**No. ED100987**

**In the**
**Missouri Court of Appeals**
**Eastern District**

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**RODNEY LEE LINCOLN,**

**Appellant,**

**v.**

**STATE OF MISSOURI,**

**Respondent.**

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**Appeal from City of St. Louis Circuit Court**
**22nd Judicial Circuit**
**The Honorable Robin R. Vannoy, Judge**

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# RESPONDENT'S BRIEF

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**CHRIS KOSTER**
**Attorney General**

**KAREN L. KRAMER**
**Assistant Attorney General**
**Missouri Bar No. 47100**

**P.O. Box 899**
**Jefferson City, MO 65102**
**Phone: (573) 751-3321**
**Fax: (573) 751-5391**
**Karen.Kramer@ago.mo.gov**

**ATTORNEYS FOR RESPONDENT**
**STATE OF MISSOURI**

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## STATEMENT OF FACTS

Appellant, Rodney Lee Lincoln, was charged with one count of capital murder, Section 565.001, RSMo 1978, and two counts of first degree assault, Section 565.050, RSMo 1978. *State v. Lincoln*, 705 S.W.2d 576, 577 (Mo.App.E.D. 1986). A jury found defendant guilty of the lesser included offense of manslaughter under the murder count and guilty of the two counts of first degree assault. *Id.* He was sentenced as a persistent offender to fifteen years for the manslaughter to run consecutive to two consecutive life terms for his assault convictions. *Id.*

This Court summarized the facts of the case as follows:

> On April 27, 1982, Joanne Tate and her two daughters were at home on a first floor apartment in a multi-family flat located in St. Louis, Missouri. About 4:00 a.m., an upstairs neighbor heard a loud "bang" from the victim's apartment. About 10:00 a.m., Mr. Gerald Woodward, Joanne Tate's boyfriend, and Nathaniel Clenney, Ms. Tate's brother, drove to her apartment. They entered the door and saw her lying dead face down in a pool of blood. Melissa Davis and Renee Tate were found lying in a bed covered with blood. They both had multiple stab wounds.
>
> At trial Melissa Davis, age 8, testified she was awakened on the night of the incident by a scream. Melissa saw her mother

lying on the floor on her stomach surrounded by blood and a naked man standing over her. Melissa testified the man "came over to my bed and picked me up ... took me into Mother's room ... started taking my clothes off ... put my legs on his hips ... and started hurting me." The man stabbed her approximately eight times. Melissa played "possum" and the man stopped stabbing her and went into the kitchen to wash off the knife. Melissa then heard the man "hurting" her sister. Melissa subsequently fell asleep and in the morning found the man was gone.

After a composite drawing of the suspect was made and released to the news media, two of Joanne Tate's relatives saw the drawing and identified the man. A photograph of the suspect in a photo display was shown to Melissa who identified the person in the photograph as the defendant. Officer Burgoon testified that when the photographic display was shown to Renee Tate, age 4, "[s]he threw the [defendant's] photograph down on the table and covered up her eyes with her hands." Melissa later positively identified defendant as her assailant at a four-person lineup at the police station.

*Id.* at 577-578.

Appellant's conviction and sentence were affirmed on direct appeal. *State v. Lincoln*, 705 S.W.2d 576 (Mo.App.E.D. 1986). This Court also affirmed the denial of postconviction relief under Supreme Court Rule 27.26. *Lincoln v. State*, 755 S.W.2d 706 (Mo.App.E.D. 1988).

On March 3, 2005, appellant filed a motion for DNA testing pursuant to Section 547.035 (DNALF 2, 7-12). An amended motion was subsequently filed (DNALF 2-3, 13-19). The State was ordered to show cause why it should not be required to conduct DNA testing (DNALF 20). The state filed a motion to dismiss appellant's motion for DNA testing (DNALF 21-28). Appellant filed suggestions in opposition to the State's motion to dismiss (DNALF 44-48). Appellant subsequently filed a second amended motion for DNA testing (DNALF 50-58).

