IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

CARLOS GREATHOUSE,

Appellant,

v. **WD No. 59518**

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Benton County
Thirtieth Judicial Circuit, Division One
The Honorable Theodore B. Scott, Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Carlos Greathouse appeals the denial of his Rule 29.15 motion after a hearing in the Circuit Court of Benton County, Missouri. This appeal does not involve any of the categories reserved for the exclusive jurisdiction of the Missouri Supreme Court. This court has jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution, Rule 29.15(k), and Section 477.070 RSMo. 1994.

STATEMENT OF FACTS

The murder and rape of Machelle Lee

Shortly after sunrise on Monday morning, November 26, 1990, a school bus driver discovered the body of fifteen year old Machelle Lee while driving his route on a rural gravel road known as Morton County Road just north of Hartville. (Tr. 617, 631-632)[1]. The nude body was lying in a field near a briar patch some 200 to 300 feet from the road. (Tr. 632).

Highway patrol officers were called to the scene. (Tr. 636, 653). They noted that Machelle's body had a number of deep scratches and that a branch from a rose bush was partially inserted into her vagina. (Tr. 640). About four feet from the body was a partially imbedded rock with hair and blood on it. (Tr. 655). The rock was surrounded by a pool of blood that had soaked more than three inches into the soil. (Tr. 656). A pajama top tied into a knot was found in a culvert next to the road. (Tr. 639). In the road were tracks made by a truck with dual tires. (Tr. 663). Also in the road near the pajama top were footprints made by combat boots. (Tr. 647, 657).

Machelle was last seen alive on Friday evening, November 23rd, when she was drinking vodka with her mother. (Tr. 608-609). They began arguing, and at 7:30 or 8:00 p.m. Machelle walked away from their home. (Tr. 609-610). She was wearing eyeglasses, a

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[1] Citations are to the trial transcript (Tr.), the legal file and the second supplemental legal file filed in the direct appeal (L.F.) (2nd Supp. L.F.), the transcript of the postconviction hearing (PCR Tr.), the postconviction legal file (PCR L.F.), and the deposition of Dr. Dean Stetler (Stetler Depo.).

two-piece pajama set, white tennis shoes, and was carrying a plastic coke cup. (Tr. 609-610).

The Curtner residence is less than an eighth of a mile from Machelle's home, and Cynthia Curtner recalled that Machelle arrived at her house that night between 8:30 and 9:00 p.m. (Tr. 619-621). She was alone, and Cynthia did not see any vehicles in her driveway. (Tr. 622, 624). Machelle had on pajamas, but she was not wearing eyeglasses or tennis shoes. (Tr. 619-620). She appeared as if she had been crying and asked to use the phone. (Tr. 620, 624). Cynthia could smell alcohol on her breath and asked what was wrong, but Machelle would not talk to her. (Tr. 620-621). Machelle dialed a number but she did not speak into the phone before hanging up. (Tr. 620). She then walked out of the house, and Cynthia watched her step off of the porch and walk down the driveway towards the open gravel road. (Tr. 621). Machelle was in the Curtner house for no more than two to three minutes. (Tr. 620).

Another resident of the rural area north of Hartville, Dwayne Coltrane, recalled seeing Frank Coday's dump truck with dual tires driving the gravel roads in the area at 11:30 p.m. on the night of the murder. (Tr. 627-628). Highway patrol officers subsequently found Machelle's plastic coke cup on another rural road about a mile from where her body was found. (Tr. 643). A trooper spoke with Frank Coday and compared the soles of the military style boots he was wearing with the footprint pattern found near Machelle's body. (Tr. 659-660). He determined that Frank Coday's boot pattern was consistent with the footprints left at the scene. (Tr. 660).

DNA evidence is found; fails to match with Carlos

The autopsy of Machelle Lee's body revealed that the cause of her death was a massive injury to the back of her head that broke through the skull and caused internal bleeding. (Tr. 1037). Machelle had also received at least ten blows to her face that were likely caused by a fist. (Tr. 1037-1040). Another major impact was apparent above her right eye that was caused by a heavier object. (Tr. 1037-1040). There were deep scratches on her breasts and near her genital area. (Tr. 1104). Her hands had a number of defensive wounds, and there were marks on her wrists and arms that suggested she had been forcefully restrained. (Tr. 1110). Seminal fluid was found in both her anus and vagina. (Tr. 1111).

A DNA analysis of the semen sample was done by forensics experts at the highway patrol crime lab. (Tr. 953). The resulting DNA profile produced from the semen was compared with DNA profiles obtained from a number of possible suspects known to live in the Hartville area who voluntarily gave samples. (Tr. 969-970). Frank Coday and Carlos Greathouse were included among the suspects who submitted their DNA for testing. (Tr. 969-970). None of the profiles obtained from the list of possible suspects matched the profile generated from the seminal fluid found in Machelle's body. (Tr. 963-966, 970).

Rumors of a gang rape involving eight people

The investigation of the murder failed to provide any new leads until over a year later, when Garrold Mitchell was elected sheriff in November, 1992. (Tr. 777). During his campaign, Mitchell had

promised to renew the search for the murderer of Machelle Lee. (Tr. 777). One of his first leads came In October of 1994 when Jeri Crapo told the sheriff about stories she heard back in 1992 regarding the murder. (Tr. 995).

