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Robyn McQuillen

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## RECENT DEVELOPMENT

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### **GREGG v. STATE: AMENDMENTS TO THE DNA POST-CONVICTION STATUTE APPLY RETROSPECTIVELY, REQUIRING PETITIONERS TO ESTABLISH THAT POST-CONVICTION DNA TESTING COULD PROVIDE EXCULPATORY OR MITIGATING EVIDENCE THAT IS RELEVANT TO PETITIONER'S CONVICTION.**

**By: Robyn McQuillen**

The Court of Appeals of Maryland held that, when a petitioner requests post-conviction DNA testing, courts should apply any amendments to the Maryland DNA Post-Conviction Statute retrospectively. *Gregg v. State*, 409 Md. 698, 976 A.2d 999 (2009). Rather than requiring petitioners to establish that DNA testing was not available at the time of their original trial and that the evidence would be “materially relevant” to establishing their innocence, the relaxed standard of the 2003 amendment to the DNA Post-Conviction Statute allows petitioners to seek post-conviction DNA testing if the evidence might be exculpatory or mitigating. *Id.* at 711-12, 976 A.2d at 1006-07.

Appellant, Donte Gregg (“Gregg”), was convicted in 2003 of first-degree murder, conspiracy to commit murder, and use of a handgun in the commission of a felony. Epithelial cells were found on the trigger of the gun used in the crime, but neither the State nor the defense analyzed the cells for DNA identification during Gregg’s trial. At trial, Gregg asserted that he did not shoot the victim and that his physical contact with the murder weapon came from defending himself from the actual shooter.

In 2003, Gregg filed a Petition for DNA Evidence Post-Conviction Review, which the Circuit Court for Baltimore City dismissed without prejudice at the petitioner’s request. The Court of Special Appeals of Maryland affirmed his conviction in 2004. In November 2005, without holding a hearing, the circuit court denied Gregg’s Motion for New Trial and for Release of Evidence for Forensic Testing. Gregg then filed a motion for reconsideration and requested a hearing and a notice of appeal, which was dismissed by the Court of Special Appeals of Maryland. Gregg then filed a Petition for Post-Conviction Relief to

seek the right to file a late appeal to the Court of Appeals of Maryland, which was granted on March 20, 2008.

In both of the 2003 and 2005 motions, Gregg requested relief under the DNA Post-Conviction statute, which is codified in section 8-201 of the Criminal Procedure Article of the Maryland Code. *Gregg*, 409 Md. at 704-05, 707, 976 A.2d at 1002-04 (citing MD. CODE ANN., CRIM. PROC. § 8-201 (2008)). This statute was enacted in 2001, and amended in 2003 and 2009, to permit persons convicted of serious crimes to seek post-conviction DNA testing of evidence that could potentially change the outcome of their convictions. *Id.* at 701, 708 n.5, 976 A.2d at 1000, 1004 n.5. The pertinent statute is section 8-201(c), which lists evidentiary requirements the court must find in order to permit DNA testing. *Id.* at 709, 976 A.2d at 1005, (citing MD. CODE ANN., CRIM. PROC. § 8-201 (2008)). Before the 2003 amendment, the statute listed requirements that the petitioner had to establish, including: (1) DNA testing for certain evidence was not available or was out of his or her control at the original trial; and (2) that there is a reasonable probability that the DNA testing will “produce results materially relevant to the petitioner’s assertion of innocence.” *Id.* at 709, 976 A.2d at 1005 (quoting MD. CODE ANN., CRIM. PROC. § 8-201(c) (2003)). The 2003 amendment to section 8-201(c) requires petitioners to show that the DNA evidence: (1) has “the potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction;” and (2) that a generally accepted scientific test is employed to examine the evidence. *Id.* at 711, 976 A.2d at 1006 (quoting MD. CODE ANN., CRIM. PROC. § 8-201(c) (2008)).