The parties stipulated to several items being submitted to the Serological Research Institute for DNA testing, including a pubic hair found on a blue blanket and a hair found near R.T.'s perineum (DNALF 85-87). Subsequent to DNA testing, appellant filed a Motion for Release pursuant to Section 547.037 (DNALF 59-84). The State filed a motion to dismiss appellant's motion for release (DNALF 89-101).

On April 24, 2012, appellant filed a third amended motion for postconviction DNA testing (DNALF 118-157). The parties stipulated to submitting materials to The Bode Technology Group for DNA testing

(DNALF 156-162). Subsequently, appellant filed an amended motion for release pursuant to Section 547.037 (DNALF 163-167). The parties stipulated as to the DNA results (DNALF 168-211).

On December 24, 2013, the trial court issued findings of fact, conclusions of law, order, and judgment denying appellant's motion for release (DNALF 6, 212-227).

## ARGUMENT

## I.

**The trial court did not clearly err in denying appellant's motion for release under Section 547.037 because the postconviction DNA test results did not demonstrate appellant's innocence of the charged crimes.**

Appellant claims that the motion court clearly erred in denying his motion for release because the results of the DNA tests demonstrated that he was innocent of the crimes for which he was convicted. The motion court correctly found that the DNA test results did not establish by a preponderance of the evidence that appellant was innocent of the crimes for which he was convicted.

### A. Standard of review.

The statute permitting an inmate to file a motion for release on the basis of DNA testing provides that "[a]n appeal may be taken from the [motion] court's findings and conclusions as in other civil cases." Section 547.037.6, RSMo Cum.Supp. 2013. Therefore, this Court should apply to this appeal the same standard of review as in other post-conviction proceedings. *See Bey v. State,* 272 S.W.3d 378, 382 (Mo.App.E.D. 2008); *Snowdell v. State*, 90 S.W.3d 512, 514 (Mo.App.E.D. 2002) (construing an appeal from the denial

of a motion for DNA testing filed pursuant to section 547.035, RSMo Cum.Supp. 2001, which contains a similar provision).

Review of the denial of a post-conviction motion is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous. *Id.* A motion court's findings and conclusions are clearly erroneous only if, after review of the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. *Id.*

**B. Analysis**

Section 547.037, RSMo, provides that an incarcerated person who obtains DNA testing can file a motion for release when the testing demonstrates that person's innocence of the crime. § 547.037.1, RSMo 2002. If the prosecutor opposes the motion to release, a hearing shall be held at which the movant has the burden of proving the allegations of his motion by a preponderance of the evidence. § 547.037.4, RSMo 2002. The question before this Court then, is whether the motion court clearly erred in finding that Appellant failed to demonstrate by a preponderance of the evidence that he is innocent of the crimes of manslaughter and first degree assault.

Preponderance of the evidence "is that which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable

than not." *Fujita v. Jeffries*, 714 S.W.2d 202, 206 (Mo. App. E.D. 1986). Only one party to a contested matter can meet the preponderance of the evidence standard. *Id.* In deciding whether a party has met that standard, the trier of fact must resolve conflicting evidence, draw inferences, and decide which of the parties' positions are more probable, more credible and of greater weight. *Id.*

**1. The hair on the blanket**

Two DNA tests were performed that are relevant to appellant's motion. One was performed on a pubic hair found on a blue blanket. Criminalist Joseph Crow examined the blanket for hairs (Tr. 634). He found one hair that did not look like a hair from the deceased victim, Joanne Tate (Tr. 634). Crow believed that it was a pubic hair (Tr. 635). There easily could have been 50 hairs on the blanket (Tr. 635). Only the single pubic hair was examined, and it was compared to 37 other pubic hairs, in addition to appellant's and the victim's (Tr. 650). The state's expert, Harold Messler, initially did not express an opinion as to the hair (Tr. 650-651). Messler was subsequently recalled and testified as follows:

> Q. And totally you compared the hair found on the blanket to thirty-nine other people: the thirty-seven submitted to you, Rodney Lincoln's hair and Joanne Tate's hair; is that right?
>
> A. That's correct.