According to Jeri Crapo's written statement, sometime in 1992 a drunken Frank Coday entered the furniture store where Jeri worked and discussed the murder with another employee. (Tr. 1013). Jeri overheard Frank Coday say that the people who committed the murder were himself, Donna Coday, Carlos Greathouse, Joe Mayo, Chris Primm, Mark Russell, and two other men whose names she could not remember. (Tr. 1019-1021). In her statement to the sheriff, Jeri said that she heard Frank Coday say that the group of eight people had picked Machelle up and took her to a gravel road where they raped and beat her. (Tr. 1020-1023). They killed her by hitting her head with a hammer, and they "shoved wine bottles, beer bottles, some sort of wood up inside her." (Tr. 1022). Jeri Crapo told Sheriff Mitchell that Carlos Greathouse had also told her the same thing that she overheard from Frank Coday. (Tr. 993-994, 1023).

Carlos Greathouse is indicted

Shortly over a month after Jeri Crapo came forward with her statement, on December 19, 1994, a grand jury indicted Carlos Greathouse for the first degree murder of Machelle Lee. (L.F. 5-6; 2nd Supp. L.F. 20). The witnesses testifying before the grand jury were Jerry Conner, who is the Wright County juvenile officer, and Sheriff Mitchell.

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**********Machelle up that night and went to a house. (Tr. 830-831). Bill and Lee Liles then went to buy some liquor while the other guys remained at the house with Machelle. (Tr. 832). When they returned, Bill said he heard "the most terrifying scream he had ever heard" and ran home. (Tr. 832). Leonard Liles told Sheriff Mitchell that Bill Liles said he had nothing to do with the murder, but that Bill also said that Lee Liles may have been involved. (Tr. 833).

Bill Liles' first statement denying any involvement

Bill Liles, who is also sometimes known as "Cecil Clark," had moved to New Mexico after Machelle was murdered. (Tr. 755, 778, 802). Sheriff Mitchell and Jerry Conner spoke with Bill on April 28, 1995 in New Mexico. (Tr. 721, 779). The Sheriff told Bill that he knew Frank Coday and Carlos Greathouse were involved in committing the murder and he wanted to know if Bill knew anything about it. (Tr. 725, 779). Bill replied that he had heard that Frank Coday and Carlos Greathouse had been jailed for the murder. (Tr. 709). Bill added that he had also heard that a "third person" was also involved who was an "employee" of Frank Coday's. (Tr. 709, 779). But Bill Liles denied any personal involvement. (Tr. 709.)

Bill Liles' second statement admitting having sex with

Machelle

Sheriff Mitchell and Officer Conner led Bill Liles to believe that they had evidence proving that he was also involved, including DNA evidence. (Tr. 727, 747). They told Bill that if he told them about Carlos Greathouse's role in the murder, they might charge him with sexual assault on Machelle and give him probation. (Tr. 713, 728). Bill then changed his story and admitted that he was the "third person" involved in the murder. (Tr. 712, 779).

According to the second statement Bill Liles gave in New Mexico, Machelle Lee had consented to having sex with him on the night she was murdered. (Tr. 693). Bill said that he was riding around that night and drinking with Frank Coday and Carlos Greathouse in Frank's van. (Tr. 679-682). They picked up Machelle Lee around 8:00 p.m. as she was walking near the junction of Pleasant Hill and Sunshine Road. (Tr. 685-686). Carlos Greathouse said that he knew her and asked if she wanted a ride. (Tr. 686). Machelle got into the van and said that she was trying to find a phone. (Tr. 686). They then went to "the Buddy Hall place" where Carlos and Machelle talked for about twenty or thirty minutes. (Tr. 687). From there, they drove to the home of John and Cynthia Curtner on Sunshine Road so Machelle could use a phone. (Tr. 687).

Bill Liles said that they parked the van on Curtner's driveway near the front porch. (Tr. 740-741). At that time, Machelle was not wearing pajamas, but had on blue jeans and a "gown"; she was also wearing eyeglasses and tennis shoes, and was not crying or upset. (Tr. 741-743). Machelle did not go into the Curtner home alone, but

was accompanied by Frank Coday and Carlos Greathouse, while Bill waited outside. (Tr. 743). All three were in Cynthia Curtner's house for at least fifteen or twenty minutes. (Tr. 744).

According to Bill Liles, Machelle then returned to the van and asked to ride around more with the three men. (Tr. 689). Bill sat with her in the back of the van and they began kissing and touching each other. (Tr. 691). When they returned to the intersection of Sunshine and Pleasant Hill Roads, Bill told Frank Coday to stop because he and Machelle wanted to have sex. (Tr. 693). Bill told Frank and Carlos to get out of the van, but they did not because they wanted to watch. (Tr. 693). At first, Bill refused to allow them to watch him have sex with Machelle, but then Bill said that he was "kind of coerced into letting them watch." (Tr. 693).

When Bill Liles and Machelle finished having sex, Bill said that Machelle then asked Frank Coday if he wanted to have sex with her, but Frank said no. (Tr. 693). Carlos Greathouse asked Machelle if he could have sex with her, but Machelle told him that he could not. (Tr. 693). Bill then got out of the back of the van to urinate, and he said that Carlos got into the back with Machelle. (Tr. 694). Bill returned to the front of the van and heard Carlos and Machelle arguing, and then they were quiet for about thirty minutes. (Tr. 696).

