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litigant's position.[14] The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.[15] Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.[16] An appellate court may award attorney fees on appeal regardless of whether a party asked for attorney fees from the trial court.[17]

Because this court has never applied judicial estoppel in the same proceeding, TFF made a valid, although unpersuasive, argument. We reject SID's bad faith argument.

CONCLUSION

The district court did not err in granting the SID's motion for summary judgment. TFF is judicially estopped from pursuing its claims against the SID because such claims are inconsistent with the district court's award of default judgment against Brook Valley for the assessments levied by the SID. But TFF's claim was not frivolous or brought in bad faith.

AFFIRMED.

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[14] See, *Cornett v. City of Omaha Police & Fire Ret. Sys.*, 266 Neb. 216, 664 N.W.2d 23 (2003); *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998).

[15] See, *Cornett, supra* note 14; *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002).

[16] *Cornett, supra* note 14; *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000).

[17] See, *Cox, supra* note 16; *Schuelke, supra* note 14.

STATE OF NEBRASKA, APPELLEE, V. JEFF BOPPRE, APPELLANT.

790 N.W.2d 417

Filed November 5, 2010. No. S-09-906.

1. **DNA Testing: Appeal and Error.** In an appeal from a proceeding under the DNA Testing Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
2. **Motions for New Trial: DNA Testing: Appeal and Error.** A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the

DNA Testing Act is addressed to the discretion of the trial court. Absent an abuse of discretion, the court's determination will not be disturbed.

3. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
5. **Motions for New Trial: DNA Testing: Time.** The DNA Testing Act permits the testing of relevant biological material and provides the means by which a person in custody may seek relief based upon newly discovered exculpatory DNA test results obtained after the statutory time period for requesting a new trial based upon newly discovered evidence has expired.
6. **Judgments: Motions to Vacate: DNA Testing.** If results obtained under the DNA Testing Act exonerate the defendant, the court may vacate and set aside the judgment and release the person.
7. **Motions for New Trial: DNA Testing.** If results obtained under the DNA Testing Act do not exonerate the defendant, but are exculpatory, the court may order a new trial if the newly discovered exculpatory DNA evidence is of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.
8. **Postconviction: Constitutional Law: Time.** Although there is no time limit to bringing a postconviction motion, postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations.
9. **Postconviction: Constitutional Law: Judgments: Jurisdiction.** Absent a factual circumstance whereby the judgment is void or voidable under the state or U.S. Constitution, the court has no jurisdiction to grant postconviction relief.
10. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
11. **Postconviction: Pleadings.** A defendant is required to make specific allegations instead of mere conclusions of fact or law in order to receive an evidentiary hearing for postconviction relief.
12. **Postconviction.** Postconviction relief without an evidentiary hearing is properly denied when the files and records affirmatively show that the prisoner is entitled to no relief.
13. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.
14. ____: ____. An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
15. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

More than 15 years after Jeff Boppre was convicted of two counts of first degree murder for the deaths of Richard Valdez and Sharon Condon, the case was reopened when Boppre filed a motion for forensic testing pursuant to Nebraska's DNA Testing Act.[1] Based on the DNA test results, Boppre filed a motion for new trial and a petition for postconviction relief. He now appeals from the denial of the motion for new trial, the denial of his motion for postconviction relief, and the denial of an evidentiary hearing on the postconviction motion. We affirm.

BACKGROUND

The facts as adduced at Boppre's trial are contained in *State v. Boppre* (*Boppre I*)[2] and are not repeated herein, except as otherwise indicated. In March 1989, Boppre was convicted of two counts of first degree murder for the deaths of Valdez and Condon. Boppre's convictions and sentences were affirmed on direct appeal.[3] Boppre filed his first motion for a new trial based on newly discovered evidence on March 13, 1992. We affirmed the denial of that motion in *State v. Boppre* (*Boppre II*).[4] On August 17, 1995, Boppre filed his first motion

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[1] Neb. Rev. Stat. § 29-4116 et seq. (Reissue 2008).