Q. And one out of those, which is Rodney Lincoln's hair, matched.

A. That's correct.

Q. And in the other two hundred cases that you have dealt with, concerning yourself with the Caucasion [sic] hairs that you've dealt with in the past, have you ever run across a circumstance where you had a hair from a scene that was matched to more than one person?

A. No, sir.

(Tr. 717-718). On cross-examination, Mr. Messler said that when he said a hair matched, he meant that "it compared favorably and had more or less the same characteristics." (Tr. 718). When asked if he could tell that a particular hair came from a particular person, Mr. Messler said, "Not usually, no. If a hair had very many individual characteristics, you could. But it's not very common at all." (Tr. 718).

Subsequent mitochondrial DNA testing revealed that the hair was not appellant's, nor did it belong to any of the victims (DNALF 173). But this evidence does not demonstrate that appellant was innocent of the charged crimes. Hairs subjected to DNA analysis that are found to be hairs of someone other than appellant do not exonerate appellant as hairs are easily transferable. *See, e.g., Haddox v. State*, 2004 WL 2544668 (Tenn.Crim.App.,

2004) (finding that petitioner would not be exonerated if DNA proved that hairs on cap were not his because hairs are easily transferable). The mere fact that the one hair out of numerous available hairs was not appellant's does not establish that appellant was not in that apartment that night and did not commit the manslaughter and the assaults.

In addition, the hair did not establish who committed the crime. This is not a sexual assault case where sperm or semen left behind could establish who committed the sexual assault. This is merely one hair (of many) that was found in the apartment; the fact that it was not appellant's did not prove that appellant was not in the apartment and did not commit the crimes therein. The hair was not necessary to prove an essential element of the crime, and thus the fact that the DNA evidence may have discredited it did not establish appellant's innocence. Appellant notes that there was no physical evidence tying appellant to the scene; but this is not unusual. A belief that there will always be some sort of testable physical evidence is a belief largely fostered in the media that does not play out in the day-to-day realities of criminal investigations. Simply put, the absence of appellant's DNA in one hair at the crime scene does not prove, by a preponderance of the evidence, that appellant was not present.

Even without the hair, a rational factfinder could fairly find appellant guilty beyond a reasonable doubt. This is because what proved appellant's

culpability was the eyewitness testimony of M.D., who never wavered in her identification of appellant as the perpetrator and only identified him after looking at over 40 pictures (Tr. 774). M.D.'s testimony was corroborated, as well, by her young sister's reaction upon seeing appellant's picture; when RT saw appellant's picture, she threw it on the table, covered her hands with her face, and started crying (Tr. 756-757). Her testimony was corroborated by appellant's statement and his mother's testimony; they both acknowledged that appellant knew Joanne Tate and her girls and that Joanne Tate and her girls had spent the night once at appellant's house (Tr. 750, 860-861). In addition, a package of cigarettes similar to those smoked by appellant was found at the victim's house; the victim did not smoke (Tr. 854-855, 909-910).

Appellant, however, argues that the victim was not credible (App.Br. 43-44). But Sections 547.035 and 547.037 "do not give the movant the right to attack witness credibility from the trial, but rather give the movant the opportunity to demonstrate his innocence by DNA testing." *Bey v. State*, 272 S.W.3d 378, 384 (Mo.App.E.D., 2008).

