

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.

STATE OF NORTH CAROLINA

v.

_____,
Defendant.

**BRIEF IN SUPPORT OF
MOTION TO DISMISS FOR
DESTRUCTION OF EXCULPATORY
EVIDENCE**

COMES NOW Defendant in the above-captioned matter, who, through the undersigned attorney, offers the following memorandum of law in support of the pending Motion to Dismiss Based on Loss and Destruction of Exculpatory Evidence.

STATEMENT OF FACTS

1. The Defendants _____ and _____ are charged with assault on a government official and resisting public officer arising out of an event that occurred on or about the evening of September 19, 2007 and continued through the morning of September 20, 2007.
2. As part of this incident the Defendant, was arrested and brought to the intake center of _____ County, NC where he was shackled to a chair and assaulted by law enforcement officers of the _____ County Sheriff's Department.
3. The intake facility was subject to video surveillance by way of a DVR system maintained by the _____ County Government by and through the _____ County Sheriff's Department in conjunction with the _____ County Emergency Management Department. This video feed originally recorded a video that showed Defendant both in contact with deputies and alone for roughly a one-hour period and contained roughly 8 gigabytes of information. On this video were images, which showed Defendant's face, body, medical condition, behaviors, and interactions with Sheriff's Officers in the period immediately following his arrest.
4. In the normal scope of operations, these videos were maintained for a period of at least 3 months following their creation before the material was taped over.
5. On October 1, 2007, while this video was still in its original form and unmodified, counsel for the Defendants sent a letter to the _____ County Sheriff's Department as well as the _____ County District Attorney's Office. This letter (herein attached as Exhibit 1 and incorporated by reference as if fully set out herein) stated:

- a. It is my understanding that your office is in possession of several tapes and unfinished reports regarding the incident, which led to my client's injuries on September 20, 2007. It is my understanding that among these reports and video is a videotape of my client, which was taken while he was detained by the _____ County Sheriff's Office for a period of about 30-40 minutes prior to his admission to the Hospital. This letter represents the formal request and demand of our office that said materials be made available for inspection at a mutually convenient time and location. In the alternative, should your office not wish to cooperate with this request, please take this letter as our office's formal demand that all such materials **be preserved and not taped over, destroyed, or altered in any way.** (See Exhibit 1)
6. No documents or videos were produced to the defendant by either the _____ County Sheriff's Department or _____ County District Attorney's Office at that time.
 7. Following this, roughly one month after the incident on or about October 19, 2007 Major _____ of the _____ County Sheriff's Department, presumably in response to the letter sent asking the _____ County Sheriff's Department to preserve this video contacted the director of _____ County Emergency Management Services, and asked to pull up the video of the intake facility (which was still in its original form) for review.
 8. The next day, the director pulled up the video, which was still in its original unmodified form, and Major _____ reviewed it in its entirety in the director's office. At this time, the _____ County Sheriff's Department had received the Defendant's letter asking the same to be maintained in its original form.
 9. Despite the letter to the Sheriff, Major _____ made no mention to the director of the need to preserve the video in its original form or the letter received from this office and instead agreed to have a third party agent review the video and use it to create a new video that only maintained what the third party determined in his sole discretion to be the "points of contact" between the Defendant and members of the _____ County Sheriff's Office.
 10. At Major _____'s direction and with his consent, the director called the third party, owner of _____ Security. He is the third party security company that the County of _____ uses for all of their video recording and monitoring and has a close business relationship with the director and the County of _____.
 11. The third party looked at the video and determined that it contained between 7 and 8 gigabytes of information. He talked with the director and together along with Major _____ they determined that it would be appropriate to modify the video to only preserve "the portions where the officers were in physical contact with the individual (Defendant)."
 12. According to the third party's deposition testimony he then created a new video. The third party created a new video using this method, removing all of the images where Defendant was in a room alone or where the third party determined in his own discretion that there was no "physical contact" between Defendant and the Deputies involved. In doing this, the third party admittedly failed to download scenes where Defendant was visible on camera in a room alone for some extended period of time.

