IN THE COURT OF COMMON PLEAS
CRAWFORD COUNTY, OHIO

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SHEILA LESTER
CRAWFORD COUNTY

State of Ohio,

Plaintiff,

CASE NO. 94 CR 0042

vs.

Judge Sean Leuthold

Kevin Keith,

Defendant.

MOTION FOR LEAVE TO FILE DELAYED MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE

Kevin Keith moves the Court, pursuant to Ohio Criminal Rule 33(B), for leave to file a delayed motion for new trial[1] based on newly discovered evidence. Keith was unavoidably prevented from discovering within the time prescribed for filing a motion for new trial the evidence concerning the BCI forensic analyst who testified against him. The State failed to disclose it to him, despite being constitutionally required to do so.

Keith is filing this motion within a reasonable time from his discovery of the evidence, and this Court should grant him the leave necessary under the Criminal Rules.

A memorandum in support follows.

Respectfully submitted,

Office of the
Ohio Public Defender

By: _____
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[1] Keith is filing his Motion for New Trial instanter.

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Memorandum in Support

I. Introduction

Kevin Keith was wrongly convicted for the aggravated murders of Marichell Chatman, Linda Chatman, and Marchae Chatman, and the attempted aggravated murders of Quanita Reeves, Quentin Reeves, and Richard Warren. The State relied heavily upon the testimony of G. Michele Yezzo, forensic analyst with Ohio's Bureau of Criminal Investigation (hereinafter "BCI"), to provide the crucial link between Keith and the crime scene. But Yezzo's employment personnel file demonstrates that her forensic conclusions were untrustworthy, and her superiors were aware of that at the time of trial. Unbeknownst to Keith until only recently, Yezzo was not only mentally unstable but she had a "reputation of giving dept. answer wants if stroke her" [sic] and was known to "stretch the truth to satisfy a department." Ex. 1, p. 2; Ex. 2, p. 12.

Keith also has learned that Lee Fisher—the Ohio Attorney General at the time of Keith's trial—would not have "permitted Ms. Yezzo to provide testimony against Kevin Keith" had he been aware of the information about her that was in her personnel file. Ex. 3, p. 3. If a proper forensic analysis had occurred, the analyst would have concluded that Ms. Yezzo's conclusions were wrong, and Keith would have powerful evidence exonerating him and incriminating another man. *See* Ex. 4, affidavit of William Bodziak.

Because Keith was never informed by the State about the very troubling information contained in the personnel files of State's witness G. Michele Yezzo, he was deprived of the opportunity to use it to challenge her and her conclusions.

After Keith's counsel learned of the information within Yezzo's personnel files and the impact on Keith, they brought this information to the attention of the current Crawford County Prosecutor and met with him in April 2016. Prosecutor Crall indicated he wished to look into the

information he was provided, and Keith's counsel agreed not to file a new trial motion until Crall had some time to look into it.

In June, Keith's counsel met with former Ohio Attorney General (and former Lieutenant Governor) Lee Fisher. Fisher was the Attorney General during the time period that Keith was indicted, tried, and convicted. In his role as Attorney General, he was the "chief legal officer and chief law enforcement officer for the state of Ohio." Ex. 3, p. 1 He was, effectively, the person in charge of Yezzo, as BCI is a section under the Office of the Attorney General. *Id.* Fisher "also hired and supervised the Superintendent of BCI." *Id.* at 2.

Keith's counsel provided Fisher with documents from Yezzo's personnel file. Before that, Fisher had not known about this troubling information regarding Yezzo, because he had "relied upon the chain of command" and those in supervisory positions to appropriately handle personnel *Id.* at 2. On July 1, Fisher provided an affidavit with his conclusions from reading about Yezzo and from reviewing information about Keith's case. *See* Ex. 3 (incorporated herein in its entirety as if rewritten.)

Fisher found the information about Yezzo "very troubling," and "concerning due to the fact that the opinions of BCI's forensic analysts are relied upon by law enforcement, judges, and juries. The character of the analyst is important." *Id.* He expressed his belief that "Ms. Yezzo's opinions were very likely wrong and that the prejudice in [Keith's] case is very significant." *Id.* at 3. Fisher is "deeply concerned that Ms. Yezzo's conclusions and testimony led to a miscarriage of justice in Mr. Keith's case." *Id.*

Fisher would not only have prevented Yezzo from testifying against Keith, but he would have ordered another analyst to re-examine the evidence submitted to Yezzo. *Id.* Fisher recognized that the State had a duty to disclose to Keith this information about Yezzo: "Because

Ms. Yezzo did testify as a witness for the State against Mr. Keith, the defense should have been notified about the information in her personnel file. It is my opinion that the State had a duty to disclose this information because it severely impacts Ms. Yezzo's credibility." *Id.*

Keith provided Prosecutor Crall with a copy of Fisher's affidavit on July 21. Counsel for Keith has left messages with and sent emails to Prosecutor Crall regularly since that time, but has not heard back.

