

Search Warrants for Meth Labs

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I've had several questions lately concerning search warrants for meth labs and the destruction of hazardous materials found during the execution of the warrants. This paper explores the legal issues involved when considering the destruction of dangerous material seized pursuant to a search warrant.

Meth labs are dangerous, so officers want to destroy what they find there. *Scientific American* explains [here](#) that “[t]he chemicals used in methamphetamine production are highly toxic,” to the extent that ingestion of even a small amount can be fatal. Furthermore, [this](#) USDOJ fact sheet observes that the chemicals used “are highly volatile and may ignite or explode if mixed or stored improperly.” (In recognition of these dangers, G.S. 130A-284 requires that any property that has been used for manufacturing methamphetamine be remediated according to [rules](#) promulgated by the Department of Health and Human Services.) Understandably, then, law enforcement officers who obtain search warrants for meth labs often want to destroy, rather than retain, the materials that they find.

But state law generally requires officers to hold evidence seized pursuant to a search warrant. G.S. 15A-258 provides that “[p]roperty seized [under a search warrant] shall be held in the custody of the person who applied for the warrant, or the officer who executed it [or an appropriate law enforcement agency] for purposes of evaluation or analysis, upon condition that upon order of the court, the items may be retained by the court or delivered to another court.” That’s consistent with the general rule, set forth in G.S. 15-11.1, that “[i]f a law-enforcement officer seizes property pursuant to lawful authority, he shall safely keep the property under the direction of the court or magistrate as long as necessary to assure that the property will be produced at and may be used as evidence in any trial,” though the statute also gives courts the power to “enter such order as may be necessary to . . . protect the rights of all parties,” and contemplates the use of photographs in lieu of physical evidence where appropriate. Furthermore, the discovery statute, G.S. 15A-903, provides that the State must make its entire “file,” including “any . . . evidence obtained during the investigation,” available to the defense.

Officers sometimes seek authorization in search warrants to destroy dangerous items. Officers may attempt to reconcile the statutory considerations set forth above with their safety concerns by seeking advance authorization to destroy certain types of evidence that are likely to be found in meth labs. For example, here’s language from a federal search warrant application:

[T]he affiant has probable cause to believe that the named *premises* contain *chemicals* which either have been used or will be used in the manufacture of a controlled substance. Your affiant knows of his own experience and training and through consultation with forensic chemist in the DEA Mid-Atlantic Regional Laboratory that some or all [of the chemicals] are explosive, flammable, poisonous, or otherwise toxic in nature. Furthermore, you[r] affiant knows that the handling of clandestine laboratory *chemicals* without proper supervision and facilities[,] has caused, in the past, explosions, fires and other events which have resulted in injuries and health problems. Because these facts and because DEA Richmond District Office presently has no adequate safe storage facilities, your affiant *requests authorization to dispose of these chemicals in proper facilities in the event of their discovery.*

United States v. Elliott, 83 F. Supp. 2d 637 (E.D. Va. 1999) (emphases in original). From the inquiries I have received, I know that judges sometimes issue warrants granting such authorization. I don’t know

whether warrant applications of this kind are ever presented to magistrates, but I think that it is a better practice to take them to judges, given the greater authority that judges have over the disposition of evidence prior to trial.

Is that proper? Defendants in meth cases sometimes argue that the immediate destruction of evidence deprives them of the opportunity to examine or test the evidence for exculpatory material. Perhaps the residue in a destroyed flask would have been something innocuous, or perhaps a destroyed chemical jar would have been free of the defendant's fingerprints. This argument can be framed as a statutory discovery issue or as a constitutional due process issue, or both. I don't think there's a North Carolina case that's very helpful. The most analogous cases may be those involving the destruction of large quantities of marijuana while preserving samples. Of particular note is *State v. Johnson*, 60 N.C. App. 369 (1983), where officers seized almost 5,000 pounds of marijuana pursuant to a search warrant, and obtained what appears to have been an *ex parte* court order the next day for destruction of the marijuana. All but a fraction of it was destroyed, and the defendant subsequently argued that he was deprived of the opportunity to test and weigh the bulk of the evidence. The court of appeals ruled that "the better practice" is to notify the defendant of the State's desire to destroy evidence so that he may object, but found no prejudicial error in that case because the drugs were carefully weighed, measured, and sampled before destruction. *See also State v. Anderson*, 57 N.C. App. 602 (1982) (similar, and stating that "[w]hether the destruction infringes upon the rights of an accused depends upon the circumstances in each case. In this case we consider particularly significant the destruction of the bulk of the marijuana in good faith and for a practical reason, the preservation of random samples, the photographs of the physical evidence, and the failure on the part of the defendants to show that the weight of the marijuana, though a necessary element, was a critical issue [in the case]").

