I. JURISDICTIONAL STATEMENT

This Court has jurisdiction of this matter pursuant to Neb. Rev. Stat. § 25-1902 (Reissue 1995). This is an appeal from a denial of Appellant's Second Motion for DNA Testing. Following a hearing on July 15, 2011, the district court denied Appellant's Second Motion for DNA Testing. The district court's order is a final order within the meaning of Neb. Rev. Stat. § 25-1902. On September 2, 2011, a timely notice of appeal and motion for leave to proceed in forma pauperis with poverty affidavit were filed.

Appellate jurisdiction to review a final order is conferred by Neb. Rev. Stat. § 25-1911 (Reissue 1995) and Neb. Rev. Stat. § 25-1912 (2000 Cum. Supp.).

II. STATEMENT OF THE CASE

A. Nature of the Case

This appeal is based on the district court's refusal to allow DNA testing pursuant to the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 *et seq.* (2006 Cum. Supp.).

B. Issues Heard Before the Lower Court

The issue below was whether Appellant was entitled to DNA testing pursuant to the DNA Testing Act.

C. How the Issues were Decided in the Lower Court

First Motion for DNA testing. On or about June 5, 2003, Appellant filed a postconviction motion pro se, requesting DNA testing. The lower court denied that request and Appellant appealed. On appeal, the State suggested a remand and this Court remanded the case to the lower court and by order found "[u]pon consideration of appellee's suggestion of remand...the case is remanded to the district court for Douglas County for reconsideration of the preliminary determination of the court required under the DNA Testing Act, which may be either upon

consideration of affidavits or after a hearing. See Neb. Rev. Stat. § 29-4120(3), (4), and (5); *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003)." (See Court of Appeals Order dated April 20, 2004)

Upon remand, the Appellant filed an Amended Verified Motion for Postconviction Relief and Request for Appointment of Counsel. Appellant was granted his request for appointed counsel and through counsel, Appellant filed his first motion for DNA testing on August 27, 2004. The district court authorized testing in a written order dated September 3, 2004 finding that "the State has filed an inventory and that evidence offered at the Defendant's original trial may contain biological material relevant to this case." (District Court Order dated August 27, 2004).

Testing was completed and in 2007, Appellant filed a motion for new trial based on newly discovered evidence. On February 26, 2008, the lower court denied Appellant's request to vacate his convictions or grant a new trial. (T44-9) On appeal, the Supreme Court affirmed the denial. *State v. Pratt*, 277 Neb. 887 (2009).

Second motion for DNA testing. On June 3, 2011, the Appellant filed his second motion for DNA testing. (T1) On August 19, 2011, the lower court denied this second motion for DNA testing. Specifically, the court found that a) the items to be tested were not retained under circumstances likely to safeguard the integrity of its original physical composition, and b) that such testing results would not produce noncumulative, exculpatory evidence relevant to the claim that Appellant was wrongfully convicted. (T21)

D. The Scope of the Appellate Court's Review

Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by

the court below. *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003); *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002); *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000).

On an appeal from a proceeding under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 *et. seq* (Cum. Supp. 2001), the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003); *State v. Poe*, 266 Neb. 437, 665 N.W.2d 654 (2003). In construing a statute, an appellate court should consider the statute's plain meaning *in pari materia* and from its language as a whole to determine the intent of the Legislature. A motion for DNA testing pursuant to the DNA Testing Act, Neb. Rev. Stat. § 29-4116 *et. seq* (Cum. Supp. 2002), is addressed to the discretion of the district court, and unless an abuse of discretion is shown, the court's determination will not be disturbed. *State v. El-Tabech*, 269 Neb. 810, 696 N.W.2d 445 (2005); *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

III. ASSIGNMENTS OF ERROR

1. The lower court erred in denying Appellant's request for DNA testing pursuant to Neb. Rev. Stat. §§29-4116 et seq. (2002).
2. The lower court erred in finding that the items of evidence were not retained under circumstances likely to safeguard the integrity of its original physical composition.
3. The state is barred by law-of-the-case doctrine in arguing the issue of improper storage of the evidence.
4. The state is barred by res judicata and estoppel in arguing the issue of improper storage of the evidence.
5. The lower court erred in denying DNA testing pursuant to the law-of-the-case doctrine.
6. The lower court erred in denying DNA testing pursuant to res judicata and estoppel.

