IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

RODNEY LEE LINCOLN,	)	
	)	
Appellant,	)	
	)	
vs.	)	Appeal No. ED 100987
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT
FROM THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS, MISSOURI
THE HONORABLE ROBIN R. VANNOY, JUDGE AT POST-CONVICTION
PROCEEDINGS FOR DNA TESTING

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Rodney Lincoln was convicted following a jury trial of Manslaughter and two counts of Aggravated Assault in cause number 22821-2021. He was subsequently sentenced to 15 years for the manslaughter, and to a life sentence for each count of assault to be served consecutively. The Missouri Court of Appeals, in cause number 47955, affirmed the convictions and sentences on January 14, 1986. In addition, the Missouri Court of appeals, in cause number 54378, affirmed the denial of Mr. Lincoln's petition for post-conviction relief.

In March and August of 2005, Appellant filed motions seeking mitochondrial DNA testing of various items of evidence in the criminal case pursuant to Section 547.035. After some period of litigation, the State stipulated to DNA testing, and the circuit court ordered testing under the statute. All of the DNA testing revealed that Appellant was not the source of any of the biological evidence.

Appellant filed his final motion for release on September 12, 2013. After oral argument on the motion, the Circuit Court denied relief on December 24, 2013. This appeal follows. As this appeal presents no questions reserved for the exclusive jurisdiction of the Missouri Supreme Court, jurisdiction properly lies in this Court, the Missouri Court of Appeals, Eastern District.

STATEMENT OF FACTS

Rodney Lincoln's first trial ended in a mistrial after the jury hung during deliberations. At the second trial, the state proceeded with the same evidence with one exception, the additional expert testimony that the microscopic hair analysis revealed that the pubic hair of the perpetrator "matched" the Appellant. "[The State's expert] separated out the pubic hairs that were not Joanne Tate's. *There was one of them that matches that man's pubic hair*. That was compared to thirty-seven others in addition to Joanne Tate . . . One out of thirty-nine people. *None, no hair that that other hair was compared with other than Rodney Lincoln's matched*." (Tr. Vol. V, 957)[1] (emphasis added). The resulting conviction obtained in this second trial was due to this expert testimony. We now know that this hair did not belong to Lincoln. Despite this fact, he remains in prison.

"[T]hat pubic hair doesn't answer any question. *There is no evidence it came from the attacker, there's no evidence that this hair was the - - came from the attacker in this case* . . . [W]hat this evidence does demonstrate is, again, that attackers don't always

[1] The Record on Appeal will be cited to as follows: Direct Appeal Legal File (DP LF), DNA Release Legal File (DNA LF), Post-Conviction Hearing on DNA Testing Transcript (PCH Tr.), Volumes I-V of the Trial Transcript (Tr. Vol. I-V), and Sentencing Transcript (S. Tr.).

leave DNA at crime scenes and that various things can happen and various items can be picked up at different times, including animal hairs and various hairs from other family members, you know, going throughout this apartment." (PCH Tr. 33) (emphasis added).

The first quote encapsulates the prosecutor's theory of the evidence as it was argued to the jury during Appellant's second 1983 trial after eight witnesses for the State, including four police officers, the lead detective, and the chief criminalist for the St. Louis Police Department testified about the gathering, preservation, comparison, and matching of Appellant's pubic hair to a pubic hair seized from the crime scene. The second quote is from the prosecutor's argument to the circuit court, 30 years after Appellant's trial, following DNA testing that excluded Appellant as the source of the hair and establishing his innocence.

The Assault on Farrar: "Bill Did It"

The tragedy of this case began on April 27, 1982. Debbie Smith lived in the upstairs apartment located at 1418 Farrar in St. Louis. Joanne Tate, the victim in this case, lived in the downstairs apartment with her two daughters, M.D. and R.T. At about 4 a.m., Ms. Smith heard a loud "boom" or "bang." Thereafter, she went back to bed. (Tr. Vol. II, 308).

At about 10:45 a.m. that same day, Gerald Woodward, Joanne's boyfriend, went to Joanne's apartment with her brother Nat Clenney. (Tr. Vol. II, 390-91). He had unsuccessfully tried to call Joanne three times that morning. Mr. Woodward knocked on

the door and it swung open. When he went inside, he saw blood on the walls and the floor. Joanne was lying face down in the kitchen with a broomstick inserted post mortem into her rectum. She was clearly deceased. (Tr. Vol. II, 393).

Nat Clenney found M.D. and R.T. covered up in their beds. He asked M.D. who did this, and she replied: "The man who worked on Mama's car." On at least three separate occasions, M.D. told Nat: "Bill did it." (Tr. Vol. II, 395, 402). Nat called the police and then called his mother, Lue Clenney. He subsequently picked his mother up and brought her to the apartment. She arrived before the police. (Tr. Vol. II, 394, 402-403).

When Lue Clenney arrived, she found M.D. crying and R.T. was unresponsive. (Tr. Vol. II, 426). She heard M.D. say: "Bill did it." (Tr. Vol. II, 438).

Within a short time, police and paramedics arrived at the apartment. M.D. had stab wounds to her chest, left arm, hand, and lacerations in her rectal-vaginal area. R.T. had been stabbed in the neck twice. Both girls were taken to Cardinal Glennon Hospital about 11:14 a.m. (Tr. Vol. II, 472-74).

On the same day, Wayne Munkel, a medical social consultant at Cardinal Glennon, had contact with M.D. She told him that a man named "Bill" had stabbed her and that "Bill" had stomped on her mother, her sister, and herself. (Tr. Vol. II, 512). Bill had broken into the house, and her mother was calling out Bill's name during the attack. M.D. knew Bill from a previous encounter. (Tr. Vol. II, 512).

On the day of the murder Daniel Clenney, Joanne's brother, came to see M.D. in the hospital. While she lay in her hospital bed, M.D. told Daniel that "Bill did it." She also told him that the killer was a cab driver and he had a white Volkswagen. (Tr. Vol. III, 620-21).

Melinda Parris, an older daughter of Joanne Tate, also questioned M.D. on the day of the murder. She repeatedly asked M.D. if Gary Parris, Joanne's ex-husband, had committed the murder. After relentless questioning, M.D. stated that Gary was involved. She then told Melinda; "They stabbed us. They woke us up about 4 a.m. They took us into the other room. They chased our mother." (Tr. Vol. IV, 786-88).

Police Try to Identify Bill: 5 Photo Lineups

On April 28, 1982, Munkel again spoke with M.D. Once more, M.D. told Munkel that "Bill did it." She had gone to Bill's house in 1981 in a yellow cab. M.D. told Munkel that Bill now drives a white Volkswagen and lives in Illinois with his mother, who always drinks. (Tr. Vol. II, 513). Munkel showed her ten photographs of suspects named "Bill" (State's Exhibits 113 a-j). M.D. made no identification. (Tr. Vol., II, 504-05).

On April 30, 1982, Munkel showed M.D. twelve more "Bill" pictures (States Exhibits 114 a-l). M.D. made no identifications. At the time he showed her these pictures, M.D. was in the intensive trauma unit, heavily sedated and under medical treatment for her substantial injuries. (Tr. Vol. II, 507).

On May 4, 1982, Joseph Burgoon, the lead police investigator in this case, went to the hospital to interview the two girls. Munkel was there during this interview. Burgoon showed M.D. 13 pictures (State's Exhibits 115 a-m). All of the individuals were white males. Most were named "Bill." M.D. did not make any identification. (Tr. Vol. IV, 740-41).

During this same interview, M.D. told Burgoon that she first met Bill in a park. On a different day, Bill took them to his house. She said: "He had black hair all the way to his ears," and drove a yellow taxi. Burgoon asked her: "How did you get the name Bill?" M.D. replied: "He told us his name." She also told Burgoon that Bill had come over to the apartment three days before the attack to fix her mother's car. (Tr. Vol. II, 515-16).

