> 504 S.E.2d 708

233 Ga.App. 539

Court of Appeals of Georgia.

BALDWIN COUNTY HOSPITAL AUTHORITY
v.
TRAWICK.

No. A98A0689.
June 17, 1998.

Reconsideration Denied July 21, 1998.

> [2]> [3]> [4] " 'Bad faith' is the opposite of 'good faith,' generally implying or involving actual or constructive fraud; or a design to mislead or deceive another; or a neglect or refusal to fulfill some duty, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. 'Bad faith' is not simply bad judgment or negligence, but it imports a dishonest purpose or some moral obliquity, and implies conscious doing of wrong, and means breach of known duty through some motive of interest or ill will." (Citations and punctuation omitted.) > Michaels v. Gordon, 211 Ga.App. 470, 473(2)(b), 439 S.E.2d 722 (1993). Standing alone, the failure of Oconee's personnel to take into consideration the effect Che'nal's prescription medicine might have had on the results of her urine test at most constitutes evidence that Oconee was negligent or guilty of exercising bad judgment in forming its professional opinion that Che'nal might be the subject of child abuse. "However, ... [evidence] of mere negligence or bad judgment is not [equivalent to evidence of a] refus[al] to fulfill [a] professional dut[y], out of some interested or sinister motive, [nor is it equivalent to evidence of a conscious act based on] some dishonest or improper purpose." > Id. Consequently, in the case at bar, there simply is no competent evidence of bad faith on Oconee's part. Absent such evidence, the trial court was warranted in granting Oconee's motion for summary judgment based on the good faith immunity provision found in > OCGA § 19-7-5(f).

> 276 S.E.2d 224

247 Ga. 328

Supreme Court of Georgia.

JORDAN
v.
STATE.

No. 36851.
March 12, 1981.

> [8] 4. Defendant contends that the trial court erred in overruling his motion to dismiss for destruction of evidence.

In numerous pretrial motions, defendant, along with the coparticipants, moved for discovery, production, inspection, examination and analysis of numerous items, some specified and others described generally. Included among such items were weapons and clothing taken from the inmates or found at the conclusion of the riot. The state responded as to the clothes and weapons that its goal had been to end the riot and to get the inmates under control and back into their regular dorms and that at the time the motions for discovery, etc., were made, the defendant's clothes and the weapons could not be located. The defendant moved to dismiss the indictment based on destruction of evidence, citing > United States v. Bryant, 439 F.2d 642 (D.C.Cir.1971).

In > United States v. Bryant, supra, the court held that > Brady v. Maryland, supra, Rule 16 (Fed.R.Crim.P.) and the Jencks Act (18 U.S.C. s 3500) require that, even before a motion for discovery is made, the government's duty to disclose upon motion operates as a duty to preserve material which must be disclosed later. The court reasoned that "Only if evidence is carefully preserved during the early stages of investigation will disclosure be possible later." (> 439 F.2d at 651). The facts in > Bryant were that an undercover narcotics agent contacted a man named Johnson who came to the agent's motel room. Johnson discussed selling heroin. The next day Johnson brought his supplier, Bryant, to the agent's motel room where negotiations for the sale were conducted. Johnson arranged for delivery away from the motel but the payment was made back at the motel room. The agent testified at trial; he was the government's only witness as to what was said in the motel room. A tape recording of the conversations made from an adjoining room had been "lost" by the agent in charge of the taping. In fact, in response to the defendant's motions for discovery or to dismiss the indictment it was learned that the agent who made the tape never intended to preserve it. The court characterized the loss of the tape recording as "intentional non-preservation by investigative officials" (> 439 F.2d at 647). The court viewed the tape recording as "absolutely crucial to the question of appellants' guilt or innocence" (> 439 F.2d 648). However, the court did not order the indictment [247 Ga. 336] dismissed. It remanded for further hearing as to the degree of negligence by the government agent and bad faith involved.

> United States v. Bryant, supra, is not directly applicable here. The Jencks Act and Rule 16 upon which the court relied are not applicable to state prosecutions. The defendants in > Bryant were targeted suspects when the tape recording equipment was set up and the recording was made. There was only one witness for the government as to what the defendants said and what they said constituted proof of the crime for which they were charged. In the case before us we do not have "intentional nonpreservation" by investigative officials.

Here the state was working under unusually exigent circumstances. They were dealing not only with some 240 sets of clothing and over 40 weapons but with rioting prisoners who had started fires and murdered 3 men. Their investigation began only after the inmates were stripped and their weapons were separated from them and they were returned to their dorms. The defendant does not claim bad faith or systematic destruction in the nonproduction of his clothes and the weapons. The trial judge ordered production, but the items could not be produced. He overruled the defendant's motion to dismiss the indictment concluding that the jury could decide the case and finding that nonproduction did not deprive the defendant of a fair trial. We find no error here.

> 54 S.E. 1022

Supreme Court of Georgia.

BLOCKER
v.
CLARK, Sheriff.
Aug. 13, 1906.

3. Error is assigned upon the following extract from the charge: "So, gentlemen of the jury, you must find that the arresting officer either made this arrest out of spite, or that he did it under circumstances that showed a reckless disregard for the rights and liberties of the citizen." We think this charge erroneous and the error prejudicial to the plaintiff. Good faith will protect the officer. Personal spite or a reckless disregard of the rights of others would amount to bad faith. But the officer may not be animated by spite, his conduct may not be reckless, and still bad faith may exist. Good faith implies due diligence. Good faith may be negatived by evidence of negligence. The failure to exercise ordinary care in a transaction like the one under consideration is inconsistent with good faith.

> 123 S.Ct. 1994

538 U.S. 760, 155 L.Ed.2d 984, 71 USLW 4387,

3 Cal. Daily Op. Serv. 4375,

2003 Daily Journal D.A.R. 5593,

16 Fla. L. Weekly Fed. S 300

Supreme Court of the United States

Ben CHAVEZ, Petitioner,
v.
Oliverio MARTINEZ.

No. 01-1444.
Argued Dec. 4, 2002.

Decided May 27, 2003.

110 ----
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
> 110k393(1) In General.

Phrase "criminal case," pursuant to Self-Incrimination Clause of the Fifth Amendment, providing that "[n]o person shall be compelled in any criminal case to be a witness against himself," at very least requires initiation of legal proceedings, and as such does not encompass entire criminal investigatory process, including police interrogations. (Per Justice Thomas, with the Chief Justice and two Justices joining, and two Justices concurring in judgment). > U.S.C.A. Const.Amend. 5.

> [4] Criminal Law K> 393(1)

110 ----
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
> 110k393(1) In General.

Statements compelled by police interrogations may not be used against defendant at trial, but it is not until their use in criminal case that violation of the Self-Incrimination Clause of the Fifth Amendment occurs. (Per Justice Thomas, with the Chief Justice and two Justices joining, and two Justices concurring in judgment).

II

The Due Process Clause of the Fourteenth Amendment protects individuals against state action that either " 'shocks the conscience,' > Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' > Palko v. Connecticut, 302 U.S. 319, 325-326, 58 S.Ct. 149, 82 L.Ed. 288 (1937)." > United States v. Salerno, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). In > Palko, the majority of the Court refused to hold that every violation of the Fifth Amendment satisfied the second standard. In a host of other cases, however, the Court has held that unusually coercive police interrogation procedures do violate that standard. > (FN1)

[538 U.S. 788] By its terms, the Fifth Amendment itself has no application to the States. It is, however, one source of the protections against state actions that deprive individuals of rights "implicit in the concept of ordered liberty" that the Fourteenth Amendment guarantees. Indeed, as I pointed out in my dissent in > Oregon v. Elstad, 470 U.S. 298, 371, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), it is the most specific provision in the Bill of Rights "that protects all citizens from the kind of custodial interrogation that was once employed by the Star Chamber, by 'the Germans of the 1930's and early 1940's,' and by some of our own police departments only a few decades ago." > (FN2) Whenever it occurs, as it did here, official interrogation of that character is a classic example of a violation of a constitutional right "implicit in the concept of ordered liberty." > (FN3)

It must be remembered that the Self-Incrimination Clause of the Fifth Amendment is applicable to the States in its full text through the Due Process Clause of the Fourteenth Amendment. > Malloy v. Hogan, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); Griffin v. California, 380 U.S. 609, 615, 85 S.Ct. 1229, 14
L.Ed.2d 106 (1965)> To view preceding link please click here . The question is the [538 U.S. 791] proper interpretation of the Self-Incrimination Clause in the context of the present dispute.

Our cases and our legal tradition establish that the Self-Incrimination Clause is a substantive constraint on the conduct of the government, not merely an evidentiary rule governing the work of the courts. The Clause must provide more than mere assurance that a compelled statement will not be introduced against its declarant in a criminal trial. Otherwise there will be too little protection against the compulsion the Clause prohibits. The Clause protects an individual from being forced to give answers demanded by an official in any context when the answers might give rise to criminal liability in the future. "It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." > Kastigar v. United States, 406 U.S. 441, 444-445, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) (footnotes omitted). The decision in > Kastigar described the Self-Incrimination Clause as an exemption from the testimonial duty. > Ibid. As the duty is immediate, so must be the privilege. Furthermore, the exercise of the privilege depends on what the witness reasonably believes will be the future use of a statement. > Id., at 445, 92 S.Ct. 1653. Again, this indicates the existence of a present right.

The Clause provides both assurance that a person will not be compelled to testify against himself in a criminal proceeding and a continuing right against government conduct intended to bring about self-incrimination. > Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973) ("The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings"); accord, Bram v. United States, 168 U.S. 532, [538 U.S. 792] 542-543, 18 S.Ct. 183, 42 L.Ed. 568 (1897)> To view preceding link please click here ; > Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 35 L.Ed. 1110 (1892). The principle extends to forbid policies which exert official compulsion that might induce a person into forfeiting his rights under the Clause. > Lefkowitz v. Cunningham, 431 U.S. 801, 806, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977) ("These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized"); accord, > Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation of City of New York, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968); > Gardner v. Broderick, 392 U.S. 273, 279, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968). Justice SOUTER and Justice THOMAS acknowledge a future privilege. Ante, at 2007; ante, at 2002. That does not end the matter. A future privilege does not negate a present right.

Their position finds some support in a single statement in > United States v. Verdugo-Urquidez, 494 U.S. 259, 264, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) ("Although conduct by law enforcement officials prior to trial may ultimately impair that right [against compelled self-incrimination], a constitutional violation occurs only at trial"). That case concerned the application of the Fourth Amendment, and the extent of the right secured under the Self-Incrimination Clause was not then before the Court. > Ibid. Furthermore, > Verdugo-Urquidez involved a prosecution in the United States arising from a criminal investigation in another country, > id., at 274-275, 110 S.Ct. 1056, so there was a special reason for the Court to be concerned about the application of the Clause in that context, > id., at 269, 110 S.Ct. 1056 (noting the Court had "rejected the claim
that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" (citing > Johnson v. Eisentrager, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950))). In any event, the decision cannot be read to support the proposition that the application of the Clause is limited in the way Justice SOUTER and Justice THOMAS describe today.

A recent case illustrates that a violation of the Self-Incrimination Clause may have immediate consequences. [538 U.S. 793] Just last Term, nine Justices all proceeded from the premise that a present, completed violation of the Self-Incrimination Clause could occur if an incarcerated prisoner were required to admit to past crimes on pain of forfeiting certain privileges or being assigned harsher conditions of confinement. > McKune v. Lile, 536 U.S. 24, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002); > id., at 48, 122 S.Ct. 2017 (O'CONNOR, J., concurring in judgment); > id., at 54, 122 S.Ct. 2017 (STEVENS, J., dissenting). Although there was disagreement over whether a violation occurred in the circumstances of that case, there was no disagreement that a present violation could have taken place. No Member of the Court suggested that the absence of a pending criminal proceeding made the Self-Incrimination Clause inquiry irrelevant.

This is not to say all questions as to the meaning and extent of the Clause are simple of resolution, or that all of the cited cases are easy to reconcile. Many questions about the application of the Self-Incrimination Clause are close and difficult. There are instances, moreover, when incriminating statements can be required from a reluctant witness, see, e.g., > Gardner, supra, at 276, 88 S.Ct. 1913, and others where information may be required even absent a promise of immunity, see, e.g., > Shapiro v. United States, 335 U.S. 1, 19, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948). Justice SOUTER and Justice THOMAS are correct to note that testimony may be ordered, on pain of contempt, if appropriate immunity is granted. It does not follow that the Clause establishes no present right. The immunity rule simply shows that the right is not absolute.

The conclusion that the Self-Incrimination Clause is not violated until the government seeks to use a statement in some later criminal proceeding strips the Clause of an essential part of its force and meaning.

This is no small matter. It should come as an unwelcome surprise to judges, attorneys, and the citizenry as a whole that if a legislative committee or a judge in a civil case demands incriminating testimony without offering immunity, and even imposes sanctions for failure to comply, that the witness and counsel cannot[538 U.S. 794] insist the right against compelled self-incrimination is applicable then and there. Justice SOUTER and Justice THOMAS, I submit, should be more respectful of the understanding that has prevailed for generations now. To tell our whole legal system that when conducting a criminal investigation police officials can use severe compulsion or even torture with no present violation of the right against compelled self-incrimination can only diminish a celebrated provision in the Bill of Rights. A Constitution survives over time because the people share a common, historic commitment to certain simple but fundamental principles which preserve their freedom. Today's decision undermines one of those respected precepts.

Dean Griswold explained the place the Self-Incrimination Clause has secured in our legal heritage:

"The Fifth Amendment has been very nearly a lone sure rock in a time of storm. It has been one thing which has held quite firm, although something like a juggernaut has pushed upon it. It has, thus, through all its vicissitudes, been a symbol of the ultimate moral sense of the community, upholding the best in us, when otherwise there was a good deal of wavering under the pressures of the times." E. Griswold, The Fifth Amendment Today 73 (1955).

It damages the law, and the vocabulary with which we impart our legal tradition from one generation to the next, to downgrade our understanding of what the Fifth Amendment requires.

There is some authority, it must be acknowledged, for the proposition that the act of torturing to obtain a confession is not comprehended within the Self-Incrimination Clause itself. In > Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936), the Court held that convictions based upon tortured confessions could not stand, but it identified the Due Process Clause, and not the Self-Incrimination Clause, as the source for its ruling. [538 U.S. 795] > Id., at 285, 56 S.Ct. 461. The Court interpreted the Self-Incrimination Clause as limited to "the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter." > Ibid. The decision in > Brown antedated the incorporation of the Clause and the ensuing understanding of its fundamental role in our legal system.

The views expressed by Justice SOUTER and Justice THOMAS also have some academic support. Professor McNaughton, in his revision of Professor Wigmore's treatise on the law of evidence, recites various rationales for the Self-Incrimination Clause, declaring all of them insufficient. 8 J. Wigmore, Evidence § 2251 (J. McNaughton rev. ed.1961). The 11th justification he discusses is the prevention of torture, id., at 315, a practice Professor McNaughton simply assures us will not be revived, ibid.

This is not convincing. The Constitution is based upon the theory that when past abuses are forbidden the resulting right has present meaning. A police officer's interrogation is different in a formal sense from interrogation ordered by an official inquest, but the close relation between the two ought not to be so quickly discounted. Even if some think the abuses of the Star Chamber cannot revive, the specter of Sheriff Screws, see > Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), or of the deputies who beat the confessions out of the defendants in > Brown v. Mississippi, is not so easily banished. See > Oregon v. Elstad, 470 U.S. 298, 312, n. 3, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985); > id., at 371-372, n. 19, 105 S.Ct. 1285 (STEVENS, J., dissenting).

III

In my view the Self-Incrimination Clause is applicable at the time and place police use compulsion to extract a statement from a suspect. The Clause forbids that conduct. A majority of the Court has now concluded otherwise, but that should not end this case. It simply implicates the larger

definition of liberty under the Due Process Clause of the [538 U.S. 796] Fourteenth Amendment. > Dickerson, 530 U.S., at 433, 120 S.Ct. 2326 ("Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment"). Turning to this essential, but less specific, guarantee, it seems to me a simple enough matter to say that use of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person. > Brown, supra, at 285, 56 S.Ct. 461; > Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937); see also > Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). The Constitution does not countenance the official imposition of severe pain or pressure for purposes of interrogation. This is true whether the protection is found in the Self-Incrimination Clause, the broader guarantees of the Due Process Clause, or both.

That brings us to the interrogation in this case. Had the officer inflicted the initial injuries sustained by Martinez (the gunshot wounds) for purposes of extracting a statement, there would be a clear and immediate violation of the Constitution, and no further inquiry would be needed. That is not what happened, however. The initial injuries and anguish suffered by the suspect were not inflicted to aid the interrogation. The wounds arose from events preceding it. True, police officers had caused the injuries, but they had not done so to compel a statement or with the purpose of facilitating some later interrogation. The case can be analyzed, then, as if the wounds had been inflicted by some third person, and the officer came to the hospital to interrogate.

There is no rule against interrogating suspects who are in anguish and pain. The police may have legitimate reasons, borne of exigency, to question a person who is suffering or in distress. Locating the victim of a kidnaping, ascertaining the whereabouts of a dangerous assailant or accomplice, or determining whether there is a rogue police officer at large are some examples. That a suspect is in fear of dying, furthermore,[538 U.S. 797] may not show compulsion but just the opposite. The fear may be a motivating factor to volunteer information. The words of a declarant who believes his death is imminent have a special status in the law of evidence. See, e.g., > Mattox v. United States, 146 U.S. 140, 152, 13 S.Ct. 50, 36 L.Ed. 917 (1892) ("The admission of the testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce as strict adherence to the truth as the obligation of an oath could impose"); see also > Fed. Rule Evid. 804(b)(2) (providing an exception from the hearsay rule for certain statements uttered under belief of impending death). A declarant in Martinez's circumstances may want to tell his story even if it increases his pain and agony to do so. The Constitution does not forbid the police from offering a person an opportunity to volunteer evidence he wishes to reveal.

There are, however, actions police may not take if the prohibition against the use of coercion to elicit a statement is to be respected. The police may not prolong or increase a suspect's suffering against the suspect's will. That conduct would render government officials accountable for the increased pain. The officers must not give the impression that severe pain will be alleviated only if the declarant cooperates, for that, too, uses pain to extract a statement. In a case like this one, recovery should be available under > § 1983 if a complainant can demonstrate that an officer exploited his pain and suffering with the purpose and intent of securing an incriminating statement. That showing has been made here.

The transcript of the interrogation set out by Justice STEVENS, ante, at 2010-2011 (opinion concurring in part and dissenting in part), and other evidence considered by the District Court demonstrate that the suspect thought his treatment would be delayed, and thus his pain and condition worsened, by refusal to answer questions.

[538 U.S. 798] It is true that the interrogation was not continuous. Ten minutes of questions and answers were spread over a 45-minute interval. App. to Pet. for Cert. 27a. Treatment was apparently administered during those interruptions. The pauses in the interrogation, however, do not indicate any error in the trial court's findings and conclusions.

The District Court found that Martinez "had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details

of the encounter with the police." Id., at 22a. His blinding facial wounds made it impossible for him visually to distinguish the interrogating officer from the attending medical personnel. The officer made no effort to dispel the perception that medical treatment was being withheld until Martinez answered the questions put to him. There was no attempt through > Miranda warnings or other assurances to advise the suspect that his cooperation should be voluntary. Martinez begged the officer to desist and provide treatment for his wounds, but the questioning persisted despite these pleas and despite Martinez's unequivocal refusal to answer questions. Cf. > Mincey v. Arizona, 437 U.S. 385, 398, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (Court said of similar circumstances: "It is hard to imagine a situation less conducive to the exercise of a rational intellect and a free will" (internal quotation marks omitted)).

The standards governing the interrogation of suspects and witnesses who suffer severe pain must accommodate the exigencies that law enforcement personnel encounter in circumstances like this case. It is clear enough, however, that the police should take the necessary steps to ensure that there is neither the fact nor the perception that the declarant's pain is being used to induce the statement against his will. In this case no reasonable police officer would believe that the law permitted him to prolong or increase pain to obtain a statement. The record supports the ultimate finding that [538 U.S. 799] the officer acted with the intent of exploiting Martinez's condition for purposes of extracting a statement.

Justice GINSBURG, concurring in part and dissenting in part.

