

IN THE CIRCUIT COURT OF THE NINTH
JUDICIAL CIRCUIT, IN AND FOR
ORANGE COUNTY, FLORIDA

STATE OF FLORIDA
Plaintiff,

CASE NO: 48-2008-CF-015606-O

DIVISION: 16

vs.

CASEY MARIE ANTHONY
Defendant.

FILED IN OFFICE
CENTRAL DISTRICT
2009 SEP 22 AM 11:29
LYDIA GARR
CLERK CIRCUIT
ORANGE CO
COURT

**RESPONSE TO MOTION TO DISMISS DUE TO SPOILIATION OF EVIDENCE AND
MOTION TO COMPEL DEFENSE WITNESS LIST FOR HEARING**

At the outset, it is important for the court to note that the Defendant has used interchangeably three separate and distinct concepts related to the destruction or unavailability of evidence in a legal proceeding. For the clarification of the court, the State will address each of these concepts initially and later discuss their applicability to the eventual evidentiary hearing that will be necessary in this case.

The term used in the title of the Defendant's Motion, spoliation, is a cause of action in civil law wherein a party whose ability to prosecute or defend an action has been adversely effected by the destruction of a piece of evidence by the opposing party. *Reed v. Alpha Professional Tools*, 975 So.2d 1202(5th DCA 2008). This concept and the rules attendant to it are not applicable to criminal cases; the analogous concepts in criminal law are referred to as destruction of or failure to preserve evidence.

The second concept discussed by the Defendant deals with claims which have their genesis in the holding in *Brady v. Maryland*, 373 U.S. 83 (1963). That concept deals with the failure of the government to turn over, or under our circumstances destroy, evidence materially favorable to the accused. Under those circumstances, the burden is on the defense to establish that, as the Defendant quotes in the section titled *Argument*, in subparagraph one: (1) the evidence possesses an exculpatory value that was apparent before the evidence was destroyed and (2) the evidence is

of such a nature that the Defendant would be unable to obtain comparable evidence by other reasonable means. At an evidentiary hearing, it will be the burden of the Defendant to establish that the "evidence", of which they complain, was destroyed. They must further establish that at the time of its' destruction, its' value to prove the innocence of the Defendant, its' exculpatory value, was apparent. A mere allegation that the evidence was potentially useful is insufficient. *Gomez v. State*, 915 So.2d 698 (3rd DCA 2005).

Even were they able to meet that heavy burden at hearing, they must further establish that the preservation of the actual items of evidence themselves, along with the hundreds of photographs documenting their exact positions at every possible stage of excavation, are not comparable evidence. It is interesting to note that the motion is replete with the impassioned arguments of counsel and recitation of their version of the facts of the case. What are noticeably absent are any affidavits from their panel of celebrity experts, who appeared for a photo opportunity at the crime scene, indicating that they have examined the available evidence and photographs and find they are insufficient to allow them to arrive at reliable conclusions which might challenge those of the State's experts. The undersigned would proffer to the court that to date those experts have only examined the remains and have yet to examine any other items collected at the crime scene. It is baffling how the Defendant can assert this claim prior to having their experts even examine the evidence.

The final concept, which the Defendant appears to use inter-changeably with the second, deals with the destruction, or failure to preserve other types of evidence. This is the type of evidence that is the subject of *California v. Trombetta*, 467 U.S. 479 (1984) and its progeny. After acknowledging the line of cases discussed above based upon *Brady*, the court pointed out the distinction, "This case raises the question whether the Fourteenth Amendment also demands that the State preserve potentially exculpatory evidence on behalf of defendants." *Trombetta*, at 418. The Courts have recognized the clear distinction between the two concepts. "The

Supreme Court has recognized that, when dealing with potentially exculpatory or useful evidence that is permanently lost, **'courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.'**" *Gomez*, at 700. The United States Supreme court acknowledged the impracticality of any other position in *Arizona v. Youngblood*, 488 U.S. 51, 58 (U.S.1988).

"Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due Process Clause (citation omitted)... as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. 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 to 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. We therefore hold that unless a criminal 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."

In summary, the civil concepts of spoliation of evidence implied in the title of this motion have no application to the matters before the court. If the Defendant is to prevail on the *Brady* claim it will be their burden to establish (1) the evidence possesses an exculpatory value that was apparent before the evidence was destroyed and (2) the evidence is of such a nature that the Defendant would be unable to obtain comparable evidence by other reasonable means. If they wish to prevail under a *Trombeta/Youngblood* claim, they will be required to prove the potentially exculpatory nature of the evidence and that it was destroyed/not preserved in bad faith.

FACTS

The burden of proof, as previously stated, is on the Defendant to prove those facts necessary to justify the relief requested. The Defendant has presented allegations in prior motions which, when pressed by the state to prove with actual evidence, fell far short of that

which was claimed.¹ It should come as no surprise to anyone that in the instant Motion the State disagrees with many of the facts alleged. Rather than present the court with yet another useless advocate's version of the facts, the State will opt instead to simply require the Defendant to prove her allegations by the presentation of witnesses subject to cross-examination before this court and then argue the application of the principles discussed above to those facts with every confidence that once again the claims by the Defendant will prove to be exaggerated.

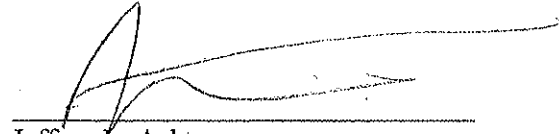
MOTION TO COMPEL DEFENSE WITNESS LIST

It is clear that this matter will require a lengthy evidentiary hearing with the burden of proof on the Defendant. F.R.C.P. 3.220(d) (1) (A) sets forth the obligations of the Defendant for production of information to the State. It states "Within 15 days after receipt by the defendant of the Discovery Exhibit furnished by the prosecutor pursuant to subdivision (b)(1)(A) of this rule, the defendant shall furnish to the prosecutor a written list of the names and addresses of all witnesses whom the defendant expects to call as witnesses at the trial or hearing." Of the defense experts referenced in this Motion, only Dr. Henry Lee has actually been listed as a witness by the Defendant. *See Amended Defense Witness List filed on or about January 22, 2009.* If any witnesses are to be called at a hearing on this motion, the State of Florida has the right pursuant to F.R.C.P. 3.220(h) (1) to take their depositions -- a right which the State anticipates fully exercising in preparation for all aspects of this case. The obligation of the defendant to list witnesses is not limited to new witnesses. The plain wording of the rule contemplates production by the Defendant of a list of all witnesses the Defendant intends to call, whether those witnesses are previously included under the state witness list. *Dufour v. State*, 495 So.2d 154 (Fla. 1986).

¹ Most notable of which was their prior Motion for Sanctions filed on or about January 26 2009 and heard March 12 2009.

The State of Florida therefore moves this court to order that, within a reasonable period of time, the Defendant produce for the State a list of all of those witnesses she intends to call at the hearing on this matter and to set the hearing with sufficient time for the State to depose all pertinent witness and be fully prepared to address the claims contained in the Defendant's motion.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Jose A. Baez, 522 Simpson Road, Kissimmee, FL 34744 on this 22nd day of September, 2009.



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