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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ARIZONA, Petitioner V. LARRY YOUNGBLOOD

CASE NO: 86-1904

PLACE: WASHINGTON, D.C.

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PAGES: 1 thru 54

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IN THE SUPREME COURT OF THE UNITED STATES

ARIZONA,

Petitioner

v. : No. 86-1904

LARRY YOUNGBLOOD

Washington, D.C.

Tuesday, October 11, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

JOHN R. GUSTAFSON, ESQ., Special Deputy Attorney for Pima County, Arizona, Tucson, Arizona; on behalf of the Petitioner.

DANIEL F. DAVIS, ESQ., Tucson, Arizona; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 86-1904, Arizona v. Youngblood.

Mr. Gustafson, you may proceed whenever you're ready. Is it Gustafson or -- it's Gustafson, isn't it?

MR. GUSTAFSON: Gustafson.

QUESTION: You've Americanized it.

ORAL ARGUMENT OF JOHN R. GUSTAFSON

ON BEHALF OF THE PETITIONER

MR. GUSTAFSON: Mr. Chief Justice, and may it please the Court.

This case concerns whether the Fourteenth Amendment requires dismissal of a state criminal conviction for the alleged failure of police to properly preserve and to test certain materials obtained from a rape victim.

The Respondent was convicted by a jury of crimes involving the rape of a boy. The Arizona Court of Appeals found that the Respondent was denied due process because of police inaction in two areas: first, that police did not perform certain tests on materials they had obtained from the rape victim. These materials were properly preserved as they were refrigerated. And secondly, the police did not refrigerate the victim's

undergarments that they had obtained when the victim went to the hospital.

The lower court found that these inactions on the part of the police constituted a due process violation requiring reversal of the jury's verdicts and dismissal of the prosecution.

It is the State's position that the lower court has substituted speculation about the evidentiary value of these materials for the constitutional standard of materiality and in doing so, has obviated the role of the jury as the trier of fact.

The circumstances regarding the collection of the evidence in question are as follows. On October 29, the 10 year old boy was kidnapped and raped. Omitting the details of the crime, he was taken to the hospital shortly after the offense.

At the hospital the boy was treated for his injuries and, in addition, the treating physician used what is known as a sexual assault kit. It's a device. It's a device -- it's a kit that collects evidence from different areas. But in this particular instance, the physician used a swab, swabbed the boy's rectum, made a microscopic slide of the contents of the smear, gave it to police who refrigerated it. And that was the proper thing to do.

At the time, the police also gathered the boy's undershirt and his underpants. Those were placed in a bag and placed in property, and they were not refrigerated.

About nine days after the gathering of that evidence, the police criminologist examined the microscope slide obtained at the hospital. He found that there was spermatozoa present on the slide, but found only a small portion of it.

QUESTION: Mr. Gustafson, did the defense ask for any Brady materials in this case?

MR. GUSTAFSON: No, and they don't need to. Under the Arizona Rules of Criminal Discovery, we're obligated to give that to them. We have to --

QUESTION: What does the record show, if anything, that the State disclosed to the defense about the existence of the swab and the clothing?

MR. GUSTAFSON: The record shows -- there's an absence in the record on this part. The police disclosure --

QUESTION: (inaudible)

MR. GUSTAFSON: Excuse me? There's an absence in the record --

QUESTION: Absence, sorry. Thank you.

MR. GUSTAFSON: The police disclosure or the

State's disclosure in this case is its formal police reports which are given directly to defense counsel.

QUESTION: The police report shows that there was a rectal swab and some clothing of the victim?

MR. GUSTAFSON: Yes.

Now, what's clear is that 10 days after his arraignment -- we will bring this to December 20 -- there was supposed to be a preliminary hearing which wasn't held. That is at the time that the State had to issue its disclosure.

QUESTION: Mr. Gustafson, could you speak up a little bit?

MR. GUSTAFSON: Okay. Yes.

QUESTION: (inaudible) Crank the thing a little higher. You're a tall Scandinavian there. We --

MR. GUSTAFSON: But I cannot say at the exact time that they knew about the existence of -- because there was a continuing process of disclosure.

QUESTION: Did the defense ever ask to examine these items to do their own testing?

MR. GUSTAFSON: No, they did not. The --

QUESTION: Why didn't the State conduct tests on the clothing for the blood group do you suppose?

MR. GUSTAFSON: The -- they eventually -- to put it in a nutshell, they were put into property and no

one asked the police criminalist to examine them for over a year. They were not examined.

QUESTION: When you say they were put into property, what do you mean?

MR. GUSTAFSON: An evidence locker.

QUESTION: An evidence locker?

MR. GUSTAFSON: Yes, in a paper bag. They were not refrigerated or anything like that. Police collected at the scene, put in a bag and placed into evidence.

After the police criminologist examined the microscope slide, which was nine days after the crime, some six weeks or five weeks after that examination, the Respondent was arrested. His mental competency was called into question. The case was stayed for about eight months pending the resolution of that. Discovery still continued during that period of time.

The State then asked on October 15 to obtain samples from the Respondent for comparison. That was denied by the trial court.

When the case first came to trial, which was in December of 1984, the defense called the criminologist who did not examine any of the evidence, either the rectal swab slide or the underwear. He testified only regarding -- in general matters about the

existence -- what might or might not be found upon these materials. The defense at trial used this to create -- as an attempt to create a reasonable doubt in the jury's mind.

The police criminalist had -- had tested the rectal swab shortly before trial and determined that it did not have --

QUESTION: That was a year or so after --

MR. GUSTAFSON: It was.

QUESTION: -- it had been refrigerated, wasn't it?

MR. GUSTAFSON: That's correct. It was a year after.

QUESTION: And I gather there were some signs after that test that perhaps, if it were accurate, the accused would be exonerated, wasn't there?

MR. GUSTAFSON: There wasn't -- contamination wasn't shown on the sample that was refrigerated. The defense expert stated -- eliminated -- since it was refrigerated, eliminated the possibility of bacterial contamination because it had been refrigerated.

