

# Supreme Court of Louisiana

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NEWS RELEASE #062

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinion handed down on the 9th day of October, 2009, is as follows:

**PER CURIAM:**

2007-KP-2034      STATE OF LOUISIANA v. ANTHONY JOHNSON (Parish of Washington)  
VICTORY, J., concurs in the recall of defendant's writ  
application.  
JOHNSON, J., dissents and assigns reasons.

10/09/09

**SUPREME COURT OF LOUISIANA**

**No. 07-KP-2034**

**STATE OF LOUISIANA**

**VERSUS**

**ANTHONY JOHNSON**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,  
FIRST CIRCUIT, PARISH OF WASHINGTON**

**PER CURIAM\***

On February 24, 1986, Anthony Johnson was convicted of the second degree murder of Angela Bond. In 2004, defendant filed an application for post-conviction relief in the Twenty-Second Judicial District Court in Washington Parish. Defendant alleged two primary claims. First, defendant alleged that he was entitled to a new trial under La. C.Cr.P. art. 930.3(7), which provides for relief if “results of DNA testing performed pursuant to an application granted under Article 926.1 proves by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted.” Defendant also asserted that he was entitled to a new trial on the basis that the State suppressed multiple items of exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

On February 21, 2007, the trial court granted defendant a new trial based on both the DNA claim and the *Brady* claims. The State appealed the DNA ruling to the First Circuit Court of Appeal and requested a reconsideration of the trial court’s ruling on the *Brady* claims, based upon the State’s claim of inadequate time to brief the issues. In October of 2007, the First Circuit Court of Appeal reversed the trial court’s

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\* Calogero, C.J., retired, recused. Chief Justice Calogero recused himself after oral argument and he has not participated in the deliberation of this case. Traylor, J., retired. Justice Traylor retired after oral argument and he has not participated in the deliberation of this case following his date of retirement, May 31, 2009.

grant of a new trial, and this court granted certiorari thereafter. *State v. Anthony Johnson*, 07-2034 (La. 6/6/08), 983 So.2d 907. During the course of this court's review, the trial court held the rehearing on the *Brady* claims in open court on May 14, 2008. After this hearing, the trial court issued no new judgment regarding the defendant's *Brady* claims, and the record in this case suggests that the trial court refrained from re-ruling on those claims due to the pending DNA claim in this court.

Thereafter, on June 26, 2009, this court issued a per curiam opinion, ordering the trial court to rule on defendant's *Brady* and ineffective assistance of counsel claims, while this court retained jurisdiction over the defendant's DNA claim. *State v. Anthony Johnson*, 07-2034 (La. 6/26/09), \_\_\_So.3d\_\_\_. Pursuant to this court's order, the trial court rendered its judgment on July 22, 2009, granting the defendant a new trial pursuant to La. C.Cr.P. art. 930.3(1). After a review of the evidence, the trial court held "that the failure to disclose the exculpatory and impeachment evidence directly impacted the fundamental fairness of the proceedings in such a material way that had it been disclosed prior to trial, there is a reasonable probability of the defendant's acquittal."

The trial court therefore granted defendant's post-conviction relief, set aside his guilty verdict, and ordered a new trial, based on the defendant's *Brady* claims. The State then appealed the trial court's July 22, 2009 judgment to this court, as directed by the per curiam. After review of the trial court's reasons for judgment, we denied the State's writ in application 09-OK-1920 this date.

Due to the trial court's July 22, 2009, ruling granting the relief sought by defendant, and this court's denial of the State's writ application concerning that ruling, this court need not consider the DNA claim raised by the defendant in his initial writ application, as it is moot. We pretermitt any discussion of defendant's DNA claim, in light of the trial court's July 22, 2009, judgment granting the defendant a new trial

based upon his *Brady* claim. As such, this court expresses no opinion concerning the efficacy of the DNA claims of the defendant or the action of the Louisiana First Circuit Court of Appeal. As such, this matter is remanded to the trial court for further proceedings.

