FILED

STATE OF WISCONSIN	CIRCUIT COURT	WOOD COUNTY

STATE OF WISCONSIN,
Plaintiff,

V. Case No: 93CF74

TODD FROST,
Defendant.

MOTION FOR POST CONVICTION RELIEF
PER WIS. STATS. § 974.06

The above-named defendant, Todd Frost, appears pro se, and hereby respectfully moves this Honorable Court for an order vacating the conviction in this case. This motion is brought pursuant to Wis. Stats. § 974.06, on the grounds that law enforcement personnel responsible for investigating this incident failed to preserve evidence possessing exculpatory value that was apparent before the evidence was destroyed, and that was within the exclusive control of the government, violating Mr. Frost's right to be free from deprivation of his liberty without due process of law, in violation of the 14th Amendment & Section 1 of the United States Constitution, and Article 1, Section 1, of the Wisconsin Constitution.

In further support of this motion, the defendant states the following:

A. *Evidence that was apparent as exculpatory in nature was seized and within exclusive control of the government, and ultimately not preserved, resulting in its irretrievable loss.*

Defendant Frost was arrested on 4-2-1993, in connection to a murder at 510 Clyde Ave. in Wis. Rapids, and at that time he voluntarily submitted to Officers' request for a sexual assault kit, which included a strip search, blood, hair and saliva specimens. Photographs and fingerprints were taken on more than one occasion, and even the defendant's clothing, money and personal papers (legal in nature), were confiscated by the Wisconsin Rapids Police Department Detectives. Defendant voluntarily submitted to officers' every request.

During their investigation of the murder, police had the Wisconsin Crime Laboratory collect evidence from the scene of the murder at 510 Clyde Ave., and used

that evidence in the trial and conviction of the defendant. Among the evidence collected were blood, semen, hair and other samples.

Attorneys for defense filed motions for discovery and inspection on 5-6-1993, and later filed motions for testing and retesting of items under the exclusive control of the state. These motions were all granted by the court without objection from the prosecution. Though DNA results were inconclusive at that time due to the limits of technology, it served notice on the state that this particular evidence was clearly exculpatory in nature and expected to play a critical role in exonerating the defendant.

The evidence was returned from the FBI Laboratory to the Wisconsin Rapids Police Department police detectives clearly labeled:

> The submitted items of evidence and the probed membrane will be returned to your office under separate cover by registered mail. In addition to the evidence in this case, the remaining processed DNA from specimens examined by DNA analysis is also being returned. The processed DNA can be found in a package marked "PROCESSED DNA SAMPLES: SHOULD BE REFRIGERATED/FROZEN". It is recommended that these samples be stored in a refrigerator/freezer and isolated from evidence that has not been examined.

Prior to and during trial it was revealed that there in fact existed a third blood type at the scene:

> Electrophoretic typing of bloodstains present on items R, AR, BY and CA identified the polymorphic enzyme phosphoglucomutase (PGM) Type 1
>
> Electrophoretic typing of the bloodstains present in items L, P, and AO identified the polymorphic enzyme Phosphoglucomutase (PGM) type 1
>
> BE2a Vaginal swabs (2) Type 1
>
> Semen was identified from the vaginal swabs and smear (items BE2a and BE2b) and the cervical swabs and smear (items BE3a and BE3b). Electrophoretic typing of the vaginal and cervical swabs (items BE2a and BE3a) identified a PGM type 1.
>
> BE2b Vaginal smear Type 1
>
> Semen was identified from the vaginal swabs and smear (items BE2a and BE2b) and the cervical swabs and smear (items BE3a and BE3b). Electrophoretic typing of the vaginal and cervical swabs (items BE2a and BE3a) identified a PGM type 1.

> BE3a Cervical swabs (2) Type 1
>
> Semen was identified from the vaginal swabs and smear (items BE2a and BE2b) and the cervical swabs and smear (items BE3a and BE3b). Electrophoretic typing of the vaginal and cervical swabs (items BE2a and BE3a) identified a PG type 1
>
> BE3b Cervical smear Type 1
>
> Semen was identified from the vaginal swabs and smear (items BE2a and BE2b) and the cervical swabs and smear (items BE3a and BE3b). Electrophoretic typing of the vaginal and cervical swabs (items BE2a and BE3a) identified a PGM type 1.
>
> Electrophoretic typing of seven (7) bloodstains present on the Yellow blanket (item BY) also identified a PGM type 1. This PGM occurs in approximately 59 to 65% Of the general population. Type 1

This third blood type, while also type O, was of a different PGM type than the defendant. This evidence consisted of blood and semen. DNA testing proved inconclusive at that time. Witnesses at trial made statements to the police stating they did not believe the victim had sexual contact with anyone for several days prior to the murder and it was determined that the semen was left immediately prior to the murder. I.e., That whomever the semen belonged to is the person who committed the murder.