Appellant's argument largely rests on his assertion that the state relied on the testimony that the hair on the blanket was appellant's (App.Br. 34). Appellant asserts that Harold Messler's testimony was false (App.Br. 34). To the extent Messler's testimony could be understood to say that the hair was, in fact, appellant's, it was obviously incorrect, given the subsequent DNA

test, but to assert that it was "false" imputes unwarranted bad faith on Mr. Messler and the State. Mr. Messler was testifying based on the available science at the time. The defense did not put on any expert at the time to suggest that Mr. Messler's conclusions were wrong or his methodology incorrect.[1]

In any event, Mr. Messler's testimony was not as conclusive as appellant now tries to make it appear to be. To begin, Mr. Messler initially said that he could not form an opinion at all regarding the hair (Tr. 650-651). When he was recalled to the stand, he agreed with the state's assertion that the hair was a "match," (Tr. 717-718), but on cross-examination he explained that by "a match," he meant only that "it compared favorably and had more or less the same characteristics." (Tr. 718). When asked if he could tell that a particular hair came from a particular person, Mr. Messler said, "Not usually, no. If a hair had very many individual characteristics, you could. But it's not very common at all." (Tr. 718). Thus, given the totality of Mr. Messler's testimony, it cannot be said that he conclusively established that the hair was, in fact, appellant's.

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[1] Of course, appellant was under no obligation to do so. Respondent merely notes that the defense did not question the validity of the science regarding hair identifications as it existed in 1982.

**2. Hair on R.T.'s perineum.**

Appellant also suggests that the DNA testing of a hair found on R.T.'s perineum was "powerful evidence" that appellant was not the perpetrator of the assault. No evidence of this hair came in at trial. DNA testing revealed that a hair found on R.T.'s perineum was not hers, her sister's, her mother's or appellant's (DNALF 173).[2] But this finding does not establish appellant's innocence by a preponderance of the evidence. Again, hair is easily transferable, and R.T. was covered up with a blanket in her bed when she was found (Tr. 401). In fact, two human hairs and an animal hair were found on R.T.'s perineum (DNALF 176-177). The hairs could have been on the blanket. The hairs could have come from people in contact with the girls in the course of removing them from the home and transporting them to the hospital.[3] While appellant argues that there was testimony from a nurse that R.T.'s rectum was reddened and that it "could" indicate some sexual abuse (Tr. 493), appellant was never charged with any sexual act against R.T., nor

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[2] If respondent reads the DNA report correctly, there were two hairs on the perineum. One tested as set out above. The other did not come from appellant, but could have originated from any of the victims (Tr. 183).

[3] Respondent cannot find anything in the record that indicates when or how the hairs were collected.

was it ever proved that R.T. was sexually assaulted. Thus, the fact that a hair found on R.T.'s perineum (three hairs, actually) did not belong to appellant does not prove, by a preponderance of the evidence, that appellant did not assault R.T..

**3. Appellant's arguments regarding the state's evidence are without merit.**

Appellant argues that the State affirmatively and repetitively used the pubic hair on the blanket as affirmative proof of appellant's guilt (App.Br. 41). In fact, the State did not even refer to the hair in its opening closing argument. It was only after appellant repeatedly referenced the hair and called the evidence into question that the prosecution mentioned it in rebuttal.

Defense counsel argued in pertinent part, as follows:

"We have hair that they can't say is his." (Tr. 936).

"We have hair samples that aren't." (Tr. 942).

> And the neatest thing about the hair in this case is that thirty-seven samples were taken from people, not many of which had been in that house; and you've got at least twenty homicide people, paramedics, medical examiner people, however many people. You heard it and all the different agencies and staffs that they're from. All those people coming in and out of that house.

Nobody checked them. You can't tell how long it had been there. You can't tell anything except it might have come from him. Look around you. Who's got dark hair? Just look around you. And the thing that just got to me so bad is when this guy is shaking hairs off a blanket with a stick and then he's picking them off, I guess with a pair of tweezers, he looks at them, and if they're not strikingly different from any other one, he throws fifty of them away. In the trash, I guess. Can you tell me that there wasn't somebody with dark hair who matched Joanne Tate's hair, since you can't tell whether it was male or female? Can you tell me that the hair of the killer didn't go in the trash? He presumes and he wants you to presume that the hair they found that might, could somehow have come from him is the hair of the killer. And you don't know that, and the reason you don't know that is you can't tell, and they didn't prove it.

(Tr. 942-943).

