STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Letitia H. Verdin, Circuit Court Judge
1998-GS-23-5212
APPELLATE CASE NO. 2012-213673

THE STATE,

Respondent,

V.

ORLANDO SMITH,

Petitioner

RETURN TO PETITION FOR WRIT OF CERTIORARI IN SUPPORT OF CERTIORARI

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PETITIONER'S ISSUE PRESENTED

Did the lower court err in applying the seven-year time limit found in Section 17-28-30(B) of the South Carolina Code, which applies to individuals who pled guilty or no contest by its clear and unambiguous language, to Orlando Smith's application for post-conviction DNA testing where Smith pled not guilty requiring application of Section 17-28-30(A) of the South Carolina Code, which has no time limit?

RESPONDENT'S COUNTER QUESTIONS PRESENTED

1. Is certiorari warranted when an incarcerated defendant convicted after a jury trial in 2000 makes an application for DNA testing in 2012 when the trial court rejected the request as untimely under the seven year statute of limitations provision of § 17-28-30(B)?
2. Does the statute of limitations for the application for DNA testing under § 17-28-30(B) apply to all convictions for defined offenses whether the applicant was convicted by a jury after the entry of a not guilty plea or a plea of guilty or nolo contendre?
3. Does § 17-28-30(A) provide that a person convicted of a defined crime after a jury trial have the right to file an application for DNA testing during the entire period of their incarceration without regard to any statute of limitations?
4. If the statute of limitations applies, does a convicted defendant whose crime occurred longer than seven years prior to the enactment have any statutory right to seek an application under the Act?

RESPONDENT'S STATEMENT OF THE CASE

This matter concerns the denial by Circuit Court Judge Letitia Verdin of a 2012 application for D.N.A. testing pursuant to S.C. Code §17-28-10, *et. seq.*, from a 1998 indictment and 2000 conviction for murder after a jury trial before the Honorable Larry Patterson. The basis of her denial was her conclusion that the 2012 DNA application was subject to dismissal because the statute of limitations of seven years applied to the Petitioner's 2000 conviction, even though it resulted from a jury trial. App.p. 582, 589. The Petitioner appeals the decision and asserts that since he pled not guilty and had a jury trial under the Act the statute of limitations set forth in § 17-28-30(B) does not apply and his case falls within the provisions of § 17-28-30(A) where there is no statute of limitations. **The State respectfully requests certiorari should be granted to resolve this issue for the benefit of the bench and Bar.**

The 2012 DNA Application Proceedings

The Petitioner made an application for D.N.A. testing on **March 20, 2012.** App.p. 568-572. In the application, Smith stated he was identifying "hairs, ligature, fingerprints and blood" as items that should be tested. App.p. 569. He claimed that he sought the type of D.N.A. testing "in which identifiable information can be obtained." He asserting why it should be a significant issue he wrote: "there was 2 other individuals that where [sic] with the victim and DNA testing can exclude Applicant." App.p. 569. He further claimed that his trial counsel told him that D.N.A. testing had been done and nothing matched him. He asserted that at trial S.L.E.D. agents testified that D.N.A. test were not done. App.p. 569-570. In responding why the testing would likely change the result, Smith wrote "there were three suspects in this case and D.N.A. testing would exclude the Applicant and prove that someone else did the crime." App.p. 570.

The Solicitor's Office Opposition

The Solicitor's Office of the Thirteenth Circuit opposed the motion on June 12, 2012 asserting that it was unaware if required funding had been provided under the Act for the DNA testing, that the 2012 application was not timely because it was not done within seven years of the conviction in 2000. Lastly, the Solicitor's office argued that the Petitioner had failed to articulate why DNA testing would exclude the Defendant to the extent it would change the outcome of the 2000 trial. App.p. 575-578.

Judge Verdin's Denial under § 17-28-30(B) as untimely.

On August 8, 2012, the Honorable Letitia H. Verdin, Circuit Court Judge, entered an Order denying the motion for testing. App.p. 582. In particular, the Order stated:

> . . . Applicant filed this application on March 20, 2012. Applicant was convicted of murder and sentenced on July 19, 2000. Therefore, this Court finds that this Application for Post-Conviction DNA Testing is time-barred pursuant to S.C. Code § 17-28-30(B) ("A person who ...was convicted ...for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing . . .no later than seven years from the date of sentencing.").1

App.p. 582. The Petitioner made a motion to alter and/or amend asserting that his request was not time-barred asserting that his request fell under § 17-28-30(A) rather than § 17-28-30(B) since he did plead not guilty and had a jury trial instead of a guilty plea. App.p. 583-584.

On December 13, 2012, Judge Verdin entered an order denying reconsideration. In its pertinent part, the Court concluded:

> Defendant argues that the seven-year limit for the application for DNA testing proscribed in §17-28-30(B) does not apply to him because he did not plead guilty to the charge, but was instead convicted at trial. This Court reiterates its

1 In her order Judge Verdin inexplicably removed from the statutory quote the portion of §17-28-30(B) which included the phrase ". . .person who pled guilty or nolo contendre . . ." This parsing gives an entirely different meaning to the phrase.

finding that §17-28-30(B) applies to those applicants who entered a plea of not guilty and were convicted at trial (("A person who ...was convicted ...for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing . . .no later than seven years from the date of sentencing.").

App.p. 589. This appeal follows.

OTHER RELATED PROCEDURAL HISTORY IN SMITH'S CASES

A. Trial and Direct Appeal.

The Applicant was indicted at the October 1998 term of the Greenville County Grand Jury for murder (1998-GS-23-5212). He was represented by C. Timothy Sullivan, Esquire. After the State called the case to trial, the Applicant was found guilty. On July 19, 2000, the Honorable Larry R. Patterson sentenced the Applicant to thirty (30) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz HI, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders brief. The Court of Appeals dismissed the appeal after review pursuant to Anders v. California. 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). State v. Orlando Smith. Op. No. 2002-UP-372 (S.C. Ct. App. filed May 23, 2002). App.p. 323.

B. Smith v. State, 2002-CP-23-6327 (First PCR Action)

The Applicant next filed a PCR application on September 17, 2002 (2002-CP-23-6327). The Applicant raised the following issues:

1. Ineffective assistance of counsel:

    a. Failed to conduct proper investigation.

    b. Failed to properly object to denial of directed verdict motion.

    c. Failed to subpoena witnesses.

d. Failed to object to certain State evidence.

e. Failed to seek psychological examination.

App.p. 325. In this action he was represented by John O'Leary.

2003 PCR Request for Scientific Testing in PCR Action

On October 13, 2003, counsel for Petitioner made a motion to compel production of evidence for scientific testing , specifically hair samples and palm prints, where the hair samples were not tested asserting that "these samples if tested against the standard samples collected from the applicant, more likely than would indicate that another person was present at the scene and exculpatory in nature. . ." App.p. 335-336.

An evidentiary hearing was convened on October 22, 2003 at the Greenville County Courthouse. John O'Leary. Esquire represented the Applicant. At the hearing, the Honorable Ned Miller orally ordered the collection of the evidence pursuant to the October 13, 2003 motion. App.p. 343. Testimony at the October 2003 hearing was received from Orlando Smith, Carolyn Bell and counsel Timothy Smith.

