

2005

Utah v. Tiedemann : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 EDGAR TIEDEMANN, : Case No. 20050676-SC
 :
 Defendant/Appellant. : Defendant is incarcerated.

REPLY BRIEF OF APPELLANT

Interlocutory appeal from orders entered in the Third Judicial Court in and for Salt Lake County, State of Utah, the Honorable Judith S. Atherton, Judge, presiding. Appellant is incarcerated.

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questions. (See e.g. id., transcript at 2-3 (trading off after Tiedemann maintained he did not want to talk)). They used tactics to take advantage of Tiedemann's condition and to get him talking for a confession.

Within months after the interrogation, Tiedemann was declared by experts and the trial court to be incompetent. (See R. 532, 534 (his "comprehension for complex questions or directions was impaired"; "[h]e demonstrate[d] significant impairment in judgment, attention and concentration, and a mild deficit of immediate memory")). Also, his Toluene addiction resulted in "repetitive episodes of acute delirium." (R. 534). Tiedemann was committed to the state hospital, where he was treated for ten years. Experts opined in early 1992 that, given the nature of the long-term brain damage, he may not be rehabilitative. (See R. 536-37, 545).

Notwithstanding those facts, the state disputes that Tiedemann was mentally impaired at the time of the interrogation. (See Brief of Appellee, at 17-18, 27-28). It disputes that he was unable to voluntarily waive his rights. The state claims the interrogation itself is evidence of competence and voluntariness because Tiedemann was alert and provided responses to complex questions. (See id.) Also, the state claims officers had no time to employ coercive tactics because Tiedemann confessed to the shootings minutes into the interview, and it suggests that officers did not know of Tiedemann's impaired mental condition when they requested a waiver from him. (See id. at 22-23, 27-28).

Tiedemann replies to those assertions as follows: while Tiedemann appeared to answer complex questions, his answers were irrational. (See R. 638:10 (the prosecutor described his answers as "weird and definitely not a normal statement"; and acknow-

ledged the "strange behavior of the defendant in the interview"); 611, transcript at 2 (Tiedemann stated his address as 1308 Hummingbird), and R. 1-5 (record reflected it as 3874 Hummingbird); R. 611, transcript at 7 (Tiedemann identified his Utah license plate as 5. . . 2221CN); R. 611, transcript at 9, 33 (Tiedemann stated Suzie lived at 1446 West 400 North, Apt. C; then "seven, seven fifteen, fourth north and 740 East," Apt. C)).

His answers were confused. He did not know what day it was (R. 611, transcript at 4), or the day of the week. (Id.) When officers asked where Tiedemann kept the guns, he stated in his hands. (Id. at 6). When they asked how long he had been with Suzie, he answered, "Thousands of years." (Id. at 7). When they asked whether she worked, he said she was a prostitute, who shoots heroin and "[t]hat's why she has to stupid work." (Id.) When officers asked when Tiedemann moved to West Valley, he answered, "in May of 1989 or 1990 or 1991 or whatever." (Id. at 9). When officers asked what he thought about before the shootings, he stated, "I don't know what. I love everyone." (Id. at 13).

While the state claims Tiedemann did not disclose mental problems or impairments before "page nine of the transcript," and "[n]othing before that would have alerted the officers" to his deficiencies (Brief of Appellee at 28), the record reflects otherwise. After the officers initially gave Miranda warnings, Tiedemann disclosed he was intoxicated, he had used Toluene long-term, and he was incapable of answering questions. (R. 611, video at 1:58 to 2:01). Officers did not ask follow-up questions, but instead left the room for 12 minutes. When they returned, they again administered Miranda warnings as though that would cure Tiedemann's disclosures and deficiencies. They then asked if Tiedemann were intoxicated, and they moved immediately on to

questions concerning the shootings. (R. 611, video at 2:13 & transcript at 1-2).

Thus, the officers were advised of Tiedemann's condition and that he was incapable of answering questions before "page nine of the transcript" (quoting Brief of Appellee at 28), and before the confessions. Notably, both in the early stages of the interview and at page nine, the disclosures did not deter the officers. They proceeded with questions for the confessions. (See R. 611, video and transcript at 9-35).

Since the officers were alerted at the outset that Tiedemann was intoxicated and incapable of answering questions, they cannot take refuge in their decision to disregard his disclosures until after they obtained confessions. Indeed, under the law, where Tiedemann's initial and early responses suggest he could not answer questions (R. 611, video at 1:58 to 2:01), officers were obligated to resolve that issue. See Leyva, 951 P.2d at 743 (stating officer must clarify an ambiguous statement relating to suspect's ability to understand and waive Miranda rights if the statement is made in a pre-waiver scenario). Instead, they proceeded with a second set of Miranda warnings. (R. 611, transcript at 1).

