

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CF-85-2637
)	
CURTIS EDWARD McCARTY,)	
)	
Defendant.)	

**BRIEF IN SUPPORT OF
MOTION TO DISMISS INFORMATION**

Curtis Edward McCarty stands charged with the 1982 murder of Pamela Willis, a heinous crime which Mr. McCarty has always denied committing. The prosecution’s circumstantial case against Mr. McCarty was never strong, and it was the seemingly objective forensic investigations of Joyce Gilchrist that made his conviction possible. Of course, the egregious misconduct of Ms. Gilchrist has also twice resulted in vacatur of his conviction. After twenty years, two guilt reversals, and proven misconduct by the state, the prosecution of Mr. McCarty has been forever tainted. The apple is now poisoned; the prosecution cannot get another bite. To be clear, Mr. McCarty does not by this Motion challenge the sufficiency of the evidence to support his prosecution (though he disputes sufficiency, he recognizes that this Court has spoken on the issue). Rather, the legal premise of this Motion is based on this Court’s own finding of bad-faith destruction of potentially exculpatory evidence by a state actor. Ms. Gilchrist’s bad-faith misconduct has irreparably harmed Mr. McCarty’s ability to put on a defense at trial, and any attempt to place him in jeopardy again cannot be fair or reliable. Due Process requires that the information against him be dismissed.

BACKGROUND

Since this Court is deeply familiar with the record in this case, an in-depth recitation of background facts and procedural history is unnecessary. However, as the case has moved from a post-conviction to a pre-trial posture, a few points relevant to the instant motion deserve review.

Pamela Willis was murdered on December 10, 1982. Two-and-a-half years transpired before the Defendant was charged on May 22, 1985. During this period, Mr. McCarty was interviewed by law enforcement on multiple occasions -- March 15, 1983 and then again on March 6, 7, and 11 of 1985 -- without being charged. *See McCarty v. State*, 904 P.2d 110, 120, 1995 CR 48 (“*McCarty II*”) (1995). McCarty’s first trial did not begin until March 17, 1986, ten months after he was charged. *See McCarty v. State*, 765 P.2d 1215, 121, 1988 OK 271 (“*McCarty I*”) (1998).

The forensic work of Joyce Gilchrist was instrumental to the prosecution and gave the most important corroboration of the otherwise weak and circumstantial case. The centrality of Ms. Gilchrist’s role in this case was recognized by the OCPD in 1986, when it awarded her a commendation for her work in Mr. McCarty’s case. In pertinent part, the commendation read:

An intensive investigation was conducted but failed to develop enough evidence to file charges against the suspect. In February 1985, Det. Sellers and Citty re-opened the case, you were able to link hairs found at the murder scene to EDDIE McCARTY. McCarty was tried, convicted and given a death sentence in January 1986. Your technical investigation of the forensic evidence was instrumental in convicting McCARTY. Moreover, the Detectives and Prosecutors have made it known that your professional demeanor and poise on the witness stand, as well as your reputation as a scientist, helped provide the justification for the jury to convict McCARTY. (Emphasis in original).

(Gilchrist OCPD Review Board, See Exhibit Number 1).

It now appears that the instrumental work of Ms. Gilchrist was possible only after she surreptitiously changed her initial conclusions. According to her handwritten notes from 1983 and 1984, not discovered until 2000, Mr. McCarty was microscopically *excluded* as the source of foreign hairs discovered on Willis' body, including the critical pubic hair (in item #39) and "coup de grace" hair fragment (item #40) from the knife wound. (Evidentiary Hearing Findings Report dated November 16, 2004 ("Findings") at 7-8, 17-18 and n. 24). Sometime after Mr. McCarty was taken into custody in 1985 and gave additional hair samples, Gilchrist altered her notes to indicate that McCarty was included as the source of these hairs. (*Id.*). Gilchrist testified at both trials that the hair evidence implicated McCarty. In the words of this Court, "[t]he most damning evidence against McCarty was Ms. Gilchrist's testimony concerning the hairs contained on Items #39 and #40." (*Id.* at 23). Of course, these critical hairs are now missing. This Court has found that Ms. Gilchrist, a state agent, "most likely did destroy or intentionally lose the evidence, acting in bad faith." (*Id.* at 24).