**THE WRIT IS MOOT AND THEREFORE RECALLED**

10/09/09

**SUPREME COURT OF LOUISIANA**

**No. 07-KP-2034**

***STATE OF LOUISIANA***

***VERSUS***

***ANTHONY JOHNSON***

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL  
FIRST CIRCUIT, PARISH OF WASHINGTON**

**VICTORY, J., concurring.**

I concur in the recall of defendant's writ application.

10/09/09

SUPREME COURT OF LOUISIANA

No. 07-KP-2034

STATE OF LOUISIANA

v.

ANTHONY JOHNSON

*On writ of Certiorari to the Court of Appeals  
First Circuit, Parish of Washington*

**JOHNSON, J., dissents, and assigns reasons:**

Since this case is *res nova*, and presents the first opportunity to give direction to trial courts on how to apply and weigh the science of deoxyribonucleic acid (DNA)<sup>1</sup> testing to determine factual innocence in Applications for Post Conviction Relief, I would grant defendant's writ application. In my view, the trial court correctly decided the DNA claim raised by the defendant in his initial writ application. The majority opines that due to the trial court's July 22, 2009, ruling, which granted defendant a new trial based on his *Brady*<sup>2</sup> claims, we need not consider the trial court's ruling on the DNA claim, nor the action of the Court of Appeal. This case presents a critical juncture between science and law for which we are obliged to do a thoughtful examination of the requirements and remedies contemplated by Louisiana Code of

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<sup>1</sup>DNA is the fundamental blueprint in each of our cells that contain all our genetic information, from our general identity as human beings to our specific identity as an individual person. No two persons, except identical twins, have the exact same DNA. Sophisticated scientific technology has combined with molecular biology to be able to decipher this individual identity from even the most minute sample of body tissue (saliva, blood, semen, skin, hair). Every cell of our body contains the complete blueprint of all our traits. La. Prac. Crim. Trial Prac. section 20:41 (4<sup>th</sup> ed. 2008)...[T]he length and composition of certain DNA base-pair sequences varies from one individual to another at several million sites along the human chromosome, and that, by examining the sizes of enough fragments at different sites on different chromosomes, statistical procedures based on known sequence frequencies in the population can be employed to establish the uniqueness of any one person's DNA pattern. Am. Jur. 2d. Evidence section 574.

<sup>2</sup>*State v. Brady*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d. 215 (1963). Under *Brady*, the prosecution has a duty to disclose evidence favorable to a defendant, whether the evidence is exculpatory or impeachment, prior to trial.

Criminal Procedure Articles 926.1<sup>3</sup> and 930.3 (7),<sup>4</sup> and to give meaningful guidance to the lower courts on the interpretation of these two codal articles.

Before a defendant is entitled to DNA testing under La. C.Cr. P. art. 930.3 (7), a showing must be made under Article 926.1 that DNA testing will resolve doubt as to the guilt of the defendant, and establish the innocence of the defendant. Clearly, La. C.Cr. P. art. 926.1 provides for an evidentiary examination in which a defendant may introduce extrinsic evidence, not admitted into evidence at trial. Said evidence must inure to the factual innocence of the defendant, establish articulable doubt as to his guilt, and establish that DNA testing will likely resolve that doubt in favor of the defendant to invoke the right to use DNA evidence for the purpose of Post Conviction Relief.

The majority of jurisdictions in this country require a threshold showing of “materiality” before testing is granted. Materiality requires the defendant to demonstrate that “a reasonable probability exists that the defendant would not have

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<sup>3</sup>Article 926.1 provides in pertinent part:

An application filed under the provisions of this Article shall comply with the provisions of Article 926 of this Code and shall allege all of the following:

(1) A factual explanation of why there is an articulable doubt, based on competent evidence whether or not introduced at trial, as to the guilt of the petitioner in that *DNA testing will resolve the doubt and establish the innocence of the petitioner.*

...C. In addition to any other reason established by legislation or jurisprudence, and whether based on the petition and answer or after contradictory hearing, the court shall dismiss any application filed pursuant to this Article unless it finds all of the following:

