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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

JOHN WILLIE MACK, SR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000329

BRIEF OF PETITIONER

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the Court of Appeals erred in affirming the PCR court's dismissal of Petitioner's application for a belated appeal from the denial of his application for DNA testing where Petitioner did state a cognizable claim under the Post-Conviction Relief Act, where the PCR application was not successive, where Petitioner complied with the statute of limitations in filing the application, and where this was the only avenue for Petitioner to obtain review of the DNA court's decision after DNA counsel failed to file an appeal?

STATEMENT OF THE CASE

A Spartanburg County grand jury indicted Petitioner for first degree burglary, and grand larceny in April 2006. App. 364-367. Prior to trial the state served Petitioner with notice of intent to seek a life sentence pursuant to S.C. Code § 17-25-45. App. 161, ll. 9-22. On February 22, 2011, the state represented by Barry J. Barnette and Anthony C. Leibert called the case to trial before the Honorable J. Derham Cole and a jury. App. 1. Petitioner was represented by Roger Poole. App. 1. Petitioner was found guilty as indicted. App. 157, ll. 14-25. Judge Cole sentenced Petitioner to life without parole on the burglary charge, pursuant to the life without parole statute, and five years imprisonment on the grand larceny charge. App. 168, ll. 14-25.

Petitioner appealed his convictions and sentences. While his direct appeal was pending, Petitioner filed a *pro se* application for retesting of the DNA in his case under the Access to Justice Post-Conviction DNA Testing Act (the DNA Act) on September 27, 2012. App. 294-295. On April 17, 2013, the Court of Appeals affirmed Petitioner's convictions in State v. Mack, 2013-UP-161(Ct. App. filed April 17, 2013).

Petitioner then filed a PCR application on May 6, 2013. App. 174-186. The state filed a return dated March 18, 2014. App. 187-192. An evidentiary hearing to address Petitioner's PCR application was held on January 14, 2015. App. 193. The Honorable Deadra Jefferson presided over the PCR hearing. The state was represented by Suzanne White. Petitioner was represented by Leah Moody. App. 193.

At the conclusion of the PCR hearing the court denied Petitioner's PCR application. App. 250. An order of dismissal was filed on April 10, 2015. App. 253-281. Petitioner immediately filed an appeal of the PCR court's decision. On February 1, 2018, this Court denied certiorari. Supp. App. 12.

As stated above, Petitioner filed a *pro se* application for retesting of the DNA in his case while his direct appeal was still pending. On October 31, 2014, a hearing was convened before the Honorable J. Derham Cole. Barry Barnette and Anthony Leibert represented the state. Petitioner was again represented by Leah Moody. App. 299.

The order denying Petitioner's request for DNA testing was filed on May 19, 2015.[1] App. 317-320. DNA counsel did not file an appeal. Petitioner filed a notice of appeal of the DNA court's denial. On July 16, 2015, the Court of Appeals dismissed Petitioner's appeal as not timely served. App. 330; App. 356.

On September 10, 2015, Petitioner filed a second PCR application wherein he alleged that DNA counsel was ineffective for failing to appeal the decision of the DNA court. App. 321-332. The state filed a return and motion to dismiss on March 23, 2017, arguing that Petitioner had failed to state a cognizable claim under the PCR Act, that the application was not filed within the statute of limitations, and that the application was successive to Petitioner's initial PCR application. App. 333-339.

A hearing was held on June 29, 2017, before the Honorable Robin B. Stilwell, solely to address the state's motion to dismiss.[2] App. 341-352. Petitioner was represented by Rodney Richey. The state was represented by Valerie Giovanoli. The court heard argument from both parties before granting the state's motion to dismiss. App. 350, ll. 11-24.

On July 7, 2017, the PCR court filed an order denying Petitioner's second PCR application and dismissing it with prejudice. App. 354-361. Petitioner's second PCR counsel,

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1 The order from the DNA Act hearing was filed one month after the initial PCR court's order of dismissal which had been filed on April 10, 2015.

2 No evidentiary hearing was ever held on the merits of Petitioner's PCR application which is the subject of this appeal.

Rodney Richey, filed an appeal of Judge Stilwell's order. Counsel also filed a separate accompanying explanation which provided that Petitioner had filed the second PCR application as the only means to appellate review of the order issued by the DNA court. App. 362-363.