Bill said that his attention was again attracted to the back of the van when he heard "some commotion that kind of rocked the van a little bit," and when he looked back he saw that Carlos had Machelle "pinned down," and that her "gown" was up and she was naked from the waist down. (Tr. 697). Carlos had his pants down and Machelle was telling him to quit. (Tr. 697). Bill also told Carlos to quit, but Bill

said that Carlos "just kind of looked at me funny." (Tr. 697). Carlos stopped only later after Frank Coday told him to, and then Machelle got out of the back of the van, followed by Carlos. (Tr. 698).

According to Bill Liles' second statement, Carlos and Machelle argued again outside of the van, while he and Frank listened to loud music in the front seat. (Tr. 698). Then Carlos got into the van alone and said, "Let's get the hell out of here." (Tr.. 699). They asked her where Machelle was, to which Carlos replied, "You don't want to know," and added that he had hit her in the head with a rock because she was going to tell the police that he had raped her. (Tr. 699). They then drove away from the intersection of Sunshine and Pleasant Hill Roads, leaving Machelle behind. (Tr. 728).

During the questioning of Bill Liles in New Mexico, Sheriff Mitchell was aware that Machelle Lee's body was not found at the intersection of Sunshine and Pleasant Hill Roads, where Bill Liles said that they left her, but on Morton County Road, a considerable distance away. (Tr. 805). Sheriff Mitchell asked Bill if he was sure that Machelle was not placed back into the van after Carlos had hit her. (Tr. 805). Bill said no, that the last time he saw her was at the intersection of Sunshine and Pleasant Hill Roads. (Tr. 805, 1209).

Bill Liles' third statement after a drive with Sheriff Mitchell improved his memory

Bill Liles returned to Wright County a few days later. (Tr. 780). Sheriff Mitchell drove Bill on the route that he said they took on the night of Machelle's murder. (Tr. 780). While they were stopped at the intersection of Sunshine and Pleasant Hill Roads, Sheriff Mitchell

told Bill that Machelle's body was not found there. (Tr. 738). The sheriff said, "Bill, I believe you up to this point here, but here's where we're gonna part ways. Because I think you was present when she was loaded back in the van and taken to the location that she was found." (Tr. 781). Bill replied that his "memory was starting to come back." (Tr. 781). Bill then was able to remember that Carlos Greathouse and Frank Coday put Machelle back into the van after Carlos hit her and then moved her to Morton County road where she was found. (Tr. 781).

After his memory came back during his drive with Sheriff Mitchell, Bill Liles was able to recall in detail how Carlos Greathouse and Frank Coday had worked together to move Machelle and to hide evidence, while Bill only watched from the front seat of the van. (Tr. 700-705). Bill remembered that instead of leaving the area, they decided to go back to the place where they first left Machelle to see how injured she was. (Tr. 700). They returned to the intersection of Sunshine and Pleasant Hill Roads and found Machelle lying unconscious by the side of the road. (Tr. 700). Carlos and Frank put her back into the van and Carlos determined that she was not breathing. (Tr. 700). Carlos and Frank then decided what to do with her body. (Tr. 700-701). They drove to Morton County Road where Carlos and Frank removed her body from the van and threw her across a fence. (Tr. 701-702). Then Frank returned to the van and Carlos dragged her into the field beside the road. (Tr. 702-703).

Bill Liles recalled that Carlos was gone for about fifteen minutes, and then they drove away. (Tr. 703). They reached a dead end on Morton County Road, which forced them to turn around and

again pass by the area where Carlos and Frank had placed Machelle's body. (Tr. 703). At that point Carlos told Frank to stop. (Tr. 703). Carlos got out and went towards the field where he had left Machelle's body. (Tr. 703-704). He returned to the van with some clothing. (Tr. 704). Bill said to Carlos that he was worried about his sperm that was left inside of Machelle after having sex with her. (Tr. 718). Carlos replied that "he had run a wire or a brier or something inside of her" in order that she would bleed and "wash the semen out." (Tr. 718-719). They then went to an abandoned pallet mill where they burned the clothes that Carlos had retrieved. (Tr. 705). From there, they went to Frank's house, and then Frank drove both Bill and Carlos home. (Tr. 705).

The deal: Bill Liles gets three years probation for "sexual assault," and his memory functions even better

In exchange for agreeing to testify against Carlos Greathouse, Bill Liles was charged with sexual assault and received three years probation on a suspended seven year sentence. (Tr. 678, 720). Sheriff Mitchell said that after giving his third statement, Bill's memory would improve even further and "he would happen to think of something else he remembered." (Tr. 782). On those occasions, Bill would come to Sheriff Mitchell's office and write out more statements. (Tr. 782). One detail that belatedly occurred to Bill in this manner was the fact that Frank Coday had used his dump truck, and not the van that Bill said they had been using all night, to drive Bill and Carlos home on the night of the murder. (Tr. 751). This was an important fact for Bill to remember because it made his story

consistent with Dwayne Coltrane's statement given shortly after the murder where he recalled seeing Frank Coday's dump truck driving the gravel roads at 11:30 p.m. (Tr. 627-628).

DNA evidence from Bill Liles fails to match DNA found in Machelle Lee

Four years after Carlos Greathouse had provided a DNA sample and had been eliminated as possibly being the source of the semen found in Machelle's vagina, Bill Liles' DNA was also analyzed for a possible match. (Tr. 959-960). Although Bill Liles admitted having sexual intercourse with Machelle Lee on the night of her murder, the result of the DNA analysis concluded that the DNA profile from the semen found in Machelle's vagina did not match the DNA from Bill Liles. (Tr. 959, 970). Bill could not explain to Sheriff Mitchell why the DNA from the semen removed from Machelle Lee did not match either his DNA sample or the sample provided by Carlos Greathouse. (Tr. 811). The person who left the semen found inside Machelle's vagina on the night she was beaten, raped, and murdered has yet to be found.

