Filed: 5/20/2024 3:43 PM
Carroll Circuit Court
Carroll County, Indiana

STATE OF INDIANA	)	IN THE CARROLL CIRCUIT COURT
	) ss:	
COUNTY OF CARROLL	)	CAUSE NO. 08C01-2210-MR-1
STATE OF INDIANA	)	
Plaintiff	)	
v.	)	
	)	
RICHARD ALLEN,	)	
Accused	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S SECOND MOTION TO DISMISS BASED UPON NEWLY DISCOVERED DESTROYED AND/OR MISSING EXCULPATORY OR POTENTIALLY USEFUL EVIDENCE

At issue is the purposeful or negligent failure to preserve and/or the destruction of material and exculpatory evidence critical to the defense of Mr. Allen. It also involves the attempted concealment of the identity of a key witness (later identified as Professor Jeffrey Turcot) and other exculpatory evidence (such as the Todd Click letter and evidence referred to by Click in his letter). This would include new examples of missing evidence detailed in the motion filed simultaneously herewith.

Indiana Code § 35-34-1-4(a) states that this Court may, upon motion of the Defendant, dismiss an information upon certain grounds. In this case, the Defendant requests the Court to Dismiss this information pursuant to Ind. Code § 35-34-1-4(a)(11), which states that a motion to dismiss an information may be granted for "any other ground that is a basis for dismissal as a matter of law." I.C. 35-34-1-4(a)(11). "Such grounds would include a violation of a defendant's

constitutional right to due process. Additionally, trial courts 'have inherent authority to dismiss criminal charges where the prosecution of such charges would violate a defendant's constitutional rights.' Section 35–34–1–4 is merely legislative recognition of this authority." *Matlock v. State*, 944 N.E.2d 936, 938 (Ind. Ct. App. 2011). *See also State v. Davis*, 898 N.E.2d 281, 285 (Ind. 2008): "Such grounds would include a violation of a defendant's constitutional right to due process."

A motion to dismiss based upon a ground specified in Ind. Code § 35-34-1-4(a)(11) may be made or renewed at any time before or during trial. See, Ind. Code § 35-34-1-4(b). Therefore, this matter is properly and timely raised.

The Indiana Supreme Court has held that, "A serious breach of duty occurs when the prosecution willfully or intentionally, when unjustified by a public policy, obstructs the access of the defense to material evidence in its possession." *Turnpaugh v. State*, 521 N.E.2d 690, 692-93 (Ind. 1988). "It is likewise a serious breach when through lack of vigilance, the negligent destruction or withholding of material evidence by law enforcement officers or the prosecutor occurs. In such instances, grounds for reversal may exist." *Id.* The Indiana Supreme Court has also held that the negligent or intentional destruction of evidence by the police can provide grounds for reversal or dismissal on due process and due course of law grounds. *See, Birkla v. State*, 323 N.E.2d 645 (Ind. 1975); Hale v. State, 230 N.E.2d 432 (Ind. 1967); Rowan v.

State, 431 N.E.2d 805 (Ind. 1982); and *Braswell v. State*, 550 N.E.2d 1280, 1283 (Ind. 1990).

"Prior to any request for discovery by the defendant, the negligent destruction or withholding of material evidence by the police or the prosecution may present grounds for reversal." *Birkla,* 323 N.E.2d at 648 (citing *Hale v. State* 230 N.E.2d 432 (Ind. 1967)). The Indiana Supreme Court has further held that "when the prosecution determines evidence to be nonmaterial, and further decides not to advise defense counsel of such evidence prior to its destruction, a heavy burden rests upon the prosecution to demonstrate that the destruction of such evidence did not prejudice the defendant." Id. at 649.

"The appropriate test to apply when deciding whether a defendant's due process rights have been violated by the State's failure to preserve evidence depends on whether the evidence in question was 'potentially useful evidence' or 'material exculpatory evidence.'" *Blanchard v. State*, 802 N.E.2d 14, 26 (Ind. Ct. App. 2004). The burden is on the State to demonstrate that this evidence was not material and its destruction did not prejudice the Defendant. *Cox v. State,* 422 N.E.2d 357 (Ind. 1981).

