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April 6, 2018 (505) 270-7148

AG Balderas Announces Convicted Murderer to Remain In Prison Despite New DNA Testing

Albuquerque, NM -- Today, Attorney General Hector Balderas announced that Second Judicial District Judge Stan Whitaker denied convicted murderer Jacob Duran's request to set aside the judgment and sentence against him for the 1986 murder of Teofilia Gradi in her North Valley home. Duran asked the Court to set aside the judgment and sentence against him on the basis of new DNA testing of evidence used at trial. The Court was not persuaded and denied Duran's request.

"As Attorney General, my number one priority is protecting New Mexican families from the most dangerous criminals, and my office works tirelessly from trial through the appellate process to ensure that these individuals remain behind bars" said Attorney General Balderas. "I am very pleased that the Court recognized the importance of finality in valid criminal convictions for the criminal justice system as a whole, especially for the victim's family, and I want to recognize the strong work of my appellate specialists for their great work in this case."

Duran attempted to have his 30 year old murder conviction overturned on the basis of a 2003 statute that allows for post-conviction DNA testing. While the Court granted Duran's request to have four pieces of evidence tested, it found that the new DNA testing did not put into doubt the evidence tying Duran to the murder, so it denied his request to overturn his conviction.

A copy of the Court's order is attached.

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STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

ENDORSED
FILED IN MY OFFICE THIS
APR 04 2018

CLERK DISTRICT COURT

JACOB DURAN,

Petitioner,

v.

No. D-202-CR-1987-42753

STATE OF NEW MEXICO,

Respondent.

ORDER DENYING PETITIONER'S MOTION TO SET ASIDE JUDGMENT AND SENTENCE

THIS MATTER came before the Court on Petitioner's Motion to Set Aside Judgment and Sentence on February 8, 2017, and hearing on December 11, 2017, following DNA testing pursuant to NMSA 1978, Section 31-1A-2 (2003). The Court, having reviewed the pleadings, transcripts, court records, and other filings, and being otherwise fully advised, hereby **FINDS** and **ORDERS** as follows:

Trial Background

1. After a four day jury trial in August of 1987, Petitioner was convicted of first-degree murder and armed robbery and sentenced to life imprisonment plus ten years.
2. The incident leading to the conviction of Petitioner was the murder of Teofilia Gradi.
3. At the trial, the State described three categories of evidence it would offer: eyewitness testimony; physical evidence; and incriminating statements from Petitioner. [8-17-1987 I Tr: 9-15]

Eyewitness testimony

4. The State presented the testimony of a witness who had been walking past the victim's home on the night of the murder and saw someone who appeared to have jumped over the victim's wall surrounding her home. [8-20-1987 III Tr. 342-344] This witness described the build and the clothing of the man he had seen and tentatively identified Petitioner from a photo array. [8-18-1987 II Tr. 147:5-:9; 8-20-1987 III Tr. 345:11-346:22; 348:19-349:15; 353:9-:22] At trial, after the Petitioner was asked to remove his glasses and walk around a table in the courtroom, the witness testified that "[t]here is a lot of resemblance there." [8-20-1987 III Tr. 353:15-:22]

Incriminating Statements

5. Regarding statements made by Petitioner, witnesses had overheard Petitioner tell his aunt that "If they get me on this one, they are going to kill me" and [8-18-1987 II Tr. 220:1-:5] and that he had been the last one to see the victim alive. [8-18-1987 II Tr. 241:10-:12]

6. Additionally, Petitioner gave inconsistent statements to BCSO detectives regarding his relationship with the victim and his whereabouts on the night of the murder. [8-18-1987 II Tr. 158:3-160:23] Also, after Petitioner was informed that there may have been a match with his hair and hairs found on the victim, he informed the police that he and the victim had been lovers and he had last been with her the day before the murder. [8-18-1987 II Tr. 166:5-167:8; 174:17-175:9; 196:11-:21]