Finally, while the state acknowledges that intoxication is a factor supporting involuntariness (Brief of Appellee at 29-30), it discounts it in this case on the grounds that intoxication is not enough. (Id.) Yet, Tiedemann has not asked this Court to find the confessions involuntary due only to intoxication. (See Brief of Appellant, Point I.B.(1)). Tiedemann's intoxication, long-term substance abuse, incompetence, and inability to understand questions, were relevant considerations. (Id.)

For reasons set forth here and in the Brief of Appellant, Tiedemann respectfully requests that this Court find the interrogation to be unconstitutional where officers

disregarded relevant markers, impairments and deficiencies to pursue Miranda waivers and the confessions. The confessions should be suppressed.

B. TIEDEMANN'S STATEMENT, "I DON'T WANT TO TALK ABOUT IT," WAS AN UNEQUIVOCAL INVOCATION OF HIS RIGHTS. OFFICERS WERE REQUIRED TO STOP QUESTIONING.

If a suspect originally waives his Miranda rights, he may invoke those rights later during questioning "in any manner, at any time." Miranda, 384 U.S. at 473-74. The later invocation must be unambiguous. See Davis v. U.S., 512 U.S. 452, 459 (1994). Once the invocation occurs, officers must stop asking questions. See Michigan v. Mosley, 423 U.S. 96, 104 (1975); Miranda, 384 U.S. at 473-74. Continued questioning is unlawful and "cannot be [anything] other than the product of compulsion, subtle or otherwise." Miranda, 384 U.S. at 474. Also, any responses obtained by officers due to such continued questioning "may not be used to cast doubt" on a defendant who has subsequently invoked his Miranda rights. See Smith v. Illinois, 469 U.S. 91, 92-93, 97-100 (1984).

As stated in the opening brief, the Court in Mosley, confirmed that Miranda gives a suspect the right to control the topics discussed, and the right to determine whether the interview will proceed at all. (See Brief of Appellant at 28-29); Mosley, 423 U.S. at 103-04. "Through the exercise of his option to terminate questioning, [a suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." Mosley, 423 U.S. at 103-04.

The defendant in Mosley initially waived his Miranda rights and agreed to talk to officers about a series of robberies. Id. at 97. He invoked his right to not talk when he said "he did not want to answer any questions about the robberies." Id. Officers were

allowed to proceed with interrogation later, only after sufficient attenuation. See id. at 104-05 (ruling that subsequent questioning was permissible after two hours, where defendant was questioned by a different officer, at a different location, about an unrelated crime, and defendant was given full Miranda warnings before second interrogation).

As set forth in the opening brief, shortly into the police interrogation, Tiedemann invoked the right to remain silent. (Brief of Appellant, Point I.B.(2); R. 611, video & transcript at 2). When officers asked him about the shootings in West Valley and what happened to Suzie, Tiedemann stated, "I don't want to talk about it." (Id.) Officers then confirmed, "You don't want to talk about it?" Tiedemann stated unequivocally, "No." As they continued to press, Tiedemann was silent. (Id., video at 2:15 to 2:17). He ultimately gave in only after it was clear that the officers would not stop the interrogation.

The record supports that Tiedemann invoked the right to remain silent. Officers were required to honor that request. Instead they continued to press him. That was unlawful. See Smith, 469 U.S. at 99-100; (Brief of Appellant, Point I.B.(2)).

The state disagrees. It seems to argue that when Tiedemann stated, "I don't want to talk about it," he did not mean what he said, and officers were free to interpret the statement to suggest that Tiedemann had an "emotional aversion" to answering questions. (Quoting Brief of Appellee at 35).

The state's argument is irrelevant for factual and legal reasons. With respect to the facts, the trial court did not find that Tiedemann had an emotional aversion to answering questions. (See R. 586, 590). In addition, the prosecutor, who investigated the facts for the suppression hearing, chose not to put officers on the stand to testify to such an

interpretation for a reason. See Utah R. Prof. Cond. 3.8, Comment (2006) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate").

With respect to the law, the U. S. Supreme Court has specified that the question of whether a suspect has invoked his rights during an interrogation is an objective one. Davis, 512 U.S. at 458-59 (to avoid "difficulties of proof and to provide guidance to officers," the question of whether a suspect has invoked his rights during interrogation is objective). A statement either is an assertion of rights or it is not. See id.