> (FN1.) Justice O'CONNOR listed many of these cases, as well as cases from state courts, in > Oregon v. Elstad, 470 U.S. 298, 312, n. 3, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985): "> Darwin v. Connecticut, 391 U.S. 346, 88 S.Ct. 1488, 20 L.Ed.2d 630 (1968) (suspect interrogated for 48 hours incommunicado while officers denied access to counsel); > Beecher v. Alabama, 389 U.S. 35, 36, 88 S.Ct. 189, 19 L.Ed.2d 35 (1967) (officer fired rifle next to suspect's ear and said 'If you don't tell the truth I am going to kill you'); > Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967) (suspect was arrested without probable cause, interrogated for nine days with little food or sleep, and gave three unwarned 'confessions' each of which he immediately retracted); > Reck v. Pate, 367 U.S. 433, 439-440, n. 3, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961) (mentally retarded youth interrogated incommunicado for a week 'during which time he was frequently ill, fainted several times, vomited blood on the floor of the police station and was twice taken to the hospital on a stretcher') .... > Cagle v. State, 45 Ala.App. 3, 4, 221 So.2d 119, 120 (1969) (police interrogated wounded suspect at police station for one hour before obtaining statement, took him to hospital to have his severe wounds treated, only then giving the > Miranda warnings; suspect prefaced second statement with 'I have already give the Chief a statement and I might as well give one to you, too'), cert. denied, > 284 Ala. 727, 221 So.2d 121 (1969); > People v. Saiz, 620 P.2d 15 (Colo.1980) (two hours' unwarned custodial interrogation of 16-year-old in violation of state law requiring parent's presence, culminating in visit to scene of crime); > People v. Bodner, 75 A.D.2d 440, 430 N.Y.S.2d 433 (1980) (confrontation at police station and at scene of crime between police and retarded youth with mental age of eight or nine); > State v. Badger, 141 Vt. 430, 441, 450 A.2d 336, 343 (1982) (unwarned 'close and intense' station house questioning of 15-year-old, including threats and promises, resulted in confession at 1:20 a.m.; court held '[w]arnings ... were insufficient to cure such blatant abuse or compensate for the coercion in this case')."

> (FN2.) Adding to the cases cited by Justice O'CONNOR, I appended this footnote: "See, e.g., > Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954); > Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945); > Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944); > Ward v. Texas, 316 U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663 (1942); > Vernon v. Alabama, 313 U.S. 547, 61 S.Ct. 1092, 85 L.Ed. 1513 (1941); > White v. Texas, 310 U.S. 530, 60 S.Ct. 1032, 84 L.Ed. 1342 (1940); > Canty v. Alabama, 309 U.S. 629, 60 S.Ct. 612, 84 L.Ed. 988 (1940); > Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940); > Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936); > Wakat v. Harlib, 253 F.2d 59 (C.A.7 1958); > People v. La Frana, 4 Ill.2d 261, 122 N.E.2d 583 (1954); cf. > People v. Portelli, 15 N.Y.2d 235, 257 N.Y.S.2d 931, 205 N.E.2d 857 (1965) (potential witness tortured by police). Such custodial interrogation is, of course, closer to that employed by

the Soviet Union than that which our constitutional scheme tolerates. See > Coleman v. Alabama, 399 U.S. 1, 15-16, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (opinion of Douglas, J.) ('In [Russia] detention incommunicado is the common practice, and the period of permissible detention now extends for nine months. Where there is custodial interrogation, it is clear that the critical stage of the trial takes place long before the courtroom formalities commence. That is apparent to one who attends criminal trials in Russia. Those that I viewed never put in issue the question of guilt; guilt was an issue resolved in the inner precincts of a prison under questioning by the police')." > Id., at 371-372, n. 19, 105 S.Ct. 1285 (dissenting opinion).

> 113 S.Ct. 1710

507 U.S. 619, 123 L.Ed.2d 353, 61 USLW 4335

Supreme Court of the United States

Todd A. BRECHT, Petitioner
v.
Gordon A. ABRAHAMSON, Superintendent, Dodge Correctional Institution.

No. 91-7358.
Argued Dec. 1, 1992.

Decided April 21, 1993.

Rehearing Denied June 7, 1993.

See > 508 U.S. 968, 113 S.Ct. 2951.

The Fourteenth Amendment prohibits the deprivation of liberty "without due process of law"; that guarantee is the source of the federal right to challenge state criminal convictions that result from fundamentally unfair trial proceedings. Neither the term "due process," nor the concept of fundamental unfairness itself, is susceptible of precise and categorical[507 U.S. 640] definition, and no single test can guarantee that a judge will grant or deny habeas relief when faced with a similar set of facts. Every allegation of due process denied depends on the specific process provided, and it is familiar learning that all "claims of constitutional error are not fungible." > Rose v. Lundy, 455 U.S. 509, 543, 102 S.Ct. 1198, 1216, 71 L.Ed.2d 379 (1982) (STEVENS, J., dissenting). As the Court correctly notes, constitutional due process violations vary dramatically in significance; harmless trial errors are at one end of a broad spectrum, and what the Court has characterized as "structural" defects--those that make a trial fundamentally unfair even if they do not affect the outcome of the proceeding--are at "the other end of the spectrum," ante, at 1717. Although Members of the Court have disagreed about the seriousness of the due process violation identified in > Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), in this case we unanimously agree that a constitutional violation occurred; moreover, we also all agree that some version of harmless-error analysis is appropriate.

We disagree, however, about whether the same form of harmless-error analysis should apply in a collateral attack as on a direct appeal, and, if not, what the collateral attack standard should be for an error of this kind. The answer to the first question follows from our long history of distinguishing between collateral and direct review, see, e.g., > Sunal v. Large, 332 U.S. 174, 178, 67 S.Ct. 1588, 1590, 91 L.Ed. 1982 (1947), and confining collateral relief to cases that involve fundamental defects or omissions

inconsistent with the rudimentary demands of fair procedure, see, e.g., > United States v. Timmreck, 441 U.S. 780, 783, 99 S.Ct. 2085, 2087, 60 L.Ed.2d 634 (1979), and cases cited therein. The Court answers the second question by endorsing Justice Rutledge's thoughtful opinion for the Court in > Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). Ante, at 1714, 1722. Because that standard accords with the statutory rule for reviewing other trial errors that affect substantial rights; places the burden on prosecutors to explain why those errors were harmless; requires a habeas court to review the entire record de novo in determining [507 U.S. 641] whether the error influenced the jury's deliberations; and leaves considerable latitude for the exercise of judgment by federal courts, I am convinced that our answer is correct. I write separately only to emphasize that the standard is appropriately demanding.

As the Court notes, ante, at 1718, n. 7, the > Kotteakos standard is grounded in the 1919 federal harmless-error statute. Congress had responded to the widespread concern that federal appellate courts had become "impregnable citadels of technicality," > Kotteakos, 328 U.S., at 759, 66 S.Ct., at 1245, by issuing a general command to treat error as harmless unless it "is of such a character that its natural effect is to prejudice a litigant's substantial rights," > id., at 760-761, 66 S.Ct., at 1246. > Kotteakos plainly stated that unless an error is merely "technical," the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution. > (FN1) A constitutional violation, of course, would never fall in the "technical" category.

Of particular importance, the statutory command requires the reviewing court to evaluate the error in the context of the entire trial record. As the Court explained: "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of [507 U.S. 642] stare decisis by what has been done in similar situations." > Id., at 762, 66 S.Ct., at 1246.

To apply the > Kotteakos standard properly, the reviewing court must, therefore, make a de novo examination of the trial record. The Court faithfully engages in such de novo review today, see ante, at 1722-1723, just as the plurality did in the dispositive portion of its analysis in > Wright v. West, 505 U.S. 277, 295-297, 112 S.Ct. 2482, 2492-2493, 120 L.Ed.2d 225 (1992) (opinion of THOMAS, J.) The > Kotteakos requirement of de novo review of errors that prejudice substantial rights--as all constitutional errors surely do--is thus entirely consistent with the Court's longstanding commitment to the de novo standard of review of mixed questions of law and fact in habeas corpus proceedings. See > Wright v. West, 505 U.S., at 299-303, 112 S.Ct., at 2493-2497 (O'CONNOR, J., concurring in judgment).

The purpose of reviewing the entire record is, of course, to consider all the ways that error can infect the course of a trial. Although THE CHIEF JUSTICE properly quotes the phrase applied to the errors in > Kotteakos (" 'substantial and injurious effect or influence in determining the jury's verdict' "), ante, at 1714, 1716, 1722, we would misread > Kotteakos itself if we endorsed only a single-minded focus on how the error may (or may not) have affected the jury's verdict. The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place. > (FN2) > Kotteakos is full of warnings to avoid that result. It requires a reviewing court to decide that "the error did not influence the jury," > 328 U.S., at 764, 66 S.Ct., at 1248, and that "the judgment was not substantially swayed by the error," > id., at 765, 66 S.Ct., at 1248. In a passage that should be kept in mind by all courts that review trial transcripts, Justice Rutledge wrote that the question is not

"were they [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is [507 U.S. 643] rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

"This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record." > Id., at 764, 66 S.Ct., at 1248 (citations omitted).

The > Kotteakos standard that will now apply on collateral review is less stringent than the > Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), standard applied on direct review. Given the critical
importance of the faculty of judgment in administering either standard, however, that difference is less significant than it might seem--a point well illustrated by the differing opinions expressed by THE CHIEF JUSTICE and by Justice KENNEDY in > Arizona v. Fulminante, 499 U.S. 279, 302, 313, 111 S.Ct. 1246, 1261, 1266, 113 L.Ed.2d 302 (1991). While THE CHIEF JUSTICE considered the admission of the defendant's confession harmless error under > Chapman, see > 499 U.S., at 312, 111 S.Ct., at 1266 (dissenting opinion), Justice KENNEDY's cogent analysis demonstrated that the error could not reasonably have been viewed as harmless under a standard even more relaxed than the one we announce today, see > id., at 313-314, 111 S.Ct., at 1266-1267 (opinion concurring in judgment). In the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied.

Although our adoption of > Kotteakos does impose a new standard in this context, it is a standard that will always require "the discrimination ... of judgment transcending confinement by formula or precise rule. United States v. [507 U.S. 644] Socony-Vacuum Oil Co., 310 U.S. 150, 240 [, 60 S.Ct. 811, 852, 84 L.Ed. 1129 (1940)> To view preceding link please click here]." > 328 U.S., at 761, 66 S.Ct., at 1246. > (FN3) In my own judgment, for the reasons explained by THE CHIEF JUSTICE, the > Doyle error that took place in petitioner's trial did not have a substantial and injurious effect or influence in determining the jury's verdict. Accordingly, I concur in the Court's opinion and judgment.

I

A

> Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), established the federal nature of the harmless-error standard to be applied when constitutional rights are at stake. Such rights, we stated, are "rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the 'independent' federal courts would be the 'guardians of those rights.' " > Id., at 21, 87 S.Ct., at 826 (footnote omitted). Thus,

"[w]hether a conviction for crime should stand when a State has failed to accord
federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." > Ibid. (emphasis added).

> Chapman, it is true, never expressly identified the source of this harmless-error standard. But, whether the standard be characterized as a "necessary rule" of federal law, > ibid., or criticized as a quasi-constitutional doctrine, see > id., at 46, 51, 87 S.Ct., at 839, 841 (Harlan, J., dissenting), the Court clearly viewed it as essential to the safeguard of federal constitutional rights. Otherwise, there would have been no justification for imposing the rule on state courts. Cf., > id., at 48-51, 87 S.Ct., at 840-841 (Harlan, J., dissenting). As far as I can tell, the majority does not question > Chapman's vitality on direct review and, therefore, the federal and constitutional underpinnings on which it rests.

That being so, the majority's conclusion is untenable. Under > Chapman, federal law requires reversal of a state [507 U.S. 646] conviction involving a constitutional violation that is not harmless beyond a reasonable doubt. A defendant whose conviction has been upheld despite the occurrence of such a violation certainly is "in custody in violation of the Constitution or laws ... of the United States," > 28 U.S.C. § 2254(a), and therefore is entitled to habeas relief. Although we have never explicitly held that this was the case, our practice before this day plainly supports this view, as the majority itself acknowledges. See, e.g., > Rose v. Clark, 478 U.S. 570, 584, 106 S.Ct. 3101, 3109, 92 L.Ed.2d 460 (1986); see also ante, at 1718.

I have no dispute with the Court's observation that "collateral review is different from direct review." Ante, at 1719. Just as the federal courts may decline to adjudicate certain issues of federal law on habeas because of prudential concerns, see > Withrow v. Williams, 507 U.S. 680, 686, 113 S.Ct. 1745, 1750, 123 L.Ed.2d 407 (1993); > id., at 699-700, 113 S.Ct., at 1757 (O'CONNOR, J., concurring in part and dissenting in part), so too may they resolve specific claims on habeas using different and more lenient standards than those applicable on direct review, see, e.g., > Teague v. Lane, 489 U.S. 288, 299-310, 109 S.Ct. 1060, 1069-1075, 103 L.Ed.2d 334 (1989) (habeas claims adjudicated under the law prevailing at time conviction became final and not on the basis of intervening changes of law). But decisions concerning the Great Writ "warrant restraint," > Withrow, 507 U.S., at 700, 113 S.Ct., at 1758 (O'CONNOR, J., concurring in part and dissenting in part), for we ought not take lightly alteration of that " 'fundamental safeguard against unlawful custody,' " > id., at 697-698, 113 S.Ct., at 1756 (quoting > Fay v. Noia, 372 U.S. 391, 449, 83 S.Ct. 822, 854, 9 L.Ed.2d 837 (1963) (Harlan, J., dissenting)).

In my view, restraint should control our decision today. The issue before us is not whether we should remove from the cognizance of the federal courts on habeas a discrete prophylactic rule unrelated to the truthfinding function of trial, as was the case in > Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067, (1976), and more recently in > Withrow v. Williams, 507 U.S. 680, 113 S.Ct. 1745, 123 L.Ed.2d 407. Rather, we are asked to alter a standard that not only finds application in virtually every case of error but that also may be critical to our faith in the reliability of the criminal process.
Because I am not convinced that the principles governing the exercise of our habeas powers--federalism, finality, and fairness--counsel against applying > Chapman's harmless-error standard on collateral review, I would adhere to our [507 U.S. 651] former practice of applying it to cases on habeas and direct review alike. See ante, at 1717-1718. I therefore respectfully dissent.

The Court begins its analysis with the nature of the constitutional violation asserted, ante, at 1716-1718, and appropriately so. We long have recognized that the exercise of the federal courts' habeas powers is governed by equitable principles. > Fay v. Noia, supra, 372 U.S., at 438, 83 S.Ct., at 848; > Withrow, at 699-700, 113 S.Ct., at 1757-1758 (O'CONNOR, J., concurring in part and dissenting in part). And the nature of the right at issue is an important equitable consideration. When a prisoner asserts the violation of a core constitutional privilege critical to the reliability of the criminal process, he has a strong claim that fairness favors review; but if the infringement concerns only a prophylactic rule, divorced from the criminal trial's truthfinding function, the prisoner's claim to the equities rests on far shakier ground. Thus, in > Withrow v. Williams, this Court declined to bar relitigation of Miranda claims on habeas because Miranda is connected to the Fifth Amendment and the Fifth Amendment, in turn, serves the interests of reliability. > Withrow, at 691-692, 113 S.Ct., at 1753. I dissented because I believe that Miranda is a prophylactic rule that actually impedes the truthseeking function of criminal trials. > Withrow, 507 U.S., at 700, 701-708, 113 S.Ct., at 1750, 1751-1754. See also > Stone v. Powell, supra, 428 U.S., at 486, 490, 96 S.Ct., at 3048, 3050 (precluding review of exclusionary rule violations in part because the rule is judicially fashioned and interferes with the truthfinding function of trial).

Petitioner in this case alleged a violation of > Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), an error the Court accurately characterizes as constitutional trial error. Ante, at 1717. But the Court's holding today, it turns out, has nothing to do with > Doyle error at all. Instead, the Court announces that the harmless-error standard of > Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), which requires the prosecution to prove constitutional error harmless beyond a reasonable doubt, no longer applies to any trial error asserted on habeas, whether it is a [507 U.S. 652]> Doyle error or not. In > Chapman's place, the Court substitutes the less rigorous standard of > Kotteakos v. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946). Ante, at 1722.

A repudiation of the application of > Chapman to all trial errors asserted on habeas should be justified, if at all, based on the nature of the > Chapman rule itself. Yet, as Justice WHITE observes, ante, at 1726 (dissenting opinion), one searches the majority opinion in vain for a discussion of the basis for > Chapman's harmless-error standard. We are left to speculate whether > Chapman is the product of constitutional command or a judicial construct that may overprotect constitutional rights. More important, the majority entirely fails to discuss the effect of the > Chapman rule. If there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate equity on the prisoner's side--the possibility that an error

may have caused the conviction of an actually innocent person--is sufficient by itself to permit plenary review of the prisoner's federal claim. > Withrow, at 700, 113 S.Ct., at 1757 (O'CONNOR, J., concurring in part and dissenting in part) (citing cases). Whatever the source of the > Chapman standard, the equities may favor its application on habeas if it substantially promotes the central goal of the criminal justice system--accurate determinations of guilt and innocence. See > Withrow, at 705-706, 113 S.Ct., at 1752-1753 (reasoning that, although Miranda may be a prophylactic rule, the fact that it is not "divorced" from the truthfinding function of trial weighs in favor of its application on habeas); > Teague, supra, 489 U.S., at 313, 109 S.Ct., at 1076 (if absence of procedure seriously diminishes likelihood of accurate conviction, new rule requiring such procedure may be retroactively applied on habeas).

In my view, the harmless-error standard often will be inextricably intertwined with the interest of reliability. By now it goes without saying that harmless-error review is of almost universal application; there are few errors that may not be forgiven as harmless. > Arizona v. Fulminante, 499 U.S. 279, 306-307, 111 S.Ct. 1246, 1262-1263, 113 L.Ed.2d 302 (1991). For example, we have recognized [507 U.S. 653] that a defendant's right to confront the witnesses against him is central to the truthfinding function of the criminal trial. See, e.g., > Maryland v. Craig, 497 U.S. 836, 845-847, 110 S.Ct. 3157, 3163-3164, 111 L.Ed.2d 666 (1990); > Ohio v. Roberts, 448 U.S. 56, 65, 100 S.Ct. 2531, 2538, 65 L.Ed.2d 597 (1980); > Mattox v. United States, 156 U.S. 237, 242-243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895); see also 3 W. Blackstone, Commentaries 373-374 (1768). But Confrontation Clause violations are subject to harmless-error review nonetheless. See > Coy v. Iowa, 487 U.S. 1012, 1021-1022, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857 (1988). When such an error is detected, the harmless-error standard is crucial to our faith in the accuracy of the outcome: The absence of full adversary testing, for example, cannot help but erode our confidence in a verdict; a jury easily may be misled by such an omission. Proof of harmlessness beyond a reasonable doubt, however, sufficiently restores confidence in the verdict's reliability that the conviction may stand despite the potentially accuracy impairing error. Such proof demonstrates that, even though the error had the potential to induce the jury to err, in fact there is no reasonable possibility that it did. Rather, we are confident beyond a reasonable doubt that the error had no influence on the jury's judgment at all. Cf. > In re Winship, 397 U.S. 358, 363-364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970) (proof of guilt beyond a reasonable doubt indispensable to community's respect and confidence in criminal process).

At least where errors bearing on accuracy are at issue, I am not persuaded that the > Kotteakos standard offers an adequate assurance of reliability. Under the Court's holding today, federal courts on habeas are barred from offering relief unless the error " 'had substantial and injurious effect or influence in determining the jury's verdict.' " Ante, at 1722 (quoting > Kotteakos, supra, 328 U.S., at 776, 66 S.Ct. at 1253). By tolerating a greater probability that an error with the potential to undermine verdict accuracy was harmful, the Court increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial. Of course, the Constitution does not require that every conceivable precaution[507 U.S. 654] in favor of reliability be taken; and certainly > 28 U.S.C. § 2254 does not impose such an obligation on its own. Indeed, I agree with the Court that habeas relief under > § 2254 is reserved for those prisoners "whom society has 'grievously wronged.' " Ante, at 1721. But prisoners who may have been convicted mistakenly because of constitutional trial error have suffered a grievous wrong and ought not be required to bear the greater risk of uncertainty the Court now imposes upon them. Instead, where constitutional error may have affected the accuracy of the verdict, on habeas we should insist on such proof as will restore our faith in the verdict's accuracy to a reasonable certainty. Adherence to the standard enunciated in > Chapman requires no more; and the equities require no less.

To be sure, the harmless-error inquiry will not always bear on reliability. If the trial error being reviewed for harmlessness is not itself related to the interest of accuracy, neither is the harmless-error standard. Accordingly, in theory it would be neither illogical nor grudging to reserve > Chapman for errors

related to the accuracy of the verdict, applying > Kotteakos' more lenient rule whenever the error is of a type that does not impair confidence in the trial's result. But the Court draws no such distinction. On the contrary, it holds > Kotteakos applicable to all trial errors, whether related to reliability or not. The Court does offer a glimmer of hope by reserving in a footnote the possibility of an exception: > Chapman may remain applicable, it suggests, in some "unusual" cases. But the Court's description of those cases suggests that its potential exception would be both exceedingly narrow and unrelated to reliability concerns. See

ante, at 1722, n. 9 (reserving the "possibility that in an unusual case, a deliberate and especially egregious error of the trial type" or error "combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even it did not substantially influence the jury's verdict").

