's use on appeal. In *Agurs* the defendant was convicted of murder in a stabbing incident. Evidence supporting the defendant's claim of self-defense was known to the prosecution, but was not revealed to the defendant because she did not specifically request it.[56] In upholding the conviction,[57] the Supreme Court identified three dif-

48. *Id.* at 88 (quoting Brady v. State, 226 Md. 422, 427, 174 A.2d 167, 169 (1961)).

49. Annotation, *supra* note 33, at 28.

50. *See id. See generally* A. CHUTE, *supra* note 46.

51. *See* Note, *Prosecutor's Duty*, *supra*, note 26, at 143-45 (the most important principles discussed are based on the fact that the state has almost unlimited investigatory capabilities at its disposal whereas a defendant has comparatively little). *But cf.* 2 M. RHODES, *supra* note 16 (discussing reasons for opposing discovery in criminal cases).

52. In the years following *Brady*, the Supreme Court decided several cases based at least in part on the *Brady* rule. *See* Moore v. Illinois, 408 U.S. 786 (1972) (suppressed witness statements are not "material" under *Brady*); Giglio v. United States, 405 U.S. 150 (1972) (information that a witness received concessions for his testimony is "material"). However, they failed to resolve the conflict in the lower courts as to what "material" evidence was for *Brady* purposes. *See* Ashley v. Texas, 319 F.2d 80 (5th Cir.), *cert. denied*, 375 U.S. 931 (1963) (withholding evidence that is of "vital significance" in *planning* and conducting the defense is a denial of due process); United States v. Keogh, 391 F.2d 138 (2nd Cir. 1968) (classifying suppression of evidence cases into three categories with a different standard of materiality for each). *See generally* Note, *Prosecutor's Duty*, *supra* note 26 (discussing the conflict in the lower courts over what is "material" evidence under *Brady*).

53. 427 U.S. 97 (1976).

54. The Court set out three definitions for material exculpatory evidence under *Brady*. *Id.* at 103-12. *See infra* text accompanying notes 58-69.

55. The evidence in question was the victim's police record, which included convictions for assault and carrying a deadly weapon. 427 U.S. at 100-01.

56. *Id.* at 101.

57. *Id.* at 114.

ferent situations to which *Brady* applies.[58]

The first situation, typified by *Mooney v. Holohan*,[59] arises when a conviction is obtained by prosecutorial use of perjured testimony. In such cases the Court said that the "conviction . . . must be set aside if there is any *reasonable likelihood* that the false testimony could have affected the judgment of the jury."[60] Prosecutorial misconduct and "a corruption of the truth-seeking function of the trial process"[61] justify such a result.

The second scenario identified in *Agurs*, and typified by *Brady*, involves a pre-trial defense request for *specific* evidence.[62] The prosecution's failure to respond to a relevant and specific defense request should seldom be excused.[63]

The final situation resembles the facts of *Agurs*.[64] Noting that a *general* defense request for "anything exculpatory"[65] or "all *Brady* material"[66] is tantamount to no request at all,[67] the Court held that the prosecution's duty in such circumstances is to turn over evidence that "creates a reasonable doubt" of guilt that would not otherwise exist.[68] Since a general request gives no real notice of what the defense is seeking, the Court thought the prosecution should only be accountable for failure to produce evidence that is "obviously exculpatory"[69] or "clearly supportive of a claim of innocence."[70]

Further refinement of the materiality standards under *Brady* and *Agurs* appeared in *United States v. Bagley*.[71] In *Bagley* the Court reversed and remanded the defendant's conviction for narcotics violations because the defense was not informed that the prosecution's

58. *Id.* at 103.

59. 294 U.S. 103 (1935). *See supra* notes 24-29 and accompanying text.

60. 427 U.S. at 103 (emphasis added).

61. *Id.* at 104.

62. *Id.*

63. *Id.* at 106.

64. This is the situation where there has been no request, but the prosecution possesses evidence that is "material" to the defendant's case. *Id.* at 101.

65. *Id.* at 106.

66. *Id.*

67. *Id.*

68. *Id.* at 112. The Court specifically rejected the standards which apply to a motion for a new trial on the basis of newly discovered evidence under FED. R. CRIM. P. 33. This rule requires a showing that the evidence, had it been introduced at trial, would likely have resulted in acquittal. 427 U.S. at 111. However, as the dissent points out, if the omitted evidence creates a "reasonable doubt" as to the defendant's guilt, it should also be evidence that would have resulted in acquittal at trial. *Id.* at 116 (Marshall, J., dissenting).