13. Additionally, contrary to his contention that the third party maintained all points of physical contact between the Deputies and Defendant, the third party also failed to download the video of the deputies bringing defendant from their vehicles into the intake facility through the sally port, though there is some question regarding the functionality of that camera. This video is particularly important as Deputy _____ testified in his deposition that Defendant was calm and compliant while they walked him into the intake and that they were able to bring him in “without incident.”
14. Admittedly, the third party did not bother to look at all of the video that was being deleted, instead stating that “whenever [he] got to the point where there wasn’t contact [he] would just fast forward...it’s not something [sic] I actually sat there and tried to, you know, make definitive processes [sic] analysis on, you know his condition or, you know what shape he was in.”
15. The third party did this based on his own determination of what was and was not important or exculpatory with an eye solely toward civil litigation stating that: “I mean you know, from being in the law enforcement background, you know, whenever he’s in the room by himself, you know, that doesn’t really matter. You know whenever he’s in contact, that’s where you are going to have the liable [sic] and legal litigation, you know nine times out of ten.”
16. The third party further evidenced a disregard for the video’s ability to show the Defendant’s physical and mental condition in the subsequent questions stating:

Q (By Attorney)—It’d be pretty important to see what sort of medical condition he was in when he was sitting alone, right?

A (Third Party)---Not to me it wouldn’t...not for video downloading. I’m sure if that person (Defendant) would have been in any type of medical distress, the person downstairs would monitor that.
17. At the time the third party downloaded the modified compressed video it would have been relatively simple and cheap to download the entire unmodified video onto a memory “stick” or external hard drive. The third party testified to this fact stating that the entire unmodified video could have been saved on a \$40 memory stick. Neither Major _____, nor the director ever asked the third party to maintain the entire unmodified video on a memory stick of this type despite presumably receiving the letter sent by counsel for defendant on October 1, 2007. It is undisputed that at a minimum the _____ County District Attorney’s Office received their copy of this same letter mailed the same day in the same mailing as confirmed by the letter dated October 9, 2007.
18. This modified video removed a sufficient amount of video data to shorten the video from its original 8 gigabytes to less than 750 megabytes, less than one-tenth of the original size of the video. This shortened video was again approved by the director prior to its delivery to Major _____.

19. After this video was modified on or about October 20th 2007 **and while the video was still available for download in its original unmodified form** the director discussed the shortening of the video with Major _____ stating: "I do remember telling Major _____ that we did---that the third party just did copies of contact. Q (Attorney) At that point, did Major _____ tell you [he] needed you to preserve the original form? A (The Director) Not that I remember."
20. Despite having this conversation with the director, and despite both the Sheriff Departments receipt of the letter dated October 1, 2007, Major _____ "OK'd" the modified video and took no steps to preserve the original video on a \$40 hard drive.
21. Despite this, the original form of the video would not have been recorded over until on or about December 19, 2007 some 3 months after the incident occurred.
22. Prior to the modification of this video, a Brady Motion was filed on October 3, 2007. This motion requested all potentially exculpatory evidence including the video in its original form. (See Brady Motion of Defendant herein incorporated by reference as Exhibit 3B).
23. In response to this motion, the Assistant District Attorney, _____, wrote "The rules of pre-trial discovery in criminal cases only apply to cases within the original jurisdiction of the Superior Court...there are no rules requiring pretrial discovery for cases within the original jurisdiction of the District Court such as Defendant's case.
24. Following this letter, upon information and belief, the _____ County District Attorney's Office made no attempt to contact the Sheriff's Department to tell them to preserve the video in its original form or to acquire the video for preservation in the District Attorney Office's records.
25. Following this motion and the response of Assistant District Attorney, **and while the video was still available in its original form** subpoenas were sent to both the _____ County District Attorney's Office and the _____ County Sheriff's Department. These subpoenas were sent on October 23, 2007 and requested, "All Sheriff Department reports, **videos of the Defendant, Defendant**, and any other documents related to the arrest and injuries that Defendant sustained on September 20, 2007."
26. The _____ County Sheriff's Department responded to this initial subpoena by producing the reports of Deputy _____ and Deputy _____, and the Taser Sheet of Deputy _____. No video was produced or identified in this response despite the Sheriff Department's knowledge of the video's existence and the recent downloading, viewing and modification of the video by Major _____.
27. At this time the video was still available in its original form and could have been copied to a \$40 hard drive memory stick.
28. Sometime after December 20, 2007 despite the letter asking to preserve the video, a pending Brady Motion, and two valid subpoenas the original form of the video was recorded over by

the _____ County Sheriff's Department. The original version of this video containing video images of Defendant's physical and mental condition on that night no longer exists.