Former Appellate Defender LaNelle Durant filed a petition for writ of certiorari on March 16, 2018. The state filed its return on July 12, 2018. The case was transferred to the Court of Appeal on July 25, 2019, and certiorari was granted on March 6, 2019. Briefing by both parties was completed in August of 2019. COA Cert. App. 1-51. The Court of Appeals affirmed the second PCR court's decision in Mack v. State, 2019-UP-386 (Ct. App. filed December 18, 2019). Petitioner filed a petition for rehearing on December 20, 2019. COA Cert. App. 54-60. The Court of Appeals denied the petition for rehearing on January 23, 2020. COA Cert. App, 61-64. Petitioner sought a writ of certiorari to this Court to review the decision by the Court of Appeals. This Court granted certiorari on August 7, 2020.

This brief follows.

STANDARD OF REVIEW

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). The Supreme Court will review questions of law de novo, with no deference to the PCR court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The Court of Appeals erred in affirming the PCR court's dismissal of Petitioner's application for a belated appeal from the denial of his application for DNA testing where Petitioner did state a cognizable claim under the Post-Conviction Relief Act, where the PCR application was not successive, where Petitioner complied with the statute of limitations in filing the application, and where this was the only avenue for Petitioner to obtain review of the DNA court's decision after DNA counsel failed to file an appeal.

Relevant Facts

On September 6, 2005, LaRhonda Moss returned home after spending the Labor Day weekend out of town and discovered her front door ajar. Inside she observed her personal items strewn about her home and several pieces of electronics and personal property missing. App. 46-48. Moss called 911 to report the burglary. App. 48.

Investigator John David Burgess and officer Eric Almond processed the scene for forensic evidence. App. 59; 61. Suspected blood was located in three separate areas: The entertainment center in the living room, a bookshelf in the hallway, and by a light switch in the back bedroom. Burgess took swabs of the suspected blood evidence which were then sent to SLED for testing. App. 61-63. The physical items containing the suspected blood evidence were not collected. Burgess testified at trial that photographs showing the locations of the suspected blood evidence were taken but that the photographs were subsequently lost[3]. App. 70, ll. 3-25.

Petitioner was arrested in February 2006. The swabs taken from the scene were matched to him through a CODIS (combined DNA index system) hit. App. 231, ll. 13-21; App. 318. The

[3] Burgess testified at trial that the photographs were lost after being uploaded to a computer. Petitioner and defense counsel never saw the alleged photographs. App. 71-72; App. 239

state obtained a confirmatory buccal swab from Petitioner in April 2009 that was sent to SLED for comparison. SLED issued a report in October 2009 stating that the DNA from the scene and the DNA from the buccal swab of Petitioner were a match. App. 318.

As outlined above, Petitioner filed a *pro se* application for retesting of the DNA in his case under the DNA Act while his direct appeal was still pending. App. 294-295. After Petitioner's convictions were affirmed, Petitioner filed am initial PCR application alleging, *inter alia*, that trial counsel was ineffective for failing to object to the admission of the DNA evidence when the state failed to produce the tangible items or pictures of the items that were allegedly swabbed for blood evidence. App. 174-186.

At the start of the initial PCR hearing Petitioner moved for a continuance stating that he needed to obtain a ruling from the DNA Act hearing that had been held before Judge Cole before proceeding with the PCR hearing as the outcome of the DNA Act application could impact his PCR claims. App. 198; 256-257. The court denied Petitioner's continuance request stating that the results of the DNA Act application would have no bearing on Petitioner's burden of proving ineffective assistance of trial counsel. App. 257. Further, the court stated that any rulings made on his PCR application would not impact any possible relief or rulings that would come from the adjudication of Petitioner's pending DNA Act motion. App. 257-258. At the conclusion of the PCR hearing the court denied Petitioner's PCR application. App. 250.

Two years after Petitioner had filed the application under the DNA Act a hearing was convened on the DNA matter. App. 299. At the hearing Petitioner requested the testing of the physical items from which the swabs were taken. App. 306-307. Petitioner argued that his original attorney had filed a Rule 5 motion requesting the tangible items and the state failed to comply, therefore he had a right to now have those items tested. App. 311. The state argued that

the items were never taken into evidence and there was no ability to test them now, especially so many years after the alleged crime. The state further maintained that re-testing of the swabs would not provide a more probative result than what was introduced at trial. App. 308-309.

The order denying Petitioner's request for DNA testing was filed one month after the initial PCR court issued its order of dismissal. App. 317-320. Judge Cole found that the items Petitioner wanted tested "were previously subjected to DNA testing and further testing would not provide a more probative result." App. 317-320. Nowhere in the order denying DNA testing did the court rule on the factors as enumerated in S.C. Code Ann. § 17-28-90.[4] DNA counsel, who was also been counsel for Petitioner during his initial PCR, did not file an appeal.