69. *Id.* at 107 (this is the standard for "general request" situations).

70. *Id.* (this is the standard for "no request" situations).

71. 473 U.S. 667 (1985).

chief witnesses received concessions for their testimony.[72] The Court also held that the prosecutor's knowing use of perjured testimony was subject to a "harmless error"[73] standard which requires the prosecution to show the perjury was "harmless beyond a reasonable doubt."[74] As for the *Brady-Agurs* type situations ("general request," "no request" and "specific request"),[75] the Court held that the evidence is material "only if there is a reasonable probability that, [had the evidence been disclosed] . . . the result of the proceeding would have been different."[76] The Court defined "reasonable probability" as a "probability sufficient to undermine confidence in the outcome."[77]

Three years before *Bagley*, the Supreme Court in *United States v. Valenzuela-Bernal*[78] discussed for the first time the constitutional questions that arise when the prosecution has lost, destroyed, or otherwise rendered evidence unavailable.[79] The defendant in *Valenzuela-Bernal* was charged with transporting illegal aliens across the border. He claimed he could not get a fair trial because the government had deported some of the illegal aliens he intended to call as witnesses.[80] The Court ruled that the defendant had to make "a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense."[81]

*California v. Trombetta*[82] is the first case prior to *Arizona v. Youngblood* to discuss the extent of the prosecution's duty to *preserve* evidence.[83] In *Trombetta* defendants charged with drunken driving

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72. *Id.* at 684.

73. *Id.* at 679. The Court noted this rule had its origin in Napue v. Illinois, 360 U.S. 264 (1959). *See supra* text accompanying note 38.

74. *Bagley*, 473 U.S. at 680.

75. *Id.* at 682.

76. *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984) (the *Strickland* standard was formulated to determine ineffective assistance of counsel)).

77. *Id.*

78. 458 U.S. 858 (1982).

79. *Id.* at 870-74. The decision relies chiefly on *Brady* and *Agurs*.

80. *Id.* The defendant based his argument on United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694), *supra* note 18 and accompanying text.

81. 458 U.S. at 873.

82. 467 U.S. 479 (1984). *See* A. CHUTE, *supra* note 46, for an excellent discussion of this case.

83. "We have . . . never squarely addressed the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants." 467 U.S. 479, 486 (1984). However, lower courts had addressed the issue on several occasions before the decision in *Trombetta*. *See, e.g.*, Hilliard v. Spalding, 719 F.2d 1443 (9th Cir. 1983) (holding prejudice to defendant is presumed when he is not afforded an opportunity to test sperm sample taken from rape victim); United States v. Gantt, 617 F.2d 831 (D.C. Cir. 1980) (holding good faith destruction of D.E.A. agent's notes did not warrant reversal); State v. Hardin, 271 Ark. 606, 609 S.W.2d 64 (1980) (finding no prejudice to defendant when destruction of evidence was inadver-

claimed that the state violated their due process rights by destroying their breath samples.[84] The Supreme Court established a two-pronged test for determining whether a defendant's constitutional rights to due process were violated by a failure to preserve evidence.[85] First, the evidence's exculpatory value must have been "apparent" before it was destroyed.[86] Second, the defendant must be unable to obtain other "comparable" evidence.[87] The Court found that the defendants failed to prove either of these elements.[88] Four years passed before the Court again considered the prosecution's duty to preserve evidence.

In *Arizona v. Youngblood*[89] the Supreme Court relied on both *Brady* and its progeny concerning the general problems of materiality and concealed evidence[90] and the reasoning in *Trombetta* concerning the special problems arising from unavailable evidence.[91] The Court first determined that because the defendant had access to the lab and criminologist reports, the hospital report, the rape kit contents, and the victim's clothing, the prosecution had complied with the standards of disclosure required by *Brady-Agurs*.[92]

The Court emphasized that, unlike *Trombetta*, the State in *Youngblood* did not use the "destroyed" evidence at trial.[93] The defendant failed to demonstrate the "apparent"[94] exculpatory value of the semen samples and therefore failed the *Trombetta* materiality test for unavailable evidence.[95] "The possibility that the semen samples *could* have exculpated [Youngblood] if preserved or tested is not

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tent and other comparable evidence was available); Hale v. State, 248 Ind. 630, 230 N.E.2d 432 (1967) (holding negligent destruction of material evidence is a denial of due process); Trimble v. State, 75 N.M. 183, 402 P.2d 162 (1965) (holding loss of evidence taken from defendant's home was a denial of due process). *See generally* 28 FED. PRAC. DIGEST 3d, *Criminal Law*, § 700(9) (West 1984 & Supp. 1988).