Also, "a suspect need not 'speak with the discrimination of an Oxford don.'" Davis, 512 U.S. at 459 (cite omitted). He need only articulate his desire so that a reasonable officer would understand it to be a request for a lawyer or a statement that defendant does not wish to answer questions. See id. Once a suspect makes his request during the interrogation, there is no need for an officer to discriminate against him, simply because the request may have been made out of fear, intimidation, or pain.

In this case, where Tiedemann stated he did not want to talk about the shootings, his request was clear. That is all that was required. Any fear, intimidation, or emotional aversion that may have been associated with the request need not concern the officers. They were required to stop questioning.

Next, the state claims that officers "expressly readvised [defendant] that he did not have to answer any questions and that he could stop the interview at any time." (Brief of Appellee at 36-37). By that, the state seems to suggest that officers attempted to follow Mosley, 423 U.S. at 104-06, before continuing with the interrogation.

Yet, according to the record, after Tiedemann invoked his right to not talk to officers, they advised him, "we're not going to force you [to] talk about anything. *We're asking you questions. As Detective Edwards stated, you can answer this question[], not answer that question, answer this question, not answer that question.* You don't have to answer any of our questions at all. You can stop at anytime." (R. 611, transcript at 3 (emphasis added)). By that statement, officers communicated they would continue to ask questions no matter what. (*Id.*) That was inappropriate. Miranda, 384 U.S. at 473-74 (if a suspect invokes his rights during questioning, officers must stop). Officers cannot continue to ask questions in the hope of creating an ambiguity or confusion in the situation. See id.; see also e.g. Smith, 469 U.S. at 98-99 (recognizing that to use continued questioning to cast doubt is "intolerable").

To the extent the officers intended to communicate that if Tiedemann did not want to answer questions, they would stop asking, their actions did not comport with that message. Tiedemann advised officers that he did not want to talk about the shootings. They asked him repeatedly "what" he did not want to talk about and "why." (R. 611, transcript at 2-3). Tiedemann was silent. (*Id.*, video at 2:15 to 2:17). By failing to honor Tiedemann's request to not talk about the shootings, the officers sent the message that they would ask questions whether Tiedemann wanted to answer or not. That is unlawful.

The state has cited to U.S. v. May, 52 F.3d 885, 890 (10th Cir. 1995), in support of its claim that officers gave Tiedemann proper advice when they told him they would keep questioning and he could answer or not. (See Brief of Appellee at 24 n.10). That case is inapplicable. There, defendants May and Lisa Tarasiuk were charged with crimes relating

to the distribution of cocaine and a "reverse sting" operation on October 29, 1991. After May's arrest, officers questioned him. He made contradictory statements to them. May, 52 F.3d at 886. At trial, May admitted that he had been involved previously in cocaine transactions, but had withdrawn from all participation prior to the October 29 event, and then he participated only because he believed Tarasiuk's life was in danger. Id. at 887.

During closing argument, the prosecutor took May to task for not disclosing his withdrawal theory until after he had obtained a lawyer for trial. Id. at 887. May was convicted. On appeal, he claimed the prosecutor's statements "were an impermissible reference" to post-arrest silence under Doyle v. Ohio, 426 U.S. 610 (1976). May, 52 F.3d at 889. Doyle supports that when a defendant invokes the right to remain silent, the government may not use that silence for purposes of impeachment when the defendant later takes the witness stand and presents a defense. See id. at 889 (citing Doyle).

The court in May considered Doyle to be inapplicable. Id. at 889-90. May never invoked his right to remain silent. He "simply chose to tell various versions of his 'story' when speaking to the authorities." Id. at 889. Also, the prosecutor's comments in closing focused on May's "prior inconsistent stories." Id. at 890. That was permissible.

Significantly, the Doyle doctrine is not at issue in Tiedemann's case. Likewise, the court in May did not examine the effect on a suspect when an officer disregards a defendant's request to not talk about matters. See May, 52 F.3d at 890.

In this case, where Tiedemann invoked the right to remain silent, the officers' advice to him—that they would ask questions and Tiedemann could answer some and not others—was not enough. Officers were required to honor Tiedemann's request and stop

questioning. Any further questioning would have to be sufficiently attenuated from the initial interrogation to be valid. See Mosley, 423 U.S. at 103-06; State v. Peirce, 364 N.W.2d 801, 806 (Minn.1985) (allowing admission of statement made more than 2 hours after defendant invoked the right to remain silent, where statement was taken at different location, by different officers, after fresh warnings); State v. Okegbenro, 409 N.W.2d 1, 3 (Minn. Ct. App. 1987).

