

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

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

MOTION TO DISMISS INFORMATION

COMES NOW Curtis Edward McCarty, by and through undersigned counsel, and moves this Court to dismiss with prejudice the Information and all charges against him related to the December 1982 murder of Pamela Willis. This prosecution has been permanently tainted by the uniquely shameful actions of state actor Dr. Joyce Gilchrist. Acting in bad faith, Gilchrist lost or destroyed the most damning and important forensic evidence in this case, irreparably damaging Mr. McCarty's ability to present a complete defense by showing that a third party actually committed this heinous crime. Moreover, DNA testing has already demonstrated that an unknown third party actually raped the victim. Given that this DNA testing was undertaken because of its clearly understood ability to exculpate McCarty, and given the permanent taint of Gilchrist's actions on the investigation, the state of Oklahoma cannot again place McCarty in jeopardy without violating the constitutions of Oklahoma and the United States.

The grounds for this motion are set forth fully in the attached memorandum. In summary, Mr. McCarty presents three independent arguments for dismissal of the Information.

First, Ms. Gilchrist's bad-faith destruction of "the most damning evidence against Mr.

McCarty [hairs on Items #39 and #40]” has permanently deprived him of the opportunity to conduct DNA testing on these items in order to vindicate his long-held claim that another person committed this crime. *See Arizona v. Youngblood*, 488 U.S. 51, 58-9 (1988) (bad-faith destruction of evidence violates Constitution); *Hogan v. State*, 877 P.2d 1157, 1161 (Okla. Cr. App. 1994) (following *Youngblood*). *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). Under these circumstances, continued prosecution of McCarty would violate due process and dismissal of the charging instrument is the appropriate remedy. *See, e.g., United States v. Bohl*, 25 F.3d 904, 915 (10th Cir. 1994); *United States v. Cooper*, 983 F.2d 928, 933 (9th Cir. 1993).

Second, since Gilchrist had originally excluded Mr. McCarty as the source of the critical hairs at issue, Defendant is also entitled to relief under the more lenient standard of *California v. Trombetta*, 467 U.S. 479, 485 (1984) (destruction of evidence with apparent exculpatory value violates due process). The fact that Gilchrist later changed her conclusion to include Mr. McCarty as the source of the hairs does not lessen their apparent exculpatory value. *See State v. Blackwell*, 245 Ga.App. 135, 137, 537 S.E.2d 457, 460 (Ga. Ct. App. 2000) (dismissing drug possession charge after state destroyed urine sample that tested negative for drugs in a field test but then tested positive at the crime lab). *See also 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).

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. *See United States v. Dinitz*, 424 U.S.

600, 611 (1976). While a similar double-jeopardy claim was previously advanced by McCarty and rejected by the CCA, *McCarty v. State*, 904 P.2d 110, 126-27, 1995 OK CR 48 (1995), the critical difference now is that this Court has found bad-faith on the part of a state actor. *See Davis v. State*, 993 P.2d 124, 127, 1999 OK CR 48 (1999) (noting absence of bad-faith conduct by State). 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). Further prosecution at this point is tantamount to bad-faith harassment. *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).

The grounds for Mr. McCarty's motion are more fully set out in the attached Brief in Support.

Respectfully submitted,

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