IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

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

MOTION FOR REHEARING AND/OR TRANSFER TO THE MISSOURI SUPREME COURT

From an Opinion dated December 2, 2014, by the Honorable Clifford H. Ahrens, J., Lawrence A. Mooney, P.J. and Glenn A. Norton, J.

COMES NOW appellant, Rodney Lee Lincoln, by and through undersigned counsel, and moves this court pursuant to Rules 83.02 and 84.17 to rehear this case *en banc* or, in the alternative, transfer it to the Missouri Supreme Court. In support of this motion, Appellant states as follows:

This Court overlooked material matters of law and fact when it held that the motion court's (Judge Robin R. Vannoy, presiding) denial of Rodney Lincoln's motion for release following post-conviction DNA testing pursuant to section 547.037 RSMo (Cum. Supp. 2004)[1] was not clear error. Division One of this Court made the following material mistakes as to facts and the law that require review: (1) the Court found that although the State relied on the microscopic hair comparison as evidence of the identity of the perpetrator at trial then reversed their position at

[1] All further statutory citations are to RSMo (Cum. Supp. 2004).

the motion to release hearing arguing the hair was irrelevant to the identification of the perpetrator, "[it] did not assert a new theory to explain away the post-conviction DNA results that is inconsistent with its interpretation of the evidence at trial." (Opinion p. 14); (2) the Court found that the identification by M.D. was unwavering and key to the conviction; (3) the Court reviewed the weight of the evidence to determine whether a jury *could* convict Mr. Lincoln rather than determining whether a jury *would* convict Mr. Lincoln as required by the Section 547.037; and, (4) the Court applied an unduly narrow reading of the statute, rendering the statute meaningless.

GROUNDS FOR TRANSFER

This case presents the following questions of general importance: (1) Where the State relied on the microscopic hair comparison as evidence of the identity of the perpetrator at trial then reversed their position at the Section 547.037 motion to release hearing arguing the hair was irrelevant to the identification of the perpetrator, is the State estopped from altering the theory used to obtain a conviction in order to gain an unfair advantage and maintain the conviction? (2) Does Section 547.037 require the Movant to prove by a preponderance of the evidence: (a) that the Movant **would not** have been convicted if exculpatory results had been obtained through the requested DNA testing; or (b) that Movant **could not** have been convicted if exculpatory results had been obtained through the requested DNA testing? And (3) Does the court's holding in this case and Bey v. State, 272 S.W.3d 378 (Mo.App. E.D. 2008) impermissibly narrow §547.037 so as to

make it meaningless by preventing the Movant from presenting information and arguments challenging the questionable nature of trial evidence in a motion for release pursuant to the statute? Does §547.037 prevent the Court from considering and weighing the credibility of the testimony of witnesses at trial in a motion for release hearing?

I. The Court overlooked material matters of law and fact when it found that although the State relied on the microscopic hair comparison as evidence of the identity of the perpetrator at trial then reversed their position at the motion to release hearing arguing the hair was irrelevant to the identification of the perpetrator, "[it] did not assert a new theory to explain away the post-conviction DNA results that is inconsistent with its interpretation of the evidence at trial." (Opinion p. 14).

1. The State and the jury relied upon the evidence of a microscopic hair comparison "match" of Appellant to prove the identity of the perpetrator and gain a conviction in this case. The court overlooked material matters of law and fact in finding, "[T]he lack of identity of the source of the hair did not prove Movant's innocence." (Opinion 7).

2. The State called 8 witnesses who testified regarding the collection and analysis of hair samples: Ronald Scaggs (Tr. Vol. III, 624); Donna Bell (Tr. Vol. III, 631-32); Joseph Crow (Tr. Vol. III, 634-39); Harold Messler (Tr. Vol. III, 642-55; Tr. Vol. IV, 717-31); Joseph Burgoon (Tr. Vol. IV, 740 - 45); Steven Jacobsmeyer (Tr. Vol. IV, 732-34); Michael Indelicata (Tr. Vol. IV, 734); George Bender (Tr. Vol. IV, 735-37). Two of these witnesses testified as experts detailing the microscopic hair comparison. The State introduced over 40 exhibits regarding the hair evidence. The experts excluded 37

alternate suspects while including Rodney Lincoln as the alleged perpetrator (Tr. Vol. IV, 726-730).