On October 31, 2003, Judge Miller entered an order dated October 24, 2003 pursuant to the motion directing that SLED and Greenville County Sheriff's Department produce and make available all physical evidence and samples collected for independent testing in addition to the work sheets and reports of the tests. If the samples were not available, it was ordered that the Court be advised within 15 days or that the production is complied within 15 days. App.p. 337-338.

Counsel O'Leary made a memorandum in support of post-conviction relief on December 16, 2003. App.p. 410-424. Particularly, an issue was raised concerning counsel failure to request independent testing of three hairs found on the body. App.p. 413-14, citing App.p. 396 (PCR 56). He also attached a report by Bruce Jernigan that the ligature found at the scene contained blood.

App.p. 418, citing App.p. 430-431.[2] Counsel further argued that trial counsel erred in failing to have the hair independently tested prior to trial or compared to a sample taken from another suspect Eric Burts. App.p. 422. [There is no evidence that this hair was independently tested by counsel O'Leary at the PCR proceeding despite the order authorizing such testing].

The Honorable Edward W. Miller denied and dismissed the application by order filed March 31, 2004. App.p. 432. A subsequent motion to alter or amend (App.p. 438-441) was denied. App.p. 441.

Denial in the Certiorari Appeal

The Applicant filed a notice of appeal. Robert M. Pachak, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of a Johnson petition. The South Carolina Supreme Court denied the petition for writ of certiorari on June 12, 2006 after review pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

C. Smith v. Warden, 2006 Federal Habeas Corpus

The Applicant filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina (6:07-327-RBH-WMC). The Respondent submitted a motion for summary judgment on July 2, 2007. The Honorable William M. Catoe, United States Magistrate Judge, issued a report and recommendation to grant the motion for summary judgment dated January 23, 2008. On March 31, 2008, the Honorable R. Bryan Harwell, United States District Judge, issued an order granting the motion for summary judgment as to all but one (1) issue. On August 12, 2008, Judge Catoe issued a second report and recommendation to grant the motion for summary judgment. On November 12, 2008, Judge Harwell granted the Respondent's motion for summary judgment and dismissed the petition with prejudice.

2 The ligature was found on the victim's back porch by the dumpster. App.p. 111 (91)..

The Applicant filed a notice of appeal at the United States Court of Appeals for the Fourth Circuit. In an opinion filed August 10, 2010, the Court of Appeals denied a certificate of appealability and dismissed the appeal.

D. 2008 "ACCESS TO JUSTICE POST-CONVICTION DNA ACT"

In 2008, the General Assembly initially passed Access to Justice Post-Conviction DNA Act." 2008 Acts and Joint Resolutions, Act No. 413, Section 7 of the Act established the effective date. The Act was ratified on June 25, 2008. However, it was vetoed by the Governor on July 2, 2008. On October 20, 2008, the veto was overridden by the South Carolina Senate and on October 21, 2008, it was overridden by the House of Representative. 2008 Acts and Joint Resolutions, Act No. 413, p. 4061.

Pertinent to the Act and this Petition, the following provisions set forth in § 17-28-30 of the Act:

§ 17-28-30. Offenses for which post-conviction DNA testing available.

(A) **A person who pled not guilty** to at least one of the following offenses, **was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense,** and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication:

(1) murder (Section 16-3-10);
(2) killing by poison (Section 16-3-30);
(3) killing by stabbing or thrusting (Section 16-3-40);
(4) voluntary manslaughter (Section 16-3-50);
(5) homicide by child abuse (Section 16-3-85(A)(1));
(6) aiding and abetting a homicide by child abuse (Section 16-3-85(A)(2));
(7) lynching in the first degree (Section 16-3-210);
(8) killing in a duel (Section 16-3-430);
(9) spousal sexual battery (Section 16-3-615);
(10) criminal sexual conduct in the first degree (Section 16-3-652);
(11) criminal sexual conduct in the second degree (Section 16-3-653);
(12) criminal sexual conduct in the third degree (Section 16-3-654);
(13) criminal sexual conduct with a minor (Section 16-3-655);

(14) arson in the first degree resulting in death (Section 16-11-110(A));
(15) burglary in the first degree for which the person is sentenced to ten years or more (Section 16-11-311(B));
(16) armed robbery for which the person is sentenced to ten years or more (Section 16-11-330(A));
(17) damaging or destroying a building, vehicle, or property by means of an explosive incendiary resulting in death (Section 16-11-540);
(18) abuse or neglect of a vulnerable adult resulting in death (Section 43-35-85(F));
(19) sexual misconduct with an inmate, patient, or offender (Section 44-23-1150);
(20) unlawful removing or damaging of an airport facility or equipment resulting in death (Section 55-1-30 (3));
(21) interference with traffic-control devices or railroad signs or signals resulting in death (Section 56-5-1030(B)(3));
(22) driving a motor vehicle under the influence of alcohol or drugs resulting in death (Section 56-5-2945);
(23) obstruction of railroad resulting in death (Section 58-17-4090); or
(24) accessory before the fact (Section 16-1-40) to any offense enumerated in this subsection.

(B) **A person who pled guilty or nolo contendere** to at least one of the offenses enumerated in subsection (A), **was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense**, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication **no later than seven years from the date of sentencing.**

S.C. Code Ann. § 17-28-30. The Act also requires that the "application must be on such form as prescribed by the Supreme Court." S.C. Code § 17-28-40.

Within Act 413, there was a companion provision styled as the "Preservation of Evidence Act." Pertinent to this appeal, within this portion it delineated offenses for which physical evidence and biological evidence must be preserved. Section 17-28-320 (A) listed the identical offenses set forth in Section 17-28-30 and established the following condition of retention:

(A) A custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for at least one of the following offenses: . . . [And]

(C) The physical evidence and biological material must be preserved until the person is

released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A). **However, if the person is convicted or adjudicated on a guilty or nolo contendere plea** for the offense enumerated in subsection (A), the physical evidence and biological material **must be preserved for seven years** from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first.

Section 17-28-320(C). When Act 413 was passed, it included, in pertinent part:

I. **This SECTION takes effect on January 1, 2009**. However, the implementation of the procedures provided for in this SECTION is **contingent** upon the State Law Enforcement Division's receipt of funds necessary to implement these provisions. Until the provisions of this SECTION are fully funded and executed, implementation of the provisions of this SECTION shall not prohibit the collection and testing of DNA samples by the methods allowed prior to the implementation of this SECTION from persons convicted, adjudicated delinquent, or on probation or parole for those crimes listed in Section 23–3–620. Upon this SECTION taking effect, a South Carolina law enforcement agency, which has in its possession any DNA samples that have been included in the State DNA Database, immediately must destroy and dispose of the DNA samples in accordance with regulations promulgated by SLED pursuant to Section 23–3–640.

Savings clause

SECTION 5. The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Severability clause

SECTION 6. If any section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, items, subitems, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Time effective

SECTION 7. The provisions of Section 17–28–350 become effective upon the signature

> of the Governor. All other provisions become effective January 1, 2009. The enactment of these provisions prior to the effective date indicates the intent of the General Assembly that statewide laws or practices shall exist to ensure additional procedures for post-conviction DNA testing, and proper preservation of biological evidence connected to murder, rape, and nonnegligent homicide in order that application for available federal funds shall be made by the appropriate agencies and considered by the appropriate federal agencies prior to the effective date.

