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IN THE SUPREME COURT OF IOWA

NO. 19-1981
Muscatine County No. FECR059164

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANNETTE DEE CAHILL,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR MUSCATINE COUNTY
THE HONORABLE PATRICK A. MCELYEA

APPELLANT'S FINAL REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS 1
TABLE OF AUTHORITIES 2
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 3
ARGUMENTS 4
- **I. The DNA testing issue was preserved for appeal, and Cahill should prevail in her claim that the hairs be tested using mtDNA analysis.** 4
- **II. The mid-trial production of the Jacque Hazen recording constituted a Brady violation, and error was preserved on this issue.** 8
- **III. The evidence of attempted testing of the human hairs was suppressed, in accordance with *Brady*.** 9

REQUEST FOR ORAL ARGUMENT 11
CERTIFICATE OF COMPLIANCE 12
CERTIFICATE OF FILING AND SERVICE 13

TABLE OF AUTHORITIES

Iowa Supreme Court Cases

State v. Burgess, 237 Iowa 162, 164, 21 N.W.2d (1946) 5

State v. Compiano, 154 N.W. 2d (Iowa 1967) 4, 5

State v. Miles, 490 N.W. 2d (Iowa 1992) 3

Iowa Court of Appeals Cases

Jackson v. State, No. 11–0944, 2012 WL 5356081, at 2 (Iowa Ct. App. Oct. 31, 2012) 9, 10

Statutory Provisions

Iowa Code § 81.10 .... 4, 7

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State v. Compiano, 154 N.W. 2d (Iowa 1967) 3, 4

State v. Miles, 490 N.W. 2d (Iowa 1992) 3

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ARGUMENTS

I. The DNA testing issue was preserved for appeal, and Cahill should prevail in her claim that the hairs be tested using mtDNA analysis.

Argument as to Appropriate Standard of Review:

The State alleges that Cahill has misinterpreted the Standard of Review in this matter. Cahill's Opening Brief stated that the standard of review is *de novo*, because the argument is a constitutional claim related to discovery issues. Cahill stated that the standard of review for the application of Iowa Code § 81.10 should be for errors of law. *See* Opening Brief, p. 18.

The State argues that the appropriate standard of review in this matter is abuse of discretion, since the argument is based on newly discovered evidence. *See* States Br. at 23. The State cites to *State v. Compiano* and *State v. Miles*. Id. Neither of those cases involved a homicide, and both are about witnesses whose testimony was changed or altered after the trial (rather than newly-discovered evidence). *State v. Compiano*, 154 N.W. 2d 847 (Iowa 1967), *State v. Miles*, 490 N.W. 2d 798, 799 (Iowa 1992).

The argument as to denial of mtDNA testing of the human hairs in this case is more complicated than *Compiano* or *Miles*, because newly-adopted section 81.10 of the Iowa Code mandates testing of DNA evidence where the test could be exculpatory (meriting an error of law standard of review). However, even if the Court agrees with the State that the standard of review here is abuse of discretion, Cahill should still

prevail. This case presents the type of "extraordinary circumstances" for the "sparingly" granted motion for new trial. See *Compiano* at 849.

As is discussed at length in the record and Appellant's Opening Brief, there is no physical evidence or eyewitness testimony indicating that Cahill killed Corey Wieneke. The mtDNA testing in this case could exonerate her, or lead to his real killer[1]. In *State v. Burgess*, the Iowa Supreme Court reversed the district court's denial of defendant's motion for new trial. In Burgess, newly discovered evidence supported defendant's alibi defense, and the Court found that this new evidence (a train conductor who had seen defendant board his train during the time of the alleged robbery) was not cumulative and could have changed the outcome of the trial. *State v. Burgess*, 237 Iowa 162, 164, 21 N.W.2d 309, 310 (1946).