[507 U.S. 655] But even if the Court's holding were limited to errors divorced from reliability concerns, the decision nevertheless would be unwise from the standpoint of judicial administration. Like Justice WHITE, I do not believe we should turn our habeas jurisprudence into a "patchwork" of rules and exceptions without strong justification. Ante, at 1728 (dissenting opinion). The interest of efficiency, always relevant to the scope of habeas relief, see, e.g., > Stone, 428 U.S., at 491, n. 31, 96 S.Ct., at 3033, n. 31; > Withrow, 507 U.S., at 693-694, 113 S.Ct., at 1753-1755; > id., at 708-713, 113 S.Ct., at 1761-1764 (O'CONNOR, J., concurring in part and dissenting in part), favors simplification of legal inquiries, not their multiplication. A rule requiring the courts to distinguish between errors that affect accuracy and those that do not, however, would open up a whole new frontier for litigation and decision. In each case, the litigants would brief and federal judges would be required to decide whether the particular error asserted relates to accuracy. Given the number of constitutional rules we have recognized and the virtually limitless ways in which they might be transgressed, I cannot imagine that the benefits brought by such litigation could outweigh the costs it would impose.

In fact, even on its own terms the Court's decision buys the federal courts a lot of trouble. From here on out, prisoners undoubtedly will litigate--and judges will be forced to decide--whether each error somehow might be wedged into the narrow potential exception the Court mentions in a footnote today. Moreover, since the Court only mentions the possibility of an exception, all concerned must also address whether the exception exists at all. I see little justification for imposing these novel and potentially difficult questions on our already overburdened justice system.

Nor does the majority demonstrate that the > Kotteakos standard will ease the burden of conducting harmless-error review in those cases to which it does apply. Indeed, as Justice STEVENS demonstrates in his concurrence, > Kotteakos is unlikely to lighten the load of the federal judiciary at all. The courts still must review the entire record in search of [507 U.S. 656] conceivable ways the error may have influenced the jury; they still must conduct their review de novo; and they still must decide whether they have sufficient confidence that the verdict would have remained unchanged even if the error had not occurred. See ante, at 1723-1724. The only thing the Court alters today is the degree of confidence that suffices. But > Kotteakos' threshold is no more precise than > Chapman's; each requires an exercise of judicial judgment that cannot be captured by the naked words of verbal formulae. > Kotteakos, it is true, is somewhat more lenient; it will permit more errors to pass uncorrected. But that simply reduces the number of cases in which relief will be granted. It does not decrease the burden of identifying those cases that warrant relief.

Finally, the majority considers the costs of habeas review generally. Ante, at 1721-1722. Once again, I agree that those costs--

the effect on finality, the infringement on state sovereignty, and the social cost of requiring retrial, sometimes years after trial and at a time when a new trial has become difficult or impossible--are appropriate considerations. See > Withrow, at 703-704, 113 S.Ct., at 1759-1760 (O'CONNOR, J., concurring in part and dissenting in part); see also > id., at 686-687, 708-709, 113 S.Ct., at 1750, 1754-1755; > Stone, supra, 428 U.S., at 489-491, 96 S.Ct., at 3050-3051. But the Court does not explain how those costs set the harmless-error inquiry apart from any other question presented on habeas; such costs are inevitable whenever relief is awarded. Unless we are to accept the proposition that denying relief whenever possible is an unalloyed good, the costs the Court identifies cannot by themselves justify the lowering of standards announced today. The majority, of course, does not contend otherwise; instead, it adheres to our traditional approach of distinguishing between those claims that are worthy of habeas relief and those that, for prudential and equitable reasons, are not. Nonetheless, it seems to me that the Court's decision cuts too broadly and deeply to comport with the equitable and remedial nature of the habeas writ; it is neither justified nor [507 U.S. 657] justifiable from the standpoint of fairness or judicial efficiency. Because I would remand the case to the Court of Appeals for application of > Chapman's more demanding harmless-error standard, I respectfully dissent.

Justice SOUTER, dissenting.

> 109 S.Ct. 333

488 U.S. 51, 102 L.Ed.2d 281, 57 USLW 4013

Supreme Court of the United States

ARIZONA, Petitioner,
v.
Larry YOUNGBLOOD.

No. 86-1904.
Argued Oct. 11, 1988.

Decided Nov. 29, 1988.

Rehearing Denied Jan. 23, 1989.

See 488 U.S. 1051, 109 S.Ct. 885.

Defendant was convicted by the Superior Court, Pima County, J. Richard Hannah, J., of child molestation, sexual assault, and kidnaping, and he appealed. The > Arizona Court of Appeals, 153 Ariz. 50, 734 P.2d 592, reversed, and the State of Arizona petitioned for review. The Supreme Court of Arizona denied petition, and certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that failure of police to preserve potentially useful evidence was not denial of due process of law absent defendant's showing bad faith on part of police.

Reversed.

Justice Stevens filed an opinion concurring in the judgment.

Justice Blackmun filed a dissenting opinion, in which Justices Brennan and Marshall joined.

Opinion on remand, > 164 Ariz. 61, 790 P.2d 759.

West Headnotes

> [1] Constitutional Law K> 268(5)

92 ----
92XII Due Process of Law
92k256 Criminal Prosecutions
92k268 Trial
92k268(2) Particular Cases and Problems
> 92k268(5) Disclosure and Discovery; Notice of Defense.

[See headnote text below]

> [1] Criminal Law K> 700(9)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
> 110k700(9) Loss or Destruction of Evidence.

Failure of police to preserve potentially useful evidence is not a denial of due process of law unless defendant can show bad faith on part of police; requiring defendant to show bad faith both limits extent of police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where interests of justice most clearly require it, that is, those cases in which police themselves by their conduct indicate that evidence could form basis for exonerating defendant. > U.S.C.A. Const.Amend. 14.

> [2] Constitutional Law K> 268(5)

92 ----
92XII Due Process of Law
92k256 Criminal Prosecutions
92k268 Trial
92k268(2) Particular Cases and Problems
> 92k268(5) Disclosure and Discovery; Notice of Defense.

[See headnote text below]

> [2] Criminal Law K> 700(9)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
> 110k700(9) Loss or Destruction of Evidence.

Defendant was not denied due process of law by failure of police, in investigating sexual assault of ten-year-old boy, to refrigerate boy's clothing and to perform tests on semen samples, thereby preserving potentially useful evidence for defendant, where there was no suggestion of bad faith on part of police; none of this information was concealed from defendant at trial, and evidence--such as it was--was made available to defendant's expert who declined to perform any tests on samples. > U.S.C.A. Const.Amend. 14.

> [3] Constitutional Law K> 268(5)

92 ----
92XII Due Process of Law
92k256 Criminal Prosecutions
92k268 Trial
92k268(2) Particular Cases and Problems
> 92k268(5) Disclosure and Discovery; Notice of Defense.

[See headnote text below]

> [3] Criminal Law K> 700(9)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney

> 110k700(9) Loss or Destruction of Evidence.

Failure of police to test semen samples with newer test device, in investigation of sexual assault of ten-year-old boy, did not violate due process clause. > U.S.C.A. Const.Amend. 14.

Syllabus > (FN*)

The victim, a 10-year-old boy, was molested and sodomized by a middle-aged man for 1 1/2 hours. After the assault, the boy was taken to a hospital where a physician used a swab from a "sexual assault kit" to collect semen samples from the boy's rectum. The police also collected the boy's clothing, which they failed to refrigerate. A police criminologist later performed some tests on the rectal swab and the boy's clothing, but he was unable to obtain information about the identity of the boy's assailant. At trial, expert witnesses testified that respondent might have been completely exonerated by timely performance of tests on properly preserved semen samples.
Respondent was convicted of child molestation, sexual assault, and kidnapping in an Arizona state court. The Arizona Court of Appeals reversed the conviction on the ground that the State had breached a constitutional duty to preserve the semen samples from the victim's body and clothing.

Held: The Due Process Clause of the Fourteenth Amendment did not require the State to preserve the semen samples even though the samples might have been useful to respondent. 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 of law. Here, the police's failure to refrigerate the victim's clothing and to perform tests on the semen samples can at worst be described as negligent. None of this information was concealed from respondent at trial, and the evidence--such as it was--was made available to respondent's expert, who declined to perform any tests on the samples. The Arizona Court of Appeals noted in its opinion--and this Court agrees--that there was no suggestion of bad faith on the part of the police. Moreover, the Due Process Clause was not violated because the State failed to perform a newer test on the semen samples. The police do not have a constitutional duty to perform any particular tests. Pp. 336-338.

> 153 Ariz. 50, 734 P.2d 592, reversed.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, post, p. 338. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, post, p. 339.

[488 U.S. 52] John R. Gustafson argued the cause for petitioner. With him on the brief were Stephen D. Neely, James M. Howard, and Deborah Strange Ward.

Daniel F. Davis argued the cause and filed a brief for respondent.

John R. Gustafson, Tucson, Ariz., for petitioner.

Daniel F. Davis, Tucson, Ariz., for respondent.

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondent Larry Youngblood was convicted by a Pima County, Arizona, jury of child molestation, sexual assault, and kidnaping. The Arizona Court of Appeals reversed his conviction on the ground that the State had failed to preserve semen samples from the victim's body and clothing. > 153 Ariz. 50, 734 P.2d 592 (1986). We granted certiorari to consider the extent to which the Due Process Clause of the Fourteenth Amendment requires the State to preserve evidentiary material that might be useful to a criminal defendant.

On October 29, 1983, David L., a 10-year-old boy, attended a church service with his mother. After he left the service at about 9:30 p.m., the boy went to a carnival behind the church, where he was abducted by a middle-aged man of medium height and weight. The assailant drove the boy to a secluded area near a ravine and molested him. He then took the boy to an unidentified, sparsely furnished house where he sodomized the boy four times. Afterwards, the assailant tied the boy up while he went outside to start his car. Once the assailant started the car, albeit with some difficulty, he returned to the house and again sodomized the boy. The assailant then sent the boy to the bathroom to wash up before he returned him to the carnival. He threatened to kill the boy if he told anyone about the attack. The entire ordeal lasted about 1 1/2 hours.

After the boy made his way home, his mother took him to Kino Hospital. At the hospital, a physician treated the boy for rectal injuries. The physician also used a "sexual assault kit" to collect evidence of the attack. The Tucson Police Department[488 U.S. 53] provided such kits to all hospitals in Pima County for use in sexual assault cases. Under standard procedure, the victim of a sexual assault was taken to a hospital, where a physician used the kit to collect evidence. The kit included paper to collect saliva samples, a tube for obtaining a blood sample, microscopic slides for making smears, a set of Q-Tip-like swabs, and a medical examination report. Here, the physician used the swab to collect samples from the boy's rectum and mouth. He then made a microscopic slide of the samples. The doctor also obtained samples of the boy's saliva, blood, and hair. The physician did not examine the samples at any time. The police placed the kit in a secure refrigerator at the police station. At the hospital, the police also collected the boy's underwear and T-shirt. This clothing was not refrigerated or frozen.

Nine days after the attack, on November 7, 1983, the police asked the boy to pick out his assailant from a photographic lineup. The boy identified respondent as the assailant. Respondent was not located by the police until four weeks later; he was arrested on December 9, 1983.

On November 8, 1983, Edward Heller, a police criminologist, examined the sexual assault kit. He testified that he followed standard department procedure, which was to examine the slides and determine whether sexual contact had occurred. After he determined that such contact had occurred, the criminologist did not perform any other tests, although he placed the assault kit back in the refrigerator. He testified that tests to identify blood group substances were not routinely conducted during the initial examination of an assault kit and in only about half of all cases in any event. He did not test the clothing at this time.

Respondent was indicted on charges of child molestation, sexual assault, and kidnaping. The State moved to compel respondent to provide blood and saliva samples for comparison with the material gathered through the use of the sexual assault kit, but the trial court denied the motion on the [488 U.S. 54] ground that the State had not obtained a sufficiently large semen sample to make a valid comparison. The prosecutor then asked the State's criminologist to perform an ABO blood group test on the rectal swab sample in an attempt to ascertain the blood type of the boy's assailant. This test failed to detect any blood group substances in the sample.

In January 1985, the police criminologist examined the boy's clothing for the first time. He found one semen stain on the boy's underwear and another on the rear of his T-shirt. The criminologist tried to obtain blood group substances from both stains using the ABO technique, but was unsuccessful. He also performed a P-30 protein molecule test on the stains, which indicated that only a small quantity of semen was present on the clothing; it was inconclusive as to the assailant's identity. The Tucson Police Department had just begun using this test, which was then used in slightly more than half of the crime laboratories in the country.

Respondent's principal defense at trial was that the boy had erred in identifying him as the perpetrator of the crime. In this connection, both a criminologist for the State and an expert witness for respondent testified as to what might have been shown by tests performed on the samples shortly after they were gathered, or by later tests performed on the samples from the boy's clothing had the clothing been properly refrigerated. The court instructed the jury that if they found the State had destroyed or lost evidence, they might "infer that the true fact is against the State's interest." 10 Tr. 90.

The jury found respondent guilty as charged, but the Arizona Court of Appeals reversed the judgment of conviction. It stated that " 'when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process.' " > 153 Ariz., at 54, 734 P.2d, at 596, quoting > State v. Escalante, 153 Ariz. 55, 61, 734 P.2d 597, 603 (App.1986). The Court of Appeals[488 U.S. 55] concluded on the basis of the expert testimony at trial that timely performance of tests with properly preserved semen samples could have produced results that might have completely exonerated respondent. The Court of Appeals
reached this conclusion even though it did "not imply any bad faith on the part of the > State." 153 Ariz., at 54, 734 P.2d, at 596. The Supreme Court of Arizona denied the State's petition for review, and we granted certiorari. > 485 U.S. 903, 108 S.Ct. 1072, 99 L.Ed.2d 232 (1988). We now reverse.

Decision of this case requires us to again consider "what might loosely be called the area of constitutionally guaranteed access to evidence." > United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982). In > Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), we held that "the suppression by the prosecution of evidence favorable to the 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." > Id., at 87, 83 S.Ct., at 1196. In > United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), we held that the prosecution had a duty to disclose some evidence of this description even though no requests were made for it, but at the same time we rejected the notion that a "prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel." > Id., at 111, 96 S.Ct., at 2401; see also > Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case").

There is no question but that the State complied with Brady and Agurs here. The State disclosed relevant police reports to respondent, which contained information about the existence of the swab and the clothing, and the boy's examination at the hospital. The State provided respondent's expert with the laboratory reports and notes prepared by the police criminologist, and respondent's expert had access to the swab and to the clothing.

[488 U.S. 56] If respondent is to prevail on federal constitutional grounds, then, it must be because of some constitutional duty over and above that imposed by cases such as Brady and Agurs. Our most recent decision in this area of the law, > California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), arose out of a drunk-driving prosecution in which the State had introduced test results indicating the concentration of alcohol in the blood of two motorists. The defendants sought to suppress the test results on the ground that the State had failed to preserve the breath samples used in the test. We rejected this argument for several reasons: first, "the officers here were acting in 'good faith and in accord with their normal practice,' " > id., at 488, 104 S.Ct., at 2533, quoting > Killian v. United States, 368 U.S. 231, 242, 82 S.Ct. 302, 308, 7 L.Ed.2d 256 (1961); second, in the light of the procedures actually used the chances that preserved samples would have exculpated the defendants were slim, > 467 U.S., at 489, 104 S.Ct., at 2534; and, third, even if the samples might have shown inaccuracy in the tests, the defendants had "alternative means of demonstrating their innocence." > Id., at 490, 104 S.Ct., at 2534. In the present case, the likelihood that the preserved materials would have enabled the defendant to exonerate himself appears to be greater than it was in Trombetta, but here, unlike in Trombetta, the State did not attempt to make any use of the materials in its own case in chief. > (FN*)

[488 U.S. 57]
Our decisions in related areas have stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government. In > United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), we said that "[n]o actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." > Id., at 325, 92 S.Ct., at 466; see also > United States v. Lovasco, 431 U.S. 783, 790, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977). Similarly, in United States v. Valenzuela-Bernal, supra, we considered whether the Government's deportation of two witnesses who were illegal aliens violated due process. We held that the prompt

deportation of the witnesses was justified "upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution." > Id., 458 U.S., at 872, 102 S.Ct., at 3449.

> [1] The Due Process Clause of the Fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process 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. Part of the reason for the difference in treatment is found in the observation made by the Court in > Trombetta, supra, 467 U.S., at 486, 104 S.Ct., at 2532, that "[w]henever potentially exculpatory[488 U.S. 58] evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause, see > Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold 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 of law.

> [2] In this case, the police collected the rectal swab and clothing on the night of the crime; respondent was not taken into custody until six weeks later. The failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent. None of this information was concealed from respondent at trial, and the evidence--such as it was--was made available to respondent's expert who declined to perform any tests on the samples. The Arizona Court of Appeals noted in its opinion--and we
agree--that there was no suggestion of bad faith on the part of the police. It follows, therefore, from what we have said, that there was no violation of the Due Process Clause.

> [3] The Arizona Court of Appeals also referred somewhat obliquely to the State's "inability to quantitatively test" certain semen samples with the newer P-30 test. > 153 Ariz., at 54, 734 P.2d, at 596. If the court meant by this statement [488 U.S. 59] that the Due Process Clause is violated when the police fail to use a particular investigatory tool, we strongly disagree. The situation here is no different than a prosecution for drunken driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests.

The judgment of the Arizona Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

Justice STEVENS, concurring in the judgment.

Three factors are of critical importance to my evaluation of this case. First, at the time the police failed to refrigerate the victim's clothing, and thus negligently lost potentially valuable evidence, they had at least as great an interest in preserving the evidence as did the person later accused of the crime. Indeed, at that time it was more likely that the evidence would have been useful to the police--who were still conducting an investigation--and to the prosecutor--who would later bear the burden of establishing guilt beyond a reasonable doubt--than to the defendant. In cases such as this, even without a prophylactic sanction such as dismissal of the indictment, the State has a strong incentive to preserve the evidence.

Second, although it is not possible to know whether the lost evidence would have revealed any relevant information, it is unlikely that the defendant was prejudiced by the State's omission. In examining witnesses and in her summation, defense counsel impressed upon the jury the fact that the State failed to preserve the evidence and that the State could have conducted tests that might well have exonerated the defendant. See App. to Pet. for Cert. C21-C38, C42-C45; 9 Tr. 183-202, 207-208; 10 Tr. 58-61, 69-70. More significantly, the trial judge instructed the jury: "If you find that the State has ... allowed to be destroyed or lost any evidence whose [488 U.S. 60] content or quality are in issue, you may infer that the true fact is against the State's interest." 10 Tr. 90. As a result, the uncertainty as to what the evidence might have proved was turned to the defendant's advantage.

Third, the fact that no juror chose to draw the permissive inference that proper preservation of the evidence would have demonstrated that the defendant was not the assailant suggests that the lost evidence was "immaterial." Our cases make clear that "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt," and that a State's failure to turn over (or preserve) potentially exculpatory evidence therefore "must be evaluated in the context of the entire record." > United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976) (footnotes omitted); see also > California v. Trombetta, 467 U.S. 479, 488, 104 S.Ct. 2528, 2533, 81 L.Ed.2d 413 (1984) (duty to preserve evidence "must be limited to evidence that might be expected to play a significant role in the suspect's defense"). In declining defense counsel's and the court's invitations to draw the permissive inference, the jurors in effect indicated that, in their view, the other evidence at trial was so overwhelming that it was highly improbable that the lost evidence was exculpatory. In Trombetta, this Court found no due process violation because "the chances [were] extremely low that preserved [breath] samples would have been exculpatory." > Id., at 489, 104 S.Ct., at 2534. In this case, the jury has already performed this calculus based on its understanding of the evidence introduced at trial. Presumably, in a case involving a closer question as to guilt or innocence, the jurors would have been more ready to infer that the lost evidence was exculpatory.

With these factors in mind, I concur in the Court's judgment. I do not, however, join the Court's opinion because it announces a proposition of law that is much broader than necessary to decide this case. It states 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 [488 U.S. 61] denial of due process of law." Ante, at 337. In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair. This, however, is not such a case. Accordingly, I concur in the judgment.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

The Constitution requires that criminal defendants be provided with a fair trial, not merely a "good faith" try at a fair trial. Respondent here, by what may have been nothing more than police ineptitude, was denied the opportunity to present a full defense. That ineptitude, however, deprived respondent of his guaranteed right to due process of law. In reversing the judgment of the Arizona Court of Appeals, this Court, in my view, misreads the import of its prior cases and unduly restricts the protections of the Due Process Clause. An understanding of due process demonstrates that the evidence which was allowed to deteriorate was "constitutionally material," and that its absence significantly prejudiced respondent. Accordingly, I dissent.

I

The Court, with minimal reference to our past cases and with what seems to me to be less than complete analysis, announces that "unless a criminal defendant can show bad faith on the part of police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Ante, at 337. This conclusion is claimed to be justified because it limits the extent of police responsibility "to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." Ibid. The majority has identified clearly one type of violation, for police action affirmatively [488 U.S. 62]

aimed at cheating the process undoubtedly violates the Constitution. But to suggest that this is the only way in which the Due Process Clause can be violated cannot be correct. Regardless of intent or lack thereof, police action that results in a defendant's receiving an unfair trial constitutes a deprivation of due process.

