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GUEST EDITORIAL

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A Comfort for the Bad Cop—A Challenge for the Good Forensic Scientist

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On 28 Nov. 1988, the U.S. Supreme Court ruled that failure by the police to preserve physical evidence that could prove a defendant's innocence does not violate the constitutional right to due process of law unless it can be proved that the police acted in "bad faith." In the case of *Arizona v. Youngblood*, the state's Court of Appeals had overturned Larry Youngblood's conviction for the kidnapping and sodomy of a ten-year-old boy on the ground that the police neglected to test semen stains on the victim's clothing, or to preserve that evidence by storing it in their freezer, thereby precluding the opportunity to compare the assailant's blood type with the defendant's when he was arrested a few weeks later. The State of Arizona appealed that ruling, and the Supreme Court, by a 6 to 3 vote, in an opinion written by a former Arizonian, Chief Justice William H. Rehnquist, reinstated Mr. Youngblood's conviction.

Although matching blood types would not have clinched the case against the suspect, a finding of different blood types most probably would have cleared him and, even more importantly, alerted the community and the local police to the fact that a dangerous child molester was still at large.

There were no witnesses to the crime, and the prosecutors obtained a conviction on the basis of the boy's rather "shaky" identification of Youngblood. Even though Justice Rehnquist acknowledges in his opinion there was a "likelihood" that the evidence might have exonerated the defendant, he concluded that the behavior of the police could "at worst be described as negligent." To prove "bad faith," he stated that a defendant must demonstrate that the police knew the evidence would be helpful to the defense at the time it was lost or destroyed.

In a dissenting opinion joined by Justices William J. Brennan and Thurgood Marshall, Justice Harry A. Blackmun warned that this type of physical evidence would become increasingly important as new and "extraordinarily precise" methods of typing blood and genetic material become more widely used. He noted that the significance of these types of evidence is indisputable "and requiring police to recognize their importance is not unreasonable." It is widely accepted among observers of the Supreme Court that Justice Blackmun possesses the greatest degree of knowledge and special interest in medicolegal subjects among his high court colleagues. It is obvious that Justice Blackmun is referring to deoxyribonucleic acid (DNA) testing, as well as the entire panoply of basic, traditional methodology used by well-trained and competent pathologists, toxicologists, chemists, criminalists, and other forensic scientists involved in medicolegal investigative work.

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Realistically, it would be almost impossible for a defendant to prove that the police acted in "bad faith" when they destroyed or improperly preserved physical evidence. How could it be affirmatively established that the police knew about the existence of certain chemical, physical, and immunological tests that could have exonerated the defendant? Is it likely that a police officer would ever sign a statement or testify under oath that he knowingly and deliberately destroyed evidence so that tests could not be performed which he realized might exculpate a defendant in a murder, rape, assault, or child abuse case?

The proper handling, treatment, and preservation of these kinds of physical evidence does not necessarily require any advanced technological knowledge or sophisticated skills. For the highest court in the land to have adopted the incredibly loose, scientifically unacceptable standards set forth in the *Youngblood* decision is to encourage and also legally protect reprehensible behavior by police that will definitely threaten not only fair trials, but also the public safety. One need not be either a civil libertarian or a criminal defense attorney to suggest that in light of the philosophy espoused by the majority of Justices in the *Youngblood* case, some police may conclude there is something to gain by functioning in such a cavalier, haphazard, and scientifically unacceptable manner.

The Arizona Court of Appeals said that "when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator," the loss is a constitutional violation regardless of any other factor.

But the Supreme Court disagreed. "Unless a criminal defendant can show bad faith on the part of the police," Chief Justice Rehnquist said, "failure to preserve potentially useful evidence does not constitute a denial of due process of law." To show "bad faith," he said, a defendant must demonstrate that the police knew the evidence would be helpful to the defense at the time it was lost or destroyed.

Chief Justice Rehnquist said the "bad faith" standard was desirable because it "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." He defined those cases as "those in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant."

The Chief Justice said that while there was a "likelihood" that the evidence might have exonerated Mr. Youngblood, the behavior of the police could "at worst be described as negligent."

In establishing a "bad faith" standard, the Court went considerably beyond what the state has asked it to do. Arizona had argued for a less sweeping proposition, asking the Court to rule that lost evidence should not lead to the setting aside of a conviction unless the evidence could be shown to be "material" to a particular defense. By "material," the state meant that the evidence must have "apparent exculpatory value" and must not be otherwise available in a different form.

Of course, even a minimally trained and relatively inexperienced "forensic scientist" should not be able reasonably and successfully to argue that he lacked the knowledge to have appreciated the potential significance of blood and genetic testing on various kinds of biological and physical materials and, therefore, could not be found to have acted in bad faith by destroying or failing to preserve properly such evidentiary items. No ethical person with a modicum of pride in his professional work as any kind of forensic scientist would ever have the temerity to offer such a pitiful excuse.

What then is the challenge to forensic scientists presented by the Supreme Court's decision in *Youngblood*? Simply and succinctly stated, it is to exert a greater effort than ever before to establish precise protocol and meticulous methodology in the handling of physical evidence from the search and recognition to the testing and preservation of all items that could be examined to help determine the guilt or innocence of a suspected or alleged perpetrator, or a formally charged defendant or "actor," in cases involving possible transfer of biological substances from one person to another or from a person to an inanimate object or

material. As an integral and essential part of this professional obligation, forensic scientists working in medical examiner/coroner offices, toxicology/chemistry labs, crime/police labs, and university/college courses must establish or revise existing training programs to make certain that all detectives and police assigned to homicide, rape and sexual assault, and child molestation cases fully understand and appreciate the critical importance of having appropriate tests on physical evidence performed whenever feasible.

In the 1960s, the Supreme Court, for the right reasons, created new vistas and challenges for forensic scientists when it handed down rather revolutionary decisions in the *Miranda*, *Escobedo*, and *Gideon* cases. Now, a generation later, the Supreme Court, for the wrong reason, has unknowingly created another formidable challenge for our profession. For the most part, forensic scientists successfully met the challenge of the sixties. We must do so again if the integrity of the criminal justice system is to be maintained and the public safety and constitutional safeguards of our citizens are to be protected.