(1) There is an articulable doubt based on competent evidence, whether or not introduced at trial, as to the guilt of the petitioner and there is a reasonable likelihood that the requested DNA testing will resolve the doubt and establish the innocence of the petitioner. In making this finding the court shall evaluate and consider the evidentiary importance of the DNA sample to be tested. [Emphasis added]

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La. C.Cr. P. art. 930.3 (7) provides in pertinent part that:

If the petitioner is in custody after a sentence for conviction of an offense, relief shall be granted only on the following grounds:

(7) The results of DNA testing performed pursuant to an application granted under Article 926.1 proves by clear and convincing evidence that the petitioner is *factually innocent* of the crime for which he was convicted.

been convicted if exculpatory results had been obtained through DNA testing.” Several states impose additional limitations after the resulting DNA testing exclude an individual. New York State permits relief if the results of DNA testing show a reasonable probability of innocence. Pennsylvania uses the heightened, more-probable-than-not, standard.<sup>5</sup> (Citations omitted).

For guidance as to the applicable standard of review, our trial court can apply already established Louisiana jurisprudence concerning Post Conviction Relief based on Brady violations. When a defendant’s application for Post Conviction Relief is based on the State’s withholding *Brady* material, a grant of Post Conviction Relief is warranted when a defendant establishes that it was reasonably probable that the result of the proceeding would have been different had the suppressed evidence been disclosed.<sup>6</sup> By analogy, when examining a claim for Post Conviction Relief based on DNA evidence, courts should weigh the evidence produced in application for DNA testing under La. C.Cr. P. art. 926.1, and the DNA results obtained under La. C.Cr. P. art. 930.3 (7), against the State’s evidence to determine whether it was reasonably probable that the result of the proceeding would have been different, had the DNA evidence been available.

The clear wording of La. C.Cr. P. art. 930.3 (7), states that the ***results from DNA testing***, pursuant to an application for Post Conviction Relief, under La. C.Cr. P. art. 926.1, ***will prove by clear and convincing evidence*** that the petitioner is ***factually innocent*** of the crime for which he was convicted (the DNA in question does not match that of the petitioner). To prove a matter by clear and convincing evidence means to demonstrate “the existence of the disputed fact must be highly

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<sup>5</sup>92 Minn. L. Rev. 1627, *Claiming Innocence*, (June 2008).

<sup>6</sup>*See, State v. Kenner*, App. 4 Cir. 2005, 900 So. 2d 948, 2004-1809 (la. App. 4 Cir. 2005), writ granted, vacated 917 So.2d 1081, 2005-1052 (la. 12/16/05).

probable, that is, much more probable than its non-existence.”<sup>7</sup>

La. C.Cr. P. art. 930.3 (7) does not require that the DNA test results exonerate a defendant, or establish actual innocence.<sup>8</sup> The clear and convincing proof contemplated by the statute is a DNA result that excludes a defendant, after an evidentiary finding that there is a reasonable likelihood that the requested DNA testing will resolve the doubt, and establish the innocence of the defendant.

In light of the facts the defendant, Anthony Johnson, (Johnson) presented to invoke the application of DNA testing, Johnson clearly showed that there existed articulable doubt, as to his guilt, based on competent evidence, and that DNA testing would resolve that doubt and establish his factual innocence. Instead of contesting these facts that were presented by Johnson as reasons to doubt his guilt, the state *conceded* that DNA testing was warranted under these circumstances. There is no issue as to the credibility of the test results since the defense and the State jointly selected the laboratory that would conduct all of the DNA testing (Reliance Technologies, Inc.). Further, the state could not rebut the scientific studies, and expert testimony offered by the defendant which established that foreign DNA under fingernails is usually a result of a violent struggle or intimate conduct.<sup>9</sup> Against the backdrop of all the facts, and evidence presented establishing reasons to doubt the correctness of Johnson’s conviction, combined with the DNA results, the District Court correctly granted Johnson a new trial.

