

IN THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

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

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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

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APPELLANT’S REPLY BRIEF

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## Argument

**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).**

Respondent argues that the “mere” fact that one hair found at the crime scene was not Appellant’s does not exonerate Appellant because hair is easily transferable, citing Haddox v. State, 2004 WL 2544668 (Tenn. Crim. App. 2004). This is because, according to Respondent, Appellant’s guilt was proven by the “unwavering” eyewitness testimony of M.D. (Respondent’s Brief, pp. 11-13).

It should first be noted that the portion of Haddox relied upon by the State was a quotation from the *trial court’s* decision in that case, which was subsequently reversed by the Tennessee Court of Appeals for DNA testing of a baseball cap found at the crime scene and purportedly worn by the perpetrator. In Haddox, the petitioner sought post-conviction DNA testing of the baseball cap and hairs found in the cap. The hairs

themselves were never introduced into evidence during trial, and they were unavailable for testing at the time of the petitioner's request. Nevertheless, the Court of Appeals reversed for post-conviction DNA testing to be conducted on the baseball cap because there was a reasonable probability that the petitioner would not have been convicted if his DNA was not on the cap. This was so even though the petitioner had been identified by several eyewitnesses to the homicide. 2004 WL 2544668, at \*3.

In the present case, the State introduced the blue blanket pubic hair into evidence for the express purpose of identifying Appellant as the killer. Messler's scientifically unreliable hair comparison analysis was used to eliminate other individuals who had access to Joanne Tate's house, including her family members, and other suspects put forward by the defense, and left no doubt that the only person who could have deposited the pubic hair was Appellant. The prosecutor told the jury Appellant's hair "matched" the pubic hair from the crime scene four times during his arguments. Further, the prosecutor used the pubic hair to corroborate and bolster M.D.'s eyewitness identification of Appellant as the killer.

The results of the post-conviction DNA testing are exculpatory because they establish that Appellant is not the source of the pubic hair which was used by the State to identify him as the killer. As the Missouri case law cited in Appellant's opening brief requires, post-conviction DNA results must be viewed in the light of the evidence presented at trial and the State's theory of that evidence at trial. This only makes logical

sense because the jury's verdict was premised upon the evidence they heard and the prosecutor's interpretation of that evidence.

Respondent's argument that the pubic hair does not establish Appellant's innocence because the hair could have belonged to anyone ignores the fact that the hair was used by the State as inculpatory evidence of Appellant's guilt at trial. The misapplication of the innocence standard in this way, by both Respondent and the circuit court, improperly negates the exculpatory nature of the post-conviction DNA results when analyzed in the context of the evidence at trial.

This is bourn out by Haddox, the very case upon which Respondent relies in its brief. The Haddox Court held that purpose of the DNA Act is to correct a past mistake, i.e. a wrongful conviction which may have occurred because of mistaken identity or false testimony. 2004 WL 2544668, at \*5. The Tennessee Court of Appeals reversed the trial court's denial of post-conviction DNA testing noting that the "proper analysis for the trial court under the DNA Analysis Act *necessarily includes a consideration of the effect on the jury of evidence showing that the Petitioner's DNA was not present on the baseball cap that was worn by the perpetrator and recovered at the crime scene.*" *Id.* (Emphasis added).

Likewise, in the present case, the proper application of the innocence standard under Section 547.037 required the circuit court to analyze the effect on the jury of the exculpatory post-conviction DNA results, including the pubic hair, in the context of the

trial evidence. This would have necessarily included a consideration of the effect of those results on M.D.'s eyewitness identification of Appellant because the pubic hair was used to bolster that identification.

Respondent relies upon this Court's decision in Bey v. State, 272 S.W.3d 378, 384 (Mo. App. E.D., 2008), for the proposition that Section 547.037 does not allow an attack on the credibility of witnesses. (Respondent's Brief, p. 13).

Respondent's reliance on Bey is misplaced. The petitioner in Bey attempted to attack the credibility of the victim independent of the post-conviction DNA results. In Bey, the state introduced new evidence by the victim that she had intercourse with other men during the DNA motion to release hearing. Bey v. State, 272 S.W.3d 378, 381 (Mo. Ct. App. 2008). We do not have that in this case. The state did not present any additional or new evidence from the victim that would support an alternate source theory. Additionally, there is no evidence of a potential alternate source in the record.