Potentially useful evidence is defined as "evidentiary material 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." *Id.* The State's failure to preserve potentially useful evidence constitutes a due process violation when the

defendant can show bad faith. *Id.* at 27. The Seventh Circuit has held that bad faith may be inferred when a party disposes of evidence in violation of its own policies. See, e.g., *Park v. City of Chicago*, 297 F.3d 606, 615 (7th Cir. 2002)(citing *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 716 (7th Cir.1998))("[V]iolation of a record retention regulation 'creates a presumption that the missing record[s] contained evidence adverse to the violator.'"). The bad faith presumption arises when the failure to retain records or other evidence actually violates the terms of the applicable policy. *Id.* However, the Indiana Court of Appeals has noted that "in some instances, the destruction or failure to preserve evidence may be so prejudicial to the defendant as to warrant reversal, even in the absence of 'bad faith' by the officers." *Stoker v. State*, 692 N.E.2d 1386, 1390 n. 8 (Ind. Ct. App. 1998).

Material exculpatory evidence, on the other hand, is defined as evidence that possesses "an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Blanchard*, 802 N.E.2d at 28. The State's good or bad faith in failing to preserve material exculpatory evidence is irrelevant. *Id.* The Indiana Supreme Court has held that "The defendant must establish materiality as a condition precedent to claiming a denial of due process where evidence is negligently lost or withheld by the government except where the materiality is self-evident or a showing of materiality is prevented by the destruction of the evidence." *Lee v. State*, 545

N.E.2d 1085, 1089 (Ind. 1989). An item is "material" if it appears that it might benefit the preparation of the defendant's case, or if it might reasonably affect the outcome of the trial. *See, Williams v. State*, 819 N.E.2d 381, 385 (Ind. Ct. App. 2004).

In this matter, given the nature of the evidence that law enforcement either failed to preserve or actually destroyed, the materiality was and is self-evident. Furthermore, as in *Lee, Id.*, the failure to preserve or destruction prevents the defense from establishing the exculpatory nature of the evidence and its materiality. As such, Allen is not required to demonstrate the materiality of the evidence. *See, Lee,* 545 N.E.2d at 1089. To be sure, the unavailable evidence had "exculpatory value" which was apparent at the time it should have been preserved and prior to its destruction, Additionally, Allen is unable to obtain comparable evidence by other reasonably available means. *See, Blanchard,* 802 N.E.2d at 28; and *see, e.g., Glotzbach v. Froman*, 854 N.E.2d 337, 338 (Ind. 2006) ("Spoliation of evidence is 'the intentional destruction, mutilation, alteration, or concealment of evidence.' If spoliation by a party to a lawsuit is proved, rules of evidence permit the jury to infer that the missing evidence was unfavorable to that party.").

Even if this Court requires a showing of "bad faith" it is apparent. Bad faith is defined as being "not simply bad judgment or negligence, but rather implies the conscious doing of wrong because of dishonest purpose or moral obliquity." *Blanchard*, 802 N.E.2d 14 at 27-28. "Obliquity" is defined as

"Deviation from moral rectitude or sound thinking." *See*, Webster's New International Dictionary 1680 (2d ed.1947).

The United States Supreme Court has recognized that the police have a constitutional duty to preserve such evidence. In *Trombetta*, the Supreme Court observed that "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488 (1984). The Court recognized that same duty in *Arizona v. Youngblood,* 488 U.S. 51 (1988), confirming that the Constitution imposes at least a limited "obligation" on the police "to preserve evidence . . . [that] could form the basis for exonerating the defendant." Id. at 58.

It is beyond debatable that the evidence at issue here would play a significant role in Mr. Allen's defense and would form a basis for exonerating him.

Additionally, "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, **irrespective of the good faith of the prosecution.**" *Brady v. Maryland,* 373 U.S. 8, 87 (1963). (Emphasis added). "To prevail on a *Brady* claim, a defendant must establish: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial. *Minnick v. State*, 698 N.E.2d 745, 755 (ind.1998) *(citing Brady* 373 U.S. at 87).

INDIANA CONSTITUTION

It is clear that the federal constitution is not the sole guarantor of the right to due process and other rights. Chief Justice Shepard made this abundantly clear in his law review article, *Second Wind for the Indiana Bill of Rights*, 22 Ind.L.Rev. 575 (1989), when he stated in conclusion that:

> Civil liberties protected only by a U.S. Supreme Court are only as secure as the Warren Court or the Rehnquist Court wishes to make them. The protection of Americans against tyranny requires that state supreme courts and state constitutions be strong centers of authority on the rights of the people. I am determined that the Indiana Constitution and the Indiana Supreme Court be strong protectors of those rights. Id. at 586.

The Chief Justice also stated that "Indiana was an early and noteworthy participant in using its bill of rights to defend personal liberty," and after citing to numerous early decisions, noted that "[t]hese were but a few in a fine line of cases in which the Indiana Supreme Court held that the Indiana Bill of Rights afforded Hoosiers rights which the federal Constitution did not." Id. at 576-77.