On May 5, 1982, M.D. was taken by law enforcement in an attempt to locate the bridge she went over to go to Bill's house. M.D. identified the McKinley Bridge as the one they drove over to go to the killer's house. (Tr. Vol. II, 514). Six days later on May 11, 1982, the girls were shown various parks in Illinois; however, they made no identifications. (Tr. Vol. II, 507).

On May 11, 1982, M.D. was shown an additional twelve photographs. Once more she made no identification. (Tr. Vol. II, 511). On May 18, 1982, William Swyers, a St. Louis police officer, went with Burgoon to M.D.'s residence in an attempt to make a sketch of the killer based on M.D.'s description. (Tr. Vol. IV, 745).

Police Try to Identify Bill: Composite Sketch

M.D. told Burgoon that the killer looked like Dennis Smith, although she said Smith was not the killer. Swyers had a Polaroid picture of Smith, and he based his rough sketch on the Smith's picture. M.D. told Swyers that the killer had dark hair. She also suggested changes to the ears. (Tr. Vol. III, 608-09). The sketch (State's Exhibit 10) was then released to the news media on May 21, 1982. (Tr. Vol. IV, 746).

Daniel Clenney, the brother of Joanne, saw the composite sketch on the news, and thought he recognized the face. (Tr. Vol. III, 612). The next day he went to the police station with his sister Abigail to speak with Detective Burgoon. Just a week earlier, Clenney delivered Joanne's diary to Burgoon. (Tr. Vol. III, 619). Now, Burgoon began reading names from this diary. When he read Appellant's name, Clenney said, "That's it." It took Clenney thirty minutes before he put Appellant's name to the sketch. According to Clenney, the eyes and eyebrows on the composite reminded him of Appellant, although Clenney thought the face should have been skinnier. (Tr. Vol. III, 613-614, 618).

Clenney had seen Appellant two or three time. He saw him last in the spring or summer of 1981 at a bar. Clenney had introduced Joanne to Appellant when Joanne commented how much Appellant looked like her first boyfriend, Larry Joe. Clenney agreed that Appellant did look like Larry Joe. (Tr. Vol. III, 615).

Burgoon called the phone number next to Appellant's name in Joanne's diary at about 10:30 a.m. on May 23, 1982. Appellant called Burgoon back about an hour later. Burgoon told Appellant that he was investigating the death of Joanne Tate. Appellant readily admitted that he met Joanne seven or eight months before at a bar. He told Burgoon that she and her children had spent the night at his house; however, he had not seen Joanne since last August. Burgoon obtained Appellant's date of birth and social security number. (Tr. Vol. IV, 750).

Thereafter, Burgoon located a black and white picture of Appellant holding a prison inmate sign (State's Exhibit 117a). In the mugshot photo, Appellant held a card with his prison number on it which had been taken during Appellant's previous incarceration in 1977. Burgoon took Appellant's photograph and a color photograph of Gary Parris, a distant relative of the family (State's Exhibit 117b), and went to see M.D. and R.T. (Tr. Vol. IV, 751).

Police Try to Identify Bill: Magic Door

Burgoon told both girls: "Now you've got to be real careful. We got a magic door downtown and we have to look through this magic door and see if you can find the bad man. Now, if we get the wrong man, we let the bad man go." (Tr. Vol. II, 432).). He also told the victim that the killer was one of these two men. He then showed M.D. the two pictures. M.D. identified Appellant. Burgoon asked her: "Are you sure this is the man? His name is not Bill. It's Rod." M.D. told Burgoon not to worry about the name because this was the man. (Tr. Vol. IV, 752). Burgoon then showed Appellant's

photograph to R.T. She threw the photograph down, covered her eyes and began to cry. (Tr. Vol. IV, 756-57). Burgoon testified this was not an identification of Appellant. (Tr. Vol. IV, 773).

Burgoon called Appellant and asked him to come down to police headquarters. Appellant agreed and willingly accompanied the police to the police station. (Tr. Vol. IV, 752). Appellant told Officer Ronald Scaggs that he was introduced to Joanne Tate by her brother in a bar. They dated in the summer of 1981, and Joanne and her two daughters had spent the night in his house. Appellant denied that he drove a cab, or owned a white Volkswagen, and denied that he had anything to do with Joanne's death. (Tr. Vol. III, 626-27). He also provided an alibi with witnesses.

Police Try to Identify Bill: Live Lineup

Appellant was then placed in a line-up with three other white males (State's Exhibit 11). Appellant was the only person with short hair. The other three men had long hair. Appellant was also the smallest person in the line-up and the oldest. The positioning of the men was suggestive of Appellant. Further, the condition of the Appellant's clothing was inconsistent with the others suggestive of a dirty or bad man. At the time, Appellant was 37 years of age. The other three men in the line-up were 21, 21 and 18 respectively. (Tr. Vol. IV, 771-72).

Within one-half hour of M.D. seeing Appellant's photograph, she was taken to the police headquarters. Burgoon carried M.D. into the line-up room and asker he if she saw

anyone she recognized. M.D. said, "Yes." She then identified Appellant. Burgoon then carried R.T. into the line-up room. R.T. turned her head away and would not look at the line-up. (Tr. Vol. IV, 755, 771).

M.D. had previously stated that there was a park across the street from Bill's house in Illinois where they had spent the night. (Tr. Vol. IV, 742). Even though Appellant did not live in Illinois, Burgoon took the two girls by his house. There was a park in the vicinity of Appellant's house, although it was not across the street from his house. (Tr. Vol. IV, 780). M.D. said that the park "looked like" the park across from Bill's house; however, M.D. did not identify Appellant's house as the house where she had spent the night. R.T. was asleep at the time and apparently never identified the park or Appellant's house. (Tr. Vol. IV, 757-59). It was not until later that M.D. identified Appellant's house. (Tr. Vol. IV, 760).

Appellant was subsequently charged with Capital Murder, pursuant to §565.001, and two counts of First Degree Assault, pursuant to §565.050. (DA LF, 77-78). Appellant's first trial ended in a hung jury and a mistrial declared. (DA LF, 7). At the re-trial, the State's case was premised on the same testimony of M.D. and the new pubic hair evidence. Appellant's case was premised on his innocence based on an alibi defense.

The Trial

The new expert testimony and conclusions about the pubic hair evidence was emphasized during the State's opening statement to the jury:

> The evidence will also be that after his arrest, pubic hair samples were taken from the defendant, and that Harold Messler, the chief criminalist at the police department lab, compared his pubic hair to the one found on the blanket at the scene of this crime, and they were found to be identical or comparable, and his testimony will be that as an expert in the field, he will be able to say that that public hair could have come from the defendant. He will tell you that in his opinion, there are perhaps one in a hundred people that would share this type of public hair. *Based upon this evidence*, I'm going to ask you to return a verdict as to Count I at the end of the case of guilty of capital murder, and in Counts II and III a verdict of assault in the first degree on little M[.] and little R[.].

(Tr. Vol. II, 303-04) (emphasis added).

M.D.'s testimony had solidified by the time of the second trial. She testified that she awoke to the sound of a scream, saw blood on the floor, and her mother laying face down near the kitchen. (Tr. Vol. II, 318). A man with no clothes on picked her up and carried her to her mother's bed. The man took her clothes off and tried to get her to "do a few things." He put her legs around his hips, and tried to put her head under the pillow. The man then started stabbing her. (Tr. Vol. II, 318-20).

M.D. acted like she was dead. The man then went into the kitchen, and M.D. ran and hid under R.T.'s bed. The man came to R.T.'s bed, and M.D. could see his feet and R.T.'s feet over the side of the bed. She heard the man hurting her sister. (Tr. Vol. II, 320-22). M.D. testified that she was sure Appellant was the man who hurt her mother, and identified him at trial. (Tr. Vol. II, 333). She acknowledged that Burgoon showed her a black and white picture of Appellant and another picture of a man she was related to. (Tr. Vol. II, 371-72). She admitted that the composite drawing showed a man with short, dark hair, and there was only one man in the line-up - - Appellant - - who had short, dark hair. That was the person she picked. (Tr. Vol. II, 372-73).

