

No. 34424-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROY WAYNE RUSSELL JR.,

Appellate.

COURT OF APPEALS
DIVISION II
07 MAY - 8 PM 1:29
STATE OF WASHINGTON
BY DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John P. Wulle

STATEMENT OF ADDITIONAL GROUNDS

ROY W. RUSSELL #713291 B-A-11
CLALLAM BAY CORRECTIONS CENTER
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A. NATURE OF THE CASE AND DECISION:

Roy Russell was charged with second degree felony murder, alternatively second degree intentional murder, or alternatively first degree manslaughter, in the death of fourteen-year old C.M.H. who was a guest at his house on November 1, 2005. CP 11-12. The trial gained substantial media attention in the Vancouver metropolitan area including television coverage. Following the jury trial Mr. Russell was convicted as charged. CP 328-30. Finding by a preponderance of the evidence that Mr. Russell had suffered two prior qualifying convictions, the court found Mr. Russell to be a persistent offender and sentenced him on the conviction for intentional second degree murder to a term of life imprisonment without the possibility of parole. CP 434-446. The court merged the two remaining counts with the count upon which it sentenced Mr. Russell. CP 439.

B. ISSUES PRESENTED FOR REVIEW:

TESTIMONY WAS GIVEN AT TRIAL THAT WAS HEARSAY UNDER ER 802 AND SHOULD NEVER BEEN HEARD BY THE JURY THE COURT ERRORED IN ALLOWING THIS.

1. Christine Bisson's testimony as to the identification of Mr. Russell was total hearsay under ER 802.

2. This testimony violated Mr. Russell's constitutional right under the sixth amendment of the United States Constitution

3. This can be brought up for the first time on appeal under **RAP 2.5 (a)(3)**, as long as the error is affecting a constitutional right.

DEFENSES MOTION TO CONDUCT A FRYE HEARING ON STATES DNA EVIDENCE WAS WRONGFULLY DENIED BY THE COURT AND VIOLATED DEFENDANTS DUE PROCESS RIGHTS

1. By the court allowing this DNA evidence in trial, it allowed the state to violate the discovery deadline.

2. Discovery deadline could have been met, but the state had to have a second DNA test.

3. The state in its offer of proof did not meet the burden of showing YSTR DNA evidence is accepted by the scientific community, this is the major question concerning; FRYE v. UNITED STATES 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923).

THE STATE FAILED TO PROVIDE SCIENTIFIC EVIDENCE THAT THE USE OF THE "COUNTING METHOD" GIVING STATISTICAL EVIDENCE ON PERCENTAGE PROBABILITIES IS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY

1. This violates the standards

set in Frye v. United States.

2. Also ER 702 which is a determining factor in admissibility.

C. ARGUMENT:

TESTIMONY WAS GIVEN AT TRIAL THAT WAS TOTAL HEARSAY UNDER ER 802 AND SHOULD NEVER BEEN HEARD BY THE JURY, THE COURT ERRORED IN ALLOWING THIS.

Christine Bisson lives at 4009 N.W. Daniels Street, which is across the street from 4010 N.W. Daniels Street, the home of defendant Mr. Russell. RP 938. Mrs. Bisson testifies her dog barks everytime she see's Mr. Russell. RP 941. Basically Mrs. Bisson's testimony is that on the night of November 1, 2005, and the early morning hours of November 2, 2005, at around 12:05 AM. She was going to bed and her dog stuck its head out the window and started barking, indicating to her that her dog is seeing Mr. Russell. While in bed she noticed bright lights light up her drapes, as if a car was backing out of the drive way of 4010 N.W. Daniels St., as her dog started barking again she deduced this to be Mr. Russell. She could not identify the person and/or vehicle backing up, since she herself never looked out the window. But from her dog barking she was

certain it was infact Mr. Russell out in his car backing-up at that hour. This so-called eye witness testimony places Mr. Russell at his home long after he told police he left, and puts him at the murder scene with the victim. **RP 938-946**. This is total Hearsay, clearly her dog was the suposed witness not her, and her testimony prejudiced Mr. Russell tremendously, therefore under ER 802 it should never have been allowed. Also it violates his sixth amendment right to confrontation, this in its self requires reversal.