On August 19, 2016, counsel for Keith met with Attorney General Mike DeWine and several members of his staff in order to discuss what was discovered in Yezzo's personnel file and how it impacted Keith. In advance of that meeting, Keith provided a copy of his prepared but unfiled new trial motion to Stephen Schumaker, Deputy Attorney General for Law Enforcement, for distribution to the meeting's attendees. The meeting concluded with the Attorney General's indication that he wished to look into it, and Keith's counsel agreed not to file a new trial motion until the Attorney General had some time to do so. The day following the meeting, counsel exchanged emails with members of the Attorney General's Office, indicating that they would be in touch. Since that time, Counsel for Keith has not heard from the Attorney General's Office on this matter, and emails sent by Keith's counsel have been unanswered.

Keith remains willing to meet with and assist the Crawford County Prosecutor and/or the Ohio Attorney General in righting this wrong. But counsel for Keith must be diligent to protect Keith's interests and to avoid an unreasonable delay. Accordingly, Keith is now filing this matter with the Court.

II Legal Standard

"Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered," unless the defendant

can show "by clear and convincing proof that [he] was unavoidably prevented from the discovery of the evidence upon which he must rely...." Ohio Crim. R. 33(B). When, as here, the evidence is discovered more than 120 days after trial, a defendant must first seek the court's leave to file a motion for a new trial. *Id. See also* R.C. 2945.80; *State v. Pinkerman,* 88 Ohio App. 3d 158, 623 N.E.2d 643 (1993). It has been more than 120 days since Keith was convicted, but he was prevented from discovering the following evidence because the State impermissibly concealed it from him.

"If the trial court determines that the documents submitted in support of a motion for leave for a new trial clearly and convincingly demonstrate the movant was unavoidably prevented from discovering the evidence, 'the court must grant the motion for leave and allow the motion for new trial to be filed.'" *State v. Glover*, 8th Dist. Cuyahoga Nos. 102828, 102829, 102831, 2016-Ohio-2833, ¶ 28 (Ct. App.) (citing *State v. Trimble*, 11th Dist. Trumbull No. 2013-P-0088, 2015-Ohio-942, ¶16 (Ct. App). "[A] party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence." *State v. Davis,* 10th Dist. Franklin No. 03AP-1200, 2004-Ohio-6065, ¶11 (Ct. App.) (citing *State v. Walden*, 19 Ohio App.3d 141, 145-146 (1984).

"Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 477 (1954). It is "more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases." *Id.* And it "does not mean clear and unequivocal." *Id.*

There are a variety of circumstances in which courts have found clear and convincing evidence that the defendant was unavoidably prevented from discovery within the requisite 120 days, and thus the analysis is a case-by-case determination. In *State v. Hatton*, 4th Dist. Pickaway No. 11CA23, 2013-Ohio-475 (Ct. App.), the trial court and the court of appeals found the defendant was "unavoidably prevented" from timely filing his motion for new trial based on the recanted statements of the State's witness/alleged co-conspirator. The court found that, ""[e]ven if Defendant knew or believed that Ricky Dunn's statements were false, he would have had no reason to suspect that Dunn would recant his statements and 'tell the truth.'" *Id.* at ¶10.

In *Glover*, the trial court and the court of appeals found the defendant was "unavoidably prevented" from timely filing his motion for new trial based on the never-before-seen police reports, obtained by the defendant through a public records request 18 years after his conviction. *Glover*, 2016-Ohio-2833, ¶ 16. Although the trial prosecutor maintained that because it was his policy, he would have disclosed to the defense the information at issue, the trial court found that it was not provided to the defense. The court of appeals agreed, stating that "the most persuasive indication that the defense did not possess this evidence is the fact that the defense never used this evidence at trial." *Id.* at ¶ 38 (citing *State v. Larkins*, 8th Dist. Cuyahoga No. 82325, 2003-Ohio-5928, at ¶ 28, citing *United States v. Stifel*, 594 F.Supp. 1525 (N.D.Ohio 1984)).

In *State v. Howard*, 10th Dist. Franklin No. 15AP-161, 2016-Ohio-504, 59 N.E.3d 685 (Ct. App.), the court of appeals found that the trial court abused its discretion in determining the defendant was not unavoidably prevented from discovering his wife's Netcare records documenting her suicide attempts. *Id.* at ¶ 55. The court of appeals determined that the defendant "relied on his trial counsel to fully investigate the matter," and that the defendant "had no reason to know that a post-trial phone call to Netcare was a worthwhile phone call to make."