Finally, the state cites to Owen v. State, 862 So.2d 687 (Fla. 2003), to suggest that the statements, "I'd rather not talk about it," and "I don't want to talk about it," are equivocal and do not require officers to stop questioning. (See Brief of Appellee at 37). Owen is not controlling here. To explain, in that case, the defendant first appealed his death conviction in 1990. See Owen v. State, 560 So.2d 207 (Fla. 1990). He argued that officers violated his Miranda rights when they continued questioning after he said, "I'd rather not talk about it," and "I don't want to talk about it." Id. at 210-11.

Under Florida law at the time, if a suspect made an equivocal assertion, officers were required to stop substantive questioning. Id. at 211. Thus, for the analysis in 1990, the court was not required to ascertain whether the statement was *unequivocal*. The court ruled that the defendant's assertions were "at the least" "an equivocal invocation of the *Miranda* right" and officers were required to stop substantive questioning. Id.

After the 1990 decision in Owen, three things happened. First, the Florida court "in numerous other opinions" made reference to the responses in Owen as an example of *equivocal utterances*. Owen, 862 So.2d at 697. Second, the U. S. Supreme Court issued Davis v. U.S., 512 U.S. 452 (1994), stating that when a suspect, who has made a knowing

and voluntary waiver of his or her Miranda rights, thereafter makes an "ambiguous or equivocal" reference to counsel, officers are not required to stop questioning. Id. at 459. They are required to stop the interrogation only when the request is unambiguous. See id. Third, Owen's case returned to the Florida court in 2003 on the Miranda issue after retrial. Owen, 862 So.2d at 690. Since the court had previously characterized Owen's responses as an example of equivocal utterances, it affirmed the characterization without analysis. Id. at 697. The state has cited to that case in its brief here. (Brief of Appellee at 37). Yet, Owen does not govern this case. This Court may engage in a proper analysis.

Here, when officers provided the Miranda warnings and asked if Tiedemann wished to speak to them, Tiedemann answered, "Ya." (R. 611, transcript at 1). Thereafter, as the officers began to ask questions about the "murders" at Hummingbird Drive and Suzie, Tiedemann responded that he did not want to talk about it. (R. 611, transcript at 2). Officers confirmed: "You don't want to talk about it?" Tiedemann answered, "No." (Id.) As officers continued to press Tiedemann, he was silent. (R. 611, transcript at 2-3 & video at 2:15 to 2:17). He gave in only after it was clear they would not stop. (See id.)

Tiedemann's statement, "I don't want to talk about it," and his silence thereafter constituted an unequivocal, unambiguous invocation of the right to remain silent.

In McGraw v. Holland, 257 F.3d 513 (6th Cir. 2001), defendant Tina McGraw signed a form waiving her Miranda rights and was interviewed by police about a gang rape. Id. at 514-15. During questioning, she stated, "I don't want to talk about it. I don't want to remember it." Id. at 515. As the interrogation continued, she repeated the

statement. "Refusing to take no for an answer, the detective kept urging full disclosure."

Id. at 515. "Succumbing at last," McGraw provided a detailed confession. Id. at 516.

She was convicted, and thereafter appealed to the state court. The court affirmed. Id.

When she filed for relief in federal court, the trial court dismissed the case. Id.

However, the United States Court of Appeals for the Sixth Circuit reinstated it. The

appellate court ruled that McGraw's statement, "I don't want to talk about it," was an

unambiguous invocation of the right to remain silent. See id. at 517.

The *Miranda* Court made it crystal clear that giving the prescribed warnings before the commencement of questioning does not preclude invocation of the right to silence during questioning: "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, *at any time prior to or during questioning*, that he wishes to remain silent, the interrogation must cease." [*Miranda*, 384 U.S.] at 473-74, 86 S.Ct. 1602 (emphasis supplied).

As the Supreme Court subsequently explained in *Michigan v. Mosley*, 423 U.S. at 96, 103, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), "[a] reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt 'fully effective means ... to notify the person of his right to silence and to assure that the exercise of the right will be *scrupulously honored*....'" [*Id.* (q)uoting *Miranda*, 384 U.S. at 479, 86 S.Ct. 1602.) (Emphasis supplied.)

Id. at 517-18. The court also cited to Davis, 512 U.S. at 459, and stated:

As far as we can see, however, there was nothing ambiguous about Tina's repeated insistence she did not want to talk about the rape. When Tina kept saying, without qualification, that she just did not want to talk about the subject – making these declarations after she had been formally advised of her right of silence – it would simply not be reasonable to take her words at less than face value. And if her reason for not wanting to talk about the rape was a fear that she would be shot and killed [in retaliation] if she did, the existence of such a fear would not make it any less clear that she meant what she was saying. If anything, it would make it even more clear that she really did not want to talk about the rape. We are aware of no support, either in logic or in law, for the proposition that an otherwise unambiguous expression of a desire to remain silent can somehow become ambiguous if prompted by a fear of retaliation.