The advent of open file discovery has bolstered *Johnson's* suggestion that providing notice and an opportunity to be heard prior to destruction is desirable. But *Johnson* and *Anderson* involved marijuana, which may be inconvenient or expensive to store but is not hazardous. The argument for pre-authorization for the destruction of toxic and potentially explosive chemicals is much stronger. So long as the pre-authorization (1) is limited to genuinely dangerous items, as established by the search warrant application, and (2) is accompanied by common-sense provisions for photographing and documenting the destroyed materials, I would expect a search warrant containing such pre-authorization to be upheld by our appellate courts. At least one state has a statutory scheme in place that is consistent with that conclusion. Wash. Code 69.50.511 ("Law enforcement agencies who during the official investigation or enforcement of any illegal drug manufacturing facility come in contact with or are aware of any substances suspected of being hazardous . . . shall notify the department of ecology for the purpose of securing a contractor to identify, clean up, store, and dispose of suspected hazardous substances, except for those random and representative samples obtained for evidentiary purposes. Whenever possible, a destruct order covering hazardous substances which may be described in general terms shall be obtained concurrently with a search warrant. Materials that have been photographed, fingerprinted, and subsampled by police shall be destroyed as soon as practical.").

What if officers destroy items found in a meth lab without prior authorization? Sometimes officers don't seek pre-authorization to destroy dangerous items found in meth labs, but nonetheless proceed to destroy them, or order third-party contractors to destroy them. I have heard the argument that this does not create any concern because the items are never seized as evidence and so fall outside the scope of the statutes discussed above. I don't buy that argument, and most cases that have analyzed this fact pattern have treated the destroyed items as evidence that have been seized. Courts generally have applied the due process framework of *Arizona v. Youngblood*, 448 U.S. 51 (1988), which provides

that the destruction of potentially useful evidence violates due process only when done in bad faith. (Shea previously blogged about *Youngblood*, and the North Carolina appellate courts' interpretation thereof, [here](#).) Factors that a court might consider when assessing bad faith in this context include how dangerous the destroyed items were; whether the destruction was required by departmental policy; whether appropriate efforts were made to photograph, fingerprint, and inventory the items prior to their destruction; and the extent to which the items had any apparent exculpatory potential.

Once again, as far as I know, there's no North Carolina appellate case on point. The issue was raised in *State v. Toler*, 2008 WL 565509 (N.C. Ct. App. Mar. 4, 2008) (unpublished), but the court determined that the defendant actually had been given an opportunity to examine all of the liquid methamphetamine in that case before most was destroyed, so it didn't need to address whether the need for destruction outweighed the defendant's right to examine the evidence. However, there are quite a few out of state cases, which I have summarized below.

No bad faith, or no duty to retain the evidence, was found in the following cases:

