COMMONWEALTH OF KENTUCKY
COURT OR APPEALS
2010-CA-000296 and 2010-CA-000297

GARR KEITH HARDIN
JEFFERY D. CLARK **APPELLANTS**

v.

Appeal from the Meade Circuit Court
Action Nos. 92-CR-042 and 92-CR-043

COMMONWEALTH OF KENTUCKY **APPELLEE**

REPLY BRIEF FOR APPELLANTS HARDIN AND CLARK

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CERTIFICATE REQUIRED BY CR 76.12(b)

The undersigned hereby certifies that a copy of this Reply Brief was served by U.S. Mail, first class postage prepaid, on May 11, 2011, on the Hon. Sam Monarch, Senior Judge, Kentucky Court of Justice, P.O. Box 147, Hardinsburg, KY 40143-0147 and by messenger mail to the Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601. I certify that the record on appeal was not removed from the custody of the Clerk of Kentucky Court of Appeals for the purpose of this Reply Brief.

Marguerite Neill Thomas by: MS

I. Introduction

The question before the Court is whether, in a "highly circumstantial" case in which even the trial judge was "surprised" by the guilty verdicts, previously unavailable DNA testing should now be performed to determine if probative biological evidence matches James Whitely, an unrelated third-party who confessed to committing the murder. Conclusively linking Whitely to the biological evidence would confirm his inculpatory statements and establish Clark's and Hardin's innocence.

Rather than use modern scientific DNA testing to determine conclusively whether Whitely is the actual perpetrator, the Commonwealth continues to rely on the circumstantial evidence it presented against Hardin and Clark at trial. The Commonwealth's continued reliance on the circumstantial evidence is troubling not only because that evidence was limited by the unavailability of DNA testing, but also because some of the circumstantial evidence presented at trial has since been undermined.

The circumstantial evidence has been undermined in at least three ways. First, the snitch testimony from Clifford Capps about Clark's purported incriminating statements was undermined when Capp's November 11, 1992, letter came to light.[1] Second, while the limitations of microscopic hair comparison were well-known at the time of trial, today there is no question that relying on microscopic hair comparison rather than DNA testing is misguided and scientifically unfounded.[2]

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[1] Capps' letter documents his attempt to coordinate fabricated testimony against Clark and Hardin. The letter and a description of its importance are included as Tab 6 of Appellants' Brief.

[2] National Research Counsel of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 87 (2009) ("[N]o forensic method other than nuclear DNA analysis has been rigorously shown to have the capacity to consistently and with a high degree of certainty support conclusions about . . . 'matching' of an unknown

Finally, the Commonwealth continues to argue that Clark's and Hardin's guilt is supported by the fact that a fingerprint from the victim was found in Clark's car. (Appellee's Brief at 8-9.) The Commonwealth argues that the print demonstrated that Clark lied to police when he told them that he had not seen the victim in the three months before she was killed. (VT No. 3: 03/01/95; 9:48:40.) The Commonwealth's position is based on its belief that prints can be time-dated. This belief has long been refuted by forensic scientists, including the Commonwealth's own expert in this case. (VT No. 14: 03/03/95, 9:33:37 – 9:34:01, 9:38:25.) Even today, we still do not have the ability to time-date latent fingerprints.[3]

Rather than championing unscientific and false positions and relying on partially undermined circumstantial evidence, the Commonwealth should join Appellants' request for modern DNA testing of all of the biological evidence.[4]

II. To Oppose DNA Testing the Commonwealth Now Relies on an Entirely New Theory of the Case That Is Inconsistent With Its Trial Theory That Hardin and Clark Committed the Crime Alone.

In opposing Appellants' request for DNA testing, the Commonwealth has now proposed an entirely new theory of the case. It has aligned itself with the trial judge, who found that identifying Whitely as the source of the hairs would do nothing more than identify a third person responsible for the crime. Notwithstanding the fact that the

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item of evidence to a specific source." See also, Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 47-63 (2009) (documenting DNA exonerations following faulty microscopic hair comparison).

[3] See Appellants' Brief, Tab 6 (listing authority for the proposition that fingerprints cannot be time-dated); Hardin TR, Vol. 1, p. 55. (same).

[4] While much of the briefing and argument has focused on the hairs found clenched in the victim's hand, evidence that has already been located, Appellants also seek testing on the victim's bloody fingernail scrapings and clippings. (Appellants' Brief, Tab 4; Clark TR Vol. II, p. 224.) Additionally, Appellants requested that the other hairs found on the victim be tested. (CD 10/01/09; 02:30:20 – 02:31:10; Hardin TR, Vol. 1, p. 53.)

Commonwealth has always maintained that Appellants committed the crime alone, there is simply no evidence connecting Whitely to Appellants. (Appellants' Brief at 17, n. 10.) The implication that Appellants committed the crime with Whitely is nothing more than a baseless guess. Indeed, if the Commonwealth believed this guess had merit, it would be seeking to test the hairs to bring Whitely to justice for the murder as a co-actor.

