

NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO _____

STATE OF NORTH CAROLINA

vs.

DEFENDANT'S MOTION
AND BRIEF FOR DISMISSAL
PURSUANT TO CONSTITUTIONAL
GUARANTEES

Defendant.

NOW COMES defendant, pursuant to N.C.G.S. 15A-954 and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and moves the Court as follows:

1. On May 28, 2011, Defendant was charged with driving while impaired, among other charges, in _____ County, North Carolina.
2. Trooper _____ was the officer who stopped, arrested, and chemically tested Defendant.
3. On May 28, 2011, Defendant was tested on the Intoximeter EC/IR-II. Upon information and belief, the _____ County Sheriff's Office has a video and/or dvd machine in the intoximeter room which records that room.
4. On January 9, 2012, Defendant's attorney _____ sent a letter to the N.C. State Highway Patrol requesting the in-car video of Officer _____'s vehicle and any other responding vehicle. In his letter _____ (Attorney) also requested the N.C. State Highway Patrol to preserve any and all video and /or audio recordings of any officer's interaction with Defendant. Such letter is attached hereto as exhibit A and incorporated by reference as though fully set forth herein.
5. On January 9, 2012, Defendant's attorney sent another letter specifically requesting a copy of the Intoximeter video involving Defendant. Such letter is attached hereto as Exhibit B and incorporated by reference as through fully set forth herein.

6. On January 10, 2012, Defendant served the District Attorney with his Brady Motion for Discovery. As part of the motion in paragraph 4, a copy of which is attached as Exhibit C and incorporated by reference as though fully set forth herein, Defendant requested the Court to order the State to provide any recordings be they video, audio, photos, or mixed, that may prove to be exculpatory or may provide material for cross-examination of the State's witnesses or may inform the defendant of a defense that is available, or in any way may be useful in the defense of the charges pending against the defendant.
7. On January 17, 2012, Major _____ from the _____ County Sheriff's Office sent Defendant's counsel a letter, attached as Exhibit D and incorporated by reference as though fully set forth herein. In the letter Major _____ informs Defendant's attorney that the intoximeter video that Defendant requested is not available due to the Sheriff's apparent practice of erasing videotape records every 20 to 30 days. The attached letter also contains a handwriting signed by Major _____ and dated January 13, 2012, that "the tape starts over every 20-30 days".
8. N.C.G.S. § 15A-954(a)(4) states that Defendant may make a motion at any time to dismiss any criminal charge and upon Defendant's motion, the Court must dismiss the charges if it determines that
 - (4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.
9. A defendant's right to the prosecution's revelation of any and all evidence favorable to the defendant upon defendant's request is constitutional under the U.S. Constitution and North Carolina law. "Suppression by the prosecution of evidence favorable¹ to an

¹Favorable or exculpatory evidence is not limited to evidence of guilt or innocence but instead can be either impeachment evidence or exculpatory evidence. U.S. v. Bagley, 473 U.S. 667, 676 (1985).

- accused upon his 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, 190 N.C.App 301, 310 (2008) *citing* Brady v. Maryland, 373 U.S. 83, 87 (1963).
10. 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 (2002), *quoting* Kyles v. Whitley, 514 U.S. 419, 434 (1995). A reasonable probability or preponderance that disclosure of the suppressed evidence would have resulted ultimately in defendant’s acquittal is not required. Kyles v. Whitley, 514 U.S. at 434. 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.
 11. Additionally, pursuant to Arizona v. Youngblood, 488 U.S. 51 (1988), 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 U.S. Constitution occurs. 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 56.
 12. In this case, pursuant to N.C.G.S. § 15A-954 and both due process standards of the U.S. Constitution outlined above, Defendant’s constitutional rights have been violated by the willful and intentional destruction of relevant exculpatory evidence at the hands of the _____ County Sheriff’s Department.
 13. Defendant’s constitutional rights certainly take precedence of the Sheriff’s possible policy to destroy videos every 20 to 30 days.

WHEREFORE, the defendant moves the Court to dismiss the underlying case.

This the _____ day of _____, 20_____.

Marcus E. Hill
Attorney for Defendant
311 E. Main Street
Durham, North Carolina 27701
(919) 688-1941