

**IN THE CIRCUIT COURT OF APPEALS
EASTERN DISTRICT**

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	Appeal ED100987
)	
RODNEY LINCOLN,)	
)	
Appellant.)	

IN THE CIRCUIT COURT OF MISSOURI
ST. LOUIS CITY, 22ND JUDICIAL CIRCUIT
Honorable Robin R. Vannoy, Judge

STATE OF MISSOURI,)	
)	
Plaintiff,)	
)	
vs.)	No. 22821-02021
)	
RODNEY LINCOLN)	
)	
Defendant.)	

RECORD ON APPEAL - TRANSCRIPT

APPEARANCES

For the Respondent:

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For the Appellant:

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22nd Judicial Circuit, Missouri

SEPTEMBER 12, 2013

The following proceedings were heard on September 12, 2013, before The Honorable Robin R. Vannoy, Judge, in Division 3 of the Circuit Court of the City of St. Louis, State of Missouri, in the case of Rodney Lincoln, Petitioner, v. State of Missouri, Respondent, Cause No. 22821-02021.

Mr. Edmund Postawko, ACA, and Ms. Shirley Rogers, ACA, appeared on behalf of the State of Missouri.

The petitioner, Rodney Lincoln, was present in person. He was represented by his attorney, Ms. Laura O'Sullivan, Esq., Kansas City, MO.

The following proceedings were had at 9:40 a.m.:

THE COURT: This is the case of Rodney Lincoln as Petitioner vs. The State of Missouri as Respondent. The Cause Number is 22821-02021. Mr. Lincoln is present along with his attorney, Laura O'Sullivan. She is assisted by her paralegal, Christi Kennard, and law student, Sarah Jackson. The state appears by Assistant Circuit Attorney Ed Postawko and also Shirley Rogers.

The court takes judicial notice of its file. On July 8th of 1983, a substitute information in lieu of indictment was filed. At that time the defendant was charged with capital murder and two counts of assault in the first degree. The defendant was also at that time

1 charged as a dangerous offender and a prior and persistent
2 offender pursuant to then Statute 557.036 of the Revised
3 Statutes of Missouri.

4 A trial was held before Judge James Gallagher
5 from August 8th to August 18th of 1983, and a mistrial was
6 declared. The second trial commenced October 3rd, 1983,
7 before Judge Jack Koehr. On October 7th, 1983, the
8 defendant was found guilty of manslaughter and two counts
9 of assault in the first degree.

10 The defendant was sentenced by the court on
11 November 4, 1983, to 15 years in the Missouri Department
12 of Corrections for Count I, a consecutive term of life
13 imprisonment for Count II, and life imprisonment for Count
14 III to be served consecutive to Counts I and II.

15 The mandate affirming the convictions was handed
16 down by the Court of Appeals of the Eastern District on
17 March 26, 1986. Defendant's original motion for release
18 pursuant to Section 547.037 of the Revised Statutes of
19 Missouri was filed by the Midwestern Innocence Project on
20 November 10th of 2010.

21 Miss O'Sullivan, it's my understanding that you
22 have an amended motion for release filed this morning?

23 MS. O'SULLIVAN: That is correct, Your Honor.

24 THE COURT: You may proceed with argument on that.

25 MS. O'SULLIVAN: Thank you, Your Honor. Your

1 Honor, the hair that proved Rodney Lincoln's guilt in 1983
2 is the hair that proves his innocence 30 years later in
3 2013. I would be remiss if I didn't start by recognizing
4 the difficulty of this case. This case is a difficult case
5 for the victims. This was a horrible, horrible crime. It's
6 a difficult case for Rodney Lincoln, an innocent man who
7 spent 30 years in prison.

8 But it's also a simple case. It's a simple case
9 where the prosecutors used a hair to convict Mr. Lincoln,
10 and that very hair proves his innocence. So I'd like to
11 start off a little bit about how did we get here, how do
12 we get before this court on a motion for release.

13 And the way we got here started in 2001,
14 actually, when the circuit attorney started with the DNA
15 Justice Project. And they started examining cases to
16 determine whether or not DNA would exonerate them and
17 Rodney Lincoln's case was one of those cases.

18 And we present to the court a stipulation to
19 post-conviction DNA results that the circuit attorney and
20 I have agreed to with the accompanying motions. I've
21 marked on it as Exhibit A and would tender that to the
22 court.

23 As part of those exhibits you'll note Exhibit 2,
24 and Exhibit 2 is a lab report by the Metropolitan Police
25 Department lab, and in that lab report they're looking at

1 the evidence in this case to determine whether or not
2 there is DNA present in order to test it to prove
3 Mr. Lincoln's innocence or guilt at that point.

4 They looked at that lab report back in 2003, the
5 report is dated July 23rd, 2003, and what they were
6 looking for was the type of DNA testing that you could
7 test at that time. They were looking for things like
8 semen. They were looking for biological results that they
9 could then do what was available at the time, which was
10 STR DNA testing.

11 As we know, we all agree, that DNA testing was
12 not available in 1983 when Mr. Lincoln was tried. So as a
13 circuit attorney was looking through many, many cases, I
14 think it's something like 1400, this was one of the cases
15 that they tendered to the lab to look for DNA test -- DNA
16 evidence because this is the type of case where DNA
17 evidence would prove Mr. Lincoln innocent if it didn't
18 match him.

19 So they didn't find the DNA that was available
20 at the time and the case was set aside. Other cases went
21 forward and those other cases, some of them there was
22 exonerating DNA and those people, you know, were released;
23 others, the DNA was tested and those people matched those
24 results and remained incarcerated.

25 But Mr. Lincoln languished because the DNA

1 that's available in his case is hair and it's not -- it
2 wasn't the type of DNA that was testable at the time, so
3 we come to 2010. And in 2010 we have mitochondrial DNA
4 testing. And mitochondrial DNA testing allows us to look
5 at the hair, to look at the hair and determine is that
6 hair Rodney Lincoln's.

7 And so the motion for DNA testing was filed, and
8 the rape kit was sent off to SERI, and you'll see that
9 report as Exhibit 1 in the DNA stipulation. On
10 November 3rd, 2010, this report sets forth the examination
11 of the rape kit and they compared it to Rodney Lincoln's
12 DNA. So this is just a blowup of the results from that
13 mitochondrial DNA test.

