

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
KENT, SC. SUPERIOR COURT

RANDY ANDERSON
Applicant

VS

PM 2009-0108

A.T. WALL, His official capacity :
As the Director of the Rhode Island :
Department of Corrections :
Respondent :

DEFENDANT'S MEMORANDUM IN RESPONSE TO THE STATES
REQUEST TO DISMISS HIS CLAIM OF POST-CONVICTION RELIEF
PURSUANT TO R.I. GENERAL LAWS 10-9.1-8

The Attorney General's response to defendant's Petition for Post-Conviction Relief based on grounds of Prosecutorial Misconduct due to his failure to comply with the dictates of Rule 16 discovery as well as his ethical duty to disclose exculpatory evidence is to assert behind the technical aspects of R.I. General Laws 10-9.1-8 entitled "Waiver of or failure to assert claim". The state doesn't respond to allegations of their clear violations of the rules of discovery which are in existence to "ensure fairness to all parties" nor to their clear violation of their ethical duty to disclose exculpatory evidence. They instead raise the doctrine of Res Judicata.

It is true that Rhode Island General Law 10-9.1.8 entitled "waiver of or failure to assert claim provides

All grounds for relief available to an applicant at the time he or she commences a proceeding under this chapter must be raised in his or her original, or a supplemental or amended, application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application...

The defendant must respectfully ask this court to place particular attention to the remaining portion of this statute that states

...Unless the court finds that in the interest of Justice the applicant should be permitted to assert such a ground for relief.

It is the defendant's specific grounds for this Post-Conviction Relief that goes to the very definition of what is meant by the "interest of Justice". There is nothing more of an affront to the "interest of Justice" than Prosecutorial misconduct. The state's deliberate failure to comply with discovery as well as their deliberate failure to turn over the victim's medical records which were clearly exculpatory in nature, violated the object of discovery which is to ensure "fair play" and the defendant's constitutional right to "due process" under the dictates of Brady v. Md. 373 U.S. 83 (1963).

In State v. Concannon, 457 A2d 1350 (1983) the court stated that "when the defense is misled into proceeding to trial unprepared, the basic precepts of due process are violated. Our Supreme Court indicated they will take a no nonsense, no tolerance approach to prosecutorial misconduct. They have gone so far as to hold that where there has been deliberate failure to comply with Rule 16, "we will grant a new trial without inquiry into the degree of harm caused by the misconduct". State v. Verlaque, 465 A2d at 214 and State v. Adams, 481 A2d 718 (1984).

Clearly, Mr. Anderson's new grounds for Post-conviction relief meets "interest of Justice" exception. After all what violates the interest of Justice more than a violation of one's constitutional right to due process.

In addition to the above arguments the defendant asserts that the evidence of the victim's medical reports is newly discovered evidence therefore it would be in the interests of Justice to allow the petition to proceed. Although, the evidence of the June

15, 1995 examination of the prosecutrix was in existence at the time of Mr. Anderson's trial and his first Post-conviction relief petition, its actual contents of the medical records were never provided or disclosed to the defendant. It was the defendant who actually secured the documents long after his trial and after the appeal on his post conviction relief petition was denied. The defendant came into possession of the June 15, 1995 medical records in September of 2006. Only then did he become aware of the full contents of the medical records and their relevance to the issue of credibility of the alleged victim. In addition to learning that there were no injuries nor scarring to the complainants vagina, the defendant learned that her hymen was intact, that she indicated she was sexually active-inferred she was having intercourse, she was using condoms as a means of birth control and that she could not tolerate the physical examination of her vaginal area. The credibility of the complainant was the key evidence in this case. One could infer from the acquittal on count 2 regarding an allegation of digital penetration that the Jury was concerned about her credibility.

She claimed she was raped by her ex-boyfriend Joseph Theroux. The defendant's attorney put the state and the court on notice by filing a Rule 26.3 motion to be permitted to cross-examine her on her prior false allegation of rape as well as her prior sexual history. The complainant told the Warwick Police she was sexually active, inferring she was having intercourse. She testified during a voire dire hearing regarding the Rule 26.3 motion, where under questioning by Judge Krause, she left the reasonable inference to draw that she had consensual intercourse with Joseph Theroux. Then she certainly left that inference that she was sexually active meaning she was having intercourse by the information she provided the hospital.

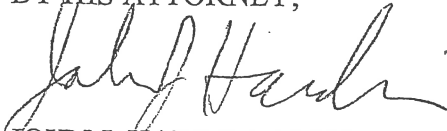
All this information was relevant in preparing to cross-examine her at trial because it went to her overall credibility as a witness in a she said/he said type of case. None of the information in the hospital report was known at the time of the trial or the first post-conviction relief petition. It was newly discovered evidence. It could not of been "knowingly, voluntarily, and intelligently waived in the prior post-conviction proceeding." This newly discovered evidence certainly would have impacted the preparation of Mr. Anderson's attorney and the strategy of the case.

This newly discovered evidence certainly satisfies the interest of Justice exception to R.I. General Laws 10-9.1-8 where the issue of prosecutorial misconduct could not of been fully and fairly litigated in the prior Post-conviction Relief Petition. Query, should the state be allowed to be excused from its solemn responsibility to fulfill its discovery responsibilities and duty to disclose exculpatory evidence by a claim of res judicata.

I will also point out that none of the "res judicata" case relied upon by the state, (Ramirez v. State, 933 A2d 1110(R.I.), Figuroa v. State, 897 A2d 55 (2006), Miguel v. State, 924 A2d 3 (2007)) were case where the issue of discovery violations and Brady violations were asserted. Lastly, if the State is going to assert a procedural bar to Mr. Anderson Request for Post-conviction Relief then I would ask the court to take note that the defendant filed his petition for Post-conviction relief on July 1st, 2009. Rhode Island General Laws 10-9.1-6 provides twenty (20) days to respond by answer or by motion. The Attorney General responded past the twenty day period on September 1st, 2009.

The defendant must respectfully requests that his petition for Post conviction relief be allowed to proceed.

RANDY ANDERSON
BY HIS ATTORNEY,


JOHN J. HARDIMAN 2792
PUBLIC DEFENDER

CERTIFICATION

I hereby certify that on November 12, 2009, I delivered a copy of said motion to the Clerk of the Court and mailed a copy to Steve Regine, Special Asst. Attorney General, McGrath Judicial Complex, 4800 Tower Hill Road, Wakefield, RI 02879.