In the present case, unlike Bey, the exculpatory DNA results have a direct correlation to M.D.'s credibility because the prosecutor linked the two at trial when he argued the public hair corroborated M.D.'s identification of Appellant as the killer. The very purpose of the DNA Act, as noted by Haddox, is to correct a wrongful conviction that occurred because of mistaken identity.<sup>1</sup> The DNA results in this case, when viewed in

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<sup>1</sup> Nationwide statistics show that "more than seventy-five percent of convictions overturned due to DNA evidence involved eyewitness misidentification." State v. Henderson, 27 A.3d 872, 886 (N.J. 2011). The circuit court took solace in the fact that M.D. did not "waver" in her identification of the Appellant. This alone, however, does

light of the trial evidence, raises a probability that M.D.'s identification of Appellant as the killer was mistaken.

Contrary to Respondent's assertion, M.D.'s identification of the killer was not "unwavering." (Respondent's Brief, p. 13). 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. M.D.'s identification of Appellant came only after being presented with a highly suggestive photo-spread followed by an even more suggestive line-up. The exculpatory DNA results now show that evidence used at trial to bolster M.D.'s identification - - the blue blanket pubic hair - - now weakens that identification. The Respondent in this Court and the circuit court below failed to address the effect the exculpatory DNA results would have on the jury's assessment of M.D.'s identification of Appellant as the killer.

Next, Respondent argues that the DNA testing of the hair on R.T.'s perineum does not establish that he is innocent of assaulting R.T. because the hair was never introduced at trial. Respondent further argues that this was not a sexual assault case because sexual

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not establish that her identification of Appellant was accurate. The Henderson Court noted that in nearly every DNA exoneration case involving eyewitness misidentification, the eyewitnesses "testified at trial that they were positive they had identified the right person." *Id.* at 889. These statistics confirm the experimental data cited by the Supreme Court of Arizona, in 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), which established that "there is no relationship between the confidence which a witness has in his or her identification and the actual accuracy of that identification."

assault was never charged and it was not proven that R.T. was sexually assaulted. (Respondent's Brief, pp. 12, 15-16).

First, the hair was not introduced during trial because it was misidentified by the State's expert as originating with M.D. using the same scientifically unreliable hair comparison analysis that was used to misidentify the public hair as belonging to Appellant. (PCH Tr., 27-28). There is little doubt the hair on R.T.'s perineum would have been introduced by the defense to establish Appellant did not commit the assault had the defense been aware that the hair did not originate with R.T., M.D., Joanne Tate or Appellant.

In addition, although Appellant was never charged with sexual assault, the State initially alleged the murder was committed during the course of a rape or sodomy, and the State's trial evidence left the distinct impression that the assaults involved sexual activity. The clothes of M.D. and R.T. were removed during their assaults. M.D. testified that the man put her legs around his hips and tried to get her to "do a few things." (Tr. Vol. II, 318-20). M.D. testified that when R.T. was being assaulted, M.D. saw her sister's legs dangling over the bedside. A nurse and the coordinator of the sexual abuse trauma team testified that the reddening around R.T.'s rectum was an indication of sexual abuse. (Tr. Vol. II, 493-94).

Further, the State's Notice of Amended Aggravating Circumstances alleged the "offense was committed while the defendant was engaged in the perpetration or in the

attempt to perpetrate the felony of rape or forcible rape or the felony of sodomy or forcible sodomy.” (Legal File from 47955, 93). The notice went on to state that the testimony of the endorsed witnesses “concerning the circumstances of the murder” would be offered to prove that Appellant committed or attempted to commit rape or sodomy. (Legal File from 47955, 94).

Given the evidence and allegations of sexual assault upon the two girls, the DNA results excluding Appellant as the originator of a hair found in the perineal area of R.T. is an exculpatory result. Certainly, had the DNA results excluding Appellant as the source of the hair been known at the time of trial, the State would have been required to disclose it as exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963). Respondent’s argument that the DNA results are not now to be considered exculpatory and relevant to Appellant’s claim of innocence is untenable.

Finally, Respondent 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 reasonable jury would have returned a guilty verdict. The question is not whether individual results standing alone exonerate Appellant by a preponderance of the evidence. Rather, the issue is whether Appellant’s exclusion as the source of the crucially important 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, makes 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).

The line between innocence and guilt in our legal system is drawn with reference to a jury’s determination of reasonable doubt. Schlup v. Delo, 513 U.S. 298, 328, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). When the exculpatory DNA results are viewed cumulatively in light of the trial evidence, it is more probable than not that a reasonable jury would have found Appellant not guilty.