In addition to her devastating hair testimony, Gilchrist gave serological testimony that directly linked Mr. McCarty to semen found in and on the victim. At least through *McCarty III*, the state's vigorously defended theory was that the person who killed Ms. Willis raped her first. Although a "John Doe" was also indicted, in *McCarty III* the CCA characterized the idea that a John Doe might be responsible for the crime as "a smoke screen", and stated that "[w]hile it is hypothetically possible [that] another person was involved in this crime, this possibility presently amounts to no more than idle speculation." *McCarty v. State*, 977 P.2d 1116, 1123, 1998 OK CR 61, ¶ 20 ("*McCarty III*") (1998). DNA tests conducted in 2001 excluded Mr. McCarty as the source of semen

from the victim, definitively proving that he did not rape the victim. (Findings at 36).

In 2001, as the Gilchrist scandal unfolded, the Governor and the Attorney General began an investigation in collaboration with OIDS to determine whether Gilchrist's work had resulted in the wrongful convictions of any innocent persons. (Letter from Oklahoma Att. Gen. to Hon Kirk Humphreys, Sept. 27, 2001, See Exhibit Number 2). This investigation utilized Oklahoma's DNA Forensic Testing Program, which gave OIDS authority to "investigate, screen and present to the appropriate prosecutorial agency claims that scientific evidence will demonstrate indigent persons convicted... are factually innocent." 22 Ok. St. Ann. § 1371.1 (2000). In January 2002, after Mr. McCarty's attorney Jack Fisher and the State agreed to test the sperm collected from the vaginal swab of Pamela Willis, OIDS determined that McCarty's case fell within the mandate of the DNA Forensic Testing Program and therefore funded the testing. (Letter from OIDS to McCarty, Jan. 23, 2002, See Exhibit Number 3).

In September 2003, Mr. McCarty filed a post-conviction application seeking reversal of his conviction and death sentence. After remand by the Court of Criminal Appeals, this Court heard testimony on October 4 and 5, 2004 and issued its findings of fact and conclusions of law shortly thereafter. Due to the limited scope of the remand order, this Court did not reach the question of whether the agreement to conduct DNA testing in this case included the State's agreement to immediately release Mr. McCarty given exculpatory results. (Findings at 36, n.47). For similar reasons, this Court also declined to undertake a full examination into whether the prosecution knew or should have known that Ms. Gilchrist provided flawed testing and testimony. (Findings at 9-10). This Court further noted that the question of Bob Macy's bad faith in this regard was then

being litigated in *Jeffrey Todd Pierce v. Gilchrist, et al.* (Findings at 9, 12).

On June 14, 2005, the CCA determined that this Court's findings and conclusions were adequately supported by the record. *McCarty v. State*, 114 P.3d 1089, 1092-93, 2005 OK CR 10, ¶ 12 ("*McCarty IV*") (2005). The CCA specifically reversed Mr. McCarty's conviction and death sentence based on a violation of *Brady v. Maryland. Id* at 1093-94.

On January 23, 2007, the Oklahoma City Council agreed to a \$4 million settlement in the *Pierce v. Gilchrist et al* litigation. See Bryan Dean, *City to Pay Innocent Man \$4 Million: Chemist's Testimony in Rape Case Enabled Wrongful Imprisonment*, Daily Oklahoman, Jan. 24, 2007 available at 2007 WLNR 1409137. See also *Pierce v. Gilchrist et al*, 359 F.3d 1279 (10th Cir. 2004) (denying defendants' motions to dismiss).

ARGUMENT

Dismissal of the Information is mandated on three independent legal grounds. First, this Court's finding that a state actor destroyed critical evidence in the case while acting in bad faith requires dismissal under the doctrine of *Arizona v. Youngblood*. Second, since the apparent exculpatory value of the destroyed hairs was initially acknowledged by Ms. Gilchrist, dismissal is also warranted under the more lenient standard of *California v. Trombetta*. Third, the prohibition against double jeopardy and the harassment of an accused by successive prosecutions must bar a *third* attempt by the state to convict Mr. McCarty after *twice* having convictions reversed because of state misconduct. Given the extraordinary misconduct and bad faith by a state actor in this case, the continued prosecution of Mr. McCarty cannot withstand constitutional scrutiny.