ARGUMENT

It is settled under North Carolina law and the United States Constitution that "Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." State v. Williams, 362 N.C. 628, 669 S.E.2d 290 (2008) *citing* Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Exculpatory evidence is not limited to evidence of guilt or innocence but instead "can be either impeachment evidence or exculpatory evidence." United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

"Evidence is considered 'material' if there is a 'reasonable probability' of a different result had the evidence been disclosed." State v. Berry, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) (quoting Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Materiality does not require a "demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Kyles, 514 U.S. at 434, 115 S.Ct. 1555 (citation omitted). Rather, defendant must show that the government's suppression of evidence would " 'undermine[] confidence in the outcome of the trial.' " *Id.* (quoting Bagley, 473 U.S. at 678, 105 S.Ct. 3375).

Additionally, pursuant to Arizona v. Youngblood, when law enforcement, acting in bad faith destroys or fails to preserve evidence which is potentially exculpatory, a violation of due process under the 14th Amendment to the United States Constitution occurs. Arizona v. Youngblood, 488 U.S., 51 (1988). The test for whether law enforcement acted in bad faith, "turns on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed" *Id.* At 56n.

The North Carolina legislature has set a strict remedy for this type of flagrant violation of a Defendant's Constitutional rights. This is reflected in N.C. Gen. Stat. s. 15A-954(a)(4) which "requires that upon a defendant's motion, the trial court must dismiss the charges stated in a criminal pleading if it determines that...a defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of the case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. s. 15A-954(a)(4).

In this case, under all three of these standards, the defendant's constitutional rights have been flagrantly violated by the willful and intentional destruction of relevant exculpatory evidence at the hands of the _____ County Sheriff's Department.

In this case, Defendant was arrested and charged with misdemeanor assault on a government official for allegedly attacking several _____ County Sheriff's Deputies. Following this altercation, Defendant was detained and transported to the intake facility located at the _____ County Courthouse. At that time, Defendant was suffering from a

badly fractured skull, blood and swelling on the brain, two broken ribs and severe swelling and contusions around his head, face and neck. As a result of these injuries, which occurred sometime during the altercation, it is the contention of the defense that Defendant was unable to form the requisite mens rea to *intentionally* assault a government official. Additionally, the officers in this case have given testimony on several occasions under oath regarding the nonexistence and invisibility of any injuries on Defendant's person while he was detained at the intake facility. The video of Defendant alone in the intake facility would be crucial impeachment evidence to rebut these claims as well as to call into question the general veracity of the officers involved in this situation. Unfortunately, this information has been made unavailable by the _____ County Sheriff's Department despite several requests to maintain the original video.

Recently, both the North Carolina Supreme Court and the North Carolina Court of Appeals has dealt with a remarkably similar situation in the case of State v. Williams. State v. Williams, 362 N.C. 628, 669 S.E.2d 290 (2008). In that case, the defendant, Theodore Jerry Williams was charged with felony assault on a government official or employee for allegedly punching a Union County Sheriff's Deputy while he was being moved from a holding cell at the Union County jail. Earlier, when Mr. Williams was originally arrested, the Sheriff's Department had taken a photograph or "mug shot" as part of their standard procedure. Following the altercation that led to the felony charge at issue, the Union County Sheriff's Department took another picture of Mr. Williams. This second picture showed some of the injuries that Mr. Williams had sustained in the altercation with the Union County Sheriffs. Following this incident Mr. Williams brought a federal civil rights action against both the Union County Sheriff's Department and Union County District Attorney's Office.

Sometime after this, some member of the District Attorney's Office created a poster with both pictures and the caption "before suing the DA's office and after suing the DA's office." The Defendant requested both this poster and the two pictures contained within the poster. However, the District Attorney involved was unable or unwilling to produce either this poster or these photos as they had previously been destroyed.

As in Williams, Defendant is charged with assaulting a government official. Also like Williams the video images Defendant has requested contained images and video of Defendant's physical and mental condition while he was detained in an intake facility immediately following the incident, which formed the basis for his criminal charges.