2008 Acts and Joint Resolutions, Act No. 413, p. 4059-4060.

E. ADDED ATTEMPTS TO GET DNA TESTING BY SMITH

1. February 17, 2009

On February 17, 2009, the Petitioner Smith wrote to the Greenville clerk of court requesting an application form pursuant to the "Post-Conviction DNA Procedures Act" App. 444. On March 19, 2009, South Carolina Court Administration sent Smith a letter advising him that the forms were unavailable at that time and would be made available at a later date and would be posted on the South Carolina Judicial Department website. App. 445.

2. April 10, 2009 – Court Form Created for Application.

The court-authorized application form was created on April 10, 2009 by court order.[3] When the Supreme Court issued its order concerning the form it footnoted:" [A]lthough the Access to Justice Post-Conviction DNA Testing Act was to be effective January 1, 2009, Section 89.127 of Act No. 414 of 2008, which imposed various budget cuts, provided that "[t]he provisions of the 'Access to Justice Post-Conviction DNA Testing Act' (Act 413 of 2008) are not

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3 Around April 2009, the application for DNA testing form was made available on the Judicial Department Website. Pertinent to this matter, the form application, approved by S.C. Court Administration included the following:

> I understand that DNA testing is only available if I have been convicted or adjudicated of an offense listed in S.C. Code Ann. § 17-28-30, that I am currently incarcerated for that offense, and that I am asserting that I am innocent of the offense. Further, if the conviction or adjudication was the result of a plea of guilty or nolo contendere, the application must be filed within seven years of the date of sentencing.

SCCADNA101 904/2009).

required to be implemented until such time as general funds are appropriated or federal or other funds are received to begin implementation of the act." RE: Forms Required by the Access to Justice Post-Conviction DNA Testing Act and Preservation of Evidence Act, Order, (S.Ct. S.C. April 10, 2009). See App.p. 453.

3. FIRST DNA APPLICATION - December 16, 2009

On December 16, 2009, Smith completed and submitted an application for forensic DNA testing to the Clerk of Court for Greenville County. App. 448 - 452. He requested testing of "hair and ligatures" and asserted that "a test that would show that the evidence is not linked to the Applicant." App.p. 449. He claimed therein that he was told before trial by Applicant's lawyer that "DNA testing was done and nothing matched the Applicant. At trial, SLED agents testified that DNA comparisons were never done..." App.p. 449-450.[4] In response, Petitioner received a copy

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4 SLED Agent Lisa Kaiser , a forensic technician described receiving matter processed from the scene. App.p. 145. She stated that she had learned from Gene Donohue that a bloody palm print was collected from the victim and was going to be very probative. When asked if three unknown pubic hairs had been collected and submitted to her, she denied she had received or tested them and stated that they were submitted to another department. App.p. 148. She stated that she was not aware that samples from Smith and Waldman were sampled against the recovered hair, in questioning from Petitioner's counsel. App.p. 148.

SLED Agent Nancy Skraba testified about the DNA comparison that she did prior to Petitioner's trial from a "sexual assault kit" from the victim which included a blood standard, hairs, vaginal swabs, oral swabs, and rectal swabs, a blood standard from the Petitioner and Thomas Waldman, fingernail scrapings from the victim's right and left hands, and a swab from a coffee table. App.p. 150. She stated that on the swabs from the DNA kit that no spermatozoa were found so nothing was available to do a comparison on. App.p. 151. Concerning the cushion, she opined that there was human blood on the cushion that she identified as the victim's. App.p. 151-152. She opined that human blood was found on the fingernail scrapings and that she forwarded them to Grayson Amick for PCR DNA testing. App.p. 153.

Agent Grayson Amick testified that he performed PCR DNA profiles for the victim, Smith and Waldman. App.p. 156. He opined that the fingernail clippings matched the victim. App.p. 156-157.

Agent Kimberly Black testified that she received hair samples from the victim and the suspect. She received a hair sample from sweeping and an additional hair sample from a ligature with a small stick. App.p. 159. In addition, there were hairs received from the victim's body. App.p. 160. She stated that she inventoried the hair samples . She stated that wit hair samples, SLED policy is that if there is blood evidence, if there is DNA evidence, they do not do a hair examination. App.p. 162. She stated that in hair comparisons, in addition to where the hair was collected from and its location, they are concerned with a relationship between the victim and the suspect. If there was an existing relationship, in most cases a hair comparison would not be done because they have a reason to believe that the suspect would have been in that location. "the significance of the hair match in hair comparison is basically to allow us to put a particular individual in a particular location. App.p. 160-161. She stated that she had learned that a bloody palm print had been located at the scene. App.p. 161. She stated that she considered the bloody palm print more

of the April 10, 2009 Supreme Court order noting that the applications are not to be accepted for filing until the act is implemented. In the order from the South Carolina Supreme Court dated April 10, 2009, it provided that in footnote one that although the Act was effective January 1, 2009 a section of Act No. 414 provided that "the provisions of the Act are not required to be implemented until such time as general funds were appropriated or federal or other funds were received to begin implementation of the Act. App. 453.

4. Rejected September 15, 2010 PCR Application – 2010-CP-23-7261

On September 1, 2010, the Petitioner made another application for post-conviction relief. Smith v. State of S.C., 2010-CP-23-7261. Particularly, the Petitioner was asserting:

> 1. "After receiving a complete copy of his file from SLED, (on September 16, 2009) the Applicant discovered irregularities and information regarding evidence that was not tested. The Applicant attempted to file an Application under the Post-Conviction DNA Testing and Preservation of Evidence Act, which was not accepted due to funding issues. As a result, the Applicant has retained a private forensic scientist and an attorney to address this matter of newly-discovered forensic evidence."
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> 2. "The Applicant is requesting the release of the forensic evidence to Dr. Robert Bennett, R.Ph.Ph. D. for forensic testing.

App.p. 455-56. He claimed, through counsel Tricia Blanchette, after he had received his complete copy of his file from SLED in September 16, 2009, concerning the existence of inconsistencies or irregularities with the information he had been told and what was presented at trial. He asserted

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definitive evidence. App.p. 162. She denied on cr0ss-examination that the hair recovered were from the pubic area, but had determined that they were from the stomach, navel and right knee. App.p. 163. She stated that hair evidence is "very mobile evidence" and that any hair found could have come from anyone who was at that location where the body was found and if there had been a particular suspect in that location had no relationship with the victim then we would have looked at those hairs to make a comparison with a known individual. App.p. 64.

Agent Black stated that she did not look at the hairs and stated that they may or may not be suitable for additional testing. App.p. 167. On re-direct, she confirmed that hairs found at a scene could have easily come from persons working the scene, law enforcement, EMS and anyone who had been at the scene at some point in the past. App.p. 167. On cross-examination, she stated that there was no indication that the hairs were pubic hairs and the determination was not made that they were pubic, head or body hairs. App.p. 168.

that he had retained Dr. Robert Bennett, R.Ph.Ph. D. for forensic testing. He further asserted that he had tried to pursue his claim under the Post-Conviction DNA Testing Act but it was returned to him. App.p. 456. The Respondent, through Assistant Attorney General Karen Ratigan made a Return and motion to dismiss as successive and untimely on December 22, 2010. App.p. 468-473.

On January 5, 2011, the Honorable Robin Stillwell, presiding judge, issued his "Conditional Order of Dismissal" finding that the application was successive and untimely. App.p. 474-479.