The information should be dismissed.

I. Dismissal Required Under *Youngblood/Hogan*

In *Arizona v. Youngblood*, the Supreme Court announced a bad-faith test to determine whether a violation of Due Process has occurred when police fail to preserve “potentially useful evidence.” 488 U.S. 51, 58-9 (1988). In *Hogan v. State*, 877 P.2d 1157, 1161 (Okla. Cr. App. 1994), the CCA adopted the *Youngblood* standard. 877 P.2d at 1161. The *Youngblood/Hogan* test is well-established in Oklahoma. See *Vilandre v. State*, 113 P.3d 893, 897 (Okla. Cr. App. 2005) (“Destruction of evidence will only require relief where the destruction is the result of bad faith by the State.”) (citing *Hogan* and *Youngblood*); *Gilson v. State*, 8 P.3d 883, 905 (Okla. Cr. App. 2000) (discussing the *Hogan* Court’s adoption of the *Youngblood* bad faith standard).

The *Youngblood/Hogan* test has two basic prongs. First, the court must determine whether “potentially useful evidence” was destroyed. “[P]otentially useful evidence,” as defined by the Court in *Youngblood*, is evidence “of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” 488 U.S. at 57. Second, the court must enquire whether the evidence was destroyed by an agent of the state, acting in bad faith. The bad-faith requirement concerns “that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.” *Youngblood*, 488 U.S. at 58. The previous findings of this Court confirm that McCarty has met both of these prongs.

With regards to the "potentially useful" prong, there is no question that the

destroyed hair evidence -- items #39 and #40 -- are potentially useful. In closing in *McCarty II*, the prosecution described the hair in item #40 as the “coup de grace” hair because the medical examiner found it in one of the victim’s chest wounds, implying that Mr. McCarty was present when the “knife was thrust into her chest.” (1989 Tr. Vol. 6 at 8). Meanwhile, the *pubic hair* in item #39 provided confirmation of the theory that the killer raped the victim before murdering her. This Court has already recognized these evidentiary items as the “most damning” proof in the State’s case.

DNA testing on these hairs could have exonerated Mr. McCarty because the hairs apparently came from the victim’s real killer. Excluding Mr. McCarty as the donor of these hairs would therefore show that he was not the person who stabbed the victim. Furthermore, DNA testing on these hairs could potentially link the hairs found on the body to the semen from which McCarty has already been excluded -- definitively proving the long-asserted theory that whoever raped the victim also killed her. While this Court has held that DNA testing of the sperm alone was not enough to exonerate Mr. McCarty, the picture of guilt would change entirely if the DNA results on the sperm were confirmed and extended by exculpatory results on the hairs. Only the real killer could have left his sperm in and on the victim, his hair in a fatal stab wound, and his pubic hair on the body.

Of course, further DNA testing is not possible precisely because of Gilchrist's bad faith actions. It is already law of the case that Gilchrist was "acting in bad faith" when she most likely lost or destroyed this evidence. The second prong of the *Youngblood/Hogan* test is thus easily met. This Court's finding was amply supported by the record: Before *McCarty I*, Ms. Gilchrist altered the records of her exculpatory analysis of hairs #39 and

#40 to incriminate Mr. McCarty, and in 2000 she either lost or destroyed this same evidence to avoid detection of her misconduct. Gilchrist was the last person in possession of the critical hair evidence, and she most likely either intentionally lost or destroyed this hair evidence in bad faith in order to avoid scrutiny of her work. (Findings at 22-23). Accordingly, Mr. McCarty satisfies the bad faith standard articulated in *Youngblood* and *Hogan* for proving violations of a defendant's due process rights.