14 They looked at everything in the rape kit. So
15 they looked at the different swabs. They took swabs from
16 the children. They took swabs from Joanne Tate. And they
17 were looking for things like semen and other biological
18 samples that they could test and they did not find semen
19 as they go through this, but they did find hair and there
20 were two hairs that were tested.

21 One was the hair that was held up and said this
22 hair is Rodney Lincoln's hair. And have no doubt about
23 it, they said this hair matches Rodney Lincoln. And
24 that's really the difference between trial one and trial
25 two. In trial one you noted that the jury was a hung

1 jury. The jury was a death-qualified jury and those
2 jurors deliberated for hours and hours.

3 They went out at 10:09 a.m. -- let me get this
4 right, excuse me -- 10:12 a.m. on August 17th, 1983, and
5 they deliberated until 7:40 p.m. that day when the judge
6 sent them home and told them to come back the following
7 morning at 8:45.

8 At 8:45 on August 18th they resumed
9 deliberation. Still with no result at 10:09 a.m., the
10 court gave them the hammer instruction. We know what the
11 hammer instruction is, go back, listen to your fellow
12 jurors, and despite that they came back at 12 o'clock,
13 which the court called the jury back out and discharged
14 them, and reset the trial to several weeks later on
15 October 3rd, 1983; again, a death-qualified jury.

16 Mr. Lincoln was charged with capital murder, and
17 with this death-qualified jury they again commenced trial
18 and tried initially to have Harold Messler testify to
19 statistics to identification with regard to the hair
20 analysis, and that was over defense counsel's objection.
21 Defense counsel said, you know, you can't allow this
22 testimony in.

23 We knew back in 1983 that microscopic hair
24 comparison is absolutely unreliable. We knew that. He
25 filed motions. He made objections. Harold Messler

1 initially went off the stand and then the state recalled
2 him and when they recalled him, that's when they got the
3 linchpin of their case. That's when they got this quote.

4 And in that state's motion they say, oh, he
5 never testified that it was a match. That's incorrect.
6 It's absolutely incorrect. You'll see in the transcript
7 of this trial, from Page 717 to Page 718, the testimony
8 was, "One of those which is Rodney Lincoln's hair
9 matched." "That's correct."

10 That's testimony from Harold Messler saying that
11 hair matched Rodney Lincoln's. We know that that's
12 absolutely impermissible testimony. We know that, and I
13 invite the court to read the testimony in its entirety
14 because after that there's more.

15 You know, this hair was the linchpin of their
16 case. It was mentioned in opening, in the direct exam, it
17 was mentioned when they recalled him. He was so important
18 that they had argument after argument through this
19 transcript, and he was so important that they recalled
20 him.

21 And they recalled him to get the testimony where
22 they're talking about, you know, you've looked at 200
23 cases, how many cases do you have where this hair matched?
24 And he said, well, this is one of only two in 200 cases.
25 That's a statistic. That's impermissible. That's

1 persuasive to the twelve men on this jury.

2 Then they talk about it pubic hair samples, and
3 this Harold Messler, the chief criminalist, took these and
4 matched them up to Rodney Lincoln. It says compared the
5 pubic hair to the one found on the blanket at the scene of
6 the crime and they were found to be identical or
7 comparable.

8 So they are saying in opening, we are going to
9 present evidence that it identifies Rodney Lincoln as the
10 perpetrator, and that's what they got when they got the
11 testimony that says it's a match. That is identification
12 testimony.

13 And then in closing he separated out the pubic
14 hairs that were not Joanne Tate's. And you'll recall from
15 the testimony that he says, we took this blanket and we
16 got the hairs off, and we looked at all of the hairs and
17 there was only this one hair that didn't match Joanne
18 Tate's. And then we took it and we took pubic hair
19 samples from some 37 people, and we looked at all of those
20 people, and the only one that matched was Rodney Lincoln.
21 That's what the testimony was at trial.

22 So we have statistic, after statistic, after
23 statistic. We have inadmissible testimony going on all
24 over the place. And so they said -- I'm sorry, 39 -- one
25 out of 39 people, none, no hair other than this hair was

1 compared with other than Rodney Lincoln's matched.

2 Again, match, match, match. That is the
3 testimony. That's the expert testimony that they
4 presented at trial, that they were so desperate to present
5 that they recalled Harold Messler. That's how important
6 this testimony was to this case.

7 So they take these pains to make sure that they
8 got this evidence here in at trial. And what happens when
9 we go to the mitochondrial DNA testing? What happens is
10 it doesn't match Rodney Lincoln. It's not his hair. The
11 hair from the blanket is not his hair.

12 And we know when we look at this -- you know,
13 and from my lay person's perspective I have to get these
14 things to guide me, but we know when the letters don't
15 match up, it doesn't work. It's not identical. It's not
16 a match.

17 And you'll see in this column is Rodney Lincoln
18 and you'll see that here we had the different hairs that
19 were looked at, and we have the hair from the blanket,
20 which is the hair that they testified -- that the
21 testimony centered around at the trial.

22 So the hair that they said matches Rodney
23 Lincoln, match, match, match, doesn't match Rodney
24 Lincoln. So at the trial it was it matches him and it's
25 important, and that's the hair that now exonerates him.

1 No question. No question it is absolutely not his hair.
2 We've stipulated to that. Not only that, but we also know
3 that this hair does not match anyone in the home. It does
4 not match [REDACTED], it does not match [REDACTED], and it does
5 not match Joanne Tate. It's none of their hair.

6 And then also tested was hair that was found
7 when they did the rape kit. And the hair that becomes
8 important is hair that was taken from four year old [REDACTED],
9 and it's taken from her perineum area. And let's remember
10 the testimony. The testimony is that these two little
11 girls went to bed in their street clothes fully clothed.
12 They climbed into bed in their street clothes and go to
13 sleep.

14 The perpetrator comes in, and you'll remember
15 [REDACTED] testimony, takes her into the other room, makes
16 her take off her clothes, takes her legs and puts them
17 around his waist and assaults her. Then he goes into the
18 kitchen to clean off the knife and she runs out of the
19 room and runs underneath the bed, underneath her sister's
20 bed, and she stays under there.