Rather than speculating about a new theory of the crime that is not supported by the Commonwealth's investigation, the Commonwealth should recognize the plain implication of linking the hairs to Whitely. Such a result would confirm Whitely's prior admissions, refute the Commonwealth's evidence from the jailhouse snitch, and allow this circumstantial case to be evaluated with science, not unreliable theories about time-dating fingerprints. Linking the hairs to Whitely would put the entire case in new light and meet *Bedingfield's* standard – would such a result "with reasonable certainty, change the verdict or … probably change the result if a new trial should be granted." *Bedingfield v. Commonwealth*, 260 S.W.3d 805, 810 (Ky. 2008) (internal citations omitted).

III. Appellants Did Not Conceal Whitely's Identity. Rather, From the Outset They Have Tried to Prove Their Innocence By Establishing Third-Party Guilt.

Before Mr. Hardin and Mr. Clark were convicted, Whitely made incriminating statements admitting that he, alone, killed the victim. The defense became aware of Whitely's admissions before trial and presented the information to the Meade County authorities.[5] Because DNA testing was not available at the time, the defense tried to use

[5] The Commonwealth continues to maintain that Hardin and Clark concealed Whitely's identity. (Appellee's Brief at 22.) The trial court also incorrectly held that Hardin and Clark concealed "Whitely's existence and identity from the police, the Commonwealth Attorney, the Court, and the jury." (Clark TR Vol. III, p. 371.) The trial court's ruling that Appellants tried to conceal Whitely's identify is directly refuted by the record.

the only forensic science technique available – microscopic hair comparison – to compare the hairs to Whitely. However, as the Commonwealth's expert explained at trial, gray hairs are not suitable for microscopic hair comparison.[6]

Appellants were clearly frustrated with the inability to compare the hairs to Whitely at the time of trial. Both asserted their innocence and asserted that the actual perpetrator will not be known until we know whose hairs were found on the victim's body. (VT No. 5: 03/07/95, 15:05:05 – 15:05:44; 15:48:29 – 15:51:31.) The Commonwealth countered that the hairs in the victim's hand might have been the victim's mother's or Sheriff Greer's. (VT No. 5: 03/07/95, 17:14:50 – 17:15:25.) While the jury was forced to sort out the parties' competing theories, we no longer have to speculate. DNA testing can confirm Whitely's admission and establish Appellants' innocence by identifying Whitely as the source of the hairs in the victim's hand.

IV. Appellants' Request for DNA Testing Is Properly Before the Court.

The Commonwealth argues that there is no procedural avenue for Appellants to seek post-conviction DNA testing, specifically arguing that CR 60.02 and KRS 422.285 do not give the Court authority to grant testing. (Appellant's Brief at 15-20.) The Commonwealth raised similar objections below. (Hardin TR Vol. I, pp. 80-82.) In fact, the trial court requested briefing on the issue and the parties submitted briefs.[7] The trial

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Specifically, Appellants told the authorities about Whitely, and this resulted in Ms. Madison's appearance before the grand jury to provide testimony about Whitely's admissions that he alone committed the murder. (Appellants' Brief, Tab 5.) The only thing preventing Appellants from establishing their innocence and confirming Whitely's guilt is DNA testing.

[6] The expert also confirmed that DNA testing was not an option at that time. (VT No. 14: 03/03/95, 10:03:40.)

[7] The Commonwealth's brief on this issue is located at Hardin TR Vol. I, pp. 72-86. Appellants' brief is located at Hardin TR Vol. I, pp. 87-110.

court held that it had the authority to grant DNA testing, despite the fact that Appellants are not under a death sentence. (Hardin TR Vol. I, pp. 111-113.) The Commonwealth did not file a cross-appeal raising this issue.

Regardless of whether the Commonwealth properly appealed this issue, its position that Appellants do not have an avenue to pursue post-conviction DNA testing is plainly refuted by the trial court's ruling, the Kentucky Constitution, *Bedingfield*, KRS 524.140, and the post-conviction DNA-based exonerations that have already occurred in Kentucky. Indeed, the procedural path Appellants seek to follow – obtain the DNA results through court-ordered testing and then file a timely motion to vacate their convictions – is the exact path the Kentucky Supreme Court recognized in *Bedingfield*.[8]

WHEREFORE, Appellants request post-conviction DNA testing that was not available to them at trial to determine whether Whitely's hairs were left in the victim's clenched hand, confirming his admissions and establishing Appellants' innocence.

Respectfully submitted,

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[8] To the extent that the Commonwealth's position is accepted and the Court finds that post-conviction DNA testing is not available in Kentucky to any defendant except those serving death sentences, such a finding not only violates Sections 1, 2, 11, 14, 16, 17, 77, and 109 of the Kentucky Constitution, it also violates Appellants' federal due process rights.