The trial of Carlos Greathouse: prison informants boost the state's case

The first trial of Carlos Greathouse occurred in June 1996 and ended in a mistrial when the jury was unable to agree on a verdict. (2nd Supp. L.F. 14). At the second trial, which began on March 17, 1997, the prosecution called a number of prison and jail inmates who testified against Carlos in exchange for favorable treatment. (L.F. 2).

Neldon Neal was in the Wright County Jail serving time on a number of offenses and struck a deal with the prosecution on March 14th, three days before trial. (Tr. 1051, 1058, 1065). Neldon said that he lived with Carlos Greathouse in 1992 and 1993, and that Carlos often talked about "how he didn't mean to kill the girl," but that "they can't prove it." (Tr. 1053). Neldon had told a highway patrol officer a similar story in 1993 when he was in the Texas County Jail on other charges. (Tr. 1053). In return for his testimony, Neldon was released from jail and placed in a witness protection program. (Tr. 1055).

Ben Hall was in the Wright County Jail with Carlos Greathouse in May of 1995 and was facing revocation of his probation and a year in jail when he called the Wright County Prosecutor to attempt to negotiate a bond reduction. (Tr. 860-862, 904). Ben gave the prosecutor a written statement indicating that "somewhere around '92 or '93" he was at a party with Carlos Greathouse and other people. (Tr. 856, 915). At the party, Ben said that he heard them talk about how "they went out and they'd picked her up [and] had one hell of a night and they said they dumped her off on a dirt road." (Tr. 856). In his statement, Ben added that while he was in jail with Carlos in 1995, Carlos told him not to not tell anyone about what he heard at the party. (Tr.. 857). After providing his statement to the prosecutor, Ben's probation was not revoked and he was released from jail a few days later. (Tr. 864).

Rodney Moore, who is seeking parole on his life sentence for second degree murder, also testified that before he was sent to prison he was at a party at Frank Coday's house on the day after the

murder, November 24, 1990, and heard both Carlos and Frank talking about it. (Tr. 919, 926). According to Rodney Moore, Carlos said that he had picked Machelle up on "some kind of gravel road" and then left her body "somewhere over a fence in some kind of brier patch." (Tr. 920). A few days after the party, Rodney saw "spots of blood" in Frank Coday's van. (Tr. 920).

Dickie Moore stated that he was also at a party in 1990 a few days after the murder and heard Carlos Greathouse ask Frank Coday "if she was dead." (Tr. 931). Dickie heard Frank reply, "Yes," and then Carlos said, "the only thing [I] did was rape her." (Tr. 934). Dickie admitted on cross-examination that he had "memory problems," and that he could not remember visiting Jerry Conner in Sheriff Mitchell's office in 1994 where he signed a statement indicating that all he knew about the case was that he heard Frank Coday say that he had "tied Machelle up inside his van." (Tr. 939, 942-944). Dickie could only recall his later meeting in 1995 with Sheriff Mitchell where he signed a statement that is consistent with what he said at trial. (Tr. 944-947).

Brian Hicks testified that he was in the Wright County Jail with Carlos Greathouse and heard him talk about his guilt of the murder "all the time." (Tr. 973-974). Brian did not report this to the sheriff until May 5th, 1996, the day before he was set to stand trial himself on burglary charges. (Tr. 977). He denied receiving any benefit for his statement, although Brian admitted on cross-examination that he has two burglary charges pending in which he has filed motions for speedy trial and the state has not moved to prosecute them. (Tr. 981).

The state explains why the DNA profiles do not match: "Spermatocele"

Cary Maloney, the criminalist from the Missouri Highway Patrol who performed the DNA profiling tests, testified that the DNA profile obtained from the semen found inside Machelle did not match the DNA profile received from either Carlos Greathouse or Billy Liles. (Tr. 965-966). The test he used can detect if the semen sample is a mixture from two or more people; Mr. Maloney concluded that the DNA submitted for testing in this case came from only one donor. (Tr. 970-971). The prosecution asked whether it was possible for intercourse to occur without leaving any identifiable DNA behind. (Tr. 967). Mr. Maloney answered that DNA is found in spermatozoa and other cells that together comprise semen, and that there are a few situations where sexual intercourse could occur without leaving behind any DNA, one of which is "where an individual may have a low or none [sic] semen count." (Tr. 966-968).

The prosecution later revisited this issue during its questioning of Dr. James Spindler, the pathologist who performed the autopsy. (Tr. 1112). Dr. Spindler did not claim to be an expert in DNA analysis but had "been to a few courses." (Tr. 1115). After Dr. Spindler indicated that he found sperm inside Machelle's vagina, the prosecution asked whether it was possible to have intercourse "and not leave a detectable amount of sperm." (Tr. 1112). Dr. Spindler replied that it was possible and that "there could be a condition

existing in the person's body that would prevent a sufficient number of sperm to be present to be registered on DNA." (Tr. 1112).

