IN THE SUPREME COURT OF FLORIDA

AMOS LEE KING,

Appellant,

vs. **CASE NO. SC02-1**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843

STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 0014087
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 801-0600
FAX (813) 356-1292

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE NO.:

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

The factual and procedural history of this case was outlined in the initial answer brief filed in this Court on January 9, 2002. As noted in that brief, on December 3, 2001, the State filed a response to King's motions for DNA testing in the circuit court (R. V1/57-193). An FBI report dated May 24, 1977 was attached to the response, as was an August 27, 2001, FDLE report containing the results of the DNA testing. The FBI report listed three brown pubic hairs of Caucasian origin, two of which were partially charred, found in the victim's pubic combings. The report noted that these hairs are microscopically like the hairs contained in K2 (the victim's hair) (R. V1/168, 170). The FDLE report lists these hairs as Exhibit 13 and represents that an analysis of the hairs produced results at the gender identification locus, amelogenin, but no results at the 13 STR loci (R. V1/81). The FDLE report also notes the testing of a hair found on the victim's nightgown and of fingernail scrapings from King and the victim with inconclusive results.

King filed a successive motion for postconviction relief which was denied on January 1, 2002; that ruling is currently before this Court in this appeal.

After discovering that the FDLE does not do mitochondrial DNA (mtDNA) testing, counsel for King returned to the circuit court on January 8, 2001, with a motion seeking release of the fingernail

scrapings and hair evidence for further DNA testing. The motion, which did not refer to Florida Rule of Criminal Procedure 3.853 or Florida Statute 925.11 (2001), alleged a need for MtDNA testing on the hair evidence and additional STR DNA testing on the fingernail scrapings. The motion was heard on January 8, 2001. Upon argument of the State that the pleading requirements of the rule had not been met, counsel moved to orally amend the motion to comply with the rule. Upon consideration of the motion and after hearing argument, the court denied the motion.

In light of Judge Schaeffer's ruling that King's motion to release evidence for further DNA testing did not comport with the technical requirements of Rule 3.853, King filed an Amended Motion to Release Evidence for Additional DNA Testing on January 11, 2001. The State filed a response pursuant to the court's request and this matter was also considered at the January 11 hearing. On January 14, 2002, the trial court denied King's amended motion:

> **ORDER DENYING DEFENDANT'S AMENDED MOTION TO RELEASE EVIDENCE FOR ADDITIONAL DNA TESTING**
>
> On January 8, 2002, the defendant filed his Motion to Release Evidence for Additional DNA Testing. The court did not require the state to respond to the motion, because it was not sufficient under the statute or the rule governing Postconviction DNA Testing. Fla. Stat. §925.11; Fla. R. Crim. P. 3.853. The court did hold a hearing, however, on January 8, 2002, and at the conclusion of the hearing, entered an order, dated January 8, 2002, denying the relief requested, finding not only that the motion was technically insufficient, but also that it could not otherwise meet the requirements of the statute or the rule for the court to afford relief.

On January 9, 2002, CCRC-M contacted the undersigned and indicated that since there was going to be a hearing on another of defendant's motions on January 11, 2002, that it would be filing an amended motion to attempt to cure the technical deficiencies. The amended motion was received, in draft, on January 10, 2001.

On January 11, 2002, this court, in an abundance of caution, ordered the state to immediately respond to the draft motion. The state filed its Response to Amended Motion to Release Evidence for Additional DNA Testing on January 11, 2002. The defendant filed his amended motion on January 11, 2002.

Another brief hearing was held on January 11, 2002, wherein the state was permitted to preserve an additional technical deficiency it had failed to allege in its response, and to correct the page numbers of its attached exhibit. A complete hearing on the amended motion was not held on January 11, 2002, since there had already been a hearing on the original motion on January 8, 2002, and the purpose of the amended motion was to allow the defendant to attempt to cure technical deficiencies in the original motion.