Is there any indication anywhere of anything that connects Rodney Lincoln to that house, any anything, any blood, any prints, any anything that you could say this fact, this fact and this fact proves to me beyond a reasonable doubt that he was there that night? Anything?

(Tr. 946).

> Told you twenty or twenty-five people were in and out of there. Are there any pubic hair samples provided to you by all of those people that their experts can say match or don't match, compare or don't compare, could have or might have come from somebody?

(Tr. 949).

> What else did you hear in this case? You heard Harold Messier say you can't tell how long a hair's been somewhere, because laying there it doesn't deteriorate. Okay. He's the expert, but if you give him that, what does that prove? Crow said — and I think it's critical — that you can't ever say that a hair came from anyone in particular. So what does that leave you? It leaves you all of this stuff which proves four days ago what I said they'd prove, and it leaves you with a child who is most inconsistent.

(Tr. 952).

It was in response to this extensive argument by defense counsel about the hair that prompted the prosecution to argue as follows:

> 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. Melissa Davis does not. Renee Tate 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. Messier 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 tells you there's absolutely no corroboration.

(Tr. 957).

Thus, while appellant is correct that the State mentioned the hair in its rebuttal closing argument, this was not because the state's case was dependent on the hair; this was because the defense made the hair an issue in closing argument. If the hair was crucial to the state's case, it would have been mentioned in the state's initial closing argument. Moreover, even without the hair, M.D.'s testimony was corroborated, as discussed above.

Appellant argues that the state used 8 witnesses to testify about the collection of the hair evidence and that the evidence was used to exclude other people as potential suspects (App.Br. 42). But the state's use of the hair evidence to negate the defense's argument calling into question the

thoroughness of the investigation does not translate into a finding that the DNA evidence proved a preponderance of the evidence that appellant was, in fact, innocent. The state's identification of appellant as the murderer was not contingent upon a hair; it was contingent on the identification made by one of the victims who saw the man attacking her and who knew him from previous encounters.

In any event, the standard is not, as appellant suggests, whether the hair evidence "did not influence the jury's verdict." (App.Br. 41). The standard is whether the DNA evidence proves appellant's innocence by a preponderance of the evidence, and it does not.

Appellant's arguments do not demonstrate how the DNA evidence proves he is innocent; rather, he attacks the state's evidence in an attempt to show that he was prejudiced by it. But the standard is not to show prejudice, as one might on a direct appeal or a postconviction appeal. The standard is not to show that the evidence might have influenced the verdict (App.Br. 45). The standard is not to show grounds for a retrial. It is not enough that appellant show a reasonable probability that he might be found innocent on retrial. Appellant does not seek a retrial; he seeks *release*. And thus, he must show, by a preponderance of the evidence that he is, in fact, innocent. And the DNA evidence in this case simply does not demonstrate that appellant was innocent.

In short, the motion court did not clearly err in finding that appellant failed to demonstrate, by a preponderance of the evidence, that he was in fact innocent. The court therefore did not clearly err in denying appellant's motion for release.

Appellant cites two Wisconsin cases, *State v. Hicks*, 549 N.W.2d 435 (Wis. 1996), and *State v. Armstrong*, 700 N.W.2d 98 (2005), wherein the convictions were reversed for new trials because of DNA evidence. There are important differences, however. First, unlike *Hicks* and *Armstrong*, appellant was identified by an actual victim of the crime as the actual perpetrator and, what is more, the victim was acquainted with appellant. In *Hicks*, the victim was not previously acquainted with the defendant. In *Armstrong*, the defendant was not identified by a victim of the crime (inasmuch as the sole victim was deceased), but was identified by witnesses as having been at the victim's apartment at the time of the murder. This evidence consisted of a witness who heard music coming from the apartment and the fact that appellant liked the album that the witness heard playing. *Id.* at 653. The other witness's testimony was based on hypnotically enhanced memory. *Id.* at 107. This witness also picked Armstrong out of a lineup, but the witness noted that all of the other participants in the lineup were wearing shoulder-length wigs and he felt that the line-up "was fixed." *Id.* at 108.