McGraw, 257 F.3d at 519.

It is true that Tina did not say to the detective, in so many words, "I want to exercise my option to terminate this interview altogether if I will otherwise have to talk about the rape." But the Supreme Court has long held that "no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination." See *Emspak v. United States*, 349 U.S. 190, 194, 75 S.Ct. 687, 99 L.Ed. 997 (1955). Any reasonable police officer, knowing that exercise of the right to silence must be "scrupulously honored," would have understood that when Tina repeatedly said she did not want to talk about the rape, she should not have been told that she *had* to talk about it. For the state trial court to hold otherwise, we believe, was objectively unreasonable.

McGraw, 257 F.3d at 518; see also State v. Day, 619 N.W.2d 745, 749-750 (Minn. 2000)

(the statement, "I don't want to tell you guys anything to say about me in court" was an unequivocal invocation); State v. Bishop, 621 P.2d 1196, 1198 (Or. Ct. App. 1980) (statement "I don't want to talk about it" "made clear that defendant wanted to remain silent").

In this case, Tiedemann unambiguously invoked the right to remain silent when he stated, "I don't want to talk about it." (R. 611, transcript at 2). The trial court's ruling on the matter should be reversed and the confessions should be suppressed.

POINT II. TIEDEMANN'S DUE PROCESS RIGHTS WERE VIOLATED BY THE DESTRUCTION OF EVIDENCE.

A. THE COURT MAY DECIDE THE FEDERAL DUE PROCESS ISSUE ON THE BRIEFS.

The United States Supreme Court has ruled that before a defendant in a criminal case may be entitled to relief under a federal due process analysis when the government destroys potentially useful evidence, the defendant must show that the government agents acted in bad faith. Arizona v. Youngblood, 488 U.S. 51, 58 (1988). If bad faith is established, the criminal charges must be dismissed.

In this case, police collected physical evidence at 3874 Hummingbird Street on November 2, 1991, after fatal shootings there. (R. 389; see also R. 477-78, 601). In 1992, Tiedemann was declared incompetent by the trial judge and experts, and the state dismissed the charges. (R. 389; see also R. 477-78; 601). Thereafter, in response to inquiries by Tiedemann, prosecutors represented they would not pursue charges against him. (R. 389-90, 478). From 1993 to 1994, government agents destroyed the physical evidence relating to the shootings. (R. 390; see also R. 477-78, 601).

Given the government's representations and the circumstances, Tiedemann never had the opportunity to examine the evidence. State agents likewise did not analyze it.

In 2002, the state filed homicide charges against Tiedemann. (R. 1-5).

Tiedemann maintains on appeal that state agents destroyed the physical evidence in bad faith. The destruction was willful and deliberate and with the intent that the state would not pursue charges against him. (See Brief of Appellant, Point II.A.)

The state disputes Tiedemann's bad-faith argument on appeal. It claims, first, that Tiedemann did not preserve his argument for review. (See Brief of Appellee at 42-43). That is incorrect. To preserve an issue for appeal, a party must make an objection. The objection must be timely and it must give the trial court notice of the error and an opportunity to correct it if the court deems it necessary. In State v. Holgate, 2000 UT 74, 10 P.3d 346, this Court stated that preservation serves two important policies.

First, "in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it." Second, a defendant should not be permitted to forego making an objection with the strategy of "enhanc[ing] the defendant's chances of acquittal and then, if that strategy fails, ... claim[ing] on appeal that the Court should reverse."

Id. at ¶11 (cites omitted). The first policy of preservation is satisfied in Tiedemann's case with respect to destruction of the evidence and the federal analysis. (See R. 388-404).

Specifically, Tiedemann cited to the federal due process analysis for destruction of evidence under Youngblood. (R. 391). He demonstrated that evidence here fell into the category of "potentially exculpatory," and that courts have failed to define bad faith for purposes of the Youngblood analysis (R. 391-92; see also Brief of Appellant at 39-42). Tiedemann maintained that bad faith could be established here, due to the amount of evidence destroyed, the seriousness of the charges, and the type of physical evidence where it may have raised doubts about the state's theories concerning who fired the shots, whether Southerland was sexually assaulted, and other relevant facts. (Brief of Appellant at 39-41; R. 390-94, 401 (arguing that the state "was fully aware of the value of this evidence" and the state "*willfully* destroy[ed]" it) (emphasis added); R. 638:24 (stating the officers "knew exactly what they were doing and they knew the potential of this evidence and that it could be potentially very, very bad for them").