7. The lower court erred in relying on dicta from previous Supreme Court findings in this case.
8. The lower court erred in finding that DNA testing would not likely produce noncumulative, exculpatory evidence relevant to Appellant's claim of wrongful conviction because DNA testing can likely prove the actual perpetrator of the crime.

IV. PROPOSITIONS OF LAW

1. The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. The law-of-the-case doctrine applies with even greater force when an appellate court remands a cause to an inferior tribunal. *State v. White*, 257 Neb. 943, 601 N.W.2d 731 (1999).
2. Matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts. *State v. Davlin*, 272 Neb. 139, 148, 719 N.W.2d 243, 254 (2006).
3. Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; as a result, those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *Talle v. Nebraska Dep't of Social Services*, 253 Neb. 823 (1998).
4. A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court. *In re Guardianship & Conservatorship of Jonathan Harley Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994).
5. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the

meaning of statutory words which are plain, direct and unambiguous. Furthermore, it is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. *Renter v. Siedenburg,* 15 Neb. App. 884 (2004).

6. Generally, absent extraordinary circumstances, a court should be reluctant to revisit its own prior decision or that of another court in a single case. *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

7. It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action. *Callahan v. Prewitt*, 143 Neb. 793 (1944).

8. Four conditions must exist in order for the doctrine of collateral estoppel to apply: 1) the identical issue was decided in the prior action; 2) there was a judgment on the merits which was final; 3) the party against whom the rule is applied was a party or in privity with a party to the prior action; and 4) there was an opportunity to fully and fairly litigate the issue in the action. *Bisgard v. Johnson*, 3 Neb. App. 198, 525 N.W.2d 225 (1994).

9. The DNA Testing Act, Neb. Rev. Stat. § 29-4116 *et. seq*. (2006 Cum. Supp.), establishes a clear procedural framework for movants seeking relief pursuant to the DNA Testing Act. The first step provides that a movant may obtain DNA testing if, inter alia, the testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.

10. The DNA Testing Act requires that the Court grant a motion for testing if the Movant has shown 1) that evidence can be subjected to retesting with more current DNA

techniques that provides a reasonable likelihood of more accurate and probative results; 2) that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and 3) that such [further] testing may produce noncumulative, exculpatory evidence relevant to the claim that [Pratt] was wrongfully convicted or sentenced. Neb. Rev. Stat. § 29-4120(5).

11. Generally, proof that an exhibit remained in the custody of law enforcement and court officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence. Important in such situations is the nature of the exhibit, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object. *State v. Langer*, 192 Neb. 525, 222 N.W.2d 820 (1974).

12. For purposes of the DNA Testing Act, exculpatory evidence means evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody. Neb. Rev. Stat. § 29-4119 (2006 Cum. Supp.); *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

V. STATEMENT OF FACTS

A. Procedural history

Although the facts of the criminal case are detailed and numerous, they are not pertinent for this appeal. The Appellant adopts the statement of facts from this court in its 2009 opinion in this case. *See, State v. Pratt*, 277 Neb. 887 (2009). Appellant will briefly provide the Court with the facts since 2009.