Dr. Spindler testified that he had looked at Carlos's prior medical records and had found one that noted "a condition of a testicular mass" that was diagnosed as "spermatocele." (Tr. 1114). Dr. Spindler explained that "spermatocele is a swelling around the testicle," which "can compress the testicle and cause insufficient production of sperm," and in some cases can "lead to complete infertility." (Tr. 1114-1115). According to Dr. Spindler, having spermatocele can reduce an individual's sperm count to such a low level that he leaves behind no identifiable trace of DNA following sexual intercourse:

> Q. And just for point of clarification, defense counsel brought up DNA. This condition that the defendant has had for the last ten years, this spermatocele condition, how does that relate to sperm being found in the vagina?
> A. It could decrease the amount of sperm produced and, therefore the amount of sperm in the vagina would have been lessened by one individual.
> Q. And could it have been so low that it wouldn't have been detectable?
> A. Possibly.
> Q. And I think you even stated that in some cases it caused infertility?
> A. That is correct

(Tr. 1129-1130).

In closing argument, the prosecution told the jury that Carlos's spermatocele condition caused a "low sperm count" and therefore explained the lack of a match in the DNA evidence:

> Now don't be confused about this DNA evidence. . . The defense attorney got up here in opening and talked about how Carlos was eliminated as a suspect because his DNA did not match the sperm in the body of Machelle Lee. . . This defendant was never eliminated as a suspect. If you don't produce sperm then you're not going to leave any. And that's what Dr. Spindler was talking about towards the end of his testimony. . . He talked about the medical reasons why you would find a person could sexually assault a woman and there be no sperm. And the various reasons range from being too drunk, not ejaculating, pulling out, having a condom on, and suffering from a condition called spermatocele which the defendant happens to suffer from and has for the last ten years. He also told you that this condition leads to infertility and most of the time low sperm count, sometimes so low that it's not detectable.

(Tr. 1294-1295).

Alibi witnesses testify that Carlos could not have been with Bill Liles

In defense of Carlos, Robert and Catherine Woolf testified that they own a dairy farm where Carlos frequently worked until he was arrested. (Tr. 1173- 1174). They both remembered that Ms. Woolf traveled to Arkansas on November 21, 1990, and Carlos, who did not own a car, stayed at the farm helping Mr. Woolf until she returned on November 27th. (Tr. 1174, 1183-1185). On the night of the 23rd, when Machelle was last seen alive, Carlos milked cows with Mr. Woolf until 9:00 or 10:00 p.m., and Mr. Woolf did not notice his dogs barking or any other sign that Carlos left the farm afterwards. (Tr. 1196-1198). The Woolfs produced checks showing that Carlos was

paid for working at their farm during that period. (Tr. 1152-1153, 1178, 1187).

Carlos is sentenced to life without possibility of parole

The jury convicted Carlos Greathouse of murder in the first degree but declined recommending the death penalty after hearing evidence during the penalty phase of trial. (Tr. 1332, 1667). The trial court sentenced Carlos to life in prison without the possibility of parole. (Sent. Tr. 39-40). This court affirmed the conviction and sentence on direct appeal in a memorandum opinion issued in *State v. Greathouse*, WD 54476.

Postconviction claim: Counsel should have challenged Dr. Spindler's assertion that having "spermatocele" prevents detection by DNA tests

Following the denial of his direct appeal, Carlos filed a motion for postconviction review seeking relief under Rule 29.15. (PCR L.F. 3-77). The motion court appointed counsel to represent Carlos on his motion, and counsel filed an amended motion. (PCR L.F. 78-130). One of the contentions included in the amended motion is that the attorney who represented Carlos at trial was constitutionally ineffective for failing to consult with an expert in DNA analysis. (PCR L.F. 89). Had he done so, the motion alleges, he would have learned that even if Carlos had a condition at the time of the murder that caused him to have a "low sperm count," he still would have left

behind enough material from which his DNA could be detected had he engaged in sex with Machelle Lee. (PCR L.F. 89).

DNA Expert: Having a "low sperm count" could not preclude detection

Dr. Dean Stetler, a professor of molecular biology at Kansas University, testified by deposition in support of the motion. He stated that a condition causing a "low sperm count" would not prevent someone from leaving a detectable amount of DNA behind after intercourse because only a small amount of "some sort of cell within a nucleus" is required for testing. (Stetler Depo. 10, 17-18). Spermatozoa cells are not required. (Stetler Depo. 17). Additionally, the term "low sperm count" is relevant when discussing pregnancy issues, but it does not have much meaning in DNA testing:

> Q. Doctor, the fact that an individual has a low sperm count, that would not preclude a match or a sample being able to be taken from him; would it?
> A. That is correct.
> Q. Just a matter of degree, it makes it more difficult and you would need a more sensitive test?
> A. That's correct. I would also want to ask the question, how low of a sperm count?
> Q. That makes a difference?
> A. A low sperm count is generally a term utilized to indicate possibly a problem to cause pregnancy. That's a whole different story than the ability to have enough sperm to provide enough DNA to generate a DNA profile.
> Q. The other question I have is, spermatozoa wouldn't be the only material by which you could obtain a DNA

sample in a sexual relation situation, there would be other cells aside from ejaculation that you could take a sample from; am I right in that regard?
A. That's correct.

(Stetler Depo. 22-23).

Dr. Stetler suggested that if the state laboratory was truly concerned about the possibility of a "low sperm count" affecting the DNA analysis, it could have used more sensitive tests that were available at the time. (Stetler Depo. 9-12, 16-21). He noted that in this case the lab used the RFLP technique of testing which requires 50 to 200 nanograms of DNA to produce a readable profile. (Stetler Depo. 9). The PCR technique was also available and being used by the lab at the time of testing in this case and requires only 1 to 5 nanograms of DNA to achieve a profile. (Stetler Depo. 9-10). Newer profiling techniques require just 0.1 nanograms. (Stetler Depo. 10). Dr. Stetler was available to testify at Carlos's trial and had often worked as an expert in prior cases for the public defender's office. (Stetler Depo. 4; Stetler Depo. Ex. 1).