Petitioner filed a second PCR application wherein he alleged that DNA counsel was ineffective for failing to appeal the decision of the DNA court. App. 321-332. The state filed a motion to dismiss. App. 333-340. A hearing was convened before the Honorable Robin B. Stillwell to address the state's motion to dismiss. App. 341; 344. At the hearing the state argued that the court should not extend the belated appeal procedure pursuant to Austin v. State[5] to actions arising under the DNA Act. The state focused on a section of the DNA Act which appeared to preclude a defendant from bringing a PCR action against DNA Counsel. The state further argued that Petitioner's PCR application was successive, was filed outside of the statute of limitations and that Petitioner did not state a cognizable claim under the PCR Act. App. 344-346.

PCR Counsel Richey argued that Petitioner had a right under the DNA Act to appeal a decision from that court and that because he was represented, it was the duty of DNA Counsel to

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4 S.C. Code Ann. § 17-28-20 sets forth the seven factors the DNA Court shall consider in granting or denying an application for testing under the DNA Act.

5 305 S.C. 453, 409 S.E.2d 395 (1991)

file that appeal. He argued that the intent of the statute was that an applicant be able to have a higher court review the decision of the DNA court and that Petitioner should not simply be "out of luck" due to the failures of DNA counsel. App. 347-348

In granting the state's motion to dismiss the court reasoned that the law was "contrary to Petitioner's position" and that a PCR application was not the venue for challenging DNA counsel's performance. The court also stated that an appeal of the DNA court's decision would not likely be productive as the items Petitioner sought to have tested had previously undergone DNA testing. App. 350, ll. 11-24. Further the court ruled that Petitioner's PCR application had to be dismissed because Petitioner had failed to state a cognizable claim under the PCR Act, had filed the PCR application outside of the statute of limitations, and the application was successive in that Petitioner could have raised these claims in his prior PCR application. App. 354-361.

DISCUSSION

As a threshold matter, the state argues that the DNA Act categorially precludes Petitioner from filling for post-conviction relief due to ineffective assistance of counsel. This assertion is incorrection. As discussed *infra*, the DNA Act does not preclude Petitioner from filing for post-conviction relief due to ineffective assistance of DNA counsel. The Court of Appeals affirmed the PCR court's dismissal of Petitioner's second PCR application by relying on a single sentence within a section of the DNA Act combined with the "plain meaning" rule of statutory construction. Respectfully, that ruling failed to consider the entirety of the DNA Act and the other pertinent rules of statutory construction.

In dismissing Petitioner's current PCR application the PCR court, and subsequently the Court of Appeals, focused on the last sentence of S.C. Code Ann. § 17-28-60 which states, "[t]he performance of counsel pursuant to this article shall not form the basis for relief in any post-

conviction relief proceeding." However, when the DNA Act is read in full it is apparent that Petitioner was not foreclosed from pursing this avenue of relief. S.C. Code Ann. § 17-28-110(B) states "*Nothing in this article prohibits a person from filing an application for post-conviction relief pursuant to Chapter 27, Title 17*" [6] (emphasis added).

The language in these two sections creates an inherent conflict within the statute. While each section, taken on its own, is clear and unambiguous, statutes are not intended to be read in a piecemeal fashion, taking only those parts which best serve a party's particular position. Citizens for Quality Rural Living, Inc. v. Greenville County Planning Commission, 426 S.C. 97, 825 S.E.2d 721 (2019) (The intention of the legislature when enacting a statute must be gleaned from the entire section and not simply clauses taken out of context). Courts, when interpreting a statute, *should not concentrate on isolated phrases within the statute*; a statute must be read as a whole and sections that are part of the same general statutory law must be construed together and each one given effect. Id. Both the Court of Appeals and the PCR court wholly failed to consider the entirety of the act and instead focused only on one isolated phrase within the statute.

Furthermore, if a court cannot reconcile the conflict within the statute then the "last legislative expression" rule applies. Under that rule, where it is impossible to harmonize two sections of a statute, the subsequent section *must* prevail over the prior one, being the last in point of time or order of arrangement. See, Feldman v. South Carolina Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943) (under the principle that the last expression of the legislative will is the law, where conflicting provisions are found in the same statute, or in different statutes, the last in point of time or order of arrangement prevails); See also Williams v. Town of Hilton Head Island, S.C., 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993) (noting that in reconciling two

6 Title 17 Chapter 27 of the South Carolina Code is the Uniform Post-Conviction Procedure Act.

statutory provisions, the "Last Legislative Expression Rule" *requires* that the "later legislation supersedes the earlier"). Applied to the present case, Petitioner would not be barred from filing a PCR claim of ineffective assistance of counsel for failing to file an appeal under the DNA Act because the subsequent section of the DNA Act specifically states that "*nothing in this article prohibits a person from filing an application for post-conviction relief*" pursuant to the PCR Act. See, S.C. Code § 17-28-110(B) (emphasis added).