The case at bar did not have an alibi defense, as Cahill has always been honest with law enforcement that she stopped at Wieneke's house briefly the morning of his death. However, as in *Burgess*, Cahill and her attorneys discovered, only after trial had concluded, that there was a path towards exonerating her through further investigation. In Burgess, defense counsel arranged for the conductor-witness to take the train to identify the defendant in a lineup. *Burgess* at 164. In the present case,

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[1] As is discussed several times in the Opening Brief, most of the other suspects in the Wieneke murder were involved in other criminal investigations, and several are convicted felons. Their DNA would be accessible to law enforcement. Further, the State admitted that it could procure DNA from Wieneke and his fiancée, Jody Hotz (Willier) in order to compare mtDNA analysis, if the court ordered it. *See* Post Trial Motion Hearing Transcript, p 25, 7-11.

mtDNA testing of the hairs in Wieneke's hand as against available samples from Wieneke, his fiancée, and other suspects in the case, could provide the virtual "lineup" to show that Cahill was not his killer.

Argument as to Preservation of Error:

The State argues that Cahill has not preserved the issue of the mtDNA testing request on appeal. However, the topic was discussed extensively by defense counsel at the Hearing on Post-Trial Motions. Counsel for Cahill read from the trial transcript in the hearing, to underscore how the State mentioned that the hairs were "not suitable for analysis" and how defense counsel said nothing to refute that, which indicated their lack of awareness of alternative testing mechanisms. Transcript on Post-Trial Motion Hearing, page 16.

The State also alleges failure to preserve error because Cahill did not "challenge the absence of a direct ruling on her other claims." State's brief, page 22. The State refers to a portion of the sentencing transcript where defense counsel was asked whether there were "any other motions pending or any reason why sentencing should not take place at this time." *See* Sent. Tr. 9:16-19. This is a hyper-technical argument, which ignores the unique scheduling of the final hearings in this matter. Because of conflicts in the specially-assigned District Court judge's schedule, the hearing on post-trial motions took place on November 21st, one day prior to sentencing. Because of this twenty-four-hour turnaround for the Court, the judge ruled orally on the post-trial motions immediately before sentencing. The Court specifically ruled on the

motions argued by defense counsel, including briefly stating that "for the reasons previously stated regarding the hair and the DCI report and the DNA testing the motion to compel is also denied." *See* sent. Tr. 8: 18-24. It is unclear what the State claims is missing to justify the claim of failure to preserve error.

Argument on the merits:

The State argues that "Cahill's claims under section 81.10…will require development of a significant factual record," and that "[e]ven if Cahill had sought a ruling on a separate application under section 81.10, it would have correct to proceed to sentencing." [sic] at page 24 of State's Brief. Iowa Code section 81.10 is a narrow remedy to force the Court to order DNA testing. When DNA testing, pursuant to that section, is property performed, the factual analysis comes AFTER the court forces the testing. Even if 81.10 required creation of a record to justify the testing, the court in Cahill's case had extensive factual and scientific information to justify ordering the tests—all evidence presented at trial and hearings in this matter, plus extensive briefing and affidavits as related directly to this issue.

In this case, the Court should have immediately granted the Motion and compelled testing of the hairs. The statute calls for a possibility that the results could alter the outcome of trial, not a prediction as to what those results would be. In this case, if the hairs exclude Cahill, they are relevant to the issue of her guilt or innocence.

At the hearing on Post-Trial Motions, defense counsel argued vigorously in favor of delaying sentencing in order to complete mtDNA testing. As is described above,

this hearing occurred the day prior to sentencing due to scheduling conflicts with the court. Defense counsel presented information in testimony and affidavits as to the efficacy of this type of testing, even for very old or very small hair samples. *See* Transcript on Post-Trial Motions, page 6.

The State failed to list any interests, other than vague mentions of "finality" that would have been impacted, even if sentencing had been postponed. By the time sentencing took place, Cahill had been incarcerated at the Muscatine County Jail for several weeks. Cahill no longer qualified for release, since she had been convicted of a forcible felony, and there were no witnesses scheduled for the sentencing hearing who would have been inconvenienced by another several week-wait for the proceeding (except for Wieneke's mother, who lives locally). Cahill herself would have been the most adversely impacted by a delay of sentencing for mtDNA testing, since it would have left her languishing in the county jail for a longer period of time before being moved to the Iowa Correctional Institution for Women in Mitchellville (which is better suited for serving long sentences).