Thus, unlike *Armstrong* and *Hicks*, in the present case, appellant was identified by the victim as the man who assaulted her, and she was previously acquainted with appellant. The identification in the present case wasn't nearly as questionable as those in *Armstrong* and *Hicks*.

Another critical difference between *Armstrong* and *Hicks* and the present case is that *Armstrong* was a postconviction motion for new trial based on newly discovered evidence and *Hicks* was a claim of ineffective assistance of counsel. These cases sought only a new trial. Appellant, in the present case, does not seek a new trial; he seeks to be released. Thus, the cases involve entirely different standards. *Armstrong* and *Hicks* did not require a showing, by the preponderance of the evidence, that the defendants were, in fact, innocent. Unlike *Hicks*, appellant is not seeking an opportunity for the jury to hear and evaluate the DNA evidence. *Hicks,* 549 N.W.2d at 441 (App.Br. 39). Unlike *Armstrong*, the question is not whether the controversy of identification was "fully tried," which does not require the reviewing court to find a substantial probability of a different result on retrial. 700 N.W.2d at 120, n. 26. Appellant seeks to be released, which requires that he show, by a preponderance of the evidence, that he is, in fact, innocent. Thus, the cases appellant cites from Wisconsin are not apposite.

Appellant goes to great lengths in his brief to define the term "innocent," in an attempt to suggest that the circuit court held him to too

high a standard in requiring him to prove that the evidence in question would exonerate him (App.Br. 29-31). While appellant notes that Section 547.035 does not define the term "innocence," (App.Br. 29), in the absence of a statutory definition, words are to be given their plain and ordinary meaning as derived from the dictionary. *State v. Sutherland*, 436 S.W.3d 645, 648 (Mo.App.E.D. 2014). In construing statutes, the primary rule is to ascertain the intent of the lawmakers by considering the plain and ordinary meaning of the words used in the statute. *State ex rel. Nixon v. Mahmud,* 11 S.W.3d 718, 720 (Mo.App.W.D. 1999). The dictionary definition of innocence applicable in the present case is "freedom from legal or specific wrong; guiltlessness." http://dictionary.reference.com/browse/innocence?s=t, last accessed on October 17, 2014.

Appellant contends that the circuit court applied "a more exacting standard" in that it required that the DNA evidence exonerate appellant (App.Br. 31). The standard applied by the circuit court was correct, however. The burden was on appellant to prove, by a preponderance of the evidence, that he was innocent of the crimes of manslaughter and assault. *Bey v. State*, 272 S.W.3d 378, 383 (Mo.App.E.D. 2008). To "exonerate" someone is "to clear, as of an accusation; free from guilty or blame; exculpate." http://dictionary.reference.com/browse/exonerate?s=t, last accessed October 17, 2014. Thus, the circuit court, in referencing whether or not the DNA

evidence "exonerated" appellant, was doing no more than determining whether appellant had demonstrated that he was free of guilt or blame, that is, whether he was innocent of the crimes. Appellant contends that the circuit court required a showing of "innocence to absolute certainty." (App.Br. 31). The court required a showing of innocence by a preponderance of the evidence, which is the correct standard (DNALF 226-227). The mere fact that the court did not find that DNA evidence demonstrated appellant's innocence, as discussed above, does not establish that the court applied an improper standard.