B. Proceedings related to the Motion for DNA Testing

On June 3, 2011, Appellant filed his Motion for DNA Testing pursuant to the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 *et. seq*. (T1) Appellant's motion for DNA testing was denied by the district court on August 22, 2011. (T21) Appellant was granted status to proceed in forma pauperis and this appeal followed. (T25)

In his motion for DNA testing, the Appellant alleged that further DNA testing may produce exculpatory evidence. The motion for DNA testing was supported by affidavit from Brian Wraxall, Executive Director and Chief Forensic Serologist at the Serological Research Institute ("SERI") in Richmond, California. (T9) Wraxall reviewed the testing procedures used in 2005 by the University of Nebraska Medical Center ("UNMC"). Wraxall proposed advanced DNA testing on the two victims' shirts and stated in his affidavit that a new form of testing has only recently become available which could lead to exculpatory evidence for the Appellant. (T9)

Wraxall outlined in detail how further testing could fill in the gaps that existed from the 2005 testing. (T11) Specifically, the 2005 results were lacking because two stains on the victims' shirts are "mixed" with male and female DNA and because the victims' DNA was not available, UNMC was unable to separate the mixed stains in order to exclude the Appellant as a contributor. Wraxall proposed using DNA testing procedures which can identify the wearer's (victim's) DNA. Wraxall believes that he will be able to obtain a known sample of the victims' DNA by testing areas of the shirt such as the armpit or collar. This alleviates the issue of having to request DNA directly from the victims. This procedure was not available in 2005 and is still not available today at UNMC.

Wraxall concluded that once the wearer's DNA is profiled, he will be able to isolate and remove the DNA profile from the two remaining mixed samples that UNMC was unable to

profile. However, although the Appellant can be excluded from the mixtures, this testing is more pertinent because the results will lead to a more complete profile that can be uploaded into the Combined DNA Index System ("CODIS"). Specifically, SERI uses certain testing kits (Identifiler Plus and Minifiler Kits) which were specifically designed to work on degraded samples to type stains that contain male DNA. As a result, profiles produced by these methods can then be used for searching databases such as CODIS. (T11)

In his motion for DNA testing, the Appellant intended to have the testing done at SERI using the testing procedures to produce a 16 marker profile which represents a complete profile. Then, in turn, the 16 marker profile could be uploaded into CODIS to obtain a "hit" matching that specific profile of the true perpetrator. (T1,)

VI. SUMMARY OF THE ARGUMENT

The lower court improperly denied DNA testing because Appellant's motion and supporting affidavit contain information required by the DNA Testing Act, specifically that 1) more advanced DNA techniques that have recently become available since his first motion for testing are relevant; 2) the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition; and 3) such further testing may produce noncumulative, exculpatory evidence relevant to the claim that the Appellant was wrongfully convicted or sentenced. Once the Appellant meets these requirements, the lower court is required to order DNA testing.

The issue of whether the evidence was retained under circumstances likely to safeguard the integrity of its original physical composition has previously been adjudicated when the lower court authorized testing in 2004 and to deny further testing on that issue alone is erroneous.

VII. ARGUMENT

1. **Biological material remains that can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results.**

"It is the intent of the Legislature that wrongfully convicted persons have the opportunity to establish their innocence through deoxyribonucleic acid, DNA, testing." Neb. Rev. Stat. § 29-4117 (2011). Appellant is simply requesting the opportunity to perform DNA testing as provided by the DNA Testing Act.

Although this case may be complex in its entirety, the issue on appeal is simple. In his second motion for DNA testing, the Appellant clearly met the requirements of the DNA Testing Act which, in turn, required the lower court to order DNA testing. Nebraska provides that a lower court must order DNA testing pursuant to a motion filed wherein the movant shows that 1) more advanced DNA techniques that have recently become available since his first motion for testing are relevant; 2) the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition; and 3) such further testing may produce noncumulative, exculpatory evidence relevant to the claim that the Appellant was wrongfully convicted or sentenced. Neb. Rev. Stat. § 29-4120 (1), (5).

In the relevant order denying testing, the lower court determined that the Appellant met the first prong, that the DNA testing was not available at the time of his trial. The lower court determined that the Appellant met the first prong and although the Appellant agrees, it should be clarified that the DNA Testing Act allows for testing where evidence "can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results." Neb. Rev. Stat. § 29-4120(1)(c).

