

**CLERK OF THE NEBRASKA SUPREME COURT  
AND NEBRASKA COURT OF APPEALS**  
2413 State Capitol, P.O. Box 98910  
Lincoln, Nebraska 68509-8910  
(402) 471-3731  
FAX (402) 471-3480

February 23, 2021

Paul Castonguay #70764  
TSCI c/o LRC Building 1  
2725 N Hwy 50 PO Box 900  
Tecumseh, NE 68450-0900

**IN CASE OF: A-21-000101, State v. Paul Castonguay  
TRIAL COURT/ID: Douglas County District Court 178-248**

**The following internal procedural submission: Misc. Submission to Court - Jurisdiction  
Submitted on 02/12/21**

**Has been reviewed by the court and the following order entered:**

Appeal dismissed. See Neb. Ct. R. App. P. § 2-107(A)(2). Appeal was untimely as notice of appeal was not filed within 30 days of the court's order of November 23, 2020. See Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2020). Appellant's "opposition" filed on December 30, 2020, did not toll the time for filing notice of appeal. See § 25-1912(3).

Respectfully,

Clerk of the Supreme Court  
and Court of Appeals

## IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA,	)	CASE I.D. CR10-9070440
	)	DOC. 178 NO. 248
Plaintiff,	)	
	)	
vs.	)	
PAUL CASTONGUAY,	)	ORDER ON DEFENDANT'S MOTION
	)	FOR TESTING UNDER THE DNA ACT
Defendant.	)	AND MOTION BASED ON NEWLY
	)	DISCOVERED EVIDENCE

This matter came on for consideration of the Defendant's Motion for Testing Under the DNA Act and Motion Based on Newly Discovered Evidence filed October 6, 2020 and the State's response to same. The Court would note that the Defendant's collateral attack filings are too voluminous, numerous and repetitious to singularly address. See Order on Defendant's Application for Post-Conviction DNA testing entered March 23, 2011. The Court finds and Orders as follows:

**Motion for Newly Discovered Evidence**

Defendant's motion fails to cite to any statutory sections in support of his request for an evidentiary hearing pursuant to this motion. Likewise, the motion does not set forth the remedy sought. Defendant does cite to *Brady* and makes allegations relating to prosecutorial misconduct, but the Court cannot determine what collateral attack Defendant is proceeding under to articulate an appropriate response. This motion appears to be in line with Defendant's numerous filings over the years where he is once again asserting complaints against the State in support of his innocence without any legal or factual support. The Nebraska appellate courts have held that such unsupported collateral requests should be denied and the Court will do so here. See e.g. *State v. Rodriguez Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008) (finding trial court lacked

jurisdiction when the legislature had not authorized a procedure for the relief sought by the defendant); *State v. Davis*, 23 Neb. App. 536, 875 N.W.2d 450 (2016) (upholding decision to dismiss multiple collateral filings when they were not provided for within the law by citing to *Rodriguez-Torres*).

### **Motion for DNA Testing**

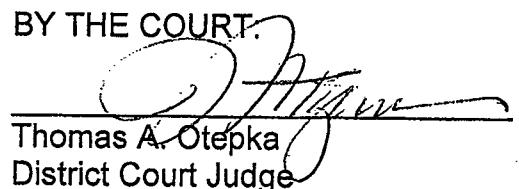
Defendant previously filed a Motion for DNA Testing in 2011. At the time of the hearing, the State offered an inventory into evidence. The Court denied testing March 23, 2011 in finding the Defendant had not “provided any explanation as to how such testing at this point would ‘produce noncumulative exculpatory evidence relative to the claim that he was wrongfully convicted or sentenced.’” Similarly here, Defendant continues to complain about prosecutorial misconduct, but fails to explain how testing would produce exculpatory evidence.

The Court can and will deny DNA testing based on subsection (5)(c), which allows dismissal of Defendant’s motion if it finds that DNA testing of evidence in question would not produce noncumulative, exculpatory evidence relevant to Defendant’s claim that he was wrongfully convicted. This is especially so in light of the fact that Defendant confessed to the sexual assault of his daughter in this case. Because the evidence requested by Defendant to be tested would not produce “noncumulative” or “exculpatory” evidence in light of the evidence set forth at the time of the plea, this motion is denied. See § 29-4120(5)(c); *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006); *State v. Phelps*, 273 Neb. 367, 27 N.W.2d 224.

Based on the foregoing analysis, the Court finds and Orders that Defendant’s motions are denied.

DATED this 20 day of November, 2020.

BY THE COURT:

  
Thomas A. Otepka  
District Court Judge

cc: Katie Benson  
Paul Castonguay



**CLERK OF THE NEBRASKA SUPREME COURT  
AND NEBRASKA COURT OF APPEALS**  
2413 State Capitol, P.O. Box 98910  
Lincoln, Nebraska 68509-8910  
(402) 471-3731  
FAX (402) 471-3480

April 8, 2021

Paul Castonguay #70764  
TSCI c/o LRC Building 1  
2725 N Hwy 50 PO Box 900  
Tecumseh, NE 68450-0900

**IN CASE OF:** A-21-000101, State v. Paul Castonguay  
**TRIAL COURT/ID:** Douglas County District Court 178-248

**The following filing:** Petition Appellant for Further Review  
Filed on 03/05/21  
Filed by appellant Paul Castonguay #70764

**Has been reviewed by the court and the following order entered:**

Petition of appellant for further review denied.

Respectfully,

Clerk of the Supreme Court  
and Court of Appeals

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, ) CASE I.D. CR10-9070440  
Plaintiff, ) DOC. 178 NO. 248  
vs. ) ORDER ON DEFENDANT'S "MOTION  
PAUL CASTONGUAY, ) FILED WITH APPEAL"  
Defendant. )  
OS

On February 4, 2021 Defendant filed a "NOTICE OF INTENT TO APPEAL AND NOTICE OF APPEAL OF THE DECISION OF THE DISTRICT COURT RULING" (sic). The "Decision" which is the subject of the February 4 appeal was entered months before on November 23, 2020. Also, on the same day he filed his appeal to the Court of Appeals, Defendant filed a "Motion to Compel" on February 4, 2021 and a "Motion for Leave to File and Submit Exhibit to Support said motion". (sic).

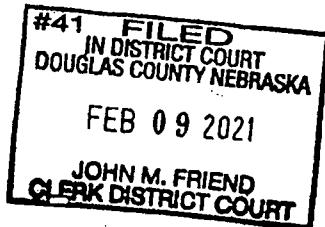
Because the two motions were filed with an appeal, this Court may not have jurisdiction to rule on them now but they are frivolous and that won't change when, if ever, ruling is appropriate.

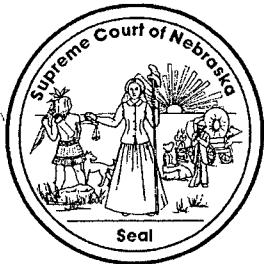
DATED this 8 day of February, 2021.

BY THE COURT:

Thomas A. Otepka  
District Court Judge

cc: Katie Benson  
Paul Castonguay





**CLERK OF THE NEBRASKA SUPREME COURT  
AND NEBRASKA COURT OF APPEALS**

2413 State Capitol, P.O. Box 98910  
Lincoln, Nebraska 68509-8910  
(402) 471-3731  
FAX (402) 471-3480

Date: January 14, 2021

Paul Castonguay #70764  
TSCI c/o LRC Building 1  
PO Box 900  
Tecumseh, NE 68450-0900

We are in receipt of your correspondence. Please review the "X" below for response.

We are unable to find a current case on appeal with the Nebraska Supreme Court or Court of Appeals as it relates to case number CR10-9070440 or Doc. 178 Page 248.

A docket sheet is enclosed for your review which provides a list of all filings and dispositions in your case, parties and counsel of record.

Copies of documents contained in file \_\_\_\_\_ are available at .25 per page or a minimum of \$1.00. Prepayment is required. The cost for your request is as follows: \$\_\_\_\_\_. Please renew your request at the time payment is sent.

We are unable to provide legal advice. Please access the Supreme Court website for further information and forms at: <https://supremecourt.nebraska.gov/self-help/welcome>.

Please contact your attorney of record at:

Your case has been mandated and this court no longer has jurisdiction. If your intent is to file an original action in the Nebraska Supreme Court, please find enclosed Neb. Ct. R. App. P. § 2-115. The requirements of this rule must be met before we can docket such an action.

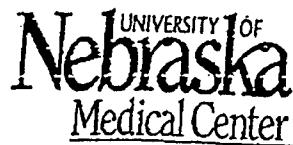
OTHER:

The last case this Court had with the above-referenced case number(s) is A-20-0033, State v. Castonguay, which was mandated on May 4, 2020.