Id. at ¶ 34. It further held that the defendant was unavoidably prevented from discovering a crucial witness's contact information to call him at trial, because he relied on counsel who failed him. *Id.* at ¶ 34.

Directly relevant to this matter is the finding of the trial court in *State v. Parsons*, Case No CR 9300098. Presented with the same evidence as here—Yezzo's personnel file—the trial court in *Parsons* agreed that Parsons was "unavoidably prevented from discovery of the facts upon which he has relied to present his claim for relief." Ex. 40, Judgment Entry (granting leave/evidentiary hearing), *State v. Parsons*, Huron C.P. No. CRI 9300098, p. 2 (Mar. 23, 2016). The trial court went on to grant Parsons a new trial, finding that the information in Yezzo's personnel file "casts grave doubts about her credibility," and reiterated that the filing was timely. Ex. 17, p. 2.

III. Kevin Keith was unavoidably prevented from discovery of this evidence within the time prescribed for filing a motion for new trial.

Keith was convicted in 1994, and thus this motion is being filed outside the window of 120 days from the date the verdict was rendered. Keith can establish by clear and convincing evidence that he was unavoidably delayed from the discovery of his new evidence.

A. Keith had no knowledge of the existence of the information contained in Yezzo's personnel file and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence.

Keith did not know about the information in Yezzo's personnel file until January 2016. He did not know until June 2016 that then-Attorney General Lee Fisher would have prevented Yezzo's testimony against Keith had Fisher known about the information in her personnel file. Despite Keith's diligence, he could not have learned about this new evidence in the 120 days following his conviction.

In January 2016, counsel for Keith saw an article in the Cleveland Plain Dealer that referenced BCI analyst Yezzo, the expert who had linked Davison's car to the crime scene. Ex. 9. The article referenced a new trial motion filed by James Parsons and quoted from a memo written by a state supervisor about Yezzo: "Yezzo's 'findings and conclusions regarding the truth maybe [sic] suspect. She will stretch the truth to satisfy a department.'" *Id.* This triggered Keith's counsel to seek out Yezzo's BCI personnel file, and she obtained it through an attorney who knew Parsons' attorney.

Keith's counsel had previously obtained documents from BCI regarding Keith's case, but BCI only turned them over after intervention by the Governor's office. In October 2009, Keith's counsel made a public records request, specifically referring to Yezzo and the fact that she testified against Mr. Keith and requesting all documents concerning Keith's case. Ex. 41. There was no specific request for Yezzo's personnel file, and neither Keith nor his counsel had any knowledge of the information in Yezzo's personnel files that called her credibility into question. Keith and his counsel also remained unaware of the fact that Yezzo's superiors had just pointedly acknowledged Yezzo's "interpretational and observational errors" as "failures that could lead to a substantial miscarriage of justice." Ex. 10.

The Assistant Attorneys General to whom Keith made the first request denied it, stating that "the merits review of the case is concluded" and that they were "unable to see what relevance [the requested information had] post-disposition." Ex. 42. Keith then made the same request to BCI itself the next day, and BCI denied the request for what appeared to be the opposite reason: that Keith's case was *not* concluded. "The work product exception to the Public Records Act applies until a matter has concluded and a law enforcement matter is only concluded when all potential actions, trial, and post-trial proceedings have ended." Ex. 43.

In May 2010, after Keith's execution date was set, Keith's counsel went to Ohio Public Defender Timothy Young for assistance, and he made his own personal request to BCI for the records. Young stated that there would "never be a time prior to [Keith's] execution that BCI cannot object to the disclosure of its records," and that BCI was not prohibited from disclosing the requested materials. Ex. 44. He stressed Keith's innocence and requested that BCI reconsider its denial of my public records request made in October 2009. *Id.* BCI again denied the request. Ex. 45.

Young then contacted Governor Ted Strickland's Chief Counsel and requested assistance in getting BCI to provide Keith the public records regarding BCI's involvement in his case. Ex. 41. A week later, BCI provided the records related to Keith's case. Ex. 46.

The records disclosed to Keith by BCI in May 2010 did not contain any of the information in Yezzo's personnel file, and Keith did not know about that information until counsel saw the Cleveland Plain Dealer article in January 2016. Ex. 41. Keith was surprised to learn that just nine months before he made his first request to the Attorney General and to BCI, specifically highlighting that he wanted to review Yezzo's conclusions, Yezzo had received a verbal reprimand because her "interpretational and observational errors" were "failures that could lead to a substantial miscarriage of justice." Ex. 10. Again, no one informed Keith of this.

That 2009 memorandum concerning Yezzo's reprimand documents the last of Yezzo's many verbal reprimands during her career as a forensic scientist with BCI. Yezzo tendered her resignation the following month. Ex. 11.