[2] *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

[3] *Id.*

[4] *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).

for postconviction relief, claiming trial counsel was constitutionally deficient during his trial. We affirmed the denial of postconviction relief in *State v. Boppre* (*Boppre III*).[5] On October 21, 2002, Boppre filed a second motion for postconviction relief, claiming prosecutors withheld exculpatory evidence. We summarily affirmed the denial of the second postconviction motion, without a written opinion.[6]

On May 16, 2005, Boppre filed a motion for forensic testing pursuant to the DNA Testing Act, which motion began the proceedings being considered in this appeal. Boppre alleged such testing would produce noncumulative, exculpatory evidence. Boppre's motion for DNA testing focused primarily on Valdez' "dying declarations" and a pair of blue jeans believed to contain bloodstains from one or both victims. The jeans were found at the trailer home of two of the State's key witnesses, Kenard Wasmer and Alan Niemann.

At the original trial, the State presented evidence that Valdez made two dying declarations identifying Boppre as his murderer. Specifically, the State alleged Valdez used his finger to write on the floor with grease the letters "'J-F-F B-O-P-E'" and on the living room door casement with suspected blood the letters "'J-E-F-F.'"[7] The pair of jeans which Boppre believed to contain bloodstains was not introduced at trial.

In his motion for DNA testing, Boppre contended that he was framed by Wasmer and Niemann after they murdered Valdez and Condon. He asserted the dying declarations should be tested for epithelial cells left behind by the person who wrote them with his or her finger.

Regarding the jeans, Boppre alleged they belonged to and were worn by Wasmer. Boppre theorized that if DNA test results showed Wasmer was the "habitual wearer" of the jeans and if the victims' DNA was found on the jeans, it would implicate Wasmer in the murders.

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[5] *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997), *disapproved on other grounds, State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[6] *State v. Boppre*, 267 Neb. xxi (No. S-03-541, Dec. 30, 2003).

[7] *Boppre I, supra* note 2, 234 Neb. at 929, 453 N.W.2d at 416.

An inventory of evidence was prepared pursuant to § 29-4120(4). The court ordered appropriate DNA testing on the following items:

> (1) Pair of blue jeans from the Wasmer-Niemann home to include "habitual wearer analysis". . . .
> (2) Flooring containing grease letters . . . .
> (3) Suspected blood stain on [living room] door frame . . . .
> (4) Suspected blood sample on [kitchen] door frame . . . .
> (5) Two towels . . . .
> (6) Suspected blood splatters on door and curtain . . . .
> (7) Suspected blood sample on carpet . . . .
> (8) Blood samples of . . . Valdez, . . . Con[d]on, . . . Wasmer, and . . . Niemann . . . .

Laboratory testing was performed on the jeans seized from the Wasmer-Niemann mobile home and cuttings taken from the jeans in preparation for trial, but an insufficient amount of DNA was present to obtain a complete DNA profile. Accordingly, DNA testing failed to establish Wasmer as the habitual wearer of the jeans. The DNA profile obtained from the jeans cuttings was consistent with the DNA profile obtained from Wasmer. Neither the jeans nor the jeans cuttings produced a DNA profile consistent with the DNA profile of either Valdez or Condon. Accordingly, DNA testing failed to establish the victims' blood on the jeans.

The letters and grease located on the flooring of the Valdez residence also failed to yield a sufficient amount of DNA to obtain a DNA profile. Thus, the DNA testing failed to definitively identify the author of the letters or contradict the State's theory that Valdez was the author.

The DNA report disclosed Condon to be the donor of the DNA profile obtained from a sample collected from a piece of wood from the north kitchen door frame at the Valdez-Condon residence. Additionally, a partial DNA profile obtained from a towel found at the Wasmer-Niemann trailer home was consistent with that of Niemann.

All other tested items resulted in an insufficient amount of DNA to obtain a full DNA profile. However, a partial DNA

profile from an unknown male was obtained from a bloodstain on the south entrance door to the Valdez-Condon residence near the doorknob. The DNA results obtained from the bloodstain near the doorknob only revealed a partial profile; however, enough genetic markers were present to search for a match. The search revealed that the genetic markers contained in the partial profile obtained near the doorknob were consistent with John Yellowboy's DNA profile.

Additional DNA testing was ordered on three brown or black hairs collected from the flooring. Boppre, Valdez, Wasmer, and Niemann were excluded as possible contributors. Condon and her maternal relatives could not be excluded as possible contributors, as maternally related relatives share identical mitochondrial DNA profiles. Yellowboy is maternally related to Condon.