In fact, at the lower court, the Respondent had asked in his opening brief that the case be remanded for possible retesting of that refrigerated thing. But I don't think it was established that that was

contaminated. There was some speculation as to that.

At trial the Respondent's position about the testing was this. Since the ABO blood test done on the sexual assault kit determined that there was no blood type on it, that raised two possibilities. It was either that that sample was insufficient when it was gathered, or that the true assailant -- this is according to the Respondent -- was part of 20 to 25 percent of the population who do not secret their blood type into their other bodily fluids.

At that trial the defense expert also questioned about the underwear, essentially that that would be a good place to look, or it -- frequently, in his experience, that semen would be found upon it. That trial resulted in the hung jury.

Following that trial, the police had obtained a new test, which is called the P-30 test. That test had been used in only -- it was of recent vintage and had been used by about 50 percent of the crime laboratories in the country. And the Tucson Police Department obtained that test, and then they tested that sample in January. Again --

QUESTION: What did they test then?

MR. GUSTAFSON: In January they tested the underwear.

QUESTION: Now, this is more than a year after the --

MR. GUSTAFSON: Yes.

QUESTION: -- underwear was first put in the evidence closet, wasn't it?

MR. GUSTAFSON: That's correct.

QUESTION: Why didn't the State test the swab with the P-30 test?

MR. GUSTAFSON: Either the police criminalist -- it doesn't appear in the record. Either he was not asked to do so, or in his opinion the sample was just too small to get a result from that test.

Now, the -- at the second trial, although this was all in question at the first trial -- at the second trial, the Respondent used the former trial testimony of his expert. They didn't do any retesting or any testing at all of the evidence.

It's the State's position that in a situation like this, we have to look at, as this Court did in California v. Trombetta, to two focus points as to the constitutional standard of materiality. First is whether or not the evidence had exculpatory value that was apparent before it was destroyed; and two, whether or not the defendant had a comparable means, a reasonably available alternative.

Now, in the instant case, the apparent value of that evidence is contingent upon technology, the existence of the technology. In essence, the claim that the Respondent made to the jury was that the material gathered was exculpatory because something would not be found within it. What would be apparently exculpatory is the absence of something. In other words, they have to first analyze the substance and then, second, if they get an inclusive result, they have to use another test, which they didn't have at the time -- was to determine whether --

QUESTION: Which test was it that they didn't have at the time?

MR. GUSTAFSON: They didn't have -- there's three types of tests that they could quantify. They did not have the P-30 test, which measures a constituent of semen, which gives an estimate as to the quantity of semen. They did not use the acid phosphatase test, which is another measure of the quantity of --

QUESTION: Okay. But now the acid test they had, but didn't use?

MR. GUSTAFSON: They did not have it.

QUESTION: And the P-30 test they didn't have.

MR. GUSTAFSON: That's correct.

QUESTION: Now, when you say they didn't have,

what do you mean? That the Tucson Police Department -- Pima County Police Department didn't employ that sort of test?

MR. GUSTAFSON: That's correct. That's what the police criminalist said they were -- his words were: "they were not in practice in our lab." That's what he stated.

QUESTION: Well, Mr. Gustafson, I take it the State, the prosecution, did not offer any of this scientific analysis evidence in trial -- at trial. The State just went to trial with the eye witness identification and the testimony of the victim and the physical clothing.

MR. GUSTAFSON: They went -- they didn't have the test -- it was all admitted -- the State's -- what the State had done with the evidence, the test results and what the defense criminalist --

QUESTION: I thought the State hadn't taken tests and so that wasn't part of the evidence.

MR. GUSTAFSON: They had taken some tests. They had looked on the swab. They had done a ABO blood type. They looked under the microscope. On the underwear, they had later done the P-30 and ABO on that.

QUESTION: But they couldn't --

MR. GUSTAFSON: They couldn't --

QUESTION: -- get a test result. So, no test results were offered. Is that right?

MR. GUSTAFSON: Yes.

QUESTION: It's hard for me to understand, frankly.

QUESTION: We're talking about the guilt phase of the trial. Was the clothing introduced?

MR. GUSTAFSON: Yes.

QUESTION: For what purpose?

MR. GUSTAFSON: To -- it was going to be introduced by either the State or the defendant. I guess the State drew the sting by introducing --

QUESTION: Pardon me?

MR. GUSTAFSON: The State basically drew the sting of the attack upon this State's testing of it. The defense was going to raise this issue. So, these items were brought in. They were marked as exhibits. They were shown to the jury, and they were testified to about.

Now, no incriminating evidence was gathered from them.

QUESTION: All right.

QUESTION: Or from the semen or from the swab.

MR. GUSTAFSON: Or from the swab.

QUESTION: Was there any objection? You said

the defense was going to offer these in any event?

MR. GUSTAFSON: There's two trials in this case. So, the one that resulted in conviction was the second trial. So, the State introduced these --

QUESTION: Was there objection to the introduction of that evidence at the second trial?

MR. GUSTAFSON: No.

QUESTION: Not to any of it?

MR. GUSTAFSON: That's correct. No objections to any of it.

QUESTION: Mr. Gustafson, can I ask you a question because it's kind of hard to piece all these tests together? But am I -- just see -- am I correct in saying two things?

One, that if they had preformed the test that showed that the semen samples were the product of a person who was a nonsecretor, that would have been a complete defense for the defendant.

MR. GUSTAFSON: Yes.

QUESTION: And secondly, what I want to know is did you at the time you had these samples and before the second trial, have tests available that could have been performed to determine that?

MR. GUSTAFSON: Between the first and the second trial?

QUESTION: No. At any time before the second trial, could you have performed tests which would have determined whether or not the donor was a nonsecretor?

MR. GUSTAFSON: Yes, Justice O'Connor --

QUESTION: Yes, it could have done that.

And then the case boils down to whether you had any obligation to do that.

