



## You Don't Know What You've Got When It's Gone

**Author :** Shea Denning

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Or, Seeking Dismissal Based on the State's Destruction of Evidence

Unpublished court of appeals opinions occasionally assume the cache of bootleg recordings of live performances of the Grateful Dead. If you've got your hands on a good one, the real value is in sharing it with an appreciative audience. One such opinion making the rounds of late is [State v. Absher](#), 2010 WL 3860501 (N.C. Ct. App. October 5, 2010). *Absher* affirmed the trial court's dismissal with prejudice of charges against the defendant arising from an altercation with the Wilkes County Sheriff's Department in which the defendant suffered a fractured skull and a serious brain injury. The trial court dismissed the charges after determining that notwithstanding numerous requests from the defendant's attorney for a videotape of the defendant in the intake center at the time of the altercation, the sheriff's department modified the video, preserving only certain images, and destroyed the original. The court of appeals agreed with the trial court that the state's destruction of the videotape was a flagrant violation of the defendant's constitutional rights that irreparably prejudiced his defense; thus, there was no remedy but to dismiss the prosecution. The appellate court relied upon *State v. Williams*, 362 N.C. 628 (2008), and rejected the premise that that *Arizona v. Youngblood*, 488 U.S. 51 (1988), controlled. In *Youngblood*, the United States Supreme Court held that the police's failure to preserve potentially useful evidence constitutes a due process violation only if the defendant can show bad faith on the part of the police. *Absher* viewed *Youngblood* as applicable to "potentially useful" evidence, as distinguished from the "material exculpatory evidence" destroyed in *Absher's* case. Thus, the court reasoned, there was no requirement that the defendant in *Absher* show bad faith on the part of the State.

What application might *Absher* have more broadly? Suppose a defendant charged with impaired driving requests to view the patrol car's videotape of the traffic stop leading to defendant's arrest. Sometime after this request but before trial, the videotape is inadvertently destroyed by the police. Is the defendant entitled to dismissal of the charges based on these facts alone? I don't think so. First, I think *Youngblood* controls and there is no due process violation absent bad faith. Second, even if North Carolina courts require no showing of bad faith where the destroyed evidence is material and exculpatory versus merely "potentially useful," I doubt the videotape of the traffic stop would, absent some additional showing, qualify as exculpatory. Finally, the absence of the videotape arguably does not irreparably prejudice the defense of the case as the defendant has other means of proving his innocence, including cross-examining the officer.

Let's turn to the published cases for a more full explanation.

The United States Supreme Court first considered in *California v. Trombetta*, 467 U.S. 479 (1984), whether the Due Process Clause of the Fourteenth Amendment required the State to preserve potentially exculpatory evidence on behalf of defendants. The question in *Trombetta* was whether due process required law enforcement agencies to preserve breath samples of drivers suspected of driving while impaired in order for the results of a breath-analysis to be admitted into evidence. *Trombetta* ultimately concluded that the State's destruction of breath samples did not run afoul of due process as any constitutional duty to preserve evidence was limited to evidence that had "an exculpatory value that was apparent before the evidence was destroyed, and [was] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489. As the "chances [we]re extremely low that preserved samples would have been exculpatory" and defendants had alternative means of

demonstrating their innocence, among them the right to cross-examine the law enforcement officer who administered the test, the court concluded that the evidence did not meet the standard of constitutional materiality. *Id.*

The court refined its analysis in *Arizona v. Youngblood*, 488 U.S. 51 (1988), a case in which the defendant sought reversal of his conviction on child molestation charges on the basis that the police's failure to refrigerate the victim's clothing and test semen samples shortly after they were collected deprived him of evidence that might have exonerated him. Recognizing that the Due Process Clause, as interpreted in *Brady v. Maryland*, 373 U.S. 83 (1963), makes the good or bad faith of the State irrelevant when the State fails to disclose material exculpatory evidence, the court held that the clause "requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.* at 57. *Youngblood* held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process." *Id.* at 58.