Following completion of all DNA testing, the State filed a motion to dismiss, while Boppre filed an amended motion to vacate and set aside the judgment pursuant to § 29-4123(2); at issue was whether the DNA results "exonerate or exculpate" Boppre. An evidentiary hearing was held on August 5, 2008. By stipulation of the parties, the court withheld its ruling until all other pending motions were heard in order to effectuate one appeal rather than multiple appeals.

The motion for new trial was heard on February 10, 2009. The court indicated that the hearing was limited to the motion for new trial; issues presented in the petition for postconviction relief were not addressed. No further hearings were held.

On August 17, 2009, the district court (1) sustained the State's motion to dismiss; (2) overruled Boppre's motion to vacate and set aside judgment; (3) overruled Boppre's motion for new trial; (4) overruled Boppre's petition for postconviction relief; and (5) overruled all other relief requested by either party. Boppre appeals the denial of a new trial on the basis of newly discovered DNA evidence and the denial of his motion for postconviction relief without an evidentiary hearing.

ASSIGNMENTS OF ERROR

Boppre assigns that the district court erred in (1) considering only the DNA laboratory test results in the context of the

original trial record when ruling on the motion for new trial; (2) refusing to order a new trial; and (3) failing to conduct an evidentiary hearing on allegations contained in Boppre's motion for postconviction relief, and denying postconviction relief.

STANDARD OF REVIEW

[1] In an appeal from a proceeding under the DNA Testing Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.[8]

[2] A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act is addressed to the discretion of the trial court.[9] Absent an abuse of discretion, the court's determination will not be disturbed.[10]

[3] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[11]

[4] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[12]

ANALYSIS

DNA Testing Act

[5-7] In this case, we examine the decision made by the district court pursuant to § 29-4120 of the DNA Testing Act. The act permits the testing of relevant biological material and provides the means by which a person in custody may seek relief based upon newly discovered exculpatory DNA test results obtained after the statutory time period for requesting a new

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[8] *State v. Pratt*, 277 Neb. 887, 766 N.W.2d 111 (2009).

[9] See Neb. Rev. Stat. § 29-2101(6) (Reissue 2008).

[10] *State v. Pratt, supra* note 8.

[11] *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009).

[12] *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009); *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008), *modified on denial of rehearing* 276 Neb. 965, 767 N.W.2d 68 (2009).

trial based upon newly discovered evidence has expired.[13] If the final testing results exonerate the defendant, the court may vacate and set aside the judgment and release the person.[14] If the evidence does not exonerate the defendant, but is exculpatory, the court may order a new trial if the newly discovered exculpatory DNA evidence is of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.[15]

Boppre does not argue that the DNA evidence exonerates him. Instead, he asserts that the DNA evidence is exculpatory, and he seeks a new trial. Thus, at issue is whether the DNA evidence was of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.[16] In considering this question, we review the trial court's decision for an abuse of discretion.[17] Unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[18]

The district court found that DNA testing disproved Boppre's hypothesis that the victims' blood or the victims' DNA would be found on Wasmer's jeans. At the trial in 1988, a forensic serologist had testified that several small bloodstains on the jeans could have come from Condon, but that she could not make a definitive determination. The DNA laboratory testing failed to disclose Valdez' or Condon's DNA on the seized jeans or jeans cuttings. At best, the DNA results support a finding that Wasmer's blood was on Wasmer's jeans at Wasmer's trailer home.

The laboratory also tested the letters and grease located on the flooring of the Valdez residence. An insufficient amount of DNA was present to obtain a DNA profile. The district

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[13] *State v. El-Tabech*, 269 Neb. 810, 696 N.W.2d 445 (2005).

[14] See *id.* See, also, *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

[15] See, *State v. Buckman, supra* note 14; *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003).

[16] See *id.*

[17] *State v. Bronson, supra* note 15.

[18] See *id.*

court found that the DNA testing failed to identify the author of the letters as anyone other than Valdez. Accordingly, the court found that the evidence neither exonerated nor exculpated Boppre.

