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FEBRUARY 21, 2012
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

DALE J. BURKE,	)	
Appellant,	)	**Supreme Court No. 20110286**
vs.	)	**District Court No. 09-2011-CV-01126**
STATE OF NORTH DAKOTA,	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF

Appeal from the District Court's Order Denying Burke's Application for Post Conviction Relief, Motion for DNA testing, and Motion for Discovery, Entered on September 19, 2011, by the Cass County District Court, East Central Judicial District, State of North Dakota, The Honorable Steven Marquart Presiding.

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[¶ 3] ARGUMENT

[¶ 4] The district court abused its discretion in denying Burke's motion for DNA testing and summarily dismissing his application for post-conviction relief. Burke was entitled to the DNA testing he requested before the court ruled on his application.

[¶ 5] It its brief, the State advances three arguments, none of which withstands scrutiny. First, the State argues the district court properly interpreted N.D.C.C. § 29-32.1-15(1)(b) in ruling that Burke's jeans had already been subjected to DNA testing in general rather than the specific DNA testing Burke requested. Second, the State argues the testing Burke requested would not produce materially relevant, noncumulative evidence. Third, the State argues the district court properly granted the State's motion to summarily dismiss Burke's application. Since the State's third claim was adequately briefed in the Appellant's opening brief, only the first two arguments will be addressed here. For the reasons outlined below, the State's arguments are without merit.

A.

[¶ 6] Burke argues the district court abused its discretion when it determined Burke's blue jeans had been previously subjected to "testing" under N.D.C.C. § 29-32.1-15(1)(b). The State argues the court properly

interpreted the meaning of "testing" under the statute. In support of its argument, the State contends, "[a] court should construe the statute in a practical manner and give consideration to the context of the statute and the purposes for which it was enacted." Appellee's Br. ¶ 40 (quoting Harter v. North Dakota Dep't of Trans., 2005 ND 70, ¶ 7, 694 N.W.2d 677). The State's argument, however, ignores longstanding canons of statutory construction and misstates N.D.C.C. § 29-32.1-15's context and purpose—accuracy in criminal convictions. Only Burke's interpretation can be correct. The district court abused its discretion in ruling otherwise.

[¶ 7] Section 29-32.1-15, N.D.C.C., was enacted in 2005 in response to a North Dakota Crime Lab request for the statute so it could remain eligible for over $200,000 in federal grants under the Justice for All Act of 2004 ("JFAA"). See H.B. 1288 (2005) Legislative History (available at http://www.legis.nd.gov/assembly/59-2005/bill-status/house/HB1288.pdf). Hope Olson from the crime lab testified that North Dakota was required to show an equivalent statutory protection scheme to remain eligible for the grants. See id. That is, in order to remain eligible for the federal grants, North Dakota was required to: (1) make post-conviction DNA testing available to state defendants; (2) allow post-conviction relief if the testing

excludes the defendant; and (3) preserve biological evidence in relation to state cases. See id.; see also generally H.R. Rep. No. 108-711(2004).

[¶ 8] The JFAA was designed to enhance the rights and protections for all persons involved in the criminal justice system. It sought to ensure the true offender was caught and convicted of the crime. In other words, the JFAA's purpose was to ensure accuracy rather than finality in criminal cases where forensic evidence is available. The State relies on Clark v. State, 1999 ND 78, ¶ 21, 593 N.W.2d 329 and State v. Kinder, 122 S.W.3d 624, 631-32 (Mo. Ct. App. 2004), a pre-JFAA Missouri Court of Appeals case, to argue that finality of Burke's conviction should somehow trump accuracy in the result. See Appellee's Br. ¶¶ 40-41. The State's argument should fail.

[¶ 9] On its face, Kinder lends the most support for the State's argument. Reliance on Kinder, however, is misplaced. There, the defendant was convicted of murder and rape. Kinder, 122 S.W.3d at 626. At trial, the State presented DNA evidence that was analyzed under the RFLP DNA profiling method. Id. Kinder sought PCR DNA testing on the same evidence under Missouri's 2001 DNA statute, Mo. Rev. Stat. § 547.035 (2001), which preceded the JFAA by three years. The trial court summarily denied Kinder's motion and he appealed. Id. at 628. Ultimately, the Missouri Court of Appeals determined that DNA testing in general was

available and therefore Kinder could not show the technology was not reasonably available at trial. See id. at 632.

[¶ 10] Like in Burke's case, the court in Kinder was asked to interpret its DNA statute. The Missouri statute, in pertinent part, reads:

> (3) the evidence was not previously tested by the movant because:
>
> (a) the technology for the testing was not reasonably available . . . at the time of the trial;
>
> (b) neither the movant nor his or her trial counsel was aware of the existence of the evidence at the time of trial; or
>
> (c) the evidence was otherwise unavailable to both the movant and movant's trial counsel at the time of trial; and
>
> . . . .
>
> (5) a reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.