84. 467 U.S. at 482.

85. *Id.* at 489.

86. *Id.*

87. *Id.*

88. *Id.* The chances were "extremely low" that the breath samples, if preserved, would have been exculpatory. *Id.* Further, the defendants had other methods of impeaching the breathalyzer results. *Id.* at 490.

89. 109 S. Ct. 333 (1988).

90. *See supra* notes 40-51 and accompanying text.

91. *See supra* notes 79-85 and accompanying text. *See generally* A. CHUTE, *supra* note 46 at 101-08 for a discussion of issues left open by *Trombetta*.

92. *Youngblood*, 109 S. Ct. at 336.

93. *Id.*

94. *Id.* at 336-37 n.** (quoting *Trombetta*, 467 U.S. at 489).

95. *Id.*

enough to satisfy the standard of constitutional materiality . . . ."[96]

Although recognizing the problems presented by unavailable evidence, the Court refused to interpret the " 'fundamental fairness' requirement of the Due Process Clause"[97] as imposing "on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of . . . significance in a particular prosecution."[98] The majority held that the police have no duty to "preserve potentially useful evidence"[99] unless their failure to do so is motivated by "bad faith."[100] "Bad faith," according to the Court, "turn[s] on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."[101] Because the semen samples *could* have been tested and the results *might* have exonerated the defendant,[102] the samples had no "apparent" exculpatory value at the time the police failed to preserve them.[103] Therefore, the fact that the police allowed the samples to deteriorate to the point of uselessness, under the facts in *Youngblood*, did not constitute "bad faith."[104]

Justice Stevens, in his concurrence,[105] argued that the majority's reasoning was too broad.[106] He felt there may well be cases in which the defendant cannot prove "bad faith" but in which the trial is constitutionally unfair due to the loss or destruction of "critical" evidence.[107] Justice Stevens reasoned that since the police had as much interest in the preservation of the semen samples as the defendant,[108] and that since the jury knew the State failed to preserve the samples,[109] but failed to find against the State on the issue,[110] there was sufficient evidence that the defendant had not been unfairly prejudiced by the loss of the semen samples.[111] Justice Stevens therefore believed

96. *Id.* (emphasis added).

97. *Id.* at 337 (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)). *Lisenba* involved an allegedly coerced confession. In denying relief the Court stated that denial of due process is a failure to observe fundamental fairness which is essential to the idea of justice.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 336 n.**.

102. *Id.* at 337.

103. *Id.*

104. This is implied in the Court's ruling the police did not act in "bad faith."

105. 109 S. Ct. at 338 (Stevens, J., concurring).

106. *Id.* at 339.

107. *Id.*

108. *Id.* at 338.

109. *Id.*

110. *Id.*

111. *Id.*

the evidence was not material and the majority should have ended its inquiry with this determination.

In his dissent,[112] Justice Blackmun contended that "[r]egardless of intent or *lack thereof*,"[113] police action resulting in an unfair trial violates due process.[114] He noted that *Brady*, *Agurs*, and *Trombetta* did not require the presence of "bad faith" to find due process violations for concealment of evidence.[115] Instead, their focus was "on the materiality of the evidence . . . ."[116] Justice Blackmun observed that the majority's "bad faith" standard is not a "bright line"[117] test, nor, does it have any basis in the Court's earlier cases.[118] By establishing the "bad faith" rule, the majority eliminates any inquiry into the "constitutional material[ity]"[119] of the lost evidence.