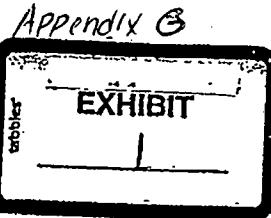
Check with the trial court.

Sincerely,

Clerk of the Supreme Court and Court of Appeals



NEBRASKA'S HEALTH SCIENCE CENTER



B-23097

## INVOICE

HUMAN DNA IDENTIFICATION LABORATORY  
Molecular Diagnostics Laboratory

December 16, 2008

Brenda Wheeler  
Douglas County Sheriff's Office  
3601 N. 156<sup>th</sup> St.  
Omaha, NE 68116

Re: Agency Case # B23097  
Nebraska Medical Center HDI Lab Case # 1071

Victim: Amanda Castonguay

### EVIDENCE SUMMARY CHART

Agency Number	HDI Number	Description	Comments	Charge
S280-2	1071-A	Vaginal swab from sexual assault kit	DNA Testing	\$495.00
S280-2	1071-B	Pubic hair combings from sexual assault kit	AP = Negative	Nt
S280-2	1071-C	Rectal swab from sexual assault kit	DNA Testing	\$495.00

Nt = Not tested

### REFERENCES TESTED

Agency Number	HDI Number	Name/Description	Screening Test(s)	PCR Results
		Not tested at this time		

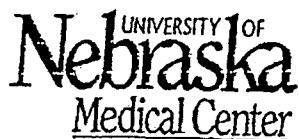
### TOTAL AMOUNT DUE:

**\$990.00**

Please remit payment within 30 days to:

ATTN Peggy Slagle, CPC  
Regional Pathology Services  
University of Nebraska Medical Center  
983135 Nebraska Medical Center  
Omaha, NE 68198-3135

Please do not hesitate to contact me at 402-559-7283 with any questions you may have regarding this invoice.



8-23097

NEBRASKA'S HEALTH SCIENCE CENTER

HUMAN DNA IDENTIFICATION LABORATORY  
Molecular Diagnostics Laboratory

## DNA Report

December 11, 2008

Brenda Wheeler  
Douglas County Sheriff's Office  
3601 N. 156<sup>th</sup> St.  
Omaha, NE 68116

Re: Agency Case # B23097

Nebraska Medical Center HDI Lab Case # 1071

Victim: Amanda Castonguay

HDI Case 1071

Page 1 of 4

985454 Nebraska Medical Center / Omaha, NE 68198-5454  
Lab: 402-559-7220 / FAX: 402-559-2490 / [www.unmc.edu](http://www.unmc.edu)

Page 72 of 90

EVIDENCE SUMMARY CHART

Agency Number	HDI Number	Description	Screening Test(s)	PCR Results
S280-2	1071-A	Vaginal swab from sexual assault kit	AP = Positive PSA = Negative	Yes
S280-2	1071-B	Pubic hair combings from sexual assault kit	AP = Negative	Nt
S280-2	1071-C	Rectal swab from sexual assault kit	AP = Positive PSA = Negative	Yes

Nt = Not tested

REFERENCES TESTED

Agency Number	HDI Number	Name/Description	Screening Test(s)	PCR Results
		Not tested at this time		

SCREENING TESTS

*Acid phosphatase (AP)* is present in semen in high concentrations compared to other body fluids. It is a common presumptive test for the identification of semen in forensic specimens.

*Prostate specific antigen (PSA)* is one of the major proteins in seminal fluid. Detection of PSA in forensic specimens is useful as a confirmatory test for semen.

DNA EXTRACTION

The extraction procedure for a forensic specimen containing possible semen attempts to isolate sperm DNA from DNA of other sources. The procedure results in two fractions, one called the "sperm fraction" (S), and the other called the "epithelial fraction" (E). The sperm fraction is expected to be mainly of male origin; however, some non-sperm DNA may be present. The epithelial fraction may consist of DNA from both semen and non-semen origin.

DNA TESTING METHODOLOGY

Specimens were analyzed by polymerase chain reaction (PCR) amplification. DNA was extracted from the specimens listed below and amplified by PCR with the Promega PowerPlex<sup>®</sup> 16 System for fifteen short tandem repeat (STR) markers (D3S1358, TH01, D21S11, D18S51, Penta E, D5S818, D13S317, D7S820, D16S539, CSF1PO, Penta D, vWA, D8S1179, TPOX, FGA), and the gender marker, Amelogenin.

INTERPRETATION (See Appendix for DNA profiles obtained)

Evidence 1071-A (Vaginal swab from sexual assault kit):

Evidence 1071-C (Rectal swab from sexual assault kit):

The extraction procedure to separate "epithelial fraction" (E) from the "sperm fraction" (S) was employed. The resulting fractions were independently amplified and analyzed.

(E) Epithelial fraction:

Specimens 1071-A (E) and 1071-C (E) generated a DNA profile that is consistent with originating from a single female individual.

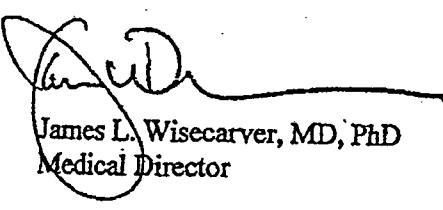
(S) Sperm fraction:

Specimen 1071-A (S) generated a DNA profile that is consistent with originating from the same single female individual observed in the epithelial fractions. 1071-C (S) generated a similar partial female DNA profile.

In the absence of male DNA, no references were tested.

The Director has reviewed all the data related to this case. The laboratory does not store evidence long-term. Call the HDI lab at (402) 559-7220 if further information is needed regarding these results and to schedule specimen return.

Melissa Helligso  
Melissa Helligso, MT(ASCP)  
Medical Technologist / DNA Analyst

  
James L. Wisecarver, MD, PhD  
Medical Director

APPENDIX: DNA RESULTS OBTAINED (reported as a phenotype below)

Genetic Locus	1071-A Vaginal swab		1071-C Rectal swab	
	E	S	E	S
	D3S1358	16,18	16,18	16,18
TH01	9,9,3	9,9,3	9,9,3	*
D21S11	27,29	27,29	27,29	*
D18S51	12,14	12,14	12,14	*
Penta E	5,13	5,13	5,13	*
D5S818	11,12	11,12	11,12	11,12
D13S317	8,12	8,12	8,12	*
D7S820	9,12	9,12	9,12	*
D16S539	9,13	9,13	9,13	13*
CSF1PO	10,11	10,11	10,11	*
Penta D	10,12	10,12	10,12	12*
Amelogenin	X	X	X	X
vWA	17,19	17,19	17,19	*
D8S1179	14,15	14,15	14,15	14,15
TPOX	11	11	11	*
FGA	21	21	21	21

(E) = Epithelial cell enriched fraction.

(S) = Sperm cell enriched fraction.

XY = Indicates male gender; does not exclude the possibility of female and male mixture.

X = Indicates female gender.

\* = Possible additional allele(s) and/or artifact(s) of PCR amplification detected; or no alleles detected.

*Exhibit 2 / Appendix H*

April 24, 2012

Mr. Paul Castonguay, Inmate #70764  
2725 North Highway 50  
P.O. Box 900  
Tecumseh NE 68450-0900

RE: Public Records Denial

Dear Mr. Castonguay:

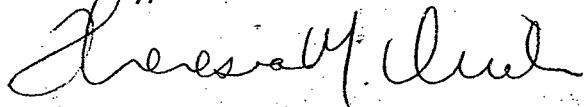
I am in receipt of your request for a certified copy of the rape kit and DNA testing results related to an Amanda Lynn Castonguay. Your records request is denied. Pursuant to Neb.Rev.Stat. §84-712.05, certain records may be withheld from the public by the records' custodian. Under §84-712.05(2), medical records may be withheld from public disclosure and under §84-712.05(5) records developed or received by law enforcement agencies charged with a duty to investigate, when the records constitute part of such an investigation may also be withheld from public disclosure.

Here, the requested records clearly fall within records developed as part of an investigation §84-712.05(5) and may also fall within medical records §84-712.05(2). As a result, your records request is denied.

Please be advised that this request was denied by the records' custodian, the Douglas County Sheriff's Office (please see §84-712.04(1)(b)) via the Douglas County Attorney's office. You may seek administrative or judicial review under §84-712.03.

Thank you.

Sincerely,



Theresia M. Urich

Deputy County Attorney

Cc: Diane Carlson, sent via email  
Matt Kuhse, sent via email  
Brenda Wheeler, DCSO, sent via email

A-21-0101

IN THE COURT OF APPEALS FOR THE STATE OF NEBRASKA

---

STATE OF NEBRASKA, APPELLEE

VS.

