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SUPREME COURT
STATE OF WASHINGTON
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BY ERIN L. LENNON
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No. 1031840

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CODY KLOEPPER,
Petitioner.

MEMORANDUM OF AMICI CURIAE FORENSIC
SCIENTISTS, ACADEMICS AND LEGAL
PROFESSIONALS IN SUPPORT OF REVIEW

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I. IDENTITY AND STATEMENT OF INTEREST

The identities and interests of the undersigned are set forth in the accompanying Motion to File Amicus Memorandum in Support of a Pending Petition for Review and are incorporated by reference.

II. STATEMENT OF FACTS

Amici adopts the Petitioner's Statement of Facts for the case. DNA testing results are located at CP 120-134; 170-171. Dr. Charlotte Word's letter is located at CP 135-168; CP 732-733. The information and opinions provided below are based on the assumption that the DNA testing conducted by the Washington State Patrol Crime Laboratory (WSP) and DNA Labs International (DLI) were performed according to generally accepted and appropriately validated practices for forensic DNA testing and correctly reported in the various reports issued from both laboratories regarding DNA testing conducted prior to trial (2010) and in 2020-21.

III. INTRODUCTION

Biological material transfer from one item or person to another item or person is the foundation of several areas of forensic science. DNA test results alone cannot conclusively determine whether transfer occurred from direct contact or via secondary (or tertiary) transfer by means of another person or object; nor can they provide definitive information regarding the specific activity that led to the deposition of the DNA recovered and tested from an item.

In this case, the scenario of transfer of semen and DNA from Mr. Salvador Cosio-Contreras, via Mr. Cody J. Kloepper, while not impossible, requires a significantly more complex series of events to occur than the scenario of direct deposition of semen by the assailant. Further, the testimony presented at Mr. Kloepper's trial is inconsistent with the post-conviction DNA testing results and those required circumstances. Thus, it is our opinion that the testing results, which were not available at the

time of Mr. Kloepper's trial, provide data that would likely be relevant and informative to the trier-of-fact.

IV. SUMMARY OF DNA RESULTS FROM CLOTHING OF D.W.

The screening and DNA results from the two items of clothing tested in this case *must* be considered when evaluating any proposed scenario. Key data points include:

- 1) A total of 13 different areas on the two items of clothing tested positive for the presence of semen and/or sperm (7 different stains on the interior, exterior, front and back of the sweatpants; and on 6 different stains on the exterior, front and back of the sweatshirt). These cuttings were consumed in this testing.
- 2) Cuttings from 3 different areas of the sweatpants (inside in the crotch, exterior front leg, and exterior rear buttocks) that were positive for sperm were selected for DNA testing. Cuttings from 3 different areas of the sweatshirt

(front exterior chest, front exterior of the right arm, and back) that were positive for sperm were selected for DNA testing. The number of sperm present in the tested samples is unknown but is assumed to be higher than what was detected in the initial screening since more cuttings were used for the DNA testing. The quality of the male DNA profile obtained from the various cuttings clearly indicates that more than a sufficient amount of DNA was recovered for the testing.

- 3) A DNA profile consistent with the profile obtained from Salvador Cosio-Contreras was observed for all 6 samples tested in the DNA extract (called “sperm fraction”) where DNA from sperm is expected to be recovered. These data are not consistent with the DNA coming from blood, saliva or tissue.
- 4) DNA results consistent with the DNA profile from D.W. were also obtained from all 6 samples tested.

- 5) No DNA from any other individual was detected on the clothing in any sufficient amount for comparison.
- 6) The DNA profile obtained from all 6 areas tested is different from that of Cody Kloepper. Therefore, Cody Kloepper is excluded as a contributor and thus cannot be the source of the DNA obtained from the sperm fraction or cell fraction of any of the 6 samples tested.

V. TWO SCENARIOS AND THEIR REQUIREMENTS GIVEN THE DNA TEST RESULTS OBTAINED

While it is generally not possible to determine how transfer occurred in a particular case, it is possible to outline the sequence of events necessary to occur under various scenarios to achieve the DNA test results obtained. Two scenarios proposed in this case are outlined below with obligatory additional requirements.