The personnel files, obtained in January 2016, demonstrate that 2009 was not the first time Yezzo's forensic conclusions were questioned by her superiors and peers. One example was in May 1989: a memorandum from the Assistant Superintendent to the Superintendent

documented that the "consensus" was that Ms. Yezzo's "findings and conclusions regarding evidence may be suspect. She will stretch the truth to satisfy a department." Ex. 1, p. 2.

Yet another example occurred in summer of 1993. In the notes detailing the investigation of Yezzo for "threatening co-workers and failure of good behavior" (Ex. 12, p. 2), it was noted that Yezzo had a "reputation of giving dept. answer wants if stroke her." Ex. 2, p. 12. In the same notes, it was recorded that the analysts reworking Yezzo's cases questioned with Ms. Yezzo's conclusions on a blood analysis and a partial footprint analysis. *Id.*

Other documents indicate that Yezzo did not respond well to "peer review." Ex. 13. Yezzo had demonstrated hostile behavior on more than one occasion with more than one co-worker, and at least one of those occasions came about during discussions of a peer review. Ex. 14. She was abusive verbally and physically to her co-workers, actually having attempted to physically assault at least two of her colleagues. *Id.* at 2, 3. She used racial slurs ("nigger bitch," "nigger in a woodpile") when addressing an African-American co-worker. *Id.* at 5, 7. By 1989, it was the "consensus of opinion" in her section at BCI that she "suffers a severe mental imbalance and needs immediate assistance." *Id.* at 8.

Then in 1993, less than a year before Yezzo testified against Keith, she was placed on Administrative Leave for "threatening co-workers and failure of good behavior." Ex.12, p. 2. Yezzo had threatened that she was going to "kill some co-workers" on multiple occasions, which led to her suspension. A hearing to determine the extent of Yezzo's suspension was stayed until May 26, 1994. Ex. 15.

In the meantime, Keith's trial came up. Yezzo testified against Keith on May 12, 1994.

B. Keith was unavoidably prevented from discovery of this evidence because the impeachment evidence was suppressed by the State.

Keith cannot be faulted for failing to uncover the truth about this State's witness earlier, as the Supreme Court has rejected "a rule thus declaring prosecutor may hide, defendant must seek," as it is "not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (internal citations omitted). "Ordinarily, we presume that public officials have properly discharged their official duties." *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (internal citations omitted). Keith had every reason to believe that the State would comply with its obligations under *Brady*. Defense counsel cannot be required to "scavenge for hints of undisclosed Brady material...." *Banks*, 540 U.S at 695.

Moreover, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley,* 514 U.S. 419, 437 (1995). The correspondence between Bucyrus Police Captain Michael Corwin and Yezzo certainly indicates that he was aware of Yezzo's willingness to say what was needed for the conviction to occur. *See* e.g. Ex. 16.

Corwin sent Yezzo a receipt for the type of tires purchased by Alton Davison the previous year and put on his car, and he also sent her a brochure picture of the tires. Corwin specifically pointed out to her which tire picture in the brochure was the tire previously put on the car. *Id.* at. 3-5. He wrote a note to Yezzo, dated March 11, 1994, that he "hope[d] this will do the trick for us." *Id.* at 6. Five days later, Yezzo rendered her conclusion—based upon the brochure pictures of tires—that the tires formerly on Davison's car were similar in tread design to the tire tracks at the scene. Ex. 18.

The police knew about this evidence, so the prosecutor was responsible for disclosing it to Keith. *Strickler v. Greene*, 527 U.S. 263, 280-281 (1999) ("[T]he rule encompasses evidence

known only to police investigators and not to the prosecutor.") No one did, not even in 2009 when Keith asked BCI for the records pertaining to his case and highlighted that Yezzo had testified against him. Again, just nine months before Keith made that request to BCI, BCI had reprimanded Yezzo for the final time of her career, because her "interpretational and observational errors" were "failures that could lead to a substantial miscarriage of justice." Ex. 10.

Instead of alerting Keith to the serious credibility problems with Yezzo and her work, the State stood silently by while Keith's execution date was set. It is only because of Governor Strickland's commutation that Keith survived long enough to obtain this information about Yezzo.

IV. Conclusion.

Based on the newly discovered evidence Keith has presented, which he could not have discovered before the conclusion of his trial or within 120 days thereafter, this Court should grant Keith's motion for leave to file a new-trial motion, and then grant him relief on his new-trial motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the forgoing MOTION FOR LEAVE TO FILE A DELAYED MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE was served by hand to the office of Matthew Crall, Crawford County Prosecutor, Crawford County Courthouse, 112 East Mansfield Street, Room 305, Bucyrus, Ohio 44820 on this the 28th day of October, 2016.

RACHEL TROUTMAN – 0076741

COUNSEL FOR DEFENDANT