In Williams the court noted the relevance and exculpatory nature of these types of images stating that: "as to the assault charge, the evidence would have been admissible at trial for impeachment purposes during defendant's cross-examination of the State's witnesses... moreover the poster and photographs were certainly relevant to the defendant's theory of conspiracy against him...the evidence would have tended to prove the partial or complete defense of self defense against the assault charge because proof of the injuries sustained at the Union County jail would have tended to show that defendant was not the aggressor." State v. Williams, 362 N.C. 628, 669 S.E.2d 290 (2008).

Similarly, in Defendant's case the videotape of the Defendant restrained in a room alone could show Defendant's actions, mental state, and any injuries, which may have been visible on Defendant's face or body. Like the evidence in Mr. Williams' case, the evidence in Defendant's case would have been admissible at trial for impeachment purposes, was relevant to Defendant's claims of a conspiracy on the part of the _____ County Sheriff's Department to deprive Defendant of his constitutionally protected civil rights, and may have supported a theory of complete or partial self defense at trial.

It is clear from the facts of this case that the district attorney's office and the specific prosecutors of this case have had little or no involvement in the destruction of this video. However as the United States Supreme Court noted, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." State v. Williams, 362 N.C. 628, 669 S.E.2d 290 (2008) *citing* Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Based on this violation of Defendant's constitutional rights and pursuant to N.C. Gen. Stat. s. 15A-954(a)(4) this alone is sufficient to warrant dismissal of the criminal charges against Mr. Absher if "there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. s. 15A-954(a)(4).

Again, the court dealt with this same standard in Williams and noted that in that case there was no remedy but to dismiss the prosecution because "it deprived the defendant of the only opportunity to obtain [a type] of evidence which might prove his innocence." State v. Williams, 362 N.C. 628, 669 S.E.2d 290 (2008). The court noted that this would impact the defendant's ability to "secure material and favorable evidence." Id. at 635. Similarly, in Defendant's case the video images of the intake facility showing Defendant's physical and mental condition have been completely destroyed effectively preventing Defendant from securing material and favorable evidence which might prove his innocence.

While this alone is sufficient to dismiss the charges against Defendant, it is also important to highlight at the outrageous and shocking destruction of evidence, by the _____ County Sheriff's Department, which was undertaken with a flagrant disregard for the constitutional rights of Defendant.

When law enforcement, acting in bad faith destroys or fails to preserve evidence, which is potentially exculpatory, a violation of due process under the 14th Amendment to the United States Constitution occurs. Arizona v. Youngblood, 488 U.S. 51 (1988). The test for whether law enforcement acted in bad faith, "turns on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed" Id. At 56n. In this case, the video in question existed for roughly three months after it was created and was erased on or about December 20, 2007. Prior to that time, a senior ranking officer with the _____ County Sheriff's Department (Major _____) had viewed the video in its entirety and was thus made aware of its potential exculpatory value. On October 1st 2007, a mere 11 days after this incident a letter was specifically directed to the _____ County Sheriff's Department and the _____ County District Attorney's Office. Two days later a Brady motion was filed asking for the video and all exculpatory evidence. On October 23rd 2007 two subpoenas were sent out requesting the video. Despite all of these requests,

motions, and subpoenas, and despite having viewed the video in its entirety, the _____ County Sheriff's Department approved the removal of 90% of the video from its original form. Further, the _____ County Sheriff's Department allowed a third party agent who was paid by the Sheriff's Office to have the sole discretion in determining what portions of the video to keep and what portions to remove. This individual did not even view the whole video to determine what to keep, but instead fast-forwarded through any part he deemed on his own to be unimportant or irrelevant. Then, despite repeated requests to the contrary, the _____ County Sheriff's Department allowed the original video to be destroyed and irrevocably taped over with no hope of recovery. Clearly, these actions show bad faith on the part of the Sheriff and at best an egregiously malicious disregard for the constitutional rights of the Defendant.

Today we live in a society where rule of law must trump rule of those with power. It is the solemn duty of our law enforcement officers to zealously protect and preserve the Constitution and all that it stands for. Justice demands no less of those who wear a badge. For the above-mentioned reasons, the Defendant respectfully requests that this court issue an order DISMISSING the charges against the Defendant.

Respectfully submitted, this the ____ day of _____, 20_____.

Attorney for Defendant