3. In establishing his "expertise," Messler testified that he can differentiate between hairs from a Caucasian person and hairs from Asian or Black people. (Tr. Vol. III, 651), and that microscopic hair comparison frequency studies indicate the population frequency of pubic hair in Caucasians. (Tr. Vol. III, 650-51). Over defense objection, the prosecution recalled Messler to testify that of the 39 samples compared, only Appellant's hair sample matched the hair found on the blue blanket. (Tr. Vol. IV, 717-18). Emphasizing the rarity of this match, he explained to the jury that in over 200 cases of Caucasian hair comparison, he never matched a hair recovered from a crime scene to more than one person. (Tr. Vol. IV, 718).

4. Messler's testimony that Appellant's hair matched the hair on the blanket constituted evidence of identity at trial, a necessary element of the crime the State must prove to meet the burden of proof[2]. The State argued that the perpetrator left the hair during the commission of the crime, and the hair matched Appellant. A significant portion of their case was devoted to presenting evidence to establish this hair comparison match to Appellant. Division One's decision that the court did not rely on this misapplies the facts and requires review.

[2] The Due Process Clause mandates, "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.ed.2d 368 (1970).

5. The Court seems to find that the State did not present a new theory because they still claim Movant is guilty. This interpretation of the caselaw is unreasonably narrow. In each case where the State seeks to maintain the conviction, they allege the Movant/defendant is guilty.

6. At trial, the State presented extensive testimony that the hair found on the blue blanket was left by the perpetrator of the crime. The State told the jury that this evidence corroborated the testimony of the M.D. During the DNA motion to release hearing, the State argued that the hair found on the blue blanket was not left by the perpetrator of the crime. The State speculated that it could have been left by any number of people because it was a dirty house, and argued that it was not an important piece of evidence to their case. These theories are clearly inconsistent.

II. The Court overlooked material matters of law and fact by finding that the identification by M.D. was unwavering and key to Appellant's conviction. (Opinion 11-14).

1. In finding that a jury would still convict, the court relies on M.D.'s identification. However, the court misapplies issues of law and fact when so holding. M.D.'s identification of the killer was not "unwavering." First, she said multiple times that "Bill" was the killer. When pressed by her sister, M.D. identified Gary Parris, ex-husband of Joanne Tate, as being involved in the killing.

2. The Court ignores the suggestive nature of the identification procedures in this case. In a passing reference, the opinion mentions the previous photos viewed by M.D. (Opinion 3). In fact, M.D. viewed 47 photos of individuals before viewing the suggestive

two person photo lineup[3]. The only similarity among the men in these photos is race – they were all white males. In other aspects, they do not resemble each other: some are young[4]; some are old[5]; many have long hair[6]; some are bald[7]; some have facial hair[8]; some do not; some are mug shots; some are not[9]; some have obvious identifying characteristics including eye glasses, eye abnormalities, scars or bruises[10]; some do not; some are heavy[11]; some are thin[12]; some are people M.D. knew; some are not. Many of the men in the photos are named William or Bill or Will or Billy. Many of the photos are the same men repeated in multiple photo lineups.[13]

3. This lack of physical resemblance is easily explained. The police did not have a physical description initially. The only description was a white man named Bill. After viewing 47 photos, M.D. thought the perpetrator looked like Dennis Smith. (Ex. 13). This "revelation" led to the creation of the composite sketch of Dennis Smith. (Ex. 10). After 4 photo lineups consisting of a minimum of 10 photos, M.D. was presented with a highly suggestive choice between two photos, one color photo[14] and one black and white