Physical Evidence

Hair Evidence

a. The State offered evidence that hairs had been found on the victim and on Petitioner's coat. At the time of the trial, the manner of analysis for the hairs was microscopic side-by-side comparison. [8-20-1987 III Tr. 449:7-:14]

b. An expert witness in the field of hair and fiber analysis and examination testified at trial about hairs found on the victim and Petitioner. [8-20-1987 III Tr. 448:6-:7]

    i. The expert testified that microscopic comparison "is not fingerprint evidence. This is not saying it definitely came from somebody. It's saying it could have come from this person." [8-20-1987 III Tr. 453:2-:4; 465:23-466:1; 474:18-:24]

    ii. There were eighteen hairs found on and around the victim. [8-20-1987 III Tr. 458:16-460:12] After a microscopic visual examination, the expert testified as follows: eleven hairs were consistent with the victim [Id.]; four had no pigmentation and were not suitable for comparison [Id.]; one hair was not consistent with either the victim or Petitioner [Id.]; and two hairs found on the victim's clothing were consistent with Petitioner. [Id.]

    iii. There were twenty-two hairs found on the clothing of Petitioner. [8-20-1987 III Tr. 460:13-461:6] After a microscopic visual examination, the expert testified as follows: fifteen of the hairs were consistent with Petitioner [Id.]; two hairs were consistent with the victim [Id.]; three hairs were not consistent with either Petitioner or the victim [Id.]; one hair was

not identifiable [Id.]; and one hair lacked pigmentation and could not be compared. [Id.]

iv. The hair expert testified that she could not say the hair was definitely the victim's or Petitioner's only that it was consistent. [8-20-1987 III Tr. 453:2-:4; 465:23-466:1; 474:18-:24] However, she testified that although the hairs could have come from someone else other than the victim or Petitioner, she had "never been faced with a situation…[with] an unknown hair comparison to two completely different hair sources." [8-20-1987 III Tr. 475:4-:7]

v. One of the investigating detectives had testified that the expert had informed him that the hairs on the victim were "indistinguishable" from Petitioner's sample. [8-18-1987 II Tr. 164:8-:19]

vi. In its opening statement the State had noted that "[t]here is a match between the hairs. Hairs matching him were found on her, at the scene….Hairs matching hers were found in the pocket of the fleece-lined Levi jacket…." [8-17-1987 I Tr. 10:6-:18]

vii. In its closing argument the State argued that the sample hairs from Petitioner were "indistinguishable" and "identical" from the hairs found on the victim and that the victim's sample hairs were "indistinguishable" and "identical" to the hairs found on Petitioner. [8-21-1987 IV Tr. 518:12-520:11; 529:23-530:3; 549:1-:3; 551:19-552:5] The State also argued that "that hair, in all of its characteristics, was the same as the hair from Jake Duran, and the hairs from the deceased are the same as those we

know were taken from him, and they were found on the Defendant's clothes." [8-21-1987 IV Tr. 529:23-530:3]

Blood Evidence

c. Evidence of blood found on and around the victim was also offered by the State. At the time, the commonly used form of analysis of blood samples was made through comparison of blood type and enzymes in the blood. [8-20-1987 III Tr. 423:2-:16] At trial, an expert in forensic serology testified about blood found at the scene. [8-20-1987 III Tr. 421:24-:25]

   i. The blood expert testified that the victim and Petitioner had the same blood type and that they only differed in one of the seven enzymes—glyoxalase. [8-20-1987 III Tr. 422:13-424:11]

   ii. Of relevance to the present issues was blood found under the victim's fingernails which, when tested, gave inconclusive results. [8-20-1987 III Tr. 425:21-426:13; 427:22-428:1; 438:24-439:21] That is, the results from under the fingernails were not reliable and that the expert could not say whether or not Petitioner's blood was present under the victim's fingernails. [8-20-1987 III Tr. 438:21-439:21]

   iii. The blood expert also testified that DNA fragmenting was a new procedure and only one sample was sent to a separate laboratory for DNA fragmenting—a blood sample from a tablecloth at the victim's house. [8-20-1987 III Tr. 426:16-428:16] The examination of this sample showed that it was the victim's blood on the tablecloth. [Id.]