First, the court decided whether the original version of the statute or the 2003 amendment applied to Gregg’s petition for post-conviction DNA testing. *Id.* at 707, 976 A.2d at 1004. Gregg argued that the 2003 amendment of section 8-201(c) applied because it was the version in effect when his 2005 motion was filed. *Gregg*, 409 Md. at 712, 976 A.2d at 1007 (citing MD. CODE ANN., CRIM. PROC. § 8-201(c) (2008)). According to Gregg, the court was required to allow DNA testing of the epithelial cells found on the gun because that evidence could show that he was not the shooter and that the actual shooter’s DNA would be found on the murder weapon. *Id.* at 712, 976 A.2d at 1007. He argued that this evidence would be exculpatory or might mitigate other evidence related to his conviction. *Id.* The State argued that the original version of section 8-201(c) applied because it was the version in effect when Gregg was convicted and when he filed

his first motion for post-conviction DNA testing. *Id.* at 713, 976 A.2d at 1007 (citing MD. CODE ANN., CRIM. PROC. § 8-201(c) (2003)). According to the State, under the original wording of the statute, the court rightfully dismissed Gregg's motion because DNA testing of the epithelial cells was available to Gregg at his original trial. *Id.* Further, the State asserted that evidence from DNA testing would not provide "materially relevant" information that would necessarily exonerate Gregg or implicate someone else in the shooting. *Id.* at 713-14, 976 A.2d at 1008.

In deciding which version of section 8-201(c) applied to Gregg's motion for post-conviction DNA testing, the court noted that legislative enactments that have a procedural or remedial effect should be applied retrospectively. *Gregg*, 409 Md. at 714, 976 A.2d at 1008 (citing *Langston v. Riffe*, 359 Md. 396, 406-08, 754 A.2d 389, 394-95 (2000)). The court found that section 8-201 has both a procedural effect, by detailing how petitioners are to seek post-conviction DNA testing, and a remedial effect, by providing a means for incorrect convictions or sentences to be reversed. *Id.* at 715, 976 A.2d at 1008-09. Therefore, the version of section 8-201 in effect when a petitioner files the motion should be applied retrospectively to determine if the courts are required to fulfill petitioner's post-conviction DNA testing request. *Id.* at 715-16, 976 A.2d at 1008-09.

The court found that, because Gregg's 2003 petition for post-conviction DNA testing was dismissed without prejudice, his 2005 petition should only have to conform to the requirements of the 2003 amendments of section 8-201(c). *Id.* at 716, 976 A.2d at 1009 (citing MD. CODE ANN., CRIM. PROC. § 8-201(c) (2008)). The court also found that Gregg had satisfied the two requirements under the 2003 amendment of section 8-201(c). *Id.* at 716-19, 976 A.2d at 1009-11 (citing MD. CODE ANN., CRIM. PROC. § 8-201(c) (2008)). The presence of another's epithelial cells, while not a guarantee of Gregg's guilt or innocence, might provide exculpatory or mitigating evidence of Gregg's guilt and conviction. *Id.* at 716, 976 A.2d at 1009.

Gregg also argued that the lower court erred in not granting him a hearing before dismissing his motion. *Gregg*, 409 Md. at 712, 976 A.2d at 1007. The court did not rule directly on this question because it already decided that the lower court ultimately erred in dismissing Gregg's 2005 motion. *Id.* at 721, 976 A.2d at 1012. By reviewing two prior cases, however, the court determined that, because of the purpose of the statute, a hearing should be held if there is a "genuine factual dispute" regarding the evidence. *Id.* at 717-19, 976 A.2d at

1009-11 (citing *Arey v. State*, 400 Md. at 491, 929 A.2d at 501 (2007); *Blake v. State*, 395 Md. at 224, 909 A.2d at 1026 (2006)) (emphasis in original).

This decision bolsters the Legislature's intent that prisoners be afforded the opportunity to clear their name through ever-advancing forensic technology, which may not have been available at the time of their conviction. Additionally, *Gregg* interprets the application of section 8-201(c) of the Criminal Procedure Article and provides that an amendment to the statute, which has a procedural and remedial effect, must be applied retrospectively to petitions for post-conviction DNA testing. Due to the January 2009 amendment of the Post-Conviction DNA Statute, Maryland petitioners seeking to file a motion for post-conviction DNA testing should pay special attention to the amendment's relaxed evidentiary requirements. Also, practitioners representing a client who is filing a motion under the statute should always seek a hearing if there is a genuine factual dispute regarding the evidence.