Over the ensuing decades, North Carolina's appellate courts applied *Youngblood* in numerous contexts, finding no constitutional violation arising from the failure to preserve potentially exculpatory evidence where the defendant failed to demonstrate bad faith. See, e.g., *State v. Hunt*, 345 N.C. 720 (1997) (police's failure in murder investigation to preserve items seized at defendant's home did not violate due process where exculpatory value of evidence was speculative and nothing suggested police willfully destroyed evidence); *State v. Mlo*, 335 N.C. 353 (1994) (release of impounded vehicle without district attorney's approval in violation of G.S. 15-11 did not warrant dismissal of murder charges where exculpatory value of comparing vehicle's tires to tracks at the location where the body was discovered was speculative and there was no bad faith on part of police); *State v. Thorne*, 173 N.C. App. 393 (2005) (holding that defendant's concession that videotape of bank robbery that led to his identification as a suspect was not lost or destroyed in bad faith obviates any due process claim); *State v. Burnette*, 158 N.C. App. 716 (2003) (intentional destruction of plastic bag containing drugs did not require dismissal of drug charges since "[w]ithout a showing of bad faith, the failure to preserve potentially exculpatory evidence does not constitute a denial of due process"); *State v. Banks*, 125 N.C. App. 681 (1997) (while police department's destruction of the rape kit obtained from the victim "violated the rules concerning the safekeeping of potential evidence," it did not violate the defendant's due process rights as there was no reason to conclude the police believed the rape kit had any exculpatory value at the time it was destroyed).

Beginning with *State v. Taylor*, 362 N.C. 514 (2008), however, the North Carolina courts' analysis underwent a subtle, yet significant, change. *Taylor* distinguished the State's failure to preserve *exculpatory* evidence, a violation it considered appropriately analyzed pursuant to *Brady*, from the State's failure to preserve *potentially useful* evidence, which was analyzed pursuant to *Youngblood* and required concomitant proof of bad faith. *Taylor* characterized this distinction as grounded in *Youngblood*. I disagree. *Youngblood* set the standard for determining when failure to preserve evidence amounts to a violation of due process (which it only does in cases involving bad faith), while *Brady* and progeny set the standard for determining when the State's failure to disclose evidence violates due process. *Youngblood's* adoption of a "potentially useful" standard merely recognizes the difficulties associated with "divining the import of materials whose contents are unknown and, very often, disputed." *Trombetta, supra*. The standard does not, in my view, apply *only* to the failure to preserve potentially useful evidence. It also applies to the destruction of material exculpatory evidence.

The state supreme court applied this new standard in *State v. Williams*, 362 N.C. 628 (2008), a case decided the same day as *Taylor*. *Williams* affirmed the trial court's dismissal of an assault charge based upon the State's destruction of a poster displayed in the district attorney's office. The poster, created by an assistant district attorney, featured two mug shots of the defendant, the first with the caption "Before he sued the D.A.'s office," and the second picture, depicting the defendant with injuries, captioned "After he sued the D.A.'s office." *Williams* made no mention of *Youngblood*, instead analyzing the case pursuant to *Brady* and holding that "the State's destruction of material, favorable evidence to defendant, and its admission that the evidence could not be produced, warrant the conclusion that any trial commenced against defendant would not comport with our notions of due process," thus amounting to a flagrant violation of the defendant's constitutional rights. *Id.* at 639.

*Williams* obviously is a rare case in that the contents of the posters were known and not subject to any significant dispute. Most defendants seeking relief based on the destruction of evidence likely will be able to prove no more than its potential usefulness; thus requiring a demonstration of bad faith. And though both *Williams* and *Absher* depart from traditional *Youngblood* analysis, it isn't hard to imagine the court finding bad faith in either case. So I suspect *Absher's* cache will be as short-lived as those bootleg tapes in the era of YouTube.