Appellant also suggests that the circuit court erred because it only found the blue blanket hair and the hair on R.T.'s perineum to be relevant and did not consider all of the evidence (App.Br. 31). That is not true. The circuit court expressly stated that "the lynchpin to the conviction in this court's opinion was the testimony of M.D." (DNALF 224):

> M.D. picked movant defendant's photograph, Exhibit 117a, and identified him as the perpetrator (Tr. 332-333, 752). While the photo-spread may have been improper and suggestive, [footnote omitted], M.D. had other occasions in which she identified movant/defendant as the attacker.
>
> M.D. also identified movant/defendant in a lineup (Tr. 755). A photograph of the lineup marked Exhibit 11 was shown to M.D.

at trial and she picked movant/defendant as the perpetrator (Tr. 333). M.D. also made an in-court identification of movant/defendant (Tr. 334). In addition, on re-direct examination, the following exchanged [sic] occurred between Mr. Bauer and the child witness M.D.:

Q. Do you remember that same day when Mr. Hampe and me were there, and Mr. Hampe was asking you some questions, and he asked you the questions, "okay. [M], who told you that Rodney Lincoln did this?" Do you remember your answer? "Nobody. All I knew that it was him."

A. Yes, sir.

Q. And when Mr. Hampe asked you a question that same day and asked you, "Is Bill[4] taller than Rodney? Do you remember your answer, "They're the same person?"

A. Yes, sir. (Tr. 387-388)

The child's testimony never wavered that it was in fact movant/defendant who attacked the family. The hair comparison testimony therefore was not the only evidence that the State had,

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[4] From the onset of the investigation, the minor child M.D. said that "Bill did it." (Tr. 394) [footnote in original].

> and determining what was or was not the lynchpin 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.

(DNALF 224-225). Thus, the circuit court did consider evidence other than just the DNA evidence. It simply did not reach the conclusion appellant hoped for.

In sum, the circuit court did not clearly err in denying appellant's motion for release because appellant failed to prove, by a preponderance of the evidence, that he was, in fact, innocent. Appellant's claim is thus without merit and should be denied.

## II.

**The circuit court did not clearly err in finding that the pubic hair did not exonerate appellant.**

Appellant contends that the circuit erred in failing to estop the State from asserting a new theory to explain away the allegedly exonerating post-conviction DNA results (App.Br. 46). Appellant contends that the new theory is "factually inconsistent" with the State's interpretation of the evidence at trial (App.Br. 46).

### A. Standard of review.

The statute permitting an inmate to file a motion for release on the basis of DNA testing provides that "[a]n appeal may be taken from the [motion] court's findings and conclusions as in other civil cases." Section 547.037.6, RSMo Cum.Supp. 2013. Therefore, this Court should apply to this appeal the same standard of review as in other post-conviction proceedings. *See Bey v. State,* 272 S.W.3d 378, 382 (Mo.App.E.D. 2008); *Snowdell v. State*, 90 S.W.3d 512, 514 (Mo.App.E.D. 2002) (construing an appeal from the denial of a motion for DNA testing filed pursuant to section 547.035, RSMo Cum.Supp. 2001, which contains a similar provision).

Review of the denial of a post-conviction motion is limited to a determination of whether the motion court's findings of fact and conclusions of law are clearly erroneous. *Id.* A motion court's findings and conclusions

are clearly erroneous only if, after review of the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. *Id.*

**B. Analysis.**

Appellant suggests that the state impermissibly used factually inconsistent prosecutorial theories (App.Br. 47). The cases that appellant relies on, however, do not apply to the present situation. *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), and *State v. Carter*, 71 S.W.3d 267 (Mo.App.S.D. 2002), involved cases where the prosecution used inconsistent prosecutorial theories for two defendants convicted of the same crime.

The state in the present case is not using inconsistent prosecutorial theories. The state is not asserting that the facts at appellant's trial are still true – i.e., that the pubic hair was appellant's – while at the same time arguing that the pubic hair belongs to someone else. On the contrary, the state is recognizing that the identity of the pubic hair, asserted in good faith at the time of trial, has been demonstrated not true, and that if the state had known that at the time of trial, its arguments at trial, in part, would have been different (inasmuch as the argument regarding the hair would not have been made), whereas its overall theory that appellant was the culprit would have remained the same. This is not "mere gamesmanship" as appellant suggests (App.Br. 48). Prejudice is examined in this manner all of the time.

For example, if a defendant argued that his counsel should have objected to an instruction, and if it turns out the instruction was incorrect, the assumption is that a correct instruction would have been given had the objection been made, not that the state was bound to the instruction as submitted.