2. **The lower court is bound by the law-of-the-case doctrine in determining whether the biological material was retained under circumstances likely to safeguard the integrity of its original physical composition.**

In 2004, in a written order, the lower court authorized DNA testing in this case after a remand from this court. (T1) In the relevant 2011 order, the lower court is not completely clear as to the previously filed motions and their relevant findings. First, in 2004, the lower court granted DNA testing pursuant to Appellant's motion for DNA testing. Subsequent to testing, the Appellant filed in the lower court, a motion for new trial based on newly discovered evidence (the DNA test results). The lower court denied the motion for new trial and made the comment that the evidence was not stored properly to meet the requirements of the Act. It is that Supreme Court opinion affirming the denial of the motion for new trial where the Court states that the "evidence was not stored in such a way as to preserve the integrity of any DNA evidence."

Also, in the relevant 2011 order, the lower court states that "[i]n order for biological material to be tested under the DNA Testing Act, I am required to determine..." and the court lists the requirements found in Neb. Rev. Stat. § 29-4120 (5) including "that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition." *Id*.

The lower court contradicts itself by authorizing DNA testing in 2004 and now denying DNA testing in 2011 based on the fact alone that the evidence was not properly stored. It is implicit that because the lower court granted testing in 2004, the lower court found no issue regarding proper storage of evidence as required in the DNA Testing Act. The lower court is barred from reconsidering this issue based on the law-of-the-case doctrine. Under the law-of-the-case doctrine, the holding of an appellate court on questions presented to it in reviewing proceedings

of the trial court become the law of the case; as a result, those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *Talle v. Nebraska Dep't of Social Services*, 253 Neb. 823 (1998).

The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. The law-of-the-case doctrine applies with even greater force when an appellate court remands a cause to an inferior tribunal. *State v. White*, 257 Neb. 943, 601 N.W.2d 731 (1999). Because the lower court itself granted DNA testing in 2004, the issue of how the evidence has been retained can not preclude testing on its own.

Interestingly, the lower court notes that it previously granted testing [in 2004] and in the same order finds that it is required to determine whether the evidence was retained under circumstances likely to safeguard the integrity of its original physical composition. It is too late to make that finding because the 2004 order authorizing DNA testing became the law-of-the-case as it relates to the issue of how the evidence was stored; any later mention is either dicta or barred pursuant to the law-of-the-case doctrine.

The court has held that, "matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts. *See, State v. Davlin*, 272 Neb. 139, 148, 719 N.W.2d 243, 254 (2006). The State has failed to present any materially and substantially different facts to afford a reconsideration by this Court. Generally, absent extraordinary circumstances, a court should be reluctant to revisit its own prior decision or that of another court in a single case. *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

Although this issue was not specifically argued in opposition by the state, the only argument the state may be allowed regarding evidence preservation would be the time between the previous testing in 2004 and today. This issue was not raised and any such argument would be bogus as the parties agree that the evidence has remained at UNMC. "Generally, proof that an exhibit remained in the custody of law enforcement and court officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence. Important in such situations are the nature of the exhibit, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object." *State v. Langer*, 192 Neb. 525, 222 N.W.2d 820 (1974). If this Court determines that the issue of preservation of evidence between 2004 and 2011 is relevant, then the circumstances surrounding custody are in favor of requiring DNA testing.

3. **The lower court is bound by res judicata and collateral estoppel in determining whether the biological material was retained under circumstances likely to safeguard the integrity of its original physical composition.**

In the alternative, the lower court is also barred by res judicata with regards to the issue of how the evidence was stored. It is this type of "material facts or questions" that was at issue during the review of appellant's first motion for DNA testing. The lower court, in 2004, determined that Appellant met the requirements for DNA testing, which included finding that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and subsequently allowed testing. Therefore, in the case of res judicata, the matter of whether the biological material has been retained cannot be raised again, either in the same court or in a different court.

The court has found that, "it is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action. *See, Callahan v. Prewitt*, 143 Neb. 793 (1994).