PAUL CASTONGUAY, APPELLANT

---

APPEAL FROM THE DISTRICT COURT OF DOUGLAS  
COUNTY, NEBRASKA

THE HONORABLE JUDGE THOMAS A. OTEPKA PRESIDING OVER THE CASE

---

BRIEF OF THE APPELLANT

Paul Castonguay  
Inmate #70764  
2725 N. Hwy. 50  
P.O. BOX 900  
Tecumseh, NE. 68450-0900  
Tel.(402)335-5998

Appellant-Pro se

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STATEMENT OF JURISDICTION OF APPELLATE COURT

This is an appeal by Paul Castonguay, ("Appellant" herein); who filed [a] Motion on Existing DNA Evidence the State held in there Constructive Possession Since (2008), in which the State withheld Exculpatory Evidence that the prosecutor caused not, to disclosed the Brady, Material under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and choosed to caused prosecutorial misconduct by withholding vital information thats relevant to the defense case. Nondisclosure, of Brady, Material of knowing the information of the DNA Evidence thats been established by the Appellant with his Exhibits supports a case of prosecutorial misconduct by the prosecutors of withholding the DNA Evidence thats been in there possession since (2008). Following other Motions relating to the Motion for DNA Testing on Existing DNA Evidence the Court shown bais by violating the Defendant , right to due process by not, allowing him to file an objection within the (10) days grace period after the State's Response.

This appeal is authorized by Nebraska Constitution Article I, Section 23, Neb.Rev.Stat. §25-1912 (Supp. 1999); and Neb.Rev.Stat. §29-2301 (Reissue 1995). The Appellant's Notice of Appeal was timely filed on or before December of 2021 but until the court had caused infringement of the defendant right by placing his appeal in a subfile folder then had finally filed defendant's appeal on February 4th., 2021; in the District Court of Douglas County, Nebraska.

## STATEMENT\_OF\_THE\_CASE

### A. NATURE\_OF\_THE\_CASE:

This was an action seeking DNA on existing DNA evidence that the State held in there constructive possession since (2008). Where, the prosecutor caused prosecutorial misconduct by not giving the information to the defendant and/or the defense once they received the DNA findings from the law enforcement agency that received it from Nebraska Medical Center after they had completed there findings from the victim A.C rape kit collection kit. Under section 29-4123 the State had an obligation to disclose the DNA evidence in which the State concealed it from the defendant by causing to violate Mr. Castonguay, right to due process. After the prosecutor filed there response with the lower court on the defendant's motions the court was bais toward defendant right by not allowing him to file an objection to the States response within the (10) days allowance time.

### B. ISSUE\_TRIED\_IN\_THE\_LOWER\_COURT:

Defendant, filed for DNA Testing on Existing DNA Samples thats been in possession of the State since (2008). In support of an Affidavit of Paul Castonguay; was provided with the Motion for DNA Testing verifying that the Appellant had absolutely No knowledge of any DNA in his case nevertheless the defendant was not aware or any DNA Samples until (March 15th., 2011); when the State filed the Index of Property verifying that the State did actully have DNA Samples that belonged to the victim A.C. Furthermore, the defendant argue and supported facts by filing a Motion for Leave to File and Submit the vicim's DNA Test Results as Exhibit-1 to support the Motion for DNA Testing along with another Exhibit-2 from a prosecutor out of

Douglas County, Nebraska denying defendant his request for a copy of the victim's DNA Report to allow the defendant to inspect and review the experts findings. That the experts findings shown "NO MALE DNA PROFILE", found or determined that the Appellant committed the sexual assault.

**C. HOW THE ISSUE WERE DECIDED AND JUDGMENT ENTERED:**

After the lower court placed an order for a written response from the State and gave the State forty five (45), days for a response the court order was dated the 5th. day of October, 2020, to respond and that the Appellant did not, receive anything from the Plaintiff until November 23rd., 2020). Which it went beyond the forty five (45) days. The lower court was bias toward defendant's rights to Due Process by causing to violate defendant's 14th. Amendment of the United States Constitution to Article I, Section 3 of the Nebraska Constitution when the plaintiff mailed there response and delayed the mailing. Here, the lower court uses the same exact "response" and "argument", the State used against the defendant to denied the defendant's motions. See: Plaintiff's Response then Review the Lower Court's Order on the Motions de novo. Where, the lower court was bias by depriving the defendant due process by denying Mr. Castonguay, the right to object to the State's response.

On November 20th., 2020 , the district court denied and overruled the defendant's motions without allowing the defendant to object to be heard after the lower court received the plaintiff's response.

SCOPE\_OF REVIEW: the scope of review is for an abuse of discretion. An "abuse of discretion", occurs when a trial court decision is based upon reason that are untenable or unreasonable or of its action is clearly against justice or conscience, reason, and evidence. U.S. v. Gapier, 468 F.3d 920, 928 (6th. Cir. 2006); and U.S. v. Johnson, 228 F.3d 920, 926 (8th. Cir. 2000).

(An abuse of discretion takes place when the lower court reason or ruling are clearly untenable and unfairly deprive a defendant the right to object after the State gives a response to said motion).

In a criminal appeal when a lower court denied a defendant Motions without probable cause, an appellate court review a trial court judgment de novo of the record to determine whether theres has been an abuse of discretion. State v. Jubl, 234 Neb. 33, 43, 449 N.W.2d 202, 209 (1989), and Ensrud v. Ensrud, 230 Neb. 720, 433 N.W.2d 192 (1988).

ASSIGNMENT\_OF\_ERRORS

- I. THE PROSECUTOR CAUSED PROSECUTORIAL MISCONDUCT BY WITHHOLDING BRADY, MATERIAL/EVIDENCE WHERE THEY KNEW ABOUT THE EXISTENCE OF THE VICTIM'S DNA REPORT THEN HINDERED IT FROM DEFENDANT.
- II. THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION BY CAUSING BIAS TOWARD DEFENDANT RIGHT TO DUE PROCESS TO EQUAL PROTECTION OF LAW BY CAUSING INFRINGEMENT OF THE DEFENDANT RIGHT BY NOT ALLOWING THE DEFENDANT TO OBJECT TO THE STATE'S RESPONSE.
- III. THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION BY DENYING A DEFENDANT OF HIS RIGHT TO DNA TESTING WHEN THE DISTRICT COURT USES A NO CONTEST PLEA AGAINST THE DEFENDANT TO DENIED THE DEFENDANT DNA TESTING.

PROPOSITION\_OF\_LAW

I. One of the principal, sworn duties of a prosecutor is to disclose to a defendant all material, favorable evidence, including impeachment evidence, in the State's possession. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The evidence must be disclosed even if there has been No request by the defendant. Strickler v. Greene, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). In addition the evidence must be disclosed "at a time when the disclosure would be of value to the accused". United States v. Davenport, 753 F.2d 1460, 1462 (9th.Cir.1985).

II. The prosecutor would have then produced the DNA evidence, regardless of any request by the defendant or court order in a timely manner so that the defendant has a meaningful opportunity to review and use the evidence at trial. United States v. Houston, 648 F.3d 806, 813 (9th.Cir.2011).

III. The plain language of section 547.035 states that a person committed to the department of corrections may bring a motion, not merely those committed following that it also states that in determining whether DNA testing is available, the sentencing court may consider the transcript of the movant's trial or guilty plea and sentencing hearing.

IV. In reaching its conclusion, the Court of Appeals relied on certain language in State v. Atwater, 245 Neb. 746, 575 N.W.2d 431 (1994), and interpreted Atwater, to mean 850 that in cases when the evidence alleged to be newly discovered was withheld by the State, a defendant is entitled to a new trial if the omitted evidence could

have created a reasonable doubt that he or she committed the alleged crime or crimes.

V. The court in United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); made clear that the prosecution's duty under Brady, to disclose evidence which is material covers "the no request, general request, and specific request cases of prosecutorial failure to disclose evidence favorable to the accused". See also Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), (duty to disclose material evidence applicable even though there has been no request by accused and duty may be violated where evidence has been suppressed either willfully or inadvertently.)

VI. Prosecutor, failed to disclose evidence violated defendant due process urging, that the prosecution failed to disclose evidence supporting defendant innocence and that the prosecutor failed to provide defense counsel with the DNA Report of the victim DNA Results. Wearry v. Cain, 136 S.Ct. 1002, 194 L.Ed.2d 78, 14 Cal. Daily Op. Serv. 2495 (2016); No. 14-10008.

VII. The Constitutional question concerns a federal criminal defendant's waiver of the right to receive from prosecutor's exculpatory impeachment material a right that the Constitution provides as part of its basic "fair trial", guarantee. See U.S. Const. Amends. 5 & 6. See also Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (Due process requires prosecutor's to "avoid an unfair trial", by making available "upon request" evidence "favorable to an accused".... Where the evidence is material either to guilt or to punishment"). United States v. Agurs, 427 U.S. 97, 112-113, 96

S.Ct. 2392, 49 L.Ed.2d 342 (1976), (defense request unnecessary); Kyles v. Whitley, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), (exculpatory evidence is evidence to suppression of which would "undermine confidence in the verdict".)