ER 802 HEARSAY RULE;

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

UNITED STATES CONSTITUTION SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**DEFENCES MOTION TO CONDUCT A
FRYE HEARING ON STATES DNA
EVIDENCE WAS WRONGFULLY DENIED
BY THE COURT AND VIOLATED
DEFENDANTS DUE PROCESS RIGHTS**

On December 27, 2005 the court was made aware of possible DNA evidence the state had in its possession, **RP 18-19**, this evidence has been in the states control since November 2, 2005. **RP 220**. The Washington State Patrol, hereafter (WSP), crime lab in Seattle took this evidence as far as it could. There conclusions are that the DNA taken from both the left hand and right hand scrappings "match" the profile of Chelsea Harrison, (the victim). **RP 851**. Noting that here in the left hand scrapping was a marker, one area of DNA, a little peak that needs to cross what is called the "threshold" for validation. **RP 851-852**. His final conclusions are that the DNA from the left hand and right hand scrappings match that of Chelsea Harrison. And that on the left hand there's a trace amount of DNA, of limited genetic information. Of which he could do no further testing. **RP 852-853**. The WSP crime lab suggested "YSTR" testing, because there might be something that was below the threshold, and that would be contributed by a male. And that the only other information or conclusions he could come to is that both DNA profiles match that of Chelsea Harrison. **RP 853-854**. At that point it was requested to be sent to a private DNA Lab in New

Orleans for further testing. **RP 19.** Defense moved to have an expert appointed, Mr. Grimsbo, this new and second DNA test was scheduled for January 5, 2006, so the defense expert Mr. Grimsbo could personally attend the testing process. Since the sample was so small it would all be consumed in this test. Leaving no material left over for the defense to test on follow-up, and try to get their own results, this test is called "YSTR" DNA testing. **RP 19-20.** The state moved the test up to December 27, 2005 but defenses expert Mr. Grimsbo could not make that date, and the defense could not get into court on this until today, the day of testing, because of the Christmas holiday. **RP 21.** The state also understands this material will be consumed during testing, because its so small. **RP 22.** As stated before when the trace evidence was discovered it was sent to the WSP crime lab for testing. **RP 220.** But since using current "STR" DNA technology the state could not link this trace DNA evidence, that fell below there threshold to Mr. Russell. **RP 22-23.** No Washington State Crime Labs can preform "YSTR" DNA testing, sincthis is a new technology, and this lab in New Orleans can take this test further. **RP 22-24.** See defense motion RE

DNA testing in, RP 18-25. The state is allowed testing on any forensic evidence it has, but the state is being allowed to commit a discovery violation in order to test this DNA a second time. Since the first test could not tie Mr. Russell to the deceased. The state had this supposed DNA evidence in their control the whole time, they could have tested it before charging Mr. Russell, and not violated discovery, but rather they decided to charge him before this was even tested. Now the only remedy the court, or state thinks is appropriate, is for Mr. Russell to waive his speedy trial right. This is unfair, this whole situation was created by the state, had they have chosen to test this DNA evidence, before charging Mr. Russell with murder charges we would not be here today. But instead they went ahead, and since Mr. Russell has exercised his speedy trial rights, now we are told the remedy is simple waive. This type of situation that the state created, simply says, "speedy trial rights" are worthless. This is unfair and highly prejudicial and should not be tolerated. Under Article I § 22, Rights of the Accused, The Constitution of the State of Washington, along with his, Sixth Amendment Rights

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of The United States Constitution, which are protected. These charges should simply be dismissed, in all fairness. RP 217-228.

Then on January 6, 2006, on a motion from the defense a hearing is conducted requesting a Frye hearing concerning the admission of this "YSTR" DNA evidence.

"In Washington, we have adopted the standard for determining if evidence based on novel scientific procedures is admissible set forth in; **Frye v. United States 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923)** The rule is settled:

[E]vidence derived from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community. Quoting; State v. Cauthron 120 Wn.2d 879,- (02/25/1993).

The state try's to offer proof to the court that "YSTR" DNA is accepted by the scientific community. And the state calls Stephenie Winter Sermeno, who is currently in charge of the Vancouver, Washington crime lab. RP 166. This witness is not one of the witnesses the state plans on calling during the trial.

But is there as an expert in the field of DNA, to testify on behalf of the state concerning this Frye hearing matter. Ms. Sermeno never testifies during direct examination that YSTR DNA testing is accepted by the scientific community. **RP 166-170.**

United States v. Chischilly 30
F.3d 1144, __, (9th
Cir.07/25/1994)

IV. Admission of DNA test results

The court established the following non-exclusive list of factors to guide lower courts assessment of the reliability of scientific evidence.

(1) Whether a scientific theory or technique can be (and has been) tested.

(2) Whether the theory or technique has been subjected to peer review and publication.

(3) the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation.

(4) Whether the technique is generally accepted.