[3] Exhibits 113 a-j; 114a-l; 115 a-m; 116 a-l.
[4] See Ex. 113j, 114l, 115a, 115k.
[5] See Ex. 114a, 115b, 115d, 116b, 116j.
[6] See Ex. 113d-f, 114d, 114f, 114g, 114i-k, 115g, 115i, 115j, 115m, 116c, 116e.
[7] See Ex. 115d, 116l.
[8] See Ex. 113a-c, 113f, 114d, 114g-i, 115e, 115i, 116c, 116k.
[9] See Ex. 13, 113c, 115c, 117b.
[10] See Ex. 113i, 114e, 114h, 115h, 115j, 116h.
[11] See Ex. 114b, 115f, 116c.
[12] See Ex. 114a, 114c.
[13] See Ex. 113e, 114k; 113f, 114i; 113i, 114e, 116h; 113j, 114l, 115k, 116h; 114g, 115i; 114j, 115m; 114b, 115f.
[14] Ex. 117b

photo of Rodney Lincoln holding a jail placard[15], to identify the "bad man." This was immediately followed by a suggestive live four-person line-up in which Appellant was the only individual with short dark hair. (Ex. 11). After this suggestive identification and prior to testifying at trial, M.D. viewed the photo she identified of Appellant numerous times further tainting her memory and her in-court identification.

4. Seventy-two percent of convictions overturned after exculpatory DNA results involve eyewitness misidentification.[16] In nearly every DNA exoneration case involving eyewitness misidentification, the eyewitnesses "testified at trial that they were positive they had identified the right person." State v. Henderson, 27 A.3d 872, 889 (N.J. 2011). "[T]here is no relationship between the confidence which a witness has in his or her identification and the actual accuracy of that identification." State v. Chapple, 660 P.2d 1208, 1221 (Ariz. 1983), *superseded by statute on other grounds as stated in* State v. Benson, 307 P.3d 19, 34 (2013).

5. This Court and the circuit court misapplied the innocence standard of Section 547.037 by failing to consider the cumulative effect of the exculpatory DNA results in determining whether, in light of all the trial evidence, it is more likely than not a

[15] Ex. 117a

[16] http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited December 16, 2014)

reasonable jury would have returned a guilty verdict.[17] The Court's focus on determining the lynchpin, or smoking gun, is misplaced. The analysis is not a summary judgment analysis in which the Court considers the impact of each piece of evidence individually. Rather, the issue is whether the exonerating DNA results, in light of all the trial evidence, it is more likely than not a reasonable jury would have returned a guilty verdict. Under this analysis, the Court engages in a weighing process.

6. When viewed through this lens, Appellant proved, by a preponderance of the evidence, that a reasonable jury more likely than not, would not have convicted him if these exculpatory DNA results were presented to the jury. Appellant's exclusion as the source of the pubic hair, his exclusion as the source of the hair found on R.T.'s perineum, and the fact that none of his DNA was found on any physical evidence submitted at trial, including the murder weapons, the questionable testimony of M.D., as well as the evidence of innocence presented including evidence that he was at home at the time of the crime and that he was not at the Tate household any of the previous days meet this standard of proof.

7. The Court seems to adopt an affirmative requirement that Movant show the State "assertively and repetitively" used the pubic hair comparison as "affirmative proof" of guilt. (Opinion 9). This analysis of the evidence reveals the misapplication of the law in evaluating the weight of the evidence. The question before the court is not how the state

[17] The line between innocence and guilt in our legal system is drawn with reference to a jury's determination of reasonable doubt. Schlup at 328.

used the evidence at trial. The question before this court is how a reasonable trier of fact would weigh the evidence at trial and the evidence of the DNA results.

8. The Court overlooked or misinterpreted material matters of law and fact in relying on Wethington v. State, 665 N.E.2d 91 (Ind. Ct. App. 1995). Wethington is distinguishable in several important ways. The victim in Wethington provided an initial physical description of the perpetrator. In this case, M.D. did not provide an initial description. Additionally, the expert in Wethington did not testify the hair "matched" Wethington. In this case, Messler testified that Appellant matched the hair microscopically, he has never revealed a hair positively compared to more than one person in over 200 cases, and his comparison excluded the other 38 pubic hair samples he reviewed (Tr. Vol. IV, 717-18). Finally, and most importantly, "[T]he trial court expressly based its decision on witness credibility and made no mention of hair evidence." Wethington at 95. This case was tried to a jury. The basis of this decision is not part of the record; therefore, this Court must weigh the evidence in light of the new DNA results.

III. The Court overlooked material matters of law and fact when it reviewed the weight of the evidence to determine whether a jury ***could*** convict Mr. Lincoln rather than determining whether a reasonable jury ***would*** convict Mr. Lincoln as required by Section 547.037.