VIII. Hence, the obligation to propel retesting when the original analyst is unavailable is the State's, not the defendant's. See: Taylor v. Illinois, 484 U.S. 400, 410, n. 14, 108 S.Ct. 646, 98 L.Ed. 2d 798 (1988).

IX. Appellate Court reviews for clear error a trial court's determination that No hearing was required on a post-conviction motion for DNA testing V.A.M.S. & 547.035 (6); Fields v. State, 425 S.W.3d 215 (2014), No. ED 100321. "Even individuals who pleaded guilty are entitled to DNA Testing", on post-conviction motion if they meet the Statutory criteria. V.A.M.S. & 547.035.

X. People have been known to confess to crimes they did not commit during police interrogations and such confessions bleed into their decisions to plead guilty. "A false coerced confession may undermine the accuracy of a guilty plea". Kevin C. McMunigal Guilty Pleas, Brady Disclosure, and Wrongful Conviction 57 Case W.Res.L.Rev. 651, 656 (2007). (The incarceration of actually innocent people implicates procedural due process.) See: Schmidt v. State, 909 N.W.2d 778 (2018), No. 15-1408.

XI. Statutory right to seek post-conviction DNA Testing was not, limited to persons convicted following trial, but applied equally to defendant who pleaded guilty to rape who was in custody and claimed that DNA Testing would demonstrate his innocence. V.A.M.S. 547.035 Weeks v. State, 140 S.W. 3d 39 (2004), No. S.C. 85448,

S.C. 85552 (Defendant who pleaded guilty to rape and kidnapping was not automatically precluded from seeking post-conviction DNA testing based on assumption that identity could not be at issue; defendant had previously declined to plead guilty, and prosecutor received laboratory reports, which were not, disclosed to defendant prior to plea hearing. Which exculpated defendant by showing that none of tested items conclusively identified defendant as rapist.

V.A.M.S. 547.035 Subd. Weeks v. State, 140 S.W.3d 39 (2004).

#### STATEMENT OF FACTS

On October 5th., 2020; defendant/appellant filed a Motion for Testing on Existing DNA Samples that's in the possession of the State since 2008 (T:18:23). Then the lower court filed an order for a written response (T:1 ); from the State. Where, the State then filed there response to defendant/appellant's motion for testing under the DNA Act and Motion based on Newly Discovered evidence (T:14:17 ).

Fact One: the State's Certificate of Service dated the 16th. day of November, 2020, placed in the U.S. Mail postmarked November 17th., 2020, out of zip code 68183. Fact Two, appellant only received the State's response after the forty five (45) days of the date of the lower court order. Which violated defendants due process under the 14th. Amendment Constitution to the United States Const. based on the fact the defendant received the State's response after (45) days which appellant received it on November 23rd., 2020. See: Exhibit 1 of appellant's filing for leave to file and submit exhibit 1 on appeal. Fact Three, the district court filed an order on defendant's/appellant Motion for Testing (T:32:35 ), dated this

20th. day of November, 2020. Where, it clearly contradict the lower court's filing date when defendant filed the Motion for Testing on Existing DNA Samples because first the lower court ordered for a written response (T: 1 ), stated that the Motions filed and dated the 5th. day of October, 2020; but here in (T: 1 ) the order on the defendant's Motion that the filing was dated October 6th. 2020 that clearly constitute plain error based on the fact the lower court indicated two separate filing dates when the defendant filed the motions and based on the foregoing analysis by the Douglas County Prosecutor Response and by the Order from the District Court are exactly the same Response.

Where, the lower court erred with there own opinion on defendant's Motion because the fact that the lower court uses the same exact Response given by the prosecutor to denied defendant's Motion for Testing on Existing DNA Samples. "Upon Motion of the Defendant the Court where the case is to be tried may Order the Prosecutor Attorney to make available to the defense such evidence necessary to allow the defense to conduct like tests or analysis with its own experts under section 29-1913".

Lastly, the most important fact here that the lower court was bias toward the defendant right to due process by causing infringement of the defendant's Constitutional right by not giving him any time to file an objection against the State's response. After the defendant filed his opposition of objection in the lower court denying defendant's Motion before allowing defendant any opportunity to object to the State's reponse. Where, the defendant's opposition of objection was filed and with No hearing or any decision from the

lower court on the defendant's objection clearly constitute abuse of discretion by the lower court.

#### SUMMARY OF ARGUMENT

Appellant, was convicted and sentenced on December 18, 2009; to first degree sexual assault after entering a plea of no contest on August 14, 2009, pursuant to section 29-1819.01 (Reissue 2020). Appellant, argue that his no contest plea gave up certain rights when he entered the no contest plea on August 14, 2009. Appellant, further argue that he never waived his right to DNA testing because the fact here DNA Testing is not [a] Constitutional issue its [a] Requirement under 29-4118 that was never met at the time of his trial proceedings and according with Neb.Rev.Stat. §29-4120 (5) and in case vs. Weeks vs. State, 140 S.W.3d 39 (2004); No. SC 85448, SC85552; defendant was denied the right to post-conviction DNA Testing because defendant entered a guilty plea. "sentencing court may consider the transcript of the movant's trial or guilty plea and sentencing hearing". [By its terms, the Statute 547.035 permits persons who have pleaded guilty to seek DNA Testing].

Appellant, further argue when he file a Motion for Leave to File and Submit the DNA Test Results/Report to Support his Motion for DNA Testing on the Existing DNA Evidence supports defendants argument that the State had No DNA evidence linking defendant to the case. See: (T:8:12-13) and (T: 24-25 ) on the Motion for Leave to Support facts of the prosecutorial misconduct caused by the prosecutor on the withheld information that was available in 2008 during the defendant's court appearances violated defendant's due

process under the 14th. Amendment of the United States Constitution to Article I, Section 3 of the Nebraska Constitution. i.e. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

**I. THE PROSECUTOR CAUSED PROSECUTORIAL MISCONDUCT BY WITHHOLDING BRADY, MATERIAL/EVIDENCE WHERE THEY KNEW THE EXISTENCE OF THE VICTIM'S DNA REPORT THEN HINDERED IT FROM DEFENDANT.**

**ARGUMENT I.**

Under Brady v. Maryland, prosecution has a duty to disclose all favorable evidence to [a] criminal defendant prior to trial. See: State v. Harris, 296 Neb. 317, 893 N.W.2d 440 (2017).

Appellant, argue that he had establish that the prosecutor deliberately withheld DNA Evidence from the trial proceedings on several reasons; 1.) Prosecutor could not have produced there witness to testify in open court against defendant, 2.) Where, the prosecutor used the death of the victim to withheld Brady, Evidence to secure there conviction, 3.) Then when the deputy received the expert DNA Report then handed it over to the prosecution after the complition of the DNA Testing the prosecution concealed it from both defense and defendant from knowing of the finding.

Due process demands that the State to disclose to a defendant all Brady, material evidence in its possession that is favorable to the defense. Where, the appellant filed for a Motion for Forensic DNA Evidence on March 15th., 2011; where the State was ordered to file [a] list of all the evidence against the defendant by the lower court. Where, the State then filed an Index of Property listing all evidence that the State held in there constructive possession and

doing so it verified and revealed that the State was in possession of DNA evidence and never entered it into evidence of the defendants case. See: Smith v. Cain, 565 U.S. 73, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012), No. 10-8145.

Appellant, further argue with the withheld information would have allowed the defense to undermined "the only evidence the State had linking (defendant) to the crime was hindered from defense. Smith v. Cain, supra. Whereas, prosecutorial misconduct is more likely to violate due process when evidence is weaker, Marshall v. Hendricks, 307 F.3d 36 (2002).

Appellant, further argue although the DNA Report from the victim A.C, was completed on December 11, 2008, the prosecutor knew and had the full knowledge of the report before the scheduled plea hearing. Where, the prosecution did not produce it to the defendant or his trial counsel, or to the Court, nor did the prosecutor change the deadline by which the appellant had to agree to plead no contest.

Appellant, further argue that on March 9th., 2009, on a hearing in Limine was heard testimony from two State witnesses from a agency called Project Harmony and specific, typical characteristics of the alleged sexual assault. First witness testified was Suzanne Haney, M.D. (69:22-23-24) where this witness state what Project Harmony does and this witness doesn't state any type of sexual assault that supposedly had occurred other then what then do any law enforcement agency take a person in on allegedly been sexually assaulted.

The State's second witness testimony during the Limine hearing was a nurse practitioner Marilyn Erickson (93:16-17-18);(93:23-24:25);

where, appellant argue that this witness testimony that she had treated the victim in this case name Amanda Castonguay, (95:4-5). The reason and purpose of this witness treating the victim A.C as stated in (95:14-15-16-17), during the witness examination the witness testified she discovered any type of medical condition that the witness verified her notes and stated "I know one thing the victim have a vaginal yeast infection" (100:8-9). Where the witness testimony giving that she diagnosis and the treatment given was given two medications for it. (100:13:14-15),(100:19-20).