iv. In its opening statement the State had indicated it was hard to tell whether Petitioner's blood was found at the scene, and in closing arguments the State argued on rebuttal that "[t]here was some indication that the Defendant is not [sic] the victim's glo that [sic] enzymes were in some of the samples below her fingerprint [sic] and on the kitchen cabinets." [8-17-1987 I Tr. 11:1-:9; 8-21-1987 IV Tr. 549:1-:11]

Other physical evidence

d. Also found at the scene was a footprint which an expert in crime scene investigation determined to have been made with an athletic-type shoe and appeared to be no larger than a size nine and could have been consistent a size six, which was Petitioner's shoe size. [8-18-1987 II Tr. 258:4-:19; 8-20-1987 III Tr. 486:14-487:11; 487:25-488:2]

e. Petitioner's foot was not measured by the expert, no athletic shoes were found at Petitioner's residence, and his aunt testified that she did not remember him having such shoes at the time of the incident. [8-18-1987 II Tr. 192:8-:9; 258:4-:19]

Direct Appeal

7. Petitioner appealed his conviction to the New Mexico Supreme Court contending insufficient evidence supported his conviction and that, as a result of prosecutorial misconduct, he was denied a fair trial. *State v. Duran*, 1988-NMSC-082, ¶ 1, 107 N.M. 603.

8. Regarding Petitioner's sufficiency of the evidence claim, the court noted that the testimony provided by the eyewitness and three expert forensic witnesses, "support the conclusion that defendant could not be excluded from the class of persons who could

have committed the crimes, and it placed the defendant in the victim's neighborhood at the time of the homicide." *Id.* ¶ 3.

9. Regarding the claim that he was denied a fair trial, the court held that "[i]t was constitutionally improper…for the trial court to admit and for the State to elicit Duran's hearsay statement made to [his aunt]" and his only proposed alibi witness. *Id.* ¶ 11. The court also held that "[t]he prosecution's conduct in calling the defense's alibi witness for the purpose of impeachment during its case-in-chief was entirely improper." *Id.* ¶ 12. However, the court noted that Petitioner had not been prejudiced by the misconduct as "there was sufficient other evidence to convict the defendant." *Id.*

10. Finally, our Supreme Court noted that the characterization of the hair evidence as "indistinguishable" was not fundamental error because it was not a complete fabrication as "[a]nother witness had testified that the expert had described the sample as 'indistinguishable.'" *Id.* ¶ 13. However, the court noted that "[h]ad the prosecutor paraphrased the expert by describing the hair comparison as 'identical,' however, he would have committed a 'calculated, rank misrepresentation,' which…would have required a new trial." *Id.*

11. The court held that "[d]espite the errors of overenthusiasm committed by the State in its presentation and summation of the case, the defendant has not shown that he was prejudiced." *Id.* ¶ 14.

<u>DNA Testing</u>

12. On April 27, 2015, Petitioner filed a Petition for DNA Testing Pursuant to NMSA 1978, Section 31-1A-2 (2003).

13. The Court granted Petitioner's petition on October 30, 2015.

14. At the December 11, 2017, hearing, Eve Tokumaru testified as an expert in forensic DNA analysis. She testified that the serology testing available in the 1980's and the use of microscopic hair comparison to identify an individual are no longer used today as there are now more specific and accurate means of testing available through DNA testing. [12-11-2017 Tr: 25:16-26:21; 27:25-29:10; 32:2-:5; 34:24-35:8]

15. Given the age of the case and how the evidence had been packaged and handled, not all evidence from the 1987 trial was available for DNA testing in 2015. [12-11-2017 Tr. 22:17-:20] However, the Department of Public Safety laboratory was able to test the following items: (1) two nail clippings from the victim; (2) two hairs which had been found on the victim's clothing; and (3) a hair from the victim's clothing which was sent to a separate laboratory for mitochondrial DNA testing, as it lacked root material. [12-11-2017 Tr. 23:13-:24; 27:3-:10; 29:16-:18; 30:12-31:3]

    a. Regarding the fingernail clippings from the victim, the 2015 DNA test results demonstrated there was no male DNA present on the fingernails, thus excluding Petitioner as a contributor. [12-11-2017 Tr. 25:4-:11; 32:22-33:14] At trial, the expert testified that the results were inconclusive and that she could not say whether or not Petitioner was a contributor. [8-20-1987 III Tr. 438:21-439:21]

    b. Regarding the two hairs from the victim's clothing, which were subjected to STR DNA testing, the results excluded Petitioner as a contributor. [12-11-2017 Tr. 27:15-:24] One of these hairs was found to belong to the victim and the other rendered a partial DNA profile matching the victim. [Id.] At trial, one of the hairs had not been tested because it lacked pigmentation. [8-20-1987 III Tr.