On February 11, 2011, counsel Blanchette made a response to the Conditional Order of Dismissal. App.p. 480-485. Counsel asserted that he was seeking to have hair evidence tested by a forensic scientist. She claimed that prior to trial his trial counsel had informed him that no hairs that were taken into evidence had matched his hair sample, citing App.p. 395-96. App.p. 483. He claims that according to his review of the SLED file, Agent Black's testimony contradicted information contained in the SLED file. App.p. 483. Petitioner was seeking to have the hairs tested due to his alleged claim of inconsistencies with the reports and testimony. She noted that funds had not been made under the Act for DNA testing and that he had retained counsel and a private expert to do the testing. App.p. 484-485.

A hearing on the motions was held before the Honorable Ned Miller on November 10, 2011. Petitioner was present and represented by counsel Blanchette and Assistant Attorney General Karen Ratigan represented the State. App.p. 499. During this hearing, counsel for the Petitioner summarized her version of the procedural history related to the Petitioner's attempt to get DNA testing. App.p. 504-505. Counsel claimed the relevance was that Petitioner had been advised by his counsel that no hairs in the murder case matched his sample. Counsel noted that SLED Agent Black had testified that she had received hair samples collected from a ligature with a

small stick. App.p. 505. In addition, counsel pointed out that Agent Black noted that there were miscellaneous hairs from the victim's body, including a hair from the victim's stomach, a hair from the victim's navel, and hair from the victim's knee and SLED's policy then that if there was blood evidence, they would not test hair.. App.p. 505. Counsel Blanchette noted that she was including various documents, including an evidence inventory sheet (reflecting the ligature with a small stick), instructions to test the ligature, two sheets , a coversheet from SLED, a note from February 9, 1999 that the agent is to look for hair on item 18 (ligature), note two hours later to collect hair and return it to the agency, a note on the sheet from 6/29/1999 that Gene Donahue wants the panties and ligature tested and other matters should be returned and a letter that prior counsel received that material was returned to Greenville in March 1999, (App.p. 493) and an additional case note sheet. App.p. 506. (Applicant No. 1). See also App.p. 461-467.

Counsel Blanchette contended that these documents reflect an inconsistency concerning an analysis on the testing of hair. Counsel asserted that a January 21, 1999 report from the Trace Department notes the ligature with a small stick (item 18) as an item without mentioning hair on it. App.p. 466. In addition she noted the report which states that the hair evidence (SLED Items 1, 2, 16-26, 29, 30) had been preserved and can be resubmitted to the SLED Forensic Laboratory for hair analysis in the future if the need arises. App.p. 508. See App.p. 466 (SLED January 21, 1999 Report). She noted that the trace report stated that hairs from the panties and a small hair on the ligature were returned to the local agency. App.p. 508, l. 12-15.

Counsel Blanchette next argued that her client had tried to use the 2008 DNA Application Act, but because it was not funded by the legislature, he was unable to do so. App.p. 508, l. 9-10. She stated that this was his only avenue to do so. App.p. 508, l. 8-11. She opined that this matters because third party guilt of Ted Waldman was argued throughout the trial by defense counsel for

Smith. App.p. 508.5 She noted that they had found Waldman's prints at the scene and that they had

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5 At trial, there was evidence that Waldman had entered the victim's apartment when the police had arrived. App.p. 136, 92. Four prints located at the apartment were matched to Waldman on a bag of beer. App.p. 62-69. However, a bloody print on the victim's arm was found to be consistent with the left palm of Orlando Smith. App.p. 67, 74-75. There were other unmatched prints located at the scene compared to the victim, Petitioner, Waldman and Burts.

Waldman testified that he had met the victim the week before the murder. App.p. 170-171.He stated that on May 22, 1998 he went to the victim's apartment . He stated that he left and then returned later after a shower at 7:30 PM. App.p. 172. He described seeing other persons at the apartment and said that they was a man and a woman there to pick up two children (one being her sister) and a young lady from across the hall with her boyfriend Orlando Smith. App.p. 172. He stated that he had a beer while he was there and when he left Orlando was still there, but not the girl from across the hall. App.p. 173. Waldman stated that he tried to reach the victim the next day by telephone but had no answer. He then decided to go over to the victim's apartment and found the door partially opened. App.p. 174. He knocked, said hello and without a response he pushed open the door, saw burnt spots on the rug, then saw the victim's feet and dialed 911. He stated he did not touch her. App.p. 176. He then located the victim's 8 month old child in the crib in the back bedroom. App.p. 176. He then went across the hall seeking assistance and tried again downstairs. He stated that he had provided blood, hair and fingerprint samples voluntarily. App.p. 178.

On cross-examination, Waldman confirmed that he had given a statement the next day which included that when he had first arrived he was in his work clothes, showered. He said he returned at around 9-9:30 and stayed until about 10:30 to 11 PM. App.p. 179. He claimed that he was not aware that the victim was married or where her husband was. He stated that the victim had appeared wired and was drinking and had told him that she had been doing cocaine with the black guy in the room. App.p. 180. He confirmed that he had said he used to be a drug person and was afraid they were doing drugs and got out of there. He stated that when he wanted a cigarette the next day when being interviewed, he found a joint in his cigarette pack. He admitted that he uses marijuana but denied that he used cocaine or that he shared a marijuana joint with Smith that evening. App.p. 181.

Eric Burts testified that he knew the victim for about a year and dealt crack cocaine to her. App.p. 182-183. About 6:30 on May 22, 1998, she paged him for some crack. Burts testified that he went to her apartment with a couple of people (Marcus Martin) and then left. He stated that he went back a second time to sell more crack and met Shirley Jean and then took her and her boyfriend to work. He came back a third time (with Benny Irby and Michael Richardson) to sell crack to the victim around 12 o'clock. App.p. 185.He saw the victim with one of her kids and Orlando. App.p. 186. He state that he had known the Petitioner about 15 years. App.p. 186. He stated that he sold her crack and then went out the back door and returned to Augusta Hills. App.p. 186-187. He stated when he left, the victim, the Petitioner and one of her children were alive. App.p. 187. Burts denied that he had slept with the victim before. He stated that he had not been charged with selling crack and that he had not given hair samples to the police. Burts stated that during that evening he had borrowed Mike Richardson's car and gone to Carolyn Bell's house. App.p. 199. He stated that he had given palm prints and fingerprints to the police. App.p. 201.

LaVonda Shaw testified she lived with Orlando Smith across the hall from the victim. App.p. 204-205. She stated between 2:30 and 3 AM, she had to let Smith in and he took a shower which he normally would not do. App.p. 207. She stated that she later discovered the pants in her son's bedroom that Smith had been wearing the night of the incident when he returned. App.p. 209. She stated the pants had bloodstains on them . She stated that Smith threw them away before his arrest. App.p. 210. She stated she was not seeing Smith anymore. She stated that Smith had contacted her later and asked that she change the time that she said he had returned to the apartment. App.p. 212. She stated that she had not noticed any scratches on him. App.p. 213. She stated that she had reported about the bloody pants in her discussions with Solicitor Seay the past November. App.p. 217.