Ronald Scaggs, a St. Louis police officer, testified that he obtained a pubic hair from Appellant at the time of his arrest on May 24. (Tr. Vol. III, 622). Donna Bell, a criminalist with the St. Louis crime laboratory, received Appellant's pubic hair from Scaggs and delivered it to Harold Messler, the head chemist. (Tr. Vol. III, 630-32).

The Pubic Hair and the Blue Blanket

During the processing of the crime scene, law enforcement seized a blue blanket from the bed against the west wall of the bedroom. (Tr. Vol. III, 587). Joseph Crow, another criminalist at the St. Louis crime lab, testified that he examined the blue blanket (State's Exhibit 22a) for the presence of hair. He was looking for any hairs that did not look like hair from Joanne Tate. (Tr. Vol. III, 633-34). Crow used a microscope to compare hairs he knew were Joanne Tate's to other hairs found on the blanket. He examined such characteristics as the color, medulla, and thickness of the hairs. (Tr. Vol. II, 636). Crow found only one pubic hair that "clearly" was not from Joanne Tate. He gave that pubic hair to Harold Messler. (Tr. Vol. II, 634-35).

Harold Messler testified extensively about comparing the pubic hair found on the blanket, a pubic hair from Joanne Tate, and Appellant's pubic hair. He took photographs of the three pubic hairs under a microscope which was shown in chart form to the jury as State's Exhibit 20a. The lower portion of the chart consisted of photographs taken of the root end of each hair. (Tr. Vol. II, 644-45).

Messler testified that he first made a visual comparison of the blanket hair to the known samples to determine if the hairs were "comparable in appearance or if they *were definitely different and not the same*." (Tr. Vol. II, 645-46). If the overall appearance and shape between the blanket hair and the hair of Appellant's were not comparable, no further testing would be undertaken. Messler testified that, after his visual comparison of the blanket hair to that of Appellant's, he continued his testing. (Tr. Vol. II, 645-46).

Thereafter, Messler examined the hairs under a low-power stereo microscope. He was looking at the color and appearance of the hairs. If under the low-power microscope, the blanket hair and Appellant's hair "appeared different," he would cease his testing. Messler testified that he did not cease testing; rather, he continued the testing. (Tr. Vol. II, 647).

Third, Messler compared the hairs under a higher power microscope. Now he was looking at the appearance, color and internal structure of the two hairs. Specifically, he was looking for the presence or absence of the center portion of the hair, which is called the medulla. He was also looking at the relative thickness of the hair and the shape of the cuticle. Messler testified that the absence of the medulla from the blanket hair and Appellant's hair was definitely something he compared. (Tr. Vol. II, 647-48).

Expert Tells Jury the Hair Matches Rodney Lincoln

Messler testified that he has been involved in over 200 cases of hair comparison. He further testified that he can tell the difference between hairs from a Caucasian person

as opposed to an Asian or Black person. (Tr. Vol. II, 651). He compared 37 other pubic hair samples, which he received from Burgoon, to the hair on the blanket. All of these hairs came from Caucasian people, and none of them were comparable to the blanket hair. (Tr. Vol. II, 650-52).

Messler further testified that there are studies indicating the frequency with which one would expect to find comparable pubic hair in a particular population, and specifically studies conducted on the frequency of pubic hairs in Caucasian populations. (Tr. Vol. II, 650-51). He did not have an opinion, however, on the frequency with which one would expect to find in the Caucasian population a pubic hair comparable to the one found on the blanket. (Tr. Vol. II, 651).

The following day, the prosecution recalled Messler to the witness stand. He again testified that he compared the blanket hair to 39 other pubic hairs. Only one of these hairs matched the hair found on the blue blanket, and that was Appellant's hair. (Tr. Vol. IV, 717-18). He reiterated that he has been involved in over 200 cases of Caucasian hair comparison, and he never had a circumstance where a hair recovered from a crime scene matched more than one person. (Tr. Vol. IV, 718).

On re-direct, Messler testified that Burgoon and another detective gave him pubic hairs in envelopes which had been gathered from 37 individuals. Thereafter, the pubic hairs with the corresponding names of the individuals who supplied them were introduced into evidence as State's Exhibits 128 through 164. (Tr. Vol. IV, 726-730). There were a number of individuals named either "Bill" or "William" in this list.

Other names included Johnny Davis, Thomas Schultz, and Raymond Parris. These names are significant because defense counsel had earlier elicited testimony from both Nate and Lue Clenney that Joanne Tate was afraid of Tom Schultz. (Tr. Vol. II, 406, 444). Lue testified that Schultz had threatened Joanne within months of her death, and that Raymond Parris had threatened Joanne while they were married. In addition, Lue testified that Joanne was a witness when Johnny Davis was shot in the neck. (Tr. Vol. II, 445-450).

Steven Jacobsmeyer, a sergeant with the police department, testified that he collected pubic hairs from two individuals, Eugene Smith and Greg Schmidt. Both were Caucasian males. (Tr. Vol. IV, 732-33). Michael Indelicata, a homicide detective, testified that he obtained a pubic hair same from Bill Hollis, who was Caucasian. (Tr. Vol. IV, 734). George Bender, another homicide detective, testified that he took pubic hair samples from a number of individuals. One of them was Billy Hayes, who was Caucasian. (Tr. Vol. IV, 735-37).

Detective Burgoon, the lead detective on the case, testified that he obtained a number of pubic hair samples from various individuals. All of them came from Caucasian people. One of them was from Abigail Wallace, the sister of Joanne Tate. (Tr. Vol. IV, 740). Burgoon testified that M.D. said the killer looked like Dennis Smith but was not him. The prosecutor then confirmed that Burgoon had collected a pubic hair sample from Smith. (Tr. Vol. IV, 745).

During cross-examination, defense counsel asked Burgoon about a report Burgoon had received from a person named Billy Hayes. Sometime between 3:30 a.m. and 4:30 a.m. on the day of the murder, Hayes saw a man covered in blood about one-half of a block from Joanne Tate's house. (The man was not Appellant.). On re-direct, the prosecutor brought out that Hayes was originally a suspect in the murder because his name was Bill. Burgoon testified that Hayes cooperated in the investigation and provided a pubic hair. (Tr. Vol. IV, 777-783).

Closing Arguments: Prosecutor Argues It's A Match

During closing argument, defense counsel argued that the blanket hair could have come from a number of people that were in Joanne's house, and it was impossible to know how long the hair had been there. "You can't tell anything except it might have come from him [Appellant]." Defense counsel further argued that there was nothing to corroborate M.D.'s identification of Appellant. (Tr. Vol. V, 938, 942-43, 945).

In response, the prosecutor made the following argument to the jury:

> And I think Mr. Hampe has mischaracterized the pubic hair in this case. Mr. Crow told you that he was looking for hairs different from Joanne Tate's. Now, we're talking about a pubic hair. Joanne Tate had pubic hair. M[.] D[.] does not. R[.] T[.] does not.
>
> He separated out the pubic hairs that were not Joanne Tate's. *There was one of them that matches that man's pubic hair*. That was compared to thirty-seven others in addition to Joanne Tate. That's thirty-nine people. One out of thirty-nine people. *None, no hair that that other hair was compared with other than Rodney Lincoln's matched*.
>
> Mr. Messler told you that in two hundred cases, he's never had more than two - - more than one match. He's never had two people match one hair

> found at a scene. *And yet he [defense counsel] tells you there's absolutely no corroboration*.

(Tr. Vol. V, 957) (emphasis added).

