DISTRICT COURT CITY & COUNTY OF DENVER, COLORADO 520 W. Colfax Ave. Denver, Colorado 80204	▲ COURT USE ONLY ▲
PEOPLE OF THE STATE OF COLORADO **Plaintiff,** **v.** **CLARENCE MOSES-EL,** **Defendant.**	**Case Number: 87CR2201** **Courtroom: 5B**
ORDER	

This matter is before the Court on Defendant's Motion for Postconviction Relief pursuant to Crim. P. 35(c). This Court held an evidentiary hearing on July 30, July 31, and August 3, 2015. At the conclusion of the hearing, the parties jointly requested the Court read the transcripts of the prior proceedings in this case (approximately 850 pages) and the witness transcripts in 06CR190 (approximately 200 pages). The Court, having reviewed the requested transcripts, the pleadings, the record, and applicable case law, makes the following findings and enters the following Order:

I. PROCEDURAL HISTORY

On September 3, 2014, Judge Starrs issued an Order on Defendant's Motion for Postconviction Relief under Crim. P. 35(c) addressing the four prongs a court should consider when a Defendant requests a new trial based on newly received evidence as outlined in *People v. Muniz*, 928 P.2d 1352, 1357 (Colo. App. 1996). In her Order, Judge Starrs found that Defendant satisfied the first two prongs, that the evidence was discovered after trial and that Defendant and his counsel exercised diligence to discover all possible evidence favorable to Defendant prior to and during the trial. As to the third prong (whether the newly discovered evidence is material to the issues involved and not merely cumulative or impeaching), she found the newly discovered evidence to be material. As to the fourth prong (the evidence is of such a character as to probably bring about an acquittal if presented at another trial), she found that an evidentiary hearing should be held on the credibility of L.C. Jackson's statements.

Subsequent to the September 3, 2014 Order, Defendant filed Motions for Discovery. Defendant filed a substitution of counsel on April 17, 2015. After ruling on the discovery matters, Judge Starrs set an evidentiary hearing for July 30, 2015.

II. FACTS

A. EVIDENCE AT TRIAL PERTINENT TO THE INSTANT ISSUE

On August 16, 1987, [redacted] testified that she returned home from a night out, which included drinking with others at a neighbor's home two doors from her home. Trial Tr. 71, 87, April 5, 1988.

After getting sick, [redacted] returned to the first floor couch to lie down. Immediately thereafter, she felt something beat her face and a male got on top of her, put his hands about her neck and raped her both anally and vaginally. Trial Tr. 69, 71-73, April 5, 1988. The same individual then covered [redacted] face with a cloth, put the cloth around her neck, and dragged her upstairs, again raping her vaginally and anally. Trial Tr. 75-77, April 5, 1988. Upon hearing her 6-month old infant crying, [redacted] asked to get the baby and was again struck in the face by the male. Trial Tr. 76-77, April 5, 1988. After [redacted] feigned sleep, the male left. When [redacted] heard the door shut, she went to her sister's home to seek aid and report the physical and sexual assault. Trial Tr. 79-80, April 5, 1988. When the police initially asked [redacted] who attacked her, she answered "LC, Earl, Darnell." Trial Tr. 81-82, April 5, 1988. She repeated this answer to her sister [redacted] and to neighbor [redacted] Trial Tr. 114-134; 125, April 5, 1988. Approximately one and one-half days later, while in the hospital, [redacted] stated that she reported to the police that she had a dream and identified Defendant as the male who assaulted her. Trial Tr. 91-92, 96 April 5, 1988. [redacted] testified that she did not recall talking to the police immediately following the assault. Trial Tr. 81-82, April 5, 1988. As a result of the assault, [redacted] sustained multiple scratches around her neck and behind her ears, had six bone breaks on the right side of her face and has lost vision in the eye. Trial Tr. 82-83, April 5, 1988.