MR. GUSTAFSON: Yes.

QUESTION: Yes.

QUESTION: Well, does the record indicate that those tests would have achieved a valid result if there was enough of a sample to make a conclusion?

MR. GUSTAFSON: They would have -- it wouldn't be conclusive was the expert's testimony. They could make an estimate based upon the different constituents.

QUESTION: And the thing that was being estimated was whether or not there was a sufficient quantity to go ahead and make the test for the blood group?

MR. GUSTAFSON: Yes.

QUESTION: Well, what test could you have performed before the second trial that you were referring to Justice Stevens?

MR. GUSTAFSON: It's because there's -- there were two samples.

QUESTION: What tests could you have performed?

MR. GUSTAFSON: The P-30.

QUESTION: On whom? On what?

MR. GUSTAFSON: On the sexual assault kit.

QUESTION: I know, but you would have been performing a test on the swab?

MR. GUSTAFSON: Yes.

QUESTION: To do what? To determine whether?

MR. GUSTAFSON: If there was sufficient quantity of semen present, to then later use an ABO blood type test.

QUESTION: But you would have had to go and have a blood type test.

MR. GUSTAFSON: Yes. They had already obtained that and got an inclusive result. The ABO blood type test in the case simply showed no blood type.

QUESTION: I'm confused by your answers to Justice Stevens and Justice Kennedy and Justice White. And it may well not be your fault. At one time you said that the Pima County criminologist said that the P-30 was not in practice in Pima County.

MR. GUSTAFSON: That's correct.

QUESTION: But now I thought you answered Justice Stevens that the State could have performed a P-30 test before the second trial.

MR. GUSTAFSON: Yes.

QUESTION: Well, how do you reconcile those two answers?

MR. GUSTAFSON: They didn't have them -- the P-30 test at the time of the first trial. After the first trial, they did the P-30 test. They then -- when they get the P-30 test, they test the clothing. They don't test the sexual assault kit with the P-30 test. Then we have the second trial. That's what happened.

So, in other words, when I'm asked is there a test that they had that they didn't do, the answer is yes. They had the P-30 that they didn't do on the sexual assault kit.

QUESTION: Why did the State not do it?

MR. GUSTAFSON: It was either the police criminalist didn't think there was enough sample there -- and he did testify that he didn't think that there was enough there -- or that he could go back and try, but it was a very small sample.

QUESTION: So, he rendered his opinion that it would not have been useful in producing evidence.

MR. GUSTAFSON: Yes.

QUESTION: But as far as that's concerned, even at the time of the second trial, it still was not too late to do the P-30 on the swab. It was too late to

do it on the clothing, but it was still not too late to do it on the swab, was it?

MR. GUSTAFSON: That's --

QUESTION: The defendant could have done that himself --

MR. GUSTAFSON: Yes.

QUESTION: -- at that point.

MR. GUSTAFSON: Yes.

QUESTION: And there was testimony in the trial that said it could still be done on the swab.

MR. GUSTAFSON: Yes. The point I think I'd like to make here is that the Respondent did have alternative means by which he could establish this, and that he did not use the tests basically because he had to make a tactical choice about the reasonable doubt argument. His reasonable doubt argument is there is either not enough of the sample there or the true assailant was a nonsecretor and yes, I'm exonerated.

If he had used the test, he may very well have found out, as it was indicated, that the samples were too small to be tested. That's the case. And his reasonable doubt argument to the jury was eliminated.

QUESTION: The odds are about four to one against, aren't they?

MR. GUSTAFSON: I don't --

QUESTION: Isn't it true that only about 20 percent of the population are nonsecretors?

MR. GUSTAFSON: That's 20 to 25 percent. That's correct.

QUESTION: So, if you had a -- I mean, so the odds would be about four to one that you'd get -- that the reason for the no blood type showing up is that the sample was too small. And he elected not to take that chance because he wanted to make his reasonable doubt argument.

But why wouldn't the State go ahead and do it anyway because presumably they're interested in knowing the truth?

MR. GUSTAFSON: They did as to one -- they used the test that they had on the sexual assault kit, and they neglected the underwear.

QUESTION: But even by the time you get to the second trial, I would think the State would have an interest in finding the answer to that question.

MR. GUSTAFSON: Yes.

QUESTION: Whose case do you think it hurt by virtue of the fact that the State failed to do some of its homework, so to speak? Did it hurt the State's case?

MR. GUSTAFSON: It hurts the State's case, yes.

QUESTION: And the instruction to the jury

told them they could use the State's failure against the State?

MR. GUSTAFSON: Yes, and they could --

QUESTION: And yet they came in with a verdict of guilty.

MR. GUSTAFSON: That's correct.

QUESTION: Unhum.

QUESTION: And you say the defendant was able to perform this P-30 test if he had so desired.

MR. GUSTAFSON: Yes.

QUESTION: And if they had read the police reports, they would have known the clothing and the swab were in existence.

MR. GUSTAFSON: And I'm not sure at what time that that happens because it's not in --

QUESTION: Well, I know, but the reports are available to them.

MR. GUSTAFSON: Yes.

QUESTION: And if they had read it, as they could have, they would have known about the swab and the clothing.

MR. GUSTAFSON: Yes.

QUESTION: Well, I guess they also knew about it because of the first trial --

MR. GUSTAFSON: Yes.

QUESTION: -- don't you suppose?

Were they offered in evidence at the first trial?

MR. GUSTAFSON: They were -- the -- yes. They were discussed in evidence. The clothing wasn't actually admitted into evidence.

QUESTION: So, there was no question, but that at the time of the second trial they fully understood --

MR. GUSTAFSON: Yes.

QUESTION: -- what the State's evidence consisted of.

MR. GUSTAFSON: Yes. And at the time of the first trial, the expert was speculating about the clothing, and it was brought out that the police did -- had obtained the underwear.