Despite the fact that the semen and matching blood samples were of a different genetic marker than the defendant, due to the inconclusiveness of DNA testing and limits of technology at that time, the defendant was wrongfully convicted and sentenced to life imprisonment.

Defendant was coerced into waiving his right to counsel without understanding what he was doing. He has been denied his right to counsel for any appellate process from the outset, in violation of his 5th, 6th and 14th amendment rights. The state public defender has out right refused to assist the defendant in any form.

As an indigent 9th grade drop out, defendant tried to proceed pro se, with another prisoner doing his legal work, but he was denied relief at every level. Defendant repeatedly tried to request information from the state regarding the DNA evidence, but again met a stonewall. The DA, Court, Police, State Crime Laboratory, and FBI Crime Laboratory all refused to reply or refused to provide the defendant with any information

he requested related to the evidence used to convict him. In fact, the defendant's own attorney refused to tell him so much as what private laboratory was used to retest the evidence, what evidence was tested, and essentially participated in the complete and total denial of the defendant's Constitutional Rights.

After contacting the Wisconsin Innocence Project, the defendant learned that the only evidence that could clear him – the semen and matching blood stains collected from the scene of the murder, had been destroyed by the police in 2002 (App.), in violation of §968.205:

> (2) Except as provided in sub. (3), if physical evidence that is in the possession of a law enforcement agency includes any biological material that was collected in connection with a criminal investigation that resulted in a criminal conviction, delinquency adjudication, or commitment under s. 971.17 or 980.06 and the biological material is from a victim of the offense that was the subject of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense, the law enforcement agency shall preserve the physical evidence until every person in custody as a result of the conviction, adjudication, or commitment has reached his or her discharge date.
>
> (2m) A law enforcement agency shall retain evidence to which sub. (2) applies in an amount and manner sufficient to develop a deoxyribonucleic acid profile, as defined in s. 939.74 (2d) (a), from the biological material contained in or included on the evidence.

This action has effectively denied the defendant any opportunity at proving his innocence through the only evidence that could positively exonerate him. In fact, the only evidence destroyed was the DNA evidence that could exonerate the defendant. Amazingly, when the police brazenly destroyed this crucial evidence, the defendant was still filing postconviction actions.

B. *The Defendant's right to due process of law under the Federal and State constitutions is violated by the Government's failure to preserve exculpatory evidence.*

As a threshold matter, the government has an affirmative duty to disclose to a defendant in a criminal case any evidence within its exclusive possession or control, favorable to the accused, where the evidence is material to either guilt or punishment. *Brady v. Maryland, 373 U.S. 83 (1963).*

The defendant asserts that the government maintained exclusive control of the blood, semen and other evidence in question here, and it was initially seized because

these samples contained DNA that was highly relevant to the investigation of this case, and later, due to the limits of technology at that time, the trial and wrongful conviction of the defendant.

These samples, though inconclusive at that time, comprised evidence of a unique and singular nature: DNA of the person responsible for the murder of which the defendant was wrongfully convicted. Not only does no other preserved evidence of the same nature exist, but the evidence is directly relevant to the heart of the issue in this case: the source of the semen and matching blood samples contain the identity of the person who committed the murder. Since the court and defendant are now deprived of the opportunity to review this evidence, any presumptions or conclusions about the relative weight of this evidence or its nature in comparison with other evidence – resolved in favor of the government and at the expense of the defendant – would be fundamentally unfair.

Dismissal with prejudice, upon motion, can be an appropriate remedy for the government's failure to preserve evidence, causing its destruction. *State v. Hahn, 132 Wis.2d 351 (Ct. App. 1986)*. In Hahn, the State's failure to preserve an auto impounded during an investigation and prosecution for homicide by intoxicated use of a motor vehicle caused the vehicle to be inadequate for testing by a defense expert for vehicular defect, an issue relevant to a statutory defense to that charge. The Hahn court ruled that in cases where the government causes destruction of criminal evidence, imposition of sanction is a discretionary matter, warranting dismissal with prejudice in that case, despite the State's argument that the failure to preserve the evidence was not deliberate.