The dissent's test in a case such as *Youngblood*, where proper testing of evidence could result in complete exoneration of a defendant,[120] would take into account current preservation and testing techniques and the circumstances of the case.[121] Under this test a due process violation would occur whenever the police fail to preserve evidence they know, if properly tested, would "reveal immutable characteristics of the criminal."[122] By focusing on the *type* of evidence rendered unavailable,[123] this test would allow a court to consider the *likelihood* that the evidence was exculpatory[124] without requiring the defendant *prove* exculpatory content of unavailable evidence.[125] In other words, the dissent thought the evidence in *Youngblood* was, by its very nature, "material." The majority thought, on the other hand,

112. *Id.* at 339 (Blackmun, J., dissenting, joined by Justices Marshall and Brennan).

113. *Id.* (emphasis added).

114. *Id.*

115. *Id.* "*Brady* and *Agurs* could not be more clear in their holdings" that "bad faith" is irrelevant. "Nor did *Trombetta* create" a "bad faith" requirement. *Id.* at 341.

116. *Id.* at 340.

117. *Id.* at 342.

118. *Id.* at 341 n.5 (noting that United States v. Marion, 404 U.S. 307 (1971) and United States v. Lovasco, 431 U.S. 783 (1977) are cases which dealt with the due process implications of a pre-indictment delay by the prosecution and do not provide a basis for the "bad faith" rule the majority espouses).

119. *Id.* at 342.

120. *Id.* at 344. It is apparent from the facts of the case that proper testing could have conclusively proved Youngblood's innocence (if his blood type had been different from that of the semen sample) or conversely, implicated him (if his blood type was the same as the semen sample).

121. *Id.*

122. *Id.* at 343.

123. *Id.* at 344.

124. *Id.*

125. *Id.*

the type of evidence involved in *Youngblood* was "useful,"[126] but without more,[127] it could not be considered "material."

The future effects of *Youngblood* will probably lie in the Court's distinction between "useful" and "material" evidence.[128] The significance of the distinction lies in the different treatment each type of evidence receives under the due process clause. If "material" evidence is lost, destroyed, or otherwise rendered unavailable by the prosecution, grounds for reversal exist and "bad faith" is irrelevant.[129] On the other hand, if the evidence is merely "useful," a conviction will not be reversed absent a showing that the prosecution was acting in "bad faith"[130] when it rendered the evidence unavailable. Obviously the defendant faces a difficult task in proving that the unavailable evidence is "material"[131] and not merely "useful." If the defendant has not seen, tested, or otherwise inspected the evidence and it is now, due to prosecutorial conduct, impossible to do so, how can he possibly show there is a reasonable likelihood the evidence would have affected the outcome of his trial?[132] The Court apparently avoids this question in *Youngblood*.[133]

However, the most important questions raised in *Youngblood* are what constitutes "bad faith" and how does the defendant prove its existence? The Court intimates that mere negligence is not "bad faith" for *Youngblood* purposes.[134] If proof of negligence is not proof

126. This is the heart of the disagreement between the majority and the dissent. If the evidence is "material," then the *Brady-Agurs-Bagley* standards apply and the police's "bad faith" becomes irrelevant.

127. In a case like *Youngblood*, where the evidence is totally useless and was never tested or otherwise examined, it is hard to conceive of what a defendant could possibly do to prove the materiality of the evidence. The burden the majority places on the defendant to prove the content of something whose content is unknown and has never been ascertained seems to contradict the idea of "fundamental fairness" and is a significant criticism of the majority opinion.

128. "Material" evidence is evidence whose exculpatory value is known, whereas "useful" evidence is that which has an undetermined exculpatory value. *See* Arizona v. Youngblood, 109 S. Ct. 333, 337 (1988) (holding untested semen samples are merely "useful").

129. This is the implicit holding in *Brady* and its progeny. *See id.*

130. 109 S. Ct. at 337.

131. *See supra* note 127.

132. In other words, how can the defendant prove the evidence was "material" under the *Brady-Agurs-Bagley* tests?

133. The Court obviously recognized the existence of such a question when it stated: "Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown . . . ." 109 S. Ct. at 337 (quoting California v. Trombetta, 467 U.S. 479, 486 (1984)). However, the Court never answers the question, but instead avoids it by holding evidence of an undetermined content is merely "useful." *Id.*

134. 109 S. Ct. at 337.

of "bad faith," will proof of recklessness suffice, or will the defendant have to show that the prosecution acted with outright malice and intentionally destroyed the evidence to hinder the defense? Moreover, what is the relationship between "bad faith" and acts "in accordance with normal [police] practice?"[135] The Court gives little guidance other than its statement that "bad faith" turns on police knowledge at the time the evidence is destroyed.[136]