At trial, the People, in their case in chief, called witnesses Denise Cousins, Officer Mark Allen, Officer Raye Sapire, Drs. Napoleon Knight, Brian Pannell, Kathren Brown and Detective James Huff. [1] The defense called L.C. Jackson and Rodney Cousins.[2] On rebuttal, the People called Mark Fuller, Stephanie Burke, and Denise Cousins. [3]

B. POST-CONVICTION HISTORY

On April 7, 1988, Defendant was convicted of sexual assault in the first degree, burglary in the second degree, and assault in the second degree. On March 17, 1989, after hearings on post-trial

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[1] Officer Mark Allen Trial Tr. 105-114, April 5, 1988 – responding officer to 2801 Arapahoe Street to interview [redacted] on scene and described the race, gender and hair style of the assailant [redacted] – Trial T. 114-134, April 5, 1988 - [redacted] sister who asked [redacted] who assaulted her and [redacted] responded "Darnell, Earl and L.C." Trial Tr. 125, April 5, 1988.
Officer Raye Sapire Trial Tr. 29-50, April 5, 1988.
Dr. Napoleon Knight Trial Tr. 11-29, April 5, 1988 – conducted physical and sexual assault examinations on [redacted] in the ER
Dr. Brian Pannell Trial Tr. 135-148, April 5, 1988 – oral surgeon resident.
Dr. Kathren Brown Trial Tr. 52-67, April 5, 1988 – serology expert.

[2] L.C. Jackson[2] Trial Tr. 93-100, April 6, 1988 - At trial, Mr. Jackson testified that he knew [redacted] for about one year and that she drank beer. Mr. Jackson also testified that there were all drinking beer at his girlfriend, Denise Sander's, house, but did not know how much [redacted] had to drink. Upon being asked a question that called for a hearsay answer, the objection was sustained and the questioned ended shortly thereafter. Trial Tr. 94-95, April 6, 1988.
Rodney Cousins Trial Tr. 100-111;113-139, April 6, 1988 – alibi witness.

[3] Mark Fuller Trial Tr. 153-157, April 6, 1988.
Stephanie Burke Trial Tr. 140-153, April 6, 1988 – Defendant's wife.
[redacted] Trial Tr. 157-159, April 6, 1988 [redacted] spoke with Defendant shortly after arrest by telephone and Defendant stated that he was across town when the incident happened. In another conversation Defendant stated that he was at 1148 29th.)

motions[4], Defendant was sentenced on count one to 48 years in the Colorado Department of Corrections ("DOC"), on count two to 16 years in DOC concurrent to count one, and on count three to 16 years in DOC concurrent to counts one and two. All sentences carried a mandatory parole period. At sentencing, the Court granted defense counsel's motion to withdraw when Defendant raised an ineffective assistance of counsel claim.

On May 5, 1989, Defendant filed a Notice of Appeal and represented himself after court-appointed appellate counsel withdrew after the opening brief was filed. The Colorado Court of Appeals (89CA0651) affirmed the trial court on April 25, 1991. The Supreme Court denied certiorari on September 13, 1991, and a mandate issued affirming the trial court.

On June 25, 1992, Defendant filed a Crim. P. 35(c) motion alleging the existence of new evidence in the form of DNA testing not presented or known at trial. The Court denied this Motion without a hearing on June 29, 1992. Defendant appealed that order and by mandate dated October 18, 1993, the Colorado Court of Appeals vacated the June 29, 1992 order and remanded with direction to the trial court to hold a hearing as to "whether defense counsel's conduct fell below an objective standard of reasonableness required of an attorney practicing criminal law, and, if so, whether the deficient performance prejudiced the defense of this case." 92CA1320 Opinion, at pp. 2-3. Defendant did not seek a hearing on remand prior to late 1996 because Defendant did not have sufficient funds for DNA testing, because destruction of the crime scene samples significantly changed the issues, and because Defendant asserted a new claim of ineffective assistance of counsel. Judge McMullen held a hearing on April 22, May 2, and May 5, 1997. By written order on May 13, 1997, the Court denied Defendant's Crim. P. 35(c) Motion. Defendant appealed this order and the Colorado Court of Appeals affirmed the trial court in 97CA1124. The Supreme Court denied certiorari and a mandate issued on July 12, 1999.

On or about July 13, 1999, Defendant filed a Crim. P. 35(c) Motion claiming ineffective assistance of counsel related to the 1997 hearing before Judge McMullen. Judge F. Martinez denied the motion on March 21, 2000. Defendant appealed this order. By Opinion dated November 8, 2001, the Colorado Court of Appeals (00CA674) affirmed the trial court's denial of the Crim. P. 35(c).

On February 7, 2001, Defendant filed a Crim. P. 35(a) motion which Judge Egelhoff denied by Order dated July 2, 2002.