II. The mid-trial production of the Jacque Hazen recording constituted a Brady violation, and error was preserved on this issue.

The State claims in its brief that error was not preserved for this issue to be heard on appeal. That is incorrect. The reciprocal discovery agreement filed on June 25, 2018 specifically addresses all "scientific tests or experiments" and "Any… tangible objects" in the possession of the State are to be turned over to the

Defendant. Defendant also argued that the missing Jacque Hazen recording prejudiced her, both in her written Motion for New Trial and in oral argument on that motion. *See* Transcript of Post-Trial Motion Hearing, p. 29. The Defendant specifically raised to the Court how law enforcement was asked at depositions in December of 2018 about the recording, and yet did not produce it until the second trial. *Id.* Cahill discusses how the absence of the recording prejudiced her in the Opening Brief. *See* Opening Brief, p. 25.

III. The evidence of attempted testing of the human hairs was suppressed, in accordance with *Brady*.

In its brief, the State alleged that the hairs themselves were not kept a secret and therefore the partial lab report regarding them could not be considered suppressed evidence. However, no evidence was available to Cahill, prior to trial, showing that the hairs had or had not been tested, only that they were on a list of evidence at the DCI lab. When multiple witnesses were asked, nobody knew whether testing had been done. Although the hairs were listed on other documents, the documents did not themselves say whether the hairs had been tested and the outcome.

In its citation to *Jackson v. State*, the State quotes "Brady is not violated when evidence in question is '**disclosed during trial** and at a **meaningful time**." *Jackson v. State*, No. 11–0944, 2012 WL 5356081, at 2 (Iowa Ct. App. Oct. 31, 2012). See State's Brief at 29. It is obvious that the evidence was disclosed at trial, to satisfy the first requirement. What is not so obvious is whether it was done at a meaningful time.

In *Jackson*, the prosecution provided defense counsel with a letter, written by the victim of the sexual assault for which defendant was on trial. *Id.* at 1. The Court found that, since Jackson's attorney had an opportunity to review the letter and decide what course of action to take, it was concluded the evidence was not suppressed. *Id.* at 2.

The evidence presented during Cahill's trial is not similar to the letter evidence in *Jackson*. The letter in Jackson described details of a sex act. The victim in that case testified to those acts at trial, and the logistics of those acts were already known to the defense through discovery. However, the missing evidence in the case at bar was not so apparent. The second element of the *Jackson* test, cited by the State, is not met because the incomplete lab report was not disclosed at a meaningful time. There was no TRUE opportunity to review it, because defense counsel did not know the difference between STR and mtDNA analysis without further research.

CONCLUSION

The State's brief relies heavily on technical arguments, and the repeated theme that Ms. Cahill is asking for extraordinary relief. The State ignores the fact that this is an extraordinary case—a murder case, in the twenty-first century, where law enforcement did not have (or, in some instances, even try to obtain) physical evidence of guilt. Cahill renews her request to this Court to remand her case for a new trial, only after mtDNA testing is performed on the human hairs found in Corey Wieneke's hand.

REQUEST FOR ORAL ARGUMENT

Oral argument would assist this Court in its analysis of the issues presented. Consequently, Appellant requests oral argument.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903 (1) (g)(1) or (2) because this brief contains 1,881 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903 (1)(g)(2).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1) (e) and the type-style requirements of Iowa R. App. P. 6.903(1) (f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Garamond 14 point font.

/s/ Elizabeth A. Araguas
Elizabeth A. Araguas
ATTORNEY FOR APPELLANT

CERTIFICATE OF FILING AND SERVICE .

The undersigned hereby certifies that this Final Reply Brief was filed via EDMS on the 16th day of October, 2020 and that a copy of this document will be served this date by US Mail upon any counsel of record or unrepresented parties in this action not served by the electronic filing system.

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