Id. at 629-30 (quoting Mo. Rev. Stat. § 547.035.2 (2001)).

[¶ 11] The Missouri statute, however, is different than North Dakota's statute in two key respects. First, unlike North Dakota's statute which requires a showing that the testing requested is generally accepted within the relevant scientific community, which supports an argument that retesting is appropriate as technology advances, the Missouri Court of Appeals recognized there was "no legislative intent to allow serial retesting of evidence due to a change in DNA technology." Id. at 632. Second, the

Missouri statute is distinguishable in that it requires the movant to show that he would not have been convicted if exculpatory results would be obtained through the DNA testing. In North Dakota, on the other hand, the statute merely requires a showing that the requested testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence. Compare Mo. Rev. Stat. § 547.035.2(5) (2001) with N.D.C.C. § 29-32.1-15(3)(b). Since there is an apparent legislative history in North Dakota to allow retesting as outlined below, in addition to the different burdens placed on the movant, reliance on Kinder here is misplaced. North Dakota's legislative intent is clear.

[¶ 12] Statutes are construed as a whole and are harmonized to give meaning to related provisions. Sample v. North Dakota Dep't of Transp., 2009 ND 198, ¶ 6, 775 N.W.2d 707 (quoting Industrial Contractors, Inc. v. Workforce Safety & Ins., 2009 ND 157, ¶ 11, 772 N.W.2d 582). The district court, at the State's prompting, gave subsection (1)(b) such a narrow meaning that it rendered subsection (3)(c)'s "testing requested" clause meaningless. "The language of the statute must be interpreted in context and according to the rules of grammar, giving meaning and effect to every word, phrase, and sentence." Sample, at ¶ 6 (quoting Walberg v. Walberg, 2008 ND 92, ¶ 9, 748 N.W.2d 702 and citing N.D.C.C. §§ 1–02–03 and 1–02–

38(2)). When our statute was enacted in 2005, DNA testing was already "employing a scientific method generally accepted within the relevant scientific community." Therefore, subsection (3)(c) must be referencing new DNA technology as it develops, which is why it requires the movant to make the "generally accepted" showing. Otherwise, subsection (3)(c) would constitute nothing more than useless rhetoric. See State v. Nordquist, 309 N.W.2d 109, 115 (N.D. 1981) ("Statutes are to be construed in a way which does not render them worthless and because the law neither does nor requires idle acts we will not assume that the Legislature intended that these sections be useless rhetoric.").

[¶ 13] To harmonize the subsections and construe the statute as a whole, subsection (1)(b) should be construed in the same manner as (3)(c). That is, subsection (1)(b)'s "the testing" provision should be construed as the specific "testing requested" by the movant, as it is in subsection (3)(b). This statute is designed to address new technologies as they are developed and become the new standards generally accepted within the scientific community.

[¶ 14] Burke's interpretation is supported by the enumerated purposes of the JFAA and the ABA's standards on post-conviction DNA testing. The ABA standard commentary specifically notes: "Given that DNA

exonerations have continued to occur in significant numbers, the availability of testing and re-testing is clearly warranted." ABA Standards for Criminal Justice, DNA Evidence (3d. Ed.), Standard 16-6.1 cmt. at p. 117 (emphasis added). The ABA commentary further states: "The requested test, for example, may not have been available at that time, which would include situations where improved technology has since been developed. . . ." Id. at p. 118 (emphasis added).

[¶ 15] The State's interpretation disregards the canons of statutory construction. Only Burke's interpretation can be correct. The district court abused its discretion in determining Burke's pants had already been subjected to "the testing" under the statute.

B.

[¶ 16] Burke also argues the district court abused its discretion in making its alternative ruling that the testing would not be "materially relevant" to Burke's claim of actual innocence. The State argues the testing Burke requested has no potential to produce new, noncumulative evidence materially relevant to Burke's assertion of actual innocence. The State's argument is without merit and the district court abused its discretion in deciding otherwise.

[¶ 17] The State's argument is based upon the premise of finality of criminal convictions and statements made at Burke's trial. Appellee's Br. ¶¶ 48-50. The State argues that the requested DNA testing must be materially relevant to Burke's specific claims of innocence at trial that there was an innocent explanation of the blood on his pants. Id. at ¶ 49. The State misinterprets the statute and ignores the purposes of the JFAA and North Dakota's post-conviction DNA testing statute.

[¶ 18] The relevant statute, N.D.C.C. § 29-32.1-15(3), provides in pertinent part:

> 3. The court shall order that the testing be performed if:
>
> a. A prima facie case has been established under subsection 2;
>
> b. The testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence; and
>
> c. The testing requested employs a scientific method generally accepted within the relevant scientific community. . . .