**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).**

Respondent asserts the State is not arguing inconsistent theories because it is not asserting the facts at Appellant's trial are still true while *at the same time* asserting the pubic hair belongs to someone else. Rather, according to Respondent, the State's argument at trial would have been different had the exculpatory DNA results been known. (Respondent's Brief, pp. 28-29).

Respondent's view of estoppel is not legally supportable. In Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990), the Ninth Circuit held that "judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one." In Rolfs, the state argued in a federal habeas proceeding that federal review was improper because the petitioner had "an adequate and available state court remedy." After the federal habeas was dismissed, the petitioner sought the state court remedy. In

the course of the state proceedings, the state argued that the remedy was not available because the petition was procedurally barred. *Id.*

The Ninth Circuit held the state was judicially estopped from arguing the petitioner's claims were procedurally barred in federal court because it had previously taken the contradictory position that the petitioner had an adequate and available state court remedy in securing the dismissal of the federal habeas petition. 893 F.2d at 1038-39.

In the present case, the State took the position at trial that the pubic hair "matched" Appellant, excluded everyone else that had access to Joanne Tate's house, and corroborated the eyewitness identification of M.D. to secure the jury verdict finding Appellant guilty. The State's current position, the position adopted by the circuit court, is that the pubic hair could have come from any number of people having access to Tate's house to secure a ruling that the DNA results, excluding Appellant as the source of the hair, do not prove his innocence. The State's current position is flatly inconsistent with that at trial and has been asserted to gain an unfair advantage in this proceeding under Section 547.037.

"A party who has gained an advantage by characterizing the law or facts involved in a case should not later be able to contradict that characterization in order to obtain a further advantage." United States v. Kepner, 843 F.2d 755, 760 (3d Cir. 1988). Thus, "[a] party can argue inconsistent positions in the alternative, but once it has sold one to the

court it cannot turn around and repudiate it in order to have a second victory.” Cont'l Ill. Corp. v. Comm'r, 998 F.2d 513, 518 (7th Cir. 1993).

Courts have held that when scientific evidence is repudiated, and the prosecution rested solely or largely upon that scientific evidence, the prosecution may not attempt to secure a conviction by changing the theory of the case to sidestep the change in science. For example, in Hildwin v. State, SC12-2101, 2014 WL 2882689 (Fla. June 26, 2014), the defendant was convicted based on serology that suggested he was the contributor of biological material found at the crime scene. DNA testing later showed that he was not the contributor, that, in fact, the contributor was the victim’s boyfriend. This was significant because Hildwin’s defense asserted that the boyfriend, and not Hildwin, was the killer. The State claimed on post-conviction that they could still convict Hildwin without the biological material, which represented a radical shift in their trial theory. The Supreme Court of Florida held:

The State cannot now distance itself from the evidence and theory it relied upon at trial by arguing that it could have still convicted Hildwin without any of the now-discredited scientific evidence. While that might be possible, we cannot turn a blind eye to the fact that a significant pillar of the State's case, as presented to the jury, has collapsed and that this same evidence actually supports the defense theory that Hildwin presented at trial.

Hildwin v. State, SC12-2101, 2014 WL 2882689 (Fla. June 26, 2014).

Respondent in the present case has taken a position inconsistent with the evidence and the theory of that evidence it presented at trial by arguing that the State could still have convicted Appellant without the now discredited “scientific” pubic hair evidence.

(Respondent's Brief, pp. 28-29). Such a radical shift in theory ignores the fact that the pubic hair evidence was a significant pillar in the State's case. It was used to identify Appellant as the killer and used to bolster the eyewitness identification of M.D. Simply put, the pubic hair was crucial to securing Appellant's conviction. The State should be estopped from now asserting a completely different theory of the evidence to gain an advantage in this proceeding in a clear attempt to negate the exculpatory nature of the post-conviction DNA results.

Appellant has carried the burden of proving his innocence under Section 547.037, and requests that this Court reverse the circuit court and order his release. In the alternative, Appellant requests a remand to the circuit court for a new hearing in which the State is estopped from asserting a factually inconsistent theory.

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 or, alternatively, remand for a new motion to release hearing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this \_\_\_\_ day of November, 2014, an electronic copy of the  
foregoing Appellant's Statement, Brief, and Argument was sent through the Missouri E-  
Filing System to Karen Kramer, Office of the Attorney General,  
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*/s/ Laura O'Sullivan* \_\_\_\_\_  
Laura O'Sullivan

## **Certificate of Counsel Pursuant to Local Rule 360 and 361**

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 2013, this brief contains lines of text and 3320 words.

Respectfully Submitted,

*/s/ Laura O'Sullivan*

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