This witness also testified in (102:25-103:1) that she conducted a pregnancy test was done. Appellant, further argue that the prosecutor had the results and hindered it from defendant as the results came back negative same as in the DNA findings that shown No Identity of No Male DNA Profile Found.

Prosecutor then cross-examine this witness in (104:19-20-21), disclosing that the victim A.C; state both anal and vaginal penetration but at no time the prosecutor revealed the DNA Report/Results once they was handed the results in 2008. Where, in U.S. v. Kenyon, 481 F.3d 1054, 1061-62 (8th.Cir.2007);(Disclosure required because medical expert gave testimony about specific, typical characteristics of sexual abuse).

Lastly, the witness testified in (105:5); that the Report was released to law enforcement. Then at some point law enforcement gave the report to the prosecution which they decline to disclose it to defense as to defendant after the fact the prosecutor knew about the existing of the report and deliberately withheld exculpatory evidence that would have exonerated the defendant from the charges.

Most importantly the witness testified during this Limine hearing (106:14-15-16); Q that the victim examination her genital and anal examination came back normal; correct A "yes, it did. (106:17:18:19).

THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION BY CAUSING BAIS TOWARD THE DEFENDANT RIGHT TO DUE PROCESS TO EQUAL PROTECTION OF LAW BY CAUSING INFRINGEMENT OF THE DEFENDANT RIGHT BY NOT ALLOWING THE DEFENDANT TO OBJECT TO THE STATE'S RESPONSE.

ARGUMENT II.

After, the lower court gave the State forty five (45) days for a written response (T: 36:49), the district court shown bais by denying Mr. Castonguay; of his legal right to object under NE.R.PLDG. 6-1112 to object to the State's response. Defendant due process to equal protection of law was in violation when the lower court clearly caused infringement of Mr. Castonguay, Constitutional right by not, allowing the defendant to object before the district court ruled on the defendant's Motions.

See; (T:51:52); the order of the district court denying defendant's Motions verifying that the district court denied said motions before the defendant had any opportunity to file his objection to the State's response.

Appellant, asserted that the State's action violated Brady v. Maryland, supra. In which the State prosecutor withheld DNA Evidence that's favorable to the accused which violated defendant's due process. Where, the propondence of the evidence is material to either prove his guilt or of his innocence. Which in this case it would clearly prove the defendant's innocence because of the mere fact the victim

A.C., DNA Report/Results does not, match No Male DNA Profile, nor the Defendant to compare any DNA Findings from the Experts report.

Court of Appeals reviews trial court's admission of DNA Evidence for abuse of discretion. Where, DNA Samples was collected from the victim in appellant's case for the exclusive purpose of verifying the identity of such person. Section 29-4107 (2), (Reissue 2020), Laws 2012 LB 66 & 2 of Subsection (2) inserted unless the DNA Samples was collected from a buccal cell samples, in which case the DNA samples shall be delivered within ten working days after collecting the samples.

Appellant, argue and shown that the State revealed the DNA samples in there constructive possession through there list of there evidence through there (Filing); of a Index of Property, List which the State had deliberately withheld Brady, Material such as the DNA Evidence from appellant case and that been in there possession since 2008.

Defendant, only discovered this Newly Discovered Evidence when he (Filed); for DNA Forensic Testing back on (March 15th., 2011), Where, the lower court instructed the prosecutor to comply with Neb.Rev.Stat. §29-4120 (4); by filing a list of all evidence that's in the States possession. i.e. Poventud v. City of New York, 750 F.3d 121 (2014); Pribble v. Davis, 2020 WL2562544, H09-CV-1896.

THE DISTRICT COURT ERRED AND ABUSED ITS DISCRETION BY  
DENYING A DEFENDANT OF HIS RIGHT TO DNA TESTING WHEN THE DISTRICT  
COURT USES A NO CONTEST PLEA AGAINST THE DEFENDANT TO DENIED THE  
DEFENDANT DNA TESTING.

ARGUMENT III.

I. On (August 14, 2009); appellant trial counsel took her client before [a] different Judge to have the lower court to accept Mr. castonguay, no-contest plea before Judge Moran, because trial counsel stated that she could not, find the original Judge on the case in which the original Judge was Judge Otepka not, Judge Moran.

II. Then on (December 16, 2009); defendant (Filed); a Motion to Withdraw Plea with the lower court and that the lower court took up the matter on an evidentiary hearing and heard testimony from appellant's public defender Leanne Srb. Where counsel was sworn in on oath and sworn that there was "No DNA", Evidence; in the defendant's case.

III. Appellant, argue that by filing multiple Motions for Forensic DNA Testing on Existing Evidence he had "Discovered", that the State had DNA Evidence in his case. Where, the State withheld Brady, Material from the Defendant's case causing prosecutorial misconduct by concealing the victim's Rape Kit & DNA Report/Results from defense.

See: Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and also see: Section 29-4123.

IV. Appellant, further argue his due process was violated when the district court used his No-Contest Plea against him to prevent him of having DNA Testing. Pursuant to Section 29-4116 et seq., [a] defendant does not, waive his right to DNA Testing based on [a] No-Contest Plea. i.e. State v. Winslow, 274 Neb. 427, 740 N.W.2d 794 (2007);

V. Appellant, further assert that when he entered the No-Contest Plea (13) Months later in his case the State continued to argue that the defendant is not entitled to DNA Testing because defendant had entered [a] No-Contest Pleas and further argue there was No DNA Evidence in appellant's case.

But, here on (March 15th., 2011); the appellant was seeking DNA Testing with the lower court and that the lower court instructed the prosecutor to file a list of all evidence that's in there possession in case no. CR10-9070440, docket 178 page 248 which the State filed an Index of Property listing all evidence the State have and prevailed some DNA Samples that was taken from the victim A.C., but the State hindered the DNA Samples and Findings from the Court proceedings of the defendant trial.

VI. Lastly, the appellant argue because the district court erred and abused there discretion by depriving the defendant of his Statutory right to DNA Testing pursuant to Section 29-4118 to DNA Testing causing to violate defendant any opportunity to DNA Testing which its relevant to his case because the fact here the State was charging the defendant of first degree sexual assault under Section 28-319 Subsection (1) subjects another person to sexual penetration after defendant entered [a] No-Contest Plea.

VII. The lower court sentence defendant to imprisonment for the term of no less then 30 years nor no more then 35 years for first degree sexual assault on (December 18, 2009); on insufficient DNA evidence. Where, the State had No DNA evidence for any comparison with the defendant of committing the sexual assault. See: Weeks\_v.\_State, 140 S.W.3d 39 (2004), NO. SC85448, SC85552 (Based on a No-Contest Plea). Defendant, argued that he never waived his right to DNA Testing when he entered the No-Contest Plea.

VIII. Appellant, further argue that pursuant to Section 29-1819.01 by entering a no-contest plea that his trial counsel failed to informed her client that he would be giving up his Constitutional righjts to [a] speedy trial but trial counsel failed to advised her client that be entering [a] no-contest plea that he would not, be entitled to DNA and as the result of trial counsel due diligence led counsel ineffective assistance of counsel for giving her client improper advise that defendant could not seek DNA testing.

State\_v.\_Dunkin, 283 Neb. 30, 807 N.W.2d 744 (2012), State\_v.\_Obely, 19 Neb.App. 26, (2011); N.W.2d WL1844791 (Neb.App.); NO. A-10-657, (in order to establish ineffective assistance of counsel, the defendant has the burden in accordance with Strickland\_v.\_Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudice her client right to DNA testing. (1) Counsel deficient performance led by depriving her client to seek DNA testing knowingly the State was charging her client with first degree sexual assault causing penetration against his victim, (2) Counsel deficient performance led by stating on oath that theres No DNA

Evidence in her client case knowingly defendant other attorneys knew the existence of the DNA evidence and DNA test results, (3) Counsel heard testimony from State's witnesses stating that during there examination of the victim A.C., the nurse from project harmony testified that the victim examination did not find any vaginal or anal tear of any sexual contact.