The court has now had the benefit of the defendants amended motion, the state's response thereto, the hearing held on the original motion on January 8, 2002, and the brief hearing on the amended motion on January 11, 2002. As to the three items sought by the defendant to be re-tested, the court finds as follows:

> 1. The hair fragment found on Natalie Brady's nightgown: According to the attachment filed with the state's response, this fragment was a body hair, unknown as to where it came from, the arms, the legs, or some other part of the body. It was too small of a fragment to determine if it was Negroid or Caucasian in origin. It was too small a fragment to be microscopically matched to any known samples. When Patrolman Rosario Coniglione, Tarpon Springs Police Department, found Mrs. Brady, she was laying on her back in the porch door threshold area, presumably having crawled from her bedroom, where the fire was started, to that area where she expired. Her nightgown was up over her breast area, and she was naked, except for the nightgown. He and Officer Dawson found her and dragged her out of the burning house, where she was eventually covered with a sheet. Mrs. Brady was examined by the medical examiner preliminarily at the scene,

and was identified by two neighbors at the scene. Many other fire and police personnel were at the scene. This hair fragment could have been transferred from any one's hair that was on Mrs. Brady's floor as she crawled from her bedroom to the back door, from any one's hair that was on her porch area where she expired, from any one's hair that was on the ground outside her house where she was dragged away from the fire, from the perpetrator of the rape and murder, from one of the men who dragged her away from the burning house, from the medical examiner, from one of those who identified her, from any other fire or police personnel present, or from Mrs. Brady. Thus, even if this fragment of a body hair could be further re-tested for DNA, and it was determined that it didn't come from Mrs. Brady, or from Mr. King, this court cannot make the required finding under the statute or the rule, that there exists a reasonable probability that the defendant would be acquitted, or that he would receive a life sentence if the requested re-testing were allowed. Fla. Stat. § 925.11 (2) (f) 3; Fla. R. Crim. P. 3.853 (c) (5) (C).

2. The three hairs obtained from the pubic hair combings of the victim: As part of the investigation of this homicide, pubic hair combings of the victim, Mrs. Brady, were obtained and sent to the FBI lab for analysis. The FBI report says "Specimen Q2 [which is Mrs. Brady's pubic combings] contained three brown pubic hairs of Caucasian origin, two of which are partially charred. The uncharred portions of these hairs and the one hair which is not charred are microscopically like the hairs contained in K2. [K2 is the known pubic hair sample from Mrs. Brady.] In all probability, these hairs originated from the person represented by K2." See FBI Report, p. 3, attached as Exhibit A. It is clear that the three pubic hairs from the pubic combings from Mrs. Brady are Mrs. Brady's pubic hairs. This is no surprise. This is what you expect from pubic combings from any person—their own pubic hairs. Occasionally, there may be a pubic hair from the perpetrator of a rape in a rape victim's pubic hair combings. But not in this case. All three pubic hairs from the combings microscopically matched the known pubic hairs of

Mrs. Brady. Since these three pubic hairs originated from the victim, this court cannot make the required finding under the statute or the rule, that there exists a reasonable probability that the defendant would be acquitted or would receive a life sentence if the requested re-testing were allowed. See Statute and Rule sections in 1., above.

3. The fingernail scrapings taken from the victim: The defendant admits in his motion that, unlike the hairs, there is not another method of DNA testing of these fingernail scrapings. The only method of testing fingernail scrapings is that which was used by the Florida Department of Law Enforcement (FDLE) to test the scrapings in this case. The type testing done by the FDLE is called Short Tandum Repeat Typing DNA testing (STR DNA). The defendant merely suggests that the results of the FDLE analysis that there was insufficient material for STR DNA analysis might be wrong. There is no provision in the statute or the rule for re-testing once testing has been done by FDLE. This would be particularly true when, as here, there is no showing that the FDLE test is inaccurate, or there is any other type DNA test that can be done. If re-testing were allowed of the fingernail scrapings in this case, re-testing would have to be allowed for <u>every</u> DNA test performed by FDLE for <u>every</u> defendant who did not like the result obtained by the FDLE test. This is not required, not contemplated, nor appropriate under either the new statute or the new rule.