The argument below comported with the preservation rules. It directed the "attention of the court to the claimed errors" so that it "might have an opportunity to correct them." Tolman v. Winchester Hills Water Co., 912 P.2d 457, 460 (Utah Ct. App. 1996) (cites omitted).

With regard to the second policy consideration under Holgate, 2000 UT 74, ¶11, Tiedemann did not forego an objection to the due process argument for any reason. He specifically requested that the trial court dismiss the charges under a federal due process

analysis. (R. 390-94, 401). The trial court refused to do so. (R. 601-03). The issue was preserved. This Court may address the matter on the merits.

Next, the state suggests that secondary evidence remaining in this case is comparable in nature to the physical evidence and sufficient for Tiedemann in defending against the first degree felony charges at issue. (Brief of Appellee at 41). In support of that claim the state has cited to the prosecutor's "Third Supplemental Response to Request for Discovery" filed in the trial court. (See id. (citing R. 60-61)).

The discovery response lists interview tapes and transcripts, photos, autopsy reports, police reports, evaluations relating to Tiedemann, and criminal histories. (R. 60-61). The secondary evidence is not a comparable substitute to the physical evidence, which included personal items belonging either to the shooting victims or Tiedemann; two handguns; audio tapes; drugs, substances, and paraphernalia; blood, hair and saliva samples and specimens; fingerprints; bedding; clothing; bullets; fragments; and gunshot residue samples. (See Brief of Appellant, Addendum E); see also Hammond v. State, 569 A.2d 81, 89-90 (Del. 1989) (recognizing that without access to physical evidence, the secondary evidence had little probative value to the defendant or his expert). As stated in the opening brief, physical evidence had the potential of calling into question the state's conclusions or theories. (Brief of Appellant at 40-42).

Finally, the state criticizes Tiedemann for arguing that the evidence was only potentially useful, where it had the potential to disprove Southerland's claims of how events transpired, to impeach her credibility, and to cause jurors to doubt her ability to perceive events on the night of the shooting. (See Brief of Appellee at 40-41).

According to the state, the argument is speculative. (Id.)

The state's criticism is unjustified. The bad-faith test in Youngblood concerns destroyed evidence of which no more can be said other than that it was potentially useful. See Youngblood, 488 U.S. at 58. Where the evidence was potentially useful, Tiedemann has made the required showing. The state destroyed the evidence in bad faith. This Court may decide the issue on established law and the briefs.

B. TIEDEMANN PRESENTED A PROPER STATE ANALYSIS. THIS COURT MAY DECIDE THE ISSUE ON THE MERITS.

Tiedemann has urged this Court to reject the Youngblood approach in cases where the government has destroyed potentially useful evidence, and to adopt instead a separate analysis under the Utah Constitution, art. I, § 7, that balances several factors for a proper remedy. (See Brief of Appellant, Argument, Point II.B.)

As stated in the opening Brief of Appellant, this Court historically and repeatedly has recognized that article I, section 7 of the Utah Constitution fully protects the citizens of this state against government action. "[T]he mandate of the due process clause of article I, section 7 of the Declaration of Rights in the Utah Constitution is *comprehensive in its application to all activities of state government*." Foote v. Ut. Bd. of Pardons, 808 P.2d 734, 735 (Utah 1991) (emphasis added); see also State v. Copeland, 765 P.2d 1266, 1272 (Utah 1988) (relying on art. I, § 7 to strike sentencing provisions); State v. Howell, 707 P.2d 115, 118 (Utah 1985) (relying on art. I, § 7 in sentencing); State v. Brickey, 714 P.2d 644, 646-47 (Utah 1986) (relying on art. I, § 7 in preliminary hearings); Labrum v. Ut. Bd. of Pardons, 870 P.2d 902, 908 n.5, 909 (Utah 1993) (agreeing that "due process is

flexible and calls for the procedural protections that the given situation demands"; and relying on art. I, § 7 in parole hearings); State v. Ramirez, 817 P.2d 774, 779-80 (Utah 1991) (concluding that in criminal cases, the standard for admissibility of eyewitness identification under art. I, § 7 diverges from the federal standard); Christiansen v. Harris, 163 P.2d 314, 315, 317 (Utah 1945) (citing to Utah's due process provision).