VIII. Appellant, further argue that (1) counsel testimony on (December 16, 2009); on oath stating theres (NO DNA), Evidence supports appellant's claim of ineffective assistance of counsel and (2) trial counsel failed to advise her client of his right that he could seek DNA testing since the State did not, enter any DNA from either of the victim or the defendant during the court proceedings from the defendant's trial court appearances, (3) trial counsel advised her client that the State can still move forward even without appellant's DNA because with the trial counsel advise led to her client entering [a] no- contest plea, and (4) counsel also knew by entering a no-contest plea that her client would give up his Constitutional rights to a speedy trial as to other certain rights but defendant was not, giving up the right to DNA testing were counsel performance led her client to believe he had no right to DNA testing once he entered the no-contest plea, (5) lastly counsel neglected her duties during her client hearing on limine and suppression requesting that the State to enter and/or produced the victim's DNA Report from the Rape Kit collection to allow the lower court to hear the Findings and allow for the defendant the opportunity to know the experts findings.

i.e. Jenkins v. Scully, 1992 WL205685 (W.D. N.Y. 1992); (where the eight circuit ruled that the lower court denied the defendant the right to know the findings by the State not disclosing it to the

defense). also see Section 29-4123.

IN-SUM: The Nebraska Court of Appeals reviews trial court's admission of DNA Evidence for abuse of discretion for the purpose that DNA Sample is being collected for the exclusive purpose of verifying the Identity of such person pursuant to Neb.Rev.Stat. 29-4107 Subsec. (2), March 26, 2020; Laws 2012 LB 66 & 2 of Subsec, (2), unless the DNA Sample was collected the DNA Sample shall be delivered within ten days after collecting the Samples. ["Which in the appellant case the State hindered the DNA evidence by concealing the Identity of its Findings by not disclosing the Brady, evidence a.k.a DNA evidence"].

WHEREAS: in the appellant case the appellant was not, subjected to DNA Testing as the language is clearly spelled out in Section 29-4106.01. that DNA Samples; Collection method choice that "A person required to submit [a] DNA Sample pursuant to Section 29-4106 to either a Blood Draw or Buccal Swab Collection Kit". Where, the Appellant was denied that right to give DNA to allow him to prove his innocent or his guilt based on the lower court theory that the defendant plead to [No Contest]; that defendant gave up that right to DNA Testing because he entered a "No Contest Plea".

CONCLUSION: the appellant respectfully request and pray that that the Court of Appeals take judicial notice and review the facts of the defendant's evidence before them de novo and grant the appellant appeal by granting the appellant the DNA Testing as [a] matter of law and on the ground the district court had shown actual bias toward the defendant right to due process by depriving the defendant of his right to DNA Testing pursuant to Sections 29-4116

through 29-4125 et seq.

Dated this ----- day of March -----, 2021.

Respectfully Submitted:

-----  
Paul Castonguay  
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Tecumseh, NE. 68450-0900  
Tel.(402)335-5998

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

CASE NO. A-21-0101

Appellee,

vs.

PROOF OF SERVICE

PAUL CASTONGUAY,

Appellant,

STATE OF NEBRASKA )

) SS.

COUNTY OF JOHNSON )

The undersigned hereby certify that on this        day of  
March, 2021; a true and accurate copy of the foregoing Appellant's  
Brief was mailed, via First-Class United States Mail. postage pre-  
paid to the following parties:

NEBRASKA COURT OF APPEALS  
2413 STATE CAPITOL  
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BY: \_\_\_\_\_

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SUBSCRIBED and SWORN to before me a Notary Public for the State of  
Nebraska on this        day of March, 2021.

Seal

Notary Public, Signature

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA, ) CASE NO. CR10-9070440

Plaintiff, )

vs. ) OPPOSITION OF OBJECTION

PAUL CASTONGUAY, ) TO THE PLAINTIFF'S RESPONSE

Defendant, ) TO THE DEFENDANT MOTION FOR

) TESTING UNDER THE DNA ACT

) AND MOTION BASED ON NEWLY

) DISCOVERED EVIDENCE

COMES Now, the Defendant, Paul Castonguay; pro se  
hereby moves for an objection to the plaintiff's response  
for the following reasons:

Your honor I object to the plaintiff's response on the  
ground that the state had an obligation and a duty to disclose all  
Brady, evidence under Brady v. Maryland, *Supra*. Where, the state  
knew about the victim AC DNA Report and still caused prosecutorial  
misconduct by withholding the information from the defendant by  
causing miscarriage of justice in this case by violating the defendant  
right to due process. i.e. Wearry v. Cain, 136 U.S. 1002, 194 L.Ed. 2d  
78, 14 Cal. Daily Op. Serv. 2495 (2016), NO. 14-10008 (the prosecutor failed to  
disclose evidence violated his due process urging, that the prosecution  
failed to disclose evidence supporting his innocence and that the prosecutor  
failed to provide defense counsel with the DNA Report or the victim DNA results.)

Your honor it clearly show the state had no intention to produce or to enter the victim DNA Report because the state had possession of this Brady, evidence since (December of, 2008); see: (EX-2).

It clearly show that the prosecutor prevented the defendant from ever knowing or seeing the DNA evidence and of the expert findings and the existence of it.

### INTRODUCTION

Due process clause demands that the state or Government disclose to a defendant all Brady, material evidence in its possession that is favorable to the defense. This disclosure must occur at a time when the evidence can be of use and value to the defendant defense to prove his involvement or noninvolvement of the crime. Sadly, the state in this case had failed to disclose the DNA material evidence to the defendant within a timely manner.

### PREJUDICIAL CLAIMS CAUSE

#### BY THE PROSECUTOR OF DEFENDANT

#### RIGHT TO DUE PROCESS

defendant, argue that the prosecutor received the victim DNA Report from the Douglas County Sheriff's Deputy(s) back in (December of, 2008), where they had possession of the information. Then decided to conceal it by causing prosecutorial misconduct by not revealing the information with the defense and/or defendant that prejudiced the defendant of his right to due process of nondisclosure

of the DNA evidence that cause a miscarriage of justice for lack of evidence.

Defendant, further argue that on (December 16, 2009); hearing on a motion for withdrawal of plea hrs Counsel of record had called his former attorney Deanne Srb, to the stand and question her regarding the DNA evidence. Where this witness testified on oath stating there was "no DNA Evidence", were this witness was the defendant's original attorney on his case and if she had NO knowledge of any DNA Evidence was because the prosecutor did not reveal that information with the defense which cause prosecutorial misconduct by withholding Brady, evidence from the defense. Which its well established that the prosecutor withheld vital information by prosecutorial misconduct and causing prejudicial toward the defendant Constitutional right to due process by failing to not disclose Brady, evidence which falls within a Brady violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

A) When an expert findings show that they had NO DNA Evidence of the defendant to compare it with a victim DNA it show that the defendant could not have been a contributor or of any match of the victim DNA. On the contrary, a DNA profile is evidence that tends to exculpate a person identity were in this case the

state prejudice Mr. Costanguay of his right by concealing the DNA evidence because the evidence is so overwhelming that it did not identify him to the sexual assault. See: Williams v. Illinois, 567 U.S. 50, 132 Sct. 2221, 183 L.Ed 2d 89 (2012), No. 10-8505.

B.) Then once the prosecutor found out they lost their witness through a car accident the state knew the only way they can secure their conviction was to withhold the victim A.C DNA Report back by causing prosecutorial misconduct because they knew and had the knowledge of the expert report/results but refused to share this information to the defendant regardless of the cause it would cause upon the defendant by violating his due process as to causing a miscarriage of justice. See: United States v. Houston, 648 F.3d 806, 813 (9th Cir. 2011).

1.) That, the state had the medical experts DNA report since (December of 2008); which the prosecutor decided not to say anything about the report or results which the prosecutor caused prosecutorial misconduct by withholding information that's relevant to defendant claim that he been wrongfully convicted. See: State v. Winslow, 274 Neb. 427, 740 N.W.2d 794 (2007); (where DNA testing could exclude defendant as the contributor to the victim DNA.)

2.) Defendant, claiming that DNA testing of the DNA samples taken in relation to the victim will demonstrate his innocence of the crime of which he was convicted. Because the DNA samples of the victim did not, identified him to the sexual assault nor it identified "NO MALE DNA PROFILE" or the identity of the defendant committing the sexual assault against the victim. Weeks v. State, 140 S.W.3d 39 (2004); NO. SC 85448, SC 85552, "who were convicted based upon a guilty plea". (The plain language of Section 547.035 states that a person committed to the department of corrections may bring a motion, not merely those committed following trial.) It also states that in determining whether DNA testing is available, the sentencing Court may consider "the transcript of the movant's trial or guilty plea and sentencing hearing. "By its terms, the statute permits persons who have pleaded guilty to seek DNA testing".

#### FACTUAL AND PROCEDURAL BACKGROUND

on (September 23, 2008); the victim AC made a statement to the Omaha Police Sgt. Theresa Thorson, who originally investigated the investigation of the alleged sexual assault and conducted the interview with the victim AC and brought her to Project Harmony. So this agency could examine her. Then on (March 4, 2009); during a limine hearing the Court heard testimony from witnesses from project harmony about there examination but they did not reveal NO DNA Evidence or identified the defendant through NO DNA evidence or being the contributor. See: Weeks v. State, Supra and State v. Winslow, Supra

#### ADDITIONAL FACT

On (April 24, 2012); defendant received a response letter from Deputy County Attorney Theresia M. Urrich; denying defendant his request for a "certified copy of the rape kit and DNA testing results related to the victim Ac. Where, the County attorney state that the request is denied because certain records may be withheld from the public. Where, I'm the defendant in this case which I'm entitled to all Brady, evidence/material because it relevant to my defense and that I'm not the public by the records custodian.