Ms. Sermeno states that the WSP crime lab does not do YSTR testing, her work load is backlogged with her regular "STR" DNA testing casework. And that YSTR and STR DNA testing are similar, but she would not say they are the same. **RP 169.** But she does inform the court that "STR" testing is

generally accepted in the scientific community. RP 170. On cross Ms. Sermeno states as they move through different types of DNA technology, it takes time for laboratories to catch-up and implement, and that YSTR is still in the process of being tested within her lab, and that they have just started the beginning steps to validate YSTR's. RP 171. Ms. Sermeno also states her lab has not performed the checks or experiments to show that YSTR testing works within her lab. RP 172. She goes even further to say that its beyond her area of expertise to know if YSTR testing involves any type of statistical analysis. But is aware of normal STR testing and its statistical analysis. RP 172. During cross she says, that she did indicate YSTR analysis is accepted within the forensic science community, but that she did not say anything in regard to statistics, this is not true see, RP 173-174. The court asks her, "if she is aware of any scientific information in any form that questions YSTR's validity", she says no. RP 176. But the court did not ask a question like, "is YSTR's accepted by the scientific community". Again the state, the court, or the defense ever asked Ms. Sermeno directly if YSTR is accepted by

the scientific community. RP 166-177. The court states quote, "I have nothing that shows me that this is not widely accepted in the community. I don't believe at this juncture that a Frye hearing is necessary." unquote. RP 181. So the court rules a Frye hearing is not required, quoting two (2) cases; State v. Leulauaialii 118 Wn.App. 870 (2003) and, State v. Gore 143 Wn.2d 288 (2001). These cases do not deal with "YSTR" testing, and/or "The Counting Method". They only deal with "STR" testing, "The Product Rule" and, The Ceiling Principle. The court ruled in error, these cases do not apply here. RP 179-182.

If the Frye test is satisfied, the trial court must then determine whether expert testimony should be admitted under the two-part test of ER 702, i.e., whether the expert's testimony would be helpful to the trier of fact. State v. Cauthron 120 Wn.2d 879,889-90. (02/25/1993).

The state fell short, as to there offer of proof there was no need for a Frye hearing, and the court did not hold the state up to the standards set in Frye. YSTR's and STR's, have been proven are not the same. Also the court did not conduct a ER 702 hearing as required in State v. Cauthron,

Therefore, since the standards to laying the proper foundation have not been met as in Frye, Cauthron, or in Chischilly, we respectfully request. Reversal of these convictions, with Remand back to the trial court for a Frye hearing, and a new trial.

THE STATE FAILED TO PROVIDE
SCIENTIFIC EVIDENCE THAT THE
USE OF "THE COUNTING METHOD
USED TO GIVE STATISTICAL
EVIDENCE PERCENTAGES IS
ACCEPTED BY THE SCIENTIFIC
COMMUNITY

The state calls James Currie from the WSP crime lab in Seattle to testify, he states that the WSP crime lab does not do YSTR testing, because it still has to be proven that it will work in his lab. RP 817-845. State now calls MeAGEN Shaffer, who works for Reliagene Technologies in New Orleans, she is deputy director of operations, and does the second analysis of the DNA evidence. RP 982-983. She testifies recieving two (2) packages from Federal Express sent by Scott Smith on December 20, 2005. RP 990. Mrs. Shaffer states that YSTR testing is not done to obtain a unique fingerprint like normal STR DNA testing. YSTR is done to detect the "Y" Chromosome, and that every male in the same family line will have the same

"Y" Chromosome. She further states that it is not possible to distinguish between full brothers or a father and a son with Y Chromosome testing. But that it is possible to distinguish between other people that you are not related too. RP 993-994. She states that there lab in calculating the statistical probabilities of another DNA match employ "The Counting Method" for YSTR testing. Also she says this method is in use, in an organization in Europe as well. And she believe's the FBI uses this method as well, but does not say for sure. RP 997-998. She goes on to say, they use a computer program in determining how many times a profile shows up in their database, and that this is what gives them the percentages they use, and that this was done in this case. RP 999. No-where in Mrs. Shaffer's does she explain this process, nor does she state this technology is accepted by the scientific community. RP 982-1008. She does say that in using this program X percent of people can be excluded, and X percentage cannot. She never says the sample matches that of Mr. Russell. RP 1006-1007. Defense counsel asks how this counting method works, is it you just divide 4 hits, into the 1242 caucasians that are in this

database. Mrs. Shaffer states there are several steps involved that have to do with the "P" value of the frequency, then says that's why we have a computer do it. But again she never really explains it, nor states this is accepted in the scientific community, in her 26 pages of testimony. RP 982-1008.

Once a methodology is accepted in the Scientific Community, then application of the science to a particular case is a matter of weight and admissibility under ER 702.
State v. Gregory No. 71155-1
(Wash.11/30/2006)

Rather, once the proper statistical foundation is laid (in a hearing outside the jury's presence), the expert should be permitted to describe the test results to the jury using the Committee's "ceiling principle" or another statistical model proved to be accepted in the scientific community. State v. Buckner
125 Wn.2d 915,919,890 P2d 460
(1995)

State next calls, Huma Nasir, she is also employed by Reliagene Technologies in New Orleans. She is forensic DNA analysis, and is the person who tested the samples in this case. RP 1009. Ms. Nasir states she was able to get results from the left hand scraping, of Chelsea Harrison. RP 1020.