On December 2, 2013, Defendant filed the current Crim. P. 35(c) motion. The Petition alleges an alternate suspect, LC Jackson (hereinafter, "Mr. Jackson"), sent a letter to "Bro. Clarence Mose-El, 11560 Road FF 75, Los Amimas, CO 81054-9573" with postal cancel date of 30 April 2012, stating "I really don't know what to say to you. but let's start by bringing what was done in the dark into the light. I have alot on my heart. I don't know who working on this. but have them come up and see me. its time. I'll be waiting. L.C." (July 2015 hearing, Ex. A). The Motion also states that Mr. Jackson "consistently stated that he could not believe it when he heard that Mr. Moses-El was accused of raping [redacted] because he was the person who had sex with [redacted] on the night – and at the time – in question." Petition, ¶ 100. Attached to the Petition is a 21-page

[4] Defendant, through trial counsel, Deputy Public Defender Thomas Hammond, filed a Motion for New Trial or Other Relief on May 3, 1988. Due to Defendant's claim of ineffective assistance of counsel, the Court permitted the Office of the Public Defender to withdraw on June 8, 1988 and appointed Dianna L. DeGette as new counsel for Defendant on June 15, 1988. Ms. DeGette also raised post-trial matters. Hearing was held on these issues prior to sentencing. Defendant's Motion to New Trial was denied.

Investigative Report of an interview with Mr. Jackson on April 8, 2013. In relevant part, the interview states that Mr. Jackson had sexual relations wi[redacted] on the night in question and that at one point, believing they had engaged in anal sex, he became angry and hit [redacted] in the face.

During the evidentiary hearing on July 30, 2015, this Court ruled on preliminary evidentiary matters, received opening statements, and heard from defense witnesses Mr. Jackson and Dr. Phillip Danielson, a serology expert. On July 31, 2015, Dr. Danielson's testimony continued and the Court heard from Demetria Yvette Harper. On August 3, 2015, the Court heard from [redacted] and closing arguments. The Court also admitted into evidence Defendant's Exhibits A-F, I-J[5], M-N, and R and People's Exhibits 1-3. The Court did not admit, over objection and after argument, Defendant's Exhibits G, H, K, L, O-Q, S, and T.

III. LAW & ANALYSIS

A. NEWLY DISCOVERED EVIDENCE

To establish newly discovered evidence to reverse a conviction under Crim. P. 35(c), a defendant must demonstrate that the newly discovered evidence: (1) was discovered after the trial; (2) defendant and his counsel exercised diligence to discover all possible evidence favorable to defendant before and during trial; (3) the newly discovered evidence is material to the issues involved and not merely cumulative or impeaching; and, (4) the newly discovered evidence would probably bring about an acquittal verdict if presented at another trial. *Muniz,* at 1357; *People v. Gutierrez*, 622 P.2d 547, 559-560 (Colo. 1981); *People v. Tomey,* 969 P.2d 785 (Colo. App. 1998).

The determination of the probable effect of the new evidence should be premised on whether, when considered with all the other evidence, the newly discovered evidence is such that *a reasonable jury* would probably conclude that a reasonable doubt concerning defendant's guilt existed and thereby reach an acquittal verdict. (emphasis supplied) *People v. Schneider*, 991 P.2d 296 (Colo. App. 1999); *People v. Estep*, 799 P.2d 405, 407 (Colo. App. 1990). *People v. Scheidt*, 528 P.2d 232 (Colo. 1974) (the newly discovered evidence must be of such a character as to probably bring about an acquittal if presented at another trial).

Reversing a judgment of conviction on the grounds of newly discovered evidence is not looked upon with great favor. *People v. Mays*, 525 P.2d 1165, 1166 (1974); *Digiallonardo v. People*, 488 P.2d 1109 (Colo. 1971). Such testimony must be received with great caution. *Schechtel v. People*, 99 P.2d 968 (Colo. 1940).

Additionally, verdicts in criminal cases should not be composed of guessing, speculation, or conjecture. *Polz v. Donelly*, 213 P.2d 385, 386 (Colo. 1949). The Court is also guided by the pattern jury instruction on credibility which reads in relevant part "... Consider how the testimony

[5] The Court reviewed the sworn testimony of Cynthia Coleman and Bithiah Coleman in People v. LC Jackson, 06CR190. The parties do no assert that this is newly discovered evidence. Rather, Defendant asks the Court to find that Mr. Jackson is a serial rapist based upon his convictions and the similarity of the facts in 06CR190 to the facts in the instant case. The Court finds that the testimony of Mses. Colman is not newly discovered evidence and will not make any findings as to the admissibility of this evidence.

of the witness is supported or contradicted by other evidence in the case. You should consider all facts and circumstances shown by the evidence when you evaluate each witness's testimony. You may believe all of the testimony of a witness, part of it, or none of it." COLJI-CRIM E:05 (Sept. 2014).