The Court's most recent pronouncement in "what might loosely be called the area of constitutionally guaranteed access to evidence," > United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982), is in > California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Trombetta addressed "the question whether the Fourteenth Amendment ... demands that the State preserve potentially exculpatory evidence on behalf of defendants." > Id., at 481, 104 S.Ct., at 2530. Justice MARSHALL, writing for the Court, noted that while the particular question was one of first impression, the general standards to be applied had been developed in a number of cases, including > Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and > United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). > (FN1) Those [488 U.S. 63] cases in no way require that government actions that deny a defendant access to material evidence be taken in bad faith in order to violate due process.

As noted by the majority, ante, at 336, the Court in Brady ruled that "the suppression by the prosecution 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." > 373 U.S., at 87, 83 S.Ct., at 1196. The Brady Court went on to explain that the principle underlying earlier cases, e.g., > Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935) (violation of due process when prosecutor presented perjured testimony), is "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." > 373 U.S., at 87, 83 S.Ct., at 1196. The failure to turn over material evidence "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile.' " > Id., at 88, 83 S.Ct., at 1197 (quoting lower court opinion).

In Trombetta, the Court also relied on > United States v. Agurs, 427 U.S., at 107, 96 S.Ct., at 2399, which required a prosecutor to turn over to the defense evidence that was "clearly supportive of a claim of innocence" even without a defense request. The Court noted that the prosecutor's duty was not one of constitutional dimension unless the evidence was such that its "omission deprived the defendant of a fair trial," > id., at 108, 96 S.Ct., at 2399, and explained:

"Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it.... If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not [488 U.S. 64] the character of the prosecutor." > Id., at 110, 96 S.Ct., at 2400 (footnote omitted). > (FN2)

Agurs thus made plain that the prosecutor's state of mind is not determinative. Rather, the proper standard must focus on the materiality of the evidence, and that standard "must reflect our overriding concern with the justice of the finding of guilt." > Id., at 112, 96 S.Ct., at 2401. > (FN3)

Brady and Agurs could not be more clear in their holdings that a prosecutor's bad faith in interfering with a defendant's access to material evidence is not an essential part of a due process violation. Nor did Trombetta create such a requirement. Trombetta 's initial discussion focused on the due process requirement "that criminal defendants be afforded a meaningful opportunity to present a complete defense," > 467 U.S., at 485, 104 S.Ct., at 2532, and then noted that the delivery of exculpatory evidence to the defendant "protect[s] the innocent from erroneous[488 U.S. 65] conviction and ensur [es] the integrity of our criminal justice system." Ibid. Although the language of Trombetta includes a quotation in which the words "in good faith" appear, those words, for two reasons, do not have the significance claimed for them by the majority. First, the words are the antecedent part of the fuller phrase "in good faith and in accord with their normal practice." > Id., at 488, 104 S.Ct., at 2533. That phrase has its source in > Killian v. United States, 368 U.S. 231, 242, 82 S.Ct. 302, 308, 7 L.Ed.2d 256 (1961), where the Court held that the

practice of discarding investigators' notes, used to compile reports that were then received in evidence, did not violate due process. > (FN4) In both Killian and Trombetta, the importance of police compliance with usual procedures was manifest. Here, however, the same standard of conduct cannot be claimed. There has been no suggestion that it was the usual procedure to ignore the possible deterioration of important evidence, or generally to treat material evidence in a negligent or reckless manner. Nor can the failure to refrigerate the clothing be squared with the careful steps taken to preserve the sexual-assault kit. The negligent or reckless failure to preserve important evidence just cannot be "in accord with ... normal practice."

Second, and more importantly, Trombetta demonstrates that the absence of bad faith does not end the analysis. The determination in Trombetta that the prosecution acted in good faith and according to normal practice merely prefaced the primary inquiry, which centers on the "constitutional materiality" of the evidence itself. > 467 U.S., at 489, 104 S.Ct., at 2534. There is [488 U.S. 66] nothing in Trombetta that intimates that good faith alone should be the measure. > (FN5)

The cases in this area clearly establish that police actions taken in bad faith are not the only species of police conduct that can result in a violation of due process. As Agurs points out, it makes no sense to overturn a conviction because a malicious prosecutor withholds information that he mistakenly believes to be material, but
which actually would have been of no help to the defense. > 427 U.S., at 110, 96 S.Ct., 2400. In the same way, it makes no sense to ignore the fact that a defendant has been denied a fair trial because the State allowed evidence that was material to the defense to deteriorate beyond the point of usefulness, simply because the police were inept rather than malicious.

I also doubt that the "bad faith" standard creates the bright-line rule sought by the majority. Apart from the inherent difficulty a defendant would have in obtaining evidence to show a lack of good faith, the line between "good faith" and "bad faith" is anything but bright, and the majority's formulation may well create more questions than it answers. What constitutes bad faith for these purposes? Does a defendant have to show actual malice, or would recklessness, or the deliberate failure to establish standards for maintaining and preserving evidence, be sufficient? Does "good faith police work" require a certain minimum of diligence, or will a lazy officer, who does not walk the few extra steps to the evidence refrigerator, be considered to be acting in good faith? While the majority leaves these questions for [488 U.S. 67] another day, its quick embrace of a "bad faith" standard has not brightened the line; it only has moved the line so as to provide fewer protections for criminal defendants.

II

The inquiry the majority eliminates in setting up its "bad faith" rule is whether the evidence in question here was "constitutionally material," so that its destruction violates due process. The majority does not say whether "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," ante, at 337, is, for purposes of due process, material. But because I do not find the question of lack of bad faith dispositive, I now consider whether this evidence was such that its destruction rendered respondent's trial fundamentally unfair.

Trombetta requires that a court determine whether the evidence possesses "an exculpatory value that was apparent before the evidence was destroyed," and whether it was "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." > 467 U.S., at 489, 104 S.Ct., at 2534. In Trombetta neither requirement was met. But it is important to note that the facts of Trombetta differed significantly from those of this case. As such, while the basic standards set by Trombetta are controlling, the inquiry here must be more finely tuned.

In Trombetta, samples of breath taken from suspected drunk drivers had been discarded after police had tested them using an Intoxilyzer, a highly accurate and reliable device for measuring blood-alcohol concentration levels. > Id., at 481-482, 104 S.Ct., at 2530. The Court reasoned that the likelihood of the posttest samples proving to be exculpatory was extremely low, and further observed that the

defendants were able to attack the reliability of the test results by presenting evidence of the ways in which the Intoxilyzer might have malfunctioned. This case differs from Trombetta in that here no [488 U.S. 68] conclusive tests were performed on the relevant evidence. There is a distinct possibility in this case, one not present in Trombetta, that a proper test would have exonerated respondent, unrebutted by any other conclusive test results. As a consequence, although the discarded evidence in Trombetta had impeachment value (i.e., it might have shown that the test results were incorrect), here what was lost to the respondent was the possibility of complete exoneration. Trombetta 's specific analysis, therefore, is not directly controlling.

The exculpatory value of the clothing in this case cannot be determined with any certainty, precisely because the police allowed the samples to deteriorate. But we do know several important things about the
evidence. First, the semen samples on the clothing undoubtedly came from the assailant. Second, the samples could have been tested, using technology available and in use at the local police department, to show either the blood type of the assailant, or that the assailant was a nonsecreter, i.e., someone who does not secrete a blood-type "marker" into other body fluids, such as semen. Third, the evidence was clearly important. A semen sample in a rape case where identity is questioned is always significant. See > Hilliard v. Spalding, 719 F.2d 1443, 1446-1447 (CA9 1983); > People v. Nation, 26 Cal.3d 169, 176-177, 161 Cal.Rptr. 299, 302-304, 604 P.2d 1051, 1054-1055 (1980). Fourth, a reasonable police officer should have recognized that the clothing required refrigeration. Fifth, we know that an inconclusive test was done on the swab. The test suggested that the assailant was a nonsecreter, although it was equally likely that the sample on the swab was too small for accurate results to be obtained. And, sixth, we know that respondent is a secreter.

If the samples on the clothing had been tested, and the results had shown either the blood type of the assailant or that the assailant was a nonsecreter, its constitutional materiality would be clear. But the State's conduct has deprived the defendant, and the courts, of the opportunity to determine with certainty the import of this evidence: it has "interfere[d] with [488 U.S. 69] the accused's ability to present a defense by imposing on him a requirement which the government's own actions have rendered impossible to fulfill." > Hilliard v. Spalding, 719 F.2d, at 1446. Good faith or not, this is intolerable, unless the particular circumstances of the case indicate either that the evidence was not likely to prove exculpatory, or that the defendant was able to use effective alternative means to prove the point the destroyed evidence otherwise could have made.

I recognize the difficulties presented by such a situation. > (FN6) The societal interest in seeing criminals punished rightly requires that indictments be dismissed only when the unavailability of the evidence prevents the defendant from receiving a fair trial. In a situation where the substance of the lost evidence is known, the materiality analysis laid out in Trombetta is adequate. But in a situation like the present one, due process requires something more. Rather than allow a State's ineptitude to saddle a defendant with an impossible burden, a court should focus on the type of evidence, the possibility it might prove exculpatory, and the existence of other evidence going to the same point of contention in determining whether the failure to preserve the evidence in question violated due process. To put it succinctly, where no comparable evidence is likely to be available to the defendant, police must preserve physical evidence of a type that they reasonably should know has the potential, if tested, to reveal immutable characteristics of the criminal, and hence to exculpate a defendant charged with the crime.

[488 U.S. 70] The first inquiry under this standard concerns the particular evidence itself. It must be of a type which is clearly relevant, a requirement satisfied, in a case where identity is at issue, by physical evidence which has come from the assailant. Samples of blood and other body fluids, fingerprints, and hair and tissue samples have been used to implicate guilty defendants, and to exonerate innocent suspects. This is not to say that all physical evidence of this type must be preserved. For example, in a case where a blood sample is found, but the circumstances make it unclear
whether the sample came from the assailant, the dictates of due process might not compel preservation (although principles of sound investigation might certainly do so). But in a case where there is no doubt that the sample came from the assailant, the presumption must be that it be preserved.

A corollary, particularly applicable to this case, is that the evidence embody some immutable characteristic of the assailant which can be determined by available testing methods. So, for example, a clear fingerprint can be compared to the defendant's fingerprints to yield a conclusive result; a blood sample, or a sample of body fluid which contains blood markers, can either completely exonerate or strongly implicate a defendant. As technology develops, the potential for this type of evidence to provide conclusive results on any number of questions will increase. Current genetic testing measures, frequently used in civil paternity suits, are extraordinarily precise. See > Clark v. Jeter, 486 U.S. 456, 465, 108 S.Ct. 1910, 1916, 100 L.Ed.2d 465 (1988). The importance of these types of evidence is indisputable, and requiring police to recognize their importance is not unreasonable.

The next inquiry is whether the evidence, which was obviously relevant and indicates an immutable characteristic of the actual assailant, is of a type likely to be independently exculpatory. Requiring the defendant to prove that the particular piece of evidence probably would be independently exculpatory[488 U.S. 71] would require the defendant to prove the content of something he does not have because of the State's misconduct. Focusing on thetype of evidence solves this problem. A court will be able to consider the type of evidence and the available technology, as well as the circumstances of the case, to determine the likelihood that the evidence might have proved to be exculpatory. The evidence must also be without equivalent in the particular case. It must not be cumulative or collateral, cf. > United States v. Agurs, 427 U.S., at 113-114, 96 S.Ct., at 2402-2403, and must bear directly on the question of innocence or guilt.

Due process must also take into account the burdens that the preservation of evidence places on the police. Law enforcement officers must be provided the option, as is implicit in Trombetta, of performing the proper tests on physical evidence and then discarding it. > (FN7) Once a suspect has been arrested the police, after a reasonable time, may inform defense counsel of plans to discard the evidence. When the defense has been informed of the existence of the evidence, after a reasonable time the burden of preservation may shift to the defense. There should also be flexibility to deal with evidence that is unusually dangerous or difficult to store.

III

Applying this standard to the facts of this case, I conclude that the Arizona Court of Appeals was correct in overturning respondent's conviction. The clothing worn by the victim contained samples of his assailant's semen. The appeals court found that these samples would probably be larger, less contaminated, and more likely to yield conclusive test results than would the samples collected by use of the assault kit. > 153 Ariz. 50, 54, 734 P.2d 592, 596 (1986). The clothing[488 U.S. 72] and the semen stains on the clothing therefore obviously were material.

Because semen is a body fluid which could have been tested by available methods to show an immutable characteristic of the assailant, there was a genuine possibility that the results of such testing might have exonerated respondent. The only evidence implicating respondent was the testimony of the victim. > (FN8) There was no other eyewitness, and the only other significant physical evidence, respondent's car, was seized by police, examined, turned over to a wrecking company, and then dismantled without the victim's having viewed it. The police also failed to check the car to confirm or refute elements of the victim's testimony. > (FN9)

[488 U.S. 73] Although a closer question, there was no equivalent evidence available to respondent. The swab contained a semen sample, but it was not sufficient to allow proper testing. Respondent had access to other evidence tending to show that he was not the assailant, but there was no other evidence that would have shown that it was physically impossible for respondent to have been the assailant. Nor would the preservation of the evidence here have been a burden upon the police. There obviously was refrigeration available, as the preservation of the swab indicates, and the items of clothing likely would not tax available storage space.

Considered in the context of the entire trial, the failure of the prosecution to preserve this evidence deprived respondent of a fair trial. It still remains "a fundamental value determination of our society that it

is far worse to convict an innocent man than to let a guilty man go free." > In re Winship, 397 U.S. 358, 372, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (concurring opinion). The evidence in this case was far from conclusive, and the possibility that the evidence denied to respondent would have exonerated him was not remote. The result is that he was denied a fair trial by the actions of the State, and consequently was denied due process of law. Because the Court's opinion improperly limits the scope of due process, and ignores its proper focus in a futile pursuit of a bright-line rule, > (FN10) I dissent.

For U.S. Supreme Court Briefs See:

1986 WL 727352 (Pet.Brief), Brief for Petitioners, (October 1, 1986)

1988 WL 1025800 (Resp.Brief), Brief for Respondent, (May 25, 1988)

Briefs and Other Related Documents

> (FN*) The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See > United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

> (FN*) In this case, the Arizona Court of Appeals relied on its earlier decision in > State v. Escalante, 153 Ariz. 55, 734 P.2d 597 (1986), holding that " 'when identity is an issue at trial and the police permit destruction of evidence that could eliminate a defendant as the perpetrator, such loss is material to the defense and is a denial of due process.' " > 153 Ariz. 50, 54, 734 P.2d 592, 596 (1986), quoting > Escalante, supra, at 61, 734 P.2d, at 603 (emphasis added). The reasoning in Escalante and the instant case mark a sharp departure from Trombetta in two respects. First, Trombetta speaks of evidence whose exculpatory value is "apparent." > 467 U.S., at 489, 104 S.Ct., at 2534. The possibility that the semen samples could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality in Trombetta. Second, we made clear in Trombetta that the exculpatory value of the evidence must be apparent "before the evidence was destroyed." Ibid. (emphasis added). Here, respondent has not shown that the police knew the semen samples would have exculpated him when they failed to perform certain tests or to refrigerate the boy's clothing; this evidence was simply an avenue of investigation that might have led in any number of directions. The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. Cf. > Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959).

> (FN1.) The Court's discussion in Trombetta also noted other cases: In > Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1117 (1959), the prosecution failed to inform the defense and the trial court that one of its witnesses had testified falsely that he had not been promised favorable treatment in return for testifying. The Court noted that a conviction obtained by the knowing use of such testimony must fall, and suggested that the conviction is invalid even when the perjured testimony is " 'not the result of guile or a desire to prejudice ... for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.' " > Id., at 270, 79 S.Ct., at 1177, quoting > People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 886-888, 136 N.E.2d 853, 854-855 (1956). In > Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Court required a federal prosecutor to reveal a promise of nonprosecution if a witness testified, holding that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." > Id., at 154, 92 S.Ct., at 766. The good faith of the prosecutor thus was irrelevant for purposes of due process. And in > Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), the Court held that in some cases the Government must disclose to the defense the identity of a confidential informant. There was no discussion of any requirement of bad faith.

> (FN2.) The Agurs Court went on to note that the standard to be applied in considering the harm suffered by the defendant was different from the standard applied when new evidence is discovered by a neutral source after trial. The prosecutor is "the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' " > 427 U.S., at 111, 96 S.Ct., at 2401, quoting > Berger v. United States, 295

U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). Holding the prosecution to a higher standard is necessary, lest the "special significance to the prosecutor's obligation to serve the cause of justice" be lost. > 427 U.S., at 111, 96 S.Ct., at 2401.

> (FN3.) Nor does > United States v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982), provide support for the majority's "bad faith" requirement. In that case a defendant was deprived of certain testimony at his trial when the Government deported potential witnesses after determining that they possessed no material evidence relevant to the criminal trial. These deportations were not the result of malice or negligence, but were carried out pursuant to immigration policy. > Id., at 863-866, 102 S.Ct., at 3444-3446. Consideration of the Government's motive was only the first step in the due process inquiry. Because the Government acted in good faith, the defendant was required to make "a plausible showing" that "the evidence lost would be both material and favorable to the defense." > Id., at 873, 102 S.Ct., at 3449. In Valenzuela-Bernal, the defendant was not able to meet that burden. Under the majority's "bad faith" test, the defendant would have no opportunity to try.

> (FN4.) In Killian, the notes in question related to witnesses' statements, were used to prepare receipts which the witnesses then signed, and were destroyed in accord with usual practice. > 368 U.S., at 242, 82 S.Ct., at 308. Had it not been the usual practice of the agents to destroy their notes, or if no reports had been prepared from those notes before they were destroyed, a different question, closer to the one the Court decides today, would have been presented.

> (FN5.) The cases relied upon by the majority for the proposition that bad faith is necessary to show a due process violation, > United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), and > United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), concerned claims that preindictment delay violated due process. The harm caused by such delay is certainly more speculative than that caused by the deprivation of material exculpatory evidence, and in such cases statutes of limitations, not the Due Process Clause, provide the primary protection for defendants' interests. Those cases are a shaky foundation for the radical step taken by the Court today.

> (FN6.) We noted in > California v. Trombetta, 467 U.S. 479, 486, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984): "The absence of doctrinal development in this area reflects, in part, the difficulty of developing rules to deal with evidence destroyed through prosecutorial neglect or oversight. Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." While the inquiry is a difficult one, I do not read Trombetta to say, nor do I believe, that it is impossible. Respect for constitutional rights demands that the inquiry be made.

> (FN7.) There is no need in this case to discuss whether the police have a duty to test evidence, or whether due process requires that police testing be on the "cutting edge" of technology. But uncertainty as to these questions only highlights the importance of preserving evidence, so that the defense has the opportunity at least to use whatever scientifically recognized tests are available. That is all that is at issue in this case.

> (FN8.) This Court "has recognized the inherently suspect qualities of eyewitness identification evidence." > Watkins v. Sowders, 449 U.S. 341, 350, 101 S.Ct. 654, 659, 66 L.Ed.2d 549 (1981) (BRENNAN, J., dissenting). Such evidence is "notoriously unreliable," ibid.; see > United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149 (1967); > Manson v. Brathwaite, 432 U.S. 98, 111-112, 97 S.Ct. 2243, 2251-2252, 53 L.Ed.2d 140 (1977), and has distinct impacts on juries. "All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!' " E. Loftus, Eyewitness Testimony 19 (1979).

Studies show that children are more likely to make mistaken identifications than are adults, especially when they have been encouraged by adults. See generally Cohen & Harnick, The Susceptibility of Child Witnesses to Suggestion, 4 Law and Human Behavior 201 (1980). Other studies show another element of possible relevance in this case: "Cross-racial identifications are much less likely to be accurate than same

race identifications." Rahaim & Brodsky, Empirical Evidence versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy, 7 Law and Psych. Rev. 1, 2 (1982). These authorities suggest that eyewitness testimony alone, in the absence of corroboration, is to be viewed with some suspicion.

> (FN9.) The victim testified that the car had a loud muffler, that country music was playing on its radio, and that the car was started using a key. Respondent and others testified that his car was inoperative on the night of the incident, that when it was working it ran quietly, that the radio did not work, and that the car could be started only by using a screwdriver. The police did not check any of this before disposing of the car. See > 153 Ariz. 50, 51-52, 734 P.2d 592, 593-594 (App.1986).

- (FN10.) Even under the standard articulated by the majority the proper resolution of this case should be a remand to consider whether the police did act in good faith. The Arizona Court of Appeals did not state in its opinion that there was no bad faith on the part of the police. Rather, it held that the proper standard to be applied was a consideration of whether the failure to preserve the evidence deprived respondent of a fair trial, and that, as a result, its holding did "not imply any bad faith on the part of the state." Id., at 54, > 734 P.2d, at 596. But there certainly is a sufficient basis on this record for a finding that the police acted in bad faith. The destruction of respondent's car by the police (which in itself may serve on remand as an alternative ground for finding a constitutional violation, see > id., at 55, 734 P.2d, at 597 (question left open)) certainly suggests that the police may have conducted their investigation with an improper animus. Although the majority provides no guidance as to how a lack of good faith is to be determined, or just how egregious police action must be, the police actions in this case raise a colorable claim of bad faith. If the Arizona courts on remand should determine that the failure to refrigerate the clothing was part of an overall investigation marred by bad faith, then, even under the majority's test, the conviction should be overturned.