The lower court is also barred by collateral estoppel with regards to the issue of how the evidence was stored. Four conditions must exist in order for the doctrine of collateral estoppel to apply: 1) the identical issue was decided in the prior action; 2) there was a judgment on the merits which was final; 3) the party against whom the rule is applied was a party or in privity with a party to the prior action; and 4) there was an opportunity to fully and fairly litigate the issue in the action. *Bisgard v. Johnson*, 3 Neb. App. 198, 525 N.W.2d 225 (1994).

The lower court (and the Appellee) are barred from arguing the issue of whether the evidence was stored in such a way to safeguard the integrity of its original physical composition. The lower court's order authorizing DNA testing was the judgment on the merits required by collateral estoppel. The State is a party against whom the rule is applied and the state had an opportunity to "fully and fairly litigate the issue in the action." *Id.* In fact, the State suggested a remand which was granted and resulted in the lower court's 2004 order authorizing testing. Therefore, the State had plenty of opportunity to fully litigate the issue and is barred by res judicata and collateral estoppel.

4. **The lower court erred in finding that DNA testing would not likely produce noncumulative, exculpatory evidence relevant to Appellant's claim of wrongful conviction because DNA testing can likely prove the actual perpetrator of the crime.**

DNA History and DNA Databases. In 1994, Congress enacted the DNA Identification Act, *see* 42 U.S.C. §14131 *et seq*, which granted the FBI authority to establish a national DNA database. Subsequently, the FBI created CODIS - the Combined DNA Index System. CODIS is "a computer software program that operates local, State, and national databases of DNA profiles from convicted offenders, unsolved crime scene evidence, and missing persons. Every state in the Nation has a statutory provision for the establishment of a DNA database that allows for the collection of DNA profiles from offenders convicted of particular crimes. CODIS software enables State, local, and national law enforcement crime laboratories to compare DNA profiles electronically, thereby linking serial crimes to each other and identifying suspects by matching DNA profiles from crime scenes with profiles from convicted offenders. The success of CODIS is demonstrated by the thousands of matches that have linked serial cases to each other and cases that have been solved by matching crime scene evidence to known convicted offenders." www.dna.gov/solving-crimes/cold-cases/howdatabasesaid/codis/ (last visited on December 10, 2011).

There are three levels of CODIS: the Local DNA Index System (LDIS), used by individual laboratories; the State DNA Index Systems (SDIS), used at the state level to serve as the state's DNA database containing DNA profiles from LDIS labs; and the National DNA Index System (NDIS), managed by the FBI as the nation's DNA database containing all DNA profiles uploaded by participating states. www.dna.gov/dna-databases/levels (last visited on December 10, 2011). A local laboratory (e.g. Nebraska State Patrol) can maintain its own local database of forensic profiles - local DNA Index System (LDIS) - and upload approved profiles to a SDIS.

The FBI is responsible for analysis of convicted offender samples in the federal prison system and for entry of those profiles. The FBI also enters DNA profiles from its forensic cases into CODIS. In this sense, it is functioning as an SDIS laboratory.

The NDIS is a system of DNA profiles input by criminal justice agencies, including state and local law enforcement agencies. CODIS, on the other hand, is the automated DNA information processing and telecommunication system that supports NDIS.

The NDIS contains convicted offender profiles, forensic profiles (i.e. DNA profiles developed from evidence in solved and unsolved cases), and arrestee profiles (i.e., several states and the Federal Government collect DNA samples from individuals arrested for certain offenses and maintain those DNA profiles in an arrestee database). www.dna.gov/dna-databases/types (last visited on December 12, 2011). A "weekly search is conducted of all DNA profiles in the ... NDIS, and resulting profile matches are automatically returned to laboratories that submitted them." www.dna.gov/dna-databases/software (last visited on December 12, 2011).