Carlos's trial attorney saw no need to challenge Dr. Spindler

The public defender who represented Carlos at trial, Dan Gralike, testified that he was aware of Dr. Stetler through his work with other attorneys in the public defender's office. (PCR Tr. 45-46). Mr. Gralike considers Dr. Stetler an expert in DNA testing. (PCR Tr. 46). Mr. Gralike testified that he did not consult with a DNA expert such as Dr. Stetler in regard to the "low sperm count" theory espoused by the prosecution. (PCR Tr. 46). He believed that the testimony of Cary Maloney, the criminalist from the Missouri Highway

Patrol, was sufficient to establish the fact that a "low sperm count" condition could not preclude detection by DNA profiling tests:

> Q. Would it have been useful to your defense to be able to call a witness in rebuttal to dispute the fact that Mr. Greathouse's low sperm count precluded DNA identification?
> A. As I recall there was no evidence presented by the State that needed rebuttal. That was an assertion made by Linda Koch [assistant attorney general], which I thought was a very far-fetched position to take. And perhaps that's as a result of my familiarity with DNA testing and, perhaps, they treated it more to the jury. But part of my examination of the DNA expert that we subpoenaed included a break down of the differences between sperm and seminal fluid and semen. And that even absent an ejaculation, and having tried a number of rape cases within that hundred I'm familiar with, I believe there are seven stages that lead to an ejaculation and that there is a seminal fluid that is deposited prior to ejaculation. And in the examination and cross examination in the second trial of Cary Maloney those distinctions were brought out. And that there need not necessarily be sperm present for purposes of DNA testing, that seminal fluid itself would have been enough. And in this case seminal fluid and sperm were both found in the body of Machelle Lee.

(PCR Tr. 46-47).

Motion court denies relief

The motion court ruled that, "at best, a DNA expert would [have] add[ed] cumulative testimony that [Carlos] was not a match for the sperm found in the victim, " that Mr. Gralike's failure to challenge Dr. Spindler's testimony about spermatocele and DNA detection was

“a strategic choice” that is “virtually unchallengeable,” and that Carlos failed to prove “that the outcome of the case would have been different had counsel retained and called a DNA expert.” (PCR L.F. 150-151).

POINT RELIED ON

The motion court erred in ruling that counsel acted reasonably and competently by not consulting with an expert in DNA analysis in order to be in a position to challenge the validity of the prosecution's explanation as to why the DNA found inside Machelle was not from Carlos. An expert would have questioned the validity of Dr. Spindler's statement that some persons who have spermatocele and a "low sperm count" are "not detectable" by DNA testing. Counsel's failure to consult with an expert violated Carlos's rights to a fair trial and effective assistance of counsel under the Sixth and Fourteenth Amendments to the Federal Constitution. Since the prosecution's theory is that Carlos raped Machelle and then murdered her when she threatened to tell the police, it is important to know why the semen found in Machelle was not from Carlos; failing to consult with an expert was prejudicial because Dr. Spindler is not an expert and there is good possibility that his testimony on this issue is inaccurate, but it went unchallenged before the jury.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984);
United States. v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984);
Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991);
Driscoll v. Delo, 71 F.3d 701 (8th Cir. 1995*);*
U.S. Const. Amend. VI and XIV.

ARGUMENT

The motion court erred in ruling that counsel acted reasonably and competently by not consulting with an expert in DNA analysis in order to be in a position to challenge the validity of the prosecution's explanation as to why the DNA found inside Machelle was not from Carlos. An expert would have questioned the validity of Dr. Spindler's statement that some persons who have spermatocele and a "low sperm count" are "not detectable" by DNA testing. Counsel's failure to consult with an expert violated Carlos's rights to a fair trial and effective assistance of counsel under the Sixth and Fourteenth Amendments to the Federal Constitution. Since the prosecution's theory was that Carlos raped Machelle and then murdered her when she threatened to tell the police, it is important to know why the semen found in Machelle was not from Carlos; failing to consult with an expert was prejudicial because Dr. Spindler is not an expert and there is good possibility that his testimony on this issue is inaccurate, but it went unchallenged before the jury.

The Sixth Amendment right to counsel also guarantees that criminal defendants receive *effective assistance* of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Our system of justice requires competent and prepared defense counsel ready and able to test the validity of the prosecution's case. *United States. v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 (1984). Effective representation is measured by the customary skill

and diligence that a reasonably competent attorney would provide under similar circumstances. *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064. Review of an attorney's performance must be highly deferential, presuming that the attorney's conduct fell within the wide range of professionally reasonable assistance and sound trial strategy. *Id.* at 689, 104 S.Ct. at 2065. Strategic choices made after thorough investigation are "virtually unchallengeable;" strategic choices made after incomplete investigation "are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id*. at 690, 104 S.Ct. at 2066.

If counsel's performance fails to meet this standard, to gain a new trial prejudice must be also be apparent. *Id*. at 694, 104 S.Ct. at 2068. Prejudice means that but for counsel's subpar performance, there is a reasonable probability that the result of the trial would have been different. *Id*. at 695, 104 S.Ct. at 2068-69. In determining prejudice "we consider all the evidence presented to the jury; we are mindful that some trial errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, whereas other errors will have produced only a trivial, isolated effect." *Id*. at 695-96, 104 S.Ct. at 2068-69.