The defendant has not filed a motion for Postconviction DNA Testing as contemplated by Fla. Stat. §925.11, or Fla. R. Crim. P. 3.853. The defendant has filed a Postconviction Motion for <u>Additional</u> DNA Testing. There is no statute or rule that requires <u>additional</u> DNA testing. The defendant admits in his motion that all the evidence he wants this court to order re-tested has already been tested for STR DNA by the Florida Department of Law Enforcement. He admits that the results of the DNA testing performed by FDLE were inconclusive because there was insufficient quality or quantity to perform an STR DNA analysis. Even if there were a provision for re-testing, as to the fingernail scrapings, the defendant has shown no good cause why that specimen should be re-

> tested by anyone. Assuming the defendant may have shown good cause for a laboratory other than FDLE to re-test the pubic hairs, and the body hair fragment, since the FDLE does not conduct mitochondrial DNA analysis, this court, for the reasons stated in 1. and 2. above, cannot make the required finding under the statute or the rule, that there exists a reasonable probability that the defendant would be acquitted or would receive a life sentence if the requested mitrochondrial DNA re-testing were allowed. Fla. Stat. § 925.11 (2) (f) 3; Fla. R. Crim. P. 3.853 (c) (5) (C). Accordingly, for all the reasons stated above, it is
>
> **ORDERED AND ADJUDGED** that the defendant's Amended Motion to Release Evidence for Additional DNA Testing is denied. It is further
>
> **ORDERED AND ADJUDGED** that while the statute and rule give the defendant thirty days in which to file his appeal from this order, in light of the fact that there is a death warrant in effect in this case, the defendant is ordered to file any appeal of this order immediately.
>
> **DONE AND ORDERED** in St. Petersburg, Pinellas County, Florida this 13th day of January, 2002.

Also on January 8, 2002, King filed a pro se motion in this Court titled "Motion to Dismiss Pro-State Attorneys, Appoint Replacements and for Stay of Execution or in the Alternative Dismiss Appeal." On January 9, this Court remanded King's motion for a hearing in the circuit court. The hearing was held on January 11, 2002. Judge Schaeffer placed King and his attorney, April Haughey, under oath and thoroughly explored all indications of dissatisfaction that could be discerned from King's motion. Ultimately, the court found that King's allegations were unfounded, and that no basis for any inference of incompetence of counsel had been presented. The court found, to the extent Section 27.701, Florida Statutes (1998), requires her to monitor the performance of

collateral counsel, that counsel had been highly effective.

Based on these findings, the court denied King's motion to dismiss counsel. The judge then called a recess so that King could consider whether he still wanted to pursue his alternative request of dismissing his appeals. After the recess, King agreed to allow Haughey to pursue his appeals.

On January 14, 2002, the court filed its orders detailing the rulings from the January 11 hearing. The court's order denying King's motion to dismiss counsel states:

> **ORDER DENYING DEFENDANT'S MOTION TO DISMISS PRO-STATE ATTORNEYS, APPOINT REPLACEMENTS, AND FOR STAY OF EXECUTION OR IN THE ALTERNATIVE DISMISS APPEAL**
>
> **THIS CAUSE** came before the court on the defendant's pro se Motion to Dismiss Pro-State Attorneys, Appoint Replacements, and for Stay of Execution or in the Alternative Dismiss Appeal, and on the State's Objection to Successive Motion to Dismiss Counsel. The defendant filed his motion in the Florida Supreme Court on or about January 9, 2002, after which the Supreme Court directed this court to hear the defendant's motion. The attorney general then filed a motion for rehearing in the Supreme Court, which was denied. Thereafter, the state filed its objection to the defendant's motion. On January 11, 2002, the court held a hearing, at which time the court conducted a *Nelson*[1] inquiry and made the following findings and rulings:
>
> 1. At the hearing, the court permitted the defendant an ample opportunity to discuss and explain the complaints raised in his motion. The court systematically inquired of the defendant as to each allegation raised in his motion, and the defendant utilized the opportunity to explain and/or supplement the allegations contained in his motion. Throughout the exchange, the court permitted April Haughey, Assistant CCRC-M, against whom many of the complaints were leveled,

[1] *Nelson v. State*, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973), approved by *Hardwick v. State*, 521 So. 2d 1071, 1074-75 (Fla. 1988), cert. denied, 488 U.S. 871 (1988).

to respond to and/or refute the allegations.