B. L.C. JACKSON'S STATEMENTS AND TESTIMONY

The question for this Court is whether the written statements and sworn testimony of Mr. Jackson, when considered with the existing evidence is such that, in the totality of the circumstances, a jury would probably acquit Defendant at a new trial.

In this case, it is undisputed that the newly discovered evidence proposed to grant relief under Crim. P.35(c)(2)(V) consists of the statements and testimony of Mr. Jackson. The Court has reviewed Mr. Jackson's written statements (Defense Exhibits A, B and People's Exhibit 1) and the Investigative Report dated April 8, 2013. Additionally, the Court heard from Mr. Jackson for approximately one and one-half hours on July 30, 2015, and had the opportunity to observe his demeanor and the quality of his testimony, and to consider his criminal history[6]. The Court has also reviewed the trial transcripts, post-trial proceedings, the pleadings and the record.

Specific to this Court's inquiry as to the newly discovered evidence, the Court makes note of the following evidence:

Trial Testimony of [redacted], Officer Allen, and [redacted] – All three testified that upon questioning at the scene, [redacted] responded "L.C., Earl, Darnell" when asked who was involved in her assault.

Testimony of Mr. Jackson - Mr. Jackson testified that he knew [redacted] because she was his girlfriend, Ms. Sanders', neighbor. Mr. Jackson testified that he had consensual sex with [redacted] on the date in question. Hearing Tr. 34; 66, July 30, 2015. He stated that once he determined that they were engaged in anal sex he became angered and hit [redacted] before returning to Ms. Sanders' home. Hearing Tr. 34-35; 66-68, July 30, 2015. Since 2013, Mr. Jackson has detailed this sexual encounter to several people. He describes in detail his anger when he learned that the sex was vaginal and anal, including his admission that he hit [redacted] on the face. Petition to Vacate Conviction, Attachment 2 pp. 6, 7, 9-12; 35(c) Hearing Tr. 34-35; 66-67; 97, July 30, 2015.

Serology Testing – At trial, Dr. Brown was qualified as an expert in serology and testified that the vaginal swab and the anal swab of [redacted] both had the presence of semen. Trial Tr. 58, April 5, 1988. Dr. Brown further testified that [redacted] is a O blood type and secretor (Trial Tr. 58, April 5, 1988) and Defendant a type B secretor (Trial Tr. 60, April 5, 1988). Dr. Brown tested the swabs collected at the hospital and concluded that the vaginal swab containing semen agreed with [redacted] blood type and the presence of H antigen. Trial Tr. 59, 61, April 5, 1988. Mr. Jackson's blood was tested after Defendant's trial and Mr. Jackson is blood type O. 35(c) Hearing Tr., July 31, 2015; Stipulation signed July 17, 2015.

Testimony of Pamela Sanders – Ms. Sanders failed to appear pursuant to subpoena by Defendant on July 30, 2015. A warrant issued for her failure to appear. Ms. Sanders was arrested and brought

[6] The Court as the finder of fact in this case is to consider a witness' felony convictions as weighing on their credibility. COLJI-CRIM D:06 (Sept. 2014).

into court on August 3, 2015. On that date, she testified that Mr. Jackson left her home about twenty to thirty minutes after [redacted] did. Mr. Jackson stated he was going to his grandmother's house nearby. Mr. Jackson returned one to two hours later and Ms. Sanders received a call about twenty minutes thereafter by someone saying [redacted] had been assaulted.

The newly discovered evidence, when considered with the previously admitted evidence, and in the totality of the circumstances, is sufficient on salient points to allow a jury to probably return a verdict of acquittal in favor of Defendant.

IV. CONCLUSION

Accordingly, Defendant's Petition for Post-Conviction Relief Pursuant to Crim. P. 35(c) on the basis of newly discovered evidence is GRANTED. Within 30 days of the date of this Order, Counsel shall contact the Court to set this matter for a new trial.

Dated this 14th day of December, 2015.

BY THE COURT:

Kandace C. Gerdes
District Court Judge

cc: DA, Ms. Johnson