Where, the prosecutor know about the existence of the victim rape kit and DNA report were Deputy County Attorney made sure to report this to CC: Diane Carlson, Matthew Kuhse and Brenda Wheeler, DCSO via email that defendant was requesting a copy of the victim Rape kit and DNA Report. See: (Ex. 2) for verification.

Defendant, further argue that the state withheld the DNA evidence because they was not able to produce there witness to testify in open court and the only way to secure there conviction was not to disclose the DNA evidence. ( There is no question but for the state to comply with Brady and Agurs here. The state disclosed relevant police reports to respondent which contained information about the existence of the swab and the clothing, and the boy's examination at the hospital. The state provided respondent's expert with the laboratory reports and notes prepared by the police criminologist, and respondent's expert had access to the swab and to the clothing.) See: United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 2401, 49 L.Fd.2d 342 (1976), (Holding that

the evidence of Sewell's criminal record was material and that its nondisclosure require a new trial because the jury might have returned a different verdict had the DNA evidence been received.) U.S. v. Agurs, supra.

#### PROPOSITION OF LAW

I. Evidence qualifies as "material" under Brady when there is any reasonable likelihood it could have affected the judgment made by the Court and/or of the jury.

II. DNA Evidence qualifies as material when there is "any reasonable likelihood" it could have "affected the Court judgment or the jury." Giglio v. United States, 405 U.S. 150, 153-154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and Weary v. Cain, 136 S.Ct. 1002, 194 L.Ed.2d 78, 14 Cal. Daily Op. Serv. 2495 (2016).

III. The withheld information would have allowed the defense to undermine "the only evidence linking (defendant) to the crime." Smith v. Cain, supra. Where the prosecutor withheld the DNA test results from defendant by violating his right to due process. Where it was the only piece of evidence the state had in their constructive possession. See: Smith v. Cain, 565 U.S. 73, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012); No. 10-8145.

IV. Under Brady, the prosecution has a duty to disclose all favorable evidence to a criminal defendant prior to trial. State v. Harris, 296 Neb. 317, 893 N.W.2d 440 (2017).

v. Due process clause, as contemplated by Brady, requires the prosecution to disclose favorable material evidence even if a defense counsel did not request it. U.S. Const. Amend. 14

vi. Favorable evidence, which the prosecutor has a duty to disclose under Brady v. Maryland, *Supra*, includes both exculpatory and impeachment evidence.

## STANDARD OF REVIEW

A. Although Section 29-4120 (1) does specify that a person in custody may, at any time after conviction, file a motion requesting forensic DNA testing of any biological material and governed by the laws of this state under LB 245 enacted 2015 insofar as applicable by Section 29-4120 (1).

- (1) There is evidence upon which DNA testing can be conducted;
- (2) The evidence was secured in relation to the crime;
- (3) The evidence was not previously tested by the movant because;
  - (a) The technology for the testing was not reasonably available to the movant at the time of trial;
  - (b) Neither the movant nor his or her trial counsel was aware of the existence of the DNA evidence at the time of trial; or
  - and;
  - (c) The evidence was otherwise unavailable to both the movant and movant's trial counsel at the time of trial; and
- (4) Identity was an issue in the trial; and
- and;
- (5) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.

B. Nebraska's DNA Testing Act, allows for post conviction motions for DNA testing if the biological material at issue "was not previously subjected to DNA testing or can be subjected to retesting, with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results 29-4120 (1)(c), that was not met in Cestenguy. Also due to the prosecution hindering the DNA evidence from the defendant case. See: State v. Prati, 20 Neb App 434, 824

N.W. 2d 393 (2013), (Pratt, claimed that with the victim's DNA, the DNA testing laboratory would be able to construct a complete profile that would result in his exoneration.)

Here, the defendant shown the same exact issue that how the state withheld vital information by withholding Brady, evidence from the victim AC DNA evidence that would not implicate any profile or the defendant identity to the sexual assault where, the prosecutor knew about the existence of the victim AC DNA Report and Results and still choose to cause the prosecutorial misconduct by withholding the information relating to the DNA results that clearly constitute violation of the defendant's due process clause prior to the no contest plea which was enter on (August 14, 2009). Prosecutor, had a duty to disclose all Brady, evidence prior to trial and/or any plea hearings under Brady v. Maryland, Supra. (Where, the state clearly decided not to disclose or produce the DNA evidence.)

"let us assume that the state possess information that blood was found on the victim, and that this blood is of a type which does not match that of the accused or of the victim." Let us assume that no related testimony was offered by the state.

See: Giles v. Maryland, 386 U.S. 662, 100, 87 S.Ct. 793, 810, 17 L.Ed. 2d 737 (1967); See: Id. at 99-101, 87 S.Ct. 809-810.

Defendant, alleged that DNA evidence was within the custody of City, County or state authorities that could be tested, and that there was a reasonable probability that the results of defendant's convictions would have been different had testing was available to him at the time of his trial. Where, the state did not meet the minimum pleading requirements to obtain post-conviction DNA testing to establish any comparison of the defendant DNA to the victim DNA samples that the state collected from the victim AC book in (2008). See: State v. Ruff, 256 S.W.3d 55 (2008); No. SC 88936 (had the state taken DNA test of a swab or a blood drawn from the defendant it would had shown he did not commit the sexual assault and that the defendant is actual innocent).

Defendant, assert that the state's actions violated Brady v. Maryland, supra. Where the state hold DNA evidence that's favorable to the accused violates the due process clause. Where, the evidence is material to either prove his guilt or his innocence. Where in this case it would clearly prove his innocence because of the relevance of the experts findings was concealed by malicious prosecution by the prosecutor or hindering Brady, evidence under certain circumstances, the due process clause of the 14th Amendment may require that the state preserve potentially exculpatory evidence on behalf of a defendant. See: California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

## JURISDICTION ISSUE

After the Omaha Police dept. realize it was not, there jurisdiction they turned the case over to the Douglas County Sheriff's office. where, the sheriff's office then assigned Deputy Brenda Wheeler to investigate the case and then Deputy Wheeler, requested a "Rape Kit" on the victim AC by the Nebraska Medical Center that's been identified. Re: Agency Case # B23097, Nebraska Medical Center HDI Lab case # 1071 DNA Report was dated (December 11, 2008); and handed to Deputy Brenda Wheeler of the Douglas County Sheriff's office.

Then at this point Deputy Brenda Wheeler turned the DNA Report over to the prosecutor Matthew Luske around the same time in (December of 2008); and deliberately withhold exculpatory evidence by causing prosecutorial misconduct because he knew about the existence of the DNA evidence that's relevant to the defendant's innocence but decided to cause miscarriage of justice by violating defendant due process by not disclosing Brady, material. See: Brady v. Maryland, 373 U.S. 83, 83 Sct 1194, 10 L.Ed.2d 215 (1963); "Prosecutorial misconduct occurred in (Costongway), Case once the prosecutor had the full knowledge of the experts findings but failed to disclosed it once the state had actual possession of the DNA. See: Schmidt v. state, 909 N.W.2d 778 (2018), NO. 15-1408.

IN SUM: Although the defendant described such evidence as being "newly discovered evidence", the claim that the defendant made support his motion for a new trial are more akin to those made by the defendant's argument such as how the prosecutor knew the existence of the victim DNA report and DNA results and failed to disclose it to the defendant. The relevance of the test result would exonerate the defendant because the results clearly show no comparison of the defendant to the victim because the DNA report is solely the victim's DNA and none of the defendant's.

CONCLUSION: Although the DNA Report was completed on (December 11, 2008); days before the defendant's entered the no contest plea the prosecution choose to cause prosecutorial misconduct by withholding vital information and Brady, evidence by violating the defendant's right to due process by failing to disclose the DNA evidence when the state had possession of it back in (December of 2008). Where, the prosecutor did not change the deadline to which the defendant could have not agreed to enter the no contest plea. Because the mere fact the defendant was unaware of the DNA findings as to the victim DNA report and results were the prosecutor proceeded with the plea hearing as schedule before a different Judge other then the original assign Judge that was assign to the defendant's criminal case.

Dated this 30th day of November 2020.