2. At the conclusion of hearing from the defendant, the court heard brief argument from the state. The court then found that each of the defendant's claims were unfounded, and that he presented no claim, individually or collectively, that warranted the dismissal of CCRC-M. Accordingly, the court orally denied the defendant's motion.

3. After the court orally denied the defendant's motion, the court inquired of defendant to determine if he wanted to dismiss his appeal, as his motion suggested. The court took a recess to allow the defendant time to discuss his decision with counsel present from CCRC-M after which the defendant abandoned his request to dismiss his appeal.

4. Although a moot point, since there was no request from Mr. King for self-representation, this court wishes to note that this defendant's persistent desire to re-litigate guilt phase issues that this court had previously, by written order, found procedurally barred, his lack of knowledge, or refusal to accept, as to what claims can permissibly be raised at this stage of his case, his obvious inability to meet the strict briefing requirements of the Florida Supreme Court, and presumably the Federal Courts, should the defendant be required to litigate issues there while a warrant is pending, his physical location, which precludes his ability to make necessary quick trips to various courts, and many other things this court has considered during the pendency of this warrant litigation, but which will not be elaborated here, since this is a moot point, reflect how difficult and impracticable it would be to allow any defendant similarly situated to represent himself or herself, after a death warrant has been signed by the Governor, if the defendant wishes to further litigate his or her case.

Accordingly, it is

ORDERED AND ADJUDGED that for the reasons set forth above, the defendant's Motion to Dismiss Pro-State Attorneys, Appoint Replacements, and for Stay of Execution is hereby denied. The defendant's Alternative to Dismiss Appeal is moot as he abandoned this request.

THE DEFENDANT IS HEREBY NOTIFIED that, since a warrant is outstanding in his case, he should file any notice of appeal immediately.

DONE AND ORDERED in, St. Petersburg, Pinellas County, Florida, this 13th day of January, 2002.

This brief is offered in support of the January 14, 2002 orders.

SUMMARY OF THE ARGUMENT

ISSUE I - The trial court properly denied King's motion to release evidence for further DNA testing. Florida's procedures for post-sentencing DNA testing do not authorize the additional testing sought by King below. The trial court's factual finding that no testing could exonerate King is supported by the record and precludes the granting of any relief on this issue.

ISSUE II - The trial court properly denied King's pro se motion to dismiss counsel. The court followed the applicable law with regard to consideration of King's complaints, and after thorough inquiry determined that no basis for any concern as to counsel's competence had been presented.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S MOTION TO RELEASE EVIDENCE FOR DNA TESTING.

King asserts that Judge Schaeffer erred in denying his request to have additional DNA testing done on hair and fingernail scrapings retained as evidence in this case. The denial of this motion involved the application of legal principles to the factual findings made below; this Court must review the factual findings for competent, substantial evidence, paying great deference to the trial court's findings, and review of the legal conclusions is de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998). Judge Schaeffer's finding that King's request for additional DNA testing did not comport with the requirements of the rule and/or statute is well supported both legally and factually and should be affirmed by this Court.

After much deliberation and debate, this Court and the Florida legislature set forth procedures for a convicted defendant to obtain DNA testing. Due to the recent development of procedures to secure DNA testing, Sixth Circuit State Attorney Bernie McCabe issued a directive to review the physical evidence in *every* death penalty case from that office, including the evidence retained in King's case. Accordingly, DNA testing had already been done on all

of the evidence still available for evaluation in the instant case when the warrant was signed. Consistent with the procedures in both the rule and the statute, this testing was conducted by FDLE and a report recounting the results was issued on August 27, 2001. FDLE reported that STR testing was conducted and that no definitive results were obtained from the exhibits (R. V1/65-85).