> 547 S.E.2d 656

249 Ga.App. 168, 1 FCDR 1378

Court of Appeals of Georgia.

GOBER
v.
The STATE.

No. A00A2482.
March 30, 2001.

Reconsideration Denied April 12, 2001.

Certiorari Granted October 2, 2001.

> (FN7.) In > Gober, officers conducted an undercover "reverse sting" drug sale using methamphetamine that their police department had previously seized in unrelated drug arrests. > 249 Ga.App. at 169, 547 S.E.2d 656. The defendant argued that the officers failed to keep adequate records about the source of the

methamphetamine, so it should have been destroyed instead of being used for police sting operations. > Id. According to the defendant, the officers' "misconduct" violated his due process rights. > Id. This Court rejected the argument, holding that

[t]o violate due process, the State's misconduct must be so extreme that it caused demonstrable prejudice to the defendant's recognized constitutional or statutory rights or was so outrageous that it was fundamentally unfair and shocking to the universal sense of justice mandated by constitution or statute so as to deprive the defendant of a fair trial as a matter of law. Absent demonstrable prejudice, a finding that such misconduct was so outrageous as to demand dismissal of the indictment would occur only in the rarest of cases.

(Punctuation and footnotes omitted.) > Id. at 171(2), 547 S.E.2d 656. Applying this standard, this Court found that the officers' failure to keep accurate records on the drugs was not so outrageous as to require reversal of his conviction. > Id.

> [3] 2. This brings us to the overriding question--whether the police use of the methamphetamine here in a commonly conducted reverse sting operation constitutes police misconduct so outrageous that due process was violated requiring this conviction (and countless others) to be reversed. We hold it does not.

> [4]> [5] To violate due process, the State's misconduct must be so extreme that it caused demonstrable prejudice to the defendant's recognized constitutional or statutory rights or was so outrageous that it was fundamentally unfair and shocking to the universal sense of justice mandated by constitution or statute so as to deprive the defendant of a fair trial as a matter of law. > (FN6) "Absent demonstrable prejudice, a finding that such misconduct was so outrageous as to demand dismissal of the indictment[ ] would occur only in the rarest of cases." > (FN7)

One such example of misconduct would be forcing the defendant at gunpoint to set up and operate an illegal drug lab, which obviously would prejudice the defendant. > (FN8) An example of what does not constitute outrageous conduct is trespassing on defendant's land that is posted "No Trespassing" and finding illegal drugs in an open field, which drugs are used in convicting the defendant. > (FN9) A second example is repeated efforts by an informant, acting at the behest of investigating officers, to encourage a corrupt officer to arrest a drug dealer so that the corrupt officer would illegally compensate the informant with confiscated funds. > (FN10) A third example is a reverse sting operation involving the sale of illegal drugs by police officers. > (FN11) Such do not constitute a violation of due process.

Recall that > Rochin v. California > (FN13) was cited by the > United States v. Russell > (FN14) court as authority for the proposition that the conduct of law enforcement agents can be so outrageous that due process would absolutely bar a prosecution. In > Rochin, police made a warrantless entry into a home and forced their way into Rochin's bedroom. Rochin immediately swallowed two capsules from a nightstand, whereupon he was handcuffed, taken to a hospital, force-fed an emetic, and intubated to have his stomach pumped. The two morphine tablets he vomited formed the basis of his conviction for possession of narcotics.

> [5] Criminal Law K> 36.6

110 ----
110II Defenses in General
110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith
> 110k36.6 In General.

Absent demonstrable prejudice, a finding of police misconduct so outrageous as to demand dismissal of an indictment, would occur only in the rarest of cases.

> 609 S.E.2d 193

271 Ga.App. 259, 5 FCDR 192

Court of Appeals of Georgia.

PASUER
v.
The STATE.

No. A04A2207.
Jan. 7, 2005.

Pasuer claims the trial court erred in admitting the audiotape of the controlled buy because portions of the tape were inaudible, these "gaps" contained evidence that was favorable to his defense, and this favorable evidence could not be corroborated because the informants gave conflicting testimony about what occurred during the controlled buy. For the following reasons, we disagree.

> [3]> [4]> [5]> [6]> [7] (a) As long as the State presents a proper foundation for an audiotape, a trial court has the discretion to admit it, even if part of it is inaudible. > Guess v. State, 264 Ga. 335, 336(2), 443 S.E.2d 477 (1994). Further, if the parties who were present when the audiotape was made testify about the statements or transaction recorded, the tape may be admitted as corroboration of the witnesses' testimony, even if it is partially inaudible. > Kelley v. State, 168 Ga.App. 911, 913(3), 311 S.E.2d 180 (1983). In fact, a trial court is not required to exclude an otherwise admissible audiotape containing inaudible material unless the tape is the only evidence offered to prove a material fact. > Pierce v. State, 255 Ga.App. 194, 195(1), 564 S.E.2d 790 (2002); > Kelley v. State, 168 Ga.App. at 913(3), 311 S.E.2d 180. Once the trial court exercises its discretion and admits an audiotape, "in the absence of a showing of tampering, alteration, or other major deficiency attacking the basic integrity of the recordings, the fact that portions of the [audiotape] are inaudible goes to weight and not admissibility." > Guerra v. State, 210 Ga.App. 102, 105(3)(b), 435 S.E.2d 476 (1993).

In this case, the officer who operated the tape recorder testified that he knew how to operate the surveillance equipment and made sure it was in good working order before the controlled buy. He listened to the direct transmission of the controlled buy while watching the Pasuers' house. The officer also testified that he had reviewed the audiotape, that the tape had not been altered in any way, and that he recognized the voices of the informants and Mrs. Pasuer on the tape. According to the officer, the audiotape was much clearer than the direct transmission had been but was consistent with what he had heard during the controlled buy. Further, both of the informants testified extensively about the controlled buy. They also testified that they had listened to the audiotape and, even though some of the recording was difficult to understand, it fairly and accurately represented what had happened during the transaction.

> [8] [271 Ga.App. 263] We find that, because the audiotape was not the only evidence of what occurred during the controlled buy, the trial court was not required to exclude it simply because it was partially inaudible. > Pierce v. State, 255 Ga.App. at 195(1), 564 S.E.2d 790; > Kelley v. State, 168 Ga.App. at 913(3), 311 S.E.2d 180 (audiotapes which corroborated the testimony of an agent who was present during the taped conversation were admissible even though the tapes lacked "clarity"). Further, we find that, under the circumstances, the trial court did not abuse its discretion in admitting the audiotape and

that, once admitted, its weight was for the jury to determine. > Guerra v. State, 210 Ga.App. at 105(3)(b), 435 S.E.2d 476; see > Gambrel v. State, 260 Ga. 197, 200(2), 391 S.E.2d 406 (1990) (investigator's testimony that he had listened to a transaction while it was being recorded, that he had reviewed the tape recording, and that the tape was a complete recording of the transaction established an adequate foundation for admission of the tape).

> [9] (b) Pasuer claims, however, that the audiotape should not have been admitted because, during an inaudible "gap" in the audiotape of the controlled buy, the informants used cocaine in violation of their agreement with the officers. The transcript shows that the informants gave directly conflicting testimony at trial about whether this drug use actually occurred. From this evidence, the jury could either infer that the drug use
occurred during an inaudible portion of the tape or that the tape did not record the incident because it never happened. Resolution of this conflict was clearly an issue for the jury. > Jackson v. State, 252 Ga.App. 268, 269(1), 555 S.E.2d 908 (2001) (it is the jury's role to resolve conflicts in the evidence and judge the credibility of witnesses). This argument provides no basis for excluding the audiotape.

(c) Pasuer also argues that under > Pierce v. State, 255 Ga.App. at 195(1), 564 S.E.2d 790, a partially inaudible audiotape is admissible only if the State proves that the inaudible portion did not contain evidence favorable to the defense, but > Pierce does not stand for that proposition. In > Pierce, this Court found that the audiotape at issue was admissible even though some of it was "garbled and indecipherable," then simply noted that the defendant had not claimed that the garbled portion contained any evidence that was favorable to his defense. > Id. at 195, 564 S.E.2d 790. Because the issue of whether the tape would still be admissible if the defendant had made such a claim was not before this Court, we did not reach the issue. > (FN6) Accordingly, Pasuer's reliance on > Pierce is [271 Ga.App. 264] misplaced, and he has failed to support his argument that a trial court must exclude an otherwise admissible audiotape if the State is unable to disprove a defendant's claim that an inaudible portion might contain favorable evidence.

3. Pasuer contends the trial court erred in refusing to give his requested jury instruction on gross police misconduct. The proposed charge read as follows: "When the police or those acting on their behalf conduct themselves in such a manner that is fundamentally unfair and shocking to the universal sense of justice mandated by the Constitution causing demonstrable prejudice to the Defendant the Defendant may be acquitted of the charge." See > Gober v. State, 249 Ga.App. 168, 171(2), 547 S.E.2d 656 (2001). > (FN7) The trial court denied the request to charge after finding that Pasuer's allegations of police misconduct did not rise to the level of a due process violation. On appeal, Pasuer argues the following actions justified the charge.

> 587 S.E.2d 177

263 Ga.App. 32, 3 FCDR 2673

Court of Appeals of Georgia.

MORGAN
v.
The STATE.

No. A03A1895.
Sept. 2, 2003.

2. Morgan contends that he was denied a fair trial because the State improperly withheld a post-arrest videotaped interview of Jackson in violation of his due process rights set forth in > Brady.

The record shows that, after their arrests, both Jackson and Morgan were briefly interviewed by police, and the interviews were videotaped. The tapes of these interviews were then placed in a box along with other evidence in the case; however, the officer handling the evidence failed to note the existence of these videotapes on the evidence sheet. The State, as a result, only became aware of these tapes after the boxes were opened during trial, and the prosecutor, who was unaware of the significance of the tapes, failed to notify the defendants about them. It is undisputed that the State acted without wilful misconduct with regard to the interviews.

> [5] Morgan now contends that the State's failure to produce Jackson's[263 Ga.App. 34] videotaped interview violated his due process rights. In order to establish a due process violation due to the State's failure to provide exculpatory material under > Brady, Morgan must show that:

(1) the State possessed evidence favorable to the defense; (2) the defense did not possess the evidence and could not obtain it with reasonable diligence; (3) the prosecution suppressed the favorable evidence; (4) the defense was denied access to such evidence during trial; (5) the disclosure would have benefitted the defense by providing evidence for the defense or impeaching prior inconsistent statements; and (6) the denial deprived the defendant of a fair trial, i.e., a reasonable probability that the outcome of the proceedings would
have been different had disclosure been made.

> Riley v. State. > (FN6) Morgan has failed to carry his burden of showing a > Brady violation under this standard.

> [6] Even if we assume that Morgan has satisfied the first five prerequisites listed above, he has not shown on appeal that the improper suppression of Jackson's videotape denied him a fair trial. Morgan argues obtusely in his brief that Jackson's interview was inconsistent with his trial testimony, without stating a single inconsistency or supporting any such inconsistency with a citation to the record. This Court has repeatedly held that it is not the function of this Court to cull the record on behalf of a party. See > Court of Appeals Rule 27(c). For this reason alone, Morgan has failed to satisfy his burden on appeal.

Moreover, we have reviewed both Jackson's trial testimony and the testimony from his videotaped interview, and we have found no evidence which would have likely resulted in a different outcome at trial. With regard to the ownership of the marijuana, Jackson gave similar testimony both in his interview and at trial. In both cases, Jackson denied ownership of the marijuana; however, he stated that the car belonged to him and he would have to take responsibility for his car and its contents. Therefore, at all times, contrary to Morgan's contentions, Jackson denied ownership of the marijuana. Accordingly, his due process claims on appeal lack merit.

> [3] Criminal Law K> 419(12)

110 ----
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
> 110k419(12) Written Statements.

Defense counsel's affidavit reported what another person purportedly said he understood the trial judge to believe and, thus, was inadmissible hearsay, where counsel stated he received a call from the trial court's case manager, who informed him that it was the position of the court that the detective's case file was not required to be reviewed in camera for exculpatory material, as it was required to do on remand.

> [4] Criminal Law K> 700(2.1)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
110k700(2) Disclosure or Suppression of Information
> 110k700(2.1) In General.

A Brady motion imposes an affirmative duty upon the prosecution to produce anything that is exculpatory or useful for impeachment

> [5] Criminal Law K> 700(2.1)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
110k700(2) Disclosure or Suppression of Information
> 110k700(2.1) In General.

Fundamental to any error based upon a violation of Brady, an appellant must prove that: (1) the State possessed evidence favorable to the defense; (2) the defense did not possess the evidence and could not obtain it with reasonable diligence; (3) the prosecution suppressed the favorable evidence; (4) the defense was denied access to such evidence during trial; (5) the disclosure would have benefitted the defense by providing evidence for the defense or impeaching prior inconsistent statements; and (6) the denial deprived the defendant of a fair trial, i.e., a reasonable probability that the outcome of the proceedings would have been different had disclosure been made.

> 561 S.E.2d 414

275 Ga. 70, 2 FCDR 894

Supreme Court of Georgia.

BRANNAN
v.
The STATE.

No. S01P1789.
March 25, 2002.

Reconsideration Denied April 10, 2002.

> [4] Criminal Law K> 700(9)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney

> 110k700(9) Loss or Destruction of Evidence.

The loss of evidence, relating to State's release of defendant's pickup truck to lienholder, and the repair of bullet holes in the truck and resale of the truck, before defendant could inspect it, was not material to the prosecution for malice murder, as element for a due process violation for prosecutorial misconduct in failing to preserve evidence; two crime scene experts testified that an examination of the five bullet holes in the truck could not reveal who fired first, the distance the victim had been from the truck, or whether the victim had been advancing or retreating, and one of the experts testified that it would be impossible to put the truck back in the exact position it had been in during the shooting in order to determine accurate bullet trajectories. > U.S.C.A. Const.Amend. 14.

> [5] Criminal Law K> 700(9)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
> 110k700(9) Loss or Destruction of Evidence.

In dealing with the failure of the State to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence.

> [6] Criminal Law K> 700(9)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
> 110k700(9) Loss or Destruction of Evidence.

For evidence that the State failed to preserve to be "material," the evidence must have had an apparent exculpatory value before it was lost and be of such a nature that the defendant cannot obtain comparable evidence by other reasonable means.

> [3]> [4] (c) Motion to Dismiss the Case or Exclude Evidence due to Prosecutorial Misconduct. After Brannan's arrest, the police impounded his white pickup truck and photographed the bullet holes in it. A private towing company under contract with the police then towed the truck to the company's parking lot. On May 8, 1998, Brannan filed a motion to preserve, inspect, and examine all physical evidence. In November 1998, when defense counsel asked the prosecutor about inspecting the truck, both attorneys learned for the first time that the towing company had released the truck to the lienholder, a large national bank, on May 1, 1998. The truck had been repaired and resold. Brannan filed a motion requesting dismissal of the
indictment due to prosecutorial misconduct or, in the alternative, an order prohibiting the State from presenting any evidence or argument [275 Ga. 74] about the truck. Brannan claimed that the failure to preserve the truck prevented his expert from determining bullet trajectories and extrapolating from the trajectories the actions of the deputy during the shooting.

> [5]> [6] "In dealing with the failure of the state to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence." > Walker v. State, 264 Ga. 676(3), 449 S.E.2d 845 (1994). See also > Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). To be material, the evidence must have had an apparent exculpatory value before it was lost, and be of such a nature that the defendant cannot obtain comparable evidence by other reasonable means. > Walker v. State, supra. The trial court held a hearing and both sides presented evidence. On the issue of bad faith, the evidence showed that the lienholder, seeking release of the truck, had phoned the DA's office, defense

counsel, the GBI, and the sheriff's office. Through a series of misunderstandings, the truck was released. The key misunderstanding occurred when the GBI contacted the assistant district attorney about the need for the truck. The prosecutor stated that he did not need to look at the truck, and the GBI agent interpreted this to mean that the truck could be released. Six months later, both the prosecutor and defense counsel were surprised to learn that the bank had repossessed the truck. On the issue of materiality, two crime scene experts testified that an examination of the five bullet holes in the truck could not reveal who fired first, the distance the deputy was from the truck, or whether the deputy was advancing or retreating. Furthermore, one of the experts testified that it would be impossible to put the truck back in the exact position it was in during the shooting in order to determine accurate bullet trajectories. The trial court found no due process violation in the release of the truck, due to a lack of bad faith on the part of the State and a lack of exculpatory value in the truck. See > Arizona v. Youngblood, supra; > Walker v. State, supra. For the same reasons, the trial court also determined that the State had not violated its discovery obligations under > OCGA § 17-16-4. The trial court did not err in denying the motion to dismiss or to exclude evidence.

> 627 S.E.2d 907

277 Ga.App. 870, 6 FCDR 797

Court of Appeals of Georgia.

BLACKWOOD
v.
The STATE.

No. A05A2120.
March 3, 2006.

> [5] Criminal Law K> 700(3)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
110k700(2) Disclosure or Suppression of Information
> 110k700(3) Particular Cases and Problems.

Defendant did not show that audiotaped recording of drug transaction had potential exculpatory value and, thus, did not establish Brady violation based on the state's destruction of audiotape in prosecution for trafficking in methamphetamine; defendant presented no evidence as to whether anyone had ever listened to tape or whether it was even audible, and audiotape would have only recorded what was said during transaction, which would not have helped defense, in that defense hinged on third party's testimony in part that defendant looked surprised when he saw methamphetamine and that he did not touch scales or assist in bagging drugs. > West's Ga.Code Ann. §§ 16-2-21, > 16-13-31(e).

> [6] Criminal Law K> 700(9)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
> 110k700(9) Loss or Destruction of Evidence.

The state has a constitutional obligation to preserve evidence that might be expected to play a significant role in a suspect's defense.

> [7] Criminal Law K> 700(9)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
> 110k700(9) Loss or Destruction of Evidence.

The state's failure to preserve evidence does not constitute a constitutional violation unless it is shown that the missing evidence was potentially useful to the defense and was destroyed in bad faith on the part of the police.

> [8] Criminal Law K> 700(9)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
> 110k700(9) Loss or Destruction of Evidence.

Prosecution may be penalized if it loses or destroys evidence that could potentially have been helpful to the defense only if the defense shows that the evidence was material and that the state acted in bad faith in failing to preserve it.

> [6]> [7]> [8] "The State has a constitutional obligation to preserve evidence that might be expected to play a significant role in the suspect's [277 Ga.App. 874] defense." (Footnote omitted.) > Giraudy v. State, 252 Ga.App. 219, 220(1), 555 S.E.2d 874 (2001). But "the failure to preserve evidence does not constitute a constitutional violation, unless it is shown that the missing evidence was potentially useful to the defense and was destroyed in bad faith on the part of the police. > Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)." > Dixon v. State, 275 Ga. 232, 233(4), 564 S.E.2d 198 (2002). Accordingly, "the prosecution may be penalized if it loses or destroys evidence that could potentially have been helpful to the defense [only] if the defense shows that the evidence was material and that the State acted in bad faith in failing to preserve it." (Punctuation and footnote omitted.) > Giraudy v. State, 252 Ga.App. at 220(1), 555 S.E.2d 874. "To be material, the evidence must have had an apparent exculpatory value before it was lost, and be of such a nature that the defendant cannot obtain comparable evidence by other reasonable means." (Citations omitted.) > Hannah v. State, 278 Ga. 195, 198(3), 599 S.E.2d 177 (2004).

While an audiotape may have apparent exculpatory value under certain circumstances, Blackwood has failed to establish that the tape in this case had such value. He presented no evidence as to whether anyone had ever listened to the tape or whether it was even audible. Moreover, the audiotape would only have recorded what was said during the transaction. Blackwood's defense hinged on Clark's testimony that Blackwood had no prior knowledge of the drug transaction; that Blackwood looked "kind of" surprised when he saw the amount of methamphetamine in the bathroom; and that he did not touch the scales or

assist in bagging the drugs. But Blackwood fails to show how the audiotape would have conveyed to the jury either his expression when he entered the bathroom or whether he was touching the scales and bagging methamphetamine during the transaction. Nor did Blackwood establish any bad faith on the state's part in destroying this evidence.

Accordingly, we find no error in the trial court's denial of a directed verdict on this ground. "[W]e cannot say that the State's failure to turn [the audiotape over to Blackwood] caused him the kind of prejudice that undermined confidence in the outcome of the trial or which created a reasonable doubt of guilt which did not otherwise exist." (Citations omitted.) > Ely v. State, 275 Ga.App. 708, 711(1)(a), 621 S.E.2d 811 (2005).

> (FN10.) See > Walker v. State, 264 Ga. 676, 681(3), 449 S.E.2d 845 (1994) (careless, shoddy and unprofessional investigatory procedures do not indicate bad faith).

> 449 S.E.2d 845

264 Ga. 676

Supreme Court of Georgia.

WALKER
v.
The STATE.

No. S94A1095.
Nov. 28, 1994.