The DNA report disclosed Condon to be the donor of the DNA sample collected from a piece of wood which was part of the north kitchen doorframe at the Valdez-Condon residence. The testing results of the three hairs found on the flooring showed Condon and her maternal relatives could not be excluded as possible contributors; Yellowboy was a maternal relative of Condon. Yellowboy's DNA was also found at the residence. Condon lived part time at the residence, and Yellowboy was a frequent visitor. The district court found the presence of Condon's and Yellowboy's DNA at the residence was not exculpatory.

As described above, DNA effectively disproved the majority of Boppre's assertions in his motion for forensic testing. But Boppre contends the forensic DNA indicates that Wasmer and Niemann testified falsely at trial, and also implicates Niemann and Yellowboy as the actual perpetrators of the crimes. These contentions appear to be based on the fact that neither Wasmer nor Niemann testified that Yellowboy was present during the commission of the crime and on the theory that impeaching these witnesses with Yellowboy's DNA would have swayed the jury to believe Boppre's version of the events. Aside from this argument, Boppre fails to allege any other way in which the DNA results are exculpatory in light of the trial record.

We find the district court did not err in its determination that the DNA results neither exonerate nor exculpate Boppre. The results obtained from the three hairs and the presence of Yellowboy's DNA do not support Boppre's argument. Boppre's reliance on these results is without merit. Condon was killed in the residence, her maternal relatives were likely visitors to the residence, and Yellowboy was a frequent visitor to the residence. The presence of hairs matching Condon or her maternal relatives neither exonerates nor exculpates Boppre. Yellowboy admitted to being at the Valdez-Condon residence on the night of the murders. Because Valdez sold drugs from his home, the residence frequently had visitors coming and going.

In its order, the district court concluded the DNA test results failed to show the dying declarations were authored by anyone other than Valdez. The DNA test results failed to confirm that Wasmer was the habitual wearer of the jeans seized from his residence or that the victims' blood was on the jeans. The DNA tests merely showed that Condon, a part-time resident, and Yellowboy, a frequent visitor, had been in the Valdez home at some point in time prior to the murder investigation. That evidence neither exonerated nor exculpated Boppre.

We need not address Boppre's first assignment of error that the district court erred in considering only the DNA test results in the context of the original trial and not also in light of the other evidence presented by Boppre. Even if the court had considered the DNA results in light of all relevant evidence, the DNA results would still not be exculpatory. Considering the record before us, we find that the district court did not abuse its discretion in denying the motion for new trial.

Second Successive Motion for Postconviction Relief

Boppre also asserts that his allegations of prosecutorial misconduct and claim of ineffective assistance of counsel merited both an evidentiary hearing and relief from the conviction. Boppre argues that these allegations, if true, amount to a violation of due process. Although the district court stated in its order denying the motion that it had granted an evidentiary hearing on February 10, 2009, our review of that hearing reveals that the February 10 hearing was limited to the motion for new trial and did not encompass the issues raised in the petition for postconviction relief. We thus must determine whether the district court erred in denying Boppre's motion for postconviction relief without an evidentiary hearing.

[8,9] Although there is no time limit to bringing a postconviction motion, postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations.[19] Absent a factual circumstance whereby the judgment is

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[19] See, *State v. Lotter, supra* note 12; *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007).

void or voidable under the state or U.S. Constitution, the court has no jurisdiction to grant postconviction relief.[20]

[10-12] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[21] But, this court has required that a defendant make specific allegations instead of mere conclusions of fact or law in order to receive an evidentiary hearing for postconviction relief.[22] And postconviction relief without an evidentiary hearing is properly denied when the files and records affirmatively show that the prisoner is entitled to no relief.[23]

[13,14] In his brief, Boppre concedes that the sole issue to be decided at this time is whether Boppre's current postconviction motion affirmatively alleges that the basis for relief was not available at the time of the first petition. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.[24] An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.[25] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[26]

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[20] *State v. Lotter, supra* note 12. See, also, *State v. Murphy*, 15 Neb. App. 398, 727 N.W.2d 730 (2007).

[21] *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

[22] *Id.*

[23] See *id*.

[24] *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

[25] *State v. Lotter, supra* note 12; *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007).

[26] *State v. Thomas, supra* note 11.