The Arizona rule created here -- and it's on page 24 of the State's brief -- states: "that when identity is in issue at trial and police permit the 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. Dismissal is the appropriate remedy unless the evidence is so strong that a court can say beyond a reasonable doubt that the destroyed evidence would not have proved exonerating."

Now, what the court did in applying this test

that dismissal is the remedy unless the evidence would not have proved exonerating is simply to determine for itself whether or not the jury has properly reached its verdict. Since the evidence wasn't in existence and it was speculation about what it was, the Arizona Court of Appeals decided to determine whether or not into the nature of these tests -- are that exonerating -- some of them -- is that they simply examined de novo the jury's verdict on the other items of evidence, the description, the identity.

Then, having done that, the court simply was not convinced by itself that the Respondent was not guilty beyond a reasonable doubt, but that was precisely the function of the trial jury in this case.

QUESTION: What if the test the State could have performed, if it came out one way, would have completely exonerated the defendant? And the State just didn't -- and the State knew that, and it thought without the test it could convict anyway. So, it just didn't perform the test. Now, that is -- that is -- that would be questionable under Trombetta, wouldn't it?

MR. GUSTAFSON: I don't think it is questionable under Trombetta because I don't think that there is an obligation for the State to test. What's at issue is a right to access the evidence on behalf of the

defense -- the defendant. In other words, the police cannot destroy it. I don't think that the police are under an obligation to test it.

QUESTION: So, suppose the police has this item which, if it tested one way would exonerate, and it tells the defendant, look, we have this item. We haven't tested it, but we'll tell you that if it comes out one way, you're exonerated; if it comes out the other, you're really -- you're really -- it will help prove you guilty. And the defendant doesn't test it either.

MR. GUSTAFSON: I think there is no due process violation.

QUESTION: Mr. Gustafson, this wasn't such a case. This wouldn't have added to your proof of guilt even if it hadn't helped the defendant. It was kind of a one-way street, wasn't it? It would either exonerate or be neutral.

MR. GUSTAFSON: Yes. There's different samples involved, but the quick answer is yes. The --

QUESTION: (inaudible) that doesn't change anything?

MR. GUSTAFSON: And if I -- if there are no further questions and if I may, I would like to reserve my remaining time for rebuttal.

QUESTION: But if -- but if the -- but the tests -- if the defendant had done it -- had run these tests, it might have -- if it came out one way, it would have destroyed his reasonable doubt argument.

MR. GUSTAFSON: Yes.

QUESTION: Which, in effect, enhances the State's case.

MR. GUSTAFSON: His reasonable doubt argument?

QUESTION: Yes. You said a while ago it was a tactical choice for him not to test.

MR. GUSTAFSON: Yes. Yes.

QUESTION: Thank you, Mr. Gustafson.

Now, Mr. Davis, we'll hear now from you.

ORAL ARGUMENT OF DANIEL F. DAVIS

ON BEHALF OF THE RESPONDENT

MR. DAVIS: Mr. Chief Justice, may it please the Court:

The Court of Appeals did not tell the State of Arizona that they needed to preserve or to test this evidence because nobody had to tell the police of the need to preserve and test this evidence. They knew that if that clothing had been placed in the refrigerator, in accordance with the normal practice of the Tucson Police Department investigating an ordinary sexual assault, that the defense could then test that evidence, and it

would be available to them.

The defense did not make the tactical decision not to test that clothing. The tactical decision was made for them when the police failed to follow their ordinary routine procedures in preserving that evidence for later testing.

QUESTION: You made the tactical decision not to test the swab.

MR. GUSTAFSON: No, sir. Test -- yes, sir. We did, in fact.

Testing the swab under -- for the P-30 protein would be a meaningless exercise even today. The police criminalist, Edward Heller, testified that in only about 10 percent of the cases do these rectal swabs ever contain any semen at all.

In addition, he had already tested it once by a destructive test to determine the presence or absence of blood markers, ABO specifically, which of the four major blood groups the semen donor belonged to.

When questioned about doing further testing, he said, "I suppose it would be possible. I don't know." But if we were to test it today, suppose that today we performed the destructive P-30 protein test and found that on the swab today there is an adequate amount to test. That does not tell us that the amount removed

from the swab and tested in the first place was adequate or not. It would tell us that we can no longer perform any further testing because we have elected to do the P-30 protein test and have thereby destroyed the evidence.

Had the defense made the tactical decision to perform that test and destroyed that last bit of semen, I would expect that we would be hearing today that it is the defense's fault that the evidence was not preserved.

QUESTION: Well, in any event, when did the defense know that the victim's clothing had been obtained by the police and that a swab had been taken?

MR. DAVIS: I don't know the precise date, Your Honor, and I was not trial counsel. However, I do know that it was after December 10, 1983. Mr. Youngblood was arrested December 10, 1983, six weeks to the day after the assault occurred.

Mr. Inman testified as a criminalist for the defense and talked about the deterioration of these markers.

QUESTION: The defense knew quite early on that these items existed and presumably could have made a demand to have them tested.

MR. DAVIS: On December 10, such a request would have been meaningless. They knew of them at that

time, but because these are organic elements, they break down in a matter of two or three weeks.

QUESTION: Well, the swab had been refrigerated.

MR. DAVIS: I agree, Your Honor.

QUESTION: So, it wasn't meaningless as to that. And it wasn't meaningless for all purposes with regard to the clothing.

MR. DAVIS: Your Honor, with regard to the swab, the testing -- we could continue to do testing today, but it is most unlikely that anything would develop from the swab. It is merely the size of a Q-tip. It has already been subjected to some testing. But I agree today that it may be a viable product for testing, but it is most unlikely that there is anything in there worthy of testing.

QUESTION: But certainly an objection was made and an argument to the jury that it was -- the State should have done this testing, and that there was a reasonable doubt because it wasn't done. Right? So, that worked to the advantage of the defendant.

MR. DAVIS: That's correct.

QUESTION: Okay.