As of October 2011, the NDIS contains over 10,269,778 offender profiles and 399,071 forensic profiles, which have produced over 164,000 hits assisting in more than 158,000 investigations. *See* http://www.fbi.gov/about-us/lab/codis/ndis-statistics (last visited on December 13, 2011). CODIS has been instrumental in solving countless unsolved cases across the United States. *See* NAT'L INST. OF JUST. DEP'T OF JUST., USING DNA TO SOLVE COLD CASES (2002).

Nebraska's DNA Identification Information Act. Nebraska codified its DNA Identification Act at § 29-4101 *et seq.* (2011). Neb. Rev. Stat.§ 29-4102 states that "[t]he Legislature finds that DNA data banks are an important tool in criminal investigations, in the exclusion of individuals who are the subject of criminal investigations, prosecutions, in deterring and

detecting recidivist acts, and in locating and identifying missing persons and human remains. Several states have enacted laws requiring persons convicted of certain crimes to provide genetic samples for DNA typing tests. Moreover, it is the policy of this state to assist federal, state, and local criminal justice and law enforcement agencies in the identification and detection of individuals in criminal investigations and in locating and identifying missing persons and human remains. It is in the best interest of this state to establish a State DNA Data Base for DNA records and a State DNA sample Bank as a repository for DNA samples from individuals convicted of felony offenses and other specified offenses and from individuals for purposes of assisting in locating and identifying missing persons and human remains." *Id*.

In terms of proving innocence, shortly after the creation of DNA databases in the early to mid-1990's, several prisoners conclusively established their innocence when a non-matching DNA profile hit to a known or unknown offender once uploaded into CODIS or a state DNA database.

In 2001, Nebraska passed the DNA Testing Act. Neb. Rev. Stat. §§ 29-4116 *et seq*. The DNA Testing Act establishes a clear and procedural framework for movants seeking relief pursuant to the DNA Testing Act. The first step provides that a movant may obtain DNA testing if, inter alia, the testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced. *Id*. To date, Nebraska has had six post conviction DNA exonerations, all from one case in Gage County. The exonerees are well known as the Beatrice 6 and combined, spent over 70 years in prison.

Nationally forty eight states plus the Federal Government and the District of Columbia have post-conviction DNA testing statutes. www.innocenceproject.org/fix/DNA-Testing-Access.php (last visited on December 20, 2011). These statutes have played a significant role in the 283

exonerations to date. *Id.* Of these 283 exonerations, the non-matching DNA profile that exonerated the innocent prisoner also identified the true perpetrator(s) in 126 of the cases. Of these 126 cases, roughly 58% resulted from a DNA database hit. Indeed, DNA database hits conclusively proved the innocence of the Beatrice 6: James Dean, Kathy Gonzalez, Debra Shelden, Ada JoAnn Taylor, Joseph White and Thomas Winslow. In other words, a DNA database hit revealed the true exculpatory nature of the non-matching DNA profile. Thus, had it not been for a DNA database hit, these prisoners would still be in prison for crimes they did not commit.

DNA testing in this case may produce noncumulative, exculpatory evidence. The lower court's order states that "such testing results may [not] produce noncumulative, exculpatory evidence relevant to the claim that the [Appellant] was wrongfully convicted." (T21) The court also points to the "considerable amount of other evidence" in support of denying the testing. *Id.*

Nebraska's DNA Testing Act provides that "the court *shall* order DNA testing pursuant to a motion filed under subsection (1) of this section upon a determination that testing was effectively not available at the time of trial, that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and that such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced." *Id.* (emphasis added)

In absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct and unambiguous. Furthermore, it is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. *Renter v. Siedenburg*, 15 Neb. App. 884 (2004). The Nebraska DNA Test Act is clear in its language and

intent. For purposes of the DNA Testing Act, exculpatory evidence means evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody. Neb. Rev. Stat. § 29-4119 (2006 Cum. Supp.); *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003). Appellant's request for testing clearly shows that testing *may* produce noncumulative exculpatory evidence. In 2004, testing was completed and resulted in the determination that testing could be more effective with the victims' DNA. Attempts were made and denied to get the victims' DNA. In the current request for DNA testing, Appellant alleges, through affidavit from Wraxall that the victims' DNA can be obtained from the shirts themselves, *without requesting or requiring DNA from the victims directly*. Wraxall outlines the process of obtaining the "wearer's DNA" from the shirts in the areas of the armpits and collars. (T11) The ability to complete this level of DNA testing was not available at UNMC in 2004. This form of testing is more likely to result in exculpatory results than in 2004 because it can overcome the very issue that the 2004 results concluded that without the victims' DNA, testing would never be beneficial.

The Appellant's testing request fits squarely within the statute and testing should have been granted. He sought DNA testing on the DNA-soaked shirts of the victims. The shirts were a central piece of evidence used by the state during the trial because they were ripped by the assailant. Indeed, had the state not introduced the shirts, it is likely that the shirts would have been destroyed just like the rape kit and underwear of the victims in this case.

The possibility of contamination is irrelevant. One issue remains from the 2004 testing and that is the fact that in 1975, items of evidence were not prepared for trial as they are today. For example, the shirts in this case have an evidence sticker on the shirts themselves and were likely passed around the jury box, or at minimum, held directly by the investigators or other law enforcement, and possibly the bailiff. This issue was argued heavily in the Appellant's motion

for new trial and on appeal. In 2004, the testing results confirmed that the Appellant was excluded from 13 of the 15 stains on the two shirts. The Appellant argued that the presence of another male's DNA was exculpatory and thus his conviction should be vacated. The state argued that there is likely other males' DNA present on the shirts because of the way evidence was handed in cases in 1975 where no one was aware of the idea of DNA. However, this issue is also overcome in the relevant appeal. Appellant is arguing that not only will testing conclude that he is excluded, but this time that more advanced DNA testing can result in a more complete profile which can be uploaded into CODIS to determine if there is a hit to another perpetrator. In that case, if there is a hit, it will be clear whether the identified CODIS hit was an investigator, juror or someone else who may have "contaminated" the evidence. In other words, this is the most conclusive type of evidence that can be obtained in the DNA world - one where a perpetrator is *actually identified* rather than simply arguing exclusion of the convicted. In spite of this speculation of contamination idea that was so heavily stressed in the previous findings in this case, DNA testing can prove Pratt's innocence if a male DNA profile is revealed and the DNA profile hits to a known or unknown serial offender once uploaded into CODIS.

Instead of determining the possibility of exculpatory results, the lower court noted the overwhelming evidence of guilt (i.e. the victims' identifications) making it impossible for DNA testing to produce exculpatory results. The proper inquiry, however, is not on the State's evidence, but on the impact the exculpatory DNA results would have on the State's case. Indeed, if a DNA profile is revealed and hits to an offender in CODIS, it would put the State's theory in an entirely different light, undermining all confidence in the Appellant's conviction.

Because the State's conduct forced Appellant to rely on a DNA database hit to prove his innocence, it cannot now bar him from accessing the only DNA technology that can prove his

innocence. The State failed to preserve the rape kit and the victim's underwear in this case. Had the State preserved the rape kit and the victim's underwear, the Appellant would have easily qualified for DNA testing under the DNA Testing Act. Without the rape kit or the victim's underwear, the Appellant must rely on the victims' shirts to prove his innocence. The State's own conduct, therefore, has placed the appellant in the unenviable position of possibly having to prove his innocence with a DNA database hit. By placing him in such a position, the State cannot now prohibit him from accessing the only technology than can conclusively prove his innocence. To do so would be irreconcilable with the Due Process Clause.

CONCLUSION

WHEREFORE, Juneal Pratt requests that this Court reverse the Order of the District Court of Douglas County below and find that he is entitled to DNA testing pursuant to the DNA Testing Act.

DATED: Resubmitted January 9, 2012

RESPECTFULLY SUBMITTED,

By: _____

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