SCENARIO #1: The assailant directly deposited his own ejaculated semen onto the items of clothing worn by D.W.

Direct transfer of semen from the assailant via his penis, hands, or other body parts to the body and clothing of the complainant is straightforward and easy to explain. In this case, direct deposition of semen and DNA from Mr. Cosio-Contreras is consistent with the presence of semen (and sperm) on D.W.'s clothing and with the DNA test results obtained. This scenario easily accounts for the absence of DNA from Cody Kloepper. The screening and DNA testing results obtained from the sweatpants and sweatshirt fit with this scenario without additional necessary conditions, explanations or requirements.

SCENARIO #2: The assailant directly deposited, by some unknown mechanism, ejaculate collected from another male onto the items of clothing of D.W.

Secondary (or tertiary, etc.) transfer of semen and DNA from Mr. Cosio-Contreras via Cody Kloepper (or anyone else), while not impossible, required a significantly more complex series of events to have occurred to generate the DNA test results

obtained. Under this scenario, extreme care with conscientiousness and skill in the planning, collection, manipulation and deposition of the semen sample by someone well-informed of the intricacies of DNA testing is required to complete the following steps in order to observe the screening and DNA test results obtained in this case.

- 1) An ejaculate from a male, either Mr. Cosio-Contreras or another male with the same DNA profile as Salvador Cosio-Contreras (e.g., an identical twin), would need to be purposely collected in a sufficient amount for deposition at a later time and to account for the presence of semen on at least 13 areas on D.W.'s clothing.
- 2) The ejaculate would need to be collected, maintained, preserved and transported in a liquid form suitable for deposition, absorption and retention on multiple areas of the clothing.
- 3) The collected ejaculate would need to be collected and transported to the apartment of D.W. in a manner such that no

DNA from any other individual was introduced into the sample.

- 4) The collected ejaculate would need to be deposited on her clothing without the introduction of DNA from the assailant onto the areas tested either in the semen itself or during his handling of her clothing and commission of the assault.

Based on the testimony of both Salvador Cosio-Contreras and Cody Kloepper heard by the jury at trial, the absence of any ejaculation by Salvador Cosio-Contreras during the time that he and Cody Kloepper were together at Mr. Cosio-Contreras' house does not provide an explanation for the availability of semen from Mr. Cosio-Contreras on the morning immediately before the assault occurred. The semen necessarily would have to have been expelled and collected at another previous time. This testimony is inconsistent with the DNA results obtained.

Similarly, the testimony of Cody Kloepper that Mr. Cosio-Contreras performed oral sex on him would result in semen

containing sperm from Mr. Kloepper and not from Mr. Cosio-Contreras, and consequentially, the DNA profile from Mr. Kloepper would have been observed in the sperm fraction from the samples collected from D.W.'s clothing. In addition, the likely presence of DNA from saliva (an excellent source of DNA) of Mr. Cosio-Contreras would typically be detected in a higher level in the cell fraction extract and not at all, or in a much-limited amount, in the sperm fraction extract. This testimony is also inconsistent with the DNA results obtained.

VI. CONCLUSIONS

It is the opinion of the undersigned that:

- 1) Items of evidence containing biological material presumed to be associated with an alleged criminal event are commonly submitted to laboratories to obtain DNA profiles.
- 2) Typically, the DNA profile obtained from each evidence item is compared to the DNA profiles obtained from various known individuals. This comparison is performed to provide

information regarding who may or may not be a possible source of DNA recovered from an item.

- 3) Inconsistency in the compared profiles permits the definitive conclusion that an individual *cannot* be a source of the DNA recovered from the item. The DNA must be from someone else.
- 4) Any individual who is not clearly eliminated by the comparison of the DNA profiles may be a possible source of the DNA recovered from the item. When this occurs, a statistical value is required to provide some measure of the strength of the DNA test results. This is commonly provided as a likelihood ratio (e.g., for autosomal STR testing) or as a frequency value of 1 in some number of the population (e.g., for Y STR testing).
- 5) DNA test results obtained from key items of evidence and the conclusions regarding who is eliminated as a source of the DNA and who is not eliminated as a possible source are often presented in court. This information may provide very helpful

information to the trier-of-fact, especially in a sexual assault case where semen and DNA from a male is recovered in the sperm fraction extract.