MR. DAVIS: Now, as to the clothing which both criminalists agree contains the better semen sample, the

larger sample, the better preserved sample, that -- testing of that was impossible as of December 10. The ABO blood markers deteriorate over roughly the same period of time as the PGM blood markers which deteriorate over a two or three week period if not refrigerated. If refrigerated, they can maintain their viability potentially for years.

The P-30 molecule deteriorates at approximately the same rate of deterioration as both the ABO and PGM markers. Hence, when you test for the P-30 molecule and find very little of it, you can also conclude that you're not likely to find much of the ABO or PGM markers.

But the last test that has been mentioned is the acid phosphatase test. That tests for the presence of a much more durable component of semen, but a component which does not provide any way of distinguishing between various semen donors. We could do the test today, but it would tend to prove no fact that's in dispute today.

QUESTION: Is it your complaint, constitutional complaint, that the State failed to test something at a time when it could have been tested, and by the time you found out that that sort of thing existed it was too late to test it?

MR. DAVIS: That is part of our complaint, yes, sir.

QUESTION: What's the other part of your complaint?

MR. DAVIS: That they failed to preserve it so that we could perform the tests. For instance, in California v. Trombetta, the evidence was tested immediately, the breath, and then disposed of. But the results of that test then became the evidence.

The semen in this case was not evidence in and of itself, but the results of testing on the semen would be evidence. Had the semen been reliably tested early on, we would have no complaint about its destruction if the reliable test results were available. But because they chose not to do the test, then we insist they must not make that choice for us, but rather merely place the clothing in the refrigerators, as they ordinarily do, so that we can make the decision as to whether to test that clothing or not.

QUESTION: What tests do we employ? It seems to me this really isn't as much like Trombetta as it is like just lost evidence.

MR. DAVIS: Well --

QUESTION: The State didn't offer, as in Trombetta, the results of some scientific testing that

the defendant then couldn't rebut. Here the State simply failed to preserve, in the fashion that might have been better, a piece of the evidence, but didn't offer any scientific tests as a result because it couldn't do them either. So, it's more like lost evidence, isn't it? And don't we then have to look at the bad faith, if any, of the State?

MR. DAVIS: No, Your Honor, with that I take some exception. If we were to allow the government to simply destroy evidence that came into their hands and then require that we show bad faith on their part, we would essentially --

QUESTION: What case do you rely on for the proposition you're now stating?

MR. DAVIS: Well, in the first place --

QUESTION: Because Trombetta certainly doesn't support you because it does talk about good faith. What case do you rely upon for the proposition you just stated?

MR. DAVIS: Well, in the first instance, I think that -- in the first place, I think that looking at cases like Valenzuela-Bernal indicate that what we are primarily concerned with is the content or the evidence, whichever way it falls.

QUESTION: But, Valenzuela-Bernal doesn't come

close to supporting you. That was where the government deported a couple of witnesses.

MR. DAVIS: They made the conscious decision to dispose of that evidence after determining that the evidence had no probative value for either side, and the defense could not counter that argument.

QUESTION: Now, what case is a holding in your favor on this point?

MR. DAVIS: Well, if -- I think that Brady and Agurs and that line of cases.

QUESTION: Well, but they aren't -- you don't seriously mean that those are holdings in your favor on this point, do you?

MR. DAVIS: They're not squarely on point.

QUESTION: Well, of course, they're not. So, what case is it that you rely on?

MR. DAVIS: Well, if I may, Your Honor. If we must prove bad faith in the government's conduct in failing to preserve evidence, that is a way around Brady and Agurs because rather than merely not disclosing the evidence, they simply choose to allow it to deteriorate, and in that way they avoid the sanctions of Agurs and Brady and the opportunity of the defense -- to present his own defense.

QUESTION: When did you first have the

opportunity to know that there was a swab and that there were clothing?

MR. DAVIS: Again, since I did not try the case, I don't know the precise date.

QUESTION: Well --

MR. DAVIS: It would have to be --

QUESTION: Do you -- do you at least by the time of the first trial?

MR. DAVIS: Certainly.

QUESTION: They knew that? And the tests could have been performed then by the defense.

MR. DAVIS: No, Your Honor. By that time the tests would have been impossible. The clothing --

QUESTION: But if the -- do you contest the notion that the clothing and the swab are mentioned in the police reports?

MR. DAVIS: I assume that they were, and I would assume --

QUESTION: Well, if they were and they were available to the defendant.

MR. DAVIS: I will assume that they were.

QUESTION: And if they read them, they knew about the clothing and the swab at a time when tests would be all right.

MR. DAVIS: No, sir. That is where I --

QUESTION: Why wouldn't that be the case?

MR. DAVIS: Because the arrest occurred six weeks after the samples were taken. The deterioration of the samples would have occurred in the first two or three weeks following the gathering of the evidence because it was not refrigerated. By the time Mr. Youngblood was arrested, the clothing samples had deteriorated beyond forensic usefulness, and there was nothing left to test on the clothing that could in any way address any of the disputed issues in the case.

And that is precisely why --

QUESTION: You had a shot at doing the P-30 sample on the swab.

MR. DAVIS: Yes, sir.

QUESTION: And you didn't even take that shot.

MR. DAVIS: No, sir.

QUESTION: So, one really wonders how -- you know, how sincere you are about using this evidence as opposed to really using it as an argument to the jury, which is how you did use it.

MR. DAVIS: Well, sir --

QUESTION: You tell us that there wasn't much chance that you'd get anything from the swab, but there was some chance --

MR. DAVIS: That's correct.

QUESTION: -- and you didn't take it?

MR. DAVIS: In order to get anything out of the swab, we would have to test it by some means other than by a P-30 analysis. And the reason for that is because if we knew the amount of P-30 protein on that -- the swab today, it would still not tell us anything about the test that was conducted on a portion of that swab years ago because it would not tell us whether an adequate sample had been tested then. And that is really the crucial issue is whether they tested an adequate sample from the swab.