Id. After establishing a prima facie case and establishing the testing requested employs a scientific method generally accepted within the relevant scientific community, Burke need only show that the requested testing has the scientific potential to produce new, noncumulative evidence materially

relevant to his assertion of actual innocence. Burke has done all the statute requires. He is entitled to the DNA testing he requested.

[¶ 19] The State argues Burke is judicially estopped from asserting now that the blood may not have been Huotari's. Appellee's Br. ¶ 50. In this post-conviction case, Burke asserted that he did not believe the blood on his jeans belonged to Huotari. At trial, however, Burke asserted that the blood on his pants must have come from Huotari when Huotari cut himself when they were installing carpet. See Burke, 2000 ND 25, ¶ 10, 606 N.W.2d 108. At this stage of the proceedings, it does not matter whether Burke misspoke, was mistaken, or simply wrong. While that may be relevant in determining whether he can show enough evidence to warrant a new trial at the dispositional stage of the post-conviction relief case, here, he need only show the potential to produce new, noncumulative evidence that would be materially relevant to his assertion. In light of Wahl's affidavit, Burke has clearly done that.

[¶ 20] The State's interpretation suggests that a movant could never be successful in obtaining post-conviction relief DNA testing if the movant pled guilty to the offense or falsely confessed to the crime. Considering the expressed purposes of the JFAA and consequently our statute, the State's position is unduly narrow and ignores the Legislature's intent; accuracy in

criminal convictions. Since 1989, there have been 289 exonerations due to post-conviction DNA testing. The Innocence Project, Facts on Post-Conviction DNA Exonerations (available at http://www.innocenceproject .org/Content/Facts_on_PostConviction_DNA_Exonerations.php). Approximately twenty-five percent of those exonerations involved false confessions. See id. Twenty-two of the first 265 exonerations involved defendants who plead guilty to crimes they did not commit. Id. The court should not put more weight on Burke's trial testimony that the statistical evidence that shows DNA has clear ability to potentially produce new, noncumulative evidence relevant to his assertion that Burke is actually innocent.

[¶ 21] Here, Burke established a prima facie case under subdivision 2, and the State has conceded that point by not arguing it here. Burke presented an affidavit from Tom Wahl, an expert forensic DNA consultant. Wahl's affidavit and expertise was unchallenged by the State. Wahl's affidavit stated that the STR DNA testing Burke requested had the scientific potential to produce new, noncumulative evidence in that STR DNA profiling has the ability to definitively exclude Huotari as the source of the blood on Burke's pants. While it would not necessarily exonerate him, excluding Huotari as the source of the blood on the pants definitely makes

Burke's assertion of actual innocence more likely to be true. See People v. Barker, 932 N.E.2d, 1209, 1216 (Ill. Ct. App. 2010); see also N.D.R.Ev. 401 (defining relevant evidence as evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence); State v. Buckley, 2010 ND 248, ¶ 30, 792 N.W.2d 518 ("'The test to determine whether evidence is relevant or irrelevant is whether the evidence would reasonably and actually tend to prove or disprove any matter of fact in issue.'" (internal quotations omitted)).

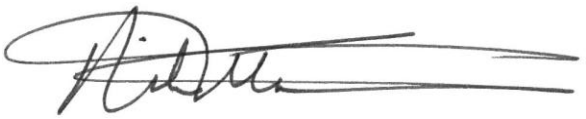
[¶ 22] The court's determination that the testing would not be materially relevant to Burke's claim is an abuse of discretion. The testing has the scientific potential to exclude the victim as the source of the blood on his pants, which makes his assertions of actual innocence much more likely to be true. Burke should be given the opportunity to have the bloodstains tested.

[¶ 23] CONCLUSION

[¶ 24] The district court abused its discretion in denying Burke's DNA motion and in summarily dismissing his post-conviction relief application. Burke respectfully requests this Court to reverse and remand this case with

instructions to grant Burke's DNA motion and hold an evidentiary hearing upon the return of the DNA results.

[¶ 25] Dated February 21, 2012.



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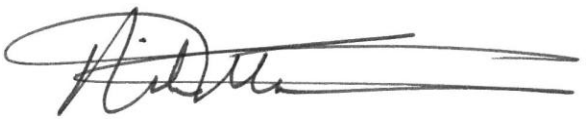
[¶ 26] **CERTIFICATE OF SERVICE**

[¶ 27] I, Nicholas D. Thornton, do hereby certify that, on the 21st day of February, 2012, I served the **APPELLANT'S REPLY BRIEF** upon Mark R. Boening and Reid A. Brady, Assistant States Attorneys, via email at the following addresses: **boeningm@casscountynd.gov; bradyr@casscountynd.gov;** and **SA-defense-notices@casscountynd.gov** pursuant to N.D. Sup. Ct. Admin. Order 14 and N.D.R.App.P. 25.

[¶ 28] Dated: February 21, 2012.



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