- 6) DNA test results only address the possible (and impossible) sources of the DNA recovered from biological material, but in many situations do not provide definitive information regarding when the DNA was deposited or the activity that led to the deposition of the DNA. However, the DNA test results along with other relevant information obtained during the testing of the items and from the investigation of the crime may provide critical support for or elimination of possible scenarios.
- 7) The principle of transfer of biological material from one item or one person to another item or person is the foundation of several areas of forensic testing. It is clear that both items of clothing tested in this case had biological material containing DNA deposited on them via some form of transfer; however, it is impossible for a DNA expert to conclusively determine

whether the transfer occurred from direct contact of a person with the clothing or via secondary (or tertiary, etc.) transfer by means of another person or object.

8) The number of sperm present in semen varies throughout the male population and is dependent on a number of factors, including whether the male has ejaculated recently, or has a lower sperm count normally or due to an inadequate vasectomy. The number of sperm in a single ejaculate should be constant and should not change upon transfer of the semen. The number of sperm detected in a semen stain provides no information regarding the mechanism of deposition of the semen.

9) There were two forms of DNA testing conducted in this case. Y STR testing, which tests multiple regions of variability only on the Y chromosome, was the most common form of testing conducted prior to the trial. Since the Y chromosome is found only in males, it permits the analysis of DNA from male(s) in the presence of DNA from female(s). While Y STR testing is

quite powerful for excluding a man as being the source of DNA obtained from an evidence item, the failure to exclude a male with Y STR testing does not provide direct identification of that man or anyone else in his family who shares the same Y chromosome since all males in the paternal lineage inherit the same Y chromosome.

- 10) The observation that Cody Kloepper cannot be eliminated as a possible source of one of the Y STR DNA profiles obtained from the glove fragment by no means provides conclusive evidence that it is “his DNA” as was misstated several times in the court testimony heard by the jury and in other court records. The reported frequency of ~1 in 440 males in the population for this profile demonstrates how common this DNA profile is and clearly supports that this is not a uniquely-identifying DNA profile. In fact, 11 men (2 African Americans, 1 Asian, 4 Caucasians and 4 Hispanics) in the Y STR database used to calculate this statistical frequency share the same profile with Cody Kloepper in

addition to all of his male relatives. Furthermore, these data cannot be used as proof that Mr. Kloepper was in the apartment at the time of the assault nor that he was the assailant.

11) The second type of DNA testing conducted in this case, which tests multiple locations on many of the non-sex (termed “autosomal”) chromosomes, was used for the semen stains found on the clothing from D.W. The results link the DNA recovered from the stains to Salvador Cosio-Contreras with a very high likelihood ratio. This testing is highly differentiating of individuals and when conducted at a sufficient number of locations in the DNA, such as used in this case, leads to the identification of the likely source of the DNA.

12) At the time of the trial, profiles from three additional unknown males had been obtained from several items collected as evidence in this case. These include Individual A from the sock (item #JMT12; autosomal DNA testing),

Individual C from the left fingernail scrapings of D.W. (item #JMT42; Y STR testing) and Individual D from the head hair (item #RJS-6; Y STR testing). The source of the DNA from these items is still undetermined.

13) The DLI 2020 and WSP 2021 DNA test results, which were not available at the time of Mr. Kloepper's trial, provide information that would likely be relevant and informative to the trier-of-fact, especially in conjunction with the information regarding the presence of DNA from additional unknown males as stated in 12) above, and with the added knowledge of the following facts:

- a) Cody Kloepper cannot be the source of the DNA found in the areas of the clothing that tested positive for the previously undetected and untested semen, therefore it cannot be his semen;
- b) Salvador Cosio-Contreras cannot be eliminated as the source of the DNA found in the areas of the clothing that tested positive for semen. A high likelihood ratio strongly

supports the observation of the DNA results obtained from the clothing if Mr. Cosio-Contreras and D.W. are the sources of the DNA as opposed to another random male in the population;

- c) Salvador Cosio-Contreras and other males in his family cannot be eliminated as a possible source of the previously unidentified Y STR DNA profile recovered from the glove fragment. The Y STR data are not conclusive that Mr. Cosio-Contreras is one of the male sources of DNA on the glove fragment.

CERTIFICATE OF COMPLIANCE

This document contains 2438 words, excluding the parts of the document exempted from the word count pursuant to RAP 18.17.

Respectfully Submitted this 15th day of August, 2024



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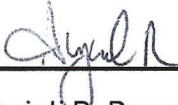
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APPENDIX A



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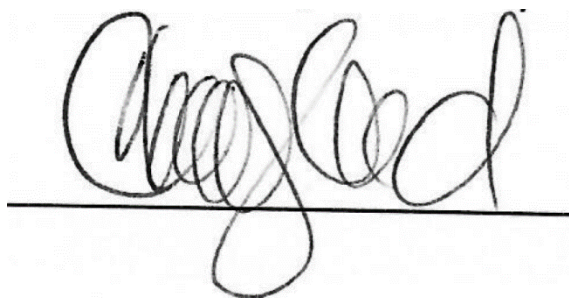
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Barbara E. Llewellyn 07/31/2024

A handwritten signature in cursive script, reading "Cecelia A. Crouse, Ph.D.", written over a horizontal line.

Cecelia Crouse, Ph.D.

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A handwritten signature in black ink, appearing to read "C. Word", is written over a solid horizontal line. The signature is fluid and cursive, with the first letter being a large capital 'C' and the last letter being a capital 'd'.

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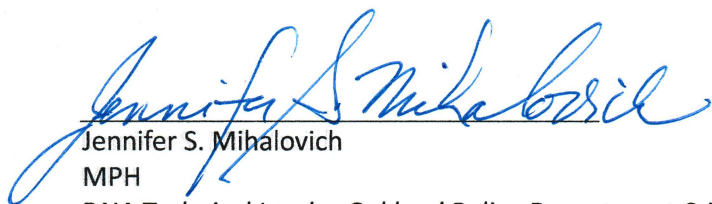
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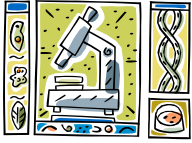
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A handwritten signature in blue ink, reading "Linda Kenney Baden". The signature is written in a cursive style with a large initial "L" and a stylized "K".

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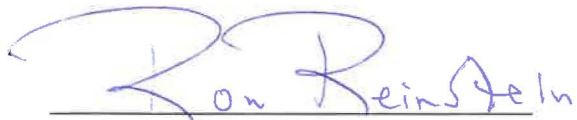
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A handwritten signature in blue ink that reads "Ron Reinstein". The signature is stylized, with the first name "Ron" and last name "Reinstein" written in a cursive-like script. The signature is positioned above a horizontal line.

Ron Reinstein

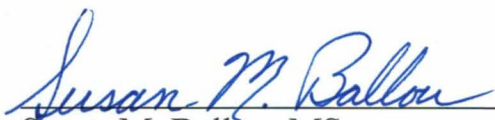
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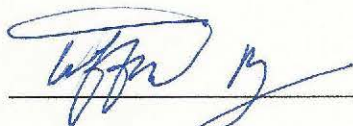
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Tiffany Roy, JD, MSFS

Forensic DNA Expert/ForensicAid



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DECLARATION OF SERVICE

I, Jennifer Aronson, declare that on August 15, 2024 I caused to be electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal, which will automatically cause such filing to be served on counsel for all other parties in this matter via the Court's e-filing platform. The filing was addressed as follows:

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Under penalty of perjury under the laws of the State of Washington, the foregoing is true and correct.

Dated: August 15, 2024



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NOT APPLICABLE

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Transmittal Information

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