Since the state conceded the defendant’s right to DNA testing in the case at bar,

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<sup>7</sup>*Fernandez v. Herbert*, 2006-1558, p. 9 (La. App. 1<sup>st</sup> Cir. 5/4/07), 961 So. 2d 404, 408..

<sup>8</sup>The actual innocence standard is employed by federal courts in determining whether a petitioner is entitled to habeas corpus relief based on constitutional claims that are procedurally barred under state law. A prisoner asserting a claim of innocence as a “gateway” to defaulted claims must establish that , in light of new evidence, it is more likely than not , that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt. *House v. Bell*, 547 U.S. 518, 126 S. Ct. 2064, 2068, 165 L.Ed. 2d 1 (2006).

<sup>9</sup>The studies introduced into evidence reported no examples of foreign DNA from fingernails being matched to someone other than a sexual partner or assailant.

there was no need to consider whether the defendant met his burden of proof under Article 926.1 Armed with his results, Defendant made his case at the post conviction hearing that the DNA test results resolved the doubt, and established his factual innocence by clear and convincing evidence.

The State's case against Johnson hinged primarily on a police officer's recollection of an inculpatory statement allegedly made by Johnson regarding the types of weapons used in the murder which revealed "special knowledge."<sup>10</sup> The body of Angela Bond, the victim, was discovered with a knife and fork protruding from it. However, this "special knowledge" of the weapons used in the murder, was known to several people, (including Johnson's sister) prior to law enforcement's arrival at the murder scene. Moreover, the alleged statement was not recorded contemporaneously, but instead, documented by the police officer nearly three months after it was purportedly uttered.

The other evidence presented by the State was Johnson's own admission that he was at the victim's home several times on the evening prior to the murder, contradictory testimony from several witnesses regarding the times Johnson was observed in the victim's neighborhood, and a hair found on a plastic shower cap at the crime scene that was similar to Johnson's hair. Though similar, the hair was not conclusively determined to have originated from Johnson. The defendant's presence in the victim's home and the presence of his DNA, would be expected, since the victim was Johnson's girlfriend, and they had a child together.

The evidence presented at the post conviction hearing supporting Johnson's

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<sup>10</sup>The trial court judge, expressing his misgivings about the conviction stated:

[T]he court can very candidly tell you that in this trial until the defendant took the stand, I had some misgivings about the, the business about every reasonable hypothesis. I truly did. I considered the case that if the defendant had not taken the stand in this case and the verdict had come back that this would be a very close case, one probably where, where the court would be in the position of having to grant a judgment verdict of acquittal.

factual innocence is compelling for the following reasons: (1) Matthew Brown was convicted of killing two other women, Bevalina Brown and Regina Jackson. One of his murder victims was a woman he killed in the same bedroom where Angela Bond's body was found. Brown confessed to at least two people that he killed the victim, Angela Bond,<sup>11</sup> (2) Two witnesses placed Matthew Brown at the victim's home within hours of the discovery of the victim's body, and the victim's neighbors testified that the victim and Brown were having an affair, (3) There was un-refuted expert testimony that a struggle likely ensued between the murder victim and her attacker, (4) There was un-refuted expert testimony that the biological evidence found under the victim's fingernails was likely transferred during the murder from the victim's attacker,<sup>12</sup> (5) DNA results proved that the biological sample was from a single male donor, and that Johnson was not the contributor of the DNA material found under the fingernails of the victim, (6) Kelvin Hayes (a suspected co-perpetrator in the murders of Bevalina Brown and Regina Jackson), admitted to law enforcement that he made a statement implicating himself as having a role in the killing of Angela Bond.<sup>13</sup>

Johnson also re-urged testimony given at his trial by Lionel Weathersby, (a neighbor of Angela Bond) who testified that he heard two men outside his window, at about 3:30 am, on the night of the murder, and one of them said, "I killed that bitch." Weathersby testified it was not defendant's voice that he heard, and the car he heard drive away, was not defendant's car.