During jury deliberations, the jury asked to see all of the physical evidence in this case except for the blankets, the clothing and the broom. (Tr. Vol. V, 963). The jury returned verdicts finding Appellant guilty of manslaughter, pursuant to §557.021, and two counts of Aggravated Assault, pursuant to §565.050. (DA LF, 44-46). On November 4, 1983, Appellant was sentenced to 15 years for the manslaughter, and to a life sentence for each count of assault, to be served consecutive to one another. (DA LF, 36-37).

Post-conviction mtDNA Testing Proves Hair is Not Rodney Lincoln's

On July 23, 2003, the St. Louis Metropolitan Crime Laboratory prepared a report after reviewing evidence in this case to determine whether any biological material was present upon which STR DNA testing could be conducted. The biological material for that type of DNA testing was unavailable in 2003, and the case was set aside. (PCH Tr., 4-6).

In March and August of 2005, Appellant filed motions seeking mitochondrial DNA testing of the blanket pubic hair, a pubic hair found on the perineum of R.T., the rectal, anal, and vaginal smears of the victims, fingernail scrapings from Joanne Tate, and various items of blood evidence pursuant to Section 547.035. (DNA LF, 7-19).

Following several years of litigation, the State stipulated to DNA testing of various items of evidence from this case. (DNA LF, 156-162). On November 3, 2010, the Serological Research Institute (SERI) prepared a report discussing the results of the DNA testing that was conducted. On September 12, 2013, the State and counsel for Appellant stipulated to these results which included that Appellant, M.D., R.T., and Joanne Tate were excluded as the source of the blanket pubic hair. The hair found on the perineum of R.T. could not have originated from Appellant, R.T., M.D., or Joanne Tate, and the mitochondrial sequence from the perineum hair was different from that of the blanket pubic hair. No seminal fluid was found on any of the submitted evidence and the fingernail scrapings from Joanne Tate revealed no YSTR results. Further, after testing seven additional pieces of evidence, including the murder weapons, no male DNA was found. No DNA profile included Appellant as a contributor from any of the DNA evidence submitted to SERI for testing. (DNA LF, 169-173).

Motion to Release is Denied

Appellant filed an Amended Motion for Release pursuant to Section 547.037, and argued that the DNA testing has falsified the key physical evidence that was used to link Appellant to the crime scene at trial. Appellant asserted that, had the jury been informed of these exculpatory DNA results, there is a reasonable probability of a different result. (DNA LF, 163-167).

Oral argument was heard on the Amended Motion for Release on September 12, 2013. The Circuit Court denied the motion in an order filed December 24, 2013. (DNA LV, 212-227). Appellant filed a timely notice of appeal. (DNA LF, 232-235).

POINT I RELIED ON

The circuit court clearly erred in denying Appellant's motion for release under § 547.037 RSMo (2002), because post-conviction DNA results prove that the microscopic hair comparison evidence used by the State to establish Appellant's identity as the perpetrator of these crimes and to corroborate the unreliable identification of Appellant by a seven-year old girl, are false and that Appellant is more likely than not innocent such that no rational fact finder, based upon all of the evidence, could now fairly find Appellant guilty beyond a reasonable doubt in violation of Due Process of Law as guaranteed by Article I, Section 10 of the Missouri Constitution and by the 5th, 6th and 14th Amendments to the United States Constitution and § 547.037 RSMo (2002).

Bey v. State, 272 S.W.3d 378 (Mo. App. ED 2008)

Snowdell v. State, 90 S.W.3d 512 (Mo. App. ED 2002)

Matney v. State, 110 S.W.3d 872 (Mo. App. SD 2003)

Hudson v. State, 190 S.W.3d 434 (Mo. App. WD 2006)

Revised Statutes of Missouri § 547.037 (2002)

POINT II RELIED ON

The circuit court erred in finding that the pubic hair was not the perpetrator's hair and failing to judicially estop the State from asserting a new theory to explain away the exonerating post-conviction DNA results, , because the new theory is factually inconsistent with the State's interpretation of the evidence before the jury at trial in violation of Due Process of Law as guaranteed by Article I, Section 10 of the Missouri Constitution and by the 5th, 6th and 14th Amendments to the United States Constitution and § 547.037 RSMo (2002).

State v. Carter, 71 S.W.3d 267 (Mo. App. SD 2002)

Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000)

ARGUMENT POINT I

The circuit court clearly erred in denying Appellant's motion for release under § 547.037 RSMo (2002), because post-conviction DNA results prove that the microscopic hair comparison evidence used by the State to establish Appellant's identity as the perpetrator of these crimes and to corroborate the unreliable identification of Appellant by a seven-year old girl, are false and that Appellant is more likely than not innocent such that no rational fact finder, based upon all of the evidence, could now fairly find Appellant guilty beyond a reasonable doubt in violation of Due Process of Law as guaranteed by Article I, Section 10 of the Missouri Constitution and by the 5th, 6th and 14th Amendments to the United States Constitution and § 547.037 RSMo (2002).

Standard of Review

The circuit court's finding and conclusion that Appellant failed to demonstrate by a preponderance of the evidence that he is innocent of the crimes for which he is in custody is subject to a clearly erroneous standard of review. Bey v. State, 272 S.W.3d 378, 382-83 (Mo. App. 2008). Findings and conclusions are clearly erroneous if "after reviewing the entire record, this court is left with the definite and firm impression that a mistake has been made." *Id*.

The Standard of Innocence Under 547.037.5

§ 547.037.5[2] provides that, if post-conviction DNA testing demonstrates a person's innocence of the crime for which the person is in custody, then the motion court "shall" order the movant's release. The burden of proof is upon the movant by a preponderance of the evidence.

The term "innocence" in 547.037.5 is not defined. Accordingly, its meaning must be gleaned from looking to other statutes dealing with the same subject matter and the case law. In Union Elec. Co. v. Dir. of Revenue, 425 S.W.3d 118, 122 (Mo. 2014), the Missouri Supreme Court held: " If the meaning of a word is unclear from consideration of the statute alone, a court will interpret the meaning of the statute *in pari materia* with other statutes dealing with the same or similar subject matter." *See also* Citizens Elec. Corp. v. Dir. of Dep't of Revenue, 766 S.W.2d 450, 452 (Mo. 1989) ("In construing a statute it is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed.")

Section 547.035 is a statute dealing with the identical subject matter as 547.037. "A person in the custody of the department of corrections claiming that forensic DNA testing *will demonstrate the person's innocence of the crime*," may file a motion seeking such testing. Mo. Ann. Stat. § 547.035.1 (emphasis added). In order for such testing to proceed, the circuit court must make the following finding: "1. [a] reasonable

[2] All statutory references are to RSMo (2002) unless otherwise noted.

probability exists that *the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing*; and 2) the movant is entitled to relief." Mo. Ann. Stat. § 547.035.7 (emphasis added).

The innocence standard of 547.035 only requires a movant to establish that he or she would not have been convicted if the exculpatory DNA results had been obtained and admitted at trial. There is no different definition or standard of "innocence" set forth in 547.037. The only difference is that the burden of proof under 547.037 is preponderance of the evidence rather than "reasonable probability." It makes sense that a lesser burden applies to obtain post-conviction DNA testing than would apply when the actual results of the testing are known. In the latter situation, the Legislature has directed that the preponderance burden applies.

The case law supports an interpretation that the DNA statutes impose a standard of innocence consistent with a finding of "not guilty." In State v. Belcher, 317 S.W.3d 101, 106 (Mo. App. SD 2010), the Southern District Court of Appeals affirmed the denial of post-conviction DNA testing because it held that exculpatory DNA test results would not have resulted in an acquittal of the defendant. *See also* Matney v. State, 110 S.W.3d 872, 877 (Mo.App. S.D.2003) (holding that, based upon the State's theory and the evidence at trial, post-conviction DNA testing would not establish a reasonable probability the movant would not have been convicted).