Also, if a defendant makes a claim that his state due process rights were violated, "[i]t is the province of the judiciary to assure that a claim of the denial of due process by an arm of government be heard and, if justified, that it be vindicated." Foote, 808 P.2d at 735; see also State v. Lafferty, 749 P.2d 1239, 1247 n.5 (Utah 1988) (this Court will not engage in a state constitutional analysis unless an argument for a different analysis under the state provision is briefed), vacated on other grounds, Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991); Society of Separationists v. Whitehead, 870 P.2d 916, 930 (Utah 1993) (stating a federal analysis "does not control our analysis under the Utah Constitution").

Tiedemann has presented textual support for his argument under article I, § 7. (See Brief of Appellant at 42-45 (relying on decisions from this Court concerning state due process in criminal proceedings; and citing to State v. Shaffer, 725 P.2d 1301, 1304-07 (Utah 1986) (referring to the Utah constitutional provision and considering several matters to determine if defendant's due process rights were violated by the destruction of evidence)). And he has cited to other jurisdictions that have adopted a separate balancing approach under a state constitutional analysis when the government destroys potentially useful evidence. (See Brief of Appellant at 47-49 (citing Thorne v. Dep't of Pub. Safety, 774 P.2d 1326, 1331 (Alaska 1989); State v. Morales, 657 A.2d 585, 593 (Conn. 1995);

Hammond v. State, 569 A.2d 81, 83-85 (Del. 1989); Commonwealth v. Henderson, 582 N.E.2d 496, 497 (Mass. 1991); State v. Ferguson, 2 S.W.3d 912, 916-17 (Tenn. 1999); State v. Delisle, 648 A.2d 632, 642-43 (Vt. 1994); State v. Osakalumi, 461 S.E.2d 504, 511, 512 (W. Va. 1995)); see also Gurley v. State, 639 So.2d 557, 564 (Ala. Crim. App. 1993) (recognizing use of a three-part balancing test under Alabama law when the government loses or destroys evidence); State v. Schmid, 487 N.W.2d 539, 541-42 (Minn. Ct. App. 1992); People v. Burch, 669 N.Y.S.2d 299, 300 (2d Dep't 1998), appeal denied, 683 N.E.2d 1056 (N.Y. 1997) (ruling that the destruction of 911 tape in the normal course prejudiced defendant where identification was an issue).

Tiedemann also presented policy arguments in favor of the separate analysis, where due process is not concerned just with bad faith actions; it is concerned with fundamental fairness. (Brief of Appellant at 44 (citing State v. Morgan, 2001 UT 87, ¶15, 34 P.3d 767 (fundamental fairness is the touchstone of due process))). A function of fundamental fairness is to preserve the "integrity of the process itself." Labrum, 870 P.2d at 909. Also, where state agents are in possession of the information relevant to destruction of the evidence, the state should bear the burden of proof. (Brief of Appellant at 44-45). The burden should be on the party in control of the evidence and with access to the information.

In this case, the state opposes the separate state constitutional analysis, claiming that Youngblood is fair. (Brief of Appellee at 46-48). It maintains that when the state fails to produce material exculpatory evidence, the defendant is prejudiced by definition

and entitled to a new trial. (Id. at 46). However, where evidence was destroyed before testing, it is "neither plainly exculpatory nor inculpatory" (id. at 47 (citing State v. Youngblood, 844 P.2d 1152, 1156 (Ariz. 1993))); thus, there is no showing of prejudice and in that instance, defendant must show bad faith. (State's Brief of Appellee at 47). If defendant is able to make the requisite showing, he is entitled to dismissal of the charges due to the unavailability of the evidence. The state maintains this is fair because government agents have demonstrated "bad faith in handling critical evidence." (Id.)

Yet, if evidence is untested and therefore only *potentially useful*, its "critical" nature has not been ascertained. Indeed, the uncertain nature of the evidence makes it nearly impossible to show the bad faith of the officers. See Thorne, 774 P.2d at 1331 n.9 (stating Youngblood could have the effect "of encouraging the destruction of evidence to the extent that evidence destroyed becomes merely 'potentially useful' since its contents would be unprovable"). "Short of an admission by the police, it is unlikely that a defendant would ever be able to make the necessary showing to establish the required elements for proving bad faith." Lolly v. State, 611 A.2d 956, 960 (Del. 1992); Ferguson, 2 S.W.3d at 916 (stating that bad faith is extremely difficult to prove).

Also, where Youngblood is such an impossible standard, it has no deterrent effect. There are no incentives for police to adopt operating procedures to ensure that evidence is properly collected and preserved. The standard does little to discourage the loss of evidence.