If the jurors believed the prosecution's evidence in this case, they would have expected that any semen found inside Machelle's body would have come from either Bill Liles or Carlos Greathouse. But one of the chief contradictions in the prosecution's case was the fact that semen was found that came from someone else. If both Bill and Carlos had engaged in sexual intercourse with Machelle

immediately before her death, why didn't the DNA test on the semen match up with either one? The prosecution's solution to this problem was to call Dr. James Spindler, a pathologist who is not an expert in DNA analysis, who said that Carlos had been diagnosed with a condition that can limit his sperm production and therefore he could be undetectable by DNA tests. (Tr. 1129-1130). This hypothesis was never challenged by defense counsel, was endorsed by the state in closing, and the jury retired without any having any reason to doubt it.

A DNA expert consulted after trial however showed there were many reasons to question the prosecution's "low sperm count" theory. The fact that a person has a "low sperm count" would *not* make him undetectable by DNA tests. Seminal fluid in fact contains cellular material other than sperm that contain DNA and that are detectable by DNA analysis. And the prosecution has much more sensitive DNA techniques available with which to test the sample again if its concern about Carlos avoiding detection on account of his spermatocele was truly genuine. (Stetler Depo. 22-23).

A defense attorney must be "ready and able to subject the prosecution's case to the 'crucible of meaningful adversarial testing;'" if counsel fails in this duty, "there can be no guarantee that the adversarial system will function properly to produce just and reliable results." *Lockhart v. Fretwell*, 506 U.S. 364, 377, 113 S.Ct. 838, 847 (1993) (Stevens, J., dissenting) (quoting *Cronic*, 466 U.S. at 654, 104 S.Ct. at 2044). DNA evidence is undoubtedly important to a jury, and the jury in this case should have at least been made aware that experts in DNA testing do not agree with Dr. Spindler's

"low sperm count" theory.

The motion court erred in refusing to grant a new trial. The first reason given by the court in denying the motion is that, "at best, a DNA expert would [have] add[ed] cumulative testimony that [Carlos] was not a match for the sperm found in the victim. " (PCR L.F. 150). In reaching this conclusion, the motion court has overlooked all of Dr. Stetler's testimony, and it appears that the court did not fully understand the contention, although it was pleaded with specificity in the amended motion. (PCR L.F. 89). The issue here concerns the fact that the state attempted to explain *why* Carlos was not a match for the sperm found in the victim by using an apparently dubious theory from a witness who admittedly was not an expert and was at trial not to testify about DNA but because he performed the autopsy. (Tr. 1115). Dr. Stetler would have challenged the prosecution's theory, which defense counsel failed to do, and his presence at trial would not have therefore "add[ed] cumulative testimony."

The second reason given for refusing to grant the motion is that "the failure to retain and call a DNA expert was a strategic choice" made at trial that is "virtually unchallengeable." (PCR L.F. 151). This conclusion is erroneous because it falsely assumes that defense counsel had prepared for trial by consulting with a DNA expert regarding the validity of Dr. Spindler's theory. The fact is that Mr. Gralike did not speak with Dr. Stetler or any other DNA expert before trial and his "strategic choice" to fail to consult with an expert relates not to trial strategy, which is "virtually unchallengeable," but to trial preparation, which is challengeable under a reasonableness standard. When Mr. Gralike's decision is reviewed under this

standard, taking into account the evidentiary importance of the DNA test and the duty of defense counsel to test the validity of the prosecution's case, the conclusion must be that he failed to meet this standard.

A properly prepared counsel has a "wide range" of strategical options available at trial that fall within professionally accepted norms, as a result "strategic choices made *after a thorough investigation of law and facts relevant to plausible options* are virtually unchallengeable." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066 (emphasis added). This presumption that counsel acted reasonably applies only where counsel has adequately prepared and is aware of all strategical options. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). The decision to consult with and interview a potential expert witness is "a decision related to adequate preparation for trial," and not one relating to trial strategy. *Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir. 1990). In regard to trial preparation, counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066.

Since the decision not to retain a DNA expert relates to trial preparation and not trial strategy, the issue that the motion court should have decided was whether counsel's decision was reasonable. Mr. Gralike did not know that DNA experts disagreed with Dr. Spindler because he had decided not to consult any in preparation for trial. The result is that counsel did not have the strategic choice available to him at trial of calling Dr. Stetler to challenge Dr. Spindler's testimony. Mr. Gralike's suggestion that his

cross-examination of Cary Maloney was an adequate substitute is not convincing because Mr. Maloney testified prior to Dr. Spindler and he was never questioned about his opinion on the validity of Spindler's theory. Counsel's decision to proceed to trial without benefit of the advice of a DNA expert relates to trial preparation and not trial strategy, and, according to *Strickland,* review is under a reasonableness standard.

In light of the importance of the evidence, counsel's failure to consult with an expert in preparation for trial was unreasonable. Mr. Gralike must have known prior to trial that the result of the DNA analysis was very significant evidence pointing to his client's innocence. He should have anticipated that the prosecution would attempt to discredit the testing or somehow explain how the results were actually consistent with a theory of guilt. In such a situation, many attorneys would retain a DNA expert to at least review the documentation of the state's testing and help anticipate possible prosecution strategies. An expert would have likely reviewed the same medical records that Dr. Spindler reviewed, which show the diagnosis of spermatocele. Perhaps the DNA expert would not have been creative enough to foresee the possibility that the prosecution would devise a "low sperm count" theory from this diagnosis, but had counsel retained Dr. Stetler to help prepare for trial he would have been in a position to at the very least call him in rebuttal. Failing to adequately prepare resulted in Dr. Spindler's questionable theory effectively negating, without challenge, important evidence showing that Carlos may be innocent.