After a court finds a violation of due process under *Youngblood*, dismissal of the indictment/information is an appropriate remedy. *See, e.g., United States v. Bohl*, 25 F.3d 904, 915 (10th Cir. 1994) (dismissing fraud-related indictment based on government's destruction of radio transmission tower legs); *United States v. Cooper*, 983 F.2d 928, 933 (9th Cir. 1993) (dismissing methamphetamine-manufacturing indictment after government destroyed alleged laboratory equipment); *United States v. Belcher*, 762 F.Supp. 666, 673 (W.D.Va 1991) (dismissing marijuana charges after state officials destroyed marijuana plants at issue). Dismissal should result when factors such as "the centrality of the evidence at trial", "the reliability of the secondary evidence", and "the effect [the] destruction had on the defendant's ability to present a complete defense" generally weigh in the defendant's favor. *Bohl*, 25 F.3d at 914.

These factors clearly favor dismissal of the Information. The centrality of the evidence at trial is beyond cavil given its status as the most damning evidence against Mr. McCarty. The reliability of the secondary evidence is questionable at best -- without the apparent corroboration of objective forensic science, the circumstantial case was not even

enough to convince prosecutors to charge Mr. McCarty in the first place.¹ Most importantly, Mr. McCarty's ability to present a defense based on demonstrating third-party guilt has been severely impaired by Ms. Gilchrist's misconduct. *See also Holmes v. South Carolina*, 126 S.Ct 1727, 1735 (2006) (admission of third-party-guilt evidence necessary for meaningful opportunity to present complete defense). Mr. McCarty cannot now present DNA test results pointing to the real killer. While he is armed with DNA test results excluding him from the sperm found in and on the victim, he cannot now confirm and strengthen those exculpatory results by DNA testing on hairs that could potentially point to the same unknown person as the source of the hairs from items #39 and #40.

II. Dismissal Required Under *Trombetta*

The fact that Ms. Gilchrist previously excluded McCarty as the source of hair from items #39 and #40 also justifies granting relief under the more lenient standard of *California v. Trombetta*, 467 U.S. 479, 485 (1984). Under *Trombetta*, bad faith is not required to find due process violated *if* the exculpatory value of the destroyed evidence is apparent before it is destroyed. *Id.* at 479-80. *See also Childs v. State ex rel. Dept. of Public Safety*, 988 P.2d 898, 901, 1999 OK 69, ¶13 (Okla. 1999) (applying *Trombetta* in Oklahoma).

This sequence of events in this case is much like those in *State v. Blackwell*, 245

¹ Even though McCarty firmly believes that no jury could convict without Gilchrist's testimony, he recognizes that the sufficiency issue has been addressed by this Court. In any event, the sufficiency question is not dispositive if the centrality-of-evidence and ability-to-present-a-complete defense factors favor the defendant. Moreover, it is worth recalling that despite Gilchrist's damning testimony, both of McCarty's juries struggled to reach convictions. In *McCarty I*, the CCA opined that the evidence against McCarty "cannot be termed overwhelming" and noted that jury experienced difficulty in reaching a verdict of guilty." *McCarty I*, 765 P.2d at 1221. Of course, the CCA reversed in *McCarty I* because of, *inter alia*, the "deplorable conduct" of prosecutors and the improper opinion testimony of Gilchrist. *Id.* at 1218-21. In *McCarty II*, the jury did not convict until after it had deliberated for almost 17 hours and had received both an *Allen* charge and repeated questions about their deliberations. *McCarty II*, 904 P.2d at 123-25.

Ga. App. 135, 137, 537 S.E.2d 457, 460 (Ga. Ct. App. 2000). In *Blackwell*, the Georgia Court of Appeals affirmed dismissal of a drug possession charge after the state destroyed a urine sample that had initially tested negative for drugs in a field test but had then tested positive at the crime lab. The court found dismissal appropriate under *Trombetta* because the exculpatory value of the destroyed evidence was apparent based on the first exculpatory result -- even though it was later contradicted. *Id.* at 138-39. In other words, to establish “apparent” exculpatory value, there needed only to be one exculpatory result.