In his own testimony, Petitioner admitted that he was at the victim's apartment that night. He said that the victim had invited him there to watch the kids and she then introduced him to her friend Waldman. He claimed that he drank a beer and he and Waldman smoked a joint. App.p. 227. He stated that it was around 9 PM and that he only stayed there about 15 minutes. App.p. 227. He stated that Waldman was there when he left. He claimed he left and went to another building where people were partying ,drinking and smoking marijuana. App.p. 228 He claimed he returned to Lavonda at around 4 AM. App.p. 228. He claimed he did not return to the victim's apartment in the interim. App.p. 229.

also investigated Eric Burts. A belt was recovered from Smith which the police thought could have been used in the strangulation of the victim. App.p. 509.She noted that Smith was viewed the day after the incident by an officer who saw no scratches on him, even though there were reports of a fight. App.p. 509, l. 6-9. In addition, there were no matches to Smith from the victim's rape kit, a swab from the table and a cushion where she was found. Blanchette reported that although there were no matches to Smith, there were matches to Waldman. App.p. 509, l. 10-12.

He claimed that he was close to the victim and it was not like the victim to leave her house open. App.p. 229. He stated that she always kept her doors locked. However, he saw the door was cracked. He stated that he went in and found the victim on the floor and saw the blood. He said that he went over to her. Thinking she had OD'd because she had been doing a lot of cocaine, he said that he touched her and that it was his handprint on her. App.p. 230. He stated that he did not tell the police that because he did not want to be implicated. App.p. 230. He stated that he was already on probation and had drugs in his system. Rather than calling 911, Petitioner stated that he left. He went to his girlfriend's apartment. App.p. 230. He thought he left the door closed when he left. App.p. 231. He attempted to explain the letter that he had written LaVonda but it was before his lawyer had provided him with the discovery package. App.p. 232. He said that he had gotten blood on his pants after he had touched the victim when he kneeled. App.p. 233. He stated that the police picked up the wrong pants because there were not there. App.p. 234. He stated that he did not have any scratches on himself when he was made to take his clothes off. App.p. 234. He stated that he did not tell the complete truth because he was "dead afraid" after his arrest. He stated that he was intimidated into giving a statement. App.p. 235.

Petitioner also stated that he saw Burts several times at the scene. He also stated that he moved the victim when he tried to revive her. App.p. 250.

Raumell Vaughn testified that when she got home that night about 15 minutes until midnight she saw four males standing between some buildings rather in front of the apartments where people usually hang out. App.p. 252. She stated that she let her girlfriend know she had returned home. She stated that her girlfriend came to the door scantily dressed and it made her more suspicious, thinking a guy she had seen had come out of the apartment. As she walked down the strip she came across two guys holding another guy telling him to come on and they got to their car

She said the guy in the middle pants would not stay up. She said they walked and met Mr. Smith at the end of the parking lot in front of building B. She said she saw him come from across the street. She stated the guy in the middle was Burts. App.p. 254-255. The next morning she saw Waldman pull up outside her apartment and then came back outside. App.p. 252.

Cherrico Garratt testified that that Friday night she, her sister, the Petitioner and a "bunch more people" were outside around 11:30 or 12. App.p. 260. She stated that she saw a black Camaro with a white driver. App.p. 260. However, she confirmed that she was not with Smith before 11:30 or after 12:30. App.p. 260. She stated she did not go in the victim's apartment. Id.

Michael Richardson testified that he let Eric Burts borrow his car for about two hour that night and had to beep him to get it back. He stated that when Burts returned he gave him back his keys "and told me that he had got some pussy or had gone on a trick." App.p. 263-264. This was from about midnight to 2:15. App.p. 265. He confirmed that he had stated in his statement that when he went to Fleetwood Manor with Eric and another fellow, they went around back and Eric went into an apartment and when he left she saw a white girl stick her head out of the apartment. App.p. 264-265. He stated they all left, including Burts App.p. 265. [In the Petitioner's earlier state court pleadings in the second PCR action, the Petitioner failed to note that after Burts left the apartment, a white girl was seen sticking her head out. See App.p. 543).

Henry Smith testified that he was Orlando Smith's uncle. App.p. 267. He stated that he knows Eric Burts because he sold drugs. He stated that Burts told him that he had a sexual relationship with the victim and described that she gave good head. App.p. 268. He claimed that he did not see Orlando Smith that day. App.p. 268-269.

Counsel Blanchette argued that the hairs had never been tested in the case and there was viable evidence of third party guilt presented. She characterized the trial court as questioning whether or not he was guilty of the crime. App.p. 509.

Counsel stated that they had filed a motion for discovery asking for the hairs referenced by Agent Black and other available evidence for DNA testing purposes. App.p. 510.

Counsel for the state, Assistant Attorney General Ratigan argued that Smith was trying to avoid the statute of limitations and successive application rule by claiming after discovered evidence, but could not because the hair was mentioned at the trial and could have been raised in the first PCR action, but was not. App.p. 512. Therefore it cannot be after discovered evidence because of the trial presentation. App.p. 512. Concerning the discovery request, counsel Ratigan stated that the testing or re-testing of material was not mandated because it's not after-discovered and asserted that he had had a full bite at the appeal. She stated the Conditional Order should be made final. App.p. 513.

Counsel Blanchette stated that they were asking for the hairs to be tested to avoid a miscarriage of justice due to the system failure. She stated that id the legislature would have funded the testing; she would not be here in the PCR proceedings. App.p. 513. She noted that there were inconsistencies in the reports. She argued that the state had nothing to lose by having the material tested, particularly where he was willing to pay for the testing himself. App.p. 514, l. 9-15.

In response to the court's inquiry as to how it is after-discovered evidence, counsel stated that Smith had not gotten the SLED file and its inconsistencies. She claimed he did not know that the hair had not been tested. App.p. 515, l. 3-13. She claimed that the reports suggested that Agent Black's testimony was incorrect. She stated that his attorney told him that there was no match,

suggesting it had been tested. Further, she claimed that his attorney was told all the evidence had been returned to Greenville when the report reveals that it was not returned to Greenville until Match 1999. App.p. 516. See, App.p.493.

Assistant Attorney General Ratigan stated that the issue of whether Counsel Sullivan should have tested the hair samples was raised at the first PCR hearing. App.p. 517, l. 5-8. She stated that the first PCR court ruled that the failure to test the hair samples did not create ineffective assistance of counsel. App.p. 517.

The Petitioner himself then advised the PCR court that after the first PCR hearing and after the DNA Act, he asked his PCR counsel John O'Leary for the complete SLED report. App.p. 518. He claimed that upon his review of the report that he received in 2009 from SLED that he had not seen a lot of the SLED tests, many things not mentioned at trial, that instead of three hairs, the here were 5 hairs, and there are unidentified fingerprints at the scene. App.p. 518-519.

Counsel Blanchette stated that she had provided the entire file to Dr. Robert Bennett in Charleston and he had advised her of similar problems in the materials as the Petitioner. App.p. 520.

