

JAMES KULBICKI

* **IN THE CIRCUIT COURT**

* **FOR BALTIMORE COUNTY**

v.

* **Case No. 93-CR-0530**

STATE OF MARYLAND

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**PETITIONER'S RESPONSE TO STATE'S SUPPLEMENT
TO POST HEARING MEMORANDUM AND PETITIONER'S
MOTION TO STRIKE SUPPLEMENT**

Petitioner James Kulbicki, through counsel, respectfully requests that the Court strike from the record the State's recently filed Supplement to Post Hearing Memorandum on the grounds that it is irrelevant and untimely. The State has chosen to ignore the most basic tenants of due process and fundamental fairness that govern all litigation and to violate the specific procedural orders of this Court by belatedly injecting into the record an inflammatory document of unexamined reliability whose sole value is its perceived ability to taint this Court and engender publicity damaging to Petitioner.

The State has failed to explain why, ten years after Petitioner filed a pro se Petition for Post Conviction Relief (February 24, 1997), nearly three years after Petitioner submitted his pro se Amended Post Conviction Petition for Post Conviction Relief (November 2, 2004), 18 months after undersigned counsel submitted Petitioner's Amended Petition for Postconviction Relief that raised claims addressing all the scientific issues including DNA (March 31, 2006), nearly one year after the State submitted its written response (October

3, 2006), approximately five months after the completion of the postconviction hearing that consumed five days of testimony (April 19-25, 2007), and over a month and a half after the submission of the last posthearing brief (Petitioner's Post-Hearing Brief, June 1, 2007; State's Post Hearing Memorandum, June 27, 2007; Petitioner's Reply, July 31, 2007), the State now places into the record a report concerning a retest of evidence that has been in its possession for 12 years. There is simply no justification that can legitimately be offered to explain this blatant violation of the Court's scheduling orders. If Petitioner, at this late date, had submitted the report of an identification expert to opine that, based on scientific research, Barbara Clay's identification was clearly mistaken, the State would cry foul and rightfully so.

More importantly, the Cellmark report is irrelevant to any issue in the case. The State claims in its two-paragraph Supplement that it is introducing this evidence in order to rebut Petitioner's claims of "actual innocence" despite acknowledging that actual innocence is not a viable postconviction claim in Maryland. Although Petitioner himself has certainly asserted his innocence, no such legal claim has been raised in the more than 300 pages of pleadings relating to this case for the simple reason that the Court of Appeals has made clear that "actual innocence" is not a basis for postconviction relief. *Diggs v. Warden, Maryland Penitentiary*, 221 Md. 624, 157 A.2d 413 (1960). To admit and consider this evidence the Court would have to conclude that, contrary to the decisions of Maryland's appellate courts, actual innocence is a

basis for postconviction relief. In effect, the State has created a claim that is not viable and that Petitioner never asserted in order to introduce inflammatory evidence into the record. See *State v. DeFronzo*, 394 N.E.2d 1027, 1034 (Ohio 1978)(testing conducted by State after trial irrelevant to new trial issues); *Commonwealth v. Reese*, 663 A.2d 206, 209-210 (Pa. 1995)(state not permitted to introduce evidence of victim's sexual encounter with boyfriend to rebut defendant's exculpatory DNA test when such evidence was not heard at trial).

The disingenuousness of the State's claimed motivation for submitting the document is fully shown by the lead prosecutor's statements to the media.

Brobst, the prosecutor handling the case, said she was uncertain whether the DNA sample tested this year was part of the material that defense attorneys have argued was mishandled years ago.

She said prosecutors decided to have the evidence retested *not because the analysis was relevant to the current challenge to Kulbicki's conviction* but rather because the defendant 'was going to repeatedly exult his innocence' through his lawyers.

Jennifer McMenamain, *DNA Test Said To Counter Kulbicki*, Baltimore Sun, September 12, 2007, 1B, at 6B (emphasis added)(see Attachment). In other words, the State has introduced a highly inflammatory document into the record *knowing* that it was not "relevant to the current challenge." This leaves two motives for the action: pique at Petitioner's assertion of his innocence and an attempt to influence the Court's deliberation by generating publicity damaging to Petitioner over irrelevant and highly questionable

evidence. It is most assuredly no coincidence that Petitioner's counsel had barely received the report before being contacted by a local television reporter who wanted comment on an "explosive" development in the Kulbicki case of which she had been provided a tip.

A prosecutor may not place inflammatory information into the record knowing that it is irrelevant to the issues at hand and then proceed to make additional inflammatory comments to the media, particularly when a matter is pending before a tribunal. Maryland Rules of Professional Conduct 3.8(e)(prosecutors have special responsibility to "... refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused"); see *Attorney Grievance Commissioner of Maryland v. Gansler*, 377 Md. 656, 835 A.2d 548 (2003) (prosecutors have duty to refrain from extrajudicial comments designed to prejudice defendant).

This Court held five days of hearing testimony and issued scheduling orders for the disclosure of expert opinions for a purpose – to give each side a chance to present and challenge complex scientific evidence. Now, the State wants the Court to consider evidence that, without notice to the defense, was secretly submitted to the same commercial DNA testing laboratory whose work has already been challenged in this case as scientifically flawed. Neither the Court nor Petitioner was given any opportunity to determine whether Petitioner's representatives could observe the testing or have any input into the conditions under which the testing would occur. By simply dropping into the record a summary, conclusory report that contains no information

regarding the chain of custody, no information regarding the methodology used, no bench notes, and no underlying data, the State apparently seeks to present inflammatory information in a way that will most prejudice the Petitioner yet, at the same time, avoid defense scrutiny.

Although the State is contending that this report is conclusive evidence of guilt, in fact, it is nothing of the sort. Petitioner presented extensive evidence regarding the mishandling of the purported bone fragments by the police, the prosecutors, and the DNA examiner. Petitioner also presented expert testimony regarding anomalies in the DNA test results that were indicative of cross-contamination of the evidence samples with the reference samples of the victim. Retesting unreliable samples does not provide a reliable result, regardless of the nature of the test or how many times it is done.


Indeed, the only note worthy aspect of the State's Supplement is its implicit concession that the initial rounds of DNA testing were unreliable, as Petitioner has long claimed. The State has gone to the trouble and expense of retesting because it has no confidence in its prior tests or the other evidence in its case. It is regrettable that it has chosen to try and salvage its case by an untimely submission of unsupported documents designed not to resolve relevant legal issues but solely to arouse public enmity and improperly influence judicial review.


This is not the first time the State has asserted that newly conducted testing has confirmed Petitioner's guilt only to have the claim fail to withstand

scrutiny by the defense. For example, in an effort to show that retesting of the ballistics evidence in this case had confirmed the inculpatory findings of the now discredited Maryland State Police firearms examiner, the State presented the testimony of Baltimore County Police firearms examiner Mike Thomas. Thomas, however, ultimately conceded on cross-examination that he had observed characteristics of the bullet fragment that actually excluded Petitioner's handgun as the murder weapon. Therefore, as has been seen repeatedly in this case, the mere submission of an expert report by the State does not guarantee either reliability or accuracy.

Because this "evidence" does not relate to any relevant issue before this Court and because it is untimely, Petitioner respectfully submits that the Court strike the State's Supplement.


Respectfully submitted,


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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 13th day of September, 2007, a copy of the foregoing was hand delivered to the Office of the State's Attorney for Baltimore County, c/o Ann Brobst and Stephen Kagay, Jr., Assistant State's Attorneys, County Courts Building, 401 Bosley Avenue, Towson, MD 21204.


Suzanne Drouet
Assistant Public Defender