King's initial request for DNA testing, filed on November 29, 2001 (before King's counsel was provided with a copy of the FDLE report), was limited to vaginal washings.[2] In his second motion seeking DNA testing, filed on January 8, 2002, and his amended motion filed on January 11, 2002, King for the first time sought testing of hair and fingernail scrapings. King alleged that since FDLE's report did not expressly state that MtDNA testing had been conducted, he should be afforded the opportunity to have MtDNA testing attempted on the hair exhibits. King further asserted that although MtDNA testing cannot be done on fingernail scrapings, he should be allowed to have the scrapings retested for STR DNA by another laboratory.

As Judge Schaeffer found, neither the rule nor the statute provide for retesting under these circumstances. Under Rule 3.853(b)(2) and Section 925.11(2)(a)2., Florida Statutes (2001), retesting is only appropriate if the defendant establishes that the results of prior DNA testing were inconclusive *and* that *subsequent*

[2] The vaginal washings were no longer available. This issue is before this Court in the initial briefs filed in this case.

scientific developments in DNA testing techniques likely would produce a definitive result. There is no provision for *additional* testing based solely on a defendant's dissatisfaction with the results obtained by the agency designated in both the rule and the statute as the agency to conduct said testing. As Judge Schaeffer noted:

> There is no provision in the statute or the rule for re-testing once testing has been done by FDLE. This would be particularly true when, as here, there is no showing that the FDLE test is inaccurate, or there is any other type DNA test that can be done. If re-testing were allowed . . . in this case, re-testing would have to be allowed for <u>every</u> DNA test performed by FDLE for <u>every</u> defendant who did not like the result obtained by the FDLE test. This is not required, not contemplated, nor appropriate under either the new statute or the new rule.

Clearly, King is not entitled to have the fingernail clippings retested by another laboratory or to have MtDNA testing done on the hair exhibits. Under Rule 3.853 and Florida Statutes, section 925.11, such retesting is not appropriate. MtDNA testing is not a *subsequent* scientific development in DNA testing techniques nor is it likely to produce a definitive result. This technique is simply a different, additional test that has been available for many years.

Moreover, for a defendant to obtain testing of DNA evidence, both the rule and the statute require a showing and a finding that *there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA*

evidence had been admitted at trial.[3] AS Judge Schaeffer found any mtDNA testing of the hair fragment obtained from the victim would be of no avail to the defendant.

To obtain any DNA testing the court is required to find that the evidence would be admissible at trial. §925.11(2)(f)2., Fla. Stat. The evidence here established that the scene was contaminated and the hair fragments obtained from her nightgown or her pubic area could have been transferred or deposited by any number of persons. As Judge Schaeffer noted:

> This hair fragment could have been transferred from any one's hair that was on Mrs. Brady's floor as she crawled from her bedroom to the back door, from any one's hair that was on her porch area where she expired, from any one's hair that was on the ground outside her house where she was dragged away from the fire, from the perpetrator of the rape and murder, from one of the men who dragged her away from the burning house, from the medical examiner, from one of those who identified her, from any other fire or police personnel present, or from Mrs. Brady. Thus, even if this fragment of a body hair could be further re-tested for DNA, and it was determined that it didn't come from Mrs. Brady, or from Mr. King, this court cannot make the required finding under the statute or the rule, that there exists a reasonable probability that the defendant would be acquitted, or that he would receive a life sentence if the requested re-testing were allowed. Fla. Stat. § 925.11 (2) (f) 3; Fla. R. Crim. P. 3.853 (c) (5) (C).

[3] Judge Schaeffer originally found that the motion failed to comport with those requirements as set forth in Rule 3.853(b), subsections 3 and 4, and section 925.11(2)(a), subsections 3 and 4, in that it failed to contain any statement that the defendant is innocent or how the DNA testing would exonerate the defendant of the crime for which he was convicted and sentenced to death, nor does it indicate how the DNA testing could mitigate the sentence he received. The court also found that the motion failed to indicate that the identification of the defendant is a genuinely disputed issue in the case, why it is disputed, and how the DNA testing relates to the identification of the defendant as the assailant.