Boppre's current motion for postconviction relief alleges in part:

> The prosecutors withheld exculpatory evidence; to wit: 1) that . . . Condon's blood, which was type A, was found on Wasmer's jeans and a towel found in Wasmer's house; 2) that Wasmer and Niemann's blood was tested less than 60 days prior to trial and they both had type "O" blood; 3) the existence of [M.M.], as well as all other evidence which would have led trial counsel to [M.M.], i.e., law enforcement's interviews with [M.M. and two other persons]; and information surrounding [M.M.'s] being moved to a foster home in North Platte; 4) the unedited version of the crime scene video which shows law enforcement looking under the body of Valdez and declaring that the door had been kicked in rather than being opened by Valdez as testified to by Niemann; and 5) crime scene photographs which would show, *inter alia*, that there were slivers of wood from the kicked in door under the body of . . . Valdez.

None of the facts alleged in the current motion could prove that the State withheld favorable evidence that was material to Boppre's guilt, as required to show a violation of due process.[27] The DNA results proved that Condon's blood was not on Wasmer's jeans. The other allegations were previously the subject of motions for new trial and postconviction relief. The past dispositions show these claims, on the merits, do not amount to a violation of Boppre's constitutional right to due process.[28]

Even assuming Boppre's due process claim can rest on the above allegations, his current motion is procedurally barred. The motion fails to allege when he discovered the alleged prosecutorial withholding of the aforementioned evidence. The motion for postconviction relief broadly states that it "is based in part upon information which has been recently received and

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[27] See, *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

[28] See *Boppre II, supra* note 4.

is not requesting review of issues already litigated or decided." The motion also incorporates portions of M.M.'s "recently obtained sworn statement." Boppre fails to allege, however, that the information contained in this affidavit was unavailable before any of the numerous challenges already made to his convictions and sentences.

Boppre also contends that trial counsel provided him ineffective assistance of counsel. But Boppre raised the issue of ineffective assistance of counsel in a previous motion for postconviction relief.[29] In his brief, Boppre argues that "[i]f original trial counsel failed to identify and call an eyewitness to the murder and that eyewitness identified [Yellowboy] as being present, then there is not conceivable trial strategy that could explain the failure to call that witness."[30] Boppre fails to further identify in his brief any basis for his assertion that trial counsel was ineffective. Further, the current petition for postconviction relief fails to specify which allegations, if any, were unavailable at the time Boppre filed his prior motions.

Boppre relies on *State v. Ryan*,[31] in which this court determined that newly discovered ex parte contacts by the trial judge with the victim's family were not procedurally barred in the defendant's successive postconviction motion. The holding in *Ryan* was based on the presence of newly discovered evidence that was not available to the defendant during his direct appeal or his first postconviction motion.[32] Boppre fails to explain how *Ryan* is analogous to the present case. Neither Boppre's current petition for postconviction relief nor his brief identifies any newly discovered evidence that Boppre was prevented from obtaining at the time of his previous motions and appeals.

[15] Boppre's current motion for postconviction relief fails to affirmatively show that he could not have presented the allegations of prosecutorial misconduct and ineffective assistance of counsel at the time he filed his prior motions. Therefore,

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[29] See *Boppre III, supra* note 5.

[30] Brief for appellant at 47.

[31] *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

[32] *Id.*

these claims are procedurally barred by Boppre's failure to raise them in his previous motions.[33] The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.[34] As previously noted, this court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.[35] On its face, Boppre's current motion for postconviction relief fails to affirmatively show that he could not have raised these issues on direct appeal or during prior motions for new trial and postconviction relief. We conclude that the district court did not err in denying relief without an evidentiary hearing.

CONCLUSION

The newly discovered DNA evidence is not of such a nature that it probably would have produced a substantially different result if it had been offered and admitted at trial. Therefore, the district court did not abuse its discretion in concluding that Boppre was not entitled to relief pursuant to the DNA Testing Act. Boppre's second successive motion for postconviction relief was also without merit because it failed to affirmatively show that it was not procedurally barred. The judgment of the district court is affirmed.

AFFIRMED.

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[33] See *State v. Marshall, supra* note 25.

[34] *State v. Lotter, supra* note 12.

[35] *Id.*