Again, when I talk about a remote likelihood --

QUESTION: Why is that the crucial issue as to whether they tested enough from the swab?

MR. DAVIS: Well, because the only tests that we have that we can look to are the ones that were performed for the blood markers, for instance, on the swab. And he says I performed a test on some unknown amount of semen at a certain point in time and found that either I didn't test enough or that the assailant was a nonsecretor. To know how much remains on the swab doesn't tell us how much was tested in that first test to help point us in one direction or the other.

QUESTION: But now, this is not evidence that the State used -- introduced at trial to incriminate the

defendant.

MR. DAVIS: No.

QUESTION: It wasn't incriminating.

MR. DAVIS: No, it was not.

QUESTION: Why can't you retest? Is it clear that there is not enough left on the swab to retest? Never mind looking to see if the original test was valid or not.

MR. DAVIS: That was the opinion of the State's criminalist was that there was not enough to retest.

QUESTION: I thought he said that a test could be done on the swab.

MR. DAVIS: He said he could go back and retest it --

QUESTION: Yes.

MR. DAVIS: -- but he didn't think that there was enough there.

QUESTION: He didn't think.

MR. DAVIS: That's right.

QUESTION: And that was enough to satisfy you.

MR. DAVIS: Well, it seemed to be enough to satisfy the State. I've not seen anything in the record --

QUESTION: The State didn't have a client they

were trying to get off. They thought they had enough evidence to convict your client. You were looking for evidence to acquit him. But just on that statement that he didn't think there was enough, you said, well, there must not be enough and chose not to go back and do any tests on the swab. I can't imagine that.

MR. DAVIS: But the situation that we're in, we're doing destructive testing. If we'd performed these tests on the swab -- if we perform a P-30 analysis on the swab, all that it tells us is that there was enough left on the swab. It does not tell us anything about the guilt or innocence of any person.

QUESTION: I don't understand that. It could -- if there was enough to do proper testing, it could have shown that your client was not the culprit, couldn't it, if there was enough to do a proper test?

MR. DAVIS: If there was in the amount that had been tested, that's correct.

QUESTION: Not in the amount that had been tested. If there's enough left now.

MR. DAVIS: Perhaps -- I'm obviously not making myself understood.

Perhaps -- let's assume that there were 100 units of some measurement of semen on the swab originally.

QUESTION: Right.

MR. DAVIS: The first test is conducted. It is to determine the blood markers.

QUESTION: Right.

MR. DAVIS: And let us assume that they used 20 of these units to perform that test. And they then don't know whether it is an insufficient sample or whether he is a nonsecretor.

But we don't know -- it was never quantified in the first place. We never knew we had this 100 units. We're doing this hypothetically.

I now go back and retest that swab and discover that there are 80 units left. I have now destroyed the ability to test that swab any further, and all it has told me was that if I had not performed this test, that if I had gone back and performed some other test, I might have been able to identify the assailant.

QUESTION: I don't understand that. I thought you could go back and not just determine that there are 80 units left, but test those 80 units right then and there.

MR. DAVIS: You test -- it depends on the test you're using. Now, the P-30 --

QUESTION: The P-30. That's what I'm talking about.

MR. DAVIS: -- will only tell you the amount that's there. It will not tell you anything about the assailant. The ABO test, which was the test that was in use at the time, would tell you information about the assailant and narrow him into one of the four basic blood groups or into the nonsecretor blood group. But those are mutually exclusive because they are destructive tests.

QUESTION: Why do you ever use the P-30 test in this instance if all it tells you that there is enough to conduct another test that means something?

MR. DAVIS: I'm not sure what it's function is. I don't know why they do it, and I know that -- for instance, I suspect that where you have a case in which there is dispute about whether an assault occurred, but the identity is not in dispute, you may perform a test like a -- the P-30 test to determine the presence or absence of semen.

The other test, the acid phosphatase test, would not give you that information with regard to an ordinary rape situation.

QUESTION: Was there testimony that it would be absolutely futile to go to the swab and attempt a test for blood groups?

MR. DAVIS: The only testimony was that he

considered it highly unlikely, and that was the police criminalist who had custody of the swab and who had done the initial analysis.

And as he indicated, particularly with regard to these sexual assaults -- these rectal swabs -- you will find -- he said that only in about 10 percent of the cases do you find much -- do you find any semen to test in a rectal swab precisely because most of the semen has drained out of the body and into the clothing. And so, they gathered the clothing and intended to put it in a refrigerator, but because of some error, they put it in a wooden locker instead.

QUESTION: Well, what if the police had not taken a swab at all?

MR. DAVIS: Well, then we would certainly have a different situation.

QUESTION: Well, yes. But the police could have taken the swab. They could have performed the right test, or they could have preserved it for you to make the tests. Do they have to take the swab?

MR. DAVIS: I would hope that --

QUESTION: Do they have to take the swab? Is it their constitutional duty --

MR. DAVIS: My position is yes --

QUESTION: -- to gather that evidence?

MR. DAVIS: -- that they have an obligation to make -- to help -- to act as --

QUESTION: Your answer to my question apparently is yes.

MR. DAVIS: Yes, sir.

QUESTION: Now, suppose the answer is no. Do you lose this case?

MR. DAVIS: No, sir, because this is a case --

QUESTION: Because they gathered the evidence and let it fritter away.

MR. DAVIS: Yes, sir, just as they gathered Broveck's** confession in the Brady case and just as they gathered the information about Linda Agurs' victim in her case. This is not a case where we're telling them to do this. They have every incentive in the world to gather this evidence so that they can exclude innocent people from consideration and remain on the trail of the guilty party while the trail is fresh.

QUESTION: Well, suppose it's a drunk driving case. And the policeman observes the driver and the erratic behavior and the slurred speech and the bleary eyes and smells whatever he smells, but doesn't take a breath-a-lyzer test. And the defendant says, well, I was a diabetic and that explains my behavior.