And in any event, this is not a question of demonstrating mere prejudice. This is a question of whether appellant proved, by a preponderance of the evidence, that the DNA evidence proved that he was innocent. As discussed in Point I, *supra*, it didn't. The ultimate issue isn't how the state argued the evidence at trial. The issue isn't how the case would be retried, inasmuch as appellant is not seeking a retrial. The issue is whether the fact that one of numerous hairs at the scene was found not to belong to appellant demonstrated that he did not commit the crime. Appellant could easily have gone into the apartment, killed Joanne Tate, brutally assaulted her two daughters, and never left behind any hair at all. Thus, the fact that the hair in question turned out not to be appellant's does not prove that he is innocent, and it does not render it impossible for a rational fact finder, based upon all of the evidence, to fairly find appellant guilty, as appellant suggests (App.Br. 52).

Appellant points to cases from other states wherein he claims that the courts rejected the State's attempts to "explain away" exonerating DNA

evidence (App.Br. 48-). But these cases involved situations where the defendant sought a new trial, not, as here, where appellant seeks release. In *Commonwealth v. Reese,* 663 A.2d 206 (1995), the movant filed a postconviction motion for a new trial based on after-discovered evidence. The state put on evidence at the evidentiary hearing that it had not presented at trial in an attempt to show that the DNA evidence was not exculpatory. But in the present case, appellant does not seek the opportunity for the jury to consider the evidence in question. Appellant asserts that the evidence warrants his release. The burden, then, is on him to prove by a preponderance of the evidence that he is, in fact, innocent, and this he has not done.

Appellant also relies on *State v. Hicks*, 549 N.W.2d 435 (Wis. 1996). Again, a critical difference between *Hicks* and the present case is that *Hicks* involved a claim of ineffective assistance of counsel, and the defendant sought only a new trial. Appellant, in the present case, does not seek a new trial; he seeks to be released. Thus, the cases involve entirely different standards before relief will be granted. *Hicks* did not require a showing, by the preponderance of the evidence, that the defendant was, in fact, innocent. Unlike *Hicks*, appellant is not seeking an opportunity for the jury to hear and evaluate the DNA evidence. *Hicks,* 549 N.W.2d at 441 (App.Br. 39). Thus, *Hicks* is inapposite.

Similarly, in *State v. Armstrong*, 700 N.W.2d 98 (2005), *Armstrong* involved a postconviction motion for new trial based on newly discovered evidence and thus sought only a new trial. Appellant, in the present case, does not seek a new trial; he seeks to be released. Thus, *Armstrong*, too, involves an entirely different standard before relief will be granted. *Armstrong* did not require a showing, by the preponderance of the evidence, that the defendants were, in fact, innocent. Unlike *Armstrong*, the question is not whether the controversy of identification was "fully tried," which does not require the reviewing court to find a substantial probability of a different result on retrial. 700 N.W.2d at 120, n. 26. Appellant seeks to be released, which requires that he show, by a preponderance of the evidence, that he is innocent. Thus, *Armstrong* is also inapposite.

In sum, the circuit court did not err in overruling appellant's motion for release because appellant failed to prove by a preponderance of the evidence that he was innocent, and the state did not improperly rely on conflicting prosecutorial theories. Appellant's claim is without merit and should be denied.

## CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's motion for release be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

*/s/ Karen L. Kramer*
KAREN L. KRAMER
Assistant Attorney General
Missouri Bar No. 47100

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Karen.Kramer@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 6,217 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2010 software; and

2. That a true and correct copy of the attached brief, was sent through the eFiling system on October 20, 2014, to Laura O'Sullivan, Senior Counsel, Mitwest Innocence Project, UMKC Law School, 500 East 52nd Street, 039 Law School, Kansas City, MO 64110.

/s/ *Karen L. Kramer*
KAREN L. KRAMER
Assistant Attorney General
Missouri Bar No. 47100

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Karen.Kramer@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI