Supreme Court No. 103184-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

CODY JOSEPH KLOEPPER,
Petitioner.

ANSWER TO BRIEFS OF AMICI CURIAE FOR CENTER FOR INTEGRITY IN FORENSIC SCIENCES, INNOCENCE NETWORK, AND FORENSIC SCIENTISTS, ACADEMICS, AND LEGAL PROFESSIONALS

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INTRODUCTION:

There is powerful evidence that the petitioner, Kody James Klopper, is guilty. He was on the maintenance staff of an apartment complex and admitted that in the early morning hours on December 10, 2009, he accessed a box containing a key to a woman's apartment. The perpetrator unlocked her door, beat her with a club, and raped her. the victim, D.W., always locked her apartment door and there was no forced entry. The woman told 911 the perpetrator worked on the apartment staff, and she described him to a tee. The perpetrator used gloves when he raped her and the defendant's DNA, at a match of one in 440 individuals, was found on a scrap of a bloody glove. He lied to his significant other, the police, and his friends about his whereabouts that night. In addition, he cut his shoulder-length hair into nearly a buzzcut to avoid being identified.

Earlier that night, the defendant drove to the residence of Salvador Contreras, who he met online that night for sex. They

did not have sex, but Contreras stated he thought he ejaculated prematurely. At a motion for new trial, the defendant conceded there was a transfer of DNA, either from Contreras to the defendant to the victim's apartment or from the defendant to Contreras to the tip of the glove.

The trial court correctly held that a new trial was unnecessary because the defendant did not prove that the verdict would change with the new information about Contreras's DNA on the victim's clothing. The Court of Appeals affirmed, ruling that the trial court did not abuse its discretion.

I. ISSUES PRESENTED FOR REVIEW

Recognizing RAP 10.3(f), that the answer to the amicus curiae brief shall be limited to new matters raised in the brief of amici, this brief will address the following:

1) Can "overwhelming" evidence be a bar to post-conviction relief? (P. 8 and 12 of Innocence Network and Center for integrity in Forensic Science brief.)

2) Did the State's theory of transfer from Contreras to the defendant to the victim's clothing contradict the trial testimony and argument? (P. 10 of Innocence Network and Center for integrity in Forensic Science brief) (P. 8-11 of Forensic Scientists, Academics, and Legal Professionals brief.)

3) Is it irrelevant to point to other defendants who have been granted a new trial and are not similarly situated, or should this Court look to the considerations in RAP 13.4(b). (P. 12-18 of Innocence Network and Center for integrity in Forensic Science brief.)

II. STATEMENT OF THE CASE

The State incorporates its Statement of the Case in its Response to the Petition for Review and its Statement of the Case in its Response Brief to the Court of Appeals.

III. ARGUMENT

A. "Overwhelming evidence" of the defendant's guilt, as here, can be a bar to post-conviction relief.

The blanket statement, " 'overwhelming' evidence cannot be a bar to post-conviction relief" is incorrect and the cases cited by amici do not support that assertion. The defendant cites *Hildwin v. State,* 141 So. 3d 1178 (Fla. 2014). However, Florida requires that newly discovered evidence was not known by the defendant, could not have been acquired by due diligence, and that the evidence would probably produce an acquittal on retrial. *Id.* at 1184. If reasonable doubt exists as to the defendant's guilt, a jury must resolve the factual matter, not the court. *Id.* at 1185. Another distinction is that the standard on review for a trial court's decision is de novo, not abuse of discretion. *Id.* at 1185.

Hildwin applied its unique facts to this standard and decided he should have a new trial. The *Hildwin* court did not state the evidence against Mr. Hildwin was "overwhelming"—far from it. In *Hildwin*, *id.* at 1189, scientific evidence established that the newly discovered DNA found at the crime scene matched the very person who Hildwin alleged committed

the murder, Mr. Haverty. The *Hildwin* court said that a "significant pillar of the State's case…has collapsed." *Id.* at 1181. In addition to the newly discovered DNA evidence was a newly discovered letter written by Haverty to the victim-they were girlfriend-boyfriend and shared living quarters- in which Haverty said, "if you don't want to be here, leave….Fuck off and die."

The other cases cited for the proposition that it does not matter how overwhelming the evidence is against the defendant are from Massachusetts. In *Commonwealth v. Grace,* 397 Mass. 303, 306, 491 N.E.2d 246 (1986), which involved recanting testimony, the Court held that the trial judge must find there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial. In *Commonwealth v. Sullivan,* 469 Mass. 340, 350, 14 N.E.3d 205 (2014), the Court held "new evidence will cast real doubt on the justice of the conviction if there is a substantial risk that

the jury would have reached a different conclusion had the evidence been admitted at trial."

None of the cases amicus cites stands for the proposition that if there is overwhelming circumstantial evidence the trial court is required to grant a motion for a new trial if there is newly discovered DNA evidence inconsistent with guilt.

B. A transfer of Contreras's DNA to the defendant or the defendant transferred the DNA to the victim does not contradict the State's trial testimony or arguments.

The victim was definite that there was only one attacker. The defendant's DNA was in a piece of the glove, to a 1 out of 440 people chance, and Mr. Contreras's DNA was on D.W.'s sweatshirt and sweatpants. So, either the defendant transferred the DNA from Contreras to D.W.'s sweatshirt and sweatpants or Mr. Conteras transferred DNA from the defendant to the piece of the glove. As the defendant argued in the motion for a new trial:

> [W]e know there has to be transfer. . . . [B]oth sides agree there has to be transfer, and that transfer is a viable scientifically proved

> phenomena. . . . [W]e know there had to be transfer because Kloepper and Contreras's DNA is in the apartment and [D.W.] says there was only one assailant.

RP at 109.

Amicus does not point out how the State or a witness at the original trial contradicted the theory that Contreras prematurely ejaculated before either oral or genital contact with the defendant, and then transferred Contreras's DNA to the defendant, who transferred it to the victim. Contreras testified at the original trial that he and the defendant did not have either oral or genital sex, and he testified to the same at the hearing on the motion for a new trial. He testified at the motion for a new trial that ("Sure I—I ejaculated") ("I—I'm pretty sure") while the defendant and him hugged. RP at 87. He was not asked if he ejaculated at the original trial.

Regarding the brief of Forensic Scientists, academics, and Legal Professionals: Ms. Aronson concludes that Contreras did not ejaculate when the defendant was at the Contreras house

because he did not state that he ejaculated at trial, but he was not asked. (P. 10 of Forensic Scientists, academics, and Legal Professionals brief.) Mr. Contreras said he was pretty sure he ejaculated when hugging the defendant. She also criticizes the trial court's understanding of Dr. Word's report. But the trial court properly set out the summary of Dr. Work's report in the written opinion. CP 818. The brief includes Conclusion No. 7 on pages 13-14, on the difficulty of determining whether the transfer occurred from the direct contact of a person or transfer by means of another person or object.

Finally, as stated above, the defendant argued that there was a transfer either from Contreras to the defendant to the victim or from the defendant to Contreras to the glove found in the victim's apartment. The defendant has not argued on appeal that he received ineffective assistance. Neither has the amici. The trial court was entitled to rely on the stipulation by the defendant that there was a transfer from either Contreras or

from the defendant to the victim's clothing or the glove inside the victim's apartment.

C. It is not relevant to point to other defendants who have been successful in moving for a new trial. Defendants cited by amicus who were successful in moving for a new trial are not similarly situated and are irrelevant.

The issue for the trial court was whether the claimed newly discovered evidence must be such that it will probably change the result if a new trial is granted. *State v. Letellier,* 16 Wn. App. 695, 699-700, 558 P.2d 838 (1977). The issue for the Court of Appeals was whether the trial court abused its discretion. The issue for this Court is whether the Court of Appeals decision violates either the State or Federal Constitutions, conflicts with a published case or involves a substantial public interest. It is not relevant to cite other defendants just as it is not relevant to cite factual decisions by one jury and argue that a particular defendant should be acquitted.

The cases cited, the evidence that the other party suspect committed the crimes far exceeds the evidence than Mr. Contreras committed the attack. In *Aguirre-Jarquin v. State,* 202 So. 3d 785, 793-94, (Fla. 2016), the newly discovered evidence included evidence that the other party suspect confessed five separate times to four different individuals. The newly discovered evidence also included the other suspect's blood in key areas of the crime scene. *Id.* at 793.

State v. Peterson, 364 N.J. Super. 387, 836 A.2d 821 (N.J. Super. Ct. App. Div. 2003) was a case reversing the order denying the defendant's motion for DNA testing of forensic evidence. The State's forensic scientist had attributed to the defendant seven hairs found at the crime scene, including three pubic hairs. No DNA testing was performed on any of the physical evidence presented at trial including the semen on the victim's pants or the blood under her fingernails. The Innocence Project-Lary Peterson website reports that the pubic hairs were matched to the victim. The victim's fingernail

scrapings and the sperm on the victim's oral, vaginal and anal swabs was found to be an unknown male, not the defendant.

In *People v. Davis,* 966 N.E.2d 570 (III. App. Ct. 2012), the prosecution argued that the semen and blood deposits on the bedding were left by the perpetrator and that the perpetrator was the defendant. The evidence also establishes the identity of the source of most of the specimens: Maurice Tucker, an occupant of the house where the crime scene was located at the time of the murder.

Here, the victim identified the perpetrator as a white man. Contreras is Hispanic. She said that he was a member of her apartment complex staff; Contreras is not. Contreras did not know the victim. The defendant did. Contreras did not have access to the key to her apartment. The defendant did. Contreras did not have a reason to change his appearance and did not. The defendant went from shoulder length hair to a buzz cut because he looked like the perpetrator.

IV. CONCLUSION

Neither amicus provides a basis for the petition for review to be granted. This document contains 1857 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED, this 10th day of September 2024.

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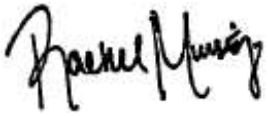

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