UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RANDY ANDERSON Petitioner	(	
v.	(	C.A._____
A.T. WALL, Director, R.I. Dept. of Corrections	(	

MOTION FOR AUTHORIZATION TO FILE A SECOND OR SUCCESSIVE 28 U.S.C. § 2254 PETITION FOR WRIT OF HABEAS CORPUS

Now comes the petitioner, Randy Anderson, in pro se, and submits his memorandum of law in support of his actual innocence claim. Petitioner submits that the true picture of his memorandum is vested in the beginning.

In May, 1995, petitioner was charged by the Warwick police with two counts of Sexual Assault. Count one from March 9, 1995, and Count two from March 12, 1995.

On June 27, 1995, petitioner was presented to Kent County Superior Court to answer to a probation violation from a previously imposed probation, imposed for a 1981 B&E. Complainant took the stand at petitioner's violation hearing and stated, under oath, that prior to her alleged assault by petitioner, she was forcibly raped by a ex-boyfriend, at his house in May of 1994. Shortly after her testimony, the Judge presiding over the case called a lunch time recess. Before the P.M. proceedings, at sidebar, the special assistant A.G. informed the Justice and Defense Counsel

that he just learned that the Complainant had had a vaginal examination as a result of Count two of the State's case. That the Complainant informed him that no medical record was made available.

On October 19, 1998, petitioner's case proceeded to trial. Prior to the start, defense counsel, Mark Smith, inquired of the State in open court the status of his second R.I. Superior Court, Criminal Court Rule 16 Motion for all exculpatory evidence. The State in response informed the Court that everything in the State's possession had been turned over. Armed with that information, petitioner proceeded to trial. Shortly into the start of trial, a voir dire hearing was held on a R.I. Superior Court Criminal Rule 26.3 Motion to impeach the credibility of the Complainant with prior false accusations of sexual abuse filed by defense counsel. The Complainant took the stand, under oath, and testified that the ex-boyfriend had not raped her as previously stated on June 27, 1995, but that he "attempted" to rape her. Further, she testified that about a week after the attempted rape she began a consensual sexual intercourse relationship with the ex-boyfriend. Defense counsel, for unknown reasons, withdrew the Rule 26.3 Motion, and so the jury never got to hear any of this information.

The State's case was based solely on the Complainant. There was no eye witness, physical/medical evidence presented at trial to substantiate the Complainant's claim. After a week long trial, the jury found petitioner guilty of Count one, and not guilty of Count two.

On November 15, 2008, petitioner came into possession of a medical report for the first time, generated by Womem & Infants

Hospital, as a result of the alleged sexual assault of March 12,1995.

Petitioner filed a post-conviction application with the R.I. Superior Court, cited as Randy Anderson v. A.T. Wall,PM-2009-0108, as well as a Motion for Appointment of Counsel. The Court in response, appointed the head of the Public Defender's, John Hardiman. Attorney Hardiman filed a memorandum of law on petitioner's behalf citing a discovery violation by the State. As part of the memorandum,counsel cited a host of cases. These cases included: State v. Verlaque, 465 A.2d 207 (R.I.); State v. Adams, 481 A.2d 718 (R.I.); State v. Concannon, 457 A.2d 1350 (R.I.); State v. Wyche, 518 A.2d 907 (R.I.); Brady v. Maryland, 373 U.S. 83 (1963).

Rhode Island's discovery Rule 16 reads in pertinent part:

> " Rule 16 (a)(5). All results or reports in writing, or copies thereof, of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case and, subject to an appropriate protective order. Order under paragraph (f) any tangible objects still in existence that were the subject of such tests or experiments."

Counsel for petitioner argued in his memorandum that the State had a duty under Rule 16 (a)(5) to furnish petitioner's defense trial counsel with a copy of the Medical Report prior to trial... thus, the State's failure to do so violated this petitioner's constitutional rights as cited in Brady v. Maryland, supra. IN furtherance of his argument, counsel pointed to the language in State v. Wyche, supra. A case relating to medical evidence withheld by the State. The R.I. Supreme Court in Wyche stated:

> "The State exhorts the court to adhere to the literal reading of the rule and require the prosecution to deliver

reports and results that are (1) known by the state to be in existence (2) within the state's custody and control and (3) in writing. Because the prosecutor had no written report or results about the victim's blood alcohol test within his possession." Id. at 910.

The State in Wyche argued he had no Rule 16 duty to disclose the .208 reading. The R.I. Supreme Court went on to state:

" There is no disputing that a blood alcohol test was performed June 19, 1984 on Garcia and that it indicated a .208 concentration. In all likelyhood some type of written report or record of the test was made in the normal course of hospital procedure. What became of that report is not of concern here. The key factor for this court is the state's knowledge that the .208 reading existed and that the state possessed this information prior to the doctor's taking the witness stand. Knowledge plus possession of the results in oral form was sufficient in our belief to trigger disclosure under Rule 16 (a)(5). To require the prosecution to produce written but not oral test results in it's possession invites abuse." Id. at 910.