A similar case is *Driscoll v. Delo*, 71 F.3d 701 (8th Cir. 1995),

in which defense counsel was held to have failed to adequately prepare for the introduction of the results of a blood test done by the state. The prosecution's theory was that the defendant had stabbed the victim with his knife, but the results of testing done on blood found on the knife showed that it was of a different type than the victim's. *Id*. at 707. The prosecution developed the theory at trial that the results of the test were actually consistent with the defendant's guilt because the victim's blood was actually on the knife, it had only been "masked" by the presence of other blood. *Id*. Counsel for the defendant never challenged this theory. *Id*.

After trial it was revealed that the prosecution's theory about the victim's blood being "masked" was questionable. *Id*. at 708. Another test done on the knife also showed the lack of the presence of the victim's blood; this second test was not susceptible to blood being "masked." *Id*. The court held that a reasonable attorney would have understood the importance of the blood test evidence and would have prepared for trial by anticipating any prosecution challenge to the validity of this evidence:

> Whether or not the alleged murder weapon . . . had blood matching the victim's constituted an issue of the utmost importance. Under these circumstances, a reasonable defense lawyer would take some measures to understand the laboratory tests performed and the inferences that one could logically draw from the results. At the very least, any reasonable attorney under the circumstances would study the state's laboratory report with sufficient care so that if the prosecution advanced a theory at trial that was at odds with the serology evidence, the defense would be in a position to expose it on cross-

examination.

Id. at 709. The court held that counsel's "failures to prepare for the introduction of the serology evidence, to subject the state's theory to the rigors of adversarial testing, and to prevent the jury from retiring with an inaccurate impression . . . fall short of reasonableness under the prevailing professional norms." *Id*.

The court in *Driscoll* recognized the importance of scientific evidence and the necessity that counsel not only fully understand it but also to anticipate prosecution strategy designed to undermine it. It is only by anticipating possible theories that the prosecution may advance can defense counsel fulfill his duty to subject the prosecution's case to "the crucible of meaningful adversarial testing." As in *Driscoll*, Mr. Gralike also failed to act reasonably in preparing his defense, and as a result the adversarial system has failed.

. The third and final reason given by the motion court in denying a new trial is that Carlos "did not establish that the outcome of the case would have been different had counsel retained and called a DNA expert." (PCR L.F. 151). The motion court appears to have placed an unfairly high burden on Carlos in ruling that he failed to adequately prove the second "prejudice" element of the *Strickland* test. Under *Strickland*, Carlos is required to prove that there is "*a reasonable probability* that the result of the trial would have been different." *Id*. at 695, 104 S.Ct. at 2068-69 (emphasis added).

The prosecution's case against Carlos Greathouse was weak. It relied for the most part on the credibility of Bill Liles, who told at least four different versions of his story and in return received probation for sexually assaulting Machelle Lee. Bill's final story is still

inconsistent in many significant ways when compared with the testimony of Cynthia Curtner, the neighbor whose home Machelle visited on the evening she was last seen alive. The rest of the prosecution's case consisted of witnesses who said they heard Carlos make incriminating statements in jail or at parties. The testimony of these witnesses carry little weight because the majority of them received benefits such as shorter jail time for testifying. The case involves a sheriff with little experience who could have been overzealous in his desire to build a case against Carlos. Finally, the most troubling weakness in the prosecution's case is the fact that DNA analysis showed that neither Carlos nor Bill Liles was the source of the semen found in Machelle Lee. This is totally inconsistent with the state's theory of guilt and leaves any reasonable person wondering who the source of the semen is, and if he is not in fact guilty of the rape and murder that the state attributes to Carlos Greathouse.

Considering the fact that the case against Carlos was weak, Counsel's failure to adequately prepare for the introduction of the DNA evidence at trial by retaining a DNA expert resulted in prejudice. The prosecution was able to neutralize the most glaring weakness in its case through Dr. Spindler's testimony regarding his "low sperm count" theory on how Carlos was able to avoid DNA detection. Subsequent post-trial testimony from an expert in DNA testing has shown that the prosecution's theory may not be valid. Because of the weakness of the case, the significance of the DNA evidence, and the importance that the jury would have likely placed on Dr. Stetler's testimony, the conclusion must be that had counsel consulted an

expert before trial in preparation for the introduction of the DNA analysis evidence there is a reasonable probability that the outcome would have been different.

CONCLUSION

For the reasons stated, this court should reverse the circuit court's denial of the postconviction motion and remand for a new trial.

Respectfully submitted,

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Certificate of service and compliance

I, David Simpson. hereby certify to the following: The attached brief complies with the limitations contained in Rule 84.06 and Special Rule 1(b). The brief was completed using Word 6.0 in arial size 14 font. The brief contains 8648 words which does not exceed the 31,000 limit.

The floppy disk filed with this brief contains a complete copy and has been scanned for viruses. The disks sent to the attorney general and the court are virus-free.

Two copies of the brief has been mailed to opposing counsel on this 10th day of July, 2001

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David Simpson