Now, does the State in these cases have an

obligation to take a breath-a-lyzer test? In your view, that would be a constitutional requirement.

MR. DAVIS: Or that he at least have some --

QUESTION: Yes? Yes?

MR. DAVIS: No, ma'am. That he also has an opportunity to gather the sample. So, the police would not in that case. And that is where I would draw that distinction as in Trombetta where Trombetta has access to his own breath sample at a time when it could be preserved.

But Mr. Youngblood had no opportunity whatsoever to gather the semen samples in this case. They either must be gathered by the police or they will never be gathered at all.

And this evidence is so potentially conclusive that it is -- that it is not surprising that the standard police procedure in Tucson, in Pima County and elsewhere --

QUESTION: Is conclusively exonerating if it comes out one way.

MR. DAVIS: Absolutely.

QUESTION: And how about the other way? If it comes out the other way, does it help the State?

MR. DAVIS: Oh, it certainly does. It certainly -- the State can come in then and they can

say, well, we have been able to conclusively establish that 80 percent of the potential semen donors out there could not have done it. It just so happens, though, that the physical description of this defendant matches the description given by the victim and, furthermore, that he is still in that small 20 percent or even narrower category of people who could have committed the crime.

QUESTION: So, it isn't conclusive for the State.

MR. DAVIS: It is today, not with the technology available then. But today, they can narrow it down with these genetic tests to a single person, and the only person who would profit from the loss then is the criminal who committed the crime.

QUESTION: Well, but we're talking about the time of trial. At the time --

MR. DAVIS: I agree.

QUESTION: -- of the trial, Youngblood was within that 80 percent of the population that is a secretor.

MR. DAVIS: That's correct. He is a type A secretor.

And given that, it's -- it is of tremendous benefit to the State and it works both ways for the

State. It helps them investigate the offense because it keeps them from being brought off the trail with false leads. It helps them to bolster their case when they finally have brought an individual to court by saying we have excluded all of these --

QUESTION: How broad is this duty? Is the Constitution going to tell prosecutors how they ought to investigate cases?

MR. DAVIS: No, Your Honor. And this court didn't tell them how to investigate. They knew how material and important this evidence was at the outset, and they intended to gather this evidence precisely for the purpose that we intend to use it for, to prove the innocence of the innocent.

QUESTION: But didn't perform the tests in time to have them relevant.

MR. DAVIS: That's correct.

QUESTION: And you say the Constitution says that conviction must be reversed even though there is no showing of bad faith.

MR. DAVIS: Bad faith, I would submit, is not at issue. We're looking at the right of the accused to defend himself. And what I would look to --

QUESTION: But we have never held the right of the accused to defend himself extends as far as you're

asking us to extend it, to simply having the police preserve every bit of evidence they ever come across in the investigation that might be relevant.

MR. DAVIS: I'm sorry if I've misled the Court in that way. I don't claim that they should reverse simply because every piece of evidence has not been preserved. And, in fact, I'm not claiming that they should reverse in every case in which semen samples are not preserved.

In this case, before the Court of Appeals would entertain our request to reverse the conviction and order a dismissal, we were required to make a strong showing of prejudice. We had to show that that evidence could have helped us. In fact, the first Arizona case that held as a matter of law that the police must preserve semen samples refused to reverse the conviction for precisely the reason that they said there is no harm here. The evidence of guilt is overwhelming.

QUESTION: So, what -- so, what's your standard? What did the court below say? Might have? Would have?

MR. DAVIS: No, sir. The court below first said that we must --

QUESTION: Yes.

MR. DAVIS: -- make a strong showing of

prejudice --

QUESTION: Well, they ruled for you.

MR. DAVIS: Because we made that strong showing of prejudice.

QUESTION: Yes. Well, what do you mean by strong showing?

MR. DAVIS: They required that we first show that there is a genuine issue of misidentification and that this evidence could have in all likelihood --

QUESTION: Could have in all likelihood.

MR. DAVIS: -- provided --

QUESTION: You mean if it came out one way, it would have helped you get off.

MR. DAVIS: It would have absolutely. He would never even had to stand trial most likely.

QUESTION: Well, what are the chances of it being prejudicial -- I mean, of it being helpful to you?

MR. DAVIS: Well, first of all --

QUESTION: (Inaudible) to the other argument, as the jury saw it, not very good.

MR. DAVIS: Well, there's the --

QUESTION: I mean, that's all we can guess by, the other evidence that we have. And the jury found that beyond a reasonable doubt the test, had it been done, would have shown that your client was the culprit.

MR. DAVIS: The other testimony, the other evidence at trial consisted solely of the testimony of the victim. At the first trial, we got a lot of information about what this victim had described at the time that the attack was vivid in his mind, that very night. He described a gray-haired man with a straight hairline who was wearing hard, plastic or leather shoes, driving a two-door automobile and who in almost every material component of that description was not Mr. Youngblood.

Mr. Youngblood's hairline is different. He has never had gray hair. His automobile is a four-door. He despises the kind of music that was being played. He cannot put his feet in leather or plastic shoes because they are so callused. He always wears cloth shoes.

And as you watch from the first trial to the second trial, the victim's testimony shifts, and he moves away from the initial description that he gave to the police and more toward a description focused toward Mr. Youngblood.

The police told him at the time of Mr. Youngblood's arrest that they arrested the man who did it. They showed him a photo lineup with six photos in it, and the victim picked two of the six as being his

assailant.

QUESTION: Well, surely you were entitled to impeach the victim at the second trial by showing -- and the jury was entitled to credit or not credit as it chose.

MR. DAVIS: I agree. And not only is that important for the jury, but because -- as this Court held in Bagley, what we are concerned about is our level of confidence in the jury's final holding. That's the reason why the Court of Appeals asked itself whether the evidence was so conclusive, so overwhelming that the loss of the semen sample is meaningless or that the loss of the semen sample could not have given anything to the defense of this case.