The PCR Court inquired that since the jury was not told the hairs were from Smith, what is to gain by the test if he were to grant it? She responded that the jury was told was that the hair was not tested, but that Agent Black did not say the hairs were not his hair, though that was what his lawyer had told him. App.p. 520. She stated that hairs could be potentially exculpatory, but she does not know what the results would be. App.p. 521. She stated that if the hairs come back as not Smith's that they come back with a full evidentiary hearing on a claim of after discovered evidence. App.p. 522. Counsel acknowledged that at the first PCR hearing the judge allowed the disclosure of the evidence for testing, but counsel only tested the ligature to see if there was blood

on the stick but did not do DNA testing. App.p. 522. Judge Miller inquired how this request was not successive to the earlier PCR then. App.p. 523. She stated it could be construed that way, but that the Petitioner did not have the SLED file then and was not aware of all the information on the hairs, other than Agent Black's general policy statement at the trial. App.p. 523. Here she claimed the need for testing had arisen because of the sentence. App.p. 523-524. She stated that O'Leary had done an affidavit in the earlier action that the ligature had tested positive for blood. App.p. 525. She claimed the result of the testing could show that others were present. She stated that there were hairs found on the body of the naked victim that was raped and killed in the apartment, not just on a rug in her kitchen. App.p. 526.

On December 29, 2011, Judge Miller issued his order of dismissal with prejudice. App.p. 530-536. Judge Miller concluded that application was untimely and successive. App.p. 533-534. The PCR Court also denied the motion for discovery to test the hairs recovered at the scene. App.p. 535. He stated that counsel had failed to satisfy the required showing of "good cause." He noted that this issue was raised in the first PCR that the hairs were never tested by the state. And that the Petitioner was not convicted based upon the hairs. App.p. 535.

Counsel made a motion for rehearing. App.p. 537-545.The State made a return to the motion. App.p. 547-549. On February 8, 2012, Judge Miller entered an order denying the motion. App.p. 551-554.

The Petitioner filed a notice of appeal from the order. On April 12, 2012, the Petitioner made an explanation pursuant to SCACR Rule 243(c) as to why there should be an appeal in a PCR case found successive or untimely. App.p. 557-565.

THE SOUTH CAROLINA SUPREME COURT'S MAY 29, 2012 ORDER.

On May 29, 2012, the Supreme Court of South Carolina issued its order dismissing

the appeal, concluding that petitioner had failed to show that there was an arguable basis for asserting that the determination by the lower court was improper. In addition, the Court stated:

> However, petitioner may submit another Application for DNA testing to the Greenville County Clerk of Court pursuant to the Access to Justice Post Conviction DNA Testing Act, see S.C.Code Ann.§ 17-28-10, et seq (Supp 2011), and that application should be processed as set forth in the Act.

App.p. 566. At that time, the Petitioner had already filed another application for DNA testing on March 12, 2012. It is that application which is presently before this Court.

ARGUMENT IN FAVOR OF CERTIORARI

This Court should resolve whether under the "Access to Justice Post-Conviction DNA Testing Act" the seven year statute of limitations application limit applies to any jury-tried conviction after a not guilty plea to a defined crime.

The application of the seven year statute of limitations to Petitioner's 2000 trial conviction is likely an error of law.

If the decision is a correct statement of the law, it will have far-reaching implications and preclude consideration under the DNA application Act to any conviction at least prior 2002 whether by jury trial or guilty plea. In light of the language of the Preservation of Evidence Act as well as the information on the court-created DNA application, this action is likely not the intent of the General Assembly when the Act was created. This issue should be resolved.

BACKGROUND

The Court of General Sessions determined that an individual who pled not guilty, but was subsequently convicted of murder was unable to seek DNA testing because of a failure to file a DNA application within the seven year period following his sentence (*even though that time period would have run before the application was created in 2010*). Specifically, the basis for such a denial was the Court of General Session's narrow reliance on Section 17-28-30(B) of the Code. At issue is whether the seven year statute of limitations mentioned in Section 17-28-30(B), applies to an individual who pled not guilty (went a trial) on a qualifying offense under subsection (A).

A. Is §17-28-30(A) limited to applications by persons "who pled not guilty"and restricted to jury trial convictions? Is §17-28-30(B) limited to applications by persons "who pled guilty or nolo contendre" or does it included "not guilty pleas and trial convictions? Does the seven year statute of limitations set forth in §17-28-30(B) apply when the person "pled not guilty"?

The focus of the issue before this Court is the difference between subsection A which states: "(A) A person **who pled not guilty** to at least one of the following offenses, *was subsequently convicted of or adjudicated delinquent for the offense*, is currently incarcerated for

the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication" and subsection B which states: "(B) A **person who pled guilty or nolo contendere** to at least one of the offenses enumerated in subsection (A), *was subsequently convicted of or adjudicated delinquent for the offense*, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication no later than seven years from the date of sentencing." The trial judge focused on the common language in the subsections "*was subsequently convicted of or adjudicated delinquent for the offense*" and its inclusion in the statute of limitations sections. Stated another way, does this language modify "a person who pled guilty or nolo contendre" or did the legislature intend for it to set forth an additional group to those who would be subject to the seven year limitation. Conversely, are those who pled not guilty and went through a jury or bench trial not subject to any statute of limitations in seeking DNA testing? If that is true, why was there any limitation in §17-28-30(A) to those person who "pled not guilty."

Respondent State of South Carolina submits that reading the Act as a whole, it appears that Section A was intended to create a group of individuals who would not be subject to a seven year statute of limitations, bolstered by the additional requirements on the judicial system to maintain custody of evidence in those cases beyond the seven year requirement when there was a conviction from trial and not a guilty plea.

B. STANDARD OF REVIEW AND STATUTORY CONSTRUCTION

a. **De Novo Review**.

"Statutory interpretation is a question of law subject to de novo review." Transp. Ins. Co.

v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010). " 'Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.' " Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). This is initially a matter of statutory construction which is a question of law. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) ("The determination of legislative intent is a matter of law."). It has been held by the Supreme Court that it is "free to decide a question of law with no particular deference to the circuit court." Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). See Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("The issue of interpretation of a statute is a question of law for the court.").

b. **The Intent of the Legislature Controls.**

In order to interpret the DNA Application Act, the Court should employ the rules of statutory interpretation, the primary of which is to ascertain and effectuate the intent of the Legislature. Berkeley County School Dist. v. South Carolina Dep't of Revenue, 383 S.C. 334, 679 S.E.2d 913 (2009). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." McClanahan v. Richland County Council, 350 S.C. 433, 567 S.E.2d 240, 242 (2002). Whenever possible, legislative intent should be found in the plain language of the statute itself. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008). A statute as a whole must receive a practical, reasonable and fair interpretation, consonant with the purpose, design and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). The words used therein should be given their plain and ordinary

meaning. Worthington v. Belcher, 274 S.C. 366, 264 S.E.2d 148 (1980). The clear and unambiguous terms of a statute must be applied according to their literal meaning. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992). The interpretation should be according to the natural and obvious significance of the wording without resort to subtle and refined construction for the purpose of either limiting or expanding the statute's operation. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984); see also Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 816 (1942) [stating "it is a familiar canon of construction that a thing which is in the intention of the makers of a statute is as much within the statute as if it were within the letter. It is also an old and well-established rule that words ought to be subservient to the intent, and not the intent to the words"]. [6]

c. The Rule of Lenity.

The rule of lenity provides that typically, statutes that are penal in nature must be strictly construed in favor of a criminally accused and against the State. See Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs., 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008) (construing parole statute strictly against the State because it was penal in nature). The rule of lenity is a rule of statutory construction. See Bryant v. State, 384 S.C. 525, 533, 683 S.E.2d 280, 284 (2009) ("When

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6 "The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." State v. Elwell, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (internal quotation marks omitted). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Id. (internal quotation marks omitted). "Therefore, [i]f a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id. (first alteration by court) (internal quotation marks omitted); see also State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) ("All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used."). **"However, penal statutes will be strictly construed against the state." Elwell, 403 S.C. at 612, 743 S.E.2d at 806.**

a genuine ambiguity exists as a result of the proposed application of [a penal statute] to a given situation, the rule of lenity requires that the doubt must be resolved in the defendant's favor."); State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) ("[W]hen a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.").

d. Statute must be read as a whole and not in isolation to give meaning to the legislative intent.