1. The Court's focus on determining the lynchpin, or smoking gun, is misplaced and reveals a misapplication of the law. The analysis is not a consideration of each piece of evidence individually. The evidence must be viewed in the context of the case as a whole. Under this analysis, the Court engages in a weighing process to determine

whether the exonerating DNA results make his claim of innocence "more probable, more credible and of greater weight." Fujita v. Jeffries, 714 S.W.2d 202, 206 (Mo. App. ED 1986).

2. "[A] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." In re Winship, 397 U.S., at 370, 90 S.Ct. at 1076 (Harlan, J., concurring). The standard of proof thus reflects "the relative importance attached to the ultimate decision." Id.

3. Regardless of the outcome, the preponderance of the evidence standard remains the same – more likely than not.[18]. Only one party can meet the preponderance of the evidence standard in a case. Fujita at 206. "To establish the requisite probability [that the petitioner is actually innocent by a preponderance of the evidence in a habeas proceeding], the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light [of new evidence of innocence]." Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. 2000). This definition of actual innocence in the 2000 Clay decision and the 1995 Schlup v. Delo, 513 U.S. 298, 330, 115 S. Ct. 851, 868, 130 L. Ed. 2d 808 (1995) decision sets forth the standard of proof applied in analyzing

[18] The Court makes note in its opinion that Appellant seeks release, not a new trial. The relief that results from the application of a particular standard of review does not alter the application of that standard of review. Spencer v. Zobrist, 323 S.W.3d 391, 398-400 (Mo.App. W.D. 2010).

the weight of the evidence to establish actual innocence. These cases were decided prior to the enactment of Sections 547.035 and 547.037 in 2001.

4. The post-conviction DNA statutes embody the legislature's balancing of competing interests: on one hand, finality of a conviction; and on the other hand, the real concern that DNA technology could produce exonerating results. In limiting the scope of the post-conviction DNA statutes, "the legislature did not want an innocent person to be convicted on evidence that would have rendered a different result if only it had been DNA tested." Hudson v. State, 190 S.W.3d 434, 441 (Mo. Ct. App. 2006); Section 547.035. The principles of comity and finality "must yield to the imperative of correcting a fundamentally unjust incarceration." Engle v. Isaac, 456 U.S. 107, 135, 102 S.Ct. 1558, 1576, 71 L.Ed.2d 783 (1982).

5. The Circuit Court erred in finding that "While Movant was not the source of the pubic hair on the blanket, this did not show that he was not in the house at the time of the crime and was not perpetrator of the crimes." (Opinion 6-7). This finding by the Court reveals the misapplication of law by reviewing the evidence to determine whether a jury **could** convict Appellant, rather than reviewing all of the evidence as a whole to determine whether a jury **would** convict appellant.

IV. The Court overlooked material matters of law and fact when it applied an unduly narrow reading of the statute so as to make the statute meaningless.

1. This Court's review of the evidence focuses on whether any rational juror could have convicted, looking to whether there is sufficient evidence which, if credited, could support the conviction. In so doing, the court has held that the assessment of the

credibility of the witnesses is beyond the scope of the court's review. Bey v. State, 272 S.W.3d 378 (Mo.App. E.D. 2008). Had the court properly understood that a jury would not have credited the testimony, it would have found the jury would not have convicted and granted relief.

2. Section 547.035.2(5) allows testing when, "A reasonable probability exists that the movant **would not** have been convicted if exculpatory results had been obtained through the requested DNA testing." (emphasis added). "Under Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the use of the word 'could' focuses the inquiry on the power of the trier of fact to reach its conclusion. Under Carrier, the use of the word **'would'** focuses the inquiry on the likely behavior of the trier of fact." Schlup at 330 (emphasis added). Section 547.037 requires a preponderance of the evidence standard that naturally implies the Carrier analysis. Schlup at 330.

3. "The hair comparison testimony therefore was **not the only evidence** the State had, and determining what was or was not the linchpin **would require the court to read the minds of the jurors,** and it cannot be decided after a review of the transcript 30 years later." (Opinion p. 6, quoting Circuit Court Opinion)(emphasis added). The Circuit Court refused to undertake the analysis necessary in this case to determine what reasonable triers of fact are likely to do.