Chief Justice Shepard also made note of the fact that many provisions of the Indiana Bill of Rights have no counterpart in the United States Constitution, and observed that Article I, Section 12, was one of those provisions, Id. at 580-81. This provision, relating to due process, is at issue in the instant case.

The due process clause of the United States Constitution is found in Sec. 1 of the Fourteenth Amendment to the Constitution. That section states in relevant part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property without due process of law; .... (emphasis added).

The right to due process conferred under the Constitution of the State of Indiana is found in Article 1, Section 12, and contains significant language not found in the Constitution of the United States. The provision states:

> All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be *administered freely, and without purchase; completely, and without denial; speedily, and without delay*. (emphasis added)

While the defense is unaware of any Indiana case law specifically interpreting the emphasized portion of this constitutional provision, the provision itself was traced back to the Magna Charta in *State ex rel. Board of County Comm'rs v. Laramore,* 175 Ind. 478, 94 N.E. 761 (1911). The *Laramore* Court also acknowledged that although the provision was derived from the Magna Charta, it may be "a broader guaranty of free, unpurchased and impartial justice." Id. at Ind. 485, 94 N.E. at 763.

Three more contemporary decisions dealing with the issue of destruction of evidence are of particular import. First, it is clear from Chief Justice Shepard's concurrence in *House v. State,* 535 N.E.2d 103, 111 (Ind. 1989) that the issue of whether a lack of good faith on the part of the State was required for a defendant to obtain a remedy for the destruction of potentially exculpatory evidence under the Indiana constitution had not been decided adversely to the defendant, even after *Youngblood.*

The *House* decision actually dealt with the discovery of potentially exculpatory evidence, and the need for materiality of that evidence. Both Chief Justice Shepard and Justice DeBruler, however, discussed the related issue of destruction or loss of such evidence. In his concurrence and dissent, Justice DeBruler stated that,

> [w]hile I agree with the result reached by the majority opinion on this [discovery] issue, I point out that when the accused shows that material evidence was in the hands of the prosecution and lost, the question of whether the accused must then go ahead and show prejudice is open in Indiana. In my judgment, when the item is not available for scrutiny by the trial court, but is known to have been material, the risk of loss should be borne by the prosecution, not the defendant. The police and prosecutors are after all highly trained specialists in the gathering and retention of evidence and should be expected to carefully retain all material evidence in usable form. Id. at 111.

Chief Justice Shepard, in his concurrence, stated that, "I agree with Justice DeBruler that this case does not decide what standard Indiana should use for cases in which the prosecution has disposed of arguably material evidence which might exculpate a defendant." *Id.* The instant case certainly appears to be the type envisioned by these comments. Two Indiana decisions have been found in which the issue of due process and the destruction of evidence was raised under both the federal and Indiana Constitutions. *Hale v. State,* 230 N.E.2d 432 (Ind. 1967*); Douglas v. State,* 464 N.E.2d 318 (Ind. 1984). Although both of these decisions were determined adversely to the defendants based on the facts of the cases, both also stated that *negligent* or intentional

destruction of material evidence by the police or the prosecution may present grounds for reversal. *Hale,* 230 N.E.2d at 435; *Douglas,* 464 N.E.2d at 320. In each case, the defense alleged a violation of due process under both the federal and state Constitutions. While both decisions were rendered prior to the United States Supreme Court's decision in *Youngblood, supra,* the decision in *House* rendered after the *Youngblood* decision, makes it clear that the principle announced in *Hale* and *Douglas* may still be valid under the Indiana Constitution. Additionally, *Lee, supra*, was decided after *Youngblood*.

If the language of Article I, Section 12 of the Indiana Constitution, "Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay…" is to have any meaning at all, it certainly seems to support a more stringent enforcement of due process rights than required under the federal Constitution. Given the facts of the instant case, the penalty involved, and the long history of concern about preservation of evidence in Indiana case law, as well as evidence of attempts of law enforcement and the State of Indiana attempting to conceal other material and exculpatory evidence, Mr. Allen should not be deprived of a remedy for the egregious loss of evidence occasioned by the actions of law enforcement and/or the prosecution in his case, especially in light of the ease with which the evidence could have been preserved.

CONCLUSION

The only remedy that serves the interests of justice and guarantees Mr. Allen's constitutional rights is dismissal.

Respectfully submitted,

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/s/ Bradley A. Rozzi
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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing pleading has been provided to all counsel of record for the opposing party, via IEFS this same day of filing.

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