Further, "the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." S. C. State Ports Auth. v. Jasper Cnty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). "If the statute is ambiguous ... courts must construe the terms of the statute." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (citation omitted). The statutory language must be construed in light of the intended purpose of the statute. Id. This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless. See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature."). The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). It is well-established that this Court will not construe a statute by concentrating on an isolated phrase. Laurens Cnty. Sch. Dists. 55 & 56 v. Cox, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose. In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a

whole, or destructive of its obvious intent."); see also Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606–07 (2006) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Moreover, statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result. Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). Because we must presume that the General Assembly is familiar with existing legislation, statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. Hodges v. Rainey, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) (citations omitted).

"If the statute is ambiguous, however, courts must construe the terms of the statute." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." Town of Mt. Pleasant, 393 S.C. at 342, 713 S.E.2d at 283. "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." Id. (internal quotation marks omitted). "Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." Id. at 342–43, 713 S.E.2d at 283.

LAW

In 2008, the General Assembly passed Act No. 413. S.C. Act No. 413 (2008). Among other things, Act 413 was passed in order to:

> AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING ARTICLE 1, CHAPTER 28 TO TITLE 17 SO AS TO ENACT THE "ACCESS TO JUSTICE POST–CONVICTION DNA TESTING ACT", TO DEFINE NECESSARY TERMS, **PROVIDE PROCEDURES FOR POST–CONVICTION DNA TESTING, PROVIDE A MANNER FOR THE PRESERVATION OF PHYSICAL AND BIOLOGICAL EVIDENCE,** PROVIDE THE METHOD OF DISCLOSING THE RESULTS OF DNA TESTING, PROVIDE IMMUNITY FROM CIVIL LIABILITY UNLESS THERE IS AN ACT OF GROSS NEGLIGENCE OR INTENTIONAL MISCONDUCT, AND PROVIDE LIMITS ON EXPENDITURES IN ONE YEAR TO ADMINISTER THE ACT

As detailed above, passage of Act 413 resulted in the enactment of the "Access to Justice Post-Conviction DNA Testing Act." S.C. Code Ann. § 17-28-10. One particular Section of the Act, what is now called Section 17-28-30 of the South Carolina Code, entitled "Offenses for which post-conviction DNA testing available" defines who is eligible for post-conviction DNA testing. Section 17-28-30 states:

> (A) A person who pled not guilty to [a qualifying offense], was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication[.]
>
> (B) A person who pled guilty or nolo contendere to at least one of the offenses enumerated in subsection (A), was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication no later than seven years from the date of sentencing.

ANALYSIS

A. Did the Legislature intend to establish two separate groups – those who pled "not guilty" and those who pled "guilty or nolo contendre"?

It appears the Post-Conviction DNA Act is intended to apply to two classes of individuals; those who meet the requirements of S.C. Code Ann. § 17-28-30(A) and those who meet the requirements of S.C. Code Ann. § 17-28-30(B). Pursuant to S.C. Code Ann. § 17-28-30(A), the Act applies to an individual who:

- "pled not guilty" to one or more of the offenses listed in (A)(1)-(A)(24);
- was "subsequently convicted or adjudicated delinquent for the offense[;]"
- "is currently incarcerated for the offense;" and
- asserts his innocence.

S.C. Code Ann. § 17-28-30(A). Assuming an individual meets the elements mentioned in Section 17-28-30(A), the statute explains such an individual "may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication." Section 17-28-30(A) makes no mention of any statute of limitations which would prohibit an individual who otherwise meets the requirements of subsection (A) from applying for DNA testing.

As indicated above, an individual may also apply for Post-Conviction DNA Testing under Section 17-28-30(B) of the Code. Pursuant to S.C. Code Ann. § 17-28-30(B) an individual "may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication *no later than seven years from the date of sentencing*" where the individual:

- "pled guilty or nolo contendere" to one or more of the offenses in subsection (A);

- "was subsequently convicted of or adjudicated delinquent for the offense;"
- "is currently incarcerated for the offense" and
- asserts his innocence.

S.C. Code Ann. § 17-28-30(B) (emphasis added above).

Giving it this reading, it would appear that the legislature created two separate groups In other words, individuals seeking post-conviction DNA testing under Section 17-28-30(B), unlike individuals seeking testing under Section 17-28-30(A), must file an application for post-conviction DNA testing within the seven (7) year period following that individual's sentencing.

To do otherwise would suggest that the separate statutory sections are mere surplusage. To accept the logic of the Circuit Court the introductory language set forth in subsection A about "person who pled not guilty" had no effect because in subsection B it was implicitly included with the use of the word "convicted." Limited reading of the section ignores an unambiguous intent on the part of the legislature to create two separate groups where one pleads not guilty and goes to trial and one who pleads guilty. This intent can be reasonably discovered by a reading of the entire act which notes in the preservation of evidence the requirement to maintain custody through the duration of a defendant's sentence when he pleads not guilty, but limit required preservation to the same seven years when he plead guilty. .

Utilizing this understanding of the statute, it seems that it would be error for a trial court to deny an individual who otherwise qualifies for testing under Section 17-28-30(A) of the Code on the basis that the individual failed to comply with Section 17-28-30(B)'s seven years from sentencing requirement. As mentioned above, it appears subsection (A) and subsection (B) apply

to two different classes of people—those who pled not guilty to a qualifying offense and were subsequently convicted (subsection (A)) and those who pled guilty or nolo contendere to a qualifying offense (subsection (B)). If this is the case, then obviously subsection (B) could not apply to an individual who pled not guilty, and therefore, subsection (B)'s seven years from sentencing requirement would be inapplicable to such an individual.

B. The Preservation of Evidence Act Supports the Legislative Intent to Create Two Separate Classes – Those who pled "Not Guilty" and Those Who Pled Guilty of Nolo Contendre. The intent of the two acts act hand in glove concerning their application to separate groups.

Moreover, contrary to the lower court's conclusion, this construction of Section 17-28-30 is also consistent with the Preservation of Evidence Act, an act that was, like the Post-Conviction DNA Testing Act, enacted as part of Act 413. As indicated in the Act, the Legislature added Article Three, Chapter 28 of Title 17:

> SO AS TO ENACT THE "PRESERVATION OF EVIDENCE ACT", TO DEFINE NECESSARY TERMS, PROVIDE PROCEDURES FOR PRESERVATION OF EVIDENCE, DELINEATE THE OFFENSES FOR WHICH PHYSICAL EVIDENCE AND BIOLOGICAL MATERIAL MUST BE PRESERVED, CREATE THE OFFENSE OF DESTROYING OR TAMPERING WITH PHYSICAL EVIDENCE OR BIOLOGICAL MATERIAL AND TO PROVIDE A PENALTY, AND PROVIDE IMMUNITY FROM CIVIL LIABILITY UNLESS THERE IS AN ACT OF GROSS NEGLIGENCE OR INTENTIONAL MISCONDUCT

S.C. Act No. 413 (2008).