> [4] We realize that relevant evidence may be excluded if its probative value is outweighed by its prejudicial impact. Here, though there was no proof that Walker had used methamphetamine on the night of the murder, there had been prior testimony that Walker had in fact purchased a quantity of methamphetamine that night. As the jury had already heard a witness testify that Walker was in possession of an illegal drug, the prejudicial impact of the statement, to the extent that that prejudice stemmed from statements identifying Walker as a drug user, was reduced. Thus, under these circumstances, the probative value of the evidence clearly outweighed its prejudicial effects.

3. Walker argues that the actions of the police in dealing with evidence denied him due process of law. Following the murder of Eugene Cooper and pursuant to their investigation, officers of the sheriff's department set up a roadblock on Saturday in front of the Cooper house in order to seek information about the murder from passing motorists. An officer testified that at about 8:00 p.m. that evening they learned from a witness, who denies she gave the police this information, that she had heard that Jeff Walker and Chris Hightower had committed
the murder and that they were driving around in Walker's white Pontiac Grand Am. At this point, according to the police, a lookout was placed on Walker's car. At approximately 1:00 a.m. on the following Sunday morning the police stopped Walker's car and arrested him for theft of the vehicle. After police officers removed Walker and his companions, Chris Hightower and Billy Gooch, from the car, they found a bill of sale for the car showing that Walker had bought the car in July 1991, having put $600 down with the balance due on September 6, 1991. The police questioned all the occupants of the car about Cooper's murder, and, on the basis of information acquired during those interrogations, charged Walker with the murder.

A technician who had been called to the crime scene located and carefully photographed a set of automobile tire tracks in Cooper's yard; the technician used a ruler so that the tread type and width of the tires could be measured to scale. Investigators from the sheriff's office processed the interior and exterior of the car, but they found no evidence of blood. Fiber, hair and other tests done on the interior of the car likewise failed to connect any of the suspects with the murder. An officer testified that, contrary to ordinary practice, no photographs were taken of the car or the tires, nor were impressions made of the [264 Ga. 679] tires. > (FN2) At trial, none of the investigating officers could recall anything about the type, size or series of the tires; however, the officer who processed the car testified that he had measured the tire tracks found at the scene of the crime and that they were consistent with the wheel base of Walker's car, though he did not record the measurement of the wheel base in his report. The processing officer found wrappers, bags and other paper items from a fast food restaurant in the car; these items he threw away, stating that he did not know whether a receipt from the restaurant had been among the items discarded. He made no inventory of the contents of the automobile, despite the fact that it was standard policy to do so.

On August 29, less than a week after the murder, the processing officer released the car to the used car dealership from which Walker had bought it at the request of Detective Evans, the lead investigator. At the time the car was released, it contained personal property which belonged to Walker. The officer who released the car testified that it was standard procedure to do so through the property and evidence officer, but that he had not followed standard procedure in this case; he stated further that he had not been required to secure a signed release form, and that he did not know who had picked up the car or when the pickup had been made. The police released the car despite the fact that they had discovered, as mentioned above, papers showing that Walker had purchased the car and despite the fact that the car would have constituted evidence in the car theft with which Walker was charged. Walker's downpayment was never recovered. The car has never been located.

Early in September, the grand jury returned an indictment against Walker that included the auto theft charge. Walker was never asked about the theft of the car, and the theft charge was dismissed prior to trial. Detective Evans prepared his report of the crime on September 9, 1991; at that time he had a report indicating that Walker's car had been released to the automobile dealership. In December, Evans attended a pre-trial hearing at which defense counsel requested permission to view Walker's car. Evans testified that he heard the defense make its request, and also heard the assistant district attorney tell defense counsel that the car was either at the crime lab or in the impound lot, but did not say anything because he did [264 Ga. 680] not know where the car was; he said he learned about the release of the car early in 1992 after he looked into the matter. Defense counsel did not receive a copy of the report indicating that the car had been released in
August of 1991 until May 1992; Evans testified he did not know why it had taken so long to get that report to the defense.

> [5]> [6] Walker argues that his due process rights were violated because the release of his automobile and the destruction of materials in the automobile denied him access to exculpatory evidence. In dealing with the failure of the state to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence. > Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). To meet the standard of constitutional materiality, the evidence must possess an exculpatory value that was apparent before it was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. > California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). We apply these standards now to the evidence at issue.

> [7] First, regarding the contents of the Pontiac, Walker maintains that there may have been a receipt among the wrappers and other paper items from the fast food restaurant which may have shown the time of the purchase or at least what the order number was. At trial, Walker never made any showing that the receipts issued by the particular fast food restaurant to which Walker claims he went indicate anything about the time or order of a purchase. But, even if receipts do have such a notation, we do not think that the discarded hamburger wrappers, bags and other pieces of paper from the restaurant would possess an exculpatory value that was apparent before they were destroyed. Further, we cannot say that the officer's

destruction of what appeared to him to be trash exhibits a bad faith effort on his part to deny Walker access to potentially useful evidence.

> [8] Second, Walker maintains that by releasing the car the state denied the jury a chance to see that there were not, in fact, any blood stains anywhere in or on the car, and prevented him from possibly showing that the treads of the tires on the car did not match the tracks left in Cooper's yard. As to the blood stains, the state admitted at trial that it had been unable to find any evidence of blood either in or on the car; thus, even though the jury cannot see the car itself, the evidence lacks materiality since the state's own admission constitutes comparable, exculpatory evidence.

> [9] The case is otherwise with the tires. We think it should have been readily apparent to an investigating officer that impressions or photographs should have been made during the processing of the car, especially in light of the facts that photographs had been carefully [264 Ga. 681] made at the scene of the crime and the car was to be released. Indeed, this was standard procedure. But, while the tires do seem to constitute material evidence, we are unable to say that their release, along with the car, is evidence of bad faith on the part of the state. As the trial court noted, the handling of the automobile may indicate careless, shoddy and unprofessional investigatory procedures, but it does not indicate that the police in bad faith attempted to deny Walker access to evidence that they knew would be exculpatory. And, as to the state's delay in notifying Walker of the release of the car, we see no reason why Walker himself could not have learned of that release by making appropriate inquiries. Accordingly, we do not find that Walker was denied due process of law.

> [10] 4. In December 1992, the trial court issued an order prohibiting the district attorney's office and the sheriff's department from conducting further interviews with any of Walker's cellmates without providing proper notice to Walker's counsel. In late February or early March, an attorney for Robert Gordon, who was Walker's cell-mate for six months, contacted the district attorney and told him that his client had information about Cooper's murder; the attorney also requested that the district attorney interview his client without Walker's knowledge. Thus, in spite of the court's order, an assistant district attorney interviewed Gordon without informing Walker's counsel of the interview. When Gordon was interviewed a second time by the state, Walker's attorneys were present. At trial, the court, by way of sanction, informed the jury of the state's violation of its order but allowed Gordon to testify. Walker contends that the trial court erred in admitting testimony of his cellmate obtained in violation of its order.

Gordon testified that an angry Walker returned to their cell after seeing his lawyer and told him, "They're trying to pin all this all on me. It was Richard's fault that I shot the guy in the first place." This testimony was competent and legally admissible as evidence. Further, though the court informed the jury that it could take into consideration the state's violation of the order in weighing Gordon's credibility, the state's decision to circumvent the mandate of the court has more to do with the integrity of the district attorney's office than it does with Gordon's credibility as a witness.

Punishment of those who have acted in contempt of the court is a proper remedy in this situation as opposed to reversal of the accused's conviction. The decision of this trial court to rebuke counsel in the jury's presence for the violation of its order was not, under these circumstances, an abuse of discretion. There was no error.

> 596 S.E.2d 805

266 Ga.App. 342, 4 FCDR 1102

Court of Appeals of Georgia.

SHOEMAKE
v.
The STATE.

No. A03A1717.
March 18, 2004.

> [1]> [2] 1. Shoemake contends the trial court should have suppressed the test of his blood alcohol content because the State violated his due process rights by destroying the sample before he could test it independently. In order to prevail on this claim, Shoemake must show that the evidence was material and that the police acted in bad faith in failing to preserve it. > Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); > Walker v. State, 264 Ga. 676, 680(3), 449 S.E.2d 845 (1994); > Milton v. State, 232 Ga.App. 672, 679(6), 503 S.E.2d 566 (1998). "Bad faith is a question of fact for the trial court to determine, and we will not disturb a trial court's finding on bad faith if there is any evidence to support it." > Swanson v. State, 248 Ga.App. 551(1)(a), 545 S.E.2d 713 (2001). In this case, the trial court denied the motion to suppress because he presented no evidence the blood sample might have been exculpatory, and no evidence or even allegation of improper motive. The State Crime Lab destroyed the blood sample "as part of a normal purging process" more than a year after it had been taken from Shoemake. The trial court also denied the motion because the blood sample was destroyed over a year after defense counsel entered an appearance, during which time Shoemake made no attempt to test the sample. Compare > State v. Blackwell, 245 Ga.App. 135, 537 S.E.2d 457 (2000) (defendant's destroyed urine sample initially tested negative for drugs and court order existed allowing defendant to test sample). As the findings are supported by the record, we affirm the trial court's ruling.

> 579 S.E.2d 35

260 Ga.App. 12, 3 FCDR 670

Court of Appeals of Georgia.

CHAMPION
v.
The STATE.

No. A02A2379.
Feb. 13, 2003.

Reconsideration Denied Feb. 27, 2003.

Certiorari Denied July 11, 2003.

> [3]> [4]> [5]> [6]> [7] 2. Champion argues that the court erred in denying her motion to dismiss based on lost exculpatory evidence. "When evidence is lost, a conviction must be reversed on a showing of bad faith

or connivance on the part of the government, or a showing that the defendant was prejudiced by the loss of evidence." (Citation omitted.) > Burson v. State, 183 Ga.App. 647, 649(4), 359 S.E.2d 731 (1987). In her motion to dismiss, Champion claimed that the State lost or allowed the disappearance of evidence by leaving it in an unsecured location. This, however, is not necessarily a showing of bad faith or connivance on the part of the State, and Champion has not otherwise made the requisite showing. See > id. "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 of law." (Punctuation and footnote omitted.) > Jones v. State, 258 Ga.App. 283, 284, 574 S.E.2d 359 (2002). Champion has also failed to show how she was prejudiced by the loss of such evidence. Although she argued that the evidence would have shown that certain expenses were paid in cash [260 Ga.App. 15] and thereby explained the missing money, " [t]o be material, the evidence must have had an apparent exculpatory value before it was lost, and be of such a nature that the defendant cannot obtain comparable evidence by other reasonable means." (Footnote omitted; emphasis supplied.) > Id. at 284-285, 574 S.E.2d 359. Champion has not shown that the missing information met this test. See > id. Thus, the trial court did not clearly err in denying the motion to dismiss on this ground.

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> 578 S.E.2d 102

276 Ga. 480, 3 FCDR 600

Supreme Court of Georgia.

FINCHER
v.
The STATE.

No. S02A1490.
Feb. 24, 2003.

Reconsideration Denied April 11, 2003.

> [12] Criminal Law K> 700(9)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
> 110k700(9) Loss or Destruction of Evidence.

State's failure to preserve telephone records that assertedly would have refuted several elements of state's case did not
violate due process in murder prosecution; while employee of sheriff's office asked that those records be held and they were subsequently destroyed by their custodian in compliance with telephone company policies of which chief investigator in case was aware, record did not indicate anyone with sheriff's department acted in bad faith. > U.S.C.A. Const.Amend. 14.

> [13] Criminal Law K> 700(9)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
> 110k700(9) Loss or Destruction of Evidence.

In dealing with the failure of the state to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence.

> [12]> [13] However, pretermitting the question of whether the issuance of the subpoena in this case was sufficient to trigger the State's duty to preserve the records the subpoena sought, Fincher has not shown a deprivation of due process. " 'In dealing with the failure of the state to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence.' [Cit.]" > Brannan v. State, supra at 74(2)(c). In the present [276 Ga. 484] case, the trial court concluded that there was no evidence that anyone with the sheriff's department acted in bad faith in connection with the failure to preserve the evidence. Although Fincher speculates about why the records were not collected and safeguarded, and assigns malignant motives to the chief investigator and the prosecution in general, our review of the record supports the trial court's holding that no bad faith was shown. At most, the record shows negligence in record keeping to be the cause of the failure to preserve the evidence. That being so, the trial court did not err in ruling that bad faith had not been shown. > Id.

> 575 S.E.2d 713

258 Ga.App. 806, 3 FCDR 49

Court of Appeals of Georgia.

JACKSON
v.
The STATE.

No. A02A1948.
Dec. 11, 2002.

Certiorari Denied April 29, 2003.

> [6] 3. Jackson contends that the trial court erred by denying his motion to exclude all evidence relating to the burgundy Mustang because it was not available for testing at the time of trial. Specifically, Jackson contends that the State improperly destroyed evidence by selling the Mustang prior to trial, thereby violating his due process rights.

The record shows that, after the Mustang had been seized, several tests were performed on it. These tests revealed: (1) no usable latent fingerprints; (2) no blood or tissue samples; (3) some paint

scrapings from the car matched paint found on Jones' clothing; and (4) broken glass found at the scene matched the glass remaining in the Mustang's passenger mirror.

After these tests had been completed, the Mustang was returned to the impound lot, and Jackson was notified that he could have the Mustang picked up at that time. Detective Toney personally called Jackson's family to let them know that the car was available. Jackson never claimed the car, however, and it was subsequently sold at auction to a salvage yard. As such, it was not available at the time of trial.

> [7]> [8] Because of this unavailability, the trial court decided to exclude the tests performed by the State because Jackson had not accessed the car in order to attempt to refute the inculpatory results. The trial court did, however, allow Detective Toney to testify regarding the condition of the car, and it also allowed pictures of the car into evidence. Jackson now contends that the trial court should have excluded all evidence of the vehicle, arguing that the State retained control of the vehicle at all times and, ultimately, destroyed the evidence so that he could not independently test it. We disagree.

In dealing with the failure of the state to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material [258 Ga.App. 810] and whether the police acted in bad faith in failing to preserve the evidence. > Arizona v. Youngblood. > (FN6) To meet the standard of constitutional materiality, the evidence must possess an exculpatory value that was apparent before it was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. > California v. Trombetta. > (FN7)

> Walker v. State. > (FN8)

As an initial matter, the evidence does not support Jackson's contention that he had no opportunity to gain access to the Mustang after it was impounded. To the contrary, the record shows that, after it was tested, the Mustang was offered back to Jackson and he simply failed to claim it. As such, his due process claim in this matter is immediately suspect. Moreover, Jackson has provided this Court with no evidence that the State acted in bad faith by releasing his car. Even if we were to assume that the State's "handling of the automobile [indicated] careless, shoddy and unprofessional investigatory procedures, [it did] not indicate that the police in bad faith attempted to deny [Jackson] access to evidence that they knew would be exculpatory." > Walker, supra at 681(3), 449 S.E.2d 845.

Under these circumstances, we cannot say that the trial court erred by allowing Detective Toney to testify regarding the condition of the car as he found it. Likewise, it was not error to introduce photographs taken of the car. > Walker, supra.

> 564 S.E.2d 198

275 Ga. 232, 2 FCDR 1507

Supreme Court of Georgia.

DIXON
v.
The STATE.

No. S02A0765.
May 28, 2002.

> [8]> [9] 4. The murder occurred in 1994, but appellant was not indicted until 1999 and he was not tried until 2000. During that period, several items of physical evidence, including the murder weapon, were disposed of in the normal course of business. Dixon contends that this destruction of the evidence was a violation of his due process rights. However, the failure to preserve evidence does not constitute a constitutional violation, unless it is shown that the missing evidence was potentially useful to the defense and was destroyed in bad faith on the part of the police. > Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). Appellant did not show that the evidence had any exculpatory value or that, if it did, the custodians acted in bad faith by disposing of it. > Terrell v. State, 271 Ga. 783, 787(6), 523 S.E.2d 294 (1999). Therefore, this enumeration is without merit.

> 554 S.E.2d 553

252 Ga.App. 222, 1 FCDR 2759

Court of Appeals of Georgia.

MOTEN
v.
The STATE.

No. A01A0850.
Aug. 28, 2001.

Reconsideration Denied Nov. 1, 2001.

> [13]> [14]> [15] More importantly, even if Moten had met his burden of properly showing error, on appellate review, he has not shown grounds for reversal.

In dealing with the failure of the [S]tate to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence. To meet the standard of constitutional materiality, the evidence must possess an exculpatory value that was apparent before it was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. 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 of law.

(Citations and punctuation omitted.) > Milton v. State, 232 Ga.App. 672, 678-679(6), 503 S.E.2d 566 (1998). The record is devoid of any evidence that the police officer acted in bad faith by placing his materials on the counter. Further, unlike the defendant in > State v. Blackwell, 245 Ga.App. 135, 537 S.E.2d 457 (2000), cited by Moten, Moten has failed to show that the purportedly destroyed evidence had exculpatory value that was apparent before it was destroyed. The counter was dusted for fingerprints, but only "smudges" were obtained. The testimony of one of the investigating officers showed that it was rare for usable fingerprints to be discovered. Moten has shown only a bare speculation that the purported evidence might have exonerated him. He has failed to show that the evidence would have played a

"significant role" in his defense, > Albert v. State, 180 Ga.App. 779, 783(3), 350 S.E.2d 490 (1986), and has not met the standard for reversal of a conviction based on the destruction of evidence.

> 547 S.E.2d 367

248 Ga.App. 772, 1 FCDR 1267

Court of Appeals of Georgia.

PENNY
v.
The STATE.

No. A01A0013.
March 26, 2001.

> [1]> [2] 1. Penny contends that his shirt must have been confiscated or destroyed by a member of the investigating team and that because the shirt was exculpatory evidence, the State's failure to turn over the shirt violated its duty under > Brady. He argues that had this shirt been entered into evidence, a reasonable probability exists that it would have bolstered his credibility and supported his defense that the eyewitness misidentified him. But here, no evidence exists that the State was in possession of the shirt, and the State had no obligation under > Brady to turn over evidence it did not have. A different standard from that discussed in > Brady applies. This standard is derived from > Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) and > California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

> [3] Under this standard, the prosecution may be penalized when it loses or destroys evidence that could potentially have been helpful to the defense only if the defense shows that the evidence was material and the State acted in bad faith in failing to preserve it. > Milton v. State, 232 Ga.App. 672, 679, 503 S.E.2d 566 (1998).

> [4] Here, neither the materiality of the shirt nor the bad faith of the State was shown. Under > Trombetta, supra, evidence is constitutionally material if it has "an exculpatory value that was apparent before the evidence was destroyed" and it is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." > Id. at 489, 104 S.Ct. 2528. The exculpatory value of the shirt in this case was not apparent either before or after it was lost or destroyed. Penny described his shirt at trial by saying, "[t]he dominant color of the shirt is red and it has white lines going down this way about that wide, and it has lines coming across that was a little bit smaller." Although he denied his shirt was plaid, from Penny's description it could easily have been described by others as plaid. It is not clear, therefore, that the shirt would have shown that Penny was misidentified. Through direct and cross-examination, the jury was also apprised of Penny's argument that the State, through either the jail personnel or the officers, had bungled the handling of evidence, which impacted the credibility of the State's witnesses. This [248 Ga.App. 775] was reinforced by Penny's trial attorney during his closing argument.

> [5] Moreover, "[u]nless 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 of law." (Citations and punctuation omitted.) > Milton, supra. And Penny has shown no such bad faith. No officer was shown to have destroyed the shirt, no officer testified that he had lost or destroyed the shirt, and the fate of the shirt was never established. We find no error here.

> 545 S.E.2d 713

248 Ga.App. 551, 1 FCDR 1198

Court of Appeals of Georgia.

SWANSON
v.
The STATE.

No. A00A2382.
March 12, 2001.

> [1] (a) Swanson claims that the trial court should have granted his motion to suppress the blood test results because the State destroyed the blood sample before he had an opportunity to independently test it.

> [2]> [3] In order to prevail upon a claim that his due process rights under the Fourteenth Amendment to the U.S. Constitution were violated by the destruction of "potentially useful evidence," > (FN1) Swanson must show bad faith. > Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); > Walker v. State, 264 Ga. 676, 680(3), 449 S.E.2d 845 (1994); > Milton v. State, 232 Ga.App. 672, 679(6), 503 S.E.2d 566 (1998). Bad faith is a question of fact for the trial court to determine, and we will not disturb a trial court's finding on bad faith if there is any evidence to support it. > Milton, supra, 232 Ga.App. at 679, 503 S.E.2d 566; > Lynott v. State, 198 Ga.App. 688, 690(4), 402 S.E.2d 747 (1991).

In this case, the trial court made the following findings:

The court can find no evidence to show "bad faith" on the part of law enforcement which resulted in the destruction of the blood sample. The Crime Lab might well have been negligent or careless in their handling of the blood sample in view of the oral announcement concerning the preservation of the sample. The District Attorney's office may well have [248 Ga.App. 552] been negligent or careless in failing to follow up on the oral request, but there is no evidence that the sample was destroyed out of an interested or sinister motive, or through a conscious doing of wrong. The evidence shows, and the court so finds, that the evidence was destroyed at the time that the Crime Lab guidelines indicated that it should be destroyed. Defendant produces no evidence that the Crime Lab or anyone acting for the State of Georgia intentionally destroyed the evidence or had the evidence destroyed as a result of improper motive, such as keeping exculpatory evidence from the defendant.