21 And what she sees is she sees the perpetrator
22 come into that room and she sees her little sister's feet
23 dangling, and then -- and she stays under there. She says
24 she can't see what happened, but somehow [REDACTED] goes from
25 fully clothed to not clothed. She goes from laying in her

1 bed to being stabbed. Her feet are dangling over the edge
2 of the bed when she's getting stabbed.

3 Her feet are dangling over the bed when he is
4 doing what he did to [REDACTED], and that is making her take
5 off her clothes, taking her legs and wrapping them around
6 his body and assaulting her, and transferring his pubic
7 hair to her perineum. That's what happened. And that
8 hair we know does not match [REDACTED], does not match [REDACTED],
9 does not match Joanne, and does not match Rodney Lincoln.

10 But we did more, we did more. We also sent
11 several items of evidence to the Kansas City crime lab.
12 And we've agreed, you know, there's no question that SERI,
13 the lab that did this, we all agree they do DNA testing,
14 they know what they're doing, and we all agree that these
15 are valid results.

16 We also agree that the Kansas City crime lab, of
17 course, also is very capable of doing testing and did DNA
18 testing in this case. In this case we looked at many,
19 many items. We looked at a swab of the tip of the steak
20 knife. We looked at the interior side of the wooden
21 handle.

22 The court will recall that one of the knives was
23 broken, so in case the perpetrator had cut themselves we
24 looked at all of the knives. We even took part of the
25 knife and swabbed inside the handle to see if the

1 perpetrator's blood was there.

2 We looked at the blood on the aluminum side of
3 the door that had a print in it. We checked that. We
4 checked the red stain from the front of the sink to see if
5 that was the perpetrator's. We took -- there was a tissue
6 paper that had blood that was on the ground sort of near
7 the door, so we checked that, let's see if that's the
8 perpetrator's. And we swabbed the interior of the knife,
9 as I said, and the tip of the knife.

10 So we took all of those different samples and
11 what we found out was that all of these -- and you can see
12 from this XX, XX, XX, they're all female. It's all female
13 DNA. And what we know from that is that 2.1 is the steak
14 knife. So we know as we look through this, this is
15 ████████ Davidson's blood.

16 And you can tell that when you combine this with
17 the serological results that were at trial, and where kind
18 of everything was and as you look at it. Q5.1, which is
19 the tissue that's near the door, this is ████████ Tate's
20 blood. And Q1 is Joanne Tate's blood. So that blood is
21 all female blood, it's all blood of the victims in this
22 case.

23 The parties agree that Rodney Lincoln is
24 excluded as a source of the hair that was identified as
25 the hair from the blue blanket that they had their expert

1 testify at trial was a match. We agreed to that. That's
2 in the stipulation. We also include the hair analysis of
3 Harold Messler. I will state that we, of course, believe
4 that this and know that this hair analysis is inaccurate,
5 and we know that because of the DNA results directly
6 contradict that.

7 The reason that this is important is because the
8 hair on the perineum, defense counsel when they got the
9 report from Harold Messler, the report says that it's
10 ██████'s hair. So no, it wasn't at trial. They didn't
11 talk about it at trial. They didn't talk about it at
12 trial because the report from the state's expert said that
13 it matched ██████ Tate and it was from ██████ Tate.

14 But in looking at that, we said we need to test
15 that. We need to see whose hair it is. And then when we
16 looked at it and seen whose hair it is, it's not ██████
17 Tate, it's not ██████ Davis, it's not Joanne Tate, and
18 it's not Rodney Lincoln on this four year old child's
19 private parts.

20 You know, the -- in Bailey vs. Commonwealth, the
21 court said, "The duty of a prosecuting attorney is not to
22 persecute but to prosecute, and that he should endeavor to
23 protect the innocent as well as to prosecute the guilty.
24 He should always be interested in seeing that the truth
25 and the right prevail."

1 In this case we filed the motion for DNA
2 testing. You know, the statute talks about when you get
3 DNA testing. It goes through some things that we can all
4 agree on. We can all agree that when we looked at this,
5 there was evidence that we could test with DNA. You know,
6 maybe not so much when they first looked at it in 2003 and
7 they weren't finding the semen and mitochondrial DNA
8 really wasn't available readily, but it sure was in 2010
9 when we tested that and we agreed to the testing.

10 We know that the evidence was secured in
11 relation to the crime. There is no question about this.
12 This hair was secured in the investigation of the crime,
13 as was all of the evidence that we tested both at SERI and
14 the Kansas City crime lab, and we stipulate to that.

15 The evidence was not previously tested. We
16 agree with that because, you know, under the first
17 paragraph, the technology for testing was not readily
18 available. There was no DNA testing in 1983. It was not
19 only not readily available, it was not reasonably
20 available, it was unavailable.

21 Identity was definitely an issue at trial, and
22 we know that because Mr. Lincoln had -- we know where
23 Mr. Lincoln was. You know, he had the testimony of his
24 mother who he had lived with, the girlfriend who he was
25 sleeping beside that very night, he had the testimony of

1 his boss, who he showed up to work on time, you know,
2 business as usual. So we know that identity was an issue
3 at trial.

4 And then the final factor is a reasonable
5 probability exists that the movant would not have been
6 convicted if exculpatory results had been obtained through
7 the requested DNA testing. So let's think about that
8 trial, that trial that would happen with the DNA testing
9 that we have today.

10 MR. POSTAWKO: Your Honor, I'm going to object.
11 At this point the motion here today is under 547.037 not
12 547.035. It's different requirements, different standards,
13 and this is irrelevant argument and irrelevant for this
14 particular hearing.

15 THE COURT: The court will overrule. I'll allow
16 it. You may continue.

17 MS. O'SULLIVAN: So if we do, if we have this
18 trial the way the state suggests, you know, we could imagine
19 it a couple of different ways. One, they would have called
20 Harold Messler to talk about how it was a match and we would
21 have brought in the DNA evidence. There is no jury that
22 would convict it.

23 Let's imagine, okay, let's say they couldn't
24 call Harold Messler. Let's say they decided not to call
25 him and it was a match. They have DNA results that tell

1 them that the hair on the blanket is not Rodney Lincoln's
2 and the hair that is found in the private parts, the pubic
3 hair in a four year old's private part is not hers. There
4 is not a jury that would convict him. There's not one.

5 And our burden under this statute, the motion
6 for release, is evidence which as a whole shows the fact
7 to be proved to be more probable than not. The fact to be
8 proved Rodney Lincoln is innocent more probable than not?
9 Absolutely.

10 So let's remember, this death-qualified jury sat
11 in one of these courtrooms and they were given
12 instructions, instructions that the court has. And the
13 instructions started off with, hey, you have to look at
14 this case and determine whether or not this is a capital
15 murder. And then there is a lesser included of murder in
16 the second degree. And then there was a lesser included
17 of that of manslaughter.

18 And you look at this and you look at how long
19 the jury was out and you look at the underlying facts, and
20 what we know is this is a compromised verdict. This is
21 not a slam dunk for the state.

22 MR. POSTAWKO: Objection to the speculation.
23 There is nothing in the record about what went on in that
24 jury room and what the decision-making process was of the
25 jury and how they reached their verdict. To call it a

1 compromised verdict is not supported by anything in the
2 record.

3 THE COURT: Well, as to the compromised verdict
4 language, the court will sustain the objection. There was a
5 lesser included that was found by the jury. The court will
6 sustain that objection as to characterizing the verdict as a
7 compromised verdict. You may continue.

8 MS. O'SULLIVAN: What we do know is this was no
9 slam dunk for the prosecution. They have a death-qualified
10 jury that's looking at the facts of this case, and the facts
11 of this case are pretty brutal, and they don't find capital
12 murder, they don't find murder in the second degree, they
13 find manslaughter after hours and hours and hours of
14 deliberation.

15 And that was after the first trial was a hung
16 jury. And that was after the state recalled Harold
17 Messler to the stand to testify that the hair was a match,
18 that he had only seen it one other time in 200 cases, and
19 that he looked at 39 other hairs.

20 You know, we can't hold on to a conviction out
21 of desperation. It's not right. It's not just. When the
22 evidence proves that he is not the perpetrator, you have
23 to release him. And the only -- the evidence that was
24 presented at trial, Rodney Lincoln is a match, the expert
25 testimony is clearly proven to be false.

1 We proved him innocent not once but twice. The
2 hair they used to convict him now proves his innocence,
3 and the hair that is found in [REDACTED] Tate's perineum
4 doesn't match him. So we would ask this court to release
5 Rodney Lincoln. He is an innocent man wrongfully
6 convicted.

7 MR. POSTAWKO: Good morning, Your Honor.

8 THE COURT: Mr. Postawko, you may proceed. Good
9 morning.

10 MR. POSTAWKO: Thank you, Your Honor. One of the
11 great things about our criminal justice system is it's not a
12 static process that stops at a certain point in time. It
13 has mechanism for evolving with the times, for changing with
14 the times.

15 The Missouri legislature, the courts in Missouri
16 have recognized the advent of numerous technologies over
17 the years and what we talk about that we now have today is
18 DNA testing, one of the greatest things that's come to the
19 area of criminal justice ever.

20 And the Missouri legislature has created a
21 mechanism for taking that into account, not just for
22 crimes that happen today, but for crimes that have
23 happened in the past. And the circuit attorney's office
24 has recognized that and has followed up on that burden and
25 responsibility and acted on that.

1 And yes, this is one of the cases that we years
2 ago took a look at and wanted to take this DNA testing
3 into account to see whether or not there's anything more
4 we can learn from this, for this case, for many other
5 cases. And those examinations were done, but now is when
6 we have to remember that life is not what's on CSI.

7 We have to look at a lot more than some thirty
8 second blurb that says DNA is present at the scene. Just
9 like fingerprints, just like other types of technology,
10 it's not just the mere existence of one item. It is the
11 context of that piece of evidence at -- as it relates to
12 that particular case.

13 Just because a 7-Eleven is robbed and a person's
14 fingerprints is found somewhere in the store doesn't mean
15 that that person committed the crime. You have to look at
16 the context. And with DNA evidence, we have to look at
17 the context that the evidence has in this particular case,
18 how does it fit in.

19 We're proceeding at this point in time under a
20 statute the Missouri legislature created, 547.037, and
21 that's the standard and the guidance that we're going on,
22 and what the law that applies here is that if testing
23 ordered pursuant to Section 547.035 demonstrates the
24 person's innocence for which the crime he is in custody,
25 that's the -- that's what we're looking at.

1 So we have to determine does this -- this case
2 is about the DNA evidence which has been done and
3 throughout this has been agreed upon to be done at the
4 various laboratories we're going to discuss. So we got
5 some DNA evidence from that. Now the question is not just
6 whether or not that DNA evidence matches the -- Rodney
7 Lincoln, the question is what does that DNA evidence mean.
8 There's more to it. That's why we have the transcript of
9 the case, that's why we have the various exhibits and the
10 items that we are going to look at.

11 So what do we have in this case? Well, we have
12 DNA testing from two different laboratories. Let's take a
13 look at that. And I'm going to start with the Kansas City
14 crime laboratory report. Numerous items from the crime
15 scene in this case were sent to Kansas City, the police
16 department's crime lab.

17 They were analyzed, serological examination, and
18 not too surprising there was blood found on many of the
19 items, lots of blood. And as Ms. O'Sullivan said, that
20 blood is Joanne Tate's, that blood is ██████'s, that blood
21 is ██████. Not surprising.

22 I would encourage the court, and I will talk to
23 the court a little bit about some of the photographs that
24 were admitted at trial. This was a bloody, bloody crime
25 scene. And we know from the transcript, we know from the

1 evidence presented in this case that all three of those
2 victims, Joanne, [REDACTED], [REDACTED], were brutally butchered
3 with a sharp instrument, with knives. There was a lot of
4 blood at this scene.

5 So we had sent a number of items to Kansas City,
6 they get examined, they get looked at, and lo and behold
7 there's blood. No surprise. No surprise that the three
8 victims' blood is found, the DNA profiles are consistent
9 with being the DNA of Joanne, [REDACTED], and [REDACTED].

10 But notice in this report it's very, very clear
11 and it's said a few times throughout this, no male DNA was
12 detected on any tested samples. Well, by the argument
13 that we're hearing today, that we just heard, well, I
14 guess that proves Rodney Lincoln is innocent. Well, no,
15 not at all.

16 Somebody did this to Joanne Tate, somebody did
17 this to [REDACTED] Tate, somebody did this to [REDACTED] Davis,
18 and I don't believe there's any dispute that the somebody
19 was a male. And yet there's no male DNA. Well, what does
20 that tell us?

21 Well, that tells us that sometimes -- again,
22 this is why life is not like what you see on CSI, this is
23 why sometimes there is DNA evidence and sometimes that DNA
24 evidence says it all, but sometimes there is no DNA
25 evidence and this is a classic example. Numerous items

1 from throughout the house that were used throughout the
2 site were tested and no male DNA was found on that. Well,
3 that just shows that DNA is not always going to be there.

4 So the bottom line is does this meet -- does
5 anything from Kansas City even come close to addressing
6 the standard in 547.037. No, it does -- nothing about
7 this demonstrates Rodney Lincoln's innocence. It just
8 shows that they weren't able to get the perpetrator's DNA.
9 So the Kansas City report doesn't tell us anything,
10 doesn't provide any evidence for the movant in this case
11 that demonstrates his innocence, nothing.

12 So we have more DNA testing. We've got the --
13 we've got the report from SERI, Serological Research
14 Institute. They tested a number of different items.
15 Well, and again, I'm well aware and I encourage the court
16 to go over that transcript thoroughly and see what the
17 various evidence was.

18 And so we know that based on what the testimony
19 of all the victims and everyone in this case involved, so
20 we're looking at some additional items now from SERI.
21 We're looking at a vaginal and a rectal swab from [REDACTED];
22 looking at a vaginal, oral and rectal swab from [REDACTED];
23 and we're looking at some swabs from Joanne, Joanne Tate.

24 I bring up those specific items initially
25 because, again, every single one of those items SERI

1 confirms no male DNA was detected, every single one of
2 those items. There is no doubt that the perpetrator of
3 this incident had contact with every -- with all three of
4 those victims, yet no male DNA is found.

5 Again, an example of DNA doesn't automatically,
6 you know, just appear at every crime scene that there is.
7 You know, we have to look and test, see what we have, and
8 we have no male DNA. Does that mean a man didn't commit
9 this crime? Of course not. A man did commit this crime.

10 So the fact that it's not found for those
11 particular items, for those, you know, seven or eight, for
12 those eight items there that we're looking at that I just
13 mentioned, that doesn't in any way meet any -- provide any
14 evidence to support the movant's claim that the DNA
15 testing has demonstrated his innocence. It doesn't
16 support it at all.

17 So what else do we have from SERI? Well, we've
18 got a couple of more items, the left hand fingernail
19 scrapings and the right hand fingernail scrapings from
20 Joanne Tate. Well, in those, male DNA was detected but
21 the sample was so degraded that they weren't able to go
22 any further.

23 They cannot include or exclude anyone as far as
24 being the source of the male DNA that was found under
25 Joanne Tate's fingernails. We just know that there's

1 something happened that got some male DNA under her
2 fingernails. Was it Rodney Lincoln's or not? SERI could
3 not say whose it was. But again, they cannot include him,
4 they cannot exclude him.

5 So again, no evidence whatsoever supporting his
6 motion that DNA testing has demonstrated his innocence.

7 So everything we've looked at so far, there's not one
8 piece of evidence, nothing to show that any DNA testing
9 would in any way even approach an argument that
10 demonstrates Rodney Lincoln's innocence.

11 So that gets us down to our final three items
12 that SERI tested, and those are the hairs. And first of
13 all, I want to talk about the hairs from the perineum of
14 [REDACTED] Tate. Yeah, as far as them demonstrating Rodney
15 Lincoln's innocence, the bottom line is they just don't do
16 it.

17 We've got a child who has been taken throughout
18 an apartment, who has had -- who was brutally attacked,
19 who was brutally cut, and when she's found many, many,
20 many hours later after huddled for the remainder of the
21 night and into the morning until around 10:30 a.m.,
22 huddled on her bed, huddled underneath her own blanket in
23 an apartment that -- again, just to point out a few of the
24 photographs that were used at trial, State's Exhibit 41,
25 State's Exhibit 49, to be frank, this is a cluttered

1 place. This is not a clean apartment.

2 Even taking into account a struggle that would
3 have occurred as a result of the crime that took place
4 that night, this place is a mess with carpeting, with all
5 sorts of stuff laying around, and there's -- there's just
6 -- it's clear that there's a lot of clutter, there's a lot
7 of stuff.

8 Now, we'll get a little bit more into Harold
9 Messler's testimony in just a moment, but we don't know,
10 you can't tell there's been evidence, you can't tell how
11 long a hair has been anywhere. Hairs can last quite a
12 while. So the fact that [REDACTED] has hair on her is not
13 surprising.

14 And what's pretty clear about this as far as not
15 knowing the source of these hairs on her perineum is the
16 SERI report confirms that on Item Number 3 in here, Item
17 Number 3 consists of one human hair with no root and one
18 animal hair. One animal hair.

19 Nothing in this record shows that an animal was
20 involved in this offense, yet somehow an animal hair got
21 on [REDACTED]'s perineum. How could that possibly happen if
22 that hair on the perineum has to come from the attacker?
23 Well, the problem is for the movant it doesn't. There is
24 no evidence that the hair on the perineum came from the
25 attacker. There's nothing that can directly link that.

1 It might have, it could have, possibly maybe,
2 and this is stuff that, again, could have been explored
3 and could have been dealt with a lot more if it had any
4 relevance back then, but the bottom line is it wasn't
5 going to answer the question. It wasn't going to answer
6 whether or not Rodney Lincoln was the attacker in this
7 case.

8 In 1983 when this case was tried and as is
9 demonstrated in Exhibit 4 to the stipulation today, they
10 knew back then that at least one of the hairs on the
11 perineum did not belong to Rodney Lincoln. They knew back
12 then it wasn't Rodney Lincoln's hair. It wasn't an issue.

13 And from the clutter, the mess that's in this
14 apartment, and the length of time this small, bloody four
15 year old child is being subjected to the environment, they
16 -- it's not unusual at all. And again, it would be, to be
17 frank, very much expected that stray hairs or stray items
18 are going to be picked up and in this case they did,
19 including animal hair.

20 So the fact that there is animal hairs of the
21 three hairs that are found -- that are discussed here on
22 the slides from ██████'s perineum, you know, she's picking
23 up different hairs. Again, one animal hair, one hair that
24 they already had excluded as coming from him, in fact had
25 said it was consistent, didn't say it was, but it was

1 consistent with being [REDACTED]'s head hair.

2 And again, they knew that back then. This
3 wasn't an issue back in 1983 because it didn't prove
4 anything back in 1983. DNA testing in -- well into the
5 2000s doesn't in any way demonstrate Rodney Lincoln's
6 innocence. It just means that these hairs which were not
7 significant 30 years ago are still not significant today.
8 They don't tell us anything about this particular case.

9 There is nothing that is, again, in the
10 transcript, in anywhere in the record here, that says that
11 the hair on the perineum had to come from the attacker,
12 and in fact it's reasonable and likely that it came from
13 some other source in the apartment.

14 So the hairs from the perineum on her, on [REDACTED],
15 don't demonstrate Rodney Lincoln's innocence either. So
16 we've got all this blood stuff, all these fingernail
17 scrapings, all this other stuff, nothing so far
18 demonstrates Rodney Lincoln's innocence. And so we have
19 one final item to discuss, that is the pubic hair that was
20 used at trial.

21 And as a prosecutor, not surprising that they
22 would use some evidence that shows that they're trying to
23 show some consistency with the individual in question
24 here. But reading this transcript as a whole, I certainly
25 have a very, very strong disagreement with the role this

1 pubic hair played in that trial.

2 The State of Missouri in this trial called --
3 well, called 27 live witnesses and one witness testified
4 through a videotaped portion, one of the doctors. So we
5 have 28 witnesses that are presented in this case, 28.
6 Harold Messler is the only one -- while others mentioned,
7 you know, may have been mentioned for chain of custody
8 purposes or for some other purpose, there is very little
9 focus placed with all the other witnesses on this
10 particular hair.

11 The only witness who really focused in on this
12 particular piece of hair, it was Harold Messler. And yes,
13 it was a piece of evidence that was used back then, but
14 the question is was it a piece of evidence that had to
15 have come from the attacker?

16 In other words, is it a piece of evidence that
17 the person who killed Joanne Tate, who brutally attacked
18 ██████ and ██████, is this a piece of evidence that had to
19 come from him and the answer to that is no. Of course if
20 there's evidence that puts somebody at the scene, it
21 helps, you know, hey, maybe we can put them at the scene.

22 But even if the DNA matched Rodney Lincoln in
23 this case, it doesn't prove his guilt either. It just
24 proves that he was -- that there's something consistent,
25 that he was at a particular location at some point in time

1 perhaps months earlier. That was the big focus of a lot
2 of the defense questioning in this case.

3 But did this pubic hair have to come from the
4 attacker? The answer is no. This pubic hair was found on
5 a blue blanket that [REDACTED] had crawled underneath after
6 having been stabbed numerous times and was suffering from
7 some pretty serious injuries.

8 You'll notice in the transcript, one of the
9 other witnesses who testified was a criminalist named Joe
10 Crow. He talked about the stuff he did, and that included
11 taking that blue blanket and, you know, putting it up and
12 knocking out to see if he could find anything.

13 He found -- he didn't even know the exact
14 number, but he found over 50 hairs on that blanket. There
15 was a hair with numerous, numerous hairs on it. Again,
16 this was a blanket that [REDACTED] had crawled and fallen
17 asleep under after she had been stabbed.

18 She was underneath that blanket for hours until
19 she was found, you know, a long time later. And it's a
20 blanket that nothing in the transcript directly reflects
21 that the attacker in this case necessarily even had any
22 contact with. He may very well not have. So they found a
23 hair on a blanket.

24 Had this case not -- had that hair not been
25 found, it's hard to imagine how this case would have been

1 tried any differently other than not calling Harold
2 Messler as a witness, because that wasn't the focus of
3 this case. This conviction did not rely on that and it
4 wasn't a piece of evidence that at any -- and there's any
5 testimony to that had to have come from Rodney Lincoln.

6 Likewise, Harold Messler never testified this
7 hair is Rodney Lincoln's hair. Look at Mr. Messler's
8 testimony as a whole. While the word "match" may have
9 been used, he didn't say this was Rodney Lincoln's hair.
10 He just could not exclude him as a possible source of that
11 hair. And when even pressed for, you know, can you give
12 us any statistical breakdown of how frequently you would
13 expect to see that, his answer was, no, I have no opinion
14 on that.

15 This pubic hair is not what this case revolved
16 around, and whether or not it was a pubic hair that
17 belonged to Rodney Lincoln -- and again, we don't dispute
18 the DNA evidence that took place here. Mitochondrial
19 evidence that is now available that can be done,
20 fantastic. But again, the context of this particular
21 hair.

22 You know, the characterization was made that the
23 state's case -- you know, this was the linchpin, was the
24 word used, of the state's case. Really. The linchpin of
25 the case. The prosecutor in his closing argument did not

1 mention this hair even once in his first half of his
2 closing argument. It's not mentioned, it's not alluded
3 to, yet it's the linchpin of the case? It wasn't.

4 It wasn't because that wasn't what this case was
5 about. This case was not about a pubic hair on a blanket.
6 That is not -- and it was by no means, the pubic hair on
7 the blanket was by no means the smoking gun or the piece
8 of evidence that this case revolved around. It was one
9 minor part of this case that was, again, not even
10 important enough to mention in the first half of the
11 closing argument.

12 Even his second half of the closing argument,
13 the discussion of it, the mention of it, was very limited.
14 It was one small part of the state's closing argument.
15 Why? Because it didn't depend on the case and the
16 evidence didn't focus in on this particular hair. There
17 was numerous other aspects of this case that the court can
18 see from the transcript which this case did revolve
19 around. It wasn't a hair on a blanket.

20 And again, just like the hairs on the perineum,
21 it wasn't a hair on a blanket which, again, looking at the
22 various, you know, trial exhibits, photographs from the
23 trial, seeing the condition of this house, looking at
24 State's Exhibit 44, State's Exhibit 50 that were used at
25 trial, this -- this place, it had thick '70s shag carpet.

1 God knows how long stuff can stay on top of that.

2 And no disrespect to Ms. Tate but, you know,
3 this isn't the neatest house in the world. She wasn't,
4 clearly it can be seen, not the neatest housekeeper in the
5 world. Who knows what's around there. Again, the
6 children going around there, getting all sorts of hairs on
7 them, including animal hair.

8 So does this testing, does the DNA testing of
9 this particular pubic hair with mitochondrial testing that
10 excluded Rodney Lincoln demonstrate Rodney Lincoln's
11 innocence for the crime for which he is in custody? No.
12 It's just it's one thing that, yeah, if the case was tried
13 today, fine, don't -- we don't call Harold Messler. But
14 otherwise, that pubic hair doesn't answer any question.
15 There is no evidence it had to come from the attacker,
16 there's no evidence that this hair was the -- came from
17 the attacker in this case.

18 So again, focusing on the DNA evidence, the
19 various items that were examined and the results that we
20 have here, what this evidence does demonstrate is, again,
21 that attackers don't always leave DNA at crime scenes and
22 that various things can happen and various items can be
23 picked up at different times, including animal hairs and
24 various hairs from other family members, you know, going
25 throughout this apartment.

1 But nothing about any of the DNA testing here
2 demonstrates Rodney Lincoln's innocence. There certainly
3 could be scenarios where DNA testing could have possibly
4 obtained results in many different cases in other
5 situations, it ain't here though. It isn't here.

6 This is a case where the DNA testing that was
7 done didn't -- ended up not answering -- not answering
8 anything, not giving any conclusive evidence, not giving
9 anything certainly that meets the burden that the defense
10 -- or that the movant has in this case as far as
11 demonstrating his innocence. It is not met, and I do ask
12 that you deny the motion for release filed by the movant.

13 Thank you.

14 THE COURT: Thank you. Miss O'Sullivan, your
15 response, please?

16 MS. O'SULLIVAN: The hair on [REDACTED] Tate's
17 perineum, let's talk about that. I'm unsure as to what
18 exactly the state is arguing, but this is -- this child went
19 to bed fully clothed and she ended up in a hospital
20 undergoing a rape kit, and in that rape kit they found
21 somebody else's pubic hair. She's four. She's four years
22 old.

23 There is -- you know, a dirty apartment does not
24 equal, you know, some perpetrator's hair on her perineum.
25 That doesn't -- that's not how that works. That's absurd

1 and ridiculous and it's grasping at straws. It's
2 desperate. It's desperate efforts to hold on to a
3 conviction that clearly needs to be vacated. It's
4 unreasonable. That argument is unreasonable, you know,
5 can't tell how long the hair was on her. Are they
6 suggesting that a four year old child is walking around
7 with hair on her perineum? That doesn't make sense.
8 That's ridiculous.

9 They want to talk about this animal hair as if
10 that proves -- I'm not really clear what that argument is.
11 But if this -- if this child, you know, the animal -- in
12 their argument they talk about, you know, are we
13 suggesting that an animal did this? No, of course not.

14 What we're suggesting is that a hair on [REDACTED]
15 Tate's perineum, that doesn't belong to Rodney Lincoln,
16 that doesn't belong to [REDACTED] Tate, doesn't belong to
17 [REDACTED] Davis, doesn't belong to Joanne Tate, that it is
18 reasonable to say that that is a hair from the
19 perpetrator. It is also reasonable to say that that
20 proves Rodney Lincoln's innocence.

21 But more importantly, the hair, the very hair
22 that the state paraded around the courtroom to say that he
23 was guilty proves his innocence. So we've proven his
24 innocence not once but twice. You know, they want to talk
25 about how we didn't talk about the hair on the perineum

1 during the trial, and I would just direct the court's
2 attention to the report of Harold Messler that says that
3 it's [REDACTED] Tate's hair. You know, that report is wrong on
4 not one occasion but two.

5 And, you know, they talk about the 50 hairs that
6 came off of this blanket. Well, apparently Joseph Crow
7 looked at all of those hairs and took one hair and said
8 this hair doesn't look like it belongs to Joanne Tate,
9 looked at all the other hairs and said those look like
10 they belong to Joanne Tate and threw them away.

11 The one that he looked at that says this doesn't
12 look like Joanne Tate's hair is the one that was paraded
13 around this courtroom as expert testimony and proof of his
14 guilt. And make no mistake, there was testimony about
15 match, there was testimony about statistics, this has only
16 happened twice in 200 cases, I looked at 39 hairs and this
17 is the only one that matched.

18 In the prosecution's opening and closing they're
19 talking about, look, see, we've got a match. We've got a
20 match for you guys, so just go back and make short work of
21 it. The blanket that this hair is found on is the blanket
22 from [REDACTED] Tate's bed. The blue blanket is the blanket
23 from [REDACTED] Tate's bed.

24 MR. POSTAWKO: Actually, I would point out -- I
25 would object, as I believe the record will reflect it's

1 Melissa's bed.

2 THE COURT: The record will reflect.

3 MS. O'SULLIVAN: Without Harold Messler there is
4 no conviction. In fact, without Harold Messler and without
5 Harold Messler's recall and his testimony when he was
6 recalled, there would be no conviction because there wasn't
7 a first time when they tried to get this information in and
8 it didn't work.

9 And you will see the struggle throughout the
10 transcript of this trial, the struggle time and time and
11 time again, they tried to do it before they released him
12 the first time and the court said no. And then they
13 recalled him, and they tried to get it in and the court
14 said no initially, and they tried and tried and then they
15 were able to.

16 So to stand up here today and say that's not the
17 linchpin, that's not what it was about, is absolutely just
18 unbelievable and unreliable. It's clearly the piece of
19 evidence because they talk about the other testimony.
20 What was the other testimony? The testimony that they had
21 was from a little eight year old child, and you'll look at
22 the testimony throughout the transcript and you will see
23 the inconsistencies.

24 MR. POSTAWKO: Objection. Going into an area
25 outside the scope of this hearing and impermissible type of

1 evidence.

2 MS. O'SULLIVAN: And I would respond to that by
3 saying he was talking about the evidence as a whole and he
4 repeatedly said that throughout his argument.

5 THE COURT: The court will allow it briefly. The
6 court is aware of what the requirements are of the statute,
7 but the court will allow it. You may continue.

8 MS. O'SULLIVAN: And so you have this
9 inconsistent, unreasonable testimony that wasn't enough to
10 get the conviction in the first trial. So they know they
11 have to beef it up. There's got to be something that they
12 can use in order to try and get him convicted, and it's the
13 hair, and it's the match, and it's the pointing at
14 Mr. Lincoln, and it's saying it's his. That's what this
15 case is about.

16 And, you know, there's other people that have
17 been released in Missouri and released because of these
18 types of results. And, you know, you'll look at cases
19 throughout the time in St. Louis City. You'll look at
20 cases like in the 1996 conviction of Antonio Beaver,
21 you'll look at the 1985 conviction of Lonnie Ervy, you'll
22 look at the 1984 conviction of Larry Johnson, you'll look
23 at the 1983 conviction of Anthony Wood, you'll look at the
24 1982 conviction of Johnny Briscoe.

25 Eighty-two, '83, '84, all of these cases

1 involving these composite drawings, these attempts to get
2 this ID evidence beefed up with serology, with some sort
3 of hair analysis. And what happens when the DNA comes
4 back? They are released.

5 MR. POSTAWKO: And, Your Honor, I'm going to
6 object to this line of argument anyway because those are
7 totally different facts. If we're going to get into the
8 analysis of Lonnie Ervy and Larry Johnson and Antonio
9 Beaver, I'd be happy to do that, but it's irrelevant for
10 this hearing.

11 THE COURT: The court will sustain. The court,
12 one, does not have any familiarity with those other cases,
13 so the court will sustain that objection.

14 MS. O'SULLIVAN: What we do know is that the DNA
15 proves innocence and not -- people throughout the country
16 have been released because DNA now shows the mistakes that
17 were made in the past, and we know that those mistakes were
18 made because of faulty eyewitness identification testimony
19 and because of hair --

20 MR. POSTAWKO: Objection, Your Honor. The
21 discussion about the -- assessing the retrying of a case
22 which was done back in 1983, and discussing the credibility
23 and reliability of a witness back in 1983 is improper.

24 THE COURT: The court notes the objection of the
25 state. That will be a continuing objection as to this

1 issue. The court will allow it. Ma'am, you may proceed.

2 MS. O'SULLIVAN: And we know that microscopic hair
3 comparison is unreliable. And when you have this type of
4 testimony, it leads to innocent people going to prison, and
5 in this case an innocent man to prison for 30 years.

6 I will just briefly say don't -- I ask the court
7 not to be lured in by this Bey case. This Bey case is a
8 case where a woman testified that she had sex with two
9 different people prior to the assault that occurred to
10 her. The facts are completely different and it's
11 completely inapplicable.

12 You know, when we went -- when we started this
13 journey down the DNA in this case, the question initially
14 was if you test the DNA will it prove his innocence.
15 That's how we got to do the DNA testing in the first
16 place. And so you file that motion and you prove that if
17 the DNA comes back, you know, he's innocent, and that's
18 already -- we already passed that hurdle. We already have
19 been over that hurdle.

20 And then what it says is you have this other
21 statute that says, okay, if it comes back and it's not
22 him, you can do this motion for release. That's where we
23 are. We've already met the burden to show that identity
24 was an issue, to show that these results will prove his
25 innocence. We did that back in 2010.

1 And now what we have is the results, and the
2 results show that it's not him. It's not him once. It's
3 not him twice. We've proved his innocence twice. Your
4 Honor, we trust this court to take a look at the facts in
5 this case, to take a look at the DNA evidence that clearly
6 exonerates Mr. Lincoln.

7 We trust this court will not hold on to the
8 conviction just because it's easier to do so, and we trust
9 this court to look at the evidence to see that this DNA
10 that was paraded around the courtroom as a match.

11 "Q Yesterday, you testified a little bit
12 concerning the comparison of the pubic hairs."

13 "A That's correct."

14 "Q And totally, you compared the hair
15 found on the blanket to 39 other people. The
16 37 submitted to you, Rodney Lincoln's hair and
17 Joanne Tate's hair, is that right?"

18 "A That's correct."

19 "Q And one of those, which is Rodney
20 Lincoln's hair, matched."

21 "A That's correct."

22 That hair doesn't match Rodney Lincoln. It's
23 not his hair. It proves his innocence. We ask the court
24 to release Mr. Lincoln. Thank you.

25 THE COURT: Thank you. Anything further from

1 either side at this point?

2 MR. POSTAWKO: No, Your Honor.

3 MS. O'SULLIVAN: No, Your Honor.

4 THE COURT: The court will take the matter as
5 heard and submitted. Prior to going on the record, the
6 movant's attorney filed a motion for leave to file an
7 amended motion for release and actually the amended motion,
8 the court granted that over the objection of the state, and
9 so the court will take this matter as heard and submitted.

10 One additional thing, Mr. Lincoln, I was remiss
11 when I came out on the bench without even saying good
12 morning to you directly. Good morning, sir. Your
13 attorney has fought diligently on your behalf and has
14 filed several pleadings.

15 It's taken us a while to get to this point. A
16 decision won't be made today. I will do my best to make a
17 decision as soon as I can. So I don't want there to be
18 any undue delay, but there certainly won't be a decision
19 made today. Thank you all very much for your
20 participation and that will conclude this hearing.

21 (The hearing adjourned at 10:50 a.m.)

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CERTIFICATE OF REPORTER

1
2 I, Janette M. Barry, Certified Court Reporter,
3 certify that I am the official court reporter for Division
4 3 of the 22nd Judicial Circuit of Missouri, at St. Louis,
5 Missouri; that I was present on September 12, 2013, and
6 reported all of the proceedings in RODNEY LINCOLN, Movant,
7 vs. STATE OF MISSOURI, Respondent, Cause No. 22821-02021.
8 I further certify that the foregoing pages contain a true
9 and accurate transcription of the proceedings.

10 The cost of preparing this transcript is:

11 \$150.50

12
13 /s/ Janette M. Barry, CCR #0390
14 Official Court Reporter
15 Division 3, 22nd Judicial Circuit
St. Louis, Missouri

16 Dated: April 15, 2014
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