The parallel here is obvious; McCarty was first excluded by Gilchrist but then included under now questionable circumstances. Based on the first exclusion, the apparent exculpatory value of the hairs has been established. Furthermore, the inference that the hairs were apparently exculpatory is further supported by the track record of DNA testing in this case: Gilchrist’s serological link between McCarty and the semen found in and on the victim has already been disproved by DNA testing. Finally, the finding that Gilchrist destroyed the hairs in bad faith justifies an inference that the evidence was exculpatory under the “spoliation doctrine.” *See Stuart v. State*, 127 Idaho 806, 816-17, 907 P.2d 783, 793-94 (Idaho 1995) (spoliation doctrine requires favorable inference concerning exculpatory value of evidence destroyed in bad faith).

III. Dismissal Required On Double-Jeopardy Grounds

While vacatur of a conviction normally does not preclude subsequent re-trial, the Constitution protects defendants from endless bad-faith harassment by the prosecution in search of a conviction. *See United States v. Dinitz*, 424 U.S. 600, 611 (1976). Of course, McCarty raised a double-jeopardy argument after his first conviction was vacated in

1988, and this claim was rejected by the CCA in *McCarty II*. However, while it did not find for McCarty then, the CCA did leave the door open for double-jeopardy claims based on serious misconduct like prosecutorial goading in cases that have been reversed on appeal. *McCarty II*, 904 P.2d at 127 (citing *Brewer v. State*, 718 P.2d 354, 359 (Okla. Cr. 1986)). Given the circumstances of McCarty's second reversal, the time is right for this Court to walk through the door the CCA left open.

The difference now is that bad-faith of a state actor has been established. Gilchrist's involvement in the investigation and conviction of McCarty has rendered the prosecution against him fundamentally unfair and seriously undermined McCarty's ability to present a complete defense. Indeed, the profound extent of Gilchrist's misconduct means that the State has effectively forfeited its "one fair opportunity to offer whatever proof it could assemble." *Burks v. United States*, 437 U.S. 1, 16 (1978). *See also Davis v. State*, 993 P.2d 124, 127, 1999 OK CR 48 (1999) (noting absence of bad-faith conduct by State). The State cannot be permitted to proceed as if this latest vacatur was a run-of-the-mill reversal. The behavior of Gilchrist was simply beyond the pale and entirely inconsistent with Oklahoma's principles of justice. The State cannot divorce itself from her misdeeds.

There is even evidence that bad faith extends beyond Gilchrist. After this Court declined to resolve the beyond-remand-scope question about Bob Macy's knowledge of Gilchrist's misconduct, the Oklahoma City Council agreed to pay \$4 million to settle claims of malicious prosecution brought by Jeffrey Todd Pierce against Gilchrist and Macy based on their joint misconduct. *See also Pierce v. Gilchrist et al*, 359 F.3d 1279 (10th Cir. 2004) (denying defendants' motions to dismiss). Of course, Pierce was

immediately released after DNA tests excluded him as the source of semen. By contrast, even though McCarty's DNA tests were funded by the OIDS/Gilchrist Investigation premised on factual innocence, the State did not consent to his release after exculpatory results were obtained. Defendant suggests that this demonstrates that the prosecution against him is not based on an objective evaluation of his culpability for the crime at issue -- but rather that the current information is being prosecuted only out of an animus against him stemming from his alleged involvement in other crimes and acts.

The Constitution does not permit placing McCarty in jeopardy once more for the murder of Pamela Willis. After twenty years, two guilt reversals, and proven misconduct by the state, the prosecution of Mr. McCarty has been forever tainted. *See Gauntlett v. Cunningham*, 171 Fed. Appx. 711, 713 (10th Cir. 2006) (bad faith or harassing prosecutions can be enjoined); *Phelps v. Hamilton*, 59 F.3d 1058, 1063-64 (10th Cir. 1995) (same).

CONCLUSION

For the reasons stated above, Mr. McCarty prays that this honorable Court will dismiss the Information in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the _____ day of _____, 2007, a true and correct copy of the above and foregoing document was delivered to:

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Perry Hudson