Defense counsel objects, and the jury is sent out. Objection to YSTR testing, and to say that this material matches Mr. Russell is unfairly prejudicial. Since even using reliagene's small database they were still four (4) other profiles that matched. RP 1023-1024. The state argue's in this particular case they are just asking the witness to reveal test results that would directly link Mr. Russell's matter under a fourteen-year olds fingernail. He tells the court it's a link to Mr. Russell, not a direct match, it's a matter of him not being able to be excluded. RP 1025. The court allows sample to be identified as a match to Mr. Russell. RP 1027. Ms. Nasir testifies results taken from the victims left hand "matches" the profile that they obtained from the buckle swab of Roy Russell. RP 1030.

"The matchprobability computed in forensic analysis refers to a particular evidentiary profile. That profile might be said to be unique if it is so rare that it becomes unreasonable to suppose that a second person in the population might have the same profile."NATIONAL RESEARCH COUNCIL, COMMITTEE ON DNA FORENSIC SCIENCE: THE EVALUATION OF FORENSIC DNA EVIDENCE 136 (1996). State v. Buckner 133 Wn.2d 63, -, (1997).

Ms. Nasir also testifies that after she obtained a match she went one step further to give statistics to give weight to this result. The profile she obtained from the fingernail scrappings was observed four (4) times, in 1242 individuals of the caucasian descent, which means that 99.4 % of the caucasian people are excluded. It was seen once (1) in 1605 of African-American descent, which translates to 99.8 % of that population is excluded. And again she states Roy Russell's profile matches that of the left hand fingernail scrappings. RP 1030-1031. Never does Ms. Nasir state that the "counting method" used to get these outrageously high percentages, is or ever has been accepted by the scientific community, in her many pages of testimony. On cross she states, she cannot excluded Mr. Russell as being the donor to the fingernail scrappings. She's not saying he's the donor, but only that he cannot be excluded. RP 1035-1036.

In, State v. Copeland 130 Wn.2d 244 (1996), State v. Buckner 133 Wn.2d 63 (1997), State v. Leulauai 118 Wn.App. 870 (2003), and State v. Gore 143 Wn.2d 288 (2001). Both the "Product Rule" and the "Ceiling Principle" have been accepted by

the scientific community. But no-where in case law is, "YSTR" DNA testing, nor "The Counting Method", that was used here in this case to calculate percentage probabilities, that were extremely high. Considering that four (4) other profiles were located in there very small database. Which only represented New Orleans, not the United States, nor the world as a whole.

PoPotential problems could result from "genetic drift" resulting in small populations having distinct genetic differences, too small a database, lack of randomness of the samples, and most importantly, lack of a truely mixed population such that each locus is in Hardy-Weinberg equilibrium as well as linkage equilibrium. (citations omitted). State v. Copeland 130 Wn.2d 244, -, 922 P.2d 1304 (1996).

Because of the limited resolution, two samples from a single person will often lead to slightly different measurements....To decide whether two samples match, each laboratory must have match criterion. The match criterion should provide an objective and quantitative rule for deciding whether two patterns match -- e.g., all fragments must lie [***45] within 2 % of one another. When samples fall outside the match criterion, they should

be declared to be
"inconclusive" or
"nonmatching".

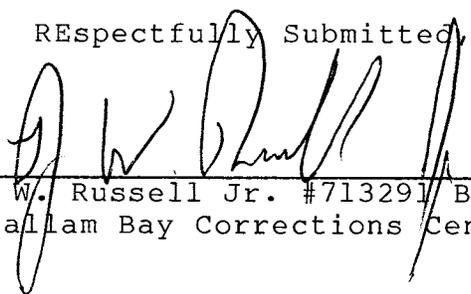
The match criterion must be based on reproducibility studies that show the actual degree of variability observed when samples from the same person are separately prepared and analyzed under typical forensic conditions. State v. Copeland 130 Wn.2d 244, ___, 922 P.2d 1304 (1996).

D. CONCLUSION:

For all the reasons stated above, Roy Russell seeks this court to reverse all his convictions, without recourse, since the states case hinged on this eyewitness testimony placing me on the scene, and this faulty DNA evidence. I submitt the state has no grounds to refile charges, due to lack of evidence. At the very least Mr. Russell asks this court to reverse and remand, for a new trial, and a Frye hearing.

DATED this 5th day of May 2007,

Respectfully Submitted,



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Clallam Bay Corrections Center

lam Bay, Washington 98326

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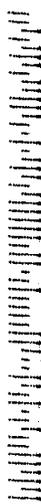
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