The circuit court in this case erroneously applied a more exacting standard than is required by the statute in denying the Appellant's motion for release. The court ruled that, without knowing where the blue blanket hair came from, how long it had been in the residence, and who had contact with the blanket, "there is no way to argue that the lack of a DNA match *exonerates movant*." (DNA LF, 226) (emphasis added). In discussing the hair on R.T.'s perineum, the circuit court ruled: "The source of this hair and how it came to be on R.T.'s perineum will never be known, *but this fact does not exonerate movant*." (DNA LF, 227) (emphasis added). The court's opinion reflects a misconception that "innocence" under 537.037 requires a showing that DNA evidence must establish innocence to absolute certainty. This would require proof beyond all doubt, an impossible standard to meet and one not recognized or applied in our jurisprudence.

In addition to applying a higher standard of innocence than is required by 537.037, the circuit court also erred by finding that only two items of evidence were relevant to the Appellant's motion: the blue blanket hair and the hair found on R.T.'s perineum. (DNA LF, 219). This finding reveals the court's inappropriately narrow view of the evidence. In examining the relevance of the DNA findings, the court views the exculpatory DNA results in light of the evidence at trial to determine whether the movant met his burden. By ignoring this additional evidence of innocence, the court improperly analyzes the importance of the DNA evidence. These rulings were prejudicial to the Appellant and require a reversal in this case. Based upon the State's theory and the evidence presented at trial, the post-conviction DNA results excluding the Petitioner as the source of any of the physical evidence at the scene, including the blue blanket hair and the hair on R.T.'s

perineum, establish that it is more likely than not the jury would have acquitted the Appellant had these results been introduced at trial.

Post-conviction DNA evidence must be viewed in light of the State's theory of the evidence at trial.

Missouri case law holds that post-conviction DNA testing results must be viewed in the context of the State's theory of the evidence at trial. Bey v. State, 272 S.W.3d 378, 383-84 (Mo. App. 2008). Thus, if key physical evidence used by the State to tie the movant to the scene of the crime is refuted by the DNA testing, the preponderance burden of § 547.037 is met if it is more likely than not the jury would have acquitted the movant had the testing results been introduced at trial.

In Bey, this Court held that post-conviction DNA results must be viewed in the context of the evidence presented at trial and the prosecutor's interpretation of that evidence. Bey, 272 S.W.3d at 383-84. Thus, in Bey, the state's expert testified at trial that there were insufficient amounts of seminal fluid to obtain a blood type, and the prosecution and the defense maintained that Bey was not the source of the sperm. 272 S.W.3d at 380. Post-conviction DNA testing excluded Bey; however, the Court held that the testing did not demonstrate Bey's innocence because both the State and the defense asserted during trial that Bey was not the source of the sperm. 272 S.W.3d at 384. In addition, the victim testified under oath to an alternate source(s) of the sperm unrelated to the crime. The jury was in Bey was aware that the source of the sperm was not the defendant.

In reaching this holding, this Court relied upon Snowdell v. State, 90 S.W.3d 512, 515 (Mo. App. ED 2002). In Snowdell, the motion court denied DNA testing of a pubic hair that was introduced during trial. In affirming the trial court's ruling, this Court held that the jury was "fully aware" that movant was not the source of the pubic hair because test results excluding him as the source was introduced to the jury. Thus, any further DNA testing would have been cumulative and would not have demonstrated Snowdell's innocence. 90 S.W.3d at 515.

Likewise, in Matney v. State, 110 S.W.3d 872 (Mo. App. SD 2003), the Southern District Court of Appeals affirmed the denial of DNA testing of certain physical evidence. The Matney Court held that the State's theory and the evidence at trial "did not preclude the possibility that someone else other than the Movant and the victims were at the scene of the crime." 110 S.W.3d at 876-77. Further, there was no blood evidence presented during trial that tied the movant to the scene. The Matney Court concluded that, if DNA testing showed foreign blood (not attributable to the movant or victims) this would fail to establish Matney's innocence because the evidence and the State's theory at trial did not preclude the possibility that someone other than Matney and the victims was present. *Id*.

Also, in Hudson v. State, 190 S.W.3d 434 (Mo. App. WD 2006), the movant requested post-conviction DNA testing of clothing worn by the complaining witness so it could be compared with the DNA profile from a cigarette butt found at the scene of the murder. In affirming the denial of that motion, the Western District Court of Appeals

noted that the DNA profile from the cigarette butt had been admitted at trial, and the jury knew that Hudson was not the source of that DNA. Further, the Court of Appeals held that the State's theory at trial never excluded the fact that a third party, the complaining witness or someone else, was at the scene smoking the cigarette. Accordingly, the State's failure to match the DNA profile to Hudson at trial was not "fatal to the State's case." 190 S.W.3d at 443-44.

Other states have applied similar burdens when under their respective post-conviction DNA testing statutes. See State v. Parmar, 808 N.W.2d 623, 629 (2012) (holding post-conviction DNA evidence that falsifies or discredits evidence necessary to prove an essential element of the crime meets the innocence standard); Haddock v. State, 146 P.3d 187, 206 (Kan. 2006) (holding that innocence is established if, in light of the new DNA evidence, a rational factfinder could not fairly find the defendant guilty beyond a reasonable doubt).

Harold Messler's hair comparison testimony at trial was false.

In the present case, the State's theory at trial was that the pubic hair found on the blue blanket tied the Appellant to the scene as the perpetrator of these crimes. During opening statement and closing argument, the prosecutor repeatedly told the jury that the blanket pubic hair "matched" and was "identical" to the Appellant's pubic hair. Further, the prosecutor argued that this "match" was significant because Harold Messler had never "matched" a hair found at a crime scene to more than one person. Thus, the use of the

pubic hair to establish the identity of the Appellant as the killer was premised entirely upon the "scientific" hair comparison testimony of Harold Messler.

Messler's testimony was neither scientific nor accurate. In 2009, the National Academy of Sciences issued a report entitled Strengthening Forensic Science in the United States: A Path Forward, National Research Council, National Academy of Sciences, (2009) (available at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf). The NAS found that "[n]o scientifically acceptable statistics exist about the frequency with which particular characteristics of hair are distributed in the population, [and] [t]here appears to be no uniform standards on the number of features on which hairs must agree before an examiner may declare a 'match.'" *Id*. at 160. The NAS cited one study showing that, of the "matches" found by microscopic examination, 12.5% were found to have come from different sources when tested for DNA. *Id*. at 161.[3] The NAS report

[3] A review of 137 DNA exoneration cases showed that 65% of the trials examined involved hair comparison analysis. "Of those, 25 – or 38% - had invalid hair comparison testimony. Most (18) of these cases involved invalid individualizing claims." Jules Epstein. "Preferring the 'Wise Man' to Science: The Failure of Courts and Non-Litigation Mechanisms to Demand Validity in Forensic Matching Testimony." 20 Widener L. Rev. 8, fn. 196 (2014). In addition, the Department of Justice has recently undertaken a review of historical cases where examiners testified to hair comparison

concluded that "testimony linking microscopic hair analysis with particular defendants is highly unreliable." *Id*.

Courts are also recognizing that the type of testimony given by Messler during the Appellant's trial is scientifically unreliable and often inadmissible. *See* Commonwealth v. Chimel, 30 A.3d 1111, 1138-1140 (Pa. 2011) (preeminent expert in the field agreed that microscopic hair analysis can be referred to as "junk science" when it is used to establish physical evidence of guilt without acknowledging the limitations of the science); State v. Butler, 24 S.W.3d 21 (Mo.App.2000), *rev'd on other grounds* 108 S.W.3d 18 (2003) ("[a]s [the expert] acknowledged in her testimony, and as the authoritative articles confirm, there is no scientific basis for testifying that a hair comes from a particular individual."); Williamson v. Reynos, 904 F. Supp. 1529, 15 8 (E.D. Okla, 1995)(expert testimony on hair analysis was too scientifically unreliable to be admissible); State v. Faircloth, 99 N.C.App. 685, 394 S.E.2d 198, 202 (1990) ("[u]nlike fingerprints, however, comparative microscopy of hair is not accepted as reliable evidence to positively identify a person.")

In the present case, Messler made statements during his testimony that are now known to be scientifically invalid. He testified that the blanket pubic hair could be associated with a specific individual, namely that it "matched" the Appellant's hair to the

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analysis, which testimony has been brought into question by DNA exonerations. *Id*. at 115-16.

exclusion of all others. Further, Messler cited the number of hair analyses with which he was involved (over 200), and the number of samples from other Caucasian individuals with which he compared the blanket hair (39) as a predictive value to bolster his conclusion that the blanket hair "matched" the Appellant's pubic hair. (Tr. Vol. IV, 717-18). There is no question that Messler's hair comparison testimony at the Appellant's trial was scientifically unreliable and patently false.[4]

It is more likely than not that, had the post-conviction DNA results been admitted during trial, the jury would have acquitted the Appellant.

The post-conviction DNA testing in this case has completely falsified Messler's testimony and the prosecutor's argument that the pubic hair at the scene "matched" the Appellant's pubic hair. That testing has excluded the Appellant as the source of the pubic hair, and identifies an unknown third party. Further, of the thirteen individual pieces of evidence submitted to DNA testing, including rectal and vaginal swabs from R.T. and M.D., fingernail scrapings from Joanne Tate's hands, swabs from Joanne Tate's inner thigh, and a hair found on the perineum of R.T., none of them contain the DNA profile of

[4] Strengthening Forensic Science in the United States: A Path Forward, (available at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf). *See also* Paul C. Giannelli, "Microscopic Hair Comparisons: A Cautionary Tale." 46 No. 3 Crim. Law Bulletin ART 7 (Summer 2010).

the Appellant. In fact, the hair found on R.T.'s perineum contains the DNA profile of an unknown party.

Further, the DNA testing has falsified other forensic evidence in this case. Initially, the forensics concluded that the hair found on R.T.'s private parts was consistent with the hair of M.D. (PCH Tr., 27-28). The DNA testing now establishes that the hair did not originate with R.T., M.D., Joanne or Appellant. (DNA LF, 169-173). It should be remembered that photographs of R.T.'s perineal area were introduced into evidence (State's Exhibits 2 & 3), and there was testimony from a nurse who was the coordinator of the sexual abuse trauma team that the reddening around R.T.'s rectum was an indication of sexual abuse. (Tr. Vol. II, 493-94). Given this testimony, the new DNA evidence demonstrating that the hair found on R.T.'s private parts belonged to an unknown person is powerful evidence that Appellant was not the perpetrator of this assault.

The circuit court misinterpreted the significance of the DNA testing in establishing the innocence of the Appellant. While acknowledging that the Appellant was excluded as the source of the hair, the circuit court concluded that "with no knowledge of where the blanket came from, how long it had been in the residence, who had contact with the blanket outside of the date of the offense, there is no way to argue that the lack of a DNA match exonerates movant." (DNA LF, 226).

The circuit court failed to take into consideration, however, that not only did the DNA testing *exclude* the Appellant (and every member of the household) as the source of

the pubic hair but it also falsified and discredited the manner in which this evidence was used to establish the Appellant's guilt at trial. In this regard, two decisions from the Wisconsin Supreme Court are persuasive.

In State v. Hicks, 549 N.W.2d 435 (Wis. 1996) , the State put on evidence at trial from a state crime lab analyst that, based upon microscopic examination, four hairs found at the crime scene were "consistent" with the samples provided by the Petitioner. After Petitioner's conviction and sentencing, the hairs were submitted for DNA analysis. Two of the hairs did not contain sufficient DNA for analysis and the Petitioner was excluded as being the source of the other hairs. Petitioner moved for a new trial, which was subsequently denied by the trial court. 549 N.W.2d at 438. In reversing the trial court's decision, and granting the Petitioner a new trial, the Wisconsin Supreme Court held:

> Here, the jury which found Hicks guilty did not have an opportunity to hear and evaluate evidence of DNA testing which excluded Hicks as the source of one of the four pubic hairs found at the scene. Instead, the jury was presented with evidence and argument that was later found inconsistent with the facts. By itself, the fact that Hicks obtained post-conviction DNA evidence might not persuade us to remand this matter for a new trial in the interest of justice. The determinative factor in the present case is the fact that the State assertively and repetitively used hair evidence throughout the course of the trial as affirmative proof of Hicks' guilt. The State went to great lengths to establish that the hairs found at the scene came from the assailant. In opening and closing arguments, the State relied heavily upon its expert's opinion that the hairs found at the scene were consistent with known standards provided by Hicks. At various times, the State referred to a "match" between the hairs, thus elevating and highlighting the importance of the hair evidence to the jury.

549 N.W.2d at 441.

In State v. Armstrong, 2005 WI 119, 700 N.W.2d 98 (2005), the Wisconsin Supreme Court reversed the defendant's convictions of first-degree sexual assault and first-degree murder based upon a factual scenario very similar to the present case. At the time of defendant's trial, the State presented the following physical evidence: 1) two of defendant's fingerprints found at the crime scene; 2) semen stains found on the victim's robe matched the defendant's secretor type; 3) hemosticks tested positive for blood under defendant's fingernails and scrapings from defendant's thumbs and toes tested positive for blood of human origin; 5) one head hair found on the victim's robe was consistent with hair from defendant, and another head hair found on the victim's robe was similar to hair from the defendant. The physical evidence was introduced to bolster the State's eyewitness who placed the defendant at the scene of the crime on the night the victim was murdered.

Post-conviction DNA testing revealed the following: 1) DNA testing excluded defendant as the source of the semen; 2) DNA testing excluded the defendant as the source of the two hairs; and, 3) no traces of blood were found on a cloth that was prepared from the hemostick swabs and the scrapings from defendant's thumbs and large toes. Defendant's motion for new trial based upon newly discovered evidence was denied by the trial court.

On appeal before the Wisconsin Supreme Court, the State attempted to downplay the significance of its use of the physical evidence. In rejecting the State's argument, the Court stated:

> Based on a review of the record, we simply cannot say with any degree of certainty that the physical evidence did not influence the jury's verdict...To bolster Orebia's identification, the State flaunted powerful conclusions before the jury that the physical evidence conclusively and irrevocably established Armstrong as the murderer. However, the jury was presented conclusions based on evidence that are now found to be inconsistent with the facts. The key hairs on the bathrobe belt that was draped over Kamps' body are not Armstrong's and the semen found on Kamps's robe is not Armstrong's. In addition, there is no indication that any blood that may have been on the hemosticks was that of Kamps. The jury did not have an opportunity to hear and evaluate the DNA evidence that excludes Armstrong as the source of the hairs and the semen. This is not evidence that tends to "chip away" at the accumulation of the State's evidence...The DNA evidence discredits one of the pivotal pieces of proof forming the very foundation of the State's case. If the State's theory is correct, that the semen is from the murderer and that the murderer's hairs fell on the bathrobe belt that was draped across Kamps' body, then that person is not Armstrong...The DNA evidence now excludes Armstrong as the donor of certain physical evidence that was relevant to the critical issue of identity; the jury did not hear this evidence, and the State used the physical evidence assertively and repetitively as affirmative proof of Armstrong's guilt.

2005 WI at 154-156.

In the present case, as in Armstrong and Hicks, the State assertively and repetitively used the pubic hair as affirmative proof of the Appellant's guilt. This Court cannot say that the pubic hair evidence "did not influence the jury's verdict" in this case. Here, the State flaunted these powerful conclusions before the jury not once, but twice, that the evidence conclusively and irrevocably established Appellant's guilt. The DNA testing results do not "chip away" at the State's evidence; rather, they discredit one of the pivotal pieces of proof forming the very foundation of the State's case. Indeed, if the State's trial theory is correct, that the pubic hair identified the perpetrator of these crimes,

then the DNA testing exonerates the Appellant because he is not the source of the pubic hair. The testing results are completely inconsistent with the State's theory and interpretation of this key evidence on the issue of the killer's identity before the jury. In the words of the Western District Court of Appeals in Hudson v. State, 190 S.W.3d 443-44, the failure of the State to "match" the Appellant's DNA profile to the pubic hair is "fatal to the State's case" on the essential element of identity.