460:13-461:6] The other hair was determined to be consistent with the victim. [Id.]

c. Regarding the third hair from the victim's clothing, which was subjected to mitochondrial DNA testing, the results excluded Petitioner as a contributor. [12-11-2017 Tr. 31:4-:23] The victim was not excluded as a contributor. [Id.] At trial, the expert had testified the hair was consistent with that of Petitioner. [8-20-1987 III Tr. 460:13-461:6]

16. After receiving the results of the DNA testing, Petitioner filed his Motion to Set Aside Judgment and Sentence and Dismiss with Prejudice or, in the Alternative, Grant a New Trial Pursuant to NMSA 1978, § 31-1A-2(H) (2005). Petitioner argued that the test results were exculpatory—that they conclusively show that the expert testimony from trial regarding the hair and blood evidence was wrong, and he is entitled to a new trial or dismissal of the charges against him.

Analysis

Section 31-1A-2(H) states "[i]f the results of the DNA testing are exculpatory, the district court may set aside the petitioner's judgment and sentence, may dismiss the charges against the petitioner with prejudice, may grant the petitioner a new trial or may order other appropriate relief." In terms of DNA evidence, New Mexico appellate courts have not had the opportunity to explore the nature of exculpatory evidence under Section 31-1A-2. More specifically, this case addresses new DNA evidence from hair and blood samples found on the victim, which demonstrated the hair and blood to have come from the victim, and trial testimony which was inconsistent with these results.

The term "exculpatory" is not defined in Section 31-1A-2, or elsewhere in Chapter 31. In *Buzbee v. Donnelly*, 1981-NMSC-097, 96 N.M. 692, our Supreme Court noted that "[i]t is plain that there are at least two distinct types of exculpatory evidence, i.e., direct exculpatory evidence and circumstantial exculpatory evidence." 1981-NMSC-097, ¶ 46. While the majority opinion in *Buzbee* discusses the type of exculpatory evidence the State was required to produce, i.e. direct or circumstantial, the dissenting opinion explores the definition of exculpatory evidence noting that

> Evidence which negates guilt is exculpatory evidence; that is, evidence that indicates the defendant is not guilty of the crime charged....Exculpatory evidence comprehends evidence which tends to negate guilt or, stated affirmatively, supports the innocence of the defendant.
>
> Evidence is not exculpatory "merely because the defendant so labels it." Evidence is not exculpatory even though it may be favorable to the defendant if the evidence "is merely collateral or impeaching." To be exculpatory, that is, to negate guilt, the evidence must tend "to establish defendant's innocence of the crimes charged."

Id. ¶¶ 96-97 (Sosa, J., dissenting) (internal citations omitted). Similarly in *State v. Herrera*, our Court of Appeals agreed that exculpatory evidence is that which "would indicate that [the defendant] is not guilty of the crime." 1979-NMCA-103, ¶ 5, 93 N.M. 442, *overruled on other grounds by Buzbee*, 1981-NMSC-097, ¶ 46.

In addressing the nature of exculpatory evidence under Section 31-1A-2, this Court considers the discussion in *Buzbee* as well as the language in Section 31-1A-2(A) which states that the petitioner must "claim[] that DNA evidence will establish his innocence," indicating the statutory section's ties to actual innocence claims. *See also Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 62, 129 S.Ct. 2308 (2009) (discussing the exonerative power of DNA testing). As such, the burden on the Petitioner should be more rigorous than simply demonstrating that the evidence is contrary to trial testimony. *Cf. Montoya v. Ulibarri*,

2007-NMSC-035, ¶ 29, 142 N.M. 89 (discussing the burden of proof of a petitioner raising an actual innocence claim and noting that "[w]hile the burden on petitioners should not be so insurmountable that it is practically impossible for a petitioner to prove his innocence, it should be more rigorous than the standard imposed on petitioners who are making a motion for a new trial based on newly discovered evidence").