The Hahn ruling was distinguished by the ruling in *Arizona v. Youngblood, 488 U.S. 51 (1988)*, in which the United States Supreme Court addressed a good faith analysis involving the State's failure to preserve evidence in a criminal case. The evidence in question in that case was semen and other bodily fluid and clothing samples from a sexual assault kit in a prosecution for sexual assault, ultimately not sufficiently available for additional testing. There was also a finding in the lower court of review that it did not imply any bad faith on the part of the state. *Id. at 55*. The Youngblood court distinguished "potentially useful evidence" from "exculpatory evidence", holding that unless a defendant can show bad faith on the part of the police, failure to preserve

potentially useful evidence does not constitute a denial of due process of law. *Id. at 57-58*. The court defined "potentially useful evidence" 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 at 57*.

However, the Youngblood court also stated that "[T]he due process clause of the fourteenth amendment, as interpreted in *Brady*, makes the good faith or bad faith of the state irrelevant when the state fails to disclose to the defense material exculpatory evidence." *Id.* While the defendant does not concede or stipulate to a lack of bad faith in the case at bar[1], it is the defense assertion that the issue need not be reached, as the evidence at issue in this case was of different genetic marker than that of the defendant, and was clearly and apparently exculpatory, rendering a good faith analysis irrelevant.

Identity of the killer has been the issue from the outset of the case. During trial state witness, Sherry Culhane, a forensic scientist employed by the Wisconsin State Crime Laboratory, described the tests she performed and the results of those tests:

> "The system that – or the proteins that I was specifically typing is abbreviated as PGM, it stands for phosphoglucomutase. It occurs in three different conventional types in the population, and those conventional types can be broken down into eight sub types."
> (R. 729:13-8).
>
> Q: Now, as to the defendant's blood type, what percentage of the general population has this type of PGM subtype?
>
> A: Approximately 20 percent.
>
> Q: And how about the victim's?
>
> A: I believe its about 40 percent.
> (R. 730:10-15).
>
> Q: Now, did you do any tests on the vaginal and cervix swabs I believe that were listed as BE2a and BE3a?

[1] "We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence in reasonable bounds and confines it to 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* at 58 (emphasis added). It is clear that police action in collecting and testing the samples in this case was conduct demonstrating an indication that the evidence could form a basis for exoneration, or at the very least, an exculpatory presumption.

> A: Yes, I did.
>
> Q: And what did you do?
>
> A: I looked at the vaginal swabs and smears to determine if there was semen present. I was able – I was able to identify semen on the vaginal swabs and smears and the cervical swabs and smears.
> (R. 733:3-10).
>
> Q: Were you able to type that semen?
>
> A: In the PGM system, yes, I was.
>
> Q: And what were the results of that?
>
> A: It was type 1, which was consistent with Francine Weaver.
>
> Q: Now I assume women don't typically have semen. Is that correct?
>
> A: That's correct.
> (R. 733:18-25).

CE1 Blood sample reportedly collected from Todd Frost. Type 2+1+

> The blood sample (item CE1) reportedly collected from Todd Frost was ABO type O blood. Electrophoretic typing of item CE1 identified the polymorphic enzyme phosphoglucomutase (PGM) Type 2-1, subtype 2+1+.
> (App.)

Furthermore, the prosecution itself has, in its theory of prosecution, clearly stated to the jury in its opening remarks at trial:

> "... Thus, the real issue for you to decide is one of identity, that is, is Todd Frost the person responsible for killing Francine Weaver in cold blood, that is, first degree murder."
> (R. 244:5-8).

Thus, its failure to ensure preservation of these obviously exculpatory, unique, and likely demonstrative pieces of evidence relating to the identity of the killer, which would clearly exonerate the defendant, grossly disables this court's ability to ensure fundamental fairness to the defendant.

The defendant's due process rights have been violated and the defendant respectfully requests dismissal of this case by asking the court to vacate the sentence imposed. To merely set aside the sentence and allow the state unlimited attempts at prosecution would further violate the defendant's rights as the only pieces of evidence that could clearly exonerate him have been maliciously destroyed by the state. Therefore, defendant respectfully requests that the judgment be vacated and the case be dismissed with prejudice

Dated this _______, day of ___________, 2012.

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