The State asserted below that the pubic hair evidence played "at best" a minor role in the case, (DNA LF, 26), and that, if this case were tried today, the only difference would be that Harold Messler would not testify. (PCH Tr., 30-31). The record flatly contradicts the State's attempt to minimize the importance of the pubic hair to their case and the effect of Messler's testimony upon the jury. Eight witnesses, nearly one-third of the State's witnesses in this case, testified to the collection and analysis of pubic hair evidence. These included two crime lab criminalists (Bell and Crow), and the chief crime lab criminalist, Harold Messler. Further, the pubic hair found at the crime scene was not only used to identify the Appellant as the killer but was also used to exclude the family members of Joanne Tate who had access to her apartment, another suspect in her murder (Billy Hayes), and other Caucasian males who were put forward by the defense as possible perpetrators of her murder, including Tom Schultz, Johnny Davis, and Raymond Parris. This negated the defense argument that the hair could have come from any number of people who had access to Joanne's apartment, (Tr. Vol. V, 942), and single out Appellant as her killer.

Further, there is a significant risk that the jury gave undue weight to Messler's false testimony, which came cloaked under the mantel of "scientific evidence." Jurors lack the capacity to independently evaluate the accuracy of scientific testimony; as a consequence, they tend to give great weight to witnesses presenting such testimony. The United States Supreme Court has recognized that "[e]xpert evidence can be both powerful and misleading." Daubert v. Merrill Dow Pharm. Inc., 509 U.S. 579, 595 (1993). "[T]he esoteric nature of an expert's opinions, together with the jargon and the expert's scholarly credentials, may cast an aura of infallibility over his or her testimony." Peter J. Neufeld and Neville Colman, "When Science Takes the Witness Stand", 262 Sci. Am. 46, 48 (May 1990).

In addition, "forensic sciences are precisely the type of scientific evidence that juries are likely to consider objective and infallible." Keith A. Findley, "Innocents At Risk: Adversary Imbalance, Forensic Science, and the Search for Truth", 38 Seaton Hall L. Rev. 893, 943 (2008). When expert scientific witnesses testify that "fingerprints, or bite marks, *or hairs*, or other such evidence from the crime scene can be matched in the laboratory to the defendant, even – as such experts sometimes claim – to the exclusion of all other persons in the world, *that testimony is likely to be accepted as conclusive*." *Id.*

The only other evidence identifying the Appellant as the killer came from the testimony of an eight year old girl. The circuit court, relying on Bey, held that the Appellant had no authority to attack the credibility of M.D.'s identification. (DNA LF, 218-19). However, the circuit court then relied upon M.D.'s "unwavering" identification

of Appellant as a basis to deny the Appellant relief. In doing so, the circuit court failed to take into consideration how the State used the false pubic hair evidence to corroborate and bolster the testimony of this eight year old child's identification of the Appellant as the killer.

According to the circuit court's opinion, the "lynchpin" to the Appellant's conviction was the testimony of M.D. (DNA LF, 224). However, on the next page of the opinion, the court stated that it was impossible to determine the lynchpin to the conviction because that would require the court to read the minds of the jury based on a 30 year-old transcript. (DNA LF, 225). Further, the circuit court seemed to acknowledge that the initial photo-spread, containing only the picture of the Appellant and Gary Parris, was improper and suggestive. (DNA LF, 224). Nevertheless, the court went on to conclude, again based upon a 30-year old record, that M.D. "never wavered" in her identification of the Appellant. (DNA LF, 225).

However, the question of whether or not M.D.'s identification was the "lynchpin" to the State's case misses the point. The circuit court ignored the undeniable fact that the State bolstered M.D.'s identification of the Appellant by asserting powerful conclusions before the jury that "match" of the blanket pubic hair to the Appellant conclusively established him as the killer. The DNA evidence now excludes Appellant as the donor of physical evidence that the State used assertively and repetitively as evidence going to the critical issue of identity. The jury never heard the new DNA evidence, and neither the

circuit court nor any other court can say with any degree of certainty that the pubic hair evidence did not influence the jury's verdict in this case.

The Appellant met his statutory burden that it is more likely true than not that, had the DNA testing results been introduced at trial, the jury would have acquitted him in light of the State's theory of the evidence. The Appellant was unable to use these results to challenge the "scientific" hair comparison testimony of Messler, leaving its "aura of infallibility" undisturbed. The jury was led to believe that it had been conclusively and scientifically determined that the pubic hair from the blanket "matched" the pubic hair of the Appellant. Not only was there no reliable scientific basis for Messler's hair comparison testimony but, most significant of all, the conclusion Messler reached was absolutely false. A conviction obtained by the use of false evidence cannot stand under these constitutional provisions. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

This circuit court erred by analyzing the significance of the DNA evidence under a higher standard than is required by 547.037. In addition, the denial of Appellant's Motion for Release and the higher burden of proof applied by the circuit court violates Appellant's Due Process rights as guaranteed to him by Article I, Section 10 of the Missouri Constitution, and the 5th, 6th and 14th Amendments to the United States Constitution. Accordingly, the circuit court's decision must be reversed, and the Appellant released.

ARGUMENT POINT II

The circuit court erred in finding that the pubic hair was not the perpetrator's hair and failing to judicially estop the State from asserting a new theory to explain away the exonerating post-conviction DNA results, because the new theory is factually inconsistent with the State's interpretation of the evidence before the jury at trial in violation of Due Process of Law as guaranteed by Article I, Section 10 of the Missouri Constitution and by the 5th, 6th and 14th Amendments to the United States Constitution and § 547.037 RSMo (2002).

Standard of Review

The determination of whether government conduct denies a citizen due process of law is a matter of law and is subject to de novo review. State v. Simmons, 364 S.W.3d 741, 745 (Mo. App. SD 2012). A district court's failure to apply judicial estoppel is reviewed under an abuse of discretion standard of review. Schaffart v. ONEOK, Inc., 686 F.3d 461, 469 (8th Cir. 2012).

Analysis

In Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), the United States Supreme Court held that the fundamental interest of the government in a criminal prosecution is "not that it shall win a case, but that justice shall be done." The Berger Court went on to hold that the prosecutor is in a "peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape *or innocence*

suffer." *Id*. (emphasis added). Although a prosecutor "may strike blows, he is not at liberty to strike foul ones." *Id*.

Based upon the prosecutor's "quasi-judicial" role, the Due Process Clause of the Fourteenth Amendment to the United States Constitution "requires conduct of a prosecutor that it does not require of other participants in the criminal justice system." Smith v. Groose, 205 F.3d 1045, 1049 (8th Cir. 2000). Thus, a conviction obtained by the prosecutor's knowing use of false evidence must fall under the Due Process Clause. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). The result is the same if the State, although not presenting false evidence, allows it to go uncorrected when it appears. *Id*.

In Smith v. Groose, 205 F.3d at 1049, the Eighth Circuit held that the presentation of factually inconsistent prosecutorial theories can violate due process of law under certain circumstances. The Eighth Circuit cited to the special concurring opinion of Judge Clark in Drake v. Kemp, 762 F.2d 1449, 1451, 1461 (11th Cir.1985), where he wrote that "[t]he state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for truth." 205 F.3d at 1050.

In State v. Carter, 71 S.W.3d 267, 271-72 (Mo. App. SD 2002), the Missouri Court of Appeals relied upon Smith v. Groose, 205 F.3d 1045, 1048, 1052 (8th Cir.2000), and noted that the State's use of "factually contradictory theories" can violate principles of due process of law.