Courts have considered the Youngblood requirement of bad faith to be an all-or-

nothing litmus test that does not find a due process violation even when serious questions exist concerning the fundamental fairness of the trial. It "permits no consideration of the materiality of the missing evidence, or its effect on the defendant's case. [The] analysis substantially increases the defendant's burden, while reducing the prosecution's burden at the expense of the defendant's fundamental right to a fair trial." Ferguson, 2 S.W.3d at 916-17.

The court must either find bad faith and dismiss the charges, despite facts which support only a finding of gross negligence, or find no bad faith and deny the defendant the benefit of a favorable inference, despite the loss of material evidence due to the State's negligence. In such a situation the court is left with an all or nothing proposition leading to two equally unsatisfactory results.

Lolly, 611 A.2d at 960; see also Delisle, 648 A.2d at 643 (stating Youngblood is too broad because it allows for sanctions even where a defendant has not been prejudiced; and it is too narrow because it limits a due process violation to cases where bad faith is shown, even though the loss of evidence may critically prejudice the defendant).

If the central objective of due process is to protect the defendant's right to a fundamentally fair trial, a trial court should consider and balance several factors for a proper remedy, including the degree of negligence involved in destroying the evidence, the significance of the destroyed evidence in light of the secondary evidence (*i.e.* reports) that remains available, the sufficiency of the remaining evidence, and the prejudice to the defendant. See Ferguson, 2 S.W.3d at 916-17; Hammond, 569 A.2d at 86; (Brief of Appellant, Point II.B.) If after considering these factors, the court finds that fundamental fairness requires a remedy, it may fashion one that is appropriate: the court may prohibit any reference to facts surrounding the destroyed evidence, it may instruct the jury to infer

that the missing evidence would have been favorable to the defense, or it may dismiss the charges. See e.g. Ferguson, 2 S.W.3d at 917; Delisle, 648 A.2d at 643.

Such an analysis would balance the defendant's due process concerns with the state's interests in pursuing a conviction. Fundamental fairness would be evaluated in the context of the entire record and balanced against the degree of prejudice to the defendant. Also, an appropriate remedy would have a deterrent effect, since state agents would realize that destroying evidence before trial will entitle a defendant to a remedy.

Finally, the state claims that a state constitutional analysis was not preserved. (Brief of Appellee at 44-45). As stated supra, pp. 16-18, to preserve an issue for appeal, a defendant must make a timely objection, and he must give notice to the trial court of the error in order that the court may correct the error if necessary. Holgate, 2000 UT 74, ¶11.

In this case, Tiedemann preserved the state constitutional issue for appeal. He argued that Youngblood was insufficient to adequately protect due process and fundamental fairness (R. 398, 399). He identified historical references to the Utah due process provision and requested that the trial court apply a separate state analysis for relief under article I, § 7. (See R. 400-401). He cited to several state courts that have rejected the Youngblood analysis for a balancing approach, including Ferguson and Hammond (*id.*), which set forth the approach argued on appeal. (Brief of Appellant, Point II.B.) He pointed out that in other jurisdictions, the defendant is not required to make a showing of bad faith under a state constitutional analysis. (R. 400). Also, even without a showing of bad faith, the destruction of potentially exculpatory evidence may be prejudicial to the defendant. (R. 401).

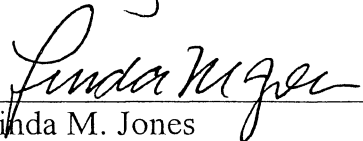
Tiedemann's argument supported a separate state constitutional analysis that would involve the balancing factors. Also, he recognized that the state analysis would require further proceedings in the trial court. (R. 638:28).

The defense did all that it was required to preserve the issue. See 438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶51, 99 P.3d 801 (stating that to preserve an issue, the issue must be timely presented with supporting evidence or relevant legal authority so as to give the trial court the opportunity to rule on it). This Court may consider the matter on the merits without deference to the trial court, and it may find that the trial court erred. See State v. Jackson, 937 P.2d 545, 547 (Utah Ct. App. 1997) (whether the Utah Constitution provides a separate analysis is a question of law).

CONCLUSION

As stated in the opening Brief of Appellant and here, Tiedemann respectfully requests that this Court order suppression of the confessions; and he requests further proceedings for a remedy under the Utah Constitution, where the state destroyed evidence.

SUBMITTED this 22 day of May, 2006.



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CERTIFICATE OF DELIVERY

I, Linda M. Jones, hereby certify that I have caused to be hand delivered an original and 9 copies of the foregoing to the Utah Supreme Court, 450 South State, 5th Floor, 140230, Salt Lake City, Utah 84114-0230 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 22 day of May, 2006.


Linda M. Jones

DELIVERED to the Utah Attorney General's Office and the Utah Supreme Court as indicated above this ___ day of May, 2006.