Part of the Preservation of Evidence Act, Section 17-28-320(C) of the Code, sets different standards for preservation of evidence based upon how an individual pleads to a qualifying offense. For example, 17-28-30(C) explains "physical evidence and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A). *However, if the person is convicted or adjudicated on a*

guilty or nolo contendere plea for the offense enumerated in subsection (A), the physical evidence and biological material must be preserved for seven years from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first." (emphasis added).

In other words, the Preservation of Evidence Act, Section 17-28-320(C) in particular, acknowledges that evidence related to a guilty plea or plea of nolo contendere only has to be stored for, at a maximum, seven years, but fails to make such a requirement apply to cases in which an individual is convicted after pleading not guilty. Thus, in the case of an individual who pleads not guilty and is subsequently convicted, an evidence custodian would have to retain such evidence until that individual's sentence has been completed. Simply put, if the legislature had intended for evidence from convictions after a not guilty plea to have a seven year limitation, it would not have required the agency to maintain custody different than if they had pled guilty.

This of course makes sense because individuals who plead guilty or nolo contendere only have seven years to request testing under 17-28-30(B), while individuals who plead not guilty and are subsequently convicted are not subject to a statute of limitations under 17-28-30(A) and therefore may request DNA testing at any time during the course of their sentence. Consistent with the above, the Legislature clearly provided that a custodian of evidence must only preserve physical evidence and biological material for defendants convicted of or adjudicated on a guilty or nolo contendere plea for offenses enumerated in §17-28-320 (A), for seven years from the date of sentencing, or until the defendant is released from incarceration, dies while incarcerated, or is executed, whichever comes first. At that time, the custodian of evidence may then either return the evidence to its rightful owner or otherwise dispose of it pursuant to existing policies and procedures, without a court order pursuant to §17-28-340.

The Act is part of 2008 S.C. Acts 413, that included the "Access to Justice Post-Conviction DNA Testing Act" aimed at providing convicted defendants with the opportunity to have evidence, which was not previously subjected to DNA testing or not to the same type of DNA testing, tested to determine whether it possesses any exculpatory value. In the opinion of this office, the Legislature's intent upon passing this Act was twofold. That intent was, first, to provide procedures for the preservation of evidence and to delineate the offenses for which physical evidence and biological material must be preserved; and secondly, to establish guidelines for the return of evidence prior to the period of time set forth therein, and to provide for penalties for destroying or tampering with evidence covered by the Act.

C. The Circuit Court's construction failed to recognize that the intent of the legislature was reasonably discovered by the plain language within each section and the creation of a statute of limitations for a limited number on defendant – not every defendant.

It appears that the clear and unambiguous reading of subsection (A) and (B) revealed the design and purpose of the Act. It appears that the court erred in emphasizing the common phrase of "subsequently convicted or adjudicated of the offense" as bringing in the "person who pled "not guilty" into subsection B. However, that phrase was included in subsection (A) as well as (B). Thus there was natural and obvious significance is using one phrase – "person who pled not guilty" in subsection (A) and person who "pled guilty or nolo contendre" in subsection (B) which included the limitations period. Had the legislature intended to include the limitations period in subsection (A), it would have done so in subsection (A). Similarly, the lower court's reading does not explain why the class of inmates who "pled guilty or nolo contendre were not included in subsection (A). The intent to use two different phrases means the legislature intended something different in each proviso. A reading that two classes were created harmonizes the provisions in §17-28-30 with the

Preservation of Evidence Act. To do otherwise would render the opening clause of §17-28-30(A) to be meaningless.

D. The Approved Application Form Is Inconsistent With The Lower Court's Interpretation and Would Need to Be Revised if Judge Verdin's Interpretation is Correct.

In the court approved form application for DNA testing, like the one used in this case, included the following information and certification by an applicant:

> I understand that DNA testing is only available if I have been convicted or adjudicated of an offense listed in S.C. Code Ann. § 17-28-30, that I am currently incarcerated for that offense, and that I am asserting that I am innocent of the offense. **Further, if the conviction or adjudication was the result of a plea of guilty or nolo contendere, the application must be filed within seven years of the date of sentencing.**

SCCADNA101 904/2009). See App.p. 568, para. 4. If the lower court decision is correct, the language included in the application is incorrect to the extent it would suggest that those who pled not guilty would not be subject to the seven year and could lead to inmates filing beyond the seven years when it was not authorized. Certiorari is necessary to resolve the correctness of the lower court decision and impact on future filings.

E. Assuming arguendo, that the Defendant was subject to the seven year limitation, an issue is created on whether the Legislature intended that any conviction that occurred before the implementation of the Act with the creation of the application and the funding, could a conviction which occurred seven years or more before the implementation of Act be authorized to apply for testing?

The Act was essentially effective on October 21, 2008 after the Governor's veto was overridden pursuant to Section 7 of Act 413. Funding for the Act was not provided in initially. The forms were not created until April 2009. Funding for the Act occurred subsequent to the enactment though not evident in this record when it occurred. The Petitioner began seeking application for DNA testing under the Act in the record before this Court by a request in February 17, 2009 to the Court for a form, App.p. 445. His next attempt was December 16, 2009, but it was rejected because

he was advised there had not been necessary funding provided under the Act. App.p. 453. **Therefore, at least until 2010, he could not seek application under the Act for his 2000 conviction.**

In Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996), the Supreme Court addressed a concern about the implementation of a statute of limitations to the state post-conviction relief act. However, the Court held that the legislature may reduce the period in which actions may be brought and may make such reduction applicable to existing causes of action; however, no new limitations shall be made to effect existing claims. In this case, the legislature did not provide for a period of time in which applications which would otherwise be barred by the statute of limitations could be brought. Unlike Peloquin, there were no existing causes of action prior to the implementation of Act 413. However, an argument could be made that a reasonable period of time should be allowed, like in Peloquin for those inmates to make DNA applications even though beyond the statute of limitations. Certiorari is appropriate to resolve whether any period of time is authorized for necessarily time-barred convictions otherwise precluded from application of the benefits of the Act.

SUMMARY

In light of the foregoing, it appears that it would be error to deny DNA testing to an individual who pled not guilty and otherwise qualifies for testing under Section 17-28-30(A), on the basis that the individual has failed to meet the within seven year requirement of Section 17-28-30(B). Indeed, it appears each subsection applies to different classes of people—those who not guilty, but were subsequently convicted (subsection (A)) and those who plead guilty or nolo contendere (subsection (B)).

Certiorari would be appropriate for this additional reason.

CONCLUSION

For all the foregoing reasons, certiorari should be granted to address the issues concerning the correctness of the lower court's interpretation of the statute of limitations to defendants who pled not guilty and were convicted of defined crimes.

If this Court finds that the certiorari is appropriate and vacates the order finding the application was untimely, the matter should be remanded to the lower court to determine if he meets the other conditions precedent and the availability and existence of the evidence to be tested.

Respectfully submitted,

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May 15, 2014

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Letitia H. Verdin, Circuit Court Judge
1998-GS-23-5212
APPELLATE CASE NO. 2012-213673

THE STATE,

Respondent,

V.

ORLANDO SMITH,

Petitioner

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett
Appellate Defender
Division of Appellate Defense
P. O. Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 15th day of May, 2014.

DONALD J. ZELENKA
Senior Deputy Assistant Attorney General