In the present case, post-conviction DNA testing has falsified the pubic hair evidence used by the prosecutor at trial to establish Appellant's guilt. In an attempt to explain away the exonerating DNA evidence, the State now asserts a position that is factually contradictory to the theory it vigorously presented to the jury at trial, i.e. the pubic hair did not come from the perpetrator of this crime but could have come from any number of people that were at Joanne Tate's residence. Interestingly enough, the State's current theory of the evidence and the decision of the district court mirrors the position taken by the defense at trial with respect to the pubic hair. (Tr. Vol. V, 942).

The same underlying due process principles are violated whether a prosecutor, as in Smith v. Groose, presents factually inconsistent arguments to convict co-defendants at different trials, or when, as in the present case, the prosecutor asserts a new theory about the pubic hair evidence that contradicts the theory about that evidence presented at trial. Such tactics are, in the words of Judge Clark quoted previously, "mere gamesmanship" that undermines the search for truth in a criminal trial, and the government's duty to seek justice instead of desperately hanging onto a conviction that is premised upon false evidence.

Courts in other jurisdictions have rejected the State's attempts to "explain away" exonerating DNA evidence by asserting theories that the respective juries never heard.

In Commonwealth v. Reese, 444 Pa. Super. 38, 663 A.2d 206 (1995), the Superior Court of Pennsylvania affirmed the lower court's setting aside of defendant's rape and kidnapping offenses, and granting him a new trial based upon post-conviction DNA

testing. During the defendant's underlying criminal trial, the victim identified the defendant as the individual who raped her. In addition, the State offered evidence of a chemist from the state crime laboratory, who testified that stains found on the victim's underwear and a smear from a vaginal slide indicated the presence of seminal fluid containing spermatozoa. "The chemist further advised the jury that he conducted no further tests on the samples to determine if Appellee was the depositor of the seminal fluid because, at that time, in the scientific community no test was available which could make such a determination within a reasonable degree of medical certainty." 663 A.2d at 207.

Post-conviction DNA testing excluded defendant as the depositor of any forensic evidence that was uncovered in this case. Accordingly, the trial court set aside his convictions and granted him a new trial. The State appealed. In upholding the trial court's order, the Superior Court of Pennsylvania found that the post-conviction DNA testing is evidence that "would be likely to compel a different result." 663 A.2d at 209.

The Commonwealth attempted to introduce evidence during the evidentiary hearing that the attacker had not ejaculated, and that the victim had a live-in boyfriend at the time of the rape with whom she was having sexual relations. The Commonwealth argued that, had the trial court considered this evidence, the new DNA results would not be exculpatory. 444 Pa. Super. at 45.

The Pennsylvania Superior Court rejected that argument as follows:

> The weakness with the Commonwealth's argument rests in the fact that the evidence it sought to have the PCRA court review *was not evidence which was introduced and heard by the jury at trial*. The jury was not advised of the assailant's comment and was not told about the victim's sexual activity. However the jury did hear testimony in which the victim detailed the attack, and identified Appellee as the attacker. The jury was also advised that seminal fluid samples were obtained from the clothing worn by the victim the night of the attack. The clear implication of the evidence offered at trial was to corroborate the victim's account of the evening and testimony of a sexual assault by Appellee. *Because the jury did not hear evidence of other explanations for the deposit of this seminal fluid, it would have been improper for the PCRA court to have considered it when examining whether the DNA evidence was exculpatory and whether it would likely have resulted in a different verdict if admitted at trial*. The narrow issue before the PCRA court was whether the DNA evidence would have affected the outcome of the trial had it been introduced. *We find that the PCRA court properly restricted the evidence during the hearing to that which was relevant to this question*. While the Commonwealth's proposed evidence may in fact be proper rebuttal testimony in a new trial, *it was irrelevant to the matter under consideration before the PCRA court.*

444 Pa. Super. at 45-46 (emphasis added).

Likewise, in State v. Hicks, 549 N.W.2d 435 (Wis. 1996), the State argued at trial that all four of the hairs found in the victim's apartment came from the same person, i.e. the defendant. When the new DNA test results excluded the defendant as the source of the hair, the State attempted to downplay the significance they placed on the hairs during trial. The Wisconsin Supreme Court did not buy their argument:

> The State now attempts to downplay its use of the hair evidence at trial. However, a review of the record leads us to the opposite conclusion. The

> State used this hair evidence throughout the trial as affirmative proof of Hicks' guilt.

549 N.W.2d at 443.

Also, in State v. Armstrong, 2005 WI 119, 700 N.W.2d 98 (2005), the Wisconsin Supreme Court again rejected the State's attempt to downplay the significance of the DNA test which excluded the defendant as being the source of the hair found at the crime scene:

> As in Hicks, the State now attempts to downplay the significance of its use of the physical evidence. An examination of the State's closing argument, however, belies the State's assertion that it merely used the evidence to establish an "inference of guilt." Indeed, in stark contrast to Hicks, where the State argued the hairs "matched" the defendants, the State in this case went further, much further. The State argued that the physical evidence "conclusively" demonstrated that Armstrong was the murderer. The State argued that there was no explanation for the hair in Kamps' apartment except for the fact that he was the murderer. And the State argued that the blood found underneath Armstrong's nails was Kamps' blood.

700 N.W.2d at 127.

In the present case, as in both Hicks and Armstrong, the State argued to the jury at trial that the pubic hair found at the scene "matched" Defendant's hair. The State argued it was a scientific match and offered expert testimony. A review of the record in this case establishes that the State relied heavily upon the pubic hair evidence at trial to establish Appellant's guilt and to exclude Joanne Tate's family members and other suspects. During opening statements and closing arguments, the State used the hair evidence as affirmative proof of Appellant's guilt. Now that DNA testing has revealed Appellant is

not the source of the hair, the State should be estopped from downplaying the significance it made of the hair during trial or reinterpreting the hair evidence in a manner that contradicts the interpretation it presented to the jury. The State's current assertion of a theory completely inconsistent with the theory it used to convict Appellant of these crimes at trial violates Article I, Section 10 of the Missouri Constitution, and the 5th, 6th and 14th Amendments to the United States Constitution, and it should not be countenanced by this Court.

CONCLUSION

This case is full of tragedy. A young woman was murdered. Her two children were brutally assaulted. An innocent man has spent 30 years in prison. The actual perpetrator of these brutal crimes has never been brought to justice. This Court has the power to reverse one of these tragedies and free an innocent man. Post-conviction DNA results prove that a key piece of evidence, a pubic hair found at the crime scene, used by the State to establish Appellant's identity as the perpetrator of these crimes and to corroborate the unreliable identification of Appellant by a seven-year old girl, establishes that Appellant is more likely than not innocent. Appellant met this burden and proved that no rational fact finder, based upon all of the evidence, could now fairly find Appellant guilty beyond a reasonable doubt. This miscarriage of justice violated Appellant's rights to Due Process of Law as guaranteed by Article I, Section 10 of the Missouri Constitution and by the 5th, 6th and 14th Amendments to the United States Constitution and of § 547.037 RSMo (2002**).**

WHEREFORE, for the forgoing reasons, Appellant prays this Honorable Court reverse the denial of his post-conviction motion for release and remand with directions granting release.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this ___ day of July, 2014, an electronic copy of the foregoing Appellant's Statement, Brief, and Argument was sent through the Missouri E-Filing System to Office of the Attorney General, at shaun.mackelprang@ago.mo.gov.

/s/ Laura O'Sullivan
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Certificate of Counsel Pursuant to Local Rule 360

Pursuant to Rule 84.06, counsel certifies that this brief complies with the limitations contained in Local Rule 360. Based upon the information provided by undersigned counsel's word processing program, Microsoft Word 2007, this brief contains lines of text and 12,855 words.

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