It is possible the Court had its recently announced "good faith exception to the exclusionary rule"[137] in mind when it created *Youngblood*'s "bad faith" destruction of "useful" evidence rule. The "good faith exception" rule, as set out in *United States v. Leon*,[138] provides that evidence seized by police acting under a defective search warrant will not be excluded from the defendant's trial if the police acted in "good faith" in obtaining and executing the warrant.[139] The "good faith" of the officers involved is measured in an "objectively reasonable"[140] manner and not on the "subjective good faith of individual officers."[141] The question is confined to "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."[142]

If the Court intends for this framework to apply in *Youngblood* situations, then it seems that in order to establish "bad faith" in the failure to *preserve* "useful" evidence, a defendant must prove the police acted in an objectively unreasonable[143] manner. Based on *Leon*, the inquiry would be whether a reasonably well-trained officer *would have known* that the evidence should have been preserved.[144] This analysis supports the holding in *Youngblood*. The police failed to detect the semen samples on the victim's clothes until it was too late to

135. *Id.* at 336 (quoting *Trombetta*, 467 U.S. at 488, and Killian v. United States, 368 U.S. 231, 242 (1961). *Killian* dealt with claims that investigator's notes which had been destroyed were material to the defense. Since the investigators only used the notes for preparation of final reports, the Court disagreed with the defendant's claims). *See generally* A. CHUTE, *supra* note 46, at 102, for a general discussion of the point.

136. 109 S. Ct. at 336-37 n.**.

137. United States v. Leon, 468 U.S. 897 (1984). *See generally* H. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE, 24 (1986).

138. 468 U.S. 897 (1984).

139. *Id.* at 920-21.

140. *Id.* at 919 n.20.

141. *Id.*

142. *Id.* at 922 n.23.

143. *Id.* at 919 n.20. This is the apparent converse of *Leon*'s requirement that the "good faith" of an officer be determined in an "objectively reasonable" manner. *Id.*

144. The inquiry could be whether a reasonably well trained officer would know the evidence should be *examined*.

*preserve* them.[145] Because they were unaware of the semen samples, the police did not realize the clothes needed refrigeration or immediate testing. In other words, the police did not reasonably know the evidence needed to be *preserved* and therefore they acted in an "objectively reasonable" manner in their handling of the clothes.[146]

However, a strong argument against this analysis exists in the Court's explicit characterization of the police's action as "negligent."[147] This implies the police failed to do something that the ordinary, reasonably prudent man would have done under same or similar circumstances.[148] In other words, the police acted in an "objectively unreasonable" manner in their handling of the evidence.[149] Yet this was not considered "bad faith."

Another possible interpretation of *Youngblood*'s "bad faith" requirement is that grounds for reversal exist only when the defendant proves the police, intentionally *and* in violation of standard police procedure, destroyed evidence they knew was "useful."[150] Under this view, as long as the police are following standard procedure, evidence with an unknown content or value[151] may be destroyed[152] with impunity. This analysis also supports the decision in *Youngblood*. The police did not intentionally render the semen samples useless[153] and they acted in accordance with standard procedure.[154] However, the dissent in *Youngblood* pointed out the problems with this analysis when it stated that "it makes no sense to ignore the fact that a defendant has been denied a fair trial . . . simply because the police were inept

145. The clothes were not *examined* nor their semen stains discovered until fifteen months after the attack. Arizona v. Youngblood, 109 S. Ct. 333, 335 (1988).

146. In other words, the police acted in "good faith." *But see supra* note 144. If the determination of "good faith" turns on the police reasonably knowing the evidence should be *examined* in the first place, then it appears the police acted in "bad faith" because of the delay in finding the semen samples.

147. 109 S. Ct. at 337. Apparently the negligence lies in the police's delay in *examining* the clothes and detecting the semen samples.

148. PROSSER AND KEETON ON TORTS 164 (5th ed. West 1984). *See also* BLACK'S LAW DICTIONARY 930 (5th ed. 1979).

149. In other words, the police acted in "bad faith." *See supra* notes 144 and 146.

150. 109 S. Ct. at 337. *See also supra* notes 6 and 135 and accompanying text. The fact that the police acted in accordance with standard police procedure seems to have played a part in the Supreme Court's decision. 109 S. Ct. at 336. *See also id.* at 341 (Blackmun, J., dissenting).