CERTIFICATE OF SERVICE

The undersigned hereby certify that on this 30th day of November, 2020; a true and accurate copy of the foregoing Opposition of objection to the Plaintiff's Response to the Defendant Motion for Testing under the DNA Act and Motion Based on Newly Discovered Evidence was mailed, via First-Class United States mail, postage prepaid to the following:

DOUGLAS COUNTY DISTRICT COURT  
Hon. THOMAS A. OTEPKA  
HALL OF JUSTICE  
1701 FARNAM STREET  
OMAHA, NE 68183

DOUGLAS COUNTY ATTORNEY  
KATIE L. BENSON  
909 CIVIC CENTER  
OMAHA, NE 68183

By: Paul Castonguay  
Paul Castonguay  
Inmate # 70764  
2725 N. Hwy. 50  
PO Box 900  
Tecumseh, NE 68450  
Tel. (402) 335-5998

Defendant- Pro se



Good Life. Great Mission.

DEPT OF CORRECTIONAL SERVICES

STATE OF NEBRASKA

CERTIFICATION  
STATE OF NEBRASKA  
DEPARTMENT OF CORRECTIONAL SERVICES

I, Gretchen Heinzman, Controller, hereby certify that the attached is a true and correct copy of the monthly institutional account transactions for Paul Castonguay, #70764 for the six-month period of August 2020 through January 2021, consisting of six page(s). Accountings for fractional portions of months are not available.

This certification is provided pursuant to Local Rule 52 of the U.S. District Court of the District of Nebraska, regarding in Forma Pauperis filings.

Dated this 11<sup>th</sup> day of February 2021.

Controller

(SEAL)

Scott R. Frakes, Director

Dept of Correctional Services

P.O. Box 94661 Lincoln, NE 68509-4661  
Phone: 402-471-2654 Fax: 402-479-5623

[corrections.nebraska.gov](http://corrections.nebraska.gov)

STATE OF NEBRASKA  
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ID	INST	REC	LAST					
NUMBER NAME	DATE REC	RELEASE	CTR LOCALITY ACTIVITY					
70764 CASTONGUAY/PAUL	12/29/09		TSC 3A 20 08/19/20					
SSN PREV ID GATE HR ASSIGNMENT DATE	IST	CNF	MNT	RST	SAV	SEC	SUS	LEG
36449263 .00 AD HU 3AB 04/12/16	O	O		O	O	O	O	O
	N	N		N	N	N	N	N
PROL VIOL DET BEGIN BAL BEG UNFR BAL CURR FR BAL CURR UNFR BAL CURR BAL								
N 16.69 .00	34.52				.00		34.52	
TRAN TRAN DOC	FROZEN							
CODE DATE NUMBER DESCRIPTION	AMOUNT	DEBIT	CREDIT	BALANCE				
01301 081820 PAY 300 89 JUL 2020			27.83	27.83				
01012 081820 FRZ/UNFRZ SUSPENSE	17.83						10.00	
19801 081920 015329 STORE 04 CHARGES		10.00						.00

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ID NUMBER	NAME	INST DATE REC	REC RELEASE	LAST CTR LOCALITY	ACTIVITY
70764	CASTONGUAY/PAUL	12/29/09		TSC 3A 20	09/30/20

SSN	PREV ID	GATE	HR ASSIGNMENT	DATE	IST	CNF	MNT	RST	SAV	SEC	SUS	LEG
36449263		.00	AD HU 3AB	04/12/16	O	O		O	O	O	O	
					N	N		N	N	N	N	

PROL	VIOL	DET	BEGIN BAL	BEG UNFR BAL	CURR FR BAL	CURR UNFR BAL	CURR BAL
		N	34.52	.00	49.93	.00	49.93

TRAN	TRAN	DOC	FROZEN				
CODE	DATE	NUMBER	DESCRIPTION	AMOUNT	DEBIT	CREDIT	BALANCE
01301	091720		PAY 300 89 AUG 2020			25.41	25.41
01012	091720		FRZ/UNFRZ SUSPENSE	15.41			10.00
19801	091720	014343	STORE 04 CHARGES		10.00		.00

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SSN 36449263	PREV ID .00	GATE AD HU 3AB	HR ASSIGNMENT 04/12/16	DATE IST CNF MNT RST SAV SEC SUS LEG O O O O O O N N N N N N			
PROL VIOL N	DET 49.93	BEGIN BAL .00	BEG UNFR BAL 67.76	CURR FR BAL .00	CURR UNFR BAL 67.76		
TRAN CODE 02362	TRAN DATE 100120	DOC NUMBER 6	DESCRIPTION MO STATMNT	FROZEN AMOUNT	DEBIT 27.83	CREDIT 27.83	BALANCE .00
01301	101920		PAY 300 89 SEP 2020				
01012	101920		FRZ/UNFRZ SUSPENSE	17.83			10.00
19801	102020	013973	STORE 04 CHARGES		10.00		.00

STATE OF NEBRASKA  
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ID NUMBER	NAME	INST DATE REC 12/29/09	REC RELEASE	CTR TSC	LOCALITY 3A 20	LAST ACTIVITY 11/23/20						
SSN 36449263	PREV ID 36449263	GATE .00	HR ASSIGNMENT AD HU 3AB	DATE 04/12/16	IST O N	CNF O N	MNT O N	RST O N	SAV O N	SEC O N	SUS O N	LEG
PROL N	VIOL 67.76	BEGIN BAL .00	BEG UNFR BAL 16.67	CURR FR BAL .00	CURR UNFR BAL 16.67	CURR BAL 16.67						
TRAN CODE	TRAN DATE	DOC NUMBER	DESCRIPTION	FROZEN AMOUNT	DEBIT	CREDIT	BALANCE					
01012 111720			FRZ/UNFRZ SUSPENS	67.71-			67.71					
19706 111720			TSC COPIES		3.70		64.01					
19706 111720			TSC COPIES		.30		63.71					
19702 111720			TSC POSTAGE		5.95		57.76					
19706 111720			TSC COPIES		6.60		51.16					
19702 111720			TSC POSTAGE		5.20		45.96					
19702 111720			TSC POSTAGE		4.63		41.33					
19702 111720			TSC POSTAGE		4.63		36.70					
19702 111720			TSC POSTAGE		.40		36.30					
19702 111720			TSC POSTAGE		.20		36.10					
19702 111720			TAC POSTAGE		.20		35.90					
19706 111720			TSC COPIES		5.40		30.50					
19706 111720			TSC COPIES		.80		29.70					
19702 111720			TSC POSTAGE		.20		29.50					
19706 111720			TSC COPIES		9.00		20.50					
19702 111720			TSC POSTAGE		1.64		18.86					
19702 111720			TSC POSTAGE		.40		18.46					
19702 111720			TSC POSTAGE		1.04		17.42					
19702 111720			TSC POSTAGE		1.04		16.38					
19706 111720			TSC COPIES		12.00		4.38					
19706 111720			TSC COPIES		.30		4.08					
19702 111720			TSC POSTAGE		3.88		.20					
19702 111720			TSC POSTAGE		.20		.00					
01301 111820			PAY 300 89 OCT 2020			26.62	26.62					
01012 111820			FRZ/UNFRZ SUSPENSE	16.62			10.00					
19801 111820 014912			STORE 04 CHARGES		10.00		.00					

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SSN 36449263	PREV ID .00	GATE AD HU 3AB	HR ASSIGNMENT 04/12/16	DATE IST CNF MNT RST SAV SEC SUS LEG O O O O O O N N N N N N		
PROL VIOL N	DET 16.67	BEGIN BAL .00	BEG UNFR BAL 32.08	CURR FR BAL .00	CURR UNFR BAL 32.08	
TRAN CODE 01301	TRAN DATE 121620	DOC NUMBER PAY 300 89	DESCRIPTION NOV 2020	FROZEN AMOUNT 15.41	DEBIT CREDIT 25.41	BALANCE 25.41
01012	121620	FRZ/UNFRZ SUSPENSE				10.00
19801	121720	014148 STORE 04 CHARGES				.00
02362	121820	121820 6 MO STATMNT X4				.00

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ID NUMBER	NAME	INST DATE REC 12/29/09	REC RELEASE	LAST CTR LOCALITY TSC 3A 20	ACTIVITY 01/20/21		
SSN 36449263	PREV ID 36449263	GATE .00	HR ASSIGNMENT AD HU 3AB	DATE 04/12/16	IST CNF MNT RST SAV SEC SUS LEG O O O O O O N N N N N N		
PROL VIOL N	DET 32.08	BEGIN BAL .00	BEG UNFR BAL 49.91	CURR FR BAL .00	CURR UNFR BAL 49.91		
TRAN CODE 01301	TRAN DATE 012021	DOC NUMBER PAY 300 89	DESCRIPTION DEC 2020	FROZEN AMOUNT	DEBIT 27.83	CREDIT 27.83	BALANCE 10.00
01012	012021	FRZ/UNFRZ SUSPENSE		17.83			
19801	012021	013899 STORE 04 CHARGES			10.00		.00