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<sup>11</sup>Brown boasted that he killed Angela Bond to a cell mate, Joseph Rogers. Brown told Rogers that one of the "girls" he killed had a boyfriend in prison with him in Washington Parish for the murder that Brown committed. Additionally, William Todd Morris (Morris) testified to a grand jury that Brown bragged to him about killing a girl with a fork, and that somebody else was taking the rap for the murder. Morris testified at Johnson's second grand Jury that Brown had confessed to killing a woman with a fork.

<sup>12</sup>The State originally suggested that the DNA from the victim's fingernail clippings could have been deposited there by a male infant the victim was caring for on the day of her murder. The State suggested, contrary to the expert testimony, that DNA is easily transferred under the fingernails from person to person.

<sup>13</sup>Two witnesses, Carlos Wayne Dunn, and Stanley Lundy, reported to police that on the day before Bevalina was found murdered, they heard Hayes threatening to rape and kill Bevalina Brown "*the same way the other girl (Angela Bonds) in that house was killed.*" Hayes admitted to the police that he made that statement.

Further, Johnson's account of his whereabouts on the evening of the murder are corroborated by at least two witnesses.<sup>14</sup> In his application for Post Conviction Relief and DNA testing, Johnson challenged the recollection of Carl McGee, one of the State's witnesses at his trial. McGee had testified that he saw Johnson leaving the victim's house around 6:00 a.m. the morning the victim's body was discovered, wearing a plastic shower cap on his head. He said Johnson, waved at him while he drove past and was wearing his plastic shower cap, as he often did. However, McGee's police statement indicated that he was outside at 6:00 a.m. because he was putting out the trash when he saw Johnson drive by, and trash day was the day *before* the body was discovered, which is also the time Johnson would have been driving to his job at the hospital, to which he always wore a plastic shower cap.

Lastly, Johnson highlighted the stark similarities between the murders of the three women killed in Bogalusa indicating a *modus operandi*. All three women were young African American women in their twenties. Regina Jackson had been beaten about the head and face and throttled like Angela Bonds. Bevalina Brown and Angela Bond, were both killed in the same house and in the same bedroom. They were both strangled with fabric wrapped around their necks, and both had a second thicker piece of fabric around their necks. Both victims' heads were turned to the right, and they both had their tongues protruding through their teeth. They both had semen in their vaginas and there was no evidence of drug or alcohol in their systems. Perhaps the strangest coincidence was that both women slept with weapons under their pillows for protection: Angela with an ice pick and fork, and Bevalina with knives.

A trial court's grant of a motion for new trial should only be reversed upon a

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<sup>14</sup>Charlotte Smith stated to the police that Johnson was at the Jug's bar that night, left with crabs and returned at least once. She recalled that he was still there when she left around 11:30 p.m. Charles Taylor told the police that Johnson was at the bar at least until 11:30 a.m. and that he left with crabs and returned several times.

finding that the trial court abused its wide discretion.<sup>15</sup> In evaluating whether newly discovered evidence warrants a new trial, the test to be employed is not simply whether another trier of fact might render a different verdict, but whether the new evidence is so material that it ought to produce a verdict different from that rendered at trial. When presented with a motion for a new trial based on newly discovered evidence, the trial judge's duty is not to weigh the new evidence as though he were a jury determining guilt or innocence; rather his duty is the narrow one of ascertaining whether there is new material fit for a new jury's judgment.<sup>16</sup>

Considering the wealth of exculpatory evidence Johnson presented pursuant to La. C.Cr. P. art. 926.1, and the DNA results, this trial court judge did not abuse his discretion in ruling that Johnson had proven his factual innocence. Thus, in my view, the Court of Appeal erred in reversing the decision of the district court, and in reinstating the conviction for second degree murder.

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<sup>15</sup>*State v. Presley*, 918 So. 2d 291 (La. App. 2 Cir 12/16/05)

<sup>16</sup>*State v. Coleman*, 04-0758, (La. App. 1 Cir. 3/24/05); 918 So.2d 23