- *State v. Dodd*, 2013 WL 2296168 (Tenn. Ct. Crim. App. May 23, 2013) (unpublished) (defendant moved to suppress "photographs of the precursors of manufacturing methamphetamine that were found during the execution of [a] search warrant"; the items themselves "were collected and later destroyed as hazardous materials"; this was proper as "the items were hazardous materials and could not be preserved for trial"; "[t]he State was not under a duty to preserve the evidence")
- *State v. Jackson*, 2008 WL 2810984 (Wash. Ct. App. Div. 2 July 22, 2008) (unpublished) (officers executed a search warrant at a residence used for manufacturing methamphetamine, and had another state agency destroy certain chemicals and other items they found there, even though state law required that "[w]henver possible, a destruct order covering hazardous substances which may be described in general terms shall be obtained concurrently with a search warrant"; the state later introduced photographs of the destroyed items over the defendant's objection; the appellate court ruled that the evidence was properly admitted because the statute was not mandatory and the officers testified that they had the items destroyed pursuant to their standard procedure and because they did not have "the facilities to handle the ingredients associated with the manufacture of methamphetamine," so there was no bad faith under *Youngblood*)
- *State v. Tremberth*, 2008 WL 1851094 (Wash. Ct. App. Div. 1 April 28, 2008) (unpublished) (finding no bad faith where officers destroyed items seized from meth lab, apparently pursuant to a court order, albeit without fingerprinting all of the destroyed items)
- *United States v. Varner*, 261 F. App'x 510 (4th Cir. 2008) (unpublished) (explaining that "for due process concerns to arise . . . the destroyed evidence must have some exculpatory value that the agents recognized, and yet nevertheless destroyed"; in order "[f]or [defendant] to demonstrate bad faith on the agents' part, he would have to show that (1) the agents knew that the chemicals were not methamphetamine, but rather an innocuous substance, or (2) the agents understood that the materials were not hazardous and destroyed them on the off chance that the chemicals were not methamphetamine"; while "[t]here [was] little doubt that the [destroyed] chemicals and glass potentially possessed exculpatory value," defendant could not show bad faith by the agents despite the fact that "the DEA agents destroyed the evidence without explicit authorization from the Attorney General as per 21 U.S.C. § 881(f)(2)")
- *United States v. Beckstead*, 500 F.3d 1154 (10th Cir. 2007) (police ordered the destruction of items seized from a meth lab pursuant to standard departmental policy; because of that, and

because there was no indication that the evidence was likely to be exculpatory, there was no bad faith; the court cites several other relevant federal cases)

- *Vilandre v. State*, 113 P.3d 893 (Okla. Ct. Crim. App. 2005) (noting the need to balance “the rights of defendants to examine evidence before trial, as well as the right of the public to be safe from hazardous materials,” and finding that the prompt destruction of materials found in a meth lab was proper under state law and not done in bad faith)
- *People v. Gentry*, 815 N.E.2d 27 (Ill. Ct. App. 4 Dist. 2004) (“According to the unrebutted testimony at trial, when members of the Task Force seized methamphetamine solution, they routinely destroyed all but a small sample of it because storing large amounts of it in the evidence vault was dangerous and impractical. The police had to don respiratory masks just to enter the garage in which they found the two jars. Destroying hazardous material pursuant to a routine, well-intentioned policy cannot be bad faith” under *Youngblood*)

Bad faith, or a duty to retain the evidence, was found in the following cases:

- *State v. Lawrence*, 2008 WL 704355 (Tenn. Ct. Crim. App. Mar. 17, 2008) (unpublished) (finding that the state had a duty to preserve evidence found inside a house where meth-related activities took place but that “did not appear to be tainted or dangerous”; the court also stated that there was no duty to preserve “evidence that is too dangerous to retain”)
- *United States v. Elliott*, 83 F. Supp. 2d 637 (E.D. Va. 1999) (officers seized glassware from defendant’s car, believing that it was used in the production of methamphetamine; the glassware contained residue of some kind, but it was destroyed before the residue was tested; it also contained the defendant’s fingerprints; the defendant argued that the residue was likely exculpatory and that the destruction of the evidence was in bad faith under *Youngblood*; court agreed and suppressed the fingerprint evidence)
- *United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993) (the trial court did not err by finding that the government acted in bad faith when it destroyed equipment allegedly used for the manufacture of methamphetamine where “[t]he equipment’s value as potentially exculpatory evidence was repeatedly suggested to government agents” prior and subsequent to its destruction; the court stated that “[t]he presence or absence of bad faith turns on the government’s knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed”; in this case, “[i]n conversations following the seizure, agents repeatedly confronted claims that the equipment was specially configured for legitimate chemical processes and was structurally incapable of methamphetamine manufacture,” thus the exculpatory value of the equipment was apparent to agents prior to its destruction)