We have reviewed the record and find evidence to support these findings. As a result, we affirm the trial court's decision to allow the blood test results into evidence.

Suppression by prosecution of evidence favorable to accused violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution, but there must be evidence that such information existed and was actually withheld. > Eades v. State, 1974, 232 Ga. 735, 208 S.E.2d 791. Constitutional Law K 268(5)

Evidence of facts which differed from those to which perjured witness testified in criminal prosecution and in addition made serious charges against prosecuting attorneys was not impeaching but sufficient on which to authorize granting of a new trial on ground of newly discovered evidence. Code, § 70-204. > Burke v. State, 1949, 205 Ga. 656, 54 S.E.2d 350. Criminal Law K 938(2)

Discovery of new evidence, materiality of which is sufficient to probably produce different result upon another trial, not discovery of new witnesses, authorizes grant of new trial. > Wright v. State, 1934, 49 Ga.App. 342, 175 S.E. 487. Criminal Law K 938(2)

The opinion of a witness who is not an expert, on the question of the sanity of accused at the time of the commission of the crime, is not newly-discovered evidence without the facts on which it is predicated. > Wright v. State, 1892, 91 Ga. 80, 16 S.E. 259. Criminal Law K 938(2)

On a melee between a foreman and employees in a cotton press, defendant was immediately arrested and confined in jail until his trial on a charge of assault with intent to murder. His attorney, on inquiring of the persons present, was misled by their telling him they did not know what part defendant took in the fuss. The discovery after the trial that they were willing to swear that he did not make the assault was ground for granting a new trial. Thomas v. State, 1874, 52 Ga. 509. Criminal Law K 938(2)

To obtain new trial based on the newly discovered witness, defendant must show: (1) that evidence came to his knowledge after trial; (2) that it was not owing to want of due diligence that he did not acquire it sooner; (3) that it was so material that it would probably produce a different verdict; (4) that it was not cumulative only; (5) that affidavit of witness could be procured or its absence accounted for; and (6) that evidence not merely impeaching. > Greeson v. State, 2002, 253 Ga.App. 161, 558 S.E.2d 749, certiorari denied; > Mills v. State, 2001, 251 Ga.App. 39, 553 S.E.2d 353, certiorari denied; > Brown v. State, 2001, 250 Ga.App. 697, 552 S.E.2d 886; > Warren v. State, 2001, 247 Ga.App. 838, 545 S.E.2d 138, certiorari dismissed; > Carter v. State, 2001, 273 Ga. 428, 541 S.E.2d 366, reconsideration denied; > Benn v. State, 2000, 244 Ga.App. 67, 535 S.E.2d 28; > Green v. State, 2000, 242 Ga.App. 868, 532 S.E.2d 111, reconsideration denied; > Cromartie v. State, 1999, 241 Ga.App. 718, 527 S.E.2d 228, reconsideration denied, certiorari denied.

Ordinarily, one convicted of crime should be granted new trial when District Court is reasonably well satisfied that a material witness' testimony against defendant was false and that, without such testimony, jury might have reached different conclusion. > Fed.Rules Crim.Proc. rule 33, 18 U.S.C.A. > Newman v. U.S., 1956, 238 F.2d 861. Criminal Law K 938(1)

Trial judge in murder prosecution erred in denying defendant's motion for new trial, filed on basis of discovery after trial of identity of important witness, where State's evidence was based solely and exclusively on circumstantial evidence and witness in question could establish that sheriff and other investigating officers knew of his identity all along and that such information was either intentionally or inadvertently kept from defendant and his counsel. > Banks v. State, 1975, 235 Ga. 121, 218 S.E.2d 851. Criminal Law K 938(1)

> 36. Evidence, generally

Defendant in prosecution for burglary with attempt to rape was not denied due process, by virtue of disappearance of evidence of button or buttons allegedly torn from his shirt at time of incident, or of brown paper bag he was supposedly carrying when perpetrating alleged offense and when apprehended, as there was no showing that evidence sought was favorable or any showing of bad faith or connivance on the part of government or prejudice in loss of evidence. > U.S.C.A. Const.Amend. 14; > O.C.G.A. §§ 16-5-21(a)(1), 16-7-1(a). > Benford v. State, 1989, 189 Ga.App. 761, 377 S.E.2d 530. Constitutional Law K 268(5); Criminal Law K 700(9)

Georgia Procedure Criminal Procedure § 14:48, Prejudice and Bad Faith Requirements; Exclusion of Evidence.

> 2. Affirmative duty of state or prosecutor

When the state fails to timely provide evidence pursuant to a reciprocal discovery request, the trial court retains discretion in determining what remedy, if any, is required to ensure a fair trial. > Barrow v. State, 2004, 269 Ga.App. 635, 605 S.E.2d 67. Criminal Law K 627.8(6)

When the state fails to timely provide evidence pursuant to a reciprocal discovery request, the trial court may order the state to permit examination of the evidence, grant a continuance, or, upon a showing of prejudice and bad faith, prohibit the state from tendering the evidence. > Barrow v. State, 2004, 269 Ga.App. 635, 605 S.E.2d 67. Criminal Law K 627.8(6)

Trial court acted within its discretion in drug trial in admitting videotape that showed police officer chasing defendant's car and plastic bags flying from car window, even though prosecutor informed defense attorney on morning of trial that he had videotape, and defendant argued that, since he opted into reciprocal discovery, prosecutor was required to provide videotape sooner; prosecutor learned of videotape's existence on morning of trial and played video for defense counsel, and video merely confirmed details of police report. > Barrow v. State, 2004, 269 Ga.App. 635, 605 S.E.2d 67. Criminal Law K 627.8(6)

The state's obligation under reciprocal-discovery statute to produce any statement of any witness that is in possession, custody, or control of the state is not triggered when a witness merely makes an oral statement. > Hunt v. State, 2004, 278 Ga. 479, 604 S.E.2d 144. Criminal Law K 627.7(3)

> 20. ---- Prejudice or bad faith required, failure to make proper disclosure

Defendant was not entitled to exclusion of incident report and demand form prepared by store security guard in prosecution for theft by shoplifting, on ground that state violated reciprocal discovery requirements of Criminal Procedure Discovery Act by failing to disclose reports before trial; defendant had not shown that prosecutor acted in bad faith by failing to produce reports 10 days before trial, and defendant failed to request a continuance to cure any prejudice which may have resulted from state's alleged failure to comply with discovery requirements. > Brown v. State, 2006, 636 S.E.2d 717. Criminal Law K 627.8(6)

Defendant's witness' testimony, which was offered to rebut co-defendant's testimony, would be excluded because defendant violated the reciprocal discovery statutes and there was evidence of bad faith and prejudice; defendant's trial counsel apprised co-defense counsel of witness' identity but did not mention witness to the court or the State even in midst of a discussion about another witness he wished to testify that day, State already had negotiated a plea deal with co-defendant, defendant failed to demonstrate harm, and there was other evidence in the record that co-defendant was the actual perpetrator. > Grier v. State, 2005, 276 Ga.App. 655, 624 S.E.2d 149, reconsideration denied, certiorari denied. Criminal Law K 629.5(2)

Sanction of evidence exclusion for the state's failure to comply with discovery requirements applies only where there has been a showing of prejudice to the defense and bad faith by the state. > Rosas v. State, 2005, 276 Ga.App. 513, 624 S.E.2d 142, reconsideration denied. Criminal Law K 627.8(6)

Trial court was not permitted to exclude certain evidence during robbery trial on grounds that defendant failed to produce the evidence within five days prior to trial, as required by the criminal discovery laws, without first making a specific finding that defendant acted in bad faith and that the State

was prejudiced thereby. > Brown v. State, 2004, 268 Ga.App. 24, 601 S.E.2d 405. Criminal Law K 627.8(6)

State was not prohibited from introducing into evidence statement defendant made to FBI agent at time of his arrest that he was out of breath, even if State was required to make pretrial disclosure of such statement, absent a showing that defendant was prejudiced by the lack of pretrial disclosure, or that State acted in bad faith. Al > Amin v. State, 2004, 278 Ga. 74, 597 S.E.2d 332, reconsideration denied, certiorari denied > 125 S.Ct. 509, 543 U.S. 992, 160 L.Ed.2d 380. Criminal Law K 627.8(6)

The lack of earlier disclosure of evidence connecting defendant to fingerprint taken from crime scene did not preclude admission of the fingerprint evidence in malice murder prosecution; before admitting the fingerprint evidence, the trial court allowed the defense to review it and to interview the expert who would testify to the match, and the circumstances did not indicate bad faith by the prosecution or prejudice to the defense. > Roebuck v. State, 2003, 277 Ga. 200, 586 S.E.2d 651, reconsideration denied. Criminal Law K 627.8(6)

The trial court's admission of photographs of victim's injuries in aggravated assault trial was not improper; defendant was not surprised by the photographs, the photographs were no more than cumulative of the testimony of the victim and the other witnesses for the prosecution, and defendant showed no bad faith on the part of the prosecution for failing to produce the photographs ten days before trial. > Davis v. State, 2002, 257 Ga.App. 500, 571 S.E.2d 497. Criminal Law K 627.8(6); Criminal Law K 675

When the state fails prior to trial to provide defendant with a copy of his custodial statement, the trial court may prohibit the state from introducing evidence improperly withheld from the defense; this sanction, however, applies only when there has been a showing of prejudice to the defense and bad faith by the state. O.C.G.A. § 17-16-4. > Reece v. State, 2001, 250 Ga.App. 1, 550 S.E.2d 414. Criminal Law K 627.8(6)

Ga. Code Ann., § 17-16-4

WEST'S CODE OF GEORGIA ANNOTATED
TITLE 17. CRIMINAL PROCEDURE
CHAPTER 16. DISCOVERY
ARTICLE 1. DEFINITIONS; FELONY CASES

Defendants were not prejudiced by state's failure to timely provide them with cooperating accomplice's taped statement, despite defendants' claim that they were thereby denied opportunity to interview their alleged leader, who was implicated in that statement; state provided defendants copy of accomplice's taped statement on day it was taken, four days before trial, neither defendant sought recess at trial to interview accomplice, and alleged leader's testimony would have been irrelevant, as accomplice's statement showed that alleged leader's only involvement in offense was to order defendants and accomplice to "go out and get some money." O.C.G.A. §§ 17-16-4, > 17-16-6 to > 17-16-8. > Johnson v. State, 1999, 241 Ga.App. 448, 526 S.E.2d 903. Criminal Law K 627.8(6)

State's failure to produce during discovery bench warrant that was issued for defendant's arrest when he did not appear for calendar call did not require bench warrant's exclusion from evidence in prosecution for financial transaction card theft; defense counsel rejected trial court's offer of continuance to cure any prejudice caused by lack of notice, defense counsel made no showing of prejudice beyond that which could have been cured by continuance, and there was no evidence of bad faith on part of state. > O.C.G.A. § 17-16-6. > Parrott v. State, 1999, 240 Ga.App. 173, 523 S.E.2d 29. Criminal Law K 627.8(6)

Generally, in order to trigger the harsh sanction of excluding evidence improperly withheld from the defense, there must be a showing of prejudice to the defense and bad faith by the State. > O.C.G.A. § 17-16-6. > Parrott v. State, 1999, 240 Ga.App. 173, 523 S.E.2d 29. Criminal Law K 627.8(6)

State's failure to serve discovery on defense counsel did not warrant exclusion of evidence, as defendant made no showing of bad faith or prejudice; prosecutor stated that entire file was mailed to defendant because there was nothing in state's file showing attorney of record, that defense counsel could have requested copy of file at any time, that there was no exculpatory evidence in file, and that defendant did not make any statement to police. O.C.G.A. §§ 17-16-4(a)(3), > 17-16-6. > Price v. State, 1999, 240 Ga.App. 37, 522 S.E.2d 543. Criminal Law K 700(5)

State's failure to comply with its discovery obligations by not providing defendant newly discovered photographs of merchandise allegedly shoplifted by defendant did not require extreme sanction of excluding photographs from trial, where defendant rejected court's offer to grant a continuance, state did not act in bad faith, and photographs were not prejudicial to defendant but cumulative. > O.C.G.A. § 17-16-6. > Brown v. State, 1999, 236 Ga.App. 478, 512 S.E.2d 369. Criminal Law K 627.8(6)

Where State fails to comply with its discovery obligations, trial court may prohibit State from introducing evidence it improperly withheld from defense; however, this sanction applies only where there has been a showing of prejudice to the defense and bad faith by the State. O.C.G.A. § 17-16-4. > Guild v. State, 1999, 236 Ga.App. 444, 512 S.E.2d 343. Criminal Law K 627.8(6)

Trial court did not abuse its discretion by allowing State to use defendant's in-custody statement, despite state's violation of reciprocal discovery statute, where defendant obtained copy of statement before prosecutor did and where he did not allege bad faith or show prejudice. O.C.G.A. §§ 17-16-4(a), > 17-16-6. > McWhorter v. State, 1997, 229 Ga.App. 875, 495 S.E.2d 139. Criminal Law K 627.8(6)

Allowing state to use scientific report not provided to defendant before trial was not error when defendant failed to show, at trial, that she was prejudiced as result of state's failure to make report available. O.C.G.A. § 17-16-4(a)(3). > Aleman v. State, 1997, 224 Ga.App. 391, 480 S.E.2d 393. Criminal Law K 627.8(6)

If state fails to comply with disclosure statute, trial court may prohibit state from introducing evidence it improperly withheld from defense; this sanction, however, applies only when there has been showing of prejudice to defense and bad faith by state. O.C.G.A. §§ 17-16-4(a)(3), > 17-16-6. > Aleman v. State, 1997, 224 Ga.App. 391, 480 S.E.2d 393. Criminal Law K 627.8(6)

In assault prosecution, trial court lacked authority to exercise discretion and exclude bloody knife from evidence at trial on ground that state failed to provide defendant with access to knife ten days before trial, since defendant made no showing that he was prejudiced as result of state's failure to make knife available prior to trial, and no continuance was requested to cure any prejudice which may have precipitated as result of state's failure to do so. O.C.G.A. §§ 17-16-4(a)(3), > 17-16-6. > Tucker v. State, 1996, 222 Ga.App. 517, 474 S.E.2d 696. Criminal Law K 627.8(6)

DUI defendant was not prejudiced by admission of evidence of intoximeter test results after a written demand for a copy of the scientific report had been made but not honored, where arresting officer testified that he provided defendant with a copy of the intoximeter test results upon completion of the test, when defendant was under arrest but not in handcuffs, and before defendant was taken from police department, and defendant allowed testimonial evidence to be admitted that policy of police department was to transport anyone "if they exceeded 28% grams alcohol," to medical center and that defendant had been transported to the medical center. > Starnes v. State, 1990, 196 Ga.App. 262, 395 S.E.2d 603. Criminal Law K 627.8(6); Criminal Law K 1166(10.10)

There was substantial compliance with statute in response to written demand to State for discovery of any relevant and material statements made by defendant while in police custody, and reversal was not required, where district attorney did not furnish statement for reason that he planned to use nothing other than testimony offered on former trial, and a transcript of such testimony was in possession of defense

attorney. Code, § 27-1302. > Tyson v. State, 1983, 165 Ga.App. 22, 299 S.E.2d 69. Criminal Law K 627.8(6)

> 22.5. Adequacy of representation

Trial counsel's failure to object to state's discovery violation and move for mistrial prejudiced defendant, as element of claim of ineffective assistance, in drug prosecution; state elicited testimony about oral admission made by defendant in custody, that drugs were his, that had not previously disclosed to defense, and based on conflicting evidence, police officer's testimony that he did not attempt to obtain fingerprints since defendant admitted ownership of cocaine, and jury's acquittal on other charge, there was reasonable probability that defendant's defense was prejudiced by officer's testimony that defendant admitted ownership of cocaine. > Johnson v. State, 2006, 281 Ga.App. 455, 636 S.E.2d 178. Criminal Law K 641.13(2.1)

Defendant's counsel who violated the reciprocal discovery statutes when he did not inform the State that he intended to introduce witness was not ineffective; even if defendant's counsel was deficient by failing to identify witness in a timely manner, defendant could not show that this deficiency prejudiced his defense. > Grier v. State, 2005, 276 Ga.App. 655, 624 S.E.2d 149, reconsideration denied, certiorari denied. Criminal Law K 641.13(6)

> 23. Brady material and violations

A Brady motion does not reach the defendant's own statements made prior to trial, as they are known to the defense. > McCarty v. State, 1982, 249 Ga. 618, 292 S.E.2d 700; > Johnson v. State, 1986, 177 Ga.App. 705, 340 S.E.2d 662; > McCoy v. State, 1985, 174 Ga.App. 621, 330 S.E.2d 746; > Williams v. State, 1982, 164 Ga.App. 148, 296 S.E.2d 739.

Defendant was not entitled to mistrial in child-cruelty trial even if state's alleged failure to disclose defendant's statement to officer that she did not want to go to hospital to be with her injured child, explaining that she knew DFACS and knew that she would be arrested, was a discovery violation; officer had testified in pretrial hearing that defendant told him at hospital, after she ultimately arrived, that she previously had problems with DFACS and was afraid not only that she would be in trouble with DFACS if she showed up at hospital but that DFACS would take away child, and thus defendant's earlier, similar statement to officer would hardly amount to a great surprise. > Gore v. State, 2006, 277 Ga.App. 635, 627 S.E.2d 198. Criminal Law K 627.8(6)

District attorney's failure to turn over entire file to trial court in response to defendant's assertion of Brady violation did not require reversal, where district attorney stated to trial court that he had turned over all materials he had relating to evidence in case and that only items he did not turn over were defense motions and scientific and scholarly articles, particularly in light of fact that new district attorney took office several months prior to trial and announced open file policy. > Smith v. State, 1998, 269 Ga. 72, 495 S.E.2d 280. Criminal Law K 1166(10.10)

Witness statements are not subject to notice to produce, although exculpatory witness statements are subject to disclosure under Brady. > O.C.G.A. § 24-10-26. > Farmer v. State, 1996, 222 Ga.App. 506, 474 S.E.2d 711. Criminal Law K 627.7(3); Criminal Law K 700(3)

Defendant's motion for exculpatory information under Brady could not be used as a discovery tool, and, in any event, defendant failed to show that any information she did not receive was exculpatory. > Shearer v. State, 1989, 259 Ga. 51, 376 S.E.2d 194, certiorari denied > 109 S.Ct. 3251, 492 U.S. 922, 106 L.Ed.2d 597. Criminal Law K 627.6(1); Criminal Law K 700(2.1)

A Brady violation occurs only when the State withholds exculpatory information in its possession from defendant. > Dawson v. State, 1983, 166 Ga.App. 515, 304 S.E.2d 570. Criminal Law K 627.6(1)

While defendant's Brady motion specifically requested any written copies or memoranda of his own statements, it failed to give the State reasonable notice that defendant sought discovery pursuant to statute giving a defendant the right to obtain written copies of any statements, whether oral or in writing, made by him prior to trial while in custody as it made no reference to the statute or invoked its ten-day time limit and, hence, there was no error in admitting defendant's statement at trial, notwithstanding that penalty for failure to comply with the statute is exclusion. Code, § 27-1302. > McCarty v. State, 1982, 249 Ga. 618, 292 S.E.2d 700. Criminal Law K 627.8(6)

Inculpatory scientific reports are not reached by Brady motion, which calls for production of exculpatory evidence. > State v. Madigan, 1982, 249 Ga. 571, 292 S.E.2d 406, on remand > 163 Ga.App. 460, 295 S.E.2d 236. Criminal Law K 627.6(4)

> 24. Presumptions and burden of proof

Upon proper application by defendant, burden of compliance with requirements of statute governing discovery of criminal defendant's statements is on state. Code, § 27-1302. > Garner v. State, 1981, 159 Ga.App. 244, 282 S.E.2d 909. Criminal Law K 627.8(1)

Ga. Code Ann., § 17-16-6

WEST'S CODE OF GEORGIA ANNOTATED
TITLE 17. CRIMINAL PROCEDURE
CHAPTER 16. DISCOVERY
ARTICLE 1. DEFINITIONS; FELONY CASES

Current through end of the 2006 Regular Session

§ 17-16-6. Court orders with respect to failure of state or defendant to comply

Exclusion of defendant's witnesses was warranted by bad faith on part of defendant; nothing in record indicated that defendant did not know of these witnesses, or intended to call them, until day of trial, and there was no good faith explanation for defendant's failure to disclose his witnesses to State. > Acey v. State, 2006, 2006 WL 2382828. Criminal Law K 629.5(2)

Excluding evidence for state's failure to comply with its discovery obligations is a harsh sanction and should be imposed only when there is a showing of prejudice to the defense and bad faith by the state. > Brown v. State, 2006, 636 S.E.2d 717. Criminal Law K 627.8(6)