151. In other words, "useful" evidence. *See supra* note 128.

152. "Destroyed" in this context does not simply mean an intentional ruining of the evidence, but also includes the concept of decay and ruination due to negligent handling.

153. This is implied in the Court's conclusion that the treatment of the semen stained clothes was only negligent. *See* 109 S. Ct. at 337.

154. *Id.* at 335.

rather than malicious."[155]

What the *Youngblood* Court fails to make clear is whether a deliberate attempt to hinder the defense is the *only* basis upon which a finding of "bad faith" in the destruction of "useful" evidence can be made.[156] Arkansas courts appear to have taken this stance.[157]

In the recent case of *Terrel v. State*,[158] the defendant argued on appeal of his rape conviction that the charges should be dismissed due to the police destruction of a cassette tape that contained the victim's statement to the police.[159] The defendant claimed the tape was "essential to impeach the victim's testimony."[160] The Arkansas Court of Appeals held that reversal was not warranted[161] because the tape had been transcribed before its destruction and the defendant had a copy of the transcription,[162] there was no showing the tape was exculpatory,[163] and the defendant failed to "allege *bad faith or connivance* on the part of the State."[164] In light of the facts of the case, this last statement indicates the reversal is appropriate on these grounds only if the defendant could show the police were trying to hinder his defense when they destroyed the tape.[165]

The full effect of the United States Supreme Court's decision in *Youngblood* remains to be seen.[166] However, it appears to grant the

155. *Id.* at 341-42 (Blackmun, J., dissenting).

156. Obviously, this is a ground for finding the police acted in "bad faith." However, the dissent indicates the majority is incorrectly suggesting this is the *only* way to act in "bad faith." *Id.* at 339 (Blackmun, J., dissenting).

157. *See* State v. Hardin, 271 Ark. 606, 609 S.W.2d 64 (1980) (finding police destruction of an automobile, used as a getaway car in a robbery, did not constitute "bad faith"); *cf.* Petition of Wright, 282 F. Supp. 999 (W.D. Ark. 1968) (holding intentional concealment of evidence of another suspect's guilt in a rape case was reversible error); Stepps v. State, 242 Ark. 587, 414 S.W.2d 620 (1967) (holding loss of a defendant's knife was not an intentional loss of essential evidence), *cert. denied*, 389 U.S. 1036 (1968); Dozier v. State, No. 86-191 (Ark. Ct. App. March 25, 1987) (finding reversal was not warranted without a showing the state contrived to make an informant unavailable for trial).

158. 26 Ark. App. 8, 759 S.W.2d 46 (1988).

159. *Id.* at 11, 759 S.W.2d at 48.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (emphasis added).

165. This is apparent from the discussion of the availability of the transcript made from the tape before its destruction. *See id.* at 11-12, 759 S.W.2d at 48. *But cf.* Hamm v. State, 296 Ark. 385, 757 S.W.2d 932 (1988) (holding that the Arkansas Rules of Civil Procedure require a taped confession be preserved and made available to the defendant).

166. One commentator has stated the decision "isn't going to have all that great an effect in the real world because police routines on the handling of evidence are already established." P. REIDINGER, *Good Faith, Bad Evidence*, Feb. '89 A.B.A. J. 48, 52 (quoting R. Feritta, Associate Dean of the National College of District Attorneys).

police much broader discretion in their handling of evidence.[167] Serious questions remain as to whether the police may decide to "toss out" evidence, when its exculpatory value is unknown or questionable, with no regard for the effect of their actions on the defendant's right to a fair trial.[168]

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167. One commentator has stated that the *Youngblood* decision is "tacit encouragement of sloppiness" in police work. *Id.* at 50 (quoting Frank Remington, Law Professor, U. of Wisconsin).

168. However, "[i]t doesn't look good when the jury hears the prosecution tell the court, 'We lost that' or 'We didn't handle that piece of evidence properly' . . . . It's not in [the prosecution's] interest to have evidence lost or ruined." *Id.* at 52 (quoting Matt Chancey, Chief of the Felony Division of the State's Attorney's Office in Lake County, Ill.).