The record shows that the victim's body was found outside the threshold of the back door of her residence on the night of the murder and then moved to the backyard and ultimately transported. Officer Charles Dawson stated when he arrived he found the victim lying on the back porch which was enveloped in smoke (DA-R. V/2 326-331). Officer Rosario Coniglione testified that he saw the Brady house on fire when en route to the correctional facility. Coniglione tried unsuccessfully to gain access to the burning house, then responded to Dawson's cries for assistance at the other side of the house. He "observed Mrs. Brady on her back porch door," "on her back with her hands up like this (Indicating) hanging out, hands holding the door partially open. Mrs. Brady had a dress garment on which was pulled up above her breast area and she was completely naked laying on her back." Officer Coniglione and Officer Dawson removed Mrs. Brady's body from the back porch area. The fire department had not arrived yet (DA-R. V8/1515). "We pulled it directly out and we took her straight to the east end by another small building and laid her on the floor and tried to cover her up." There were no undergarments at all (DA-R. V8/1505-1518). Ambulance attendant Greg Myers stated that when he came on the scene, the victim was lying in the grass in the backyard and was nude from the waist down (DA-R. V1/179-185). Clearly, in the attempt to aid the victim and extinguish the house fire, the scene was contaminated and the hair fragments obtained from her nightgown

or her pubic area could have been transferred or deposited by any number of persons, including medical or emergency response personnel.

Under similar circumstances, the court in State v. Sawyer, 561 So. 2d 278 (Fla. 2d DCA 1990), agreed with the trial court that the probative value of the hair evidence was outweighed by the prejudicial value. In support of that decision, the court considered expert testimony concerning hair transference where numerous people were walking in and out of a crime scene area where evidence is being collected. The expert in Sawyer described the methods by which hair is transferred from one location to another, and stated Sawyer may have been in the victim's kitchen or the hair may have been transferred secondarily. He noted that a concrete slab would be a likely surface for hair transfer and that a person jumping from the windowsill wearing only socks could drop a hair in the kitchen. An FBI agent also testified in Sawyer that numerous people walking in and out of a crime scene area where evidence is being collected violates the concept of preserving the crime scene and may result in contamination. "People and equipment at the crime scene and even Janet's body could have contaminated the kitchen area. He could not testify as to how a given hair gets to a particular location, especially in light of extensive contamination." Id at 283. The Sawyer trial court had also found that "the hair had been collected approximately eleven hours after

the police found Janet's body, that several other unknown hairs were found on and about Janet's body, that the crime scene had been contaminated by approximately sixteen persons and heavy equipment prior to collection of the hair, and there were several other methods by which the hair may have been carried to that location, none of which were more likely than any other." Id at 283. Thus, even if the evidence in this case was admissible and indicated that the hair belonged to someone other than the defendant or the victim, the court below properly found that such result would not exonerate the defendant or assist in mitigating his sentence.

As to the three hairs found in the pubic hair combings of the victim, the lower court was unable to make the requisite findings under Fla. R. Crim. P. 3.853(c)(5)(C) or section 925.11(2)(f)3., i.e. that there is a reasonable probability that King would have been acquitted or would have received a lesser sentence if these hairs were tested. Judge Schaeffer ruled:

> As part of the investigation of this homicide, pubic hair combings of the victim, Mrs. Brady, were obtained and sent to the FBI lab for analysis. The FBI report says "Specimen Q2 [which is Mrs. Brady's pubic combings] contained three brown pubic hairs of Caucasian origin, two of which are partially charred. The uncharred portions of these hairs and the one hair which is not charred are microscopically like the hairs contained in K2. [K2 is the known pubic hair sample from Mrs. Brady.] In all probability, these hairs originated from the person represented by K2." See FBI Report, p. 3, attached as Exhibit A. It is clear that the three pubic hairs from the pubic combings from Mrs. Brady are Mrs. Brady's pubic hairs. This is no surprise. This is what you expect from pubic combings from any person—their own pubic hairs. Occasionally, there may be a pubic hair