Defendant's witness' testimony, which was offered to rebut co-defendant's testimony, would be excluded because defendant violated the reciprocal discovery statutes and there was evidence of bad faith and prejudice; defendant's trial counsel apprised co-defense counsel of witness' identity but did not mention witness to the court or the State even in midst of a discussion about another witness he wished to testify that day, State already had negotiated a plea deal with co-defendant, defendant failed to demonstrate harm, and there was other evidence in the record that co-defendant was the actual perpetrator. > Grier v. State, 2005, 276 Ga.App. 655, 624 S.E.2d 149, reconsideration denied, certiorari denied. Criminal Law K 629.5(2)

Record supported findings that defendant acted in bad faith in failing to identify defense witness until first day of trial and that the state was thereby prejudiced, and thus defendant was not entitled to present witness, given that he failed to comply with the state's request for reciprocal discovery; defendant had several months to tell defense counsel about witness, failed to do so until three days before trial started on a Monday, and offered no justification or valid excuse for such failure. > Card v. State, 2005, 273 Ga.App. 367, 615 S.E.2d 139, reconsideration denied. Criminal Law K 629.5(2)

Trial court acted within its discretion in excluding defense witness for discovery violation after defendant declined to waive his speedy trial demand and continue case; defendant, who opted into reciprocal discovery, did not provide the state with witness's written statement no later than ten days prior to trial, as required by discovery statute, and defendant did not include witness's date of birth in his list of witnesses, as required by discovery statute, and thus the state was unable to investigate witness's criminal record, if any. > Clark v. State, 2005, 271 Ga.App. 534, 610 S.E.2d 165, certiorari denied. Criminal Law K 629.5(2)

Trial court's refusal to exclude evidence of defendant's prior difficulty with victim in which he stabbed her and forced her into his truck, based on State's alleged failure to provide such evidence in discovery, and refusal to grant defendant continuance to investigate such evidence, was not abuse of discretion, in instant trial for false imprisonment, aggravated assault, and criminal trespass which involved same victim; defendant's attorney and prosecutor had discussed prior difficulty prior to trial, prosecutor had offered counsel opportunity to review file, defendant and attorney were well aware of prior difficulty before trial, and, while making argument regarding discovery, counsel stated that "[e]verybody in this case is aware that these folks had a problem before." > Jackson v. State, 2004, 270 Ga.App. 166, 605 S.E.2d 876. Criminal Law K 589(1); Criminal Law K 627.8(6)

The trial court's exclusion of a telephone log and a credit card receipt that defendant tendered two weeks after the start of trial was not an abuse of discretion; trial court found that defendant acted in bad faith in failing to provide discovery and that a continuance would unfairly burden the court and the State. > Watson v. State, 2004, 278 Ga. 763, 604 S.E.2d 804, reconsideration denied. Criminal Law K 627.8(6)

State's failure to produce two letters for defendant's counsel before trial that defendant sent to codefendant from jail, which were offered to impeach defendant's claim that he never apologized to codefendant for getting him in trouble, did not require their exclusion as sanction; defendant did not request continuance, did not present evidence of bad faith or that he was prejudiced by state's failure to provide letters earlier, and state did not receive letters until after trial began and letters were not relevant until defendant testified. > Boykin v. State, 2003, 264 Ga.App. 836, 592 S.E.2d 426, reconsideration denied, certiorari denied. Criminal Law K 627.8(6)

Allowing witness whose name was not included on state's witness list to testify did not constitute abuse of discretion, in trial for armed robbery and aggravated assault, where trial court allowed defendant opportunity to interview witness before witness testified. > Gay v. State, 2002, 258 Ga.App. 634, 574 S.E.2d 861. Criminal Law K 629.5(2)

Testimony of defendant's expert witness that defendant who made incriminating statement would not likely appreciate import of right to remain silent should not have been excluded from evidence at Jackson-Denno hearing as sanction for defendant's failure to provide State with copy of expert's report during discovery; there was no finding defendant had acted in bad faith and it did not appear defendant was attempting to hide information from State given that he provided expert's name and address to State during discovery. > Williams v. State, 2002, 256 Ga.App. 249, 568 S.E.2d 132. Criminal Law K 627.8(6)

Fingerprint evidence taken from crime scene that was unknown to state until police officer testified at defendant's criminal trial, and so had not been provided to defense counsel before trial, was properly excluded from evidence, and thus motion for mistrial was properly denied, since defendant could

not show harm caused by discovery rule violation. O.C.G.A. § 17-16-6. > Davis v. State, 2002, 253 Ga.App. 803, 560 S.E.2d 711. Criminal Law K 627.8(6)

Even if state violated its discovery obligations by filing its witness list late, exclusion of testimony of witness was not warranted where defendant was not surprised by witness and was allowed to interview witness before she testified. O.C.G.A. § 17-16-6. > Carter v. State, 2002, 253 Ga.App. 795, 560 S.E.2d 697, reconsideration denied. Criminal Law K 629.5(2)

Admitting testimony of police officer, whose name was not on state's witness list, was not abuse of discretion, where officer's name was referenced on warrant, defendant received officer's narrative report, officer's testimony was limited to substance of report, and defendant was permitted to interview witness before he took stand. O.C.G.A. § 17-16-6. > Arnold v. State, 2002, 253 Ga.App. 307, 560 S.E.2d 33. Criminal Law K 629.5(3)

Defendant failed to show that he was prejudiced and that the state acted in bad faith by failing to turn over defendant's statement until day of trial and not disclosing name of officer as a similar transaction witness until shortly before day of trial and in not disclosing some of the officer's notes, and thus, the trial court was warranted in failing to grant defendant's motion to exclude his statement as a sanction for State's alleged reciprocal discovery violation, as well as in admitting officer's testimony, in prosecution for aggravated assault and theft by taking. O.C.G.A. § 17-16-6. > Thomas v. State, 2001, 253 Ga.App. 58, 557 S.E.2d 483. Criminal Law K 627.8(6); Criminal Law K 629.5(2)

Trial court did not abuse its discretion in refusing to allow defendant to call witnesses that State had received no notice of until witness was actually called; though counsel claimed he discovered witness only one hour before trial, counsel failed to notify State even at that time. O.C.G.A. §§ 17-16-6, > 17-16-8(a). > Jones v. State, 2001, 251 Ga.App. 285, 554 S.E.2d 238. Criminal Law K 629.5(2)

Exclusion of expert's testimony as to direct opinion on techniques that state used to interview child victims in trial for aggravated sexual assault and two counts of aggravated child molestation was not warranted, and better solution would have been to allow prosecutor to interview witness before he testified, where defense counsel provided state with name of expert witness, but as of discovery deadline, without explanation, did not provide expert with any materials to review, and state's experts testified without any knowledge of what defense expert would say. > O.C.G.A. §§ 17-16-4(b)(2), 17-16-6. > Beck v. State, 2001, 250 Ga.App. 654, 551 S.E.2d 68, reconsideration dismissed. Criminal Law K 629.5(2)

Interview of the witness is a remedy for failure to comply with the requirement that a witness must be identified prior to trial, which avoids the harsh statutory sanction of excluding evidence not properly disclosed. > O.C.G.A.§§ 17-16-4(b)(2), 17-16-6. > Beck v. State, 2001, 250 Ga.App. 654, 551 S.E.2d 68, reconsideration dismissed. Criminal Law K 629.5(2)

Exclusion of expert's testimony as sanction for failing to disclose expert prior to trial pursuant to statute, to preclude expert from directly critiquing state's interviews with child victims, likely did not contribute to guilty verdict, and thus error was harmless, where jury heard extensive testimony on expert's opinion as to proper interviewing techniques, and, in response to strikingly similar hypotheticals, why interview techniques like those used by state's experts were flawed, defense counsel was able to extensively cross-examine state's witnesses, and expert also testified as to possible reasons why children would name defendant as molester when he claimed he did not commit acts described. > O.C.G.A. §§ 17-16-4(b)(2), 17-16-6. > Beck v. State, 2001, 250 Ga.App. 654, 551 S.E.2d 68, reconsideration dismissed. Criminal Law K 629.5(2)

An interview of the witness is the remedy for failure to comply with the requirement that a witness must be identified prior to trial; this remedy avoids the harsh sanction of excluding evidence not properly disclosed. O.C.G.A. §§ 17-16-6, > 17-16-8(a). > Massey v. State, 2000, 272 Ga. 50, 525 S.E.2d 694, reconsideration denied. Criminal Law K 629.5(1); Criminal Law K 629.5(2)

Defendant was not entitled to exclude testimony of accomplice's cellmate, in prosecution for felony murder while in commission of an armed robbery, though defendant was not notified until day before trial that state intended to call cellmate as witness, where prosecuting attorney notified the defense as soon as she became aware that cellmate might be a possible witness for the state, cellmate was called as last witness in state's case in chief, cellmate was not allowed to testify until defense counsel completed an extensive voir dire outside the presence of the jury, defendant did not move for any additional time to interview cellmate, and cellmate did not implicate defendant in the crimes. O.C.G.A. § 17-16-6. > McKenzie v. State, 1999, 271 Ga. 47, 518 S.E.2d 404. Criminal Law K 629(3.1)

Trial court did not abuse its discretion in refusing to allow testimony by allegedly newly discovered defense witness on last day of trial based on incredible explanation for why testimony was not discovered earlier and based on prejudice to state from defendant's failure to provide identifying information requested to allow state to investigate witness. O.C.G.A. § 17-16-6. > Thompson v. State, 1999, 237 Ga.App. 466, 517 S.E.2d 339. Criminal Law K 629.5(2)

Even if defense counsel were misled by state's failure to specify that it intended to introduce into evidence various items of tangible evidence, and even if failure to so specify violated criminal discovery provisions, such items were properly admitted into evidence; trial court gave counsel opportunity to inspect items before their introduction into evidence, and defendant showed neither prejudice nor bad faith. O.C.G.A. § 17-16-6. > Felder v. State, 1999, 270 Ga. 641, 514 S.E.2d 416, denial of post-conviction relief affirmed > 274 Ga. 870, 561 S.E.2d 88, certiorari denied 123 S.Ct. 175, 537 U.S. 844, 154 L.Ed.2d 69. Criminal Law K 627.8(6)

State's failure to comply with its discovery obligations by not providing defendant newly discovered photographs of merchandise allegedly shoplifted by defendant did not require extreme sanction of excluding photographs from trial, where defendant rejected court's offer to grant a continuance, state did not act in bad faith, and photographs were not prejudicial to defendant but cumulative. O.C.G.A. § 17-16-6. > Brown v. State, 1999, 236 Ga.App. 478, 512 S.E.2d 369. Criminal Law K 627.8(6)

Denial of motion for continuance filed by defendant charged with sex offenses, which motion was based on state's failure to provide him, within 10 days of trial, with copy of written scientific report concerning deoxyribonucleic acid (DNA) testing, was reversible error; permitting defense counsel to inspect scientific report only four days prior to trial did not afford adequate time for trial preparation. > O.C.G.A. §§ 17-16-4(a)(4), 17-16-6. > Brady v. State, 1998, 233 Ga.App. 287, 503 S.E.2d 906. Criminal Law K 627.8(6); Criminal Law K 1166(10.10)

Witness could testify as to conversation in which defendant bragged about armed robbery, despite defendant's "objection" that he was not properly served under discovery statutes, where defendant did not request any relief enumerated under statute for State's failure to comply with discovery requirements. O.C.G.A.§ 17-16-6. > Williams v. State, 1997, 226 Ga.App. 313, 485 S.E.2d 837. Criminal Law K 627.8(3)

Youngblood

- (FN10.) Even under the standard articulated by the majority the proper resolution of this case should be a remand to consider whether the police did act in good faith. The Arizona Court of Appeals did not state in its opinion that there was no bad faith on the part of the police. Rather, it held that the proper standard to be applied was a consideration of whether the failure to preserve the evidence deprived respondent of a fair trial, and that, as a result, its holding did "not imply any bad faith on the part of the state." Id., at 54, > 734 P.2d, at 596. But there certainly is a sufficient basis on this record

for a finding that the police acted in bad faith. The destruction of respondent's car by the police (which in itself may serve on remand as an alternative ground for finding a constitutional violation, see > id., at 55, 734 P.2d, at 597 (question left open)) certainly suggests that the police may have conducted their investigation with an improper animus. Although the majority provides no guidance as to how a lack of good faith is to be determined, or just how egregious police action must be, the police actions in this case raise a colorable claim of bad faith. If the Arizona courts on remand should determine that the failure to refrigerate the clothing was part of an overall investigation marred by bad faith, then, even under the majority's test, the conviction should be overturned.

> Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214, pointed out two specific instances in which an official might forfeit his good-faith defense by deviating from a reasonable performance of his job. An official does not carry out his official duties properly if he chooses a course of conduct that he knows, or should know, is unconstitutional. > Id., at 322, 95 S.Ct., at 1000. Similarly, an official steps outside his proper role when he uses his powers to inflict constitutional or other harm on an individual for reasons unrelated to the performance
of his duty. > (FN7) Selective and malicious enforcement of the law is not good faith.

[434 U.S. 572] Under this standard, Navarette may well be able to defeat these defendants' affirmative defense of good faith. He has alleged, and therefore we must assume, that the defendants did not in fact act within the sphere of their accepted responsibilities. If they carelessly disregarded the standards which their superiors directed them to follow, they would be unable to make the threshold showing necessary to establish good faith. Whether or not that showing can be made in this case depends on a resolution of the conflict between Navarette's allegations of negligence and the statements in defendants' affidavit.

The defendants fare no better if we limit our attention to the two examples of bad faith set out in Wood v. Strickland, supra. The Wood Court stated that actual malice--the intent to cause constitutional or other injury--cannot be good faith; a defendant may not have the benefit of the good-faith defense if he misuses his powers by singling out the plaintiff for special and unfair injuries. > (FN8) In this case, malice is alleged in some of the plaintiff's claims, and we must assume that it can be proved. The evidence might show that the defendants intentionally confiscated some of Navarette's mail as a punishment and that they negligently mislaid other letters. A jury might then find that the defendants' animus toward Navarette so tainted their handling of his mail that the good-faith defense should be denied them even with respect to harm caused by their negligence. Only by qualifying its previous teaching about this defense can the Court regard evidence of the defendants' ill will toward the plaintiff as totally irrelevant to any claim that he may have for harm caused by the negligent performance of their duties.

The Wood Court also noted that a plaintiff may successfully rebut a claim of immunity based on the defendant's good-[434 U.S. 573] performance of official duties by demonstrating that the defendant knew, or should have known, that he was acting unconstitutionally. I think the Court is correct in concluding that the First Amendment's applicability to an inmate's correspondence was not so well established in 1971 that the defendants should have known that interfering with a prisoner's routine mail was unconstitutional. That does not, however, foreclose the argument that the official neglect alleged in this case implicated a different constitutional right--the prisoner's right of access to the courts. In 1971, Navarette had a well-established right of access to the courts and to legal assistance. > (FN9)

> (FN7.) Referring to Wood v. Strickland, the Court in > O'Connor v. Donaldson, 422 U.S. 563, 577, 95 S.Ct. 2486, 2494, 45 L.Ed.2d 396, stated:

"Under that decision, the relevant question for the jury is whether O'Connor 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [Donaldson], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [Donaldson].' [> 420 U.S.], at 322, 95 S.Ct., at 1001."

Thus, both in Wood and in O'Connor, the Court expressly stated that the defendant would forfeit his qualified immunity if he acted with the malicious intention to cause a deprivation of constitutional rights or if he deliberately intended to cause "other injury."

> 472 S.E.2d 461

221 Ga.App. 715

Court of Appeals of Georgia.

HARPER et al.
v.
DOOLEY et al.

No. A96A0343.
May 29, 1996.

Reconsideration Denied June 17, 1996.

Certiorari Denied Oct. 4, 1996.

> [6] Appeal and Error K> 1026

30 ----
30XVI Review
30XVI(J) Harmless Error
30XVI(J)1 In General
30k1025 Prejudice to Rights of Party as Ground of Review
> 30k1026 In General.

In order to obtain a reversal, appellant must show not just error, but harm.

> [7] Appeal and Error K> 1050.1(1)

30 ----
30XVI Review
30XVI(J) Harmless Error
30XVI(J)10 Admission of Evidence
30k1050 Prejudicial Effect in General
30k1050.1 Evidence in General
> 30k1050.1(1) In General.

When evidence is erroneously admitted, it is considered harmful unless it can be said that it did not affect the verdict.

> 102 S.Ct. 940

455 U.S. 209, 71 L.Ed.2d 78

Supreme Court of the United States

Harold J. SMITH, Superintendent, Attica Correctional Facility
v.
William R. PHILLIPS.

No. 80-1082.
Argued Nov. 9, 1981.

Decided Jan. 25, 1982.

> 92 S.Ct. 763

405 U.S. 150, 31 L.Ed.2d 104

Supreme Court of the United States

John GIGLIO, Petitioner,
v.
UNITED STATES.

No. 70--29.
Argued Oct. 12, 1971.

Decided Feb. 24, 1972.

While appeal from a judgment of conviction was pending in the Court of Appeals, defense counsel filed a motion for new trial on basis of newly discovered evidence. The District Court denied the motion. On certiorari to the Court of Appeals, the Supreme Court, Mr. Chief Justice Burger, held that if assistant United States attorney, who first dealt with key Government witness, promised witness that he would not be prosecuted if he cooperated with the Government, such a promise was attributable to the Government, regardless of whether attorney had authority to make it, and nondisclosure of promise, which was not communicated to assistant United States attorney who tried the case, would constitute a violation of due process requiring a new trial.

Reversed > [1] Criminal Law K> 706(2)

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k705 Presentation of Evidence
110k706 For Prosecution
> 110k706(2) Use of Improper Evidence; Perjured or False Testimony.

(Formerly > 110k700)

Deliberate deception of a court and jurors by presentation of known false evidence is incompatible with rudimentary demands of justice.

> [1]> [2]> [3] As long ago as > Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in > Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In > Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, '(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' > Id., at 269, 79 S.Ct., at 1177. Thereafter > Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' See American[405 U.S. 154] Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function s 3.11(a). When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. > Napue, supra, at 269, 79 S.Ct., at 1177. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . ..' > United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under > Brady, supra, at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .' > Napue, supra, at 271, 79 S.Ct., at 1178.

As already noted, the Court of Appeals did not rely upon the District Court's imputation of bias. Indeed, it did not even reach the question of juror bias, holding instead that the prosecutors' failure to disclose Smith's application, without more, violated respondent's right to due process of law. Respondent contends that the Court of Appeals thereby correctly[455 U.S. 219] preserved "the appearance of justice." Brief for Respondent 7. This contention, too, runs contrary to our decided cases.

> [5] Past decisions of this Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. In > Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), for example, the prosecutor failed to disclose an admission by a participant in the murder which corroborated the defendant's version of the crime. The Court held that a prosecutor's suppression of requested evidence "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." > Id., at 87, 83 S.Ct., at 1196. Applying this standard, the Court found the undisclosed admission to be relevant to punishment and thus ordered that the defendant be resentenced. Since the admission was not material to guilt, however, the Court concluded that the trial itself complied with the requirements of due process despite the prosecutor's wrongful suppression. > (FN9) The Court thus recognized that the aim of due process "is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused." Ibid.

This principle was reaffirmed in > United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). There, we held that a prosecutor must disclose unrequested evidence which would create a reasonable doubt of guilt that did not otherwise exist. Consistent [455 U.S. 220] with Brady, we focused not upon the prosecutor's failure to disclose, but upon the effect of nondisclosure on the trial:

"Nor do we believe the constitutional obligation [to disclose unrequested information] is measured by the moral culpability, or willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it.

Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of the evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." > 427 U.S., at 110, 96 S.Ct., at 2400 (footnote and citation omitted). > (FN10)

In light of this principle, it is evident that the Court of Appeals erred when it concluded that prosecutorial misconduct alone requires a new trial. We do not condone the conduct of the prosecutors in this case. Nonetheless, as demonstrated in Part II of this opinion, Smith's conduct did not impair his ability to render an impartial verdict. The trial judge expressly so found. > 87 Misc.2d, at 627, 384 N.Y.S.2d, at 915. [455 U.S. 221] Therefore, the prosecutors' failure to disclose Smith's job application, although requiring a post-trial hearing on juror bias, did not deprive respondent of the fair trial guaranteed by the Due Process Clause.

IV

> [6]> [7] A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution. As we said in > Cupp v. Naughten, 414 U.S. 141, 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973):

"Before a federal court may overturn a conviction resulting from a state trial ... it must be established not merely that the [State's action] is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."

Absent such a constitutional violation, it was error for the lower courts in this case to order a new trial. Even if the Court of Appeals believed, as the respondent contends, that prosecutorial misbehavior would "reign unchecked" unless a new trial was ordered, it had no authority to act as it did. Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension. > Chandler v. Florida, 449 U.S., at 570, 582-583, 101 S.Ct., at 807, 813-814; > Cupp v. Naughten, supra, 414 U.S. at 146, 94 S.Ct., at 400. No such wrongs occurred here. Accordingly, the judgment of the Court of Appeals is

Reversed.