Additionally, situated between these two conflicting portions of the DNA Act is another section which supports Petitioner's right to bring post-conviction relief actions against ineffective DNA Counsel. S.C. Code Ann § 17-28-90(A) states in relevant part that "[*a*]*ll rules and statutes applicable in criminal proceedings are available* to the applicant and the solicitor or Attorney General, as applicable." (emphasis added). This further supports the contention that Petitioner is not statutorily barred from raising an ineffective assistance of DNA counsel claim as *all rules and statutes applicable in criminal proceedings are also applicable in proceedings commenced under the DNA Act*. See S.C. Code Ann. § 17-27-20 (Uniform Post-Conviction Procedure Act); Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) (creating a right to a belated appeal of PCR denial when PCR counsel fails to file a timely appeal).

In interpreting the statute to resolve the conflict, it is apparent that PCR claims are not barred in their entirety. The language relied on by the Court of Appeals, that performance by counsel appointed pursuant to the DNA Act "shall not form the basis" for a PCR action is removed from the context of the entire DNA Act. While it could be interpreted to mean that performance by counsel appointed pursuant to the DNA Act shall not be the *sole basis for an initial application* for PCR, it cannot be interpreted as a complete bar on PCR actions when read

with the remainder of the DNA Act. The language expressed later in the DNA Act makes it clear that a PCR application could include ineffective assistance of DNA counsel.

Petitioner's second PCR application stated a cognizable claim under the PCR Act

In the order dismissing Petitioner's second PCR application the PCR court stated that an allegation of ineffective assistance of counsel raised pursuant to the DNA Act "does not form a collateral attack on the validity of the conviction or sentence and may not form the basis for relief in any post-conviction relief action." App. 358. This ruling failed to consider that applications pursuant to the DNA Act may only be made to "demonstrate innocence." See S.C. Code Ann. § 17-28-40. A claim of innocence is a direct attack on the validity of a defendant's conviction and sentence.

It is worth nothing that other states with post-conviction DNA testing statutes have held that an application for post-conviction DNA testing is a collateral attack on a defendant's conviction and sentence. See State v. Poe, 271 Neb. 858, 865, 717 N.W.2d 463, 469 (2006) (an action under the DNA Testing Act is a collateral attack on a conviction); Rose v. State, 198 S.W.3d 271, 272 (Tex. App. 2006) (a hearing on post-conviction DNA testing is a collateral attack on a judgment comparable to a habeas corpus proceeding); State v. Bembenek, 2006 WI App 198, 296 Wis. 2d 422, 724 N.W.2d 685 (holding defendant breached plea agreement to not collaterally challenge her conviction when she filed a motion for DNA testing which constituted a collateral attack on the evidence underlying her conviction).

Furthermore, Petitioner's conviction hinged entirely on the DNA evidence presented at trial. It logically follows then that a challenge to the DNA evidence is a direct challenge to the validity of Petitioner's conviction and sentence. Without the alleged DNA match to Petitioner the state would not have been able to charge Petitioner, must less convict him at trial.

While Petitioner's case presents a novel issue for this Court to consider, it is not the first time that this Court has been asked to extend PCR actions. This Court was asked to extend PCR actions to cover alleged ineffectiveness of PCR counsel in the Aice and Austin cases when dealing with this precise issue. In Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) this Court held that a second PCR application filed on the ground that the first complete PCR application was insufficient due to ineffective PCR counsel was not proper. This Court simultaneously handed down Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) which extended PCR actions to cover ineffective assistance of PCR counsel in the *limited situation* in which PCR counsel failed to file an appeal. In distinguishing these two cases this Court reasoned,

> "We have held that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Gamble v. State, 298 S.C. 179, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the Austin and Aice cases. Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purpose of the Act and rules."

Aice at 452.

Petitioner's current situation is on all fours with Austin and not Aice. The Court, in handing down Austin, stated it "must craft a remedy to correct the unfairness which has occurred." Austin at 454. Petitioner finds himself in a situation where an unfairness has occurred but where there is currently no remedy to correct the unfairness. It is axiomatic then that when every other route to relief is foreclosed, it is proper that this Court be asked to craft a remedy.

The state, in its initial return, relied on Lance v State, 279 S.C. 144, 303 S.E.2d 100 (1983), as an example of this Court refusing to extend PCR actions to judgments made pursuant to other sections of the South Carolina Code. In Lance the petitioner submitted an application for post-conviction relief contesting the fact that he had been adjudicated a habitual offender. In that case, this Court refused to extend PCR actions to *civil* determinations made under the Habitual Offender Act. This Court noted that "the determination by a circuit judge that a person is a habitual offender is not a criminal conviction, and the consequent loss of the privilege to drive is not a sentence." Id at 145.