4. The Circuit Court found that "while Movant was not the source of the pubic hair on the blanket, **this did not show that he was not in the house at the time of the crime and was not the perpetrator of the crimes."** (Opinion p. 6-7) "[P]etitioner's showing of innocence is not insufficient solely because the trial record contained sufficient

evidence to support the jury's verdict. The Court must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial" and determine what **reasonable triers of fact are likely to do**." Schlup at 331-32. As a result, the Court must review the DNA results in conjunction with other evidence, whether presented at trial or not, to determine whether reasonable triers of fact would convict Movant.

5. Concerning the hair found on R.T.'s perineum, the motion court noted that this evidence was not used at trial, as Messler had noted in his lab report that it was comparable to the head hair of R.T., and Movant was excluded as the source of the hair. (Opinion 7). The court relied on this in finding that the jury could convict Mr. Lincoln. This ignores the exculpatory DNA results excluding Appellant, as well as R.T. and any of her maternal relatives; however, presuming these exculpatory results were also presented at trial, a reasonable jury would conclude that this, along with the remaining evidence, establishes more likely than not, that Appellant is not guilty. There was no other evidence presented that would establish how this hair got on R.T., and new information calling into question the identification assures that a jury would not convict.

6. The Court found that Sections 547.035 and 547.037 do not give Movant the ability to attack M.D.'s credibility from the trial, however. Bey, 272 S.W.3d at 384. (Opinion 12). This Court's reading of the statute and the evidence required by Movant results in an unduly narrow reading of the statute. This would lead to the absurd result limiting successful cases to those convictions based solely on biological evidence. It would be rare if not impossible to obtain a conviction solely on the basis of that type of testimony.

This fails to consider the evidence available at the time. Testimony regarding biological evidence was limited in the 1980's, most commonly to serological examination or hair microscopy[19].

7. This Court seems to hold that if additional evidence is produced, the defense may not argue the credibility of the witnesses, only the weight of the testimony. Such a rule impossibly limits defense counsel. One cannot successfully argue the weight to be given to testimony without necessarily discussing the credibility. Pursuant to this application, anytime an eyewitness testified, the movant would lose because this analysis does not allow a meaningful review of the witness's testimony when the credibility of the witness cannot be challenged by the defense.[20] To the extent the Bey Court holds that a movant in a Section 547.037 motion to release cannot attack the credibility of the evidence at trial including the testimony of witnesses, Appellant in this case requests this existing law be reexamined.

8. This Court presumes that the legislature did not intend an absurd result. Weeks v. State, 140 S.W.3d 39, 47 (Mo. 2004) *citing* In re Beyersdorfer, 59 S.W.3d 523, 526 (Mo. banc 2001). The Court's application of the statute allows for DNA testing pursuant to Section 547.035.2(5) after Movant met the statutory requirements including proof that a

[19] The accuracy of both of these methods is now highly questioned. See "Invalid Forensic Science Testimony and Wrongful Convictions," 95 Va. L. Rev. 1 (2009)

[20] In Bey, this court allowed the State to present additional testimony by the victim in the case while preventing the defense from arguing the credibility of that testimony.

reasonable probability exists that the Movant would not have been convicted if exculpatory results had been obtained. However, when the Movant obtained those exculpatory results, he would not be entitled to relief pursuant to Section 547.037 if this Court's reading of the statute is permitted. "[T]his Court presumes that the General Assembly does not enact meaningless provisions." Weeks v. State, 140 S.W.3d 39, 45-46 (Mo. 2004) *citing* Bachtel v. Miller County Nursing Home Dist., 110 S.W.3d 799, 805 (Mo. banc 2003).

Therefore, the Court of Appeals, Eastern District, overlooked material matters of law and fact when it failed to reverse and remand for release. Appellant respectfully moves this Court to rehear this matter *en banc*, or to grant transfer to the Supreme Court of Missouri.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 17th day of December, 2014, the foregoing was placed for delivery through the Missouri e-Filing System to Karen Kramer, Assistant Attorney General, at Karen.Kramer@ago.mo.gov.

/s/ Laura O'Sullivan
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