A post-conviction hearing was held on May 19, 2010, before the trial Justice. The State in response to petitioner's post-conviction stated that despite having in their possession a signed Medical Waiver form from the Complainant, no one from the A G's Office obtained a copy of the Medical Report, and that petitioner was represented by highly skilled legal counsel who could have obtained a copy himself. Defense counsel quickly countered that it is customary for the Attorney General Office in the course of such cases to file for and obtain such records... That such records are crucial in rape cases to evaluate the extent of the injuries...to call upon medical personal as needed...That the records indicate

that the State was in possession of a Medical Waiver form. While it would be pure speculation on petitioner's part...; it would be inconceivable that the State would not move to obtain a copy of the Medical Report after they obtained a Medical Waiver form from the Complainant, and proceeded to trial with simply the word/credibility of the Complainant. Logic dictates that in a attempt to proceed to trial with all the evidence available to booster their case, they would follow the normal office procedure and obtain a copy of the report....could be that he did receive a copy and that it did not booster the State's case, but did contain evidence helpful to defense, and thus the State made a concientious decision to exclude the Medical Report from the file...But again, this is just pure speculation on the part of the petitioner.

The medical content is the evidence that the petitioner relies on in his actual innocence claim. Complainant as previously stated, informed the Warwick Police in her handwritten report that she had had sex prior to the assault by petitioner. She told the Dept. of Children, Youth and Families she was sexually active. She testified she was forcibly raped by her ex-boyfriend at petitioner's probation violation hearing...Told the Courts that she had informed petitioner and her two friends she was raped. Told Women and Infants Hospital that she was sexually active with the use of condoms as a means of birth control. Told petitioner's trial Justice that while she was not raped as previously testified to, but did have sexual intercourse with the ex-boyfriend about a week later. She leaves no doubt that she is at least having "consensual" sex despite her perjured testimony that she was raped. A review of the

Medical Report revealed the fact that the Complainant was actually still a virgin. That the medical physician was actually unable to conduct a vaginal exam because patient was hyper sensitive. This information was crucial to impeach the Claimant's claims of rape and consensual intercourse. Because the State's case was based on the credibility of the Complainant, defense counsel's Superior Court Criminal Rule 26.3 to attempt to impeach the credibility of the Complainant with prior false evidence would have been granted, and the jury would have heard that the Complainant had accused a ex-boyfriend of rape...That she told petitioner and school friends she was raped. That she made it clear that she was sexually active and stated as such under oath. To be informed and made part of the record that despite all her claims she is actually still a virgin. That the examination was conducted on June 15, 1995, and her last reported sexual encounter with the ex-boyfriend was May of 1994. 13 months later. While it may be lost on the men of petitioner's jurors, the women would know that it is medically impossible to be having sexual intercourse and still be a virgin, because a Hymen does not grow back. As such, this Medical Report proves that the Complainant's testimony at voir dire and all other indications of sexual contacts was a lie, and thus makes her credibility worthless. Because her credibility was the States whole case there is no way petitioner's jury could have found him guilty beyond a reasonable doubt. Petitioner had alibied that on March 12, 1995 (Count two), he was actually home and not out assaulting Complainant. The Jury found him not guilty. Petitioner's jury had also asked the Court to be re-read the definition of reasonable doubt.

Had the jury had all the testimony and Medical Report to prove Complainant had a propensity to accuse others of sexual abuse, no way could the jury collectively found the petitioner guilty, because there was no other evidence besides her word.

Because this is the petitioner's second petition to this Court, he must establish the proof that he is entitled to relief. That he must meet standards set by Murry v. Carrier, 477 U.S. 478 (1986) as cited in Schlup v. Delo, 513 U.S. 298 (1995), and House v. Bell, 547 U.S. 518 (2006). The Court in Schlup stated:

> " To satisfy Carrier's "actual innocence" standard, a petitioner must show that, in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. The focus on actual innocence means that a district court is not bound by the admissibility rules that would govern at trial, but may consider the probative force of relevant evidence that was either wrongly excluded or unavailable at trial. The district court must make a probabilistic determination about what reasonable, properly instructed jurors would do, and it is presumed that a reasonable juror would consider fairly all of the evidence presented and would conscientiously obey the trial court's instructions requiring proof beyond a reasonable doubt." Id. at 301.

The Court went on to state:

> " The Carrier standard, although requiring a substantial showing, is by no means equivalent to the standard governing review of insufficient evidence claims. Jackson v. Virginia, 443 U.S. 307, 61 L.Ed 2d 560, 99 S.Ct. 2781. distinguished. In applying the Carrier standard to Schlup's request for an evidentiary hearing, the District Court must assess the probative force of the newly pre-

sented evidence in connection with the evidence of guilt adduced at trial. The court is not required to test the new evidence by a standard appropriate for deciding a motion for summary judgment, but may consider how the submission's timing and the affiants' likely credibility bear on the probable reliability of that evidence." Schlup, at 301.

Petitioner recites the fact that the State's case at trial was based solely on the credibility of the Complainant. No other evidence was presented, and the only evidence to be developed in the case was the medical examination report which was either, by design or mistake, not turned over. This evidence clearly would have proved that the State's sole piece of evidence was worthless. That the Complainant showed a dangerous propensity to accuse others of sexual abuse. Given the standards set in Murry v. Carrier, as cited in Schlup, petitioner contends that he is entitled to a hearing and meets the standards governed in second or successive petitions for writ of habeas corpus 28 U.S.C. § 2254

WHEREFORE, petitioner requests that this Honorable Court grant petitioner's motion to order a new trial, in the interest of justice.

Respectfully submitted,

Dated: August 21, 2014

Randy Anderson

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CERTIFICATION

I, Randy Anderson, hereby certify that I have mailed a true and correct copy to the Department of Attorney General, 150 South Main Street, Providence, Rhode Island 02903, postage prepaid, on 21 day of August, 2014.

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