> from the perpetrator of a rape in a rape victim's pubic hair combings. But not in this case. All three pubic hairs from the combings microscopically matched the known pubic hairs of Mrs. Brady. Since these three pubic hairs originated from the victim, this court cannot make the required finding under the statute or the rule, that there exists a reasonable probability that the defendant would be acquitted or would receive a life sentence if the requested re-testing were allowed.

Even if testing of the hairs in question was appropriate, there are only three possible results, none of which exonerates the defendant; 1) the hairs belong to the defendant, 2) they belong to an unknown third party or 3) they belong to the victim.

The first possibility, that the hair belongs to King, obviously does not exonerate him.

The second possibility also does not establish a reasonable probability that the defendant would have been acquitted. As Judge Schaeffer noted the record readily supports the inference that during the upheaval at the scene, hairs may have been transferred to or from the victim. Additionally, unlike cases where the State introduces hair evidence in support of the defendant's guilt, this hair evidence was never presented to the jury as it was in Murray v. State, 692 So. 2d 157 (Fla. 1997) (Murray's DNA matched one of the five hairs recovered from the crime scene) and Kimbrough v. State, 700 So. 2d 634 (Fla. 1997) (DNA evidence showed that some of the pubic hairs matched defendant's). Accordingly, there is no possibility that any misinformation was presented to the jury upon which they may have relied in reaching their verdict. Thus, the

possibility that it belongs to someone other than the defendant in no way undermines confidence in the evidence presented at trial.

The third and, based upon the reports, the most likely result is that the source of the hairs is the victim herself. As Judge Schaeffer noted, the F.B.I. report clearly found that the hairs were consistent with the victim's hair. The presence of the victim's own hair on her pubic area (as well as on her clothing) is wholly consistent with the finding of guilt in the instant case.

On these facts, the lower court properly rejected this claim, and King is not entitled to additional DNA testing.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S PRO SE MOTION TO DISMISS COUNSEL

The court below also denied King's pro se motion to dismiss counsel, which had been remanded by this Court for an expedited hearing. This issue presents a mixed question of fact and law which must be reviewed de novo, with deference to the factual findings made below. Stephens v. State, 748 So. 2d 1028 (Fla. 1999).

The transcript of the January 11, 2002, hearing reflects that Judge Schaeffer conducted an appropriate inquiry into King's complaints regarding his counsel's performance, and properly determined that no basis for finding that King's attorneys are not adequately representing him. To the contrary, the court expressly determined that King was being provided highly effective representation and that his attorneys were going above and beyond the call of duty.

Pursuant to Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973), a trial court's responsibility when confronted with a defendant dissatisfied with his counsel is to inquire as to the basis of the dissatisfaction, and then determine whether a sufficient basis for removal of counsel has been demonstrated. Judge Schaeffer followed this procedure and examined King's motion, page by page, providing him and his attorney an opportunity to address each allegation individually.

Judge Schaeffer concluded that King's allegations "were unfounded, and that he presented no claim, individually or collectively, that warranted the dismissal of CCRC-M." (Order, p. 1). The lower court's order is supported by the record and consistent with all applicable law. King is not entitled to the appointment of other counsel, and no basis for relief is presented with regard to the ruling on his motion to dismiss counsel.

CONCLUSION

Based on the foregoing arguments and authorities, this Court must affirm the lower court's denial of King's motion for additional DNA testing.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843

STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 14087
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 801-0600
(813) 356-1292 Facsimile

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. mail to Richard E. Kiley and April E. Haughey, Assistant Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida, 33619, and the Honorable Susan F. Schaeffer, Circuit Judge, Sixth Judicial Circuit, 545 First Avenue North, Room 417, St. Petersburg, Florida 33701, this _____ day of January, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____
COUNSEL FOR APPELLEE