Unlike the defendant in Lance, Petitioner does not seek to extend PCR actions to a civil determination that does not have an impact on his conviction. Actions taken under the DNA Act are only ever initiated as the *direct result of a criminal conviction*. The application for retesting is filed in the General Sessions courts of this state, is in no way a civil procedure, and deals with a challenge to the applicant's conviction and resulting sentence. The granting of an application under the DNA Act can result in new evidence that would require the applicant's conviction and sentence to be vacated. Also, the DNA Act creates an absolute right to appeal, contemplates PCR actions based on ineffective assistance of DNA counsel, and specifically states that all rules and statutes applicable in criminal proceedings are available to parties in actions taken under the DNA Act. See, S.C. Code Ann § 17-28-90 and § 17-28-110(B).

In Austin it was noted that the right to seek appellate review of the denial of PCR is expressly authorized by state law. The same is true of rulings from applications filed under the DNA Act. S.C. Code § 17-28-90(G) expressly and explicitly authorizes the right of either the applicant or the state to appeal a final order under the Act through a writ of certiorari. Here, as in Austin, the failure of counsel to seek review correctly supported a claim for ineffective

assistance of counsel on the narrow ground of failing to appeal. Under exceptional circumstances such as these, the only way to correct the unfairness is to craft a remedy that allows Petitioner to move forward with his belated appeal of the denial of his request for DNA testing.

Petitioner's second PCR application was neither successive nor time barred

In its return to Petitioner's writ of certiorari to the Court of Appeals, the state conceded that Petitioner's PCR application was not successive. The state recognized that Petitioner had no way to know that his DNA counsel, who was also his PCR counsel at the time, would fail to file an appeal of the DNA court's decision, which is the issue at the heart of Petitioner's current appeal. Absent an ability to predict the future, no one in Petitioner's situation could have raised the new grounds for relief as they relate to the DNA Act application at the time of the initial PCR application. Accordingly, the grounds raised in Petitioner's second PCR application were not successive.

The state also conceded that Petitioner's current PCR application was not barred by the statute of limitations because it would not have been possible for Petitioner to raise this issue within a year of the trial. Petitioner is requesting a belated appeal under Austin, *supra*, where "a defendant can appeal a denial of a PCR application after the statute of limitations has expired if the defendant *either requested and was denied an opportunity to seek appellate review or did not knowingly and intelligently waive the right to appeal*." Odom v. State 337 S.C. 259-60, 523 S.E.2d at 755 (1999) (emphasis added). As this Court importantly noted, the policy of Austin would be frustrated if the one-year statute of limitations applied to unjust procedural errors as Austin is intended to act as a final safeguard against such errors. Id at 263-264, 523 S.E.2d at 757. Thus, Petitioner's application was not barred by a statute of limitations.

In summation, Petitioner is not seeking a full-scale review of the performance of DNA Counsel. He is merely requesting that the Court consider the *very limited issue* of whether DNA counsel was ineffective for failing to file an appeal. The DNA Act explicitly creates the right to counsel and the right to an appeal by any party to the application. See S.C. Code Ann. § 17-28-60; S.C. Code Ann. § 17-28-90(G). Petitioner should not be foreclosed from pursuing this path due to actions and circumstances beyond his control.

A ruling in Petitioner's favor would not "open the floodgates" to PCR claims based solely on ineffective assistance of DNA counsel because Petitioner has presented an extremely narrow issue to this Court. Petitioner, like the complainant in Austin and Odom, *supra*, is merely seeking the appellate review that he is entitled to under the law. In Austin it was noted that the right to seek appellate review of the denial of PCR is *expressly authorized* by state law. The same is true of rulings coming from applications filed under the DNA Act. S.C. Code § 17-28-90(G) *expressly and explicitly authorizes the right of either the applicant or the state to appeal* a final order under the Act through a writ of certiorari.

Finally, expanding the Austin procedure to this discrete situation does not run afoul of the last sentence of S.C. Code § 17-28-60. Petitioner is attacking *the procedure used in his case*. Petitioner was denied his right to appeal which was a procedural error that prevented him from getting his "one fair bite" at the apple. *See*, Odom at 263, 523 S.C. at 757.

CONCLUSION

Based on the foregoing Petitioner respectfully request this Court grant him a belated appeal pursuant to Austin, *supra*, on the denial of his application for postconviction testing under the DNA Act.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of September, 2020.