Regarding the blood under the victim's fingernails, in the original trial, the State did not particularly emphasize or rely on the blood evidence that was discovered indicating that it was hard to tell whether Petitioner's blood was found at the scene and arguing there was "some indication" that Petitioner's glo's were found at the scene. The expert testimony regarding the blood was similarly inconclusive and did not indicate whether or not Petitioner's blood was found at the scene. While the 2015 DNA testing was able to conclusively exclude Petitioner as a source of blood found at the scene, the Court does not find the new blood evidence to be exculpatory in light of the other evidence linking Petitioner to the crime, as discussed below, or the 1987 trial testimony which was inconclusive regarding the source of the blood and not heavily relied upon or emphasized by the State or defense.

The 1987 trial testimony regarding the hair evidence was that there were two hairs found on the victim that were consistent with Petitioner's hair. The State seemed to rely, in part, upon the hairs to place the Petitioner at the scene of the crime. Trial testimony that hairs found on the victim matched those of the Petitioner was emphasized by the State in both its opening statement and in its closing arguments. However, the actual expert testimony at trial regarding the hair comparisons was measured and careful in noting the results were not definitive. The 2015 DNA testing excluded Petitioner as the source of one of the hairs that had been testified to as being

consistent with his hairs found at the crime scene. The remaining hair that had been linked to Petitioner was unavailable for DNA testing.

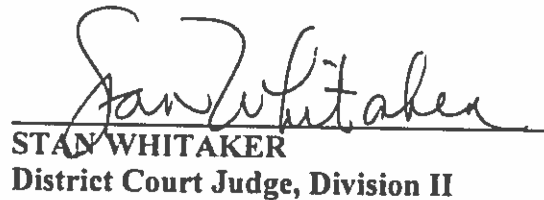
The 2015 DNA testing indicated that the hairs belonged to or likely belonged to the victim, including the hair that had been linked to Petitioner. This fact, albeit different from the 1987 trial testimony, does not implicate any other person in the crime or exculpate Petitioner. It simply confirms the hairs found on the victim belonged to the victim and nothing more. *Cf. Nebraska v. Boppre*, 790 N.W.2d 417, 424, 280 Neb. 774 (Neb. 2010) (holding that the presence of hairs found in the residence of the victim and which matched the victim or her maternal relatives neither exonerates nor exculpates defendant); *Pennsylvania v. Brooks*, 875 A.2d 1141, 2005 PA Super 185 (Pa. Super. Ct. 2005) (refusing to grant petitioner access to DNA testing as "even if appellant's DNA was not at the crime scene, it would prove nothing" noting that "absence of evidence is not evidence of absence" (citations omitted)).

The 2015 DNA testing results do not put into doubt the additional circumstantial evidence implicating Petitioner, *see Osborne*, 557 U.S. at 62 (noting that "DNA testing alone does not always resolve a case" that there may be "enough other incriminating evidence and an explanation for the DNA result" and that "[t]he dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice" (citations omitted)). Some of that circumstantial evidence was the eyewitness who placed the Petitioner at the scene on the night of the murder, in addition to the hairs found on the Petitioner, which were testified to be consistent with the victim's hair. This testimony has not been called into question, as those hair samples have been lost and are not available for DNA testing.

Conclusion

Given the post-conviction nature of these proceedings—after Petitioner has pursued a direct appeal to address any constitutional infirmities in his conviction—and the public's interest in the finality of judgements, *see Ulibarri*, 2007-NMSC-035, ¶ 29 (noting the importance of the "public's interest in the finality of a conviction after a petitioner has been afforded all constitutional rights required by law"); the 2015 DNA testing results in this case is insufficient to cast doubt upon the evidence implicating Petitioner in the murder of Teofilia Gradi to warrant vacating Petitioner's convictions and granting a new trial.

It is therefore **ORDERED** that Petitioner's Motion to Set Aside Judgment and Sentence is **DENIED**.



STAN WHITAKER
District Court Judge, Division II