QUESTION: Mr. Davis, supposing the semen sample had been lost because there was a fire in the police station --

MR. DAVIS: Again, that is why --

QUESTION: -- would it be a deprivation of due process still?

MR. DAVIS: Yes, Your Honor, because it is a matter that the evidence is lost, good faith or bad faith.

I would urge that a different test would apply if we could prove bad faith because I would hope that we

would want to deter that. But even the innocent loss of that evidence has the same effect on the defendant as the most malicious loss of that evidence. It deprives him of his opportunity to vindicate his innocence. And because of the fact that the --

QUESTION: Well, if that's true, if a material witness dies, you're exonerated.

You can't -- certainly there must be a difference between negligence on the part of the police and the situation Justice Stevens poses in which the station just burns down. I assume that would be a logical line for us to draw between those two instances.

MR. DAVIS: I think that the line is going to be drawn at a number of other points as well.

The Court of Appeals did not hold -- and I do not advocate a position -- that the loss of evidence automatically results in any particular sanction. If the evidence is lost through inadvertence, that in and of itself is some evidence that perhaps that bit of data was not material or significant in any particular way because the police didn't bother to gather it, the defense didn't draw the police attention to it. And so, that would come into play there.

But if the police are exercising reasonable care in following their procedures and the evidence is

still lost, that is of small benefit to the accused who finds that he cannot put on his defense as a result of the loss of that evidence.

And for those reasons, I would urge that good faith and bad faith not enter into the question at this stage, but that instead, unless -- if the defense can prove bad faith, then I would say that that is a different case and it's not worthy of the same standard here. But when we have -- when everybody intended to gather the evidence, intended to test the evidence and intended to preserve the evidence, and then simply failed to do so, we must look at the -- our conviction in --regarding the fairness of the trial and our certainty that the outcome is a reliable one.

And because those should be the guiding principles as far as fashioning the remedy, the courts should be given broad latitude in providing remedies ranging from absolutely nothing at all to jury instructions to instructions that certain facts must be presumed to the contrary of the position taken by the spoliator.

And finally, in some cases, in order to preserve the integrity of the judicial process, after the court, as the Arizona Court of Appeals did, considered all other sanctions, the court may find that

fairness and due process require a dismissal of the charges. That sanction should be available to the court.

The Court of Appeals on the record before this Court reviewed those various options and made it very clear that they were aware of the range of potential sanctions and found that it is only because -- that it is only a dismissal of the charges that can protect Mr. Youngblood's due process rights -- did they order a dismissal of the charges.

Thank you.

QUESTION: Thank you, Mr. Davis.

Mr. Gustafson, you have four minutes remaining.

REBUTTAL ARGUMENT OF JOHN R. GUSTAFSON

MR. GUSTAFSON: This case isn't like Brady v. Maryland or United States v. Agurs. If I could make the broad analogy here.

It's more like -- at least as towards the underwear, it is more like a case that had really nothing like these facts, but it's like United States v. Lavasco, which is a pre-indictment delay case. This is where I'm looking for a constitutional analogy.

In those cases, United States v. Lavasco, United States v. Marian, a defendant is basically claiming because of government inaction, delay

basically, that inaction has resulted in my losing evidence. A witness has died or something has happened.

As to his complaint about the underwear, it is this. By the time I was arrested, it was gone. Analytically it's the same thing. He's saying because of police inaction, it is gone by the time of arrest.

Under that framework, in United States v. Lavasco or United States v. Marian, this Court looks to the prejudice to the defendant and government conduct, whether or not there was a tactical motive on the part of the police to get a tactical advantage over the defendant.

QUESTION: Do you agree that on the state of this record, that after six weeks, the samples on the clothing had deteriorated so that a useful test could not be made?

MR. GUSTAFSON: No. There's so many different tests. There is at least one test that would have eliminated the reasonable doubt argument, which was the acid phosphatase test, which their expert said stayed stable over a period of years.

And, he may -- he probably has the best point that the identification test -- the identification test, like the ABO, that would narrow down the population -- may very well have been gone by the time he was

arrested. But there is at least -- he could have attempted to narrow down his argument, his argument about the reasonable doubt to the jury, by doing an acid phosphatase test.

QUESTION: (Inaudible) the only thing that can possibly happen to him in the test is that -- is that it will eliminate his reasonable doubt argument.

MR. DAVIS: What he -- as to that one piece, but there were several pieces and he won't examine any of them.

And that one evidence is --

QUESTION: Mr. Gustafson, do you agree that the P-30 test doesn't do anything except tell you how much --

MR. GUSTAFSON: Yes.

QUESTION: -- how much semen you have.

MR. GUSTAFSON: That's it.

QUESTION: It's a useless test, isn't it?

MR. GUSTAFSON: It is except it was of importance here. When there was no ABO blood group typing, then the claim is the real assailant is a nonsecretor. Otherwise it's not important. Now, the P-30 test can come in to tell you the additional information that the -- if there was a large amount of semen present, then you do have a nonsecretor. If you

have a low amount, you don't. That's how it comes into play.

The characterization as to the underwear as the better sample was really speculation. It's based only upon the expert who never saw it. And there was evidence in the record, which I need not go into it. It was just basically that the victim washed up and that the victim then put his clothes back on shortly after the crime and was taken in a quick manner to the hospital. So, what was or was not on the underwear, without examining it, was pure speculation.

QUESTION: Well, I suppose when the tests -- when the evidence was gathered, they had no suspect.

MR. GUSTAFSON: That's correct.

QUESTION: And so, they may or may not ever have had a suspect.

MR. GUSTAFSON: That's correct.

QUESTION: So, I guess the claim is that the State must preserve this -- the clothing and the swab for as long as the case is open.

MR. GUSTAFSON: Yes.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gustafson.

The case is submitted.

(Whereupon, at 1:58 o'clock p.m., the case in

CERTIFICATION

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#86-1904 - ARIZONA, Petitioner V. LARRY YOUNGBLOOD

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BY alan friedman

(REPORTER)